FEDERAL RESERVE SYSTEM

12 CFR Part 226

[Docket No. R–1390]

Regulation Z; Truth in Lending

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Proposed rule; request for public comment.

SUMMARY: The Board proposes to amend Regulation Z, which implements the Truth in Lending Act (TILA), and the staff commentary to the regulation, as part of a comprehensive review of TILA's rules for home-secured credit. This proposal would revise the rules for the consumer's right to rescind certain open-end and closed-end loan secured by the consumer's principal dwelling. In addition, the proposal contains revisions to the rules for determining when a modification of an existing closed-end mortgage loan secured by real property or a dwelling is a new transaction requiring new disclosures. The proposal would amend the rules for determining whether a closed-end loan secured by the consumer's principal dwelling is a "higher-priced" mortgage loan subject to the special protections in § 226.35. The proposal would provide consumers with a right to a refund of fees imposed during the three business days following the consumer's receipt of early disclosures for closed-end loans secured by real property or a dwelling.

The proposal also would amend the disclosure rules for open- and closed-end reverse mortgages. In addition, the proposal would prohibit certain unfair acts or practices for reverse mortgages. A creditor would be prohibited from conditioning a reverse mortgage on the consumer's purchase of another financial or insurance product such as an annuity, and a creditor could not extend a reverse mortgage unless the consumer has obtained counseling. The proposal also would amend the rules for reverse mortgage advertising.

DATES: Comments must be received on or before December 23, 2010.

ADDRESSES: You may submit comments, identified by Docket No. R–1390, by any of the following methods:

- *Agency Web Site*: *http://www.federalreserve.gov.* Follow the instructions for submitting comments at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm.*
- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *E-mail: regs.comments@federalreserve.gov.* Include the docket number in the subject line of the message.
- *FAX:* (202) 452–3819 or (202) 452–3102.
- *Mail:* Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW., Washington, DC 20551.

All public comments are available from the Board's Web site at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm* as submitted, unless modified for technical reasons. Accordingly, your comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper in Room MP–500 of the Board's Martin Building (20th and C Streets, NW.) between 9 a.m. and 5 p.m. on weekdays.

FOR FURTHER INFORMATION CONTACT: For home-equity lines of credit: Jennifer S. Benson or Jelena McWilliams, Attorneys; Krista P. Ayoub or John C. Wood, Counsels. For closed-end mortgages: Jamie Z. Goodson, Catherine Henderson, Nikita M. Pastor, Samantha J. Pelosi, or Maureen C. Yap, Attorneys; Paul Mondor, Senior Attorney. For reverse mortgages, Brent Lattin or Lorna M. Neill, Senior Attorneys. Division of Consumer and Community Affairs, Board of Governors of the Federal Reserve System, at (202) 452–3667 or 452–2412; for users of Telecommunications Device for the Deaf (TDD) only, contact (202) 263–4869.

SUPPLEMENTARY INFORMATION:

I. Background on TILA and Regulation Z

Congress enacted the Truth in Lending Act (TILA) based on findings that economic stability would be enhanced and competition among consumer credit providers would be strengthened by the informed use of credit resulting from consumers' awareness of the cost of credit. One of the purposes of TILA is to provide meaningful disclosure of credit terms to enable consumers to compare credit terms available in the marketplace more readily and avoid the uninformed use of credit.

TILA's disclosures differ depending on whether credit is an open-end (revolving) plan or a closed-end (installment) loan. TILA also contains procedural and substantive protections for consumers. TILA is implemented by the Board's Regulation Z. An Official Staff Commentary interprets the requirements of Regulation Z. By statute, creditors that follow in good faith Board or official staff interpretations are insulated from civil liability, criminal penalties, or administrative sanction.

II. Summary of Major Proposed Changes

The goal of the proposed amendments to Regulation Z is to update and make clarifying changes to the rules regarding the consumer's right to rescind certain open- and closed-end loans secured by the consumer's principal dwelling. The amendments would also ensure that consumers receive TILA disclosures for modifications to key loan terms, by revising the rules regarding when a modification to an existing closed-end mortgage loan results in a new transaction. The amendments would ensure that prime loans are not incorrectly classified as "higher-priced mortgage loans" subject to special protections for subprime loans in the Board's 2008 HOEPA Final Rule in § 226.35, or as HOEPA loans under § 226.32. The proposal would provide consumers a right to a refund of fees for three business days after the consumer receives early disclosures for closed-end mortgages, ensuring that consumers do not feel financially committed to a transaction before they have had a chance to review the disclosures and consider other options.

The amendments also would improve the clarity and usefulness of disclosures for open- and closed-end reverse mortgages. They would protect consumers from unfair practices in connection with reverse mortgages, including conditioning a reverse mortgage on the consumer's purchase of a financial or insurance product such as an annuity, and originating a reverse mortgage before the consumer has received independent counseling. A consumer could not be required to pay a nonrefundable fee until three business days after the consumer has received counseling. Finally, the amendments would ensure that advertisements for reverse mortgages contain balanced information and are not misleading. Many of the proposed changes to disclosures are based on consumer testing, which is discussed in more detail below.

The Consumer's Right to Rescind. The proposed revisions to Regulation Z would:

- Simplify and improve the notice of the right to rescind provided to consumers at closing;
- Revise the list of "material disclosures" that can trigger the extended right to rescind, to focus on disclosures that testing shows are most important to consumers; and

• Clarify the parties' obligations when the extended right to rescind is asserted, to reduce uncertainty and litigation costs.

Loan Modifications That Require New TILA Disclosure. The proposal would provide that new TILA disclosures are required when the parties to an existing closed-end loan secured by real property or a dwelling agree to modify key loan terms, without reference to State contract law.

• New disclosures would be required when, for example, the parties agree to change the interest rate or monthly payment, advance new money, or add an adjustable rate or other risky feature such as a prepayment penalty.

• Consistent with current rules, no new disclosures would be required for modifications reached in a court proceeding, and modifications for borrowers in default or delinquency, unless the loan amount or interest rate is increased, or a fee is imposed on the consumer.

• Certain beneficial modifications, such as "no cost" rate and payment decreases, would also be exempt from the requirement for new TILA disclosures.

Coverage Test for 2008 HOEPA Final Rule and HOEPA. The Board proposes to revise how a creditor determines whether a closed-end loan secured by a consumer's principal dwelling is a "higher-priced mortgage loan" subject to the Board's 2008 HOEPA Final Rule in § 226.35, and how points and fees are calculated for coverage under the HOEPA rules in §§ 226.32 and 226.34.

• The proposal would replace the APR as the metric a creditor compares to the average prime offer rate to determine whether the transaction is a higher-priced mortgage loan.

• Creditors instead would use a "coverage rate" that would be closely comparable to the average prime offer rate, and would not be disclosed to consumers.

• The proposal would clarify that most third party fees would not be counted towards "points and fees" that trigger HOEPA coverage.

Consumer's Right to a Refund of Fees. For closed-end loans secured by real property or a dwelling, the proposal would require a creditor to:

• Refund any appraisal or other fees paid by the consumer (other than a credit report fee), if the consumer decides not to proceed with a closed-end mortgage transaction within three business days of receiving the early disclosures (fees imposed after this three-day period would not be refundable); and

• Disclose the right to a refund of fees to consumers before they apply for a closed-end mortgage loan.

Reverse Mortgage Disclosures. The proposal would require a creditor to provide a consumer with new and revised reverse mortgage disclosures.

• Before the consumer applies for a mortgage, the creditor must provide a new two-page notice summarizing basic information and risks regarding reverse mortgages, entitled "Key Questions To Ask about Reverse Mortgage Loans;"

• Within three business days of application, and again before the reverse mortgage loan is consummated (or the account is opened, for an open-end reverse mortgage):

 ○ Loan cost information specific to reverse mortgages that is integrated with information required to be disclosed for all home-equity lines of credit (HELOCs) or closed-end mortgages, as applicable; and

 ○ A table expressing total costs as dollar amounts, in place of the table of reverse mortgage "total annual loan cost rates."

Required Counseling for Reverse Mortgages. The proposal would prohibit a creditor or other person from:

• Originating a reverse mortgage before the consumer has obtained independent counseling from a counselor that meets the qualification standards established by HUD, or substantially similar standards;

• Imposing a nonrefundable fee on a consumer (except a fee for the counseling itself) until three business days after the consumer has received counseling from a qualified counselor; and

• Steering consumers to specific counselors or compensating counselors or counseling agencies.

Prohibition on Cross-Selling for Reverse Mortgages. The proposal would:

• Prohibit a creditor or broker from requiring a consumer to purchase another financial or insurance product (such as an annuity) as a condition of obtaining a reverse mortgage; and

• Provide a "safe harbor" for compliance if, among other things, the reverse mortgage transaction is consummated (or the account is opened) at least ten calendar days before the consumer purchases another financial or insurance product.

Reverse mortgage advertising. The proposal would amend Regulation Z to revise the advertising rules for reverse mortgages so that consumers receive accurate and balanced information. For example, the proposal would require advertisements that state that a reverse mortgage "requires no payments" to clearly disclose the fact that borrowers must pay taxes and required insurance.

Other Proposed Revisions. The proposal would contain several changes to the rules for HELOCs and closed-end mortgage loans. These changes include:

• Conforming advertising rules for HELOCs to rules for closed-end mortgage loans adopted as part of the Board's 2008 HOEPA Final Rule;

• Clarifying how creditors may comply with the 2008 HOEPA Final Rule's ability to repay requirement when making short-term balloon loans;

• Clarifying that certain practices regarding prepayment of FHA loans constitute prepayment penalties for purposes of TILA disclosures and the Board's 2008 HOEPA Final Rule;

• Requiring servicers to provide consumers with the name and address of the holder or master servicer of the consumer's loan obligation, upon the consumer's written request; and

• Revising the disclosure rules related to credit insurance and debt cancellation and suspension products.

III. The Board's Review of Home-Secured Credit Rules

A. Background

The Board has amended Regulation Z numerous times since TILA simplification in 1980. In 1987, the Board revised Regulation Z to require special disclosures for closed-end ARMs secured by the borrower's principal dwelling. 52 FR 48665, Dec. 24, 1987. In 1995, the Board revised Regulation Z to implement changes to TILA by the Home Ownership and Equity Protection Act (HOEPA). 60 FR 15463, Mar. 24, 1995. HOEPA requires special disclosures and substantive protections for home-equity loans and refinancings with APRs or points and fees above certain statutory thresholds. Numerous other amendments have been made over the years to address new mortgage products and other matters, such as abusive lending practices in the mortgage and home-equity markets.

The Board's current review of Regulation Z was initiated in December 2004 with an advance notice of proposed rulemaking.[1] 69 FR 70925, Dec. 8, 2004. At that time, the Board announced its intent to conduct its

[1] The review was initiated pursuant to requirements of section 303 of the Riegle Community Development and Regulatory Improvement Act of 1994, section 610(c) of the Regulatory Flexibility Act of 1980, and section 2222 of the Economic Growth and Regulatory Paperwork Reduction Act of 1996. An advance notice of proposed rulemaking is published to obtain preliminary information prior to issuing a proposed rule or, in some cases, deciding whether to issue a proposed rule.

review of Regulation Z in stages, focusing first on the rules for open-end (revolving) credit accounts that are not home-secured, chiefly general-purpose credit cards and retailer credit card plans. In January 2008, the Board issued final rules for open-end credit that is not home-secured. 74 FR 5244, Jan. 29, 2009. In May 2009, Congress enacted the Credit Card Accountability Responsibility and Disclosure Act of 2009 (Credit Card Act), which amended TILA's provisions for open-end credit. The Board approved final rules implementing the Credit Card Act in January and June 2010 (February 2010 Credit Card Rule). 75 FR 7658, Feb. 22, 2010; 75 FR 37526, June 29, 2010.

Beginning in 2007, the Board proposed revisions to the rules for home-secured credit in several phases.

• *HOEPA.* In 2007, the Board proposed rules under HOEPA for higher-priced mortgage loans (2007 HOEPA Proposed Rules). The final rules, adopted in July 2008 (2008 HOEPA Final Rule), prohibited certain unfair or deceptive lending and servicing practices in connection with closed-end mortgages. The Board also approved revisions to advertising rules for both closed-end and open-end home-secured loans to ensure that advertisements contain accurate and balanced information and are not misleading or deceptive. The final rules also required creditors to provide consumers with transaction-specific disclosures early enough to use while shopping for a mortgage. 73 FR 44522, July 30, 2008.

• *Timing of Disclosures for Closed-End Mortgages.* In May 2009, the Board adopted final rules implementing the Mortgage Disclosure Improvement Act of 2008 (the MDIA).[2] The MDIA adds to the requirements of the 2008 HOEPA Final Rule regarding transaction-specific disclosures. Among other things, the MDIA and the final rules require early, transaction-specific disclosures for mortgage loans secured by dwellings even when the dwelling is not the consumer's principal dwelling, and requires waiting periods between the time when disclosures are given and consummation of the transaction. 74 FR 23289, May 19, 2009.

• *Examples of Rate and Payment Increases for Variable Rate Mortgage Loans.* The MDIA also requires payment examples if the interest rate or payments can change. Those provisions of the MDIA become effective January 30, 2011. As part of the August 2009 Closed-End Proposal, the Board proposed rules to implement the examples required by the MDIA. The Board has adopted an interim final rule published elsewhere in today's **Federal Register** that would include the examples and model clauses, to provide guidance to creditors until the August 2009 Closed-End Proposal is finalized.

• *Closed-End and HELOC Proposals.* In August 2009, the Board issued two proposals. For closed-end mortgages, the proposal would revise the disclosure requirements and address other issues such as loan originators' compensation. 74 FR 43232, Aug. 26, 2009. For HELOCs, the proposal would revise the disclosure requirements and address other issues such as account terminations, suspensions and credit limit reductions, and reinstatement of accounts. 74 FR 43428, Aug. 26, 2009. Public comments for both proposals were due by December 24, 2009. The Board has adopted a final rule on mortgage originator compensation, published elsewhere in today's **Federal Register.** The Board is reviewing the comments on the other aspects of the Closed-End and HELOC Proposals.

• *Final Rule on Mortgage Originator Compensation.* The Board has adopted a final rule on mortgage originator compensation, published elsewhere in today's **Federal Register.** In the August 2009 Closed-End Proposal, the Board proposed to prohibit compensation to mortgage brokers and loan officers (collectively "originators") that is based on a loan's interest rate or other terms, and to prohibit originators from steering consumers to loans that are not in consumers' interests. The final rule is substantially similar to the proposal.

• *Notice of Sale or Transfer of Mortgage Loans.* On November 20, 2009, the Board issued an interim final rule to implement amendments to TILA in the Helping Families Save Their Homes Act of 2009. 74 FR 60143, Nov. 20, 2009. The statutory amendments took effect on May 20, 2009, and require notice to consumers when their mortgage loan is sold or transferred. The Board has adopted a final rule that is published elsewhere in today's **Federal Register.**

This proposal would add or revise several rules, including rules that apply to rescission; modifications of existing closed-end loans; the method for determining whether a closed-end loan is a "higher-priced mortgage" loan; the fee restriction for early disclosures for closed-end mortgage loans; reverse mortgage disclosures; restrictions on certain acts and practices in connection with reverse mortgages; and advertising practices for reverse mortgages and HELOCs.

B. Consumer Testing for This Proposal

A principal goal for the Regulation Z review is to produce revised and improved disclosures that consumers will be more likely to understand and use in their decisions, while not creating undue burdens for creditors. Currently, Regulation Z requires creditors to provide a notice to inform the consumer about the right to rescind and how to exercise that right.

Regulation Z also provides that a consumer who applies for a reverse mortgage must receive the "standard" TILA disclosure for a HELOC or closed-end mortgage, as applicable, *and* a special disclosure tailored to reverse mortgages. In addition, the Board has recently proposed some new disclosures that were tested as part of this proposal:

• In the Board's August 2009 HELOC Proposal, the Board proposed model clauses and forms for periodic statements, and notices that would be required when a creditor terminates, suspends, or reduces a HELOC, as well as when a creditor responds to a consumer's request to reinstate a suspended or reduced line.

• In the Board's August 2009 Closed-End Proposal, the Board proposed model clauses for credit insurance, debt suspension, and debt cancellation products ("credit protection products") offered in connection with a HELOC or closed-end mortgage loan.

The Board retained ICF Macro, a research and consulting firm that specializes in designing and testing documents, to conduct consumer testing to help the Board's review of Regulation Z's disclosures.

ICF Macro worked closely with the Board to test model rescission notices, model HELOC periodic statements and other HELOC notices, model notices for credit protection products, and model forms for reverse mortgages. Each round of testing involved testing several model disclosure forms. Interview participants were asked to review model forms and provide their reactions, and were then asked a series of questions designed to test their understanding of the content. Data were collected on which elements and features of each form were most successful in providing information clearly and effectively. The findings from each round of interviews were incorporated in revisions to the model forms for the following round of testing.

Some of the key methods and findings of the consumer testing are summarized below. ICF Macro prepared reports of the results of the testing, which are available on the Board's public Web site

[2] The MDIA is contained in Sections 2501 through 2503 of the Housing and Economic Recovery Act of 2008, Public Law 110–289, enacted on July 30, 2008. The MDIA was later amended by the Emergency Economic Stabilization Act of 2008, Public Law 110–343, enacted on October 3, 2008.

along with this proposal at: *http://www.federalreserve.gov.*

Rescission and Credit Protection Testing. This consumer testing consisted of four rounds of one-on-one cognitive interviews. The goals of these interviews were to learn more about what information consumers read and understand when they receive disclosures, to research how easily consumers can find various pieces of information in these disclosures, and to test consumers' understanding of certain words and phrases. To address specific issues that surfaced during testing, the Board proposes to revise significantly the content of the model form for the right to rescind by setting forth new format requirements, and new mandatory and optional disclosures for the notice. The Board proposes new model and sample forms for the costs and features of credit protection products. The Board believes that the proposed new format rules and model forms would improve consumers' ability to identify disclosed information more readily; emphasize information that is most important to consumers; and simplify the organization and structure of required disclosures to reduce complexity and information overload.

1. Rescission Testing and Findings. The Board's goal was to develop clear and conspicuous model forms for the notice of the right to rescind that would enable borrowers to understand that they have a right to rescind the transaction within a certain period of time, and how to exercise that right. Beginning in the fall of 2009, four rounds of one-on-one cognitive interviews with a total of 39 participants were conducted in different cities throughout the United States. The consumer testing groups were comprised of participants representing a range of ethnicities, ages, educational levels, and levels of experience with home-secured credit.

Participants in three rounds of testing were shown HELOC model forms for the notice of the right to rescind, and the participants in the last round were shown closed-end model forms for the notice of the right to rescind. In the first two rounds of testing, approximately one half of the participants had some knowledge about the right to rescind prior to testing. However, in the last two rounds of testing only a few participants had some knowledge about the right to rescind.

Tabular format for rescission form. In the first round of rescission testing, the Board tested two forms, one that provided required information in a mostly narrative format based on the current model form, and another form that provided required information in a tabular form. Almost all participants in the first round commented that the information was easier to understand in a tabular form and had more success answering comprehension questions with a tabular form. This finding is consistent with previous findings in the Board's consumer testing of the HELOC disclosures, closed-end mortgage disclosures, and credit card disclosures. 74 FR 43428, Aug. 26, 2009; 74 FR 43232, Aug. 26, 2009; 75 FR 7658, Feb. 22, 2010. As a result, the remaining three rounds of testing focused on developing, testing and refining the tabular form. The forms tested in subsequent rounds differed mainly in how they described the deadline to rescind.

Tear-off portion of rescission form. Currently, consumers must be given two copies of the notice of right to rescind—one to use to exercise the right and one to retain for the consumer's records. *See* §§ 226.15(b) and 226.23(b). The current model forms contain an instruction to the consumer to keep one copy of the two notices that they receive because it contains important information regarding their right to rescind. *S*ee Model Forms G–5 through G–9 of Appendix G and Model Forms H–8 and H–9 of Appendix H. The Board tested a model form that would allow the consumer to detach the bottom part of the form and use it to notify the creditor that the consumer wishes to rescind the transaction. Most participants said that they would use the bottom part of the form to cancel the transaction. A few participants said that they would prepare and send a separate statement in addition to the form. When asked what they would do if they lost the notice and wanted to rescind, most participants said that they would call the creditor or visit their creditor's Web site to obtain another copy of the notice. Almost all participants said that they would make and keep a copy of the form if they decided to exercise the right.

Accordingly, the Board is proposing to eliminate the requirement that creditors provide two copies of the notice of the right to rescind to each consumer entitled to rescind. *See* proposed §§ 226.15(b)(1) and 226.23(b)(1), below. Instead, the Board is proposing to require creditors to provide a form at the bottom of the notice that the consumer may detach and use to exercise the right to rescind, enabling them to retain the portion explaining their rights. *See* proposed § 226.15(b)(2)(i) and (3)(viii), § 226.23(b)(2)(i) and (3)(vii).

Deadline for rescission. Consumer testing also revealed that consumers are generally unable to calculate the deadline for rescission based on the information currently required in the notice. The current model forms provide a blank space for the creditor to insert a date followed by the language "(or midnight of the third business day following the latest of the three events listed above)" as the deadline by which the consumer must exercise the right. The three events referenced are the following: (1) The date of the transaction or occurrence giving rise to right of rescission; (2) the date the consumer received the Truth in Lending disclosures; and (3) the date the consumer received the notice of the right to rescind.

Most participants had difficulty using the three events to calculate the deadline for rescission. The primary causes of errors were not counting Saturdays as a business day, counting Federal holidays as a business day, and counting the day the last event took place as the first day of the three-day period. Alternative text was tested to assist participants in calculating the deadline based on the three events; however, the text added length and complexity to the form without a significant improvement in comprehension. Participants in all rounds strongly preferred forms that provided a specific date over those that required them to calculate the deadline themselves. Thus, the Board is proposing to require a creditor to provide the calendar date on which it reasonably and in good faith expects the three business day period for rescission to expire. *See* proposed §§ 226.15(b)(3)(vii) and 226.23(b)(3)(vi).

Extended right to rescind. Consumer testing also indicated that consumers do not understand how an extended right to rescind could arise. Consumers were confused when presented with a single disclosure that provided information about the three-business-day right to rescind and an extended right to rescind. In two rounds of testing, participants were presented with a model form that contained a statement explaining when a consumer might have an extended right to rescind. However, consumer testing revealed that these explanations added length and complexity but did not increase consumer comprehension of the extended right to rescind. Nonetheless, the Board believes that some disclosure regarding the extended right to rescind is necessary for full disclosure of the consumer's rights. Thus, the Board is proposing to include a statement in the model forms that the right to cancel the transaction or occurrence giving rise to the right of rescission may extend beyond the date disclosed in the notice.

How to exercise the right of rescission. Consumer testing revealed that consumers are particularly concerned about proving that they exercised the right to rescind before the three-day period expires. Participants offered varied responses about a preferred delivery method to submit the notice of the right to rescind to the creditor: some preferred to send it by e-mail and facsimile to receive instant electronic confirmation; others preferred to send it by mail with return receipt and tracking requested. Most participants said they would not hand-deliver the notice to a bank employee unless they could be certain that the employee was authorized to receive the notice on the creditor's behalf and could provide them with a receipt.

The proposed rule would require a creditor, at minimum, to disclose the name and address to which the consumer may mail the notice of rescission. *See* proposed §§ 226.15(b)(3)(vi) and 226.23(b)(3)(v). The proposed rule would also permit a creditor to describe other methods, if any, that the consumer may use to send or deliver written notification of exercise of the right, such as overnight courier, fax, e-mail, or in person. The proposed sample forms include information for the consumer to submit the notice of rescission by mail or fax. *See* proposed Samples G–5(B) and G–5(C) of Appendix G and Sample H–8(B) of Appendix H.

2. Credit Protection Products Testing and Findings. The Board and ICF Macro also developed and tested model and sample forms for credit protection products in the last two rounds of 18 interviews—one round with 10 participants for HELOCs, and one round with 8 participants for closed-end mortgages. These forms were based on model clauses proposed in the August 2009 Closed-End Proposal. The sample form was based on samples for credit life insurance disclosures proposed in the August 2009 Closed-End Proposal.

Consumer testing revealed that consumers have limited understanding of credit protection products, and that some of the current disclosures do not adequately inform consumers of the costs and risks of these products. For example, the current regulation allows creditors to disclose the cost of the product on a unit-cost basis in certain situations. However, even when provided with a calculator, only three of 10 participants in the first round of testing could correctly calculate the cost of the product using the unit cost. When the cost was disclosed as a dollar figure tailored to the loan amount in the second round of testing, all participants understood the cost of the product. Accordingly, the proposal would require creditors to disclose the maximum premium or charge per period.

In addition, most credit protection products place limits on the maximum benefit, but the current regulation does not require disclosure of these limits. To address this problem, the Board tested a disclosure of the maximum benefit amount for a sample credit life insurance policy. In the first round of testing, only five of the 10 participants understood the disclosure of the maximum benefit when disclosed at the bottom of the form by the signature line. In the second round of testing, this information was presented in a tabular question-and-answer format and all eight participants understood the disclosure. Accordingly, the proposal would require creditors to disclose the maximum benefit amount. In addition, based on consumer testing, the proposal would require other improved disclosures, such as the disclosure of eligibility requirements.

Prior to consumer testing, the Board reviewed several disclosures for credit protection disclosures, which revealed that many disclosures were in small font, not grouped together, and in dense blocks of text. Based on the Board's experience with consumer disclosures, the Board was concerned that consumers would find these disclosures difficult to comprehend. To address these problems, the Board tested a sample credit life insurance disclosure that used 12-point font, tabular question-and-answer format, and bold, underlined text. Participants understood the content of the disclosures when presented in this format. Accordingly, the proposal would require creditors to provide the disclosures clearly and conspicuously in a minimum 10-point font, and group them together with substantially similar headings, content, and format to the proposed model forms. *See* proposed Model Forms G–16(A) and H–17(A).

3. Reverse Mortgage Disclosures Testing and Findings.

The reverse mortgage testing consisted of four focus groups and three rounds of one-on-one cognitive interviews. The goals of these focus groups and interviews were to learn about consumers' understanding of reverse mortgages, how consumers shop for reverse mortgages and what information consumers read when they receive reverse mortgage disclosures, and to assess their understanding of such disclosures. The consumer testing groups contained participants with a range of ethnicities, ages, and educational levels, and included consumers who had obtained a reverse mortgage as well as those who were eligible for one based on their age and the amount of equity in their home.

Exploratory focus groups. In January 2010 the Board worked with ICF Macro to conduct four focus groups with consumers who had obtained a reverse mortgage or were eligible for one based on their age and the amount of equity in their home. Each focus group consisted of ten people that discussed issues identified by the Board and raised by a moderator from ICF Macro. Through these focus groups, the Board gathered information on consumers' understanding of reverse mortgages, as well as the process through which consumers decide to apply for a reverse mortgage. Focus group participants also provided feedback on a sample reverse mortgage disclosure that was representative of those currently in use. Following the focus groups, ICF Macro's design team used what they learned to develop improved versions of the disclosures for further testing.

Cognitive interviews on existing disclosures. In 2010, the Board worked with ICF Macro to conduct three rounds of cognitive interviews with a total of 31 participants. These cognitive interviews consisted of one-on-one discussions with reverse mortgage consumers, during which consumers were asked to explain what they understood about reverse mortgages, their experiences and perceptions of shopping for the product, and to review samples of existing and revised reverse mortgage disclosures. In addition to learning about the information that consumers thought was important to know about reverse mortgages, the goals of these interviews were: (1) To test consumers' comprehension of the existing reverse mortgage disclosure form; (2) to research how easily consumers can find various pieces of information in the existing and revised disclosures; and (3) to test consumers' understanding of certain reverse mortgage related words and phrases.

Findings of reverse mortgage testing. Many consumer testing participants did not understand reverse mortgages or had misconceptions about them. Most participants understood that reverse mortgages are different from traditional mortgages in that traditional mortgages have to be paid back during the borrower's lifetime, while reverse mortgage borrowers receive payments from the lender based on the equity in the consumer's home. However, important misconceptions about reverse mortgages were shared by a significant number of participants. For example, some participants believed that by getting a reverse mortgage, a borrower is giving the lender ownership of his or her home. Rather than seeing a reverse mortgage as a loan that needs to be repaid, these participants believed it represented the exchange of a home for a stream of funds. Some participants also believed that if the amount owed on a reverse mortgage exceeds the value of the home, the borrower is responsible for paying the difference and that if at any point a borrower "outlives" their reverse mortgage—that is, if the equity in their home decreases to zero—they will no longer receive any payments from the lender.

Therefore, the proposal would require creditors to provide key information about reverse mortgages at the time an application form is provided to the consumer, as discussed below.

Reverse mortgage disclosures provided to consumers before application. Currently, for reverse mortgages, creditors must provide the home equity line of credit (HELOC) or closed-end mortgage application disclosures required by TILA, depending on whether the reverse mortgage is open-end or closed-end credit. These documents are not tailored to reverse mortgages.

For open-end reverse mortgages this includes a Board-published HELOC brochure or a suitable substitute at the time an application for an open-end reverse mortgage is provided to the consumer. For an adjustable-rate closed-end reverse mortgage, consumers would receive the lengthy CHARM booklet that explains how ARMs generally work. However, closed-end reverse mortgages are almost always fixed rate transactions, so consumers generally do not receive any TILA disclosures at application.

Since consumers have a number of misconceptions about reverse mortgages that are not addressed by the current disclosures, the proposal would require creditors to provide, for all reverse mortgages, a two-page document that explains how reverse mortgages work and about terms and risks that are important to consider when selecting a reverse mortgage, rather than the current documents.

Reverse mortgage disclosures provided to consumers after application. Depending on whether a reverse mortgage is open-end or closed-end credit, the current cost disclosure requirements under TILA and Regulation Z differ. All reverse mortgage creditors must provide the total annual loan cost ("TALC") disclosure at least three business days before account-opening for an open-end reverse mortgage, or consummation for a closed-end reverse mortgage. For closed-end reverse mortgages, TILA and Regulation Z require creditors to provide an early TILA disclosure within three business days after application and at least seven business days before consummation, and before the consumer has paid a fee other than a fee for obtaining a credit history. For open-end reverse mortgages, creditors must provide disclosures on or with an application that contain information about the creditor's open-end reverse mortgage plans. These disclosures do not include information dependent on a specific borrower's creditworthiness or the value of the dwelling, such as the APRs offered to the consumer, because the application disclosures are provided before underwriting takes place. Creditors are required to disclose transaction-specific costs and terms at the time that an open-end reverse mortgage plan is opened.

In addition, reverse mortgage creditors currently must disclose a table of TALC rates. The table of TALC rates is designed to show consumers how the cost of the reverse mortgage varies over time and with house price appreciation. Generally, the longer the consumer keeps a reverse mortgage the lower the relative cost will be because the upfront costs of the reverse mortgage will be amortized over a longer period of time. Thus, the TALC rates usually will decline over time even though the total dollar cost of the reverse mortgage is rising due to interest and fees being charged on an increasing loan balance.

Very few participants understood the table of TALC rates. Although participants seemed to understand the paragraphs explaining the TALC table, the vast majority could not explain how the description related to the percentages shown in the TALC table. Participants could not explain why the TALC rates were declining over time even though the reverse mortgage's loan balance was rising. Most participants thought the TALC rates shown were interest rates, and interpreted the table as showing that their interest rate would decrease if they held their reverse mortgage for a longer period of time. Participants, including those who currently have a reverse mortgage (and thus presumably received the TALC disclosure), consistently stated that they would not use the disclosure to decide whether or not to obtain a reverse mortgage. Instead, participants consistently expressed a preference for a disclosure providing total costs as a dollar amount.

Thus, the proposal would require a table that demonstrates how the reverse mortgage balance grows over time. The table expresses this information as dollar amounts rather than as annualized loan cost rates. The table would show (1) How much money would be advanced to the consumer; (2) the total of all costs and charges owed by the consumer; and (3) the total amount the consumer would be required to repay. This information would be provided for each of three assumed loan periods of 1 year, 5 years, and 10 years. Consumer testing has shown that consumers would have a much easier time understanding this table and would be much more likely to use it in evaluating a reverse mortgage than they would the TALC rates.

In addition, the proposed reverse mortgage disclosures would combine reverse-mortgage-specific information with much of the information that the Board proposed for HELOCs and closed-end mortgages in 2009. For example, the proposed disclosure would include information about APRs, variable interest rates and fees. However, because not all of the information currently required for HELOCs and closed-end mortgages is relevant or applicable to reverse mortgage borrowers, the disclosures would not contain information that would not be meaningful to reverse mortgage consumers. By consolidating the reverse mortgage disclosures, the proposal would ensure that consumers receive meaningful information in an understandable format that is largely similar for open-end and closed-end reverse mortgages, and has been designed and consumer tested for reverse mortgage consumers.

Additional testing during and after comment period. During the comment period, the Board may work with ICF Macro to conduct additional testing of model disclosures proposed in this notice.

IV. The Board's Rulemaking Authority

TILA Section 105. TILA mandates that the Board prescribe regulations to carry out the purposes of the act. TILA also specifically authorizes the Board, among other things, to:

- Issue regulations that contain such classifications, differentiations, or other provisions, or that provide for such adjustments and exceptions for any class of transactions, that in the Board's judgment are necessary or proper to effectuate the purposes of TILA, facilitate compliance with the act, or prevent circumvention or evasion. 15 U.S.C. 1604(a).

• Exempt from all or part of TILA any class of transactions if the Board determines that TILA coverage does not provide a meaningful benefit to consumers in the form of useful information or protection. The Board must consider factors identified in the act and publish its rationale at the time it proposes an exemption for comment. 15 U.S.C. 1604(f).

In the course of developing the proposal, the Board has considered the views of interested parties, its experience in implementing and enforcing Regulation Z, and the results obtained from testing various disclosure options in controlled consumer tests. For the reasons discussed in this notice, the Board believes this proposal is appropriate pursuant to the authority under TILA Section 105(a).

Also, as explained in this notice, the Board believes that the specific exemptions proposed are appropriate because the existing requirements do not provide a meaningful benefit to consumers in the form of useful information or protection. In reaching this conclusion with each proposed exemption, the Board considered (1) The amount of the loan and whether the disclosure provides a benefit to consumers who are parties to the transaction involving a loan of such amount; (2) the extent to which the requirement complicates, hinders, or makes more expensive the credit process; (3) the status of the borrower, including any related financial arrangements of the borrower, the financial sophistication of the borrower relative to the type of transaction, and the importance to the borrower of the credit, related supporting property, and coverage under TILA; (4) whether the loan is secured by the principal residence of the borrower; and (5) whether the exemption would undermine the goal of consumer protection. The rationales for these proposed exemptions are explained in part VI below.

TILA Section 129(l)(2). TILA also authorizes the Board to prohibit acts or practices in connection with:

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

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

The authority granted to the Board under TILA Section 129(l)(2), 15 U.S.C. 1639(l)(2), is broad. It reaches mortgage loans with rates and fees that do not meet HOEPA's rate or fee trigger in TILA section 103(aa), 15 U.S.C. 1602(aa), as well as mortgage loans not covered under that section, such as home purchase loans. Moreover, while HOEPA's statutory restrictions apply only to creditors and only to loan terms or lending practices, Section 129(l)(2) is not limited to acts or practices by creditors, nor is it limited to loan terms or lending practices. *See* 15 U.S.C. 1639(l)(2). It 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 Board's authority is not limited to regulating specific contractual terms of mortgage loan agreements; it extends to regulating loan-related practices generally, within the standards set forth in the statute.

HOEPA does not set forth a standard for what is unfair or deceptive, but the Conference Report for HOEPA indicates that, in determining whether a practice in connection with mortgage loans is unfair or deceptive, the Board should look to the standards employed for interpreting state unfair and deceptive trade practices statutes and the Federal Trade Commission Act (FTC Act), Section 5(a), 15 U.S.C. 45(a).[3]

Congress has codified standards developed by the Federal Trade Commission (FTC) for determining whether acts or practices are unfair under Section 5(a), 15 U.S.C. 45(a).[4] Under the FTC Act, an act or practice is unfair when it causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. In addition, in determining whether an act or practice is unfair, the FTC is permitted to consider established public policies, but public policy considerations may not serve as the primary basis for an unfairness determination.[5]

The FTC has interpreted these standards to mean that consumer injury is the central focus of any inquiry regarding unfairness.[6] Consumer injury may be substantial if it imposes a small harm on a large number of consumers, or if it raises a significant risk of concrete harm.[7] The FTC looks to whether an act or practice is injurious in its net effects.[8] The FTC has also observed that an unfair act or practice will almost always reflect a market failure or market imperfection that prevents the forces of supply and demand from maximizing benefits and minimizing costs. [9] In evaluating unfairness, the FTC looks to whether consumers' free market decisions are unjustifiably hindered. [10]

The FTC has also adopted standards for determining whether an act or practice is deceptive (though these standards, unlike unfairness standards, have not been incorporated into the FTC Act).[11] First, there must be a representation, omission or practice that is likely to mislead the consumer. Second, the act or practice is examined from the perspective of a consumer acting reasonably in the circumstances. Third, the representation, omission, or practice must be material. That is, it must be likely to affect the consumer's conduct or decision with regard to a product or service.[12]

Many states also have adopted statutes prohibiting unfair or deceptive acts or practices, and these statutes employ a variety of standards, many of them different from the standards currently applied to the FTC Act. A number of states follow an unfairness standard formerly used by the FTC. Under this standard, an act or practice is unfair where it offends public policy; or is immoral, unethical, oppressive, or unscrupulous; and causes substantial injury to consumers.[13]

In developing proposed rules under TILA Section 129(l)(2)(A), 15 U.S.C. 1639(l)(2)(A), the Board has considered the standards currently applied to the

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

[4] *See* 15 U.S.C. 45(n); Letter from Commissioners of the FTC to the Hon. Wendell H. Ford, Chairman, and the Hon. John C. Danforth, Ranking Minority Member, Consumer Subcomm. of the H. Comm. on Commerce, Science, and Transp. (Dec. 17, 1980).

[5] 15 U.S.C. 45(n).

[6] Statement of Basis and Purpose and Regulatory Analysis, Credit Practices Rule, 42 FR 7740, 7743, Mar. 1, 1984 (*Credit Practices Rule*).

[7] Letter from Commissioners of the FTC to the Hon. Wendell H. Ford, Chairman, and the Hon. John C. Danforth, Ranking Minority Member, Consumer Subcomm. of the H. Comm. on Commerce, Science, and Transp., n.12 (Dec. 17, 1980).

[8] *Credit Practices Rule,* 42 FR at 7744.

[9] *Id.*

[10] *Id.*

[11] Letter from James C. Miller III, Chairman, FTC to the Hon. John D. Dingell, Chairman, H. Comm. on Energy and Commerce (Oct. 14, 1983) (*Dingell Letter*).

[12] *Dingell Letter* at 1–2.

[13] *See, e.g., Kenai Chrysler Ctr., Inc.* v. *Denison,* 167 P.3d 1240, 1255 (Alaska 2007) (quoting *FTC* v. *Sperry & Hutchinson Co.,* 405 U.S. 233, 244–45 n.5 (1972)); *State* v. *Moran,* 151 N.H. 450, 452, 861 A.2d 763, 755–56 (N.H. 2004) (concurrently applying the FTC's former test and a test under which an act or practice is unfair or deceptive if "the objectionable conduct … attain[s] a level of rascality that would raise an eyebrow of someone inured to the rough and tumble of the world of commerce.") (citation omitted); *Robinson* v. *Toyota Motor Credit Corp.,* 201 Ill. 2d 403, 417–418, 775 N.E.2d 951, 961–62 (2002) (quoting 405 U.S. at 244–45 n.5).

FTC Act's prohibition against unfair or deceptive acts or practices, as well as the standards applied to similar State statutes.

V. Discussion of Major Proposed Revisions

The objectives of the proposed revisions are to update and clarify the rules for home-secured credit that provide important protections to consumers, and to reduce undue compliance burden and litigation risk for creditors. The proposal would improve the clarity and usefulness of disclosures for the consumer's right to rescind. Disclosures for reverse mortgages would be improved, providing greater clarity about transactions that are complex and unfamiliar to many consumers. The proposal would also ensure that consumers receive disclosures when the creditor modifies key terms of an existing loan. Consumers would be assured the opportunity to review early disclosures for closed-end loans, before a fee is imposed that may make the consumer feel financially committed to the loan offered. Proposed changes to disclosures are based on consumer testing, to ensure that the disclosures are understandable and useful to consumers.

In considering the revisions, the Board sought to ensure that the proposal would not reduce access to credit, and sought to balance the potential benefits for consumers with the compliance burdens imposed on creditors. For example, the proposal revises the material disclosures that can trigger an extended right to rescind, to include disclosures that consumer testing has shown consumers find important in their decision making, and exclude disclosures that consumers do not find useful. The proposal also includes tolerances for certain material disclosures, to ensure that inconsequential errors do not result in an extended right to rescind.

A. The Consumer's Right to Rescind

TILA and Regulation Z provide that a consumer generally has three business days after closing to rescind certain loans secured by the consumer's principal dwelling. The consumer may have up to three years after closing to rescind, however, if the creditor fails to provide the consumer with certain "material" disclosures or the notice of the right to rescind (the "extended right to rescind").

The Notice of Rescission. Regulation Z requires creditors to provide two copies of the notice of the right to rescind to each consumer entitled to rescind the transaction, to ensure that consumers can use one copy to rescind the loan and retain the other copy with information about the right to rescind. The regulation sets forth the contents for the notice and provides model forms that creditors may use to satisfy these disclosure requirements. Creditors are required to provide the date of the transaction, the date the right expires, and an explanation of how to calculate the deadline on the form.

Consumer testing shows that consumers may have difficulty understanding the explanation of the right of rescission in the current model forms. Consumers struggled with determining when the deadline to rescind expires, based on the later of consummation, delivery of the material disclosures, or delivery of the notice of the right to rescind. Consumer testing also shows that when rescission information was presented in a certain format, participants found information easier to locate and their comprehension of the disclosures improved. In addition, creditors have raised concerns about the two-copy rule, indicting this rule can impose litigation risks when a consumer alleges an extended right to rescind based on the creditor's failure to deliver two copies of the notice.

Based on the results of consumer testing and outreach, the Board proposes to revise the content and format requirements for the notice of the right to rescind and issue revised model forms. The revised notice would include:

- The calendar date when the three-business-day rescission period expires, without the explanation of how to calculate the deadline.
- A statement that the consumer's right to cancel the loan may extend beyond the date stated in the notice and in that case, the consumer must send the notice to either the current owner of the loan or the servicer.
- A "tear off" form that a consumer may use to exercise his or her right to rescind.

In addition, the information required in the rescission notice must be disclosed:

- In a tabular format, as opposed to a narrative format used in the current model rescission forms.
- On the front side of a one-page document, separate from all other unrelated material; and
- In a minimum 10-point font.

Two-copy rule. The proposal also requires creditors to provide just one notice of the right to rescind to each consumer entitled to rescind (as opposed to two copies required under the current regulation). The proposed model rescission notice contains a "tear off" form at the bottom, so that the consumer could separate that portion to deliver to the creditor while retaining the top portion with the description of rights. The Board believes that consumers who rescind should be able to keep a written explanation of their rights, but is concerned about the litigation costs imposed by the two-copy rule. Moreover, the need for the two-copy rule seems to have diminished. Today, consumers generally have access to copy machines and scanners that would allow them to make and keep a copy of the notice if they decide to exercise the right.

Material Disclosures. A consumer's right to rescind generally does not expire until the notice of the right to rescind and the material disclosures are properly delivered. If the notice or material disclosures are never delivered, the right to rescind expires on the earlier of three years from the date of consummation or upon the sale or transfer of all of the consumer's interest in the property. Delivery of the material disclosures and notice ensures that consumers are notified of their right to rescind, and that they have the information they need to decide whether to exercise the right. Because different disclosures are given for open- and closed-end loans, TILA and Regulation Z specify certain "material disclosures" that must be given for HELOCs and other "material disclosures" that must be given for closed-end home-secured loans.

Congress added the statutory definition of "material disclosures" in 1980. Changes in the HELOC and closed-end mortgage marketplace since then have made this statutory definition outdated. Certain disclosures that are the most important to consumers in deciding whether to take out a loan (based on consumer testing) currently are not considered "material disclosures." In contrast, other disclosures that are not likely to impact a consumer's decision to enter into a loan currently are "material disclosures" under the statutory definition. The Board believes that revising the definition of "material disclosures" to reflect the disclosures that are most critical to the consumer's evaluation of credit terms would better ensure that the compliance costs related to rescission are aligned with disclosure requirements that provide meaningful benefits for consumers. Thus, the Board proposes to use its adjustment and exception authority to add certain disclosures and remove other disclosures from the definition of "material disclosures" for both HELOCs and closed-end mortgage loans. The Board also proposes to add tolerances for accuracy for certain disclosures to ensure inconsequential disclosure errors do not result in extended rescission rights.

Material Disclosures for HELOCs. In the August 2009 HELOC Proposal, the Board proposed comprehensive revisions to the account-opening disclosures for HELOCs that would reflect changes in the HELOC market. The proposed account-opening disclosures and revised model forms were developed after extensive consumer testing to determine which credit terms consumers find the most useful in evaluating HELOC plans. Consistent with the August 2009 HELOC Proposal, the staff recommends proposed revisions to the definition of material disclosures to include the information that is critical to consumers in evaluating HELOC offers, and to remove information that consumers do not find to be important. For example, the proposal revises the definition of "material disclosures" to include the credit limit applicable to the HELOC plan, which consumer testing shows is one of the most important pieces of information that consumers wanted to know in deciding whether to open a HELOC plan. The proposal also adds to the definition of "material disclosures" a disclosure of the total one-time costs imposed to open a HELOC plan (*i.e.,* total closing costs), but removes from the definition an itemization of these costs. Consumer testing shows that it is the total closing costs (rather than the itemized costs) that is more important to consumers in deciding whether to open a HELOC plan. Also, based on the results of consumer testing, the proposal would add and remove other disclosures from the definition of "material disclosures." The proposal contains tolerances for accuracy of the credit limit and the total one-time costs imposed to open a HELOC plan, to ensure inconsequential errors in these disclosures do not result in extended rescission rights.

Material Disclosures for Closed-End Mortgage Loans. In the August 2009 Closed-End Proposal, the Board proposed comprehensive revisions to the disclosures for closed-end mortgages that would reflect the changes in the mortgage market. The Board developed the proposed disclosures and revised model forms based on extensive consumer testing to determine which credit terms consumers find the most useful in evaluating closed-end mortgage loans. Consistent with the August 2009 Closed-End Proposal, this proposal revises the definition of material disclosures to include the information that is critical to consumers in evaluating closed-end mortgage offers, and to remove information that consumers do not find to be important. For example, the proposal adds to the definition of "material disclosures" information about the interest rate, the total settlement charges, and whether a loan has negative amortization or permits interest-only payments. Consumer testing shows these disclosures are critical to consumers in evaluating closed-end mortgage loans. In addition, the proposal adds disclosures of the loan amount and the loan term (*e.g.,* 30 year loan) to the definition of "material disclosures." These disclosures would replace disclosures of the amount financed, and the total and number of payments. Also, based on the results of consumer testing, other disclosures would be added to the definition of "material disclosures," such as disclosure of any prepayment penalty. The proposal retains the current rule's existing tolerances for certain material disclosures, and provides tolerances for certain of the proposed material disclosures, such as the total settlement charges, the loan amount and the prepayment penalty, to ensure inconsequential errors in these disclosures do not result in extended rescission rights.

Parties' Obligations When a Consumer Rescinds. TILA and Regulation Z set out the process for rescission. The regulation specifies that when a consumer rescinds:

- The creditor's security interest becomes void;
- The creditor must refund all interest and fees paid by the consumer; and
- After the creditor's performance, the consumer must return any money or property to the creditor.

TILA and Regulation Z allow a court to modify the process for rescission.

The rescission process during the initial three-business-day period after closing normally is straightforward, because loan funds typically have not been disbursed yet. In those cases, when a consumer provides a notice of rescission, the creditor's security interest is automatically void. Within 20 calendar days of receipt of the consumer's notice, the creditor must return any money paid by the consumer and take whatever steps are necessary to terminate its security interest.

If the consumer provides a notice of rescission after the initial three-business-day period, however, the process is problematic. In this case, the creditor has typically disbursed money or delivered property to the consumer and perfected its security interest. In addition, it may be unclear whether the consumer's right to rescind has expired. Therefore, a creditor may be reluctant to terminate the security interest until the consumer establishes that the right to rescind has not expired and the consumer can tender the loan balance. Given these circumstances, questions have been raised about: (1) Whether the creditor must respond to a notice of rescission, (2) how the parties may resolve a claim outside of a court proceeding, and (3) whether the release of the security interest may be conditioned on the consumer's tender. Both consumer advocates and creditors have urged the Board to clarify the operation of the rescission process in the extended right context. To address the concerns discussed above, the Board proposes a revised process for rescission in the extended right context.

Rescission process outside a court proceeding. The proposal provides that if a creditor receives a consumer's notice of rescission outside of a court proceeding, the creditor must send a written acknowledgement to the consumer within 20 calendars days of receipt of the notice. The acknowledgement must indicate whether the creditor will agree to cancel the transaction. If the creditor agrees to cancel the transaction, the creditor must release its security interest upon the consumer's tender of the amount provided in the creditor's written statement. Under this proposed process, consumers would be promptly and clearly informed about the status of their notice of rescission, and better prepared to take appropriate action. The proposal would ensure that if a consumer tenders the amount requested, the creditor must terminate its security interest in the consumer's home.

Rescission process in a court proceeding. The Board proposes to use its adjustment authority to ensure a clearer and more equitable process for resolving rescission claims raised in court proceedings. The sequence of rescission procedures set forth in TILA and the current regulation would seem to require the creditor to release its security interest whether or not the consumer can tender the loan balance. The Board does not believe that Congress intended for the creditor to lose its status as a secured creditor if the consumer does not return the loan balance. Therefore, the proposal provides that when the parties are in a court proceeding, the creditor is not required to release its security interest until the consumer tenders the principal balance less interest and fees, and any damages and costs, as determined by the court. The Board believes this adjustment would facilitate compliance with TILA. The majority of courts that have considered this issue condition the creditor's release of the security interest on the consumer's proof of tender.

Other Revisions Related to Rescission. The Board proposes several changes to Regulation Z that are designed to preserve the right to rescind while reducing undue litigation costs and compliance burden for creditors. These amendments would provide that:

- A consumer who exercises the extended right may send the notice to the servicer rather than the current holder, because many consumers cannot readily identify the holder;
- Certain events terminate the extended right to rescind, such as a refinancing with a new creditor;
- *Bona fide* personal financial emergencies that enable a consumer to waive the right to rescind will usually involve imminent property damage or threats to health or safety, not the imminent expiration of a discount on goods or services; and
- A consumer who guarantees a loan that is subject to the right of rescission and who pledges his principal dwelling has a right to rescind.

B. Loan Modifications That Require New TILA Disclosures

Currently Regulation Z provides that for closed-end loans, a "refinancing" by the same creditor is a new transaction that requires new TILA disclosures. Whether there is a "refinancing" depends on the parties' intent and State law. State law is largely based on court decisions that determine whether the original obligation has been satisfied and replaced, or merely modified. Reliance on State law leads to inconsistent application of Regulation Z and in some cases to loopholes. For example, some creditors simply insert a clause in all notes that the parties do not intend to refinance, thus, creditors can make significant changes to loan terms without giving TILA disclosures.

The Board proposes to require new TILA disclosures when the same creditor and the consumer agree to modify certain key mortgage loan terms. These key terms include changing the interest rate or monthly payment, advancing new debt, and adding an adjustable rate or other risky feature such as a prepayment penalty. In addition, if a fee is imposed on the consumer in connection with a modification, the modification would be a new transaction requiring new TILA disclosures. Consistent with the current rule, the proposal would exempt modifications reached in a court proceeding, and modifications for borrowers in default or delinquency, unless the loan amount or interest rate is increased, or a fee is imposed on the consumer. Certain beneficial modifications, such as rate and payment decreases, would also be exempt from the requirement for new TILA disclosures.

The proposal would result in more modifications being new transactions requiring new disclosures. For example, the Board estimates in states such as New York and Texas, where refinancings are commonly structured as modifications or consolidations to avoid State mortgage recording taxes, the number of transactions reported as refinancings could potentially double. The Board does not believe, however, that consumers located in these states would be unable to refinance their mortgage simply because creditors would be required to provide TILA disclosures under the proposal. Outreach conducted in connection with this proposal revealed that some large creditors in these states always provide consumers with TILA disclosures, regardless of whether the transaction is classified as a "refinancing" for purposes of Regulation Z.

In addition, the proposal provides that whenever a fee is imposed on a consumer in connection with a modification, including a modification for a consumer in default, a "new transaction" would occur requiring new TILA disclosures. The Board believes that including the imposition of fees as an action that triggers new disclosures is appropriate to ensure that consumers receive important information about the costs of modifying loan terms. The Board recognizes, however, that this aspect of the proposal would likely result in a significant number of modifications being deemed "new transactions," and is seeking comment on whether fees imposed on consumers in connection with modifications should include all costs of the transaction or a more narrow range of fees.

Finally, if the new transaction's APR exceeds the threshold for a "higher-priced mortgage loan" under the Board's 2008 HOEPA rules, then special HOEPA protections would apply to the new transaction. The right of rescission would likely apply to any new transaction secured by the consumer's principal dwelling, unless the transaction qualifies for a narrow exemption from rescission. Specifically, transactions are exempt from rescission if they (1) involve the original creditor who is also the current holder of the note, (2) do not involve an advance of new money, and (3) do not add a new security interest in the consumer's principal dwelling. The Board believes, however, that the potential burdens associated with the right of rescission would not discourage modifications that are in consumers' interests.

C. Improve the Coverage Test for the 2008 HOEPA Rules

In the 2008 HOEPA Final Rule, the Board adopted special consumer protections for "higher-priced mortgage loans" aimed at addressing unfair and deceptive practices in the subprime mortgage market. The Board defined a higher-priced mortgage loan as a transaction secured by a consumer's principal dwelling for which the annual percentage rate exceeds the "average prime offer rate" by 1.5 percentage points or more, for a first-lien transaction, or by 3.5 percentage points or more, for a subordinate-lien transaction.

In the August 2009 Closed-End Proposal, the Board proposed to amend Regulation Z to provide a simpler, more inclusive APR, to assist consumers in comparison shopping and reduce compliance burden. APRs would be higher under the proposal because they would include most third party closing costs. The Board noted that higher APRs would result in more loans being classified as "higher-priced" mortgage loans. More loans would be subject to HOEPA's statutory protections, and to State anti-predatory lending laws. The Board concluded, based on the limited data it had, that the proposal to improve the APR would be in consumers' interests. Comment was solicited on the potential impact of the proposed rule.

Numerous mortgage creditors and their trade associations filed comments agreeing in principle with the proposed finance charge definition but opposing the change because it would cause many prime loans to be incorrectly classified as higher-priced mortgage loans. They also stated that it would inappropriately expand the coverage of HOEPA and State laws. Consumer advocates, on the other hand, argued that any additional loans covered by the more inclusive finance charge and APR should be subject to the restrictions for HOEPA loans and higher-priced mortgage loans because they would be similarly risky to consumers. Accordingly, they argued, the increased coverage would be warranted.

To ensure that loans are not inappropriately classified as higher-priced mortgage loans, the proposal would replace the APR as the metric a creditor compares to the average prime offer rate to determine whether the transaction is a higher-priced mortgage loan. Creditors instead would use a "coverage rate" that would not be disclosed to consumers. The coverage rate would be calculated using the loan's interest rate, the points, and any other origination charges the creditor and a mortgage broker (or an affiliate of either party) retains. Thus the coverage rate would be closely comparable to the average prime offer rate. The proposal would also clarify that the more inclusive APR would have no impact on whether a loan's "points and fees" exceed the threshold for HOEPA's statutory protections. Very few HOEPA loans are made, in part because assignees of HOEPA loans are subject to all claims and defenses a consumer could bring against the original creditor. Thus, the clarification is necessary to avoid unduly restricting access to credit.

D. Consumer's Right to a Refund of Fees

TILA disclosures are intended to help consumers understand their credit terms and to enable them to compare available credit options and avoid the uninformed use of credit. In 2008, Congress amended TILA through the Mortgage Disclosure Improvement Act (the MDIA), to codify the Board's 2008 rules requiring creditors to provide good faith estimates of credit terms (early disclosures) within three business days after receiving a consumer's application for a closed-end mortgage loan, and before a fee is imposed on the consumer (other than a fee for obtaining a consumer's credit history). Thus, the MDIA helps ensure that consumers receive TILA disclosures at a time when they can use them to verify the terms of the mortgage loan offered and compare it to other available loans. The Board issued rules implementing the MDIA in May 2009. 74 FR 74989, Dec. 10, 2008.

Since the rules required by MDIA were issued, concerns have been raised that the rules' fee restriction is not sufficient to protect consumers' ability to comparison shop for credit. Under the current rule, a fee may be imposed as soon as the consumer receives the early disclosures for a closed-end mortgage loan. Thus, the consumer may feel financially committed to a transaction as soon as the disclosure is received, before having had adequate time to review it and make decisions. The fee restriction was intended to ensure that consumers are not discouraged from comparison shopping by paying application fees that cause them to feel financially committed to the transaction before costs are fully disclosed. Fees imposed at application historically have been non-refundable application fees, and include an appraisal fee and a rate lock fee, if any, which may be significant.

To address this issue, the Board proposes to provide a right to a refund of fees, if the consumer decides not to proceed with the transaction during the three business days following receipt of the early disclosures. To ensure that consumers are aware of the right, the proposal would require a brief disclosure at application. Mortgage loans are complex transactions, and thus the proposal would allow consumers time to review the terms of the loan and decide whether to go forward without feeling financially committed due to having paid an application fee. TILA and Regulation Z provide a substantially similar refund right for HELOCs.

The Board recognizes that the proposal may result in creditors refraining from imposing any fees until four days after a consumer receives the early disclosures, to avoid having to refund fees. As a result, creditors likely will not order an appraisal or lock a rate without collecting a fee from the consumer, thus, the proposal may cause a delay in processing the consumer's transaction. The right to a refund for HELOCs, however, does not seem to have caused undue delays or burdens for consumers seeking HELOCs. In addition, the proposal would guarantee that consumers have three days to consider their disclosures free of any financial constraints or pressures, whereas under RESPA, an originator may impose a nonrefundable fee on a consumer as soon as the consumer receives the early RESPA disclosure and has agreed to go forward with the transaction.

E. Reverse Mortgage Disclosures

Disclosures at Application. TILA and Regulation Z require that creditors provide, as applicable, closed-end or HELOC disclosures for reverse mortgage transactions. Currently, a creditor is required to provide a consumer with a Board-published HELOC brochure or a suitable substitute at the time an application for a HELOC is provided to the consumer. The HELOC brochure is 20 pages long and provides general information about HELOCs and how they work, as well as a glossary of relevant terms and a description of various features that can apply to HELOCs. However, it does not contain information specific to reverse mortgages. Closed-end reverse mortgages are almost always fixed-rate transactions, so consumers generally do not receive any TILA disclosures at application. For an adjustable-rate closed-end reverse mortgage, however, consumers would receive the lengthy CHARM booklet that is not tailored to reverse mortgages.

The Board proposes to use its adjustment and exception authority to replace the current HELOC and closed-end application disclosures with a new two-page document published by the Board entitled, "Key Questions to Ask about Reverse Mortgage Loans" (the "Key Questions" document). Consumer testing on reverse mortgage disclosures has shown that consumers have a number of misconceptions about reverse mortgages that are not addressed by the current disclosures. The proposal would require a creditor to provide the new "Key Questions" document that would be published by the Board for all reverse mortgages, whether open- or closed-end, or fixed- or adjustable-rate. This two-page document is intended to be a simple, straightforward and concise disclosure informing consumers about how reverse mortgages work and about terms and risks that are important to consider when selecting a reverse mortgage. The "Key Questions" document was designed based on consumers' preference for a question-and-answer tabular format, and refined in several rounds of consumer testing.

Reverse Mortgage Cost Disclosures. Depending on whether a reverse mortgage is open-end or closed-end credit, the cost disclosure requirements under TILA and Regulation Z differ. All reverse mortgage creditors must provide the TALC disclosure at least three business days before account-opening for an open-end reverse mortgage, or consummation for a closed-end reverse mortgage. For closed-end reverse mortgages, TILA and Regulation Z require creditors to provide an early TILA disclosure within three business days after application and at least seven business days before consummation, and before the consumer has paid a fee other than a fee for obtaining a credit history. If subsequent events make the early TILA disclosure inaccurate, the creditor must provide corrected disclosures before consummation. However, if subsequent events cause the APR to exceed certain tolerances, the creditor must provide a corrected disclosure that the consumer must receive at least three business days before consummation.

For open-end reverse mortgages, TILA and Regulation Z require creditors to provide disclosures on or with an application that contains information about the creditor's open-end reverse mortgage plans. These disclosures do not include information dependent on a specific borrower's creditworthiness or the value of the dwelling, such as the

APRs offered to the consumer, because the application disclosures are provided before underwriting takes place. Creditors are required to disclose transaction-specific costs and terms at the time that an open-end reverse mortgage plan is opened.

Content of proposed reverse mortgage disclosures. The Board proposes three consolidated reverse mortgage disclosure forms: (1) An early disclosure for open-end reverse mortgages, (2) an account-opening disclosure for open-end reverse mortgages, and (3) a closed-end reverse mortgage disclosure. The proposal would ensure that consumers receive meaningful information in an understandable format using forms that are designed, and have been tested, for reverse mortgage consumers. Rather than receive two or more disclosures under TILA that come at different times and have different formats, consumers would receive all the disclosures in a single format that is largely similar regardless of whether the reverse mortgage is structured as open-end or closed-end credit. The proposal would also facilitate compliance with TILA by providing creditors with a single set of forms that are specific to and designed for reverse mortgages, rather than requiring creditors to modify and adapt disclosures designed for forward mortgages.

For reverse mortgages, the proposal would require creditors to provide either:

• The "early" open-end reverse mortgage disclosure within three business days after application, and the account-opening disclosure at least three business days before account opening; or

• The closed-end reverse mortgage disclosures within three business days after application and again at least three business days before consummation.

The timing of these disclosures would generally match the proposed timing requirements in the Board's 2009 HELOC and closed-end mortgage proposals.

Information about reverse mortgage total costs. Currently, Regulation Z requires reverse mortgage creditors to disclose a table of TALC rates. The table of TALC rates is designed to show consumers how the cost of the reverse mortgage varies over time and with house price appreciation. Generally, the longer the consumer keeps a reverse mortgage the lower the relative cost will be because the upfront costs of the reverse mortgage will be amortized over a longer period of time. Thus, the TALC rates usually will decline over time even though the total dollar cost of the reverse mortgage is rising.

As discussed above, very few consumers in testing understood the table of TALC rates. Although participants seemed to understand the explanation accompanying the TALC table, the vast majority could not explain how the explanation related to the percentages shown in the TALC table. Consumers, including those who currently have a reverse mortgage (and thus presumably received the TALC disclosure), consistently stated that they would not use the disclosure to decide whether or not to obtain a reverse mortgage. Instead, consumers consistently expressed a preference for a disclosure providing total costs as a dollar amount.

For these reasons, the Board proposes to use its exception and exemption authority to propose replacing the TALC rates disclosure with other information that is likely to be more meaningful to consumers. The proposal would require a table that demonstrates how the reverse mortgage balance grows over time. The table expresses this information as dollar amounts rather than as annualized loan cost rates. Under the proposal, the creditor must provide three items of information: (1) The sum of all advances to and for the benefit of the consumer; (2) the sum of all costs and charges owed by the consumer; and (3) the total amount the consumer would be required to repay. This information must be provided for each of three assumed loan periods of one year, 5 years, and 10 years. Consumer testing has shown that consumers would have a much easier time understanding this table and would be much more likely to use it in evaluating a reverse mortgage.

Other reverse mortgage cost information. The proposed reverse mortgage disclosures would combine reverse-mortgage-specific information with much of the information that the Board proposed for HELOCs and closed-end mortgages in 2009. For example, the proposed disclosure would include information about APRs, variable interest rates and fees. However, because not all of the information currently required for HELOCs and closed-end mortgages is relevant or applicable to reverse mortgage borrowers, the Board proposes to use its exception and exemption authority to remove or replace disclosures that are not likely to provide a meaningful benefit to reverse mortgage consumers. For example, TILA and Regulation Z require HELOC disclosures to state whether a grace period exists within which any credit extended may be repaid without incurring a finance charge. For reverse mortgage borrowers who do not make regular payments to the lender, such a disclosure is unlikely to be meaningful and may confuse consumers into thinking that some type of regular repayment is required.

Open-end reverse mortgage account-opening disclosures. For open-end reverse mortgages, the proposal would require creditors to provide disclosures at least three business days before account opening, consistent with the current rule for the TALC disclosure. The content of the open-end reverse mortgage account-opening disclosures would be largely similar to the early disclosure, but would contain additional information about fees, consistent with the Board's 2009 HELOC proposal.

F. Requirement for Reverse Mortgage Counseling

Prospective borrowers of FHA-insured reverse mortgages, known as Home Equity Conversion Mortgages (HECMs), must receive counseling before obtaining a HECM. While proprietary reverse mortgage creditors have in the past routinely required counseling for borrowers from HUD-approved counselors, Federal law does not require such counseling for proprietary reverse mortgages. Recently, concerns have surfaced about abusive practices in proprietary reverse mortgages. Reverse mortgages are complex transactions, and even sophisticated consumers seeking reverse mortgages may not be sufficiently aware of the risks and obligations of reverse mortgages solely through disclosures provided during the origination process. Although the proposed rule would improve TILA's reverse mortgage disclosures, the Board believes that the complexity of and risks associated with reverse mortgages warrant added consumer protections. Home equity is a critical financial resource for reverse mortgage borrowers, who generally must be 62 years of age or older. Reverse mortgage borrowers also risk foreclosure if they do not clearly understand important facts about reverse mortgages.

To address these concerns, the proposal would prohibit a creditor or other person from originating a reverse mortgage before the consumer has obtained counseling from a counselor or counseling agency that meets the counselor qualification standards established by HUD, or substantially similar standards. The proposed rule would apply to HECMs and proprietary reverse mortgages. To confirm that the consumer received the required counseling, creditors could rely on a certificate of counseling in a form approved by HUD, or a substantially similar written form. In addition, the proposal would prohibit a creditor or any other person from imposing a nonrefundable fee (except a fee for counseling) on a consumer until three business days after the consumer has obtained counseling. Under the proposal, creditors or others could not steer consumers to particular counselors, or compensate counselors or counseling agencies. These rules would be proposed under the Board's HOEPA authority to prohibit unfair or deceptive acts or practices in connection with mortgage loans.

G. Conditioning a Reverse Mortgage on the Purchase of Other Financial or Insurance Products

Reverse mortgage originators often refer reverse mortgage consumers to third parties that offer the consumers other products or services. Some originators affirmatively require the consumer to purchase another financial product to obtain the reverse mortgage. Originators who refer consumers to providers of financial and other products may receive referral fees, creating strong incentives to encourage reverse mortgage consumers to purchase additional products regardless of whether they are appropriate.

Products often cited as being required as part of a reverse mortgage transaction include annuities, certificates of deposit (CDs) and long-term care insurance. These may be beneficial products for many consumers; however purchase of these and other products may harm consumers who do not understand them. For example, some reverse mortgage consumers have reportedly been sold annuities scheduled to mature after their life expectancy. Further, an annuity may yield at a lower rate of interest than the reverse mortgage used to pay for it. Reverse mortgage borrowers who become aware of these drawbacks may face high fees for early withdrawal or cancellation of the annuity.

Reverse mortgage borrowers often have limited options for obtaining additional funds; for some, a reverse mortgage may be the resource of last resort. These consumers may be forced to accept a requirement that they use reverse mortgage funds to purchase another product, even if it has little benefit. In addition, reverse mortgages are complex loan products whose requirements and characteristics tend to be unfamiliar even to the most sophisticated consumers. Thus, many consumers may be easily misled or confused about the costs of other products and services and the potential downsides to tapping their home equity to pay for them. Moreover, consumers can obtain the benefits from other products and services by voluntarily choosing them.

The Board proposes anti-tying rules specific to reverse mortgages to ensure that all reverse mortgage originations are covered—including both HECMs and proprietary products, as well as reverse mortgages originated by depository and nondepository institutions. These rules would be proposed under the Board's HOEPA authority to prohibit unfair or deceptive acts or practices in connection with mortgage loans.

The proposal would prohibit a creditor or loan originator from requiring a consumer to purchase another financial or insurance product as a condition of obtaining a reverse mortgage. A creditor or loan originator will be deemed not to have required the purchase of another product if:

- The consumer receives the "Key Questions to Ask about Reverse Mortgage Loans" document; and
- The reverse mortgage is consummated (or the account is opened for a HELOC) at least ten days before the consumer purchases another financial or insurance product.

The proposal would define "financial or insurance product" to include both bank products, such as loans and certificates of deposit, and non-bank products, such as annuities, long-term care insurance, securities, and other nondepository investment products. The proposal expressly exempts from the definition of "financial or insurance product" savings and certain other deposit accounts established to disburse reverse mortgage proceeds, as well as products and services intended to protect the creditor's or insurer's investment, such as mortgage insurance, property inspection services, and appraisal or property valuation services.

H. Reverse Mortgage Advertising

Regulation Z currently contains rules that apply to advertisements of HELOCs and closed-end mortgages, including reverse mortgages. The advertisement of rates is addressed in these rules. In addition, advertisements that contain certain specified credit terms, including payment terms, must include additional advertising disclosures, such as the APR. For closed-end mortgages, including reverse mortgages, Regulation Z prohibits seven misleading or deceptive practices in advertisements. For example, Regulation Z prohibits use of the term "fixed" in a misleading manner in advertisements where the rate or payment is not fixed for the full term of the loan.

Reverse mortgage advertisements generally focus on special features of reverse mortgages, such as the fact that regular payments of principal and interest are not required. For this reason, the proposal contains additional advertising requirements specific to reverse mortgages that supplement, rather than replace, the general advertising requirements for open-end or closed-end credit.

The proposal would require that a reverse mortgage advertisement disclose clarifying information if the advertisement contains certain statements that are likely to mislead or confuse consumers. For example, a clarifying statement would be required for:

- Advertisements stating that a reverse mortgage "requires no payments;"
- Advertisements stating that a consumer need not repay a reverse mortgage "during your lifetime;" and
- Advertisements stating that a consumer "cannot lose" or there is "no risk" to a consumer's home with a reverse mortgage.

VI. Section-by-Section Analysis

Section 226.1 Authority, Purpose, Coverage, Organization, Enforcement, and Liability

Section 226.1(d) provides an outline of Regulation Z. The Board proposes to revise § 226.1(d)(5) and (7) to reflect the proposed changes to the requirements for reverse mortgages.

1(d) Organization

1(d)(5)

The Board provided in the 2008 HOEPA Final Rule a staff comment to clarify how the effective date of October 1, 2009 would apply for each of the rule's provisions. *See* comment 1(d)(5)–1. The Board is proposing to make two changes to comment 1(d)(5)–1. One change would provide that a radio advertisement occurs on the date it is broadcast, and the other would conform comment 1(d)(5)–1 to changes proposed to § 226.20(a).

Advertising rules. The comment provides that the Board's advertising rules adopted as part of the 2008 HOEPA Final Rule would apply to advertisements that occur on and after the effective date. It then states as an example that "a radio ad occurs on the date it is first broadcast." The Board has been asked whether this example means that, as long as a radio advertisement was first broadcast prior to October 1, 2009, it then may be rebroadcast indefinitely without the HOEPA Final Rule's advertising provisions ever applying to that advertisement. The Board did not intend this result but, rather, intended the new advertising rules to apply to all radio advertisements that are broadcast on or after the effective date, regardless of whether they happen to have been broadcast prior to the effective date.

This proposal would remove the word "first" from the language referenced above in comment 1(d)(5)–1. Thus, under proposed comment 1(d)(5)–1, a radio advertisement broadcast on or after October 1, 2009 would be subject to the new advertisement rules, regardless of whether it is the first time the advertisement has been broadcast. This revision would prevent possible misinterpretation of the example about the effective date of the advertising rules as they apply to radio advertisements.

Conforming amendments for proposed § 226.20(a). Existing comment 1(d)(5)–1 provides that the 2008 HOEPA protections would apply to a "refinancing" of an existing closed-end mortgage loan under § 226.20(a), if the creditor receives an application for the refinancing on or after the effective date. The 2008 HOEPA rules would not apply, however, if the same creditor and consumer merely "modify" an existing obligation after the effective date. Under current § 226.20(a), when the same creditor and consumer modify the terms of an existing closed-end mortgage loan, there is no refinancing or new transaction unless the existing loan is satisfied and replaced under State law.

As discussed under § 226.20(a) below, the Board is proposing to amend § 226.20(a) to provide that a new transaction would occur when the same creditor and the consumer agree to change certain key terms of an existing closed-end loan secured by real property or a dwelling, regardless of State law. As noted in the discussion under § 226.20(a) below, the proposal would increase significantly the number of modifications that are new transactions. A modification that is a new transaction under proposed § 226.20(a)(1) also would be subject to the 2008 HOEPA rules in § 226.35, if the new transaction is a "higher-priced mortgage loan" under § 226.35(a). Thus, the Board expects that the number of transactions that are subject to § 226.35 will increase but believes that the burdens associated with increased coverage are offset by the consumer protections in § 226.35. The Board solicits comment on the extent of any increased coverage under § 226.35, and whether the costs of complying with § 226.35 would unduly restrict consumers' ability to modify their loans.

Section 226.2 Definitions and Rules of Construction

2(a) Definitions

2(a)(6) Business Day

Currently, § 226.2(a)(6) contains two definitions of business day. Under the general definition, a business day is a day on which the creditor's offices are open to the public for carrying on substantially all of its business functions. *See* comment 2(a)(6)–1. For some purposes, however, a more precise definition of business day applies: all calendar days except Sundays and specified Federal legal holidays for purposes of determining the three-business-day right of rescission under §§ 226.15 and 226.23, as well as when disclosures are deemed received, or by when disclosures must be received, for certain mortgage transactions under §§ 226.19(a)(1)(ii), 226.19(a)(2), and 226.31(c) and for private education loans under § 226.46(d)(4). In addition, the Board has proposed to apply this more precise definition of business day to determining when consumers have received disclosures required under proposed §§ 226.5b(e) and 226.9(j)(2). *See* 74 FR 43428, 43575, 43593, 43608, Aug. 26, 2009.

Nonrefundable fees for closed-end mortgages. Section 226.19(a)(1)(i) currently requires a creditor to provide good faith estimates of credit terms (early disclosures) within three business days after the creditor receives a consumer's application for a closed-end mortgage that is secured by the consumer's dwelling and subject to RESPA. Under the August 2009 Closed-End Proposal, § 226.19(a)(1)(iv) would require that any fee paid within three business days after a consumer receives the early disclosures be refundable during that period, as discussed in detail below. For purposes of proposed § 226.19(a)(1)(iv), the more precise definition of business day would apply. The Board therefore proposes to revise § 226.2(a)(6) and comment 2(a)(6)–2 to reflect the use of the more precise definition in determining when the refund period ends.

Reverse mortgages. For reverse mortgages, the proposal would use the general definition of business day for purposes of providing the early open-end reverse mortgage disclosure within three business days after application. The Board proposes to revise § 226.2(a)(6) and comment 2(a)(6)-2 to use the more precise definition of business day for purposes of the requirement in § 226.33 that creditors provide disclosures for open-end reverse mortgages at least three business days before account opening. This proposal would also apply the more precise definition of business day to the proposed prohibition on imposing a nonrefundable fee until three business days after a reverse mortgage consumer has obtained required counseling. *See* proposed § 226.40(b)(2) and accompanying commentary. This prohibition is discussed in greater detail below, in the section-by-section analysis of § 226.40(b)(2).

2(a)(11) Consumer

Rescission

TILA and Regulation Z provide that, unless the transaction is exempted, a consumer has a right to rescind a consumer credit transaction in which a security interest is or will be retained or acquired in a consumer's principal dwelling. TILA Section 125(a), (e); 15 U.S.C. 1635(a), (e); § 226.23(a), (f). Accordingly, for purposes of rescission, Regulation Z defines a consumer as "a natural person in whose principal dwelling a security interest is or will be retained or acquired, if that person's ownership interest in the dwelling is or will be subject to the security interest." Section 226.2(a)(11).

Comment 2(a)(11)–1 states that guarantors, endorsers, and sureties (hereinafter, "guarantors") "are not generally consumers for purposes of the regulation, but they may be entitled to rescind under certain circumstances." A number of questions have been raised about the circumstances under which a guarantor may be entitled to rescind. In particular, the Board is aware of uncertainty regarding when a guarantor who has pledged his principal dwelling as security for repayment of another person's consumer credit obligation would have the right to rescind. For example, creditors have asked if a guarantor pledging his principal dwelling as additional collateral for a consumer's residential mortgage transaction would have the right to rescind. The Board notes the holding of one court that a guarantor giving a security interest in her principal dwelling as additional collateral for her nephew's consumer credit transaction to purchase an automobile and primarily secured by the automobile has the right to rescind.[14]

The Board's proposal. The Board proposes to revise comment 2(a)(11)–1 to specify the circumstances under which a guarantor has the right of rescission. The proposed comment clarifies that a guarantor who has pledged his principal dwelling as

[14] *See, e.g., Soto* v. *PNC Bank,* 221 B.R. 343 (Bankr. E.D. Pa. 1998).

security for repayment of a borrower's consumer credit obligation would have the right to rescind when: (1) the borrower has the right to rescind because he or she is a natural person to whom consumer credit is offered or extended and in whose principal dwelling a security interest is or will be retained or acquired; and (2) the guarantor pledges his or her principal dwelling as additional security for the consumer credit transaction, and personally guarantees the borrower's repayment of the consumer credit transaction. The Board believes that in the circumstances outlined in the proposed comment, TILA affords the guarantor the right to rescind, just as the borrower on the underlying obligation has a right to rescind.

Where the underlying transaction is not a consumer credit transaction, TILA Section 125(a) and §§ 226.15 and 226.23 do not provide a guarantor with the right to rescind. 15 U.S.C. 1635(a). TILA Section 125(a) provides a right to rescind "in the case of a *consumer credit transaction* * * * in which a security interest * * * is or will be retained or acquired in any property which is used as the principal dwelling of the person to whom credit is extended.* * *" 15 U.S.C. 1635(a) (emphasis added). Regulation Z applies to consumer credit (defined in § 226.2(a)(12) as credit offered or extended to a consumer primarily for personal, family, or household purposes), not business credit. Section 226.3(a). Accordingly, comments 15–1 and 23–1 state that the right of rescission does not apply to a business-purpose loan, even though the loan is secured by the borrower's principal dwelling.

In addition, a guarantor would not have a right to rescind where the underlying consumer credit transaction is not secured by the borrower's principal dwelling, as in the case of an automobile loan secured only by the automobile, or an unsecured education loan. With these loans, no security interest is taken in "the principal dwelling *of the person to whom credit is extended,*" as required by TILA Section 125(a) for the right to rescind to apply to a transaction. 15 U.S.C. 1635(a) (emphasis added). The guarantor's pledge of his or her own principal dwelling as collateral for the consumer credit transaction is irrelevant under the statute, because the guarantor is not "the person to whom credit is extended."

Similarly, a guarantor does not have a right to rescind where the underlying consumer credit transaction is a loan used by the borrower to purchase his or her principal dwelling and is secured by that principal dwelling. The right of rescission does not arise in these transactions because they are "residential mortgage transactions." TILA Section 125(e)(1), 15 U.S.C. 1635(e)(1); §§ 226.15(f)(1) and 226.23(f)(1). Congress exempted residential mortgage transactions from rescission. It would be impracticable to unwind home-purchase transactions and return all parties, including the home seller, to the financial status each occupied before the transaction occurred. Thus, neither the borrower to whom the consumer credit is extended, nor the guarantor who has pledged his own principal dwelling as security for that extension of credit, has the right to rescind such a transaction.

A guarantor who personally guarantees and offers his home as security for a rescindable consumer credit transaction should have the right to rescind because the guarantor is in a situation very similar to that of the borrower. Both the borrower and the guarantor are obligors who are liable on the promissory note, a security interest is taken in both the borrower's and the guarantor's principal dwelling, and the consumer credit transaction is not exempt from rescission. While the Board believes that it would be unusual for a creditor to accept the pledge of a guarantor's home without a personal guarantee, the Board solicits comment on the frequency of such a practice.

Revocable Living Trusts

As discussed in detail below, under § 226.3(a), the Board is proposing to clarify that credit extensions to revocable living trusts for a consumer purpose are consumer credit, even though a trust is not a natural person. Accordingly, proposed comment 2(a)(11)–3 includes clarification that, therefore, such transactions are considered credit extended to a consumer.

Reverse Mortgages

The Board proposes to adopt an alternative definition of consumer for purposes of the counseling requirement for reverse mortgages under proposed § 226.40(b). The Board proposes to add a sentence to § 226.2(a)(11) cross-referencing the definition of consumer in proposed § 226.40(b)(7). For clarity, proposed comment 2(a)(11)–4 restates the proposed § 226.40(b)(7) definition of consumer: for purposes of the counseling requirements under § 226.40(b) for reverse mortgages subject to § 226.33, with one exception, a consumer includes any person who, at the time of origination of a reverse mortgage subject to § 226.33, will be shown as an owner on the property deed of the dwelling that will secure the applicable reverse mortgage. For purposes of the prohibition on imposing nonrefundable fees in connection with a reverse mortgage transaction until after the third business day following the consumer's completion of counseling (proposed § 226.40(b)(2)(i)), however, the term consumer includes only persons on the property deed who will be obligors on the applicable reverse mortgage. This proposal is discussed in greater detail in the section-by-section analysis to § 226.40(b)(7), below.

2(a)(25) Security Interest

Current § 226.2(a)(25) defines "security interest" and comment 2(a)(25)–6 provides guidance on the disclosure of a security interest. With respect to rescission, current comment 2(a)(25)–6 provides that the acquisition or retention of a security interest in the consumer's principal dwelling may be disclosed in a rescission notice with a general statement such as the following: "Your home is the security for the new transaction." *See also* §§ 226.15(b)(1) and 226.23(b)(1)(i). The Board proposes to delete this provision in comment 2(a)(25)–6 as obsolete. As discussed in more detail in the section-by-section analysis to proposed §§ 226.15(b) and 226.23(b), the rescission notice no longer would include a disclosure of "the retention or acquisition of a security interest in the consumer's principal dwelling." Based on consumer testing, the Board is concerned that the current language in comment 2(a)(25)–6 and model rescission forms in Appendices G and H for disclosure of the retention or acquisition of a security interest might not alert consumers that the creditor has the right to take the consumer's home if the consumer defaults. To clarify the significance of the security interest, for rescission notices related to HELOC accounts, proposed § 226.15(b)(3)(ii) requires a creditor to provide a statement that the consumer could lose his or her home if the consumer does not repay the money that is secured by the home. Similarly, for rescission notices related to closed-end mortgage transactions, proposed § 226.23(b)(3)(i) requires a creditor to provide a statement that the consumer could lose his or her home if the consumer does not make payments on the loan. Guidance for how to meet these proposed disclosure requirements is contained in proposed Samples G–5(B) and G–5(C) for HELOC accounts, and in proposed Model Forms H–8(A) and H–9 and Sample H–8(B) for closed-end mortgage transactions.

Section 226.3 Exempt Transactions

3(a) Business, Commercial, Agricultural, or Organizational Credit

Generally, TILA and Regulation Z cover extensions of credit to a consumer, which is defined as a natural person. *See* TILA Section 103(h), 15 U.S.C. 1602(h); § 226.2(a)(11). Extensions of credit to other than a natural person, such as an organization, are exempt from coverage. *See* TILA Sections 103(c), 104(1), 15 U.S.C. 1602(c), 1603(1); § 226.3(a). Thus, credit extended to a trust is exempt from coverage, because a trust is considered an organization, not a natural person. *See* TILA Section 103(c), 15 U.S.C. 1602(c). However, under Regulation Z, credit extended to a land trust for consumer purposes is considered credit extended to a natural person rather than to an organization, and thus is covered by the regulation. *See* comment 3(a)–8. In a land trust transaction, the creditor extends credit to the land trust, which has been created by a natural person to purchase real property, borrow against equity, or refinance a loan already secured by the property. Assuming that these transactions are for personal, family, or household purposes, they are substantively the same as other consumer credit transactions covered by the regulation. *See* comment 3(a)–8.

Concerns have been raised about whether Regulation Z should apply to loans made to revocable living (“intervivos”) trusts in the same manner as it applies to land trusts. Revocable living trusts have become popular estate planning devices for consumers. A natural person creates the revocable living trust (also referred to as the “settlor” of the trust) and is also a beneficiary and trustee of the trust. Title to the personal and real property of the settlor/beneficiary/trustee is held by the revocable living trust. A creditor may extend credit to the revocable living trust (the borrower) to purchase personal or real property, borrow against equity, or refinance an existing secured or unsecured loan. Upon the settlor’s death, new persons become beneficiaries of the trust—usually the settlor’s heirs.

Many creditors treat loans made to revocable living trusts for consumer purposes and secured by real property as consumer credit transactions subject to TILA and Regulation Z. At least one court has held that the refinancing of a loan originally made to a natural person and secured by that person’s principal dwelling, which was later transferred to a revocable living trust that refinanced the loan, was a rescindable consumer credit transaction.[15]

The Board believes that credit extended to a revocable living trust should be subject to Regulation Z because in substance (if not form) consumer credit is being extended. Accordingly, the Board proposes to revise comments 2(a)(11)–3 and 3(a)–8 to clarify that credit extended to revocable living trusts for consumer purposes is considered credit extended to a natural person and, thus, to a consumer.

Section 226.4 Finance Charge

4(a) Definition

Current comment 4(a)(1)–2 clarifies that an annuity required by the creditor in a reverse mortgage transaction is a finance charge. As discussed more fully in the section-by-section analysis to § 226.40 below, the Board is proposing to prohibit creditors from requiring the purchase of an annuity with a reverse mortgage. Accordingly, the Board is proposing to remove this comment about required annuity purchases.

4(d)(1) and (3) Voluntary Credit Insurance Premiums; Voluntary Debt Cancellation and Debt Suspension Fees

Under TILA and Regulation Z, a premium or other charge for credit insurance or debt cancellation or debt suspension coverage (collectively, “credit protection products”) is a finance charge if the insurance or coverage is written in connection with a credit transaction. TILA Section 106(a)(5), 15 U.S.C. 1605(a)(5); § 226.4(b)(7) and (b)(10). However, under TILA and Regulation Z, the creditor may exclude the premium or charge from the finance charge if: (1) The insurance or coverage is not required by the creditor and the creditor discloses this fact in writing; (2) the creditor discloses the premium or charge for the initial term of the insurance or coverage; (3) the creditor discloses the term of the insurance or coverage, if the term is less than the term of the credit transaction; (4) the creditor provides a disclosure for debt suspension coverage, as applicable; and (5) the consumer signs or initials an affirmative written request for the insurance or coverage after receiving the required disclosures. TILA Section 106(b), 15 U.S.C. 1605(b); § 226.4(d)(1) and (d)(3).

In the August 2009 Closed-End Proposal, the Board proposed several changes to the finance charge, the conditions for exclusion from the finance charge, and the required disclosures. First, under proposed § 226.4(g), the provisions of § 226.4(d) would not apply to closed-end credit transactions secured by real property or a dwelling, so the premium or charge for a credit protection product written in connection with the credit transaction would be included in the finance charge for the credit transaction whether or not it was voluntary. Under proposed § 226.38(h), however, a creditor would still be required to provide the credit protection product disclosures required under § 226.4(d)(1) and (d)(3). Second, concerns about eligibility requirements were addressed in proposed § 226.4(d)(1)(iv) and (d)(3)(v), which would require the creditor to determine at the time of enrollment that the consumer meets any applicable age or employment eligibility criteria for insurance or coverage. The creditor would be required to make this determination in order to exclude the premium or charge from the finance charge for the credit transaction. Finally, based on consumer testing, revised disclosures were proposed to address concerns about disclosure of the voluntary nature, costs, and eligibility requirements of the product. *See* proposed Model Clauses and Samples G–16(C), G–16(D), H–17(C), and H–17(D) in Appendices G and H, 74 FR 43232, 43338, 43348, Aug. 26, 2009.

Based on comments to the August 2009 Closed-End Proposal and the Board’s review of creditor solicitations and disclosures for credit protection products, the Board now proposes changes to the timing, format, and content of disclosures required under § 226.4(d). These disclosures would be necessary to satisfy the disclosure requirements of proposed § 226.6(a)(5)(i) for HELOCs, § 226.6(b)(5)(i) for open-end credit that is not home-secured, § 226.18(n) for closed-end credit that is not home-secured, and § 226.38(h) for closed-end mortgages. These disclosures would be required whether the credit protection product was optional or required. As discussed more fully in the section-by-section analyses for proposed § 226.38 in the August 2009 Closed-End Proposal and for proposed §§ 226.6 and 226.18 below, the Board is proposing to use its TILA Section 105(a) authority to require these disclosures for credit protection products that are required in connection with the credit transaction to ensure that consumers are fully informed of the costs and risks of these products. The disclosures and requirements are discussed more fully in the section-by-section analyses below for §§ 226.6(a)(5)(i), 226.6(b)(5)(i), and 226.18(n). In the August 2009 Closed-

[15] *See Amonette* v. *Indymac Bank, F.S.B.*, 515 F. Supp. 2d 1176 (D. Haw. 2007).

End Proposal, the credit protection product disclosures were listed in proposed § 226.38(h). In the final rule, the list of these disclosures would be consolidated in § 226.4(d)(1) and (d)(3), and § 226.38(h) would simply provide a cross-reference to § 226.4(d)(1) and (d)(3).

Timing. Under a final rule for credit cards issued in January 2009 (January 2009 Credit Card Rule), a credit protection product sold before or after the opening of an open-end (not home-secured) plan would be considered "written in connection with the credit transaction." *See* comments 4(b)(7) and (b)(8)–2 and 4(b)(10)–2; 74 FR 5244, 5459, Jan. 29, 2009. (The January 2009 Credit Card Rule was withdrawn as of February 22, 2010, but comments 4(b)(7) and (b)(8)–2 and 4(b)(1)–2 were retained in a final rule published separately that same day (February 2010 Credit Card Rule). 75 FR 7925 and 7658, 7858–7859, Feb. 22, 2010.) The August 2009 Closed-End Proposal would apply this same rule to HELOCs. *See* proposed comments 4(b)(7) and (b)(8)–2 and 4(b)(10)–2; 74 FR 43232, 43370, Aug. 26, 2009. That is, to exclude a premium or charge from the finance charge, a creditor would have to comply with § 226.4(d) if the credit protection product was sold before or after the opening of an open-end plan (whether or not it was home-secured). Thus, for closed-end credit, a creditor would have to comply with § 226.4(d) if the creditor protection product was sold before—but not after—consummation. To clarify these requirements, proposed § 226.4(d)(1) and (d)(3) and comment 4(d)–2 would state that a creditor must fulfill the conditions of § 226.4(d) before the consumer enrolls in the insurance or coverage "written in connection with the credit transaction." Comment 4(d)–2 would also cross-reference comments 4(b)(7) and (b)(8)–2 and 4(b)(10)–2 for a discussion of when insurance or coverage is "written in connection with the credit transaction." Comment 4(d)–6 would be revised to clarify that if the premium is not imposed by the creditor in connection with the credit transaction, it is not covered by § 226.4.

4(d)(1)(i)

Format. Currently, Regulation Z does not mandate the format of the disclosures required under § 226.4(d) and does not provide model forms or samples specific to the disclosures for credit protection products. The Board's review of several disclosures for credit protection products revealed that many disclosures were in small font, not grouped together, and in dense blocks of text. For example, one creditor provided credit protection product disclosures in 6-point font on the back of an enrollment form, separate from the signature line, and with multiple Federal and State disclosures in dense blocks of text. Although the August 2009 Closed-End Proposal provided model clauses and a credit life insurance sample, there was no model form with a specific format. In addition, although the proposal included a credit life insurance sample, commenters requested separate samples for debt cancellation and debt suspension products.

To address these problems, the Board tested a sample credit life insurance disclosure that used 12-point font, tabular and question-and-answer format, and bold and underlined text. Participants understood the content of the disclosure when presented in this format. The Board also worked with its consultant to develop samples for debt cancellation and debt suspension products. Accordingly, the Board proposes to revise § 226.4(d)(1)(i) and (d)(3)(i) to require the creditor to provide clearly and conspicuously in a minimum 10-point font the disclosures, which must be grouped together and substantially similar in headings, content, and format to Model Forms G–16(A) or H–17(A) in Appendix G or H. Proposed § 226.4(d)(1)(i)(D) would require several disclosures in a tabular and question-and-answer format. Also, samples for credit life insurance, disability debt cancellation coverage, and unemployment debt suspension coverage are proposed at Samples G–16(B), (C) and (D), and H–17(B), (C) and (D), respectively.

4(d)(1)(i)(D)(*1*)

Need for product. To address concerns about the costs and benefits of the product relative to traditional life insurance, the August 2009 Closed-End Proposal required the creditor to provide the following statement: "If you have insurance already, this policy may not provide you with any additional benefits." Several industry trade associations, banks, community banks, and credit protection companies noted that this language could be misleading. Credit protection products can supplement existing insurance policies. Accordingly, the Board proposes § 226.4(d)(1)(i)(D)(*1*) to require a revised statement that if the consumer already has enough insurance or savings to pay off or make payments on the debt if a covered event occurs, the consumer may not need the product. Proposed comment 4(d)–15 would clarify that a "covered event" refers to the event that would trigger coverage under the policy or agreement, such as loss of life, disability, or involuntary unemployment. Examples of how to provide this statement for particular products would be provided in Samples G–16(B), (C) and (D) and H–17(B), (C) and (D) in Appendices G and H.

4(d)(1)(i)(D)(*3*)

Cost. Currently, Regulation Z permits a creditor to disclose the premium or charge on a unit-cost basis for: Open-end transactions; closed-end credit transactions by mail or telephone under § 226.17(g); and certain closed-end credit transactions involving insurance or coverage that limits the total amount of indebtedness subject to coverage. Section 226.4(d)(1)(ii) and (d)(3)(ii). Concerns have been raised that unit-cost disclosures do not provide a meaningful disclosure of the potential cost of the product. The Board's review of several disclosures for credit protection products revealed that creditors often provide multiple unit-cost disclosures for each State in which the creditor offers the product. Moreover, during consumer testing conducted by the Board for this proposal, most participants could not correctly calculate the cost of the product based on a unit-cost disclosure. However, when the cost was disclosed as a dollar figure tailored to the loan amount, all participants understood the cost of the credit insurance. The Board believes that consumers would benefit from disclosure of the maximum premium or charge for the insurance or coverage to determine whether the product is affordable for them.

Accordingly, the Board proposes § 226.4(d)(1)(i)(D)(*3*) to require a statement of the maximum premium or charge per period. The Board understands that the premium or charge is typically calculated based on the rate multiplied by the outstanding balance, monthly principal and interest payment, or minimum monthly payment. Thus, for a product based on the outstanding balance of closed-end credit, the periodic premium or charge may decline as the balance declines. Alternatively, for a product based on the minimum monthly payment under an open-end credit plan, the periodic premium or charge may vary. Thus, the Board also proposes to require a disclosure that the cost depends on the consumer's balance or interest rate, as applicable.

Proposed comment 4(d)–16 would clarify that the creditor must use the maximum rate under the policy or coverage. In addition, if the premium or charge is based on the outstanding balance or periodic principal and interest payment, the creditor must base the disclosure on the maximum outstanding balance or periodic principal and interest payment possible under the loan contract or line of credit plan. Current comment 4(d)–4 regarding unit-cost disclosures would be revised to apply only to property insurance disclosures. Comment 4(d)–2 would be revised to state that, if disclosures are given early, a creditor must redisclose if the statement of the maximum premium or charge per period is different at the time of consummation or account-opening.

4(d)(1)(i)(D)(*4*)

Maximum benefit. The August 2009 Closed-End Proposal would require creditors to disclose the loan amount together with cost information for the credit protection product. *See* proposed § 226.38(h)(9). However, the Board's review of several disclosures for credit protection products revealed that the loss-of-life insurance or coverage sometimes does not cover the full loan amount. Moreover, debt cancellation or debt suspension coverage usually places limits on the dollar amount and number of payments to be paid. The Board is concerned that consumers may not realize that there are limits to the benefits, and that they will have to pay any amounts that are not covered under the insurance or coverage. During consumer testing conducted by the Board for this proposal, some participants were surprised that benefits would be capped at an amount less than the loan amount, but most understood the disclosure. Accordingly, the Board proposes § 226.4(d)(1)(i)(D)(*4*) to require a statement of the maximum benefit amount, together with a statement that the consumer will be responsible for any balance due above the maximum benefit amount, as applicable.

4(d)(1)(i)(D)(*5*) and (*6*)

Eligibility. The August 2009 Closed-End Proposal would require creditors to make a determination at the time of enrollment that the consumer meets any applicable age or employment eligibility criteria for insurance or debt cancellation or debt suspension coverage. *See* proposed § 226.4(d)(1)(iv) and (d)(3)(v). If the insurance or coverage contained other eligibility restrictions in addition to age and employment, the proposal provided the following model clauses: "Based on our review of your age and/or employment status at this time, you may be eligible to receive benefits. However, you may not qualify to receive any benefits because of other eligibility restrictions." *See* proposed Model Clauses G–16(C) in Appendix G and H–17(C) in Appendix H. Comments from consumer advocates, a Federal banking agency, a trade association, a bank, two credit protection companies, and several community banks indicated that they felt that these statements were too vague and potentially misleading. Consumer advocates suggested the Board conduct more testing to find the right balance between information overload and information sufficient for rational decision making.

To address these concerns, the Board conducted additional rounds of testing to improve this disclosure. The following language was tested: "*You may not qualify for benefits even if you buy this product.* Based on our review you currently meet the age and employment eligibility requirements, but there are other requirements that you may not meet. If you do not meet these eligibility requirements, you will not receive any benefits even if you purchase this product and pay the monthly premium." Most participants understood the disclosure, and were surprised that they might not receive benefits even after purchasing the product and making payments for a number of years. Most indicated that they would use the Federal Reserve Board Web site to learn more about eligibility requirements.

Accordingly, the Board proposes § 226.4(d)(1)(i)(D)(*5*) to require a statement that the consumer meets the age and employment eligibility requirements. If there are other eligibility requirements, the Board further proposes § 226.4(d)(1)(i)(D)(*6*) to require a statement in bold, underlined text that the consumer may not receive any benefits even if the consumer pays for the product, together with a statement that there are other requirements that the consumer may not meet and that, if the consumer does not meet these eligibility requirements, the consumer will not receive any benefits even if the consumer purchases the product and pays the periodic premium or charge. Sample language is included in Model Forms G–16(A) and H–17(A), and Sample Forms G–16(B), (C) and (D), and H–17(B), (C) and (D) in Appendices G and H.

4(d)(1)(i)(D)(*7*)

Coverage period. Currently, Regulation Z requires disclosure of the term of the insurance or coverage if it is less than the term of the credit transaction. Section 226.4(d)(1)(ii) and (d)(3)(ii). The August 2009 Closed-End Proposal would require disclosure of the term in all cases. *See* proposed § 226.38(h)(9). Consumer advocates that commented on the proposal also suggested disclosure of the date on which the consumer would no longer meet the age eligibility requirement. One bank suggested a highlighted disclosure of the age eligibility requirement. To address these concerns, the Board proposes § 226.4(d)(1)(i)(D)(*7*) to require a statement of the time period and age limit for coverage. The Board believes that disclosure of the age, rather than the date, would be more meaningful to consumers.

4(d)(1)(ii)

The August 2009 Closed-End Proposal would require creditors to make a determination at the time of enrollment that the consumer meets any applicable age or employment eligibility criteria for insurance or debt cancellation or debt suspension coverage. *See* proposed § 226.4(d)(1)(iv) and (d)(3)(v). To provide creditors with some flexibility, the Board proposes § 226.4(d)(1)(ii) to allow creditors to make the determination *prior to* or at the time of enrollment. Comment 4(d)–14 regarding age or employment eligibility criteria is revised accordingly.

4(d)(3)(i)

Debt suspension coverage. In the January 2009 Credit Card Rule, the existing rules for debt cancellation coverage were applied to debt suspension coverage. The rule requires a disclosure that the obligation to pay loan principal and interest is only suspended, and that interest will continue to accrue during the period of suspension. *See* § 226.4(d)(3)(iii); 74 FR 5244, 5401, Jan. 29, 2009. (The January 2009 Credit Card Rule was withdrawn as of February 22, 2010, but § 226.4(d)(3)(iii) was retained in the February 2010 Credit Card Rule. 75 FR 7925 and 7658, 7796, Feb. 22, 2010.) In response to the August 2009 Closed-End Proposal, several industry commenters requested guidance on how to incorporate this requirement into the revised disclosure. Accordingly, the Board proposes § 226.4(d)(3)(i) to include this requirement in the disclosure, and proposes model forms and samples incorporating the disclosure at G–16(A) and (D) in Appendix G and H–17(A) and (D) in Appendix H.

4(d)(3)(ii)

The August 2009 Closed-End Proposal would require creditors to make a determination at the time of enrollment that the consumer meets any applicable age or employment eligibility criteria for insurance or debt cancellation or debt suspension coverage. *See* proposed

§ 226.4(d)(1)(iv) and (d)(3)(v). To provide creditors with some flexibility, the Board proposes § 226.4(d)(3)(ii) to allow creditors to make the determination *prior to* or at the time of enrollment. Comment 4(d)–14 regarding age or employment eligibility criteria is revised accordingly.

4(d)(4) Telephone Purchases

In the January 2009 Credit Card Rule, the Board exempted open-end (not home-secured) plans, from the requirement to obtain a written signature or initials from the consumer for the telephone sales of credit insurance or debt cancellation or debt suspension plans. *See* § 226.4(d)(4); 74 FR 5244, 5401, Jan. 29, 2009. However, creditors must make the disclosures required under current § 226.4(d)(1)(i) and (ii) or (d)(3)(i) through (iii) orally; maintain evidence that the consumer affirmatively elected to purchase the insurance or coverage; and mail the required disclosures within three business days after the telephone purchase. (The January 2009 Credit Card Rule was withdrawn as of February 22, 2010, but § 226.4(d)(4) was retained in the February 2010 Credit Card Rule. 75 FR 7925 and 7658, 7796, Feb. 22, 2010.) The August 2009 Closed-End Proposal would apply this same rule to HELOCs. *See* proposed § 226.4(d)(4); 74 FR 43232, 43322, Aug. 26, 2009. Under this proposal, the disclosures would be required under § 226.4(d)(1)(i) and (d)(3)(i), rather than under § 226.4(d)(1)(i) and (ii) and (d)(3)(i) through (iii). Accordingly, the Board proposes to revise § 226.4(d)(4) to require creditors making telephone disclosures to provide orally the disclosures required under § 226.4(d)(1)(i) and (d)(3)(i).

Section 226.5 General Disclosure Requirements

Section 226.5 provides general disclosure requirements for open-end credit. The Board is proposing to revise § 226.5 and the associated commentary to include references to the proposed open-end reverse mortgage disclosures in § 226.33.

Section 226.5b Requirements for Home-Equity Plans

Reverse Mortgages

Currently, reverse mortgages that are structured as open-end credit plans are subject to § 226.5b. The Board is proposing to consolidate the disclosure requirements for open-end reverse mortgages in § 226.33. Consequently, the Board proposes to revise § 226.5b to exclude reverse mortgages from the disclosure requirements in current paragraphs (a) through (e). The Board's 2009 HELOC Proposal also proposed to amend § 226.5b. *See* 74 FR 43428 Aug. 26, 2009 for further information. The Board has incorporated in the regulatory text and commentary for § 226.5b both the changes that were proposed in the Board's 2009 HELOC Proposal and the changes proposed in this notice. The Board is not soliciting comment on the amendments previously proposed.

Proposed § 226.5b(h) provides a cross-reference to the sections in § 226.33 which apply to reverse mortgages. The Board is also proposing to remove proposed comments 5b(c)(9)(ii)–6 and 5b(c)(9)(iii)–4, which provide guidance on how to disclose the payment terms for open-end reverse mortgages. *See* 74 FR 43428, 43586, Aug. 26, 2009. As discussed more fully below in the section-by-section analysis to § 226.33, the Board is proposing not to apply the minimum periodic payment disclosures to open-end reverse mortgages.

Reverse mortgages would remain subject to the other provisions in § 226.5b. Current § 226.5b(g) (proposed to be redesignated as § 226.5b(d) in the August 2009 HELOC Proposal) requires a creditor to refund fees paid for a home equity plan if any term required to be disclosed in § 226.5b(d) (proposed to be redesignated as § 226.5b(c) in the August 2009 HELOC Proposal) changes (other than a change due to fluctuations in the index in a variable-rate plan) before the plan is opened and the consumer elects not to open the plan. *See* 74 FR 43428, 43484, Aug. 26, 2009. For reverse mortgages, proposed § 226.5b(d) would be revised to apply to the early open-end reverse mortgage disclosures required by § 226.33(d)(1). Revisions to proposed § 226.5b(d) also would clarify that the creditor would not be required to refund fees if the consumer changed the type of payment he elected to receive under proposed § 226.33(c)(5), or for changes resulting from verification of the appraised property value or the consumer's age. For example, if the disclosure is based on the consumer's choice to receive only monthly payments, but after the disclosure is provided the consumer decides instead to receive funds in the form of a line of credit, the creditor would not be required to refund the consumer's fees if the consumer later decided not to proceed with the reverse mortgage.

Under current § 226.5b(h) (proposed to be redesignated as § 226.5b(e) in the August 2009 HELOC Proposal), which implements TILA Section 127A(c)(2), neither a creditor nor any other person may impose a nonrefundable fee on a consumer until after the third business day following the consumer's receipt of the disclosures required by § 226.5b. 15 U.S.C. 1637a(c)(2); 74 FR 43428, 43536, 43593, Aug. 26, 2009. This provision applies to all HELOCs subject to § 226.5b, including reverse mortgages. As discussed in the section-by-section analysis to § 226.33, for open-end reverse mortgages, the disclosures required by § 226.5b are proposed to be moved to § 226.33; the nonrefundable fee provision in § 226.5b, however, still applies to open-end reverse mortgages subject to § 226.33. Thus, under proposed § 226.5b(e), a consumer who has applied for a HELOC, including an open-end reverse mortgage, may choose not to proceed with the transaction for any reason within three business days after application and receive a refund of any fees paid. *See* proposed comment 5b(e)–1, 74 FR 43428, 43593, Aug. 26, 2009.

This proposal amends the commentary to previously proposed § 226.5b(e) to reflect a new proposed rule regarding reverse mortgages, discussed in more detail below in the section-by-section analysis to § 226.40(b)(2). Under this new rule, neither a creditor nor any other person may impose a nonrefundable fee on a consumer for a reverse mortgage until after the third business day following the consumer's completion of counseling from a qualified counselor. *See* proposed § 226.40(b)(2) and accompanying commentary. Consequently, open-end reverse mortgages would be subject to two restrictions on imposing nonrefundable fees: (1) The rule under previously proposed § 226.5b(e) described above, which applies to all HELOCs subject to § 226.5b (*see* 74 FR 43428, 43536, Aug. 26, 2009); and (2) the rule under proposed § 226.40(b)(2), which applies to all reverse mortgages subject to § 226.33.

The Board proposes to add comment 5b(e)–5 to clarify that, for open-end reverse mortgages, the restrictions on imposing nonrefundable fees in §§ 226.5b and 226.40(b)(2) both apply. The proposed comment also cross-references proposed commentary to § 226.40(b)(2), which explains the practical implications of these restrictions in reverse mortgage transactions. *See* proposed comment 40(b)(2)(i)–3.

Current § 226.5b(f) limits the changes that creditors may make to HELOCs subject to § 226.5b, including open-end reverse mortgages. Current § 226.5b(f)(1) limits changes to the annual percentage rate, and current § 226.5b(f)(3) limits changes to plan terms; both apply to reverse mortgages. Current § 226.5b(f)(2) limits the situations in which a creditor may terminate a plan and demand repayment of the entire outstanding balance in advance of the original term. It does not apply to reverse mortgages. Instead, current § 226.5b(f)(4) limits when open-end reverse mortgages may be terminated: in the case of default; if the consumer transfers title to the property securing the note; if the consumer ceases using the property as the primary dwelling; or upon the consumer's death. No substantive revisions to these provisions are proposed. The proposal would revise § 226.5b(f)(4) to reflect the change of the defined term "reverse mortgage transaction" to "reverse mortgage" discussed in the section-by-section analysis to § 226.33(a).

Interest Rate Not Under the Creditor's Control

TILA Section 137(a), implemented by § 226.5b(f)(1), prohibits variable-rate HELOCs from being subject to any interest rate changes other than those based on "an index or rate of interest which is publicly available and is not under the control of the creditor." 15 U.S.C. 1647(a). Accordingly, § 226.5b(f)(1) prohibits creditors from changing a HELOC's APR unless the change is "based on an index that is not under the creditor's control" and is "available to the general public." The Official Staff Commentary to § 226.5b(f)(1) explains that a creditor may not make changes based on its own prime rate or cost of funds, and may not reserve a contractual right to change rates at its discretion. See comment 5b(f)(1)–1. The commentary states that a creditor may use a published prime rate, such as that in the *Wall Street Journal,* even if the creditor's own prime rate is one of several rates used to establish the published rate. *Id.*

In the August 2009 HELOC Proposal, the Board did not propose to revise these provisions. However, earlier this year, the Board adopted final rules regarding open-end (not-home-secured) credit, which include additional guidance regarding what constitutes an index outside of the creditor's control in the context of credit cards under an open-end (not-home-secured) consumer credit plan (February 2010 Credit Card Rule). *See* 75 FR 7658, 7737, 7819, 7909, Feb. 22, 2010. Under the February 2010 Credit Card Rule, new § 226.55(b)(2) provides that a creditor may not increase an APR for a variable-rate credit card unless the change is based on "an index that is not under the card issuer's control and is available to the general public" and "the increase in the [APR] is due to an increase in the index." *See id.* at 7819.

The commentary to this new provision incorporates the explanations of "an index that is not under the [creditor's] control" that appear in the HELOC rules, described above. *See* comment 55(b)(2)–2.i; 75 FR 7658, 7909, Feb. 22, 2010. In addition, the commentary includes two situations not currently associated with the meaning of this phrase in the HELOC rules.

First, under § 226.55(b)(2), a card issuer exercises control over the index if the card issuer has set a minimum rate "floor" below which a variable rate cannot fall, even if a decrease would be consistent with a change in the applicable index. *See* comment 55(b)(2)-2.ii; 75 FR 7658, 7737, 7909, Feb. 22, 2010. Second, a card issuer exercises control over the index if the variable rate can be calculated based on any index value that existed during a period of time. *See* comment 55(b)(2)–2.iii; 75 FR 7658, 7737, 7909, Feb. 22, 2010. In explaining this second provision, the **SUPPLEMENTARY INFORMATION** to the February 2010 Credit Card Rule notes that card issuers typically reset rates on variable-rate credit cards monthly, every two months, or quarterly. Under the new rule, a card issuer is permitted to adjust the variable rate based on the value of the index on a particular day, or in the alternative, the average index value during a specific period. *See id.* This second provision, however, is designed prevent creditors from setting the new rate based on, for example, the highest index value during a given period of time preceding the reset date (such as the 90 days preceding the last day of a month or billing cycle).

The Board expressed concerns that setting a rate "floor" and adjusting rates based on any index value that existed during a period of time can prevent consumers from receiving the benefit of decreases in the index. Upon review, the Board concluded that these practices constitute a creditor's control over an index to change rates in a manner prohibited by TILA. *See id.* at 7909 (citing TILA Section 171(b)(2); 15 U.S.C. 1666(b)(2)).

The Board solicits comment on whether to amend the commentary to § 226.5b(f)(1) to adopt these clarifications regarding what constitutes control over an index for purposes of the restrictions on changing the rate for a variable-rate HELOC. The Board requests that commenters provide specific reasons why the Board should or should not do so.

Section 226.6 Account-Opening Disclosures

Reverse Mortgages

Section 226.6(a), as proposed to be amended in the Board's August 2009 HELOC Proposal, would be revised by this proposal to exclude reverse mortgages from the tabular disclosure requirements in § 226.6(a)(1) and (a)(2). Instead, reverse mortgages would be subject to the disclosure requirements in proposed § 226.33(c) and (d)(2). In addition, as discussed in the section-by-section analysis to § 226.33(c) below, reverse mortgages would not be subject to the requirements in § 226.6(a)(5)(i) to disclose voluntary credit insurance, debt cancellation or debt suspension, and in § 226.6(a)(5)(v) to disclose information about fixed-rate and -term payment plans. However, reverse mortgages would remain subject to the disclosure requirements in § 226.6(a)(3), (a)(4), (a)(5)(iii) and (a)(5)(iv). These provisions require disclosures about charges, rates, security interests, billing rights, and possible creditor actions, respectively, and would be provided outside the required disclosure tables. The Board has incorporated in the regulatory text and commentary for § 226.6 both the changes that were proposed in the Board's 2009 HELOC Proposal and the changes proposed in this notice. The Board is not soliciting comment on the amendments previously proposed.

Credit Protection Products

As discussed in the section-by-section analysis to proposed § 226.4(d)(1) and (d)(3) above, credit insurance, debt cancellation coverage, and debt suspension coverage (collectively, "credit protection products") are products that are offered in connection with a credit transaction and that present unique costs and risks to the consumer. Currently, Regulation Z requires the creditor to provide detailed disclosures of the costs to the consumer if the product is voluntary (as a condition of excluding the costs from the finance charge), but not if the product is required. *See* TILA Section 106(b), 15 U.S.C. 1605(b); § 226.4(d)(1) and (d)(3). If the product is required, Regulation Z requires only a brief disclosure of the cost, without further details, such as the length of coverage. *See* § 226.6(b)(5)(i) (open-end not home-secured); proposed § 226.6(a)(5)(i) (HELOCs). Based on comments to the August 2009 Closed-End Proposal and the Board's review of creditor solicitations and disclosures for credit protection products, the Board is proposing more comprehensive disclosures of the risks associated with the optional products. *See* proposed § 226.4(d)(1) and (d)(3). However, the Board is concerned that consumers that are offered HELOCs or open-end (not home-secured) credit that require payment for credit protection products will not be fully informed of the costs and risks associated with these products.

Accordingly, the Board proposes to require creditors that require credit protection products in connection with open-end credit to provide the disclosures required in § 226.4(d)(1)(i) and (d)(3)(i), as applicable, except for § 226.4(d)(1)(i)(A), (B), (D)(5), (E) and (F). This proposal would replace § 226.6(a)(5)(i), which was proposed for HELOCs in the August 2009 HELOC Proposal, and would revise § 226.6(b)(5)(i), which was adopted for open-end (not home-secured) credit in the January 2009 Credit Card Rule. (The January 2009 Credit Card Proposal was withdrawn as of February 22, 2010, but § 226.6(b)(5)(i) was retained in the February 2010 Credit Card Rule. 75 FR 7925 and 7658, 7804, Feb. 22, 2010.) Thus, for required credit protection products, creditors would have to disclose information about the Federal Reserve Board's Web site regarding credit protection products, the need for the product, the maximum cost and benefit, general eligibility restrictions, and the time period and age limit for coverage. However, the creditor would not be required to do the following because it is not applicable if the credit protection product is required in connection with the credit transaction: (1) Determine the consumer's age or employment eligibility at the time of enrollment; (2) obtain the consumer's affirmative consent; or (3) disclose the optional nature, age and employment eligibility, or statement of the consumer's affirmative consent.

The Board proposes to require these disclosures using its authority under TILA Section 105(a), 15 U.S.C. 1604(a). TILA Section 105(a) authorizes the Board to prescribe regulations to carry out the purposes of the act. TILA's purposes include promoting "the informed use of credit," which "results from an awareness of the cost thereof by consumers." TILA Section 102(a), 15 U.S.C. 1601(a). A premium or charge for a required credit protection product is a cost assessed in connection with credit. The credit transaction and the relationship between the creditor and the consumer are the reasons the product is offered or available. Because there have long been concerns about the merits of these products,[16] the Board believes that consumers would benefit from clear and meaningful disclosures regarding the associated costs and risks. As discussed more fully in the section-by-section analysis for proposed § 226.4(d)(1) and (d)(3) above, consumer testing showed that without clear disclosures, participants were unaware of the costs and risks of these products. For these reasons, the Board believes that this proposed rule would serve to inform consumers of the costs and risks of accepting a HELOC or open-end (not home-secured) credit plan with a required credit protection product.

Section 226.7 Periodic Statement

Reverse mortgages. Section 226.7 identifies information about an open-end account, including a reverse mortgage, that must be disclosed when a creditor is required to provide periodic statements. Section 226.7(a)(8), which implements TILA Section 127(b)(9), requires a creditor offering HELOCs subject to § 226.5b, including reverse mortgages, to disclose on the periodic statement the date by which or the time period within which the new balance or any portion of the new balance must be paid to avoid additional finance charges. 15 U.S.C. 1637(b)(9). As discussed more fully below in the section-by-section analysis to § 226.33(c)(13), the disclosure of a grace period for reverse mortgages is not relevant or meaningful to consumers who are not making regular payments. For this reason the Board proposes to exercise its authority under TILA Sections 105(a) and 105(f) to exempt reverse mortgages from the requirement to state whether or not any time period exists within which any credit extended may be repaid without incurring a finance charge. The Board believes that an exemption is warranted because the grace period disclosure may be confusing to reverse mortgage consumers who are not making regular payments.

Consumer testing of periodic statements for all HELOCs. Under the August 2009 HELOC Proposal, creditors would be required to provide periodic statements that group fees and interest together, separate from transactions. *See* proposed § 226.7(a)(6)(i), 74 FR 43428, 43541, Aug. 26, 2009. The Board also proposed to eliminate the requirement that creditors disclose the effective APR on HELOC periodic statements. The Board proposed sample forms for HELOC periodic statements, developed largely based on the results of the Board's prior consumer testing conducted for credit cards. *See* proposed Samples G–24(A), G–24(B), and G–24(C) in Appendix G of part 226, 74 FR 43428, 43570, Aug. 26, 2009. The Board indicated that it would conduct additional consumer testing of model disclosures before finalizing the August 2009 HELOC Proposal. 74 FR 43428, 43433, Aug. 26, 2009. In 2009 and 2010, the Board and ICF Macro tested sample periodic statements in three rounds of interviews with 31 participants. Macro prepared a detailed report of findings, which is available on the Board's public Web site: *http://www.federalreserve.gov.* The Board is also providing this summary of the testing and solicits comment.

Consistent with the results from the Board's credit card testing, participants in the three rounds of HELOC testing found it beneficial to have fees and interest separated from transactions on the periodic statement. Consumer testing also further supported the Board's August 2009 HELOC Proposal to eliminate the requirement for creditors to disclose the effective APR on HELOC periodic statements. Participants in the three rounds of HELOC testing were asked questions about the effective APR disclosure designed to elicit their understanding of the rate. A very small minority of participants correctly explained that the effective APR for fixed-rate advances was higher than the corresponding APR for fixed-rate advances because the effective APR included a fixed-rate advance fee that had been imposed. An even smaller minority also correctly explained that the effective APR for variable-rate advances was the same as the corresponding APR for variable-rate advances because no transaction fee had been imposed on those advances. A majority offered incorrect explanations or did not offer any explanation. In addition, the inclusion of the effective APR disclosure on the statement was often confusing to participants; in two rounds some participants mistook the effective APR for the corresponding APR. These results are consistent with the testing results of the effective APR for credit cards.

Section 226.9 Subsequent Disclosure Requirements

Reverse mortgages. Section 226.9 sets forth a number of disclosure requirements that apply after a home-equity plan subject to § 226.5b, including an open-end reverse

[16] *See, e.g.,* Bd. of Governors of the Fed. Reserve Sys. and U.S. Dep't of Hous. and Urban Dev., *Joint Report to the Congress Concerning Reform to the Truth in Lending Act and the Real Estate Settlement Procedures Act* at 64–66 (1998) (raising concerns about high-pressure sales tactics, costs and cancellation rights for credit protection products).

mortgage, is opened. This section contains cross-references to the account-opening disclosures in § 226.6. The proposal would revise § 226.9 and the associated commentary to reference the reverse mortgage account-opening disclosure requirements in § 226.33 as well. The Board has incorporated in the regulatory text and commentary for § 226.9 both the changes that were proposed in the Board's 2009 HELOC Proposal and the changes proposed in this notice. The Board is not soliciting comment on the amendments previously proposed.

Consumer testing of notices of action taken and reinstatement notices and responses for all HELOCs. Under the August 2009 HELOC Proposal, proposed § 226.9(j)(1) would retain the existing requirement that a creditor provide the consumer with notice of temporary account suspension or credit limit reduction under § 226.5b(f)(3)(i) or (f)(3)(vi). 74 FR 43428, 43521, Aug. 26, 2009. Under proposed § 226.9(j)(3), creditors taking action under § 26.5b(f)(2) would be required to provide the consumer with a notice of the action taken and specific reasons for the action. In addition, proposed § 226.5b(g)(2)(v) would require creditors to provide consumers with a notice of results of a reinstatement investigation. To facilitate compliance, model clauses were proposed to illustrate the requirements for these notices. *See* proposed Model Clauses G–22(A), G–22(B), G–23(A) and G–23(B) in Appendix G of part 226, 74 FR 43428, 43569, Aug. 26, 2009. The Board indicated that it would conduct additional consumer testing of model disclosures before finalizing the August 2009 HELOC Proposal. 74 FR 43428, 43433, Aug. 26, 2009.

The Board and ICF Macro conducted testing in 2009 and 2010 of the proposed model clauses for notices that would be required when a creditor suspends or reduces the credit limit for a HELOC, and when a creditor responds to a consumer's request to reinstate a suspended or reduced line. In this proposal, the Board provides a summary of the findings for comment. A detailed report of the findings is included in Macro's report, available on the Board's public Web site: *http://www.federalreserve.gov.*

In the August 2009 HELOC Proposal, the Board included model clauses G–23(A) and G–23(B) to illustrate language for a notice to be used in circumstances in which the creditor:

• Temporarily suspends, advances or reduces a credit limit due to a significant decline in the value of the property, a material change in the consumer's financial circumstances, or the consumer's default of a material obligation under the plan; or

• Takes action (including termination of the account as well as temporary suspension or credit limit reduction) due to the consumer's failure to make a required minimum periodic payment within 30 days of the due date, the consumer's action or inaction that adversely affected the creditor's interest in the property, or an occurrence of fraud or material misrepresentation concerning the account.

Notice of suspension or reduction. A notice that included model clauses in G–23(A) was tested in two rounds of interviews with a total of 21 participants. The notice that was shown to participants indicated that their credit limit had been reduced because the value of the property securing their loan had declined significantly. The notice tested in one round was in the form of a checklist that the creditor could use to indicate the reason for reducing the credit line. A few participants were confused by the listing of other options on the list, even though only one option was checked and the others did not apply to the consumer's situation. Several other participants seemed somewhat confused by the format but eventually understood the form.

As a result, the notice tested in the following round included the specific reason for credit line reduction with no other options listed on the notice. Participants in the next round expressed significantly better understanding of the revised notice. All participants understood that the purpose of the disclosure was to inform them that their credit line was reduced because the value of their home decreased. All participants also understood that they could ask for reinstatement of their original credit limit and how to do so. Some participants understood that they would not be charged a fee by the creditor for the first request to reinstate the credit line, and all but one participant understood that they might be charged for subsequent requests.

Response to request for reinstatement. The Board also tested model clauses in proposed G–22(B) regarding the consumer's rights when the consumer requests reinstatement of a HELOC that has been suspended or reduced and for the creditor's response to a reinstatement request. These clauses were tested in one round with 11 participants. The model clauses, for example, inform the consumer that the consumer's reinstatement request has been received and that the creditor has investigated the request. They contain sample language for explaining the results of a reinstatement investigation in which the creditor found that a reason for suspension of advances or reduction of the credit limit still exists, either because the condition permitting the freeze or credit limit reduction continues to exist or because another condition permitting a freeze or credit line reduction under Regulation Z exists.

Consumer testing indicated that consumers understand the proposed model clauses for a reinstatement notice. In one round of interviews, all participants were able to explain the purpose of the reinstatement notice. All participants also understood that: Their credit limit was not being reinstated to the previous level due to factors other than a reduction in the value of their home; the creditor's decision was based on information received from an examination of the consumer's credit report; and that they could ask the creditor to reinstate their credit limit again, but would have to pay a fee in connection with the request. The proposed model clauses for a reinstatement notice tested so well that the Board did not repeat the testing of this disclosure in subsequent rounds.

Section 226.15 Right of Rescission

15(a) Consumer's Right To Rescind

15(a)(1) Coverage

Section 226.15(a)(1), which implements TILA Section 125(a), generally provides that in a credit plan in which a security interest is or will be retained or acquired in a consumer's principal dwelling, each consumer whose ownership interest is or will be subject to the security interest shall have the right to rescind: (1) Each credit extension made under the plan; (2) the plan when the plan is opened; (3) a security interest when added or increased to secure an existing plan; and (4) the increase when a credit limit on the plan is increased. 15 U.S.C. 1635(a). Nonetheless, as provided in TILA Section 125(e), the consumer does not have the right to rescind each credit extension made under the plan if the extension is made in accordance with a previously established credit limit for the plan. 15 U.S.C. 1635(e). The Board proposes technical edits to § 226.15(a)(1) and related commentary. No substantive change is intended.

Different terminology is used throughout § 226.15 and the related commentary to refer to the events mentioned above that give rise to a right of rescission, such as "transactions" and "occurrences." For consistency, the Board proposes to revise § 226.15 and related commentary to refer to these events as "transactions" for purposes of § 226.15.

15(a)(2) Exercise of the Right

As discussed in the section-by-section analysis to proposed § 226.23(a)(2) below, the Board proposes to revise § 226.23(a)(2) and related commentary on rescission for closed-end loans to describe (1) How the consumer must exercise the right of rescission, (2) whom the consumer must notify during the three-business-day period following consummation and after that period has expired (the extended right), and (3) when the creditor or current owner will be deemed to receive the consumer's notice. Proposed § 226.23(a)(2) provides that the party the consumer must notify depends on whether the right of rescission is exercised during the three-business-day period following consummation or after expiration of that period. Proposed § 226.23(a)(2)(ii)(A) states that, during the three-business-day period, the consumer must notify the creditor or the creditor's agent designated on the rescission notice. Proposed § 226.23(a)(2)(ii)(A) also includes the guidance from current comment 23(a)(2)–1, that if the notice does not designate the address of the creditor or its agent, the consumer may mail or deliver notification to the servicer, as defined in § 226.36(c)(3). The proposed rule is intended to ensure that the notice is sent to the person most likely still to own the debt obligation. Generally, closed-end loans are not transferred during the three-business-day period following consummation.

Proposed § 226.23(a)(2)(ii)(B) addresses to whom the notice must be sent after the three-business-day period has expired, and is intended to ensure that consumers can exercise the extended right of rescission if the creditor has transferred the consumer's debt obligation. Under proposed § 226.23(a)(2)(ii)(B), the consumer must mail or deliver notification to the current owner of the debt obligation. However, notice to the servicer would also constitute delivery to the current owner. As discussed in the section-by-section analysis to proposed § 226.23(a)(2), closed-end loans are often transferred shortly after consummation and securitized. In addition, the original creditor may no longer exist because of dissolution, bankruptcy, or merger. As a result, consumers may have difficulty identifying the current owner of their loan, and may reasonably be confused as to whom they should contact to rescind their loan. In contrast, consumers usually know the identity of their servicer. They may regularly receive statements or other correspondence from their servicer, for example, and many consumers continue to mail monthly mortgage payments to the servicer rather than have these payments automatically debited from their checking or savings account.

The Board proposes revisions to § 226.15(a)(2) applicable to HELOCs, consistent with those proposed in § 226.23(a)(2) as discussed above. While the Board realizes that HELOC accounts may not be transferred and securitized as often as closed-end loans, there are cases for HELOCs where the original creditor no longer exists because of dissolution, bankruptcy, or merger. Thus, the Board believes that the proposed rules in § 226.15(a)(2) are needed for HELOCs to ensure that consumers can exercise the extended right of rescission if the creditor has transferred the consumer's debt obligation. The Board also believes that having consistent rules on these issues for closed-end mortgage loans and HELOCs will facilitate creditors' compliance with the rules. As discussed in more detail in the section-by-section analysis to proposed § 226.23(a)(2), the Board solicits comment on this proposed approach.

15(a)(3) Rescission Period

For the reasons discussed in the section-by-section analysis to proposed § 226.23(a)(3) below, the Board proposes to revise § 226.15(a)(3) and related commentary to clarify the following: (1) The consumer's death terminates an unexpired right to rescind; (2) the consumer's filing for bankruptcy generally does not terminate the unexpired right to rescind if the consumer still retains an interest in the property after the bankruptcy estate is created; and (3) a refinancing with a creditor other than the current holder of the obligation and paying off the loan would terminate the unexpired right to rescind. The Board also proposes to clarify when the rescission period expires where a creditor provides corrected material disclosures or a rescission notice.

15(a)(4) Joint Owners

Section 226.15(a)(4) provides that when more than one consumer in a transaction has the right to rescind, the exercise of the right by one consumer is effective for all consumers. Comment 15(a)(4)–1 provides that when more than one consumer has the right to rescind a transaction, any one consumer may exercise that right and cancel the transaction on behalf of all. For example, if both a husband and wife have the right to rescind a transaction, either spouse acting alone may exercise the right and both are bound by the rescission. The Board proposes technical edits to these provisions. No substantive change is intended.

15(a)(5) Material Disclosures

Background

TILA and Regulation Z provide that a consumer may exercise the right to rescind until midnight after the third business day following the latest of (1) the transaction that gives rise to the right of rescission (such as opening the HELOC account), (2) delivery of the notice of the right to rescind, or (3) delivery of all material disclosures. TILA Section 125(a); 15 U.S.C. 1635(a); § 226.15(a)(3). Thus, the right to rescind does not expire until the notice of the right to rescind and the material disclosures are properly delivered. This ensures that consumers are notified of their right to rescind, and that they have the information they need to decide whether to exercise the right. If the rescission notice and material disclosures are not delivered, a consumer's right to rescind may extend for up to three years from the date of the transaction that gave rise to the right to rescind. TILA Section 125(f); 15 U.S.C. 1635(f); § 226.15(a)(3).

TILA defines the following as "material disclosures" for purpose of the right of rescission related to HELOCs: (1) The method of determining the finance charge and the balance upon which a finance charge will be imposed, and (2) the APR. TILA Section 103(u); 15 U.S.C. 1602(u). Consistent with TILA, current footnote 36 to § 226.15(a)(3) defines the term "material disclosures" to include the above disclosures. In addition, the Board has previously added information about membership or participation fees and certain payment information to the regulatory definition of "material disclosures" for HELOCs, pursuant to the Board's authority to make adjustments to TILA requirements as in the judgment of the Board are necessary or proper to effectuate the purposes of TILA. *See* TILA Sections 102(a), 105(a); 15 U.S.C. 1601(a), 1604(a); 46 FR 20847, Apr. 7, 1981; 54 FR 24670, June 9, 1989. Thus, current footnote 36 to § 226.15(a)(3) also includes the following information as "material disclosures:": (1) The amount or method of determining the amount of any membership or participation fee that may be imposed as part of the plan; and (2) payment information described in current §§ 226.5b(d)(5)(i) and (ii) that is required under former § 226.6(e)(2) (redesignated as § 226.6(a)(3)(ii) in the February 2010 Credit Card Rule). This payment information is: (1) The length of the draw period and any repayment period; (2) an explanation of how the minimum periodic payment will be determined and the timing of the payments; and (3) if payment of only the minimum periodic payment may not repay any of the principal or may repay less than the outstanding balance, a statement of this fact as well as that a balloon payment may result.

Congress first added the definition of "material disclosures" to TILA in 1980 so that creditors would be "in a better position to know whether a consumer may properly rescind a transaction." [17] The HELOC market has changed considerably since Congress created this definition of "material disclosures." In the August 2009 HELOC Proposal, the Board proposed comprehensive revisions to the account-opening disclosures for HELOCs that would reflect these changes in the HELOC market. The proposed account-opening disclosures and revised model forms were developed after extensive consumer testing to determine which credit terms consumers find the most useful in evaluating credit transactions. Based on consumer testing, the August 2009 HELOC Proposal made less prominent or eliminated certain account-opening disclosures that are currently defined as "material disclosures," while adding other disclosures that are more important to consumers today. As discussed below, the Board proposes to revise the definition of "material disclosures" consistent with the Board's proposed changes to the account-opening disclosures in § 226.6(a) under the August 2009 HELOC Proposal and with the proposed changes to open-end reverse mortgage disclosures discussed in the section-by-section analysis to § 226.33 below. The Board also proposes to revise the definition of "material disclosures" for closed-end mortgage loans, as discussed under § 226.23(a)(5) below.

August 2009 HELOC Proposal

In the August 2009 HELOC Proposal, the Board proposed two significant revisions to the account-opening disclosures for HELOCs under § 226.6(a) (moved from former §§ 226.6(a) through (e)). The proposed revisions (1) require a tabular summary of key terms to be provided before the first transaction on the HELOC plan (see proposed §§ 226.6(a)(1) and (a)(2)), and (2) change how and when cost disclosures must be made (see proposed § 226.6(a)(3) for content, and proposed § 226.5(b) and proposed § 226.9(c) for timing)).

Under the current rules, a creditor must disclose any "finance charge" or "other charge" in the account-opening disclosures that must be provided before the first transaction on a HELOC plan. In addition, the regulation identifies fees that are not considered to be either "finance charges" or "other charges" and therefore need not be included in the account-opening disclosures. The distinctions among finance charges, other charges, and charges that do not fall into either category are not always clear. Examples of included or excluded charges are in the regulation and commentary, but these examples cannot provide definitive guidance in all cases. This uncertainty can pose legal risks for creditors that act in good faith to comply with the law. Creditors are subject to civil liability and administrative enforcement for underdisclosing the finance charge or otherwise making erroneous disclosures, so the consequences of an error can be significant. Furthermore, over-disclosure of rates and finance charges is not permitted by Regulation Z for open-end credit. The fee disclosure rules also have been criticized as being outdated and impractical. These rules require creditors to provide fee disclosures at account opening, which may be months and possibly years before a particular disclosure is relevant to the consumer, such as when the consumer calls the creditor to request a service for which a fee is imposed. In addition, an account-related transaction may occur by telephone, when a written disclosure is not feasible.

The proposed changes to the disclosures in § 226.6(a) in the August 2009 HELOC Proposal are designed to respond to these criticisms while still giving full effect to TILA's requirement to disclose credit charges before they are imposed. Specifically, in the August 2009 HELOC Proposal, the Board proposed to require creditors to provide a tabular summary of key terms in writing to a consumer before the first transaction is made under the HELOC plan. This proposed tabular summary contains information about rates, fees, and payment information that the Board believes to be the most important information in the current marketplace for consumers to know before they use a HELOC account. "Charges imposed as part of the HELOC plan," as set forth in proposed § 226.6(a)(3), that are not required to be disclosed in the account-opening table must be disclosed orally or in writing before the consumer agrees to or becomes obligated to pay the charge.

The Board's Proposal

Consistent with the August 2009 HELOC Proposal, the Board now proposes to revise the definition of material disclosures to include information that is critical to consumers in evaluating HELOC offers, and to remove information that consumers do not find to be important. The proposal is intended to ensure that consumers have the information they need to decide whether to rescind a HELOC.

Proposed § 226.15(a)(5) would *retain* the following as material disclosures:

- Any APR, information related to introductory rates, and information related to variable rate plans that is required to be disclosed in the proposed account-opening table except for the lowest and highest value of the index in the past 15 years;
- Any annual or other periodic fees that may be imposed by the creditor for the availability of the plan (including any fee based on account activity or inactivity), how frequently the fee will be imposed, and the annualized amount of the fee;
- The length of the plan, the length of the draw period and the length of any repayment period;
- An explanation of how the minimum periodic payment will be determined and the timing of the payments. If paying only the minimum periodic payments may not repay any of the principal or may repay less than the outstanding balance by the end of the plan, a statement of this fact, as well as a statement that a balloon payment may result or will result, as applicable; and
- A fee for required credit insurance, or debt cancellation or suspension coverage.

The following disclosures would be *added* to the list of material disclosures:

- The total of all one-time fees imposed by the creditor and any third parties to open the plan (this disclosure would replace an itemization of the one-time fees to open the plan that are currently material disclosures);
- Any fee that may be imposed by the creditor if a consumer terminates the plan prior to its scheduled maturity;
- If applicable, a statement that negative amortization may occur, and that negative amortization increases the principal balance and reduces the consumer's equity in the dwelling;
- Any limitations on the number of extensions of credit and the amount of credit that may be obtained during any time period, as well as any minimum outstanding balance and minimum draw

[17] S. Rep. No. 368, 98 Cong. 2d Sess. 29, *reprinted in* 1980 U.S.C.A.N.N. 236, 264.

requirements (this disclosure would replace the disclosure of fees imposed for these limitations or restrictions, which are currently material disclosures); and

- The credit limit applicable to the plan.

The following disclosures would be *removed* from the list of material disclosures:

- Any APRs that are not required to be in the proposed account-opening table, specifically any penalty APRs or APRs for fixed-rate and fixed-term advances during the draw period (unless they are the only advances allowed during the draw period);
- An itemization of one-time fees imposed by the creditor and any third parties to open the plan;
- Any transaction charges imposed by the creditor for use of the home-equity plan;
- Any fees imposed by the creditor for a consumer's failure to comply with any limitations on the number of extensions of credit and the amount of credit that may be obtained during any time period, as well as for failure to comply with any minimum outstanding balance and minimum draw requirements;
- Any finance charges that are not required to be disclosed in the account-opening table; and
- The method of determining the balance upon which a finance charge will be imposed (*i.e.,* a description of balance computation methods).

Proposed comment 15(a)(5)(i)–1 states that the right to rescind generally does not expire until midnight after the third business day following the latest of: (1) The transaction that gives rise to the right of rescission, (2) delivery of the rescission notice, as set forth in § 226.15(b), or (3) delivery of all material disclosures, as set forth in § 226.15(a)(5)(i). A creditor must make the material disclosures clearly and conspicuously, consistent with the requirements of proposed § 226.6(a)(2) or, for open-end reverse mortgages, § 226.33(c). The proposed comment clarifies that a creditor may satisfy the requirements to provide the material disclosures by providing an account-opening table described in proposed § 226.6(a)(1) or § 226.33(d)(1) and (d)(4) that complies with the regulation. Failure to provide the required non-material disclosures set forth in § 226.6 or § 226.33 or the information required under § 226.5b does not affect the right of rescission, although such failure may be a violation subject to the liability provisions of TILA Section 130, or administrative sanctions. 15 U.S.C. 1640.

Under the August 2009 HELOC Proposal, proposed §§ 226.6(a)(1)(ii) and (a)(2) sets forth certain terminology and format requirements with which creditors must comply in disclosing certain terms in the account-opening table. For example, under proposed § 226.6(a)(2)(vi)(A)(*1*)(*i*), if an APR that must be disclosed in the account-opening table is a variable rate, a creditor must disclose the fact that the APR may change due to the variable-rate feature. In describing that the rate may vary, a creditor in the account-opening table must use the term "variable rate" in underlined text. Similar requirements for reverse mortgages are proposed in § 226.33(c), (d)(2) and (d)(4).

Proposed comment 15(a)(5)(i)–3 specifies that failing to satisfy terminology or format requirements in proposed §§ 226.6(a)(1) or (a)(2) or § 226.33(c), (d)(2) and (d)(4) (including the tabular format requirement) or in the proposed model forms in Appendix G or Appendix K is not by itself a failure to provide material disclosures. In addition, a failure to satisfy the proposed 10-point font size requirement that would apply to disclosures in the HELOC or reverse mortgage account-opening tables, as set forth in proposed comment 5(a)(1)–3, is not by itself a failure to provide material disclosures. Nonetheless, a creditor must provide the material disclosures clearly and conspicuously, as described in § 226.5(a)(1) and comments 5(a)(1)–1 and –2 (as adopted in the February 2010 Credit Card Rule). In the example above, as long as a creditor satisfies the requirement to disclose clearly and conspicuously the fact that the APR may change due to the variable-rate feature, the creditor will be deemed to have provided this material disclosure even if the creditor does not use the term "variable rate" in underlined text to indicate that a rate may vary.

The Board believes that in most cases, creditors will satisfy the terminology and format requirements applicable to the account-opening disclosures when providing the material disclosures. As discussed above, proposed comment 15(a)(5)(i)–1 provides that a creditor may satisfy the requirement to provide the material disclosures by giving an account-opening table described in § 226.6(a)(1) or § 226.33(d)(2) and (d)(4) that complies with the regulation (including the terminology and format requirements). The Board believes that most creditors will take advantage of the safe harbor in proposed comment 15(a)(5)(i)–1 by using the account-opening disclosures to fulfill the obligation to provide material disclosures.

The Board does not believe that right of rescission should be extended when the creditor has provided the material disclosures clearly and conspicuously to the consumer, but the material disclosures do not meet all the terminology and format requirements applicable to the account-opening disclosures. A material disclosure that is clear and conspicuous but contains a formatting error, such as failure to use bold text, is unlikely to impair a consumer's ability to determine whether to exercise the right to rescind. In addition, providing an extended right of rescission in these cases may increase the cost of credit, as creditors would incur litigation risk and potential costs to unwind transactions based on a failure to meet certain technical terminology or format requirements, even though the disclosure in a particular case was still made clearly and conspicuously to the consumer.

Legal authority to add disclosures. The Board proposes to revise the definition of material disclosures pursuant to its authority under TILA Section 105. 15 U.S.C. 1604. Although Congress specified in TILA the disclosures that constitute material disclosures, Congress gave the Board broad authority to make adjustments to TILA requirements based on its knowledge and understanding of evolving credit practices and consumer disclosures. Under TILA Section 105(a), the Board may make adjustments to TILA to effectuate the purposes of TILA, to prevent circumvention or evasion, or to facilitate compliance. 15 U.S.C. 1604(a). The purposes of TILA include ensuring the "meaningful disclosure of credit terms" to help consumers avoid the uninformed use of credit. 15 U.S.C. 1601(a), 1604(a).

The Board has considered the purposes for which it may exercise its authority under TILA Section 105(a) and, based on that review, believes that the proposed adjustments are appropriate. The Board believes that the proposed amendments to the definition of "material disclosures" are warranted by the complexity of HELOC products offered today and the number of disclosures that are critical to the consumer's evaluation of a credit offer. Consumer testing conducted for the Board for the August 2009 HELOC Proposal showed that certain terms in HELOC products are more important to consumers. Defining these disclosures as "material disclosures" would ensure the "meaningful disclosure of credit terms" so that consumers would have the information they need to make informed decisions about whether to rescind the credit transaction. The proposed definition may also prevent circumvention or evasion of the disclosure rules because creditors would have a greater incentive to ensure that the material disclosures are accurate.

Legal authority to add tolerances. The Board recognizes that increasing the number of material disclosures could increase the possibility of errors resulting in extended rescission rights. To ensure that inconsequential disclosure errors do not result in extended rescission rights, the Board proposes to add tolerances for accuracy of disclosures of the credit limit applicable to the plan and the total of all one-time fees imposed by the creditor and any third parties to open the plan.

The Board proposes to model the tolerances for disclosures of the credit limit and the total of all one-time fees imposed to open the plan on the tolerances provided by Congress in 1995 for the disclosure of the finance charge for closed-end mortgage loans, as discussed in more detail in the section-by-section analysis to proposed § 226.23(a)(5). As discussed in more detail in the section-by-section analyses below, disclosure of the credit limit would be considered accurate if the disclosed credit limit: (1) Is overstated by no more than ½ of 1 percent of the credit limit required to be disclosed under § 226.6(a)(2)(xviii) or $100, whichever is greater; or (2) is less than the credit limit required to be disclosed under § 226.6(a)(2)(xviii). The total of all one-time fees imposed to open the plan would be considered accurate if the disclosed amount is understated by no more than $100; or is greater than the amount required to be disclosed under § 226.6(a)(2)(vii) or § 226.33(c)(7)(i)(A).

The Board proposes the new tolerances for these disclosures pursuant to its authority in TILA Section 121(d) to establish tolerances for numerical disclosures that the Board determines are necessary to facilitate compliance with TILA and that are narrow enough to prevent misleading disclosures or disclosures that circumvent the purposes of TILA. 15 U.S.C. 1631(d). The Board does not believe that an extended right of rescission is appropriate if a creditor understates or slightly overstates the credit limit applicable to the plan, or overstates or slightly understates the total one-time fees imposed to open the plan. Creditors would incur litigation and other costs to unwind transactions based on the extended right of rescission, even though the error in the disclosure was not critical to a consumer's decision to enter into the credit transaction, and, in turn, to rescind the transaction. These disclosure errors are unlikely to influence the consumer's decision of whether to rescind the loan. The Board believes that the proposed tolerances are broad enough to alleviate creditors' compliance concerns regarding minor disclosure errors, and narrow enough to prevent misleading disclosures.

Legal authority to remove disclosures. As discussed above, the proposal removes certain disclosures from the definition of "material disclosures." Some of these removed disclosures would be replaced with similar, but more useful, disclosures, such as removing an itemization of one-time fees imposed to open a HELOC plan from the definition of "material disclosures," but including the total of one-time fees imposed to open a plan as a material disclosure. The Board proposes to remove these disclosures from the definition of "material disclosures" through its exception and exemption authority under TILA Section 105. 15 U.S.C. 1604. Although Congress specified in TILA the disclosures that constitute material disclosures that extend rescission, the Board has broad authority to make exceptions to or exemptions from TILA requirements based on its knowledge and understanding of evolving credit practices and consumer disclosures. Under TILA Section 105(a), the Board may make adjustments to TILA to effectuate the purposes of TILA, to prevent circumvention or evasion, or to facilitate compliance. 15 U.S.C. 1604(a). The purposes of TILA include ensuring "meaningful disclosure of credit terms" to help consumers avoid the uninformed use of credit. 15 U.S.C. 1601(a), 1604(a).

TILA Section 105(f) authorizes the Board to exempt any class of transactions from coverage under any part of TILA if the Board determines that coverage under that part does not provide a meaningful benefit to consumers in the form of useful information or protection. 15 U.S.C. 1604(f)(1). TILA Section 105(f) directs the Board to make the determination of whether coverage of such transactions provides a meaningful benefit to consumers in light of specific factors. 15 U.S.C. 1604(f)(2). These factors are (1) The amount of the loan and whether the disclosures, right of rescission, and other provisions provide a benefit to consumers who are parties to the transactions involving a loan of such amount; (2) the extent to which the requirement complicates, hinders, or makes more expensive the credit process; (3) the status of the borrower, including any related financial arrangements of the borrower, the financial sophistication of the borrower relative to the type of transaction, and the importance to the borrower of the credit, related supporting property, and coverage under TILA; (4) whether the loan is secured by the principal residence of the borrower; and (5) whether the exemption would undermine the goal of consumer protection.

The Board has considered each of these factors and, based on that review, believes that the proposed exceptions and exemptions are appropriate. Consumer testing of borrowers with varying levels of financial sophistication shows that the disclosures the Board proposes to remove from the definition of "material disclosures" (as listed above) are not likely to impact a consumer's decision to obtain a HELOC or to exercise the right to rescind. Retaining these disclosures as material disclosures increases the cost of credit when failure to provide these disclosures or technical violations due to calculation errors results in an extended right to rescind. Defining such disclosures as "material disclosures" would not provide a meaningful benefit to consumers in the form of useful information or protection. Revising the definition of "material disclosures" to reflect the disclosures that are most critical to the consumer's evaluation of credit terms would better ensure that the compliance costs are aligned with disclosure requirements that provide meaningful benefits for consumers.

An analysis of the disclosures retained, added, and removed from the definition of "material disclosures" is set forth below.

15(a)(5)(i)(A) Annual Percentage Rates

Consistent with TILA Section 103(u), current footnote 36 of § 226.15(a)(3) defines "material disclosures" to include APRs. Current comment 15(a)(3)–3 further provides that for variable rate programs, the material disclosures also include variable rate disclosures that must be given as part of the account-opening disclosures, namely the circumstances under which the rate may increase, the limitations on the increase, and the effect of the increase. The Board proposes to include any APRs that must be disclosed in the proposed account-opening table as material disclosures. *See* proposed § 226.15(a)(5)(i)(A), proposed § 226.6(a)(2)(vi), and proposed § 226.33(c)(6)(i). This includes all APRs that may be imposed on the HELOC plan related to the payment plan disclosed in the table, except for any penalty APR or any APR for fixed-rate and fixed-term advances during the draw period (unless those are the only advances allowed during the draw period). *See* proposed comment 15(a)(5)(i)–4; *see also* proposed §§ 226.6(a)(2) and (a)(2)(vi). The Board believes that APRs are critical to consumers in deciding whether to open a particular HELOC plan, and in deciding whether to rescind the plan. Consumer testing conducted for the Board on HELOC disclosures for the August 2009 HELOC Proposal shows that that current APRs on the HELOC plan are among the most important pieces of information that consumers want to know in deciding whether to open a HELOC plan.

The Board notes that the tolerance amount set forth in § 226.14(a) applies to the disclosure of APRs as material disclosures under proposed § 226.15(a)(5). *See* comment 14(a)–1. Under § 226.14(a), an APR is considered accurate if it is not more than ⅛ of 1 percentage point above or below the APR determined in accordance with § 226.14.

Introductory rate information. The Board proposes to continue to define information related to introductory rates as material disclosures. Thus, the term "material disclosures" would include the following introductory information: (1) The introductory rate; (2) the time period during which the introductory rate will remain in effect; and (3) the rate that will apply after the introductory rate expires. *See* proposed § 226.15(a)(5)(i)(A) and proposed § 226.6(a)(2)(vi)(B); *see also* proposed comment 15(a)(5)(i)–5. Based on consumer testing conducted for the Board on HELOC plans for the August 2009 HELOC Proposal, the Board believes that this information related to introductory rates is critical to consumers in understanding the current APRs that apply to the HELOC plan.

Variable-rate information. In addition, the Board proposes to continue to define information related to variable-rate plans as material disclosures. Specifically, the term "material disclosures" would include the following information related to variable-rate plans: (1) The fact that the APR may change due to the variable-rate feature; (2) an explanation of how the APR will be determined; (3) the frequency of changes in the APR; (4) any rules relating to changes in the index value and the APR, and resulting changes in the payment amount, including, for example, an explanation of payment limitations and rate carryover; and (5) a statement of any limitations on changes in the APR, including the minimum and maximum APR that may be imposed under the payment plan disclosed in the table, or if no annual or other periodic limitations apply to changes in the APR, a statement that no annual limitation exists. *See* proposed § 226.15(a)(5)(i)(A) and proposed § 226.6(a)(2)(vi)(A); *see also* proposed comment 15(a)(5)(i)–6.

Based on consumer testing conducted for the Board on HELOC plans for the August 2009 HELOC Proposal, the Board believes that the above information about variable rates is critical to consumers in understanding the variable nature of the APRs on HELOC plans. For example, consumers in the testing consistently said that they found an explanation of how the APR will be determined, which means the type of index used in making the rate adjustments and the value of the margin (such as prime rate plus 1 percent), to be valuable information in understanding how their APRs would be determined over time. In addition, the Board believes that consumers should be informed of all rate caps and floors, as consumer testing has shown that this rate information is among the most important information to a consumer in deciding whether to open a HELOC plan. Current comment 15(a)(3)–3 dealing with variable rate plans would be moved to proposed comment 15(a)(5)(i)–6 and would be revised to list the information related to variable rate plans that would be considered material disclosures, as discussed above.

The Board proposes not to include the disclosure of the lowest and highest value of the index in the past 15 years as a material disclosure even though this information is required to be included in the proposed account-opening table as part of the variable-rate information. *See* proposed § 226.15(a)(5)(i)(A), proposed § 226.6(a)(2)(vi)(A)(*1*)(*vi*), and proposed § 226.33(c)(6)(i)(A)(*1*)(*vi*). This disclosure may be useful to some consumers in understanding how the index moved in the past, so that they would have some sense of how it might change in the future; the Board does not propose to include this disclosure as a material disclosure, however, because it provides general information and does not describe a specific term applicable to the HELOC plan.

Exemption for APRs that are not required to be disclosed in the account-opening table. As discussed above, the Board proposes to exclude APRs that are not required to be disclosed in the proposed account-opening table from the definition of "material disclosures." These APRs are penalty APRs and APRs for fixed-rate and fixed-term advances during the draw period (unless they are the only advances allowed during the draw period). *See* proposed §§ 226.6(a)(2) and (a)(2)(vi).

The Board does not believe that removing penalty APRs and APRs for fixed-rate and fixed-term advances during the draw period (unless they are the only advances allowed during the draw period) from the definition of "material disclosures" would undermine the goals of consumer protection provided by the right of rescission. With respect to penalty APRs, under the August 2009 HELOC Proposal, the Board proposed to restrict creditors offering HELOCs subject to § 226.5b from imposing a penalty rate on the account for a consumer's failure to pay the account when due, unless the consumer is more than 30 days late in paying the account. *See* proposed comment 5b(f)(2)(ii)–1. In addition, under the August 2009 HELOC Proposal, creditors offering HELOCs subject to § 226.5b would be required to provide consumers with a written notice of the increase in the APR to the penalty rate at least 45 days before the effective date of the increase. *See* proposed § 226.9(i). Due to the very limited circumstances in which a penalty rate may be imposed under the August 2009 HELOC Proposal, as well as the more stringent advance notice requirements proposed, the Board believes that information about the penalty rate would not be useful to consumers in deciding whether to open a HELOC plan, and, in turn, deciding whether to exercise the right of rescission. For these reasons, the Board proposes to remove penalty APRs from the definition of "material disclosures."

Regarding APRs for fixed-rate and fixed-term advances during the draw period, some HELOC plans offer a fixed-rate and fixed-term payment feature, where a consumer is permitted to repay all or part of the balance at a fixed rate (rather than a variable rate) over a specified time period. In the August 2009 HELOC Proposal, the Board proposed that if a HELOC plan is generally subject to a variable interest rate but includes a fixed-rate and fixed-term option during the draw period, a creditor generally must not disclose in the proposed account-opening table the terms applicable to the fixed-rate and fixed-term feature, including the APRs applicable to the fixed-rate and fixed-term advances. *See* proposed § 226.6(a)(2). However, if a HELOC plan offers only a fixed-rate and fixed-term feature during the draw period, a creditor must disclose in the table information related to the fixed-rate and fixed-term feature when making the disclosures in the proposed account-opening table. The Board believes that including information about the variable-rate feature and the fixed-rate and fixed-term feature in the proposed account-opening table would create "information overload" for consumers. The Board chose to highlight the terms of the variable-rate feature in the table because this feature is automatically accessed when a consumer obtains advances from the HELOC plan. The Board understands that consumers generally must take active steps to access the fixed-rate and fixed-term payment feature.

When the fixed-rate and fixed-term features are optional features, the Board believes that information about the APRs applicable to fixed-rate and fixed-terms advances during the draw period is not critical to most consumers' decisions on whether to open a HELOC plan, and, in turn, their decisions on whether to exercise the right of rescission. Many consumers may never exercise the optional fixed-rate and fixed-term feature. For these reasons, the Board proposes to remove APRs applicable to optional fixed-rate and fixed-terms advances during the draw period from the definition of "material disclosures."

15(a)(5)(i)(B) Total of All One-Time Fees Imposed by the Creditor and Any Third Parties To Open the Plan

Consistent with TILA Section 103(u), footnote 36 to § 226.15(a)(3) defines "material disclosures" to include the method of determining the finance charge. Under § 226.4, some one-time fees imposed by the creditor or any third parties to open the HELOC plan are considered finance charges, such as loan origination fees, and those fees currently are considered material disclosures. Other one-time fees to open the HELOC plan are not considered "finance charges" under § 226.4, such as appraisal fees, and those fees currently are not considered material disclosures. *See* § 226.4(c). In addition, the total of one-time fees imposed by the creditor or any third parties to open the plan is not currently required to be disclosed in the account-opening disclosures set forth in current § 226.6, and that disclosure currently is not considered a material disclosure.

Under the August 2009 HELOC Proposal, a creditor would be required to disclose in the proposed account-opening table both (1) the total of all one-time fees imposed by the creditor and any third parties to open the HELOC plan, stated as a dollar amount; and (2) an itemization of all one-time fees imposed by the creditor and any third parties to open the plan, stated as dollar amounts, and when such fees are payable. *See* proposed §§ 226.6(a)(2)(vii) and 226.33(c)(7)(i)(A). Under this proposal, the Board proposes to revise the definition of "material disclosures" to add the total of one-time fees imposed by the creditor and any third parties to open the HELOC plan. *See* proposed § 226.15(a)(5)(i)(B). The Board believes that the total of one-time fees imposed by the creditor and any third parties to open the HELOC plan is critical information for consumers to understand the cost of the credit transaction and to decide whether to enter into the credit transaction or exercise the right of rescission. In consumer testing on HELOCs conducted for the Board for the August 2009 HELOC Proposal, participants consistently said that the total of one-time fees imposed to open the HELOC plan was one of the most important pieces of information they would consider in deciding whether to open the HELOC plan.

Tolerances. To reduce the likelihood that rescission claims would arise because of minor discrepancies in the disclosure of the total of one-time fees to open the HELOC plan, the Board proposes a tolerance in § 226.15(a)(5)(ii). As discussed above, this tolerance would be modeled after the tolerance for the finance charge for closed-end mortgage loans created by Congress in 1995. Specifically, proposed § 226.15(a)(5)(ii) provides that the total of all one-time fees imposed by the creditor and any third parties to open the plan and other disclosures affected by the total would be considered accurate for purposes of rescission if the disclosed total of all one-time fees imposed by the creditor and any third parties to open the plan is understated by no more than $100 or is greater than the amount required to be disclosed under proposed § 226.6(a)(2)(vii) or § 226.33(c)(7)(i)(A). As discussed in more detail in the section-by-section analysis to proposed § 226.23, these tolerances are consistent with the proposed tolerances applicable to the total settlement charges disclosed for closed-end mortgage loans under § 226.23(a)(5).

Proposed comment 15(a)(5)(ii)–1 addresses a situation where the total one-time fees imposed to open the account may affect the disclosure of fees imposed by the creditor if a consumer terminates the plan prior to its scheduled maturity. Specifically, waived total costs of one-time fees imposed to open the account would be considered a fee imposed by the creditor for early termination of the account by the consumer, if the creditor will impose those costs on the consumer if the consumer terminates the plan within a certain amount of time after account opening. Proposed comment 15(a)(5)(ii)–1 makes clear that the tolerances set forth in proposed § 226.15(a)(5)(ii) also apply to these waived total costs of one-time fees if they are disclosed as fees imposed by the creditor for early termination of the plan by the consumer.

The Board believes that the proposed tolerances are broad enough to alleviate creditors' compliance concerns regarding minor disclosure errors, and narrow enough to prevent misleading disclosures. The total cost of one-time fees imposed to open the HELOC account may be more prone to calculation errors than other material disclosures defined in proposed § 226.15(a)(5) because it is a tally of costs (as opposed to being a single fee), and is a term that is generally customized to the consumer (as opposed to being a standard fee amount that is the same for all consumers offered a particular HELOC plan by the creditor). The Board notes that the tolerance amounts for the total one-time fees imposed to open the account only applies to disclosures for purposes of rescission under § 226.15. These tolerances do not apply to disclosure of these total costs under § 226.6(a)(2)(vii) or § 226.33(c)(7)(i)(A); this ensures that creditors continue to take steps to provide accurate disclosure of the total one-time fees to open the account under § 226.6(a)(2)(vii) or § 226.33(c)(7)(i)(A) to avoid civil liability or administrative sanctions.

The Board proposes to model the tolerance for the disclosure of the total of one-time fees imposed to open the account on the narrow tolerances provided for closed-end mortgage loans by Congress in 1995. However, due to compliance concerns, the Board has not proposed a special tolerance for foreclosures as is provided for the finance charge for closed-end loans. The Board solicits comment on this approach. Moreover, the Board believes that the total of one-time fees imposed to open an account is often smaller than the finance charge for closed-end mortgages, and for this reason has proposed a tolerance based on a dollar figure, rather than a percentage of the credit limit applicable to the plan. The Board requests comment on whether it should increase or decrease the dollar figure. The Board also requests comment on whether the tolerance should be linked to an inflation index, such as the Consumer Price Index.

Exemption for itemization of one-time fees to open the account. While the Board proposes to include the total cost of one-time fees imposed to open the HELOC plan in the definition of "material disclosures," the Board proposes not to include the itemization of one-time fees imposed by the creditor and any third parties to open the HELOC plan as material disclosures. For each itemized one-time account opening fee that is a "finance charge," the Board would be removing this fee from the definition of "material disclosures." (Each itemized one-time account opening fee that is not a "finance charge" is currently not considered a material disclosure.) The Board does not believe that removing the itemization of one-time fees imposed to open the account from the definition of "material disclosures" would undermine the goals of consumer protection provided by the right of rescission. In consumer testing on HELOCs conducted for the Board for the August 2009 HELOC Proposal, participants indicated that they found the itemization of the one-time fees imposed to open the account helpful to them for understanding what fees they would be paying to open the HELOC plan. Nonetheless, as noted above, they indicated that the total of one-time fees imposed to open the account, and not the itemization of the fees, is one of the most important pieces of information on which they would base a decision of whether to enter into the credit transaction. Therefore, the Board believes that the total of one-time fees imposed to open the account, and not the itemization of the fees, is material to the consumer's decision about whether to enter the credit transaction or, in turn, rescind it. In addition, the Board believes that defining "material disclosures" to include the itemization of fees imposed to open the plan is unnecessary because, in most cases, if the itemization of the one-time fees imposed to open the account is incorrect, the total of those one-time fees will be incorrect as well. Nonetheless, there may be some cases where the total of one-time fees to open the account is correct but the creditor either fails to disclose one of the itemized fees or discloses it incorrectly. The Board believes that even though consumers would not have an extended right to rescind in those cases, consumers would not be harmed because the total of the one-time fees imposed to the open the account would be correct, and it is this disclosure which consumers are likely to use to base their decision of whether to enter into the credit transaction or rescind the transaction. For these reasons, the Board proposes to remove the itemization of one-time fees imposed to open the HELOC account from the definition of "material disclosures."

15(a)(5)(i)(C) Fees Imposed by the Creditor for the Availability of the HELOC Plan

Under the August 2009 HELOC Proposal, a HELOC creditor would be required to disclose in the proposed account-opening table any annual or other periodic fees that may be imposed by the creditor for the availability of the plan (including any fee based on account activity or inactivity), how frequently the fee will be imposed, and the annualized amount of the fee. *See* proposed §§ 226.6(a)(2)(viii) and 226.33(c)(7)(ii). These fees currently are considered material disclosures under footnote 36 to § 226.15(a)(3) because these fees would either be "finance charges" as defined in § 226.4, or membership or participation fees. The Board proposes to retain these disclosures as material disclosures. *See* proposed § 226.15(a)(5)(i)(C). The Board believes that fees for the availability of the HELOC plan are important to consumers in deciding whether to open the HELOC account and thus, in deciding whether to rescind the transaction. As discussed in the **SUPPLEMENTARY INFORMATION** to the August 2009 HELOC Proposal, Board research indicates that many HELOC consumers do not plan to take advances at account opening, but instead plan to use the HELOC account in case of emergency. The on-going costs of maintaining the HELOC plan may be of particular importance to these consumers in deciding whether to open a HELOC plan for these purposes and, in turn, whether to rescind it.

15(a)(5)(i)(D) Fees Imposed by the Creditor for Early Termination of the Plan by the Consumer

Under the August 2009 HELOC Proposal, a creditor would be required to disclose in the proposed account-opening table any fees that may be imposed by the creditor if a consumer terminates the plan prior to its scheduled maturity. *See* proposed §§ 226.6(a)(2)(ix) and 226.33(c)(7)(iii). These fees currently are not considered "material disclosures" under footnote 36 to § 226.15(a)(3) because these fees traditionally have not be considered "finance charges" and are not membership or participation fees. *See* comment 6(a)(2)–1.vi (as designated in the February 2010 Credit Card Rule). The Board proposes to include these fees in the definition of "material disclosures." The Board believes it is important for consumers to be informed of these early termination fees as consumers decide whether to open a HELOC plan, and, in turn, whether to rescind the transaction. This information may be especially important for consumers who want the option of re-negotiating or cancelling the plan at any time. HELOC consumers may particularly value these options, as most HELOCs are subject to a variable rate. The Board believes that adding fees imposed by the creditor for early termination of the plan by the consumer to the definition of "material disclosures" would not unduly increase creditor burden, as these fees typically do not require mathematical calculations that expose the creditor to the risk of errors. As discussed above, where waived total one-time fees imposed to open a HELOC are disclosed as fees imposed by the creditor for early termination of the plan by the consumer, proposed comment 15(a)(5)(ii)–1 makes clear that the tolerances set forth in proposed § 226.15(a)(5)(ii) would apply.

15(a)(5)(i)(E)–(F) Payment Terms

Under the August 2009 HELOC Proposal, a creditor would be required to disclose in the proposed account-opening table certain information related to the payment terms of the plan that will apply at account opening, including the following: (1) The length of the plan, the length of the draw period, and the length of any repayment period; (2) an explanation of how the minimum periodic payment will be determined and the timing of the payments; (3) if paying only the minimum periodic payments may not repay any of the principal or may repay less than the outstanding balance by the end of the plan, a statement of this fact, as well as a statement that a balloon payment may result or will result, as applicable; and (4) sample payments showing the first minimum periodic payment for the draw period and any repayment period, and the balance outstanding at the beginning of the repayment period for both the current APR and the maximum APR, based on the assumption that the consumer borrows the entire credit line at account opening and does not make any further draws. *See* proposed § 226.6(a)(2)(v).

Currently, the following payment terms are defined as "material disclosures:" (1) The length of the draw period and any repayment period; (2) an explanation of how the minimum periodic payment will be determined and the timing of the payments; and (3) if payment of only the minimum periodic payment may not repay any of the principal or may repay less than the outstanding balance, a statement of this fact as well as that a balloon payment may result. The Board proposes to retain these disclosures as "material disclosures." *See* proposed § 226.15(a)(5)(i)(E) and (F). In addition, the Board proposes to include the length of the plan as a "material disclosure."

Based on consumer testing, the Board believes that the payment information described above is critical to consumers in understanding how payments will be structured under the HELOC plan. The length of the plan, the length of the draw period, and the length of any repayment period communicate important information to consumers about how long consumers may need to make at least minimum payments on the plan. In addition, an explanation of how the minimum periodic payment will be determined and the timing of the payment, as well as information about any balloon payment, provide important information to consumers about whether the minimum payments will only cover interest during the draw period (and any repayment period) or whether the minimum payments will pay down some or all of the principal by the end of the HELOC plan. Consumer testing has shown that whether a plan has a balloon payment is important information that consumers want to know when deciding whether to open a HELOC plan.

Sample payments. As discussed above, the proposed account-opening table also contains sample payments based on the payment terms disclosed in the table. The Board proposes not to include these sample payments as material disclosures. These sample payments would be based on a number of assumptions, and in most cases would not be the actual payments for consumers. Specifically, sample payments would show the first minimum periodic payment for the draw period and the first minimum periodic payment for any repayment period, and the balance outstanding at the beginning of any repayment period, based on the following assumptions: (1) The consumer borrows the maximum credit line available (as disclosed in the account-opening table) 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 APRs used to calculate the sample payments remain the same during the draw period and any repayment period. The sample payments would be based on the maximum APR possible for the plan, as well as the current APR offered to the consumer on the HELOC plan. With respect to the current APR, if an introductory APR applies, a creditor would be required to calculate the sample payments based on the rate that would otherwise apply to the plan after the introductory APR expires. While the Board believes these sample payments are useful to consumers in understanding the payment terms offered on the HELOC plan, the Board proposes not to include them as material disclosures because in most cases they would not be the actual payments for consumers. This is particularly true for HELOCs, as opposed to the proposed payment summary for closed-end mortgage loans (discussed in the section-by-section analysis to § 226.23), because most HELOC consumers do not take out the full credit line at account opening and most HELOCs have a variable interest rate, so the rate is unlikely to remain the same throughout the life of the HELOC plan. The purpose of the sample payments disclosure is to give the consumer an understanding of the payment terms applicable to the HELOC plan, not to ensure that the consumer knows what his or her payments will be.

15(a)(5)(i)(G) Negative Amortization

Under the August 2009 HELOC Proposal, a creditor would be required to disclose in the proposed account-opening table the statement that negative amortization may occur and that negative amortization increases the principal balance and reduces the consumer's equity in the dwelling, as applicable. *See* proposed § 226.6(a)(2)(xvi). This statement about negative amortization currently is not considered a material disclosure. The Board proposes to include this statement about negative amortization in the definition of "material disclosures." *See* proposed § 226.15(a)(5)(i)(G). The Board believes that whether negative amortization may occur on a HELOC account is likely to impact a consumer's decision on whether to open a particular HELOC account, and, in turn, a consumer's decision about whether to rescind the transaction. Many consumers may want to avoid HELOCs that will erode the equity in their homes. An explanation of how the minimum periodic payment will be calculated is a material disclosure, but it will not always be clear from this explanation that negative amortization might occur on the HELOC plan. For example, if the minimum periodic payment is calculated as 1 percent of the outstanding balance—but the APR is above 12 percent—negative amortization would occur. Nonetheless, simply disclosing that the minimum periodic payment is calculated as 1 percent of the outstanding balance would not alert most consumers to the possibility of negative amortization. Consumer testing conducted on closed-end mortgages in relation to the August 2009 Closed-End Proposal showed that participants were generally unfamiliar with the term or concept of negative amortization. Thus, the Board proposes to include the statement about negative amortization as a material disclosure to ensure that consumers are informed about the possibility of negative amortization when deciding whether to open or rescind the HELOC account. The Board believes that adding this statement about negative amortization to the definition of material disclosures would not unduly increase creditor burden, as this statement does not require mathematical calculations that expose the creditor to the risk of errors.

15(a)(5)(i)(H) Transaction Requirements

Under the August 2009 HELOC Proposal, a creditor would be required to disclose in the proposed account-opening table any limitations on the number of extensions of credit and the amount of credit that may be obtained during any time period, as well as any minimum outstanding balance and minimum draw requirements. *See* proposed §§ 226.6(a)(2)(xvii) and 226.33(c)(7)(v). This information about transaction requirements currently is not considered a material disclosure. The Board proposes to include this information in the definition of "material disclosures." *See* proposed § 226.15(a)(5)(i)(H). The Board believes that these transaction restrictions are likely to impact a consumer's decision to enter into a particular HELOC account, and the consumer's decision whether to rescind the transaction. For example, as discussed in the **SUPPLEMENTARY INFORMATION** to the August 2009 HELOC Proposal, Board research indicates that many HELOC consumers do not plan to take advances at account opening, but instead plan to use that HELOC account in emergency cases. Any minimum balance requirement, and any required initial advance, would be particularly important to consumers that intend to use the account in emergency cases only. Also, restrictions on the number of advances or the amount of the advances per month or per year may be important to consumers, depending on how they plan to use the HELOC plan. The Board believes that adding disclosures about any limitations on the number of extensions of credit and the amount of credit that may be obtained during any time period, as well as any minimum outstanding balance and minimum draw requirement, to the definition of material disclosures would not unduly increase creditor burden, as these disclosures do not require mathematical calculations that expose the creditor to the risk of errors.

15(a)(5)(i)(I) Credit Limit

Under the August 2009 HELOC Proposal, creditors would be required to disclose in the proposed account-opening table the credit limit applicable to the plan. *See* proposed § 226.6(a)(2)(xviii). Currently, the credit limit is not considered a "material disclosure." The Board proposes to include the credit limit in the definition of "material disclosures." *See* proposed § 226.15(a)(5)(i)(I). Based on consumer testing on HELOCs conducted for the Board for the August 2009 HELOC Proposal, the Board believes that the credit limit is likely to impact a consumer's decision to open a particular HELOC account, and a consumer's decision to rescind the transaction. As discussed in the **SUPPLEMENTARY INFORMATION** to the August 2009 HELOC Proposal, participants in consumer testing indicated that the credit limit was one of the most important pieces of information that they wanted to have in deciding whether to open a HELOC plan.

Tolerances. As discussed above, this proposal provides a tolerance for disclosure of the credit limit applicable to the HELOC plan, modeled after the tolerances for the finance charge for closed-end mortgage loans created by Congress in 1995. Specifically, proposed § 226.15(a)(5)(iii) provides that the credit limit applicable to the plan shall be considered accurate for purposes of § 226.15 if the disclosed credit limit (1) is overstated by no more than ½ of 1 percent of the credit limit applicable to the plan required to be disclosed under § 226.6(a)(2)(xviii) or $100, whichever is greater; or (2) is less than the credit limit required to be disclosed under § 226.6(a)(2)(xviii). For example, for a HELOC plan with a credit limit of $100,000, a creditor may overstate the credit limit by $500 and the disclosure would still be considered accurate for purposes of triggering an extended rescission right. In addition, a creditor may understate the credit limit by any amount and still be considered accurate for purposes of rescission. As discussed in more detail in the section-by-section analysis to proposed § 226.23, these tolerances are consistent with the proposed tolerances under § 226.23(a)(5) applicable to the loan amount for closed-end mortgage loans.

The Board believes that the proposed tolerances are broad enough to alleviate creditors' compliance concerns regarding minor disclosure errors, and narrow enough to prevent misleading disclosures. The credit limit may be more prone to errors than other material disclosures defined in proposed § 226.15(a)(5) because it is a term that is customized to the consumer (as opposed to being a standard term that is the same for all consumers offered a particular HELOC plan by the creditor). The Board notes that the tolerance amounts for the credit limit applicable to the plan apply only to disclosures for purposes of rescission under § 226.15. These tolerances do not apply to disclosure of the credit limit applicable to the plan under § 226.6(a)(2)(xviii); this ensures that creditors continue to take steps to provide accurate disclosure of the credit limit applicable to the plan under § 226.6(a)(2)(xviii) to avoid civil liability or administrative sanctions.

As stated above, the Board proposes to model the tolerance for disclosure of the credit limit on the tolerances provided by Congress in 1995 for disclosure of the finance charge for closed-end mortgage loans. However, the Board believes that the credit limit for HELOCs is often smaller than the finance charge for closed-end mortgages. The Board requests comment on whether it should decrease the amount of the tolerance in light of the difference between the amount of the finance charge for closed-end mortgages and the credit limit for HELOCs. On the other hand, the Board recognizes that Congress set the $100 figure in 1995 and a higher dollar figure may be more appropriate at this time. Alternatively, it may be more appropriate to link the dollar figure to an inflation index, such as the Consumer Price Index. Thus, the Board also requests comments on whether the tolerance should be set at a higher dollar figure, or linked to an inflation index, such as the Consumer Price Index. In addition, due to compliance concerns, the Board has not proposed a special tolerance for disclosure of the credit limit in connection with foreclosures as is provided for the finance charge for closed-end mortgage loans. The Board solicits comment on this approach. Finally, the Board requests comment on whether the Board should limit the amount by which the credit limit could be understated and still be considered accurate, and if so, what that limit should be. For example, could an underdisclosure of the credit limit by a large amount harm consumers (particularly homeowners that are not also borrowers on the HELOC) because the amount of the security interest that would be taken in the property would be larger than the disclosed credit limit?

15(a)(5)(i)(J) Fees for Required Credit Insurance, Debt Cancellation, or Debt Suspension Coverage

Under the August 2009 HELOC Proposal, a creditor would be required to disclose in the proposed account-opening table a premium for credit insurance described in § 226.4(b)(7) or debt cancellation or suspension coverage described in § 226.4(b)(10), if the credit insurance or debt cancellation or suspension coverage is required as part of the plan. *See* proposed § 226.6(a)(2)(xx). Fees for required credit insurance, or debt cancellation or suspension coverage currently are defined as "material disclosures" because these fees would be considered "finance charges" under § 226.4. *See* §§ 226.4(b)(7) and (b)(10). The Board proposes to retain these fees as material disclosures. *See* proposed § 226.15(a)(5)(i)(J). If credit insurance or debt cancellation or suspension coverage is required to obtain a HELOC, the Board believes that consumers should be aware of these charges or fees when deciding whether to open a HELOC plan, and, in turn, whether to rescind the plan, because consumers will be required to pay the charge or fee for this coverage every month to have the plan.

Disclosures That Would Be Removed From the Definition of "Material Disclosures"

As discussed above, the proposal removes the following disclosures from the definition of "material disclosures:" (1) Any APRs that are not required to be in the account-opening table, specifically any penalty APR or APR for fixed-rate and fixed-term advances during the draw period (unless they are the only advances allowed during the draw period); (2) an itemization of one-time fees imposed by the creditor and any third parties to open the plan; (3) any transaction charges imposed by the creditor for use of the home-equity plan; (4) any fees imposed by the creditor for a consumer's failure to comply with any limitations on the number of extensions of credit and the amount of credit that may be obtained during any time period, as well as for failure to comply with any minimum outstanding balance and minimum draw requirements; (5) any finance charges that are not required to be disclosed in the account-opening table; and (6) the method of determining the balance upon which a finance charge will be imposed (*i.e.,* a description of balance computation methods). The proposed exemptions from the definition of "material disclosures" for APRs that are not required to be in the account-opening table and for an itemization of one-time fees imposed by the creditor and any third parties to open the account are discussed in more detail above in the section-by-section analyses to proposed §§ 226.15(a)(3)(A) and (B) respectively. The other exemptions are discussed below.

Transaction charges. Under the August 2009 HELOC Proposal, a creditor would be required to disclose in the proposed account-opening table any transaction charges imposed by the creditor for use of the home-equity plan (except for transaction charges imposed on fixed-rate and fixed-term advances during the draw period, unless those are the only advances allowed during the draw period). *See* proposed §§ 226.6(a)(2) and (a)(2)(xii), and § 226.33(c)(13)(i). For example, a creditor may impose a charge for certain types of transactions under a variable-rate feature, such as cash advances or foreign transactions made with a credit card that accesses the HELOC plan. Transaction charges currently are considered material disclosures because they are "finance charges" under § 226.4. The Board proposes to remove transaction charges as material disclosures. The Board does not believe that removing transaction charges from the definition of "material disclosures" would undermine the goals of consumer protection provided by the right of rescission. Board research and outreach for the August 2009 HELOC Proposal indicates that transaction charges typically imposed today are not critical to a consumer's decision about whether to enter into the HELOC plan, or the consumer's decision to rescind the plan. Based on outreach for the August 2009 HELOC Proposal, the Board understands that creditors typically do not impose transaction charges on each advance under the variable-rate feature; instead, transaction charges typically are only imposed on cash advances or foreign transactions made with a credit card that accessed the HELOC plan. While the Board believes that it is important that consumers receive information about cash advance and foreign transaction fees before using a HELOC account to avoid being surprised by these fees, the Board does not believe that these fees are critical to a consumer's decision about whether to enter into the credit transaction or rescind the transaction. For these reasons, the Board proposes to remove transaction charges from the definition of "material disclosures."

Fees for failure to comply with transaction requirements. As discussed above, under the August 2009 HELOC Proposal, a creditor would be required to disclose in the proposed account-opening table any limitations on the number of extensions of credit and the amount of credit that may be obtained during any time period, as well as any minimum outstanding balance and minimum draw requirements. *See* proposed §§ 226.6(a)(2)(xvii) and 226.33(c)(7)(v). In addition, a creditor must disclose in the proposed account-opening table any fee imposed by the creditor for a consumer's failure to comply with any of the transaction requirements or limitations listed above, as well as any minimum outstanding balance and minimum draw requirements. *See* proposed §§ 226.6(a)(2)(xiv) and 226.33(c)(13)(ii). Currently, these fees for failure to comply with the transaction requirements or limitations, as well as any minimum outstanding balance and minimum draw requirements, are considered material disclosures because these fees are "finance charges" under § 226.4.

The Board proposes to remove fees for failure to comply with the transaction requirements or limitations, as well as minimum outstanding balance and minimum draw requirements, as material disclosures. While the Board believes it is important that consumers be informed of these fees before using the HELOC plan to avoid being surprised by these fees, the Board does not believe that these fees are critical to a consumer's decision about whether to enter into the credit transaction or rescind the transaction. In addition, as discussed above, the Board proposes to include the transaction requirements or limitations, as well as minimum outstanding balance and minimum draw requirements, as material disclosures. Thus, a consumer will have an extended right of rescission if a creditor incorrectly discloses (or does not disclose) the transaction requirements or limitations, as well as minimum outstanding balance and minimum draw requirements, to the consumer. The Board believes that it is the transaction requirements or limitations or minimum outstanding balance and minimum draw requirements themselves, rather than the fees for failure to comply with those requirements or limitations, that are critical to a consumer's decisions about whether to enter into the HELOC plan, and whether to rescind the transaction. For these reasons, the Board proposes to remove fees for failure to comply with the transaction requirements or limitations, as well as minimum outstanding balance and minimum draw requirements, from the definition of "material disclosures."

Finance charges not required to be disclosed in the proposed account-opening table. Again, all finance charges on the HELOC plan currently must be disclosed prior to the first transaction under the HELOC plan, and are considered material disclosures. As discussed above, in the August 2009 HELOC Proposal, the Board proposed no longer to require that all finance charges be disclosed prior to the first transaction under the HELOC plan; instead, only finance charges required to be disclosed in the account-opening table would have to be provided in writing before the first transaction under the HELOC plan. "Charges imposed as part of the HELOC plan," as set forth in proposed § 226.6(a)(3), that are not required to be disclosed in the account-opening table would have to be disclosed orally or in writing before the consumer agrees to or becomes obligated to pay the charge. The Board believes that it is appropriate to provide flexibility to creditors regarding disclosure of less significant charges that are not likely to impact a consumer's decision to enter into the credit transaction. Disclosure of these charges soon before a consumer agrees to pay the charge may be more useful to the consumer because the disclosure would come at a time when the consumer would be more likely to notice the disclosure.

Consistent with the August 2009 HELOC Proposal, the Board proposes to exclude finance charges that are not disclosed in the proposed account-opening table from the definition of "material disclosures." The Board does not believe that this would undermine the goals of consumer protection provided by the right of rescission. The Board believes that the proposed account-opening table contains the charges that are most important for consumers to know about before they use a HELOC account in the current marketplace. In consumer testing on HELOCs conducted for the Board for the August 2009 HELOC Proposal, participants could not identify any additional types of fees beyond those included in the proposed account-opening table that they would want to know before they use the HELOC account.

On the other hand, continuing to define finance charges that are not required to be disclosed in the proposed account-opening table as "material disclosures" would undercut the flexibility set forth in the August 2009 HELOC Proposal for creditors to disclose these finance charges at a time after account opening, as long as they are disclosed orally or in writing before the consumer agrees to or becomes obligated to pay the charge. If these finance charges continued to be defined as "material disclosures," creditors as a practical matter would be required to disclose these fees at account opening, to avoid the extended right of rescission. For these reasons, the Board proposes to remove finance charges that are not disclosed in the proposed account-opening table from the definition of "material disclosures."

Description of balance computation methods. Under the August 2009 HELOC Proposal, a creditor would be required to disclose below the account-opening table the name(s) of the balance computation method(s) used by the creditor for each feature of the account, along with a statement that an explanation of the method(s) is provided in the account agreement or disclosure statement. *See* proposed § 226.6(a)(2)(xxii). To determine the name of the balance computation method to be disclosed, a creditor would be required to refer to § 226.5a(g) for a list of commonly-used methods; if the method used is not among those identified, creditors would be required to provide a brief explanation in place of the name. As discussed in the **SUPPLEMENTARY INFORMATION** to the August 2009 HELOC Proposal, the Board believes that the proposed approach of disclosing the name of the balance computation method below the table, with a more detailed explanation of the method in the account-opening disclosures or account agreement, would provide an effective way to communicate information about the balance computation method used on a HELOC plan to consumers, while not detracting from other information included in the proposed account-opening table.

TILA and Regulation Z define the method of determining the balance on which the finance charge will be imposed (*i.e.,* explanation of the balance computation methods) as a material disclosure. TILA Section 103(u); 15 U.S.C. 1602(u); § 226.15(a)(3) n. 36. The Board proposes to exclude this disclosure from the definition of "material disclosures." The Board does not believe that removing information about the balance computation method from the definition of "material disclosures" would undermine the goals of consumer protection provided by the right of rescission. Explanations of the balance computation methods often are complicated and difficult for consumers to understand. In consumer testing on HELOCs conducted for the Board for the August 2009 HELOC Proposal, none of the participants indicated that information about the balance computation methods was information they would use to decide whether to open a particular HELOC account. For these reasons, the Board proposes to remove the disclosure of the balance computation method from the definition of "material disclosures."

Proposed Comments 15(a)(5)(i)–1 and –2

Current comment 15(a)(3)–2 specifies that a creditor must provide sufficient information to satisfy the requirements of § 226.6 for the material disclosures, and indicates that a creditor may satisfy this requirement by giving an initial disclosure statement that complies with the regulation. This comment also provides that failure to give the other required initial disclosures (such as the billing rights statement) or the information required under § 226.5b does not prevent the running of the three-day rescission period, although that failure may result in civil liability or administrative sanctions. In addition, this comment specifies that the payment terms in current footnote 36 to § 226.15(a)(3) apply to any repayment phase in the agreement. Thus, the payment terms described in former § 226.6(e)(2) (redesignated as § 226.6(a)(3)(ii) in the February 2010 Credit Card Rule) for any repayment phase as well as for the draw period are material disclosures.

The Board proposes to move comment 15(a)(3)–2 to proposed comments 15(a)(5)(i)–1 and –2 and revise it consistent with the new definition of "material disclosures" in the proposed regulation. Specifically, proposed comment 15(a)(5)(i)–1 provides that a creditor must make the material disclosures clearly and conspicuously consistent with the requirements of § 226.6(a)(2). A creditor may satisfy the requirement to provide material disclosures by giving an account-opening table described in § 226.6(a)(1) or § 226.33(d)(2) and (d)(4) that complies with the regulation. Failure to provide the required non-material disclosures set forth in §§ 226.6, 226.33, or the information required under § 226.5b does not affect the right of rescission, although such failure may be a violation subject to the liability provisions of TILA Section 130, or administrative sanctions. 15 U.S.C. 1640. In addition, proposed comment 15(a)(5)(i)–2 clarifies that the terms described in § 226.15(a)(5) for any repayment phase as well as for the draw period are material disclosures.

Material Disclosures for Reverse Mortgages

The Board is proposing disclosures for open-end reverse mortgages in § 226.33 that would incorporate many of the disclosures required by § 226.6(a) for all home-equity plans into the reverse mortgage specific disclosures. Proposed § 226.15(a)(5)(i) would contain cross-references to analogous provisions in proposed § 226.33. In addition, as discussed in the section-by-section analysis to § 226.33, some of the proposed material disclosures for home-equity plans do not apply to reverse mortgages and would not be required. Thus, for reverse mortgages, the following disclosures would not be material disclosures:

- The length of the plan, the draw period, and any repayment period;
- An explanation of how the minimum periodic payment will be determined and the timing of payments;
- A statement about negative amortization;
- The credit limit applicable to the plan; and
- Fees for debt cancellation or suspension coverage.

The Board requests comment on whether any of these, or other, disclosures should be material disclosures for reverse mortgages.

15(b) Notice of Right To Rescind

TILA Section 125(a) requires the creditor to disclose clearly and conspicuously the right of rescission to the consumer. 15 U.S.C. 1635(a). It also requires the creditor to provide appropriate forms for the consumer to exercise the right to rescind. Section § 226.15(b) implements TILA Section 125(a) by setting forth format, content, and timing of delivery standards for the notice of the right to rescind for transactions related to HELOC accounts that give rise to the right to rescind. Section 226.15(b) also states that the creditor must deliver two copies of the notice of the right to rescind to each consumer entitled to rescind (one copy if the notice is delivered in electronic form in accordance with the E-Sign Act). The right to rescind generally does not expire until midnight after the third business day following the latest of: (1) The transaction giving rise to the right of rescission; (2) delivery of the rescission notice; and (3) delivery of the material disclosures. TILA Section 125(a); 15 U.S.C. 1635(f); § 226.15(a)(3). If the rescission notice or the material disclosures are not delivered, a consumer's right to rescind may extend for up to three years from the date of the transaction that gave rise to the right to rescind. TILA Section 125(f); 15 U.S.C. 1635(f); § 226.15(a)(3).

As part of the 1980 Truth in Lending Simplification and Reform Act, Congress added TILA Section 105(b), requiring the Board to publish model disclosure forms and clauses for common transactions to facilitate creditor compliance with the disclosure obligations and to aid borrowers in understanding the transaction by using readily understandable language. 12 U.S.C. 1615(b). The Board issued its first model forms for the notice of the right to rescind applicable to HELOC accounts in 1981. 46 FR 20848, Apr. 7, 1981. While the Board has made some changes to the content of the model forms over the years, the current Model Forms G–5 through G–9 in Appendix G to part 226 are generally the same as when they were adopted in 1981.

The Board has been presented with a number of questions and concerns regarding the notice requirements and the model forms. Creditors have raised concerns about the two-copy rule, indicating that this rule can impose litigation risks when a consumer alleges an extended right to rescind based on the creditor's failure to deliver two copies of the notice. In addition, particular problems with the format, content, and timing of delivery of the rescission notice were highlighted during the Board's outreach and consumer testing conducted for this proposal. To address these problems and concerns, the Board proposes to revise § 226.15(b), and the related commentary. As discussed in more detail below, the Board proposes to revise § 226.15(b) to require creditors to provide one notice of the right to rescind to each consumer entitled to rescind. In addition, the Board proposes to revise significantly the content of the rescission notice by setting forth new mandatory and optional disclosures for the notice. The Board also proposes new format and timing requirements for the notice. Moreover, as discussed in more detail in the section-by-section analysis to Appendix G to part 226, the Board proposes to replace the current model forms for the rescission notices in Model Forms G–5 through G–9 with proposed Model Form G–5(A), and two proposed Samples G–5(B) and G–5(C).

15(b)(1) Who Receives Notice

Section 226.15(b) currently states that the creditor must deliver two copies of the notice of the right to rescind to each consumer entitled to rescind (one copy if the notice is delivered in electronic form in accordance with the E–Sign Act). Obtaining from the consumer a written acknowledgment of receipt of the notice creates a rebuttable presumption of delivery. *See* 15 U.S.C. 1635(c). Comment 15(b)–1 states that in a transaction involving joint owners, both of whom are entitled to rescind, both must receive two copies of the notice of the right of rescission. For the reasons discussed in the section-by-section analysis to proposed § 226.23(b)(1) below, the Board proposes to revise § 226.15(b) and comment 15(b)–1 (redesignated as § 226.15(b)(1) and comment 15(b)(1)–1 respectively) to require creditors to provide one notice of the right to rescind to each consumer entitled to rescind.

15(b)(2) Format of Notice

The current formatting requirements for the notice of the right of rescission appear in § 226.15(b) and are elaborated on in comment 15(b)–2. Section 226.15(b) provides that the required information must be disclosed clearly and conspicuously. Comment 15(b)–2 provides that the rescission notice may be physically separate from the material disclosures or combined with the material disclosures, so long as the information required to be included on the notice is set forth in a clear and conspicuous matter. The comment refers to the forms in Appendix G to part 226 as models that the creditor may use in giving the notice.

The Board proposes new format rules in § 226.15(b)(2) and related commentary intended to (1) Improve consumers' ability to identify disclosed information more readily; (2) emphasize information that is most important to consumers who wish to exercise the right of rescission; and (3) simplify the organization and structure of required disclosures to reduce complexity and "information overload." The Board proposes these format requirements pursuant to its authority under TILA Section 105(a). 15 U.S.C. 1604(a). Section 105(a) authorizes the Board to make exceptions and adjustment to TILA to effectuate the statute's purpose, which include facilitating consumers' ability to compare credit terms and helping consumers avoid the uninformed use of credit. 15 U.S.C. 1601(a), 1604(a). The Board believes that the proposed formatting rules described below would facilitate consumers' ability to understand the rescission right and avoid the uninformed use of credit. The proposed format changes are generally consistent with findings from the Board's consumer testing of rescission notices conducted to prepare this proposal, as well as the consumer testing on HELOC disclosures, credit card disclosures, and closed-end mortgage disclosures conducted in connection with the Board's August 2009 HELOC Proposal, February 2010 Credit Card Rule, and August 2009 Closed-End Proposal, respectively. 74 FR 43428, Aug. 26, 2009; 75 FR 7658, Feb. 22, 2010; 74 FR 43232, Aug. 26, 2009. Testing generally shows that emphasizing terms and costs consumers find important, and separating out less useful information, are critical to improving consumers' ability to identify and use key information in their decision-making process.[18]

Proposed § 226.15(b)(2) requires the mandatory and optional disclosures to appear on the front side of a one-page document, separate from all other unrelated material, and to be given in a minimum 10-point font. Proposed § 226.15(b)(2) also requires that most of the mandatory disclosures appear in a tabular format. During consumer testing for this proposal, participants overwhelmingly preferred a version of a notice of the right to rescind that presented information in a tabular format to a version of a notice that presented information in narrative form. Moreover, the notice would contain a "tear off" section at the bottom of the page, which the consumer could use to exercise the right of rescission. Information unrelated to the mandatory disclosures would not be permitted to appear on the notice.

Proposed comment 15(b)(2)–1 states that the creditor's failure to comply with the format requirements in § 226.15(b)(2) does not by itself constitute a failure to deliver the notice to the consumer. However, to deliver the notice properly for purposes of § 226.15(a)(3), the creditor must provide the mandatory disclosures appearing in the notice clearly and conspicuously, as described in proposed § 226.15(b)(3) and proposed comment 15(b)(3)–1.

Section 226.5(a)(1) generally requires that creditors make the disclosures required by subpart B regarding open-end credit (including the rescission notice) in writing in a form that the consumer may keep. Proposed comment 15(b)(2)–2 cross references these requirements in § 226.5(a)(1) to clarify that they apply to the rescission notice.

[18] *See also Improving Consumer Mortgage Disclosure* at 69 (consumer testing results showed that current mortgage disclosure forms failed to convey key cost disclosures, but that prototype disclosures, which removed less useful information, significantly improved consumers' recognition of key mortgage costs).

15(b)(2)(i) Grouped and Segregated

Current comment 15(b)–2 provides that the rescission notice may be physically separate from the material disclosures or combined with the material disclosures, so long as the information required to be included on the notice is set forth in a clear and conspicuous matter. The Board is concerned that allowing creditors to combine the right of rescission disclosures with other unrelated information, in any format, will diminish the clarity of this key material, potentially cause "information overload," and increase the likelihood that consumers may not read the notice of the right of rescission.

To address these concerns, proposed § 226.15(b)(2)(i) requires the mandatory and any optional rescission disclosures to appear on the front side of a one-page document, separate from any unrelated information. Only information directly related to the mandatory disclosures may be added.

The proposal also requires that certain information be grouped together. Proposed § 226.15(b)(2)(i) requires that disclosure of the type of transaction giving rise to the right of rescission, the security interest, the right to cancel, the refund of fees upon cancellation, the effect of cancellation on the existing line of credit, how to cancel, and the deadline for cancelling be grouped together in the notice. This information was grouped together in forms the Board tested, and participants generally found the information easy to identify and understand. In addition, this proposed grouping ensures that the information about the consumer's rights would be separated from information at the bottom of the notice, which is designed for the consumer to detach and use to exercise the right of rescission.

15(b)(2)(ii) Specific Format

The Board proposes to impose formatting requirements for the rescission notice, to improve consumers' comprehension of the required disclosures. *See* proposed §§ 226.15(b)(2)(i) and (ii). For example, some information would be required to be in a tabular format. The current model forms for the rescission notice provide information in narrative form, which consumer testing participants found difficult to read and understand. However, consumer testing showed that when rescission information was presented in a tabular format, participants found the information easier to locate and their comprehension of the disclosures improved.

The proposal requires the title of the notice to appear at the top of the notice. Certain mandatory disclosures (*i.e.,* the identification of the type of transaction giving rise to the right of rescission, the security interest, the right to cancel, the refund of fees upon cancellation, the effect of cancellation on the existing line of credit, how to cancel, and the deadline for cancelling in proposed §§ 226.15(b)(3)(i)-(vii)) would appear beneath the title and be in the form of a table. If the creditor chooses to place in the notice one or both of the optional disclosures (*e.g.,* regarding joint owners and acknowledgement of receipt as permitted in proposed § 226.15(b)(4)), the text must appear after the disclosures required by proposed §§ 226.15(b)(3)(i)-(vii), but before the portion of the notice that the consumer may use to exercise the right of rescission required by proposed § 226.15(b)(3)(viii). If both optional disclosures are inserted, the statement regarding joint owners must appear before the statement acknowledging receipt. If the creditor chooses to insert an acknowledgement as described in § 226.15(b)(4)(ii), the acknowledgement must appear in a format substantially similar to the format used in Model Form G–5(A) in Appendix G to part 226. The proposal would require the mandatory disclosures required by proposed § 226.15(b)(3) and the optional disclosures permitted under § 226.15(b)(4) to be given in a minimum 10-point font.

15(b)(3) Required Content of Notice

TILA Section 125(a) and current § 226.15(b) require that all disclosures of the right to rescind be made clearly and conspicuously. 15 U.S.C. 1635(a). This requirement restates the general requirement in § 226.5(a)(1) that creditors make the disclosures required under subpart B (including the rescission notice) clearly and conspicuously. Comments 5(a)(1)–1 through –3, as revised by the February 2010 Credit Card Rule, set forth guidance regarding the clear and conspicuous standard contained in § 226.5(a)(1). Proposed comment 15(b)(3)–1 clarifies that the guidance in comments 5(a)(1)–1 and –2 is applicable to the rescission notice.

Current § 226.15(b) provides the list of disclosures that must appear in the notice: (i) An identification of the transaction or occurrence giving rise to the right of rescission; (ii) the retention or acquisition of a security interest in the consumer's principal dwelling; (iii) the consumer's right to rescind the transaction; (iv) how to exercise the right to rescind, with a form for that purpose, designating the address of the creditor's (or its agent's) place of business; (v) the effects of rescission, as described in current § 226.15(d); and (vi) the date the rescission period expires. Current comment 15(b)–3 states that the notice must include all of the information described in § 226.15(b)(1)–(5). This comment also provides that the requirement to identify the transaction or occurrence may be met by providing the date of the transaction. Current Model Forms G–5 through G–9 contain these disclosures. However, consumer testing of the model forms conducted by the Board for this proposal suggests that the amount and complexity of the information currently required to be disclosed in the notice might result in information overload and discourage consumers from reading the notice carefully. The Board also is concerned that certain terminology in the current model forms might impede consumer comprehension of the information.

To address these concerns, the Board proposes to revise the requirements for the notice in new § 226.15(b)(3). Proposed § 226.15(b)(3) removes information required under current §§ 226.15(b)(1)–(5) that consumer testing indicated is unnecessary for the consumer's comprehension and exercise of the right of rescission. The proposed section also simplifies the information disclosed and presents key information in plain language instead of legalistic terms. The Board proposes these revisions pursuant to its authority in TILA Section 125(a) which provides that creditors shall clearly and conspicuously disclose, in accordance with regulations of the Board, to any obligator in a transaction subject to rescission the rights of the obligor. 15 U.S.C. 1635(a).

15(b)(3)(i) Identification of Transaction

Current § 226.15(b) requires a creditor to identify in the notice the transaction or occurrence giving rise to the right of rescission; current comment 15(b)–3 provides that the requirement that the transaction or occurrence be identified may be met by providing the date of the transaction or occurrence. As discussed in more detail in the section-by-section analysis to proposed § 226.15(b)(3)(vii), creditors, servicers, and their trade associations noted that creditors might be unable to provide an accurate transaction date where a transaction giving rise to the right of rescission is conducted by mail or through an escrow agent, as is customary in some states. They noted that in these cases, the date of the transaction giving rise to the right of rescission cannot be identified accurately before it actually occurs. For example, for a transaction by mail, the creditor cannot know at the time of mailing the rescission notice when the consumer will sign the loan documents (*i.e.,* the date of the transaction).

The Board proposes in new § 226.15(b)(3)(i) to retain the requirement that the rescission notice identify the transaction giving rise to the right of rescission. Nonetheless, to address the concerns discussed above, the provision in current comment 15(b)–3 about the date of the transaction satisfying this requirement would be deleted. Instead, the proposal provides that a creditor would identify the transaction giving rise to the right of rescission by disclosing the type of transaction that is occurring. For example, proposed Sample G–5(B) provides guidance on how to satisfy to this disclosure requirement when the rescission notice is given for opening a HELOC account where the full credit line is secured by the consumer's home and is rescindable. In this case, a creditor may meet this disclosure requirement by stating: "You are opening a home-equity line of credit." Proposed Sample G–5(C) provides guidance on how to satisfy this disclosure requirement when the rescission notice is given for a credit limit increase on an existing HELOC account. Here, a creditor may meet this disclosure requirement by stating: "We are increasing the credit limit on your line of credit." The Board believes that identifying in the rescission notice the type of transaction that is triggering the right of rescission is particularly important for HELOCs where a number of transactions give rise to a rescission right, such as account opening, an increase in the credit limit, or an addition of a security interest. The Board believes that identifying the relevant transaction in the rescission notice will clarify for consumers why they are receiving the rescission notice.

15(b)(3)(ii) Security Interest

Current § 226.15(b)(1) requires the creditor to disclose that a security interest will be retained or acquired in the consumer's principal dwelling. For example, current Model Form G–5, which provides a model rescission notice for when a HELOC account is opened, discloses the retention or acquisition of a security interest by stating: "You have agreed to give us a [mortgage/lien/security interest] [on/in] your home as security for the account."

The Board's consumer testing of a similar statement regarding a security interest for its August 2009 Closed-End Proposal showed that very few participants understood the statement. 74 FR 43232, Aug. 26, 2009. The Board is concerned that the current language in Model Forms G–5 through G–9 for disclosure of the retention or acquisition of a security interest might not alert consumers that the creditor has the right to take the consumer's home if the consumer defaults. To clarify the significance of the security interest, proposed § 226.15(b)(3)(ii) requires a creditor to provide a statement that the consumer could lose his or her home if the consumer does not repay the money that is secured by the home. Proposed Sample G–5(B) provides guidance on how to satisfy this disclosure requirement when the rescission notice is given for opening a HELOC account where the full credit line is secured by the consumer's home and is rescindable. In this case, a creditor may meet this disclosure requirement by stating, "You are giving us the right to take your home if you do not repay the money you owe under this line of credit." Consumer testing of this plain-language version of the security interest disclosure showed high comprehension by participants. Proposed Sample G–5(C) provides guidance on how to satisfy this disclosure requirement when the rescission notice is given for a credit limit increase on an existing HELOC account. Here, a creditor may meet this disclosure requirement by stating: "You are giving us the right to take your home if you do not repay the money you owe."

15(b)(3)(iii) Right To Cancel

Current § 226.15(b)(2) requires the creditor to disclose the consumer's right to rescind the transaction. Accordingly, in a section entitled "Your Right to Cancel," current Model Form G–5, which provides a model rescission notice for opening a HELOC account, discloses the right by stating that the consumer has a legal right under Federal law to cancel the account, without costs, within three business days from the latest of the opening date of the consumer's account (followed by a blank to be completed by the creditor with a date), the date the consumer received the Truth in Lending disclosures, or the date the consumer received the notice of the right to cancel. Consumer testing of language similar to the disclosure in current Model Form G–5 showed that the current description of the right was unnecessarily wordy and too complex for most consumers to understand and use.

In addition, during outreach regarding this proposal, industry representatives remarked that consumers often overlook the disclosure that the right of rescission is provided by Federal law. They also noted that the rule generally requiring creditors to delay remitting funds to the consumer until the rescission period has ended, also imposed by Federal law, is not a required disclosure and not included in the current model forms. *See* § 226.15(c). Industry representatives indicated that consumers should be notified of this delay in funding so they are not surprised when they must wait for at least three business days after signing the loan documents to receive any funds. To address these problems and concerns, proposed § 226.15(b)(3)(iii) requires two statements: (1) A statement that the consumer has the right under Federal law to cancel the transaction giving rise to the right of rescission on or before the date provided in the notice; and (2) if § 226.15(c) applies, a statement that Federal law prohibits the creditor from making any funds (or certain funds, as applicable) available to the consumer until after the stated date. Proposed Sample G–5(B) provides guidance on how to satisfy these disclosure requirements when the rescission notice is given for opening a HELOC account where the full credit line is secured by the consumer's home and is rescindable. In this case, a creditor may meet these disclosure requirements by stating: "You have the right under Federal law to cancel this line of credit on or before the date stated below. Under Federal law, we cannot make any funds available to you until after this date." Proposed Sample G–5(C) provides guidance on how to satisfy these disclosure requirements when the rescission notice is given for a credit limit increase on an existing HELOC account. Here, a creditor may meet these disclosure requirements by stating: "You have the right under Federal law to cancel this credit limit increase on or before the date stated below. Under Federal law, we cannot make these funds available to you until after this date."

The Board notes that in some instances the delay of performance requirement in § 226.15(c) does not apply during a rescission period. Specifically, comment 15(c)–1 provides that a creditor may continue to allow transactions under an existing open-end credit plan during a rescission period that results solely from the addition of a security interest in the consumer's principal dwelling. Thus, in those cases, a creditor would not be required to include in the rescission notice a statement that Federal law prohibits the creditor from making any funds (or certain funds, as applicable) available to the consumer until after the stated date.

15(b)(3)(iv) Fees

Current § 226.15(b)(4) requires the creditor to disclose the effects of rescission, as described in current § 226.15(d). The disclosure of the effects of rescission in current Model Forms G–5 through G–9 is essentially a restatement of the rescission process set forth in current §§ 226.15(d)(1)–(3). This information consumes one-third of the space in the model forms, is dense, and uses legalistic phrases. Moreover, in most cases, this information is unnecessary to understand or exercise the right of rescission.

In addition, consumer testing showed that the current model forms do not adequately communicate that the consumer would not be charged a cancellation fee for exercising the right of rescission. Also, the language of the current model forms did not convey that all fees the consumer had paid in connection with the transaction giving rise to the right of rescission would be refunded to the consumer. To clarify the results of rescission for the consumer, the Board proposes in § 226.15(b)(3)(iv) to require a plain-English statement regarding fees, instead of restating the rescission process in current § 226.15(d). Specifically, proposed § 226.15(b)(3)(iv) requires a statement that if the consumer cancels, the creditor will not charge the consumer a cancellation fee and will refund any fees the consumer paid in connection with the transaction giving rise to the right of rescission. Most participants in the Board's consumer testing of these proposed statements understood that the creditor had to return all applicable fees to the consumer, and could not charge fees for rescission. The Board believes that the statement about the refund of fees communicates important information to consumers about their rights if they choose to cancel the transaction. In addition, the Board is concerned that without this disclosure, consumers might believe that they would not be entitled to a refund of fees. This mistaken belief might discourage consumers from exercising the right to rescind where a consumer has paid a significant amount of fees related to opening the line of credit or other transaction that gave rise to the right of rescission.

15(b)(3)(v) Effect of Cancellation on Existing Line of Credit

As discussed above, current § 226.15(b)(4) requires the creditor to disclose the effects of rescission, as described in current § 226.15(d). As part of satisfying this requirement, current Model Forms G–6 through G–9 provide a disclosure of how cancellation of the transaction giving rise to the right of rescission will impact the existing line of credit. (This disclosure is not provided in Model Form G–5, which provides a model form for opening a HELOC account.) For example, current Model Form G–7 provides a model form for an increase in the credit limit on an existing HELOC account. This model form states that "If you cancel, your cancellation will apply only to the increase in your credit limit and to the [mortgage/lien/security interest] that resulted from the increase in your credit limit. It will not affect the amount you presently owe, and it will not affect the [mortgage/lien/security interest] we already have [on/in] your home."

The Board proposes to retain a description of the effects of the cancellation on the existing line of credit. Specifically, proposed § 226.15(b)(3)(v) requires creditors to disclose the following statements, as applicable: (1) A statement that if the consumer cancels the transaction giving rise to the right of rescission, all of the terms of the consumer's current line of credit with the creditor will still apply; (2) a statement that the consumer will still owe the creditor the current balance; and (3) if some or all of that money is secured by the home, a statement that the consumer could lose his or her home if the consumer does not repay the money that is secured by the home. Proposed Sample G–5(C) provides guidance on how to satisfy these disclosure requirements when the rescission notice is given for a credit limit increase on an existing HELOC account. In this case, a creditor may meet these disclosure requirements by stating: "If you cancel this credit limit increase, all of the terms of your current line of credit with us will still apply. You will still owe us your current balance, and we will have the right to take your home if you do not repay that money."

15(b)(3)(vi) How To Cancel

Current § 226.15(b)(3) requires the creditor to disclose how to exercise the right to rescind, with a form for that purpose, designating the address of the creditor's (or its agent's) place of business. Current Model Forms G–5 through G–9 contain a statement that the consumer may cancel by notifying the creditor in writing; the form contains a blank for the creditor to insert its name and business address. The current model forms state that if the consumer wishes to cancel by mail or telegram, the notice must be sent "no later than midnight of," followed by a blank for the creditor to insert a date, followed in turn by the language "(or midnight of the third business day following the latest of the three events listed above)." If the consumer wishes to cancel by another means of communication, the notice must be delivered to the creditor's business address listed in the notice "no later than that time."

Current comment 15(a)(2)–1 states that the creditor may designate an agent to receive the rescission notification as long as the agent's name and address appear on the notice. The Board proposes to remove this comment, but insert similar language into proposed § 226.15(b)(3)(vi) and proposed comment 15(b)(3)–3. Specifically, proposed § 226.15(b)(3)(vi) requires a creditor to disclose the name and address of the creditor or of the agent chosen by the creditor to receive the consumer's notice of rescission and a statement that the consumer may cancel by submitting the form located at the bottom portion of the notice to the address provided. Proposed comment 15(b)(3)–3 states that if a creditor designates an agent to receive the consumer's rescission notice, the creditor may include its name along with the agent's name and address in the notice.

Proposed comment 15(b)(3)–2 clarifies that the creditor may, at its option, in addition to providing a postal address for regular mail, describe other methods the consumer may use to send or deliver written notification of exercise of the right, such as overnight courier, fax, e-mail, or in-person. The Board requires the notice to include a postal address to ensure that an easy and accessible method of sending notification of rescission is provided to all consumers. Nonetheless, the Board would provide flexibility to creditors to provide in the notice additional methods of sending or delivering notification, such as fax and e-mail, which consumers might find convenient.

15(b)(3)(vii) Deadline To Cancel

Current § 226.15(b)(5) requires the creditor to disclose the date on which the rescission period expires. Current Model Forms G–5 through G–9 disclose the expiration date in the section of the notice entitled "How to Cancel." The current model forms provide a blank for the creditor to insert a date followed by the language "(or midnight of the third business day following the latest of the three events listed above)" as the deadline by which the consumer must exercise the right. The three events referenced are the date of the transaction giving rise to right of rescission, the date the consumer received the Truth in Lending disclosures, and the date the consumer received the notice of the right to cancel.

The Board proposes to eliminate the statements about the three events and require instead that the creditor provide the calendar date on which the three-business-day period for rescission expires. *See* proposed § 226.15(b)(3)(vii). Many participants in the Board's consumer testing had difficulty using the three events to calculate the deadline for rescission. The primary causes of errors were: Not counting Saturdays, not identifying Federal holidays, and counting the day the last event took place as day one of the three-business-day period. Alternative text was tested to assist participants in calculating the deadline based on the three events; however, the text added length and complexity to the form without a significant improvement in participant comprehension. Moreover, participants in the Board's consumer testing strongly preferred forms that provided a specific date over those that required them to calculate the deadline themselves. Also, parties consulted during the Board's outreach on this proposal stated that the model forms should provide a date certain for the expiration of the three-business-day period.

One of the dates that serves as the basis for calculating the expiration date is the transaction date. Creditors, servicers, and their trade associations noted, however, that creditors might be unable to provide an accurate expiration date when a transaction giving rise to the right of rescission is conducted by mail or through an escrow agent, as is customary in some states. They pointed out that in these cases, the date of the transaction giving rise to the right of rescission cannot be identified accurately before it actually occurs. For example, for a transaction by mail, the creditor cannot know at the time the rescission notice is mailed when the consumer will sign the loan documents (*i.e.,* the date on which the transaction occurs). Some creditors stated that when a transaction giving rise to the right of rescission is conducted by mail or through an escrow agent, they anticipate dates for the date of the transaction and the deadline for rescission. These creditors stated that they calculate a deadline that provides extra time to consumers, because they cannot accurately predict the date the transaction giving rise to the right of rescission would occur (that is, the date the consumer will sign the documents).

To ensure that consumers can readily identify the deadline for rescinding the transaction giving rise to the right of rescission, proposed § 226.15(b)(3)(vii) specifies that a creditor must disclose in the rescission notice the calendar date on which the three-business-day rescission period expires. If the creditor cannot provide an accurate calendar date on which the three-business-day rescission period expires, the creditor must provide the calendar date on which it reasonably and in good faith expects the three-business-day period for rescission to expire. If the creditor provides a date in the notice that gives the consumer a longer period within which to rescind than the actual period for rescission, the notice shall be deemed to comply with proposed § 226.15(b)(3)(vii), as long as the creditor permits the consumer to rescind through the end of the date in the notice. If the creditor provides a date in the notice that gives the consumer a shorter period within which to rescind than the actual period for rescission, the creditor shall be deemed to comply with the requirement in proposed § 226.15(b)(3)(vii) if the creditor notifies the consumer that the deadline in the first notice of the right of rescission has changed and provides a second notice to the consumer stating that the consumer's right to rescind expires on a calendar date which is three business days from the date the consumer receives the second notice. Proposed comment 15(b)(3)–4 provides further guidance on these proposed provisions.

The proposed approach is intended to provide consumers with accurate notice of the date on which their right to rescind expires while ensuring that creditors do not face liability for providing a deadline in good faith, that later turns out to be incorrect. The Board recognizes that this approach will further delay access to funds for consumers in certain cases where the creditor must provide a corrected notice. Nonetheless, the Board believes that a corrected notice is appropriate; otherwise, consumers would believe based on the first notice that the rescission period ends earlier than the actual date of expiration. The Board, however, solicits comment on the proposed approach and on alternative approaches for addressing situations where the transaction date is not known at the time the rescission notice is provided.

Extended right to rescind. Under TILA and Regulation Z, the right to rescind generally does not expire until midnight after the third business day following the latest of: (1) The transaction giving rise to the right of rescission; (2) delivery of the rescission notice; and (3) delivery of the material disclosures. If the rescission notice or the material disclosures are not delivered, consumer's right to rescind may extend for up to three years from the date of the transaction that gave rise to the right to rescind. TILA Section 125(f); 15 U.S.C. 1635(f); § 226.15(a)(3). In multiple rounds of consumer testing for this proposal, the Board tested statements explaining when a consumer might have up to three years to rescind (the extended right to rescind). The Board found, however, that including such explanations added length and complexity to the notice, and confused consumers. Nonetheless, the Board believes that some disclosure regarding the extended right is necessary for an accurate disclosure of the consumer's right of rescission. Thus, the Board proposes in new § 226.15(b)(3)(vii) to require creditors to include a statement that the right to cancel the transaction giving rise to the right of rescission may extend beyond the date disclosed in the notice, and in such a case, a consumer wishing to exercise the right must submit the form located at the bottom of the notice to either the current owner of the line of credit or the person to whom the consumer sends his or her payments. Proposed Samples G–5(B) and G–5(C) provide examples of how to satisfy these disclosure requirements. For example, proposed Sample G–5(B) provides guidance on how to satisfy these disclosure requirements when the rescission notice is given for opening a HELOC account where the full credit line is secured by the consumer's home and is rescindable. In this situation, a creditor may meet these disclosure requirements by placing an asterisk after the sentence disclosing the calendar date on which the right of rescission expires along with a sentence starting with an asterisk that states: "In certain circumstances, your right to cancel this line of credit may extend beyond this date. In that case, you must submit the bottom portion of this notice to either the current owner of your line of credit or the person to whom you send payments." *See* proposed Samples G–5(B) and G–5(C). Without this statement, the notice would imply that the period for exercising the right is always three business days. In addition, this statement would inform consumers to whom they should submit notification of exercise when they have this extended right to rescind. *See* proposed § 226.15(a)(2). The Board requests comment on the proposed approach to making the consumer aware of the extended right.

15(b)(3)(viii) Form for Consumer's Exercise of Right

Current § 226.15(b)(3) requires the creditor to disclose how to exercise the right to rescind, and to provide a form that the consumer can use to rescind. Current Model Forms G–5 though G–9 explain the consumer may cancel by using any signed and dated written statement, or may use the notice by signing and dating below the statement: "I WISH TO CANCEL."

Section 226.15(b) currently requires a creditor to provide two copies of the notice of the right (one copy if delivered in electronic form in accordance with the E-Sign Act) to each consumer entitled to rescind. The current Model Forms contain an instruction to the consumer to keep one copy of the two notices because it contains important information regarding the right of rescission. The Board tested a model notice form that would allow the consumer to detach the bottom part of the notice form and use it to notify the creditor that the consumer is rescinding the transaction. Participants in the Board's consumer testing said unanimously that, if they wished to exercise the right of rescission, they would use the bottom part of the notice to cancel the transaction. However, a few participants said that they would prepare and send a statement of cancellation in addition to the bottom part of the notice. When asked what they would do if they lost the notice and wanted to rescind, most participants said that they would contact the creditor to obtain another copy of the notice. Almost all participants said that they would make and keep a copy of the notice if they decided to exercise the right.

Based on these findings, proposed §§ 226.15(b)(2)(i) and (3)(viii) require creditors to provide a form at the bottom of the notice that the consumer may use to exercise the right to rescind. The creditor would be required to provide two lines on the form for entry of the consumer's name and property address. The creditor would have the option to pre-print on the form the consumer's name and property address. In addition, a creditor would have the option to include the account number on the form, but may not request that or require the consumer to provide the account number. Proposed comment 15(b)(3)–5 elaborates that creditors are not obligated to complete the lines in the form for the consumer's name and property address, but may wish to do so to identify accurately a consumer who uses the form to exercise the right. Proposed comment 15(b)(3)–5 further explains that at its option, a creditor may include the account number on the form. A creditor would not, however, be allowed to request that or require the consumer to provide the account number on the form, such as by providing a space for the consumer to fill in the account number. A consumer might not be able to locate the account number easily and the Board is concerned that allowing creditors to request a consumer to provide the account number might mislead the consumer into thinking that he or she must provide the account number to rescind.

Current Model Forms G–5 through G–9 contain a statement that the consumer may use any signed and dated written statement to exercise the right to rescind. The Board does not propose to retain such a statement on the rescission notice because consumer testing showed that this disclosure is unnecessary. In fact, the Board's consumer testing results suggested that the statement might cause some consumers to believe that they *must* prepare a second statement of cancellation. Moreover, the Board believes it is unlikely that consumers who misplace the form, and later decide to rescind, would remember the statement about preparing their own documents. Based on consumer testing, the Board expects that consumers would use the form provided at the bottom of the notice to exercise the right of rescission. Participants in the Board's testing said that if they lost the form, they would contact the creditor to get another copy.

In addition, current Model Forms G–5 through G–9 contain a statement that the consumer should "keep one copy" of the notice because it contains information regarding the consumer's rescission rights. This statement would be deleted as obsolete. As discussed in the section-by-section analysis to proposed § 226.15(b)(1), the proposal requires creditors to provide a single copy of the notice to each consumer entitled to rescind. The notice would be revised to permit a consumer to detach the bottom part of the notice to use as a form for exercising the right of rescission while retaining the top portion of the notice containing the explanation of the consumer's rights.

15(b)(4) Optional Content of Notice

Current comment 15(b)–3 states that the notice of the right of rescission may include information related to the required information, such as: a description of the property subject to the security interest; a statement that joint owners may have the right to rescind and that a rescission by one is effective for all; and the name and address of an agent of the creditor to receive notification of rescission.

The Board proposes to continue to allow creditors to include additional information in the rescission notice that is directly related to the required disclosures. Proposed § 226.15(b)(4) sets forth two optional disclosures that are directly related to the mandatory rescission disclosures: (1) A statement that joint owners may have the right to rescind and that a rescission by one owner is effective for all owners; and (2) a statement acknowledging the consumer's receipt of the notice for the consumer to initial and date. In addition, proposed comment 15(b)(4)–1 clarifies that, at the creditor's option, other information directly related to the disclosures required by § 226.15(b)(3) may be included in the notice. For instance, an explanation of the use of pronouns or other references to the parties to the transaction is directly related information that the creditor may choose to add to the notice.

The Board notes, however, that under the proposal, only information directly related to the disclosures may be added to the notice. *See* proposed § 226.15(a)(2)(i). The Board is concerned that allowing creditors to combine disclosures regarding the right of rescission with other unrelated information, in any format, will diminish the clarity of this key material, potentially cause "information overload," and increase the likelihood that consumers may not read the rescission notice.

15(b)(5) Time of Providing Notice

TILA and Regulation Z currently do not specify when the consumer must receive the notice of the right to rescind. Current comment 15(b)–4 states that the creditor need not give the notice to the consumer before the transaction giving rise to the right of rescission, but notes that the rescission period will not begin to run until the notice is given to the consumer. As a practical matter, with respect to the rescission notice that must be given when opening a HELOC account, most creditors provide the notice to the consumer along with the account-opening disclosures and other documents given at account opening.

The Board proposes to require creditors to provide the notice of the right to rescind before the transaction that gives rise to the right of rescission. *See* proposed § 226.15(b)(5). The Board proposes this new timing requirement pursuant to the Board's authority under TILA Section 105(a), which authorizes the Board to make exceptions and adjustments to TILA to effectuate the statute's purposes which include facilitating consumers' ability to compare credit terms and helping consumers avoid the uninformed use of credit. 15 U.S.C. 1601(a), 1604(a). The Board believes that this proposed timing rule would facilitate consumers' ability to consider the rescission right and avoid the uninformed use of credit.

TILA and Regulation Z provide that a consumer may exercise the right to rescind until midnight after the third business following the latest of (1) The transaction giving rise to the right of rescission, (2) delivery of the notice of right to rescind, or (3) delivery of all material disclosures. TILA Section 125(a); 15 U.S.C. 1635(a); § 226.23(a)(3). Creditors typically provide the account opening disclosures at closing, and use these disclosures to satisfy the requirement to provide material disclosures. For the right of rescission that arises with respect to account opening, requiring that the rescission notice be given prior to account opening would better ensure that account opening will be the latest of the three events that trigger the three-business-day rescission period (assuming the account-opening disclosures were given no later than account opening). In this way, the three-business-day period would occur directly after account opening, a time during which the consumer may be most focused on the transaction and most concerned about the right to rescind. By tying a creditor's provision of the rescission notice to an event in the lending process of primary importance to the consumer—account opening—this rule might lead consumers to assess the account-opening disclosures and other loan documents with a more critical eye. The Board solicits comment on any compliance or other operational difficulties the proposal might cause. For example, the Board invites comment on problems that could arise from applying this requirement to transactions that give rise to the right of rescission that occur after account opening, such as a credit limit increase on an existing HELOC account.

Current comment 15(b)–4 would be removed as inconsistent with the proposed timing requirement. Proposed comment 15(b)(5)–1 clarifies that delivery of the notice after the transaction giving rise to the right of rescission would violate the timing requirement of § 226.15(b)(5), and the right of rescission does not expire until three business days after the day of late delivery if the notice was complete and correct.

15(b)(6) Proper Form of Notice

Appendix G to part 226 currently contains five model rescission notices, one that corresponds to each of the five transactions that might give rise to a right of rescission. Consumer advocates have expressed concern about creditors failing to complete the model forms properly. For example, some courts have held that notices with incorrect or omitted dates for the identification of the transaction and the expiration of the right are nevertheless adequate to meet the requirement of delivery of notice of the right to the consumer.[19]

To address these concerns, proposed § 226.15(b)(6) provides that a creditor satisfies § 226.15(b)(3) if it provides the model form in Appendix G, or a substantially similar notice, which is properly completed with the disclosures required by § 226.15(b)(3). Proposed comment 15(b)(6)–1 explicitly states that a notice is not properly completed if it lacks a calendar date or has an incorrectly calculated calendar date for the expiration of the rescission period. Such a notice would not fulfill the requirement to deliver the notice of the right to rescind. As discussed in the section-by-section analysis to proposed § 226.15(b)(3)(vii) above, however, a creditor who provides a date reasonably and in good faith that later turns out to be incorrect would be deemed to have complied with the requirement to provide the notice if the creditor complies with proposed § 226.15(b)(3)(vii) and proposed comment 15(b)–4.

15(c) Delay of Creditor's Performance

For the reasons discussed in the section-by-section analysis to § 226.23(c) below, the Board proposes to revise comment 15(c)–5 to state that a creditor may satisfy itself that the consumer has not rescinded by obtaining a written statement from the consumer that the right has not been exercised. The statement must be signed and dated by the consumer only at the end of the three-business-day period.

15(d) Effects of Rescission

For the reasons discussed in the section-by-section analysis to proposed § 226.23(d) below, the Board proposes to revise § 226.15(d) to address the effects of rescission during the initial three-day period following consummation and after that period. Generally, during the initial three-day period, the creditor has not disbursed money or delivered property to the consumer. Proposed § 226.15(d)(1) would provide that when a consumer provides a notice of rescission during this period, the creditor's security interest is automatically void. Within 20 calendar days after receipt after the consumer's notice, the creditor must return any money paid by the consumer and take whatever steps are necessary to terminate its security interest.

Proposed § 226.15(d)(2) would generally apply after the initial three-day period has passed. During this time period, the creditor has typically disbursed money or delivered property to the consumer and perfected its security interest, but the consumer's right to rescind may have expired. Most creditors are reluctant to release a lien under these conditions, and courts are frequently called upon to resolve rescission claims, which increases costs for consumers and creditors. Accordingly, proposed § 226.15(d)(2)(i) would provide a process for the parties to resolve a rescission claims outside of a court proceeding. The proposal would require that within 20 calendar days after receiving a consumer's notice of rescission, the creditor must mail or deliver to the consumer a written acknowledgment of receipt together with a written statement of whether the creditor will agree to cancel the transaction. If the creditor agrees to cancel the transaction, the creditor's acknowledgment of receipt must contain the amount of money or a description of the property that the creditor will accept as the consumer's tender; a reasonable date for tender; and a statement that within 20 calendar days after receipt of tender, the creditor will take whatever steps are necessary to terminate its security interest. The consumer may respond by tendering the amount of money or property described in the written statement. The creditor must take whatever steps are necessary to terminate its security interest within 20 calendar days after receipt of the consumer's tender.

Proposed § 226.15(d)(2)(ii) would address the effect of rescission if the parties are in a court proceeding, the creditor has disbursed money or delivered property to the consumer, and the consumer's right to rescind has not expired. Consistent with the holding of the majority of courts, the proposal would require the consumer to tender before the creditor releases its security interest. As in the current regulation, a court may modify these procedures.

15(e) Consumer's Waiver of Right To Rescind

For the reasons discussed in the section-by-section analysis to proposed § 226.23(e) below, the Board proposes to

[19] *See, e.g., Melfi* v. *WMC Mortgage Corp.,* 568 F.3d 309 (1st Cir. 2009).

provide additional guidance on when a consumer may waive the right to rescind due to a *bona fide* personal financial emergency. The proposed revisions clarify the procedure to be used for such waiver and add new, non-exclusive examples of *bona fide* personal financial emergencies that may justify such waiver and of circumstances that are not a *bona fide* personal financial emergency.

Proposed § 226.15(e) provides that a consumer may modify or waive the right to rescind, after delivery of the notice required by § 226.15(b) and the disclosures required by § 226.6, if the consumer determines that the loan proceeds are needed during the rescission period to meet a *bona fide* personal financial emergency. Proposed § 226.15(e) provides further that to modify or waive the right, each consumer entitled to rescind must give the creditor a dated written statement that describes the emergency, specifically modifies or waives the right to rescind, and bears the consumer's signature. Finally, proposed § 226.15(e) provides that printed forms for the purposes of waiver are prohibited.

Proposed comment 15(e)–1 states that a consumer may modify or waive the right to rescind only after the creditor delivers the notice required by § 226.15(b) and the disclosures required by § 226.6. Proposed comment 15(e)–1 also states that, after delivery of the required notice and disclosures, the consumer may waive or modify the right to rescind by giving the creditor a dated, written statement that specifically waives or modifies the right and describes the *bona fide* personal financial emergency. In addition, proposed comment 15(e)–1 clarifies that a waiver is effective only if each consumer entitled to rescind signs a waiver statement. Further, proposed comment 15(e)–1 clarifies that where there are multiple consumers entitled to rescind, the consumers may, but need not, sign the same waiver statement. Finally, proposed comment 15(e)–1 sets forth a cross-reference to § 226.2(a)(11), which establishes which natural persons are consumers with the right to rescind.

Proposed comment 15(e)–2 states that to modify or waive the right to rescind, there must be a *bona fide* personal financial emergency that requires disbursement of loan proceeds before the end of the rescission period. Proposed comment 15(e)–2 states further that whether there is a *bona fide* personal financial emergency is determined by the facts surrounding individual circumstances. In addition, proposed comment 15(e)–2 clarifies that a *bona fide* personal financial emergency typically, but not always, will involve imminent loss of or harm to a dwelling or harm to the health or safety of a natural person. Proposed comment 15(e)–2 also clarifies that a waiver is not effective if the consumer's statement is inconsistent with facts known to the creditor.

Finally, proposed comment 15(e)–2 provides examples that describe circumstances that are and are not a *bona fide* personal financial emergency. Proposed comment 15(e)–2.i states that examples of a *bona fide* personal financial emergency include the following: (1) The imminent sale of the consumer's home at foreclosure; (2) the need for loan proceeds to fund immediate repairs to ensure that a dwelling is habitable, such as structural repairs needed due to storm damage; and (3) the imminent need for health care services, such as in-home nursing care for a patient recently discharged from the hospital. In each case, those examples assume that loan proceeds are needed during the rescission period.

Proposed comment 15(e)–2.ii states that examples of circumstances that are not a *bona fide* personal financial emergency include the following: (1) The consumer's desire to purchase goods or services not needed on an emergency basis, even though the price may increase if purchased after the rescission period; and (2) the consumer's desire to invest immediately in a financial product, such as purchasing securities. Proposed comment 15(e)–2.iii states that the conditions for a waiver are not met where the consumer's waiver statement is inconsistent with facts known to the creditor. For example, proposed comment 15(e)–2.iii states that the conditions for a waiver are not met where the consumer's waiver statement states that loan proceeds are needed during the rescission period to abate flooding in a consumer's basement, but the creditor is aware that there is no flooding.

Section 226.16 Advertising

Overview

The Board proposes to revise § 226.16(d) to address certain misleading or deceptive practices used in open-end home-secured credit plan advertisements and promote consistency in the advertising rules applicable to open-end and closed-end home-secured credit. First, the Board proposes to revise § 226.16(d)(6) to require advertisements for open-end home-secured credit that state any lower payments that apply for less than the full term of the plan to state also (1) The period of time during which those payments will apply, and (2) the amounts and time periods of other payments that will apply. Second, the Board proposes to add new §§ 226.16(d)(7) through (d)(13), which would prohibit the following seven acts or practices in connection with advertisements for open-end home-secured credit: (i) The use of the term "fixed" to refer to rates or payments, unless certain conditions are satisfied; (ii) comparisons between actual or hypothetical payments or rates and payments or rates available under the advertised plan, unless certain conditions are satisfied; (iii) misleading statements that a plan is supported or endorsed by the government; (iv) misleading use of the name of a consumer's current creditor; (v) misleading claims of debt elimination; (vi) misleading use of the term "counselor;" and (vii) foreign-language advertisements that provide some required disclosures only in English.

In January of 2008, the Board proposed new rules for closed-end mortgage advertising (January 2008 Proposal). *See* 73 FR 1672, January 9, 2008. The Board proposed a new rule requiring additional disclosures about rates and payments to address concerns that advertisements placed undue emphasis on low promotional "teaser" rates or payments, and proposed to prohibit the seven acts or practices listed above in connection with closed-end mortgage advertisements. *See* 73 FR 1672, 1708, January 9, 2008.

The January 2008 Proposal also included a rule regarding disclosure of promotional rates and payments in advertisements for open-end home-secured credit (home-equity lines of credit or HELOCs). Unlike the rule proposed for closed-end mortgages, however, the proposed HELOC rule did not cover all low introductory payments; instead, additional disclosures were required in advertisements that included low rates or payments not based on the index or margin that would apply to rates and payments after the promotional period. *See* 73 FR 1672, 1705, January 9, 2008. Low introductory payments based on the index and margin, such as interest-only payments, were not covered. The Board did not propose to extend the other seven prohibitions to advertisements for HELOC plans, but solicited comment on whether to do so and on whether other acts or practices associated with advertisements for HELOC plans should be prohibited. *See* 73 FR 1672, 1705, January 9, 2008.

Commenters on the January 2008 Proposal were divided on whether to extend the proposed prohibitions to HELOC advertising. Many community banks argued that the misleading or deceptive acts often associated with closed-end mortgage advertisements do not occur in HELOC advertisements. Some consumer groups and state regulators, however, urged the Board to extend all of the prohibitions to HELOCs. Few commenters suggested that Board consider additional prohibitions for HELOC advertising.

In July of 2008, the Board adopted final rules for closed-end mortgage advertising, including both the rates and payments disclosure rule (§ 226.24(f)), and the prohibitions on the seven acts or practices listed above (§§ 226.24(i)(1) through (i)(7)) (2008 HOEPA Final Rule). *See* 73 FR 44522, July 30, 2008. The July 2008 Final Rule also adopted § 226.16(d)(6), regarding disclosure of promotional rates and payments in HELOC advertising. The Board did not extend the prohibitions contained in § 226.24(i) to advertisements for open-end home-secured credit. The Board indicated that it had not been provided with, or found, sufficient evidence demonstrating that advertisements for HELOCs contain deceptive practices similar to those found in advertisements for closed-end mortgage loans. The Board stated, however, that it might consider prohibiting certain misleading or deceptive practices in HELOC advertising as part of its larger review of the rules for open-end home-secured credit.

As part of its review of these rules, Board staff reviewed numerous examples of advertisements for HELOCs to identify advertising practices that could mislead consumers. This research indicated that many advertisements prominently disclose interest-only payments, while disclosing with much less prominence, often in a footnote, that higher payments also will be required during the term of the plan. Many advertisements also include misleading comparisons with other credit products and other misleading terms or statements, or employ practices prohibited in the July 2008 Final Rule for closed-end mortgages.

The Board is now proposing to revise § 226.16(d)(6) to improve disclosure in advertisements of the rates and payments that will apply over the full term of a HELOC and to add new §§ 226.16(d)(7) through (d)(13) to extend the prohibitions in § 226.24(i) applicable to closed-end mortgage advertising to advertising for HELOCs.

The Board solicits comment on the appropriateness of the proposed revisions to the advertising rules for open-end home-secured credit discussed in greater detail below, and on whether other acts or practices associated with advertisements for HELOC plans should be prohibited.

Legal Authority

TILA Section 147, implemented by § 226.16(d), governs advertisements of open-end home-equity plans secured by the consumer's principal dwelling. 15 U.S.C. 1665b. The statute applies to the advertisement itself, and therefore, the statutory and regulatory requirements apply to any person advertising an open-end home-secured credit plan, whether or not the person meets the definition of creditor. *See* comment 2(a)(2)–2. Under the statute, if an advertisement for an open-end home-secured credit plan sets forth, affirmatively or negatively, any of the specific terms of the plan, including any required periodic payment amount, then the advertisement also must clearly and conspicuously state: (i) Any loan fee the amount of which is determined as a percentage of the credit limit and an estimate of the aggregate amount of other fees for opening the account; (ii) in any case in which periodic rates may be used to compute the finance charge, the periodic rates expressed as an annual percentage rate; (iii) the highest annual percentage rate which may be imposed under the plan; and (iv) any other information the Board may by regulation require.

Under TILA Section 105(a), the Board has authority to adopt regulations to ensure meaningful disclosure of credit terms so that consumers will be able to compare available credit terms and avoid the uninformed use of credit. 15 U.S.C. 1604(a).

The Board proposes to use its authority under TILA Sections 147 and 105(a) to require that advertisements for open-end home-equity plans with certain payment and rate information also include specified additional information as described in the proposed rule. *See* proposed §§ 226.16(d)(6), (d)(7), and (d)(8) and proposed comments 16(d)–5, 16(d)–10, and 16(d)–11.

TILA Section 129(*l*)(2) authorizes the Board to prohibit acts or practices in connection with mortgage loans that the Board finds to be unfair, deceptive, or designed to evade the provisions of TILA Section 129. 12 U.S.C. 1639(*l*)(2). The Board proposes to use its authority under TILA Sections 129(*l*)(2) and 105(a), described above, to prohibit certain deceptive practices in HELOC advertising. *See* proposed §§ 226.16(d)(9)–(d)(13) and proposed comment 16(d)–12.

16(d) Additional Requirements for Home-Equity Plans

16(d)(6) Promotional Rates and Payments

Many HELOC advertisements emphasize a low monthly payment as one of the advantages of the product compared to other forms of credit. The monthly payment prominently stated in the advertisement, however, often is an interest-only payment that, for example, would apply only during the draw period and increase substantially during the repayment period or would result in a balloon payment. This may mislead consumers about the actual payments they will be required to make over the life of the plan.

Section 226.16(d)(6), as adopted in the July 2008 Final Rule, addresses the advertisement of promotional rates and payments in HELOC plans. Regarding payments, the rule provides that if an advertisement for a home-equity plan states a "promotional payment," the advertisement must include the following in a clear and conspicuous manner with equal prominence and in close proximity to each listing of the promotional payment: (i) The period of time during which the promotional payment will apply; and (ii) the amounts and time periods of any payments that will apply under the plan (if payments under a variable-rate plan will be determined based on application of an index and margin, the additional disclosed payments must be determined based on application of a reasonably current index and margin). The rule defines a "promotional payment" for a variable-rate plan as any minimum payment (i) that is applicable for less than the full term of the loan and is not derived by applying to the outstanding balance the index and margin used to determine other minimum payments under the plan, and (ii) that is less than other minimum payments under the plan, given an assumed balance.

The rules regarding disclosure of rates and payments in closed-end mortgage advertising (§ 226.24(f)) are more comprehensive than § 226.16(d)(6). Section 226.24(f) generally requires that advertisements for closed-end mortgages that state a rate or payment amount also disclose other rates and payments that will apply over the term of the loan and the time periods during which they apply. In contrast, § 226.16(d)(6) does not address advertisements that emphasize low monthly payments derived by applying the index and margin generally used to determine payments under the plan, such as interest-only payments. Also, as noted, disclosure of payments such as interest-only payments can be problematic in HELOC advertisements. The Board therefore proposes to revise the definition of promotional payment for variable-rate plans in § 226.16(d)(6)(i)(B)(*1*) so that, as in closed-end advertising, the HELOC advertising rule will cover these types of payments.

Specifically, the proposal would eliminate the portion of the current definition of "promotional payment" that restricts the term to payments that are *not* derived from the generally applicable index and margin. Instead, the new definition would be limited to the following portion of the current definition: "For a variable-rate plan, any minimum payment applicable for a promotional period that is less than other minimum payments under the plan derived by applying a reasonably current index and margin that will be used to determine the amount of such payments, given an assumed balance." *See* proposed § 226.16(d)(6)(i)(B)(*1*). Thus, under the proposed rule, a payment would be "promotional" if it is (1) temporary and (2) lower than any payments under the plan based on the index and margin generally applicable to the plan. As a result, under this definition, a "promotional payment" could be based on the generally applicable index and margin, but would have to be lower than other payments under that plan that are also based on the plan's index and margin.

A technical revision would be made to § 226.16(d)(6)(ii)(C), which describes one of the additional disclosures that must be included in advertisements with a promotional payment, to reflect the revised definition. Thus, this additional disclosure would be described as "the amounts and time periods of any payments that will apply under the plan *given the same assumed balance*." *See* proposed § 226.16(d)(6)(ii)(C) (emphasis added).

For example, an advertisement for a variable-rate home-equity plan might state an interest-only monthly payment derived by applying a reasonably current index and margin to an assumed balance. This payment would be considered a promotional payment because it is less than, for example, fully-amortizing monthly payments or a balloon payment that would be required at other times during the life of the plan given the same assumed balance. If an advertisement stated this payment, the advertisement also would be required to state in a clear and conspicuous manner with equal prominence and in close proximity to each listing of that payment: (i) The period of time during which that payment would apply; and (ii) the amounts and time periods of all payments that would apply under the plan given the same assumed balance.

The Board also proposes to revise comment 16(d)–5(i), regarding variable-rate plans, to reflect the revised definition of promotional payment for variable-rate plans and to provide additional guidance on that definition. Revised comment 16(d)–5(i) would state that if the advertised payment is the same as other minimum payments under the plan derived by applying a reasonably current index and margin, and given an assumed balance, it is not a promotional payment. The revised comment would further state that if the advertised payment is less than other minimum payments under the plan based on the same assumptions, it is a promotional payment. The revised comment would give the following example: if the advertised payment is an interest-only payment applicable during the draw period, and minimum payments during the repayment period will be higher because they are based on a schedule that fully amortizes the outstanding balance by the end of the repayment period, or there is no repayment period and a balloon payment would result at the end of the draw period, then the advertised payment is a promotional payment.

The Board also proposes to revise comment 16(d)–5(iii), regarding the amounts and time periods of payments, to include the following example: if an advertisement for a home-equity plan offers a $100,000 line of credit with a 10-year draw period and a 10-year repayment period, and assumes that the entire line is drawn, resulting in an interest-only minimum payment of $300 per month during the draw period, increasing to $750 per month during the repayment period, the advertisement must disclose the amount and time period of each of the two monthly payment streams, with equal prominence and in close proximity to the promotional payment.

The Board also proposes to revise comment 16(d)–5(iv). The comment states that if an advertised payment is calculated in the same way as other payments based on an assumed balance, the fact that the minimum payment could increase if the consumer makes an additional draw does not make the payment a promotional payment. Currently, the comment applies only to variable-rate plans; under the proposed revision, the comment would be applicable to non-variable-rate plans as well as variable-rate plans.

The Board does not propose to revise the definition of promotional payment for plans other than variable-rate plans in § 226.16(d)(6)(i)(B)(*2*) or the definitions and requirements related to promotional rates included in § 226.16(d)(6). Introductory and other payments that trigger the additional disclosure requirements in § 226.16(d)(6)(ii) under the existing rule would continue to do so under the rule as revised.

16(d)(7) Misleading Advertising of "Fixed" Rates and Payments

Use of the term "fixed" is addressed in the open-end credit advertising rules that apply to both home-secured and other open-end credit. Section 226.16(f) provides that an advertisement for open-end credit may not refer to an annual percentage rate as "fixed," or use a similar term, unless the rate will not increase while the plan is open or the advertisement specifies the time period during which the rate will be fixed.

The rules regarding use of the term "fixed" in closed-end mortgage loan advertising (§ 226.24(i)(1)) are different from the § 226.16(f) rules applicable to open-end credit. In particular, whereas the open-end credit rule applies only to descriptions of annual percentage rates as "fixed," the closed-end mortgage rule restricts the use of the term "fixed" to describe rates, payments, or an advertised credit plan as a whole. Advertisements for HELOCs, however, often emphasize the amount of payments under the plan as much as, or more than, rates associated with the plan.

In adopting § 226.24(i)(1) for closed-end mortgage advertisements, the Board noted that some advertisements do not adequately disclose that interest rates or payment amounts are "fixed" only for a limited period of time. The use of the word "fixed" in these advertisements may mislead consumers into believing that the advertised product is a fixed-rate mortgage loan with rates and payments that will not change during the term of the loan. The Board noted that whether the rates and payments for a particular credit product are fixed or variable is a key factor for consumers evaluating the risks and costs associated with that credit. *See* 73 FR 44522, 44587, July 30, 2008.

The Board believes that inaccurate or incomplete statements about whether a rate or payment is fixed would be as misleading in the open-end context as in the closed-end context. The Board therefore proposes to add new § 226.16(d)(7), which would impose requirements regarding use of the term "fixed" on HELOC advertisements similar to those for closed-end mortgage advertisements.

Proposed § 226.16(d)(7) would prohibit the use of the word "fixed" to refer to rates, payments, or home-equity plans in advertisements for variable-rate or other plans in which the payment may increase, unless certain conditions are met. The proposed rule describes the conditions that must be met for three different cases: (i) Advertisements for variable-rate plans; (ii) advertisements for non-variable-rate plans; and (iii) advertisements for both variable- and non-variable-rate plans. In an advertisement for one or more variable-rate plans, "fixed" can be used only if: (i) The phrase "variable rate" appears in the advertisement before the first use of the word "fixed" and is at least as conspicuous as any use of the word "fixed" in the advertisement; and (ii) each use of "fixed" to refer to a rate or payment is accompanied by an equally prominent and closely proximate statement of the time period for which the rate or payment is fixed, and the fact that the rate may vary or the payment may increase after that period.

Under the proposal, in an advertisement solely for non-variable-rate plans where the payment may increase, "fixed" can be used only if each use of "fixed" to refer to the payment is accompanied by an equally prominent and closely proximate statement of the time period for which the payment is fixed and the fact that the payment may increase after that period.

Under the proposal, in an advertisement for both variable- and non-variable-rate plans, "fixed" can be used only if:

(i) The phrase "variable rate" appears in the advertisement with equal prominence to any use of "fixed;" and

(ii) Each use of the word "fixed" to refer to a rate, payment, or plan either:

- Refers solely to the plans for which rates are fixed for the plan term and is accompanied by an equally prominent and closely proximate statement of the time period for which the payment is fixed, and, if applicable, the fact that the payment may increase after that period; or
- Refers to variable-rate plans and is accompanied by an equally prominent and closely proximate statement of the time period for which the rate or payment is fixed and the fact that the rate may vary or the payment may increase after that period.

The proposed rule would not prohibit use of the term "fixed" in advertisements for home-equity plans, including advertisements for variable-rate plans. For example, some advertisements for variable-rate home-equity plans may state that the consumer has the option to convert a portion of their balance to a fixed rate. Such an advertisement would comply with proposed § 226.16(d)(7) as long as: (i) The phrase "variable rate" appears in the advertisement with equal prominence as any use of the term "fixed" or similar terms; (ii) "fixed" is used solely in reference to the fixed rate conversion option; and (iii) any reference to payments associated with that option that may increase as "fixed" includes an equally prominent and closely proximate statement of the time period for which the payment is fixed and the fact that the payment will increase after that period.

16(d)(8) Misleading Comparisons in Advertisements

For closed-end mortgage loans, an advertisement may not make any comparison between actual or hypothetical credit payments or rates and any payment or rate available under the advertised plan unless certain additional disclosures are made. *See* § 226.24(i)(2). In adopting this provision, the Board noted that the advertised rates or payments used in comparisons included in advertisements for closed-end mortgage loans often were low introductory "teaser" rates or payments that would not apply over the full term of the loan. The Board concluded that such comparisons are deceptive and misleading to consumers unless certain additional disclosures are made. *See* 73 FR 44522, 44587, July 30, 2008.

Board research indicates that many advertisements for open-end home-equity plans compare monthly payments under that plan with the combined monthly payment for other consumer loans, such as credit card, car loan, and personal loan payments. Without adequate disclosure, these comparisons may mislead consumers about the relative advantages and disadvantages of a HELOC. For example, the HELOC payment used in these comparisons often is an interest-only payment that would apply only during the draw period and increase substantially thereafter or would result in a balloon payment. This is problematic because some of the payments in the comparison group, such as car loan payments, may be fully-amortized principal and interest payments. In addition, while HELOCs often have variable interest rates, some of the loans in the comparison group, such as car loans or personal loans, may have fixed rates.

Home-equity plan advertisements that include comparisons such as those described above often explain that the home-equity plan payment used in the comparison is an interest-only payment or that the home-equity plan's interest rate is variable. However, these disclosures often are either wholly or partially in small print, in footnotes, or on the back of a page. The Board believes that additional, prominent disclosure is needed to prevent consumers from being misled by payment comparisons.

The Board therefore proposes to adopt new § 226.16(d)(8), which would impose requirements consistent with those for closed-end mortgage advertising under § 226.24(i)(2). Proposed § 226.16(d)(8) would prohibit an advertisement for a home-equity plan from including any comparison between actual or hypothetical credit payments or rates and any payment or rate that will be available under the advertised plan for a period less than the full term of the plan unless two additional disclosures are made. First, the advertisement must include a clear and conspicuous comparison to the information required to be disclosed under § 226.16(d)(6)(ii) (promotional period and post-promotional rates or payments). Second, if the advertisement is for a variable-rate plan, and the advertised payment or rate is based on the index or margin that will be used to make subsequent rate or payment adjustments over the term of the loan, the advertisement must include an equally prominent statement in close proximity to the payment or rate that the payment or rate is subject to adjustment and the time period when the first adjustment will occur.

Consistent with comment 24(i)–1 for closed-end mortgages, proposed comment 16(d)–10 would clarify that the requirements of § 226.16(d)(8) apply to all advertisements for HELOC plans, including radio and television advertisements. The proposed comment also states that a claim about the amount a consumer may save under the advertised plan, such as "save $400 per month on a balance of $35,000," would constitute an implied comparison between the advertised plan's payment and an actual or hypothetical payment. The requirements of § 226.16(d)(8) therefore would apply.

The Board also proposes to add comment 16(d)–11; the comment would clarify that the requirements of § 226.16(d)(8) apply to comparisons in advertisements for variable-rate plans, because the payments or rates may not be available for the full term of the plan due to variation in the rate, even if the payments or rates shown for the advertised plan are not promotional payments or rates, as defined in § 226.16(d)(6)(i).

16(d)(9) Misrepresentations About Government Endorsement

For closed-end mortgage loans, an advertisement may not make any statement that the loan offered is a "government loan program," "government-supported loan," or otherwise endorsed or sponsored by a Federal, State, or local government entity, unless the advertised loan is in fact an FHA loan, a VA loan, or a loan offered under a similar program that is endorsed or sponsored by a Federal, State, or local government entity. *See* § 226.24(i)(3). In adopting this provision, the Board found these types of advertisements to be deceptive, stating its concern that these advertisements can mislead consumers into believing that the government is guaranteeing, endorsing, or supporting the advertised loan product. *See* 73 FR 44522, 44589, July 30, 2008. The Board further observed that government-endorsed loans often offer certain benefits or features that may be attractive to many consumers and that, as a result, a loan product's association with a government program can be a material factor in the consumer's decision to apply for that particular loan.

The Board believes that false or misleading statements about government endorsement would be as misleading in the context of HELOC advertising as in the closed-end advertising context. To avoid the possibility of home-equity advertisements containing misleading statements about government endorsement in the future, and for consistency between the advertising rules applicable to open-end and closed-end home-secured credit, the Board proposes to prohibit statements in HELOC advertisements that a plan is a "government loan program," "government-supported loan," or is otherwise endorsed or sponsored by any Federal, State, or local government entity, unless the advertisement is for a credit program that is, in fact, endorsed or sponsored by a Federal, State, or local government entity. *See* proposed § 226.16(d)(9).

For closed-end mortgages, comment 24(i)–2 provides an example of a misrepresentation about government endorsement: A statement that the Federal Community Reinvestment Act (CRA) entitles the consumer to refinance his or her mortgage at the low rate offered in the advertisement. The Board does not propose to adopt a parallel comment under § 226.16(d); the example does not appear applicable to HELOCs, because HELOCs generally are not refinanced. However, if a misleading statement about the CRA were made in a home-equity plan advertisement, it would be prohibited under § 226.16(d)(9).

16(d)(10) Misleading Use of the Current Creditor's Name

For closed-end mortgage loans, an advertisement that is not sent by or on behalf of the consumer's current creditor may not use the name of that creditor, unless the advertisement also discloses with equal prominence the name of the person or creditor making the advertisement, and a clear and conspicuous statement that the person making the advertisement is not associated with, or acting on behalf of, the consumer's current creditor. *See* § 226.24(i)(4). In research for the July 2008 Final Rule, the Board found advertisements for home-secured loans that prominently displayed the name of the consumer's current mortgage creditor, but failed to disclose or to disclose adequately that the advertisement is by a mortgage creditor not associated with the consumer's current creditor. The Board found that these advertisements are deceptive because they may mislead consumers into believing that their current creditor is offering the loan advertised, or that the advertisement is promoting a reduction in the consumer's payment amount or rate on his or her current loan, rather than offering to refinance the current loan with a different creditor. *See* 73 FR 44522, 44589, July 30, 2008.

Board research for this proposal has shown that some HELOC advertisements contain misleading uses of the name of the consumer's current creditor. To prevent these misleading statements in home-equity advertisements, and for consistency between the advertising rules applicable to open-end and closed-end home-secured credit, the Board proposes to prohibit the use the name of the consumer's current creditor in a HELOC advertisement that is not sent by or on behalf of the consumer's current creditor, unless the advertisement: (i) Discloses with equal prominence the name of the creditor or other person making the advertisement; and (ii) includes a clear and conspicuous statement that the creditor or other person making the advertisement is not associated with, or acting on behalf of, the consumer's current creditor. *See* proposed § 226.16(d)(10).

16(d)(11) Misleading Claims of Debt Elimination

Section 226.24(i)(5) prohibits advertisements for closed-end mortgage loans that offer to eliminate debt, or to waive or forgive a consumer's existing loan terms or obligations to another creditor. In the July 2008 Final Rule, the Board found these advertisements to be deceptive because they can mislead consumers into believing that they are entering into a debt forgiveness program, rather than merely replacing one debt obligation with another. *See* 73 FR 44522, 44589, July 30, 2008.

The Board has found evidence that some HELOC advertisements contain misleading statements about debt elimination as well. To prevent this practice in HELOC advertisements, and for consistency between the advertising rules applicable to open-end and closed-end home-secured credit, the Board proposes to prohibit misleading claims in a HELOC advertisement that the plan offered will eliminate debt or result in a waiver or forgiveness of a consumer's existing loan terms with, or obligations to, another creditor. *See* proposed § 226.16(d)(11). The Board also proposes to adopt new comment 16(d)–12, parallel to comment 24(i)–3 in the closed-end rule. The proposed comment provides examples of claims that would be prohibited. These include: "Get out of debt;" "Take advantage of this great deal to get rid of all your debt;" "Celebrate life, debt-free;" and "[Name of home-equity plan] gives you an easy-to-follow plan for being debt-free." The proposed comment also clarifies that the rule would not prohibit a HELOC advertisement from claiming that the advertised product may reduce debt payments, consolidate debts, or shorten the term of the debt.

16(d)(12) Misleading Use of the Term "Counselor"

Advertisements for closed-end mortgage loans may not use the term "counselor" to refer to a for-profit mortgage broker or mortgage creditor, its employees, or persons working for the broker or creditor that are involved in offering, originating or selling mortgages. *See* § 226.24(i)(6). Nothing in the rule prohibits advertisements for *bona fide* consumer credit counseling services, such as counseling services provided by non-profit organizations, or *bona fide* financial advisory services, such as services provided by certified financial planners. In the July 2008 Final Rule, the Board found that the use of the term "counselor" is deceptive outside of the context of non-profit organizations and *bona fide* financial advisory services; outside of these circumstances, the term "counselor" is likely to mislead consumers into believing that the creditor or broker has a fiduciary relationship with the consumer and is considering only the consumer's best interest. *See* 73 FR 44522, 44589, July 30, 2008.

Board research for this proposal has yielded evidence of this practice in HELOC advertising. To prevent this practice in HELOC advertising, and for consistency between the advertising rules for open-end and closed-end home-secured credit, the Board proposes to prohibit use of the term "counselor" in a HELOC advertisement to refer to a for-profit broker or creditor, its employees, or persons working for the broker or creditor that are involved in offering, originating or selling home-equity plans. *See* proposed § 226.16(d)(12).

16(d)(13) Misleading Foreign-Language Advertisements

Section 226.24(i)(7) prohibits advertisements for closed-end home-secured mortgages from providing information about some trigger terms or required disclosures, such as an initial rate or payment, only in a foreign language, but providing information about other trigger terms or required disclosures, such as information about the fully-indexed rate or fully-amortizing payment, only in English. Advertisements that provide all trigger terms and disclosures in both English and a foreign language, or advertisements that provide all trigger terms and disclosures entirely in English or entirely in a foreign language, are not affected by this prohibition. In the July 2008 Final Rule, the Board noted that, in general, advertisements for home-secured loans targeted to non-English speaking consumers are an appropriate means of promoting home ownership or making credit available to under-served, immigrant communities. The Board also noted, however, that some of these advertisements provide information about some trigger terms or required disclosures, such as a low introductory "teaser" rate or payment, in a foreign language, but provide information about other trigger terms or required disclosures, such as the fully-indexed rate or fully-amortizing payment, only in English. The Board found that this practice is deceptive because it can mislead non-English speaking consumers who may not be able to comprehend the important English-language disclosures. *See* 73 FR 44522, 44590, July 30, 2008.

The Board believes that advertisements that provide some terms only in English and others only in a foreign language would be as misleading in HELOC advertisements as in closed-end mortgage advertisements. To avoid the possibility of this practice in HELOC advertising, and for consistency between the advertising rules for open-end and closed-end home-secured credit, the Board proposes to prohibit in HELOC advertisements the provision of information about some trigger terms or required disclosures, such as a promotional rate or payment, only in a foreign language, while providing information about other trigger terms or required disclosures, such as information about the fully-indexed rate or fully-amortizing payment, only in English. *See* proposed § 226.16(d)(13).

Section 226.17 General Disclosure Requirements

17(c) Basis of Disclosures and Use of Estimates

Current comment 17(c)(1)–14 provides guidance on assumptions creditors must use in disclosing closed-end reverse mortgages. The guidance in comment 17(c)(1)–14 is still required for creditors to calculate a finance charge and APR for closed-end reverse mortgages. For clarity, the proposal would move the comment into proposed § 226.33(c)(16), which provides the rules for disclosing closed-end reverse mortgages and is discussed in the section-by-section analysis of that section. The comment also clarifies that reverse mortgages where some or all of the appreciation in the value of the property will be shared between the consumer and the creditor are considered variable-rate mortgages, and, therefore, must follow the disclosure rules for variable-rate mortgages. Under the proposal, the content of disclosure for reverse mortgages, including reverse mortgages with shared appreciation features, would be set forth in § 226.33, as discussed in the section-by-section analysis to that section.

17(d) Multiple Creditors; Multiple Consumers

The Board is proposing to amend staff comment 17(d)–2 to clarify that, in rescindable transactions involving more than one consumer, disclosures required by § 226.19(a) need only be provided to one consumer who will be primarily liable on the obligation. For example, if two consumers apply for a covered mortgage loan as co-applicants, with a third consumer acting solely as a guarantor of the debt, only either of the first two consumers must receive the § 226.19(a) disclosures. In addition, the revised comment would clarify that each consumer entitled to rescind, even any such consumer with no legal obligation on the transaction, must receive the material disclosures in § 226.23(a)(5) and the notice of right to rescind in § 226.23(b) prior to consummation.

Background

MDIA amendments to TILA. Prior to the MDIA, TILA and Regulation Z required creditors to provide good faith estimates of transaction-specific disclosures for certain purchase-money mortgage loans secured by the consumer's principal dwelling, within three business days after application ("the early disclosures"). The MDIA extended this requirement for early disclosures to certain closed-end, non-purchase money transactions, including refinance loans, home equity loans, and reverse mortgages.[20] The MDIA also extended the requirement for early disclosures to loans secured by a dwelling other than a consumer's principal dwelling. In addition, the MDIA required creditors to mail or deliver the early TILA disclosures at least seven business days before consummation and, if the APR in the early disclosure becomes inaccurate, provide corrected disclosures that the consumer must receive no later than three business days before consummation. *See* TILA Section 128(b)(2), 15 U.S.C. 1638(b)(2). The MDIA became effective on July 30, 2009.

Final rule implementing the MDIA. The Board published final regulations implementing the MDIA on May 19, 2009 (MDIA Final Rule). 74 FR 23289. The MDIA Final Rule amended § 226.19(a) of Regulation Z to require that, in a closed-end mortgage transaction subject to the Real Estate Settlement Procedures Act (RESPA) that is secured by a consumer's dwelling, the creditor make good faith estimates of the disclosures required by § 226.18 and deliver or place them in the mail not later than the third business day after the creditor receives the consumer's written application.[21] *See* § 226.19(a)(1)(i). The early disclosures must be delivered or placed in the mail not later than the seventh business day

[20] This provision of the MDIA codified action that the Board had taken in the 2008 HOEPA Final Rule, which was to be effective October 1, 2009. 73 FR 44522, July 30, 2008.

[21] The August 2009 Closed-End Proposal would eliminate the qualification that the transaction be subject to RESPA and instead would apply § 226.19(a) to any transaction secured by real property or a dwelling. It also would change the reference to § 226.18 so that it requires good faith estimates of the § 226.38 disclosures that the August 2009 Closed-End Proposal would require for mortgage transactions generally.

before consummation. *See* § 226.19(a)(2)(i). Finally, if the APR stated in the early disclosures becomes inaccurate, the creditor must provide corrected disclosures with all changed terms, which the consumer must receive no later than three business days before consummation.[22] *See* § 226.19(a)(2)(ii).

Transactions involving multiple consumers. Since the MDIA Final Rule, creditors have asked the Board whether, in a transaction involving more than one consumer, every consumer must receive the early and final disclosures.[23] TILA Section 121(a) provides that in such transactions, except transactions subject to the right of rescission, the creditor need only make disclosures to one primary obligor. Section 226.17(d) implements TILA Section 121(a) and further provides that, if the transaction is rescindable, disclosures must be provided to each consumer with the right to rescind. Consumers who have the right to rescind include non-obligors as well as obligors if (i) They have an ownership interest in the property securing the transaction, (ii) their ownership interest would be subject to the creditor's security interest, and (iii) the property securing the transaction is their principal dwelling. *See* §§ 226.23(a)(1), 226.2(a)(11). Creditors have expressed uncertainty over whether, for a rescindable transaction, they must provide early and final disclosures to each obligor and to each non-obligor consumer.

The Board's Proposal

Disclosure requirements for primary obligors. The Board proposes to amend staff comment 17(d)–2 to clarify that, in rescindable transactions involving multiple consumers, the early and final disclosures required by § 226.19(a) need only be made to one consumer who will be a primary obligor. The purpose of the early and final disclosures is to provide consumers with transaction-specific information early enough to use while shopping for a mortgage. Before the MDIA was enacted, only consumers considering a purchase-money transaction received these early disclosures. If multiple obligors were involved in purchase-money transactions, one set of disclosures was deemed sufficient to facilitate consumer shopping under § 226.17(d). The MDIA's purpose is to extend the same early disclosure requirement for purchase-money transactions to non-purchase money transactions. The MDIA did not amend TILA Section 121(a), which provides that only one primary obligor need receive disclosures. Thus, nothing in the MDIA suggests that Congress intended to require that, for rescindable transactions, each obligor receive the early and final shopping disclosures. Accordingly, under proposed comment 17(d)–2, in a rescindable transaction involving multiple obligors only one primary obligor must receive the early and final disclosures required by § 226.19(a).

Disclosure requirements for non-obligor consumers. The Board further proposes to amend comment 17(d)–2 to provide that non-obligor consumers who have a right to rescind need not be given the early and final disclosures required by § 226.19(a). These non-obligors are consumers only for the purpose of rescission under § 226.23. *See* § 226.2(a)(11). The purpose of TILA Section 121(a)'s requirement that each consumer with the right to rescind receive disclosures is to ensure that each such consumer has the necessary information to decide whether to exercise that right. Non-obligor consumers do not need the early disclosures because they are not shopping for credit and comparing different loan offers. Thus, creditors must provide these consumers only with the material disclosures and a notice of the right to cancel before consummation of the transaction. *See* § 226.17(b).

Accordingly, the Board proposes to amend comment 17(d)–2 to clarify that the early and final disclosures required by § 226.19(a) need not be made to each consumer who has the right to rescind. This rule applies in all cases where there are multiple consumers, whether primarily liable, secondarily liable, or not liable at all on the obligation. The Board believes that this interpretation is consistent with the purpose of the § 226.19(a) disclosures. Thus, creditors may provide § 226.19(a) disclosures solely to any one primary obligor in a rescindable transaction. Pursuant to § 226.17(b), however, the creditor must make disclosures before consummation to each consumer who has the right to rescind under § 226.23, regardless of whether the consumer is also an obligor. The proposed revisions to comment 17(d)–2 would contain this guidance. Proposed new comment 19(a)–1 would contain a cross reference to comment 17(d)–2.

Thus, proposed comment 17(d)–2 would address the delivery of § 226.19(a) disclosures to all possible kinds of consumers in a rescindable transaction. For example, assume a rescindable transaction in which two consumers will be primarily liable as co-borrowers, own the collateral property, and occupy it as their principal dwelling, a third consumer will act as a guarantor (and thus is secondarily but not primarily liable) but has no ownership interest in the property, and a fourth consumer will have no liability on the obligation but is entitled to rescind under §§ 226.23(a)(1) and 226.2(a)(11) by virtue of having an ownership interest and residing in the home securing the transaction. The creditor satisfies § 226.19(a) by delivering early and final disclosures to either of the first two consumers. Before consummation, however, the creditor also must deliver material disclosures and the notice of the right to rescind to the other of the first two consumers and to the fourth consumer (but need not deliver them to the third consumer), pursuant to §§ 226.17(b) and 226.23(b).

17(f) Early Disclosures

Section 226.17(f) establishes general timing requirements for corrected disclosures required where disclosures required by Subpart C are given before consummation of a closed-end credit transaction and a subsequent event makes them inaccurate.[24] The Board proposes to revise a cross-reference in comment 17(f)(2)–2 to reflect a proposed change to § 226.22(a)(3), discussed in detail below.

17(f)(2)

Section 226.17(f)(2) provides that, if disclosures required by Subpart C of Regulation Z are given before consummation of a transaction, the creditor must disclose all changed terms before consummation if the APR at the time of consummation varies from the APR disclosed earlier by more than ⅛ of 1 percentage point in a regular transaction or more than ¼ of 1 percentage point in an irregular transaction, as defined in § 226.22(a). Comment 17(f)(2)–1 states that, for purposes of § 226.17(f)(2), a transaction is deemed to be "irregular" in accordance with footnote 46 to § 226.22(a)(3). The Board proposes to revise comment 17(f)(2)–1 to reflect the

[22] The August 2009 Closed-End Proposal would require final disclosures three business days before consummation in all cases, rather than only when the disclosed APR becomes inaccurate. For consistency with the August 2009 Closed-End Proposal, this discussion refers to the disclosures provided three business days prior to consummation as the "final disclosures."

[23] Creditors have noted that practical issues arise for consumers who have the right to rescind but will not be liable on the obligation. They state that in many cases a creditor may not learn of the existence of such consumers until after the early disclosures must be made under § 226.19(a)(1)(i).

[24] Special disclosure timing requirements for transactions secured by a dwelling are set forth in § 226.19(a).

Board's proposal to remove and reserve footnote 46, which defines an irregular transaction, and to integrate its text into proposed § 226.22(a)(3), as discussed below.

226.18 Content of Disclosures

18(k) Prepayment

18(k)(1)

The Board is proposing to amend comment 18(k)(1)–1 to clarify that, on a closed-end transaction, assessing interest for a period after the loan balance has been paid in full is a prepayment penalty, even if the charge results from the "interest accrual amortization" method used on the transaction, as discussed below. The 2008 HOEPA Final Rule defined a class of higher-priced mortgage loans that are subject to certain protections involving prepayment penalties. For example, on a higher-priced mortgage loan, a prepayment penalty may not apply after the second year following consummation or if the prepayment is effected through a refinancing by the creditor or its affiliate. *See* § 226.35(b)(2)(ii). These restrictions on prepayment penalties were effective for applications taken on or after October 1, 2009.

Shortly before the 2008 HOEPA Final Rule took effect, the Board was asked whether the prepayment penalty provisions would apply to certain Federal Housing Administration (FHA) and other loans as of the October 1, 2009 effective date. Specifically, the Board was informed that, 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. For example, if a consumer repays an FHA loan in full on April 20, the payoff amount the consumer is required to pay includes the principal balance outstanding as of April 1 and interest calculated on that amount for all 30 days in April, rather than for only the 20 days elapsed before the prepayment.

Under the Board's existing guidance, a prepayment penalty includes "interest charges for any period after prepayment in full is made." *See* Comment 18(k)(1)–1.[25] FHA staff indicated, however, that it has not considered the payment of interest for a period after a loan is prepaid in full as a prepayment penalty and has advised lenders that they need not disclose this practice as a prepayment penalty for FHA loans. FHA staff also explained that, under the FHA program, for purposes of allocating a consumer's payment to accrued interest and principal, all loan payments are treated as being made on the scheduled due date if the payment is made prior to the expiration of the payment grace period. For example, if the grace period expires on the 15th of the month, payments made on the 14th are not treated as late. This method of interest accounting is known as "monthly interest accrual amortization." Under this arrangement, consumers are not penalized for making payments during the grace period because they are treated as made on the scheduled due date. At the same time, however, consumers that make payments before their scheduled due dates, such as on the 20th of the preceding month, also are treated as having paid on the payment due date and do not receive any reduction in interest due.

In response to the concerns about FHA loans and prepayment penalties, Board staff issued an interpretive letter to HUD Secretary Shaun Donovan on September 29, 2009.[26] The letter noted that, although comment 18(k)(1)–1 provides guidance about prepayment penalties, it does not address the specific situation involving loans that use the monthly interest accrual amortization method. In light of FHA's guidance and the fact that the staff commentary does not expressly address this issue in the context of monthly interest accrual amortization, Board staff advised HUD that lenders who have followed this practice in the past have acted reasonably and have complied in good faith with the prepayment penalty provisions of Regulation Z, whether or not the additional interest was treated or disclosed as a prepayment penalty. The letter also noted that Board staff would review the staff commentary and consider whether it should be changed to address specifically this aspect of FHA and other lending programs, including whether the commentary should be changed to treat this practice as a prepayment penalty.

Based on further review and analysis, the Board believes that the charging of interest for the remainder of the month in which prepayment in full is made should be treated as a prepayment penalty for TILA purposes, even when done pursuant to the monthly interest accrual amortization method. As the Board's proposed revision in the August 2009 Closed-End Proposal reflects, there is no loan balance to which the creditor can apply the interest rate once the loan has been paid off. Thus, although the amount the consumer is charged upon prepayment is determined by reference to the interest rate, the charge is not accrued interest because there is no balance against which it could have accrued. Further, because the charge is triggered by prepayment in full, the Board believes that the charge is most appropriately treated as a prepayment penalty.

Accordingly, proposed comment 18(k)(1)–1 would provide that 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," even if the charge results from the interest accrual amortization method used on the transaction. The proposed comment would explain by example that, under monthly interest accrual amortization, if the amount of interest due on May 1 for the preceding month of April is $3,000, the creditor will require payment of $3,000 in interest whether the payment is made on April 20, on May 1, or on May 10. In this example, if the interest charged for the month of April upon prepayment in full on April 20 is $3,000, the charge constitutes a prepayment penalty of $1,000 because the amount of interest actually earned through April 20 is only $2,000.

The Board also proposed certain other changes to comment 18(k)(1)–1 as part of the August 2009 Closed-End Proposal for conforming, clarity, and organization purposes. For ease of reference, those other proposed changes are reflected in this proposal as well. The Board requests that interested parties limit the scope of their comments to the newly proposed changes to comment 18(k)(1)–1 discussed in the **SUPPLEMENTARY INFORMATION** to this proposed rule.

18(n) Insurance, Debt Cancellation, and Debt Suspension

For the reasons discussed in the section-by-section analyses for §§ 226.4(d)(1) and (d)(3) and 226.6 above, the Board proposes to revise § 226.18(n) to require creditors to provide the disclosures and comply with the requirements of §§ 226.4(d)(1)(i) through (d)(1)(iii) and (d)(3)(i) through (d)(3)(iii) if the creditor offers optional credit insurance, debt cancellation coverage, or debt suspension coverage that is identified in §§ 226.4(b)(7) or (b)(10). For required

[25] In the Board's August 2009 Closed-End Proposal, the Board proposed to revise this comment to clarify that "when the loan balance is prepaid in full, there is no balance to which the creditor may apply the interest rate." 74 FR 43232, 43257, Aug. 26, 2009. The Board noted that no substantive change was intended.

[26] The letter was issued under TILA Section 130(f), which provides that creditors are not liable for any act or omission taken in good faith and that conforms with any interpretation of TILA or Regulation Z issued by a Board official or employee whom the Board has authorized to issue such interpretations. 15 U.S.C. 1640(f).

credit insurance, debt cancellation coverage, or debt suspension coverage, the Board proposes to require the creditor to provide the disclosures required in §§ 226.4(d)(1)(i) and (d)(3)(i), as applicable, except for §§ 226.4(d)(1)(i)(A), (B), (D)(5), (E) and (F).

Section 226.19 Early Disclosures and Adjustable-Rate Disclosures for Transactions Secured by Real Property or a Dwelling

19(a) Mortgage Transactions

Under TILA Section 128(b)(2), as revised by the Mortgage Disclosure Improvement Act (MDIA), a creditor must provide good faith estimates of credit terms (early disclosures) to a consumer within three business days after receiving the consumer's application and at least seven business days before consummation of a closed-end mortgage transaction secured by a dwelling.[27] 15 U.S.C. 1638(b)(2)(A). No person may impose a fee, other than a fee for obtaining the consumer's credit history, in connection with such transaction before the consumer receives the early disclosures. 15 U.S.C. 1638(b)(2)(E). The creditor must deliver or mail the early disclosures at least seven business days before consummation. 15 U.S.C. 1638(b)(2)(A). If the APR changes beyond a specified tolerance, the creditor must provide corrected disclosures, which the consumer must receive no later than three business days before consummation. 15 U.S.C. 1638(b)(2)(D). The consumer may waive a waiting period if the consumer determines that loan proceeds are needed during the waiting period to meet a *bona fide* personal financial emergency. 15 U.S.C. 1638(b)(2)(F). The Board implemented these requirements in § 226.19(a).[28]

The Board proposes to require that any fee paid by a consumer, other than a fee for obtaining the consumer's credit history, be refundable for three business days after the consumer receives the early disclosures. Specifically, if a consumer pays a fee after receiving the early disclosures, the creditor would have to refund such a fee upon the consumer's request made within three business days after a consumer receives the early disclosures. A similar requirement applies to HELOCs under § 226.5b(h) (redesignated § 226.5b(e) in the August 2009 HELOC Proposal). The Board also proposes several revisions to § 226.19(a) and associated commentary to address issues regarding disclosure requirements and limitations on the imposition of fees before a consumer receives the early disclosures. Those proposed revisions include: (1) Clarifying that a counselor or counseling agency may charge a *bona fide* and reasonable fee for housing counseling required for a reverse mortgage insured by HUD (a HECM) or other housing or credit counseling required by applicable law before the consumer receives the early disclosures; (2) providing examples of circumstances that constitute imposing a fee; and (3) providing examples of when an overstated APR is accurate under the tolerances provided in § 226.22.

The Board has received questions whether, in a transaction involving more than one consumer, every consumer must receive the early disclosures and corrected disclosures required by § 226.19(a).[29] The Board proposes to clarify to which consumers creditors must provide the disclosures required by § 226.19(a) in a proposed new comment 17(d)–2, as discussed above in the section-by-section analysis of § 226.17(d). Proposed comment 19(a)–1 states that creditors should utilize comment 17(d)–2 to determine to which consumers a creditor must provide the required disclosures.

Further, the Board proposes to provide additional guidance regarding when a consumer may waive a waiting period under § 226.19(a)(3), where the consumer determines that loan proceeds are needed to meet a *bona fide* personal financial emergency. Those proposed revisions are consistent with the proposed revisions to the provisions for waiver of a rescission period under §§ 226.15(e) and 226.23(e), discussed below in the section-by-section analysis of § 226.23(e).

The Board also proposes to add headings to previously proposed § 226.19(a)(4)(i) through (iii), regarding disclosure requirements for timeshare transactions, for clarity. Finally, the Board proposes to conform headings for commentary on proposed § 226.19 with the headings for § 226.19 previously proposed under the August 2009 Closed-End Proposal. No substantive change is intended by the foregoing proposed technical amendments, which are not discussed again below.

For ease of reference, this proposal republishes revisions to § 226.19(a) and associated commentary previously proposed under the August 2009 Closed-End Proposal. The Board requests that interested parties limit the scope of their comments to the newly proposed changes to § 226.19(a) and associated commentary discussed in detail in the **SUPPLEMENTARY INFORMATION** to this proposed rule.

19(a)(1)

19(a)(1)(ii) Imposition of Fees

TILA Section 128(b)(2)(E) provides that a consumer must receive the early disclosures "before paying any fee to the creditor or other person in connection with the consumer's application for an extension of credit that is secured by the dwelling of a consumer." 15 U.S.C. 1638(b)(2)(E). A creditor or other person may impose a *bona fide* and reasonable fee for obtaining the consumer's credit report before the consumer receives the early disclosures, however. *Id.* Consistent with TILA Section 128(b)(2)(E), § 226.19(a)(1)(iii) provides that a creditor or other person may impose a fee for obtaining a consumer's credit history before the consumer receives the early disclosures. Thus, TILA Section 128(b)(2) and § 226.19(a)(1)(ii) help ensure that consumers receive disclosures while they still are shopping for a loan and before they pay significant fees.

Creditors and other persons have asked the Board what it means to "impose" a fee. To address that question, the Board proposes to add commentary providing several examples of when a fee is imposed. Proposed comment 19(a)(1)(ii)–4 clarifies that a fee is imposed if a consumer is obligated to pay a fee or pays a fee, even if the fee is refundable. This is consistent with the Board's statement when adopting § 226.19(a)(1)(ii) that the fee restriction applies to refundable fees because "[l]imiting the fee restriction to nonrefundable fees * * * would likely undermine the intent of the rule." 74 FR 44522, 44592, July 30, 2008.

Proposed comment 19(a)(1)(ii)–4 states, for example, that a fee is imposed if a creditor takes a consumer's check for payment, whether or not the check is post-dated and/or the creditor agrees

[27] The MDIA is contained in Sections 2510 through 2503 of the Housing and Economic Recovery Act of 2008, enacted on July 30, 2008. Public Law 110–289, 122 Stat. 2654. The MDIA was amended by the Emergency Economic Stabilization Act of 2008, enacted on October 3, 2008. Public Law No. 110–343, 122 Stat. 3765.

[28] Section 226.19(a) also implements the MDIA's timing requirements for timeshare transactions. The Board proposed revisions to § 226.19(a) under the August 2009 Closed-End Proposal. For a detailed discussion of those proposed revisions, *see* 74 FR 43232, 43258, Aug. 26, 2009. The Board is implementing provisions of the MDIA related to disclosures for adjustable-rate mortgages in a separate notice published in today's **Federal Register.**

[29] The August 2009 Closed-End Proposal requires creditors to provide final disclosures that a consumer must receive at least three business days before consummation and corrected disclosures as needed that trigger an additional waiting period, as discussed below in the section-by-section analysis of proposed commentary on § 226.19(a)(2)(iii).

to wait until the consumer receives the disclosures required by § 226.19(a)(1)(ii) to deposit the check. A consumer who gives a creditor or other person a negotiable instrument such as a check for payment has paid a fee. Post-dating a check for a date after the consumer is expected to receive the early disclosures does not prevent the check from being deposited immediately. A consumer's account may be charged when a properly payable check is presented, even if the check is post-dated, unless the consumer gives the bank notice of the post-dating and describes the check with reasonable certainty. *See* U.C.C. 4–401(c). Moreover, a consumer who provides to a consumer a check for payment of fees may feel financially committed to the transaction before he or she has had an opportunity to review the credit terms offered.

For further example, proposed comment 19(a)(1)(ii)–4 states that a fee is imposed if a creditor uses a consumer's credit card or debit card to initiate payment or places a hold on the consumer's account. A hold for fees on a consumer's account may constrain a consumer from applying for a mortgage and receiving early disclosures from multiple creditors, contrary to the intent of § 226.19(a)(1)(ii). A creditor may take account information, however, as long as the creditor does not initiate a charge to the consumer's account.

Many applications for mortgage credit request that a consumer provide information identifying a consumer's accounts, including credit card accounts and checking accounts likely linked to a debit card. The Board believes that providing this information does not likely impede consumers from shopping among credit alternatives, provided the information is not used to initiate payment before the consumer receives the early disclosures. Proposed comment 19(a)(1)(ii)–4 therefore states that a fee is not imposed if a creditor takes a number, code, or other information that identifies a consumer's account before a consumer receives the disclosures required by § 226.19(a)(1)(i), but does not use the information to initiate payment from or place a hold on the account until after the consumer receives the required disclosures.

The Board also proposes to revise comment 19(a)(1)(ii)–1, regarding the timing of fees, to cross-reference the right to a refund of fees imposed within three days after a consumer receives the required disclosures under proposed § 226.19(a)(1)(iv), discussed below in the section-by-section analysis of proposed § 226.19(a)(1)(iv). In addition, the Board proposes to revise comment 19(a)(1)(ii)–2, regarding the types of fees that may not be imposed before a consumer receives the early disclosures, to discuss the treatment of fees for housing or credit counseling. Proposed comment 19(a)(1)(ii)–2 states that under proposed § 226.19(a)(1)(v), if housing or credit counseling is required by applicable law, a *bona fide* and reasonable charge imposed by a counselor or counseling agency is not a "fee" for purposes of § 226.19(a)(1)(ii).

The Board requests comment on the proposed commentary illustrating circumstances where a fee is or is not imposed. In particular, the Board requests comment on whether the proposed commentary appropriately balances consumers' convenience and consumers' ability to shop among loan offers without feeling financially committed to a particular transaction.

Subsequent Creditors

The Board has received questions regarding whether a creditor may accept a consumer's application made through a third party, such as a mortgage broker, where the consumer previously has paid fees in connection with two or more applications made through the third party that were denied or withdrawn. Comment 19(a)(1)(ii)–3.iii addresses the imposition of fees in a case where a third party submits a consumer's written application to a second creditor following a prior creditor's denial, or the consumer's withdrawal, of an application made to the prior creditor. Comment 19(a)(1)(ii)–3.iii states that, if a fee already has been assessed, the new creditor or third party complies with § 226.19(a)(1)(ii) if it does not collect or impose any additional fee until the consumer receives an early mortgage loan disclosure from the new creditor. That is, the fact that the consumer previously has paid a fee in connection with a mortgage transaction does not foreclose a new creditor or third party from accepting or approving the consumer's application.

The Board proposes to revise comment 19(a)(1)(ii)–3.iii to clarify that the comment applies not only to a second creditor, but to any subsequent creditor. The Board also proposes to clarify that a subsequent creditor may impose a fee for obtaining the consumer's credit history before the consumer receives the early disclosures. That proposed revision conforms comment 19(a)(1)(ii)–3.iii with comments 19(a)(1)(ii)–3.i and –3.ii.

Reverse Mortgages Subject to § 226.33

The Board proposes to add a comment 19(a)(1)(ii)–5 to clarify that three provisions regarding imposing fees apply to reverse mortgages. Under current and proposed § 226.19(1)(ii), fees generally may be imposed after a consumer receives the disclosures required by § 226.19(a)(1)(i). The Board is proposing, however, to prohibit the imposition of a *nonrefundable* fee for three business days after a consumer receives the early disclosures. This proposal is discussed in detail below in the section-by-section analysis of proposed § 226.19(a)(1)(iv). Moreover, under the proposal a creditor or any other person may not impose a nonrefundable fee for a reverse mortgage subject to § 226.33 until after the third business day following the consumer's completion of counseling required under proposed § 226.40(b)(1), as discussed in detail below in the section-by-section analysis of proposed § 226.40(b). Proposed comment 19(a)(1)(ii)–5 clarifies that, for reverse mortgages subject to §§ 226.19 and 226.33, creditors and other persons must comply with the restriction on imposing a nonrefundable fee under § 226.40(b)(2) in addition to the restrictions on imposing fees under § 226.19(a)(1)(ii) and (iv). Proposed comment 19(a)(1)(ii)–5 also cross-references additional clarifying commentary under comment 40(b)(2)–4.i.

19(a)(1)(iii) Exception to Fee Restriction

Currently, § 226.19(a)(1)(iii) provides that a creditor or other person may impose a fee for obtaining a consumer's credit history before the consumer receives the disclosures required by § 226.19(a)(1)(i), provided the fee is *bona fide* and reasonable in amount. The Board now proposes to revise § 226.19(a)(1)(iii) to clarify that a *bona fide* and reasonable fee for obtaining a consumer's credit history need not be refundable, notwithstanding the requirement under proposed § 226.19(a)(1)(iv) that neither a creditor nor any other person may impose a nonrefundable fee for three business days after a consumer receives the early disclosures required by § 226.19(a)(1)(i), discussed below.

19(a)(1)(iv) Imposition of Nonrefundable Fees

Background

Section 226.19(a)(1)(ii) provides that neither a creditor nor any other person may impose a fee (other than a fee for obtaining a consumer's credit history) in connection with a consumer's application for a closed-end, dwelling-secured transaction before the consumer receives the early disclosures, as discussed above in the section-by-section analysis of the provision.

Section 226.19(a)(1)(ii) also provides that if the early disclosures are mailed to a consumer, the consumer is considered to have received them three business days after they are mailed. In adopting the fee imposition restriction, the Board stated that in most instances consumers will receive the early disclosures within three business days and that it is common industry practice to deliver mortgage disclosures by overnight courier. 74 FR 44522, 44593, July 30, 2008. The Board stated further that it had contemplated providing a timeframe longer than three business days for the presumption that a consumer has received the early disclosures but believed that the adopted time frame struck a proper balance between enabling consumers to review their credit terms before making a financial commitment and maintaining the efficiency of automated and streamlined loan processing. *Id.*

Concerns have been raised, however, that under the current rule consumers will not necessarily have adequate time to consider the early disclosures before a fee is imposed. If a fee is imposed immediately after a consumer receives the early disclosures, the consumer may feel financially committed to a transaction he or she has not had adequate time to consider. The restriction on imposing fees under the MDIA and Regulation Z are intended to ensure that consumers are not discouraged from comparison shopping by fees, such as an appraisal fee or a rate-lock fee, that cause them to feel financially committed to the transaction.

The Board's Proposal

To address the concerns discussed above, the Board proposes to require that creditors and other persons refund any fees imposed within three business days after the consumer receives the early disclosures if the consumer decides not to proceed with the transaction. The Board makes this proposal pursuant to the Board's authority under TILA Section 105(a), which authorizes the Board to prescribe regulations to carry out TILA's purposes and to prevent circumvention or evasion of TILA's requirements. TILA's purposes include assuring a meaningful disclosure of credit terms to enable consumers more readily to compare available credit terms and to avoid the uninformed use of credit. 15 U.S.C. 1601(a) and 1604(a). Allowing consumers time to consider the early disclosures without incurring fees would promote the informed use of credit, consistent with TILA's purposes. Moreover, the Board believes the proposed refund right is necessary to prevent the frustration of MDIA's purposes. A consumer who pays an application fee immediately upon receiving disclosures may feel committed to proceed on the terms stated in the early disclosures rather than seek better loan terms from the creditor or from other creditors.

Proposed § 227.19(a)(1)(iv) provides that neither a creditor nor any other person may impose a nonrefundable fee for three business days after a consumer receives the early disclosures required by § 226.19(a)(1)(i). (Proposed § 226.19(a)(1)(iii) provides that a fee for obtaining a consumer's credit history need not be refundable under the proposal, however, as discussed above. This is because creditors generally need to review a consumer's credit history to provide meaningful early disclosures.) Proposed § 226.19(a)(1)(iv) also provides that a creditor or other person must refund any fees paid within three business days after the consumer receives those disclosures upon the consumer's request. Proposed § 226.19(a)(1)(iv) provides, however, that the refund right applies only to a refund request the consumer makes within three business days after receiving the disclosures and only if the consumer decides not to enter into the transaction. That is, under the proposal, a consumer does not have a right to obtain a refund of fees if the consumer decides to enter into the transaction. Moreover, after three business days have elapsed after the consumer receives the early disclosures, a consumer has no right to a refund under proposed § 226.19(a)(1)(iv) even if the consumer decides not to enter into the transaction.

The Board recognizes that the proposal may result in some creditors' refraining from imposing any fees (other than a fee for obtaining the consumer's credit history) until four days after a consumer receives the early disclosures (or longer, if there are intervening non-business days), to avoid having to refund fees. Some creditors may not order an appraisal without collecting a fee from a consumer; in such cases, the proposal may result in some delay in the processing of a consumer's transaction. Further, some creditors may not agree to lock-in an interest rate until a consumer pays a rate-lock fee, and interest rates could increase during the refund period. Other creditors may anticipate that few consumers will request a refund and collect fees during the three-business-day refund period, however. Moreover, the Board believes that the proposed refund right for closed-end mortgages is necessary to implement the purposes of the MDIA. A consumer who pays an application fee immediately upon receiving disclosures likely feels constrained to proceed on the terms stated in the early disclosures rather than seek better loan terms from the creditor or from other creditors. In addition, the Board notes that TILA Section 137(e) and § 226.5b(h) provides a substantially similar refund right for HELOCs. 15 U.S.C. 1647(e).

The Board requests comment on all aspects of the proposal to require that any fee imposed within three business days after the consumer receives the early disclosures for a closed-end loan secured by real property or a dwelling be refundable, discussed in more detail below. In particular, the Board requests comment on differences between HELOCs and closed-end mortgages with respect to the timing of loan processing and the types of fees imposed that may make it difficult for creditors to comply with the proposed refund requirement. The Board also requests comments on such differences that may cause the costs of the proposed refund requirement to outweigh its benefits to consumers.

Business day. Section 226.2(a)(6) provides two definitions of "business day." The general definition provides that a "business day" is a day on which the creditor's offices are open to the public for carrying on substantially all of its business functions. *See* § 226.2(a)(6) and comment 2(a)(6)–1. For purposes of certain provisions, however, a more precise definition applies; in those cases "business day" means all calendar days except Sundays and specified Federal legal holidays. *See* § 226.2(a)(6) and comment 2(a)(6)–2.

For ease of compliance and for consistency with the refund right for HELOCs under § 226.5b(h), the Board proposes to apply the more precise definition of "business day" for the proposed prohibition on imposing a nonrefundable fee for three business days after a consumer received the early disclosures required by § 226.19(a)(1)(i). Proposed comment 19(a)(1)(iv)–1 states that, for purposes of § 226.19(a)(1)(iv), the term "business day" means all calendar days except Sundays and the legal public holidays referred to in § 226.2(a)(6). It is easier to determine when the refund period ends using the more precise definition. Using the more precise definition also would mean that the standard for determining when a waiting period ends is the same for all creditors.

Using the more precise definition of "business day" would not account for differences in when creditors and other persons are open for business to receive a consumer's refund request, however (although a creditor may provide for a refund request to be made when the creditor is not open for business, for example, through the creditor's Internet Web site). Saturday is a "business day" under the more precise definition, and some persons' offices are not open on Saturdays. Further, if a legal public holiday falls on a weekend, some creditors' offices may observe the holiday on a weekday, but the observed holiday is a "business day" under the more precise definition. *See* comment 2(a)(6)–2. The Board requests comment on whether general definition of a "business day" (a day on which a creditor's offices are open to the public for carrying on substantially all of its business functions) is more appropriate than the more precise definition of a "business day" (all calendar days except Sundays and legal public holidays) to use to determine the period during which a consumer may request a refund.

Refund period. Proposed comment 19(a)(1)(iv)–2 states that a fee may be imposed after the consumer receives the disclosures required under § 226.19(a)(1)(i) and before the expiration of three business days, but the fee must be refunded if, within three business days after receiving the required disclosures, the consumer decides not to enter into a loan agreement and requests a refund. This is consistent with comment 5b(h)–1, regarding collection of fees for home equity lines of credit. Proposed comment 19(a)(1)(iv)–2 also states that, under § 226.19(c), a notice of the right to receive a refund is provided in a publication entitled "Key Questions to Ask about Your Mortgage" proposed under the August 2009 Closed-End Proposal.[30] As previously proposed, that publication must be provided at the time an application form is provided to the consumer or before the consumer pays a nonrefundable fee, whichever is earlier. *See* 74 FR 43232, 43329, Aug. 26, 2009. The proposed notice of the refund right is discussed in detail below.

Proposed comment 19(a)(1)(iv)–2 states further that a creditor or other person may, but need not, rely on the presumption under § 226.19(a)(1)(ii) that a consumer a receives the early disclosures three business days after they are mailed to the consumer or delivered to the consumer by means other than delivery in person. The proposed comment clarifies that if a creditor or other person relies on that presumption of receipt, a nonrefundable fee may not be imposed until after the end of the sixth business day following the day disclosures are mailed or delivered by means other than in person.

Proposed comment 19(a)(1)(iv)–2 also provides examples that illustrate how to determine when the refund period ends. For example, proposed comment 19(a)(1)(iv)–2.i illustrates a case where a creditor receives a consumer's application on Monday, and the consumer receives the early disclosures in person on Tuesday and pays an application fee that same day. Proposed comment 19(a)(1)(iv)–2.i clarifies that the fee must be refundable through the end of Friday, the third business day after the consumer received the early disclosures. For further example, proposed comment 19(a)(1)(iv)–2.ii illustrates a case where a creditor receives a consumer's application on Monday, places the early disclosures in the mail on Tuesday, and relies on the presumption of receipt, such that the consumer is considered to receive the early disclosures on Friday, the third business day after the disclosures are mailed. Proposed comment 19(a)(1)(iv)–2.ii clarifies that if the consumer pays an appraisal fee the next Monday, the fee must be refundable through the end of Tuesday, the third business day after the consumer received the early disclosures and the sixth business day after the disclosures were mailed.

Proposed comment 19(a)(1)(iv)–2.iii illustrates a case where a creditor receives a consumer's application on Monday and places the early disclosures in the mail on Wednesday, and the consumer receives the disclosures on Friday. Proposed comment 19(a)(1)(iv)–2.iii clarifies that if the consumer pays an application fee the following Wednesday, the fee need not be refundable because the refund period expired at the end of the previous day, Tuesday, the third business day after the consumer received the early disclosures.

Reverse mortgages subject to § 226.33. The Board proposes to add a comment 19(a)(1)(iv)–3 to clarify that two provisions regarding imposing nonrefundable fees apply to reverse mortgages. The Board is proposing to prohibit the imposition of a *nonrefundable* fee for three business days after a consumer receives the early disclosures, as discussed in detail below in the section-by-section analysis of proposed § 226.19(a)(1)(iv). Moreover, the Board is proposing to prohibit the imposition of a nonrefundable fee for a reverse mortgage subject to § 226.33 until after the third business day following the consumer's completion of counseling required under proposed § 226.40(b)(1), as discussed in detail below in the section-by-section analysis of proposed § 226.40(b). Proposed comment 19(a)(1)(iv)–3 clarifies that, for reverse mortgages subject to §§ 226.19 and 226.33, creditors and other persons must comply with the restriction on imposing a nonrefundable fee under § 226.40(b)(2) in addition to the restriction on imposing a nonrefundable fee under § 226.19(a)(1)(iv). Proposed comment 19(a)(1)(iv)–3 also cross-references additional clarifying commentary under comment 40(b)(2)–4.ii.

Notice of refund right. The Board proposes to include a notice of the refund right for closed-end mortgages in a proposed Board publication entitled "Key Questions to Ask About Your Mortgage," which under proposed § 226.19(c)(1) and (d) of the August 2009 Closed-End Proposal is provided when an application form is provided to a consumer. *See* 74 FR 43232, 43329, Aug. 26, 2009. The proposed notice reads as follows: "You cannot be charged a fee, other than a credit history fee, until you get disclosures. If you do not want the loan, you have a right to a fee refund, except for a credit history fee, for three days after you get the disclosures." The Board requests comment on the content of the proposed notice of the refund right under proposed § 226.19(a)(iv). *See* Attachment B.

The Board also solicits comment regarding the timing and placement of the refund right notice for closed-end mortgages. On the one hand, notifying consumers of a refund right in a "Key Questions" publication may help consumers to comparison shop with confidence, knowing that they need not incur fees before they decide to proceed with a transaction. On the other hand, if a consumer pays a fee within three business days after receiving the early disclosures, the consumers may not remember that the fee is refundable. The Board requests comment regarding whether notice of the refund right under proposed § 226.19(iv) should be included in a "Key Questions" document provided when an application form is provided to the consumer, in transaction-specific disclosures provided soon after a creditor receives a consumer's application, in both documents, or in some other manner.

19(a)(1)(v) Counseling Fee

The Board has received questions regarding whether § 226.19(a)(2)(ii) prohibits the imposition of a fee for housing counseling required before a creditor may process an application for a reverse mortgage that is insured by the

[30] The proposed publication was published at 74 FR 43232, 43425, Aug. 26, 2009.

Federal Housing Administration of HUD (known as a Home Equity Conversion Mortgage or HECM), before the consumer receives the early disclosures. The MDIA's prohibition of imposing fees (other than a fee for obtaining a consumer's credit history) before a consumer receives the early disclosures is designed to help ensure that consumers receive the early disclosures without being financially committed to a transaction. That prohibition can facilitate comparison shopping of loans by consumers.

The housing counseling requirement for HECMs is intended to ensure that consumers considering a reverse mortgage receive information about the costs, benefits, and features of HECMs. This information may assist consumers in deciding whether to apply for a reverse mortgage, or seek other financial options. The Board believes that the information consumers receive from HECM housing counseling improves their ability to make such a decision, and to comparison shop for loans, as does the MDIA's prohibition on imposing fees before a consumer receives the early disclosures. The Board also believes that a fee assessed for HECM housing counseling is not likely to constrain a consumer from applying for loans with multiple creditors. In contrast with fees that different creditors each may impose, such as an application fee, a fee for HECM housing counseling need be paid only once. A consumer's completion of HECM housing counseling satisfies the counseling requirement with respect to any HECM application the consumer makes within 180 days, as discussed below in the section-by-section analysis of proposed § 226.40(b)(3).

For the foregoing reasons, the Board does not believe that Congress intended the MDIA's fees restriction to apply to fees for HECM housing counseling that are imposed before the consumer receives the early TILA disclosures. Proposed § 226.19(a)(1)(v) provides that if housing or credit counseling is required by applicable law, a *bona fide* and reasonable charge imposed by a counselor or counseling agency for such counseling is not a "fee" for purposes of § 226.19(a)(1)(ii). Proposed § 226.19(a)(1)(v) and proposed comment 19(a)(1)(v)–1 state further that such a counseling fee need not be refundable under proposed § 226.19(a)(1)(iv). Proposed comment 19(a)(1)(v)–1 also states that a HECM counseling fee is an example of a fee that may be imposed before a consumer receives the early disclosures.

The example of a HECM counseling fee is illustrative and not exclusive. Credit or housing counseling may be required by applicable law for a closed-end mortgage transaction other than a HECM, to help consumers make informed credit decisions. Proposed § 226.19(a)(1)(ii) therefore applies broadly to a fee for credit or housing counseling required by applicable law. The Board solicits comment about whether there are other types of fees that should not be considered imposed in connection with a consumer's application for a mortgage transaction, for purposes of the fee imposition restriction under § 226.19(a)(1)(ii).

19(a)(2)

19(a)(2)(i) Seven-Business-Day Waiting Period

Section 226.19(a)(2)(i) provides that a creditor must deliver or place in the mail the early disclosures required by § 226.19(a)(1)(i) no later than the seventh business day before consummation of the transaction. Comment 19(a)(2)(i)–1 states that the seven-business-day waiting period begins when the creditor delivers the early disclosures or places them in the mail, not when the consumer receives or is deemed to have received the early disclosures. (By contrast, the three-business-day waiting period after a creditor makes corrected disclosures is determined based on when the consumer receives the corrected disclosures. § 226.19(a)(2)(ii); comments 19(a)(2)(ii)–1 and –3.) Comment 19(a)(2)(i)–1 states, for example, that if a creditor delivers the early disclosures to a consumer in person or places them in the mail on Monday, June 1, consummation may occur on or after Tuesday, June 9, the seventh business day following delivery or mailing of the early disclosures.

The Board has received questions regarding how delivering or mailing the early disclosures on a Sunday or a legal public holiday affects when the seven-business-day waiting period ends. The fact that Sundays and legal public holidays are not business days for purposes of waiting periods under § 226.19(a)(2) (*see* comment 19(a)(2)–1) does not affect when the seven-business-day waiting period ends, because the first day of the waiting period is the first business day *after* the early disclosures are delivered or placed in the mail. This is clarified by the example provided in comment 19(a)(2)(i)–1, discussed above. The Board proposes to revise comment 19(a)(2)(i)–1 for clarity. The Board proposes further to revise the example in comment 19(a)(2)(i)–1 to be based on a case where the early disclosures are delivered or placed in the mail on Sunday, for additional clarity.

Proposed comment 19(a)(2)(i)–1 states that the seven-business-day waiting period after a creditor mails or delivers the early disclosures is counted starting with "the first business day after" (rather than "when") the creditor delivers the early disclosures or places them in the mail. Proposed comment 19(a)(2)(i)–1 states further, for example, that if a creditor delivers the early disclosures to a consumer in person or places them in the mail on Sunday, May 31, consummation may occur on or after Monday, June 8, the seventh business day following delivery or mailing of the early disclosures.

The proposed revisions are technical amendments for clarity and no substantive change is intended. The examples provided in existing commentary regarding when a consumer is presumed to receive disclosures or when a waiting period ends illustrate that such period is counted starting with the day after disclosures are mailed (not the day disclosures are mailed). *See, e.g.,* comments 19(a)(2)(ii)–1 and –4.

19(a)(2)(iii) Additional Three-Business-Day Waiting Period

Section 226.19(a)(2)(ii) provides that a creditor must make corrected disclosures with all changed terms if the APR disclosed in the early disclosures required by § 226.19(a)(1)(i) becomes inaccurate, as defined in § 226.22. (Section 226.22 is discussed in detail below in connection with proposed revisions.) Under the August 2009 Closed-End Proposal, the Board proposed to require creditors to provide a "final" TILA disclosure in all cases for closed-end mortgage transactions secured by a dwelling or real property; a consumer would have to receive those disclosures at least three business days before consummation.[31] The Board also proposed two alternative requirements for corrected disclosures thereafter, each under proposed § 226.19(a)(2)(iii). Under Alternative 1, a creditor must provide corrected disclosures if any disclosed term becomes inaccurate. Under Alternative 2, the creditor must provide corrected disclosures only if the disclosed APR becomes inaccurate under § 226.19(a)(2)(iv) or if a fixed-rate mortgage becomes an adjustable-rate mortgage.[32] The Board proposes

[31] For a detailed discussion of the proposed requirement for final disclosures and alternative proposals for corrected disclosure requirements, see 74 FR 43232, 43258–43262, Aug. 26, 2009.

[32] Under proposed § 226.19(a)(2)(iv), an APR disclosed under proposed § 226.19(a)(2)(ii) or (iii) is

Continued

revisions to commentary under both Alternative 1 and Alternative 2, discussed in detail below.

Alternative 1—Proposed § 226.19(a)(2)(iii)

Under Alternative 1, proposed comment 19(a)(2)(iii)–1 discusses whether or not an APR change requires a creditor to provide corrected disclosures, after providing final disclosures. The comment is intended to clarify that if the APR changes but the disclosed APR is accurate under the applicable tolerance, a creditor may provide corrected disclosures at consummation. The Board proposes to revise proposed comment 19(a)(2)(iii)–1 under Alternative 1 to clarify that the comment is limited to cases where only the APR changes. If a term other than the APR changes, the creditor must provide corrected disclosures that the consumer must receive at least three business days before consummation, even if the disclosed APR is accurate.

Alternative 2—Proposed § 226.19(a)(2)(iii)

Section 226.19(a)(2)(ii) provides that a creditor must make corrected disclosures with all changed terms if the APR disclosed in the early disclosures required by § 226.19(a)(1)(i) becomes inaccurate, as defined in § 226.22. The Board has clarified that corrected disclosures are not required as a result of APR changes if the disclosed APR is accurate under the tolerances in § 226.22. 74 FR 23289, 23293, May 19, 2009 (final rule implementing the MDIA). The Board also has explained that, under § 226.22(a)(4), a disclosed APR is considered accurate and does not trigger corrected disclosures if it results from a disclosed finance charge that is greater than the finance charge required to be disclosed (*i.e.,* the finance charge is overstated). 74 FR 43232, 43261, Aug. 26, 2009. Nevertheless, the Board continues to receive questions regarding the application of the special APR tolerances for mortgage transactions under § 226.22(a)(4) and (5) to the requirement to provide corrected disclosures under § 226.19(a)(2)(ii).

To address those questions, the Board proposes to revise certain examples in the commentary under Alternative 2 to reflect that all of the tolerances under § 226.22, not only the tolerances under § 226.22(a)(2) and (3), apply in determining whether a disclosed APR is accurate.[33] As proposed under the August 2009 Closed-End Proposal, comment 19(a)(2)(iii)–1 states that, if a disclosed APR changes so that it is not accurate under § 226.19(a)(2)(iv) or an adjustable-rate feature is added, the creditor must make corrected disclosures of all changed terms so that the consumer receives them not later than the third business day before consummation. Proposed comment 19(a)(2)(iii)–1 also contains an example that illustrates when consummation may occur in such case. The Board proposes to remove the example from comment 19(a)(2)(iii)–1 and insert a cross-reference to a more detailed example in comment 19(a)(2)(iii)–4.

The Board also proposes to revise proposed comment 19(a)(2)(iii)–4 to clarify that an APR disclosed for a regular transaction is considered accurate not only if the APR is accurate under the tolerance of ⅛ of 1 percentage point under § 226.22(a)(2), but also if the disclosed APR is accurate under the special tolerance for mortgage transactions set forth in § 226.22(a)(4) or (a)(5) (and no other tolerance applies under proposed § 226.19(a)(2)(iv)). Similarly, an APR disclosed for an irregular transaction is accurate not only if the APR is accurate under the tolerance of ¼ of 1 percentage point for an irregular transaction under § 226.22(a)(3), but also if the disclosed APR is accurate under the special tolerance for mortgage transactions set forth in § 226.22(a)(4) or (a)(5) (and no other tolerance applies under proposed § 226.19(a)(2)(iv)).

Under the August 2009 Closed-End Proposal, proposed comment 19(a)(2)(iii)–2 states that, if corrected disclosures are required under proposed § 226.19(a)(2)(iii), a creditor may provide a complete set of new disclosures or may redisclose only the changed terms. This is consistent with current comment 19(a)(2)(ii)–2.

The Board proposes to revise proposed comment 19(a)(2)(iii)–2 under Alternative 2 to state that if a creditor does not provide a complete set of new disclosures, corrected disclosures must contain the changed terms *and* certain general disclosures required by previously proposed § 226.38(f) and (g) ("no obligation," security interest, "no refinance guarantee," and tax deductibility statements) and the identities of the creditor and loan originator.[34] The Board believes that requiring the foregoing disclosures in corrected disclosures would provide important information to consumers and would impose minimal, if any, burdens on creditors.

19(a)(3) Consumer's Waiver of Waiting Period Before Consummation

TILA Section 128(b)(2)(E), added by the MDIA, provides that a consumer may waive or modify the waiting periods between when a creditor provides early disclosures or corrected disclosures and consummation of a closed-end, dwelling-secured transaction, if the consumer determines that the extension of credit is needed to meet a *bona fide* personal financial emergency.[35] 15 U.S.C. 1638(b)(2). The waiver statement must bear the signature of "all consumers entitled to receive the disclosures" required by TILA Section 128(b)(2). *Id.* The Board implemented TILA Section 128(b)(2)(E) in § 226.19(a)(3). Section 226.19(a)(3) provides that, to modify or waive a waiting period required by § 226.19(a)(2), a consumer must 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 primarily liable on the legal obligation.[36] Printed forms are prohibited.

The requirements for waiving a pre-consummation waiting period under § 226.19(a)(3) are substantially similar to the requirements for waiving a pre-consummation waiting period under § 226.31(c)(1)(iii) and waiving the right to rescind under §§ 226.15(e) and 226.23(e). Over the years, creditors have asked the Board to clarify the procedures for waiver and provide additional examples of a *bona fide* personal financial emergency.

considered accurate as provided by § 226.22, except that in certain specified circumstances the APR is considered accurate if the APR decreases from the previously disclosed APR. *See* 74 FR at 43261, 43326–43327.

[33] The proposed revision is not necessary in the commentary on § 226.19(a)(2)(iii) under Alternative 1, because Alternative 1 would require creditors to provide corrected disclosures if any disclosed terms become inaccurate. A change that affects the APR likely would affect other terms and trigger corrected disclosures whether or not the disclosed APR becomes inaccurate. Therefore, commentary that illustrates whether or not a creditor must provide corrected disclosures where the APR changes is not provided under Alternative 1.

[34] For a discussion of those proposed general disclosures, see 74 FR 43232, 43309–43312, Aug. 26, 2009.

[35] Currently, if the APR stated in early disclosures changes beyond a specified tolerance, creditors must provide corrected disclosures that the consumer must receive at least three business days before consummation. § 226.19(a)(2)(ii). Under the August 2009 Closed-End Proposal, the Board proposed to revise § 226.19(a)(2)(ii) to require creditors, in all cases, to provide final disclosures that a consumer must receive at least three business days before consummation of a credit transaction secured by real property or a dwelling, as discussed above.

[36] A consumer need not waive a waiting period entirely and may modify—that is, shorten—a waiting period. References in this Supplementary Information and in commentary on § 226.19(a)(3) to waiver of a waiting period also refer to modification of a waiting period.

For the reasons discussed in the section-by-section analysis of § 226.23(e), the Board proposes to provide additional guidance regarding when a consumer may waive a waiting period. The proposed revisions clarify the procedure to be used for a waiver. The proposed revisions also provide new examples of a *bona fide* personal financial emergency, in addition to the current example of an imminent foreclosure sale. *See* comment 19(a)(3)–1. The Board proposes these new examples as non-exclusive illustrations of other *bona fide* personal financial emergencies that may justify a waiver of the right to rescind. The Board also proposes examples of circumstances that are not *bona fide* personal financial emergencies. The Board requests comment on all aspects of the proposed revisions to § 226.19(a)(3).

Procedures

Proposed § 226.19(a)(3) and associated commentary clarify that a consumer may modify or waive a waiting period, after the consumer receives the notice required by § 226.38, if each consumer primarily liable on the obligation signs and gives the creditor a dated, written statement that specifically modifies or waives the waiting period and describes the *bona fide* personal financial emergency. Currently, comment 19(a)(3)–1 clarifies that the *bona fide* personal financial emergency is one in which loan proceeds are needed before the waiting period ends. Proposed § 226.19(a)(3) incorporates that provision into the regulation. Other proposed revisions to § 226.19(a)(3) clarify that each consumer primarily liable on the obligation may sign a separate waiver statement; a proposed conforming amendment to comment 19(a)(3)–1 is discussed below. (Disclosure requirements for closed-end credit transactions that involve multiple consumers are discussed above in the section-by-section analysis of proposed § 226.17(d).)

Currently, comment 19(a)(3)–1 states that a consumer may modify or waive the right to a waiting period required by § 226.19(a)(2) only after "the creditor makes" the disclosures required by § 226.18. (Under the August 2009 Closed-End Proposal, § 228.38, rather than § 226.18, sets forth the required content for mortgage disclosures. *See* 74 FR 43232, 43333, Aug. 26, 2009.) Both current and proposed § 226.19(a)(3) provide that a consumer must receive the required disclosures before waiving a waiting period. The Board therefore proposes to revise comment 19(a)(3)–1 to clarify that waiver is permitted only after "the consumer receives" the required disclosures. The Board proposes further to revise comment 19(a)(3)–1 to clarify that where multiple consumers are primarily liable on the legal obligation and must sign a waiver statement, the consumers may, but need not, sign the same waiver statement.

The Board also proposes to move the discussion of circumstances that are a *bona fide* personal financial emergency in comment 19(a)(3)–1 to a new comment 19(a)(3)–2, to conform the waiver commentary under § 226.19(a)(3) with the waiver commentary under §§ 226.15(e) and 226.23(e). Proposed comment 19(a)(3)–2 is discussed below.

Bona Fide Personal Financial Emergency

Proposed comment 19(a)(3)–2 provides clarification regarding *bona fide* personal financial emergencies. The proposed comment contains the current guidance under existing comment 19(a)(3)–1, that whether the conditions for a *bona fide* personal financial emergency are met is determined by the facts surrounding individual circumstances.

Proposed comment 19(a)(3)–2 also states that a *bona fide* personal financial emergency typically, but not always, will arise in situations that involve imminent loss of or harm to a consumer's dwelling or imminent harm to the health or safety of a consumer. Proposed comment 19(a)(3)–2 states further that a waiver is not effective if a consumer's waiver statement is inconsistent with facts known to the creditor. The comment is not intended to impose a duty to investigate consumer claims.

In addition, proposed comment 19(a)(3)–2 states that creditors may rely on examples and other commentary provided in comment 23(e)–2 to determine whether circumstances are or are not a *bona fide* personal financial emergency. That commentary is discussed in detail below in the section-by-section analysis of § 226.23(e).

19(b) Adjustable-Rate Loan Program Disclosures

Section 226.19(b) currently requires special disclosure for closed-end transactions secured by a consumer's principal dwelling with a term greater than one year for which the APR may increase after consummation. Section 226.19(b) requires creditors to provide, among other things, detailed disclosures about ARM programs (ARM program disclosures) if a consumer expresses an interest in an ARM. ARM program disclosures must disclose the index or formula used in making adjustments and a source of information about the index or formula, among other information. § 226.19(b)(2)(ii). If interest rate changes are at the creditor's discretion, this fact must be disclosed, and if an index is internally defined, such as by a creditor's prime rate, the ARM program disclosures should either briefly describe that index or state that interest-rate changes are at the creditor's discretion. Comment 19(b)(2)(ii)–2.

Under the August 2009 Closed-End Proposal, the Board proposed to revise § 226.19(b) to change the content and format of ARM program disclosures required for ARMs defined in proposed § 226.38(a)(3), with certain exclusions.[37] With respect to an ARM's index, the Board proposed to require that ARM program disclosures state the index or formula used in making adjustments, a source of information about the index or formula, and an explanation of how the interest rate will be determined when adjusted, including an explanation of how the index is adjusted. *See* proposed § 226.19(b)(1)(iii), 74 FR 43232, 43328, Aug. 26, 2009. The August 2009 Closed-End Proposal retained comment 19(b)(2)(ii)–2, regarding interest rate changes based on an internally defined index, and proposed to redesignate that comment as comment 19(b)(1)(iii)–2.

As discussed in detail below, the Board requests comment on whether to require the use of an index that is outside a creditor's control and publicly available. The Board also proposes a minor conforming amendment to comment 19(b)–1 consistent with the Board's proposal, for reverse mortgages, to require creditors to provide disclosures specific to reverse mortgages rather than general disclosures for closed-end mortgages. That proposal is discussed below in the section-by-section analyses of proposed § 226.19(e) and 226.33(b).

Index Within Creditor's Control

TILA does not prohibit using an index within a creditor's control for purposes of a closed-end ARM. For open-end credit transactions, however, TILA restricts the use of such an index. TILA Sections 137(a) and 171(a) and (b) prohibit a creditor from using an index within its control, for purposes of a variable-rate HELOC or a credit card account under an open-end consumer credit plan that is not home-secured (credit card account). 15 U.S.C. 1647(a), 1666i–1(a), (b). TILA Section 137(a) provides that, for variable-rate HELOCs, the index or other rate of interest to

[37] For a discussion of the proposed revisions to the content and format of ARM program disclosures, *see* 74 FR 43232, 43262–43269, Aug. 26, 2009.

which changes in the APR are related must be "based on an index or rate of interest which is publicly available and is not under the control of the creditor." 15 U.S.C. 1637(a). Section 226.5b(f)(1) implements TILA Section 137(a). TILA Section 171(a) provides that, for a credit card account, a card issuer may not increase any APR, rate, fee, or finance charge applicable to any outstanding balance, except as permitted under TILA Section 171(b). 15 U.S.C. 1666i–1(a). TILA Section 171(b)(2) provides an exception for an increase in a variable APR in accordance with a credit card agreement that provides for changes in the rate according to the operation of an index that is *not* under the control of the creditor and is available to the general public. 15 U.S.C. 1666i–1(b)(2). Section 226.55(b)(2) implements TILA Section 171(b)(2).

The Board believes that use of an index within a creditor's control, such as a creditor's own cost of funds, for closed-end mortgages has not been common in recent years but does occur. Although TILA does not prohibit using an index within a creditor's control, federally chartered banks and thrifts may be subject to rules that prohibit using such an index. OCC regulations generally require that an ARM index used by a national bank be "readily available to, and verifiable by, the borrower and beyond the control of the bank." 12 CFR 34.22(a). Similarly, OTS regulations generally provide that any index a Federal savings association uses for ARMs must be "readily available and independently verifiable" and must be "a national or regional index." 12 CFR 560(d)(1). An exception applies if a national bank or Federal savings association notifies the OCC or the OTS, respectively, of its use of an index that does not meet the applicable standard and the OCC or OTS does not notify the institution that such use presents supervisory concerns or raises significant issues of law or policy. 12 CFR 34.22(b); 12 CFR 560.35(d)(3). If the OCC or the OTS notifies an institution of such concerns or issues, the institution may not use the index without prior written approval. *Id.*

The Board solicits comment on whether Regulation Z should prohibit the use of an index under a creditor's control for a closed-end ARM and require the use of a publicly available index. What, if any, are the potential benefits to consumers of using an index within a creditor's control, such as a creditor's own cost of funds, for closed-end ARMs? What are the risks to consumers of using such an index? Are interest rates higher or more volatile when creditors base ARMs' interest rates on their own internal index rather than on an index not under their control and available to the general public? Is the use of an index within a creditor's control more common with certain types of creditors (for example, community banks), in certain regions of the country, or for certain types of closed-end ARMs and if so, why?

Reverse Mortgages

Under the August 2009 Closed-End Proposal, the Board proposed to expand the coverage of § 226.19(b). Currently, § 226.19(b) applies to a closed-end credit transaction secured by the consumer's principal dwelling with a term greater than one year, if the APR may increase after consummation. Under the August 2009 Closed-End Proposal, § 226.19(b) generally would apply to a closed-end credit transaction if the APR may increase and the transaction is secured by real property or a consumer's dwelling.[38] *See* proposed §§ 226.19(b) and 226.38(a)(3), 74 FR 43232, 43327, 43333, Aug. 26, 2009.

Comment 19(b)–1 currently clarifies the coverage of § 226.19(b) and discusses particular transaction types. Under the August 2009 Closed-End Proposal, comment 19(b)–1 would be revised consistent with the proposed expansion of the coverage of § 226.19(b). The Board now is proposing, however, to except reverse mortgages from the requirement to provide ARM program disclosures, as discussed below in the section-by-section analysis of proposed §§ 226.19(e) and 226.33(b). The Board therefore now proposes a conforming amendment to comment 19(b)–1 to state that § 226.19(b) does not apply to reverse mortgages subject to § 226.33(a). For ease of reference, this proposal republishes the previously proposed revisions to proposed comment 19(b)–1.[39] The Board requests that interested parties limit the scope of their comments to the newly proposed change to comment 19(b)–1.

19(e) Exception for Reverse Mortgages

Section 226.19(b) currently requires creditors to provide detailed disclosures about adjustable-rate loan programs and a booklet entitled *Consumer Handbook on Adjustable Rate* Mortgages (CHARM booklet) if a consumer expresses an interest in ARMs. Section 226.19(b) applies to closed-end transactions secured by a consumer's principal dwelling with a term greater than one year. Under the August 2009 Closed-End Proposal, the Board proposed to revise the information required under § 226.19(b) for ARM program disclosures and to remove the requirement to provide the CHARM booklet.[40] The Board also proposed to add a new § 226.19(c) requiring creditors to provide two proposed publications, "Key Questions to Ask About Your Mortgage" and "Fixed vs. Adjustable Rate Mortgages," whether or not a consumer expresses an interest in ARMs. Previously proposed § 226.19(d) provides timing requirements for the disclosures required by § 226.19(c) and (d). For reverse mortgages, the Board is proposing to require creditors to provide a separate "Key Questions about Reverse Mortgage Loans" publication. The Board therefore proposes to except reverse mortgages from the requirements of § 226.19(b) through (d).

Section 226.20 Subsequent Disclosure Requirements

20(a) Refinancings: Modifications to Terms by the Same Creditor

Background

For closed-end credit transactions, existing § 226.20(a) applies to "refinancings" undertaken by the original creditor or the current holder or servicer of the original obligation. Section 226.20(a) provides that a refinancing by the original creditor or the current holder or servicer of the original obligation is a new transaction requiring the creditor to provide new TILA disclosures to the consumer. A refinancing by any other person is, in all cases, a new transaction under Regulation Z subject to a new set of disclosures, and is not governed by the provisions in § 226.20(a). For all refinancings, the prohibitions in § 226.35 apply if the new transaction is a higher-priced mortgage loan, as defined in § 226.35(a). *See* comments 20(a)–2, –5.

Under § 226.20(a), a refinancing is generally deemed to occur when an existing obligation is satisfied and replaced by a new obligation involving the same parties, "based on the parties' contract and applicable law." *See* comment 20(a)–1. Any change to an agreement by the same parties that does not result in satisfaction and replacement of the existing obligation—

[38] For a discussion of previously proposed exclusions from coverage by proposed § 226.19(b), see proposed comment 19(b)–3, 74 FR 43232, 43397, Aug. 26, 2009.

[39] No changes are proposed to previously proposed § 226.19(b) or to previously proposed commentary, other than the coverage commentary under proposed comment 19(b)–1. Therefore, only the revisions previously proposed to comment 19(b)–1 are republished.

[40] For a discussion of the proposed revisions to the content and format of ARM program disclosures, see 74 FR 43232, 43258–43262, Aug. 26, 2009.

for example, a change in the loan's maturity date—does not require new disclosures under § 226.20(a), with two exceptions: (1) An increase in a variable rate not previously disclosed; or (2) conversion from a fixed rate to a variable rate. *See* comment 20(a)–3. These two modifications to terms are always considered "refinancings" under Regulation Z, even if the existing obligation is not satisfied and replaced.

On the other hand, the following modifications to terms are *not* treated as new transactions for purposes of Regulation Z, even if "satisfaction and replacement" has occurred: (1) Single payment renewals with no changes in original terms; (2) APR reductions with a corresponding change in payment schedule; (3) judicial proceeding workouts; (4) workouts for delinquent or defaulting consumers, unless the APR increases or new money is advanced; or (5) renewal of optional insurance if disclosures were previously provided. *See* § 226.20(a)(1)–(5).

The Board originally defined the term "refinancing" and established it as an event requiring new disclosures to address the practice of "flipping," in which a loan involving pre-computed financed charges was prepaid and replaced with a new obligation between the same parties. *See* 34 FR 2009, Feb. 11, 1969. The Board believed that disclosures for these refinancings would arm consumers with information regarding the impact of "flipping" on their credit terms. Under the 1969 definition of "refinancing," almost any post-consummation modification to terms created a "new credit transaction" that required new TILA disclosures, with few clear exceptions. This standard proved complex and resulted in many requests for interpretation and guidance. In response, the Board issued several interpretive letters to clarify, for example, that judicial workouts were exempt, but not workouts for delinquent or defaulting consumers.

In 1980, the Board re-examined the definition of refinancing in connection with implementing the TILA Simplification Act. The Board initially proposed a broad definition that depended largely on the mutual intent of both parties to the agreement. *See* 45 FR 29726, 29749, May 5, 1980. Many commenters, mostly from industry, asserted that the definition was too broad, vague, and difficult to apply. 45 FR 80648, 80685, Dec. 5, 1980. The Board issued a second proposal in December 1980, ultimately adopted in 1981, setting forth the current definition: "A refinancing occurs when an existing obligation that was subject to this subpart is satisfied and replaced by a new obligation undertaken by the same consumer." § 226.20(a). The Board believed that this definition would provide a more precise standard that aligned with industry use of the term, and would cover modifications to terms that are similar to new credit transactions. 46 FR 20882, 20903, Apr. 7, 1981.

Concerns With the Current Definition of "Refinancing"

Since 1981, creditors have frequently requested guidance on the types of modifications to an existing obligation that constitute a refinancing under existing § 226.20(a). As discussed above, whether a refinancing occurs under Regulation Z depends on whether the existing obligation is satisfied and replaced under applicable State law. However, court decisions on satisfaction and replacement are inconsistent. State courts take a case-by-case approach to ascertain the parties' intent before deciding whether an existing note was satisfied and replaced by a new note (*i.e.,* novation).[41] Many cases focus on determining lien priorities and the equitable interests of sureties or guarantors, not on protecting the interests of consumers.[42]

Reliance on State law to determine whether a refinancing occurs under Regulation Z has led to inconsistent application of TILA and Regulation Z and, in some cases, opportunities to circumvent disclosure requirements. Compliance and enforcement are also difficult, as creditors and examiners must monitor and interpret State case law. In some states, promissory notes routinely include a statement that the parties do not intend to extinguish (*i.e.,* satisfy and replace) the existing obligation. As a result, transactions involving the same creditor are rarely considered refinancings in those states, even when the creditor makes significant modifications to the terms of the existing obligation. To avoid long-term interest rate risk, some creditors that hold loans in portfolio will structure mortgage transactions as short-term balloon loans, which they modify shortly before the balloon comes due on the note. The modification may include an increase in the consumer's interest rate, but may not be a refinancing under current Regulation Z. Some creditors may provide TILA disclosures in these circumstances, but they need not do so, and the protections in § 226.35 for higher-priced mortgage loans do not apply. *See* 73 FR 44522, 44594, July 30, 2008.

In addition, in certain states, a refinancing may be structured as a modification to avoid State taxes on the refinancing.[43] The modifications to the consumer's existing obligation can be significant, and may even involve substitution of a new creditor for the existing creditor through assignment of the note before the modification occurs. Under some states' laws, however, satisfaction and replacement has not occurred. These arrangements may help the consumer avoid paying taxes associated with a refinancing in certain states, but consumers are not entitled to new TILA disclosures to help them fully understand the costs of the new transaction, and may not have a right to rescind under § 226.23 or the protections in § 226.35 if the modified loan is a higher-priced mortgage loan.

The Board's Proposal

The Board is proposing a new standard for determining when new disclosures are required. Under the proposal, new disclosures would be required for mortgage transactions when the existing parties agree to modify certain key terms, such as the interest rate or loan amount. The proposal would replace the existing standard of "satisfaction and replacement," which requires an assessment of whether the existing legal obligation is satisfied and replaced under applicable State law. Instead, under the proposal, when existing parties to a mortgage transaction agree to modify certain terms, the creditor would have to give the consumer a complete new set of TILA disclosures. At the same time, the proposal would expressly provide that changing certain other terms does not require new disclosures, even if the existing obligation is satisfied and replaced. For non-mortgage transactions, Regulation Z continues to rely upon satisfaction and replacement to determine whether a "refinancing" of the existing obligation between the same

[41] *Compare Temores* v. *Overland Bond and Investment Corp.,* 1999 U.S. Dist. LEXIS 11878 (N.D. Ill. 1999) (finding that a change in payment schedule resulted in "satisfaction and replacement," and therefore, was a "refinancing"), *with Hanson* v. *Central Savings Bk.,* 2007 Mich. App. LEXIS 920 (Ct. App. MI 2007) (holding that a consolidation of several notes, one of which was not originally secured by the mortgage, was not a "refinancing" but a renewal).

[42] *See Citizens & Southern Nat'l Bank* v. *Scheider,* 228 S.E.2d 611 (Ga. App. 1976) (involving the liability of a guarantor); *see also Metro Hampton Co.* v. *Dietrich et al.,* 1999 Mich. App. LEXIS 2274 (Ct. App. MI 1999) (involving the liabilities of guarantors).

[43] For example, New York's mortgage recording tax rates are comparatively high. Consolidations, extensions, and modifications are typically used to allow consumers to avoid this tax; consumers thus pay taxes only to the extent the refinancing exceeds the amount of the original mortgage.

parties is a new transaction that requires new disclosures.

Specifically, proposed § 226.20(a)(1)(i) provides that a new transaction results, and new disclosures are required, when the same creditor and same consumer modify an existing obligation by: (1) Increasing the loan amount; (2) imposing a fee on the consumer in connection with the agreement to modify an existing legal obligation, regardless of whether the fee is reflected in an agreement between the parties; (3) changing the loan term; (4) changing the interest rate; (5) increasing the periodic payment amount; (6) adding an adjustable-rate feature or other risk factor identified in proposed § 226.38(d)(1)(iii) or 226.38(d)(2), such as a prepayment penalty or negative amortization; or (7) adding new collateral that is a dwelling or real property.

Proposed § 226.20(a)(1)(ii) provides three exceptions to the general definition of a new transaction: (1) Modifications that occur as part of a court proceeding; (2) modifications that occur in connection with the consumer's default or delinquency, unless the loan amount or interest rate is increased, or a fee is imposed on the consumer in connection with the modification; and (3) modifications that decrease the interest rate with no additional modifications to terms other than a decrease in the periodic payment amount, an extension of the loan term, or both, and where no fee is imposed on the consumer.

Proposed § 226.20(a)(1)(iii) defines the term "same creditor" for purposes of proposed § 226.20(a)(1). These proposed provisions are explained in further detail below.

Benefits of the proposal. The proposal is intended to bring uniformity to creditors' practices, to facilitate compliance, and to ensure that consumers receive disclosures in all cases in which the loan terms change significantly, risky features are added, or fees are imposed in connection with a modification. In addition, if the transaction is a higher-priced mortgage loan, the proposal ensures that the consumer will receive the protections in § 226.35, including the requirement that the creditor assess the consumer's ability to repay the loan. Proposed § 226.20(a)(1) is intended to ensure more consistent application of TILA and Regulation Z and to diminish possible circumvention of the disclosure requirements. Moreover, the proposal should facilitate compliance and enforcement because creditors and examiners would no longer need to monitor and apply State case law to each transaction to determine whether the transaction requires new disclosures.

The Board believes that when the same parties to an existing closed-end mortgage transaction agree to modify key terms, the modification is the functional equivalent of a "refinancing," and therefore, should be treated as a new credit transaction under TILA and Regulation Z. To further TILA's purpose of promoting the informed use of credit, this proposal requires that, in defined circumstances, consumers receive new TILA disclosures to help them decide whether to proceed with a modification or to shop and compare other available credit options.

In particular, the proposed rule would ensure that consumers receive important information about modifications to key terms of their existing mortgage obligation, such as taking on new debt, a change in the interest rate, or the addition of a risky feature (*e.g.,* a prepayment penalty), and the costs assessed by creditors to modify these terms. These modifications would also be highlighted in the revised TILA disclosures that the Board published for comment in August 2009. *See* 74 FR 43232, Aug. 26, 2009. Thus, the revised disclosures assure a meaningful disclosure of credit terms to apprise consumers of the impact that modifications have on their existing credit terms and the costs of the transaction, and to enable them to compare the modified terms to other credit options.

The Board believes that removing the standard of "satisfaction and replacement" to determine whether a modification results in a "new credit transaction" under TILA and Regulation Z will facilitate compliance and diminish creditors' ability to circumvent TILA and Regulation Z requirements. The proposed rule, however, would not limit states' ability to set their own standards for determining when recording taxes are required or for ordering lien priorities.

Impact of proposal on existing mortgage market. The Board recognizes that proposed § 226.20(a)(1) is comprehensive and would increase the number of transactions requiring new disclosures.[44] Most changes in terms that are now only "modifications" would be new transactions. For example, the Board estimates in those states where refinancings are commonly structured as modifications or consolidations to avoid State mortgage recording taxes, such as New York and Texas, the number of transactions requiring new TILA disclosures could potentially double.[45] The Board does not believe, however, that consumers located in these states would be unable to refinance their mortgages simply because creditors would be required to provide TILA disclosures under the proposal. The Board recognizes that requiring new TILA disclosures in these cases would increase costs to creditors, and that these costs would be passed on to consumers. However, outreach conducted by the Board for this proposal revealed that some large creditors in these states currently provide consumers with TILA disclosures, regardless of whether the transaction is classified as a "refinancing" for purposes of § 226.20(a). In this regard, the proposal appears to align with current industry practice. In addition, the Board emphasizes that the proposal is not intended to affect applicable State law as it relates to the note and mortgage, or other matters. For example, the proposal would not limit states' ability to impose standards for determining when recording taxes are required or the ordering of lien priorities.

The Board also recognizes that some creditors might decline to make some modifications that are beneficial for consumers because of the burden of giving new TILA disclosures and the potential exposure to TILA remedies for errors, including rescission. The proposal seeks to address this issue by providing several clear exceptions. For example, agreements made in connection with consumers' delinquency or default on existing obligations do not require new disclosures, unless the loan amount or interest rate increases, or a fee is imposed on the consumer in connection with the agreement. This exception is intended to ensure that creditors are not discouraged from offering workouts to consumers at risk of losing their homes and who likely do not have other credit

[44] The Board estimates that the number of refinancings that occur annually with the same creditor, and which would be impacted by this proposal, represents approximately 26% of all loans made in the mortgage market. This figure was calculated by taking a sample of refinancing transactions that occurred between 2003 and 2008 from the database of one of the three national consumer reporting agencies, and identifying those transactions that used the same mortgage subscriber code.

[45] This figure was determined by comparing the share of reported refinancing activity (obtained from credit record data reported under HMDA for 2008) of counties located within New York and Texas to counties directly bordering those states. The number of refinancings reported in 2008 for New York was 95,434, and for Texas, 141,733. Under the proposal, the number of refinancings reported could increase up to 190,868 and 283,466, for New York and Texas, respectively.

options. In addition, the proposal provides exceptions for judicial proceeding workouts, and for decreases in the interest rate that lower the periodic payment amount or lengthen the loan term but do not involve an additional fee. The Board notes that the utility of some of these exceptions is limited by the requirement that the creditor not impose a fee on the consumer in connection with the agreement to modify the existing obligation. The Board is seeking comment on the scope of the fee restriction. *See* section-by-section analysis of proposed § 226.20(a)(1)(i)(B) discussing fees, and § 226.20(a)(1)(ii), discussing exceptions.

Moreover, under the proposal, some modifications to the terms of an existing legal obligation would not be new transactions under TILA and Regulation Z, even if State law treats the existing obligation as being satisfied and replaced. For example, a change in the payment schedule that permits the consumer to make bi-weekly rather than monthly payments would not require new TILA disclosures if no other modification identified under the proposed definition of new transaction occurred, even if applicable State law treats the modification as a new transaction.

Certain informal arrangements by the same parties also remain outside the scope of the proposed definition of new transaction for mortgages. Generally, a change to the terms of the legal obligation between the parties requires new disclosures. *See* § 226.17(c)(1) and corresponding commentary. The "legal obligation" is determined by applicable State law or other law, and is normally presumed to be contained in the note or contract that evidences the agreement. *See* comment 17(c)(1)–2. Thus, if an arrangement between the same parties does not rise to the level of a change to the terms of the legal obligation under applicable State law (*i.e.,* a change as evidenced in the note or contract, or by separate agreement), then new disclosures would not be required under proposed § 226.20(a)(1)(i). However, in all cases where a fee is imposed on the consumer in connection with the arrangement, a new transaction requiring new disclosures occurs under proposed § 226.20(a)(1)(i), regardless of whether the fee is reflected in any agreement between the parties. See proposed § 226.20(a)(1)(i)(B) regarding fees. For example, new disclosures would not be required if a creditor informally permits the consumer to defer payments owed on an obligation from time to time, for instance to account for holiday seasons. Under the same example, however, if a creditor imposes a fee on the consumer in connection with the arrangement, a new transaction requiring new disclosures would result under proposed § 226.20(a)(1)(i), regardless of whether the fee is reflected in any agreement between the parties.

As discussed more fully below, the scope of proposed § 226.20(a)(1)(i) is comprehensive and would increase the number of modifications that would result in new transactions subject to the right of rescission. The Board solicits comment on whether the features identified under proposed § 226.20(a)(1)(i)(A)–(G) that would trigger new disclosures, and other applicable requirements under TILA and Regulation Z, such as rescission, are appropriate, including comment on whether the scope of the rule should be narrower or broader.

Authority. The Board is proposing to revise when modifications to terms of an existing legal obligation result in a new credit transaction that requires new TILA disclosures pursuant to its authority under TILA Section 105(a). 15 U.S.C. 1604(a). TILA Section 105(a) authorizes the Board to prescribe regulations and make adjustments or exceptions necessary or proper to carry out TILA's purposes, which include informing consumers about their credit terms and helping them shop for credit, to prevent circumvention or evasion, or to facilitate compliance. TILA Section 102; 15 U.S.C. 1601(a), 1604(a).

Scope of proposed § 226.20(a)(1). Proposed § 226.20(a)(1) applies only to closed-end mortgage transactions secured by real property or dwellings, including vacant land and construction loans. Covering these transactions would be consistent with the Board's August 2009 Closed-End Proposal to improve disclosure requirements and provide other substantive consumer protections for closed-end mortgages secured by real property or a dwelling. *See* 74 FR 43232, Aug. 26, 2009; 73 FR 44522, July 30, 2008.

The Board is not aware of concerns with the existing "refinancing" definition as it relates to non-mortgage transactions. Thus, for closed-end non-mortgage transactions, current § 226.20(a) would be redesignated as § 226.20(a)(2) and would continue to provide that a "refinancing" is a new transaction that occurs upon "satisfaction and replacement," as discussed in further detail below. The Board will determine whether proposed § 226.20(a)(1) should also extend to non-mortgage credit in the next phase of the Board's Regulation Z review.

Definitions for proposed § 226.20(a)(1). Existing § 226.20(a) provides that the "same creditor" is the original creditor, holder or servicer. *See* comment 20(a)–5. Proposed § 226.20(a)(1)(iii) defines "same creditor" as the current holder of the original obligation or the servicer acting on behalf of the current holder.

Proposed section 226.20(a)(1) applies to creditors. Under TILA Section 103(f), a person is a "creditor" when it extends consumer credit and is the person to whom the debt is originally payable (*i.e.,* the original creditor). 15 U.S.C. 1602(f); § 226.2(a)(17). "Credit" is defined as "the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment." TILA Section 103(e); 15 U.S.C. 1602(e); § 226.2(a)(14). The Board believes that any person who makes significant changes to the terms of an existing legal obligation, such as the interest rate or the loan amount, engages in extending credit to the consumer by continuing the extension of debt on different terms and, therefore, is a "creditor" under TILA. Thus, pursuant to its authority under Section 105(a), the Board proposes under § 226.20(a)(1) to treat the current holder or servicer as a creditor when it modifies key terms to the existing obligation, whether the current holder is the original creditor, an assignee or the servicer. 15 U.S.C. 1604(a). For a discussion of differences between this proposal and the Secure and Fair Enforcement for Mortgage Licensing Act (the SAFE Act),[46] see "Impact of Proposed § 226.20(a)(1) on Other Rules," below.

20(a)(1)(i)

Modifications to Terms—Mortgages

Proposed § 226.20(a)(1)(i) provides that, for an existing closed-end mortgage loan secured by real property or a dwelling subject to TILA and Regulation Z, a new transaction requiring new disclosures occurs when the same creditor and same consumer agree to modify the terms of an existing obligation by: (1) Increasing the loan amount; (2) imposing a fee on the consumer in connection with the modification of an existing legal obligation, regardless of whether the fee is reflected in any agreement between the parties; (3) changing the loan term; (4) changing the interest rate; (5) increasing the periodic payment amount; (6) adding an adjustable-rate feature or other risk factor identified in

[46] The SAFE Act is contained in Sections 1501 through 1517 of the Housing and Economic Recovery Act of 2008, Pub. L. 110–289 (July 30, 2008), *codified at* 12 U.S.C. 5101–5116.

proposed § 226.38(d)(1)(iii) or 226.38(d)(2); or (7) adding new collateral that is a dwelling or real property. Each of these modifications to terms is discussed below.

Proposed comment 20(a)(1)(i)–1 provides guidance about the scope of § 226.20(a)(1). Proposed § 226.20(a)(1) applies only to certain modifications to an existing legal obligation that are made by the same creditor (*i.e.,* the current holder or the servicer acting on behalf of the current holder). This comment also clarifies that all other creditors are not subject to § 226.20(a)(1), but must provide TILA disclosures when entering into an agreement to extend credit covered by TILA, and are subject to all other applicable provisions of TILA and Regulation Z.

Proposed comment 20(a)(1)(i)–2 provides that when the same creditor and same consumer modify a term or add a condition that is *not* identified under proposed § 226.20(a)(1)(i), such a modification is *not* a new transaction and therefore, new TILA disclosures are not required. Proposed comment 20(a)(1)(i)–2 provides as an example, a rescheduling of payments under an existing obligation from monthly to bi-weekly with no other modifications to the terms listed under § 226.20(a)(1)(i)(A)–(G).

Proposed comment 20(a)(1)(i)–2 also provides that § 226.20(a)(1) applies only if the modification to terms rises to the level of a change to the terms of an existing legal obligation, as defined under applicable State law, unless a fee is imposed on the consumer. Generally, a change to the terms of the legal obligation between the parties requires new disclosures. *See* § 226.17(c)(1) and corresponding commentary. The "legal obligation" is determined by applicable State law or other law, and is normally presumed to be contained in the note or contract that evidences the agreement. *See* comment 17(c)(1)–2. If the modification does not rise to the level of a change to the terms of the legal obligation under applicable State law, then new disclosures would not be required under proposed § 226.20(a)(1)(i), unless a fee is imposed. However, in all cases where a fee is imposed on the consumer in connection with the modification, a new transaction requiring new disclosures occurs, regardless of whether the fee is reflected in any agreement between the parties. *See* proposed § 226.20(a)(1)(i)(B). Proposed comment 20(a)(1)(i)–2 provides several examples of informal arrangements that would not be new transactions under proposed § 226.20(a)(1).

Proposed comment 20(a)(1)(i)–3 clarifies that a new transaction requires the creditor to provide the consumer with a complete set of new disclosures and also to comply with other applicable provisions of Regulation Z, such as the protections in § 226.35 for higher-priced mortgage loans and the notice of rescission in § 226.23(b). Proposed comment 20(a)(1)(i)–3 provides several examples of when other applicable provisions of Regulation Z, such as the rescission notice requirements under proposed § 226.23(b), may apply.

For mortgage transactions subject to TILA and Regulation Z, applicable disclosures must be provided in accordance with specific timing requirements. For example, under proposed § 226.19(a), creditors must mail or deliver an early disclosure of credit terms to the consumer within three business days after the creditor receives an application and at least seven business days before consummation, and before a fee is imposed on the consumer other than a fee for obtaining the consumer's credit history. Proposed comment 20(a)(1)(i)–4 provides guidance to creditors on when a written application is received for a new transaction for purposes of meeting the timing requirements for disclosures under TILA and Regulation Z. Proposed comment 20(a)(1)(i)–4 cross references existing comment 19(a)(1)(i)–3 (due to technical revisions, now proposed comment 19(a)(1)(i)–2), which states that creditors may rely on RESPA and Regulation X in deciding when a "written application" is received, regardless of whether the transaction is subject to RESPA.

The Board is aware that consumers may not always formally apply for a modification of the terms of an existing obligation. In many cases, the creditor may have in its possession the information in the definition of "application" under RESPA and Regulation X (*e.g.,* the consumer's name, monthly income, or property address). *See* 12 CFR 3500.2(b). Therefore, proposed comment 20(a)(1)(i)–4 also provides that an application is deemed received in those instances where the creditor has the information necessary to constitute an "application" as defined under RESPA and Regulation X, whether the creditor requests the information from the consumer anew or uses information on file.

Proposed comment 20(a)(1)(i)–5 clarifies that if, before the time period provided for the early disclosure requirement expires, the creditor decides it will not or cannot make the modification requested or the consumer withdraws the application, then the creditor need not make the early disclosure of credit terms required by § 226.19(a)(1)(i). This proposed comment also cross references ECOA and Regulation B regarding adverse action notice requirements, which may apply. See 12 CFR 202.9(a).

Increase in the loan amount. Proposed § 226.20(a)(1)(i)(A) provides that a new transaction occurs when the loan amount is increased. "Loan amount" is defined under proposed § 226.38(a)(1) as "the principal amount the consumer will borrow as reflected in the loan contract," and would be required to be disclosed on the revised mortgage disclosures published in the Board's August 2009 Closed-End Proposal. *See* 74 FR 43292, Aug. 26, 2009. An increase in the loan amount represents new debt secured by the consumer's real estate or dwelling. Thus, an increase in the loan amount presents risk to the consumer and merits new disclosures and the protections afforded by Regulation Z.

Under proposed § 226.20(a)(1)(i)(A), the new loan amount would include any cost of the transaction that is financed, but exclude amounts attributable to capitalization of arrearages and funds advanced for existing or newly established escrow accounts. Proposed comment 20(a)(1)(i)(A)–1 clarifies that an increase in the loan amount occurs for purposes of § 226.20(a)(1) when the new loan amount exceeds the unpaid principal balance plus any earned unpaid finance charge or earned unpaid non-finance charge (*e.g.,* a late fee) on the existing obligation. Under the proposal, even if a fee is not part of the new loan amount, it would nevertheless result in a new transaction that requires new disclosures. For example, if a creditor imposes an application or modification fee on the consumer in connection with the agreement to modify terms of an existing obligation, and the consumer pays that fee directly in cash, a new transaction requiring new disclosures would occur. See proposed § 226.20(a)(1)(i)(B) for further discussion of fees imposed on the consumer in connection with the agreement, resulting in a new transaction requiring new disclosures.

Proposed comment 20(a)(1)(i)(A)–2 provides that an increase in the loan amount includes any costs of the transaction, such as points, attorney's fees, or title examination and insurance fees that are financed by the consumer, and provides an example of a transaction where the loan amount is increased because fees are paid from loan proceeds.

Proposed comment 20(a)(1)(i)(A)–3 clarifies that amounts that are advanced to the consumer to fund either an existing escrow account, or a newly established escrow account, are not considered in determining whether an increase in loan amount has occurred under proposed § 226.20(a)(1). RESPA limits the amount creditors may collect for escrows, and therefore, it is unlikely that large advances will be financed into the loan amount to establish or fund an escrow account. *See* 24 CFR 3500.17(c)(1)–(9), (f), and (g). In addition, the Board believes that a creditor is unlikely to establish an escrow account without first notifying the consumer. Thus, the Board believes that any benefit of new TILA disclosures in these instances is outweighed by the burden imposed on creditors.

The Board solicits comment on whether to provide that a *de minimis* increase in the loan amount owed on the existing legal obligation would not trigger a requirement to give new disclosures. If the Board chose to establish a *de minimus* increase, should the increase be stated in terms of a dollar amount, a percentage of the loan, or both? What increase in the loan amount should be considered *de minimus*?

Fees imposed on the consumer. Proposed § 226.20(a)(1)(i)(B) provides that a new transaction occurs when a creditor imposes a fee on the consumer in connection with a modification. The Board believes that including the imposition of fees as an action that results in a new transaction is appropriate to ensure that consumers receive important information about the terms and fees relating to the transaction. On the revised mortgage disclosures published in the Board's August 2009 Closed-End Proposal, costs of the transaction would be disclosed as "total settlement charges," together with required statements regarding the amount of charges included in the loan amount. *See* 74 FR 43292, Aug. 26, 2009. Thus, providing new TILA disclosures when consumers must pay a fee in connection with modifying a term of the existing obligation would ensure that consumers are aware of and review cost information associated with the modification. In this way, consumers would have a meaningful opportunity to shop and compare other available credit options.

Proposed comment 20(a)(1)(i)(B)–1 clarifies that a fee imposed on the consumer in connection with a modification of an existing legal obligation need not be part of a contractual arrangement between the parties to result in a new transaction under § 226.20(a)(1)(i)(B). For example, a creditor may impose an application fee on the consumer, but not reference that fee in the existing agreement or the agreement to modify the terms of an existing obligation. Under the proposal, imposing an application fee would result in a new transaction requiring new disclosures.

Proposed comment 20(a)(1)(i)(B)–2 provides guidance that fees imposed on the consumer in connection with the agreement include any fee that the consumer pays out-of-pocket or from loan proceeds. Proposed comment 20(a)(1)(i)(B)–2 also provides examples of fees under § 226.20(a)(1)(i)(B), such as points, underwriting fees, and new insurance premiums. The commentary further clarifies that charging insurance premiums to continue insurance coverage does not constitute imposing a fee on the consumer under proposed § 226.20(a)(1)(i)(B). For example, where a creditor charges premiums for the continuation of insurance coverage, but does not increase the premiums for existing hazard insurance or require increased property insurance amounts, such costs are not considered fees imposed on the consumer in connection with the agreement. Proposed comment 20(a)(1)(i)(B)–3 states that creditors may rely on proposed comment 19(a)(1)(i)–2 to determine when an application is received for a new transaction subject to proposed § 226.20(a)(1).

The Board recognizes that including any fee imposed on the consumer in connection with the modification as an event triggering disclosures will likely result in a significant number of modifications being deemed "new credit transactions" under TILA. The Board solicits comment on the proposed scope of § 226.20(a)(1)(i)(B) regarding fees. Specifically, the Board seeks comment on whether fees imposed on consumers in connection with a modification should include all costs of the transaction or, for example, only those fees that are retained by creditors or their affiliates. Should the rule further provide that § 226.20(a)(1)(i)(B) does not cover those instances where only a *de minimis* fee is retained by the creditor? What fee amount should be considered *de minimis*? And, should a *de minimis* fee be stated in terms of a dollar amount, a percentage of the loan, or both?

As discussed in greater detail below, the Board proposes several exceptions to the general definition of "new transaction." For example, agreements entered into in connection with the consumer's delinquency or default on the existing obligation, or modifications that decrease the rate are generally not "new transactions" under the proposal. See proposed § 226.20(a)(1)(ii)(B) and (C) discussing these exceptions. However, these exceptions are unavailable if a creditor imposes a fee on the consumer in connection with the agreement to modify the existing legal obligation. The Board is aware that when creditors modify existing obligations in these instances, reasonable fees may be necessary to underwrite and process the loan modification, and that requiring creditors to give a full set of new disclosures for imposing these fees may discourage creditors from offering beneficial arrangements to consumers. Thus, the Board solicits comment on whether an exception should be made for reasonable fees imposed in connection with these modifications. What types of fees, if any, are necessary for these modifications and thus should be permitted under these exceptions, and in what amounts? Are commenters aware of abuses concerning these types of fees, suggesting that they should not be permitted? Should the amount of any fee permitted under these exceptions be stated in terms of a dollar amount, a percentage of the loan, or both? The Board also seeks comment on whether adopting two separate approaches regarding fees unnecessarily complicates the regulatory scheme under TILA and Regulation Z, and whether creditors would take advantage of any exception provided for fees.

Change in the loan term. Under proposed § 226.20(a)(1)(i)(C), a new transaction occurs when the creditor modifies the loan term of the existing obligation. That is, a new transaction requiring new disclosures would occur where the maturity date of the new transaction will occur earlier or later than the maturity date of the existing legal obligation. The loan term is a key piece of information that consumers should be aware of when evaluating a loan offer, as shown by the Board's consumer testing, and would be disclosed on the revised mortgage disclosures published in the Board's August 2009 Closed-End Proposal. *See* 74 FR 43292, 43299 Aug. 26, 2009. Changing the amortization period of a loan can significantly impact the total interest that a consumer must pay over the life of the mortgage. Thus, the Board believes that consumers should receive new TILA disclosures to compare the total cost (expressed as the APR) associated with modifying the existing obligation over an extended or shortened period of time.

Proposed comment 20(a)(1)(i)(C)–1 clarifies that a change in the loan term occurs when the maturity date of the new transaction is earlier or later than the maturity date of the existing obligation, and provides an example of a change in the loan term that would result in a new transaction. Proposed comment 20(a)(1)(i)(C)–1 also cross references proposed § 226.38(a) for the meaning of "loan term."

Change in the interest rate. Proposed § 226.20(a)(1)(i)(D) provides that a new transaction occurs when the creditor changes the contractual interest rate of the existing obligation. The interest rate is one of the most important pieces of information provided to consumers, as shown by the Board's consumer testing, and would be required to be disclosed on the revised mortgage disclosures published in the Board's August 2009 Closed-End Proposal. *See* 74 FR 43239, 43299 Aug. 26, 2009. A change in the interest rate may increase or decrease the cost of the loan and periodic payment obligation. In either case, the Board believes that consumers may wish to explore other credit alternatives before agreeing to a rate change, and therefore should receive TILA disclosures before agreeing to the change.

Proposed comment 20(a)(1)(i)(D)–1 clarifies that, to determine whether an increase or decrease in rate occurs, the creditor should compare the interest rate of the new obligation (the fully-indexed rate for an ARM) to the interest rate for the existing obligation that is in effect within a reasonable period of time—for example, 30 calendar days. The comment also gives examples of when a change in rate does and does not occur. Proposed comment 20(a)(1)(i)(D)–2 clarifies that a rate change stemming from changes in the index, margin, or rate does not result in a new transaction under proposed § 226.20(a)(1) if these changes were disclosed as part of the existing obligation, and provides an example. Proposed comment 20(a)(1)(i)(D)–2 clarifies further that if the rate feature was not previously disclosed, a modification to the rate would be a new transaction requiring new disclosures under proposed § 226.20(a)(1)(i).

Increase in the periodic payment amount. Proposed § 226.20(a)(1)(i)(E) provides that a new transaction occurs when the same creditor increases the periodic payment amount owed on an existing legal obligation. Consumer testing consistently showed that consumers shop for and evaluate a mortgage based on the monthly or periodic payment, as well as the interest rate. *See* 74 FR 43239, 43299, Aug. 26, 2009. The monthly payment helps consumers to determine whether they can afford the loan, and, accordingly, must be highlighted on the proposed mortgage disclosures published in the Board's August 2009 Closed-End Proposal. In keeping with the Board's findings about the importance of the periodic payment amount to consumers, the Board believes that consumers should receive a new TILA disclosure before agreeing to an increase in their monthly or other periodic payment obligation.

The Board solicits comment on whether consumers would benefit from having new TILA disclosures not only for increases in the periodic payment amount, but also for decreases in the payment amount obligation, when no other terms listed in § 226.20(a)(1)(i)(A)–(G) are modified. In addition, the Board solicits comment on whether to allow for *de minimis* differences between the periodic payment amount of an existing obligation and a new transaction, so that new disclosures would not be required for nominal discrepancies between the periodic payment amounts owed. What situations would suggest that a *de minimis* threshold for differences in the periodic payment amount is needed? If the Board adopts a *de minimis* threshold for differences in the periodic payment amount owed, should the threshold be stated in terms of a dollar amount, a percentage of the pre-existing payment, or both? What differences in periodic payment amounts would be so nominal as to be *de minimus*?

Proposed comment 20(a)(1)(i)(E)–1 clarifies that an increase in periodic payment amount based on a payment change previously disclosed on an existing legal obligation is not a new transaction under proposed § 226.20(a)(1)(i), and provides an example. Proposed comment 20(a)(1)(i)(E)–1 also clarifies that if the payment adjustment was not previously disclosed, any change that increases the periodic payment amount would be a new transaction requiring new disclosures under proposed § 226.20(a)(1)(i).

Proposed comment 20(a)(1)(i)(E)–2 clarifies that amounts that are advanced to the consumer to fund either an existing escrow account, or a newly established escrow account, are not considered in determining whether an increase in the payment amount has occurred under proposed § 226.20(a)(1). For further discussion of the Board's rationale for this exception, see the section-by-section analysis to proposed § 226.20(a)(1)(A) ("Increase in the loan amount") above, explaining proposed comment 20(a)(1)(i)(A)–3.

Addition of a risk feature. Proposed § 226.20(a)(1)(i)(F) provides that a new transaction occurs when an adjustable-rate feature one more of the risk features listed in § 226.38(d)(1)(iii) or 226.38(d)(2) is added to the existing obligation, or is otherwise part of the new transaction, as follows: (1) A prepayment penalty; (2) interest-only payments; (3) negative amortization; (4) a balloon payment; (5) a demand feature; (6) no documentation or low documentation; and (7) shared equity or shared appreciation. These features would be required to be disclosed to consumers under the Board's August 2009 Closed-End Proposal, based on the Board's consumer testing. *See* 74 FR 43304, 43335, Aug. 26, 2009. The Board believes that these features can change the fundamental nature of a loan transaction and may significantly increase the cost of the loan or risk to the consumer. For example, some of these terms pose a significant risk of payment shock, such as negative amortization; others, such as shared equity or shared appreciation, entitle creditors to the consumer's future equity. Consequently, the Board believes that when one or more of these features is added to an existing obligation, the consumer should receive new TILA disclosures and, if applicable, the right to rescind and the special protections in § 226.35.

Proposed comment 20(a)(1)(i)(F)–1 clarifies that changing the underlying index or formula upon which the interest rate calculation is based constitutes adding an adjustable-rate feature (unless the change was previously disclosed, see proposed § 226.20(a)(1)(i)(D)) and, therefore, is a new transaction under proposed § 226.20(a)(1)(i)(F). Proposed comment 20(a)(1)(i)(F)–1 provides further guidance that a new transaction does not result where the original index or formula becomes unavailable and is substituted by an alternative index or formula with substantially similarly historical rate fluctuations, and that produces a rate similar to the rate that was in effect at the time the original index or formula became unavailable.

Proposed comment 20(a)(1)(i)(F)–2 clarifies that if a creditor adds a feature listed under proposed § 226.38(d)(1)(iii) or 226.38(d)(2), such as a prepayment penalty, balloon payment, or negative amortization, a new transaction requiring new TILA disclosures occurs.

Addition of new collateral. Proposed § 226.20(a)(1)(i)(G) provides that adding real property or a dwelling as collateral to secure the existing obligation results in a new transaction requiring new disclosures. This approach ensures that consumers are notified of modifications to key credit terms of an existing obligation when they pledge assets as significant as a dwelling or real estate.

20(a)(1)(ii)

Exceptions

Currently, § 226.20(a) provides that, for closed-end credit transactions, the following modifications to terms are not new transactions even if "satisfaction and replacement" occurs: (1) Single payment renewals with no changes in original terms; (2) APR reductions with a corresponding change in payment schedule; (3) judicial proceeding workouts; (4) workouts for delinquent or defaulting consumers, unless the APR increases or new money is advanced; and (5) renewal of optional insurance if disclosures were previously provided.

The Board is proposing under § 226.20(a)(1)(ii) to eliminate these provisions and to instead provide three exceptions to the general definition of a new transaction for closed-end mortgages. The three proposed exceptions are modifications that: (1) Occur as part of a court proceeding; (2) occur in connection with the consumer's default or delinquency, unless the loan amount or interest rate increases, or a fee is imposed on the consumer in connection with the agreement to modify the existing legal obligation; and (3) decrease the interest rate with no other modifications to the terms, except a decrease in the periodic payment amount, an extension of the loan term, or both, and no fee is imposed on the consumer. Each of these proposed exceptions is discussed below.

Judicial workouts. The Board proposes under § 226.20(a)(1)(ii)(A) that modifications to terms agreed to as part of a court proceeding are not new transactions. This proposed exception is consistent with the existing exception from the definition of a "refinancing" under § 226.20(a)(3). Consumers entering into these arrangements typically are in bankruptcy and attempting to avoid foreclosure, and consequently have few credit options. These workouts occur with judicial oversight and benefit from safeguards associated with court proceedings. Thus, the Board believes that in those circumstances, the benefit to consumers of receiving new TILA disclosures is relatively small, and is outweighed by the burden to creditors of providing new disclosures. Proposed comment 20(a)(1)(ii)(A)–1 is adopted without revision from existing comment 20(a)(3).

Workout agreements for consumers in delinquency or default. Existing § 226.20(a)(4) provides an exception for workouts for consumers in delinquency or default unless the rate is increased or additional credit is advanced to the consumer (*i.e.,* the new amount financed is greater than the unpaid balance plus earned finance charge and premiums for the continuation of certain insurance types). Under this existing exception, fees imposed on the consumer in connection with the agreement to modify an existing legal obligation, and which the consumer pays directly or finances from loan proceeds, are not considered to be additional credit advanced to the consumer.

Similarly, proposed § 226.20(a)(1)(ii)(B) provides that modifications to terms agreed to as part of a workout arrangement for consumers in delinquency or default are not new transactions, unless there is an increase in the loan amount or interest rate, or a fee is imposed on the consumer in connection with the agreement to modify the existing legal obligation. Consumers in delinquency or default are unlikely to have other credit options available to them. The Board believes that where creditors provide these consumers with certain changes to terms, such as a decrease in rate and payment, and the consumer does not take on new debt or pay any fee, the modification is beneficial. In these instances, the benefit to consumers of a TILA disclosure appears outweighed by the risk that creditors would be discouraged from extending beneficial modifications (in lieu of foreclosure) due to the burden of giving new TILA disclosures and the potential exposure to TILA remedies for errors, including rescission.

Proposed § 226.20(a)(1)(ii)(B) differs from the existing exception from the definition of a "refinancing" under § 226.20(a)(4) in two respects. First, the term "loan amount," rather than the term "amount financed," is used to determine whether the consumer is taking on new debt in connection with the modification. For further discussion of the loan amount, see proposed § 226.20(a)(1)(i)(A). Using the term "loan amount" simplifies determining whether new debt is involved, but does not create a substantive change in the exception.

Second, the proposed exception under § 226.20(a)(1)(ii)(B) is unavailable to creditors if any fee is imposed on the consumer in connection with the agreement to modify the existing legal obligation. Anecdotal evidence suggests that excessive or abusive fees may be imposed as part of loan modifications or other workouts offered to consumers in delinquency or default. The Board believes that, although consumers in delinquency or default may not have other credit options available to them, they should be aware of the costs incurred in modifying any term of the existing legal obligation. Providing new TILA disclosures in these instances will make these consumers aware of, and help them to verify, the changes being made to their existing obligation and the costs of the modification; this serves TILA's purpose of helping consumers "avoid the uninformed use of credit." 15 U.S.C. 1601(a).

At the same time, the Board recognizes that charging some fees for underwriting or processing a modification may be necessary, and is concerned that requiring new disclosures whenever necessary and reasonable fees are charged could discourage creditors from offering workouts. As discussed above, the Board solicits comment on whether proposed § 226.20(a)(1)(i)(B) should permit creditors to rely on the exceptions to the requirement to give new disclosures (such as where the consumer is in delinquency or default under proposed § 226.20(a)(1)(ii)(B)), even if they charge certain fees. Specifically, the Board solicits comment on whether there are any fees that creditors should be allowed to charge without triggering the requirement to give new disclosures. Should permitted fees, if any, include only those paid to third parties (who are not affiliates of the creditor), or should certain fees retained by the creditor or the creditor's affiliates be permitted without triggering the requirement to give new disclosures? Should the Regulation Z provide that creditors can retain a *de minimis* fee without triggering disclosure requirements? What amount would be appropriate for exclusion? Should the amount be stated in terms of a dollar amount, a percentage of the loan, or both?

Proposed comment 20(a)(1)(ii)(B)–1 clarifies that this exception is available for all types of workout arrangements offered to consumers in delinquency or default, such as forbearance, repayment or loan modification agreements, unless the loan amount or the interest rate increase, or a fee is imposed on the consumer in connection with the agreement. Proposed comment 20(a)(1)(ii)(B)–1 also cross references § 226.20(a)(1)(i)(B) and corresponding commentary regarding fees.

The Board believes that most workout arrangements will involve fees imposed on the consumer and therefore, will be covered under the proposed definition of new transaction for mortgages and require new disclosures. However, depending on the scope of fees that may or may not be allowed under this proposed exception, some workout agreements might not be covered and new disclosures would not be required. Outreach conducted in connection with this proposal revealed that lack of information regarding the terms of the modified loan offered to consumers is a concern with many of the loan modifications offered to delinquent or defaulting consumers. Although modification agreements contain the final credit terms, they are typically contracts in dense prose that use legal terms unfamiliar to most consumers. As a result, many consumers may not be able to determine readily how much is actually owed on the new loan, or may simply be unaware of their new monthly payment amount.

Thus, the Board is concerned that the exception for modifications in circumstances of delinquency or default under proposed § 226.20(a)(1)(ii)(B) may result in some consumers not receiving new disclosures, and therefore not knowing how their terms are being modified. To address this concern, the Board could adopt a rule requiring servicers to provide a full TILA disclosure for every modification that occurs in cases of delinquency or default. At the same time, however, disclosures required under existing TILA and Regulation Z may not offer a clear comparison of existing terms to changed terms and, therefore, may not help consumers to understand the impact of the modification on their credit terms. Thus, the Board solicits comment on whether to require a new, streamlined disclosure that highlights changed terms in an effort to ensure that consumers are aware of changes made to their existing legal obligation. Although delinquent or defaulting consumers may not have an opportunity to shop for other credit options, a streamlined disclosure provided in these instances could enable a consumer to compare the changed terms that are offered to other alternatives, such as a short sale or a deed-in-lieu of foreclosure.

The Board recognizes that servicers would incur significant operational and compliance costs to implement a requirement to give a new, streamlined disclosure for modifications in the context of delinquency or default. Thus, the Board solicits comment on whether modifying the proposed exception under § 226.20(a)(1)(ii)(B) and requiring a new, streamlined disclosure that highlights changed terms would be preferable to eliminating the exception under proposed § 226.20(a)(1)(ii)(B) entirely. Eliminating the exception would require servicers to provide a full TILA disclosure in all cases. The Board seeks comment on the relative benefits and costs associated with either approach.

In addition, the Board considered, but does not propose, extending the exception under proposed § 226.20(a)(1)(ii)(B) to consumers who are in "imminent" delinquency or default. The Board is aware that current government-sponsored modification programs specifically address consumers in imminent "danger" of default or delinquency. However, the Board believes that these consumers are more likely to have other financing options than those who are already delinquent or in default. Thus, a new TILA disclosure would apprise these consumers of new credit terms and allow them to compare other available credit options, which serves TILA's purpose to inform consumers about their credit terms and help them shop for credit. TILA Section 102(a); 15 U.S.C. 1601(a). Moreover, the Board believes it would be difficult to define the term "imminent default" with sufficient clarity to facilitate compliance and avoid undue litigation risk. Nevertheless, the Board seeks comment on whether providing an exception for consumers who are in "imminent" delinquency or default is appropriate, and whether such an exception could be crafted with sufficient clarity to facilitate compliance and avoid posing undue litigation risk to creditors.

Decreases in the interest rate. Section 226.20(a)(2) currently provides an exception from the definition of a "refinancing" for closed-end credit transactions that decrease the APR with a corresponding decrease in the payment schedule (*i.e.,* a decrease in the payment amount or number of payments), even if the change in term results in "satisfaction and replacement" of the existing legal obligation. *See* comments 20(a)(2)–1 and –2.

Proposed § 226.20(a)(1)(ii)(C) provides that, for mortgage credit, a decrease in the contractual interest rate is not a new transaction under the following circumstances: (1) No other modifications are made, except a decrease in the periodic payment amount, an extension of the loan term, or both, and (2) no fee is imposed on the consumer in connection with the modification. This proposed exception differs from the existing exception under § 226.20(a)(2) because it would: (1) Be available only for decreases in the contract note rate (not the APR), (2) allows for decreasing the periodic payment amount and extending (rather than shortening) the loan term, and (3) does not allow any fees to be imposed on the consumer as part of the change. For example, as indicated in proposed comment 20(a)(1)(ii)(C)–1, the exception under proposed § 226.20(a)(1)(ii)(C) would be unavailable to creditors who decrease the interest rate, but then add a prepayment penalty and impose a fee on the consumer.

Exempting creditors from the requirement to provide a complete new set of disclosures in situations specified in proposed § 226.20(a)(1)(ii)(C) is intended to facilitate changes that are helpful to consumers. The Board believes that where creditors decrease the consumer's note rate and the periodic payment amounts, the modification is beneficial to the consumer. The Board also believes that decreasing the note rate and increasing the loan term can benefit consumers at risk of default or delinquency, because creditors may give consumers the option to defer payments for a period of time and make them after the existing maturity date. By contrast, shortening the loan term may increase periodic payment amounts even if the interest rate is decreased, making it more difficult for consumers to meet payment obligations. Transactions such as deferrals, forbearance agreements, or renewals, are typically entered into in response to a request by a consumer who is suffering a temporary financial hardship, or for consumers with seasonal income. These transactions may simply extend the loan term or provide for new payment due dates. For these reasons, the Board believes that where the interest rate is increased, but no other modifications to the terms are made except for an extension of the loan term, the benefit of the TILA disclosure to the consumer is outweighed by the risk that creditors may be discouraged from extending these types of beneficial modifications. Again, however, in all cases where a fee is imposed on the consumer in connection with a modification, a new transaction requiring new disclosures occurs, regardless of whether the fee is reflected in any agreement between the parties. *See* proposed § 226.20(a)(1)(i)(B) and (a)(1)(ii)(C).

Outreach efforts revealed that, apart from loss mitigation, rate decreases are typically offered as part of customer retention programs in a falling rate environment, and that these programs may offer consumers some savings in closing costs, such as lower or no title insurance fees. However, in exchange for decreasing the interest rate, a consumer may have to pay other significant closing costs (such as application or origination fees) or accept new terms that pose risk, such as a prepayment penalty or shared-equity feature. The Board believes that in these cases, consumers should be afforded a meaningful opportunity to review the credit terms offered and compare them to other available credit options. For example, where consumers must pay a fee to modify a key term of an existing mortgage, they should be aware of this cost, and be able to compare the cost of the modification and its terms to other available credit options. Thus, the Board believes that in these instances consumers should receive new TILA disclosures and be afforded the right to rescind and the special protections in § 226.35, if applicable. As discussed in greater detail above, the Board solicits comment on whether some fees, such as third party fees, should be permitted without triggering disclosure requirements, or whether all fees paid by the consumer out of loan proceeds or out-of-pocket in connection with these transactions should trigger the requirement to provide new TILA disclosures.

Proposed comment 20(a)(1)(ii)(C)–1 explains that a decrease in the interest rate occurs if the contractual interest rate (the fully-indexed rate for an adjustable-rate mortgage) for the new loan at the time the new transaction is consummated is lower than the interest rate (the fully-indexed rate for an adjustable-rate mortgage) of the existing obligation in effect at the time of the modification. This comment clarifies that a decrease in the interest rate is not a new transaction under § 226.20(a)(1) under the following circumstances: no additional fees or other changes are made to the existing legal obligation, except that the payment schedule may reflect lower periodic payments or a lengthened maturity date. The comment further clarifies that the exception in § 226.20(a)(1)(ii)(C) does not apply if the maturity date is shortened, or if the payment amount or number of payments is increased beyond that remaining on the existing transaction.

Proposed comment 20(a)(1)(ii)(C)–1 also provides examples of modifications to terms that would and would not result in a new transaction requiring new disclosures under proposed § 226.20(a)(1). First, if a creditor lowers the interest rate of an existing legal obligation and retains the existing loan term of 30 years (resulting in lower monthly payments), no new disclosures are required. Second, if a creditor lowers the interest rate and also enters into a six-month payment forbearance arrangement with the consumer, with those six months of payments to be added to the end of the loan term (resulting in a longer loan term), no new disclosures are required. However, the comment indicates that a new transaction requiring new disclosures occurs if the creditor lowers the interest rate and shortens the loan term from, for example, 30 to 20 years. Moreover, a new transaction requiring new disclosures also occurs if the creditor lowers the interest rate but adds a new term, such as a prepayment penalty, or imposes a fee on the consumer.

Finally, this comment cross references proposed comments 20(a)(1)(i)(C)–1, 20(a)(1)(i)(D)–1, and 20(a)(1)(i)(B)–1 to provide further guidance to creditors regarding changes in the loan term, interest rate, and imposition of fees, respectively. To reflect the revisions related to rate changes discussed above, the Board proposes to eliminate the existing exception for APR reductions under existing § 226.20(a)(2) and corresponding commentary as unnecessary for mortgage credit, but to retain this exception for non-mortgage credit, which was not subject to review as part of this proposal. *See* proposed § 226.20(a)(2)(ii) and accompanying commentary.

Renewals. The Board proposes to eliminate the current exception for renewals under existing § 226.20(a)(1) for closed-end mortgages. This exception appears to have limited applicability to closed-end mortgages because it relates principally to single payment obligations. Typically, mortgages are not structured as single payment obligations or periodic payments of interest with no principal reduction. However, the Board seeks comment on whether there are any circumstances under which this exception may be appropriate for closed-end mortgages.

Optional insurance. The Board proposes to eliminate the current exception for optional insurance under existing § 226.20(a)(5) as unnecessary under the proposal. Proposed § 226.20(a)(1)(i) does not treat as a new transaction the renewal of an expired insurance policy. The Board believes that renewing an expired insurance policy that was originally disclosed at consummation does not, by itself, create a new "credit" transaction.

20(a)(2) and (3)

Refinancings by the Same Creditor—Non-mortgage Credit; Unearned Finance Charge

As noted above, the Board is proposing to redefine when modifications to terms result in new transactions for closed-end credit secured by real property or a dwelling under new § 226.20(a)(1). Accordingly, the Board is proposing to redesignate existing § 226.20(a) as new § 226.20(a)(2), which would apply to transactions not secured by real property or a dwelling, and proposes conforming and technical revisions, as discussed more fully below.

Current § 226.20(a) would be redesignated as new § 226.20(a)(2) and would continue to provide that a "refinancing" occurs upon "satisfaction and replacement" for all non-mortgage closed-end credit transactions; no substantive change is intended. Existing § 226.20(a)(2), regarding treatment of unearned finance charges that are not credited to the existing obligation, would be redesignated as new § 226.20(a)(3) and revised to clarify that the rule applies to all closed-end credit transaction types, including mortgages; no other substantive change is intended.

In technical revisions, comments 20(a)–1 through –3, which generally address the definition of "satisfaction and replacement," would be redesignated as new comments 20(a)(2)–1 through –3 and revised to reflect their coverage of transactions not secured by real property or a dwelling; no substantive change is intended. Current comment 20(a)(1)–4 addresses treatment of unearned finance charges not credited to the existing obligation and would be redesignated as new comment 20(a)(3)–1, and revised to reflect that it also applies to the proposed definition of "new transaction" for closed-end credit secured by real property or a dwelling; no other substantive change is intended. Current comment 20(a)–5 addresses coverage of the general definition of refinancing and would be redesignated as comment 20(a)(2)–4; no substantive change is intended.

Existing § 226.20(a)(1)–(5) addresses exceptions to the general definition of refinancing under current § 226.20(a). In technical revisions, § 226.20(a)(1)–(5) would be redesignated as new § 226.20(a)(2)(i)–(v), and corresponding commentary 20(a)(1)–(5) would be redesignated as new comments 20(a)(2)(i)–(v); no substantive change is intended.

Impact of Proposed § 226.20(a)(1) on Other Rules

Interaction of proposed § 226.20(a)(1) with the right of rescission. Currently, only certain refinancings are subject to the right of rescission. Specifically, refinancings that provide a "new advance of money" or add a security interest in the consumer's principal dwelling are subject to rescission, whether the same creditor (*i.e.,* current holder) is the original creditor or an assignee. *See* comment 23(f)–4. Refinancings that occur with the original creditor or its successor are exempt under § 226.23(f)(2). As discussed more fully in the section-by-section analysis to § 226.23(f)(2), the Board is proposing to narrow the exemption from rescission to only those refinancings that involve the original creditor who is also the current holder. Thus, the exemption from rescission under proposed § 226.23(f)(2) would be available only for refinancings with the original creditor that is also the current holder of the note, and which do not advance new money or add a security interest in the principal dwelling.

Proposed § 226.20(a)(1) would expand the number of closed-end mortgage transactions considered "new transactions" generally subject to rescission. Under existing § 226.20(a), many modifications currently do not result in "satisfaction and replacement" under applicable State law, and therefore are currently not "refinancings" that trigger new disclosures and the right to rescind. Proposed § 226.20(a)(1)(i) for closed-end mortgage transactions, however, would result in many of these modifications being "new transactions" that require TILA disclosures. In addition, the scope of proposed § 226.20(a)(1)(i) would continue to apply to modifications with the same creditor, which would be defined as the current holder or servicer acting on behalf of the current holder. Thus, "new transactions" with the current holder, or servicer acting on behalf of the current holder, would be subject to the consumer's right to rescind under § 226.23, unless exempt from the right of rescission under § 226.23(f)(2), because they involve the original creditor who is also the current holder of the note and do not entail advancing new money or adding a security interest in the consumer's principal dwelling.

To illustrate, assume that a consumer and the original creditor, who is also the current holder of the note, agree to modify an existing obligation secured by the consumer's principal dwelling to (a) Reduce the consumer's interest rate, (b) advance the consumer $10,000 to consolidate bills, and (c) finance $3,000 in closing costs. This transaction is a "new transaction" requiring TILA disclosures, even if the existing obligation is not satisfied and replaced, because the loan amount increased by $13,000. *See* proposed § 226.20(a)(1)(i)(A). In addition, the consumer may rescind the transaction to the extent of the new advance of money, *i.e.,* the $10,000 advanced to the consumer to consolidate bills. In the same example, if the original creditor did not advance $10,000, the consumer would not have the right to rescind because there would be no "new advance of money" as defined in comment 23(f)–4. However, a new transaction would still occur, and new disclosures would be required, because the loan amount increased by $3,000. *See* proposed § 226.20(a)(1)(i)(B). As noted above, the Board solicits comment on whether the scope of modifications under proposed § 226.20(a)(1) that would result in new transactions being subject to the right of rescission is appropriate, or should be narrower or broader.

The Home Mortgage Disclosure Act (HMDA) and Regulation C. HMDA requires financial institutions to report data on "refinancings." Under Regulation C, a refinancing occurs when the existing obligation is satisfied and replaced; the regulation and commentary do not refer to the parties' contract or applicable law.[47] As a result, "refinancings" must be reported, whereas mere renewals and modifications are not. Although consistency between the rules facilitates compliance, the Board notes that the purposes of TILA and HMDA differ. TILA is focused on promoting the informed use of credit through meaningful disclosure of credit terms. HMDA requires financial institutions to provide data to the public to aid in determining how well the institution is serving the housing needs of its community, and to aid in fair lending enforcement. However, some creditors have indicated that they currently treat transactions similarly for purposes of both Regulation Z and Regulation C, except for consolidation, extension, and modification agreements (CEMAs).[48] The Board anticipates reviewing HMDA and Regulation C at a later date, and seeks comment on whether "refinancing" in Regulation C should be defined the same or differently than "refinancing" under proposed § 226.20(a)(1), and the operational and compliance difficulties raised by either approach.

The Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (SAFE Act). Congress enacted the SAFE Act on July 30, 2008, to mandate a nationwide licensing and registration system for mortgage loan originators.[49] On July 28, 2010, the Board, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, the Farm Credit Administration, and the National Credit Union Administration (the agencies) issued joint final rules to implement the SAFE Act for individuals employed by agency-regulated institutions.[50] The joint final rule requires individuals that meet the definition of "mortgage loan originator" to be licensed and registered in the Nationwide Mortgage Licensing System and Registry ("Registry") in order to engage in residential mortgage transactions. For purposes of this licensing and registration requirement, "mortgage loan originator" is defined as an individual who takes a residential mortgage loan application and offers or negotiates terms of a residential mortgage loan for compensation or gain.[51] In the preamble to the final rule, the agencies state that the term "mortgage loan originator" generally does *not* include individuals who engage in transactions such as modifications or assumptions that do not result in the extinguishment of the existing loan and the replacement by a new loan (*i.e.,* satisfaction and replacement).[52] Thus, under the SAFE Act and implementing regulations, individuals that modify the terms of existing loans, or allow existing loans to be assumed, are generally not considered "mortgage loan originators," and do not need to obtain a license or register in the Registry.

In contrast to the SAFE Act, under this proposal modifications to certain loan terms would be new transactions requiring new TILA disclosures even if not satisfied and replaced under applicable State law. *See* proposed § 226.20(a)(1). The Board recognizes that proposed § 226.20(a)(1) takes a different approach to modifications than the SAFE Act regulations, but notes that the purposes of the SAFE Act and TILA differ. The SAFE Act seeks to improve communications among regulators, increase accountability of loan originators, reduce fraud, and provide consumers with free and easily accessible information regarding the employment history of, and certain disciplinary and enforcement actions against, mortgage loan originators. TILA, on the other hand, focuses on promoting the informed use of credit through meaningful disclosure of credit terms in order to facilitate consumers' ability to compare available credit options. TILA Section 102(a); 15 U.S.C. 1601(a). The

[47] 12 CFR 203.2(k).

[48] In 2002, the Board clarified that CEMAs are not reportable under Regulation C. *See* 67 FR 7227, Feb. 15, 2002.

[49] 12 U.S.C. 5101–5116.

[50] 75 FR 44656, July 28, 2010. Mortgage loan originators not employed by agency-regulated institutions must license and register in accordance with the regime provided by the applicable state within the timeframes prescribed under the SAFE Act.

[51] *See, e.g.,* 24 CFR 208.102(b), implementing § 1503(3) of the SAFE Act, 12 U.S.C. 5102(3), and App. A to Subpart I of Pt 208, which provides examples of mortgage loan originator activities.

[52] 75 FR at 44662–44663, July 28, 2010.

Board believes that proposed § 226.20(a)(1) serves TILA's purposes. Thus, under the proposal, when the parties to an existing agreement modify key loan terms, TILA disclosures should be provided to the consumer. However, the Board seeks comment on any operational and compliance difficulties raised by the approach proposed under § 226.20(a)(1), specifically in relation to the definition of "mortgage loan originator" under the SAFE Act for purposes of its licensing and registration requirements.

20(c) Rate Adjustments

Background

Currently, § 226.20(c) requires that disclosures be provided when adjustments are made to the interest rate of an ARM subject to § 226.19(b).[53] The timing of the disclosures required by § 226.20(c) depends on whether or not a payment adjustment accompanies an interest rate adjustment. If a payment adjustment accompanies an interest rate adjustment, a creditor must deliver or mail disclosures regarding the interest rate and payment adjustment at least 25, but no more than 120, days before payment at a new level is due. If interest rate adjustments are made during the year without accompanying payment adjustments, a creditor must disclose the rates charged at least once during that year.

In the August 2009 Closed-End Proposal, the Board proposed to revise § 226.20(c) to require that disclosures be provided between 60 and 120 calendar days before payment at a new level is due, if a payment adjustment accompanies an interest rate adjustment.[54] That proposal is designed to ensure that consumers have adequate advance notice of a payment change to seek to refinance or modify the loan if they cannot afford the adjusted payment. The Board also proposed to revise the content and format of disclosures required by § 226.20(c), based on consumer testing, to improve consumer understanding of pending interest and payment adjustments and provide additional important information.[55] In addition, the Board proposed to replace the term "variable-rate mortgage" with the more commonly understood term "adjustable-rate mortgage."

In this proposal, the Board proposes to clarify that proposed § 226.20(c) applies to ARM adjustments that are based on interest rate adjustments provided for under the terms of an existing legal obligation. On the other hand, disclosures are not required under proposed § 226.20(c) when an ARM adjustment is not made pursuant to an existing loan agreement, such as if the parties modify the terms of their loan agreement. If the parties increase the interest rate or payment or a fee is imposed in connection with the modification, however, proposed § 226.20(a) requires that new TILA disclosures be provided unless an exception applies. A detailed discussion of the proposed rules for modifications is set forth in the section-by-section analysis of proposed § 226.20(a).

The Board's Proposal

Proposed § 226.20(c) provides that, if an adjustment is made to an ARM's interest rate, with or without a corresponding adjustment to the payment, disclosures must be provided to the consumer. Proposed § 226.20(c) provides further that disclosures are required only for ARMs subject to § 226.19(b) and to adjustments made based on the terms of the existing legal obligation between the parties.[56] The Board believes that it is not necessary to provide disclosures under § 226.20(c) when adjustments not provided for under the existing legal obligation are made, because more comprehensive disclosures are required under proposed § 226.20(a) if a loan modification increases a loan's interest rate or payment or a fee is imposed in connection with a loan modification. In some circumstances, moreover, providing disclosures under § 226.20(c) 60 to 120 days before payment at a new level is due may delay beneficial modifications to a consumer's loan terms or otherwise may be impractical.

Proposed § 226.20(c) clarifies that an interest rate adjustment for which disclosures are required under § 226.20(c) includes an interest rate adjustment made when an ARM subject to § 226.19(b) is converted to a fixed-rate transaction as provided under the existing legal obligation between the parties. The requirement to provide disclosures under § 226.20(c) in connection with conversion of an ARM to a fixed-rate transaction is consistent with current comment 20(c)–1, which the Board proposed to incorporate into § 226.20(c) under the August 2009 Closed-End Proposal.

Proposed comment 20(c)–1 clarifies that § 226.20(c) applies only if adjustments are made under the terms of the existing legal obligation between the parties. Typically, these adjustments will be made based on a change in the value of the applicable index or on the application of a formula. Proposed comment 20(c)–1 also clarifies that if an interest rate adjustment is not based on the terms of the existing legal obligation, then no disclosures are required under § 226.20(c). Proposed comment 20(c)–1 clarifies that an interest rate adjustment not based on the terms of the existing legal obligation likely would require new TILA disclosures under proposed § 226.20(a). For example, proposed comment 20(c)–1 states that no disclosures are required under § 226.20(c) when an adjustment to the interest rate is made pursuant to a modification of the legal obligation, but such modification may be a new transaction for which the creditor must provide new disclosures under § 226.20(a). Proposed comment 20(c)–1 states further that disclosures must be given under § 226.20(c) if that new transaction is an adjustable-rate mortgage subject to § 226.20(c) and the interest rate is adjusted based on a change in the index value or on the application of a formula as provided in the modified legal obligation.

Examples. Proposed comment 20(c)–1 provides examples to illustrate whether or not disclosures are required under § 226.20(c) in different circumstances. Proposed comment 20(c)–1.i provides an example of a case where disclosures are required under § 226.20(c), assuming that: (1) The loan agreement provides that the interest rate on an ARM subject to § 226.19(b) will be determined by the 1-year LIBOR plus a margin of 2.75 percentage points; (2) the consumer's current interest rate is 6%, based on the index and margin; (3) the loan agreement provides that the interest rate will adjust annually and the corresponding payment will be due on October 1; and (4) when the adjusted interest rate is determined, the 1-year LIBOR for 2010 has increased by 2 percentage points over the 1-year LIBOR

[53] Section 226.19(b) currently requires certain disclosures before application for closed-end loans secured by a consumer's principal dwelling with a term greater than one year, if the APR may increase after consummation. Under the August 2009 Closed-End Proposal, proposed § 226.19(b) applies generally to an "adjustable-rate mortgage" described in § 226.38(a)(3), *i.e.,* to a closed-end mortgage secured by real property or a dwelling if the APR may increase after consummation, with certain exclusions. *See* proposed § 226.19(b) and comment 19(b)–3, 74 FR 43232, 43327, 44333, Aug. 26, 2009. For a discussion of proposed § 226.19(b), see 74 FR at 43262–43268.

[54] For a discussion of the proposed amendments to timing requirements for ARM adjustment notices under § 226.20(c), see 74 FR at 43269–43271.

[55] For a discussion of proposed revisions to the required content of disclosures under § 226.20(a), see 74 FR at 43271–43273.

[56] Under the August 2009 Closed-End Proposal, § 226.19(b) does not apply to "price level adjusted mortgages" and certain other mortgages for which the APR may increase after consummation. Therefore, disclosures are not required for such mortgages under § 226.20(c). For a discussion of such mortgages, see 74 FR 43232, 43264, August 26, 2009.

for 2009. Under the terms of the loan agreement, therefore, the interest rate will be adjusted to 8%, and the corresponding payment will be due on October 1, 2010. Proposed comment 20(c)–1 provides that, in the case illustrated by the example, the notice required by § 226.20(c)(1) must be provided 60 to 120 days before the corresponding payment is due, that is, between June 3 and August 2, 2010.

Proposed comment 20(c)–1.ii provides an example of a case where disclosures are not required under § 226.20(c), assuming the same loan agreement and facts as in the previous example, except that on January 4, 2010 the parties modify the loan agreement and the consumer pays a $500 modification fee. Proposed comment 20(c)–1.ii provides the additional assumptions that: (1) The parties agree that the consumer's current interest rate will be reduced temporarily from 6% to 4.5%, with the corresponding payment due on February 1, 2010; (2) after modification, interest rate adjustments will continue to be made based on adjustments to the 1-year LIBOR and the corresponding payment will continue to be due on October 1; and (3) when the adjusted interest rate is determined, the 1-year LIBOR for 2010 has increased by 2 percentage points over the 1-year LIBOR for 2009. Under those assumptions, the payment due on October 1, 2010 will be based on an interest rate of 8% applied because of an adjustment in the 1-year LIBOR. Proposed comment 20(c)–1.ii states that, in the example, notice need not be provided under § 226.20(c)(1) 60 to 120 days before payment based on the interest rate of 4.5% is due on February 1, because that payment change is not made based on an interest rate adjustment provided for in the original loan agreement. Proposed comment 20(c)–1.ii clarifies that disclosures may be required before modification under § 226.20(a), however. Moreover, proposed comment 20(c)–1.ii states that notice must be provided under § 226.20(c)(1) 60 to 120 days before payment based on the interest rate of 8% is due on October 1 (that is, the creditor must send a notice between June 3 and August 2, 2010); this is because the payment due on October 1 is made based on change in the value of the index applied as provided for in the modified loan agreement.

Mortgages not covered. Currently, comment 20(c)–2 states that § 226.20(c) does not apply to "shared-equity," "shared-appreciation," or "price level adjusted" or similar mortgages. Under the August 2009 Closed-End Proposal, the Board proposed to remove the references to "shared-equity" and "shared-appreciation" mortgages. Under the August 2009 Closed-End Proposal, these types of mortgages are adjustable-rate mortgages only if the loan has an adjustable rate. For example, a fixed-rate mortgage with an equity sharing feature would not be an adjustable-rate mortgage under the August 2009 Closed-End Proposal. Thus, whether or not ARM adjustment notices are required for shared-equity or shared-appreciation mortgages depends on whether the mortgage has an adjustable rate or a fixed rate.[57] The Board also proposed to add a cross-reference to comment 19(b)–3, which under the August 2009 Closed-End Proposal clarifies that "price level adjusted" mortgages and certain other mortgages whose APR may change after consummation are not ARMs subject to § 226.19(b) and therefore are not subject to § 226.20(c). The Board now proposes to revise comment 20(c)–2 further for clarity.

Conversion. Under the Board's August 2009 Closed-End Proposal, the Board proposed to incorporate into § 226.20(c) commentary stating that the requirements of § 226.20(c) apply when the interest rate and payment adjust following conversion of an ARM subject to § 226.19(b) to a fixed-rate mortgage.[58] *See* comment 20(c)–1. The Board now proposes to clarify that § 226.20(c) applies if such a conversion is made in accordance with an existing legal obligation. Proposed § 226.20(c) states that interest rate adjustments made pursuant to the terms of an existing legal obligation include adjustments made upon conversion of an ARM to a fixed-rate transaction.

Proposed comment 20(c)–4 clarifies that § 226.20(c) applies to adjustments made when an adjustable-rate mortgage is converted to a fixed-rate mortgage if the existing legal obligation provides for such conversion and establishes a specific index and margin or formula to be used to determine the new interest rate. Proposed comment 20(c)–4 clarifies further, however, that if the existing legal obligation does not provide for conversion or provides for conversion but does not state a specific index and margin or formula to be used to determine the new interest rate, or if the parties agree to change the index, margin, or formula to be used to determine the interest rate upon conversion, new disclosures instead may be required under § 226.20(a). Proposed comment 20(c)–4 clarifies further that disclosures may be required under § 226.20(a) if a conversion fee is charged, whether or not the legal obligation establishes the amount of the conversion fee, or loan terms other than the interest rate and corresponding payment are modified. Finally, proposed comment 20(c)–4 clarifies that if an open-end account is converted to a closed-end transaction subject to § 226.19(b), disclosures need not be provided under § 226.20(c) until adjustments subject to § 226.20(c) are made following conversion. This is consistent with current comment 20(c)–1.

The Board solicits comment on whether, when an ARM is converted to a fixed-rate transaction as provided in an existing legal obligation, new TILA disclosures under § 226.20(a) should be provided instead of notice of an interest rate adjustment under § 226.20(c). Would new TILA disclosures be more useful to consumers who are deciding whether to convert an ARM into a fixed-rate mortgage on terms established under an existing legal obligation or to seek a fixed-rate mortgage from a different creditor? Would potential liability risk from providing new disclosures under § 226.20(a), including rescission in rescindable transactions, discourage creditors from providing ARMs with a conversion option?

Previously proposed revisions. The new revisions the Board now proposes address the applicability of § 226.20(c) and would be made only to the introductory text of § 226.20(c) and commentary associated with that introductory text. For ease of reference, however, this proposal republishes proposed revisions to disclosure timing, content, and format requirements under § 226.20(c)(1) through (5) and associated commentary proposed previously under the August 2009 Closed-End Proposal. The Board requests that interested parties limit the scope of their comments to the newly proposed changes to the introductory text of § 226.20(c) and proposed comments 20(c)–1 through –4.

Section 226.22 Determination of Annual Percentage Rate

22(a) Accuracy of Annual Percentage Rate

The APR is a measure of the cost of credit, expressed as a yearly rate, that relates the amount and timing of value received by a consumer to the amount and timing of payments made. § 226.22(a)(1). The APR must be determined in accordance with either the actuarial method or the United States Rule method. *Id.* TILA Section 107(c) provides a general tolerance for the accuracy of a disclosed APR. 15

[57] *See* 74 FR 43232, 43270, 43405, Aug. 26, 2009.

[58] *See id.* 43270, 43329–43330.

U.S.C. 1606(c). TILA Section 106(f) provides special tolerances for disclosure of a finance charge "and other disclosures affected by any finance charge" for a closed-end credit transaction secured by real property or a dwelling. 15 U.S.C. 1605(f). TILA Section 107(c) is implemented in § 226.22(a)(2) and (3), and TILA Section 106(f) is implemented in § 226.22(a)(4) and (5).

The Board proposes to add examples to illustrate whether the APR disclosed for a mortgage transaction is considered accurate where the finance charge and APR are overstated. The Board proposes further to clarify that the tolerances under proposed § 226.23(a)(5)(ii), applicable for purposes of rescission, do not apply in determining under § 226.19(a) whether a creditor must provide corrected disclosures that a consumer must receive at least three business days before consummation. (The Board proposes to redesignate § 226.23(g) and (h)(2), as discussed below in the section-by-section analysis of proposed § 226.23(a)(5)(ii).) The Board also proposes minor clarifying amendments to § 226.22(a).

In addition, the Board proposes several technical amendments to § 226.22(a). The Board proposes to integrate footnote 45d into § 226.22(a)(1) and to redesignate existing regulatory text. The Board proposes further to revise § 226.22(a) to use the term "interest and settlement charges" instead of "finance charge" when referring to a disclosed finance charge, consistent with a terminology change proposed for closed-end mortgage transactions in proposed § 226.38(e)(5)(ii) under the August 2009 Closed-End Proposal.[59] Also, the Board proposes to add headings to § 226.22(a)(1), (a)(2), and (a)(3), to clarify that those provisions address a closed-end credit transaction's actual APR, a tolerance for a regular transaction, and a tolerance for an irregular transaction, respectively. Finally, the Board proposes conforming amendments to headings for commentary on § 226.22(a)(1), (a)(2), and (a)(3).

22(a)(1) Actual Annual Percentage Rate

Section 226.22(a)(1) states that the APR for a closed-end credit transaction is a measure of the cost of credit, expressed as a yearly rate, that relates to the amount and timing of value received by the consumer to the amount and timing of payments made. Section 226.22(a)(1) states further that the APR for a closed-end credit transaction is to be determined in accordance with the actuarial method or the United States Rule method. Footnote 45d to § 226.22(a)(1) states that an error in disclosure of an APR or finance charge shall not, in itself, be considered a violation of this regulation if: (1) The error resulted from a corresponding error in a calculation tool used in good faith by the creditor; and (2) upon discovery of the error, the creditor promptly discontinues use of that calculation tool for disclosure purposes and notifies the Board in writing of the error in the calculation tool. The Board has stated that footnote 45d protects creditors from administrative enforcement, including restitution, for errors in a calculation tool used in good faith. *See* 48 FR 14883, Apr. 3, 1983. (TILA Section 130(c) protects creditors from civil liability for violations resulting from such errors. 15 U.S.C. 1640(c).)

The Board proposes to integrate the text of footnote 45d into § 226.22(a) and to remove the footnote. First, the Board proposes to redesignate the existing text of § 226.22(a)(1) as proposed § 226.22(a)(1)(i). The Board also proposes to redesignate comment 22(a)(1)–2 as comment 22(a)(1)(i)–2 and revise the comment to clarify that a previously proposed requirement that disclosures for closed-end mortgage transactions use the term "interest and settlement charges" in place of the term "finance charge," discussed above, does not affect how an APR is calculated using the actuarial method.

Next, the Board proposes to add a new § 226.22(a)(1)(ii) that contains the text of footnote 45d. However, proposed § 226.22(a)(1)(ii) omits a statement in footnote 45d that could be read to mean that an error in the disclosure of the APR or finance charge resulting from an error in a calculation tool used in good faith (but no longer used) is a violation of Regulation Z if a creditor does not notify the Board in writing of the error in the calculation tool. That statement is inconsistent with TILA Section 130(c), which provides that a creditor or assignee may not be held liable in any action brought under TILA Section 125 or TILA Section 130 if the creditor or assignee shows by a preponderance of the evidence that the violation was not intentional and resulted from a *bona fide* error, notwithstanding the maintenance of procedures reasonably adapted to avoid any such error. 15 U.S.C. 1640(c). Examples of a *bona fide* error include calculation errors and computer malfunction and programming errors. *Id.*

The Board also proposes to redesignate comment 22(a)(1)–5, regarding good faith reliance on faulty calculation tools, as comment 22(a)(1)(ii)–1, and to revise the comment to clarify that the "finance charge" is disclosed as "interest and settlement charges" for purposes of mortgage transaction disclosures. The Board further proposes to add a conforming heading, and update a cross-reference to footnote 45d.

22(a)(2) Regular Transaction

Section 226.22(a)(2) provides that, as a general rule, an APR for a closed-end credit transaction is considered accurate if the APR is not more than 1/8 of 1 percentage point above or below the APR determined in accordance with § 226.22(a)(1). The Board also proposes minor revisions to § 226.22(a)(2) for clarity.

22(a)(3) Irregular Transaction

Section 226.22(a)(3) provides that, in an irregular transaction, a disclosed APR is considered accurate if it is not more than 1/4 of 1 percentage point above or below the actual APR. Footnote 46 to § 226.22(a)(3) clarifies that, for purposes § 226.22(a)(3), an irregular transaction is one that includes any of the following features: Multiple advances, irregular payment periods, or irregular payment amounts, other than an irregular first period or an irregular first or final payment. The Board proposes to integrate footnote 46 into proposed § 226.22(a)(3) and to set forth several types of "irregular transactions" currently described in comment 22(a)(3)–1.

Specifically, proposed § 226.22(a)(3)(i) states that the term "irregular transaction" includes: (1) A construction loan for which advances are made as construction progresses; (2) a transaction where payments vary to reflect the consumer's seasonal income; (3) a transaction where payments vary due to changes in a premium for or termination of mortgage insurance; and (4) a transaction with a graduated payment schedule where the contract commits the consumer to several series of payments in different amounts. Proposed § 226.22(a)(3)(ii) provides that the term "irregular transaction" does not include a loan with a variable-rate feature that has regular payment periods, however. The Board also proposes minor revisions to § 226.22(a)(3) for clarity.

The examples of transactions that are and are not irregular transactions are incorporated from current comment 22(a)(3)–1, with the exception of proposed § 226.22(a)(3)(i)(C). Proposed

[59] For a discussion of the proposed terminology change, see 74 FR 43232, 43307–43308, Aug. 26, 2009.

§ 226.22(a)(3)(i)(C) (currently footnote 45d) provides that an irregular transaction includes a transaction where payments vary due to changes in a premium for or termination of mortgage insurance. No substantive change is intended by incorporating this example of an irregular transaction into the regulation text, however.

22(a)(4) Mortgage Loans

Under TILA Section 106(f), a special tolerance for the disclosed finance charge and "other disclosures affected by any finance charge" applies for closed-end credit transactions secured by real property or a dwelling, in addition to the general tolerance for a regular transaction under § 226.22(a)(2) or for an irregular transaction under § 226.22(a)(3), as applicable. 15 U.S.C. 1605(f). TILA Section 106(f)(1) states that, in closed-end credit transactions secured by real property or a dwelling, the disclosure of the finance charge and other disclosures affected by the finance charge shall be treated as accurate if the amount disclosed as the finance charge (1) does not vary from the actual finance charge by more than $100; or (2) is greater than the amount required to be disclosed. 15 U.S.C. 1605(f)(1). (TILA Section 106(f) establishes a different tolerance for these transactions for purposes of rescission under TILA Section 125, as discussed below. 15 U.S.C. 1605(f)(2)). The APR is a disclosure "affected by" the finance charge. When implementing the special tolerance for mortgage loans in § 226.22(a)(4), the Board stated that if the APR is not considered to be a disclosure affected by the finance charge, "transactions in which the disclosed finance charge is misstated but considered accurate under the new tolerance would remain subject to legal challenge based on the disclosed APR, which seems inconsistent with the legislative intent." 61 FR 49237, 49242, Sept. 19, 1996.

Under § 226.22(a)(4), if the APR disclosed in a transaction secured by real property or a dwelling varies from the actual APR determined in accordance with § 226.22(a)(1), the disclosed APR is considered accurate if (1) the disclosed APR results from the disclosed finance charge, and (2) the disclosed finance charge would be considered accurate under § 226.18(d)(1). (Under the August 2009 Closed-End Proposal, § 226.38(e)(5)(ii) rather than § 226.18(d)(1) would set forth the accuracy tolerance for a finance charge disclosed for a closed-end mortgage transaction.[60]) Comment 22(a)(4)–1 currently provides an example of the APR tolerance where a disclosed APR results from a disclosed finance charge that is understated by $100 or less and therefore considered accurate under § 226.18(d)(1). The Board proposes to redesignate the current comment as comment 22(a)(4)–1.i and add an example that illustrates the operation of the APR tolerance where the disclosed finance charge and APR are overstated.

Proposed comment 22(a)(4)–1.ii provides that, if a creditor improperly includes a $200 fee in the interest and settlement charges on a regular transaction, the overstated interest and settlement charges are considered accurate under § 226.38(e)(5)(ii), and the APR that results from those overstated interest and settlement charges is considered accurate even if it falls outside the tolerance of ⅛ of 1 percentage point provided under § 226.22(a)(2). Proposed comment 22(a)(4)–1.ii clarifies that because the interest and settlement charges were overstated by $200 in the example, an APR corresponding to a $225 overstatement of the interest and settlement charges will *not* be considered accurate. Although the proposed example describes a regular transaction to which the ⅛ of 1 percentage point tolerance applies under § 226.22(a)(2), the same principles apply for an irregular transaction to which the ¼ of 1 percentage point tolerance applies under § 226.22(a)(3).

Special tolerances for rescission. TILA Sections 106(f)(2) and 125(*i*)(2) provide special tolerances for the finance charge and all related disclosures when a consumer asserts the right to rescind a closed-end mortgage transaction under TILA Section 125. 15 U.S.C. 1605(f)(2), 1635(*i*)(2). TILA Section 106(f)(2) provides that, for purposes of the right to rescind, the finance charge and disclosures affected by the finance charge are treated as accurate if the disclosed finance charge does not vary from the actual finance charge by more than an amount equal to one-half of one percent of the loan amount.[61] TILA Section 125(*i*)(2) provides a different tolerance if rescission is asserted as a defense to foreclosure. In that circumstance, the finance charge and all related disclosures are considered accurate if the disclosed finance charge does not vary from the actual finance charge by more than $35 or is greater than the actual finance charge. TILA Sections 106(f)(2) and 125(*i*)(2) are implemented in § 226.23(g) and (h) (proposed to be redesignated as § 226.23(a)(5)(ii)). The tolerances under TILA Sections 106(f)(2) and 125(*i*)(2) are larger than the tolerance of ⅛ of one percentage point provided for a regular transaction under TILA Section 107(c). Therefore, those tolerances limit the circumstances in which a consumer may rescind a loan based on inaccurate TILA disclosures.[62] 15 U.S.C. 1606(c).

With respect to the special APR tolerances for mortgage transactions under § 226.22(a)(4), proposed § 226.22(a)(4)(ii)(B) provides that, *for purposes of rescission,* the finance charge and all related disclosures are accurate if the finance charge is accurate under proposed § 226.23(a)(5)(ii), as applicable. Some creditors have asked the Board whether the larger tolerances under § 226.23(g) and (h) (proposed § 226.23(a)(5)(ii)) apply under § 226.19(a)(2) in determining whether a consumer must receive corrected disclosures at least three business days before consummation of *a rescindable transaction.* Section 226.19(a)(1)(i) requires creditors to provide good faith estimates of the TILA disclosures for all loans secured by a dwelling, within three business days of receiving a consumer's application. Section 226.19(a)(2) provides that if the difference between the actual APR and the disclosed APR exceeds the applicable tolerance, the creditor must provide corrected TILA disclosures that the consumer must receive at least three business days before consummation. In light of that requirement, some creditors have asked the Board whether, *for a rescindable transaction,* they need not provide corrected disclosures and wait three business days to consummate a transaction if a disclosed APR would be considered accurate under § 226.23(g) or (h) (proposed § 226.23(a)(5)(ii)) if the consumer tries to rescind in the future.

Proposed comment 22(a)(4)–2 clarifies that § 226.22(a)(4)(ii)(B) does not establish a special tolerance for determining whether corrected disclosures are required under

[60] Regarding the proposal to change where the finance charge tolerance for closed-end mortgage transaction is set forth, see the discussion of proposed revisions to § 226.18(d)(1) at 74 FR 43232, 43256, Aug. 26, 2009.

[61] For rescission of a refinancing of a principal balance made without a new consolidation or new advance, TILA Section 106(f)(2) provides a tolerance of one percent of the loan amount, provided the loan is not a high-cost HOEPA loan under TILA Section 103(aa), 15 U.S.C. 1602(aa). 15 U.S.C. 1605(f)(2).

[62] The tolerance for a regular transaction under TILA Section 107(c) is implemented in § 226.22(a)(2). TILA Section 107(c) provides that the Board may allow a greater tolerance to simplify compliance where irregular payments are involved. 15 U.S.C. 1606(c).

§ 226.19(a)(2) for rescindable mortgage transactions. The tolerances for the finance charge (interest and settlement charges) under § 226.23(g) and (h) (proposed § 226.23(a)(5)(ii)), apply only when the consumer actually asserts the right of rescission under § 226.23, as discussed above.

Conforming amendments. The Board proposes certain conforming amendments to § 226.22(a)(4). Section 226.22(a)(4) incorporates by reference finance charge tolerances under § 226.18(d)(1), as discussed above. Under the August 2009 Closed-End Proposal, proposed § 226.38(e)(5)(ii) instead of § 226.18(d)(1) would set forth the tolerances for the finance charge for a closed-end mortgage transaction, as discussed above. The Board proposes to revise § 226.22(a)(4) and comment 22(a)(4)–1 to replace the references to § 226.18(d)(1) with references to proposed § 226.38(e)(5)(ii). The Board also proposes to revise § 226.22(a)(4) and comment 22(a)(4)–1 to reflect that the term "interest and settlement charges" is used instead of the term "finance charge" for closed-end mortgage disclosures under the August 2009 Closed-End Proposal, as discussed above.

22(a)(5) Additional Tolerance for Mortgage Loans

Section 226.22(a)(5) provides an additional tolerance for transactions secured by real property or a dwelling. This additional tolerance avoids the anomalous result of imposing liability on a creditor for a disclosed APR that is not the actual APR but is closer to the actual APR than the APR that would be considered accurate under the statutory tolerance in § 226.22(a)(4). *See* 61 FR 49237, 49243, Sept. 19, 1996 (discussing the adoption of § 226.22(a)(5)). Section 226.22(a)(5), as proposed to be revised, states that if the disclosed interest and settlement charges are calculated incorrectly but considered accurate under proposed § 226.38(e)(5)(ii) or § 226.23(g) or (h) (proposed § 226.23(a)(5)(ii)), the disclosed APR is considered accurate if: (1) the disclosed interest and settlement charges are *understated* and the disclosed APR also is understated, but is closer to the actual APR than the APR that would be considered accurate under § 226.22(a)(4); or (2) the disclosed interest and settlement charges are *overstated* and the disclosed APR also is overstated but is closer to the actual APR than the rate that would be considered accurate under § 226.22(a)(4). Comment 22(a)(5)–1 illustrates the APR tolerance for mortgage transactions under § 226.22(a)(5), where a $75 omission from the finance charge for an irregular transaction occurs. The Board proposes to revise comment 22(a)(5)–1 for clarity and to reflect that the term "interest and settlement charges" is used instead of the term "finance charge" for closed-end mortgage disclosures under the August 2009 Closed-End Proposal.

New example for overstated APR. The Board also proposes to add an example that illustrates the APR tolerance in § 226.22(a)(5) where a disclosed APR is based on overstated interest and settlement charges. Proposed comment 22(a)(5)–1.ii provides the example of an irregular transaction for which the actual APR is 9.00 percent and the interest and settlement charges improperly include a $500 fee corresponding to a disclosed APR of 9.40 percent. That is, the disclosed APR of 9.40% results from disclosed interest and settlement charges that are considered accurate under previously proposed § 226.38(e)(5)(ii) because they are greater than the interest and settlement charges required to be disclosed and therefore are considered accurate under § 226.22(a)(4). Proposed § 226.22(a)(5)–1.ii clarifies that, in that case, a disclosed APR of 9.30 is within the tolerance in § 226.22(a)(5) because it is closer to the actual APR of 9.00% than the 9.40% APR that would be considered accurate under § 226.22(a)(4). Proposed comment 22(a)(5)–1.ii clarifies further that, for purposes of the example, an APR below 8.75 percent (corresponding to the ¼ of one percentage point tolerance for an irregular transaction) or above 9.40 percent (corresponding to the APR that results from the disclosed interest and settlement charges) will not be considered accurate.

Section 226.23 Right of Rescission

23(a) Consumer's Right to Rescind

23(a)(1) Coverage

Section 226.23(a)(1), which implements TILA Section 125(a), provides that in a credit transaction in which a security interest is or will be retained or acquired in a consumer's principal dwelling, each consumer whose ownership interest is or will be subject to the security interest shall have the right to rescind the transaction, except for transactions exempted under § 226.23(f). 15 U.S.C. 1635(a). Footnote 47 to § 226.23(a)(1) currently provides that for purposes of rescission, the addition to an existing obligation of a security interest in a consumer's principal dwelling is a transaction. The right of rescission applies only to the addition of the security interest and not the existing obligation. When adding a security interest, the creditor must deliver the notice of the right of rescission required under § 226.23(b), but need not deliver new material disclosures. Delivery of the required rescission notice begins the rescission period.

The Board proposes to move the first two sentences of footnote 47 to the text of § 226.23(a)(1) in order to make clear that the addition of a security interest in a consumer's principal dwelling is a rescindable transaction. However, the last two sentences of footnote 47 regarding the creditor's obligation to provide a rescission notice would be moved to comment 23(a)(1)–5.

Currently, comment 23(a)(1)–5 states that the addition of a security interest in a consumer's principal dwelling to an existing obligation is rescindable even if the existing obligation is not satisfied and replaced by a new obligation, and even if the existing obligation was previously exempt (because it was credit over $25,000 not secured by real property or a consumer's principal dwelling). The right of rescission applies only to the added security interest, and not to the original obligation. In those situations, only the § 226.23(b) notice need be delivered, not new material disclosures; the rescission period begins to run from the delivery of the notice.

The Board proposes to revise comment 23(a)(1)–5 to reflect changes under proposed § 226.20(a). As discussed in more detail in the section-by-section analysis for proposed § 226.20 above, proposed § 226.20(a)(1) would provide that the addition of new collateral that is real property or a dwelling to an existing legal obligation secured by real property or a dwelling would be a "new transaction" requiring new TILA disclosures. Thus, for example, if a creditor adds a security interest in the consumer's principal dwelling to an existing loan secured by vacant land, then the creditor would have to provide the consumer with new TILA disclosures. Accordingly, comment 23(a)(1)–5 would be revised to state that if the addition of a security interest in the consumer's principal dwelling is a new transaction under § 226.20(a)(1), then the creditor must deliver new material disclosures in addition to the § 226.23(b) notice.

For an existing obligation not secured by real property or a dwelling, proposed § 226.20(a)(2) would provide that new TILA disclosures are required if the existing obligation is satisfied and replaced by a new obligation. Thus, for example, if a creditor satisfies and replaces an existing auto loan and adds a security interest in the consumer's principal dwelling, then the creditor must deliver new material disclosures in addition to the § 226.23(b) notice. Comment 23(a)(5)–1 would be revised to reflect this requirement. As in the current comment, if the existing obligation is not satisfied and replaced, then the creditor need only deliver the § 226.23(b) notice, not new material disclosures.

Finally, comment 23(a)(1)–5 would be revised to clarify that the rescission period will begin to run from the delivery of the rescission notice and, as applicable, the delivery of the material disclosures.

23(a)(2) Exercise of the Right

Background

TILA permits a consumer to assert rescission against the creditor or any assignee of the loan obligation. TILA Sections 125(a), 131(c); 15 U.S.C. 1635(a), 1641(c). To exercise the right of rescission, the consumer must send notification to the creditor or the creditor's agent designated on the notice of the right of rescission provided by the creditor. TILA Section 125(a); 15 U.S.C. 1635(a); § 226.23(a)(2), (b)(iii); comment 23(a)(2)–1. If the creditor fails to provide the consumer with a designated address for sending the notification of rescission, delivering notification to the person or address to which the consumer has been directed to send payments (*i.e.,* the loan servicer) constitutes delivery to the creditor or assignee. *See* comment 23(a)(2)–1.

This regulatory framework for asserting the right to rescind is applicable to most transactions that are rescinded within the initial three-business-day period. TILA and Regulation Z provide that the right of rescission expires three business days after the later of (1) consummation, (2) delivery of the notice of the right to rescind, or (3) delivery of the material disclosures. TILA Section 125(a); 15 U.S.C. 1635(a); § 226.23(a)(3). The creditor may not, directly or through a third party, disburse money, perform services, or deliver materials until the initial three-day rescission period has expired and the creditor is reasonably satisfied that the consumer has not rescinded. § 226.23(c); comment 23(c)–1. Within the three-business-day period, a consumer normally would send the notice to the creditor or the creditor's agent whose address appears on the rescission notice. The consumer's notification asserting the right against the "creditor" (as defined in § 226.2(a)(17)) in most cases would be effective because, as the Board understands, loans typically are not assigned within the three-business-day period. Under current comment 23(a)(2)–1, if no address were listed for the creditor or the creditor's agent on the rescission notice, the consumer could assert rescission against the creditor by notifying the servicer.

The current regulations, however, do not as readily apply to the exercise the right of rescission during the extended right to rescind. If the creditor fails to deliver the notice of the right to rescind or the material disclosures, the right to rescind expires three years from the date of consummation (or upon the sale or transfer of the property). TILA Section 125(f); 15 U.S.C. 1635(f); § 226.23(a)(3). In the case of certain administrative proceedings, the right to rescind may be further extended. *See id.* The principal problem during the extended rescission period is that the party against which a consumer must assert may no longer be the creditor on the original notice of rescission. TILA Section 125 and § 226.23 set forth the steps the consumer must take to assert that right only with respect to the creditor, yet, during the extended period, a notice to the creditor listed on the original rescission notice may be ineffective. The original creditor may have transferred the obligation shortly after consummation, and, if the loan is securitized, it may have been transferred several times. In addition, the original creditor may no longer exist because of dissolution, bankruptcy, or merger. Moreover, some courts have held that notice is ineffective when the consumer notifies the original creditor and the current servicer, but not the current holder.[63] For practical reasons, a consumer that has an extended right of rescission should assert the right directly against the assignee (the current holder of the loan), because only the assignee is in a position to cancel the transaction.

Unfortunately, consumers have difficulty identifying the assignee that currently holds their loan. Recognizing this problem, Congress recently amended TILA to help consumers determine who the current owner of their loan is and how to contact the owner.[64] The amendments, which the Board implemented in new § 226.39, require an assignee to provide its name and contact information to the consumer within 30 days of acquiring the loan. Consumers can also obtain this information under TILA Section 131(f)(2), which requires loan servicers, upon request from a consumer, to provide the name, address, and telephone number of the owner or master servicer of a loan. 15 U.S.C. 1641(f)(2). The Board is proposing new § 226.41 to require servicers to provide the information the consumer requests under TILA Section 131(f)(2) within a reasonable time. 15 U.S.C. 1641(f)(2).

Despite these improvements, a consumer may still send notification of exercise to the incorrect party because they mistakenly believe that the original creditor or an assignee that once held the loan continues to hold the loan. This reasonable mistake has the most serious consequences for consumers with an extended right that will soon expire; they may lose their right to rescind entirely because of a time lag in the consumer's receipt of information provided pursuant to § 226.41 or § 226.39. Some consumers may never be informed of a certain transfer of their loan because the § 226.39 notice was lost in the mail or the provision of a § 226.39 notice was not required (for instance, when a transferee assigns the loan within 30 days of acquisition). Other consumers may receive a § 226.39 notice identifying the current holder, but fail to read or to keep it, possibly because few consumers will recognize the importance of the information contained in a § 226.39 notice for exercising the right to rescind. Finally, many consumers do not understand the difference between the servicer and the owner of a loan, and may attempt to exercise their right by notifying the servicer.

The Board's Proposal

To address some of these problems, the Board proposes to revise § 226.23(a)(2) and associated commentary. Revised § 226.23(a)(2) would describe: (1) How the consumer must exercise the right of rescission; (2) whom the consumer must notify during the three-business-day period following consummation and after that period has expired (the extended right); and (3) when the creditor or current owner will be deemed to receive the consumer's notice. Comment 23(a)(2)–1 would be divided into three comments and the sentence regarding the start of the time period for the creditor's performance under § 226.23(d)(2) would be moved into new comment 23(a)(2)(ii)(B)–1.

23(a)(2)(i) Provision of Written Notification

Proposed § 226.23(a)(2)(i) contains the same requirements as current § 226.23(a)(2) with respect to the form of

[63] *See, e.g., Roberts* v. *WMC Mortgage Corp.,* 173 Fed. Appx. 575 (9th Cir. 2006) (unpublished); *Meyer* v. *Argent Mortgage Co.,* 379 B.R. 529 (Bankr. E.D. Pa. 2007).

[64] *See* Helping Families Save Their Homes Act, Public Law 111–22, tit. IV, § 404(a), 123 Stat. 1632, 1658 (2009).

and timing for provision of notification. The reference to notices sent by telegram would be removed from the listed methods of transmitting written communication in the regulation and associated commentary as obsolete. No other substantive changes are intended.

23(a)(2)(ii) Party the Consumer Shall Notify

Proposed § 226.23(a)(2)(ii) provides that the party the consumer must notify depends on whether the right of rescission is exercised during the three-business-day period following consummation of the transaction or after expiration of that period. Proposed § 226.23(a)(2)(ii)(A) states that, during the three-business-day period following consummation of the transaction, the consumer must notify the creditor or the creditor's agent designated on the rescission notice. Proposed § 226.23(a)(2)(ii)(A) also includes the guidance from current comment 23(a)(2)–1, that if the notice does not designate the address of the creditor or its agent, the consumer may mail or deliver notification to the servicer, as that term is defined in § 226.36(c)(3). The proposed rule is intended to ensure that the notice is sent to the person who most likely still will own the debt obligation. Generally, loans are not transferred during the three-business-day period following consummation.

Proposed § 226.23(a)(2)(ii)(B) is intended to ensure that consumers can exercise the extended right of rescission if the creditor has transferred the consumer's debt obligation. Under proposed § 226.23(a)(2)(ii)(B), the consumer must mail or deliver notification to the current owner of the debt obligation; however, notice to the servicer would also constitute delivery to the current owner. As discussed above, consumers may have difficulty identifying the current owner of their loan, and may reasonably be confused as to whom they should correspond with about rescinding their loan. In contrast, consumers usually know the identity of their servicer. They may regularly receive statements or other correspondence from their servicer, for example, and many consumers continue to mail monthly mortgage payments to the servicer rather than have these payments automatically debited from their checking or savings account. For these reasons, the Board believes that consumers who exercise the extended right of rescission by notifying their servicers should not be deprived of this important consumer remedy. Moreover, servicers are generally agents of the owner concerning correspondence and other communications to and from the consumer. The Board expects that it would not be unduly burdensome for the servicer to receive a consumer's notification of rescission on behalf of the owner and to inform the owner of the rescission. Proposed comment 23(a)(2)(ii)(B)–1 clarifies that when a consumer provides the servicer with notification of exercise of the extended right of rescission under proposed § 226.23(a)(2)(ii)(B), the period for the creditor's or owner's actions in § 226.23(d)(2) begins to run from the time the servicer receives the consumer's notification.

The Board requests comment on whether the proposal to permit consumers to exercise the right to rescind by notifying the servicer, even if the servicer is not the current owner of the loan, could create any operational or other compliance issues. In particular, the Board seeks comment on whether it is feasible for a servicer to inform the creditor or owner of the debt obligation that the consumer has rescinded on the same day as the servicer receives the consumer's notification, or if the servicer could contractually be responsible for handling the rescission process.

23(a)(3) Rescission Period

Section 226.23(a)(3), which implements TILA Section 125(a), provides that a consumer may exercise the right to rescind until midnight after the third business day following consummation, delivery of all material disclosures, or delivery of the rescission notice, whichever occurs last. 15 U.S.C. 1635(a). If the required notice and material disclosures are not delivered, § 226.23(a)(3) further states that the right of rescission expires three years after the date of consummation of the transaction, upon transfer of all of the consumer's interest in the property, or upon sale of the property, whichever occurs first.

23(a)(3)(i) Three Business Days

Questions have been raised about when the three-business-day rescission period starts if the creditor provided an incorrect or incomplete rescission notice or material disclosures. Some courts have held that the three-business-day rescission period starts when the creditor delivers corrected material disclosures and a new notice of the right to rescind.[65] Some industry representatives, however, maintain that delivery of the corrected material disclosures retroactively triggers the three-business-day rescission period to start when the transaction was consummated. Accordingly, these representatives believe that a new notice of the right to rescind is unnecessary and that the consumer is not entitled to a "second" three-business-day rescission period that starts from delivery of the corrected material disclosures.

To address these questions, the Board is proposing to add a new comment 23(a)(3)(i)–1.iii. The proposed comment explicitly states that the provision of incorrect or incomplete material disclosures or an incorrect or incomplete notice of the right to rescind does not constitute delivery of the material disclosures or notice. The comment explains that, if the creditor originally provided incorrect or incomplete material disclosures, the three-business-day rescission period starts only when the creditor delivers complete, correct material disclosures[66] together with a complete, correct, updated notice of the right to rescind. An updated rescission notice is required because the notice that the creditor previously provided would have contained an incorrect date of expiration of the right, calculated from the later of the date that the transaction was consummated, that the first notice of the right of rescission was provided, or that the incorrect or incomplete material disclosures were provided, instead of the date from which the correct, complete material disclosures were delivered (which had not yet occurred). Of course, if the creditor originally delivered correct, complete material disclosures, but provided a defective notice of the right to rescind, the creditor must deliver to the consumer a complete, correct, updated notice of the right to rescind to commence the three-business-day rescission period.

Proposed comment 23(a)(3)(i)–1.iii also states that the consumer would have the right of rescission until midnight after the third business day following the date of either (1) delivery of the correct and complete material disclosures and correct, complete, updated notice of the right of rescission, or (2) delivery of only the correct, complete, updated notice of the right of rescission, as appropriate. Such delivery

[65] *See, e.g., Smith* v. *Wells Fargo Credit Corp.,* 713 F. Supp. 354 (D. Ariz. 1989); *In re Underwood,* 66 B.R. 656 (Bankr. W.D. Va. 1986).

[66] In its August 2009 Closed-End Proposal, the Board proposed two alternative requirements under § 226.19(a)(2)(iii) for creditors to provide corrected disclosures to the consumer three business days before consummation when a subsequent event makes the final disclosures inaccurate. The Board's final rule under § 226.19(a)(2)(iii) will determine whether a creditor providing corrected material disclosures to comply with this proposed § 226.23(a)(3)(i) must redisclose just the changed terms or all of the terms of the loan.

would also terminate the consumer's extended right to rescind arising from the creditor's original provision of defective material disclosures and/or notice of the right of rescission.

The Board is also proposing to move the final sentence of existing comment 23(a)(3)–1, which clarifies that the consumer must place the rescission notice in the mail or deliver it to the creditor's place of business within the three-business-day period, to proposed § 226.23(a)(2). The Board further proposes to move the remainder of existing comment 23(a)(3)–1, explaining the calculation of the three-business-day period, to proposed comment 23(a)(3)(i)–1.iii. The example of a calculation of the three-business-day period where the notice of right to rescind was delivered after consummation would be omitted because proposed § 226.23(b)(5) requires delivery of the notice of right to rescind prior to consummation.

23(a)(3)(ii) Unexpired Right of Rescission

Implementing TILA Section 125(a), § 226.23(a)(3) currently states that if the material disclosures and rescission notice are not delivered, the right of rescission expires "three years after consummation, upon transfer of all of the consumer's interest in the property, or upon sale of the property, whichever occurs first." 15 U.S.C. 1635(a). Concerns have been raised about whether certain occurrences, such as the consumer's death, filing for bankruptcy, refinancing the loan, or paying off the loan, would terminate an unexpired right to rescind. The Board is proposing to revise § 226.23(a)(3) and associated commentary to clarify these issues. In addition, portions of comment 23(a)(3)–3 would be removed because they simply repeat the regulation. Finally, footnote 48 and comment 23(a)(3)–2 would be moved to the new provision in the proposed § 226.23(a)(5) addressing material disclosures.

Consumer's death. Proposed comment 23(a)(3)(ii)(A)–1 clarifies that the consumer's death terminates an unexpired right to rescind. Through the operation of law, upon the consumer's death all of the consumer's interest in the property is transferred to the consumer's heirs or the estate. Thus, the consumer's death results in a "transfer of all of the consumer's interest in the property," which, as noted above, terminates the right to rescind under § 226.23(a)(3).

Bankruptcy. Proposed comment 23(a)(3)(ii)(A)–1 also clarifies that the consumer's filing for bankruptcy generally does not terminate the unexpired right to rescind, if the consumer still retains an interest in the property after the bankruptcy estate is formed. In a Chapter 7 bankruptcy, most consumers will claim a homestead or other exemption in their residences and, thus, retain an interest in the property. In a Chapter 13 bankruptcy, the consumer retains a right of possession of all property of the bankruptcy estate.[67] Upon confirmation of the Chapter 13 bankruptcy plan, unless otherwise provided, all of the property of the estate is vested in the debtor (consumer).[68] Thus, in those cases, the consumer does not transfer "all of the consumer's interest in the property," so the right to rescind should not expire under § 226.23(a)(3).

Refinancing. Proposed § 226.23(a)(3)(ii)(A) clarifies that a refinancing with a creditor other than the current holder of the obligation terminates the unexpired right to rescind. Refinancing a consumer credit transaction extinguishes the prior creditor's lien on the consumer's property, and terminates the consumer's obligation to repay the creditor under the promissory note through satisfaction of that obligation. These results are the same as those of a "sale of the property," which, as noted above, terminates the right of rescission under TILA and Regulation Z. TILA Section 125(a); 15 U.S.C. 1635(a); § 226.23(a)(3). The Board also believes that continuance of the unexpired right is unnecessary when refinancing with a new creditor, because the results are substantively similar to those of rescission—namely, voiding of the prior creditor's security interest, release of the borrower from the obligation to make payments to that creditor, and return to the creditor of money borrowed.

Under proposed § 226.23(a)(3)(ii)(A), not all refinancings would terminate the extended right to rescind—the right to rescind would still apply to refinancings with the current holder of the credit obligation. The Board is concerned that if all refinancings terminate the extended right to rescind, including refinancings with the same creditor, some creditors may abuse the refinancing process to profit without benefiting the consumer. In particular, some unscrupulous creditors might refinance their own loans on terms that are no better for the consumer than the terms of the prior loan to purposely terminate the consumer's right to rescind the previous loan in which material disclosures or the notice of the right was not delivered. A creditor might do this repeatedly, charging fees and stripping the consumer's equity. Unless these creditors are subject to the consumer remedy of rescission, the Board believes that consumers would not be adequately protected.

Loan pay off. Under proposed § 226.23(a)(3)(ii)(A), paying off a loan would also terminate the unexpired right to rescind. Similar to a refinancing, paying off a consumer credit transaction extinguishes the creditor's prior lien on the consumer's property, and terminates the consumer's obligation to repay the creditor under the promissory note through satisfaction of that obligation. Again, these results are the same as those of a "sale of the property," which, as noted above, terminates the right of rescission under TILA and Regulation Z. TILA Section 125(a); 15 U.S.C. 1635(a); § 226.23(a)(3). The Board also believes that continuance of the unexpired right is unnecessary once a loan is paid off, because paying off the loan largely accomplishes the results of rescission—namely, voiding of the prior creditor's security interest, release of the borrower from the obligation to make payments to that creditor, and return to the creditor of money borrowed.

Proposed comments 23(a)(3)(ii)(A)–2 and –3 regarding the sale or transfer of property are adopted from current comment 23(a)(3)–3. No substantive change is intended. Proposed § 226.23(a)(3)(ii)(B) regarding the extension of the right to rescind in connection with certain administrative proceedings is adopted from the current § 226.23(a)(3). No substantive change is intended. The sentence regarding the extension of the right to rescind in connection with certain administrative proceedings in current comment 23(a)(3)–3 does not appear in a proposed comment because it simply repeats the regulation. No substantive change is intended.

The Board solicits comment on the proposed clarifications that the consumer's death, bankruptcy (when the consumer retains an interest in the securing property), refinancings (with a new creditor), and paying off the loan terminate the unexpired right to rescind.

23(a)(4) Joint owners

Section 226.23(a)(4) provides that when more than one consumer in a transaction has the right to rescind, the exercise of the right by one consumer shall be effective as to all consumers. Comment 23(a)(4)–1 provides that when more than one consumer has the right to rescind a transaction, any one of them may exercise that right and cancel the transaction on behalf of all. For example, if both a husband and wife

[67] 11 U.S.C. 1306(b).

[68] 11 U.S.C. 1327(b).

have the right to rescind a transaction, either spouse acting alone may exercise the right and both are bound by the rescission. The Board proposes technical edits to these provisions. No substantive change is intended.

23(a)(5) Material Disclosures

Background

TILA and Regulation Z provide that a consumer may exercise the right to rescind until midnight of the third business day after the latest of (1) Consummation, (2) delivery of the notice of right to rescind, or (3) delivery of all material disclosures. TILA Section 125(a); 15 U.S.C. 1635(a); § 226.23(a)(3). Thus, the right to rescind does not expire until the notice of right to rescind and the material disclosures are properly delivered. This ensures that consumers are notified of their right to rescind, and that they have the information they need to decide whether to exercise the right. If the rescission notice or the material disclosures are not delivered, a consumer's right to rescind may extend for up to three years from consummation. TILA Section 125(f); 15 U.S.C. 1635(f); § 226.23(a)(3).

TILA defines the following as "material disclosures": (1) The annual percentage rate, (2) the amount of the finance charge, (3) the amount to be financed, (4) the total of payments, (5) the number and amount of payments, (6) the due dates or periods of payments scheduled to repay the indebtedness, (7) the disclosures required by HOEPA, and (8) the inclusion of a provision in a mortgage that is prohibited by HOEPA, such as negative amortization. TILA Sections 103(u), 129(j); 15 U.S.C. 1602(u), 1639(j).

Congress first added the definition of "material disclosures" to TILA in 1980 so that creditors would be "in a better position to know whether a consumer may properly rescind a transaction."[69] The mortgage market has changed considerably since Congress created this definition of "material disclosures." For example, many creditors now offer nontraditional mortgage products that contain complex or risky features, such as negative amortization or interest-only payments. In the August 2009 Closed-End Proposal, the Board proposed comprehensive revisions to the disclosures for closed-end mortgages that would reflect these changes in the mortgage market. 74 FR 43232, Aug. 26, 2009. The proposed disclosures and revised model forms were developed after extensive consumer testing to determine which credit terms consumers find the most useful in evaluating credit transactions. Based on consumer testing, the August 2009 Closed-End Proposal would add certain new disclosures, such as the interest rate and whether a loan has negative amortization or permits interest-only payments, while making certain other disclosures less prominent, such as the amount financed and the total and number of payments. The proposed rule would also add certain formatting requirements, such as font size and tabular format, to facilitate consumers' understanding of the disclosures.

The Board's Proposal

The Board now proposes to revise the definition of material disclosures to include the information that is critical to consumers in evaluating loan offers, and to remove information that consumers do not find to be important. The proposal is intended to ensure that consumers have the information they need to decide whether to rescind a loan.

Proposed § 226.23(a)(5) would *retain* the following as material disclosures:

- The special HOEPA disclosures and the HOEPA prohibitions referred to in §§ 226.32(c) and (d) and 226.35(b)(2);
- The annual percentage rate;
- The payment summary; and
- The finance charge, renamed the "interest and settlement charges."

The following disclosures would be *added* to the list of material disclosures:

- The loan amount;
- The loan term;
- The loan type (such as an adjustable-rate mortgage);
- The loan features (such as negative amortization);
- The total settlement charges;
- The prepayment penalty; and
- The interest rate.

The following disclosures would be *removed* from the list of material disclosures:

- The amount financed;
- The number of payments; and
- The total of payments.

Proposed comment 23(a)(5)(i)–1 would state that the right to rescind generally does not expire until midnight after the third business day following the latest of (1) consummation; (2) delivery of the notice of right to rescind, as set forth in § 226.23(b); or (3) delivery of all material disclosures, as set forth in § 226.23(a)(5)(i). A creditor must make the material disclosures clearly and conspicuously consistent with the requirements of §§ 226.32(c) and 226.38. The proposed comment would clarify that a creditor may satisfy the requirements for § 226.32(c) by using the Section 32 Loan Model Clauses in Appendix H–16, or providing substantially similar disclosures. In addition, a creditor may satisfy the requirements for proposed § 226.38 by providing the appropriate model form in Appendix H or, for reverse mortgages, Appendix K, or a substantially similar disclosure, which is properly completed with the disclosures required by proposed § 226.38. Failure to provide the non-material disclosures does not affect the right of rescission, although such failure may be a violation subject to the liability provisions of TILA Section 130, or administrative sanctions. 15 U.S.C. 1640.

A material disclosure that is clear and conspicuous but contains a formatting error, such as failure to use bold text, is unlikely to impair a consumer's ability to determine whether to exercise the right to rescind. Thus, proposed comment 23(a)(5)(i)–2 would clarify that failing to satisfy any specific terminology or format requirements set forth in proposed § 226.33 or § 226.37 or in the proposed model forms in Appendix H or Appendix K is not by itself a failure to provide material disclosures. Nonetheless, a creditor must provide the material disclosures clearly and conspicuously, as described in proposed § 226.37 and proposed comments 37(a)–1 and 37(a)(1)–1 and -2.

Legal authority to add disclosures. The Board proposes to revise the definition of material disclosures pursuant to its authority under TILA Section 105. 15 U.S.C. 1604. Although Congress specified in TILA the disclosures that constitute material disclosures, Congress gave the Board broad authority to make adjustments to TILA requirements based on its knowledge and understanding of evolving credit practices and consumer disclosures. Under TILA Section 105(a), the Board may make adjustments to TILA to effectuate the purposes of TILA, to prevent circumvention or evasion, or to facilitate compliance. 15 U.S.C. 1604(a). The purposes of TILA include ensuring the "meaningful disclosure of credit terms" to help consumers avoid the uninformed use of credit. 15 U.S.C. 1601(a), 1604(a).

The Board has considered the purposes for which it may exercise its authority under TILA Section 105(a) and, based on that review, believes that the proposed adjustments are appropriate. The Board believes that the proposed amendments to the definition of "material disclosures" are warranted by the complexity of mortgage products offered today and the number of

[69] S. Rep. No. 368, 98 Cong. 2d Sess. 29, *reprinted in* 1980 U.S.C.A.N.N. 236, 264.

disclosures that are critical to the consumer's evaluation of a loan offer. Some of those features did not exist when Congress created the definition of "material disclosures" in 1980, and the Board does not believe that Congress intended to omit critical mortgage features from the definition. Consumer testing has shown that changes in the mortgage marketplace have made certain disclosures more important to consumers. Defining these disclosures as "material disclosures" would ensure the "meaningful disclosure of credit terms" so that consumers would have the information they need to make informed decisions about whether to rescind the credit transaction. The proposed definition may also prevent circumvention or evasion of the disclosure rules set forth in proposed § 226.38 because creditors would have a greater incentive to ensure that the material disclosures are accurate.

Legal authority to add tolerances. The Board recognizes that increasing the number of material disclosures could increase the possibility of errors resulting in extended rescission rights. Although the creditor must re-disclose any changed terms before consummation, consistent with § 226.17(f), there may still be errors in the final TILA disclosure. To ensure that inconsequential disclosure errors do not result in extended rescission rights, the Board proposes to add tolerances for accuracy of disclosures of the loan amount, the total settlement charges, the prepayment penalty, and the payment summary.

The proposal would retain the existing tolerances for the interest and settlement charges (currently referred to as the "finance charge"). The tolerances for disclosure of the finance charge were created by Congress in 1995,[70] and implemented by the Board in 1996.[71] Thus, TILA and Regulation Z provide a general tolerance for disclosure of the finance charge, a special tolerance for a refinancing with no new advance, and a special tolerance for foreclosures. TILA Sections 106(f)(2), 125(i)(2); 15 U.S.C. 1605(f)(2), 1635(i)(2); § 226.23(g), (h). Under the general rule, the finance charge is considered accurate if the disclosed finance charge is understated by no more than ½ of 1 percent of the face amount of the note or $100, whichever is greater; or is greater than the amount required to be disclosed. There is a greater tolerance for a refinancing with a new creditor if there is no new advance and no consolidation of existing loans. In that case, the finance charge is considered accurate if the disclosed finance charge is understated by no more than 1 percent of the face amount of the note or $100, whichever is greater; or is greater than the amount required to be disclosed. Finally, there is a stricter tolerance after the initiation of foreclosure on the consumer's principal dwelling that secures the credit transaction. In that case, the finance charge is considered accurate if it is understated by no more than $35; or is greater than the amount required to be disclosed. The APR is treated as accurate if the disclosed APR is based on a finance charge that would be considered accurate under the rule.

The Board proposes to model the tolerances for the loan amount, the total settlement charges, the prepayment penalty, and the payment summary on the tolerances provided by Congress in 1995 for the disclosure of the finance charge. As discussed in more detail in the section-by-section analyses below, the loan amount would be considered accurate if the disclosed loan amount is understated by no more than ½ of 1 percent of the face amount of the note or $100, whichever is greater; or is greater than the amount required to be disclosed. In a refinancing with no new advance, the loan amount would be considered accurate if the disclosed loan amount is understated by no more than 1 percent of the face amount of the note or $100, whichever is greater; or is greater than the amount required to be disclosed. The total settlement charges, the prepayment penalty, and the payment summary would be considered accurate if each of the disclosed amounts is understated by no more than $100; or is greater than the amount required to be disclosed.

The Board proposes the new tolerances for the loan amount, the total settlement charges, the prepayment penalty, and the payment summary pursuant to its authority in TILA Section 121(d) to establish tolerances for numerical disclosures that the Board determines are necessary to facilitate compliance with TILA and that are narrow enough to prevent misleading disclosures or disclosures that circumvent the purposes of TILA. 15 U.S.C. 1631(d). The Board does not believe that an extended right of rescission is appropriate if a creditor overstates or slightly understates the loan amount, the total settlement charges, the prepayment penalty, or the payment summary. Creditors would incur litigation and other costs of unwinding transactions based on the extended right of rescission, even though the overstatement or slight understatement of the disclosure was not critical to a consumer's decision to enter into the credit transaction, and in turn, to rescind the transaction. The overstatement or slight understatement is unlikely to influence the consumer's decision of whether to rescind the loan. The Board believes that the proposed tolerances are broad enough to alleviate creditors' compliance concerns regarding minor disclosure errors, and narrow enough to prevent misleading disclosures.

Legal authority to remove disclosures. The proposal would remove the following disclosures from the definition of "material disclosures": the amount financed, the number of payments, and the total of payments. The Board proposes to remove these disclosures from the definition of "material disclosures," under its exception and exemption authority under TILA Section 105. 15 U.S.C. 1604. Although Congress specified in TILA the disclosures that constitute material disclosures that extend rescission, the Board has broad authority to make exceptions to or exemptions from TILA requirements based on its knowledge and understanding of evolving credit practices and consumer disclosures. Under TILA Section 105(a), the Board may make adjustments to TILA to effectuate the purposes of TILA, to prevent circumvention or evasion, or to facilitate compliance. 15 U.S.C. 1604(a). The purposes of TILA include ensuring "meaningful disclosure of credit terms" to help consumers avoid the uninformed use of credit. 15 U.S.C. 1601(a), 1604(a).

TILA Section 105(f) authorizes the Board to exempt any class of transactions from coverage under any part of TILA if the Board determines that coverage under that part does not provide a meaningful benefit to consumers in the form of useful information or protection. 15 U.S.C. 1604(f)(1). The Board is proposing to exempt closed-end credit transactions secured by real property or a dwelling from the part of TILA Section 103(u) that includes the amount financed, the number of payments, and the total of payments as material disclosures. TILA Section 105(f) directs the Board to make the determination of whether coverage of such transactions provides a meaningful benefit to consumers in light of specific factors. 15 U.S.C. 1604(f)(2). These factors are (1) The amount of the loan and whether the disclosures, right of rescission, and other provisions provide a benefit to consumers who are parties to the transactions involving a loan of such amount; (2) the extent to

[70] Public Law No. 104–29 §§ 3 and 8, 109 Stat. 274, 272 and 275 (1995), *codified at* 15 U.S.C. 1605(f)(2) and 1635(i)(2).

[71] 61 FR 49237, Sept. 19, 1996; § 226.23(g), (h).

which the requirement complicates, hinders, or makes more expensive the credit process; (3) the status of the borrower, including any related financial arrangements of the borrower, the financial sophistication of the borrower relative to the type of transaction, and the importance to the borrower of the credit, related supporting property, and coverage under TILA; (4) whether the loan is secured by the principal residence of the borrower; and (5) whether the exemption would undermine the goal of consumer protection.

The Board has considered each of these factors and, based on that review, believes that the proposed exceptions and exemptions are appropriate. Mortgage loans generally are the largest credit obligation that most consumers assume. Most of these loans are secured by the consumer's principal residence. Consumer testing of borrowers with varying levels of financial sophistication shows that certain disclosures are not likely to significantly impact a consumer's decision to enter into a mortgage transaction or to exercise the right to rescind. Treating the amount financed and the number and total of payments as "material disclosures" would not provide a meaningful benefit to consumers in the form of useful information or protection. However, retaining these disclosures as material disclosures can increase the cost of credit when failure to provide these disclosures or technical violations due to calculation errors results in an extended right to rescind. Revising the definition of "material disclosures" to reflect the disclosures that are most critical to the consumer's evaluation of credit terms would better ensure that the compliance costs are aligned with disclosure requirements that provide meaningful benefits for consumers.

An analysis of the disclosures retained, added, and removed from the definition of "material disclosures" is set forth below.

23(a)(5)(i) HOEPA and Higher-Priced Mortgage Disclosures and Limitations

In 1994, Congress enacted HOEPA as an amendment to TILA, and added to the definition of "material disclosures" the special disclosures for HOEPA loans.[72] TILA Section 103(u); 15 U.S.C. 102(u). Congress also provided that the inclusion of a provision in a HOEPA loan that is prohibited by HOEPA, such as negative amortization, is deemed to be a failure to deliver the material disclosures. TILA Section 129(j); 15 U.S.C. 1639(j). Currently, the following disclosures for HOEPA loans are material disclosures: (1) A statement that the consumer is not obligated to complete the agreement merely because the consumer has received the disclosures or signed an application; (2) a statement that the consumer could lose the home if the consumer does not meet the loan obligations; (3) the annual percentage rate; (4) the amount of the regular payment and any balloon payment; (5) for variable-rate transactions, a statement that the interest rate and monthly payment may increase, and a disclosure of the maximum monthly payment; and (6) the amount borrowed. TILA Sections 103(u), 129(a); 15 U.S.C. 1602(u), 1639(a); §§ 226.23(a)(3) n.48, 226.32(c). In addition, TILA and Regulation Z prohibit certain loan terms in connection with mortgage loans covered by HOEPA, including some prepayment penalties, balloon payments, negative amortization, and rate increases upon default. TILA Section 129(c)–(g), (j); 15 U.S.C. 1639(c)–(g), (j); §§ 226.23(a)(3) n.48, 226.32(d), 226.35(b)(2). Because of the importance of these disclosures and limitations for high-cost loans, the Board proposes to retain their inclusion in the definition of "material disclosures."

23(a)(5)(i)(A) Loan Amount

Currently, TILA and Regulation Z do not require creditors to disclose the loan amount, except in connection with HOEPA loans. For those loans, creditors must disclose the amount borrowed, which is a material disclosure. TILA Sections 103(u), 129; 15 U.S.C. 1602(u), 1639; §§ 226.23(a)(3) n.48, 226.32(c)(5). The amount borrowed is treated as accurate if it is not more than $100 above or below the amount required to be disclosed. Section 226.32(c)(5). The Board adopted this requirement in December 2001, noting that the disclosure responded to concerns that consumers sometimes seek a modest loan amount only to discover at closing (or after) that the note amount is substantially higher due to fees and insurance premiums that are financed along with the requested loan amount. 66 FR 65611, Dec. 20, 2001.

For non-HOEPA loans, disclosure of the loan amount is not currently required under TILA or Regulation Z. Consumers testing showed, however, that participants could not ascertain the loan amount from other currently-required disclosures, such as the total of payments or the amount financed, which is generally the loan amount less the prepaid finance charge. The August 2009 Closed-End Proposal would require creditors to disclose the loan amount, defined as the principal amount the consumer will borrow as reflected in the loan contract. *See* proposed § 226.38(a)(1). Participants in consumer testing were able to identify the exact loan amount based on this disclosure. 74 FR 43292, Aug. 26, 2009. The Board noted that the loan amount is a core loan term that the consumer should be able to verify readily from the disclosure. Furthermore, the disclosure would alert the consumer to the financing of points and fees.

Accordingly, the Board proposes § 226.23(a)(5)(i)(A) to include the loan amount disclosed under § 226.38(a)(1) in the definition of "material disclosures." This would not significantly increase creditors' burden because this amount presumably is reflected in other documents, such as the promissory note. However, to reduce the likelihood of rescission claims based on minor discrepancies between the disclosure and loan documents that are unlikely to affect a consumer's decision-making, the Board proposes to provide a tolerance for the disclosure of the loan amount.

Tolerances. As discussed above, this proposal would provide a tolerance for the loan amount modeled after the tolerances for the finance charge created by Congress in 1995. Specifically, proposed § 226.23(a)(5)(iii)(A) would provide that the loan amount disclosure would be considered accurate for purposes of rescission if the disclosed loan amount (1) is understated by no more than ½ of 1 percent of the face amount of the note or $100, whichever is greater; or (2) is greater than the amount required to be disclosed. Proposed § 226.23(a)(5)(iii)(B) would provide a special tolerance for a refinancing with a creditor other than the current holder of the debt obligation if there is no new advance and no consolidation of existing loans. Under those circumstances, the loan amount would be considered accurate if the disclosed loan amount (1) is understated by no more than 1 percent of the face amount of the note or $100, whichever is greater; or (2) is greater than the amount required to be disclosed. These tolerances would be consistent with the tolerances applicable to the credit limit disclosed for HELOCs under proposed § 226.15(a)(5)(iii).

Proposed comment 23(a)(5)(iii)–2 would clarify that if there is no new advance of money and no consolidation of existing loans, a refinancing with the current holder who is not the original creditor is subject to the special

[72] HOEPA was contained in the Riegle Community Development and Regulatory Improvement Act of 1994, Public Law 103–325, 108 Stat. 2160 (1994). Section 152 of HOEPA added a new section 129 to TILA.

tolerance for the loan amount set forth in § 226.23(a)(5)(iii)(B). However, a new transaction under § 226.20(a)(1) with the original creditor who is also the current holder is exempt from rescission under § 226.23(f)(2). Proposed comment 23(a)(5)(iii)–3 would clarify that the term "new advance" would have the same meaning as in proposed § 226.23(f)(2)(ii).

Proposed comment 23(a)(5)(iii)–1 would clarify that if the mortgage is a HOEPA loan, then the tolerance for the amount borrowed as provided in § 226.32(c)(5) would apply to the disclosure of the loan amount for purposes of rescission. For example, the loan amount for a HOEPA loan would be treated as accurate if it is not more than $100 above or below the amount required to be disclosed.

As stated above, the Board proposes to model the tolerance for the loan amount on the tolerances provided by Congress in 1995 for disclosure of the finance charge. However, the Board recognizes that the loan amount is typically smaller than the finance charge. The Board requests comment on whether it should decrease the tolerance in light of the difference between the amount of the finance charge and the loan amount. On the other hand, the Board recognizes that Congress set the $100 in 1995 and a higher dollar figure may be more appropriate at this time. Alternatively, it may be more appropriate to link the dollar figure to an inflation index, such as the Consumer Price Index. Thus, the Board also requests comments on whether the tolerance should be set at a higher dollar figure, or linked to an inflation index, such as the Consumer Price Index. In addition, due to compliance concerns, the Board has not proposed a special tolerance for the loan amount in connection with foreclosures as is provided for the finance charge. The Board solicits comment on this approach. Finally, the Board solicits comment on whether the proposed tolerances should conform to the tolerance for HOEPA loans, which would mean that the loan amount would be treated as accurate if it is not more than $100 above or below the amount required to be disclosed.

23(a)(5)(i)(B) Loan Term

Currently, TILA and Regulation Z do not require disclosure of the loan term, although a consumer could conceivably calculate the loan term from the number of payments and the due dates or periods of payments, which are material disclosures. TILA Sections 103(u), 128(a)(6); 15 U.S.C. 1602(u), 1638(a)(6); §§ 226.18(g), 226.23(a)(3) n.48. The loan term is the period of time to repay the obligation in full. However, consumer testing showed that consumers were not able to readily identify the loan term from the number of payments and due dates, particularly for loans such as adjustable-rate mortgages that have multiple payment levels. 74 FR 43292, Aug. 26, 2009. Accordingly, the August 2009 Closed-End Proposal would require creditors to disclose prominently the loan term, while making the disclosure of the number of payments less prominent than it is under the current regulation. *See* proposed § 226.38(a)(2), (e)(5)(i). The disclosure of the loan term would clearly convey the time period for repayment, which would help consumers evaluate whether the loan is appropriate for them. For example, the loan term would alert consumers to a balloon payment. For a 10-year loan with a balloon payment due in year 10 and an amortization schedule of 30 years, the proposed disclosure would state that the loan term was for 10 years. A consumer considering this loan could then evaluate whether that loan term is appropriate for his or her situation.

Therefore, the Board proposes § 226.23(a)(5)(i)(B) to include the loan term disclosed under § 226.38(a)(2) in the definition of "material disclosures," and, for the reasons discussed below, to remove the number of payments from the definition. Including the loan term as a material disclosure should not expose creditors to increased risk, because it is the same concept as the number of payments, which is currently a material disclosure. Moreover, the loan term is a fixed number that is not dependent on other aspects of the transaction, such as the interest rate. The Board does not believe a tolerance for loan term is necessary, but seeks comment on this issue.

23(a)(5)(i)(C) Loan Type

Currently, § 226.18(f) requires creditors to disclose certain information about variable-rate features, as applicable. Current comment 23(a)(3)–2 provides that the failure to provide information about the APR also includes the failure to inform the consumer of the existence of a variable-rate feature, which is a material disclosure. Consumer testing showed, however, that the current variable-rate disclosure did not clearly convey whether the loan had a fixed- or variable-rate. 74 FR 43292, Aug. 26, 2009. Accordingly, the August 2009 Closed-End Proposal would require the creditor to disclose whether a loan is a fixed-rate, adjustable-rate, or step-rate loan. *See* proposed § 226.38(a)(3)(i). This proposed loan type disclosure would be broader than the current requirement because it would require the creditor to identify a loan that has a fixed or step rate, not just a loan with a variable rate. Consumer testing showed that whether a loan's rate is fixed or adjustable is very important to consumers because they want to know whether their loan rate and payments may increase. The loan type disclosure would alert consumers to the potential for payment shock in an adjustable-rate or step-rate loan.

Accordingly, the Board proposes § 226.23(a)(5)(i)(C) to include the loan type disclosed under § 226.38(a)(3)(i) in the definition of "material disclosures." The Board does not believe that correctly disclosing the loan type would significantly increase creditors' burden because creditors are already required to disclose a variable-rate feature. Moreover, the Board believes the risk of incorrectly disclosing the loan type is low, as it does not depend on mathematical calculations, and is a major feature of the loan agreement, which the creditor can easily identify.

23(a)(5)(i)(D) Loan Features

To inform consumers of risky loan features, the August 2009 Closed-End Proposal would require creditors to disclose the following loan features, as applicable: Step-payments, payment options, negative amortization, or interest-only payments. *See* proposed § 226.38(a)(3)(ii). Through disclosures of the loan features, participants in consumer testing were able to easily identify the type of loan being offered. 74 FR 43292, Aug. 26, 2009. To avoid information overload, the creditor would be limited to disclosure of two of the risky features. The Board noted that disclosures should clearly alert consumers to these features before the consumer becomes obligated on the loan. 74 FR at 43293, Aug. 26, 2009. Therefore, the Board proposes § 226.23(a)(5)(i)(D) to include the loan features disclosed under § 226.38(a)(3)(ii) in the definition of "material disclosures." The loan features would inform consumers about risky features and help consumers decide whether to rescind a loan that might be unsuitable for their situation.

23(a)(5)(i)(E) Total Settlement Charges

Currently, TILA and Regulation Z do not require creditors to disclose the total settlement charges, except as part of the disclosure of the finance charge. The disclosure of settlement charges is governed by RESPA, 12 U.S.C. 2601–2617, and implemented by HUD under Regulation X, 24 CFR Part 3500. Under RESPA and Regulation X, creditors must provide a Good Faith Estimate (GFE) of settlement costs within three business days of application for a mortgage. Creditors must also provide a statement of the final settlement costs at loan closing in the HUD–1 or HUD–1A settlement statement. The GFE is subject to certain tolerances, absent changed circumstances. RESPA and Regulation X do not, however, provide any remedies for a violation of the accuracy requirements.

Consumer testing conducted for the Board consistently showed that participants wanted information about settlement costs on the TILA disclosure to verify the loan costs and to avoid surprise costs at closing. 74 FR 43293, Aug. 26, 2009. Accordingly, the August 2009 Closed-End Proposal would require the creditor to disclose on the final TILA the sum of the final settlement charges as disclosed on the HUD–1 or HUD–1A settlement statement. Alternatively, the creditor could provide the consumer with a copy of the final HUD–1 or HUD–1A settlement statement. *See* proposed § 226.38(a)(4). In either case, the proposal would require the creditor to provide a disclosure of the total settlement charges so that the consumer receives it three days before consummation.

Because of the importance of this disclosure to consumers, the Board proposes § 226.23(a)(5)(i)(E) to include the total settlement charges disclosed under § 226.38(a)(4) in the definition of "material disclosures." Correctly disclosing total settlement charges may impose a burden on creditors, but the Board believes that any burden on creditors would be outweighed by the benefit to consumers of knowing their total final settlement charges before deciding whether to rescind the transaction.

Tolerances. To reduce the likelihood that rescission claims would arise because of minor discrepancies in the disclosure of the total settlement charges, the Board proposes a tolerance in § 226.23(a)(5)(iv). As discussed above, this tolerance would be modeled after the tolerance for the finance charge created by Congress in 1995. Specifically, proposed § 226.23(a)(5)(iv) would provide that the total settlement charges reflected on the TILA disclosure would be considered accurate for purposes of rescission if the total settlement charges disclosed are understated by no more than $100, or are greater than the amount required to be disclosed. These tolerances would be consistent with the proposed tolerances applicable to the disclosure of the total of all one-time fees imposed by the creditor and any third parties for opening a HELOC plan under proposed § 226.15(a)(5)(ii).

The Board proposes to model the tolerance for the disclosure of the total settlement charges on the narrow tolerances provided by Congress in 1995. However, due to compliance concerns, the Board has not proposed a special tolerance for foreclosures as is provided for the finance charge. The Board solicits comment on this approach. Moreover, the Board recognizes that the total settlement charges are typically much smaller than the finance charge, and for this reason has proposed a tolerance based on a dollar figure, rather than a percentage of the loan amount. The Board requests comment on whether it should increase or decrease the dollar figure. The Board also requests comment on whether the tolerance should be linked to an inflation index, such as the Consumer Price Index.

The Board recognizes that Regulation X contains tolerances that limit creditors' and settlement service providers' ability to impose charges at closing that exceed the amounts previously disclosed on the GFE. Regulation X generally provides that certain charges may not exceed the amount disclosed on the GFE, the sum of other charges may not be greater than 10 percent above the sum of the amounts disclosed on the GFE, and certain other charges are permitted to change at settlement. *See* 12 CFR 3500.7(e). However, the Board does not believe that it would be feasible to adopt this approach for the TILA disclosure. First, the Regulation X and Regulation Z tolerances serve different purposes. The Regulation X tolerances determine the extent to which the amounts charged at closing can vary from the amounts disclosed on the GFE. The Regulation Z tolerances would determine the extent to which the total settlement charges actually disclosed can vary from the total settlement charges required to be disclosed. Second, the tolerances differ in the level of detail required for analysis. The Regulation X tolerances require an analysis of specific line items on the HUD–1, whereas the proposed Regulation Z tolerance would be based on the total of all settlement charges as provided on the TILA disclosure. This proposal does not currently contemplate that the creditor or consumer would need to review the itemized list of charges on the HUD–1 to determine whether the disclosure of the total settlement charges is accurate for purposes of rescission under TILA. The Board solicits comment on whether the Regulation X tolerances, or some other tolerance based on a percentage, would be appropriate for the disclosure of the total settlement charges on the TILA disclosure for purposes of rescission.

23(a)(5)(i)(F) Prepayment Penalty

For HOEPA loans and higher-priced mortgage loans, prepayment penalties are subject to certain restrictions, and the inclusion in a HOEPA loan of a prohibited prepayment penalty is deemed a failure to deliver a material disclosure. TILA Section 129(c), (j); 15 U.S.C. 1639(c), (j); §§ 226.23(a)(3) n.48, 226.32(d)(3), 226.35(b)(2). For all other mortgages, TILA and Regulation Z require disclosure of whether or not the consumer may pay a penalty if the obligation is prepaid in full, but this is not a material disclosure. TILA Section 128(a)(11); 15 U.S.C. 1638(a)(11); § 226.18(k)(1).

Consumer testing showed that the current prepayment penalty disclosure does not adequately inform consumers of the existence of a penalty, the magnitude of the penalty, and under what circumstances it would apply. 74 FR 43294, Aug. 26, 2009. Consumers with adjustable-rate mortgages, in particular, need to be informed of the potential payment shock of a prepayment penalty before they accept a loan, as they may be planning to refinance the loan before the rate and payment adjust. The August 2009 Closed-End Proposal would require all mortgage loans to indicate the amount of the maximum prepayment penalty and the circumstances and period in which the creditor may impose the penalty. *See* proposed § 226.38(a)(5). Therefore, the Board proposes § 226.23(a)(5)(i)(F) to include the prepayment penalty disclosed under § 226.38(a)(5) in the definition of "material disclosures."

Tolerances. The Board recognizes that there is some risk of error in disclosing the maximum penalty amount. Moreover, it does not appear consumers need to know the exact amount of the prepayment penalty to make a decision about whether to rescind the loan. To reduce the likelihood that rescission claims would arise because of minor discrepancies in the disclosure of the prepayment penalty, the Board proposes a tolerance in § 226.23(a)(5)(iv). As discussed above, this tolerance would be modeled after the tolerances for the finance charge created by Congress in 1995. Specifically, proposed § 226.23(a)(5)(iv) would provide that the prepayment penalty would be considered accurate for purposes of rescission if the disclosed prepayment penalty: (1) Is understated by no more than $100; or (2) is greater than the amount required to be disclosed.

The Board proposes to model the tolerance for the disclosure of the prepayment penalty on the narrow tolerances provided by Congress in 1995 for disclosure of the finance charge. However, due to compliance concerns, the Board has not proposed a special tolerance for foreclosures as is provided for the finance charge. The Board solicits comment on this approach. Moreover, the Board recognizes that the prepayment penalty is typically much smaller than the finance charge, and for this reason has proposed a tolerance based on a dollar figure, rather than a percentage of the loan amount. The Board requests comment on whether it should increase or decrease the dollar figure. The Board also requests comment on whether the tolerance should be linked to an inflation index, such as the Consumer Price Index.

23(a)(5)(i)(G) Annual Percentage Rate

Currently, TILA and Regulation Z require disclosure of the finance charge expressed as an "annual percentage rate," which is a material disclosure. TILA Sections 103(u), 128(a)(4); 15 U.S.C. 1602(u), 1638(a)(4); §§ 226.18(e), 226.23(a)(3) n.48. Sections 226.23(g) and (h) provide tolerances for disclosure of the APR.

The APR is the only disclosure that combines interest and fees to express the overall cost of the credit in a single number that consumers can use to compare different terms. Consumer testing showed that consumers did not understand the current APR disclosure, and did not use it to evaluate loan offers. 74 FR 43296, Aug. 26, 2009. The August 2009 Closed-End Proposal, however, would improve the disclosure of the APR by making it a more inclusive measure of the cost of credit. *See* proposed § 226.38(b). The proposal would also improve the manner in which the APR is disclosed on the TILA statement by showing the APR in the context of other rates being offered in the market for similar loan products. Accordingly, the Board proposes § 226.23(a)(5)(i)(G) to retain the APR disclosed under § 226.38(b)(1) as a material disclosure.

The Board proposes to move the tolerances applicable to finance charges (now called interest and settlement charges) and the APR in current § 226.23(g) and (h)(2) to proposed § 226.23(a)(5)(ii) and to make technical revisions. Specifically, proposed § 226.23(a)(5)(ii) would provide a general tolerance for disclosure of the interest and settlement charges and the APR, a special tolerance for a refinancing with no new advance, and a special tolerance for foreclosures. Under the general rule, the interest and settlement charges and the APR would be considered accurate if the disclosed interest and settlement charges are understated by no more than ½ of 1 percent of the face amount of the note or $100, whichever is greater; or are greater than the amount required to be disclosed. There is a greater tolerance for a refinancing with a new creditor if there is no new advance and no consolidation of existing loans. In that case, the interest and settlement charges and the APR would be considered accurate if the disclosed interest and settlement charges are understated by no more than 1 percent of the face amount of the note or $100, whichever is greater; or are greater than the amount required to be disclosed. Finally, there is a stricter tolerance after the initiation of foreclosure on the consumer's principal dwelling that secures the credit transaction. In that case, the interest and settlement charges and the APR would be considered accurate if the disclosed interest and settlement charges are understated by no more than $35; or are greater than the amount required to be disclosed. Thus, the APR is treated as accurate if the disclosed APR is based on interest and settlement charges that would be considered accurate under the rule.

23(a)(5)(i)(H) Interest Rate and Payment Summary

Currently, TILA and Regulation Z do not require disclosure of the interest rate, but do require disclosure of the number, amount, and due dates or period of payments scheduled to repay the total of payments, which are material disclosures. TILA Sections 103(u), 128(a)(6); 15 U.S.C. 1602(u), 1638(a)(6); §§ 226.18(g), 226.23(a)(3) n.48. The recent MDIA amendments to TILA also provide that, for "adjustable-rate or payment loans," creditors must disclose examples of the interest rates and payments, including the maximum possible interest rate and payment under the loan's terms. TILA Section 128(b)(2)(C); 15 U.S.C. 1638(b)(2)(C). HOEPA loans are subject to additional payment disclosures, which are material disclosures. TILA Sections 103(u), 129(a)(2)(A); 15 U.S.C. 1602(u), 1639(a)(2)(A); §§ 226.23(a)(3) n.48, 226.32(c)(3), (4). For HOEPA loans, the creditor must disclose the amount of the regular monthly (or other periodic) payment and the amount of any balloon payment. The regular payment disclosed is accurate if it is based on an amount borrowed that is not more than $100 above or below the amount required to be disclosed. Section 226.32(c)(3) and (5). In addition, for HOEPA loans that are variable-rate transactions, the creditor must disclose a statement that the interest rate and monthly payment may increase, and the amount of the maximum monthly payment.

Consumer testing consistently showed that consumers shop for and evaluate a mortgage based on the interest rate and monthly payment. 74 FR 43299, Aug. 26, 2009. Consumer testing also indicated that the current TILA payment schedule is ineffective at communicating to consumers what could happen to their interest rate and payments for an adjustable-rate mortgage. Thus, the August 2009 Closed-End Proposal would add the interest rate to the TILA statement and revise the disclosure of the payment. *See* proposed § 226.38(c). For adjustable-rate or step-rate loans, the proposal would require disclosure of the interest rate and payment at consummation, the maximum interest rate and payment at first adjustment, and the highest possible maximum interest rate and payment. Special disclosures would be required for loans with negatively-amortizing payment options, introductory interest rates, interest-only payments, and balloon payments.

Accordingly, the Board proposes § 226.23(a)(5)(i)(H) to include the interest rate and payment summary disclosed under § 226.38(c) in the definition of "material disclosures." The Board believes that adding the interest rate to the definition of material disclosures would not unduly increase creditor burden, as the interest rate is a key term of the loan agreement. In addition, payment information, particularly for adjustable-rate transactions, is critical to the consumer's evaluation of the affordability of the loan and decision of whether to rescind.

Tolerances. Although creditors may face some risk for incorrectly disclosing payments, the Board believes such risk is outweighed by the benefit to consumers of knowing the payment or payments due over the life of the loan. However, to mitigate the risk that insignificant errors in the payment disclosures would result in an extended right to rescind, the Board proposes a tolerance for the payments. As discussed above, this tolerance would be modeled after the tolerance for the finance charge created by Congress in 1995. Specifically, proposed § 226.23(a)(5)(iv) would provide that the payment summary would be considered accurate for purposes of rescission if the disclosed payment is understated by not more than $100, or is greater than the amount required to be disclosed.

Proposed comment 23(a)(5)(iv)–1 would clarify that if the mortgage is a HOEPA loan, then the tolerance for the regular payment as provided in § 226.32(c)(3) would apply. In a HOEPA loan, there is no tolerance for a payment other than the regular payment. Thus, the disclosure of the regular payment in the payment summary for a HOEPA loan is accurate if it is based on a loan amount that is not more than $100 above or below the amount required to be disclosed. The disclosure of any other payment, such as the maximum monthly payment, is not subject to a tolerance.

The Board proposes to model the tolerance for the disclosure of the payment summary on the narrow tolerances for the finance charge provided by Congress in 1995. However, due to compliance concerns, the Board has not proposed a special tolerance for foreclosures as is provided for the finance charge. The Board solicits comment on this approach. Moreover, the Board recognizes that the payments are typically much smaller than the finance charge, and for this reason has proposed a tolerance based on a dollar figure, rather than a percentage of the loan amount. The Board requests comment on whether it should increase or decrease the dollar figure. The Board also requests comment on whether the tolerance should be linked to an inflation index, such as the Consumer Price Index.

23(a)(5)(i)(I) Finance Charge; Interest and Settlement Charges

TILA Section 106(a) provides that the finance charge is the sum of all charges, payable by the consumer and imposed by the creditor as a condition of or incident to the extension of credit. 15 U.S.C. 105(a). The finance charge is meant to represent the cost of credit in dollar terms, and is used to calculate the APR. Currently, TILA and Regulation Z require disclosure of the finance charge, which is a material disclosure. TILA Sections 103(u), 128(a)(3); 15 U.S.C. 1602(u), 1638(a)(3); §§ 226.18(d), 226.23(a)(3) n.48. In 1995, Congress amended TILA to provide tolerances for disclosure of the finance charge in connection with a rescission claim.[73] Sections 226.23(g) and (h) currently implement these tolerances.

The August 2009 Closed-End Proposal makes the disclosure less prominent, but would revise the disclosure to aid consumer understanding. *See* proposed § 226.38(e)(5)(ii). Consumer testing showed that participants did not understand the term "finance charge," so the finance charge would be referred to as "interest and settlement charges." 74 FR 43307, Aug. 26, 2009. The proposal would also require a brief statement that the interest and settlement charges represent part of the total payments amount. Consumer testing suggests that providing the interest and settlement charges in the context of the total payments improves consumers' comprehension of the total cost of credit.

Therefore, the Board proposes § 226.23(a)(5)(i)(I) to retain the finance charge (interest and settlement charges) disclosed under § 226.38(e)(5)(ii) as a material disclosure. Although consumer testing suggested that the interest and settlement charges disclosure is not as important to consumers as certain other information, the disclosure is still important to understanding the total cost of credit.

The Board proposes to move the tolerances applicable to finance charges (now called interest and settlement charges) and the APR in current § 226.23(g) and (h)(2) to proposed § 226.23(a)(5)(ii) and to make technical revisions. Specifically, proposed § 226.23(a)(5)(ii) would provide a general tolerance for disclosure of the interest and settlement charges and the APR, a special tolerance for a refinancing with no new advance, and a special tolerance for foreclosures. Under the general rule, the interest and settlement charges and the APR would be considered accurate if the disclosed interest and settlement charges are understated by no more than ½ of 1 percent of the face amount of the note or $100, whichever is greater; or are greater than the amount required to be disclosed. There is a greater tolerance for a refinancing with a new creditor if there is no new advance and no consolidation of existing loans. In that case, the interest and settlement charges and the APR would be considered accurate if the disclosed interest and settlement charges are understated by no more than 1 percent of the face amount of the note or $100, whichever is greater; or are greater than the amount required to be disclosed. Finally, there is a stricter tolerance after the initiation of foreclosure on the consumer's principal dwelling that secures the credit transaction. In that case, the interest and settlement charges and the APR would be considered accurate if the disclosed interest and settlement charges are understated by no more than $35; or are greater than the amount required to be disclosed.

The Board believes these tolerances should mitigate any risk resulting from insignificant disclosure errors related to the finance charges (interest and settlement charges) and the APR. In the August 2009 Closed-End Proposal, the Board proposed to require more third-party charges be included in the finance charge. *See* proposed § 226.4(g). In light of that proposal, the Board solicits comment on whether it should increase the finance charge tolerance, or whether the tolerance should be linked to an inflation index, such as the Consumer Price Index. Disclosures That Would Be Removed from the Definition of "Material Disclosures"

As discussed above, the Board proposes to remove the following disclosures from the definition of "material disclosures:" the amount financed, the total of payments, and the number of payments. Consumer testing has shown that these disclosures are not likely to significantly impact a consumer's decision to enter into a mortgage transaction. Thus, these disclosures are not likely to influence a consumer's decision of whether to rescind.

Amount financed. Currently, TILA and Regulation Z require disclosure of the "amount financed," which is a material disclosure. TILA Sections 103(u), 128(a)(2); 15 U.S.C. 1602(u), 1638(a)(2); §§ 226.18(b), 226.23(a)(3) n.48. The August 2009 Closed-End Proposal would require disclosure of the amount financed, but the disclosure would be less prominent than it is under the current regulation. *See* proposed § 226.38(e)(5)(iii). During consumer testing, participants had difficulty understanding the disclosure of the amount financed and some mistook it for the loan amount (thereby under-estimating the loan amount). 74 FR 43308, Aug. 26, 2009. Consumers stated that they would not be likely to use the disclosure to shop for loans or to understand their loan terms. For these reasons, the Board proposes to remove the amount financed from the definition of "material disclosures." The Board believes that requiring the loan amount as a material disclosure provides better protection for consumers.

Total of payments. Currently, TILA and Regulation Z require disclosure of the total of payments, which is a material disclosure. TILA Section 103(u), 128(a)(5); 15 U.S.C. 1602(u), 1638(a)(5); §§ 226.18(h), 226.23(a)(3) n.48. The August 2009 Closed-End Proposal would require disclosure of the number and total of payments, but the

[73] Public Law 104–29 §§ 3 and 8, 109 Stat. 274, 272 and 275 (1995), *codified at* 15 U.S.C. 1605(f)(2) and 1635(i)(2).

disclosures would be less prominent than they are under the current regulation. Consumer testing showed that most participants did not find the total of payments to be helpful in evaluating a loan offer. 74 FR 43306, Aug. 26, 2009. For this reason, the Board proposes to remove the total of payments from the definition of "material disclosures."

Number of payments. Currently, TILA and Regulation Z require disclosure of the number of payments, which is a material disclosure. TILA Sections 103(u), 128(a)(6); 15 U.S.C. 1602(u), 1638(a)(6); §§ 226.18(g), 226.23(a)(3) n.48. The August 2009 Closed-End Proposal would require disclosure of the number and total of payments, but the disclosures would be less prominent than they are under the current regulation. Consumer testing showed that most consumers did not use the number and total of payments to evaluate a loan offer. 74 FR 43306, Aug. 26, 2009. Moreover, consumers were not able to readily identify the loan term from the number of payments, particularly for loans that had multiple payment levels. 74 FR 43292, Aug. 26, 2009. For these reasons, the Board proposes to remove the number of payments from the definition of "material disclosures." As discussed above, the Board believes that the addition of the loan term to the definition of "material disclosures" would provide a more meaningful benefit to consumers.

Material Disclosures for Reverse Mortgages

The Board is proposing disclosures for open-end reverse mortgages in § 226.33 that would incorporate many of the disclosures required by proposed § 226.38 for all closed-end mortgages into the reverse mortgage specific disclosures. Proposed § 226.23(a)(5)(i) would contain cross-references to analogous provisions in proposed § 226.33. In addition, as discussed in the section-by-section analysis to § 226.33, some of the proposed new material disclosures for closed-end mortgages do not apply to reverse mortgages and would not be required. Thus, for reverse mortgages, the loan amount, loan term, loan features, and payment summary would not be material disclosures because the disclosures do not apply to, and would not be required for, reverse mortgages. The Board requests comment on whether any of these, or other, disclosures should be material disclosures for reverse mortgages.

23(b) Notice of Right to Rescind

TILA Section 125(a) requires the creditor to disclose clearly and conspicuously the right of rescission to the consumer, and requires the creditor to provide appropriate forms for the consumer to exercise the right to rescind. 15 U.S.C. 1635(a). Section 226.23(b) implements TILA Section 125(a) by setting forth format, content, and timing of delivery standards for the notice of the right to rescind for closed-end mortgage transactions subject to the right. Section 226.23(b) also states that the creditor must deliver two copies of the notice of the right to rescind to each consumer entitled to rescind (one copy if the notice is delivered in electronic form in accordance with the E-Sign Act). The right to rescind generally does not expire until midnight after the third business day following the latest of: (1) Consummation of the transaction, (2) delivery of the rescission notice, or (3) delivery of the material disclosures. TILA Section 125(a); 15 U.S.C. 1635(f); § 226.23(a)(3). If the rescission notice or the material disclosures are not delivered, a consumer's right to rescind may extend for up to three years from consummation. TILA Section 125(f); 15 U.S.C. 1635(f); § 226.23(a)(3).

As part of the 1980 Truth in Lending Simplification and Reform Act, Congress added TILA Section 105(b), requiring the Board to publish model disclosure forms and clauses for common transactions to facilitate creditor compliance with the disclosure obligations and to aid borrowers in understanding the transaction by using readily understandable language. 12 U.S.C. 1615(b). The Board issued its first model forms for the notice of the right to rescind certain closed-end transactions in 1981. 46 FR 20848, Apr. 7, 1981. While the Board has made some changes to the content of the model forms over the years, the current Model Forms H–8 and H–9 in Appendix H to part 226 are generally the same as when they were adopted in 1981.

The Board has been presented with a number of questions and concerns regarding the notice requirements and the model forms. Creditors have raised concerns about the two-copy rule (as described in the section-by-section analysis for 15(b) above), indicating this rule can impose litigation risks when a consumer alleges an extended right to rescind based on the creditor's failure to deliver two copies of the notice. In addition, particular problems with the format, content, and timing of delivery of the notice were highlighted during the Board's outreach and consumer testing conducted for this proposal. To address these problems and concerns, the Board proposes to revise § 226.23(b) and the related commentary. As discussed in more detail below, the Board proposes to revise § 226.23(b) to require creditors to provide one notice of the right to rescind to each consumer entitled to rescind. In addition, the Board proposes to revise significantly the content of the rescission notice by setting forth new mandatory and optional disclosures for the notice. The Board also proposes new format and timing requirements for the notice. Moreover, as discussed in more detail in the section-by-section analysis to Appendix H to part 226, the Board proposes to revise significantly Model Forms H–8 (redesignated as proposed H–8(A)) and H–9, and to add Sample H–8(B).

23(b)(1) Who Receives Notice

TILA Section 125(a) provides that the creditor must notify "any obligor in a transaction subject to this section [of] the rights of the obligor under this section." 15 U.S.C. 1635(a). Section 226.23(b)(1) currently states that the creditor must deliver two copies of the notice of the right to rescind to each consumer entitled to rescind (one copy if the notice is delivered in electronic form in accordance with the E-Sign Act). Obtaining from the consumer a written acknowledgment of receipt of the notice creates a rebuttable presumption of delivery. *See* 15 U.S.C. 1635(c). Comment 23(b)–1 states that in a transaction involving joint owners, both of whom are entitled to rescind, both must receive two copies of the notice of the right of rescission.

The Board originally issued the two-copy rule in 1968, and opted to retain the rule in 1981 to ensure that consumers would be able to use one copy to rescind the loan and retain the other copy with information about their rights. *See* 34 FR 2002, 2010, Feb. 11, 1969; 46 FR 20848, 20884, Apr. 7, 1981. The Board continues to believe that consumers who rescind should be able to keep the written explanation of their rights. However, since 1981, the need for the two-copy rule seems to have diminished while litigation involving the two-copy rule has increased. First, technological advances have made it easier for consumers to retain a copy of the notice of right to rescind, which discloses their rights. Today, consumers generally have greater access to copy machines, scanners, and electronic mail. In consumer testing conducted for the Board, almost all participants said that they would make and keep a copy of the form if they decided to exercise the right. Moreover, the two-copy rule can impose litigation risks when a consumer alleges an extended right to rescind based on the creditor's failure to deliver two copies of the notice.[74] Creditors have expressed concern that it is difficult to prove, if challenged, that the consumer received two copies of the notice at loan closing. Such case-by-case determinations consume judicial resources and increase credit costs. Finally, the two-copy rule would be less necessary because the Board is proposing a model rescission notice that would include a notification of rescission at the bottom, which the consumer could separate and deliver to the creditor while retaining the top portion of the notice containing the description of the consumer's rights.

For these reasons, the Board proposes to revise § 226.23(b)(1) to require creditors to provide one notice of the right to rescind to each consumer entitled to rescind. Comment 23(b)–1 would be revised to delete references to the two-copy requirement. The Board further proposes to remove the references to the E-Sign Act from § 226.23(b)(1) and comment 23(b)–1. The requirement to provide one notice of the right to rescind would be the same for electronic and non-electronic disclosures. Requirements related to the E-Sign Act appear elsewhere in Regulation Z. *See* §§ 226.5(a), 226.17(a), 226.31(b).

23(b)(2) Format of Notice

The current formatting requirements for the notice of the right of rescission appear in § 226.23(b)(1) and are elaborated upon in comment 23(b)–2. Section 226.23(b)(1) states that the notice shall be on a separate document and the required information shall be disclosed clearly and conspicuously. Comment 23(b)–2 provides that the notice must be on a separate piece of paper, but may appear with other information such as the itemization of the amount financed. Comment 23(b)–2 additionally states that the required information must be clear and conspicuous, but no minimum type size or other technical requirements are imposed. Comment 23(b)–2 also refers to the forms in Appendix H to part 226 as models that the creditor may use in giving the notice.

For the reasons discussed in the section-by-section analysis to proposed § 226.15(b), the Board proposes new format rules in § 226.23(b)(2) and related commentary intended to (1) Improve consumers' ability to identify disclosed information more readily; (2) emphasize information that is most important to consumers who wish to exercise the right of rescission; and (3) simplify the organization and structure of required disclosures to reduce complexity and "information overload." The Board proposes these format requirements pursuant to its authority under TILA Section 105(a). 15 U.S.C. 1604(a). Section 105(a) authorizes the Board to make exceptions and adjustments to TILA to effectuate the statute's purpose, which include facilitating consumers' ability to compare credit terms and helping consumers avoid the uninformed use of credit. 15 U.S.C. 1601(a), 1604(a). The Board believes that the proposed formatting rules described below would facilitate consumers' ability to understand the rescission right and avoid the uninformed use of credit.

Specifically, proposed § 226.23(b)(2) requires the mandatory and optional disclosures to appear on the front side of a one-page document, separate from all other unrelated material, and to be given in a minimum 10-point font. Proposed § 226.23(b)(2) also requires that most of the mandatory disclosures appear in a tabular format. Moreover, the notice would contain a "tear off" section at the bottom of the page, which the consumer could use to exercise the right of rescission. Information unrelated to the mandatory disclosures would not be permitted to appear on the notice.

Proposed comment 23(b)(2)–1 states that the creditor's failure to comply with the format requirements set forth in § 226.23(b)(2) does not by itself constitute a failure to deliver the notice to the consumer. However, to deliver the notice properly for purposes of § 226.23(a)(3), the creditor must provide the mandatory disclosures appearing in the notice clearly and conspicuously, as described in proposed § 226.23(b)(3) and proposed comment 23(b)(3)–1.

Section 226.17(a) generally requires that creditors must make the disclosures required by subpart C regarding closed-end credit (including the rescission notice) in writing in a form that the consumer may keep. Proposed comment 23(b)(2)–2 cross references these requirements in § 226.17(a) to clarify that they apply to the rescission notice.

23(b)(2)(i) Grouped and Segregated

Current § 226.23(b)(1) states that the notice shall be on a separate document. Comment 23(b)–2 provides that the notice must be on a separate piece of paper, but may appear with other information such as the itemization of the amount financed. The Board is concerned that allowing creditors to combine the right of rescission disclosures with other unrelated information, in any format, will diminish the clarity of this key material, potentially cause "information overload," and increase the likelihood that consumers may not read the notice of the right of rescission.

To address these concerns, proposed § 226.23(b)(2)(i) requires the mandatory and any optional rescission disclosures to appear on the front side of a one-page document, separate from any unrelated information. Only information directly related to the mandatory disclosures may be added.

The proposal also requires that certain information be grouped together. Proposed § 226.23(b)(2)(i) requires that disclosure of the security interest, the right to cancel, the refund of fees upon cancellation, the effect of cancellation on the previous loan with the same creditor, how to cancel, and the deadline for cancelling be grouped together in the notice. This information was grouped together in forms the Board tested, and participants generally found the information easy to identify and understand. In addition, this proposed grouping ensures that the information about the consumer's rights would be separated from information at the bottom of the notice, which is designed for the consumer to detach and use to exercise the right of rescission.

23(b)(2)(ii) Specific Format

Current comment 23(b)–2 states that the information disclosed in the notice must be clear and conspicuous, but no minimum type size or other technical requirements are imposed. The Board proposes to impose formatting requirements for this information, to improve consumers' comprehension of the required disclosures. *See* proposed § 226.23(b)(2)(i) and (ii). For example, some information would be required to be in tabular format. The current model forms for the rescission notice provide information in narrative form, which consumer testing participants found difficult to read and understand. However, consumer testing showed that when rescission information was presented in a tabular format, participants found the information

[74] *See, e.g., Smith* v. *Argent Mortgage Co., LLC,* 2009 U.S. App. LEXIS 10702 at *4 (10th Cir. 2009); *American Mortgage Network, Inc.* v. *Shelton,* 486 F.3d 815, 817 (4th Cir. 2007); *Wells Fargo Bank, N.A.* v. *Jaaskelainen,* 407 B.R. 449, 452 (D. Mass. 2009); *Singh* v. *Washington Mutual Bank,* 2009 U.S. Dist. LEXIS 73315 at *3 (N.D. Cal. 2009); *Jobe* v. *Argent Mortgage Co, LLC,* 2009 U.S. Dist. LEXIS 70311 at *1 (M.D. Pa. 2009); *Lippner* v. *Deutsche Bank National Trust Co.,* 544 F. Supp. 2d 695, 697 (N.D. Ill. 2008); *In re Merriman,* 329 B.R. 710, 714 (D. Kan. 2005).

easier to locate and their comprehension of the disclosures improved.

The proposal requires the title of the notice to appear at the top of the notice. Certain mandatory disclosures (*i.e.,* the security interest, the right to cancel, the refund of fees upon cancellation, the effect of cancellation on the previous loan with the same creditor, how to cancel, and the deadline for cancelling in proposed § 226.23(b)(3)(i)–(vi)) must appear beneath the title and be in the form of a table. If the creditor chooses to place in the notice one or both of the optional disclosures (*e.g.,* regarding joint owners and acknowledgement of receipt as permitted in proposed § 226.23(b)(4)), the text must appear after the disclosures required by proposed § 226.23(b)(3)(i)–(vi), but before the portion of the notice that the consumer may use to exercise the right of rescission required by proposed § 226.23(b)(3)(vii). If both optional disclosures are inserted, the statement regarding joint owners must appear before the statement acknowledging receipt. If the creditor chooses to insert an acknowledgement as described in § 226.23(b)(4)(ii), the acknowledgement must appear in a format substantially similar to the format used in proposed Forms H–8(A) or H–9 in Appendix H to part 226. Proposed § 226.23(b)(2)(ii) also requires the mandatory disclosures required under proposed § 226.23(b)(3) and the optional disclosures permitted under § 226.23(b)(4) to be given in a minimum 10-point font.

23(b)(3) Required Content of Notice

TILA Section 125(a) and current § 226.23(b)(1) require that all disclosures of the right to rescind be made clearly and conspicuously. 15 U.S.C. 1635(a). Proposed comment 23(b)(3)–1 clarifies that, to meet the clear and conspicuous standard, disclosures must be in a reasonably understandable form and readily noticeable to the consumer.

Current § 226.23(b)(1) provides the list of disclosures that must appear in the notice: (i) An identification of the transaction; (ii) the retention or acquisition of a security interest in the consumer's principal dwelling; (iii) the consumer's right to rescind the transaction; (iv) how to exercise the right to rescind, with a form for that purpose, designating the address of the creditor's (or it's agent's) place of business; (v) the effects of rescission, as described in current § 226.23(d); and (vi) the date the rescission period expires. Current comment 23(b)–3 states that the notice must include all of the information described in § 226.23(b)(1)(i)–(v). It also provides that the requirement to identify the transaction may be met by providing the date of the transaction. Current Model Forms H–8 and H–9 contain these disclosures. However, consumer testing of the model forms conducted by the Board for this proposal suggests that the amount and complexity of the information currently required to be disclosed in the notice would result in information overload and discourage consumers from reading the notice carefully. The Board also is concerned that certain terminology in the current model forms would impede consumer comprehension of the information.

To address these concerns, the Board proposes to revise the requirements for the notice in new § 226.23(b)(3). Proposed § 226.23(b)(3) removes information required under current § 226.23(b)(1)(i)–(v) that consumer testing indicated is unnecessary for the consumer's comprehension and exercise of the right of rescission. The proposed section also simplifies the information disclosed and presents key information in plain language instead of legalistic terms. The Board proposes these revisions pursuant to its authority in TILA Section 125(a) which provides that creditors shall clearly and conspicuously disclose, in accordance with regulations of the Board, to any obligator in a transaction subject to rescission the rights of the obligor. 15 U.S.C. 1635(a).

Identification of transaction. Current § 226.23(b)(1) requires a creditor to identify the transaction in the rescission notice; current comment 23(b)–3 provides that the requirement that the transaction be identified may be met by providing the date of the transaction. As discussed in more detail in the section-by-section analysis to proposed § 226.15(b)(3)(vii), creditors, servicers and their trade associations noted that creditors might be unable to provide an accurate transaction date when a transaction is conducted by mail or through an escrow agent, as is customary in some states. They noted that in these cases, the date of the transaction cannot be identified accurately before it actually occurs. For example, for a transaction by mail, the creditor cannot know at the time of mailing the rescission notice when the consumer will sign the loan documents (*i.e.,* the date of the transaction).

To address these concerns, the Board proposes not to require that the transaction be identified in the rescission notice for closed-end mortgages. Accordingly, the provision in current comment 23(b)–3 about the date of the transaction satisfying this requirement would be deleted as obsolete. Unlike rescission rights for HELOCs, which may often arise for events occurring after account opening such as increasing the credit limit, the right of rescission for closed-end mortgages normally arises only at consummation. *See* section-by-section analysis to proposed § 226.15(b). In addition, as discussed in more detail in the section-by-section analysis to proposed § 226.23(b)(5), the Board proposes to require creditors to provide the notice of the right to rescind before consummation of the transaction, which would tie the creditor's provision of the rescission notice to consummation of the transaction. *See* proposed § 226.23(b)(5)(i). As a result, the Board believes that consumers are likely to understand from the context in which the notice is given that it is the closed-end mortgage transaction that is giving rise to the right of rescission, even if this is not explicitly stated in the notice.

Addition of a security interest to an existing obligation. Section 226.23(a)(1) describes two situations where a right to rescind generally arises under § 226.23: (1) a credit transaction in which a security interest is or will be retained or acquired in a consumer's principal dwelling; and (2) the addition to an existing obligation of a security interest in a consumer's principal dwelling. Where a security interest is being added to an existing obligation, consumers only have the right to rescind the addition of the security interest and not the existing obligation. See proposed § 226.23(a)(1). The Board believes that the right to rescind typically arises because of a credit transaction, not because the creditor adds a security interest to an existing obligation. Thus, for simplicity, the proposed content of the required disclosures reference the right to cancel "the loan." See proposed § 226.23(b)(3) and proposed Model Form H–8(A). The Board solicits comment, however, on how often the right of rescission arises from the addition to an existing obligation of a security interest in a consumer's principal dwelling, and whether the Board should issue an additional model form to address this situation.

23(b)(3)(i) Security Interest

Current § 226.23(b)(1)(i) requires the creditor to disclose that a security interest will be retained or acquired in the consumer's principal dwelling. Model Forms H–8 and H–9 currently disclose the retention or acquisition of a security interest by stating that "[the] transaction will result in a [mortgage/lien/security interest] [on/in] your home" and "[y]our home is the security for this new transaction," respectively.

The Board's consumer testing of a similar statement regarding a security interest for its August 2009 Closed-End Proposal showed that very few participants understood the statement. 74 FR 43232, Aug. 26, 2009. The Board is concerned that the current language in Model Forms H–8 and H–9 for disclosure of the retention or acquisition of a security interest might not alert consumers that the creditor has the right to take the consumer's home if the consumer defaults. To clarify the significance of the security interest, proposed § 226.23(b)(3)(i) requires a creditor to provide a statement that the consumer could lose his or her home if the consumer does not make payments on the loan. Consumer testing of this plain-language version of the security interest disclosure showed high comprehension by participants.

23(b)(3)(ii) Right to Cancel

Current § 226.23(b)(1)(ii) requires the creditor to disclose the consumer's right to rescind the transaction. In a section entitled "Your Right to Cancel," current Model Forms H–8 and H–9 disclose the right by stating that the consumer has a legal right under Federal law to cancel the transaction, without costs, within three business days from the latest of the date of the transaction (followed by a blank to be completed by the creditor with a date), the date the consumer received the Truth in Lending disclosures, or the date the consumer received the notice of the right to cancel. Consumer testing of language similar to the disclosure in current Model Forms H–8 and H–9 showed that the current description of the right was unnecessarily wordy and too complex for most consumers to understand and use.

In addition, during outreach regarding this proposal, industry representatives remarked that consumers often overlook the disclosure that the right of rescission is provided by Federal law. They also noted that the rule requiring creditors to delay remitting funds to the consumer until the rescission period has ended, also imposed by Federal law, is not a required disclosure and not included in the current model forms. *See* § 226.23(c). Industry representatives indicated that consumers should be notified of this delay in funding so they are not surprised when they must wait for at least three business days after signing the loan documents to receive any funds. To address these problems and concerns, proposed § 226.23(b)(3)(ii) requires two statements: (1) a statement that the consumer has the right under Federal law to cancel the loan on or before the date provided in the notice; and (2) a statement that Federal law prohibits the creditor from making any funds available to the consumer until after the stated date.

23(b)(3)(iii) Fees

Current § 226.23(b)(1)(iv) requires the creditor to disclose the effects of rescission, as described in current § 226.23(d). The disclosure of the effects of rescission in current Model Forms H–8 and H–9 is essentially a restatement of the rescission process set forth in current § 226.23(d)(1)–(3). This information consumes one-third of the space in the model forms, is dense, and uses legalistic phrases. Moreover, in most cases, this information is unnecessary to understand or exercise the right of rescission.

In addition, consumer testing showed that the current model forms do not adequately communicate that the consumer would not be charged a cancellation fee for exercising the right of rescission. Also, the language of the current model forms did not convey that all fees the consumer had paid in connection with obtaining the loan (such as fees charged by the creditor to obtain a credit report and appraisal of the home) would be refunded to the consumer.

To clarify the results of rescission for the consumer, the Board proposes in § 226.23(b)(3)(iii) to require a plain-English statement regarding fees, instead of restating the rescission process in current § 226.23(d). Proposed § 226.23(b)(3)(iii) requires a statement that if the consumer cancels, the creditor will not charge the consumer a cancellation fee and will refund any fees the consumer paid to obtain the loan. Most participants in the Board's consumer testing of these proposed statements understood that the creditor had to return all fees to the consumer, and could not charge fees for rescission. The Board believes that the statement about the refund of fees communicates important information to consumers about their rights if they choose to cancel the transaction. In addition, the Board is concerned that without this disclosure, consumers might believe that they would not be entitled to a refund of fees. This mistaken belief might discourage consumers from exercising the right to rescind where a consumer has paid a significant amount of fees in connection with the loan.

23(b)(3)(iv) New Advance of Money With the Same Creditor Under § 226.23(f)(2)

As discussed in more detail above in the section-by-section analysis to proposed § 226.23(b)(3)(iii), current § 226.23(b)(1)(iv) requires the creditor to disclose the effects of rescission, as described in current § 226.23(d). Currently, Regulation Z provides that a consumer may rescind a refinancing with the same creditor only to the extent of any new advance of money. § 226.23(f)(2); comment 23(f)–4. If the consumer has a valid right to rescind, the creditor must return costs made by the consumer for the refinancing, and take any action necessary to terminate the security interest. § 226.23(d)(2); comment 23(f)–4. Then the consumer must tender back the amount of the new advance. § 226.23(d)(3); comment 23(f)–4. The consumer remains obligated to repay the previous balance under the terms of the previous note. Accordingly, as part of satisfying the requirement to disclose the effects of rescission, current Model Form H–9 includes a statement that if the consumer cancels the new loan, it will not affect the amount the consumer presently owes, and the consumer's home is the security for that amount.

The proposal retains a special disclosure for a new advance of money with the same creditor (as defined in § 226.23(f)(2)). Specifically, proposed § 226.23(b)(3)(iv) requires creditors to disclose that if the consumer cancels the new loan, all of the terms of the previous loan will still apply, the consumer will still owe the creditor the previous balance, and the consumer could lose his or her home if the consumer does not make payments on the previous loan.

Proposed comment 23(b)(3)–6 cross-references § 226.23(f)(2) for an explanation of when there is a new advance of money with the same creditor, as discussed in the section-by-section analysis to proposed § 226.23(f)(2) below. In addition, proposed comment 23(b)(3)–6 clarifies that the transaction is rescindable only to the extent of the new advance and the creditor must provide the consumer with the information in proposed § 226.23(b)(3)(iv). Finally, the proposed comment clarifies that proposed Model Form H–9 is designed for a new advance of money with the same creditor. *See* proposed Model Form H–9 in Appendix H.

23(b)(3)(v) How to Cancel

Current § 226.23(b)(1)(iii) requires the creditor to disclose how to exercise the right to rescind, with a form for that purpose, designating the address of the creditor's (or its agent's) place of business. Current Model Forms H–8 and H–9 contain a statement that the consumer may cancel by notifying the creditor in writing; the form contains a blank for the creditor to insert its name and business address. The current model forms state that if the consumer wishes to cancel by mail or telegram, the notice must be sent "no later than midnight of," followed by a blank for the creditor to insert a date, followed in turn by the language "(or midnight of the third business day following the latest of the three events listed above)." If the consumer wishes to cancel by another means of communication, the notice must be delivered to the creditor's business address listed in the notice "no later than that time."

Current comment 23(a)(2)–1 states that the creditor may designate an agent to receive the rescission notification as long as the agent's name and address appear on the notice. The Board proposes to remove this comment, but insert similar language into proposed § 226.23(b)(3)(v) and proposed comment 23(b)(3)–3. Specifically, proposed § 226.23(b)(3)(v) requires a creditor to disclose the name and address of the creditor or of the agent chosen by the creditor to receive the consumer's notice of rescission and a statement that the consumer may cancel by submitting the form located at the bottom portion of the notice to the address provided. Proposed comment 23(b)(3)–3 states that if a creditor designates an agent to receive the consumer's rescission notice, the creditor may include its name along with the agent's name and address in the notice.

Proposed comment 23(b)(3)–2 clarifies that the creditor may, at its option, in addition to providing a postal address for regular mail, describe other methods the consumer may use to send or deliver written notification of exercise of the right, such as overnight courier, fax, e-mail, or in-person. The Board requires the notice to include a postal address to ensure that an easy and accessible method of sending notification of rescission is provided to all consumers. Nonetheless, the Board would provide flexibility to creditors to provide in the notice additional methods of sending or delivering notification, such as fax and e-mail, which consumers might find convenient.

23(b)(3)(vi) Deadline to Cancel

Current § 226.23(b)(1)(v) requires the creditor to disclose the date on which the rescission period expires. Current Model Forms H–8 and H–9 disclose the expiration date in the section of the notice entitled "How to Cancel." The current model forms provide a blank for the creditor to insert a date followed by the language "(or midnight of the third business day following the latest of the three events listed above)" as the deadline by which the consumer must exercise the right. The three events referenced are the date of the transaction, the date the consumer received the Truth in Lending disclosures, and the date the consumer received the notice of the right to cancel.

For the reasons set forth in the section-by-section analysis to proposed § 226.15(b), the Board proposes to eliminate the statements about the three events and require instead that the creditor provide the calendar date on which the three-business-day period for rescission expires. *See* proposed § 226.23(b)(3)(vi). Many participants in the Board's consumer testing had difficulty using the three events to calculate the deadline for rescission. Moreover, participants in the Board's consumer testing strongly preferred forms that provided a specific date over those that required them to calculate the deadline themselves. Also, parties consulted during the Board's outreach on this proposal stated that the model forms should provide a date certain for the expiration of the three-business-day period.

To ensure that consumers can readily identify the deadline for rescinding a loan, proposed § 226.23(b)(3)(vi) specifies that a creditor must disclose in the rescission notice the calendar date on which the three-business-day rescission period expires. If the creditor cannot provide an accurate calendar date on which the three-business-day rescission period expires, the creditor must provide the calendar date on which it reasonably and in good faith expects the three-business-day period for rescission to expire. If the creditor provides a date in the notice that gives the consumer a longer period within which to rescind than the actual period for rescission, the notice shall be deemed to comply with proposed § 226.23(b)(3)(vi), as long as the creditor permits the consumer to rescind through the end of the date in the notice. If the creditor provides a date in the notice that gives the consumer a shorter period within which to rescind than the actual period for rescission, the creditor shall be deemed to comply with the requirement in proposed § 226.23(b)(3)(vi) if the creditor notifies the consumer that the deadline in the first notice of the right of rescission has changed and provides a second notice to the consumer stating that the consumer's right to rescind expires on a calendar date which is three business days from the date the consumer receives the second notice. Proposed comment 23(b)(3)–4 provides further guidance on these proposed provisions.

The proposed approach is intended to provide consumers with accurate notice of the date on which their right to rescind expires while ensuring that creditors do not face liability for providing a deadline in good faith, that later turns out to be incorrect. The Board recognizes that this approach will further delay access to funds for consumers in certain cases where the creditor must provide a corrected notice. Nonetheless, the Board believes that a corrected notice is appropriate; otherwise consumers would believe based on the first notice that the rescission period ends earlier than the actual date of expiration. The Board, however, solicits comment on the proposed approach and on alternative approaches for addressing situations where the transaction date is not known at the time the rescission notice is provided.

Extended right to rescind. Under TILA and Regulation Z, the right to rescind generally does not expire until midnight after the third business day following the latest of: (1) Consummation of the transaction, (2) delivery of the rescission notice, or (3) delivery of the material disclosures. If the rescission notice or the material disclosures are not delivered, a consumer's right to rescind may extend for up to three years from consummation. TILA Section 125(f); 15 U.S.C. 1635(f); § 226.23(a)(3).

For the reasons set forth in the section-by-section analysis to proposed § 226.15(b), the Board proposes a disclosure regarding the extended right to rescind. Specifically, proposed § 226.23(b)(3)(vi) requires creditors to include a statement that the right to cancel the loan may extend beyond the date disclosed in the notice, and in such a case, a consumer wishing to exercise the right must submit the form located at the bottom of the notice to either the current owner of the loan or the person to whom the consumer sends his or her payments. A creditor may meet these disclosure requirements by placing an asterisk after the sentence disclosing the calendar date on which the right of rescission expires along with a sentence starting with an asterisk that states "In certain circumstances, your right to cancel this loan may extend beyond this date. In that case, you must submit the bottom portion of this notice to either the current owner of your loan or the person to whom you send payments." *See* proposed Model Forms H–8(A) and H–9. Without this statement, the notice would imply that the period for exercising the right is always three business days. In addition, this statement would inform consumers to whom they should submit notification of exercise when they have this extended right to rescind. *See* proposed § 226.23(a)(2). The Board requests comment on the proposed approach to making the consumer aware of the extended right.

23(b)(3)(vii) Form for Consumer's Exercise of Right

Current § 226.23(b)(1)(iii) requires the creditor to disclose how to exercise the right to rescind, and to provide a form that the consumer can use to rescind. Current comment 23(b)–3 permits the creditor to provide a separate form that the consumer may use to exercise the right or to combine that form with the other rescission disclosures, as illustrated by the model forms in Appendix H. Current Model Forms H–8 and H–9 explain a consumer may cancel by using any signed and dated written statement or may use the notice by signing and dating below the statement, "I WISH TO CANCEL." Section 226.23(b)(1) currently requires a creditor to provide two copies of the notice of the right (one copy if delivered in electronic form in accordance with the E–Sign Act) to each consumer entitled to rescind. The current Model Forms contain an instruction to the consumer to keep one copy of the two notices because it contains important information regarding the right of rescission.

For the reasons set forth in the section-by-section analysis to proposed § 226.15(b), proposed § 226.23(b)(2)(ii) and (3)(vii) require creditors to provide a form at the bottom of the notice that the consumer may use to exercise the right to rescind. Current comment 23(b)–3, which permits the creditor to provide a form for exercising the right that is separate from the other rescission disclosures, would be deleted. The creditor would be required to provide two lines on the form for entry of the consumer's name and property address. The creditor would have the option to pre-print on the form the consumer's name and property address. Proposed comment 23(b)(3)–5 elaborates that creditors are not obligated to complete the lines in the form for the consumer's name and property address, but may wish to do so to identify accurately a consumer who uses the form to exercise the right. Proposed comment 23(b)(3)–5 further explains that at its option, a creditor may include the loan number on the form. A creditor would not, however, be allowed to request or to require that the consumer provide the loan number on the form, such as by providing a space for the consumer to fill in the loan number. A consumer might not be able to locate the loan number easily and the Board is concerned that allowing creditors to request a consumer to provide the loan number might mislead the consumer into thinking that he or she must provide the loan number to rescind.

Current Model Forms H–8 and H–9 contain a statement that the consumer may use any signed and dated written statement to exercise the right to rescind. The Board does not propose to retain such a statement on the rescission notice because consumer testing showed that this disclosure is unnecessary. In fact, the Board's consumer testing results suggested that the statement might cause some consumers to believe that they *must* prepare a second statement of cancellation. Moreover, the Board believes it is unlikely that consumers who misplace the form, and later decide to rescind, would remember the statement about preparing their own documents. Based on consumer testing, the Board expects that consumers would use the form provided at the bottom of the notice to exercise the right of rescission. Participants in the Board's testing said that if they lost the form, they would contact the creditor to get another copy.

In addition, current Model Forms H–8 and H–9 contain a statement that the consumer should "keep one copy" of the notice because it contains information regarding the consumer's rescission rights. This statement would be deleted as obsolete. As discussed in the section-by-section analysis to proposed § 226.23(b)(1), the proposal requires creditors to provide only a single copy of the notice to each consumer entitled to rescind. The notice would be revised to permit a consumer to detach the bottom part of the notice to use as a form for exercising the right of rescission while retaining the top portion of the notice containing the explanation of the consumer's rights.

23(b)(4) Optional Content of Notice

Current comment 23(b)–3 states that the notice of the right of rescission may include information related to the required information, such as: a description of the property subject to the security interest; a statement that joint owners may have the right to rescind and that a rescission by one is effective for all; and the name and address of an agent of the creditor to receive notification of rescission.

The Board proposes to continue to allow creditors to include additional information in the rescission notice that is directly related to the required disclosures. Proposed § 226.23(b)(4) sets forth two optional disclosures that are directly related to the mandatory rescission disclosures: (1) a statement that joint owners may have the right to rescind and that a rescission by one owner is effective for all owners; and (2) a statement acknowledging the consumer's receipt of the notice for the consumer to initial and date. In addition, proposed comment 23(b)(4)–1 clarifies that, at the creditor's option, other information directly related to the disclosures required by § 226.23(b)(3) may be included in the notice. For instance, an explanation of the use of pronouns or other references to the parties to the transaction is directly related information that the creditor may choose to add to the notice.

The Board notes, however, that under the proposal, only information directly related to the disclosures may be added to the notice. *See* proposed § 226.23(b)(2)(i). The Board is concerned that allowing creditors to combine disclosures regarding the right of rescission with other unrelated information, in any format, will diminish the clarity of this key material, potentially cause "information overload," and increase the likelihood that consumers may not read the rescission notice.

23(b)(5) Time of Providing Notice

TILA and Regulation Z currently do not specify when the consumer must receive the notice of the right to rescind. Current comment 23(b)–4 states that the creditor need not give the notice to the consumer before consummation of the transaction, but notes, however, that the rescission period will not begin to run until the notice is given to the consumer. As a practical matter, most creditors provide the notice to the consumer along with the Truth in Lending disclosures and other loan documents at loan closing.

The Board proposes to require creditors to provide the notice of the right of rescission before consummation of the transaction. *See* proposed § 226.23(b)(5). The Board proposes this new timing requirement pursuant to the Board's authority under TILA Section 105(a), which authorizes the Board to make exceptions and adjustments to TILA to effectuate the statute's purposes which include facilitating consumers' ability to compare credit terms and helping consumers avoid the uninformed use of credit. 15 U.S.C. 1601(a), 1604(a). The Board believes that the proposed timing rule would facilitate consumers' ability to consider the rescission right and avoid the uninformed use of credit.

General timing rule. Except as discussed below, the Board proposes to require creditors generally to provide the notice of the right to rescind before consummation of the transaction. *See* proposed § 226.23(b)(5)(i). TILA and Regulation Z provide that a consumer may exercise the right to rescind until midnight after the third business day following the latest of (1) consummation, (2) delivery of the notice of right to rescind, or (3) delivery of all material disclosures. TILA Section 125(a); 15 U.S.C. 1635(a); § 226.23(a)(3). Creditors typically use the final TILA disclosures to satisfy the requirement to provide material disclosures, and under the August 2009 Closed-End Proposal, the final TILA disclosures must be provided no later than three business days before consummation. Requiring that the rescission notice be given prior to consummation would better ensure that consummation will be the latest of the three events that trigger the three-business-day rescission period (assuming that the TILA disclosures were given no later than three business days prior to consummation). In this way, the three-business-day period would occur directly after consummation of the transaction, a time during which the consumer may be most focused on the transaction and most concerned about the right to rescind it. By tying a creditor's provision of the rescission notice to an event in the lending process of primary importance to the consumer—consummation—this rule might lead consumers to assess the TILA disclosures and other loan documents with a more critical eye.

The proposal should not significantly increase compliance burden because, as noted, currently most creditors provide the rescission notice at loan closing, along with the TILA disclosures. As noted above, under the August 2009 Closed-End Proposal, a creditor would be required to provide the final TILA disclosures no later than three business days prior to consummation. Under this proposal, a creditor could provide the rescission notice with the final TILA disclosures, but would not be required to do so. The creditor could provide the notice at any time before consummation, separately from the final TILA disclosures. The Board solicits comment on whether the rescission notice should be required to be provided with the final TILA disclosures. The Board also invites comment on any compliance or other operational difficulties the proposal might cause.

Comment 23(b)–4 would be removed as inconsistent with the proposed timing requirement. Proposed comment 23(b)(5)–1 clarifies that delivery of the notice after consummation would violate the timing requirement of § 226.23(b)(5)(i), and that the right of rescission does not expire until three business days after the day of late delivery if the notice was complete and correct.

Addition of a security interest. If the right to rescind arises from the addition of a security interest to an existing obligation as described in proposed § 226.23(a)(1), a creditor would be required to provide the rescission notice prior to the addition of the security interest. See proposed § 226.23(b)(5)(ii). Tying a creditor's provision of the rescission notice to the event that gives rise to the right of rescission—the addition of the security interest—might lead consumers to consider more closely the right to rescind. The Board solicits comment on any compliance or other operational difficulties this proposed rule might cause.

23(b)(6) Proper Form of Notice

Current § 226.23(b)(2) states that to satisfy the disclosure requirements of current § 226.23(b)(1), the creditor must provide the appropriate model form in current Appendix H or a substantially similar notice. As discussed above, Appendix H currently provides Model Form H–8 for most rescindable transactions, and Model Form H–9 for a new advance of money by the same creditor with a new advance of money. Before 1995, there was uncertainty about which model form to use. One court held that a creditor could create its own nonstandard notice form, if neither of the Board's two model forms fit the transaction.[75] In 1995, Congress amended TILA to provide that a consumer would not have rescission rights based solely on the form of written notice used by the creditor, if the creditor provided the appropriate form published by the Board, or a comparable written notice, that was properly completed by the creditor, and otherwise complied with all other requirements regarding the notice. TILA Section 125(h); 15 U.S.C. 1635(h). When the Board implemented these amendments to TILA, it revised Model Form H–9 to ease compliance and clarify that it may be used in loan refinancings with the original creditor, without regard to whether the creditor is the holder of the note at the time of the refinancing. As discussed in the section-by-section analysis to § 226.23(b)(3)(iv) above, the Board now proposes to rename Model Form H–9 as "Rescission Model Form (New Advance of Money with the Same Creditor)" to further clarify the purpose of the form and ease compliance.

Consumer advocates have expressed concern about creditors failing to complete the model forms properly. For example, some courts have held that notices with incorrect or omitted dates for the identification of the transaction and the expiration of the right are nevertheless adequate to meet the requirement of delivery of notice of the right to the consumer.[76]

To address these concerns, proposed § 226.23(b)(6) provides that a creditor satisfies § 226.23(b)(3) if it provides the appropriate model form in Appendix H, or a substantially similar notice, which is properly completed with the disclosures required by § 226.23(b)(3). Proposed comment 23(b)(6)–1 explicitly states that a notice is not properly completed if it lacks a calendar date or has an incorrectly calculated calendar date for the expiration of the rescission period. Such a notice would not fulfill the requirement to deliver the notice of the right to rescind. As discussed in the section-by-section analysis to proposed § 226.23(b)(3)(vi) above, however, a creditor who provides a date reasonably and in good faith that later turns out to be incorrect would be deemed to have complied with the requirement to provide the notice if the creditor provides a corrected notice as described in proposed § 226.23(b)(3)(vi) and comment 23(b)–4.

23(c) Delay of Creditor's Performance

Section 226.23(c) provides that, unless the consumer has waived the right of rescission under § 226.23(e), no money may be disbursed other than in escrow, no services may be performed, and no materials delivered until the rescission period has expired and the creditor is reasonably satisfied that the consumer has not rescinded. Comment 23(c)–4 states that a creditor may satisfy itself that the consumer has not rescinded by obtaining a written statement from the consumer that the right has not been exercised. The comment does not address the timing of providing or signing the written statement.

Concerns have been raised that some creditors provide the consumer with a certificate of nonrescission at closing, which is the same time at which the consumer receives the notice of right to rescind and signs all of the closing documents. In some cases, the consumer

[75] *See, e.g., In re Porter,* 961 F.2d 1066, 1076 (3d Cir. 1992).

[76] *See, e.g., Melfi* v. *WMC Mortgage Corp.* 568 F.3d 309 (1st Cir. 2009).

mistakenly signs the nonrescission certificate in the rush to complete closing. In other cases, creditors may specifically require or encourage the consumer to sign the nonrescission certificate at closing, rather than after the expiration of the right of rescission. This may cause the consumer to believe that the right to rescind has been waived or the rescission period has expired. During outreach conducted by the Board for this proposal, industry representatives stated that the majority of creditors have abandoned the practice of providing a nonrescission certificate at closing. In addition, the majority of courts to consider this issue have held that having a consumer sign a nonrescission certificate at closing violates the requirement under TILA and Regulation Z that the creditor provide the notice of right to rescind "clearly and conspicuously." [77] TILA Section 125(b); 15 U.S.C. 1635(b); § 226.23(b)(1). On the other hand, some consumers have advised the Board that their creditors provided a nonrescission certificate at closing, which the consumers have signed. Also, a few courts have held that having the consumer sign a nonrescission certificate at closing is permissible under TILA and Regulation Z.[78] The Board is concerned that permitting consumers to sign and date a nonrescission certificate at closing will undermine consumers' understanding of their right to rescind.

To address these concerns, the Board proposes to revise comment 23(c)–4 to state that a creditor may satisfy itself that the consumer has not rescinded by obtaining a written statement from the consumer that the right has not been exercised. The statement must be signed and dated by the consumer only at the end of the three-day period. The Board acknowledges that some creditors and consumers may be inconvenienced by waiting three days after consummation to provide a nonrescission certificate, but believes that this burden is outweighed by the benefit to consumers of a better understanding of the right to rescind.

[77] *See, e.g., Rand Corp.* v. *Moua,* 449 F.3d 842, 847 (8th Cir. 2009) ("Requiring borrowers to sign statements which are contradictory and demonstrably false is a paradigm for confusion."); *Rodash* v. *AIB Mortgage Co.,* 16 F.3d 1142, 1146 (11th Cir. 1994), *abrogated on other grounds by Veale* v. *Citibank,* 85 F.3d 557 (11th Cir. 1996) (holding that the "primary effect" of providing a nonrescission certificate at closing was to confuse the consumer about her right to rescind).

[78] *See, e.g., ContiMortgage Corp.* v. *Delawder,* 2001 Ohio App. LEXIS 3410 at *12 (Ohio Ct. App. July 30, 2001) (holding that "nothing in the statute or administrative regulations expressly prohibits the signing of a post-dated waiver of the right of rescission").

23(d) Effects of Rescission

Background

TILA and Regulation Z provide that the right of rescission expires three business days after the later of (1) consummation, (2) delivery of the notice of the right to rescind, or (3) delivery of the material disclosures. TILA Section 125(a); 15 U.S.C. 1635(a); § 226.23(a)(3). During the initial three-day rescission period, the creditor may not, directly or through a third party, disburse money, perform services, or deliver materials. Section 226.23(c); comment 23(c)–1. If the creditor fails to deliver the notice of the right to rescind or the material disclosures, a consumer's right to rescind may extend for up to three years from the date of consummation. TILA Section 125(f); 15 U.S.C. 1635(f); § 226.23(a)(3).

TILA Section 125(b) and § 226.23(d) set out the process for rescission. 15 U.S.C. 1635(b). The regulation specifies that "[w]hen a consumer rescinds a transaction, the security interest giving rise to the right of rescission becomes void and the consumer shall not be liable for any amount, including any finance charge." Section 226.23(d)(1). The regulation also states that "[w]ithin 20 calendar days after receipt of a notice of rescission, the creditor shall return any money or property that has been given to anyone in connection with the transaction and shall take any action necessary to reflect the termination of the security interest." Section 226.23(d)(2). Finally, the regulation provides that when the creditor has complied with its obligations, "the consumer shall tender the money or property to the creditor * * *." Section 226.23(d)(3).

TILA and Regulation Z allow a court to modify the process for rescission. TILA Section 125(b); 15 U.S.C. 1635(b); § 226.23(d)(4). After passage of TILA in 1968, courts began to use their equitable powers to modify the rescission procedures so that a creditor would be assured of the consumer's valid right to rescind and ability to tender before the creditor was required to refund costs and release its security interest and lien position.[79] In 1980, Congress codified this judicial authority in the Truth in Lending Simplification and Reform Act by providing that the rescission procedures "shall apply except when otherwise ordered by a court." [80] Regulation Z states that "[t]he procedures outlined in paragraphs (d)(2) and (3) of this section may be modified by court order." Section 226.23(d)(4).

[79] *See Williams* v. *Homestake Mortgage Co.,* 968 F.2d 1137, 1140 (11th Cir. 1992) (citing cases from the Fourth, Sixth, Ninth and Tenth Circuits permitting judicial modification prior to Congress enacting the judicial modification provisions of TILA).

Concerns with the Rescission Process

The rescission process is straightforward if the consumer exercises the right to rescind within three business days of consummation. During this three-day period, the creditor is prohibited from disbursing any money or property and, in most cases, the creditor has not yet recorded its lien. Section 226.23(c). Thus, if the creditor receives a rescission notice from the consumer, the creditor simply returns any money paid by the consumer, such as a document preparation fee.

If the consumer exercises the right to rescind after the initial three-day post-consummation period, however, the process is problematic. The parties may not agree that the consumer still has a right to rescind. For example, the creditor may believe that the consumer's right to rescind has expired or that the creditor properly delivered the notice of right to cancel and material disclosures. Typically, the creditor will not release the lien or return interest and fees to the consumer until the consumer establishes that the right to rescind has not expired and that the consumer can tender the amount provided to the consumer. Both consumer advocates and creditors have urged the Board to clarify the operation of the rescission process in the extended right context. Following is a discussion of the issues that arise when the right to rescind is asserted after the initial three-day period, including the effect of the consumer's notice, the creditor's obligations upon receipt of a consumer's notice, judicial modification, and the form of the consumer's tender.

Effect of the consumer's notice. Consumer advocates and creditors have asked the Board to clarify the effect of the provision of the consumer's notice of rescission on the security interest once the initial three-day period has passed. Some consumer advocates maintain that when a consumer sends a notice to the creditor exercising the right to rescind, the creditor's security interest is automatically void. A few courts have held that the security interest is void as soon as the creditor receives the notice of rescission, regardless of the consumer's ability to tender. However, these courts have still

[80] Truth in Lending Simplification and Reform Act, Public Law 96–221, tit. VI, § 612(a)(4), 94 Stat. 168, 172 (1980).

required the consumer to repay the obligation in full.[81]

Industry representatives, on the other hand, state that courts may condition the release of the security interest upon the consumer's tender. Several courts have held that the creditor's receipt of a valid notice of rescission does not automatically void the creditor's security interest and terminate the consumer's liability for charges.[82] In addition, the majority of Federal circuit courts hold that a court may condition the creditor's release of the security interest on proof of the consumer's ability to tender.[83]

Creditor's obligations upon receipt of notice. Consumer advocates and creditors have expressed confusion about the creditor's obligations upon receiving the consumer's notice of rescission once the initial three-day period has passed. Some creditors use the judicial process to resolve rescission issues. For example, some creditors seek a declaratory judgment whether the consumer's right to rescind has expired. Other creditors concede the consumer has a right to rescind, but tender the refunded costs and the release of the lien to the court with a request that the court release the funds and the lien after the consumer tenders. Although these approaches follow the text of the statute, they increase costs for creditors and consumers. Other creditors do not use the judicial process. For example, some creditors notify the consumer that the refunded costs and release of the lien will be held in escrow until the consumer is prepared to tender. If the consumer tenders, the creditor refunds the costs and releases the lien. Although this process saves the parties the time and expense of a court proceeding, concerns have been raised about creditors conditioning rescission on tender.[84] Finally, some creditors do not respond to the notice of rescission, requiring consumers to go to court to enforce their rights. Courts are divided on whether use of this approach violates of TILA.[85]

Judicial modification. As noted above, when the consumer provides a notice of rescission after the initial three-day period, the consumer and creditor typically dispute whether the consumer has a right to rescind. The parties often seek to resolve the issue in court. It appears that most courts determine first whether the consumer's right to rescind has expired. If the consumer's right has not expired, then the court determines the amounts owed by the consumer and creditor, and then the procedures for the consumer to tender.[86] However, a minority of courts have dismissed the case if the consumer does not first establish the ability to tender.[87] Courts may seek to conserve judicial resources in cases where the consumer would not be able to tender any amount. As a practical matter, a court might determine under certain circumstances that a consumer would be unable to tender even after the loan balance is reduced.

Consumer advocates have expressed concern that conditioning the determination of the right to rescind on the consumer's tender can impose a hardship on consumers. Consumers may have trouble obtaining a refinancing for the entire outstanding loan balance, rather than a reduced amount based on the loan balance less any interest, fees or damages. Moreover, consumers often assert the right to rescind in foreclosure or bankruptcy proceedings, when it is difficult for them to obtain a refinancing.

To address these concerns, the Board in 2004 amended the Official Staff Commentary to provide that "[t]he sequence of procedures under § 226.23(d)(2) and (3) or a court's modification of those procedures under § 226.23(d)(4), does not affect a consumer's substantive right to rescind and to have the loan amount adjusted accordingly. Where the consumer's right to rescind is contested by the creditor, a court would normally determine whether the consumer has a right to rescind and determine the amounts owed before establishing the procedures for the parties to tender any money or property." *See* comment 23(d)(4)–1; 69 FR 16769, March 31, 2004. Notwithstanding this comment, some courts have stated that the court may condition its determination of the consumer's rescission claim on proof of the consumer's ability to tender.[88]

Consumer tender. As noted, consumers often assert the right to rescind in foreclosure or bankruptcy proceedings. These consumers may have difficulty tendering because most creditors will not refinance a loan in such circumstances. Consumer advocates report that this problem has worsened due to the drop in home values in the last few years. A consumer may, however, be able to tender in installments or through other means, such as a modification, deed-in-lieu of foreclosure, or short sale of the property. Industry representatives, on the other hand, have expressed concern about consumers tendering less than the full amount due and note that these alternatives are not contained in the statutory provisions. Several courts have permitted consumers to tender in

[81] *See, e.g., Bell* v. *Parkway Mortgage, Inc.,* 309 B.R. 139 (Bankr. E.D. Pa. 2004) (holding that the court cannot modify the automatic voiding of the security interest, but ordering the consumer to file an amended bankruptcy plan to classify the creditor's unsecured claim separately and provide payment in full over the life of the plan); *Williams* v. *BankOne, N.A.,* 291 B.R. 636 (Bankr. E.D. Pa. 2003) (same). *Cf. Williams* v. *Homestake Mortgage Co.,* 968 F.2d 1137, 1140 (11th Cir. 1992) (holding that rescission of the security interest is automatic but may be conditioned on the consumer's tender).

[82] *See, e.g., American Mortgage Network* v. *Shelton,* 486 F.3d 815, 821 (4th Cir. 2007) ("This Court adopts the majority view of reviewing courts that unilateral notification of cancellation does not automatically void the loan contract."); *Yamamoto* v. *Bank of New York,* 329 F.3d 1167, 1172 (9th Cir. 2003) ("[I]t cannot be that the security interest vanishes immediately upon the giving of notice. Otherwise, a borrower could get out from under a secured loan simply by claiming TILA violations, whether or not the lender had actually committed any."); *Large* v. *Conseco Fin. Servicing Corp.,* 292 F.3d 49, 54–55 (1st Cir. 2002) ("The natural reading of [15 U.S.C. 1635(b)] is that the security interest becomes void when the obligor exercises a right to rescind that is available in a particular case, either because the creditor acknowledges that the right of rescission is available, or because the appropriate decision maker has so determined.").

[83] *See American Mortgage Network* v. *Shelton,* 486 F.3d 815, 820 (4th Cir. 2007); *Yamamoto* v. *Bank of New York,* 329 F.3d 1167, 1172 (9th Cir. 2003); *Williams* v. *Homestake Mortgage Co.,* 968 F.2d 1137, 1140 (11th Cir. 1992); *FDIC* v. *Hughes Development Co.,* 938 F.2d 889, 890 (8th Cir. 1991); *Brown* v. *Nat'l Perm. Fed. Sav. and Loan Ass'n,* 683 F.2d 444, 447 (D.C. Cir. 1982); *Rudisell* v. *Fifth Third Bank,* 622 F.2d 243, 254 (6th Cir. 1980).

[84] *Compare Personias* v. *HomeAmerican Credit, Inc.,* 234 F. Supp. 2d 817 (N.D. Ill. 2002) (upholding the creditor's rescission offer conditioned on the consumer's tender), *with Velazquez* v. *HomeAmerican Credit, Inc.,* 254 F. supp. 2d 1043 (N.D. Ill. 2003) (holding that neither TILA nor Regulation Z permitted the creditor to condition rescission on the consumer's tender).

[85] *Compare Garcia* v. *HSBC Bank USA, N.A.,* 2009 U.S. Dist. LEXIS 114299 at *15 (N.D. Ill. 2009) (holding an assignee liable under TILA for failing to respond to a notice of rescission within 20 days), *with Rudisell* v. *Fifth Third Bank,* 622 F.2d 243, 254 (6th Cir. 1980) ("The statute does not say what should happen if the creditor does not tender back the property within ten days as required under the statute due to a good faith belief that the debtor has no right to rescind.").

[86] *See, e.g., Dawson* v. *Thomas,* 411 B.R. 1, 43 (Bankr. D.C. 2008) (determining that the consumer had an extended right to rescind because the creditor failed to deliver the material disclosures and notice of right to rescind, then determining the amount of consumer's tender based on the loan amount less any amounts paid by the consumer, and permitting the consumer to tender after the sale of the house).

[87] *See, e.g., Yamamoto* v. *Bank of New York,* 329 F.3d 1167, 1173 (9th Cir. 2003) (affirming the district court's decision to dismiss a case prior to determination of the merits of the rescission claim because the consumer could not tender).

[88] *See, e.g., Mangindin* v. *Washington Mutual Bank,* 637 F. Supp. 2d 700 (N.D. Cal. 2009) (granting the creditor's motion to dismiss in a rescission claim because the consumer failed to plead the ability to tender); *ING Bank* v. *Korn,* 2009 U.S. Dist. LEXIS 73329 at *4 (W.D. Wash. May 22, 2009) (same).

installments,[89] but other courts have held that a consumer must tender the full amount due in a lump sum.[90] Consumer advocates have urged the Board to address whether a court may modify the consumer's obligation to tender.

The Board's Proposal

To address the problems that arise when the consumer asserts the right to rescind after the initial three-day period has passed and to facilitate compliance, the Board proposes to revise § 226.23(d) to provide two processes for rescission. Proposed § 226.23(d)(1) would apply only if the creditor has not, directly or indirectly through a third party, disbursed money or delivered property, and the consumer's right to rescind has not expired. Generally, this process would apply during the initial three-day waiting period. Rescission in these circumstances is self-effectuating.

Proposed § 226.23(d)(2) would apply in all other cases, when the consumer asserts the right to rescind after the initial three-day period has expired and the loan proceeds have been disbursed or property has been delivered. In these cases, the consumer's ability to rescind depends on certain facts that may be disputed by the parties. Proposed § 226.23(d)(2)(i) would address how the parties may agree to resolve a rescission claim outside of a court proceeding. The Board believes that the parties should have flexibility to resolve a rescission claim. As noted above, some creditors do not respond to a consumer's notice of rescission. Thus, the proposal would require that the creditor provide an acknowledgment of receipt within 20 calendar days after receiving the consumer's notice of rescission and a written statement of whether the creditor will agree to cancel the transaction. The proposal would also set forth a process for the consumer to tender and the creditor to release its security interest.

Proposed § 226.23(d)(2)(ii) would address the effects of rescission if the parties are in a court proceeding that has jurisdiction over the disputed rescission claim. Consistent with the holding of the majority of courts that have addressed this issue, the proposal would require the consumer to tender before the creditor releases its security interest. As in TILA and the current regulation, the court may modify these procedures.

Legal authority. The Board proposes § 226.23(d)(2) pursuant to its authority in TILA Section 105(a). Section 105(a) authorizes the Board to prescribe regulations to effectuate the statute's purposes and facilitate compliance. 15 U.S.C. 1601(a), 1604(a). TILA's purposes include facilitating consumers' ability to compare credit terms and helping consumers avoid the uninformed use of credit. Section 105(a) also authorizes the Board to make adjustments to the statute for any class of transactions as in the judgment of the Board are necessary or proper to effectuate the purposes of the statute, prevent circumvention or evasion of the statute, or facilitate compliance with the statute.

As discussed above, the process for rescission functions well when rescission is asserted within three days of consummation. 15 U.S.C. 1635. The Board believes TILA Section 125 was designed for consumers to use primarily during the initial three-day period. The process set out in TILA Section 125 does not work well, however, after the initial three-day period when the creditor has disbursed funds and perfected its lien, and the consumer's right to rescind may have expired. Most creditors are reluctant to release a lien under these conditions, particularly if the consumer is in default or in bankruptcy and would have difficulty tendering. Thus, when a creditor receives a consumer's notice after the initial three-day period, the rescission process is unclear and courts are frequently called upon to resolve rescission claims.

To address issues that arise when rescission is asserted after the initial three-day period, the Board is proposing rules to effectuate the statutory purpose and facilitate compliance using its authority under TILA Section 105(a). 15 U.S.C. 1604(a). First, if the parties are not in a court proceeding, the proposal would require the creditor to acknowledge receipt of a notice of rescission and would provide a clear process for the parties to resolve the rescission claim. The Board believes that requiring creditors to acknowledge receipt of the consumer's notice of rescission would effectuate the consumer protection purpose of TILA. Currently, it is not clear whether a creditor must take action upon receipt of a consumer's notice because there may be a good faith dispute as to whether the consumer's right to rescind has expired. The proposal would clarify that a creditor must send a written acknowledgement within 20 calendar days of receipt of the notice. In addition, under the proposal, the creditor must provide the consumer with a written statement that indicates whether the creditor will agree to cancel the transaction and, if so, the amount the consumer must tender. This statement should assist the consumer in deciding whether to seek to resolve the matter with the creditor or to take other action, such as initiating a court action. Also, if the creditor agrees to cancel the transaction, under the proposal the creditor must release its security interest upon the consumer's tender of the amount provided in the creditor's written statement. Thus, the proposal would facilitate compliance with, and prevent circumvention of TILA. Consumers would be promptly and clearly informed about the status of their notice of rescission, and better prepared to take appropriate action.

Second, the proposal would adjust the procedures described in TILA Section 125 to ensure a clearer and more equitable process for resolving rescission claims that are raised in court proceedings after the initial three-day period has passed. 15 U.S.C. 1635. The proposal would provide that when the parties are in a court proceeding, the creditor's release of the security interest is not required until the consumer tenders the principal balance less interest and fees, and any damages and costs, as determined by the court. The Board believes that this adjustment for transactions subject to rescission after the initial three-day period has passed would facilitate compliance. The sequence of procedures set forth in TILA Section 125 would seem to require the creditor to release its security interest whether or not the consumer can tender the funds provided to the consumer after the initial three-day period has passed. The Board does not believe that Congress intended for the creditor to lose its status as a secured creditor if the consumer does not return the amount of money provided or the property delivered. Indeed, the majority of courts that have considered the issue condition the creditor's release of the security interest on the consumer's proof of tender. The proposal would provide clear rules regarding the consumer's obligation to tender before the creditor releases its security interest.

23(d)(1) Effects of Rescission prior to the Creditor Disbursing Funds

Proposed § 226.23(d)(1) would apply only if the creditor has not, directly or

[89] *See, e.g., Sterten* v. *OptionOne Mortgage Co.,* 352 B.R. 380 (Bankr. E.D. Pa. 2006) (permitting tender in installments); *Shepeard* v. *Quality Siding & Window Factory, Inc.,* 730 F. Supp. 1295 (D.Del. 1990) (same); *Smith* v. *Capital Roofing,* 622 F. Supp. 191 (S.D. Miss. 1985) (same).

[90] *See, e.g., Bustamante* v. *First Fed. Sav. & Loan Ass'n,* 619 F.2d 360 (5th Cir. 1980) (holding that tender of installments into escrow is not proper tender). *Cf. American Mortgage Network, Inc.* v. *Shelton,* 486 F. 3d 815, 820 n.5 (4th Cir. 2007) ("This Court does not believes that the [consumers'] offer to sell their residence to [the creditor] for an amount determined by a non-independent appraiser constituted 'reasonable value.' ").

indirectly through a third party, disbursed money or delivered property, and the consumer's right to rescind has not expired. The Board believes that rescission is self-effectuating in these circumstances. Accordingly, under proposed § 226.23(d)(1)(i), when a consumer provides a notice of rescission to a creditor, the security interest would become void and the consumer would not be liable for any amount, including any finance charge. Proposed comment 23(d)(1)(i)–1, adopted from current comment 23(d)(1)–1, would emphasize that "[t]he security interest is automatically negated regardless of its status and whether or not it was recorded or perfected."

As in the current regulation, the creditor would be required to return money paid by the consumer and take whatever steps are necessary to terminate its security interest within 20 calendar days after receipt of the consumer's notice. Accordingly, current § 226.23(d)(2), and existing commentary would be retained and re-numbered as proposed § 226.23(d)(1)(ii). Proposed comment 23(d)(1)(ii)–3 is adopted from current comment 23(d)(2)–3 and revised for clarity. The proposed comment would state that the necessary steps include the cancellation of documents creating the security interest, and the filing of release or termination statements in the public record. If a mechanic's or materialman's lien is retained by a subcontractor or supplier of a creditor-contractor, the creditor-contractor must ensure that the termination of that security interest is also reflected. The 20-calendar-day period for the creditor's action refers to the time within which the creditor must begin the process. It does not require all necessary steps to have been completed within that time, but the creditor is responsible for ensuring that the process is completed.

Proposed comment 23(d)(1)(ii)–4 would clarify that the 20-calendar-day period begins to run from the date the creditor *receives* the consumer's notice. The comment would also clarify that, consistent with proposed § 226.23(a)(2)(ii)(A), the creditor is deemed to have received the consumer's notice of rescission if the consumer provides the notice to the creditor or the creditor's agent designated on the notice. Where no designation is provided, the creditor is deemed to have received the notice if the consumer provides it to the servicer.

Finally, current § 226.23(d)(3) and (d)(4) and associated commentary would be deleted to remove references to the consumer's obligations and judicial modification, which are not applicable in the initial three-day rescission period.

23(d)(2) Effects of Rescission After the Creditor Disburses Funds

Proposed § 226.23(d)(2) would apply if the creditor has, directly or indirectly through a third party, disbursed money or delivered property, and the consumer's right to rescind has not expired under § 226.23(a)(3)(ii). Generally, this process would apply after the initial three-day period has expired.

23(d)(2)(i) Effects of Rescission if the Parties Are Not in a Court Proceeding

23(d)(2)(i)(A) Creditor's Acknowledgment of Receipt

Proposed § 226.23(d)(2)(i) would address the effects of rescission if the parties are not in a court proceeding. Proposed comment 23(d)(2)(i)–1 would clarify that the process set forth in § 226.23(d)(2)(i) does not affect the consumer's ability to seek a remedy in court, such as an action to recover damages under section 130 of the act, and/or an action to tender in installments. In addition, a creditor's written statement, as described in § 226.23(d)(2)(i)(B), is not an admission by the creditor that the consumer's claim is a valid exercise of the right to rescind.

As noted above, some creditors do not respond to the consumer's notice of rescission. To address this issue, proposed § 226.23(d)(2)(i)(A) would require that within 20 calendar days after receiving a consumer's notice of rescission, the creditor must mail or deliver to the consumer a written acknowledgment of receipt of the consumer's notice. The acknowledgment must include a written statement of whether the creditor will agree to cancel the transaction.

Proposed comment 23(d)(2)(i)(A)–1 would clarify that the 20-calendar-day period begins to run from the date the creditor *receives* the consumer's notice. The comment would also cross-reference comment 23(a)(2)(ii)(B)–1 to further clarify that the creditor is deemed to have received the consumer's notice of rescission if the consumer provides the notice to the servicer. TILA's legislative history indicates that Congress intended for creditors to promptly respond to a consumer's notice of rescission. Originally, Congress provided the creditor with 10 days to address these matters.[91] As part of the Truth in Lending Simplification and Reform Act of 1980, however, Congress increased this time period from 10 to 20 days.[92] The legislative history states: "This section also increases from 10 to 20 days the time in which the creditor must refund the consumer's money and take possession of property sold after a consumer exercises his right to rescind. This will give creditors a better opportunity to determine whether the right of rescission is available to the consumer and whether it was properly exercised."[93] Nonetheless, the Board recognizes the complexities of evaluating the creditor's course of action after receiving the consumer's notice of rescission, and solicits comments as to whether a period greater than 20 calendar days should be provided to the creditor particularly because the proposal would require the creditor to provide a written statement of whether it will agree to cancel the transaction.

23(d)(2)(i)(B) Creditor's Written Statement

Proposed § 226.23(d)(2)(i)(B) would set forth the requirements for creditors who agree to cancel the transaction. The proposal would state that if the creditor agrees to cancel the transaction, the acknowledgment of receipt must contain a written statement, which provides: (1) As applicable, the amount of money or a description of the property that the creditor will accept as the consumer's tender, (2) a reasonable date by which the consumer may tender, and (3) that within 20 calendar days after receipt of the consumer's tender, the creditor will take whatever steps are necessary to terminate its security interest. Proposed comment 23(d)(2)(i)(B)–1 would clarify that if the creditor disbursed money to the consumer, then the creditor's written statement must state the amount of money that the creditor will accept as the consumer's tender. For example, suppose the principal balance owed at the time the creditor received the consumer's notice of rescission was $165,000, the costs paid directly by the consumer at closing were $8,000, and the consumer made interest payments totaling $20,000 from the date of consummation to the date of the creditor's receipt of the consumer's notice of rescission. The creditor's written statement could provide that the acceptable amount of tender is $137,000, or some amount higher or lower than that amount.

[91] Truth in Lending Act, Public Law 90–321, tit. I, § 125(b), 82 Stat. 146, 153 (1968).

[92] Truth in Lending Simplification and Reform Act, Public Law 96–221, tit. VI, § 612(a)(3), 94 Stat. 168, 175 (1980).

[93] *See* S. Rep. No. 96–368, at 29 (1979), *as reprinted in* 1980 U.S.C.A.N.N. 236, 264.

Proposed comment 23(d)(2)(i)(B)–2 would provide an example that it would be reasonable under most circumstances to require the consumer's tender within 60 days of the creditor mailing or delivering the written statement. The Board seeks to balance the consumer's need for sufficient time to seek a refinancing or other means of securing tender, with the creditor's need to resolve the matter and possibly resume interest charges. The Board seeks comment on whether such a time period should be provided and, if so, whether it should be shorter or longer.

23(d)(2)(i)(C) Consumer's Response

Proposed § 226.23(d)(2)(i)(C) would set forth the requirements for the consumer's actions in response to the creditor's written statement described in § 226.23(d)(2)(i)(B). If the creditor disbursed money to the consumer in connection with the credit transaction, proposed § 226.23(d)(2)(i)(C)(*1*) would provide that the consumer may respond by tendering to the creditor the money described in the written statement by the date stated in the written statement. Currently, Regulation Z requires the consumer to tender money at the creditor's designated place of business. Section 226.23(d)(3). However, the proposal would permit the consumer to tender money at the creditor's place of business, or any reasonable location specified in the creditor's written statement. The Board does not believe that the consumer's tender of money must be limited to the creditor's place of business if tender can be accomplished at another reasonable location, such as a settlement office.

If the creditor delivered property to the consumer, proposed § 226.23(d)(2)(i)(C)(*2*) would provide that the consumer may respond by tendering to the creditor the property described in the written statement by the date stated in the written statement. As provided in TILA and Regulation Z, the proposal would state that where this tender would be impracticable or inequitable, the consumer may tender its reasonable value. TILA Section 125(b); 15 U.S.C. 1635(b); § 226.23(d)(3). Proposed comment 23(d)(2)(i)(C)–1, adopted from current comment 23(d)(3)–2, would clarify that if returning the property would be extremely burdensome to the consumer, the consumer may offer the creditor its reasonable value rather than returning the property itself. For example, if aluminum siding has already been incorporated into the consumer's dwelling, the consumer may pay its reasonable value. As provided in TILA and Regulation Z, the proposal would further provide that at the consumer's option, tender of property may be made at the location of the property or at the consumer's residence. TILA Section 125(b); 15 U.S.C. 1635(b); § 226.23(d)(3). Proposed comment 23(d)(2)(i)(C)–2, adopted from current comment 23(d)(3)–1, would provide an example that if aluminum siding or windows have been delivered to the consumer's home, the consumer may tender them to the creditor by making them available for pick-up at the home, rather than physically returning them to the creditor's premises.

TILA and Regulation Z provide that if the creditor does not take possession of the money or property within 20 calendar days after the consumer's tender, the consumer may keep it without further obligation. TILA Section 125(b); 15 U.S.C. 1635(b); § 226.23(d)(3). The Board does not believe that this situation is likely to arise in the context of resolving a claim outside a court proceeding and therefore, is not proposing to include this provision. That is, the Board believes that if the consumer provides the creditor with the amount of money or property described in the written statement by the date requested, it seems unlikely that the creditor would choose not to accept it. The Board seeks comment on this approach.

23(d)(2)(i)(D) Creditor's Security Interest

Proposed § 226.23(d)(2)(i)(D) would require that within 20 calendar days after receipt of the consumer's tender, the creditor must take whatever steps are necessary to terminate its security interest. Proposed comment 23(d)(2)(i)(D)–1 would cross-reference comment 23(d)(1)(ii)–3, described above, regarding reflection of the security interest termination.

23(d)(2)(ii) Effect of Rescission in a Court Proceeding

23(d)(2)(ii)(A) Consumer's Obligation

Proposed § 226.23(d)(2)(ii) would address the effects of rescission if the creditor and consumer are in a court proceeding, and the consumer's right to rescind has not expired as provided in § 226.23(a)(3)(ii). With respect to the validity of the right to rescind, proposed comment 23(d)(2)(ii)–1 would clarify that the procedures set forth in § 226.23(d)(2)(ii) assume that the consumer's right to rescind has not expired as provided in § 226.23(a)(3)(ii). Thus, if the consumer provides a notice of rescission more than three years after consummation of the transaction, then the consumer's right to rescind has expired and these procedures do not apply.

Proposed § 226.23(d)(2)(ii)(A) would set forth the requirements for the consumer's obligation to tender. The consumer would be required to tender after the creditor receives the consumer's valid notice of rescission, but before the creditor releases its security interest. If the creditor disbursed money to the consumer, proposed § 226.23(d)(2)(ii)(A)(*1*) would require the consumer to tender to the creditor the principal balance then owed less any amounts the consumer has given to the creditor or a third party in connection with the transaction. Tender of money may be made at the creditor's designated place of business, or other reasonable location.

Proposed comment 23(d)(2)(ii)(A)–1 would clarify that the consumer must tender to the creditor the principal balance owed at the time the creditor received the consumer's notice of rescission less any amounts the consumer has given to the creditor or a third party in connection with the transaction. For example, suppose the principal balance owed at the time the creditor received the consumer's notice of rescission was $165,000, the costs paid directly by the consumer at closing were $8,000, and the consumer has made interest payments totaling $20,000 from the date of consummation to the date the creditor received the consumer's notice of rescission. The amount of the consumer's tender would be $137,000. This amount may be reduced by any amounts for damages, attorney's fees or costs, as the court may determine. Proposed comments 23(d)(2)(ii)(A)–2 and –3 are adopted from current comments 23(d)(2)–1 and –2 regarding the creditor's obligations to refund money. The comments are revised for clarity; no substantive change is intended.

Proposed comment 23(d)(2)(ii)(A)–4 would clarify that there may be circumstances where the consumer has no obligation to tender and therefore, the creditor's obligations would not be conditioned on the consumer's tender. For example, in the case of a new transaction with the same creditor and a new advance of money, the new transaction is rescindable only to the extent of the new advance. *See* § 226.23(f)(2)(ii). Suppose the amount of the new advance was $3,000, but the costs paid directly by the consumer at closing were $5,000. The creditor would need to provide $2,000 to the consumer. In that case, within 20 calendar days after the creditor's receipt of the consumer's notice of rescission, the creditor would refund the $2,000 and terminate the security interest.

As stated above, if the creditor delivered property to the consumer, proposed § 226.23(d)(2)(ii)(A)(*2*) would require the consumer to tender the property to the creditor, or where this tender would be impracticable or inequitable, tender its reasonable value. At the consumer's option, tender of property may be made at the location of the property or at the consumer's residence. Proposed comments 23(d)(2)(ii)(A)–5 and –6 would cross-reference comments 23(d)(2)(i)(C)–1 and –2, described above, regarding the reasonable value and location of property. Proposed § 226.23(d)(2)(ii)(A)(*3*) would state that if the creditor does not take possession of the money or property within 20 calendar days after the consumer's tender, the consumer may keep it without further obligation.

23(d)(2)(ii)(B) Creditor's Obligation

Proposed § 226.23(d)(2)(ii)(B) would require that within 20 calendar days after receipt of the consumer's tender, the creditor must take whatever steps are necessary to terminate its security interest. If the consumer tendered property, the creditor must return to the consumer any amounts the consumer has given to the creditor or a third party in connection with the transaction. Proposed comment 23(d)(2)(ii)(B)–1 would cross-reference comment 23(d)(1)(ii)–3, described above, regarding the reflection of the security interest termination.

23(d)(2)(ii)(C) Judicial Modification

As in the current regulation, proposed § 226.23(d)(2)(ii)(C) would recognize that a court has the authority to modify the creditor's or consumer's obligations under the rescission procedures. Existing comment 23(d)(4)–1 would be re-numbered as proposed comment 23(d)(2)(ii)(C)–1, and revised to clarify that the comment is meant to address concerns about conditioning the determination of the rescission claim on proof of the consumer's ability to tender. The comment would clarify, consistent with the holding of the majority of courts, that where the consumer's right to rescind is contested by the creditor, a court would normally determine first whether the consumer's right to rescind has expired, then the amounts owed by the consumer and the creditor, and then the procedures for the consumer to tender any money or property.

Proposed comment 23(d)(2)(ii)(C)–2 would provide examples of ways the court might modify the rescission procedures. To address concerns about whether a court may modify the consumer's obligation to tender, the proposed comment would provide an example that a court may modify the consumer's form or manner of tender, such as by ordering payment in installments or by approving the parties' agreement to an alternative form of tender.

23(e) Consumer's Waiver of Right to Rescind

Background

TILA Section 125(d) provides that the Board may authorize the modification or waiver of any rights created under TILA's rescission provisions, if the Board finds such action necessary to permit homeowners to meet *bona fide* personal financial emergencies. 15 U.S.C. 1635(d). The Board exercised that authority under §§ 226.15(e) and 226.23(e), for open-end and closed-end mortgage transactions, respectively. Those provisions state that to modify or waive the right to rescind, a consumer must give a creditor a dated, written statement that describes the emergency, specifically modifies or waives the right to rescind, and bears the signature of all the consumers entitled to rescind.[94] Printed forms are prohibited.[95]

Congress also has used the *bona fide* personal financial emergency standard for the consumer's waiver of pre-consummation waiting periods in HOEPA and recently in the MDIA. Sections 226.19(a) and 226.31(c)(1)(iii) implement the waiver provisions under the MDIA and HOEPA, respectively.

Over the years, creditors have asked the Board to clarify the procedures for waiver of rescission rights and to provide additional examples of a *bona fide* personal financial emergency. Currently, the only example of a *bona fide* personal financial emergency is provided in the commentary to the waiver provisions for the pre-consummation waiting periods required by the MDIA and HOEPA. *See* comments 19(a)(3)–1 and 31(c)(1)(iii)–1. The example states that the imminent sale of a consumer's home at foreclosure is a *bona fide* personal financial emergency.

Creditors have expressed concerns that consumers may have other types of *bona fide* personal financial emergencies, but, given the potential liability for failure to comply with rescission rules, creditors are reluctant to accept waivers that do not conform to the foreclosure example provided in the commentary. During the MDIA rulemaking, creditors asked for additional guidance and examples of *bona fide* personal financial emergencies that would allow a consumer to waive the MDIA's pre-consummation waiting periods. Creditors offered several examples, including the need to pay for college tuition, an emergency medical expense, home repairs after a natural disaster, and avoidance of late charges or an interest rate increase on an existing home mortgage. Consumer advocates, by contrast, stated that the definition of a *bona fide* personal financial emergency should be narrowly construed, to avoid routine waivers of the right to rescind. Consumer advocates stated that pre-consummation waiting periods should be waived only in the case of imminent foreclosure, tax, or condemnation sale.

When the Board finalized the MDIA rule, it stated that whether a *bona fide* personal financial emergency exists is determined based on the facts associated with individual circumstances, and that "waivers should not be used routinely to expedite consummation for reasons of convenience." 74 FR 23289, 23296, May 19, 2009. The Board did not adopt new examples or guidance in the final MDIA rule.

The Board's Proposal

The Board proposes to provide additional guidance regarding when a consumer may waive the right to rescind. The proposed revisions clarify the procedure to be used for a waiver. In addition, new examples of a *bona fide* personal financial emergency would be added to the current example of an imminent foreclosure sale. The Board proposes these new examples as non-exclusive illustrations of other *bona fide* personal financial emergencies that may justify a waiver of the right to rescind. The Board also proposes new examples of circumstances that are not *bona fide* personal financial emergencies.

Procedures. Proposed § 226.23(e) and the associated commentary clarify that the consumer may modify or waive the right to rescind if: (1) The creditor delivers to each consumer entitled to rescind the rescission notice required by § 226.23(b), the credit term disclosures required by § 226.38 and, if applicable, the special disclosures required by § 226.32(c) for high-cost mortgage

[94] Waiver of the right to rescind is more common than modification of that right, but a consumer may modify the right to rescind to shorten the rescission period. References in this **SUPPLEMENTARY INFORMATION** and in commentary on §§ 226.15(e) and 226.23(e) to waiver of the right to rescind also refer to modification of that right.

[95] The Board authorized the use of printed waiver forms for certain natural disasters occurring in 1993 and 1994. *See* § 226.23(e)(2)–(4).

transactions under HOEPA; and (2) each consumer entitled to rescind signs and gives the creditor a dated, written statement that describes the *bona fide* personal financial emergency and specifically modifies or waives the right to rescind. Currently, comment 23(e)–1 clarifies that the *bona fide* personal financial emergency must be such that loan proceeds are needed before the rescission period ends. Proposed § 226.23(e) incorporates that requirement into the regulation.

Proposed § 226.23(e) provides that delivery of the disclosures required by § 226.38 and, if applicable, 226.32(c), must occur before a consumer may waive the right to rescind. This change is proposed for clarity and to conform § 226.23(e) with waiver provisions under §§ 226.19(a)(3) and 226.31(c)(1)(iii). Proposed § 226.23(e) also provides that delivery of the notice of the right of rescission required by § 226.23(b) must occur before a consumer may waive the right to rescind. This ensures that consumers are properly informed of the right, so they can make an informed decision whether to waive the right. Other proposed revisions to § 226.23(e) clarify that each consumer entitled to rescind need not sign the same waiver statement; a proposed conforming revision to comment 23(e)–2 is discussed below. Obsolete references in the regulation to the use of printed forms for natural disasters occurring in 1993 and 1994 are deleted.

The Board proposes to revise comment 23(e)–2 to clarify that where multiple consumers are entitled to rescind, the consumers may, but need not, sign the same waiver statement. The Board proposes further to revise a discussion in existing comment 23(e)–2 of waiver by multiple consumers to refer to § 226.2(a)(11), which establishes which natural persons are consumers with the right to rescind. (Disclosure requirements for closed-end credit transactions that involve multiple consumers are discussed above in the section-by-section analysis of proposed § 226.17(d).) In addition, the Board proposes to revise comment 23(e)–2 to conform the comment with proposed § 226.23(e) and for clarity and to redesignate the comment as comment 23(e)–1.

Bona fide personal financial emergency. Proposed comment 23(e)–2 provides additional clarification regarding *bona fide* personal financial emergencies. The proposed comment contains the current guidance under existing comments 19(a)(3)–1 and 31(c)(1)(iii)–1, that whether the conditions for a *bona fide* personal financial emergency are met is determined by the facts surrounding individual circumstances. Proposed comment 23(e)–2 incorporates existing comment 23(e)–1 but omits the last sentence of existing comment 23(e)–1 ("The existence of the consumer's waiver will not, of itself, automatically insulate the creditor from liability for failing to provide the right of rescission."). The Board believes this general statement regarding liability is not helpful in determining what constitutes a *bona fide* personal financial emergency.

To provide more guidance and ensure that waivers do not become routine, proposed comment 23(e)–2 provides that a *bona fide* personal financial emergency is most likely to arise in situations that involve imminent loss of or harm to a dwelling or imminent harm to the health or safety of a natural person. The proposal does not limit a *bona fide* personal financial emergency to situations involving property damage, health, or safety, however. Instead, the proposal is intended to provide creditors with a general standard to use in determining whether a particular circumstance constitutes a *bona fide* personal financial emergency. Other circumstances that are similar to those described in the proposed comment might be *bona fide* personal financial emergencies under the facts presented. The proposal provides, however, that the conditions for a waiver are not met where the consumer's statement is inconsistent with facts known to the creditor.

Proposed comments 23(e)–2.i and –2.ii provide examples of what may or may not constitute a *bona fide* personal financial emergency. Proposed comment 23(e)–2.i provides the following as examples of a *bona fide* personal financial emergency: (1) The imminent sale of the consumer's home at foreclosure; (2) the need to fund immediate repairs to ensure that a dwelling is habitable, such as structural repairs needed due to storm damage; and (3) the imminent need for health care services, such as in-home nursing care for a patient recently discharged from the hospital. Each example assumes that the emergency cannot be addressed unless the loan proceeds are disbursed during the rescission period, consistent with existing comment 23(e)–1 and proposed comment 23(e)–2. Proposed comment 23(e)–2.ii provides the following as examples of what would *not* constitute a *bona fide* personal financial emergency: (1) The consumer's desire to purchase goods or services not needed on an emergency basis, even though the price may increase if purchased after the rescission period ends; and (2) the consumer's desire to invest immediately in a financial product, such as purchasing securities.

In addition, proposed comment 23(e)–2.iii provides an example of a case where the waiver conditions are not met because a waiver statement is inconsistent with facts known to the creditor. The example provides that, where the waiver statement claims that loan proceeds are needed during the rescission period to abate flooding in a consumer's basement but the creditor is aware that there is no flooding, the conditions for waiver are not met. This example is not an exhaustive statement of situations in which a waiver would not be valid. The comment is not intended to impose a duty to investigate consumer claims.

The Board solicits comment regarding the proposed revisions to § 226.23(e) and accompanying commentary. In particular, the Board requests comment on then proposed examples of circumstances that are and are not a *bona fide* personal financial emergency and then proposed an example of a case where the conditions for waiver are not met under the proposal.

23(f) Exempt Transactions

23(f)(2)

Currently, the right of rescission does not apply to a refinancing or consolidation by the same creditor of an extension of credit already secured by the consumer's principal dwelling. TILA Section 125(e)(2); 15 U.S.C. 1635(e)(2); § 226.23(f)(2). The "same creditor" means the original creditor to whom the written agreement was initially made payable. Comment 23(f)–4. The right of rescission applies, however, to the extent the new amount financed exceeds the unpaid principal balance, any earned unpaid finance charge on the existing debt, and amounts attributed solely to the costs of the refinancing or consolidation.

Definition of "refinancing." Concerns have been raised about the scope of the exemption because the term "refinancing" is not defined and the term "same creditor" needs clarification. Congress added the exemption for a same-creditor refinancing as part of the 1980 Truth in Lending Simplification and Reform Act,[96] but did not define "refinancing" or the "same creditor." Regulation Z contains a definition of "refinancing" for purposes of disclosures required subsequent to consummation under § 226.20(a), but does not state

[96] Public Law 96–221, tit. VI, § 6, 94 Stat. 145, 176 (1980).

whether this definition should be applied for purpose of the exemption from rescission in § 226.23(f). In addition, under new proposed § 226.20(a)(1), a same-creditor refinancing of a mortgage would now be referred to as a "new transaction." This change may make it more difficult for practitioners to determine where to locate a definition of same-creditor "refinancing."

To address this problem, the Board proposes to specifically reference in § 226.23(f)(2) the term "new transaction" that would be used in proposed § 226.20(a)(1). That is, instead of "refinancing or consolidation," proposed § 226.23(f)(2) would reference "a new transaction under § 226.20(a)(1)." The Board believes that these proposed revisions to §§ 226.20(a) and 226.23(f)(2) will clarify the scope of the rescission exemption for consumers and creditors.

Definition of "same creditor." The Board also proposes to revise the definition of the "same creditor" to clarify that the exemption applies to the original creditor who is also the current holder of the debt obligation. Over time, the definition of the "same creditor" as the "original creditor" has become less meaningful as fewer creditors originate and hold mortgage loans. The Board believes that when the exemption for a refinancing by the "same creditor" was written in 1980, Congress likely intended for the exemption to apply to a portfolio lender who originated the existing mortgage with the consumer and retained the risk for the mortgage. Presumably, in that situation, the consumer would have developed some trust in, or at least familiarity with, the practices of the creditor. In addition, the current definition does little to reduce creditors' risk of rescission. During outreach conducted by the Board for this proposal, the Board was informed that few creditors use this exemption because they are not certain that they were the "original creditor" for the transaction. Creditors can incur liability for mistakenly using Model Form H–9 for a new advance of money with the same creditor when they were not the "original creditor."

To address this problem, the Board proposes § 226.23(f)(2)(i) to define the term "same creditor" to mean "the original creditor that is also the current holder of the debt obligation." The proposal would also move the definition of "original creditor" from the commentary to the regulatory text. The Board believes that this proposal would benefit consumers by limiting the exemption to only the creditor who holds the loan's risk and with whom the consumer has an existing relationship. Furthermore, the proposal may ease the compliance burden and litigation risk for creditors by providing clear guidance on the definition of the "same creditor."

Definition of "new advance of money." The Board also proposes to simplify the definition of a "new advance of money." Currently, the right of rescission applies to a same-creditor refinancing to the extent the new amount financed exceeds the unpaid principal balance, any earned unpaid finance charge on the existing debt, and amounts attributed solely to the costs of the refinancing or consolidation. TILA Section 125(e)(2); 15 U.S.C. 1635(e)(2); § 226.23(f)(2). Proposed § 226.23(f)(2)(ii) would substitute the "loan amount" for the "amount financed." As stated in the August 2009 Closed-End Proposal, the Board believes that this change would simplify the determination of the new advance; no substantive change is intended. Proposed comment 23(f)(2)–1 would cross-reference § 226.38(a)(1) for a definition of the "loan amount." As stated in the August 2009 Closed-End Proposal, proposed § 226.38(a)(1) would define the "loan amount" as the principal amount the consumer will borrow as reflected in the loan contract. The proposal would also clarify in the regulation, rather than in the commentary, that if the new transaction with the same creditor involves a new advance of money, the new transaction is rescindable only to the extent of the new advance.

The proposal contains two changes to the commentary to clarify the meaning of a "new advance." Currently, comment 23(f)–4 states that a new advance does not include amounts attributed solely to the costs of the refinancing, and refers to amounts included under § 226.4(c)(7), such as attorney's fees and title examination and insurance fees, if *bona fide* and reasonable in amount. Under the August 2009 Closed-End Proposal, § 226.4(c)(7) would no longer apply to closed-end mortgages. Thus, proposed comment 23(f)(2)–2 would clarify that a new advance does not includes amounts attributed solely to "any *bona fide* and reasonable" cost of the new transaction. In addition, proposed comment 23(f)(2)–4 would clarify that amounts that are financed to fund an existing or newly-established escrow account do not constitute a new advance. The term "escrow amount" would have the same meaning as in 24 CFR 3500.17.

To address compliance concerns regarding use of the model forms, as discussed in the section-by-section analysis for § 226.23(b)(e)(iv) above, Model Form H–9 would be renamed "Rescission Model Form (New Advance of Money with the Same Creditor)." Proposed comment 23(f)(2)–5, adopted from current comment 23(f)–4, would clarify that Model Form H–9 should be used for a new advance of money with the same creditor. Otherwise, the general rescission notice (Model Form H–8) is the appropriate form for use by creditors.

The proposal also contains a number of revisions to the regulation and commentary to improve clarity, but no substantive change is intended. In particular, the commentary is revised and re-numbered to correspond to the specific exemption.

23(f)(5)

Currently, § 226.23(f)(5) provides that the right of rescission does not apply to "[a] renewal of optional insurance premiums that is not considered a refinancing under § 226.20(a)(5)." Under section 226.20(a)(5), a "refinancing" does not include "[t]he renewal of optional insurance purchased by the consumer and added to an existing transaction, if disclosures relating to the initial purchase were provided as required by this subpart." The Board proposes to move this definition to the text of proposed § 226.23(f)(5). In addition, the Board proposes to treat the renewal of optional debt cancellation coverage and debt suspension coverage the same as the renewal of optional insurance premiums. The Board has recently proposed to revise and update several sections of Regulation Z to extend its provisions to debt cancellation and debt suspension products.[97] Thus, proposed § 226.23(f)(5) would provide that the right of rescission does not apply to "[a] renewal of optional credit insurance premiums, debt cancellation coverage or debt suspension coverage, provided that the disclosures relating to the initial purchase were provided as required under § 226.38(h)."

23(g) and (h)

Section 226.23(g) and (h)(2) currently provide tolerances for disclosure of the finance charge and the APR for purposes of rescission. As discussed in the section-by-section analysis to proposed § 226.23(a)(5), these tolerances would be moved to § 226.23(a)(5)(ii).

Section 226.23(h)(1) currently provides that after the initiation of foreclosure on the consumer's principal dwelling that secures the credit obligation, the consumer shall have the

[97] *See, e.g.,* August 2009 Closed-End Proposal, 74 FR 43232, 43278, Aug. 26, 2009 (treating debt suspension coverage in the same manner as debt cancellation coverage for purposes of disclosing the amount borrowed for a HOEPA loan).

right to rescind the transaction if: (1) a mortgage broker fee that should have been included in the finance charge was not included; or (2) the creditor did not provide the properly completed appropriate model form in appendix H of this part, or a substantially similar notice of rescission. The Board proposes to move this provision and associated commentary to proposed § 226.23(g) and make technical revisions. No substantive change is intended.

Section 226.24 Advertising

24(f) Disclosure of Rates and Payments in Advertisements for Credit Secured by a Dwelling

24(f)(3) Disclosure of Payments

The Board is proposing to amend § 226.24(f)(3) to remove an erroneous cross reference to § 226.24(c). Section 226.24(f)(3) imposes certain requirements on advertisements for credit secured by a dwelling that state the amount of any payment.[98] Section 226.24(f)(3)(i) contains the introductory language, "In addition to the requirements of paragraph (c) of this section," before prescribing the applicable requirements. Section 226.24(c), however, imposes certain requirements on advertisements that state a rate of finance charge, not the amount of any payment. Accordingly, proposed § 226.24(f)(3)(i) would omit the inappropriate reference to "paragraph (c) of this section." No substantive change is intended.

Section 226.31 General Rules

Section 226.31 provides general rules that relate to the disclosures for reverse mortgages under § 226.33 and for high-cost mortgages under § 226.32.

31(b) Form of Disclosures

Under § 226.31(b), a creditor may give a consumer the disclosures required by §§ 226.32 and 226.33 in electronic form, as long as the creditor complies with the consumer notice and consent procedures and other applicable provisions of the Electronic Signatures in Global and National Commerce Act (E–Sign Act) (15 U.S.C. 7001 *et seq.*). The proposal would revise § 226.31(b) to permit, under certain circumstances, the proposed disclosures required for reverse mortgage under § 226.33(b) (the "Key Questions" document) to be provided to a consumer in electronic form without regard to the requirements of the E–Sign Act.

Current §§ 226.5(a)(1) and 226.17(a)(1) contain similar exceptions to the E–Sign Act's notice and consent requirements for (among others) the application disclosures required by §§ 226.5b and 226.19(b), respectively. The Board also proposed similar exceptions for the "Key Questions" disclosures in the August 2009 Closed-End and HELOC Proposals. *See* 74 FR 43232, 43323, Aug. 26, 2009; 74 FR 43428, 43442, Aug. 26, 2009. The purpose of this exception from the E–Sign Act's notice and consent requirements is to facilitate credit shopping. When proposing the current exceptions, the Board stated its belief that the exceptions would eliminate a potentially significant burden on electronic commerce without increasing the risk of harm to consumers: requiring consumers to follow the notice and consent procedures of the E–Sign Act to access an online application, solicitation, or advertisement is potentially burdensome and could discourage consumers from shopping for credit online; at the same time, there appears to be little, if any, risk that the consumer will be unable to view the disclosures online when they are already able to view the application, solicitation, or advertisement online. 72 FR 63462, Nov. 9, 2007.

This exception would not be extended to the disclosures that would be provided within three business days after application under proposed § 226.33(d)(1) and (d)(3). The credit shopping process takes place primarily when a consumer reviews applications and associated disclosures and decides whether to submit an application. Three business days after the consumer has submitted an application, the consumer may have completed the credit shopping process. Requiring compliance with the E–Sign Act's notice and consent procedures for disclosures at this point would not likely hinder credit shopping, and would ensure that the consumer is able and willing to receive disclosures in electronic form. In addition, compliance with the E–Sign Act for disclosures three business days after application should not be unduly burdensome, because the time between application and three days later should be sufficient for the creditor to carry out the E–Sign Act notice and consent procedures.

31(c) Timing of Disclosure

31(c)(1) Disclosures for Certain Closed-End Home Mortgages

31(c)(1)(iii) Consumer's Waiver of Waiting Period Before Consummation

Background

TILA Section 103(aa) establishes a category of high-cost, closed-end mortgage loans generally referred to as "HOEPA loans". 15 U.S.C. 1602(aa). TILA Section 129(b)(1) provides that a creditors must make special disclosures required for HOEPA loans at least three business days before consummation. 15 U.S.C. 1639(b)(1). The Board implemented that requirement in § 226.31(c)(1).

TILA Section 129(b)(3) provides that the Board may authorize the modification of or waiver of rights provided for HOEPA loans if the Board finds such action necessary to permit homeowners to meet *bona fide* personal financial emergencies. 15 U.S.C. 1639(b)(3). The Board exercised that authority to allow a consumer to modify or waive the requirement under § 226.31(c)(1) that consumers receive special disclosures for HOEPA loans at least three business days before consummation. § 226.31(c)(1)(iii). To waive the right, the consumer must give the creditor a dated, written statement that describes the *bona fide* personal financial emergency, specifically modifies or waives the waiting period, and bears the signature of all the consumers entitled to the waiting period.[99] Printed forms are prohibited.[100]

The requirements for modifying or waiving a pre-consummation waiting period under § 226.31(c)(1)(iii) are substantially similar to the requirements for waiving a pre-consummation waiting period under § 226.19(a)(3) and the right to rescind under §§ 226.15(e) and 226.23(e). Over the years, creditors have asked the Board to clarify the procedures for waiver and provide additional examples of a *bona fide* personal financial emergency, as discussed in detail above in the section-by-section analysis of § 226.23(e).

The Board's Proposal

For the reasons discussed above in the section-by-section analysis of proposed

[98] The Board added § 226.24(f) as part of the July 2008 HOEPA Final Rule. *See* 73 FR 44522, 44601–44602; Jul. 30, 2008.

[99] A consumer need not waive a waiting period entirely and may modify—that is, shorten—a waiting period. References to waiver of a waiting period in this Supplementary Information and in commentary § 226.31(c)(1)(iii) also refer to modification of a waiting period.

[100] The Board authorized the use of printed waiver forms for certain natural disasters occurring in 1993 and 1994. *See* §§ 226.23(e)(2)–(4) and § 226.31(c)(1)(iii).

§ 226.23(e), the Board proposes to clarify the procedure to be used for a waiver. The Board also proposes to provide new examples of circumstances that are a *bona fide* personal financial emergency (in addition to the current example of an imminent foreclosure sale, *see* comment 31(c)(1)(iii)–1) and circumstances that are not a *bona fide* personal financial emergency.

Procedures. Proposed § 226.31(c)(1)(iii) and the associated commentary clarify that the consumer may modify or waive a waiting period, after the consumer receives the HOEPA loan disclosures required by § 226.31(c)(1), if each consumer primarily liable on the legal obligation signs and gives the creditor a dated, written statement that describes the *bona fide* personal financial emergency, specifically modifies or waives the waiting period, and bears the consumer's signature. Proposed § 226.31(c)(1)(iii) provides that loan proceeds must be needed during the waiting period. This is consistent with comment 31(c)(1)(iii)–1, which incorporates by reference a substantially similar requirement under § 226.23(e).

The Board proposes to revise § 226.31(c)(1)(iii) and comment 31(c)(1)(iii)–1 to state that each consumer primarily liable on the obligation (rather than "each consumer entitled to the waiting period") must sign a waiver statement for a waiver to be effective, for clarity and conformity with § 226.19(a)(3). Other proposed revisions to § 226.31(c)(1)(iii) and comment 31(c)(1)(iii)–1 clarify that each consumer primarily liable on the obligation may sign a separate waiver statement.

The Board also proposes to move the discussion of circumstances that are a *bona fide* personal financial emergency in comment 31(c)(1)(iii)–1 to a new comment 31(c)(1)(iii)–2, to conform the waiver commentary under § 226.31(c)(1)(iii) with the waiver commentary under §§ 226.15(e) and 226.23(e). Proposed comment 31(c)(1)(iii)–2 is discussed below.

Bona fide personal financial emergency. Proposed comment 31(c)(1)(iii)–2 provides clarification regarding *bona fide* personal financial emergencies. The comment contains the current guidance under existing comment 31(c)(1)(iii)–1, that whether the conditions for a *bona fide* personal financial emergency are met is determined by the facts surrounding individual circumstances.

To provide additional guidance, proposed comment 31(c)(1)(iii)–2 also states that a *bona fide* personal financial emergency typically, but not always, will involve imminent loss of or harm to a dwelling or harm to the health or safety of a natural person. Proposed comment 31(c)(1)(iii)–2 also states that a waiver is not effective if a consumer's waiver statement is inconsistent with facts known to the creditor. Further, proposed comment 31(c)(1)(iii)–2 states that creditors may rely on the examples and other commentary provided in comment 23(e)–2 to determine whether circumstances are or are not a *bona fide* personal financial emergency. Those examples are discussed above in the section-by-section analysis of proposed § 226.23(e).

Written waiver statement. The Board also proposes to revise comment 31(c)(1)(iii)–1 to state that a waiver statement must be "written" rather than "handwritten". Since the time comment 31(c)(1)(iii)–1 was adopted, use of personal computers and printers has increased significantly. The commentary on other waiver provisions under Regulation Z uses the term "written" rather than "handwritten", moreover. *See* comments 15(e)–2, 19(a)(3)–1, and 23(e)–2. Using the term "written" would promote consistency among the waiver comments. A consumer (or a consumer's designee, such as a housing counselor, unrelated to the creditor or loan originator) may write a waiver statement by hand, typewriter, computer, or some other means. Nevertheless, § 226.31(c)(1)(iii) and the other waiver provisions continue to prohibit the use of printed forms.

The Board solicits comment regarding the proposed revisions to § 226.31(c)(1)(iii). In particular, the Board requests comment regarding the proposed commentary stating that creditors may rely on commentary on § 226.23(e) for proposed examples of circumstances that are and are not a *bona fide* personal financial emergency.

31(c)(2) Disclosures for Reverse Mortgages

The proposed rule would remove the timing rules for reverse mortgage disclosures from § 226.31(c)(2) and instead cross-reference the timing rules in proposed § 226.33(d), discussed in the section-by-section analysis of that section.

31(d) Basis of Disclosures and Use of Estimates

31(d)(2) Estimates

Section 226.31(d)(2) provides for the use of estimates in disclosures. Under this section, if any information necessary for an accurate disclosure is unknown to the creditor, the creditor must make the disclosure based on the best information reasonably available at the time the disclosure is provided, and state clearly that the disclosure is an estimate. Proposed § 226.19(a)(2) in the Board's August 2009 Closed-End Proposal would limit a creditors' use of estimates in certain closed-end mortgage disclosures. Under the proposal, the rules in § 228.19(a), including the limits on using estimated disclosures in § 226.19(a)(2), would apply to the disclosures for closed-end reverse mortgages, as discussed in the section-by-section analysis to § 226.33(d)(3). Accordingly, § 226.31(d)(2) would be revised and comment 31(d)(2)–2 added to clarify that the use of estimates would be subject to the restrictions in proposed § 226.19(a)(2). The Board requests comment on whether there are specific terms required to be disclosed for reverse mortgages in § 226.33(c) that a creditor may need to estimate in final closed-end reverse mortgage disclosures.

Section 226.32 Requirements for Certain Closed-End Mortgages

32(a) Coverage

32(a)(1)

32(a)(1)(ii)

As discussed in detail below, the Board is proposing to revise the definition of "points and fees" for purposes of HOEPA coverage, in § 226.32(b)(1). Under the points and fees test in § 226.32(a)(1)(ii), HOEPA coverage is determined by calculating whether the total points and fees exceeds 8 percent of the total loan amount (or a fixed-dollar alternative). Comment 32(a)(1)(ii)–1 explains how to determine the total loan amount for this purpose and provides several examples. The Board is proposing to revise the comment to be consistent with the proposed revisions to § 226.32(b)(1). Proposed comment 32(a)(1)(ii)–1 would state that, for purposes of determining the total loan amount, a transaction's prepaid finance charge and amount financed are determined without applying § 226.4(g).

32(a)(2)

32(a)(2)(ii)

Section 226.32 implements TILA Section 129 by providing rules for certain high-cost mortgages. TILA Section 129 exempts reverse mortgage transactions as defined in TILA Section 103(bb). 15 U.S.C. 1639. Among the restrictions on high-cost mortgage loans are restrictions on balloon payments and negative amortization. In reverse mortgages, consumers do not make regular periodic payments. Instead, interest charges and fees are added to the consumer's loan balance, causing negative amortization. In addition, consumers repay a reverse mortgage in a single payment when the loan becomes due. For these reasons, a closed-end reverse mortgage that meets the definition of a high-cost mortgage loan (because the annual percentage rate or points and fees exceed those specified in § 226.32(a)(1)) would be prohibited by Section 129 of TILA. Consequently, Congress exempted reverse mortgages from Section 129 and instead imposed the disclosure requirements in TILA Section 138. (In addition, open-end reverse mortgages are covered by TILA Section 138 even though open-end credit plans are exempt from TILA Section 129.)

TILA Section 103(bb) defines the term "reverse mortgage transaction" to mean, among other things, a nonrecourse transaction. 15 U.S.C. 1602(bb). That is, the reverse mortgage must limit the homeowner's liability under the contract to the proceeds of the sale of the home (or a lesser amount specified in the contract). Consequently, if a closed-end reverse mortgage allows recourse against the consumer, and the transaction is a high-cost mortgage loan under § 226.32, the transaction is subject to all the requirements of § 226.32 including the limitations concerning balloon payments and negative amortization.

As discussed in the section-by-section analysis to § 226.33 below, the proposed rule would modify the definition of a reverse mortgage for the purposes of disclosures and other substantive protections to include reverse mortgages that allow recourse against the consumer (that is, that do not limit the consumer's liability under the contract to the proceeds from the sale of the home or a lesser specified amount). Reverse mortgages that allow for recourse against the consumer present even greater consumer protection concerns than nonrecourse reverse mortgages because the consumer or consumer's estate could be liable for significantly more than the home is worth when such a reverse mortgage becomes due. In addition, for these same reasons, the proposed rule would preserve the narrow exemption for nonrecourse reverse mortgages from the high-cost loan provisions in § 226.32(a)(2)(ii). Current comment 33(a)–1, which discusses the nonrecourse limitation, would be moved to comment 32(a)(2)(ii)–1.

32(b) Definitions

32(b)(1)

In the August 2009 Closed-End Proposal, the Board proposed to expand the definition of the finance charge and APR to include most closing costs, including third-party closing costs. 74 FR 43232, 43241, Aug. 26, 2009. The Board also proposed to include these costs in the "points and fees" definition for purposes of HOEPA coverage. The Board is now proposing to amend § 226.32(b)(1) to preserve the existing treatment of certain closing costs in the "points and fees" definition for HOEPA coverage purposes, which does not cover most third-party charges. Under proposed § 226.32(b)(1), points and fees would include all items included in the finance charge pursuant to § 226.4 (other than interest or time-price differential), except that, for purposes of this definition, § 226.4(g) would not apply.

Background

Under § 226.32(b)(1), "points and fees" includes (i) Items required to be disclosed under §§ 226.4(a) and 226.4(b), except interest or the time-price differential; (ii) all compensation paid to mortgage brokers; (iii) all items listed in § 226.4(c)(7) (other than amounts held for 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 not paid to an affiliate of the creditor; and (iv) premiums or other charges for credit life, accident, health, or loss-of-income insurance, or debt-cancellation coverage (whether or not the debt-cancellation coverage is insurance under applicable law) that provides for cancellation of all or part of the consumer's liability in the event of the loss of life, health, or income or in the case of accident, written in connection with the credit transaction.

In the August 2009 Closed-End Proposal, the Board proposed to amend § 226.4 to provide a simpler, more inclusive definition of the finance charge. *See* 74 FR 43232, 43321–23, Aug. 26, 2009. The Board's objective was to improve the utility of the APR as a single number that consumers can use to compare the costs of loan offers, and to facilitate compliance and reduce litigation costs for creditors. Under the August 2009 Closed-End Proposal, the finance charge and APR would include most closing costs, including many third-party costs such as appraisal fees and premiums for title insurance. The Board also proposed to amend the definition of "points and fees" in § 226.32(b)(1) to conform to the more inclusive finance charge definition. The Board noted that, as a result of the more inclusive finance charge, APRs and points and fees would increase, and more loans would potentially qualify as higher-priced mortgage loans, HOEPA loans covered by §§ 226.32 and 226.34, and loans subject to certain State anti-predatory lending laws. 74 FR 43344–45, Aug. 26, 2009. Nevertheless, the Board concluded, based on the limited data it had, that the proposal to improve the APR would be in consumers' interests. Comment was solicited on the potential impact of the proposed rule.

Numerous mortgage creditors and their trade associations commented on the proposal to make the finance charge and APR more inclusive. Most expressed agreement in principle with the proposed finance charge definition. Nevertheless, most industry commenters opposed the proposal, stating that it would cause many prime loans to be incorrectly classified as higher-priced mortgage loans under § 226.35 and that it would inappropriately expand the coverage of HOEPA and similar State laws. These commenters indicated that the more inclusive finance charge would have a much more significant impact under the points and fees tests than under the APR tests. One creditor estimated that 30 to 50 percent of its subprime loans, which currently are higher-priced mortgage loans but not HOEPA loans, would become HOEPA (or state "high-cost") loans under the proposal.

Consumer advocates uniformly supported the proposal to make the finance charge and APR more inclusive. They recognized the resulting expansion of coverage under §§ 226.32 and 226.35, and under similar State laws, but they argued that any such expanded coverage would be appropriate. Consumer advocates stated that the more inclusive finance charge and APR only would reveal newly covered loans for what they have always been, namely, HOEPA loans and higher-priced mortgage loans. Accordingly, they argued, the increase in the coverage of §§ 226.32 and 226.35, as well as affected State laws, would be warranted.

The Board's Proposal

The Board is proposing to amend § 226.32(b)(1) to retain the existing treatment of third-party charges in the points and fees definition. Under proposed § 226.32(b)(1)(i), points and fees would include all items included in the finance charge pursuant to § 226.4, except interest or the time-price differential and except that § 226.4(g) would not apply. Thus, § 226.4(g), as proposed in the August 2009 Closed-End Proposal, still would include most third-party charges in the finance charge, but proposed § 226.32(b)(1)(i) would preserve the existing treatment of such charges for purposes of points and fees. As discussed above, the Board is also proposing to amend comment 32(a)(1)(ii)–1 to make the determination of the total loan amount consistent with this proposal.

As discussed above, the Board recognized when it issued the August 2009 Closed-End Proposal that the more inclusive finance charge would have some impact on HOEPA coverage. At the time, the Board lacked adequate data to quantify the impact, but believed that the more inclusive finance charge would benefit consumers. Based on the comments, the Board now believes that the changes to § 226.32(b)(1) in the August 2009 Closed-End Proposal would have a substantial impact on HOEPA coverage. The objectives of the more inclusive finance charge are to enhance the APR's utility to consumers as a comparison shopping tool, as well as to eliminate compliance burden and legal risk for industry. *See* 74 FR 43232, 43243, Aug. 26, 2009. The Board does not believe those objectives support an expansion of HOEPA coverage under the points and fees test.

Relatively few loans are made that meet HOEPA's coverage tests. The lack of lending activity above HOEPA's thresholds may be attributable to HOEPA's substantive restrictions on loan terms, additional liability for violations under TILA Section 130(a)(4), 15 U.S.C. 1640(a)(4), and concerns about HOEPA's assignee liability provision. The Board is concerned that significantly expanding the loans covered by HOEPA would result in reduced access to credit. Accordingly, the Board now proposes to amend § 226.32(b)(1) to retain the existing treatment of certain charges in the definition of points and fees.[101] Charges that would be excluded from points and fees under proposed § 226.32(b)(1) include closing agent charges under § 226.4(a)(2); miscellaneous charges under § 226.4(c), including application fees charged to all applicants under § 226.4(c)(1), and the real estate related fees listed in § 226.4(c)(7) when reasonable and paid to third parties; and certain government recording and related charges and insurance premiums incurred in lieu of such charges under § 226.4(e).[102]

Although this proposal would avoid improper coverage of certain loans under HOEPA, many such loans nevertheless would remain higher-priced mortgage loans under § 226.35. As a result, they still would be subject to the Board's substantive protections for such loans, including the prohibition of lending based on the value of the collateral without regard to the consumer's repayment ability, significant restrictions on prepayment penalties, and the requirement that an escrow account for taxes and insurance be established. The Board believes that the mortgage industry's reluctance to make HOEPA loans does not extend to the same degree to higher-priced mortgage loans. Nevertheless, the Board also is concerned that the coverage of § 226.35 not be unduly expanded by the more inclusive finance charge and annual percentage rate and is therefore proposing revisions to § 226.35(a), discussed below.

This proposal would reorganize and revise the staff commentary under § 226.32(b)(1) to conform to the proposed changes to the regulation. The commentary's substantive guidance would be retained to the extent it remains pertinent. Proposed comment 32(b)(1)(i)–1 would clarify that loans that are secured by a consumer's principal dwelling and therefore potentially subject to § 226.32 are subject to the special rules for the finance charge calculation for transactions secured by real property or a dwelling. The comment also would explain, however, that the special rules in § 226.4(g) govern only a transaction's finance charge and have no effect on the transaction's points and fees, and it would illustrate the difference with an example. Proposed comment 32(b)(1)(ii)–1 would note that points and fees always includes mortgage broker compensation paid by the consumer, but the comment would clarify that compensation that is not paid by the consumer is excluded. For example, compensation paid to a mortgage broker by a creditor, including a yield spread premium, is not included in points and fees.

The August 2009 Closed-End Proposal also would have amended § 226.32(b)(1)(i) to follow more closely the provision of TILA that it implements, TILA Section 103(aa)(4)(A), 15 U.S.C. 1602(aa)(4)(A). The proposed changes were for clarity, with no substantive effect intended. For ease of reference, this proposal republishes those proposed changes. The Board requests that interested parties limit the scope of their comments to the newly proposed changes to § 226.32(b)(1) and associated commentary discussed in the **SUPPLEMENTARY INFORMATION** to this proposed rule.

Section 226.33 Requirements for Reverse Mortgages

Introduction

Reverse mortgage products enable eligible borrowers to exchange the equity in their homes for cash without requiring borrowers to repay the loan while they live in their homes. Reverse mortgage proceeds may used for a variety of purposes. According to a recent GAO study, the most common uses of reverse mortgage proceeds are for paying off an existing mortgage, home repairs or improvements, or improving quality of life.[103] For many borrowers, a reverse mortgage may provide the only funds available to pay for health care needs and other living expenses. As a result, reverse mortgages, if offered appropriately, could become an increasingly important mechanism for financial institutions to address the credit needs of an aging population.

The need to provide consumers with adequate information about reverse mortgages and to ensure appropriate consumer protections is high. Reverse mortgages are complex loan products that present a wide range of complicated options to borrowers. Moreover, they are typically secured by the borrower's primary asset—his or her home.

Reverse mortgage products. The reverse mortgage market currently consists of two types of products: proprietary products offered by individual lenders and FHA-insured reverse mortgages offered under HUD's HECM program. A HECM loan is subject

[101] The Board notes that this proposal is consistent with the recently enacted Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (July 21, 2010), which amends TILA Section 103(aa)(1) to exclude all "bona fide third party charges" from points and fees. The Dodd-Frank Act makes numerous other changes to HOEPA, including changes to the definition of points and fees and to the points and fees test itself. This proposal is intended only to preserve the existing treatment under the points and fees test of third-party charges, virtually all of which generally are excluded, notwithstanding the Board's proposal to include those charges in the finance charge. The Board expects to propose for comment additional revisions to Regulation Z in a future rulemaking to implement the amendments to HOEPA under the Dodd-Frank Act.

[102] Credit insurance premiums and similar charges that are disclosed in accordance with § 226.4(d)(1) or (d)(3), as applicable, would be added to the finance charge under the Board's proposal, but those charges already are included in points and fees under § 226.32(b)(1)(iv).

[103] U.S. Government Accountability Office, *Reverse Mortgages: Product Complexity and Consumer Protection Issues Underscore Need for Improved Controls Over Counseling for Borrowers,* GAO–09–606, 7–8 (June 2009) (citing AARP, *Reverse Mortgages: Niche Product or Mainstream Solution? Report on the 2006 AARP Nat'l Survey of Reverse Mortgage Shoppers* (Washington, DC: Dec. 2007)).

to HUD regulations that establish a range of consumer protections and other requirements.

Reverse mortgages generally are nonrecourse, home-secured loans that provide one or more cash advances to borrowers and require no repayments until a future event. Both HECMs and proprietary reverse mortgages generally must be repaid only when the last surviving borrower dies, all borrowers permanently move to a new principal residence, or the loan is in default. For example, repayment would be required when the borrower sells the home or has not resided in the home for a year. A borrower may be in default on a reverse mortgage when the borrower fails to pay property taxes, fails to maintain hazard insurance, or lets the property fall into disrepair.

When a reverse mortgage becomes due, the home must be sold or, alternatively, the borrower (or surviving heirs) may repay the full amount of the loan including accrued interest. If the home is sold, however, the borrower or estate generally is not liable to the lender for any amounts in excess of the value of the home.

To obtain a reverse mortgage, the borrower must occupy the home as a principal residence and generally be at least 62 years of age. Reverse mortgages are typically structured as first lien mortgages and require that any prior mortgage be paid off either before obtaining the reverse mortgage or with the funds from the reverse mortgage. The funds from a reverse mortgage may be disbursed in several different ways:

- A single lump sum that distributes up to the full amount of the principal credit limit in one payment;
- A credit line that permits the borrower to decide the timing and amount of the loan advances;
- A monthly cash advance, either for a fixed number of years selected by the borrower or for as long as the borrower lives in the home; or
- Any combination of the above selected by the borrower.

Generally, the amount of money the consumer may borrow will be larger when the consumer is older, the home is more valuable, or interest rates are lower. Interest rates on a reverse mortgage may be fixed or variable.

Most reverse mortgages have been structured as open-end lines of credit. For example, in fiscal year 2008, 89 percent of HECM borrowers chose to receive money solely as a line of credit and another 6 percent chose to receive a line of credit combined with a monthly payment. Generally, those choosing a line of credit withdrew about 60 percent of their funds at account opening.[104] In addition, most HECMs have had variable interest rates.[105] However, in 2008 HUD issued a mortgagee letter regarding the availability of fixed-rate HECMs.[106] Since then, originations of fixed-rate HECMs have grown and in recent months have been the majority of HECM originations.[107] Fixed-rate HECMs are generally structured as closed-end credit and borrowers usually may receive loan proceeds only as a lump sum of the full principal amount at closing.

Reverse mortgage market trends. The volume of reverse mortgages has grown considerably over the years. HECM originations, which account for over 90 percent of the market, have grown from 157 loans in fiscal year 1990 to more than 112,000 loans in fiscal year 2008.[108] A substantial portion of this growth has occurred in recent years, with HECM originations nearly tripling between 2005 and 2008.[109] A secondary market for HECMs exists, with Fannie Mae having purchased 90 percent of HECM loans as of 2008.[110] In addition, in 2007 Ginnie Mae developed and implemented a HECM mortgage-backed security with issuance growing to $1.5 billion for 2009.[111]

Proprietary reverse mortgages have also experienced growth, but that growth has stalled in the last few years due to market conditions.[112] A key feature of proprietary reverse mortgages is that they generally offer loans in amounts greater than the HECM loan limits.[113] The Housing and Economic Recovery Act of 2008 raised the HECM loan limit.[114] As a result, at least one lender, Fannie Mae, discontinued its proprietary reverse mortgage product in 2008.[115] However, a report by the GAO in 2009 found that most lenders with proprietary products planned to offer them again, depending on the availability of funding in the secondary market.[116]

Interagency supervisory guidance. In December 2009, the Federal banking agencies, through the Federal Financial Institutions Examination Council (FFIEC), published proposed supervisory guidance on reverse mortgage products (Proposed Reverse Mortgage Guidance).[117] The FFIEC finalized this Guidance in August 2010 (Final Reverse Mortgage Guidance or Guidance).[118] The Final Reverse Mortgage Guidance is designed to help financial institutions ensure that their risk management and consumer protection practices adequately address the compliance and reputation risks raised by reverse mortgage lending. The Guidance addresses the consumer protection concerns raised by reverse mortgages, and focuses on the need for banks, thrifts, and credit unions to provide clear and balanced information to consumers about the risks and benefits of reverse mortgages while consumers are shopping for these products.

Specifically, the Final Reverse Mortgage Guidance states that lenders offering proprietary products should require counseling from "qualified independent counselors" before a consumer submits an application or pays an application fee for a reverse mortgage product. The Guidance also states that institutions should take steps to avoid any appearance of a conflict of interest. Accordingly, the Guidance advises institutions to adopt clear policies stating that borrowers are not required to purchase other financial products to obtain a reverse mortgage. Institutions are also advised to guard against inappropriate compensation or incentive policies that encourage loan originators to link reverse mortgage products to other financial products.[119]

Current Reverse Mortgage Disclosures

TILA Section 103(bb) defines the term "reverse mortgage transaction" as a

[104] *Id.* at 8.

[105] HUD Single Family Portfolio Snap Shot—HECM Loans, data for Inception 1989–Dec. 2008 *http://www.hud.gov/offices/hsg/comp/rpts/hecmsfsnap/hecmsfsnap.cfm.*

[106] HUD Mortgagee Letter 2008–08, March 28, 2008.

[107] HUD Single Family Portfolio Snap Shot—HECM Loans, data for Jan. 2010–May 2010 *http://www.hud.gov/offices/hsg/comp/rpts/hecmsfsnap/hecmsfsnap.cfm.*

[108] U.S. Government Accountability Office, *Reverse Mortgages: Policy Changes Have Had Mostly Positive Effects on Lenders and Borrowers, but These Changes and Market Developments Have Increased HUD's Risk,* GAO–09–836, 4–5 (July 2009).

[109] *Id.*

[110] *Id* at 7.

[111] Ginnie Mae, *Ginnie Mae Finishes 2009 Strong,* January 22, 2010, *http://www.ginniemae.gov/news2010/01–22presshud.pdf.*

[112] U.S. Government Accountability Office, GAO–09–836 at 18.

[113] *Id.*

[114] Housing and Economic Recovery Act of 2008 (HERA), Public Law 110–289 (July 30, 2008), § 2122(a)(5) (amending Section 255 of the National Housing Act, 12 U.S.C. 1715z–20(g)).

[115] Fannie Mae Reverse Mortgage Lender Letter 2008–3: Announcement to Terminate Purchase of Home Keeper® Reverse Mortgages (Sept. 3, 2008).

[116] U.S. Government Accountability Office, GAO–09–836 at 18.

[117] *Reverse Mortgage Products: Guidance for Managing Compliance and Reputation Risks,* 74 FR 66652, Dec. 16, 2009 (Proposed Reverse Mortgage Guidance).

[118] *Reverse Mortgage Products: Guidance for Managing Compliance and Reputation Risks,* 75 FR 50801, Aug. 17, 2010 (Final Reverse Mortgage Guidance).

[119] *Id.* at 50811.

nonrecourse transaction in which a mortgage, deed of trust, or equivalent consensual security interest is created against the consumer's principal dwelling securing one or more advances. 15 U.S.C. 1602(bb). In addition, the payment of any principal, interest and shared appreciation or equity is due and payable (other than in the case of default) only after the transfer of the dwelling, the consumer ceases to occupy the dwelling as a principal dwelling, or the death of the consumer.

TILA Section 138 requires disclosures for reverse mortgages in addition to the other disclosures required by TILA. 15 U.S.C. 1648. Specifically, TILA Section 138 requires disclosure of a good faith estimate of the projected total cost of the reverse mortgage to the consumer expressed as a table of annual interest rates, to be provided at least three business days before consummation. Each annual interest rate in the table is to be based on a projected total future credit balance under a projected appreciation rate for the dwelling and a term for the mortgage. The statute calls for at least three projected appreciation rates and at least three credit transaction periods as determined by the Board. The periods are to include a short-term reverse mortgage, a term equaling the consumer's life expectancy, and a longer term as the Board deems appropriate. The disclosure must also include a statement that the consumer is not obligated to complete the reverse mortgage transaction merely because the consumer has received the disclosure or signed an application.

Under TILA Section 138, the projected total cost of the reverse mortgage used to calculate the table of annual interest rates includes all costs and charges to the consumer, including the costs of any associated annuity that the consumer will or is required to purchase as part of the reverse mortgage. The projected total costs also includes any shared appreciation or equity that the legal obligation entitles the lender to receive, and any limitation on the liability of the consumer under the reverse mortgage, such as nonrecourse limits and equity conversion agreements. In addition, the total cost projection also reflects all payments to and for the benefit of the consumer. If the consumer purchases an annuity (whether or not required by the lender as a condition of making a reverse mortgage), any annuity payments received by the consumer and financed from the proceeds of the loan are considered the payments to the consumer, rather than the reverse mortgage proceeds that were used to finance the annuity.

Sections 103(bb) and 138 of TILA are implemented in §§ 226.31(c)(2) and 226.33. Section 226.31(c)(2) requires the creditor to furnish the disclosures for reverse mortgages at least three business days before consummating a closed-end credit transaction or the first transaction under an open-end credit plan. Section 226.33 contains the statutory definition of "reverse mortgage transaction" and the content of the reverse mortgage disclosures. Under Section 226.33, the reverse mortgage disclosures must include a statement that the consumer is not obligated to complete the transaction, a good-faith projection of the total cost of credit expressed as a table of "total-annual-loan-cost rates" (TALC rates) and an explanation of the table. The disclosures must also include an itemization of loan terms, charges, the age of the youngest borrower, and the appraised property value. Appendix K to Regulation Z provides instructions on how to calculate the TALC rates required to be disclosed, based on the calculation method used in Appendix J for the closed-end APR, and provides a model and sample disclosure form. Appendix L to Regulation Z contains the loan periods creditors must use in disclosing the TALC rates and a table of life expectancies that must be used to determine loan periods based on the consumer's life expectancy.

Section 226.33 requires that the table show TALC rates for assumed annual appreciation rates of 0%, 4%, and 8%. It also requires that TALC rates be provided for the assumed loan periods of: two years; the consumer's actuarial life expectancy; and the consumer's actuarial life expectancy multiplied by a factor of 1.4. In addition, at the creditor's option, the table may contain a fourth assumed loan period based on the consumer's actuarial life expectancy multiplied by 0.5.

The commentary to § 226.33 contains a number of clarifications. Comment 33(a)–1 clarifies that a transaction must be nonrecourse to meet the definition of a reverse mortgage in section 226.33(a). That is, the consumer's liability must be limited to the proceeds from the sale of the home. Comment 33(a)–1 clarifies, however, that if a closed-end reverse mortgage does not limit the consumer's liability to the proceeds of the sale of the home, and the transaction meets the definition of a high-cost mortgage loan under § 226.32, the transaction is subject to all the requirements of §§ 226.32 and 226.34. Comment 33(a)(2)–1 clarifies that the term "default" is not defined by the statute or regulation, but rather by the legal obligation and state or other applicable law. Comment 33(a)(2)–2 clarifies that to meet the definition of a reverse mortgage transaction, a creditor cannot require principal, interest, or shared appreciation or equity to be due and payable (other than in the case of a default) until after the consumer's death, transfer of the dwelling, or the consumer ceases to occupy the dwelling as a principal dwelling. This comment further clarifies that the reverse mortgage obligation may state a specific maturity date or term of repayment and still meet the definition of a reverse mortgage, as long as the maturity date or term will not cause maturity prior to the occurrence of any of the maturity events recognized in the regulation. For example, the obligation could state a term but automatically extend the term for consecutive periods if no recognized maturity event has occurred.

Comment 33(c)(1)–1 clarifies that all costs and charges the consumer incurs in a reverse mortgage are included in the projected total cost whether or not the cost or charge is a finance charge under § 226.4. Current comment 33(c)(1)–2 clarifies that the amount paid by the consumer for an annuity is a cost to the consumer. Comment 33(c)(1)–3 clarifies that costs incurred in connection with the sale or transfer of the property subject to the reverse mortgage are not included in the cost to the consumer.

Comment 33(c)(2)–1 clarifies that certain contingent payments to the consumer are excluded from the total cost projection. Comments 33(c)(3)–1 and 33(c)(4)–1 clarify that shared appreciation or shared equity, and limitations on the consumer's liability, respectively, are included in the projected total cost. Comment 33(c)(4)–2 provides a uniform assumption that, if the consumer's liability is limited to the "net proceeds" from the sale of the home, the costs associated with selling the dwelling should be assumed to be 7 percent of the projected total sale price, unless another amount is specified in the legal obligation.

Commentary to Appendix K and Appendix L provides further guidance on calculating TALC rates and on the clear and conspicuous standard for the model disclosure form.

Current Open-End and Closed-End Disclosures

Reverse mortgages are subject to the disclosure requirements for other home-secured credit. § 226.31(a). Reverse mortgages structured as open-end credit are subject to the provisions in Subpart B of Regulation Z, including the provisions in §§ 226.5b and 226.6

applicable to HELOCs. Closed-end reverse mortgages are subject to Subpart C of Regulation Z.

The current disclosures required for HELOCs and closed-end mortgages require creditors to provide information about costs and repayment amounts that must be calculated using a specific loan term. For example, even though reverse mortgages are single-payment transactions, they are currently subject to the requirements to disclose the payment schedule for closed-end loans under § 226.18(g), or the repayment example for a $10,000 HELOC draw under § 226.5b(d)(5)(iii). To disclose the single payment amount, the creditor must know when the loan will become due in order to calculate the amount of interest that will be charged. Yet reverse mortgage creditors must base these disclosures on an assumed repayment period, because the exact date that a reverse mortgage will become due and payable is unknown. The current commentary provides guidance on assumptions creditors must use. *See* comments 5b(d)(5)(iii)–4, 5b(d)(12)(xi)–10 and 17(c)(1)–14. For instance, creditors are instructed to base disclosures on the term of the reverse mortgage if a definite term exists, even though the consumer may not actually repay the loan at the end of the term. If no term exists, the disclosures must be based on the consumer's life expectancy.

The August 2009 Proposals

The Board's August 2009 proposals on closed-end mortgages and HELOCs were developed based on consumer testing that focused on the more common (forward) versions of those products. As a result, the proposed disclosures focus on terms, such as monthly payment amounts that are not as relevant or useful to reverse mortgage consumers. Yet these disclosures contain information about other terms that are relevant to reverse mortgage consumers. The Board requested comment in the August 2009 HELOC Proposal about how the proposed disclosures could be modified for reverse mortgages. Commenters who addressed the issue suggested that the Board develop a single disclosure form for reverse mortgages that would combine the disclosures under § 226.33 with those under §§ 226.5b and 226.6 for HELOCs, or § 226.18 for closed-end credit, as appropriate.

Proposed Reverse Mortgage Disclosures

The Board is proposing three consolidated reverse mortgage disclosure forms: an early disclosure for open-end reverse mortgages, an account-opening disclosure for open-end reverse mortgages, and a closed-end reverse mortgage disclosure. The Board's proposal would ensure that consumers receive meaningful information in an understandable format using forms that are designed, and have been consumer tested, for reverse mortgage consumers. Rather than receive two or more disclosures under TILA that come at different times and have different formats, consumers would receive all the disclosures in a single format that is similar regardless of whether the reverse mortgage is structured as open-end or closed-end credit. The Board's proposal would also facilitate compliance with TILA by providing creditors with a single set of forms that are specific to and designed for reverse mortgages, rather than requiring creditors to modify and adapt disclosures designed for forward mortgages.

33(a) Definition

As discussed above in the section-by-section analysis to § 226.32, TILA section 103(bb), implemented by current § 226.33(a), defines a "reverse mortgage transaction" as, among other things, a nonrecourse transaction. *See* 15 U.S.C.1602(bb). The proposal would simplify the defined term from "reverse mortgage transaction" to "reverse mortgage." The proposed rule would also modify the definition of a reverse mortgage to include both nonrecourse and recourse transactions whether structured as open-end or closed-end credit. Currently, any reverse mortgage that allows recourse against the consumer (that is, that does not limit the consumer's liability to the proceeds from the sale of the home) is not covered by § 226.33. The proposal would ensure that the disclosures and other substantive protections apply to all reverse mortgages regardless of whether or not they contain a nonrecourse provision.

The Board proposes this rule pursuant to its authority in TILA Section 105(a) to make adjustments and exceptions to the requirements in TILA to effectuate the statute's purposes, which include facilitating consumers' ability to compare credit terms and helping consumers avoid the uniformed use of credit. 15 U.S.C. 1601(a), 1604(a). As discussed above in the section-by-section analysis to § 226.32, TILA's definition of a "reverse mortgage transaction" was added in the context of a excluding reverse mortgages from coverage under TILA Section 129's high-cost loan provisions. TILA Section 129 prohibits high-cost loans with negative amortization and balloon payments, both of which are features of reverse mortgages. 15 U.S.C. 1639. Thus, by defining a "reverse mortgage transaction" as only a nonrecourse reverse mortgage, the statute prohibits making high-cost reverse mortgages that do not limit recourse against the consumer. However, reverse mortgages that allow for recourse against the consumer and are not prohibited by TILA Section 129 (either because they are open-end or because they are not high-cost reverse mortgages) present even greater consumer protection concerns than nonrecourse reverse mortgages. The consumer or the consumer's estate could be liable for significantly more than the home is worth when a reverse mortgage that allows for recourse against the consumer becomes due. (For this reason the proposal would modify § 226.32 to preserve the current narrow exemption for only reverse mortgages that are nonrecourse.) As discussed in the section-by-section analysis to § 226.33(c) below, the proposed reverse mortgage disclosures would require specific statements about the consumer's liability under a reverse mortgage that allows recourse against the consumer. The Board believes this information, and the other proposed consumer protections for reverse mortgages, are appropriate for all reverse mortgages.

33(b) Reverse Mortgage Document Provided On or With the Application

Based on the results of consumer testing and similar to the Board's August 2009 Closed-End Mortgage and HELOC Proposals, this proposal would require creditors to provide consumers with a Board publication, or a substantially similar document, for reverse mortgages. The publication, entitled "Key Questions to Ask about Reverse Mortgage Loans," discusses how a reverse mortgage works and describes loan terms and conditions that are important for consumers to consider when deciding whether to pursue a reverse mortgage.

In addition, the document would disclose to consumer that they are not obligated to purchase any other financial product or service, along with explanatory information. Proposed § 226.40(a), discussed in the section-by-section analysis to that section below, would prohibit a creditor or loan originator from requiring a consumer to purchase any financial or insurance product as a condition of obtaining a reverse mortgage. The Board believes that providing information to consumers about this protection will help them avoid potential deception or misunderstanding about whether the purchase of an offered financial or insurance product is required. The Board proposes this rule pursuant to its authority in TILA Section 105(a) to make adjustments and exceptions to the requirements in TILA to effectuate the statute's purposes, which include facilitating consumers' ability to compare credit terms and helping consumers avoid the uniformed use of credit. 15 U.S.C. 1601(a), 1604(a).

The Board proposes to require creditors to provide this publication at the time a consumer is given an application form or before the consumer pays a nonrefundable fee (except a fee for reverse mortgage counseling), whichever is earlier. Special rules under proposed § 226.33(b)(2)–(4) for when the consumer accesses an application form electronically and when the creditor receives a consumer's application from an intermediary agent or broker are modeled after the Board's TILA proposals for HELOCs and closed-end mortgages. *See* 74 FR 43428, 43446–43450, Aug. 26, 2009; 74 FR 43232, 43268–43269, Aug. 26, 2009.

33(c) Content of Disclosures for Reverse Mortgages

Current § 226.33(b) details the content of disclosures for reverse mortgages. It requires a notice that the consumer is not obligated to complete the reverse mortgage merely because the consumer has received the disclosures or has signed an application as required by TILA Section 138(a)(2). 15 U.S.C. 1648(a)(2). It also requires an itemization of loan terms and charges, and disclosure of the age of the youngest borrower and the appraised property value. Finally, it requires a good faith projection of the total cost of credit in the form of a table of "total-annual-loan-cost rates" and an explanation of the table.

Under the proposed rule, the content of the reverse mortgage disclosures would be moved to § 226.33(c). The proposed rule would retain the no-obligation notice in § 226.33(c)(1) and would add a requirement that if the creditor provides space for the consumer's signature, the creditor must state that the signature only confirms receipt of the disclosure statement. Section 226.33(c)(2) would require certain identification information for the creditor and loan originator. Section 226.33(c)(3) would require the itemization of the consumer's name, address, account number, the age of each borrower, and the appraised property value. As discussed in the section-by-section analysis below, the proposed rule would also require a number of new disclosures about reverse mortgages. The Board proposes these new disclosures pursuant to its authority in TILA Section 105(a) to make adjustments and exceptions to the requirements in TILA to effectuate the statute's purposes, which include facilitating consumers' ability to compare credit terms and helping consumers avoid the uniformed use of credit.

Table of Total-Annual-Loan-Cost Rates

Based on consumer testing the Board is proposing to replace the disclosure of the table of total-annual-loan-cost (TALC) rates with other information that is likely to be more meaningful to and better understood by consumers.

The table of TALC rates is designed to show consumers how the cost of the reverse mortgage varies over time and with house price appreciation. Generally, the longer a consumer keeps a reverse mortgage the lower the relative cost will be because the upfront costs of the reverse mortgage will be amortized over a longer period of time. In addition, home-value appreciation can lower the total cost of the reverse mortgage if the consumer eventually benefits from a limitation on the consumer's liability, such as a nonrecourse limit.

In order to show the effect of time and home-value appreciation on the cost of the reverse mortgage, current § 226.33(c) requires a disclosure for three periods: two years; the consumer's life expectancy; and the consumer's life expectancy multiplied by 1.4. In addition, creditors have the option of including a loan period based on the consumer's life expectancy multiplied by 0.5. Creditors must also show TALC rates for assumed annual appreciation rates of 0%, 4%, and 8%. As a result, the table of TALC rates must show at least nine TALC rates and may show twelve TALC rates. Usually, the TALC rates will decline over time even though the total dollar cost of the reverse mortgage is rising due to interest and fees being charged and added to an increasing loan balance.

In the consumer testing conducted for the Board on reverse mortgage disclosures, participants were shown a disclosure with the table of TALC rates that is currently required. Very few consumers understood the table of TALC rates.[120] Although participants seemed to understand the paragraphs explaining the TALC table, the vast majority could not explain how the description related to the percentages shown in the TALC table. A number of participants could not even attempt to explain what the TALC table was showing. Those consumers who attempted to explain the TALC table could not explain why the TALC rates were declining over time even though the reverse mortgage's loan balance was rising. Most participants thought the TALC rates shown were interest rates, and interpreted the table as showing that their interest rate would decrease if they held their reverse mortgage for a longer period of time. When asked whether the information in the TALC table would make a reverse mortgage easier or more difficult to understand, the vast majority of participants stated that this information would make their reverse mortgage more difficult to understand. Consumers, including those who currently have a reverse mortgage (and thus presumably received the TALC disclosure), consistently stated that they would not use the disclosure to decide whether to obtain a reverse mortgage.

These results are consistent with the Board's consumer testing of the APR for closed-end mortgages and student loans. The TALC rates express loan costs as annualized percentage rates, similar to the closed-end APR. Yet consumer testing conducted by the Board has found that the closed-end APR—the cost of credit expressed as a single percentage rate—is difficult for many consumers to understand even when an explanation is provided. To understand the table of TALC rates, not only must consumers understand the concept of expressing total loan costs as an annualized rate, they must further be able to evaluate the TALC rates along two other dimensions (time and home-value appreciation). The consumer testing conducted for the Board does not indicate that simplifying the table of TALC rates, such as by removing the dimension of home-value appreciation, would materially improve consumers' understanding of the disclosure. Instead, consumers consistently expressed a preference for a disclosure providing total costs as a dollar amount.

For these reasons, the proposed rule would remove the table of TALC rates from the reverse mortgage disclosure. Under the Board's exception and exemption authorities under TILA Sections 105(a) and 105(f) the Board is proposing to make an exception to the requirement in TILA Section 138 that the table of TALC rates be provided. The Board believes that by removing a disclosure that almost all consumers found to be unhelpful, and that appeared to be misleading to some, will

[120] *See* ICF Macro International, Inc., *Design and Testing of Truth in Lending Disclosures for Reverse Mortgages,* 11, 18, 27, 35–26 (July 2010) available at *http://www.federalreserve.gov/newsevents/press/bcreg/bcreg20100816_Reverse_Mortgage_Report_(7–28)_(FINAL).pdf.*

effectuate the purposes of TILA by providing meaningful disclosure of credit terms to the consumer and assisting consumers in avoiding the uninformed use of credit. The Board has considered that reverse mortgages are secured by the consumer's principal dwelling and are likely to be made for relatively large amounts. The Board also considered that reverse mortgage borrowers may lack financial sophistication relative to the complexity of the reverse mortgage transaction, the importance of the credit and supporting property to the borrower, and whether the goal of consumer protection would be undermined by an exception. In addition, the Board considered the extent to which the requirement to provide the table of TALC rates complicates, hinders, or makes more expensive the credit process for reverse mortgages. Given the importance of the reverse mortgage to the borrower and the fact that the table of TALC rates provides no meaningful benefit in the form of useful information or protection, the Board believes that an exemption is warranted. As discussed below, the Board is proposing new disclosures to explain the total cost of a reverse mortgage more effectively pursuant to its authority in TILA Section 105(a) to effectuate the statute's purposes, which include facilitating consumers' ability to compare credit terms and helping consumers avoid the uniformed use of credit.

33(c)(4) Information about the Reverse Mortgage

Proposed § 226.33(c)(4) requires a statement that the consumer does not have to repay the reverse mortgage while remaining in the home. It would also require a description of the types of payments the consumer may receive, such as an initial advance, a monthly payment, or discretionary cash advances in which the consumer controls the timing of advances. This section would require a statement that the consumer will retain title to the home and must pay property taxes and insurance and maintain the property. The proposal also requires a statement that the consumer will have access to the loan funds and continue to receive any payments even if the loan's principal balance exceeds the value of the home, as long as the consumer does not default. Finally, it would require a description of the events that cause the reverse mortgage to become due and payable, and a statement that the consumer must repay the loan including interest and fees once such an event occurs. In the consumer testing conducted for the Board, many consumers indicated that this information was new to them, and that they found it to be important. The Board proposes this rule pursuant to its authority in TILA Section 105(a) to make adjustments and exceptions to the requirements in TILA to effectuate the statute's purposes, which include facilitating consumers' ability to compare credit terms and helping consumers avoid the uniformed use of credit.

33(c)(5) Payment of Loan Funds

Proposed § 226.33(c)(5) requires an itemization of the types of payments the creditor will make to the consumer. The disclosure must include the label "Initial Advance" along with the amount of any initial advance made to the consumer at consummation or, in the case of an open-end reverse mortgage, once the consumer becomes obligated on the plan. *See* proposed § 226.33(c)(5)(i)(A). The disclosure must also include a statement that the funds will be paid to the consumer after the consumer accepts the reverse mortgage. In addition, the creditor must disclose the amount of any monthly or other regular periodic payment of funds labeled "Monthly Advance," and include a statement that the funds will be paid to the consumer each month while the consumer remains in the home. *See* proposed § 226.33(c)(5)(i)(B). Finally, the creditor must disclose any amount made available to the consumer as discretionary cash advances in which the consumer controls the timing of advances. Comment 33(c)(5)–1 clarifies that the creditor must label this type of payment as a "Line of Credit," regardless of whether the reverse mortgage is structured as open-end or closed-end credit. *See* proposed § 226.33(c)(5)(i)(C). The disclosure must also include a statement that the funds will be available to the consumer at any time while the consumer remains in the home. The creditor must also disclose that the consumer may change the type of payments, if applicable. *See* proposed § 226.33(c)(5)(iii).

In some cases, the consumer may not have chosen the types of payments he wishes to receive at the time the disclosures are provided. In these cases, the creditor must follow the rules in § 226.33(c)(5)(ii) as discussed in comment 33(c)(5)–2. The creditor must disclose the maximum amount the consumer could receive in discretionary cash advances. The creditor must also state that the consumer may choose to take some or all of the funds in an initial advance or as a monthly or periodic payment, as applicable.

If the creditor does not provide the consumer with the option to receive funds as discretionary cash advances, the creditor must disclose the total amount the consumer may receive as an initial advance and state that the consumer may choose to take some or all of the funds in the form of a monthly or other periodic payment, if applicable. As discussed above in the Introduction to the section-by-section analysis to § 226.33, historically consumers have tended to take reverse mortgage proceeds as a line of credit. Because this has tended to be the most common consumer choice, the proposal would require creditors to disclose how much the consumer could get through discretionary advances. If a discretionary advance option is not available to the consumer, a disclosure of the total amount the consumer could get in an initial advance would provide the closest substitute. The Board requests comment on other approaches for disclosing how much the consumer could receive if the consumer has not chosen a payment type.

33(c)(6) Annual Percentage Rate

33(c)(6)(i) Open-End Annual Percentage Rate

Proposed § 226.33(c)(6)(i) is modeled after §§ 226.5b(c)(10) and 226.6(a)(2)(vi) and the associated commentary in the Board's August 2009 HELOC Proposal, which would implement TILA Section 127A(a)(1). *See* 74 FR 43428, 43472–43478 and 43501–43502, Aug. 26, 2009; 15 U.S.C. 1637a(a)(1). Accordingly, proposed § 226.33(c)(6)(i) would require disclosure of each periodic interest rate applicable to the reverse mortgage that may be used to compute the finance charge on an outstanding balance, expressed as an annual percentage rate (as determined by § 226.14(b)). The annual percentage rates would be required to be in at least 16-point type, except for: (1) any minimum or maximum annual percentage rates that may apply; and (2) any disclosure of rate changes set forth in the initial agreement that would not generally apply after the expiration of an introductory rate, such as a rate that would apply when an employee preferred rate is terminated because the borrower-employee leaves the creditor's employ.

For variable rate open-end reverse mortgages, proposed § 226.33(c)(6)(i)(A) would require disclosure of the fact that the annual percentage rate may change due to the variable-rate feature, using the term "variable rate." It would require an explanation of how the annual percentage rate will be determined by identifying the type of index used and the amount of any margin, and the frequency of changes in the annual percentage rate. It would also require disclosure of any rules relating to changes in the index value and the annual percentage rate and a statement of any limitations on changes in the annual percentage rate, including the minimum and maximum annual percentage rate that may be imposed. If no annual or other periodic limitations apply to changes in the annual percentage rate, the creditor would be required to disclose a statement that no annual limitation exists. In addition, the proposed provision specifies that a variable rate is considered accurate if it is a rate as of a specified date, and was in effect within the last 30 days before the disclosures are provided.

Finally, this proposed provision in § 226.33(c)(6)(i)(A) would require disclosure of the lowest and highest value of the index and margin in the past 15 years. The Board's August 2009 HELOC Proposal would require a disclosure of only the lowest and highest value of the index, not the index and margin. *See* 74 FR 43428, 43477, Aug. 26, 2009. The Board requests comment on whether the proposed reverse mortgage disclosure should show only the range of the index value.

If the initial rate is an introductory rate, proposed § 226.33(c)(6)(i)(B) would require the creditor to disclose the introductory rate along with the rate that would otherwise apply to the plan, and use the term "introductory" or "intro" in immediate proximity to the introductory rate. The creditor would also be required to disclose the time period during which the introductory rate will remain in effect and the rate that will apply after the introductory rate expires.

33(c)(6)(ii) Closed-End Annual Percentage Rate

Proposed § 226.33(c)(6)(ii)(A) is modeled after the annual percentage rate disclosure proposed by the Board in § 226.38(b) in the August 2009 Closed-End Mortgage Proposal, which would implement TILA Section 128(a)(4). *See* 74 FR 43232, 43296–43298, Aug. 26, 2009; 15 U.S.C. 1638(a)(4). It would require disclosure of the annual percentage rate, using that term, along with the description, "overall cost of this loan including interest and fees." The Board is not proposing to include the APR graph under proposed § 226.38(b)(2), the statement of the average prime offer rate under proposed § 226.38(b)(3) or the average per-period savings from a 1 percentage point reduction in the APR under § 226.38(b)(4). Comparisons to the average prime offer rate are not likely to be meaningful to consumers because reverse mortgages may have different pricing structures than closed-end mortgages. In addition, a statement about the per-period savings from a 1 percentage point reduction in the APR would not likely be meaningful because the consumer does not make regular monthly payments on a reverse mortgage.

In consumer testing conducted for the Board, a common question that consumers had was whether reverse mortgage interest rates were fixed or variable.[121] For this reason, proposed § 226.33(c)(6)(ii)(B) would require a disclosure of whether the rate is fixed, adjustable, or a step-rate. This proposal is based on proposed § 226.38(a)(3)(i) in the Board's August 2009 Closed-End Mortgage Proposal which would require a similar disclosure of a closed-end mortgage loan's rate type. Proposed comment 33(c)(6)(ii)(B)–1 would refer to proposed § 226.38(a)(3) for guidance on determining the rate type of the reverse mortgage.

Proposed § 226.33(c)(6)(ii)(C) is modeled after proposed §§ 226.38(e)(1) and (e)(2) in the August 2009 Closed-End Mortgage Proposal and would require, if the interest rate may increase after consummation, a description of the method used to calculate the interest rate and the frequency of interest rate adjustments. If the interest rate that applies at consummation is not based on the index and margin that will be used to make later interest rate adjustments, the description must include the time period when the initial interest rate expires. For a variable-rate mortgage, any limitations on the increase in the interest rate would have to be disclosed together with a statement of the maximum rate that may apply pursuant to such limitations during the transaction's term to maturity. To maintain consistency with the disclosures for open-end reverse mortgages, § 226.33(c)(6)(ii)(C) would require disclosure of the lowest and highest value of the index in the past 15 years. The Board proposes this rule pursuant to its authority in TILA Section 105(a) to make adjustments and exceptions to the requirements in TILA to effectuate the statute's purposes, which include facilitating consumers' ability to compare credit terms and helping consumers avoid the uninformed use of credit.

33(c)(6)(iii) Statement About Interest Accrual

Proposed § 226.33(c)(6)(iii) would require a statement that interest charges will be added to the loan balance each month (or other applicable period) and collected when the loan is due. In the consumer testing conducted for the Board, some consumers were initially unsure as to whether interest charges must be paid each month or are added to the loan balance. The proposed disclosure would clarify that interest charges accrue but are not payable until the reverse mortgage becomes due and payable. The Board proposes this rule pursuant to its authority in TILA Section 105(a) to make adjustments and exceptions to the requirements in TILA to effectuate the statute's purposes, which include facilitating consumers' ability to compare credit terms and helping consumers avoid the uniformed use of credit.

33(c)(7) Fees and Transactions Costs

The Board's August 2009 HELOC Proposal requires disclosure of a number of different fees and transaction costs that would apply to open-end reverse mortgages in the proposed disclosure table. However, for closed-end mortgages, the current rules do not require an itemization of fees in the segregated disclosures. In addition, the Board's August 2009 closed-end mortgage proposal would require only disclosure of the total settlement charges, but not an itemization, in the required disclosure table.

For reverse mortgages, however, current § 226.33(b)(3) requires an itemization of charges to the borrower. For this reason, and to maintain consistency between the closed-end and open-end reverse mortgage disclosures, proposed § 226.33(c)(7) would require disclosure of fees and transactions costs for all types of reverse mortgages. The Board proposes this rule pursuant to its authority in TILA Section 105(a) to make adjustments and exceptions to the requirements in TILA to effectuate the statute's purposes, which include facilitating consumers' ability to compare credit terms and helping consumers avoid the uniformed use of credit.

33(c)(7)(i) Fees Imposed by the Creditor and Third Parties to Consummate the Transaction or Open the Plan

Proposed § 226.33(c)(7)(i) is modeled after §§ 226.5b(c)(11) and 226.6(a)(2)(vii) and the associated commentary in the Board's August 2009 HELOC Proposal,

[121] *See* ICF Macro International, Inc., *Design and Testing of Truth in Lending Disclosures for Reverse Mortgages,* 9 (July 2010) available at <http://www.federalreserve.gov/newsevents/press/bcreg/bcreg20100816_Reverse_Mortgage_Report_(7–28)_(FINAL).pdf >.

which would implement TILA Sections 127A(a)(3) and (a)(4). *See* 74 FR 43428, 43478–43480 and 43502, Aug. 26, 2009; 15 U.S.C. 1637a(a)(3) and (a)(4). It would apply to open-end and closed-end reverse mortgages.

Proposed § 226.33(c)(7)(i)(A) would require a disclosure of the total of all one-time fees imposed by the creditor and any third parties to open the plan, stated as a dollar amount. For the open-end early disclosures only, if the exact total of one-time fees for account opening is not known at the time the disclosures are provided, a creditor would be required to provide the highest total of one-time account opening fees possible for the plan and that the costs may be "up to" that amount.

Proposed § 226.33(c)(7)(i)(B) would require an itemization of all one-time fees imposed by the creditor and any third parties to open the plan, stated as a dollar amount, and when such fees are payable. For the open-end early disclosures only, if the dollar amount of a fee is not known at the time the disclosures are provided, the creditor would be required to provide a range for the fee. For the open-end account-opening disclosures, the creditor would be required to provide the exact amounts of such fees. *See* proposed comment 33(c)(7)(i)–1.ii. (Creditors will know the amount of the fees at the time they make the open-end account-opening disclosures.) For the closed-end disclosures, creditors must make good faith estimates of the disclosures as required by § 226.19(a)(1) and must provide a final disclosure before consummation. *See* proposed § 226.33(d)(3).

33(c)(7)(ii) Fees Imposed by the Creditor for Availability of the Reverse Mortgage

Proposed § 226.33(c)(7)(ii) is modeled after §§ 226.5b(c)(12) and 226.6(a)(2)(viii) and the associated commentary in the Board's August 2009 HELOC Proposal. *See* 74 FR 43428, 43480–43481, 43499, Aug. 26, 2009. This proposed provision would apply to open-end and closed-end reverse mortgages. It would require disclosure of all monthly or other periodic fees that may be imposed by the creditor for the availability of the reverse mortgage, including any fee based on activity or inactivity; how frequently the fee will be imposed; and the annualized amount of the fee. It would also require disclosure of all costs and charges to the consumer that may be imposed by the creditor on a regular periodic basis as part of the reverse mortgage, such as a servicing fee or mortgage insurance premium. The proposed section would also require a disclosure labeled "Monthly Interest Charges" (or other applicable period) of the interest rate. In consumer testing conducted for the Board some consumers believed that interest charges would be payable on a monthly basis.[122] Therefore, the proposal would include monthly interest charges with other monthly charges to emphasize that interest charges, like other monthly fees, are added to the loan balance along with other charges.

33(e)(7)(iii) Fees Imposed by the Creditor for Early Termination of the Reverse Mortgage

Proposed § 226.33(c)(7)(iii) is modeled after §§ 226.5b(c)(13) and 226.6(a)(2)(ix) and the associated commentary in the Board's August 2009 HELOC Proposal. *See* 74 FR 43428, 43481, 43499, Aug. 26, 2009. This proposed provision would apply to open-end and closed-end reverse mortgages. It would require disclosure of any fee that may be imposed by the creditor if the consumer terminates the reverse mortgage, or prepays the obligation in full, prior to the scheduled maturity.

33(c)(7)(iv) Statement About Other Fees

Proposed § 226.33(c)(7)(iv) is modeled after §§ 226.5b(c)(14) and 226.6(a)(2)(xv) and the associated commentary in the Board's August 2009 HELOC Proposal. *See* 74 FR 43428, 43481–43482 and 43503, Aug. 26, 2009. This proposed provision would apply to open-end and closed-end reverse mortgages. It would require a statement that other fees may apply. For the early open-end disclosures, the creditor would be required to disclose either a statement that the consumer may receive, upon request, additional information about fees applicable to the plan, or if the additional information about fees is provided with the table, reference that the information is enclosed with the table. For closed-end and account-opening disclosures the creditor would be required to provide a reference to the reverse mortgage agreement.

33(c)(7)(v) Transaction Requirements

Proposed § 226.33(c)(7)(v) is modeled after §§ 226.5b(c)(16) and 226.6(a)(2)(xvii) and the associated commentary in the Board's August 2009 HELOC Proposal. *See* 74 FR 43428, 43482 and 43503, Aug. 26, 2009. It would require a disclosure of any limitations on the number of extensions of credit and the amount of credit that may be attained during any time period, as well as any minimum draw requirements. This proposed provision would apply to open-end and closed-end reverse mortgages. Proposed § 226.33(c)(7)(v) would not require the disclosure of any minimum outstanding balance because such a requirement is unlikely to apply to reverse mortgages. The Board requests comment on whether such requirements may apply to reverse mortgages and therefore should be disclosed.

33(c)(8) Loan Balance Growth

In place of the table of TALC rates currently required by § 226.33, proposed § 226.33(c)(8) requires a table that demonstrates how the reverse mortgage balance grows over time. For the reasons discussed above in this section-by-section analysis, this information is expressed as dollar amounts rather than as annualized loan cost rates. The creditor must provide three items of information: (1) The sum of all advances to and for the benefit of the consumer, including any payments that the consumer will receive from an annuity that the consumer purchases along with the reverse mortgage; (2) the sum of all costs and charges owed by the consumer, including the costs of any annuity the consumer purchases along with the reverse mortgage; and (3) the total amount the consumer would be required to repay. *See* proposed § 226.33(c)(8)(ii)(A)–(C). This information must be provided for each of three assumed loan periods of 1 year, 5 years, and 10 years.

The current TALC disclosure requires TALC rates based on three different property-value appreciation assumptions, but consumers in the Board's consumer testing found these disclosures confusing and unhelpful. Thus, the proposed loan balance table would not require disclosure based on varying appreciation rates (with the exception of reverse mortgages that include a shared equity or shared appreciation feature discussed below). The Board tested various alternatives in both dollar amount and graphical forms to attempt to show the impact that home price appreciation had on the cost of the reverse mortgage. Many consumers did not understand those disclosures and those who did found them not to be useful. In addition, many consumers did not understand that the time periods used on the TALC form were based on assumptions about their life expectancy. Consumers expressed a preference for figures based on standardized time

[122] *See* ICF Macro International, Inc., *Design and Testing of Truth in Lending Disclosures for Reverse Mortgages,* 25, 33 (July 2010) available at *http://www.federalreserve.gov/newsevents/press/bcreg/bcreg20100816_Reverse_Mortgage_Report_(7–28)_(FINAL).pdf.*

periods such as one year, five years and ten years. The Board requests comment on whether other time periods would be more appropriate.

Annuities. Under TILA Section 138, the projected total cost of a reverse mortgage used to calculate the TALC rates includes "the costs of any associated annuity that the consumer elects or is required to purchase as part of the reverse mortgage transaction." 15 U.S.C. 1648. In addition, the payments to the consumer include "the annuity payments received by the consumer and financed from the proceeds of the loan, instead of the proceeds used to finance the annuity." 15 U.S.C. 1648. Proposed § 226.40(a) prohibits a creditor from requiring a consumer to purchase any financial or insurance product, including an annuity, as a condition of obtaining a reverse mortgage. Under the safe harbor for compliance in proposed § 226.40(a)(2), a creditor is deemed to comply with the prohibition on required purchases of financial or insurance products if, among other things, the reverse mortgage transaction is completed at least 10 calendar days before the purchase of another product. Accordingly, comment 33(c)(1)–2, which clarifies that annuity costs are a cost to the consumer, would be redesignated as comment 33(c)(8)–2 and revised to remove references to "required" purchases of an annuity. It would also clarify that the cost of an annuity purchased after the reverse mortgage transaction is complete, in accordance with the safe harbor in § 226.40(a)(2), would not be considered a cost to the consumer.

Similarly, payments from an annuity that the consumer purchases after the reverse mortgage transaction is complete, in accordance with the safe harbor, would not be required to be disclosed as the advances to the consumer. The Board believes that requiring disclosure of the cost of an annuity that the consumer will not be obligated to purchase until at least 10 days after the reverse mortgage transaction is complete would be impractical. A creditor may not know whether the consumer plans to purchase the annuity, and even if the consumer indicates intent to purchase an annuity, the consumer may decide not to do so. In addition, a disclosure that includes the cost of an annuity that the consumer is not obligated to purchase may confuse the consumer about whether the purchase is, in fact, optional and about the amount of the reverse mortgage payments the consumer will receive.

Conversely, if the consumer voluntarily purchases an annuity along with a reverse mortgage, and the creditor does not follow the safe harbor in § 226.40(a)(2), the amount paid by the consumer to purchase the annuity would be included as a cost to the consumer regardless of whether the annuity is purchased from the creditor or a third party. The examples used in the current commentary would be retained to clarify that this includes the cost of an annuity the creditor offers, arranges, or assists the consumer in purchasing, or that the creditor is aware that the consumer is purchasing as part of the transaction. In addition, the advances that the consumer will receive from the annuity must be disclosed as the advances to the consumer, rather than the proceeds used to finance the annuity. The Board requests comment on the circumstances under which the cost of, and payments from, an annuity should be included in the loan balance table in § 226.33(c)(8).

All costs and charges. Comment 33(c)(1)–1 would be redesignated as comment 33(c)(8)–1. This comment clarifies that all costs and charges to the consumer that are incurred in a reverse mortgage are included in the loan balance table whether or not the cost or charges are finance charges under § 226.4. Comment 33(c)(1)–3 would be redesignated as comment 33(c)(8)–3 and would clarify that costs incurred in connection with the sale or transfer of the property subject to the reverse mortgage are not included in the costs to the consumer. Comment 33(c)(2)–1 would be redesignated as comment 33(c)(8)–4 and would clarify that the disclosure of the amount advanced to the consumer should not reflect contingent payments in which a credit to the outstanding loan balance or payment to the consumer's estate is made upon the occurrence of an event, such as a "death benefit" payable if the consumer's death occurs within a certain period of time.

Limits on liability. Comment 33(c)(4)–1 would be redesignated as comment 33(c)(8)–7 and would clarify that a creditor would have to include any limitation on the consumer's liability, such as a nonrecourse limit or equity conservation agreement, in the disclosure of the amount owed by the consumer. The Board requests comment on whether the amount owed by the consumer should reflect such limitations on the consumer's liability since the proposed disclosures would not be based on any assumed home-value appreciation and thus may understate the consumer's eventual liability.

Net proceeds from sale of home. Comment 33(c)(4)–2 would be redesignated as comment 33(c)(8)–8 and would clarify that if the contract specifies that the consumer's liability will be limited to the "net proceeds" of the sale of the home, but does not specify a percentage for the "net proceeds" liability, for purposes of the disclosure of the amount the consumer will be required to repay under § 226.33(c)(8)(ii)(C), a creditor must assume that the costs associated with selling the property will equal 7 percent of the projected sale price. The Board requests comment on whether the 7 percent assumption is still appropriate. The Board also requests comment on whether any assumption for the "net proceeds" amount should be used, or whether, for simplicity, the total amount owed by the borrower should be shown as limited by the appraised value of the home.

Set-asides. Comment 33(c)(8)–9 would clarify that if the creditor sets aside a portion of the loan amount for the benefit of the consumer, such as for making required repairs to the dwelling, the creditor must treat the entire amount of the set-aside as advanced to the consumer. For example, if the creditor estimates of repairs will cost $1000 but sets aside $1500 (150% of the estimated cost of repairs), the entire $1500 amount of the repair set-aside is considered an advance for the benefit of the consumer. The Board requests comment on whether a different assumption should be used when disclosing the amount advanced to the consumer under a repair set-aside.

Assumptions used to calculate loan balance growth. Proposed § 226.33(c)(8)(i) requires creditors to base the disclosures of the loan balance growth on a number of assumptions. First, the creditor would have to base the loan balance growth table on the initial interest rate in effect at the time the disclosures are provided and assume that the consumer does not make any repayments during the term of the reverse mortgage. The creditor would also have to assume that all closing and other consumer costs are financed by the creditor unless the creditor and consumer have agreed otherwise. The Board requests comment on whether these or other assumptions should be used.

Amount the consumer will owe—shared equity or appreciation. In reverse mortgages without a shared appreciation or equity feature, the creditor would have to assume that the dwelling's value does not change. However, if the creditor is entitled by contract to any shared appreciation or equity, the creditor must assume the dwelling's value increases by 4 percent per year and include the shared appreciation in the disclosure of the total amount the consumer would be required to repay. Comment 33(c)(3)–1 would be redesignated as comment 33(c)(8)–5 and revised to clarify that any shared appreciation or equity that the creditor is entitled to receive pursuant to the legal obligation must be included in the amount the consumer will owe. Comment 33(c)(8)–6 clarifies that because the cost to the consumer must reflect the shared appreciation, the creditor must use the 4 percent appreciation assumption. The 4 percent appreciation assumption is currently used as the middle appreciation assumption in the TALC disclosure. The Board requests comment on whether a different appreciation assumption should be used, whether a uniform appreciation assumption should be used regardless of whether the reverse mortgage has a shared appreciation feature, or whether the shared appreciation feature should not be reflected in the total amount the consumer will owe and disclosed only under the separate disclosure proposed in § 226.33(c)(8)(iv).

Type of payments selected by consumer. The loan balance growth table would also be based on the type of payments selected by the consumer as disclosed in § 226.33(c)(5). In some cases, the consumer may have a portion of the loan amount available for discretionary cash advances, such for a line of credit. In these instances the creditor must make an assumption about how much the consumer will draw over time. Under the proposal, if the consumer has elected to receive an initial advance, periodic payments, or some combination of the two that accounts for 50 percent or more of the principal loan amount available to the consumer, the creditor must assume that the consumer takes no further advances. Otherwise, the creditor must assume that the entire available principal loan amount is advanced to the consumer at closing, or in the case of an open-end reverse mortgage when the consumer becomes obligated under the plan.

Comment 33(c)(8)–10.ii provides two examples. The first example assumes a reverse mortgage with a principal loan amount of $105,000 and creditor-finance closing costs of $5,000, leaving an available loan amount of $100,000. The consumer elects to take $25,000 in an initial advance and have $25,000 paid out in the form of regular monthly advances, for a total of $50,000. The consumer chooses to leave the remaining $50,000 in the line of credit. Because the initial advance and the monthly payments accounts for 50 percent of the available principal amount the creditor must assume that the consumer takes no advances from the line of credit. The second example assumes that the consumer elects to take $24,000 in an initial advance, have $25,000 paid in the form of regular monthly advances, and leave $51,000 in a line of credit. Because the initial advance and the monthly payments account for less than 50 percent of the principal loan amount, the creditor must assume that the consumer draws all $51,000 from the line of credit at closing.

In the consumer testing conducted for the Board, consumers were shown reverse mortgage disclosures that included an initial advance, monthly payments, and a line of credit. Consumers were shown disclosures that assumed hypothetical periodic advances from the line of credit and disclosures that assumed no advances from the line of credit. Consumers initially found a disclosure with a hypothetical line of credit draw to be confusing. They understood that the costs of the reverse mortgage would be higher if the consumer drew funds from the line of credit and did not find the hypothetical amounts to be meaningful.

In some cases however, the consumer may choose to have most of the reverse mortgage principal amount remain in a line of credit and take only a small initial advance or monthly payment. In these instances, a disclosure of total cost of the reverse mortgage may not provide the consumer with sufficient information to judge the eventual costs of future draws from a line of credit. The current disclosure of the table of TALC rates requires the creditor to assume in all cases that the consumer draws 50 percent of the line of credit at closing and obtains no additional extensions of credit. *See* Appendix K(b)(9). The Board's August 2009 HELOC Proposal would require the creditor to assume that the consumer draws the full credit line at account opening and does not obtain any additional extension of credit. 74 FR 43428, 43534, Aug. 26, 2009. In addition, under some reverse mortgages, including HECMs, the credit limit on the unused portion of a consumer's line of credit grows over time. The current disclosures do not take such as feature into account because they assume that the consumer takes only an initial line of credit draw. The proposed disclosures also would not reflect a credit line growth feature because consumers in consumer testing found a relatively simple hypothetical disclosure that assumed yearly $1500 draws on a line of credit to be confusing. The Board requests comment on whether a different assumption should be used for reverse mortgages that allows the consumer to take discretionary cash advances. For example, the Board requests comment on whether the creditor should assume that the consumer draws the entire amount at closing or at account opening in all cases, or whether the creditor should demonstrate a credit line growth feature.

Additional disclosures for shared equity or shared appreciation. Proposed § 226.33(c)(8) would also require additional disclosures for reverse mortgages with shared equity or shared appreciation features. The creditor would be required to disclose a statement and a numerical example based on a hypothetical $100,000 increase in the home's value under the heading, "Shared Equity" or "Shared Appreciation." Comment 33(c)(8)–11 provides an example. For example, if the creditor is entitled by contract to 25 percent of any appreciation in the value of the dwelling, the creditor may state, "This loan includes the Shared Appreciation Agreement, which means that we will be entitled to 25 percent of any profit made between when you accept the loan and the sale or refinance your home. *For example, if your home were worth $100,000 more when the loan becomes due than it is worth today, you would owe us an additional $25,000 on the loan.*" Proposed comment 33(c)(8)–11, emphasis added. In the consumer testing conducted for the Board, the numerical example based on a $100,000 hypothetical increase in the home's value clearly explained the potential costs to consumers. The Board requests comment on whether another hypothetical amount should be used that could better help consumers to understand the percentage calculation.

33(c)(9) Statements About Repayment Options

The proposed rule requires statements explaining the consumer's repayment options. Under proposed § 226.33(c)(9)(i), the creditor would be required to state that once the loan becomes due and payable, the consumer or consumer's heirs may pay the loan balance in full and keep the home, or sell the home and use the proceeds to pay off the loan. For nonrecourse transactions, the creditor would also be required to state that if the home sells for less than the consumer owes, the consumer will not be required to pay the difference and that if the home sells for more than the consumer owes, the difference will be given to the consumer or the consumer's heirs. *See* proposed § 226.33(c)(9)(ii)(A) and (B). If the reverse mortgage includes a shared equity or shared appreciation feature, the creditor must state that the creditor will deduct any shared appreciation or equity before paying the remaining funds to the consumer or the consumer's heirs. For transactions that allow recourse against the borrower, the creditor would be required to state that the consumer or the consumer's estate will be required to repay the entire amount of the loan, even if the home sells for less than the consumer owes. *See* proposed § 226.33(c)(9)(iii).

33(c)(10) Statements About Risks

Proposed § 226.33(c)(10) requires the creditor to provide a number of disclosures about risks and possible actions by the creditor. Under this provision, the creditor would have to state that the reverse mortgage will be secured by the consumer's home, implementing TILA Sections 127A(a)(5) (for open-end credit) and 128(a)(9) (for closed-end credit). 15 U.S.C. 1637a(a)(5); 15 U.S.C. 1638(a)(9). The creditor would also have to state the possible actions it could take, including foreclosing on the home and requiring the consumer to leave the home; stop making periodic payments to the consumer, if applicable; prohibit additional extensions of credit, if applicable; terminate the reverse mortgage and require payment of the outstanding balance in a single payment and impose fees on termination; and implement changes in the reverse mortgage.

The creditor would also be required to describe the conditions under which it could take these actions including, as applicable, if the consumer fails to maintain the collateral; if the consumer ceases to use the dwelling as his principal dwelling (including any residency time period that will be used to determine whether the dwelling is the consumer's principal dwelling, such as if the consumer is not in the home for 12 consecutive months); and the consumer's failure to pay property taxes or maintain homeowner's insurance. Comment 33(c)(10)–1 would clarify for open-end reverse mortgages that if changes may occur under § 226.5b(f)(3)(i)–(v) as proposed in the Board's August 2009 HELOC Proposal, a creditor must state that the creditor can make changes to the plan.[123]

33(c)(11) Additional Information and Web Site

Under proposed § 226.33(c)(11), creditors would be required to state that if the consumer does not understand any disclosure, the consumer should ask questions and include a statement that the consumer may obtain additional information at the Web site of the Federal Reserve Board and a reference to that Web site. The August 2009 Proposals for Closed-End Mortgages and HELOCs contain similar requirements. The Board proposes this rule pursuant to its authority in TILA Section 105(a) to effectuate the statute's purposes, which include facilitating consumers' ability to compare credit terms and helping consumers avoid the uniformed use of credit.

33(c)(12) Additional Early Disclosures for Open-End Reverse Mortgages

As discussed above, TILA Section 138, implemented by current § 226.31(a), requires HELOC or closed-end mortgage TILA disclosures to be provided for reverse mortgages, including the early HELOC disclosures (required by § 226.5b), the account-opening HELOC disclosures (required by § 226.6), and the closed-end disclosures (required by §§ 226.18 and 19). 15 U.S.C. 1648. While the Board is proposing to consolidate the disclosure content for reverse mortgages as much as possible into proposed § 226.33(c)(1) through (11), some of the content for each of the disclosures differs. Accordingly, proposed § 226.33(c)(12) through (14) would require specific disclosures for the open-end early reverse mortgage disclosures, the open-end account-opening disclosures, and the closed-end disclosures, respectively.

Comparison to the August 2009 HELOC Proposal

A number of disclosures applicable to HELOCs do not apply to, or are not meaningful for, reverse mortgages. A number of other required disclosures, however, are applicable to and meaningful for reverse mortgages and therefore are included in proposed § 226.33(c), which sets forth the required content for all reverse mortgage disclosures.

Disclosures required in § 226.33(c). First, the identification information and no-obligation statement in proposed § 226.5b(c)(1), (2), and (3) would be required by proposed § 226.33(c)(1), (2) and (4)(i) for reverse mortgages. Second, TILA Section 127A(a)(5) requires the creditor to disclose that the creditor will acquire a security interest in the consumer's dwelling and that loss of the dwelling may occur in the event of default. Proposed § 226.33(c)(4) and (c)(10) would implement this provision. 15 U.S.C. 1637a(a)(5).

TILA Section 127A(a)(8) requires a disclosure of HELOC repayment options and would be implemented by proposed § 226.5b(c)(9) under the Board's August 2009 HELOC Proposal. 15 U.S.C. 1637a(a)(8). The HELOC proposal contains a number of disclosures related to minimum payments during a draw period and repayment period for HELOCs that would not be applicable or meaningful to reverse mortgage consumers. For reverse mortgages, proposed § 226.33(c)(4), (c)(8), and (c)(9) would implement TILA Section 127A(a)(8). These provisions would require disclosures of reverse mortgage repayment options by describing the circumstances under which the reverse mortgage may become due and payable and providing the consumer with a table showing how much the consumer would be required to repay under different assumed loan terms.

TILA Section 127A(a)(9), implemented by current § 226.5b(d)(5)(iii), requires an example based on a $10,000 outstanding balance and a recent APR, showing the minimum periodic payments, the amount of any balloon payment, and the time it would take to repay the $10,000 outstanding balance if the consumer made only those payments and obtained no additional extensions of credit. 15 U.S.C. 1637a(a)(9). Proposed § 226.33(c)(8) would implement this provision with some modifications. Consumers make only one payment on a reverse mortgage and the timing of that single payment is generally unknown. Thus, for reverse mortgages, the disclosure contemplated by TILA Section 127A(a)(9) requires using not only a hypothetical balance of $10,000, but also an assumed loan period. Consequently, the information provided to consumers is likely to be less useful because it may not accurately reflect either the timing or the amounts of their eventual repayment on a reverse mortgage. Proposed § 226.33(c)(8) would require a disclosure of the loan balance growth over different assumed periods using the consumer's actual reverse mortgage rather than a hypothetical $10,000 balance. The Board proposes this rule pursuant to its authority in TILA Section 105(a) to make adjustments and exceptions to the requirements in TILA to effectuate the statute's purposes, which include facilitating consumers' ability to compare credit terms and helping consumers avoid the uniformed use of credit.

TILA Section 127A(a)(7)(A) provides that a creditor must disclose as part of the application disclosures a statement that, under certain conditions, the creditor may terminate the plan and require payment of the outstanding

[123] *See* 74 FR 43428, 43487–43489, Aug. 26, 2009.

balance in full in a single payment, prohibit additional extensions of credit and reduce the credit limit. 15 U.S.C. 1637a(a)(7)(A). In addition, current § 226.5b(d)(4)(i) requires that a creditor disclose as part of the application disclosures a statement that under certain conditions the creditor may impose fees upon termination or may implement certain changes in the plan as specified in the initial agreement. Proposed § 226.33(c)(10) would implement these provisions for reverse mortgages.

TILA Section 127A(a)(11) provides that if applicable, a creditor must provide as part of the application disclosures a statement that negative amortization may occur and that negative amortization increases the principal balance and reduces the consumer's equity in the dwelling. 15 U.S.C. 1637a(a)(11). Negative amortization is a key feature of a reverse mortgage, and TILA Section 127(A)(a)(11) would be implemented in proposed § 226.33(c)(4), (c)(8), and (c)(9) which explain the terms of the reverse mortgage, provide a table of the loan balance growth, and describe the consumer's repayment options, including the consequences for the consumer if the loan balance is greater than the home's value.

Proposed § 226.5b(c)(17) in the Board's August 2009 HELOC Proposal requires a disclosure of the credit limit. Under an open-end reverse mortgage, the overall credit limit, which will be based on the value of the dwelling, is not likely to be meaningful to the consumer as a standalone disclosure. Instead, proposed § 226.33(c)(5) would require a disclosure of the amounts and types of payments that the consumer may receive under the reverse mortgage.

Proposed § 226.5b(c)(20) and 5b(c)(21) in the Board's August 2009 HELOC Proposal requires statements about asking questions and a reference to the Board's Web site. These disclosures would be required for reverse mortgages by proposed § 226.33(c)(11).

Disclosures not applicable to reverse mortgages. For open-end credit secured by the consumer's principal dwelling in which the extension of credit may exceed the fair market value of the dwelling, TILA Section 127A(a)(13) requires a disclosure that the interest on the portion of the credit extension that is greater than the fair market value of the dwelling is not tax deductible for Federal income tax purposes; and that the consumer should consult a tax adviser for further information regarding the deductibility of interest and charges. 15 U.S.C. 1637a(a)(13). Section 226.5b(c)(8) of the August 2009 HELOC Proposal would implement this section. The disclosure about the tax deductibility of interest is likely to be confusing to reverse mortgage consumers and accordingly the Board proposes to use its authority under TILA Sections 105(a) and 105(f) to exempt reverse mortgages from the requirements of TILA Section 127A(a)(13). For reverse mortgages, interest accrues over time but the consumer does not make regular payments of interest or principal. The consumer generally would not be able to deduct interest payments until the reverse mortgage terminates and the consumer makes the single payment. In addition, in many cases neither the consumer nor the lender can be sure whether extensions of credit greater than the fair market value of the dwelling will eventually be made. The Board has considered that reverse mortgages are secured by the consumer's principal dwelling and are likely to be made for relatively large amounts, and in most cases the consumer will have the right of rescission. The Board also considered that reverse mortgage borrowers may lack financial sophistication relative to the complexity of the reverse mortgage, the importance of the credit and supporting property to the borrower, and whether the goal of consumer protection would be undermined by an exception. In addition, the Board considered the extent to which the requirement to provide the tax deductibility disclosure complicates, hinders, or makes more expensive the credit process for reverse mortgages. The Board believes that an exemption is warranted because the tax deductibility disclosure is unlikely to provide a meaningful benefit to reverse mortgage consumers.

Proposed § 226.5b(c)(18) in the Board's August 2009 HELOC Proposal requires disclosures regarding fixed-rate and fixed-term payment plans. Reverse mortgages may have either fixed or variable rates, and may have fixed-term options for making payments to the borrower, such as providing a monthly payment for a period of 10 years. However, the Board is unaware of any reverse mortgage plans that have fixed-rate or -term repayment plans, which, for example, would allow the consumer to draw funds that would accrue interest at a fixed rate for a period of time. Therefore the Board is not proposing to require such a disclosure for reverse mortgages, but the Board requests comment on whether reverse mortgages may have fixed-rate and -term payment plans.

Proposed § 226.5b(c)(19) in the Board's August 2009 HELOC Proposal requires disclosures about required credit insurance and debt cancellation and debt suspension coverage. As discussed below in the section-by-section analysis to § 226.40, the Board is proposing to prohibit creditors from conditioning a reverse mortgage on the purchase of any other financial or insurance product. Accordingly, the Board does not propose to require the disclosures about required credit insurance and debt cancellation and debt suspension coverage.

33(c)(12)(i) Statement Regarding Refund of Fees Under § 226.5b(e)

Proposed § 226.33(c)(12)(i), modeled on proposed § 226.5b(c)(5), requires a creditor to disclose in the table as part of the early open-end reverse mortgage disclosures a statement that the consumer may receive a refund of all fees paid, if the consumer notifies the creditor within three business days of receiving the early disclosures that the consumer does not want to open the plan. The proposed disclosure would be required if a creditor will impose fees on the plan prior to the expiration of the three-day period. *See* 74 FR 43428, 43461, August 26, 2009.

33(c)(12)(ii) Refund of Fees Under § 226.40(b)

As discussed in the section-by-section analysis to § 226.40(b) below, the Board is proposing to prohibit creditors from making a reverse mortgage unless the consumer has received independent counseling. In addition, the proposal would require creditors to refund all fees paid (except for the fee for counseling itself) if the consumer notifies the creditor within three business days of receiving the counseling that the consumer does not want the reverse mortgage. Proposed § 226.33(c)(12)(ii) requires a creditor to disclose in the table as part of the early open-end reverse mortgage disclosures a statement regarding the consumer's refund right after counseling.

33(c)(12)(iii) Changes to Disclosed Terms

TILA Section 127A(a)(6)(A) provides that creditors must disclose as part of the application disclosures a statement of the time by which the consumer must submit an application to obtain specific terms disclosed in the application disclosures and an identification of any disclosed term that is subject to change prior to opening the plan. 15 U.S.C. 1637a(a)(6)(A).

The Board's August 2009 HELOC Proposal implements this provision in proposed § 226.5b(c)(4). Proposed § 226.5b(c)(4)(i) requires an identification of any disclosed term subject to change prior to opening the plan. This statement would be required to be placed below the proposed early HELOC disclosure table. Proposed § 226.5b(c)(4)(ii) requires a statement that the consumer may receive a refund of all fees paid if a disclosed term changes (other than changes due to fluctuations in the index in a variable-rate plan) and the consumer elects not to open the account. This statement would be required to be inside the proposed early HELOC disclosure table. *See* 74 FR 43428, 43460–43461, August 26, 2009.

Proposed § 226.33(c)(12)(iii) requires the disclosure required by proposed § 226.5b(c)(4)(ii)—the statement regarding the consumer's right to a refund of fees if a disclosed term changes. For clarity, proposed § 226.33(c)(12)(i) through (c)(12)(iii) require disclosures that must be placed inside the proposed early open-end reverse mortgage table. Proposed § 226.33(c)(12)(iv), discussed below, would require disclosures that must be placed directly beneath the table.

33(c)(12)(iv) Statement About Refundability of Fees

Proposed § 226.33(c)(12)(iii) is modeled after § 226.5b(c)(4)(i) and (c)(22) and the associated commentary in the Board's August 2009 HELOC Proposal. *See* 74 FR 43428, 43460–43461, 43483–43484, August 26, 2009. It would require an identification of any disclosed term subject to change prior to opening the plan, a statement that the consumer may be entitled to a refund of all fees paid if the consumer decides not to open the plan, and a cross reference to the "Fees" section in the disclosure statement. Each of these disclosures would be required to be placed directly beneath the early open-end reverse mortgage disclosure table. *See* proposed § 226.33(d)(4)(vi).

33(c)(13) Additional Disclosures Before the First Transaction Under an Open-End Reverse Mortgage

Proposed § 226.33(c)(13) would require additional disclosures before the first transaction for open-end reverse mortgages. Its provisions are modeled after those in proposed § 226.6(a)(2) in the Board's August 2009 HELOC Proposal.

As discussed above in the section-by-section analysis under § 226.33(c)(12), a number of disclosures applicable to HELOCs are not applicable to, or are not meaningful for, reverse mortgages. A number of other required disclosures, however, are applicable to and meaningful for reverse mortgages and thus are included in proposed § 226.33(c), which sets forth the required content for all reverse mortgage disclosures.

Disclosures required in § 226.33(c). As discussed above in the section-by-section analysis to § 226.33(c)(12), the proposed disclosures required by § 226.33(c) include the disclosures that would be required by proposed § 226.6(a)(2)(i) (identification information); (a)(2)(ii) (security interest and risk to home); (a)(2)(iii) (possible actions by creditor); (a)(2)(v) (payment terms); (a)(2)(xvi) (negative amortization); (a)(2)(xviii) (credit limit); (a)(2)(xxiv) (no obligation statement); (a)(2)(xxv) (statement about asking questions); and (a)(2)(xxvi) (statement about Board's Web site).

Disclosure required by § 226.6. TILA Section 127(a)(2) provides that creditors must explain as part of the account-opening disclosures the method used to determine the balance to which rates are applied. 15 U.S.C. 1637(a)(2). Under the Board's 2009 HELOC Proposal, a creditor would be required to disclose below the account-opening table the name of the balance computation method used by the creditor for each feature of the account, along with a statement that an explanation of the method(s) is provided in the account agreement or disclosure statement. *See* 74 FR 43428, 43539, August 26, 2009 (proposed § 226.6(a)(2)(xxii)). In addition, proposed § 226.6(a)(4)(i)(D) would require creditors to explain the balance computation method in the account-opening agreement or other disclosure statement. *See* 74 FR 43428, 43506, August 26, 2009.

For reverse mortgages, the Board is not proposing to include a disclosure below the account-opening table of the name of the balance computation method along with a statement that an explanation of the method is provided in the account agreement or disclosure statement. Under the Board's HELOC proposal, however, reverse mortgage creditors would be required to explain the balance computation method in the account-opening agreement or other disclosure statement. The Board believes that because reverse mortgage consumers do not make regular payments to the lender, a disclosure of the balance computation method below the account-opening table would be unnecessary and could result in information overload for consumers. However, creditors would still be required to provide the information in the account-opening agreement or other disclosure statement.

Disclosures not applicable to reverse mortgages. Proposed § 226.33(c)(13) does not include the disclosures that would be required by § 226.6(a)(2)(iv) (tax implications); (a)(2)(xix) (statements about fixed-rate and -term payment plans); and (a)(2)(xx) (required insurance, debt cancellation or debt suspension coverage). For the reasons discussed in the section-by-section analysis to § 226.33(c)(12), these disclosures do not apply to, or are not meaningful for, reverse mortgages.

In addition, a number of other required account-opening disclosures for HELOCs are not relevant or meaningful in the reverse mortgage context. Proposed § 226.6(a)(2)(x), which requires disclosure of any late-payment fee, and proposed § 226.6(a)(2)(xiii), which requires disclosure of any returned-payment fee, do not apply to reverse mortgages because the consumer does not make regular payments. Also, TILA Section 127(a)(1), implemented by proposed § 226.6(a)(2)(xxi), provides that a creditor must disclose as part of the account-opening disclosures a statement of when finance charges begin to accrue, including an explanation of whether any time period exists within which any credit extended may be repaid without incurring a finance charge. 15 U.S.C. 1637(a)(1). However, disclosure of a grace period for reverse mortgages is not relevant or meaningful to consumers who are not making regular payments. For this reason the Board proposes to exercise its authority under TILA Sections 105(a) and 105(f) to exempt reverse mortgages from the requirement to state whether or not any time period exists within which any credit extended may be repaid without incurring a finance charge. The Board has considered that reverse mortgages are secured by the consumer's principal dwelling and are likely to be made for relatively large amounts, and in most cases the consumer will have the right of rescission. The Board also considered that reverse mortgage borrowers may lack financial sophistication relative to the complexity of the reverse mortgage transaction, the importance of the credit and supporting property to the borrower and whether the goal of consumer protection would be undermined by an exception. The Board also considered the extent to which the requirement to provide the grace period disclosure complicates, hinders, or makes more expensive the credit process for reverse mortgages. The Board believes that an exemption is warranted because the grace period disclosure may be confusing to reverse mortgage consumers who are not making regular payments.

Disclosures required by § 226.33(c)(13). Proposed § 226.33(c)(13)(i) and (ii), modeled on proposed § 226.6(a)(2)(xii) and (a)(2)(xiv) in the Board's August 2009 HELOC Proposal, requires disclosure of transaction charges imposed for use of the reverse mortgage and any fees for failure to comply with transaction limitations. Proposed § 226.33(c)(13)(iii), modeled on proposed § 226.6(a)(2)(xxiii), implements TILA Section 127(a)(7) which requires creditors offering credit subject to § 226.5b to provide notices of billing rights at account opening. 15 U.S.C. 1637(a)(7). Proposed § 226.33(c)(13)(iv), modeled on proposed § 226.6(a)(2)(xxiv)(B) in the Board's August 2009 HELOC Proposal, requires a statement that the consumer should confirm the terms in the disclosure statement. The Board proposes this rule pursuant to its authority in TILA Section 105(a) to effectuate the statute's purposes, which include facilitating consumers' ability to compare credit terms and helping consumers avoid the uniformed use of credit.

33(c)(14) Additional Disclosures for Closed-End Reverse Mortgages

Proposed § 226.33(c)(14) would require additional disclosures for closed-end reverse mortgages. The proposed provisions are modeled on those in the Board's August 2009 Closed-End Mortgage Proposal.

Comparison to the August 2009 Closed-End Mortgage Proposal

The Board's August 2009 Closed-End Mortgage Proposal would create a new § 226.38 setting forth the content for closed-end mortgage disclosures, replacing the disclosures currently required by § 226.18. Many of the new and revised disclosures in proposed § 226.38 focus on disclosing possible changes to the consumer's monthly payment amount and thus would not apply to or be meaningful for reverse mortgage consumers. Accordingly, proposed § 226.33(c)(14) would not require some the disclosures required by proposed § 226.38. Other disclosures required by proposed § 226.38 would be required elsewhere in § 226.33(c) for reverse mortgages.

Disclosures required in § 226.33. Proposed § 226.38(a) would require a loan summary disclosure including information about the loan amount, term, type, and features. Some, but not all, of the items in the loan summary disclosure would be required (or would have parallel provisions) elsewhere under proposed § 226.33(c). For example, the loan amount, term, and type would be disclosed for all reverse mortgages under proposed § 226.33(c)(4), (c)(5), and (c)(6)(ii)(B). Proposed § 226.38(a) would also require a disclosure of total settlement charges. As discussed more fully above, proposed § 226.33(c)(7) would require a disclosure of costs to the consumer modeled more closely after the fee disclosure requirements for HELOCs.

Proposed § 226.38(c) would require an interest rate and payment summary for closed-end mortgages. Proposed § 226.33(c)(14) would not require the interest rate and payment summary, because for reverse mortgages there is only a single final payment and the timing of that payment is unknown and would have to be estimated. Instead, other provisions in proposed § 226.33(c) would require disclosure of the types of payments the consumer could receive (§ 226.33(c)(5)), a summary of the loan balance over time (§ 226.33(c)(8)), and descriptions of the consumer's repayment options (§ 226.33(c)(9)). These disclosures would give a reverse mortgage consumer relevant and meaningful information about the cost of the loan and the options for repaying the loan. In addition, proposed § 226.33(c)(6)(ii)(C), discussed above, would require information about the interest rate calculation.

Proposed § 226.38(d) would require disclosure of a section labeled, "Key Questions About Risk." This section would include information about rate increases, payment increases, prepayment penalties and other potentially risky features, such as disclosures about shared equity or shared appreciation features. The disclosures in proposed § 226.38(d) regarding payment increases, interest-only payments, negative amortization, balloon payments, demand features and no- or low-documentation loans either do not apply to reverse mortgages or would be more meaningful if disclosed in a different way. For example, the proposed disclosures of the loan balance growth in § 226.33(c)(8) and the consumer's repayment options in proposed § 226.33(c)(9) provide information about the negative amortization and balloon payment features of reverse mortgages that is tailored specifically for the reverse mortgage context. In addition, proposed § 226.33(c)(4) and (c)(10) would require disclosures about certain risks applicable to reverse mortgages. Proposed § 226.33(c)(8) would require disclosures about features such as shared equity or shared appreciation.

Proposed § 226.38(e) in the August 2009 Closed-End Mortgage Proposal would require disclosure of information about payments for closed-end mortgages. Proposed § 226.33(c) would include some, but not all of these disclosures. Proposed § 226.33(c) would not require disclosures of escrows for taxes and insurance or disclosures about mortgage insurance premiums; instead, § 226.33(c)(4)(iii) and (c)(10)(iii)(C) would require disclosures that the reverse mortgage consumer remains responsible for taxes and insurance.

Disclosures not required. Proposed § 226.38(f) and (g) in the August 2009 Closed-End Mortgage Proposal would require disclosures of additional information, most of which would be required for reverse mortgages by § 226.33(c). However, as discussed below, disclosures about tax deductibility of interest, and a statement that there is no guarantee the consumer may refinance, would not be required for reverse mortgages.

For closed-end credit secured by the consumer's principal dwelling in which the extension of credit may exceed the fair market value of the dwelling, TILA Section 128(a)(15) requires a disclosure that the interest on the portion of the credit extension that is greater than the fair market value of the dwelling is not tax deductible for Federal income tax purposes; and the consumer should consult a tax adviser for further information regarding the deductibility of interest and charges. 15 U.S.C. 1638(a)(15). The disclosure about the tax deductibility of interest is likely to be confusing to reverse mortgage consumers and accordingly the Board proposes to use its authority under TILA Sections 105(a) and 105(f) to exempt reverse mortgages from the requirements of TILA Section 128(a)(15).

Although reverse mortgages accrue interest over time, because the consumer does not make regular payments on a reverse mortgage, the consumer generally would not be able to deduct interest payments until the reverse mortgage terminates and the consumer makes the single payment. In addition, in many cases neither the consumer nor the lender will know whether or not extensions of credit greater than the fair market value of the dwelling will eventually be made. The Board has considered that reverse mortgages are secured by the consumer's principal dwelling and are likely to be made for relatively large amounts, and in most cases the consumer will have the right of rescission. The Board also considered that reverse mortgage borrowers may lack financial sophistication relative to the complexity of the reverse mortgage transaction, the importance of the credit and supporting property to the borrower and whether the goal of consumer protection would be undermined by an exception. In addition, the Board considered the extent to which the requirement to provide the tax deductibility disclosure complicates, hinders, or makes more expensive the credit process for reverse mortgages. The Board believes that an exemption is warranted because the potential the tax deductibility disclosure is unlikely to provide a meaningful benefit to reverse mortgage consumers.

Proposed § 226.38(h) in the August 2009 Closed-End Proposal requires disclosures about credit insurance and debt cancellation and debt suspension coverage. Reverse mortgage consumers do not make regular payments and the death of the consumer is one of the events that causes a reverse mortgage to become due and payable. Reverse mortgage consumers do not appear to be offered credit insurance or debt cancellation or debt suspension coverage. Accordingly, the disclosures about credit insurance and debt cancellation and debt suspension coverage are not applicable and would not be required. The Board requests comment on whether credit insurance and debt cancellation and debt suspension coverage may be offered for reverse mortgages.

TILA Section 128(b)(2)(C) requires additional disclosures for loans secured by a dwelling in which the interest rate or payments may vary. 15 U.S.C. 1638(b)(2)(C). Specifically, creditors must provide "examples of adjustments to the regular required payment on the extension of credit based on the change in the interest rates specified by the contract for such extension of credit. Among the examples required is an example that reflects the maximum payment amount of the regular required payments on the extension of credit, based on the maximum interest rate allowed under the contract." TILA Section 128(b)(2)(C), 15 U.S.C. 1638(b)(2)(C). Creditors must provide these disclosures within three business days of receipt of the consumer's written application, as provided in TILA Section 128(b)(2)(A), implemented in § 226.19(a)(1)(i). TILA Section 128(b)(2)(C) provides that these examples must be in conspicuous type size and format and that the payment schedule be labeled "Payment Schedule: Payments Will Vary Based on Interest Rate Changes." Section 128(b)(2)(C) requires the Board to conduct consumer testing to determine the appropriate format for providing the disclosures to consumers so that the disclosures can be easily understood, including the fact that the initial regular payments are for a specific time period that will end on a certain date, that payments will adjust afterwards potentially to a higher amount, and that there is no guarantee that the borrower will be able to refinance to a lower amount. 15 U.S.C. 1638(b)(2)(C). The Board is implementing these requirements in an interim rule published elsewhere in today's **Federal Register**.

The requirements of TILA Section 128(b)(2)(C) are designed to ensure that consumers understand the potential for changes in their regular payment amount under a variable-rate mortgage and are aware that the borrower may not be able to refinance to a lower amount once such a change occurs. Armed with this information, consumers can determine whether payments on a variable-rate mortgage could become unaffordable. For reverse mortgages, however, these disclosures are unlikely to be meaningful and may cause confusion because consumers do not make regular payments to the lender. A disclosure that there is no guarantee that a consumer can refinance to lower their payment may be confusing to someone who is not making regular payments. Similarly, "examples of adjustments to the regular required payment" based on changes in the interest rate provides information that is less useful to reverse mortgage consumers than to consumers with traditional mortgages. This is because reverse mortgage consumers do not make a "regular required payment," but rather only a single final payment.

In addition, other factors, such as the consumer's longevity and changes to the home's value, may have significant effects on the total payment amount. In most cases, the total repayment amount will be subject to a nonrecourse limit, meaning that the consumer's maximum possible payment will be limited to the proceeds from the sale of the home (unless the consumer wishes to retain the home). Thus, even if a variable interest rate were to climb to its maximum possible amount, the effect may not be to increase the maximum *amount* the consumer could owe, but rather how quickly the consumer's loan balance reached an amount subject to the nonrecourse limit.

For these reasons, the proposed rule would not require disclosures of examples of changes to a reverse mortgage's final payment amount based on changes in the interest rate, or a statement that there is no guarantee the consumer can refinance to a lower payment. Under the Board's exception and exemption authorities under TILA Sections 105(a) and 105(f) the Board is proposing to make an exception to these requirements in TILA Section 128(b)(2)(C) for reverse mortgages. The Board believes that there is a potential for confusion or information overload from these disclosures and that an exception for reverse mortgages will effectuate the purposes of TILA of providing meaningful disclosure of credit terms to the consumer and assisting consumers in avoiding the uninformed use of credit. The Board has considered that reverse mortgages are secured by the consumer's principal dwelling and are likely to be made for relatively large amounts. The Board also considered that reverse mortgage borrowers may lack financial sophistication relative to the complexity of the reverse mortgage transaction, the importance of the credit and supporting property to the borrower, and whether the goal of consumer protection would be undermined by an exception.

In addition, the Board considered the extent to which the requirements complicate, hinder, or make more expensive the credit process for reverse mortgages. Given the importance of the reverse mortgage to the borrower and the fact that the disclosures would not provide a meaningful benefit in the form of useful information or protection, the Board believes that an exemption is warranted. As discussed below, the Board is proposing new disclosures to explain the total cost of a reverse mortgage more effectively pursuant to its authority in TILA Section 105(a) to effectuate the statute's purposes, which include facilitating consumers' ability to compare credit terms and helping consumers avoid the uniformed use of credit.

Disclosures required by § 226.33(c)(14). TILA Section 128 requires disclosure of the "finance charge," using that term; the "amount financed," using that term; the sum of the amount financed and the finance charge, termed the "total of payments;" and the number, amount, and due dates or periods of payments scheduled to repay the total of payments. 15 U.S.C. 1638(a)(2)(A), (a)(3), (a)(5), (a)(6), and (a)(8). Proposed § 226.33(c)(4)(v) and (c)(9) would implement the requirement to disclose the number and due dates of payments by requiring disclosure of when the reverse mortgage becomes due and payable and that the consumer must make a single payment to repay the reverse mortgage.

Proposed § 226.33(c)(14), modeled on proposed § 226.38(e)(5) in the August 2009 Closed-End Mortgage Proposal, would implement TILA Section 128 by requiring disclosure of the total payments, the finance charge, and the amount financed for all closed-end reverse mortgages. In the August 2009 Closed-End Mortgage Proposal, the Board proposed to use its exception authorities to make certain changes to the disclosures required by TILA Section 128. *See* 74 FR 43232, 43305–43309, Aug. 26, 2009; 15 U.S.C. 1638(a)(2)(A), (a)(3), (a)(5). The creditor would be required to disclose the total payments amount calculated based on the number and amount of scheduled payments in accordance with the requirements of § 226.18(g), together with a statement that the total payments is calculated on the assumption that market rates will not change, if applicable, and a statement of the estimated loan term. The creditor would be required to disclose the interest and settlement charges, using that term, calculated as the finance charge as required by § 226.4, expressed as a dollar figure, together with a brief statement that the interest and settlement charges amount represents part of the total payments amount. The interest and settlement charges would be treated as accurate if the amount disclosed is understated by no more than $100 or is greater than the amount required to be disclosed. The creditor would also be required to disclose the amount financed, using that term and expressed as a dollar figure, together with a brief statement that the interest and settlement charges and the amount financed are used to calculate the APR.

33(c)(15) Disclosures Provided Outside the Table

For closed-end reverse mortgages, proposed § 226.33(c)(15) would also require the creditor to comply with proposed § 226.38(j), which requires separate disclosures of the itemization of the amount financed, a statement of whether the consumer is entitled to a rebate of any finance charge in certain circumstances, late payment charges, a statement that the consumer may obtain property insurance from any insurer that is acceptable to the creditor, a statement of the consumer should refer to the contract for certain other information, and the statements whether or not a subsequent purchaser may be permitted to assume the obligation. Creditors would only need to provide these statements as applicable. As under the August 2009 Closed-End Mortgage Proposal, these disclosures would be required to be outside the reverse-mortgage disclosure table required by § 226.33(d).

For open-end credit, § 226.6(a)(3) through (a)(5) require certain disclosures to be provided at account-opening. Under the Board's August 2009 proposal, these disclosures would be required to be outside the table containing the disclosures under § 226.6.(a)(2). For reverse mortgages, proposed § 226.33(c)(15) would require the disclosures under § 226.6(a)(3) (disclosure of charges imposed as part of a home-equity plan), (a)(4) (disclosure of rates for home-equity plans), and (a)(5)(ii) through (iv) (disclosure of security interests, statement of billing rights, and possible creditor actions) as applicable. As under the August 2009 HELOC Proposal, these disclosures would be required to be outside the reverse-mortgage disclosure table required by § 226.33(d). As discussed above, the proposed reverse mortgage disclosures would not include disclosures regarding voluntary credit insurance, debt cancellation, or debt suspension, or additional information about fixed-rate and -term payment plans.

33(c)(16) Assumptions for Closed-End Disclosures

For creditors to calculate the total of payments, finance charge, and annual percentage rate for closed-end credit, they must use an assumed loan term. Current comment 17(c)(1)–14 provides guidance on assumptions creditors must use in making these disclosures for closed-end reverse mortgages. For clarity, the current comment would be moved into the regulation as proposed § 226.33(c)(16). The proposed provision and comment 33(c)(16)–1 would also clarify that the use of these rules does not, by itself, make the disclosures estimates. Thus, creditors using these rules for the disclosures required by proposed § 226.19(a)(2) would be able to comply with that section's limitation on using estimated disclosures.

Under proposed § 226.33(c)(16), if the reverse mortgage has a specified period for disbursements but repayment is due only upon the occurrence of a future event such as the death of the consumer, the creditor must assume that disbursements will be made until they are scheduled to end. The creditor must assume repayment will occur when disbursements end (or within a period following the final disbursement which is not longer than the regular interval between disbursements). This assumption should be used even though repayment may occur before or after the disbursements are scheduled to end.

For example, if the reverse mortgage will provide the consumer with monthly payments for a period of 10 years, the creditor must assume that payments continue for 10 years and that repayment occurs at the end of that time. This assumption must be used even though the consumer may still be living in the home at the end of 10 years and may not actually repay the reverse mortgage at that time.

If the reverse mortgage has neither a specified period for disbursements nor a specified repayment date, and these terms will be determined solely by reference to future events including the consumer's death, the creditor may assume that the disbursements will end upon the consumer's death (estimated by using actuarial tables, for example). The creditor may assume that repayment will be required at the same time as the consumer's death (or within a period following the date of the final disbursement which is not longer than the regular interval for disbursements). Alternatively, the creditor may base the disclosures upon another future event it estimates will be most likely to occur first. (If terms will be determined by reference to future events which do not include the consumer's death, the creditor must base the disclosures upon the occurrence of the event estimated to be most likely to occur first.) For example, if the consumer is scheduled to receive monthly payments for as long as the consumer remains in the home, the creditor must assume that disbursements end and repayment occurs either at the consumer's life expectancy, or another future event the creditor estimates will be most likely to occur first.

In making the disclosures, the creditor must assume that all disbursements and accrued interest will be paid by the consumer. For example, if the note has a nonrecourse provision providing that the consumer is not obligated for an amount greater than the value of the house, the creditor must nonetheless assume that the full amount to be disbursed will be repaid. The Board requests comment on whether other assumptions should be used in making the disclosures required by § 226.33(c)(14), or whether other clarifications about how to make these disclosures for reverse mortgages would be beneficial. As discussed below, the Board also requests comment on whether retaining the table of life expectancies (updated to current figures) in Appendix L would be useful in determining the total of payments, annual percentage rate, and finance charge under proposed § 226.33(c)(14). In addition, a borrower's age may be calculated in different ways. In some cases, the borrower's age is based on the borrower's *nearest* birthday (even if that birthday is in the future) rather than on the borrower's last birthday. For example, under the first method someone born on January 1, 1930 would be considered to be 81 years old on

September 1, 2010 because the borrower is nearer to his next birthday than his last birthday. Under the second method, the borrower would not be considered to be 81 years old until January 1, 2011. The Board requests comment on whether to adopt a uniform assumption for determining the consumer's age and, if so, which method to use.

33(d) Special Disclosure Requirements for Reverse Mortgages

Proposed § 226.33(d) would provide special disclosure requirements for reverse mortgages in addition to those in § 226.31. Proposed § 226.33(d)(1) would require the open-end early reverse-mortgage disclosures be provided at the earlier of three business days after application or three business days before the first transaction under the plan. The timing requirement for the open-end early reverse mortgage disclosures would differ slightly from the timing for the early HELOC disclosures under the Board's August 2009 HELOC Proposal. Under the HELOC Proposal, creditors would be required to provide the parallel disclosures under § 226.5b not later than account opening or three business days following receipt of the consumer's application, whichever is earlier. However, for reverse mortgages, TILA Section 138 requires that the open-end reverse-mortgage-specific disclosures be provided at least three business days before the first transaction under the plan. *See* current § 226.31(c)(2); 15 U.S.C. 1648.

For the account-opening open-end reverse mortgage disclosures, proposed § 226.33(d)(2) would require that the disclosures be provided to the consumer at least three business days before the first transaction under the plan. As discussed above, TILA Section 127(a) and current § 226.5(b)(1) require the HELOC account-opening disclosures be provided before the first transaction under the plan. 15 U.S.C. 1637. For reverse mortgages however, TILA Section 138 requires disclosures be provided at least three business days before the first transaction under an open-end reverse mortgage plan. 15 U.S.C. 1648. Because the proposal combines the HELOC disclosures with the reverse mortgage specific disclosures, only one timing rule may apply. The proposal follows the timing requirements that are specific to reverse mortgages. Reverse mortgages are complex transactions and the Board believes that consumers would benefit from receiving open-end disclosures at least three business days before becoming obligated on the plan so that they have sufficient time to review and contemplate the disclosures. The Board proposes this rule pursuant to its authority in TILA Section 105(a) to make adjustments and exceptions to the requirements in TILA to effectuate the statute's purposes, which include facilitating consumers' ability to compare credit terms and helping consumers avoid the uniformed use of credit. 15 U.S.C. 1604(a).

For closed-end reverse mortgages, TILA Section 128(b)(2) requires creditors to provide good faith estimates of the closed-end TILA disclosure within three business days after application and at least seven business days before consummation, and before the consumer has paid a fee other than a fee for obtaining a credit history. If subsequent events cause changes to the APR that exceed certain tolerances, the creditor must provide a corrected disclosure that the consumer must receive at least three business days before consummation. 15 U.S.C. 1638(b)(2). TILA Section 138 requires that reverse mortgage disclosures be provided at least three business days before closing. 15 U.S.C. 1648. Proposed § 226.33(d)(3) would require creditors to provide the disclosures required by § 226.33(c) for closed-end reverse mortgages in accordance with the rules in § 226.19(a). Since § 226.19(a), as proposed in the 2009 Closed-End Mortgage Proposal, requires the TILA good faith estimates to be provided at least 7 business days before closing, and any required re-disclosures to be provided at least three business days before closing, the timing requirements in proposed § 226.19(a) would satisfy the timing requirements of both TILA Section 128 and Section 138.

In addition, § 226.19(a) permits consumers to waive the seven- and three-day waiting periods for a *bona fide* personal financial emergency, implementing TILA Section 128(b)(2)(F). 15 U.S.C. 1638(b)(2)(F). These waiver provisions would also apply to the closed-end reverse mortgage disclosures required by proposed § 226.33(d)(3). TILA Section 138 does not explicitly provide for such a waiver for the reverse-mortgage-specific disclosures. However, the Board believes that it would be impractical for creditors and consumers to allow waivers for the waiting periods for some parts of the reverse mortgages disclosures and not others, or to allow only partial waivers of the waiting periods. The Board also believes that the benefits to reverse mortgage consumers of allowing them to waive the disclosure waiting periods for *bona fide* personal financial emergencies outweigh the need to have the extra time to review the disclosures in those cases. Accordingly, the Board proposes to apply the waiver rules in § 226.19(a) to the closed-end reverse mortgage disclosures. The Board proposes this rule pursuant to its authority in TILA Section 105(a) to make adjustments to the statute to carry out its purposes and facilitate compliance with TILA. 15 U.S.C. 1604(a).

Section 226.19(a), as proposed in the Board's 2009 Closed-End Mortgage proposal, would also limit creditors' use of estimates in making final TILA disclosures. As a result of applying the rules in proposed § 226.19(a) to closed-end reverse mortgage disclosures, this proposal would also limit the use of estimates in the same manner. As discussed in the section-by-section analysis to § 226.33(c)(16) above, while creditors must use certain assumptions in § 226.33(c)(16) in making closed-end reverse mortgage disclosures, use of those assumptions would not, by themselves, make the disclosures estimates. *See* proposed comment 33(c)(16)–1. Thus, creditors would be able to comply with proposed § 226.19(a). The Board requests comment, however, on whether there are other disclosures that creditors would need to estimate in final closed-end reverse mortgage disclosures.

Proposed § 226.33(d)(4) would require the disclosures in §§ 226.33(c)(3) through (c)(10), (c)(12)(i), (c)(12)(ii), (c)(12)(iii), (c)(13)(i), (c)(13)(ii), and (c)(14) be provided in the form of a table with headings, content and format substantially similar to the model forms in Appendix K. It would also require certain information to be placed directly above the table, other information to be placed directly below the table and limit the information that could be within the table. It would also require that certain information be disclosed in bold text. For closed-end reverse mortgages it would also require that the APR be more conspicuous than other required disclosures, as required by TILA Section 122, and be in at least 16 point font. 15 U.S.C. 1632. Proposed § 226.33(d)(5), modeled after proposed §§ 226.5b(b)(3) and 6(a)(1)(iv), would provide rules for disclosure of fees based on a percentage of another amount.

33(e) Reverse Mortgage Advertising

Overview

Currently, advertisements for reverse mortgages are subject to general advertising requirements under § 226.16, for open-end credit, or § 226.24, for closed-end credit. Board staff extensively reviewed reverse mortgage advertisements, which generally focused on special features of reverse mortgages, such as the fact that payments of principal and interest are not required. As a result, the Board proposes additional advertising requirements for reverse mortgages.

The Board proposes to require that a reverse mortgage advertisement disclose clarifying information if the advertisement contains one or more of the seven following types of statements: (1) A reverse mortgage is a "government benefit"; (2) a reverse mortgage provides payments "for life" or a consumer need not repay a reverse mortgage "during your lifetime"; (3) a consumer "cannot lose" or there is "no risk" to a consumer's home with a reverse mortgage; (4) a consumer or a consumer's heirs "cannot owe" or will "never repay" more than the value of the consumer's home; (5) payments are not required for a reverse mortgage; (6) government fee limits apply to a reverse mortgage; or (7) a reverse mortgage does not affect a consumer's eligibility for or benefits under a government program. The Board also proposes to require that a reverse mortgage advertisement that refers to housing or credit counseling state a telephone number and Internet Web site for housing counseling resources maintained by HUD. The proposed requirements apply to advertisements for both open-end and closed-end reverse mortgages.

Authority

TILA Section 105(a) provides the Board with general authority to prescribe regulations to carry out TILA's purposes, which include ensuring meaningful disclosure of credit terms so that consumers will be able to compare available credit terms and avoid the uninformed use of credit. 15 U.S.C. 1601(a), 1604(a). TILA Section 147(a) authorizes the Board to require by regulation that an advertisement for open-end credit secured by a consumer's principal dwelling that sets forth a specific plan term clearly and conspicuously disclose any information the Board prescribes, in addition to the credit term information set forth in TILA Section 147(a)(1)–(3) (as implemented in § 226.16(d)). 15 U.S.C. 1665b(a).

The Board proposes to use its general authority under TILA Section 105(a) and, for open-end reverse mortgage advertisements, its authority under TILA Section 147 to require that a reverse mortgage advertisement disclose clarifying information if the advertisement contains any of seven types of statements.[124] The Board also proposes to use its authority under TILA Sections 105(a) and 147 to require that an advertisement provide a telephone number and Internet Web site for HUD's housing counseling resources if the advertisement contains a reference to housing or credit counseling. The foregoing information would be helpful to consumers considering a reverse mortgage, and requiring its inclusion would promote the informed use of credit.

TILA Section 122 authorizes the Board to require that information be disclosed in a clear and conspicuous manner. 15 U.S.C. 1632. Pursuant to the Board's authority under TILA Section 122, information required to accompany a statement that triggers the disclosure requirement (a triggering statement) must be clearly and conspicuously disclosed.

Research and Outreach

The Board's staff extensively reviewed reverse mortgage advertising copy in developing the proposed provisions regarding reverse mortgage advertising. Board staff also considered a report by the GAO regarding its review of reverse mortgage marketing materials and related consultations with Federal and state banking regulators and other parties.[125] In addition, Board staff considered the Proposed Reverse Mortgage Guidance published by the FFIEC, and the comments received on this proposed guidance, as well as the FFIEC's Final Reverse Mortgage Guidance.[126] Board staff also consulted with Federal Trade Commission staff to identify problems connected with advertisements for reverse mortgages, as well as areas where reverse mortgage advertising disclosures could be improved.

Through this research and outreach effort, Board staff identified eight types of statements that warrant a requirement to provide clarifying information. These statements are discussed in detail below. The Board solicits comment on the proposed requirements for reverse mortgage advertisements.

33(e)(1) Scope

Proposed § 226.33(e) applies to all advertisements for reverse mortgages. The Board's consumer testing has found that consumers find it difficult to understand reverse mortgages. The reverse mortgage advertisements Board staff reviewed generally focused on special features of reverse mortgages, such as the fact that payments of principal and interest are not required.

The proposed requirements supplement, rather than replace, general advertising requirements for open-end or closed-end credit transactions under Subpart B or Subpart C of Regulation Z, respectively. This approach is consistent with § 226.31(a), which provides that the requirements and limitations of Subpart E of Regulation Z, including requirements and limitations for reverse mortgages, are in addition to requirements contained in other subparts of Part 226.

Proposed § 226.33(e)(1) provides that the requirements of proposed § 226.33(e) apply to any advertisement for a reverse mortgage, including promotional materials that accompany applications. Proposed comment 33(e)(1)–1 states that the requirements of proposed § 226.33(e) apply to both open-end and closed-end reverse mortgages. Proposed comment 33(e)(1)–1 also states that the requirements and limitations of proposed § 226.33(e) are in addition to those contained in other subparts, including advertising requirements under § 226.16 in Subpart B or § 226.24 in Subpart C, as applicable, and contains a cross-reference to § 226.31(a).

33(e)(2) Clear and Conspicuous Standard

Reverse mortgage advertisements currently are subject to the clear and conspicuous standard for open-end or closed-end advertisements set forth in § 226.16 in Subpart B or § 226.24 in Subpart C, respectively. Proposed § 226.33(e)(2) provides that disclosures required for reverse mortgage advertisements must be made clearly and conspicuously. Proposed comment 33(e)(2)–1 clarifies that advertisements for reverse mortgages are subject to the general "clear and conspicuous" standard for Subpart B or Subpart C, as applicable. Proposed comment 33(e)(2)–1 contains a cross-reference to proposed comment 33(e)(1)–1, which in turn refers to § 226.31(a), discussed above.

Proposed comment 33(e)(2)–1 clarifies that proposed § 226.33(e) prescribes no specific rules for the format of required disclosures, other than the following requirements: (1) the disclosures required by proposed § 226.33(e)(3)–(9) must be made with equal prominence and in close proximity to each triggering statement; and (2) the disclosure required by proposed § 226.33(e)(10) must be at least as conspicuous as any

[124] Most reverse mortgages are lines of credit, which are open-end credit transactions. *See* U.S. Government Accountability Office, GAO–09–606 at 8.

[125] *Id.*

[126] *See* Proposed Reverse Mortgage Guidance, 74 FR 66652, Dec. 16, 2009; Final Reverse Mortgage Guidance, 75 FR 50801. Aug. 17, 2010.

use of the triggering statement. Proposed comment 33(e)(2)–1 clarifies further that required statements need not be printed in a certain type size and need not appear in any particular place in the advertisement, except as necessary to comply with the foregoing requirements regarding prominence, proximity, and conspicuousness.

Proposed comment 33(e)(2)–2 states that information required to be disclosed under proposed § 226.33(e) that is in the same type size as the triggering statement is deemed to be equally prominent with such statement. Proposed comment 33(e)(2)–2 states further that if a disclosure required by proposed § 226.33(e) is made with greater prominence than the triggering statement, the equal prominence requirement is satisfied. In addition, proposed comment 33(e)(2)–2 states that information required to be disclosed under proposed § 226.33(e) that is immediately next to or directly above or below a triggering statement, without any intervening text or graphical displays and not in a footnote, is deemed to be closely proximate to such statement. Proposed comments 33(e)(2)–3, –4, and –5 clarify that, in determining whether required disclosures in an Internet, televised, or oral advertisement for a reverse mortgage are made clearly and conspicuously for purposes of proposed § 226.33(e)(2), creditors may rely on comments 16–3, –4, and –5 for open-end reverse mortgages, and comments 24(b)–3, –4, and –5 for closed-end reverse mortgages.

33(e)(3) Need To Repay Loan

Some advertisements state that a reverse mortgage is a "government benefit" or other government aid, without indicating that a reverse mortgage is a loan that must be repaid. Reverse mortgages are complex transactions, and consumers do not necessarily know how a reverse mortgage can enable a consumer to receive, rather than make, periodic payments. For example, some of the consumers who participated in the Board's consumer testing did not know at the outset that a reverse mortgage is a loan that must be repaid. A reference to government aid may compound many consumers' confusion regarding how reverse mortgages operate.

The Board believes that a statement that a reverse mortgage is a "government benefit" or other aid from a government entity may mislead a consumer to believe that a reverse mortgage is government assistance that the consumer need not repay. Therefore, the Board proposes to provide that such a statement in a reverse mortgage advertisement triggers a requirement to disclose clarifying information.

Proposed § 226.33(e)(3) provides that if an advertisement states that a reverse mortgage is a "government benefit" or other aid provided by any Federal, state, or local government entity, each such statement must be accompanied by an equally prominent and closely proximate statement of the fact that a reverse mortgage is a loan that must be repaid. The proposed disclosures would reduce consumers' confusion regarding the nature of a reverse mortgage likely to result from a statement that a reverse mortgage is government aid.

Proposed comment 33(e)(3)–1 provides examples illustrating how an advertisement that states that a reverse mortgage is aid provided by a government entity may clearly and conspicuously disclose that a reverse mortgage is a loan that must be repaid. One such example is the following statement: "You are eligible for benefits under the government's Home Equity Conversion Mortgage program. A reverse mortgage under the program is a loan that you must repay."

Proposed comment 33(e)(3)–2 clarifies that an advertisement may not state that a reverse mortgage is a "government benefit" unless the reverse mortgage is associated with a government program, such as HUD's HECM program. The comment further clarifies that if a reverse mortgage is associated with a government program, then an advertisement may contain a statement that a reverse mortgage is a government benefit; however, the statement must be accompanied by a statement that a reverse mortgage is a loan that must be repaid, as illustrated in the examples provided in comment 33(e)(3)–1. Finally, proposed comment 33(e)(3)–2 notes that reverse mortgage advertisements are subject to the prohibitions in proposed § 226.16(d)(9), for open-end reverse mortgages, and § 226.24(*i*)(3), for closed-end reverse mortgages, on misrepresentations that a mortgage is endorsed or sponsored by the government. The comment clarifies that an advertisement with this type of misrepresentation will violate TILA regardless of whether a statement that the reverse mortgage is a loan that must be repaid accompanies the misrepresentation.

Proposed comment 33(e)(3)–3 clarifies that a statement that a reverse mortgage is a "government-supported loan" or a "government loan program" or is a loan insured, authorized, developed, created, or otherwise sponsored or endorsed by a government entity does not trigger a requirement to disclose clarifying information. Such statements make clear that a reverse mortgage is a loan. Proposed comment 33(e)(3)–3 is consistent with § 226.24(*i*)(3), which allows statements regarding government endorsement or sponsorship if an advertised loan program in fact is endorsed or sponsored by a government entity. Proposed comment 33(e)(3)–3 also provides examples of statements that do not trigger a requirement to disclose clarifying information under proposed § 226.33(e)(3), including the following example: "A Home Equity Conversion Mortgage is a loan insured by the U.S. Department of Housing and Urban Development."

Proposed comment 33(e)(3)–4 clarifies that a reference to benefits or other aid through a government program unrelated to reverse mortgages does not trigger the requirement to disclose clarifying information. Proposed comment 33(e)(3)–4 clarifies further that using the term "benefit" to mean "advantage" does not trigger the requirement to disclose clarifying information. The proposed comment also provides examples that illustrate uses of the term "benefit" that do not trigger a requirement to disclose clarifying information under proposed § 226.33(e)(3), including the following: "A reverse mortgage does not affect your Social Security benefits." (Proposed comment 33(e)(3)–4 clarifies, however, that the foregoing statement regarding Social Security benefits triggers a requirement under proposed § 226.33(e)(9) to disclose that a reverse mortgage may affect a consumer's benefits under some other government programs, as discussed below in the section-by-section analysis of § 226.33(e)(9).)

33(e)(4) Events That End Loan Term

Some advertisements state that a reverse mortgage provides payments or access to a line of credit throughout a consumer's lifetime. However, a consumer may outlive a credit line if home equity is exhausted and payments under the term option do not continue beyond a specified term. A statement that a reverse mortgage provides payments throughout a consumer's lifetime is partially true where a consumer chooses a HECM program that provides payments as long as a consumer lives in the home (tenure option), but relatively few HECM consumers choose the tenure option.[127] And even with the tenure option, an

[127] In 2008, 89% of consumers with a HECM chose the line of credit option and an additional 6% chose the line of credit option combined with either the tenure option or the option for a specified term. *See* U.S. Government Accountability Office, GAO–09–606 at 8.

event other than a consumer's death may cause a reverse mortgage to become due, including sale of the home and failure by the consumer to use the home as a principal residence, to maintain the home in good repair, or to pay property taxes or insurance premiums. Many participants in the Board's consumer testing were surprised to learn that such events may cause a reverse mortgage to become due.

Other advertisements state that a consumer need not repay a reverse mortgage during the consumer's lifetime. As discussed above, however, several events other than a consumer's death may cause a reverse mortgage to become due.

The Board believes that the foregoing statements in an advertisement may mislead a consumer to believe that he or she will receive payments or have access to a line of credit, or need not repay, a reverse mortgage until death. The Board therefore proposes to require that such statements be accompanied by a clarifying disclosure of circumstances that may result in the termination of payments or of access to a line of credit, or repayment being required, for a reverse mortgage.

Proposed § 226.33(e)(4) requires that equally prominent and closely proximate clarifying information accompany each statement in an advertisement that a reverse mortgage provides payments "for life" or that a consumer need not repay a reverse mortgage "during your lifetime" or another statement that payments or access to a line of credit for a reverse mortgage or the term of a reverse mortgage will continue throughout a consumer's lifetime. Specifically, proposed § 226.33(e)(4) provides that the advertisement must disclose that in the following cases, payments or access to a line of credit may end or repayment may be required during the consumer's lifetime: If the consumer (1) sells the home or (2) lives elsewhere for longer than allowed by the loan agreement. The foregoing disclosure is intended to address the potentially misleading effects of a statement that payments or access to a line of credit continue throughout a consumer's lifetime or that a consumer need not repay a reverse mortgage during the consumer's lifetime.

A reverse mortgage may become due in other circumstances, such as if a consumer does not pay property taxes or insurance premiums or does not maintain the home. The Board is concerned that requiring advertisements to include many examples of such circumstances could contribute to information overload, however. For that reason, the Board proposes to limit the required disclosure of clarifying information to the two circumstances of selling the home and living elsewhere for longer than a specified period of time. At the same time, the Board believes that clearly and conspicuously disclosing more than two events that cause a reverse mortgage to end may be possible. Therefore, reverse mortgage advertisements may state more than two such examples under the Board's proposal, as discussed below.

The examples of selling of the home and living elsewhere for longer than a specified period of time are particularly relevant to the consumers to whom reverse mortgages typically are advertised. Generally aged 62 or older, these consumers may be more likely than younger consumers to need to live in an assisted living facility, with relatives, or someplace other than their home for health reasons. Consequently, proposed § 226.33(e)(4) requires that an advertisement include these specific examples, if applicable, in the disclosure triggered by a statement that a reverse mortgage provides payments "for life" or that a consumer need not repay a reverse mortgage "during your lifetime" or by another statement that a reverse mortgage will continue throughout a consumer's lifetime.

Proposed comment 33(e)(4)–1 provides examples that illustrate how an advertisement may disclose the clarifying information required by proposed § 226.33(e)(4), including the following example: "You get payments for as long as you live, except that payments may end sooner in some circumstances. For example, you do not get payments for as long as you live if you sell your home or live somewhere else for longer than the loan agreement allows." Proposed comment 33(e)(4)–2 states that the disclosures required by proposed § 226.33(e)(4)(A) and (B) need be made only if applicable.

Proposed comment 33(e)(4)–3 states that proposed § 226.33(e)(4) does not require the use of a particular format in providing the required disclosures, other than requiring that they be equally prominent with and in close proximity to each triggering statement. Proposed comment 33(e)(4)–3 also clarifies that an advertisement need not make the required disclosures in a single sentence and may make the required disclosures, for example, using a list format. Further, proposed comment 33(e)(4)–3 states that an advertisement may provide the required disclosures in any order. Proposed comment 33(e)(4)–4 states that an advertisement for a reverse mortgage may state additional circumstances in which a reverse mortgage will end during a consumer's lifetime (for example, where a consumer chooses to receive payments for a specific time period), but must not obscure the required disclosures.

33(e)(5) Risk of Foreclosure

Some advertisements state that, with a reverse mortgage, a consumer cannot lose his or her home or that there is no risk to a consumer's home. Principal and interest payments are not required with a reverse mortgage, but foreclosure nevertheless may occur. Some participants in the Board's consumer testing were surprised that a consumer's home is at risk with a reverse mortgage. Statements that a reverse mortgage poses no risk to a consumer's home compounds some consumers' lack of understanding that a reverse mortgage is a loan secured by a consumer's home.

The Board believes that a statement that a consumer cannot lose his or her home or that there is no risk to a consumer's home may mislead a consumer to believe that foreclosure of a reverse mortgage cannot occur. The Board therefore proposes to provide that such statement triggers a requirement to disclose clarifying information. Proposed § 226.33(e)(5) provides that if an advertisement states that a consumer "cannot lose" or that there is "no risk" to the consumer's home or otherwise states that foreclosure cannot occur if the consumer (1) lives somewhere other than the dwelling longer than allowed by the loan agreement or (2) does not pay property taxes or insurance premiums. The foregoing disclosures clarify a statement that a reverse mortgage poses no risk to a consumer's home.

Of course, foreclosure may result from other circumstances, such as not maintaining the home in good repair. However, the Board is concerned that requiring that advertisements include many examples of circumstances that may result in foreclosure could contribute to information overload. For that reason, the Board proposes to limit the required disclosure of clarifying information to the consumer living somewhere other than the dwelling longer than allowed by the loan agreement or not paying property taxes or insurance premiums. At the same time, the Board believes that clearly and conspicuously disclosing more than two events that cause a reverse mortgage to end may be possible. Therefore, reverse mortgage advertisements may state more than two such examples under the Board's proposal, as discussed below.

Proposed comment 33(e)(5)–1 provides examples that illustrate how an advertisement may disclose the clarifying information required by proposed § 226.33(e)(5). One such example is the following: "You cannot lose your home except in certain circumstances, including if you live somewhere else for longer than allowed by the loan agreement or you do not pay taxes or insurance." Proposed comment 33(e)(5)–2 clarifies that the disclosures required by proposed § 226.33(e)(5)(A) and (B) need be made only if applicable.

Proposed comment 33(e)(5)–3 states that proposed § 226.33(e)(5) does not require the use of a particular format in providing the required disclosures, other than requiring that they be equally prominent with and in close proximity to each triggering statement. Proposed comment 33(e)(5)–3 also clarifies that an advertisement need not make the required disclosures in a single sentence and may make the required disclosures, for example, using a list format. Further, proposed comment 33(e)(5)–3 states that an advertisement may provide the required disclosures in any order. Proposed comment 33(e)(5)–4 states that an advertisement for a reverse mortgage may state additional circumstances in which foreclosure may occur, but must not obscure the required disclosures.

33(e)(6) Amount Owed

Some advertisements state that a consumer or a consumer's heirs or estate cannot owe more than the consumer's home is worth with a reverse mortgage. Although a creditor's recourse in the event of a HECM default is limited to the value of a consumer's home, the loan balance can exceed the value of the home. A consumer or the consumer's heirs or estate must pay the entire loan balance to retain a home when a reverse mortgage becomes due.

In the past, some HECM creditors themselves mistakenly believed that a consumer or a consumer's heirs could retain the consumer's home by paying the home's value rather than the outstanding loan balance, leading HUD to issue a clarifying statement.[128] Given evidence of creditors' confusion in this regard, the Board believes that a statement in a reverse mortgage advertisement that a consumer or a consumer's heirs cannot owe more than the consumer's home is worth may mislead consumers. This type of assertion may give a consumer false comfort about the consumer's ability, or the ability of the consumer's heirs, to retain the home when a reverse mortgage's term ends. The Board therefore proposes to require that clarifying information accompany a statement that the consumer or a consumer's heirs or estate cannot owe more than the consumer's home is worth.

Proposed § 226.33(e)(6) provides that if an advertisement states that a consumer or a consumer's heirs or estate "cannot owe" or will "never repay" more than, or otherwise states that repayment is limited to, the value of the consumer's dwelling, each such statement must be accompanied by an equally prominent and closely proximate statement of the fact that (1) to retain the dwelling when the reverse mortgage becomes due the consumer or the consumer's heirs or estate must pay the entire loan balance and (2) the balance may be greater than the value of the consumer's dwelling. The proposed disclosures would reduce the risk that consumers will underestimate the likelihood that they or their heirs will lose a home they may want to keep.

Proposed comment 33(e)(6)–1 provides examples that illustrate how an advertisement for a reverse mortgage may disclose the clarifying information required by proposed § 226.33(e)(6). One such example is the following: "Your heirs cannot owe more than the value of your house, unless they want to keep the house when the reverse mortgage is due. To keep the house, they must pay the entire loan balance, which may be higher than the house's value."

33(e)(7) Payments for Taxes and Insurance

Many advertisements state that a reverse mortgage will enable a consumer to make no payments. A statement that there are no payments with a reverse mortgage may cause a consumer to overlook the need to pay property taxes or insurance. Many consumers are used to making a single payment to a creditor each month that includes payment for principal, interest, and property taxes and insurance. Such consumers may misconstrue a statement that a reverse mortgage will eliminate their payments to mean that the creditor will make taxes and insurance payments on their behalf out of home equity and that the consumer need not make those payments directly. To reduce the likelihood of consumer confusion, the Board proposes to require that a statement regarding the obligation to make property tax and insurance payments accompany a statement that a consumer is not required to make payments for a reverse mortgage.

Specifically, proposed § 226.33(e)(7) provides that, if an advertisement states that payments are not required for a reverse mortgage, each such statement must be accompanied by an equally prominent and closely proximate statement that a consumer must make payments for property taxes or insurance premiums, if applicable. Proposed § 226.33(e)(7) is consistent with § 226.24(f)(3), which provides that in an advertisement for a first-lien, closed-end mortgage, a statement of the amount of any payment triggers a requirement to disclose the fact that the stated payments do not include amounts payable for taxes and insurance premiums. Proposed comment 33(e)(7)–1 provides examples that illustrate how an advertisement for a reverse mortgage may disclose the clarifying information required by § 226.33(e)(7). One such example is the following: "There are no loan payments for a reverse mortgage. You continue to pay for property taxes and insurance."

33(e)(8) Government Fee Limitation

Some advertisements state that government limits on HECM fees minimize consumers' costs. This and similar statements may obscure the fact that HECM fees can be substantial, notwithstanding statutory or regulatory limits. A statement that the government restricts reverse mortgage fees may cause a consumer to think that HECMs are less expensive than "forward" mortgages or other financial products. In fact, reverse mortgages often have higher up-front costs than "forward" mortgages.[129]

Further, consumers may misconstrue a statement that the government caps HECM fees to mean that the government sets the amount of such fees. Fees charged may vary, however, because creditors need not charge the maximum fees permissible for a HECM. Also, pricing discretion exists despite HECM fee caps, because interest rates for HECMs are not prescribed. To address concern that consumers will misunderstand the effect government caps have on reverse mortgage costs, the Board proposes to provide that a statement regarding government limitations on fees or other costs triggers a requirement to provide specified clarifying information.

Proposed § 226.33(e)(8) provides that if an advertisement states that a Federal, state, or local government limits or regulates fees or other costs for a reverse mortgage, each such statement must be accompanied by an equally prominent and closely proximate statement that costs may vary among creditors and loan types and that less expensive

[128] *See* HUD Mortgagee Letter 2008–38 (Dec. 8, 2008).

[129] *See, e.g.,* U.S. Government Accountability Office, GAO–09–606 at 10–11 (describing typical reverse mortgage costs).

options may be available. Proposed comment 33(e)(8)–1 provides examples of how an advertisement may disclose the required clarifying information. One such example is the following: "The government has capped fees for HECMs. Costs may vary by lender or loan type, and cheaper alternatives may be available."

33(e)(9) Eligibility for Government Programs

Many reverse mortgage advertisements state that a reverse mortgage will not affect a consumer's Social Security or Medicare benefits. Although a reverse mortgage generally does not affect a consumer's benefits from or eligibility for Social Security or Medicare, reverse mortgage proceeds may affect a consumer's benefits from or eligibility for means-tested programs such as Supplemental Security Income (SSI) and Medicaid. Concerns have been raised that consumers may misunderstand a statement that a reverse mortgage does not affect certain government benefits to mean that a reverse mortgage does not affect government benefits generally.[130] Concerns also have been raised that some housing counselors do not mention that a reverse mortgage may affect benefits from and eligibility for government assistance, even though provision of this information is required.[131]

With careful planning, some consumers may avoid having a reverse mortgage adversely affect eligibility for or benefits from a means-tested government program. Consumers would benefit from clarification in an advertisement that, although a reverse mortgage may not affect eligibility for or benefits from a particular government program, a reverse mortgage may affect eligibility for and benefits from other government programs. Such clarification would identify an issue about which many consumers should seek additional information.

Proposed § 226.33(e)(9) provides that if an advertisement states that a reverse mortgage does not affect a consumer's eligibility for or benefits from a government program, each such statement must be accompanied by an equally prominent and closely proximate statement of the fact that a reverse mortgage may affect a consumer's eligibility for benefits through some government programs, such as SSI or Medicaid. Such advertisement must mention SSI and Medicaid specifically, so that consumers have concrete examples of means-tested programs to discuss with a housing counselor or other person. Proposed comment 33(e)(9)–1 provides examples that illustrate how an advertisement may disclose the clarifying information required by proposed § 226.33(e)(9).

33(e)(10) Credit Counseling Information

Some advertisements discuss the availability of housing counseling in connection with reverse mortgages. Requiring that an advertisement that refers to housing or credit counseling include a telephone number and Internet Web site for housing counseling resources maintained by HUD would help consumers to consult with a housing counselor early in the lending process. The Board proposes such requirement to promote the informed use of credit, consistent with TILA's goals.

Proposed § 226.33(e)(10) provides that if an advertisement contains a reference to housing or credit counseling, the advertisement must disclose a telephone number and Internet Web site for housing counseling resources maintained by HUD. Proposed comment 33(e)(10)–1 clarifies that disclosure of HUD's counseling telephone number and Web site must be at least as conspicuous as any reference to housing or credit counseling in the advertisement. The comment further clarifies that the telephone number and Web site information does not have to be included with every reference to counseling resources. Proposed comment 33(e)(10)–1 also clarifies that language identifying the purpose of the telephone number and Web site must accompany the disclosure, and provides the following illustrative statement: "For information about housing counseling options, call [telephone number] or go to [Internet Web site]."

Section 226.34 Prohibited Acts or Practices in Connection With Credit Subject to § 226.32

34(a) Prohibited Acts or Practices for Loans Subject to § 226.32

34(a)(4) Repayment Ability

The Board is proposing to remove and reserve a comment under § 226.34(a)(4). Section 226.34(a)(4) prohibits creditors from making a higher-priced mortgage loan without regard to the consumer's repayment ability as of consummation of the transaction. Comment 34(a)(4)–4 contains an erroneous cross reference to § 226.34(a)(4)(iv). Accordingly, the Board proposes to remove the comment. No substantive change is intended.

34(a)(4)(iv) Exclusions From Presumption of Compliance

The Board is proposing to add a new comment 34(a)(4)(iv)–3 to provide guidance on compliance with the repayment ability requirements of § 226.34(a)(4) for certain balloon loans with terms of less than seven years ("short-term balloon loans"). Section 226.34(a)(4)(iii) provides a presumption of compliance with the repayment ability requirements if the creditor follows certain procedures, including verifying the borrower's income. Under § 226.34(a)(4)(iv), however, the presumption of compliance is not available for certain loan products, such as short-term balloon loans. Exclusion of short-term balloon loans from the presumption of compliance has led creditors to ask the Board whether they can make such loans and how to comply with the repayment ability rule.

Proposed comment 34(a)(4)(iv)–3 states that the exclusion of short-term balloon loans from the presumption of compliance does not prohibit creditors from making short-term balloon loans that are higher-priced mortgage loans. The proposed comment would clarify, however, that the creditor must use prudent underwriting standards and determine that the value of the collateral (the home) is not the basis for repaying the obligation (including the balloon payment). The proposed comment clarifies that the creditor need not verify that the consumer has assets and/or income at the time of consummation that would be sufficient to pay the balloon payment when it comes due. Proposed comment 34(a)(4)(iv)–3 states that, in addition to verifying the consumer's ability to make regular monthly payments, the creditor should verify that the consumer would likely be able to satisfy the balloon payment obligation by refinancing the loan or through income or assets other than the collateral.

Proposed comment 34(a)(4)(iv)–3 contains the same guidance concerning short-term balloon loans as was previously provided in a Consumer Affairs Letter issued by Board staff in response to the inquiries from creditors noted above. *See* Short-Term Balloon Loans and Regulation Z Repayment Ability Requirement for Higher-Priced Mortgage Loans, CA 09–12 (Nov. 9, 2009). The Board is proposing to add new comment 34(a)(4)(iv)–3 to the staff commentary to make this existing guidance available to all creditors that are subject to Regulation Z's requirements. The Board seeks

[130] *See, e.g.,* Proposed Reverse Mortgage Guidance, 74 FR at 66658; Final Reverse Mortgage Guidance, 75 FR at ________.

[131] *See* U.S. Government Accountability Office, GAO–09–606 at 37.

comment, however, on whether the guidance can be improved as part of this rulemaking. For instance, would the addition of examples, illustrating when a consumer would and would not be considered able to satisfy the balloon payment by refinancing, provide greater assurance to creditors that consumers obtaining short-term balloon loans in similar circumstances would be deemed able to repay the obligation, as required by § 226.34(a)(4)? Should there be more concrete guidance regarding the use of assumptions for the terms on which the consumer might refinance in the future, and should the guidance vary depending on the current transaction's terms? For example, should guidance regarding the treatment of a two-year balloon loan with interest-only payments over the whole term differ from that regarding the treatment of a six-year balloon loan with amortizing payments?

Section 226.35 Prohibited Acts or Practices in Connection With Higher-Priced Mortgage Loans

35(a) Higher-Priced Mortgage Loans

The Board is proposing to amend § 226.35(a) to provide that a creditor determines whether a transaction is a higher-priced mortgage loan subject to § 226.35 by comparing the "transaction coverage rate," rather than the annual percentage rate, to the average prime offer rate. Under the proposal, the transaction coverage rate is a transaction-specific rate that would be used solely for coverage determinations; it would not be disclosed to consumers. A creditor would calculate the transaction coverage rate based on the rules in Regulation Z for calculation of the annual percentage rate, with one exception: The creditor would make the calculation using a modified value for the prepaid finance charge, as discussed below. The Board also is proposing to add new staff commentary clarifying when § 226.35 would apply to construction loans in which the creditor permanently finances the acquisition of a dwelling as well as the initial construction of the dwelling.

Background

In the 2008 HOEPA Final Rule, the Board adopted special consumer protections for "higher-priced mortgage loans." 73 FR 44522, 44603, July 30, 2008. These protections include: A requirement that creditors assess borrowers' ability to repay loans without regard to collateral and verify the borrower's income and assets; restrictions on a creditor's imposition of prepayment penalties; and a requirement to establish an escrow account for taxes and insurance for first-lien loans ("the 2008 HOEPA protections"). The Board defined a higher-priced mortgage loan as a transaction secured by a consumer's principal dwelling for which the annual percentage rate exceeds the "average prime offer rate" by 1.5 percentage points or more, for a first-lien transaction, or by 3.5 percentage points or more, for a subordinate-lien transaction.

The Board's objective in adopting these rules was to extend the 2008 HOEPA protections to the entire subprime market and generally to exclude the prime market from their coverage. The 2008 HOEPA protections were designed to address unfair and deceptive practices that were widespread in the subprime market. The prime market, however, did not show evidence that the same practices were as pervasive or were as clearly likely to injure consumers as in the subprime market. Thus, the Board did not apply the 2008 HOEPA protections to the prime market, stating that the protections should be applied broadly, "but not so broadly that the costs, including the always present risk of unintended consequences, would clearly outweigh the benefits." 73 FR 43522, 44532, July 30, 2008. The Board believed that, in the prime market, a case-by-case approach to determining whether practices are unfair or deceptive is more appropriate. The Board recognized, at the same time, that there is uncertainty as to what coverage metric would best achieve the objectives of covering the subprime market and generally excluding the prime market. The Board stated that it is appropriate to err on the side of covering somewhat more than the subprime market. 73 FR 43522, 43533, July 30, 2008.

In the August 2009 Closed-End Proposal, the Board proposed to amend § 226.4 to provide a simpler, more inclusive definition of the finance charge. *See* 74 FR 43232, 43321–23, Aug. 26, 2009. Under the proposal, most closing costs, including many third-party costs such as appraisal fees and premiums for lender's title insurance, would be included in the finance charge and APR. Thus, APRs would be greater than they are under the current rule. The Board noted that because APRs generally would increase, more loans would potentially qualify as higher-priced mortgage loans and HOEPA loans covered by §§ 226.32 and 226.34 and trigger state anti-predatory lending laws. 74 FR 43232, 43344–45, Aug. 26, 2009. The Board concluded, based on the limited data it had, that the proposal to improve the APR would be in consumers' interests. Comment was solicited on the potential impact of the proposed rule.

Problems with potential over-inclusive coverage of § 226.35. There are currently some differences between the APR and the average prime offer rate. Section 226.35(a)(2) defines "average prime offer rate" as an APR that is derived from average interest rates, points, and other loan pricing terms currently offered to consumers by a representative sample of creditors for mortgage transactions that have low-risk pricing characteristics. These average terms currently are obtained from the Primary Mortgage Market Survey® (PMMS) published by Freddie Mac. Freddie Mac surveys mortgage creditors weekly on the loan pricing, consisting of interest rate and points, that they currently offer consumers with low-risk transaction terms and credit profiles. Thus, the average prime offer rate is calculated using data that includes only contract interest rates and points.

Because average prime offer rates are based on points but not other origination fees, they are generally comparable to the current APR under Regulation Z, but not perfectly so. The PMMS does not define "points," and it is likely that survey respondents generally consider "points" to include only discount points and, possibly, origination fees, which often are calculated as points (i.e., as a percentage of the loan amount). An APR includes not only discount points and origination fees but also other charges the creditor retains, such as underwriting and processing fees. Such charges are not commonly thought of as "points" because they are not calculated as percentages of the loan amount. Thus, survey respondents most likely do not include such charges in their points when they respond to the PMMS. The Board's August 2009 Closed-End Proposal would widen the disparity between the APR and the average prime offer rate. Under that proposal, APRs would be calculated based on a finance charge that includes most third-party fees in addition to points, origination fees, and any fees the creditor retains.

As noted above, the Board solicited comment on the impact of the August 2009 Closed-End Proposal on higher-priced mortgage loans and HOEPA loans and triggering of state predatory lending laws. Numerous mortgage creditors and their trade associations commented on the proposal to make the finance charge and APR more inclusive. Most expressed agreement in principle with the proposed finance charge definition. Nevertheless, most industry commenters opposed the proposal, stating that it would cause many prime loans to be incorrectly classified as higher-priced mortgage loans under § 226.35. They also stated that the proposal would inappropriately expand the coverage of HOEPA and State laws. These commenters noted that HOEPA and most State laws have not only APR tests but also "points and fees" tests and that the more inclusive finance charge would have a much more significant impact under the applicable points and fees tests than under the APR tests. One creditor estimated that 30–50% of its subprime loans, which currently are higher-priced mortgage loans but not HOEPA loans, would become HOEPA (or state "high-cost") loans under the proposal.

Consumer advocates uniformly supported the proposal to make the finance charge and APR more inclusive. They recognized the resulting expansion of coverage under §§ 226.32 and 226.35 and similar State laws, but they argued that any such expanded coverage would be appropriate. Consumer advocates stated that the more inclusive finance charge and APR would reveal newly covered loans for what they have always been, namely, HOEPA loans and higher-priced mortgage loans. Accordingly, they argued, the increased coverage would be warranted.

The Board's Proposal

A new metric for determining coverage. As discussed above, the Board's definition of a higher-priced mortgage loan was intended to cover all of the subprime mortgage market and generally to exclude the prime market. Based on public comment and the Board's own analysis, the Board believes the test for coverage under § 226.35 should be revised, especially in light of the Board's proposal to make the APR more inclusive. That is, the Board adopted the current test in 2008 knowing it would result in some degree of coverage beyond the subprime market, but the degree of coverage would expand significantly with the inclusion in the finance charge and APR of title insurance premiums and other third-party charges that currently are excluded. The Board therefore proposes to replace the APR with the "transaction coverage rate" as the transaction-specific metric a creditor compares to the average prime offer rate to determine whether the transaction is covered. The Board adopted the APR as the metric for coverage under § 226.35 because the Board believes the best way to identify the subprime market is by loan price, and the APR is the best available measure of loan price. *See* 73 FR 44532, July 30, 2008. The Board believes that a modified approach is appropriate, however, given the disparity between the average prime offer rate and the more-inclusive APR that the Board has proposed.

Under proposed § 226.35(a)(1), the creditor would compare the "transaction coverage rate," instead of the APR, to the average prime offer rate. As discussed below, the transaction coverage rate would be a modified version of the transaction's annual percentage rate. Specifically, under proposed § 226.35(a)(2)(i), the transaction coverage rate would be calculated in the same manner as the APR, except that it would be based on a modified prepaid finance charge that would include only finance charges retained by the creditor, its affiliate, or a mortgage broker, as discussed below. The transaction coverage rate would not reflect other closing costs that are treated as finance charges for purposes of the APR that is disclosed to the consumer. Thus, the proposed, more inclusive APR would reflect such third-party charges as title insurance premiums, appraisal fees, and credit report fees, whereas the transaction coverage rate would not. Proposed comment 35(a)(2)(i)–1 would clarify that the transaction coverage rate is not the APR that is disclosed to the consumer and that the transaction coverage rate calculated under § 226.35(a)(2)(i) would be solely for coverage determination purposes. Existing § 226.35(a)(2), which defines "average prime offer rate," would be redesignated as § 226.35(a)(2)(ii).

Mandatory use of transaction coverage rate. The Board's goal in developing the transaction coverage rate is to provide a simple modification to the metric for § 226.35 coverage that does not create undue regulatory burden for creditors. The Board recognizes that any new metric would impose some costs, including training staff and modifying software and other systems. The Board believes, however, that these costs should be relatively small because the proposal would necessitate only a one-time modification to creditors' systems. On balance, the Board believes the costs of the new metric would be offset by the benefits of ensuring that the 2008 HOEPA protections apply only to loans for which they were intended, i.e., subprime mortgages.

The Board considered whether to propose making the use of the transaction coverage rate optional. An optional approach, however, would have the anomalous result that identical transactions extended by two different creditors could have inconsistent coverage under § 226.35. The Board does not believe that whether a consumer receives the 2008 HOEPA protections should depend on which creditor extends the credit. The Board seeks comment, however, on whether the use of the transaction coverage rate should be optional.

Finance charges retained by the creditor, its affiliate, or a mortgage broker. The proposed transaction coverage rate would provide a measure of a loan's pricing that is more closely aligned with the average prime offer rate. As discussed above, the average prime offer rate reflects the contract interest rate and points for a hypothetical, low-risk transaction. Thus, the transaction coverage rate should reflect only a transaction's interest rate and points. A transaction's contract interest rate is well-understood, while "points" is not well-defined, as noted above. The proposal therefore seeks to define as clearly as possible which charges count toward the "points" component of the transaction coverage rate, i.e., which charges would be included in the modified prepaid finance charge used to calculate the transaction coverage rate. The Board proposes to include in the modified prepaid finance charge only charges that are retained by the creditor, its affiliates, or a mortgage broker. This rule would avoid any uncertainty about what is included and would prevent creditors from evading coverage by shifting points into other charges or to affiliated third-parties.

The proposal would include in the modified prepaid finance charge any charges retained by a mortgage broker to ensure that the transaction coverage rate is comparable to the average prime offer rate for both retail and wholesale mortgage transactions. The average prime offer rate reflects creditors' retail pricing, which is higher (either in rate or in points) than the pricing the same creditors set for wholesale transactions. Lower wholesale pricing reflects creditors' reduced overhead and other costs of origination for loans originated through a mortgage broker. This difference tends to be eliminated once the mortgage broker's compensation is added into the retail pricing that the consumer pays. To ensure that § 226.35 coverage determinations for wholesale transactions account for this difference, any charges retained by a mortgage broker would be reflected in the transaction coverage rate.

Proposed comment 35(a)(2)(i)–2 would clarify that the inclusion of charges retained by a mortgage broker would be limited to compensation that otherwise constitutes a prepaid finance charge. This limitation would exclude compensation paid by a creditor to a mortgage broker under a separate arrangement (e.g., compensation that comes from "yield spread premium"), although such compensation is included already to the extent it comes from amounts paid by the consumer that are prepaid finance charges, such as points. *See* comment 4(a)(3)–3.[132] If mortgage broker compensation comes from amounts paid by the consumer to the creditor that are finance charges but not prepaid finance charges, such as interest, those amounts would affect the transaction coverage rate just as they affect the APR, but the broker compensation itself would not affect the transaction coverage rate directly. Proposed comment 35(a)(2)(i)–2 would illustrate these principles with an example.

Alternative approach not proposed. Many industry commenters that expressed concerns about the Board's proposal to make the APR more inclusive suggested that the Board address the issue by revising the calculation of the average prime offer rate. These commenters asserted that the average prime offer rate should reflect average amounts for other closing costs that are reflected in the APR, in addition to the points currently included. The Board considered whether to propose such an approach but determined that it is not feasible. Closing costs vary significantly by geographical location. They also include costs that are fixed dollar amounts, which tend to have differing effects on the annual percentage rate depending on the loan amount. The commenters' suggested approach, therefore, would need to account for these two considerations, most likely by providing for separate average prime offer rates for various loan-size and geographical location categories. Such an approach would result in significant complexity and compliance burden for creditors.

In addition, the Board is not proposing to include closing costs in the average prime offer rate because the Board could not identify a reliable source for "average" closing costs in every location throughout the country. Because closing costs change over time, the necessary data source would have to be updated periodically. The Board is not aware of any source that includes all closing costs for all relevant geographical and loan-size variations and that is reliably and regularly updated. The Board considered regularly surveying creditors for information on closing costs, but determined that the cost and burden on creditors would be significant. The Board believes the proposal achieves the same objective as the alternative approach, but without imposing the burden of ongoing data collection and reporting on creditors.

HOEPA and State laws. As noted above, the Board considered the impact of the 2009 Closed-End Proposal's more inclusive APR on the coverage of HOEPA and certain State laws, in addition to higher-priced mortgage loans under § 226.35. Industry commenters also raised concerns regarding additional coverage. The Board's proposal to address the potential impact of the more inclusive finance charge on HOEPA coverage under the points and fees test is discussed above in the section-by-section analysis of § 226.32(b)(1). State predatory lending coverage thresholds are established under state authorities. The Board believes that those authorities are best positioned to make any adjustments to coverage they deem appropriate.

35(a)(3)

Construction-permanent loans. The Board is proposing to add new comment 35(a)(3)–1 to clarify how § 226.35 applies to cases where a creditor that extends financing for the initial construction of a dwelling also may permanently finance the home purchase. The proposed comment states that the construction phase is not a higher-priced mortgage loan, as provided in § 226.35(a)(3), regardless of the creditor's election to disclose such cases as either a single transaction or as two separate transactions, pursuant to § 226.17(c)(6)(ii).

Loans for the initial construction of a dwelling are excluded from the definition of a higher-priced mortgage loan by § 226.35(a)(3). In adopting the 2008 HOEPA Final Rule, the Board found that construction-only loans do not appear to present the same risk of consumer abuse as other loans. Applying § 226.35 to construction-only loans, which generally have higher interest rates than the permanent financing, could hinder some borrowers' access to construction financing. The permanent financing of such loans, however, is not excluded from the definition. The Board has received inquiries as to how the § 226.35 coverage test and the 2008 HOEPA protections apply to a construction loan that may be permanently financed by the same creditor.

Section 226.17(c)(6)(ii) permits creditors, at their option, to disclose construction-permanent financing as either a single transaction or two separate transactions. That is, if a creditor extends credit to finance the initial construction of a dwelling and may permanently finance the transaction at the end of the construction phase, the creditor may deliver a single TILA disclosure of both phases as a single transaction or may deliver a separate TILA disclosure for each phase as though they were two separate transactions. Creditors have asked whether and how a creditor's election to disclose such cases as either a single transaction or as two separate transactions under § 226.17(c)(6)(ii) affects the coverage and application of § 226.35. In providing that construction lending would not be subject to § 226.35, the Board did not intend to influence creditors' elections under § 226.17(c)(6)(ii). Neither did the Board intend these elections to affect the exclusion of construction financing from the meaning of higher-priced mortgage loan. In any event, the proposed transaction coverage rate, discussed above, would eliminate the use of APRs to determine whether transactions are subject to § 226.35. Such determinations therefore would be unaffected by how many disclosures the creditor elects to provide for a construction-permanent loan, as transaction coverage rates would not be disclosed.

Proposed staff comment 35(a)(3)–1 would clarify that, even if the creditor discloses construction financing that the creditor may permanently finance as two separate transactions, a single transaction coverage rate, reflecting the appropriate charges from both phases, must be calculated and compared to the average prime offer rate to determine coverage under § 226.35(a)(1). If the transaction is determined to be a higher-priced mortgage loan, the proposed comment would clarify that only the permanent phase is subject to the requirements of § 226.35. For example, the requirement to establish an escrow account prior to consummation of a higher-priced mortgage loan secured by a first lien on a principal dwelling, under § 226.35(b)(3), would apply only

[132] Comment 4(a)(3)–3 provides that indirect compensation such as yield spread premiums paid by creditors to mortgage brokers is not a prepaid finance charge. Creditors and brokers have asked the Board whether these payments should be treated as prepaid finance charges because HUD's revised RESPA rules require a yield spread premium to be disclosed as a credit to the borrower. They believe that this disclosure results in a direct payment from the consumer to the mortgage broker, made by drawing on the disclosed credit. The Board notes that the RESPA disclosure does not affect the correct treatment of such payments for TILA purposes. Accordingly, indirect compensation such as yield spread premiums are not included as a separate component of the finance charge, regardless of how they must be disclosed on the RESPA disclosures.

to the permanent phase and not to the construction phase. The proposed comment would ensure that a creditor's disclosure election under § 226.17(c)(6)(ii) is not affected by whether the transaction would be covered under § 226.35. It also would ensure that the construction loan phase is not subject to § 226.35's requirements, for the reasons stated.

Effective Date for 2008 HOEPA Final Rule

When the Board adopted the 2008 HOEPA Final Rule, it adopted comment 1(d)(5)–1, which provides guidance on the effective date for the rule. The Board is proposing to make two changes to comment 1(d)(5)–1, as discussed in more detail in the section-by-section analysis for § 226.1 above. One change would provide that a radio advertisement occurs on the date it is broadcast, and the other would conform comment 1(d)(5)–1 to changes proposed to § 226.20(a). Proposed § 226.20(a) provides that a new transaction would occur when the same creditor and the consumer agree to change certain key terms of an existing closed-end loan secured by real property or a dwelling, without reference to State law. A modification that is a new transaction under proposed § 226.20(a)(1) would also be subject to the 2008 HOEPA rules in § 226.35, if the new transaction is a "higher-priced mortgage loan" under § 226.35(a). The Board is soliciting comment on the potential burdens and benefits of the proposed changes to § 226.20(a) and comment 1(d)(5)–1.

35(b) Rules for Higher-Priced Mortgage Loans

Comment 35(b)–1 provides guidance regarding the applicability of the higher-priced mortgage loan rules to closed-end mortgage transactions. The Board proposes to amend comment 35(b)–1 to add a cross-reference to proposed comment 20(a)(1)(i)–2, which clarifies that, if the same consumer and same creditor agree to increase the interest rate on a transaction resulting in the new transaction being a higher-priced mortgage loan under § 226.35(a), then the creditor must provide new disclosures and also must comply with the requirements under § 226.35(b).

Section 226.38 Content of Disclosures for Closed-End Mortgages

38(a) Loan Summary

38(a)(5) Prepayment Penalty

The August 2009 Closed-End Proposal would create a new § 226.38 governing disclosure content for mortgage transactions. (Current § 226.18 would provide disclosure content for non-mortgage transactions.) For the same reasons discussed above under § 226.18(k)(1), this proposal would revise proposed comment 38(a)(5)–2 to parallel proposed comment 18(k)(1)–1.

38(h) Required or Voluntary Credit Insurance, Debt Cancellation Coverage, or Debt Suspension Coverage

In the August 2009 Closed-End Proposal, the disclosures for credit insurance, debt cancellation coverage, or debt suspension coverage required under § 226.4(d)(1) and (d)(3) were also listed in proposed § 226.38(h). The Board proposes to consolidate the list of these disclosures in § 226.4(d)(1) and (d)(3), and provide a cross-reference to the required disclosures in § 226.38(h). Associated commentary would be revised accordingly.

The August 2009 Closed-End Proposal would require creditors to make a determination at the time of enrollment that the consumer meets any applicable age or employment eligibility criteria for insurance or debt cancellation or debt suspension coverage. *See* proposed §§ 226.4(d)(1)(iv) and (d)(3)(v), 226.38(h). To provide creditors with some flexibility, the Board proposes to revise comment 38(h)–2 to allow creditors to make the determination *prior to* or at the time of enrollment.

38(k) Reverse-mortgage Transactions

Currently reverse-mortgage transactions that are structured as closed-end credit are subject to §§ 226.17 and 18. Under the Board's August 2009 Closed-End Proposal, disclosures for closed-end mortgages would move to new §§ 226.37 and 226.38. For closed-end reverse mortgages, the Board is proposing to consolidate the content of the disclosure requirements in § 226.33. However, under the August 2009 Closed-End Proposal there would be a number of other references in Regulation Z to mortgages subject to § 226.38, which include closed-end reverse mortgages. In order to make clear that closed-end reverse-mortgage transactions should still be included in any reference to § 226.38, the Board proposes to mention them explicitly in § 226.38(k) and provide a cross-reference to the provisions in § 226.33 and § 226.38 which apply to reverse mortgages.

Section 226.40 Prohibited Acts or Practices in Connection With Reverse Mortgages

In addition to the disclosure and advertising rules discussed above under § 226.33, the Board is proposing additional consumer protections for reverse mortgages. As discussed below, the proposal would prohibit requiring the consumer to purchase other financial or insurance products as a condition of obtaining the reverse mortgage and would require counseling for reverse mortgage consumers. The Board also considered other consumer protections, discussed below, that it is not proposing.

40(a) Requiring the Purchase of Other Financial or Insurance Products

Background

Consumer advocates and policy makers have raised concerns that reverse mortgage creditors and others may persuade consumers to use the proceeds of their reverse mortgages to purchase financial or other products unsuited to their circumstances. Based on discussions with industry representatives and consumer advocates, the Board understands that reverse mortgage originators often refer reverse mortgage consumers to third parties that offer the consumers other products or services. Some of these creditors or others affirmatively require the consumer to purchase another financial product to obtain the reverse mortgage. Some consumer advocates have stated that more unscrupulous creditors have allegedly "tied" other products to the reverse mortgage by covertly slipping authorization documents for them in with the reverse mortgage paperwork.[133]

Providers of other financial and insurance products may receive commissions, and those who refer consumers to these providers may receive referral fees, creating strong incentives to encourage reverse mortgage consumers to purchase additional products regardless of whether they are appropriate.[134] When financed by reverse mortgage proceeds, these commissions and fees can deplete home equity, often without the consumer's full awareness of these charges and their long-term consequences.

Products often cited as being required as part of a reverse mortgage transaction

[133] *See, e.g., Building Sustainable Homeownership: Responsible Lending and Informed Consumer Choice,* Public Hearing on the Home Equity Lending Market before the Federal Reserve Bank of San Francisco, 183 (2006) (Statement by Shirley Krohn, Board Chair, Fair Lending Consortium).

[134] *See, e.g., id.* (statement by Margaret Burns, Director of the Federal Housing Administration's Single Family Program Development, U.S. Department of Housing and Urban Development); Nat'l Consumer Law Center, *Subprime Revisited: How Reverse Mortgage Lenders Put Older Homeowners' Equity at Risk,* 14 (Oct. 2009) (NCLC Report).

include annuities,[135] certificates of deposit (CDs) and long-term care insurance, among others. These may be beneficial products for many consumers and an appropriate way to spend reverse mortgage funds; however, purchase of these and other products may harm consumers who are uninformed or misinformed about them.

Consumers who purchase an annuity, for example, normally cannot receive payments until a future date; some reverse mortgage consumers have reportedly been sold annuities scheduled to mature after their life expectancy.[136] Further, an annuity may yield at a lower rate of interest than the reverse mortgage used to pay for it, causing a borrower to lose more in home equity than he or she could gain in annuity profits. Reverse mortgage borrowers who become aware of these drawbacks face high fees for early withdrawal or cancellation of the annuity.

Similarly, a CD may have a lower rate of interest than the reverse mortgage, tying up the consumer's money without yielding a greater return than the corresponding loss of home equity. Should the consumer need the funds before expiration of the CD term, high early withdrawal penalties may apply.

Long-term care insurance may be unnecessary, such as where the long-term care insurance coverage is not appreciably better than Medicaid coverage. Other consumers may not be able to afford the premiums if they go up, resulting in the loss of all of their reverse mortgage and other funds used to pay upfront costs and premiums. Further, a particular plan may not cover what the consumer needs, or policies may have terms or limitations that make receiving money for a claim difficult.

Housing and Economic Recovery Act of 2008 (HERA)

To address concerns about inappropriate product tying in reverse mortgage transactions, in 2008 Congress adopted three rules restricting the sale of other products and services with an FHA-insured reverse mortgage, or HECM. Adopted as part of the Housing and Economic Recovery Act of 2008 (HERA),[137] these rules apply only to HECMs; they do not affect proprietary reverse mortgage products.

- *Anti-tying Provision: First,* Congress prohibited the lender (or any other party) from requiring a borrower (or any other party) to purchase "an insurance, annuity, or other similar product" as a condition of obtaining a HECM.[138] Products exempt from this prohibition include title insurance, hazard, flood, or other peril insurance, or other products determined by HUD to be "customary and normal" for originating a HECM.
- *Provision Restricting Activities: Second,* Congress prohibited the lender and "any other party that participates in the origination of a [reverse] mortgage" from "participat[ing] in" any financial or insurance activity other than reverse mortgage lending. These parties may do so, however, if they have "firewalls and other safeguards" to ensure the following:
- Individuals involved in originating a reverse mortgage are not involved with any other financial or insurance product and have no incentive to see that the reverse mortgage consumer obtains one.
- The consumer will not be directly or indirectly required to purchase another financial or insurance product.
- *Provision Restricting Relationships:* Third, Congress prohibited reverse mortgage lenders and "any other party that participates in the origination of a [reverse] mortgage" from being "associated with" or "employing" any party that participates in or is involved with any financial or insurance activity other than reverse mortgage lending. These relationships are permitted, however, if the party maintains the firewalls and safeguards described above.

HUD—Implementing the HERA Cross-selling Provisions

As an initial step in implementing the HERA cross-selling provisions, HUD has issued a Mortgagee Letter instructing HECM lenders that they must not condition a HECM on the purchase of "any other financial or insurance product."[139] Consistent with HERA, the Mortgagee Letter also advises lenders to establish firewalls and other safeguards to ensure that there is no undue pressure or appearance of pressure for a HECM borrower to purchase another product from the mortgage originator or mortgage originator's company. The Board understands that HUD plans to issue an Advance Notice of Proposed Rulemaking (ANPR) to solicit input on how HUD should interpret the HERA cross-selling provisions.

Federal Anti-Tying Laws

Banks and other depository institutions are subject to anti-tying rules under the Bank Holding Company Act[140] (BHCA) and the Gramm-Leach Bliley Act[141] (GLBA).

Bank Holding Company Act amendments. Section 106 of the BHCA generally prohibits a bank from conditioning the availability or price of one product, such as a reverse mortgage, on a requirement that the customer also obtain another product, such as insurance or an annuity, from the bank or an affiliate of the bank. However, the statute expressly permits a bank to condition the availability or price of a product or service on a requirement that the customer also obtain certain bank products—loan discount, deposit, or trust services—from the bank or an affiliate of the bank. Savings associations and savings and loan association holding companies and their affiliates are subject to similar anti-tying restrictions under the Home Owners' Loan Act (HOLA).[142]

Gramm-Leach Bliley Act. Section 305 of the GLBA requires the Federal banking agencies to prescribe regulations that prohibit depository institutions from engaging in practices that would cause a reasonable consumer to believe that an extension of credit (which would include a reverse mortgage) is conditioned on the purchase of an insurance product or an annuity from the creditor or its affiliates, or on the consumer's agreement not to purchase an insurance product or annuity from an unaffiliated entity.

Interagency Supervisory Guidance on Reverse Mortgages. The Board and other Federal banking agencies, through the FFIEC, responded to concerns about unfair and deceptive practices in reverse mortgage lending by issuing guidance

[135] In this Supplementary Information, an "annuity" means a contractual arrangement under which an insurance or financial entity receives a premium or premiums from a consumer, and in exchange is obligated to make payments to the consumer at some point in the future, usually at regular intervals. *See* 4 Am. Jur. 2d Annuities, § 1.

[136] *See, e.g., Reverse Mortgages: Polishing not Tarnishing the Golden Years,* Hearings before the Senate Special Committee on Aging, 110th Cong., 1st Sess. 22 (2007) (statement by Prescott Cole, on behalf of the Coalition to End Elder Financial Abuse).

[137] Housing and Economic Recovery Act of 2008 (HERA), Public Law 110–289 (July 30, 2008), § 2122 (amending Section 255 of the National Housing Act, 12 U.S.C. 1715z–20).

[138] HERA, § 2122(a)(9) (codified at 12 U.S.C. 1715z–20(n) and (o)).

[139] HUD Mortgagee Letter 2008–24 (Sept. 16, 2008).

[140] Public Law 91–607, Title I, § 106(b), 84 Stat. 1766 (Dec. 31, 1970) (codified at 12 U.S.C. §§ 1972 (banks and bank holding companies), 1464(q) (savings and loan associations), and 1467a(n) (savings and loan association holding companies and their affiliates)).

[141] Public Law 106–102, Title III, Subtitle A, § 305, 113 Stat. 1338, 1410–15 (Nov. 12, 1999) (codified at 12 U.S.C. 1831x) (implemented at 12 CFR 14.30 (Office of the Comptroller of the Currency), 208.83 (Board of Governors of the Federal Reserve System), 343.30 (Federal Deposit Insurance Corp.), and 536.30 (Office of Thrift Supervision)).

[142] *See* 12 U.S.C. 1464(1) and 1467a(n).

for institutions offering reverse mortgages.[143] To guard against inappropriate product tying with reverse mortgages, the Final Reverse Mortgage Guidance advises institutions to adopt policies and internal controls that do the following:

- Ensure that the institution does not violate any applicable anti-tying restrictions. To illustrate, the Guidance states that an institution risks violations if it requires the borrower to purchase an annuity, insurance or any product other than a traditional banking product in order to obtain a reverse mortgage from the institution or an affiliate.
- Ensure that the institution complies with restrictions designed to avoid conflicts of interest. To illustrate, the Guidance states that an institution risks violations if it requires the borrower to purchase an annuity, insurance (other than appropriate title, flood or hazard insurance), or similar financial product from the institution or any third party in order to obtain a reverse mortgage from the institution or broker.[144]

The Guidance also advises institutions to adopt compensation policies to guard generally against "other inappropriate incentives" for loan officers and third parties, such as mortgage brokers and correspondents, to make a loan.[145]

The Board's Proposal

The anti-tying provisions of the BHCA, GLBA and HERA apply to some reverse mortgages, but not all. The Board believes that anti-tying rules specific to reverse mortgages may be appropriate to ensure that all reverse mortgage originations are covered—including both government-insured reverse mortgages and proprietary products, as well as reverse mortgages originated by both depository and nondepository institutions. For the reasons discussed below, the Board believes that the practice of requiring a consumer to purchase any other "financial or insurance product" as a condition of obtaining a reverse mortgage could be unfair to consumers. Based on its authority under TILA Section 129(*l*)(2)(A) to prohibit acts or practices in mortgage lending that the Board finds to be unfair or deceptive, the Board proposes new § 226.40(a) to prohibit creditors and loan originators from engaging in this practice. The Board does not intend to suggest that this practice is unfair prior to the effective date of any final rule implementing this proposed prohibition. Prior to the effective date of a final rule, the Board expects that whether this practice is unfair will be judged on a case-by-case basis and on the totality of the circumstances under applicable laws and regulations.

Substantial consumer injury. Consumers who are required to use reverse mortgage proceeds to purchase ancillary financial or insurance products stand to lose substantial equity in their most valuable lifetime asset for little or no benefit. This can take away their ability to cover daily living expenses, medical costs and other needed expenses at a time when their income sources are most limited. In addition, for many seniors, their longtime goal of having assets to share with their heirs can be significantly undermined, affecting their heirs' financial circumstances as well. Worse, misuse of reverse mortgage funds may leave borrowers unable to afford taxes and insurance or home maintenance required under the reverse mortgage contract, exposing them to foreclosure at an especially vulnerable time in their lives.

Injury not reasonably avoidable. For several reasons, reverse mortgage consumers may not be reasonably able to avoid the injuries that may result from having to use their reverse mortgage funds for an ancillary product, or from having to obtain a substantially more expensive reverse mortgage if they do not purchase an additional product. First, reverse mortgage borrowers often have limited options for obtaining additional funds; for some, a reverse mortgage may be the resource of last resort. Faced with high medical expenses or other financial challenges, these consumers may be forced to accept a requirement that they use reverse mortgage funds to purchase another product, even if they question its necessity or benefits, or to accept a substantially more expensive loan that will diminish their home equity much more quickly.

Second, reverse mortgages are complex loan products whose requirements and characteristics tend to be unfamiliar even to the most sophisticated consumers. Thus, many consumers may be easily misled or confused about the costs of other products and services and the potential downsides to using their home equity to pay for them.

Third, other consumer protections may not, by themselves, sufficiently protect reverse mortgage consumers from inappropriate product tying because reverse mortgages are especially complex and the target consumer population—seniors—is comparatively vulnerable. For example, the disclosure required in proposed § 226.33(b) that the consumer is not obligated to use his or her reverse mortgage proceeds to purchase any other financial or insurance product or service is an important consumer protection but may not by itself protect all consumers from persuasive loan officers and brokers, who may pressure consumers to rush through paperwork. In addition, the proposed anti-tying rule and the disclosure rule are complementary: the anti-tying rule is necessary to make the disclosure true.

Similarly, reverse mortgage counseling, required under proposed § 226.40(b), is critical to a consumer's understanding of a reverse mortgage but may not sufficiently protect consumers from inappropriate product tying. Counselors are not trained to advise consumers about the suitability of a range of financial or insurance products and services, and recent data indicate that the effectiveness of counseling may not be consistent from borrower to borrower.[146]

Injury not outweighed by countervailing benefits. On balance, potential benefits of tying other products to a reverse mortgage do not appear to outweigh the substantial harm that could be caused, as described above. The Board recognizes that requiring a consumer to pay for certain additional financial products to obtain a reverse mortgage or certain terms may benefit some consumers. For instance, if a consumer opts to receive reverse mortgage proceeds in a lump sum to take advantage of a fixed rate, the consumer may benefit from putting the funds in a CD rather than a savings account. However, consumers could still enjoy this benefit by voluntarily choosing this option. The proposed anti-tying prohibition prohibits the consumer from being *required* to put the money in a CD, because the consumer would incur penalties for early withdrawal.

Benefits to competition also do not appear to outweigh injury to the consumer. Indeed, it has long been recognized that tying arrangements suppress competition.[147] The function of a tying arrangement is generally to market a product that is critical or desirable to a consumer (the reverse mortgage) and tie access to that product to the purchase of a less critical or

[143] Final Reverse Mortgage Guidance, 75 FR 50801.

[144] *Id.* at 50811

[145] *Id.*

[146] U.S. Government Accountability Office, GAO–09–606 at 32–40.

[147] *See Standard Oil Co. of Cal.* v. *United States,* 337 U.S. 293, 305–06 (1949) (noting that tying arrangements "serve hardly any purpose other than to suppress competition").

desirable product (the ancillary financial or insurance product).[148] Product tying by definition creates an obstacle to a consumer's ability to survey the available alternatives and choose the most advantageous product. In an ideal marketplace, if a consumer wants certain financial products, the consumer could weigh the costs, benefits, and risks of several alternatives, such as various insurance products. In a tying arrangement, however, the creditor chooses a product for the consumer regardless of the benefits for that consumer. By contrast, if consumers are permitted to choose ancillary products freely, as the proposed rule seeks to promote, competition would likely increase and costs would concomitantly go down.

The Board requests comment on whether the proposed anti-tying rule addresses the practices of greatest concern and prevalence regarding product tying in reverse mortgage transactions. In this regard, the Board invites additional examples of inappropriate product tying in reverse mortgage transactions, as well as commenters' views on the potential effectiveness of the proposal in stopping these practices. Specific aspects of the proposed prohibition are discussed below.

Covered Persons. The proposed anti-tying rule would apply to a creditor or a loan originator, as defined in § 226.36(a)(1). Regulation Z defines "creditor" to mean, in pertinent part, "A person (A) who regularly extends consumer credit that is subject to a finance charge * * *, and (B) to whom the obligation is initially payable, either on the face of the note or contract, or by agreement when there is no note or contract." § 226.2(a)(17)(i). Under the Board's August 2009 Closed-End Proposal, a "loan originator" would be defined as, "with respect to a particular transaction, a person who for compensation or other monetary gain, arranges, negotiates, or otherwise obtains an extension of consumer credit for another person. The term 'loan originator' includes employees of the creditor. The term includes the creditor if the creditor does not provide the funds for the transaction at consummation out of the creditor's own resources, out of deposits held by the creditor, or by drawing on a bona fide warehouse line of credit." Proposed § 226.36(a)(1); 74 FR 43232, 43331–43332, Aug. 29, 2009. This definition was adopted by the Board in a final rule published elsewhere in today's **Federal Register.** The Board requests comment on the proposal to apply this rule to creditors and loan originators, including whether the proposed anti-tying rule should apply to any other persons.

40(a)(1) Financial or Insurance Products

Excluded Products and Services

Proposed § 226.40(a)(1) excludes from the meaning of "financial or insurance product" two types of products and services: (1) transaction accounts and savings deposit accounts, as defined in Regulation D, 12 CFR part 204, that are established to disburse the reverse mortgage proceeds; and (2) products and services customarily required to protect the creditor's interest in the collateral or otherwise mitigate the creditor's risk of loss.

Transaction accounts and savings deposits. With the first exemption—transaction accounts and savings deposits, as defined in Regulation D, that are established to disburse reverse mortgage proceeds—the Board seeks to facilitate the disbursement of reverse mortgage proceeds to the consumer. The Board understands based on outreach that a consumer may be able to access their reverse mortgage funds more readily if they are deposited in an account with the creditor or loan originator. Under Regulation D, a "transaction account" includes demand deposit accounts such as traditional checking accounts and NOW accounts.[149] A "savings deposit" includes traditional interest-bearing savings accounts, passbook savings accounts and money market accounts.[150] The Board does not propose to limit the consumer's use of these accounts only to transactions involving proceeds of the reverse mortgage. However, the Board proposes to permit that these accounts be required only if they will serve as a means of disbursing reverse mortgage proceeds. Neither "transaction accounts" nor "savings deposits" under Regulation Z include "time deposit" accounts. As indicated in proposed comment 40(a)(1)–1, the Board intends to prohibit the tying of time deposit accounts, which include CDs and other accounts to which penalties for early withdrawal may apply, to a reverse mortgage.

The Board requests comment on the necessity of the exemption for transaction and savings deposit accounts from the products that cannot be tied to a reverse mortgage, and solicits views on whether this exemption should include a broader or narrower range of accounts.

Products and services customarily required in connection with a reverse mortgage. The Board also proposes to exempt products and services that creditors or loan originators "customarily" require in a reverse mortgage transaction to safeguard their interest in the collateral or otherwise guard against loss. Proposed comment 40(a)(1)–2 explains that these products would include, among others, "appraisal or other property evaluation services; title insurance; flood, hazard or other peril insurance; and mortgage insurance, such as the insurance required by the U.S. Department of Housing and Urban Development." The Board believes that this exemption is necessary to facilitate the availability of credit to consumers and to promote the safety and soundness of lending institutions. Comment is requested on the appropriateness of this exemption, and the utility of the examples of exempt products and services in the proposed comment.

Covered Products and Services

Proposed comment 40(a)(1)–1 clarifies that the "financial or insurance products," namely, products and services that may not be tied to a reverse mortgage, include both bank and nonbank products. The comment provides the following examples of covered products and services: extensions of credit, trust services, certificates of deposit, annuities, securities and other nondepository investment products, financial planning services, life insurance, long-term care insurance, credit insurance, and debt cancellation and debt suspension coverage.

Unlike the proposal for reverse mortgages, the BHCA anti-tying provision specifically permits a bank to condition both the availability and price of credit on the requirement that the customer obtain a product traditionally provided by a bank, specifically, a "loan, discount, deposit, or trust service." [151] These "bank" products include, but are not limited to, all types of extensions of credit, including loans, lines of credit, and backup lines of credit, and all forms of deposit accounts, including demand, negotiable order of withdrawal ("NOW"), savings and time deposit accounts, as well as CDs.

With the exception of certain deposit accounts, discussed below, the Board proposes to include these types of bank products in the proposed anti-tying rule for reverse mortgages for three reasons.

[148] *See Times-Picayune Publishing Co.* v. *United States,* 345 U.S. 594, 614 (1953) ("The common core of * * * unlawful tying arrangements is the forced purchase of a second distinct commodity with the desired purchase of a dominant 'tying' product.").

[149] *See* 12 CFR 204.2(e).

[150] *See id.* 204.2(d).

[151] 12 U.S.C. 1972(1)(A).

First, any number of traditional bank products could be inappropriate for a reverse mortgage consumer to purchase in connection with obtaining the reverse mortgage. As noted, one example would be a CD that yields at a lower rate than the rate of interest accruing on the reverse mortgage. Thus, the proposal is intended to enhance consumer protection by covering a fuller range of potential abuses.

Second, as discussed earlier, the Board believes that reverse mortgage borrowers are particularly vulnerable to abusive product tying and need stronger protections than those that apply to other financial service consumers. The proposal is intended to give reverse mortgage borrowers added protections without diminishing their access to appropriate traditional bank products, such as a checking or savings account to facilitate receipt of funds; reverse mortgage consumers would retain the freedom to choose any product voluntarily.

Third, an exemption for bank products would unfairly favor depositories over nondepositories. Unlike the BHCA's anti-tying rule, which applies only to depository institutions, the Board's proposed rule would apply to both depositories and nondepositories. The rationale for the traditional bank product exception under the BHCA anti-tying rule—namely, to allow banks and their customers to continue to negotiate their fee arrangements on the basis of the customer's entire banking relationship with the bank—would not apply to nondepositories. In effect, depositories would have greater leverage to reduce rates and fees on reverse mortgages than nondepositories because they could package a wider range of products with the reverse mortgage.

Proposed comment 40(a)(1)–1 also specifically mentions certain products that the Board has learned through research and outreach may be especially problematic in reverse mortgage transactions. These include annuities, financial planning services, and long-term care insurance. Credit insurance and debt cancellation and debt suspension coverage are mentioned to clarify that they would be covered as well, even though they may not be common in reverse mortgage transactions.

Other Products and Services

As proposed, the reverse mortgage anti-tying rule would not prohibit conditioning a reverse mortgage on the consumer's obtaining home improvement services, because home repairs may legitimately be required before a consumer is eligible for a reverse mortgage.[152] The Board received anecdotal evidence, however, that reverse mortgage originators may require consumers to obtain unnecessary or excessively costly home repairs. The Board requests additional evidence of abuse in home improvement contracting associated with reverse mortgages, if any, and comments on whether and how Board rules should address potential abuse in this area without interfering with legitimately required repairs.

The Board requests comment on benefits or drawbacks of its proposed explanations of "financial or insurance product," as well as whether any additional products should be expressly included in or exempted from the tying restrictions.

40(a)(2) Safe Harbor

The Board is aware that whether a creditor has required a consumer to purchase another product to obtain a reverse mortgage in violation of § 226.40(a) may not always be clear. For this reason, the Board proposes in § 226.40(a)(2) a "safe harbor" for compliance with the anti-tying rule. The proposed paragraph provides that a creditor or other person will not be deemed to have required a consumer to purchase another financial or insurance product if two conditions are met.

First, the consumer received at application the "Key Questions to Ask about Your Reverse Mortgage" document required under proposed § 226.33(b), or a substantially similar document. As proposed by the Board, this document includes a statement that the consumer is not obligated to purchase any other financial or insurance product to obtain the reverse mortgage, along with explanatory information.

Second, for a reverse mortgage subject to § 226.5b, the account was opened, or, for any other reverse mortgage, the loan was consummated, at least 10 calendar days before the consumer becomes obligated to purchase any financial or insurance product from any of the following persons:

(1) The creditor;

(2) The loan originator;

(3) An affiliate of either the creditor or loan originator; or

(4) Any other party, if the creditor, loan originator, or an affiliate of either will receive compensation for the purchase of the ancillary product or service.

Comment 40(a)(2)–1 safe harbor conditions not met. Proposed comment 40(a)(2)–1 clarifies that where the safe harbor conditions are not met in a particular reverse mortgage transaction, the creditor or loan originator will not necessarily have violated the anti-tying rule in § 226.40(a). Whether a violation has occurred in this case will depend on an evaluation of all of the facts and circumstances. To provide additional guidance, however, the Board proposes an example of an instance in which the safe harbor conditions were not met and the creditor violated § 226.40(a). In this example, the terms or features of a reverse mortgage are not available unless the consumer purchases another financial or insurance product; in this situation, the Board believes that the consumer has been required to purchase the product to obtain the reverse mortgage.

The Board solicits comment on the example of an anti-tying violation where the creditor did not meet the safe harbor conditions.

"Key Questions" Document

The first condition of the safe harbor—that the consumer has received the "Key Questions to Ask about Your Reverse Mortgage"—is intended to promote the consumer's understanding that he or she is not obligated to purchase an additional financial or insurance product. As proposed by the Board, this two-page document includes the following information for the consumer:

What if my lender wants me to use money from my reverse mortgage to buy an annuity or make another investment?

Under Federal law, you cannot be required to use your reverse mortgage money to purchase any other financial or insurance product (such as an annuity, long-term care insurance, or life insurance). If another product is offered to you, make sure you understand: (1) how the product works and what its benefits are, (2) how much it costs, (3) whether you need it, and (4) how much money the person selling the product makes if you purchase it. Talk with a HUD-approved reverse mortgage counselor or financial advisor before you decide.

See Attachment A. To qualify for the safe harbor, the creditor or loan originator must have provided this disclosure on or with the application, as required under proposed § 226.33(b).

10-Calendar-Day Waiting Period

The Board believes that the "Key Questions" document is an important

[152] *See, e.g.,* 24 CFR 206.47 (requiring properties that do not meet the property standards of the HECM program to be repaired before FHA will insure reverse mortgages secured by those properties).

consumer safeguard but is concerned that by itself the document may not sufficiently protect all consumers from high-pressure sales tactics. Therefore, the Board proposes a second element of the safe harbor—requiring a 10-day waiting period after account-opening or consummation, as applicable, before the consumer becomes obligated to purchase another financial or insurance product from one of four parties: the creditor; the loan originator; an affiliate of either the creditor or loan originator; and any other person, if the creditor, loan originator, or an affiliate of either will receive compensation for the purchase.

This element of the proposed safe harbor is intended to create an operational barrier to requiring the purchase of an additional product as a condition of providing a reverse mortgage. In the Board's view, a purchase several days after reverse mortgage funds are available to a consumer is more likely to be voluntary than a purchase closer in time to consummation or account opening of a reverse mortgage. Consumers will be more adequately prepared to make decisions about purchasing additional products when they have several days after consummation or account opening to consider whether to enter into a reverse mortgage and also to purchase another financial or insurance product. A reverse mortgage, as any other home mortgage, is a major financial undertaking requiring the consumer to contemplate considerable details, review voluminous paperwork, and make numerous decisions at and around the time of closing. But reverse mortgages are particularly complex loan products that carry special risks; consumers need ample time before and after the transaction to understand them.

The proposal may also have the effect of curtailing instances of consumers believing (or being led to believe) that the purchase of another product is required to complete the reverse mortgage transaction when it is not. In rescindable transactions, for example, proceeds typically may not be disbursed until after the consumer's right to rescind has expired, which is three business days after account-opening or consummation. Thus, if a consumer consummates the reverse mortgage on Monday, June 1, the consumer typically would have access to the reverse mortgage funds on Friday, June 5 (i.e., the day after the consumer's right to rescind has expired). The 10-day waiting period would extend until Thursday, June 11, however. The condition that the reverse mortgage transaction and the purchase of another product be separated by 10 days ensures that consumers are less susceptible to high-pressure sales tactics that might occur at or immediately after consummation or account opening, but before funds are available. Finally, the proposal has the added consumer benefit of giving consumers a "cooling off" period of several days after reverse mortgage funds are available to consider whether using that money to buy another financial or insurance product is a sound financial choice.

Comment 40(a)(2)(B)–1 obligated to purchase. Proposed comment 40(a)(2)(ii)–1 states that whether a consumer has become obligated to purchase a financial or insurance product will be a factual inquiry. This comment provides guidance on when a consumer becomes obligated to purchase a product through two examples. First, a consumer would become obligated to purchase a financial or insurance product, for example, when the consumer signs an agreement to purchase the product, even if the purchase will occur in the future. Second, a consumer would also become obligated to purchase a product when the consumer signs an agreement to purchase a product but has the option to cancel the purchase for a period of time after the purchase occurs. Finally, proposed comment 40(a)(2)(ii)–1 provides the following example to explain the effect of the 10-calendar-day waiting period: If a consumer consummates a reverse mortgage on Monday, June 1, the creditor will qualify for the safe harbor only if the consumer does not sign an agreement to purchase another financial or insurance product from the parties enumerated in this paragraph until Thursday, June 11, at the earliest.

The Board requests comment on the utility and appropriateness of the guidance in the proposed commentary regarding when a reverse mortgage consumer becomes obligated to purchase another financial or insurance product. The Board solicits comment on whether and what additional examples may be warranted.

Persons From Whom the Consumer may not Purchase a Product

Creditor, loan originator, or affiliate of either. The proposed safe harbor waiting period is intended to eliminate incentives for the creditor or loan originator to require a consumer to purchase another product or service to obtain the reverse mortgage. Thus, the persons from whom a consumer cannot have purchased another product or service within 10 days of consummation are the creditor, loan originator, and any affiliate of either. See proposed § 226.40(a)(2)(ii)(A)–(C). The Board believes that a product purchased from one of these parties would confer a financial benefit on the creditor or loan originator that may give the creditor or loan originator an incentive to require the purchase.

Nonaffiliated third party. The safe harbor would also prohibit, within the 10-calendar-day waiting period, the consumer's purchase of a product or service from a nonaffiliated third party if the creditor or loan originator, or an affiliate of either, would receive compensation for the purchase. Proposed comment 40(a)(2)(ii)(D)–1 is intended to clarify that compensation would be considered to be received by a creditor, loan originator, or an affiliate of either with respect to a particular purchase, if any of these parties receives a fee because the consumer purchased the ancillary product.

For further guidance, this comment also gives an example of a situation in which a creditor would not be deemed to have received compensation for a consumer's purchase of an ancillary product. Specifically, the comment states that a creditor does not receive compensation for a consumer's purchase of an ancillary product if the creditor sells a customer list to a nonaffiliated third party, which, in turn, sells a financial or insurance product to a reverse mortgage consumer on the list within the 10-day waiting period, as long as the creditor receives no compensation directly or indirectly related to whether the consumer purchases the product. The Board intends with this example to clarify that the safe harbor does not prohibit practices that may result in compensation to the creditor, loan originator, or affiliate, when the compensation received would be too attenuated from the purchase of the ancillary product to create a realistic incentive for the creditor or loan originator to engage in prohibited product tying.

The Board requests comment on the appropriateness and efficacy of the proposed safe harbor and accompanying commentary for addressing the problem of inappropriate product tying in reverse mortgage transactions.

Disbursements Directly to the Consumer

The HECM rules require that reverse mortgage proceeds must be disbursed directly to the consumer "at the initial disbursement or after closing (upon expiration of the 3-day rescission period under 12 CFR part 226, if applicable)," except for certain payments related to the mortgage transaction. The following disbursements are excepted from the requirement to disburse HECM proceeds directly to the consumer: (1) Disbursements to a relative or legal representative of the mortgagor, or a trustee for the benefit of the mortgagor; (2) disbursements for the initial mortgage insurance premium required for the HECM; (3) fees that the mortgagee is authorized to collect under the HECM rules; (4) amounts required to discharge any existing liens on the property; (5) annuity premiums if disclosed as part of the TALC disclosure required in current § 226.33; and (6) funds required to pay contractors who performed repairs as a condition of closing, in accordance with standard FHA requirements for repairs required by appraisers.[153]

The Board believes that the proposed disclosure requirement and 10-day waiting period to qualify for the "safe harbor" will sufficiently protect consumers from harmful product tying in reverse mortgage transactions; thus, the Board does propose to require that reverse mortgage proceeds be disbursed only to the consumer. The Board is also concerned that the term "initial" disbursement may be difficult to define clearly, especially in open-end reverse mortgage transactions where the consumer might not draw on the line until well after account opening. A rule covering disbursements beyond those occurring at or immediately after account opening, however, may be overly broad. For example, requiring that proceeds be disbursed directly to the consumer one year after account opening would be unnecessary to stop the creditor from requiring the consumer to purchase another product as a condition of obtaining the reverse mortgage; the consumer would already have the reverse mortgage.

The Board requests comment on whether the Board should adopt disbursement restrictions similar to those that apply to HECMs for proprietary reverse mortgages, including specific reasons why commenters believe that the Board should or should not do so.

40(b) Counseling

The Board is concerned that consumers seeking reverse mortgages may not be sufficiently aware of the risks, obligations, and financial implications of reverse mortgages solely through disclosures provided during the origination process. The Board's consumer testing of reverse mortgage disclosures revealed that even more sophisticated consumers do not readily understand how reverse mortgages work and their impact on a consumer's financial future. As discussed above in the section-by-section analysis to proposed § 226.33(a)–(d), the Board proposes comprehensive revisions to TILA's reverse mortgage disclosures, which the Board anticipates will significantly improve consumer understanding of these complex transactions. As discussed further below, however, the Board believes that the complexity of and risks associated with reverse mortgages warrant added consumer protections, including a requirement that counseling occur before the consumer obtains a reverse mortgage and at least three business days before a consumer has to pay a nonrefundable fee in connection with a reverse mortgage transaction (except a fee for the counseling).

Background

Prospective borrowers must receive counseling before obtaining a HECM.[154] In addition, several states have enacted reverse mortgage counseling rules.[155] Federal law does not require prospective borrowers of proprietary reverse mortgages to obtain counseling.

Counseling Requirements for HECMs

Referrals. When a potential HECM borrower first contacts or communicates with an FHA-approved HECM mortgagee, the mortgagee must provide the borrower with contact information for ten HUD-approved counseling agencies.[156]

Timing. A HECM mortgagee may not begin "processing" a HECM loan application before receiving a certificate confirming that the borrower has received reverse mortgage counseling.[157] According to HUD guidance, this means that a mortgagee may accept a borrower's application before receiving the counseling certificate, but "may not order an appraisal, title search, or FHA case number or in any other way begin the process of originating a HECM loan."[158] The mortgagee also may not charge an application fee or any other HECM-related fees before the mortgagee receives a required HECM counseling certificate indicating that counseling has been completed.

Content. HECM counselors must provide information on, among other topics: (1) The financial implications of entering into a HECM; (2) the consequences of a HECM on the borrower's taxes, estate, and eligibility for assistance under Federal and state programs; (3) other home equity conversion options, such as sale-leaseback financing; (4) additional financial options such as other housing, social service, health, and financial options (provided through the government or non-profit organizations, for example); and (5) the circumstances under which the HECM becomes due.[159]

Counselor independence. HECM mortgagees are prohibited from steering, directing, recommending, or otherwise encouraging a consumer to choose a particular counseling agency.[160] They also may not contact a counselor or counseling agency to refer a consumer or discuss a consumer's personal information.

In 2008, Congress expanded these general restrictions by prohibiting certain parties from directly or indirectly compensating or being associated with a counselor or counseling agency; specifically, any party "involved in": (1) "originating or servicing the mortgage"; (2) "funding the loan underlying the mortgage"; or (3) "the sale of annuities, investments, long-term care insurance, or any other type of financial or insurance product."[161] To implement these measures, HUD issued a Mortgagee Letter prohibiting lenders from paying counseling agencies, directly or indirectly, for HECM counseling services through either a lump-sum payment or on a case-by-case basis.[162] The Mortgagee Letter indicates that a lender would "indirectly" pay for HECM counseling by "funneling payment for HECM counseling through a nonprofit, foundation, association or any other entity or organization that is a branch of,

[153] *See* 24 CFR 206.29.

[154] *See* 12 U.S.C. 1715z–20(d)(2)(B) and (f); HECM Handbook 4235.1 REV–1, ch. 2–1.

[155] *See* Ariz. Rev. Stat. §§ 6–1602, 1603A; Ark. Code Ann. § 23–54–106(a); Cal. Civ. Code §§ 1923.2(j) and (k), 1923.5(a); Colo. Rev. Stat. § 11–38–111; Del. Code Ann. Tit. 5 §§ 2118 and § 2244; 205 Ill. Comp. Stat. Ann. § 5/6–1; Md. Fin. Inst. Code Ann. §§ 12–1219, 12–1221; Mass. Gen. Laws Ann. Ch. 167E, § 7(e); Mo. Rev. Stat. § 53–270(6); N.Y. Real Property Law §§ 280(2)(g) and 280–a(2)(j); N.C. Gen. Stat. §§ 53–257(4), 53–264(b), 53–269, 53–270(6); S.C. Code Ann. § 29–4–60; Tenn. Code Ann. §§ 47–30–102(4), 47–30–104(c), 47–30–115(6), 47–30–109(b); Tex Const. Art. 16 § 50(k)(8); Utah Code Ann. § 61–2d–112; Vt. Stat. Ann. Tit. 8 § 10702; W.Va. Code § 47–24–7(b).

[156] HUD Mortgagee Letter 2009–10 (March 27, 2009).

[157] HECM Handbook 4235.1 REV–1, ch. 2–1, 2–3; HUD Mortgagee Letter 2004–25 (June 23, 2004).

[158] HUD Mortgagee Letter 2004–25 (June 23, 2004).

[159] HECM Handbook 4235.1 REV–1, ch. 2–5; HUD Mortgagee Letter 2004–25 (June 23, 2004).

[160] HUD Mortgagee Letter 2004–25 (June 23, 2004).

[161] HERA § 2122(a)(3) (codified at 12 U.S.C. 1715z–20(d)(2)(B)).

[162] HUD Mortgagee Letter 2008–28 (Sept. 29, 2008).

affiliated with or associated with a lending institution." Neither the statute nor HUD's Mortgagee Letter indicates whether a creditor or other person is prohibited from, for example, making charitable donations designated for general purposes to a non-profit organization that offers multiple services that include reverse mortgage counseling, or whether this rule prohibits arranging for the consumer to finance the counseling fee as part of the reverse mortgage transaction.

Counseling protocol. HUD has previously issued a "Counseling Protocol," which includes additional counseling requirements.[163] HUD issued an updated and expanded Counseling Protocol that will go into effect on September 11, 2010.[164]

Interagency Supervisory Guidance on Reverse Mortgages

Through the FFIEC, the Board and other Federal banking agencies recently stated in the Final Reverse Mortgage Guidance that reverse mortgage borrowers "do not consistently understand the terms, features, and risks of their loans." [165] Thus, despite concerns about whether counseling is uniformly effective, the agencies stated further that counseling for borrowers of proprietary reverse mortgages is necessary to "promote consumer understanding and manage compliance risks."§ [166]

Timing. The Guidance advises institutions to require consumers to have received counseling before the consumer submits a reverse mortgage application or pays an application fee.

Content. The Final Reverse Mortgage Guidance states that counseling sessions should cover a range of information, largely consistent with information required for HECM counseling. This information includes, for example, "[t]he availability of other housing, social service, health, and financial options" and "[t]he financial implications and tax consequences of entering into a reverse mortgage." In addition, the Guidance advises that counseling sessions should cover, among other topics, "[t]he differences between HECM loans and proprietary reverse mortgages."

Counselor independence. Under the Guidance, institutions offering proprietary reverse mortgages should ensure the independence of counselors by adopting policies that prohibit the following:

- Steering a consumer to any one particular counseling agency.
- Contacting a counselor to discuss a particular consumer, a particular transaction, or the timing or content of a counseling session "unless the consumer is involved."

Outreach

During Board outreach for this proposal and in comments on the Proposed Reverse Mortgage Guidance, representatives of the reverse mortgage industry uniformly affirmed the importance and value of counseling for reverse mortgage borrowers and generally agreed that creditors should ensure that prospective borrowers of proprietary reverse mortgages receive counseling. The National Reverse Mortgage Lenders Association (NRMLA) commented that the Federal banking agencies should deem the HECM counseling rules "best and prudent practices" for institutions offering proprietary products. Several industry representatives, however, expressed concerns that the counseling network is underfunded and understaffed, resulting in long wait times for prospective borrowers and lower quality counseling.

Consumer advocates have expressed support for requiring consumer counseling in all reverse mortgage transactions. They caution, however, that counseling alone may insufficiently protect consumers against abusive practices.[167] Like industry representatives, consumer advocates question the effectiveness of counseling due to inadequate funding and the limited availability of trained counselors. Some consumer advocates therefore favor not only strengthening counseling, but also requiring lenders and brokers to assess the suitability of a reverse mortgage for each borrower before making a loan.[168] *See* "Suitability," below.

Reverse mortgage counselors consulted by the Board expressed differing views on a range of counseling issues. They differed on when counseling should occur; some suggested that counseling was best after the consumer had transaction-specific documents to review with the counselor, while others thought that counseling was optimal earlier in the process as an aid to informed consumer shopping. On counseling content, counselors generally expressed concerns that requirements such as having to complete a full budget for the consumer to determine the appropriateness and affordability of a reverse mortgage would be too difficult and time-consuming. Some advocated requiring additional content, such as information about the general differences between proprietary reverse mortgages and HECMs.

On counselor independence, some counselors shared anecdotally that creditors have compromised counselor independence by providing the required list of HECM counselors, while orally "recommending" particular counselors. At least one expressed support for Congress's ban on creditors directly or indirectly paying HECM counselors (discussed above), stating that this has stopped significant abuses. All, however, shared the view that lack of funding for counseling is a significant and growing problem.

The Board's Proposal

Based on its research and outreach, the Board believes that originating a reverse mortgage before the consumer has obtained counseling should be considered an unfair practice under Regulation Z. The Board also believes that imposing a nonrefundable fee on a prospective reverse mortgage consumer within three days after a consumer has obtained counseling should be considered unfair. The Board therefore proposes to prohibit these practices under its authority in TILA Section 129(*l*)(2)(A) to prohibit practices in connection with mortgage lending that the Board finds unfair or deceptive. 12 U.S.C. 1639(*l*)(2)(A). The Board does not intend to suggest that these practices are unfair prior to the effective date of any final rule implementing these proposed prohibitions. Prior to the effective date of a final rule, the Board expects that whether these practices are unfair will be judged on a case-by-case basis and on the totality of the circumstances under applicable laws and regulations.

The proposed counseling requirement would apply to HECMs as well as to proprietary reverse mortgages. While counseling is already required for HECMs, a private action may not be brought against a mortgagee for failure to comply with the counseling requirements; TILA Section 130, however, gives consumers a private right of action. 15 U.S.C. 1640. Consequently, the Board's proposal is intended in part to level the playing field between HECM and proprietary reverse mortgage originators. As discussed below, the Board is also proposing to provide that compliance

[163] HUD, HECM Counseling Protocol (December 2006).

[164] See HUD Handbook 7610.1 (05/2010) *http://www.hud.gov/offices/adm/hudclips/handbooks/hsgh/7610.1/76101HSGH.pdf* (visited July 15, 2010).

[165] Final Reverse Mortgage Guidance, 75 FR at 50809.

[166] *Id.* at 50811.

[167] NCLC Report at 18.

[168] *Id.* at 19.

with the HECM counseling rules satisfies the Board's rule.

Substantial consumer injury. Uninformed reverse mortgage consumers stand to lose substantial equity in their most valuable asset—their home—at a time when they may be least able to recover financially. This loss could jeopardize a consumer's health and fundamental well-being. Home equity is a critical financial resource for reverse mortgage borrowers, who generally must be 62 years of age or older. Borrowers in this age group are more likely to be retired than younger borrowers, and thus tend to have more limited income sources. Should emergency expenses arise or the cost of living increase higher than expected, home equity may be the only resource for these consumers.

Reverse mortgage borrowers also risk foreclosure if they do not clearly understand important facts about reverse mortgages. These include the consequences of failing to pay property taxes and insurance directly (rather than relying on the lender to do so, as is common with some traditional "forward" mortgages), moving out of the home for an extended period, or failing to maintain the property. Borrowers aged 62 or older may be more likely to face physical constraints on their mobility than younger borrowers, and so as a practical matter may be less able to find affordable alternative housing should they lose their home.

In addition, uninformed or misinformed reverse mortgage borrowers may unknowingly compromise their goals to leave assets for their heirs, undermining not only their personal financial objectives that may have taken years to achieve, but also their heirs' financial prospects. Finally, Board research and outreach has indicated that many consumers choose reverse mortgages if they have few or no other options; at age 62 or older, they may be on a fixed income or otherwise have limited financial resources. Consequently, reverse mortgage consumers may be especially vulnerable to pressure to go through with a reverse mortgage transaction if they have to pay nonrefundable fees before they have received adequate information to make an informed decision about whether the transaction is appropriate for them.

Injury not reasonably avoidable. Without counseling, prospective reverse mortgage borrowers may not reasonably be able to avoid these injuries. If counseling is not required, creditors and financial advisors may not be aware of or inform consumers of counseling resources. Consumers could receive information about reverse mortgages from other sources, such as the Internet, but these sources may provide conflicting and confusing information, and be too voluminous for consumers to categorize coherently for review. Creditors or financial planners themselves may be willing to provide counseling to consumers, but their guidance and information may be biased by an economic interest in steering the consumer to a reverse mortgage.

As noted above, consumer testing conducted by the Board has shown that consumers need considerable guidance to understand the complexities of reverse mortgages, and that for some prospective reverse mortgage borrowers, disclosures about reverse mortgage costs, features, and risks, while valuable, are not by themselves sufficient. For the same reason, merely informing consumers orally or in a written disclosure that counseling is advisable and available may not ensure that consumers in fact receive sufficient information and guidance.

Finally consumers who have to pay nonrefundable fees after applying for a reverse mortgage, but before they receive counseling, may feel locked into a reverse mortgage transaction—even if subsequent counseling creates doubt about whether a reverse mortgage is right for them. Consumers on a fixed income or with otherwise limited resources, as many reverse mortgage borrowers are, may be especially vulnerable to this pressure. A primary purpose of counseling is to ensure that the consumer freely chooses a reverse mortgage, based on an informed conclusion that the reverse mortgage is truly suitable for that consumer. The imposition of nonrefundable fees on consumers before they have had a chance to consider the information received through counseling may render counseling ineffective in accomplishing this purpose.

Injury not outweighed by countervailing benefits. The potential injury to consumers described above may not be outweighed by the potential benefits of *not* requiring counseling. Benefits of not requiring counseling might include that consumers would save the counseling fee and potentially be able to obtain reverse mortgages more quickly to receive needed cash sooner. Creditors might also benefit by being able to make more reverse mortgages in a shorter timeframe. Creditors might be more likely to enter the reverse mortgage marketplace if counseling is not required, increasing competition.

In the Board's view, however, these potential benefits may not outweigh the possibility of severe negative consequences to reverse mortgage consumers' financial well-being. Moreover, any increased competition due to higher reverse mortgage volume would be offset by the detriment to competition resulting from uninformed consumers. Informed consumers are able to shop more effectively than uninformed consumers, driving the market to produce more affordable loan products with features better tailored to consumers' needs and preferences.

40(b)(1) Counseling Required

Under proposed § 226.40(b)(1), a creditor or other person may not originate a reverse mortgage before the consumer has obtained counseling from a counselor or counseling agency that meets the counselor qualification standards established by HUD pursuant to its authority under the National Housing Act, as amended (NHA),[169] or "substantially similar" standards. *See* 12 U.S.C. 1715z–20(f).

Counselor Qualifications

For several reasons, the Board proposes to require that counselors meet HUD's qualification standards for HECM counselors, or standards that would require a similar level of training and knowledge to those required for HUD-approved counselors. First, the Board recognizes that HUD has developed and continues to improve a comprehensive system of certifying counselors to provide required counseling on reverse mortgages under the HECM program. Second, the Board learned through outreach with creditors and reverse mortgage counselors that proprietary reverse mortgage creditors have routinely required borrowers to obtain counseling from HUD-approved counselors, indicating that the Board's proposal would not be unduly burdensome. Finally, the Board believes that consumer protection can be served through a counseling requirement only if counselors are properly trained to provide germane, consistent, and detailed information about reverse mortgages to consumers.

The Board requests comment on the potential benefits and drawbacks of this aspect of the proposal. In particular, the Board acknowledges concerns expressed during outreach that the quantity of counselors may be insufficient to meet the demand for counseling and requests comment on the potential effects of the proposed qualification standards on the reverse mortgage market for both HECMs and proprietary products. The Board also requests comment on the appropriateness of allowing counselors

[169] 12 U.S.C. 1701 *et seq.*

to meet qualification standards that are "substantially similar" to those established by HUD, such as standards that might be developed by a state.

Originating a Reverse Mortgage

The Board proposes to prohibit originating a reverse mortgage before the consumer has obtained counseling from a HUD-approved or similarly qualified counselor. As noted above, the HECM program requires counseling before a HECM mortgagee may "process" an application, meaning that the mortgagee 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.[170] The Board proposes to take a different position in proposed comment 40(b)(1)–1, which states that a creditor or other person may not "open a reverse mortgage account (for an open-end reverse mortgage) or consummate a reverse mortgage loan (for a closed-end reverse mortgage) before the consumer has obtained the counseling required under § 226.40(b)(1)." The proposed comment explains that a creditor or other person may accept an application for a reverse mortgage and may also begin processing the application (by, for example, ordering an appraisal or title search) before the consumer has obtained counseling. As discussed below, however, the Board is also proposing that the creditor not be permitted to impose a nonrefundable fee before the consumer has obtained counseling.

The proposed rule is intended to establish a bright line basis for determining the time by which counseling must have occurred—origination. The Board believes that this approach will provide greater clarity to proprietary reverse mortgage creditors subject to the proposed counseling rule. The proposal will facilitate compliance, because creditors and others would not have to question whether a particular activity related to a consumer's application is considered part of "processing" the application and therefore prohibited. A more precise rule is especially important where, as here, creditors are subject to a private right of action for violations. At the same time, consumers would be protected because, as discussed below, the proposal would also require a creditor to refund any fees that the consumer paid if the consumer decides, within three business days after receiving counseling, not to proceed with the transaction. *See* proposed § 226.40(b)(2) and comment 40(b)(2)(i)–1.

Allowing creditors and others to engage in the full range of application processing activities before receiving confirmation of counseling may in some cases allow them to produce transaction-specific documents that the consumer could then review with the counselor. In outreach, some reverse mortgage counselors expressed the view that counseling can be particularly effective when transaction-specific documents are available. The proposed rule, however, would also permit counseling to be obtained earlier in the process, such as before application, equipping the consumer to engage in more informed shopping.

Proposed comment 40(b)(1)–2 provides that a creditor may rely on a certificate of counseling in a form approved by HUD pursuant to 12 U.S.C. 1715z–20(f), or a substantially similar form, to confirm that the consumer received the required counseling. HUD's current Certificate of HECM Counseling requires the names, addresses and signatures of the homeowners receiving counseling (namely, all persons shown as homeowners on the deed); a list of seven topics required to be covered in HECM counseling sessions; and spaces for the name, contact information, employer information, and signature of the counselor.[171] The Certificate of HECM Counseling also requires an indication of how the interview was held (face-to-face or by telephone), how long the session lasted, how much was charged for the session, and whether the fee was paid up front, financed or waived. Finally, the Certificate requires the date of counseling and the "certificate expiration date," which is 180 days from the date of the counseling session.

The Board's proposed counseling rule applies not only to HECMs, but also to proprietary reverse mortgages. Hence the Board proposes to give creditors the flexibility of relying on a "substantially similar" form, which the Board believes should include information sufficient to confirm, at a minimum, that the consumer received counseling in accordance with the requirements in the proposed rule for counselor qualifications and the date of the counseling session. The Board understands that many proprietary reverse mortgage creditors have required that counseling be verified with the Certificate of HECM Counseling and requests comment on whether the proposed safe harbor allowing creditors to rely on a form "substantially similar" to the Certificate of HECM Counseling is appropriate.

40(b)(2) Nonrefundable Fees Prohibited

Paragraph 40(b)(2)(i)

Under the proposal, neither a creditor nor any other person may impose a nonrefundable fee in connection with a reverse mortgage subject to § 226.33 until after the third business day following the consumer's completion of counseling. *See* proposed § 226.40(b)(2)(i) and accompanying commentary. With this proposal, the Board seeks to address concerns that consumers who have to pay a nonrefundable fee after applying for a reverse mortgage, but before they receive counseling, may feel locked into a reverse mortgage even if they later receive counseling and have doubts about whether a reverse mortgage is a sound choice. As noted above, Board research and outreach have indicated that many consumers choose reverse mortgages if they have few or no other options; at age 62 or older, they may be on a fixed income or otherwise have limited financial resources. The Board therefore is concerned that a reverse mortgage consumer may be especially vulnerable to pressure to go through with a transaction once the consumer has invested money in it that cannot be recouped. A restriction on imposing nonrefundable fees would help ensure that counseling effectively assists consumers in making informed financial choices, because consumers would not be financially committed to a reverse mortgage transaction before receiving comprehensive guidance and information.

For consistency in Regulation Z, this rule is similar to the rule on imposing nonrefundable fees under current § 226.5b(h) and accompanying commentary (redesignated and revised in the August 2009 HELOC Proposal as § 226.5b(e) and comments 5b(e)–1 and –2), which prohibits imposing nonrefundable fees until three business days after a consumer receives the disclosures required by § 226.5b. 74 FR 43428, 43536, 43594, Aug. 26, 2009. As discussed in the section-by-section analysis to § 226.19 above, the Board is proposing a parallel rule for closed-end real property- or dwelling-secured mortgages. *See* proposed § 226.19(a)(1)(iv) and accompanying commentary.

Proposed comment 40(b)(2)(i)–1 clarifies that a creditor or other person may collect a fee, including an application fee, earlier than the expiration of three business days after

[170] HUD Mortgagee Letter 2004–25 (June 23, 2004).

[171] *See* HUD Form 92902 (6/2008).

the consumer obtains counseling. Similarly to comment 5b(h)–1, which explains the implications of the analogous HELOC nonrefundable fee rule, proposed comment 40(b)(2)(i)–1 explains that the creditor or other person must refund the fee if, within three business days of obtaining counseling, the consumer decides not to enter into the reverse mortgage transaction. Unlike current comment 5b(h)–1, however, proposed comment 40(b)(2)(i)–1 does not state that the consumer must be notified that the fee is refundable. The Board proposes to require reverse mortgage creditors to notify the consumer of this refund right as part of the early reverse mortgage disclosures under proposed § 226.33(c), (d)(1) and (d)(3). However, unlike the proposed nonrefundable fee rule, the disclosure requirement is not proposed based on the Board's authority under TILA Section 129 to prohibit unfair or deceptive practices. *See* 15 U.S.C. 1639(*l*)(2)(A). Violations for rules proposed under the Board's Section 129 authority carry enhanced damages. *See* TILA Section 130(a)(4); 15 U.S.C. 1640(a)(4). Therefore, the Board does not propose to refer to this disclosure requirement in comment 40(b)(2)(i)–1, which interprets § 226.40(b)(2), a provision proposed pursuant to the Board's authority under TILA Section 129.

In new comment 40(b)(2)(i)–2, the Board proposes guidance regarding how a creditor or other person may determine when the consumer obtained counseling for purposes of imposing a nonrefundable fee. Specifically, the comment states that a creditor or other person may rely on the date of the counseling session indicated on a certificate of counseling in a form approved by the Secretary of HUD pursuant to 12 U.S.C. 1715z–20(f), or a substantially similar form. A creditor would be free to rely on a consumer's oral representation of the date on which counseling occurred but would incur the risk of this representation later being more difficult to substantiate.

Proposed comment 40(b)(2)(i)–3 explains how the proposed restriction on imposing nonrefundable fees for reverse mortgages interacts with the longstanding restriction on imposing nonrefundable fees for HELOCs subject to § 226.5b. Historically, most reverse mortgages have been open-end mortgages subject to § 226.5b.[172] Consequently, these reverse mortgages have been subject to the restriction on imposing nonrefundable fees before the consumer has received the disclosures required under § 226.5b (also discussed in the section-by-section analysis of § 226.5b, above). Under this proposal, reverse mortgages subject to § 226.5b would still be subject to this restriction, but would also be subject to the restriction under proposed § 226.40(b)(2)(i), which prohibits imposing a nonrefundable fee (other than a counseling fee (see proposed § 226.40(b)(2)(ii))) until three business days after the consumer has obtained counseling. As explained in the section-by-section analysis to proposed 226.33(a) through (d), the Board proposes to move the relevant early disclosure requirements applicable to open-end reverse mortgages from § 226.5b to § 226.33(c) and (d)(1).

Proposed comment 40(b)(2)(i)–3 notes that, for open-end reverse mortgages, a nonrefundable fee generally may not be imposed until both waiting periods have ended and provides two illustrations of the relationship between these restrictions. First, if three business days have elapsed since the consumer received the early disclosures required under proposed § 226.33(d)(1), but fewer than three business days have elapsed since the consumer obtained counseling, the creditor or other person could not impose a nonrefundable fee (other than a fee for required counseling (see proposed § 226.40(b)(2)(ii))) until after the third business day following the consumer's completion of counseling. Similarly, if three business days have elapsed since the consumer obtained counseling, but fewer than three business days have elapsed since the consumer received the early disclosures, the creditor or other person may not impose a nonrefundable fee until after the third business day following the consumer's receipt of the required disclosures.

Comment 40(b)(2)(i)–4.i. Proposed comment 40(b)(2)(i)–4.i explains how the proposed restriction on imposing nonrefundable fees for reverse mortgages interacts with the restriction in § 226.19(a)(1)(ii) on imposing any fees for a closed-end real property- or dwelling-secured mortgage until the consumer has received the early disclosures required under § 226.19(a)(1)(i). Exceptions to this restriction on imposing fees are fees for obtaining a consumer's credit history (§ 226.19(a)(1)(iii)) and, as discussed in the section-by-section analysis to proposed § 226.19(a)(1)(v), fees for required counseling (proposed § 226.19(a)(1)(v)). As discussed in the section-by-section analysis to proposed § 226.33(a) through (d), the Board proposes to move the early disclosure requirements for closed-end reverse mortgages from §§ 226.19 and 226.38 to § 226.33(c) and (d)(3).

Proposed comment 40(b)(2)(i)–4.i provides two illustrations of the relationship between the fee restrictions in § 226.19(a)(1)(ii) and proposed § 226.40(b)(2)(i). First, if the consumer has received the early disclosures, but fewer than three business days have elapsed since the consumer obtained counseling, the creditor or other person could not impose a nonrefundable fee on the consumer (other than a fee for required counseling) until after the third business day following the consumer's completion of counseling. Second, if three business days have elapsed since the consumer obtained counseling, but the consumer has not received the early disclosures, the creditor or other person may not impose any fees—refundable or nonrefundable (except for a fee for obtaining a consumer's credit history or required counseling)—until the consumer has received the early disclosures.

Comment 40(b)(2)(i)–4.ii. Under this proposal, closed-end reverse mortgages would be subject to two restrictions on imposing nonrefundable fees. The first restriction would be under proposed § 226.19(a)(1)(iv), which prohibits imposing a nonrefundable fee (other than a fee for obtaining a consumer's credit history (*see* § 226.19(a)(1)(iii)) and a fee for required counseling (*see* § 226.19(a)(1)(v)) until after the third business day following the consumer's receipt of the early disclosures required under §§ 226.19(a)(1)(i) and 226.33(d)(3). (Again, as discussed in the section-by-section analysis to proposed § 226.33(a) through (d), the Board proposes to move the early disclosure requirements for closed-end reverse mortgages from §§ 226.19 and 226.38 to § 226.33(c) and (d)(3).) The second restriction would be under proposed § 226.40(b)(2), which prohibits imposing a nonrefundable fee (other than a fee for required counseling (*see* § 226.40(b)(2)(ii))) until after the third business day following the consumer's completion of counseling.

Proposed comment 40(b)(2)(i)–4.ii explains that, for closed-end reverse mortgages, a nonrefundable fee generally may not be imposed until both waiting periods have ended and provides two illustrations of the relationship between these restrictions

[172] In fiscal year 2008, for example, most HECM borrowers chose to receive at least part of their payments as a line of credit. Of these borrowers, 89 percent chose to receive their payments exclusively as a line of credit; another 6 percent chose to receive a line of credit in combination with term or tenure payments. *See* U.S. Government Accountability Office, GAO–09–606 at 8 (referencing HUD data).

on imposing nonrefundable fees. First, if three business days have elapsed since the consumer received the early disclosures required under §§ 226.19(a)(1)(i) and 226.33(d)(3), but fewer than three business days have elapsed since the consumer obtained counseling, the creditor or other person may not impose a nonrefundable fee (except for a counseling fee) until after the third business day following the consumer's completion of counseling. Second, if three business days have elapsed since the consumer obtained counseling, but fewer than three business days have elapsed since the consumer received the early disclosures, the creditor or other person may not impose a nonrefundable fee (except a fee for obtaining a consumer's credit history or counseling) until after the third business day following the consumer's receipt of the early disclosures.

Proposed comment 40(b)(2)(i)–5 provides that, for purposes of proposed § 226.40(b)(2)(i), which prohibits imposing a nonrefundable fee until three business days after the consumer has obtained counseling, the term "business day" has the more precise definition used for rescission and certain disclosure purposes: All calendar days except Sundays and the Federal holidays referred to in § 226.2(a)(6). For example, if a consumer were to obtain counseling on Monday, June 1, a creditor could not impose a nonrefundable fee on the consumer until Friday, June 5. If the consumer decided on June 4 not to proceed with the transaction, the creditor would have to refund to the consumer any fees that had been charged before that time for the reverse mortgage transaction.

The Board proposes to use the more precise definition of "business day" for this provision to conform to the Board's proposal to use the more precise definition in the nonrefundable fee rule for open-end mortgage transactions subject to § 226.5b. *See* 74 FR 43428, 43593, Aug. 26, 2009. Under that rule, as discussed above, a creditor or other person may not impose a nonrefundable fee on the consumer until three business days after the consumer has received the disclosures required under § 226.5b. The more precise definition of "business day" also applies to the restriction on imposing fees for closed-end reverse mortgages under § 226.19(a)(1)(ii) and the restriction on imposing nonrefundable fees under proposed § 226.19(a)(1)(iv). *See* comment 19(a)(1)(ii)–1 and proposed comment 19(a)(1)(iv)–1. As noted, the closed-end mortgage fee restriction under § 226.19(a)(1)(ii) prohibits imposing any fees until the consumer has received the early disclosures required under § 226.19(a)(1)(i) (*also see* proposed § 226.33(d)(3)). Proposed § 226.19(a)(1)(iv) would prohibit imposing a nonrefundable fee in connection with a closed-end mortgage before the consumer has received the early disclosures required under § 226.19(a)(1)(i) (also see proposed § 226.33(d)(3)). In both cases, the consumer is deemed to have received the disclosures three business days after the creditor has mailed the disclosures. *See* comment 19(a)(1)(ii)–2 and proposed comment 19(a)(1)(iv)–2. By using the same definition of "business day" for all of these fee restrictions, the Board seeks to alleviate confusion among creditors and others regarding when fees may be imposed, and when obligations to refund fees arise.

Paragraph 40(b)(2)(ii)

To facilitate compliance with the proposed rule on imposing nonrefundable fees, the Board proposes in § 226.40(b)(2)(ii) to exempt from the restriction on imposing nonrefundable fees a bona fide and reasonable fee for required reverse mortgage counseling imposed by a qualified counselor or counseling agency. This proposed provision specifies that the counselor or counseling agency must meet the counselor qualification standards established by the Secretary of HUD pursuant to 12 U.S.C. 1715z–20(f), or substantially similar qualification standards, as proposed in § 226.40(b)(1). Comment 40(b)(2)(ii)–1 clarifies that a fee for required counseling may be collected earlier than the expiration of three business days after the consumer obtains counseling, and does not have to be refunded if the consumer decides not to proceed with the transaction within three business days, as described in proposed comment 40(b)(2)(i)–1.

The Board proposes this exemption because counseling fees are often collected at the point of service by the counselor or counseling agency. These fees are not always connected to a specific reverse mortgage transaction because, under HECM rules and the proposal, a consumer need obtain counseling only once with respect to multiple reverse mortgage applications (as long as fewer than 180 days have elapsed between the time of counseling and the application, as required under proposed § 226.40(b)(4)). In addition, the Board is cognizant of funding concerns for reverse mortgage counseling, and therefore does not believe that counselors and counseling agencies should have to refund fees charged for counseling as prescribed in the proposed rule.

Comparison to HECM Rules

The Board believes that determining how to comply with the proposed restriction on imposing nonrefundable fees until after the third business day following counseling will not pose serious challenges to reverse mortgage providers, because, as noted above in the "Introduction" to § 226.33, historically, most reverse mortgages have been open-end mortgage loans subject to § 226.5b. Consequently, most reverse mortgage providers will be familiar with this general approach to imposing nonrefundable fees. The Board recognizes, however, that HUD's rule on imposing fees for HECMs differs from this proposal. As discussed earlier, HUD guidance indicates that a HUD mortgagee may not charge the borrower an application fee, an appraisal fee, or fees for any other HECM-related services before the mortgagee receives HUD's required Certificate of HECM Counseling.[173] The Board's proposal would cover not only fees imposed by HUD mortgagees, but also fees imposed by any third party that might perform a transaction-related service. The Board believes that this broader coverage is important to protect consumers from being committed to a particular reverse mortgage transaction before having had an opportunity to consider information received during counseling.

Another difference from the HECM rules is that the Board's proposal would permit creditors and others to charge (and collect) fees earlier than three business days after the consumer has obtained counseling. However, these fees would have to be refunded should the consumer decide not to go forward with the transaction within that time period. The Board believes that this approach will facilitate reverse mortgage transactions in a manner that will help consumers make more informed credit decisions. For example, allowing appraisal or other property valuation fees to be charged would enable consumers to know how much money would be available to them before being committed to a particular transaction. Also, consumers would be more likely to have accurate transaction-specific documents to review with a counselor if they may pay a fee for a creditor to process their application. If, after counseling, the consumer decides that the transaction is not the best choice, the consumer would be entitled to a refund of any fees paid. At the same

[173] *See* HUD Mortgagee Letter 2004–25 (June 23, 2004).

time, the proposed restriction on nonrefundable fees would not delay moving forward with transactions as much as a restriction on imposing any fees prior to counseling might. This could benefit consumers who have immediate financial needs.

Finally, the proposal is intended to ensure that consumers have time after counseling to consider whether to proceed with the transaction. Under the HECM rules, once a creditor receives a HECM counseling certificate, the creditor may immediately impose fees on the consumer. Under the proposal, if a creditor receives a HECM counseling certificate one business day after the consumer obtained counseling, the creditor would still have to give the consumer two additional business days to cancel the transaction and receive a refund of fees.

Regarding the new restriction on imposing nonrefundable fees for both open-end and closed-end reverse mortgages, the Board requests comment on the usefulness of illustrations and other guidance in the comments, as well as potential disadvantages and benefits of the proposed restriction.

40(b)(3) Content of Counseling

To ensure that the reverse mortgage counseling provides relevant and useful information to the consumer, the Board proposes to define minimum content requirements for counseling. Specifically, under proposed § 226.40(b)(3), the required counseling must include "information regarding reverse mortgages and their suitability to the consumer's financial needs and circumstances." Proposed comment 40(b)(3)–1 provides a safe harbor for this content requirement: Counseling that conveys the information required by HUD for the HECM program, or substantially similar information. Information required by HUD includes the following, among other topics: (1) The financial implications of entering into a HECM; (2) the consequences of a HECM on the borrower's taxes, estate, and eligibility for assistance under Federal and state programs; (3) other home equity conversion options, such as sale-leaseback financing; (4) additional financial options such as other housing, social service, health, and financial options (provided through government entities or non-profit organizations, for example); and (5) the circumstances under which the HECM becomes due.[174] The Board believes that counseling that conveys this information would satisfy the general requirement that counseling must include "information regarding reverse mortgages and their suitability to a consumer's financial needs and circumstances." *See* proposed § 226.40(b)(3).

To provide flexibility for complying with the content requirement for counseling, the Board also proposes that counseling covering topics that are "substantially similar" to those required for HECMs also would satisfy the requirements of § 226.40(b)(3). The Board recognizes that consumers have varying levels of financial sophistication and diverse financial needs and goals, and that counseling covering additional or alternative topics may therefore be appropriate. These topics might include information about the differences between proprietary reverse mortgages and HECMs or an explanation of the disclosures required for reverse mortgage transactions under proposed § 226.33(b) ("Key Questions to Ask about Reverse Mortgages") and § 226.33(c) (regarding reverse mortgage costs and related information). *See* proposed § 226.33(b) and (c) and accompanying commentary.

The Board requests comment on the proposed requirements and safe harbor for the content of counseling required under § 226.40(b)(3).

40(b)(4) Timing of Counseling

Proposed § 226.40(b)(4) requires counseling for each reverse mortgage transaction to have occurred no earlier than 180 calendar days (six months) prior to the creditor's receipt of the consumer's application. The Board proposes this restriction on the time for which counseling remains valid for two reasons. First, this time limitation is necessary to ensure that the counseling session addresses the consumer's current financial circumstances, assuming that significant changes generally would not have occurred within only six months. Second, the 180-day expiration date for the validity of counseling is generally consistent with the rule applicable to HECM counseling, and thus should require no adjustments on the part of HECM lenders that choose to offer proprietary products.[175] The Board requests comment on whether 180 days prior to application or some other timeframe is an appropriate limit on the period for which counseling is valid.

40(b)(5) Type of Counseling

Proposed § 226.40(b)(5) requires that reverse mortgage counseling occur face-to-face or by telephone. Proposed comment 40(b)(5)–1 is intended to accommodate additional forms of communication that may be characterized as telephone, face-to-face, or both, such as connections over the Internet allowing persons to see one another and communicate in real time. This comment also clarifies that communications via the Internet or similar connection designed to accommodate persons with disabilities, such as those who are visually or hearing impaired, would also meet the requirement that counseling be face-to-face or by telephone.

During discussions with the Board for this proposal and in comments on the Proposed Reverse Mortgage Guidance, industry representatives, consumer advocates, and reverse mortgage counselors did not agree on whether face-to-face counseling should be preferred (or required) over telephone counseling. Consumer advocates generally commented that in-person counseling was better for consumers. At least one consumer advocacy organization, however, opposed requiring in-person counseling because many reverse mortgage consumers lack the mobility required to travel to a counseling session; in addition, conference calls often allow family members across the country or other named owners on the deed of the securing property (*see* proposed § 226.40(b)(7)) to participate in the session.

The Board is not persuaded that either form of counseling is superior in all cases. The Board solicits comment on the proposed rule and guidance regarding the types of counseling permitted, including the absence of a requirement that counseling occur in only one particular form.

40(b)(6) Independence of Counselor

During outreach for this proposal, the Board heard from consumer advocates and reverse mortgage counselors that counselors may not in all cases be impartial advisors. Given certain incentives, counselors may provide guidance that favors a particular reverse mortgage product, regardless of its appropriateness for the consumer. In addition, Congress recently enacted restrictions on how counselors may be compensated to address concerns that counselors may not be independent of creditors and may consequently steer

[174] HECM Handbook 4235.1 REV–1, ch. 2–5; HUD Mortgagee Letter 2004–25 (June 23, 2004).

[175] *See* HUD Form 92902, "Certificate of HECM Counseling," (6/2008) (specifying that the counseling session is valid for 180 days after the date of the session). *See also* HUD Mortgagee Letter 2004–25 (June 23, 2004) (providing that the mortgagee must take the application before the counseling expiration date, but need not close the loan before the expiration date).

consumers to particular reverse mortgage products.[176]

The Board believes that counselor impartiality is essential to ensuring that counseling affords meaningful consumer protection. Without counselor impartiality, the prohibitions on originating a reverse mortgage or imposing a nonrefundable fee on a reverse mortgage applicant before the consumer obtains counseling would be of limited value. The Board has identified two primary incentives that undermine counselor impartiality:

- Receiving compensation from a particular originator. A counselor or counseling agency compensated by a creditor or mortgage broker may present biased information about reverse mortgages intended to steer the consumer to the creditor's or mortgage broker's product.
- Receiving consumers for counseling through referrals by a particular originator. If a counselor or counseling agency counsels only prospective borrowers referred by a single originator, that counselor may be motivated to steer consumers to that originator's products.

This proposal therefore incorporates two provisions designed to promote counselor independence: one restricting compensation for counseling services and another prohibiting creditors or others from steering consumers to particular counselors or counseling agencies.

40(b)(6)(i) Counselor Compensation

Proposed § 226.40(b)(6)(i) prohibits a creditor or any other person involved in originating a reverse mortgage from compensating a counselor or counseling agency for providing reverse mortgage counseling with respect to a particular transaction. As noted earlier, in 2008 Congress broadly prohibited parties involved in originating or servicing a HECM, or in selling any financial or insurance product, from directly or indirectly paying a counselor or being associated in any way with the counselor.[177] To implement these measures, HUD issued a Mortgagee Letter prohibiting lenders from paying counseling agencies, directly or indirectly, for HECM counseling services.[178]

The Board proposes a similar rule that would prohibit creditors and other persons involved in originating a reverse mortgage, such as mortgage brokers, from compensating a counselor or counseling agency for providing the counseling required under proposed § 226.40(b)(1) for a particular transaction. See proposed § 226.40(b)(6)(i). Proposed comment 40(b)(6)(i)–1, however, clarifies that a creditor or other person would not violate this provision by arranging for the counseling fee to be financed as part of a reverse mortgage transaction. Even though financing counseling fees may involve the creditor or other person remitting funds from the financed transaction to the counselor, this provision is intended to retain consumers' options for paying for counseling without creating unnecessary compliance risk.

The Board believes that the proposed compensation rule will curtail the practice of counselors promoting a particular reverse mortgage product or provider. In the Board's view, a more precise rule prohibiting compensation for counseling with respect to a particular transaction, rather than a rule prohibiting any financial assistance for counseling services generally, is appropriate where, as under TILA, violations trigger a private right of action. By contrast, the recent amendments to the NHA's HECM provisions under the HERA are not enforceable through private action.[179] In addition, the Board has frequently heard concerns that counseling resources are limited, and that funding for counseling is inadequate. As a result, the Board has reservations about expressly prohibiting reverse mortgage providers from providing any financial assistance to non-profit counseling agencies. Donations that are not related to a particular transaction could help ensure that needed counseling is available for more consumers.

At the same time, the Board is concerned that these donations may in some cases compromise counselor independence. For example, donations by a creditor to a counseling agency could compromise counselor independence if the donations occur on a regular basis, and are tied in amount to the number or value of transactions made by the donating creditor to consumers counseled by the recipient counseling agency. The Board also notes, however, that RESPA's prohibition on referral fees for settlement services (which include originating a mortgage loan)[180] may already deter donations designed to secure more business for the donating reverse mortgage provider.

With these considerations in mind, the Board requests comment on whether to adopt additional or alternative restrictions on compensation of counselors or counseling agencies by persons involved in originating reverse mortgages.

40(b)(6)(ii) Steering

The second provision designed to promote counselor independence is proposed § 226.40(b)(6)(ii), which prohibits steering a consumer to a particular counselor or counseling agency. In the Board's view, without this prohibition, the rule requiring counseling would be ineffective. Absent a steering prohibition, a creditor could send the consumer to a counselor who is a family member or personal friend, for example, and with whom the creditor has a tacit or express agreement to refer clients in exchange for preferable treatment of the creditor's products in the counseling session.

Whether steering of this type has occurred is a case-by-case determination and may be difficult to discern. Accordingly, the Board has proposed in § 226.40(b)(6)(ii) a "safe harbor" for compliance with this anti-steering rule. The safe harbor would permit a creditor or other person involved in originating a reverse mortgage to ensure compliance with the rule by providing to the consumer a list of at least five HUD-approved counselors or counseling agencies. Comment 40(b)(6)(ii)–1 clarifies that a creditor or other person that does not provide a list of five counselors or counseling agencies has not in all cases violated this provision. The comment points out, for example, that when the consumer has received qualifying counseling prior to contacting (or being contacted by) a creditor, broker, or other person offering or promoting reverse mortgages, the consumer would not need a list of counselors or counseling agencies from that creditor or other person. Here, the concern about the creditor steering the consumer to a particular counselor would be irrelevant.

The list proposed to constitute a safe harbor must include at least five counselors or counseling agencies, although the Board is aware that HECM rules require mortgagees to provide to

[176] HERA § 2122(a)(3) (codified at 12 U.S.C. 1715z–20(d)(2)(B)) (prohibiting parties involved in originating or servicing a HECM, or in selling any financial or insurance product, from directly or indirectly paying a counselor or being associated in any way with the counselor).

[177] *Id.*

[178] HUD Mortgagee Letter 2008–28 (Sept. 29, 2008).

[179] *See, e.g.,* 12 U.S.C. 1735f–14(b)(1)(H) (granting the Secretary of HUD authority to impose civil money penalties against a mortgagee who knowingly and materially violates any provision of Title II of the National Housing Act, as amended ("NHA"), 12 U.S.C. 1707 *et seq.,* or any implementing regulation or handbook issued under the NHA, including provisions under the HECM program pursuant to Section 255(d) of the National Housing Act, 12 U.S.C. 1715z–20).

[180] 12 U.S.C. 2607; 24 CFR 3500.14.

the consumer a list of at least ten counseling agencies.[181] The Board is concerned that it may be unreasonable to require a list of at least ten counselors or agencies for proprietary reverse mortgage transactions. In particular, the Board is concerned that fewer counselors and agencies may have the expertise to provide information about proprietary reverse mortgages than HECMs.

The Board requests comment on the proposed approach to curtailing steering of consumers to particular counselors or counseling agencies. The Board solicits comment on whether there are other situations in which a list may not be necessary, or in which the creditor or other person would not be able to meet the safe harbor but should still be deemed to comply with proposed § 226.40(b)(6)(ii). The Board also requests comment on whether a list of fewer or more than five counselors or agencies should be required to qualify for the proposed safe harbor.

Communications With Counselors

The Board is not proposing limitations on a creditor or other person's communications with counselors. Parties consulted during the Board's outreach for this proposal disagreed on whether restrictions on originators' contacting counselors compromised counselor independence. Consumer advocates generally support prohibitions on communications between counselors and creditors or other key participants in reverse mortgage originations. Industry representatives have raised concerns that restrictions on communication could prevent counselors with questions about an institution's proprietary reverse mortgage product from obtaining information critical to the consumer. Reverse mortgage counselors consulted by the Board indicated that freedom to communicate with a creditor to clear up questions about a particular transaction can enhance the quality of counseling and consumer understanding.

The anti-steering proposal is intended to address harmful practices, not to stop communications that may be beneficial to consumers. The Board invites comment on whether and what specific restrictions on communications between counselors and key participants in reverse mortgage originations (such as creditors, brokers, and correspondents) would be appropriate.

40(b)(7) Definition of "Consumer"

Proposed § 226.40(b)(7) provides that, for purposes of the proposed counseling requirements under § 226.40(b)(1), the meaning of "consumer" includes all persons who, at the time of origination of a reverse mortgage subject to § 226.33, will be shown as owners on the property deed of the dwelling that will secure the applicable reverse mortgage. Under this proposed definition, however, for purposes of § 226.40(b)(2), which prohibits a creditor or other person from imposing a nonrefundable fee in connection with a reverse mortgage until after the third business day following the consumer's completion of counseling, the term "consumer" includes only persons who will be obligors on the applicable reverse mortgage. The Board proposes this clarification based on its authority under TILA Section 105(a) to prescribe regulations containing classifications, differentiations, or other provision as in the judgment of the Board are necessary or proper to effectuate the purposes of TILA. 12 U.S.C. 1604(a). This clarification is necessary in reverse mortgage transactions because all owners may have to pay off the mortgage themselves to retain homeownership if the party obligated on the note dies or moves out. In addition, the Board's proposal conforms to the HECM rule requiring counseling for all named owners listed on the property deed.[182] Thus, the proposed rule is especially appropriate for HECMs, for which all parties on the property deed must meet HUD's mortgagor qualification standards and all are obligated on the mortgage.[183]

The Board believes that creditors should not have to wait for all owners shown on the deed to obtain counseling before beginning to process the reverse mortgage application. A creditor would have to order a title search to obtain that information, which gives rise to a title search fee. Moreover, in some cases, certain parties on the deed may not use the securing property as their principal dwelling and may be difficult to locate. For these reasons, the Board proposes to require that only parties who will be obligors on the reverse mortgage—in most instances, those who have applied for the reverse mortgage—be required to have obtained counseling before a nonrefundable fee may be imposed under proposed § 226.40(b)(2).

The Board requests comment on whether requiring counseling for all persons who, at the time of origination of a reverse mortgage subject to § 226.33, will be shown as owners on the property deed of the dwelling that will secure the applicable reverse mortgage is appropriate for proprietary reverse mortgages, which may have different requirements and features than HECMs.

Suitability

Background

For this proposal, the Board examined whether reverse mortgages are a product for which suitability standards are warranted because reverse mortgages are complex and the population for which reverse mortgages are intended—typically consumers 62 years of age or older—may be more vulnerable than younger consumers to the potential adverse consequences of obtaining inappropriate financial products. In this regard, the Board considered whether the practice of making a reverse mortgage without evaluating whether the product is suitable for the consumer is unfair or deceptive, and thus should be banned under the Board's authority to prohibit practices that are unfair or deceptive in mortgage transactions. TILA § 129(*l*)(2)(A), 15 U.S.C. 1639(*l*)(2)(A).

Some consumer advocates have recommended imposing a fiduciary "duty of good faith and fair dealing" on reverse mortgage originators, which would include a duty to assess whether a reverse mortgage is suitable for the consumer.[184] In addition, the Code of Ethics of the National Association of Reverse Mortgage Lenders (NRMLA) includes a number of provisions requiring members to act in the best interests of their customers.[185] The Board is also aware that the Securities and Exchange Commission (SEC) has approved, and most states have adopted, suitability standards for the sale of annuities; the Board recognizes that annuities function similarly to many reverse mortgage transactions in that the consumer exchanges something of value for the right to receive regular payments.[186]

Determination

At this time, the Board is not proposing a finding that originating a reverse mortgage without assessing the transaction's suitability for the

[181] HUD Mortgagee Letter 2009–10 (March 7, 2009).

[182] HUD Mortgagee Letter 2004–25 (June 23, 2004).

[183] *See, e.g.,* 24 CFR 206.35.

[184] NCLC Report at 18–19 (Oct. 2009).

[185] Nat'l Ass'n of Reverse Mortgage Lenders, Code of Ethics & Professional Responsibility: Ethics Standards Complaint Procedures, Values 1, 3, and 5; Rules 107, 108, 501, 502 (revised June 16, 2009).

[186] *See, e.g.,* NASD Rule 2821, "Responsibilities Regarding Deferred Variable Annuities"; National Ass'n of Ins. Commissioners, "Suitability in Annuity Transactions Model Regulation," Model 275.

consumer is unfair. Enhanced reverse mortgage disclosures (proposed § 226.33(a)–(d)), new advertising rules (proposed § 226.33(e)), and a requirement that consumers receive counseling before taking out a reverse mortgage or incurring nonrefundable fees (proposed § 226.40(b)) provide protections for consumers that the Board believes should render a suitability assessment by the originator unnecessary. Other factors that the Board considered include those discussed below.

First, the Board is concerned that any suitability standard would reduce the availability and increase the cost of reverse mortgage credit for many consumers who could benefit from this product. A reverse mortgage suitability rule would be adopted under the Board's authority in TILA § 129(*l*)(2)(A) to deem certain practices in mortgage transactions unfair or deceptive, hence violations of the rule would give rise to a private right of action, potentially exposing creditors to significant litigation risk. 15 U.S.C. 1639(*l*)(2)(A); 15 U.S.C. 1640(a), (e). By contrast, SEC and most state suitability rules for annuities do not carry a private right of action. The Board also notes that the National Association of Insurance Commissioners' model suitability rule for annuities, adopted by many states, requires that an annuity provider have "reasonable grounds" for determining that an annuity is a suitable recommendation for a consumer; [187] the Board is concerned that the concept of "reasonableness" could be subject to substantial and possibly frivolous litigation when incorporated into a rule conveying a private right of action. In sum, the attendant risks of a suitability rule imposed under the Board's Section 129 authority may deter many reputable originators from offering reverse mortgages, especially to those who may be most in need of this type of credit.

Second, any suitability rule would require the creditor to collect significant information from the consumer about the consumer's financial status, tax status, and investment goals.[188] The amount and type of information required to make a suitability determination would be difficult to define clearly, because each consumer's situation is different. Yet a more flexible rule could expose creditors to excessive litigation risk—again, increasing the cost of reverse mortgage credit and reducing its availability. In addition, the challenge of producing substantial financial information may discourage many elders from pursuing a financial option that they may need. In effect, reverse mortgages may be rendered less accessible to the consumers for which they were designed, those with substantial home equity but few or no other assets. Finally, on a practical level, some consumers may simply find that navigating the reverse mortgage application process with these additional requirements is too difficult to undertake.

Third, as a result of market innovation, reverse mortgages may eventually be designed for borrowers under 62 years of age, and these products would presumably be subject to any suitability rule adopted under Regulation Z. The Board believes that arguments for suitability standards in reverse mortgage transactions may be weaker where the consumers are younger, as these borrowers are not a segment of the population generally distinguished in other Federal laws for special protections.[189]

Fourth, the Board's proposed counseling rule, discussed above, and enhanced disclosure rules, discussed in the section-by-section analysis to § 226.33(a) through (d), are designed to equip consumers to make their own informed decisions about whether a reverse mortgage is suitable for them. The proposed counseling rule, for instance, incorporates requirements for the timing and content of counseling, as well as provisions to ensure the independence of counselors, all of which are intended to ensure that consumers receive information about the appropriateness of a reverse mortgage from an independent counselor. See proposed § 226.40(b) and accompanying commentary. In the Board's view, reverse mortgage originators who comply with the proposed counseling requirements and enhanced disclosure rules should be able to presume that prospective borrowers have adequate information to make informed financial judgments for themselves.

The Board invites comment on its decision not to propose a suitability standard for reverse mortgages at this time, and solicits specific recommendations for an appropriate and workable standard.

Set Asides for Property Taxes and Insurance

Background

Both industry representatives and consumer advocates have expressed concerns about reverse mortgages becoming prematurely due if the borrower fails to pay required taxes, insurance, and assessments on the property securing the mortgage. The Board understands that some reverse mortgage borrowers may not make required payments because they are unaware of or forget to fulfill this obligation; others may simply not have the funds to do so. Borrowers that default on their reverse mortgage obligations in this way risk losing their homes.

Reverse mortgage borrowers may be at risk for not making these payments because they may be accustomed to traditional "forward" mortgages, in which property taxes and insurance are often escrowed and remitted by the loan servicer. In addition, as discussed in the section-by-section analysis to § 226.33(e), some reverse mortgage advertisements have stated that the borrower need not make any payments for a reverse mortgage. The initial impression given by these advertisements may lead consumers to overlook that they still must pay taxes and insurance on a regular basis.

When presented with this issue at their meeting on March 24, 2010, members of the Board's Consumer Advisory Council supported the Board's consideration of rules to protect reverse mortgage consumers who, for any number of reasons, fail to stay current on their tax and insurance payments. Consumer advocate members emphasized the benefits to consumers of requiring a set aside for taxes and insurance to ensure that funds are available to avoid default. Creditor and servicer members expressed concerns about the business implications of eventually having to foreclose on a senior homeowner, and therefore supported efforts to prevent consumers from defaulting in this way. Safety and soundness is another industry concern. For example, even if a HECM mortgagee covers these costs for a defaulting borrower, the loan is in technical default and cannot be assigned to FHA (FHA otherwise allows a HECM lender to assign a HECM to FHA if the loan amount reaches 98 percent of the maximum claim amount).[190] The mortgagee must then hold the loan even if it ultimately will not be able to collect from FHA the entire amount owed,

[187] National Ass'n of Ins. Commissioners, "Suitability in Annuity Transactions Model Regulation," Model 275.

[188] *See, e.g., id.* § 6(B).

[189] *See* Equal Credit Opportunity Act, 15 U.S.C. 1691(a) (implemented by the Board's Regulation B, 12 CFR Part 202).

[190] 24 CFR 206.107(a)(1).

because that amount would exceed the maximum claim amount.

HECM Rules on Set Asides and Escrow Accounts

In general, HECM borrowers are responsible for directly paying all "property charges" (consisting of taxes, ground rents, flood and hazard insurance premiums, and special assessments).[191] The borrower may elect, however, to have the mortgagee pay property charges by withholding funds from monthly payments due to the borrower or by charging the borrower's line of credit.[192]

Currently, FHA regulations permit a mortgagee to advance funds to cover property charges that a borrower fails to pay.[193] When the loan ends (such as when the borrower dies or moves out), the mortgagee can seek reimbursement from FHA for these advanced funds through the claims process.[194]

• Set asides. HECM rules require set asides in a few instances. First, if the borrower chooses to have the mortgagee pay property charges by withholding funds from monthly payments, the mortgagee must set aside a portion of the principal limit at the outset of the transaction to cover any initial property charges.[195] Set asides of the principal limit are also required to cover post-closing repairs, if needed, and for monthly servicing charges.[196]

• Escrow accounts. The HECM rules prohibit escrow accounts, which could be harmful to the borrower for two reasons. First, funds for escrow accounts are added to the loan balance even before the property charges to which they are allocated are due. Thus the borrower is forced to pay more interest and a higher monthly mortgage insurance premium (which is based on the loan amount) for a longer period of time than if the funds were added to the loan balance only when paid out to cover each tax and insurance payment. Second, escrow accounts are typically interest-bearing accounts that may have tax implications for the borrower.

• HUD property charges proposal. HUD has stated that it plans to propose a rule that would permit, under certain circumstances, a HECM mortgagee to set aside a portion of the borrower's principal limit (the maximum amount that a consumer may borrow) to cover property charges that the servicer would pay on the borrower's behalf.

[191] 24 CFR 206.205(a).

[192] 24 CFR 206.205(b).

[193] 24 CFR 206.205(c).

[194] 24 CFR 206.123, 206.129.

[195] 24 CFR 206.19(d)(3), 206.205(f).

[196] 24 CFR 206.19(d)(2), (4).

The Board's Proposal

One way in which the Board is addressing concerns about consumer defaults for failure to pay property charges is through its proposed reverse mortgage disclosure and advertising rules. *See* proposed § 226.33(c) and (e) and accompanying commentary. In particular, as discussed above in the section-by-section analysis to proposed § 226.33(c)(4), the Board is proposing to require that open- and closed-end reverse mortgage TILA disclosures must notify the consumer that he or she will retain title to the home and must pay property taxes and insurance. *See* proposed § 226.33(c)(4)(iii). In addition, the Board is proposing an advertising rule that would highlight consumers' obligation to pay property taxes and insurance. *See* proposed § 226.33(e)(7).

Largely due to HUD's pending initiative on property charges, however, the Board is not at this time proposing regulations expressly addressing set asides for property charges in reverse mortgage transactions. The Board solicits comment on specific concerns and problems related to reverse mortgage borrower defaults due to failure to pay property charges. The Board also requests comment on and suggestions for alternatives to address these problems, particularly for proprietary reverse mortgages.

Section 226.41 Servicer's Response to Borrower's Request for Information

Background

After consummation or account-opening, a consumer may need to contact the current assignee of their loan for a number of reasons, including to request changes to or to assert their rights in connection with the mortgage or HELOC. For example, TILA Section 131(c) provides that a consumer may assert a right to rescind against an assignee of the obligation. 15 U.S.C. 1641(c). Consumers may also have a cause of action against an assignee, although generally assignees are only liable for TILA violations apparent on the face of the disclosure statement. TILA Section 131(e); 15 U.S.C. 1641(e). Consumers may also need to contact an assignee to seek forbearance or modification of loan terms.

Consumers may have difficulty determining the identity of an assignee. A consumer typically knows who the original creditor was, but may not know who the subsequent assignee of the loan is. If a loan is sold after consummation, the consumer's point of contact is usually a loan servicer who is under contract with the owner of the debt obligation or the owner's representative. Servicers are not assignees or owners for purposes of TILA Section 131's liability provisions. *See* TILA Section 131(f); 15 U.S.C. 1641(f).

TILA Section 131(f)(2) provides a means for consumers to identify and obtain contact information for the current owner or assignee of their loans. 15 U.S.C. 1641(f)(2). Specifically, upon receipt of a consumer's written request, the loan servicer must provide to the consumer, to the servicer's best knowledge, the name, address, and telephone number of the owner or master servicer of the obligation. Currently, Regulation Z does not provide any rules to implement TILA Section 131(f)(2).

Consumer advocates have expressed concerns that servicers often ignore information requests under TILA Section 131(f)(2). They point out that, if a servicer does not promptly and properly respond to a consumer's written request, the consumer could be prevented from asserting important legal rights. In one case, for example, a court found that a consumer's right of rescission was time-barred, after the servicer delayed responding to the consumer's written request for at least five months.[197] One reason servicers may ignore written requests is that TILA provides no deadline for the servicer's action. Moreover, until recently, TILA provided no private cause of action for failure to respond to a consumer's request under Section 131(f)(2).

To address these and related concerns, in 2009 Congress amended TILA in two ways. First, Congress added TILA Section 131(g) to require a new owner or assignee of a debt obligation to provide written notice to the consumer of the transfer no later than 30 days after the transfer.[198] 15 U.S.C. 1641(g). Among other information, the notice must include the identity, address, and telephone number of the new owner or assignee of the note and information on how to reach an agent or party having authority to act on behalf of the new owner or assignee. Second, Congress amended TILA Section 130(a) to give consumers a private right of action for violations of TILA Sections 131(f) and 131(g).[199] 15 U.S.C. 1640(a), 1641(f) and (g).

In November 2009, the Board published new § 226.39 as an interim final rule to implement TILA Section 131(g). 74 FR 60143, Nov. 20, 2009. In comments on § 226.39, consumer

[197] *See Meyer* v. *Argent Mortgage Co.,* 379 B.R. 529 (Bankr. E.D. Pa. 2007).

[198] Helping Families Save Their Homes Act of 2009, Public Law 111–22, tit. IV, § 404(a), 123 Stat. 1632, 1638 (2009).

[199] *Id.* at § 404(b).

advocates argued that regulations implementing TILA Section 131(f)(2) are necessary, even though TILA Section 131(g) and § 226.39 require assignees to identify themselves to consumers. Consumer advocates note that a consumer may still need to use TILA Section 131(f)(2) to request information regarding the current owner if, for example, transfer of the obligation occurred before the effective date of TILA Section 131(g), the consumer misplaced or never received the TILA Section 131(g) notice from the new owner, or if the consumer wishes to exercise the right to rescind or otherwise contact the new owner before receiving the notice under TILA Section 131(g). In addition, § 226.39 does not require notice to the consumer if a transferee assigns the obligation within 30 days of acquisition. Although RESPA provides consumers with the right to obtain information from a servicer by making a "qualified written request," [200] such a request would not be helpful in time-sensitive situations, because the servicer has 60 days to provide the requested information.[201]

The Board's Proposal

To address these concerns, the Board proposes new § 226.41 to implement TILA Section 131(f)(2). 15 U.S.C. 1641(f)(2). Under the proposal, upon receipt of a written request from the consumer, the servicer would be required to provide the consumer, within a reasonable time and to the best of its knowledge, the name, address, and telephone number of the owner or the master servicer of the debt obligation. The term "servicer" as used in the proposal has the same meaning as in § 226.36(c)(3). Proposed comment 41–1 clarifies that it would be reasonable under most circumstances to provide the required information within ten business days of receipt of the consumer's written request.

Proposed § 226.41 is intended to ensure that information critical for the consumer's exercise of legal rights against the current owner or assignee is provided within a reasonable time. The Board does not expect that the rule would impose a significant burden on servicers, because they should already possess or may easily obtain the requested information. The Board requests comment on the appropriateness of the ten business day safe harbor in proposed comment 41–1, as well as any benefits or burdens that the proposed rule may create.

[200] 12 U.S.C. 2600 *et seq.*(implemented by Regulation X, 12 CFR Part 3500).

[201] 12 U.S.C. 2605(e)(2); 24 CFR 3500.21(e).

Appendices G and H—Open-End and Closed-End Model Forms and Clauses

Appendices G and H set forth model forms, model clauses and sample forms that creditors may use to comply with the requirements of Regulation Z. Appendix G contains model forms, model clauses and sample forms applicable to open-end plans. Appendix H contains model forms, model clauses and sample forms applicable to closed-end loans. Although use of the model forms and clauses is not required, creditors using them properly will be deemed to be in compliance with the regulation with regard to those disclosures. As discussed above, the Board proposes to revise or add several model and sample forms to Appendices G and H for the requirements applicable to rescission and credit insurance, debt cancellation coverage, and debt suspension coverage ("credit protection products"). The revised or new model or sample forms are discussed above in the section-by-section analysis applicable to the regulatory provisions to which the forms relate. *See* discussion under §§ 226.4(d) (credit protection products), 226.15(b) (rescission of a HELOC), and 226.23(b) (rescission of a closed-end mortgage).

Permissible Changes

The staff commentary to Appendices G and H contain comment app. G and H–1, which discusses changes creditors may make to the model forms and clauses. Comment app. G and H–1 also lists the models to which formatting changes may not be made because the disclosures must be made in a form substantially similar to that in the models to retain the safe harbor from liability. In the August 2009 HELOC Proposal and the August 2009 Closed-End Proposal, the Board proposed to revise comment app. G and H–1 by adding a number of proposed new open-end and closed-end model forms and clauses to the list of model forms and clauses to which formatting changes may not be made. In addition, in the August 2009 Closed-End Proposal, the Board proposed to require creditors to provide disclosures for transactions secured by real property or a dwelling only as applicable. *See* proposed § 226.38. As a result, the Board proposed to amend comment app. G and H–1.vi to clarify that the use of multipurpose standard forms is not permitted for transactions secured by real property or a dwelling. *See* discussion under proposed § 226.37(a)(2) in the August 2009 Closed-End Proposal. In addition, current comment app. G and H–1.vii provides that acceptable changes to model forms includes using a vertical, rather than a horizontal, format for the boxes in the closed-end disclosures. Consistent with the proposed restrictions on format changes to the proposed closed-end model forms, the Board proposed in the August 2009 Closed-End Proposal to delete comment app. G and H–1.vii as obsolete.

In this proposal, the Board proposes to revise comment app. G and H–1 further by adding proposed Forms G–5(A)–(C) (for rescission in connection with a HELOC) to the list of forms to which formatting changes may not be made. As discussed in more detail in the section-by-section analysis to proposed § 226.15(b), proposed § 226.15(b)(6) provides that a creditor satisfies § 226.15(b)(3) if it provides Model Form G–5(A), or a substantially similar notice, which is properly completed with the disclosures required by § 226.15(b)(3). In addition, proposed Samples G–5(B) and G–5(C) provide sample forms for how a creditor may satisfy the content and format requirements set forth in § 226.15(b) and Model Form G–5(A) for certain rescission notices.

For similar reasons, the Board also proposes to revise comment app. G and H–1 by adding proposed Model Forms H–8(A) and H–9 and Sample H–8(B) (for rescission in connection with a closed-end mortgage) to the list of forms to which formatting changes may not be made. As discussed in more detail in the section-by-section analysis to proposed § 226.23(b), proposed § 226.23(b)(6) provides that a creditor satisfies § 226.23(b)(3) if it provides the appropriate model form (H–8(A) or H–9), or a substantially similar notice, which is properly completed with the disclosures required by § 226.23(b)(3). Proposed Sample H–8(B) provides a sample form for how a creditor may satisfy the content and format requirements set forth in § 226.23(b) and Model Form H–8(A).

Finally, the Board proposes to revise comment app. G and H–1 by adding proposed Model Forms G–16(A) and H–17(A), and Sample Forms G–16(B)–(D) and H–17(B)–(D) (for credit protection products) to the list of forms to which formatting changes may not be made. As discussed in more detail in the section-by-section analysis to proposed § 226.4(d), proposed § 226.4(d) provides that a creditor satisfies § 226.4(d) if it provides the required disclosures grouped together and substantially similar in headings, content, and format to Model Forms G–16(A) or H–17(A). Proposed Samples G–16(B)–(D) and H–17(B)–(D) provide examples of how a creditor may satisfy the content and format requirements set forth in § 226.4(d) and Model Forms G–16(A) or H–17(A).

Appendix G—Open-End Model Forms and Clauses

Appendix G to part 226 sets forth model forms, model clauses and sample forms that creditors may use to comply with requirements of Regulation Z for open-end credit. Although use of the model forms and clauses generally is not required, creditors using them properly will be deemed to be in compliance with the regulation with regard to those disclosures.

Credit Protection Products

As noted above, the Board proposes a new model form and three new sample forms for the requirements applicable to credit protection products under § 226.4(d). Accordingly, the Board proposes to delete the current G–16(A) Debt Suspension Model Clause and G–16(B) Debt Suspension Sample, and add G–16(A) Credit Insurance, Debt Cancellation Coverage, or Debt Suspension Coverage Model Form; G–16(B) Credit Life Insurance Sample; G–16(C) Disability Debt Cancellation Coverage Sample; and G–16(D) Unemployment Debt Suspension Coverage Sample to illustrate the disclosures required under proposed § 226.4(d)(1) and (d)(3).

Model and Sample Forms Applicable to the Right of Rescission Notice

In this proposal, the Board would require new disclosures in proposed § 226.15(b) for open-end consumer credit transactions subject to the right of rescission. As discussed in the section-by-section analysis to proposed § 226.15(b) and as discussed in detail below, the Board proposes to replace the current model forms for the rescission notices in Model Forms G–5 through G–9 with proposed Model Form G–5(A), and two proposed Sample Forms G–5(B) and G–5(C). Currently, Appendix G provides the following five model rescission notices, one that corresponds to each of the five transactions that might give right to a right of rescission: (1) Form G–5 for account opening; (2) Form G–6 for each advance that is greater than the previously-established credit limit; (3) Form G–7 for increases in the credit limit; (4) Form G–8 for addition of a security interest; and (5) Form G–9 for increases in a security interest when there is not a credit limit increase.

As discussed in the section-by-section analysis to proposed § 226.15(b), the Board proposes to require new disclosures for the notice of the right to rescind for HELOC accounts. Consistent with the proposed content and format requirements for the rescission notices in proposed § 226.15(b), the Board proposes to replace current Model Forms G–5 through G–9 with proposed Model Form G–5(A), and two proposed Samples G–5(B) and G–5(C). The Board also proposes to revise comment app. G–4 consistent with the new model and sample forms. Under the proposal, most of the guidance in current comment app. G–4 regarding existing Model Forms G–5 through G–9 would be deleted. Guidance regarding the parenthetical information following the blank for the deadline for rescission would be deleted as unnecessary. The cross reference to § 226.2(a)(25) regarding the specificity with which the security interest should be disclosed in current Model Form G–7 is no longer necessary.

The Board proposes to replace the material removed from comment app. G–4 with guidance regarding the content and format requirements in proposed § 226.15(b)(2) and corresponding proposed comments. Specifically, proposed comment app. G–4.i provides that a creditor satisfies § 226.15(b)(3) if it provides the Model Form G–5(A), or a substantially similar notice, which is properly completed with the disclosures required by § 226.15(b)(3).

Sample G–5(B) provides guidance where a creditor is providing the rescission notice for opening of a HELOC account where the credit line is being secured by the consumer's home and the full credit line is rescindable. Proposed comment app. G–4.ii clarifies that in this situation, a creditor may use Sample G–5(B) to meet the content and format requirements for the rescission notice set forth in § 226.15(b) and Model Forms G–5(A).

Sample G–5(C) provides guidance where a creditor is providing the rescission notice for a credit limit increase on the HELOC account. Proposed comment app. G–4.iii clarifies that in this situation, a creditor may use proposed Sample G–5(C) to meet the content and format requirements for the rescission notice set forth in § 226.15(b) and Model Form G–5(A).

Proposed comment app. G–4.iv notes that Samples G–5(B) and G–5(C) contain the following optional disclosures set forth in § 226.15(b): (1) A disclosure about joint owners; (2) an acknowledgment of receipt of the notice; (3) the consumer's name and property address pre-printed on the form; (4) an account number on the form; and (5) a fax number that may be used by the consumer to exercise his or her rescission right. This proposed comment clarifies that a creditor may delete these optional disclosures from Samples G–5(B) and G–5(C) and still retain the safe harbor from liability by using these forms.

Proposed comment app. G–4.v provides that although creditors are not required to use a certain paper size in disclosing the rescission notice required under § 226.15(b), Samples G–5(B) and G–5(C) are each designed to be printed on an 8½ x 11 inch sheet of paper. In addition, proposed comment app. G–4.v specifies that the following formatting techniques were used in presenting the information in the sample notices to ensure that the information is readable:

A. A readable font style and font size (10-point Arial font style).

B. Sufficient spacing between lines of the text.

C. Adequate spacing between paragraphs when several pieces of information were included in the same row of the table, as appropriate.

D. Standard spacing between words and characters. In other words, the text was not compressed to appear smaller than 10-point type.

E. Sufficient white space around the text of the information in each row, by providing sufficient margins above, below and to the sides of the text.

F. Sufficient contrast between the text and the background. Generally, black text was used on white paper.

Proposed comment app. G–4.vi specifies that while the regulation does not require creditors to use the above formatting techniques in presenting information in the rescission notice (except for the 10-point font requirement), creditors are encouraged to consider these techniques when deciding how to disclose information in the notice, to ensure that the information is presented in a readable format.

Proposed comment app. G–4.vi clarifies that creditors may use color, shading and similar graphic techniques with respect to the rescission notices, so long as the notice remains substantially similar to the model and sample forms in G–5(A)–(C).

The Board is not proposing to provide sample forms for each transaction that might give rise to a right to rescind for HELOC accounts. For example, the Board is not proposing to provide samples forms for the following situations where a right to rescind arises under § 226.15: (1) Each advance that falls outside of a previously-established credit limit; (2) an addition of a security interest; and (3) an increase in the security interest when there is not a credit limit increase. Based on Board research, the Board understands that these situations rarely occur. The Board believes that sample forms for these transactions would not necessarily be helpful to creditors. Because these events are rare, when they do occur, creditors may need to craft a specialized notice to deal with facts that pertain to that particular transaction. Nonetheless, the Board solicits comment on whether the Board should issue sample forms for these transactions, and if so, in what context they generally arise.

Appendix H—Closed-End Model Forms and Clauses

Appendix H to part 226 sets forth model forms, model clauses and sample forms that creditors may use to comply with requirements of Regulation Z for closed-end credit. Although use of the model forms and clauses generally is not required, creditors using them properly will be deemed to be in compliance with the regulation with regard to those disclosures.

Credit Protection Products

As noted above, the Board proposes a new model form and three new sample forms for the requirements applicable to credit protection products under § 226.4(d). Accordingly, the Board proposes to delete the current H–17(A) Debt Suspension Model Clause and H–17(B) Debt Suspension Sample, and add H–17(A) Credit Insurance, Debt Cancellation Coverage, or Debt Suspension Coverage Model Form; H–17(B) Credit Life Insurance Sample; H–17(C) Disability Debt Cancellation Coverage Sample; and H–17(D) Unemployment Debt Suspension Coverage Sample to illustrate the disclosures required under proposed § 226.4(d). In a technical revision, the Board also proposes to revise comments app. H–1, H–3 and H–12 to clarify that the guidance applies to new Model Form H–17(A) and Samples H–17(B), (C) and (D).

Model Forms and Sample Form for Notice of the Right of Rescission

In this proposal, the Board would require new disclosures in proposed § 226.23(b) for closed-end consumer credit transactions subject to the right of rescission. Current Model Form H–9 illustrates the format and content of disclosures currently required under § 226.23(b) for a refinancing with the original creditor involving the extension of new money. Current Model Form H–8 illustrates the format and content of disclosures currently required under § 226.23(b) for all other closed-end consumer credit transactions subject to the right of rescission. As discussed in the section-by-section analysis to proposed § 226.23(b) and as discussed in detail below, the Board proposes to revise the current model forms for the rescission notices in Model Forms H–8 (redesignated as H–8(A)) and H–9 (renamed as “Rescission Model Form (New Advance of Money with the Same Creditor)”, and to add Sample H–8(B).

The Board proposes to revise existing commentary that provides guidance to creditors on how to use current Model Forms H–8 and H–9. Under the proposal, most of the guidance contained in current comment app. H–11 regarding current Model Forms H–8 and H–9 would be deleted. Guidance regarding the parenthetical information following the blank for the deadline for rescission would be deleted as unnecessary. The cross reference to § 226.2(a)(25) regarding the specificity with which the security interest should be disclosed in current Model Form H–9 is no longer necessary, nor is the guidance regarding the use of the current model forms over the previous forms.

The Board proposes to replace the material removed from comment app. H–11 with guidance regarding the content and format requirements introduced by proposed § 226.23(b)(2) and the corresponding proposed comments. Specifically, proposed comment app. H–11 clarifies that Model Forms H–8(A) and H–9 contain the rescission notices for a typical closed-end transaction and a new advance of money with the same creditor, respectively. These proposed model forms illustrate, in the tabular format, the disclosures required generally by proposed § 226.23(b). Proposed comment app. H–11.ii specifies that a creditor satisfies § 226.23(b)(3) if it provides the appropriate model form (H–8(A) or H–9), or a substantially similar notice, which is properly completed with the disclosures required by § 226.23(b)(3).

Proposed comment app. H–11.iii notes that Sample H–8(B) contains the following optional disclosures set forth in § 226.23(b): (1) a disclosure about joint owners; (2) an acknowledgment of receipt of the notice; (3) the consumer’s name and property address pre-printed on the form; and (4) the loan number on the form; and (5) a fax number that may be used by the consumer to exercise his or her rescission right. This proposed comment clarifies that a creditor may delete these optional disclosures from Sample H–8(B) and still retain the safe harbor from liability by using this form.

Proposed comment app. H–11.iv provides that although creditors are not required to use a certain paper size in disclosing the rescission notice required under § 226.23(b), proposed Model Forms H–8(A) and H–9 and Sample H–8(B) are designed to be printed on an 8½ x 11 inch sheet of paper. In addition, proposed comment app. H–11.iv states that the following formatting techniques were used in presenting the information in the model and sample notices to ensure that the information was readable:

A. A readable font style and font size (10-point Arial font style).

B. Sufficient spacing between lines of the text.

C. Adequate spacing between paragraphs when several pieces of information were included in the same row of the table, as appropriate.

D. Standard spacing between words and characters. That is, words were not compressed to appear smaller than 10-point type.

E. Sufficient white space around the text of the information in each row, by providing sufficient margins above, below and to the sides of the text.

F. Sufficient contrast between the text and the background. Black text was used on white paper.

Proposed comment app. H–11.v states that while the regulation does not require creditors to use the above formatting techniques in presenting information in the table (except for the 10-point font size), creditors are encouraged to consider these techniques when deciding how to disclose the notice, to ensure that the information is presented in a readable format.

Proposed comment app. H–11.vi clarifies that creditors may use color, shading and similar graphic techniques with respect to the rescission notices, so long as the notice remains substantially similar to the model and sample forms in Appendix H.

Appendix K—Model and Sample Reverse Mortgage Forms

Current Appendix K to Regulation Z provides instructions on how to calculate the TALC rates required to be disclosed, based on the calculation method used for closed-end APRs in Appendix J, and provides a model and sample disclosure form. Because the Board is proposing to remove the disclosure of the TALC rate table, Appendix K would be revised to contain only the model and sample disclosure forms that creditors may use to comply with the requirements of Regulation Z for reverse mortgages. Although use of the model forms and clauses is not required, creditors using them properly will be deemed to be in compliance with the regulation with regard to those disclosures.

As discussed in the section-by-section analysis to proposed § 226.33(c) and (d), the Board proposes to add new model and sample forms for open-end reverse mortgage early disclosures, open-end reverse mortgage account-opening disclosures, and closed-end reverse mortgage disclosures. Accordingly, the Board proposes to add new Model Forms, Sample Forms, and Model Clause K–1 through K–7 that creditors may use to comply with the requirements in proposed § 226.38(c) and (d).

The Board proposes to add Models K–1 through K–3 to illustrate the format and content of disclosures required under proposed § 226.33 for early open-end reverse mortgage disclosures, account-opening reverse mortgage disclosures, and closed-end reverse mortgage disclosures, respectively. In addition, the Board would add Model Clause K–7 to provide guidance to creditors on how to disclose a shared equity or shared appreciation feature.

In addition, the Board proposes to add several sample forms to provide examples of how creditors can provide certain disclosures required under proposed § 226.33 in the tabular format for each of the types of reverse mortgage disclosures. Specifically, proposed Samples K–4 through K–6 illustrate disclosures required under proposed § 226.33 for early open-end reverse mortgage disclosures, account-opening reverse mortgage disclosures, and closed-end reverse mortgage disclosures, respectively.

The Board also proposes to add commentary to provide guidance to creditors on the purpose of the sample forms, and how to use Model Forms, Sample Forms and Model Clause K–1 through K–7 for reverse mortgages. Comment app. K–1 and app. K–2 discuss permissible changes that creditors may make to the model forms and clauses without losing protection from liability for failure to comply with the regulation's disclosure requirements. For example, the commentary indicates that Samples K–4 through K–6 are designed to be printed on 8½ x 11 inch sheets of paper. In addition, the following formatting techniques were used in presenting the information in the table to ensure that the information was readable:

1. A readable font style and font size (10-point Ariel font style, except for the APR which is shown in 16-point type).
2. Sufficient spacing between lines of the text.
3. Standard spacing between words and characters. That is, words were not compressed to appear smaller than 10-point type.
4. Sufficient white space around the text of the information in each row, by providing sufficient margins above, below and to the sides of the text.
5. Sufficient contrast between the text and the background. Black text was used on white paper.

Although the Board is not requiring creditors to use the above formatting techniques in presenting information in the table (except for the 10-point and 16-point font size), the Board encourages creditors to consider these techniques when disclosing information in the tabular format to ensure that the information is presented in a readable format. However, comment app. K–2 clarifies that, except as otherwise permitted, disclosures must be substantially similar in sequence and format to model forms K–1 through K–3, as applicable.

Comment app. K–3 provides guidance to creditors regarding the purpose of sample forms generally. In addition, the Board proposes to add comments to indicate the terms illustrated in the sample forms. Comment app. K–4 would indicate the terms of the early open-end reverse mortgage disclosure illustrated in Sample K–4. Comment app. K–5 would indicate the terms of the account-opening open-end reverse mortgage disclosure illustrated in Sample K–5. Comment app. K–6 would indicate the terms of the closed-end reverse mortgage disclosure illustrated in Sample K–6.

Appendix L—Reserved

Appendix L to Regulation Z contains the loan periods creditors must use in disclosing the TALC rates and a table of life expectancies that must be used to determine loan periods based on the consumer's life expectancy. The proposal would remove and reserve Appendix L because the Board is proposing to eliminate the table of TALC rates. The Board requests comment on whether the life expectancies (updated to current figures) in Appendix L would be useful in determining the total of payments, annual percentage rate, and finance charge under proposed § 226.33(c)(14).

VII. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3506; 5 CFR part 1320 appendix A.1), the Board reviewed the proposed rule under the authority delegated to the Board by the Office of Management and Budget (OMB). The collection of information that is required by this proposed rule is found in 12 CFR part 226. The Board may not conduct or sponsor, and an organization is not required to respond to, this information collection unless the information collection displays a currently valid OMB control number. The OMB control number is 7100–0199.

This information collection is required to provide benefits for consumers and is mandatory (15 U.S.C. 1601 *et seq.*). Since the Board does not collect any information, no issue of confidentiality arises. The respondents/recordkeepers are creditors and other entities subject to Regulation Z.

TILA and Regulation Z are intended to ensure effective disclosure of the costs and terms of credit to consumers. For open-end credit, creditors are required to, among other things, disclose information about the initial costs and terms and to provide periodic statements of account activity, notice of changes in terms, and statements of rights concerning billing error procedures. Regulation Z requires specific types of disclosures for credit and charge card accounts and home equity plans. For closed-end loans, such as mortgage and installment loans, cost disclosures are required to be provided prior to consummation. Special disclosures are required in connection with certain products, such as reverse mortgages, certain variable-rate loans, and certain mortgages with rates and fees above specified thresholds. TILA and Regulation Z also contain rules concerning credit advertising. Creditors are required to retain evidence of compliance for twenty-four months, § 226.25, but Regulation Z identifies only a few specific types of records that must be retained.[202]

Under the PRA, the Board accounts for the paperwork burden associated with Regulation Z for the state member banks and other creditors supervised by the Federal Reserve that engage in consumer credit activities covered by Regulation Z and, therefore, are respondents under the PRA. Appendix I of Regulation Z defines the Federal Reserve-regulated institutions as: State member banks, branches and agencies of foreign banks (other than Federal branches, Federal agencies, and insured state branches of foreign banks), commercial lending companies owned or controlled by foreign banks, and organizations operating under section 25 or 25A of the Federal Reserve Act. Other Federal agencies account for the paperwork burden imposed on the entities for which they have administrative enforcement authority. The current total annual burden to

[202] *See* comments 25(a)–3 and –4.

comply with the provisions of Regulation Z is estimated to be 1,497,362 hours for the 1,138 Federal Reserve-regulated institutions that are deemed to be respondents for the purposes of the PRA. To ease the burden and cost of complying with Regulation Z (particularly for small entities), the Board provides model forms, which are appended to the regulation.

As discussed in the preamble, the Board proposes changes to format, timing, and content requirements for the following notices and disclosures governed by Regulation Z: (1) Right of rescission—notice of right to rescind certain open- and closed-end loans secured by the consumer's principal dwelling; (2) subsequent disclosure requirements—loan modifications that require new TILA disclosures; (3) advertisements for open-end home-secured credit plans; (4) requirements for reverse mortgages; and (5) notices given by loan servicers containing information about the current owner or master servicer of a consumer's loan.[203]

The proposed rule would impose a one-time increase in the total annual burden under Regulation Z for all respondents regulated by the Federal Reserve by 190,168 hours, from 1,497,362 to 1,687,530 hours. In addition, the Board estimates that, on a continuing basis, the proposed revisions to the rules would increase the total annual burden by 610,464 hours from 1,497,362 to 2,107,826 hours.

The total estimated burden increase, as well as the estimates of the burden increase associated with each major section of the proposed rule as set forth below, represents averages for all respondents regulated by the Federal Reserve. The Board expects that the amount of time required to implement each of the proposed changes for a given institution may vary based on the size and complexity of the respondent.[204]

The Board proposes to revise the content and format requirements for the notice of the right to rescind under sections 226.15 and 226.23. In an effort to reduce burden the Board is amending Appendix G, as it pertains to section 226.15, and Appendix H, as it pertains to section 226.23, to replace the current model forms for the rescission notices. The Board estimates that 1,138 respondents regulated by the Federal Reserve would take, on average, 160 hours (four business weeks) to update their systems, internal procedure manuals, and provide training for relevant staff to comply with the proposed notice and disclosure requirements in sections 226.15 and 226.23. This one-time revision would increase the burden by 182,080 hours.

The Board proposes to revise section 226.16 to address certain misleading or deceptive practices used in open-end home-secured credit plan advertisements and promote consistency in the current advertising rules applicable to open-end and closed-end home-secured credit. The Board estimates that the 651 respondents regulated by the Federal Reserve would take, on average, 8 hours (one business day) to update their systems for advertising to comply with the proposed disclosure requirements in section 226.16. This one-time revision would increase the burden by 5,208 hours.

The Board proposes to revise section 226.20(a) for closed-end mortgages requiring new disclosures for mortgage transactions when existing parties agree to modify certain key terms, such as the interest rate or loan amount, and to remove reliance on whether the existing legal obligation is satisfied and replaced under applicable State law. The Board estimates that the 1,138 respondents regulated by the Federal Reserve would take, on average, 40 hours a month to comply with the proposed disclosure requirements in section 226.20(a). This revision would increase the burden by 546,240 hours.

The Board proposes to revise section 226.33 to ensure consumers receive meaningful information in an understandable format using forms that are designed, and have been consumer tested, for reverse mortgage consumers. The Board is proposing three consolidated reverse mortgage disclosure forms: An early disclosure for open-end reverse mortgages, an account-opening disclosure for open-end reverse mortgages, and a closed-end reverse mortgage disclosure. Rather than receive two or more disclosures under TILA that come at different times and have different formats, consumers would receive all the disclosures in a single format that is largely similar regardless of whether the reverse mortgage is structured as open-end or closed-end. The Board's proposal would also facilitate compliance with TILA by providing creditors with a single set of forms that are specific to and designed for reverse mortgages, rather than requiring creditors to modify and adapt disclosures designed for forward mortgages. In an effort to reduce burden Appendix K would be amended by removing the disclosure of the TALC rate table and adding model and sample disclosure forms that creditors may use to comply with the requirements of Regulation Z for reverse mortgages. The Board estimates that 18 respondents regulated by the Federal Reserve would take, on average, 160 hours (four business weeks) to update their systems, internal procedure manuals, and provide training for relevant staff to comply with the proposed notice and disclosure requirements in sections 226.33. This one-time revision would increase the burden by 2,080 hours. On a continuing basis the Board estimates that 18 respondents regulated by the Federal Reserve would take, on average, 8 hours a month to comply with the proposed notice and disclosure requirements in sections 226.33 and would increase the ongoing burden by 1,728 hours.

Board proposes new § 226.41 to implement TILA Section 131(f)(2). 15 U.S.C. 1641(f)(2). Under the proposal, upon receipt of a written request from the consumer, the servicer would be required to provide the consumer, within a reasonable time and to the best of its knowledge, the name, address, and telephone number of the owner or the master servicer of the debt obligation. The Board estimates that 651 respondents regulated by the Federal Reserve would take, on average, 8 hours a month to comply with the proposed notice and disclosure requirements in section 226.41 and would increase the ongoing burden by 62,496 hours.

The other Federal financial agencies: Office of the Comptroller of the Currency (OCC), Office of Thrift Supervision (OTS), the Federal Deposit Insurance Corporation (FDIC), and the National Credit Union Administration (NCUA) are responsible for estimating and reporting to OMB the total paperwork burden for the domestically chartered commercial banks, thrifts, and Federal credit unions and U.S. branches and agencies of foreign banks for which they have primary administrative enforcement jurisdiction under TILA Section 108(a), 15. U.S.C. 1607(a). These agencies are permitted, but are not required, to use the Board's burden estimation methodology. Using the Board's method, the total current

[203] This proposal also contains changes to format and content requirements for disclosures related to credit insurance or debt cancellation or debt suspension coverage ("credit protection products"). These proposed changes amend provisions that were originally proposed as part of an earlier Board proposal on closed-end mortgages (Docket No. R–1366) (74 FR 43232). The burden estimate for changes to disclosures for credit protection products are not included in burden estimates for this rulemaking because they were included in the burden estimate for the earlier closed-end mortgage proposal.

[204] The burden estimate for this rulemaking does not include the burden addressing changes to implement the following provisions announced in separate rulemakings:

- Closed-End Mortgages (Docket No. R–1366) (74 FR 43232), or
- Home-Equity Lines of Credit (Docket No. R–1367) (74 FR 43428).

estimated annual burden for the approximately 16,200 domestically chartered commercial banks, thrifts, and Federal credit unions and U.S. branches and agencies of foreign banks supervised by the Federal Reserve, OCC, OTS, FDIC, and NCUA under TILA would be approximately 19,610,245 hours. The proposed rule would impose a one-time increase in the estimated annual burden for such institutions by 5,313,600 hours to 24,923,845 hours. On a continuing basis the proposed rule would impose an increase in the estimated annual burden by 3,110,400 to 22,720,645 hours. The above estimates represent an average across all respondents; the Board expects variations between institutions based on their size, complexity, and practices.

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the Board's functions; including whether the information has practical utility; (2) the accuracy of the Board'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. Comments on the collection of information should be sent to Michelle Shore, Federal Reserve Board Clearance Officer, Division of Research and Statistics, Mail Stop 95–A, Board of Governors of the Federal Reserve System, Washington, DC 20551, with copies of such comments sent to the Office of Management and Budget, Paperwork Reduction Project (7100–0199), Washington, DC 20503.

VIII. Initial Regulatory Flexibility Analysis

In accordance with section 3(a) of the Regulatory Flexibility Act (RFA), 5 U.S.C. 601–612, the Board is publishing an initial regulatory flexibility analysis for the proposed amendments to Regulation Z. The RFA requires an agency either to provide an initial regulatory flexibility analysis with a proposed rule or to certify that the proposed rule will not have a significant economic impact on a substantial number of small entities. Under regulations issued by the Small Business Administration (SBA), an entity is considered "small" if it has $175 million or less in assets for banks and other depository institutions, and $7 million or less in revenues for non-bank mortgage lenders and loan servicers.[205]

Based on its analysis and for the reasons stated below, the Board believes that this proposed rule will have a significant economic impact on a substantial number of small entities. A final regulatory flexibility analysis will be conducted after consideration of comments received during the public comment period. The Board requests public comment in the following areas.

A. Reasons for the Proposed Rule

Congress enacted TILA based on findings that economic stability would be enhanced and competition among consumer credit providers would be strengthened by the informed use of credit resulting from consumers' awareness of the cost of credit. One of the stated purposes of TILA is providing a meaningful disclosure of credit terms to enable consumers to compare credit terms available in the marketplace more readily and avoid the uninformed use of credit. TILA's disclosures differ depending on whether credit is an open-end (revolving) plan or a closed-end (installment) loan. TILA also contains procedural and substantive protections for consumers. TILA is implemented by the Board's Regulation Z.

In this regard, the proposed amendments to Regulation Z partly aim to improve the effectiveness of the disclosures that creditors provide to consumers. Accordingly, the Board is proposing changes to format, timing and content requirements for disclosures related to rescission rights, and to credit insurance or debt cancellation or debt suspension coverage ("credit protection products"). The proposal revises the rules regarding when a modification to an existing closed-end mortgage loan results in a new transaction, to ensure that consumers receive TILA disclosures for modifications to key loan terms. The Board also is proposing to provide consumers with a right to a refund of fees for three days after the consumer receives early disclosures required under § 226.19(a). The proposal includes changes to format, timing, and content requirements for reverse mortgage disclosures, and rules to govern reverse mortgage and open-end mortgage advertising. The proposal also would require loan servicers, upon request, to provide a consumer with information about the owner or master servicer of the consumer's loan within a reasonable time after the request, such as 10 business days.

Congress enacted HOEPA in 1994 as an amendment to TILA. TILA is implemented by the Board's Regulation Z. HOEPA imposed additional substantive protections on certain high-cost mortgage transactions. HOEPA also charged the Board with prohibiting acts or practices in connection with mortgage loans that are unfair, deceptive, or designed to evade the purposes of HOEPA, and acts or practices in connection with refinancing of mortgage loans that are associated with abusive lending or are otherwise not in the interest of borrowers.

The proposed regulations would revise and enhance disclosure requirements of Regulation Z for transactions secured by a consumer's principal dwelling, as noted above. These amendments are proposed in furtherance of the Board's responsibility to prescribe regulations to carry out the purposes of TILA, including promoting consumers' awareness of the cost of credit and their informed use thereof. The proposal also would revise the rules for determining whether a closed-end mortgage is a higher-priced mortgage loan subject to special consumer protections, to ensure that prime loans are not incorrectly classified as higher-priced loans. Finally, the Board is proposing rules to mandate reverse mortgage counseling and prohibit reverse mortgage cross-selling. These restrictions are proposed pursuant to the Board's statutory responsibility to prohibit unfair and deceptive acts and practices in connection with mortgage loans.

B. Statement of Objectives and Legal Basis

The **SUPPLEMENTARY INFORMATION** contains the statement of objectives and legal basis. In summary, the proposed amendments to Regulation Z are designed to: (1) Revise the rules regarding the consumer's right to rescind certain open- and closed-end loans secured by the consumer's principal dwelling in §§ 226.15 and 226.23; (2) revise the rules regarding when a modification of an existing closed-end loan requires new disclosures in § 226.20(a); (3) revise the rules regarding when a closed-end loan is a "higher-priced" mortgage subject to special consumer protections in § 226.35; (4) provide consumers with the right to a refund of fees for three days after the consumer receives the early disclosures required under § 226.19(a); (5) for reverse mortgages, revise the cost disclosures, prohibit certain unfair lending acts or practices,

[205] 13 CFR 121.201; *see also* SBA, Table of Small Business Size Standards Matched to North American Industry Classification System Codes, *available at http://www.sba.gov/idc/groups/public/documents/sba_homepage/serv_sstd_tablepdf.pdf.*

and ensure that advertising is balanced and accurate in §§ 226.33 and 226.40; (6) revise the rules regarding disclosure requirements for credit protection products written in connection with a credit transaction in § 226.4(d); (7) revise the rules regarding advertisements for HELOC plans in § 226.16(d); and (8) add new § 226.41 to require loan servicers, upon request, to provide information to a consumer about the owner or master servicer of the consumer's loan within a reasonable time after the request, such as 10 business days.

The legal basis for the proposed rule is in Sections 105(a), 105(f), 129(*l*)(2), 131(f)(2) and 147 of TILA. 15 U.S.C. 1604(a), 1604(f), 1639(*l*)(2), 1641(f)(2) and 1665b. A more detailed discussion of the Board's rulemaking authority is set forth in part IV of the **SUPPLEMENTARY INFORMATION**.

C. Description of Small Entities to Which the Proposed Rule Would Apply

The proposed regulations would apply to all institutions and entities that engage in originating or extending home-secured credit, as well as servicers of these loans. The Board is not aware of a reliable source for the total number of small entities likely to be affected by the proposal, and the credit provisions of TILA and Regulation Z have broad applicability to individuals and businesses that originate, extend, and service even small numbers of home-secured credit. *See* § 226.1(c)(1).[206] All small entities that originate, extend, or service open-end loans secured by a consumer's principal dwelling or closed-end loans secured by a real property or a dwelling; or offer credit protection products in connection with any credit transaction covered by Regulation Z potentially could be subject to at least some aspects of the proposed rules.

The Board can, however, identify through data from Reports of Condition and Income ("call reports") approximate numbers of small depository institutions that would be subject to the proposed rules. Based on March 2010 call report data, approximately 8,845 small institutions would be subject to the proposed rules. Approximately 15,658 depository institutions in the United States filed call report data, approximately 11,148 of which had total domestic assets of $175 million or less and thus were considered small entities for purposes of the RFA. Of 3,898 banks, 523 thrifts and 6,727 credit unions that filed call report data and were considered small entities, 3,776 banks, 496 thrifts, and 4,573 credit unions, totaling 8,845 institutions, extended mortgage credit. For purposes of this analysis, thrifts include savings banks, savings and loan entities, co-operative banks, and industrial banks.

The Board cannot identify with certainty the number of small non-depository institutions that would be subject to the proposed rules. Home Mortgage Disclosure Act (HMDA)[207] data indicate that 1,507 non-depository institutions filed HMDA reports in 2008.[208] Based on the small volume of lending activity reported by these institutions, most are likely to be small.

Certain parts of the proposed rule would also apply to mortgage servicers. The Board is not aware, however, of a source of data for the number of small mortgage servicers. The available data are not sufficient for the Board realistically to estimate the number of mortgage servicers that would be subject to the proposed rules, and that are small as defined by SBA.

D. Projected Reporting, Recordkeeping, and Other Compliance Requirements

The compliance requirements of the proposed rules are described in part VI of the **SUPPLEMENTARY INFORMATION**. The effect of the proposed revisions to Regulation Z on small entities is unknown. Some small entities would be required, among other things, to modify their notices of the right to rescind and the processes for delivery thereof to comply with the revised rules. The precise costs to small entities of updating their systems and disclosures are difficult to predict. These costs will depend on a number of unknown factors, including, among other things, the specifications of the current systems used by such entities to prepare and provide disclosures and to administer and maintain accounts, the complexity of the terms of credit products that they offer, and the range of such product offerings.

Small entities would be required to provide only one copy of the notice of the right to rescind to consumers at closing, thus enjoying a cost savings. The proposed rules would also clarify the parties' obligations when the right to rescind is asserted after the initial three days, and clarify that the consumer's death and certain refinancings terminate an extended right to rescind, thus reducing litigation risks and costs for small entities. The proposed rules would revise the list of "material disclosures" that can trigger the extended right to rescind to focus on disclosures that testing shows are most important to consumers, and establish accuracy tolerances for certain disclosures, accordingly lowering costs for small entities.

Under the proposed rules, a new transaction for purposes of TILA occurs when the creditor and consumer modify certain key terms, regardless of State law or the parties' intent. The proposed rules would thus increase the number of transactions that require new disclosures and potential compliance with HOEPA rules, raising costs for small entities. The precise costs to small entities of providing more disclosures are difficult to predict. These costs would be mitigated somewhat by the proposed exemption of loan workouts reached in a court proceeding, loan workouts for borrowers in delinquency or default, and certain beneficial modifications unless fees are charged and new money is advanced.

The proposed rules would require creditors to determine whether a loan is a higher-priced mortgage loan by comparing the loan's rate without third-party fees (the "coverage rate") to the APOR. The coverage rate would be calculated using the loan's interest rate and the points and any other origination charges the creditor keeps for itself, and so would be closely comparable to the APOR. The precise costs to small entities of updating their systems are difficult to predict. The proposal would reduce potential compliance burden for all entities, including small entities, by ensuring that prime loans are not erroneously classified as higher-priced loans subject to the special protections in § 226.35(a).

The proposed rules would provide consumers with a right to a refund of fees during the three business days following the consumer's receipt of the early disclosures required under § 226.19(a). The right to a refund would

[206] Regulation Z generally applies to "each individual or business that offers or extends credit when four conditions are met: (i) the credit is offered or extended to consumers; (ii) the offering or extension of credit is done regularly, (iii) the credit is subject to a finance charge or is payable by a written agreement in more than four installments, and (iv) the credit is primarily for personal, family, or household purposes." § 226.1(c)(1).

[207] The 8,388 lenders (both depository institutions and mortgage companies) covered by HMDA in 2008 accounted for the majority of home lending in the United States. Under HMDA, lenders use a "loan/application register" (HMDA/LAR) to report information annually to their Federal supervisory agencies for each application and loan acted on during the calendar year. Only lenders that have offices (or, for non-depository institutions, lenders that are deemed to have offices) in metropolitan areas are required to report under HMDA. However, if a lender is required to report, it must report information on all of its home loan applications and loans in all locations, including non-metropolitan areas.

[208] *The 2008 HMDA Data, http://www.federalreserve.gov/pubs/bulletin/2010/pdf/hmda08final.pdf.*

likely delay processing the consumer's application until the three days expire, as creditors may not order an appraisal or issue a rate lock without charging a nonrefundable fee. These delays may inconvenience consumers, but it is not clear that the delays would impose costs on small entities. Small entities would, however, incur costs to revise their systems and train personnel to comply with the right to a refund. The precise costs to small entities of updating their systems and training personnel are difficult to predict. In addition, the proposal would require a short disclosure of the right to a refund on the "Key Questions" disclosure proposed in the Board's August 2009 Closed-End Proposal. This disclosure would impose no additional burden, as it would be included in the Key Questions document published by the Board and would not require institutions to tailor the disclosure to individual transactions.

The proposed rules would require creditors to provide a new "Key Questions" disclosure before a consumer applies for a reverse mortgage that would explain the product and identify potential risks. The current TALC rates required under § 226.33 would be replaced with dollar figures for the consumer's costs and how much they will owe, based on three life expectancies. The precise costs to small entities of updating their systems and disclosures are difficult to predict. These costs will depend on a number of unknown factors, including, among other things, the specifications of the current systems used by such entities to prepare and provide disclosures and to administer and maintain accounts, the complexity of the terms of credit products that they offer, and the range of such product offerings. Very few small entities likely offer reverse mortgages, however, so only a very small number would be affected by the proposed rules on reverse mortgages.

The proposed prohibition on conditioning a reverse mortgage on the purchase of an annuity or other insurance or financial product may lead to a loss of revenue, but the precise costs are difficult to ascertain. A safe harbor would be available if, among other things, a reverse mortgage is closed at least ten days before the sale of another product, thus reducing litigation risks and compliance costs. The proposed requirement that prospective borrowers receive independent counseling before a reverse mortgage is made may slow down the process, but should not otherwise impose costs on small entities. The Board is proposing rules that would apply to advertisements for HECMs and proprietary reverse mortgages, and to open-end mortgages. The Board believes that these proposed rules will require the same types of professional skills and recordkeeping procedures that are needed to comply with existing TILA and Regulation Z advertising rules. The cost to small entities will accordingly be mitigated.

To implement TILA Section 131(f)(2), the proposed rules also would provide that when a consumer requests information from his or her loan servicer about the owner of the loan, the servicer must provide certain information about the owner or master servicer of the loan within a reasonable time, which generally would be 10 business days. Although the precise costs to small servicers of providing these notices are difficult to predict, the Board does not anticipate substantial burden on small servicers in providing these notices. RESPA already provides consumers with the right to obtain information from a servicer by making a "qualified written request," [209] but a servicer in that case has 60 days to provide the requested information.[210] The Board does not expect, however, that requiring loan servicers to provide information about the current owner or master servicer of the loan in a shorter time frame, such as 10 business days, would impose a significant burden on servicers because they should already possess or may easily obtain that information.

Finally, the proposed rules would require creditors to provide revised disclosures when offering or requiring a credit protection product in connection with a credit transaction. The revised disclosure would explain the product and identify potential risks. The precise costs to small entities of updating their systems and disclosures are difficult to predict.

The Board believes that costs of the proposed rules as a whole will have a significant economic effect on small entities, including small mortgage creditors and servicers. The Board seeks information and comment on any costs, compliance requirements, or changes in operating procedures arising from the application of the proposed rules to small businesses.

[209] 12 U.S.C. 2600 *et seq.* (implemented by Regulation X, 12 CFR part 3500).

[210] 12 U.S.C. 2605(e)(2); 24 CFR 3500.21(e).

E. Identification of Duplicative, Overlapping, or Conflicting Federal Rules

Other Federal Rules

The Board has not identified any Federal rules that conflict with the proposed revisions to Regulation Z.

Overlap With RESPA

HUD issued Frequently Asked Questions suggesting that a creditor may impose a nonrefundable fee under the Real Estate Settlement Procedures Act (RESPA) if the consumer receives a Good Faith Estimate (GFE) and expresses an intent to proceed with the loan covered by the GFE.[211] Under the proposed rule, however, the consumer would have a right to a refund of all fees during the three business days following receipt of the early disclosures required under § 226.19(a).

The proposed rules governing early disclosures for closed-end reverse mortgages may overlap with RESPA requirements that closed-end reverse mortgage consumers receive a GFE.

RESPA provides consumers with the right to obtain information from a servicer by making as "qualified written request," [212] and the servicer has 60 days to provide the requested information.[213] Under the proposed rule, however, when a consumer requests information from his or her loan servicer about the owner of the loan, the servicer must provide certain information about the owner or master servicer of the loan within a reasonable time after the request, which generally would be 10 business days.

Overlap With HUD's Guidance

The Board recognizes that HUD issued guidance on HECMs. The Board intends that its proposal be consistent with HUD's guidance for HECMs, and complement HUD's guidance by extending certain protections to proprietary reverse mortgages.

The Board seeks comment regarding any Federal rules that would duplicate, overlap, or conflict with the proposed rules.

F. Identification of Duplicative, Overlapping, or Conflicting State Laws

State Equivalents to TILA and HOEPA

Many states regulate consumer credit through statutory disclosure schemes similar to TILA. Under TILA Section

[211] *New RESPA Rule Facts* 7, *available at http://www.hud.gov/offices/hsg/ramh/res/resparulefaqs422010.pdf.*

[212] 12 U.S.C. 2600 *et seq.* (implemented by Regulation X, 12 CFR part 3500).

[213] 12 U.S.C. 2605(e)(2); 24 CFR 3500.21(e).

111, the proposed rules would not preempt such State laws except to the extent they are inconsistent with the proposal's requirements. 15 U.S.C. 1610.

Currently, whether there is a refinancing depends on the parties' intent and State law. State court decisions are the predominant type of State law, and focus on whether the original obligation has been satisfied and replaced, or merely modified, in order to determine lien-holder priority. Reliance on State law leads to inconsistent application of Regulation Z and, in some cases, to loopholes. The proposed rules would not preempt such State laws except to the extent they are inconsistent with the proposal's requirements. *Id.*

The Board also is aware that many states regulate "high-cost" or "high-priced" mortgage loans under laws that resemble HOEPA. Many of these State laws involve coverage tests that partly depend on the APR of the transaction. The proposed rules would overlap with these laws by requiring lenders to determine whether a loan is a higher-priced mortgage loan by comparing the loan's coverage rate to the APOR.

Some State laws deal with reverse mortgage counseling, cross-selling, and suitability standards, and with credit insurance. The proposed rules would not preempt such State laws except to the extent they are inconsistent with the proposal's requirements. *Id.*

The Board seeks comment regarding any state or local statutes or regulations that would duplicate, overlap, or conflict with the proposed rules.

G. Discussion of Significant Alternatives

The steps the Board has taken to minimize the economic impact and compliance burden on small entities, including the factual, policy, and legal reasons for selecting the alternatives adopted and why each one of the other significant alternatives was not accepted, are described above in the **SUPPLEMENTARY INFORMATION.** The Board has provided a different standard for defining higher-priced mortgage loans to correspond more accurately to mortgage market conditions, and exclude from the definition some prime loans that might otherwise have been classified as higher-priced. The Board believes that this standard will decrease the economic impact of the proposed rules on small entities by limiting their compliance costs for prime loans that the Board does not intend to cover under the higher-priced mortgage loan rules.

The Board welcomes comments on any significant alternatives, consistent with the requirements of TILA, that would minimize the impact of the proposed rules on small entities.

List of Subjects in 12 CFR Part 226

Advertising, Consumer protection, Federal Reserve System, Mortgages, Reporting and recordkeeping requirements, Truth in Lending.

Text of Proposed Revisions

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

Authority and Issuance

For the reasons set forth in the preamble, the Board proposes to amend Regulation Z, 12 CFR part 226, as follows:

PART 226—TRUTH IN LENDING (REGULATION Z)

1. The authority citation for part 226 continues to read as follows:

Authority: 12 U.S.C. 3806; 15 U.S.C. 1604, 1637(c)(5), and 1639(l); Pub. L. 111–24 § 2, 123 Stat. 1734.

Subpart A—General

2. Section 226.1 is amended by revising paragraphs (d)(5) and (d)(8) to read as follows:

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

* * * * *

(d) * * *

(5) Subpart E contains special rules for certain mortgage transactions. Section 226.32 requires certain disclosures and provides limitations for loans that have rates and fees above specified amounts. Section 226.33 **[**requires**]** ►contains rules on◄ disclosures**[**, including the total annual loan cost rate,**]** ►and advertising◄ for reverse mortgages. Section 226.34 prohibits specific acts and practices in connection with mortgage transactions that are subject to § 226.32. Section 226.35 prohibits specific acts and practices in connection with higher-priced mortgage loans, as defined in § 226.35(a). Section 226.36 prohibits specific acts and practices in connection with credit secured by a consumer's principal dwelling. ►Section 226.40 prohibits specific acts and practices in connection with reverse mortgages.◄

* * * * *

(8) Several appendices contain information such as the procedures for determinations about State laws, state exemptions and issuance of staff interpretations, special rules for certain kinds of credit plans, a list of enforcement agencies, and the rules for computing annual percentage rates in closed-end credit transactions **[**and total-annual-loan-cost rates for reverse mortgage transactions**]**.

* * * * *

3. Section 226.2 is amended by revising paragraphs (a)(6) and (a)(11) to read as follows:

§ 226.2 Definitions and rules of construction.

(a) * * *

(6) *Business day* means a day on which the creditor's offices are open to the public for carrying on substantially all of its business functions. However, for purposes of rescission under §§ 226.15 and 226.23, and for purposes of ►§ 226.5b(e), § 226.9(j)(2),◄ § 226.19(a)(1)(ii), ►§ 226.19(a)(1)(iv),◄ § 226.19(a)(2), § 226.31, ►§ 226.33(d)(1)(ii), § 226.33(d)(2), § 226.40(b)(2)◄ and § 226.46(d)(4), the term means all calendar days except Sundays and the legal public holidays specified in 5 U.S.C. 6103(a), such as New Year's Day, the Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, and Christmas Day.

* * * * *

(11) *Consumer* means a cardholder or a natural person to whom consumer credit is offered or extended. However, for purposes of rescission under §§ 226.15 and 226.23, the term also includes a natural person in whose principal dwelling a security interest is or will be retained or acquired, if that person's ownership interest in the dwelling is or will be subject to the security interest. ►For purposes of the counseling requirements under § 226.40(b) for reverse mortgages subject to § 226.33, the term is defined in § 226.40(b)(7).◄

* * * * *

4. Section 226.4 is amended by revising paragraphs (d)(1), (d)(3), and (d)(4) to read as follows:

§ 226.4 Finance charge.

* * * * *

(d) *Insurance and debt cancellation and debt suspension coverage.* (1) *Voluntary credit insurance premiums.* ►Except as provided in § 226.4(g), premiums◄**[**Premiums**]** for credit life, accident, health, or loss-of-income insurance may be excluded from the finance charge if the following conditions are met ►before the consumer enrolls in the credit insurance policy written in connection with the credit transaction◄:

(i) [The insurance coverage is not required by the creditor, and this fact is disclosed in writing.]▶The creditor clearly and conspicuously in a minimum 10-point font provides the following disclosures, which shall be grouped together and substantially similar in headings, content, and format to Model Form G–16(A) or H–17(A) in Appendix G or H of this part, as applicable:

(A) A heading disclosing the optional nature of the product, together with the name of the product;

(B) A statement that the consumer should stop to review the disclosure, together with a statement that the consumer does not have to buy the product to get or keep the loan or line of credit, as applicable;

(C) A statement that the consumer may visit the Web site of the Federal Reserve Board to learn more about the product, and a reference to that Web site;

(D) The following information in a tabular and question-and-answer format:

(*1*) A statement that if the consumer already has enough insurance or savings to pay off or make payments on the debt if a covered event occurs, the consumer may not need the product;

(*2*) A statement that other types of insurance can give the consumer similar benefits and are often less expensive;

(*3*) A statement of the maximum premium or charge per period, together with a statement that the cost depends on the consumer's balance or interest rate, as applicable;

(*4*) A statement of the maximum benefit amount, together with a statement that the consumer will be responsible for any balance due above the maximum benefit amount, as applicable;

(*5*) A statement that the consumer meets the age and employment eligibility requirements, as required under paragraph (d)(1)(ii) of this section;

(*6*) If there are other eligibility requirements in addition to age and employment, a statement in bold, underlined text that the consumer may not receive any benefits even if the consumer purchases the product, together with a statement that there are other requirements that the consumer may not meet and that, if the consumer does not meet these requirements, the consumer will not receive any benefits even if the consumer purchases the product and pays the periodic premium or charge; and

(*7*) A statement of the time period and age limit for coverage;

(E) A checkbox and a statement that the consumer wants to purchase the optional product, together with a statement of the maximum premium or charge per period; and

(F) A designation for the consumer's signature or initials.◀

(ii) [The premium for the initial term of insurance coverage is disclosed in writing. If the term of insurance is less than the term of the transaction, the term of insurance also shall be disclosed. The premium may be disclosed on a unit-cost basis only in open-end credit transactions, closed-end credit transactions by mail or telephone under § 226.17(g), and certain closed-end credit transactions involving an insurance plan that limits the total amount of indebtedness subject to coverage.]▶The creditor determines prior to or at the time of enrollment that the consumer meets any applicable age or employment eligibility criteria for insurance coverage; and◀

(iii) The consumer signs or initials an affirmative written request for the insurance after receiving the disclosures specified in paragraph (d)(1)(i) of this section, except as provided in paragraph (d)(4) of this section. Any consumer in the transaction may sign or initial the request.

* * * * *

(3) *Voluntary debt cancellation or debt suspension fees.* ▶Except as provided in § 226.4(g), charges◀ [Charges] or premiums paid for debt cancellation coverage for amounts exceeding the value of the collateral securing the obligation or for debt cancellation or debt suspension coverage in the event of the loss of life, health, or income or in case of accident may be excluded from the finance charge, whether or not the coverage is insurance, if the following conditions are met ▶before the consumer enrolls in the coverage written in connection with the credit transaction◀:

(i) [The debt cancellation or debt suspension agreement or coverage is not required by the creditor, and this fact is disclosed in writing;

(ii) The fee or premium for the initial term of coverage is disclosed in writing. If the term of coverage is less than the term of the credit transaction, the term of coverage also shall be disclosed. The fee or premium may be disclosed on a unit-cost basis only in open-end credit transactions, closed-end credit transactions by mail or telephone under § 226.17(g), and certain closed-end credit transactions involving a debt cancellation agreement that limits the total amount of indebtedness subject to coverage;

(iii) The following are disclosed]▶ The creditor clearly and conspicuously provides in a minimum 10-point font the disclosures specified in paragraph (d)(1)(i) of this section, which shall be grouped together and substantially similar in headings, content, and format to Model Form G–16(A) or H–17(A) in Appendix G or H of this part, as applicable, including a disclosure◀, as applicable, for debt suspension coverage[: That]▶that◀ the obligation to pay loan principal and interest is only suspended, [and] that interest will continue to accrue during the period of suspension ▶, and that the balance will increase during the suspension period◀;

▶(ii) The creditor determines prior to or at the time of enrollment that the consumer meets any applicable age or employment eligibility criteria for the debt cancellation or debt suspension coverage; and◀

[(iv)]▶(iii)◀ The consumer signs or initials an affirmative written request for coverage after receiving the disclosures specified in paragraph (d)(3)(i) of this section, except as provided in paragraph (d)(4) of this section. Any consumer in the transaction may sign or initial the request.

(4) *Telephone purchases.* If a consumer purchases credit insurance or debt cancellation or debt suspension coverage for an open-end [(not home-secured)] plan by telephone, the creditor must make the disclosures under paragraphs (d)(1)(i) [and (ii)] or (d)(3)(i) [through (iii)] of this section, as applicable, orally. In such a case, the creditor shall:

(i) Maintain evidence that the consumer, after being provided the disclosures orally, affirmatively elected to purchase the insurance or coverage; and

(ii) Mail the disclosures under paragraphs (d)(1)(i) [and (ii)] or (d)(3)(i) [through (iii)] of this section, as applicable, within three business days after the telephone purchase.

* * * * *

Subpart B—Open-End Credit

5. Section 226.5 is amended by revising paragraph (a)(1)(ii) to read as follows:

§ 226.5 General disclosure requirements.

(a) * * *

(1) * * *

(ii) The creditor shall make the disclosures required by this subpart in writing,[7] in a form that the consumer may keep,[8] except that:

(A) The following disclosures need not be written:

[7] [Reserved].

[8] [Reserved].

►(*1*) Disclosures under § 226.6(a)(3) of charges that are imposed as part of a home-equity plan that are not required to be disclosed under § 226.6(a)(2) or § 226.33(c) and related disclosures under § 226.9(c)(1)(ii)(B) of charges;

(*2*)◄ Disclosures under § 226.6(b)(3) of charges that are imposed as part of an open-end (not home-secured) plan that are not required to be disclosed under § 226.6(b)(2) and related disclosures under § 226.9(c)(2)(ii)(B) of charges;

►(*3*) Disclosures◄ [disclosures] under § 226.9(c)(2)(v); and

►(*4*) Disclosures◄ [disclosures] under § 226.9(d) when a finance charge is imposed at the time of the transaction.

(B) The following disclosures need not be in a retainable form:

►(*1*)◄ Disclosures that need not be written under paragraph (a)(1)(ii)(A) of this section;

►(*2*) Disclosures◄ [disclosures] for credit and charge card applications and solicitations under § 226.5a; [home-equity disclosures under § 226.5b(d);]

►(*3*) The◄ [the] alternative summary billing-rights statement under § 226.9(a)(2);

►(*4*) The◄ [the] credit and charge card renewal disclosures required under § 226.9(e); and

►(*5*) The◄ [the] payment requirements under § 226.10(b), except as provided in § 226.7(b)(13).

* * * * *

6. Section 226.5b, as proposed to be amended on Aug. 26, 2009 (74 FR 43428), is further amended by revising the introductory text and paragraphs (d), (e), (f)(2) introductory text, and (f)(4), and adding new paragraph (h) to read as follows:

§ 226.5b Requirements for home equity plans.

The requirements of this section apply to open-end credit plans secured by the consumer's dwelling►, except as provided in paragraph (i) of this section◄.

* * * * *

(d) *Refund of fees.* A creditor shall refund all fees paid by the consumer if any term required to be disclosed under paragraph (b) of this section changes (other than a change due to fluctuations in the index in a variable-rate plan►, or changes to the disclosures required by § 226.33(c)(3), (c)(5) or (c)(8) due to changes in the type of payment the consumer receives, or verification of the appraised property value or the consumer's age ◄) before the plan is opened and the consumer elects not to open the plan.

(e) *Imposition of nonrefundable fees.* Neither a creditor nor any other person may impose a nonrefundable fee until three business days after the consumer receives the disclosures required under paragraph (b) of this section ►or § 226.33(d)(1)◄.[10d] If the disclosures required under this section are mailed to the consumer, the consumer is considered to have received them three business days after they are mailed.

(f) * * *

(2) Terminate a plan and demand repayment of the entire outstanding balance in advance of the original term (except for reverse mortgage►s◄ [transactions] that are subject to paragraph (f)(4) of this section) unless:

* * * * *

(4) For reverse mortgage►s◄ [transactions] that are subject to § 226.33, terminate a plan and demand repayment of the entire outstanding balance in advance of the original term except:

(i) In the case of default;

(ii) If the consumer transfers title to the property securing the note;

(iii) If the consumer ceases using the property securing the note as the primary dwelling; or

(iv) Upon the consumer's death.

* * * * *

►(h) *Reverse mortgages.* For reverse mortgages that are subject to § 226.33, the creditor must comply with the requirements for open-end reverse mortgages in § 226.33 and not with paragraphs (a) through (c) of this section.◄

* * * * *

7. Section 226.6, as proposed to be amended on August 26, 2009 (74 FR 43428), is further amended by revising paragraphs (a) introductory text, (a)(5) introductory text, and (a)(5)(i), and § 226.6 is also amended by revising paragraphs (b)(5) introductory text and (b)(5)(i) to read as follows:

§ 226.6 Account-opening disclosures.

(a) *Rules affecting home-equity plans.* The requirements of paragraph (a) of this section apply only to home equity plans subject to § 226.5b. ►The requirements of paragraphs (a)(1), (a)(2), (a)(5)(i), and (a)(5)(v) do not apply to reverse-mortgage transactions.◄

* * * * *

(5) *Additional disclosures for home-equity plans.* A creditor shall disclose [to the extent applicable] ►or comply with, as applicable◄:

(i) [Voluntary]►*Required or voluntary*◄ *credit insurance, debt cancellation* ►*coverage,*◄ *or debt suspension* ►*coverage*◄. The disclosures ►and requirements◄ in § 226.4(d)(1)(i) [and (d)(1)(ii)] ►through (d)(1)(iii)◄ and (d)(3)(i) through (d)(3)(iii)►, as applicable,◄ if the creditor offers optional credit insurance,[or] debt cancellation ►coverage◄ or debt suspension coverage that is identified in § 226.4(b)(7) or (b)(10). ►For required credit insurance, debt cancellation coverage, or debt suspension coverage that is identified in § 226.4(b)(7) or (b)(10), the creditor shall provide the disclosures required in § 226.4(d)(1)(i) and (d)(3)(i), as applicable, except for § 226.4(d)(1)(i)(A), (B), (D)(5), (E) and (F).◄

* * * * *

(b) * * *

(5) *Additional disclosures for open-end (not home-secured) plans.* A creditor shall disclose ►or comply with, as◄[to the extent] applicable:

(i) [*Voluntary*]►*Required or voluntary*◄ *credit insurance, debt cancellation* ►*coverage*◄*, or debt suspension* ►*coverage*◄*.* The disclosures ►and requirements◄ in § 226.4(d)(1)(i) [and (d)(1)(ii)]►through (d)(1)(iii)◄ and (d)(3)(i) through (d)(3)(iii) ►,as applicable,◄ if the creditor offers optional credit insurance, [or] debt cancellation ►coverage,◄ or debt suspension coverage that is identified in § 226.4(b)(7) or (b)(10). ►For required credit insurance, debt cancellation coverage, or debt suspension coverage that is identified in § 226.4(b)(7) or (b)(10), the creditor shall provide the disclosures required in § 226.4(d)(1)(i) and (d)(3)(i), as applicable, except for § 226.4(d)(1)(i)(A), (B), (D)(5), (E) and (F).◄

* * * * *

8. Section 226.7 is amended by revising paragraph (a)(8) to read as follows:

§ 226.7 Periodic statement.

* * * * *

(a) . * * *

(8) *Grace period.* ►Except for reverse mortgages that are subject to § 226.33, t◄[T]he date by which or the time period within which the new balance or any portion of the new balance must be paid to avoid additional finance charges. If such a time period is provided, a creditor may, at its option and without disclosure, impose no finance charge if payment is received after the time period's expiration.

* * * * *

9. Section 226.9 is amended by revising paragraphs (b)(1) and (2), redesignating paragraph (c)(1)(ii) as paragraph (c)(1)(iv) and revising it, revising paragraph (c)(1)(iii), and adding

[10d] Reserved.

new paragraph (c)(1)(ii) to read as follows:

§ 226.9 Subsequent disclosure requirements.

* * * * *

(b) *Disclosures for supplemental credit access devices and additional features.* (1) If a creditor, within 30 days after mailing or delivering the account-opening disclosures under ►§ ◄§ 226.6(a)(1)►,◄ [or] ►6◄(b)(3)(ii)(A), ►or 226.33(d)(2) and (d)(4)(i),◄ as applicable, adds a credit feature to the consumer's account or mails or delivers to the consumer a credit access device, including but not limited to checks that access a credit card account, for which the finance charge terms are the same as those previously disclosed, no additional disclosures are necessary. Except as provided in paragraph (b)(3) of this section, after 30 days, if the creditor adds a credit feature or furnishes a credit access device (other than as a renewal, resupply, or the original issuance of a credit card) on the same finance charge terms, the creditor shall disclose, before the consumer uses the feature or device for the first time, that it is for use in obtaining credit under the terms previously disclosed.

(2) Except as provided in paragraph (b)(3) of this section, whenever a credit feature is added or a credit access device is mailed or delivered to the consumer, and the finance charge terms for the feature or device differ from disclosures previously given, the disclosures required by ►§ ◄§ 226.6(a)(1)►,◄ [or] ►6◄(b)(3)(ii)(A), ►or 226.33(d)(2) and (d)(4)(i),◄ as applicable, that are applicable to the added feature or device shall be given before the consumer uses the feature or device for the first time.

* * * * *

(c) *Change in terms.* (1) *Rules affecting home-equity plans.*—(i) *Written notice required.* * * *

►(ii) *Charges not covered by § 226.6(a)(1) and (a)(2) or § 226.33.* Except as provided in paragraph (c)(1)(iv) of this section, if a creditor increases any component of a charge or provides for a new charge required to be disclosed under § 226.6(a)(3) that is not required to be disclosed in a tabular format under §§ 226.6(a)(2) or 226.33(d)(4), a creditor may either, at its option:

(A) Comply with the requirements of paragraph (c)(1)(i) of this section; or

(B) Provide notice of the amount of the charge before the consumer agrees to or becomes obligated to pay the charge, at a time and in a manner that a consumer would be likely to notice the disclosure of the charge. The notice may be provided orally or in writing.

(iii) *Disclosure requirements.*—(A) *Changes to terms described in account-opening table.* If a creditor changes a term required to be disclosed in a tabular format pursuant to §§ 226.6(a)(1) and (a)(2), or 226.33(d)(4)(i), the creditor must provide the following information on the notice provided pursuant to paragraph (c)(1)(i) of this section:

(*1*) A summary of the changes made to terms required by §§ 226.6(a)(1) and (2) or 226.33(d)(4)(i);

(*2*) A statement that changes are being made to the account;

(*3*) A statement indicating the consumer has the right to opt out of these changes, if applicable, and a reference to additional information describing the opt-out right provided in the notice, if applicable;

(*4*) The date the changes will become effective; and

(*5*) If applicable, a statement that the consumer may find additional information about the summarized changes, and other changes to the account, in the notice.

(B) *Format requirements.*—(*1*) *Tabular format.* The summary of changes described in paragraph (c)(1)(iii)(A)(*1*) of this section must be in a tabular format, with headings and format substantially similar to any of the account-opening tables found in G–15 in Appendix G to this part, or for reverse mortgages, in K–2 and K–5 in Appendix K to this part. The table must disclose the changed term(s) and information relevant to the change(s), if that relevant information is required by §§ 226.6(a)(1) and (a)(2), or 226.33(c) and (d)(4). The new terms must be described with the same level of detail as required when disclosing the terms under § 226.6(a)(2) or § 226.33(c).

(*2*) *Notice included with periodic statement.* If a notice required by paragraph (c)(1)(i) of this section is included on or with a periodic statement, the information described in paragraph (c)(1)(iii)(A)(1) of this section must be disclosed on the front of any page of the statement. The summary of changes described in paragraph (c)(1)(iii)(A)(1) of this section must immediately follow the information described in paragraph (c)(1)(iii)(A)(2) through (c)(1)(iii)(A)(5) of this section, and be substantially similar to the format shown in Sample G–25 in Appendix G to this part.

(*3*) *Notice provided separately from periodic statement.* If a notice required by paragraph (c)(1)(i) of this section is not included on or with a periodic statement, the information described in paragraph (c)(1)(iii)(A)(1) of this section must, at the creditor's option, be disclosed on the front of the first page of the notice or segregated on a separate page from other information given with the notice. The summary of changes required to be in a table pursuant to paragraph (c)(1)(iii)(A)(1) of this section may be on more than one page, and may use both the front and reverse sides, so long as the table begins on the front of the first page of the notice and there is a reference on the first page indicating that the table continues on the following page. The summary of changes described in paragraph (c)(1)(iii)(A)(1) of this section must immediately follow the information described in paragraph (c)(1)(iii)(A)(2) through (c)(1)(iii)(A)(5) of this section, substantially similar to the format shown in Sample G–25 in Appendix G to this part.◄

►(iv)◄[(ii)] *Notice not required.* For home-equity plans subject to the requirements of § 226.5b, a creditor is not required to provide notice under this section when the change involves a reduction of any component of a finance or other charge or when the change results from an agreement involving a court proceeding. ►Suspension of credit privileges, reduction of a credit limit, or termination of an account do not require notice under paragraph (c)(1)(i) of this section, but must be disclosed pursuant to paragraph (j) of this section.◄

[(iii) *Notice to restrict credit.* For home-equity plans subject to the requirements of § 226.5b, if the creditor prohibits additional extensions of credit or reduces the credit limit pursuant to § 226.5b(f)(3)(i) or (f)(3)(vi), the creditor shall mail or deliver written notice of the action to each consumer who will be affected. The notice must be provided not later than three business days after the action is taken and shall contain specific reasons for the action. If the creditor requires the consumer to request reinstatement of credit privileges, the notice also shall state that fact.]

* * * * *

10. Section 226.15 is revised to read as follows:

§ 226.15 Right of rescission.

(a) *Consumer's right to rescind.* (1) ►*Coverage.*◄—(1)(i) Except as provided in paragraph►s◄ (a)(1)(ii) ►and (f)◄ of this section, in a credit plan in which a security interest is or will be retained or acquired in a consumer's principal dwelling, each consumer whose ownership interest is or will be subject to the security interest shall have the right to rescind ►the following transactions◄: each credit extension made under the plan; the plan when the plan is opened; a security interest when added or increased to secure an existing plan; and the increase when a credit limit on the plan is increased.

(ii) As provided in section 125(e) of the Act, the consumer does not have the right to rescind each credit extension made under the plan if such extension is made in accordance with a previously established credit limit for the plan.

(2) ►*Exercise of the right.* (i) *Provision of written notification.*◄ To exercise the right to rescind, the consumer shall notify the creditor of the rescission by mail [, telegram,] or other means of written communication. Notice is considered given when mailed, [or when filed for telegraphic transmission,] or, if sent by other means, when delivered to the [creditor's designated place of business.]► appropriate party identified in paragraph (a)(2)(ii) of this section within the applicable time period.

(ii) *Party the consumer shall notify.* (A) *During the three-business-day period following the transaction.* To exercise the right to rescind during the three-business-day period following the transaction that gave rise to the right of rescission, the consumer shall mail or deliver written notice of the rescission to the creditor or the creditor's agent for receiving such notice, as designated on the notice provided by the creditor pursuant to paragraph (b) of this section. Where no designation is provided, mailing or delivering notice to the servicer, as defined in § 226.36(c)(3), constitutes delivery to the creditor.

(B) *After the three-business-day period following the transaction.* To exercise an extended right to rescind after the three-business-day period following the transaction that gave rise to the right of rescission, the consumer shall mail or deliver written notice of the rescission to the current owner of the debt obligation. A notice of rescission mailed or delivered to the servicer, as defined in § 226.36(c)(3), shall constitute delivery to the current owner.◄

(3) ►*Rescission period.* (i) *Three business days.*◄ The consumer [may exercise]►has◄ the right to rescind until midnight [of] ►after◄ the third business day following the ►transaction◄[occurrence] described in paragraph (a)(1) of this section that gave rise to the right of rescission, delivery of the notice required by paragraph (b) of this section, or delivery of all material disclosures ►required by paragraph (a)(5) of this section◄,[36] whichever occurs last.

►(ii) *Unexpired right of rescission.* (A) *Up to three years.*◄ If the [required] notice ►required by paragraph (b) of this section or◄ [and] material disclosures ►required by paragraph (a)(5) of this section◄ are not delivered, the right to rescind shall expire three years after the ►transaction◄ [occurrence] giving rise to the right of rescission, [or] upon transfer of all of the consumer's interest in the property, [or upon] sale of the property►, refinancing with a creditor other than the current holder, or paying off of the obligation◄, whichever occurs first.

►(B) *Extension in connection with certain administrative proceedings.*◄ In the case of certain administrative proceedings, the rescission period shall be extended in accordance with section 125(f) of the Act.

(4) ►*Joint owners.*◄ When more than one consumer has the right to rescind, the exercise of the right by one consumer shall be effective as to all consumers.

►(5)(i) *Definition of material disclosures.* For purposes of this section, the term *material disclosures* means the following disclosures required under § 226.6(a)(2) or § 226.33(c):

(A) Any annual percentage rate, information related to introductory rates, and information related to variable rate plans disclosed under § 226.6(a)(2)(vi) or § 226.33(c)(6)(i) except for the lowest and highest value of the index in the past 15 years disclosed under § 226.6(a)(2)(vi)(A)(*1*)(*vi*) or § 226.33(c)(6)(i)(A)(*1*)(*vi*);

(B) The total of all one-time fees imposed by the creditor and any third parties to open the plan disclosed under § 226.6(a)(2)(vii) or § 226.33(c)(7)(i)(A);

(C) Any annual or other periodic fees that may be imposed by the creditor for the availability of the plan (including any fee based on account activity or inactivity), how frequently the fee will be imposed, and the annualized amount of the fee disclosed under § 226.6(a)(2)(viii) or § 226.33(c)(7)(ii);

(D) Any fee that may be imposed by the creditor if a consumer terminates the plan prior to its scheduled maturity disclosed under § 226.6(a)(2)(ix) or § 226.33(c)(7)(iii);

(E) The length of the plan, the length of the draw period and the length of any repayment period disclosed under § 226.6(a)(2)(v)(A);

(F) An explanation of how the minimum periodic payment will be determined and the timing of the payments. If paying only the minimum periodic payments may not repay any of the principal or may repay less than the outstanding balance by the end of the plan, a statement of this fact, as well as a statement that a balloon payment may result or will result, as applicable, disclosed under § 226.6(a)(2)(v)(B);

(G) If applicable, a statement that negative amortization may occur and that negative amortization increases the principal balance and reduces the consumer's equity in the dwelling disclosed under § 226.6(a)(2)(xvi);

(H) Any limitations on the number of extensions of credit and the amount of credit that may be obtained during any time period, as well as any minimum outstanding balance and minimum draw requirements disclosed under § 226.6(a)(2)(xvii) or § 226.33(c)(7)(v);

(I) The credit limit applicable to the plan disclosed under § 226.6(a)(2)(xviii); and

(J) A fee for insurance described in § 226.4(b)(7) or debt cancellation or suspension coverage described in § 226.4(b)(10), if the insurance or debt cancellation or suspension coverage is required as part of the plan as disclosed under § 226.6(a)(2)(xx).

(ii) *Tolerances for accuracy of total of all one-time fees imposed by the creditor and any third parties to open the plan.* The total of all one-time fees imposed by the creditor and any third parties to open the plan and other disclosures affected by the total shall be considered accurate for purposes of this section if the disclosed total of all one-time fees imposed by the creditor and any third parties to open the plan:

(A) Is understated by no more than $100; or

(B) Is greater than the amount required to be disclosed under § 226.6(a)(2)(vii) or § 226.33(c)(7)(i)(A).

(iii) *Tolerances for accuracy of the credit limit applicable to the plan.* The credit limit applicable to the plan shall be considered accurate for purposes of this section if the disclosed credit limit applicable to the plan:

(A) Is overstated by no more than ½ of 1 percent of the credit limit applicable to the plan required to be disclosed under § 226.6(a)(2)(xviii) or $100, whichever is greater; or

[36] ►[Reserved.]◄ [The term *material disclosures* means the information that must be provided to satisfy the requirements in § 226.6 with regard to the method of determining the finance charge and the balance upon which a finance charge will be imposed, the annual percentage rate, the amount or method of determining the amount of any membership or participation fee that may be imposed as part of the plan, and the payment information described in § 226.5b(d)(5)(i) and (ii) that is required under § 226.6(e)(2).]

(B) Is less than the amount required to be disclosed under § 226.6(a)(2)(xviii).◄

(b) *Notice of right to rescind.* ►(1) *Who receives notice.*◄ In any transaction [or occurrence] subject to rescission, a creditor shall deliver [two copies of] the notice of the right to rescind to each consumer entitled to rescind. [(one copy to each if the notice is delivered in electronic form in accordance with the consumer consent and other applicable provisions of the E-Sign Act). The notice shall identify the transaction or occurrence and clearly and conspicuously disclose the following:

(1) The retention or acquisition of a security interest in the consumer's principal dwelling.

(2) The consumer's right to rescind, as described in paragraph (a)(1) of this section.

(3) How to exercise the right to rescind, with a form for that purpose, designating the address of the creditor's place of business.

(4) The effects of rescission, as described in paragraph (d) of this section.

(5) The date the rescission period expires.]

►(2) *Format of notice.* (i) *Grouped and segregated.* The disclosures required under paragraph (b)(3) of this section and the optional disclosures permitted under paragraph (b)(4) of this section shall appear on the front side of a one-page document, separate from all other unrelated material. The disclosures required by paragraph (b)(3)(i)–(vii) of this section shall appear grouped together in the notice. The disclosures required by paragraph (b)(3)(viii) of this section shall appear grouped together and shall be segregated from all other information in the notice. The notice shall not contain any other information not directly related to the disclosures required under paragraph (b)(3) of this section.

(ii) *Specific format.* The title of the notice shall appear at the top of the notice. The disclosures required by paragraph (b)(3)(i)–(vii) of this section shall appear beneath the title and be in the form of a table. If the creditor chooses to place in the notice one or both of the optional disclosures described in paragraph (b)(4) of this section, the text shall follow the disclosures required by paragraph (b)(3)(i)–(vii) of this section, but appear before the segregated disclosures required by paragraph (b)(3)(viii) of this section. If both statements described in paragraph (b)(4) of this section are inserted, the statement described in paragraph (b)(4)(i) of this section shall appear before the statement described in paragraph (b)(4)(ii) of this section. The disclosures required by paragraph (b)(3) of this section and any optional disclosures permitted under paragraph (b)(4) of this section must be given in a minimum 10–point font. If the creditor chooses to insert an acknowledgement as described in paragraph (b)(4)(ii) of this section, the acknowledgement must be disclosed in a format substantially similar to the format used in Model Form G–5(A) in Appendix G to this part.

(3) *Required content of notice.* The creditor shall clearly and conspicuously disclose the following information in the notice:

(i) *Identification of the transaction.* An identification of the type of transaction giving rise to the right of rescission.

(ii) *Security interest.* A statement that the consumer could lose his or her home if the consumer does not repay the money owed under the obligation that is secured by the home.

(iii) *Right to cancel.* A statement that the consumer has the right under Federal law to cancel the transaction on or before the stated date. If paragraph (c) of this section applies, a statement that Federal law prohibits the creditor from making any funds (or certain funds, as applicable) available to the consumer until after the stated date.

(iv) *Fees.* A statement that, if the consumer cancels, the creditor will not charge the consumer a cancellation fee and will refund any fees the consumer paid in connection with the transaction giving rise to the right of rescission.

(v) *Effect of cancellation on existing line of credit.* As applicable, the following statements:

(A) A statement that if the consumer cancels the transaction giving rise to the right of rescission, all of the terms of the consumer's current line of credit with the creditor will still apply;

(B) A statement that the consumer will still owe the creditor the current balance; and

(C) Except for a reverse mortgage, if some or all of that money is secured by the home, a statement that the consumer could lose his or her home if the consumer does not repay the money that is secured by the home.

(vi) *How to cancel.* The name and postal address for regular mail of the creditor or its agent and a statement that the consumer may cancel by submitting the form located at the bottom of the notice to the address provided.

(vii) *Deadline to cancel.* The calendar date on which the three-business-day rescission period expires, together with a statement that the right to cancel the transaction may extend beyond this date and in that case the consumer must submit the form located at the bottom of the notice to either the current owner of the line of credit or the person to whom the consumer sends his or her payments. If the creditor cannot provide an accurate calendar date on which the three-business-day rescission period expires, the creditor must provide the calendar date on which it reasonably and in good faith expects the three-business-day period for rescission to expire. If the creditor provides a date in the notice that gives the consumer a longer period within which to rescind than the actual period for rescission, the notice shall be deemed to comply with this paragraph, as long as the creditor permits the consumer to rescind through the end of the date in the notice. If the creditor provides a date in the notice that gives the consumer a shorter period within which to rescind than the actual period for rescission, the creditor shall be deemed to comply with the requirement in this paragraph if the creditor notifies the consumer that the deadline in the first notice of the right of rescission has changed and provides a second notice to the consumer stating that the consumer's right to rescind expires on a calendar date which is three business days from the date the consumer receives the second notice.

(viii) *Form for consumer's exercise of right.* A form that the consumer may use to exercise the right of rescission, which includes spaces for entry of the consumer's name and property address. At a creditor's option, the creditor may pre-print on the form the consumer's name, property address and account number, but may not request that or require the consumer to provide the account number.

(4) *Optional content of notice.* (i) *Exercise of right by joint owners.* At a creditor's option, a statement that joint owners may have the right to rescind and that a rescission by one owner is effective for all owners.

(ii) *Acknowledgement of receipt.* At a creditor's option, a statement the consumer may use to acknowledge receipt of the notice.

(5) *Time of providing notice.* The notice required by paragraph (b) of this section shall be provided before the transaction that gives rise to the right of rescission.

(6) *Proper form of notice.* A creditor satisfies the disclosure requirements of paragraph (b)(3) of this section if it provides the model form in Appendix G of this part, or a substantially similar notice, which is properly completed with the disclosures required by paragraph (b)(3) of this section.◄

(c) *Delay of creditor's performance.* Unless a consumer waives the right to rescind under paragraph (e) of this section, no money shall be disbursed other than in escrow, no services shall be performed, and no materials delivered until after the rescission period has expired and the creditor is reasonably satisfied that the consumer has not rescinded. A creditor does not violate this section if a third party with no knowledge of the event activating the rescission right does not delay in providing materials or services, as long as the debt incurred for those materials or services is not secured by the property subject to rescission.

(d)►(1)◄ *Effects of rescission* ►*prior to the creditor disbursing funds.* This paragraph applies if the creditor has not, directly or indirectly through a third party, disbursed money or delivered property, and the consumer's right to rescind has not expired.◄

【(1)】►(i) *Effect of consumer's notice of rescission.*◄ When a consumer 【rescinds a transaction】►provides a notice of rescission to a creditor ◄, the security interest giving rise to the right of rescission becomes void and the consumer shall not be liable for any amount, including any finance charge.

【(2)】►(ii) *Creditor's obligations.*◄ Within 20 calendar days after receipt of a 【notice of rescission, the creditor shall return any money or property that has been given to anyone】►consumer's notice of rescission, the creditor shall return to the consumer any money that the consumer has given to the creditor or a third party◄ in connection with the transaction and shall take 【any action】 ►whatever steps are◄ necessary to 【reflect the termination of the】►terminate its◄ security interest.

【(3) If the creditor has delivered any money or property, the consumer may retain possession until the creditor has met its obligation under paragraph (d)(2) of this section. When the creditor has complied with that paragraph, the consumer shall tender the money or property to the creditor or, where the latter would be impracticable or inequitable, tender its reasonable value. At the consumer's option, tender of property may be made at the location of the property or at the consumer's residence. Tender of money must be made at the creditor's designated place of business. If the creditor does not take possession of the money or property within 20 calendar days after the consumer's tender, the consumer may keep it without further obligation.

(4) The procedures outlined in paragraphs (d)(2) and (3) of this section may be modified by court order.】

►(2) *Effects of rescission after the creditor disburses funds.* This paragraph applies if the creditor has, directly or indirectly through a third party, disbursed money or delivered property, and the consumer's right to rescind has not expired under § 226.15(a)(3)(ii).

(i) *Effects of rescission if the parties are not in a court proceeding.* This paragraph applies if the creditor and consumer are not in a court proceeding.

(A) *Creditor's acknowledgment of receipt.* Within 20 calendar days after receipt of a consumer's notice of rescission, the creditor shall mail or deliver to the consumer a written acknowledgment of receipt of the consumer's notice, which shall include a written statement of whether the creditor will agree to cancel the transaction.

(B) *Creditor's written statement.* If the creditor agrees to cancel the transaction, the creditor's acknowledgment of receipt shall contain a written statement, which provides:

(*1*) As applicable, the amount of money or a description of the property that the creditor will accept as the consumer's tender;

(*2*) A reasonable date by which the consumer may tender the money or property described in paragraph (d)(2)(i)(B)(*1*); and

(*3*) That within 20 calendar days after receipt of the consumer's tender, the creditor will take whatever steps are necessary to terminate its security interest.

(C) *Consumer's response.* (*1*) *Tender of money.* This paragraph applies if the creditor disbursed money to the consumer. A consumer may respond by tendering to the creditor the money described in the written statement by the date stated in the written statement. Tender of money may be made at the creditor's designated place of business, or any reasonable location specified in the creditor's written statement.

(*2*) *Tender of property.* This paragraph applies if the creditor delivered property to the consumer. A consumer may respond by tendering to the creditor the property described in the written statement by the date stated in the written statement. Where this tender would be impracticable or inequitable, the consumer may tender the property's reasonable value. At the consumer's option, tender of property may be made at the location of the property or at the consumer's residence.

(D) *Creditor's security interest.* Within 20 calendar days after receipt of the consumer's tender, the creditor shall take whatever steps are necessary to terminate its security interest.

(ii) *Effects of rescission in a court proceeding.* This paragraph applies if the creditor and consumer are in a court proceeding, and the consumer's right to rescind has not expired as provided in paragraph 15(a)(3)(ii) of this section.

(A) *Consumer's obligation.* (*1*) *Tender of money.* This paragraph applies if the creditor disbursed money to the consumer. After the creditor receives the consumer's notice of rescission, the consumer shall tender to the creditor the principal balance then owed less any amounts the consumer has given to the creditor or a third party in connection with the transaction. Tender of money may be made at the creditor's designated place of business, or other reasonable location.

(*2*) *Tender of property.* This paragraph applies if the creditor delivered property to the consumer. After the creditor receives the consumer's notice of rescission, the consumer shall tender the property to the creditor, or where this tender would be impracticable or inequitable, tender its reasonable value. At the consumer's option, tender of property may be made at the location of the property or at the consumer's residence.

(*3*) *Effect of non-possession.* If the creditor does not take possession of the money or property within 20 calendar days after the consumer's tender, the consumer may keep it without further obligation.

(B) *Creditor's obligation.* Within 20 calendar days after receipt of the consumer's tender, the creditor shall take whatever steps are necessary to terminate its security interest. If the consumer tendered property, the creditor shall return to the consumer any amounts the consumer has given to the creditor or a third party in connection with the transaction.

(C) *Judicial modification.* The procedures outlined in paragraphs (d)(2)(ii)(A) and (B) of this section may be modified by a court.◄

(e) *Consumer's waiver of right to rescind.* 【(1)】 The consumer may modify or waive the right to rescind►, after delivery of the notice required by paragraph (b) of this section and the disclosures required by § 226.6,◄ if the consumer determines that the 【extension of credit is needed】► loan proceeds are needed during the rescission period◄ to meet a *bona fide* personal financial emergency. To modify or waive the right, 【the consumer】► each consumer entitled to rescind◄ shall give the creditor a dated written statement that describes the emergency, specifically modifies or waives the right to rescind, and bears the ►consumer's◄ signature【 of all the consumers entitled to rescind❳. Printed forms for this purpose are prohibited❲, except as provided in paragraph (e)(2) of this section❳.

❲(2) The need of the consumer to obtain funds immediately shall be regarded as a *bona fide* personal financial emergency provided that the dwelling securing the extension of credit is located in an area declared during June through September 1993, pursuant to 42 U.S.C. 5170, to be a major disaster area because of severe storms and flooding in the Midwest.[36a] In this instance, creditors may use printed forms for the consumer to waive the right to rescind. This exemption to paragraph (e)(1) of this section shall expire one year from the date an area was declared a major disaster.

(3) The consumer's need to obtain funds immediately shall be regarded as a *bona fide* personal financial emergency provided that the dwelling securing the extension of credit is located in an area declared during June through September 1994 to be a major disaster area, pursuant to 42 U.S.C. 5170, because of severe storms and flooding in the South.[36b] In this instance, creditors may use printed forms for the consumer to waive the right to rescind. This exemption to paragraph (e)(1) of this section shall expire one year from the date an area was declared a major disaster.

(4) The consumer's need to obtain funds immediately shall be regarded as a *bona fide* personal financial emergency provided that the dwelling securing the extension of credit is located in an area declared during October 1994 to be a major disaster area, pursuant to 42 U.S.C. 5170, because of severe storms and flooding in Texas.[36c] In this instance, creditors may use printed forms for the consumer to waive the right to rescind. This exemption to paragraph (e)(1) of this section shall expire one year from the date an area was declared a major disaster.❳

(f) *Exempt transactions.* The right to rescind does not apply to the following:

(1) A residential mortgage transaction.

(2) A credit plan in which a state agency is a creditor.

❲[36a] A list of the affected areas will be maintained by the Board.❳

❲[36b] A list of the affected areas will be maintained and published by the Board. Such areas now include parts of Alabama, Florida, and Georgia.❳

❲[36c] A list of the affected areas will be maintained and published by the Board. Such areas now include the following counties in Texas: Angelina, Austin, Bastrop, Brazos, Brazoria, Burleson, Chambers, Fayette, Fort Bend, Galveston, Grimes, Hardin, Harris, Houston, Jackson, Jasper, Jefferson, Lee, Liberty, Madison, Matagorda, Montgomery, Nacagdoches, Orange, Polk, San Augustine, San Jacinto, Shelby, Trinity, Victoria, Washington, Waller, Walker, and Wharton.❳

11. Section 226.16 is amended by revising paragraph (d)(6), and adding paragraphs (d)(7) through (13) to read as follows:

§ 226.16 Advertising.

* * * * *

(d) * * *

(6) *Promotional rates and payments.* (i) *Definitions.* The following definitions apply for purposes of paragraph (d)(6) of this section:

(A) *Promotional rate.* The term "promotional rate" means, in a variable-rate plan, any annual percentage rate that is not based on the index and margin that will be used to make rate adjustments under the plan, if that rate is less than a reasonably current annual percentage rate that would be in effect under the index and margin that will be used to make rate adjustments under the plan.

(B) *Promotional payment.* The term "promotional payment" means:

(*1*) For a variable-rate plan, any minimum payment applicable for a promotional period that ❲:

(*i*) Is not derived by applying the index and margin to the outstanding balance when such index and margin will be used to determine other minimum payments under the plan; and

(*ii*) Is❳ ►is◄ less than other minimum payments under the plan derived by applying a reasonably current index and margin that will be used to determine the amount of such payments, given an assumed balance.

(*2*) For a plan other than a variable-rate plan, any minimum payment applicable for a promotional period if that payment is less than other payments required under the plan given an assumed balance.

(C) *Promotional period.* A "promotional period" means a period of time, less than the full term of the loan, that the promotional rate or promotional payment may be applicable.

(ii) *Stating the promotional period and post-promotional rate or payments.* If any annual percentage rate that may be applied to a plan is a promotional rate, or if any payment applicable to a plan is a promotional payment, the following must be disclosed in any advertisement, other than television or radio advertisements, in a clear and conspicuous manner with equal prominence and in close proximity to each listing of the promotional rate or payment:

(A) The period of time during which the promotional rate or promotional payment will apply;

(B) In the case of a promotional rate, any annual percentage rate that will apply under the plan. If such rate is variable, the annual percentage rate must be disclosed in accordance with the accuracy standards in §§ 226.5b or 226.16(b)(1)(ii) as applicable; and

(C) In the case of a promotional payment, the amounts and time periods of any payments that will apply under the plan ►given the same assumed balance◄. In variable-rate transactions, payments that will be determined based on application of an index and margin shall be disclosed based on a reasonably current index and margin.

(iii) *Envelope excluded.* The requirements in paragraph (d)(6)(ii) of this section do not apply to an envelope in which an application or solicitation is mailed, or to a banner advertisement or pop-up advertisement linked to an application or solicitation provided electronically.

►(7) *Misleading advertising of "fixed" rates and payments.* An advertisement may not use the word "fixed" to refer to rates, payments, or the plan in an advertisement for a variable-rate plan or other plan where the payment may increase, unless:

(i) In the case of an advertisement solely for one or more variable-rate plans:

(A) The phrase "variable rate" appears in the advertisement before the first use of the word "fixed" and is at least as conspicuous as any use of the word "fixed" in the advertisement; and

(B) Each use of the word "fixed" to refer to a rate or payment is accompanied by an equally prominent and closely proximate statement of the time period for which the rate or payment is fixed, and the fact that the rate may vary or the payment may increase after that period;

(ii) In the case of an advertisement solely for non-variable-rate plans where the payment may increase, each use of the word "fixed" to refer to the payment is accompanied by an equally prominent and closely proximate statement of the time period for which the payment is fixed, and the fact that the payment may increase after that period; or

(iii) In the case of an advertisement for both variable-rate plans and non-variable-rate plans:

(A) The phrase "variable rate" appears in the advertisement with equal prominence to any use of the word "fixed;" and

(B) Each use of the word "fixed" to refer to a rate, payment, or the plan either refers solely to the plans for which the rate is fixed for the term of the plan and complies with paragraph (d)(7)(ii) of this section, if applicable, or, if it refers to the variable-rate plans, is accompanied by an equally prominent and closely proximate statement of the time period for which the rate or payment is fixed, and the fact that the rate may vary or the payment may increase after that period.

(8) *Misleading comparisons in advertisements.* An advertisement may not make any comparison between actual or hypothetical credit payments or rates and any payment or rate that will be available under the advertised plan for a period less than the full term of the plan, unless:

(i) *In general.* The advertisement includes a clear and conspicuous comparison of the actual or hypothetical payments or rates to any payments and rates that will apply under the advertised plan, in accordance with paragraph (d)(6)(ii) of this section; and

(ii) *Application to variable-rate transactions.* If the advertisement is for a variable-rate transaction, and the advertised payment or rate is based on the index and margin that will be used to make subsequent rate or payment adjustments over the term of the plan, the advertisement includes an equally prominent statement in close proximity to the payment or rate that the payment or rate is subject to adjustment and the time period when the first adjustment will occur.

(9) *Misrepresentations about government endorsement.* An advertisement may not make any statement in an advertisement that the plan offered is a "government loan program," "government-supported loan," or is otherwise endorsed or sponsored by any Federal, state, or local government entity, unless the advertisement is for a credit program that is, in fact, endorsed or sponsored by a Federal, state, or local government entity.

(10) *Misleading use of the current creditor's name.* An advertisement may not use the name of the consumer's current creditor in an advertisement that is not sent by or on behalf of the consumer's current creditor, unless the advertisement:

(i) Discloses with equal prominence the name of the creditor or other person making the advertisement; and

(ii) Includes a clear and conspicuous statement that the creditor or other person making the advertisement is not associated with, or acting on behalf of, the consumer's current creditor.

(11) *Misleading claims of debt elimination.* An advertisement may not make any misleading claim in an advertisement that the plan offered will eliminate debt or result in a waiver or forgiveness of a consumer's existing loan terms with, or obligations to, another creditor.

(12) *Misleading use of the term "counselor."* An advertisement may not use the term "counselor" in an advertisement to refer to a for-profit broker or creditor, its employees, or persons working for the broker or creditor that are involved in offering, originating or selling home-equity plans.

(13) *Misleading foreign-language advertisements.* An advertisement may not provide information about some trigger terms or required disclosures, such as a promotional rate or payment, only in a foreign language in an advertisement, but provide information about other trigger terms or required disclosures, such as information about the fully-indexed rate or fully amortizing payment, only in English in the same advertisement.◄

* * * * *

Subpart C—Closed-End Credit

12. Section 226.18 is amended by revising the introductory text and paragraph (n) to read as follows:

§ 226.18 Content of disclosures.

For each transaction, the creditor shall disclose the following information or comply with the following requirements, as applicable ►, except that for each transaction secured by real property or a dwelling, the creditor shall make the disclosures required by § 226.38◄:

* * * * *

(n) *Insurance* ►,◄ 【*and*】 *debt cancellation*►*, and debt suspension.*◄ 【The items required by § 226.4(d) in order to exclude certain insurance premiums and debt cancellation fees from the finance charge.】 ►The disclosures and requirements of §§ 226.4(d)(1)(i) through (d)(1)(iii) and (d)(3)(i) through (d)(3)(iii), as applicable, if the creditors offers optional credit insurance, debt cancellation coverage, or debt suspension coverage that is identified in § 226.4(b)(7) or (b)(10). For required credit insurance, debt cancellation coverage, or debt suspension coverage that is identified in § 226.4(b)(7) or (b)(10), the creditor shall provide the disclosures required in §§ 226.4(d)(1)(i) and (d)(3)(i), as applicable, except for §§ 226.4(d)(1)(i)(A), (B), (D)(5), (E) and (F).◄

* * * * *

13. Section 226.19 is amended by revising the section heading and paragraph (a), adding introductory text, reserving paragraph (d), and adding paragraph (e) to read as follows:

§ 226.19 【Certain mortgage and variable-rate transactions.】►Early disclosures and adjustable-rate disclosures for transactions secured by real property or a dwelling.

In connection with a closed-end transaction secured by real property or a dwelling, subject to paragraph (a)(4) of this section, the following requirements shall apply:◄

(a) *Mortgage transactions* 【*subject to RESPA*】—(1)(i) *Time of* ►*good faith estimates of*◄ *disclosures.* 【In a mortgage transaction subject to the Real Estate Settlement Procedures Act (12 U.S.C. 2601 *et seq.*) that is secured by the consumer's dwelling, other than a home equity line of credit subject to § 226.5b or mortgage transaction subject to paragraph (a)(5) of this section, t】►T◄he creditor shall make good faith estimates of the disclosures required by 【§ 226.18】►§ 226.38◄ and shall deliver or place them in the mail not later than the third business day after the creditor receives the consumer's written application.

(ii) *Imposition of fees.* Except as provided in paragraph (a)(1)(iii) of this section, neither a creditor nor any other person may impose a fee on a consumer in connection with the consumer's application for a mortgage transaction subject to paragraph (a)(1)(i) of this section before the consumer has received the disclosures required by paragraph (a)(1)(i) of this section. If the disclosures are mailed to the consumer ►or delivered to the consumer by means other than delivery in person◄, the consumer is considered to have received them three business days after they are mailed ►or delivered◄.

(iii) *Exception to fee restriction.* A creditor or other person may impose a fee for obtaining the consumer's credit history before the consumer has received the disclosures required by paragraph (a)(1)(i) of this section, provided the fee is *bona fide* and reasonable in amount. ►Notwithstanding paragraph (a)(1)(iv) of this section, a *bona fide* and reasonable fee paid for obtaining a consumer's creditor history need not be refundable.◄

►(iv) *Imposition of nonrefundable fees.* Neither a creditor nor any other person may impose a nonrefundable fee for three business days after a consumer receives the disclosures required by paragraph (a)(1)(i) of this section. A creditor or other person shall refund any fee paid by a consumer within three business days after receiving those disclosures, upon the consumer's request. This paragraph (a)(1)(iv) applies only to a refund request made by the consumer within three business days after receiving the early disclosures and only if the consumer decides not to enter into the transaction.

(v) *Counseling fee.* If housing or credit counseling is required by applicable law, a *bona fide* and reasonable charge imposed by a counselor or counseling agency for such counseling is not a "fee" for purposes of paragraph (a)(1)(ii) of this section and need not be refundable under paragraph (a)(1)(iv) of this section.◄

【(2) *Waiting periods for early disclosures and corrected disclosures.* (i)】►(2)(i) *Seven-business-day waiting period.*◄ The creditor shall deliver or place in the mail the good faith estimates required by paragraph (a)(1)(i) of this section not later than the seventh business day before consummation of the transaction.

►(ii) *Three-business-day waiting period.* After providing the disclosures required by paragraph (a)(1)(i) of this section, the creditor shall provide the disclosures required by § 226.38 before consummation. The consumer must receive the new disclosures no later than three business days before consummation. Only the disclosures required by §§ 226.38(c)(3)(i)(C), 226.38(c)(3)(ii)(C), 226.38(c)(6)(i) and 226.38(e)(5)(i) may be estimated disclosures.◄

ALTERNATIVE 1—PARAGRAPH (a)(2)(iii)

【(ii) If the annual percentage rate disclosed under paragraph (a)(1)(i) of this section becomes inaccurate, as defined in § 226.22, the creditor shall provide corrected disclosures with all changed terms.】►(iii) *Additional three-business-day waiting period.* If a subsequent event makes the disclosures required by paragraph (a)(2)(ii) inaccurate, as defined in § 226.22, the creditor shall provide corrected disclosures, subject to paragraph (a)(2)(iv) of this section.◄ The consumer must receive the corrected disclosures no later than three business days before consummation. ►Only the disclosures required by §§ 226.38(c)(3)(i)(C), 226.38(c)(3)(ii)(C), 226.38(c)(6)(i) and 226.38(e)(5)(i) may be estimated disclosures.◄ 【If the corrected disclosures are mailed to the consumer or delivered to the consumer by means other than delivery in person, the consumer is deemed to have received the corrected disclosures three business days after they are mailed or delivered.】

Alternative 2—paragraph (a)(2)(iii)

【(ii)】►(iii) *Additional three-business-day waiting period.*◄ If the annual percentage rate disclosed under paragraph 【(a)(1)(i)】►(a)(2)(ii)◄ of this section becomes inaccurate, as defined in § 226.22, ►or a transaction that was disclosed as a fixed-rate transaction becomes an adjustable-rate transaction,◄ the creditor shall provide corrected disclosures with all changed terms►, subject to paragraph (a)(2)(iv) of this section◄. The consumer must receive the corrected disclosures no later than three business days before consummation. ► Only the disclosures required by §§ 226.38(c)(3)(i)(C), 226.38(c)(3)(ii)(C), 226.38(c)(6)(i) and 226.38(e)(5)(i) may be estimated disclosures.◄ 【If the corrected disclosures are mailed to the consumer or delivered to the consumer by means other than delivery in person, the consumer is deemed to have received the corrected disclosures three business days after they are mailed or delivered.】

►(iv) *Annual percentage rate accuracy.* An annual percentage rate disclosed under paragraph (a)(2)(ii) or (a)(2)(iii) shall be considered accurate as provided by § 226.22, except that even if one of the following subsequent events makes the disclosed annual percentage rate inaccurate under § 226.22, the APR shall be considered accurate for purposes of paragraph (a)(2)(ii) and (a)(2)(iii) of this section:

(A) A decrease in the loan's annual percentage rate due to a discount the creditor gives the consumer to induce periodic payments by automated debit from a consumer's deposit or other account.

(B) A decrease in the loan's annual percentage rate due to a discount a title insurer gives the consumer on voluntary owners' title insurance.

(v) *Timing of receipt.* If the disclosures required by paragraph (a)(2)(ii) or paragraph (a)(2)(iii) of this section are mailed to the consumer or delivered by means other than delivery in person, the consumer is considered to have received the disclosures three business days after they are mailed or delivered.◄

(3) *Consumer's waiver of waiting period before consummation.* 【If the consumer determines that the extension of credit is needed to meet a *bona fide* personal financial emergency, the】►The◄ consumer may modify or waive the seven-business-day waiting period or 【the】►a◄ three-business-day waiting period required by paragraph (a)(2) of this section, after receiving the disclosures required by 【§ 226.18】►§ 226.38, if the consumer determines that the loan proceeds are needed before the waiting period ends to meet a *bona fide* personal financial emergency◄. To modify or waive a waiting period, 【the consumer】►each consumer primarily liable on the obligation◄ shall give the creditor a dated written statement that describes the emergency, specifically modifies or waives the waiting period, and bears the ►consumer's◄ signature【 of all the consumers who are primarily liable on the legal obligation】. Printed forms for this purpose are prohibited.

【(4) *Notice.* Disclosures made pursuant to paragraph (a)(1) or paragraph (a)(2) of this section shall contain the following statement: "You are not required to complete this agreement merely because you have received these disclosures or signed a loan application." The disclosure required by this paragraph shall be grouped together with the disclosures required by paragraph (a)(1) or (a)(2) of this section.】

【(5)】►(4)◄ *Timeshare plans.* In a mortgage transaction 【subject to the Real Estate Settlement Procedures Act (12 U.S.C. 2601 *et seq.*)】 that is secured by a consumer's interest in a timeshare plan described in 11 U.S.C. 101(53(D)):

(i) ►*Exemption.*◄ The requirements of paragraphs (a)(1) through 【(a)(4)】►(a)(3)◄ of this section do not apply;

(ii) ►*Time of disclosures for timeshare plans.*◄ The creditor shall make good faith estimates of the disclosures required by 【§ 226.18】 ►§ 226.38◄ before consummation, or shall deliver or place them in the mail not later than three business days after the creditor receives the consumer's written application, whichever is earlier; and

(iii) ►*Redisclosure for timeshare plans.*◄ If the annual percentage rate at the time of consummation varies from the annual percentage rate disclosed under paragraph (a)【(5)】►(4)◄(ii) of this section by more than 1/8 of 1 percentage point in a regular transaction or 1/4 of 1 percentage point in an irregular transaction, the creditor shall disclose all the changed terms no later than consummation or settlement.

* * * * *

►(d) [Reserved]

(e) *Exception for reverse mortgages.* The requirements of paragraphs (b) through (d) of this section do not apply to reverse mortgages, as defined in § 226.33(a).◄

14. Section 226.20 is amended by revising paragraphs (a) and (c) to read as follows:

§ 226.20 Subsequent disclosure requirements.

(a) ►*Modifications to terms by the same creditor.* (1) *Mortgages.* (i) A new transaction results and the creditor must provide new disclosures to the consumer if the same creditor and consumer modify an existing legal obligation secured by real property or a dwelling that was subject to this part by:

(A) Increasing the loan amount;

(B) Imposing a fee on the consumer in connection with the modification, whether or not the fee is reflected in any agreement between the parties;

(C) Changing the loan term;

(D) Changing the interest rate;

(E) Increasing the amount of the periodic payment;

(F) Adding an adjustable-rate feature or a feature listed in § 226.38(d)(1)(iii) or (d)(2); or

(G) Adding new collateral that is real property or a dwelling.

(ii) *Exceptions.* New disclosures shall not be required if the same creditor and consumer modify an existing legal obligation secured by real property or a dwelling that was subject to this part:

(A) As part of a court proceeding;

(B) In connection with the consumer's default or delinquency, unless there is an increase in the loan amount or interest rate, or a fee is imposed on the consumer in connection with the modification; or

(C) By decreasing the interest rate with no other modifications, except a decrease in the periodic payment amount, an extension of the loan term, or both, and no fee is imposed on the consumer in connection with the modification.

(iii) For purposes of paragraph (a)(1) of this section, the term "same creditor" means the current holder, or servicer acting on behalf of the current holder, of an existing legal obligation.◄

⟦(a)⟧►(2)◄ *Refinancings* ►*by the same creditor—Non-mortgage credit*◄. A refinancing occurs when an existing obligation that was subject to this subpart ►and that is not secured by real property or a dwelling◄ is satisfied and replaced by a new obligation undertaken by the same consumer. A refinancing is a new transaction requiring new disclosures to the consumer.⟦ The new finance charge shall include any unearned portion of the old finance charge that is not credited to the existing obligation.⟧ The following shall not be treated as a refinancing:

⟦(1)⟧►(i)◄ A renewal of a single payment obligation with no change in the original terms.

⟦(2)⟧►(ii)◄ A reduction in the annual percentage rate with a corresponding change in the payment schedule.

⟦(3)⟧►(iii)◄ An agreement involving a court proceeding.

⟦(4)⟧►(iv)◄ A change in the payment schedule or a change in collateral requirements as a result of the consumer's default or delinquency, unless the rate is increased, or the new amount financed exceeds the unpaid balance plus earned finance charge and premiums for continuation of insurance of the types described in § 226.4(d).

⟦(5)⟧►(v)◄ The renewal of optional insurance purchased by the consumer and added to an existing transaction, if disclosures relating to the initial purchase were provided as required by this subpart.

►(3) *Unearned finance charge.* In connection with any new transaction under this subsection 226.20(a), the new finance charge must include any unearned portion of the old finance charge that is not credited to the existing obligation.◄

* * * * *

⟦(c) *Variable-rate adjustments.*[45c] An adjustment to the interest rate with or without a corresponding adjustment to the payment in a variable-rate mortgage subject to § 226.19(b) is an event requiring new disclosures to the consumer. At least once each year during which an interest rate adjustment is implemented without an accompanying payment change, and at least 25, but no more than 120, calendar days before a payment at a new level is due, the following disclosures, as applicable, must be delivered or placed in the mail:

(1) The current and prior interest rates.

(2) The index values upon which the current and prior interest rates are based.

(3) The extent to which the creditor has foregone any increase in the interest rate.

(4) The contractual effects of the adjustment, including the payment due after the adjustment is made, and a statement of the loan balance.

(5) The payment, if different from that referred to in paragraph (c)(4) of this section, that would be required to fully amortize the loan at the new interest rate over the remainder of the loan term.⟧

►(c) *Rate adjustments.* If an adjustment to the interest rate of an adjustable rate mortgage is made, with or without a corresponding adjustment to the payment, disclosures required by this paragraph must be provided to the consumer. This paragraph applies only to adjustable rate mortgages subject to § 226.19(b), and to adjustments made based on the terms of the legal obligation between the parties, including adjustments made upon conversion to a fixed-rate transaction.

(1) *Timing of disclosures.* (i) *Payment change.* If an interest rate adjustment is accompanied by a payment change, the creditor shall deliver or place in the mail the disclosures required by paragraph (c)(2) of this section at least 60, but no more than 120, calendar days before a payment at a new level is due.

(ii) *No payment change.* At least once each year during which an interest rate adjustment is implemented without an accompanying payment change, the creditor shall deliver or place in the mail the disclosures required by paragraph (c)(3) of this section.

(2) *Content of payment change disclosures.* The creditor must provide the following information on the notice provided pursuant to paragraph (c)(1)(i) of this section, as applicable:

(i) A statement that changes are being made to the interest rate, the date such changes are effective, and a statement that more detailed information is available in the loan agreement(s).

(ii) A table containing the following disclosures—

(A) The current and new interest rates.

(B) If payments on the loan may be interest-only or negatively amortizing, the amount of the current and new payment allocated to pay principal, interest, and taxes and insurance in escrow, as applicable. The current payment allocation disclosed shall be based on the payment allocation in the last payment period during which the current interest rate applies. The new payment allocation disclosed shall be based on the payment allocation in the first payment period during which the new interest rate applies.

(C) The current and new payment and the due date for the new payment.

(iii) A description of the change in the index or formula and any application of previously foregone interest.

(iv) The extent to which the creditor has foregone any increase in the interest rate and the earliest date the creditor may apply foregone interest to future adjustments, subject to rate caps.

(v) Limits on interest rate or payment increases at each adjustment, if any, and the maximum interest rate or payment over the life of the loan.

(vi) A statement of whether or not part of the new payment will be allocated to pay the loan principal and a statement of the payment required to fully amortize the loan at the new interest rate over the remainder of the loan term or to fully amortize the loan without extending the loan term, if different from the new payment disclosed

⟦[45c] Information provided in accordance with variable-rate subsequent disclosure regulations of other Federal agencies may be subsituted for the disclosure required by paragraph (c) of this section.⟧

pursuant to paragraph (c)(2)(ii)(C) of this section.

(vii) A statement of the loan balance as of the date the interest rate change will become effective.

(3) *Content of annual interest rate notice.* The creditor shall provide the following information on the annual notice provided pursuant to paragraph (c)(1)(ii) of this section, as applicable:

(i) The specific time period covered by the disclosure, and a statement that the interest rate on the loan has changed during the past year without changing required payments.

(ii) The highest and lowest interest rates that applied during the period specified under paragraph (c)(3)(i) of this section.

(iii) Any foregone increase in the interest rate or application of previously foregone interest.

(iv) The maximum interest rate that may apply over the life of the loan.

(v) A statement of the loan balance as of the last day of the time period required to be disclosed by paragraph (c)(3)(i) of this section.

(4) *Additional information.* In addition to the disclosures provided under paragraph (c)(2) or (c)(3) of this section, the creditor shall provide the following information:

(i) If the creditor may impose a penalty if the obligation is prepaid in full, a statement of the circumstances under which and period in which the creditor may impose the penalty and the amount of the maximum penalty possible during the period between the date the creditor delivers or mails the disclosures required by this paragraph (c) and the last day the creditor may impose the penalty.

(ii) A telephone number the consumer may call to obtain additional information about the consumer's loan.

(iii) A telephone number and Internet Web site for housing counseling resources maintained by the Department of Housing and Urban Development.

(5) *Format of disclosures.* (i) The disclosures required by this paragraph (c) shall be provided in the form of tables with headings, content and format substantially similar to Form H–4(G) in Appendix H to this part, where an interest rate adjustment is accompanied by a payment change, or Form H–4(K) in Appendix H to this part, where a creditor provides an annual notice of interest rate adjustments without an accompanying payment change. The disclosures required by paragraph (c)(2) or (c)(3) of this section shall be grouped together with the disclosures required by paragraph (c)(4) of this section, and shall be in a prominent location.

(ii) The disclosures required by paragraph (c)(2)(i) or paragraph (c)(3)(i) of this section shall precede the other disclosures required by paragraph (c)(2) or (c)(3). The disclosures required by paragraph (c)(4) shall be located directly beneath the disclosures required by paragraph (c)(2) or (c)(3).

(iii) The disclosures required by paragraph (c)(2)(ii) shall be in the form of a table with headings, content, and format substantially similar to Form H–4(G) in Appendix H to this part. The disclosures required by paragraphs (c)(2)(iii) through (c)(2)(vii) of this section shall be located directly below the table required by paragraph (c)(2)(ii).◄

15. Section 226.22 is amended by revising paragraph (a) to read as follows:

§ 226.22 Determination of annual percentage rate.

(a) *Accuracy of annual percentage rate.* (1) ►*Actual annual percentage rate.* (i)◄ The annual percentage rate is a measure of the cost of credit, expressed as a yearly rate, that relates the amount and timing of value received by the consumer to the amount and timing of payments made. The annual percentage rate shall be determined in accordance with either the actuarial method or the United States Rule method. Explanations, equations and instructions for determining the annual percentage rate in accordance with the actuarial method are set forth in appendix J to this regulation.[45d]

►(ii) An error in disclosure of the finance charge, for non-mortgage loans, or the interest and settlement charges, for mortgage loans, or in disclosure of the annual percentage rate is not a violation of this part if:

(A) The error resulted from a corresponding error in a calculation tool used in good faith by the creditor; and

(B) Upon discovery of the error, the creditor promptly discontinues use of that calculation tool for disclosure purposes.◄

(2) ►*Regular transaction.*◄ As a general rule, [the]►a disclosed◄ annual percentage rate shall be considered accurate if it is not more than 1⁄8 of 1 percentage point above or below the annual percentage rate determined in accordance with paragraph (a)(1) of this section.

(3) ►*Irregular transaction.*◄ In an irregular transaction, [the]►a disclosed◄ annual percentage rate shall be considered accurate if it is not more than 1⁄4 of 1 percentage point above or below the annual percentage rate determined in accordance with paragraph (a)(1) of this section.[46] ►For purposes of this paragraph (a)(3), "irregular transaction" means a transaction that includes any of the following features: multiple advances, irregular payment periods, or irregular payment amounts, other than an irregular first period or an irregular first or final payment.

(i) The term "irregular transaction" includes the following:

(A) A construction loan for which advances are made as construction progresses;

(B) A transaction where payments vary to reflect the consumer's seasonal income;

(C) A transaction where payments vary due to changes in a premium for or termination of mortgage insurance; and

(D) A transaction with a graduated payment schedule where the contract commits the consumer to several series of payments in different amounts.

(ii) The term "irregular transaction" does not include a loan with a variable-rate feature that has regular payment periods.◄

(4) *Mortgage loans.* If the annual percentage rate disclosed in a transaction secured by real property or a dwelling varies from the actual rate determined in accordance with paragraph (a)(1) of this section, in addition to the tolerances applicable under paragraphs (a)(2) and (3) of this section, the disclosed annual percentage rate shall also be considered accurate if:

(i) The rate results from the disclosed [finance charge]►interest and settlement charges◄; and

(ii)(A) The disclosed [finance charge]►interest and settlement charges◄ would be considered accurate under [§ 226.18(d)(1)] ►§ 226.38(e)(5)(ii)◄; or

(B) For purposes of rescission, if the disclosed [finance charge]►interest and settlement charges◄ would be considered accurate under § 226.23►(a)(5)(ii)◄[(g) or (h), whichever applies].

(5) *Additional tolerance for mortgage loans.* In a transaction secured by real property or a dwelling, in addition to

[[45d] An error in disclosure of the annual percentage rate or finance charge shall not, in itself, be considered a violation of this regulation if: (1) The error resulted from a corresponding error in a calculation tool used in good faith by the creditor; and (2) upon discovery of the error, the creditor promptly discontinues use of that calculation tool for disclosure purposes and notifies the Board in writing of the error in the calculation tool.]

[46] ►[Reserved.]◄[For purposes of paragraph (a)(3) of this section, an irregular transaction is one that includes one or more of the following features: multiple advances, irregular payment periods, or irregular payment amounts (other than an irregular first period or an irregular first or final payment).]

the tolerances applicable under paragraphs (a)(2) and (3) of this section, if the disclosed [finance charge is]►interest and settlement charges are◄ calculated incorrectly but [is]►are◄ considered accurate under § 226.►38(e)(5)(ii)◄[18(d)(1)] or § 226.23►(a)(5)(ii)◄[(g) or (h)], the disclosed annual percentage rate shall be considered accurate:

(i) If the disclosed [finance charge is]►interest and settlement charges are◄ understated, and the disclosed annual percentage rate is also understated but it is closer to the actual annual percentage rate than the rate that would be considered accurate under paragraph (a)(4) of this section;

(ii) If the disclosed [finance charge is]►interest and settlement charges are◄ overstated, and the disclosed annual percentage rate is also overstated but it is closer to the actual annual percentage rate than the rate that would be considered accurate under paragraph (a)(4) of this section.

* * * * *

16. Section 226.23 is revised to read as follows:

§ 226.23 Right of rescission.

(a) *Consumer's right to rescind.* (1) ►*Coverage.*◄ In a credit transaction in which a security interest is or will be retained or acquired in a consumer's principal dwelling, each consumer whose ownership interest is or will be subject to the security interest shall have the right to rescind the transaction, except for transactions described in paragraph (f) of this section.[47] ►For purposes of this section, the addition to an existing obligation of a security interest in a consumer's principal dwelling is a transaction. The right of rescission applies only to the addition of the security interest and not the existing obligation.◄

(2) ►*Exercise of the right.* (i) *Provision of written notification.*◄ To exercise the right to rescind, the consumer shall notify the creditor of the rescission by mail[, telegram] or other means of written communication. Notice is considered given when mailed, [when filed for telegraphic transmission] or, if sent by other means, when delivered to the [creditor's designated place of business] ► appropriate party identified in paragraph (a)(2)(ii) of this section within the applicable time period.

(ii) *Party the consumer shall notify.* (A) *During the three-business-day period following consummation.* To exercise the right to rescind during the three-business-day period following consummation of the transaction, the consumer shall mail or deliver written notice of the rescission to the creditor or the creditor's agent for receiving such notice, as designated on the notice provided by the creditor pursuant to paragraph (b) of this section. Where no designation is provided, mailing or delivering notice to the servicer, as defined in § 226.36(c)(3), constitutes delivery to the creditor.

(B) *After the three-business-day period following consummation.* To exercise an extended right to rescind after the three-business-day period following consummation, the consumer shall mail or deliver written notice of the rescission to the current owner of the debt obligation. A notice of rescission mailed or delivered to the servicer, as defined in § 226.36(c)(3), shall constitute delivery to the current owner.◄

(3) ►*Rescission period.* (i) *Three business days.*◄ The consumer [may exercise] ►has◄ the right to rescind until midnight [of] ►after◄ the third business day following consummation, delivery of the notice required by paragraph (b) of this section, or delivery of all material disclosures ►required by paragraph (a)(5) of this section◄,[48] whichever occurs last.

►(ii) *Unexpired right of rescission.* (A) *Up to three years.*◄ If the [required] notice ►required by paragraph (b) of this section◄ or material disclosures ►required by paragraph (a)(5) of this section◄ are not delivered, the right to rescind shall expire three years after consummation, upon transfer of all of the consumer's interest in the property, [or upon] sale of the property►, refinancing with a creditor other than the current holder, or paying off of the obligation◄, whichever occurs first.

►(B) *Extension in connection with certain administrative proceedings.*◄ In the case of certain administrative proceedings, the rescission period shall be extended in accordance with section 125(f) of the Act.

(4) ►*Joint Owners.*◄ When more than one consumer in a transaction has the right to rescind, the exercise of the right by one consumer shall be effective as to all consumers.

►(5)(i) *Definition of material disclosures.* For purposes of this section, the term *material disclosures* means the disclosures and limitations referred to in §§ 226.32(c) and (d) and 226.35(b)(2), and the following disclosures required under §§ 226.33 and 226.38:

(A) The loan amount disclosed under § 226.38(a)(1);

(B) The loan term disclosed under § 226.38(a)(2);

(C) The loan type disclosed under § 226.38(a)(3)(i) or the rate type under § 226.3(c)(6)(ii)(B);

(D) The loan features disclosed under § 226.38(a)(3)(ii);

(E) The total settlement charges disclosed under § 226.38(a)(4) or the total fees under § 226.33(c)(7)(i)(A);

(F) The prepayment penalty disclosed under § 226.38(a)(5) or § 226.33(c)(7)(iii);

(G) The annual percentage rate disclosed under § 226.38(b)(1) or § 226.33(c)(6)(ii)(A);

(H) The interest rate and payment summary disclosed under § 226.38(c) or the interest rate under § 226.33(c)(7)(ii)(C)(*1*); and

(I) The interest and settlement charges disclosed under § 226.38(e)(5)(ii) or § 226.33(c)(14)(ii).

(ii) *Tolerances for accuracy of the interest and settlement charges.* (A) *In general.* Except as provided in paragraphs (a)(5)(ii)(B) and (a)(5)(ii)(C) of this section, the interest and settlement charges and the annual percentage rate shall be considered accurate for purposes of this section if the disclosed interest and settlement charges:

(1) Are understated by no more than ½ of 1 percent of the face amount of the note or $100, whichever is greater; or

(2) Are greater than the amount required to be disclosed.

(B) *Special tolerance for a refinancing with no new advance.* In a refinancing of a residential mortgage transaction with a creditor other than the current holder of the debt obligation (other than a transaction covered by § 226.32), if there is no new advance and no consolidation of existing loans, the interest and settlement charges and the annual percentage rate shall be considered accurate for purposes of this section if the disclosed interest and settlement charges:

(1) Are understated by no more than 1 percent of the face amount of the note or $100, whichever is greater; or

(2) Are greater than the amount required to be disclosed.

(C) *Special tolerance for foreclosures.* After the initiation of foreclosure on the

[47] ►[Reserved.]◄[For purposes of this section, the addition to an existing obligation of a security interest in a consumer's principal dwelling is a transaction. The right of rescission applies only to the addition of the security interest and not the existing obligation. The creditor shall deliver the notice required by paragraph (b) of this section but need not deliver new material disclosures. Delivery of the required notice shall begin the rescission period.]

[48] ►[Reserved.]◄[The term "material disclosures" means the required disclosures of the annual percentage rate, the finance charge, the amount financed, the total payments, the payment schedule, and the disclosures and limitations referred to in § 226.32 (c) and (d) and 226.35(b)(2).]

consumer's principal dwelling that secures the credit obligation, the interest and settlement charges and the annual percentage rate shall be considered accurate for purposes of this section if the disclosed interest and settlement charges:

(1) Are understated by no more than $35; or

(2) Are greater than the amount required to be disclosed.

(iii) *Tolerances for accuracy of the loan amount.* (A) *In general.* Except as provided in paragraph (a)(5)(B) of this section and § 226.32(c)(5), the loan amount shall be considered accurate if the disclosed loan amount:

(1) Is understated by no more than ½ of 1 percent of the face amount of the note or $100, whichever is greater; or

(2) Is greater than the amount required to be disclosed.

(B) *Special tolerance for a refinancing with no new advance.* Except as provided in § 226.32(c)(5), in a refinancing of a residential mortgage transaction with a creditor other than the current holder of the debt obligation, if there is no new advance and no consolidation of existing loans, the loan amount shall be considered accurate for purposes of this section if the disclosed loan amount:

(1) Is understated by no more than 1 percent of the face amount of the note or $100, whichever is greater; or

(2) Is greater than the amount required to be disclosed.

(iv) *Tolerances for accuracy of the total settlement charges, the prepayment penalty, and the payment summary.* The total settlement charges, the prepayment penalty, and the payment summary shall be considered accurate for purposes of this section if each of the disclosed amounts:

(A) Is understated by no more than $100; or

(B) Is greater than the amount required to be disclosed.

(b)**[**(1)**]** *Notice of right to rescind.* ►(1) *Who receives notice.*◄ In a transaction subject to rescission, a creditor shall deliver **[**two copies of**]** the notice of the right to rescind to each consumer entitled to rescind►.◄ **[**(one copy to each if the notice is delivered in electronic form in accordance with the consumer consent and other applicable provisions of the E-Sign Act). The notice shall be on a separate document that identifies the transaction and shall clearly and conspicuously disclose the following:

(i) The retention or acquisition of a security interest in the consumer's principal dwelling.

(ii) The consumer's right to rescind the transaction.

(iii) How to exercise the right to rescind, with a form for that purpose, designating the address of the creditor's place of business.

(iv) The effects of rescission, as described in paragraph (d) of this section.

(v) The date the rescission period expires.**]**

(2) **[***Proper form***]**►*Format*◄ *of notice.* **[**To satisfy the disclosure requirements of paragraph (b)(1) of this section, the creditor shall provide the appropriate model form in Appendix H of this part or a substantially similar notice.**]** ►(i) *Grouped and segregated.* The disclosures required under paragraph (b)(3) of this section and the optional disclosures permitted under paragraph (b)(4) of this section shall appear on the front side of a one-page document, separate from all other unrelated material. The disclosures required by paragraph (b)(3)(i)–(vi) of this section shall appear grouped together in the notice. The disclosures required by paragraph (b)(3)(vii) of this section shall appear grouped together and shall be segregated from all other information in the notice. The notice shall not contain any other information not directly related to the disclosures required under paragraph (b)(3) of this section.

(ii) *Specific format.* The title of the notice shall appear at the top of the notice. The disclosures required by paragraph (b)(3)(i)–(vi) of this section shall appear beneath the title and be in the form of a table. If the creditor chooses to place in the notice one or both of the optional disclosures described in paragraph (b)(4) of this section, the text shall follow the disclosures required by paragraph (b)(3)(i)–(vi) of this section, but appear before the segregated disclosures required by paragraph (b)(3)(vii) of this section. If both statements described in paragraph (b)(4) of this section are inserted, the statement described in paragraph (b)(4)(i) of this section shall appear before the statement described in paragraph (b)(4)(ii) of this section. The disclosures required by paragraph (b)(3) of this section and any optional disclosures permitted under paragraph (b)(4) of this section must be given in a minimum 10-point font. If the creditor chooses to insert an acknowledgement as described in paragraph (b)(4)(ii) of this section, the acknowledgement must be disclosed in a format substantially similar to the format used in Model Form H–8(A) or H–9 in Appendix H to this part.

(3) *Required content of notice.* The creditor shall clearly and conspicuously disclose the following information in the notice:

(i) *Security interest.* A statement that the consumer could lose his or her home if the consumer does not repay the money owed under the loan that is secured by the home.

(ii) *Right to cancel.* A statement that the consumer has the right under Federal law to cancel the loan on or before the stated date, together with a statement that Federal law prohibits the creditor from making any funds available to the consumer until after the stated date.

(iii) *Fees.* A statement that, if the consumer cancels, the creditor will not charge the consumer a cancellation fee and will refund any fees the consumer paid to obtain the loan.

(iv) *New advance of money with the same creditor under paragraph (f)(2) of this section.* If there is a new transaction with the same creditor and a new advance of money as described in paragraph (f)(2) of this section, a statement that if the consumer cancels the new transaction, all of the terms of the previous loan will still apply, the consumer will still owe the creditor the previous balance, and the consumer could lose his or her home if the consumer does not repay the previous loan.

(v) *How to cancel.* The name and postal address for regular mail of the creditor or its agent and a statement that the consumer may cancel by submitting the form located at the bottom of the notice to the address provided.

(vi) *Deadline to cancel.* The calendar date on which the three-business-day rescission period expires, together with a statement that the right to cancel the loan may extend beyond this date and in that case the consumer must submit the form located at the bottom of the notice to either the current owner of the loan or the person to whom the consumer sends his or her payments. If the creditor cannot provide an accurate calendar date on which the three-business-day rescission period expires, the creditor must provide the calendar date on which it reasonably and in good faith expects the three-business-day period for rescission to expire. If the creditor provides a date in the notice that gives the consumer a longer period within which to rescind than the actual period for rescission, the notice shall be deemed to comply with this paragraph, as long as the creditor permits the consumer to rescind through the end of the date in the notice. If the creditor provides a date in the notice that gives the consumer a shorter period within which to rescind than the actual period for rescission, the creditor shall be deemed to comply with the requirement in this paragraph if the creditor notifies the consumer that the deadline in the first notice of the right of rescission has changed and provides a second notice to the consumer stating that the consumer's right to rescind expires on a calendar date which is three business days from the date the consumer receives the second notice.

(vii) *Form for consumer's exercise of right.* A form that the consumer may use to exercise the right of rescission, which includes spaces for entry of the consumer's name and property address. At a creditor's option, the creditor may pre-print on the form the consumer's name, property address and loan number, but may not request or require the consumer to provide the loan number.

(4) *Optional content of notice.* (i) *Exercise of right by joint owners.* At a creditor's option, a statement that joint owners may have the right to rescind and that a rescission by one owner is effective for all owners.

(ii) *Acknowledgement of receipt.* At a creditor's option, a statement the consumer may use to acknowledge receipt of the notice.

(5) *Time of providing notice.* (i) *In general.* Except as provided in paragraph (b)(5)(ii) of this section, the notice required by paragraph (b) of this section shall be provided before consummation of the transaction.

(ii) *Addition of a security interest to an existing obligation.* In the case of the addition to an existing obligation of a security interest as described in paragraph (a)(1) of this section, the notice required by paragraph (b) of this section shall be provided before the addition of the security interest to the existing obligation.

(6) *Proper form of notice.* A creditor satisfies the disclosure requirements of paragraph (b)(3) of this section if it provides the appropriate model form in Appendix H of this part, or a substantially similar notice, which is properly completed with the disclosures required by paragraph (b)(3) of this section.◀

(c) *Delay of creditor's performance.* Unless a consumer waives the right of rescission under paragraph (e) of this section, no money shall be disbursed other than in escrow, no services shall be performed and no materials delivered until the rescission period has expired and the creditor is reasonably satisfied that the consumer has not rescinded.

(d)▶(1)◀ *Effects of rescission* ▶*prior to the creditor disbursing funds.* This paragraph applies if the creditor has not, directly or indirectly through a third party, disbursed money or delivered property, and the consumer's right to rescind has not expired.◀

⟦(1)⟧▶(i) *Effect of consumer's notice of rescission.*◀ When a consumer ⟦rescinds a transaction⟧▶provides a notice of rescission to a creditor ◀, the security interest giving rise to the right of rescission becomes void and the consumer shall not be liable for any amount, including any finance charge.

⟦(2)⟧▶(ii) *Creditor's obligations.*◀ Within 20 calendar days after receipt of a⟦notice of rescission, the creditor shall return any money or property that has been given to anyone⟧▶consumer's notice of rescission, the creditor shall return to the consumer any money that the consumer has given to the creditor or a third party◀ in connection with the transaction and shall take ⟦any action⟧▶whatever steps are◀ necessary to ⟦reflect the termination of the⟧▶terminate its◀ security interest.

⟦(3) If the creditor has delivered any money or property, the consumer may retain possession until the creditor has met its obligation under paragraph (d)(2) of this section. When the creditor has complied with that paragraph, the consumer shall tender the money or property to the creditor or, where the latter would be impracticable or inequitable, tender its reasonable value. At the consumer's option, tender of property may be made at the location of the property or at the consumer's residence. Tender of money must be made at the creditor's designated place of business. If the creditor does not take possession of the money or property within 20 calendar days after the consumer's tender, the consumer may keep it without further obligation.

(4) The procedures outlined in paragraphs (d)(2) and (3) of this section may be modified by court order.⟧

▶(2) *Effects of rescission after the creditor disburses funds.* This paragraph applies if the creditor has, directly or indirectly through a third party, disbursed money or delivered property, and the consumer's right to rescind has not expired under § 226.23(a)(3)(ii).

(i) *Effects of rescission if the parties are not in a court proceeding.* This paragraph applies if the creditor and consumer are not in a court proceeding.

(A) *Creditor's acknowledgment of receipt.* Within 20 calendar days after receipt of a consumer's notice of rescission, the creditor shall mail or deliver to the consumer a written acknowledgment of receipt of the consumer's notice, which shall include a written statement of whether the creditor will agree to cancel the transaction.

(B) *Creditor's written statement.* If the creditor agrees to cancel the transaction, the creditor's acknowledgment of receipt shall contain a written statement, which provides:

(*1*) As applicable, the amount of money or a description of the property that the creditor will accept as the consumer's tender;

(*2*) A reasonable date by which the consumer may tender the money or property described in paragraph (d)(2)(i)(B)(*1*); and

(*3*) That within 20 calendar days after receipt of the consumer's tender, the creditor will take whatever steps are necessary to terminate its security interest.

(C) *Consumer's response.* (*1*) *Tender of money.* This paragraph applies if the creditor disbursed money to the consumer. A consumer may respond by tendering to the creditor the money described in the written statement by the date stated in the written statement. Tender of money may be made at the creditor's designated place of business, or any reasonable location specified in the creditor's written statement.

(*2*) *Tender of property.* This paragraph applies if the creditor delivered property to the consumer. A consumer may respond by tendering to the creditor the property described in the written statement by the date stated in the written statement. Where this tender would be impracticable or inequitable, the consumer may tender the property's reasonable value. At the consumer's option, tender of property may be made at the location of the property or at the consumer's residence.

(D) *Creditor's security interest.* Within 20 calendar days after receipt of the consumer's tender, the creditor shall take whatever steps are necessary to terminate its security interest.

(ii) *Effects of rescission in a court proceeding.* This paragraph applies if the creditor and consumer are in a court proceeding, and the consumer's right to rescind has not expired as provided in paragraph 23(a)(3)(ii) of this section.

(A) *Consumer's obligation.* (*1*) *Tender of money.* This paragraph applies if the creditor disbursed money to the consumer. After the creditor receives the consumer's notice of rescission, the consumer shall tender to the creditor the principal balance then owed less any amounts the consumer has given to the creditor or a third party in connection with the transaction. Tender of money may be made at the creditor's designated place of business, or other reasonable location.

(*2*) *Tender of property.* This paragraph applies if the creditor delivered property to the consumer. After the creditor receives the consumer's notice of rescission, the consumer shall tender the property to the creditor, or where this tender would be impracticable or inequitable, tender its reasonable value. At the consumer's option, tender of property may be made at the location of the property or at the consumer's residence.

(*3*) *Effect of non-possession.* If the creditor does not take possession of the money or property within 20 calendar days after the consumer's tender, the consumer may keep it without further obligation.

(B) *Creditor's obligation.* Within 20 calendar days after receipt of the consumer's tender, the creditor shall take whatever steps are necessary to terminate its security interest. If the consumer tendered property, the creditor shall return to the consumer any amounts the consumer has given to the creditor or a third party in connection with the transaction.

(C) *Judicial modification.* The procedures outlined in paragraphs (d)(2)(ii)(A) and (B) of this section may be modified by a court.◄

(e) *Consumer's waiver of right to rescind.* ⟦(1)⟧ The consumer may modify or waive the right to rescind►, after delivery of the notice required by paragraph (b) of this section and the disclosures required by §§ 226.32(c) and 226.38, as applicable,◄ if the consumer determines that the ⟦extension of credit is needed⟧►loan proceeds are needed during the rescission period◄ to meet a *bona fide* personal financial emergency. To modify or waive the right, ⟦the consumer⟧►each consumer entitled to rescind◄ shall give the creditor a dated written statement that describes the emergency, specifically modifies or waives the right to rescind, and bears the ►consumer's◄ signature⟦of all the consumers entitled to rescind⟧. Printed forms for this purpose are prohibited⟦, except as provided in paragraph (e)(2) of this section⟧.

⟦(2) The need of the consumer to obtain funds immediately shall be regarded as a *bona fide* personal financial emergency provided that the dwelling securing the extension of credit is located in an area declared during June through September 1993, pursuant to 42 U.S.C. 5170, to be a major disaster area because of severe storms and flooding in the Midwest.[48a] In this instance, creditors may use printed forms for the consumer to waive the right to rescind. This exemption to paragraph (e)(1) of this section shall expire one year from the date an area was declared a major disaster.

(3) The consumer's need to obtain funds immediately shall be regarded as a *bona fide* personal financial emergency provided that the dwelling securing the extension of credit is located in an area declared during June through September 1994 to be a major disaster area, pursuant to 42 U.S.C. 5170, because of severe storms and flooding in the South.[48b] In this instance, creditors may use printed forms for the consumer to waive the right to rescind. This exemption to paragraph (e)(1) of this section shall expire one year from the date an area was declared a major disaster.

(4) The consumer's need to obtain funds immediately shall be regarded as a *bona fide* personal financial emergency provided that the dwelling securing the extension of credit is located in an area declared during October 1994 to be a major disaster area, pursuant to 42 U.S.C. 5170, because of severe storms and flooding in Texas.[48c] In this instance, creditors may use printed forms for the consumer to waive the right to rescind. This exemption to paragraph (e)(1) of this section shall expire one year from the date an area was declared a major disaster.⟧

(f) *Exempt transactions.* The right to rescind does not apply to the following:

(1) A residential mortgage transaction.

(2) A ⟦refinancing or consolidation⟧ ► new transaction under § 226.20(a)(1)◄ by the same creditor of an extension of credit already secured by the consumer's principal dwelling ►, except to the extent of any new advance of money.

(i) For purposes of this paragraph, the term *same creditor* means the original creditor that is also the current holder of the debt obligation. The original creditor is the creditor to whom the written agreement was initially made payable. In a merger, consolidation or acquisition, the successor institution is considered the original creditor.

(ii) For purposes of this paragraph, the term *new advance* means the amount by which the new loan amount exceeds the unpaid principal balance, any earned unpaid finance charge on the existing debt, and amounts attributed solely to the costs of the new transaction. If the new transaction with the same creditor involves a new advance of money, the new transaction is rescindable only to the extent of the new advance.◄ ⟦The right of rescission shall apply, however, to the extent the new amount financed exceeds the unpaid principal balance, any earned unpaid finance charge on the existing debt, and amounts attributed solely to the costs of the refinancing or consolidation.⟧

(3) A transaction in which a state agency is a creditor.

(4) An advance, other than an initial advance, in a series of advances or in a series of single-payment obligations that is treated as a single transaction under § 226.17(c)(6), if the notice required by paragraph (b) of this section and all material disclosures have been given to the consumer.

(5) A renewal of optional ►credit◄ insurance premiums►, debt cancellation coverage or debt suspension coverage, provided that the disclosures relating to the initial purchase were provided as required under § 226.38(h)◄ ⟦that is not considered a refinancing under § 226.20(a)(5)⟧.

⟦(g) *Tolerances for accuracy*—(1) *One-half of 1 percent tolerance.* Except as provided in paragraphs (g)(2) and (h)(2) of this section, the finance charge and other disclosures affected by the finance charge (such as the amount financed and the annual percentage rate) shall be considered accurate for purposes of this section if the disclosed finance charge:

(i) is understated by no more than ½ of 1 percent of the face amount of the note or $100, whichever is greater; or

(ii) is greater than the amount required to be disclosed.

(2) *One percent tolerance.* In a refinancing of a residential mortgage transaction with a new creditor (other than a transaction covered by § 226.32), if there is no new advance and no consolidation of existing loans, the finance charge and other disclosures affected by the finance charge (such as the amount financed and the annual percentage rate) shall be considered accurate for purposes of this section if the disclosed finance charge:

(i) is understated by no more than 1 percent of the face amount of the note or $100, whichever is greater; or

(ii) is greater than the amount required to be disclosed.⟧

⟦(h)⟧►(g)◄ *Special rules for foreclosures.* ⟦(1) *Right to rescind.*⟧ After the initiation of foreclosure on the consumer's principal dwelling that secures the credit obligation, the

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⟦[48a] A list of the affected areas will be maintained by the Board.⟧

⟦[48b] A list of the affected areas will be maintained and published by the Board. Such areas now include parts of Alabama, Florida, and Georgia.⟧

⟦[48c] A list of the affected areas will be maintained and published by the Board. Such areas now include the following counties in Texas: Angelina, Austin, Bastrop, Brazos, Brazoria, Burleson, Chambers, Fayette, Fort Bend, Galveston, Grimes, Hardin, Harris, Houston, Jackson, Jasper, Jefferson, Lee, Liberty, Madison, Matagorda, Montgomery, Nacagdoches, Orange, Polk, San Augustine, San Jacinto, Shelby, Trinity, Victoria, Washington, Waller, Walker, and Wharton.⟧

consumer shall have the right to rescind the transaction if:

【(i)】►(1)◄ A mortgage broker fee that should have been included in the [finance charge]► interest and settlement charges◄ was not included; or

【(ii)】►(2)◄ The creditor did not provide the properly completed appropriate model form in appendix H of this part, or a substantially similar notice of rescission.

【(2) *Tolerances for disclosures.* After the initiation of foreclosure on the consumer's principal dwelling that secures the credit obligation, the finance charge and other disclosures affected by the finance charge (such as the amount financed and the annual percentage rate) shall be considered accurate for purposes of this section if the disclosed finance charge:

(i) Is understated by no more than $35; or

(ii) Is greater than the amount required to be disclosed.】

17. Section 226.24 is amended by revising paragraph (f)(3)(i) to read as follows:

§ 226.24 Advertising.

* * * * *

(f) * * *

(3) *Disclosure of payments*—(i) *In general.* 【In addition to the requirements of paragraph (c) of this section, if】 ►If◄ an advertisement for credit secured by a dwelling states the amount of any payment, the advertisement shall disclose in a clear and conspicuous manner:

* * * * *

Subpart E—Special Rules for Certain Home Mortgage Transactions

18. Section 226.31 is amended by revising paragraphs (b), (c)(1)(iii), (c)(2), and (d)(2) to read as follows:

§ 226.31 General rules.

* * * * *

(b) *Form of disclosures.* The creditor shall make the disclosures required by this subpart clearly and conspicuously in writing, in a form that the consumer may keep. The disclosures required by this subpart may be provided to the consumer 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.*). ►The disclosures required by § 226.33(b) may be provided to the consumer in electronic form without regard to the consumer consent or other provisions of the E–Sign Act in the circumstances set forth in that section.◄

(c) * * *

(1) * * *

(iii) *Consumer's waiver of waiting period before consummation.* 【The consumer may, after receiving the disclosures required by paragraph (c)(1) of this section, modify or waive the three-day waiting period between delivery of those disclosures and consummation, if the consumer determines that the extension of credit is needed】►The consumer may modify or waive the three-day waiting period between when the consumer receives the disclosures required by paragraph (c)(1) of this section and consummation, after receiving those disclosures, if the consumer determines that the loan proceeds are needed before the waiting period ends◄ to meet a *bona fide* personal financial emergency. To modify or waive the right, 【the consumer】►each consumer primarily liable on the legal obligation◄ shall give the creditor a dated written statement that describes the emergency, specifically modifies or waives the waiting period, and bears the ►consumer's◄ 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 § 226.23(e)(2)】.

(2) *Disclosures for reverse mortgages.* The creditor shall furnish the disclosures required by § 226.33 ►as specified in paragraph (d) of that section◄【at least three business days prior to:

(i) Consummation of a closed-end credit transaction; or

(ii) The first transaction under an open-end credit plan】.

* * * * *

(d) * * *

(2) *Estimates.* ►Except as otherwise required by § 226.19(a)(2), i◄ 【I】f any information necessary for an accurate disclosure is unknown to the creditor, the creditor shall make the disclosure based on the best information reasonably available at the time the disclosure is provided, and shall state clearly that the disclosure is an estimate.

* * * * *

19. Section 226.32 is amended by revising paragraphs (a)(2)(ii) and (b)(1)(i) to read as follows:

§ 226.32 Requirements for certain closed-end home mortgages.

(a) * * *

(2) * * *

(ii) A ►nonrecourse◄ reverse mortgage 【transaction】 subject to § 226.33.

* * * * *

(b) * * *

(1) * * *

(i) All items 【required to be disclosed under】 ►included in the finance charge pursuant to◄ § 226.4【(a) and 226.4(b)】, except►—

(A)◄ Interest or the time-price differential; ►and

(B) For purposes of this paragraph (b)(1)(i), § 226.4(g) does not apply;◄

* * * * *

20. Section 226.33 is revised to read as follows:

§ 226.33 Requirements for reverse mortgages.

(a) *Definition.* For purposes of this subpart, *reverse mortgage* 【*transaction*】 means a 【nonrecourse】 consumer credit obligation in which:

(1) A mortgage, deed of trust, or equivalent consensual security interest securing one or more advances is created in the consumer's principal dwelling; and

(2) Any principal, interest, or shared appreciation or equity is due and payable (other than in the case of default) only after:

(i) The consumer dies;

(ii) The dwelling is transferred; or

(iii) The consumer ceases to occupy the dwelling as a principal dwelling.

►(b) *Reverse mortgage document provided on or with the application.* (1) *In general.* Except as provided in paragraph (b)(2) of this section, the reverse mortgage document "Key Questions to Ask about Reverse Mortgage Loans" published by the Board, or a substantially similar document, shall be provided prominently on or with an application form at the time the application form is provided to the consumer or before the consumer pays a nonrefundable fee (except a bona fide and reasonable fee imposed by a counselor or a counseling agency for reverse mortgage counseling required by applicable law), whichever is earlier.

(2) *Application made by telephone or through an intermediary.* If the creditor receives the consumer's application through an intermediary agent or broker or by telephone, the creditor satisfies the requirements of paragraph (b)(1) of this section if the creditor delivers the document or places it in the mail not later than three business days after the creditor receives the consumer's application; or before consummation or account opening, whichever is earlier.

(3) *Electronic disclosure.* For an application that is accessed by the consumer in electronic form, the document required by paragraph (b)(1) of this section must be provided in a timely manner and may be provided to

the consumer in electronic form on or with the application.

(4) *Duties of third parties.* Persons other than the creditor who provide applications to consumers for open-end reverse mortgages must comply with paragraphs (b)(1) and (b)(3) of this section, except that these third parties are not required to deliver or mail the document required by paragraph (b)(1) of this section for telephone applications as discussed in paragraph (b)(2) of this section.◄

【(b)】►(c)◄ *Content of disclosures* ►*for reverse mortgages*◄. In addition to other disclosures required by this part, in a reverse mortgage 【transaction】 the creditor shall provide the following disclosures in a form substantially similar to 【the model form】 ►Forms K–1, K–2, or K–3◄ found in 【paragraph (d) of】 appendix K of this part:

(1) *Notice.* A statement that the consumer is not obligated to complete the reverse mortgage 【transaction】 merely because the consumer has received the disclosures required by this section or has signed an application for a reverse mortgage loan. ►If the creditor provides space for the consumer's signature, a statement that a signature by the consumer only confirms receipt of the disclosure statement.◄

(2) ►*Identification information.* (i) The identity of the creditor.

(ii) The date the disclosure was prepared.

(iii) The loan originator's unique identifier, as defined by Sections 1503(3) and (12) of the Secure and Fair Enforcement for Mortgage Licensing Act of 2008, 12 U.S.C. 5102(3) and (12).◄【*Total annual loan cost rates.* A good-faith projection of the total cost of the credit, determined in accordance with paragraph (c) of this section and expressed as a table of "total annual loan cost rates," using that term, in accordance with appendix K of this part.】

(3) *Itemization of pertinent information.* 【An itemization of loan terms, charges, the age of the youngest borrower】 ►The name, address, account number, and age of each borrower◄, and the appraised property value.

(4) ►*Information about the reverse mortgage.* (i) A statement that the consumer has applied for a reverse mortgage secured by his dwelling that does not have to be repaid while the consumer remains in the home.

(ii) A description of the types of payments which the consumer may receive, such as an initial advance, a monthly or other periodic advance, or through discretionary cash advances in which the consumer controls the timing of advances, if more than one type of payment is available.

(iii) A statement that the consumer will retain title to the home and must pay any property charges such as taxes and insurance and must maintain the property.

(iv) As applicable, a statement that the consumer will have access to the loan funds and will continue to receive payments even if the loan's principal balance exceeds the value of the home, provided that the consumer remains in the home.

(v) A description of the events that may cause the reverse mortgage to become due and payable, and a statement that the consumer must repay the loan, including interest and fees, once such an event occurs.◄【*Explanation of table.* An explanation of the table of total annual loan cost rates as provided in the model form found in paragraph (d) of appendix K of this part.】

►(5) *Payment of loan funds.* (i) An itemization of the types of payments the creditor will make to the consumer including, as applicable:

(A) The amount of any initial advance at consummation or for a HELOC, after the consumer becomes obligated on the plan, and a statement that the funds will be paid to the consumer after the consumer accepts the reverse mortgage, labeled "Initial Advance".

(B) The amount of any monthly or other regular periodic payment of funds to the consumer and a statement that the funds will be paid each month (or other applicable period) while the consumer remains in the home, labeled "Monthly Advance" (or other applicable period).

(C) Any amount made available to the consumer as discretionary cash advances, the timing of which the consumer controls, and a statement that the funds will be available to the consumer at any time while the consumer remains in the home, labeled "Line of Credit."

(ii) If the consumer may choose the types of payments by which to receive loan funds, and the consumer has not selected a payment option at the time the disclosures are provided, the creditor shall disclose the amount the consumer may receive in the following manner:

(A) As the maximum amount the consumer could receive under paragraph (c)(5)(i)(C) of this section along with a statement that the consumer may also choose to take some or all of the funds in an initial advance or periodic payment as described in paragraphs (c)(5)(i)(A) or (c)(5)(i)(B) of this section, if applicable.

(B) If the creditor does not provide the consumer with the option to receive funds in the manner described in paragraph (c)(5)(i)(C) of this section, as the maximum amount the consumer may receive as an initial advance under paragraph (c)(5)(i)(A) of this section along with a statement that the consumer may choose to take some or all of the funds in the form of a periodic payment as described in paragraph (c)(5)(i)(B) of this section, if applicable.

(iii) A statement that the consumer may change the types of payments received, if applicable.

(6) *Annual percentage rate.* (i) *Open-end annual percentage rate.* For an open-end reverse mortgage, each periodic interest rate applicable to the transaction that may be used to compute the finance charge on an outstanding balance, expressed as an annual percentage rate (as determined by § 226.14(b)). The annual percentage rates disclosed pursuant to this paragraph shall be in at least 16-point type, except for the following: Any minimum or maximum annual percentage rates that may apply; and any rate changes set forth in the initial agreement that would not generally apply after the expiration of an introductory rate, such as the loss of an employee preferred rate when an employee ceases employment.

(A) *Disclosures for variable-rate plans.* (*1*) If a rate disclosed under paragraph (c)(6)(i) of this section is a variable rate, the following disclosures, as applicable:

(*i*) The fact that the annual percentage rate may change due to the variable-rate feature, using the term "variable rate" in underlined text as shown in the applicable tables found in Samples K–4, or K–5 in Appendix K of this part.

(*ii*) An explanation of how the annual percentage rate will be determined. Except as provided in paragraph (c)(6)(i)(A)(*1*)(*vi*) of this section, in providing this disclosure, a creditor must only identify the type of index used and the amount of any margin.

(*iii*) The frequency of changes in the annual percentage rate.

(*iv*) Any rules relating to changes in the index value and the annual percentage rate.

(*v*) A statement of any limitations on changes in the annual percentage rate, including the minimum and maximum annual percentage rate that may be imposed. If no annual or other periodic limitations apply to changes in the annual percentage rate, a statement that no annual limitation exists.

(*vi*) The lowest and highest value of the index and margin in the past 15 years.

(*2*) A variable rate is accurate if it is a rate as of a specified date and the rate was in effect within the last 30 days before the disclosures are provided.

(B) *Introductory initial rate.* If the initial rate is an introductory rate, the creditor must disclose the rate that would otherwise apply pursuant to paragraph (c)(6)(i) of this section. Where the rate is fixed, the creditor must disclose the rate that will apply after the introductory rate expires. Where the rate is variable, the creditor must disclose the rate based on the applicable index or formula. A creditor must disclose in the table described in paragraph (d)(4) of this section the introductory rate along with the rate that would otherwise apply to the plan, and use the term "introductory" or "intro" in immediate proximity to the introductory rate. The creditor must also disclose the time period during which the introductory rate will remain in effect.

(ii) *Closed-end annual percentage rate.* (A) The "annual percentage rate," using that term (as determined by § 226.22), and the following description: "overall cost of this loan including interest and settlement charges."

(B) *Rate type.* (*1*) If the annual percentage rate may increase after consummation, a statement that the rate is an "adjustable rate" using that term.

(*2*) If the interest rate will change after consummation, and the rates and periods in which they will apply are known, a statement that the rate is a "step rate" using that term.

(*3*) If the rate is not an adjustable rate or a step rate, a statement that the rate is a "fixed rate" using that term.

(C) *Rate calculation and rate change limits.* If the annual percentage rate may increase after consummation:

(*1*) A statement labeled "Rate Calculation" that described the method used to calculate the interest rate and the frequency of interest rate adjustments. If the interest rate that applies at consummation is not based on the index and margin that will be used to make later interest rate adjustments, the statement must include the time period when the initial interest rate expires.

(*2*) Any limitations on the increase in the interest rate together with a statement of the maximum rate that may apply, labeled "Rate Change Limits."

(*3*) The lowest and highest value of the index and margin in the past 15 years.

(iii) *Statement about interest accrual.* A statement that interest charges will be added to the loan balance each month (or other applicable period) and collected when the loan is due.

(7) *Fees and transaction requirements.* (i) *Fees imposed by the creditor and third parties to consummate the transaction or open the plan.* (A) The total of all one-time fees imposed by the creditor and any third parties to open the plan or consummate the transaction, stated as a dollar amount. If the exact total of one-time fees for account opening is not known at the time the open-end early disclosures required by paragraph (d)(1) of this section are delivered or mailed, a creditor must provide the highest total of one-time account opening fees possible for the plan terms with a indication that the one-time account opening costs may be "up to" that amount.

(B) An itemization of all one-time fees imposed by the creditor and any third parties to open the plan or consummate the transaction, stated as a dollar amount, and when such fees are payable. If the dollar amount of an itemized fee is not known at the time the disclosures under paragraph (d)(1) of this section are delivered or mailed, a creditor must provide a range for such fee.

(C) A creditor shall not disclose the amount of any property insurance premiums under this paragraph, even if the creditor requires property insurance.

(ii) *Fees imposed by the creditor for availability of the reverse mortgage.* (A) Any monthly or other periodic fees that may be imposed by the creditor for the availability of the reverse mortgage, including any fee based on account activity or inactivity; how frequently the fee will be imposed; and the annualized amount of the fee. A creditor must not disclose the amount of any property insurance premiums under this paragraph, even if the creditor requires property insurance.

(B) All costs and charges to the consumer that may be imposed by the creditor on a regular periodic basis as part of the reverse mortgage, such as a servicing fee or mortgage-insurance premium.

(C) The label "Monthly Interest Charges" along with:

(*1*) For a closed-end reverse mortgage, the interest rate applicable to the loan and, if the rate is variable, a statement that the rate can change.

(*2*) For an open-end reverse mortgage, the annual percentage rate applicable to the plan and, if the rate is variable, a statement that the rate can change.

(iii) *Fees imposed by the creditor for early termination of the reverse mortgage.* Any fee that may be imposed by the creditor if a consumer terminates the reverse mortgage, or prepays the obligation in full, prior to its scheduled maturity.

(iv) *Statement about other fees.* (A) For the early open-end disclosure required by paragraph (d)(1) of this section, a statement that other fees may apply, if applicable. As applicable, either:

(*1*) A statement that the consumer may receive, upon request, additional information about fees applicable to the plan, or

(*2*) If the additional information about fees is provided with the table described in paragraph (d)(4)(i) of this section, a reference to the location of the information.

(B) For the open-end account-opening disclosures required by paragraph (d)(2) of this section and the closed-end disclosures required by paragraph (d)(3) of this section, a statement that other fees may apply and that information about other fees is included in the disclosures or agreement, as applicable.

(v) *Transaction requirements.* Any limitations on the number of extensions of credit and the amount of credit that may be obtained during any time period, as well as any minimum draw requirements.

(8) *Loan balance growth.* (i) *Itemization.* An itemization of the loan balance expressed as a dollar amount. The creditor shall base the itemization on:

(A) The initial interest rate in effect at the time the disclosures are provided.

(B) The assumption that the consumer does not make any repayments during the term of the reverse mortgage.

(C) The payment type(s) selected by the consumer as disclosed in paragraph (c)(5) of this section. If the consumer has elected to receive an initial advance, a periodic payment, or some combination of the two which accounts for fifty percent or more of the principal loan amount available to the consumer, the creditor shall assume that the consumer takes no further advances. In all other cases, including where the consumer has not selected a payment type, the creditor shall assume that the entire principal loan amount is advanced at closing or, in the case of an open-end credit transaction, at the time the consumer becomes obligated on the plan.

(D) If the creditor is entitled by contract to any shared appreciation or shared equity, the assumption that the dwelling's value increases by 4 percent per year. In all other cases, the assumption that the dwelling's value does not change.

(E) If the creditor and consumer have not agreed on whether any closing or account-opening and other transaction costs will be financed by the creditor or paid by the consumer, the assumption that all such costs will be financed by the creditor.

(ii) *Content.* The itemization shall contain only the following information for each of the assumed loan periods of one year, five years, and ten years:

(A) The sum of all advances to and for the benefit of the consumer, including payments that the consumer will receive from an annuity that the consumer purchases along with the reverse mortgage;

(B) The sum of all costs and charges owed by the consumer, including the costs of any annuity the consumer purchases along with the reverse mortgage; and

(C) The total amount the consumer would be required to repay, including any shared appreciation or equity in the dwelling that the creditor is entitled by contract to receive and any limitations on the consumer's liability (such as nonrecourse limits and equity-conservation agreements).

(iii) *Explanation.* An explanation of the table required by paragraph (c)(8)(v) of this section including:

(A) A statement that the table is based on payment type(s) selected by the consumer as disclosed in paragraph (c)(5) of this section and, if applicable, a statement that the disclosure assumes no further advances are taken.

(B) For a reverse mortgage under an open-end credit plan, the annual percentage rate in effect at the time the disclosures are provided and a statement that the table is based on the assumption that the annual percentage rate does not change.

(C) For a closed-end reverse mortgage, the interest rate in effect at the time the disclosures are provided and a statement that the table is based on the assumption that the interest rate does not change.

(iv) *Shared appreciation disclosure.* If the creditor is entitled by contract to any shared appreciation or equity, a statement under the heading, "Shared Appreciation" or "Shared Equity," that the reverse mortgage includes such an agreement and a description that this means the lender will be entitled to a specified percent of any gain the consumer makes when the consumer sells or refinances the home. The creditor must also disclose a numeric example of the amount of shared appreciation or equity the creditor would be entitled to based on a hypothetical $100,000 appreciation in the home's value.

(v) *Format.* The information in paragraph (c)(8)(ii) shall be in the form of a table with headings, content and format substantially similar to Forms K–1, K–2, or K–3 in Appendix K to this part. That table shall contain only the information required in paragraph (c)(8)(iii). The information in paragraph (c)(8)(iv) shall be in the form of a table with headings, content and format substantially similar to Model Clause K–7 in Appendix K to this part.

(9) *Statements about repayment options.* (i) A statement that once the loan becomes due and payable the consumer or the consumer's heirs may pay the loan balance in full and keep the home, or sell the home and use the proceeds to pay off the loan.

(ii) For a nonrecourse transaction a statement that:

(A) If the home sells for less than the consumer owes, the consumer will not be required to pay the difference.

(B) If the home sells for more than the consumer owes, the difference will be provided to the consumer or the consumer's heirs. If the reverse mortgage includes a shared equity or shared appreciation feature, a statement that the creditor will deduct any shared appreciation or equity before paying the remaining funds to the consumer or consumer's heirs.

(iii) For a transaction that allows recourse against the borrower, a statement that the consumer or the consumer's estate will be required to repay the entire amount of the loan, even if the home sells for less than the consumer owes.

(10) *Statements about risks.* (i) A statement that the reverse mortgage will be secured by the consumer's home.

(ii) As applicable, a statement that the creditor may:

(A) Foreclose on the home and require that the consumer leave the home;

(B) Stop making periodic payments to the consumer;

(C) Prohibit additional extensions of credit or reduce the credit limit, if applicable;

(D) Terminate the reverse mortgage and require payment of the outstanding balance in full in a single payment and impose fees upon termination; and

(E) Implement changes in the reverse mortgage.

(iii) A statement of the following conditions under which the creditor may take the actions in paragraph (c)(10)(ii) of this section, including as applicable:

(A) The consumer's failure to maintain the collateral.

(B) The consumer's ceasing to use the dwelling as the consumer's principal residence and a statement of any residency time period that will be used to determine whether the dwelling is the consumer's principal residence (such as if the consumer does not reside in the dwelling for 12 consecutive months).

(C) The consumer's failure to pay property taxes or maintain homeowner's insurance.

(D) The consumer's failure to meet any other obligations.

(11) *Additional information and Web site.* A statement that if the consumer does not understand any disclosure required by this section the consumer should ask questions; a statement that the consumer may obtain additional information at the Web site of the Federal Reserve Board; and a reference to that Web site.

(12) *Additional early disclosures for open-end reverse mortgages.* The following disclosures must be provided with the disclosures required by paragraph (d)(1) of this section:

(i) *Refund of fees under § 226.5b(e).* A statement that the consumer may receive a refund of all fees paid, if the consumer notifies the creditor within three business days of receiving the disclosures given pursuant to this paragraph (d) of this section that he does not want to open the plan.

(ii) *Refund of fees under § 226.40(b).* A statement that the consumer may receive a refund of all fees paid, if the consumer notifies the creditor within three business days of receiving the counseling required by § 226.40(b) that he does not want to open the plan.

(iii) *Changes to disclosed terms.* A statement that, if a disclosed term changes (other than a change due to fluctuations in the index in a variable-rate plan) prior to opening the plan and the consumer elects not to open the plan, the consumer may receive a refund of all fees paid.

(iv) *Statement about refundability of fees.* (A) Identification of any disclosed term that is subject to change prior to opening the plan.

(B) A statement that the consumer may be entitled to a refund of all fees paid if the consumer decides not to open the plan; and

(C) A cross reference to the "Fees" section in the table described in paragraph (d)(4)(i) of this section.

(13) *Additional disclosures before the first transaction under an open-end reverse mortgage.* The following disclosures must be provided with the disclosures required by paragraph (d)(2) of this section:

(i) *Transaction charges.* Any transaction charge imposed by the creditor for use of the reverse mortgage.

(ii) *Fees for failure to comply with transaction limitations.* Any fee imposed by the creditor for a consumer's failure to comply with:

(A) Any limitations on the number of extensions of credit or the amount of credit that may be obtained during any time period.

(B) Any minimum draw requirements.

(iii) *Billing error rights reference.* A statement that information about consumers' right to dispute transactions is included in the account-opening disclosures.

(iv) *Statement about confirming terms.* A statement that the consumer should confirm that the terms in the disclosure statement are the same terms for which the consumer applied.

(14) *Additional disclosures for closed-end reverse mortgages.* The following disclosures must be provided with the disclosures required by paragraph (d)(3) of this section, grouped together under the subheading "Total Payments," using that term:

(i) *Total payments.* The total payments amount, calculated based on the number and amount of scheduled payments in accordance with the requirements of § 226.18(g), together with a statement that the total payments is calculated on the assumption that market rates do not change, if applicable, and a statement of the estimated loan term.

(ii) *Interest and settlement charges.* The *interest and settlement charges,* using that term, calculated as the finance charge in accordance with the requirements of § 226.4 and expressed as a dollar figure, together with a brief statement that the interest and settlement charges amount represents part of the total payments amount. The disclosed interest and settlement charges, and other disclosures affected by the disclosed interest and settlement charges (including the amount financed and annual percentage rate), shall be treated as accurate if the amount disclosed as the interest and settlement charges—

(A) Is understated by no more than $100;

(B) Is greater than the amount required to be disclosed.

(iii) *Amount financed.* The *amount financed,* using that term and expressed as a dollar figure, together with a brief statement that the interest and settlement charges and the amount financed are used to calculate the annual percentage rate.

(15) *Disclosures provided outside the table.* The following disclosures must be provided outside the table required by paragraph (d)(4) of this section:

(i) For closed-end reverse mortgages, the disclosures required by § 226.38(j), as applicable.

(ii) For open-end reverse mortgages, the information required by § 226.6(a)(3), (a)(4), and (a)(5), as applicable.

(16) *Assumptions for closed-End disclosures.* In a closed-end reverse mortgage, the creditor must apply the following rules, as applicable, in making the disclosures required by paragraph (c)(14) of this section. The creditor's use of these rules does not, by itself, make the disclosures estimates:

(i) If the reverse mortgage has a specified period for disbursements but repayment is due only upon the occurrence of a future event such as the death of the consumer, the creditor must assume that disbursements will be made until they are scheduled to end. The creditor must assume repayment will occur when disbursements end or within a period following the final disbursement which is not longer than the regular interval between disbursements.

This assumption should be used even though repayment may occur before or after the disbursements are scheduled to end.

(ii) If the reverse mortgage has neither a specified period for disbursements nor a specified repayment date and these terms will be determined solely by reference to future events including the consumer's death, the creditor may assume that the disbursements will end upon the consumer's death (which may be estimated by using actuarial tables, for example) and that repayment will be required at the same time (or within a period following the date of the final disbursement which is not longer than the regular interval for disbursements). Alternatively, the creditor may base the disclosures upon another future event it estimates will be most likely to occur first. If terms will be determined by reference to future events which do not include the consumer's death, the creditor must base the disclosures upon the occurrence of the event estimated to be most likely to occur first.

(iii) In making the disclosures, the creditor must assume that all disbursements and accrued interest will be paid by the consumer. For example, if the note has a nonrecourse provision providing that the consumer is not obligated for an amount greater than the value of the house, the creditor must nonetheless assume that the full amount to be disbursed will be repaid.◀

【(c) *Projected total cost of credit.* The projected total cost of credit shall reflect the following factors, as applicable:

(1) *Costs to consumer.* All costs and charges to the consumer, including the costs of any annuity the consumer purchases as part of the reverse mortgage transaction.

(2) *Payments to consumer.* All advances to and for the benefit of the consumer, including annuity payments that the consumer will receive from an annuity that the consumer purchases as part of the reverse mortgage transaction.

(3) *Additional creditor compensation.* Any shared appreciation or equity in the dwelling that the creditor is entitled by contract to receive.

(4) *Limitations on consumer liability.* Any limitation on the consumer's liability (such as nonrecourse limits and equity conservation agreements).

(5) *Assumed annual appreciation rates.* Each of the following assumed annual appreciation rates for the dwelling:

(i) 0 percent.

(ii) 4 percent.

(iii) 8 percent.

(6) *Assumed loan period.* (i) Each of the following assumed loan periods, as provided in appendix L of this part:

(A) Two years.

(B) The actuarial life expectancy of the consumer to become obligated on the reverse mortgage transaction (as of that consumer's most recent birthday). In the case of multiple consumers, the period shall be the actuarial life expectancy of the youngest consumer (as of that consumer's most recent birthday).

(C) The actuarial life expectancy specified by paragraph (c)(6)(i)(B) of this section, multiplied by a factor of 1.4 and rounded to the nearest full year.

(ii) At the creditor's option, the actuarial life expectancy specified by paragraph (c)(6)(i)(B) of this section, multiplied by a factor of .5 and rounded to the nearest full year.】

▶(d) *Special disclosure requirements for reverse mortgages.* (1) *Timing of early open-end reverse mortgage disclosures.* In a reverse mortgage structured as an open-end credit plan, the creditor shall deliver or mail the disclosures required under paragraph (c) of this section, as applicable, not later than—

(i) Three business days following receipt of a consumer's application by the creditor; or

(ii) Three business days before the first transaction under the plan, if earlier.

(2) *Timing of open-end reverse mortgage account-opening disclosures.* In a reverse mortgage structured as an open-end credit plan, at least three business days before the first transaction under the plan a creditor must provide the disclosures specified in paragraph (c) of this section, as applicable.

(3) *Timing of closed-end reverse mortgage disclosures.* In a closed-end reverse mortgage, the creditor shall

make the disclosures required by paragraph (c) of this section, as applicable, in accordance with the rules in § 226.19(a).

(4) *Form of disclosures; tabular format.* (i) The disclosures required by paragraphs (c)(3) through (c)(10), (c)(12)(i), (c)(12)(ii), (c)(12)(iii), (c)(13)(i), (c)(13)(ii), and (c)(14) of this section generally shall be in the form of a table with headings, content, and format substantially similar to any of the applicable tables found in K–1, K–2, or K–3 in Appendix K to this part.

(ii) The table described in paragraph (d)(4)(i) of this section shall contain only the information required or permitted by paragraphs (c)(3) through (c)(10), (c)(12)(i), (c)(12)(ii), (c)(12)(iii), (c)(13)(i), (c)(13)(ii), and (c)(14).

(iii) Disclosures required by paragraph (c)(2) of this section must be placed directly above the table described in paragraph (d)(4)(i) of this section, in a format substantially similar to any of the applicable tables found in K–1, K–2, or K–3 in Appendix K to this part.

(iv) The disclosures required by paragraphs (c)(1), (c)(11), (c)(12), (c)(12)(iv), (c)(13)(iii), and (c)(13)(iv) of this section must be disclosed directly below the table described in paragraph (d)(4)(i) of this section, in a format substantially similar to any of the applicable tables found in K–1, K–2, or K–3 in Appendix K to this part.

(v) Other information may be presented with the table described in paragraph (d)(4)(i) of this section, provided that such information appears outside of the required table.

(vi) The following disclosures must be disclosed in bold text:

(A) Disclosures required by paragraphs (c)(1), (c)(6)(iii), (c)(8)(ii)(C), (c)(11), (c)(12)(iv)(A), and (c)(12)(iv)(B) of this section.

(B) Any dollar amount required to be disclosed under paragraph (c)(5)(i) of this section.

(C) Any annual percentage rates required to be disclosed under paragraph (c)(6) of this section. For closed-end reverse mortgages, the annual percentage rate must be more conspicuous than the other required disclosures and in at least 16 point font.

(D) Total account opening fees required to be disclosed under paragraph (c)(7)(i) of this section.

(E) Any percentage or dollar amount required to be disclosed under paragraphs (c)(7)(ii), (c)(7)(iii), (c)(7)(v), (c)(13)(i), and (c)(13)(ii) of this section except the annualized amount of any periodic fee disclosed pursuant to paragraph (c)(7)(ii) of this section.

(5) *Disclosures based on a percentage.* Except for disclosing fees under paragraph (c)(7)(i) of this section, if the amount of any fee required to be disclosed under paragraph (c) of this section or the amount of any transaction requirement required to be disclosed under paragraph (c)(7)(v) of this section is determined on the basis of a percentage of another amount, the percentage used and the amount against which the percentage is applied may be disclosed instead of the amount of the fee or transaction amount, as applicable.

(e) *Reverse mortgage advertising.*

(1) *Scope.* The requirements of paragraph (e) of this section apply to any advertisement for a reverse mortgage, including promotional materials accompanying applications.

(2) *Clear and conspicuous standard.* Disclosures required by paragraph (e) of this section shall be made clearly and conspicuously.

(3) *Need to repay loan.* If an advertisement states that a reverse mortgage is a "government benefit" or otherwise is aid provided by any Federal, state, or local government entity, each such statement shall be accompanied by an equally prominent and closely proximate statement of the fact that a reverse mortgage is a loan that must be repaid.

(4) *Events that end loan term.* If an advertisement states that a reverse mortgage provides payments "for life" or that a consumer need not repay a reverse mortgage "during your lifetime" or otherwise states that a reverse mortgage will continue throughout a consumer's lifetime, each such statement shall be accompanied by an equally prominent and closely proximate statement that a reverse mortgage will end sooner in certain circumstances, including, as applicable, if the consumer—

(A) Sells the dwelling; or

(B) Lives somewhere other than the dwelling for a longer period than allowed by the loan agreement.

(5) *Risk of foreclosure.* If an advertisement states that a consumer "cannot lose", or that there is "no risk" to, a consumer's dwelling with a reverse mortgage or otherwise states that foreclosure cannot occur with a reverse mortgage, each such statement shall be accompanied by an equally prominent and closely proximate statement that foreclosure may occur in some circumstances, including, as applicable, if the consumer—

(A) Lives somewhere other than the dwelling longer than allowed by the loan agreement; or

(B) Does not pay property taxes or insurance premiums.

(6) *Amount owed.* If an advertisement states that with a reverse mortgage a consumer or a consumer's heirs or estate "cannot owe" or will "never repay" an amount greater than, or otherwise states that repayment is limited to, the value of the consumer's dwelling, each such statement shall be accompanied by an equally prominent and closely proximate statement of the fact that—

(A) To retain the dwelling when the reverse mortgage becomes due, the consumer or the consumer's heirs or estate must pay the entire loan balance; and

(B) The balance may be greater than the value of the consumer's dwelling.

(7) *Payments for taxes and insurance.* If an advertisement states that payments are not required for a reverse mortgage, each such statement shall be accompanied by an equally prominent and closely proximate statement of the fact that a consumer must pay taxes and insurance premiums, if applicable.

(8) *Government fee limitation.* If an advertisement states that a Federal, state, or local government limits or regulates fees or other costs for a reverse mortgage, each such statement shall be accompanied by an equally prominent and closely proximate statement of the fact that costs may vary among creditors and loan types and that less expensive options may be available.

(9) *Eligibility for government programs.* If an advertisement states that a reverse mortgage does not affect a consumer's benefits from or eligibility for a Federal, state, or local government program, each such statement shall be accompanied by an equally prominent and closely proximate statement of the fact that a reverse mortgage may affect benefits from or eligibility for some government programs such as Supplemental Security Income and Medicaid.

(10) *Credit counseling information.* If an advertisement for a reverse mortgage contains a reference to housing or credit counseling, the advertisement shall disclose a telephone number and Internet Web site for housing counseling resources maintained by the U.S. Department of Housing and Urban Development that is at least as conspicuous as any such reference in the advertisement.◄

* * * * *

21. Section 226.35 is amended by revising paragraphs (a)(1) and (a)(2) to read as follows:

§ 226.35 Prohibited acts or practices in connection with higher-priced mortgage loans.

(a) *Higher-priced mortgage loans*—(1) For purposes of this section, a higher-priced mortgage loan is a consumer credit transaction secured by the consumer's principal dwelling with ►a transaction coverage rate◄ [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 1.5 or more percentage points for loans secured by a first lien on a dwelling, or by 3.5 or more percentage points for loans secured by a subordinate lien on a dwelling.

(2) ►*Definitions.* (i) "Transaction coverage rate" means the rate used to determine whether a transaction is a higher-priced mortgage loan subject to this section. The transaction coverage rate is determined in accordance with the applicable rules of this part for the calculation of the annual percentage rate for a closed-end transaction, except that the prepaid finance charge for purposes of calculating the transaction coverage rate includes only prepaid finance charges that will be retained by the creditor, its affiliate, or a mortgage broker.

(ii)◄ "Average prime offer rate" means an annual percentage rate that is derived from average interest rates, points, and other loan pricing terms currently offered to consumers by a representative sample of creditors for mortgage transactions that have low-risk pricing characteristics. The Board publishes average prime offer rates for a broad range of types of transactions in a table updated at least weekly as well as the methodology the Board uses to derive these rates.

* * * * *

22. Section 226.38, as proposed to be added on August 26, 2009 (74 FR 43232), is further amended by revising the introductory text and paragraph (h), and by adding paragraph (k) to read as follows:

►§ 226.38 Content of disclosures for closed-end mortgages.

In connection with a closed-end transaction secured by real property or a dwelling, the creditor shall disclose the following information, ►or comply with the following requirements, as applicable◄:

* * * * *

(h) [*Credit*] ►*Required or voluntary credit*◄ *insurance,* [*and*] *debt cancellation* ►*coverage, or*◄ [*and*] *debt suspension coverage.* ►The disclosures and requirements of § 226.4(d)(1)(i) through (d)(1)(iii) and (d)(3)(i) through (d)(3)(iii), as applicable if the creditor offers optional or required credit insurance, debt cancellation coverage, or debt suspension coverage that is identified in § 226.4(b)(7) or (b)(10). For required credit insurance, debt cancellation coverage, or debt suspension coverage that is identified in § 226.4(b)(7) or (b)(10), the creditor shall provide the disclosures required in § 226.4(d)(1)(i) and (d)(3)(i), as applicable, except for § 226.4(d)(1)(i)(A) and (B).◄ [The disclosures specified in paragraphs (h)(1)–(10) of this section, which shall be grouped together and substantially similar in headings, content and format to Model Clauses H–17(A) and H–17(C) in Appendix H to this part.

(1)(i) If the product is optional, the term "OPTIONAL COSTS," in capitalized and bold letters, along with the name of the program, in bold letters; or

(ii) If the product is required, the name of the program, in bold letters.

(2) If the product is optional, the term "STOP," in capitalized and bold letters, along with a statement that the consumer does not have to buy the product to get the loan. The term "not" shall be in bold text and underlined.

(3) A statement that if the consumer already has insurance, then the policy or coverage may not provide the consumer with additional benefits.

(4) A statement that other types of insurance may give the consumer similar benefits and are often less expensive.

(5) (i) If the eligibility restrictions are limited to age and/or employment, a statement that based on the creditor's review of the consumer's age and/or employment status at this time, the consumer would be eligible to receive benefits.

(ii) If there are other eligibility restrictions in addition to age and/or employment, a statement that based on the creditor's review of the consumer's age and/or employment status at this time, the consumer may be eligible to receive benefits.

(6) If there are other eligibility restrictions in addition to age and/or employment, such as pre-existing health conditions, a statement that the consumer may not qualify to receive any benefits because of other eligibility restrictions.

(7) If the product is a debt suspension agreement, a statement that the obligation to pay loan principal and interest is only suspended, and that interest will continue to accrue during the period of suspension.

(8) A statement that the consumer may obtain additional information about the product at the Web site of the Federal Reserve Board, and reference to that Web site.

(9)(i) If the product is optional, a statement of the consumer's request to purchase or enroll in the optional product and a statement of the cost of the product expressed as a dollar amount per month or per year, as applicable, together with the loan amount and the term of the product in years; or

(ii) If the product is required, a statement that the product is required, along with a statement of the cost of the product expressed as a dollar amount per month or per year, as applicable, together with the loan amount and the term of the product in years.

(iii) The cost, month or year, loan amount, and term of the product shall be underlined.

(10) A designation for the signature of the consumer and the date of the signing.]

* * * * *

►(k) *Reverse mortgages.* Reverse mortgages under § 226.33(a) that are structured as closed-end credit are subject to the requirements in § 226.33(c) and (d), not the requirements in § 226.38(a) through (i).◄

23. A new § 226.40 is added to Subpart E to read as follows:

►§ 226.40 Prohibited acts or practices in connection with reverse mortgages.

(a) *Requiring the purchase of other financial or insurance products.* Neither a creditor nor a loan originator, as defined in § 226.36(a)(1), may require a consumer to purchase any financial or insurance product as a condition of obtaining a reverse mortgage subject to § 226.33.

(1) *Financial or insurance products.* For purposes of this § 226.40(a), the term "financial or insurance product" does not include—

(i) A transaction account or savings deposit, as defined in Regulation D, 12 CFR part 204, that is established to disburse proceeds of the reverse mortgage; and

(ii) Any product or service customarily required to protect the creditor's interest in the collateral or otherwise mitigate the creditor's risk of loss.

(2) *Safe harbor.* A creditor or loan originator is deemed to have complied with this § 226.40(a) if:

(i) The consumer receives the document required by § 226.33(b), or a substantially similar document, on or with the application; and

(ii) For a reverse mortgage subject to § 226.5b, the account is opened, or, for any other reverse mortgage, the loan is consummated, at least 10 calendar days before the consumer becomes obligated to purchase any other financial or insurance product from—

(A) The creditor;

(B) The loan originator;

(C) An affiliate of either the creditor or loan originator; or

(D) Any other party, if the creditor, loan originator, or an affiliate of either will receive compensation for the purchase.

(b) *Counseling.* (1) *Counseling required.* Neither a creditor nor any other person may originate a reverse mortgage subject to § 226.33 before the consumer has obtained counseling from a counselor or counseling agency that meets the counselor qualification standards established by the Secretary of the U.S. Department of Housing and Urban Development pursuant to 12 U.S.C. 1715z–20(f), or substantially similar qualification standards.

(2) *Nonrefundable fees prohibited.* (i) Neither a creditor nor any other person may impose a nonrefundable fee in connection with a reverse mortgage subject to § 226.33 until three business days after the consumer, as defined in paragraph (b)(7) of this section, has obtained the counseling required in paragraph (b)(1) of this section.

(ii) A bona fide and reasonable charge for counseling required under paragraph (b)(1) of this section imposed by a counselor or counseling agency meeting the counselor qualifications described in paragraph (b)(1) of this section is not a "fee" for purposes of paragraph (b)(2)(i) of this section.

(3) *Content of counseling.* The counseling required under paragraph (b)(1) of this section must include information regarding reverse mortgages and their suitability to the consumer's financial needs and circumstances.

(4) *Timing of counseling.* For each reverse mortgage subject to § 226.33, the counseling required under paragraph (b)(1) of this section must be completed no earlier than 180 days prior to the creditor's receipt of the consumer's application for the reverse mortgage.

(5) *Type of counseling.* The counseling required under paragraph (b)(1) of this section must occur face-to-face or by telephone.

(6) *Independence of counselor.* (i) *Counselor compensation.* Neither a creditor nor any other person involved in originating a reverse mortgage subject to § 226.33 may compensate a counselor or counseling agency for providing counseling required under paragraph (b)(1) of this section in relation to a particular reverse mortgage transaction.

(ii) *Steering.* Neither a creditor nor any other person involved in originating a reverse mortgage subject to § 226.33 may steer or otherwise direct a consumer to choose a particular counselor or counseling agency for the counseling required under paragraph (b)(1) of this section. A creditor or other person involved in originating a reverse mortgage is deemed to have complied with this § 226.40(b)(6)(ii) if the creditor or other person provides to the consumer a list of at least five counselors or counseling agencies meeting the requirements specified in paragraph (b)(1) of this section.

(7) *Definition of "consumer."* Except for purposes of paragraph (b)(2) of this section, the term "consumer" in paragraph (b) of this section includes all persons who, at the time of origination of a reverse mortgage subject to § 226.33, will be shown as owners on the property deed of the dwelling that will secure the applicable reverse mortgage. For purposes of this § 226.40(b)(2), the term "consumer" includes only persons who will be obligors on the applicable reverse mortgage.◀

24. A new § 226.41 is added to Subpart E to read as follows:

▶§ 226.41 Servicer's response to borrower's request for information.

Upon receipt of a written request from the consumer for the identity of or the contact information for the current owner of the debt obligation and/or the current master servicer of the debt obligation, the current servicer of the debt obligation shall provide to the consumer, within a reasonable time and to the best of its knowledge, the name, address, and telephone number of the owner of the debt obligation and the master servicer of the debt obligation. For purposes of this section, the term "servicer" has the same meaning as in § 226.36(c)(3).◀

25. Appendix G to Part 226 is amended by:

A. Removing the entry for G–5, adding entries for G–5(A), G–5(B), and G–5(C), revising the entries for G–16(A) and G–16(B), and adding entries for G–16(C) and G–16(D) in the table of contents at the beginning of the appendix;

B. Removing G–5 and removing and reserving G–6, G–7, G–8, and G–9;

C. Removing G–16(A) and G–16(B); and

D. Adding new Model Forms G–5(A) and G–16(A), and new Samples G–5(B), G–5(C), G–16(B), G–16(C), and G–16(D) in numerical order.

Appendix G to Part 226—Open-End Model Forms and Clauses

* * * * *

* * * * *

BILLING CODE P

G–5 ▶(A)◀ Rescission Model Form [(When Opening an Account)] ▶

Your Right to Cancel

You Could Lose Your Home	[Identification of the type of transaction giving rise to the right of rescission.] [A statement of the security interest and risk to home.]
Your Right to Cancel	[A statement of the right to cancel the transaction giving rise to the right of rescission.] [As applicable, a statement about the creditor's delay in making funds available to the consumer.]
If You Cancel	[Statements about the creditor not charging a cancellation fee and about refunding fees.] [As applicable, statements about the effect of the cancellation on the existing line of credit.]
How to Cancel	[Statements about how a consumer may exercise the right to cancel.]
Deadline to Cancel	[A statement of the calendar date on which the three-business-day period for rescission expires.] [A statement that the right to cancel the transaction may extend beyond the stated date and a statement of how a consumer may exercise the right to cancel in that case.]

[At the creditor's option, a statement that joint homeowners may have the right to rescind and that a rescission by one owner is effective for all owners.]

[At the creditor's option, a format for the consumer to use to acknowledge receipt of the notice, as follows:

Initial here _________ to acknowledge the receipt of this notice on ____________.]

[initials] ***[date]***

[A form for exercise of the consumer's right to cancel, as follows:]

cut here → -

I AM CANCELLING THIS [*identify type of transaction giving rise to the right of rescission***].**

____

Name

____

Property Address

[12345678______________________________]

[Account Number]

G–5(B) Rescission Sample (When Opening an Account)

Your Right to Cancel

You Could Lose Your Home	**You are opening a home-equity line of credit. You are giving us the right to take your home if you do not repay the money you owe under this line of credit.**
Your Right to Cancel	**You have the right under federal law to cancel this line of credit on or before the date stated below.** Under federal law, we cannot make any funds available to you until after this date.
If You Cancel	If you cancel, we will: • Not charge you a cancellation fee; and • Refund to you any fees you paid to get this line of credit.
How to Cancel	To cancel, you may submit the bottom portion of this notice to XXX Bank at 1234 Main Street, Anytown, ST, 12345 or 1-XXX-XXX-XXXX (fax).
Deadline to Cancel	**If you want to cancel this line of credit, you must submit the bottom portion of this notice on or before May 14, 2010.*** *In certain circumstances, your right to cancel this line of credit may extend beyond this date. In that case, you must submit the bottom portion of this notice to either the current owner of your line of credit or the person to whom you send payments.

If two or more people are opening this line of credit, cancellation by one person is effective for all of them.

Initial here _________ to acknowledge receipt of this notice on ____________.
(initials) ***(date)***

cut here → -

I AM CANCELLING THIS LINE OF CREDIT.

John Consumer
Name

1234 Central Drive, Anytown, ST 12345
Property Address

12345678
Account Number

G–5(C) Rescission Sample (When Increasing the Credit Limit)

Your Right to Cancel

You Could Lose Your Home	**We are increasing the credit limit on your line of credit. You are giving us the right to take your home if you do not repay the money you owe.**
Your Right to Cancel	**You have the right under federal law to cancel this credit limit increase on or before the date stated below.** Under federal law, we cannot make these funds available to you until after this date.
If You Cancel	If you cancel, we will: • Not charge you a cancellation fee; and • Refund to you any fees you paid to get this credit limit increase. If you cancel this credit limit increase, all of the terms of your current line of credit with us will still apply. You will still owe us your current balance, and we will have the right to take your home if you do not repay that money.
How to Cancel	To cancel, you may submit the bottom portion of this notice to XXX Bank at 1234 Main Street, Anytown, ST, 12345 or 1-XXX-XXX-XXXX (fax).
Deadline to Cancel	**If you want to cancel this credit limit increase, you must submit the bottom portion of this notice on or before May 14, 2010.*** *In certain circumstances, your right to cancel this credit limit increase may extend beyond this date. In that case, you must submit the bottom portion of this notice to either the current owner of your line of credit or the person to whom you send payments.

If two or more people have the right to cancel this credit limit increase, cancellation by one person is effective for all of them.

Initial here _________ to acknowledge receipt of this notice on ____________.
(initials) (date)

cut here → -

I AM CANCELLING THIS CREDIT LIMIT INCREASE.

John Consumer
Name

1234 Central Drive, Anytown, ST 12345
Property Address

12345678
Account Number

G–6—[Rescission Model Form (For Each Transaction)]►Reserved.◄

G–7—[Rescission Model Form (When Increasing the Credit Limit)] ►Reserved.◄

G–8—[Rescission Model Form (When Adding a Security Interest)] ►Reserved.◄

G–9—[Rescission Model Form (When Increasing the Security)] ►Reserved.◄

* * * * *

[G–16(A) Debt Suspension Model Clause

Please enroll me in the optional [insert name of program], and bill my account the fee of [how cost is determined]. I understand that enrollment is not required to obtain credit. I also understand that depending on the event, the protection may only temporarily suspend my duty to make minimum payments, not reduce the balance I owe. I understand that my balance will actually grow during the suspension period as interest continues to accumulate.

[To Enroll, Sign Here]/[To Enroll, Initial Here]. X____________

G–16(B) Debt Suspension Sample

Please enroll me in the optional [name of program], and bill my account the fee of $.83 per $100 of my month-end account balance. I understand that enrollment is not required to obtain credit. I also understand that depending on the event, the protection may only temporarily suspend my duty to make minimum payments, not reduce the balance I owe. I understand that my balance will actually grow during the suspension period as interest continues to accumulate.

To Enroll, Initial Here. X____________]

►G–16(A) Credit Insurance, Debt Cancellation Coverage, or Debt Suspension Coverage Model Form

OPTIONAL COSTS

Option to Purchase (*Name of Product*)

STOP. You do **not** have to buy (*name of product*) to [get][keep] this line of credit. Go to (*Web site of the Federal Reserve Board*) to learn more about this product.

Do I need this product?	[These payments will only temporarily suspend your payments due and will not reduce the balance you owe. Your balance will actually increase during the suspension period as interest continues to accumulate.] If you already have enough insurance or savings to [pay off this line of credit][make payments on this line of credit] if you (*covered event*), you may not need this product. Other types of insurance can give you similar benefits and are often less expensive.
How much does it cost?	This product will cost up to **(*maximum premium or charge*) per (*period*)** if you borrow the entire credit limit. [The cost depends on your [balance][interest rate].
What is the maximum benefit amount?	This product [will pay off your outstanding line of credit][only covers the first (*maximum benefit amount*) of the outstanding line of credit][will make your minimum payments of up to (*amount*) for (*time period*)]. [You will be responsible for any balance due above (*maximum benefit amount*).]
Can I receive benefits?	**[You may not receive any benefits even if you buy this product.]** You meet the [age][employment] eligibility requirements [but there are other requirements that you must meet. If you do not meet these requirements, you will not receive any benefits even if you buy this product and pay the (*period*) [premium][charge]].
How long does the coverage last?	This product provides coverage for the first (*period*) of your line of credit [or until you reach age (*age*), whichever comes first].

☐ Yes, I want to purchase optional (*name of product*) at a cost of up to (*maximum premium or charge*) per (*period*).

____

[Signature][Initials]

G–16(B) Credit Life Insurance Sample

OPTIONAL COSTS

Option to Purchase Credit Life Insurance

STOP. You do **not** have to buy Credit Life Insurance to get this line of credit. Go to www.frb.gov/creditprotectionproducts to learn more about this product.

Do I need this product?	If you already have enough insurance or savings to pay off this line of credit if you die, you may not need this product. Other types of insurance can give you similar benefits and are often less expensive.
How much does it cost?	This product will cost up to **$63 per month** if you borrow the entire credit limit. The cost depends on your balance and interest rate.
What is the maximum benefit amount?	This product only covers the first $50,000 of the outstanding line of credit. You will be responsible for any balance due above $50,000.
Can I receive benefits?	**You may not receive any benefits even if you buy this product.** You meet the age eligibility requirements, but there are other requirements that you must meet. If you do not meet these requirements, you will not receive any benefits even if you buy this product and pay the monthly premium.
How long does the coverage last?	This product provides coverage for the first 10 years of your line of credit or until you reach age 70, whichever comes first.

☐ Yes, I want to purchase optional Credit Life Insurance at a cost of up to $63 per month.

____

Signature

G–16(C) Disability Debt Cancellation Coverage Sample

OPTIONAL COSTS

Option to Purchase Disability Debt Cancellation Coverage

STOP. You do **not** have to buy Disability Debt Cancellation Coverage to get this line of credit. Go to www.frb.gov/creditprotectionproducts to learn more about this product.

Do I need this product?	If you already have enough insurance or savings to make payments on this line of credit if you are temporarily disabled, you may not need this product. Other types of insurance can give you similar benefits and are often less expensive.
How much does it cost?	This product will cost up to **$42 per month** if you borrow the entire credit limit. The cost depends on your balance and interest rate.
What is the maximum benefit amount?	This product will make your minimum payments of up to $2,000 for 6 months.
Can I receive benefits?	**You may not receive any benefits even if you buy this product.** You meet the employment eligibility requirements, but there are other requirements that you must meet. If you do not meet these requirements, you will not receive any benefits even if you buy this product and pay the monthly charge.
How long does the coverage last?	This product provides coverage for the first 10 years of your line of credit.

☐ Yes, I want to purchase optional Disability Debt Cancellation Coverage at a cost of up to $42 per month.

____

Signature

G–16(D) Unemployment Debt Suspension Coverage Sample (§ 226.4(d)(1) and (d)(3))

OPTIONAL COSTS

Option to Purchase Unemployment Debt Suspension Coverage

STOP. You do **not** have to buy Unemployment Debt Suspension Coverage to get this line of credit. Go to www.frb.gov/creditprotectionproducts to learn more about this product.

Do I need this product?	These payments will only temporarily suspend your payments due and will not reduce the balance you owe. Your balance will actually increase during the suspension period as interest continues to accumulate. If you already have enough insurance or savings to make payments on this line of credit if you are temporarily unemployed, you may not need this product. Other types of insurance can give you similar benefits and are often less expensive.
How much does it cost?	This product will cost up to **$42 per month** if you borrow the entire credit limit. The cost depends on your balance and interest rate.
What is the maximum benefit amount?	This product will make your minimum payments of up to $2,000 for 6 months.
Can I receive benefits?	**You may not receive any benefits even if you buy this product.** You meet the age and employment eligibility requirements, but there are other requirements that you must meet. If you do not meet these requirements, you will not receive any benefits even if you buy this product and pay the monthly charge.
How long does the coverage last?	This product provides coverage for the first 10 years of your line of credit or until you reach age 70, whichever comes first.

☐ Yes, I want to purchase optional Unemployment Debt Suspension Coverage at a cost of up to $42 per month.

____

Signature

* * * * *

26. Appendix H to Part 226 is amended by:

A. Removing the entry for H–(8) and adding entries for H–8(A), and H–8(B), revising the entry for H–9, H–17(A), and H–17(B), and adding entries for H–17(C) and H–17(D) in the table of contents at the beginning of the appendix;

B. Removing H–8, H–17(A), and H–17(B); and

C. Adding new Model Forms H–8(A), H–9, and H–17(A), and new Samples H–8(B), H–17(B), H–17(C), and H–17(D) in numerical order.

Appendix H to Part 226—Closed-End Model Forms and Clauses

* * * * *

* * * * *

H–8 ►(A)◄ Rescission Model Form (General)►

Your Right to Cancel This Loan

You Could Lose Your Home	**You are giving us the right to take your home if you do not repay the money you owe under this loan.**
Your Right to Cancel	**You have the right under federal law to cancel this loan on or before the date stated below.** Under federal law, we cannot make any funds available to you until after this date.
If You Cancel	If you cancel, we will: • Not charge you a cancellation fee; and • Refund to you any fees you paid to get this loan.
How to Cancel	To cancel, you may submit the bottom portion of this notice to __________________ at __________________________________ [or __________________________________ or __________________________________].
Deadline to Cancel	**If you want to cancel this loan, you must submit the bottom portion of this notice on or before _________ _____, _____.*** *In certain circumstances, your right to cancel this loan may extend beyond this date. In that case, you must submit the bottom portion of this notice to either the current owner of your loan or the person to whom you send payments.

[If two or more people have the right to cancel this loan, cancellation by one person is effective for all of them.]

[***Initial here*** ________ ***to acknowledge receipt of this notice on*** ___________.]
[(initials) (date)]

cut here → -

I AM CANCELLING THIS LOAN.

____
Name

____
Property Address

[12345678 ________________________]
[Loan Number]

H–8(B) Rescission Sample (General)

Your Right to Cancel This Loan

You Could Lose Your Home	**You are giving us the right to take your home if you do not repay the money you owe under this loan.**
Your Right to Cancel	**You have the right under federal law to cancel this loan on or before the date stated below.** Under federal law, we cannot make any funds available to you until after this date.
If You Cancel	If you cancel, we will: • Not charge you a cancellation fee; and • Refund to you any fees you paid to get this loan.
How to Cancel	To cancel, you may submit the bottom portion of this notice to Community Bank at 1234 Main Street, Greenville, NY, 12345 or 1-800-555-1212 (fax).
Deadline to Cancel	**If you want to cancel this loan, you must submit the bottom portion of this notice on or before May 14, 2010.*** *In certain circumstances, your right to cancel this loan may extend beyond this date. In that case, you must submit the bottom portion of this notice to either the current owner of your loan or the person to whom you send payments.

If two or more people have the right to cancel this loan, cancellation by one person is effective for all of them.

Initial here ________ to acknowledge receipt of this notice on ___________.
(initials) (date)

cut here → -

I AM CANCELLING THIS LOAN.

John Consumer
Name

1234 Central Drive, Greenville, NY, 12345
Property Address

12345678
Loan Number

H–9 Rescission Model Form [(Refinancing With Original Creditor)]►(New Advance of Money with the Same Creditor)

Your Right to Cancel This Loan

You Could Lose Your Home	**You are giving us the right to take your home if you do not repay the money you owe under this new loan.**
Your Right to Cancel	**You have the right under federal law to cancel this new loan on or before the date stated below.** Under federal law, we cannot make any funds available to you until after this date.
If You Cancel	If you cancel, we will: • Not charge you a cancellation fee; and • Refund to you any fees you paid to get this loan. If you cancel this new loan, all of the terms of your previous loan with us will still apply. You will still owe us your previous balance, and we will have the right to take your home if you do not repay that money.
How to Cancel	To cancel, you may submit the bottom portion of this notice to ____________________ at ______________________________________ [or ______________________________________ or ______________________________________].
Deadline to Cancel	**If you want to cancel this loan, you must submit the bottom portion of this notice on or before __________ _____, _____.*** *In certain circumstances, your right to cancel this loan may extend beyond this date. In that case, you must submit the bottom portion of this notice to either the current owner of your loan or the person to whom you send payments.

[If two or more people have the right to cancel this loan, cancellation by one person is effective for all of them.]

[***Initial here*** _________ ***to acknowledge the receipt of this notice on*** ____________.]
[(initials) (date)]

cut here → -

I AM CANCELLING THIS LOAN.

____
Name

____
Property Address

[12345678______________________________]
[Loan Number]

* * * * *

[H–17(A) Debt Suspension Model Clause

Please enroll me in the optional [insert name of program], and bill my account the fee of [insert charge for the initial term of coverage]. I understand that enrollment is not required to obtain credit. I also understand that depending on the event, the protection may only temporarily suspend my duty to make minimum payments, not reduce the balance I owe. I understand that my balance will actually grow during the suspension period as interest continues to accumulate.

[To Enroll, Sign Here]/[To Enroll, Initial Here]. X______

H–17(B) Debt Suspension Sample

Please enroll me in the optional [name of program], and bill my account the fee of $200. I understand that enrollment is not required to obtain credit. I also understand that depending on the event, the protection may only temporarily suspend my duty to make minimum payments, not reduce the balance I owe. I understand that my balance will actually grow during the suspension period as interest continues to accumulate.

To Enroll, Initial Here. X______]

►H–17(A) Credit Insurance, Debt Cancellation Coverage, or Debt Suspension Coverage Model Form

OPTIONAL COSTS

Option to Purchase (*Name of Product*)

STOP. You do **not** have to buy (*name of product*) to get this loan. Go to (*Web site of the Federal Reserve Board*) to learn more about this product.

Do I need this product?	[These payments will only temporarily suspend your payments due and will not reduce the balance you owe. Your balance will actually increase during the suspension period as interest continues to accumulate.] If you already have enough insurance or savings to [pay off this loan][make payments on this loan] if you (*covered event*), you may not need this product. Other types of insurance can give you similar benefits and are often less expensive.
How much does it cost?	This product will cost up to ***(maximum premium or charge)* per *(period)***. [The cost depends on your [loan balance][interest rate].]
What is the maximum benefit amount?	This product [will pay off your outstanding loan balance, which is now (*outstanding loan balance*)][only covers the first (*maximum benefit amount*) of the outstanding balance on your loan] [will make your loan payments of up to (*amount*) for (*period*)]. [You will be responsible for any balance due above (*maximum benefit amount*).]
Can I receive benefits?	**[You may not receive any benefits even if you buy this product.]** You meet the [age][employment] eligibility requirements [but there are other requirements that you must meet. If you do not meet these requirements, you will not receive any benefits even if you buy this product and pay the (*period*) [premium][charge]].
How long does the coverage last?	This product provides coverage for the first (*period*) of your loan [or until you reach age (*age*), whichever comes first].

☐ Yes, I want to purchase optional (*name of product*) at a cost of up to (*maximum premium or charge*) per (*period*).

____

Signature

H–17(B) Credit Life Insurance Sample

OPTIONAL COSTS

Option to Purchase Credit Life Insurance

STOP. You do **not** have to buy Credit Life Insurance to get this loan. Go to www.frb.gov/creditprotectionproducts to learn more about this product.

Do I need this product?	If you already have enough insurance or savings to pay off this loan if you die, you may not need this product. Other types of insurance can give you similar benefits and are often less expensive.
How much does it cost?	This product will cost up to **$118 per month**. The cost depends on your loan balance.
What is the maximum benefit amount?	This product only covers the first $150,000 of the outstanding balance on your loan. You will be responsible for any balance due above $150,000.
Can I receive benefits?	**You may not receive any benefits even if you buy this product.** You meet the age eligibility requirements, but there are other requirements that you must meet. If you do not meet these requirements, you will not receive any benefits even if you buy this product and pay the monthly premium.
How long does the coverage last?	This product provides coverage for the first 10 years of your loan or until you reach age 70, whichever comes first.

☐ Yes, I want to purchase optional Credit Life Insurance at a cost of up to $118 per month.

____

Signature

H–17(C) Disability Debt Cancellation Coverage Sample

OPTIONAL COSTS

Option to Purchase Disability Debt Cancellation Coverage

STOP. You do **not** have to buy Disability Debt Cancellation Coverage to get this loan. Go to www.frb.gov/creditprotectionproducts to learn more about this product.

Do I need this product?	If you already have enough insurance or savings to make payments on this loan if you are temporarily disabled, you may not need this product. Other types of insurance can give you similar benefits and are often less expensive.
How much does it cost?	This product will cost up to **$81 per month**. The cost depends on your loan balance and interest rate.
What is the maximum benefit amount?	This product will make your loan payments of up to $5,000 for 6 months.
Can I receive benefits?	**You may not receive any benefits even if you buy this product.** You meet the employment eligibility requirements, but there are other requirements that you must meet. If you do not meet these requirements, you will not receive any benefits even if you buy this product and pay the monthly charge.
How long does the coverage last?	This product provides coverage for the first 10 years of your loan.

☐ Yes, I want to purchase optional Disability Debt Cancellation Coverage at a cost of up to $81 per month.

____

Signature

H–17(D) Unemployment Debt Suspension Coverage Sample

OPTIONAL COSTS

Option to Purchase Unemployment Debt Suspension Coverage

STOP. You do **not** have to buy Unemployment Debt Suspension Coverage to get this loan. Go to www.frb.gov/creditprotectionproducts to learn more about this product.

Do I need this product?	These payments will only temporarily suspend your payments due and will not reduce the balance you owe. Your balance will actually increase during the suspension period as interest continues to accumulate. If you already have enough insurance or savings to make payments on this loan if you are temporarily unemployed, you may not need this product. Other types of insurance can give you similar benefits and are often less expensive.
How much does it cost?	This product will cost up to **$81 per month**. The cost depends on your loan balance and interest rate.
What is the maximum benefit amount?	This product will make your loan payments of up to $5,000 for 6 months.
Can I receive benefits?	**You may not receive any benefits even if you buy this product.** You meet the age and employment eligibility requirements, but there are other requirements that you must meet. If you do not meet these requirements, you will not receive any benefits even if you buy this product and pay the monthly charge.
How long does the coverage last?	This product provides coverage for the first 10 years of your loan or until you reach age 70, whichever comes first.

☐ Yes, I want to purchase optional Unemployment Debt Suspension Coverage at a cost of up to $81 per month.

____

Signature

* * * * *

27. Appendix K is revised to read as follows:

Appendix K to Part 226—[Total Annual Loan Cost Rate Computations for] Reverse Mortgage [Transactions] Model Forms and Clauses

►K–1 Open-End Reverse Mortgage Early Disclosure Model Form (§ 226.33(d)(1))
K–2 Open-End Reverse Mortgage Account-Opening Disclosure Model Form (§ 226.33(d)(2))
K–3 Closed-End Reverse Mortgage Model Form (§ 226.33(d)(3))
K–4 Open-End Reverse Mortgage Early Disclosure Sample (§ 226.33(d)(1))
K–5 Open-End Reverse Mortgage Account-Opening Disclosure Sample (§ 226.33(d)(2))
K–6 Closed-End Reverse Mortgage Sample (§ 226.33(d)(3))
K–7 Shared Appreciation Model Clause (§ 226.33(c)(8)(iv))

►K–1 Open-End Reverse Mortgage Early Disclosure Model Form

REVERSE MORTGAGE LOAN SUMMARY

[Name of Creditor] [Date]
[Loan Originator's Unique Identifier]

Borrower & Property Information	
Borrowers' Names & Ages	[Loan Applicants' Name and Ages]
Property Address	[Loan Applicants' Address]
Appraised Value	[Disclosure of value of property]

About this Loan

- [Statement that the consumer has applied for a reverse mortgage that does not have to be repaid for as long as the consumer lives in the home]
- [Statement about the types of payments the consumer may receive]
- [Statement about consumers' obligations] [Cross reference to risks section]
- [Statement that the borrower will continue to receive monthly payments and have access to loan funds as long as the borrower remains in the home even if the loan balance eventually exceeds the value of the home]
- [Statement that the loan must be repaid]

Payment of Loan Funds

[You have chosen to receive your funds as follows:] [You (may/will) receive your funds as follows:]

Initial Advance	[Disclosure of initial advance]
Monthly Advance	[Disclosure of monthly advance]
Line of Credit	[Disclosure of line of credit]

[Statement that consumers may change the type of payments they receive]

Annual Percentage Rate	
Annual Percentage Rate (APR)	[APR(s) applicable to the reverse mortgage, including introductory APR information] [For variable APRs, the following (1) description that the APR varies, (2) how the APR is determined, (3) the frequency of changes in the APR, (4) description of any limitations on changes in the APR (except for minimum and maximum APRs) or a statement that no annual limitation exists, as applicable, and (5) description of any rules relating to changes in the index value and the APR, including preferred rate provisions and rate carryover provisions, if any]
Maximum APR	[Disclosure of maximum APR]
Historical Changes to (identification of index) Rate	[Description of the lowest and highest value of the index and margin in the past 15 years]

Interest charges will be added to your loan balance each month and collected when the loan is due.

Fees	
[Description of consumer's rights to refund of fees]	
Account Opening Fees	
[Account opening fees]	[Description of itemized one-time account opening fees]
TOTAL Account Opening Fees	[Description of total one-time account opening fees]
Monthly Fees *(added to your loan balance each month but not collected until the loan is due)*	
[Monthly Fees]	[Description of fees imposed by the creditor for availability of the reverse mortgage]
Interest Charges	[**Starts at**] [APR] annually [but this rate can change]
Other Fees	
Early Termination Fee	[Description of fees imposed by the creditor for early termination of the reverse mortgage]
[Statements about other fees]	

Borrowing Guidelines	
Minimum Transaction	[Description of any minimum draw requirements]
Limits on Number of Credit Transactions	[Description of any limitations on the number of extensions of credit]
Limits on Amount of Credit Borrowed	[Description of any limitations on the amount of credit that may be obtained during any time period]

How the Loan Balance Grows

[Description of how loan balance may grow, related to table below]

	After 1 Year	After 5 Years	After 10 Years
How much money will you have received?	$__	$__	$__
How much will be owed for interest + fees?	$__	$__	$__
How much will be owed altogether?	$__	$__	$__

Repayment Options
[Description of repayment options]

Risks	
[Statement about security interest in the consumer's dwelling] [Description of ways the borrower may default on the loan]	
• Foreclose On Your Home	[Statements about possible action by creditor]
• Stop Giving You Money	[Statements about possible actions by creditor]
• Terminate Your Loan	[Statements about possible actions by creditor]
[Statements that other changes can be made to the loan]	

➔ [Statement that the consumer has no obligation to accept the terms disclosed in the table] [Identification of any disclosed term that is subject to change prior to opening the plan, or a statement that all terms disclosed could change before the plan is opened, as applicable]

➔ [Statement that the consumer may be entitled to refund of all fees paid if the consumer decides not to open the plan] [Cross reference to the "Fees" section in the table]

➔ [Statement about asking questions]

➔ [Statement about Board's website]

[if the creditor has a provision for the consumer's signature, a statement that a signature by the consumer only confirms receipt of the disclosure statement]

[

Borrower's Signature **Date]**

K–2 Open-End Reverse Mortgage Account-Opening Disclosure Model Form

REVERSE MORTGAGE LOAN SUMMARY

[Name of Creditor] [Date]
[Loan Originator's Unique Identifier] [Loan number]

Borrower & Property Information	
Borrowers' Names & Ages	[Loan Applicants' Name and Ages]
Property Address	[Loan Applicants' Address]
Appraised Value	[Disclosure of value of property]

About this Loan

- [Statement that the consumer has applied for a reverse mortgage that does not have to be repaid for as long as the consumer lives in the home]
- [Statement about the types of payments the consumer may receive]
- [Statement about consumers' obligations] [Cross reference to risks section]
- [Statement that the borrower will continue to receive monthly payments and have access to loan funds as long as the borrower remains in the home even if the loan balance eventually exceeds the value of the home]
- [Statement that the loan must be repaid]

Payment of Loan Funds

[You have chosen to receive your funds as follows:] [You (may/will) receive your funds as follows:]

Initial Advance	[Disclosure of initial advance]
Monthly Advance	[Disclosure of monthly advance]
Line of Credit	[Disclosure of line of credit]

[Statement that consumers may change the type of payments they receive]

Annual Percentage Rate	
Annual Percentage Rate (APR)	[APR(s) applicable to the reverse mortgage, including introductory APR information] [For variable APRs, the following: (1) description that the APR varies, (2) how the APR is determined, (3) the frequency of changes in the APR, (4) description of any limitations on changes in the APR (except for minimum and maximum APRs) or a statement that no annual limitation exists, as applicable, and (5) description of any rules relating to changes in the index value and the APR, including preferred rate provisions and rate carryover provisions, if any]
Maximum APR	[Disclosure of maximum APR]
Historical Changes to [identification of index] Rate	[Description of the lowest and highest value of the index and margin in the past 15 years]

Interest charges will be added to your loan balance each month and collected when the loan is due.

Fees	
Account Opening Fees	
[Account opening fees]	[Description of itemized one-time account opening fees]
TOTAL Account Opening Fees	[Description of total one-time account opening fees]
Monthly Fees *(added to your loan balance each month but not collected until the loan is due)*	
[Monthly Fees]	[Description of fees imposed by the creditor for availability of the reverse mortgage]
Interest Charges	[**Starts at**] [APR] annually [but this rate can change]
Transaction Fees	
Exceeding Limits on Amount of Credit Borrowed	[Description of any fees imposed for a consumer's failure to comply with any limitations on the amount of credit that may be obtained during any time period]
Transaction less than $____	[Description of any fees imposed for a consumer's failure to comply with minimum draw requirements]
Exceeding Limits on Number of Credit Transactions	[Description of any fees imposed for a consumer's failure to comply with any limitations on the number of extensions of credit]
[Itemization of any transaction charges imposed by the creditor for use of the reverse mortgage]	
Other Fees	
Early Termination Fee	[Description of fees imposed by the creditor for early termination of the reverse mortgage]
[Statements about other fees]	

Borrowing Guidelines	
Minimum Transaction	[Description of any minimum draw requirements]
Limits on Number of Credit Transactions	[Description of any limitations on the number of extensions of credit]
Limits on Amount of Credit Borrowed	[Description of any limitations on the amount of credit that may be obtained during any time period]

How the Loan Balance Grows

[Description of how loan balance may grow, related to table below]

	After 1 Year	After 5 Years	After 10 Years
How much money will you have received?	$__	$__	$__
How much will be owed for interest + fees?	$__	$__	$__
How much will be owed altogether?	$__	$__	$__

Repayment Options

[Description of repayment options]

Risks

[Statement about security interest in the consumer's dwelling]

[Description of ways the borrower may default on the loan]

• Foreclose On Your Home	[Statements about possible action by creditor]
• Stop Giving You Money	[Statements about possible actions by creditor]
• Terminate Your Loan	[Statements about possible actions by creditor]

[Statements that other changes can be made to the loan]

Billing Rights: [Reference to account agreement for details on billing-error rights]

➔ [Statement that the consumer has no obligation to accept the terms disclosed in the table] [Statement that the consumer should use this form to confirm that these are the terms for which the consumer applied]

➔ [Statement about asking questions]

➔ [Statement about Board's website]

[if the creditor has a provision for the consumer's signature, a statement that a signature by the consumer only confirms receipt of the disclosure statement]

[

Borrower's Signature **Date]**

K–3 Closed-End Reverse Mortgage Model Form

REVERSE MORTGAGE LOAN SUMMARY

[Name of Creditor] [Date]

[Loan Originator's Unique Identifier]

Borrower & Property Information	
Borrowers' Names & Ages	[Loan Applicants' Name and Ages]
Property Address	[Loan Applicants' Address]
Appraised Value	[Disclosure of value of property]

About this Loan

- [Statement that the consumer has applied for a reverse mortgage that does not have to be repaid for as long as the consumer lives in the home]
- [Statement about the types of payments the consumer may receive]
- [Statement about consumers' obligations] [Cross reference to risks section]
- [Statement that the borrower will continue to receive monthly payments and have access to loan funds as long as the borrower remains in the home even if the loan balance eventually exceeds the value of the home]
- [Statement that the loan must be repaid]

Payment of Loan Funds

[You have chosen to receive your funds as follows:] [You (may/will) receive your funds as follows:]

Initial Advance	[Disclosure of initial advance]
Monthly Advance	[Disclosure of monthly advance]
Line of Credit	[Disclosure of line of credit]

[Statement that consumers may change the type of payments they receive]

Annual Percentage Rate	
Overall cost of this loan including interest and settlement charges	___% APR
Rate Type	This is a[n] [adjustable] [fixed] [step] rate.
Rate Calculation	[When the (length of time) introductory period ends,] your rate will be determined (frequency) based on the (identification of index) (the market rate) plus ___%.]
Rate Change Limits	[When the (length of time) introductory period ends,] your interest rate can increase up to ___% from (period) to the next, and no more than ___% total for the life of the loan, which would result in a maximum ever rate of ___%.]
Historical Changes to (identification of index) Rate	[Description of the lowest and highest value of the index and margin in the past 15 years]

Interest charges will be added to your loan balance each month and collected when the loan is due.

Fees	
Account Opening Fees	
[Account opening fees]	[Description of itemized one-time account opening fees]
TOTAL Account Opening Fees	[Description of total one-time account opening fees]
Monthly Fees *(added to your loan balance each month but not collected until the loan is due)*	
[Monthly Fees]	[Description of fees imposed by the creditor for availability of the]
Interest Charges	[**Starts at**] [interest rate] annually [but this rate can change]
Other Fees	
Prepayment Penalty	[Description of fees imposed by the creditor for early termination or prepayment in full of the reverse mortgage]
[Statements about other fees]	

Borrowing Guidelines	
Minimum Transaction	[Description of any minimum transaction requirements]
Limits on Number of Credit Transactions	[Description of any limitations on the number of extensions of credit]
Limits on Amount of Credit Borrowed	[Description of any limitations on the amount of credit that may be obtained during any time period]

How the Loan Balance Grows

[Description of how loan balance may grow, related to table below]

	After 1 Year	After 5 Years	After 10 Years
How much money will you have received?	$__	$__	$__
How much will be owed for interest + fees?	$__	$__	$__
How much will be owed altogether?	$__	$__	$__

Repayment Options
[Description of repayment options]

Risks	
[Statement about security interest in the consumer's dwelling] [Description of ways the borrower may default on the loan]	
• Foreclose On Your Home	[Statements about possible action by creditor]
• Stop Giving You Money	[Statements about possible actions by creditor]
• Terminate Your Loan	[Statements about possible actions by creditor]
[Statements that other changes can be made to the loan]	

➔ [Statement that the consumer has no obligation to accept the terms disclosed in the table]

➔ [Statement about asking questions]

➔ [Statement about Board's website]

[if the creditor has a provision for the consumer's signature, a statement that a signature by the consumer only confirms receipt of the disclosure statement]

[____

Borrower's Signature **Date]**

K–4 Open-End Reverse Mortgage Early Disclosure Sample

REVERSE MORTGAGE LOAN SUMMARY

LENDER: ABC Bank DATE: April 30, 2010

LOAN OFFICER: 12345 1234

Borrower & Property Information	
Borrowers' Names & Ages	John Doe (84); Jane Doe (82)
Property Address	123 Ward Street, Jingle Bells, TX 12345
Appraised Value	$275,000

About this Loan

- You are applying for a reverse mortgage loan on your home that you do not have to repay for as long as you live there.
- You may get money from this loan paid to you all at once, as a regular monthly advance, or at times and in amounts that you choose.
- You will continue to own your home so you must pay your property taxes and insurance, and keep the home in good repair (see the Risks section).
- If the loan balance eventually is greater than the value of the home, you will continue to receive monthly payments and have access to your loan funds as long as you remain in the home.
- The amount of the loan, plus interest and fees, must be paid back in full if the home is sold **or** when the last surviving borrower dies or does not live in the house for 12 consecutive months.

Payment of Loan Funds

You may receive your funds as follows:

Line of Credit	**$186,974** available to you at any time while you remain in your home
You may choose to change the type of payments you receive. Your other choices are:	
Initial Advance	paid to you after you accept the loan
Monthly Advance	paid to you each month while you remain in your home

Annual Percentage Rate	
Annual Percentage Rate (APR)	**2.93%.** This is a variable rate that will change annually based on the Treasury rate plus 2.5%. Each year, your rate can increase by up to 2.0%.
Maximum APR	**7.93%**
Historical Changes to Treasury Rate	Over the past 15 years, the Treasury rate plus 2.5% has varied between 2.77% and 8.90%.
Interest charges will be added to your loan balance each month and collected when the loan is due.	

Fees	
We will refund all fees you paid if you tell us that you do not want to open an account: • for any reason within three business days after you receive this statement; or • for any reason within three business days after you receive reverse mortgage counseling; or • any time before your account is opened if any of these terms (other than the APR) change.	
Account Opening Fees	
Loan Origination	$ 4,735
Inspection	$ 500
Title Search & Title Insurance	$ 595
Appraisal	$ 295
Reverse Mortgage Insurance Premium	$ 5,500
TOTAL Account Opening Fees	**$11,625**
Monthly Fees *(added to your loan balance each month but not collected until the loan is due)*	
Servicing Fee	**$35 per month** ($420 annually)
Reverse Mortgage Insurance Premium	**0.042%** monthly (0.5% annually)
Monthly Interest Charges	**Starts at 2.93%** annually but this rate can change.
Other Fees	
Other fees may apply. Ask us for additional information about these fees.	

How the Loan Balance Grows

The table shows an example of how your loan balance might grow if:

- You borrow $186,974 after you accept the loan and do not borrow any more money, *and*
- The APR stays at 2.93%.

	After 1 Year	After 5 Years	After 10 Years
How much money will you have received?	$186,974	$186,974	$186,974
How much will be owed for interest + fees?	$18,972	$51,015	$97,764
How much will be owed altogether?	**$205,946**	**$237,989**	**$255,750**

Repayment Options

At the end of the loan, you or your heirs may either:

- Pay the loan balance in full and keep the home, or
- Sell the home and use the proceeds to pay off the loan. If your home sells for less than you owe, you will not be required to pay the difference. If your home sells for more than you owe, the difference will be given to you or your heirs.

Risks

Your reverse mortgage loan will be secured by your home. If you default on your reverse mortgage loan by:

- Allowing the property to deteriorate beyond reasonable wear and tear; or
- Failing to pay property taxes or insurance; or
- Failing to live in the house for 12 consecutive months; or
- Failing to meet any other obligation

…then we may take any or all of the following actions:

• Foreclose On Your Home	We could foreclose on your property and require that you leave the home.
• Stop Giving You Money	We may stop making payments to you and not allow you to borrow any more money from your line of credit, even if you have borrowed less than your credit limit.
• Terminate Your Loan	We may terminate your loan, make you pay the outstanding loan balance in one payment, and charge you fees on termination.

We may also make other changes to your loan.

➔ **You have no obligation to accept these terms. These terms could change before we open your account.**

➔ **You may be entitled to a refund of all fees paid if you decide not to open an account.** See "Fees" section above for more details.

➔ **Ask questions if you do not understand any part of this form.**

➔ **For more information, go to** *www.frb.gov/reverse_mortgages/*.

By signing below, I acknowledge receipt of this form.

____

Borrower's Signature **Date**

K–5 Open-End Reverse Mortgage Account-Opening Disclosure Sample

REVERSE MORTGAGE LOAN SUMMARY

LENDER: ABC Bank DATE: April 30, 2010
LOAN OFFICER: 12345 1234 LOAN NUMBER: 123-12-1234-567

Borrower & Property Information	
Borrowers' Names & Ages	John Doe (84); Jane Doe (82)
Property Address	123 Ward Street, Jingle Bells, TX 12345
Appraised Value	$275,000

About this Loan

- You are applying for a reverse mortgage loan on your home that you do not have to repay for as long as you live there.
- You may get money from this loan paid to you all at once, as a regular monthly advance, or at times and in amounts that you choose.
- You will continue to own your home so you must pay your property taxes and insurance, and keep the home in good repair (see the Risks section).
- If the loan balance eventually becomes greater than the value of the home, you will continue to receive monthly payments and have access to your loan funds as long as you remain in the home.
- The amount of the loan, plus interest and fees, must be paid back in full if the home is sold **or** when the last surviving borrower dies or does not live in the house for 12 consecutive months.

Payment of Loan Funds

You have chosen to receive your funds as follows:

Initial Advance	**$12,000**	will be paid to you after you accept the loan
Monthly Advance	**$ 1,287**	will be paid to you each month while you remain in your home
Line of Credit	**$15,000**	will be available to you at any time while you remain in your home

You may choose to change the type of payments you receive.

Annual Percentage Rate	
Annual Percentage Rate (APR)	**2.93%.** This is a variable rate that will change annually based on the Treasury rate plus 2.5%. Each year, your rate can increase by up to 2.0%.
Maximum APR	**7.93%**
Historical Changes to Treasury Rate	Over the past 15 years, the Treasury rate plus 2.5% has varied between 2.77% and 8.90%.

Interest charges will be added to your loan balance each month and collected when the loan is due.

Fees	
Account Opening Fees	
Loan Origination	$ 4,735
Inspection	$ 500
Title Search & Title Insurance	$ 595
Appraisal	$ 295
Reverse Mortgage Insurance Premium	$ 5,500
TOTAL Account Opening Fees	**$11,625**
Monthly Fees *(added to your loan balance each month but not collected until the loan is due)*	
Servicing Fee	**$35 per month** ($420 annually)
Reverse Mortgage Insurance Premium	**0.042%** monthly (0.5% annually)
Interest Charges	**Starts at 2.93%** annually but this rate can change.
Other Fees	
Other fees may apply; see your account agreement for details. Ask us for additional information about these fees.	

How the Loan Balance Grows

The table shows an example of how your loan balance might grow if:

- You never borrow from the Line of Credit, only receiving the *initial* and *monthly* advances listed on page 1, *and*
- The APR stays at 2.93%.

	After 1 Year	After 5 Years	After 10 Years
How much money will you have received?	$27,443.00	$80,208.00	$166,434.00
How much will be owed for interest + fees?	$13,166.00	$23,023.00	$56,300.00
How much will be owed altogether?	**$40,609.00**	**$103,232.00**	**$222,733.00**

Repayment Options

At the end of the loan, you or your heirs may either:

- Pay the loan balance in full and keep the home, or
- Sell the home and use the proceeds to pay off the loan. If your home sells for less than you owe, you will not be required to pay the difference. If your home sells for more than you owe, the difference will be given to you or your heirs.

Risks

Your reverse mortgage loan will be secured by your home. If you default on your reverse mortgage loan by:

- Allowing the property to deteriorate beyond reasonable wear and tear; or
- Failing to pay property taxes or insurance; or
- Failing to live in the house for 12 consecutive months; or
- Failing to meet any other obligation

...then we may take any or all of the following actions:

• Foreclose On Your Home	We could foreclose on your property and require that you leave the home.
• Stop Giving You Money	We may stop making payments to you and not allow you to borrow any more money from your line of credit, even if you have borrowed less than your credit limit.
• Terminate Your Loan	We may terminate your loan, make you pay the outstanding loan balance in one payment, and charge you fees on termination.

We may also make other changes to your loan.

Billing Rights: Information on your rights to dispute transactions and how to exercise those rights is provided in your account agreement.

➔ **You have no obligation to accept these terms.** Use this statement to confirm that these are the terms for which you applied.

➔ **Ask questions if you do not understand any part of this form.**

➔ **For more information, go to** *www.frb.gov/reverse_mortgages/*.

By signing below, I acknowledge receipt of this form.

____

Borrower's Signature **Date**

K–6 Closed-End Reverse Mortgage Sample

REVERSE MORTGAGE LOAN SUMMARY

LENDER: ABC Bank DATE: April 30, 2010
LOAN OFFICER NO.: 12345-1234

Borrower & Property Information	
Borrowers' Names & Ages	John Marsh (62)
Borrowers' Account Number	123456789
Property Address	123 Ward Street, Jingle Bells, TX 12345
Appraised Value	$120,000

About this Loan

- You are applying for a reverse mortgage loan on your home that you do not have to repay for as long as you remain in the home.
- You will continue to own your home so you must pay your property taxes and insurance, and keep the home in good repair (see the Risks section).
- The amount of the loan, plus interest and fees, must be paid back in full if the home is sold **or** when the last surviving borrower dies or does not live in the house for 12 consecutive months.

Payment of Loan Funds

You will receive your funds as follows:

Initial Advance	**$55,242** will be paid to you after you accept the loan

Annual Percentage Rate (APR)	
Overall cost of this loan including interest and settlement charges	**7.16 % APR**
Rate Type	This is a fixed rate

Interest charges will be added to your loan balance each month and collected when the loan is due.

Fees	
Account Opening Fees	
Loan Origination	$ 2,500
Inspection	$ 500
Title Search & Title Insurance	$ 590
Appraisal	$ 298
Settlement Fee	$ 415
Counseling Fee	$ 125
Reverse Mortgage Insurance Premium	$ 2,400
TOTAL Account Opening Fees	**$6,828**
Monthly Fees *(added to your loan balance each month but not collected until the loan is due)*	
Servicing Fee	**$30 per month** ($360 annually).
Reverse Mortgage Insurance Premium	**0.042%** monthly (0.5% annually).
Interest Charges	**5.56%** annually.

How the Loan Balance Grows

The table shows how your loan balance will grow.

	After 1 Year	After 5 Years	After 10 Years
How much money will you have received?	$55,242.00	$55,242.00	$55,242.00
How much will be owed for interest + fees?	$11,068.00	$30,838.00	$63,321.00
How much will be owed altogether?	**$66,310.00**	**$86,080.00**	**$111,600.00**

Total Payments	If your loan lasted 21 years, you would make one payment totaling $236,165.31. Of this amount, $180,923.50 would go to interest and settlement charges. This amount, and your amount financed of $55,241.81, is used to calculate your APR.

Repayment Options
At the end of the loan, you or your heirs may either: • Pay the loan balance in full and keep the home, or • Sell the home and use the proceeds to pay off the loan. If your home sells for less than you owe, you will not be required to pay the difference. If your home sells for more than you owe, the difference will be given to you or your heirs.

Risks	
Your reverse mortgage loan will be secured by your home. If you default on your reverse mortgage loan by: • Allowing the property to deteriorate beyond reasonable wear and tear; or • Failing to pay property taxes or insurance; or • Failing to live in the house for 12 consecutive months; or • Failing to meet any other obligation; **…then we may take any or all of the following actions:**	
• Foreclose On Your Home	We could foreclose on your property and require that you leave the home.
• Terminate Your Loan	We may terminate your loan, make you pay the outstanding loan balance in a single payment, and charge you fees on termination.

➔ **You have no obligation to accept these terms.**

➔ **Ask questions if you do not understand any part of this form.**

➔ **For more information, go to** *www.frb.gov/reverse_mortgages/*.

By signing below I acknowledge receipt of this form.

____

Borrower's Signature **Date**

K–7 Shared Appreciation Model Clause

Shared Appreciation Model Clause

Shared Appreciation
This loan includes a Shared Appreciation Agreement, **which means that the lender will be entitled to [shared appreciation percent]% of any gain you make when you sell or refinance your home**. *For example, if your home were worth $100,000 more when the loan becomes due than it is worth today, you would owe us an additional $[shared appreciation amount] on the loan.*

BILLING CODE C

[(a) *Introduction.* Creditors are required to disclose a series of total annual loan cost rates for each reverse mortgage transaction. This appendix contains the equations creditors must use in computing the total annual loan cost rate for various transactions, as well as instructions, explanations, and examples for various transactions. This appendix is modeled after appendix J of this part (Annual Percentage Rates Computations for Closed-End Credit Transactions); creditors should consult appendix J of this part for additional guidance in using the formulas for reverse mortgages.

(b) *Instructions and equations for the total annual loan cost rate*—(1) *General rule.* The total annual loan cost rate shall be the nominal total annual loan cost rate determined by multiplying the unit-period rate by the number of unit-periods in a year.

(2) *Term of the transaction.* For purposes of total annual loan cost disclosures, the term of a reverse mortgage transaction is assumed to begin on the first of the month in which consummation is expected to occur. If a loan cost or any portion of a loan cost is initially incurred beginning on a date later than consummation, the term of the transaction is assumed to begin on the first of the month in which that loan cost is incurred. For purposes of total annual loan cost disclosures, the term ends on each of the assumed loan periods specified in § 226.33(c)(6).

(3) *Definitions of time intervals.*

(i) A *period* is the interval of time between advances.

(ii) A *common period* is any period that occurs more than once in a transaction.

(iii) A *standard interval of time* is a day, week, semimonth, month, or a multiple of a week or a month up to, but not exceeding, 1 year.

(iv) All months shall be considered to have an equal number of days.

(4) *Unit-period.* (i) In all transactions other than single-advance, single-payment transactions, the unit-period shall be that common period, not to exceed one year, that occurs most frequently in the transaction, except that:

(A) If two or more common periods occur with equal frequency, the smaller of such common periods shall be the unit-period; or

(B) If there is no common period in the transaction, the unit-period shall be that period which is the average of all periods rounded to the nearest whole standard interval of time. If the average is equally near two standard intervals of time, the lower shall be the unit-period.

(ii) In a single-advance, single-payment transaction, the unit-period shall be the term of the transaction, but shall not exceed one year.

(5) *Number of unit-periods between two given dates.* (i) The number of days between two dates shall be the number of 24-hour intervals between any point in time on the first date to the same point in time on the second date.

(ii) If the unit-period is a month, the number of full unit-periods between two dates shall be the number of months. If the unit-period is a month, the number of unit-periods per year shall be 12.

(iii) If the unit-period is a semimonth or a multiple of a month not exceeding 11 months, the number of days between two dates shall be 30 times the number of full months. The number of full unit-periods shall be determined by dividing the number of days by 15 in the case of a semimonthly unit-period or by the appropriate multiple of 30 in the case of a multimonthly unit-period. If the unit-period is a semimonth, the number of unit-periods per year shall be 24. If the number of unit-periods is a multiple of a month, the number of unit-periods per year shall be 12 divided by the number of months per unit-period.

(iv) If the unit-period is a day, a week, or a multiple of a week, the number of full unit-periods shall be determined by dividing the number of days between the two given dates by the number of days per unit-period. If the unit-period is a day, the number of unit-periods per year shall be 365. If the unit-period is a week or a multiple of a week, the number of unit-periods per year shall be 52 divided by the number of weeks per unit-period.

(v) If the unit-period is a year, the number of full unit-periods between two dates shall be the number of full years (each equal to 12 months).

(6) *Symbols.* The symbols used to express the terms of a transaction in the equation set forth in paragraph (b)(8) of this appendix are defined as follows:

A_j=The amount of each periodic or lump-sum advance to the consumer under the reverse mortgage transaction.

i=Percentage rate of the total annual loan cost per unit-period, expressed as a decimal equivalent.

j=The number of unit-periods until the jth advance.

n=The number of unit-periods between consummation and repayment of the debt.

P_n=Min (Bal_n, Val_n). This is the maximum amount that the creditor can be repaid at the specified loan term.

Bal_n=Loan balance at time of repayment, including all costs and fees incurred by the consumer (including any shared appreciation or shared equity amount) compounded to time n at the creditor's contract rate of interest.

Val_n=$Val_0(1 + \sigma)^y$, where Val_0 is the property value at consummation, σ is the assumed annual rate of appreciation for the dwelling, and y is the number of years in the assumed term. Val_n must be reduced by the amount of any equity reserved for the consumer by agreement between the parties, or by 7 percent (or the amount or percentage specified in the credit agreement), if the amount required to be repaid is limited to the net proceeds of sale.

σ = The summation operator.

$$= \sum_{j=0}^{x-1} (1+i)^{x-j}$$

$$= (1+i)^x + (1+i)^{x-1} + \cdots (1+i)^1;\ or$$

$$= \frac{(1+i)^x - 1}{i} \times (1+i)$$

Symbols used in the examples shown in this appendix are defined as follows:

w=The number of unit-periods per year.

I=wi×100=the nominal total annual loan cost rate.

(7) *General equation.* The total annual loan cost rate for a reverse mortgage transaction must be determined by first solving the following formula, which sets forth the relationship between the advances to the consumer and the amount owed to the creditor under the terms of the reverse mortgage agreement for the loan cost rate per unit-period (the loan cost rate per unit-period is then multiplied by the number of unit-periods per year to obtain the total annual loan cost rate I; that is, I = wi):

$$\sum_{j=0}^{x-1} A_j (1+i)^{x-j} = P_x$$

(8) *Solution of general equation by iteration process.* (i) The general equation in paragraph (b)(7) of this appendix, when applied to a simple transaction for a reverse mortgage loan of equal monthly advances of $350 each, and with a total amount owed of $14,313.08 at an assumed repayment period of two years, takes the special form:

$$P_x = 350 FV_{24\neg}\ i, or$$

$$P_x = 350 \times \left[\frac{(1+i)^n - 1}{i} \times (1+i) \right]$$

Using the iteration procedures found in steps 1 through 4 of (b)(9)(i) of appendix J of this part, the total annual loan cost rate, correct to two decimals, is 48.53%.

(ii) In using these iteration procedures, it is expected that calculators or computers will be programmed to carry all available decimals throughout the calculation and that enough iterations will be performed to make virtually certain that the total annual loan cost rate obtained, when rounded to two decimals, is correct. Total annual loan cost rates in the examples below were obtained by using a 10-digit programmable calculator and the iteration procedure described in appendix J of this part.

(9) *Assumption for discretionary cash advances.* If the consumer controls the timing of advances made after consummation (such as in a credit line arrangement), the creditor must use the general formula in paragraph (b)(7) of this appendix. The total annual loan cost rate shall be based on the assumption that 50 percent of the principal loan amount is advanced at closing, or in the case of an open-end transaction, at the time the consumer becomes obligated under the plan. Creditors shall assume the advances are made at the interest rate then in effect and that no further advances are made to, or repayments made by, the consumer during the term of the transaction or plan.

(10) *Assumption for variable-rate reverse mortgages.* If the interest rate for a reverse mortgage transaction may increase during the loan term and the amount or timing is not known at consummation, creditors shall base the disclosures on the initial interest rate in effect at the time the disclosures are provided.

(11) *Assumption for closing costs.* In calculating the total annual loan cost rate, creditors shall assume all closing and other consumer costs are financed by the creditor.

(c) *Examples of total annual loan cost rate computations*—(1) *Lump-sum advance at consummation.*

Lump-sum advance to consumer at consummation: $30,000

Total of consumer's loan costs financed at consummation: $4,500

Contract interest rate: 11.60%

Estimated time of repayment (based on life expectancy of a consumer at age 78): 10 years

Appraised value of dwelling at consummation: $100,000

Assumed annual dwelling appreciation rate: 4%

$$30,000(1+i)^{10-0} + \sum_{j=0}^{9} 0(1+i)^{10-j} = 103,385.84$$

P_{10}= Min (103,385.84, 137,662.72)
i = .1317069438
Total annual loan cost rate
(100(.1317069438 × 1)) = 13.17%

(2) *Monthly advance beginning at consummation.*

Monthly advance to consumer, beginning at consummation: $492.51
Total of consumer's loan costs financed at consummation: $4,500
Contract interest rate: 9.00%
Estimated time of repayment (based on life expectancy of a consumer at age 78): 10 years
Appraised value of dwelling at consummation: $100,000

$$P_{120} = Min\,(107{,}053.63,\ 200{,}780.02)$$

$$492.51\times\left[\frac{(1+i)^{120}-1}{i}\times(1+i)\right]=107{,}053.63$$

$$i = .009061140$$

Assumed annual dwelling appreciation rate: 8%
Total annual loan cost rate (100(.009061140 × 12))=10.87%

(3) *Lump sum advance at consummation and monthly advances thereafter.*

Lump sum advance to consumer at consummation: $10,000
Monthly advance to consumer, beginning at consummation: $725
Total of consumer's loan costs financed at consummation: $4,500
Contract rate of interest: 8.5%
Estimated time of repayment (based on life expectancy of a consumer at age 75): 12 years
Appraised value of dwelling at consummation: $100,000

$$P_{144} = Min\,(221{,}818.30,\ 234{,}189.82)$$

$$10{,}000(1+i)^{144-0}+\sum_{j=0}^{143}725(1+i)^{144-j}=221{,}818.30$$

$$i = .007708844$$

Assumed annual dwelling appreciation rate: 8%
Total annual loan cost rate (100(.007708844 × 12)) = 9.25%

(d) *Reverse mortgage model form and sample form* —(1) *Model form.*

Total Annual Loan Cost Rate

Loan Terms

Age of youngest borrower:
Appraised property value:
Interest rate:
Monthly advance:
Initial draw:
Line of credit:

Initial Loan Charges

Closing costs:
Mortgage insurance premium:
Annuity cost:

Monthly Loan Charges

Servicing fee:

Other Charges

Mortgage insurance:
Shared Appreciation:

Repayment Limits

Assumed annual appreciation	Total annual loan cost rate			
	2-year loan term	[ ]-year loan term]	[ ]-year loan term	[ ]-year loan term
0%	....	[ ]	....	....
4%	....	[ ]	....	....
8%	....	[ ]	....	....

The cost of any reverse mortgage loan depends on how long you keep the loan and how much your house appreciates in value. Generally, the longer you keep a reverse mortgage, the lower the total annual loan cost rate will be.

This table shows the estimated cost of your reverse mortgage loan, expressed as an annual rate. It illustrates the cost for three [four] loan terms: 2 years, [half of life expectancy for someone your age,] that life expectancy, and 1.4 times that life expectancy. The table also shows the cost of the loan, assuming the value of your home appreciates at three different rates: 0%, 4% and 8%.

The total annual loan cost rates in this table are based on the total charges associated with this loan. These charges typically include principal, interest, closing costs, mortgage insurance premiums, annuity costs, and servicing costs (but not costs when you sell the home).

The rates in this table are estimates. Your actual cost may differ if, for example, the amount of your loan advances varies or the interest rate on your mortgage changes.

Signing an Application or Receiving These Disclosures Does Not Require You To Complete This Loan

(2) Sample Form.

Total Annual Loan Cost Rate

Loan Terms

Age of youngest borrower: 75
Appraised property value: $100,000
Interest rate: 9%
Monthly advance: $301.80
Initial draw: $1,000
Line of credit: $4,000

Initial Loan Charges

Closing costs: $5,000
Mortgage insurance premium: None
Annuity cost: None

Monthly Loan Charges

Servicing fee: None

Other Charges

Mortgage insurance: None
Shared Appreciation: None

Repayment Limits

Net proceeds estimated at 93% of projected home sale

Assumed annual appreciation	Total annual loan cost rate			
	2-year loan term (percent)	[6-year loan term] (percent)	12-year loan term (percent)	17-year loan term (percent)
0%	39.00	[14.94]	9.86	3.87
4%	39.00	[14.94]	11.03	10.14
8%	39.00	[14.94]	11.03	10.20

The cost of any reverse mortgage loan depends on how long you keep the loan and how much your house appreciates in value. Generally, the longer you keep a reverse mortgage, the lower the total annual loan cost rate will be.

This table shows the estimated cost of your reverse mortgage loan, expressed as an annual rate. It illustrates the cost for three [four] loan terms: 2 years, [half of life expectancy for someone your age,] that life expectancy, and 1.4 times that life expectancy. The table also shows the cost of the loan, assuming the value of your home appreciates at three different rates: 0%,4% and 8%.

The total annual loan cost rates in this table are based on the total charges associated with this loan. These charges typically include principal, interest, closing costs, mortgage insurance premiums, annuity costs, and servicing costs (but not disposition costs—costs when you sell the home).

The rates in this table are estimates. Your actual cost may differ if, for example, the amount of your loan advances varies or the interest rate on your mortgage changes.

Signing an Application or Receiving These Disclosures Does Not Require You To Complete This Loan]

Appendix L to Part 226—►[Reserved]◄

28. Appendix L is removed and reserved.

29. In Supplement I to Part 226, as proposed to be amended on August 26, 2009 (74 FR 43232, 74 FR 43428) is further amended by:

A. Under *Section 226.1—Authority, Purpose, Coverage, Organization, Enforcement and Liability, 1(d) Organization, Paragraph 1(d)(5),* paragraph 1 is revised.

B. Under *Section 226.2—Definitions and Rules of Construction, 2(a) Definitions:*

i. *2(a)(6) Business day,* paragraph 2 is revised;

ii. *2(a)(11) Consumer,* paragraphs 1 and 3 are revised, and paragraph 4 is added;

iii. *2(a)(25) Security interest,* paragraph 6 is revised.

C. Under *Section 226.3—Exempt Transactions, 3(a) Business, commercial, agricultural, or organizational credit,* paragraph 8 is revised.

D. Under *Section 226.4—Finance Charge:*

i. *4(a) Definition, 4(a)(1) Charges by third parties,* paragraph 2 is removed;

ii. *4(d) Insurance and debt cancellation and debt suspension coverage* and *4(d)(3) Voluntary debt cancellation or suspension fees* are revised.

E. Under *Section 226.5—General Disclosure Requirements:*

i. *5(a) Form of disclosures, 5(a)(1) General,* paragraphs 1 and 3 are revised;

ii. *5(b) Time of disclosures, 5(b)(1) Account-opening disclosures, 5(b)(1)(ii) Charges imposed as part of an open-end (not home-secured) plan,* the heading and paragraph 1 are revised.

F. Under *Section 226.5b—Requirements for Home-Equity Plans:*

i. *5b(c) Content of Disclosures, Paragraph 5b(c)(9)(ii),* paragraph 6 is removed, and *Paragraph 5b(c)(9)(iii),* paragraph 3 is removed;

ii. *5b(d) Refund of fees* is revised;

iii. *5b(e) Imposition of nonrefundable fees* is revised.

G. Under *Section 226.6—Account-Opening Disclosures, 6(a) Rules affecting home-equity plans,* paragraph 3 is added.

H. Under *Section 226.9—Subsequent Disclosure Requirements, 9(c) Change in terms, 9(c)(1) Rules affecting home-equity plans, 9(c)(1)(ii) Charges not covered by § 226.6(a)(1) and (a)(2)* is revised, and *9(c)(1)(iii) Disclosure requirements, 9(c)(1)(iii)(A) Changes to terms described in account-opening table,* paragraphs 2 and 6 are revised.

I. Under *Section 226.15—Right of Rescission:*

i. Paragraph 1 is revised;

ii. *15(a) Consumer's right to rescind, Paragraph 15(a)(1)* is revised;

iii. *15(a) Consumer's right to rescind, Paragraph 15(a)(2),* the heading is revised; new heading *15(a)(2)(i) Provision of written notification* is added and paragraph 1 is revised; and *15(a)(2)(ii) Party the consumer shall notify, 15(a)(2)(ii)(B) After the three-business day period following the transaction,* paragraph 1 is added;

iv. *15(a) Consumer's right to rescind, Paragraph 15(a)(3)* is revised;

v. *15(a) Consumer's right to rescind, Paragraph 15(a)(4)* is revised;

vi. *15(a) Consumer's right to rescind, Paragraph 15(a)(5)* is added;

vii. *15(b) Notice of right to rescind* is revised;

viii. *15(c) Delay of creditor's performance* is revised;

ix. *15(d) Effects of rescission* is revised;

x. *15(e) Consumer's waiver of right to rescind* is revised.

J. Under *Section 226.16—Advertising, 16(d) Additional requirements for home-equity plans,* paragraph 5 is revised, and paragraphs 10, 11, and 12 are added.

K. Under *Section 226.17—General Disclosure Requirements:*

i. *17(c) Basis of disclosures and use of estimates, Paragraph 17(c)(1),* paragraph 14 is removed;

ii. *17(d) Multiple creditors; multiple consumers,* paragraph 2 is revised;

iii. *17(f) Early disclosures, Paragraph 17(f)(2),* paragraph 1 is revised.

L. Under *Section 226.18—Content of Disclosures, 18(k) Prepayment, Paragraph 18(k)(1),* paragraph 1 is revised.

M. Under *Section 226.19—Certain Mortgage and Variable-Rate Transactions:*

i. The heading is revised and paragraph 1 is added;

ii. *19(a) Mortgage transactions* is added;

iii. *19(a)(1)(i) Time of disclosure* through *19(a)(5)(iii) Redisclosure for timeshare plans* are revised;

iv. *19(b) Certain variable-rate transactions,* the heading is revised and paragraph 1 is revised.

N. Under *Section 226.20—Subsequent Disclosure Requirements:*

i. *20(a) Refinancings* is redesignated *20(a)(2), Refinancings by the same creditor—Non-mortgage credit,* and revised.

ii. *20(a) Modifications to terms by the same creditor, 20(a)(1) Mortgages* is added;

iii. *20(a) Modifications to terms by the same creditor, 20(a)(3) Unearned finance charge* is added;

iv. *20(c) Rate adjustments,* paragraphs 1 and 2 are revised, paragraph 3 is republished, and paragraph 4 is added;

v. *20(c)(1) Timing of disclosures, Paragraph 20(c)(2)(ii), Paragraph 20(c)(2)(iv), Paragraph 20(c)(2)(vi), Paragraph 20(c)(2)(vii), Paragraph 20(c)(3)(iii)* and *Paragraph 20(c)(3)(v)* are republished.

O. Under *Section 226.22—Determination of the Annual Percentage Rate, 22(a) Accuracy of the annual percentage rate:*

i. *Paragraph 22(a)(1)* is revised;

ii. *Paragraph 22(a)(2),* the heading and paragraph 1 are revised;

iii. *Paragraph 22(a)(3),* the heading and paragraph 1 are revised;

iv. *Paragraph 22(a)(4) Mortgage loans* is revised.

v. *Paragraph 22(a)(5)* is revised.

P. Under *Section 226.23—Right of Rescission:*

i. *23(a) Consumer's right to rescind* is revised;

ii. *23(b) Notice of the right to rescind* is revised;

iii. *23(c) Delay of creditor's performance* is revised;

iv. *23(d) Effects of rescission* is revised;

v. *23(e) Consumer's waiver of right to rescind* is revised;

vi. *23(f) Exempt transactions* is revised;

vii. *23(g) Tolerances for accuracy* is removed;

viii. *23(h) Special rules for foreclosures* is redesignated as *23(g) Special rules for foreclosures* and revised.

Q. Under *Section 226.31—General Rules:*

i. *31(c) Timing of disclosure, 31(c)(1) Disclosures for certain closed-end home mortgages, Paragraph 31(c)(1)(iii)* is revised and *31(c)(2) Disclosures for reverse mortgages* is removed;

iii. *31(d) Basis of disclosures and use of estimates,* paragraph 2 is added.

R. Under *Section 32—Requirements for Certain Closed-End Home Mortgages:*

i. *32(a) Coverage, Paragraph 32(a)(1)(ii),* paragraph 1 is revised;

ii. *Paragraph 32(a)(2)(ii)* is added;

iii. *32(b) Definitions,* new heading *Paragraph 32(b)(1)* is added;

iv. *32(b) Definitions, Paragraph 32(b)(1)(i), Paragraph 32(b)(1)(ii), Paragraph 32(b)(1)(iii),* and *Paragraph 32(b)(1)(iv)* are revised.

S. *Section 226.33—Requirements for Reverse Mortgages* is revised.

T. Under *Section 226.34—Prohibited Acts or Practices in Connection with Credit Subject to § 226.32, 34(a) Prohibited acts or practices for loans subject to § 226.32, 34(a)(4) Repayment ability,* paragraph 4 is removed and reserved, and *34(a)(4)(iv) Exclusions from presumption of compliance,* paragraph 3 is added.

U. Under *Section 226.35—Prohibited Acts or Practices in Connection With Higher-Priced Mortgage Loans:*

i. *35(a) Higher-priced mortgage loans, Paragraph 35(a)(2),* the heading is revised;

ii. *35(a) Higher-priced mortgage loans, Paragraph 35(a)(2), Paragraph 35(a)(2)(i)* is revised;

iii. *35(a) Higher-priced mortgage loans, Paragraph 35(a)(2),* new heading *35(a)(2)(ii)* is added;

iv. *35(a) Higher-priced mortgage loans, Paragraph 35(a)(3)* is added;

v. *35(b) Rules for higher-priced mortgage loans,* paragraph 1 is revised.

V. Under *Section 226.38—Content of Disclosures for Closed-End Mortgages:*

i. *38(a) Loan summary, 38(a)(5) Prepayment penalty,* paragraph 2 is revised;

ii. *38(h) Credit insurance and debt cancellation coverage and debt suspension coverage* is revised.

W. *Section 226.40—Prohibited Acts or Practices in Connection with Reverse Mortgages* is added.

X. *Section 226.41—Servicer's Response to Borrower's Request for Information* is added.

Y. Under Appendices G and H—Open-End and Closed-End Model Forms and Clauses, paragraph 1 is revised.

Z. Appendix G to Part 226 is amended by revising paragraph 4.

AA. Appendix H to Part 226 is amended by revising paragraphs 1, 3, 11, and 12.

BB. Appendix K to Part 226—Total Annual Loan Cost Rate Computations for Reverse Mortgage Transactions Model Forms and Clauses is redesignated as Reverse Mortgage Model Forms and Clauses and revised.

CC. Appendix L—Assumed Loan Periods for Computations of Total Annual Loan Cost Rates is removed and reserved.

Supplement I to Part 226—Official Staff Interpretations

* * * * *

Subpart A—General

Section 226.1—Authority, Purpose, Coverage, Organization, Enforcement and Liability

* * * * *

1(d) Organization.

* * * * *

Paragraph 1(d)(5).

1. *Effective dates.* The Board's revisions to Regulation Z published on July 30, 2008 (the "final rules") apply to covered loans (including 【refinance loans】►modifications◄ and assumptions considered new transactions under § 226.20►(a)(1)(i) or (b)◄ for which the creditor receives an application on or after October 1, 2009, except for the final rules on advertising, escrows, and loan servicing. *But see* comment 1(d)(3)–1. The final rules on escrows in § 226.35(b)(3) are effective for covered loans (including [refinances] ►modifications◄ and assumptions in § 226.20►(a)(1)(i) and (b)◄) for which the creditor receives an application on or after April 1, 2010; but for such loans secured by manufactured housing on or after October 1, 2010. The final rules applicable to servicers in § 226.36(c) apply to all covered loans serviced on or after October 1, 2009. The final rules on advertising apply to advertisements occurring on or after October 1, 2009. For example, a radio ad occurs on the date it is 【first】 broadcast; a solicitation occurs on the date it is mailed to the consumer. The following examples illustrate the application of the effective dates for the final rules.

i. *General.* A 【refinancing】 ►modification◄ [or assumption] as defined in § 226.20(a)►(1)(i)◄ or ►assumption as defined in § 226.20(b)◄ is a new transaction and is covered by a provision of the final rule if the creditor receives an application for the transaction on or after that provision's effective date. For example, if a creditor receives an application for a [refinance loan] ►modification◄ covered by § 226.35(a) on or after October 1, 2009, and the [refinance loan] ►modification◄ is consummated on October 15, 2009, the provision restricting prepayment penalties in § 226.35(b)(2) applies. However, if the transaction were a modification of an existing obligation's terms that does not [constitute a refinance loan] ►result in a new transaction as provided◄ under § 226.20(a)►(1)(ii)◄, the final rules, including for example the restriction on prepayment penalties, would not apply.

* * * * *

Section 226.2—Definitions and Rules of Construction

2(a) Definitions.

* * * * *

2(a)(6) Business day.

* * * * *

2. *Rule for rescission, disclosures for certain mortgage ►and home-equity line of credit◄ transactions, and private education loans►, and the restriction on imposing nonrefundable fees in connection with reverse mortgages subject to § 226.33◄*. A more precise rule for what is a business day (all calendar days except Sundays and the Federal legal holidays specified in 5 U.S.C. 6103(a)) applies when the right of rescission, the receipt of disclosures for certain 【dwelling-secured】 mortgage transactions under §§ ►226.5b(e), 226.9(j)(2),◄ 226.19(a)(1)(ii), 226.19(a)(2), 226.31(c), ►226.33(d)(1)(ii), 226.33(d)(2),◄ 【or 】the receipt of disclosures for private education loans under § 226.46(d)(4)►, the restriction on imposing nonrefundable fees for certain mortgage transactions under § 226.19(a)(1)(iv), or the restriction on

imposing nonrefundable fees under § 226.40(b)(2) in connection with reverse mortgages subject to § 226.33◀ is involved. Four Federal legal holidays are identified in 5 U.S.C. 6103(a) by a specific date: New Year's Day, January 1; Independence Day, July 4; Veterans Day, November 11; and Christmas Day, December 25. When one of these holidays (July 4, for example) falls on a Saturday, Federal offices and other entities might observe the holiday on the preceding Friday (July 3). In cases where the more precise rule applies, the observed holiday (in the example, July 3) is a business day.

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2(a)(11) Consumer.

1. *Scope.* i. Guarantors, endorsers, and sureties are not generally consumers for the purposes of the regulation, but【they】▶such parties◀ may be entitled to rescind under ▶the following◀【certain】circumstances【and they may】:

▶A. The borrower has the right to rescind because he or she is a natural person to whom consumer credit is offered or extended and in whose principal dwelling a security interest is or will be retained or acquired; and

B. The guarantor, endorser, or surety personally guarantees the borrower's repayment of the consumer credit transaction and pledges his or her principal dwelling as security for the borrower's consumer credit transaction.

ii. Guarantors, endorsers, or sureties may also◀ have certain rights if they are obligated on credit card plans.

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3. *Land trusts* ▶*and revocable living trusts*◀. Credit extended to land trusts ▶or revocable living trusts◀, as described in the commentary to § 226.3(a), is considered to be extended to a natural person for purposes of the definition of consumer.

▶4. *Reverse mortgages subject to § 226.33.* For purposes of the counseling requirements under § 226.40(b) for reverse mortgages subject to § 226.33, with one exception, a consumer includes any person who, at the time of origination of a reverse mortgage subject to § 226.33, will be shown as an owner on the property deed of the dwelling that will secure the applicable reverse mortgage. *See* § 226.40(b)(7). For purposes of the prohibition on imposing nonrefundable fees in connection with a reverse mortgage transaction until after the third business day following the consumer's completion of counseling (§ 226.40(b)(2)), however, the term consumer includes only persons on the property deed who will be obligors on the applicable reverse mortgage.◀

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2(a)(25) Security interest.

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6. *Specificity of disclosure.* A creditor need not separately disclose multiple security interests that it may hold in the same collateral. The creditor need only disclose that the transaction is secured by the collateral, even when security interests from prior transactions remain of record and a new security interest is taken in connection with the transaction. In disclosing the fact that the transaction is secured by the collateral, the creditor also need not disclose how the security interest arose. For example, in a closed-end credit transaction, a【rescission】notice need not specifically state that a new security interest is "acquired" or an existing security interest is "retained" in the transaction.【The acquisition or retention of a security interest in the consumer's principal dwelling instead may be disclosed in a rescission notice with a general statement such as the following: "Your home is the security for the new transaction."】

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Section 226.3—Exempt Transactions 3(a) Business, commercial, agricultural, or organizational credit.

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8. *Land trusts* ▶*and revocable living trusts*◀. Credit extended for consumer purposes to a land trust ▶a or revocable living trust◀ is considered to be credit extended to a natural person rather than credit extended to an organization. In some jurisdictions, ▶land trusts are established to serve a function similar to that of a mortgage between◀ a financial institution【financing】▶and a natural person for the financing of◀ a residential real estate transaction【 for an individual uses a land trust mechanism】. Title to the property is conveyed to the land trust for which the financial institution itself is a trustee.【The underlying installment note is executed by the financial institution in its capacity as trustee and payment is secured by a trust deed, reflecting title in the financial institution as trustee. In some instances, the consumer executes a personal guaranty of the indebtedness. The note provides that it is payable only out of the property specifically described in the trust deed and that the trustee has no personal liability on the note.】▶Revocable living trusts generally are established by a natural person to serve an estate planning function, such as avoidance of probate. The natural person often uses the revocable living trust to hold title to real and personal property.◀ Assuming the transactions are for personal, family, or household purposes,【these transactions】▶extensions of credit to a land trust or a revocable living trust◀ are subject to the regulation since in substance (if not form) consumer credit is being extended.

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Section 226.4—Finance Charge

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4(a) Definition.

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4(a)(1) Charges by third parties.

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【2. *Annuities associated with reverse mortgages.* Some creditors offer annuities in connection with a reverse-mortgage transaction. The amount of the premium is a finance charge if the creditor requires the purchase of the annuity incident to the credit. Examples include the following:

i. The credit documents reflect the purchase of an annuity from a specific provider or providers.

ii. The creditor assesses an additional charge on consumers who do not purchase an annuity from a specific provider.

iii. The annuity is intended to replace in whole or in part the creditor's payments to the consumer either immediately or at some future date.】

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4(d) Insurance and debt cancellation and debt suspension coverage.

1. *General.* Section 226.4(d) permits insurance premiums and charges and debt cancellation and debt suspension charges to be excluded from the finance charge▶, except for certain transactions secured by real property or a dwelling, as provided in § 226.24(g)◀. The required disclosures must be made ▶clearly and conspicuously◀ in writing, except as provided in § 226.4(d)(4). The rules on【location】▶the form◀ of insurance and debt cancellation and debt suspension disclosures【for closed-end transactions】are in §§ 226.17(a)▶ and 226.37(a)(1) for closed-end transactions and § 226.5(a)(1) for open-end transactions.◀ For purposes of § 226.4(d), all references to insurance also include debt cancellation and debt suspension coverage unless the context indicates otherwise.

2. *Timing of disclosures.* ▶Disclosures must be given before the consumer enrolls in the insurance or debt cancellation or debt suspension coverage written in connection with the credit transaction. See comments 4(b)(7) and (b)(8)–2 and 4(b)(10)–2 for a discussion of when insurance or coverage is written in connection with the credit transaction.◀ If disclosures are given early, for example under § 226.17(f) or 226.19(a), the creditor【need not】▶must◀ redisclose if the【actual premium】▶maximum premium or charge per period◀ is different at the time of consummation ▶or account-opening◀. If【insurance】disclosures are not given at the time of early disclosure and insurance ▶or debt cancellation or debt suspension coverage◀ is in fact written in connection with the transaction, the disclosures under § 226.4(d) must be made in order to exclude the premiums ▶or charges◀ from the finance charge.

3.【*Premium rate*】▶*Rate*◀ *increases.* The creditor should disclose the premium amount ▶or charge◀ based on the rates currently in effect and need not designate it as an estimate even if the premium rates ▶or charges◀ may increase. An increase in insurance ▶or debt cancellation or debt suspension coverage◀ rates after consummation of a closed-end credit transaction or during the life of an open-end credit plan does not require redisclosure in order to exclude the additional premium ▶or charge◀ from treatment as a finance charge.

4. *Unit-cost disclosures* ▶*for property insurance*◀. i. *Open-End credit.* The premium【or fee】for insurance【or debt cancellation or debt suspension】for the initial term of coverage may be disclosed on a unit-cost basis in open-end credit transactions. The cost per unit should be based on the initial term of coverage, unless one of the options under comment 4(d)–12 is available.

ii. *Closed-end credit.* One of the transactions for which unit-cost disclosures (such as 50 cents per year for each $100 of the amount financed) may be used in place of the total insurance premium involves a particular kind of insurance plan. For example, a consumer with a current indebtedness of $8,000 is covered by a plan of ❲credit life❳ insurance coverage with a maximum of $10,000. The consumer requests an additional $4,000 loan to be covered by the same insurance plan. Since the $4,000 loan exceeds, in part, the maximum amount of indebtedness that can be covered by the plan, the creditor may properly give the insurance-cost disclosures on the $4,000 loan on a unit-cost basis.

5. *Required credit life insurance or debt cancellation or suspension coverage.* Credit life, accident, health, or loss-of-income insurance ►described in § 226.4(b)(7)◄, and debt cancellation and suspension coverage described in § 226.4(b)(10), must be voluntary in order for the premium or charges to be excluded from the finance charge ►(except that, as provided in § 226.4(g), even charges for voluntary insurance or coverage may not be excluded) ◄. Whether the insurance or coverage is in fact required or optional is a factual question. If the insurance or coverage is required, the premiums ►or charges◄ must be included in the finance charge, whether the insurance or coverage is purchased from the creditor or from a third party. If the consumer is required to elect one of several options—such as to purchase credit life insurance, or to assign an existing life insurance policy, or to pledge security such as a certificate of deposit—and the consumer purchases the credit life insurance policy, the premium must be included in the finance charge. (If the consumer assigns a preexisting policy or pledges security instead, no premium is included in the finance charge. The security interest would be disclosed under § 226.6(a)(4), § 226.6(b)(5)(ii), or § 226.18(m). See the commentary to § 226.4(b)(7) and (b)(8).)

6. *Other types of voluntary insurance.* Insurance is not credit life, accident, health, or loss-of-income insurance if the creditor or the credit account of the consumer is not the beneficiary of the insurance coverage. If the premium for such insurance is not imposed by the creditor ❲as an incident to or a condition of credit❳►in connection with the credit transaction◄, it is not covered by § 226.4.

7. *Signatures.* If the creditor offers a number of insurance ►or debt cancellation or debt suspension coverage◄ options under § 226.4(d), the creditor may provide a means for the consumer to sign or initial for each option, or it may provide for a single authorizing signature or initial with the options selected designated by some other means, such as a check mark. The ❲insurance❳ authorization may be signed or initialed by any consumer, as defined in § 226.2(a)(11), or by an authorized user on a credit card account.

8. *Property insurance.* To exclude property insurance premiums or charges from the finance charge, the creditor must allow the consumer to choose the insurer and disclose that fact. This disclosure must be made whether or not the property insurance is available from or through the creditor. The requirement that an option be given does not require that the insurance be readily available from other sources. The premium ❲or charge❳ must be disclosed only if the consumer elects to purchase the insurance from ►or through◄ the creditor; in such a case, the creditor must also disclose the term of the property insurance coverage if it is less than the term of the obligation. ►Insurance is available "from or through" a creditor if it is available from the creditor's affiliate, as defined under the Bank Holding Company Act, 12 U.S.C. 1841(k).◄

9. *Single-interest insurance.* Blanket and specific single-interest coverage are treated the same for purposes of the regulation. A charge for either type of single-interest insurance may be excluded from the finance charge if:

i. The insurer waives any right of subrogation.

ii. The other requirements of § 226.4(d)(2) are met. This includes, of course, giving the consumer the option of obtaining the insurance from a person of the consumer's choice. The creditor need not ascertain whether the consumer is able to purchase the insurance from someone else.

10. *Single-interest insurance defined.* The term *single-interest insurance* as used in the regulation refers only to the types of coverage traditionally included in the term *vendor's single-interest insurance* (or *VSI*), that is, protection of tangible property against normal property damage, concealment, confiscation, conversion, embezzlement, and skip. Some comprehensive insurance policies may include a variety of additional coverages, such as repossession insurance and holder-in-due-course insurance. These types of coverage do not constitute single-interest insurance for purposes of the regulation, and premiums for them do not qualify for exclusion from the finance charge under § 226.4(d). If a policy that is primarily VSI also provides coverages that are not VSI or other property insurance, a portion of the premiums must be allocated to the nonexcludable coverages and included in the finance charge. However, such allocation is not required if the total premium in fact attributable to all of the non-VSI coverages included in the policy is $1.00 or less (or $5.00 or less in the case of a multiyear policy).

11. *Initial term ►for property insurance◄.*

i. The initial term of ►property◄ insurance ❲or debt cancellation or debt suspension coverage❳ determines the period for which a premium amount must be disclosed, unless one of the options discussed under comment 4(d)–12 is available. For purposes of § 226.4(d), the initial term is the period for which the insurer or creditor is obligated to provide coverage, even though the consumer may be allowed to cancel the coverage or coverage may end due to nonpayment before that term expires.

ii. For example:

A. The initial term of a property insurance policy on an automobile that is written for one year is one year even though premiums are paid monthly and the term of the credit transaction is four years.

B. The initial term of an insurance policy is the full term of the credit transaction if the consumer pays or finances a single premium in advance.

12. *Initial term; alternative.*

i. *General.* A creditor has the option of providing cost disclosures on the basis of one year of ►property◄ insurance ❲or debt cancellation or debt suspension coverage❳ instead of a longer initial term (provided the premium ❲or fee❳ is clearly labeled as being for one year) if:

A. The initial term is indefinite or not clear, or

B. The consumer has agreed to pay a premium ❲or fee❳ that is assessed periodically but the consumer is under no obligation to continue the coverage, whether or not the consumer has made an initial payment.

ii. *Open-End plans.* For open-end plans, a creditor also has the option of providing unit-cost disclosure on the basis of a period that is less than one year if the consumer has agreed to pay a premium ❲or fee❳ that is assessed periodically, for example monthly, but the consumer is under no obligation to continue the coverage.

iii. *Examples.* To illustrate:

A. A ❲credit life insurance❳ policy providing coverage for a ❲30-year mortgage❳►seven-year automobile◄ loan has an initial term of ❲30❳►seven◄ years, even though premiums are paid monthly and the consumer is not required to continue the coverage. Disclosures may be based on the initial term, but the creditor also has the option of making disclosures on the basis of coverage for an assumed initial term of one year.

13. *Loss-of-income insurance.* The loss-of-income insurance mentioned in § 226.4(d) includes involuntary unemployment insurance, which provides that some or all of the consumer's payments will be made if the consumer becomes unemployed involuntarily.

►14. *Age or employment eligibility criteria.* A premium or charge for credit life, accident, health, or loss-of-income insurance, or debt cancellation or debt suspension coverage is voluntary and can be excluded from the finance charge only if the consumer meets the product's age or employment eligibility criteria prior to or at the time of enrollment in the product. To exclude such a premium or charge from the finance charge, the creditor must determine prior to or at the time of enrollment that the consumer is eligible for the product as of enrollment under the product's age or employment eligibility restrictions. The creditor may use reasonably reliable evidence of the consumer's age or employment status to satisfy this condition. Reasonably reliable evidence of a consumer's age would include using the date of birth on the consumer's credit application, on the driver's license or other government-issued identification, or on the credit report. Reasonably reliable evidence of a consumer's employment status would include the consumer's information on a credit application, an Internal Revenue Service Form W–2, tax returns, payroll receipts, or other evidence such as a letter or e-mail from the consumer or the consumer's employer. If the consumer does not meet the product's age or employment eligibility criteria at the time of enrollment, then the premium or charge is not voluntary. In such circumstances, the premium or charge is a finance charge. If the creditor offers a bundled product (such as credit life insurance combined with credit involuntary unemployment insurance) and the consumer is not eligible for all of the bundled products, the creditor must either: (1) Treat the entire premium or charge for the bundled product as a finance charge, or (2) offer the consumer the option of selecting only the products for which the consumer is eligible and exclude the premium or charge from the finance charge if the consumer chooses an optional product for which the consumer meets the age or employment eligibility criteria prior to or at the time of enrollment.

15. *Covered event.* The term "covered event" in § 226.4(d)(1)(i)(D)(*1*) refers to the event that would trigger coverage under the policy or agreement, such as loss of life, disability, or involuntary unemployment.

16. *Cost disclosures for credit insurance or debt cancellation or debt suspension coverage.* To comply with the disclosure requirements of § 226.4(d)(1)(i)(D)(*3*), the creditor must disclose the maximum premium or charge per period. The creditor must use the maximum rate under the policy or coverage. If the premium or charge is based on the outstanding balance or periodic principal and interest payment, the creditor must base the disclosure on the maximum outstanding balance or periodic principal and interest payment possible under the loan contract or line of credit plan.◀

4(d)(3) Voluntary debt cancellation or debt suspension fees.

1. *General.* Fees charged for the specialized form of debt cancellation agreement known as guaranteed automobile protection ("GAP") agreements must be disclosed according to § 226.4(d)(3) rather than according to § 226.4(d)(2) for property insurance.

2. *Disclosures.* Creditors can comply with § 226.4(d)(3) by providing a disclosure that refers to debt cancellation or debt suspension coverage whether or not the coverage is considered insurance. Creditors may use the model credit insurance disclosures only if the debt cancellation or debt suspension coverage constitutes insurance under State law. (See Model 【Clauses】▶Forms◀ and Samples at G–16▶(A) and (D)◀ and H–17▶(A) and (D)◀ in appendix G and appendix H to part 226 for guidance on how to provide the disclosure required by § 226.4(d)(3)【(iii)】▶(i)◀ for debt suspension products.)

3. *Multiple events.* If debt cancellation or debt suspension coverage for two or more events is provided at a single charge, the entire charge may be excluded from the finance charge if at least one of the events is accident or loss of life, health, or income and the conditions specified in § 226.4(d)(3) or, as applicable, § 226.4(d)(4), are satisfied.

4. *Disclosures in programs combining debt cancellation and debt suspension features.* If the consumer's debt can be cancelled under certain circumstances, the disclosure may be modified to reflect that fact. The disclosure could, for example, state (in addition to the language required by § 226.4(d)(3)【(iii)】▶(i)◀) that "In some circumstances, 【my】▶your◀ debt may be cancelled." However, the disclosure would not be permitted to list the specific events that would result in debt cancellation.

4(d)(4) Telephone purchases.

1. *Affirmative request.* A creditor would not satisfy the requirement to obtain a consumer's affirmative request if the "request" was a response to a script that uses leading questions or negative consent. A question asking whether the consumer wishes to enroll in the credit insurance or debt cancellation or suspension plan and seeking a yes-or-no response (such as "Do you want to enroll in this optional debt cancellation plan?") would not be considered leading.

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Subpart B—Open-End Credit

Section 226.5—General Disclosure Requirements

5(a) Form of disclosures.

5(a)(1) General.

1. *Clear and conspicuous standard.* The "clear and conspicuous" standard generally requires that disclosures be in a reasonably understandable form. Disclosures for credit card applications and solicitations under § 226.5a, ▶disclosures for home-equity plans required three business days after application under § 226.5b(b) and § 226.33(d)(1),◀ highlighted account-opening disclosures under ▶§ 226.6(a)(1),◀ § 226.6(b)(1), ▶and § 226.33(d)(4),◀ highlighted disclosure on checks that access a credit card under § 226.9(b)(3), highlighted change-in-terms disclosures under ▶§ 226.9(c)(1)(iii)(B) and◀ § 226.9(c)(2)(iii)(B), and highlighted disclosures when a rate is increased due to delinquency, default or ▶otherwise as◀ [for] a penalty under § 226.9(g)(3)(ii) ▶and § 226.9(i)(4)◀ must also be readily noticeable to the consumer ▶to meet the "clear and conspicuous" standard◀.

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3. *Clear and conspicuous—readily noticeable standard.* To meet the readily noticeable standard, disclosures for credit card applications and solicitations under § 226.5a, ▶disclosures for home-equity plans required three business days after application under § 226.5b(b) and § 226.33(d)(1),◀ highlighted account-opening disclosures under ▶§ 226.6(a)(1),◀ § 226.6(b)(1), ▶and § 226.33(d)(4),◀ highlighted disclosures on checks that access a credit card account under § 226.9(b)(3), highlighted change-in-terms disclosures under ▶§ 226.9(c)(1)(iii)(B) and◀ § 226.9(c)(2)(iii)(B), and highlighted disclosures when a rate is increased due to delinquency, default or penalty pricing under § 226.9(g)(3)(ii) ▶and § 226.9(i)(4)◀ must be given in a minimum of 10-point font. (See special rule for font size requirements for the annual percentage rate for purchases ▶in an open-end (not home-secured) plan◀ under §§ 226.5a(b)(1) and 226.6(b)(2)(i) ▶, and for the annual percentage rate in a home-equity plan under §§ 226.5b(c)(10), 226.6(a)(2)(vi), and 226.33(c)(6)(i)◀.)

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5(b) Time of disclosures.

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5(b)(1) Account-opening disclosures.

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5(b)(1)(ii) Charges imposed as part of an open-end [(not home-secured)] plan.

1. *Disclosing charges before the fee is imposed.* Creditors may disclose charges imposed as part of an open-end [(not home-secured)] plan orally or in writing at any time before a consumer agrees to pay the fee or becomes obligated for the charge, unless the charge is specified under ▶§ 226.6(a)(2),◀ § 226.6(b)(2) ▶, or § 226.33(c)◀. (Charges imposed as part of an open-end 【(not home-secured)】 plan that are not specified under ▶§ 226.6(a)(2),◀ § 226.6(b)(2)▶, or § 226.33(c)◀ may alternatively be disclosed in electronic form; see the commentary to § 226.5(a)(1)(ii)(A).) Creditors must provide such disclosures at a time and in a manner ▶such◀ that a consumer would be likely to notice them. For example, if a consumer telephones a ▶creditor◀ 【card issuer】 to discuss a particular service, a creditor would meet the standard if the creditor clearly and conspicuously discloses the fee associated with the service that is the topic of the telephone call orally to the consumer. Similarly, a creditor providing marketing materials in writing to a consumer about a particular service would meet the standard if the creditor provided a clear and conspicuous written disclosure of the fee for that service in those same materials. A creditor that provides written materials to a consumer about a particular service but provides a fee disclosure for another service not promoted in such materials would not meet the standard. For example, if a creditor provided marketing materials promoting payment by Internet, but included the fee for a replacement card on such materials with no explanation, the creditor would not be disclosing the fee at a time and in a manner that the consumer would be likely to notice the fee.

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Section 226.5b–Requirements for Home-Equity Plans

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5b(c) Content of disclosures.

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5b(c)(9) Payment terms.

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Paragraph 5b(c)(9)(ii).

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[6. *Reverse mortgages.* Reverse mortgages, also known as reverse annuity or home-equity conversion mortgages, in addition to permitting the consumer to obtain advances, may involve the disbursement of monthly advances to the consumer for a fixed period or until the occurrence of an event such as the consumer's death. Repayment of the reverse mortgage (generally a single payment of principal and accrued interest) may be required to be made at the end of the disbursements or, for example, upon the death of the consumer. In disclosing these plans, creditors must apply the following rules, as applicable:

i. If the reverse mortgage has a specified period for advances and disbursements but repayment is due only upon occurrence of a future event such as the death of the consumer, the creditor must assume that disbursements will be made until they are scheduled to end. The creditor must assume repayment will occur when disbursements end (or within a period following the final disbursement which is not longer than the regular interval between disbursements). This assumption should be used even though repayment may occur before or after the disbursements are scheduled to end. In such cases, the creditor may include a statement such as "The disclosures assume that you will repay the line at the time the borrowing period and our payments to you end. As provided in your agreement, your repayment may be required at a different time." The single payment should be considered the "minimum periodic payment" and consequently would not be treated as a balloon payment. The examples of the minimum payment under § 226.5b(c)(9)(iii) should assume the consumer borrows the full credit line (as disclosed in § 226.5b(c)(17)) at the beginning of the draw period.

ii. If the reverse mortgage has neither a specified period for advances or disbursements nor a specified repayment date and these terms will be determined solely by reference to future events, including the consumer's death, the creditor may assume that the draws and disbursements will end upon the consumer's death (estimated by using actuarial tables, for example) and that repayment will be required at the same time (or within a period following the date of the final disbursement which is not longer than the regular interval for disbursements). Alternatively, the creditor may base the disclosures upon another future event it estimates will be most likely to occur first. (If terms will be determined by reference to future events which do not include the consumer's death, the creditor must base the disclosures upon the occurrence of the event estimated to be most likely to occur first.)

iii. In making the disclosures, the creditor must assume that all draws and disbursements and accrued interest will be paid by the consumer. For example, if the note has a non-recourse provision providing that the consumer is not obligated for an amount greater than the value of the house, the creditor must nonetheless assume that the full amount to be drawn or disbursed will be repaid. In this case, however, the creditor may include a statement such as "The disclosures assume full repayment of the amount advanced plus accrued interest, although the amount you may be required to pay is limited by your agreement."

iv. Some reverse mortgages provide that some or all of the appreciation in the value of the property will be shared between the consumer and the creditor. The creditor must disclose the appreciation feature, including describing how the creditor's share will be determined, any limitations, and when the feature may be exercised.]

Paragraph 5b(c)(9)(iii).

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【3. *Reverse mortgages.* See comment 5b(c)(9)(ii)–6 for guidance on providing the payment examples required under § 226.5b(c)(9)(iii) for reverse mortgages.】

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5b(d) Refund of fees.

1. *Refund of fees required.* If any disclosed term, including any term provided upon request pursuant to § 226.5b(c)►or § 226.33(c)(7)(iv)◄, changes between the time the early disclosures are provided to the consumer and the time the plan is opened, and the consumer decides to not enter into the plan, a creditor must refund all fees paid by the consumer. All fees, including credit-report fees and appraisal fees, must be refunded whether such fees are paid to the creditor or directly to third parties. A consumer is entitled to a refund of fees under these circumstances whether or not terms are guaranteed by the creditor under § 226.5b (c)(4)(i) ►or 226.33(c)(12)(iii)◄.

2. *Changes not requiring refund.* The right to a refund of fees does not apply to changes in the annual percentage rate resulting from fluctuations in the index value in a variable-rate plan. Also, if the maximum annual percentage rate is an amount over the initial rate, the right to refund of fees would not apply to changes in the cap resulting from fluctuations in the index value. ►In addition, the right to a refund does not apply to changes to the disclosures required by § 226.33(c)(3), (c)(5) or (c)(8) due to changes in the type of payment the consumer receives, or verification of the appraised property value or the consumer's age. For example, if the disclosure is based on the consumer's choice to receive only monthly payments, and after the disclosure is provided, the consumer decides instead to receive funds in the form of a line of credit, the creditor would not be required to refund the consumer's fees if the consumer later decides not to proceed with the reverse mortgage.◄

3. *Changes in terms.* If a term, such as a fee, is stated as a range in the early disclosures required under § 226.5b(b) ►or 226.33(d)(1)◄, and the term ultimately applicable to the plan falls within that range, a change does not occur for purposes of this section. If, however, no range is used and the term is changed (for example, a rate cap of 6 rather than 5 percentage points over the initial rate), the change would permit the consumer to obtain a refund of fees. If a fee imposed by the creditor is stated in the early disclosures as an estimate and the fee changes, the consumer could elect to not enter into the agreement and would be entitled to a refund of fees.

4. *Timing of refunds and relation to other provisions.* The refund of fees must be made as soon as reasonably possible after the creditor is notified ►,after a term has changed,◄ that the consumer is not entering into the plan [because of the changed term,] or that the consumer wants a refund of fees. The fact that an application fee may be refunded to some applicants under this provision does not render such fees finance charges under section 226.4(c)(1) of the regulation.

5b【*(h)*】►*(e)*◄ *Imposition of nonrefundable fees.*

1. *Collection of fees after consumer receives disclosures.* A fee may be collected after the consumer receives the disclosures ►required under § 226.5b(e) or 226.33(d)(1)◄ [and brochure] and before the expiration of three ►business◄ days, although the fee must be refunded if, within three ►business◄ days of receiving the required information, the consumer decides not to enter into the agreement. In such a case, the consumer must be notified that the fee is refundable for three ►business◄ days. The notice must be clear and conspicuous and in writing, and ►must ◄ [may] be included with the disclosures required under § 226.5b[(d)]►(b) or § 226.33(d)(1)◄ [or as an attachment to them]. If disclosures ►required under § 226.5b(b) or § 226.33(d)(1)◄ [and brochure] are mailed to the consumer, [footnote 10d of] the regulation provides that a nonrefundable fee may not be imposed until six business days after the mailing.

2. *Collection of fees before consumer receives disclosures.* An application fee may be collected before the consumer receives the disclosures ►required under § 226.5b(b) or 226.33(d)(1)◄ [and brochure] (for example, when an application contained in a magazine is mailed in with an application fee) provided that [it] ►the fee◄ remains refundable until three business days after the consumer receives the § 226.5b►(b) or 226.33(d)(1)◄ disclosures. No other fees except a refundable membership fee may be collected until after the consumer receives the disclosures required under § 226.5b►(b) or 226.33(d)(1)◄.

3. *Relation to other provisions.* A fee collected before disclosures ►required under § 226.5b(b) or 226.33(d)(1)◄ are provided may become nonrefundable except that, under § 226.5b(g), it must be refunded if ►a term changes and◄ the consumer elects not to enter into the plan [because of a change in terms]. (Of course, all fees must be refunded if the consumer later rescinds under § 226.15.)

►4. *Definition of "Business Day".* For purposes of § 226.5b(e), the more precise definition of business day (meaning all calendar days except Sundays and specified Federal holidays) under § 226.2(a)(6) applies. *See* comment 2(a)(6)–2.

5. *Reverse mortgages subject to § 226.33.* For reverse mortgages subject to §§ 226.5b and 226.33, creditors and other persons must also comply with the restriction on imposing a nonrefundable fee in § 226.40(b)(2). *See* comment 40(b)(2)(i)–3.◄

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Section 226.6—Account-Opening Disclosures

6(a) Rules affecting home-equity plans.

* * * * *

►3. *Reverse mortgages.* Open-end reverse mortgages that are subject to § 226.5b are not subject to the account-opening disclosure requirements in § 226.6(a)(1) and (a)(2), but rather are subject to the account-opening disclosure requirements in § 226.33(c) and (d)(2). Open-end reverse mortgages are also subject to § 226.6(a)(3), (a)(4), and (a)(5)(ii) through (iv).◄

* * * * *

Section 226.9—Subsequent Disclosure Requirements

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9(c) Change in terms.

9(c)(1) Rules affecting home equity plans.

* * * * *

►*9(c)(1)(ii) Charges not covered by § 226.6(a)(1) and (a)(2) or § 226.33.*

1. *Applicability.* Generally, if a creditor increases any component of a charge, or introduces a new charge (assuming in either case that such action is permitted under § 226.5b(f)), that is imposed as part of the plan under § 226.6(a)(3) but is not required to be disclosed as part of the account-opening summary table under § 226.6(a)(2) or § 226.33(d)(4), the creditor may either, at its option, provide at least 45 days' written advance notice before the change becomes effective to comply with the requirements of § 226.9(c)(1)(i), or provide notice orally or in writing, or electronically if the consumer requests the service electronically, of the amount of the charge to an affected consumer before the consumer agrees to or becomes obligated to pay the charge, at a time and in a manner that a consumer would be likely to notice the disclosure. (See the commentary under § 226.5(a)(1)(iii) regarding disclosure of such changes in electronic form.) For example, a fee for expedited delivery of a credit card is a charge imposed as part of the plan under § 226.6(a)(3) but is not required to be disclosed in the account-opening summary table under § 226.6(a)(2) or § 226.33(d)(4). If a creditor adds expedited delivery of a credit card as a new service, the new service and the accompanying fee would be permissible under § 226.5b(f)(3)(iv) as a beneficial change. In these circumstances, the creditor may provide written advance notice of the change to affected consumers at least 45 days before the change becomes effective. Alternatively, the creditor may provide oral or written notice, or electronic notice if the consumer requests the service electronically, of the amount of the charge to an affected consumer before the consumer agrees to or becomes obligated to pay the charge, at a time and in a manner that the consumer would be likely to notice the disclosure. (See comment 5(b)(1)(ii)–1 for examples of disclosures given at a time and in a manner such that the consumer would be likely to notice them.)

9(c)(1)(iii) Disclosure requirements.

9(c)(1)(iii)(A) Changes to terms described in account-opening table.◄

* * * * *

►2. *Changing index for calculating a variable rate.* If the creditor is changing the index pursuant to § 226.5b(f)(3)(ii), the creditor must disclose the amount of the new rate (as calculated using the new index) and indicate that the rate varies and the how the rate is determined, as explained in § 226.6(a)(2)(vi)(A) or § 226.33(c)(6)(i)(A). For example, if a creditor is changing from using a prime rate to using the LIBOR in calculating a variable rate, the creditor would disclose in the table the new rate (using the new index) and indicate that the rate varies with the market based on the LIBOR.◄

* * * * *

►6. *Changes in fees.* If a creditor is changing part of how a fee that is disclosed in a tabular format under § 226.6(a)(2) or § 226.33(d)(4) is determined, the creditor must redisclose all relevant information related to that fee regardless of whether this other information is changing. For example, if a creditor currently charges a cash advance fee of "Either $5 or 3% of the transaction amount, whichever is greater. (Max: $100)," and the creditor is only changing the minimum dollar amount from $5 to $10, the issuer must redisclose the other information related to how the fee is determined. The creditor in this example would disclose the following: "Either $10 or 3% of the transaction amount, whichever is greater. (Max: $100)." (See § 226.5b(f) for restrictions on a creditor's right to change terms.)◄

* * * * *

Section 226.15—Right of Rescission

1. *Transactions not covered.* Credit extensions that are not subject to the regulation are not covered by § 226.15 even if the customer's principal dwelling is the collateral securing the credit. For this purpose, *credit extensions* also would include the ►transactions◄ [occurrences] listed in comment 15(a)(1)–1. For example, the right of rescission does not apply to the opening of a business-purpose credit line, even though the loan is secured by the customer's principal dwelling.

15(a) Consumer's right to rescind.

[*Paragraph*] *15(a)(1)* ►*Coverage*◄.

1. ►*Transactions*◄ [*Occurrences*] *subject to right.* Under an open-end credit plan secured by the consumer's principal dwelling, the right of rescission generally arises with each of the following ►transactions◄[occurrences]:

►i.◄[•] Opening the account.

►ii.◄[•] Each credit extension.

►iii.◄[•] Increasing the credit limit.

►iv.◄[•] Adding to an existing account a security interest in the consumer's principal dwelling.

►v.◄[•] Increasing the dollar amount of the security interest taken in the dwelling to secure the plan. For example, a consumer may open an account with a $10,000 credit limit, $5,000 of which is initially secured by the consumer's principal dwelling. The consumer has the right to rescind at that time and (except as noted in § 226.15(a)(1)(ii)) with each extension on the account. Later, if the creditor decides that it wants the credit line fully secured, and increases the amount of its interest in the consumer's dwelling, the consumer has the right to rescind the increase.

2. *Exceptions.* Although the consumer generally has the right to rescind with each transaction on the account, section 125(e) of the Act provides an exception: the creditor need not provide the right to rescind at the time of each credit extension made under an open-end credit plan secured by the consumer's principal dwelling to the extent that the credit extended is in accordance with a previously established credit limit for the plan. This limited rescission option is available whether or not the plan existed prior to the effective date of the Act.

3. *Security interest arising from transaction.* ►i.◄ In order for the right of rescission to apply, the security interest must be retained as part of the credit transaction. For example:

[•]►A.◄ A security interest that is acquired by a contractor who is also extending the credit in the transaction.

[•]►B.◄ A mechanic's or materialman's lien that is retained by a subcontractor or supplier of a contractor-creditor, even when the latter has waived its own security interest in the consumer's home.

►ii.◄ The security interest is not part of the credit transaction, and therefore the transaction is not subject to the right of rescission when, for example:

[•]►A.◄ A mechanic's or materialman's lien is obtained by a contractor who is not a party to the credit transaction but merely is paid with the proceeds of the consumer's cash advance.

[•]►B.◄ All security interests that may arise in connection with the credit transaction are validly waived.

[•]►C.◄ The creditor obtains a lien and completion bond that in effect satisfies all liens against the consumer's principal dwelling as a result of the credit transaction.

►iii.◄ Although liens arising by operation of law are not considered security interests for purposes of disclosure under § 226.2, that section specifically includes them in the definition for purposes of the right of rescission. Thus, even though an interest in the consumer's principal dwelling is not a required disclosure under [§ 226.6(c)]►§ 226.6(a)(5)(ii)◄, it may still give rise to the right of rescission.

4. *Consumer.* To be a consumer within the meaning of § 226.2, that person must at least have an ownership interest in the dwelling that is encumbered by the creditor's security interest, although that person need not be a signatory to the credit agreement. For example, if only one spouse enters into a secured plan, the other spouse is a consumer if the ownership interest of that spouse is subject to the security interest.

5. *Principal dwelling.* A consumer can only have one principal dwelling at a time. (But see comment 15(a)(1)–6.) A vacation or other second home would not be a principal dwelling. A transaction secured by a second home (such as a vacation home) that is not currently being used as the consumer's principal dwelling is not rescindable, even if the consumer intends to reside there in the future. When a consumer buys or builds a new dwelling that will become the consumer's principal dwelling within one year or upon completion of construction, the new dwelling is considered the principal dwelling if it secures the open-end credit line. In that case, the transaction secured by the new dwelling is a residential mortgage transaction and is not rescindable. For example, if a consumer whose principal dwelling is currently A builds B, to be occupied by the consumer upon completion of construction, an advance on an open-end line to finance B and secured by B is a residential mortgage transaction. Dwelling, as defined in § 226.2, includes structures that are classified as personalty under State law. For example, a transaction secured by a mobile home, trailer, or houseboat used as the consumer's principal dwelling may be rescindable.

6. *Special rule for principal dwelling.* Notwithstanding the general rule that consumers may have only one principal dwelling, when the consumer is acquiring or constructing a new principal dwelling, a credit plan or extension that is subject to Regulation Z and is secured by the equity in

the consumer's current principal dwelling is subject to the right of rescission regardless of the purpose of that loan (for example, an advance to be used as a bridge loan). For example, if a consumer whose principal dwelling is currently A builds B, to be occupied by the consumer upon completion of construction, a loan to finance B and secured by A is subject to the right of rescission. Moreover, a loan secured by both A and B is, likewise, rescindable.

【*Paragraph*】 *15(a)(2)* ►*Exercise of the right.*

15(a)(2)(i) Provision of written notification.◄

1. *Consumer's exercise of right.* The consumer must exercise the right of rescission in writing ►and may, but is not required to, use◄ 【but not necessarily on】 the notice supplied under § 226.15(b). 【Whatever the means of sending the notification of rescission—mail, telegram or other written means—the time period for the creditor's performance under § 226.15(d)(2) does not begin to run until the notification has been received. The creditor may designate an agent to receive the notification so long as the agent's name and address appear on the notice provided to the consumer under § 226.15(b). Where the creditor fails to provide the consumer with a designated address for sending the notification of rescission, delivery of the notification to the person or address to which the consumer has been directed to send payments constitutes delivery to the creditor or assignee. State law determines whether delivery of the notification to a third party other than the person to whom payments are made is delivery to the creditor or assignee, in the case where the creditor fails to designate an address for sending the notification of rescission.】

►*15(a)(2)(ii) Party the consumer shall notify.*

15(a)(2)(ii)(B) After the three-business-day period following the transaction.

1. *In general.* To exercise an extended right of rescission, the consumer must notify the current owner of the debt obligation. Under § 226.15(a)(2)(ii)(B), the current owner of the debt obligation is deemed to have received the consumer's notification if the consumer provides it to the servicer, as defined in § 226.36(c)(3). Therefore, the period for the creditor's or owner's actions in § 226.15(d)(2) begins on the day the servicer receives the consumer's notification.◄

【*Paragraph*】 *15(a)(3)* ►*Rescission period.*

15(a)(3)(i) Three business days.◄

1. *Rescission period.* ►i.◄ The consumer's right to rescind does not expire until midnight after the third business day following the last of three events:

【•】►A.◄ The ►transaction◄【occurrence】 that gives rise to the right of rescission.

【•】►B.◄ Delivery of all material disclosures 【that are relevant to the plan】.

【•】►C.◄ Delivery to the consumer of the required rescission notice.

►ii.◄ For example, 【an account is opened on Friday, June 1, and the disclosures and notice of the right to rescind were given on Thursday, May 31; the rescission period will expire at midnight of the third business day after June 1—that is,】 ►assume the consumer received all material disclosures on Wednesday, May 23 and received the notice of the right to rescind on Thursday, May 31, and the transaction giving rise to the right of rescission occurred on Friday, June 1. The rescission period will expire at midnight after the third business day, which is◄ Tuesday June 5. 【In another example, if the disclosures are given and the account is opened on Friday, June 1, and the rescission notice is given on Monday, June 4, the rescission period expires at midnight of the third business day after June 4—that is, Thursday, June 7. The consumer must place the rescission notice in the mail, file it for telegraphic transmission, or deliver it to the creditor's place of business within that period in order to exercise the right.】

►iii. The provision of incorrect or incomplete material disclosures or an incorrect or incomplete notice of the right to rescind does not constitute delivery of the disclosures or notice. If the creditor originally provided incorrect or incomplete material disclosures, to commence the three-business-day rescission period, the creditor must deliver to the consumer complete, correct material disclosures together with a complete, correct, updated notice of the right to rescind. If the creditor originally provided an incorrect or incomplete notice of the right to rescind, to commence the three-business-day rescission period, the creditor must deliver to the consumer a complete, correct, updated notice of the right to rescind. In either situation, the consumer would have three business days after proper delivery to rescind the transaction.◄

【2. *Material disclosures.* Footnote 36 sets forth the material disclosures that must be provided before the rescission period can begin to run. The creditor must provide sufficient information to satisfy the requirements of § 226.6 for these disclosures. A creditor may satisfy this requirement by giving an initial disclosure statement that complies with the regulation. Failure to give the other required initial disclosures (such as the billing rights statement) or the information required under § 226.5b does not prevent the running of the rescission period, although that failure may result in civil liability or administrative sanctions. The payment terms set forth in footnote 36 apply to any repayment phase set forth in the agreement. Thus, the payment terms described in § 226.6(e)(2) for any repayment phase as well as for the draw period are "material disclosures."

3. *Material disclosures—variable rate program.* For a variable rate program, the material disclosures also include the disclosures listed in footnote 12 to § 226.6(a)(2): The circumstances under which the rate may increase; the limitations on the increase; and the effect of an increase. The disclosures listed in footnote 12 to § 226.6(a)(2) for any repayment phase also are material disclosures for variable-rate programs.】

【4.】 ►15(a)(3)(ii)◄ *Unexpired right of rescission.*

►*15(a)(3)(ii)(A) Up to three years.*◄

【When the creditor has failed to take the action necessary to start the three-day rescission period running the right to rescind automatically lapses on the occurrence of the earliest of the following three events:

• The expiration of three years after the occurrence giving rise to the right of rescission.

• Transfer of all the consumer's interest in the property.

• Sale of the consumer's interest in the property, including a transaction in which the consumer sells the dwelling and takes back a purchase money note and mortgage or retains legal title through a device such as an installment sale contract.】

►1. *Transfer.* A◄ transfer of all the consumer's interest ►that terminates the right of rescission◄ includes 【such】 transfers [as bequests and] ►by operation of law following the consumer's death and by◄ gift【s】. [A sale or transfer of the property need not be voluntary to terminate the right to rescind. For example, a foreclosure sale would terminate an unexpired right to rescind. As provided in section 125 of the act, the three-year limit may be extended by an administrative proceeding to enforce the provisions of § 226.15.】 A partial transfer of the consumer's interest, such as a transfer bestowing co-ownership on a spouse, does not terminate the right of rescission. ►Filing for bankruptcy generally does not terminate the right of rescission if the consumer retains an interest in the property after the bankruptcy estate is created.

2. *Sale.* A sale of the consumer's interest in the property that terminates the right of rescission includes a transaction in which the consumer sells the dwelling and takes back a purchase money note and mortgage or retains legal title through a device such as an installment sale contract.

3. *Involuntary sale or transfer.* A sale or transfer of the property need not be voluntary to terminate the right to rescind. For example, a foreclosure sale would terminate an unexpired right to rescind.◄

【*Paragraph*】 *15(a)(4)* ►*Joint owners*◄.

1. ►*In general*◄【*Joint owners*】. When more than one consumer has the right to rescind a transaction, any one of them may exercise that right and cancel the transaction on behalf of all. For example, if both a husband and wife have the right to rescind a transaction, either spouse acting alone may exercise the right and both are bound by the rescission.

►*Paragraph 15(a)(5)*

15(a)(5)(i) Definition of material disclosures.

1. *In general.* The right to rescind generally does not expire until midnight after the third business day following the latest of (1) the transaction that gives rise to the right of rescission, (2) delivery of the notice of the right to rescind, as set forth in § 226.15(b), or (3) delivery of all material disclosures, as set forth in § 226.15(a)(5)(i). *See* § 226.15(a)(3). A creditor must make the material disclosures clearly and conspicuously, consistent with the requirements of § 226.6(a)(2) or § 226.33(c). A creditor may satisfy the requirement to provide material disclosures by giving an account-opening table described in § 226.6(a)(1) or § 226.33(d)(2) and (d)(4) that complies with the regulation. Failure to provide the required non-material

disclosures set forth in § 226.6 or § 226.33 or the information required under § 226.5b does not affect the right of rescission, although such failure may be a violation subject to the liability provisions of section 130 of the Act, or administrative sanctions.

2. *Repayment phase.* Section 226.6(a)(2) requires that disclosures described in that section be given for the draw period and any repayment period, as applicable. *See* comment 6(a)–2. Thus, the terms described in § 226.15(a)(5) for any repayment phase as well as for the draw period are "material disclosures."

3. *Format.* Failing to satisfy terminology or format requirements set forth in § 226.6(a)(1) or (a)(2) or § 226.33(c), (d)(2), or (d)(4) in the model forms in Appendix G or Appendix K is not by itself a failure to provide material disclosures. Nonetheless, a creditor must provide the material disclosures clearly and conspicuously, as described in § 226.5(a)(1) and comments 5(a)(1)–1 and –2.

4. *Annual percentage rates.* Under § 226.15(a)(5)(i)(A), any annual percentage rates that must be disclosed in the account-opening table under §§ 226.6(a)(2)(vi) or 226.33(c)(6)(i) are considered material disclosures. This includes all annual percentage rates that may be imposed on the HELOC plan related to the payment plan disclosed in the table, except for any penalty annual percentage rates or any annual percentage rates for fixed-rate and fiexed-term advances during the draw period (unless those are the only advances allowed during the draw period). See §§ 226.6(a)(2) and (a)(2)(vi).

5. *Introductory rates.* Under § 226.15(a)(5)(i)(A), information related to introductory rates required to be disclosed in the account-opening table under § 226.6(a)(2)(vi)(B) or § 226.33(c)(6)(i)(B) are considered material disclosures. Thus, the term "material disclosures" would include the following introductory rate information that is required to be disclosed in the account-opening table: (1) The introductory rate; (2) the time period during which the introductory rate will remain in effect; and (3) the rate that will apply after the introductory rate expires.

6. *Variable-rate plans.* Under § 226.15(a)(5)(i)(A), information related to variable-rate plans required to be disclosed in the account-opening table under § 226.6(a)(2)(vi)(A) or § 226.33(c)(6)(i)(A) generally is considered material disclosures. Specifically, the term "material disclosures" would include the following information related to variable-rate plans required to be disclosed in the account-opening table: (1) The fact that the annual percentage rate may change due to the variable-rate feature; (2) an explanation of how the annual percentage rate will be determined; (3) the frequency of changes in the annual percentage rate; (4) any rules relating to changes in the index value and the annual percentage rate, and resulting changes in the payment amount, including, for example, an explanation of payment limitations and rate carryover; and (5) a statement of any limitations on changes in the annual percentage rate, including the minimum and maximum annual percentage rate that may be imposed under the payment plan disclosed in the table, or if no annual or other periodic limitations apply to changes in the annual percentage rate, a statement that no annual limitation exists. The term "material disclosures," however, does not include the disclosure of the lowest and highest value of the index in the past 15 years, even though this information is required to be included in the account-opening table as part of the variable rate information.

15(a)(5)(ii) Tolerances for accuracy of total of all one-time fees imposed by the creditor and any third parties to open the plan.

1. *Effect of the total of all one-time fees imposed to open the plan on termination fee disclosure.* Section 226.15(a)(5)(ii) provides tolerances for the accuracy of the total of all one-time fees imposed by the creditor and any third parties to open the plan and other disclosures affected by the total costs. Fees imposed by the creditor if a consumer terminates the plan prior to its scheduled maturity, which are also a material disclosure for purposes of rescission under § 226.15(a)(5), include waived total costs of one-time fees imposed to open the plan if the creditor will impose those costs on the consumer should the consumer terminate the plan within a certain amount of time after account opening. The tolerances set forth in § 226.15(a)(5)(ii) apply to these waived total costs of one-time fees imposed to open the plan that would be considered fees imposed by the creditor if a consumer terminates the plan prior to its scheduled maturity.◀

15(b) Notice of right to rescind.

▶*15(b)(1) Who receives notice.*◀

1. [*Who receives notice*]▶*In general.* i.◀ Each consumer entitled to rescind must be given:

[•]▶A.◀ [Two copies of the]▶The◀ rescission notice.

[•]▶B. ◀ The material disclosures.

▶ii.◀ [In]▶For example, in◀ a transaction involving joint owners, both of whom are entitled to rescind, both must receive the notice of the right to rescind and disclosures. [For example, if both spouses are entitled to rescind a transaction, each must receive two copies of the rescission notice (one copy to each if the notice is provided in electronic form in accordance with the consumer consent and other applicable provisions of the E-Sign Act) and one copy of the disclosures.]

[2. *Format.* The rescission notice may be physically separated from the material disclosures or combined with the material disclosures, so long as the information required to be included on the notice is set forth in a clear and conspicuous manner. See the model notices in appendix G.]

▶*15(b)(2) Format of notice.*

1. *Failure to format correctly.* The creditor's failure to comply with the format requirements in § 226.15(b)(2) does not by itself constitute a failure to deliver the notice of the right to rescind. However, to deliver the notice properly for purposes of § 226.15(a)(3), the creditor must provide the disclosures required under § 226.15(b)(3) clearly and conspicuously, as described in § 226.15(b)(3) and comment 15(b)(3)–1.

2. *Notice must be in writing in a form the consumer may keep.* The rescission notice must be in writing in a form that the consumer may keep. *See* § 226.5(a)(1)(ii).

15(b)(3) Required content of notice.◀

[3. *Content.* The notice must include all of the information outlined in § 226.15(b)(1) through (5). The requirement in § 226.15(b) that the transaction or occurrence be identified may be met by providing the date of the transaction or occurrence. The notice may include additional information related to the required information, such as:

• A description of the property subject to the security interest.

• A statement that joint owners may have the right to rescind and that a rescission by one is effective for all.

• The name and address of an agent of the creditor to receive notice of rescission.]

▶1. *Clear and conspicuous standard.* Section 226.15(b)(3) requires that the disclosures in § 226.15(b)(3) be given clearly and conspicuously. *See* comments 5(a)(1)–1 and 5(a)(1)–2 for guidance on the clear and conspicuous standard.

2. *Methods for sending notification of exercise.* In addition to providing a postal address for regular mail in the disclosure required under § 226.15(b)(3)(vi), the creditor, at its option, may describe overnight courier, fax, e-mail, in-person, or other methods of communication that the consumer may use to send or deliver written notification to the creditor of exercise of the right of rescission.

3. *Creditor's or its agent's address.* If the creditor designates an agent to receive the consumer's rescission notice, the creditor may include its name along with the agent's name and address in the disclosure required by § 226.15(b)(3)(vi).

4. *Calendar date on which the rescission period expires.* i. In some cases, the creditor cannot provide the calendar date on which the three-business-day period for rescission expires, such as when the transaction is conducted through the mail or when the transaction giving rise to the right of rescission occurs through an escrow agent and involves two or more borrowers who do not sign at the same time. If the creditor cannot provide an accurate deadline, the creditor must provide the calendar date on which it reasonably and in good faith expects the three-business-day period for rescission to expire. For example, when opening a HELOC account, assume that a consumer receives all material disclosures on February 15. If the creditor uses an overnight courier service to deliver closing documents and the rescission notice to the consumer on Monday, March 1, the creditor could instruct the consumer to sign the documents no later than Wednesday, March 3, in which case the creditor should provide Saturday, March 6 as the calendar date after which the three-business-day period for rescission expires. In this example, Saturday, March 6 is the calendar date on which the creditor can reasonably expect the rescission period to expire because the creditor expects that the consumer will receive the notice of the right of rescission on Monday, March 1 with the rest of the closing documents and because the creditor can reasonably assume that the consumer will wait until the deadline of Wednesday, March 3 to sign the closing documents and complete the transaction.

ii. If the creditor provides a date in the notice that gives the consumer a longer period within which to rescind than the actual period for rescission, the notice shall be deemed to comply with the requirement in § 226.15(b)(3)(vii), as long as the creditor permits the consumer to rescind the transaction through the end of the date in the notice. For instance, in the example in comment 15(b)(3)–4.i. above, if the consumer signs the closing documents upon receipt on Monday, March 1, the actual expiration date of the right to rescind would be at the end of Thursday, March 4. The creditor's notice stating that the expiration date is Saturday, March 6 would be deemed compliant with § 226.15(b)(3)(vii), as long as the creditor permits the consumer to rescind through the end of Saturday, March 6.

iii. If the creditor provides a date in the notice that gives the consumer a shorter period within which to rescind than the actual period for rescission, the creditor shall be deemed to comply with the requirement in § 226.15(b)(3)(vii) if the creditor notifies the consumer that the deadline in the first notice of the right of rescission has changed and provides a second notice to the consumer stating that the consumer's right to rescind expires on a calendar date, which is three business days from the date the consumer receives the second notice. For instance, in the example in comment 15(b)(3)–4.i. above, if the consumer disregards the creditor's instructions to sign the closing documents no later than Wednesday, March 3, and signs the closing documents on Thursday, March 4, the actual date after which the right of rescission expires would be Monday, March 8. The creditor's notice stating that the expiration date is Saturday, March 6 would not violate § 226.15(b)(3)(vii) if the creditor discloses to the consumer that the expiration date in the first notice (March 6) has changed and provides a corrected notice with an additional three-business-day period to rescind. For example, the creditor could prepare on Monday, March 8 a second notice stating that the expiration date for the right to rescind is the end of Friday, March 12 and include that second notice in a package delivered by overnight courier to the consumer on Tuesday, March 9. The creditor also could include in the package a cover letter stating that the deadline to cancel the transaction has changed, and refer to the "Deadline to Cancel" section in the second notice.

5. *Form for consumer's exercise of right.* Creditors must provide a space for the consumer's name and property address on the form. Creditors are not obligated to complete the lines in the form for the consumer's name and property address, but may wish to do so to ensure that the consumer who uses the form to exercise the right can be readily identified. At its option, a creditor may include the account number on the form. A creditor may not, however, request or require that the consumer provide the account number on the form (such as including a space labeled "account number" for the consumer to complete).

15(b)(4) Optional content of notice.

1. *Related information.* Section 226.15(b)(4) lists optional disclosures that are related to the disclosures required by § 226.15(b)(3) that may be added to the notice. In addition, at the creditor's option, other information directly related to the disclosures required by § 226.15(b)(3) may be included in the notice. An explanation of the use of pronouns or other references to the parties to the transaction is directly related information. For example, a creditor might add to the notice a statement that "'You' refers to the customer and 'we' refers to the creditor."

15(b)(5)◀【4.】 *Time of providing notice.*

▶1.◀ The notice required by § 226.15(b) ▶must be given◀【need not be given】 before the ▶transaction◀ 【occurrence】 giving rise to the right of rescission. ▶If t◀【T】he creditor 【may】 deliver▶s◀ the notice after the ▶transaction,◀ 【occurrence but】▶ the timing requirement of § 226.15(b)(5) is violated and the right of rescission does not expire until the earlier of three business days after◀ 【rescission period will not begin to run until】 the notice is ▶properly◀ given ▶or upon the occurrence of one of the events listed in § 226.15(a)(3)(ii)(A)◀. For example, if the creditor ▶delivers the material disclosures on Monday, March 1 and account opening occurs on that same day, but the creditor provides the rescission notice on Wednesday, March 24, the right of rescission does not expire until the end of the third business day after Wednesday, March 24, that is, until the end of Saturday, March 27◀ [provides the notice on May 15, but disclosures were given and the credit limit was raised on May 10, the 3-business-day rescission period will run from May 15】.

▶*15(b)(6) Proper form of notice.*

1. A creditor satisfies § 226.15(b)(3) if it provides the model form in Appendix G, or a substantially similar notice, which is properly completed with the disclosures required by § 226.15(b)(3). For example, a notice would not fulfill the requirement to deliver the notice of the right to rescind if the date on which the three-business-day period for rescission terminates was not properly completed because the date was missing or incorrectly calculated. If the creditor provides a date that is later deemed inaccurate, the notice may be deemed to comply with § 226.15(b)(3) if the creditor follows § 226.15(b)(3)(vii) and the guidance in comment 15(b)(3)–4.◀

15(c) Delay of creditor's performance.

1. *General rule.* ▶i.◀ Until the rescission period has expired and the creditor is reasonably satisfied that the consumer has not rescinded, the creditor must not, either directly or through a third party:

【•】▶A.◀ Disburse advances to the consumer.

【•】▶B.◀ Begin performing services for the consumer.

【•】▶C.◀ Deliver materials to the consumer.

▶ii.◀ A creditor may, however, continue to allow transactions under an existing open-end credit plan during a rescission period that results solely from the addition of a security interest in the consumer's principal dwelling. (See comment 15(c)–3 for other actions that may be taken during the delay period.)

2. *Escrow.* The creditor may disburse advances during the rescission period in a valid escrow arrangement. The creditor may not, however, appoint the consumer as "trustee" or "escrow agent" and distribute funds to the consumer in that capacity during the delay period.

3. *Actions during the delay period.* Section 226.15(c) does not prevent the creditor from taking other steps during the delay, short of beginning actual performance. Unless otherwise prohibited, such as by State law, the creditor may, for example:

【•】▶i.◀ Prepare the cash advance check.

【•】▶ii.◀ Perfect the security interest.

【•】▶iii.◀ Accrue finance charges during the delay period.

4. *Performance by third party.* The creditor is relieved from liability for failure to delay performance if a third party with no knowledge that the rescission right has been activated provides materials or services, as long as any debt incurred for materials or services obtained by the consumer during the rescission period is not secured by the security interest in the consumer's dwelling. For example, if a consumer uses a bank credit card to purchase materials from a merchant in an amount below the floor limit, the merchant might not contact the card issuer for authorization and therefore would not know that materials should not be provided.

5. *Delay beyond rescission period.* ▶i.◀ The creditor must wait until it is reasonably satisfied that the consumer has not rescinded ▶within the applicable time period◀. For example, the creditor may satisfy itself by doing one of the following:

【•】▶A.◀ Waiting a reasonable time after expiration of the rescission period to allow for delivery of a mailed notice.

【•】▶B.◀ Obtaining a written statement from the consumer that the right has not been exercised. ▶The statement must be signed and dated by the consumer only at the end of the three-day period.◀

▶ii.◀ When more than one consumer has the right to rescind, the creditor cannot reasonably rely on the assurance of only one consumer, because other consumers may exercise the right.

15(d) Effects of rescission.

15(d)▶(1)◀ Effects of rescission ▶prior to the creditor disbursing funds◀.

[Paragraph] 15(d)(1)▶(i) Effect of consumer's notice of rescission◀.

1. *Termination of security interest.* Any security interest giving rise to the right of rescission becomes void when the consumer 【exercises the right of rescission】▶provides a notice of rescission to a creditor◀. The security interest is automatically negated regardless of its status and whether or not it was recorded or perfected. Under § 226.15【(d)(2)】▶(d)(1)(ii)◀, however, the creditor must take 【any action】▶whatever steps are◀ necessary to 【reflect the fact that】▶terminate◀ the security interest 【no longer exists】.

2. *Extent of termination.* The creditor's security interest is void to the extent that it is related to the occurrence giving rise to the right of rescission. For example, upon rescission:

【•】▶i.◀ If the consumer's right to rescind is activated by the opening of a plan, any security interest in the principal dwelling is void.

[•]►ii.◄ If the right arises due to an increase in the credit limit, the security interest is void as to the amount of credit extensions over the prior limit, but the security interest in amounts up to the original credit limit is unaffected.

[•]►iii.◄ If the right arises with each individual credit extension, then the interest is void as to that extension, and other extensions are unaffected.

[*Paragraph*] 15[*(d)(2)*]►*(d)(1)(ii) Creditor's obligations*◄.

1. *Refunds to consumer.* The consumer cannot be required to pay any amount [in the form of money or property] either to the creditor or to a third party as part of the credit transaction subject to the right of rescission. Any amounts [of this nature] already paid by the consumer must be refunded. *Any amount* includes finance charges already accrued, as well as other charges, such as broker fees, application and commitment fees, or fees for a title search or appraisal, whether paid to the creditor, paid by the consumer directly to the third party, or passed on from the creditor to the third party. It is irrelevant that these amounts may not represent profit to the creditor. For example:

[•]►i.◄ If the occurrence is the opening of the plan, the creditor must return any membership or application fee paid.

[•]►ii.◄ If the occurrence is the increase in a credit limit or the addition of a security interest, the creditor must return any fee imposed for a new credit report or filing fees.

[•]►iii.◄ If the occurrence is a credit extension, the creditors must return fees such as application, title, and appraisal or survey fees, as well as any finance charges related to the credit extension.

2. *Amounts not refundable to consumer.* Creditors need not return any money given by the consumer to a third party outside of the credit transaction, such as costs incurred for a building permit or for a zoning variance. [Similarly, the term *any amount* does not apply to any money or property given by the creditor to the consumer; those amounts must be tendered by the consumer to the creditor under § 226.15(d)(3).]

3. *Reflection of security interest termination.* The creditor must take whatever steps are necessary to [indicate that]►terminate◄ the security interest [is terminated]. Those steps include the cancellation of documents creating the security interest, and the filing of release or termination statements in the public record. [In a transaction involving subcontractors or suppliers that also hold security interests related to the credit transaction, the creditor]►If a mechanic's or materialman's lien is retained by a subcontractor or supplier of a creditor-contractor, the creditor-contractor◄ must ensure that the termination of [their]►that◄ security interest[s] is also reflected. The 20-day period for the creditor's action refers to the time within which the creditor must begin the process. It does not require all necessary steps to have been completed within that time, but the creditor is responsible for [seeing the process through to completion]►ensuring that the process is completed◄.

►4. *Twenty-calendar-day period.* The 20-calendar-day period begins to runs from the date the creditor *receives* the consumer's notice. The creditor is deemed to have received the consumer's notice of rescission if the consumer provides the notice to the creditor or the creditor's agent designated on the notice. Where no designation is provided, the creditor is deemed to have received the notice if the consumer provides it to the servicer. See § 226.15(a)(2)(ii)(A).◄

[*Paragraph 15(d)(3).*

1. *Property exchange.* Once the creditor has fulfilled its obligations under § 226.15(d)(2), the consumer must tender to the creditor any property or money the creditor has already delivered to the consumer. At the consumer's option, property may be tendered at the location of the property. For example, if fixtures or furniture have been delivered to the consumer's home, the consumer may tender them to the creditor by making them available for pick-up at the home, rather than physically returning them to the creditor's premises. Money already given to the consumer *must* be tendered at the creditor's place of business. For purposes of property exchange, the following additional rules apply:

- A cash advance is considered money for purposes of this section even if the creditor knows what the consumer intends to purchase with the money.
- In a 3-party open-end credit plan (that is, if the creditor and seller are not the same or related persons), extensions by the creditor that are used by the consumer for purchases from third-party sellers are considered to be the same as cash advances for purposes of tendering value to the creditor, even though the transaction is a purchase for other purposes under the regulation. For example, if a consumer exercises the unexpired right to rescind after using a 3-party credit card for one year, the consumer would tender the amount of the purchase price for the items charged to the account, rather than tendering the items themselves to the creditor.

2. *Reasonable value.* If returning the property would be extremely burdensome to the consumer, the consumer may offer the creditor its reasonable value rather than returning the property itself. For example, if building materials have already been incorporated into the consumer's dwelling, the consumer may pay their reasonable value.

Paragraph 15(d)(4).

1. *Modifications.* The procedures outlined in § 226.15(d)(2) and (3) may be modified by a court. For example, when a consumer is in bankruptcy proceedings and prohibited from returning anything to the creditor, or when the equities dictate, a modification might be made. The sequence of procedures under § 226.15(d)(2) and (3), or a court's modification of those procedures under § 226.15(d)(4), does not affect a consumer's substantive right to rescind and to have the loan amount adjusted accordingly. Where the consumer's right to rescind is contested by the creditor, a court would normally determine whether the consumer has a right to rescind and determine the amounts owed before establishing the procedures for the parties to tender any money or property.]

►*15 (d)(2) Effects of rescission after the creditor disburses funds.*

15*(d)(2)(i) Effects of rescission if the parties are not in a court proceeding.*

1. *Effect of the process.* The process set forth in § 226.15(d)(2)(i) does not affect the consumer's ability to seek a remedy in court, such as an action to recover damages under section 130 of the act, and/or an action to seek to tender in installments. In addition, a creditor's written statement as described in § 226.15(d)(2)(i)(B) is not an admission by the creditor that the consumer's claim is a valid exercise of the right to rescind.

15(d)(2)(i)(A) Creditor's acknowledgment of receipt.

1. *Twenty-calendar-day period.* The 20-calendar-day period begins to run from the date the creditor *receives* the consumer's notice. The creditor is deemed to have received the consumer's notice of rescission if the consumer provides the notice to the servicer. See comment 15(a)(2)(ii)(B)–1.

15(d)(2)(i)(B) Creditor's written statement.

1. *Written statement regarding tender of money.* If the creditor disbursed money to the consumer, then the creditor's written statement must state the amount of money that the creditor will accept as the consumer's tender. For example, suppose the principal balance owed at the time the creditor received the consumer's notice of rescission was $165,000, the costs paid directly by the consumer at closing were $8,000, and the consumer made interest payments totaling $20,000 from the date of consummation to the date of the creditor's receipt of the consumer's notice of rescission. The creditor's written statement could provide that the acceptable amount of tender is $137,000, or some amount higher or lower than that amount.

2. *Reasonable date.* The creditor must provide the consumer with a reasonable date by which the consumer may tender the money or property described in paragraph (d)(2)(i)(B)(*1*) of this section. For example, it would be reasonable under most circumstances to permit the consumer's tender within 60 days of the creditor mailing or delivering the written statement.

3. *Tender of money or property.* For purposes of determining whether the consumer should tender money or property, the following additional rules apply:

i. A cash advance is considered money for purposes of this section even if the creditor knows what the consumer intends to purchase with the money.

ii. In a three-party open-end credit plan (that is, if the creditor and seller are not the same or related persons), extensions by the creditor that are used by the consumer for purchases from third-party sellers are considered to be the same as cash advances for purposes of tendering value to the creditor, even though the transaction is a purchase for other purposes under the regulation. For example, if a consumer exercises the unexpired right to rescind after using a three-party credit card for one year, the consumer would tender the amount of the purchase price for the items charged to the account, rather than tendering the items themselves to the creditor.

15(d)(2)(i)(C) Consumer's response.

1. *Reasonable value of property.* If returning the property would be extremely burdensome to the consumer, the consumer may offer the creditor its reasonable value rather than returning the property itself. For example, if aluminum siding has already been incorporated into the consumer's dwelling, the consumer may pay its reasonable value.

2. *Location for tender of property.* At the consumer's option, property may be tendered at the location of the property. For example, if aluminum siding or windows have been delivered to the consumer's home, the consumer may tender them to the creditor by making them available for pick-up at the home, rather than physically returning them to the creditor's premises. For example, if aluminum siding has already been incorporated into the consumer's dwelling, the consumer may pay its reasonable value.

15(d)(2)(i)(D) Creditor's security interest.

1. *Extent of termination.* See comment 15(d)(1)(i)–2.

2. *Reflection of security interest termination.* See comment 15(d)(1)(ii)–3.

15(d)(2)(ii) Effects of rescission in a court proceeding.

1. *Valid right of rescission.* The procedures set forth in § 226.15(d)(2)(ii) assume that the consumer's right to rescind has not expired as provided in § 226.15(a)(3)(ii). Thus, if the consumer provides a notice of rescission more than three years after consummation of the transaction, then the consumer's right to rescind has expired, and these procedures do not apply. See § 226.15(a)(3)(ii)(A).

15(d)(2)(ii)(A) Consumer's obligation.

1. *Tender of money.* If the creditor disbursed money to the consumer, the consumer shall tender to the creditor the principal balance owed at the time the creditor received the consumer's notice of rescission less any amounts the consumer has given to the creditor or a third party in connection with the transaction. For example, suppose the principal balance owed at the time the creditor received the consumer's notice of rescission was $165,000, the costs paid directly by the consumer at closing were $8,000, and the consumer made interest payments totaling $20,000 from the date of consummation to the date the creditor received the consumer's notice of rescission. The amount of the consumer's tender would be $137,000. This amount may be reduced by any amounts for damages, attorney's fees, or costs, as the court may determine.

2. *Refunds to consumer.* See comment 15(d)(1)(ii)–1.

3. *Amounts not refundable to consumer.* For purposes of § 226.15(d)(2)(ii)(A), the term *any amount* does not include any money given by the consumer to a third party outside of the credit transaction, such as costs the consumer incurred for a building permit or for a zoning variance. Similarly, the term *any amount* does not apply to any money or property given by the creditor to the consumer.

4. *Condition of consumer's tender.* There may be circumstances where the consumer has no obligation to tender and, therefore, the creditor's obligations would not be conditioned on the consumer's tender. In that case, within 20 calendar days after the creditor's receipt of a consumer's notice of rescission, the creditor would terminate the security interest and refund any amounts the consumer has given to the creditor or a third party in connection with the transaction.

5. *Tender of money or property.* See comment 15(d)(2)(i)(B)-3.

6. *Reasonable value of property.* See comment 15(d)(2)(i)(C)–1.

7. *Location for tender of property.* See comment 15(d)(2)(i)(C)–2.

15(d)(2)(ii)(B) Creditor's obligation.

1. *Extent of termination.* See comment 15(d)(1)(i)–2.

2. *Reflection of security interest termination.* See comment 15(d)(1)(ii)–3.

15(d)(2)(ii)(C) Judicial modification.

1. *Determination of the consumer's right to rescind.* The sequence of procedures under §§ 226.15(d)(2)(ii)(A) and (B), or a court's modification of those procedures under § 226.15(d)(2)(ii)(C), does not affect a consumer's substantive right to rescind and to have the loan amount adjusted accordingly. Where the consumer's right to rescind is contested by the creditor, a court would normally determine first whether the consumer's right to rescind has expired, then the amounts owed by the consumer and the creditor, and then the procedures for the consumer to tender any money or property.

2. *Judicial modification of procedures.* The procedures outlined in §§ 226.15(d)(2)(ii)(A) and (B) may be modified by a court. For example, when a consumer is in bankruptcy proceedings and prohibited from returning anything to the creditor, or when the equities dictate, a modification might be made. A court may modify the consumer's form or manner of tender, such as by ordering payment in installments or by approving the parties' agreement to an alternative form of tender.◄

15(e) Consumer's waiver of right to rescind.

【1. *Need for waiver.* To waive the right to rescind, the consumer must have a *bona fide* personal financial emergency that must be met before the end of the rescission period. The existence of the consumer's waiver will not, of itself, automatically insulate the creditor from liability for failing to provide the right of rescission.】

【2.】►1.◄ *Procedure.* 【To waive or modify the right to rescind, the consumer must give a written statement that specifically waives or modifies the right, and also includes a brief description of the emergency. Each consumer entitled to rescind must sign the waiver statement. In a transaction involving multiple consumers, such as a husband and wife using their home as collateral, the waiver must bear the signatures of both spouses.】►A consumer may modify or waive the right to rescind only after the creditor delivers the notice required by § 226.15(b) and the disclosures required by § 226.6. After delivery of the required notice and disclosures, the consumer may waive or modify the right to rescind by giving the creditor a dated, written statement that specifically waives or modifies the right and describes the *bona fide* personal financial emergency. A waiver is effective only if each consumer entitled to rescind signs a waiver statement. Where there are multiple consumers entitled to rescind, the consumers may, but need not, sign the same waiver statement. See § 226.2(a)(11) to determine which natural persons are consumers with the right to rescind.

2. *Bona fide personal financial emergency.* To modify or waive the right to rescind, there must be a *bona fide* personal financial emergency that requires disbursement of loan proceeds before the end of the rescission period. Whether there is a *bona fide* personal financial emergency is determined by the facts surrounding individual circumstances. A *bona fide* personal financial emergency typically, but not always, will involve imminent loss of or harm to a dwelling or harm to the health or safety of a natural person. A waiver is not effective if the consumer's statement is inconsistent with facts known to the creditor. The following examples describe circumstances that are and are not a *bona fide* personal financial emergency.

i. *Examples—bona fide personal financial emergency.* Examples of a *bona fide* personal financial emergency include the following:

A. The imminent sale of the consumer's home at foreclosure, where the foreclosure sale will proceed unless the loan proceeds are made available to the consumer during the rescission period.

B. The need for loan proceeds to fund immediate repairs to ensure that a dwelling is habitable, such as structural repairs needed due to storm damage, where loan proceeds are needed during the rescission period to pay for the repairs.

C. The imminent need for health care services, such as in-home nursing care for a patient recently discharged from the hospital, where loan proceeds are needed during the rescission period to obtain the services.

ii. Examples—not a bona fide personal financial emergency. Examples of circumstances that are not a *bona fide* personal financial emergency include the following:

A. The consumer's desire to purchase goods or services not needed on an emergency basis, even though the price may increase if purchased after the rescission period.

B. The consumer's desire to invest immediately in a financial product, such as purchasing securities.

iii. Consumer's waiver statement inconsistent with facts. The conditions for a waiver are not met where the consumer's waiver statement is inconsistent with facts known to the creditor. For example, the conditions for a waiver are not met where the consumer's waiver statement states that loan proceeds are needed during the rescission period to abate flooding in a consumer's basement, but the creditor is aware that there is no flooding.◄

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Section 226.16—Advertising

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16(d) Additional requirements for home-equity plans.

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5. *Promotional rates and payments in advertisements for home-equity plans.* Section 226.16(d)(6) requires additional

disclosures for promotional rates or payments.

i. *Variable-rate plans.* In advertisements for variable-rate plans, if the advertised annual percentage rate is based on ⟦(or the advertised payment is derived from)⟧ the index and margin that will be used to make rate ⟦(or payment)⟧ adjustments over the term of the ⟦loan⟧ ► plan ◄, then there is no promotional rate⟦ or promotional payment⟧. If, however, the advertised annual percentage rate is not based on ⟦(or the advertised payment is not derived from)⟧ the index and margin that will be used to make rate ⟦(or payment)⟧ adjustments, and a reasonably current application of the index and margin would result in a higher annual percentage rate ⟦(or, given an assumed balance, a higher payment)⟧ then there is a promotional rate⟦ or promotional payment⟧. ► If the advertised payment is the same as other minimum payments under the plan derived by applying a reasonably current index and margin and given an assumed balance, then there is no promotional payment. If, however, the advertised payment is less than other minimum payments under the plan based on the same assumptions, then there is a promotional payment. For example, if the advertised payment is an interest-only payment applicable during the draw period, and minimum payments during the repayment period will be higher because they are based on a schedule that fully amortizes the outstanding balance by the end of the repayment period, or there is no repayment period and a balloon payment would result at the end of the draw period, then the advertised payment is a promotional payment. ◄

ii. *Equal prominence, close proximity.* Information required to be disclosed in § 226.16(d)(6)(ii) that is immediately next to or directly above or below the promotional rate or payment (but not in a footnote) is deemed to be closely proximate to the listing. Information required to be disclosed in § 226.16(d)(6)(ii) that is in the same type size as the promotional rate or payment is deemed to be equally prominent.

iii. *Amounts and time periods of payments.* Section 226.16(d)(6)(ii)(C) requires disclosure of the amount and time periods of any payments that will apply under the plan. This section may require disclosure of several payment amounts, including any balloon payment. For example, if an advertisement for a home-equity plan offers a $100,000 five-year line of credit and assumes that the entire line is drawn resulting in a minimum payment of $800 per month for the first six months, increasing to $1,000 per month after month six, followed by a $50,000 balloon payment after five years, the advertisement must disclose the amount and time period of each of the two monthly payment streams, as well as the amount and timing of the balloon payment, with equal prominence and in close proximity to the promotional payment. However, if the final payment could not be more than twice the amount of other minimum payments, the final payment need not be disclosed. ► In another example, if an advertisement for a home-equity plan offers a $100,000 line of credit with a 10-year draw period and a 10-year repayment period and assumes that the entire line is drawn resulting in an interest-only minimum payment of $300 per month during the draw period, increasing to $750 per month during the repayment period, the advertisement must disclose the amount and time period of each of the two monthly payment streams, with equal prominence and in close proximity to the promotional payment. ◄

iv. ⟦*Plans other than variable-rate plans*⟧ ►*Additional draw* ◄. ⟦For a plan other than a variable-rate plan, if⟧ ► If ◄ an advertised payment is calculated in the same way as other payments based on an assumed balance, the fact that the minimum payment could increase ⟦solely⟧ if the consumer made an additional draw does not make the payment a promotional payment. For example, if a payment of $500 results from an assumed $10,000 draw, and the payment would increase to $1,000 if the consumer made an additional $10,000 draw, the payment is not a promotional payment.

v. *Conversion option.* Some home-equity plans permit the consumer to repay all or part of the balance during the draw period at a fixed rate (rather than a variable rate) and over a specified time period. The fixed-rate conversion option does not, by itself, make the rate or payment that would apply if the consumer exercised the fixed-rate conversion option a promotional rate or payment.

vi. *Preferred-rate provisions.* Some home-equity plans contain a preferred-rate provision, where the rate will increase upon the occurrence of some event, such as the consumer-employee leaving the creditor's employ, the consumer closing an existing deposit account with the creditor, or the consumer revoking an election to make automated payments. A preferred-rate provision does not, by itself, make the rate or payment under the preferred-rate provision a promotional rate or payment.

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► 10. *Comparisons in advertisements.* The requirements of § 226.16(d)(8) apply to all advertisements for home-equity plans, including radio and television advertisements. A comparison includes a claim about the amount a consumer may save under the advertised plan. For example, a statement such as: "Save $400 per month on a balance of $35,000," constitutes an implied comparison between the advertised plan's payment and a consumer's actual or hypothetical payment under alternative credit plans.

11. *Variable-rate plans.* The requirements of § 226.16(d)(8) apply to comparisons in advertisements for variable-rate plans even if the payments or rates shown for the advertised plan are not promotional payments or rates, as defined in § 226.16(d)(6)(i). In this case, the payment or rate may not be available for the full term of the plan because the rate may vary in accordance with the index.

12. *Misleading claims of debt elimination.* The prohibition in § 226.16(d)(11) against misleading claims of debt elimination or waiver or forgiveness does not apply to legitimate statements that the advertised product may reduce debt payments, consolidate debts, or shorten the term of the debt. Examples of misleading claims of debt elimination or waiver or forgiveness of loan terms with, or obligations to, another creditor of debt include: "Get out of debt;" "Take advantage of this great deal to get rid of all your debt;" "Celebrate life, debt-free;" and "⟦Name of home-equity plan⟧ gives you an easy-to-follow plan for being debt-free." ◄

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Subpart C—Closed-End Credit

Section 226.17—General Disclosure Requirements

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17(c) Basis of disclosures and use of estimates.

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Paragraph 17(c)(1).

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⟦14. *Reverse mortgages.* Reverse mortgages, also known as reverse annuity or home equity conversion mortgages, typically involve the disbursement of monthly advances to the consumer for a fixed period or until the occurrence of an event such as the consumer's death. Repayment of the loan (generally a single payment of principal and accrued interest) may be required to be made at the end of the disbursements or, for example, upon the death of the consumer. In disclosing these transactions, creditors must apply the following rules, as applicable:

- If the reverse mortgage has a specified period for disbursements but repayment is due only upon the occurrence of a future event such as the death of the consumer, the creditor must assume that disbursements will be made until they are scheduled to end. The creditor must assume repayment will occur when disbursements end (or within a period following the final disbursement which is not longer than the regular interval between disbursements). This assumption should be used even though repayment may occur before or after the disbursements are scheduled to end. In such cases, the creditor may include a statement such as "The disclosures assume that you will repay the loan at the time our payments to you end. As provided in your agreement, your repayment may be required at a different time."
- If the reverse mortgage has neither a specified period for disbursements nor a specified repayment date and these terms will be determined solely by reference to future events including the consumer's death, the creditor may assume that the disbursements will end upon the consumer's death (estimated by using actuarial tables, for example) and that repayment will be required at the same time (or within a period following the date of the final disbursement which is not longer than the regular interval for disbursements). Alternatively, the creditor may base the disclosures upon another future event it estimates will be most likely to occur first. (If terms will be determined by reference to future events which do not include the consumer's death, the creditor must base the disclosures upon the occurrence of the event estimated to be most likely to occur first.)
- In making the disclosures, the creditor must assume that all disbursements and

accrued interest will be paid by the consumer. For example, if the note has a nonrecourse provision providing that the consumer is not obligated for an amount greater than the value of the house, the creditor must nonetheless assume that the full amount to be disbursed will be repaid. In this case, however, the creditor may include a statement such as "The disclosures assume full repayment of the amount advanced plus accrued interest, although the amount you may be required to pay is limited by your agreement."

• Some reverse mortgages provide that some or all of the appreciation in the value of the property will be shared between the consumer and the creditor. Such loans are considered variable-rate mortgages, as described in comment 17(c)(1)–11, and the appreciation feature must be disclosed in accordance with § 226.18(f)(1). If the reverse mortgage has a variable interest rate, is written for a term greater than one year, and is secured by the consumer's principal dwelling, the shared appreciation feature must be described under § 226.19(b)(2)(vii).】

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17(d)–Multiple creditors; multiple consumers.

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2. *Multiple consumers.* When two consumers are joint obligors with primary liability on an obligation, the disclosures may be given to either one of them. If one consumer is merely a surety or guarantor, the disclosures must be given to the principal ► obligor ◄ 【debtor】. In rescindable transactions, however, separate disclosures must be given to each consumer who has the right to rescind under § 226.23, 【although the】 ► except that:

i. The ◄ disclosures required under § 226.19(b) need only be provided to the consumer who expresses an interest in a variable-rate loan program.

►ii. The disclosures required under § 226.19(a) need only be provided to one consumer who will have primary liability on the obligation. Material disclosures under § 226.23(a)(5) and the notice of the right to rescind required by § 226.23(b), however, must be given before consummation to each consumer who has the right to rescind, including any such consumer who is not an obligor. *See* §§ 226.2(a)(11), 226.17(b), 226.23(b). ◄

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17(f) Early disclosures.

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Paragraph 17(f)(2).

1. *Irregular transactions.* For purposes of this paragraph, a transaction is deemed to be "irregular" according to the definition in 【footnote 46 of】 § 226.22(a)(3).

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Section 226.18—Content of Disclosures

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18(k) Prepayment.

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Paragraph 18(k)(1).

1. *Penalty.* 【This】 ► Section 226.18(k)(1) ◄ applies only to those transactions in which the interest calculation takes account of all scheduled reductions in principal, as well as transactions in which interest calculations are made daily. The term *penalty* as used here encompasses only those charges that are assessed strictly because of the prepayment in full of a simple-interest obligation, as an addition to all other amounts. Items which are penalties include, for example:

【• Interest charges for any period after prepayment in full is made.】 ►i. Charges determined by treating the loan balance as outstanding for a period after prepayment in full and applying the interest rate to such "balance," even if the charge results from the interest accrual amortization method used on the transaction. "Interest accrual amortization" refers to the method by which the amount of interest due for each period (e.g., month) in a transaction's term is determined. For example, "monthly interest accrual amortization" treats each payment as made on the scheduled, monthly due date even if it is actually paid early or late (until the expiration of a grace period). Thus, under monthly interest accrual amortization, if the amount of interest due on May 1 for the preceding month of April is $3000, the creditor will require payment of $3000 in interest whether the payment is made on April 20, on May 1, or on May 10. In this example, if the interest charged for the month of April upon prepayment in full on April 20 is $3000, the charge constitutes a prepayment penalty of $1000 because the amount of interest actually earned through April 20 is only $2000. ◄ (See the commentary to § 226.17(a)(1) regarding disclosure of 【interest】 ► such ◄ charges assessed for periods after prepayment in full as directly related information ►, for transactions not secured by real property or a dwelling ◄.)

【•】 ►ii. ◄ A minimum finance charge in a simple-interest transaction. (See the commentary to § 226.17(a)(1) regarding the disclosure of a minimum finance charge as directly related information.) Items which are not penalties include, for example, loan guarantee fees.

* * * * *

Section 226.19—【Certain Mortgage and Variable-Rate Transactions.】 ► Early Disclosures and Adjustable-rate Disclosures for Transactions Secured by Real Property or a Dwelling.◄

1. *Coverage.* Section 226.19 applies to transactions secured by real property or a dwelling, other than home equity lines of credit subject to § 226.5b. Creditors must make the disclosures required by § 226.19 even if the transaction is not subject to the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. 2602 *et seq.,* and its implementing Regulation X, 24 CFR 3500.1 *et seq.,* administered by the U.S. Department of Housing and Urban Development. For example, disclosures are required for construction loans that are not covered by RESPA or Regulation X because they are not considered "federally related mortgage loans." *See* 12 U.S.C. 2602(1); 15 CFR 3500.2(b). However, § 226.19 only applies to transactions that are offered or extended to a consumer primarily for personal, family, or household purposes, even if the transactions are secured by real property or a dwelling. TILA and Regulation Z do not apply to transactions that are primarily for business, commercial, or agricultural purposes. *See* 15 U.S.C. 1603(1); § 226.3(a)(2). *See also* § 226.2(a)(12) and (b)(2). Section 226.19(a)(4) contains special disclosure timing requirements for mortgage transactions secured by a consumer's interest in a timeshare plan described in 11 U.S.C. 101(53(D)).

19(a) Mortgage transactions.

1. *Multiple consumers.* For a discussion of how to determine to which consumers creditors must provide the disclosures required under § 226.19(a), see comment 17(d)–2.◄

► Paragraph 19(a)(1) ◄

19(a)(1)(i) Time of► good faith estimates of◄ disclosure ►s ◄.

【1. *Coverage.* This section requires early disclosure of credit terms in mortgage transactions that are secured by a consumer's dwelling (other than home equity lines of credit subject to § 226.5b or mortgage transactions secured by an interest in a timeshare plan) that are also subject to the Real Estate Settlement Procedures Act (RESPA) and its implementing Regulation X, administered by the Department of Housing and Urban Development (HUD). To be covered by § 226.19, a transaction must be a Federally related mortgage loan under RESPA. "Federally related mortgage loan" is defined under RESPA (12 U.S.C. 2602) and Regulation X (24 CFR 3500.2), and is subject to any interpretations by HUD.】

【2.】►1.◄ *Timing and use of estimates.* The disclosures required by § 226.19(a)(1)(i) must be delivered or mailed not later than three business days after the creditor receives the consumer's written application. The general definition of "business day" in § 226.2(a)(6)—a day on which the creditor's offices are open to the public for substantially all of its business functions—is used for purposes of § 226.19(a)(1)(i). *See* comment 2(a)(6)–1. This general definition is consistent with the definition of "business day" in HUD's Regulation X—a day on which the creditor's offices are open to the public for carrying on substantially all of its business functions. *See* 24 CFR 3500.2. Accordingly, the three-business-day period in § 226.19(a)(1)(i) for making early disclosures coincides with the time period within which creditors 【subject to RESPA】 must provide good faith estimates of settlement costs ►for transactions subject to RESPA◄. If the creditor does not know the precise credit terms, the creditor must base the disclosures ►required by § 226.19(a)(1)(i)◄ on the best information reasonably available and indicate that the disclosures are estimates under § 226.17(c)(2). If many of the disclosures are estimates, the creditor may include a statement to that effect (such as "all numerical disclosures 【except the late-payment disclosure】 are estimates") instead of separately labeling each estimate. In the alternative, the creditor may label as an estimate only the items primarily affected by unknown information. (*See* the commentary to § 226.17(c)(2).) The creditor may provide explanatory material concerning the estimates and the contingencies that may affect the actual terms, in accordance with the commentary to § 226.17(a)(1)[.]►and § 226.37. The disclosures required by § 226.19(a)(2) may not contain estimates, however, with limited exceptions. See the commentary on § 226.19(a)(2) for a discussion of limitations on estimates in disclosures made under that subsection.◄

[3.]►2.◄ *Written application.* Creditors may rely on RESPA and Regulation X (including any interpretations issued by HUD) in deciding whether a "written application" has been received. In general, Regulation X defines an "application" to mean the submission of a borrower's financial information in anticipation of a credit decision relating to a federally-related mortgage loan. *See* 24 CFR 3500.2(b). ►Creditors may rely on RESPA and Regulation X even for a transaction not subject to RESPA.◄An application is received when it reaches the creditor in any of the ways applications are normally transmitted—by mail, hand delivery, or through an intermediary agent or broker. (*See* [comment 19(b)–3]►the commentary on § 226.19(d)(3)◄ for guidance in determining whether or not the transaction involves an intermediary agent or broker.) If an application reaches the creditor through an intermediary agent or broker, the application is received when it reaches the creditor, rather than when it reaches the agent or broker.

[4.]►3.◄ *Denied or withdrawn application.* The creditor may determine within the three-business-day period that the application will not or cannot be approved on the terms requested, as, for example, when a consumer applies for a type or amount of credit that the creditor does not offer, or the consumer's application cannot be approved for some other reason. In that case, or if the consumer withdraws the application within the three-business-day waiting period, the creditor need not make the disclosures under this section. If the creditor fails to provide early disclosures and the transaction is later consummated on the original terms, the creditor will be in violation of this provision. If, however, the consumer amends the application because of the creditor's unwillingness to approve it on its original terms, no violation occurs for not providing disclosures based on the original terms. But the amended application is a new application subject to § 226.19(a)(1)(i).

[5.]►4.◄ *Itemization of amount financed.* In many mortgage transactions ►subject to RESPA◄, the itemization of the amount financed required by [§ 226.18(c)]►§ 226.38(j)◄ will contain items, such as origination fees or points, that also must be disclosed as part of the good faith estimates of settlement costs required under RESPA. Creditors furnishing the RESPA good faith estimates need not give consumers any itemization of the amount financed►, whether or not a transaction is subject to RESPA◄.

19(a)(1)(ii) Imposition of fees.

1. *Timing of fees.* The consumer must receive the disclosures required by this section before paying or incurring any fee imposed by a creditor or other person in connection with the consumer's application for a mortgage transaction that is subject to § 226.19(a)(1)(i), except as provided in § 226.19(a)(1)(iii). ►(Under § 226.19(a)(1)(iv), fees paid after the consumer receives disclosures must be refundable for three business days after the consumer receives those disclosures.)◄ If the creditor delivers the disclosures to the consumer in person, a fee may be imposed anytime after delivery. If the creditor places the disclosures in the mail, the creditor may impose a fee after the consumer receives the disclosures or, in all cases, after midnight [on the third business day] following ►the third business day after◄ mailing of the disclosures. ►Creditors that use electronic mail or a courier to provide disclosures may also follow this approach. Whatever method is used to provide disclosures, creditors may rely on documentation of receipt in determining when a fee may be imposed.◄ For purposes of § 226.19(a)(1)(ii), the term "business day" means all calendar days except Sundays and legal public holidays referred to in § 226.2(a)(6). *See* [C]►c◄omment 2(a)(6)–2. For example, assuming that there are no intervening legal public holidays, a creditor that receives the consumer's written application on Monday and mails the early mortgage loan disclosure on Tuesday may impose a fee on the consumer [after midnight on Friday.]►on Saturday◄.

2. *Fees restricted.* A creditor or other person may not impose any fee, such as for an appraisal, underwriting, or broker services, until the consumer has received the disclosures required by § 226.19(a)(1)(i). [The only]►An◄ exception to the fee restriction allows the creditor or other person to impose a *bona fide* and reasonable fee for obtaining a consumer's credit history, such as for a credit report(s). ►*See* § 226.19(a)(1)(iii).◄ Further, if housing or credit counseling is required by applicable law, a *bona fide* and reasonable charge imposed by a counselor or counseling agency for such counseling is not a "fee" for purposes of § 226.19(a)(1)(ii). *See* § 226.19(a)(1)(v).◄

3. *Collection of fees.* A creditor complies with § 226.19(a)(1)(ii) if—

i. The creditor receives a consumer's written application directly from the consumer and does not collect any fee, other than a fee for obtaining a consumer's credit history, until the consumer receives the early mortgage loan disclosure.

ii. A third party submits a consumer's written application to a creditor and both the creditor and third party do not collect any fee, other than a fee for obtaining a consumer's credit history, until the consumer receives the early mortgage loan disclosure from the creditor.

iii. A third party submits a consumer's written application to a [second]►subsequent◄ creditor following a prior creditor's denial of an application made by the same consumer (or following the consumer's withdrawal), and, if a fee already has been assessed, the new creditor or third party does not collect or impose any additional fee►, other than a fee for obtaining a consumer's credit history,◄ until the consumer receives an early mortgage loan disclosure from the new creditor.

►4. *Examples.* Under § 226.19(a)(1)(ii), neither a creditor nor any other person may impose a fee on a consumer in connection with the consumer's application for a mortgage transaction before the consumer has received the disclosures required by § 226.19(a)(1)(i) to be provided within three business days after the creditor receives the consumer's application. A fee is imposed in violation of § 226.19(a)(1)(ii) if, before a consumer receives the early disclosures required by § 226.19(a)(1)(i), the consumer is obligated to pay a fee or the consumer pays a fee, even if the fee is refundable. For example, a fee is imposed if a creditor takes the consumer's check for payment, whether or not the check is post-dated and/or the creditor agrees to wait to until the consumer receives the disclosures required by § 226.19(a)(1)(i) to deposit the check. For further example, a fee is imposed if a creditor uses the consumer's credit card or debit card to initiate payment or places a hold on the consumer's account. A fee is not imposed, however, if a creditor or other person takes a number, code, or other information that identifies a consumer's account before a consumer receives the disclosures required by § 226.19(a)(1)(i), for example, on an application form, but does not use the information to initiate payment from or place a hold on the account until after the consumer receives those disclosures.

5. *Reverse mortgages subject to § 226.33.* Under § 226.19(a)(1)(ii), fees generally may be imposed after a consumer receives the disclosures required by § 226.19(a)(1)(i). However, under § 226.19(a)(1)(iv), a nonrefundable fee may not be imposed within three business days after a consumer receives the early disclosures. For reverse mortgages subject to §§ 226.19 and 226.33, moreover, creditors and other persons also must comply with the restriction on imposing a nonrefundable fee within three business days after a consumer completes required counseling, under § 226.40(b)(2). *See* comment 40(b)(2)(i)–4.i.◄

19(a)(1)(iii) Exception to fee restriction.

1. *Requirements.* A creditor or other person may impose a fee before the consumer receives the required disclosures if it is for obtaining the consumer's credit history, such as by purchasing a credit report(s) on the consumer. The fee also must be *bona fide* and reasonable in amount. For example, a creditor may collect a fee for obtaining a credit report(s) if it is in the creditor's ordinary course of business to obtain a credit report(s). If the criteria in § 226.19(a)(1)(iii) are met, the creditor may describe or refer to this fee, for example, as an "application fee."

►*19(a)(1)(iv) Imposition of nonrefundable fees.*

1. *Business day.* For purposes of § 226.19(a)(1)(iv), the term "business day" means all calendar days except Sundays and the legal public holidays referred to in § 226.2(a)(6). *See* comment 2(a)(6)–2.

2. *Refund period.* A fee may be imposed after the consumer receives the disclosures required under § 226.19(a)(1)(i) and before the expiration of three business days, but the fee must be refunded if, within three

business days after receiving the required information, the consumer decides not to enter into a loan agreement and requests a refund. (A notice of the right to receive a refund is provided in the publication entitled "Key Questions to Ask About Your Mortgage," which must be provided at the time an application form is provided to the consumer or before the consumer pays a nonrefundable fee, whichever is earlier. *See* § 226.19(c).) A creditor or other person may, but need not, rely on the presumption that a consumer receives those disclosures three business days after they are mailed to the consumer or delivered to the consumer by means other than delivery in person. *See* § 226.19(a)(1)(ii) and comment 19(a)(1)(ii)–1. If a creditor or other person relies on that presumption of receipt, a nonrefundable fee may not be imposed until after the end of the sixth business day following the day disclosures are mailed or delivered by means other than in person. The following examples illustrate how to determine when the refund period ends (assuming that all referenced days are business days and there are no intervening legal public holidays):

i. Assume a creditor receives a consumer's application on Monday, and the consumer receives the early disclosures in person on Tuesday and that same day pays an application fee (distinct from a previously paid fee for obtaining the consumer's credit history). The fee must be refundable through the end of Friday, the third business day after the consumer received the early disclosures. If the consumer does not request a refund of the fee by the end of Friday, however, the fee ceases to be refundable under § 226.19(a)(1)(iv), even if on Saturday or thereafter the consumer decides not to enter into the transaction.

ii. Assume a creditor receives a consumer's application on Monday and places the early disclosures in the mail on Tuesday. The creditor relies on the presumption of receipt and the consumer is considered to receive the early disclosures on Friday, the third business day after the disclosures are mailed. The consumer pays an appraisal fee the next Monday. The fee must be refundable through the end of Tuesday, the third business day after the consumer received the early disclosures and the sixth business day after the disclosures were mailed. If the consumer does not request a refund of the fee by the end of Tuesday, however, the fee ceases to be refundable under § 226.19(a)(1)(iv), even if on Wednesday or thereafter the consumer decides not to enter into the transaction.

iii. Assume a creditor receives a consumer's application on Monday and places the early disclosures in the mail on Wednesday. The consumer receives the disclosures on Friday and pays an application fee the following Wednesday. The fee need not be refundable, because the refund period expired at the end of the previous day, Tuesday, the third business day after the consumer received the early disclosures.

3. *Reverse mortgages subject to § 226.33.* Under § 226.19(a)(1)(iv), a nonrefundable fee may not be imposed within three business days after a consumer receives the early disclosures required by § 226.19(a)(1)(i) for a closed-end mortgage secured by real property or a dwelling. *See* § 226.19(a)(1)(iv). For reverse mortgages subject to §§ 226.19 and 226.33, moreover, creditors and other persons also must comply with the restriction on imposing a nonrefundable fee within three business days after a consumer completes required counseling, under § 226.40(b)(2). *See* comment 40(b)(2)(i)–4.ii.

19(a)(1)(v) Counseling fee.

1. *In general.* For purposes of § 226.19(a)(1)(ii), if housing or credit counseling is required by applicable law, a *bona fide* and reasonable charge imposed for such counseling is not a fee imposed on a consumer in connection with the consumer's application for a mortgage transaction and therefore may be imposed before the consumer receives the early disclosures required by § 226.19(a)(1)(i). For example, a fee for housing counseling that a consumer must complete in connection with a reverse mortgage insured by the U.S. Department of Housing and Urban Development may be imposed before the consumer receives the early disclosures. Notwithstanding § 226.19(a)(1)(iv), a charge for counseling that is not considered a fee imposed in connection with a mortgage transaction under § 226.19(a)(1)(ii) need not be refundable if the consumer does not proceed with a loan transaction.◄

►*Paragraph*◄ *19(a)(2)* [*Waiting periods required.*]

1. *Business day definition.* For purposes of § 226.19(a)(2), "business day" means all calendar days except Sundays and the legal public holidays referred to in § 226.2(a)(6). *See* comment 2(a)(6)–2.

2. *Consummation after* [*both*]►*all*◄ *waiting periods expire.* Consummation may not occur until both the seven-business-day waiting period and the three-business-day waiting period►(s)◄ have expired. For example, assume a creditor delivers the early disclosures to the consumer in person or places them in the mail on Monday, June 1, and the creditor then delivers [corrected]►new◄ disclosures in person to the consumer on Wednesday, June 3. Although Saturday, June 6 is the third business day after the consumer received the [corrected]►new◄ disclosures, consummation may not occur before Tuesday, June 9, the seventh business day following delivery or mailing of the early disclosures.

19(a)(2)(i) Seven-business-day waiting period.

1. *Timing.* The disclosures required by § 226.19(a)(1)(i) must be delivered or placed in the mail no later than the seventh business day before consummation. The seven-business-day waiting period begins [when]►the first business day after◄ the creditor delivers the early disclosures or places them in the mail, not [when]►the first business day after◄ the consumer receives or is deemed to have received the early disclosures. For example, if a creditor delivers the early disclosures to the consumer in person or places them in the mail on [Monday, June 1]►Sunday, May 31◄, consummation may occur on or after [Tuesday, June 9]►Monday, June 8◄, the seventh business day following delivery or mailing of the early disclosures.

►*19(a)(2)(ii) Three-business-day waiting period.*

1. *New disclosures in all cases.* The creditor must provide new disclosures under § 226.38 so that the consumer receives them not later than the third business day before consummation, even if the new disclosures are identical to the early disclosures provided under § 226.19(a)(1)(i).

2. *Content of disclosures.* Disclosures made under § 226.19(a)(2)(ii) must contain each of the applicable disclosures required by § 226.38.

3. *Estimates.* Section 226.19(a)(2)(ii) provides that only the disclosures required by §§ 226.38(c)(3)(i)(C), 226.38(c)(3)(ii)(C), 226.38(c)(6)(i), and 226.38(e)(5)(i) may be estimated disclosures. Because estimated amounts of escrowed taxes and insurance premiums and mortgage insurance premiums disclosed (as applicable) under §§ 226.38(c)(3)(i)(C), 226.38(c)(3)(ii)(C), and 226.38(c)(6)(i) are components of the total periodic payments disclosure required by §§ 226.38(c)(3)(i)(D) and 226.38(c)(3)(ii)(D) and the total payments disclosure required by § 226.38(e)(5)(i), those disclosures are estimated disclosures. (A total payments disclosure is not required for loans with a negative amortization feature subject to § 226.38(c)(6).) Creditors may estimate components of the total periodic payments disclosures required by §§ 226.38(c)(3)(i)(C), 226.38(c)(3)(ii)(C) and 226.38(c)(6)(i) and the total payment disclosure required by § 226.38(e)(5)(i) only to the extent the estimated escrowed amounts and mortgage insurance premiums affect those disclosures.

4. *Timing.* The creditor must provide final disclosures so that the consumer receives them not later than the third business day before consummation. For example, for consummation to occur on Thursday, June 11, the consumer must receive the disclosures on or before Monday, June 8.◄

Alternative 1—Paragraph 19(a)(2)(iii)

►*19(a)(2)(iii) Additional three-business-day waiting period.*

1. *Conditions for corrected disclosures.* A disclosed annual percentage rate is accurate for purposes of § 226.19(a)(2)(iii) if the disclosure is accurate under § 226.19(a)(2)(iv). If a change occurs that does not render the annual percentage rate inaccurate and no other change occurs, the creditor must disclose the changed terms before consummation, consistent with § 226.17(f).

2. *Content of corrected disclosures.* Disclosures made under § 226.19(a)(2)(iii) must contain each of the applicable disclosures required by § 226.38.

3. *Estimates.* In disclosures provided under § 226.19(a)(2)(iii), only the disclosures required by §§ 226.38(c)(3)(i)(C), 226.38(c)(3)(ii)(C), 226.38(c)(6)(i) and 226.38(e)(5)(i) may be estimates. See comment 19(a)(2)(ii)–3 for a discussion of which of the disclosures required under § 226.38 creditors may estimate.

4. *Timing.* The creditor must provide the corrected disclosures so that the consumer receives them not later than the third business day before consummation. For example, for consummation to occur on

Saturday, June 13, the consumer must receive the disclosures on or before Wednesday, June 10.◀

[19(a)(2)(ii) Three-business-day waiting period.*

1. *Conditions for redisclosure.* If, at the time of consummation, the annual percentage rate disclosed is accurate under § 226.22, the creditor does not have to make corrected disclosures under § 226.19(a)(2). If, on the other hand, the annual percentage rate disclosed is not accurate under § 226.22, the creditor must make corrected disclosures of all changed terms (including the annual percentage rate) so that the consumer receives them not later than the third business day before consummation. For example, assume consummation is scheduled for Thursday, June 11 and the early disclosures for a regular mortgage transaction disclose an annual percentage rate of 7.00%.

i. On Thursday, June 11, the annual percentage rate will be 7.10%. The creditor is not required to make corrected disclosures under § 226.19(a)(2).

ii. On Thursday, June 11, the annual percentage rate will be 7.15%. The creditor must make corrected disclosures so that the consumer receives them on or before Monday, June 8.

2. *Content of new disclosures.* If redisclosure is required, the creditor may provide a complete set of new disclosures, or may redisclose only the changed terms. If the creditor chooses to provide a complete set of new disclosures, the creditor may but need not highlight the new terms, provided that the disclosures comply with the format requirements of § 226.17(a). If the new creditor chooses to disclose only the new terms, all the new terms must be disclosed. For example, a different annual percentage rate will almost always produce a different finance charge, and often a new schedule of payments; all of these changes would have to be disclosed. If, in addition, unrelated terms such as the amount financed or prepayment penalty vary from those originally disclosed, the accurate terms must be disclosed. However, no new disclosures are required if the only inaccuracies involve estimates other than the annual percentage rate, and no variable-rate feature has been added. *See* § 226.17(f). For a discussion of the requirement to redisclose when a variable-rate feature is added, see comment 17(f)–2. For a discussion of redisclosure requirements in general, see the commentary on § 226.17(f).

3. *Timing.* When redisclosures are necessary because the annual percentage rate has become inaccurate, they must be received by the consumer no later than the third business day before consummation. (For redisclosures triggered by other events, the creditor must provide corrected disclosures before consummation. *See* § 226.17(f).) If the creditor delivers the corrected disclosures to the consumer in person, consummation may occur any time on the third business day following delivery. If the creditor provides the corrected disclosures by mail, the consumer is considered to have received them three business days after they are placed in the mail, for purposes of determining when the three-business-day waiting period required under § 226.19(a)(2)(ii) begins. Creditors that use electronic mail or a courier other than the postal service may also follow this approach.

4. *Basis for annual percentage rate comparison.* To determine whether a creditor must make corrected disclosures under § 226.22, a creditor compares (a) what the annual percentage rate will be at consummation to (b) the annual percentage rate stated in the most recent disclosures the creditor made to the consumer. For example, assume consummation for a regular mortgage transaction is scheduled for Thursday, June 11, the early disclosures provided in May stated an annual percentage rate of 7.00%, and corrected disclosures received by the consumer on Friday, June 5 stated an annual percentage rate of 7.15%:

i. On Thursday, June 11, the annual percentage rate will be 7.25%, which exceeds the most recently disclosed annual percentage rate by less than the applicable tolerance. The creditor is not required to make additional corrected disclosures or wait an additional three business days under § 226.19(a)(2).

ii. On Thursday, June 11, the annual percentage rate will be 7.30%, which exceeds the most recently disclosed annual percentage rate by more than the applicable tolerance. The creditor must make corrected disclosures such that the consumer receives them on or before Monday, June 8.]

Alternative 2—Paragraph 19(a)(2)(iii)

▶*19(a)(2)(iii) Additional three-business-day waiting period.*

1. *Conditions for corrected disclosures.* If the annual percentage rate disclosed under § 226.19(a)(2)(ii) changes so that it is not accurate under § 226.19(a)(2)(iv) or an adjustable-rate feature is added (*see* comment 17(f)–2), the creditor must make corrected disclosures of all changed terms (including the annual percentage rate) so that the consumer receives them not later than the third business day before consummation. (If a change occurs that does not render the annual percentage rate on the early disclosures inaccurate, the creditor must disclose the changed terms before consummation, consistent with § 226.17(f).) For an example illustrating whether or not and by when a consumer must receive corrected disclosures when a disclosed annual percentage rate changes, see comment 19(a)(2)(iii)–4.◀

[*19(a)(2)(ii) Three-business-day waiting period.*

1. *Conditions for redisclosure.* If, at the time of consummation, the annual percentage rate disclosed is accurate under § 226.22, the creditor does not have to make corrected disclosures under § 226.19(a)(2). If, on the other hand, the annual percentage rate disclosed is not accurate under § 226.22, the creditor must make corrected disclosures of all changed terms (including the annual percentage rate) so that the consumer receives them no later than the third business day before consummation. For example, assume consummation is scheduled for Thursday, June 11 and the early disclosures for a regular mortgage transaction disclose an annual percentage rate of 7.00%:

i. On Thursday, June 11, the annual percentage rate will be 7.10%. The creditor is not required to make corrected disclosures under § 226.19(a)(2).

ii. On Thursday, June 11, the annual percentage rate will be 7.15%. The creditor must make corrected disclosures so that the consumer receives them on or before Monday, June 8.]

2. *Content of* [*new*]▶*corrected*◀ *disclosures.* If redisclosure is required ▶under § 226.19(a)(2)(iii)◀, the creditor may provide a complete set of new disclosures, or may redisclose only the changed terms ▶together with the disclosures required by § 226.38(f) and (g)◀. If the creditor chooses to provide a complete set of new disclosures, the creditor may but need not highlight the new terms, provided that the disclosures comply with the format requirements of § 226.17(a) ▶and § 226.37◀. If the new creditor chooses to disclose only the new terms, all the new terms must be disclosed. For example, a different annual percentage rate will almost always produce [a different finance charge, and often a new schedule of payments]▶different interest and settlement charges, and often a new payment summary◀; all of these changes would have to be disclosed. If, in addition, unrelated terms such as the amount financed or prepayment penalty vary from those originally disclosed ▶or an adjustable-rate feature is added (*see* comment 17(f)–2)◀, the accurate terms must be disclosed. [However, no new disclosures are required if the only inaccuracies involve estimates other than the annual percentage rate, and no variable-rate feature has been added. For a discussion of the requirement to redisclose when a variable-rate feature is added, see comment 17(f)–2. For a discussion of redisclosure requirements in general, see the commentary on § 226.17(f).]

[3. *Timing.* When redisclosures are necessary because the annual percentage rate has become inaccurate, they must be received by the consumer no later than the third business day before consummation. (For redisclosures triggered by other events, the creditor must provide corrected disclosures before consummation. *See* § 226.17(f).) If the creditor delivers the corrected disclosures to the consumer in person, consummation may occur any time on the third business day following delivery. If the creditor provides the corrected disclosures by mail, the consumer is considered to have received them three business days after they are placed in the mail, for purposes of determining when the three-business-day waiting periods required under § 226.19(a)(2)(ii) begins. Creditors that use electronic mail or a courier other than the postal service may also follow this approach.]

▶3. *Estimates.* In disclosures provided under § 226.19(a)(2)(iii), only the disclosures required by §§ 226.38(c)(3)(i)(C), 226.38(c)(3)(ii)(C), 226.38(c)(6)(i) and 226.38(e)(5)(i) may be estimates. See comment 19(a)(2)(ii)–3 for a discussion of which of the disclosures required under § 226.38 creditors may estimate.◀

4. *Basis for annual percentage rate comparison.* To determine whether a creditor

must make corrected disclosures under [§ 226.22[►§ 226.19(a)(2)(iii)◄, a creditor compares (a) what the annual percentage rate will be at consummation to (b) the annual percentage rate stated in the most recent disclosures the creditor made to the consumer. For example, assume consummation for a regular mortgage transaction is scheduled for Thursday, June 11, the early disclosures provided in May stated an annual percentage rate of 7.00%, and [corrected]►new◄ disclosures received by the consumer on Friday, June 5 stated an annual percentage rate of 7.15%:

i. On Thursday, June 11, the annual percentage rate will be 7.25%, which exceeds the most recently disclosed annual percentage rate ►of 7.15%◄ by less than the [applicable] tolerance ►for a regular transaction under § 226.22(a)(2)◄. The creditor is not required to make additional corrected disclosures or wait an additional three business days under § 226.19(a)(2).

ii. On Thursday, June 11, the annual percentage rate will be 7.30%, which exceeds the most recently disclosed annual percentage rate ►of 7.15%◄ by more than the [applicable tolerance. The]►tolerance for a regular transaction under § 226.22(a)(2). If the most recently disclosed annual percentage rate of 7.15% is not accurate under § 226.22(a)(4) or (5) and no other tolerance applies under § 226.19(a)(2)(iv), the◄ creditor must make corrected disclosures such that the consumer receives them on or before Monday, June 8.

►*19(a)(2)(iv) Annual percentage rate accuracy.*

1. *Other changed terms.* If a change occurs that does not render the APR inaccurate under § 226.19(a)(iv), the creditor must disclose the changed terms before consummation, consistent with § 226.17(f).

19(a)(2)(v) Timing of receipt.

1. *General.* If the creditor delivers the disclosures required by § 226.19(a)(2)(ii) or (a)(2)(iii) to the consumer in person, consummation may occur any time on the third business day following delivery. If the creditor provides the disclosures required by § 226.19(a)(2)(ii) or (a)(2)(iii) of this section by mail, the consumer is considered to have received them three business days after they are placed in the mail, for purposes of determining when the three-business-day waiting periods required under § 226.19(a)(2)(ii) and (iii) begin. Creditors that use electronic mail or a courier to provide disclosures may also follow this approach. Whatever method is used to provide disclosures, creditors may rely on documentation of receipt in determining when the three-business-day waiting period begins.◄

19(a)(3) Consumer's waiver of waiting period before consummation.

1. [*Modification or waiver.*]►*Procedure.*◄ A consumer may modify or waive the right to a waiting period required by § 226.19(a)(2) only after the [creditor makes the disclosures required by § 226.18]►consumer receives the disclosures required by § 226.38◄. [The consumer must have a *bona fide* personal financial emergency that necessitates consummating the credit transaction before the end of the waiting period. Whether these conditions are met is determined by the facts surrounding individual situations. The imminent sale of the consumer's home at foreclosure, where the foreclosure sale will proceed unless loan proceeds are made available to the consumer during the waiting period, is one example of a *bona fide* personal financial emergency. Each consumer who is primarily liable on the legal obligation must sign the written statement for the waiver to be effective.]►After receiving the required disclosures, the consumer may waive or modify a waiting period by giving the creditor a dated, written statement that specifically waives or modifies the waiting period and describes the *bona fide* personal financial emergency. A waiver is effective only if each consumer primarily liable on the legal obligation signs a waiver statement. Where there are multiple consumers entitled to rescind, the consumers may, but need not, sign the same waiver statement.◄

►2. *Bona fide personal financial emergency.* To modify or waive a waiting period, there must be a *bona fide* personal financial emergency that requires disbursement of loan proceeds before the end of the waiting period. Whether there is a *bona fide* personal financial emergency is determined by the facts surrounding individual circumstances. A *bona fide* personal financial emergency typically, but not always, will involve imminent loss of or harm to a dwelling or harm to the health or safety of a natural person. A waiver is not effective if the consumer's statement is inconsistent with facts known to the creditor. To determine whether circumstances are or are not a *bona fide* personal financial emergency under § 226.19(a)(3), creditors may rely on the examples and other commentary provided in comment 23(e)–2.◄

[2. *Examples of waivers within the seven-business-day waiting period.* Assume the early disclosures are delivered to the consumer in person on Monday, June 1, and at that time the consumer executes a waiver of the seven-business-day waiting period (which would end on Tuesday, June 9) so that the loan can be consummated on Friday, June 5:

i. If the annual percentage rate on the early disclosures is inaccurate under § 226.22, the creditor must provide a corrected disclosure to the consumer before consummation, which triggers the three-business-day waiting period in § 226.19(a)(2)(ii). After the consumer receives the corrected disclosure, the consumer must execute a waiver of the three-business-day waiting period in order to consummate the transaction on Friday, June 5.

ii. If a change occurs that does not render the annual percentage rate on the early disclosures inaccurate under § 226.22, the creditor must disclose the changed terms before consummation, consistent with § 226.17(f). Disclosure of the changed terms does not trigger the additional waiting period, and the transaction may be consummated on June 5 without the consumer giving the creditor an additional modification or waiver.]

3. [*Examples of waivers made after the seven-business-day waiting period.* Assume the early disclosures are delivered to the consumer in person on Monday, June 1 and consummation is scheduled for Friday, June 19.]► *Examples of effect on consummation timing.* Assume consummation is scheduled for Friday, June 19, the disclosures required by § 226.19(a)(1)(i) are delivered to the consumer in person on Monday, June 1, and the consumer receives the disclosures required by § 226.19(a)(2)(ii) on Monday, June 15.◄ On Wednesday, June 17, a change in the annual percentage rate occurs:

i. If the annual percentage rate on the [early] disclosures ►required by § 226.19(a)(2)(ii)◄ is [inaccurate under § 226.22]►not accurate under § 226.22 nor accurate under § 226.19(a)(2)(iv)◄, the creditor must provide a corrected disclosure before consummation, which triggers the three-business-day-waiting period in § 226.19(a)(2)►(iii)◄. After the consumer receives the corrected disclosure, the consumer must execute a waiver of the three-business-day waiting period in order to consummate the transaction on Friday, June 19.

ii. If a change occurs that does not render the annual percentage rate on the [early] disclosures ►required by § 226.19(a)(2)(ii)◄ inaccurate under § 226.22, the creditor must disclose the changed terms before consummation, consistent with § 226.17(f). Disclosure of the changed terms does not trigger an additional waiting period, and the transaction may be consummated on Friday, June 19 without the consumer giving the creditor an additional modification or waiver.

19(a)(4) [*Notice.*]►Timeshare plans.◄

1. *Inclusion in other disclosures.* The notice required by § 226.19(a)(4) must be grouped together with the disclosures required by § 226.19(a)(1)(i) or § 226.19(a)(2). See comment 17(a)(1)–2 for a discussion of the rules for segregating disclosures. In other cases, the notice set forth in § 226.19(a)(4) may be disclosed together with or separately from the disclosures required under § 226.18. *See* comment 17(a)(1)–5(xvi).]

19(a)[*(5)*]►*4*◄*(ii) Time of disclosures for timeshare plans.*

1. *Timing.* A mortgage transaction secured by a consumer's interest in a "timeshare plan," as defined in 11 U.S.C. 101(53D), [that is also a Federally related mortgage loan under RESPA] is subject to the requirements of § 226.19(a)[(5)]►(4)◄ instead of the requirements of § 226.19(a)(1) through § 226.19(a)[(4)]►(3)◄. *See* comment 19(a)(1)(i)–1. Early disclosures for transactions subject to § 226.19(a)[(5)]►(4)◄ must be given (a) before consummation or (b) within three business days after the creditor receives the consumer's written application, whichever is earlier. The general definition of "business day" in § 226.2(a)(6)—a day on which the creditor's offices are open to the public for substantially all of its business functions—applies for purposes of § 226.19(a)(5)(ii). *See* comment 2(a)(6)–1. These timing requirements are different from the timing requirements under § 226.19(a)(1)(i). Timeshare transactions covered by § 226.19(a)[(5)] may be consummated any time after the disclosures required by § 226.19(a)[(5)]►(4)◄(ii) are provided.

2. *Use of estimates.* If the creditor does not know the precise credit terms, the creditor must base the disclosures on the best information reasonably available and indicate that the disclosures are estimates under § 226.17(c)(2). If many of the disclosures are estimates, the creditor may include a statement to that effect (such as "all numerical disclosures [except the late-payment disclosure] are estimates") instead of separately labeling each estimate. In the alternative, the creditor may label as an estimate only the items primarily affected by unknown information. (*See* the commentary to § 226.17(c)(2).) The creditor may provide explanatory material concerning the estimates and the contingencies that may affect the actual terms, in accordance with the commentary to § 226.17(a)(1)[.]►and § 226.37. The disclosures required by § 226.19(a)(2) may not contain estimates, however, with limited exceptions. See the commentary on § 226.19(a)(2) for a discussion of limitations on estimates in disclosures made under that subsection.◄

3. *Written application.* For timeshare transactions, creditors may rely on comment 19(a)(1)(i)–[3]►2◄ in determining whether a "written application" has been received.

4. *Denied or withdrawn applications.* For timeshare transactions, creditors may rely on comment 19(a)(1)(i)–[4]►3◄ in determining that disclosures are not required by § 226.19(a)[(5)]►(4)◄(ii) because the consumer's application will not or cannot be approved on the terms requested or the consumer has withdrawn the application.

5. *Itemization of amount financed.* For timeshare transactions, creditors may rely on comment 19(a)(1)(i)–[5]►4◄ in determining whether providing the good faith estimates of settlement costs required by RESPA satisfies the requirement of § 226.18(c) to provide an itemization of the amount financed.

19(a)[(5)]►4◄(iii) Redisclosure for timeshare plans.

1. *Consummation or settlement.* For extensions of credit secured by a consumer's timeshare plan, when corrected disclosures are required, they must be given no later than "consummation or settlement." "Consummation" is defined in § 226.2(a). "Settlement" is defined in Regulation X (24 CFR 3500.2(b)) and is subject to any interpretations issued by HUD. In some cases, a creditor may delay redisclosure until settlement, which may be at a time later than consummation. If a creditor chooses to redisclose at settlement, disclosures may be based on the terms in effect at settlement, rather than at consummation. For example, in a variable-rate transaction, a creditor may choose to base disclosures on the terms in effect at settlement, despite the general rule in comment [17(c)(1)–8]►§ 226.17(c)(1)(iii)◄ that variable-rate disclosures ►generally◄ should be based on the terms in effect at consummation.

2. *Content of new disclosures.* Creditors may rely on comment 19(a)(2)(ii)–2 in determining the content of corrected disclosures required under § 226.19(a)[(5)]►(4)◄(iii).

19(b) [Certain variable-rate transactions]►Adjustable-rate loan program disclosures◄.

[1. *Coverage.* Section 226.19(b) applies to all closed-end variable-rate transactions that are secured by the consumer's principal dwelling and have a term greater than one year. The requirements of this section apply not only to transactions financing the initial acquisition of the consumer's principal dwelling, but also to any other closed-end variable-rate transaction secured by the principal dwelling. Closed-End variable-rate transactions that are not secured by the principal dwelling, or are secured by the principal dwelling but have a term of one year or less, are subject to the disclosure requirements of § 226.18(f)(1) rather than those of § 226.19(b). (Furthermore, "shared-equity" or "shared-appreciation" mortgages are subject to the disclosure requirements of § 226.18(f)(1) rather than those of § 226.19(b) regardless of the general coverage of those sections.) For purposes of this section, the term of a variable-rate demand loan is determined in accordance with the commentary to § 226.17(c)(5). In determining whether a construction loan that may be permanently financed by the same creditor is covered under this section, the creditor may treat the construction and the permanent phases as separate transactions with distinct terms to maturity or a single combined transaction. For purposes of the disclosures required under § 226.18, the creditor may nevertheless treat the two phases either as separate transactions or as a single combined transaction in accordance with § 226.17(c)(6). Finally, in any assumption of a variable-rate transaction secured by the consumer's principal dwelling with a term greater than one year, disclosures need not be provided under §§ 226.18(f)(2)(ii) or 226.19(b).]

►1. *Coverage.* Section 226.19(b) applies to all closed-end adjustable-rate mortgages described in § 226.38(a)(3)(i) that are secured by real property or a dwelling, except for reverse mortgages subject to § 226.33(a). Closed-End adjustable-rate transactions that are not secured by real property or a dwelling are subject to the disclosure requirements of § 226.18(f) rather than those of § 226.19(b). In determining whether a construction loan that may be permanently financed by the same creditor is covered under this section, the creditor may treat the construction and the permanent phases as separate transactions with distinct terms to maturity or a single combined transaction. *See* comment 17(c)(6)–2. In any assumption of an adjustable-rate transaction secured by real property or a dwelling, disclosures need not be provided under § 226.19(b).◄

* * * * *

Section 226.20—Subsequent Disclosure Requirements

►*20(a) Modifications to terms by the same creditor.*

20(a)(1) Mortgages.

Paragraph 20(a)(1)(i).

1. *Coverage.* Section 226.20(a)(1) describes certain modifications to the terms of an existing legal obligation by the "same creditor" that are new transactions requiring a complete new set of disclosures. "Same creditor" is defined for purposes of this section as the current holder of an existing obligation secured by real property or a dwelling, or the servicer acting on behalf of such current holder. *See* § 226.20(a)(1)(iii). All other creditors that enter into an agreement to extend credit covered by TILA also must make the disclosures required under this part (for example, the disclosures required by §§ 226.19 and 226.38), and are otherwise subject to all applicable provisions of this part.

2. *Transactions not covered.* A modification to the terms of the existing legal obligation by the same creditor and same consumer is a new transaction under § 226.20(a)(1) only if one or more of the modifications listed in § 226.20(a)(1)(i)(A)–(G) occurs. For example, if the creditor changes the payment schedule under an existing legal obligation by adjusting the payment frequency from monthly to bi-weekly, with no other modification to the terms listed under § 226.20(a)(1)(i)(A)–(G), a new transaction under § 226.20(a)(1) does not occur. In addition, § 226.20(a)(1) applies only if the modification rises to the level of a change in the terms of the existing legal obligation, unless a fee is imposed on the consumer in connection with the modification, regardless of whether the fee is reflected in any agreement between the parties. (See § 226.17(c)(1) and corresponding commentary for a discussion of the "legal obligation.") For example, the following are modifications that do not result in a change in the terms of the existing legal obligation, provided that no fee is imposed in connection with the modification:

i. A creditor informally permits the consumer to defer payments from time to time, for instance to take account of holiday seasons or seasonal employment;

ii. A creditor enters into an informal arrangement with the consumer to change the monthly payment amount owed, for instance by allowing the consumer to make interest-only payments for 6 months and subsequently increasing the monthly payment amount owed for the remainder of the loan term to account for the 6 months of unpaid principal amount; or

iii. A creditor informally extends the consumer's payment due date by giving the consumer an additional 30 days to make a monthly payment amount that is due.

3. *New transaction requirements.* A new transaction under § 226.20(a)(1) requires a complete set of new disclosures and is subject to all applicable provisions of this part. For example:

i. If the same creditor adds an adjustable-rate feature to an existing legal obligation, the disclosures required under § 226.19(b) must be given at the time of application (see comment 20(a)(1)(i)–4) or before the consumer pays a nonrefundable fee, whichever is earlier, in addition to disclosures required under §§ 226.19(a) and 226.38;

ii. If the same creditor increases the interest rate of an existing legal obligation which results in the new transaction being a higher-priced mortgage loan under § 226.35(a), the creditor must provide a complete set of new disclosures and comply with the requirements under § 226.35(b);

iii. If the same creditor advances new money under an existing legal obligation secured by the consumer's principal dwelling, a new transaction occurs under § 226.20(a)(1)(i)(A) and is subject to rescission under § 226.23, whether the creditor is the original creditor or an assignee. *See* § 226.23(f)(2). In this case, the creditor must provide to the consumer the rescission notice required under § 226.23(b) in addition to the disclosures required under §§ 226.19 and 226.38. (See §§ 226.23(f)(2) and corresponding commentary for a discussion of advance of new money);

iv. If the same creditor adds a security interest in the consumer's principal dwelling to an existing legal obligation, a new transaction under § 226.20(a)(1)(i)(G) occurs and is subject to rescission under § 226.23, whether the creditor is the original creditor or an assignee. In this case, the creditor must provide to the consumer the rescission notice required under § 226.23(b) in addition to the disclosures required under §§ 226.19 and 226.38. (See § 226.23(a)(1) and corresponding commentary for a discussion of addition of a security interest); or

v. If the same creditor extends the loan term of an existing legal obligation (*i.e.,* renews the loan), and imposes a fee in connection with the modification, a new transaction under § 226.20(a)(1)(i)(C) occurs that requires new disclosures. The transaction is not subject to rescission if the same creditor (current holder) is also the original creditor. (See § 226.23(f)(2) for a discussion of the exemption from rescission for refinancings.) In this case, the creditor must provide to the consumer the disclosures required under §§ 226.19 and 226.38, but need not provide a rescission notice.

4. *Application.* Creditors may rely on comment 19(a)(1)(i)–2 in determining when a written application is received for a new transaction covered by this subsection. Comment 19(a)(1)(i)–2 provides, in part, that an application is received when the consumer submits the information set forth in the definition of "application" in Regulation X (see 24 CFR 3500.2(b)). In some cases, the consumer may not need to submit information to the creditor to make a "written application" for a modification. For example, where a consumer contacts the same creditor to modify a term of an existing legal obligation, the creditor may have information on file that constitutes an "application." Whether the creditor requests the information from the consumer anew or uses information on file, an application is deemed received where the creditor has the information set forth in the definition of "application" as defined under Regulation X. *See* 24 CFR § 3500.2(b).

5. *Denied or withdrawn applications.* A creditor must deliver or mail an early disclosure of credit terms to the consumer not later than three business days after the creditor receives an application for a modification. (See § 226.19(a)(1)(i) and corresponding commentary for the early disclosure timing requirements.) Within this three-business-day period, the creditor may determine that an application for a modification to the terms of an existing legal obligation will not be approved on the terms requested, or a consumer may withdraw an application. In these cases, the creditor need not make the early disclosures required by § 226.19(a)(1)(i). (See comment 19(a)(1)(i)–3 for further discussion of denied or withdrawn applications. See also 12 CFR 202.9(a) and corresponding commentary regarding adverse action notice requirements under ECOA and Regulation B.)

Paragraph 20(a)(1)(i)(A).

1. *General.* Under § 226.20(a)(1), an increase in the loan amount occurs when the new loan amount exceeds the unpaid principal balance plus any earned unpaid finance charge or earned unpaid non-finance charge, such as a late fee, on the existing obligation. (See § 226.38(a)(1) for the meaning of "loan amount.")

2. *Costs of the transaction.* An increase in the loan amount includes any cost of the transaction, such as points, appraisal or attorney's fees, title examination and insurance fees, or new insurance premiums, that are paid out of the proceeds of the new loan amount, except amounts that are used to fund an escrow account. (See comments 20(a)(1)(i)(A)–3 regarding escrows and 20(a)(1)(i)(B)–2 regarding fees.) For example, if the sum of the outstanding principal balance plus the earned unpaid finance charge is $200,000 and the new loan amount is $203,000, a new transaction requiring new disclosures would occur under § 226.20(a)(1), even where the extra $3,000 is attributable solely to costs of the transaction and no other modifications to terms listed in §§ 226.20(a)(1)(i)(A)–(G) occur.

3. *Escrows.* Amounts that are advanced to the consumer to fund an existing or newly-established escrow account are not included in the determination of whether there is an increase in the loan amount under § 226.20(a)(1)(i)(A). For purposes of this paragraph 20(a)(1)(i)(A), "escrow account" has the same meaning as in 24 CFR 3500.17(b), as amended.

Paragraph 20(a)(1)(i)(B).

1. *General.* Imposing a fee on the consumer in connection with the agreement to modify an existing legal obligation results in a new transaction under § 226.20(a)(1)(i)(B). That is, the fee does not need to be part of the new contractual arrangement to constitute an event that results is a new transaction under § 226.20(a)(1)(i)(B).

2. *Payment and types of fees.* A fee imposed on the consumer in connection with the agreement to modify the existing legal obligation includes any fee that is paid out of the proceeds of the new loan amount or paid directly by the consumer out-of-pocket, except amounts that are used to fund an escrow account. *See* comment 20(a)(1)(i)(A)–3. Fees imposed on the consumer in connection with the agreement include, for example, points, credit report, appraisal and underwriting fees, or new insurance premiums. Charging an insurance premium for the continuation of coverage does not constitute a fee under § 226.20(a)(1)(i). That is, if a creditor does not impose on the consumer additional insurance premiums or new insurance requirements (for example, if the creditor does not increase the existing premium for hazard insurance or require increased property insurance amounts), but merely continues coverage, such costs are not fees imposed on the consumer in connection with the agreement under § 226.20(a)(1)(i). (See § 226.19(a)(1)(ii) and corresponding commentary regarding restrictions on the imposition of fees.)

3. *Timing.* Creditors may rely on comment 19(a)(1)(i)–2 regarding when a written application is received for a new transaction covered by this subsection. (See comment 20(a)(1)(i)–4 for a discussion of application.)

Paragraph 20(a)(1)(i)(C).

1. *General.* A change in loan term occurs when the maturity date of the new transaction is earlier or later than the maturity date of the existing legal obligation. For example, a change in loan term occurs, and a new transaction results under § 226.20(a)(1)(i)(C), if the existing obligation has a maturity date of June 30, 2020, and the creditor agrees to modify the existing legal obligation to extend the maturity date by three years to June 30, 2023. (See § 226.38(a)(2) for the meaning of "loan term.")

Paragraph 20(a)(1)(i)(D).

1. *General.* Section 226.20(a)(1)(i)(D) applies to any change in rate, including both increases and decreases in the interest rate, except as provided under § 226.20(a)(1)(ii)(C). A change in rate occurs for purposes of § 226.20(a)(1)(i)(D) when the interest rate (the fully-indexed rate for an adjustable-rate mortgage) for the new obligation is different than the interest rate for the existing obligation that is in effect within a reasonable period of time of the modification. For example, 30 calendar days would be a reasonable period of time. The following example illustrates the rule. Assume that on June 15, 2010, the existing legal obligation is a 5/1 ARM that currently provides for a fully-indexed interest rate of 6 percent, which adjusts annually according to changes in the one-year LIBOR index. The next adjustment is scheduled for September 1, 2010. The same creditor and same consumer consummate an agreement on July 1, 2010, to modify the existing legal obligation to provide for a 3 percent introductory rate, that will adjust to the fully-indexed rate of 6.25 percent after 6 months, and annually thereafter according to changes in the one-year LIBOR index. A change in rate occurs under § 226.20(a)(1)(i)(D) because the fully-indexed rate on the new transaction is 6.25 percent, which is different than the 6 percent interest rate in effect under the existing legal obligation within 30 calendar days of consummation of the modification. If, however, the fully-indexed rate on the new transaction at consummation is 6 percent and adjusts annually thereafter according to changes in the one-year LIBOR index, a change in rate does not occur under § 226.20(a)(1)(i)(D). (See § 226.38(c)(7)(iii) for the meaning of the term "fully-indexed rate," and § 226.38(a)(3)(i)(A) for the meaning of the term "adjustable-rate mortgage.")

2. *Rate calculation and limits.* A change in rate based on an adjustable-rate feature disclosed as required by § 226.38(e)(1)–(2) in connection with the existing obligation is not a new transaction under § 226.20(a)(1). For example, assume the disclosures for an existing adjustable-rate mortgage provide that the 5.25 percent introductory rate will expire after three years, adjust to 7.25 percent in the fourth year, and adjust annually thereafter

based on the one-year LIBOR index plus 2 percent with a lifetime cap of 12 percent. A change in rate made in accordance with these disclosures does not result in a new transaction under § 226.20(a)(1). However, a change in the interest rate of an existing legal obligation occurs where the same parties to an existing obligation modify, for example, the index or formula used (*e.g.,* from the one-year LIBOR to the 6-month Treasury), the margin (*e.g.,* from 2 percent to 1.5 percent), or rate limit (*e.g.,* from 12 percent to 15 percent) not previously disclosed in accordance with § 226.38(e)(1)–(2). One or more of these modifications results in a new transaction requiring new disclosures for purposes of § 226.20(a)(1).

Paragraph 20(a)(1)(i)(E).

1. *General.* An increase in the periodic payment amount based on payment change limits disclosed as required under § 226.38(e)(2) in connection with the existing legal obligation is not a new transaction under § 226.20(a)(1). For example, assume the disclosures for an existing fixed-rate mortgage with negative amortization provides for minimum payments that can increase by 5 percent each year for the first 10 years, and thereafter the full monthly principal and interest payments will be required for the remainder of the loan term. A change in the monthly payment amount owed in the seventh year that is made in accordance with these disclosures does not result in a new transaction under § 226.20(a)(1). However, an increase in the periodic payment amount owed under the existing legal obligation as a result of a change in any limitations on payment adjustments not previously disclosed in accordance with § 226.38(e)(2) is a new transaction requiring new disclosures. Using the same example as above, a new transaction requiring new disclosures occurs under § 226.20(a)(1) if the minimum payment owed in the seventh year is increased by 6 percent rather than by the disclosed 5 percent increase.

2. *Escrows.* Amounts that are advanced to the consumer to fund an existing or newly-established escrow account are not included in the determination of whether there is an increase in the periodic payment amount under § 226.20(a)(1)(i)(E). For purposes of this paragraph 20(a)(1)(i)(E), "escrow account" has the same meaning as in 24 CFR 3500.17(b), as amended.

Paragraph 20(a)(1)(i)(F).

1. *Adjustable-rate feature.* A creditor adds an adjustable-rate feature to an existing legal obligation by changing the index or formula used to adjust the rate to a different index or formula. A creditor does not add an adjustable-rate feature to an existing legal obligation if it changes the index or formula used to adjust the rate because the original index or formula becomes unavailable, as long as historical fluctuations in the original and replacement indices or formulas were substantially similar, and as long as the replacement index or formula will produce a rate similar to the rate that was in effect at the time the original index or formula became unavailable. If the replacement index or formula is newly established and therefore does not have any rate history, it may be used if it produces a rate substantially similar to the rate in effect when the original index or formula became unavailable.

2. *Other risk features.* A new transaction requiring new disclosures occurs where a creditor adds one or more of the following features or conditions to an existing legal obligation: prepayment penalty; interest-only; negative amortization; balloon payment; demand; no-documentation or low-documentation; or shared-equity or shared-appreciation.

20(a)(1)(ii) Exceptions.

Paragraph 20(a)(1)(ii)(A).

1. *Court agreements.* This exception includes, for example, agreements such as reaffirmations of debts discharged in bankruptcy, settlement agreements, and post-judgment agreements. (See commentary to § 226.2(a)(14) for a discussion of court-approved agreements that are not considered new extensions of "credit.")

Paragraph 20(a)(1)(ii)(B).

1. *Workout agreements.* An agreement entered into as a result of the consumer's default or delinquency includes, for example, forbearance, repayment or loan modification agreements. The exception under § 226.20(a)(1)(ii)(B) does not apply, however, if there is an increase in the loan amount or the interest rate, or a fee is imposed on the consumer in connection with the agreement. (See § 226.20(a)(1)(i)(B) and corresponding commentary regarding fees.)

Paragraph 20(a)(1)(ii)(C).

1. *Decreases in interest rate.* A decrease in the interest rate occurs if the contractual interest rate (the fully-indexed rate for an adjustable-rate mortgage) for the new loan at the time the new transaction is consummated is lower than the interest rate (the fully-indexed rate for an adjustable-rate mortgage) of the existing obligation in effect at the time of the modification. Section 226.20(a)(1)(ii)(C) provides that a decrease in the interest rate is not a new transaction under § 226.20(a)(1) under the following circumstances: No additional fees or other changes are made to the existing legal obligation, except that the payment schedule may reflect lower periodic payments or a lengthened maturity date. The exception in § 226.20(a)(1)(ii)(C) does not apply if the maturity date is shortened, or if the payment amount or number of payments is increased beyond that remaining on the existing transaction. For example, if a creditor lowers the interest rate of an existing legal obligation and retains the existing loan term of 30 years (resulting in lower monthly payments), no new disclosures are required. Similarly, if a creditor lowers the interest rate and also enters into a 6-month payment forbearance arrangement with the consumer, with those six months of payments to be added to the end of the loan term (resulting in a longer loan term), no new disclosures are required. However, a new transaction requiring new disclosures occurs if the creditor lowers the interest rate and shortens the loan term from, for example, 30 to 20 years. A new transaction requiring new disclosures also occurs if the creditor lowers the interest rate but adds a new term, such as a prepayment penalty, or imposes a fee on the consumer. (See comment 20(a)(1)(i)(C) for a discussion of changes in the loan term, comment 20(a)(1)(i)(D)–1 for a discussion of changes in the interest rate, and comment 20(a)(1)(i)(B)–1 regarding fees.)◄

20(a) ►(2)◄ Refinancings ►by the same creditor—Non-mortgage credit◄.

1. *Definition.* ►For transactions not secured by real property or a dwelling, a◄[A] refinancing is a new transaction requiring a complete new set of disclosures. Whether a refinancing has occurred is determined by reference to whether the original obligation has been satisfied or extinguished and replaced by a new obligation, based on the parties' contract and applicable law. The refinancing may involve the consolidation of several existing obligations, disbursement of new money to the consumer or on the consumer's behalf, or the rescheduling of payments under an existing obligation. In any form, the new obligation must completely replace the prior one.

i. Changes in the terms of an existing obligation, such as the deferral of individual installments, will not constitute a refinancing unless accomplished by the cancellation of that obligation and the substitution of a new obligation.

ii. A substitution of agreements that meets the refinancing definition will require new disclosures, even if the substitution does not substantially alter the prior credit terms.

2. *Exceptions.* A ►non-mortgage◄ transaction is subject to § 226.20(a)►(2)◄ only if it meets the general definition of a refinancing. Section 226.20(a)►(2)◄ [(1)]►(i)◄ through [(5)]►(v)◄ lists 5 events that are not treated as refinancings, even if they are accomplished by cancellation of the old obligation and substitution of a new one.

3. *Variable-rate.* i. If a variable-rate feature was properly disclosed under the regulation, a rate change in accord with those disclosures is not a refinancing. For example, no new disclosures are required when the variable-rate feature is invoked on a renewable balloon-payment [mortgage]►transaction◄ that was previously disclosed as a variable-rate transaction.

ii. Even if it is not accomplished by the cancellation of the old obligation and substitution of a new one, a new transaction subject to new disclosures results if the creditor either:

A. Increases the rate based on a variable-rate feature that was not previously disclosed; or

B. Adds a variable-rate feature to the obligation. A creditor does not add a variable-rate feature by changing the index of a variable-rate transaction to a comparable index, whether the change replaces the existing index or substitutes an index for one that no longer exists.

[iii. If either of the events in paragraph 20(a)3.ii.A. or ii.B. occurs in a transaction secured by a principal dwelling with a term longer than one year, the disclosures required under § 226.19(b) also must be given at that time.]

[4. *Unearned finance charge.* In a transaction involving precomputed finance charges, the creditor must include in the finance charge on the refinanced obligation any unearned portion of the original finance charge that is not rebated to the consumer or credited against the underlying obligation. For example, in a transaction with an add-on finance charge, a creditor advances new money to a consumer in a fashion that extinguishes the original obligation and replaces it with a new one. The creditor neither refunds the unearned finance charge on the original obligation to the consumer nor credits it to the remaining balance on the old obligation. Under these circumstances, the unearned finance charge must be included in the finance charge on the new obligation and reflected in the annual percentage rate disclosed on refinancing. Accrued but unpaid finance charges are included in the amount financed in the new obligation.❚

❙5❚►4◄. *Coverage.* Section 226.20(a)►(2)◄ applies only to refinancings undertaken by the original creditor or a holder or servicer of the original obligation. A "refinancing" by any other person is a new transaction under the regulation, not a refinancing under this section.

Paragraph 20(a)❙(1)❚►(2)(i)◄

1. *Renewal.* This exception applies both to obligations with a single payment of principal and interest and to obligations with periodic payments of interest and a final payment of principal. In determining whether a new obligation replacing an old one is a renewal of the original terms or a refinancing, the creditor may consider it a renewal even if:

i. Accrued unpaid interest is added to the principal balance.

ii. Changes are made in the terms of renewal resulting from the factors listed in § 226.17(c)(3).

iii. The principal at renewal is reduced by a curtailment of the obligation.

Paragraph 20(a)(2)►(ii)◄

1. *Annual percentage rate reduction.* A reduction in the annual percentage rate with a corresponding change in the payment schedule is not a refinancing. If the annual percentage rate is subsequently increased (even though it remains below its original level) and the increase is effected in such a way that the old obligation is satisfied and replaced, new disclosures must then be made.

2. *Corresponding change.* A corresponding change in the payment schedule to implement a lower annual percentage rate would be a shortening of the maturity, or a reduction in the payment amount or the number of payments of an obligation. The exception in § 226.20(a)(2)►(ii)◄ does not apply if the maturity is lengthened, or if the payment amount or number of payments is increased beyond that remaining on the existing transaction.

Paragraph 20(a)❙(3)❚►(2)(iii)◄

1. *Court agreements.* This exception includes, for example, agreements such as reaffirmations of debts discharged in bankruptcy, settlement agreements, and post-judgment agreements. (See the commentary to § 226.2(a)(14) for a discussion of court-approved agreements that are not considered "credit.")

Paragraph 20(a)❙(4)❚►(2)(iv)◄

1. *Workout agreements.* A workout agreement is not a refinancing unless the annual percentage rate is increased or additional credit is advanced beyond amounts already accrued plus insurance premiums.

Paragraph 20(a)❙(5)❚►(2)(v)◄

1. *Insurance renewal.* The renewal of optional insurance added to an existing credit transaction is not a refinancing, assuming that appropriate Truth in Lending disclosures were provided for the initial purchase of the insurance.

►*20(a)(3) Unearned finance charge.*

1. *Unearned finance charge.* In a transaction involving precomputed finance charges, the creditor must include in the finance charge on the new obligation any unearned portion of the original finance charge that is not rebated to the consumer or credited against the underlying obligation. For example, in a mortgage transaction with an add-on finance charge, a creditor increases the loan amount (or, in a non-mortgage transaction with an add-on finance charge, a creditor advances new money to a consumer) in a manner that extinguishes the original obligation and replaces it with a new one. The creditor neither refunds the unearned finance charge on the existing obligation to the consumer nor credits it to the remaining balance on the existing obligation. Under these circumstances, the unearned finance charge must be included in the finance charge on the new obligation and reflected in the annual percentage rate disclosed on the new obligation. Accrued but unpaid finance charges are included in the amount financed in the new obligation.◄

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❙*Paragraph 20(c) Variable-rate adjustments*❚►*20(c) Rate adjustments.*◄

❙1. *Timing of adjustment notices.* This section requires a creditor (or a subsequent holder) to provide certain disclosures in cases where an adjustment to the interest rate is made in a variable-rate mortgage transaction subject to § 226.19(b). There are two timing rules, depending on whether payment changes accompany interest rate changes. A creditor is required to provide at least one notice each year during which interest-rate adjustments have occurred without accompanying payment adjustments. For payment adjustments, a creditor must deliver or place in the mail notices to borrowers at least 25, but not more than 120, calendar days before a payment at a new level is due. The timing rules also apply to the notice required to be given in connection with the adjustment to the rate and payment that follows conversion of a transaction subject to § 226.19(b) to a fixed-rate transaction. (In cases where an open-end account is converted to a closed-end transaction subject to § 226.19(b), the requirements of this section do not apply until adjustments are made following conversion.)❚

►1. *General.* Section 226.20(c) requires a creditor (or a subsequent holder) to provide certain disclosures in cases where an adjustment to the interest rate is made in an adjustable-rate mortgage subject to § 226.19(b). (For a discussion of "price level adjusted mortgages" and other mortgages not subject to § 226.19(b), *see* comment 19(b)–3.) Section 226.20(c) applies only if adjustments are made under the terms of the existing legal obligation between the parties. Typically, these adjustments will be made based on a change in the value of the applicable index or on the application of a formula. If an adjustment to the interest rate is made that is not based on the terms of the legal obligation, then no disclosures are required under § 226.20(c). Such an adjustment likely would require new TILA disclosures under § 226.20(a). For example, no disclosures are required under § 226.20(c) when an adjustment to the interest rate is made pursuant to a modification of the legal obligation, but such modification may be a new transaction for which the creditor must provide new disclosures under § 226.20(a). Further, disclosures must be given under § 226.20(c) if such new transaction is an adjustable-rate mortgage subject to § 226.19(b) and the interest rate is adjusted based on a change in the value of the applicable index or on the application of a formula. The following examples illustrate whether or not disclosures are required under § 226.20(c) in different circumstances:

i. *Disclosure required.* Assume that the loan agreement provides that the interest rate on an ARM subject to § 226.19(b) will be determined by the 1-year LIBOR plus a margin of 2.75 percentage points. Currently the consumer's interest rate is 6%, based on the index and margin. The loan agreement provides that the interest rate will adjust annually and the corresponding payment will be due on October 1. Assume that, when the adjusted interest rate is determined, the 1-year LIBOR for 2010 has increased by 2 percentage points over the 1-year LIBOR for 2009. Under the terms of the loan agreement, the interest rate will be adjusted to 8%, and the corresponding payment will be due on October 1, 2010. The creditor or holder must provide the notice required by § 226.20(c)(1) 60 to 120 days before the corresponding payment is due, that is, between June 3 and August 2, 2010. (Disclosures may be required before modification under § 226.20(a), however.)

ii. *Disclosure not required.* Assume the same loan agreement and facts as in the previous example, except that on January 4, 2010 the parties modify the loan agreement and the consumer pays a $500 modification fee. They agree that the consumer's current interest rate will be reduced temporarily from 6% to 4.5%, with the corresponding payment due on February 1, 2010. They also agree that after modification interest rate adjustments will continue to be made based on adjustments to the 1-year LIBOR and the corresponding payment will continue to be due on October 1. Assume that, when the adjusted interest rate is determined, the 1-year LIBOR for 2010 has increased by 2 percentage points over the 1-year LIBOR for 2009. Under the terms of the modified loan agreement, the interest rate will be adjusted to 8%, and the corresponding payment will be due on October 1, 2010.

A. The creditor need not send a notice under § 226.20(c)(1) 60 to 120 days before payment based on the interest rate of 4.5% is due on February 1 because the payment change is not made based on an interest rate adjustment provided for in the original loan agreement. Disclosures may be required under § 226.20(a) in connection with the modification, however.

B. The creditor must send a notice under § 226.20(c)(1) 60 to 120 days before payment based on the interest rate of 8% is due on October 1, that is, the creditor must send a notice between June 3 and August 2, 2010. This is because the payment due on October 1 is based on an interest rate adjusted based on a change to the index value and as provided for in the modified loan agreement.◀

2. [*Exceptions.*]▶*Not applicable.*◀ Section 226.20(c) does not apply to [“shared-equity,” “shared-appreciation,” or “price level adjusted” or similar mortgages]▶“price-level adjusted mortgages and certain other mortgages that are not adjustable-rate mortgages subject to the disclosure requirements of § 226.19(b). *See* comment 19(b)–3◀.

3. *Basis of disclosures.* The disclosures required under this section shall reflect the terms of the parties’ legal obligation, as required under § 226.17(c)(1).

▶4. *Conversion.* Section 226.20(c) applies to adjustments made when an adjustable-rate mortgage subject to § 226.19(b) is converted to a fixed-rate mortgage if the existing legal obligation provides for such conversion and establishes an index or formula to be used to determine the interest rate upon conversion. New disclosures instead may be required under § 226.20(a), however, if the existing legal obligation does not provide for conversion or provides for conversion but does not state a specific index and margin or formula to be used to determine the new interest rate, or if the parties agree to change the index, margin, or formula to be used to determine the interest rate upon conversion. New disclosures may be required under § 226.20(a), moreover, if a conversion fee is charged (whether or not the existing legal obligation establishes the amount of the conversion fee) or loan terms other than the interest rate and corresponding payment are modified. If an open-end account is converted to a closed-end transaction subject to § 226.19(b), disclosures need not be provided under § 226.20(c) until adjustments subject to § 226.20(c) are made following conversion.◀

▶*20(c)(1) Timing of disclosures.*

1. *When required.* Payment changes due to changes in property tax obligations or mortgage-related insurance premiums do not trigger the requirement to make disclosures under § 226.20(c)(1)(i).◀

[*Paragraph 20(c)(1)*]▶*Paragraph 20(c)(2)(ii)*◀.

1. *Current and* [*prior*]▶*new*◀ *interest rates.* The requirements under this paragraph are satisfied by disclosing the interest rate used to compute the new adjusted payment amount [(“current rate”)]▶(“new rate”)◀ and the adjusted interest rate that was disclosed in the last adjustment notice[, as well as all other interest rates applied to the transaction in the period since the last notice (“prior rates”)]▶(“current rate”)◀. (If there has been no prior adjustment notice, the [prior rates are]▶current rate is◀ the interest rate applicable to the transaction at consummation▶.)◀ [, as well as all other interest rates applied to the transaction in the period since consummation.) If no payment adjustment has been made in a year, the current rate is the new adjusted interest rate for the transaction, and the prior rates are the adjusted interest rate applicable to the loan at the time of the last adjustment notice, and all other rates applied to the transaction in the period between the current and last adjustment notices. In disclosing all other rates applied to the transaction during the period between notices, a creditor may disclose a range of the highest and lowest rates applied during that period.]

[*Paragraph 20(c)(2).*

1. *Current and prior index values.* This section requires disclosure of the index or formula values used to compute the current and prior interest rates disclosed in § 226.20(c)(1). The creditor need not disclose the margin used in computing the rates. If the prior interest rate was not based on an index or formula value, the creditor also need not disclose the value of the index that would otherwise have been used to compute the prior interest rate.]

[*Paragraph 20(c)(3)*]▶*Paragraph 20(c)(2)(iv)*◀.

1. *Unapplied index increases.* The requirement that the consumer receive information about the extent to which the creditor has foregone any increase in the interest rate ▶and the earliest date a creditor may apply foregone interest to future adjustments, subject to rate caps,◀ is applicable only to those transactions permitting interest rate carryover. The amount of increase that is foregone at an adjustment is the amount that, subject to rate caps, can be applied to future adjustments independently to increase, or offset decreases in, the rate that is determined according to the index or formula.

[*Paragraph 20(c)(4).*

1. *Contractual effects of the adjustment.* The contractual effects of an interest rate adjustment must be disclosed including the payment due after the adjustment is made whether or not the payment has been adjusted. A contractual effect of a rate adjustment would include, for example, disclosure of any change in the term or maturity of the loan if the change resulted from the rate adjustment. In transactions where paying the periodic payments will not fully amortize the outstanding balance at the end of the loan term and where the final payment will equal the periodic payment plus the remaining unpaid balance, the amount of the adjusted payment must be disclosed if such payment has changed as a result of the rate adjustment. A statement of the loan balance also is required. The balance required to be disclosed is the balance on which the new adjusted payment is based. If no payment adjustment is disclosed in the notice, the balance disclosed should be the loan balance on which the payment disclosed under § 226.20(c)(5) is based, if applicable, or the balance at the time the disclosure is prepared.]

[*Paragraph 20(c)(5)*]▶*Paragraph 20(c)(2)(vi)*◀.

1. *Fully-amortizing payment.* This paragraph requires a disclosure ▶of the fully amortizing payment◀ only when negative amortization occurs as a result of the adjustment. A disclosure is not required simply because a loan calls for non-amortizing or partially amortizing payments. For example, in a transaction with a five-year term and payments based on a longer amortization schedule, and where the final payment will equal the periodic payment plus the remaining unpaid balance, the creditor would not have to disclose the payment necessary to fully amortize the loan in the remainder of the five-year term. A disclosure is required, however, if the ▶new◀ payment disclosed under [§ 226.20(c)(4)] ▶§ 226.20(c)(2)(ii)(C)◀ is not sufficient to prevent negative amortization in the loan. The adjustment notice must state the payment required to prevent negative amortization. (This paragraph does not apply if the payment disclosed in [§ 226.20(c)(4)] ▶§ 226.20(c)(2)(ii)(C)◀ is sufficient to prevent negative amortization in the loan but the final payment will be a different amount due to rounding.)

▶2. *Effect on loan term.* The creditor must disclose any change in the term or maturity of the loan if the change resulted from the rate adjustment. The creditor need not make that disclosure if the loan term or maturity has not changed.◀

Paragraph 20(c)(2)(vii).

1. *Basis of disclosure.* A statement of the loan balance must be disclosed. The balance required to be disclosed is the balance on which the new adjusted payment is based.

Paragraph 20(c)(3)(iii).

1. *Unapplied index increases.* Creditors may rely on comment 20(c)(2)(iv)–1 in determining which transactions the requirement to disclose foregone interest increases applies to and how to disclose such increases. Although creditors must disclose the earliest date the creditor may apply foregone interest to future adjustments under § 226.20(c)(2)(iv), creditors need not disclose this information in the disclosures required by § 226.20(c)(3)(iii), which are made when interest rate changes do not cause payment changes during a year.

Paragraph 20(c)(3)(v).

1. *Basis of disclosure.* A statement of the loan balance must be disclosed. The balance required to be disclosed is the balance on the last day of the period for which the creditor discloses the highest and lowest interest rates.◀

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Section 226.22—Determination of the Annual Percentage Rate

22(a) Accuracy of the annual percentage rate.

▶*22(a)(1) Actual annual percentage rate.*◀

Paragraph 22(a)(1)▶*(i)*◀.

1. *Calculation method.* The regulation recognizes both the actuarial method and the United States Rule Method (U.S. Rule) as measures of an exact annual percentage rate. Both methods yield the same annual percentage rate when payment intervals are equal. They differ in their treatment of unpaid accrued interest.

2. *Actuarial method.* When no payment is made, or when the payment is insufficient to

pay the accumulated finance charge, the actuarial method requires that the unpaid finance charge be added to the amount financed and thereby capitalized. Interest is computed on interest since in succeeding periods the interest rate is applied to the unpaid balance including the unpaid finance charge. Appendix J provides instructions and examples for calculating the annual percentage rate using the actuarial method. ►(The fact that § 226.38(e)(5)(ii) requires the "finance charge" to be disclosed as "interest and settlement charges" for purposes of mortgage transaction disclosures does not affect how an annual percentage rate is calculated using the actuarial method.)◄

3. *U.S. Rule.* The U.S. Rule produces no compounding of interest in that any unpaid accrued interest is accumulated separately and is not added to principal. In addition, under the U.S. Rule, no interest calculation is made until a payment is received.

4. *Basis for calculations.* When a transaction involves "step rates" or "split rates"—that is, different rates applied at different times or to different portions of the principal balance—a single composite annual percentage rate must be calculated and disclosed for the entire transaction. Assume, for example, a step-rate transaction in which a $10,000 loan is repayable in 5 years at 10 percent interest for the first 2 years, 12 percent for years 3 and 4, and 14 percent for year 5. The monthly payments are $210.71 during the first 2 years of the term, $220.25 for years 3 and 4, and $222.59 for year 5. The composite annual percentage rate, using a calculator with a "discounted cash flow analysis" or "internal rate of return" function, is 10.75 percent.

►*Paragraph 22(a)(1)(ii).*◄

[5.]►1.◄ *Good faith reliance on faulty calculation tools.* [Footnote 45d]►Section 226.22(a)(1)(ii)◄ absolves a creditor of liability for an error in the ►disclosed◄ annual percentage rate or finance charge that resulted from a corresponding error in a calculation tool used in good faith by the creditor. ►(For a mortgage transaction, the finance charge is disclosed as the "interest and settlement charges" (*see* § 226.38(e)(5)(ii)).◄ Whether or not the creditor's use of the tool was in good faith must be determined on a case-by-case basis, but the creditor must in any case have taken reasonable steps to verify the accuracy of the tool, including any instructions, before using it. Generally, [the footnote]►§ 226.22(a)(1)(ii)◄ is available only for errors directly attributable to the calculation tool itself, including software programs; it is not intended to absolve a creditor of liability for its own errors, or for errors arising from improper use of the tool, from incorrect data entry, or from misapplication of the law.

[*Paragraph*]*22(a)(2)*► *Regular transaction*◄.

1. [*Regular transactions*]►*General*◄. The annual percentage rate for a regular transaction is considered accurate if it varies in either direction by not more than ⅛ of 1 percentage point from the actual annual percentage rate. For example, when the exact annual percentage rate is determined to be 10⅛%, a disclosed annual percentage rate from 10% to 10¼%, or the decimal equivalent, is deemed to comply with the regulation.

[*Paragraph*]*22(a)(3)*► *Irregular transaction*◄.

1. [*Irregular transactions*]►*General*◄. The annual percentage rate for an irregular transaction is considered accurate if it varies in either direction by not more than ¼ of 1 percentage point from the actual annual percentage rate. This tolerance is intended for more complex transactions that do not call for a single advance and a regular series of equal payments at equal intervals. The ¼ of 1 percentage point tolerance may be used, for example, in a construction loan where advances are made as construction progresses, or in a transaction where payments vary to reflect the consumer's seasonal income ►or due to changes in a premium for or termination of mortgage insurance◄. It may also be used in transactions with graduated payment schedules where the contract commits the consumer to several series of payments in different amounts. It does not apply, however, to loans with variable rate features where the initial disclosures are based on [a regular amortization schedule]►having regular payment periods◄ over the life of the loan, even though payments may later change because of the variable rate feature.

22(a)(4) Mortgage loans.

1. *Example*►*s.* i.◄ If a creditor improperly omits a $75 fee from the [finance charge]►interest and settlement charges◄ on a regular transaction, the understated [finance charge is]►interest and settlement charges are◄ considered accurate under [§ 226.18(d)(1)] ►§ 226.38(e)(5)(ii)◄, and the annual percentage rate corresponding to [that understated finance charge also is considered accurate even if it falls]►those interest and settlement charges also are considered accurate even if they fall◄ outside the tolerance of ⅛ of 1 percentage point provided under § 226.22(a)(2). Because a $75 error was made, ►however,◄ an annual percentage rate corresponding to a $100 understatement of the [finance charge]►interest and settlement charges◄ would not be considered accurate.

►ii. If a creditor improperly includes a $200 fee in the interest and settlement charges on a regular transaction, the overstated interest and settlement charges are considered accurate under § 226.38(e)(5)(ii), and the annual percentage rate corresponding to those overstated interest and settlement charges is considered accurate even if it falls outside the tolerance of ⅛ of 1 percentage point provided under § 226.22(a)(2). Because a $200 error was made, however, an annual percentage rate corresponding to a $225 overstatement of the interest and settlement charges would not be considered accurate.

2. *Rescission purposes.* Section 226.22(a)(4)(ii)(B) does not establish a special tolerance for determining whether corrected disclosures are required for rescindable mortgage transactions under § 226.19(a)(2). The tolerances for interest and settlement charges under § 226.23►(a)(5)(ii)◄[(g) and (h)] apply only when the consumer asserts the right of rescission under § 226.23.◄

22(a)(5) Additional tolerance for mortgage loans.

1. *Example*►*s.* Section 226.22(a)(5)◄[. This paragraph] contains an additional tolerance for a disclosed annual percentage rate that is incorrect but is closer to the actual annual percentage rate than the rate that would be considered accurate under the tolerance in § 226.22(a)(4). To illustrate: In an irregular transaction subject to a ¼ of 1 percentage point tolerance[, if]►—

i. If◄ the actual annual percentage rate is 9.00 percent and a $75 omission from the [finance charge]►interest and settlement charges◄ corresponds to [a]►an annual percentage◄ rate of 8.50 percent that is considered accurate under § 226.22(a)(4), a disclosed APR of 8.65 percent is within the tolerance in § 226.22(a)(5). In this example of [an understated finance charge]►understated interest and settlement charges◄, a disclosed annual percentage rate below 8.50 ►(the annual percentage rate that corresponds to the disclosed interest and settlement charges)◄ or above 9.25 percent ►(the annual percentage rate that corresponds to the ¼ of 1 percentage tolerance for an irregular transaction)◄ would not be considered accurate.

►ii. If the actual annual percentage rate is 9.00 percent and the improper inclusion of a $500 fee in the interest and settlement charges corresponds to an annual percentage rate of 9.40 percent that is considered accurate under § 226.22(a)(4), a disclosed annual percentage rate of 9.30 percent is within the tolerance in § 226.22(a)(5). In this example of overstated interest and settlement charges, a disclosed annual percentage rate below 8.75 percent (the annual percentage rate that corresponds to the ¼ of one percentage point tolerance for an irregular transaction) or above 9.40 percent (the annual percentage rate that corresponds to the disclosed interest and settlement charges) would not be considered accurate.◄

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Section 226.23—Right of Rescission

1. *Transactions not covered.* Credit extensions that are not subject to the regulation are not covered by § 226.23 even if a customer's principal dwelling is the collateral securing the credit. For example, the right of rescission does not apply to a business purpose loan, even though the loan is secured by the customer's principal dwelling.

23(a) Consumer's right to rescind.

[Paragraph] *23(a)(1)* ►*Coverage.*◄

1. *Security interest arising from transaction.* ►i.◄ In order for the right of rescission to apply, the security interest must be retained as part of the credit transaction. For example:

[•]►A.◄ A security interest that is acquired by a contractor who is also extending the credit in the transaction.

[•]►B.◄ A mechanic's or materialman's lien that is retained by a subcontractor or supplier of the contractor-creditor, even when the latter has waived its own security interest in the consumer's home.

►ii.◄ The security interest is not part of the credit transaction and therefore the transaction is not subject to the right of rescission when, for example:

[•]►A.◄ A mechanic's or materialman's lien is obtained by a contractor who is not a party to the credit transaction but is merely paid with the proceeds of the consumer's unsecured bank loan.

[•]▶B.◀ All security interests that may arise in connection with the credit transaction are validly waived.

[•]▶C.◀ The creditor obtains a lien and completion bond that in effect satisfies all liens against the consumer's principal dwelling as a result of the credit transaction.

▶iii.◀ Although liens arising by operation of law are not considered security interests for purposes of disclosure under § 226.2, that section specifically includes them in the definition for purposes of the right of rescission. Thus, even though an interest in the consumer's principal dwelling is not a required disclosure under [§ 226.18(m)]▶§ 226.38(f)(2)◀, it may still give rise to the right of rescission.

2. *Consumer.* To be a consumer within the meaning of § 226.2, that person must at least have an ownership interest in the dwelling that is encumbered by the creditor's security interest, although that person need not be a signatory to the credit agreement. For example, if only one spouse signs a credit contract, the other spouse is a consumer if the ownership interest of that spouse is subject to the security interest.

3. *Principal dwelling.* A consumer can only have one principal dwelling at a time. (But see comment 23(a)(1)–4.) A vacation or other second home would not be a principal dwelling. A transaction secured by a second home (such as a vacation home) that is not currently being used as the consumer's principal dwelling is not rescindable, even if the consumer intends to reside there in the future. When a consumer buys or builds a new dwelling that will become the consumer's principal dwelling within one year or upon completion of construction, the new dwelling is considered the principal dwelling if it secures the acquisition or construction loan. In that case, the transaction secured by the new dwelling is a residential mortgage transaction and is not rescindable. For example, if a consumer whose principal dwelling is currently A builds B, to be occupied by the consumer upon completion of construction, a construction loan to finance B and secured by B is a residential mortgage transaction. Dwelling, as defined in § 226.2, includes structures that are classified as personalty under State law. For example, a transaction secured by a mobile home, trailer, or houseboat used as the consumer's principal dwelling may be rescindable.

4. *Special rule for principal dwelling.* Notwithstanding the general rule that consumers may have only one principal dwelling, when the consumer is acquiring or constructing a new principal dwelling, any loan subject to Regulation Z and secured by the equity in the consumer's current principal dwelling (for example, a bridge loan) is subject to the right of rescission regardless of the purpose of that loan. For example, if a consumer whose principal dwelling is currently A builds B, to be occupied by the consumer upon completion of construction, a construction loan to finance B and secured by A is subject to the right of rescission. A loan secured by both A and B is, likewise, rescindable.

5. *Addition of a security interest.* [Under footnote 47, the]▶The◀ addition of a security interest in a consumer's principal dwelling to an existing obligation is rescindable even if the existing obligation is not satisfied and replaced by a new obligation, and even if the existing obligation was previously exempt (because it was credit over $25,000 not secured by real property or a consumer's principal dwelling). The right of rescission applies only to the added security interest, however, and not to the original obligation. [In those situations, only the § 226.23(b) notice need be delivered, not new material disclosures; the rescission period will begin to run from the delivery of the notice.]▶Except as provided in § 226.20(a), the creditor need only deliver the § 226.23(b) notice, not new material disclosures. If the addition of a security interest in the consumer's principal dwelling is a new transaction under § 226.20(a)(1) or a refinancing under § 226.20(a)(2), then the creditor must deliver new material disclosures. The rescission period will begin to run from the delivery of the notice and, as applicable, the delivery of the material disclosures.◀

[*Paragraph*] *23(a)(2)*▶ *Exercise of the right.*

23(a)(2)(i) Provision of written notification.◀

1. *Consumer's exercise of right.* The consumer must exercise the right of rescission in writing ▶and may, but is not required to, use◀ [but not necessarily on] the notice supplied under § 226.23(b). [Whatever the means of sending the notification of rescission—mail, telegram or other written means—the time period for the creditor's performance under § 226.23(d)(2) does not begin to run until the notification has been received. The creditor may designate an agent to receive the notification so long as the agent's name and address appear on the notice provided to the consumer under § 226.23(b). Where the creditor fails to provide the consumer with a designated address for sending the notification of rescission, delivering the notification to the person or address to which the consumer has been directed to send payments constitutes delivery to the creditor or assignee. State law determines whether delivery of the notification to a third party other than the person to whom payments are made is delivery to the creditor or assignee, in the case where the creditor fails to designate an address for sending the notification of rescission.]

▶*23(a)(2)(ii) Party the consumer shall notify.*

23(a)(2)(ii)(B) After the three-business-day period following consummation.

1. *In general.* To exercise an extended right of rescission, the consumer must notify the current owner of the debt obligation. Under § 226.23(a)(2)(ii)(B), the current owner of the debt obligation is deemed to have received the consumer's notification if the consumer provides it to the servicer, as defined in § 226.36(c)(3). Therefore, the period for the creditor's or owner's actions in § 226.23(d)(2) begins on the day the servicer receives the consumer's notification.◀

[*Paragraph*] *23(a)(3)* ▶*Rescission period.*

23(a)(3)(i) Three business days.◀

1. *Rescission period.* ▶i.◀ The consumer's right to rescind does not expire until midnight after the third business day following the last of three events:

[•]▶A.◀ Consummation of the transaction.

[•]▶B.◀ Delivery of all material disclosures.

[•]▶C.◀ Delivery to the consumer of the required rescission notice.

✖ For example, [if a transaction is consummated on Friday, June 1, and the disclosures and notice of the right to rescind were given on Thursday, May 31, the rescission period will expire at midnight of the third business day after June 1—that is,▶assume the consumer received all material disclosures on Wednesday, May 23 and received the notice of the right to rescind on Thursday, May 31, and the transaction was consummated on Friday, June 1. The rescission period will expire on midnight after the third business day, which is◀ Tuesday, June 5. [In another example, if the disclosures are given and the transaction consummated on Friday, June 1, and the rescission notice is given on Monday, June 4, the rescission period expires at midnight of the third business day after June 4—that is Thursday, June 7. The consumer must place the rescission notice in the mail, file it for telegraphic transmission, or deliver it to the creditor's place of business within that period in order to exercise the right.]

▶iii. The provision of incorrect or incomplete material disclosures or an incorrect or incomplete notice of the right to rescind does not constitute delivery of the disclosures or notice. If the creditor originally provided incorrect or incomplete material disclosures, to commence the three-business-day rescission period, the creditor must deliver to the consumer complete, correct material disclosures together with a complete, correct, updated notice of the right to rescind. If the creditor originally provided an incorrect or incomplete notice of the right to rescind, to commence the three-business-day rescission period, the creditor must deliver to the consumer a complete, correct, updated notice of the right to rescind. In either situation, the consumer would have three business days after proper delivery to rescind the transaction.◀

[2. *Material disclosures.* Footnote 48 sets forth the material disclosures that must be provided before the rescission period can begin to run. Failure to provide information regarding the annual percentage rate also includes failure to inform the consumer of the existence of a variable rate feature. Failure to give the other required disclosures does not prevent the running of the rescission period, although that failure may result in civil liability or administrative sanctions.]

[3.]▶*23(a)(3)(ii)*◀ *Unexpired right of rescission.*

▶*23(a)(3)(ii)(A) Up to three years.*◀

[When the creditor has failed to take the action necessary to start the three-business day rescission period running, the right to rescind automatically lapses on the occurrence of the earliest of the following three events:

• The expiration of three years after consummation of the transaction.

• Transfer of all the consumer's interest in the property.

• Sale of the consumer's interest in the property, including a transaction in which the consumer sells the dwelling and takes back a purchase money note and mortgage or retains legal title through a device such as an installment sale contract.❳

►1. *Transfer.* A◄ transfer of all the consumer's interest ►that terminates the right of rescission◄ includes ❲such❳ transfers ❲as bequests and❳►by operation of law following the consumer's death and by ◄ gift❲s❳. ❲A sale or transfer of the property need not be voluntary to terminate the right to rescind. For example, a foreclosure sale would terminate an unexpired right to rescind. As provided in section 125 of the Act, the three-year limit may be extended by an administrative proceeding to enforce the provisions of this section.❳ A partial transfer of the consumer's interest, such as a transfer bestowing co-ownership on a spouse, does not terminate the right of rescission. ► Filing for bankruptcy generally does not terminate the right of rescission if the consumer retains an interest in the property after the bankruptcy estate is created.

2. *Sale.* A sale of the consumer's interest in the property that terminates the right of rescission includes a transaction in which the consumer sells the dwelling and takes back a purchase money note and mortgage or retains legal title through a device such as an installment sale contract.

3. *Involuntary sale or transfer.* A sale or transfer of the property need not be voluntary to terminate the right to rescind. For example, a foreclosure sale would terminate an unexpired right to rescind.◄

❲*Paragraph*❳ *23(a)(4)*► *Joint Owners*◄.

1. ❲*Joint owners*❳► In general◄. When more than one consumer has the right to rescind a transaction, any of them may exercise that right and cancel the transaction on behalf of all. For example, if both husband and wife have the right to rescind a transaction, either spouse acting alone may exercise the right and both are bound by the rescission.

►23(a)(5) Definition of material disclosures.

Paragraph 23(a)(5)(i)

1. *In general.* The right to rescind generally does not expire until midnight after the third business day following the latest of (1) consummation, (2) delivery of the notice of the right to rescind, as set forth in § 226.23(b), or (3) delivery of all material disclosures, as set forth in § 226.23(a)(5)(i). *See* § 226.23(a)(3). A creditor must make the material disclosures clearly and conspicuously consistent with the requirements of §§ 226.32(c) and 226.38. A creditor may satisfy the requirements of § 226.32(c) by using the Section 32 Loan Model Clauses in Appendix H–16 of this part, or substantially similar disclosures. A creditor may satisfy the requirements of § 226.38 by providing the appropriate model form in Appendix H or, for reverse mortgages, Appendix K of this part, or a substantially similar disclosure, which is properly completed with the disclosures required by § 226.38. Failure to provide the required non-material disclosures does not affect the right of rescission, although such failure may be a violation subject to the liability provisions of section 130 of the Act, or administrative sanctions.

2. *Format.* Failing to satisfy any specific terminology or format requirements set forth in § 226.33 or § 226.37 or in the model forms in Appendix H or Appendix K is not by itself a failure to provide material disclosures. Nonetheless, a creditor must provide the material disclosures clearly and conspicuously, as described in § 226.37(a)(1) and comments 37(a)–1 and 37(a)(1)–1 and –2.

23(a)(5)(ii) Tolerance for accuracy of the interest and settlement charges.

1. *Current holder.* If there is no new advance of money and no consolidation of existing loans, a refinancing with the current holder who is not the original creditor is subject to the special tolerance for interest and settlement charges set forth in § 226.23(a)(5)(ii)(B). If there is no new advance of money, a new transaction under § 226.20(a)(1) with the original creditor who is the current holder is exempt from the right of rescission under § 226.23(f)(2).

2. *New advance.* The term *new advance* has the same meaning as in § 226.23(f)(2)(ii).

3. *Interest and settlement charges.* This section is based on the accuracy of the total interest and settlement charges as disclosed under § 226.33(c)(14)(ii) or § 226.38(e)(5)(ii) rather than the component charges, such as a document preparation fee.

23(a)(5)(iii) Tolerances for accuracy of the loan amount.

1. *HOEPA loans.* Paragraphs (a)(5)(iii)(A) and (B) provide certain tolerances for the loan amount. However, if the mortgage is subject to § 226.32, then the tolerance for the amount borrowed as provided in § 226.32(c)(5) would apply to the disclosure of the loan amount for purposes of rescission. For example, the loan amount for a HOEPA loan would be treated as accurate if it is not more than $100 above or below the amount required to be disclosed.

2. *Current holder.* If there is no new advance of money and no consolidation of existing loans, a refinancing with the current holder who is not the original creditor is subject to the special tolerance for the loan amount set forth in § 226.23(a)(5)(iii)(B). If there is no new advance of money, a new transaction under § 226.20(a)(1) with the original creditor who is the current holder is exempt from the right of rescission under § 226.23(f)(2).

3. *New advance.* The term *new advance* has the same meaning as in § 226.23(f)(2)(ii).

23(a)(5)(iv) Tolerances for accuracy of the total settlement charges, the prepayment penalty, and the payment summary.

1. *HOEPA loans.* Paragraph (a)(5)(iv) provides a tolerance for disclosure of the payment summary. However, if the mortgage is subject to § 226.32, then the tolerance for the regular payment as provided in § 226.32(c)(3) would apply. In a HOEPA loan, there is no tolerance for a payment other than the regular payment. Thus, the disclosure of the regular payment in the payment summary for a HOEPA loan is accurate if it based on a loan amount that is not more than $100 above or below the amount required to be disclosed. The disclosure of any other payment, such as the maximum monthly payment, is not subject to a tolerance.◄

23(b) Notice of right to rescind.

►23(b)(1) Who receives notice.◄

1. ❲*Who receives notice*❲►*In general.* i.◄ Each consumer entitled to rescind must be given:

❲•❳►A.◄ ❲Two copies of the❳ ►The◄ rescission notice.

❲•❳►B.◄ The material disclosures.

►ii.◄ ❲In❳►For example, in◄ a transaction involving joint owners, both of whom are entitled to rescind, both must receive the notice of the right to rescind and disclosures. [For example, if both spouses are entitled to rescind a transaction, each must receive two copies of the rescission notice (one copy to each if the notice is provided in electronic form in accordance with the consumer consent and other applicable provisions of the E-Sign Act) and one copy of the disclosures.]

❲2. *Format.* The notice must be on a separate piece of paper, but may appear with other information such as the itemization of the amount financed. The material must be clear and conspicuous, but no minimum type size or other technical requirements are imposed. The notices in appendix H provide models that creditors may use in giving the notice.❳

►*23(b)(2) Format of notice.*

1. *Failure to format correctly.* The creditor's failure to comply with the format requirements in § 226.23(b)(2) does not by itself constitute failure to deliver the notice of the right to rescind. However, to deliver the notice properly for purposes of § 226.23(a)(3), the creditor must provide the disclosures required under § 226.23(b)(3) clearly and conspicuously, as described in § 226.23(b)(3) and comment 23(b)(3)–1.

2. *Notice must be in writing in a form the consumer may keep.* The rescission notice must be in writing in a form that the consumer may keep. *See* § 226.17(a).

23(b)(3) Required content of notice.◄

❲3. *Content.* The notice must include all of the information outlined in § 226.23(b)(1)(i) through (v). The requirement in § 226.23(b) that the transaction be identified may be met by providing the date of the transaction. The creditor may provide a separate form that the consumer may use to exercise the right of rescission, or that form may be combined with the other rescission disclosures, as illustrated in appendix H. The notice may include additional information related to the required information, such as:

• A description of the property subject to the security interest.

• A statement that joint owners may have the right to rescind and that a rescission by one is effective for all.

• The name and address of an agent of the creditor to receive notice of rescission.]

►1. *Clear and conspicuous standard.* The clear and conspicuous standard generally requires that disclosures be in a reasonably understandable form and readily noticeable to the consumer.

2. *Methods for sending notification of exercise.* In addition to providing a postal address for regular mail in the disclosure

required under § 226.23(b)(3)(v), the creditor, at its option, may describe overnight courier, fax, e-mail, in-person or other methods of communication that the consumer may use to send or deliver written notification to the creditor of exercise of the right of rescission.

3. *Creditor's or its agent's address.* If the creditor designates an agent to receive the consumer's rescission notice, the creditor may include its name along with the agent's name and address in the disclosure required by § 226.23(b)(3)(v).

4. *Calendar date on which the rescission period expires.* i. In some cases, the creditor cannot provide the calendar date on which the three-business-day period for rescission expires, such as when the transaction is conducted through the mail or occurs through an escrow agent and involves two or more borrowers who do not sign the closing documents at the same time. If the creditor cannot provide an accurate calendar date on which the three-business-day rescission period expires, the creditor must provide the calendar date on which it reasonably and in good faith expects the three-business-day period for rescission to expire. For example, assume that a consumer receives all material disclosures on February 15. If the creditor uses an overnight courier service to deliver closing documents and the rescission notice to the consumer on Monday, March 1, the creditor could instruct the consumer to sign the documents no later than Wednesday, March 3, in which case the creditor should provide Saturday, March 6, as the calendar date after which the three-business-day period for rescission expires. In this example, Saturday, March 6, is the calendar date on which the creditor can reasonably expect the rescission period to expire because the creditor expects that the consumer will receive the notice of the right of rescission on Monday, March 1 with the rest of the closing documents and because the creditor can reasonably assume that the consumer will wait until the deadline of Wednesday, March 3, to sign the closing documents and consummate the transaction.

ii. If the creditor provides a date in the notice that gives the consumer a longer period within which to rescind than the actual period for rescission, the notice shall be deemed to comply with the requirement in § 226.23(b)(3)(vi), as long as the creditor permits the consumer to rescind the transaction through the end of the date in the notice. For instance, in the example in comment 23(b)(3)–4.i. above, if the consumer signs the closing documents upon receipt on Monday, March 1, the actual expiration date of the right to rescind would be at the end of Thursday, March 4. The creditor's notice stating that the expiration date is Saturday, March 6 would be deemed compliant with § 226.23(b)(3)(vi), as long as the creditor permits the consumer to rescind through the end of Saturday, March 6.

iii. If the creditor provides a date in the notice that gives the consumer a shorter period within which to rescind than the actual period for rescission, the creditor shall be deemed to comply with the requirement in § 226.23(b)(3)(vi) if the creditor notifies the consumer that the deadline in the first notice of the right of rescission has changed and provides a second notice to the consumer stating that the consumer's right to rescind expires on a calendar date which is three business days from the date the consumer receives the second notice. For instance, in the example in comment 23(b)(3)–4.i. above, if the consumer disregards the creditor's instructions to sign the closing documents no later than Wednesday, March 3, and signs the closing documents on Thursday, March 4, the actual date after which the right of rescission expires would be Monday, March 8. The creditor's notice stating that the expiration date is Saturday, March 6, would not violate § 226.23(b)(3)(vi) if the creditor discloses to the consumer that the expiration date in the first notice (March 6) has changed and provides a corrected notice with an additional three-business-day period to rescind. For example, the creditor could prepare on Monday, March 8 a second notice stating that the expiration date for the right to rescind is the end of Friday, March 12 and include that second notice in a package delivered by overnight courier to the consumer on Tuesday, March 9. The creditor also could include in the package a cover letter stating that the deadline to cancel the transaction has changed, and refer to the "Deadline to Cancel" section in the second notice.

5. *Form for consumer's exercise of right.* Creditors must provide a space for the consumer's name and property address on the form. Creditors are not obligated to complete the lines in the form for the consumer's name and property address, but may wish to do so to ensure that the consumer who uses the form to exercise the right can be readily identified. At its option, a creditor may include the loan number on the form. A creditor may not, however, request or require the consumer to provide the loan number on the form (such as including a space labeled "loan number" for the consumer to complete).

6. *New advance of money with the same creditor under § 226.23(f)(2).* Under § 226.23(f)(2), a consumer may rescind a new transaction with the same creditor only if there is a new advance of money as defined in § 226.23(f)(2)(ii). The new transaction is rescindable only to the extent of the new advance. In such transactions, the creditor must provide the consumer with the information in § 226.23(b)(3)(iv) regarding the previous loan. Model Form H–9 is designed for providing notice of the right of rescission to a consumer obtaining a new advance of money with the same creditor.

23(b)(4) Optional content of notice.

1. *Related information.* Section 226.23(b)(4) lists optional disclosures that are related to the disclosures required by § 226.23(b)(3) that may be added to the notice. In addition, at the creditor's option, other information directly related to the disclosures required by § 226.23(b)(3) may be included in the notice. An explanation of the use of pronouns or other references to the parties to the transaction is directly related information. For example, a creditor might add to the notice a statement that "'You' refers to the customer and 'we' refers to the creditor."

23(b)(5)◀[4.] *Time of providing notice.*

▶1. In those cases where § 226.23(b)(5)(i) applies, the◀[The] notice required by § 226.23(b) ▶must be given◀[need not be given] before consummation of the transaction. ▶ If t◀[T]he creditor [may] deliver▶s◀ the notice after the transaction is consummated, [but the]▶the timing requirement of § 226.23(b)(5)(i) is violated and the right of rescission does not expire until the earlier of three business days after ◀ [rescission period will not begin to run until] the notice is ▶properly◀ given ▶or upon the occurrence of one of the events listed in § 226.15(a)(3)(ii)(A)◀. For example, if the creditor ▶delivers the material disclosures to the consumer in person on Monday, March 1 and the loan is consummated on Thursday, March 4 (after all applicable waiting periods under § 226.19(a)(2) have expired), but the creditor provides the rescission notice on Wednesday, March 24, the right of rescission does not expire until the end of the third business day after Wednesday, March 24, that is, until the end of Saturday, March 27◀[provides the notice on May 15, but disclosures were given and the transaction was consummated on May 10, the 3-business-day rescission period will run from May 15].

▶*23(b)(6) Proper form of notice.*

1. A creditor satisfies § 226.23(b)(3) if it provides the appropriate model form in Appendix H, or a substantially similar notice, which is properly completed with the disclosures required by § 226.23(b)(3). For example, a notice would not fulfill the requirement to deliver the notice of the right to rescind if the date on which the three-business-day period for rescission terminates was not properly completed because the date was missing or incorrectly calculated. If the creditor provides a date that is later deemed inaccurate, the notice may be deemed to comply with § 226.23(b)(3) if the creditor follows the guidance in § 226.23(b)(3)(vi) and comment 23(b)(3)–4.◀

23(c) Delay of creditor's performance.

1. *General rule.* Until the rescission period has expired and the creditor is reasonably satisfied that the consumer has not rescinded, the creditor must not, either directly or through a third party:

[•]▶A.◀ Disburse loan proceeds to the consumer.

[•]▶B.◀ Begin performing services for the consumer.

[•]▶C.◀ Deliver materials to the consumer.

2. *Escrow.* The creditor may disburse loan proceeds during the rescission period in a valid escrow arrangement. The creditor may not, however, appoint the consumer as "trustee" or "escrow agent" and distribute funds to the consumer in that capacity during the delay period.

3. *Actions during the delay period.* Section 226.23(c) does not prevent the creditor from taking other steps during the delay, short of beginning actual performance. Unless otherwise prohibited, such as by State law, the creditor may, for example:

[•]▶A.◀ Prepare the loan check.

[•]▶B.◀ Perfect the security interest.

[•]▶C.◀ Prepare to discount or assign the contract to a third party.

[•]▶D.◀ Accrue finance charges during the delay period.

4. *Delay beyond rescission period.* ►i.◄ The creditor must wait until it is reasonably satisfied that the consumer has not rescinded ►within the applicable time period◄. For example, the creditor may satisfy itself by doing one of the following:

[•]►A.◄ Waiting a reasonable time after expiration of the rescission period to allow for delivery of a mailed notice.

[•]►B.◄ Obtaining a written statement from the consumer that the right has not been exercised. ►The statement must be signed and dated by the consumer only at the end of the three-day period.◄

►ii.◄ When more than one consumer has the right to rescind, the creditor cannot reasonably rely on the assurance of only one consumer, because other consumers may exercise the right.

23(d) Effects of rescission

23(d)►(1)◄ Effects of rescission ►prior to the creditor disbursing funds◄.

[*Paragraph*] *23(d)(1)►(i) Effect of consumer's notice of rescission◄.*

1. *Termination of security interest.* Any security interest giving rise to the right of rescission becomes void when the consumer [exercises the right of rescission]►provides a notice of rescission to a creditor◄. The security interest is automatically negated regardless of its status and whether or not it was recorded or perfected. Under § 226.23[(d)(2)]►(d)(1)(ii)◄, however, the creditor must take [any action]►whatever steps are◄ necessary to [reflect the fact that]►terminate◄ the security interest [no longer exists].

[*Paragraph*] *23[(d)(2)]►(d)(1)(ii) Creditor's obligations◄.*

1. *Refunds to consumer.* The consumer cannot be required to pay any amount [in the form of money or property] either to the creditor or to a third party as part of the credit transaction. Any amounts [of this nature] already paid by the consumer must be refunded. *Any amount* includes finance charges already accrued, as well as other charges, [such as broker fees, application and commitment fees, or fees for a title search or appraisal,] whether paid to the creditor, paid directly to a third party, or passed on from the creditor to the third party. It is irrelevant that these amounts may not represent profit to the creditor.

2. *Amounts not refundable to consumer.* Creditors need not return any money given by the consumer to a third party outside of the credit transaction, such as costs incurred for a building permit or for a zoning variance. [Similarly, the term *any amount* does not apply to any money or property given by the creditor to the consumer; those amounts must be tendered by the consumer to the creditor under § 226.23(d)(3).]

3. *Reflection of security interest termination.* The creditor must take whatever steps are necessary to [indicate that]►terminate◄ the security interest [is terminated]. Those steps include the cancellation of documents creating the security interest, and the filing of release or termination statements in the public record. [In a transaction involving subcontractors or suppliers that also hold security interests related to the credit transaction, the creditor]►If a mechanic's or materialman's lien is retained by a subcontractor or supplier of a creditor-contractor, the creditor-contractor◄ must ensure that the termination of [their]►that◄ security interest[s] is also reflected. The 20-day period for the creditor's action refers to the time within which the creditor must begin the process. It does not require all necessary steps to have been completed within that time, but the creditor is responsible for [seeing the process through to completion]►ensuring that the process is completed◄.

►4. *Twenty-calendar-day period.* The 20-calendar-day period begins to runs from the date the creditor *receives* the consumer's notice. The creditor is deemed to have received the consumer's notice of rescission if the consumer provides the notice to the creditor or the creditor's agent designated on the notice. Where no designation is provided, the creditor is deemed to have received the notice if the consumer provides it to the servicer. See § 226.23(a)(2)(ii)(A).◄

[*Paragraph 23(d)(3).*

1. *Property exchange.* Once the creditor has fulfilled its obligations under § 226.23(d)(2), the consumer must tender to the creditor any property or money the creditor has already delivered to the consumer. At the consumer's option, property may be tendered at the location of the property. For example, if lumber or fixtures have been delivered to the consumer's home, the consumer may tender them to the creditor by making them available for pick-up at the home, rather than physically returning them to the creditor's premises. Money already given to the consumer *must* be tendered at the creditor's place of business.

2. *Reasonable value.* If returning the property would be extremely burdensome to the consumer, the consumer may offer the creditor its reasonable value rather than returning the property itself. For example, if building materials have already been incorporated into the consumer's dwelling, the consumer may pay their reasonable value.

Paragraph 23(d)(4).

1. *Modifications.* The procedures outlined in § 226.23(d)(2) and (3) may be modified by a court. For example, when a consumer is in bankruptcy proceedings and prohibited from returning anything to the creditor, or when the equities dictate, a modification might be made. The sequence of procedures under § 226.23(d)(2) and (3), or a court's modification of those procedures under § 226.23(d)(4), does not affect a consumer's substantive right to rescind and to have the loan amount adjusted accordingly. Where the consumer's right to rescind is contested by the creditor, a court would normally determine whether the consumer has a right to rescind and determine the amounts owed before establishing the procedures for the parties to tender any money or property.]

►*23(d)(2) Effects of rescission after the creditor disburses funds.*

23(d)(2)(i) Effects of rescission if the parties are not in a court proceeding.

1. *Effect of the process.* The process set forth in § 226.23(d)(2)(i) does not affect the consumer's ability to seek a remedy in court, such as an action to recover damages under section 130 of the act, and/or an action to seek to tender in installments. In addition, a creditor's written statement as described in § 226.23(d)(2)(i)(B), is not an admission by the creditor that the consumer's claim is a valid exercise of the right to rescind.

23(d)(2)(i)(A) Creditor's acknowledgment of receipt.

1. *Twenty-calendar-day period.* The 20-calendar-day period begins to run from the date the creditor *receives* the consumer's notice. The creditor is deemed to have received the consumer's notice of rescission if the consumer provides the notice to the servicer. See comment 23(a)(2)(ii)(B)–1.

23(d)(2)(i)(B) Creditor's written statement.

1. *Written statement regarding tender of money.* If the creditor disbursed money to the consumer, then the creditor's written statement must state the amount of money that the creditor will accept as the consumer's tender. For example, suppose the principal balance owed at the time the creditor received the consumer's notice of rescission was $165,000, the costs paid directly by the consumer at closing were $8,000, and the consumer made interest payments totaling $20,000 from the date of consummation to the date of the creditor's receipt of the consumer's notice of rescission. The creditor's written statement could provide that the acceptable amount of tender is $137,000, or some amount higher or lower than that amount.

2. *Reasonable date.* The creditor must provide the consumer with a reasonable date by which the consumer may tender the money or property described in paragraph (d)(2)(i)(B)(*1*) of this section. For example, it would be reasonable under most circumstances to permit the consumer's tender within 60 days of the creditor mailing or delivering the written statement.

23(d)(2)(i)(C) Consumer's response.

1. *Reasonable value of property.* If returning the property would be extremely burdensome to the consumer, the consumer may offer the creditor its reasonable value rather than returning the property itself. For example, if aluminum siding has already been incorporated into the consumer's dwelling, the consumer may pay its reasonable value.

2. *Location for tender of property.* At the consumer's option, property may be tendered at the location of the property. For example, if aluminum siding or windows have been delivered to the consumer's home, the consumer may tender them to the creditor by making them available for pick-up at the home, rather than physically returning them to the creditor's premises.

23(d)(2)(i)(D) Creditor's security interest.

1. *Reflection of security interest termination.* See comment 23(d)(1)(ii)–3.

23(d)(2)(ii) Effects of rescission in a court proceeding.

1. *Valid right of rescission.* The procedures set forth in § 226.23(d)(2)(ii) assume that the consumer's right to rescind has not expired as provided in § 226.23(a)(3)(ii). Thus, if the consumer provides a notice of rescission more than three years after consummation of the transaction, then the consumer's right to rescind has expired, and these procedures do not apply. See § 226.23(a)(3)(ii)(A).

23(d)(2)(ii)(A) Consumer's obligation.

1. *Tender of money.* If the creditor disbursed money to the consumer, the consumer shall tender to the creditor the principal balance owed at the time the creditor received the consumer's notice of rescission less any amounts the consumer has given to the creditor or a third party in connection with the transaction. For example, suppose the principal balance owed at the time the creditor received the consumer's notice of rescission was $165,000, the costs paid directly by the consumer at closing were $8,000, and the consumer made interest payments totaling $20,000 from the date of consummation to the date the creditor received the consumer's notice of rescission. The amount of the consumer's tender would be $137,000. This amount may be reduced by any amounts for damages, attorney's fees or costs, as the court may determine.

2. *Refunds to consumer.* See comment 23(d)(1)(ii)–1.

3. *Amounts not refundable to consumer.* For purposes of § 226.23(d)(2)(ii)(A), the term *any amount* does not include any money given by the consumer to a third party outside of the credit transaction, such as costs the consumer incurred for a building permit or for a zoning variance. Similarly, the term *any amount* does not apply to any money or property given by the creditor to the consumer.

4. *Condition of consumer's tender.* There may be circumstances where the consumer has no obligation to tender and, therefore, the creditor's obligations would not be conditioned on the consumer's tender. For example, in the case of a new transaction with the same creditor and a new advance of money, the new transaction is rescindable only to the extent of the new advance. See § 226.23(f)(2)(ii). Suppose the amount of the new advance was $3,000, but the costs paid directly by the consumer at closing were $5,000. The creditor would need to provide $2,000 to the consumer. In that case, within 20 calendar days after the creditor's receipt of a consumer's notice of rescission, the creditor would refund the $2,000 and terminate the security interest.

5. *Reasonable value of property.* See comment 23(d)(2)(i)(C)–1.

6. *Location for tender of property.* See comment 23(d)(2)(i)(C)–2.

23(d)(2)(ii)(B) Creditor's obligation.

1. *Reflection of security interest termination.* See comment 23(d)(1)(ii)–3.

23(d)(2)(ii)(C) Judicial modification.

1. *Determination of the consumer's right to rescind.* The sequence of procedures under §§ 226.23(d)(2)(ii)(A) and (B), or a court's modification of those procedures under § 226.23(d)(2)(ii)(C), does not affect a consumer's substantive right to rescind and to have the loan amount adjusted accordingly. Where the consumer's right to rescind is contested by the creditor, a court would normally determine first whether the consumer's right to rescind has expired, then the amounts owed by the consumer and the creditor, and then the procedures for the consumer to tender any money or property.

2. *Judicial modification of procedures.* The procedures outlined in §§ 226.23(d)(2)(ii)(A) and (B) may be modified by a court. For example, when a consumer is in bankruptcy proceedings and prohibited from returning anything to the creditor, or when the equities dictate, a modification might be made. A court may modify the consumer's form or manner of tender, such as by ordering payment in installments or by approving the parties' agreement to an alternative form of tender.◄

23(e) *Consumer's waiver of right to rescind.*

[1. *Need for waiver.* To waive the right to rescind, the consumer must have a *bona fide* personal financial emergency that must be met before the end of the rescission period. The existence of the consumer's waiver will not, of itself, automatically insulate the creditor from liability for failing to provide the right of rescission.]

[2.]►1.◄ *Procedure.* [To waive or modify the right to rescind, the consumer must give a written statement that specifically waives or modifies the right, and also includes a brief description of the emergency. Each consumer entitled to rescind must sign the waiver statement. In a transaction involving multiple consumers, such as a husband and wife using their home as collateral, the waiver must bear the signatures of both spouses.]►A consumer may modify or waive the right to rescind only after the creditor delivers the notice required by § 226.23(b) and the disclosures required by §§ 226.32(c) and 226.38, as applicable. After delivery of the required notice and disclosures, the consumer may waive or modify the right to rescind by giving the creditor a dated, written statement that specifically waives or modifies the right and describes the *bona fide* personal financial emergency. A waiver is effective only if each consumer entitled to rescind signs a waiver statement. Where there are multiple consumers entitled to rescind, the consumers may, but need not, sign the same waiver statement. See § 226.2(a)(11) to determine which natural persons are consumers with the right to rescind.

2. *Bona fide personal financial emergency.* To modify or waive the right to rescind, there must be a *bona fide* personal financial emergency that requires disbursement of loan proceeds before the end of the rescission period. Whether there is a *bona fide* personal financial emergency is determined by the facts surrounding individual circumstances. A *bona fide* personal financial emergency typically, but not always, will involve imminent loss of or harm to a dwelling or harm to the health or safety of a natural person. A waiver is not effective if the consumer's statement is inconsistent with facts known to the creditor. The following examples describe circumstances that are and are not a *bona fide* personal financial emergency.

i. *Examples—bona fide personal financial emergency.* Examples of a *bona fide* personal financial emergency include the following:

A. The imminent sale of the consumer's home at foreclosure, where the foreclosure sale will proceed unless the loan proceeds are made available to the consumer during the rescission period.

B. The need for loan proceeds to fund immediate repairs to ensure that a dwelling is habitable, such as structural repairs needed due to storm damage, where loan proceeds are needed during the rescission period to pay for the repairs.

C. The imminent need for health care services, such as in-home nursing care for a patient recently discharged from the hospital, where loan proceeds are needed during the rescission period to pay for the services.

ii. *Examples—not a bona fide personal financial emergency.* Examples of circumstances that are not a *bona fide* personal financial emergency include the following:

A. The consumer's desire to purchase goods or services not needed on an emergency basis, even though the price may increase if purchased after the rescission period.

B. The consumer's desire to invest immediately in a financial product, such as purchasing securities.

iii. *Consumer's waiver statement inconsistent with facts.* The conditions for a waiver are not met where the consumer's waiver statement is inconsistent with facts known to the creditor. For example, the conditions for a waiver are not met where the consumer's waiver statement states that loan proceeds are needed during the rescission period to abate flooding in a consumer's basement, but the creditor is aware that there is no flooding.◄

23(f) Exempt transactions.

►1. *Converting open-end to closed-end credit.* Under certain State laws, consummation of a closed-end credit transaction may occur at the time a consumer enters into the initial open-end credit agreement that is subject to a closed-end conversion feature. As provided in the commentary to § 226.17(b), closed-end credit disclosures may be delayed under these circumstances until the conversion of the open-end account to a closed-end transaction. In accounts secured by the consumer's principal dwelling, no new right of rescission arises at the time of conversion. Rescission rights under § 226.15 are unaffected.

Paragraph 23(f)(1).◄

1. *Residential mortgage* [*transaction*]►*transactions exempt*◄. Any transaction to construct or acquire a principal dwelling, whether considered real or personal property, is exempt. (See the commentary to § 226.23(a).) For example, a credit transaction to acquire a mobile home or houseboat to be used as the consumer's principal dwelling would not be rescindable.

2. *Lien status.* The lien status of the mortgage is irrelevant for purposes of the exemption in § 226.23(f)(1); the fact that a loan has junior lien status does not by itself preclude application of this exemption. For example, a home buyer may assume the existing first mortgage and create a second mortgage to finance the balance of the purchase price. Such a transaction would not be rescindable.

3. *Combined-purpose transaction.* A loan to acquire a principal dwelling and make improvements to that dwelling is exempt if treated as one transaction. If, on the other hand, the loan for the acquisition of the principal dwelling and the subsequent

advances for improvements are treated as more than one transaction, then only the transaction that finances the acquisition of that dwelling is exempt.

►*Paragraph 23(f)(2).*◄

[4.]►1.◄ *New advances.* [The exemption in § 226.23(f)(2) applies only to refinancings (including consolidations) by the original creditor. The original creditor is the creditor to whom the written agreement was initially made payable. In a merger, consolidation or acquisition, the successor institution is considered the original creditor for purposes of the exemption in § 226.23(f)(2). If the refinancing involves a new advance of money, the amount of the new advance is rescindable.] In determining whether there is a new advance, a creditor may rely on 【the amount financed, refinancing costs,】►the loan amount, the new transaction costs,◄ and other figures stated in the final Truth in Lending disclosures provided to the consumer and is not required to use, for example, more precise information that may only become available when the loan is closed. ►*See* § 226.38(a)(1) regarding the meaning of the term *loan amount.*◄

►2. *Costs of the new transaction.*◄ For purposes of the right of rescission, a new advance does not include amounts attributed solely to [the]►any *bona fide* and reasonable◄ costs of the [refinancing]►new transaction◄. [These amounts would include § 226.4(c)(7) charges (such as attorneys fees and title examination and insurance fees, if bona fide and reasonable in amount), as well as insurance premiums and other charges that are not finance charges. (Finance charges on the new transaction—points, for example—would not be considered in determining whether there is a new advance of money in a refinancing since finance charges are not part of the amount financed.)] To illustrate, if the sum of the outstanding principal balance plus the earned unpaid finance charge is $50,000 and the new [amount financed]►loan amount◄ is $51,000, then the [refinancing]►new transaction◄ would be exempt if the extra $1,000 is attributed solely to ►*bona fide* and reasonable◄ costs financed in connection with the ►new transaction◄【refinancing that are not finance charges】.

►3. *Refund of costs.* If◄[Of course, if] new advances of money are made (for example, to pay for home improvements) and the consumer exercises the right of rescission, the consumer must be placed in the same position as he or she was in prior to entering into the new [credit] transaction. Thus, all amounts of money (which would include all the costs of the 【refinancing】►new transaction◄) already paid by the consumer to the creditor or to a third party as part of the 【refinancing】►new transaction◄ would have to be refunded to the consumer. (See the commentary to § 226.23(d)(2) for a discussion of refunds to consumers.)

►4. *Escrows.* Amounts that are financed to fund an existing or newly-established escrow account do not constitute a new advance. For purposes of this paragraph, the term *escrow account* has the same meaning as in 24 CFR 3500.17(b).◄

►5. *Model rescission notice.*◄ A model rescission notice applicable to [transactions] ►a new advance of money with the same creditor◄[involving new advances] appears [in]►as model form H–9◄ in appendix H. 【The】►Otherwise, the◄ general rescission notice (model form H–8) is the appropriate form for use by creditors 【not considered original creditors in refinancing transactions】.

►*Paragraph 23(f)(3).*◄

[5.]►1.◄ *State creditors.* Cities and other political subdivisions of states acting as creditors are not exempted from this section.

►*Paragraph 23(f)(4).*◄

【6.】►1.◄ *Multiple advances.* Just as new disclosures need not be made for subsequent advances when treated as one transaction, no new rescission rights arise so long as the appropriate notice and disclosures are given at the outset of the transaction. For example, the creditor extends credit for home improvements secured by the consumer's principal dwelling, with advances made as repairs progress. As permitted by § 226.17(c)(6), the creditor makes a single set of disclosures at the beginning of the construction period, rather than separate disclosures for each advance. The right of rescission does not arise with each advance. However, if the advances are treated as separate transactions, the right of rescission applies to each advance.

【7.】►2.◄ *Spreader clauses.* When the creditor holds a mortgage or deed of trust on the consumer's principal dwelling and that mortgage or deed of trust contains a "spreader clause," subsequent loans made are separate transactions and are subject to the right of rescission. Those loans are rescindable unless the creditor effectively waives its security interest under the spreader clause with respect to the subsequent transactions.

【8. *Converting open-end to closed-end credit.* Under certain State laws, consummation of a closed-end credit transaction may occur at the time a consumer enters into the initial open-end credit agreement. As provided in the commentary to § 226.17(b), closed-end credit disclosures may be delayed under these circumstances until the conversion of the open-end account to a closed-end transaction. In accounts secured by the consumer's principal dwelling, no new right of rescission arises at the time of conversion. Rescission rights under § 226.15 are unaffected.】

【*23(g) Tolerances for accuracy.*

23(g)(2) One percent tolerance.

1. *New advance.* The phrase "new advance" has the same meaning as in comment 23(f)–4.

23(h)】 ►*23(g)*◄*Special rules for foreclosures.*

1. *Rescission.* Section 【226.23(h)】►226.23(g)◄ applies only to transactions that are subject to rescission under § 226.23(a)(1).

Paragraph 【*23(h)(1)(i)*】►*23(g)(1)*◄.

1. *Mortgage broker fees.* A consumer may rescind a loan in foreclosure if a mortgage broker fee that should have been included in the 【finance charge】►interest and settlement charges◄ was omitted, without regard to the dollar amount involved. If the amount of the mortgage broker fee is included but misstated the rule in 【§ 226.23(h)(2)】►§ 226.23(a)(5)(ii)(C)◄ applies.

【*23(h)(2) Tolerance for disclosures.*

1. *General.* This section is based on the accuracy of the total finance charge rather than its component charges.】

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Subpart E—Special Rules for Certain Home Mortgage Transactions

Section 226.31—General Rules

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31(c) Timing of disclosure.

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31(c)(1) Disclosures for certain closed-end home mortgages

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【*Paragraph*】*31(c)(1)(iii) Consumer's waiver of waiting period before consummation.*

1. 【*Modification or waiver.*】►*Procedure.*◄ A consumer may modify or waive the right to the three-day waiting period only after receiving the disclosures required by § 226.32►.◄ 【and only if the circumstances meet the criteria for establishing a *bona fide* personal financial emergency under § 226.23(e). Whether these criteria are met is determined by the facts surrounding individual situations. The imminent sale of the consumer's home at foreclosure during the three-day period is one example of a *bona fide* personal financial emergency. Each consumer entitled to the three-day waiting period must sign the handwritten statement for the waiver to be effective.】►After delivery of the required disclosures, the consumer may waive or modify the three-day waiting period by giving the creditor a dated, written statement that specifically waives or modifies the right and describes the *bona fide* personal financial emergency. A waiver is effective only if each consumer primarily liable on the obligation signs a waiver statement. Where there are multiple consumers entitled to rescind, the consumers may, but need not, sign the same waiver statement.◄

►2. *Bona fide personal financial emergency.* To modify or waive a waiting period, there must be a *bona fide* personal financial emergency that requires disbursement of loan proceeds before the end of the waiting period. Whether there is a *bona fide* personal financial emergency is determined by the facts surrounding individual circumstances. A *bona fide* personal financial emergency typically, but not always, will involve imminent loss of or harm to a dwelling or harm to the health or safety of a natural person. A waiver is not effective if the consumer's statement is inconsistent with facts known to the creditor. To determine whether circumstances are or are not a *bona fide* personal financial emergency under § 226.31(c)(1)(iii), creditors may rely on the examples and other commentary provided in comment 23(e)–2.◄

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[*31(c)(2) Disclosures for reverse mortgages.*

1. *Business days.* For purposes of providing reverse mortgage disclosures, "business day" has the same meaning as in comment 31(c)(1)–1—all calendar days

except Sundays and the Federal legal holidays listed in 5 U.S.C. 6103(a). This means if disclosures are provided on a Friday, consummation could occur any time on Tuesday, the third business day following receipt of the disclosures.

2. *Open-end plans.* Disclosures for open-end reverse mortgages must be provided at least three business days before the first transaction under the plan (see § 226.5(b)(1)).]

31(d) Basis of disclosures and use of estimates.

1. *Redisclosure.* Section 226.31(d) allows the use of estimates when information necessary for an accurate disclosure is unknown to the creditor, provided that the disclosure is clearly identified as an estimate. For purposes of Subpart E, the rule in § 226.31(c)(1)(i) requiring new disclosures when the creditor changes terms also applies to disclosures labeled as estimates.

►2. *Reverse mortgages subject to § 226.19.* For reverse mortgages subject to § 226.19, the disclosures required by § 226.19(a)(2) may not be estimated disclosures.◄

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Section 226.32—Requirements for Certain Closed-End Home Mortgages

32(a) Coverage.

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Paragraph 32(a)(1)(ii).

1. *Total loan amount.* For purposes of the "points and fees" test, the total loan amount is calculated by taking the amount financed, as determined according to § 226.18(b), and deducting any cost listed in § 226.32(b)(1)(iii) and § 226.32(b)(1)(iv) that is both included as points and fees under § 226.32(b)(1) and financed by the creditor. ►In calculating the total loan amount, however, the creditor determines a transaction's prepaid finance charge and amount financed without regard to § 226.4(g), consistent with § 226.32(b)(1)(i)(B).◄ Some examples follow, each using a $10,000 amount borrowed, a $300 appraisal fee, and $400 in points. A $500 premium for optional credit life insurance is used in one example. ►In the following examples, "prepaid finance charge" and "amount financed" refer to those amounts as determined without regard to § 226.4(g). Thus, those amounts reflect the exclusions found in §§ 226.4(a)(2) and 226.4(c)–(e) for purposes of determining the total loan amount, even though § 226.4(g) provides that many of those exclusions do not apply for purposes of determining the finance charge.◄

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►*Paragraph 32(a)(2)(ii).*

1. *Nonrecourse reverse mortgage.* A nonrecourse reverse mortgage limits the homeowner's liability under the contract to the proceeds of the sale of the home (or any lesser amount specified in the contract). If a closed-end reverse mortgage allows recourse against the consumer, and the annual percentage rate or the points and fees exceed those specified under § 226.32(a)(1), the transaction is subject to all the requirements of § 226.32, including the limitations concerning balloon payments and negative amortization.◄

32(b) Definitions.

►*Paragraph 32(b)(1).*◄

Paragraph 32(b)(1)(i).

1. *General.* Section 226.32(b)(1)(i) includes in the total "points and fees" items ►included in the finance charge pursuant to § 226.4, except interest and the time-price differential. In addition, for purposes of § 226.32(b)(1)(i), § 226.4(g) does not apply. Section 226.4(g) contains special rules governing which other provisions of § 226.4 apply to the determination of the finance charge for transactions secured by real property or a dwelling. Consequently, all closed-end transactions that are secured by a consumer's principal dwelling are subject to the special rules in § 226.4(g). Under § 226.32(b)(1)(i)(B), however, those special rules are ignored in determining a transaction's "points and fees." Thus, the exclusions for certain charges in §§ 226.4(a)(2) and 226.4(c)–(e) are observed for purposes of determining a mortgage transaction's "points and fees," even though the same exclusions do not apply for purposes of determining the transaction's finance charge. For example, fees actually paid to public officials for perfecting a security interest, if itemized and disclosed, may be excluded from the finance charge for non-mortgage transactions under § 226.4(e), but § 226.4(g) includes such fees in the finance charge for transactions secured by real property or a dwelling. Notwithstanding their inclusion in the finance charge for such transactions, however, § 226.32(b)(1)(i) does not include such fees in "points and fees." Certain fees that are not included in "points and fees" pursuant to § 226.32(b)(1)(i), however, nevertheless may be included in "points and fees" under § 226.32(b)(1)(ii) or (iii).◄ [defined as finance charges under §§ 226.4(a) and 226.(4)(b). Items excluded from the finance charge under other provisions of § 226.4 are not included in the total "points and fees" under paragraph 32(b)(1)(i), but may be included in "points and fees" under paragraphs 32(b)(1)(ii) and 32(b)(1)(iii).] Interest, including per-diem interest, is excluded from "points and fees" under § 226.32(b)(1).

Paragraph 32(b)(1)(ii).

1. *Mortgage broker fees.* In determining "points and fees" for purposes of ►§ 226.32(a)(1)(ii),◄ [this section,] compensation paid by a consumer to a mortgage broker (directly or through the creditor for delivery to the broker) is included in the calculation [whether or not the amount is disclosed as a finance charge]. Mortgage broker fees that are not paid by the consumer are not included. ►*See* comment 4(a)(3)–3.◄ Mortgage broker fees already included in the calculation as finance charges under § 226.32(b)(1)(i) need not be counted again under § 226.32(b)(1)(ii).

►*Paragraph 32(b)(1)(iii).*

1.◄ [2.]*Example.* Section 226.32(b)(1)(iii) defines "points and fees" to include all items listed in § 226.4(c)(7), other than amounts held for the future payment of taxes. An item listed in § 226.4(c)(7) may be excluded from the "points and fees" calculation, however, if the charge is reasonable, the creditor receives no direct or indirect compensation from the charge, and the charge is not paid to an affiliate of the creditor. For example, a reasonable fee paid by the consumer to an independent, third-party appraiser may be excluded from the "points and fees" calculation (assuming no compensation is paid to the creditor). A fee paid by the consumer for an appraisal performed by the creditor must be included in the calculation, [even though the fee may be excluded from the finance charge if it is bona fide and reasonable in amount.] ►however, because the creditor is compensated for the appraisal.◄

Paragraph 32(b)(1)(iv).

1. *Premium amount.* In determining "points and fees" for purposes of ►§ 226.32(a)(1)(ii)◄ [this section,] premiums paid at or before closing for credit insurance are included whether they are paid in cash or financed, and whether the amount represents the entire premium for the coverage or an initial payment.

* * * * *

Section 226.33—Requirements for Reverse Mortgages

33(a) Definition.

[1. *Nonrecourse transaction.* A nonrecourse reverse mortgage transaction limits the homeowner's liability to the proceeds of the sale of the home (or any lesser amount specified in the credit obligation). If a transaction structured as a closed-end reverse mortgage transaction allows recourse against the consumer, and the annual percentage rate or the points and fees exceed those specified under § 226.32(a)(1), the transaction is subject to all the requirements of § 226.32, including the limitations concerning balloon payments and negative amortization.]

Paragraph 33(a)(2).

1. *Default.* Default is not defined by the statute or regulation, but rather by the legal obligation between the parties and state or other law.

2. *Definite term or maturity date.* To meet the definition of a reverse mortgage transaction, a creditor cannot require any principal, interest, or shared appreciation or equity to be due and payable (other than in the case of default) until after the consumer's death, transfer of the dwelling, or the consumer ceases to occupy the dwelling as a principal dwelling. Some State laws require legal obligations secured by a mortgage to specify a definite maturity date or term of repayment in the instrument. An obligation may state a definite maturity date or term of repayment and still meet the definition of a reverse mortgage [transaction] if the maturity date or term of repayment used would not operate to cause maturity prior to the occurrence of any of the maturity events recognized in the regulation. For example, some reverse mortgage programs specify that the final maturity date is the borrower's 150th birthday; other programs include a shorter term but provide that the term is automatically extended for consecutive periods if none of the other maturity events has yet occurred. These programs would be permissible.

►*33(b) Reverse mortgage document provided on or with the application.*

33(b)(1) In general.

1. *Mail and telephone applications.* If an application is sent through the mail, the

document required by § 226.33(b) must accompany the application. If an application is taken over the telephone, the document must be delivered or mailed not later than consummation or account opening or three business days following receipt of a consumer's application by the creditor, whichever is earlier. If an application is mailed to the consumer following a telephone request, however, the document must be sent along with the application.

2. *General purpose applications.* The document required by § 226.33(b) need not be provided when a general purpose application is given to a consumer unless (1) the application or materials accompanying it indicate that it can be used to apply for a reverse mortgage or (2) the application is provided in response to a consumer's specific inquiry about a reverse mortgage. On the other hand, if a general purpose application is provided in response to a consumer's specific inquiry only about credit other than a reverse mortgage, the document need not be provided even if the application indicates it can be used for a reverse mortgage, unless it is accompanied by promotional information about reverse mortgages.

3. *Publicly-available applications.* Some creditors make applications for reverse mortgages, such as take-ones, available without the need for a consumer to request them. These applications must be accompanied by the document required by § 226.33(b), such as by attaching the document to the application form.

4. *Response cards.* A creditor may solicit consumers for its reverse mortgage product by mailing a response card which the consumer returns to the creditor to indicate interest in the product. If the only action taken by the creditor upon receipt of the response card is to send the consumer an application form or to telephone the consumer to discuss the reverse mortgage product, the creditor need not send the document required by § 226.33(b) with the response card. *See* comment 33(b)(1)–1 discussing mail and telephone applications.

5. *Denial or withdrawal of application.* Section 226.33(b)(2) provides that for telephone applications and applications received through an intermediary agent or broker, creditors must deliver or mail the document required by § 226.33(b)(1) to the consumer not later than consummation or account opening, or three business days following receipt of a consumer's application by the creditor, whichever is earlier. If the creditor determines within that three-day period that an application will not be approved, the creditor need not provide the document. Similarly, if the consumer withdraws the application within this three-day period, the creditor need not provide the document.

6. *Prominent location.*

i. *When document not given in electronic form.* The document required by § 226.33(b)(1) must be prominently located on or with the application. The document is deemed to be prominently located, for example, if the document is on the same page as an application. If the document appears elsewhere, it is deemed to be prominently located if the application contains a clear and conspicuous reference to the location of the document and indicates that the document provides information about reverse mortgages.

ii. *Form of electronic document provided on or with electronic applications.* Generally, creditors must provide the document required by § 226.33(b)(1) in a prominent location on or with a blank application that is made available to the consumer in electronic form, such as on a creditor's Internet Web site. (*See* comment 33(b)(2)–1.) Creditors have flexibility in satisfying this requirement. Whatever method is used to satisfy the disclosure requirement, a creditor need not confirm that the consumer has read the document. Methods creditors could use to satisfy the requirement include, but are not limited to, the following examples:

A. The document could automatically appear on the screen when the application appears;

B. The document could be located on the same Web page as the application (whether or not they appear on the initial screen), if the application contains a clear and conspicuous reference to the location of the document and indicates the document provides information about reverse mortgages.

C. Creditors could provide a link to the electronic document on or with the application as long as consumers cannot bypass the document before submitting the application. The link would take the consumer to the document, but the consumer need not be required to scroll completely through the document; or

D. The document could be located on the same Web page as the application without necessarily appearing on the initial screen, immediately preceding the button that the consumer will click to submit the application.

33(b)(2) Application made by telephone or through an intermediary.

1. *Intermediary agent or broker.* In determining whether an application involves an intermediary agent or broker as discussed in § 226.33(b)(2), creditors should consult the provisions in comment 19(d)(3)–3.

33(b)(3) Electronic disclosures.

1. *When electronic disclosure must be given.* Whether the document required by § 226.33(b)(1) must be in electronic form depends upon the following:

i. If a consumer accesses a reverse mortgage application electronically (other than as described under ii. below), such as online at a home computer, the creditor must provide the disclosure required by § 226.33(b)(1) in electronic form (such as with the application form on its Web site) in order to meet the requirement to provide the disclosure in a timely manner on or with the application. If the creditor instead mailed a paper disclosure to the consumer, this requirement would not be met.

ii. In contrast, if a consumer is physically present in the creditor's office, and accesses a reverse mortgage application electronically, such as via a terminal or kiosk (or if the consumer uses a terminal or kiosk located on the premises of an affiliate or third party that has arranged with the creditor to provide applications to consumers), the creditor may provide the disclosure in either electronic or paper form, provided the creditor complies with the timing, delivery, and retainability requirements of the regulation.

33(b)(4) Duties of third parties.

1. *Duties of third parties.* The duties under § 226.33(b)(4) are those of the third party; the creditor is not responsible for ensuring that a third party complies with those obligations.

2. *Effect of third party delivery of document required by § 226.33(b)(1).* If a creditor determines that a third party has provided a consumer with the document required by § 226.33(b)(1), the creditor need not give the consumer a second copy of the document.

3. *Telephone applications taken by third party.* For telephone applications taken by a third party, the third party is not required to provide the document required by § 226.33(b)(1). The document required by § 226.33(b)(1) must be provided by the creditor not later than three business days before account opening or three business days following receipt of the consumer's application by the creditor, whichever is earlier, along with the disclosures required by § 226.33(d)(1).◄

33(c) ► *Content of disclosures for reverse mortgages*◄ **[***Projected total cost of credit***]**.

►1. *Disclosures given as applicable.* The disclosures required under this section need be made only as applicable. Thus, for example, if there are no transactions requirements for a reverse mortgage, reference to them need not be made.◄

[*33(c)(1) Costs to consumer.***]**

►*33(c)(2) Identification information.*

1. *Identification of creditor.* The creditor must be identified. Use of the creditor's name is sufficient, but the creditor may also include an address and/or telephone number. In transactions with multiple creditors, any one of them may make the disclosures; the one doing so must be identified.

2. *Multiple loan originators.* In transactions with multiple loan originators, each loan originator's unique identifier must be disclosed. For example, in a transaction where a mortgage broker meets the definition of a loan originator under the Secure and Fair Enforcement for Mortgage Licensing Act of 2008, Section 1503(3), 12 U.S.C. 5102(3), the identifiers for the broker and for its employee originator meeting that definition must be disclosed.

33(c)(5) Payment of loan funds.

1. *Use of the term "line of credit."* If the reverse mortgage allows the consumer to make discretionary cash withdrawals, the disclosure must use the term "line of credit" regardless of whether the reverse mortgage is open-end or closed-end credit.

2. *Disclosures where consumer has not yet elected the type of payments.*

i. If the creditor provides the consumer with more than one of the payment options described in § 226.33(c)(5)(i) and the consumer has not selected the type of payment at the time the disclosure is provided, the creditor must disclose the consumer's options in the manner described in § 226.33(c)(5)(ii). If the creditor offers the consumer the option to receive funds in the form of discretionary cash advances, the creditor must disclose the total dollar amount of the line of credit the consumer could receive. The creditor must also describe any other types of payments the consumer may receive but must not disclose any dollar amounts with those descriptions.

ii. If the creditor does not offer the consumer the option to receive discretionary cash advances, the creditor must disclose the total dollar amount the consumer could receive in an initial advance and describe any other types of payments that the consumer may receive without using dollar amounts.

iii. If the creditor offers consumers only one type of payment, the creditor need only disclose that payment type.

33(c)(6) Annual percentage rate.

33(c)(6)(i) Open-end annual percentage rate.

1. *Rates disclosed.* The only rates that may be disclosed in the table required by § 226.33(d)(4) are annual percentage rates determined under § 226.14(b). Periodic rates must not be disclosed in the table.

2. *Rate changes set forth in initial agreement.* This paragraph requires disclosure of the rate changes set forth in the initial agreement, as discussed in § 226.5b(f)(3)(i). For example, this paragraph requires disclosure of preferred-rate provisions, where the rate will increase upon the occurrence of some event, such as the borrower-employee leaving the creditor's employ or the consumer closing an existing deposit account with the creditor. The creditor must disclose the preferred rate that applies to the plan, and the rate that would apply if the event occurs, such as the borrower-employee leaving the creditor's employ or the consumer closing an existing deposit account with the creditor. If the preferred rate and the rate that would apply if the event occurs are variable rates, the creditor must disclose those rates based on the applicable index or formula, and disclose other information required by § 226.33(c)(6)(i)(A).

33(c)(6)(i)(A) Disclosures for variable-rate plans.

1. *Variable-rate accounts—definition.* For purposes of § 226.33(c)(6)(i)(A), a variable-rate account exists when rate changes are part of the plan and are tied to an index or formula. (See the commentary to § 226.6(a)(4)(ii)–1 for examples of variable-rate plans.)

2. *Variable-rate accounts—fact that the rate varies and how the rate will be determined.* In describing how the applicable rate will be determined, the creditor must identify in the table described in § 226.33(d)(4) the type of index used and the amount of any margin. In describing the index, a creditor may not include in the table details about the index. For example, if a creditor uses a prime rate, the creditor must disclose the rate as a "prime rate" and may not disclose in the table other details about the prime rate, such as the fact that it is the highest prime rate published in the Wall Street Journal two business days before the closing date of the statement for each billing period. A creditor may not disclose in the table the current value of the index (such as that the prime rate is currently 7.5 percent). See Samples K–4, and K–5 for guidance on how to disclose the fact that the applicable rate varies and how it is determined.

3. *Limitations on increases in rates.* The creditor must disclose in the table required by § 226.33(d) any limitations on increases in the annual percentage rate, including the minimum and maximum annual percentage rate that may be imposed. A creditor must disclose any rate limitations that occur, for example, every two years, annually or less than an annual basis. If the creditor bases its rate limitation on 12 monthly billing cycles, such a limitation must be treated as an annual cap. Rate limitations imposed on more or less than an annual basis must be stated in terms of a specific amount of time. For example, if the creditor imposes rate limitations on only a semiannual basis, this must be expressed as a rate limitation for a six-month time period. If the creditor does not impose annual or other periodic limitations on rate increases, the fact must be stated in the table described in § 226.33(d).

5. *Maximum limitations on increases in rates.* The maximum annual percentage rate that may be imposed over the term of the plan must be provided in the table described in § 226.33(d). If separate overall limitations apply to rate increases resulting from events such as leaving the creditor's employ, those limitations also must be stated. Limitations do not include legal limits in the nature of usury or rate ceilings under state or Federal statutes or regulations.

6. *Sample forms.* Samples K–4, and K–5 provide illustrative guidance on the variable-rate rules.

33(c)(6)(i)(B) Introductory initial rate.

1. *Preferred rates.* If a creditor offers a preferred rate that will increase a specified amount upon the occurrence of a specified event other than the expiration of a specific time period, such as the borrower-employee leaving the creditor's employ, the preferred rate is not an introductory rate under § 226.33(c)(6)(i)(B), but must be disclosed in accordance with § 226.33(c)(6)(i). See comment 33(c)(6)(i)–2.

2. *Immediate proximity.* i. *In general.* If the term "introductory" is in the same phrase as the introductory rate, it will be deemed to be in immediate proximity of the listing. For example, a creditor that uses the phrase "introductory APR X percent" has used the word "introductory" within the same phrase as the rate.

ii. *More than one introductory rate.* If more than one introductory rate may apply to a particular balance in succeeding periods, the term "introductory" need only be used to describe the first introductory rate. For example, if a creditor offers an introductory rate of 8.99% on the plan for six months, and an introductory rate of 10.99% for the following six months, the term "introductory" need only be used to describe the 8.99% rate.

3. *Rate that applies after introductory rate expires.* If the initial rate is an introductory rate, the creditor must disclose the introductory rate, how long the introductory rate will remain in effect, and the rate that would otherwise apply to the plan. Where the rate that would otherwise apply is fixed, the creditor must disclose the rate that will apply after the introductory rate expires. Where the rate that would otherwise apply is variable, the creditor must disclose the rate based on the applicable index or formula, and disclose the other variable-rate disclosures required under § 226.33(c)(6)(i)(A).

33(c)(6)(ii) Closed-end annual percentage rate.

1. *Disclosure required.* The creditor must disclose the cost of the credit as an annual rate, expressed as a percentage and using the term "annual percentage rate," plus a brief descriptive phrase as required under § 226.33(c)(6)(ii). Under § 226.33(d)(4)(vi)(C), the annual rate, expressed as a percentage, must be more conspicuous than the other required disclosures and in at least 16 point font.

33(c)(6)(ii)(B) Rate type.

1. *Rate type.* The rate type to be disclosed corresponds to the loan type required to be disclosed for closed-end credit secured by a dwelling under § 226.38(a)(3). Creditors may follow the commentary to § 226.38(a)(3) in determining the rate type of the reverse mortgage.

33(c)(6)(ii)(C) Rate calculation and rate change limits.

1. *Calculation.* If the interest rate will be calculated based on an index, an identification of the index to which the rate is tied, the amount of any margin that will be added to the index, and any conditions or events on which the increase is contingent must be disclosed. When no specific index is used, the factors used to determine any rate increase must be disclosed. When the increase in the rate is discretionary, the fact that any increase is within the creditor's discretion must be disclosed. When the index is internally defined (for example, by that creditor's prime rate), the creditor may comply with this requirement by providing either a brief description of that index or a statement that any increase is in the discretion of the creditor.

2. *Limitations on interest rate increases.* Limitations include any maximum imposed on the amount of an increase in the rate at any time, as well as any maximum on the total increase over the loan's term to maturity.

33(c)(7) Fees and transaction requirements.

33(c)(7)(i) Fees imposed by creditor and third parties to consummate the transaction or open the plan.

1. *Applicability.* Section 226.33(c)(7)(i) applies only to one-time fees imposed by the creditor or third parties to consummate the transaction or open the plan. The fees include items such as application fees, points, appraisal or other property valuation fees, credit report fees, government agency fees, and attorneys' fees. Monthly fees or other periodic fees that may be imposed for the availability of the reverse mortgage would not be disclosed under § 226.33(c)(7)(i), but must be disclosed under § 226.33(c)(7)(ii). A creditor must not state the amount of any property insurance premiums in the table, even if property insurance is required by the creditor.

2. *Manner of describing itemized fees.* i. Section 226.33(c)(7)(i)(B) provides that if the dollar amount of a one-time account opening fee is not known at the time the

open-end early disclosures under § 226.33(d)(1) are delivered or mailed, a creditor must provide a range for such fee. If a range is shown, the highest and lowest amounts of the fee in that range must be the highest and lowest amounts of the fee that may be imposed.

ii. For the open-end account-opening disclosures required by § 226.33(d)(2), a creditor must disclose in the reverse mortgage account-opening table the total of all one-time fees imposed by the creditor and third parties to open the plan, and may not disclose the highest amount of possible fees as allowed under § 226.33(c)(7)(i)(A) for the disclosure table required under § 226.33(d)(1). In addition, a creditor must disclose in the account-opening table an itemization of all one-time fees imposed by the creditor and third parties to open the plan, and may not disclose a range for those fees, as otherwise allowed under § 226.33(c)(7)(i)(B) for the disclosure table required under § 226.33(d)(1).

3. *Fees not required to be disclosed.* Fees that are not imposed to consummate the transaction or open the plan, such as fees for researching an account, photocopying, exceeding the credit limit, or closing out an account, do not have to be disclosed under this section. For open-end reverse mortgages property valuation fees imposed to investigate whether a condition permitting a freeze continues to exist—as discussed in § 226.5b(g)(2)(iv) and accompanying commentary—are not required to be disclosed under this section.

4. *Rebates of fees.* If one-time fees for consummation or account opening are imposed they must be disclosed, regardless of whether such costs may be rebated later (for example, rebated to the extent of any interest paid during the first year of the plan).

5. *Disclosure of itemized list of fees to open a plan.* A creditor will be deemed to provide the itemization of the consummation or account-opening fees clearly and conspicuously if the creditor provides this information in a format as shown in Samples K–3, K–4 and K–5.

33(c)(7)(ii) Fees imposed by the creditor for availability of the reverse mortgage.

1. *Fee to obtain access devices.* The fees referred to in § 226.33(c)(7)(ii) include fees to obtain access devices, such as fees to obtain checks or credit cards to access the reverse mortgage. For example, a fee to obtain checks or a credit card on the account must be disclosed in the table as a fee for issuance or availability under § 226.33(c)(7)(ii). This fee must be disclosed even if the fee is optional; that is, if the fee is charged only if the consumer requests checks or a credit card.

2. *Fees kept by third party.* The fees referred to in § 226.33(c)(7)(ii) include any fees that are imposed by the creditor for the availability of the reverse mortgage, whether the fees are kept by the creditor or a third party. For example, if a creditor charges the consumer for a monthly mortgage insurance premium and this fee is paid directly to a third party, the fee must be disclosed under § 226.33(e)(7)(ii).

3. *Waived or reduced fees.* If fees required to be disclosed under § 226.33(c)(7)(ii) are waived or reduced for a limited time, the introductory fees or the fact of fee waivers may be provided in the table in addition to the required fees if the creditor also discloses how long the reduced fees or waivers will remain in effect.

33(c)(7)(iii) Fees imposed by the creditor for early termination of the reverse mortgage.

1. *Applicability.* This disclosure applies to fees (such as penalty or prepayment fees) that the creditor imposes if the consumer terminates the reverse mortgage, or prepays the obligation in full, prior to its scheduled maturity. This disclosure includes waived consummation or account-opening fees for the plan, if the creditor will impose those costs on the consumer if the consumer terminates the plan or pays off the loan within a certain amount of time after account opening or consummation, respectively. The disclosure does not apply to fees that are imposed when the reverse mortgage expires in accordance with the agreement or that are associated with collection of the debt if the creditor terminates the reverse mortgage, such as attorneys' fees and court costs.

33(c)(7)(iv) Statement about other fees.
Paragraph 33(c)(7)(iv)(A).

1. *Disclosure of additional information upon request.* A creditor generally must include in the early open-end disclosure table required by § 226.33(d)(1) and (d)(4) a statement that the consumer may receive, upon request, additional information about fees applicable to the plan. Alternatively, a creditor may provide additional information about fees applicable to the plan along with the table required by § 226.33(d)(1) and (d)(4). In that case, the creditor must disclose in the table that is required by § 226.33(d)(1) and (d)(4) that additional information about fees applicable to the plan is enclosed with the table. In providing additional information about fees to a consumer upon the consumer's request prior to account opening (or along with the table required under § 226.33(d)(1) and (d)(4)), a creditor must disclose the transaction fees that are required to be disclosed under § 226.33(c)(7)(v), (c)(13)(i), and (c)(13)(ii), and a statement that other fees may apply. A creditor must use a tabular format to disclose the additional information about fees that is provided upon request or provided with the table required by § 226.33(d)(1) and (d)(4). If the consumer, prior to consummation or the opening of a plan, requests additional information about fees applicable to the plan, the creditor must provide this information as soon as reasonably possible after the request.

33(c)(7)(v) Transaction requirements.

1. *Applicability.* A limitation on automated teller machine usage need not be disclosed under this paragraph unless that is the only means by which the consumer can obtain funds.

33(c)(1) Costs to consumer.

►*33(c)(8) Loan balance growth.*◄

1. *Costs and charges to consumer—relation to finance charge.* All costs and charges to the consumer that are incurred in a reverse mortgage are included in the ►loan balance table◄ ⟦projected total cost of credit, and thus in the total annual loan cost rates⟧, whether or not the cost or charge is a finance charge under § 226.4.

2. *Annuity costs ►and annuity payments◄*. ⟦As part of the credit transaction, some creditors require or permit a consumer to purchase an annuity that immediately—or at some future time—supplements or replaces the creditor's payments.⟧►Section 226.40(a) prohibits a creditor from requiring a consumer to purchase any financial or insurance product, including an annuity, as a condition of obtaining a reverse mortgage. Under the safe harbor for compliance in § 226.40(a)(2), a creditor is deemed to comply with the prohibition on required purchases of financial or insurance products if, among other things, the reverse mortgage transaction is completed at least 10 calendar days before the purchase of another product. The cost of an annuity purchased after the reverse mortgage transaction is completed in accordance with the safe harbor is not considered a cost to the consumer under this section. Similarly, payments from an annuity that the consumer purchases after the reverse mortgage transaction is completed in accordance with the safe harbor are not required to be disclosed as the advances to the consumer under this section. However, if the consumer voluntarily purchases an annuity along with a reverse mortgage, and the creditor does not follow the safe harbor in § 226.40(a)(2), t◄⟦T⟧he amount paid by the consumer for the annuity is a cost to the consumer under this section, regardless of whether the annuity is purchased through the creditor or a third party⟦, or whether the purchase is mandatory or voluntary⟧. For example, this includes the costs of an annuity that a creditor offers, arranges, assists the consumer in purchasing, or that the creditor is aware the consumer is purchasing as a part of the transaction. ►Similarly, if the consumer voluntarily purchases an annuity along with a reverse mortgage, and the creditor does not follow the safe harbor in § 226.40(a)(2), the advances that the consumer will receive from the annuity must be disclosed as the advances to the consumer, rather than the proceeds used to finance the annuity.◄

3. *Disposition costs excluded.* Disposition costs incurred in connection with the sale or transfer of the property subject to the reverse mortgage are not included in the costs to the consumer under this paragraph. (However, see ⟦the definition of Valn in appendix K to the regulation⟧ comment 33(c)(8)–8 to determine the effect certain disposition costs may have on ►the disclosure of the amount the consumer will owe◄⟦the total annual loan cost rates⟧.)

⟦*33(c)(2) Payments to consumer.*⟧

►4◄⟦1⟧. *Payments upon a specified event.* The ►disclosure of the amount advanced to the consumer◄ ⟦projected total cost of credit⟧ should not reflect contingent payments in which a credit to the outstanding loan balance or a payment to the consumer's estate is made upon the occurrence of an event (for example, a "death benefit" payable if the consumer's death occurs within a certain period of time). ⟦Thus, the table of total annual loan cost rates required under § 226.33(b)(2) would not reflect such payments.⟧ At its option, however, a creditor may put an asterisk, footnote, or similar type of notation in the table next to the applicable ►payment total◀ [total annual loan cost rate], and state in the body of the note, apart from the table, the assumption upon which the ▶payment total◀ [total annual loan cost] is made and any different ▶payment◀ [rate] that would apply if the contingent benefit were paid.

[*Paragraph 33(c)(3) Additional creditor compensation.*]

▶5◀[1]. *Shared appreciation or equity.* Any shared appreciation or equity that the creditor is entitled to receive pursuant to the legal obligation must be included in the ▶amount the consumer will owe◀ [total cost of a reverse mortgage loan]. For example, if a creditor agrees to a reduced interest rate on the transaction in exchange for a portion of the appreciation or equity that may be realized when the dwelling is sold, that portion is included in the amount the consumer will owe.

▶6. *Assumed dwelling appreciation for shared appreciation or equity disclosure.* The creditor must assume that the dwelling's value does not appreciate unless the creditor is entitled by contract to shared appreciation or equity. Because the cost to the consumer must reflect any shared appreciation or equity, the creditor must assume that the dwelling appreciates by 4 percent per year and must state this assumption.◀

[*Paragraph 33(c)(4) Limitations on consumer liability.*]

▶7◀[1]. ▶ *Limitations on consumer liability*◀[*In general*]. Creditors must include any limitation on the consumer's liability (such as a nonrecourse limit or an equity conservation agreement) in the ▶disclosure of the amount owed by the consumer◀ [projected total cost of credit]. These limits and agreements protect a portion of the equity in the dwelling for the consumer or the consumer's estate. For example, the following are limitations on the consumer's liability that must be included in the ▶disclosure of the amount owed by the consumer◀ [projected total cost of credit]:

i. A limit on the consumer's liability to a certain percentage of the projected value of the home.

ii. A limit on the consumer's liability to the net proceeds from the sale of the property subject to the reverse mortgage.

▶8◀[2]. *Uniform assumption for* "*net proceeds*" *recourse limitations.* If the legal obligation between the parties does not specify a percentage for the "net proceeds" liability of the consumer, for purposes of the disclosures [required by] ▶of the amount the consumer will be required to repay under◀ § 226.33▶(c)(8)(ii)(C)◀, a creditor must assume that the costs associated with selling the property will equal 7 percent of the projected sale price [(see the definition of the Valn symbol under appendix K(b)(6))].

▶9. *Set-asides.* In some reverse mortgages the creditor will set aside a portion of the loan amount to be paid for the benefit of the consumer, such as for making required repairs to the dwelling. The creditor must treat the entire amount of the funds set aside as an advance to the consumer and not merely the portion of the set-aside that the creditor estimates will be used. For example, if the creditor estimates that repairs will cost $1,000 but sets aside $1,500 (150% of the estimated cost of repairs), the entire $1,500 amount of the repair set-aside is considered an advance for the benefit of the consumer.

10. *Assumptions about type of payments to consumer.*

i. If the creditor provides the consumer with more than one of the payment options described in § 226.33(c)(5)(i) and the consumer has selected the type of payment(s) at the time the disclosure is provided, the creditor must base the disclosures on the consumer's selection(s). If the consumer has not yet selected the types of payments, the creditor must base the disclosures on the assumptions in § 226.33(c)(5)(ii).

ii. In some cases the consumer may choose to receive an initial advance, a periodic payment, or some combination of the two, but also leave some of the principal amount available for discretionary cash advances. In these instances, the creditor must assume that the consumer does not take any discretionary advances if the scheduled advances account for 50 percent or more of the principal loan amount. Otherwise, the creditor must assume that the consumer draws the entire available principal loan amount at closing or, in an open-end transaction, when the consumer becomes obligated under the plan.

(A) For example, assume that the reverse mortgage has a principal loan amount of $105,000 and that the creditor finances $5,000 in closing costs, leaving an available loan amount of $100,000. The consumer elects to take $25,000 in an initial advance, and have $25,000 paid out in the form of regular monthly installments, for a total of $50,000. The consumer chooses to leave the remaining $50,000 in a line of credit. Because the initial advance and the monthly payments account for 50 percent of the available principal amount, the creditor must assume that the consumer takes no advances from the line of credit.

(B) Alternatively, assume that the consumer elects to take $24,000 in an initial advance, have $25,000 paid out in the form of regular monthly installments and leave $51,000 in a line of credit. Because the initial advance and the monthly payments account for less than 50 percent of the available loan amount the creditor must assume that the consumer draws all $51,000 from the line of credit at closing.

11. *Shared appreciation or equity disclosure.* The creditor must disclose if it is entitled by contract to any shared appreciation or equity. For example, if the creditor is entitled by contract to 25 percent of any appreciation in the value of the dwelling, the creditor may state, "This loan includes a Shared Appreciation Agreement, which means that we will be entitled to 25 percent of any gain made when you sell or refinance your home. For example, if your home were worth $100,000 more when the loan becomes due than it is worth today, you would owe us an additional $25,000 on the loan." The disclosure must be in a form substantially similar to the Model Clause in K–7 in Appendix K to this part.

33(c)(10) Statements about risks.

1. *Changes to the plan.* If changes may occur pursuant to § 226.5b(f)(3)(i)–(v), a creditor must state that it can make changes to the plan.

33(c)(12) Additional early *disclosures for open-end reverse mortgages.*

33(c)(12)(i) Refund of fees under § 226.5b(e).

1. *Relation to other provisions.* Creditors should consult the rules in § 226.5b(e) regarding refund of fees if the consumer rejects the plan within three business days of receiving the disclosures required by § 226.33(d)(1).

33(c)(12)(ii) Refund of fees under § 226.40(b).

1. *Relation to other provisions.* Creditors should consult the rules in § 226.40(b) regarding refund of fees if the consumer rejects the plan within three business days of receiving counseling as required by § 226.40(b).

33(c)(12)(i)(B) Changes to disclosed terms.

1. *Relation to other provisions.* Creditors should consult the rules in § 226.5b(d) regarding refund of fees when terms change.

33(c)(12)(iv) Statement about refundability of fees.

Paragraph 33(c)(12)(iv)(A).

1. *Guaranteed terms.* If a creditor chooses not to guarantee any terms, it must disclose that all of the terms are subject to change prior to opening the plan. The creditor is permitted to guarantee some terms and not others, but must indicate which terms are subject to change.

Paragraph 33(c)(13) Additional disclosures before the first transaction under an open-end reverse mortgage.

Paragraph 33(c)(13)(i) Transaction charges.

1. *Charges imposed by person other than creditor.* Charges imposed by a third party, such as a seller of goods, shall not be disclosed in the table under this section; the third party would be responsible for disclosing the charge under § 226.9(d)(1).

Paragraph 33(c)(14) Additional disclosures for closed-end reverse mortgages.

Paragraph 33(c)(14)(i) Total payments.

1. *Calculation of total payments scheduled.* Creditors should use the assumptions in § 226.33(c)(16) and the rules under § 226.18(g) and associated commentary, and comments 17(c)(1)(iii)–1 and –3 for adjustable-rate transactions, to calculate the total payments amount.

33(c)(14)(ii) Interest and settlement charges.

1. *Calculation of interest and settlement charges.* The interest and settlement charges disclosure is identical to the finance charge, as calculated under § 226.4.

2. *Disclosure required.* The creditor must disclose the interest and settlement charges as a dollar amount, using the term interest and settlement charges, together with a brief statement as required by § 226.33(c)(14)(ii). The interest and settlement charges must be disclosed only as a total amount; the components of the interest and settlement charges amount may not be itemized in the table required by § 226.33(d)(4) except as required or permitted by § 226.33(c)(7), although the regulation does not prohibit itemization elsewhere.

33(c)(14)(iii) Amount financed.

1. *Principal loan amount.* In a closed-end reverse mortgage, the principal loan amount is the same as the loan amount disclosed for

closed-end mortgage transactions under § 226.38(a)(1). As provided in that section, the loan amount is the principal amount the consumer will borrow reflected in the loan contract. Thus the principal loan amount includes all amounts financed as part of the transaction, whether they are finance charges or not.

2. *Disclosure required.* The net amount of credit extended must be disclosed using the term "amount financed" together with a descriptive statement as required by § 226.33(c)(14)(iii).

33(c)(16) Assumptions for closed-end disclosures.

1. *Basis of disclosures.* The creditor's use of the rules in § 226.33(c)(16) does not, by itself, make the disclosures estimates. Thus, creditors may use these rules for the disclosures required by proposed § 226.19(a)(2) and comply with that section's limitation on using estimated disclosures.

33(d) Special disclosure requirements for reverse mortgages.

1. *Business days.*

i. For purposes of providing the early open-end reverse mortgage disclosure within three business days after application as required by § 226.33(d)(1)(i), the term "business day" means a day on which the creditor's offices are open to the public for carrying on substantially all of its business functions.

ii. For purposes of providing disclosures for open-end reverse mortgages at least three business days before account opening as required by § 226.33(d)(1)(ii) and (d)(2), "business day" has the same meaning as in comment 31(c)(1)–1—all calendar days except Sundays and the Federal legal holidays listed in 5 U.S.C. 6103(a). Thus, for example, if disclosures are provided on a Friday, June 1, consummation could occur any time on Tuesday, June 5, the third business day following receipt of the disclosures.

33(d)(1) Timing of early open-end reverse mortgage disclosures.

1. *Denial or withdrawal of application.* Section 226.33(d)(1) provides that creditors must deliver or mail disclosures required by § 226.33(c) to the consumer not later than three business days before the first transaction under the plan, or three business days following receipt of a consumer's application by the creditor, whichever is earlier. If the creditor determines within the three-day period that an application will not be approved, the creditor need not provide the disclosures. Similarly, if the consumer withdraws the application within this three-day period, the creditor need not provide the disclosures.

33(d)(4) Form of disclosures; tabular format.

1. *Terminology.* Section 226.33(d)(4) generally requires that the headings, content and format of the tabular disclosures be substantially similar, but need not be identical, to the applicable tables in Appendix K to part 226. See § 226.5(a)(2) for terminology requirements applicable to disclosures provided pursuant to § 226.33(d)(1) and (d)(2).

2. *Other format requirements.* See § 226.33(c)(6)(i)(A)(*1*)(*i*) for formatting requirements applicable to disclosure of variable rates in the table required by § 226.33(d)(1) and (d)(2). See comment 33(c)(7)(iv)(A)–1 for format requirements that apply to information that a creditor provides to a consumer upon request.

3. *Highlighting of disclosures.* i. *In general.* See Samples K–4, K–5 and K–6 for guidance on providing the disclosures described in § 226.33(d)(4)(vi) in bold text.

ii. *Itemized list of fees to open the plan.* The total amount of fees for consummation or account opening disclosed under § 226.33(c)(7)(i) must be disclosed in bold text. The itemization of those fees that is also required to be disclosed under § 226.33(c)(7)(i) must not be disclosed in bold text.

4. *Clear and conspicuous standard.* See comment 5(a)(1)–1 for the clear and conspicuous standard applicable to § 226.33(d)(1) and (d)(2) disclosures. See comments 37(a)–1, and 37(a)(1)–1 through –3 for the clear and conspicuous standard applicable to § 226.33(d)(3) disclosures.

5. *Tabular disclosures required under § 226.33(d)(2).* The account-opening disclosures required by § 226.33(d)(2) and early open-end disclosures required by § 226.33(d)(1) generally follow the same formatting requirements, except for the following:

i. A creditor may not disclose below the account-opening table an identification of any disclosed term that is subject to change prior to opening the plan.

ii. A creditor may not disclose in the account-opening table a statement about the right to a refund of fees pursuant to §§ 226.5b(e) or 226.40(b).

iii. A creditor must disclose in the account-opening table the total of all one-time fees imposed by the creditor and third parties to open the plan, and may not disclose the highest amount of possible fees as allowed under § 226.33(c)(7)(i)(A). In addition, a creditor must disclose in the account-opening table an itemization of all one-time fees imposed by the creditor and third parties to open the plan, and may not disclose a range for those fees, as otherwise allowed under § 226.33(c)(7)(i)(B).

iv. A creditor may not disclose below the account-opening table a statement that the consumer may be entitled to a refund of all fees paid if the consumer decides not to open the plan pursuant to § 226.5b(d).

33(d)(5) Disclosures based on a percentage.

1. *Transaction requirements.* Section 226.33(c)(7)(v) requires a creditor to disclose in the table required under § 226.33(d) any limitations on the number of extensions of credit and the amount of credit that may be obtained during any time period, as well as any minimum draw requirements. If any amount that must be disclosed under § 226.33(c)(7)(v) is determined on the basis of a percentage of another amount, the percentage used and the identification of the amount against which the percentage is applied may be disclosed instead of the transaction amount.

33(e) Reverse mortgage advertising.

33(e)(1) Scope.

1. *In general.* The requirements and limitations of § 226.33(e) apply to both open-end and closed-end reverse mortgages. The requirements and limitations are in addition to those contained in other subparts of this part, including advertising requirements in § 226.16 in Subpart B or § 226.24 in Subpart C, as applicable. *See* § 226.31(a).

33(e)(2) Clear and conspicuous standard.

1. *Clear and conspicuous standard—general.* Advertisements for reverse mortgages are subject to the general "clear and conspicuous" standard for Subpart B or Subpart C, as applicable. *See* comment 33(e)(1)–1. Section 226.33(e) prescribes no specific rules for the format of the required disclosures other than the following: The disclosures required by § 226.33(e)(3)–(9) must be made with equal prominence and in close proximity to each triggering statement, and the disclosure required by § 226.33(e)(10) must be at least as conspicuous as the triggering statement. Disclosures need not be printed in a certain type size and need not appear in any particular place in the advertisement, except as necessary to comply with the aforementioned requirements. For a discussion of the equal prominence and close proximity requirements, see comment 33(e)(2)–2.

2. *Clear and conspicuous standard—advertisements for reverse mortgages.* Information required to be disclosed under § 226.33(e) that is in the same type size as the statement that triggered the required disclosure is deemed to be equally prominent with such statement. If a disclosure required by § 226.33(e) is made with greater prominence than the statement that triggered the required disclosure, the equal prominence requirement is satisfied. Information required to be disclosed under § 226.33(e) that is immediately next to or directly above or below a statement that triggered the required disclosure, without any intervening text or graphical displays and not in a footnote, is deemed to be closely proximate to such statement.

3. *Clear and conspicuous standard—Internet advertisements for reverse mortgages.* For purposes of § 226.33(e)(2), creditors may rely on comment 16–3 or comment 24(b)–3, as applicable, in determining whether a required disclosure in an Internet advertisement for a reverse mortgage is made clearly and conspicuously.

4. *Clear and conspicuous standard—televised advertisements for reverse mortgages.* For purposes of § 226.33(e)(2), creditors may rely on comment 16–4 or comment 24(b)–4, as applicable, to determine whether a required disclosure in a televised advertisement for a reverse mortgage is made clearly and conspicuously.

5. *Clear and conspicuous standard—oral advertisements for reverse mortgages.* For purposes of § 226.33(e)(2), creditors may rely on comment 16–5 or comment 24(b)–5, as applicable, to determine whether a required disclosure in an oral advertisement for a reverse mortgage is made clearly and conspicuously.

33(e)(3) Need to repay loan.

1. *Examples.* The following examples illustrate how an advertisement may disclose the clarifying information required by § 226.33(e)(3):

i. "You are eligible for benefits under the government's Home Equity Conversion

Mortgage program. A reverse mortgage under the program is a loan that must be repaid."

ii. "Congress recently improved the HECM benefits you can receive. A HECM is a loan that you must repay."

iii. "The U.S. Department of Housing and Urban Development has increased the aid available to people over the age of 62. The aid is available through a loan that must be repaid."

2. *Applicability.* An advertisement may not state that a reverse mortgage is a government benefit unless the reverse mortgage is associated with a government program, such as the U.S. Department of Housing and Urban Development's Home Equity Conversion Mortgage program. If a reverse mortgage is associated with a government program, then an advertisement may contain a statement that a reverse mortgage is a government benefit; however, the statement must be accompanied by a statement that a reverse mortgage is a loan that must be repaid, as illustrated in the examples provided in comment 33(e)(3)–1. A statement that a reverse mortgage is a loan that must be repaid will not cure a violation of § 226.16(d)(9) or § 226.24(*i*)(3). These provisions prohibit misrepresentations of government endorsement or sponsorship in an advertisement for, respectively, open-end or closed-end mortgages, including reverse mortgages. *See* comment 33(e)(1)–1.

3. *Statements regarding government insurance or other support.* A statement that a reverse mortgage is a "government-supported loan" or a "government loan program" or is a loan insured, authorized, developed, created, or otherwise sponsored or endorsed by a Federal, state, or local government entity does not trigger the requirement under § 226.33(e)(3) to disclose that a reverse mortgage is a loan that must be repaid. The following examples illustrate statements that do not trigger the requirement to disclose this clarifying information:

i. "A Home Equity Conversion Mortgage is a loan insured by the U.S. Department of Housing and Urban Development."

ii. "Congress developed the HECM loan program to help senior citizens."

4. *Other meanings or terms.* A reference to benefits or other aid through a government program unrelated to reverse mortgages does not trigger the requirement under § 226.33(e)(3) to disclose clarifying information. Further, using the term "government benefit" to mean "advantage" does not trigger the requirement to disclose clarifying information. The following examples illustrate statements that do not trigger a requirement to disclose clarifying information:

i. "A reverse mortgage does not affect your Social Security benefits." The term "benefits" is used to refer to benefits through a government program unrelated to reverse mortgages and therefore does not trigger the requirement in § 226.33(e)(3) to disclose clarifying information. (However, the statement triggers the requirement to disclose that a reverse mortgage may affect benefits under some government programs, such as Supplemental Security Income and Medicaid. *See* § 226.33(e)(9) and accompanying commentary.)

ii. "A home equity conversion mortgage provides several benefits, including the ability to stay in your home." The term "benefits" is used to mean "advantages" and, therefore, does not trigger the requirement to disclose clarifying information.

33(e)(4) Events that end loan term.

1. *Examples.* The following examples illustrate how an advertisement may disclose the clarifying information required by § 226.33(e)(4):

i. "You get payments for as long as you live, except that payments may end sooner in some circumstances. For example, you do not get payments for as long as you live if you sell the home or live somewhere else for longer than the loan agreement allows."

ii. "You can have lifetime access to a line of credit. However, you may not have lifetime access in certain circumstances, including if you sell your home or live in another place longer than [specify time period]."

iii. "Never repay during your lifetime, except that you may have to repay early in some cases, such as if you sell your house or live somewhere else for longer than the time stated in the loan contract."

2. *Applicability.* The disclosures required by § 226.33(e)(4)(A) and (B) need be made only if applicable. Any disclosure not relevant to a particular statement or advertisement may be omitted.

3. *Format; order of disclosures.* Section 226.33(e)(4) does not require the use of a particular format in providing the disclosures set forth in § 226.33(e)(4)(A) and (B), other than requiring that they be equally prominent with and in close proximity to each triggering statement. An advertisement need not make all of the disclosures required by § 226.33(e)(4) in a single sentence. For example, an advertisement may make the required disclosures using a list format. An advertisement may state the disclosures required by § 226.33(e)(4) in any order.

4. *Additional circumstances.* An advertisement for a reverse mortgage may state additional circumstances in which payments or access to a line of credit for a reverse mortgage or the term of a reverse mortgage will end during a consumer's lifetime, for example, where a consumer chooses to receive payments for a specific time period. A statement of such additional circumstances must be presented in a way that does not obscure the disclosures set forth in § 226.33(e)(4)(A) and (B), however.

33(e)(5) Risk of foreclosure.

1. *Examples.* The following examples illustrate how an advertisement for a reverse mortgage may disclose the clarifying information required by § 226.33(e)(5):

i. "You cannot lose your home except in certain circumstances, including if you live somewhere else for longer than allowed by the loan agreement or you do not pay taxes or insurance."

ii. "There is no risk to your house unless you do not meet the loan conditions, for example if you live in another place for longer than [specify time period] or do not pay taxes and insurance."

2. *Applicability.* The disclosures required by § 226.33(e)(5)(A) and (B) need be made only if applicable. Any disclosure not relevant to a particular advertisement may be omitted.

3. *Format; order of disclosures.* Section 226.33(e)(5) does not require the use of a particular format in providing the disclosures set forth in § 226.33(e)(5)(A) and (B), other than requiring that they be equally prominent with and in close proximity to each triggering statement. An advertisement need not make all of the disclosures required by § 226.33(e)(4) in a single sentence. For example, an advertisement may make the required disclosures using a list format. An advertisement may state the disclosures required by § 226.33(e)(4) in any order.

4. *Additional circumstances.* An advertisement for a reverse mortgage may state additional circumstances in which foreclosure may occur. A statement of such additional circumstances must be presented in a way that does not obscure the disclosures set forth in § 226.33(e)(5)(A) and (B), however.

33(e)(6) Amount owed.

1. *Examples.* The following examples illustrate how an advertisement for a reverse mortgage may disclose the clarifying information required by § 226.33(e)(6):

i. "Your heirs cannot owe more than the value of your house, unless they want to keep the house when the reverse mortgage is due. To keep the house, they must pay the entire loan balance, which may be higher than the house's value."

ii. "You never repay more than your home is worth, unless you want to keep your home when the reverse mortgage is due. If you want to keep your home, you must pay the whole loan balance, which may be more than your home is worth."

iii. "Your repayment is limited to your home's value if your home is sold to repay the loan. You can keep your home if you pay the total loan balance, which may be more than the home is worth."

33(e)(7) Payments for taxes and insurance.

1. *Examples.* Under § 226.33(e)(7), if an advertisement states that payments are not required for a reverse mortgage, the advertisement must disclose that a consumer must pay taxes and insurance premiums, if applicable. The following examples illustrate how an advertisement for a reverse mortgage may disclose the clarifying information required by § 226.33(e)(7):

i. "There are no loan payments for a reverse mortgage. You continue to pay for property taxes and insurance."

ii. "You do not have to make monthly mortgage payments, but you must pay for property taxes and insurance."

33(e)(8) Government fee limitation.

1. *Examples.* Under § 226.33(e)(8), if an advertisement states that a government limits or regulates fees or other costs for a reverse mortgage, the advertisement shall clearly and conspicuously disclose that costs may vary among creditors and loan types and less expensive alternatives may be available. The following examples illustrate how an advertisement for a reverse mortgage may disclose the clarifying information required by § 226.33(e)(8):

i. "The government has capped fees for HECMs. Costs may vary by lender or loan type, and cheaper alternatives may be available."

ii. "Maximum HECM fees are set by law. There can be different charges by creditor or loan type, and you may be able to find less expensive loans."

33(e)(9) Disclosure of effects on eligibility for government programs.

1. *Examples.* Under § 226.33(e)(9), if an advertisement states that a reverse mortgage does not affect a consumer's benefits from or eligibility for a government program, the advertisement must disclose that a reverse mortgage may affect benefits from or eligibility for some government programs such as Supplemental Security Income and Medicaid. The following examples illustrate how an advertisement may disclose the clarifying information required by § 226.33(e)(9):

i. "A reverse mortgage usually does not affect your eligibility for Social Security or Medicare. It may affect eligibility for other government programs, such as Supplemental Security Income and Medicaid."

ii. "Social Security and Medicare benefits are not affected, but some other government benefits may be affected, such as Supplemental Security Income and Medicaid."

33(e)(10) Credit counseling information.

1. *Accompanying telephone number and Internet Web site.* Under § 226.33(e)(10), if an advertisement for a reverse mortgage contains a reference to housing or credit counseling, the advertisement must disclose a telephone number and Internet Web site for housing counseling resources maintained by the U.S. Department of Housing and Urban Development. The disclosure of the telephone number and Web site must be at least as conspicuous as any reference to housing or credit counseling, but this disclosure need not accompany each reference to housing or credit counseling in the advertisement. Identifying language must accompany the statement of the telephone number and Internet Web site for housing counseling resources maintained by U.S. Department of Housing and Urban Development, such as: "For information about housing counseling options, call [telephone number] or go to [Internet Web site]."◄

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Section 226.34—Prohibited Acts or Practices in Connection With Credit Subject to § 226.32

34(a) Prohibited acts or practices for loans subject to § 226.32.

* * * * *

34(a)(4) Repayment ability.

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4. [*Discounted introductory rates and non-amortizing or negatively-amortizing payments.* A credit agreement may determine a consumer's initial payments using a temporarily discounted interest rate or permit the consumer to make initial payments that are non-amortizing or negatively amortizing. (Negative amortization is permissible for loans covered by § 226.35(a), but not § 226.32). In such cases the creditor may determine repayment ability using the assumptions provided in § 226.34(a)(4)(iv).]►[Reserved.]◄

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34(a)(4)(iv) Exclusions from presumption of compliance.

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►3. *Short-term balloon loans.* Under § 226.34(a)(4)(iv)(B), a creditor cannot obtain the presumption of compliance provided in § 226.34(a)(4)(iii) for a balloon loan with a term of less than seven years ("short-term balloon loan"). Section 226.34(a)(4) does not, however, prohibit short-term balloon loans that are higher-priced mortgage loans. In making a short-term balloon loan that is a higher-priced mortgage loan, the creditor must use prudent underwriting standards and, after considering a consumer's income, employment, obligations and assets other than the collateral, determine that the value of the collateral (the home) is not the basis for repaying the obligation (including the balloon payment). This requirement does not require the creditor to verify that the consumer has assets and income at the time of consummation that would be sufficient to pay the balloon payment when it comes due. In addition to verifying the consumer's ability to make the regular periodic payments, the creditor should verify that the consumer would likely be able to satisfy the balloon payment by refinancing the loan or through income or assets other than the collateral. The creditor should consider factors such as the loan-to-value ratio and the borrower's debt-to-income ratio or residual income at the time of consummation. For instance, a consumer with a high debt-to-income ratio, or with little or no equity in the property, may be less likely to be able to refinance the loan before the balloon payment comes due than a borrower with lower debt-to-income and loan-to-value ratios. The creditor is not required to estimate the consumer's future financial circumstances, interest rate environment, and home value.◄

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Section 226.35—Prohibited Acts or Practices in Connection with Higher-Priced Mortgage Loans

35(a) Higher-priced mortgage loans.

►*35(a)(2) Definitions.*◄

Paragraph 35(a)(2)►*(i)*◄.

►1. *Transaction coverage rate.* The transaction coverage rate is calculated solely for purposes of determining whether a transaction is subject to § 226.35. The creditor is not required to disclose it to the consumer. The creditor determines the transaction coverage rate in the same manner as the transaction's annual percentage rate, except that, for purposes of calculating the transaction coverage rate and determining § 226.35 coverage, the value of the prepaid finance charge is modified in accordance with § 226.35(a)(2)(i). Under that section, only prepaid finance charges retained by the creditor, its affiliate, or a mortgage broker are treated as prepaid finance charges in determining the transaction coverage rate, and any other fees or charges that are otherwise included in the prepaid finance charge for purposes of calculating the annual percentage rate are disregarded. For example, assume a transaction in which the creditor charges one discount point, an underwriting fee is imposed and paid to an affiliate of the creditor, an origination charge is imposed and paid to a mortgage broker, and a mortgage insurance premium is paid at consummation to a mortgage insurer that is not the creditor's affiliate. For purposes of the annual percentage rate disclosed to the consumer, all of the listed charges are included in the prepaid finance charge; for purposes of the transaction coverage rate, however, the mortgage insurance premium is excluded from the modified prepaid finance charge. The transaction coverage rate that results from these special rules must be compared to the average prime offer rate to determine whether the transaction is subject to § 226.35.

2. *Inclusion of finance charges in modified prepaid finance charge; mortgage broker charges.* For purposes of the special rules under § 226.35(a)(2)(i), the modified prepaid finance charge includes only items that are finance charges, consistent with the definition of prepaid finance charge in § 226.2(a)(23); charges that are not included in the prepaid finance charge for annual percentage rate purposes also should not be included in the modified prepaid finance charge for transaction coverage rate purposes. Accordingly, the inclusion of charges retained by a mortgage broker is limited to broker compensation that otherwise constitutes a prepaid finance charge. Compensation paid by the creditor to a mortgage broker under a separate arrangement (e.g., compensation that comes from "yield spread premium") is not included because it is not included for annual percentage rate purposes, although it may be included if it comes from amounts paid by the consumer to the creditor that are prepaid finance charges, such as points. *See* comment 4(a)(3)–3. If mortgage broker compensation comes from amounts paid by the consumer to the creditor that are finance charges but not prepaid finance charges, such as interest, those amounts affect the transaction coverage rate just as they affect the annual percentage rate, but the broker compensation itself does not affect the transaction coverage rate directly. For example, assume a transaction in which a mortgage broker imposes a $1,000 origination charge:

i. If the $1,000 charge comes from yield-spread premium derived from the interest rate that will be charged to the consumer during the loan's term, the charge is excluded from the modified prepaid finance charge for transaction coverage rate purposes, just as it is excluded from the prepaid finance charge for annual percentage rate purposes in accordance with comment 4(a)(3)–3.

ii. In contrast, if the consumer pays the $1,000 charge directly in cash or by check at consummation or it is withheld from the proceeds of the credit, the charge is included for both annual percentage rate and transaction coverage rate purposes.

Paragraph 35(a)(2)(ii).◄

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►*Paragraph 35(a)(3).*

1. *Construction-permanent loans.* Under § 226.35(a)(3), § 226.35 does not apply to a

transaction to finance the initial construction of a dwelling. When such a transaction may be permanently financed by the same creditor, § 226.17(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 226.17(c)(6)(ii) addresses only how a creditor may elect to disclose a combined construction-permanent transaction. Which disclosure option a creditor elects under § 226.17(c)(6)(ii) does not affect the determination of whether the transaction is subject to § 226.35. Whether the creditor discloses the two phases as a single transaction or as two separate transactions, a single transaction coverage rate, reflecting the appropriate charges from both phases, must be calculated for the transaction in accordance with § 226.35(a). The transaction coverage rate must be compared to the average prime offer rate for a comparable transaction to determine coverage under § 226.35. If the transaction is determined to be a higher-priced mortgage loan, only the permanent phase is subject to the requirements of § 226.35. Thus, for example, the requirement to establish an escrow account prior to consummation of a higher-priced mortgage loan secured by a first lien on a principal dwelling, under § 226.35(b)(3), applies only to the permanent phase and not to the construction phase.◄

35(b) Rules for higher-priced mortgage loans.

1. *Effective date*►*and scope*◄. For guidance on the applicability of the rules in section 226.35(b), see comment►s◄ 1(d)(5)–1► and 20(a)(1)(i)–2◄.

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Section 226.38—Content of Disclosures for Closed-End Mortgages

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38(a) Loan summary.

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38(a)(5) Prepayment penalty.

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2. *Penalty.* The term "penalty" as used in § 226.38(a)(5) encompasses only those charges that are assessed solely because of the prepayment in full of a transaction in which the interest calculation takes account of all scheduled reductions in principal. Charges which are penalties include, for example:

i. Charges determined by treating the loan balance as outstanding for a period after prepayment in full and applying the interest rate to such ["balance."] ►"balance," even if the charge results from the interest accrual amortization method used on the transaction. "Interest accrual amortization" refers to the method by which the amount of interest due for each period (e.g., month) in a transaction's term is determined. For example, "monthly interest accrual amortization" treats each payment as made on the scheduled, monthly due date even if it is actually paid early or late (until the expiration of a grace period). Thus, under monthly interest accrual amortization, if the amount of interest due on May 1 for the preceding month of April is $3,000, the creditor will require payment of $3,000 in interest whether the payment is made on April 20, on May 1, or on May 10. In this example, if the interest charged for the month of April upon prepayment in full on April 20 is $3,000, the charge constitutes a prepayment penalty of $1,000 because the amount of interest actually earned through April 20 is only $2,000.◄

ii. A minimum finance charge in a simple-interest transaction.

iii. Fees, such as loan closing costs, that are waived unless the consumer prepays the obligation.

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38(h) [*Credit*] ►*Required or voluntary credit*◄ *insurance and debt cancellation coverage and debt suspension coverage.*

1. *Location.* This disclosure may, at the creditor's option, appear apart from the other disclosures. It may appear with any other information, including the amount financed itemization, any information prescribed by State law, or other information. When this information is disclosed with the other segregated disclosures, however, no additional explanatory material may be included.

[*Paragraph 38(h)(5).*]

[1.]►2.◄ *Compliance.* If, based on the creditor's review of the consumer's age and/or employment status ►prior to or◄ at the time of enrollment in the product, the consumer would not be eligible to receive the benefits of the product, then providing the disclosure required under [§ 226.38(h)(5)]►§ 226.4(d)(1)(i)(D)(*5*)◄ would not comply with [this provision]►the requirements of § 226.38(h)◄. That is, if the consumer does not meet the age and/or employment eligibility criteria, then the creditor cannot state that the consumer may be eligible to receive benefits and cannot comply with [this requirement]►§ 226.38(h)◄. If the creditor offers a bundled product (such as credit life insurance combined with credit involuntary unemployment insurance) and the consumer is not eligible for all of the bundled products, then providing the disclosure required under [§ 226.38(h)(5)]►§ 226.4(d)(1)(i)(D)(*5*)◄ would not comply with [this provision]►§ 226.38(h)◄. However, the disclosure still satisfies the requirements of this section if an event subsequent to enrollment, such as the consumer passing the age limit of the product, makes the consumer ineligible for the product based on the product's age or employment eligibility restrictions.

[2. *Reasonably reliable evidence.* A disclosure under § 226.38(h)(5) shall be deemed to comply with this section if the creditor used reasonably reliable evidence to determine whether the consumer met the age or employment eligibility criteria of the product. Reasonably reliable evidence of a consumer's age would include using the date of birth on the consumer's credit application, on the driver's license or other government-issued identification, or on the credit report. Reasonably reliable evidence of a consumer's employment status would include a consumer's statement on a credit application form, an Internal Revenue Service Form W–2, tax returns, payroll receipts, or other written evidence such as a letter or e-mail from the consumer or the consumer's employer.]

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► *Section 226.40—Prohibited Acts or Practices in Connection With Reverse Mortgages*

40(a) Requiring the purchase of other financial or insurance products.

40(a)(1) Financial or insurance products.

1. *Covered products and services.* For purposes of § 226.40(a), the term "financial or insurance product" includes bank products, except for transaction accounts and savings deposits (as defined in Regulation D, 12 CFR part 204) established to disburse reverse mortgage proceeds. The term also includes nonbank products. For example, the term includes extensions of credit; trust services; time deposits as defined in Regulation D, 12 CFR part 204 (such as certificates of deposit); annuities; securities and other nondepository investment products; financial planning services; life insurance; long-term care insurance; credit insurance; and debt cancellation and debt suspension coverage.

2. *Exclusion for products and services customarily required.* Products and services that are customarily required to protect the creditor's interest in the collateral or otherwise mitigate the creditor's risk of loss are excluded from the definition of "financial product or service" for purposes of § 226.40(a). Examples of excluded products and services include appraisal or other property valuation services; title insurance; hazard, flood, or other peril insurance; home improvement services required to originate the reverse mortgage; and mortgage insurance where consumers are required to pay the premiums, such as the insurance required by the U.S. Department of Housing and Urban Development to originate a reverse mortgage under the Home Equity Conversion Mortgage program.

40(a)(2) Safe harbor.

1. *Safe harbor conditions not met.* If the safe harbor conditions in § 226.40(a)(2) are not met, whether a consumer is required to purchase a financial or insurance product to obtain a reverse mortgage is a factual question. For example, where the safe harbor conditions are not met for a particular reverse mortgage transaction, and the terms or features of that reverse mortgage are not available unless the consumer purchases another product, the consumer has been required to purchase that product to obtain the reverse mortgage.

Paragraph 40(a)(2)(ii).

1. *Obligated to purchase.* Whether a consumer has become obligated to purchase a financial or insurance product for purposes of the safe harbor under § 226.40(a)(2) is a factual inquiry. A consumer becomes obligated to purchase a financial or insurance product, for example, when the consumer signs an agreement to purchase the product, even if the purchase will occur in the future. A consumer also becomes obligated to purchase a product when the consumer signs an agreement to purchase a product, but has

the option to cancel the purchase for a period of time after the purchase occurs. If a consumer consummates a reverse mortgage on Monday, June 1, the creditor will qualify for the safe harbor only if the consumer does not sign an agreement to purchase another financial or insurance product from the persons enumerated in § 226.40(a)(2)(ii)(A)–(D)) until Thursday, June 11.

Paragraph 40(a)(2)(ii)(D).

1. *Examples of receiving compensation for the consumer's purchase of another product.* If, within 10 days of consummating a reverse mortgage, the consumer purchases another financial or insurance product from a party that is not affiliated with the creditor, the creditor qualifies for the safe harbor under § 226.40(a)(2)(ii) if the creditor and its affiliates do not receive compensation for the purchase. The creditor receives compensation for the consumer's purchase of another financial or insurance product if the creditor is paid a fee because the consumer purchases the product. By contrast, the creditor does not receive compensation for the purchase if the creditor sells a customer list to a nonaffiliated third party, which, in turn, sells a financial or insurance product to a reverse mortgage consumer on the list within the 10-day waiting period, as long as the creditor receives no compensation directly or indirectly related to whether the consumer purchases the product.

40(b) Counseling.

40(b)(1) Counseling required.

1. *Originating a reverse mortgage.* A creditor or other person may accept an application for a reverse mortgage and begin to process the application (by, for example, ordering an appraisal or title search) before the consumer has obtained the counseling required under § 226.40(b)(1). A creditor or other person may not, however, open a reverse mortgage account (for an open-end reverse mortgage) or consummate a reverse mortgage loan (for a closed-end reverse mortgage) before the consumer has obtained the counseling required under § 226.40(b)(1).

2. *Safe harbor.* A creditor may rely on a certificate of counseling in a form approved by the Secretary of the U.S. Department of Housing and Urban Development pursuant to 12 U.S.C. 1715z–20(f), or a substantially similar form, to confirm that the consumer obtained the counseling required under § 226.40(b)(1).

40(b)(2) Nonrefundable fees prohibited.

Paragraph 40(b)(2)(i).

1. *Collection of fees.* A fee, including an application fee, may be collected earlier than three business days after the consumer obtains counseling. However, the fee must be refunded if, within three business days of obtaining counseling, the consumer decides not to enter into the reverse mortgage transaction.

2. *Timing for imposition of nonrefundable fees.* To determine when the consumer obtained counseling for purposes of imposing a nonrefundable fee, a creditor or other person may rely on the date of the counseling session indicated on a certificate of counseling in a form approved by the Secretary of the U.S. Department of Housing and Urban Development pursuant to 12 U.S.C. 1715z–20(f), or a substantially similar form. *See* comment 40(b)(1)–2.

3. *Imposition of fees—reverse mortgages subject to § 226.5b.* For reverse mortgages subject to § 226.5b, two restrictions on imposing nonrefundable fees apply. The first restriction is under § 226.5b(e), which prohibits imposing a nonrefundable fee until after the third business day following the consumer's receipt of the early disclosures required under § 226.33(d)(1). The second restriction is under § 226.40(b)(2), which prohibits imposing a nonrefundable fee (other than a fee for required counseling (*see* § 226.40(b)(2)(ii))) until after the third business day following the consumer's completion of counseling. A nonrefundable fee may not be imposed until both waiting periods have ended. Thus, if three business days have elapsed since the consumer received the early disclosures, but fewer than three business days have elapsed since the consumer obtained counseling, the creditor or other person may not impose a nonrefundable fee (except a fee for required counseling) until after the third business day following the consumer's completion of counseling. Alternatively, if three business days have elapsed since the consumer obtained counseling, but fewer than three business days have elapsed since the consumer received the early disclosures, the creditor or other person may not impose a nonrefundable fee until after the third business day following the consumer's receipt of the early disclosures.

4. *Imposition of fees—reverse mortgages subject to § 226.19.* i. Under § 226.19(a)(1)(ii), which applies to closed-end, real property- or dwelling-secured mortgages, neither the creditor nor any other person may impose any fees (other than a fee for obtaining a consumer's credit history (*see* § 226.19(a)(1)(iii)) and a fee for required counseling (see § 226.19(a)(1)(v))) in connection with the consumer's application before the consumer has received the early disclosures required under § 226.19(a)(1)(i). Thus, in connection with a closed-end reverse mortgage, neither the creditor nor any other person may impose a fee (except for a fee for obtaining a consumer's credit history or required counseling) until the consumer has received the early disclosures required under §§ 226.19(a)(1)(i) and 226.33(d)(3). In addition, the restriction on imposing nonrefundable fees under § 226.40(b)(2) applies to closed-end reverse mortgages, so neither the creditor nor any other person may impose a nonrefundable fee (other than a fee for required counseling (see § 226.40(b)(2)(ii))) in connection with a closed-end reverse mortgage until after the third business day following the consumer's completion of counseling. Thus, for closed-end reverse mortgages, if the consumer has received the early disclosures, but fewer than three business days have elapsed since the consumer obtained counseling, the creditor or other person may not impose a nonrefundable fee on the consumer (except a fee for required counseling) until after the third business day following the consumer's completion of counseling. Alternatively, if three business days have elapsed since the consumer obtained counseling, but the consumer has not received the early disclosures, the creditor or other person may not impose any fees—refundable or nonrefundable (except for a fee for obtaining a consumer's credit history or required counseling)—until the consumer has received the early disclosures.

ii. For reverse mortgages subject to § 226.19, two restrictions on imposing nonrefundable fees apply. The first restriction is under § 226.19(a)(1)(iv), which prohibits imposing a nonrefundable fee (other than a fee for obtaining a consumer's credit history (*see* § 226.19(a)(1)(iii)) and a fee for required counseling (*see* § 226.19(a)(1)(v)) until after the third business day following the consumer's receipt of the early disclosures required under §§ 226.19(a)(1)(i) and 226.33(d)(3). The second restriction is under § 226.40(b)(2), which prohibits imposing a nonrefundable fee (other than a fee for required counseling (see § 226.40(b)(2)(ii))) until after the third business day following the consumer's completion of counseling. A nonrefundable fee generally may not be imposed until both waiting periods have ended. Thus, if three business days have elapsed since the consumer received the early disclosures, but fewer than three business days have elapsed since the consumer completed counseling, the creditor or other person may not impose a nonrefundable fee (except for a fee for required counseling) until after the third business day following the consumer's completion of counseling. Alternatively, if three business days have elapsed since the consumer obtained counseling, but fewer than three business days have elapsed since the consumer received the early disclosures, the creditor or other person may not impose a nonrefundable fee (except for a fee for obtaining a consumer's credit history or required counseling) until after the third business day following the consumer's receipt of the early disclosures.

5. *Definition of "business day."* For purposes of § 226.40(b)(2), the more precise definition of "business day" (meaning all calendar days except Sundays and specified Federal holidays) under § 226.2(a)(6) applies. *See* comment 2(a)(6)–2.

Paragraph 40(b)(2)(ii).

1. *Counseling fee.* A fee for the counseling required under § 226.40(b)(1) may be imposed by a counselor or counseling agency meeting the qualifications in § 226.40(b)(1) earlier than the expiration of three business days after the consumer obtains counseling and need not be refunded under the circumstances described in comment 40(b)(2)(i)–1.

40(b)(3) Content of counseling.

1. *Safe harbor.* Counseling that conveys the information required by the Secretary of the U.S. Department of Housing and Urban Development to be provided pursuant to 12 U.S.C. 1715z–20(f), or substantially similar information, satisfies the requirements of § 226.40(b)(3).

40(b)(5) Type of counseling.

1. *Internet communication.* Counseling considered face-to-face or by telephone includes counseling provided via an Internet or other connection allowing the counselor and consumer to see and hear one another in real time and communication via an Internet or other connection designed to accommodate persons with disabilities.

40(b)(6) Independence of counselor.

40(b)(6)(i) Counselor compensation.

1. *Prohibited compensation.* Section 226.40(b)(6)(i) prohibits a creditor or any person involved in originating a reverse mortgage, such as a mortgage broker, from compensating a counselor or counseling agency for reverse mortgage counseling services related to a particular transaction. Section 226.40(b)(6)(i) does not prohibit a creditor or other person from arranging for the counseling fee to be financed as part of a reverse mortgage transaction.

40(b)(6)(ii) Steering.

1. *Safe harbor.* To comply with 226.40(b)(6)(ii), a creditor or other person need not in all cases provide a list of at least five counselors or counseling agencies to the consumer. For example, if the consumer received reverse mortgage counseling that complies with § 226.40(b)(i) before any initial communication between the consumer and the creditor or other person involved in originating a reverse mortgage, the consumer would have already obtained the counseling needed to satisfy § 226.40(b)(1). Therefore, a list of counselors or counseling agencies would be unnecessary.◀

▶*Section 226.41—Servicer's Response to Borrower's Request for Information*

1. *Reasonable time.* The servicer must provide the required information to the consumer within a reasonable time after the consumer's written request. For example, it would be reasonable under most circumstances to provide the required information within ten business days of receipt of the consumer's written request.◀

* * * * *

Appendices G and H—Open-End and Closed-End Model Forms and Clauses

1. *Permissible changes.* Although use of the model forms and clauses is not required, creditors using them properly will be deemed to be in compliance with the regulation with regard to those disclosures. Creditors may make certain changes in the format or content of the forms and clauses and may delete any disclosures that are inapplicable to a transaction or a plan without losing the act's protection from liability▶.◀ [, except] ▶However,◀ formatting changes may not be made to ▶the following◀ model forms ▶, model clauses,◀ and samples in ▶Appendices G and H:◀ G–2[(A)], G–3[(A)], G–4[(A)], ▶G–5(A)–(C),◀G–10(A)–(E), ▶G–14(A)– (E), G–15(A)–(D), G–16(A)-(D)◀ G–17(A)–(D), G–18(A) (except as permitted pursuant to § 226.7(b)(2)), G–18(B)–(C), G–19, G–20, [and] G–21▶, G–22(A)–(B), G–23(A)–(B), G–24(A) (except as permitted pursuant to § 226.7(a)(2)), G–25, and G–26; and H–4(B) through H–4(L), H–8(A)–(B), H–9, H–17(A) through (D), H–19(A)–(I), and H–20 through H–22◀. The rearrangement of the model forms and clauses may not be so extensive as to affect the substance, clarity, or meaningful sequence of the forms and clauses. Creditors making revisions with that effect will lose their protection from civil liability. Except as otherwise specifically required, acceptable changes include, for example:

i. Using the first person, instead of the second person, in referring to the borrower.

ii. Using "borrower" and "creditor" instead of pronouns.

iii. Rearranging the sequences of the disclosures.

iv. Not using bold type for headings.

v. Incorporating certain state "plain English" requirements.

vi. Deleting inapplicable disclosures by whiting out, blocking out, filling in "N/A" (not applicable) or "0," crossing out, leaving blanks, checking a box for applicable items, or circling applicable items. (This should permit use of multipurpose standard forms ▶for transactions not secured by real property or a dwelling◀.)

[vii. Using a vertical, rather than a horizontal, format for the boxes in the closed-end disclosures.]

Appendix G—Open-End Model Forms and Clauses

* * * * *

4. 【*Models G–5 through G–9.*】 ▶*Model Form G–5(A) and Samples G–5(B) and G–5(C).* i. A creditor satisfies § 226.15(b)(3) if it provides the Model Form G–5(A), or a substantially similar notice, which is properly completed with the disclosures required by § 226.15(b)(3).

ii. Sample G–5(B) provides guidance where a creditor is providing the rescission notice for opening of a HELOC account where the credit line is being secured by the consumer's home and the full credit line is rescindable. In this situation, a creditor may use Sample G–5(B) to meet the content and format requirements for the rescission notice set forth in § 226.15(b) and Model Form G–5(A).

iii. Sample G–5(C) provides guidance where a creditor is providing the rescission notice for a credit limit increase on the HELOC account. In this situation, a creditor may use proposed Sample G–5(C) to meet the content and format requirements for the rescission notice set forth in § 226.15(b) and Model Form G–5(A).

iv. Samples G–5(B) and G–5(C) contain the following optional disclosures set forth in § 226.15(b): (1) A disclosure about joint owners; (2) an acknowledgment of receipt of the notice; (3) the consumer's name and property address pre-printed on the form; (4) the account number on the form; and (5) a fax number that may be used by the consumer to exercise his or her rescission right. A creditor may delete these optional disclosures from Samples G–5(B) and G–5(C) and still retain the safe harbor from liability provided by these forms.

v. Although creditors are not required to use a certain paper size in disclosing the rescission notice required under § 226.15(b), Samples G–5(B) and G–5(C) are each designed to be printed on an 8½ x 11 inch sheet of paper. In addition, the following formatting techniques were used in presenting the information in the sample notices to ensure that the information is readable:

A. A readable font style and font size (10-point Arial font style).

B. Sufficient spacing between lines of the text.

C. Adequate spacing between paragraphs when several pieces of information were included in the same row of the table, as appropriate.

D. Standard spacing between words and characters. In other words, the text was not compressed to appear smaller than 10-point type.

E. Sufficient white space around the text of the information in each row, by providing sufficient margins above, below and to the sides of the text.

F. Sufficient contrast between the text and the background. Generally, black text was used on white paper.

vi. While the regulation does not require creditors to use the above formatting techniques in presenting information in the notice (except for the 10-point font requirement), creditors are encouraged to consider these techniques when deciding how to disclose information in the notice, to ensure that the information is presented in a readable format.

vii. Creditors may use color, shading and similar graphic techniques with respect to the notice, so long as the notice remains substantially similar to the model and sample forms in Appendix G. ◀[These models set out notices of the right to rescind that would be used at different times in an open-end plan. The last paragraph of each of the rescission model forms contains a blank for the date by which the consumer's notice of cancellation must be sent or delivered. A parenthetical is included to address the situation in which the consumer's right to rescind the transaction exists beyond 3 business days following the date of the transaction, for example, when the notice or material disclosures are delivered late or when the date of the transaction in paragraph 1 of the notice is an estimate. The language of the parenthetical is not optional. See the commentary to section 226.2(a)(25) regarding the specificity of the security interest disclosure for model form G–7.】

* * * * *

Appendix H—Closed-End Model Forms and Clauses

1. *Models H–1 and H–2.* Creditors may make several types of changes to closed-end model forms H–1 (credit sale) and H–2 (loan) and still be deemed to be in compliance with the regulation, provided that the required disclosures are made clearly and conspicuously. Permissible changes include the addition of the information permitted by 【footnote 37 to】 section 226.17 and "directly related" information as set forth in the commentary to section 226.17(a).

The creditor may also delete, or on multi-purpose forms, indicate inapplicable disclosures, such as:

- The itemization of the amount financed option (See sample【s】 H–12【 through H–15】.)
- The credit 【life and disability】 insurance▶ or debt cancellation or debt suspension coverage◀ disclosures (See ▶model forms and◀ samples H-【11】▶17(A), (B), (C), and (D).)
- The property insurance disclosures (See ▶model clause H–18, and ◀samples H–10 through H–12【, and H–14】.)
- The "filing fees" and "nonfiling insurance" disclosures (See samples H–11 and H–12.)

• The prepayment penalty or rebate disclosures (See sample【s】 H–12 【and H–14】.)

• The total sale price (See samples H–11 【through】 ►and◄ H–【15】►12◄.) Other permissible changes include:

• Adding the creditor's address or telephone number. (See the commentary to § 226.18(a).)

• Combining required terms where several numerical disclosures are the same, for instance, if the "total of payments" equals the "total sale price." (See the commentary to § 226.18.)

• Rearranging the sequence or location of the disclosures—for instance, by placing the descriptive phrases outside the boxes containing the corresponding disclosures, or by grouping the descriptors together as a glossary of terms in a separate section of the segregated disclosures; by placing the payment schedule at the top of the form; or by changing the order of the disclosures in the boxes, including the annual percentage rate and finance charge boxes.

• Using brackets, instead of checkboxes, to indicate inapplicable disclosures.

• Using a line for the consumer to initial, rather than a checkbox, to indicate an election to receive an itemization of the amount financed.

• Deleting captions for disclosures.

• Using a symbol, such as an asterisk, for estimated disclosures, instead of an "e."

• Adding a signature line to the insurance disclosures to reflect joint policies.

• Separately itemizing the filing fees.

• Revising the late charge disclosure in accordance with the commentary to § 226.18(1).

* * * * *

3. *Models H–4►(A)◄【 through】►, H–4(C), H–4(H), H–5,◄ H–7►, H–16, H–18, and H–20 through H–23◄.* The model clauses are not included in the model forms although they are mandatory for certain transactions. Creditors using the model clauses when applicable to a transaction are deemed to be in compliance with the regulation with regard to that disclosure.

* * * * *

11. *Models H–8►(A)◄ and H–9 ►and Sample H–8(B)◄.* ► Model Forms H–8(A) and H–9◄ 【These models】 contain the rescission notices for a typical closed-end transaction and a 【refinancing】►new advance of money with the same creditor◄, respectively.

►i. These model forms illustrate, in the tabular format, the disclosures required generally by § 226.23(b).

ii. A creditor satisfies § 226.23(b)(3) if it provides the appropriate model form (H–8(A) or H–9), or a substantially similar notice, which is properly completed with the disclosures required by § 226.23(b)(3).

iii. Sample H–8(B) contains the following optional disclosures set forth in § 226.23(b): (1) A disclosure about joint owners; (2) an acknowledgment of receipt of the notice; (3) the consumer's name and property address pre-printed on the form; (4) the loan number on the form; and (5) a fax number that may be used by the consumer to exercise his or her rescission right. A creditor may delete these optional disclosures from Sample H–8(B) and still retain the safe harbor from liability provided by this form.

iv. Although creditors are not required to use a certain paper size in disclosing the rescission notice under § 226.23(b), Model Forms H–8(A) and H–9 and Sample H–8(B) are designed to be printed on an 8½ × 11 sheet of paper. In addition, the following formatting techniques were used in presenting the information in the model forms and sample to ensure that the information is readable:

A. A readable font style and font size (10-point Arial font style);

B. Sufficient spacing between lines of the text;

C. Adequate spacing between paragraphs when several pieces of information were included in the same row of the table, as appropriate.

D. Standard spacing between words and characters. In other words, the text was not compressed to appear smaller than 10-point type;

E. Sufficient white space around the text of the information in each row, by providing sufficient margins above, below and to the sides of the text;

F. Sufficient contrast between the text and the background. Generally, black text was used on white paper.

v. While the regulation does not require creditors to use the above formatting techniques in presenting information in the tabular format (except for the 10-point minimum font requirement), creditors are encouraged to consider these techniques when deciding how to disclose information in the notice to ensure that the information is presented in a readable format.

vii. Creditors may use color, shading and similar graphic techniques with respect to the notice, so long as the notice remains substantially similar to the model and sample forms in Appendix H.◄ 【The last paragraph of each model form contains a blank for the date by which the consumer's notice of cancellation must be sent or delivered. A parenthetical is included to address the situation in which the consumer's right to rescind the transaction exists beyond 3 business days following the date of the transaction, for example, where the notice or material disclosures are delivered late or where the date of the transaction in paragraph 1 of the notice is an estimate. The language of the parenthetical is not optional. See the commentary to section 226.2(a)(25) regarding the specificity of the security interest disclosure for model form H–9. The prior version of model form H–9 is substantially similar to the current version and creditors may continue to use it, as appropriate. Creditors are encouraged, however, to use the current version when reordering or reprinting forms.】

12. *Sample forms.* 【The sample forms】►Samples◄ 【(】►H–4(D) through H–(F), H4(I) and H–4(J), H–8(B),◄H–10 through H–【15】►12, H–17(B) through (D), and H–19(D) through (I)◄【)】 serve a different purpose than the model forms► and model clauses◄. The samples illustrate various ways of adapting the model forms to the individual transactions described in the commentary to appendix H. The deletions and rearrangements shown relate only to the specific transactions described. As a result, the samples do not provide the general protection from civil liability provided by the model forms and clauses.

* * * * *

Appendix K to Part 226—[Total Annual Loan Cost Rate Computations for] Reverse Mortgage [Transactions] ►Model Forms and Clauses◄

►1. *Permissible changes.* i. Although use of the model forms is not required, creditors using them properly will be deemed to be in compliance with the regulation. Creditors may make certain types of changes to the model forms and still be deemed to be in compliance with the regulation, provided that the required disclosures are made clearly and conspicuously. The model forms aggregate disclosures into groups under specific headings. Changes may not include rearranging the sequence of disclosures, for instance, by rearranging which disclosures are provided under each heading or by rearranging the sequence of the headings and grouping of disclosures. Changes to the model forms may not be so extensive as to affect the substance or clarity of the forms. Creditors making revisions with that effect will lose their protection from civil liability. Acceptable changes include, for example:

A. Using the first person, instead of the second person, in referring to the borrower

B. Using "borrower" and "creditor" instead of pronouns

C. Incorporating certain state "plain English" requirements

D. Deleting inapplicable disclosures by whiting out, blocking out, filling in "N/A" (not applicable) or "0," crossing out, leaving blanks, checking a box for applicable items, or circling applicable items.

ii. Although creditors are not required to use a certain paper size in disclosing the § 226.33 disclosures, samples K–4, K–5, and K–6 are designed to be printed on three 8½ x 11 inch sheets of paper. A creditor may use larger sheets of paper, such as 8½ x 14 inch sheets of paper, or may use multiple pages. If the disclosures are provided on two sides of a single sheet of paper, the creditor must include a reference or references, such as "SEE BACK OF PAGE" at the bottom of each page indicating that the disclosures continue onto the back of the page. If the disclosures are on two or more pages, a creditor may not include any intervening information between portions of the disclosure. In addition, the following formatting techniques were used in presenting the information in the sample tables to ensure that the information is readable:

A. A readable font style and font size (10-point Ariel font style for body text, except for annual percentage rates shown in 16-point type).

B. Sufficient spacing between lines of the text.

C. Standard spacing between words and characters. In other words, the body text was not compressed to appear smaller than the 10-point type size.

D. Sufficient white space around the text of the information in each row, by providing sufficient margins above, below and to the sides of the text.

E. Sufficient contrast between the text and the background. Generally, black text was used on white paper.

iii. The Board is not requiring creditors to use the above formatting techniques in presenting information in the tabular format (except for the 10-point and 16-point minimum font requirements); however, the Board encourages creditors to consider these techniques when disclosing information in the table to ensure that the information is presented in a readable format.

2. *Models K–1 through K–3.* i. These model forms illustrate, in the tabular format, the disclosures required generally under § 226.33(c) and (d) for reverse mortgages. Creditors can use model K–1 for early open-end reverse mortgages disclosures required by § 226.33(d)(1); model K–2 for account-opening open-end reverse mortgage disclosures; and model K–3 for closed-end reverse mortgages.

ii. Except as otherwise permitted, disclosures must be substantially similar in sequence and format to model forms K–1 through K–3, as applicable.

3. *Sample forms.* Samples K–4 through K–6 serve a different purpose than the model forms and model clauses. The samples illustrate various ways of adapting the model forms to the individual transactions described in the commentary to appendix K. The deletions and rearrangements shown relate only to the specific transactions described. As a result, the samples do not provide the general protection from civil liability provided by the model forms and clauses.

4. *Sample K–4.* This sample illustrates the early disclosures under § 226.33 for an open-end variable-rate reverse mortgage. The appraised property value is $275,000, and the age of the youngest consumer is 82. The consumer has not yet chosen the type of payments to receive from the creditor. Under the creditor's reverse mortgage the consumer may receive a line of credit, and the maximum draw on the line of credit that the consumer could take at closing is $186,974. The variable APR is 2.93%. There are no transactions requirements or early termination fee and therefore they are not shown. The consumer's liability is limited to the net proceeds of the sale of the home, and the costs associated with the sale are assumed to be 7%.

5. *Sample K–5.* This sample illustrates the account-opening disclosures under § 226.33 for an open-end variable-rate reverse mortgage. It corresponds to the early disclosure Sample K–4, and illustrates the situation where the consumer has chosen to receive an initial advance of $12,000, a line of credit of $15,000, and a monthly payment amount of $1,287.

6. *Sample K–6.* This sample illustrates the closed-end reverse mortgage disclosures. The appraised property value is $120,000 and the age of the youngest borrower is 62. The consumer may only receive funds in the form of an initial advance at closing at $55,242. The loan has a fixed simple interest rate of 5.56%. There are no applicable fees other than those itemized in the disclosure and therefore the disclosure regarding other fees is not shown. The consumer's liability is limited to the net proceeds of the sale of the home, and the costs associated with the sale are assumed to be 7%.

7. *Model K–7.* Model Clause K–7 is not included in the model forms although it is mandatory for certain transactions. Creditors using the model clause when applicable to a transaction are deemed to be in compliance with the regulation with regard to that disclosure. Model Clause K–7 illustrates, in the tabular format, the disclosures required under § 226.33(c)(8)(v) regarding shared-equity or shared-appreciation disclosures applicable to reverse mortgages subject to § 226.33.◀

[1. *General.* The calculation of total annual loan cost rates under appendix K is based on the principles set forth and the estimation or "iteration" procedure used to compute annual percentage rates under appendix J. Rather than restate this iteration process in full, the regulation cross-references the procedures found in appendix J. In other aspects the appendix reflects the special nature of reverse mortgage transactions. Special definitions and instructions are included where appropriate.

(b) Instructions and equations for the total annual loan cost rate.

(b)(5) Number of unit-periods between two given dates.

1. *Assumption as to when transaction begins.* The computation of the total annual loan cost rate is based on the assumption that the reverse mortgage transaction begins on the first day of the month in which consummation is estimated to occur. Therefore, fractional unit-periods (used under appendix J for calculating annual percentage rates) are not used.

(b)(9) Assumption for discretionary cash advances.

1. *Amount of credit.* Creditors should compute the total annual loan cost rates for transactions involving discretionary cash advances by assuming that 50 percent of the initial amount of the credit available under the transaction is advanced at closing or, in an open-end transaction, when the consumer becomes obligated under the plan. (For the purposes of this assumption, the initial amount of the credit is the principal loan amount less any costs to the consumer under section 226.33(c)(1).)

(b)(10) Assumption for variable-rate reverse mortgages.

1. *Initial discount or premium rate.* Where a variable-rate reverse mortgage transaction includes an initial discount or premium rate, the creditor should apply the same rules for calculating the total annual loan cost rate as are applied when calculating the annual percentage rate for a loan with an initial discount or premium rate (see the commentary to § 226.17(c)).

(d) Reverse mortgage model form and sample form.

(d)(2) Sample form.

1. *General.* The "clear and conspicuous" standard for reverse mortgage disclosures does not require disclosures to be printed in any particular type size. Disclosures may be made on more than one page, and use both the front and the reverse sides, as long as the pages constitute an integrated document and the table disclosing the total annual loan cost rates is on a single page.]

Appendix L—▶Reserved◀[Assumed Loan Periods for Computations of Total Annual Loan Cost Rates

1. *General.* The life expectancy figures used in appendix L are those found in the U.S. Decennial Life Tables for women, as rounded to the nearest whole year and as published by the U.S. Department of Health and Human Services. The figures contained in appendix L must be used by creditors for all consumers (men and women). Appendix L will be revised periodically by the Board to incorporate revisions to the figures made in the Decennial Tables.]

By order of the Board of Governors of the Federal Reserve System, August 16, 2010.

Robert deV. Frierson,

Deputy Secretary of the Board.

Note: The following attachments A and B will not appear in the Code of Federal Regulations.

BILLING CODE P

Attachment A

FEDERAL RESERVE BOARD CONSUMER PROTECTION RESOURCES

Key Questions to Ask about Reverse Mortgage Loans

When you are shopping for a reverse mortgage loan, consider the questions below. Ask your lender about other loan products, such as a traditional home equity loan or home equity line of credit. For more information, go to: www.frb.gov.

1) What is a Reverse Mortgage Loan?

A reverse mortgage loan is available to seniors (usually age 62 and older) who own all or almost all of the equity in their home. This loan allows you to exchange equity in your home for cash. With a reverse mortgage loan, you typically don't pay back the loan for as long as you live in your home. Instead, the loan must be repaid in full when the last living borrower dies, sells the home, or moves out of the home for 12 months or more. Repaying the loan in full includes the amount of the original loan plus all interest and any other fees and charges. Most borrowers (or their heirs) repay a reverse mortgage by selling the home.

2) How is a reverse mortgage loan different from a traditional mortgage?

- **Traditional mortgages** are loans generally used to buy a home or to borrow against your home equity for bills or other expenses. When you take out a traditional mortgage, typically the lender owns most of the equity in your home. As you pay back the loan over time (usually through monthly payments), you get that equity back from the lender. Once the traditional mortgage is paid off, you own all the equity in your home—the lender owns nothing.
- With a **reverse mortgage loan,** you already own all or most of the equity in your home, and you exchange this equity for cash from a lender. Because you do not pay back this money gradually over time, you do not earn equity back from the lender. Instead, the equity you own decreases and the amount you owe increases as interest and other fees and charges are added to the amount of the original loan.

3) Is a reverse mortgage loan right for me?

The advantage of a reverse mortgage is that you can exchange your home equity for cash and do not have to make monthly payments. **But reverse mortgages have risks:**

- ***Loan amount increases over time***
  The amount you owe increases every month. The younger you are when you take out a reverse mortgage, the more time there will be for the interest to grow and the more you will owe.
- ***Less cushion for emergencies***
  By taking out a reverse mortgage now, you will have less home equity later when you may need it more, for example, to pay for future emergencies, health care needs, home repairs, or everyday living expenses. If you are not facing a financial emergency now, consider postponing taking out a reverse mortgage.
- ***Costs more than other loan options***
  Reverse mortgages are generally more expensive than other home loans, so consider other options before taking a reverse mortgage. Reverse mortgages may also have tax consequences or may affect your eligibility for federal or state assistance. Talk with a HUD-approved reverse mortgage counselor or financial advisor to learn more.

4) What fees and charges are added to a reverse mortgage loan?

Fees and charges can vary in amount and type from one reverse mortgage loan to another. Most borrowers choose to have these costs added to their loan balance. If you choose to add these costs to your loan balance, you will be charged interest on these costs each month in addition to the interest charged on the cash you receive. Reverse mortgage loan fees and charges typically include:

- **Closing costs**, which are charged once, at closing
- **Reverse mortgage insurance premium**, which is charged in two parts: once at closing and each month as a percent of your outstanding loan balance
- **Interest**, which is charged on your outstanding loan balance each month
- **Servicing fee**, which is charged each month.

5) What if my lender wants me to use money from my reverse mortgage to buy an annuity or make another investment?

Under federal law, you cannot be required to use your reverse mortgage money to purchase any other financial or insurance product (such as an annuity, long-term care insurance, or life insurance). If another product is offered to you, make sure you understand: (1) how the product works and what its benefits are, (2) how much it costs, (3) whether you need it, and (4) how much money the person selling the product makes if you purchase it. Talk with a HUD-approved reverse mortgage counselor or financial advisor before you decide.

6) Does the lender take the title to my home while I have a reverse mortgage?

No. You continue to own your home while you have a reverse mortgage loan. This means that you must still pay for property taxes, insurance, and repairs.

7) Can I lose my home while I have a reverse mortgage?

Yes. You could lose your home if you do not pay for property taxes, insurance, and repairs. For example, if you don't pay your taxes, the lender could demand that you repay the loan in full. You may have to sell your home to repay the loan. Or the lender could take your home through foreclosure. Also, if you don't live in your home for 12 straight months or more (for example, if you are in the hospital or a nursing home), the lender could demand that you repay the loan in full, and you may have to sell your home to repay the loan.

8) What happens at the end of the loan? What if I owe more than my home is worth when the loan comes due?

A reverse mortgage loan is usually repaid by selling the home. If the money earned through selling the home isn't enough to repay the reverse mortgage, almost all lenders will absorb the difference. These lenders will not be able to sue you or your heirs for more money. If the reverse mortgage is insured by the federal government, the government will absorb the difference instead of the lender. However, if you or your heirs want to keep your home, the loan must be repaid in full. Ask your lender if this applies to your loan.

9) What happens if there is money left over after the home is sold?

Almost all reverse mortgage loans let the homeowner (or the homeowner's heirs) keep any money left over after the loan is repaid in full. Ask your lender if this applies to your loan.

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Attachment B

FEDERAL RESERVE BOARD CONSUMER PROTECTION RESOURCES

Key Questions to Ask About Your Mortgage

When you are shopping for a loan, ask each lender the questions below. Some loans have risky features that could make it difficult for you to make payments in the future. Make sure you understand the terms of your loan. If you are not comfortable with the risks, ask your lender about other loan products. **The only way to make sure you get the best possible loan terms is to talk to several lenders.**

Shop. Compare. Negotiate.

You cannot be charged a fee, other than a credit history fee, until you get disclosures. If you do not want the loan, you have a right to a fee refund, except for a credit history fee, for three days after you get the disclosures.

For more information about risky loan features, read *Shop Wisely: Understanding Your Mortgage Choices*, available at: www.federalreserve.gov.

1	**Can my interest rate increase?** If you have an adjustable rate mortgage (ARM), your interest rate can go up or down after a short period. This means that your monthly payments could increase.
2	**Can my monthly payment increase?** With some loans, your monthly payment could increase after a period of time, often by hundreds of dollars. This increase could be because you have a lower introductory interest rate, your property taxes or insurance premiums increase, or because in the beginning your monthly payment only covers the interest on the loan, and not the principal owed.
3	**Will my monthly payments reduce my loan balance?** Some loans let you pay only the interest on your loan each month. These payments do not pay down the amount you borrowed. As a result, if you have this type of loan, you may not build any equity in your home.
4	**Even if I make my monthly payments, can my loan balance increase?** Some loans let you choose to pay even less than the interest owed each month. The unpaid interest is added to your loan balance and increases the total amount that you owe. This could cause you to lose equity in your home over time.
5	**Could I owe a prepayment penalty?** Some loans charge you a large fee if you pay off your loan, refinance it, or sell your home within the first few years of the loan. This penalty fee could be thousands of dollars.
6	**Will I owe a balloon payment?** Some loans require a very large payment at the end of the loan—sometimes tens of thousands of dollars. If interest rates go up or if the value of your property drops, you may not be able to refinance your loan before you have to make this large payment.
7	**Will I have to document my employment, income, and assets to get this loan?** Sometimes a lender will make a loan without requiring you to show that you are employed and have the income or assets to repay the loan. These no-documentation (“no-doc”) or low-documentation (“low-doc”) loans usually have higher interest rates or higher fees than other loans.

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