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To: California Department of Financial Protection and Innovation
From: Legal Department, First American Docutech
Date: February 25, 2021
Subject: Submission of Comments for PRO 01-21

To Whom It May Concern:

On February 4, 2021 the Department of Financial Protection and Innovation ("DFPI") published an "Invitation For Comments On Proposed Rulemaking Under the California Consumer Financial Protection Law" (PRO 01-21). We would like to accept this invitation and submit, for the DFPI's consideration, the following comments in response to the following question posed:

> "Should the DFPI prescribe rules to ensure that the features of a consumer financial product or service are fully, accurately, and effectively disclosed to consumers in a manner that permits consumers to understand the costs, benefits, and risks associated with the product or service? (Fin. Code § 90009, sub. (d).) If so, please describe the product or service where consumers would benefit from disclosure rules, what disclosures the DFPI should require, and why those disclosures will help consumers understand the costs, benefits, and the risks associated with the product or service."

Comment # 1

The DFPI should not prescribe additional disclosure rules in connection with mortgage loan products and services (at least, those connected with the origination of such loans), because:

1. Consumers are already subjected to "information overload" with the quantity of disclosures provided to them during the mortgage loan origination process. Additional disclosures - which would likely repeat much of the same information already provided - will not improve a consumer's understanding of "the costs, benefits, and risks associated with the product or service". In fact, such additional disclosures may give consumers cause to skim through all information provided, due to the sheer volume of paperwork they are provided.

2. Disclosures currently required, including the Loan Estimate and Closing Disclosure, in addition to ancillary tools provided by the Federal Consumer Financial Protection Bureau ("CFPB"), along with nearly universal access to the Internet, already give consumers the necessary information and means to research "the costs, benefits, and risks associated with the product or service" offered to them, to an extent satisfactory to themselves.

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Consumers in a typical mortgage loan transaction receive at least fourteen disclosures[1] (and up to twenty-four)[2] required by Federal law during the initial stages of loan origination. During the later stages of origination (up through closing), they receive at least eight[3] Federally required disclosures.

Under California law, there are up to twenty-eight disclosures which we must be provided during the initial stages of origination; at closing, there are ten.[4]

These, plus additional documentation which may be required by investors (particularly Fannie Mae and Freddie Mac), Federal agencies (FHA, VA, and USDA), and housing programs (CalHFA), as well as other documents necessary to make a valid and legally enforceable mortgage loan (*e.g.*, a promissory note, security instrument, *etc.*), inundate consumers with over a hundred pages of information concerning their loan.

To give a concrete estimate, according to our own records, the average number of pages in a document package mailed to consumers in California during the initial stages of origination is fifty-four pages. Documents delivered at the time of closing tend to be nearly twice as large.

Most consumers are not familiar with the mortgage loans (both processes, terms, and conditions), thus most are susceptible to feeling overwhelmed with the information provided to them. While such information is critical, consumers can feel pressured into skimming through such information, if it is redundant and excessive – thus running the risk that they may overlook critical terms and conditions which are important to them.

One of the purposes of the California Consumer Financial Protection Law ("CCFPL") is to "enforce provisions of the Federal Dodd-Frank Wall Street Consumer Financial Protection Act of 2010 over existing licensees, to protect consumers from unlawful, unfair, deceptive, or abusive acts or practices" (see Senate Committee On Budget And Fiscal Review Analysis of CA AB 1864 [2020], dated August 26, 2020; available at: https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200AB1864).

It is also meant to "provide [the] DFPI with the tools and authority to enforce existing state and federal laws with which financial services companies must already comply. . . . By borrowing the definitions and structure from Dodd-Frank, this bill leverages the value of an existing regulatory

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[1] Appraisal Waiver/Receipt Form (Regulations B and Z), ECOA Notice (Regulation B), Demographics Information Request (Regulation C), Privacy Policy Notice (Regulation P), Credit Score Disclosure Form H-3 (Regulation V), Credit Score Matrix (Regulation V), List of Homeownership Counseling Organizations (Regulation X), Anti-Steering Disclosure of Loan Options (Regulation Z), Loan Estimate (Regulation Z), Written List of Providers (Regulation Z), IRS Form 4506-C (IRS Regulations), PATRIOT Act Disclosure (PATRIOT Act), Certification and Authorization (12 U.S.C.A. § 3404), and Taxpayer Consent Form (26 U.S.C.A. § 6103[c]).

[2] For a complete list, please see First American Docutech's "Federal Disclosure Matrix", available at: https://compliance.docutech.com/matrices/.

[3] Escrow Account Disclosure (Regulation X), Notice of Transfer of Servicing (Regulation X), Closing Disclosure (Regulation Z), FACT Act Notice (FACT Act), Amortization Schedule (HPA), PMI Disclosure (HPA), W-9 Taxpayer ID (IRS Regulations), and 4506 Copy of Tax Form (IRS Regulations).

[4] For a complete list, please see First American Docutech's "Disclosure Matrix", available at: https://compliance.docutech.com/matrices/.

framework to which industry participants are already subject. Companies that provide consumer financial products and services, regardless of whether they are required to be licensed under existing state law, should already have programs in place to comply with Dodd-Frank and CFPB regulations, and those companies will be able to use their existing policies and procedures to ensure compliance with this law." (see Assembly Floor Analysis of CA AB 1864 [2020], dated August 31, 2020; available at: https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200AB1864).

Altogether, the CCFPL is both heavily based on the Federal Dodd-Frank Act and it created the DPFI, in part, to enforce this Act. Under this Act, and through regulations implemented by the CFPB, a robust number of high quality disclosures and tools, which enable consumers to understand "the costs, benefits, and risks associated with the product or service" of their transaction, are already provided.

For example, the CFPB conducted extensive research when developing the new "Loan Estimate" and "Closing Disclosure" forms required under 12 C.F.R. § 1026.19(e) & (f), to ensure that such forms would be "consumer friendly" and adequately disclose, in an understandable manner, the terms of their transaction (see https://www.consumerfinance.gov/know-before-you-owe/compare/). The CFPB also provides interactive websites for consumers, providing them further details about the information contained within the "Loan Estimate" and "Closing Disclosure" (see https://www.consumerfinance.gov/owning-a-home/loan-estimate/ and https://www.consumerfinance.gov/owning-a-home/closing-disclosure/).

The CFPB's "Your Home Loan Toolkit" booklet, provided for all transactions subject to *Ibid*. § 1026.19(g), contains twenty-eight pages worth of information for consumers, explaining to them what key terms of the transaction are (*e.g.*, fixed-rate, adjustable-rate, balloon payment, negative amortization, points, down payment, *etc.*) and what considerations consumers should take when shopping for a mortgage loan.

These and other Federally-required disclosures are well-renowned in the industry, particularly by State authorities. Five States have received exemption status to parts of the Federal Truth-in-Lending Act (in accordance with *Ibid*. § 1026.29), for a similar purpose as the CCFPL: to give State agencies more power and autonomy in enforcing the Truth-in-Lending Act. Despite these exemptions and each State's ability to formulate their own disclosures, each of them largely defers to Federal Regulation Z for their disclosure requirements, with few (if any) additional disclosures being required.[5]

Other States will quite often defer to Regulation Z disclosures for providing the borrower with details about their transaction - even for more complicated loans. For example, New York law requires detailed disclosures to be given in connection with certain junior lien mortgage loans and alternative mortgage instruments[6] which have, what can be described as, "non-conforming" loan terms (*e.g.*, balloon payments, adjustable payments and/or terms, growing equity, non-

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[5] See Conn. Gen. Stat. Ann. § 36a-678; Mass. Gen. Laws Ann. ch. 140D, §§ 1 through 35 and Mass. Regs. Code tit. 209, ch. 32; Me. Rev. Stat. Ann. tit. 9-A, § 8-504; Okla. Stat. Ann. tit. 14A, § 3-301.1; and Wyo. Stat. Ann. §§ 40-14-320, 40-23-113, & 40-23-114.

[6] *e.g.*, "balloon payment, growing equity and pledged account mortgage loans in a principal amount of less than $250,000 and which may be structured as non-amortizing or partially amortizing provided that a balloon-payment mortgage loan must have an initial fixed-rate period of three years"

amortization terms, *etc.*).[7] However, New York law also holds that providing certain disclosures under Regulation Z is sufficient for complying with most of these disclosure requirements.[8]

Also, other States repealed some of their disclosure requirements between the time that the CFPB's TILA-RESPA Integrated Disclosure rule (78 FR 79730 [2013]) was finalized and after it took effect. This includes Florida, which repealed eight of their requirements in 2014, citing Federal law (particularly those impacted by the Dodd-Frank Act and the TILA-RESPA Integrated Disclosure rule) as providing sufficient disclosures (thus making Florida's requirements redundant).[9]

Taken altogether, we would like to present to the DFPI, for its consideration, the premise that Federal law, coupled with California's current disclosure requirements, provides sufficient details for consumers to know and understand the terms of their transaction. If a consumer wishes to obtain a better understanding of such terms, or about the mortgage loan process, additional resources are readily accessible to consumers (*e.g.*, the CFPB's interactive website, homeownership counseling, financial education sites on the Internet, *etc.*).

Comment # 2

If the DFPI does believe (either now or at a future date) that additional disclosures should be provided, we would like to recommend that the DFPI consider providing a model form for such requirements, to mitigate issues which arise when State authorities and creditors have different interpretations as to what these requirements mandate. Quite often, creditors will make a "good faith" effort to comply with these requirements, only to be flagged and/or fined by State auditors who interpret the requirements differently - which interpretations may evolve over time, as new auditors replace the previous ones, which subsequently may cause creditors to make changes to their disclosures which, under the previous auditors, were considered to be correct.

A model form, coupled with regulations which hold that the proper use of such form constitutes a "safe harbor" of compliance (see 12 C.F.R. Pt. 1016, App. A for an example), is a "win-win" scenario for all parties. The DFPI can set the standard of compliance by crafting the specific language and format of the disclosure given to consumers, to help them "understand the costs, benefits, and the risks associated with product or service."

Creditors can then use the model form with the assurance that, if they use it appropriately, they will be complying with the DFPI's requirements. Creditors can still retain some flexibility in complying with the requirements by using their own original form or modifying the model form if they so choose (*e.g.*, adding a logo, barcode for recordkeeping purposes, *etc.*), albeit if they do so, the onus be on them to ensure that it complies with the law (*i.e.*, "safe harbor" is lost).

[7] For disclosure requirements, see *e.g.*, N.Y. Comp. Codes & Regs. tit. 3, §§ 80.4, 80.5, 82.5, & 82.6.

[8] See *Ibid.* §§ 80.12 & 82.9.

[9] See https://compliance.docutech.com/2014/06/27/document-retirement-various-florida-disclosures-cx3421-cx4133-cx4503-cx5282-cx12926-cx15133/ for details, as well as Florida House Message Summary to FL SB 1012 (2014), which is attached.

Altogether, use of a model form ensures that: (1) the DFPI is accomplishing its mission in protecting consumers; (2) creditors are assured of complying with the law; and (3) consumers receive the information the DFPI wishes for them to receive.