Testimony of David G. Kittle, CMB

Chairman-Elect

Mortgage Bankers Association

Before the

Subcommittee on Oversight and Investigations

Committee on Financial Services

United States House of Representatives

Hearing on

"HUD's Proposed Real Estate Settlement Procedures Act (RESPA) Rule"

September 16, 2008

Chairman Watt, Ranking Member Miller and Members of the Subcommittee, my name is David G. Kittle, CMB, and I am Chairman-Elect of the Mortgage Bankers Association (MBA).[1] Thank you for the opportunity to testify before the Subcommittee today as you consider HUD's recent proposed rulemaking under the Real Estate Settlement Procedures Act (RESPA).

Specifically, you ask about—

- Any changes you believe would be desirable to the proposed RESPA rule;
- The need for harmonization of HUD's proposed RESPA rule with the TILA rule issued by the Federal Reserve;
- Whether changes are needed to the proposed Good Faith Estimate (GFE);
- The potential challenges with implementing the proposed closing script:
- The impact of the proposed HUD rule on mortgage bankers specifically;
- Other legislative or regulatory changes to RESPA that you believe should be made; and
- Any other information or issues you believe would be beneficial to the Financial Services Committee in meeting its oversight and legislative responsibilities.

Before I begin, to introduce myself, I have been in the mortgage lending business for 30 years and am currently President and Chief Executive Officer of Principle Wholesale Lending, Inc. in Louisville, Kentucky. It is a great privilege for me to testify today before this subcommittee as a mortgage banker as well as Chairman-Elect of MBA.

In my capacity as an officer of MBA and throughout my career, I have worked with lenders of all sizes and business models from across the nation. MBA's membership of 2,400 companies spans small, medium and large mortgage bankers, as well as hundreds of small businesses in ancillary industries including law firms, technology vendors and title insurers. Also, in my work at MBA, I have been particularly involved in our organization's efforts to develop a range of approaches to simplification of the mortgage process that I believe would markedly improve it.

Most importantly, over many years, I have worked personally with thousands of consumers, answered their questions, addressed their concerns and been gratified to provide them fairly priced, sustainable loans so they and their families could realize their homeownership dreams.

Just in case there is any doubt, the MBA and I, personally, are firmly committed to improving the mortgage process for both industry and consumers alike, and we have been for a very long time. As detailed in the attached comment letter MBA filed with HUD on June 11, 2008, in response to the proposed rule, we strongly believe there is a need to update and harmonize mortgage disclosures in the interest of industry and consumers alike. For this reason, we also strongly support a comprehensive approach to mortgage reform where both HUD's RESPA disclosures and the Federal Reserve's disclosure are addressed together in a careful and coordinated manner.

[1] The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 370,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets; to expand homeownership and extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of over 2,400 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, Wall Street conduits, life insurance companies and others in the mortgage lending field. For additional information, visit MBA's Web site: www.mortgagebankers.org.

If HUD is still determined to go forward independently, HUD's effort should be pared back to improving the forms (also as detailed in our attached comment letter). HUD's new forms should be developed in coordination with the Board so that they work in harmony with the forthcoming Truth in Lending Act (TILA) forms for the borrower. Finally, to avoid saddling borrowers with unnecessary confusion and implementation costs, HUD's and the Board's rules should be implemented on the same timeline.

Regulations impose an overly cumbersome disclosure process on the industry that increases costs. At the same time, consumers are burdened and confused by a seemingly endless pile of papers during the process, so much so that the addition of disclosures only takes them further past the point of diminishing returns.

Nonetheless, problems confronting today's mortgage borrowers reveal that while some may have made bad choices, others may have been confused about their credit costs and terms under adjustable rate mortgages, thereby entering into mortgage loans they simply did not understand. Borrowers need clarity about the terms and costs of credit that is the Board's responsibility under TILA.

RESPA, which is HUD's responsibility, is intended to provide consumers with disclosures about closing costs. While confusion about closing costs has not been as prominent an issue in the mortgage crisis, borrowers would realize significant benefits from greater transparency if the disclosures mandated under both RESPA and TILA were improved. RESPA and TILA disclosures are provided to borrowers at the same time and they should complement each other.

Viewed in context, however, this proposal comes at a time when the financial markets are more fragile than they have been in decades, as are the conditions of many lenders. Consequently, credit is also tighter than it has been in decades and, in recognition of the persistence of credit market concerns, the government recently took over the Fannie Mae and Freddie Mac (the GSEs). I would respectfully submit that this is not the time to burden the industry unnecessarily or unduly, even with the best of intentions. It is the time to carefully assess regulatory changes to help borrowers in the future and to apply them in a manner that does not worsen today's market and further tighten credit.

The Board has already issued proposed new rules under TILA and the Home Ownership and Equity Protection Act (HOEPA)[2] concerning the mortgage market generally and has announced it is now undertaking further reform efforts concerning TILA disclosures. Moreover, very recently enacted amendments to TILA under the Housing and Economic Recovery Act (HERA) necessitate additional implementation by the Board. HUD's efforts should be linked to the Board's efforts.

While there is clearly a need to improve the disclosure process, there is a right way to improve it and a wrong way. The right way is to comprehensively and carefully revise all of the federal disclosure forms under TILA and RESPA that are given to consumers. Assuring that all of these forms are not only simpler but work well together is the only real way to make certain that borrowers get a complete picture of their settlement costs and the costs of the credit so they can pick the best mortgage for themselves and their families.

[2] 73 Fed. Reg. 147 (July 30, 2008).

The wrong way is a *seriatim*, piecemeal approach where HUD first finalizes an array of changes to its disclosures and rules and later the Board finalizes its own array of changes. This not only assures differences in approach and confusion by borrowers, but it also assures increased implementation costs that are ultimately borne by borrowers. And, at the end of the day, under a piecemeal approach, government, consumers and industry will have all invested their time and money with little improvement to show for their efforts. Meanwhile, the pile of disclosures remains or even grows and the cacophony of information persists.

Only through concerted and coordinated reform of TILA disclosures regarding the costs of credit, and RESPA disclosures regarding settlement costs, can borrowers be empowered to navigate the mortgage market and protect themselves against abuse.

Looking back, MBA believes HUD pursued the wrong way by initially embarking independently on its rulemaking and then proceeding to finalize the rule in the face of these concerns. After it issued its proposal, it ignored a request from this and virtually every industry association, Federal Reserve staff and 242 Members of Congress. These commenters asked HUD to work with the Board in a careful, coordinated and comprehensive manner to improve and simplify disclosures under both TILA and RESPA. Now, HUD has not only ignored the request, but it has sent a final RESPA rule to the Office of Management and Budget for review.

Although, the final rule has not been released, our review of the proposed rule causes great concern about what the final rule might contain. As outlined below and detailed in the attached comment, rather than achieving the goal of simplicity, the proposed rule would require: a long and difficult to understand Good Faith Estimate (GFE) of loan terms and settlement costs, which would be given to borrowers before they apply for a loan; a new HUD-1 that is not readily comparable to the GFE; a lengthy "closing script" to be required at closing; as well as several controversial rule changes. The costs of all of these measures would be extremely high and many are regarded as beyond HUD's authority. Moreover, they would have unintended consequences that could ill serve consumers and the fragile mortgage and housing markets of today.

Most importantly, HUD's proposal did not demonstrate any effort to coordinate and harmonize its requirements with those currently required under TILA. In fact, the new proposed GFE discloses loan terms in a manner that is incompatible with the Board's current TILA disclosure requirements. The proposed new requirement for display of an interest rate, but not an APR, is inconsistent with the Board's current TILA requirements.

There are also many ambiguities and unanswered questions raised by the proposal as well as HUD's current RESPA rules.

MBA believes if finalized in its current form, the rule would have significant effects on businesses generally, and mortgage bankers in particular:

1) Retooling costs – The proposed rule would require extensive system changes and staff training to convert to the forms;

2) Burdensome disclosure requirements – The new requirements would take additional time and resources to fulfill, substantially increasing the costs of compliance; and

3) Increased litigation risks – Businesses would be forced to comply with a regulation that appears to conflict with other statutes and regulations, exposing businesses to liability.

For the reasons outlined below and detailed in our attached comment letter, MBA believes HUD should coordinate its efforts with the Board. If HUD is bent on going forward, HUD should pare back its effort to simplifying and improving the GFE and making it easily comparable to the HUD-1 settlement statement. This will allow consumers to effectively review their settlement costs. HUD should forego implementation of the closing script and other unwarranted rule changes at this time. Most importantly, to avoid unnecessary costs and confusion, HUD, of course, should avoid any conflicts with the Board's current and forthcoming TILA revisions, and should time implementation of any RESPA rule changes to coincide with implementation of the Board's revised TILA provisions.

BACKGROUND

Though RESPA was enacted in 1974, as early as the 1980's, the Reagan Administration is reported to have considered reform of RESPA to simplify the mortgage process. In 1992, HUD amended its RESPA rules to implement amendments to the law to permit affiliated businesses to refer customers among affiliates as long as there was disclosure and use of the affiliate was not required.[3] Also in 1992, under an opinion of the HUD Office of General Counsel and then through HUD's 1992 rule revisions, HUD required the disclosure of mortgage broker fees in table-funded transactions.[4]

In 1996, Congress required HUD and the Board to simplify and improve RESPA and the TILA disclosures and, if necessary to make recommendations for legislation to Congress to do so.[5] In 1998, as a result, HUD and the Board reported to Congress and made recommendations to establish a firmer GFE and to provide an exemption to RESPA to permit guaranteed packages of mortgage services.[6] About the same time, after the industry was confronted with litigation and consumer complaints that payments by lenders to mortgage brokers amounted to illegal kickbacks, HUD conducted a negotiated rulemaking and issued a proposed rule concerning the legality and disclosure of mortgage broker fees, which was never finalized.

In 1999 and 2001, in the face of continuing litigation concerning the legality of mortgage broker fees, HUD issued policy statements clarifying its position on the legality of broker fees also calling for improved disclosure.[7] Industry groups supported the policy statement.

In 2002, nearly six years ago, HUD proposed to reform its disclosure requirements under RESPA to: (1) provide an exemption from Section 8 of RESPA for guaranteed mortgage packages; (2) revise its good faith estimate requirements to establish tolerances for those not seeking the mortgage package exemption; and (3) improve the disclosure of mortgage broker fees. As a result of opposition to the rule from the title, mortgage brokerage and (ultimately) the mortgage lending and real estate brokerage industries, HUD withdrew its proposal in 2004.

In the summer of 2005, HUD conducted a series of seven roundtables to solicit the views of industry and consumer groups regarding RESPA reform, including small businesses.

---

[3] 67 Fed. Reg. 49134 (July 29, 2002).

[4] August 14, 1992 legal opinion by Frank Keating, General Counsel, HUD.

[5] See Section 2101 of the Economic Growth and Regulatory Paperwork Reduction Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009.

[6] Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. No. 104-193 (August 22, 1996).

[7] See RESPA Statement of Policy 1999-1, 64 Fed. Reg. 10080 (March 1, 1999), and Clarification of RESPA Policy Statement 1999-1, 66 Fed. Reg. 53052 (October 18, 2001).

Nearly three years later —having communicated little on the subject of reform during those years— HUD issued its proposed rule on March 14, 2008.

The proposed rule would: (1) establish a four-page standard Good Faith Estimate (GFE) form; (2) impose tolerances to limit increases in GFE estimates at closing; (3) revise requirements for disclosure of mortgage broker fees as 'the charge or credit for the interest rate chosen;" (4) make changes to the HUD-1 to facilitate comparison between GFE and HUD-1 charges; (5) establish a new script to be read to borrowers at settlement concerning final loan terms and settlement costs; (6) revise regulations to permit certain average-cost pricing and volume discounts; (7) clarify "required use" requirements to restrict disincentives to use of non-affiliates; and (8) make technical amendments to the RESPA rules.

In its proposal, HUD has also announced that it intends to seek legislative changes to: (1) authorize the HUD Secretary to impose civil money penalties for violations of Section 4 of RESPA (the Settlement Statement), Section 5 (the GFE and Special Information Booklet), Section 6 (servicing), Section 8 (kickbacks, referral fees and unearned fees), Section 9 (title insurance), and Section 10 (escrows); (2) require delivery of the HUD-1 to the borrower three days prior to closing; and (3) expand and make uniform the statute of limitations applicable to governmental and private actions under RESPA.

The proposal originally invited public comment for 60 days from the date of Federal Register publication. After receiving Congressional and other requests, HUD extended the comment period to 90 days.

A more detailed summary of the statute and the regulatory proposal is contained in Appendix E of the attached comment letter.

MBA's VIEWS ON THE RESPA PROPOSED RULE

Since HUD last issued its proposed rule in 2002,[8] the real estate industry and the mortgage system have experienced a crisis of a magnitude that was unexpected and has been unprecedented. While the crisis has resulted in pervasive dislocation and hardship for consumers and businesses alike, its benefit has been to again bring into focus what has been working in the mortgage system and what must be improved.

While MBA does not believe that the lack of transparency in the mortgage process is a principal cause of consumer difficulties, or that its improvement is the only solution, greater transparency could help stem abuses. The sheer volume and opacity of disclosures today allows abusers to hide in plain sight. As indicated, long before the current market crisis, MBA consistently supported and invested considerable resources in mortgage simplification and much greater financial literacy for consumers in the mortgage market. MBA now believes that problems in the industry are a good reason to redouble efforts in both these areas.

Greater transparency would better empower consumers to understand and pick among the range of choices available from the mortgage market based on their own financing needs and risk appetites while at the same time allowing them to shop and compare offers. This enhanced competition among mortgage lenders would also reduce costs.

[8] 67 Fed. Reg. 49134 (July 29, 2002).

MBA applauds HUD's continuing efforts at improving RESPA disclosures. At the same time, MBA also applauds the Board's announced effort to update its TILA disclosures to reflect the increased complexity of mortgage products[9] and to make improved mortgage broker disclosures part of that effort.

As recent events demonstrate, borrowers need greater clarity about the terms and costs of credit that is the Board's responsibility under TILA. RESPA, which is HUD's responsibility is intended to provide consumers with disclosures about closing costs and should accompany TILA reform. RESPA and TILA disclosures are ordinarily provided to borrowers at the same time.

Having evaluated HUD's current proposal, and the Board's current rules, it is clear that there are considerable variations between the Board's and HUD's approaches to reform. For example, HUD's proposed summary of loan terms discloses many of the terms of credit which are the Board's province under TILA but, at the same time, discloses only the note rate of the loan and not the annual percentage rate (APR) as it appears on the TILA disclosure today. This anomaly will prove confusing to both consumers and industry.

A. MBA's General and Specific Views

Considering the fragility of the market and the costs of industry changes including systems conversions necessary to accommodate new requirements, as well as the need for borrowers to better understand both the terms of their loans as well as their costs, MBA strongly believes that HUD's efforts should not be finalized until they are combined and harmonized with the Board's efforts to reform its TILA disclosures. HUD and the Board should work together to develop, reissue and finalize joint rules to simplify both the RESPA and TILA disclosures at the same time. Toward this end, MBA is furnishing, as Appendix A to the comment letter attached to the testimony, a suggested joint RESPA-TILA disclosure.

MBA believes that only through combined, comprehensive reform can consumers take advantage of better transparency and at the same time lower costs. MBA requests that both HUD and the Board involve industry and consumer advocates to help shape the proposals and that it utilize consumer testing to the maximum extent to ensure that improvements do in fact increase consumer understanding. Separate and conflicting efforts will create more confusion for consumers and increase costs for everyone involved.

If, notwithstanding the requests from this industry, Members of Congress and others, HUD determines to go forward and finalize the proposed RESPA rule independently, MBA believes the effort should be pared back considerably and put on a timeline that would match the Board's forthcoming disclosure reform efforts under TILA. Since little has changed in the ensuing period, except that the Board for now withdrew its proposal regarding mortgage broker fees (explained below), MBA calls the Subcommittee's attention to MBA's comment letter to HUD which is highlighted in this testimony. The comment letter makes the following key points:

1. HUD's summary of loan terms should be excluded from the GFE and should be issued by the Board in consultation with HUD;

[9] "The Board recognizes that [TILA] disclosures need to be updated to reflect the increased complexity of mortgage products. The Board indicated that in early 2008, it would begin testing current TILA mortgage disclosures and potential revisions to these disclosures through one-on-one interviews with consumers. The Board also indicated that it expects that this testing will identify potential improvements for the Board to propose for public comment in a separate rulemaking." 73 Fed. Reg. 1673 (January 9, 2008).

2. MBA has particular concerns about key definitions in the proposal including the proposed definitions of “mortgage broker” and “originator,” which should be revised;

3. MBA supports improvement of the GFE and HUD-1 and harmonization between the forms, it therefore has strong concerns about HUD’s overall disclosure approach;

4. MBA believes HUD’s proposed GFE would overload the borrower with material, counter to HUD’s and MBA’s goal of ensuring that the consumer focuses on important information regarding mortgage costs. MBA urges HUD to work with the Board to finalize a combined RESPA-TILA form or, if it proceeds independently, to finalize a GFE form as proposed by MBA in the attached Appendix B;

5. MBA supports revision of the GFE to separately disclose mortgage broker charges;

6. While MBA appreciates HUD’s efforts to facilitate shopping, this aspect of the rule should not be finalized, because of the difficulties of coordinating the concept with other laws. An alternative approach should be adopted;

7. While MBA supports methods to stem increases in fees from lenders and mortgage brokers from the time of application until settlement, it has serious concerns about HUD’s proposal to limit lenders to a “zero tolerance” and to make them responsible for the charges of third-party providers. It believes retention of the “good faith” standard is consistent with the statute and that a bright line “Borrower Protection” approach should be established to help protect borrowers from fee increases;

8. The proposed changes to the HUD-1 to refer to the new GFE fail to achieve the objective of making the GFE and HUD-1 harmonious and readily comparable;

9. HUD should not implement a “closing script” to be read at closing and to be signed by the borrower;

10. MBA supports, with some modifications, HUD’s proposal to clarify that lenders and brokers can use average cost pricing for settlement services within any class of transactions;

11. While MBA supports HUD’s proposal to clarify the legality of volume discounts, MBA believes the proposal is too restrictive;

12. Concerning the proposed revisions to prohibitions against requiring the use of affiliates, MBA believes it would be sufficient for HUD to reaffirm that it may scrutinize discounts to ensure that they are *bona fide* rather than enact rules that would risk depriving borrowers of certain discounts altogether;

13. MBA generally supports HUD’s efforts to update its RESPA regulations concerning mortgage servicing transfers and escrows and to explicitly recognize the applicability of ESIGN[10] to RESPA;

[10] On June 30, 2000, Congress enacted the ESIGN Act (15 U.S.C. §7001-7031) to facilitate the use of electronic records and signatures in interstate and foreign commerce by ensuring the validity and legal effect of contracts entered into electronically. Careful to preserve the underlying consumer protection laws governing consumers' rights to receive certain information in writing, Congress imposed special requirements on businesses that want to use electronic records or signatures in consumer transactions. Section 101(c)(1)(C)(ii) of the Act requires businesses to

14. MBA will evaluate HUD's legislative proposals as they are developed in accordance with key principles to ensure transparency and facilitate the mortgage market; and

15. MBA supports an implementation schedule that would link implementation of this rule to the Board's forthcoming TILA reform rule.

B. HUD and the Board Should Coordinate on Comprehensive RESPA-TILA Reform

RESPA and TILA are the primary laws Congress enacted to require certain mortgage information be provided to consumers.[11] They cover different aspects of the same transaction. As indicated, RESPA is intended to provide consumers information on their closing costs and TILA is intended to provide consumers information on the terms and costs of credit. RESPA and TILA disclosures are provided to most borrowers at the same time during the mortgage process.

Better information on both credit terms and loan costs, as well as better information on mortgage broker compensation, would greatly empower borrowers and protect them from abuse. The need for improvements in both understanding credit and settlement costs strongly militates in favor of both HUD and the Board working together in the reform process so that both RESPA and TILA disclosures are compatible.

Piecemeal, sequential or s*eriatim* reform of the RESPA disclosures, however, followed by reform of the TILA disclosures, would be extremely costly to businesses both small and large, and ultimately to consumers. New disclosures along the lines HUD proposed will require substantial retooling of systems and considerable expenses for training, compliance and staffing. Changes to TILA are expected to result in similar costs. Since the mortgage crisis has led to tightened and more costly credit for lenders and borrowers alike, these very considerable expenses would occur at just the time that the industry and consumers can least afford them. Moreover, if the efforts of the agencies are not compatible, they will greatly confuse consumers and increase the costs to industry and consumers even more.

HUD's own Regulatory Flexibility Analysis estimates that the total one-time costs to the lending and settlement industries of the new GFE and HUD-1 alone will be $570 million, $390 million of which are estimated to be borne by small business.[12] HUD estimates that the total recurring costs are estimated to be $1.231 billion annually or $98.74 per loan. While MBA believes these costs are underestimates, even if they were accurate, the costs of TILA reform, following after these costs are incurred, can be expected to result in costs of similar size for retooling, retraining, re-staffing and other costs to the industry.[13] If, on the other hand, RESPA and TILA changes were accomplished together, it is reasonable to anticipate that economies could result in lower costs to implement both sets of reforms.

---

obtain from consumers electronic consent or confirmation to receive information electronically that a law requires to be in writing. The Act went into effect in October 2000.

[11] The Truth in Lending Act (TILA) covers credit in addition to mortgages: "It is the purpose of this subchapter to assure a meaningful disclosure of credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices" (TILA §102, 15 U.S.C. §1601).

[12] 73 Fed. Reg. 14102 (March 14, 2008).

[13] Schnare, Ann B., The Estimated Costs of HUD's Proposed RESPA Regulations, National Association of Realtors, (June 3, 2008).

In any event, hasty efforts at mortgage reform should not be justified based on current market difficulties. While it is clear that borrowers are experiencing higher default and foreclosure rates today than they have in recent years, the great majority of loans and borrowers in the nonprime market are performing well, as are the vast majority of prime loans. The area of greatest concern has been nonprime adjustable rate mortgage (ARM) loans and particularly hybrid ARMs (which employ an extended introductory rate period with an adjustable rate feature at the end of the introductory period) which are generally no longer available in today's market to these borrowers. While there are concerns that steering by mortgage brokers may have been part of the problem, there is no apparent evidence that closing costs have been a major aspect of it.[14]

It must also be borne in mind that as mortgage applications have risen over the last two decades, so too have the percentage of families realizing – and successfully sustaining – the dream of homeownership. This is due to several factors including lower interest rates (which are at historically low levels – even today), risk-based pricing and a host of industry efforts and innovations. According to the Board's Flow of Funds data,[15] the value of residential real estate assets owned by households has increased from $10.4 trillion in 1999 to $20.1 trillion as of the first quarter of 2007, and aggregate homeowner's equity now is $9.6 trillion. Unnecessarily increased costs that might stem from unwise reforms should not be allowed to undermine the objective of sustainable homeownership.

C. If HUD Goes Forward Independently

Once again, MBA strongly reiterates that HUD and the Board should work together in the interests of industry and consumer alike. However, if HUD decides to finalize the proposed rule without such coordination, MBA believes the rule should be pared down and several significant changes should be made before a final rule is published.

1. HUD's summary of loan terms should be excluded from the GFE and should be issued by the Board in consultation with HUD.

MBA strongly believes that while a "Summary of Your Loan Terms" could be very useful to provide borrower's key information to better understand mortgages and to shop among them, it should not be part of the HUD proposal and should be developed and issued by the Board. Were HUD and the Board to separately issue such summaries, the efforts would be duplicative and confusing.

While HUD's proposed summary includes "adjusted origination charges," "charges for other settlement services" and "total estimated settlement charges," the summary mainly concerns points relevant to credit costs and terms that are the Board's province.

Notably, while HUD's proposed summary displays the "initial interest rate," it does not include the "annual percentage rate" or "APR" or the Finance Charge" and the "Amount Financed." Although MBA believes these terms themselves cause confusion, the Truth in Lending Act requires their use at this time. Also, by dealing with the matters of "balloon payments" and "prepayment penalties," the summary is unnecessarily repetitious of the TILA disclosure. The

[14] See 73 Fed. Reg. 1698-1700 (January 9, 2007).
[15] The Board's Flow of Funds data may be viewed at the following Website: http://www.federalreserve.gov/releases/z1/current/default.htm.

Board also should issue the summary to assure its consistency with forthcoming TILA disclosures as well as current ones**.**

2. Definitions – MBA has particular concerns about key definitions in the proposal including the proposed definitions of "mortgage broker" and "originator," which should be revised.

MBA does not support changes in the definition of mortgage broker to include an "intermediary" and it does not support calling both lenders and brokers "originators." While MBA understands that some advocates for the mortgage brokerage industry argue that a "level playing field" requires this blurring of the roles of lenders and brokers respectively, the fact is that the players and their functions are substantively different. This proposed nomenclature blurs these distinctions and obfuscates the differing regulatory needs of consumers regarding lenders and brokers.[16]

To clarify this and other related issues, MBA has recently published the attached paper "*Mortgage Bankers and Mortgage Brokers: Distinct Businesses Warranting Distinct Regulation*" which is attached as Appendix D to MBA's comment letter.[17]

The paper points out that mortgage brokers are middlemen that facilitate or make arrangements for loans and that lenders, on the other hand, incur risk and lend money. Consumers perceive brokers and lenders differently. Consumers regard mortgage brokers as shopping for them and ordinarily cease their own shopping when they deal with them, ceding the shopping to the broker. In contrast, consumers regard lenders (and their employees and agents) as providers of loan products amongst whom they shop and compare.

Because mortgage brokers are regarded as shopping for borrowers, they present a much greater risk of steering consumers to a higher rate loan in return for a larger fee. Accordingly, MBA believes it is appropriate for brokers, to tell borrowers the compensation they receive from lenders. MBA does not believe that lenders or their exclusive agents warrant the same treatment because borrowers do not perceive them the same and they do not present the same risks.

3. MBA supports improvement of the GFE and HUD-1 and harmonization between the forms, it therefore has strong concerns about HUD's overall disclosure approach.

MBA appreciates HUD's effort to create a comprehensive GFE document to help the borrower shop and better understand the mortgage process. Although MBA understands that the first page is intended to be a summary, and the second page a list of closing costs, MBA believes the resultant document is far too long and would overload the borrower with material that ultimately would be ignored and therefore would be counterproductive to HUD's and MBA's own consumer protection objectives.[18]

[16] A comment letter transmitted on June 4, 2008 from the Federal Deposit Insurance Corporation to HUD in regards to the proposed rule objects to this provision of the proposal because it blurs the distinction between brokers and bankers.
[17] The paper is also available on the Web at the following address: http://www.mortgagelenders.org/files/News/InternalResource/62646_Paper.pdf.
[18] A comment letter transmitted on June 4, 2008 to HUD from the Federal Deposit Insurance Corporation indicates that in light of its own testing of consumers, it has the same concern.

The proposed changes to the HUD-1, while also appreciated, also fall short of making the GFE and HUD-1 correspond, necessitating the use of a “closing script” to be read by the closing agent and signed by the borrower. MBA believes that a better approach would be to make the GFE more closely correspond to the HUD-1, so that the consumer could easily compare the two documents, eliminating the need for the closing script altogether. MBA’s proposed GFE and HUD-1 forms appended to the comment letter do more closely correspond and should be adopted by HUD if it moves forward independently.

4. MBA believes HUD’s proposed GFE would overload the borrower with material, counter to HUD’s and MBA’s goal of ensuring that the consumer focuses on important information regarding mortgage costs. MBA urges HUD to work with the Board to finalize a combined RESPA-TILA form or, if it proceeds independently, to finalize a GFE form along the lines of the Appendix B of the attached comment letter.

As indicated, MBA strongly supports a combined and coordinated effort by HUD and the Federal Reserve to develop and implement a joint GFE-TILA disclosure. For this purpose, industry representatives –including MBA members– developed the two-page form appended to the comment letter with the first page displaying the settlement costs and the second page displaying the costs of credit for a consumer’s mortgage.

If HUD goes forward to finalize the GFE independently, MBA urges HUD to use the RESPA related portions of the forms. MBA provided an earlier version of the form to HUD which HUD critiqued in its Regulatory Flexibility Analysis.[19] These forms have been revised to address those comments and this subject is discussed in MBA’s comment letter.

Also, while MBA generally supports the grouping of the amount or ranges of specific services on the GFE in a manner that is comprehensible and comparable, the form itself should be modified so it is mainly a list of charges with minimal supplementary material, as is the MBA form in Appendix B to the comment letter. MBA believes most of the material on the form, except the costs, should be moved to explanatory materials, such as the Special Information Booklet.

MBA maintains that the form appended to the comment letter is much more useful than HUD’s proposed GFE. The recommended form is much shorter and was developed by those who make mortgage loans and day-in and day-out are presented with consumers’ questions. It is also readily comparable to the revised HUD-1, also appended to the comment letter, and also developed by MBA and presented to HUD. MBA believes the use of these comparable forms throughout the mortgage process at shopping, at or following application, following underwriting and at and a day before closing would eliminate the need for the closing script and reduce costs to small and large businesses.

While MBA believes that there will be retooling costs associated with implementation of its shorter GFE and HUD-1, it believes that its forms will be easier to implement and easier for borrowers to understand, These differences will translate into lower initial, and much lower recurring, costs for businesses large and small and ultimately borrowers.

5. MBA supports revision of the GFE to separately disclose mortgage broker charges and complement mortgage broker fee agreements.

[19] Pages 4-8 through 4-11 and 4-19 through 4-20, Regulatory Impact Analysis and Initial Regulatory Flexibility Analysis, FR-5180-P-01, Proposed Rule to Improve the Process of Obtaining Mortgages and Reduce Consumer Costs, Department of Housing and Urban Development (March 2008).

MBA has long supported a straightforward disclosure of mortgage broker fees as the best way to protect consumers and finally resolve this issue that has bedeviled the industry and consumers for years. Recently, legislators have sought to limit or eliminate yield spread premiums (YSPs). While MBA strongly supports the legality of YSPs and other fees paid by lenders to permit consumers the option of "building their closing costs into their rate and monthly payments," MBA believes that clear disclosure is essential. Disclosure can help assure that these payments do not simply augment borrowers' costs, unbeknownst to them, and also help stem steering of consumers by mortgage brokers to higher rate products.
The Board originally proposed under its Homeownership and Equity Protection Act rules to require brokers to enter into agreements with consumers spelling out the compensation they were to be paid by the lender prior to any such payment along with a description of the broker's incentives. Although this proposal was withdrawn pending further review as part of the forthcoming TILA review, the OCC now requires a similar upfront disclosure. In light of such agreements, MBA believes there should be a place on the GFE and HUD-1 to reflect these disclosures.

HUD's proposed GFE and HUD-1 do not require a clear enough disclosure of lender payments to mortgage brokers nor do they reference any earlier agreement. Instead, HUD would revise the requirement for disclosure of YSPs from lenders to mortgage brokers so that it would be described as "a charge or credit for the interest rate chosen." This amount would be subtracted from the lender and brokers' "service charge" to arrive at the "adjusted origination charge." MBA believes the costs occasioned by the adoption of this new terminology for mortgage broker fees will be enormous but its benefits to elucidate consumers will be few.

While MBA appreciates HUD's efforts to clarify the function of a YSP in relation to the interest rate, MBA believes that this could be accomplished without creating confusing new terminology for broker fees. Also, some brokers may be paid on a basis other than a loan's interest rate and HUD's forms do not contemplate that possibility.

In contrast, MBA's proposed GFE appended to MBA's comment discloses to the borrower in plain English the total compensation for the broker's services and the amounts paid by the lender to the broker on the borrower's behalf. It also references any agreement and indicates that the amounts paid to the broker by the lender are paid by the borrower through the loan's interest rate and monthly payment.

Based on the preamble, the proposed rule and the Regulatory Impact Analysis,[20] MBA understands that HUD's approach to disclosure is shaped by concerns from mortgage brokerage industry advocates and the Federal Trade Commission (FTC) that the form should provide a "level playing field" between brokers and lenders. MBA believes that these assertions are incorrectly premised and obfuscate or do not fully comprehend the differing functions and the differing consumer expectations of brokers and lenders respectively. This approach also does not appropriately address the consequently greater threat of steering by mortgage brokers. Notably, the Federal Deposit Insurance Corporation (FDIC) does not appear to share the FDIC's approach.[21]

[20] See 73 Fed. Reg. 14030 (March 14, 2008).
[21] Both the Board, prior withdrawal of its HOEPA proposal, and the FDIC have supported different approaches as shown in the HOEPA proposed rule and the comment letter on the HUD proposal from the FDIC.

As indicated, lenders and brokers perform distinct functions in the marketplace and are perceived differently by consumers. As explained in the attached paper at Appendix D to the comment letter, they are not the same players; they do not have the same role, and applying the same rules to them is ill-advised.

Specifically, considering that consumers regard brokers as middlemen who comparison shop for them, it is wholly appropriate for the consumer to know if the broker is also receiving a fee from the lender based on the consumer's choice of a higher rate. Armed with compensation information, and other information on the relationship between the interest rate and settlement costs, the consumer can make an informed choice and avoid steering and abuse.

Requiring separate disclosures of mortgage lender fees and mortgage broker compensation is consistent with HUD's current requirements. HUD's own Statements of Policy issued in 1999 and 2001[22] provide that mortgage brokers must provide distinct goods, facilities or services to justify compensation and such compensation must be reasonably related to the value of such goods, facilities and services. The Policy Statements and HUD's rules direct separate disclosure of mortgage broker fees.

MBA agrees with these directives and believes that broker fees must be separately itemized, and specifically labeled, so that consumers and regulators are able to discern whether the compensation paid to a mortgage broker is in fact reasonably related to the goods, services and facilities provided. Any disclosure approach that combines broker and lender compensation would undermine HUD's own analysis of the legality of broker fees. Therefore, by separately disclosing broker and lender compensation, MBA's proposed forms are consistent with HUD's longstanding legal interpretations in this area.

Finally, MBA notes that HUD spends considerable time in the preamble to its proposal discussing the consumer testing of its forms in general and of the broker disclosure in particular. The purpose of this testing though was to avoid borrowers incorrectly selecting lenders' versus brokers' loan offers. This approach, however, incorrectly assumes that there are no differences between brokers and lenders. Considering all the distinctions identified in MBA's paper in Appendix D to the comment letter, MBA believes that borrowers need to understand both the functions and fees of lenders and brokers respectively. The tests conducted by HUD are not relevant to the panoply of concerns surrounding these issues. MBA strongly supports testing of the forms it proposes which make the respective fees clear and also reference any mortgage broker fee agreement.

6. While MBA appreciates HUD's efforts to facilitate shopping, this aspect of the rule should not be finalized because of the difficulties of coordinating the concept with other laws. An alternative approach should be adopted (as discussed in 7 below).

As detailed in the comment letter, while MBA appreciates HUD's efforts to facilitate shopping, the fashioning of a new "GFE application" to elicit a binding GFE raises significant regulatory concerns and statutory questions.

The matter of bait and switch in consumer shopping could be better resolved by empowering consumers with a new "shopping tool" developed by HUD and the Board, along the lines proposed at Appendix C of the comment letter that would elicit offers from lenders and mortgage brokers. As discussed in greater detail in the comment letter, the matter of stopping

[22] 64 Fed. Reg. 10080 (March 1, 1999); 66 Fed. Reg. 53,052 (October 18, 2001).

unwarranted payment shock from the time of application to the time of closing can be addressed without changing the definition of "application."

Under HUD's proposal, the definition of "mortgage application" currently found in RESPA's implementing regulation would be replaced with two new definitions that, in effect, would bifurcate the mortgage application process into two distinct phases - the "GFE application" phase and the "mortgage application" phase. The impact of this redefinition has repercussions that extend well beyond RESPA, and may significantly alter legal and regulatory responsibilities under other laws and/or engender great confusion.

Specifically, changes in the definition of "application" would impact TILA and "Regulation Z,"[23] the Equal Credit Opportunity Act (ECOA) and "Regulation B,"[24] the Home Mortgage Disclosure Act (HMDA) and "Regulation C,"[25] the Fair Credit Reporting Act (FCRA) rules, and Section 311 of the Fair and Accurate Credit Transactions Act of 2003 (FACTA)[26] concerning the risk-based pricing notice.

But MBA does not believe these changes are necessary. Variations in costs from the time a borrower shops until the time they actually apply with a particular lender or mortgage broker is a different matter from closing cost shock at the time of settlement, where actual closing costs significantly vary from costs estimated at the time of mortgage application. The former, in MBA's view, is less of a problem and does not warrant revising the definition of application considering the foregoing regulatory concerns.

Many consumers today effectively shop among mortgage lenders. In order to further facilitate shopping by others among lenders and brokers, MBA supports the establishment of a new shopping tool to be developed by HUD and the Board, along the lines proposed by some members of MBA, and attached as Appendix C to the comment letter. Such a tool would elicit offers from lenders and mortgage brokers in the form of a non-binding GFE at Appendix A of the attached comment letter. The market would respond, as it does today, with relatively firm offers and the borrower could use the tool to narrow its search.

There is also some concern that shopping through a series of applications would adversely affect borrower's credit ratings. This concern would be obviated by the use of a shopping tool and non-binding GFEs.

Finally, going forward, HUD and the Board should make clear in informational materials that prices alone need not be determinative of a consumer's choice of a lender or mortgage broker. Borrowers do and should consider the quality of services provided, including, but not limited to, the particular lender's capacity and competence to provide responsive and prompt service to facilitate a timely, efficient and high quality lending experience.

7. While MBA supports methods to stem increases in fees from lenders and mortgage brokers from the time of application until settlement, it has serious concerns about HUD's proposal to limit lenders to a "zero tolerance" and to make them responsible for the charges of third-party providers. It believes retention of the "good faith" standard is

[23] 12 C.F.R. § 226.
[24] See *Federal Reserve Board Regulation B Official Staff Interpretations,* 12 C.F.R. § 202.2(f), Supp. I, comment 2.
[25] 12 C.F.R. § 203.2(b).
[26] Pub. L. No. 108-159 (December 4, 2003).

consistent with the statute and that a bright line borrower protection approach should be established to help protect borrowers from fee increases.

While MBA supports greater protection for consumers against significant unjustified cost increases from the GFE at time of loan application to closing, it does not believe that the establishment of a zero tolerance for lender or broker fees is justifiable under RESPA or that a 10 percent tolerance on certain third party charges required by the lender or broker, as detailed below, is the best approach.

While MBA opposes unjustified increases in settlement costs at closing, the establishment of tolerances, in general, and restriction to a zero tolerance, in particular, for lender fees are legally questionable under RESPA. Section 5 of RESPA requires a "good faith estimate of the amount or range of charges for specific settlement services the borrower is likely to incur in connection with the settlement as prescribed by the Secretary."[27] While HUD asserts that the basis for its ability to impose tolerances is grounded in its ability to define the term "good faith," MBA does not believe that – considering the structure or legislative history of the statute – there is clear basis for tolerances generally and particularly a "zero tolerance."[28]

MBA does not believe that, as a general matter, lenders can or should be held responsible for the costs of third parties when lenders have no ability to control their costs. As more fully discussed below, the current proposal for volume discounts will not facilitate pricing arrangements that will be beneficial to the consumer. Lenders will not enter into volume discount arrangements if doing so causes them to face additional liability. MBA also believes that the establishment of a 10 percent tolerance overall on third-party charges recommended by

---

[27] 12 U.S.C. § 2604(c).

[28] The proposed amendments to the GFE are inconsistent with RESPA insofar as those amendments would impose tolerances or other specific standards for the accuracy of the GFE disclosure. The RESPA statute requires the lender to provide "a good faith *estimate* of the amount or range of charges for specific settlement services the borrower is likely to incur in connection with the settlement as prescribed by the Secretary." 12 USC 2604(c) (emphasis added). This is a requirement for an <u>estimate</u> of the settlement charges, not a requirement that these charges be disclosed with exact accuracy. Congress separately provided in RESPA for a final settlement statement for the charges actually imposed. 12 USC 2603. This requirement for a final settlement statement differs markedly from the GFE requirement by not stating that the disclosures could be provided as estimates. Because Congress provided separately for a final statement of settlement charges (in Section 4 of both the original RESPA and the current RESPA), and a "good faith estimate" of the settlement charges to be provided at the beginning of the loan application process, it seems clear that Congress did not contemplate that the GFE would be absolutely accurate.

The amendments at the enactment of RESPA are also instructive. The original RESPA statute stated that is was "the duty of the lender," when making the advance disclosure of settlement charges, "to obtain or cause to be obtained from persons who provide or will provide services in connection with such settlement the amount of each charge they intend to make." 12 USC 2605 (1974 version). Congress deleted this duty in its amendment to RESPA in 1976 when Congress added the formal GFE requirement. The RESPA statute has not changed in that regard since 1976 and still does not impose an affirmative duty on the lender to enter into binding relationships with third parties regarding the amount of such third parties' fees. While a lender must make a good faith effort to obtain accurate information as to the amounts of third party charges, that is quite different from a requirement that the disclosure of those amounts be accurate within regulatorily-specified tolerances.

Comparing RESPA to TILA, Congress expressly included accuracy standards and tolerances into TILA. See, for example, 15 USC 1605(f) and 1649(a)(3) (each providing accuracy tolerances for finance charges), and 15 USC 1606(c) (providing tolerances for the disclosure of the annual percentage rate). In contrast, Congress did <u>not</u> impose or imply accuracy standards for GFE's.

Therefore, we believe that HUD's attempt to impose strict accuracy standards for the GFE is inconsistent with RESPA itself. Any such action by HUD would be in excess of HUD's statutory jurisdiction and authority, and a reviewing court therefore should hold such action to be unlawful and set it aside under the APA. 5 USC 706(2).

the lender will likely prove counterproductive as long as the lender is held liable for violations of the tolerances. Lenders will simply not have the incentive to make any recommendations to the consumer of beneficial services.

Additionally, MBA believes the establishment of a tolerance for government recording and transfer charges is unwarranted and presents unnecessary risks to lenders and to mortgage brokers.

While MBA notes that HUD has provided relief from the tolerances for unforeseeable circumstances, including acts of God and exceptions for other circumstances, MBA believes that these exceptions are too narrow considering the applicable statutory requirements, as detailed in the attached comment letter.

MBA believes that the current regulations are more consistent with the current statute in requiring that estimates must be made in "good faith" and bear a "reasonable relationship" to the charge a borrower is likely to pay at settlement.[29] The rules should not require a lender to show that all increases are unforeseeable. What should be required is that the lender make estimates based on information known to him in "good faith" at the time the estimates are made.

Finally, MBA does not believe there is a legal basis for RESPA rules requiring that when a loan application is rejected, and the tolerances are inapplicable, the borrower must be notified within one day. A one-day requirement is also unreasonable considering other workload constraints and, in MBA's view, it will present a particular hardship to small mortgage lenders and brokers. Moreover, before the rule is finalized, it must be harmonized with other provisions of law governing notice of denial (e.g., ECOA).

As indicated, MBA believes a better approach under the current statute, as detailed in the comment letter, would be to apply the current regulatory standard for good faith estimates at 24 C.F.R. § 3500.7 which provides:

> *Each such estimate must be made in good faith and bear a reasonable relationship to the charge a borrower is likely to be required to pay at settlement, and must be based upon experience in the locality of the mortgaged property. As to each charge with respect to which the lender requires a particular settlement service provider to be used, the lender shall make its estimate based upon the lender's knowledge of the amounts charged by such provider.*

The rules would then establish that HUD and other federal and state regulators would scrutinize lenders' good faith estimates for compliance unless lenders' and brokers' good faith estimates were in conformity with the Borrower Protection approach described below.

Under this approach, lenders and brokers would be deemed to be in good faith for any mortgage where (1) their own fees were no more than five percent greater at closing than estimated on the GFE at time of application and (2) estimated third party charges of providers required and selected or recommended by the originator were no more than 10 percent greater overall than estimated on the GFE.

When the borrower is ready to apply for a mortgage, he or she would do so. The lender or broker would then provide a GFE either by delivering the good faith estimate, or by placing it in

[29] 24 C.F.R. § 3500.7(c).

the mail to the loan applicant, not later than three business days after the application is received or prepared.

The GFE would be provided at no cost, except possibly for the cost of the credit report. MBA is mindful that the Board has proposed to require the early TILA disclosure without any significant fees and it supports the provision of a combined RESPA-TILA disclosure. However, in instances where the borrower wishes expedited treatment, the borrower should be allowed to provide a fee if he or she chooses an appraisal or a rate lock to expedite closing or to lock-in a rate. The ability to lock-in should not be unwittingly prevented under any new rules.

The GFE must be provided in good faith and would be subject to enhanced regulatory review. The foregoing five percent leeway on lender fees (including discount points and any charge for when a rate is locked) and a 10 percent overall window of certain costs (including title, appraisals, and required services the lender or broker selects or recommends such as pest inspections) on the GFE would apply to lenders and mortgage brokers to assure that they meet the good faith standard. Under this approach, fee increases that exceed these standards could be scrutinized by HUD or another applicable state or federal regulator to determine whether they are in good faith or whether they were not.

8. The proposed changes to the HUD-1 to refer to the new GFE fail to achieve the objective of making the GFE and HUD-1 harmonious and readily comparable.

While laudable, MBA does not believe that the changes to the HUD-1, in the form of relatively minor revisions and references to the GFE, are sufficient to make the forms truly comparable for the consumer. In fact, MBA believes that the introduction of the new closing script, which is intended to describe the relationship of the costs and terms on the GFE to those on the HUD-1, is at least in part an admission that the forms are not easily comparable. Considering that HUD's cost estimates for implementation of the GFE and HUD-1 forms are based on the comparability of these forms, MBA is convinced that these cost estimates are far too low.[30]

9. HUD should not implement a "closing script" to be read at closing and to be signed by the borrower.

As detailed in the comment letter, MBA does not believe that implementation of the closing scripts proposed by HUD, as an addendum to the HUD-1 or HUD-1A, is advisable. MBA believes its implementation would raise legal concerns, be too costly, provide little benefit to the consumer at closing and raise significant operational concerns. Moreover, the script itself is concerned with both loan terms and settlement costs and as such should await the involvement of the Board as part of comprehensive RESPA-TILA reform, if it is to be implemented at all.

Just as important, MBA believes that the script will add unnecessary costs to the closing process. HUD itself estimates that the script will add 45 minutes of additional time per closing and estimates that cost at $54 (derived from a $150,000 salary). HUD also says the costs in a normal year (based on 12.5 million originations) would be an estimated $676 million. It is not apparent, however, in reaching what MBA regards as an unusually low estimate, HUD fully considered all costs including the additional time for the lender, broker and others to assist in developing the script. There is also no apparent consideration of the considerable costs to borrowers considering the time the borrower must invest in this effort, e.g. lost wages.

[30] 73 Fed. Reg. 14115-14116.

For the consumer, closing is far too late to focus on a comparison of estimated and final loan terms and closing costs. It would be far better for the consumer to be provided a HUD-1, and a TILA disclosure prior to closing that was readily comparable to the GFE. Prior to closing, a consumer can question the lender or broker about charges and determine whether he or she will proceed with the loan.

Current RESPA regulations[31] permit the borrower to inspect the HUD-1 or HUD-1A settlement statement the business day immediately prior to settlement but the rules only require review of items that are known to the settlement agent at the time of inspection. Over the past few years, MBA, the American Land Title Association (ALTA) and the American Escrow Association (AEA) have been working together to develop uniform closing instructions. In their current form, these procedures, while not yet finalized, would, in part, enable borrowers to receive a complete HUD-1 a day before closing. MBA believes that, enhanced by a GFE that is truly comparable to the HUD-1, this effort holds far greater promise than the closing script to timely inform borrowers of closing costs and facilitate comparison with the GFE.

Finally, use of such a script would present logistical problems in eMortgage transactions and in states where escrow closings are prevalent. The use of the script will either make these transactions unworkable and/or simply increase the paper required for borrower review. Also, considering that settlement agents must read the script and will be expected to answer questions, the script's use may be impossible in states where there are statutes prohibiting the unauthorized practice of law.

10. MBA commends, with some modifications, HUD's proposal to clarify that lenders and brokers can use average cost pricing for settlement services within any class of transactions.

MBA commends HUD's proposal to exert its authority under Section 19 of RESPA to clarify that lenders and brokers can use average cost pricing for settlement services, with some clarifications and modifications. MBA has long sought explicit clarification of the legality of average cost pricing, not to increase industry profits but to facilitate pricing arrangements to reduce operational and compliance costs, and streamline operations, all of which will result in lower costs to consumers. Average cost pricing methodologies permit tiered pricing arrangements where the average prices for third party services purchased in volume are lower than the prices for services purchased individually. These benefits are passed on to consumers in the market. Explicitly permitting these arrangements reduces legal risks resulting from requirements for precise price calculations.

MBA believes that with some modifications and clarifications, detailed in the comment letter, considering the benefits of average cost pricing, this proposal should be finalized even if the entire rule is not. In such event, MBA respectfully requests that HUD issue a policy statement or an interpretive rule for this purpose. For example, MBA believes that before this provision is finalized under a rule or an interpretative rule, the rule should be clarified to give maximum latitude to the lender to define a "class of transactions." Specifically, the lender should have latitude to broadly define a class based on type of service, type of property, loan type and/or geographic region. The standard should be "a reasonably similar class of transactions" as defined by the lender. This approach would give the lender discretion to identify transactions such as valuations in a particular county or the subset of semi-detached homes in such county.

[31] 24 C.F.R. § 3500.10(a)

Likewise, the lender should have latitude to define an “average period” and the “average price” as long as the approach is “reasonable.”

Finally, the documentation requirements should be revised to ensure that they are flexible and do not impede use of this provision by requiring unnecessarily burdensome documentation. The documentation should not be required to be retained to demonstrate “accuracy” but to support the lender’s determinations.

11. While MBA commends HUD’s proposal to clarify the legality of volume discounts, MBA believes the proposal is too restrictive.

MBA also commends HUD’s proposal under Section 19 of RESPA to clarify that volume discounts are not prohibited, but does not believe it goes far enough. MBA respectfully directs the subcommittee, to the attached comment letter for ways to make these provisions operate more effectively. If it is modified, MBA believes that it also should be issued as an interpretative rule or clarification whether or not HUD goes forward with this rulemaking.

Negotiated discount arrangements for services and materials result in lower costs to consumers and are therefore consistent with RESPA’s purposes of lowering settlement costs. These arrangements achieve this objective in other industries, such as in the automobile industry where parts are ordered through volume arrangements. MBA does not believe RESPA was intended to or should impede similar discounting in the settlement services industry.

Nevertheless, by also including a requirement that no more than the reduced price can be charged to the borrower, MBA believes that there will be little incentive for lenders to enter into discount arrangements. Scrutiny to ensure that each and every dollar of discount is passed on to the consumer presents regulatory risks and will make the exception uninviting. Moreover, such a restriction is unnecessary. Market competition will result in the consumer receiving the benefit of discounts. If HUD is insistent about maintaining this provision, at the very least, HUD should make clear that “average cost pricing” can be employed in conjunction with volume discounts. Under such an approach, it would be acceptable for the average price to be charged to the borrower, if permissible under the rules, rather than the fully discounted price.

12. Concerning the proposed revisions to prohibitions against requiring the use of affiliates, MBA believes it would be sufficient for HUD to reaffirm that it may scrutinize discounts to ensure that they are *bona fide* rather than depriving borrowers of certain discounts altogether.

HUD proposes to change the definition of “required use” so an economic disincentive where a consumer will pay a higher price if it fails to purchase a settlement service from an affiliated provider would be as problematic under RESPA as a requirement that a consumer choose a particular provider. The proposed rule indicates that it is particularly directed to homebuilder affiliates but covers other affiliate situations.

MBA believes that the proposal in this area is too broad and may result in depriving borrowers of discounts that may indeed be *bona fide*. MBA believes it would be sufficient for HUD to indicate that under its current rules it may scrutinize discounts to assure they are *bona fide* rather than risking depriving borrowers of discounts altogether, as indicated in the attached comment letter.

13. MBA generally supports HUD's efforts to update its RESPA regulations concerning mortgage servicing transfers and escrows and to explicitly recognize the applicability of ESIGN to RESPA.

MBA supports those clarifications that will conform the rules to current law and practice and thereby alleviate confusion in the real estate finance industry and among the consumers it serves, thereby reducing costs to companies large and small.

14. MBA will evaluate HUD's legislative proposals as they are developed in accordance with key principles to ensure transparency and facilitate the mortgage market.

In its proposal, HUD announced that it intends to seek legislative changes to: (1) authorize the Secretary to impose civil money penalties for violations of Section 4 of RESPA (the Settlement Statement), Section 5 (the GFE and Special Information Booklet), Section 6 (servicing), Section 8 (kickbacks, referral fees and unearned fees), Section 9 (title insurance), and Section 10 (escrows); (2) require delivery of the HUD-1 to the borrower three days prior to closing; and (3) expand and make uniform the statute of limitations applicable to governmental and private actions under RESPA.

There currently are some provisions under Sections 6, 8, 9 and 10 of RESPA to enforce those provisions but no appreciable enforcement authority exists under Sections 4 and 5. Nevertheless, state and federal regulators under a variety of laws do enforce these requirements. For this reason, as the proposals are developed, MBA will evaluate them carefully in the context of other authorities, including those under TILA, and the following principles:

- Disclosures should be streamlined and greatly simplified and uniform throughout the nation; terms that are not consumer friendly should be replaced with terms that are simple and understandable;
- Disclosures should be binding as early in the process as possible, considering that during the mortgage process information is developed and circumstances can change;
- The timing of disclosures should not result in undue delay for borrowers to receive needed credit;
- The process should facilitate competition to lower costs as well as the provision of high quality services;
- Borrowers and regulators should be appropriately empowered to prevent abuses;
- Lenders should have a reasonable opportunity to cure errors prior to litigation; and
- Remedies for errors should not result in unduly increased costs for all consumers.

15. MBA supports an implementation schedule that would link implementation of this rule to the Board's forthcoming TILA reform rule.

Although, MBA strongly prefers combination of the TILA and RESPA efforts, as indicated, MBA believes the objective of minimizing costs can, to some extent, be achieved through an extended implementation period if HUD goes forward independently. In such event, MBA recommends that the implementation period for new forms and any aspect of the rule that requires retooling, systems changes or other significant costs should extend to 18 months after the rule's effective date or until the end of the implementation period for the Board's new rule, whichever is later.

CONCLUSION

MBA has long supported efforts to make the mortgage process simpler, clearer and more transparent for consumers. But HUD's proposal raises serious issues and it is not simplification. Moreover, it comes at a time when the market is fragile and neither industry nor consumers should be forced to bear unnecessary and undue costs. If we are to proceed with mortgage reform, it is imperative that we do it right. Considering these points, common sense dictates that HUD and the Board work together to reform all of the federal disclosures to borrowers under RESPA and TILA. If HUD goes forward independently, the rule should be pared down to simplifying the RESPA forms. HUD should consult with the Board so the changes resulting from HUD's and the Board's efforts are harmonious, work for borrowers and are implemented at the same time to avoid confusion and unnecessary costs.

On behalf of MBA, I greatly appreciate the opportunity to present our views on these important issues. I look forward to your questions.

ATTACHMENT

MBA's June 11, 2008 Comment Letter to HUD in Response to

HUD's Proposed RESPA Rule, Docket No. FR-5180-P-01

June 11, 2008

Regulations Division
Office of General Counsel
Department of Housing and Urban Development
451 7th Street, SW
Room 10276
Washington, DC 20410-0001

Re: Comments in Response to the Department of Housing and Urban Development's Real Estate Settlement Procedures Act (RESPA): Proposed Rule to Simplify and Improve the Process of Obtaining Mortgages and Reduce Consumer Settlement Costs, Docket No. FR-5180-P-01

Gentlepersons:

The Mortgage Bankers Association[1] (MBA) appreciates the opportunity to comment on the above-cited proposed rule issued on March 14, 2008 by the United States Department of Housing and Urban Development (HUD) to amend Regulation X, HUD's Real Estate Settlement Procedures Act (RESPA) Regulations.

MBA supports RESPA reform and continues to believe that if done correctly RESPA reform would improve disclosures to consumers concerning their closing costs. As detailed in these comments, however, MBA strongly believes that HUD should work with the Board of Governors of the Federal Reserve System (Board) in a careful, coordinated and comprehensive manner to truly simplify and improve the mortgage process for consumers.

Problems confronting today's mortgage borrowers reveal that while some may have made bad choices, others may have been confused about their credit costs and terms under adjustable rate mortgages and entered into mortgage loans they simply did not understand. Borrowers need clarity about the terms and costs of credit which is the Board's responsibility under the Truth in Lending Act (TILA).

RESPA, which is HUD's responsibility, is intended to provide consumers with disclosures about closing costs. While confusion about closing costs has not been as prominent an issue in the mortgage crisis, borrowers would benefit from greater transparency if the disclosures mandated

[1] The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 370,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets; to expand homeownership and extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of over 2,400 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, Wall Street conduits, life insurance companies and others in the mortgage lending field. For additional information, visit MBA's Web site: www.mortgagebankers.org.

under both laws were markedly improved. RESPA and TILA disclosures are to a great extent provided to borrowers at the same time.

The Board has already issued proposed new rules under TILA and the Home Ownership and Equity Protection Act (HOEPA)[2] concerning the mortgage market generally and is expected to soon embark on further reform efforts concerning TILA disclosures specifically; HUD's efforts should be linked to the Board's efforts. Only through concerted and coordinated reform of TILA disclosures regarding the costs of credit, and RESPA disclosures regarding settlement costs, can borrowers be empowered to navigate the mortgage market and protect themselves against abuse.

Specifically, MBA strongly recommends that HUD and the Board work together to produce a combined TILA and Good Faith Estimate (GFE) form and implement it simultaneously to replace the current RESPA and TILA disclosures provided at the time of application. For this purpose, MBA and its members have developed a proposed combined form and a comparable revised HUD-1 attached in Appendix A.

Notwithstanding the significant number of well considered comments it has and will receive advising against it, if HUD moves forward to finalize its proposed GFE and HUD-1 under current law, independent of the Board's reform efforts, MBA urges that it pare back the proposal and accompanying forms to address only closing cost issues. MBA believes HUD's authority is constrained to and within that sphere. MBA would specifically suggest that HUD use the relevant pages of MBA's proposed disclosures displayed in Appendix B to these comments which are confined to RESPA authorized disclosures. MBA believes that, if more comparable GFE and HUD-1 closing cost forms are adopted and used through the mortgage process, and borrowers are enabled to inspect their HUD-1 or HUD-1A the business day before settlement, the proposed closing script can and should be dispensed with entirely. The GFE and HUD-1 disclosures (as proposed in Appendix B) identify mortgage broker fees and reference the mortgage broker fee agreement proposed by the Board and currently required by federal financial regulators.

MBA also recommends that the tolerances be replaced with a *Borrower Protection* approach spelled out later in this letter, utilizing HUD's current authority. The accompanying rule changes to the application process should be dispensed with and instead, GFEs should be provided after application at no or nominal charge, except for the cost of a credit report, unless the borrower determines that he or she wishes a rate lock or to immediately arrange an appraisal. MBA would support HUD proceeding as expeditiously as possible to finalize its proposals concerning average cost pricing and volume discounts, with suggested modifications, as well as making any necessary clarifications regarding electronic disclosures and mortgage servicing transfers. MBA also respectfully requests that HUD address MBA's other comments detailed below.

Finally, MBA would support changes to the current RESPA and TILA statutory framework to complement HUD and the Board's reform effort. MBA will support proposals that carry out the following principles:

[2] 73 Fed. Reg. 1672 (January 9, 2008).

- Disclosures should be streamlined and greatly simplified and uniform throughout the nation; terms that are not consumer friendly should be replaced with terms that are simple and understandable;
- Disclosures should be binding as early in the process as possible, taking into account that during the mortgage process information is developed and circumstances can change;
- The timing of disclosures should not result in undue delay for borrowers to receive needed credit;
- The process should facilitate competition to lower costs as well as the provision of high quality services;
- Borrowers and regulators should be appropriately empowered to prevent abuses;
- Lenders should have a reasonable opportunity to cure errors prior to litigation; and
- Remedies for errors should not result in unduly increased costs for all consumers.

This letter provides background and then sets forth general and specific comments to help achieve HUD's ultimate goal, shared by MBA, of creating a more transparent mortgage process that increases consumer understanding and lowers mortgage costs. MBA also provides responses to questions posed by HUD in the proposal.

I. Background

A. Past Efforts to Reform RESPA

Though the current law was enacted in 1974, as early as the 1980s, the Reagan Administration considered reform of RESPA to simplify the mortgage process. In 1992, HUD amended its RESPA rules to implement amendments to the law to permit affiliated businesses (formerly termed "controlled businesses") in accordance with the requirements of section 8(c)(4).[3] Also in 1992, under an opinion of the HUD Office of General Counsel and then through HUD's 1992 rule revisions, HUD required the disclosure of mortgage broker fees in table-funded transactions.[4]

In 1996, Congress required HUD and the Board to simplify and improve RESPA and the TILA disclosures and, if necessary to make recommendations to Congress to do so.[5] In 1998, as a result, HUD and the Board reported to Congress and made recommendations to establish a firmer GFE and to provide an exemption to RESPA to permit guaranteed packages of mortgage services.[6] About the same time, after considerable litigation and consumer complaints that payments by lenders to mortgage brokers amounted to illegal kickbacks, HUD conducted a negotiated rulemaking and issued a proposed rule concerning the legality and disclosure of mortgage broker fees, which was never finalized.

---

[3] 67 Fed. Reg. 49134 (July 29, 2002).
[4] August 14, 1992 legal opinion by Frank Keating, General Counsel, HUD.
[5] See Section 2101 of the Economic Growth and Regulatory Paperwork Reduction Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009.
[6] Joint Report to Congress Reform to the Truth in Lending Act and Real Estate Settlement Procedures Act, Board of Governors of the Federal Reserve System, Department of Housing and Urban Development (July 1998).

In 1999 and 2001, in the face of continuing litigation concerning the legality of mortgage broker fees, HUD issued policy statements clarifying its position on the issue that also included a call for improved disclosure.[7] Industry groups supported the policy statement.

In 2002, nearly six years ago, HUD proposed to reform its disclosure requirements under RESPA to: (1) establish an exemption from Section 8 of RESPA for guaranteed mortgage packages; (2) revise its good faith estimate requirements to establish tolerances for those not seeking the mortgage package exemption; and (3) improve the disclosure of mortgage broker fees. As a result of opposition to the rule from the title, mortgage brokerage and ultimately the mortgage lending and real estate brokerage industries, HUD withdrew its proposal in 2004.

In 2005, HUD sponsored seven roundtables to solicit the views of industry and consumer groups, including small businesses, regarding RESPA reform.

B. Rulemaking versus Legislative Solutions

In 1996, Congress directed the Board and HUD to simplify and improve their mortgage disclosures through rulemaking where possible. If legislative changes were required, the Board and HUD were to make recommendations to Congress. In 1998, the Board and HUD concluded that “meaningful change could come only through legislation.”[8] In 2002, however, and in this 2008 rulemaking, HUD determined that it had sufficient authority under RESPA to simplify and improve RESPA disclosures.

In this comment letter, MBA addresses HUD’s current regulatory proposals and urges its linkage with anticipated regulatory action by the Board. MBA believes, however, that HUD’s authority is limited under current law and responds to these proposals in that vein. As indicated, MBA would support complementary statutory changes that truly simplify and improve the mortgage process consistent with the above principles including, for example, revisions to facilitate early firm disclosures and changes to TILA to change the statute’s required disclosures to make them much more relevant and usable.

C. The Current RESPA Proposal

The proposed rule would: (1) establish a four-page standard Good Faith Estimate (GFE) form; (2) impose tolerances to limit increases in GFE estimates at closing; (3) revise requirements for disclosure of mortgage broker fees as ‘the charge or credit for the interest rate chosen;” (4) make changes to the HUD-1 to facilitate comparison between GFE and HUD-1 charges; (5) establish a new script to be read to borrowers at settlement concerning final loan terms and settlement costs; (6) revise regulations to permit certain average-cost pricing and volume discounts; (7) clarify “required use” requirements to restrict disincentives to use of non-affiliates; and (8) make technical amendments to the RESPA rules. The proposal also announces that HUD will seek legislative proposals to increase enforcement authority, including injunctive authority, under RESPA concerning the GFE and HUD-1, servicing, Section 8, title insurance

---

[7] *See* RESPA Statement of Policy 1999-1, 64 Fed. Reg. 10080 (March 1, 1999), and Clarification of RESPA Policy Statement 1999-1, 66 Fed. Reg. 53052 (October 18, 2001).

[8] Joint Report to Congress Concerning Reform to the Truth in Lending Act and the Real Estate Settlement Procedures Act, p. 2, Board of Governors of the Federal Reserve System, Department of Housing and Urban Development (July 1998).

and escrow accounts. The proposal currently would invite public comment for 60 days from the date of Federal Register publication.

In this proposal, HUD has also announced that it intends to seek legislative changes to: (1) authorize the Secretary to impose civil money penalties for violations of Section 4 of RESPA (the Settlement Statement), Section 5 (the GFE and Special Information Booklet), Section 6 (servicing), Section 8 (kickbacks, referral fees and unearned fees), Section 9 (title insurance), and Section 10 (escrows); (2) require delivery of the HUD-1 to the borrower three days prior to closing; and (3) expand and make uniform the statute of limitations applicable to governmental and private actions under RESPA.

A more detailed summary of the statute and the regulatory proposal is contained in Appendix E.

II. MBA's Comments

A. Overview - MBA's VIEWS ON THE RESPA PROPOSED RULE

Since HUD last issued its proposed rule in 2002,[9] the real estate industry and the mortgage system have experienced a crisis of a magnitude that was largely unexpected and has been nearly unprecedented. While the crisis has resulted in pervasive dislocation and hardship for consumers and businesses alike, its benefit has been to again bring into focus what has been working in the mortgage system and what must be improved.

This crisis has many victims and causes. The causes range from economic conditions, excess capacity and escalating real estate prices to outsized investor and borrower appetites. The victims include more than borrowers themselves but also include future borrowers, communities and the economy at large.

While MBA does not believe that the lack of transparency in the mortgage process is the main cause of borrower difficulties, or that its improvement is the only solution, greater transparency could help stem abuses. The sheer volume and opacity of disclosures today allows abusers to hide in plain sight. Long before the current market crisis, MBA consistently supported and invested considerable resources in mortgage simplification and much greater financial literacy for consumers in the mortgage market. MBA now believes that problems in the industry are a good reason to redouble efforts in both these areas.

Greater transparency would better empower consumers to understand and pick among the range of choices available from the mortgage market based on their own financing needs and risk appetites while at the same time allowing them to shop and compare offers.

MBA applauds HUD's continuing efforts at improving RESPA disclosures. At the same time, MBA also applauds the Board's recent efforts to improve mortgage broker fee disclosures[10] and

[9] 67 Fed. Reg. 49134 (July 29, 2002).
[10] 73 Fed. Reg. 1672 (January 9, 2008).

underwriting under its recent HOEPA rule[11] as well as its recognition that TILA disclosures need updating to reflect the increased complexity of mortgage products.[12]

As recent events demonstrate, borrowers need greater clarity about the terms and costs of credit which is the Board's responsibility under the Truth in Lending Act (TILA). RESPA, which is HUD's responsibility is intended to provide consumers with disclosures about closing costs and should accompany TILA reform. RESPA and TILA disclosures are ordinarily provided to borrowers at the same time.

Problems confronting today's mortgage borrowers reveal that while some may have made bad choices, others may have been confused about their credit costs and terms under adjustable rate mortgages and entered into mortgage loans they simply did not understand. Confusion about closing costs and related issues, except for concerns about steering which implicate both laws, has not been a prominent issue in the mortgage crisis. To improve consumer understanding of both the terms and costs of credit and closing costs, HUD and the Board must work together in the reform process to make both RESPA and TILA disclosures clearer and more compatible.

While these efforts are needed, HUD's efforts come at a time of retrenchment in the industry and a credit crunch for borrowers. To minimize costs to the industry and borrowers, changes must be undertaken judiciously and in combination. New disclosure requirements that necessitate new systems changes, training and staffing will be extremely costly and could not come at a more difficult time.

Having evaluated HUD's current proposal, and the Board's new proposal concerning disclosures thus far in the HOEPA rule, it is clear that there are considerable variations between the Board and HUD's approaches to reform. Mortgage broker fee disclosure is an excellent example. The Board proposes a clear agreement between broker and consumer while HUD's approach is far from direct. Also, HUD's proposed summary of loan terms discloses many of the terms of credit which are the Board's province under TILA but, at the same time, discloses only the note rate of the loan and not the annual percentage rate (APR) as it appears on the TILA disclosure today. This anomaly will prove confusing to both consumers and industry.

MBA's Overarching Comment

Considering the costs of changes including system conversions necessary to accommodate new requirements and, most importantly, the need for borrowers to better understand both the terms of their loans as well as their costs, MBA strongly believes that HUD's efforts should not be finalized until they are combined and harmonized with the Board's efforts to reform its TILA disclosures. HUD and the Board should work together to develop, reissue and finalize joint rules to simplify both the RESPA and TILA disclosures. Toward this end, MBA is furnishing, as Appendix A of this comment letter, a suggested joint RESPA-TILA disclosure.

[11] 73 Fed. Reg. 1672 (January 9, 2008).

[12] "The Board recognizes that [TILA] disclosures need to be updated to reflect the increased complexity of mortgage products. In early 2008, the Board will begin testing current TILA mortgage disclosures and potential revisions to these disclosures through one-on-one interviews with consumers. The Board expects that this testing will identify potential improvements for the Board to propose for public comment in a separate rulemaking." 73 Fed. Reg. 1673 (January 9, 2008).

MBA believes that only through comprehensive reform can consumers take advantage of better transparency and lower costs. MBA requests that both HUD and the Board involve industry and consumer advocates to help shape the proposals and that it utilize consumer testing to ensure that improvements do in fact increase consumer understanding. Separate and conflicting efforts will create more confusion for consumers and increase costs for everyone involved.

If, notwithstanding the requests from this industry and others, HUD determines to go forward and finalize the proposed RESPA rule independently, MBA believes the effort should be pared back considerably and put on a timeline that would match the Board's forthcoming disclosure reform efforts under TILA. In case HUD goes forward with the rulemaking, MBA submits the following comments, as detailed in this letter:

1. **HUD's summary of loan terms should be excluded from the GFE and should be issued by the Board in consultation with HUD;**

2. **MBA has particular concerns about key definitions in the proposal including the proposed definitions of "mortgage broker" and "originator," which should be revised;**

3. **MBA supports improvement of the GFE and HUD-1 and harmonization between the forms, it therefore has strong concerns about HUD's overall disclosure approach;**

4. **MBA believes HUD's proposed GFE would overload the borrower with material, counter to HUD's and MBA's goal of ensuring that the consumer focuses on important information regarding mortgage costs. MBA urges HUD to work with the Board to finalize a combined RESPA-TILA form or, if it proceeds independently, to finalize a GFE form as proposed by MBA in the attached Appendix B;**

5. **MBA supports revision of the GFE to separately disclose mortgage broker charges and complement the Board's proposed mortgage broker fee agreement;**

6. **While MBA appreciates HUD's efforts to facilitate shopping, this aspect of the rule should not be finalized because of the difficulties of coordinating the concept with other laws. An alternative approach should be adopted;**

7. **While MBA supports methods to stem increases in fees from lenders and mortgage brokers from the time of application until settlement, it has serious concerns about HUD's proposal to limit lenders to a "zero tolerance" and to make them responsible for the charges of third-party providers. It believes retention of the "good faith" standard is consistent with the statute and that a bright line Borrower Protection approach should be established to help protect borrowers from fee increases;**

8. **The proposed changes to the HUD-1 to refer to the new GFE fail to achieve the objective of making the GFE and HUD-1 harmonious and readily comparable;**

9. **HUD should not Implement a "closing script" to be read at closing and to be signed by the borrower;**

10. **MBA supports, with some modifications, HUD's proposal to clarify that lenders and brokers can use average cost pricing for settlement services within any class of transactions;**

11. **While MBA supports HUD's proposal to clarify the legality of volume discounts, MBA believes the proposal is too restrictive;**

12. **Concerning the proposed revisions to prohibitions against requiring the use of affiliates, MBA believes it would be sufficient for HUD to reaffirm that it may scrutinize discounts to ensure that they are *bona fide* rather than enact rules that would risk depriving borrowers of certain discounts altogether;**

13. **MBA generally supports HUD's efforts to update its RESPA regulations concerning mortgage servicing transfers and escrows and to explicitly recognize the applicability of ESIGN[13] to RESPA;**

14. **MBA will evaluate HUD's legislative proposals as they are developed in accordance with key principles to ensure transparency and facilitate the mortgage market; and**

15. **MBA supports an implementation schedule that would link implementation of this rule to the Board's forthcoming TILA reform rule.**

B. HUD and the Board Should Coordinate on Comprehensive RESPA-TILA Reform

As indicated, MBA strongly supports simplification of the mortgage process. Nevertheless, HUD's proposal should not be finalized at this time; rather HUD should work in concert with the Board's efforts to reform TILA so that reform of mortgage disclosure best serves consumers.

RESPA and TILA are the primary laws Congress enacted to require certain mortgage information be provided to consumers.[14] They cover different aspects of the same transaction. As indicated, RESPA is intended to provide consumers information on their closing costs and TILA is intended to provide consumers information on the terms and costs of credit. RESPA and TILA disclosures are provided to most borrowers at the same time during the mortgage process.

[13] On June 30, 2000, Congress enacted the ESIGN Act (15 U.S.C. §7001-7031) to facilitate the use of electronic records and signatures in interstate and foreign commerce by ensuring the validity and legal effect of contracts entered into electronically. Careful to preserve the underlying consumer protection laws governing consumers' rights to receive certain information in writing, Congress imposed special requirements on businesses that want to use electronic records or signatures in consumer transactions. Section 101(c)(1)(C)(ii) of the Act requires businesses to obtain from consumers electronic consent or confirmation to receive information electronically that a law requires to be in writing. The Act went into effect in October 2000.

[14] The Truth in Lending Act covers credit in addition to mortgages: "It is the purpose of this subchapter to assure a meaningful disclosure of credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices" (TILA §102, 15 U.S.C. §1601).

Problems in the mortgage market indicate that while some borrowers may have made bad choices, the difficulties of others, in part, may have involved confusion concerning the terms of their mortgages rather than merely the costs for them.[15] Others may have entered into products they did not understand. Better information on both credit terms and loan costs, as well as better information on mortgage broker compensation, would greatly empower borrowers and protect them from abuse. The need for improvements in both understanding credit and settlement costs strongly militates in favor of both HUD and the Board working together in the reform process so that both RESPA and TILA disclosures are compatible.

Piecemeal, sequential or s*eriatim* reform of the RESPA disclosures, on the other hand, followed by reform of the TILA disclosures, would be extremely costly to businesses both small and large, and ultimately to consumers. New disclosures along the lines HUD proposed will require substantial retooling of systems and considerable expenses for training, compliance and staffing. Changes to TILA are expected to result in similar costs. Since the mortgage crisis has led to tightened and more costly credit for lenders and borrowers alike, these very considerable expenses would occur at just the time that the industry and consumers can least afford them. Moreover, if the efforts of the agencies are not compatible they will greatly confuse consumers and increase the costs to industry and consumers even more.

HUD's own Regulatory Flexibility Analysis estimates that the total one-time costs to the lending and settlement industries of the new GFE and HUD-1 alone will be $570 million, $390 million of which are estimated to be borne by small business.[16] HUD estimates that the total recurring costs are estimated to be $1.231 billion annually or $98.74 per loan. While MBA believes these costs are underestimates, even if they were accurate, the costs of TILA reform, following after these costs are incurred, can be expected to result in costs of similar size for retooling, retraining, re-staffing and other costs to the industry.[17] If, on the other hand, RESPA and TILA changes were accomplished together, it is reasonable to anticipate that economies could result in lower costs for both RESPA and TILA reforms if performed simultaneously.

In any event, hasty efforts at mortgage reform should not be justified based on current market difficulties. While it is clear that borrowers are experiencing higher default and foreclosure rates today than they have in recent years, the great majority of loans and borrowers in the nonprime market are performing well, as are the vast majority of prime loans. The area of greatest concern has been nonprime adjustable rate mortgage (ARM) loans and particularly hybrid ARMs (which employ an extended introductory rate period with an adjustable rate feature at the end of the introductory period) which are generally no longer available in today's market to these borrowers. While there are concerns that steering by mortgage brokers may have been part of the problem, there is no apparent evidence that closing costs have been a major aspect of it.[18]

[15] MBA data of the third quarter of 2007 showed significant percentages of investor properties among all loan types in several states: Arizona 22 percent; California 16 percent; Florida 22 percent; and Nevada 22 percent.
[16] 73 Fed. Reg. 14102 (March 14, 2008).
[17] Schnare, Ann B., The Estimated Costs of HUD's Proposed RESPA Regulations, National Association of Realtors, (June 3, 2008).
[18] See 73 Fed. Reg. 1698-1700 (January 9, 2007).

It must also be borne in mind that as mortgage applications have risen over the last two decades, so too have the percentage of families realizing – and successfully sustaining – the dream of homeownership. This is due to several main factors including lower interest rates (which are at historically low levels – even today), risk-based pricing and a host of industry efforts and innovations. According to the Board's Flow of Funds data,[19] the value of residential real estate assets owned by households has increased from $10.4 trillion in 1999 to $20.1 trillion as of the first quarter of 2007, and aggregate homeowner's equity now is $9.6 trillion. Unnecessarily increased costs that might stem from unwise reforms should not be allowed to undermine the objective of sustainable homeownership.

C. If HUD Goes Forward Independently

Once again, MBA strongly reiterates that HUD and the Board must work together in the interests of industry and consumer alike. However, if HUD decides to finalize the proposed rule without such coordination, MBA believes the rule should be pared down and several significant changes should be made before a final rule is published.

1. HUD's summary of loan terms should be excluded from the GFE and should be issued by the Board in consultation with HUD.

MBA strongly believes that while a "Summary of Your Loan Terms" could be very useful to provide borrowers with key information to better understand mortgages and to shop among them, it should not be part of the HUD proposal and should be developed and issued by the Board. Were HUD and the Board to separately issue such summaries, the efforts would be duplicative and confusing.

While HUD's proposed summary includes "adjusted origination charges", "charges for other settlement services" and "total estimated settlement charges" (discussed below), it mostly includes points relevant to credit costs and terms. These include: "Your initial loan balance;" "Your initial monthly payment owed for principal, interest and any mortgage insurance is;" Your rate lock period is;" "Can your interest rate rise?;" "Can your loan balance rise?;" "Can your monthly payment amount owed for principal interest and any mortgage insurance rise?;" "Does your loan have a prepayment penalty?;" Does your loan have a balloon payment;" and "Does you loan include a monthly escrow payment for property taxes and, possibly, other obligations?" Considering that these are matters relevant to credit costs which are the Board's responsibility under TILA, this type of disclosure should be issued by the Board in consultation with HUD.

While HUD's proposed summary displays the "initial interest rate," it does not include the "annual percentage rate" or "APR" or the Finance Charge" and the "Amount Financed." Although MBA believes these terms themselves cause confusion, the Truth in Lending Act requires their use at this time. Pending amendments to delete them, which MBA would support, a summary that does not address them will likely cause confusion if they are still disclosed under TILA. Also, by dealing with the matters of "balloon payments" and "prepayment penalties," the summary is unnecessarily repetitious of the TILA disclosure. The Board also

[19] The Board's Flow of Funds data may be viewed at the following Website: http://www.federalreserve.gov/releases/z1/current/default.htm.

should issue the summary to assure its consistency with forthcoming TILA disclosures as well as current ones.

MBA believes the Board, in arriving at a summary form, should utilize the input of concerned groups as well as consumer testing. In that process, as well as in the process of combining RESPA and TILA forms, the goal should be to lessen the amount of paper that consumers confront to navigate the settlement process. Considering that closing costs may appear in the summary, the Board should consult with HUD on this matter going forward.

2. Definitions – MBA has particular concerns about key definitions in the proposal including the proposed definitions of "mortgage broker" and "originator," which should be revised.

HUD would change the definition of mortgage broker to mean a "person (not an employee of the lender) or entity that renders origination services in a table funded or intermediary transaction." The definition would also apply to a loan correspondent approved under 24 C.F.R. § 202.8 for Federal Housing Administration (FHA) programs. This formulation would include an "exclusive agent" under the definition of "mortgage broker."

MBA, however, does not believe the definition should be changed to include exclusive agents of lenders and it also does not believe that that the term "intermediary" should be injected into the definition at all. MBA believes that mortgage lenders, including their agents and employees, are functionally different from mortgage brokers, and should therefore be treated differently by law. To clarify this and other related issues, MBA has recently published the attached paper "*Mortgage Bankers and Mortgage Brokers: Distinct Businesses Warranting Distinct Regulation*" which is attached as Appendix D to these comments.[20]

The paper points out that mortgage brokers are middlemen that facilitate or make arrangements for loans and that lenders, on the other hand, lend money. Consumers perceive brokers and lenders differently. Consumers regard mortgage brokers as shopping for them and ordinarily cease their own shopping when they deal with them, ceding the shopping to the broker. In contrast, consumers regard lenders (and their employees and agents) as providers of loan products amongst whom they shop and compare.

Because mortgage brokers are regarded as shopping for borrowers, they present a greater potential risk of steering consumers. Accordingly, MBA believes it is appropriate for brokers, for example, to disclose that they receive additional compensation from lenders. MBA does not believe that lenders or their exclusive agents warrant the same treatment because borrowers do not perceive them the same and they do not present the same risks.

Further, MBA does not believe the term "intermediary" should be injected into the definition at all, unless it is defined to clearly cover independent mortgage brokers. As it stands, the term is undefined and could be misinterpreted to cover some loan officers who work for lenders and may be independent contractors.

[20] The paper is also available on the Web at the following address: http://www.mortgagelenders.org/files/News/InternalResource/62646_Paper.pdf.

The proposed rule would also define “loan originator” as meaning a “lender or mortgage broker.” It also would introduce the term into several definitions including “closing script,” “good faith estimate application,” “mortgage application” to name a few. MBA believes, however, that since a “lender” and “mortgage broker” are different they, should not be defined with a single term. MBA believes that borrowers do understand the differences between “mortgage lenders” and “mortgage brokers” and urges that HUD not blur these differences and create confusion for borrowers.

While MBA understands that some advocates for the mortgage brokerage industry argue that a “level playing field” requires this blurring, the fact is that the players and their functions are substantively different. As described more fully below, these efforts blur these distinctions and obfuscate the differing regulatory needs of consumers regarding lenders and brokers. [21]

3. MBA supports improvement of the GFE and HUD-1 and harmonization between the forms, it therefore has strong concerns about HUD’s overall disclosure approach.

MBA believes as a general matter that the proposed GFE is far too long and will be largely ignored by consumers. While it appreciates that the first page is intended to be a summary, and the second page a list of closing costs, MBA strongly believes, as discussed below, that no matter how laudable the educational purposes of the rest of the form may be, the form’s sheer length will cause borrowers to ignore its important information.

The proposed changes to the HUD-1, while appreciated, also fall short of making the GFE and HUD-1 correspond, necessitating the use of a “closing script” to be read by the closing agent and signed by the borrower. The GFE is visually different from the HUD-1. While the HUD-1 has been somewhat rearranged it mainly only refers to lines on the GFE. MBA believes that a better approach would be to make the GFE more closely correspond to the HUD-1, so that the consumer could easily compare the two documents, eliminating the need for the closing script altogether. The forms in Appendix B more closely correspond and should be adopted by HUD if it moves forward independently.

4. MBA believes HUD’s proposed GFE would overload the borrower with material, counter to HUD’s and MBA’s goal of ensuring that the consumer focuses on important information regarding mortgage costs. MBA urges HUD to work with the Board to finalize a combined RESPA-TILA form or, if it proceeds independently, to finalize a GFE form along the lines of the attached Appendix B.

HUD and the Board Should Issue a Combined GFE-TILA Disclosure

As indicated, MBA strongly supports a combined and coordinated effort by HUD and the Federal Reserve to develop and implement a joint GFE-TILA disclosure. For this purpose, industry representatives – including MBA members – have developed the attached two-page form at Appendix A with the first page displaying the settlement costs and the second page displaying the costs of credit for a consumer’s mortgage.

[21] A comment letter transmitted on June 4, 2008, from the Federal Deposit Insurance Corporation to HUD in regards to the proposed rule objects to this provision of the proposal because it blurs the distinction between brokers and bankers.

If, however, HUD goes forward to finalize the GFE independently, MBA recommends that HUD use the form as modified and set forth in Appendix B and implement the rule on the same schedule as the Board's changes under TILA. MBA provided an earlier version of the form to HUD which HUD critiqued in its Regulatory Flexibility Analysis.[22] This version has been revised to address these comments and is discussed below. Before discussing the MBA form, MBA offers the following comments on HUD's proposed GFE and HUD-1.

HUD's Proposed GFE

HUD's proposal would establish a standard four-page GFE form.[23] The form would:

> (1) Disclose, in a summary, the loan details specifying the loan amount, term, interest rate, initial payment, rate lock period, whether the amounts for principal, interest and mortgage insurance can rise, whether the loan has a prepayment penalty or a balloon payment and whether the loan includes a monthly escrow payment for taxes and insurance; as well as "adjusted origination charges", "charges for other settlement services" and "total estimated settlement charges."
>
> (2) Disclose the costs in ten cost categories including:
>
> > (a) Lender and mortgage broker charges known as "our service charge;
> > (b) The YSP or points as "credit or charge for the interest rate chosen," and then "adjusted origination charges;"
> > (c) Required services selected by the originator;
> > (d) Title services and title insurance;
> > (e) Required services the borrower can shop for;
> > (f) Government recording and transfer charges;
> > (g) Reserves or escrow;
> > (h) Daily interest charges;
> > (i) Homeowner's insurance; and
> > (j) Optional owner's title insurance;
>
> (3) Advise the borrower of the relationship between the interest rate and the borrower's settlement costs; and
>
> (4) Disclose various other information for borrowers including how to apply for the loan, estimated taxes, flood and property insurance premium information, a shopping chart, and information about lenders receiving additional fees by selling the loan at a future date.

While MBA appreciates HUD's effort to create a comprehensive document to help the borrower shop and better understand the mortgage process, MBA believes the resultant document is far

[22] Pages 4-8 through 4-11 and 4-19 through 4-20, Regulatory Impact Analysis and Initial Regulatory Flexibility Analysis, FR-5180-P-01, Proposed Rule to Improve the Process of Obtaining Mortgages and Reduce Consumer Costs, Department of Housing and Urban Development (March 2008).
[23] See proposed GFE form at 73 Fed. Reg. 14095-8.

too long and would overload the borrower with material that ultimately would be ignored and therefore counterproductive to HUD's and MBA's own consumer protection objectives.[24]

As indicated, RESPA requires that lenders provide a "good faith estimate" of the amount or range of charges for specific settlement services the borrower is likely to incur in connection with the settlement as developed by the Secretary in conjunction with a Special Information Booklet prescribed by HUD.[25]

MBA's Comments on HUD's Form

While MBA generally supports the grouping of the amount or ranges of specific services on the GFE in a manner that is comprehensible and comparable, the form itself should be modified so it is mainly a list of charges with minimal supplementary material, as is the MBA form in Appendix B. MBA believes most of the material on the form, except the costs, should be moved to explanatory materials, such as the Special Information Booklet.

MBA's specific comments regarding the proposed GFE are as follows:

(1) The term "originator" and "origination" services should not be used on the form. Instead the terms "lender" and "mortgage broker" should be used. As indicated, the latter terms are understood by many borrowers and using another term will only obfuscate the different functions of brokers and lenders.

(2) Unless a combined RESPA-TILA form is issued in conjunction with the Board, the Instructions portion should indicate that the GFE simply gives an "estimate of settlement charges" rather than "settlement charges" and "loan terms."

(3) Accompanying instructions should fully explain the rules governing GFE estimates including that costs may increase for a variety of valid reasons. If the point concerning when the loan must be closed is included on the form, it should note that the date will not finally be set until the borrower actually applies for a loan and that such date may be governed by the rate lock chosen by the lender and borrower.

(4) The information concerning how long the costs and interest rate are open to borrower acceptance needs greater clarification and could be provided in accompanying materials. Borrowers should be informed that they are not required to lock the rate on the GFE and they may lock in a different rate at a different cost at a different time. If this material is included in the GFE form, the accompanying rule instructions also should make clear that the interest rate in the GFE may be available until a specified hour and date. Rates frequently change several times a day.

(5) While MBA believes that a "Summary of Your Loan Terms" could be useful, the summary should be removed from the GFE and issued by the Board in consultation with HUD.

[24] A comment letter transmitted on June 4, 2008 to HUD from the Federal Deposit Insurance Corporation indicates that in light of its own testing of consumers it has the same concern.
[25] The "good faith estimate" and the booklet are authorized under Section 5 of RESPA (12 U.S.C. §2604).

(6) The use of the term “Adjusted Origination Charge” at the bottom of the first page is not at all helpful to consumers. It introduces new terminology in a setting where it is already difficult for the consumer to understand the costs themselves.

(7) Similarly, on the top of the second page, MBA does not regard the introduction of the new term “Our service charge” to cover both lender and broker fees as helpful to the lending industry or illuminating to consumers.

(8) All of the materials on page three, advising on how to shop and which charges can change at settlement should be moved to explanatory materials. It simply takes up too much space and lengthens the form.

(9) The material on “looking at tradeoffs” also should be moved to explanatory materials, possibly a Shopping Tool to be developed in conjunction with the Board. (An example of a Shopping Tool is attached as Appendix C.) While MBA supports the concept of providing borrowers with hypothetical information on loan alternatives, and does so through its Home Loan Learning Center, homeloanlearningcenter.com, it does not support the idea of requiring lenders to provide alternative mortgage information on the GFE. Also, the information proposed by HUD to be provided involves comparative interest rates and monthly payments involving loan terms. This type of information, if provided at all, should be provided by the Board under TILA.

(10) Similarly, all of the information on page four, with the possible exception of “how to accept the GFE”, should be moved to the accompanying materials. A description of the homeowner’s financial responsibilities, how they should get more information, and how to use a shopping chart, while well-intended, needlessly lengthens the form and risk its disregard by the borrower.

(11) Finally, MBA does not believe the material on whether lenders can receive additional fees by selling the borrower’s loan after settlement is helpful to borrowers. Because the text does not concern settlement or settlement costs, MBA believes it is outside the purview of RESPA.

MBA’s Proposed Form

Two years ago, MBA developed with its members, and provided to HUD its own proposed GFE form. In HUD’s Regulatory Impact Analysis and Initial Regulatory Flexibility Analysis, HUD critiqued the form.[26] In its analysis, HUD objected to the presentation of the yield spread premium (YSP) and supported its own approach. HUD said that the distinction between mortgage lenders and mortgage brokers on MBA’s form would create confusion because consumers, it believes, are unfamiliar with the meaning of these terms. HUD criticized the print size on the form pointing out that explanations were one size smaller than the material disclosed and HUD was also concerned about the form’s readability if it was sent via facsimile. The

[26]Pages 4-8 through 4-11 and 4-19 through 4-20, Regulatory Impact Analysis and Initial Regulatory Flexibility Analysis: Proposed Rule to Improve the Process of Obtaining Mortgages and Reduce Consumer Costs (March 14, 2008).

analysis also expressed concern about the presentation of certain components of a monthly mortgage payment, mainly the mortgage insurance payment. Finally, HUD expressed concern that MBA's grouping of fees was arbitrary, e.g., valuation included both credit reports and appraisals.

HUD also provided comments on MBA's proposed HUD-1 in its analysis. HUD objected to the omission of a place for charges paid outside of closing. HUD pointed out that the "actual monthly payment" in MBA's HUD-1 is different from the "estimated monthly payment" which will cause confusion. It also indicated that the direction to compare the HUD-1 and GFE charges are wrong in suggesting that only the borrower's charges are to be compared; borrower and seller payments should be compared. HUD also expressed other concerns about some of the category groupings, the absence of any label on line 704 and line 850 is missing a place for the borrower payment.

MBA has revised the forms, which are now the first pages of the combined RESPA-TILA forms at Appendix A, and displayed as separate RESPA forms at Appendix B, to address most of HUD's concerns. MBA maintains, however, that consumers should be made aware with great clarity of the respective fees of lenders on the one hand and mortgage brokers on the other. Consumers should be made aware of the differences between lenders and brokers and HUD should not increase borrower confusion. MBA has changed its broker disclosure so that the broker fee reflects total compensation to the mortgage broker and the lender's payment on the borrower's behalf. It has also revised the form to reference the mortgage broker fee agreement that the Board has proposed and other regulators are requiring. Notably, Office of the Comptroller of the Currency (OCC) examiners have been requiring disclosures along these lines by federally regulated institutions since April 1, 2008 pursuant to the OCC's Advisory Letter 2003-3.

Rather than provide notations on the form concerning "payments outside of closing" which are not well understood by borrowers, the GFE and the HUD-1 at Appendix B provides a disclosure at line 1701 of "Amounts Paid by Borrower Before Closing."

The recommended form is much shorter and was developed by those who make mortgage loans and day-in and day-out are presented with consumer questions. It is also readily comparable to the revised HUD-1, also at Appendix B and also developed by MBA and presented to HUD. MBA believes the use of these comparable forms throughout the mortgage process at shopping, at or following application, following underwriting and at and a day before closing would eliminate the need for the closing script and reduce costs to small and large businesses.

HUD's own Regulatory Flexibility Analysis estimates that the total one-time costs to the lending and settlement industry of the new GFE and HUD-1 alone will be $570 million, $390 million of which are estimated to be borne by small business.[27] HUD estimates that the total recurring costs are estimated to be $1.231 billion annually, or $98.74 per loan. While MBA believes that there will be retooling costs associated with implementation of its shorter GFE and HUD-1, it believes that its forms cover less ground and will be easier for borrowers to understand, resulting in fewer questions and concerns directed to industry. MBA believes these differences

[27] 73 Fed. Reg. 14102 (March 14, 2008).

will translate into lower initial – and much lower recurring – costs for businesses large and small, as well as for borrowers.

Again, MBA maintains that the form in Appendix B is much more useful than HUD's proposed GFE. While HUD indicates at length that it tested its proposed form, MBA has profound concerns about the nature and scope of the testing. MBA believes that, in an atmosphere where borrowers are literally inundated with paper during the mortgage process, effective testing should also include a consideration whether the many additional pages proposed by HUD enhance or actually detract from the consumer's ability to understand the costs and terms of their mortgage. MBA believes that in the context of combined RESPA-TILA or, if HUD goes forward independently, much more comprehensive testing is required.

5. MBA supports revision of the GFE to separately disclose mortgage broker charges and complement the Board's proposed mortgage broker fee agreement.

Board Proposal and Federal Financial Regulator Requirements

MBA has long supported the straight-forward disclosure of mortgage broker fees in a manner similar to that proposed by the Board in its HOEPA proposal[28] as the best way to protect consumers and finally resolve this issue which has bedeviled industry and consumers for years. Recently, legislators have sought to limit or eliminate yield spread premiums (YSPs). While MBA strongly supports the legality of YSPs and other fees paid by lenders to help defray borrowers' closing costs, MBA believes that to assure that they do not simply augment costs, unbeknownst to consumers, and to avoid the unwitting steering of consumers by mortgage brokers to higher rate products, consumers must be clearly advised of payments made to mortgage brokers by lenders based on the interest rate. MBA strongly believes that the new GFE, therefore, should include provisions making it compatible with the mortgage broker fee agreement the Board has proposed, and similar agreements required by federal regulators.

HUD's proposed GFE and HUD-1 makes no such provision. Instead it would revise the requirement for disclosure of YSPs from lenders to mortgage brokers as "a charge or credit for the interest rate chosen." This amount would be subtracted from the lender and brokers' "service charge" to arrive at the "adjusted origination charge." The costs occasioned by the adoption of a new terminology for mortgage broker fees will be enormous but its benefits are not apparent.

While MBA appreciates HUD's efforts to clarify the function of a YSP in relation to the interest rate, MBA believes that this could be accomplished without creating confusing new terminology for broker fees. HUD's approach to mortgage broker disclosures, in MBA's view, would be unclear to borrowers. In fact, it further confuses the issue by disclosing discount points as charges in the same block as YSPs. Also, it is possible in the future that some brokers will be paid on a basis other than a loan's interest rate and HUD form does not encompass that possibility.[29]

---

[28] 73 Fed. Reg. 1672 (January 9, 2008).

[29] The Board proposed that if a broker is compensated on a basis other than an interest rate, it may not have to enter into the agreement with the borrower. The proposal would "provide creditors two alternative ways to comply, one where the creditor complies with a state law that provides consumers equivalent protection, a second where a

The GFE at Appendix A, on the other hand, discloses to the borrower in plain English the total compensation for the broker's services and the amounts paid by the lender to the broker on the borrower's behalf. It also makes clear that the amounts paid to the broker by the lender are paid by the borrower through the loan's interest rate and monthly payment as follows:

> ***Important Information When Using a Mortgage Broker****. If you have agreed that the Lender may pay the Broker on your behalf part of the Total Broker Compensation (line 902), you will pay this amount through your loan's interest rate and monthly payment. Your Mortgage Broker is required to enter into a Mortgage Broker Fee Agreement with you which you should review.*

Based on the preamble, the proposed rule and the Regulatory Impact Analysis,[30] MBA understands that HUD's approach to disclosure is shaped by concerns from mortgage brokerage industry advocates and the Federal Trade Commission (FTC) that the form should provide a "level playing field" between brokers and lenders. MBA believes that these assertions are incorrectly premised and typify confusion about brokers' and lenders' respective functions. They do not appropriately consider the risks of steering. Moreover, HUD's approach to disclosure is not shared by other regulators.[31]

As indicated, lenders and brokers perform distinct functions in the marketplace and are perceived differently by consumers. As explained in the attached paper at Appendix D, they are not the same players; they do not have the same role, and applying the same rules to them is ill-advised.

Specifically, considering that consumers regard brokers as middlemen who comparison shop for them, it is wholly appropriate for the consumer to know if the broker is also receiving a fee from the lender based on the consumer's choice of a higher rate. Armed with compensation information, and other information on the relationship between the interest rate and settlement costs, the consumer can make an informed choice and avoid steering and abuse.

Requiring separate disclosures of mortgage lender fees and mortgage broker compensation is also far more consistent with HUD's approach that mortgage brokers provide settlement

---

creditor can demonstrate that its payments to a mortgage broker are not determined by reference to the transaction's interest rate. The first safe harbor is for a creditor payment to a broker for a transaction in connection with a state statute or regulation that (a) expressly prohibits the broker from being compensated in a manner that would influence a broker to offer loan products or terms not in the consumer's interest or not the most favorable the consumer could obtain; and (b) requires that a mortgage broker provide consumers with a written agreement that includes a description of the mortgage broker's role in the transaction and the broker's relationship to the consumer, as defined by such statute or regulation. An example would be a state statute or regulation that imposed a fiduciary obligation on a mortgage broker not to puts its own interests ahead of the consumer's and required the broker to disclose this obligation in an agreement with the consumer. ¶The second alternative is for a creditor that can demonstrate that the compensation it pays to a mortgage broker in connection with a transaction is not determined, in whole or in part, by reference to the transaction's interest rate. For instance, if a creditor can show that it pays brokers the same flat fee for all transactions regardless of the interest rate, the creditor would not be subject to the restriction on payments to brokers under § 226.36(a)(1)." 73 Fed. Reg. 1700 (January 9, 2008).

[30] *See* 73 Fed. Reg. 14030 (March 14, 2008).

[31] Both the Board and the FDIC have supported different approaches as shown in the HOEPA proposed rule and the comment letter on this proposal from the FDIC.

services distinct from lenders. HUD's own Statements of Policy issued in 1999 and 2001[32] indicated that mortgage brokers provide distinct goods, facilities or services and to justify such compensation, mortgage broker compensation must be reasonably related to the value of such goods, facilities and services. The Statements directed separate disclosure of mortgage broker fees.

MBA agrees with these opinions and believes that broker fees must be separately itemized, and specifically labeled, so that consumers and regulators are able to discern whether the compensation paid to a mortgage broker is in fact reasonably related to the goods, services and facilities provided. Any disclosure approach that combines broker and lender compensation would undermine HUD's own analysis of the legality of broker fees. By separately disclosing broker and lender compensation, MBA's proposed forms are consistent with HUD's longstanding legal interpretations on this matter.

Finally, MBA notes that HUD spends considerable time in the preamble to its proposal discussing the consumer testing of its forms in general and the broker disclosure in particular. The purpose of this testing though was to avoid borrowers incorrectly selecting lenders versus brokers loan offers. This approach, however, assumed there were no differences between brokers and lenders. Considering all the distinctions identified in MBAs paper in Appendix D, MBA believes that borrowers need to understand both the functions and fees of lenders and brokers respectively. The tests conducted by HUD are not relevant to the panoply of concerns surrounding this issue. Considering that MBA and others hold otherwise, and believe that borrowers need better understanding of the functions and fees of lenders and brokers respectively, these test are not relevant concerning this issue. MBA strongly supports testing of the forms it proposes which make the respective fees clear and reference the mortgage broker fee agreement. It would also assist in the development of informational materials to make the broker's functions clear as well.

6. While MBA appreciates HUD's efforts to facilitate shopping, this aspect of the rule should not be finalized because of the difficulties of coordinating the concept with other laws. An alternative approach should be adopted (as discussed in 7 below).

The New Definition Is Inadvisable

While MBA appreciates HUD's efforts to facilitate shopping, the use of a new GFE application to elicit a binding GFE raises significant regulatory concerns and statutory questions. It is unnecessary to stop "sticker shock" at the settlement table based on differences between the GFE and the HUD-1.

The matter of bait and switch in consumer shopping could be better resolved by empowering consumers with a new Shopping Tool developed by HUD and the Board, along the lines proposed at Appendix C, that would elicit offers from lenders and mortgage brokers. As discussed in greater detail in 6 below, the matter of stopping unwarranted payment shock from the time of application to the time of closing can be addressed without changing the definition of "application."

The New Definition Would Raise Significant Regulatory Concerns

[32] 64 Fed. Reg. 10080 (March 1, 1999); 66 Fed. Reg. 53,052 (October 18, 2001).

The proposed revisions to the definition of "mortgage application" create significant concerns for lenders. The proposal would replace the definition currently found in RESPA's implementing regulation with two new definitions that, in effect, would bifurcate the mortgage application process into two distinct phases: the "GFE application" phase and the "mortgage application" phase. The impact of this redefinition has repercussions that extend well beyond RESPA, and may significantly alter legal and regulatory responsibilities under other laws and/or engender great confusion.

The term "mortgage application" is extremely important to RESPA's and TILA's disclosure regimes because it defines the start of the time period during which all initial consumer disclosures must be delivered. It is also important under other consumer protection statutes that regulate mortgage lending and employ "mortgage application" as the triggering event for disclosure or other requirements.

Specifically, changes in the definition of "application" would impact TILA and "Regulation Z,"[33] the Equal Credit Opportunity Act (ECOA) and "Regulation B,"[34] Home Mortgage Disclosure Act (HMDA) and "Regulation C,"[35] Fair Credit Reporting Act (FCRA) rules, and Section 311 of the Fair and Accurate Credit Transactions Act of 2003 (FACTA)[36] concerning the risk-based pricing notice.

The following list serves as a summary of the legal requirements that employ "application" as the triggering term:

- **Truth-In-Lending Act and "Regulation Z"**: TILA does not specifically define the term "application." Instead, the TILA regulations specifically adopt RESPA's definitions, stating that "creditors may rely on RESPA and Regulation X (including any interpretations issued by HUD) in deciding whether a 'written application' has been received." *Federal Reserve Board Regulation Z Official Staff Interpretations,* 12 C.F.R. § 226.19, 12 C.F.R. part 226 (Supp. I). *See also* 12 C.F.R. § 226.19.

- **Equal Credit Opportunity Act and "Regulation B"**: Regulation B defines a "loan application" as "an oral or written request for an extension of credit that is made in accordance with the procedures established by a creditor for the type of credit requested."[37] The *commentaries* to the regulations clarify that the actual practices followed by a creditor for making credit decisions, as well as its stated application procedures, will determine whether an application was actually made.[38]

- **Home Mortgage Disclosure Act and "Regulation C"**: HMDA requires that creditors report to the Federal Government the date that an "application" is received. Under HMDA's regulations, the definition for "application" is an "oral or written request for a home-purchase or refinance loan, or a refinancing that is made in

[33] 12 C.F.R. § 226.
[34] *See Federal Reserve Board Regulation B Official Staff Interpretations,* 12 C.F.R. § 202.2(f), Supp. I, comment 2.
[35] 12 C.F.R. § 203.2(b).
[36] Pub. L. No. 108-159 (December 4, 2003).
[37] 12 C.F.R. § 202.5(f).
[38] *See Federal Reserve Board Regulation B Official Staff Interpretations,* 12 C.F.R. § 202.2(f), Supp. I, comment 2.

accordance with procedures used by a financial institution for the type of credit requested.[39] The Regulation C commentary at Comment 2(b)-1 says that the Board interpretations that appear in the official staff commentary to Regulation B (Equal Credit Opportunity, 12 C.F.R. part 202, Supplement 1) are generally applicable to the definition of an application under Regulation C. However, under Regulation C the definition of an application does not include prequalification requests.[40]

- **Fair Credit Reporting Act**: Section 311 of the Fair and Accurate Credit Transactions Act of 2003 ("FACTA") provides that the risk-based pricing notice may be provided at the "time of application," when credit is granted, or when the approval is communicated to the consumer. Final rulemaking is still pending on the definitions and requirements of this provision.

HUD's proposal raises regulatory questions under these provisions because of its establishment of two separate and distinct definitions for the term "application." There now is no definitive answer regarding which of the two proposed definitions – GFE application or mortgage application – is the officially recognized trigger for the various statutory requirements. Each federal statute serves a different purpose, and, without clarification, each interpretation of a statute may diverge on how the time line for "application" should apply.

The HUD proposal is not clear and consistent on how other statutes are to apply. On the one hand, the proposed rule's preamble makes the statement that whether a GFE application "under a particular set of facts triggers HMDA or ECOA requirements must be determined under Regulation B and Regulation C, as interpreted by the Federal Reserve Board."[41] It also states that there have been "consultations with representatives of the Federal Reserve," and there are indications that the Board would prefer that early TILA disclosures be given in connection with the GFE application.[42] On the other hand, the proposed rule's Regulatory Impact Analysis makes a statement that expresses a two-pronged triggering mechanism for other federal statutes: (1) the definition of "application" for GFE and early TILA disclosures would be triggered by the GFE application; and (2) the requirements under Regulations B (ECOA) and C (HMDA) will be met when borrowers complete the application process by selecting a loan originator with whom his application will go forward.[43]

MBA agrees with HUD that the Board has final jurisdiction over the definitions required under the statutes it administers. In order to save considerable costs, these ambiguities must be resolved before this aspect of the rule is finalized, and not afterward in time consuming and expensive litigation.

HUD Need Not Establish the New Definition to Facilitate Shopping

Variations in costs from the time a borrower shops until the time they actually apply with a particular lender or mortgage broker is a different matter from closing cost shock at the time of

[39] 12 C.F.R. § 203.2(b).
[40] See 12 C.F.R. § 203.2(b).
[41] 73 Fed. Reg. 14036.
[42] Ibid.
[43] *See* 73 Fed. Reg. 14103.

settlement, where actual closing costs significantly vary from costs estimated at the time of mortgage application. The former, in MBA's view, is less of a problem and does not warrant revising the definition of application considering the foregoing regulatory concerns.

Many consumers today effectively shop among mortgage lenders. In order to facilitate the shopping by others among lenders and brokers, MBA supports the establishment of a new Shopping Tool to be developed by HUD and the Board, along the lines proposed by some members of MBA, and attached as Appendix C to these comments. Such a tool would elicit offers from lenders and mortgage brokers in the form of a non-binding GFE at Appendix A. The market would respond, as it does today, with relatively firm offers and the borrower could use the tool to narrow its search.

There is also some concern that shopping through a series of applications would adversely affect borrower's credit ratings. This concern would be obviated by the use of a shopping tool and non-binding GFEs.

Finally, going forward, HUD and the Board should make clear in informational materials that prices alone need not be determinative of a consumer's choice of a lender or mortgage broker. Borrowers do and should consider the quality of services provided, including, but not limited to, the particular lender's capacity and competence to provide responsive and prompt service to facilitate a timely, efficient and high quality lending experience.

7. While MBA supports methods to stem increases in fees from lenders and mortgage brokers from the time of application until settlement, it has serious concerns about HUD's proposal to limit lenders to a "zero tolerance" and to make them responsible for the charges of third-party providers. It believes retention of the "good faith" standard is consistent with the statute and that a bright line Borrower Protection approach should be established to help protect borrowers from fee increases.

While MBA supports greater protection for consumers against significant unjustified cost increases from the GFE at time of loan application to closing, it does not believe that the establishment of a zero tolerance for lender or broker fees is justifiable under RESPA or that a 10 percent tolerance on certain third party charges required by the lender or broker, as detailed below, is the best approach.

Problems with Establishing Tolerances

The proposed rule would prohibit lenders and brokers from exceeding the amount listed as "our service charge" on the GFE (provided in response to a preliminary GFE application) absent unforeseeable circumstances at time of closing. Under HUD's proposed rule, the "charge or credit for the interest rate chosen," if the interest rate is locked, also cannot be exceeded absent unforeseeable circumstances.

The proposed rule would also prohibit the sum of all the other settlement services subject to a tolerance from increasing by more than 10 percent. Such services include originator-required services where the originator selects the third party provider, originator-required services where the borrower selects from a list of third party providers identified by the originator, and optional owner's title insurance.

While MBA opposes unjustified increases in settlement costs at closing, the establishment of tolerances, in general, and restriction to a zero tolerance, in particular, for lender fees are legally questionable under RESPA. Section 5 of RESPA requires a "good faith estimate of the amount or range of charges for specific settlement services the borrower is likely to incur in connection with the settlement as prescribed by the Secretary."[44] While HUD asserts that the basis for its ability to impose tolerances is grounded in its ability to define the term "good faith," MBA does not believe that – considering the structure or legislative history of the statute – there is clear basis for tolerances and particularly a "zero tolerance."[45]

MBA does not believe that, as a general matter, lenders can or should be held responsible for the costs of third parties when lenders have no ability to control their costs. As more fully discussed below, the current proposal for volume discounts will not facilitate pricing arrangements that will be beneficial to the consumer. Lenders will not enter into volume discount arrangements if doing so causes them to face additional liability. MBA also believes that the establishment of a 10 percent tolerance overall on third-party charges recommended by the lender will likely prove counterproductive as long as the lender is held liable for violations of the tolerances. Lenders will simply not have the incentive to make any recommendations to the consumer of beneficial services.

---

[44] 12 U.S.C. § 2604(c).

[45] The proposed amendments to the GFE are inconsistent with RESPA insofar as those amendments would impose tolerances or other specific standards for the accuracy of the GFE disclosure. The RESPA statute requires the lender to provide "a good faith *estimate* of the amount or range of charges for specific settlement services the borrower is likely to incur in connection with the settlement as prescribed by the Secretary." 12 USC 2604(c) (emphasis added). This is a requirement for an estimate of the settlement charges, not a requirement that these charges be disclosed with exact accuracy. Congress separately provided in RESPA for a final settlement statement for the charges actually imposed. 12 USC 2603. This requirement for a final settlement statement differs markedly from the GFE requirement by not stating that the disclosures could be provided as estimates. Because Congress provided separately for a final statement of settlement charges (in Section 4 of both the original RESPA and the current RESPA), and a "good faith estimate" of the settlement charges to be provided at the beginning of the loan application process, it seems clear that Congress did not contemplate that the GFE would be absolutely accurate.

The amendments at the enactment of RESPA are also instructive. The original RESPA statute stated that is was "the duty of the lender," when making the advance disclosure of settlement charges, "to obtain or cause to be obtained from persons who provide or will provide services in connection with such settlement the amount of each charge they intend to make." 12 USC 2605 (1974 version). Congress deleted this duty in its amendment to RESPA in 1976 when Congress added the formal GFE requirement. The RESPA statute has not changed in that regard since 1976 and still does not impose an affirmative duty on the lender to enter into binding relationships with third parties regarding the amount of such third parties' fees. While a lender must make a good faith effort to obtain accurate information as to the amounts of third party charges, that is quite different from a requirement that the disclosure of those amounts be accurate within regulatorily-specified tolerances.

Comparing RESPA to TILA, Congress expressly included accuracy standards and tolerances into TILA. See, for example, 15 USC 1605(f) and 1649(a)(3) (each providing accuracy tolerances for finance charges), and 15 USC 1606(c) (providing tolerances for the disclosure of the annual percentage rate). In contrast, Congress did not, however, impose or imply accuracy standards for GFE's.

Therefore, we believe that HUD's attempt to impose strict accuracy standards for the GFE is inconsistent with RESPA itself. Any such action by HUD would be in excess of HUD's statutory jurisdiction and authority, and a reviewing court therefore should hold such action to be unlawful and set it aside under the APA. 5 USC 706(2).

Additionally, MBA believes the establishment of a tolerance for government recording and transfer charges is unwarranted and presents unnecessary risks to lenders and to mortgage brokers.

While MBA notes that HUD has provided relief from the tolerances for unforeseeable circumstances, including acts of God and exceptions for other circumstances, MBA believes that these exceptions are too narrow considering the applicable statutory requirements. Section 5(c) of RESPA requires lenders to provide "a good faith estimate of the amount or range of charges for specific settlement services the borrower is likely to incur in connection with the settlement as prescribed by the Secretary [of HUD]." The proposal indicates that the tolerances would exclude acts of God or disaster or other type of emergency that makes it impossible or impracticable for the originator to perform or circumstances that could not be reasonably foreseen at the time of GFE application that are particular to the transaction and that result in increased costs such as change in the property purchase price, boundary disputes, or environmental problems that were not described to the loan originator in the GFE application; the need for a second appraisal and flood insurance.

Under this approach, by way of example, if a GFE is provided that reflects government recording and transfer charges that are based on the governmental unit's current fees, and later the governmental unit increases its charges, such an increase might be regarded as "unforeseeable" because governmental units increase fees from time to time. However, such an estimate would have been made in "good faith." Similarly, while price increases may be foreseeable they are may be unknown at the time of an "estimate" in "good faith."

MBA believes that the current regulations are more consistent with the current statute in requiring that estimates must be made in "good faith" and bear a "reasonable relationship" to the charge a borrower is likely to pay at settlement.[46] The rules should not require a lender to show that all increases are unforeseeable. What should be required is that the lender makes estimates based on information known to him in "good faith" at the time the estimates are made.

Finally, MBA does not believe there is a legal basis for RESPA rules requiring that when a loan application is rejected, and the tolerances are inapplicable, the borrower must be notified within one day. A one-day requirement is also unreasonable considering other workload constraints and, in MBA's view, it will present a particular hardship to small mortgage lenders and brokers. Moreover, before the rule is finalized, it must be harmonized with other provisions of law governing notice of denial (e.g., ECOA).

MBA's Alternative Approach: Borrower Protection Approach

As indicated, MBA believes a better approach under the current statute would be to apply the current regulatory standard for good faith estimates at 24 C.F.R. § 3500.7 which provides:

> *Each such estimate must be made in good faith and bear a reasonable relationship to the charge a borrower is likely to be required to pay at settlement, and must be based upon experience in the locality of the mortgaged property. As to each charge with respect to which the lender requires a particular settlement service provider to be used,*

[46] 24 C.F.R. § 3500.7(c).

the lender shall make its estimate based upon the lender's knowledge of the amounts charged by such provider.

The rules would then establish that HUD and other federal and state regulators would scrutinize lenders' good faith estimates for compliance unless lenders and brokers good faith estimates were in conformity with the Borrower Protection approach described below.

Under this approach, lenders and brokers would be deemed to be in good faith for any mortgage where (1) their own fees were no more than five percent greater at closing than estimated on the GFE at time of application and (2) estimated third party charges of providers required and selected or recommended by the originator were no more than 10 percent greater overall than estimated on the GFE.

MBA believes that the establishment of the Borrower Protection plan is a better approach than tolerances. Lenders and brokers will manage their businesses within Borrower Protections to assure that their estimates comply. At the same time, an approach along these lines would be more consistent with the statute and assure flexibility in unusual circumstances not contemplated by the rule.

Operationally, a borrower would first shop for a mortgage as he or she does today. The borrower could request a GFE from a lender or broker at that time but the estimate would not be binding and the tolerances would not apply. (The GFE that would be provided would be the same as the GFE used throughout the process (see below.)) Tolerances are unnecessary at this point. The market today responds to requests for GFEs at a preliminary stage with good offers. The problem that requires consideration is protecting borrowers from unjustified variations in costs between application and settlement.

Nonetheless, MBA strongly urges that HUD and the Board do much more to facilitate borrower shopping. As indicated, in 6 above, MBA believes that HUD and the Board should develop a Shopping Tool along the lines of the document in Appendix C to empower the consumer to ask the right questions about credit costs and settlement costs.

When the borrower is ready to apply for a mortgage, he or she would do so. The lender or broker would then provide a GFE either by delivering the good faith estimate, or by placing it in the mail to the loan applicant, not later than three business days after the application is received or prepared.

The GFE would be provided at no cost, except possibly for the cost of the credit report. MBA is mindful that the Board has proposed to require the early TILA disclosure without any significant fees and it supports the provision of a combined RESPA-TILA disclosure. However, in instances where the borrower wishes expedited treatment, the borrower should be allowed to provide a fee if he or she chooses an appraisal or a rate lock to expedite closing or to lock-in a rate. The ability to lock-in benefits borrowers and should not be unwittingly prevented under any new rules.

The GFE must be provided in good faith and would be subject to enhanced regulatory review. The foregoing five percent leeway on lender fees (including discount points and any charge for when a rate is locked) and a 10 percent overall window of certain costs (including title,

appraisals, and required services the lender or broker selects or recommends such as pest inspections) on the GFE would apply to lenders and mortgage brokers to assure that they meet the good faith standard. Under this approach, fee increases that exceed these Borrower Protection standards could be scrutinized by HUD or another applicable state or federal regulator to determine whether they are in good faith or whether they were not. Considering that government recording and transfer charges may change arbitrarily, they are outside MBA's proposed enhanced regulatory review and Borrower Protection requirements.
In applying the good faith standard, final costs explicitly may exceed the Borrower Protection amounts if: (1) the borrower requests a change in the loan product or amount by a bright line amount, $10,000 is suggested; or (2) acts of God occur; (3) any issues materially affecting the value of the borrower's credit or collateral are discovered; or (4) other circumstances occur such as increases in charges or fees that the lender or broker was not aware of at the time of its estimate in good faith.

Lenders and brokers will reissue the combined RESPA-TILA form following final underwriting at the time a commitment letter is sent to the borrower to reflect the results of final underwriting, including any applicable changes. Lenders and brokers will also issue an updated GFE as they often do today when the borrower changes the loan product or loan amount. Again, the GFE along with the TILA form at the pre-application stage, the application stage and the commitment stage will be the same form. Based on MBA's redesign, the forms will be readily comparable at each stage of the process.

MBA will continue to work at assuring the HUD-1 is available to borrowers the day before closing. For comparison purposes, borrowers will be advised to compare the GFE provided at loan approval to the HUD-1 to assure that the standard of good faith is met and that HUD may scrutinize increases that exceed the Borrower Protection standards.

8. The proposed changes to the HUD-1 to refer to the new GFE fail to achieve the objective of making the GFE and HUD-1 harmonious and readily comparable.

While laudable,
MBA does not believe that the changes to the HUD-1, in the form of relatively minor revisions and references to the GFE, are sufficient to make the forms truly comparable for the consumer. In fact, MBA believes that the introduction of the new closing script, which is intended to describe the relationship of the costs and terms on the GFE to those on the HUD-1, is at least in part an admission that the forms are not easily comparable. Considering that HUD's cost estimates for implementation of the GFE and HUD-1 forms are based on the comparability of these forms, MBA is convinced that these cost estimates are far too low.[47]

9. HUD should not Implement a "closing script" to be read at closing and to be signed by the borrower.

MBA does not believe that implementation of the closing scripts proposed by HUD, as an addendum to the HUD-1 or HUD-1A, is advisable. MBA believes its implementation would raise legal concerns, be too costly, provide little benefit to the consumer at closing and raise significant operational concerns. Moreover, the script itself is concerned with both loan terms

[47] 73 Fed. Reg. 14115-14116.

and settlement costs and as such should await the involvement of the Board as part of comprehensive RESPA-TILA reform, if it is to be implemented at all.

Notwithstanding the characterization of the script as an addendum to the HUD-1or HUD-1A, the script is an additional form to be prepared by the settlement agent, read to the borrower and signed at settlement which compares the loan terms and settlement charges on the GFE to the HUD-1. RESPA requires the HUD Secretary to develop and prescribe "a standard form for the statement of settlement costs which shall be used… as the standard real estate settlement form in all transactions in the United States which involve federally related mortgage loans."[48] While RESPA explicitly authorizes several other disclosures, the authority for establishing a closing script, which is in effect an additional disclosure, is not evident.

Just as important, MBA believes that the script will add unnecessary costs to the closing process. HUD itself estimates that the script will add 45 minutes of additional time per closing and estimates that cost at $54 (derived from a $150,000 salary.) HUD also says the costs in a normal year (based on 12.5 million originations) would be an estimated $676 million. It is not apparent, however, in reaching what MBA regards as an unusually low estimate, HUD fully considered all costs including the additional time for the lender, broker and others to assist in developing the script. There is also no apparent consideration of the considerable costs to borrowers considering the time the borrower must invest in this effort, e.g. lost wages.

For the consumer, closing is far too late to focus on a comparison of estimated and final loan terms and closing costs. It would be far better for the consumer to be provided a HUD-1, and a TILA disclosure prior to closing that was readily comparable to the GFE. Prior to closing, a consumer can question the lender or broker about charges and determine whether he or she will proceed with the loan.

Current RESPA regulations at 24 C.F.R. § 3500.10(a) permit the borrower to inspect the HUD-1 or HUD-1A settlement statement the business day immediately prior to settlement but the rules only require review of items that are known to the settlement agent at the time of inspection. Over the past few years, MBA, the American Land Title Association (ALTA) and the American Escrow Association (AEA) have been working together to develop uniform closing instructions. In their current form, these procedures, while not yet finalized, would, in part, enable borrowers to receive a complete HUD-1 a day before closing. MBA believes that, enhanced by a GFE that is truly comparable to the HUD-1, this effort holds far greater promise than the closing script to timely inform borrowers of closing costs and facilitate comparison with the GFE.

The script itself is focused as much on the rates and terms of the mortgage product chosen by the consumer as its settlement costs. For this reason alone, MBA would urge that if implementation is to be pursued further – and we do not believe it should be as proposed – it should be made part of a RESPA-TILA reform effort, coordinated with the Board.

Finally, use of such a script would present logistical problems in eMortgage transactions and in states where escrow closings are prevalent. The use of the script will either make these transactions unworkable and/or simply increase the paper required for borrower review. Also,

[48] 12 U.S.C. § 2603(a).

considering that settlement agents must read the script and will be expected to answer questions, and will be expected to answer questions, the script's use may be impossible in states where there are statutes prohibiting the unauthorized practice of law.

10. MBA commends, with some modifications, HUD's proposal to clarify that lenders and brokers can use average cost pricing for settlement services within any class of transactions.

MBA commends HUD's proposal to exert its authority under Section 19 of RESPA to clarify that lenders and brokers can use average cost pricing for settlement services, with some clarifications and modifications. MBA has long sought explicit clarification of the legality of average cost pricing, not to increase industry profits but to facilitate pricing arrangements to reduce operational and compliance costs, and streamline operations all of which will result in lower costs to consumers. Average cost pricing methodologies permit tiered pricing arrangements where the average prices for third party services purchased in volume are lower than the prices for services purchased individually. These benefits are passed on to consumers in the market. Explicitly permitting these arrangements reduces legal risks resulting from requirements for precise price calculations.

MBA believes that with some modifications and clarifications, considering the benefits of average cost pricing, this proposal should be finalized even if the entire rule is not. In such event, MBA respectfully requests that HUD issue a policy statement or an interpretive rule for this purpose.

Specifically, the proposal would allow the average price for settlement services to be determined and disclosed based on either (1) the actual average price for the service on all loans closed by the "loan originator" on a national or more limited basis over the averaging period; or (2) the average price based on a tiered pricing contract for the service if the projected number of loans used in the calculation is equal to the actual number of loans actually closed during the averaging period.

The first circumstance identified above would require experience over a recent period of six consecutive months preceding the receipt of the GFE application as designated by the "loan originator." The second demands a tiered pricing contract during a retrospective averaging period. MBA believes that there should be additional flexibility to facilitate average cost pricing so that firms that do not fit into one of the two designated circumstances can still employ average cost pricing arrangements to benefit consumers.

MBA suggests that the rule include another approach or approaches that would be less restrictive and facilitate entry into average cost pricing for other firms to benefit consumers. MBA notes that several lenders who engage in average cost pricing are commenting on this rule. MBA urges HUD to look carefully at their comments on this subject (as well as other issues). Under one approach suggested, a firm would charge the average cost for a class of transactions over a prospective averaging period during which all transactions in the class would be charged a projected average price. As long as the total amounts charged on transactions in the class do not exceed the amount paid to the service providers for such transactions by more than a small amount (e.g., by more than 10 percent,) the average price would be permissible.

The proposal also provides that if a loan originator uses average cost pricing for "any class of transactions" in a particular period, the loan originator must use the same average cost price in every transaction within that class. The "loan originator" also must retain all documentation that the average cost pricing is "accurate" in a given time period under the pricing formula used for at least three years.

MBA believes that before this provision is finalized under a rule or an interpretative rule, the rule should be clarified to give maximum latitude to the lender to define a "class of transactions." Specifically, the lender should have latitude to broadly define a class based on type of service, type of property, loan type, and/or geographic region. The standard should be "a reasonably similar class of transactions" as defined by the lender. This approach would give the lender discretion to identify transactions such as valuations in a particular county or the subset of semi-detached homes in such county. Likewise, the lender should have latitude to define an "average period" and the "average price" as long as the approach is 'reasonable."

Finally, the documentation requirements should be revised to ensure that they are flexible and do not impede use of this provision by requiring unnecessarily burdensome documentation. The documentation should not be required to be retained to demonstrate "accuracy" but to support the lender's determinations.

11. While MBA commends HUD's proposal to clarify the legality of volume discounts, MBA believes the proposal is too restrictive.

MBA also commends HUD's proposal under Section 19 of RESPA to clarify that volume discounts are not prohibited, but does not believe it goes far enough. If it is modified, MBA believes that it also should be issued as an interpretative rule or clarification whether or not HUD goes forward with this rulemaking.

In its proposal, HUD redefined "thing of value," in connection with anti-kickback and referral fee provisions of Section 8, to exclude "discounts negotiated by settlement service providers based on negotiated pricing arrangements," provided that no more than the reduced price is charged the borrower and disclosed on the HUD-1 and HUD-1A.

Negotiated discount arrangements for services and materials result in lower costs to consumers and are therefore consistent with RESPA's purposes of lowering settlement costs. These arrangements achieve this objective in other industries, such as in the automobile industry where parts are ordered through volume arrangements. MBA does not believe RESPA was intended to or should impede similar discounting in the settlement services industry.

Nevertheless, by also including a requirement that no more than the reduced price can be charged to the borrower, MBA believes that there will be little incentive for lenders to enter into discount arrangements. Scrutiny to ensure that each and every dollar of discount is passed on to the consumer presents regulatory risks and will make the exception uninviting. Moreover, such a restriction is unnecessary. Market competition will result in the consumer receiving the benefit of discounts. If HUD is insistent about maintaining this provision, at the very least, HUD should make clear that "average cost pricing" can be employed in conjunction with volume discounts. Under such an approach, it would be acceptable for the average price to be charged to the borrower, if permissible under the rules, rather than the fully discounted price.

MBA also questions the idea that discounts can only be negotiated by a settlement service provider, arguably excluding builders. MBA believes this approach could deprive consumers of negotiated discounts on house prices offered by lenders that have joint ventures and marketing agreements with builders.

While MBA recognizes that some small businesses do not support volume discounts, MBA is confident that small businesses will continue to thrive in the marketplace for settlement services as they do today and RESPA should not deprive consumers of the cost savings from volume discounts.

12. Concerning the proposed revisions to prohibitions against requiring the use of affiliates, MBA believes it would be sufficient for HUD to reaffirm that it may scrutinize discounts to ensure that they are *bona fide* rather than depriving borrowers of certain discounts altogether.

HUD proposes to change the definition of "required use" so an economic disincentive that a consumer can only avoid by purchasing a settlement service from an affiliated provider would be as problematic under RESPA as an incentive contingent on a consumer's choice of a particular provider. The proposed rule indicates that it is particularly directed to homebuilder affiliates but covers other affiliate situations.

MBA believes that the proposal in this area is too broad and may result in depriving borrowers of discounts that may indeed be *bona fide*. MBA believes it would be sufficient for HUD to indicate that under its current rules it may scrutinize discounts to assure they are *bona fide* rather than risking depriving borrowers of discounts altogether.

13. MBA generally supports HUD's efforts to update its RESPA regulations concerning mortgage servicing transfers and escrows and to explicitly recognize the applicability of ESIGN to RESPA.

MBA generally supports aspects of the proposed rule that would update the current RESPA regulations concerning the provision of the mortgage servicing disclosure statement within three days of a mortgage application and to remove outdated escrow provisions.

Specifically, these proposals would retain the initial mortgage servicing transfer notice but remove the requirement in the current rules that applicants for mortgage loans be provided a disclosure describing the lender's historical practice regarding the sale or transfer of servicing rights and sign the mortgage servicing transfer disclosure. The requirement for this aspect of the disclosure was removed by statute.[49] The proposal would also remove references to the phase-in period for the requirement of aggregate accounting for escrow accounts, which expired on October 12, 1997. Finally, the proposal also makes clear that that RESPA disclosures may be

[49] Economic Growth and Regulatory Paperwork Reduction Act of 1996 (Title II of the Omnibus Consolidated Appropriations Act, 1997) (Pub. L. 104-208, §2103(a), 110 Stat. 3009).

provided in electronic form as long as the consumer consents to receive them in accordance with the provisions of the ESIGN Act.

MBA supports those clarifications that will conform the rules to current law and practice and thereby alleviate confusion in the real estate finance industry and among the consumers it serves, thereby reducing costs to companies large and small.

14. MBA will evaluate HUD's legislative proposals as they are developed in accordance with key principles to ensure transparency and facilitate the mortgage market.

In its proposal, HUD announced that it intends to seek legislative changes to: (1) authorize the Secretary to impose civil money penalties for violations of section 4 of RESPA (the Settlement Statement), section 5 (the GFE and Special Information Booklet), section 6 (servicing), section 8 (kickbacks, referral fees and unearned fees), section 9 (title insurance), and section 10 (escrows); (2) require delivery of the HUD-1 to the borrower three days prior to closing; and (3) expand and make uniform the statute of limitations applicable to governmental and private actions under RESPA.

There currently are some provisions under Sections 6, 8, 9 and 10 of RESPA to enforce those provisions but no appreciable enforcement authority exists under Sections 4 and 5. Nevertheless, state and federal regulators under a variety of laws do enforce these requirements. For this reason, as the proposals are developed, MBA will evaluate them carefully in the context of other authorities, including those under TILA, and the following principles:

- Disclosures should be streamlined and greatly simplified and uniform throughout the nation; terms that are not consumer friendly should be replaced with terms that are simple and understandable;
- Disclosures should be binding as early in the process as possible, considering that during the mortgage process information is developed and circumstances can change;
- The timing of disclosures should not result in undue delay for borrowers to receive needed credit;
- The process should facilitate competition to lower costs as well as the provision of high quality services;
- Borrowers and regulators should be appropriately empowered to prevent abuses;
- Lenders should have a reasonable opportunity to cure errors prior to litigation; and
- Remedies for errors should not result in unduly increased costs for all consumers.

Additionally, as indicated, MBA has been working to ensure that the HUD-1 is available one day prior to closing as part of its uniform closing instructions project. This effort can help ensure that borrowers all have an opportunity to view their HUD-1 the day before settlement. MBA is concerned, however, that requiring a disclosure three days prior to closing could unduly slow settlements and delay the provision of needed financing.

15. MBA supports an implementation schedule that would link implementation of this rule to the Board's forthcoming TILA reform rule.

Although, MBA strongly prefers combination of the TILA and RESPA efforts, as indicated, MBA believes the objective of minimizing costs can, to some extent, be achieved through an extended implementation period if HUD goes forward independently. In such event, MBA recommends that the implementation period for new forms and any aspect of the rule that requires retooling, systems changes or other significant costs should extend to 18 months after the rule's effective date or until the end of the implementation period for the Board's new rule, whichever is later.

III. RESPONSES TO SPECIFIC QUESTIONS

The proposal states that HUD welcomes comments on all aspects of the proposal. In addition, HUD specifically requests comment on the following issues:

1. and 2. Whether a 12-month implementation period for the GFE is appropriate. (Section IV.D.) The proposed GFE, as well as the proposed HUD–1/1A Settlement Statement Forms.

As stated, MBA favors an implementation period for any new forms beginning 18 months after the effective date of a final RESPA rule or 18 months after the implementation period for the Board's expected TILA rule, whichever is later. Requiring the industry to implement changes to RESPA disclosures and then to later implement changes to TILA disclosures would result in large and duplicative costs for systems changes, training and staffing that would be borne ultimately by consumers.[50] A *seriatim* approach to reform by HUD and then the Board would also result in considerable confusion and additional costs on the part of both consumers and the industry

3. Possible additional ways to increase consumer understanding of adjustable rate mortgages.

MBA appreciates HUD's interest in increasing consumer understanding of adjustable mortgages. MBA would point out, however, that the Board, other financial regulators, associations and individual companies have put considerable effort into this area and, for this reason, MBA believes that rather than "reinvent the wheel", this is an area where the various efforts should be built upon in close coordination with the Board, which has the primary responsibility in this area.

To the point, MBA believes that the TILA is the proper law to ensure that borrowers understand the nature of their credit terms and costs under their mortgage loans. MBA believes, for this reason, that RESPA reform pending Board involvement should be confined to closing costs. TILA and RESPA reform should converge so that borrowers have information on both credit and closing.

Notably, the Board has provided information on adjustable or variable rate mortgages under TILA. The Board has relatively recently updated its Consumer Handbook on Adjustable Rate-

[50] *See* page 3-15 of the Regulatory Impact Analysis and Initial Regulatory Flexibility Analysis: Proposed Rule to Improve the Process of Obtaining Mortgages and Reduce Consumer Costs (March 14, 2008).

Mortgages (CHARM booklet) to reflect concerns about interest-only and payment option ARMs.[51] Pursuant to the Board's requirements, creditors are now required to provide information on the terms of adjustable loans.[52]

Additionally, the federal financial regulators have provided recent guidance on nontraditional mortgage products and subprime loans along with illustrations to help borrowers understand payment changes over the lives of loans so they can shop and compare mortgages.

MBA has also developed *The Simple Facts* and *the Simple Calculator,* which is available on its Home Loan Learning Center at www.homeloanlearningcenter.com. These tools explain and then demonstrate to borrowers how to predict present and future payments on adjustable rate mortgages. *The Simple Facts* and the interactive calculator have received enormous attention from those shopping for mortgages garnering approximately 1.5 million "hits" over the last year. MBA member companies also have invested considerable funds in the development of a wide range of educational materials and co-branded with MBA on these efforts.

Since disclosures regarding ARM loans raise different concerns from matters related to settlement costs under RESPA, it is an important that a consumer both understand the terms of credit as well as their settlement costs. However, for a range of reasons, including the Board's preeminence in this area, MBA strongly believes that HUD should follow the Board's lead in this area.

4. Whether the proposed requirements for completing and delivering the Addendum to the HUD–1/1A, including the mandatory reading of the Closing Script by the party conducting the closing to the borrower(s), are the best methods for assuring that borrower(s) understand their loan terms and the differences between the GFE and the HUD–1/1A.

As mentioned earlier in this comment letter, MBA does not believe that the closing script is well advised. Instead, MBA believes its implementation would raise legal concerns, be too costly, provide little benefit to the consumer at closing and raise significant operational concerns. Moreover, the script itself covers both loan terms and settlement costs and as such should await comprehensive RESPA-TILA reform, if it is to be implemented at all.

Once again, MBA believes it would beneficial to the consumer if the HUD-1 and GFE were truly comparable and if the complete HUD-1 were delivered to the consumer the day before closing so he or she may compare it to the GFE. It is, appropriately, the responsibility of the mortgage lender or mortgage broker to explain any cost differences between estimated and final costs. The closing agent should not be forced to step into the shoes of the lender and provide this costly and time consuming closing script.

As indicated, MBA is working with the American Land Title Association and the American Escrow Association to develop uniform closing instructions which in their present draft would assure a complete HUD-1 the day before closing.

---

[51] The CHARM booklet was updated by the Board on December 26, 2006. The current booklet may be viewed at the following Web address: <http://www.federalreserve.gov/pubs/arms/arms_english.htm>.
[52] 73 Fed. Reg. 30997 (May 29, 2008).

5. Whether a provision should be added to the RESPA regulations allowing a loan originator, for a limited time after closing, to address the failure to comply with tolerances under the proposed GFE requirements, and if so, how should such a provision be structured? (Section IV.E. 10) Would such a provision be useful, and if so, what would be the appropriate time frame for finding and refunding excess charges? Could such a provision be abused, and therefore harmful to consumers? Would the ability of prosecutors to exercise enforcement discretion obviate the need for such a provision?

MBA strongly believes that a provision should be added to the regulations to allow lenders and mortgage brokers a limited time after closing to address the failure to comply with the tolerances as suggested above. Such procedures, in MBA's view, would be extremely useful and offer prompt relief to a borrower without costly litigation. If such a provision were included in the final rule, there should be sufficient time allotted to the lender or broker to review and correct the error. MBA would support a period of at least 90 days, after which enforcement or other action could be taken.

MBA does not believe such a provision would be abused. It would provide a short finite period during which the lender or mortgage broker has every incentive to correct any errors to eliminate the possibility of enforcement and/or legal action. The ability of prosecutors to exercise enforcement discretion would not obviate the need for this provision. Even in the best of circumstances, the attention of enforcement officials to particular matters will come too late to provide borrowers the prompt corrective action that rational cure provisions such as these could provide.

6. Proposed methods for calculating average cost prices and on any alternative methods that should be permitted (Section IV.H.), specifically, how to define ''class of transactions.'' Comments are also invited on alternative average cost pricing methods and other pricing methods that benefit consumers and are based on factors that would lead to charges to the consumer and disclosure of such charges that are easily calculated, verified, and enforced, but difficult to manipulate in an abusive manner. Such factors could include: (a) Experience over a period of time that is longer or shorter than that currently provided in the proposed rule; (b) Prices for the service among the usual third party providers upon which the lender or other settlement service usually relies; (c) General industry practices; and (d) A reasonable projection of future costs.

As detailed above, MBA supports the proposal, with some clarifications and modifications, so lenders and brokers can use average cost pricing for settlement services to benefit consumers. MBA has long sought explicit clarification of the legality of average cost pricing, to facilitate pricing arrangements benefiting consumers, reduce operational and compliance costs, and to streamline operations. Average cost pricing methodologies permit tiered pricing arrangements where the average prices for third party services purchased in volume are lower than the prices for services purchased individually. Explicitly facilitating these arrangements reduces legal risks resulting from requirements for precise price calculations that serve to increase costs for consumers.

MBA requests that the final rule clarify that lenders may assign any “averaging” period as a “rolling,” rather than a “static” period. Imposing a static six-month averaging period would, in effect, create “fee caps” that would severely hamper industry operations in times of inflation or excess demand. A “rolling” period, however, would allow lenders to more accurately reflect market prices in the provision of settlement services, because market shifts would be allowed to be incorporated slowly into current pricing models.

HUD should afford lenders maximum flexibility to define “class of transaction.” We note that the market is dynamic and that any definition supplied by regulation will do nothing but calcify a classification that is likely to become obsolete in a short time. We also note that all public and private players involved in the administration and supply of mortgage capital – government, GSEs, investors, etc. – are currently restructuring operations and rethinking product categories in light of recent market events. Any definition that HUD adopts will become imprecise, even unusable, as market segments are redefined, new product categories introduced, and new regulations adopted.

For these reasons, the lender should have latitude to broadly define a class based on type of service, type of property, loan type, and geographic region. The standard should be “a reasonably similar class of transactions” as defined by the lender. This approach would give the lender discretion to identify transactions such as valuations in a particular county or the subset of semi-detached homes there.

This flexibility would adequately protect consumers. The rule would still provide guidance to assure that average cost pricing is reasonably based.

As mentioned before, MBA suggests that the rule include another approach or approaches that would be less restrictive and facilitate entry into average cost pricing for other firms to benefit consumers. Some MBA members commenting on this proposed rule will be offering alternatives. Under one approach suggested, a firm would charge the average cost for a class of transactions and a prospective averaging period during which all transactions in the class would be charged a projected average price. As long as the total amounts charged on transactions in the class do not exceed the amount paid to the service providers for such transactions by more than a small amount (e.g., by more than 10 percent, the average price would be permissible).

MBA requests further discussions on the documentation requirements that would be imposed on lenders under any final rule. The current proposal is scant on guidance that defines the precise documentation that HUD would require to demonstrate that the pricing is “accurate”. MBA questions that standard. MBA respectfully requests that, if this aspect of this rule is finalized, HUD meet with the industry to craft a statement of policy that carefully sets forth documentation requirements in a way that ensures that lenders are not discouraged from using average cost pricing because of documentation requirements.

7. Whether the proposed change in the definition of ‘‘required use’’ will better serve the purposes of RESPA and whether further improvements could be made in the definition to accomplish the intent of both the affiliated business exemption in section 8 and the prohibition in section 9 on the required use of a title company. (Section IV.I.)

HUD proposes to change the definition of "required use" so an economic disincentive that a consumer can only avoid by purchasing a settlement service from an affiliated provider would be as problematic under RESPA as an incentive contingent on a consumer's choice of a particular provider. The proposed rule indicates that this provision is particularly directed to homebuilder affiliates but covers other affiliate situations.

MBA believes that this proposed amendment is a well-intentioned attempt to further the goals of RESPA. However, MBA believes that it would be sufficient for HUD to indicate that under its current rules HUD may scrutinize discounts and other special pricing or cost incentives to assure they are *bona fide*.

The reason for MBA's opposition to this aspect of the rule is that it has the real potential of precluding settlement service providers from offering *any* discounts, concessions, or benefits whatsoever. The amendments, as proposed, are too broad, and could be read to impose a penalty every time a provider offers a "special discount program" but withholds it from any consumer, even under fair and reasonable circumstances. In such an environment, a settlement service provider would not, for example, innovate to establish any conditions, stipulations, or restrictions around discount programs, because such conditions would run the risk of being interpreted as "disincentives" under the meaning of the proposed rule. "Conditions" for a benefit, and "disincentives," or "penalties" are fundamentally different concepts, but they would be indistinguishable in the RESPA context, as proposed. Rather than face these risks, providers would simply forego or eliminate these programs altogether, at great detriment to consumers, and contrary to the broad purpose of RESPA itself.

Again, MBA believes it would be sufficient for HUD to indicate that under its current rules, the Department may scrutinize discounts to assure they are *bona fide* and proper.

8. With respect to the revised definition of ''Good Faith Estimate'' set forth in the proposed rule language at 24 CFR 3500.2, is the standard set forth sufficient to ensure that good faith estimates will be filled out consistently by all loan originators in a particular community?

As indicated, while MBA does not concur in either the form of the GFE or the accompanying requirements proposed by HUD, the definition of "Good faith estimate or GFE" appears appropriate. The proposed rule provides that a GFE means "an estimate of settlement charges a borrower is likely to incur, as a dollar amount, and related loan information, based upon common practice and experience of the locality of the mortgaged property, provided on the form prescribed in Appendix C to this part that is prepared in accordance with the requirements at 3500.7 and the Instructions to Appendix A of this part." By incorporating the instructions – assuming they are clear as finalized – and requiring knowledge of practice and the experience of the locality, the definition should result in GFE forms being filled out consistently.

9. Should the Section 6 disclosure on transfer of servicing that is required under RESPA be included on the GFE?

No. In the interest of ensuring that the borrower is focused on what is most important on the GFE – the settlement costs – MBA strongly believes that the form should be directed to the best presentation of these costs and not cluttered with extrinsic information. While, the information provided in the transfer of servicing disclosure may be relevant to some borrowers, it is not directly relevant to the borrower's costs and should be presented in a separate disclosure. As stated earlier, the new GFE already contains too much information that may confuse the borrower.

10. Should a loan originator be required to include a ''no cost loan'' on the trade-off chart on page 3 of the GFE as one of the alternative loans if it is not the loan for which the GFE is written?

No. MBA does not believe a comparison of "no cost loan" must be included in the GFE on page three. MBA believes information on alternative products could be included in additional pamphlets and/or on the shopping form prior to the application stage. It does not believe the trade-off chart should be included on the GFE.

IV. CONCLUSION

Again, MBA greatly appreciates the opportunity to provide comments to HUD on the subject rules. The Mortgage Bankers Association supports efforts to make the mortgage process simpler, clearer and more transparent for consumers. Doing so will empower consumers and help fight predatory lending. MBA does not believe the RESPA rule released by HUD is the right approach.

To ensure that we achieve a cohesive and improved disclosure methodology that is permanent, and protective of consumers, HUD and the Board must work together to reform their respective disclosures under RESPA and TILA in a comprehensive and complementary manner. Though inadvisable, if HUD goes forward independently, the rule should be pared down considerably and implemented on the same schedule as the Board's.

MBA looks forward to working with HUD and the Board to implement final regulations. For questions or further information, please do not hesitate to contact Ken Markison, Associate Vice President and Regulatory Counsel, at kmarkison@mortgagebankers.org or (202) 557-2930.

Sincerely,

Jonathan L. Kempner

Jonathan L. Kempner
President and Chief Executive Officer
Mortgage Bankers Association

Appendix A – Joint Combined RESPA-TILA Forms

Appendix B – MBA RESPA Forms

Appendix C – Consumer Shopping Tool

Appendix D – Mortgage Lenders and Mortgage Brokers

Appendix E – Summary of RESPA and the HUD Proposed Rule

Combined Good Faith Estimate of Settlement Costs and Truth in Lending Act Disclosure

Lender Name and Address	Mortgage Broker Name and Address	File Number
Buyer/Borrower Name and Address	**Property Address**	**Date GFE Provided**

Loan Description

Proposed Mortgage Loan Amount $ ______ ☐ Conventional ☐ FHA ☐ VA ☐ FSA/RHS

About this Combined Good Faith Estimate of Settlement Costs and Truth in Lending Act Disclosure

This disclosure contains a Good Faith Estimate of your settlement costs on page 1 and Truth in Lending disclosures of your loan's terms and costs on page 2. These are estimates based on information you provided. If your loan is approved, the estimated amounts may change based upon conditions discovered by the Lender in underwriting, or, if, among other things, you request a change in the loan amount, term, type of loan or lock your interest rate at a different time or on different terms.

Mortgage Loan Settlement Charges to Be Paid by You

The line numbers below correspond to the item numbers on the HUD-1 Settlement Statement you will receive at loan closing. You should compare this Disclosure with the HUD-1 Statement you receive at closing to determine whether any changes have occurred and the reason for any changes. Call your lender or mortgage broker with any questions.

Prepaid Finance Charges of $______ are included in the Settlement Charges shown below and are marked with an †. Your Prepaid Finance Charges together with interest and other lender-required loan related charges you will pay after closing (such as mortgage insurance premiums, if applicable) are shown on your Truth in Lending Disclosure as the Finance Charge.

800. Lender Origination Charges† (Line 801 plus 802 plus 803 less 804) $ ______

- **801 Lender Charges** for loan origination and other Lender services $ ______
- **802 Discount Points** paid to reduce your interest rate ______% $ ______
- **803 Rate Lock** paid to lock in your interest rate ______% $ ______
  (If you lock in your rate at a different time or on different terms, the lock fee may change. See your Rate Lock Agreement for additional details.)
- **804 Lender Credit** for your choosing a higher interest rate ($ ______)

900. Mortgage Broker Origination Charges† (Line 901 less 902) $ ______

- **901 Total Broker Compensation** for Broker's services $ ______
- **902 Amounts Paid by Lender** to Broker on your behalf ($ ______)

Important Information When Using a Mortgage Broker. If you have agreed that the Lender may pay the Broker on your behalf part of the Total Broker Compensation (line 902), you will pay this amount through your loan's interest rate and monthly payment. Your Mortgage Broker is required to enter into a Mortgage Broker Fee Agreement with you, which you should review.

1000. Credit Report and Pre-Closing Appraisal and Inspection Charges $ ______
For credit reports, appraisals, property valuations, inspections, tax or flood determinations.

1100. Title and Closing Charges (Sum of lines 1101–1105) $ ______

- **1101 Title Charges** $ ______
  (Lender's title insurance, survey, title examination, notary services, abstract or title search, documentation preparation)
- **1102 Owner's Title Insurance** with title coverage of $ ______ $ ______
- **1103 Closing Agent** to attend closing† $ ______
- **1104 Services Required** by closing agent but not by Lender $ ______
- **1105 Closing Agent Services** required by Lender† $ ______

1200. Government Recording & Transfer Charges $ ______

1300. Items Required by Lender to be Paid in Advance (Sum of lines 1301–1306) $ ______

- **1301 Daily Interest Charges**† from the day of your settlement until the first day of your normal payment cycle, estimated at $ ______ per day for 30 days. $ ______
- **1302 Taxes** $ ______
- **1303 Hazard Insurance Premium** $ ______
- **1304 Flood Insurance Premium** $ ______
- **1305 Mortgage Insurance Premium**† $ ______
- **1306 Other (Specify)** ______ $ ______

1400. Initial Escrow Deposit† for escrow account to pay taxes, insurance, and other charges $ ______

☐ Mortgage insurance premium reserves of $ ______ are included in this amount

1500. Other Mortgage Loan Settlement Charges† such as life-of-loan flood and tax services, lender's attorney's fees, wire transfer and other miscellaneous services not covered above $ ______

1600. Total Estimated Mortgage Loan Settlement Charges $ ______

1700. Mortgage Loan Settlement Charges to be Paid by Borrower at Settlements $ ______
(Line 1600 less 1701 less 1702 less 1703)

- **1701 Amounts Paid by Borrower Before Closing** ($ ______)
- **1702 Amounts from Lender or Mortgage Broker** ($ ______)
- **1703 Settlement Charges Paid by Seller** ($ ______)

Note: In a purchase transaction the amount you will pay at settlement will be affected by whether the seller has agreed to pay any of the settlement charges, by the amount of your down payment, and by the amount you have already paid as a deposit. Settlement charges paid by seller (line 1703) will appear on the HUD-1 Settlement Statement.

You are entitled to shop for a limited number of settlement services. Check with your lender about the services you may shop for. These services and their charges are included in your Mortgage Loan Settlement Charges shown on line 1700 above; if you shop for these services, however, these amounts may change.

Combined Good Faith Estimate of Settlement Costs and Truth in Lending Act Disclosure

Lender Name and Address	Mortgage Broker Name and Address	File Number
Buyer/Borrower Name and Address	**Property Address**	**Date GFE Provided**

Loan Description

Proposed Mortgage Loan Amount $ ______ ☐ **Conventional** ☐ **FHA** ☐ **VA** ☐ **FSA/RHS**

About this Combined Good Faith Estimate of Settlement Costs and Truth in Lending Act Disclosure

This disclosure contains a Good Faith Estimate of your settlement costs on page 1 and Truth in Lending disclosures of your loan's terms and costs on page 2. These are estimates based on information you provided. If your loan is approved, the estimated amounts may change based upon conditions discovered by the Lender in underwriting, or, if, among other things, you request a change in the loan amount, term, type of loan or lock your interest rate at a different time or on different terms.

Annual Percentage Rate	Finance Charge	Amount Financed	Total of Payments
The cost of your loan as a yearly rate including interest as shown in the schedule below and other finance charges	The dollar amount the loan will cost you including Prepaid Finance Charges shown on page 1	Your Loan Amount less the Prepaid Finance Charges shown on page 1	The amount you will have paid after you have made all payments as scheduled
______ %	$ ______	$ ______	$ ______

Schedule of Interest Rates, Balances and Payments. Your loan has a term of ______ years, repayable as follows:

Interest Rate	Beginning Principal Balance	Number of Payments	Amount of Payment	Payments Due Monthly Beginning

Payment Increases. If checked below, your loan has features that may cause your payments to increase. Consider carefully whether you can afford to make the higher payments. Do not assume that you will be able to refinance to lower your payments.

☐ **Adjustable Rate:** Your loan contains an adjustable rate feature. See the Truth in Lending Act disclosures provided to you earlier about your adjustable rate feature. If the index used to adjust your interest rate increases, your actual interest rates and payments may be higher than shown above, but your interest rate will not increase above ______ % and your payments will not increase above $ ______.

☐ **Interest Only:** The initial monthly payments cover only the interest on your loan amount. If you pay only interest due, after a certain period of time, your monthly payment will increase because you must pay back principal and interest.

☐ **Negative Amortization:** You may be allowed to make payments on your loan that do not cover all of the interest owed. Unpaid interest owed will be added to your principal balance, increasing the amount that you must repay, but your principal balance will not increase above $ ______.

☐ **Balloon Payment:** Your loan must be paid off in one large final payoff payment of up to $ ______ after ______ years.

☐ **Demand Feature:** The entire amount owed on this loan is payable on demand. This means that the lender may require you to pay off your loan in full at any time. All disclosures are based on an assumed maturity of one year.

Mortgage Insurance.

☐ **You will be required** to pay the cost of mortgage insurance for your loan. Any amounts you paid at or before closing are disclosed on page 1 and any costs you will pay after closing are included in the payments shown above.

☐ **You will not be required** to pay mortgage insurance for your loan.

Payments for Taxes and Insurance. The payments shown above do not include amounts you will pay for real estate taxes and hazard insurance, estimated to be an additional $ ______ per month. This amount is subject to change throughout the term of the loan.

☐ **Your loan provides** for an escrow account from which the lender will pay your taxes and insurance. Page 1 shows your initial escrow deposit. Monthly escrow payments will be required. You will receive an escrow account statement no later than 45 days after settlement.

☐ **Your loan does not provide** for an escrow account. You are responsible for paying taxes and insurance when due.

Prepayment.

☐ **Your loan has a prepayment charge.** If you pay off during the first [time period], you may have to pay a charge of up to $ ______.

☐ **Your loan has no prepayment charge.** If you pay off early, you will not have to pay a prepayment charge.

Hazard and Flood Insurance. You may obtain the required insurance from anyone you want that is acceptable to the lender.

Late Charge. If a payment is late, you will be charged $ ______.

Security. If you obtain this loan, the lender will have a mortgage on your home. You could lose your home, and any money you have put into it, if you do not meet your obligations under the mortgage. You are not required to obtain this loan merely because you have received these disclosures or have signed a loan application.

Assumption. Someone buying your house:

☐ **may, subject to conditions, be allowed** to assume the remainder of your mortgage on the original terms

☐ **will not be allowed** to assume the remainder of your mortgage on the original terms.

Combined HUD-1 Statement of Settlement Costs and Final Truth in Lending Act Disclosure

Lender Name and Address		**Mortgage Broker Name and Address**	
Buyer/Borrower Name and Address		**Seller Name and Address**	
Settlement Agent		**Property Address**	
Settlement Date	**Loan Number**	**File Number**	**MI Number**

Loan Description

Proposed Mortgage Loan Amount $ ________ ☐ Conventional ☐ FHA ☐ VA ☐ FSA/RHS

About this Combined HUD-1 Statement of Settlement Costs and Truth in Lending Act Disclosure

This disclosure contains a summary of the borrower's and seller's transaction on page 1, your settlement costs on page 2 and the final Truth in Lending Act disclosures of your loan's terms and costs on page 3. You can compare the estimated settlement costs on your Combined Good Faith Estimate of Settlement Costs and Truth in Lending Act Disclosure provided to you earlier to the final settlement costs on page 2.

A. Summary of Borrower's Transaction	B. Summary of Seller's Transaction
100. **Gross Amount Due from Borrower**	400. **Gross Amount Due to Seller**
101. Contract Sales Price	401. Contract sales price
102. Personal Property	402. Personal property
103. Net Settlement Charges to be Paid by Borrower (line 1700)	403.
104.	404.
105.	405.
Adjustments for items paid by seller in advance	**Adjustments for items paid by seller in advance**
106. City/town Taxes to	406. City/town taxes to
107. County Taxes to	407. County Taxes to
108. Assessments to	408. Assessments to
109.	409.
110.	410.
111.	411.
112.	412.
120. **Gross Amount Due from Borrower**	420. **Gross Amount Due to Seller**
200. **Amounts Paid by or on behalf of Borrower**	500. **Reduction in Amount Due to Seller**
201. Deposit or earnest money	501. Excess deposit (see instructions)
202. Principal amount of new loan(s)	502. Net Settlement Charges to be Paid by Seller (line 1700)
203. Existing loan(s) taken subject to	503. Existing loan(s) taken subject to
204.	504. Payoff of first mortgage loan
205.	505. Payoff of second mortgage loan
206.	506.
207.	507.
208.	508.
209.	509.
Adjustments for items unpaid by seller	**Adjustments for items unpaid by seller**
210. City/town taxes to	510.City/town taxes to
211. County taxes to	511. County taxes to
212. Assessments to	512. Assessments to
213.	513.
214.	514.
215.	515.
216.	516.
217.	517.
218.	518.
219.	519.
220. **Total Paid By/For Borrower**	520. **Total Reduction Amount Due Seller**
300. **Cash at Settlement From/To Borrower**	600. **Cash at Settlement To/From Seller**
301. **Gross Amount Due from Borrower (line 120)**	601. **Gross Amount Due to Seller (line 420)**
302. Less Amounts paid By/For Borrower (line 220)	602. Less Reductions in Amount Due Seller (line 520)
303. Cash ☐ **From** ☐ **To** Borrower	603. Cash ☐ **To** ☐ **From** Seller

Combined HUD-1 Statement of Settlement Costs and Final Truth in Lending Act Disclosure

Lender Name and Address	**Mortgage Broker Name and Address**
Buyer/Borrower Name and Address	**Property Address**

C. Settlement Charges

Note: Prepaid Finance Charges of $________ are included in the Settlement Charges shown below and are marked with an †. Your Prepaid Finance Charges together with interest and other lender-required loan related charges you will pay after closing (such as mortgage insurance premiums, if applicable) are shown on your Truth in Lending Disclosure as the Finance Charge.

C-1. Real Estate Sale Settlement Charges	**Column A** Paid From Borrower's Funds at Settlement	**Column B** Paid From Seller's Funds at Settlement
700. Total Real Estate Commission — sales price $ ________ at ______% A $ ________		
Division of Commission in 700 is as follows:		
701. $ ________ to ________		
702. $ ________ to ________		
703. Real Estate Commission on line 700 paid at settlement	$ ________	$ ________
704. Other (specify) ________	$ ________	$ ________
C-2. Other Charges for Transactions Not Required by Broker or Lender		
750. Borrower's Attorney's Fee	$ ________	$ ________
751. Other (specify) ________	$ ________	$ ________
C-3. Mortgage Loan Settlement Charges to Be Paid by You		
800. Lender Origination Charges† (Line 801 plus 802 plus 803 less 804)	$ ________	$ ________
801. Lender Charges for loan origination and other Lender services $ ________		
802. Discount Points paid to reduce your interest rate ______% / $ ________		
803. Rate Lock paid to lock in your interest rate ______% / $ ________		
804. Lender Credit for your choosing a higher interest rate ($ ________)		
900. Mortgage Broker Origination Charges† (Line 901 less 902)	$ ________	$ ________
901. Total Broker Compensation for Broker's services $ ________		
902. Amounts paid by Lender to Broker on your behalf ($ ________)		
1000. Credit Report and Pre-Closing Appraisal and Inspection Charges (Appraisal, Credit Report, Tax or Flood Determination, Pre-closing Inspection, Pest Inspection)	$ ________	$ ________
1100. Title and Closing Charges (Sum of lines 1101–1104)	$ ________	$ ________
1101. Title Charges (Lender's Title insurance, Survey, Title examination, Notary services, Abstract or title search, Documentation preparation) $ ________		
1102. Owner's Title Insurance (Coverage $ ________) $ ________		
1103. Closing agent to attend closing† $ ________		
1104. Services required by the closing agent but not by the lender $ ________		
1105. Closing agent services required by Lender† $ ________		
1200. Government Recording and Transfer Charges (Sum of lines 1201–1204)	$ ________	$ ________
1201. Recording fees Deed: $ ________ Mortgage: $ ________ Releases: $ ________		
1202. City/county tax stamps Deed: $ ________ Mortgage: $ ________		
1203. State tax stamps Deed: $ ________ Mortgage: $ ________		
1204. Other government recording and transfer costs $ ________		
1300. Items Required by Lender to be Paid in Advance (Sum of lines 1301–1306)	$ ________	$ ________
1301. Daily Interest Charges from ______% to ______% at $ ______ per day† $ ________		
1302. Taxes $ ________		
1303. Hazard insurance premium for ______months at $ ______ per month $ ________		
1304. Flood insurance premium for ______months at $ ______ per month $ ________		
1305. Mortgage insurance premiums for ______months at $ ______ per month† $ ________		
1306. Other (specify) ________ $ ________		
1400. Initial Escrow Deposit for escrow account to pay taxes, insurance premiums and other charges (including mortgage insurance premiums† of $ ________)	$ ________	$ ________
1500. Other Mortgage Loan Settlement Charges† required by lender (e.g., life-of loan flood service, wire transfers, lender's attorney's fee, life-of loan tax service, other miscellaneous services not shown above)	$ ________	$ ________
1600. Total Mortgage Loan Settlement Charges (Sum of amounts in Columns A and B)	$ ________	$ ________
1700. Net Settlement Charges to be Paid by Borrower at Closing (Line 1600 less 1701 less 1702 less 1703)(also entered on lines 103 and 502)	$ ________	$ ________
1701. Amounts Paid by Borrower before Closing $ ________ (specify item numbers) ________		
1702. Amounts from Lender or Mortgage Broker $ ________		
1703. Settlement Charges Paid by Seller (specify item numbers)	$ ________	

Borrower: compare the amounts for each category (including the amounts the seller has agreed to pay, if any) with the amounts for each category shown on your Good Faith Estimate of Settlement Costs.

Combined HUD-1 Statement of Settlement Costs and Final Truth in Lending Act Disclosure

Lender Name and Address	Mortgage Broker Name and Address
Buyer/Borrower Name and Address	**Property Address**

Annual Percentage Rate	Finance Charge	Amount Financed	Total of Payments
The cost of your loan as a yearly rate including interest as shown in the schedule below and other finance charges	The dollar amount the loan will cost you including Prepaid Finance Charges shown on page 2	Your Loan Amount less the Prepaid Finance Charges shown on page 2	The amount you will have paid after you have made all payments as scheduled
_______ %	$ _______	$ _______	$ _______

Schedule of Interest Rates, Balances and Payments. Your loan has a term of _______ years, repayable as follows:

Interest Rate	Beginning Principal Balance	Number of Payments	Amount of Payment	Payments Due Monthly Beginning

Payment Increases. If checked below, your loan has features that may cause your payments to increase. Consider carefully whether you can afford to make the higher payments. Do not assume that you will be able to refinance to lower your payments.

☐ **Adjustable Rate:** Your loan contains an adjustable rate feature. See the Truth in Lending Act disclosures provided to you earlier about your adjustable rate feature. If the index used to adjust your interest rate increases, your actual interest rates and payments may be higher than shown above, but your interest rate will not increase above _______ % and your payments will not increase above $ _______.

☐ **Interest Only:** The initial monthly payments cover only the interest on your loan amount. If you pay only interest due, after a certain period of time, your monthly payment will increase because you must pay back principal and interest.

☐ **Negative Amortization:** You may be allowed to make payments on your loan that do not cover all of the interest owed. Unpaid interest owed will be added to your principal balance, increasing the amount that you must repay, but your principal balance will not increase above $ _______.

☐ **Balloon Payment:** Your loan must be paid off in one large final payoff payment of up to $ _______ after _______ years.

☐ **Demand Feature:** The entire amount owed on this loan is payable on demand. This means that the lender may require you to pay off your loan in full at any time. All disclosures are based on an assumed maturity of one year.

Mortgage Insurance.

☐ **You will be required** to pay the cost of mortgage insurance for your loan. Any amounts you paid at or before closing are disclosed on page 2 and any costs you will pay after closing are included in the payments shown above.

☐ **You will not be required** to pay mortgage insurance for your loan.

Payments for Taxes and Insurance. The payments shown above do not include amounts you will pay for real estate taxes and hazard insurance, estimated to be an additional $ _______ per month. This amount is subject to change throughout the term of the loan.

☐ **Your loan provides** for an escrow account from which the lender will pay your taxes and insurance. Page 2 shows your initial escrow deposit. Monthly escrow payments will be required. You will receive an escrow account statement no later than 45 days after settlement.

☐ **Your loan does not provide** for an escrow account. You are responsible for paying taxes and insurance when due.

Prepayment.

☐ **Your loan has a prepayment charge.** If you pay off during the first [time period], you may have to pay a charge of up to $ _______.

☐ **Your loan has no prepayment charge.** If you pay off early, you will not have to pay a prepayment charge.

Hazard and Flood Insurance. You may obtain the required insurance from anyone you want that is acceptable to the lender.

Late Charge. If a payment is late, you will be charged $ _______.

Security. If you obtain this loan, the lender will have a mortgage on your home. You could lose your home, and any money you have put into it, if you do not meet your obligations under the mortgage. You are not required to obtain this loan merely because you have received these disclosures or have signed a loan application.

Assumption. Someone buying your house:

☐ **may, subject to conditions, be allowed** to assume the remainder of your mortgage on the original terms

☐ **will not be allowed** to assume the remainder of your mortgage on the original terms.

Borrower Signature Date Borrower Signature Date

Good Faith Estimate of Settlement Costs

Lender Name and Address	Mortgage Broker Name and Address	File Number
Buyer/Borrower Name and Address	**Property Address**	**Date GFE Provided**

Loan Description

Proposed Mortgage Loan Amount $ ______ ☐ Conventional ☐ FHA ☐ VA ☐ FSA/RHS

About this Good Faith Estimate of Settlement Costs

This disclosure contains a Good Faith Estimate of your settlement costs on page 1. These are estimates based on information you provided. If your loan is approved, the estimated amounts may change based upon conditions discovered by the Lender in underwriting, or, if, among other things, you request a change in the loan amount, term, type of loan or lock your interest rate at a different time or on different terms.

Mortgage Loan Settlement Charges to Be Paid by You

The line numbers below correspond to the item numbers on the HUD-1 Settlement Statement you will receive at loan closing. You should compare this Disclosure with the HUD-1 Statement you receive at closing to determine whether any changes have occurred and the reason for any changes. Call your lender or mortgage broker with any questions.

Prepaid Finance Charges of $______ are included in the Settlement Charges shown below and are marked with an †. Your Prepaid Finance Charges together with interest and other lender-required loan related charges you will pay after closing (such as mortgage insurance premiums, if applicable) are shown on your Truth in Lending Disclosure as the Finance Charge.

800. Lender Origination Charges† (Line 801 plus 802 plus 803 less 804) $ ______

801 Lender Charges for loan origination and other Lender services $ ______

802 Discount Points paid to reduce your interest rate ______% $ ______

803 Rate Lock paid to lock in your interest rate ______% $ ______

(If you lock in your rate at a different time or on different terms, the lock fee may change. See your Rate Lock Agreement for additional details.)

804 Lender Credit for your choosing a higher interest rate ($ ______)

900. Mortgage Broker Origination Charges† (Line 901 less 902) $ ______

901 Total Broker Compensation for Broker's services $ ______

902 Amounts Paid by Lender to Broker on your behalf ($ ______)

Important Information When Using a Mortgage Broker. If you have agreed that the Lender may pay the Broker on your behalf part of the Total Broker Compensation (line 902), you will pay this amount through your loan's interest rate and monthly payment. Your Mortgage Broker is required to enter into a Mortgage Broker Fee Agreement with you, which you should review.

1000. Credit Report and Pre-Closing Appraisal and Inspection Charges $ ______

For credit reports, appraisals, property valuations, inspections, tax or flood determinations.

1100. Title and Closing Charges (Sum of lines 1101–1105) $ ______

1101 Title Charges $ ______

(Lender's title insurance, survey, title examination, notary services, abstract or title search, documentation preparation)

1102 Owner's Title Insurance with title coverage of $ ______ $ ______

1103 Closing Agent to attend closing† $ ______

1104 Services Required by closing agent but not by Lender $ ______

1105 Closing Agent Services required by Lender† $ ______

1200. Government Recording & Transfer Charges $ ______

1300. Items Required by Lender to be Paid in Advance (Sum of lines 1301–1306) $ ______

1301 Daily Interest Charges† from the day of your settlement until the first day of your normal payment cycle, estimated at $ ______ per day for 30 days. $ ______

1302 Taxes $ ______

1303 Hazard Insurance Premium $ ______

1304 Flood Insurance Premium $ ______

1305 Mortgage Insurance Premium† $ ______

1306 Other (Specify) ______ $ ______

1400. Initial Escrow Deposit† for escrow account to pay taxes, insurance, and other charges $ ______

☐ Mortgage insurance premium reserves of $ ______ are included in this amount

1500. Other Mortgage Loan Settlement Charges† such as life-of-loan flood and tax services, lender's attorney's fees, wire transfer and other miscellaneous services not covered above $ ______

1600. Total Estimated Mortgage Loan Settlement Charges $ ______

1700. Mortgage Loan Settlement Charges to be Paid by Borrower at Settlements $ ______

(Line 1600 less 1701 less 1702 less 1703)

1701 Amounts Paid by Borrower Before Closing ($ ______)

1702 Amounts from Lender or Mortgage Broker ($ ______)

1703 Settlement Charges Paid by Seller ($ ______)

Note: In a purchase transaction the amount you will pay at settlement will be affected by whether the seller has agreed to pay any of the settlement charges, by the amount of your down payment, and by the amount you have already paid as a deposit. Settlement charges paid by seller (line 1703) will appear on the HUD-1 Settlement Statement.

You are entitled to shop for a limited number of settlement services. Check with your lender about the services you may shop for. These services and their charges are included in your Mortgage Loan Settlement Charges shown on line 1700 above; if you shop for these services, however, these amounts may change.

HUD-1 Statement of Settlement Costs

Lender Name and Address	**Mortgage Broker Name and Address**
Buyer/Borrower Name and Address	**Seller Name and Address**
Settlement Agent	**Property Address**

Settlement Date	**Loan Number**	**File Number**	**MI Number**

Loan Description

Proposed Mortgage Loan Amount $ ________ ☐ **Conventional** ☐ **FHA** ☐ **VA** ☐ **FSA/RHS**

About this HUD-1 Statement of Settlement Costs

This disclosure contains a summary of the borrower's and seller's transaction on page 1 and your settlement costs on page 2. You can compare the estimated settlement costs on your Combined Good Faith Estimate of Settlement Costs and Truth in Lending Act Disclosure provided to you earlier to the final settlement costs on page 2.

A. Summary of Borrower's Transaction	B. Summary of Seller's Transaction
100. **Gross Amount Due from Borrower**	400. **Gross Amount Due to Seller**
101. Contract Sales Price	401. Contract sales price
102. Personal Property	402. Personal property
103. Net Settlement Charges to be Paid by Borrower (line 1700)	403.
104.	404.
105.	405.
Adjustments for items paid by seller in advance	**Adjustments for items paid by seller in advance**
106. City/town Taxes to	406. City/town taxes to
107. County Taxes to	407. County Taxes to
108. Assessments to	408. Assessments to
109.	409.
110.	410.
111.	411.
112.	412.
120. **Gross Amount Due from Borrower**	420. **Gross Amount Due to Seller**
200. **Amounts Paid by or on behalf of Borrower**	500. **Reduction in Amount Due to Seller**
201. Deposit or earnest money	501. Excess deposit (see instructions)
202. Principal amount of new loan(s)	502. Net Settlement Charges to be Paid by Seller (line 1700)
203. Existing loan(s) taken subject to	503. Existing loan(s) taken subject to
204.	504. Payoff of first mortgage loan
205.	505. Payoff of second mortgage loan
206.	506.
207.	507.
208.	508.
209.	509.
Adjustments for items unpaid by seller	**Adjustments for items unpaid by seller**
210. City/town taxes to	510.City/town taxes to
211. County taxes to	511. County taxes to
212. Assessments to	512. Assessments to
213.	513.
214.	514.
215.	515.
216.	516.
217.	517.
218.	518.
219.	519.
220. **Total Paid By/For Borrower**	520. **Total Reduction Amount Due Seller**
300. **Cash at Settlement From/To Borrower**	600. **Cash at Settlement To/From Seller**
301. **Gross Amount Due from Borrower (line 120)**	601. **Gross Amount Due to Seller (line 420)**
302. Less Amounts paid By/For Borrower (line 220)	602. Less Reductions in Amount Due Seller (line 520)
303. Cash ☐ **From** ☐ **To** Borrower	603. Cash ☐ **To** ☐ **From** Seller

HUD-1 Statement of Settlement Costs

Lender Name and Address	**Mortgage Broker Name and Address**
Buyer/Borrower Name and Address	**Property Address**

C. Settlement Charges

Note: Prepaid Finance Charges of $________ are included in the Settlement Charges shown below and are marked with an †. Your Prepaid Finance Charges together with interest and other lender-required loan related charges you will pay after closing (such as mortgage insurance premiums, if applicable) are shown on your Truth in Lending Disclosure as the Finance Charge.

C-1. Real Estate Sale Settlement Charges	**Column A** Paid From Borrower's Funds at Settlement	**Column B** Paid From Seller's Funds at Settlement
700. Total Real Estate Commission — sales price $ ________ at ______% A $ ________		
Division of Commission in 700 is as follows:		
701. $ ________ to ________		
702. $ ________ to ________		
703. Real Estate Commission on line 700 paid at settlement	$ ________	$ ________
704. Other (specify) ________	$ ________	$ ________
C-2. Other Charges for Transactions Not Required by Broker or Lender		
750. Borrower's Attorney's Fee	$ ________	$ ________
751. Other (specify) ________	$ ________	$ ________
C-3. Mortgage Loan Settlement Charges to Be Paid by You		
800. Lender Origination Charges† (Line 801 plus 802 plus 803 less 804)	$ ________	$ ________
801. Lender Charges for loan origination and other Lender services $ ________		
802. Discount Points paid to reduce your interest rate ______% / $ ________		
803. Rate Lock paid to lock in your interest rate ______% / $ ________		
804. Lender Credit for your choosing a higher interest rate ($ ________)		
900. Mortgage Broker Origination Charges† (Line 901 less 902)	$ ________	$ ________
901. Total Broker Compensation for Broker's services $ ________		
902. Amounts paid by Lender to Broker on your behalf ($ ________)		
1000. Credit Report and Pre-Closing Appraisal and Inspection Charges (Appraisal, Credit Report, Tax or Flood Determination, Pre-closing Inspection, Pest Inspection)	$ ________	$ ________
1100. Title and Closing Charges (Sum of lines 1101–1104)	$ ________	$ ________
1101. Title Charges (Lender's Title insurance, Survey, Title examination, Notary services, Abstract or title search, Documentation preparation) $ ________		
1102. Owner's Title Insurance (Coverage $ ________) $ ________		
1103. Closing agent to attend closing† $ ________		
1104. Services required by the closing agent but not by the lender $ ________		
1105. Closing agent services required by Lender† $ ________		
1200. Government Recording and Transfer Charges (Sum of lines 1201–1204)	$ ________	$ ________
1201. Recording fees		
Deed: $ ________ Mortgage: $ ________ Releases: $ ________		
1202. City/county tax stamps Deed: $ ________ Mortgage: $ ________		
1203. State tax stamps Deed: $ ________ Mortgage: $ ________		
1204. Other government recording and transfer costs $ ________		
1300. Items Required by Lender to be Paid in Advance (Sum of lines 1301–1306)	$ ________	$ ________
1301. Daily Interest Charges from ______% to ______% at $ ______ per day† $ ________		
1302. Taxes $ ________		
1303. Hazard insurance premium for ______months at $ ______ per month $ ________		
1304. Flood insurance premium for ______months at $ ______ per month $ ________		
1305. Mortgage insurance premiums for ______months at $ ______ per month† $ ________		
1306. Other (specify) ________ $ ________		
1400. Initial Escrow Deposit for escrow account to pay taxes, insurance premiums and other charges (including mortgage insurance premiums† of $ ________)	$ ________	$ ________
1500. Other Mortgage Loan Settlement Charges† required by lender (e.g., life-of loan flood service, wire transfers, lender's attorney's fee, life-of loan tax service, other miscellaneous services not shown above)	$ ________	$ ________
1600. Total Mortgage Loan Settlement Charges (Sum of amounts in Columns A and B)	$ ________	$ ________
1700. Net Settlement Charges to be Paid by Borrower at Closing (Line 1600 less 1701 less 1702 less 1703)(also entered on lines 103 and 502)	$ ________	$ ________
1701. Amounts Paid by Borrower before Closing $ ________ (specify item numbers) ________		
1702. Amounts from Lender or Mortgage Broker $ ________		
1703. Settlement Charges Paid by Seller (specify item numbers)	$ ________	

Borrower: compare the amounts for each category (including the amounts the seller has agreed to pay, if any) with the amounts for each category shown on your Good Faith Estimate of Settlement Costs.

Note: 1 page front/back – To be provided in English and a few other languages.

IMPORTANT INFORMATION REGARDING MORTGAGE PRODUCTS

This document explains some basic terms of loan products available, and provides a tool for you to use to shop and compare products. Be sure to understand your loan terms, including any fees/charges that apply. Seek any professional help you need to understand your loan terms, such as a lawyer, accountant, or translator. If you have any questions, contact your loan officer or mortgage broker. Before you choose your loan, be sure that you know the answers to the following questions about your loan. You can use the attached chart to compare loan products.

- **Can my monthly principal & interest payment go up over time? By how much and how often?**

Payment Increases can occur for many reasons, many of which are more fully described below. If you can't make the payments when due, you could lose your property. Even if you are eligible to refinance your loan at that time, you will have to pay refinance expenses, your payments and interest rate may increase, and the number of payments remaining may increase. If your property has gone down in value or if you don't have enough equity in your property, you may find it more difficult or more expensive to refinance or to obtain cash back at the sale of your property.

- **Can my interest rate go up over time? By how much and how often?**

Adjustable Rate Mortgages (ARMs) have rates that change over time. The rate is made up of two numbers: an "index" and a "margin". The index is usually found in newspapers or on the Internet, and it changes over time. The margin is an additional amount that usually doesn't change. The lender calculates your rate by adding the index and margin together. ARMs may start with rates that are lower than fixed rate loans, but over time, the rate and payment can go higher.

- **Can my loan balance go up, even if I make all payments in full and on time?**

Negative Amortization Mortgages permit the loan balance to increase, even if you make the minimum payments. Negative amortization prevents you from building equity, and can even leave you owing more than the property is worth. Eventually, the reduced payment ends, and your payment will increase.

- **Will any scheduled payment exceed the normal monthly payment?**

Balloon Payments are payments that exceed the normal monthly payment, sometimes significantly.

- **Will my normal payment cover only interest at any point during the loan term?**

Interest Only Payments cover only the interest accrued on the loan balance during the month, and do not reduce the outstanding loan balance. As a result, they are lower than payments that include principal. Interest only payments last only for a certain period of time, after which, your monthly payment will increase.

- **Will my normal payment include taxes, assessments and insurance (referred to as "escrow payments")? If not, will I pay a fee for not including escrow payments in my monthly payment?**

Escrow Accounts are special cash reserves that you pay to your lender, which the lender uses to pay taxes, insurance, or other charges related to the property. The lender will add the additional "escrow amount" to your regular loan payment, and annually, will adjust the amount upward or downward to reflect increases or decreases in these costs. In some situations, the lender may waive this escrow account requirement. If the lender waives the requirement, your monthly payment will be reduced, but the lender may charge an additional cost for agreeing to do so, and you will still have to pay the taxes, insurance and other charges yourself.

- **If I choose to provide the lender with less than complete documentation of my income or assets, will I pay additional costs?**

Reduced Documentation Loans limit the information you must give the lender in order to be approved (such as pay-stubs or tax returns). The lender instead relies on your statements about income or assets. While this feature may be convenient, the lender may charge a higher rate and/or extra fees for offering it.

- **Will I have to pay a fee if I pay off the loan in full ahead of schedule? Will I have to pay a fee if I pay more than the required monthly payment? (See information on prepayments below.)**

Prepayment Fees are fees for paying ahead of schedule. Some apply only if you pay off the full balance. Others apply anytime you make a payment that exceeds your scheduled payment. A prepayment fee will make it more expensive for you to sell or refinance the property.

- **Will I pay an additional fee if my payments are late? How much?**

Late Fees apply when you do not make a payment on time. Your lender may, or may not, give you a "grace period", during which you can pay late without incurring a late fee.

- **What is my initial interest rate and what are my settlement charges?**

Lower interest rates may have higher settlement charges, and higher interest rates may have lower settlement charges. Be sure to understand both the rate and the settlement charges, and choose the best package for you.

- **What Are Discount Points? Should I Buy Discount Points? How Many?**

Discount Points are fees paid to the lender at closing in order to lower your mortgage interest rate and monthly mortgage payment. The cost of each point is equal to 1% of the loan amount. As a rule of thumb, the mortgage's interest rate is reduced by ¼ percentage point for every discount point you pay. The actual amount, however, varies by lender. Whether or not paying points makes sense depends in part on how long you plan to keep the loan.

Note: 1 page front/back – To be provided in English and a few other languages.

LOAN COMPARISON CHART – Only you can decide upon the best loan for you. As you shop for the loan that best fits your needs, use this chart to compare loan products, fees and terms. Use additional pages to compare more products.

Borrower Name: **Property Address:**	**Loan 1**	**Loan 2**	**Loan 3**	**Loan 4**
Product Type (ARM, Fixed, Interest Only, etc.)				
Loan Amount				
Loan Term				
Once I lock in an interest rate, how quickly must I close the loan to take advantage of the locked rate?				
What are my total estimated settlement charges?				
What amount of my total estimated settlement charges is made up of points?				
How will my interest rate be affected by discount points?				
What is the initial interest rate?				
Can the interest rate rise? Be sure to understand by how much and how often the interest rate can rise.				
What is the maximum interest rate?				
What is the initial monthly payment (including principal, accrued interest, but excluding taxes, assessments and any property or mortgage insurance)?				
Can the monthly payment go up over time? Be sure to understand by how much and how often the monthly payment can rise.				
Will any scheduled payment exceed the normal monthly payment?				
Will my normal payment cover only interest at any point during the loan term?				
Will my normal payment include taxes, assessments and property insurance? Be sure to understand if any additional costs will be incurred for not including escrow payments.				
Will my loan require mortgage insurance? Be sure to understand how much and how the premium will be paid.				
Can my loan balance go up, even if I make all payments in full and on time?				
Will I have to pay a fee if I pay off the loan in full ahead of schedule or if I pay more than the required monthly payment? Be sure to understand the amount of any prepayment fee and how it is calculated.				
Will I pay an additional fee if my payments are late? Be sure to understand the amount of any late fee and when the fee is due.				
If I choose to provide the lender with less than complete documentation of my income or assets, will I pay additional costs?				

This is not a commitment to make a loan to you or to offer the terms or costs that may be filled in by you or any one else in the chart above. In order to obtain any specific loan, you must first submit a loan application, pay any required application fees, as well as, lock your rate and terms, and pay any required lock fees.

MORTGAGE BANKERS ASSOCIATION

MORTGAGE BANKERS AND MORTGAGE BROKERS:

DISTINCT BUSINESSES WARRANTING DISTINCT REGULATION

MORTGAGE BANKERS ASSOCIATION®
Investing in communities

Executive Summary

For many consumers, buying a house is the biggest financial investment they will make. The mortgage process, however, can be both complex and confusing, with a broad menu of loan offerings and a puzzling multitude of actors. Among those actors are mortgage bankers and mortgage brokers. While there is some superficial similarity in how they interact with consumers, mortgage bankers and mortgage brokers conduct very different businesses. These differences, however, are not well understood, creating confusion that can lead to inappropriate regulatory approaches.

To support policymakers working to improve the mortgage market, the Mortgage Bankers Association (MBA) has prepared this Issue Paper explaining the functional, financial, and regulatory differences between mortgage bankers and mortgage brokers. MBA believes that these differences warrant distinct regulatory approaches. Accordingly, policymakers and regulators must understand and properly consider these differences as they explore measures to increase transparency in the mortgage process, protect consumers from steering and abuse, and ensure that consumers are the beneficiaries of the lower homeownership costs that a free and fair market can produce.

Based on the distinctions set out below, this paper also proposes legal and regulatory changes that would provide borrowers with clearer information about mortgage brokers' responsibilities and compensation, improve brokers' financial accountability and strength, and ensure that loan originators are appropriately licensed and meet rigorous standards of professionalism.

Mortgage bankers and mortgage brokers perform different functions

- **Brokers are intermediaries between borrowers and mortgage bankers.**

Mortgage brokers typically have access to the loan offerings of numerous mortgage bankers. They inform borrowers of loan choices, receive loan applications, and perform certain services, such as collecting documentation, and initiating credit and other reviews.

Mortgage brokers turn loans over to mortgage bankers for underwriting and funding.

- **Mortgage bankers provide funds for mortgages.**

Mortgage bankers purchase and fund loans arranged by mortgage brokers and by other mortgage bankers. To do so, mortgage bankers use their own funds, funds they borrow, or funds they receive from secondary market investors. As part of the funding process, mortgage bankers are responsible for loan underwriting and, correspondingly, have a significant financial stake in a loan's performance.

Additionally, mortgage bankers often originate loans through their own retail sales force, informing borrowers about available loan products and working with borrowers through the lending process.

Mortgage bankers may also service loans, collecting and processing monthly payments and handling other ongoing customer service needs. Servicers, along with other mortgage bankers that sell loans into the secondary market, have ongoing responsibilities to investors.

Consumers have different expectations of mortgage bankers and mortgage brokers

- **Consumers perceive brokers as "trusted advisors."**

Consumers working with mortgage brokers generally rely on the broker, as an intermediary with access to multiple mortgage bankers' products, to identify the best loan product(s) for them. Consumers expect that mortgage brokers are comparison shopping on their behalf.

Mortgage brokers frequently perpetuate this expectation by promoting themselves as "trusted advisors," even though brokers in most cases have no legal obligation to act in borrowers' best interests.

- **Consumers look to mortgage bankers for information about their product offerings and the application process.**

When consumers work directly with mortgage bankers in obtaining a loan, they view the mortgage banker as a knowledgeable source of information about their own loan products and the mortgage process. Consumers generally will compare mortgage bankers' loan offerings with those of other mortgage bankers and/or mortgage brokers.

Mortgage banker and mortgage broker compensation differs

- **Brokers are paid to arrange loans and they receive compensation at the time the loan is made.**

A mortgage broker is compensated at the time a loan is closed through fees directly charged to the borrower (direct fees) and payments from mortgage bankers (indirect fees), which vary based on a loan's interest rate and/or other loan pricing terms. Indirect fees, known as yield spread premiums (YSPs), generally are greater when the loan's interest rate is greater.

YSPs, when used properly, can help borrowers pay their up-front closing costs, including broker fees, by building them into the interest rate. When a consumer does not understand the YSP, which is often the case, the risk is greater that the YSP will simply augment the broker's direct fees and saddle the borrower with a higher rate and monthly payment.

- **Mortgage bankers receive revenue in several ways throughout the life cycle of a loan.**

Mortgage banker compensation can come throughout the life of a loan from:

- Origination fees;
- Interest payments;
- Servicing fees;
- Proceeds from the sale of servicing rights; and/or
- Proceeds from the sale of a loan.

Differences between mortgage banker and mortgage broker compensation mean different financial incentives

- **Brokers' compensation has the potential to incentivize brokers to put borrowers into more expensive and/or inappropriate loans.**

Because broker compensation is directly tied to a loan's interest rate and brokers lack an ongoing financial stake in loan performance, brokers have a high incentive to get loans closed, maximize fees for origination, and move on to their next transaction. Furthermore, the current lack of understanding about YSPs makes it easier for some brokers to direct consumers toward loans with higher interest rates and other terms, such as prepayment penalties, that increase the loans' value to a mortgage banker or investor.

- **Mortgage bankers' financial successes are linked to loan performance, giving mortgage bankers a stake in borrowers' ongoing ability to repay their loans.**

Mortgage bankers also are financially motivated to make loans. Origination fees, however, are but one of several sources of mortgage banker revenue. Mortgage banker revenue can come from multiple revenue streams associated with managing various risks throughout the life of a loan, including the risk that the borrower defaults.

Whether they hold loans or sell them to investors, mortgage bankers generally lose money when loans default. As a result, mortgage bankers have a greater interest in ensuring that borrowers choose products that will give them long-term financial success.

Mortgage bankers and mortgage brokers are subject to different disclosure requirements, with broker fee disclosures inadequate for effective consumer shopping

- **Current disclosures do not adequately inform borrowers of the connection between a broker's compensation and a loan's interest rate or the terms of the mortgage selected.**

While Real Estate Settlement Procedures Act (RESPA) rules require mortgage brokers to disclose the amount of their direct fees received from the borrower and the amount of any YSP received from the mortgage banker, current YSP disclosures do not explain adequately the connection between the YSP and a loan's interest rate.

As a result, consumers lack sufficient information to effectively shop among brokers and mortgage bankers and their various loan offerings. Both the U.S. Department of Housing and Urban Development (HUD) and the Federal Reserve are concerned about this problem and are trying to address it through proposed regulations to clarify YSP disclosures and enhance consumer understanding of the connection between YSPs and interest rates.

- **Mortgage bankers' costs and fees related to origination — such as processing and underwriting fees, as well as discount points and origination fees — are disclosed as settlement costs.**

RESPA regulations do not require mortgage bankers to disclose loan officer compensation and payments the mortgage banker might receive, such as gains (or losses) on secondary market sales of loans. This difference is appropriate because consumers do not rely on mortgage bankers and their loan officer employees as "trusted advisors" in the same manner as they do with mortgage brokers. Additionally, payments related to a secondary market transaction are not always known with certainty at the time of settlement.

Barriers to market entry differ and are greater for mortgage bankers

- **Becoming a mortgage banker requires a significantly larger commitment of financial and other resources than becoming a mortgage broker.**

A mortgage banker must have capital to fund loans, or access to credit, such as through a warehouse line of credit. Moreover, to maintain and renew its license or charter, a mortgage banker must have a specified level of net worth and/or regulatory capital.

Mortgage brokers generally are not required to have funding sources or net worth except in nominal amounts.

Mortgage bankers and mortgage brokers are subject to different types and levels of regulatory oversight

- **Mortgage bankers are subject to greater supervision and regulation than brokers, and broker regulation is uneven across the nation.**

Mortgage bankers are subject to many complex state and federal laws that impose substantial penalties for noncompliance. Whether they are depository or non-depository institutions, mortgage bankers are routinely examined and audited by both federal and state regulators.

Mortgage bankers who sell loans to investors are subject to investor-required oversight. This oversight can include periodic reviews covering financial and business operations, origination practices, and financial safety and soundness. Similarly, mortgage bankers making loans insured by the Federal Housing Administration (FHA) are subject to oversight by HUD.

Mortgage broker licensing laws are uneven,[1] with brokers overall subject to less comprehensive and less demanding legal and regulatory oversight.[2]

Recommendations

The fundamental differences in consumer expectations, market incentives, and regulatory oversight call for distinct approaches to improving mortgage broker and mortgage banker regulation. Because improving consumer protection and enhancing market functions and transparency can be best

---

1 See *State by State Tally of Mortgage Broker Rules,* www.bankrate.com, http://www.bankrate.com/brm/news/mtg/20010104b.asp

2 See Lloyd T. Wilson, Jr., *A Taxonomic Analysis Of Mortgage Broker Licensing Statutes: Developing a Programmatic Response to Predatory Lending,* 36 N.M.L. REV. 297 (Spring 2006).

achieved through proposals that recognize these differences and address areas of weak or ineffective regulation, MBA supports measures requiring that:

- Borrowers receive clear disclosures of brokers' responsibilities and compensation;
- Mortgage brokers who claim to be or act as borrower agents be treated legally as agents;
- Mortgage brokers have sufficient financial resources — through a national minimum net worth requirement — to provide protection to borrowers and mortgage bankers where necessary;
- Mortgage brokers be appropriately bonded to give consumers greater protection; and
- All loan originators, including mortgage brokers and mortgage bankers, be appropriately licensed and registered in accordance with rigorous standards.

The current turmoil in the mortgage market and the credit markets has spurred efforts by regulators and policymakers to examine the causes and identify the right approaches to protect consumers and improve market functions and transparency. MBA supports these efforts. Policymakers, however, should avoid broad brush efforts that do not consider the complexity of the marketplace and the differing roles and responsibilities of mortgage brokers and mortgage bankers. MBA believes that measures which improve the regulation of mortgage brokers and other loan originators by addressing specific regulatory and oversight weaknesses are likely to improve the market for consumers, mortgage bankers, mortgage brokers, and other mortgage professionals and not produce barriers to efficient market operations.

MBA looks forward to working with Congress, regulators, and its industry partners to improve the marketplace and to improve the housing industry's ability to serve America's homebuyers.

Table of Contents

Introduction

The past two decades have been unprecedented for the U.S. housing market. Homeownership has reached historically high rates, borrowers have had access to a greater variety of loan products and features than ever before, and the breadth and complexity of the mortgage markets have increased exponentially.

At the same time, the mortgage brokerage industry has emerged and grown tremendously. According to the National Association of Mortgage Brokers (NAMB), there are over 25,000 mortgage brokerages in the United States.[3] Close to 50 percent of residential mortgage loans in the U.S. market are originated by independent mortgage brokers.[4] At the height of the recent boom of the subprime mortgage market, 70 to 80 percent of nonprime loans are estimated to have been mortgage broker originations.[5]

Mortgage brokers have become key intermediaries in expanding access to mortgage credit, including for communities traditionally underserved by mainstream financial institutions. Through mortgage brokers, mortgage bankers have expanded product reach, and thus served larger numbers of consumers.

3 http://www.namb.org/namb/About_NAMB.asp?SnID=1841827686. See also *Mortgage Brokers Fall on Tough Times,* USA Today (August 30, 2007).

4 MBA Research Data Notes, *Residential Mortgage Origination Channels,* September 2006.

5 Ibid.

Although mortgage bankers' and mortgage brokers' roles may be complementary, mortgage bankers and brokers perform distinctly different functions. The differences between mortgage banking and mortgage brokerage, however, are not well understood, possibly because mortgage bankers and brokers interact extensively in the mortgage process.

Some representatives of the mortgage brokerage industry have added to the confusion by proposing identical standards for mortgage brokers and mortgage bankers because both are "loan originators." They assert that there should be a "level playing field" on which brokers and mortgage bankers should compete for consumer business. MBA shares the goal of ensuring robust competition in the mortgage market place. However, a "one size fits all" approach to regulation is not the same as achieving a level playing field and ignores the fact that there are profound differences between the two industries warranting distinctive regulation.

This paper reviews the distinctions between mortgage bankers and mortgage brokers. The most critical distinctions are that mortgage brokers and mortgage bankers:

- Perform different functions and provide different services;
- Create vastly different expectations in borrowers;
- Are compensated differently;
- Have very different financial incentives;
- Face much different barriers to marketplace entry, with brokers facing very low barriers to entry; and
- Are subject to different regulatory requirements with bankers generally subject to more stringent regulation and oversight.

Considering the profound differences between mortgage bankers and mortgage brokers, this paper concludes with recommendations for regulatory improvements to enhance consumer understanding and information in the loan origination process, and to promote greater mortgage broker accountability.

Differences Between Mortgage Bankers and Mortgage Brokers

Mortgage Bankers and Mortgage Brokers Perform Different Functions in the Mortgage Process

Brokers Act as Intermediaries between Consumers and Mortgage Bankers

Mortgage brokers are independent intermediaries who bring together prospective borrowers and mortgage bankers. According to NAMB, a mortgage broker has "a working relationship with numerous banks and other mortgage bankers and provides the consumer with access to hundreds of options when it comes to financing a home."[6] Mortgage brokers tend to be small businesses and frequently have little capital.

Mortgage brokers help arrange loans, performing application-related services, such as requesting verification of the borrower's employment, requesting credit and other information, and compiling borrower documentation.[7] Brokers typically do not provide loan funds.[8]

Brokers can — and do — provide substantial benefits to borrowers and mortgage bankers and contribute to the efficiency of the mortgage industry. Brokers are an important distribution channel for

---

6 http://www.namb.org/namb/Mission.asp?SnID=1411867994

7 Until recently, brokers often arranged for property appraisals. Freddie Mac and Fannie Mae recently announced several changes in their appraisal requirements, including a new policy that prohibits brokers from selecting or compensating appraisers. See http://www.fanniemae.com/media/pdf/030308_agreement.pdf

8 In most instances, the mortgage broker assigns the mortgage to the mortgage banker at settlement and the mortgage broker is paid for his or her origination services. This process is known as "table funding."

mortgage bankers' loan products and, in particular, can enhance mortgage bankers' ability to serve traditionally underserved borrowers and communities.

Mortgage Bankers Provide Mortgage Funds

Mortgage bankers lend money through various channels: directly to consumers through their own retail sales forces, by funding loans arranged by brokers or other mortgage bankers, and by purchasing loans originated by other mortgage bankers. In most cases, mortgage bankers offer their own products.[9] Regardless of the lending channel, mortgage bankers are responsible for underwriting the loan, which involves evaluating the borrower's credit worthiness and the value of the home.

Once a loan is funded, mortgage bankers — depending on their business models — pursue various paths. Some mortgage bankers hold the loans in their own portfolios; others sell the loan to a secondary market investor. Separately, a mortgage banker may service the loan or sell the servicing rights.

Mortgage banking is highly competitive — mortgage bankers compete with each other and at times, with mortgage brokers, for customers. Nearly 8,900 mortgage lenders reported under HMDA in 2006.[10] Mortgage bankers compete for consumers through price, products, and services. Mortgage bankers seek to offer attractive interest rates and loan terms and to develop innovative loan products and services to meet a variety of consumer mortgage needs. Additionally, if a mortgage banker services loans, they provide continuous customer service and support to borrowers during the life of the loan.

Mortgage bankers are organized in many forms, such as federal- and state-chartered banks, thrifts, credit unions, and other depository institutions, as well as non-depository mortgage companies. Mortgage bankers come in many different sizes, from small businesses to large multinational corporations.

Differing Functions of Mortgage Bankers and Brokers Lead to Vastly Different Consumer Expectations

The different functions and services of mortgage bankers and mortgage brokers lead consumers to have vastly differing expectations of each. Consumer expectations of mortgage brokers often do not match brokers' actions and responsibilities, which effectively limits the consumer's ability to protect his or her own interests.

---

9 Mortgage bankers sometimes function as mortgage brokers, offering the loan products of other, larger mortgage bankers. Where a mortgage banker performs the function of a mortgage broker, MBA believes that the banker should be subject to the same disclosure requirements as a broker.

10 Robert B. Avery, Kenneth P. Brevoort, and Glenn B. Canner, "The HMDA Data," *Federal Reserve Bulletin,* December 2007. http://www.federalreserve.gov/pubs/bulletin/2007/pdf/hmda06final.pdf

Consumers Perceive Brokers as Acting in the Consumer's Best Interest

Consumers expect mortgage brokers to act as independent advisors and work with various mortgage bankers to identify and evaluate various financing options and ultimately to arrange their loans. In their marketing, brokers often position themselves as "trusted advisors" who will shop among mortgage bankers and arrange for the best loan. A 2003 AARP survey of older borrowers who had obtained refinancings found that 70 percent of respondents with broker-originated refinance loans (compared with 52 percent of respondents with lender-originated loans) reported that they had relied "a lot" on their brokers to find the best mortgage for them.[11]

Brokers' legal obligations, however, do not match up with consumer perceptions. While a consumer expects a broker to act in the consumer's interests, unless state law[12] or written agreement exists to the contrary, brokers are not legally considered their customers' agents. Comments in the Federal Reserve Board's recent Truth in Lending Act (TILA) regulatory proposal,[13] which requires compensation agreements between brokers and consumers, address this point and the concerns it raises:

> "Several commenters in connection with the Board's 2006 hearings suggested that mortgage broker marketing cultivates an image of the broker as a 'trusted advisor' to the consumer. Consumers who have this perception may rely heavily on a broker's advice, and there is some evidence that such reliance is common…
>
> If consumers believe that brokers protect consumers' interests by shopping for the lowest rates available, then consumers will be less likely to take steps to protect their own interests when dealing with a broker. For example, they may be less likely to shop rates across retail and wholesale channels simultaneously to assure themselves the broker is providing a competitive rate. They may also be less likely to shop and negotiate brokers' services, obligations, or compensation up-front, or at all. For example, they may be less likely to seek out brokers who will promise in writing to obtain the lowest rate available."[14]

---

11 Kellie K. Kim-Sung & Sharon Hermanson, *Experiences of Older Refinance Mortgage Loan Borrowers: Broker- and Lender-Originated Loans,* Data Digest #83 (AARP Public Policy Inst., Washington, D.C.), Jan. 2003, at 3, available at http://www.aarp.org/research/credit-debt/

12 A handful of state mortgage broker licensing laws — including Vermont, Kentucky, Minnesota, Maine, and North Carolina — create some level of agency-principal relationship between mortgage brokers and their customers. See Lloyd T. Wilson, *A Taoxonomic Analysis of Mortgage Broker Licensing Statututes: Developing a Programmatic Response to Predatory Lending,* 36 N.M.L. REV. 297, 325-339 (Spring, 2006).

13 Truth in Lending; Proposed Rule, 73 FED. REG. 1672, 1699 (request for comment January 9, 2008).

14 Ibid.

Consumers View Mortgage Bankers as Offering a Set of Products

When a consumer deals with a mortgage banker, he or she looks to the mortgage banker as a knowledgeable source of information about its' own products. Consumers expect a mortgage banker (through its employee loan officers) to explain the features of its loan product offerings and to provide assistance through the application and closing process. However, a borrower seeking to obtain a mortgage directly from a mortgage banker likely will research and compare different mortgage bankers' prices and products. As noted above, a borrower using a broker generally delegates the research and comparison of loan products to the broker.[15]

The Federal Reserve's recent TILA proposal reaches the same conclusion about consumer expectations and behavior:

> "The [Federal Reserve] Board is not aware of significant evidence that consumers perceive mortgage bankers' employees the way they often perceive independent brokers — as trusted advisors who shop for the best loan for a consumer among a wide variety of sources. Accordingly, it is not clear that a key premise of the proposal to restrict creditor payments to brokers — that consumers expect a broker has a legal or professional obligation to give disinterested advice and find the consumer the best loan available — holds true for creditor payments to their own employees."[16]

Compensation to Mortgage Bankers and Mortgage Brokers Differs, with Broker Compensation Presenting Greater Risks of Steering

Mortgage banker and broker compensation are based on the rate and terms of loans. However, mortgage banker and mortgage broker revenue and profit drivers are very different, reflecting the different services performed and financial risks borne by each:

- Mortgage brokers are paid solely for sourcing and facilitating loans, and they bear little — if any — ongoing financial risk.
- Mortgage bankers receive a variety of payments at the time of origination and after for performing a variety of services and managing a complex set of risks.

When coupled with ineffective consumer information about broker compensation, the "upfront" nature of broker compensation and its link to the borrower's interest rate pose greater risks of steering

15 The tendency to rely (to the consumer's financial detriment) on a mortgage broker can be especially strong for borrowers either from traditionally underserved market segments or with blemished credit. See Kenneth R Harney, *Study of Loan Fees Shows All Borrowers Not Equal,* The Washington Post, July 19, 2003, at F01.

16 73 FED. REG. at 1699.

than the mortgage banking business's more varied and complicated revenue streams. Those banker revenue streams, as discussed below, are closely linked to loan performance.

Brokers Are Paid for Sourcing and Originating Loans and Bear Virtually No Financial Responsibility for Loan Performance

The most common compensation model for mortgage brokers is a combination of fees paid or financed by the prospective borrower at loan closing (direct fees) and fees paid to the broker by the mortgage banker (indirect fees). Direct fees are typically loan origination or similar charges paid by borrowers at settlement. Once the loan is funded, brokers bear little — if any — ongoing risk. Brokers bear some risk if there is fraud in the loan documents and for very early loan payoffs (typically, within the first 90 to 180 days),[17] but the extent of that liability generally is only as large as the brokers' fees.[18]

Indirect fees are payments from the mortgage banker to the broker for origination services and are based on the rate of the loan and/or other loan pricing features. These payments are commonly called "YSPs" or "yield spread premiums." The YSP is the present value of the difference between the interest rate that the broker obtained for the loan and the lowest rate the mortgage banker would have accepted for the specific transaction (the "par rate"). The greater the spread between the rate on the specific loan and the par rate, the greater the YSP. Loan pricing features that increase the value of a mortgage loan, such as prepayment fees, may also increase YSPs.

The mortgage broker receives the YSP from the mortgage banker. However, consumers pay for the YSP through higher interest rates and higher monthly payments. Where YSPs are understood, they can provide a useful option for consumers to pay the broker's direct fees and other closing costs as part of the mortgage by essentially building them into the loan rate and payments.

Many Mortgage Bankers Receive Compensation throughout the Life of a Loan and Are Financially Accountable for Loan Performance

Mortgage bankers earn revenue in several ways, including through fees for services related to loan origination and underwriting. Borrowers pay these fees at closing or may choose to finance some or all of these fees. The borrower may also pay the mortgage banker "points" to reduce further the interest rate on the mortgage loan.

---

17 The duration of a broker's liability for early payoffs depends on the specific terms of a broker's contract with a lender.

18 In the case of early payoffs, most wholesaler agreements require the broker to forfeit some or all of his fees. Wholesaler agreements normally provide that the broker is liable for repurchase in the case of fraud. However, repurchases rarely occur due to brokers' limited capital. As a fallback, wholesalers will seek an indemnification from the broker that he/she will reimburse for any losses incurred on the loan; this usually ends up taking the form of some or all of the brokers' fees.

A mortgage banker who holds the loan in its portfolio receives interest payments from the monthly payments over the life of the loan. A mortgage banker holding a loan in portfolio must manage and hedge against both the interest rate and credit risk associated with the loan; correspondingly, the mortgage banker's financial gain or loss is linked to the success of that risk management.

Mortgage bankers also realize gains (or losses) on the sale of mortgages when loans are pooled and sold to investors in the secondary mortgage market. A secondary market sale and the corresponding financial outcome, however, are not always a certainty at the time a loan is closed. Constant fluctuations in the market, shifting interest rates and unpredictable investor appetites for mortgages mean that there is no assurance that mortgage bankers can sell loans to investors at a profit.

Additionally, selling a loan to a secondary market investor does not fully eliminate the financial risks to the mortgage banker. When selling a loan to a secondary market investor, the mortgage banker ordinarily guarantees to the investor that the loan and borrower credit characteristics are as stated to the investor and that the loan complies with relevant legal and regulatory requirements, including applicable anti-fraud and anti-predatory lending laws and guidelines. Typically, mortgage bankers are bound contractually to buy back non-performing loans[19] found to be inconsistent with these representations and warranties. This is an on-going financial risk that the mortgage banker bears.

Mortgage bankers who service loans (known as "servicers") also earn servicing fees. However, a servicer only earns these fees as long as the borrower is making timely payments. A loan's servicing rights can be sold separately from the loan itself. A mortgage banker who sells a loan's servicing rights has ongoing financial exposure through representations and warrants made to the buyer of the servicing.

Profit Drivers for Brokers Increase the Likelihood of Steering

Studies indicate that the fees charged to borrowers for origination activities, such as application processing and underwriting rarely result in profits for mortgage bankers.[20] Instead, these fees offset the mortgage banker's costs of processing and underwriting a loan application. Other loan-related fees, such as fees for credit reports and appraisals, are required to cover only the actual out-of-pocket costs for items provided by third party vendors, such as credit reporting agencies and appraisal companies and the costs of reviewing them. They therefore do not provide profit for mortgage bankers. The vast majority of mortgage banking income comes from interest, loan servicing, and, where loans are profitably sold in the secondary market, asset sales.[21]

19 A "non-performing" loan is a loan that is delinquent or in default.

20 See Mortgage Bankers Association, *2007 MBA Cost Study,* at 10–12.

21 Ibid.

In contrast, origination and origination-related fees and YSPs are the main profit centers for mortgage brokers. Mortgage brokers do not generally have continuing business relationships with their borrower clients after loan closing (unless it is to refinance their loan or obtain another mortgage at a later date). Unlike brokers of other financial products, such as independent insurance agents, mortgage brokers do not receive additional compensation based on loan performance or have other meaningful incentives to assure such performance.

The importance of YSPs as a source of broker revenue, coupled with the fact that YSPs are not well understood, increases the risk that some mortgage brokers will steer borrowers to costlier mortgages because they provide the mortgage broker with more lucrative YSPs.

The difference in a mortgage banker's degree of control over a loan officer employee versus a mortgage broker also makes it easier for mortgage brokers to steer borrowers into unnecessarily costly loans. Mortgage bankers have a variety of means for monitoring their loan officer employees and disciplining loan officers engaged in inappropriate steering. While mortgage bankers can — and do — refuse to do business with mortgage brokers engaged in inappropriate steering and other unprofessional practices, mortgage brokers' independence and the fact that mortgage bankers are not present as mortgage brokers work with borrowers and shop loans makes monitoring difficult.

Mortgage Bankers' Incentives Are Aligned More Closely With Consumers' Interests

Mortgage Bankers, Like Borrowers, Benefit Financially from Positive Loan Performance and Lose from Negative Performance

Mortgage bankers know at loan origination that their own financial success can depend on the long-term success of the loans they originate. As discussed, mortgage banking involves a variety of financial risks. Economic loss in mortgage lending can be a function of many factors, but usually involves the risk of default (e.g., non-payment of the loan by the borrower). If a loan defaults, a mortgage banker's financial exposure can be considerable whether a mortgage banker holds a loan in portfolio or has sold the loan to a secondary market investor.

In addition to losing the cash flows that come from a performing loan (i.e., servicing fee income and interest payments), when a borrower defaults, the mortgage banker can end up owning the home and incurring the costs associated with maintaining and ultimately selling the house.[22]

22 A 2003 Federal Reserve study estimated that losses on foreclosures range from 30 percent to 60 percent of the outstanding loan balances "because of legal fees, foregone interest, and property expenses." Karen M. Pence, *Foreclosing on Opportunity: State Laws and Mortgage Credit,* (Board of Governors of the Federal Reserve System) (May 13, 2003) at 1.

Additionally, mortgage bankers that also offer other financial services have a significant financial stake in maintaining strong, ongoing relationships with their consumers. Business success for these mortgage bankers relies on their customers' long-term financial success.

Mortgage Brokers' Financial Incentives Are Not Linked to Loan Performance

On top of the compensation they receive for sourcing a loan and providing application-related services, mortgage brokers do not receive compensation based on loan performance. Furthermore, brokers do not generally have loan repurchase obligations.[23] As a result, a broker has a strong incentive to close loans and maximize their direct and indirect upfront fees.

While the market for brokerage services and the availability of competition can serve as brakes on broker fees, as indicated, many borrowers do not shop among competing brokers, either because the first broker they encounter is perceived to be an independent advisor shopping for them and/or there is limited competition among originators in the borrower's community.

Since YSPs are not well understood and loan performance does not affect compensation, a broker has a strong incentive to seek the most lucrative indirect fees. There is an information imbalance between broker and borrower that works in the broker's favor. Mortgage brokers are aware of the par rates and yield spreads of various loan products and of various mortgage bankers, and this information informs the broker's decision about what loans to offer any given borrower.[24] At the same time, if a borrower delegates comparison shopping to a broker and the broker's indirect compensation is not understood, the borrower is not taking action to educate himself further about other loan options and is unlikely to question a loan product and/or fees unless or until the borrower runs into trouble with the loan.[25]

23 Some mortgage broker agreements provide for the broker to buy-back loans, but mortgage broker accountability under these agreements is limited by (1) the cost and effort required to enforce the obligation; and (2) the limited capital of brokers, which typically would not be sufficient to repurchase loans, even where a legal or contractual obligation exists.

24 See Kenneth R. Harney, *Study of Loan Fees Shows All Borrowers Not Equal,* The Washington Post (July 19, 2003), p. F01 (discussing a study by Susan E. Woodward, Ph.D.).

25 See 73 FR at 1699 (January 9, 2008).

Current Federal Disclosure Requirements Do Not Reduce the Risks of Steering by Brokers

Current Broker Disclosures Provide Consumers with Inadequate Information about Broker Compensation and Responsibilities

Since 1992, RESPA[26] regulations have required mortgage brokers to disclose on the good faith estimate (GFE), which is provided at the time of loan application, and on the HUD-1 Settlement Statement, which is provided at closing, the amount of direct fees from the borrower and the amount of any indirect fees received from the mortgage banker.[27]

Direct fees to mortgage brokers are listed and included in the borrower's total settlement costs. YSPs to brokers are disclosed as a separate number, outside the column of closing costs, designated as "YSP POC" or "Yield Spread Premium Paid Outside of Closing."[28]

Though the amount of the YSP is disclosed to the borrower and it is identified as a Yield Spread Premium, borrowers are not informed of the YSP's calculation and the fact that the borrower generally pays the YSP through a higher interest rate.[29] Additionally, current disclosures do not tell the borrower if the broker is or is not functioning as an agent of the borrower.[30]

Whether or not a broker is involved in a loan transaction, mortgage bankers' costs and fees related to origination — such as origination and underwriting fees, as well as discount points — are disclosed as settlement costs on the GFE and on the HUD-1 Settlement Statement.[31] The RESPA regulations do not require mortgage bankers to disclose payments from the secondary market or loan officer compensation. HUD has not treated these costs as equivalent to mortgage broker compensation. Unlike YSPs to mortgage brokers, secondary market payments, if they occur, are not paid at settlement and are outside RESPA's coverage.[32] These payments would also require imputation where loans are not sold.

---

26 12 USC § 2601 et seq.

27 For current mortgage broker fee disclosure rules, see 24 CFR § 3500.7(a) and (c), and Real Estate Settlement Procedures Act (RESPA) Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, 64 FR 10080, 10085 (March 31, 1999).

28 24 CFR Appendix A, Appendix B.

29 See *Predatory Mortgage Lending Practices: Abusive Uses of Yields Spread Premiums: Hearing Before the Senate Committee on Banking, Housing and Urban Affairs,* 107th Cong. (January 8, 2002) (statement of Prof. Howell E. Jackson, Harvard Law School).

30 This is the case with regard to federal and state mortgage lending laws. The precise nature of a broker's fiduciary duty is a question that several state courts have addressed, including in California, Missouri, and Texas, finding that brokers' had an agency and/ or fiduciary relationship with their borrower-customers. Additionally, a few state legislatures have begun examining the issue. See Joya K. Raha and Andrea Lee Negroni, *Mortgage Brokers-What Fiduciary Duties Exist?* Mortgage Banking (October 2007).

31 12 USC § 2604(c), 24 CFR 3500.7(a).

32 24 CFR 3500.5(b)(7). See also 57 FR 49600 (November 2, 1992), 67 FR 49134, 49140 (July 29, 2002), 66 FR 53052, 53053 (October 18, 2001).

Moreover, mortgage bankers sometimes lose money on these sales. HUD has not regarded employees as separate from their employers for other purposes under RESPA.[33] Importantly, mortgage bank loan officers do not function as independent intermediaries, nor do consumers perceive loan officers in the role of an "intermediary" responsible for shopping for the most favorable loan product available.

Regulators Recognize Broker Disclosures Are Weak and Need Improvement

For almost a decade, HUD has advocated an improved consumer disclosure that would clearly advise the consumer of the compensation the broker receives in the transaction. Most recently, HUD issued proposed changes to the RESPA regulations intended to enable consumers to compare more effectively origination costs and to inform consumers of the connection between the YSP to be paid to the broker and the interest rate.[34]

Separately, the Federal Reserve expressed "concerns that creditor payments to mortgage brokers are not transparent to consumers and are potentially unfair to them,"[35] recently proposed changes to its Truth in Lending rules (Regulation Z) pertaining to broker fees. The goal of the proposal is to "limit the potential for unfairness, deception and abuse in creditor payments to brokers in exchange for higher interest rates while preserving this option for consumers to finance their obligations to brokers."[36]

The proposed regulations prohibit a creditor (including mortgage bankers) from directly or indirectly paying a mortgage broker in connection with a mortgage transaction unless the mortgage broker enters into a written agreement with the consumer, before a fee is paid, spelling out the broker's total compensation for the transaction, including payments from the creditor and consumer, and the payment does not exceed such amount. The agreement would be required to state: (1) the total compensation that the broker will receive and retain from all sources; (2) that the consumer will pay the entire amount of the compensation even if all or part of it is paid by the creditor; (3) that the creditor will increase the borrower's interest rate if the creditor pays part of the compensation; and (4) that creditor payments can influence the broker to offer certain loan products or terms, which may not be in the consumer's interest or that they may be less favorable than can be otherwise be obtained.[37]

The prohibition would not apply if a broker is (1) subject to a state statute or regulation under which a broker may not offer loan products or terms less favorable than the consumer could otherwise obtain

---

33 In 1992, when HUD amended its RESPA rules to establish the employer-employee exemption under the affiliated business provisions of RESPA, it indicated that it regarded employees as indistinguishable from their own employers for purposes of RESPA's anti-referral fee provisions. See 57 FR 49600 (November 2, 1992).

34 Department of Housing and Urban Development, *RESPA: Proposed Rule to Simplify and Improve the Process of Obtaining Mortgages and Reduce Consumer Settlement Costs,* 73 FR 14030 (March 14, 2008).

35 73 FR at 1698 (January 9, 2008).

36 Ibid., at 1699.

37 73 FR at 1734 (January 9, 2008).

through the same broker assuming the same loan's terms and conditions or (2) where a creditor can demonstrate that the compensation it pays to the broker is not based on the interest rate.[38]

Barriers to Market Entry Also Differ and Are Greater for Mortgage Bankers

Entering Mortgage Banking Requires Significant Financial Resources

The barriers to entry and the costs of being in the mortgage banking and brokerage businesses differ significantly. This reflects the fact that a mortgage banker's business of funding loans and managing the corresponding credit and interest rate risk is more operationally complex and involves more ongoing financial exposure and management than a mortgage broker's business of arranging loan originations and related activities.

To participate credibly in the mortgage industry, a mortgage banker must have sources of capital for funding loans, or secure a credit line for loan originations, known as a warehouse line of credit. Moreover, to maintain and renew its license or charter, a mortgage banker must have a specified level of net worth and/or regulatory capital. The continuing (and continuously escalating) operating costs, including costs associated with regulatory compliance, also help to ensure that undercapitalized and uncommitted mortgage bankers have little incentive to enter the industry, and even less ability to continue with success.

Mortgage bankers also must operate in accordance with multiple levels of government and market oversight as well, such as the guidelines and requirements of the secondary market agencies (Fannie Mae, Freddie Mac, and Ginnie Mae), loan insurers and guarantors (the FHA and VA), and other investors (such as banks and investment funds).

Fannie Mae, Freddie Mac, and the Federal Housing Administration (FHA) approve and oversee any mortgage banker who wishes to work with or sell loans to them. This includes minimum net worth requirements ($250,000 for Fannie Mae/Freddie Mac seller-servicer status; $250,000 for FHA approved mortgagees) and pre-approval reviews for financial and operational soundness.[39] Additionally, private investors and mortgage insurance companies routinely conduct audits of the mortgage bankers with whom they work.

38 Ibid.

39 Institutions (including mortgage brokerages) can also seek approval as Fannie Mae or Freddie Mac sellers only. In the case of Fannie Mae, applicants for seller-only status, however, must have a minimum net worth of $1,000,000 and undergo extensive operational and financial reviews covering all aspects of their businesses. Freddie Mac's public materials do not specify a minimum net worth level for "seller only" status.

Prospective Mortgage Brokers Face Few Barriers to Entry

Entering the mortgage brokerage business requires fewer resources and less operational capacity. Mortgage brokers face little federal regulation and, as discussed in this paper, are subject to widely varying degrees of state regulation in an environment where state regulators have limited enforcement staff and resources. Mortgage brokers generally are not required to have funding sources or net worth except in nominal amounts, and even the nominal requirements of state laws are inconsistent. FHA requires brokers who wish to offer FHA-insured products to have a minimum net worth of $63,000 and undergo yearly audits.

Mortgage brokers are typically authorized or chartered only by state governments, and they are far less likely than mortgage bankers to be approved (and subject to ongoing audit by) the secondary market agencies or federal government agencies with lending related regulatory functions.

Current Federal and State Regulatory Requirements Differ and Are More Rigorous for Mortgage Bankers

Mortgage bankers are subject to many complex state and federal laws that impose substantial penalties for non-compliance. Whether they are depository or non-depository institutions, federally or state chartered, mortgage bankers are routinely supervised by federal and state regulators and must comply with a vast array of state and federal laws applicable to their lending activities. Federally chartered mortgage bankers are subject to regulatory review and examination by the federal financial regulatory agencies, and other mortgage bankers are subject to regulation and examination by state regulatory agencies. All mortgage bankers are subject to federal loan origination laws, such as RESPA, the Truth in Lending Act (TILA)[40] and HMDA.[41]

Notwithstanding that the mortgage brokerage industry has grown rapidly since mortgage brokers first appeared in the late 1980s, there are far fewer substantive laws regulating mortgage brokers at the state and federal levels. Additionally, the consequences of noncompliance by mortgage brokers are less severe. The number and variety of regulators focused on mortgage broker regulatory compliance is also fewer and these regulators are concentrated at the state level, where constrained state budgets and thin staffing often translate into minimal oversight.

40 The Truth in Lending Act (TILA) is the popular name for Title I of the Consumer Credit Protection Act, 15 USC § 1601 et. seq.

41 12 USC § 2801 et. seq.

State Laws

Both mortgage bankers and mortgage brokers are subject to state licensing and registration under a diverse set of state laws. In addition, state mortgage regulatory agencies (typically, banking and financial institutions departments) have adopted a patchwork of administrative rules that apply to various aspects of the mortgage business. These laws and regulations vary from state to state and, in many cases differ in their treatment of mortgage bankers and mortgage brokers. Even in states whose licensing requirements do not differ substantially between mortgage bankers and brokers, the sheer volume of licensed brokers suggests that brokers are not likely to be subject to the same degree of scrutiny and supervision as mortgage bankers.[42]

National policymakers have identified the inconsistency of broker regulation as an area in need of reform. In fact, the March 2008 report of the President's Working Group on Financial Markets (PWG) includes, among several recommendations affecting the mortgage and credit markets, a call for state financial regulators to implement strong nationwide licensing standards for mortgage brokers.[43]

While mortgage banking regulations also vary state to state, mortgage bankers overall are generally subject to state licensing laws that are more rigorous and extensive than those affecting mortgage brokers.[44] Specifically, state licensing laws tend to impose more burdens (financial, experience, reporting and otherwise) on mortgage bankers than on brokers. Additionally mortgage bankers are sometimes subject to multiple licensing laws depending on their loan product offerings. For example, several states have additional licensing laws for mortgage bankers depending on the loan finance charge, principal amount, or other criteria.[45]

---

42 For example, in Nevada, mortgage bankers and mortgage brokers must have two years of verifiable experience in mortgage lending, and neither bankers nor brokers are subject to minimum net worth or surety bonding. However, as of August 2007, the Commissioner of Mortgage Lending in the Nevada Department of Business and Industry had oversight of 294 mortgage bankers and 1,029 mortgage brokers. With the same staff to investigate and enforce the statutes involving both bankers and brokers, there is a greater statistical likelihood that a mortgage banker will be examined and regulated than will a Nevada broker.

43 The President's Working Group on Financial Markets, *Policy Statement on Financial Markets Developments,* (March 2008) p. 12 http://www.treas.gov/press/releases/reports/pwgpolicystatemktturmoil_03122008.pdf

44 There are exceptions to this general rule, as described below. For example, the states of Alabama, Montana, Ohio and Texas regulate mortgage brokers under comprehensive licensing statutes, while most mortgage companies (mortgage bankers) are currently exempt from licensing in these four states, or are subject to a lesser degree of state regulation. In Alabama, the Mortgage Brokers Licensing Act, Ala. Code § 5-25-1 et seq., requires mortgage brokers to be licensed, maintain net worth of $25,000, and complete approved education, but mortgage bankers approved under the National Housing Act (FHA lenders) are exempt from licensing in Alabama. Ohio's mortgage broker registration law, Oh. Rev. Code § 1322.01 et seq., requires registration of mortgage brokers but exempts "mortgage bankers." Mortgage bankers include persons and entities that make, service, buy or sell mortgage loans, underwrite loans and are approved by HUD or the VA or one of the secondary market agencies. Texas has supervisory laws for both mortgage bankers (who must register under Tex. Fin. Code Ann. § 157.001 et seq.) and mortgage brokers (who must be licensed under Tex. Fin. Code § 156.001 et seq). The registration process is simplified; the registration of Texas mortgage bankers is primarily designed to facilitate the handling of complaints from the public. The licensing procedure for mortgage brokers, on the other hand, requires each licensed broker to maintain an office in Texas, have a minimum level of experience and/or education, and pass an examination.

45 For example, the Florida Mortgage Brokerage and Lending Act, Fla. Stat. Ann. ch. 494 et seq., requires both mortgage bankers and mortgage brokers to be licensed by the Office of Financial Regulation. This licensing law applies to residential mortgage loans and to loans on commercial property with five or more dwelling units where the borrower is a natural person or the lender is a noninstitutional investor. The Florida Consumer Finance Act, Fla. Stat. Ann. ch. 516, on the other hand, applies only to lenders (not to brokers) of loans of $25,000 or less where the annual interest rate exceeds 18 percent.

Virtually every state requires the registration and licensing of mortgage broker companies, and almost two-thirds require individual broker licensure or registration. However, the requirements are uneven, and in one case — California — any individual licensed as a real estate agent is automatically licensed as a mortgage broker. Some states call for individual brokers to meet various continuing education, examination, and criminal background check requirements, as well as net worth, surety bond, and auditing requirements, while others do not. Mortgage brokers generally are not subject to multiple licensing laws in a single state based on the size or terms of loans they arrange. Also, recently enacted high-cost loan laws targeted at "predatory lending" generally are directed mainly to mortgage bankers, not to brokers.[46]

State laws regarding a broker's obligation to a borrower vary significantly. Some state laws hold that a broker must act as an agent of the borrower. In other states, courts have ruled that agency relationships exist based on the broker's conduct. Other states have concluded there is no agency relationship implied.[47]

Mortgage bankers are subject to a continuous examination schedule by their chartering agencies, their funding sources, loan guaranty and insurance agencies, and investors. Mortgage brokers are typically authorized or chartered only by state financial institution regulators. They generally are not required to have funding sources or net worth except in nominal amounts, and they are unlikely to be subject to ongoing examination or audit.[48]

New York is an illustrative example of the differences in the state qualification and regulation of mortgage bankers and mortgage brokers.[49] Both mortgage bankers and mortgage brokers are subject to licensing by the New York Banking Department, but the approval criteria are quite different, and the extent of supervision of licensees varies significantly.[50]

In New York, a mortgage banker must have a minimum net worth of $250,000 and access to a $1 million line of credit, plus a surety bond that varies with the volume of loans closed in the calendar

---

46 For example, the Florida Fair Lending Act, Fla. Stat. Ann. § 494.0078, applies principally to mortgage bankers of high-cost mortgage loans and their assignees.

47 For an overview of the state-by-state imposition of fiduciary duties on mortgage brokers, see "Mortgage Brokers — What fiduciary duties exist?" by Andrea Lee Negroni, Esq. in the October 2007 issue of Mortgage Banking Magazine.

48 As indicated above, the general rule is not universal. For example, in Arizona, the experience required to obtain a mortgage broker license is three years (for each individual licensed broker) but for a mortgage banker, only the "responsible" individual must have three years of lending experience. Moreover, mortgage brokers licensed under Arizona law must take and pass an examination to test their competency, but mortgage bankers are not subject to pre-licensing exams.

49 N.Y. Banking Law § 589 et seq.

50 New York Banking Department data indicates that for calendar year 2006, there were 321 New York-licensed mortgage bankers, of which 124 were examined, an examination rate of 38.6 percent. Only 527 of the 2,431 New York-registered mortgage brokers were examined in 2006, an examination rate of 21.6 percent. Thus, in 2006, mortgage bankers were 70 percent more likely to be examined than mortgage brokers. (The statistics for the first nine months of 2007 reflect an examination rate of 15.1 percent for mortgage bankers and 13.3 percent for mortgage brokers, indicating that the examination frequency gap between the two types of licensees was substantially reduced in 2007.) Moreover, the average duration of an examination of a licensed mortgage banker is 10 days, whereas for a mortgage broker, the average duration of an examination is three days, meaning a mortgage banker's examination was more than three times as long as a broker's.

year preceding the license year. The minimum bond is $50,000, while the maximum is $500,000. An applicant for a mortgage banking license must have five years of verifiable experience in the business of making residential mortgage loans or similar lending and credit evaluation experience.[51]

In contrast, a residential mortgage broker in New York is not required to maintain any minimum amount of net worth, not required to maintain a credit line, and its surety bond requirement ranges from $10,000 to $100,000 depending on the number of loan applications taken in the year prior to the license year.[52]

New York's registration requirements for mortgage brokers are much looser, the main requirement being that the Superintendent of Banking find the applicant's financial responsibility and experience "acceptable."[53] This generally means two years of experience, though some applicants — such as real estate brokers and attorneys — are not required to demonstrate any experience at all.[54] Moreover, a mortgage broker may apply for registration on the sole basis of having completed relevant coursework (with no test or other objective evaluation of whether he or she has learned from the coursework). In contrast, an applicant for a mortgage banker license does not have the option to substitute coursework for the required five years of experience.

Federal Laws

Mortgage bankers of all types are subject to an array of federal laws governing loan originations, including TILA, RESPA, the Fair Housing Act, the Equal Credit Opportunity Act,[55] and HMDA.

While mortgage brokers are subject to fair lending laws, they are not subject to HMDA's reporting and disclosure requirements. While mortgage brokers are subject to RESPA and TILA to some extent, consumer disclosure obligations under these laws are mainly the responsibility of mortgage bankers.

TILA

The Truth-in-Lending Act (TILA)[56] is designed to promote the informed use of credit by consumers through meaningful disclosure of its costs. Creditors (i.e., mortgage bankers) making residential mortgage loans for personal, family, or household purposes must provide TILA disclosures except where transactions satisfy specific exceptions. TILA disclosures are detailed and mandatory and

---

51 3 N.Y. Comp. R & Regs. § 410.1.

52 3 N.Y. Comp. R & Regs. § 410.15(a).

53 3 N.Y. Comp. R & Regs. § 410.3.

54 Individual real estate brokers and attorneys are not required to demonstrate any particular experience to engage in the mortgage brokerage business, despite the fact that the qualifications for these occupations and professions do not ordinarily demand specific familiarity with mortgages or consumer credit.

55 15 USC § 1691 et seq.

56 15 USC § 1601 et seq.

failure to make them timely and accurately subjects the creditor to significant penalties and remedies, including the borrower's right to rescind the loan.

The principal TILA disclosures for mortgage transactions include: the amount financed; the prepaid finance charge;[57] the finance charge; the finance charge expressed as an annual percentage rate (APR); the number, amounts, and due dates of payments; the total of payments; any late payment, prepayment or nonpayment provisions; whether a security interest is taken in the transaction; and the creditor's assumption policy. While a broker may furnish the initial TILA disclosure forms to a mortgage applicant, TILA's disclosure requirements fall squarely on creditors or mortgage bankers in covered transactions.

The potential liabilities and penalties associated with TILA violations provide significant incentives for mortgage bankers to comply.[58] Furthermore, market mechanisms (e.g., the salability of covered loans in the secondary market) add another layer of incentives for creditor compliance. An error in calculating any of the key terms in a TILA disclosure has significant consequences for the creditor.[59] A large body of case law attests to the frequency with which borrowers sue mortgage bankers for TILA non-compliance, both perceived and real. Consumers injured by creditor violations may rescind their loans and sue to recover their damages plus penalties, costs and attorneys' fees. Moreover, assignees of creditors may be liable for violations by original creditors.

Unlike mortgage bankers, mortgage brokers have no liability under TILA, although they may deliver TILA disclosures to consumers.[60] A mortgage broker who verbally underestimates loan costs, finance charges, payments or other key elements of a loan in connection with soliciting an application undermines the purposes of TILA, but bears no liability.

RESPA

The Real Estate Settlement Procedures Act (RESPA)[61] mandates disclosure of certain settlement costs to consumers, including direct broker fees and YSPs, and prevents certain fees among settlement service providers which may increase settlement costs.[62] RESPA requires a mortgage banker to provide a good faith estimate (GFE) of settlement charges at the time of mortgage application

---

57 "Finance charge" is a difficult definition to work with under the law because of the lengthy list of items included and excluded from its calculation.

58 15 U.S.C. § 1640(a).

59 15 U.S.C. § 1601 et. seq. See also Brophy v. Chase Manhattan Mortgage Co., 947 F. Supp. 879 (E.D. Pa. 1996).

60 15 USC §§ 1602(f), 1631(b).

61 12 USC §§ 2601-2617.

62 "It is clear that at the time RESPA was passed, its basic thrust was to enable consumers to understand better the home purchase and settlement process, and, where possible, to bring about a reduction in settlement costs." Paul Barron and Michael A. Berenson, "Federal Regulation of Real Estate and Mortgage Lending," Fourth Edition, § 2:1 (Thomson/West 2003) (hereafter, Barron, "Federal Regulation of Real Estate and Mortgage Lending").

and a statement of costs at settlement. RESPA prohibits kickbacks, referral fees, and unearned fees among settlement service providers for federally related mortgage loans.[63]

Mortgage brokers may provide GFEs as well. As long as the mortgage broker has provided the GFE, the funding mortgage banker is not required to provide an additional GFE, but the funding mortgage banker is responsible for ascertaining that the GFE has been delivered.[64] However, to ensure compliance, lenders customarily provide their own GFEs to borrowers. A mortgage banker that requires the use of affiliated providers for settlement services is obligated to disclose any relationship between itself and the provider(s).[65]

There are no statutory penalties under RESPA for failure to provide RESPA-required disclosures,[66] but various courts have held that the lack of a statutory penalty does not obviate a borrower's right of action for violation of the disclosure rules,[67] so mortgage bankers can be subject to lawsuits for noncompliance with RESPA. More frequently, federal and state regulators enforce mortgage banker compliance with RESPA disclosure requirements. Mortgage bankers must keep HUD-1 settlement statements and all other documentation in connection with loans, including the application. This recordkeeping obligation does not fall on brokers.

The Fair Housing Act and the Equal Credit Opportunity Act (ECOA)

The Fair Housing Act prohibits discrimination both by direct providers of housing (such as landlords and real estate companies) and mortgage bankers and others who provide services in connection with a "residential real estate-related transaction." Both mortgage brokers and mortgage bankers are subject to the Fair Housing Act. Under the Fair Housing Act, it is unlawful for "any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin."

ECOA prohibits a "creditor" from discriminating against a loan applicant "with respect to any aspect of a credit transaction" and an "arranger" of credit (such as a mortgage broker) from discriminating on the basis of race, color, religion, national origin, sex or marital status, age (provided the applicant has the capacity to contract), "because all or part of the applicant's income derives from any public assistance program," or "because the applicant has in good faith exercised any right under [ECOA]." While both mortgage bankers and mortgage brokers are subject to these laws, consumers

63 The term "federally related mortgage loan" is broadly defined under RESPA. 24 USC § 2602 (1).

64 24 CFR § 3500.7(b).

65 24 CFR § 3500.7(e).

66 RESPA also requires that prospective borrowers be given a Special Information Booklet which describes settlement costs. The receipt of an application for a federally related mortgage loan triggers the obligation to provide the Booklet. Mortgage bankers or mortgage brokers may provide the Special Information Booklet. 24 CFR § 3500.6.

67 Barron, "Federal Regulation of Real Estate and Mortgage Lending," § 2:41.

and regulators are more likely to make claims against mortgage bankers for any discrimination by independent mortgage brokers because mortgage bankers are perceived to have the resources to pay fines and judgments.

Home Mortgage Disclosure Act (HMDA)

Although mortgage bankers and mortgage brokers are subject to the fair lending laws, only mortgage bankers are required to report and disclose data on mortgage lending activities under HMDA and, thus, are subjected to the scrutiny that HMDA brings. HMDA regulations are the responsibility of the Federal Reserve. The Federal Reserve has stated that the three main purposes of HMDA are:

- To provide the public and government officials with information that will help show whether financial institutions are serving the housing needs of the neighborhoods and communities in which they are located;
- To help public officials target public investments to promote private investments in neighborhoods where investment is needed; and
- To provide data that assist in identifying possible discriminatory lending patterns and enforcing antidiscrimination statutes.

HMDA, among other things, requires covered mortgage bankers to collect, report, and publicly disclose detailed data relating to mortgage applications, denials, and loan pricing. These data include loan type and amount; property location and type; the disposition of the application, such as whether it was denied or resulted in an origination; and the applicant's ethnicity, race, sex, and income.

For 2004, the Federal Reserve began requiring mortgage bankers to report pricing data for first-lien loans with an Annual Percentage Rate (APR) equal to or greater than the rate payable on a Treasury security of comparable maturity plus three percent and for subordinate-liens with an APR equal to or greater than the rate on a comparable Treasury security plus 5 percent. In establishing these requirements, the Federal Reserve sought data on lending patterns in the subprime mortgage market.

As a consequence of these HMDA amendments and the availability of pricing data, hundreds of governmental reviews have been initiated concerning loan pricing by mortgage bankers. These reviews include several by the Department of Justice, the Federal Trade Commission (FTC), the Office of the Comptroller of Currency (OCC), the Federal Deposit Insurance Corporation (FDIC) the Federal Reserve, the Office of Thrift Supervision (OTS), and various state attorneys general. These agencies have continued to use HMDA data in support of other fair lending initiatives, including the review of traditional denial disparity issues, redlining, predatory lending, and steering.

Recommendations for Regulatory Improvements

MBA believes that by appropriately recognizing the differences that exist between mortgage bankers and mortgage brokers, legislators and regulators can take important steps toward addressing consumer protection shortcomings in the mortgage process. MBA recommends the following:

Borrowers Should Have Access to Improved and Timely Disclosures Regarding the Services Furnished by Brokers and Compensation for Those Services

Some have proposed broad prohibitions on compensation linked to loan terms without differentiating between mortgage bankers and mortgage brokers. MBA believes that consumers and the market would be better served with clear information on the amount of total broker compensation, its sources and the broker's functions, early in the process. Such information would encourage consumers to comparison shop among brokers just as they currently do among mortgage bankers, help the consumer understand how compensation derived from rate can be used to pay origination charges and other settlement costs, and increase the likelihood that the consumer ends up with the most favorable loan terms. Additionally, clear information on whether the broker is or is not serving as the borrower's agent would similarly inform the consumer's decision about shopping among multiple brokers.

The recent Federal Reserve proposal to require mortgage brokers to enter into a written agreement with the consumer before compensation is paid to a broker is notable. It would require disclosure of the broker's direct and indirect compensation and help borrowers avoid steering. Additionally, HUD's most recent RESPA proposal seeks to improve YSP disclosures to make clear to the consumer the link between YSP and a higher interest rate. While MBA has concerns with the HUD and Federal Reserve proposals, MBA applauds both HUD's and the Federal Reserve's work in producing them. Additionally, MBA encourages both agencies to work together as they finalize their proposals.

Some have pointed to studies by the Federal Trade Commission (FTC) to refute the position that more information about broker compensation would better equip consumers to comparison shop for mortgages and mortgage providers.[68] The FTC tested various forms of YSP disclosures with consumers and found that the disclosures did not help consumers identify the least costly loans. The FTC staff report also concluded that the YSP disclosures caused a bias against broker sourced loans. While the FTC's findings highlight the challenges in improving consumer mortgage disclosures, they do not address the problem of consumers' often incorrectly placed reliance on brokers as trusted advisors. Nor do the FTC staff conclusions obviate the need to counter steering through improved consumer information about brokers' compensation and legal responsibilities.

Brokers Who Claim to be or Act as Borrowers' Agents Should Be Treated As Agents Under the Law of Principal and Agent

If a broker asserts or acts in a manner that indicates that he or she is shopping for the borrower, the broker should be subject to the duties of agency.[69] This would clarify that a broker is acting on the borrower's behalf and has an obligation to act in the borrower's best interests.

MBA believes that this is best accomplished through a declaration (or disclaimer) of agency relationship by the broker. This clearly would inform a borrower as to whether he should rely on a broker to shop for him. Mere imposition of an undefined standard of fiduciary duty on all mortgage brokers, irrespective of the borrower's wishes, would likely increase liability and costs to both mortgage bankers and borrowers.

All Loan Originators Should Be Registered and Subject to Appropriate, Rigorous Licensing Standards

MBA supports the President's Working Group on Financial Markets' recommendation that mortgage brokers should be held to stronger licensing and enforcement standards. In fact, MBA supports requiring licensing for all individual loan originators — brokers and bankers — except those employed by an institution with a federal charters (current law exempts employees at federally chartered institutions from state licensing laws). Additionally, there should be a nationwide registry

---

68 James M. Lacko and Janis K. Pappalardo, "The Effect of Mortgage Broker Compensation Disclosures on Consumers and Competition: A Controlled Experiment," Federal Trade Commission Bureau of Economics Staff Report (February 2004).

69 Agency is a fiduciary relationship created by express or implied contract or by law, in which one party (the agent) may act on behalf of another party (the principal) and bind that other party by words or actions, C.J.S. Agency §§ 2, 4-6, 23, 25–27, 33, 38-40, 58.

of mortgage broker and mortgage banker employees who originate loans. All originators, including those employed by federally chartered institutions, should participate in this registry. A nationwide registry would provide a powerful tool for regulators, industry participants, and consumers in tracking unscrupulous actors.

MBA also supports rigorous and appropriate licensing standards for loan originators. Ensuring that loan originators fall under rigorous licensing requirements will ensure that mortgage brokers, as well as mortgage bankers have the competence and professionalism required to serve consumers. Additionally, MBA supports greater appropriations at the state and federal level for enforcement of such requirements.

Brokers Should Have Sufficient Financial Resources to Provide Relief to Borrowers and Mortgage Bankers Where Necessary

Brokers should be required to maintain a minimum level of financial net worth. Currently, FHA requires brokers offering FHA-insured mortgages to have a net worth of at least $63,000, plus $25,000 for each branch office.

MBA supports establishing a nationwide financial net worth requirement for all mortgage brokers consistent with these requirements. A requirement for minimum financial worth would provide greater protection to consumers and mortgage bankers and help brokers meet their repurchase obligations, making brokers more financially accountable.

Brokers, Where Possible, Should Be Sufficiently Bonded

Additional protection for the public can be obtained if surety bonds are required in connection with licensing of mortgage brokers. MBA supports minimum bonding, where available, of $75,000 or an amount equal to 10 percent of the broker's annual loan volume, whichever is higher.

A number of states already require brokers to maintain surety bonds. Fidelity bonding for the employees of mortgage brokers would be an additional protection for consumers who put their trust in a mortgage broker to obtain mortgage financing. Bonds commonly are available from commercial insurers, and obtaining them would not generally create a hardship on brokers.

Aggrieved consumers and mortgage bankers could file claims for economic losses against the bonding companies. Moreover, since bonding in many cases requires a financial audit, such an audit can provide additional protection to the public and is consistent with existing FHA regulations.

Mortgage Brokers, as Independent Entities, Should Not Be Made Agents of Mortgage Bankers as a Matter of Law

The foregoing recommendations will solve key regulatory concerns in a more targeted manner. Recently, however, one federal legislative proposal suggested that mortgage bankers should be liable for the acts, omissions, and representations made by mortgage brokers whenever they sell or deliver a subprime mortgage to a mortgage banker or for any loan where a mortgage broker receives a YSP from a mortgage banker.

MBA strongly believes this proposal would have deleterious, albeit unintended, effects. Mortgage brokers are independent entities and act independently from mortgage bankers during the loan sourcing and application process. Mortgage bankers lack the ability to control and oversee broker conduct. Making mortgage bankers liable for mortgage brokers, considering brokers' independence, would result in fewer purchases of mortgage broker loans by mortgage bankers. This would decrease competition and lessen choices to borrowers, ultimately increasing borrowers' costs.

Conclusion

The U.S. mortgage market offers a wide array of mortgage credit options and has been a critical factor in increasing national homeownership rates, which are near record levels. Nonetheless, a rising foreclosure rate and recent excesses in the subprime market have brought calls for greater regulation of all aspects of the mortgage process, including the duties and responsibilities of mortgage brokers. The current challenges that the housing market and some homeowners face point to weaknesses in the quality of consumer information and required disclosures.

Both mortgage bankers and mortgage brokers perform beneficial functions in the mortgage market and have been able to offer borrowers an array of credit choices. As this paper illustrates, although complementary, mortgage bankers and mortgage brokers have fundamentally distinct functions and responsibilities. MBA, therefore, urges legislators and regulators to resist pressure to embrace an unwarranted one-size-fits-all regulatory approach. Instead, MBA believes the differences between the brokerage and lending industries should be recognized, considered, and carefully addressed to assure that regulatory inadequacies are properly addressed, consumers are protected, and that the market functions fully and fairly for the benefit of all.

MORTGAGE
BANKERS
ASSOCIATION®
Investing in communities

1331 L Street, NW
Washington, DC 20005
www.mortgagebankers.org

Summary of the RESPA Statute and HUD's 2008 Proposed RESPA Rule

The RESPA Statute

RESPA was enacted in 1974, for the stated purpose of effecting "certain changes in the settlement process for residential real estate that will result –

(1) in more effective advance disclosure to home buyers and sellers of settlement costs;

(2) in the elimination of kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services;

(3) in a reduction in the amounts home buyers are required to place in escrow accounts established to insure the payment of real estate taxes and insurance; and

(4) in significant reform and modernization of local recordkeeping of land title information.''[1]

Section 4(a) of RESPA[2] requires the HUD Secretary to develop and prescribe ''a standard form for the statement of settlement costs which shall be used… as the standard real estate settlement form in all transactions in the United States which involve "federally related mortgage loans.'' The law further requires that the form ''conspicuously and clearly itemize all charges imposed upon the borrower and all charges imposed upon the seller in connection with the settlement..."[3]

Section 5 of RESPA[4] requires the HUD Secretary to prescribe a Special Information Booklet for borrowers. Sections 5(c) and 5(d) of RESPA require each lender to provide a Good Faith Estimate (GFE), as prescribed by the Secretary, within three days of loan application, and that the GFE state ''the amount or range of charges for specific settlement services the borrower is likely to incur in connection with the settlement..."

Section 8(a) of RESPA[5] prohibits persons from giving and from accepting ''any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that [real estate settlement service business] shall be referred to any person."[6]

Section 8(b) of RESPA prohibits persons from giving and from accepting ''any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.''[7]

---

[1] 12 U.S.C. §2601(b).
[2] 12 U.S.C. §2603(a).
[3] Ibid.
[4] 12 U.S.C. §2604.
[5] 12 U.S.C. §2607(a).
[6] Ibid.
[7] 12 U.S.C. §2607(b).

Section 8(c) provides, in part, that ''[n]othing in [Section 8] shall be construed as prohibiting… the payment to any person of a *bona fide* salary or compensation or other payment for goods or facilities actually furnished or for services actually performed…"

Section 8(c) provides "Nothing in this section shall be construed as prohibiting… (4) affiliated business arrangements so long as (A) a disclosure is made of the existence of such an arrangement to the person being referred and, in connection with such referral, such person is provided a written estimate of the charge or range of charges generally made by the provider to which the person is referred… (B) such person is not required to use any particular provider of settlement services, and (C) the only thing of value that is received from the arrangement, other than the payments permitted under this subsection, is a return on the ownership interest or franchise relationship, or (5) such other payments or classes of payments or other transfers as are specified in regulations prescribed by the Secretary, after consultation with the Attorney General, the Secretary of Veterans Affairs, the Federal Home Loan Bank Board, the Federal Deposit Insurance Corporation, the Board of Governors of the Federal Reserve System, and the Secretary of Agriculture…."[8]

Section 19 of RESPA (12 U.S.C. 2617), among other provisions, authorizes the Secretary to seek to achieve the purposes of RESPA by prescribing regulations, making interpretations, and granting reasonable exemptions for classes of transactions.

HUD's RESPA regulations, Regulation X,[9] implement the statute including the requirements for the GFE to be provided at or within three days of application, the settlement information booklet and the HUD-1 Settlement Statement (the HUD-1) as well as the anti-kickback and affiliated business provisions.

<u>HUD's 2008 Proposed RESPA Rule</u>

The proposed rule would: (1) establish a four-page standard Good Faith Estimate (GFE) form; (2) impose tolerances to limit increases in GFE estimates at closing; (3) revise requirements for disclosure of mortgage broker fees as 'the charge or credit for the interest rate chosen;" (4) make changes to the HUD-1 to facilitate comparison between GFE and HUD-1 charges; (5) establish a new script to be read to borrowers at settlement concerning final loan terms and settlement costs; (6) revise regulations to permit certain average-cost pricing and volume discounts; (7) clarify "required use" requirements to restrict disincentives to use of non-affiliates; and (8) make technical amendments to the RESPA rules. The proposal also announces that HUD will seek legislative proposals to increase enforcement authority, including injunctive authority, under RESPA concerning the GFE and HUD-1, servicing, section 8, title insurance and escrow accounts. The proposal currently would invite public comment for 60 days from the date of Federal Register publication. These proposals are described in greater detail in the below and would:

1. **Good Faith Estimate –** Establish and require the use of a new *standard* GFE form that would disclose: (1) in summary form, the loan details including the loan amount, term, interest rate, initial

---

[8] 12 U.S.C. §2607(c)(2).
[9] 24 C.F.R. §3500.

payment, rate lock period, whether the amounts for principal, interest and mortgage insurance can increase during the mortgage, whether the loan has a prepayment penalty, a balloon payment and whether the loan includes a monthly escrow payment for taxes and insurance; (2) the costs in ten cost categories including (a) lender and mortgage broker charges known as “our service charge;” (b) the YSP or points as “credit or charge for the interest rate chosen,” and then “adjusted origination charges,” (c) required services selected by the originator; (d) title services and title insurance; (e) required services the borrower can shop for; (f) government recording and transfer charges; (g) reserves or escrow; (h) daily interest charges; (i) homeowner’s insurance; and (j) optional owner’s title insurance; (3) Advise the borrower of the relationship between the interest rate and the borrower’s settlement costs; and (4) other information for borrowers including how to apply for the loan, using the included shopping chart, estimated taxes, and flood and property insurance premiums.

2. **Application –** Establish accompanying regulations for a new “GFE application” to elicit a GFE which includes name, social security number, property address, gross monthly income and borrower information on the house price or property value; allows a loan originator at its option to charge a fee for providing the GFE; and requires that settlement costs offered in the GFE be open for 10 days.

3. **Tolerances –** Provide, absent unforeseeable circumstances, that the following charges could not increase at settlement from the GFE: (1) loan originators’ charges, characterized as “our service charge;” (2) mortgage broker fees, characterized as the “charge or credit for the interest rate chosen “after the borrower locks their interest rate; (3) “adjusted origination charges,” also once the rate is locked; and (4) government recording and transfer charges. Would prohibit the sum of other settlement services subject to tolerances, including those that are selected or suggested by the originator and owner’s optional title insurance, from increasing by more than 10 percent overall at settlement, absent unforeseeable circumstances. Unforeseeable circumstances include acts of God and other circumstances that could not be reasonably foreseen when GFE was given such as a change to the property price or environmental problems. Where an originator cannot perform or meet the tolerances because of unforeseeable circumstances, originator must document the costs occasioned by them and charge the borrower only the increased costs caused by such circumstances. Also, not bound by tolerances if borrower requests a change in the loan but originator must provide new GFE. If originator offers borrower a new loan, the originator must provide a new GFE subject to new tolerances. Notify the borrower within one day of a decision to reject the loan in final underwriting.

4. **Disclosure of Mortgage Broker Fees –** Require mortgage brokers to disclose all fees from the borrowers and the lender in block 1 as “our service charge,” in block 2 disclose a YSP as any credit “for the interest rate of ___%” and subtract it from the “service charge” to arrive at the “adjusted origination charge.” Lender must disclose all fees received from borrowers in block 1 and, while lender need not disclose any “charge or credit for the interest rate chosen,” lender must check a box on the form indicating that the credit or charge is “included in the service charge.’ Also, any discount points must be included in block 2 and added to the “service charge” to arrive at the “adjusted origination charge.” Under the rule, HUD also proposes to remove the specific limits on origination charges for Federal Housing Administration loans.

5. **GFE HUD-1 Comparison –** Modify current HUD-1/1A and includes references to corresponding blocks on the GFE. Accompanying rules clarify which services must be separately itemized,

generally including services of third parties but not those of the loan originator or third parties employed by them. Some title services are to be separately itemized.

6. **New Script for Closing Use –** Establish a new script that the settlement agent would be required to read and provide to the borrower at settlement that: compares the loan terms and settlement charges estimated on the GFE with those on the HUD-1; advises whether or not the tolerances have been met; and states the loan terms as contained in the mortgage note and related settlement information.

7. **Average Cost Pricing and Negotiated Discounts –** Permit disclosure of average cost prices on the HUD-1 in accordance with specified computation methods. Also, amends HUD's rules to allow settlement service providers to negotiate discounts in the price of settlement services as long as borrowers are not charged more than the discounted prices.

8. **Revisions to Prohibition Against Requiring the Use of Affiliates –** Change the definition of "required use" so an economic disincentive that a consumer can only avoid by purchasing a settlement service from an affiliated provider would be as problematic under RESPA as an incentive contingent on a consumer's choice of a particular provider. Proposal indicates that it is at least in part directed to homebuilder affiliates but covers other affiliate situations.

9. **Technical Amendments –** Conform RESPA's mortgage transfer of servicing rules to statutory changes and explicitly recognizes the applicability of the Electronic Signatures in Global and National Commerce Act (ESIGN Act)[10] to RESPA disclosures.

10. **Enforcement –** Provide that charging a fee in excess of tolerances or other failures to follow GFE requirements constitutes a violation of Section 5 of RESPA. Solicits comments about whether the industry should have a period of time to remedy an overcharge without violating this provision.

Future Legislation - In its proposal, HUD also announced that it intends to seek legislative changes to: (1) authorize the Secretary to impose civil money penalties for violations of Section 4 of RESPA (the Settlement Statement), Section 5 (the GFE and Special Information Booklet), Section 6 (servicing), Section 8 (kickbacks, referral fees and unearned fees), Section 9 (title insurance), and Section 10 (escrows); (2) require delivery of the HUD-1 to the borrower three days prior to closing; and (3) expand and make uniform the statute of limitations applicable to governmental and private actions under RESPA.

[10] On June 30, 2000, Congress enacted the ESIGN Act (15 U.S.C. §7001-7031) to facilitate the use of electronic records and signatures in interstate and foreign commerce by ensuring the validity and legal effect of contracts entered into electronically. Careful to preserve the underlying consumer protection laws governing consumers' rights to receive certain information in writing, Congress imposed special requirements on businesses that want to use electronic records or signatures in consumer transactions. Section 101(c)(1)(C)(ii) of the Act requires businesses to obtain from consumers electronic consent or confirmation to receive information electronically that a law requires to be in writing. The Act went into effect in October 2000.