April 8, 2008

Jennifer J. Johnson, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551

Dear Ms. Johnson:

Re: Comments in Response to the Board of Governors of the Federal Reserve's Truth in Lending Proposed Rule, Regulation Z, Docket No. R-1305

The Mortgage Bankers Association[1] (MBA) greatly appreciates the opportunity to comment on the subject regulations proposed by the Board of Governors of the Federal Reserve System (Board) to amend Regulation Z under the Truth in Lending Act (TILA) and the Home Ownership and Equity Protection Act (HOEPA).

MBA regards the Board's proposed rule as a far reaching and important structure for new national standards to protect consumers against mortgage lending abuses. Final rules developed from this proposal will be crucial to the future efficiency of the mortgage market and the families it serves.

The Board invites comments on all aspects of the proposed rule and asks numerous questions. MBA's comment letter includes: I. Summary of MBA's Comments; II. Background - outlining the proposed rule; and III. MBA's Specific Comments containing more detailed summaries of each proposed point and specific comments including responses to the questions posed. MBA developed its comments following considerable consultation with its member firms. It looks forward to working with the Board as it finalizes these important rules.

I. Summary of MBA's Comments

A. Context – MBA's General Comments

There are several important points that MBA would emphasize to provide context for the comments to follow.

- **MBA's Overarching Comment – The rule proposes extensive new prohibitions and potentially egregious penalties for nonprime or "higher-priced mortgage loans"**

[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.

based on the amount their annual percentage rates (APRs) exceed comparable Treasury securities, and also establishes prohibitions and potentially egregious penalties that would apply to all loans. The proposed rule also includes rebuttable presumptions that increase risk.

- **While MBA agrees with many of the prohibitions proposed by the Board, it wants to make certain that: (1) the metrics defining the class of nonprime loans are structured so that they do not overreach and cover prime loans; (2) all of the prohibitions are reasonable; and (3) the remedies and penalties are appropriate. The increased regulatory burden and, more importantly, the increased liability and reputational risk that could be presented to lenders by overly broad, burdensome rules for nonprime loans and for all loans, if not revised in the final rule, could prevent many lenders from making loans to those borrowers most in need of credit and significantly increase the costs of credit for all borrowers.**

- **For these reasons, MBA believes it is crucial that, in the final rules, the category of nonprime loans be bounded properly, the prohibitions be reasonably structured, with safe harbors to ensure good lending practices in the marketplace, and the penalties be better tailored to fit each offense. Finally, the rules must be implemented in an orderly manner. To do otherwise, will lessen competition and burden families with unnecessary financing costs for the years ahead. A closer look at MBA's concerns follows.**

First, MBA commends the work of the Board to develop a comprehensive set of rules to address abuses in the mortgage market. This effort has very obviously involved an enormous commitment of resources. The resultant proposals show a great deal of thought and an appreciation of the fact that ill-conceived restrictions can result in unacceptably high costs to innovation and the availability of credit for borrowers. MBA urges the Board to finalize these rules at the earliest possible date, after addressing MBA's concerns on behalf of the industry and the consumers it serves.

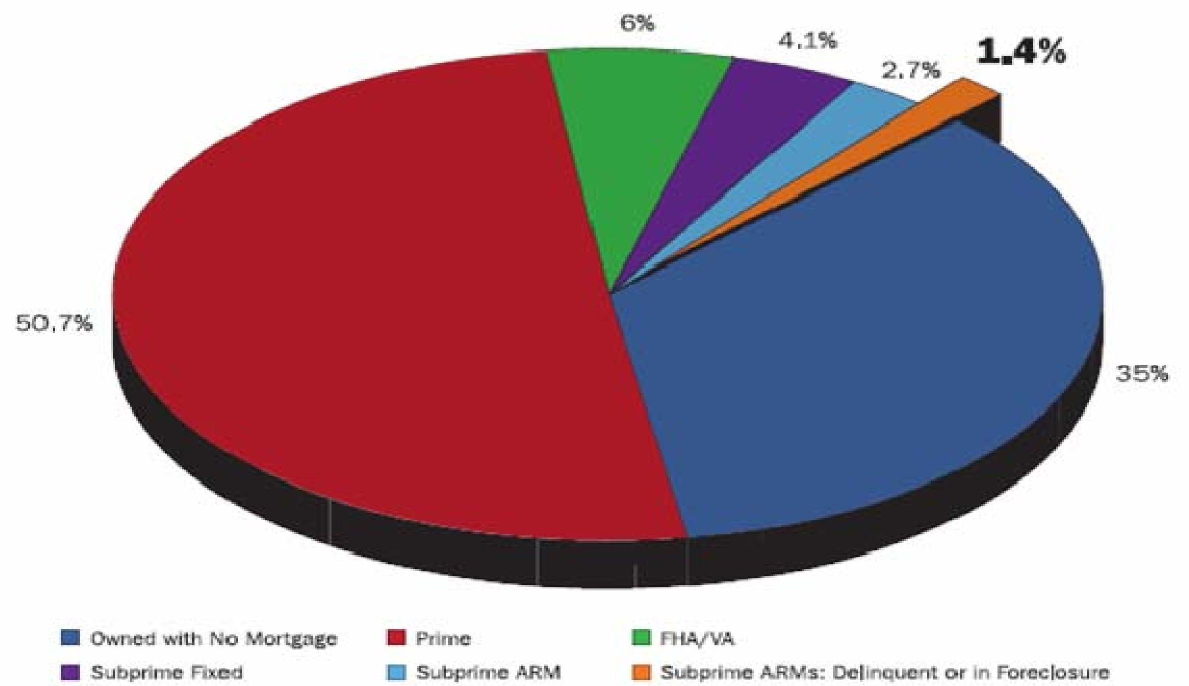
As the Board is well aware, the mortgage industry has been in the eye of a dangerous storm threatening the availability of credit in the nation and in the global economy. This crisis has many victims and causes. These include economic conditions, excess capacity and escalating prices in the real estate market, out-sized investor and borrower appetites, as well as some originator abuses, with the victims including borrowers, future borrowers, communities and the economy at large. MBA believes that while these rules address only the mortgage related aspects of the crisis, their implementation, with some prudent changes, will not only better protect consumers, but will increase investor confidence to help return liquidity to the markets.

As the rules are finalized, MBA urges the Board to continue to keep in mind that the market and other policymakers have already reacted to tighten credit standards and that regulators in federal and state governments are addressing many of the issues addressed here through legislation, regulations and guidance. Recently, real estate prices in many markets have declined and credit has been constricted. In the interest of current borrowers and borrowers to come, MBA urges the Board to take a balanced approach in devising final regulations so that the credit crisis is not worsened. MBA is extremely concerned that the availability of mortgage credit may continue to tighten in the coming months and that it will be difficult for the industry to continue to serve consumers and homeowners in need of mortgage finance.

Second, MBA has been long committed to uniform national standards as the best means of curbing bad lending practices and assuring the future availability of sustainable credit. Abusive lending is a stain on the mortgage industry. Responsible uniform standards are the best means of assuring that consumers nationwide are protected from abusive lenders and that competition is maximized to lower costs and increase choices for consumers.

The current patchwork of state and local federal laws has increased costs to the consumers they are meant to protect while providing uneven regulation. MBA believes the Board's efforts to regulate under HOEPA and TILA can be an important step to providing solid national standards. Notwithstanding, while MBA regards the Board's proposed rules as serving this purpose, MBA is concerned that these comprehensive rules may be regardless a starting point for some jurisdictions, ultimately resulting in increased regulatory costs and lessened benefits for borrowers. In light of this concern, MBA urges the Board to exercise its preemption authority under TILA to the greatest extent feasible.

Third, while it is clear that the nonprime borrowers are experiencing higher foreclosure and default rates today than they have in recent years, the great majority of loans 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. MBA strongly believes that since the nonprime segment is of greatest regulatory concern, the focus of any remedies should be well tailored to specifically address these loans and not over-regulate other sectors of the market. The chart below illustrates the relatively small proportion of nonprime mortgages in the total mortgage market and the subset of nonprime mortgages that is made up of delinquent nonprime ARM loans.



Note: Data based on MBA's National Delinquency Survey, 4th Quarter 2007

In this vein, while MBA supports targeted regulation of nonprime mortgages as preferable to overbroad regulation of the entire mortgage market, the determination of how mortgages are defined as “nonprime” or “higher-priced” loans, and how the new requirements are specified, are matters that are crucial to the industry and to the consumers it serves, or who hope to be served by mortgage finance. A major concern of the calculation is whether the rate trigger finally implemented captures the loans the Federal Reserve is seeking to regulate or whether it covers a much wider set of loans. The metrics chosen, as well as the final form the rules take, will determine whether any covered loans are made.

Fourth, while there are and have been significant market concerns, it still must be borne in mind that as mortgage applications have risen over the last two decades, so to have the percentage of families realizing and successfully sustaining the dream of homeownership. This is due to several main factors including lower interest rates, risk-based pricing and a host of industry efforts and innovations. According to the Federal Reserve’s own Flow of Funds data, 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. As the Board well recognizes, innovation to provide sustainable homeownership should not be compromised by overly broad actions.

Fifth, while MBA supports the Board’s efforts to address abuses in the mortgage market, MBA is profoundly concerned about the extent and nature of liability presented by the proposed rule, which MBA believes will have the unintended consequence of tightening and increasing the costs of credit for borrowers. TILA Section 129(l)(2)[2] empowers the Board, by regulation or order to address “unfair and deceptive acts or practices” (UDAPs) in the market, and to broadly regulate refinancings that are associated with abusive practices or not in the borrower’s interest. This mandate, however, is specifically delineated.

Consistent with its Section 129 authority, the Board may only address those acts or practices which are unequivocally unfair or deceptive. Overbroad use of section 129(l) will have a deleterious effect on the availability of affordable mortgage credit and expose lenders to extraordinary liability that may far exceed the damage incurred because of any compliance failure. MBA urges, therefore, that the Board promulgate the proposed rules pursuant to its principal rulemaking authority under TILA – Section 105(a) – which grants the Board broad authority to regulate the proper use of credit. The exercise of this authority does not sacrifice the ability to treat specific circumstances as UDAPs where warranted. Considering the scope of the Board’s Section 129 authority, MBA does not believe the Board should exercise its regulatory authority under Section 129 of TILA for all seven of the practices identified.

Sixth, regulation of the financial services industry that implements subjective and ill-defined standards harms consumers. Such standards invite class action litigation that provides little relief for individuals who have been abused. In contrast, bright line standards add clarity to define permissible behavior and truly protect consumers. Safe harbors assure appropriate conduct and “rebuttable presumptions” invite unnecessary litigation.

Requiring a reasonable showing of a “pattern or practice” of misbehavior helps stem litigation for relatively small infractions which increase costs to all borrowers. Individual cases are best addressed through procedures where borrowers can make claims against lenders for prompt corrective relief prior to and hopefully in lieu of litigation.

[2] 15 U.S.C § 1639(l)(2).

Seventh, the rule should work in a manner that is consistent with and complementary to other laws and regulations, at least at the federal level. While MBA has long supported clear disclosure to the borrower of settlement costs including mortgage broker's compensation, the Department of Housing and Urban Development (HUD) has recently published a rule to revise its disclosure requirements for mortgage broker compensation that differs significantly in nomenclature and approach from that which the Board proposes. Any final rule should complement other federal rulemakings to avoid confusion and unnecessary costs.

Eighth, the changes in the proposed rule will broadly affect all aspects of lending and servicing practices, they will necessitate numerous systems, training, and staffing changes. Accordingly, MBA believes the implementation schedule for any final rule should address these concerns.

B. Summary of MBA's Specific Comments

Higher-Priced Mortgage Loans

- ***Regulating and Establishing the Category of Higher-Priced Mortgage Loans –*** *While MBA supports targeted regulation of nonprime mortgages as preferable to overbroad regulation of the entire mortgage market, the determination of how mortgages are defined as "nonprime" or higher-priced, and how the new requirements are specified, are crucial to the industry and to the consumers it serves or who hope to be served by mortgage finance.*

- *While MBA also agrees with the Board's proposal that mortgages that are higher-priced or nonprime should be defined by objective metrics that are ascertainable by lenders early in the mortgage process, MBA also believes that the particular metrics proposed by the Board (see Section 226.35 of the proposed rule) – an APR three percentage points over Treasury securities of comparable term for first lien mortgages and five percentage points over comparable Treasuries for second lien mortgages – are inappropriate. These metrics – as a result of market stresses – will result in dramatic over-coverage of prime as well as Alt-A mortgages, classifying them as higher-priced for the foreseeable future, and subjecting them to unnecessary regulation and inflated costs for consumers. MBA urges the Board to consider different benchmarks and/or to adopt different thresholds than those proposed. If Treasuries of comparable maturity are used as the benchmark, we recommend thresholds of at least 400 basis points over Treasuries to define higher-priced first lien mortgages, and 600 basis points over Treasuries for second lien mortgages, to avoid over regulating the prime first and second lien mortgage markets as well as the Alt-A markets. MBA generally supports the Board's proposed exclusions from coverage as higher-priced mortgage loans and, in addition, urges the exclusion of Federal Housing Administration (FHA), Veterans Administration (VA), Rural Housing Service (RHS) and other loans under government housing programs.*

- ***Requiring Consideration of Repayment Ability –*** *MBA agrees that creditors should not engage in a pattern or practice of extending credit for higher-priced mortgage loans to consumers based on the consumer's collateral without regard to a consumer's repayment ability at consummation, and that creditors should consider the consumer's current and reasonably expected income, current and reasonably expected obligations, employment and assets other than collateral. That said, MBA believes that, to avoid depriving worthy borrowers of credit, any final restrictions in this area should be* *reasonable, allow for future innovation to qualify borrowers and, of greatest importance, should be established through bright-line standards in the form of a safe harbors rather than through the proposed rebuttable presumption of non-compliance. While MBA supports the safe harbor which the Board has proposed where a lender has a reasonable basis to believe that a borrower can make payments, the safe harbor should be improved, among other things, to permit lender consideration of other legitimate risk-related factors to qualify borrowers for loans, including those facing reset. If FHA and VA mortgage loans are not excluded from the higher priced mortgage loan requirements, an additional safe harbor should be established for these loans for this provision.*

- ***Requirement for Income and Asset Verification –*** *MBA does not oppose the proposed requirement that, for higher-priced mortgage loans, creditors must verify income and assets which they rely on with documentation, as long as the requirements recognize other legitimate underwriting criteria beyond income and assets including repayment experience.*

- ***Restrictions on Prepayment Penalties –*** *MBA supports reasonable restrictions on prepayment fees for higher-priced mortgage loans along the lines the Board proposes as long as such fees remain available as an option for nonprime borrowers. While MBA would support a general limitation of prepayment fees of three years and expiration 60 days prior to adjustment, it does not favor a DTI restriction or a limitation on prepayment fees to the same creditor or its affiliate in conjunction with MBA's proposal. Prepayment fees allow borrowers access to lower rates and, for some borrowers, whose risk profiles are more challenged, their only opportunity for mortgage financing. MBA urges the Board, however, to use its preemption authority respecting state laws pertaining to prepayment penalties to create consistency and uniformity regarding the proposed restrictions for higher-priced mortgage loans.*

- ***Requirement for Escrow Accounts –*** *The mortgage industry generally supports escrowing to help lenders and borrowers control their costs. Accordingly, MBA does not object to the Board's proposed one-year mandatory escrowing requirement, with certain clarifications and changes. MBA specifically requests that the Board (1) clarify that creditors may, but are not required to, cancel escrow accounts after the one-year mandatory period; (2) continue to allow creditors and servicers to control the imposition of escrow accounts after the one-year period; (3) permit creditors flexibility in the application of escrows on certain borrowers; and (4) exclude escrows from onerous 129 penalties. MBA also believes that an 18-month implementation period would be warranted for those servicers currently lacking the capacity to escrow.*

Requirements for All Mortgages

- ***Requirement for Agreement between Mortgage Broker and Borrower Limiting Fees –*** *MBA has long supported clear disclosure of a mortgage broker's compensation to the consumer and MBA regards the Board's approach as consistent with MBA's policy. MBA believes the proposal, with some clarifications, will add transparency and help stem steering of consumers based on commissions. Incentive compensation to mortgage brokers, because of the broker's role, presents risks that are not presented by payments to other originators. MBA, nonetheless, is concerned, that the Board's approach differs from, and is incompatible with, the approach to broker disclosure proposed by HUD under its new proposed Real Estate Settlement Procedures Act*

(RESPA) rule. It believes that both HUD and the Board should promulgate compatible disclosure requirements along the lines proposed by the Board with some modifications.

- ***Prohibition Against Appraiser Coercion –*** *While MBA believes it is crucial to stem undue pressure on appraisers by a host of actors in the mortgage process, MBA opposes the Board's proposed prohibition at Section 226.36(d) of the proposed rule as it is directed only at the lending industry and it makes lenders legally responsible for the conduct of both appraisers and mortgage brokers. It is important to recognize that the purpose of the appraisal is to provide a valid opinion of value for the lender that ensures, among other things, that the buyer and seller are not engaged in any collusion. This fact places the lender in a different position respecting the appraiser than other actors in the process, including the lender's commissioned sales personnel. While MBA appreciates the Board's establishment of bright lines to identify conduct that is and is not permissible in this area, and the Board's use of settled terms to define proscribed conduct, it strongly opposes holding lenders liable for the conduct of independent third parties.*

- ***Prohibitions Involving Loan Administration –*** *MBA opposes the regulation of servicing activities under this rule in general and under the Board's Section 129 unfair and deceptive practices authority. These prohibitions are apparently based on allegations of consumer abuse rather than the Board's full review of actual servicing practices. Section 129 penalties are particularly excessive when applied in the context of servicing activities that can extend over the life of the loan. MBA believes any effort to address particular servicing activities should be done through regulatory guidance.   If the Board, however, insists on incorporating these servicing activities within this rule, which MBA opposes, the Board should regulate under Section 105.*

- *With regard to the specific servicing practices being proposed, MBA offers the following additional comments. The Board should: (1) Specifically recognize that "effective date crediting" (which allows servicers to handle payments that cannot be processed and credited when received) may result in the posting of a late fee or negative credit report, but such events alone should not violate the rule, provided the servicer reverses such late charges and, as necessary, submits corrections to the credit repositories when a full installment is received timely; (2) Recognize RESPA's Qualified Written Request rule for resolving disputes over late fees; (3) Rather than requiring a list of all fees, adopt a rule that mortgage servicers must be able to respond to borrower's questions about their circumstances and fees in accordance with RESPA's Qualified Written Request process; and (4) Support a 10 calendar day timeline for responding to payoff requests as adopted by the National Conference of Commissioners on Uniform State Laws (NCCUSL).*

- ***Coverage –*** *MBA does not believe it is necessary to extend the protections for all loans to home equity lines of credit (HELOCs). The Board indicates that these loans are generally held in portfolio and are infrequently originated by mortgage brokers. They also do not present the same servicing challenges as first lien loans. Where borrowers experience servicing issues, they should avail themselves of the Qualified Written Request process under RESPA to resolve issues.*

- ***Other HOEPA Prohibitions –*** *MBA does not believe that prohibitions under HOEPA, beyond those proposed by the Board, should be extended to higher-priced loans at this time. The prohibitions proposed in this rulemaking will involve considerable retooling in a time of scarce resources for lenders.*

- ***Steering –*** *MBA shares the view that separate anti-steering provisions are unnecessary. It agrees with the Board that fair lending laws, the proposed mortgage broker requirements and the restriction against a pattern or practice of collateral based lending will all help address this concern.*

- ***Advertising –*** *MBA supports the Board's efforts to revise its advertising requirements to reflect the development of new products and to facilitate compliance in media such as radio, television, and Web banner advertisements. MBA urges use of the Board's authority in Section 105, to promulgate these regulations or to implement them as guidance to avoid undue litigation that will unnecessarily increase costs to consumers. It also urges the Board to ensure that final rules do not make it difficult for consumers to receive valid information to make informed choices.*

- ***Mortgage Loan Disclosures –*** *MBA recommends that the Board advance cautiously in amending the basic rules that guide mortgage lending disclosures. MBA generally supports the proposed requirements for providing early TILA disclosures along with the Good Faith Estimate (GFE) in more classes of transactions. Many lenders give such coupled disclosures today, even without these requirements, in the interest of effectively informing and avoiding confusion to consumers. MBA notes, however, that this requirement will have implementation and training costs that may be outweighed to some extent by providing the GFE and early TILA disclosures together. MBA also questions the benefits of the Board's proposal to limit the fee that a lender may charge only a credit report in relation to its costs.*

- *MBA applauds the Board's commitment to updating its TILA disclosures. However, MBA is concerned that this effort will provide suboptimal and even confusing results for consumers if the Board and HUD do not work together to update and simplify the disclosures that each is responsible for in a concerted and consistent manner.*

- ***Liability –*** *MBA urges the Board to promulgate the new provisions under Sections 226.35 and 226.36 pursuant to its principal rulemaking authority under the Truth in Lending Act – Section 105(a). In making this request, MBA joins other financial industry representatives who have expressed profound concern that implementing the proposals under Section 129 would present significant risks to lenders and impose unnecessary costs on consumers. Promulgating its proposals under Section 105 would not sacrifice any of the strong consumer protections the Board intends. If any violation of these provisions also rises to the level of being "unfair" and "deceptive," or if the creditor has shown a systematic practice, or at least a pattern or practice, of violating the requirement that evidences an intent to deceive , then such violations would be subject to the enhanced provisions applicable to UDAP violators under Section 129. Notably, the servicing proposals should be addressed in guidance or, if not, along with the other practices under Section 105.*

- ***Implementation –*** *MBA favors a staggered implementation schedule that includes implementation six months after the effective date for only those aspects of the rules that do not require major operational changes for lenders provided necessary forms and commentary are developed by the Board. The implementation of provisions dependent on the use of the new metric to define higher-priced loans will take longer, an estimated 12 months from the effective date. MBA also believes that an 18-month implementation* *period is necessary for those servicers currently lacking the capacity to escrow. While MBA is mindful of the need to move forward to protect consumers against abuses, the rules are far-reaching and will require considerable systems changes, training, and staffing changes as well as forms preparation. All of these factors will require months of implementation time.*

II. Background

The proposed revisions would establish seven new requirements under Section 129(I)(2) the Home Ownership Equity and Protection Act (HOEPA), which authorizes the Board to prohibit unfair or deceptive practices in connection with mortgage loans.

The revisions would establish:

– Four requirements to apply to a category of “higher-priced mortgage loans” (or “higher-priced mortgage loans”) defined under the proposed rule as having APRs at or greater than three percentage points over U.S. Treasury securities with comparable maturities for first lien mortgages or five percentage points over comparable treasuries for second lien mortgages. The new requirements affecting higher-priced mortgage loans would include: (1) prohibiting a pattern or practice of extending credit for higher-priced mortgage loans to consumers based on the consumer’s collateral without regard to a consumer’s repayment ability at consummation including considering the consumer’s current and reasonably expected income, current and reasonably expected obligations, employment and assets other than collateral; (2) prohibiting creditors from relying on amounts of assets or income, including expected income, unless the creditor verifies such amounts with third-party documents that provide reasonably reliable evidence; (3) restricting prepayment penalties unless certain conditions are met; and (4) requiring creditors to establish escrow accounts for at least the first year of a first lien higher-priced mortgage for taxes and insurance, while permitting creditors to allow borrowers to opt out of the escrow one year after loan consummation. In addition, the proposal would prohibit creditors from structuring closed-end mortgage loans as open-end lines of credit for the purpose of evading these rules.

– Three requirements under HOEPA for all consumer purpose closed-end mortgages secured by a consumer’s principal dwelling including: (1) prohibiting creditors from paying a mortgage broker more than the consumer agrees to in advance under a contract with the broker spelling out his compensation and other points of information for the consumer; (2) prohibiting any creditor or mortgage broker from coercing, influencing or otherwise encouraging an appraiser to provide a misstated appraisal; and (3) prohibiting certain servicing practices including pyramiding late fees, failing to credit payments as of the date of receipt, failing to provide loan payoff statements upon request within a reasonable period of time, or failing to deliver a fee schedule to a consumer upon request;

– Seven prohibited practices for advertisements for closed-end mortgage loans under the Truth in Lending Act (TILA), Section 105(a): These practices would include: (1) advertising fixed-rate loans when payments are fixed only for a limited period of time; (2) comparing an actual or hypothetical loan to an advertised loan unless the advertisement states the rates or payments over the full term of the advertised loan; (3) falsely advertising loan products as “government” or “government sponsored loan” programs;

(4) prominently displaying a current lender's name in an advertisement without prominently disclosing that the advertising lender is not affiliated with the current lender; (5) advertising claims of debt elimination if the product is merely replacing one debt obligation with that of another; (6) advertising that creates a false impression that a mortgage broker or lender has a fiduciary relationship with the consumer; and (7) foreign-language advertisements in which some information like the teaser rate is provided in the foreign-language and other disclosures are in English;

– Change the timing and fee requirements for provision of early TILA and Good Faith Estimate (GFE) disclosures; and

– Increase the penalties and damages for failure to meet the new requirements.

III. MBA's Specific Comments Detailed

A. Provisions Applicable to Higher-Priced Mortgage Loans

1. Regulating and Establishing the Category of Higher-Priced Mortgage Loans

The Board's proposal would define a new category of "higher-priced mortgage loans" as consumer credit transactions secured by the consumer's principal dwelling where the annual percentage rate (APR) on the loan exceeds the yield on comparable Treasury securities by at least three percentage points for first lien loans, or five percentage points for subordinate lien loans.

The Board seeks comment on whether a different threshold than that proposed, such as four percentage points for first lien loans (and six percentage points for subordinate-lien loans), would better satisfy the objectives of covering the nonprime market, excluding the prime market, and avoiding unintended consequences for consumers in the Alt-A market. The Board also seeks comment and supporting data on the extent to which the proposed threshold would cover the Alt-A market and, as discussed above, on the costs and benefits of such coverage. The Board indicates it also does not have data indicating how closely the proposed threshold of five percentage points for subordinate-lien loans would correspond to the nonprime home equity market, but that the Board understands this threshold, which has prevailed in Regulation C, has been at least roughly accurate. The Board also seeks comment on the extent to which lenders may set an internal threshold lower than that set forth in the regulation to ensure compliance, and the consequences that could have for consumers. Conversely, the Board seeks comment on the extent of the risk creditors would circumvent the proposed restrictions by charging more fees and lower interest rates to reduce their loans' APRs, and the consequences that could have for consumers. Is this risk significant enough to warrant addressing separately? The Board asks if it should adopt a separate fee trigger. What fees would such a trigger include and at what level would it be set? Alternatively, it asks would a general prohibition on manipulating the APR to circumvent the protections of Section 226.35 be practicable?

The Board proposes to apply protections—with the exception of the requirement to establish escrows—to subordinate-lien loans and seeks comment on whether other exceptions would be appropriate. It asks, for example, whether it should limit coverage of all or some of the proposed restrictions to certain kinds of subordinate-lien loans such as ''piggy backs'' to first-lien loans, or subordinate-lien loans that are larger than the first-lien loan? The Board also seeks comment on whether bridge loans should be excluded?

The proposed definition would include purchase loans, refinancings of such loans and home equity loans, but would exclude loans for investment, vacation properties, home-equity lines of credit (HELOCs), reverse mortgages, bridge loans (with a term of no more than 12 months) and construction-only loans.

While the Board proposes to exclude HELOCs, it indicates creditors may seek to evade limitations on closed-end transactions by structuring such transactions as open-end transactions. In proposed 226.35(b) (5)[3], discussed below, the Board proposes to prohibit structuring a closed-end loan as an open-end transaction for the purpose of evading the new rules in 226.35. If it is believed appropriate to apply those rules directly

[3] § 226.35 refers to the proposed amendment to Regulation Z providing rules for higher-priced mortgage loans as defined on 73 Fed. Reg. 1680 (January 9, 2008).

to HELOCs, the Board seeks comment on how an APR threshold for HELOCs could be set to achieve the objectives, discussed further in subpart E, of covering the nonprime market and generally excluding the prime market. The Board seeks data with which to evaluate the proposed approach to matching mortgage loans to Treasury securities and the proposal to select the appropriate Treasury security based on the application date. The Board also solicits suggestions for alternative approaches that would better meet the objectives of relative simplicity and reasonably accurate coverage.

MBA's Comments – While MBA supports targeted regulation of nonprime mortgages as preferable to overbroad regulation of the entire mortgage market, the determination of how mortgages are defined as "nonprime" or higher-priced, and how the new requirements are specified, are crucial to the industry and to the consumers it serves or who hope to be served by mortgage finance.

While MBA also agrees with the Board's proposal that mortgages that are higher-priced or nonprime should be defined by objective metrics that are ascertainable by lenders early in the mortgage process, MBA also believes that the particular metrics proposed by the Board (see Section 226.35 of the proposed rule) – an APR three percentage points over Treasury securities of comparable term for first lien mortgages and five percentage points over comparable Treasuries for second lien mortgages – are inappropriate. These metrics – as a result of market stresses – will result in dramatic over-coverage of prime as well as Alt-A mortgages, classifying them as higher-priced for the foreseeable future, and subjecting them to unnecessary regulation and inflated costs for consumers. MBA urges the Board to consider different benchmarks and/or to adopt different thresholds than those proposed. If Treasuries of comparable maturity are used as the benchmark, we recommend thresholds of at least 400 basis points over Treasuries to define higher-priced first lien mortgages, and 600 basis points over Treasuries for second lien mortgages, to avoid over regulating the prime first and second lien mortgage markets as well as the Alt-A markets. MBA generally supports the Board's proposed exclusions from coverage as higher-priced mortgage loans and, in addition, urges the exclusion of Federal Housing Administration (FHA), Veterans Administration (VA), Rural Housing Service (RHS) and other loans under government housing programs.

MBA supports careful regulation of those segments of the mortgage market where there have been abuses rather than over regulating the entire market. While MBA believes some market participants may not have operated as well as they could have in recent years--failing in key areas such as providing sufficient transparency--the market still remains the best means of providing consumers innovation and lower cost home financing alternatives. Overbroad regulation risks unintended consequences such as limiting the availability of sound, well-priced, home financing opportunities.

The purposes of the narrowed HOEPA interest rate triggers are to bound and bring additional regulation to bear on a category of nonprime or higher-priced mortgage loans. The increased regulatory burden and, more importantly, the increased liability and reputational risk presented to lenders by the new rules for these loans, will prevent many lenders from making any loans subject to these triggers. It is crucial that the costs, in the form of reduced availability of credit, be weighed against the benefits of the additional regulatory scrutiny. A major concern of the calculation is whether the rate trigger captures the loans the Federal Reserve is seeking to regulate or whether too many loans will be inadvertently covered due to the vagaries and fluctuations of the market.

The Metrics Proposed by the Board to Define Higher-priced Mortgage loans Will Result in Dramatic Over-Coverage of Prime and Alt-A Mortgages for the Foreseeable Future

With these concerns in mind, MBA generally agrees with the Board's proposal that mortgages that are higher-priced or nonprime should be defined by objective metrics that are ascertainable by lenders early in the mortgage process. Nonetheless, MBA also believes the particular metrics proposed by the board – an APR three percentage points over comparable Treasury securities of for first lien mortgages and five percentage points over comparable Treasuries for second lien mortgages – will result in dramatic over-coverage of prime as well as Alt-A mortgages as higher-priced for the foreseeable future.

Since 2004, creditors have been required to report the rate spreads of loans using metrics similar to those proposed in this rule under the Board's Home Mortgage Disclosure Act (HMDA) regulations.[4] For HMDA reporting for the year 2006, which became available in aggregated form in the Fall of 2007, as the Board is aware, because the yield curve was flat or at times inverted, the result was at least 15 percent over-reporting of Alt-A and some prime loans as higher-priced.[5]

As illustrated in the graph in the pages to come, whenever the credit markets experience profound stresses, as they have recently, as they continue to have today, and as they have in other economic crises over the last several decades,[6] the spreads between mortgage rates and Treasury securities widen markedly. This is a function of several factors that include a decreased investor appetite for mortgage backed securities (MBS) resulting in increased mortgage rates along with a concomitant "flight to quality" that bids up prices and reduces the interest rates for Treasury securities.

According to data available to MBA, for the week of March 13, 2008, the spread between conforming loans with 30-year terms and comparable Treasury securities went above 250 basis points. (In this calculation, MBA used a 10-year Constant Maturity Treasury (CMT).) For mortgages in excess of the conforming loan limit (jumbo mortgages), where there has been even less liquidity, contract rates have run 350 basis points over comparable Treasuries using a 10-year CMT.

When fees such as increased charges from the government sponsored enterprises (GSEs) and mortgage insurance as well as finance charges are added to these spreads, MBA believes that the use of the proposed 300 and 500 over comparable Treasuries metric, will result in the treatment of most first lien jumbo prime mortgages and too many prime first lien mortgages as higher-priced mortgage loans. Based on MBA estimates, these metrics will also encompass most of the Alt-A first lien market as well as the nonprime market.

While the proposed trigger is based on the APR of the loan, it must be borne in mind that the APR is only one component of the revenue received by a lender on any particular transaction. A lender's willingness to make a loan at a particular rate will be influenced not only by interest rates but the value of other components. For example, some of the principal components of revenue on any mortgage loan transaction are the secondary market price for that loan in the capital markets, the non-pass-through fees paid by the borrower, the net interest margin on the loan while it is held by the lender and the value of the servicing rights to the loan, regardless of whether those rights are sold or retained. Lenders will often originate a loan at a coupon below the par price in the market and subsidize the lower rate with either the additional fees paid by

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[4] *See* Regulation C, 12 C.F.R. § 203.

[5] Avery, Robert et. al., "The 2006 HMDA Data," http://www.federalreserve.gov/pubs/bulletin/2007/pdf/hmda06final.pdf

[6] For example, the Asian currency crisis and the Russian debt crisis.

the borrower, the expected value of the servicing rights or the expected net interest margin for the expected holding period.

Here is a simplified pricing example. Assume a lender originates a mortgage at a contract rate of 7.50 percent, with the intent of delivering it into a mortgage-backed security with a coupon rate of seven percent. Given market conditions, yields on other securities and prepayment speed projections, assume that a seven percent MBS is selling for 99 11/32 or .99344 of face value, so that when the lender delivers a $200,000 mortgage into that security, the lender will be paid $198,688 for a loss of $1,312. Offsetting that loss, however, is a portion of the other 50 basis points of interest that the lender is collecting, the difference between the 7.50 percent collected from the borrower and the seven percent paid to the investor in the MBS. Those 50 basis points can be divided between the required servicing fee of 25 basis points and a credit support or guaranty fee of 25 basis points. Assuming the 25 basis points of servicing has a market value of .830, that is, the servicing is selling at a multiple of 3.3 times the annual gross fee or 3.7 times the fee net of servicing costs. In addition, assuming it takes the lender one month to deliver the loan to the investor, the lender will collect the full 7.5 percent interest income, but will have interest expense on the warehouse line used to fund the loan. Assuming the net interest spread is around 120 basis points, or 10 basis points per month, the total income on the transaction is as follows:

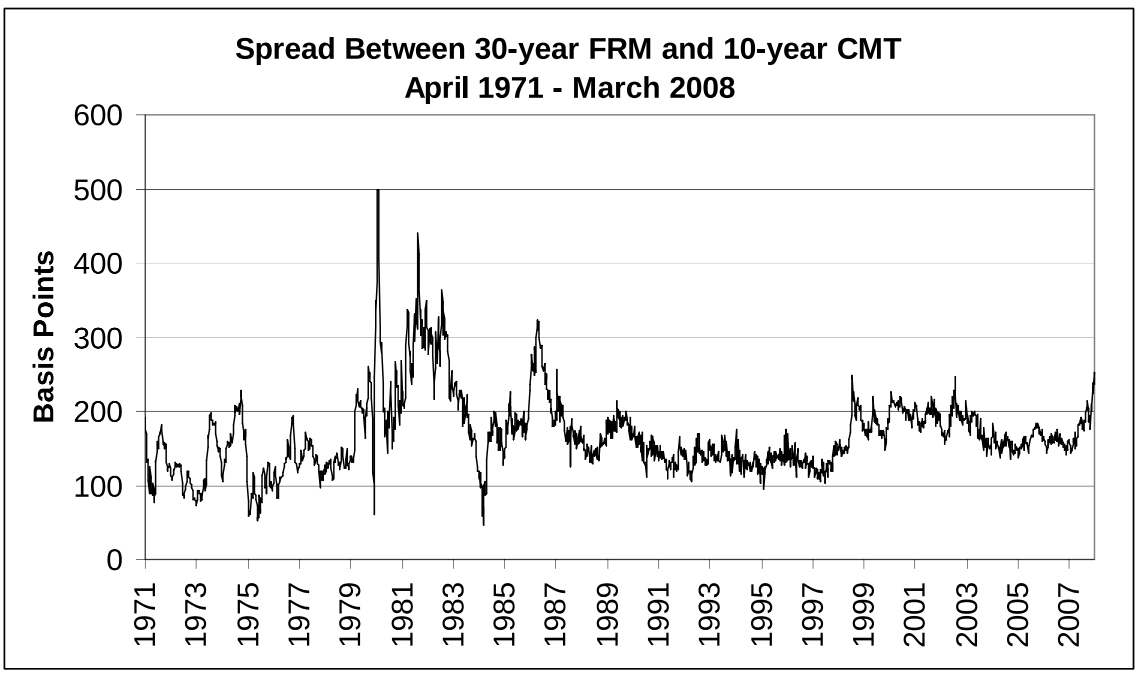
Proceeds from sale:	99.344
Servicing value:	0.830
Excess servicing:	0.222
Net interest margin:	0.100
TOTAL:	100.496

In this case, the lender would make $992 on a $200,000 loan before operating and hedging costs. Based on the lender's costs, the lender would add points and other fees to bring the net yield up to an acceptable level. Assuming for this example a full point, the additional revenue would be $2,000 on a $200,000 loan, for total revenue of $2,992 before expenses. There are many other moving parts. For example, increasing the coupon on the mortgage to 7.75 percent would create another 25 basis points of yield and would appear to increase the proceeds on the loan by $1,850 (25 basis points multiplied by 3.7 on $200,000). However, the higher coupon rate increases the value of the prepayment option, decreasing the market price on the loan, the value of the servicing and value of this extra yield; the increase in the proceeds would be something less than $1,850.

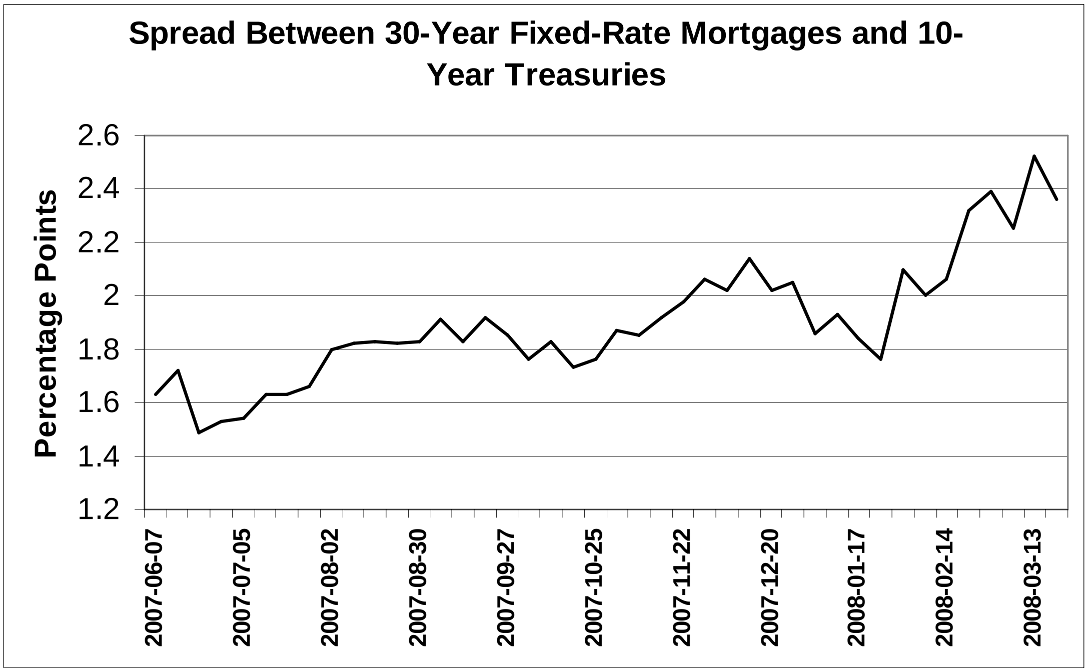
This example illustrates two important points. First, two of the revenue components are not part of the APR calculation. If servicing values were suddenly to fall, such as in a rapid prepayment environment, lenders would respond by increasing contract rates and/or fees just to keep the same return on the loan. Thus the APR would be higher on the exact same loan with the exact same risks due to external market conditions. The second point is that the rate fee tradeoff will differ by loan size and market conditions. For example, on March 28, 2008, one major lender's rate on a 30-year fixed rate mortgage (FRM) conforming loan in California was 6.00 with points of .890. If instead, the borrower preferred to receive points to cover other costs, the rate was 6.625 with negative points of -.878. In contrast, the rate on a jumbo 30-year FRM was 8.00 percent with the payment of 1.028 points. If the borrower preferred to receive points of .484, the rate jumped to 9.50. Thus there was a 150-basis-point swing in contract rates (138 basis points in APR) depending on just the rate fee combination chosen by the borrower for this particular loan in this environment.

There is an additional important pricing dynamic that the Federal Reserve should keep in mind when setting the level of the trigger. Many leveraged holders of mortgages and mortgage-backed securities like Fannie Mae and Freddie Mac employ dynamic hedging models to balance the duration of their assets and liabilities. The same holds true for institutions carrying large amounts of mortgage servicing rights. As drops in interest rates impact prepayment speeds and therefore the expected duration of their assets, a typical tactic of these convexity hedgers would be to buy Treasuries to counteract the shrinking durations of the MBS and the servicing rights. As indicated above, this demand puts further upward pressure on Treasury prices and downward pressure on yields. While this alone would tend to increase mortgage rates compared to Treasury spreads, rapidly declining servicing values in this environment would reduce the degree to which originators can subsidize mortgage rates, resulting in further upward pressure on rates, points and fees, and thus APRs.

The materiality of such swings is entirely dependent on the index or security chosen by the Federal Reserve and the spread above that index. It is important, therefore, to examine first the historic range of spreads between 30-year Fixed Rate Mortgages (FRMs) and the 10-year CMT. To the extent that spreads between the 10-year CMT and prime 30-year conforming fixed-rate mortgages account for a large portion of the proposed 300 basis point spread over Treasuries, it is more likely that more loans will be inadvertently subject to HOEPA regulation due to factors like whether the loan is a jumbo or the rate/point combination chosen by the borrower. The chart below shows that over the last ten years, it has not been uncommon for 30-year FRM spreads to climb above 200 basis points. In fact, during the 1980s, the 30-year FRM actually went above 300 basis points on several occasions.



A more detailed view of recent mortgage-to-Treasury spreads is given in the next graph. With 30-year conforming spreads exceeding 250 basis points during the middle of March, many prime loans would be subject to the Board's proposed 300 basis points higher cost mortgage loan trigger.



The Board Should Carefully Consider Other Benchmarks

MBA supports the Board's efforts to carefully consider comparable securities or other benchmarks to be used in conjunction with any rate spread to define higher-priced mortgage loans. MBA would prefer a comparable security or other measure that better reflects mortgage finance and is not as susceptible to movement in a manner as independent of mortgage rates as Treasury obligations generally move. But Treasury obligations are preferable to the use of a measure or index with even greater infirmities.

MBA notes that some of its members have developed proposals for formulae that will provide relative stability over the long term. One such formula combines the Board's duration-matching component with a factor that captures credit risk/liquidity in the mortgage industry and a spread to ensure that only higher-priced loans are identified and that prime loans are not captured. This approach would use the appropriate Treasury rate based on the Board's duration matched suggestion plus the Mortgage Credit Risk Spread (Freddie Mac rate minus the seven year Treasury rate plus 200 basis points. Another possibility suggested is the use of the higher of the yield on mortgage-backed securities (MBS) or pass-through certificates (PCS) plus a margin or index. MBA supports the careful exploration of these proposals by the Board before a proposal comparing APRs to CMTs is finalized. MBA offers its help to assist Board economists in considering this and other proposals.

If the Board concludes, nonetheless, that a suitable index or benchmark that works more judiciously in bounding higher-priced mortgages cannot be found and a percentage point over comparable Treasuries modality approach is retained in the final rule, MBA believes that it is crucial that the percentage point spread in the final rule be increased to avoid over-coverage of prime loans, considering the market behavior of Treasury securities. MBA believes that a spreads of 400 percentage points for first lien and 600 percentage points for second lien mortgages over comparable Treasuries would avoid covering, and further increase costs on too much of the prime mortgage market.

Additionally, we believe that the Federal Reserve should reserve the power in the final rule to suspend the application of the rule in times of extraordinary market events. Unless the Federal Reserve reserves this power, the final rule will be an impediment to making credit available during such an event.

Moreover, whatever metrics are chosen, the rule should commit the Board to validating and revalidating the thresholds as well as the comparable security or index periodically based on available data, and to adjust it as appropriate, with notice and comment from the public. Only with periodic review can the Board be certain that it has the appropriate metrics in place.

Exclusions

MBA generally supports the Board's exclusions from coverage. In particular, MBA believes the exclusion of HELOCs is appropriate. Proposed Section 226.35(b) (5)[7], discussed below, prohibits the structuring of closed-end loans as open-end transactions for evasion purposes to solve the problem of structuring loans to elude coverage. MBA believes this approach is superior to attempting to fashion an additional trigger or threshold for the HELOC market that would cover the nonprime market and generally exclude the prime market.

In addition to the Board's exclusions, MBA also believes that loans under federal and state programs, notably including the Federal Housing Administration (FHA) program, the Department of Veterans Affairs (VA) program as well as Rural Housing Service (RHS) loans are also deserving of exclusion from coverage as higher-priced mortgage loans. While there is little danger that loans under these programs will be abusive to borrowers, there is the possibility that their APRs may, for a variety of reasons, including mortgage insurance premiums, may cause mortgages' APRs to cross the thresholds. To address this anomaly, loans under these programs should be excluded. Notably, H.R. 3915, the Mortgage Reform and Anti-Predatory Lending Act, which passed the House of Representatives this past year but has not yet been considered by the Senate, explicitly treated FHA and VA loans as "qualified mortgages" not subject to the same scrutiny as higher-priced mortgages.[8]

Additionally, MBA supports excluding jumbo loans (mortgage loans that exceed the conforming loan limit) from the restrictions under the Board's rule for higher-priced mortgage loans. State-predatory lending laws have exempted these loans from their reach because they serve an area of the market where abuses have been much less prevalent. Moreover, borrowers in this market pay higher rates and fees. Making these loans subject to higher-priced restrictions would further exacerbate the widened spreads and higher costs for these loans in the market.

2. Requiring Consideration of Repayment Ability

Ability to Repay – The Board's proposal at §§ 226.34(a)(4) and 226.35(b)(1) would prohibit creditors from engaging in a pattern or practice of extending credit for higher-priced loans to consumers based on the consumer's collateral without regard to a consumer's repayment ability at consummation including considering the consumer's current and reasonably expected income, current and reasonably expected obligations, employment and assets other than collateral. This provision currently applies to high-cost HOEPA loans.

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[7] § 226.35 refers to the proposed amendment to Regulation Z providing rules for higher-priced mortgage loans as defined on 73 Fed. Reg. 1680 (January 9, 2008.)
[8] H.R. 3915, 110th Cong. (1st Sess. 2007). The bill categorized FHA and VA loans as "qualified mortgages," removing them from the category of "not-qualified mortgages," roughly nonprime mortgages regardless of their APRs.

The rule provides at § 226.34(a)(4)(i) there is a presumption of a violation where a lender engages in a pattern or practice of failing to:

> ***(1) Verify and document repayment ability in accordance with §226.35(b) (2) (i) which requires verification using the consumer's W-2, tax returns, payroll receipts, financial institution records, or other third-party documents that provide reasonably reliable evidence of the consumer's income or assets***
> ***(2) Consider consumer's ability to make loan payment based on the interest rate –***
>> ***-- For variable rate loans by adding the margin and index as of the date of consummation or the initial rate if that rate is greater than the sum of the index value and margin as of consummation ;and***
>> ***--For step rate loans by calculating the highest rate possible within the first seven years - The Board seeks comment on whether a shorter period, such as five years, would be appropriate.***
>
> ***(3) Consider consumers' ability to make loan payments based on a fully amortizing payment that includes property taxes, homeowners' association dues, property insurance and mortgage insurance premiums;;***
> ***(4) Consider the ratio of the consumers' total debt obligations to-income; and***
> ***(5) Consider the income consumers have after paying obligations.***

Safe Harbor: The rule provides a creditor does not violate this provision if it has a reasonable basis to believe consumers will be able to make loan payments for at least seven years after consummation of the transaction considering these factors and any other factors relevant to determining repayment ability.

The proposal asks a variety of questions about these provisions including whether the presumptions are appropriate, whether other presumption should be added and whether these presumptions would ensure that creditors adequately consider repayment ability. The Board seeks comment on whether it should adopt a presumption of violation, or a safe harbor at 50 percent debt-to income ratio, or at a lower or higher ratio. It seeks comment on what exceptions would be necessary for borrowers with high incomes or substantial assets, or for other cases?

The Board seeks comment on whether the rule would ensure that creditors adequately consider repayment ability without unduly constraining credit availability. The Board seeks data and information that could help the Board evaluate the costs and benefits of the proposal as it would affect the nonprime market and any portion of the alt-A market to which the proposal may apply.

MBA's Comments – MBA agrees that creditors should not engage in a pattern or practice of extending credit for higher-priced mortgage loans to consumers based on the consumer's collateral without regard to a consumer's repayment ability at consummation, and that creditors should consider the consumer's current and reasonably expected income, current and reasonably expected obligations, employment and assets other than collateral. That said, MBA believes that, to avoid depriving worthy borrowers of credit, any final restrictions in this area should be reasonable, allow for future innovation to qualify borrowers and, of greatest importance, should be established through bright-line standards in the form of a safe harbors rather than through the proposed rebuttable presumption of non-compliance. While MBA supports the safe harbor which the Board has proposed where a lender has a reasonable basis to believe that a borrower can make payments the safe harbor should be improved, among other things, to permit lender consideration of other legitimate risk-related factors to qualify borrowers for loans, including those facing reset. If FHA and VA mortgage loans are not excluded from the higher priced mortgage loan requirements, an additional safe harbor should be established for these loans for this provision.

Some of the difficulties in the market today have been important reminders that sound underwriting is a cornerstone of responsible lending. Responsible lenders have every incentive to carefully consider and evaluate relevant risk factors such as credit reports, credit scores, front end and back end ratios, type of property, and down payment to determine a consumer's ability to make their mortgage payments. Where they neglect to do so and loans fail, they are forced to repurchase them and risk a decision by investors not to do business with them in the future.

In the past, MBA has not supported underwriting standards prescribed in law because they can, and do, limit the availability of credit to entire segments of borrowers who would otherwise be appropriate credit risks. MBA has preferred guidance which has permitted greater flexibility to innovate and, thereby, assist borrowers who have the means of repaying their obligations. However, considering the difficulties that some nonprime borrowers have experienced, and the adverse competition that some originators injected into the marketplace, MBA would generally support a requirement along the lines the Board proposes, with the modifications described below. Final rules should be targeted and clear, and they should not create presumptions of non-compliance that unduly stifle innovation. Instead, the rules should encourage alternative avenues for qualification of borrowers who have the capability of repaying their loans.

MBA does not believe these standards should be rigidly applied to borrowers who are currently in hybrid ARM loans facing reset and who may not qualify under such a standard. Such borrowers are under particular stress, and they should therefore receive special consideration under the Board's final rules.

MBA supports the use of a pattern or practice standard with respect to the assessment of ability to repay. MBA shares the Board's view that creating civil liability for an originator that fails to assess repayment ability on any individual loan "could inadvertently cause an unwarranted reduction in the availability of mortgage credit to consumers." As the Board points out "the 'pattern or practice' element is intended to reduce that risk while helping prevent originators from making unaffordable loans on a scale that could cause consumers substantial injury."[9] For similar and additional reasons, MBA believes the proposed prohibition here should be restructured as a set of prohibitions with a clear safe harbor rather than as a set of rebuttable presumptions of violations that a lender must then disprove.

Because of the nature of a rebuttable presumption, it would not serve creditors or consumers well to establish several presumptions as means to address the legitimate concern of assuring that consumers have the ability to repay their loans. By its nature, a rebuttable presumption creates uncertainty because, by being rebuttable, it invites challenges that shift to the lender the burden of proving that it did not act improperly. By employing a rebuttable presumption or presumptions, the Board would leave to the courts the issue of what constitutes an appropriate determination that the consumer has the ability to repay the loan or not. Because of the uncertainty surrounding such an approach, and the potential for different results from different courts, there will be a lack of uniformity among lenders regarding the assessment process.

Uncertainty creates new risks and the mortgage marketplace accounts for risk by constraining the availability of credit to those consumers who present greater risks, and by increasing prices for others. Neither result is good for the mortgage industry or the consumers it serves. The problems associated with a rebuttable presumption are not found with regard to safe harbors. In fact, a safe harbor promotes uniformity in conduct by establishing a definitive standard that is deemed to satisfy the requirement to determine the ability to repay. Moreover, a safe harbor enables lenders to control risk, which promotes the availability of credit at competitive prices for consumers.

[9] 72 Fed. Reg. 1672, 1688 (January 9, 2008).

MBA recommends, therefore, that the rule be restructured as a prohibition against engaging in a pattern or practice of extending credit for higher-priced mortgage loans to consumers based on the consumer's collateral without regard to a consumer's repayment ability including the consumer's current and reasonably expected income, current and reasonably expected obligations, employment and assets other than the collateral. Under this proposal, any creditor may presume that it does not violate this prohibition if it: (1) verifies and documents repayment ability; (2) considers ability to repay based on the interest rate for variable rate loans by adding the margin and index as of the date of consummation and for step rate loans by calculating the highest rate possible within the first seven years; (3) considers taxes and insurance and other required expenses in underwriting; (4) considers ratio of the consumer's total debt obligation to income; and (5) considers residual income after paying obligations**.**

In order to provide bright lines without unduly limiting credit, MBA would not oppose adoption of a safe harbor that also includes an objective, quantitative measure or measures provided such measure or measures are not exclusive or unduly limiting and would clearly protect a lender from liability, such as a reasonable debt-to-income (DTI) ratio. If the Board determines to include in the safe harbor quantitative measures such as these, the final rule must make clear that any such factors are capable of offset by other factors such as a high credit score, significant equity or assets other than the collateral, strong repayment experience or other valid characteristics to qualify for the safe harbor. If the Board elects to construct a narrower safe harbor of only identified factors, the Board should identify other factors in the rule that can be used to demonstrate compliance even if the safe harbor does not apply. Absent such flexibility far too many borrowers capable of sustaining a mortgage will be denied credit.

MBA supports the Board's proposal of a safe harbor where the originator has a reasonable basis to believe the borrower can repay the loan for several years considering each of the factors identified in Section 226.34(a)(4)(ii) *and* any other factors relevant to determining repayment ability. However, MBA believes that the safe harbor could be considerably improved and would be more realistic if: (1) several years was defined to be "five years" rather than seven; (2) the lender qualified for the safe harbor where the lender had *no* reason to believe that the borrower would be unable to repay based on the listed factors and/or other factors relevant to repayment ability and (3) clarifying that creditors could consider the listed factors and/or other factors demonstrating repayment ability. If the Board does not determine to exclude government sponsored and insure loans generally from the higher-cost mortgage loan requirements as requested above, the safe harbor for this provision should extend to loans under these programs.

MBA believes seven years is an unduly long period for forecasting, and seems unnecessary considering that many borrowers are likely to move or refinance well before seven years elapses. Respecting the second point, lenders make underwriting judgments based on the information before them. Restructuring the safe harbor to allow a lender to qualify a borrower if it has no reason to believe that the borrower will be unable to repay is consistent with sound underwriting and will still ensure that lenders must find borrowers able to repay. Finally, by allowing a creditor to consider the listed factors and/or other relevant factors, lenders could consider other relevant factors, such as rent receipts, electricity bills, and other traditional and nontraditional items along with or instead of the listed factors if they are relevant to repayment ability. Such formulation would permit creditors to innovate to effectively address the particular circumstances of borrowers, including those who have significantly higher incomes or assets, without forcing consideration of the listed factors exclusively.

MBA also supports express language in the rules to establish a right to cure on the part of the lender. Under such procedures before a pattern or practice claim may be brought judicially, the creditor should have an opportunity to address the claim or claims administratively.

3. Requirement for Income and Asset Verification

Documentation – For higher-priced mortgage loans, the proposed rule at § 226.35(b)(2) would prohibit creditors from relying on amounts of assets or income, including expected income, unless the creditor verifies such amounts with third-party documents that provide reasonably reliable evidence. The proposal would specifically allow a creditor to rely on W-2 forms, tax returns, payroll receipts, financial institution records or other third party documents that provide reasonably reliable evidence of the consumer's income or assets.

It would also create a safe harbor for creditors who fail to verify income or assets if the amounts of income and assets that the creditor relied upon in approving the transaction are not materially greater than the amounts of the consumer's income or assets that the creditor could have verified at the time the loan was consummated. The Board rule seeks comment on whether, and in what specific circumstance, the proposed rule would reduce access to credit for certain borrowers, such as the self-employed, who may have difficulty documenting income and assets. The Board also requests comment on whether the rule could be made more flexible without undermining consumer protection. Comment on these questions is solicited both with respect to the nonprime market and any part of the alt-A market that the proposed definition of ''higher-priced mortgage loan'' would tend to cover. Comment is also sought on the appropriateness of the proposed safe harbor, and on whether other safe harbors would be appropriate.

The Board seeks suggestions of narrower alternatives that would impose fewer costs on creditors and consumers while providing sufficient protection to consumers who may be injured, directly or indirectly, by stated income lending. For example, should the Board, instead of adopting the proposed rule, prohibit creditors and mortgage brokers from inflating incomes, influencing consumers to inflate incomes, or extending credit while having reason to believe that a consumer inflated income or was influenced to inflate income? Would a rule attempting to distinguish cases where creditors or brokers were not complicit in applicants' inflating incomes be cost-effective and practicable? If such a rule were adopted, should it provide a safe harbor for verifying income? (p. 1692)

The Board's proposal covers both first-lien and subordinate lien loans, but the Board request comment on whether the proposed rule should make an exception for all subordinate-lien loans, or for subordinate-lien loans in amounts less than a specified dollar amount, or less than a specified percentage of the home's value. Requiring income and asset verification for subordinate-lien loans could in some cases increase costs without providing meaningful protection to consumers. For example, if a consumer has a record of making timely payments on a first-lien loan, then verifying income or assets for a small subordinate-lien loan—assuming the creditor relied on income or assets to make the credit decision—may not provide sufficient additional information about the borrower's ability to repay the debt to justify the cost of verification. Thus, the Board seeks suggestions for potential exemptions for subordinate-lien loans that would not undermine consumer protection. (p. 1692-3)

MBA's Comments – MBA does not oppose the proposed requirement that, for higher-priced mortgage loans, creditors must verify income and assets which they rely on with documentation, as long as the requirements recognize other legitimate underwriting criteria beyond income and assets including repayment experience.

Currently, there is little liquidity for nonprime mortgages, especially for those where documentation does not support the borrower's income or assets. It should be noted however that, when greater liquidity returns to the market, a requirement for verifying documentation in addition to credit information and other relevant underwriting factors, such as equity, will greatly slow the process for some borrowers and make it impossible for others to obtain credit.

MBA appreciates that the Board's proposal would permit creditor's reliance on W-2 forms, tax returns, payroll receipts, financial institution records as well as other third party documents that provide reasonably reliable evidence of the consumer's income or assets. The preamble indicates creditors may also use check cashing receipts or a written statement from the consumer's employer among other third party documents.

MBA believes the final rule should make clear that underwriting need not be limited to consideration of income and assets and that other third party documentation in addition to these documents may support a favorable underwriting decision. For example, items such as rent payment and utility receipts and other third party documents that show payment experience have been used increasingly in new, and proven, underwriting models. MBA believes it is important that the final rule make this clear so the rule does not negate efforts to qualify borrowers who are good risks based upon nontraditional documentation. Also, the rule should make clear that where documentation is not available, reduced documentation should be permitted where the creditor can document clear mitigating factors, such as a particularly high credit score and/or considerable assets other than the collateral.

MBA appreciates the fact that the proposed rule is intended to allow lenders to adjust their underwriting standards for self-employed borrowers and employed borrowers with irregular income and it does not require creditors to re-collect documents if the information would not have changed. Both of these points are helpful.

MBA also appreciates that the proposed rule provides a safe harbor for creditors who fail to verify income or assets where the failure would not have altered the decision to grant credit or the terms of the credit. Remedies under the rule should be available only where there is harm.

MBA believes that lenders use of validated automated underwriting systems should also enjoy a safe harbor. Lenders do not ordinarily know how the criteria in these systems precisely work since they are treated as proprietary by their owners. Nonetheless, lenders appropriately rely on them as valid, predictive systems to efficiently qualify consumers for mortgage credit.

MBA does not support an alternative approach that would make lenders and brokers liable for inflating income of borrowers. MBA does not believe that it is in the interest of lenders, as distinguished from some commissioned intermediaries or employees, to inflate income. Moreover, while MBA believes such conduct is wholly inappropriate, it is not clear that it would fully address the concerns of lenders and investors that a loan be appropriately underwritten.

As a less intrusive alternative, MBA would support a clear disclosure to the borrower, no later than the time of application, of any rate or cost difference between the results from a "no doc" or reduced documentation loan and a "full doc" loan. It is not clear, however, that a disclosure alone would be satisfactory to investors.

MBA supports an exception to this requirement for subordinate lien loans. It is not evident that documentation surrounding these loans has proven to be a significant problem to warrant inclusion. Moreover, as it stands the rule addresses efforts to evade restrictions by structuring transactions as subordinate lien loans.

4. Restrictions on Prepayment Penalties

The proposed rule at § 226.32(d) (6) and (7); §226.35(b) (3) would extend restrictions for prepayment penalties that currently apply to high-cost HOEPA loans to higher-priced mortgage loans. These restrictions allow prepayment penalties on higher-priced mortgage loans only if the borrower's debt-to-income ratio at closing does not exceed 50 percent (and debt and income are verified); prepayment is not made using funds from a refinancing by the same creditor or its affiliate; the penalty term does not exceed five years from closing; and

the penalty is not prohibited under other applicable laws. The ability to levy a prepayment penalty, however, would expire 60 days before the first scheduled reset, if any.

The Board asks for comment on several issues including whether the proposal appropriately balances costs and benefits, whether a prepayment penalty term should be less than five years and whether a prepayment penalty period on a higher-priced loan should expire at least sixty days prior to the first date on which a periodic payment may increase. Specific comment is also sought on the proposal to strengthen the statute's income verification requirement, and on the potential effects of the same-creditor restriction in a market where creditors sell many of their loans. In addition, the Board solicits comments on whether this provision should apply only to loans whose periodic payment may change within a certain number of years (for example, three or five years) after loan consummation. The Board also seeks comment on whether particular loan types (for example, graduated payment, step-rate, or growth equity transactions) should be exempted from a rule on prepayment penalty expiration. Comment on [the length and expiration of a prepayment period] is sought both with respect to the nonprime market and any part of the alt-A market the proposal may cover. Comment is also sought both with respect to higher-priced mortgage loans and with respect to the sub-category of HOEPA loans. The Board requests comment on whether, if it adopts the proposed prepayment penalty expiration requirement, the Board should specifically address the requirement's interaction with § 226.20(c) [§ 226.20(c) addresses disclosures for variable-rate adjustments].

MBA's Comments – MBA supports reasonable restrictions on prepayment fees for higher-priced mortgage loans along the lines the Board proposes as long as such fees remain available as an option for nonprime borrowers. While MBA would support a general limitation of prepayment fees of three years and expiration 60 days prior to adjustment, it does not favor a DTI restriction or a limitation on prepayment fees to the same creditor or its affiliate in conjunction with MBA's proposal. Prepayment fees allow borrowers access to lower rates and, for some borrowers, whose risk profiles are more challenged, their only opportunity for mortgage financing. MBA urges the Board, however, to use its preemption authority respecting state laws pertaining to prepayment penalties to create consistency and uniformity regarding the proposed restrictions for higher-priced mortgage loans.

MBA has supported a disclosure to borrowers informing them of the existence and terms of any prepayment fees and, where available, a choice of a loan with and without such a fee. MBA also has supported a maximum term for prepayment fees of three years. In earlier comments, MBA urged a 30-day period to allow a borrower to refinance prior to reset, though lenders subsequently complied with the 60-day period required by the Subprime Statement[10] and parallel state requirements. Accordingly, MBA would support modifications to the Board's proposals along these lines for higher-priced mortgages as long as there are no further limitations and borrowers can continue to receive the lower rates and financing that prepayment fees permit.

MBA would not, for instance, support further limitations of prepayment fees to a term less than three years, unless the interest rate of the loan adjusts prior to that period and the adjustment is significant. MBA also believes that if new limitations on prepayment penalties of three years are established for higher-priced loans, these restrictions should not be dependent on whether the borrower's DTI ratio at closing exceeds 50 percent or whether prepayment is or is not made using funds from a refinancing by the same creditor or its affiliate.

Prepayment fees with a duration limited to three years should be available to borrowers with higher DTIs. These borrowers are most in need of the lower rates or even the availability of a loan that the existence of prepayment fees can provide. Also, as the Board notes, nonprime loans are normally frequently sold. Limiting the ability to charge a prepayment fee to a creditor

[10] 72 Fed. Reg. 37569-75 (July 10, 2007).

other than the original creditor may ultimately make it more difficult for many borrowers to affordably refinance with the same creditor.

MBA does not support requiring an objective standard such as a DTI of 50 percent as a prerequisite to the application of prepayment fees to higher-priced mortgage loans. If the Board nevertheless wishes to have such a standard, MBA would suggest consideration of a residual income standard for higher-priced mortgage loans in lieu of or as a mitigating factor to exceed the DTI ratio. One lender indicates that it is their experience in applying a DTI standard versus a residual income standard at the same level results in fewer applicants from the same population being eligible; 30,000 households under the DTI standard, versus 150,000 households applying under a residual income standard.

If the Board determines to adopt the 60-day period prior to reset, MBA believes the Board should specifically address the requirement's interaction with Section 226.20(c) which concerns disclosures for variable-rate adjustments.

5. Requirement for Escrow Accounts

For higher-priced mortgage loans, the Board would require at §226.35 (b)(4) establishment of escrow accounts for taxes and insurance for at least the first year of a first lien higher-priced mortgage loan. The proposal also permits, but does not require, creditors to offer borrowers an ability to opt out of the escrow once the first year has passed. The lender is permitted to cancel an escrow account only in response to a borrower's dated, written request to cancel the account received at least 12 months after consummation. The Board seeks comment on whether the benefits of prohibiting a creditor from making a higher priced mortgage secured by a first lien without establishing an escrow account outweigh the costs. The Board seeks information on what state laws may be inconsistent with its proposal. The Board also seeks comment on several points including whether creditors should be required to permit borrowers to opt out, whether mandatory escrow accounts should be maintained longer than 12 months and whether borrowers could be protected from manipulation if they were permitted to opt out at closing.

MBA's Comments – The mortgage industry generally supports escrowing to help lenders and borrowers control their costs. Accordingly, MBA does not object to the Board's proposed one-year mandatory escrowing requirement, with certain clarifications and changes. MBA specifically requests that the Board (1) clarify that creditors may, but are not required to, cancel escrow accounts after the one-year mandatory period; (2) continue to allow creditors and servicers to control the imposition of escrow accounts after the one-year period; (3) permit creditors flexibility in the application of escrows on certain borrowers; and (4) exclude escrows from onerous 129 penalties. MBA also believes that an 18-month implementation period would be warranted for those servicers currently lacking the capacity to escrow.

MBA has long supported a disclosure to borrowers regarding their responsibility to pay taxes and insurance whether or not an escrow account is established for the borrower. MBA believes that arming borrowers with information about their tax and insurance obligations reduces the likelihood that borrowers can be misled by advertisements quoting monthly payment amounts that are lower than others simply because escrow amounts are not included. Disclosing whether the loan will or will not have an escrow account for the borrower is important. MBA, therefore, supports providing the borrower with greater information at origination about their obligations to pay taxes and insurance and whether or not the loan has an escrow for these expenses.

The Board's proposal goes beyond disclosure and would require escrow accounts for higher priced mortgage loans. In examining this proposal, the historical context of mortgage escrow requirements deserves consideration. In past years, consumer advocates pressed to limit escrow accounts. Consequently, HUD issued regulations under RESPA in the mid-1990s that limited the amounts that can be held in escrow accounts.[11] The Board's proposal to require escrow accounts, at this time, raises a number of issues.

The Rule Should Explicitly Provide that a Creditor[12] Can Cancel the Account After the First Year

According to the preamble, it appears the Board intended to permit a creditor to discontinue an escrow account after the one year mandatory period. However, language in the section to be codified states that the creditor may cancel the escrow "only in response to a consumer's dated written request to cancel the escrow account." This language can be read to imply that the borrower has the sole authority to determine whether to maintain the escrow account and that a creditor may cancel an account only when the borrower requests it. The rule should explicitly provide that a creditor has a unilateral right to cancel (or maintain) an escrow account after the first year and, as discussed below, the borrower's right to cancel after a year must be subject to the creditor's standards and policies and any agreement with the creditor.

MBA urges the Board to confirm the creditor's continued right to control costs, including the ability to require or to cancel escrow accounts after the mandated 12-month period, as necessary. Creditors generally do consider escrows to be desirable, because they enhance the value of the servicing asset, ultimately lowering costs to borrowers. However, the value is eroded and costs to borrowers increase when creditors and their servicers are not able to control their costs to escrow over the mortgage term. One way to control these costs, especially when charges imposed by government entities are excessive, is to stop maintaining escrow accounts. Such a decision is not made lightly and would be a last resort.

States and localities have long regulated escrow accounts with requirements for interest and other conditions. Servicing costs can be significant especially if the state fails to adjust its statutory interest rates for escrow accounts during periods of falling market interest rates. Recently, some localities have added new requirements and levied additional charges on escrow accounts. MBA is concerned that an increasing number of jurisdictions may regard escrow accounts as a means to augment state revenues. By way of example, Cook County, Illinois recently instituted a requirement that all loan servicers that pay taxes on properties must also pay an additional fee to the county each time a parcel's tax payment information is retrieved from the county database and each time the tax payment is submitted. Taxes are paid twice a year. The fee is substantial in the aggregate and comprises about half the average servicers' annual net servicing income on impacted loans.

In practice, servicers are not inclined to release escrows unless they are confronted with onerous operational costs. Escrows are valuable assets and provide the creditor with protections against losses of the collateral and against superior liens that could result from unpaid taxes. The establishment of accounts incurs real costs. For these reasons, creditors are inclined to require escrows for longer than one year. However, if costs to manage those escrows soar, especially costs imposed by governmental entities that the servicer cannot control, creditors must be able to terminate these accounts.

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[11] 24 CFR Parts, 203, 234 and 3500. 59 Fed. Reg. 53890 (October 26, 1994)

[12] For purposes of the discussion of the new escrow account and servicing requirements, MBA frequently uses the term "creditor(s)" to encompass servicers as well.

Borrowers' Cancellation Right Should Not Be Unconditional

Borrowers should not have an unconditional right to cancel or opt out of an escrow account once established or required by the creditor. There is considerable risk that borrowers who are experiencing financial difficulty (even if not delinquent), or who wish to improve their cash flow for other reasons, will cancel their escrow accounts in order to divert the money to other obligations or interests. If funds are not available to pay taxes and insurance when they become due, servicers often must advance their own funds or borrow funds to make these payments. The costs to the industry may be prohibitive since many investors require that servicers pay tax and insurance payments even when the borrower is delinquent. Again, servicers must be able to reasonably control their costs of doing business. Allowing borrowers to unilaterally cancel escrows will not only result in increased servicing advances, but it may also result in a greater risk of priority liens and uninsured losses.

MBA, therefore, believes that borrowers should not have an unconditional right to opt out of an escrow account after the mandatory period. Creditors and their servicers should continue to retain the right to mandate escrow accounts for periods longer than 12 months and allow a borrower to cancel an escrow account based on their own written policies to guard against delinquency, deficiency or for other valid business reasons, including their risk tolerance. In addition, the final rule should make clear that the mortgage contract prevails regarding whether an escrow account can be re-established on a non-escrowed account. The most common reasons for re-establishing an escrow account are the borrower's failure to make escrow payments or mortgage payments.

Other Matters

If the Board moves forward with a mandatory escrow period, MBA would support the Board's preemption of state laws that conflict. Moreover, we believe that such preemption must extend beyond the mandatory period to preempt state laws that either mandate escrow accounts or limit the servicer's right to cancel accounts after 12 months. Finally, if the Board decides in the final rule to extend the mandatory escrow period beyond a year, MBA also urges the Board to preempt laws or ordinances like the one in Cook County that frustrate servicers' abilities to escrow in a manner that permits them to minimize their costs and facilitates the availability of escrow accounts to borrowers.

MBA supports applying the escrow provision only to closed end *first* mortgages. MBA applauds the Board's recognition of the challenges that would come with expanding this mandatory escrow provision to second lien and home equity servicers. In addition, MBA believes it is important that the Board clarify that its mandatory escrowing requirement would not override or conflict with existing RESPA rules, which govern when servicers are required to make advances, for example.

MBA has requested above, in the section discussing the establishment of higher-priced mortgages, that jumbo loans be excluded from the coverage of those rules. If the Board determines not to do so, MBA believes the rule should provide discretion to the lender or servicer to waive the escrow requirement on a jumbo loan in any event, where the borrower has demonstrated his or her ability to manage escrow obligations. Otherwise, it may be difficult for these borrowers to refinance their performing non-escrowed loan.

MBA also suggests that servicers be permitted to waive the mandatory period for non-escrowed loans that are refinanced, provided that the borrower has not been delinquent in his or her mortgage or in the payment of taxes or insurance within the last year. Servicers would continue to treat these loans according to their own corporate policies and require escrows or choose not to based on the creditor's or servicer's particular policies and risk tolerances.

The Requirement for an Escrow Account Should Not Be Regarded as a UDAP

The lack of escrows on many nonprime mortgages is not intended to deceive consumers, but stems from the fact that many nonprime lenders came into the market from the consumer finance markets where companies did not traditionally have the technology systems or people in place to establish and collect escrows. The makeup of the nonprime industry today has changed, however, and MBA found that 51 percent of first lien nonprime loans were escrowed based on MBA's 2007 Servicing Operation Study. That figure compares to 71 percent of prime loans that are escrowed. Many borrowers prefer not to escrow their loans and have demonstrated their ability to manage these expenses. For these reasons, MBA strongly believes that not escrowing can hardly be viewed as predatory, unfair or deceptive act or practice. Accordingly, as explained later in this comment letter during the discussion of liability for violations, later in this comment letter, MBA does not believe this issue should be regulated under the Board's unfair and deceptive acts or practices authority.

Implementation Will Take Additional Time for Some Servicers

Creditors and servicers who do not have the current capacity to escrow have reported to MBA that a considerable implementation period would be needed for them to comply with a mandatory escrow requirement, Considerable resources and time will be required not only to bring systems on line but also to perform the necessary testing, training and compliance changes and to staff an escrow department.

As indicated later in this comment, based on discussions with these members, an implementation period of 18 months is needed from the effective date of the final rule. Those lenders with the capability to escrow could be subject to the rule 12 months after the effective date as discussed below because of the need for systems enhancements.

B. PROVISIONS APPLICABLE TO ALL MORTGAGE LOANS

1. Requirement for Agreement between Mortgage Broker and Borrower Limiting Fees

The Board's proposal at§ 226.36(a) would prohibit creditors from directly or indirectly paying a mortgage broker for a covered transaction in excess of an amount broker agrees to under a written agreement with the consumer. Agreement must include the broker's total compensation that the broker will receive and retain from all sources, that the consumer will pay the entire compensation even if all or part is paid directly by the creditor, and that a creditor's payment to a broker can influence the broker to offer loan terms or products that are not in the consumer's interest or are not the most favorable the consumer could obtain. The rule provides that compensation would be disclosed as a flat dollar amount; it would not permit disclosing the compensation as a range of fees or a percentage figure.

The proposal would provide creditors two alternative ways to comply ,in the form of safe harbors (1) where the creditor makes payment to a broker under 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 that includes a description of the broker's role in the transaction and the broker's relationship to the consumer as defined by the law or rule complies with a state law that provides a consumer equivalent protection, for example, it requires that the mortgage brokers act as fiduciaries or (2) a creditor can demonstrate that the compensation that it pays to the broker is not determined in whole or in part by reference to the transaction's interest rate.

The Board asks several questions including the costs and benefits of applying the proposal to all mortgage loans, or only higher-priced mortgage loans, including the proposed alternative means of compliance, whether requirements should apply to loan originators (loan officers) in the employ of lenders as well as brokers, and if so how the rule would address practical difficulties such as whether the requirement for an agreement before the consumer pays a fee reduces broker incentive to shop actively for the consumer and whether there should be leeway for payment increase if loan is more costly. The Board also asks if these are concerns, would it be appropriate for the Board to provide a narrow allowance for renegotiation of the broker's compensation and how should such permission be crafted to ensure transparency and protect consumers from bait and switch?

MBA's Comments – MBA has long supported clear disclosure of a mortgage broker's compensation to the consumer and MBA regards the Board's approach as consistent with MBA's policy. MBA believes the proposal, with some clarifications, will add transparency and help stem steering of consumers based on commissions. Incentive compensation to mortgage brokers, because of the broker's role, presents risks that are not presented by payments to other originators. MBA, nonetheless, is concerned, that the Board's approach differs from, and is incompatible with, the approach to broker disclosure proposed by HUD under its new RESPA rule. It believes that both HUD and the Board should promulgate compatible disclosure requirements along the lines proposed by the Board with some modifications.

MBA has long supported a clear agreement between the broker and the consumer disclosing that the broker is compensated by the lender as well as the consumer. MBA believes borrowers also should receive a disclosure about the broker's role, the maximum amount of any fee the broker may receive from the lender, and that the fee may increase based on a higher rate or other product features. Where a broker holds himself out as shopping for the borrower, MBA believes he should be regarded as a fiduciary of the borrower as a legal matter.

The Board's proposal in large measure is consistent with MBA's approach. Three general principles underlie MBA comments on this long-debated issue. First, the final rule should increase transparency and help stem broker steering of consumers based on the commission rather than benefit to the borrower. Second, MBA believes that brokers differ significantly from lenders and their employees. Last, consumers should have sufficient information to navigate the mortgage market and promote fair and robust competition among brokers and lenders.

Brokers Differ From Lenders and Loan Officers and Require Different Consumer Protection Requirements

As the Board indicates, some in the mortgage brokerage industry have asserted that lenders' compensation from the secondary market and to lender employees based on rate is "equivalent" and should be treated in the same manner as mortgage broker compensation. However, the functions of lenders, loan officers and mortgage brokers differ widely, as do the expectations of consumers regarding each. For this reason, MBA strongly believes it is appropriate that lenders' loan officers and mortgage brokers should be subject to different consumer protection requirements.

Generally, mortgage brokers act as intermediaries and arrange mortgages for borrowers. They act as advisors to borrowers on loan choices, receive loan applications, and perform other loan origination services such as arranging appraisals. They generally are not responsible for loan funds but work with mortgage bankers that "table fund" loans.[13]

Mortgage bankers, on the other hand, are lenders who provide funds for mortgage transactions utilizing their own funds or funds they receive from secondary market investors. Mortgage bankers frequently purchase loans originated by mortgage brokers through table funding after origination by acting as loan "wholesalers." Mortgage bankers may originate loans themselves directly to borrowers through their own retail sales forces who they may compensate on commission, sometimes based on the rate of the loan. When lenders sell loans to the secondary market they may receive compensation based on the yield of a loan.

The differing functions of mortgage bankers and mortgage brokers lead to vastly different expectations among consumers. When a consumer seeks a mortgage from a mortgage broker, the consumer believes the broker, as an intermediary and an advisor, is shopping for him or her. The consumer then often stops shopping and relies on the mortgage broker to find the best loan product(s). When a consumer seeks a mortgage from a lender, the lender is regarded as a qualified vendor or dealer and its employees are regarded as a sales force. Neither is perceived as working for the borrower. Lenders' prices are shopped and compared with those of other lenders and mortgage brokers.

Mortgage brokers are generally compensated by lenders for origination services provided by the broker in the transaction. The compensation is generally based on a combination of factors, including level of services rendered, the rate or terms of the loan they originate plus any direct fees from the borrower, locality of the service, etc. In light of the sometimes complex compensation criterion that includes compensation based on rate or terms, there is often a realistic concern that a mortgage broker may steer a borrower to a costlier mortgage because it provides the mortgage broker with more lucrative compensation. Since brokers' compensation from lenders is not well understood and borrowers tend to cease comparison shopping when dealing with a broker, the loan and/or fees may not be questioned except when the loan later fails to perform.

Current Mortgage Broker Fee Disclosure Requirements Fall Short In Informing Consumers

Since 1992, pursuant to HUD opinions and regulations under RESPA[14] mortgage brokers have been required to disclose on the GFE (provided at the time of loan application) and on the HUD-1 Settlement Statement (provided at closing), the amount of their direct fees received from the borrower and the amount of any compensation or YSP received from the lender.[15] YSPs to brokers are disclosed outside the column of closing costs on these disclosures, as a separate number designated as "YSP POC" or "Yield Spread Premium Paid Outside of Closing."

Under these requirements, mortgage broker compensation and functions are not clear to consumers. These disclosures do not empower the borrower to put together direct and indirect fees to arrive at the broker's total compensation or help the borrower understand that part of the compensation may come from a higher interest rate or the terms of the mortgage the broker

[13] In so-called table funding transactions, the mortgage broker assigns the mortgage to the mortgage banker at settlement and the mortgage broker is paid for his or her origination services. Where mortgage brokers are the real source of funds, they act as mortgage bankers.
[14] 12 U.S.C. § 2601 *et seq*.
[15] 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 Fed. Reg. 10080, 10085, (March 31, 1999).

selects. The current disclosure also does not make the borrower aware of whether the broker is or is not functioning as an agent of the consumer to get them the best loan.

MBA believes clearer information on the amount of total broker compensation, its sources and the broker's incentives would provide several benefits. It would allow the consumer to: (1) compare the broker's origination costs; (2) understand how the consumer may use compensation derived from rate to pay origination charges and other settlement costs; and (3) avoid steering. Clear information on whether the broker is or is not serving as the borrower's agent would help the consumer determine whether he or she should continue shopping for an advantageous mortgage loan. MBA believes that considering these benefits, any final rule should apply these requirements to broker compensation for all mortgage loans and not simply to higher-priced mortgage loans.

HUD and the Board's Requirements Must Be Compatible

Regrettably, HUD's recently proposed mortgage broker rule[16] does not require a clear disclosure of mortgage broker fees. In its proposal, HUD takes an approach that is contrary to the Board's current efforts – HUD's proposal would highlight, not the actual broker compensation amount, but instead, the impact of the YSP on the overall costs to the consumer. HUD avoids using the terms "mortgage broker compensation" or "YSP" altogether, and instead requires disclosure of mortgage broker fees as the "payment or charge for the interest rate chosen" on the new GFE, eventually resulting in a figure entitled "adjusted origination charges." While HUD points out that it arrived at this approach after consumer testing and to avoid mistaken consumer selection of lenders because of a more direct mortgage broker disclosure, the fact is that this is a far different approach than the Board has taken in its proposed rule.

MBA believes that the disparate approaches of the Board and HUD must be reconciled and MBA favors reconciliation along the lines the Board proposes, through a clear disclosure of mortgage broker fees early in the process. The Board's approach is direct and is a forthright solution to the steering problem, while the proposal from HUD adds new terms and does not deal with the problem of the broker being regarded as an intermediary while he or she still receives indirect fees.

In any case, having disparate disclosure requirements by the two agencies will only result in unnecessary compliance costs and confusion for consumers. For these reasons, MBA would strongly suggest that this aspect of its proposal not be finalized unless it is coordinated with HUD and HUD modifies its proposal to complement the Board's approach.

Improving the Board's Proposal

MBA is concerned about unintended consequences arising from requiring an agreement between the broker and the consumer before the consumer pays a fee, such as reducing the broker's incentive to actively shop for the consumer. MBA believes this could be mitigated by allowing a broker to renegotiate his or her compensation under an unforeseeable circumstance. This concept is embodied in HUD's proposed RESPA rule. MBA believes the Board's rules should adopt this approach and provide identical descriptions of unforeseeable circumstances to avoid an unnecessary regulatory burden, unintended disincentives for brokers and to protect consumers from bait and switch tactics.

[16] 73 Fed. Reg. 14030 (March 14, 2008).

Also, MBA notes that the definition of “mortgage broker” under the Board’s proposal differs from HUD’s current rules and its proposal. While it does not believe the differences are substantive, MBA believes the definitions of both HUD and the Board in this area should be the same.

MBA agrees with the Board that creditors should have at least the two alternative ways to comply, in the form of safe harbors: (1) where the creditor makes payment to a broker under 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 that includes a description of the broker’s role in the transaction and the broker’s relationship to the consumer as defined by the law or rule for example, it requires that the mortgage brokers act as fiduciaries; or (2) a creditor can demonstrate that the compensation that it pays to the broker is not determined in whole or in part by reference to the transaction’s interest rate.

MBA believes to facilitate compliance and avoid unwarranted litigation risk to lenders, the Board should provide a listing of states’ and localities’ laws and rules that the Board considers as satisfying the first safe harbor, see “(1)” above, and the Board should provide commentary on compensation schemes that satisfy the second safe harbor in “(2)” above. MBA also believes the Board should mandate an agreement form so that lenders and mortgage brokers can be certain they comply with the rule. MBA is aware of draft proposed forms by other trade associations that would offer good approaches to this issue. MBA would like to assist the Board in the development of a form going forward.

MBA also believes that if it can develop a satisfactory agreement form to disclose broker compensation, which HUD accepts, consideration also should be given to preempting state required agreements. Neither lenders nor consumers are well served by the volume and patchwork of consumer disclosures.

Finally, MBA does not believe that this matter should be regarded as an UDAP under the Board’s proposed rules. Through HUD, the federal government has had a decades-long policy that yield spread premium payments are not per se illegal, specifying that such payments must be properly disclosed and compliant with anti-kickback provisions of RESPA. An abrupt suggestion that payments from lenders to brokers for services rendered should now be “suspect” and subject to special compliance burdens under UDAP concepts would disrupt years of judicial development and industry practice. If the Board decides to now categorize such payments as devious or deceptive, then MBA believes a safe harbor should be constructed to expressly permit the lender to rely on the certification of the broker with an attached contract prior to paying the broker.

2. Prohibition Against Appraiser Coercion

At Section 226.36(b), the Board proposes to “address the harm from improper influencing of appraisers” to prohibit creditors and mortgage brokers and their affiliates from coercing an appraiser to misrepresent the value of a consumer’s principal dwelling. Under the proposal, creditors would be prohibited from extending credit if the creditor knew or had reason to know that a mortgage broker coerced an appraiser to misstate a dwelling’s value, unless the creditor acted with reasonable diligence to determine that the appraisal was accurate. The commentary to the proposal gives examples of acts that would violate the regulation including implying to an appraiser that retention of the appraiser depends on the amount at which the appraiser values a consumer’s principal dwelling, failing to compensate an appraiser for retain the appraiser in the future because the appraiser does not value a consumer’s principal dwelling at or above a certain amount and conditioning an appraiser’s compensation on loan consummation. The commentary also would list examples of acts that would not violate the regulation including: requesting that an appraiser consider additional

information for, provide additional information about or correct factual errors in valuation; obtaining multiple appraisals of a dwelling (provided that the creditor or mortgage broker selects appraisals based on reliability rather than on the value stated); withholding compensation from an appraiser for breach of contract or substandard performance of service; terminating a relationship for violation of legal or ethical standards; and taking action permitted or required by applicable Federal or state statute, regulation or agency guidance.

The Board seeks comment on the costs and benefits of the rule and the examples of actions that would or would not violate the proposed regulation.

MBA's Comments – While MBA believes it is crucial to stem undue pressure on appraisers by a host of actors in the mortgage process, MBA opposes the Board's proposed prohibition at Section 226.36(d) of the proposed rule as it is directed only at the lending industry and it makes lenders legally responsible for the conduct of both appraisers and mortgage brokers. It is important to recognize that the purpose of the appraisal is to provide a valid opinion of value for the lender that ensures, among other things, that the buyer and seller are not engaged in any collusion. This fact places the lender in a different position respecting the appraiser than other actors in the process, including the lender's commissioned sales personnel. While MBA appreciates the Board's establishment of bright lines to identify conduct that is and is not permissible in this area, and the Board's use of settled terms to define proscribed conduct, it strongly opposes holding lenders liable for the conduct of independent third parties.

MBA shares the Board's view, articulated in the preamble to the rule, that appraisals that overstate and/or understate the market value of properties are harmful to unsuspecting consumers. But what is not emphasized, however, is that in the first instance bad appraisals harm lenders and thereby increase the costs for consumers. Viewed in its proper context, appraisals are services conducted for the benefit of lenders, to verify the value of properties for purchase money and refinance mortgages. Consumers can, and sometimes do, order their own appraisals but the objects of this proposal are lender-required appraisals that serve as the primary valuation tools for lenders' collateral. When a home is over-appraised, lenders are left with a security interest that may not satisfy the debt in the event of foreclosure and the over appraisal may also lead to a claim for recourse. Lenders, therefore, have a strong interest in the veracity of appraisals, and for this reason, their interests are aligned with those of responsible consumers, and appraisers.

MBA recognizes appraisers are subject to significant pressure by various actors in the mortgage process including real estate agents, mortgage brokers and sometimes commissioned employees of lenders – loan officers – as well as borrowers themselves. In fact according to the 2007 National Appraisal Survey performed by the October Research Corporation in 2006, 71 percent of appraisers said they received "uncomfortable pressure" from mortgage brokers to raise a property's appraised value, meanwhile 56 percent of appraisers surveyed said they experienced pressure from real estate agents, 35 percent said consumers (presumably buyers and/or sellers), and 33 percent said from lenders.[17] Notwithstanding, the Board's proposal directs its prohibitions only against lenders and mortgage brokers and makes lenders liable not only for their own misconduct but for the misconduct of appraisers and mortgage brokers as well.

Title XI of the Federal Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) regulates appraisals for all federally-related transactions. It requires appraisals to be in writing and performed by professionals with demonstrated competency. Additionally, the Board, FDIC,

[17] In the survey, there is no distinction between lenders and a lender's commissioned sales employees.

OCC, OTS, and NCUA have also issued guidance and clear requirements for appraisal management. These entities may take informal and formal enforcement actions and impose civil money penalties against lending institutions to enforce the guidance. Finally, the Uniform Standards of Professional Appraisal Practice (USPAP), which under Title XI of FIRREA applies to all federally related transactions with loan amounts over $250,000, directs appraisers to conduct their inspection and their relationship with the party ordering the appraisal in accordance with these requirements. As an alternative to the rule as proposed, MBA believes the Board should consider extending these requirements to non-bank lenders and mortgage brokers.

Lenders Have Different Motivations in the Mortgage Process

As described earlier in this letter – during the discussion of yield spread premiums – there are significant distinctions between mortgage bankers and mortgage brokers who are independent actors in the mortgage process. There are also distinctions between lenders as lenders and employees of lenders who are compensated through commission. These distinctions are particularly evident concerning the appraisal process.

A mortgage broker is incented by compensation at closing. A mortgage broker gets paid a greater amount, the more loans it originates. Also the amount of each loan, which is based in large part on the appraised value of the home, has a bearing on the mortgage broker's compensation for each transaction. While a broker's role in the transaction is generally completed at settlement, when he or she receives payment, the lender, on the other hand, has interests and obligations that extend well beyond the closing table.

Mortgage bankers rely on the appraisal to be accurate whether the lender holds the loan in portfolio or sells it into the secondary market. Where a loan in portfolio defaults, the lender generally loses money. Where a loan defaults in the secondary market, an investor can be expected to seek recourse for its lost value. While a broker also may be held responsible for early payment default, as a practical matter most lenders do not seek recourse against mortgage brokers because they are thinly capitalized, if capitalized at all.

While a lender's loan officer is compensated based on commission and his incentives therefore may be similar to those of a broker, unlike a broker, pursuant to firewalls in companies, loan officers can be kept clear of appraisal arrangements. The imperatives of the lender differ from those of loan officers.

For all of these reasons, as confirmed by the statistics reported in the 2007 Appraisal Survey, MBA does not believe that lenders as lenders deserve to be treated as the sole or key problem respecting appraisal pressure, nor does MBA believe they should be assigned quasi-law enforcement responsibility for the misdeeds of independent entities. The Board's approach opens the door to unfounded liability and claims in the future ultimately adding risks and costs that will increase the costs to borrowers.

The Board Should Object to the Recent Agreement Between the New York Attorney General and the GSEs

Recently, since this proposed rule was published, Fannie Mae, Freddie Mac (the GSEs) and the Office of Federal Housing Enterprise Oversight (OFHEO) entered into a settlement agreement with the New York State Attorney General which is pending for comment until April 30, 2008. The agreement governs appraisal requirements for mortgages purchased by Fannie

Mae and Freddie Mac.[18] Under the agreement, as of January 2009, the GSEs will require as part of their representations and warrants from the lender, and as a precondition of the sale of any mortgage to the GSEs to the effect that: 1) the lender did not rely on appraisals provided by mortgage brokers; and 2) the lender or broker did not use an in-house appraiser, affiliate, subsidiary, or any other entity owned by the lender or broker, to conduct the subject property appraisal.

MBA has both procedural and substantive concerns regarding the agreement. First, the agreement permits a state regulator to regulate federally regulated financial institutions, the GSEs and federally regulated mortgage lenders, notwithstanding settled law. Second, this settlement was reached without due consideration of the appraisal proposals under this rulemaking. In fact, the agreement would effectively "trump" the Board's current rulemaking process and put in place new, sweeping requirements that go beyond the Board's proposal without notice or meaningful comment.

Third, the agreement would eliminate much of the investment that lenders and service providers have made to improve the accuracy and efficiency of the appraisal process through the use of in-house appraisers and the development of automated valuation models. If lenders cannot control the appraisal process, their safety and soundness is put at risk. Since comments on the agreement have been requested, MBA believes that federal regulators, including the Board, should object to the agreement considering the procedural and substantive issues raised.

Improving the Board's Proposal

While no regulation can completely eliminate the existence of appraiser fraud and appraiser pressure, MBA believes that the Board's regulation can be improved to ensure the veracity of appraisals without holding lenders responsible for third parties. Bearing in mind that MBA strongly objects to the proposed prohibitions and liabilities in the proposed rule bearing on lenders, if the Board goes forward, MBA finds the examples provided in the proposed rule helpful in delineating conduct that would and would not violate the rule. Considering MBA's objections to the rule, MBA would recommend, in lieu of finalizing this section of the proposal respecting lenders, that the Board, in conjunction with the federal financial regulators, amend the frequently asked questions and interagency statement on appraisals (FAQ)[19] to make clear the distinctions between acceptable and inappropriate contact between appraisers and mortgage bankers. Such an amendment to the FAQ document could provide specific commentary on the boundaries of a proper relationship for lenders and appraisers, but be directed to and used by both users of appraisals and providers of appraisals. This will result in the dissemination of appropriate information on the practices of ordering and using appraisals to all parties involved in the real estate transaction.

Finally, however, if the Board finalizes this section as proposed, MBA believes that there also should be a safe harbor for lenders who establish one or more mechanisms to assure the veracity of appraisals. For example, many lenders set up a variety of procedures within their organizations which establish "firewalls" and ordering review processes so that appraisers do not report to the production arm of the organization. Some lenders use random appraisal ordering procedures to prevent familiarity and regular contact between independent appraisers

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[18] Freddie Mac and Fannie Mae combined held 75.6 percent of market share in the fourth quarter of 2007. "Fannie, Freddie Keep Benefitting from Market's Woes," *Inside the GESs* (February 6, 2008).
[19] Frequently Asked Questions on the Appraisal Regulations and the Interagency Statement on Independent Appraisal and Evaluation Functions, OCC, FRB, FDIC, OTS, and NCUA (March 22, 2005).

and the production department. MBA would be willing to work with the Board to construct a workable safe harbor that would ensure appraiser independence without compromising a lender's business model.

3. Prohibitions Against Servicing Abuses

The Board's proposed § 226.36(d) would prohibit certain practices by servicers specifically: (1) Failing to credit a consumer's periodic payment as of the date received; (2) Imposing a late fee or delinquency charge where the only basis for the delinquency is the failure to pay a late fee or delinquency charge imposed on earlier payments; (3) Failing to provide a current schedule of servicing fees and charges within a reasonable time after a request; or (4) Failing to provide an accurate payoff statement within a reasonable time after a request (the Board suggests three business days under normal market conditions and longer during high volume refinance periods). The Board seeks comment on several matters including whether the commentary should include a safe harbor for what constitutes a reasonable cut-off time to credit payments that day, alternatives to requiring a schedule of servicing fees and charges and whether the benefits of these provisions outweigh their costs.

MBA's Comments – MBA opposes the regulation of servicing activities under this rule in general and under the Board's Section 129 unfair and deceptive practices authority. These prohibitions are apparently based on allegations of consumer abuse rather than the Board's full review of actual servicing practices. Section 129 penalties are particularly excessive when applied in the context of servicing activities that can extend over the life of the loan. MBA believes any effort to address particular servicing activities should be done through regulatory guidance. If the Board, however, insists on incorporating these servicing activities within this rule, which MBA opposes, the Board should regulate under Section 105.

With regard to the specific servicing practices being proposed, MBA offers the following additional comments. The Board should: (1) Specifically recognize that "effective date crediting" (which allows servicers to handle payments that cannot be processed and credited when received) may result in the posting of a late fee or negative credit report, but such events alone should not violate the rule, provided the servicer reverses such late charges and, as necessary, submits corrections to the credit repositories when a full installment is received timely; (2) Recognize RESPA's Qualified Written Request rule for resolving disputes over late fees; (3) Rather than requiring a list of all fees, adopt a rule that mortgage servicers must be able to respond to borrower's questions about their circumstances and fees in accordance with RESPA's Qualified Written Request process; and (4) Support a 10 calendar day timeline for responding to payoff requests as adopted by the National Conference of Commissioners on Uniform State Laws (NCCUSL).

General Concerns

MBA is extremely concerned about the Board's expansion of HOEPA to include new servicing prohibitions resulting from the claims of a consumer advocacy organization or organizations. The Board confirms that it has not performed additional study or investigation into the accuracy of these claims; and MBA believes that these abuses are largely overstated or nonexistent.

MBA believes HOEPA and its penalties were designed to address origination activities of lenders. Accordingly, it does not believe servicing activities should be regulated under these rules. The Board's proposal would impose an unfair and deceptive practices standard on servicers, which carries particularly onerous penalties in this context. Application of the Board's Section 129 remedies and penalties are therefore especially inequitable in the servicing context.

Borrowers would be permitted to make claims to recoup finance charges, obtain statutory penalties, and attorneys fees for relatively minor and correctable infractions that occur up to the 30^{th} or even 40^{th} year of the loan.

MBA believes any effort to address particular servicing activities should be done through regulatory guidance. If the Board, however, insists on incorporating these servicing activities within this rule, which MBA opposes, the Board should regulate under Section 105 as explained later in this comment letter during the discussion of liability for violations.

Crediting of Payments

The Proposal would require a servicer to credit a payment to the consumer's loan account *as of* the date received. The Board states that the servicer does not violate the requirement if it physically posts the payment on a later date provided the posting does not result in a finance or other charge or causes the reporting of negative information to a credit reporting agency. In effect, through this proposal, the Board seems to be implicitly recognizing the practice of "effective dating," whereby a servicer need not physically credit the payment on the date received, but must treat the payment as if it was credited on the date received – even when the payment is physically credited on a later date. It also allows a payment to be posted after the date it is received if such action does not result in a late fee or negative credit reporting.

MBA supports the Board's recognition of "effective dating." "Effective dating" allows servicers time to handle payments that cannot be processed and credited when received through the automated lock box service. As can be expected, a small percentage of payments received each month cannot be credited on the date received. They must be processed manually or require additional research for a variety of reasons, including the receipt of coins and paper money, multiple cashiers' checks that require special screening, payments from non-customers, checks representing multiple installments, installments that exceed the amount required, or payments on loans in bankruptcy that require special handling. Moreover, partial payments are not credited to borrowers' accounts.

What is important to recognize with "effective dating" is that, in some cases, late fees and negative credit reporting will automatically post on an account when a payment is being researched. For example, a payment received on April 14^{th} may not be physically credited to the account until the 17^{th} because it must be researched. Because the payment was not credited by the termination of the grace period (typically 15 days from the due date), the servicing system will automatically generate a late fee and notice. If the payment cannot be credited by the end of the month, a negative credit report may ensue. Nevertheless, the late fee and credit report are reversed when the payment is "effective date" credited to April 14th, provided the borrower is otherwise current and a full installment is received.

Mortgage servicers manage millions of payments each month and automated systems make the process less costly and more efficient for servicers and consumers. Servicers must continue to be able to rely on their automated systems and the Board should recognize practical solutions to situations that will arise from an automated process. MBA, therefore, requests that the Board *explicitly* recognize that "effective date" crediting may result in the posting of a late fee or negative credit report, but such events alone do not violate the rule, provided the servicer reverses any late charges and submits corrections to any credit repositories, if necessary, when a full installment is received timely and no other delinquency is outstanding.[20]

Any conflicts that result from errors in reversing charges or credit reports, and occasionally there will be such errors, can be handled through RESPA's "Qualified Written Request," or QWR, process. Imposing penalties in the amount of total finance charges for an unintentional and correctable error that occurs on one payment in the 15th or 20th year of a loan, for example, goes well beyond excessive. Servicers are willing to and do correct payments application errors and thus a strict liability rule is not appropriate.

The Board also indicates that it is appropriate for servicers to dictate specific conditions for remitting payments including where the payments must be sent and cut-off times. MBA supports these concepts, and asks that the Board recognize these conditions for regular installment payments and pay-off funds. In addition, we ask the Board to recognize "other conditions." For example, servicers impose other conditions on payments received on home equity lines of credit where the line is approaching or has reached its credit limit. The servicer either specifies the types of financial instruments required (good funds) or may credit the account, but not allows further draws until the funds clear. These are appropriate and necessary safeguards that protect the servicer from excessive risk and all borrowers from excessive costs.

The Board seeks comment on whether (and if so, how) partial payments should be addressed in this provision. MBA opposes the mandatory crediting of partial payments. MBA feels strongly that the Board should indicate that servicers need only credit payments that represent full installments. A full installment is scheduled principal and interest, as well as escrow items if the loan is escrowed. Reinstatements of delinquent loans must be handled differently as other charges, such as foreclosure costs, may have accrued and are payable as a condition to reinstatement.

While lenders should not be required to credit partial payments, they should be allowed to hold them in suspense[21] or return them to the borrower. Both methods of managing partial payments are valid and often are dictated by government regulation, such as through the rules governing HUD and VA loans, state law or business rules. For example, servicers may hold a partial payment in suspense to avoid returning the initial payment only to receive the shortfall the next day, which then must be returned – creating further delay and confusion in the process. Conversely, many servicers do not have the capacity to track partial payments or feel it is prudent to return the funds to the borrower when not credited. Again, some states, as well as HUD and VA, dictate how to handle partial payments. Most servicers also have instituted a tolerance whereby they will accept and credit payments as a full installment even though short by a nominal amount, such as $25.

From a purely financial standpoint, however, it is important to recognize that most home mortgages are installment loans. As such, they do not behave like credit cards that impose a daily accrual of interest on amounts unpaid. Other than the contractually established late charges, the borrower is charged the same scheduled amount of interest, whether that

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[20] The Board appears to support the notion of crediting full installments received to the oldest outstanding payment due, rather than crediting to the month the payment is received when an older delinquency is outstanding. See Staff Commentary on the Credit Practices Rule found at: http://www.federalreserve.gov/Regulations/cg/crdtpracrul.htm

[21] Holding a payment in suspense means that the lender cashes the check and holds the money in a suspense account tied to the loan that will be credited to the borrower's account when a full installment is received.

installment is paid on time or is paid 30 days or 90 days late. Moreover, crediting a partial payment does not relieve the borrower from paying a late fee, it does not stop a negative credit report, and does not advance the due date (e.g., the borrower is still deemed delinquent).

What crediting a partial payment does do, however, is create significant problems for the servicer and the borrower. First, such crediting would convert a fully amortizing loan into a negative amortization loan because future interest would be calculated on a larger than anticipated (scheduled) loan balance. Such an outcome would seem at odds with the Interagency Guidance and the Board's efforts. Second, crediting a partial payment would create a significant investor reporting problem as the borrower's amortization of the loan will differ greatly from the security's scheduled amortization. Third, crediting a partial payment is not possible under most servicing systems, which were designed based on the fundamental understanding that a mortgage is an installment loan.

Additionally, a policy to mandate that servicers credit partial payments may encourage borrowers to short their mortgage payments. If this occurs, it would significantly increase servicer costs in the form of advances to investors of scheduled principal and interest. Any shortfall in the scheduled amounts received from a borrower must be advanced to investors from the servicer's capital account or through borrowed funds. Finally, MBA believes that mandating the crediting of partial payments could be abused by borrowers as a means to bar foreclosure. As a pre-condition to foreclosure, the servicer must accelerate the loan – rendering the entire amount due and payable. Crediting of a partial payment after acceleration would create a defense to foreclosure because the servicer is accepting an amount less than the full indebtedness. Such action would invalidate the acceleration and bar the lender from proceeding to foreclosure. Borrowers, therefore, could frustrate foreclosure rights easily if partial payments were permitted. For all of these reasons, MBA urges the Board not to require the crediting of partial payments.

Pyramiding of Late Fees

Proposed Section 226.36(d)(1)(ii) would prohibit servicers from imposing any late fee or delinquency charge on the consumer in connection with a payment, when the only delinquency is attributable to late fees or delinquency charges assessed on an earlier payment, and the payment is otherwise a full payment for the applicable period and is paid on its due date or within an applicable grace period. MBA is perplexed by this proposed requirement. The Credit Practices Rule[22] already prohibits the pyramiding of late charges and the Board already has authority to enforce non-compliance. MBA questions whether the Board has other evidence that servicers in today's marketplace are pyramiding late charges or whether the Board is trying to address some other activity. Other than where caused by a rare clerical error, the mortgage industry does not pyramid late fees and thus MBA does not oppose a general prohibition. Such errors can be handled under existing QWR rules or the Board's existing rule.

Schedule of Fees

The Board's proposal would require a servicer to provide to a consumer upon request a schedule of all specific fees and charges that may be imposed in connection with the servicing of the consumer's account, including a dollar amount and an explanation of each, and the circumstances under which it may be imposed. The stated purpose for this requirement is to

[22] 12 C.F.R. 227.15; see also 16 C.F.R. 444 (Federal Trade Commission).

provide more transparency and to make it difficult for unscrupulous servicers to camouflage or inflate fees by gathering them together or giving them generic names.

MBA opposes this provision for several reasons: (1) the requirement is virtually impossible to implement as the Board currently proposes it; (2) a broadly defined schedule of all fees and charges would be an unnecessarily burdensome requirement for the industry resulting in unnecessary costs to all consumers; (3) the proposal mischaracterizes current servicer disclosures; and (4) alternatives exist that are less burdensome but which would achieve the desired results. Rather than impose such a requirement on servicers, MBA suggests the Board again refer to the Qualified Written Request procedure under RESPA in the rule to ensure that borrowers are properly informed of fees and charges.

It is virtually impossible for mortgage servicers to provide a comprehensive list of all fees that may be charged in connection with a mortgage because the fees can vary by product type, geographical areas and jurisdictions, and apply to different stages in the life of a loan. Mortgage servicers charge fees for a wide range of circumstances. In many cases these fees are merely pass-throughs of fees imposed by states and local governments. Some fees are charged for voluntary services, such as the use of speed pay, which are separately agreed to by the borrower. Other fees are specifically stated in the mortgage or other documents and do not need re-disclosure. Finally, some fees result from the borrower's action or inaction, such as fees associated with delinquency, bankruptcy or waste and are very specific to the particular legal process and investor or insurer guidelines. It is important to note that the most common fees servicers charge are often listed on the back of monthly statement or other communications.

Requiring a comprehensive list that would capture every possible fee will only result in a list that is incomplete, outdated or simply wrong. For example, lenders are permitted under the mortgage to make emergency repairs to avoid damage to the home. Those costs are then billed to the homeowner or become part of the total indebtedness. The costs for such repairs vary depending on the damage, the cost of labor and materials and other factors. There is simply no way to estimate these costs in advance. Similarly, it would be misleading to disclose foreclosure attorneys' fees as an hourly or flat charge as suggested by the Board because these fees do not represent the entire costs.

Other fees could include filing fees, court costs, publication, service of process, mailings, property registration fees, inspection fees, broker price opinions and appraisals, title fees, etc. These fees may not be known to the servicer, will change constantly and require a disclosure nearly the size of a phone book. This is not to say that once a fee is incurred on an individual loan that a detailed itemization cannot be provided – it can, and the QWR process already provides a means by which the borrower can request such an itemization.

What is particularly troubling about the proposal is the presumption that fees "lumped together" or given "generic names" are intended to mask some unscrupulous intent of the servicer. This is not accurate. This grouping simply represents on-going constraints of automation. Servicers depend heavily on computer systems and technology to manage the vast amounts of data necessary to properly service mortgages. It is not currently feasible to include a field for every charge that could occur in all 50 states, 3,141counties, approximately 27,000 taxing jurisdiction, other towns and cities, as well as other fees occurring from delinquency, bankruptcy, vacancy, assumption, etc. It is also unrealistic to assume that servicers and their technology vendors can predict new fees imposed by local jurisdictions.

To manage the ever-changing landscape, servicers group fees in fields or "categories" when a specific field is not available. The details of the charges are maintained in the narrative portion of computer programs that may not be extractable for itemization on pay-off statements, monthly statements or other statements without moving to a completely manual process. Such a process would impose unreasonable expenses on servicers.

It is important to note that there is no evidence that servicers have denied a borrower's request to break down grouped fees. However, borrowers rarely ask, most likely because the fees are nominal or sufficiently identified. Given that the consumer can obtain this information if so desired by contacting the servicer, MBA suggests that the Board simply state that mortgage servicers must be able to respond to borrowers' questions about fees, which is consistent with what RESPA already requires.

RESPA and its implementing regulations deal with matters of dispute.[23] Specifically, as indicated, RESPA provides for a process by which the borrower can submit a "Qualified Written Request," to obtain answers to questions or disputes about their mortgage. Under RESPA, a servicer has 60 days following the receipt of a Qualified Written Request to investigate any dispute or provide any information that the borrower requested. As part of this procedure, if a response cannot be provided within 20 days, a servicer must provide a written acknowledgment of receipt of the Qualified Written Request within 20 days. The servicer is then obligated to investigate such a dispute and either provide an explanation as to why the account is correct, or correct the account (including any late charges and penalties) within the 60-day period. Most servicers can and do respond to questions about fees on a much faster timeline, but RESPA provides a more generous timeline to account for more complicated cases.

The rules and regulations governing RESPA's Qualified Written Request provisions have now been operational for over a decade; industry, regulators and consumers have experienced an efficient application of these rules and are now proficient in their operation and procedure. Second, these rules were specifically designed to address issues pertaining to problem resolution and negative credit reporting. Vendors and legal professionals have already developed and implemented systems to effectively address disputes in the form of Qualified Written Requests and the introduction of a different set of requirements would increase costs. Again, MBA urges the Board to consider RESPA's existing requirements as sufficient to address the Board's concerns about the improper application of fees.

Payoff Statements

The Board's proposal calls for servicers to provide an accurate payoff statement within a reasonable time after a request, such as three business days under normal market conditions. The Board further proposes that such time frames may be extended during high volume refinance periods. MBA believes that the three-day time frame should be extended to provide sufficient time for servicers to deal with common, but complex payoff situations, such as where the loan is delinquent, in foreclosure, in bankruptcy or where there has been an escrow advance. In those cases, the servicer will need to obtain outstanding bills from third parties or verify advances. A longer time frame would also address changes in market conditions without the Board needing to issue regulations to extend the time frame. Given that regulatory action takes time, any final Board action may be too late to address increased refinance volume, for example, resulting in unintended but nonetheless massive non-compliance by the industry.

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[23] See Real Estate Settlement Procedures Act, Regulation X, 24 C.F.R. § 3500.21(e).

The National Conference of Commissioners on Uniform State Laws produced a model state bill after vetting concerns from consumer groups, the mortgage industry and legal professionals and ultimately settled on a ten calendar day time frame. MBA supports a ten calendar day time frame as well. This time frame is reasonable given that the borrower will know about their property sale, refinance or foreclosure date far in advance of this schedule.

In addition, the Board should allow the servicer to establish where the pay-off requests must be sent to be considered received, the form of financial instrument acceptable for pay-off, cut-off times, how long the pay-off quote will be valid, the ability to update pay-off quotes and how often the borrower may request a pay-off statement under the protections of the Board's guidance or rule.

We also urge the Board to be more descriptive in the use of the word "accurate" when referencing payoff statements. The industry today provides accurate payoff statements at the time they are issued. However, these quotes are not static and will change when an event happens between the issuance date and closing. The most common events that would cause a quoted pay-off to change would be: (1) an intervening escrow advance; (2) return of a previous month's installment check for insufficient funds; or (3) a late fee or other delinquency charge. It is, therefore, critical that the Board clarify that a pay-off statement must be accurate when it is issued and that intervening events may occur that would invalidate the pay-off quote.

The Board proposes that pay-off information may be provided to the borrower, his or her legal representative and housing counselors. MBA is concerned, however, about the risks presented by requiring servicers to release non-public private information to housing counselors and other third parties that are not agents of the servicer or not authorized by the borrower to receive such information. Servicers are concerned that the proposed requirement would violate privacy laws. As a result, MBA asks the Board to specifically state that is reasonable for the servicer to require a release of information or authorization signed by the borrower and co-borrower(s) as a precondition to releasing the information to a party other than the borrower. The servicer should have the right to dictate the form of the authorization and other conditions for processing the authorizations.

Finally, MBA again emphasizes that it opposes the inclusion of servicing activities within the scope of Section 129's unfair and deceptive practices and discusses this matter later in this comment letter during the discussion of liability for violations.

4. Coverage

The Board proposes to apply the above protections of § 226.36 to all mortgage loans generally, if primarily for a consumer purpose and secured by the consumer's principal dwelling, but to exclude HELOCs because the risks to consumers are less. The Board seeks comment on whether there is a need to apply any or all of the proposed prohibitions to HELOCs. The Board notes that most originators of HELOCs hold them in portfolio rather than sell them which "aligns these originators interests more closely with the borrowers' interests" and that one source reports that the proportion of HELOCs originated through mortgage brokers is quite small. This may suggest that the risks of improper creditor payments to brokers or broker coercion of appraisers in connection with HELOCs is limited. The Board asks if mortgage brokers are growing as a channel for HELOC origination such that regulation under §§ 226.36(a) through 226.36(c) is necessary? Do originators contract out HELOC servicing often enough to necessitate the proposed protections of § 226.36(d)? If coverage should be extended to HELOCs, the Board also solicits comment as to whether such coverage should be limited to specific types of HELOCs. For example, do purchase money HELOCs, which are often used in combination with first-lien closed-end loans to purchase a home, mirror the risks associated with first-lien loans?

MBA's Comments – MBA does not believe it is necessary to extend the protections for all loans to HELOCs. The Board indicates that these loans are generally held in portfolio and are infrequently originated by mortgage brokers. They also do not present the same servicing challenges as first lien loans. Where borrowers experience servicing issues, they should avail themselves of the Qualified Written Request process under RESPA to resolve issues.

5. Other HOEPA Prohibitions

a) Extend to Higher Cost Lost Loans?

Under its proposed rule, the Board is extending two of the restrictions on higher-priced mortgage loans to HOEPA loans-the provisions on repayment ability and prepayment penalties.

The Board seeks comment on whether... restrictions [on HOEPA loans, such as prohibiting negative amortization, interest rate increases after default, balloon payments on loans with a term of less than five years, prepaid payments, allowing creditors to pay home improvement contractors only when the consumer consents in writing, and limitation of due on demand clauses and on refinancings by the same creditor (or assignee) within one year unless the refinancing is in the borrower's interest] should be applied to higher-priced mortgage loans. Is there evidence that any of these practices has caused consumers in the subprime market substantial injury or has the potential to do so? Would the benefits of applying the restriction to higher-priced mortgage loans outweigh the costs, considering both the subprime market and the part of the alt-A market that may be covered by the proposal?

MBA's Comments – MBA does not believe that prohibitions under HOEPA, beyond those proposed by the Board, should be extended to higher-priced loans at this time. The prohibitions proposed in this rulemaking will involve considerable retooling in a time of scarce resources for lenders.

MBA believes that the restrictions already proposed are comprehensive and will already discourage some responsible lenders from lending to higher-priced mortgage loan borrowers. Unless the practice is a major problem, it should not be added to the list of regulatory restrictions.

MBA does not believe that the problems addressed by these restrictions are generally prevalent in the nonprime market. While dealer loans for home improvement may be a problem, it is not clear that the current HOEPA restriction is the best means of addressing it. MBA suggests that better licensing and enforcement are preferable.

b) Steering

The Board proposal points out that consumer advocates and others claim that borrowers are sometimes steered into loans with prices higher than risk profiles warrant and features not suitable to the borrower. The Board pints out that steering on the basis of race , ethnicity or other prohibited factors, the creditor would violate the Equal Credit Opportunity Act , 15 Y.S.C. 1601 et seq., as well as the Fair Housing Act, 42 U.S.C. 3601 et seq. Also, two parts of the proposal would help to address steering, the mortgage broker provisions at §226.36(a) and the prohibitions against a pattern or practice of collateral based lending proposed as §226.35(b)(1).

MBA Comments – MBA shares the view that separate anti-steering provisions are unnecessary. It agrees with the Board that fair lending laws, the proposed mortgage broker requirements and the restriction against a pattern or practice of collateral based lending will all help address this concern.

c) Restrictions on Advertising Practices for Home-Secured Loans

The Board proposes several amendments to its advertising rules for open-end home equity plans under § 226.16 and for closed end credit under § 226.24 to address advertisements for home-secured loans. For open end home-equity plan advertisements, according to the Board, the two most significant changes relate to the clear and conspicuous standard and the advertisement of introductory terms.

For advertisements for closed end credit, the three most significant changes relate to strengthening the clear and conspicuous standard for advertising disclosures, regulating the disclosure of rates and payments in advertisements to ensure that low introductory or "teaser rates" are not unduly emphasized and prohibiting several advertising practices. The revised rules would ban advertising practices that include: (a) advertising fixed-rate loans when payments are fixed only for a limited period of time; (b) comparing an actual or hypothetical loan to an advertised loan unless the advertisement states the rate or payments over the full term of the advertised loan; (c) falsely advertising loan products as "government" or "government sponsored" loans programs; (d) prominently displaying a current lender's name in an advertisement without disclosing that the advertising lender is not affiliated with the current lender; (e) advertising claims of debt elimination if the product is merely replacing one debt obligation with that of another; (f) advertising that creates a false impression that a mortgage broker or lender has a fiduciary relationship with the consumer; and (g) foreign language advertisements in which some information like the teaser rate is provided in the foreign language and other disclosure are in English. The prohibitions would not apply to postal envelopes, and banner and pop-up advertisements on the Internet.

The Board asks whether it should extend any or all of the prohibitions contained in the proposed § 226.34(i) to home equity plans, or whether there are other acts or practices associated with advertisements for such loans that should be prohibited.

The Board seeks comment on the feasibility (in cost and practical limitations) of requiring all information for home equity loans, specifically, and home-secured loans, generally, in electronic advertising about rates or payments that apply for the term of the plan be stated in close proximity to introductory rates or payments in a manner that does not require a consumer to click a link to access the information.

Should the requirements for "close proximity and prominence" be extended to oral advertisements, despite its appearance of infeasibility in application, the Board inquires.

The Board seeks comment on whether the requirements should only apply to advertisements that state or imply that a creditor provides extensions of credit greater than the fair market value of the dwelling.

The Board solicits comment on whether and to what extent multiple indexes and margins are used in home equity plans; would additional rules be needed?

Are comparisons based on the assumed refinancing of non-mortgage debt into a new home secured loan associated with abusive lending practices or otherwise not in the interest of the borrower? For example, a consumer's current payments include taxes and insurance, but the advertised product does not include those amounts.

MBA's Comments – MBA supports the Board's efforts to revise its advertising requirements to reflect the development of new products and to facilitate compliance in media such as radio, television, and Web banner advertisements. MBA urges use of the Board's authority in Section 105, to promulgate these regulations or to implement them as guidance to avoid undue litigation that will unnecessarily increase costs to consumers. It also urges the Board to ensure that final rules do not make it difficult for consumers to receive valid information to make informed choices.

Triggering Requirements

MBA generally supports the changes in the "trigger term" requirements for closed-end credit advertising. Under the Board's rules at Section 226.6(a) and (b), "triggering terms" such the payment terms of the plan or finance charges would activate additional disclosure requirements for open end credit. To avoid the concern that advertisers will avoid showing any cost information in their advertising, the Board more than twenty years ago added provisions to the Commentary that have allowed advertising to include an initial discounted payment, including an initial "payment" rate that is less than a fully-amortizing payment, without triggering all the other disclosures that would otherwise be required. In order to qualify for this treatment, the advertisement must show other information, including the term during which the reduced rate applies, the annual percentage rate (APR), and, for loans with negative amortization, the rate at which interest actually accrues during the discounted period. Advertisements may also show the effect of a seller or creditor buydown on the payment schedule, without triggering a requirement to disclose the entire payment schedule.[24]

Under the Board's proposal, the requirements for advertising discounted rates would be moved from the Commentary to the regulation and it would no longer be permissible to advertise a rate other than the simple interest rate or APR, such as a payment, effective, or accrual rate. In addition, it would no longer be permissible to advertise only the payments applicable to an initial discounted or buydown period without showing the full payment stream. Finally, "triggered" disclosures would have to be shown in "close proximity" to the statements that triggered them. For example, in a mailed solicitation, it would no longer be permissible to include those disclosures in a footnote.

The theory behind providing flexibility under the current Commentary is that requiring disclosure of the limited term during which the initial rate applied and of the APR would alert consumers to ask questions about the structure of the product, particularly if there was a big difference between the initial interest rate and the APR or if the initial period was very short. Although MBA does not disagree with the Board that complex new products have raised questions about whether the guidance is still viable, it is important to note that many questionable advertisements for 2/28 or 3/27 products or nontraditional loans violate the existing requirements by omitting the APR, failing to show the limited period for which the initial rate was applicable, or both. For example, MBA is aware of advertisements for financing as low as one percent in which the initial rate was valid for only a very short time, as little as one month. If those advertisements had complied with the existing Commentary and shown the length of time that the low rate applied and the APR of perhaps 4.5 or five percent (which both the existing regulation and the proposed rule requires be shown equally conspicuously with any interest rate), consumers would have understood that they needed to ask more questions, and the deceptive impact of advertising the low initial rate would have been mitigated.

While MBA generally supports revising the rules, the Board should consider these points in fashioning a final rule. The Board should also retain the other parts of the proposed rule (discussed below) that would accommodate advertising in media, including television, radio, and the Internet, where it is not practical to include all of the triggered information in the initial advertisement.

MBA does not oppose the proposal to prohibit the use of rates such as payment or effective rates in advertising. But MBA questions the proposed rule's removal of Commentary language that enables lenders to disclose the range of payments, from low to high, in "graduated-payment" loans. The Board notes that many have interpreted this language as also allowing the disclosure of a range of payments in other forms of nontraditional loans such as Option ARMs and interest-only loans.

[24] *See* Official Staff Commentary to Regulation Z, 12 C.F.R. supp. I § 226.24(b)-3, -4, -5.

Nevertheless, some lenders are willing, because of space considerations or for the sake of clarity, to forego the ability to show the intermediate payment amounts between the initial payment and the fully-indexed, fully-amortized payment, even though omitting this information can make a loan look more costly than it really is. As discussed below, the Proposal requires advertising to show triggered information in "close proximity" to the triggering information, *i.e.*, placing that information in the up-front text rather than the footnotes. Requiring lenders to show all the intermediate payments would discourage them from promoting such products or result in a cluttered advertisements that consumers could not understand. MBA believes the Board should clarify the existing Commentary provision, which provides the flexibility to state a range of payments that vary because of the mortgage insurance premium, by explicitly stating that those premiums, which are set by an independent third party, may be based on estimates.

The Board's Proposed Comment 24(f)(3)-2 states that "if the payment that applies at consummation is not based on the index and margin that will be used to make subsequent payment adjustments over the term of the loan, the requirements of Section 226.24(f)(3)(i) [multiple payment streams] apply." It is common for ARMs to have an initial rate that is calculated in a slightly different manner from the rate that will be used for later adjustments. For example, the initial rate may be based on the index in effect as of the lock-in or closing date, rather than another date such as the 15th day of the month preceding the anniversary of closing, and the initial rate may be not be rounded. The Commentary should explicitly clarify what seems to be intended – that such minor discrepancies do not trigger the special requirements for disclosure of loans with multiple rates in advertising, because they are still based on the index and margin that will be used for later rate resets. This is the way that the existing Commentary discussion of discounted and premium rates has been interpreted.

Clear and Conspicuous Standard: Alternative Disclosures in Radio and Television Commercials; Internet Advertising

MBA strongly supports the concept of allowing more flexible alternatives for making disclosures in radio and television commercials using an understandable verbal disclosure or a toll-free number that the consumer can call to receive detailed additional disclosures. As the Board notes, it has been difficult to provide disclosures that are truly "clear and conspicuous" in television and radio commercials and still promote the product. In addition, the telephone alternative allows consumers to review the disclosures, more than once if they wish, and at a time when their attention is focused on the disclosures.

MBA also supports the additional clarification in the proposed Commentary that it is permissible to use the same toll-free number for purposes other than making the disclosures, provided that the disclosure option appears early in the list of alternatives presented during a phone call to the toll-free number. This would allow advertisers to use a single number in the advertisement, which the consumer is more likely to be able to remember than multiple numbers.

The Board also seeks comment on whether the "close proximity" requirements for HELOC and closed-end "triggered" terms should apply to Internet advertising. MBA does not believe that this requirement is helpful to consumers in the Internet context. As the Board notes, a consumer can easily click through to the required disclosures. In addition, just as it is difficult to include a clear and conspicuous disclosure of all required terms in a television or radio commercial, it can be difficult to find the space for all required terms in a small banner advertisement.

The proposed rule also provides guidance as to when an alternative voice-over disclosure complies with the "clear and conspicuous" requirement. The proposed rule states that, under this alternative, disclosures must be provided "at a speed and volume sufficient for a consumer to hear and comprehend them." The Commentary should be clarified to make it clear that disclosures which are understandable meet this standard, even if they are delivered rapidly by a skilled announcer.

The Board should consider providing an additional alternative means of compliance in which television and radio advertisements that do not otherwise include a telephone number, but do provide a Web address, can provide additional disclosures on the landing page for the Web site shown in the advertisement, or on a clearly and conspicuously identified link on the landing page. If an advertisement does not include a telephone number, a Web site is a good substitute for conveying required information.

The Board should also clarify its apparent intent that auditory disclosures in a television commercial are optional when they can still be displayed clearly and conspicuously on the screen. Language in the preamble to the regulation suggests that the toll-free telephone number is "an alternative to certain oral disclosures in television or radio advertisements," which could be interpreted to indicate that screen displays would no longer be allowed.[25]

Clear and Conspicuous Standard: HELOC Introductory Rates

The Board is proposing to add comments 16-4 and 16-7 to clarify how the clear and conspicuous standard applies to advertisements for home-equity loans.

Section 226.16(d)(6) introduces new definitions of "introductory rate," "introductory payment," and "introductory period." The Board should clarify that these definitions apply only to rates, payments, and periods *before* the rate based on a margin and index goes into effect. Otherwise, the definitions could be construed as applying to advertisements that promote a "fixed-rate conversion" option, in which the borrower has the option of converting a HELOC into a fixed-rate loan, at a rate that may not be based on an index and margin. It would be confusing to consumers to have such rates described as "intro" or "introductory" rates, when they only begin to apply after a period during which the rate based on the margin and plan are in effect. In addition, treating the pre-conversion rate as an "introductory rate" would conflict with the basic principle of Regulation Z that disclosures are based on the legal obligation at the time that the plan is opened and should not reflect "events occurring after disclosures are made," such as a consumer's exercise of the conversion option.[26] Consistent with this principle, the Board should also clarify that an option that is introduced after the plan is opened – such as a temporary discount on new advances – falls outside the definition of an "introductory rate."

The Board should also clarify that a method of determining the rate or payment that applies through the entire draw period is not an introductory rate or payment, even if that method will change during the repayment period. HELOCs commonly provide for interest-only payments during the draw period, followed by an amortization schedule for the repayment period that will be sufficient to pay off the balance as of the end of the draw period. Such a change – or a similar change in how the rate is calculated to allow for level payments during all or a portion of

[25] *See* 73 Fed. Reg. 1706.
[26] *See* Regulation Z, 12 C.F.R. § 226.5(c), (e); Official Staff Commentary to Regulation Z, 12 C.F.R. pt. 226 § 226.5(e)-1.

the repayment period – should not trigger disclosure of the payments or rates during the draw period.

Finally, the Board seeks comment on the use, if any, of multiple indexes and margins in home-equity plans. MBA does not believe that HELOCs with such features are common (except in connection with the end of the draw period as discussed above) or that any further changes in the regulation are needed to address them.

Other Issues

MBA supports the proposal to clarify that the existing requirement to state the balloon payment if the advertisement contains a statement "about" a periodic payment applies only if the statement actually describes the amount of a periodic payment. The Commentary also should be clarified to emphasize that a statement about how the periodic payment is calculated that does not indicate the amount does not trigger the requirement to show the balloon payment.

Proposed Sections 226.16(d)(4) and 226.24(h) would implement a provision of the Bankruptcy Act that requires a disclosure that interest is tax deductible only to the extent of the fair market value of the dwelling, if the loan or plan permits extensions of credit above the fair market value. MBA supports the proposal to limit this disclosure to plans that, by their terms, allow for extensions of credit greater than fair market value. Because of the potential for fluctuations in value, the regulation should clarify that fair market value is determined when the plan is opened. Otherwise, many loans and HELOCs could be viewed as theoretically permitting extensions of credit above fair market value.

The Board seeks comment on whether this disclosure should also be restricted to advertisements that explicitly state or imply that the lender provides extensions of credit greater than fair market value. MBA would support such a change, which would make lenders better able to promote other features of their loans when they have limited space available, as with a banner advertisement or radio commercials.

Prohibitions Against UDAPs in Advertising Should be Issued under Section 105, not Section 129(l),

The Board is proposing to create new rules prohibiting unfair and deceptive acts or practices ("UDAPs"), or abusive refinancing practices in the advertising of closed-end loans secured by a home, based on the Board's authority under Section 129(*l*) of TILA. TILA includes a separate section, Chapter 3,[27] which specifically sets out the practices that Congress believed should be prohibited and the disclosures that Congress believed should be required in advertising for consumer credit. Significantly, TILA does not provide for any private right of action for violations of the provisions under Chapter 3. In contrast, as discussed above, Section 130(a)(4) of TILA provides for liability of the entire amount of any finance charges and fees paid by the consumer for any violation of Section 129, unless the creditor can demonstrate that the violation was not material. Given the structure of the statute and the legislative history to the effect that 129(*l*) should be used sparingly, only the most serious misrepresentations, which cause significant consumer injury, should be covered by 129(*l*) regulations.

Although MBA supports the concepts behind many of the prohibitions that the Board proposes under Section 129, many of the prohibited practices do not meet the standards for deception

[27] Sections 141-47, 15 U.S.C. §§ 1661-1665b.

articulated by the Board in the Deception Policy Statement. As the Board said in that Statement, a specific statement within an advertisement must be viewed in context:

> In determining whether an individual statement, representation, or omission is misleading, the statement, representation, or omission will not be evaluated in isolation. The Agencies will evaluate it in the context of the entire advertisement, transaction, or course of dealing to determine whether it constitutes deception.[28]

Nevertheless, several of the proposed provisions which would make advertisements UDAPs assume that a specific statement in an advertisement is misleading regardless of the context. For example the proposed rule would apparently prohibit the use of the common term "fixed-to-adjustable" to describe a hybrid adjustable-rate mortgage, regardless of how well the advertisement explains the adjustable-rate feature, because the word "fixed" precedes the word "adjustable." The proposed rule would allow the use of the abbreviation "ARM" in advertisements promoting both fixed- and variable-rate mortgages, but not in those that promote only variable-rate mortgages. This level of detail would treat many advertisements that cannot reasonably be considered unfair or deceptive as violations of TILA, subjecting creditors to civil lawsuits for huge sums.

While MBA agrees with the proposed rule to prohibit the misleading use of the name of the current lender by another unaffiliated party as deceptive to consumers and injurious to legitimate lenders, regulating under Section 129 will not serve the Board's objectives. Many, if not most, companies engaged in the practice of misrepresenting that they are affiliated with the current lender or servicer are mortgage brokers that are not "creditors" for TILA purposes, and, therefore, would not be subject to civil liability for violating the proposed regulation.

As discussed above, if the Board wishes to regulate advertising beyond the specific requirements of TILA, it should use the authority in Section 105(a) of TILA. Any "UDAP" advertising rules should be issued under that section. The Board should also consider moving many of these provisions into informal guidance, particularly where, as with the use of the word "fixed," there are many ways to present the information in ways that are not misleading.

Specific Comments – As indicated, while MBA supports all of the Board's specific advertising proposals, MBA believes they should be modified and/or presented as guidance

1) Advertising "fixed" rates or payments for loans whose rates or payments can vary without adequately disclosing that the interest rate or payment amounts are "fixed" only for a limited period of time, rather than for the full term of the loan.

MBA would support this provision but believes that it belongs in guidance to the effect that misleading claims of "fixed" rates or payments are UDAPs If the Board decides to include such a requirement in a regulation, the rule should not prescribe detailed formatting rules but should merely state that compliance with the "trigger term" regulations complies with this section.

2) Comparing an actual or hypothetical consumer's current rate or payment obligations and the rates or payments that would apply if the consumer obtains the advertised

[28] Board of Governors of the Federal Reserve System & Federal Deposit Insurance Corporation, Unfair or Deceptive Acts or Practices by State-Chartered Banks (March 11, 2004).

product unless the advertisement states the rates or payments that will apply over the full term of the loan.

While MBA supports the thrust of this proposal, the restriction could be included in UDAP guidance. The “trigger-term” requirements of the regulation, especially as modified in the Proposal, address this issue.

The Board requests comments on whether comparisons based on the assumed refinancing of non-mortgage debt into a new home-secured loan are associated with abusive lending practices or otherwise not in the interest of the borrower and should be prohibited. While abuses exist, a debt-consolidation loan can often be very helpful to consumers by improving cash flow and reducing their interest rate. Prohibiting truthful advertising unduly limits consumer choice and competition.

3) Advertisements that characterize the products offered as “government loan programs,” “government-supported loans,” or otherwise endorsed or sponsored by a federal or state government entity even though the advertised products are not government-supported or -sponsored loans.

MBA supports this provision but the regulation should clarify that the envelope or other mailing material are part of the “advertisement” and subject to the same prohibitions.

4) Advertisements, such as solicitation letters, that display the name of the consumer’s current mortgage lender, unless the advertisement also prominently discloses that the advertisement is from a mortgage lender not affiliated with the consumer’s current lender.

MBA also supports this provision and again suggests that the regulation make clear that the envelope or other mailing materials are part of the advertisement.

5) Advertising claims of debt elimination if the product advertised would merely replace one debt obligation with another.

MBA supports this provision as clarified in the proposed Commentary, which limits the provision to claims that debt will be eliminated as opposed to “claims that the advertised product may reduce debt payments, consolidate debts, or shorten the term of the debt.”

6) Advertisements that create a false impression that the mortgage broker or lender has a fiduciary relationship with the consumer.

While MBA agrees that misrepresentation of whether the broker or lender has a fiduciary relationship with the consumer should be a UDAP, the proposed rule would too broadly prohibit the use of the terms “counselor” or “financial advisor” in advertising. MBA does not believe that use of these terms causes consumers to believe that a fiduciary relationship exists in all cases.

Clearly, this provision is intended to prevent consumers from thinking they are working with bona-fide financial professionals when, in reality, the advertising parties are not bound by any sort of professional standards, rules, or regulations.

These concerns however should not apply to advertisements for mortgages by securities firms that use the term “financial advisor.” In these cases, while the advisor may not be a fiduciary, the consumer is working with a duly registered securities broker-dealer who is bound by a number of federal and state rules and regulations that govern ethical dealings with customers.

Also, because of the wide variety of situations covered by this provision, the provision should be moved to informal guidance and the specific prohibitions should be removed.

7) Foreign-language advertisements in which certain information, such as a low introductory 'teaser' rate, is provided in a foreign language, while required disclosures are provided only in English.

MBA supports this provision, but believe it should be clarified that a Web advertisement in a foreign language may link to a Web page in English without violating this provision. Some advertisers may not have the capability of offering translations on their Internet sites into every language they use in advertising.

The Length of a Long-Term, Traditional Loan Should Not Be a Trigger Term

Finally, MBA believes the Board should use its broad exception authority under Section 105(a) to allow creditors to show the term of a long-term, traditional closed-end mortgage loan without triggering additional disclosures, other than the APR. As indicated, the number of payments or period of repayment is a trigger term, requiring that both the APR and the terms of repayment be shown. In situations where space is at a premium and they wish to avoid triggering detailed disclosures, advertisers often replace the term of the loan with a phrase such as "long-term" financing. This allows the advertiser to show a simple interest rate and APR without triggering additional disclosures.

With the other changes in the proposed rule that will reduce the chances of consumer confusion about more esoteric products, it is reasonable to assume that consumers will understand the meaning of an advertisement for "30-year mortgage financing at xx% APR" even if the advertisement does not show the payment schedule. Therefore, MBA also recommends that the Board permit advertisers to show the number of payments or period of repayment, on a loan secured by real property or a dwelling with a term of at least 15 years on first mortgages or 10 years on second mortgages, for loans that do not have an irregular payment schedule, without triggering additional disclosures under 12 C.F.R. Section 226.24(c).

D. Mortgage Loan Disclosures

Under its authority pursuant to TILA Section 105(a) the Board proposes to require changes to the requirements for TILA early mortgage disclosures. TILA Section 128(b)(1) currently provides that the primary closed end disclosure which includes the APR and other material disclosures such as a payment schedule with payments must be delivered "before the credit is extended". A separate rule applies to residential mortgage transactions subject to RESPA and requires that the good faith estimate and the mortgage loan disclosure be made before the credit is extended or delivered or placed in the mail not later than three business days after the after the creditor receives the consumer's application whichever is earlier.

The Board proposes to amend Regulation Z to extend the early disclosure requirement to other types of closed-end residential mortgage transactions including mortgage refinancings, home equity loans and reverse mortgages secured by a consumer's principal dwelling. The Board seeks comment on the costs and benefits of this proposal. It also proposes to require that the early loan disclosure be provided before the consumer pays a fee to any person in connection with a loan application except for a bona fide and reasonable fee to obtain a credit report or other similar information on the consumer's credit history. The Board seeks comment on whether further guidance is necessary to clarify what fees would be deemed in connection with an application.

In its proposal, the Board also announces that in early 2008, the Board plans to begin consumer testing to update its disclosures to reflect the increased complexity of mortgage products.

MBA's Comments – MBA recommends that the Board advance cautiously in amending the basic rules that guide mortgage lending disclosures. MBA generally supports the proposed requirements for providing early TILA disclosures along with the Good Faith Estimate (GFE) in more classes of transactions. Many lenders give such coupled disclosures today, even without these requirements, in the interest of effectively informing and avoiding confusion to consumers. MBA notes, however, that this requirement will have implementation and training costs that may be outweighed to some extent by providing the GFE and early TILA disclosures together. MBA also questions the benefits of the Board's proposal to limit the fee that a lender may charge only a credit report in relation to its costs.

To fully understand MBA's comments and concerns, the Board must appreciate the full regulatory onslaught that the lending industry is facing today. As a result of recent market events, MBA members are facing an unparalleled level of regulation, oversight, and legal uncertainty. Although some of the proposals may appear as "tweaks" in forms, or mere adjustments to timing requirements, the reality including the cumulative effects of all proposals requires careful evaluation to determine which changes are essential and which are not, which are efficient and which are too costly.

There are real costs associated with the full body of regulatory proposals now in progress. Developing processes for both, new disclosure rules and increased risks created by new regulations is a major challenge for all responsible institutions. A clear example is the recent proposed rule recently issued by HUD. Under HUD's new RESPA proposal, lenders will have to assure that estimated costs are accurately disclosed. The rule requires specific tolerances in conjunction with the provision of the Good Faith Estimate (GFE). The lending community is still analyzing the HUD proposals, but MBA points out that where regulatory changes require precision changes to timing requirements for disclosures are viewed through that prism.

In this context, while MBA agrees that more shopping is beneficial for markets and consumers, it is not clear that prohibitions of all fees at application by consumers are necessary. Borrowers shop in today's market by telephone and over the internet before they formally apply for loans, and lenders accommodate such requests at no cost. While the market may ultimately result in competitors foregoing a fee to prepare a loan offer, MBA believes this type of market response is superior to a prescribed fee limitation.

MBA is also concerned that this prohibition on fees may reverse the gains lenders have made in streamlining the process of obtaining a mortgage, all to the consumer's benefit. It could prevent a consumer from locking in a rate at application in a rising interest rate environment as well as harm consumers who may need an early loan closing. Consumers typically request, and most lenders strive to close loans within a short timeframe, and collecting a fee enables the lender to begin the process of ordering third-party services such as an appraisal. Given the costs associated with loan processing, MBA believes the Board's requirement could also add several days to the loan origination process.

Lenders report that they have not received complaints from consumers about charging a fee at application and this may not be a serious consumer concern, particularly where information on loans is readily available prior to application. Notwithstanding, by prohibiting a fee, the changes to the industry and consumer costs would be large. Another approach is that for those who choose the disclosure can be given at the time of application, which indicates the fee is not refundable and give the consumer the option of proceeding or not.

If the Board does adopt this part of the proposed rule, MBA requests the Board to define "delivered," which is commonly defined as the date of mailing and to provide specific guidance on what fees would be deemed in connection with an application.

Finally, MBA notes that there is a difference between shopping for mortgages and other shopping. Considerable expenditure is required before the originator can arrive at a final price quote – in short, market participants must purchase services (credit reports, appraisals, etc) in order to achieve accurate cost estimates. The Board must take this reality into account when issuing a final rule. If it decides to bar all fees at the mortgage shopping stage, it is merely assuring that these costs are defrayed elsewhere in the process by consumers. If the market is, by itself, evolving towards free dissemination of information to allow consumers to shop, then the law should be permissive and not intrude upon that natural change.

MBA applauds the Board's commitment to updating its TILA disclosures. However, MBA is concerned that this effort will provide suboptimal and even confusing results for consumers if the Board and HUD do not work together to update and simplify the disclosures that each is responsible for in a concerted and consistent manner.

The current disclosures under RESPA and TILA are confusing to consumers and far less useful than they could be. Reform that is valuable to industry and consumers alike will not occur unless the forms and rules for both agencies are not only simplified but either are combined or mesh. As indicated above, however, MBA is disappointed in the apparent incongruity of the Board and HUD's approach to mortgage broker fee disclosure, for example. MBA believes that going forward the Board and HUD must resolve their differences in these and other matters so lenders and consumers are not bedeviled by diverse and confusing requirements.

E. Liability for Violations

As set forth in Part XII of the proposed rule's preamble, the Board proposes to adopt more substantial consumer protection portions of the Board's proposed regulations—226.35 (prohibitions on "higher priced" loans) and 226.36 (prohibitions on all mortgages) pursuant to its authority under TILA Section 129(l)(2). The Board states that Consumers who bring timely actions against creditors for violations of these restrictions may be able to recover: (i) Actual damages; (ii) Statutory damages in an individual action of up to $2,000 or, in a class action, total statutory damages for the class of up to $500,000 or one percent of the creditor's net worth, whichever is less; (iii) Special statutory damages equal to the sum of all finance charges and fees paid by the consumer; and (iv) Court costs and attorney fees. TILA Section 130(a), 15 U.S.C. 1640(a).

MBA's Comments – MBA urges the Board to promulgate the new provisions under Sections 226.35 and 226.36 pursuant to its principal rulemaking authority under the Truth in Lending Act – Section 105(a). In making this request, MBA joins other financial industry representatives who have expressed profound concern that implementing the proposals under Section 129 would present significant risks to lenders and impose unnecessary costs on consumers. Promulgating its proposals under Section 105 would not sacrifice any of the strong consumer protections the Board intends. If any violation of these provisions also rises to the level of being "unfair" and "deceptive," or if the creditor has shown a systematic practice, or at least a pattern or practice of violating the requirement that evidence an intent to deceive , then such violations would be subject to the enhanced provisions applicable to UDAP violators under Section 129. Notably, the

servicing proposals should be addressed in guidance or, if not, along with the other practices under Section 105.

As indicated, MBA generally agrees with many of the proposed requirements that create a set of heightened standards to protect consumers. The Board's proposals focus on a far-reaching range of concerns that include ensuring that income and assets are documented, prepayment fees are fairly used, that consumers are protected from default when escrow items are excluded from loan payments and instances where consumers are not made aware of back-end fees paid to mortgage brokers.

None of these concerns involve conduct that is inherently unfair or deceptive. Escrow accounts, prepayment penalties, yield spread premiums and low documentation loans can be both beneficial and harmful depending on how they are used. With the exception of the servicing proposals, the real purpose of the proposals advanced by the Board in this rulemaking are consistent with the broadly stated purposes of TILA itself, and Regulation Z – ensuring that there is an "informed use of credit," and that consumers "are able to compare more readily the various credit terms available."[29] Since the practices described above can hardly be classified as comprising inherently unfair or deceptive practices, the Board's regulatory authority for its proposals is more appropriately grounded in Section 105(a), not the authority described under Section 129(l).

Under its authority under Section 129, the Board is charged with addressing practices in connection with mortgage loans that are "unfair" and/or "deceptive" or designed to evade HOEPA's requirements, and addressing acts or practices in connection with refinance mortgage loans that are "abusive" or otherwise not in the best interest of the borrower. In 2004, the Board defined these terms in guidance issued with the Federal Deposit Insurance Corporation (FDIC).[30] Importantly, the Board stated that determining whether an act or practice is unfair or deceptive often depends on the specific facts or circumstances involved.

As the Board itself notes, the Board's authority and discretion under Section 129(l) are circumscribed by the legislative history of Section 129(l), where Congress carefully sought to avoid the use of this section where it would impair the availability of credit. The "discretionary regulatory authority" that is contained in Section 129(l)[31] was intended to ensure that the HOEPA legislation did not unintentionally diminish "fair credit" options.[32] Again referring to the examples above, the market has successfully used yield spread premiums, non-escrowed loans, prepayment fees and "low doc" or "no doc" loans to serve specific consumer needs; labeling these tools as "unfair or deceptive" is unwarranted and would present grave consequences for the availability of credit.

Further proof of the Congressional intent that Section 129(l) is to be reserved for clear cases of unfair, deceptive or abusive practices, and is not to be applied in other situations where, as the Board states, terms could be of beneficial use by consumers,[33] is the existence of severe penalties for violations of Section 129. The level of punishment under Section 129(l) is so

[29] 15 U.S.C. §1601.
[30] Board of Governors of the Federal Reserve System & Federal Deposit Insurance Corporation, *Unfair or Deceptive Acts or Practices by State-Chartered Banks* (Mar. 11, 2004).
[31] 140 Cong. Rec. S.3056 (Mar. 16, 1994); *see also id.* S. 3044.
[32] *Id.* S3175 (Mar. 17, 1994).
[33] See discussion at 73 Fed. Reg. 1686, where Board states that "the proposed rules may reduce the access of some consumers in some circumstances to legitimate and beneficial credit arrangements…"

elevated that it is difficult to conclude that legislators would have intended these provisions to apply to terms that may or may not be harmful to consumers and to practices that have proven beneficial to borrowers.

Notably, it is particularly difficult to believe that any of the identified servicing abuses including failing to promptly credit payments, give payoff statements or provide fee schedules, while unsatisfactory, would rise to the level of unfair or deceptive practices. Even if they did, considering the violations under these provisions could occur over decades and the penalties even longer, it is hard to believe such onerous penalties could have been intended for these infractions. MBA believes the servicing proposals should be addressed in guidance or, if not, along with the other practices under Section 105.

By asking the Board to advance its proposals under Section 105, MBA does not in any way seek to have the Board forego its UDAP authority. To the contrary, MBA seeks for the Board to ensure that its authority be used for truly unfair and deceptive acts. Overly onerous penalties will deprive borrowers of a range of credit options because it will remove creditors' incentives to compete and provide borrowers innovative, sound and affordable, new credit options.

Under MBA's approach, most of the violations identified in this rule would be addressed under Section 105. Section 129 liability would be triggered, however, if any violation of these provisions also rises to the level of being "unfair" or "deceptive" under the Board's guidance and the creditor has shown a systematic practice or at least a pattern or practice of violating the requirement that evidence an intent to deceive.

MBA believes that this approach is a fair application of TILA's legislative structure, and a rational methodology that ensures that credit availability is not unintentionally and negatively affected in all cases by disproportionate liability. MBA fully supports increased liability in instances where there is true deceit and unfairness in lending.

MBA, therefore, asks that most of the provisions under the proposed Sections 226.35 (prohibitions on "higher priced" loans) and 226.36 (prohibitions on all mortgages) be promulgated under the Board's Section 105(a) authority. MBA believes that the proposed provisions that are more appropriately authorized under Section 105(a), and not under Section 129(l), are the: (1) Prepayment penalty provisions; (2) Escrow requirements; (3) Verification of income and asset requirements; (4) Disclosure provisions, including the mortgage broker fee agreement and early TILA disclosures; (5) Appraisal provisions; (6) Servicing provisions, if at all; and (7) Advertising provisions. MBA notes that the "ability to repay" provision might arguably fit under Section 129(l) rather than Section 105(a). For purposes of clarity and uniformity, however, MBA urges the Board to retain the "ability to repay" standard under Section 105(a). The use of Section 105 (a) would not preclude the exercise of Section 129 authority under appropriate circumstances for truly deceptive acts or practices.

F. Effective Date

Under TILA the Board's disclosure regulations are to have an effective date of that October 1 which follows by at least six months the date of promulgation. However, the Board may lengthen the period for creditors to adjust their forms to accommodate new requirements or shorten the period where the Board makes a specific finding that such action is necessary to prevent unfair or deceptive disclosure practices. The Board requests comment on whether six months would be an appropriate implementation period for the rules for creditors and to prevent unfair and deceptive acts or practices.

MBA Comments – MBA favors a staggered implementation schedule that includes implementation six months after the effective date for only those aspects of the rules that do not require major operational changes for lenders provided necessary forms and commentary are developed by the Board. The implementation of provisions dependent on the use of the new metric to define higher-priced loans will take longer, an estimated 12 months from the effective date. MBA also believes that an 18-month implementation period is necessary for those servicers currently lacking the capacity to escrow. While MBA is mindful of the need to move forward to protect consumers against abuses, the rules are far-reaching and will require considerable systems changes, training, and staffing changes as well as forms preparation. All of these factors will require months of implementation time.

MBA understands from members that certain of the provisions for all loans including the mortgage broker provisions, the provisions concerning appraisers, if any, and the servicing restrictions could be implemented within six months after the rule becomes effective if the Board provides necessary forms and commentary.

The implementation of provisions involving the use of the new metric to define higher-priced loans including repayment ability, income and asset verification, prepayment penalties and escrow accounts will take longer, an estimated 12 months from the effective date. In order to meet these new requirements, lenders would not only have to retool their systems to embed the new metrics but they must establish additional staffing, compliance and quality assurance procedures to ensure full compliance.

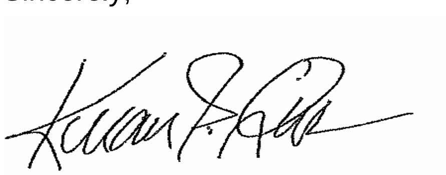
Finally, as noted in the discussion of "Requirement for Escrow Accounts" above, while those institutions that currently have the capability to establish escrow accounts can comply with the rule within 12 months, for those who do not, MBA is advised that 18 months from the date that the rule becomes effective will be necessary to bring requisite systems and operational changes on line.

IV. Conclusion

Again, MBA greatly appreciates the opportunity to provide comments to the Board on the subject rules. MBA looks forward to working with the Board on its members to implement final regulations.

For questions or further information, please do not hesitate to contact Ken Markison, MBA Senior Director and Regulatory Counsel at kmarkison@mortgagebankers.org or at (202) 557-2930.

Sincerely,



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