CONSUMER MORTGAGE COALITION

April 8, 2008

Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
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Re: Docket No. R-1305

Ms. Johnson:

The Consumer Mortgage Coalition (the "CMC"), a trade association of national residential mortgage lenders, servicers, and service-providers, appreciates the opportunity to submit comments on the Board of Governors of the Federal Reserve System's ("Board") proposed rules (the "Proposal") under the Truth in Lending Act ("TILA") and the Home Equity and Ownership Protection Act ("HOEPA").

The CMC applauds the Board's four broad objectives in crafting the Proposal. First, while any regulations of necessity will be broad, they must not be so broad that they result in costly unintended consequences. The impetus for the Proposal is the recent turmoil in the subprime mortgage market. Additional regulations should for the most part be confined to this market. Second, the CMC supports the Board's decision to base any regulations on the loan rather than the consumer for the reasons the Board cites. Third, the CMC strongly supports the Board's decision to create a simple, bright-line rule for determining whether a loan is a "higher-priced mortgage loan." While the CMC is concerned that the threshold in the Proposal is too low, as discussed below, a simple, bright-line rule is essential for lenders to be able to ensure compliance with any new regulations without creating a new overwhelming burden for lenders. Fourth, the CMC strongly supports the Board's goal of crafting the regulations so that creditors can know prior to closing whether a loan is covered.

The CMC appreciates the Board's efforts, in pursuing the foregoing objectives, to balance the application to certain lending practices of a more robust regulatory scheme with the need to preserve affordable credit opportunities for subprime borrowers. While CMC generally supports the rule and its objectives, the CMC believes that certain critical changes should be made to better meet these objectives.

- **Thresholds.** As noted, we are concerned that the thresholds for identifying "higher-priced mortgage loans" are too low and will capture substantial numbers of loans that are not subprime. We have set forth for the Board's consideration two alternative thresholds to use for the dividing line between prime and subprime**.**

- **Liability.** Much of the proposal is drafted to be adopted under the authority of Section 129, and violations of those parts of the proposal would lead to significant liability. Our view, as set forth below, is that most parts of the proposal would be better adopted under Section 105, both in terms of a fair reading of the statutory basis and the consequences of the Board's proposed action. However, if the Board nevertheless applies Section 129, a violation of such section should be triggered only when the violation meets the Board's standards for an unfair or deceptive act or practice—including the requirement that the violation has substantially harmed the consumer or has the likelihood of substantially harming the consumer.

- **Clear Rules.** The importance of clear bright-line rules is paramount. Lenders must be able to know for certain that if they follow certain practices, they will be in compliance. Without that, we fear that major lenders, and many minor ones too, will exit the market for "higher-priced mortgage loans," thus reducing the availability of credit opportunities to borrowers in less favorable financial circumstances, including minority borrowers.[1] The potential liability is just too great.

    - TILA has severe penalties for violations of Section 129—in addition to the usual panoply of civil damages, the creditor may have to pay all finance charges and fees paid by the consumer. In a case where the consumer is making their TILA claim defensively in recoupment or set-off, there is no statute of limitations and "all finance charges" could include many years of interest on the loan. Many lenders—probably most lenders—will refuse to make loans subject to such a severe liability structure, just as is the case with HOEPA loans.

- **Mortgage Broker Disclosure.** We strongly support the Board's proposal to require a disclosure of the mortgage broker's maximum total compensation. This information is important for the borrower to understand when using a broker to help arrange a loan. The Department of Housing and Urban Development (HUD) has now proposed additional, new mortgage disclosures in the Good Faith Estimate and HUD-1 settlement statement, as well as a new closing script, under the Real Estate Settlement Procedures Act (RESPA). We also recognize that the Board is in the process of reforming its closed-end Regulation Z disclosures. It is clearly time to overhaul the current mortgage disclosure regime, which does not work well, and replace it with revised disclosures that consumers will understand and use. As these processes unfold, it is critical for all agencies,

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[1] *See* Board of Governors of the Federal Reserve System, *Report to the Congress on Credit Scoring and its Effects on the Availability and Affordability of Credit* (Aug. 2007), *available at* http://www.federalreserve.gov/boarddocs/RptCongress/creditscore/creditscore.pdf. While the policy implications of the Board's findings in this study are only beginning to be analyzed, we urge the Board to consider carefully the effect that this proposal, as well as legislative proposals relating to mortgage lending, are likely to have on lending to low and moderate income borrowers and many borrowers living in predominantly minority census tracts.

including the Federal Trade Commission (FTC), to work together, with the industry and consumers, to adopt improved disclosures. Piecemeal disclosure revisions will be extremely counterproductive, particularly if different agencies develop overlapping requirements. We also urge the agencies to allow the industry and consumers to have input on the formats for consumer-testing of proposed disclosures. The goal should be an integrated disclosure package that provides consumers with the information they need in a user-friendly format, without imposing unreasonable burdens on the industry.

- **Fee Limits Before Early Disclosures**. We have concerns about the Board's new requirement that neither the lender nor any other person may take and begin to process an application prior to collecting any fee, other than a fee for a credit report. We are concerned that this will raise costs and introduce inefficiencies in the market. The Board is aware that underwriting and processing mortgage loans is an expensive process, and one that will likely be slower and more expensive after the Board's adoption of a final rule. Most lenders will not lock in a rate until a fee can be charged. Recent market events have underscored the ongoing criticality of property valuation and downpayment requirements, and we expect that as a result the inability to collect an appraisal fee early in the process will slow down the loan process, including the determination for each consumer of the available product choices and related pricing. Moreover, this requirement must now be viewed in the context of new proposed RESPA regulations that re-define the concept of "application," and place a separate limitation on upfront fees.

- **Servicing.** We have questions about the Proposal's servicing requirements. As the Board itself notes, the severe penalties for non-compliance would only fall on those creditors that service loans that they originated. We are concerned that the inability to create a level playing field will undercut the proposed requirements, and we expect that some creditors who can do so without triggering other financial obstacles will transfer the servicing to avoid the reach of TILA's liability provisions. We also are concerned about disproportionate liability. For example, the extremely prompt provision of payoff statements or provision of schedules of all potential fees and charges are operationally difficult, and non-compliance with these difficult provisions should not automatically constitute an unfair or deceptive practice.

- **Escrows.** We do not object to requiring escrows for higher-cost loans. But we believe that a significant implementation period will be required to allow compliance. Many home equity lenders do not have these systems in place in the current market, and requiring escrows—and getting them right—will require extensive programming changes and training.

- **Appraisals**. While we agree that the current legal structure governing appraisals is outdated and the business structure provides insufficient disincentives for appraiser misconduct, we do not believe that the system can be improved by placing lenders at even further risk from the appraisal industry. 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. Lenders already lose too much money when appraisers provide faulty appraisals. Because the status quo has not worked, new mechanisms to protect lenders and consumers from inflated appraisals must be put into place, including increased use of AVMs, mechanisms for the contemporaneous report of pressure, and prohibiting lenders from allowing brokers to order appraisals.

- **Advertising**. We support the Board's proposal to place additional restrictions on credit advertising. We agree that deceptive or incomplete advertising has been a substantial problem in the marketplace and that new rules are required to address those issues. While we have specific comments on the Proposal, we concur with the need for updated advertising rules.

- **Preemption.** Finally, we urge the Board to recognize that the rules it adopts reflect a federal law judgment of the appropriate level of regulation that will protect consumers without unduly jeopardizing their ability to access home mortgage credit. State laws that impose more burdensome requirements or remedies should be recognized as "inconsistent" with this judgment because their over-regulation, and the resulting restriction of affordable credit opportunities, works more harm than good for consumers. Thus, the Board should exercise its authority under Section 111 of TILA to establish that its regulatory requirements, including those applicable to higher-priced mortgage loans, as well as disclosures, preempt such inconsistent state laws. The nationwide uniformity in mortgage lending regulation arising from such preemption will provide better, more consistent protection for consumers. It will also lead to more affordable products as the compliance costs of adhering to one, national standard will be greatly reduced from the current cost of dealing with a multiplicity of differing state laws. The adoption of national lending standards for subprime loans, moreover, is fully consistent with the Administration's recently announced broad plan for optimal, effective financial regulation reform.

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I. BASING THE PROPOSED RULES ON SECTION 105(a), NOT SECTION 129(l).

While the CMC applauds the Board's consideration of using its authority under Section 105(a) of TILA and Section 129(l) of HOEPA to ensure consumers better understand mortgage products, particularly subprime mortgage products, and protect consumers from unfair and deceptive practices in mortgage lending, the CMC believes that most of the proposed regulations are more appropriately authorized under Section 105(a), not under Section 129(l). In particular, the following provisions should be promulgated under Section 105(a) rather than Section 129(l):

- Prepayment penalty provisions;
- Escrow requirements;
- Disclosure provisions, including the mortgage broker fee agreement and early TILA disclosures;
- Appraisal provisions;
- Servicing provisions; and
- Advertising provisions.

Conversely, the provision of the Proposal that is more appropriately promulgated under Section 129(l) rather than Section 105(a) is the requirement that lenders must evaluate the borrower's ability to repay the loan.

This distinction is critical. The potential liability for violations of Section 129 is severe and in most cases disproportional to the harm sought to be addressed. The CMC believes that most of the proposed regulations are better understood as part of the Board's plan to promote the informed use, and prevent the uninformed use, of credit—the statutory purpose that underlies Board regulatory action under Section 105(a). The penalties for violations of the proposed regulations should be consistent with the other provisions of TILA and Regulation Z with the same purposes. Additionally, if the regulations are based on the Board's UDAP authority under Section 129(l), lenders could be subject to additional and substantial liability under state UDAP laws. The CMC respectfully believes this degree of liability exposure is inconsistent with Congress's intent in enacting and amending TILA and HOEPA, and would likely have significant negative unintended consequences relating to the price and availability of credit.

Additionally, while the Board is authorized to promulgate most of the proposed regulations under Section 105(a), the Board's UDAP authority is not unlimited and, analyzed under the Board's own existing UDAP interpretations, does not extend to second-guessing consumer choice. Moreover, the legislative history of Section 129(l) emphasizes that the Board is to take care in using this authority to ensure it does not inadvertently limit the availability of credit. While Congress was concerned with abusive lending practices in enacting HOEPA, Congress also recognized that the imposition of numerous specific prohibitions in an area as complex as residential mortgage lending could prohibit transactions that benefit consumers. Concerned that such specific prohibitions would preclude refinancing and result in "endless litigation," Senator Riegle—then chairman of the Senate Banking Committee—introduced Amendment 1524 which replaced the specific prohibitions with the "discretionary regulatory authority" contained in

Section 129(l).[2] Indeed, Section 129(l) was intended "to make sure this legislation [HOEPA] does not have the unintended consequence of making less fair credit available."[3] Actions that are likely to decrease the availability of credit must be closely scrutinized to ensure that they are consistent with the Congressional intent of Section 129(l).

The Board acknowledges that "some of the practices that would be prohibited [by the Proposal] would benefit some consumers in some circumstances" and "may reduce access to some consumers in some circumstances to legitimate and beneficial credit arrangements . . . ."[4] Practices cannot be considered "unfair," "deceptive," or "abusive" within the meaning of Section 129(l) if they often provide significant benefits to consumers. Many of the proposed regulations are not aimed at "unfair," "deceptive," or "abusive" practices as the Board has defined those terms,[5] but are intended to promote the informed use, and prevent the uninformed use, of credit, and thus are more appropriately authorized by Section 105(a).

Two-Tiered Rulemaking and Liability Structure

To the extent the Board decides to continue with a rule-making based, in part, on its 129(l) authority, the CMC urges the Board to adopt a two-tiered rulemaking.

- First, the various provisions of the Proposal would be promulgated under the Board's Section 105(a) authority. This would still accomplish the Board's goals of enhancing the informed use of credit and preventing the uninformed use of credit and also would expose lenders to the more appropriate and proportional liability structure applicable to TILA violations generally. The CMC notes that the lending community goes to great lengths to comply with the provisions of TILA, and that the standard TILA damages provisions—which would apply to violations of rules promulgated under Section 105(a)—have been sufficient to cause creditors generally to comply with TILA and Regulation Z.

- Second, if a violation of a provision also rises to the level of being "unfair" and "deceptive" as those terms have been defined and clarified by the Board (and as discussed below and consistent with the Board's authority), the violation of the provision also would be subject to the heightened damage provisions applicable to violations of Section 129. In this way, the severe liability that would apply to violations of rules promulgated under Section 129(l) would apply only to conduct where the potential harm is proportionate to the penalty.

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2 140 Cong. Rec. S3056 (Mar. 16, 1994); *see also id.* S3044.

3 *Id.* S3175 (Mar. 17, 1994).

4 73 Fed. Reg. 1672, 1686 (Jan. 9, 2008).

5 *See, e.g.*, 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) (the "UDAP Guidance"), *available at* http://www.federalreserve.gov/BoardDocs/Press/bcreg/2004/20040311/attachment.pdf. The Board and FDIC based their guidance on the FTC's previous guidance. *See* FTC *Policy Statement on Unfairness* (December 17, 1980); *FTC Policy Statement on Deception* (October 14, 1983)

This two-tiered approach would allow the Board to accomplish the goals articulated in the Proposal while remaining consistent with its authority under both Sections 105(a) and 129(l).

Ability to Cure

Additionally, the CMC urges the Board to allow lenders to cure any compliance failures. The CMC recommends that the Board make clear that Section 130(b) of TILA allowing the cure of TILA violations applies to violations of the new Regulation Z requirements. Under this provision:

> A creditor or assignee has no liability under this section [Section 130] or section 108 or section 112 for any failure to comply with any requirement imposed under this chapter or chapter 5, if within sixty days after discovering an error, whether pursuant to a final written examination report or notice issued under section 108(e)(1) or through the creditor's or assignee's own procedures, and prior to the institution of an action under this section or the receipt of written notice of the error from the obligor, the creditor or assignee notifies the person concerned of the error and makes whatever adjustments in the appropriate account are necessary to assure that the person will not be required to pay an amount in excess of the charge actually disclosed, or the dollar equivalent of the annual percentage rate actually disclosed, whichever is lower.

We recommend that the Board interpret this provision to allow a creditor or other person subject to the new rules who fails to comply with them to cure the violation, within the applicable timing requirements, by, at its option:

(1) In the case of a higher-priced mortgage loan, changing the terms of the loan in a manner beneficial to the borrower so that the loan will no longer be considered a higher-priced mortgage loan; or

(2) In the case of a failure to provide the mortgage broker fee agreement in accordance with the rule, refunding the amount of the mortgage broker fee; or

(3) Changing the terms of the loan in a manner that alleviates the effect of the violation (e.g., if the failure related to not verifying a borrower’s income needed to qualify for the loan, the lender would take steps to verify the income after the fact and if the verified income was lower than that used to qualify the borrower, absent a finding of fraud, the terms would be amended such that the borrower would only be required to make payments that the verified income would support).

Moreover, if the Board decides to promulgate any portion of its Proposal under Section 129(l), the CMC urges the Board to clarify expressly that the severe liability provisions applicable to Section 129 violations would apply only to the creditor, and not to assignees. While we believe that this already would be the correct legal analysis, the rule creates some uncertainty, and we expect secondary market participants to tread very cautiously in this area. Assignees should be provided a clear safe harbor similar to that contained in Section 131(e) of TILA, where assignees are liable only for violations that are “apparent on the face” of the documents. If assignees cannot gain additional comfort that they understand their potential liability, there will be no market for "higher-priced" mortgage loans and, consequently, they—like HOEPA loans—simply will not be made in any significant number.

A. The Board Has Authority to Promulgate the Proposed Regulations Under Section 105(a).

The Board has broad authority to "effectuate the purposes" of TILA under Section 105(a). The central purpose of TILA is to promote the informed use of credit and avoid the uninformed use of credit.[6] Historically, the Board has interpreted its authority under Section 105 very broadly. For example, Section 105 is the only statutory provision cited as authority for the Board to promulgate rules requiring use of the Consumer Handbook on Adjustable Rate Mortgages (the "CHARM" booklet)—a requirement not otherwise contained in the statute.[7] The CMC believes that just as Section 105 gives the Board the authority to require use of the CHARM booklet, it gives the Board authority to promulgate nearly all of the proposed regulations.

The Board has appropriately based its proposed disclosure regulations on Section 105(a). The CMC urges the Board not to limit the exercise of its 105(a) authority to disclosure provisions. Nearly all of the Board's proposed regulations are intended to promote the informed use and avoid the uninformed use of credit. These regulations therefore are authorized by Section 105(a). Indeed, only Section 105(a) expressly authorizes the Board to require new or different disclosures.[8]

Given the potential for substantially greater—and disproportionate—liability under Section 129(l) as discussed above, the CMC urges the Board to clarify that nearly all of its proposed regulations are based on Section 105(a), not Section 129(l).

B. The Board Should Adhere To Its UDAP Guidance.

Section 129(l) provides the Board with authority to address acts or practices that are "unfair" and/or "deceptive." Because those two terms are amorphous, and can be subjectively interpreted to prohibit almost any act or practice the interpreter does not approve of, enforcement agencies and regulators, such as the Board and the FTC, have appropriately provided further guidance that limits the potential application of those terms. The Board's guidance in this area, issued in 2004, is recent, consistent with the guidance of other agencies with substantial experience with those terms such as the FTC, and provides appropriate balance between regulation of unfair practices in the market and constraining the ability of U.S. consumers in making choices for their own circumstances. For this reason, and for those discussed above, in our view, the Board should apply its Section 129(l) authority only where the act or practice is truly "unfair" or "deceptive" as those terms have been defined and clarified by the Board in its

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6 *See* TILA § 102(a), 15 U.S.C. § 1601(a).

7 *See, e.g.*, 50 Fed. Reg. 20221 (May 15, 1985).

8 Additionally, since Section 129(a)(1) applies only to mortgages referred to in Section 103(aa), and since Section 129(a) does not otherwise authorize the creation of additional disclosure obligations, Section 129(a) does not authorize additional disclosure requirements.

2004 guidance. In our view, there are many practices that would be covered by the Proposal that do not reach the level of "unfair" or "deceptive" but are certainly appropriate for regulation by the Board as an update to its regulations adopted under the authority of Section 105(a). We urge the Board to maintain this balance as it delineates what rules are authorized under Section 105(a) and what are authorized under Section 129(l).

The Board has recognized that the determination of whether an act or practice is unfair or deceptive is an inherently individualized inquiry and depends on the specific facts or circumstances involved: "Whether an act or practice is unfair or deceptive will in each instance depend upon a careful analysis of the facts and circumstances."[9] The Board also has clarified that the standards for "unfairness" and "deceptiveness" are different.[10] These two standards are discussed in detail below.

Guidance Regarding "Unfairness"

In determining whether a specific act or practice is unfair, the Board has explained that it employs a three-part test:

> An act or practice is unfair where it (1) causes or is likely to cause substantial injury to consumers, (2) cannot be reasonably avoided by consumers, <u>and</u> (3) is not outweighed by countervailing benefits to consumers or to competition. Public policy may also be considered in the analysis of whether a particular act or practice is unfair.[11]

The Board has indicated that an act or practice is deemed unfair only if it satisfies <u>all</u> three of these criteria.

While the Board will consider an act or practice that causes "substantial injury" to consumers, the Board clarified that "[t]rivial or merely speculative harms are typically insufficient for a finding of substantial injury."[12]

Additionally, an act or practice is not considered unfair if the consumer reasonably can avoid injury. The Board has indicated that there are circumstances under which a consumer may be prevented from reasonably avoiding injury, such as where an act or practice interferes with a consumer's ability effectively to make decisions, where material information is withheld until after a consumer makes a decision, or where undue influence or coercion is employed. Importantly, however, the Board has clarified that it "*will not second-guess the wisdom of*

9 UDAP Guidance at 2.

10 *Id.*

11 *Id.* (emphasis in original).

12 *Id.* at 3.

particular consumer decisions."[13] Instead, the Board will consider whether a particular act or practice "unreasonably creates or takes advantage of an obstacle to the free exercise of consumer decision-making."[14] Thus, the touchstone is whether the consumer is free to make his or her own decisions. If the act or practice does not impede a consumer's ability to make decisions, the act or practice is not "unfair" for purposes of a UDAP analysis irrespective of whether the Board agrees with the consumer's decision.

Furthermore, the Board explained that "[t]o be unfair, the act or practice must be injurious in its net effects—that is, the injury must not be outweighed by any offsetting consumer or competitive benefits that are also produced by the act or practice." Importantly, the Board further explained that "[o]ffsetting benefits may include lower prices or a wider availability of products and services."[15] Additionally, the Board has explained that

> Costs that would be incurred for remedies or measures to prevent the injury are also taken into account in determining whether an act or practice is unfair. These costs may include the costs to the bank in taking preventive measures and the costs to society as a whole of any increased burden and similar matters.[16]

Finally, the Board explained that public policy considerations may factor into the unfairness analysis, although such considerations "will not serve as the primary basis for determining that an act or practice is unfair."[17] For example, "the fact that a particular practice is affirmatively allowed by statute may be considered as evidence that the practice is not unfair."[18]

Guidance Regarding "Deceptiveness"

The Board also follows a three-part test in determining whether a representation, act or omission is deceptive:

> First, the representation, omission, or practice must mislead or be likely to mislead the consumer. Second, the consumer's interpretation of the representation, omission, or practice must be reasonable under the circumstances. Lastly, the misleading representation, omission, or practice must be material.[19]

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13 *Id.* (emphasis added).

14 *Id.*

15 *Id.*

16 *Id.*

17 *Id.* at 3-4.

18 *Id.*

19 *Id.* at 4.

In determining whether a representation, omission or practice is deceptive, the Board has explained it will evaluate it in context.[20] Additionally, a representation, omission or practice is deceptive for purposes of a UDAP analysis only if "the consumer's expectations or interpretation are reasonable in light of the claims made."[21] Finally, the Board has explained that a representation, omission or practice is material "if it is likely to affect a consumer's decision regarding a product or service."[22]

C. The Board Should Adhere To Its Guidance Regarding "Abusive" Lending Practices.

The Board, along with the other federal banking agencies, also has provided guidance on what constitutes "abusive" or "predatory" practices in subprime lending. In the Interagency Guidance on Nontraditional Mortgage Product Risks ("Nontraditional Mortgage Guidance"), the agencies reiterated that the 2001 Expanded Guidance contains the agencies' guidance regarding what constitutes "abusive" practices.[23] The Expanded Guidance rightly acknowledges that "subprime lending that is appropriately underwritten, priced and administered" is not abusive.[24] The agencies then note that generally abusive practices involve one or more of the following elements:

- "Making unaffordable loans based on the assets of the borrower rather than on the borrower's ability to repay an obligation;
- "Inducing a borrower to refinance a loan repeatedly in order to charge high points and fees each time the loan is refinanced ('loan flipping'); or
- "Engaging in fraud or deception to conceal the true nature of the loan obligation, or ancillary products, from an unsuspecting or unsophisticated borrower."[25]

The CMC urges the Board to follow its existing guidance and categorize a practice as abusive only if the subprime loan (1) is unaffordable and "based on the assets of the borrower" rather than a prudent assessment of the borrower's ability to repay; (2) involves "loan flipping"; and/or (3) involves fraud or deception.

The CMC also urges the Board to follow its UDAP guidance in refusing to "second-guess the wisdom of particular consumer decisions."[26] As is discussed in greater detail below, consumers generally make sensible decisions regarding the price of the house they buy based on their

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[20] *Id.*

[21] *Id.*

[22] *Id.* at 5.

[23] 71 Fed. Reg. 58609, 58614 (Oct. 4, 2006); *see also Statement on Subprime Lending*, 72 Fed. Reg. 37569, 37570 (July 10, 2007).

[24] *Expanded Guidance for Subprime Lending Programs*, at 10 (2001) (hereinafter "Expanded Guidance").

[25] *Id.* at 10-11.

[26] *See supra* note 13 and accompanying text.

prospects for future income.[27] The CMC suggests it would be inappropriate for the Board to second-guess borrowers' sensible decisions, even if the decisions can create some level of risk for the borrower.

D. The Board Should Clarify That "Materiality" Under Section 129 Can Be Determined Only on an Individual Basis.

As the Board is aware, violations of the requirements of Section 129 are subject to far greater damages than are violations of other requirements of TILA. Unlike other TILA provisions, a violation of a requirement of Section 129 may be subject to enhanced damages and rescission. As noted above, actions that would result in "endless litigation" are inconsistent with the Congressional intent of Section 129(l).[28] Additionally, the costs of such punishments and litigation would drive substantial numbers of lenders from the market, reducing the availability and affordability of mortgage credit and thereby harming consumers.

Nevertheless, the enhanced damages are available only when a failure to comply is "material." Under Section 130(a)(4) of TILA, a creditor is liable for enhanced damages unless "the creditor demonstrates that the failure to comply is not material." Moreover, any failure to comply with a requirement adopted under Section 129(l) could be viewed as an unfair or deceptive practice under state UDAP laws—and subject a lender to the substantial damages provided by state UDAP laws.

In its UDAP guidance, the Board has explained that the analysis of whether a particular act or practice is unfair or deceptive is an inherently individualized one: "Whether an act or practice is unfair or deceptive will in each instance depend upon a careful analysis of the facts and circumstances."[29] In light of the fact-dependent nature of the evaluation of unfairness and deceptiveness, and the Board's previous guidance to that effect, a failure to comply should be determined to be "material" only on an individual (i.e., not on a class-wide) basis. The CMC requests that the Board clarify that the evaluation of "materiality" can be made only on an individual basis.

Furthermore, Section 129(j) by its terms applies only to contractual "provisions" prohibited by Section 129. It does not apply to any lending practices the Board might prohibit under its Section 129(l) authority. The CMC requests that the Board clarify that Section 129(j) does not apply to any regulations the Board promulgates relating to lending practices more generally (and solely with respect to loans defined in Section 103(aa) under Section 129(l)). In particular, the CMC requests that the Board clarify that the right of rescission does not apply to any aspect of the Proposal that does not address contractual "provisions" of the mortgage loan.[30]

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27 *See infra* note 47 and accompanying text.

28 *See supra* notes 2-3 and accompanying text.

29 UDAP Guidance, *supra* note 5, at 2.

30 For example, while Section 129(j) might apply to prepayment penalties, which generally are included in a contractual provision of the loan agreement, other aspects of the Proposal such as borrower's ability to repay are not.

II. EXCLUDING PRIME, JUMBO, GOVERNMENT AND CRA LOANS FROM THE DEFINITION OF "HIGHER-PRICED MORTGAGE LOANS."

The Board has correctly noted that very few loans are made with rates or fees above the HOEPA triggers.[31] For practical purposes, the HOEPA thresholds function like usury ceilings. Given the potential liability for non-compliance of new requirements on "higher-priced mortgage loans" in the Proposal, the threshold used for defining these loans may similarly become a usury ceiling for practical purposes. In any event, lenders and investors will almost certainly impose additional charges and fees to compensate for the increased costs and risks of making or holding them. Given that the market for these loans has collapsed and this market segment is generally seen as having created a severe economic crisis, we expect lenders to take a very cautious approach to re-entering this market. Even when a secondary market for subprime loans re-emerges, and we expect that eventually it will, many and perhaps most lenders will choose not to make loans in this category due to both the substantial liability that will be associated with origination errors and the stigma of exceeding the federal threshold. In this light, the coverage threshold demarcating what is and what is not a higher-priced mortgage loan is critical. As detailed below, our view is that the Board should both exclude from coverage several categories of loans and increase the size of the rate spread designating the "higher-priced" category.

Coverage

The CMC agrees with the inclusion of purchase money loans in the definition of "higher-priced mortgage loan." The CMC also agrees with the exclusions in § 226.35(e)(5) of the Proposal. In addition, the CMC urges the Board to exclude from the definition loans that exceed the permanent conforming limit ("jumbo" loans). Because they have higher incomes and thus a higher degree of sophistication, borrowers who obtain jumbo loans do not need as much protection as borrowers of lesser amounts. There is little evidence, even anecdotally, of widespread issues in the jumbo market. Nevertheless, since many jumbo loans already bump up against the Home Mortgage Disclosure Act (HMDA) threshold, the Proposal's threshold would capture many of these jumbo loans. Borrowers eligible for jumbo loans should have the freedom to choose from the widest range of financial options.

For many of the same reasons, loans insured by the Federal Housing Administration (FHA) or guaranteed by the Department of Veterans' Affairs (VA) should be excluded as well. The rules governing the origination of FHA and VA loans already include substantial consumer protections that appear to have protected their borrowers from the significant consumer issues that have faced substantially similar borrowers in the private subprime market. Moreover, these rules are and have been actively managed by federal agencies to address market changes, and lenders that violate those rules already face substantial penalties. As with jumbo loans, however, many of these loans either bump up against or exceed the proposed threshold. Especially given the level of reliance that executive branch and Congressional policymakers are currently placing on the use of the FHA program—both to maintain liquidity in the mortgage market and to provide a

[31] 73 Fed. Reg. 1672, 1677-78 (Jan. 9, 2008). The CMC understands that according to the 2006 HMDA data, only 0.11% of loans were HOEPA loans.

refinancing tool for borrowers who are delinquent or who face delinquency—it is crucial that as many lenders as possible be available to make them.

Moreover, the Board should also exclude from the definition of "higher-priced mortgage loans" loans originated under special loan programs aimed at community development. The recent Interagency Statement on Subprime Mortgage Lending continued the use of the federal banking agencies' definition of subprime loans from the expanded guidance on subprime lending that the agencies issued in 2001. That definition excludes from the coverage of subprime "community development loans as defined in the CRA [Community Reinvestment Act] regulations that may have some higher risk characteristics, but are otherwise mitigated by guarantees from government programs, private credit enhancements, or other appropriate risk mitigation techniques." While the annual percentage rate (APR) on these loans may exceed whatever threshold the Board sets for this rule, often due to the cost of the credit enhancement, CRA loans excluded from the Subprime Guidance have not been the subject of complaints either that such loans are marketed in an unfair manner or that the terms, structure, or underwriting of such loans are unfair. As a result, we believe that similarly excluding these loans from treatment as "higher-priced" loans would be consistent with both the Board's consumer protection and community development objectives. Without such an exclusion, we are concerned that the Proposal will greatly limit the availability of community development loans created to meet Community Reinvestment Act objectives.

A. Raising the Higher-Priced Mortgage Loan Threshold

The CMC believes the thresholds in the Proposal—3 percentage points over comparable Treasury securities for first liens and 5 percentage points over comparable Treasury securities for second liens—are too low and, as a result, will designate a substantial chunk of the prime market as "higher-priced." Moreover, they capture different segments of the market depending on the type of product. The Board acknowledges that the proposed cutoffs "would capture at least the higher-priced end of the alt-A market," *see* 72 Fed. Reg. at 1682-83, but it must be acknowledged that they would also capture a significant proportion of the fully prime market for certain products.

For example, consider the average rates quoted by Bankrate.com as of March 5, 2008 (*see* http://www.bankrate.com/dls/static/mortgage-analysis.asp?caret=2,[32] *visited on* March 10, 2008). The Proposal would require that these rates be compared with Treasury constant-maturity rates as of February 15, 2008, shown on Release H-15, available at http://www.federalreserve.gov/releases/H15/20080219/. The following table compares the average APR for that week with the applicable threshold cutoff. The APR is estimated from the interest rate, based on the Bankrate.com report that points and origination fees on 30-year fixed-rate loans averaged 0.39%, and making the often-unrealistic assumption that no other fees would have been included in the finance charge and reflected in a higher APR. As the table shows, the APR differs only modestly from the simple interest rate.

[32] The rates for ARM loans displayed on Bankrate.com are based on the fully-indexed rate for the loans.

For example, the average APR on a 30-year first-lien jumbo loan for that date was 7.47%, which is 0.71% *above* the higher-priced mortgage loan threshold of 6.76%, implying that the vast majority of jumbo loans – made to the most sophisticated category of borrowers – would have been subject to restrictions on higher-priced mortgage loans that are aimed at protecting less knowledgeable consumers. The estimated APR on the very popular 5/1 ARM – not an "exotic" or particular risky product – exactly equaled the applicable threshold for that date, so that many typical 5/1 ARMs would have been considered a higher-priced mortgage loan. Although the average rates in two other categories – 15-year and 30-year conforming, fixed-rate mortgages – were below the thresholds, for both products the difference was less than ½ of 1%. This implies that even some of these prime loans could be covered, particularly in areas with higher mortgage rates than the national average, or for lower-denomination loans for which the APR is often somewhat higher than the average. Many, if not most, FHA and VA loans would also be covered. The only category in which the threshold was significantly below the average estimated APR was home-equity loans, but that difference reflects the fact that the rate spread for junior-lien loans is five rather than three percentage points.

	Instruments				Avg. Mortgage Week of 3/5/08 (APR assumes points of 0.39% except for home-equity loan)		
Loan Product	Treasury Instrument	Comp. Treasury Rate	1st-Lien Cutoff	Junior-Lien Cutoff	Int. Rate	Est. APR	APR minus Treasury
5/1 ARM	5-year	2.76%	5.76%	7.76%	5.72%	5.76%	0.00%
15-year fixed	7-year	3.21%	6.21%	8.21%	5.79%	5.85%	-0.36%
30-year conforming	10-year	3.76%	6.76%	8.76%	6.32%	6.36%	-0.40%
30-year jumbo	10-year	3.76%	6.76%	8.76%	7.43%	7.47%	0.71%
10/15 year home equity loan	10-year	3.76%	6.76%	8.76%	7.75%	7.75%	-1.01%

As the Board notes throughout its Proposal, the main impetus for this rulemaking is the turmoil in the subprime mortgage market. As shown above, the "higher-priced mortgage loan" threshold set forth in the Proposal will capture many loans that are not subprime loans, including substantial numbers of prime loans, including the vast majority of jumbo loans and FHA loans, in addition to Alt-A loans. The vast majority of these loans have performed and continue to perform well. Consequently, there is no need to apply the additional limitations on "higher-priced mortgage loans" to these non-subprime loans. Applying these limitations (many of which are subjective) beyond the subprime market will only serve to make credit less available and less affordable to many consumers. Moreover, the percentage of these loan products that are "captured" by the new threshold could increase and decrease dramatically over time as the market perceptions change as to the degree to which mortgage securities pose a greater risk than Treasury securities.

If Treasury securities are to be the benchmark (and, as discussed below, the CMC believes there are appropriate, and perhaps better, alternatives), the CMC believes the threshold should be 400 and 600 basis points above the comparable Treasury securities. This is the alternative suggested in the Proposal's preamble. We have canvassed our members, and, based on their preliminary analyses of recent loan production data, we believe that these revised spreads should largely protect the prime market from coverage under the new "higher-priced" loan rules without substantially reducing the number of subprime loans that are covered. All in all, we think the Proposal would mis-classify (i.e., designate prime loans as "higher-priced" or fail to classify subprime loans as "higher-priced") between three and four times as many loans as the slightly expanded spread that we are recommending. The "subprime" loans that would not be covered using these spreads would be the loans that are at the very top of the subprime market and that only marginally fit that characterization – and thus, generally loans made to the least vulnerable group of subprime borrowers. By contrast, the same preliminary analyses conducted by some of our members indicate that under the Proposal's current thresholds, almost 20% of the prime and "Alt-A" market could be above threshold, which could have serious effects on these loans' pricing and availability.

Especially given that there is not even a commonly understood definition of subprime, that lenders use different indices for funding ARMs and fixed-rate loans, and that different lenders use different indices, we recognize that any line that is drawn will have some "fit" issues. More importantly, any line represents some degree of trade-off between providing special protections for vulnerable borrowers that the Board believes are important to extend and ensuring the ongoing availability of mortgage capital in the prime mortgage market. Given the current market conditions, we believe that the Board should weigh the factors in the direction of protecting the prime market to the greatest extent. Last month, the Board correctly intervened to protect the market from the potential failure of a major investment bank. The potential failure ultimately was caused by the uncertainty of the collateral value of the residential real estate underlying mortgage security interests. That same uncertainty is widely (and we believe correctly) thought to be the underlying source of much of the turmoil in the financial markets. While the thresholds set in the Proposed Rule will not drive the fundamentals of U.S. residential real estate values, actions that are likely to further limit the availability of financing in the strongest segment of the residential real estate finance market would be unhelpful in light of the Board's other efforts to help stabilize and protect the market. When that is weighed against the potential failure to provide new protections for the least vulnerable subprime borrowers, in our judgment the higher spread we are recommending is the right path for the Board to take.

Moreover, as this is a regulatory as opposed to statutory determination, the Board would be free in future years to analyze both the sufficiency of coverage of its rule and the effect of the rule on the availability of credit. The Board would thus be able to adjust the threshold periodically if it believed such an adjustment was necessary or that market conditions indicated the Board should weigh the competing factors differently.

B. An Alternative Appropriate Index and Threshold

The CMC has been concerned that the use of comparable maturity Treasury securities, while relatively simple to understand as the benchmark, is a poor fit because residential mortgages are not typically priced off of those comparable Treasury securities. Each lender prices loans on the basis of a variety of rate factors, including its own cost of funds and the market pricing for the loans. Moreover, we understand that the Board has also been concerned about the fluctuations in market coverage that can be created by changes in the yield curve without changes occurring in the actual marketplace (e.g., the differences between the 2004 and 2005 HMDA data coverage). Based on some members' preliminary analyses, we believe that the Board could address these concerns by creating a new threshold as follows: (i) first, by creating a "mortgage credit spread" by subtracting the 7-year Treasury securities rate from the Freddie Mac 30-year conventional loan rate, currently published in the Board's H.15 Bulletin Selected Interest Rates Statistical Release, which would automatically adjust for credit differences between the residential mortgage lending market and the Treasury market, (ii) adding the new duration-matched Treasury securities included in the Proposal, and (iii) adding 200 basis points for first lien mortgages and 400 basis points for junior lien mortgages. While we understand that the Board would be concerned with the use of any index provided, in part, by a private party, we believe that it would be a sound index from which to adjust the thresholds for coverage as a higher-priced loan that would largely address the issues raised by yield curve changes.[33] Given the complexity of calculating this proposed threshold, we recommend that the Board calculate, maintain and publish the threshold weekly just before the beginning of the business day on Mondays, so that lenders will be able to use these values in calculating whether loans being underwritten that day will be classified as higher-priced. We believe that the foregoing threshold would provide similar coverage to the Treasury plus 400/600 proposal set forth above, with the similar, substantial advantage of creating a threshold that will not harm the prime market. Moreover, although only time will tell, we expect that a threshold that incorporates the mortgage credit spread may prove to be better at the margins than the comparable Treasury securities of automatically adjusting for changes in both the yield curve and sources of residential mortgage loan funding.

Timing

If the Board decides to use Treasury yields as the benchmark for the "higher-priced mortgage loan" threshold, the CMC urges the Board to reconcile the timing requirement with the HOEPA

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[33] We note that the legislation offered by each of Chairman Frank in the House of Representatives and Chairman Dodd in the Senate would employ the Freddie Mac index. As an alternative to the Freddie Mac index, the Board could develop its own similar index in the same way as it generates the credit card rate index based on rates from reporting banks that the Board publishes in the G.19 Consumer Credit Statistical Release.

loan threshold and the threshold used for reporting loan pricing under HMDA. The HOEPA threshold is based on the Treasury yield as of the 15th day of the month immediately preceding the month in which the application is received.[34] However, the proposed "higher-priced mortgage loan" definition is based on "the yield on Treasury securities as of the 15th day of the preceding month if the creditor receives the application between the 1st and the 14th day of the month and as of the 15th day of the current month if the creditor receives the application on or after the 15th day."[35] This is similar to the HMDA threshold except that the HMDA threshold is based upon when the rate is set rather than the receipt of the application. Thus, the benchmarks used for determining whether a loan is a "higher-priced mortgage loan" or a HOEPA loan or a price reportable loan under HMDA may all be different depending on when the rate is set and whether the application is received on the 15th day or later. The inconsistencies in these benchmarks will impose substantial and unnecessary operational burdens. The CMC urges the Board to use the same benchmarks for both the "higher-priced mortgage loan" under TILA and HMDA so that lenders can test loans simultaneously for both thresholds. Once the standard has been determined, we would recommend that the Board seek legislative changes to HOEPA so that calculations under Section 103(aa) of TILA can be conformed to the new index, and all thresholds – for HOEPA, for higher-priced mortgage loans, and for HMDA – are set in the same way off of the same index. This will reduce operational difficulties.

Lenders will likely make the determination whether a loan is a higher-priced mortgage loan during final underwriting of the application. Thus, there is a risk, whatever the threshold, that subsequent changes in the APR may occur, due to a borrower-requested change in terms, or other unforeseen circumstance, that could push a loan over the threshold after final underwriting. This could have a significant impact on consumers, particularly if the lender has adopted a policy of not making any higher-priced mortgage loans. In such a case, the loan would have to be rejected. To avoid such a case, lenders will build in a "cushion" in their determination whether a loan's APR falls below the applicable threshold at closing. This approach will have the practical effect of further lowering the threshold below the Board's stated benchmark, and encompassing potentially more prime loans. This underscores the need for a higher threshold.[36]

In addition, we urge the Board to implement these new benchmarks on a timetable that gives lenders sufficient time to modify their systems to capture the necessary information to ensure compliance with Regulation Z as well as Regulation C. In light of the considerable programming, training, and system testing required, we urge the Board to allow at least nine months from the publication of the final rule for lenders to implement the necessary changes to comply with the new thresholds. In this regard, since HMDA reporting occurs after the fact on an annualized basis, the Board could explore the feasibility of allowing lenders to comply with a new threshold for reporting pricing data under HMDA for loans originated in 2009, provided that all information related to the threshold necessary to report such HMDA data was clearly

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[34] 12 C.F.R. § 226.32(a)(1).

[35] Proposed § 226.35(a)(4).

[36] The Board could also consider adopting a tolerance for changes in the APR occurring between final underwriting and closing.

identified in advance (so lenders could be sure to capture it readily for all 2009 originations) and requirements for quarterly updates of HMDA registers and reports were relaxed.

III. MODIFYING AND CLARIFING THE BOARD'S UNDERWRITING REQUIREMENTS.

A. The Provisions Regarding a Consumers' Ability to Repay.

As a general matter, the CMC agrees that underwriting standards should evaluate the borrower's ability to service the debt. However, we urge the Board to clarify that the repayment ability analysis requires that a lender determine that "there is no reason for the lender reasonably to believe" the borrower cannot repay the loan. Many factors—including many unknown to any lender and known only to the borrower—determine whether a borrower *can* repay—or will choose to repay—a loan. Even the most prudent underwriting practices cannot determine with absolute certainty that a borrower can or will repay a loan. Rather, prudent underwriting practices ensure that there is no reason to believe that a borrower cannot repay a loan. We urge the Board to clarify that the Proposal does not subject lenders to a new and unprecedented obligation of insuring that a borrower will repay a loan—only that there is no reason to doubt the borrower's ability to do so.

Change "Pattern or Practice" to "Systematic Practice"

The CMC believes the Proposal's application of the "pattern or practice" concept to underwriting is problematic. While the CMC ordinarily supports the use of established legal concepts in new regulations, the "pattern or practice" standard as applied to underwriting could be applied in instances where there are very few actual instances of a violation. As discussed below, we urge the Board to change "pattern or practice" to "systematic practice."

Existing regulatory guidance in consumer lending underscores this concern. For example, the Interagency Policy Statement on Discrimination in Lending contains a Q&A that explains what constitutes a "pattern or practice" in lending discrimination cases. While the Board states that "isolated, unrelated, or accidental occurrences will not constitute a pattern or practice," it also states that "repeated, intentional, regular, usual, deliberate, or institutionalized practices will almost always constitute a pattern or practice. The totality of the circumstances must be considered . . . ."[37] The Board explains that considerations include (1) whether the conduct is "grounded in an unwritten policy;" (2) whether there is evidence of similar conduct toward *more than one* applicant; (3) whether the conduct "has some common source or cause;" and (4) whether the conduct occurred in the same area of operations. The Board further explains that while "the relationship of the number of instances of conduct to the financial institution's total lending activity" is a consideration, "depending on the circumstances, *violations that involve only a small percentage of an institution's total lending activity could constitute a pattern or practice*."[38] Similarly, the Board's Proposal also notes that a "pattern or practice" "can be

[37] *Policy Statement on Discrimination in Lending*, Q&A no. 9 (FRRS § 6-153.25).

[38] *Id.* (emphasis added).

established without the use of a statistical process"[39] and could be determined solely by a lender's acting under a lending policy.[40]

Since underwriting practices generally are grounded in established underwriting policies and guidelines, they are applied to all applicants, they have a common source, and occur in the same area of operations, the CMC is very concerned that even a minute number of errors—even a number otherwise considered within acceptable tolerances—could be considered a "pattern or practice" in violation of the proposed regulations. For example, a lender that made 100,000 loans but that failed to fully comply with the Proposal's underwriting standards 1/10 of 1% of the time would still have made the error 100 times. We are concerned that under this standard, a court or an enforcement agency would (incorrectly) find that 100 instances constituted a pattern or practice. Given the potential for severe liability under Section 129 of HOEPA and under state UDAP laws for underwriting errors, such a result would create in essence strict liability and is unwarranted.

Our concern is underscored further by the incredibly expansive view some courts have taken of what constitutes a "pattern or practice" in other contexts. For example, in *Hill v. Amoco Oil Co.*, the Illinois federal district court concluded that allegations of thirty instances of discrimination in consumer fuel transactions—out of *millions* of transactions—could potentially constitute a "pattern or practice."[41] In fact, another court concluded that a "pattern or practice" could exist *based on only a single instance* of alleged conduct.[42] And another court found a "pattern or practice" with only two instances of alleged conduct.[43] Other courts similarly have concluded that a "pattern or practice" could be established with a shockingly small number of alleged instances.[44] Under these precedents, even an exemplary error rate otherwise considered could be deemed a "pattern or practice" of violations. Indeed, even an error rate that would qualify a lender for "six sigma" quality operations could conceivably be deemed to constitute a "pattern or practice." The CMC is concerned that few lenders, if any, could be safe from a finding of "pattern or practice" no matter how cautious the lender or how thorough its oversight.

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[39] The CMC notes that even where statistical evidence is used to show a "pattern or practice," such statistical evidence often is used inappropriately. *See, e.g.*, Allan G. King, *'Gross Statistical Disparities' as Evidence of a Pattern and Practice of Discrimination: Statistical Versus Legal Significance*, 22 LAB. LAW. 271 (2007).

[40] 73 Fed. Reg. at 1688.

[41] *Hill v. Amoco Oil Co.*, No. 97 C 7501, 2003 WL 262424, at *4 (N.D. Ill. Jan. 27, 2003).

[42] *U.S. v. Taigen & Sons, Inc.*, 303 F. Supp. 2d 1129, 1138 (D. Idaho 2003).

[43] *U.S. v. Pelzer Realty Co., Inc.*, 484 F.2d 438, 445 (5th Cir. 1973).

[44] *See, e.g.*, *U.S. v. Mintzes*, 304 F. Supp. 1305, 1314-15 (D. Md. 1969) (3 instances); *United States v. Balistrieri*, 981 F.2d 916, 929-30 (7th Cir. 1992) (5 instances); *see also U.S. v. Bob Lawrence Realty, Inc.*, 474 F.2d 115, 123-24 (5th Cir. 1973) (holding that small numbers of instances of alleged conduct by people not acting in concert could collectively constitute a "pattern or practice").

As the Board is aware, underwriting is a holistic, subjective process that not only involves dozens of factors but how those factors interrelate.[45] With such a complex, subjective process there inevitably will be some level of instances where a loan is approved that, in hindsight and in light of subsequent developments, perhaps should not have been approved. Such errors are inherent in such complex, subjective systems, however, and do not represent a true "pattern" of the lender's business practices within any reasonable meaning of that term.

Thus, the CMC recommends that "pattern or practice" be changed to "systematic practice" to ensure that small numbers of errors do not result in disproportionate liability. We also recommend that the Board provide examples to illustrate the systematic practice standard.

Fully-Indexed, Fully-Amortizing

The CMC generally agrees that underwriting standards should evaluate the borrower's ability to service the debt. We note that the recent Statement on Subprime Mortgage Lending requires lenders to use "[p]rudent qualifying standards [that] recognize the potential effect of payment shock in evaluating a borrower's ability to service a debt," and that such an analysis "should include an evaluation of the borrower's ability to repay the debt by its final maturity at the fully indexed rate."[46] As it has asserted in previous comments to the Board, however, the CMC continues to believe that while underwriting to the fully-indexed rate may be appropriate in many circumstances, it creates an inappropriate limitation on credit in other circumstances. Housing economists recently have found that "people make sensible housing decisions in that the size of the house they buy today relates to their future income, not just their current income and that innovations in mortgages over 30 years gave many people the opportunity to own a home that they would not have otherwise had, just because they didn't have enough assets in the bank at the moment they needed the house."[47]

Instead of imposing a rigid requirement that lenders underwrite to the fully-indexed rate, the Board should allow lenders to underwrite using prudent but flexible underwriting guidelines that, among other things, allow reasonable projections of an applicant's income to meet future payment increases, manage risk at the portfolio level, and thus allow lenders the flexibility to offer consumers products that meet their needs. Such flexibility is essential for lenders to be able

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[45] For example, length of employment may be a factor in underwriting, but may be a positive or negative factor depending on other factors. If a person has a low income, frequent employment changes may be a negative indicator of creditworthiness. However, if a person has a high income, frequent employment changes may be a positive indicator, since many individuals at senior levels in their professions may be able to advance only by taking a position at another company.

[46] *See Statement on Subprime Mortgage Lending*, 72 Fed. Reg. 37569, 37573 (July 10, 2007).

[47] *See* Gerardi, Kristopher et al., *Do Households Benefit from Financial Deregulation and Innovation? The Case of the Mortgage Market,* NBER Working Paper No. W12967 (Mar. 2007); available at http://ssrn.com/abstract=971601.

to meet not only the needs of borrowers, but also the needs of communities—particularly communities with large immigrant populations.[48]

If the Board nonetheless adopts the requirement that loans be underwritten to the fully-indexed rate on a fully amortizing basis, we recommend that the Board undertake periodic reassessments of this policy to ensure that the policy continues to balance consumer protection requirements with the ability of the market to provide loan products that will sustain homeownership.

Moreover, if the Board decides to impose such a requirement, to maintain both flexibility and consistency CMC urges the Board to adopt the definition of fully-indexed rate from the Nontraditional Mortgage Guidance and permit a lender to qualify a consumer for an ARM loan of a particular risk class if the consumer qualifies for a 30-year fixed-rate mortgage of the same risk class.[49] In addition, the Board should recognize that, especially when underwriting to a fully indexed rate and a fully amortizing payment, consideration of reasonable increases in the borrower's income is not an unfair or abusive lending practice. To benefit consumers, lender flexibility in qualifying borrowers must be maintained.

Finally, as noted below, where a stepped rate feature or interest rate caps apply, the borrower should be permitted to qualify for a loan based on the applicable payments under those features or caps.

Five Years versus Seven Years

We note that the Proposal would not hold a creditor liable if the creditor has a reasonable basis to believe the consumer will be able to make loan payments for at least seven years after consummation, considering the repayment factors outlined in the Proposal. The CMC urges the Board to apply the repayment ability analysis to a five-year rather than a seven-year period. (The Board's Proposal asked only for recommendations of five or seven years.) We believe a seven-year period is inappropriate because borrowers generally do not keep their loan for seven years. In the experience of CMC and its members, the vast majority of subprime borrowers refinance long before the loan term expires. In fact, thirty-year subprime mortgages have an average duration of around three years. Please see the attached **Exhibit A**, which shows prepayment speeds for subprime loans**.** Subprime borrowers access credit and use their home as security in many different ways and for many different reasons. These reasons generally result in restructuring or refinancing the debt over short-term periods. Subprime loans often serve as a critical bridge over financial setbacks and as a means of repairing credit. Requiring borrowers to qualify for a loan for a period beyond which few will still have the loan is, in our view, unduly restrictive.

Moreover, to the extent that payment shock and repayment ability problems are the result of declining home values, historical trends suggest that most significant downturns in the housing

48 *See, e.g.*, Edward L. Yingling, *Viewpoint: Subprime Loans Helping a Texas Town*, AM. BANKER, May 4, 2007 (describing how a bank used flexible criteria to help many borrowers in the small town of Van Horn, Texas buy homes who likely would not otherwise have been able to do so).

49 *See* 71 Fed. Reg. 58609, 58614 n.5 (Oct. 4, 2006).

market have corrected within five years, providing another reason why a five year period for the repayment ability analysis is appropriate. Attached as **Exhibit B** are graphs depicting the extent and length of nominal house price declines experienced in four metro areas (Los Angeles, New York, San Francisco and Boston) at various times in recent history. These graphs use the Case-Shiller index of house prices, unadjusted for inflation. Also attached is a graph of the Texas experience, using statewide data and the OFHEO house price index, as the Case Shiller indices do not cover Texas during the relevant period in the late 1980s. Each of these graphs show that the housing price declines lasted fewer than 60 months.

We recommend that, over this five-year period, the creditor would underwrite the borrower's ability to repay based upon the payment using the lower of the fully-indexed rate or the highest rate that could apply, based on a stepped rate feature, or interest rate caps, etc., during the first five years of the loan.

With respect to balloon loans, this safe harbor should also be based on a five-year period rather than a seven year period. Underwriting to the fully-amortizing payment schedule should not be required if the balloon payment occurs after the first five years. Since most balloon loans do not require a balloon payment for many years (e.g., 15-year balloon loans, 30/40 products requiring a balloon payment after 30 years, etc.), there is little risk of payment shock to borrowers and little reason to impose a requirement to underwrite at a fully-amortized payment schedule. Instead, balloon loans with a term of five years or more should be underwritten based on the amortization period used to calculate the monthly payments, and the interest rate used should be the fixed rate or, in the case of a variable rate loan, the lower of the fully-indexed variable rate or the highest step rate that would apply to the loan before the balloon comes due. For balloon payments with terms of less than five years, the amortization period used should be the amortization period used to calculate the monthly payments and the interest rate used for underwriting should be the fixed rate, or in the case of a variable rate loan, the lower of the fully-indexed variable rate, or highest step rate that would apply to the loan before the balloon comes due plus a margin of 2% to cover the risk of a payment shock when the borrower attempts to refinance. However, if the borrower has an option to extend the amortization period, the amortization period used should be based on the full term the borrower may choose, as provided in the Nontraditional Mortgage Guidance.[50] There would not be a need to underwrite the loan using an additional margin of 2% above the applicable rate in this case.

Expected Income

The CMC supports the Board's position that lenders may consider a consumer's expected income when making underwriting decisions. As noted above, this is appropriate because consumers sensibly consider future income when making housing decisions.[51]

Indeed, a lender's ability to consider expected income is essential to avoiding what has been characterized as the "tilt" problem in housing finance, namely, that "borrowers are required to

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[50] *See supra* note at 58614 n.6.

[51] *See supra* notes and accompanying text.

qualify for loans based on current income yet are likely to experience growth in income over time."[52] If lenders are not permitted to consider expected income, borrowers likely will incur "unnecessary transaction costs repeatedly trading up to obtain the house that matches their long term housing consumption preferences."[53]

The CMC also requests that the Board clarify how this provision relates to the provisions of ECOA with respect to older borrowers. For example, while the income of a 64 year-old borrower may be sufficient to repay the loan, a lender may believe that the borrower may retire in the near future—and, as a result, the borrower's income may decrease. The CMC asks the Board to clarify how the lender's duty to consider the borrower's ability to repay interacts with ECOA's prohibition against discriminating against older borrowers. The Commentary to Regulation B explains that "[a] creditor may consider the applicant's occupation and length of time to retirement" in determining creditworthiness. It is by no means clear that a lender could assume a consumer will retire at a particular age. The CMC suggests that the Board clarify that lenders simply should not consider a borrower's potential retirement and diminution of income as a factor in underwriting the loan unless the lender actually knows when the consumer will retire. In the alternative, the Board should clarify that inquiring of older applicants about their retirement plans and resources does not violate ECOA.

Debt-to-Income Ratio and Residual Income

The CMC urges the Board to reconsider the presumption that a lender has violated the requirement to consider repayment ability if the lender does not consider the consumer's debt-to-income ratio or the consumer's residual income. The Board correctly notes that "[t]hese are but two of many factors that determine repayment ability."[54] The Board rightly declined to impose quantitative standards for these factors because, "depending on the circumstances, the repayment risk implied by a high debt-to-income ratio could be offset by other factors that reduce the risk, such as a high credit score and a substantial down payment."[55] Similarly, repayment ability may be determined by focusing on other factors without considering debt-to-income ratio or residual income. However, the subjective requirements to "consider" debt-to-income ratio and residual income needlessly create uncertainty and could restrict a creditor's willingness to originate – and the secondary market's willingness to purchase -- these loans without requirements that would impose additional costs on the borrower.

Additionally, this requirement is vague and will pose significant compliance burdens. Debt-to-income ratio can be calculated in a variety of ways, and it is unclear whether a lender's method of determining this ratio would constitute compliance with the Proposal. Additionally, residual income is very difficult to calculate. If the Board moves forward with this aspect of its

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[52] Michael LaCour-Little & Jing Yang, *Pay Me Now or Pay Me Later: Alternative Mortgage Products and Housing Consumption*, at 34 (Jan. 24, 2008).

[53] *Id.* at 35.

[54] 73 Fed. Reg. at 1689.

[55] *Id.*

Proposal—and the CMC urges it not to do so—the Board should provide clear guidance regarding what constitutes "debt-to-income ratio" and "residual income" for purposes of the Proposal.

The CMC believes there is no reason the Board should create a presumption based on these two factors when dozens of factors are considered in making underwriting decisions. These presumptions do not enhance the repayment ability requirement and may impose significant costs on borrowers.

Consideration of Other Loans

The CMC agrees that the requirement to underwrite loans considering other loans being provided simultaneously is prudent. However, this requirement should be limited to considering loans made by the same lender. A lender often will not know whether a borrower is seeking a loan (or loans) from other lenders. Many CMC members have been victimized by this type of practice in the past. Lenders should be required to consider only information available to them.

GSE Underwriting Engines

The CMC urges the Board to clarify that a lender's use of an automated underwriting system provided by a Government Sponsored Enterprise (GSE) satisfies the repayment ability requirement for the lender. As the Board is aware, many lenders rely heavily on automated underwriting systems provided by the GSEs (e.g., Desktop Underwriter) in underwriting the loans they make to ensure that the loan will be saleable to the GSEs. Lenders do not know, however, how the GSE evaluates the various factors input to the automated system. These systems are proprietary, and the GSEs do not provide lenders with information regarding how they analyze and evaluate various factors. Lenders that rely on such systems to underwrite their loans will be severely burdened if they are required to re-underwrite each loan in addition to using the GSE's system.

Given their dominant presence in the market, the GSEs should be required to ensure that their automated underwriting systems will satisfy the repayment ability requirement (if they do not do so already), including all of the factors the Board may require in its final rule. If a loan underwritten through a GSE's system subsequently is found to have violated the repayment ability requirement, the GSE—not the lender—should be held liable for the violation.

Borrower Fraud

Finally, the CMC urges the Board to exempt lenders from any liability in cases where the consumer knowingly or intentionally misrepresented, misstated or omitted material information in the loan application. Such material misrepresentations, misstatements or omissions constitute mortgage fraud against the lender. The mortgage industry has lost billions of dollars in recent years through mortgage fraud schemes.[56] Borrowers who have committed mortgage fraud

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56 *See, e.g.*, Federal Bureau of Investigations, *Financial Crimes Report to the Public*, at 21-30 (2007), *available at* http://www.fbi.gov/publications/financial/fcs_report2006/publicrpt06.pdf.

should not be entitled to profit from the lender further. If a borrower has made a material misrepresentation, misstatement or omission in the application, the borrower should not be able to impose liability on the victim lender under the Board's rules.

Evasion

The CMC believes the Board's anti-evasion provision is unnecessary. It is already well-established that creditors cannot use open-end products such as HELOCs to evade the requirements imposed on closed-end mortgage products. This principle needs no further regulation to be effective. However, the inclusion of this regulation could have unintended and unforeseen consequences. HELOCs can provide important benefits to consumers, and there are many legitimate uses of them unrelated to the evasion of closed-end requirements. The Board should avoid chilling the use of HELOCs out of fear of violating a vague anti-evasion provision. Because the regulation is unnecessary, this risk is unwarranted.

If, however, the Board decides to promulgate such a rule, the CMC asks the Board to clarify that there are many legitimate uses of HELOCs that provide important benefits to consumers and are not intended to evade any closed-end requirements. Lien position restrictions alone will not accomplish this clarification.

B. The Income and Asset Verification Requirement.

The CMC supports the Board's presumption that the verification requirement is satisfied if the income relied upon is not materially greater than the income and assets the creditor could have verified.

The CMC also requests that the Board clarify that lenders need verify only the amount necessary for the consumer to qualify for a loan. For example, if an applicant can qualify for a loan with an income of $50,000 per year the lender should be required to verify only $50,000 in income and not additional income or assets. Thus, even if the borrower indicates that her income is $75,000 per year, the lender should be required to verify only the $50,000 per year necessary for the borrower to qualify for the loan.

The CMC also urges the Board to incorporate in its regulation the mitigation concept from the Statement on Subprime Mortgage Lending. In the Statement, the agencies explained that stated income and low-documentation loans may be made "if there are mitigating factors that clearly minimize the need for direct verification of repayment capacity." The agencies further explained that "mitigating factors arise when a borrower with favorable payment performance seeks to refinance an existing mortgage with a new loan of a similar size and with similar terms, and the borrower's financial condition has not deteriorated. Other mitigating factors might include situations where a borrower has substantial liquid reserves or assets that demonstrate repayment capacity and can be verified and documented by the lender."[57] Where such mitigating factors exist, lenders should be able to extend credit without requiring the borrower to verify—or in the case of a refinancing with the same lender, re-verify—the borrower's income or assets.

[57] *See Statement on Subprime Mortgage Lending*, 72 Fed. Reg. 37569, 37573 (July 10, 2007).

The CMC notes that with respect to older borrowers there is some tension between the Board's Proposal and ECOA. Under the Board's rules, older borrowers would be required to disclose Social Security payments and retirement savings and/or plans. The Board should clarify how the Proposal interacts with ECOA to ensure that a lender seeking to comply with the Board's rules cannot be found to have violated ECOA.

The CMC supports the Board's Proposal to require verification of income by reliable third party information. We urge the Board to permit the use of third party information that is confirmed orally if the lender believes it is reasonable to rely on such information. Often, there is no documentation readily available for such information.

IV. MODIFYING AND CLARIFYING THE PREPAYMENT PENALTY PROVISIONS.

The Board acknowledges that prepayment penalties "may also benefit borrowers in the subprime market overall."[58] Indeed, prepayment penalties are associated with lower loan prices.[59] When the use of prepayment penalties is limited, the price of mortgage credit to borrowers increases.[60] Because prepayment penalties provide important benefits to consumers, the use of prepayment penalties should not be considered an "unfair" or "deceptive" act or practice under Section 129(l).

The Board, does, however, have authority under Section 105(a) to limit prepayment penalties. The Board has explained that its concern regarding prepayment penalties is based on because the costs associated with the prepayment penalties "may not be clear to [consumers]" and because there are "serious questions as to whether the borrowers knowingly accept the risk" associated with prepayment penalties.[61] These concerns are directly aimed at the informed and uninformed uses of credit—and, therefore, regulations to address these concerns are more appropriately authorized by Section 105(a). The Board should clarify that the prepayment penalty provisions are brought under Section 105(a).

The CMC supports the limiting prepayment penalties to no later than 60 days before the reset date of an ARM. We also support the use of effective disclosures of prepayment penalty options so that borrowers have meaningful choices and retain access to affordable credit.

However, the CMC urges the Board to remove the debt-to-income limitation. The debt-to-income ratio limitation is unnecessary because the Proposal already requires lenders to determine whether the borrower can repay the loan. Additionally, a borrower's debt-to-income ratio can be calculated in a variety of different ways, making it difficult for lenders to know whether they are

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[58] 73 Fed. Reg. at 1693.

[59] Gregory Elliehausen, Michael E. Staten & Jevgenijs Steinbuks, *The Effect of Prepayment Penalties on the Pricing of Subprime Mortgages*, at 15 (July 2007).

[60] *Id.*

[61] 73 Fed. Reg. at 1694.

in compliance with the Proposal. The limitations on timing of prepayment penalties are sufficient to protect consumers. As noted, prepayment penalties can provide significant benefits to borrowers by decreasing the interest rate and, as a result, lowering the borrower's monthly payment and making the loan more affordable. This benefit may be especially important to seniors and others with substantial assets but low incomes who would be forced to pay higher payments than they would be otherwise required if the loan included a prepayment penalty.

Instead of including the debt-to-income limitation, the CMC proposes reducing the limitation on prepayment penalties from the first 5 years of the loan to the first 3 years, with a maximum prepayment charge of 3 percent. Many lenders already have put in place similar restrictions on their prepayment penalties and this would pose far fewer operational difficulties to implement. Additionally, the CMC proposes that lenders include prepayment penalty provisions only if the prepayment penalty provides a benefit (such as a lower rate) to the borrower.

V. MODIFYING AND CLARIFYING THE ESCROW REQUIREMENTS.

As an initial matter, it should be noted that the standard practice of not escrowing in the subprime market did not arise as a result of unfairness or deception such as the sales practice issues noted in the Proposal. Rather, the subprime market traditionally was a "home equity" market comprised largely of junior lien loans, not first lien loans. Although the subprime market shifted dramatically toward first lien refinancings as a result of both dropping interest rates and rate and fee limits that make smaller loans either unprofitable or impermissible, the loans continued to be serviced on platforms that had been designed to service second lien products—which are rarely escrowed in any credit category. The movement toward permitting or even encouraging escrows in subprime servicing arose largely as a result of the servicer's desire to reduce delinquency and default created by the annual payment shock for local taxes.

The Proposal provision permitting lenders to allow consumers to "opt-out" after one year appears sensible. However, we urge the Board to clarify that this provision's preemption of state law continues even after the one-year period elapses, whether or not the creditor allows the borrower to opt out of an escrow requirement. For example, the rule should make clear that a lender may require an escrow for the term of the loan whether or not a state would prohibit a mandatory escrow account in this case.

Finally, it is worth noting that many consumers do not like escrow requirements and prefer to make tax and insurance payments themselves. This fact has two implications. First, the Proposal should permit a lender to exempt from the escrow requirement a refinancing borrower who is currently on time with tax and insurance requirements and who is not escrowed currently. If such a borrower does not want to escrow, there is no reason to require it. In addition, because that borrower is already not escrowing, there is no concern of that borrower being deceived by sales pitches touting the lower payments available without escrows. Second, we note that there are a sufficient number of borrowers who prefer to pay their own taxes—and do so without trouble (or the assistance of their lender) —that it causes us to question whether the proposal's reference to a "market failure" as a result of sales practices may be somewhat overstated.

VI. ADOPTING ONE, UNIFORM RATIONAL SET OF MORTGAGE DISCLOSURES FOR ALL FEDERALLY RELATED MORTGAGE LOANS.

In our previous comments to the Board, we stated that it is time for federal regulators to adopt reformed mortgage disclosures. Consumers need effective, streamlined disclosures not only to enhance their ability to comparison shop for lower cost loans, but to deter potential borrower deception and abuse.

In this regard, we applaud the Board's commitment to update the TILA disclosures, and we support the Board's Proposal to extend the early mortgage disclosure requirement for residential mortgage transactions to other types of closed-end mortgage transactions. But we urge the Board to go further. Working with HUD and the FTC, and using its authority under Section 105(a) of TILA, the Board should take this opportunity to develop one uniform, rational set of mortgage disclosures for all federally-related mortgage loans. We believe the Board is the best positioned agency to make mortgage disclosure reform happen. Its deep experience in consumer credit disclosures and issues and its independence from significant industry pressures allows it to adopt rules that both streamline existing mortgage disclosures and protect consumers.

In this regard, we urge the Board, in connection with the FTC and HUD, to engage in consumer testing to determine which information consumers most need to know, and to do so before testing any particular disclosure proposal. While the mortgage industry and the consumer advocates have views about what consumers most need to know, past experience has indicated that the best way to determine what consumers need to know is to ask them.[62] Once this has been identified, the CMC suggests that the Board allow commenters to submit proposed disclosure forms. These disclosure forms, and others the Board may develop, then can be used as the basis for consumer testing.

As noted above, HUD has proposed additional, new mortgage disclosures in the Good Faith Estimate and HUD-1 settlement statement, as well as a new closing script. We also recognize that the Board is in the process of reforming its closed-end Regulation Z disclosures. We cannot emphasize enough the importance of all agencies to work together to develop, with industry input, and test, with industry input, an integrated set of reformed disclosures. Piecemeal disclosure requirements that require the industry to make systems changes more than once will be extremely counterproductive, and costly for consumers and industry alike. While we understand that HUD has performed some testing on its disclosures, it is important that additional testing occur of the entire set of integrated disclosures, rather than piecemeal. Industry and consumer input in this process is also critical because of the numerous products and features that are currently in the market and will likely come into the market in the future. The goal should be an integrated disclosure package that provides consumers with the information they need in a user-friendly format, without imposing unreasonable burdens on the industry.

[62] *See, e.g.*, Speech of Sandra F. Braunstein to the Exchequer Club, Washington, DC, Feb. 20, 2008 (explaining that contrary to the assertions of consumer advocates, consumers did not want monthly statements for payroll cards but instead wanted 24/7 access to information regarding the balance on their card).

A. The Proposed Mortgage Broker Fee Agreement

We strongly support the Board's proposal to require a mortgage broker fee agreement that gives the consumer important information about the broker's costs. We believe the following recommendations will improve this requirement.

First, we recommend that the Board provide a uniform federal mortgage broker fee agreement, not just model disclosure language. This simplifies compliance. It is much simpler to check for the required language if it is always in the same uniform document. We have attached, as **Exhibit C**, a form of mortgage broker fee agreement, derived from forms that our member companies use. This form addresses, respectively, (i) the broker's services, (ii) the fees paid to the broker directly by the consumer, (iii) the compensation, in the form of a yield spread premium, paid to the broker by the lender, on the consumer's behalf, and (iv) the maximum total compensation the broker may receive from all sources. It also contains a reference to other closing costs the borrower should look for in the Good Faith Estimate.

The form in Exhibit D is to be signed by the borrower and will be binding by regulation on the broker and the lender. We recommend that any broker or lender using this form be deemed in compliance with the substance of the mortgage broker agreement requirement, so long as the compensation paid to the broker does not exceed the maximum broker compensation to be calculated as set forth in the form.

Second, the CMC urges the Board to impose a direct obligation on the mortgage broker to provide the mortgage broker disclosure agreement and a direct prohibition on the mortgage broker not to accept any fees or the consumer's application until the mortgage broker fee agreement has been signed by the consumer. The Board noted that it considered such a requirement, but "it did not appear, however, that a disclosure alone would provide consumers adequate protection." We suggest that the Board require brokers to provide the mortgage broker fee agreement, and prohibit acceptance of compensation, not in lieu of the limitation on creditors, but in addition to it. It will significantly help compliance efforts if both the broker and the creditor have to comply with this requirement.

Third, again to ease compliance, the disclosure of the broker compensation retained by the broker should be clearly disclosed on the HUD-1 settlement statement, as well as in the model mortgage broker fee agreement. This makes it easier for lenders to confirm that the broker did not receive any excess compensation.

Fourth, regarding coverage, a "mortgage broker" is defined in the Proposal to exclude any person who funds a loan from its own resources, from deposits or from a "*bona fide* warehouse line of credit." The member companies of the CMC include some of the nation's most experienced warehouse lenders. We recommend the Board provide guidance on what constitutes a "*bona fide*" warehouse line of credit.

Fifth, the Proposal states that the broker must enter into the agreement before the consumer (a) pays a fee to any person, or (b) submits a written application to the broker. Creditors can demonstrate compliance by obtaining a copy of a "timely executed" agreement. The problem here is that it would be impossible for the ultimate creditor to ever know whether the timing requirement was met. The form in Exhibit C references that the borrower should not pay any fees prior to entering into an agreement with the broker. We recommend that the mandated format of agreement include a recitation of the timing of the agreement, and a representation that no fee was charged to the consumer by any person. The rule should make clear that a lender would be entitled to conclusively rely upon such a recitation or representation in the agreement or otherwise.

The timing requirement of the proposed broker agreement raises difficult issues generally. If a lender receives a loan package from a broker without the disclosure agreement in the package, or with the disclosure agreement but imperfectly or untimely completed, the lender appears to have no choice but to alert the broker that no payments will be made to the broker on the loan. In such event, the broker would have no incentive to continue working on the loan. To avoid such a situation, we recommend the rule provide that a broker who fails to comply with the mortgage broker agreement requirement and, as a result, is not permitted to receive any compensation, must nevertheless complete the mortgage broker services on the loan to its conclusion as if compensation were being paid. Alternatively, the Board could provide an error resolution procedure for this situation that is fair to the broker that is providing services in the transaction.

Sixth, the Proposal requires disclosure of the total broker compensation as a dollar amount, and does not permit variance. We support this requirement, although there should be no liability if the broker receives less than the total amount stated. Thus, we recommend that this total broker fee amount be a maximum amount and that the mortgage broker disclosure agreement state that the broker will not receive any broker fee in excess of such maximum amount.

Seventh, we have strong concerns about the exception in the Proposal that applies to loans subject to a state law that both (1) 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 (2) requires that the mortgage broker provide a written agreement that includes a description of the broker's role in the transaction and the broker's relationship to the consumer, as defined by state statute or regulation ("qualified state statute"). Initially, we are concerned that this kind of exception leads to the patchwork of uneven compliance requirements that we are trying to avoid. Consumers should receive the same federal disclosures regardless of the state they are living in.

In addition, based on the description, it is not clear which state laws would qualify as a qualified state statute. The standards for such a statute are vague (*e.g.*, "products or terms not in the consumer's interest", "not the most favorable a consumer *could* obtain"). At the very least, the Board would need to issue guidance whether a particular state statute met the test. Moreover, it would seem impossible for a creditor to ever determine, with any degree of certainty, that a broker had complied with a qualified state statute. It is unclear if the exception applies solely based on the existence of a qualified state statute, or on both its existence and the broker's compliance with it. We recommend that this exemption be eliminated.

Last, we recommend that the Board apply this rule to all Federally related mortgage loans, not just consumer credit transactions secured by a consumer's principal dwelling, and preempt all state laws that require alternative disclosures or limits on broker compensation. The mortgage industry is national in scope and it needs to have national, uniform rules. The Board indicated in its Proposal that under Section 111 of TILA, the proposed rule would not preempt state laws except to the extent they are inconsistent with the Proposal's requirements. The CMC urges the Board to interpret these rules such that any state laws that differ from the rule's requirements are "inconsistent" with them. Strong federal standards are useless if they don't result in uniformity. Permitting states to continue adopting a patchwork of inconsistent standards results in higher compliance costs for multi-state lenders, which in turn results (indirectly) in higher costs to consumers—in complete conflict with the purposes of this Proposal. It can also result in reduced credit availability and/or higher costs in specific states—resulting in two otherwise comparable consumers having different products and rates available, based solely on their state of residence.

B. A Combined TILA/RESPA Mortgage Disclosure

We continue to believe that the "mortgage packaging" approach—which guarantees closing costs early in the loan process—offers consumers the best information about a loan to promote comparison-shopping. Borrowers would be empowered under reformed and streamlined disclosures to make logical, informed choices about settlement fees and costs in the context of a single number that is firm, and loan originators and packagers would have to abide by this firm disclosure. We understand that such an approach is controversial. It would also require relief from Section 8 of RESPA.

But even without packaging, simplified, effective mortgage disclosures that yield greater understanding can be achieved. We have attached, as **Exhibit D**, a combined TILA/RESPA disclosure that could be the basis of a single federal mortgage information form that could be given within three days after application. This form, titled "Mortgage Terms and Costs Initial Disclosure," is a 2-page form that provides the consumer the basic information needed to understand the loan's terms, features and costs, so that he or she may shop and compare the loan with other loans. This shopping function is critical. It enhances a deeper understanding of the loan and its features. Once a potential borrower begins to compare the terms and features of several loans, his or her comprehension of those features increases. The concepts and terminology begin to make more sense and become real.

On Page 1, this disclosure includes all the basic loan terms and payment obligations that a consumer needs to (i) determine whether he or she is comfortable with the current and future payments that will come due, and (ii) shop and compare this loan with other loans to decide which loan is most appropriate for his or her circumstances:

- The loan amount
- The proposed loan discount points
- The loan product type
- APR, Finance Charge, Amount Financed, and Total of Payments. Note that we have provided a better description of the Amount Financed that should be understandable to the consumer. In the course of reviewing its disclosures, however, we urge the Board to consider whether the Amount Financed and Total of Payments disclosures add or detract from the borrower's understanding. Our experience is that few borrowers understand the

Amount Financed disclosure, or use it in any meaningful way. While the Total of Payments is understandable, it may also be of little use for other than shock value, given the extremely low likelihood that any borrower keeps his loan outstanding for the entire term.

- Schedule of Payments and Interest Rates. This disclosure is key to the borrower's understanding of potential rate and payment increases during the term of the loan. For an ARM loan, the disclosure sets forth, based on the current index, the interest rates that will be effective during the term of the loan, the timing of those changes, and the payment amounts that will reflect those changes. In addition, the disclosure of the balances will alert the consumer to any negative amortization or the effect of an interest-only loan on the outstanding principal balance over the loan's term. This disclosure should go a long way toward eliminating the "payment shock" concerns the Board and other regulators have sought to address.
- Escrows. The disclosure would inform the consumer whether or not schedule of payments includes escrow payments, advises the consumer to inquire about escrow payments, and, if escrow is required, informs the consumer about the escrow account statement the consumer will receive no later than 45 days after settlement.
- Payment Increases. For variable rate mortgages, the disclosure includes the maximum interest rate and maximum payment amount that may be charged during the loan.
- Negative Amortization. The disclosure advises the consumer if negative amortization may occur, and the maximum principal balance that may be reached.
- Balloon Payments. The disclosure includes the maximum balloon payment that may occur and the time period such payment may be triggered.
- Prepayment Penalty. The disclosure includes the maximum prepayment penalty and the time period during which such penalty applies.
- Security. The disclosure informs the consumer that he or she may lose their house if they do not meet their loan obligations.
- Late Charge and Assumption information.

On Page 2, the disclosure includes the mortgage loan settlement charges, segregated in easily understood categories, including:

- Lender Origination Charges
- Mortgage Broker Origination Charges. A reference to the Mortgage Broker Fee Agreement is made here. There is no need for duplication of information.
- Credit and Pre-Closing Valuation and Inspection Charges
- Title Charges. This includes information regarding charges for an owner's title policy, as well as charges for the closing agent that are included in the Finance Charge calculation.
- Government Recording and Transfer Charges
- Interest and Mortgage Insurance Charges to be paid in advance
- Taxes, Flood and Hazard Insurance Charges to be paid in advance
- Escrow Costs/Reserves to be collected at closing, breaking out the reserves for mortgage insurance
- A catch-all category of other loan settlement charges, such as life-of-loan flood and tax services and wire transfer charges.

This disclosure uses the same numbers and format that would be included on a revised HUD-1 statement, which is attached as **Exhibit E**. This disclosure titled, "Settlement Statement and Mortgage Terms and Costs Final Disclosure, again combines the HUD-1 and final TILA disclosure in a manner that is easily compared with the initial combined disclosure.

This new combined disclosure would be provided within 3 days of application, similar to current early disclosures under RESPA and TILA. The same information would also be disclosed at closing in the expanded HUD-1 Settlement Statement, which allows the consumer to compare the early disclosure with the closing disclosure.

C. Early TILA Disclosures Under the Board's Proposal

As noted, we believe the early TILA disclosures should be replaced by a new Mortgage Terms and Costs Disclosure, described above. We understand that the development of such a new disclosure takes time and will require coordination among other agencies, including HUD and the FTC. With the hope that that process will gain swift momentum, we have the following comments on the Board's Proposal to require early TILA disclosures for mortgage transactions subject to RESPA that are secured by the consumer's principal dwelling.

As noted, the CMC supports this proposal. Most lenders today provide these disclosures within 3 days of receiving the application for all their mortgage loans, not just for home purchase loans as is currently required, and there is no reason not to apply this requirement to refinancings and closed-end home equity loans.

The CMC recommends, however, that the exception to the prohibition on charging the consumer any fees before the early disclosures are given be expanded in three respects. First, we recommend that the creditor or the mortgage broker be permitted to collect a flat amount, such as $25, that would cover the credit report fee, rather than the exact amount of the credit report fee. In large organizations with numerous pricing schedules, it is sometimes difficult to ensure that the exact credit report charge is being collected. Permitting a flat $25 would greatly ease the burden of compliance. Second, we recommend that the lender or broker be permitted to collect appraisal fees. Under the Proposal, only credit report fees are excepted from this rule.

Second, the CMC recommends that the exception not apply to rate lock fees. If lenders cannot charge rate lock fees, they will be unwilling to bear the interest rate risk of rate locks. Consequently, consumers will be less able to lock in interest rates at the time of application, resulting in greater uncertainty and confusion to consumers.

With respect to appraisal fees, at the outset, we note that we are not aware that the collection of an appraisal fee at application has given rise to significant abuse either in the prime or subprime markets over the years, whether or not the initial TILA disclosure was delivered at that time or three days later. It is standard practice in virtually every market. Moreover, while we understand the Board's concern that no significant fees be charged prior to receiving the disclosure, there are good reasons why an appraisal fee should also be excepted from this prohibition. First, requiring a delay in ordering the appraisal until the disclosures are provided, particularly through the mails, can have a very real impact on the timing of a closing, and the borrower's rate. It is not uncommon for a borrower to want to apply and close quickly to take advantage of a low rate environment. A transaction that can be turned around quickly will cost the consumer less because of reduced hedging costs. It is clear that an interest rate under a 15-day lock period can be significantly lower than the interest rate for the same borrower under a 30-day or 60-day rate lock. Delays in processing the transaction, including obtaining the appraisal, thwart borrowers who seek very quick closings. Experience shows that making arrangements with the borrower to collect the appraisal fee at some point after the application is taken is problematic. Any need for additional consumer "touches" involves time-consuming back and forth communications and delays.

Third, as noted elsewhere in this comment, we believe that automated valuation models (AVM) are being used and should be encouraged to be used more extensively by lenders. The cost of running a property through an AVM is generally not significant, and the lender should be able to collect this fee upfront.

Finally, with respect to charges that the Board permits, we urge the Board to use its authority to preempt state laws that would place limitations on these fees. For example, some states limit third party fees, such as a credit report fees, to the exact pass-through amount charged by such third party.

VII. MODIFYING AND CLARIFYING THE APPRAISAL REQUIREMENTS.

The Proposal would create additional requirements prohibiting coercion of appraisers, including guidance regarding what actions would, or would not, constitute impermissible pressure. While we concur that appraisal fraud is both a significant cause of the current troubles in the mortgage market and an ongoing concern, we recommend that the Proposal be adjusted to place more emphasis on ensuring proper appraisal practice and to recognize that, while faulty appraisals may clearly impact borrowers adversely, the lenders and investors are the parties for whom the appraisal is performed and the parties that are at the greatest risk when appraisals are negligent or fraudulent.

Appraisals are, and have been, principally an underwriting tool meant to protect a lender's investment in a real estate secured loan and the principal victim of appraisal inflation are the lenders whose security is insufficient, not the borrowers who were able to borrow unsecured or undersecured funds at rates and in amounts commensurate with the risk for secured loans. The primary cause of the tens of billions of dollars of mortgage loan and mortgage securities write-downs since last summer is the market's current view that the security properties, on a systematic basis in many markets, are not or will not be worth the appraised value determined by the appraiser at the time of loan origination. In most cases, this difference has been largely caused by the general downward trend in residential real estate prices. Still, some of the difference has been caused by appraisal fraud and appraisal inflation. Lenders and investors – and not appraisers – have taken the financial hit on this problem, whether the lender or investor holds the loans or in the case of a lender or conduit that sold the loans and has had to repurchase them due to appraisal fraud. Lenders and investors do not need additional financial incentives not to pressure appraisers – lenders already suffer massive losses when appraisers do not adequately play their role in the transaction.

The widespread nature of the problems that have been cited by the Board – including the statistic that as many as 90% of appraisers polled having been subject to pressure and the massive losses suffered by lenders and other non-appraiser participants in the marketplace – indicates that the problem may not be that there are insufficient constraints or penalties for lenders or brokers that either put or are perceived to have put pressure on appraisers, but that the system for valuing real estate collateral may need to be rethought. In fact, even many banks that employ the substantial safeguards required by the existing inter-agency bank regulatory guidance for appraisals have suffered substantial appraisal-related losses.

The issue of appraisal pressure has existed as long as there have been appraisers, and the existing appraisal guidance strives mightily to address structurally ways to eliminate or reduce the possibility of pressure. Appraisers, too, have to resist pressure. Their role in the transaction is to give a valid opinion of a property's actual value, and if they cannot do so they have no role at all – they are simply collecting a fee. Appraisers already make 25 certifications with each appraisal that they deliver on the standard Fannie Mae/Freddie Mac form. These certifications include the following (the entire list of certifications is attached as **Exhibit F** to this comment):

- I have not knowingly withheld any significant information from this appraisal report and, to the best of my knowledge, all statements and information in this appraisal report are true and correct.
- I stated in this appraisal report my own personal, unbiased, and professional analysis, opinions, and conclusions, which are subject only to the assumptions and limiting conditions in this appraisal report.
- I have no present or prospective interest in the property that is the subject of this report, and I have no present or prospective personal interest or bias with respect to the participants in the transaction. I did not base, either partially or completely, my analysis and/or opinion of market value in this appraisal report on the race, color, religion, sex, age, marital status, handicap, familial status, or national origin of either the prospective owners or occupants of the subject property or of the present owners or occupants of the properties in the vicinity of the subject property or on any other basis prohibited by law.
- My employment and/or compensation for performing this appraisal or any future or anticipated appraisals was not conditioned on any agreement or understanding, written or otherwise, that I would report (or present analysis supporting) a predetermined specific value, a predetermined minimum value, a range or direction in value, a value that favors the cause of any party, or the attainment of a specific result or occurrence of a specific subsequent event (such as approval of a pending mortgage loan application).
- The borrower, another lender at the request of the borrower, the mortgagee or its successors and assigns, mortgage insurers, government sponsored enterprises, and other secondary market participants may rely on this appraisal report as part of any mortgage finance transaction that involves any one or more of these parties.
- Any intentional or negligent misrepresentation(s) contained in this appraisal report may result in civil liability and/or criminal penalties including, but not limited to, fine or imprisonment or both under the provisions of Title 18, United States Code, Section 1001, et seq., or similar state laws.

An appraiser that does not resist pressure is violating numerous of the above certifications (as well as others not recited here). These certifications are not buried in obscure regulatory guidance unknown to the average appraiser. Rather, they are set forth just above the appraiser's signature <u>on each appraisal</u> that is delivered, because the GSEs, and the banks and other lenders that use their form as the standard, want the appraiser to truly certify their work. In addition to the certifications, and the potential federal criminal liability associated with them when delivered to a federally insured bank or a federally-insured loan, the interagency guidance clearly provides for appraisers to be considered institution affiliated parties and subject to reporting from the bank regulatory agencies to the appraiser's state regulator. These individual certifications, this potential liability, these possible referrals to the appraiser's regulators together have not proven to be sufficient incentive for appraisers not to succumb to pressure. While there are no doubt individual appraisers who approach their task in a professional manner, the appraisal industry has proven to be incapable of being the bulwark against value inflation.

Nonetheless, and for many of the reasons stated by the Board in the Proposal, we concur that appraisal pressure is a force that negatively affects all market participants and that measures can and should be taken to address it, including with respect to lender actions. But that will not provide even a minor fix for the problem. A broader set of solutions is needed that will require cooperation of federal banking agencies and the Department of Justice.

Require Appraisers to Report Instances of Pressure

In addition to lender requirements, the Board can use its unfair and deceptive acts and practices authority under Section 129(l) to prohibit appraisers from being swayed by pressure and to require appraisers to report contemporaneously to (i) a new special appraisal office at the Board (or some other federal agency), (ii) the appraiser's state regulator, and (iii) the lender's or broker's regulator any instances of pressure from lenders or brokers to inflate appraisals and to prohibit lenders and brokers from pressuring appraisers to inflate values. Such notice should also be provided to the lender. Contemporaneous reporting is necessary to prevent appraisers from only later stating that they were pressured, once a property has been determined to be of a much lower value, and allows lenders and mortgage brokerages to identify and take action with respect to employees that violate appraisal policies. In addition, an appraiser who has been pressured should be required either to withdraw from the valuation assignment or to provide a special additional certification that the appraisal valuation does not reflect the pressure that the appraiser has reported to have been applied and is a fair valuation of the property.

Impose Capital and Insurance Requirements

Additionally, the Board should, working through the FFIEC Appraisal Subcommittee, use the existing authority under FIRREA to impose minimum capital and insurance requirements that will be sufficient to cover losses from fraudulently or negligently inflated appraisals. Currently, appraisers are rarely held to account for the liability they created by establishing too high of a value, principally because there is insufficient capital available.

Establish a Mechanism to Decertify Poor or Fraudulent Appraisers

The current state mechanisms for decertifying appraisers have not achieved the objective of protecting the industry. While thousands of inflated appraisals have been delivered in contravention of the numerous appraiser certifications and the rules of appraisals, few appraisers are ever decertified or debarred. The office created to receive reports on appraisal pressure should also receive confidential reports from lenders and servicers when the lender suspects that inflation may have occurred. Using this data, the new appraisal office could work with state authorities to remove poor appraisers, or if that is unavailing under state law, make factual reports available to the public regarding appraisal issues. The appraisal office should also identify appraisers believed to have criminally violated their certifications, and refer them to the Department of Justice for prosecution.

Permit the Wider Use of AVMs

FIRREA's requirements for appraisals should be amended to apply only to commercial mortgages, so that AVMs could be used more broadly in connection with residential mortgages. For properties for which available AVMs have reached an acceptable level of accuracy, AVMs offer a more cost effective valuation procedure free of undue influence. For example, Fannie Mae and Freddie Mac both currently use "tiered" valuation systems in which they use automated valuation models as a complete or partial substitute for a full appraisal in some lower-risk loans. For the most creditworthy borrowers in loans with a substantial amount of equity, the GSEs rely on the automated valuation system as the primary method of determining value, performing at most a limited inspection of the property by an appraiser. Freddie Mac also allows certain loans with very low risk to be processed without a property valuation. For transactions that present somewhat higher risks, the GSEs require an exterior-only inspection, while they require a full appraisal by a licensed or certified appraiser for other, riskier transactions, including high loan-to-value-ratio loans. Conversely, the GSEs use their automated valuation systems as a check on the validity of an appraisal, requiring further investigation when the automated valuation conflicts with the appraisal. Large private investors use similar automated valuation models as a substitute for appraisals when their analysis indicates that the cost of a full appraisal is not justified by any reduction in risk that the appraisal might offer.

Prohibit Brokers from Ordering Appraisals

As noted above, lenders already have a substantial financial interest in ensuring that appraisals are realistic. Unfortunately, mortgage brokers do not. Because of the lack of such an interest, undue pressure on appraisers from mortgage brokers is a very real concern. While such a change may drastically alter the residential mortgage market, prohibiting brokers from being involved in choosing and communicating with the appraiser could greatly reduce the likelihood of pressure and fraud. Most lenders have adopted appraisal processes that keep the choice of appraiser at some remove from loan origination personnel. Brokers, however, cannot remove the loan officer from the appraisal choice – it is a crucial part of the broker's business model to control the appraisal outcome. As a result, we suggest the Board examine whether a better alternative would be to prohibit brokers from ordering appraisals. As noted below, the recent agreements among the New York Attorney General, the government sponsored enterprises, and the Office of Federal Housing Enterprise Oversight ("OFHEO") would bar lenders selling loans to the GSEs from using broker-ordered appraisals.

Specific Comments on the Proposal

If the Board nonetheless goes forward with its proposal, we have a number of more specific comments on the proposal.

As with other new restrictions in the Proposal, we believe that this requirement should be promulgated under Section 105 of TILA, and should only be a violation of Section 129 if the creditor's act creates substantial harm for the consumer in that specific case.

In our view, the use of the term "influence" is too vague. Section 226.36(b)(1) prohibits lenders and brokers from "directly or indirectly … influence, or otherwise encourage an appraiser to misstate or misrepresent the value of such dwelling." That language is so broad that it could be used to attack any communication or action at all taken or not taken by the lender. As such, it would in effect prohibit any communication with the appraiser other than those that are expressly allowed under subparagraph (ii). Subparagraph (ii), for its part, states that a lender may terminate an appraiser for breaches of law or ethical standards, and permits lenders to take other action permitted under federal law, presumably a veiled reference to a bank's authority (and duty) to eliminate appraisers that are found to provide inaccurate values. Lenders must have the ability to safely terminate or restrict their use of appraisers who violate "service-level" standards to which they are subject. However, as a practical matter, any termination of an appraiser, or even any diminution of an appraiser's workflow, is likely to be challenged under this rubric as it potentially allows enormous recovery if the appraiser wins the suit.

In addition, we believe that the term "reason to know" in Section 226.36(b)(2) is too vague – any lender could be accused of having "reason to know" an appraisal was inflated – whether from the appraiser, or a simple glance at the appraisal, regardless of whether the lender did know. Defeating such a claim without substantial resources being employed in litigation would appear quite difficult. It would appear that liability would only be warranted if the lender had actual knowledge that the appraisal was inflated.

In addition, we are not comfortable with the fact that the definition of "mortgage broker" potentially includes TILA "creditors:" this bright line test in TILA has always made it easy to understand which entity is the creditor, and we believe that this rule would start to muddy the waters.

GSE Cooperation Agreements

Finally, we note that recent Cooperation Agreements ("Agreements") have been executed among the New York Attorney General Andrew Cuomo, Fannie Mae and Freddie Mac and OFHEO that significantly affect the appraisal process for lenders. Accurate appraisals are a critically important component of sound mortgage lending, and Attorney General Cuomo is to be lauded for his leadership on this issue. As noted above, we support prohibiting lenders to use appraisals that have been ordered by the mortgage broker in a brokered transaction, and believe such a restriction will go a long way to reduce the effect of undue appraiser pressure.

As we further analyze the impact of the Agreements, we do recommend that the Board review the comments submitted to the GSEs and the Office of Federal Housing Enterprise Oversight (OFHEO) by affected parties carefully. We believe some restrictions in the Agreements should be modified, namely, the restrictions on using an appraisal prepared by the lender's employee and certain restrictions on appraisal management companies. As you know, banks have used in-house salaried appraisers for many years. These appraisers have been subject to repeated regulatory examinations, and in some cases the record of accurate appraisals is exemplary. It is our belief that these appraisers are actually more accountable to the lender, because of the losses the lender suffers due to faulty appraisals, than are independent appraisers. Lenders have also benefited from the innovations and significant capital resources of appraisal management companies.

VIII. NARROWING AND MODIFYING THE SERVICING REQUIREMENTS

We support the issuance of mortgage loan servicing best practices by the federal banking agencies. Indeed, through the Ocwen settlement with the OTS and other settlements that servicers have entered into with their federal regulators, we believe that the federal banking regulators have established precedents regarding what constitutes an unfair or deceptive act or practice in mortgage loan servicing. However, when fully considered, we are concerned that the costs of the servicing aspects of the Proposal principally as a result of the penalties that will accrue for even minor violations – and that would accrue without the intervening judgment of a responsible enforcement agency – will significantly outweigh the benefits to consumers, particularly considering that most major services already have procedures in place to address the Board's issues.

Recent Political and Press Focus on Servicing

We realize that there has been an increase in complaints about servicing practices in the past year, as is often the case when delinquencies and foreclosures rise. This current wave of delinquencies and foreclosures comes at the same time as the likelihood that the owner of a loan or the entity taking the credit risk is ever more likely to transfer the servicing of a delinquent loan to a special servicer perceived to have greater expertise in handling troubled loans. The increased likelihood of transfers causes greater confusion in a number of respects. First, the simple fact of the transfer, along with the new payment address, appears to be the cause of a substantial number of consumer payment mistakes. In addition, delinquent borrowers often are reluctant to discuss their loans or their situation with the new servicer, or even open mail they receive from the servicer. Moreover, the transfer of a delinquent loan can interrupt discussions the borrower may have had with the collection staff of the prior servicer -- while the payment history is successfully transferred to the new servicer, the content of the history of discussions is not typically transitioned to the new servicer. Finally, and crucially with respect to some of the allegations that have been made with respect to default servicing fees, in many cases the detail regarding the servicing fees incurred but unpaid also does not get transferred to the new servicer, leaving the new servicer with knowledge of the total amount due on the account but not the full break-out identifying specifically each fee that was charged and the reason for the fee. A purported academic treatment of the issue alleging systematic errors by servicers was based on a variety of grave errors and does not provide a foundation for action.

Anecdotal Factual Basis

We note that servicing issues have not been the focus of the Board’s inquiries relating to HOEPA. As a result, the Proposal in this area appears to be based on anecdotal information rather than a more comprehensive survey of current servicing practices. Even within banks and bank holding company affiliates under the Board's regulatory jurisdiction, we believe the Board could discover substantial relevant data that could improve this Proposal. Our members, and in our experience, [all] major mortgage servicers, including major subprime servicers, already (i) process payments as of the date they are received, (ii) provide payoff statements with reasonable alacrity, (iii) do not engage in “pyramiding”; and (iv) generally attempt to inform consumers of mortgage servicing fees prior to or contemporaneously with the fees' imposition. Over time, these have become considered good servicing practices, and are protective of servicers who are concerned about enforcing the mortgage note and security instrument in accordance with existing state common law "good faith and fair dealing" requirements applicable to all contracting parties as well as with existing federal and state unfair and deceptive acts and practices laws. Violations of these laws and principles give rise to both consumer complaints to regulators and to civil litigation. As a result, in our view, the Board has not made the case for the need for these new rules as part of the HOEPA proposal, and we believe that if the Board conducted a comprehensive study of servicing practices it would not find that these new rules are necessary to protect consumers.

Preliminary Considerations

However, as noted in the release, the enforcement of these requirements would be under the harsh penalties for violations of HOEPA and would be unevenly enforced. As the Proposal currently stands, a violation of the new servicing requirements would be treated as a violation of HOEPA. The penalties for such a violation, if applicable to the servicer, would include not only attorney’s fees and statutory damages, but also all finance charges and fees paid on the loan, “unless the creditor demonstrates that the failure to comply is not material.” That could mean, for instance, that a servicer that credited a customer payment late and then imposed a late fee, or that was not sufficiently prompt in issuing a payoff statement, could be liable for all finance charges paid by the consumer during the course of the loan up to the time of violation (plus the one year statute of limitations), in addition to any actual damages suffered by the consumer, and attorney’s fees. Under this penalty structure, a minor error could lead to six-figure liability, with the principal defense being a “facts and circumstances” defense not available as a motion to dismiss. Thus, the penalties that would be imposed for these violations are massively disproportionate to the harm that the violations would cause.

As a result, we propose the following alternatives:

- The Board, in concert with the other federal bank regulators, should issue guidance, similar to the non-traditional lending guidance, setting forth its expectations for its regulated banks. This guidance would swiftly become the industry standard.

- If the Board determines nonetheless to issue the servicing requirements under HOEPA, the Board should include language in the rule that a violation of the servicing requirements set forth in section 36(d) are not "material" for purposes of Section 130(a)(4). A servicer that showed a systematic practice of violating the rule would be subject to enforcement for those violations by state and federal enforcement agencies that could take appropriate action given the severity and scope of the violation.

We also note that, as the market currently operates, some loans are serviced by the original creditor (which would have severe HOEPA liability associated with servicing miscues prohibited under the new rule) while other loans are serviced by another entity (perhaps even an affiliate), which would not have that liability. We would expect that no major servicer would service loans that it had also originated as a result of the drastically different liability structure attached to servicing loans that the entity had originated as creditor. In fact, given that the Board argues in the Proposal that one reason underlying any “market failure” in servicing is the fact that consumers do not choose their servicers and thus servicers have little reason to act properly – an argument that we do not accept as accurate – one would think the appropriate response would be for the harsh penalties to apply only when the servicer is not the same entity as the originator, not the other way around. Thus, we question whether the proposal leads to the outcome that the Board intends.

Discussion of Specific Servicing Proposals

<u>Payment Processing</u>

We support effective dating of full payments as of the date received. We also support ensuring that the consumer is provided with appropriate disclosures and notice as to where to send payments (something already required under Section 6 of RESPA and implemented by HUD under 24 CFR § 3500.21).

We note that the Proposal as written needs to better account for the acceptance or non-acceptance of partial payments. A payment is considered sufficient when it includes sufficient funds to pay current principal, interest, tax and insurance amount owing (i.e., this amount includes escrows on escrowed loans). A partial payment is not considered to include unpaid late or other fees except in the case of a reinstatement payment, which is required by most servicers to include all fees due under the security instrument, including unpaid late and servicing fees. Currently, most servicers handle partial payments in three ways, depending on the situation: (a) if the amount necessary to make the payment complete is minimal (e.g., $10 on a $2,000 payment), often, the servicer contributes the extra dollars and then adds that amount to the account for future collection from the consumer, (b) accepts the borrower’s payment instrument, cashes it, and places the funds received into a “suspense account” awaiting further payment from the borrower to complete the complete installment due, or (c) returns the payment to the consumer. If a creditor is required to credit the partial payment to the consumer account within five days (as opposed to placing it in suspense) or return it to the consumer, we expect that servicers will begin to return many more payments because [many][the vast majority of] servicing systems are unable to handle partial credits on an account. Crediting partial payments also plays havoc with both investor reporting and credit reporting requirements.

From a consumer account perspective, for the majority of mortgage loans that are "scheduled amortization" loans (e.g., standard first lien Fannie Mae, Freddie Mac or FHA loans), the current practice of "suspensing" partial payments does not cause additional interest to be imposed on the account. However, a borrower who has failed to make their complete payment is subject to both the imposition of a late fee (if their complete payment is not received by the end of the grace period) and negative credit reporting (if their complete payment is not received by the end of the month). For "daily simple interest loans," which comprise a small minority of mortgage loans but for which interest is calculated similar to credit card loans (i.e., a daily interest rate is applied to the balance on each day),[some servicers already credit partial payments while others place partial payments in suspense.] While we can see some merit in the Board's proposal to credit partial amounts to slow the accrual of interest in this situation, we note that forcing servicers to credit partial payments will in effect encourage consumers to make insufficient payments. That, in turn, will lead to a negative amortization situation on numerous additional loans, an outcome that would be ironic considering the substantial attention the Board has given elsewhere in this Proposal and in recent issuances on non-traditional and subprime lending to reducing consumer opportunities for negative amortization. We believe that this result will be bad for both consumers and lenders, and urge the Board to drop the five day crediting requirement. Any final rule should exempt partial payments from the prompt crediting requirement.

<u>Late Fee Pyramiding</u>

We have no objection to prohibiting late fee pyramiding, but we believe that it is already prohibited under other laws and do not believe it to be a widespread servicing practice or abuse. In fact, we were unaware that it still exists in the marketplace. We believe that RESPA's qualified written request procedures and the Credit Practices Rule are sufficient to prohibit late fee pyramiding. So while banning this practice does not concern our members, its inclusion in the proposal casts doubt on the adequacy of the factual record underlying the proposed requirements relating to loan servicing. We question whether the Board, other federal banking agencies, or the FTC have received any credible evidence of pyramiding by servicers and whether any of the federal banking agencies or the FTC have undertaken any enforcement actions in response to such evidence. We also question whether the additional penalties and enforcement mechanisms that would be created are in any way necessary to eliminate this practice from the marketplace.

<u>Fee Schedules</u>

We disagree that providing fee schedules would provide an appropriate benefit for mortgage loan customers. The scope of the schedule that the Board appears to contemplate could be quite considerable, and would not only create a significant compliance burden but would likely be too long and complex for use by consumers. Moreover, we do not believe that the Board has adequately made the case that the proposed rule addresses an unfair or deceptive act or practice.

There are numerous different types of servicing fees, and they may be imposed at different times or circumstances in the transaction. Fees include contractually-established fees such as late fees, account maintenance fees such as requests for payment histories, payoff statements, name changes and similar fees, payment-related fees such as "speed pay" and similar fees for services offered by servicers for the convenience of their customers, or insufficient funds fees, and default-related fees such as field inspections, broker price opinions, foreclosure and/or bankruptcy attorney's fees, many of which differ by state or locality

The above list does not include some other default related amounts that can be owed when the servicer advances funds for insurance, taxes or clearing other liens from the security property. The cost of the fees can differ by state law, by geography (a field inspection or broker price opinion in New York City may cost more than one in Rochester, NY), and by circumstance (how much of the foreclosure proceeding took place prior to the borrower either reinstating or declaring bankruptcy?). In other words, we believe that the type of fee schedule that the Board has proposed is impractical to achieve.

As a result, if the Board goes forward with this proposal, it will have to be careful to specify which type or types of fees are covered by the requirement, which are not, allow the servicer to respond with ranges and percentages, and to make clear that the disclosure is not a guarantee of the future amount of any fee, and the servicer does not have any duty to update the consumer that made the request for the fee schedule. Finally, due to the complexity of managing these fees and fee schedules, we would urge the Board to promulgate the rule in a way that does not create a private right of action to consumers for failure to disclose fees or for disclosing incorrect fees to discourage frivolous lawsuits and class actions. Various servicing fees have been actively challenged in class actions since the mid-1990s, and we believe that this requirement will resuscitate these actions.

By contrast to the proposed requirements, we note that many servicers currently list many common fees on the back of their monthly statements, or in annual communications, or communicate them with their "hello" letter required under RESPA. They do this under current law both for customer relations reasons as well as to ensure that they comply with "good faith and fair dealing" and similar requirements.

Loan Payoff Statement

We concur that servicers ought to be required to respond to requests for a payoff statement within a certain reasonable time-frame. However, we have several concerns regarding the proposal. First, in our view, three business days is too short of a period. Demand for payoffs varies greatly and payoff departments can get backed up in surge periods, or if system outages cause delays in processing payoffs. We suggest the Board set any time limit at fifteen calendar days, along with adding limits as to how often a borrower may request a payoff statement. Second, the generation of payoffs for loans in default is a different process due to trailing invoices for third party fees for inspections and other services typically required by investors, and thus any requirement should carve out loans that are 30 or more days past due. Third, we urge the Board to include in the Commentary language that reflects the fact that payoff amounts can change based on a variety of factors, including prior payments being reversed for insufficient funds, servicer error, trailing fees, the borrower incurring additional new fees, and other reasons. Fourth, servicers need the ability verify the identity of the person requesting the payoff and that the requestor has adequate authority to obtain the payoff statement. Finally, as noted above, we believe that a private right of action that would permit the borrower to recover all finance charges on the loan if the servicer does not produce a payoff statement fast enough is entirely disproportional. As with other servicing proposals, the adoption of an inter-agency interpretation of the FTC Act would appear to be a better solution, as would allowing enforcement agencies to deal harshly with scofflaws that systematically violate the standard as opposed to creating another "gotcha" for use by the consumer class action bar.

IX. MODIFYING AND CLARIFYING THE ADVERTISING REQUIREMENTS.

The CMC generally supports the Board's efforts to modernize the existing advertising rules and accompanying Official Staff Commentary to reflect the development of new products and to facilitate compliance in media such as radio, television, and web banner advertisements. We also support the concept behind the proposed prohibitions against unfair or deceptive advertising, although those concepts would be more appropriately included in agency guidance, or at most under the Board's authority in Section 105, rather than in binding regulations that could subject lenders (but not other advertisers) to ruinous judgments in civil lawsuits for a minor failure to comply. Finally, we believe that the Board should exercise its broad exception authority under the Truth in Lending Act to correct an anomaly in the current regulations–the fact that truthfully advertising the length of a "plain-vanilla" long-term, traditional mortgage loan triggers the requirement to show the terms of the loan as well, which has discouraged lenders from providing useful information to consumers.

The challenge that the Board faces in implementing TILA's advertising provisions, as well as in addressing unfair or deceptive advertising, is to provide information that consumers can use to understand and compare credit offers, without imposing requirements that are so extensive that they make it difficult or impossible for lenders to promote the attractive features of their loans or even to quote credit terms in an advertisement. Overly detailed requirements that restrict advertisers' ability to focus on the most important features in their advertising can result in advertising that confuses consumers instead of helping them choose a loan product that meets their needs.

We discuss these general concerns, as well as more specific issues related to the details of the Proposal, below.

A. The Amendments Based on Chapter 3 of TILA and on the Board's General Rulemaking Authority Should be Modified and Clarified.

The Board is proposing a number of changes to the regulation, based on the credit advertising provisions in Chapter 3 of TILA and its general rulemaking powers in Section 105 of the Act.

Trigger Term Requirements

While CMC generally supports the changes in the "trigger term" requirements for closed-end credit advertising, there is a significant cost to requiring more detail. The more information that must be provided, the more likely it is that advertisers will avoid showing any cost information in their advertising. To mitigate this problem, 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. *See* Official Staff Commentary to Regulation Z, 12 C.F.R. supp. I § 226.24(b)-3, -4, -5. Under the 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 we do not disagree with the Board that the complexity of many new products has raised questions about whether this theory 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, we are aware of advertisements for financing as low as 1% 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 5% (which both the existing regulation and the Proposal require be shown equally conspicuously with any interest rate), consumers would have understood that they needed inquire further and the deceptive impact of advertising the low initial rate would have been mitigated.

Nevertheless, the CMC generally supports the proposed changes in the trigger-term rules, provided that the Board retains the other parts of the Proposal (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. CMC members devote significant attention to ensuring that their advertising cannot be viewed as misleading, even if it is technically compliant with Regulation Z, and, therefore, often do not take advantage of the exceptions provided by the existing Commentary. The Proposal would create a more level playing field in which all lenders and brokers would have to provide meaningful information about the terms of their loans in their advertising.

The following are our comments about technical aspects of the Proposal regarding advertising of loans with multiple or discounted rates:

- **Multiple payments.** CMC does not oppose the proposal to prohibit the use of rates such as payment or effective rates in advertising. But the Proposal would also remove from the Commentary the ability to disclose the range of payments, from low to high, in "graduated-payment" loans, which, as the Board notes, many have interpreted as also allowing the disclosure of a range of payments in other forms of nontraditional loans such as Option ARMs and interest-only loans. 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.*, in the text rather than the footnotes. Requiring lenders to show all the intermediate payments would discourage them from promoting such products. If a lender decided to do so anyway, many advertisements would present a cluttered appearance that would be hard for consumers to understand. 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.

- **Multiple rates.** 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 § 226.24(f)(3)(i) [multiple payment streams] apply." It is common for adjustable-rate mortgages ("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 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

CMC strongly supports the concept of allowing more flexible alternatives for making disclosures in radio and television commercials–either an understandable oral 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 have time to 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.

We also support 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 in a phone 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 toll-free numbers.

The Board also seeks comment on whether the "close proximity" requirements for HELOC and closed-end "triggered" terms should apply to Internet advertising. We do 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 Proposal also provides guidance as to when an alternative voice-over disclosure complies with the "clear and conspicuous" requirement. The Proposal 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 that are understandable meet this standard, even if they are delivered rapidly by a skilled announcer such as the "FedEx guy" in the 1980s television commercials.

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, to 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, the advertiser is not interested in receiving calls from prospective borrowers but is, instead, attempting to direct traffic to its web site. In that situation, it is more useful to consumers and more practical for the advertiser to provide the required disclosures on the web site rather than through a toll-free telephone number.

Finally, the Board should clarify its apparent intent that disclosures in a television commercial can still be displayed clearly and conspicuously on the screen–*i.e.*, that the new alternatives are optional. 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 read to indicate that screen displays would no longer be allowed. *See* 73 Fed. Reg. at 1706.

Clear and Conspicuous Standard: HELOC Introductory Rates

In addition to the comments above, which apply to both closed- and open-end disclosures, we note that there is an apparent contradiction between two comments explaining the meaning of "close proximity" in proposed Section 226.16(d), which would add requirements for the advertising of "introductory rates." Proposed Comment 226.16-2 states that, for purposes of the entire subsection, information is deemed to be in "close proximity" if it "is located immediately next to or directly above or below the advertised rates or payments triggering the required disclosures," while Comment 226.16(d)-5(iii) states that information about introductory rates is "closely proximate" if it is in the same paragraph as the introductory rate or payment. Any ambiguity about the meaning of "close proximity" could be resolved by inserting, before the first sentence of Comment 226.16(d)-5(iii), the phrase "Notwithstanding the general rule stated in Comment 226.16-2," and retaining the rest of the comment.

In addition, 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. *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. 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 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. We do 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

Balloon Payments

We support 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. 12 C.F.R. § 226.16(d)(3). The Commentary should be further 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.

Tax Implications

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. We support 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 at the time of plan opening, for open-end plans, or consummation, for closed-end plans. 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. We would support such a change, which make it easier for lenders to promote other features of their loans when they have limited space available, as with a banner advertisement or radio commercial.

B. The Board's 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 Chapter 3 (Sections 141-47, 15 U.S.C. §§ 1661-1665b) that 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 Chapter 3's provisions. By contrast, as discussed above, Section 130(a)(4) of TILA provides for draconian and potentially ruinous 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 CMC 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 articulated by the Board in its UDAP Guidance. As the Board said in that Guidance, 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.[63]

Yet several of the advertising UDAP provisions assume that a specific statement in an advertisement is misleading regardless of the context. Turning again to the regulation of the use of the word "fixed" in advertisements for variable-rate mortgages, the Proposal 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 Proposal would allow the use of the abbreviation "ARM" in advertisements promoting both fixed- and variable-rate mortgages, but

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[63] "UDAP Guidance, *supra* note 5, at 4."

not in those that promote only variable-rate mortgages. This almost comical 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.

Other provisions suffer from the same problem discussed above with respect to the servicing provisions–if they were adopted under Section 129(*l*), the liability for violations would apply unevenly. Take, for example, the proposal to prohibit the misleading use of the name of the current lender by another, unaffiliated party. We agree that this practice is deceptive to consumers and causes injury to legitimate lenders. CMC member lenders have been competitively damaged by this abusive practice and we strongly support the concept behind this proposed provision. In fact, this practice has caused many consumers to disregard important communications from their actual lender or servicer, one factor that has impeded communications regarding workout and other loss-mitigation opportunities. But 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 these "UDAP" provisions into informal guidance, particularly where, as with the use of the word "fixed," there are many ways to present the information in a non-misleading manner.

Turning to the Board's specific proposals, as described in the preamble to the proposed regulation:[64]

> **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.**

CMC would support including a statement in informal guidance that misleading claims of "fixed" rates or payments are UDAPs, but, as noted, believes that it is inappropriate to include this provision in the regulation. 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.

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

Similarly, this general statement could be included in UDAP guidance. But the "trigger-term" requirements of the regulation, especially as modified in the Proposal, adequately address this issue.

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[64] Our comments on each provision should not be construed as support for the Board's legal authority to issue that provision under Section 105(a).

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 also hurts competition and limits consumer choice by reducing the free flow of information.

> **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.**

We support this provision, which is narrowly-drawn to address the specific deceptive practice. The regulation should clarify that an envelope is part of the "advertisement" and is subject to the same prohibitions.

> **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.**

We also support this provision, and again suggest that the regulation make clear that an envelope is part of an advertisement.

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

We support this provision as it is 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."

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

While we agree that misrepresentation of whether the broker or lender has a fiduciary relationship with the consumer would be a UDAP, the Proposal would prohibit the use of the terms "counselor" or "financial advisor" in advertising to describe a for-profit mortgage broker or lender or its employees. We do not believe that use of these terms causes consumers to believe that a fiduciary relationship exists in all cases. For example, some registered financial advisors are also licensed mortgage brokers, and the dual status does not necessarily cause customer confusion. Because of the wide variety of situations covered by this provision, it should be moved to informal guidance and the specific prohibitions should be removed.

> **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.**

We support this provision, but suggest that it 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.

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

Finally, 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. Currently, 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. But loans of varying length can truthfully be characterized as "long-term." Therefore, this method of complying with the existing regulation results in consumers receiving less information and losing the ability to make an apples-to-apples comparison of the rates offered by different lenders.

With the other changes in the Proposal 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, CMC 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 fifteen years on first mortgages or ten years on second mortgages, for loans that do not have an irregular payment schedule, without triggering additional disclosures under 12 C.F.R. § 226.24(c).

The term "irregular" would be defined as in 226.22(a)(3) n.46 ("irregular" means one or more of "multiple advances, irregular payment periods, or irregular payment amounts [other than an irregular first period or an irregular first or final payment]"), except that a loan with a balloon payment would also be considered "irregular" and ineligible for the exception to the trigger-term rules. A "balloon payment" could be defined as a final payment of at least twice the amount of the regular payments.

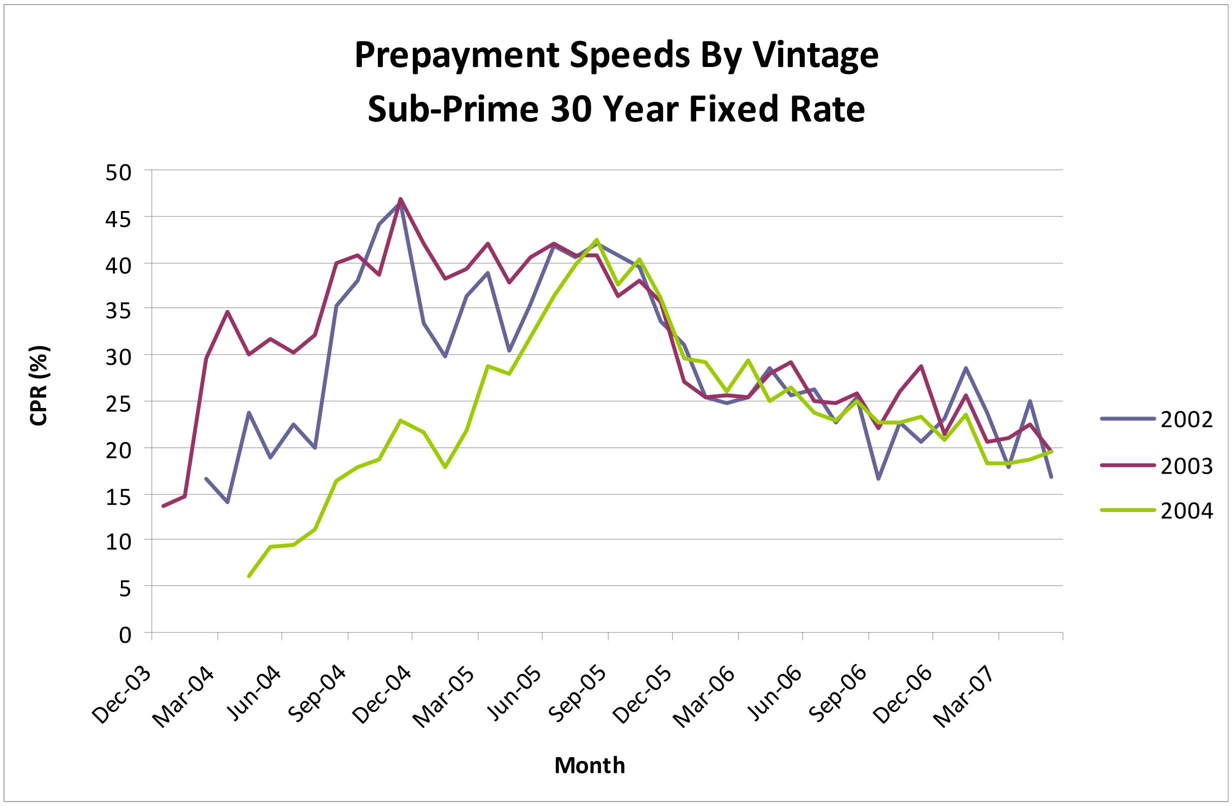
* * *

We appreciate the opportunity to present our views. Please do not hesitate to call (202) 742-4366 with any questions.

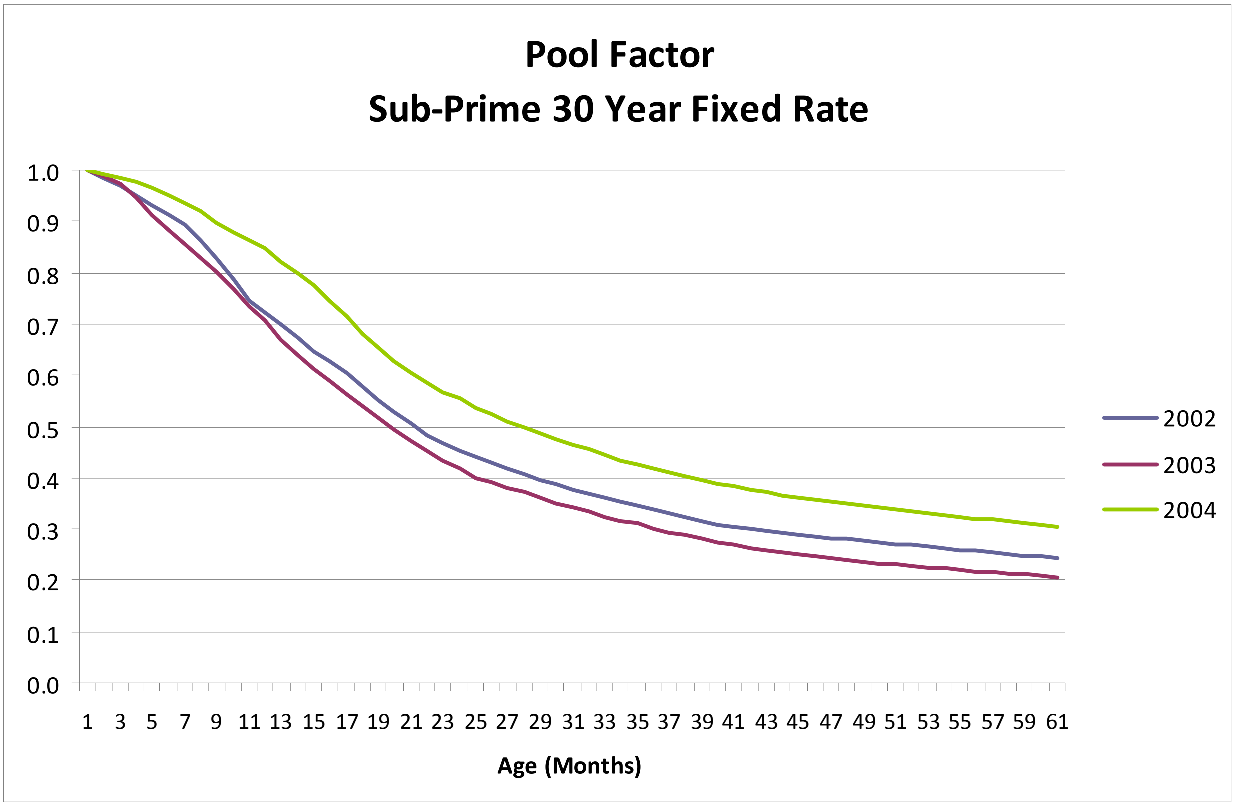
Sincerely,

Anne C. Canfield
Executive Director

EXHIBIT A

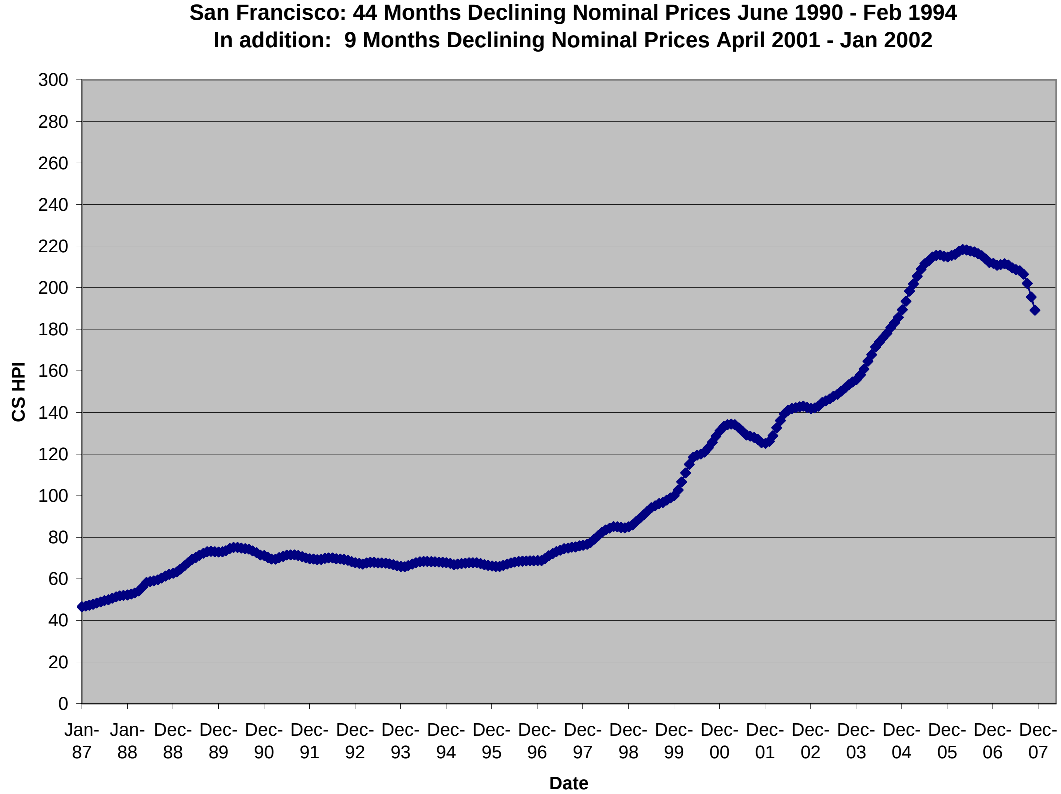


Prepayment Speeds By Vintage
Sub-Prime 30 Year Fixed Rate
CPR (%)
50
45
40
35
30
25
20
15
10
5
0
Dec-03
Mar-04
Jun-04
Sep-04
Dec-04
Mar-05
Jun-05
Sep-05
Dec-05
Mar-06
Jun-06
Sep-06
Dec-06
Mar-07
Month
2002
2003
2004



Pool Factor
Sub-Prime 30 Year Fixed Rate
1.0
0.9
0.8
0.7
0.6
0.5
0.4
0.3
0.2
0.1
0.0
1 3 5 7 9 11 13 15 17 19 21 23 25 27 29 31 33 35 37 39 41 43 45 47 49 51 53 55 57 59 61
Age (Months)
2002
2003
2004

EXHIBIT B


San Francisco: 44 Months Declining Nominal Prices June 1990 - Feb 1994
In addition: 9 Months Declining Nominal Prices April 2001 - Jan 2002
CS HPI
300
280
260
240
220
200
180
160
140
120
100
80
60
40
20
0
Jan-87
Jan-88
Dec-88
Dec-89
Dec-90
Dec-91
Dec-92
Dec-93
Dec-94
Dec-95
Dec-96
Dec-97
Dec-98
Dec-99
Dec-00
Dec-01
Dec-02
Dec-03
Dec-04
Dec-05
Dec-06
Dec-07
Date

Texas: 1975-2007 (OFHEO Quarterly HPI State Level)
54 Months Decline in Nominal House Prices June 1986 - Dec 1990

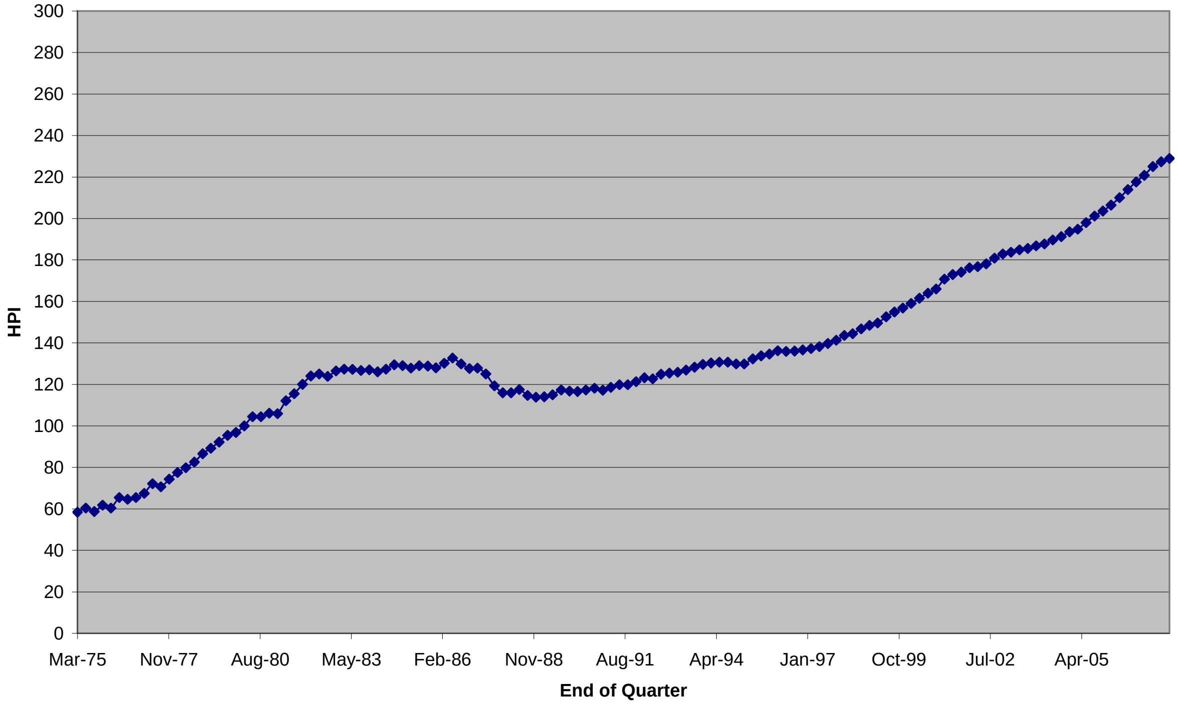


EXHIBIT C

MORTGAGE BROKER FEE AGREEMENT AND DISCLOSURE

This document confirms the agreement between you and [Broker Name], your mortgage broker ("Broker") about how your Broker will be paid. You should not pay any fees prior to entering into an agreement with your Broker. If you pay any fees before the loan closes, be sure to understand whether those fees are partially or fully refundable and under what circumstances.

1. BROKER SERVICES - You have engaged your Broker to arrange a loan for you. Your Broker charges you fees to arrange a loan from a lender who will fund the loan. Broker fees can influence the loan products and terms you are offered. Your Broker will seek to assist you in obtaining a loan that meets your financial needs, but your Broker does not distribute the products of all lenders in the market and cannot guarantee you the lowest price or best terms available. Before signing loan documents, be sure that you understand and are satisfied with the product and terms your broker arranges for you.

2. BROKER FEES - You have asked your Broker to assist you in obtaining a loan in the amount of $(A) (Note: For a line of credit, the loan amount is the maximum credit limit on the line). You have the choice of paying your Broker directly or directing lender to pay the Broker on your behalf**.**

These are the fees you agree to pay your Broker directly:

Application Fee:	$(B) [exclusive of any application fees paid to lender]
Processing Fee:	$(C) [exclusive of any processing fees paid to lender]
Other:	$(D) [describe]
Broker Fee (Points)	$(F x A) This fee will not exceed (F)% of your loan amount.

In addition to fees you agree to pay your Broker directly, you agree that the lender may pay your Broker additional fees on your behalf as follows:

Yield Spread Premium (YSP): The YSP is paid by the lender on your behalf in exchange for a higher interest rate. Based on current market rates and your current loan request, your Broker would be paid a YSP equal to $(G). The YSP may change but in no event will the YSP exceed (H)% of your loan amount.

Other: $[I] [describe]

BASED ON A LOAN AMOUNT OF $(A), THE MAXIMUM FEES YOU WILL PAY THE BROKER DIRECTLY OR THAT THE LENDER WILL PAY THE BROKER ON YOUR BEHALF ARE $[B+C+D+(FxA)+(HxA)+I].

If your actual loan amount is different than $(A), then the maximum fees shown in this agreement may increase or decrease accordingly. Until you decide how much you wish to borrow and until you lock your interest rate and terms through the closing date, your Broker will not know the exact amount of fees. Once your interest rate is locked and your loan amount and terms are finalized, your Broker will be able to tell you the exact amount of these fees. .

3. OTHER CLOSING COSTS - In addition to Broker fees, estimates of other fees you will pay in connection with your loan (fees to lenders, appraisers, title companies, credit bureaus, *etc*.) can be found in your "Good Faith Estimate of Closing Costs". Be sure that you receive the Good Faith Estimate, and that you understand and are comfortable with the fees disclosed in the Good Faith Estimate. (Note: Good Faith Estimates are not provided for lines of credit, so if your application is for a line of credit, you will not receive a Good Faith Estimate, however, information about your other closing costs will be set forth in your line of credit agreement.)

Note: This Agreement does not address additional fees a lender may pay Broker after the closing date of your loan based on the overall quality of loans delivered by the Broker to the lender.

DO NOT SIGN THIS DOCUMENT IF YOU DON'T UNDERSTAND THE INFORMATION ABOVE.

Borrower:_______________________	Co-Borrower: _______________________
Signature:_______________________	Signature:_______________________
Date:_______________________	Date:_______________________

[Broker Name],

by: Signature:_______________________ [Broker address and phone number]

Printed Name:_______________________

Date:_______________________

EXHIBIT D

Mortgage Terms and Costs Initial Disclosure - Page 1

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

About this Disclosure

This Disclosure will help you compare the proposed terms and costs of your loan with those of other loans. See also the charts and information in the Special Information Booklet provided to you by your Lender or Mortgage Broker. The Special Information Booklet is also available online at __________________. **E**xcept as noted, all settlement charges are good faith estimates of the amounts you are likely to pay at settlement. See your contract documents for any additional information about nonpayment, default, any required repayment in full before the scheduled date and prepayment refunds and penalties.

____

Principal Loan Amount: $______________

Annual Percentage Rate The cost of your loan as yearly rate	**Finance Charge** The dollar amount the loan will cost you	**Amount Financed** Your principal loan amount less the portion of the Finance Charge paid at or before loan settlement	**Total of Payments** The amount you will have paid after you have made all payments as scheduled
%	$	$	$

Schedule of Payments and Interest Rates

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

Escrow Payments. The payments shown above ☐ include ☐ do not include escrow payments for real estate taxes and insurance. Ask your Lender or Mortgage Broker about your estimated escrow payments. If escrow is required, you will receive an escrow account statement no later than 45 days after settlement.

Payment Increases. If checked below, your loan has features that may cause your payments to increase. Consider carefully whether you will have the ability to repay the higher payments.

☐ **Variable Rate:** Your loan contains a variable rate feature. See the disclosures about the variable rate feature provided to you earlier. If the index used to adjust your interest rate increases, your actual interest rates and payments may be higher than shown above, but your interest rate will not increase above ______% and your payments will not increase above $___________.

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

☐**Balloon Payment:** Your loan may require a balloon payment of up to $_________________ after ___ years.

☐**Demand Feature:** The entire amount owed on this loan is payable on demand. All disclosures are based on an assumed maturity of one year.

Prepayment.☐If you pay off early, you will not have to pay a penalty.

☐ If you pay off during the first [time period] you may have to pay a penalty of up to $_________.

Security. You are giving a security interest in your house. You could lose your house, and any money you have put into it, if you do not meet your obligations under the loan.

Property Insurance. You may obtain property insurance from anyone you want that is acceptable to the lender.

Late Charge. If a payment is late, you will be charged $_________or________% of the payment, whichever is [less] [more].

Assumption. Someone buying your house
☐ may, subject to conditions, be allowed to assume the remainder of the mortgage on the original terms
☐ cannot be allowed to assume the remainder of the mortgage on the original terms.

Required Deposit. ☐ The annual percentage rate does not take into account your required deposit.

See your contract documents for any additional information about nonpayment, default, any required repayment in full before the scheduled date and prepayment refunds and penalties.
________________________ e means an estimate

Mortgage Terms and Costs Initial Disclosure - Page 2

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

Mortgage Loan Settlement Charges to Be Paid by You

(Charges marked with † are used to calculate Finance charge and Annual Percentage Rate on Page 1)

The numbers below correspond to the numbers on the HUD-1 Settlement Statement and Mortgage Terms and Costs Final Disclosure you will receive at loan closing and are based on the loan amount listed above on Page 1. You should compare this Disclosure with the HUD-1 Statement you receive at closing to determine whether any changes have occurred and the reason for any changes.

800. Lender Origination Charges includes charges in A-1 – A-3 below† **$________**

A-1 Lender Charges for loan origination and other Lender services† $ _______
A-2 Discount Points paid to reduce your interest rate† $ _______
A-3 Rate Lock paid to lock in your interest rate† $ _______
(If you lock in your rate later, Lender may charge additional fee)

850. Mortgage Broker Origination Charges paid directly by you for loan origination and other Mortgage Broker services† *(N/A if no broker involved)* **$________**

If using a mortgage broker, see your "Mortgage Broker Fee Agreement" for important information about your broker's services and charges.

900. Credit and Pre-Closing Valuation and Inspection Charges **$________**
For credit reports, property valuation, inspections, tax or flood determinations

1000. Title Charges for title insurance, title related services and closing services **$________**

☐ Charges for Owner's Title Insurance of $____ are included in this amount
☐ Charges for closing agent to attend closing of $ ____ are included in this amount†

1100. Government Recording & Transfer Charges on this transaction **$________**

1200. Interest and Mortgage Insurance Charges† to be paid in advance **$________**
Note: This estimate may change depending on when you actually close.

1300. Taxes, Flood and Hazard Insurance Charges to be paid in advance **$________**

1300. Escrow Costs/Reserves for escrow account to pay taxes, insurance, and other charges **$________**
☐ Mortgage insurance premium reserves of $ _____ are included in this amount†

1350. Other Mortgage Loan Settlement Charges such as life-of-loan flood and tax services, wire transfer and other miscellaneous services not covered above† **$________**

Total Estimated Mortgage Loan Settlement Charges **$________**

Minus Mortgage Loan Settlement Charges Paid by Borrower Before Closing – **$________**
Minus Any Credit from Lender – **$________**

1400. Mortgage Loan Settlement Charges to Borrower **$________**

You may be able to finance all or part of these charges. In a purchase transaction, review your sales contract to determine how much your down payment is, how much you have already paid as a deposit and any settlement charges listed above that the seller will pay and any other adjustments to determine how much you will be responsible for at settlement.

I have read and understood this disclosure.

Lender/Broker (Originator) Signature **Date** **Borrower(s) Signature** **Date**

Borrower(s) Signature **Date**

Signing this disclosure does not obligate you to close your loan. Do not sign your loan documents at closing if you do not understand them or if you do not believe you will be able to repay your loan.

EXHIBIT E

Settlement Statement and Mortgage Terms and Costs
Final Disclosure - Page 1

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

A. Summary of Borrower's Transaction		**B. Summary of Seller's Transaction**	
100. Gross Amount Due from Borrower		**400. Gross Amount Due to Seller**	
101. Contract Sales Price		401. Contract Sales Price	
102. Personal Property		402. Personal Property	
103. Settlement Charges to Borrower (line 1400)		403	
104.		404.	
105.		405.	
Adjustments for items paid by seller in advance		**Adjustments for items paid by seller in advance**	
106. City/town Taxes to		406. City/town to	
107. County Taxes to		407. County Taxes to	
108. Assessments to		408. Assessments to	
109.		409.	
110.		410.	
111.		411.	
112.		412.	
120. Gross Amount Due from Borrower		**420. Gross Amount Due to Seller**	
200. Amounts Paid by or on behalf of Borrower		**500. Reductions in Amount Due to Seller**	
201. Deposit or earnest money		501. Excess deposit (see instructions)	
202. Principal amount of new loan(s)		502. Settlement charges to seller (line 1400)	
203. Existing loan(s) taken subject to		503. Existing loan(s) taken subject to	
204.		504. Payoff of first mortgage loan	
205.		505. Payoff of second mortgage loan	
206.		506.	
207.		507.	
208.		508.	
209.		509.	
Adjustments for items unpaid by seller		**Adjustments for items unpaid by seller**	
210. City/town taxes to		510. City/town taxes to	
211. County Taxes to		511. County Taxes to	
212. Assessments to		512. Assessments to	
213.		513.	
214.		514.	
215.		515.	
216.		516.	
217.		517.	
218.		518.	
219.		519.	
220. **Total Paid By/For Borrower**		520. **Total Reduction Amount Due Seller**	
300. Cash at Settlement From/To Borrower		600. Cash at Settlement To/From Seller	
301. Gross Amount due from Borrower (line 120)		**601. Gross Amount due to Seller (line 420)**	
302. Less Amounts paid By/For Borrower (line 220)	( )	602. Less reductions in amt. Due seller (line 520)	( )
303. Cash ☐ From ☐ To Borrower		603. Cash ☐ To ☐ From Seller	

Signatures of Seller/Buyer

Settlement Statement and Mortgage Terms and Costs
Final Disclosure - Page 2

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

C. Settlement Charges		
C-1. Real Estate Sale Settlement Charges		
700. Total Real Estate Commission based on sales price $ ___________@__________ % or $_____________		
Division of Commission in 700 is as follows:	Paid From Borrower's Funds at Settlement	Paid From Seller's Funds at Settlement
701. $ to		
702. $ to		
703. Real Estate Commission on line 700 paid at Settlement	$	$
704.	$	$
C-2. Other Charges for Transaction Not Required by Broker or Lender		
750. For	$	$
C-3. Mortgage Loan Settlement Charges to Be Paid by You **COMPARE 1ST COLUMN—CHARGES TO BE PAID BY BORROWER—TO INITIAL DISCLOSURE** *Note: Charges marked with a †are used to calculate the finance charge and APR on page 3.*		
The numbered cost categories below are included in your Net Settlement Charges if filled in. All of the particular fees and services may or may not be included for your loan.		
800. Lender Origination Charges may include the charges in A-1 through A-3 below:†		
A-1. Lender Charges for loan origination and other Lender services† $__________		
A-2. Discount Points paid to reduce your interest rate† __________% / $__________		
A-3. Rate Lock paid to lock in your interest rate† __________% / $__________		
850. Mortgage Broker Origination Charges to be paid directly by You to the Mortgage Broker for loan origination and other mortgage broker services.	$	$
Note: If using a mortgage broker, see your "Mortgage Broker Fee Agreement" for important information about your broker's services and charges.		
900. Credit, and Pre-Closing Valuation and Inspection Charges for your loan that may include:	$	$
• Appraisal or valuation fee • Credit Report • Tax or Flood Determination • Pre-closing Inspection • Pest Inspection		
1000. Title Charges for your loan that may include	$	$
• Settlement or closing-escrow services • Abstract or title search • Title insurance binder • Documentation preparation • Attorney Services • Title insurance • Survey • All other title and closing services • Title examination • Lender's coverage • Notary services ☐ Charges for optional Owner's Title Insurance Coverage of $________ are included in this amount if this box is checked. ☐ Charges for closing agent to attend closing of $_______ are included in this amount if this box is checked.†		
1100. Government Recording and Transfer Charges for this transaction include:	$	$
• Recording fees; Deed $________; Mortgages $________; Releases $_________ • City/county tax stamps: $________ • State tax stamps: $_________ • Other government recording and transfer costs: $________		
1200. Interest and Mortgage Insurance Charges to be paid in advance include:†	$	$
• Interest from _______ to _______ at $_______ a day • Mortgage insurance premium for ________ months at $________ a day • VA funding fee/FHA mortgage insurance premium $_________ • [Other] __________________ for $________________		
1250. Taxes, Flood and Hazard Insurance Charges to be paid in advance include:	$	$
• Taxes: __________________ • Hazard insurance premium for ________ months at $_________ • Flood insurance premium for ________months at $________ • [Other] ____		
1300. Escrow Charges/Reserves to establish an escrow account to pay taxes, insurance premiums and other charges.	$	$
Note: Borrower's initial escrow account analysis, describing how the amount of the escrow deposit was calculated, will be provided to Borrower at settlement or within 45 days thereafter. ☐ Mortgage insurance premium reserves of $________ are included in this amount if this box is checked.		
1350. Other Mortgage Loan Settlement Charges for services for your loan that may include.†	$	$
• Life-of-Loan flood insurance • Life-of-Loan tax service • Wire transfers • All other miscellaneous services not covered above		
Summary of Settlement Charges		
Gross Amount of Settlement Charges (C-1,C-2 & C-3)	$	$
Minus Settlement Charges Paid before Closing	$ ( )	$ ( )
Minus Any Credit from Lender	$ ( )	$ ( )
1400. Net settlement Charges (enter on lines 103 & 502)	$	$

Settlement Statement and Mortgage Terms and Costs
Final Disclosure - Page 3

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

Principal Loan Amount: $______________

Annual Percentage Rate The cost of your loan as yearly rate %	**Finance Charge** The dollar amount the loan will cost you $	**Amount Financed** Your principal loan amount less the portion of the Finance Charge paid at or before loan settlement\ $	**Total of Payments** The amount you will have paid after you have made all payments as scheduled $

Schedule of Payments and Interest Rates

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

Escrow Payments. The payments shown above ☐ include ☐ do not include escrow payments for real estate taxes and insurance. Ask your Lender or Mortgage Broker about your estimated escrow payments. If escrow is required, you will receive an escrow account statement no later than 45 days after settlement.

Payment Increases. If checked below, your loan has features that may cause your payments to increase. Consider carefully whether you will have the ability to repay the higher payments.

☐ **Variable Rate:** Your loan contains a variable rate feature. See the disclosures about the variable rate feature provided to you earlier. If the index used to adjust your interest rate increases, your actual interest rates and payments may be higher than shown above, but your interest rate will not increase above ______% and your payments will not increase above $___________.

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

☐**Balloon Payment:** Your loan may require a balloon payment of up to $_________________ after ___ years.

☐**Demand Feature:** The entire amount owed on this loan is payable on demand. All disclosures are based on an assumed maturity of one year.

Prepayment.☐If you pay off early, you will not have to pay a penalty.

☐ If you pay off during the first [time period] you may have to pay a penalty of up to $_________.

Security. You are giving a security interest in your house. You could lose your house, and any money you have put into it, if you do not meet your obligations under the loan.

Property Insurance. You may obtain property insurance from anyone you want that is acceptable to the lender.

Late Charge. If a payment is late, you will be charged $_________or________% of the payment, whichever is [less] [more].

Assumption. Someone buying your house
☐ may, subject to conditions, be allowed to assume the remainder of the mortgage on the original terms
☐ cannot be allowed to assume the remainder of the mortgage on the original terms.

Required Deposit. ☐ The annual percentage rate does not take into account your required deposit.

See your contract documents for any additional information about nonpayment, default, any required repayment in full before the scheduled date and prepayment refunds and penalties.

Borrower(s) Signature **Date**

Borrower(s) Signature **Date**

EXHIBIT F

APPRAISER'S CERTIFICATION: The Appraiser certifies and agrees that:

1. I have, at a minimum, developed and reported this appraisal in accordance with the scope of work requirements stated in this appraisal report.
2. I performed a complete visual inspection of the interior and exterior areas of the subject property. I reported the condition of the improvements in factual, specific terms. I identified and reported the physical deficiencies that could affect the livability, soundness, or structural integrity of the property.
3. I performed this appraisal in accordance with the requirements of the Uniform Standards of Professional Appraisal Practice that were adopted and promulgated by the Appraisal Standards Board of The Appraisal Foundation and that were in place at the time this appraisal report was prepared.
4. I developed my opinion of the market value of the real property that is the subject of this report based on the sales comparison approach to value. I have adequate comparable market data to develop a reliable sales comparison approach for this appraisal assignment. I further certify that I considered the cost and income approaches to value but did not develop them, unless otherwise indicated in this report.
5. I researched, verified, analyzed, and reported on any current agreement for sale for the subject property, any offering for sale of the subject property in the twelve months prior to the effective date of this appraisal, and the prior sales of the subject property for a minimum of three years prior to the effective date of this appraisal, unless otherwise indicated in this report.
6. I researched, verified, analyzed, and reported on the prior sales of the comparable sales for a minimum of one year prior to the date of sale of the comparable sale, unless otherwise indicated in this report.
7. I selected and used comparable sales that are locationally, physically, and functionally the most similar to the subject property.
8. I have not used comparable sales that were the result of combining a land sale with the contract purchase price of a home that has been built or will be built on the land.
9. I have reported adjustments to the comparable sales that reflect the market's reaction to the differences between the subject property and the comparable sales.
10. I verified, from a disinterested source, all information in this report that was provided by parties who have a financial interest in the sale or financing of the subject property.
11. I have knowledge and experience in appraising this type of property in this market area.
12. I am aware of, and have access to, the necessary and appropriate public and private data sources, such as multiple listing services, tax assessment records, public land records and other such data sources for the area in which the property is located.
13. I obtained the information, estimates, and opinions furnished by other parties and expressed in this appraisal report from reliable sources that I believe to be true and correct.
14. I have taken into consideration the factors that have an impact on value with respect to the subject neighborhood, subject property, and the proximity of the subject property to adverse influences in the development of my opinion of market value. I have noted in this appraisal report any adverse conditions (such as, but not limited to, needed repairs, deterioration, the presence of hazardous wastes, toxic substances, adverse environmental

conditions, etc.) observed during the inspection of the subject property or that I became aware of during the research involved in performing this appraisal. I have considered these adverse conditions in my analysis of the property value, and have reported on the effect of the conditions on the value and marketability of the subject property.

15. I have not knowingly withheld any significant information from this appraisal report and, to the best of my knowledge, all statements and information in this appraisal report are true and correct.
16. I stated in this appraisal report my own personal, unbiased, and professional analysis, opinions, and conclusions, which are subject only to the assumptions and limiting conditions in this appraisal report.
17. I have no present or prospective interest in the property that is the subject of this report, and I have no present or prospective personal interest or bias with respect to the participants in the transaction. I did not base, either partially or completely, my analysis and/or opinion of market value in this appraisal report on the race, color, religion, sex, age, marital status, handicap, familial status, or national origin of either the prospective owners or occupants of the subject property or of the present owners or occupants of the properties in the vicinity of the subject property or on any other basis prohibited by law.
18. My employment and/or compensation for performing this appraisal or any future or anticipated appraisals was not conditioned on any agreement or understanding, written or otherwise, that I would report (or present analysis supporting) a predetermined specific value, a predetermined minimum value, a range or direction in value, a value that favors the cause of any party, or the attainment of a specific result or occurrence of a specific subsequent event (such as approval of a pending mortgage loan application).
19. I personally prepared all conclusions and opinions about the real estate that were set forth in this appraisal report. If I relied on significant real property appraisal assistance from any individual or individuals in the performance of this appraisal or the preparation of this appraisal report, I have named such individual(s) and disclosed the specific tasks performed in this appraisal report. I certify that any individual so named is qualified to perform the tasks. I have not authorized anyone to make a change to any item in this appraisal report; therefore, any change made to this appraisal is unauthorized and I will take no responsibility for it.
20. I identified the lender/client in this appraisal report who is the individual, organization, or agent for the organization that ordered and will receive this appraisal report.
21. The lender/client may disclose or distribute this appraisal report to: the borrower; another lender at the request of the borrower; the mortgagee or its successors and assigns; mortgage insurers; government sponsored enterprises; other secondary market participants; data collection or reporting services; professional appraisal organizations; any department, agency, or instrumentality of the United States; and any state, the District of Columbia, or other jurisdictions; without having to obtain the appraiser’s or supervisory appraiser’s (if applicable) consent. Such consent must be obtained before this appraisal report may be disclosed or distributed to any other party (including, but not limited to, the public through advertising, public relations, news, sales, or other media).
22. I am aware that any disclosure or distribution of this appraisal report by me or the lender/client may be subject to certain laws and regulations. Further, I am also subject to the provisions of the Uniform Standards of Professional Appraisal Practice that pertain to disclosure or distribution by me.

23. The borrower, another lender at the request of the borrower, the mortgagee or its successors and assigns, mortgage insurers, government sponsored enterprises, and other secondary market participants may rely on this appraisal report as part of any mortgage finance transaction that involves any one or more of these parties.
24. If this appraisal report was transmitted as an “electronic record” containing my “electronic signature,” as those terms are defined in applicable federal and/or state laws (excluding audio and video recordings), or a facsimile transmission of this appraisal report containing a copy or representation of my signature, the appraisal report shall be as effective, enforceable and valid as if a paper version of this appraisal report were delivered containing my original hand written signature.
25. Any intentional or negligent misrepresentation(s) contained in this appraisal report may result in civil liability and/or criminal penalties including, but not limited to, fine or imprisonment or both under the provisions of Title 18, United States Code, Section 1001, et seq., or similar state laws.

Uniform Residential Appraisal Report at pages 5 and 6
(Fannie Mae Form 1004/ Freddie Mac Form 70)
available at https://www.efanniemae.com/sf/formsdocs/forms/pdf/sellingtrans/1004.pdf