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Via E-mail

Re: Docket Number R-1366

Ladies and Gentlemen:

I have the honor of serving as Executive Vice President of Bank of the James and respectfully submit this letter on behalf of Bank of the James and Bank of the James Mortgage, a division of Bank of the James. This letter highlights the major concerns expressed by our Senior Management and Board of Directors.

We applaud the Board's efforts at reforming the mortgage process so as to better protect consumers; however we believe that the Board's revised rules go too far. It is our position that many of the motivating factors for the Board's proposal have been addressed due to increased consumer awareness, recently enacted statutes and regulations and changes in the secondary market and available loan products. In some cases, consumers have been harmed by the very same statutes and regulations intended to protect them, for instance due to new waiting periods.

Imposing new disclosures and a revised annual percentage rate ("APR") calculation will result in substantial implementation costs which would be borne by consumers as well as lenders. At a time when many lenders are struggling to stay afloat, we fear that yet another major change in regulatory disclosure and calculation requirements will reduce the pool of professional mortgage lenders. A reduction of lenders is also likely to result in increased costs to consumers. Nevertheless, we understand that the Board is unlikely to respond to requests to withdraw the proposed rules in their entirety, which is our preference. Therefore, we respectfully request that the Board consider our concerns regarding specific portions of the proposed revisions. In response to the Board's request for comments concerning an implementation timeline, we strongly suggest that the Board not enact a new regulation before 2011 and that any regulatory changes not be effective until at least 2012.

Disclosure at Application

We do not object to providing the new "Key Questions" disclosure; however, we urge the Board to require such disclosure at the earlier of the time of application or payment of a non-refundable fee (instead of before the consumer applies for a loan).

Such an approach provides creditors with a clearly defined time to make the disclosure, is consistent with the Truth in Lending Act ("TILA") and would still afford consumers adequate time to shop for and consider the appropriate loan product.

Revised APR Calculation

While we have not fully considered the issue of the Board's authority to revise the finance charge calculation set forth in TILA, we question whether the Board has the authority to do so as set forth in the proposed regulation. Assuming that the Board does have the authority to so do, we fear that the harm to consumers will outweigh the benefits. While we favor simplification of the calculation of the APR, we believe that the proposed change must not occur without a corresponding change in the calculation and definition of "Section 32" high-cost mortgage loans.

Including the proposed additional fees in the APR will result in fewer loans to consumers seeking relatively small loan amounts because such loans would constitute high-cost loans not made by mortgage lenders. While we are concerned about the fair lending issues associated with imposing minimum loan amounts, we are confident that many lenders will have to increase their minimum loan amounts.

We believe that the Board's proposed analysis estimating a 0.6 percent increase in high-cost loans is conservative. Many mortgage lenders are confirming the impact that the new APR definition would have on their portfolios. We expect that they will comment on their own with estimates of the fractional increase of loans that will meet the federal and Virginia high-cost loan thresholds under the proposed revised APR definition.

We remind the Board that many states use the federal definition of finance charge and APR in implementing anti-predatory lending legislation and that their thresholds are even lower than that set forth under HOEPA. Therefore, the proposed changes will have an even greater impact on many low income consumers.

Disclosures Required Within Three Days After Application

We are frustrated by the duplicative but not identical summary of terms required by the proposed regulation and Regulation X. We urge the Board and HUD to work together to formulate one set of early disclosures.

We agree that consumers are confused about the definition of "finance charges" and that the words "interest and settlement charges" will be more meaningful to consumers. We believe that consumers want and need to know the total amount of their monthly payment, including escrows. It is unclear, however, whether lenders will have the requisite information to provide this requirement by the new form within three days of application.

There are other changes required by the new disclosures which will be difficult for lenders to implement. For instance, many lenders have expressed practical, technical concerns with producing the graph. In fact, at least one lender stated that it is impossible to program a "moving dot on a line." Another lender expressed concern about the absence of a definition for "excellent" relative to credit quality in the comparison graph. While the graph shows a comparison based on credit, it seems that it might be the case that even a consumer with excellent credit will not receive the best available rate due to product choices. Moreover, lenders have stated that it will be difficult to calculate and produce a constantly moving average for each loan type. Furthermore, some lenders have questioned how meaningful the graph will be because price increase might be more pronounced as credit quality declines. Finally as to the graph, at least one lender found the graph to be confusing.

The proposed form requires lenders to advise consumers of the amount that they could save as a result of lowering their APR; however, it is possible that a lower APR might not be available to the consumer, thus misleading the consumer.

We appreciate that consumers must understand early in the loan process whether their payments can increase. Nevertheless, the manner in which this question is posed in the model disclosure is also misleading. A payment increase is possible even with a performing fixed-rate, fully amortizing loan, such as due to increased escrow amounts. Therefore, we recommend either removing this sentence or adding clarifying language (such as indicating that it applies only to the portion of the payment constituting principal and interest). We have the same concerns with the "Payment Change Limits."

Lenders have expressed concerns about their ability to calculate the prepayment penalty at the time the disclosure is required. Under the proposed rule, it would be insufficient to advise the consumer of the manner of calculating the prepayment penalty, which is how lenders would prefer the disclosure to read.

Lenders have voiced concern about the manner in which the forms must be populated. That is, instead of a "check the box" method, which is relatively easy to populate from a technological perspective, it seems that the form would have to be populated to reflect only the applicable terms as indicated by, for instance, the "No" or "Yes" statements in the payment increase and prepayment penalty sections. Some lenders have expressed their doubts as to how they could accomplish this.

Disclosures Required Three Days Before Consumation

We strongly believe that the recent Regulation Z changes effective July 30, 2009, pursuant to the Mortgage Disclosure Improvement Act ensure that consumers will not arrive at the closing table to discover an impermissible increase in their APR. Moreover, the new RESPA regulatory changes ensure that even non-finance charges will not increase beyond specific tolerances. Therefore, we urge the Board not to require an additional disclosure and waiting period, absent an APR change outside of the tolerances. The challenges in the mortgage industry have already increased consumer frustration with the loan process due to the extended time period from application to closing. To impose yet another delay is unwarranted, absent a change to the APR outside of the permitted tolerances.

While not set forth in the proposed rules, we encourage the Board to revise Regulation Z to provide that any over disclosure of the APR will constitute a permitted tolerance so that creditors need not issue a revised disclosure due to a decrease in the APR. Over disclosure of the APR does not result in consumers being overcharged at the closing table, and in many cases the additional waiting period harms the consumer. For instance, it could impact the consumer's performance under a purchase and sale agreement or result in additional interest and charges for debts to be paid as part of a refinance transaction. The added delay also impacts interest rate locks resulting in higher interest rates or additional costs to the consumer.

Of the two alternatives the Board proposes relative to re-disclosure, we favor the second approach resulting in re-disclosure and an additional waiting period only if the APR changes beyond the tolerance. Otherwise, it could be provided at closing.

Loan Originator Compensation

Of most concern to us is the Board's proposed prohibition on payments to loan originators based upon terms and conditions of the loan, including the interest rate. Many lenders have expressed concern about whether it is appropriate for the Board to limit compensation as the Board proposes.

We are confident that implementation of the rule in its proposed form would be severely detrimental to consumers. First, it would discourage loan originators from working with those consumers needing the most protection: first-time home buyers, credit-challenged consumers and consumers seeking low loan amounts. Because of the time required to assist these consumers with the loan process, many lenders fear that these consumers would be underserved.

Another concern expressed by lenders is that a change in the loan originator compensation structure would drive away experienced loan originators due to limitations on their income. While many loan originators are compensated based on loan terms, consumers are educated about their choices relative to interest rate and closing costs in order to decide what best suits them. Most lenders strive to serve consumers of all socioeconomic strata. Limiting compensation based on loan terms would likely provide a disincentive to serve lower income consumers.

Allowing some variance in loan originator compensation would allow consumers to pay more for additional service. It would help to ensure that loan originators would still serve more challenging consumers. At least one lender questioned the impact of the proposed limitation on customer service. More particularly, she believes that loan originators might not provide the same level of service and devote the same number of hours to each loan if their compensation were limited as the Board proposes.

We believe that the abuses in the market leading the Board to propose the prohibition on loan originator compensation based on loan terms have been corrected by the market, thus rendering the Board's proposal unnecessary. Nevertheless, we understand the Board's desire to protect consumers. Therefore, we propose the following alternatives to the Board's proposal. We present the alternatives below in lieu of compensation based on the principal amount of the loan because the principal loan amount generally does not determine the loan originator's compensation.

One alternative would be to limit the amount of loan originator compensation, such as to 200 basis points. For fair lending reasons among others, many lenders already limit variances in loan originator compensation based on rate in such a manner.

A second alternative would be to limit loan originator compensation based on loan terms only for all "high-cost" or "higher priced" mortgage loans as well as those loans with the following features:

Interest-only payments;
Negative amortization;
Prepayment penalty; or
Balloon payments.

A third alternative would be to permit variable loan originator compensation in connection with the following loans: FHA, VA or USDA. The reason for allowing variable loan originator compensation in connection with such products is that agency guidelines already afford special protections to consumers.

A fourth alternative would be to allow loan originator compensation to vary based upon:

Initial principal loan amount;
Loan volume; and
Secondary market compensation.

Of course, the Board may consider each of theee alternatives individually or cumulatively.

Steering

We strongly encourage the Board to abandon its proposed rule relative to steering. We find the proposal inappropriately paternalistic. It is and should be for the consumer, not the loan originator, to shop and determine which loan is in the consumer's best interest.

Many of the terms in the proposed Section 226.36(e) are vague or too imprecise to interpret with certainty. While lenders strive to act in the consumer's interest, such a vague standard is difficult to interpret. Even language in the "safe harbor" is vague, such as what is in a "significant" number of the creditors with which the originator "regularly" does business; and the consumer's expression of interest and "fees." Finally, the information to be presented to consumers under proposed Section 226.36(e)(3)(i)(C) would require countless options and is not a meaningful comparison.

Conclusion

We appreciate the Board's efforts and the consideration it has expressed while considering the implementation issues raised by the proposed rules. Thank you in advance for your continued consideration of the professionals in the mortgage industry.

Respectfully submitted,

J. Todd Scruggs
EVP – CFO
Bank of the James