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December 23, 2009

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

Re: Docket No. R-1366 –Proposed Changes to Regulation Z Rules for Closed-end Mortgages

Dear Ms. Johnson:

Citigroup Inc. ("Citigroup"), one of the largest U.S. financial services holding companies in the world, respectfully submits these comments in response to the rules proposed by the Federal Reserve Board (the Board") which would modify various provisions of Regulation Z, 12 C.F.R. Part 226, relating to closed-end consumer mortgage loans (the "Proposal"). The Proposal was published in the Federal Register on August 26, 2009. The Board also proposed a modification of the provisions of Regulation Z relating to open-end credit, upon which we are commenting separately.

Citigroup appreciates the opportunity to provide the Board with comments on the Proposal. Although we understand the Board's desire to simplify consumer disclosures while making them more meaningful to the consumer, we suggest that the Board reconsider certain of its proposals, or appropriately scale them back to avoid unintended and undesirable marketplace consequences.

Overview of Proposal. The Proposal would apply to all closed-end credit transactions under the Truth-in-Lending Act ("TILA") and Regulation Z that are secured by a consumer's real property or a dwelling; it would not be limited to credit secured by the consumer's *principal* dwelling. The Proposal contains new requirements and changes to the format of disclosures provided at application ("Application Disclosures") and would make revisions to the disclosures that are provided within three days of application ("Early Disclosures"). It would also require creditors to provide final disclosures ("Final Disclosures") that the consumer must receive at least three business days prior to loan consummation.

In some cases, a creditor would be required to provide corrected disclosures ("Corrected Disclosures") if amounts on the Final Disclosures change prior to consummation. The Proposal provides two alternative rules that would govern the instances when Corrected Disclosures would be required. Alternative 1 would require Corrected Disclosures if any terms change after the Final Disclosures are provided. Alternative 2 would only require Corrected Disclosures if the APR set forth in the Final Disclosures changes up or down by more than a stated tolerance level, or if an adjustable-rate feature is added to the loan.

The new rule would make significant changes in the computation of the finance charge and APR, by moving to an "All-Inclusive APR" that would include many of the finance charges that are presently excluded in the APR computation.

The Proposal would also require changes in the timing, content and types of notices provided after consummation, and would contain limits on originator compensation for all closed-end mortgages. For example, a loan originator would not be able to receive compensation that is based on a loan's "terms and conditions." In addition, a loan originator would not be permitted to "steer" consumers to transactions that are "not in the consumer's interest" in order to increase the loan originator's compensation paid by the creditor.

Highlights of our Comments. In the "Discussion" section below, we provide detailed comments on the various provisions in the Proposal. In summary, we believe that:

- ***The new rules should not be applicable to mortgage loans secured by vacant land.***

- ***Various modifications should be made to the format and content of Application Disclosures, and a creditor should be allowed to provide them "at or before" application.***

- ***Where a loan is sourced by a mortgage broker, the mortgage broker should be responsible for ensuring that Application Disclosures are provided.***

- ***Eliminating most of the traditional finance charge exclusions when computing the APR will have extremely negative effects on consumers and creditors. In particular, we are concerned that it will limit the availability of credit for both prime and non-prime consumers because it will cause many more loans to exceed the APR and/or "points and fees" thresholds of HOEPA and state high-cost loan laws.***

- ***Various modifications should be made to the rules relating to format and content of Early Disclosures, Final Disclosures and Corrected Disclosures.***

- ***Estimates should be permitted on Final Disclosures and creditors should be able to use the HUD-1 Form provided at consummation to satisfy the requirement to provide the itemization of amount financed. Alternatively, the Board should require*** *settlement agents to provide the final HUD-1 Form eight business days prior to consummation.*

- *In determining when Corrected Disclosures are required, Alternative 2 is highly preferable to Alternative 1 from both a creditor and a consumer standpoint.*

- *An exception should be provided to the proposed change in the timing of ARM adjustment notices for existing ARM loans with "look-back" periods shorter than 45 days.*

- *A creditor should continue to have the option to provide translated disclosures; it should not be required to do so.*

- *The prohibition that a loan originator's compensation may not be "based on the loan's terms and conditions" should be modified to allow payments to loan originators that are based on a fixed percentage of the loan amount, or that are based on percentages that decrease as the loan amount or loan-to-value ratio increases.*

- *Mortgage brokers should be permitted to receive compensation for placing a loan from both the creditor and the consumer in the same transaction, if the mortgage broker's <u>total</u> compensation is "reasonable." We provide guidance as to the amounts that should be considered "reasonable."*

- *Similarly, transactions where a mortgage broker's total compensation does not exceed a "reasonable" amount should not be subject to the anti-steering rule.*

- *Due to the significant systems, operational and procedural modifications that will be required, creditors will require no less than eighteen months to implement final rules.*

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Discussion

1. Scope.

We support applying the new disclosure rules to all consumer loans secured by real property but do not believe it should apply to loans secured by vacant land.

The rates and terms of loans secured by vacant land more closely resemble unsecured loans than traditional mortgage loans. For example, loans secured by vacant land are more likely to have relatively short loan terms and balloon features. In addition, loans secured by vacant land tend to be niche products that are not originated or serviced using traditional mortgage systems. Subjecting these loans to rules that were intended for traditional mortgage loans would be inapposite, and could result in creditors ceasing to make these loans available if significant systems changes would be required to service them. We therefore suggest that creditors be given the option of providing disclosures on loans secured by vacant land under either the general closed-end credit rules, which apply to loans that they more closely resemble, or the rules under the Proposal that are applicable to closed end loans secured by a dwelling.

If disclosures are made for a loan secured by vacant land under the rules applicable to dwelling-secured loans, exemptions or revisions to certain disclosures are required. Since rates for loans secured by vacant land are significantly different from rates for conforming dwelling-secured loans, the former should not be subject to the requirements in Sections 226.38(b)(2) and (b)(3) that would require the loan's APR to be compared to the APOR. There is already a similar exemption for construction loans and bridge loans in Section 226.38(b)(5), presumably because the rates on these loans are not comparable to rates on conforming loans.

In addition, creditors should be permitted to revise the security interest disclosure required by Section 226.38(f)(2) for loans secured by vacant land to delete references in that disclosure to the possible loss of "the home", since there is no home on vacant land.

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<u>2. Application Disclosures</u>.

<u>a. Key Questions to Ask About Your Mortgage</u>.

We suggest a number of revisions to the questions and answers on the Application Disclosures to improve their accuracy and make them consistent with the information provided in the adjustable rate program disclosures and the Early Disclosures and Final Disclosures that are subsequently provided.

<u>Question 1</u>. The answer to this question indicates that the interest rate on ARMs can go up or down "after a short period." However, this statement is not always accurate, depending upon the particular ARM product. An ARM whose rate adjusts after one month, for example, will adjust more frequently (and clearly has more risk) than a hybrid ARM where the initial rate will not change for 10 years. We suggest that the disclosure be revised to delete the language shown in brackets and add the language that is underlined in the following sentence: "If you have an adjustable rate mortgage (ARM), your interest rate can go up or down [after a short period]. This means that your monthly payment could increase. <u>On some ARMS your initial rate and payment may be in effect for only a short period.</u>"

<u>Question 2</u>. The answer to question 2 indicates that a mortgage loan payment may increase because "property taxes or insurance premiums increase." However, the consumer's property taxes or insurance premiums may increase regardless of what mortgage loan the consumer chooses or whether the consumer has a mortgage at all. We suggest replacing the current sentence relating to taxes and insurance with the following sentence: "Your payments for property taxes or insurance premiums could increase."

<u>Question 3</u>. The language in Question 3 ("Will my monthly payments reduce my loan balance?") is replaced with different language in subsequent disclosures ("Will any of my monthly payments be interest-only?"). We suggest that the language in Question 3 reflect the same language as used on subsequent disclosures. Additionally, although the portion of each payment allocated to principal has an effect on the consumer's equity, decreases in the market value of the home may have an even greater effect. We suggest adding the underlined language to the last sentence of the answer: "As a result, if you have this type of loan, you may not build any equity in your home <u>even if your home does not decrease in value.</u>"

<u>Question 4.</u> For the same reason discussed above under question 3, we suggest adding the underlined language to the last sentence of the answer: "This could cause you to lose equity in your home over time <u>even if your home does not decrease in value</u>."

<u>Question 7.</u> The language in Question 7 ("Will I have to document my employment, income and assets to get this loan?") is replaced with a different sentence in subsequent disclosures ("Will my loan have a higher rate or fees because I did not document my employment, income or other assets?"). We suggest that the language in Question 7 use the same language that is used in subsequent disclosures.

b. Fixed vs. Adjustable Rate Mortgages.

The column of the form describing ARMs contains the following sentence: "However, both the rate and payment can increase very quickly." This statement is not accurate for hybrid ARMs that have many years until the first adjustment. We recommend revising this sentence to add the underlined language: "However, on some ARMs both the rate and payment may increase very quickly."

Subsequent disclosures distinguish between fixed rate loans and step rate loans and have additional requirements for fixed rate balloon loans. However, this disclosure appears to tell the consumer that if the rate is fixed then payments will stay the same for the life of the loan, which is inaccurate. We suggest adding the underlined language to the first sentence of the first paragraph: "A traditional fixed rate mortgage with equal monthly payments throughout the life of the loan is a safe choice for many borrowers."

We further suggest that description in the Fixed Rate Mortgages column be revised to address potential risks of certain fixed rate mortgages by adding the underlined language as follows: "With a fixed rate mortgage, the interest rate and monthly payment typically stay the same for the entire loan term. However, the interest rate and monthly payment often are higher than the initial rate and payment on an ARM."

c. Adjustable Rate Loan Program Disclosures

ARMs Where the Initial Rate is Not Determined Using the Index or Formula that Applies to Subsequent Rate Adjustments. Certain ARM programs do not set the initial interest rate using the index or formula that applies to subsequent rate adjustments. In these cases, at the time it provides Application Disclosures, the creditor will not be able to tell the consumer whether the initial rate is equal to, higher than or lower than the fully indexed rate.

Borrowers are frequently offered choices that will affect the initial rate on their loan – for example, they can pay discount points to obtain a lower initial rate, or take a higher initial rate in exchange for a credit towards closing costs. Under the standard FNMA, FHLMC, FHA and VA adjustable-rate mortgage programs, the borrower's choice of the initial rates and the points paid (or credit received) for that initial rate does not usually decrease or increase the margin that will be used for subsequent rate adjustments and therefore does not affect the fully-indexed rate. Therefore the borrower is often able to choose different initial rates that may be lower than, equal to, or higher than the fully-indexed rate. At the time it provides Application Disclosures, the creditor will not know what choice the borrower will make. Even if the borrower chooses an initial rate that appears to be a discounted rate at the time of application, that rate may equal or exceed the fully-indexed rate at the time of consummation if the index declines.

For loan programs where the initial rate is not determined using the index or formula that applies to subsequent rate adjustments, instead of disclosing that the initial rate "is discounted", creditors should be permitted to disclose that the initial rate "may be discounted"…. even if there is a possibility that the consumer may choose an initial rate that is not discounted.

Optional Prepayment Penalties. The proposed ARM disclosure must specify whether or not the ARM program requires a prepayment penalty. In some cases, a prepayment penalty may be optional – for example, a borrower may be offered the choice of accepting a prepayment penalty in exchange for a lower rate or lower points. In these cases, the ARM disclosure should contain an explanation of the choice that is offered to the borrower, to assist the borrower in making an informed decision.

Other Loan Programs Presenting Risks. In addition to requiring additional disclosures regarding "risk features" such as adjustable rates, we believe that consumers would benefit from receiving disclosures on fixed rate loan programs that have other risk features – specifically, those risk features that have been identified in the "Key Questions to Ask About Your Mortgage" disclosure discussed above. This would include features such as step rates or step payments, negative amortization, prepayment penalties, balloon payments, and higher pricing applicable to "no documentation" or "low documentation" loans. In many cases creditors and mortgage brokers are already required to disclose these risk features under guidelines applicable to "nontraditional mortgage products" adopted by federal and/or state regulators ("Nontraditional Mortgage Guidance").[1]

d. Timing of Application Disclosures.

Section 226.19(d)(1) retains the current language that the adjustable rate loan program disclosures and other disclosures be provided "at the time an application form is provided or before the consumer pays a non-refundable fee." In light of the specific timing rules provided for electronic disclosures and for applications made by telephone or through an intermediary, we suggest that the Board clarify this general rule by providing that these disclosures may be made "at or before application" or before the consumer pays a non-refundable fee. This would provide institutions with additional flexibility and would eliminate any contentions relating to the time when an "application" is made, especially if it involves a multi-step process.

e. Application Disclosures for Loans Sourced by Mortgage Brokers.

Section 226.19(d)(3) provides that when an application is submitted through an intermediary, such as a mortgage broker, the creditor satisfies the timing requirement by delivering or mailing application disclosures to the consumer within three business days after receiving the application from the broker.

Although we generally support this rule, we note that it could result in a delay in the consumer's receipt of disclosures, since nothing in either RESPA or TILA requires a broker to promptly submit an application to a creditor. As a result, there may be a considerable gap in time between when the consumer applies to a mortgage broker and when the consumer eventually receives the disclosures from the creditor. We therefore believe that a mortgage broker who sources a loan should be responsible for ensuring that the Application Disclosures are provided at or before application or collection of a nonrefundable fee, whichever is earlier. The Board should also provide that a creditor would not be liable for a broker's failure to provide the

[1] See, example, OCC Bulletin 2006-41 (October 4, 2006) entitled "Guidance on Nontraditional Mortgage Product Risks".

required disclosures (although, if the creditor has actual knowledge that the disclosures were not provided, it would be responsible for providing them to the consumer within three days after it receives the consumer's application from the broker).

We believe the Board should adopt this rule since mortgage brokers are in the best position to provide Application Disclosures because they are the first interface with the consumer in the mortgage application process. As the Board acknowledges, it is critical that consumers receive disclosures early in the process so that they can understand the risks and costs associated with various types of mortgage products. Although the consumer may not be charged a fee other than a credit report fee until the Early Disclosures are received, it is likely that the consumer will have made a product decision at the time the application was submitted to the broker. Furthermore, it should not be burdensome for brokers to provide application disclosures since they are not transaction-specific and may be preprinted.

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3. All-Inclusive APR and Elimination of Current Finance Charge Exclusions.

The Board believes that reversal of many existing exclusions from the finance charge is necessary because consumers typically assume that the APR includes *all* fees and charges payable in connection with a mortgage loan. Consequently, the Proposal would reverse the present exclusion from the finance charge for many of these fees and charges, causing these fees to be included in computing an All-Inclusive APR.

Existing exclusions that would be reversed include charges for certain settlement agents' fees, fees for title examination, title insurance and property survey, document preparation fees, notary and credit report fees, state recording fees and mortgage taxes, property appraisal and inspection fees including fees relating to pest inspections and flood hazard determinations, and amounts required to be paid into escrow accounts, even if such amounts would not otherwise be included in the finance charge.

The finance charge would continue to exclude: (i) fees or charges paid in comparable cash transactions; (ii) late fees and similar default or delinquency charges; (iii) seller's points; and (iv) premiums for property damage and property liability insurance.

Although we are in favor of any measures that would improve a consumer's understanding of the cost of credit, we are extremely concerned that eliminating the traditional finance charge exclusions, especially the exclusion for third party fees, will have a number of extremely negative effects on both creditors and consumers.

a. Diminished Credit Availability Since More Loans Will Trigger Points & Fees or APR Thresholds for HOEPA, Higher-Priced Mortgage Loans and State High-Cost Loan Laws.

First, and most importantly, we believe the new rule will diminish the availability of credit, especially for certain segments of the consumer population. As the Board is aware, inclusion of fees and charges presently excluded from the APR can result in more loans qualifying as: (i) high-cost mortgage loans falling within the protective provisions of the Home Ownership Equity Protection Act ("HOEPA Loans") that are covered by Section 226.32 of Regulation Z[2]; (ii) "higher priced mortgage loans" that are covered by Section 226.35 of Regulation Z[3] ("Higher-Priced Mortgage Loans"); and/or (iii) loans falling under state anti-

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[2] HOEPA Loans are defined in Section 103(aa) of TILA as closed-end home equity loans, excluding home purchase and reverse mortgage loans, but including refinances of purchase-money loans, where, as of the date of this letter: (i) the APR at consummation exceeds 8% for first-lien loans or 10% for subordinate lien loans over the yield on Treasury securities having a comparable period of maturity; or (ii) total points and fees payable at or before closing exceed the greater of 8% of the loan amount or a fixed dollar amount that adjusts annually, which was $583 for 2009. HOEPA Loans are subject to the additional disclosure requirements and prohibitions set forth in Section 129 of TILA and Section 226.32 of Regulation Z.

[3] Higher-Priced Mortgage Loans are defined as consumer credit transactions secured by the consumer's principal dwelling (except for short-term construction or bridge loans, reverse mortgage loans, and home-equity lines of credit), where the APR exceeds the "average prime offer rate" for a comparable transaction by 1.5% or more (for first liens) or 3.5% or more (for second liens). Higher-Priced Mortgage Loans are subject to the additional disclosures and prohibitions set forth in Section 226.35 of Regulation Z.

predatory lending laws for high-cost loans ("High-Cost Loan Laws") that use the APR or "points and fees" as a coverage test.

Because HOEPA loans and loans subject to state High-Cost Loan Laws contain strict loan term limitations and are generally not saleable in the secondary market, many lenders do not offer these loans. The Board points out that only three states/districts have High-Cost Loan Laws with APR thresholds lower than HOEPA's APR threshold –Illinois, the District of Columbia and Maryland. The Board therefore estimates that the Proposal would cause only a minimal number of loans in these areas that are not already covered by HOEPA to trigger state High-Cost Loan Laws.[4] We question the assumptions used by the Board to determine what appears to be a relatively minimal impact. Assuming a loan amount of $200,000 and loans with 30 year terms (as the Board did) does not capture a large segment of the mortgage market, particularly those with low to moderate incomes or the subprime market.

For example, our subprime lending business frequently makes Higher-Priced Mortgage Loans at rates that compensate it for the additional credit risk it undertakes when lending to customers with compromised or incomplete credit profiles. These loans are made at rates lower than those that would trigger HOEPA or state High-Cost Loan Laws. We project that the Proposal would cause anywhere from 30-50% of our subprime lending business to fall within the rates that trigger those laws, depending on geography and loan sizes. There is no secondary market for these loans, and we would consider the risks of holding these loans for portfolio as unacceptable. We would therefore be forced to reduce the number of loans we make to consumers with compromised or incomplete credit profiles.

Furthermore, our analysis does not take into account the impact of state High-Cost Loan Laws that employ a "points and fees" test. Many states have High-Cost Loan Law thresholds lower than HOEPA's 8% points and fees threshold. In fact, we believe that the High-Cost Loan Laws of as many as *twenty* states could be triggered by the Proposal and this will impact credit availability for prime and non-prime customers. We have listed these states in Attachment 1, together with the points and fees threshold applicable in each.

Since many state High-Cost Loan Laws incorporating HOEPA requirements assumed that reasonable and customary fees for appraisals, credit reports, title searches, title insurance and document recording were excluded from the points and fees test, the thresholds under these laws were set significantly lower than the HOEPA threshold. Those states would have to modify their points and fees thresholds to prevent loans from being covered by their High-Cost Loan Law that were not intended to be covered. Even if states were able to enact such laws given today's competing political considerations, it could not be done overnight, and without an impact on their consumer populations until such laws are enacted.

b. Other Negative Impacts of Adopting an All-Inclusive APR.

Furthermore, we believe the new rule is likely to: (i) cause delays in closings if the Proposal does not increase currently-permissible finance charge tolerances; (ii) subject creditors

[4] Specifically, the Board estimates that the following percentages of loans in these areas would become subject to state High-Cost Loan Laws by virtue of the Proposal: 2.4% in the District of Columbia, 4% in Illinois and 0% in Maryland. 74 Fed. Reg. 43244 (August 26, 2009).

to TILA violations for finance charge inaccuracies caused by the inclusion of third party fees the creditor cannot control; and (iii) reduce the ability of consumers to shop for settlement services and hurt small providers, because creditors will need to require the use of specific settlement service providers to control third party fees, tending toward use of fewer, larger providers.

Finally, if the Board adopts an All-Inclusive APR for closed-end mortgages, we note that there will be an inconsistency between the APR for these products and other types of secured and unsecured credit covered by TILA and Regulation Z. The Board should consider the effect that this discrepancy will have on consumers' understanding of their credit disclosures.

We question the need for the new rule since consumers already receive a detailed disclosure of fees and charges well in advance of closing pursuant to the Real Estate Settlement Procedures Act ("RESPA") and Regulation X. As the Board is aware, fees and charges incidental to the cost of credit must be disclosed on a RESPA good faith estimate ("GFE") within three days of application. The recent changes to RESPA requirements[5] that take effect on January 1, 2010 now require a much firmer disclosure of these costs. If consumers are confused by the computation of the APR, we believe that the solution is to provide better synchronization of the format, content and timing requirements of RESPA with those of Regulation Z, not to further complicate Regulation Z disclosures.

c. Alternative Approaches to Limit the Negative Effects of Moving to an All-Inclusive APR.

We question the need for all All-Inclusive APR in light of the many significant negative effects it is likely to have. If the Board is determined to move to an All-Inclusive APR, we believe that should mitigate these negative effects by considering one or more of the following actions:

1. Retain the present exclusions from the computation of the finance charge, but include such fees in the computation of the All-Inclusive APR. This would resolve most of the problems that we point out, but would retain any presumed benefits to consumers of including these fees and charges in the APR.

2. Limit the amount of third party fees included in the finance charge to the maximum amount that the consumer would have paid for these services if the consumer had used the providers identified by the creditor or mortgage broker. This would be more consistent with the recent modifications to RESPA. [6]

Under RESPA, if a consumer uses the providers identified by the creditor or broker, the consumer will not pay more for these services than the amounts estimated on the GFE plus 10%. Our suggested alternative would cause the finance charge to more accurately reflect the true cost of credit, because under RESPA, the borrower will only pay more than the amount estimated on the GFE plus 10% if the borrower chooses settlement service providers

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[5] 73 Fed. Reg. 68204 (November 17, 2008).
[6] Specifically, the Board could provide that the amount included in the finance charge for third party settlement services, as shown in Blocks 3, 4, 5 and 7 of the GFE (after exclusion of services that would be provided in a comparable cash transaction), would be equal to the lesser of: (i) the actual costs of those services or (ii) the total amount estimated on the GFE for those services plus 10%.

other than the providers identified in the GFE by the mortgage broker or creditor. Borrowers should not be disincented to shop for providers, even if they are somewhat more expensive than those identified by the creditor, because those providers may provide services that the borrowers desire in exchange for slightly higher fees. Under the Proposal, creditors would have a strong incentive to attempt to control third party costs rather than allowing borrowers to shop for these services. This could result in the creditor choosing a small number of large providers rather than allowing the borrower to shop for settlement services.

A borrower's selection of a settlement service provider that is somewhat more expensive than the provider selected or identified by the creditor should not cause the loan to be treated as a HOEPA loan, Higher-Cost Mortgage Loan or state High-Cost Loan since it would be the borrower's choice, rather than the creditor's pricing and requirements, that cause the loan to exceed the thresholds provided for those loans. Adoption of a rule consistent with RESPA would not cause the borrower to fall within those requirements if the incremental charges are due to the borrower's choice of a slightly more expensive provider.

Finally, because the amount that would be included in the finance charge would not exceed the creditor's estimated amount plus 10%, the borrower's decision to select a somewhat more expensive provider would have a limited effect on the accuracy of the TILA disclosure, limiting the incidents when redisclosures – and a new waiting period – would be required.

<u>3. Define "points and fees" in Proposed Section 226.32(b)(1) to retain the current exclusions from points and fees (particularly those relating to third party fees) used to determine whether a loan is subject to HOEPA</u>[7]. We also recommend that these fees not be subtracted in the calculation of the "total loan amount" which is used to calculate the points and fees threshold.[8] We believe that this interpretation would be reasonable in light of the fact that the statutory definition of points and fees in Section 103(aa)(4) of TILA excludes third party charges if certain conditions are met. We point out, however, that adopting this measure is not a full solution to the problem that will be caused by having more loans fall within the proscriptions of state High-Cost Loan Laws. This is likely to have a negative effect on the availability of credit for certain segments of consumers unless and until states are able to act to increase their points and fees thresholds in response to the new Regulation Z rules.

<u>4. Adjust the average prime offer rates ("APORs") that determine whether a loan is subject to the loan restrictions for Higher-Cost Mortgage Loans under Section 226.35 of Regulation Z, to accurately reflect the additional fees and charges that are being included in the All-Inclusive APR.</u> Under the current rule, APORs are based on disclosure rules that exclude those fees and charges from the finance charge. If APORs are not adjusted, loans will be

[7] 23 C.F.R.§ 226.32.

[8] See Regulation Z, comment 32(a)(1)(ii)-1. HOEPA's 8% points and fees threshold is not calculated on the principal loan amount, but on the "total loan amount." The calculation of the total loan amount begins with the "amount financed" which, under Section 226.18(b)(3), is calculated by subtracting any prepaid finance charges from the principal loan amount. Thus, by including reasonable government and third party fees in the finance charge, not only are the amounts of the "points and fees" increased, but also the limit is decreased, because the total loan amount is being reduced by the same amount.

covered by rules relating to Higher-Cost Mortgage Loans that were not intended to be covered. Another reason that compels modification of APORs is the fact that APORs are used to establish the proper basis for the reporting of a loan as required by the Home Mortgage Disclosure Act. [9]

5. Increase finance charge tolerances in Regulation Z to take into account the increases in the APR that result from the reversal of the present exclusion for many fees, especially third party fees. This approach is logical because many of these costs are outside the creditor's control. Specifically, we recommend that the finance charge tolerance be increased to the dollar equivalent of the APR tolerance, which is .125% for first-lien fixed rate mortgages and .250% for first-lien ARMs. [10]

6. Retain certain exclusions from the finance charge, primarily with respect to third party costs. Specifically, exclusions should continue to apply for: (a) settlement agent charges where fees are for services not reasonably required to close the loan and are not required by the creditor; (b) credit insurance, if properly disclosed and where payment is not made by means of a single premium; (c) government recording fees and mortgage taxes; and (d) amounts included in escrow accounts, if they would not otherwise be finance charges. In addition, the Board should clarify that other specific charges are not finance charges under the revised finance charge definition. We offer the following specific comments with respect to exclusions and clarifications that would be appropriate:

i. Settlement Agent Charges. We are deeply concerned with the elimination of the settlement agent charges rule, Section 226.4(a) (2). While most settlement agents charge reasonable fees for services and provide services that are reasonably required to close the loan, in some cases settlement agents charge "junk fees" - fees that are either unreasonable in amount or that are for services that are not needed to close the loan and were not requested by either the creditor or the borrower. Neither RESPA nor TILA currently provide any protection against settlement agent junk fees, nor do they give the creditor any means to prevent such junk fees from being charged. The current rule recognizes that the inclusion of all settlement agent fees that are "incident to" the extension of credit would be too broad. While the current rule that includes fees where the creditor "requires the particular service" may be too narrow, we recommend that fees of settlement agents and the services that they arrange with other third parties not be included in the finance charge unless such services are reasonably required to close a loan or consist of other particular services that the creditor requires the settlement agent to provide.

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9 12 C.F.R. §203.4(a)(12)(ii).

10 For example, assume a 30-year loan of $250,000 at 6% interest rate with equal monthly payments where the disclosed finance charge accurately captures the interest paid over the life of the loan but fails to include $3,316.28 of prepaid finance charges. The creditor discloses an amount financed of $250,000 and an APR of 6%. In this example, the disclosed finance charge and amount financed are understated by $3,316.28 and the APR is understated by .125%. Consequently, the APR tolerance applicable to this loan would be that of a "regular transaction" – i.e., .125%. Because this loan is within APR tolerance, it would also be within the finance charge tolerance. Any greater understatement, however, would be a violation.

We also note that it is particularly important that charges of the settlement agent and other third parties hired by the settlement agent for such charges not be treated as finance charges to the extent that they exceed the amounts estimated on the GFE plus 10%.

Finally, we believe that the Board under its TILA Section 129 authority[11] should require a settlement agent to disclose to the creditor and to the consumer at least eight business days prior to consummation the final amount of the settlement agent's closing or settlement fee, which fee must include all of the settlement agent's services and all of the third parties hired by the settlement agent, other than services paid for and disclosed as part of the title insurance premium.

ii. State Recording Fees and Mortgage Taxes. We recommend that the exclusion of government recording fees be retained. Because these fees are established by governmental entities, the difference in these fees from one creditor's loan to another creditor's loan is trivial. Including such fees in the finance charge and APR will not enhance the consumer's ability to shop. Furthermore, the recording fees in some states are substantially higher than others. In higher cost states, including these fees may cause the loan to exceed HOEPA or state High-Cost Loan Law APR and/or points and fees thresholds.

iii. Payments into Escrow. The Board states that "Under the proposal, the following fees currently excluded would be included in the finance charge… amounts required to be paid into escrow or trustee accounts if the amounts would not otherwise be include in the finance charge." [12] Eliminating this exclusion will drastically distort disclosed APRs and finance charges and may easily cause loan to exceed HOEPA and state High-Cost Loan Law thresholds. The consumer will bear the cost of hazard and flood insurance and property taxes whether or not an escrow account is established. In fact, the consumer will often benefit from the establishment of an escrow account because it will help to ensure that the consumer will not suffer an uninsured loss or lose the home for non-payment of taxes. Additionally, RESPA provides comprehensive protections concerning the amount that the consumer may be required to initially deposit and maintain in an escrow account. We recommend that Proposed Section 226.4(g) be revised to provide that Section 226.4(c)(7)(v) (which states that amounts required to be paid into escrow or trustee accounts are excluded from the finance charge if such amounts would not otherwise be included in the finance charge) would continue to apply to closed-end transactions secured by real property or a dwelling.

iv. Charges Related to the Discharge or Subordination of Existing Liens. Creditors who make a new mortgage loan will generally require that any prior mortgage loan be paid off and discharged or subordinated. Creditors holding the existing lien may charge a service fee for the preparing and recording the documents necessary to discharge or subordinate the existing lien. The cost of recording may vary depending upon the length of the documents prepared by the prior creditor. Continued exclusion of these fees would not affect the ability of the consumer to compare loans from different creditors because the

[11] 15 U.S.C. § 1639(l).
[12] 74 Fed. Reg. 43247 (August 26, 2009).

prior creditor would normally charge the same fees regardless of which new creditor the consumer chooses. We recommend that these charges continue to be excluded from the finance charge.

v. Modification or Conversion Fees. Fees charged to modify a loan or to convert it to a fixed rate should continue to be excluded from the finance charge. At the time the loan is made the creditor cannot anticipate whether or not the consumer may modify or convert. The disclosures should continue to reflect the payments and fees which assume that the consumer will pay the loan in accordance with its stated terms.

vi. Required Property Completion or Repairs. Where an applicant is constructing a home or is purchasing a newly constructed home, the creditor needs to be sure that the property securing the loan has been fully and properly completed. Related costs of construction and repair should not be included in the finance charge. We do not believe that exclusion of these costs in the finance charge would be confusing to consumers or impair their ability to shop. Whether or not the consumer was seeking the loan, the consumer would want to complete the construction and would want to keep their property in good repair.

Including estimates of these types of costs would make it more difficult to focus on true loan costs. At the time the applicant applies for a loan the creditor would have no way to estimate construction costs and the creditor would typically not know that an existing home was in need of repair. Including costs of repair in the finance charge could discourage creditors from requiring needed repairs, which could result in exposing the consumer to potential health and safety issues and have negative effects on the neighborhood in which the property is located. As a practical matter, including the cost of new construction or repairs in the finance charge would in many cases prevent the loan from being made because the loan would then exceed the HOEPA and or state High-Cost Loan Law points and fees and/or APR thresholds.

vii. Payoff of Prior Liens or Debts. The payoff of an existing lien on the property should not be included in the finance charge. If it were, refinancing an existing loan would become virtually impossible. Other liens, such as tax liens, represent amounts that the consumer already owes and are not a new cost to the borrower. Similarly, a consumer may apply for a debt consolidation loan or be required to pay off debts at the time the loan is underwritten. Again, these are amounts that the consumer already owes. Treating them as finance charges would often make it impossible to make the loan under HOEPA and state High-Cost Loan Laws thresholds. It would make it more difficult for the consumer to understand the true costs of the loan. Also, the ability to refinance prior liens and debts often dramatically lowers costs to consumers. Without the ability to refinance, the consumer may not be able to repay these debts, potentially leading to the loss of the home.

viii. Premiums and Rebates; Preclosing Credits. Proposed Comment 38(c)(5)(iii)-2 states that if a creditor is legally obligated by the terms of the credit obligation to charge a reduced interest rate or reduced costs as a consequence of the premium, the disclosures should reflect those credit terms. Where the premium will be paid after the loan is consummated, it should be relatively clear whether the premium is part of the legal obligation or not. We agree with the proposed comment's treatment of premiums and rebates that will be paid after the loan is consummated. However, creditors often provide marketing credits at or before consummation to reduce closing costs and these credits are not documented in the note or other loan documentation. Consequently, we recommend a clarification that if a creditor provides a premium, rebate or other credit at or before consummation the creditor may choose to reduce the prepaid finance charge by the amount of that credit.

ix. Clarification of Exclusion for Fees Charged in Comparable Cash Transactions. Proposed Comment 4(g)-3 clarifies that charges that would be payable in a comparable cash transaction, such as property taxes and fees and taxes imposed to record the deed, are not finance charges. We recommend that Proposed Comment 4(g)-3 be expanded to list additional charges that should be excluded under this rule because the borrower would pay them even if no loan was made as part of the property purchase transaction transaction. These charges include:

- Fees for preparing the deed and other documents related to the purchase of the property (note that the Proposal would include such charges)[13]
- Real estate broker's fees
- Fees of the borrower's attorney
- Escrow agent charges
- Fees for services required under the purchase and sale agreement with the seller.

We note that it would be particularly helpful if the Board and HUD would coordinate so that such charges were listed in a block on the GFE separate from the charges that are included in the finance charge.

x. Seller's Points; Relocation Benefits. Points and other fees paid by the seller of the property should continue to be excluded from the finance charge, on the basis that the borrower does not pay these charges. We further recommend that the final regulation clarify that amounts paid by employers on a relocation loan should also be excluded.

xi. Servicing Fees Charged for Optional Services. Interest and fees such as mortgage insurance that are part of the original loan agreement but which are charged after the loan is consummated are included in the finance charge. However, if after consummation a servicer provides services to the consumer that are not required by the original loan agreement, the cost of such services should continue to be excluded from the finance charge.

xii. Voluntary and Optional Fees Incident to the Extension of Credit. The Board notes that it proposes to include voluntary and optional fees in the finance charge because excluding voluntary fees requires a factual determination and that "charges may be imposed by the creditor even if the services for which the fee is imposed are not

[13] 74 Fed. Reg. 43247 (August 26, 2009).

specifically required by the creditor."[14] However, a creditor is not actually imposing a fee if the service is truly voluntary and optional. The Board notes that credit insurance is the primary optional service of which it is aware; this appears to indicate that significant problems have not arisen with other types of services and therefore that further action is not necessary.

To the extent that the Board has determined that there are significant problems with other voluntary and optional services, it would be preferable to address those issues through disclosures and/or, where the service is ongoing, to require that the borrower be permitted to cancel the service. Furthermore, the factual determination of whether a service is "incident to the extension of credit" is at least as difficult as determining whether it is optional or voluntary. Because creditors may sell other products and services in addition to the loan, we are concerned that the costs of services that are only tangentially related to the loan or that the creditor might not know about at all would be included in the finance charge.[15]

If the Board determines that fees for voluntary or optional services should be treated as finance charges - or determines that they should not be treated as finance charges if disclosures of the optional nature of the service are provided - the Board should provide further guidance on the circumstances when a voluntary or optional fee is considered incident to the extension of credit. In this event we recommend that fees for voluntary or optional services would only be considered incident to the extension of credit if: (1) the creditor offers that service or provided a referral to the third party that offers the service; (2) the service relates to the loan, such as credit insurance on the loan or an automatic payment service, rather than a service that the borrower could have used even if there had been no loan; and (3) the borrower contracts for the service at or before loan consummation.

xiii. Voluntary Credit Insurance Premiums and Voluntary Debt Cancellation and Debt Suspension Fees. Under the Proposal, premiums for voluntary credit insurance fees for voluntary debt cancellation and debt suspension fees which may be excluded from the finance charge on other types of loans may not be excluded from the finance charge for closed-end mortgage transactions. As a practical matter, including these premiums and fees in the finance charge will make it very difficult to continue to offer these products. In addition, including these premiums as finance charges will require creditors to offer such products early in the loan application and approval process which could create the unintended consequence of consumers not fully understanding that the products are optional despite the enhanced disclosures proposed by the Board. Consumers often benefit from these products, and we believe that the Board can provide additional protections to consumers without causing these products not to be offered.

[14] 74 Fed. Reg. 43246 (August 26, 2009).

[15] For example, assume a bank making a mortgage loan cross-sells the borrower a checking account that has a monthly fee. Does the fact that the cross-sale opportunity arose out of the mortgage application make the checking account charge a voluntary charge incident to the extension of credit? What if a borrower, prior to closing on a new loan, arranges with his bank (which is not the creditor) for automatic payments on the mortgage loan and the bank charges a fee for that service?

We recommend that the fee premiums for these products continue to be excludible provided that: (1) the enhanced disclosures required by the Proposal (Model Clauses H-17(c) and H-17(d)) are provided with the additional changes in content that we recommend in Section 5 below; (2) the premiums or fees may not be charged as a single premium or fee at or before closing but are charged with the periodic payment; and (3) the consumer may cancel coverage and the obligation to make any further payment of premiums or fees at any time.

xiv. Hazard and Flood Insurance. We agree that hazard insurance premiums should be excluded from the finance charge because a prudent borrower would insure the home whether or not it was mortgaged, and the borrower may choose the insurer. Including the cost of hazard insurance in the finance charge and APR would make comparison of loan costs between different creditors more difficult, because different creditors may use different estimates of the cost of the insurance. However, the actual costs will reflect the borrower's choices. Flood insurance should be treated as a form of hazard insurance. It would be poor public policy to incent creditors not to require hazard or flood insurance so that they could lower the disclosed APR at the cost of leaving borrowers exposed to floods and other hazards.

xv. Inclusion of Affiliate in Required Disclosures for Insurance Available From or Through the Creditor; Affiliate Should be Authorized to Make Disclosure on Behalf of Creditor. We do not object to treating insurance available though an affiliate of the creditor as being available from or through the creditor, thereby triggering the requirement that the premium and term (if less than the term of the obligation) be disclosed. We recommend that Comment 4(d)-8 be further clarified to state that the disclosure may be made by the affiliate. We also recommend that Proposed Section 226.38(j)(4), which requires a disclosure that the consumer may obtain property insurance from any insurer that is acceptable to the creditor, also refer to the disclosures required to exclude property insurance available from or through the creditor from the finance charge under Section 226.4(d)(2), if applicable.

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4. Format of Disclosures.

The Proposal contains a number of formatting changes that would apply to Early Disclosures, Final Disclosures and Corrected Disclosures. We recognize that the proposed format requirements, including the requirement to tailor the disclosures to the specific features of the requested loan, will improve the ability of consumers to read and understand the disclosures. However the format requirements are complex, increasing the risk that a creditor may make an inadvertent error. We offer the following recommendations in connection with the proposed format requirements:

a. APR to APOR Graph.

In Section 5 of this letter, we provide comments on the content of the APR to APOR graph that the Proposal would require to be included in the disclosures. If the Board is determined to require that disclosures include comparative loan information, we note that providing APOR information is beyond the capability of the origination systems of most creditors. We believe that creditors should be permitted to provide the information in a tabular format, since providing the information in the form of a graph will be unnecessarily costly and burdensome.

b. Additional Examples.

To help creditors deal with the complex formatting requirements, additional disclosure examples should be provided which cover, at a minimum, the structure of all of the standard mortgage programs of FNMA, FHLMC, the FHA and the VA.

c. Text Printed on Shaded Background.

Text should not be printed on a shaded background. For many consumers, such text is more difficult to read. Additionally, both consumers and creditors may need to make photocopies of the disclosures or fax them, which could render the text printed on a shaded background illegible.

d. Format Errors Should Not Give Rise to Statutory Damages.

Failure to comply with format requirements should not give rise to statutory damages.

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5. Content of Disclosures.

The Proposal contains a number of changes that would apply to the content of Early Disclosures, Final Disclosures and Corrected Disclosures. Our comments on these provisions are as follows:

a. Address.

The borrower's mailing address may be different than the address of the property securing the loan. Clarify that both addresses may be shown.

b. Loan Officer Unique ID.

Many loans will involve more than one individual who is a loan originator. Proposed Comment 38(g)(2)-1 would require that where there are multiple loan originators, the numbers of all originators have to be listed. However, a loan might have five or six individuals who are registered as loan originators touch the file. Consequently, for retail loans, the creditor should only be required to list one loan officer and should be permitted to use any reasonable method of determining which loan originator it lists. Where the loan has been handled by loan originators at both a mortgage broker and the creditor, then at least one from each should be identified.

c. Rate Reduction Mortgages vs. Step Rate Mortgages.

"Rate reduction mortgage products", where the loan's rate will decrease by specified amounts at specified times if the loan is paid as agreed, should not be disclosed as step rate mortgages. Consequently, the definition of "step rate mortgages" in Proposed Section 226.38(a)(3)(i)(B) should be modified to cover only loans "where the interest rate may increase after consummation." This modified definition would be consistent with Section 226.38(a)(3)(ii)(A), which requires a step rate disclosure if rates will "gradually increase."

d. Circumstances of Penalty on HOEPA and Higher-Priced Mortgage Loans.

Model language should be provided on how to disclose the limitations on the assessment of prepayment penalties under Sections 226.32 and 226.35.

e. Two Stage Penalty Calculation.

In situations where the use of the two stage penalty calculation is permissible, creditors should be given the option of disclosing the actual maximum prepayment penalty.

f. Accepting Prepayment on FHA Loans Mid-Month and Charging Interest Through the Next Installment Due Date is Not a Penalty.

Proposed Comment 18(k)(1)-1 lists as an example of a prepayment penalty charges determined by treating the loan balance as outstanding for a period after prepayment in full and applying the interest rate to such balance. This Comment appears to be inconsistent with

Comments 36(c)(1)(i)-1 & 2 and the Board's explanation of these comments on the prompt crediting of payments requirement.[16] Those comments and the explanation noted that: (1) many loans require calculation of interest based on an amortization schedule where payments are deemed credited as of the due date, whether the payment was actually received prior to the scheduled due date or within any grace period; (2) the rule requiring crediting of payments as of the date of receipt was not intended to prohibit or alter the use of the monthly accrual amortization method; and (3) the crediting the payment as of the payment due date was not considered to be the imposition of additional interest.

Under FHA rules,[17] if a borrower tenders payment on an FHA loan made on or after August 2, 1985 on a day other than the due date, the mortgagee may either: (1) refuse to accept the prepayment until the next installment due date (the first of the next month); or (2) require the payment of interest to the next installment due date if the borrower receives a disclosure in a form approved by HUD. HUD issued, withdrew and then reissued an FAQ stating that the GFE's disclosure of whether a loan has a prepayment penalty should indicate that an FHA loans does not have a prepayment penalty. The Board's Division of Consumer Affairs clarified that it did not consider such FHA loans to have a prepayment penalty for any purpose under Regulation Z. This action was welcomed because it clarified that creditors did not violate Regulation Z by failing to disclose a prepayment penalty and that FHA loans would not violate the Higher-Priced Mortgage Loan rule restrictions on prepayment penalties.

We recommend that the Board include a clarification in Proposed Comment 18(k)(1)-1 that, for FHA loans and other loans on the monthly accrual amortization method, crediting a prepayment as of the next installment due date is not considered to be additional interest after prepayment in full and is not a penalty. However, if the Board decides that such situations should be considered prepayment penalties, then we request that the Board also clearly note that this change is prospective.

g. APR to APOR Graph.

(i) General requirement. We question the value of providing the consumer with a comparison of the APR on his or her loan to the APOR and Higher-Priced Mortgage Loan APR threshold without providing an explanation of the factors affecting the APR. Although we do believe that it is useful for a customer to understand how his or her credit profile compares to the general population, there is already a mechanism in process to explain this to consumers under the Fact Act, in the risk-based pricing notice that has just been finalized by the Board[18]. Second, a consumer's credit profile is only one of the factors – in addition to factors such as loan to value ratio, occupancy status (whether the property is borrower's primary residence, second home or an investment property) and loan amount – that affects the cost of credit. If the Board believes that consumers would benefit by an explanation of

[16] See 73 Fed. Reg. 44571 (August 26, 2009).
[17] See 24 C.F.R 203.558(c).
[18] See Joint Press Release issued on December 22, 2009 by the Federal Reserve Board and the Federal Trade Commission.

the factors that affect the cost of credit, the risk-based pricing disclosure –and not the TILA disclosure - should list these factors.

As we mention in Section 4 above, providing a list of factors in a tabular format would be much simpler for a creditor to provide than an APOR, in addition to making more sense to a consumer. Furthermore, the scale as presently shown reflects the triggers for Higher-Priced Mortgage Loans under 226.35, not the triggers for high-cost HOEPA loans. However, the label it uses for those higher-priced loans is "High-Cost Zone", which is closer to the language in HOEPA than the language that defines Higher-Priced Mortgage Loans. Since this could create confusion and lead a consumer to think that it reflects HOEPA rates (which are higher than Higher-Priced Mortgage Loan rates), we suggest that the name of the zone where they appear should be changed to "Higher-Priced Mortgage Loan Zone" to be consistent with the terminology in Section 226.35.

<u>(ii) Date of APOR</u>. Paragraph (b)(2) of Proposed Section 226.38 indicates that the disclosed APOR should be for the week in which the disclosure required under that section is "provided" while paragraph (b)(3) says that it should be the APOR as of the date the disclosure is "produced." Because there may be a delay between when a disclosure is produced and when it is provided to the consumer (for example, when a disclosure is produced but mailed the next business day) we request a clarification that the creditor may use the APOR in effect either on the date the disclosure is produced or provided. This would be very helpful because at the time the disclosure is produced the creditor may or may not know exactly when the disclosure will be provided.

Additionally both Paragraphs (b)(2) and (b)(3) of Proposed Section 226.38 refer to the Higher-Priced Mortgage Loan threshold as defined in Section 226.35(a)(1). That threshold is determined using the "rate set date." We recommend that Proposed Comment 38(b)(3)-1 be revised to: (i) indicate that the APOR may be determined as of either the date the disclosure is produced or the date the disclosure is provided; and (2) delete the reference to Comment 35(a)(2)-3 because that comment states that the APOR is determined by the rate set date rather than the date the disclosure is produced or provided.

<u>(iii) Comparison for Loans Not Secured by Owner-Occupied Properties, Loans Above FNMA, FHLMC Loan Limits and Loans with Loan-To-Value Ratios above 80%</u>. The Board recognizes that the APOR is computed for owner occupied conforming loans with loan-to-value ratios of 80% or less. As a result, the APOR is substantially understated for loans that are not secured by owner-occupied properties, for loan amounts above the FNMA/FHLMC loan limit and for loans with LTVs requiring mortgage insurance. We believe that the Board should consider publishing separate APORs for these types of loans so that consumers will see an accurate comparison.

Alternatively, the Board could revise the language used to explain the comparison by adding the <u>underlined</u> language and deleting the language in [brackets]: "How does this loan compare? For the week of *(date)* the average APR on similar {but <u>smaller</u>} conforming loans offered to applicants with excellent credit <u>and substantial equity in their homes</u> was ___%. Today an APR of ___% or above is considered higher-priced and is usually [available] charged to applicants with poor credit history or whose loan amounts are very large or are more than 80% of their home's worth."

h. How Much Could I Save By Lowering My APR.

As the Board acknowledges, although this disclosure refers to a lowering of the applicant's APR by 1%, the proposed calculation would be based upon a reduction in the interest rate on the loan by 1%. It is also unclear why the model form has a blank for the amount of the reduction in the APR if 1% should always be used. We recommend that the disclosure be revised to state "How much could I save by lowering my interest rate? For this loan, a 1% reduction in the interest rate could save you an average of $ ______each month."

Alternatively, if the Board determines that it wishes to continue to reference APR in the disclosure, in addition to the calculation method contained in the Proposal the Board should also permit the savings to be calculated using the same methodology that is used to reduce payments to cure an APR violation.

We also note that the examples only address fully-amortizing loans with monthly payments. We request that the Board provide an example of how the disclosure is calculated for the balloon loan shown in Model Form H-19(D) and model language for loans that do not require monthly payments.

i. Escrow Payments; The Average Monthly Cost of Taxes and Insurance Should be Disclosed on First Liens Whether or Not an Escrow is Required.

Under the Proposal, if the creditor requires the establishment of an escrow account, then the escrow payments must be included in the Interest Rate and Payment Summary. The rationale for this requirement is that many consumers compare loans based on the monthly payment amount. However, while it makes sense for consumers to understand what their escrow payments will be, they also need to understand that they will need to set aside the same amount for taxes and insurance each month even if an escrow account is not established. Requiring that the average monthly amount of taxes and insurance be disclosed only on loans where an escrow account will be required may be misleading, particularly because it would facilitate an unscrupulous loan originator comparing its payments without escrow to the consumer's existing loan, or a competitor's new loan, that includes escrow.

In addition, as the Board's Higher-Priced Mortgage Loan rules recognize,[19] it is often to the consumer's benefit to have an escrow account – so loans where there is such an escrow should not be permitted to appear as less beneficial to the consumer. Consequently, we recommend that for all first lien loans the Interest Rate and Payment Summary should include the Estimated Tax and Insurance amount whether or not an escrow account is required.

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[19] 23 C.F.R. § 226.35(b)(3).

j. Disclosure When Some But Not All Items Escrowed.

When an escrow account is required, some items may be paid out of the escrow account while other items are paid directly by the consumer. However, the escrow language for loans that require escrow accounts in the "More Information About Your Payments" section of the TILA disclosure does not appear to take this possibility into consideration, although the GFE and HUD-1 do. We suggest revising the language by deleting the language in [brackets] and adding the language that is underlined as follows: "An escrow account is required on this loan.[for property taxes and insurance (such as homeowner's insurance).] Your escrow payment is an estimate and can change at any time. See your Good Faith Estimate or HUD-1 form for [more] details on what property taxes, insurance (such as homeowner's insurance) and other items will be paid from the escrow account and which items you must pay on your own.

k. Introductory Rate Notice; Discounted Initial Rate.

When the initial interest rate on an ARM loan is not set by using the same formula that will be used for rate adjustments, the creditor will not know at the time it prepares Early Disclosures whether the initial rate chosen by the borrower will be higher or lower than the fully indexed rate at the time of consummation. This is because the index value used to compute the fully indexed rate may increase or decrease between the time Early Disclosures are prepared and consummation.[20] We recommend a clarification to Comment 38(c)(2)(iii)-1 that the creditor should determine whether to provide the introductory rate notice on Early Disclosures, Final Disclosures or Corrected Disclosures based upon an estimate of the fully-indexed rate, using an index value no older than the look-back period as of the date the disclosure is mailed or delivered to the consumer.

l. Key Questions About Risk; Payment Increases.

We request that Proposed Section 226.38(d)(1)(ii) be clarified to provide that possibility of an increase in the escrow payment does not trigger a disclosure that the payments may increase. The consumer bears the risk of an increase in the cost of property taxes and insurance whether or not the consumer obtains a loan or has an escrow account established.

m. Disclosures Requirements When Loan Assumed by "Subsequent Consumer."

The Proposal revises the definition of residential mortgage transaction in comment 2(a)(24)-1 to remove the language stating that the definition is relevant to Section 226.20(b)'s disclosure requirements for assumptions. The Proposal also eliminates Comment 20(b)-2, which states that the creditor should look to the assuming consumer to determine if the assumption involves a residential mortgage transaction (in other words, new disclosures would only be required if the consumer assuming the loan would be acquiring the home as his or her principal dwelling). Section 226.20(b) continues to indicate, however, that an assumption requires new

[20] For example, assume that at the time the Early Disclosure is prepared the initial interest rate is 6.00% and, based upon an index value of 3.00% and the margin of 2.75%, the fully-indexed rate is 5.75%. At consummation the initial interest rate is 6.00% and, based upon an updated index value of 3.375% and the margin of 2.75%, the fully-indexed rate is 6.125%.

disclosures if the assumption is by a "subsequent consumer." Because there is no definition of subsequent consumer or a reference to a residential mortgage transaction, the Proposal is not clear when new disclosures would be required.

We recommend that new disclosures be required only if a consumer who was not obligated on the original loan and was not already an owner of the property purchases an interest in the property. Frequently there are transfers of an interest in the property where the Garn-St. Germain Act prohibits acceleration of the loan under a due on sale provision.[21] Typically, in these situations one of the original borrowers will ask to be released from personal liability on the loan, and the servicer will agree to such release if the other individual agrees to be personally liable and is creditworthy. Often the other individual is already a borrower or has an ownership interest in the property. However, the Garn-St. Germain Act requirements do not *require* servicers to provide such releases. If servicers would be required to provide assumption disclosures in these circumstances, then they may decide not to entertain such requests.

n. Disclosures in Proposed Section 226.38(j) Should be Eliminated.

The Proposal noted that the rebate, late payment, property insurance, contract reference and assumption disclosures were not of primary importance to consumers and were not always well understood. Even if these disclosures are provided in a separate form, they will still contribute to information overload. We therefore recommend that these disclosures be eliminated entirely. However, if the Board decides to retain these disclosures, it should not expand the current requirement to disclose whether or not a loan is assumable from purchase transactions to all mortgage loans. As the Board noted, "very few participants understood the language indicating that the loan was assumable, and even fewer felt it was important information."

o. Rate Reduction Mortgages.

"Rate Reduction Mortgages" provide that if the consumer makes a certain number of timely payments, the rate on the loan will decrease. These programs are generally offered to borrowers who have less than excellent credit as an incentive to make timely payments. We request a clarification as to whether the disclosures should assume that timely payments will be made and reflect the rate decreases or should not assume that timely payments will be made and not reflect the rate decreases.

p. Credit insurance and debt cancellation and debt suspension coverage.

Employment eligibility criteria. We do not object to the proposed requirement to determine that the consumer meets the age eligibility criteria in light of Proposed Comment 4(d)-12 which permits the creditor to rely upon "the date of birth on the consumer's credit application." However, we urge the Board to eliminate the requirement to determine whether the consumer meets employment eligibility criteria.

We believe that the burden of obtaining this information outweighs the benefit, as employment eligibility at time of enrollment is not determinative of the value of the product. For

[21] 24 C.F.R. 1601 j-3.

example, a consumer who is between jobs or temporarily working part-time may still want the product because the consumer expects to meet the employment eligibility requirements in the near future. Moreover, current ineligibility for one aspect of the product does not undermine the value of the product as a whole, and thus should not prevent the consumer from purchasing it. Debt cancellation and debt suspension products typically provide coverage in a variety of circumstances, only some of which will be relevant (e.g., marriage or birth of a child) and only some for which the consumer will be eligible (e.g., loss of income) at a given time. Thus, determining that a consumer is ineligible for a product based on employment would deny them the opportunity to participate in a bundle of benefits that are valuable over time. In addition, other people may be eligible for protection. For example, if a consumer's spouse loses his or her job, the consumer could claim benefits.

Although the Proposal does not directly prohibit creditors from providing products to consumers who do not meet the employment eligibility criteria, it would generally have that effect. If a consumer is ineligible based on employment, the product would be deemed "required" (although the product is not in fact contractually required) and its cost would be included in the finance charge.

Post-sale review. In response to the Board's request for comment, creditors should not be required to review employment eligibility criteria after the product is sold. Determining continuing employment eligibility would be impractical as it would require creditors to conduct a periodic personal interview with the consumer. Even those interviews would only determine employment eligibility at a specific point in time, which may not be relevant, if, for example, the person is temporarily unemployed. (Moreover, they would likely be collecting the benefits in that case).

Suggested Changes to the Proposed Model Forms. We urge the Board to revise clauses H-17(C) and H-17(D) so that they are accurate. In general, the model language is misleading to the extent it suggests debt cancellation and suspension products are insurance when they are not. Thus, we request that where the products are not insurance, the creditor be permitted to revise references to "this policy" and "other types of insurance" to appropriately reflect debt cancellation and debt suspension products. In addition, the first bullet is inaccurate. These products cover the debt or payments on the debt, and therefore are in addition to other coverage the consumer already has. Even if a consumer has insurance, debt cancellation and debt suspension products would provide benefits in circumstances not typically covered by insurance, such as getting married, adopting a child, or moving – all of which impact income. The second bullet is also untrue as to debt cancellation and debt suspension products because no other product, even credit insurance, offers the same breadth of possible benefits. The third bullet is misleading to the extent it implies that all benefits have age or employment requirements, which is untrue. For example, death benefits have no such requirements. We suggest that this bullet point should only be required where the offered products do in fact have such eligibility requirements. Finally, we request that the Board delete the use of the word "STOP." We are unaware of any other required disclosure that begins this way and think that it could unduly alarm consumers and unfairly prejudice creditors. Also, the Board does not address how the model language should be delivered if the product is purchased over the telephone. In a telephone conversation, the word "STOP" should not be required as it would be nonsensical for a customer service representative reading a script to inject STOP. Moreover, the length and redundancy of the disclosures makes them ill-suited to oral delivery.

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6. Timing of Disclosures.

a. Definition of Application.

Both the current regulation and the Proposal require that Early Disclosures be mailed or delivered within three business days after application and at least seven business days before consummation. The consumer must receive the Early Disclosures before paying a fee, other than a fee for obtaining the consumer's credit history.

Because the timing of the disclosures turns on whether, and when, an "application" has been received, we agree with Proposed Comment 19(a)(1)(i)-2 that would allow creditors to rely on RESPA and Regulation X to determine whether and when an application has been received, even for a transaction not subject to RESPA. In addition, we request that this comment should be further revised to state that, for transactions not subject to RESPA, a creditor may determine whether an application has been received by relying on the Equal Credit Opportunity Act and Regulation B.

"General business days" in Regulation Z are defined as days that "the creditor's offices are open to the public for carrying on substantially all of its business functions."[22] It is not clear how to apply this test to a mortgage creditor's back office, which is usually where the Early Disclosures are prepared, since back offices are never "open to the public." Comment 2(a)(6)-1 states that activities which indicate that a creditor is open for substantially all business functions include the availability of personnel to make loan disbursements, open new accounts and handle credit transaction inquiries. However, none of these standards appear to be rationally related to the ability of a mortgage creditor to prepare and provide the Early Disclosures. Due to the waiting period requirements, a mortgage creditor could not disburse or "open" a mortgage loan at application even if it wanted to do so. A creditor may have the ability to handle certain types of inquiries, but personnel in many other areas, including those that prepare disclosures, may not be available.

We suggest that a more relevant measure in determining the three-day period for when a creditor must issue Early Disclosures is to consider those days when it is fully-staffed, since it would have difficulty preparing disclosures on days when it is not. For purposes of simplification, since most back offices are not fully staffed on weekends and holidays (and would not have access to post offices for much of this time), we ask that the Board adopt a rule that states that weekends and holidays are not considered "business days" for purposes of determining whether Early Disclosures have been issued in a timely way. Furthermore, the Proposal's new requirements to tailor Early Disclosures to the particular transaction will make it particularly difficult for creditors to provide those disclosures on a timely basis if weekends and holidays count against the three business-day period. We agree that the "precise" definition of "business day" should continue to apply when determining whether the waiting periods have expired.

[22] 23 C.F.R. § 226.2(a)(6).

b. Early Disclosures May be Made "At or Before Application."

We request the Board to clarify that Early Disclosures may be made at *or before* application. This would provide creditors with additional flexibility and would eliminate any contentiousness as to the time when an "application" is made, especially if it involves a multi-step application process.

c. Obligation to Redisclose.

We believe that the Proposal should require redisclosure before the Final Disclosures if the borrower amends his application, or accepts a counteroffer, to add a feature identified in the "Key Questions" disclosure as presenting additional risks. Other changes in loan terms should not require redisclosure under Regulation Z prior to Final Disclosures.

d. Need for Consistency with RESPA rules.

The Board acknowledges that it must work with the Department of Housing and Urban Development ("HUD") to make the RESPA rules consistent with the rules under Regulation Z[23]. Any other result would result in undue procedural difficulties for creditors and customer confusion. This is especially important with respect to the issue of whether redisclosures are required.

We have recommended above that Regulation Z require redisclosure of a change in terms prior to Final Disclosures when additional risk features are added to the loan, whether this is due to a change in the consumer's application or as a result of the consumer's acceptance of a counteroffer. At present, RESPA rules requiring redisclosure of the GFE are different. Under RESPA, a new GFE must be provided within three business days after a borrower's change in circumstances, or a borrower's requested change in the loan terms from the terms that were previously disclosed.[24] This redisclosure obligation is broader than the obligation to redisclose that we recommend under Regulation Z.

We request that the Board work with HUD to conform RESPA's redisclosure requirements with those that we recommend under Regulation Z. Changes other than those that result in the addition of "risky" loan features do not present significant risks to consumers and should not require redisclosure.

e. Basis for Redisclosures.

The final RESPA rule and FAQs issued by HUD indicate that a revised GFE should not increase the estimates for settlement charges from what was provided on the initial GFE unless justified by changed circumstances or a borrower-requested change, notwithstanding the fact that the creditor may have subsequently obtained information showing that the fees are higher than initially estimated. For example, assume that fees subject to the 10% tolerance were initially estimated at $2,000 and are now estimated at $2,100 and that a change in circumstances did not

[23] 74 Fed. Reg. 43233 (August 26, 2009).
[24] See 24 C.F.R. § 3500.7(f).

justify an increase in those costs. Because the comparison of GFE fees to actual fees on page 3 of the HUD-1 Form bases the tolerance calculation on the amounts disclosed on the GFE, the amount disclosed on the revised GFE should continue to be $2,000, so that borrower can see that the actual charge of $2,100 is within tolerance.

We request a clarification to Proposed Comment 17(c)(2)(i)-1 stating that the creditor may estimate the amounts of fees using either: (1) the amount of the fees based upon information reasonably available at the time the TILA disclosure is made (the $2,100 amount in this example); or (2) the amounts shown on GFE plus 10% ($2,200 in this example) notwithstanding the fact that Regulation X may require the revised GFE to disclose a lower amount.

f. Use of Estimates.

The Proposal would require creditors to provide Final Disclosures that the borrower will receive at least three business days before consummation, even if no terms have changed since the Early Disclosures were provided. Under the Proposal, if certain changes occurred after the Final Disclosures, Corrected Disclosures would be required and a new three business-day waiting period would be necessary.

The Proposal would limit the use of estimates in the Final Disclosures to certain disclosures affected by escrowed taxes, insurance premiums and mortgage insurance premiums. Required disclosures that are affected by changes in settlement charges but which may *not* be estimated under the Proposal include the total settlement charges as required to be disclosed on the HUD-1 Form, the interest and settlement charges (formerly referred to as the finance charge) disclosure, the APR disclosure and the amount financed disclosure.

We request the following clarifications and offer the following comments with respect to the use of estimates for other charges on Final Disclosures:

i. Interest rates. Many creditors allow borrowers to choose whether to "float" the final interest rate on the loan until consummation or lock the rate earlier. The effect of the Proposal's limits on the use of estimates will effectively require borrowers to have their rates locked more than a week before consummation. We defer to the Board's judgment on whether it is in the consumer's interest to remove the choice to continue to float the rate in exchange for greater certainty in the Final Disclosures.

ii. Per Diem Interest. Even though per diem interest can be computed prior to consummation, closings are sometimes postponed. We therefore recommend a clarification to Proposed Comment 17(c)(2)(ii)-1 that the current rule - which provides that disclosures affected by per diem interest are considered accurate - applies to Final Disclosures, so that these are not considered estimates that would trigger redisclosure.

iii. Consistency with RESPA and Regulation X. The Board acknowledges the need for consistency between the disclosure rules under TILA and those under RESPA and Regulation X. The use of estimates on final disclosures is an example of a situation where rules should be made consistent. We recommend that estimates of settlement charges be permitted on the Final Disclosures, but they should be consistent with Regulation X requirements.

If the Board will not allow estimates to be provided in Final Disclosures in accordance with RESPA and Regulation X rules, we request that the Board require settlement agents to provide final settlement amounts and the HUD-1 Form required under RESPA to the creditor at least eight business days before consummation. This would include the total settlement charges and information sufficient to determine the finance charges to be included in the interest and settlement charges.

The Board also recognizes that most creditors provide either a GFE or HUD-1 according to Regulation X's timing rules to satisfy the itemization of amount financed requirement, but the Proposal would not permit the use of the HUD-1 Form to fulfill this requirement unless it is delivered with the Final Disclosures. If the Board desires to have settlement agents finalize settlement costs and prepare the final HUD-1 Form so that Final Disclosures will require no estimates, then the regulation should explicitly require the settlement agent to do so. We recommend that the Board continue to permit creditors to provide either a GFE or HUD-1 Form according to Regulation X's timing rule until the Board and HUD are able to coordinate the timing rules of both regulations.

g. Redisclosure Requirements.

The Proposal suggests two alternatives for when Corrected Disclosures would be required. The need for Corrected Disclosures would trigger a new three-day waiting period. Alternative 1 would require Corrected Disclosures if *any* terms changed from the Final Disclosures; Alternative 2 would require Corrected Disclosures only if the APR increases (or decreases, with limited exceptions) beyond the applicable tolerance or if an adjustable rate feature is added, and would allow all other changes to be disclosed at consummation.

We agree with the Board when it states that it is not always clear that it is in the consumer's interest to delay closing until three business days after receipt of Corrected Disclosures if any terms or costs change. We believe that Alternative 2 is preferable from both the consumer's and the creditor's standpoint. Adoption of Alternative 1 could result in endless and repeated delays in closings due to minor changes, which could only result in consumer inconvenience and discontent.

h. Addition of Risk Feature.

In addition to requiring Corrected Disclosures, if the APR increases beyond the applicable tolerance or a variable rate feature is added, we believe that redisclosure should also be required if any risk feature identified in the "Key Questions" is added to the loan. (This would include, for example, the inclusion of a step payment or interest-only feature that would cause payments to increase, a negative amortization feature, a prepayment penalty feature, or a balloon payment feature.) We note that the addition of these features just before consummation is rare. This would be consistent with our suggestion that changes in loan terms should be redisclosed under TILA's timing rules, while changes in fees should be redisclosed under the RESPA's timing rules.

i. Reduction in APR.

In addition, we believe that Corrected Disclosures should not be required if a reduction in the APR occurs, regardless of whether this is due to a change in the loan's interest rate or settlement costs. Any reduction in the APR, regardless of the reason for the reduction, is clearly beneficial to the consumer and should not cause a delay in closing that would be caused if redisclosure were required.

j. Overstated APR Resulting From Overstated Finance Charge.

Under the current rule, if an overstatement of the APR results from an overstatement of the finance charge, the APR is considered to be within tolerance and Corrected Disclosures are not required. The Board stated that it believes that an APR 'results from' an overstated finance charge only if the APR is also overstated.[25] We agree with this interpretation. If, notwithstanding our recommendation above, the Board decides to require redisclosure unless the overstatement of the APR results from an overstatement in the finance charge, we would greatly appreciate the Board clarifying that in each of the following situations an overstated APR will be considered accurate because the overstatement resulted from an overstatement of the finance charge (or explaining why it would not be):

- A settlement charge included on the Final Disclosures was included in the prepaid finance change when it should have been excluded.

- The estimated amount of a settlement charge included on the Final Disclosures was properly treated as a prepaid finance charge but the actual charge is waived or reduced.

- A charge that was treated as a prepaid finance charge and was expected to be paid by the borrower when the Final Disclosures was prepared is paid by the seller and excluded as seller's points.

- The finance charge included within the payment schedule of the Final Disclosures is overstated because the borrower negotiated a lower rate and the actual fixed rate or initial interest rate on an ARM is lower than the rate used to prepare the Final Disclosures.

- The prepaid finance charge, initial interest rate and margin used to calculate the fully indexed rate on an ARM loan have not changed from the Final Disclosures, but an updated lower index value results in a lower fully indexed rate and causes the finance charges included within the payment schedule of the Final Disclosures to be overstated.

[25] 74 Fed. Reg. 43261 (August 26, 2009).

k. Clarification for APR Changes Due to Discounts for Automatic Debits or Title Insurance Discount.

We request the Board to clarify how the proposed exceptions to the requirement to redisclose due to a reduction in the APR would apply in the following situations:

i. Title insurance. Proposed Section 226.19(a)(2)(iv)(B) states that the APR will be considered accurate even if there is a decrease in the APR due to a discount a title insurer gives the consumer on voluntary owners' title insurance. However, Proposed Comment 4(g)-2 states that "...premiums for owner's title insurance coverage are not finance charges because they are not imposed as an incident to the extension of credit." If such premiums are not finance charges to begin with, how could a reduction in the amount of those premiums result in an overstatement of the APR? Is this exception meant to cover a discount given to the consumer on the cost of the creditor's coverage due to the purchase of voluntary owner's title insurance coverage?

ii. Automatic Debits. If the Final Disclosures were prepared before the borrower chose to obtain a lower rate by arranging for automatic debits, it would appear that the actual APR would be overstated from the APR disclosed on the Final Disclosures due to an overstatement of the finance charge (i.e., the higher finance charge included in the payment schedule). Why would this exception not be covered by the general rule?

l. Consummation Disclosure.

We suggest revising Proposed Comment 19(a)(2)(iii)-1 under the Board's Alternative 2 by adding the underlined language and deleting the language in [brackets]: "(If a change occurs that makes a disclosed term inaccurate but does not require receipt of a corrected disclosure three business days before consummation [that does not render the annual percentage rate on the Early Disclosures inaccurate], the creditor must disclose the changed terms before consummation, consistent with Section 226.17(f).)" For clarity, we further recommend that Section 226.19(a)(iii) should also refer to the requirement to provide disclosures prior to consummation in these cases.

m. ARMs Where the Initial Rate is Not Determined Using the Index or Formula that Applies to Rate Adjustments.

The Proposal retains existing Comment 17(c)(1)-10(i) (renumbered Comment 17(c)(1)(iii)-3(i)) which states that, for an ARM for which the initial rate is not calculated using the index or formula for later adjustments, and for which the loan contract provides for a delay in the implementation of changes in an index value (a "look-back period"), the creditor may use any index value in effect during the look-back period before consummation in calculating TILA disclosures. We request that this proposed comment clarify that for disclosures prepared prior to consummation, the creditor may use any index value during the look-back period as of the date the disclosures are mailed or delivered, and that that the final APR to which the previously disclosed APR is compared for accuracy may be calculated with any index value in effect during the look-back period before consummation.

n. Irregular Transaction Even if Initial Rate and Fully Indexed Rate are the Same.

The Proposal retains existing Comment 17(c)(1)-10(iv) (renumbered Comment 17(c)(1)(iii)-3(iv)) which states that such transactions involve irregular payment amounts and are subject to the rate tolerance of ¼ of 1%. We request a further clarification to Comment 17(c)(1)(iii)-3(iv) that such transactions are considered irregular transactions notwithstanding the fact that an index value in effect during the look-back period before consummation may result in a fully indexed rate that happens to equal the initial interest rate and disclosed payments that do not appear to be "irregular" because they are equal in amount.

o. Disclosures Required Under Proposed Section 226.38(j).

Under the Proposal, it appears that the rebate, late payment, property insurance, contract reference and assumption disclosures would have to be given at the time of Early Disclosures, Final Disclosures, Corrected Disclosures and, under Alternative 2, the disclosures given at consummation. As noted above, in light of the limited usefulness of these disclosures, we recommend that they be eliminated. However, if the Board determines to continue to require these disclosures, it should be sufficient to provide these disclosures once, at any time prior to consummation.

p. Disclosure of Total Settlement Charges on Final Disclosures.

Proposed Comment 38(a)(4)-1 provides that, in the Final Disclosures, the creditor may disclose as total settlement charges the sum of "charges that cannot increase," charges that in total cannot increase by more than 10%" and "charges that can change." It appears that the total that will be shown on line 1400 of the HUD-1 or HUD-1A Form may not be used as the total settlement charges. Presumably this is because the Final Disclosures include amounts such as real estate broker fees that were not disclosed on the GFE and are not consequently a cost of the loan. If this is the intent, the Proposed Comment should state that the line 1400 total may not be used.

The proposed comment further indicates that the creditor has the alternative, in the Final Disclosures, to provide the consumer with the final HUD-1 or the HUD-1A Form. In all of the model forms provided in the Proposal however, the total settlement charges disclosure appears in the loan summary section and is not bracketed. If the creditor provides the final HUD-1 or the HUD-1A Form, the creditor should have the option of either making or not making the total settlement charges disclosure on the Final Disclosures. The Board should also include in the model forms Final Disclosures that do not include the total settlement charges disclosure because the final HUD-1 or HUD-1A Form was provided.

q. Requirement to Provide GFE with Early Disclosures Should Be Eliminated When Mortgage Broker Provides the Initial GFE .

The Proposal would permit the GFE to act as a substitute for the itemization of amount financed on the Early Disclosures when the GFE is provided with the Early Disclosures. Where the creditor provides the initial GFE, this presents no problems. However, where application is taken by a mortgage broker, the mortgage broker will usually send the initial GFE to the borrower within three business days after the mortgage broker receives the application and the creditor will usually send the Early Disclosures in a separate package within three business days after the creditor receives the application from the mortgage broker. We recommend that in such circumstances the mortgage broker's provision of the GFE in accordance with RESPA requirements be deemed to satisfy the itemization of amount financed requirements, even though the GFE and Early Disclosures are not sent at the same time. It would be burdensome for the creditor to provide the borrower with another GFE, and doing so would only provide the borrower with redundant information.

r. Requirement for No Estimates and HUD-1 with Final Disclosures.

The Board stated that it believes "that to permit substitution of the HUD-1 settlement statement for the itemization without requiring that it be delivered three business days before consummation would be inconsistent with the purposes of the 2008 amendments to the Mortgage Disclosure Improvement Act (the "MDIA").[26] We disagree. Nothing in the MDIA indicates that the use of estimates on TILA disclosures will prevent the running of the waiting period prior to consummation. To the contrary, the fact that the MDIA only requires redisclosure and a new waiting period if the APR becomes inaccurate is consistent with the recognition that other disclosures may reflect estimates, and that the closing should not be delayed because the Final Disclosures may be somewhat different than the estimated Early Disclosures.

As noted above, if the Board wishes to have the total settlement charge disclosure on the Final Disclosures not be an estimate and will not permit the HUD-1 Form given at settlement to substitute for the itemization of amount financed, then it should require the settlement agent to finalize all fees and provide the HUD-1 Form to the creditor at least 8 business days prior to closing. Otherwise, the Board should permit estimates that are consistent with RESPA's tolerance requirements.

s. Revise Itemization of Amount Financed to Be Consistent With Other TILA Disclosures.

Under the Proposal, creditors would continue to have the option of providing an itemization of amount financed, but the TILA disclosures will not refer to prepaid finance charges and will highlight the loan amount more prominently than the amount financed. We recommend that an additional model form for the itemization of amount financed be provided for use with closed-end mortgage loans. The new form should show an itemization of the disbursements from the loan amount, rather than from the amount financed.

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[26] 74 Fed. Reg. 43314 (August 26, 2009).

7. Servicing.

a. Adjustment Notices - Timing.

We support changing the minimum period of time that an adjustment notice must be provided before a payment change from 25 days to 60 days. However, exceptions should be provided for: (i) existing loans with look-back periods shorter than 45 days; and (ii) construction and temporary loans.

i. Existing adjustable-rate loans with look-back period shorter than 45 days. If the minimum notice period is increased to 60 days, the notes for new ARM loans can provide for a look-back period of 45 days or more which would enable the notice to be provided on a timely basis. However, for existing loans many ARM notes provide for a shorter look-back period. Requiring a notice 60 days in advance on such loans would conflict with the contractual requirements of the underlying loan documentation.

Consider, for example, an FHA loan that will have a rate adjustment on February 1^{st} and a payment adjustment on March 1^{st}. Under the Proposal, the servicer would have to provide a payment change notice on December 31^{st} (60 days prior to March $1^{st)}$ However, FHA loans have a 30 day look-back period, so that the index value used to determine the new rate would be the index as of January 2^{nd}. It would therefore be impossible to send a rate adjustment notice on December 31^{st} reflecting a January 2^{nd} index value. Servicers also need a reasonable time *after* the index value becomes available to perform quality control checks before mailing the notices; mailings cannot take place immediately upon a change in the index. Consequently, we suggest that, for adjustable rate loans with application dates prior to the effective date of the revised rule, the servicer be allowed to provide the payment adjustment notice within 15 days after the look-back date, but not less than 25 days prior to the payment change.

ii. Construction and Temporary Loans. These products should continue to be exempt from the requirements to provide adjustment notices. The concern that borrowers have sufficient time to refinance before the payment increases is not relevant in these circumstances because it is highly unlikely that the consumer would be able to refinance a construction or bridge loan prior to completion of construction or the sale of the house. Construction loans and bridge loans often have adjustable rates with short or no look-back period. We are concerned that imposition of the longer look-back period may cause creditors not to offer these products.

b. Adjustment Notices – Content and Format.

We request a clarification that servicers may include on the adjustment notices information that is required by FNMA, FHLMC, the FHA, the VA or by applicable law. For example, the FHA requires that the ARM adjustment notices for loans that it insures must state the date of the index. Additionally, adjustment notices for ARM loans with mortgage insurance often include certain information relevant to the consumer's rights under the Homeowners Protection Act such as information on mortgage insurance cancellation and termination dates, and we ask that servicers be permitted to continue to provide such information. We also ask the Board to clarify that the servicer could provide any of these additional disclosures as part of the TILA adjustment notice or include it in the same envelope.

c. Prepayment Penalty Disclosure.

While servicers have systems and procedures to calculate the amount of a prepayment penalty as of a specified payoff date, calculating the maximum possible prepayment penalty is a significant burden. Substantially all of the consumer benefits of the Proposal could be obtained by disclosing the date that the prepayment penalty period would end and advising borrowers who are considering refinancing to call the servicer to obtain a payoff amount including the penalty.

If the Board decides to require that the adjustment notice state the amount of the penalty, we suggest the following changes to improve that disclosure for consumers and lessen the compliance burden. The Proposal states that "The Board believes that disclosure regarding a prepayment penalty would assist consumers in determining when to seek a refinance loan"[27]. It would therefore be more helpful for the payment adjustment notice to inform the consumer about what the penalty would be if the loan were refinanced by the due date of the payment, rather than to recite what the maximum penalty *could* be at any time during the penalty period. We therefore recommend revising the disclosure to the following (added language is underlined, deleted language is in [brackets]): Prepayment Penalty: If you pay off your loan, refinance or sell your home before *(date)* you could pay a penalty [of up to$______]. If you do so before *(date of payment change)*, your penalty may be up to $______." A similar change should be made in the annual notice, with the penalty calculated over the next year.

Because there may be a delay between when the notice is prepared and when it is mailed or delivered, the servicer should be given the option of calculating the maximum penalty beginning on either date. We recommend adding a comment to Section 226.20(c)(4(i) clarifying that the "two-stage penalty calculation" as described in Proposed Comment 38(a)(5)-6 may be used to calculate the maximum penalty amount.

In some cases the loan documents may provide that a prepayment penalty will not be charged if the loan is sold or if the loan is refinanced by the same creditor or an affiliate. (Indeed, if a Higher-Priced Mortgage Loan with a prepayment penalty is refinanced by the original creditor or an affiliate, TILA would not allow a penalty to be charged). Servicers should be given the option of including on the notice an explanation of the circumstances under which a penalty would not be charged.

d. Description of Interest Rate.

The language provided in Model Form H-4(G) indicates that "Your rate will change due to an [increase] [decrease] in the (index)." This language does not appear to take into consideration situations where: (1) the current and new rates are the same; (2) the old and new index values are the same; or (3) the current rate is a premium or discount rate so that the change in rate if any, is not entirely due to a change in the index value (or may be directionally different

[27] 74 Fed. Reg. 43273 (August 26, 2009).

if the amount of the premium or discount exceeds the amount of the change in the index). In order to address these situations, we recommend that the language be changed to reference the index value rather than the interest rate, as follows: "The index on your mortgage [increased][decreased][stayed the same], which may affect the interest rate." This recommendation is consistent with Proposed Section 226.20(c)(2)(iii), which requires "A description in the interest rate or formula..." and not a description of the change in interest rate.

e. Escrow Information on Adjustment Notice.

Requiring that the adjustment notice contain information on escrow payments may well cause confusion, since RESPA already requires an annual escrow analysis with a notification to the borrower.[28] The timing of the RESPA escrow analysis is usually based upon the state where the property is located (because that determines when property taxes are due) and is not connected in any way to the timing of rate adjustments. Because escrow payments may be in the process of adjusting at the time the adjustment notice is being prepared, providing correct escrow information may be difficult, and any information provided could be confusing to the borrower. We therefore request that the requirement to provide escrow amounts on the adjustment notice be deleted. In any event, instead of providing the allocation on the adjustment notice, the servicer should be allowed to satisfy this requirement by showing the allocation of payments on the periodic statement.

f. Conversion to Fixed Rate.

Where an adjustable rate loan is converted to a fixed rate loan under a written agreement, no adjustment notice should be required. Because the consumer would have just entered into an agreement regarding the conversion which would have specified the consumer's new monthly payment, there would be no need for an adjustment notice and indeed, such notice may be confusing to the consumer.

g. Statement Requirements for Negative Amortization Loans with Payment Options.

We recommend revising Proposed Comment 20(d)(1)-1 to remove the requirement to provide the table if the payment required by that statement and all subsequent required payments will fully amortize the loan. At this point in the life of the loan, the table does not provide any useful information to the consumer and may be confusing. We further request that, where the servicer provides information on loans made prior to the effective date of the final regulation as required by the Nontraditional Mortgage Guidance, such disclosures should be deemed to comply with the requirements of Proposed Section 226.20(d).

h. Insurance Placed by Creditor.

The Proposal requests comment on whether the notice should include a local or toll-free number to contact the creditor regarding creditor-placed insurance. We agree that the contact information included in the notice should include such a local or toll-free number. A comment should be added clarifying that all references to the "creditor" in this section refer to the creditor

[28] 42 C.F.R. § 3500.17(c)(3).

or the servicer performing these functions for the creditor. We also request that the Board clarify that insurance may be placed by the creditor in accordance with these regulations not only when insurance lapses, but also when insurance is inadequate.

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8. Translated Disclosures and Advertisements.

a. Translated Disclosures.

We believe that the Board should retain the existing rule which allows the creditor to provide TILA disclosures in a language other than English so long as the disclosures are also made available in English at the consumer's request. However, the Board should not adopt a rule that would require the creditor to make the disclosures in a language other than English. It would be extremely difficult for creditors to support TILA disclosures in many different languages because of the sheer number of languages they would have to support, the difficulties of translation, and the fact that other languages may use non-Roman characters. We do suggest, however, that the Board officially publish foreign-language examples of the disclosures in the new format for all standard FNMA, FHLMC, FHA and VA loan programs, and make these disclosures available upon request and on its website.

b. Advertising Rules.

We note that the recently-enacted Section 226.24(f) would require disclosures in advertisements for dwelling-secured credit that are substantially more detailed in many respects than the Early Disclosures that the consumer would receive if he or she actually applied for a loan.

We believe that providing a consumer with information in advertisements that would not even be required if he or she applied for a loan results in information overload and is unnecessary. (Indeed, the Proposal expressed concern about information overload, even when a consumer is applying for a loan, and provided for streamlined disclosures in order to ensure that the consumer will read and understand them.) We therefore suggest that the TILA advertising rules be revised so that the information provided in advertisements is consistent with the streamlined disclosures that would be required in Early Disclosures.

Currently, Section 226.24 of Regulation Z requires certain other loan terms including payment schedule disclosures to be disclosed if an advertisement mentions a "triggering term." We note that, under the Proposal, Section 226.18 will generally not apply to closed-end mortgage loan disclosures (whose disclosures have been moved to Section 226.38), so it is unclear what payment schedule disclosures, if any, should be included in a mortgage loan advertisement when a triggering term is used. We suggest that the Board review whether it needs to change the rules for what constitutes a "triggering terms" for purposes of Regulation Z and what disclosures should now be required if a triggering term is used.

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9. Restrictions on Compensation.

a. Compensation Provided to "Loan Originators."

The Proposal would prohibit payments to loan originators that are based on a loan's terms and conditions. It would define "loan originators" to include mortgage brokers, and employees of mortgage brokers and creditors who perform loan origination functions. The Board requests comment on an alternative that would allow loan originators to receive payments that are based on the principal loan amount, which it acknowledges as a common practice today. In either case, a consumer would not be prohibited from making payments directly to loan originators, although, if a consumer pays a loan originator, the loan originator could not receive compensation on the same transaction from any other party such as the creditor.

We agree with the Board that, for individuals who are employed by mortgage brokers or creditors, loan originator compensation should not be based on loan terms and conditions. However, for all loan originators including both employees and mortgage brokers, we strongly urge the Board to adopt the interpretation that would exclude "loan amount" from the definition of "loan terms and conditions." As the Board acknowledges, the compensation of many loan originators is currently structured as a percentage of the loan amount.

In response to the Board's question, we believe that in addition to compensation based on a fixed percentage of the loan amount (subject to a minimum or maximum that was discussed in the Proposal), it should also be permissible to use percentages that decrease as the loan amounts increase. Because of concerns express in the Proposal that larger loan sizes may result in higher loan to value ratios which would lessen the consumer's equity and increase the consumer's risk, we recommend that the final rule also permit lower compensation for loans with higher loan to value ratios.

In addition, we offer the following comments with respect to the rules relating to loan originator compensation:

i. Loan Originator Definition. The definition of "loan originator" should exclude individuals who are managers and supervisors, whose compensation is not based upon the loans that they directly originate but on the production of the individuals they manage and supervise.

ii. Loan Originator Volume. The Board should clarify that the lender's ability to consider the loan originator's "overall volume" when paying compensation to the originator may include not only the number of loans sourced by the originator but also the total dollar amount of loans.

iii. CRA Loans. Additional compensation should always be permitted for CRA loans – that is, loans to low- and moderate-income ("LMI")[29] consumers and loans secured by property in LMI census tracts.

[29] 12 C.F.R. § 228.12(m).

iv. Certain Commonly Used Compensation Criteria Are Not Loan Terms or Conditions. The Board should clarify that compensation may be based upon approval rates, file quality, customer satisfaction, the quality of customer service and communication and other similar factors.

v. Exclude Amounts Not Retained from Definition of "Compensation." The definition of loan originator "compensation" should be clarified to exclude any amounts that are not retained by the loan originator, such as amounts that are used to pay other closing costs.

vi. Permit Concessions to Affect Compensation. An employer should be able to reduce the loan originator's compensation for granting a concession, as long as such concessions are monitored and occur only on an exception basis. We note that the Board indicates that a decrease in a loan originator's compensation based upon loan terms and conditions would also not be permitted. We agree that if there were no limits on this practice, the effect would be the same as increasing the loan originator's compensation for negotiating certain terms and conditions. However, where the creditor or broker limits the employee's discretion to negotiate prices and other terms and monitors exceptions, it should be permissible for the creditor or broker to reduce the compensation for those employees who permit exceptions to be made. We make this recommendation not because we wish to encourage employees to charge similarly situated consumers different amounts or steer them to different terms; to the contrary, we make this recommendation because reducing the employee's compensation is an effective tool for limiting exceptions and providing equal treatment to consumers.

b. Compensation Limits Applicable Specifically to Mortgage Brokers.

Currently, some creditors pay commissions to mortgage brokers in the form of a "yield spread premium (a "YSP"). The Proposal defines a YSP as "the present dollar value of the difference between the lowest interest rate the wholesale lender would have accepted on a present transaction and the interest rate the broker actually obtained for the lender".[30] The Board goes on to states that some or all of this dollar value is usually paid by the creditor to the broker as a form of compensation, although it also may be applied to closing costs.

The Board further states that: "Yield spread premiums can create financial incentives to steer consumers to riskier loans for which loan originators will receive greater compensation. Consumers are generally not aware of loan originators' conflict of interest and cannot reasonably protect themselves against it. Yield spread premiums may provide some benefit to consumers because consumers do not have to pay loan originators' compensation... However, the Board believes that this benefit may be outweighed by costs to consumers..."[31]

We agree that costs of yield spread premiums to consumers outweigh the advantages in some cases and therefore additional protections are required. However, in cases where the total compensation retained by the broker is reasonable, we question whether additional protections are necessary.

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[30] 74 Fed. Reg. 43280 (August 26, 2009).
[31] 74 Fed. Reg. 43240 (August 26, 2009).

We also believe that the final rules should treat mortgage brokers differently from employees of creditors or mortgage brokers who are loan originators. RESPA already contains limitations on how a wholesale creditor may compensate a mortgage broker. Effectively, those rules would prevent a wholesale creditor from compensating a broker in the same manner that a retail creditor can compensate its loan originator employees. Specifically, a retail lender can compensate an employee based upon the employee's total loan volume, but a wholesale lender who compensates a mortgage broker based upon the mortgage broker's total volume may violate Section 8 of RESPA.[32] A retail lender can charge the consumer discount points on a loan and pay compensation to its employee, but RESPA prohibits lender-paid broker compensation and discount points in the same transaction. (See new RESPA Rule FAQs at GFE –Block 2 FAQ 2.[33]) Also, while employees look solely to their employers for compensation, mortgage brokers are independent businesses who are free to determine the wholesale creditors with whom they wish to do business, and to establish their own compensation targets.

Accordingly, for mortgage brokers we recommend that the final rule establish an amount of <u>total</u> mortgage broker compensation (including both amounts received from the creditor and directly from the consumer) that would be deemed "reasonable." For example, an amount not in excess of the greater of 2% of the loan amount or $500 could be deemed reasonable. Above that amount, the rules substantially as outlined in the Proposal would apply, provided that the compensation complied with the disclosure and tolerance requirements in the RESPA rule. The mortgage broker should also have a safe harbor from the steering rules in this case. This rule would be consistent with the standard adopted under RESPA that allows compensation to be paid to mortgage brokers by both the creditor and the consumer, provided that the total amount of compensation received by the loan originator is "reasonably related to the value of goods or facilities actually furnished or services actually performed."[34]

Where a mortgage broker's total compensation is reasonable, the proposed prohibition on the mortgage broker receiving compensation from both the consumer and creditor will harm consumers. Consider a situation where a retail lender is currently offering the consumer a rate of 5.125% with 1 point and a mortgage broker is offering the consumer a rate of 5.000% with 1 point and is receiving an additional 1 point in compensation from the lender. Clearly the mortgage broker's rate to the consumer in this case is better than the retail creditor's but the proposed rule would prevent the mortgage broker from offering that rate. In order to receive total compensation equal to 2 points, the mortgage broker would either have to offer a higher rate so that the creditor would pay the entire amount of compensation or require the consumer to pay the entire 2 points directly. Even if the mortgage broker were willing to accept a lower amount of compensation from the lender in order to offer the consumer a better rate, the Proposal would not permit the mortgage broker to do so. The effect of the proposed prohibition would be to deny consumers the benefit of choice and competition precisely in the most critical price range – where the rates offered by mortgage brokers are competitive with retail lenders and mortgage brokers receive a modest amount of compensation from the wholesale creditor.

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[32] 12 U.S.C. § 2607.
[33] HUD's new RESPA Rule FAQs are published on its RESPA website: http:.//www.hud.gov/offices/hsg/ramh/res/respa_hm.cfm.
[34] HUD Statement of Policy 2001-1 (October 18, 2001).

As stated above, we recommend elimination of the restriction on a mortgage broker's receipt of compensation from both the creditor and the consumer where the mortgage broker's total compensation is reasonable. Adopting this rule should not harm consumers. It would allow creditors to compensate mortgage brokers in a manner similar to the way in which they compensate retail loan originators, and would be consistent with RESPA requirements.

c. Determination of Whether Creditor is Paying the Mortgage Broker Should Be Conformed to RESPA Rules.

As discussed above, the Proposal would prevent a loan originator from receiving compensation by the consumer and another party, such as the creditor, in the same transaction. Even if this rule is modified as we suggest, if the mortgage broker's total compensation is greater than the amount the Board deems reasonable it will be critical for the parties to a transaction to properly allocate payments that are made by the creditor and the consumer.

In many transactions both the wholesale creditor and the consumer will be making payments to various parties and at different times. Since money is fungible, it will often be unclear whether funds are paid by the creditor or by the consumer (or both) to the mortgage broker for origination of the loan. If compensation is determined to be from both the creditor and the consumer, the creditor has a significant amount at stake because of the substantial penalties that apply to TILA violations under the Board's Section 129 authority[35]. The final rules should provide guidelines which precisely determine the source of the mortgage broker's compensation.

We believe that payments should be allocated in a manner that reflects the disclosure of creditor payments on the GFE and HUD-1 statements under the final RESPA rule. That is, payments made by creditors should first be allocated to the creditor's own origination charges, then to broker compensation and finally as a credit to other closing costs.

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[35] 15 U.S.C. § 1640.

10. Steering.

a. General rule.

The Board also seeks comment on whether it should adopt a rule that would prohibit mortgage brokers from directing or "steering" consumers to a particular creditor's loan products for which the mortgage broker would receive additional compensation, unless that loan is "in the consumer's interest."[36] The Proposal would provide that a transaction would not violate the "steering" prohibition if the loan was chosen by a consumer from at least three loan options for each type of transaction in which the consumer expressed an interest.

We agree that prohibiting payments from creditors to mortgage brokers based on loan terms and conditions would be meaningless if brokers could significantly increase their compensation by steering the borrower to another creditor. However, we believe that:

- the anti-steering rule should not apply to transactions where the mortgage broker's total compensation is reasonable;
- the rule should consider total compensation rather than just creditor- paid compensation in determining whether the rule is violated;
- the standard of whether a transaction is "in the consumer's interest" is too vague and should be clarified as recommended below; and
- the standards for presenting loan offers that qualify for the safe harbor should be revised.

b. Recommendations.

We recommend that the Board clarify that following points in connection with its proposed rules on steering:

i. Exempt Transactions Where Total Broker Compensation is Reasonable. If the mortgage broker's compensation is reasonable, the transaction should be deemed to be "in the consumer's interest." We suggest that total mortgage broker compensation be deemed reasonable if it does not exceed 2% of the loan amount, subject to a minimum of $500. By exempting transactions where total broker compensation is reasonable, it is unlikely that consumers will be steered due to compensation considerations and the risks and operational burdens of mortgage brokers will be greatly reduced.

ii. Focus on Total Broker Compensation, Not Creditor-Paid Compensation. It is not clear why it a mortgage broker should be permitted to "steer" a consumer to consummate a transaction in which the consumer will pay direct broker compensation that is greater than amounts that are reasonable, particularly if the loan amount is increased so that the

[36] 74 Fed. Reg. 43241 (August 26, 2009).

consumer may pay the mortgage broker's compensation from loan proceeds. The rule should focus on whether the mortgage broker is steering the consumer to consummate a transaction in order to receive greater total broker compensation than could have been received on other transactions the mortgage broker could have offered.

iii. Transactions That Are "In the Consumer's Interest." It would be helpful for the Board to provide additional examples of transactions that are in the consumer's interest including: (1) transactions that do not have the features identified as risk features in the "Key Questions to Ask About Your Mortgage"; (2) placing a loan with a wholesale creditor who provides a high level of service or who will be able to close the loan within the time period desired by the consumer; (3) obtaining the loan product on terms desired by the consumer; and (4) placing the loan with a wholesale creditor who has a higher likelihood of approving the application.

iv. Loans Placed by a Creditor's Employee with an Affiliate. In some cases, companies may use different affiliates to make different types of mortgage loans. For example, one affiliate may make closed end first mortgages while another affiliate may make home equity loans. Where these affiliates employ individuals as loan originators, the compensation rule in Proposed Section 226.36(d) says that affiliates are treated as a single person. This would appear to require that, if the employee received different compensation for sourcing a closed end first mortgage than for a home equity loan, it would have to be for a reason other than the loan terms (see Proposed Comment 36(d)(3)-10).

Proposed Comment 36(e)(1) -2(ii) addresses the steering rules and states that if a loan originator who is an employee of the creditor is not compensated based on the transaction's terms or conditions pursuant to 226.36(d)(1), then compliance with that provision also satisfies the steering rule requirements of 226.36(e)(1). We believe a clarification should be made to Proposed Comment 36(e)(1)-2(ii) by inserting "or its affiliate" after "employee of the creditor" , to clarify that employees of the creditor's affiliates who originate loans for the creditor will be deemed to be in compliance with the steering rules if their compensation is in compliance with the compensation rules.

c. Safe Harbor.

We ask that the Board clarify the following points with respect to the safe harbor that it provides to determine whether steering has occurred (the "Safe Harbor"):

i. Loan Types. The Proposal refers to loan types refers to whether the APR may or may not increase after consummation. Are first and subordinate liens considered different loan types?

ii. "Buy Down" Option. A creditor will usually permit the mortgage broker to offer a lower rate to the consumer if the consumer pays incremental points to "buy down" the rate. As the Proposal is written, it would appear that the mortgage broker would have to include, in the "low rate" option it includes pursuant to the Safe Harbor, a loan with a 5% interest rate and 10 discount points over a loan with a 5.125% rate and no discount points. Presumably this was not the intent. We also recommend that, if the mortgage broker's compensation will be paid by the creditor, then the mortgage broker, at its option, could disclose the lowest rate at which the creditor would compensate it.

iii. 5 Year Horizon. The Proposal's use of a five year time horizon for the loan with the lowest rate appears to be at odds with the HOEPA and Higher-Priced Mortgage Loan Rule's "ability to repay" test that uses a seven year time horizon.[37] We suggest that the Board consider harmonizing these time horizons.

iv. Lowest Total Dollar Amount for Origination Points or Fees and Discount Points Offered by Creditors. The Proposal provides no definition of what constitutes "origination points or fees and discount points offered by creditors" for purposes of the Safe Harbor. The final RESPA rule requires that the fees and charges of the mortgage broker and creditor be aggregated together and disclosed to the consumer on the GFE and HUD-1 as "Our origination charge," "Your credit or charge (points) for the specific interest rate chosen," and "Your adjusted origination charge." In light of the RESPA rule, how should a mortgage broker determine which points and fees are offered by the creditor and which are offered by the Broker? It also appears that the Proposal is concentrating on what the creditor will require as payment for providing a loan rather than what the consumer would pay. Would a loan where the broker would receive compensation from the creditor always be considered to have a lower total dollar amount than a loan with a par rate where the borrower pays the broker's compensation? For example, would a creditor who offered a 10% rate with no points and fees to the consumer (but substantial compensation to the broker) have to be offered to a consumer instead of a creditor who offered a 5.00% with .125 points?

11. Implementation Period.

The Proposal will require sweeping changes to a creditor's TILA compliance program since it affects all stages of the mortgage application, approval and servicing processes. In addition, to the extent it affects compensation of loan originators, sufficient time must be allowed for creditors to change existing compensation plans. Consequently, we recommend that the Board provide for a period of at least eighteen months before the Proposal is due to take effect.

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[37] See for example, 12 C.F.R. 226.32(a)(4)(iii).

On behalf of Citigroup, I thank you again for the opportunity to provide these comments on the Proposal. Should you have any questions or wish to discuss any of these issues further, please call Carl Howard at (212) 559-2938 or me at (212) 559-9342.

Very truly yours,

Joyce Elkhateeb
Associate General Counsel

Attachment 1: State High-Cost Loan Law Points & Fees Chart

ATTACHMENT 1

LIST OF STATES WITH A "POINTS AND FEES" TEST LOWER THAN THE HOEPA 8% "POINTS AND FEES" TRIGGER:

1. California--6%
2. Colorado--6%
3. District of Columbia--5%
4. Georgia--5% for loans of $20,000 or more. Lesser of 8% or $1000 if less than $20,000
5. Illinois--5%
6. Indiana--5% if loan is $40,000 or more. 6% if less than $40,000
7. Kentucky--greater of 6% or $3000
8. Maine--5% if loan is $40,000 or more. 6% if less than $40,000
9. Maryland--7%
10. Massachusetts--5%
11. New Jersey--4.5% if loan is $40,000 or more. 6% if $20,000 or more but less than $40,000. Lesser of 6% or $1000 if loan is less than $20,000
12. New Mexico--5% if loan is $20,000 or more. Lesser of 8% or $1000 if less than $20,000.
13. New York--5% if loan is $50,000 or more. Greater of 6% or $1500 is less than $50,000
14. North Carolina--5% if loan is $20,000 or more. Lesser of 8% or $1000 is less than $20,000
15. Ohio--5% is loan is $25,000 or more. 8% if less than $25,000
16. Rhode Island--5% if loan is $50,000 or more. 8% if loan is less than $50,000
17. South Carolina--5% is loan is $20,000 or more. Lesser of 8% or $1000 is less than $20,000
18. Tennessee--Greater of $2400 or 5% for loans greater than $30,000. 8% for loans of $30,000 or less.
19. Wisconsin--6%
20. Arkansas--5% if loan is $75,000 or more. 6% if loan is $20,000 to $74,999. 8 % if loan is less than $20,000