21st MORTGAGE CORPORATION

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

July 15, 2011

RE: Regulation Z; Truth in Lending (Ability-to-Repay) – Proposed Rule
Docket No. R-1417

21st Mortgage Corporation ("21st Mortgage"), a lender specializing in the financing of manufactured housing, appreciates the opportunity to submit to the Federal Reserve Board ("Board") our comments and input regarding the proposed rules referenced above.

As the Board is no doubt aware, the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act" or "Act"), as well as the rules that will implement the Act, will have a disproportionate impact on low income borrowers who wish to purchase a new or existing manufactured home. We respectfully ask that the Board and the Consumer Financial Protection Bureau consider the unique challenges faced by consumers who wish to finance a manufactured home and the impact upon retailers and lenders who serve those consumers. Because of its affordability and portability, manufactured housing is a vital component of our nation's affordable housing alternative to less desirable rental housing. According to the 2010 American Housing Survey ("AHS"), 72% of all new homes sold under $125,000 were manufactured housing, with manufactured housing also making up 47% of all new homes sold under $150,000 and 27% of all new homes sold under $200,000. These numbers continue to increase as more consumers see manufactured housing as an affordable and reliable housing alternative. There are approximately nine (9) million manufactured homes in this country and the AHS indicates that over half these homes have a value of $30,000 or less.

Comment 1:
Points and Fees Exclusion for Manufactured Home Retailers - § 226.32(b)(2)(i)

The Dodd-Frank Act sets out the definition of "mortgage originator" in Section 1401, adding new §103(cc) to the Truth in Lending Act ("TILA"). A mortgage originator is defined as "any person who, for direct or indirect compensation or gain, or in the expectation of direct or indirect compensation or gain - (i) takes a residential mortgage loan application; (ii) assists a consumer in obtaining or applying to obtain a residential mortgage loan; or (iii) offers or negotiates terms of a residential mortgage loan;" In order for an individual to fall under the definition of mortgage originator, they must not only engage in one of the above listed activities, but they must do so "for direct or indirect compensation or gain, or in the expectation of direct or indirect compensation or gain." "Compensation or gain" is critical to whether an individual is considered a mortgage originator. Additionally, Congress specifically excluded from the definition of mortgage originator "an employee of a retailer of manufactured homes" who does not: (1) take a residential mortgage loan application, (2) offer or negotiate terms of a residential mortgage loan, or (3) advise a consumer on loan terms (including rates, fees, and other costs). Therefore, when read together, §103(cc)(2)(A) & (C) allows the employee of a manufactured home retailer to take a residential mortgage loan application or offer or negotiate terms of a residential mortgage loan so long as they do not receive or expect to receive direct or indirect "compensation or gain" for engaging in these activities. Further, under the manufactured home retailer exemption, that same employee can prepare residential mortgage loan packages and collect information on behalf of the consumer regardless of whether that employee receives "compensation or gain." "Compensation and gain" is not defined in the Dodd-Frank amendments, but we submit that the intent of this legislation was to exclude employees of manufactured home retailers from the definition of mortgage originator unless they are compensated or provided some other type of consideration from a party to a residential mortgage loan specifically because they engaged in either taking a loan application or offering or negotiating terms of a residential mortgage loan.

In amending the points and fees definition under §226.32, the Board has incorporated by reference the definition of "loan originator" under §226.36(a)(1) which states that "for purposes of this section, the term 'loan originator' means with respect to a particular transaction, a person who for compensation or other monetary gain, or in expectation of compensation or other monetary gain, arranges, negotiates, or otherwise obtains an extension of consumer credit for another person." As in the definition of mortgage originator under the Dodd-Frank amendments, the individual must engage in a covered activity for "compensation or gain" in order to meet the definition of a loan originator. Further as in the Dodd-Frank amendments, the Board has proposed an exemption from the point and fees definition of §226.32 for compensation paid to a "retailer of manufactured homes" so long as they are not compensated for taking a residential mortgage loan, offering or negotiating terms of a mortgage loan, or advising a consumer on loan terms." Again, as in the TILA amendments above, the points and fees definition does not include "compensation or gain" paid to an employee of a manufactured home retailer who assists a consumer in obtaining or applying to obtain a residential mortgage loan. The proposed rules also do not define "compensation or gain."

We propose that Congress intended to allow retailers of manufactured homes and their sales staff to continue to assist a consumer in locating a lender to finance their home and to assist that consumer in submitting loan stipulation documentation to a lender, so long as they are not paid additional sums for specifically performing these activities.

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The manufactured housing industry is a unique and important segment of the housing market that provides low cost housing to tens of millions of consumers and employs thousands of people in manufacturing jobs. The vast majority of manufactured homes are located on rental property or private family land that is not owned by the consumer. These homes are financed as chattel loans (personal property) and do not fall under traditional "stick-built" home purchase and home financing models. While it's true that loans made to finance manufactured housing are secured by a consumer's "dwelling" as that term is defined in TILA, the process of purchasing and financing a manufactured home is vastly different from the site-built model. Almost all new manufactured homes are sold by manufactured home retailers at sales centers or in manufactured home communities. Because of this unique model and a lack of a secondary market for manufactured home loans, the universe of lending institutions is small. Congress, therefore, recognized the need for manufactured home retailers and their respective sales staff to continue to be able to assist consumers in applying for or obtaining a loan to complete their manufactured home purchase. This practice is critical to the success of the industry and its employees, and to consumers who depend on manufactured housing as a source of affordable housing. Since many state and federal banks, national lenders and even local community lenders do not engage in manufactured home financing, consumers are often unaware of their options when it comes to financing their manufactured home purchase. Without the benefit of an employee of a manufactured home retailer assisting consumers in completing loan applications (where in some cases it is necessary because of illiteracy or because English is the second language of a consumer) and providing the consumer with necessary information about financing options, many consumers would be unable to locate financing to complete their home purchase.

However, in an attempting to address these important issues, the TILA amendments in Dodd-Frank and the proposed amendments to Regulation Z create additional uncertainty and new burdens for the industry, in addition to creating a loophole in the points and fees calculation. This loophole could allow a creditor or loan originator to arbitrarily compensate an employee of a manufactured home retailer (by way of a spiff or finders fee that is in addition to the sales commission of that employee) so long as the employee did not take an application, offer or negotiate loan terms or advise a consumer on the terms of the loan. This unintended loophole could lead to competition between creditors and loan originators as to who is willing or able to provide the most monetary incentives to employees of manufactured home retailers that assist a consumer in "obtaining or applying to obtain a residential mortgage loan." Manufactured home retailers might consider pointing consumers toward a particular lender that pays the highest steering bonus.

It is altogether unlikely that Congress' intent behind creating the mortgage originator definition and the manufactured home retailer employee exemption was to: 1) prevent an employee of a manufactured home retailer from assisting a consumer in completing their home purchase by taking a residential mortgage loan application if they receive no additional benefit for doing so, and yet 2) to allow these same employees to be additionally compensated above and beyond their compensation from the sale of a home by pointing a consumer to a particular creditor and assisting that creditor in gathering necessary documentation without requiring the creditor to consider this spiff in the "points and fees" calculation.

In order to provide true clarity needed by manufactured home retailers and the manufactured home industry, the Board's final rule should include language that ensures that, regardless of the activities involved, spiffs, finders fees and other gain received by the employee of a manufactured home retailer that exceed the compensation that the same employee would have received in an identical cash transaction is included in and covered by the points and fees definition in §226.32, while any compensation received by that same employee solely from completing the sale of the home is not covered by the points and fees definition in §226.32. Therefore, we propose that the Board create a definition of "compensation or gain" or include additional staff commentary that states that the term excludes compensation or gain to the employee of a manufactured home retailer if that compensation or gain is tied solely to the sale of the home and is equal to what that employee would have received in an identical cash transaction. Under this definition, employees of manufactured home retailers will not have to be concerned that their assistance to a consumer could subjectively rise to the level of "taking a residential mortgage loan application" or "advising a consumer on loan terms" since they are not being compensated above and beyond their compensation from the sale of the home for specifically engaging in those activities. Conversely, if the employee of a manufactured home retailer receives any compensation or other gain in addition to their compensation based off the sale of the home because a consumer's manufactured home purchase is financed, it will be clear to the creditor that those amounts must be included in the points and fees calculation regardless of the activity performed by the employee.

Several states have taken a similar stance and included similar language in their version of the SAFE Act to clarify that a broker, lender or loan originator license is not required for manufactured home retailers or their employees that engage in certain activities, *so long as they do not receive additional compensation for doing so.* Other states have clarified by way of staff opinions that manufactured home retailers and their employees may share information with a consumer about financing sources for manufactured housing, discuss estimated payment amounts based on the sale amount of the house, and help consumers complete a loan application and collect conditions on behalf of the customer, so long as they are not compensated by or receiving financial gain from a lender or loan originator for receiving the application and forwarding it to a third party.

This interpretation is also consistent with the exclusion for individuals that perform only "real estate brokerage activities," under §226.32(b)(2)(ii). The exception does not apply if that individual is compensated by the "lender, mortgage broker, or other mortgage originator" or an agent of those parties. Clearly one of the reasons for this limitation to the real estate broker exception is to prohibit lenders, mortgage brokers or mortgage originators from paying spiffs or finders fees to a real estate broker for generating a lead without that fee being included in the points and fees calculation.

The MH Retailer Exception in §103(cc)(2) and §226.32(b)(2)(i) attempts to exempt from coverage essentially the same activities as the licensing statutes and the real estate broker exemption, but if not further clarified, we believe it will lead to unintended results. We submit that Congress intended to exclude manufactured home retailers and their employees from the requirement to be licensed as a loan originator because their compensation comes from the sale of the home and not from engaging in these activities. That manufactured home exemption, therefore, should exclude from the points and fees calculation all compensation received by the employee of a manufactured home retailer except any additional compensation paid by the consumer, creditor or loan originator that is above and beyond the compensation equal to what that employee would earn in an identical cash transaction, regardless of the activities performed by the employee. We believe this will create a bright line for retailers, creditors and regulators and will bring much needed relief to the manufactured home industry.

Comment 2:
Qualified Mortgage - Safe Harbor vs. Rebuttable Presumption - §226.43(e)(1)

In its proposed rule, the Board specifically requests comments regarding §226.43(e) and the dual alternatives for implementing §1412 of the Dodd-Frank Act. This section, entitled the "SAFE HARBOR AND REBUTTABLE PRESUMPTION," creates new TILA §129C(b) in which Congress established the "Qualified Mortgage" as a new type of residential mortgage loan. Congress' use of the words "safe harbor" and "presume" in the legislation has led the Board to propose two alternatives for implementing the Qualified Mortgage exception: Alternative 1 - a "safe harbor" for creditors who make a qualified mortgage and Alternative 2 - a "presumption of compliance" with the ability-to-repay provisions. We submit that Congress' intent in establishing the Qualified Mortgage was to encourage creditors to gravitate toward that loan type and to make Qualified Mortgages more readily available to consumers. For this reason, we urge the Board to adopt Alternative 1 which creates a safe harbor and true incentive for creditors who follow the requirements of §129C(b).

Congress entitled Section 1412 of the Dodd-Frank Act "Safe Harbor and Rebuttable Presumption." The inclusion of the term "Safe Harbor" in the heading of this section makes it clear that Congress was contemplating more that just a presumption of compliance when creating the Qualified Mortgage exception. The use of this term was wholly unnecessary had Section 129C(b) not been specifically created to provide creditors and assignees of Qualified Mortgages with a safe harbor from the provisions of 129C(a).

As the Board correctly points out, when defined as a true safe harbor, the Qualified Mortgage creates certainty and provides much more clarity than the presumption of compliance alternative. Creditors can follow the guidelines set out in TILA and Regulation Z for making a Qualified Mortgage, establish polices and procedures to ensure that they follow these guidelines, and can thereby be assured they have made a loan that they may collect or assign without concern that their credit decision can be challenged years later by a consumer or their legal counsel. Further, the safe harbor alternative makes Qualified Mortgages a much more marketable loan product on the secondary market and thus attractive to more creditors and investors. Under the safe harbor alternative, potential assignees of Qualified Mortgages can conduct due diligence on a portfolio without the need to re-underwrite and second-guess the credit decision on each loan that was made.

Only under the safe harbor alternative do creditors have a true incentive to conform to the Qualified Mortgages requirements, and therefore make these loan types more readily available to consumers. Consumers therefore stand to benefit from adoption of the safe harbor alternative because they will have increased access to Qualified Mortgages, that by law may not contain loan features such as negative amortization, deferment of principal payments, high points and fees, and loan terms over thirty years – features which are normally considered as more risky for a consumer.

Conversely, interpreting the Qualified Mortgage exception as only creating a presumption of compliance provides little to no benefit to creditors, assignees or consumers. Under this model, creditors must follow all the requirements set out in §129C(a) regardless of whether they are making a Qualified Mortgage or a residential mortgage loan with more risky terms or points and fees in excess of the 3% maximum. While this alternative may still provide a presumption that the creditor has complied with the ability to repay provisions, it does not prevent a consumer from years later challenging the underwriting of their loan in a suit against the creditor or as a defense to foreclosure. When faced with offsetting the increased risk and added cost of defending even an arbitrary and unsuccessful legal challenge, creditors have much less incentive to limit their origination charge to the amounts necessary to make a Qualified Mortgage. Since the intent of Congress was to encourage creditors to offer less risky, Qualified Mortgages to consumers, it stands to reason that Congress intended to offer additional protections and assurances to creditors.

The Board's comments imply that unless the Qualified Mortgage exception serves as a rebuttable presumption, creditors would not give consideration to a consumer's ability to repay a loan prior to making a Qualified Mortgage. However, when making a Qualified Mortgage, creditors must still verify and document income and assets and consider all mortgage related obligations before consummating the loan. Additionally, the creditor must underwrite the loan based on a payment schedule that fully amortizes over the life of the loan. It is not logical that creditors required to verify a consumer's income and assets and underwrite the loan based on fully amortizing payments would not be giving any consideration to the consumer's ability to repay the residential mortgage loan.

Another of the Board's arguments for the presumption of compliance alternative relies on a comparison between new Qualified Mortgage exception and the presumption of compliance created in the 2008 HOEPA Final Rule ("2008 Rule"). As the Board points out in its supplementary commentary, the 2008 Rule created new §226.34(a)(4) of Regulation Z, prohibiting creditors from extending credit to a consumer under §226.32 without regard to the consumer's ability to repay the loan. Just as in the new ability to repay requirements in new TILA §126C(a), a creditor making a loan subject to §226.32 of Regulation Z is required to consider the consumer's mortgage-related obligations and

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must also consider the consumer's repayment ability by verifying income, assets and the consumer's current obligations. In addition, the 2008 Rule created a presumption of compliance under §226.34(a)(iv) for creditors that followed the specific steps set out therein. Those steps include verifying and documenting the consumer's income and assets, utilizing the highest possible payment during the first seven years of the loan in the repayment consideration, as well as considering the consumer's debt-to-income ratio or residual income.

Unlike the restrictions placed on creditors under the Qualified Mortgage exception, the presumption of compliance under §226.34(a)(iv) does not add additional considerations for the creditor or place additional restrictions on the loan features that may be included. Instead this section simply further defines and articulates exactly how a creditor should proceed in verifying a consumer's ability to repay under §226.34(a)(4) and creates a presumption of compliance for creditors that follow these specific steps.

New TILA §129C(a) as created by Section 1411 of the Dodd-Frank Act is comparable to §226.34(a)(4) in that it creates an ability to repay requirement under subsection (1) and then details in subsections (2) and (3) those steps the lender must follow in order to determine the consumer's ability to repay. In fact, new section 129C(a) includes additional requirements and regulation for creditors in determining a consumer's ability to repay than those currently required of a creditor making a high cost home loan under §226.32. However, neither the new TILA amendments nor the Board's proposed rule create a similar presumption of compliance for creditor who following the specific requirements set out in subsections (2) and (3) of §129C(a). Complying with these guidelines would currently provide creditors a presumption of compliance under §226.34(a)(4). If anything, the Board should utilize their rule making authority to create an additional presumption of compliance for creditors that follow the requirements of §226.43(c) that is similar to the presumption under §226.34. This should be in addition to the safe harbor that was intended to be available to a creditor who makes a Qualified Mortgage under new TILA section 129C(b).

In summary and for the reasons stated above, we urge the Board to adopt Alternative 1, the safe harbor alternative, as new §226.43(e)(1) of Regulation Z. This interpretation fulfills the intent of Congress in creating a residential mortgage loan product that is attractive to creditors and contains features that are beneficial for consumers.

Comment 3:
<u>Points and Fees on Smaller Loans - §226.43(e)(3)(i)</u>

The Board has also requested comments on dual alternatives set out in the proposed rule to implement the mandate under new §129C(b)(2)(D) of TILA that the Board adjust the points and fees threshold for Qualified Mortgages that are "smaller loans." To achieve this purpose, the Board has proposed to set the smaller loan threshold at $75,000 and to adopt one of two alternatives for setting the maximum allowable points and fees for loans under this threshold amount. Under either approach, the Board has proposed limiting points and fees to a maximum of 5% for loans of $20,000 or less, while loans of $75,000 or above are capped at 3%. We submit that neither alternative effectively accomplishes Congress' intent of urging creditors to continue to make smaller loans to consumers, because the Board's proposed increases will not allow creditors to recover the costs associated with originating a residential mortgage loan with a smaller loan amount. These smaller balance loans are critical to the success of the manufactured home industry and to consumers wishing to purchase affordable housing.

There are approximately 18 million manufactured homeowners in this country, with approximately 9 million of these manufactured homes valued under $30,000. It is vital that both for the current owners of these homes who may wish to sell their home and for the manufactured home industry that these homes be marketable. In order to be marketable, potential homebuyers must be able to secure financing to make their home purchase. Under either of the Board's proposed alternatives, the maximum amount of points and fees a creditor may charge to originate a Qualified Mortgage to purchase one of these homes would be $1350 on a $30000 loan (under Alternative 1), $1000 on a $20,000 loan and $500 on a $10,000 loan. Creditors, however, incur fixed cost in originating a residential mortgage loan no matter the loan amount and for most, the proposed cap would not be enough to cover their actual costs for originating a loan, forgetting any potential profit. Therefore, the interested buyer would be unable to complete the home purchase.

Instead of relying strictly on hypothetical examples, consider the following actual manufactured home purchase:

Home Location:	Auburn, Alabama
Sale Price:	$37,236
Square Feet:	960 ($39 per square foot)

Assuming the customer made a 10% down payment towards this purchase, they would have required a total loan amount of $33,512. Under either Alternative 1 or Alternative 2, the creditor could have only charged up to 4.5% of the total loan amount (or $1508) in points and fees in making a Qualified Mortgage for this consumer.

The Board has proposed two alternatives for smaller loans in which the creditor's allowable points and fees percentage increases as the total loan amount decreases. While the Board's approach of increasing the points and fees percentage seems logical, it does not address the reality that a creditor has a minimum amount of fixed cost for originating a loan, and that those cost in regard to a loan of $33,512 or a loan of $150,000 is practically identical. Under the Board's proposal, a creditor could charge up to a maximum of 3% in points and fees (or $4500) on the $150,000 loan, a difference of $2992. When considering home purchases like the one above, the impact that the proposed points and fees caps would have on manufactured home lending, and on smaller home loans in general is apparent. This result is clearly contrary to the directive of Congress in §129C(b)(2)(d) which states "the Board shall prescribe rules. . .to permit lenders that extend smaller loans to meet the requirements of [a Qualified Mortgage]" and further that "in prescribing such rules, the Board shall consider the potential impact of such rules on rural areas and other areas where home values are lower." By capping the maximum allowable points and fees for a qualified mortgage at 5% (or $1000) for a $20,000 loan, the Board will effectively discourage creditors from making smaller loans. Under either option, creditors will be unable to recover their origination costs on most loans under $50,000. The result for consumers is that a residential mortgage loan of less than $50,000 will be difficult if not impossible to secure.

For this reason, we implore the Board to consider an alternative that we believe is both more consistent with the true intent of the smaller loan exception in §129(b)(2)(D) and will also be much clearer and easier for creditors to implement into their current underwriting systems and procedures. Our proposal would allow creditors to charge the greater of 3% of the total loan amount **or $2000 (indexed for inflation).** As indicated in the examples below, this alternative will achieve the desired result of limiting points and fees to a reasonable amount while still allowing creditors to recover the fixed cost necessary to originate a smaller loan:

For a total loan amount of $70,000, a creditor could charge points and fees of:
Board's Alternative 1: $2450 (3.5%)
Board's Alternative 2: $2240 (3.2%)
21st Mortgage Proposal: $2100 (greater of 3% or $2000)

For a total loan amount of $50,000:
Board's Alternative 1: $2000 (4%)
Board's Alternative 2: $1950 (3.9%)
21st Mortgage Proposal: $2000 (greater of 3% or $2000)

For a loan to purchase the residence in Auburn, AL cited above ($33,512):
Board's Alternative 1: $1508 (4.5%)
Board's Alternative 2: $1508 (4.5%)
21st Mortgage Proposal: $2000 (greater of 3% or $2000)

As these examples reflect, limiting the points and fees to the greater of 3% of the total loan amount or $2000 would ensure that consumers continue to have access to smaller loans with limited points because creditors would continue to be able to recover their origination costs. As noted, this alternative is also a much simpler rule, and would be much easier for lenders to implement than either of the tier alternatives proposed by the Board. This simple, bright-line standard would be easier for creditors, it would protect consumers from unreasonable fees, and it would encourage lenders to offer low price home loans.

In summary, we ask the Board to consider this alternative approach in order to most effectively accomplish Congress' mandate of "permitting lenders that extend smaller loans to meet the requirements of [a Qualified Mortgage]." Under either of the Board's proposed alternatives, smaller loans will become even more scarce, and the impact on owners of the over 9 million manufactured home residences valued under $30,000 will be significant.

Comment 4:
Loan Originator Compensation - Employees of Creditor - §226.32(b)(1)(ii)

Under the safe harbor provisions established by Dodd-Frank in Section 1412, creditors may avoid the ability to repay requirements by making a Qualified Mortgage. This section, which amends TILA to add new §129C(b) defines a Qualified Mortgage as a loan wherein, among other restrictions, the consumer is not charged points and fees in excess of 3% of the total loan amount. Section 129C(b)(2)(C) defines points and fees by reference to §103(aa)(4) of TILA, as amended by Dodd-Frank under Section 1431(c)(4). The amended definition of points and fees under §103(aa)(4) includes "all compensation paid directly or indirectly by a consumer or creditor to a mortgage originator from any source, including a mortgage originator that is also the creditor in a table-funded transaction." Section 1401 of Dodd-Frank defines a "mortgage originator" as a person who "for direct or indirect compensation or gain, or in the expectation of direct or indirect compensation or gain. . .(i) takes a residential mortgage loan application; (ii) assists a consumer in obtaining or applying to obtain a residential mortgage loan; or (iii) offers or negotiates terms of a residential mortgage loan." No doubt the aim of Congress in implementing these changes was to ensure that compensation to a loan originator for originating a mortgage loan is included in the creditor's points and fees calculation.

In implementing the amendments to TILA as set out in Dodd-Frank, the proposed rules amend §226.32 of Regulation Z to include in the definition of points and fees "all compensation paid directly or indirectly by a consumer or creditor to a loan originator as defined in §226.36(a)(1)." As the Board notes in a footnote of the proposed rule, §226.36 of Regulation Z defines "loan originator" as person who "for compensation or other monetary gain, or in expectation of compensation or other monetary gain, arranges, negotiates, or otherwise obtains an extension of credit for another person." Further, the term "includes employees of a creditor as well as employees of a mortgage broker that satisfy this definition." However, a creditor is only considered a loan originator under this section if they are "the creditor in a table-funded transaction." The compensation issue is further clarified by Paragraph 32(b)(1)(ii) of the proposed Official Staff Commentary which indicates that "loan originator fees already included in points and fees calculation as finance charges under §226.32(b)(1)(i) need not be counted again under §226.32(b)(1)(ii)." Under §226.32(b)(1)(i) a creditor already must include their finance charges in the points and fees calculation.

We interpret the Board's comments under Paragraph 32(b)(1)(ii) as exempting creditors from including compensation to their employees who originate a residential mortgage loan if that compensation is already included in the creditor's finance charge. We submit that creditors already factor in all compensation paid to their loan originators when determining their finance charge for a residential mortgage loan. Creditors then establish a finance charge that is similar for similarly situated consumers and include this charge in the points and fees calculation under Sec. 226.32(b)(1)(i). We therefore propose that the Board's final rule clarify that compensation paid to a loan originator that is an employee of a creditor need not be separately accounted for by the creditor and included in the points and fees calculation under section 226.32(b)(1)(ii) if that compensation is already a part of the creditor's costs that are considered in calculating and establishing the creditor's finance charge.

As previously mentioned in our Comment #3 above, creditors charge an origination charge in large part to cover all of their costs incurred in originating a residential mortgage loan. These costs include compensation paid to the creditor's employees involved in the loan origination process (including administrative and support staff). Therefore, whether compensation paid by a creditor to a loan originator they employ is salary (which the Board has excluded from the points and fees calculation in the proposed rules), a bonus, commission or otherwise, it is a cost to the creditor in originating the loan and therefore has already been considered by the creditor in establishing their finance charge for making a residential mortgage loan.

We understand that the goal of both the Dodd-Frank amendments and the Board's proposed rule is to ensure that creditors account for and include in a consumer's points and fees calculation any compensation earned by loan originators in originating the loan. We understand and agree that compensation paid to a mortgage broker or an outside loan originator is a charge above and separate from the creditor's finance charge and must be additionally included the points and fees calculation. Further, we understand and agree that a creditor's finance charge is included in the points and fees calculation. We submit however that it was not the intent of Congress or the Board to create additional burdens and costs for creditors who already consider loan originator compensation when establishing their finance charge.

It would not be prudent business practice for a creditor to compensate an employee for originating a loan without accounting for that cost when setting their finance charge. Such compensation is effectively already included in the finance charge and in the points and fees calculation. To further require creditors to track and itemize compensation for each specific residential mortgage loan and make, in many cases, subjective determinations regarding whether a particular bonus or other compensation is tied closely enough to a specific loan to trigger specific inclusion of that amount in the points and fees calculation for a specific loan would create additional costly, redundant and time-consuming documentation and an unnecessary record keeping for creditors already steeped in regulation, while providing no real benefit to a consumer. In fact, it could be a deterrent to some consumers. If creditors were to include in the points and fees calculation the compensation paid to their in-house originators in addition to their finance charge, the consumer would, in some cases, be arbitrarily paying higher origination fees.

For example, assume a creditor pays a bonus to its loan originator employees of $100 after the first ten residential mortgage loans they originate. This bonus is perfectly acceptable under the Board's loan originator compensation rules. As noted, this bonus is a cost to the creditor and is already a factor used by the creditor in establishing its finance charge for residential mortgage loans of this type. Further assume that similarly situated consumers 9, 10, 11 and 12 apply for a loan with creditor around the same time period with the same employee of the creditor. The Board's current proposal would seemingly require creditors to specifically include that $100 bonus in the points and fees calculation for each of the loans on which the bonus was earned by the loan originator. Therefore, instead of the creditor charging similar loan origination fees for residential mortgage loans to similarly situated consumers based on its average costs for originating these loans, the creditor would have to arbitrarily increase the origination charge for some loans but not others.

In this example, consumers 9 and 10 would receive an arbitrary benefit of paying $100 less in origination charges than consumers 11 and 12 because no bonus or other loan-specific compensation was paid to the loan originator in originating their loans. This leaves consumers 11 and 12 arbitrarily paying more simply because of the timing of their loan applications. Clearly this was not the intended result of the TILA amendments or the Board's proposed rules.

We ask the Board, therefore, to clarify the proposed rule and the Official Staff Commentary to make it clear that when a creditor, in establishing their finance charge, considers the average cost incurred by the creditor to originate residential mortgage loans of that type (including the compensation paid to employee for loan origination) and that finance charge is included under §226.32(b)(1)(i), then there is no further requirement for the creditor to specifically include the compensation paid to an individual employee of the creditor for originating a specific loan. We submit that this clarification will have the dual effect of reducing unnecessary and redundant regulation for creditors and maintaining consistent finance charges for similarly situated consumers no matter when they happen to apply for a residential mortgage loan. Further, this language will accomplish the intent of Congress and the Board in including compensation paid to a loan originator in the points and fees calculation.

In addition, we ask the Board to consider adding clarifying language to the proposed rules that excludes from §226.32(b)(ii) all compensation paid to a manufactured home retailer and/or their employees that is earned in the normal course of business from the sale of a manufactured home, even if that manufactured home retailer or their employee is also acting as a licensed loan originator with regard to the transaction. Without this clarification, a creditor would presumably have to consider as points and fees all compensation received by the manufactured home retailer that is a licensed loan originator, even if the majority of that compensation is earned by the retailer in the normal course of their business of selling manufactured homes.

By way of an example, assume that an employee of a manufactured home retailer has completed the necessary steps and properly obtains a loan originator license under applicable state law. Assume further that the employee, who is also a salesperson, takes the application of one of their prospective customers and forwards it to a creditor for consideration. Upon receiving a loan approval from the creditor, the manufactured home retailer's employee presents the loan terms to their customer. The customer agrees to purchase the home and finance the purchase through the creditor.

For their services as a loan originator, and in addition to the sales commission they receive from the manufactured home retailer for selling the home, the employee earns a "broker fee" that is paid by the consumer and financed into the loan. As required by the proposed rule, this fee earned by the employee for performing the activities of a "loan originator" must be included by the creditor in the overall points and fees calculation. However, since the proposed rule states that points and fees includes "all compensation paid directly or indirectly to a loan originator" it appears that under the proposed rule the creditor would also be required to include in the points and fees calculation all compensation earned by the employee, even the sales commission earned from the sale of the home (and not earned as a result of their loan originator activities).

This result is inconsistent with the intent of Congress in that they specifically excluded manufactured home retailers and their employees from the definition of loan originator if they do not engage in the activities of a loan originator. It stands to reason, therefore, that compensation earned by a manufactured home retailer and their employees should only be included in the points and fees calculation if the compensation was earned in the performance of loan originator activities. The compensation of a manufactured home retailer or their employee earned strictly from the sale of a manufactured home should always be excluded from the points and fees calculation, regardless of whether the manufactured home retailer or their employee is a loan originator or not.

In closing, we urge the Board to consider the comments above and the impact of the Board's regulation on the manufactured home industry and on consumers wishing to purchase affordable housing. Should you require any additional information or have additional questions, please do not hesitate to contact us.

Sincerely,

Tim Williams
President, 21st Mortgage Corporation

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