MORTGAGE BANKERS ASSOCIATION
Investing in communities

December 22, 2010

Jennifer J. Johnson
Secretary
Board of Governors of the
Federal Reserve System
20th Street and Constitution Ave. NW
Washington, DC 20551
regs.comments@federalreserve.gov

Re: Proposed Rule, Request for Public Comment (Docket No. R-1390)

Dear Ms. Johnson:

The Mortgage Bankers Association[1] (MBA) appreciates the opportunity to comment on proposed amendments to Regulation Z and the Official Staff Commentary to Regulation Z (the Commentary) issued for public comment by the Board of Governors of the Federal Reserve System (the Board).[2]

This Proposal constitutes a major revision of the implementing regulations for the Truth in Lending Act (TILA), Regulation Z, resulting from the Board's comprehensive review of these regulations. Last year, at this time, MBA commented on the first two major parts of that review, proposed overhauls of closed-end and open-end disclosures, respectively (the 2009 Proposals). Since then, the Board has issued several additional proposed regulations, interim final regulations and final regulations to amend Regulation Z, including a regulation on loan originator compensation arising from the 2009 Proposals.

This Proposal would amend Regulation Z to: (1) make changes to certain disclosure requirements; (2) clarify the operation of the right to rescind certain open-end and

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[1]The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets; to expand homeownership and extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of over 2,200 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, Wall Street conduits, life insurance companies and others in the mortgage lending field. For additional information, visit MBA's Web site: www.mortgagebankers.org.

[2] The proposed amendments were published at 75 Fed. Reg. 58539 (Sept. 24, 2010), and will be referred to in this letter as the "Proposal" or the "Proposed Rule."

closed-end loans secured by the consumer's principal dwelling; (3) revise requirements for determining when a modification or refinance of an existing closed-end mortgage loan secured by real property or a dwelling is a new transaction requiring new disclosures; (4) establish a new calculation for determining whether a closed-end loan secured by the consumer's principal dwelling is a "higher-priced"' mortgage loan subject to the special protections in Section 226.35; (5) provide a new right to a refund for consumers for fees imposed during the three business days following the consumer's receipt of early disclosures for closed-end loans secured by real property or a dwelling; and (6) address several other issues, including whether the Board's 2008 Home Ownership and Equity Protection Act (HOEPA) prohibitions against misleading advertising should apply to open-end loans, a change to the disclosures applicable to credit insurance and debt protection products as well as a change to treat FHA accrued interest as a prepayment penalty.

MBA has long supported far greater transparency in the mortgage process and greatly appreciates the work the Board has done over several decades implementing TILA. Nonetheless, just over a month before this proposal was issued, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), which establishes a new Bureau of Consumer Financial Protection (Bureau) and mandates that, as of the "transfer date" on July 21, 2011, the Bureau takes over responsibility for TILA regulation and virtually all other consumer financial protection laws, including the Real Estate Settlement Procedures Act (RESPA).

No later than one year after the transfer date, the Bureau must issue a proposed regulation to integrate and combine the TILA and RESPA disclosures. Given this timeframe, in September of this year, Treasury Secretary Timothy Geithner and Special Advisor to the President Elizabeth Warren began discussions with stakeholders to begin the disclosure integration process and announced that combining the two disclosures into a single, integrated disclosure will be a first priority of the Bureau. Additionally, Title XIV of Dodd-Frank contains extensive mortgage reform provisions, including setting minimum standards for mortgages, high cost mortgage provisions and other requirements that all require implementation. Some of these provisions utilize thresholds for applicability that are based on a loan's annual percentage rate (APR).

Considering these points, as a general matter, MBA opposes efforts to finalize those provisions of the Proposal dealing with either the form or timing of disclosures.
More specifically, we believe the Board's disclosure reform efforts should be postponed to synchronize them with the Bureau's work. MBA wishes to make certain the joint RESPA-TILA simplification is neither confused nor confounded and will not cause lenders to incur unnecessary programming and reprogramming costs that ultimately will be borne by consumers.

Also, considering the Board's new responsibilities and the impending work to implement the estimated hundreds of rules required under Dodd-Frank, throughout this comment, MBA urges the Board to allow the Bureau to address the various issues raised under this proposal, which implicate provisions of Dodd-Frank. We urge this because the Bureau will be empowered to comprehensively address consumer financial protection issues and it will have unique resources at its command to carry out its charge. For example, the Bureau may use its broad financial education authorities to complement its broad authority to require consumer disclosures.

Notwithstanding our above recommendation to delay finalizing the Proposal, MBA takes several specific positions relating to aspects of the Proposal.

First, MBA generally supports the Board's proposals regarding rescission of closed-end residential mortgages secured by the consumer's principal dwelling and believes the Board should finalize those provisions. The Board has performed a substantial review of the issues relating to rescission and focuses its rulemaking on clarifying implementation of this complex right to reflect Congress' intent as well as the realities of current practices.

Reform of the rescission provisions is needed because it resolves ambiguities in the application of TILA's rescission provisions for borrowers and lenders alike. Unfortunately, TILA claims for rescission of mortgage loans have increased markedly as a tool to stop foreclosures, regardless of their merit, making the need for guidance in this area particularly urgent. Unlike the Board's proposals on disclosure and Dodd-Frank requirements that should await the Bureau, greater clarity in this area is needed today to help avoid unnecessary litigation and reduce costs that are borne by borrowers who day-in and day-out make payments on their mortgages.

Second, although MBA generally supports the policy behind providing new TILA disclosures for refinanced loans, where there truly is a new loan, MBA opposes the Board's proposal to abandon the "satisfaction and replacement" standard as it relates to delinquent borrowers, borrowers at imminent risk of default and certain other transactions. MBA believes the Board's proposed changes risk hindering the loan modification process.

Third, because MBA supports maximum competition for good, sustainable mortgage credit and consumer shopping among lenders and other originators for loans, MBA encourages taking a comprehensive look at the effectiveness of existing disclosure requirements under both TILA and RESPA before adding a new refund requirement and waiting period to the existing morass of timing and redisclosure requirements, to assure consumers benefit and are not unduly delayed by timing requirements. MBA believes the Board should allow the Bureau to undertake this review since a review of disclosure timing should be an integral part of the Bureau's RESPA-TILA effort. Not only does the Bureau have responsibility for that undertaking, but, going forward, it will be the sole regulator under RESPA and TILA to assure consistency.

Fourth, MBA has supported an all-in APR provided that the Board make appropriate changes to its provisions (e.g., the Average Prime Offer Rate (APOR) or APR thresholds for higher-priced mortgage loans, Home Mortgage Disclosure Act (HMDA) reportable rate spreads under Section 203.4(a)(12) of Regulation C) and state requirements conform. Accordingly, MBA greatly appreciates the Board's work to develop and propose a "transaction coverage rate" to help achieve that purpose. Nevertheless, considering that the new provisions under Dodd-Frank, such as the prepayment penalty and escrow provisions, are triggered by APR thresholds, the Board's proposed changes to establish a new coverage rate should be done by the Bureau contemporaneous with the other Dodd-Frank amendments.

Similarly, while MBA recommended in our 2009 comment letter that the Board revise the definitions of "points and fees" and "total loan amount" to establish the threshold for loans subject to Section 226.32 of Regulation Z ("HOEPA Loans") to continue to exclude the charges currently excluded from those definitions, Dodd-Frank has also revised the points and fees trigger for HOEPA Loans and established a new limitation on fees as part of the ability to repay/qualified mortgage formulation. Consequently, efforts to revise these triggers should also be accomplished with implementation of the Dodd-Frank provisions.

Fifth, MBA supports changes to strengthen anti-deceptive advertising requirements that create consistency among agency regulations, but opposes the proposed changes that would require lenders to provide unduly negative credit insurance disclosures and changes that would make FHA loans more difficult to originate.

Finally, given the size of this rulemaking, we urge the Board to give the industry more time to consider and comment on the Proposal.

This comment letter addresses the issues raised above and numerous other matters in detail. A companion joint comment letter from the National Reverse Mortgage Lenders Association (NRMLA) and MBA addresses the Board's proposals for open- and closed-end reverse mortgages and its prohibitions on certain unfair acts or practices for such mortgages.

General Background

As indicated, in August 2009, the Board issued two major disclosure reform proposals (the 2009 proposals). They included a proposal to revise the disclosure requirements for closed-end mortgages and to address other issues including loan originators' compensation. 74 Fed. Reg. 43232 (Aug. 26, 2009). The Board also issued a proposal that would revise the disclosure requirements for Home Equity Lines of Credit (HELOCs) and address other issues such as account terminations, suspensions and credit limit reductions, and reinstatement of accounts. 74 Fed. Reg. 43428. Although public comments for both proposals were due by December 24, 2009, the Board has adopted only a final rule on loan originator compensation from these rulemakings. The Board indicates it is still reviewing comments on other aspects of the closed-end and HELOC proposals.

In addition, this proposal would add or revise several disclosures and rules that apply to: rescission; modifications of existing closed-end loans; the method for determining whether a closed-end loan is a "higher-priced mortgage" loan; refund of fees after early disclosures for closed-end mortgage loans; expansion of deceptive advertising prohibitions to open-end loans; credit insurance products; treatment of interest under FHA loans as prepayment penalties; and other matters, as well reverse mortgages (addressed in MBA's comment letter with NRMLA).

Accordingly our comment letter discusses these topics in the following sections:

I. **Summary of MBA's Major Comments**
II. **Facilitating the RESPA-TILA Effort and Dodd-Frank Implementation**
III. **Consumer's Right to Rescind**
IV. **Loan Modifications and TILA Disclosures and Restrictions**
V. **Consumer's Right to a Refund of Fees**
VI. **Coverage Test for 2008 HOEPA Final Rule and HOEPA**
VII. **Other Provisions**
VIII. **Other Matters**
IX. **Conclusion**

I. **Summary of MBA's Major Comments.** MBA has several major comments on the proposed rule which are discussed further below:

A. <u>Facilitating the RESPA-TILA Effort and Dodd-Frank Implementation.</u>

MBA strongly supports the provisions of Dodd-Frank that require the Bureau to integrate RESPA and TILA disclosures and we applaud the announcement by Treasury Secretary Timothy Geithner and Special Advisor to the President Elizabeth Warren that they have begun this effort. We agree that the Bureau should consider the RESPA-TILA integration its first priority. In light of this, we also believe that the efforts of the Board and other government agencies to modify TILA disclosures and their timing should be suspended to avoid interfering with the Bureau's RESPA-TILA simplification effort. We believe this suspension is imperative to avoid causing unnecessary costs of programming and reprogramming lender systems, which costs ultimately will be borne by consumers. Additionally, we note that many of the provisions of this Proposal will require revisiting in light of the enactment of Dodd-Frank. MBA opposes implementing piecemeal, incomplete changes to Regulation Z that may risk becoming obsolete shortly after implementation. Rather, we believe that the Bureau should issue comprehensive proposed revisions that include all of the required changes to Regulation Z as mandated by Dodd-Frank. Accordingly, in this comment, we urge that the Board refrain from adopting any portion of the Proposal that must later be revised by the Bureau during the Dodd-Frank implementation process.

B. Consumer's Right to Rescind - MBA Supports the Board's Efforts to Update and Clarify the TILA Rescission Rules.

Uncertainty surrounding existing rescission requirements has led to erroneous holdings by some courts and unnecessary costly litigation, increasing costs to all borrowers. For this reason, we support efforts by the Board to provide clear guidance on rescission at this time. We believe the Board's view is wholly consistent with the statute's intent of returning both parties to their *status quo ante* when the remedy is applied. This result does not treat either the consumer or the lender unfairly. Given this, MBA also agrees with many of the Board's proposed changes to the identification of those material disclosures that could give rise to an extended right to rescind and supports proposed changes to the safe harbor rescission disclosure form to provide a tear off sheet. Nevertheless, as noted above, MBA believes that the Board might leave both of these disclosure changes only to the Bureau as part of its RESPA-TILA integration effort.

C. Loan Modifications and TILA - MBA Opposes Changing the Satisfaction and Replacement Standard for Delinquent Borrowers, Borrowers at Imminent Risk of Default and Certain Other Transactions.

MBA is concerned that the Board's efforts related to redefining what constitutes a "new transaction" for purposes of providing consumers with new TILA disclosures and protections is overly broad. We are especially concerned that the Board's position treats most modifications granted to delinquent or financially troubled borrowers as new transactions and in turn triggers new disclosures, rescission rights, and various prohibitions. The rule, which is not well suited to loss mitigation activities, will create legal impediments to servicers offering assistance to borrowers in financial trouble.

D. Consumer's Right to a Refund of Fees - If a New Refund Period and/or a New Three-Day Pre-Closing Period Are to Be Established They Should Be Established By the New Bureau After a Full Review of All the Current Disclosure Requirements.

MBA supports efforts to ensure consumers receive clear disclosures and to ensure that they have time to consider disclosures before they are committed to a loan. Nevertheless, MBA opposes establishment of a new right for a consumer to receive a refund of any appraisal or other fees paid by the consumer (other than a credit report fee), if the consumer decides not to proceed with a closed-end mortgage transaction within three business days of receiving the early disclosures. MBA strongly believes that as part of its RESPA and TILA integration efforts, the Bureau should reevaluate the timing requirements of disclosures to assure consumers benefit and are not unduly delayed by timing requirements.

E. Coverage Test for 2008 HOEPA Final Rule and HOEPA - If the Board Implements a New All-In APR, then an Improved Metric to Trigger Higher Priced Mortgage Coverage Is Essential, Such a Metric Should Not Be Established Except in Conjunction with Implementation of Dodd Frank and Other Requirements.

In the past, MBA has indicated that it would support establishment of a more inclusive finance charge and "all-in" APR, if the Board addresses a range of concerns related to this change, to avoid including the possibility that an excessive amount of prime loans may be captured within the definition of a "higher-priced" mortgage loan. Accordingly, although MBA appreciates that the Board has moved forward to create a "coverage rate" that would be closely comparable to the Average Prime Offer Rate to help address this concern, the enactment of Dodd-Frank has created several new concerns. More specifically, Dodd-Frank's reliance on APR as a threshold measure is at odds with the creation of a new "coverage rate." Thus, again, MBA urges the Board to refrain from adopting changes in this area and leave to the Bureau efforts to undertake this change along with changes to HMDA's rate spread threshold and other federal and state lending laws. As part of that process, the Board should consider revising the Average Prime Offer Rate (APOR).

F. Other Provisions: - MBA has comments about several other provisions in the proposal including the following:

   a. MBA Supports Conforming Advertising Rules for HELOCs to the Rules for Closed-End Mortgage Loans, but also Urges the Board to Work with the FTC to Develop a Common Set of Rules.

   b. MBA Has Concerns about the Board's Proposal to Revise the Disclosure Rules Related to Credit Insurance and Debt Cancellation and Suspension Products and Believes Changes Should Await Consideration by the Bureau.

   c. MBA Opposes the Board's Reversal of Its Policy with Regard to FHA's Monthly Interest Accrual Amortization Method for Calculating Interest Owed upon Pay-Off that Would Treat All FHA Mortgages as Having Prepayment Penalties.

G. Other Matters:

   a. Considering the Length and Detail in this Proposal, the Board Should Utilize a Process to Obtain Further Input From Stakeholders.

   b. The Drafting Paradigm Incorporating the Proposal into Regulation Z is Unnecessarily Difficult to Navigate.

   c. Waivers of Waiting Periods Should Be a Viable Option for Consumers. Any New Requirement for a New Disclosure Should Include Provisions that Truly Permit Borrowers to Waive the Requirements Based on Exigent Circumstances.

   d. These Extensive Changes Will Require Considerable Implementation Time.

II. Facilitating the RESPA-TILA Effort and Dodd-Frank Implementation

A. RESPA-TILA

MBA appreciates the Board's dedication to improving consumer disclosures under TILA. For nearly two decades MBA has advocated for a comprehensive overhaul of the mortgage disclosure process and joint RESPA-TILA reform in particular.

Now that Dodd-Frank has charged the Bureau with this responsibility, MBA and other trade associations wrote[3] to Chairman Bernanke on November 10, 2010, urging him to work with Treasury Secretary Geithner, Housing and Urban Development Secretary Donovan, Advisor to the President Warren and subsequently the Bureau Director, to develop a comprehensive plan for disclosure reform that includes an agenda and timetable to propose, finalize and implement all mortgage disclosure revisions by the Board and the Bureau and other agencies in an orderly manner.

The letter urges that the plan establish RESPA-TILA integration as a first priority and assure that other rules to improve mortgage disclosures complement that effort. The associations stated:

> "We believe efforts of individual agencies, including the Board's to improve TILA disclosures, at this point should be rescheduled to later in the process, to avoid diverting the efforts of stakeholders into what may become a fruitless pursuit and/or confusing the joint RESPA-TILA simplification effort itself."

Our industry knows too well that consumers are inundated with countless ill-timed, uncoordinated and confusing disclosures during the mortgage process, which as a result are often ignored, despite their importance. Both independent and governmental studies confirm that consumers are confused, and may even be misled, by the array of required forms.

MBA believes that if TILA and RESPA disclosures are combined and made simpler, or at least made harmonious and complementary, and provided to consumers with other essential information in a coordinated manner at rational times in the process, consumers would be far better equipped to navigate the market, understand their mortgage and settlement costs, and shop intelligently to meet their financing needs.

Improving the transparency of the process is essential to true reform and needs to be the first stage of the reform process. The way should be clear for stakeholders to channel their energies into this effort to facilitate its successful achievement.

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[3] Joint trade letter to Chairman Ben Bernanke, November 10, 2010. http://www.mortgagebankers.org/files/Advocacy/2010/JointLettertoTreasury,HUD,andFederalReserveonRESPATILA.pdf.

A key purpose of Dodd-Frank in establishing the new Bureau was to put all consumer financial protection efforts in one place to establish a coordinated consumer financial protection effort. The Bureau will have regulatory authority over both RESPA and TILA in addition to its RESPA-TILA integration charge. Regrettably, the urgent need for coordination has been demonstrated all too well.

During the last few years, the Board and HUD, with the best of intentions, initiated separate efforts to improve disclosures under their respective laws that resulted in new RESPA disclosures, additional TILA rules and several TILA proposals for reform. The results thus far have yielded complex, confusing and even conflicting requirements and very considerable costs.[4] Congress added to the confusion in 2008 by establishing new timing requirements for TILA disclosures, which differ from the timing of RESPA disclosures. These differences were exacerbated by additional timing requirements for redisclosure of the Good Faith Estimate (GFE) under the new RESPA rule, and proposals offered in Congress.

In early 2008, HUD proposed its overhaul of the GFE and HUD-1 Settlement Statement. It finalized the rule in November of 2008, and the regulations became effective January 1, 2010, with clarifying issuances that continue to this day. These new regulations establish substantive and procedural requirements that vary from those proposed by the Board; untold expenses have been and continue to be incurred by the lending industry to implement them notwithstanding.

In the summer of 2009, after issuing rules to protect consumers from unfair, abusive, or deceptive lending and servicing practices as well as accompanying changes to the Home Mortgage Disclosure Act (Regulation C), the Board issued its 2009 proposals that would overhaul many of its TILA disclosures for closed-end and open-end transactions and required comments by December 24, 2009. Although provisions of the Board's proposal concerning loan officer compensation have been finalized, the disclosure provisions have not been finalized yet, making this an appropriate time to bring this effort into the RESPA-TILA integration process.

On September 24, 2010, the Board published this second extensive proposal, which like the 2009 proposals has required an enormous investment of time by stakeholders to review and comment, diverting energy that in our judgment would be better spent on RESPA-TILA integration.

Although these proposals provide useful spadework that can help set the stage for future action, RESPA and TILA requirements remain divergent and it is clear that both sets of requirements may be revised considerably as a result of the integration effort.

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[4] A recent example of overlapping and problematic TILA and RESPA requirements is the new Interim Final Regulation (MDIA) issued by the Board. This rule will require disclosure of a new Interest Rate and Payment Summary form to show how an interest rate or payment amount may change. As pointed out in MBA's comment, we agree disclosure of that information is important, but the new disclosure form repeats information that is already required to be disclosed on the GFE and HUD-1 under the new RESPA rule, but on a different form.

For all of these reasons, the time is overdue to suspend the agencies' disparate disclosure reform efforts.

B. Dodd-Frank

Title XIV of Dodd-Frank contains extensive mortgage reform provisions, including minimum standards for mortgages, high cost mortgage provisions and other requirements. As examples, it includes provisions that utilize thresholds for applicability that are based on a loan's APR such as new restrictions on prepayment penalties; it also assigns FHA authority to determine qualified FHA mortgages.

Provisions of this Proposal, nonetheless, would establish a "coverage rate," discussed in Part V below, in lieu of an APR for purposes of the TILA higher-priced mortgage loan provisions. The Proposal also includes a characterization of FHA accrued interest as a prepayment penalty notwithstanding Dodd-Frank.

MBA strongly urges the Board to refrain from adopting these or any other portions of the Proposal that may be revised by the Bureau during the Dodd-Frank implementation process. Implementing piecemeal, incomplete changes to Regulation Z before Dodd-Frank is implemented will needlessly increase compliance costs ultimately borne by borrowers. We strongly believe that the Bureau should be the agency to issue comprehensive proposed revisions to Dodd-Frank including any required changes to Regulation Z.

III. Consumer's Right to Rescind

MBA generally supports the Board's proposals regarding rescission of closed-end residential mortgages secured by the consumer's principal dwelling. The Board has performed a substantial review of the issues relating to rescissions and has maintained focus on the how to implement this complex right in light of congressional intent in creating the right of rescission and the realities of the current marketplace.

As evidenced by the text of the current rules and disclosures, the TILA rescission rules were drafted to protect consumers who had thoughtlessly entered into a home improvement transaction and wished to change their minds within a few days of getting their loan. Situations in which consumers ask to rescind under these circumstances are a very small percentage of total transactions. Accordingly, although official statistics have not been maintained, the experience of our members is that the rescission right's most common use is not during the original three-day "cooling off period" that allows the consumer to better think through the merits of a home improvement or refinancing transaction. The right to rescind most often is used during the *extended three-year* right to rescind as a tactic by a consumer who is in default, to avoid or delay foreclosure.

The difference between the expected and actual use of the right, and the text of the disclosures currently in use, have created a great deal of unnecessary litigation and costs. This state of affairs benefits neither borrowers, who may believe that they can simply eliminate their loan without repaying the principal, nor creditors and servicers, who are forced to pass along the unnecessary costs of handling claims to their customers. The time and resources dedicated to resolving rescission issues could be put to better use to assisting consumers with loan modifications.

A. Is the Termination of the Security Interest Automatic or is Tender by the Consumer Required?

One salient aspect of the Proposal that has received substantial attention is the Board's clarification that the consumer must tender the loan principal when rescinding the loan and seeking the termination of the creditor's security interest. This clarification is consistent with both (i) the widespread understanding of common law rescission, which seeks to place both sides of a contract back in the same position they were in prior to entering into the contract, and (ii) the rulings of most courts around the country. It will simply clarify existing law.[5]

As noted in *Homestake*, even before Congress amended TILA to expressly permit courts to modify the mechanics of a rescission, courts in a majority of circuits did so in order to ensure that the statutory mechanics, which appear to give the consumer the right to rescind and only later provide the principal, did not result in an inequitable situation where the creditor releases the lien but the consumer has not tendered the principal. In 1980, Congress amended Section 125 expressly to allow for these mechanical changes, and courts all over the country have generally ensured that the consumer can and will tender before requiring the creditor to release the lien. While some courts have refused to modify the mechanics to protect the creditor's security interest until the consumer tenders, the majority of recent cases have simply focused on whether the consumer is required to plead the ability to tender when rescinding the loan.[6]

The Board has cited two federal bankruptcy court decisions in which the court took the position that the exercise of the rescission right did automatically void the security instrument. The decision in the first case, *Bell v. Parkway Mortgage, Inc.*,[7] was reconsidered by the court, and while the court upheld the automatic termination of the security instrument, it also required tender of the entire amount due on the loan through the Chapter 13 plan, a form of tender likely to make the consumer's plan impossible to complete as that would accelerate the amortization of the principal balance into a maximum five-year period.[8] The second case, *Williams v. BankOne, N.A.*,[9] was cited

[5] See, e.g., *Williams v. Homestake Mortgage*, 968 F.2d 1137 (11th Cir. 1992), *American Mortgage Network v. Shelton*, 486 F3d 815 (4th Cir. 2007), *Yamamoto v. Bank of New York*, 329 F.3d 1137 (9th Cir. 2003).
[6] *See, e.g., ING Bank v. Ahn*, 2009 WL 2083965 (N.D. Cal 2009).
[7] 309 B.R. 139 (Bankr. E.D. Pa 2004).
[8] *See In re Bell*, 314 B.R. 54 (Bankr. E.D. Pa. 2004).
[9] 291 B.R. 636 (Bankr. E.D. Pa. 2003).

as standing for the "refuted notion that a notice of rescission automatically voids the creditor's security interest."[10]

While we are sure that there are other decisions that could be cited in support of the position that the language of Section 125 required a result that the termination of the security interest was automatic and in no way dependent on the ability of the consumer to perform his or her side of the rescission, we think the *Jaskelainen* court succinctly summed up the case law in this area because it is simply impossible that Congress intended to strip creditors of their security interest in attempting to put the parties back to their original position.

The Board's clarification of this issue, both in the rule itself and the notice form, will greatly improve consumer understanding of their actual rights and will reduce the cost and burden the lack of clarity has created. In this economic environment, when homes have decreased in value and underwriting standards have tightened, most consumers who purport to rescind as part of a foreclosure avoidance or delay strategy are unable to tender the principal of their loan. If these consumers would like to remain in their homes and have the income to reasonably support staying there, they are good candidates for a loan modification, and servicers are aggressively implementing loan modification and other foreclosure avoidance programs for such consumers. A consumer would be far better off seeking a loan modification from their servicer than requesting a rescission that the consumer cannot perform.

B. <u>To Whom Must the Consumer Rescind in an Extended Rescission?</u>

In Section 226.23(a)(2)(ii)(B), the Board seeks to clarify the party to whom the consumer must send the notice of rescission when attempting to exercise an extended right to rescind after the three-day period has ended by identifying either the current owner or the current servicer.[11] We believe that this requirement will only create confusion. Accordingly, we recommend that the Board take the position that in these cases that consumers should be required to rescind directly to the current servicer of the loan. We make this recommendation for two reasons. First, identifying one recipient rather than two possible recipients makes exercise of the right easier for consumers. Second, most loan owners have no operational capability to handle these requests, and would end up delegating the request to the servicer, albeit after some amount of time had elapsed, further shortening the 20-day window for response. Allowing the consumer to rescind to the current owner (when the owner is not already the entity taking payments) will add time, cost and confusion to an already difficult process of identifying whether the rescission request is valid and can be performed.

[10] *Wells Fargo Bank NA v. Jaskelainen*, 407 B.R. 449 at 461 (Bankr. D. Mass. 2009).
[11] The Proposal states: To exercise an extended right to rescind after the three-business-day period following consummation, the consumer shall mail or deliver written notice of the rescission to the current owner of the debt obligation. A notice of rescission mailed or delivered to the servicer . . . shall constitute delivery to the current owner.

The servicer, however, must be allowed to designate where the rescission notice must be sent, such as a specific address, in order for the rescission notice to be deemed delivered. Moreover, we believe that the Rescission Form should be required to be signed by the borrower and include contact information for the borrower.

C. Same Creditor Refinancings

One issue that touches many aspects of the proposed changes to rescission is the differential treatment of "same creditor" refinancings and new creditor refinancings. Specifically, in Section 226.23(f)(2), certain same creditor refinances are exempt from the right to rescind.[12] In our view, these differences are not warranted because there is no substantive difference to the consumer in a same creditor refinance transaction versus a new creditor refinance transaction.

Were the distinction implemented as proposed, however, it would create additional work for a creditor to ensure that it is not the original creditor, and we believe it is possible that the market will place a different value on new creditor refinancings than same creditor refinancings because of their different legal status. Moreover, the proposal could make the exemption for same creditor refinances and modifications meaningless, given that most loans are held in securitization trusts and, therefore, rarely result in the original creditor being the current noteholder (except in the case of loan originated and held for portfolio). We do not see a reason for these noteholders to be treated differently.

The principal policy justification for the differential appears to be the possibility of a predatory portfolio creditor that refinances the consumer's loans to strip equity or perhaps even to bury compliance defects in past loans. In our view, the issue of the abusive portfolio creditor can be better addressed by the adoption of an anti-evasion rule – that a refinancing offered or entered into for the purpose of hiding or burying past compliance errors would not serve that purpose, but otherwise same creditor refinancings should be treated the same, across the board, as new creditor refinancings.

D. Material Disclosures

The Board proposes numerous changes to the definition of "material disclosures." The definition of this term is a key definition because a creditor's failure to provide an accurate "material disclosure" (which means that the disclosure must be correct or within tolerance), will provide the consumer with an extended right to rescind the loan for up to three years. We strongly concur with the Board's view that the definition requires an update. For example, we expect that most consumers do not understand

[12] As proposed, the right to rescind does not apply to a new transaction under Section 226.20(a)(1) by the same creditor of an extension of credit already secured by the consumer's principal dwelling, except to the extent of any new advance of money. For purposes of the above, "same creditor" refers to the original creditor that is also the current holder of the debt obligation. 75 Fed. Reg. 58,703 (Sept. 24, 2010).

the meaning of the disclosure of the "amount financed;" and, accordingly, we anticipate that potential borrowers are not utilizing that disclosure to shop for loans. We also agree with the Board's proposal to create tolerance levels for the material disclosures. At present, even a dollar-a-month difference in the schedule of payments – or even an overstatement – is arguably a violation supporting rescission.

Moreover, we agree with many of the new material disclosures recommended by the Board. While the compliance burden in making these changes will be very heavy, we believe that consumers in fact are depending on critical factors such as the loan amount, loan term and loan type in making their decision, and if these disclosures are inaccurate and the consumer was confused about these key terms of the loan, it could well affect whether the consumer would have decided to obtain the loan.

However, we have serious concerns with the Board's proposal to add settlement charges to the list of material disclosures. This change for the first time would make lenders liable for rescission based on a possible error in these charges. We think the substantial liability associated with this will make many transactions very hard to close, especially if there are any changes in the transaction as the transaction moves towards closing. Moreover, creditors have little control over some of the costs, especially settlement and closing agent costs. It is not fair to creditors to increase their liability by virtue of the actions of third parties such as title agents. Congress has acted very directly on settlement charges and their disclosure by enacting (and periodically amending) RESPA. If Congress believed settlement charges should be referenced in the TILA rescission right, with the associated costs and concerns, we believe Congress would have enacted statutory text that would provide that guidance to the Board.

Finally, we have concern that changes outside of the rescission proposal to the calculation of the "interest and settlement changes" – the finance charge – to include even more items outside of the creditor's control will make the current tolerances for error obsolete. We note that in most states, the consumer has a right to choose the title/settlement provider, making monitoring and control of those entities by creditors even more difficult. We recommend that the Board consider whether a larger tolerance for the finance charge should be adopted if other changes are included in the finance charge calculation.

E. Extended Right After Payoff or Refinancing

With the exception of the same creditor refinance exception, we applaud the Board's determination to clarify that the right of rescission terminates upon the payoff or refinancing of a loan. These issues have engendered substantial litigation over what is, in the end, a relatively metaphysical concept of undoing a transaction that has already been undone by the parties. As noted by the Board's Proposal, these situations are very similar to the sale of the property and should terminate the right of rescission.

F. One Copy of the Notice

We agree with the Board's proposal to require only one copy of the notice to be provided to consumers. Because very few consumers are in fact considering rescinding as they undergo the closing process, most consumers are quizzical about why they get two copies of the notice. As the Board noted, advances in technology have made access to photocopying close to ubiquitous, making the two copy rule unnecessary. However, in our members' experience, a considerable number of consumers who purport to rescind their loans do so on the alleged basis that they received only one copy of the correct disclosure form, notwithstanding the fact that the creditor's file contains copies of two signed notices and often a separate disclosure signed by the borrower asserting that they received two copies. The removal of the two copy requirement, which as a factual matter makes it difficult to obtain a swift and inexpensive dismissal of the consumer's claim, will improve this situation without reducing consumer notice and rights.

G. Providing the Notice Three Days Prior to Consummation

We have a concern about the requirement to provide the notice prior to closing because in many cases, especially in so-called "escrow states," the date of consummation may still be indistinct three days prior to expected consummation. The other TILA disclosures can be given because they are not date specific other than with respect to per diem interest, which can be estimated. However, the proposed rescission forms require the creditor to state a specific date (as opposed to a statement that it is three days following certain occurrences) by which the loan must be rescinded, and if the creditor gets that date wrong it will make the rescission notice ineffective. If this technical issue can be resolved, we are not opposed to sending the notice out with the other TILA disclosures.

H. Waiver and *Bona Fide* Personal Emergency

The ability of the consumer to waive the three-day cooling off period remains a difficult policy issue. As a result of the difficulties in administering waivers, most legal counsel advise creditors never to grant a waiver, because it can always be second guessed. The Proposal allows the three-day period to be waived for a bona fide emergency that involves the imminent loss of or harm to a consumer's dwelling or imminent harm to the health and safety of a consumer."[13] However, few creditors (especially now) are willing to make loans to consumers who are on the literal or figurative courthouse steps facing foreclosure sale. As a result, that particular waiver offers few borrowers meaningful assistance. Rather, the common recurring situation -- and the one with the most financial impact -- is a consumer who wishes to close his or her loan quickly due to a rate lock that expires or some other situation that fits into what the Board terms "the

[13] 75 Fed. Reg. 58593

consumer's desire to purchase goods or services not needed on an emergency basis, even though the price may increase if purchased after the rescission period ends."

On this issue, we think that the Board and the consumer advocates may have misjudged what is in the consumer's interest. If the savings are substantial – and they can be in the thousands of dollars – in almost every case, the consumer is better off with the savings than with a right that they probably never will exercise. One possible way to address this issue would be to allow a consumer who is represented by counsel to sign a waiver asserting a financial emergency. In this way, the consumer will have consulted a lawyer who can advise them of the possible value of the right, making any such waiver knowing and informed. This rule would also be self-limiting as it will only be considered if the savings are sufficient to warrant hiring counsel.

IV. Loan Modifications and TILA Disclosures and Restrictions

A. Background and Overarching Concern

The Board's proposal would change the definition of a "new transaction" to cover not only traditional refinances, but certain loan modifications. The result is that modifications would now be subject to TILA origination disclosures, rights of rescission, and higher-priced and HOEPA restrictions. The Board cites several reasons for the policy change including: 1) covering refinances in New York and Texas that are structured as modifications to avoid state mortgage recording taxes; 2) the Board's difficulty in keeping up with 50 state laws for when a refinance occurs, and 3) assuring borrowers are informed of the terms of their modification. Unfortunately, we believe making this change would chill the servicers' interest in and ability to execute modifications. Because the Board has publicly criticized servicers for having incentives that are misaligned with borrowers' incentives to avoid foreclosure, we are surprised that the Board would propose these new changes that themselves would create significant servicer disincentives and obstacles to perform modifications.

At present, the Board uses a "satisfaction and replacement" standard to determine when a new transaction or refinance has occurred triggering TILA requirements. The satisfaction and replacement standard has a long history, but relies primarily on state law to define when a satisfaction of and replacement of the existing obligation has occurred. We agree that some clarification to this standard is warranted, but overall it is a superior standard to the one being proposed. Specifically, we propose that "satisfaction and replacement" be defined in the rule to mean the cancellation of a note, the release of the related security interest and replacement with a new promissory note and security instrument. We also recommend conforming the exemptions to the basic standard.

The proposed changes to treat many modifications as refinancing will be unduly burdensome on both servicers/creditors and borrowers. The proposed change in standard raises many questions, and no doubt unforeseen consequences, that the Board will not be able to fully address in the final regulation. We believe this is especially true in light of the fact that modification efforts are constantly evolving; and there is no realistic way for the Regulation and Commentary to keep pace with market changes. Moreover, borrowers themselves do not view modifications as refinancings and would likely view “refinance” disclosures accompanying a modification as inherently confusing and a right to rescind purposeless.

Changes to key terms of the obligation are today provided in the modification agreement and other materials provided to the borrower. To the extent that the Board believes that borrowers are not receiving critical information regarding their modifications, we urge the Board to work with the GSEs, HUD, VA, the Treasury and the Bureau to resolve the issue, nonetheless using the “satisfaction and replacement” standard. These agencies set specific parameters for their programs and thus, if the modification agreement is insufficient, they can adopt an informational fact sheet or disclosure that lays out important terms of the modifications that will be far more meaningful to the borrower than a complete set of disclosures that were really designed for entirely new loans, not changes to existing obligations. In fact, Treasury has established very detailed information that servicers must provide to the borrower upon acceptance (or denial) of HAMP trial and permanent modifications. There is, therefore, no need to change the “satisfaction and replacement” standard for modifications used to avoid foreclosure.

Finally, we are concerned that applying TILA disclosures and rules to modifications will prove operationally challenging and may force servicers not to modify loans if the disclosures cannot be delivered according to TILA timelines. This would be a disservice to the borrower. As stated in more detail below, unlike a true refinance, most of the terms of the modification agreement can only be determined after the borrower’s financial situation is evaluated. Each modification is extremely personalized and thus the ability to get disclosures to the borrower within three days of “application” will prove to be a legal impediment to executing modifications. Moreover, our members indicate that servicers do not currently have software to support TILA disclosures and rules and that existing software utilized in origination is not suited to providing disclosures on seasoned, delinquent loans. The ability to get specifically designed software to handle modifications and other loss mitigation options and to integrate the software and policies will be extremely challenging. We are concerned such operational challenges could delay or stop loss mitigation activities for an extended period.

To extent that the Board wishes to treat “Consolidation, Extension, and Modifications” (CEMs) as refinances, the Board can simply clarify that CEMs are refinances through its Commentary. It is already current industry practice to treat CEMs as refinances. These loans are executed through origination channels, creditors provide borrowers with new disclosures and comply with other applicable aspects of TILA.

Before discussing the Board's proposed changes, we would like to address the existing exemptions and Board comment under the current "satisfaction and replacement" standard that has been problematic and needs clarification. We will then outline various concerns and points of confusion that support our belief that the "satisfaction and replacement" standard should not be eliminated.

1. Satisfaction and Replacement Commentary

As stated above, MBA believes that the Board should retain the "satisfaction and replacement" standard. However, we suggest clarification to the exemptions and Commentary. Existing Section 226.20(a) and related Commentary found at 226.20(a)(1-4) are contradictory, which has proved problematic and has increased servicer exposure to litigation. If the Board retains the "satisfaction and replacement" standard, which we urge the Board to do, we request that the Board clarify the standard and Commentary.

As it is currently written, the current regulation and Commentary lists several exemptions to the definition of a refinance (found at 226.20(a)(1-5)) that we believe actually confuses the basic definition.[14] In our view, exemptions (1), (3), (4), and (5) are inherently inconsistent with the basic premise that existing obligations must be satisfied and replaced with a new obligation. Thus these exemptions are at best meaningless or worse expose the industry to a contrary interpretation. It would then follow that the above highlighted exemptions could be deleted, bringing further clarity to the basic rule.

The current Commentary tries to clarify that there must be a cancellation of the old obligation and a replacement with a new one, but then, for example, uses contradictory language by stating that "the refinancing may involve…the rescheduling of payments under an existing obligation."[15] Debtors' counsels argue, as a result, that changing the payment schedule on a loan through a modification is a refinancing. Conversely servicers argue that modifying a loan does not rise to the level of a refinance. Failure to address this particular situation leaves servicers without sufficient guidance. MBA believes that the Board should remove conflicting references that do not meet the commonly understood definition of "satisfaction and replacement."

[14]"The following shall not be treated as a refinancing:
(1) A renewal of a single payment obligation with no change in the original terms.
(2) A reduction in the annual percentage rate with a corresponding change in the payment schedule.
(3) An agreement involving a court proceeding.
(4) A change in the payment schedule or a change in collateral requirements as a result of the consumer's default or delinquency, unless the rate is increased, or the new amount financed exceeds the unpaid balance plus earned finance charge and premiums for continuation of insurance of the types described in §226.4(d).
(5) The renewal of optional insurance purchased by the consumer and added to an existing transaction, if disclosures relating to the initial purchase were provided as required by this subpart."

[15] Official Staff Commentary on Regulation Z, 12 C.F.R. 226, Supplement I (Feb. 22, 2010), 226.20(a)-1.

2. Summary of Proposed Changes Affecting Modifications

As stated above, the Board proposes to replace the "satisfaction and replacement" standard with a new standard that will include most modifications within the scope of the definition of a refinancing. Specifically, the Board proposes in Section 226.20(a)(1)(i) that a new transaction results, and new disclosures and other protections are required, when the same creditor and same consumer modify an existing obligation by: (1) increasing the loan amount; (2) imposing a fee on the consumer in connection with the agreement to modify an existing legal obligation, regardless of whether the fee is reflected in an agreement between the parties; (3) changing the loan term; (4) changing the interest rate; (5) increasing the periodic payment amount; (6) adding an adjustable-rate feature or other risk factor identified in proposed Section 226.38(d)(1)(iii) or 226.38(d)(2), such as a prepayment penalty or negative amortization; or (7) adding new collateral that is a dwelling or real property.[16]

Notwithstanding the above, the Board proposes three exceptions to the general definition of a new transaction: (1) modifications that occur as part of a court proceeding; (2) modifications that occur in connection with the consumer's default or delinquency, unless the loan amount or interest rate is increased, or a fee is imposed on the consumer in connection with the modification; and (3) modifications that decrease the interest rate with no additional modifications to terms other than a decrease in the periodic payment amount, an extension of the loan term, or both, and where no fee is imposed on the consumer.[17]

We would like to comment on key aspects of the Proposal that we believe are problematic, unclear and are likely to treat far more modifications as "new transactions" than even the Board may have contemplated. We are concerned that the Proposal will create a significant disincentive for servicers to perform modifications for fear of substantial penalties, including extended rights of rescission and outright prohibitions, and an inability to operationally meet the requirements.

3. Right of Rescission

One of the most problematic aspects of the Proposal is the application of the right of rescission on modified loans and the narrowing exemption for "same creditor" transactions. Specifically under the Proposal, transactions are exempt from rescission if they:

a) Involve the original creditor, who is also the current holder of the note,
b) Do not involve an advance of new money, and
c) Do not add a new security interest in the consumer's principal dwelling.[18]

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[16] 75 Fed. Reg. at 58698 (to be codified at 12 CFR 226.20(a)(1)(ii))
[17] Id. (to be codified at 12 CFR 226.20(a)(1)(ii))
[18] *Ibid.,* at 58703 (to be codified at 12 C.F.R. 226.23(f)(2)).

The Board states that the potential burdens associated with the right of rescission would not discourage modifications that are in consumers' interests.[19] We respectfully disagree. Rescission is one of the most onerous and draconian penalties imposed on lenders. When imposed on the servicer for assisting borrowers avoid foreclosure, the remedy will cause servicers to avoid the risk.

The Board's proposed exemption is extremely limited and fails to recognize that most mortgages originated in the market today are sold into the secondary market to Fannie Mae or Freddie Mac or are securitized by Ginnie Mae. Few loans are originated for a bank's portfolio. As a result, in most cases, a noteholder will not be the same as the original creditor and the noteholder or its servicer will not get the benefit of the exemption. Even in the case of private label securitization, the holder of the note is a trust and is a separate legal entity from the originator, even though both parties are managed or owned by the same financial institution. It is unclear whether these parties would get the benefit of the exemption. Similarly, as the government takes over institutions and sells their assets, purchasers of such servicing rights will be disadvantaged in their loss mitigation efforts because they will not be the original creditor. We find this highly problematic. As stated above, we believe same creditor refinances and new creditor refinances should be treated the same across the board and allow both types of refinances to be eligible for the exemption if the other eligibility standards are met. See Section III of this comment letter.

B. <u>Transactions Without a Change to the Existing Legal Obligation</u>

According to the Section-by-section analysis, proposed Section 226.20(a)(1) would apply only if "the modification to terms rises to the level of a change in the terms of an existing legal obligation, as defined under applicable state law, *unless a fee is imposed on the consumer.*"[20] (Emphasis added).

The Board adds:

> "However, in all cases where a fee is imposed on the consumer in connection with the modification, a new transaction requiring new disclosures occurs, *regardless of whether the fee is reflected in any agreement between the parties.*"[21] (Emphasis added)

The Board's proposal to nullify the exemption upon the charging of a fee is very problematic and could be read to cover far more activities than modifications or refinances. We believe, without clarification, the proposal could be read to trigger TILA disclosures, restrictions and penalties whenever the servicer charges any fee, even if already part of the existing mortgage contract or if the fee is for a separate optional service ("Speed Pay", accelerated pay-off statement). The mere presence of a fee

[19] *Ibid.,* at 58548.
[20] *Ibid.,* at 58595, referring to Commentary Section 226.20(a)(1)(i)-2.
[21] *Ibid.,* at 58597.

without a legal change to the mortgage cannot be a "new transaction" and goes far beyond the reasonable concept of credit extension.

As stated in Section 226.20(a)(1)(i), any charge of a fee would trigger new TILA disclosures and related rules and penalties. There are many situations where a fee is charged, such fee is permitted/required by the existing note or mortgage, and thus there is no change in the terms of the existing legal obligation. For example, there may be situations where the borrower fails to pay flood or hazard insurance and the servicer must impose lender-placed insurance pursuant to the mortgage, note or federal law. Should the imposition of the cost of this insurance on an existing loan cause a "new transaction" even though there is no modification or refinance or change to any terms of the contract? Surely not since the consumer agreed to lender placement when he or she signed the mortgage.

Some lenders charge a fee for establishing a bi-weekly payment schedule to cover the cost of additional systems work and periodic statements. Despite the example stating that a bi-weekly payment schedule is not a change in the legal obligation, it also appears that the Board is proposing that if the servicer charges a fee to cover the cost of managing bi-weekly payments, then it may result in a refinance subject to TILA. If the borrower adds optional insurance such as credit life or disability insurance, should this rise to a new credit transaction despite no change in legal obligation on the first mortgage? Again, we cannot imagine that selecting a new product or exercising current rights under an existing mortgage should cause a refinance without any extension of funds or change in legal terms. Moreover, charging for an optional service should not trigger a refinance. Unfortunately, the Section-by-section analysis can be read so broadly that it will be used by debtors' counsel to prohibit all fees. Should the Board go forward with its proposal, which we urge the Board not to do, we ask that the Board provide very clear guidance that fees imposed pursuant to the existing contract or for optional services do not trigger a refinance.

In addition, this section appears to implicate forbearance programs. Forbearance programs are not permanent changes to the terms of the mortgage agreement. Rather, the servicer agrees not to foreclose (a contractual remedy) and to accept less than the contractual payment or no payment at all for a period of time. In most cases, the forbearance does *not* involve a change in the maturity date. The borrower's payments are reduced for a period of time, but must be made up within 12-24 months of curing the hardship. Short-term forbearance plans do not usually require a writing and are usually for a maximum of three months. Long-term forbearances are written and last for longer than three months. In many cases, forbearance is followed by a modification that capitalizes the arrearage. Forbearances are used most commonly today for unemployed borrowers or borrowers with temporary hardships. Forbearances are not an extension of credit and are not changes to the terms of the legal obligation. The Proposal, however, appears to treat forbearances as new transactions if there is an agreement or if a fee is charged, despite not meeting any reasonable standards of credit extension. This expansion creates an enormous amount of ambiguity and litigation risk. If taken to its ultimate conclusion, we also fear that debtor's counsel will seek to restrict the servicer's ability to charge a fee for any optional service, or as previously stated, for exercising standard contractual mortgage provisions. Without any further guidance, we are concerned servicers will be unable to offer forbearance plans and other helpful borrower services.

Moreover, it is unclear when an application would occur in the case of a forbearance plan. Servicers will often grant a short term forbearance plan verbally over the phone on the first call. As a result, some forbearance plans do not involve an application at all and, therefore, it is unclear when the disclosures would be triggered. Would the disclosure be given seven days before executing the forbearance plan? Delaying assistance does not seem to be in the best interest of consumers. It is important to provide solutions to borrowers as quickly as possible and without additional or multiple contacts required.

C. Imposition of a Fee

The Proposal provides that whenever a fee--however small--is imposed on a consumer in connection with a modification (and in other cases), including a modification for a consumer in default or in imminent risk of default, a "new transaction"' would occur requiring new TILA disclosures and imposing TILA restrictions. The Board recognizes, however, that this proposal would result in a significant number of modifications being deemed "new transactions," and seeks comment on whether fees imposed on consumers in connection with modifications should include all costs of the transaction or a more narrow range of fees.

1. Costs to Execute A Modification Should Not Trigger TILA

We believe that the imposition of a fee that the servicer incurs to execute a modification should not trigger a "new transaction" under the rule if the borrower is in default or in "imminent risk of default" as defined by Fannie Mae. [22] As you are aware, the execution of a modification has fees associated with it, including recordation fees, subordination preparation fees, broker price opinions or appraisal fees, and title search and endorsement fees. These are hard costs that servicers should be allowed to recoup from the borrower. Failure to allow these costs to be recovered creates a tremendous drain on the servicer's financial ability to execute a high volume of modifications and is unsustainable. These fees are reasonable, necessary and appropriate whether paid to a third party or to an affiliate for a service performed. They are services that are prerequisites to modifications under most investor and servicing contracts and by some state laws. The fees represent necessary actions a servicer must take to protect its investment (such as prioritize the modified loan) and the servicer's stockholders. While the HAMP program requires that the servicer or investor absorb some of these costs, many servicers are unable to participate in HAMP because of the significant costs of the

[22] Fannie Mae Announcement 09-05R (Apr. 21, 2009) page 5.

program. Thus, we believe it is appropriate to look beyond HAMP to ensure that the Board creates the correct incentives and policies. Out-of-pocket expenses incurred to execute the modification should be allowed to be reimbursed to ensure that servicers can support the staff and other resources they need to administer defaulted loans. Collection of the fees are generally not required in cash and thus do not create a hardship on the defaulted borrower. Rather, in non-HAMP loans, these fees can be capitalized to address borrowers with immediate cash flow concerns.

2. <u>Proposal Is Problematic Given New HAMP Feature</u>

The Treasury has now changed HAMP to allow borrowers with certain HAMP denials to request a review appraisal and pay $200.[11] The Treasury explains that the $200 fee ensures the borrower is committed to the modification and not just delaying foreclosure. Unfortunately, the result is to force the servicer to incur the balance of the appraisal cost ($300-700), without the servicer's control over frequency. This is of grave concern on its own. But, had the Board's proposal been in place, this monetary exchange would have also resulted in a new transaction despite a reduction in rate, reduction in monthly payment and no other fee imposed on the borrower. Under HAMP, the servicer cannot ignore the imposition of the fee or simply not conduct an appraisal. There appears to be no flexibility in the Board's standard as proposed, which we argue will create unintended consequences for servicers. Borrowers should not be in the position of triggering a "new transaction" and cause increased risks of rescission and compliance burdens that did not exist prior to the modification, especially since there is no traditional extension of new credit.

3. <u>Escrow Items Should Not Be Treated as Fees</u>

Proposed comment 20(a)(1)(i)(B)-2 provides that fees, such as points, underwriting fees, and new insurance premiums, imposed on the consumer in connection with the agreement include any fee that the consumer pays out-of-pocket or from loan proceeds. The Commentary adds that when a creditor does not impose additional insurance premiums or new insurance requirements (for example, if the creditor does not increase the existing hazard insurance premium for hazard insurance or increase property insurance amounts), but merely continues coverage, such costs are not fees imposed on the consumer. This implies that if taxes and insurance premiums increase concurrent with the modification or refinance, or possibly at other times, the increase triggers a new transaction. The standard fails to recognize the following factors:

First, borrowers are required to pay real estate taxes whether or not the borrower has a mortgage. The amount of taxes is set by the taxing authority and, therefore, cannot be a fee imposed by the servicer. If the taxing authority changes the composition of the tax bill to include, for example, water and sewer assessments, does this become a new transaction? Does an increase in the assessed value or tax rate result in a new transaction? We do not believe it should because all loans will suffer an increase in insurance premiums and taxes during their lives.

Second, almost all borrowers maintain hazard insurance regardless of having a mortgage. The GSEs, FHA, and VA all require hazard insurance in certain amounts to protect the security interest. Again these fees are not retained by the servicer and should not be treated like points and underwriting fees. If insurance premiums go up as a result of the insurance carrier's state-submitted rates, does this increase result in a new transaction? We do not believe such changes created by third parties should impact whether new credit has been extended.

Third, in the case of flood insurance, federal law mandates that lenders and servicers enforce -- for the life of the loan -- the borrower's purchase obligations in specific amounts. The GSEs have recently determined that some condominium associations are purposely underinsuring the building and, thus, individual units. The associations' behavior is triggering mandatory purchase requirements on certain unit owners pursuant to the law. Should the association's failure to provide sufficient insurance, which may trigger the purchase of a HO-6 policy at the time of modification or refinance, be considered a new transaction? We do not believe so. Borrowers are required by the original mortgage contract to maintain insurance and pay taxes. Failure to maintain coverage in the correct amounts is a breach of contract. The mortgage identifies the remedy for such a breach, which is to allow the servicer to pay for those amounts (including force-placing insurance) and to charge the borrower's account. As a result, escrow increases are not triggered by the modification but, rather, by the non-performance of the borrower. The Board should not consider a failure to perform, which results in increased escrow amounts a new transaction.

Fifth, this section appears to conflict with Section 226.20(a)(1)(i)(E) regarding increases in periodic payments. Specifically, Section 226.20(a)(1)(i)(E) states that amounts to fund either an existing escrow account or a newly established escrow account are not considered in determining whether there is an increase in the periodic payment. If that is true, why would such escrow items be considered fees for purposes of determining whether there is a new transaction?

Sixth, it appears that timing is the critical component for determining whether insurance or tax amounts trigger a new transaction. If so, we respectfully argue that such a provision is arbitrary. If property insurance or taxes increase prior to the modification or refinance, then a new transaction appears not to occur (although even this is unclear). However, if the modification or refinance triggers a reevaluation of the escrow account resulting in higher premiums or tax payments, then the rule appears to trigger a new transaction. Why should the discovery and recovery of an escrow deficiency or shortage at modification or refinance trigger a new transaction? We do not believe it should. In many cases, such deficiencies would have been uncovered during standard servicing due diligence and annual escrow analysis. The escrow payment would have been adjusted accordingly and would not have triggered a new transaction.

Seventh, to the extent there are deficiencies or shortages in the escrow account, servicers follow RESPA for notifying the borrower and for repayment standards. There is no need to trigger TILA requirements that confuse and conflict with existing laws and create ambiguity, which will be exploited by attorneys seeking to enrich themselves. The GSEs, HUD, VA and Congress are effectively setting these policies that are causing the Board's reaction. Should the government's policies regarding tax and insurance collection be problematic, we ask the Board to seek elimination of the problematic standards and hold servicers harmless for the consequences of such policy changes rather than impose additional risk and disclosure obligations on the mortgage industry.

F. Increase in the Loan Amount

In the preamble and Commentary to Section 20(a)(1)(i)(A)-1, the Board provides that a new transaction occurs when the new loan amount exceeds the unpaid principal balance plus any earned unpaid finance charge or earned unpaid non-finance charge (*e.g.,* a late fee) on the existing obligation. Proposed comments 20(a)(1)(i)(A)-2 and 20(a)(1)(i)(A)-3 provide that an increase in the loan amount includes any costs of the transaction and any fee paid by the consumer, such as points, attorney's fees, title examination, appraisals, credit reports and insurance fees that are financed or paid in cash by the consumer. Clearly the reference to attorney's fee, title examinations and appraisals refers to costs incurred on the new loan or modification, not costs incurred in exercising the right to foreclosure or to seek relief from a bankruptcy stay on the existing loan. The preamble is clear that an increase in the principal balance due to the capitalization of delinquent interest, escrow items and late fees do not constitute fees that would trigger a new transaction.

First, as stated above, we believe the costs to modify a loan should be recoverable. Second, we agree with the conclusion that unpaid finance charges and unpaid non-finance charges are amounts that represent the existing debt. We, therefore, also presume costs incurred to foreclose, seek relief from bankruptcy filing, and preserve the property are also part of the existing debt.

Although we urge the Board not to adopt its proposed changes, to the extent that the Board moves forward with this proposal, we ask that it clarify that "earned unpaid finance and non-finance charges" include costs incurred to exercise foreclosure, to obtain relief from bankruptcy and to preserve the property. The Board may also want to include examples such as foreclosure and bankruptcy attorneys fees incurred, title examinations performed to provide state foreclosure (bankruptcy) notifications to junior lien holders, foreclosure and bankruptcy court costs and filing fees, property preservation costs, appraisals or BPOs incurred to determine a bid price at foreclosure, and other standard costs attributed to the foreclosure or bankruptcy proceeding that occurred prior to or concurrent with the modification or trail modification. Such a policy would be consistent with Treasury rules on HAMP that permit the servicer to capitalize foreclosure and property preservation costs.[23]

G. Changes to Periodic Payment

Proposed Section 226.20(a)(1)(i)(E) provides that a new transaction occurs when the same creditor increases the periodic payment amount owed on an existing legal obligation.[24] Proposed Comment 20(a)(1)(i)(E)-2 clarifies that amounts that are advanced to the consumer to fund either an existing escrow account, or a newly established escrow account, are not considered in determining whether an increase in the payment amount has occurred under proposed Section 226.20(a)(1).

The Proposal and proposed Commentary, however, do not indicate whether an increase in the escrow account in the normal course of business (that is not an advance) triggers "an increase in periodic payment." We urge the Board to define periodic payment as the payment of interest and principal that does not include tax and insurance payments, because there is no doubt that these amounts change each year. We do not believe it is appropriate for a new transaction to be triggered because of an inevitable increase in taxes or insurance premiums.

Moreover, it appears the Proposal anticipates a new transaction where the old loan is extinguished and a new escrow account is funded (despite the reference to the same creditor). In a modification, the escrow account continues according to existing contract. If there is not a deficiency in the escrow account, no advances or funding of the escrow account would be necessary. At the same time, the periodic payment may go up depending on the timing of the modification and receipt of tax and insurance bills. In sum, because taxes and insurance are third party charges they should not be a factor in determining when a "new transaction" occurs. These increases would be required whether or not the borrower initiated a modification or refinance and thus make no sense in the context of the concept of "extension of new credit."

We presume that an increase to periodic payments triggers a new transaction only when the borrower is current on his or her payments at the time of the modification or refinance. However, the exemption found at 226.20(a)(1)(ii)(C) does not distinguish between current and delinquent borrowers. Therefore, can the Proposal be read that an increase in the periodic payment on a modification to a delinquent borrower triggers a "new transaction?" We do not believe that was the Board's intent, but should the Board proceed with this proposal, a clear statement to this effect is important. Severely delinquent borrowers, with substantial arrearages may find it advantageous to capitalize

[23] Making Home Affordable, Handbook for Servicers of Non-GSE Mortgages, Version 3.0 (December 2, 2010, page 65. https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/mhahandbook_30.pdf.

[24] Proposed comment 20(a)(1)(i)(E)-1 clarifies that an increase in periodic payment amount based on a payment change previously disclosed on an existing legal obligation is not a new transaction under proposed § 226.20(a)(1)(i). Proposed comment 20(a)(1)(i)(E)-1 also clarifies that if the payment adjustment was not previously disclosed, any change that increases the periodic payment amount would be a new transaction requiring new disclosures under proposed § 226.20(a)(1)(i).

the arrearage even though there will be an increase in periodic payment despite a reduction in rate. Servicers should not be discouraged from offering modifications to severely delinquent borrowers.

1. Decreases in Periodic Payments

The Board solicits comment on whether consumers would benefit from having new TILA disclosures for decreases in periodic payments as well as for increases in the periodic payment. We do not believe this is necessary since the consumer benefits from the decrease in payment and does not need the same protections. We are concerned that if TILA liability is extended to reductions in the periodic payments, creditors will be reluctant to modify loans to reduce periodic payments.

H. Changes in Interest Rate

Proposed Section 226.20(a)(1)(i)(D) provides that a new transaction occurs when the creditor changes the contractual interest rate of the existing obligation. Proposed Comment 20(a)(1)(i)(D)-1 clarifies that, to determine whether an increase or decrease in rate occurs, the creditor should compare the interest rate of the new obligation (the fully-indexed rate for an ARM) to the interest rate for the existing obligation that is in effect within a reasonable period of time – for example, 30 calendar days. In the case of delinquent loans, the exemption at 226.20(a)(1)(ii)(B) provides that a modification that decreases the rate, is not a new transaction unless a fee is paid by the borrower or the loan amount increases.

1. Increased Rates--Conversions from ARMs to Fixed Rates for Delinquent Borrowers

In many delinquent modifications, ARM loans are converted to fixed rate loans to provide consistent payments throughout the life of the product. This is a substantial benefit to the borrower and his or her ability to sustain the loan over time. Unfortunately, such modifications would be treated as new transactions which may cause servicers to reduce this option. Servicers would be inclined to offer ARM to ARM modifications to avoid a new transaction. While ARM to ARM modifications should not be viewed negatively because in many cases the borrower cannot afford a fixed rate, it will chill the servicer's interest and ability to offer fixed rate modifications. Should the Board move forward with this Proposal, we urge it to specifically except such conversions from triggering a new transaction in order to facilitate modifications of this nature.

2. Change in Terms – ARM to Fixed Rate for Current Borrowers

The Proposal at 226.20(a)(1)(ii)(C) provides that a modification is a new transaction if: (1) the modified rate ("fully indexed rate" for ARMs) is higher; (2) the periodic payment is higher; (3) there is a *modification to the terms* other than the extension of the maturity date; and/or (4) a fee was imposed on the borrower. We presume the conditions of this exemption apply only to current borrowers, not delinquent borrowers covered by the exemption found at 226.20(a)(1)(i)(B), but this is not entirely clear since this exemption is not specifically limited to current borrowers. It appears that a modification changing an ARM to a fixed rate loan is a "change in terms" that would trigger a new transaction, at a minimum for current borrowers and borrowers at imminent risk of default. We also believe that a modification converting an ARM to a fixed rate loan triggers a new transaction even if the interest rate remains the same or is lower. Given the unprecedented low rates, we suggest that should the Board move forward with this Proposal, modifications converting ARMs to fixed rate mortgage for all types of borrowers (whether current, in imminent risk of default, or delinquent) should not in itself be a new transaction.

3. Comparison of Rates

MBA seeks clarification on how to handle HAMP modifications on imminent default borrowers under this provision. Under HAMP's standard waterfall, a borrower's interest rate must be reduced to two percent for a period of five years if necessary to achieve a 31 percent housing debt-to-income ratio. After five years, the mortgage will gradually increase by one percent each year until the "Interest Rate Cap" is reached.[25] The "Interest Rate Cap" is the rate published in Freddie Mac's Primary Mortgage Market Survey (PMMS) at the time of the trial modification.[26] In today's interest rate environment, the "Interest Rate Cap" is lower than most existing mortgage rates, and, thus, we do not believe there is an "increase in the rate." Of course as rates rise, servicers may be reluctant to offer modifications because it will trigger TILA responsibilities. Moreover, as stated above, to the extent that a servicer modifies an ARM, the modified fixed-rate likely will be higher. Regardless, if the Board moves forward with the Proposal as drafted, it would be beneficial to know how to apply the rule:

What must servicers compare? We presume that the servicer would compare the existing loan contract rate to the "Interest Rate Cap" (contract rate as modified).

Given the rate step-up feature, are HAMP modifications considered ARMs for purposes of disclosures? If so, how can the servicer disclose the index and margin when the product does not have one?

If a HAMP modification was executed prior to the adoption of final rules (i.e., which means the borrower did not receive TILA disclosures), will a new transaction occur each time the HAMP step-up rate feature[27] occurs based on the Board's Proposed Comment at 226.20(a)(1)(i)(E)? Proposed Comment 226(a)(1)(i)(E) states that "if the rate feature was not previously disclosed, a modification to the rate would be a new transaction

[25] Making Home Affordable, Handbook for Servicers of Non-GSE Mortgages, Version 3.0 at 66.
[26] *Ibid.,* at 82.
[27] *Ibid.*

requiring new disclosures under proposed §226.20(a)(1)(i)." Would each such step-up in rate allow the borrower to rescind? What would occur if the borrower rescinded? These questions exemplify the complexity and ambiguity that is being created by the change in standard and why we urge the Board to retain the "satisfaction and replacement" standard for delinquent and imminent default borrowers, with MBA's other changes proposed herein.

I. Definition of an "Application"

For mortgage transactions subject to TILA and Regulation Z, applicable disclosures must be provided in accordance with specific timing requirements. For example, under proposed § 226.19(a), creditors must mail or deliver an early disclosure of credit terms to the consumer within three business days after the creditor receives an application and at least seven business days before consummation, and before a fee is imposed on the consumer other than a fee for obtaining the consumer's credit history.

Proposed Comment 20(a)(1)(i)-4 provides that creditors may rely on RESPA and Regulation X in deciding when a "written application" is received, regardless of whether the transaction is subject to RESPA.[28] The Board continues by stating it "is aware that consumers may not always formally apply for a modification of the terms of an existing obligation. In many cases, the creditor may have in its possession the information in the definition of "application" under RESPA and Regulation X (e.g., the consumer's name, monthly income, or property address). See 12 CFR 3500.2(b)." Therefore, proposed Comment 226.20(a)(1)(i)-4 also provides that an application is deemed received in those instances where the creditor has the information necessary to constitute an "application" as defined under RESPA and Regulation X, whether the creditor requests the information from the consumer anew or uses information on file.

The use of RESPA's definition of an application is not appropriate in the context of modifications used to avoid foreclosure. The RESPA definition is:

> *"Application* means the submission of a borrower's financial information in anticipation of a credit decision relating to a federally related mortgage loan, which shall include the borrower's name, the borrower's monthly income, the borrower's social security number to obtain a credit report, the property address, an estimate of the value of the property, the mortgage loan amount sought, and any other information deemed necessary by the loan originator."[29]

In the case of a modification, the information required to begin evaluating the borrower for HAMP and other foreclosure avoidance programs is different. HAMP, for example, requires the following information (referred to as an "Initial Package"):

[28] Proposed Comment 226.19(a)(1)(i)-2.
[29] 24 C.F.R. § 3500.2(b).

- Request for Modification and Affidavit, which includes a "hardship letter" explaining the reason for default. Servicers require "hardship letters" on most all other requests for modification.
- IRS Form 4506T or a 4506-EZ.
- Evidence of income. HAMP now requires that borrowers provide evidence of their income as part of the borrower's request for HAMP. In origination transactions evidence of income can be submitted after the application is signed.
- Dodd-Frank Certification regarding criminal convictions. This is specific to HAMP and is not required in the case of originations.[30]

Failure to provide one of these items means that the borrower has not submitted sufficient information to be evaluated for HAMP. Does the RESPA definition allow, for example, the servicer to determine that an application is not received because the borrower failed to submit a Dodd-Frank Certification? We believe so. The borrower's failure to give the Dodd-Frank Certification is an incomplete package which eliminates the borrower from review and consideration.

The Board provides that an application is received if some of the information needed to underwrite the borrower is available in the loan file. This standard is too broad as much of the information in the loan file about the property or borrower's income and assets at origination is stale and irrelevant to the borrower's eligibility for a modification or refinance. The Board should allow servicers and lenders to require current borrower information before an application is considered received.

Even when the components of the "Initial Package" are provided pursuant to HAMP or other modification program, it will be difficult to establish the terms of the modification (or eligibility) within three business days of receipt of the so-called "application". Under HAMP, for example, the servicer is given 30 days to evaluate the borrower for a HAMP modification.[31] This timing is necessary because not only must the servicer review the Initial Package of information, but must run various qualifying scenarios including the base eligibility standards, the Net Present Value calculation and the Waterfall calculations.[32] Until these are done, the servicer is unable to provide the borrower the modified rate or payment amount. The same problem is present in non-HAMP cases, where the servicer must evaluate the borrower before it knows the terms or programs it can offer the borrower. We are concerned servicers will be unable to meet the timelines required for these origination-based disclosures and will be barred from modifying loans.

Once again, the differences in origination and modification documentation demonstrate that these types of transaction differ tremendously. Their objectives are different. In the case of a true refinance, the creditor is extending new credit and, therefore, performing due diligence to ensure the borrower is creditworthy, has sufficient cash flow, the

[30] Making Home Affordable, Handbook for Servicers of Non-GSE Mortgages, Version 3.0 at 55.
[31] Making Home Affordable, Handbook for Servicers of Non-GSE Mortgages, Version 3.0 at 47.
[32] *Ibid.,* at 41-44, 65, 77.

collateral is sufficient, and the property is marketable. In the case of a modification for delinquent or distressed borrowers, the lien holder has already absorbed the credit risk and is attempting to mitigate losses and assist its customers. These distinctions are important and stress yet again that the current treatment of modifications for delinquent, imminent default borrowers is appropriate. The proposal to treat most modifications as refinances and new extensions of credit is simply a poor fit, causing compliance difficulties, lack of clarity, increased risk of TILA liability and disincentives to perform loss mitigation. We urge the Board to retain the "satisfaction and replacement" standard for delinquent borrowers and borrowers in imminent risk of default as defined by Fannie Mae.

J. Servicing Technology

The application of front-end disclosures on servicing activities is a substantial operational change and not well suited for servicers. In addition to the timing concerns, servicers indicate that there is no known software that can address disclosures for seasoned, delinquent loans. For example, how is interest that has accrued on the loan at the time of modification reflected in the calculation of the prepaid finance charges, amount financed, total payments, APR and other disclosures? Should the disclosures be calculated in the same manner as current Comment 226.20(b)-6 for assumptions? Having accrued interest affects the disclosed loan amount and may greatly complicate providing disclosures because the amount of accrued interest will make the loan amount change on a daily basis. Should creditors assume that modifications are effective on a payment due date and prepare final disclosures based upon the assumption that the loan will be current on that date?

Servicers simply do not have the capacity to implement the Proposal today and any efforts to impose TILA on servicing actions will require significant financial investments and resources. Moreover, the Board must recognize that integrating the proposal will require significant lead time that could not be achieved properly without a 24- to 36-month lead time. This is not to suggest that the Proposal should be adopted. We simply point out the system constraints.

V. Consumer's Right to a Refund of Fees

A. Background

In 2008, Congress amended TILA through the Mortgage Disclosure Improvement Act (MDIA), to codify the Board's 2008 rules requiring creditors to provide good faith estimates of credit terms (early disclosures under TILA) within three business days after receiving a consumer's application for a closed-end mortgage loan, and before a fee is imposed on the consumer (other than a fee for obtaining a consumer's credit history). The stated purpose was to help ensure consumers receive TILA disclosures at a time when they can use them to verify the terms of the mortgage loan offered and compare it to other available loans. The Board issued rules relevant to certain provisions of MDIA in May 2009.[33]

Currently under Regulation Z, a lender may impose a fee as soon as the consumer receives the early disclosures for a closed-end mortgage loan.[34] In this Proposal, the Board expresses concern that the consumer may feel financially committed to a transaction as soon as the disclosure is received, before having had adequate time to review it and make decisions. The Board indicates that this fee restriction was intended to ensure that consumers are not discouraged from comparison shopping by paying application fees that cause them to feel financially committed to the transaction before costs are fully disclosed. Fees imposed at application may include non-refundable application fees, which include an appraisal fee and a rate lock fee, if any, the amount of which may be significant.

B. <u>This Proposal</u>

To address this issue, the Board proposes in Section 226.19(a)(iv), to provide a right to a refund of fees if the consumer decides not to proceed with the transaction during the three business days following receipt of the early disclosures. To ensure that consumers are aware of this right, the Proposal would require a brief disclosure at application. The Board says it believes this would allow consumers time to review the terms of the loan and decide whether to go forward without feeling financially committed having paid an application fee. TILA and Regulation Z provide a substantially similar refund right for HELOCs.

The Board admits that the Proposal may result in creditors refraining from imposing any fees until four days after a consumer receives the early disclosures, to avoid having to refund fees. As a result, creditors likely will not order an appraisal or lock a rate without collecting a fee from the consumer, thus, the Proposal may cause a delay of three days in processing the consumer's transaction. The Board says that the right to a refund for HELOCs, does not seem to have caused undue delays or burdens for consumers seeking HELOCs. The Board also notes that under RESPA, an originator may impose a nonrefundable fee on a consumer as soon as the consumer receives the early RESPA disclosure and has agreed to go forward with the transaction.

C. <u>MBA Comment</u>

MBA supports efforts to assure consumers receive simpler, clearer disclosures and have a reasonable time to consider them during the mortgage process. Nonetheless, MBA believes that before consumers are afforded a new three-day right to refund, the Board should consider the following points.

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[33] 74 Fed. Reg. 74,989 (Dec. 10, 2008).
[34] 12 C.F.R. § 226.19(a)(ii).

1. The various timelines applicable to the TILA closed-end disclosure process today without this addition constitute a maze of regulatory requirements that make compliance exceedingly difficult and delay needed funds to borrowers.

At present, in addition to requiring disclosure to the consumer within three business days after receiving the consumer's application, the rules require that at least seven business days elapse before consummation[35] The new rules implementing MDIA also provide that if the APR changes from the amount disclosed on the early TILA disclosure outside of a specific tolerance, the creditor must provide corrected disclosures that the consumer must receive at least three business days before consummation (referred to as the "Waiting Period").[36] If any term other than the APR becomes inaccurate, the creditor must give the corrected disclosure no later than at consummation. While the rules provide the consumer may waive the seven- and three-day waiting periods for a *bona fide* personal financial emergency[37] the Board has not provided sufficient guidance to permit such waivers to occur (see number 5 below).

Under the 2009 Proposal, for the stated purpose of addressing long-standing concerns about consumers facing different loan terms or increased settlement costs at closing, the Board also proposed to require creditors to provide a "final" TILA disclosure at least three business days before consummation (the "Additional Waiting Period") in all cases.[38] The proposal offered two alternatives regarding the circumstances for this redisclosure.[39]

Under current law, for most refinance transactions, as the Board is aware, there also is a three-day right of rescission following consummation (though only a small population of borrowers ever exercise this right.)[40]

2. Since both the TILA and RESPA requirements are intended to provide complementary information their timing and any fee restrictions should be the same.

As the Board notes, the RESPA requirements differ from those presently existing under TILA and those as proposed by the Board in the Proposal. RESPA prohibits payment of a nonrefundable fee other than a credit report to be collected from the borrower at

[35] 12 C.F.R. § 226.19(a).
[36] 12 C.F.R. § 226.19(a)(2).
[37] 12 C.F.R. § 226.19.
[38] 74 Fed. Reg. at 43,393 (to be codified at 12 C.F.R. § 226.19(a)(2)(ii)).
[39] Under alternative 1, if any terms change during the Waiting Period, the creditor would be required to provide a "final" TILA disclosure and wait an additional three business days before consummation could occur.
Under alternative 2, creditors would be required to provide a final TILA disclosure, but would have to wait an additional three business days before consummation only if, during the Waiting Period, the APR increased beyond a designated tolerance or the creditor adds an adjustable-rate feature. Otherwise, the creditor would be permitted to provide the new final TILA disclosure at consummation.
In its comment on the 2009 proposal, MBA supported Alternative 2. It would support a new timing paradigm if it truly served the interests of consumers.
[40] 12 C.F.R. § 226.23.

application.[41] As noted above, under RESPA, an originator may impose a nonrefundable fee on a consumer as soon as the consumer receives the early RESPA disclosure and has agreed to go forward with the transaction.

RESPA requires redisclosure where tolerances (that are different from those set under TILA) may be exceeded due to changed circumstances[42] and permits borrowers to request to review the HUD-1 as of one business day prior to consummation. Regulation X also requires that lenders leave open a 10-day shopping period during which the settlement cost offer cannot change.[43]

Given the differences in the timing and tolerance requirements for RESPA and TILA disclosures, creditors already find complying with these two laws difficult; and we anticipate that further changes to the timing and tolerance requirements will only cause greater confusion. And, unfortunately, it is the consumer who ultimately suffers. Not only are the disclosures confusing, but the fact that they are given several times in the process actually works to make them more not less likely to be ignored. We believe harmonization of the laws is essential. Accordingly, we urge that the Board refrain from adopting the proposed changes and leave to the Bureau the task of resolving the differences between TILA and RESPA disclosures' timing as well as terms disclosed.

3. <u>It is not at clear whether the occasion of the receipt of initial disclosures is the best or appropriate time to encourage shopping or whether the institution of the new 3-day period will simply lead to undue delay.</u>

Many borrowers shop for loans prior to submitting an application. Potential borrowers do this through phone calls to lenders, through newspaper advertisements or otherwise. By the time they receive their disclosures they ordinarily wish to close without delay. MBA recommends that before this new provision is instituted, a study of mortgage shopping behavior be completed particularly in view of the new HUD shopping period.

4. <u>If shopping occurs using early disclosures, it is not clear that a mandatory refund is necessary to allow borrowers to shop.</u>

The value of the proposed requirement is unclear at best. Under RESPA, borrowers may avail themselves of the 10-day shopping period knowing that the costs disclosed to them, with rare exception, will remain firm. That time is intended to permit borrowers to compare offers.

While MBA supports maximum competition for sustainable mortgage credit and consumer shopping among lenders and other originators for loans, considering these concerns, MBA again urges that these new requirements not be instituted at this time. As indicated, MBA believes the Bureau should undertake a comprehensive

[41] 24 C.F.R. § 3500.7(f)(1).
[42] 24 C.F.R. § 3500.7(f)(1).
[43] 24 C.F.R. § 3500.7(c).

consideration of timing requirements as well as the form of the new disclosures as an integral part of its RESPA-TILA integration effort. Not only does the Bureau have responsibility for that effort, but going forward it will be the sole regulator under RESPA and TILA to assure consistency. Moreover, considering the Bureau has responsibility for both financial literacy and research, the Bureau will be better equipped to comprehensively address the issues raised by this proposal. We urge that in considering new consistent timing of proposals, the Bureau should consider in conjunction with the establishment of new waiting periods such as one for pre-closing review whether the post-closing rescission period is simply a redundancy that delays the process.

Also, as we commented last year, in the past, the Board has provided little guidance concerning the types of financial emergencies that warrant a waiver of the three-day right of rescission or the new seven-day and three-day periods prescribed under MDIA. Accordingly, we believe any addition of a new three-day period should be accompanied by more specific Bureau guidance to warrant a waiver, such as the borrower's interest in a rate lock. Guidance should also make clear that lenders are able to rely on borrower statements and claims when considering the merit of a request for waiver or modification of a waiting period.

VI. Coverage Test for 2008 HOEPA Final Rule and HOEPA

A. Background

The Board's 2008 HOEPA Final Rule adopted special requirements for "higher-priced mortgage loans" (HPMLs) to address what the Board concluded were unfair and deceptive practices in the subprime mortgage market.[44] These protections include: a requirement that creditors assess borrowers' ability to repay loans without regard to collateral and verify the borrower's income and assets; restrictions on prepayment penalties; and a requirement to establish an escrow account for taxes and insurance for first-lien loans.

The Board defined a HPML as a transaction secured by a consumer's principal dwelling for which the annual percentage rate exceeds the "average prime offer rate" by 1.5 percentage points or more, for a first-lien transaction, or by 3.5 percentage points or more, for a subordinate-lien transaction. Average prime offer rate is calculated from average interest rates, points, and other loan pricing terms currently offered to consumers by a representative sample of creditors for mortgage transactions that have low-risk pricing characteristics. These averages come from the Primary Mortgage Market Survey® (PMMS) published by Freddie Mac.[45]

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[44] 73 Fed. Reg. 44, 522, 44,603 (July 30, 2008).
[45] 12 C.F.R. § 226.35(a)(2). The Average Prime Offer Rate is published by the FFIEC: http://www.ffiec.gov/ratespread/newcalc.aspx.

In its 2009 Proposal, the Board proposed to amend Regulation Z to provide a more inclusive APR, to assist consumers in comparison shopping and to reduce the compliance burden.

MBA and others supported the APR change in principle but opposed its implementation because by inflating the APR, the Board would cause a larger number of prime loans to be incorrectly classified as higher-priced mortgage loans. (This is because the APRs would be higher because they would encompass third party closing costs.) MBA also expressed concern that any change might expand the loans included under the definition of Section 32/HOEPA and within the scope of state anti-predatory lending laws modeled after the federal paradigm.

B. This Proposal:

1. Transaction Coverage Rate

To avoid the inappropriate classification of prime loans as HPML, the Board proposes for lenders to compare the loan's "transaction coverage rate" or "coverage rate" (instead of its APR) to the average prime offer rate.

Lenders would calculate the transaction coverage rate by using the loan's interest rate, the points, and any other origination charges the creditor and a mortgage broker (or an affiliate of either party) retains. The transaction coverage rate would not include the other closing costs that, according to the 2009 Proposal would be treated as finance charges for purposes of the APR that is disclosed to the consumer. According to this new calculation, the Board believes that the transaction coverage rate would be closely comparable to the average prime offer rate. The transaction coverage rate would not be disclosed to the consumer and would be solely for coverage determination purposes.[46]

The Board acknowledges that by creating this new metric, lenders will incur costs, including training staff and modifying software and other systems. Nevertheless, the Board says it believes these costs should be relatively small because the Proposal would necessitate only a one-time modification to creditors' systems. Also, the costs of the new metric would be offset by the benefits of ensuring that the 2008 HOEPA protections apply only to loans for which they were intended, *i.e.,* subprime mortgages.

2. Calculation of Points and Fees

The Proposal would also clarify, in Section 226.32(b), that most third party fees would not be counted towards the "points and fees" that trigger HOEPA coverage. The Board noted that very few HOEPA loans are made and clarification was necessary to avoid unduly restricting access to credit.

[46] 12 C.F.R. Off. Staff. Comm. § 226.35(a)(2)(i).

3. Average Prime Offer Rate

The Board also noted that industry commenters expressed concerns about the Board's proposal to make the APR more inclusive and suggested that the Board address the issue by revising the calculation of the average prime offer rate. The average prime offer rate could reflect average amounts for other closing costs that are reflected in the APR, in addition to the points currently included.

The Board says while it considered proposing such an approach, it determined it was not feasible since closing costs vary significantly by geographical location. They also include costs that are fixed dollar amounts, which tend to have differing effects on the annual percentage rate depending on the loan amount. The Board says an APOR approach would need to account for these two considerations, most likely by providing for separate average prime offer rates for various loan size and geographical locations. The Board said such an approach would result in significant complexity and compliance burden and the Board could not identify a reliable source for "average" closing costs in every location throughout the country. Because closing costs change over time, the necessary data source would have to be updated periodically. The Board believes the proposal achieves the same objective as the alternative approach, but without imposing the burden of ongoing data collection and reporting on creditors.

The Board indicated that it considered making the use of the transaction coverage rate optional but it expressed concern that two creditors would have inconsistent coverage under Section 226.35. The Board seeks comment on this subject anyway.

C. MBA Comment

As indicated, MBA has, over the years since TILA was enacted in 1968, supported establishment of a more inclusive finance charge and all-in APR. MBA maintains that use of an all-in APR would be a more realistic calculation of the cost of credit which would provide a far more useful shopping tool for consumers. Changing to such an approach, if done properly, would also make obsolete a far too complex regulatory structure where too much time is spent determining which items are inside and outside of the calculation rather than serving customers. It is for this reason that MBA welcomed the Board's proposal. Nevertheless, MBA believes that the Board must address the following concerns before MBA can support such a conversion:

1. Dodd-Frank includes several requirements that are triggered by a loan's relationship to the APOR. These include for example, restrictions on prepayment penalties and requirements for escrow accounts. Implementation of any revisions to the APR or APOR for coverage purposes should occur along with implementation of these new Dodd-Frank requirements. Piecemeal implementation of a transaction coverage rate for HPML loans without regard to the rest of Dodd-Frank implementation would serve no one. Considering the

proximity of the transfer date, MBA urges that the Bureau take a comprehensive approach to implementing any new requirements in this area to finish the Board's work.

2. Similarly, while MBA recommended in our 2009 comment letter that the Board revise the definitions of "points and fees" and "total loan amount" to establish the threshold for loans subject to Section 226.32 of Regulation Z ("HOEPA Loans") to continue to exclude the charges currently excluded from those definitions, Dodd-Frank has also revised the points and fees trigger for HOEPA Loans and established a new limitation on fees as part of the ability to repay/qualified mortgage formulation. Consequently, efforts to revise these triggers should also be accomplished with implementation of the Dodd-Frank provisions.

3. Even if a coverage rate were established for HPML, and other federal requirements under Dodd-Frank, the problem of how any change at the federal level would affect state legal requirements remains. The Board indicated this would be a matter for the states. MBA believes the Bureau's charge under Dodd-Frank to work with the states could help address this concern as the Bureau considers the issue.

4. Despite the Board's estimate that the compliance costs would be small, MBA believes that the costs and confusion engendered by maintaining both an APR and a coverage rate would be considerable. This and other factors, including the prevalence of state use of the APR, argues in favor of working harder to retain a single APR for all purposes. For this reason, MBA believes further consideration should be given to enhancing the APOR to be more comparable to an all-in APR. MBA believes a state-by-state and even loan size estimate of costs would be provided by private vendors for lenders and for the government. Vendors today are collecting and providing data on closing costs in light of the new RESPA requirements which require lenders to have data on third-party costs. This issue should be considered further going forward.

5. Finally, there are other difficulties in developing a separate coverage rate. It is doubtful that a coverage rate could be kept private as the Board suggests. Moreover, the coverage rate should not be optional. All creditors' loans should be measured against the same standard to best facilitate a competitive market.

VII. Other Provisions

A. <u>Advertising Rules for Open-End Home Secured Credit</u>

In its proposal, the Board would revise Regulation Z, Section 226.16(d)(6)[47] "to require advertisements for open-end, home-secured credit that state any lower payments that apply for less than the full term of the plan to also state (1) the period of time during which those payments will apply, and (2) the amounts and time periods of other payments that will apply."[48]

Additionally, the Board proposes to add language substantially similar to that which the Board recently promulgated for closed-end mortgage advertising[49] prohibiting seven deceptive or misleading practices in advertisements, which the Board made effective on October 1, 2009 for closed-end loans.[50] The proposal indicates that these amendments will promote consistency in advertising rules applicable to open-end and closed-end home-secured credit.

The seven deceptive or misleading practices in advertisements for closed-end mortgage loans that are prohibited include:

a) Stating "fixed" rates or payment for loans where the rates or payments can vary without adequately disclosing that the interest rate or payment amounts are "fixed" only for a limited period of time, rather than for the full term of the loan;
b) Comparing an actual or hypothetical rate or payment obligation to the rates or payments that would apply if the consumer obtains the advertised product unless the advertisement states the rates or payments that will apply over the full term of the loan;
c) Characterizing products offered as "government loan programs," "government-supported loans," or as otherwise endorsed or sponsored by a federal or state government entity even though the advertised products are not government-supported or sponsored loans;
d) Displaying the name of the consumer's current mortgage lender in advertisements such as solicitation letters, unless the advertisement also prominently discloses that the advertisement is from a mortgage lender not affiliated with the consumer's current lender;
e) Making the claim of debt elimination if the product advertised would merely replace one debt obligation with another;
f) Creating a false impression that the mortgage broker or lender is a "counselor" for the consumer; and

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[47] Advertising, 12 C.F.R. Part 226 (2009).
[48] Regulation Z; Truth in Lending, 75 Fed. Reg. 58539 (2010) (to be codified at 12 C.F.R. Part 226).
[49] Advertising, 12 C.F.R. Part 226 (2009).
[50] Regulation Z; Truth in Lending, 73 Fed. Reg. 44522 (2009) (to be codified at 12 C.F.R. 226).

g) Including foreign-language information, such as a low introductory "teaser" rate, in a foreign language, while required disclosures are in English.[51]

While MBA does not object to consistent rules to stem deceptive advertising, it is important to note that the Federal Trade Commission has also regulated in this area, which includes its own requirements concerning commercial communication regarding any term of any mortgage credit product.

The FTC's proposal differs somewhat from the Board's. It covers more subjects and expresses its prohibitions differently. For instance, both the Board and the FTC prohibit misuse of the word "fixed." But the FTC goes beyond that and prohibits misrepresentations about "the variability of interest, payments or other terms of the mortgage credit product, including but not limited to misrepresentations using the word "fixed."[52] On the other hand, the Board restriction confines itself to "Advertisements that state 'fixed' rates or payments for loans whose rate or payments can vary without adequately disclosing that the interest rate or payment amounts are 'fixed' only for a limited period of time, rather than for the full term of the loan."[53]

Dodd-Frank also specifically confers on the Bureau authority to prescribe rules to prevent unfair, deceptive, or abusive acts or practices[54] similar to the FTC's authority. In order to avoid duplication or conflict it also directs the Bureau to enter into an agreement with respect to rulemaking with each agency.[55]

Considering the enactment of Dodd-Frank, the variation in the Fed and the FTC rules and the new responsibilities of the Bureau, while MBA supports transparency in mortgage advertising, we believe at this point it is appropriate for the Bureau to work with the FTC and finalize consistent rules. Were the Board to finalize these rules today, as important as they are, they would still lead to inconsistency.

B. <u>Credit Insurance, Debt Cancellation or Debt Suspension Coverage</u>

Currently, Section 226.4(d) of Regulation Z requires disclosures regarding credit insurance and debt cancellation and suspension products that state:

- The insurance coverage is not required as a condition of the loan.
- The premium for the initial term of insurance coverage.
- The consumer must sign or initial an affirmative written request for the insurance after receiving the above disclosures.

1. <u>Board Proposal</u>

[51] *Ibid.*, at 44523.
[52] *Ibid.*, at 60370.
[53] Regulation Z: Truth in Lending, 73 Fed. Reg. 44522, 44523 (2009) (to be codified at 12 C.F.R. 226).
[54] Dodd-Frank Act, Pub. L. No. 111-203, § 1031(b), 124 Stat. 1376, 2005-06 (2010).
[55] Dodd-Frank Act, Pub. L. No. 111-203. § 106(1)(b)(5)(D) 124 Stat. 1376, 2037 (2010).

With respect to the above disclosures, the Board proposes to change the timing, format and content. More specifically, the Board is proposing seven new disclosures that would be required irrespective of whether the credit protection product is optional or required. Of these new disclosures, MBA is particularly concerned about the following:

a) A required statement that if the consumer already has enough insurance or savings to pay off or make payments on the debt if a covered event occurs, the consumer may not need the product;[56]

b) A required statement that other types of insurance can give the consumer similar benefits and are often less expensive;[57] and

c) If there are additional eligibility requirements for the insurance, a statement in bold, underlined text that the consumer may not receive any benefits even if the consumer pays for the product, together with a statement that there are other requirements that the consumer may not meet and that, if the consumer does not meet these eligibility requirements, the consumer will not receive any benefits even if the consumer purchases the product and pays the periodic premium or charge.[58]

According to the Board, the proposed new format rules and model forms would improve consumers' ability to identify disclosed information more readily, emphasize information that is most important to consumers, and simplify the organization and structure of required disclosures to reduce complexity and information overload.[59]

2. MBA Comment

Although MBA supports disclosure reform generally, it opposes these specific requirements; and recommends that the Board refrain from adopting any changes to these disclosures, and, rather, leave reforms in this area to the Bureau.

We share the view of other commenters that the language in these disclosures is far too negative and unbalanced. As such, it unfairly discourages the offering and purchase of credit protection products that have served many borrowers well.

Statements that insurance may not be worth purchasing and that similar benefits are covered under other insurance products (see (a) and (b), above) go beyond providing needed information to borrowers and, instead, interfere with consumer choice and the marketplace itself. At the same time, because the disclosure fails to provide any information on the benefits of this insurance — such as protection from unlikely

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[56] *See* 75 Fed. Reg. 58,690 (Sept. 24, 2010) (to be codified at 12 C.F.R. § 226.4(d)(1)(i)(D)(*1*)).
[57] *See* 75 Fed. Reg. 58,690 (Sept. 24, 2010) (to be codified at 12 C.F.R. § 226.4(d)(1)(i)(D)(*2*)).
[58] *See* 75 Fed. Reg. 58,690 (Sept. 24, 2010) (to be codified at 12 C.F.R. § 226.4(d)(1)(i)(D)(*6*)).
[59] 75 Fed. Reg. 58,542 (Sept. 24, 2010).

economic crises and peace of mind — the disclosure fails to provide sufficient information for the borrower to make an informed decision regarding whether to purchase.

Similarly, the statements regarding eligibility requirements (see (c), above) also are biased and do not explain that the underwriting standards for life insurance are more rigorous than credit insurance, which does not require a medical examination or lengthy questionnaire. The disclosures also do not explain that the costs of these products vary at least in part because they may cover and be available to borrowers who may not otherwise be insurable.

If these disclosures are adopted, many consumers are likely to forego the opportunity to purchase good insurance products only to learn later that alternative coverage is either unavailable or only available at a much higher premium.

Considering the extensive work that is needed to revise these proposals and the Bureau's charge with respect to both financial product disclosure and TILA regulation, we believe the Bureau would be well positioned to conduct a careful review of what, if any, changes to disclosure requirements in this area are needed. We urge the Bureau to take up this work and that the Board not finalize these proposals at this time.

C. FHA Prepayment Penalties

MBA opposes in the strongest terms the Board's Proposal reversing its policy with regard to FHA's monthly interest accrual amortization method for calculating interest owed upon pay-off. The Proposal would treat the interest accrual requirements as "prepayment penalties" potentially denying borrowers now and in the future the ability to obtain FHA loans.

Specifically, the Proposal would amend Comment 226.18(k)(1)-1 to provide that, on a closed-end transaction, assessing interest for a period after the loan balance has been paid in full is a prepayment penalty, even if the charge results from the "interest accrual amortization" method used on the transaction, as discussed below. Under this Proposal, *all* FHA mortgages would have prepayment penalties.

Previously, in a letter to Ginnie Mae dated September 29, 2009, the Board indicated that FHA loans that apply the monthly interest accrual amortization method were deemed *not* to have prepayment penalties. The Board stated:

> Board staff believes that lenders that use such an interest accrual method discussed above may continue to follow that practice. Lenders that engage in this practice would not be required to treat the interest charged from the date of prepayment until

the next installment due date as the prepayment penalty for any purpose under Regulation Z.[60]

The Board further advised that it would review this policy in the future, and the Proposal apparently sets forth the new policy. The effects of the policy are as follows:

Under the Board's July 2008 final HOEPA rule, the Board defined a class of higher-priced mortgage loans and made them subject to certain requirements, including a prohibition on prepayment penalties for longer than two years and, in the case of certain higher-priced loans, prepayment penalties of any duration are prohibited.[61]

Accordingly, FHA loans would be deemed to have a prepayment penalty for the entire term of the mortgage loan, exceeding the permissible two year limit. The Board's proposal, therefore, would prohibit a servicer from refinancing or modifying a borrower into an FHA loan if the transaction has an APR that exceeded the higher-priced mortgage trigger.[62]

Dodd-Frank also bans "prepayment penalties" on loans that are not "qualified mortgages." While the term is not yet defined[63] and, importantly, Congress directed HUD, not the Board, to define it for FHA purposes,[64] it is not clear whether FHA can treat mortgages as "qualified mortgages" if they contain prepayment penalties that exceed three years. If FHA loans cannot be treated as qualified mortgages, such loans would be subject to liability that would make them far more difficult and costly to originate.[65] We do not believe that this is a result that the Board could have intended.

More than one-third of mortgage borrowers today are served by FHA-insured mortgages. Considering the deleterious effects of the Proposal on the current and future FHA market and the fact that it implicates Dodd-Frank, if the Proposal is to be pursued at all, it should wait for the Bureau to undertake it as part of the Dodd-Frank

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[60] Interpretive Letter from Sandra Braunstein, Director, Director of Division of Consumer and Community Affairs to HUD Secretary Shaun Donovan dated September 29, 2009.

[61] See 12 C.F.R. § 226.35(b)(2)(ii). These restrictions on prepayment penalties were effective for applications taken on or after October 1, 2009.

[62] Under the Board's Proposal we presume that if the interest rate decreases and the loan is not a higher-priced mortgage, than the modification or refinance of an FHA loan into another/modified FHA loan would not trigger a new transaction despite the interest accrual method of accounting because the transaction is not *adding* a prepayment penalty. Rather, the "payment penalty" already existed. More specifically, the Proposal states: Proposed § 226.20(a)(1)(i)(F) provides that a new transaction occurs when an adjustable-rate feature or one or more of the risk features listed in § 226.38(d)(1)(iii) or 226.38(d)(2) *is added* to the existing obligation, or is otherwise part of the new transaction, as follows: (1) a prepayment penalty; (2) interest-only payments; (3) negative amortization; (4) a balloon payment; (5) a demand feature; (6) no documentation or low documentation; and (7) shared equity or shared appreciation. (Emphasis added) We also presume that any change in the Board's treatment of FHA loans is not retroactive on existing mortgages that do not involve modifications or a refinances.

[63] 15 U.S.C. § 129C(c)(1)(A), added by Dodd-Frank Act § 1414, Pub. L. No. 111-203, 24 Stat 1376, 2149 (2010).

[64] 15 U.S.C. § 129C(b)(3)(B)(ii)(I), added by Dodd-Frank Act § 1412, Pub. L. No. 111-203, 24 Stat 1376, 2148 (2010).

[65] Dodd-Frank also created a "qualified residential mortgage." This term is not yet defined, but must be "no broader" than the definition of qualified mortgage. Congress specifically exempted FHA from the restrictions relating to qualified residential mortgages, and, thus, HUD is delegated authority to determine the appropriate prepayment penalty rules for FHA loans.

implementation process. Were the Board to implement it notwithstanding, it would have to be revisited again when the “qualified mortgage” and “qualified residential mortgage” definitions are finalized at substantial cost to industry and borrowers alike. Again, we strongly oppose this Proposal and urge the Board not to adopt it.

VIII. Other Matters

A. Considering the Length and Detail in this Proposal, the Board Should Utilize a Process to Obtain Further Input From Stakeholders.

While MBA appreciates the opportunity to comment, no stakeholder can adequately review a proposal of this size during the comment period provided considering the other rules and laws that have been proposed or have an effective date during this same period. On the same day this rule was issued, the Board alone issued four other major rules. Considering the length of the Proposal, MBA urges the Board to consult more extensively with stakeholders before finalizing the rule to assure that ill-advised provisions are not adopted precipitously.

It is important to recognize that this vital initiative is being undertaken in the midst of a surfeit of proposed and final regulations that require fundamental changes to the mortgage finance business model and a generation of systems which support it. Major changes under TILA, including HOEPA revisions, and new loan officer compensation rules, along with new RESPA disclosures, SAFE Act compliance and appraisal standards, to name a few, have stretched thin the compliance capabilities of most institutions, and have stretched to the breaking point the capabilities of smaller institutions. Hundreds more proposed rules will be forthcoming under Dodd-Frank. If these efforts are not coordinated going forward, the cumulative regulatory burden will threaten the availability of sound housing finance options.

B. The Drafting Paradigm Incorporating the Proposal into Regulation Z is Unnecessarily Difficult to Navigate.

We reiterate our comment from last year on the 2009 Proposals. The Board should establish separate regulations under TILA applicable to closed-end and open-end mortgage transactions rather than melding the modifications made by the Proposal into Regulation Z rules for other closed-end credit transactions. Submerging the changes made by the Proposal along with countless cross references in the Regulation is confusing and far less effective in presenting requirements to consumers and practitioners. Effective compliance is greatly facilitated by clear and concise rules – the time has come for the creation of separate parts in Regulation Z that contain all rules governing open-end and closed-end mortgage lending.

C. Waivers of Waiting Periods Should Be a Viable Option for Consumers. Any New Requirement for a New Disclosure Should Include Provisions that Truly Permit Borrowers to Waive the Requirements Based on Exigent Circumstances**.**

The Board has provided little guidance on current waiver provisions, including the provisions for waiver of the three-day right of rescission or the new seven-day and three-day prescribed periods under the Mortgage Disclosure Improvement Act (MDIA). Consequently, lenders tend to be fearful of granting waivers to avoid later litigation.

The Board should provide better guidance on bases for waiver, so borrowers are not denied needed funds because of a paucity of relevant guidance. Such circumstances should include the expiration of a rate lock, the need to complete the purchase of the home or move into the home by a specific date, and the need to obtain funds by a specific date to meet contractual obligations or prevent the expiration of contractual rights. See III H above for one possible approach. Moreover, lenders should be able to rely on borrowers' statements and claims of financial emergency when considering the merit of a request for waiver or modification of a waiting period.

D. These Extensive Changes Will Require Considerable Implementation Time.

Changes proposed, including but not limited to, the requirements for new disclosures for loan modifications, the coverage rate, and new disclosures for insurance products will require extensive changes in loan origination and servicing systems and numerous business processes. MBA would urge that considering the breadth and scope of the proposed changes, at minimum the mandatory implementation period for changes in the Proposal should be at least 12-18 months. For any changes requiring disclosure for modifications and other loss mitigation practices, we believe the implementation period should be at least 24 months, given the surfeit of other requirements and the lack of computer programs to handle these types of transactions and the operational difficulties of implementing the rule.

IX. Conclusion

MBA again appreciates the opportunity to comment on the proposed amendments to Regulation Z. Should you have questions or wish to discuss any aspect of these comments further, please contact our offices at (202)557 2700.

Sincerely,

John A. Courson

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President and Chief Executive Officer
Mortgage Bankers Association