CONSUMER MORTGAGE COALITION

February 2, 2009

Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th St. and Constitution Avenue, NW
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Re: Proposed Amendments to Regulation Z to Implement the Mortgage Disclosure Improvement Act
Docket No. R-1340

Dear Sir or Madam:

The Consumer Mortgage Coalition (the "CMC"), a trade association of national residential mortgage lenders, servicers, and service-providers, appreciates the opportunity to submit these comments on the proposal by the Board of Governors of the Federal Reserve System (Board) to amend Regulation Z to implement certain provisions of the Mortgage Disclosure Improvement Act (MDIA).[1] We strongly support The Board's efforts to improve consumer disclosures and to help consumers make informed decisions.

I. Background

The MDIA will require new disclosures in connection with consumer mortgage transactions. Pursuant to the MDIA, the Board's proposed regulation would require early disclosure of loan terms including the annual percentage rate (APR), within three days of loan application, and seven days before loan consummation. The proposal would define delivery by mail as having occurred three days after a creditor mails the disclosure. If, after an early disclosure, an APR changes and the early disclosure becomes inaccurate, creditors would be required to make a corrected disclosure, and a new waiting period of three days would be required before loan consummation.

The Department of Housing and Urban Development (HUD) recently finalized amended regulations implementing the Real Estate Settlement Procedures Act of 1974 (RESPA).[2] Among other changes, the new RESPA regulations will establish new disclosure

[1] The Mortgage Disclosure Improvement Act is set forth in §§ 2501 – 2503 of the Housing and Economic Recovery Act of 2008, Pub. Law No. 110-289, 122 Stat. 2654, 2855 – 57.
[2] 73 Fed. Reg. 68204 (November 17, 2008).

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requirements concerning good faith estimates (GFEs) of settlement charges that lenders must provide to mortgage loan applicants. The new rules also will amend the requirements for mortgage loan settlement statements (HUD-1 and HUD-1A forms).

Generally, RESPA focuses on consumer disclosures concerning mortgage loan settlements, while Regulation Z focuses on disclosures about consumer loan terms. These two areas of disclosure are similar in several ways. We believe it is important that the disclosures required by one set of rules complement and not confuse the disclosures required by the other set of rules.

II. New Disclosures and Mandatory Waiting Periods

A. Consumers' Ability to Waive Waiting Periods

For loans secured by a consumer's dwelling, the MDIA permits consumers to waive the seven-day waiting period after an early disclosure before loan consummation, and also permits a consumer to waive the three-day waiting period after a corrected disclosure, in case of "*bona fide* personal emergency." The statute does not define this term. Rather, Congress left that definition to the Board.[3] The proposed amendments to the Official Staff Commentary to Regulation Z would clarify the definition of *bona fide* personal emergency and would discuss when the emergency must exist to permit waivers of waiting periods. The proposed clarification states:

> Whether a *bona fide* personal financial emergency must be met before the end of the waiting period is determined by the facts surrounding individual situations. The imminent sale of the consumer's home at foreclosure during the waiting period is one example of a *bona fide* personal financial emergency.[4]

This waiver of a waiting period in case of *bona fide* personal emergency is similar to the waivers of rescission rights and of waiting periods permitted under the Home Ownership and Equity Protection Act (HOEPA) for high-cost mortgage loans. The Board solicits comment on whether the modification or waiver procedures should be more or less flexible than the existing procedures for high-cost loans. It also asks whether circumstances other than pending foreclosure should be a permissible basis for a consumer to waive the waiting periods. The Board also solicits comment on whether modification or waiver of the waiting periods should be permitted when a *bona fide* personal emergency exists but need not be addressed before the end of the waiting period.

The purposes of the MDIA are very different from those of the HOEPA. The MDIA applies to all dwelling-secured loans for personal, family, or household purposes, while HOEPA applies to a small subset of those loans in situations where consumers were believed to be particularly vulnerable to abusive practices. Because the purposes of

[3] Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, § 2502(a)(6), 122 Stat. 2564, 2856 (to be codified at 15 U.S.C. § 1638(b)(2)(F)(i).
[4] 73 Fed. Reg. 74989, 74998 (December 10, 2008).

HOEPA and MDIA are very different, differing waivers under each statute are appropriate.

The MDIA is designed to help ensure that all consumers are fully informed about the cost of their loan before they enter into a transaction secured by a dwelling. The mandatory waiting periods are designed to give consumers the time they need to read and understand their loan disclosures. There are many circumstances under which it will not be in the consumer's interest to wait before closing on a mortgage loan. Certainly imminent foreclosure on a consumer's dwelling is one of them, but it is not the only one.

A consumer may be trying to refinance a mortgage loan to avoid foreclosure on a property with up to four dwelling units, only one of which the consumer occupies. The consumer may have another place to live, and in this case foreclosure may not be an emergency for the consumer, but it may be an emergency for the tenants in the other units. We therefore believe that consummation of a loan that can avoid *any* foreclosure should be, by definition, a sufficient *bona fide* personal emergency to permit a consumer to elect to waive any waiting period.

As time is important in foreclosures, we believe that the waiting periods should be subject to waiver even if the foreclosure may not be complete before the waiting periods would expire. Foreclosure is a process, not something that happens in one instant. A consumer facing foreclosure may incur fees and costs as the foreclosure process progresses, such as the cost of taking time off from work for court appearances, attorneys' fees, and other costs. We see no reason to prevent a consumer from refinancing to prevent incurring preventable pre-foreclosure costs. Even a day or two can make a significant difference to a consumer.

There also are many reasons a consumer may wish to take out or refinance a mortgage loan quickly that are unrelated to foreclosure prevention. The MDIA does not restrict the definition of *bona fide* personal emergency to foreclosure preventions, and the Board should not create that unnecessary restriction. The purpose of the MDIA is consumer protection, not consumer restriction. Not every consumer needs seven days, or even three, to read and understand an APR disclosure. As long as consumers make informed choices, there is little, if any, reason to restrict their choices.

- A consumer would benefit from a waiver when a consumer is trying to get a "cash out" refinance to cover an emergency expenditure, such as a medical or tuition expense. In a case where a consumer wants to take out a loan because of an immediate need for funds, requiring the consumer to wait would again be counter to the goal of assisting consumers.

- A consumer may be purchasing a house in a jurisdiction that is about to increase its tax on land transfers. The consumer may wish to close a loan before the tax increase goes into effect.

- Consumers very frequently refinance mortgage loans to get a lower interest rate, or to avoid an imminent rate increase on an existing loan. In this case, a consumer may wish to waive the waiting period simply to save money. The amount of money the consumer would save in just a few days may not be large, but it would be a very real savings to the consumer. Some consumers may feel this is an emergency.

There is no satisfactory way to define by regulation every instance that an individual may feel is a personal emergency. What one person can tolerate, another may feel is a very significant emergency. Creditors are not in a position, and should not be required, to pass judgment on which personal circumstance is or is not an emergency for any individual consumer. Consumers, not creditors, are the best judges of this highly individual question.

If a creditor should receive a consumer's written statement that the waiting period would cause the consumer adverse consequences, the creditor should be able to waive the waiting period. However, it is important for the Board to permit the creditor to rely upon both the truthfulness of the consumer's statements and on the consumer's determination that the adverse circumstances rise to the level of an emergency, because creditors do not have a way to verify the statements or determinations.

Additionally, we urge the Board to make clear that if a consumer requests and receives a waiver of a waiting period, the creditor may not be liable for any result of the waiver. That is, when a consumer submits a written request to a creditor for a waiver of a waiting period, that submission should be, by definition, an acknowledgement that the consumer has had time to understand the Regulation Z disclosures.

In cases where the creditor and consumer are both ready, willing, and able to close a loan, it should be up to the consumers themselves to decide whether to close a loan before the waiting period expires. In these cases, there appears no reason to require an informed consumer to wait unwillingly, and there certainly is no *consumer protection* reason to require an informed consumer to wait unwillingly.

B. Mandatory Waiting Period Should Not Be Required When APR Was Overstated

We support the proposal to require redisclosure three business days before settlement *only* if the APR becomes inaccurate under Section 226.22 of Regulation Z, but believe that it should be extended to exempt from an additional waiting period all loans in which the initial disclosure overstated the APR.

Under the current Regulation Z, a redisclosure is required if the APR varies outside of – either above or below – the 1/8 or 1/4 of one percent tolerance. Under §§ 226.22(a)(4) and 226.18(d)(1), in a transaction secured by real property or a dwelling, if the APR results from a disclosed finance charge, and that finance charge is greater than the amount required to be disclosed, the APR and finance charge are treated as accurate, even though they may be above the applicable tolerance. Therefore, an overstatement of the

APR that results from an overestimate of prepaid finance charges is considered accurate under § 226.22 and would not trigger redisclosure and an additional waiting period under the Board's proposal. On the other hand, any other overstatement of the APR would still trigger an additional waiting period, even though the reduction in the APR benefits the consumer.

Regardless of the reason for the overstatement, any overstatement that would trigger a corrected disclosure would normally be due to a positive change for the consumer, such as a lower rate or lower fees. It would not be beneficial to the consumer to impose the three-business-day waiting period and delay the closing because the APR decreased from the initially disclosed rate. We believe that where the APR is inaccurate due to an overstatement, instead of requiring the three business day waiting period, the regulation should require a final disclosure before consummation.

Creditors often do not know the exact amount of certain charges that are considered prepaid finance charges under Regulation Z, such as the closing agent's fee, in time to reflect those items in the early Truth in Lending Act (TILA) calculations – in fact, they often do not know those charges in time to prepare the TILA disclosure under current law. Therefore, they have used, and will continue to use under MDIA, a relatively high estimate of those charges in calculating the TILA amounts. This can cause the prepaid finance charges and resulting APR to be overstated outside of the tolerances, but, as noted, it does not violate Regulation Z. Where the disclosed numbers are above the applicable tolerance, the amount of the APR overstatement is generally small because the creditor has an incentive not to exaggerate the costs of the loan and drive the consumer to competing creditors.

Consumers are not harmed by this practice. On the contrary, if the disclosed APR and finance charge are overstated in the early disclosure, compared to the actual loan offered at closing, the purposes of the MDIA of promoting informed consumer choice are met because the consumer will have had time to review disclosures reflecting a less desirable loan and has decided to proceed with the transaction.

The Board should also clarify that an overstated APR in the early disclosures does not trigger new disclosures and a new three-business-day waiting period, even if it is not associated with a particular component of the prepaid finance charges, either because it reflects a lower interest rate or for other reasons. In a period when interest rates are falling, an initial TILA disclosure will disclose an APR that can become inaccurate because the loan rate decreases after loan application but before loan consummation. Certainly a drop in interest rates is advantageous to the consumer. As proposed, the rule would impose a three-day waiting period after corrected disclosures regardless of whether the early disclosure overstated or understated the new APR, unless an overstatement results from an overstatement of the finance charge. Because declining rates favor consumers, the rule should not require a three-day waiting period in any circumstance in which the disclosure that requires amendment *over*stated the APR.

Therefore, while we strongly support the policy behind the proposal to require a redisclosure only if the APR shown in the early MDIA disclosures is inaccurate within the meaning of § 226.22, we believe that the principle should be extended to all loans in which the APR is overstated, but that a new disclosure should be provided before or at consummation.

C. Corrected Disclosures Should Be Required Based on the Accuracy of the Most Recent, Rather Than the Early, Disclosure

Although proposed § 226.19(a)(2) requires only one corrected disclosure, creditors are likely to provide the corrected disclosure well before consummation. This is particularly true in light of the new RESPA regulations that will often require numerous GFE re-disclosures. The Board should clarify that, if the final APR at consummation is different from the APR shown on the first corrected disclosure, whether a second corrected disclosure is required is determined by comparing the final APR to the last disclosed APR, rather than to the APR in the early disclosure.

For example, assume that the creditor provided an early disclosure showing an APR of 5.00%. Subsequently the creditor provides a corrected disclosure showing an APR of 5.50% – an amount that is outside either tolerance. At consummation, the final APR is 5.40%. The final APR of 5.40% should be compared to the last disclosed APR of 5.50%, and an additional corrected disclosure should not be required because it is within the tolerance.

Once an early disclosure has been corrected, it becomes irrelevant. Consumers will disregard, if not discard, all prior disclosures, and those disclosures should no longer have any bearing on the transaction for any reason. Any other treatment would risk confusing consumers.

Although we assume that the Board intended that each disclosure would be compared to the most recent disclosure or redisclosure, we suggest that § 226.19(a)(1) be clarified as follows:

> If the annual percentage rate disclosed in **the latest disclosure for one loan application, made in either** the good faith estimates required by paragraph (a)(1) of this section **or a corrected disclosure made under paragraph (a)(2) of this section,** becomes inaccurate under § 226.22, the creditor shall make corrected disclosures to the consumer . . . .

D. Receipt Date Should Be the Earlier of Three Days After mailing or Actual Receipt Date

When a creditor mails a corrected disclosure, the proposed rule would deem a consumer to have received the corrected disclosure three business days after the creditor mails it. Lenders often use the Postal Service's two-day delivery method, electronic delivery, or paper delivery by a private carrier because these methods provide delivery confirmation.

We request clarification of what we believe is the Board's intent – that a consumer will be deemed to have received a corrected disclosure at the earlier of three days after a creditor mails it, or the actual date of delivery.

E. Format of Notice that Loan is Not Mandatory

Proposed § 226.19(a)(4) would require creditors to include in early and corrected disclosures, under § 226.19(a)(1) and (a)(2), the statement, "You are not required to complete this agreement merely because you have received these disclosures or signed a loan application." We suggest that this mandatory disclosure be added to Model Forms H-13 and H-15 in Appendix H to Part 226. Further, we suggest that creditors have flexibility in locating this statement within the disclosure statements.

The MDIA requires that the notice be provided in "conspicuous type size and format,"[5] and the preamble to the proposed rule notes the requirement for a clear and conspicuous disclosure.[6] Proposed § 226.19(a)(4) does not subject the notice to any additional type size or format requirements. We recommend that a Comment be added stating that the notice must be made clearly and conspicuously as provided in § 226.17(a)(1) and its Commentary provisions.

F. Multiple Consumers

Proposed Comment 19(a)(3)-1 specifies how consumers may waive the waiting period required by § 226.19(a)(1)(i) or § 226.19(a)(2) and states that "Each consumer entitled to receive the required disclosures must sign the written statement for the waiver to be effective."[7] We recommend that this Comment be clarified to indicate which consumers are entitled to receive the required disclosures by adding a cross reference to Comment 17(d)-2. Comment 17(d)-2 provides that where two consumers are joint obligors with primary liability on the obligation, the disclosures may be given to either one of them, and that in rescindable transactions, separate disclosures must be given to each consumer who has the right to rescind under § 226.19(b).

G. Certain Adjustable Rate Loans as Irregular Transactions

For amortizing adjustable rate loans, Comment 23(a)(3)-1 currently provides that the higher tolerance applicable to irregular transactions does not apply "…to loans with variable-rate features where the initial disclosures are based on a regular amortization schedule over the life of the loan, even though payment may later change because of the variable-rate feature." Where the creditor sets the initial interest rate at the fully indexed rate using the index and formula used to make later adjustments, it is clear from this Comment that the transaction would not be an irregular transaction solely because of its variable rate feature. However, where the creditor sets the initial interest rate using a

[5] MDIA § 2502(a)(6), 122 Stat. 2654, 2855-56, to be codified at 15 U.S.C. § 1638(b)(2)(B).
[6] 73 Fed. Reg. 74989, 74992 (December 10, 2008).
[7] 73 Fed. Reg. 74989, 74998 (December 10, 2008).

different index and formula from those used to make later adjustments, in most cases the creditor may, under Comment 17(c)(1)-10, choose among different index values to project the fully-indexed rate reflected in the disclosures. In these cases, the projected fully-indexed rate may or may not equal the initial interest rate depending upon the index value chosen. In these circumstances it is not clear whether the loan is a regular or irregular transaction, or whether that depends upon which index value the creditor chooses to use. We recommend a clarification that where the creditor sets the initial interest rate using a different index and formula from those used to make later adjustments, the loan should be treated as an irregular transaction even if the projected fully indexed rate reflected in the early or corrected disclosures is the same as the initial interest rate.

The following example illustrates the need for this clarification. Assume a borrower applies for an adjustable rate loan where the formula used to make later adjustments takes the index value 45 days before the change date, adds a margin of 2.00%, and rounds that sum to the nearest .125%. The loan is a fully amortizing ARM, so the loan payments over the life of the loan will be equal only if the fully-indexed rate is the same as the initial interest rate. The borrower may choose an initial rate of from 4.75% to 5.25% (depending upon the number or discount points the borrower wishes to pay) and chooses an initial rate of 5.00%. Pursuant to Comment 17(c)(1)-10, the creditor may use any index value not more than 45 days old to project the fully-indexed rate. The index values in effect during the 45 day period before the early disclosures and again in the 45 day period before consummation include values of 2.875%, 3.00% and 3.125%. Thus, depending upon the index value chosen, the projected fully-indexed rate may be 4.875%, 5.00% or 5.125%, causing the 5.00% initial rate to be a premium rate, fully indexed rate, or discounted rate. May a creditor determine that no corrected disclosure is required if: (1) the creditor could calculate a final APR using an index value permitted under Comment 17(c)(1)-10 that results in the fully-indexed rate being different than the initial interest rate (thus causing variations in payment amounts); and (2) the APR previously disclosed differs from the final APR by no more than the tolerance permitted for irregular transactions?

H. Timing of HELOC Disclosures

The current proposal does not cover home equity lines of credit (HELOCs), which Regulation Z treats separately from closed-end loans. However, the Board solicits comment on the timing of HELOC disclosures. In particular, the Board asks whether a requirement that disclosures be made three days before a HELOC is opened would substantially benefit consumers who plan to draw on the HELOC immediately.

We support the Board's efforts to ensure informed consumer choices, as to HELOCs as well as other loans.

It is easily foreseeable for a consumer on Monday to intend no immediate draws on a line of credit, only to take a draw on Tuesday. We do not see any reason to prohibit consumers from changing their plans. We believe the focus of Regulation Z disclosures should be on helping consumers make informed choices, rather than on restricting consumer choices.

We do not believe that creditors' obligations should be tied to something as unpredictable, variable, and difficult to establish as a consumer's future intent. Creditors cannot predict which consumers will or will not change their intentions about when they will draw on a line of credit. Consumers' present intent about future actions should not be the standard by which HELOC disclosures are timed.

Basing a creditor's obligation on consumer's intent to refrain from drawing on a line of credit for a period of time would restrict consumers. Given the substantial litigation risk for allegations of Regulation Z violations, and because creditors cannot know which consumers will change their intentions, creditors would have no choice but to refuse draws until the maximum possible waiting period has expired, even if a dire emergency were to arise. As a practical matter, this litigation risk will make any three-day waiting period mandatory, even if Regulation Z were to permit waivers. Such a unilateral restriction of consumer choice may not be an advisable consumer protection.

III. Aligning Regulation Z and RESPA

A. Definition of "Business Day"

We agree that the "general" definition of business day should be used to determine the timing of the early TILA disclosures, so that the timing of the early Truth in Lending disclosures will remain aligned with the timing of the RESPA good faith estimate disclosures. We recommend that the "precise" definition of business day be used not only to determine the three-business day waiting period as the Board proposed, but also to determine the seven-business day waiting period.

Both Regulation Z and the RESPA rules require lenders to give disclosures to consumers within three days of a mortgage loan application.

- The RESPA regulation will require lenders to provide good faith estimates to consumers within three business days after receiving a loan application.[8] The RESPA regulation defines a business day as a day on which a lender's offices are open to the public for carrying on substantially all of the lender's business functions.[9]

- Regulation Z similarly requires creditors to provide certain disclosures within three business days after receiving a written loan application.[10] For these purposes, Regulation Z defines business day as a day on which the creditors'

[8] 24 C.F.R. § 3500.7(a)(1).
[9] 24 C.F.R. § 3500.2(b).
[10] 12 C.F.R. § 226.19(a)(1).

> offices are open to the public for carrying on substantially all of its business functions.[11]

It is extremely important that RESPA and Regulation Z require their initial disclosures at the same time. It would be easier for consumers to understand their initial disclosures if they were to receive one package containing all disclosures, rather than to receive multiple, similar yet related, disclosures at different times. Having differing time limits would increase compliance costs while diminishing the clarity of consumer disclosures. Having the same definition of "business day" under both sets of rules is more important than having a clear definition.

Regulation Z also contains a second definition of "business day" that it uses for purposes that do not overlap with RESPA. This second, more precise, definition is a better definition because (i) it is unambiguous and (ii) it is the same for each lender, as discussed below.

Ideally, both Regulation Z and RESPA would use the more precise definition for all purposes. Barring that, we urge the Board to use the RESPA-like definition only for purposes of determining when early disclosures are required, and to use the more precise definition for other purposes.

The more precise definition counts as business days all calendar days except Sundays and Federal holidays.[12] This more precise definition does not depend on a determination of which days a creditor is "open."

The Board's current proposal would use a time measure in the following matters unrelated to RESPA requirements. The proposal would:

- Deem a consumer to have received a corrected disclosure three days after a creditor mails it.
- Require, after a corrected disclosure, a three-day waiting period before loan consummation.
- Require a seven-day waiting period after an early disclosure before loan consummation.

The Board proposes to use the more precise definition of business day for the proposal that a consumer would be deemed to have received a corrected disclosure three days after the creditor mails it, and in determining the three-day waiting period after a corrected disclosure. The Board solicits comment on whether the precise definition should also be used to determent the seven-day waiting period after an early disclosure.

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[11] 12 C.F.R. § 226.2(a)(6).
[12] 12 C.F.R. § 226.2(a)(6).

There are several reasons why the more precise definition is the better one, and it should therefore be used when RESPA coordination does not pose a problem in doing so.

First, the definition based on which days a creditor is "open" is irrelevant in the information age. Many creditors are open for most purposes around the clock every day, through websites and automated teller machines, as well as through live telephone call centers and automated telephone response systems. Using a definition that turns on when a creditor is open for substantially all business can make it difficult to know which day is a business day. Using the precise definition would help creditors know how to comply with Regulation Z.

Even if we could clearly tell which day a creditor is "open" for business, the distinction is likely meaningless to consumers. The purpose of the three-day and the seven-day waiting periods is to ensure consumers have sufficient time to read their disclosures. Consumers do not wait until a creditor's branches are open before reading their loan disclosures. Rather, they read then when they have time. Consumers are likely to have more time to read loan disclosures on Saturday, not on weekdays when many people go to work and see their children to and from school. Because consumers need the waiting periods to have time to read their disclosures, and because consumers are likely to use Saturdays to read them, it is most appropriate to include Saturdays, that is, use the precise definition, in setting the waiting periods.

Further, a definition based on which days creditors are open will vary by lender. Creditors in Maine and Massachusetts may close their branches (except for automated teller machines) the third Monday in April when those states observe Patriots' Day, while creditors in other states probably have staffed branch offices that day. There appears no justification for assigning consumers differing waiting periods based on their geographic area or their creditors' branch schedules.

There can be no purpose for defining the three-day waiting period and the seven-day waiting period by differing definitions of business day. The definition that does not consider the confusing question of which day a creditor is "open" for substantially all of its business functions is the more clear definition. Because the waiting periods are designed for consumers to have time to read disclosures, and because consumers will often read disclosures on Saturdays and not just on weekdays, the more precise definition is also the more relevant definition. For these reasons, we urge the Board to use the more precise definition in determining the three-day and seven-day waiting periods, as well as for determining when a mailing is received.

B. Applications Withdrawn Within Three Days

Similar to Regulation Z, RESPA rules require lenders to make consumer disclosures within three days of a consumer loan application. It is important that these two regulations be coordinated as much as possible to make the disclosures easier for consumers to understand. RESPA does not require a lender to make disclosures within three days after a loan application if the consumer withdraws the application during that time.[13] The Board's proposal would add to the Regulation Z Supplement an exception to the requirement that disclosures be made within three days of a loan application when the creditor determines within three days that "the application will not or cannot be approved on the terms requested[.]"[14] We request clarification that if a consumer withdraws an application within three days of submitting it that no Regulation Z disclosures are required regarding that application.

C. RESPA's Adjusted Origination Charges

1. Lender-Paid Broker Compensation

One of the recent changes to RESPA rules will require disclosures about loan origination charges before and after certain adjustments for compensation that lenders pay to mortgage brokers. HUD noted in its final RESPA rulemaking:

> In its consultation with the Federal Reserve Board staff, HUD raised the concerns expressed by some commenters that treating lender payments to mortgage brokers as a credit toward the origination charges could increase the points and fees of each brokered mortgage loan, thereby resulting in more loans coming under HOEPA coverage. Federal Reserve Board staff advised HUD that notwithstanding HUD's changed requirements, determinations of whether payments to a mortgage broker must be included in the finance charge and whether a loan is covered by HOEPA are based on the statutory definitions and requirements in TILA, as implemented by the Federal Reserve Board's Regulation Z, which are unaffected by HUD's RESPA rulemaking.[15]

HOEPA is a part of TILA, and is implemented in Regulation Z's Part E. HOEPA and its implementing regulations impose restrictions on certain high-cost loans and higher-priced mortgage loans. High-cost loans are loans that have an APR more than specified amounts above the yield on comparable Treasury securities or have consumer-paid points and fees exceeding (usually) 8% of the total loan amount. Higher-priced mortgage loans are loans that have an APR more than specified amount above the average prime offer rate.[16]

The recent changes to the RESPA rule will amend required disclosures about payments that lenders make to mortgage brokers. It would help avoid confusion for the Board to clarify the distinctions between the RESPA disclosures and the thresholds for coverage under HOEPA. In particular, it would help to receive confirmation that thresholds for HOEPA coverage are not affected by the difference between "our origination charge" and "your adjusted origination charges" that the RESPA rule incorporates into its revised GFE statements and into the revised HUD-1 and HUD-1A settlement statements. TILA

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[13] 24 C.F.R. § 3500.7(a)(3)(ii).

[14] 73 Fed. Reg. 74989, 74997.

[15] 73 Fed. Reg. 68204, 68226 (November 17, 2008).

[16] 15 U.S.C. § 1602(aa)(1); 12 C.F.R. §§ 226.32, 226.35.

includes in the definition of "finance charge" payments that *borrowers* make to mortgage brokers.[17] HOEPA's thresholds are determined by reference to the APR or to points and fees that the consumer pays. We would appreciate clarification that payments creditors, rather than borrowers, make to mortgage brokers are not finance charges, do not affect the calculation of the APR, and should not be considered in determining whether a loan meets a HOEPA threshold for either APR or points and fees for high-cost loan under § 226.32, or for APR for a higher-priced mortgage loan under § 226.35.

2. *Distinction Between RESPA and TILA Treatment of Application Fees, Appraisal Costs, and Credit History Charges*

The revised RESPA rules include in "our origination charge" (a required disclosure both in the GFE and in the HUD-1 and HUD-1A settlement statements) certain costs that are not included in the "finance charge" under TILA. The settlement statement must disclose, in the loan originators' own charge, all charges for services performed by or on behalf of the loan originator.[18] This includes, for example, the appraisal charges. The GFE and the settlement statement must also disclose the appraisal fee, credit report fee, and other required third party services for which the borrower will pay.

TILA excludes from its definition of "finance charge" application fees charged to all applicants, whether or not a loan closes, and *bona fide* and reasonable credit report fees and pre-closing appraisal fees for mortgage loans.[19]

It would be helpful for the Board to confirm that these application and underwriting costs are not part of the finance charge under Regulation Z, even if creditors require them, despite the RESPA inclusion of them as origination charges.

3. *Treatment of Origination Charges in "No Cost" Loans*

Regulation Z requires creditors to disclose the "amount financed."[20] In mortgage transactions, the amount financed is generally calculated by subtracting from the loan amount the amount of "prepaid finance charges." On a true "no-cost" loan, where the borrower is not paying any origination charges directly (either by cash or check or by having them withheld from loan proceeds), there are no "prepaid finance charges."

The new RESPA rules, however, could cause some potential confusion for borrowers on this point. The RESPA rules change the disclosures required for "no cost" loans on the HUD-1, meaning loans on which the lender absorbs settlement costs (or pays a third party for the costs), and does not add the settlement costs to the loan principal. As HUD explains:

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[17] 15 U.S.C. § 1605(a)(6).
[18] 24 C.F.R. § 3500.8(b).
[19] 12 C.F.R. § 226.4(c)(1), (c)(7)(iii), and (c)(7)(iv).
[20] 12 C.F.R. § 226.18(b).

> In the case of "no cost" loans, where "no cost" refers only to the loan originator's fees, the amounts shown on Lines 801 and 802 [of a HUD-1/1A] should offset, so that the charge shown on Line 803 is zero. Where "no cost" includes third party settlement services, the credit shown in Line 802 will more than offset the amount shown in Line 801. The amount shown in Line 803 will be a negative number to offset the settlement charges paid indirectly through the loan originator.[21]

We request a conforming clarification in Comment 226.18(b)(3) that, notwithstanding RESPA's required disclosures for no-cost loans, there are no prepaid finance charges on a true "no cost" loan where the borrower is not paying any origination charges directly (either by cash or check or from having them withheld from the proceeds).

D. Seller's Points

RESPA's new GFEs will disclose the points a lender charges on a loan. A property seller may actually pay the points at settlement. If so, the settlement statement must disclose this.

> [I]f a seller pays for a charge that was included on the GFE, the charge should be listed in the borrower's column on page 2 of the HUD-1. That charge should also be offset by listing a credit in that amount to the borrower on lines 204 – 209 on page 1 of the HUD-1, and by a charge to the seller in lines 5-6-509 on page 1 of the HUD-1.[22]

The RESPA disclosures may give the appearance that the buyer-borrower was obligated to the lender for these points. Seller's points are not part of the finance charge under Regulation Z.[23] It would help avoid confusion for the Board to clarify that when a seller pays points on a buyer's mortgage loan, those points are not prepaid finance charges under Regulation Z.

E. RESPA's Average Charge Disclosures

RESPA requires disclosures to consumers of the settlement costs of their mortgage loans. Calculating those costs is complicated by, among other things, the fact that many different costs go into a single real estate settlement. The recent amendments to the RESPA rules address this issue by, in some circumstances, permitting the disclosures to be calculated as the average cost of a settlement service across a number of settlements. Average charges may not be used when a charge is based on the loan amount or property value, such as charges for mortgage insurance, title insurance, and transfer taxes.[24]

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[21] 73 Fed. Reg. 68204, 68245 (November 17, 2008).
[22] *Id.* at 68243.
[23] 12 C.F.R. § 226.4(c)(5).
[24] 24 C.F.R. § 3500.8(b)(2).

Regulation Z requires creditors to disclose finance charges, and the definition of finance charge excludes certain "real-estate related fees." Specifically, a "finance charge" excludes *bona fide* and reasonable fees for title examination, abstract of title, property survey, fees for preparing loan-related documents, notary and credit report fees, appraisals, and property inspections.[25]

It would be helpful for the Board to determine that any real-estate related fees charged to consumers, that are calculated by the average charge method under the revised RESPA rules, are *bona fide* and reasonable real-estate related fees exempt from the Regulation Z definition of finance charge, even if the fee charged in a particular loan is above or below the exact cost in that transaction. Otherwise, a finance charge would be based on costs other than what the consumer actually pays, which would be expressly counter to the purpose of Regulation Z.

F. Adjustable Interest Rate Disclosures

For mortgage loans with adjustable interest rates, the new RESPA rules will require creditors to make disclosures about the maximum rate the loan could have, the most it may change at once, and the highest level the payment for principal, interest, and mortgage insurance can reach.

In the MDIA, Congress recently enacted similar requirements for disclosures of the worst-case scenario under adjustable mortgage loans. For loans with payments that may adjust, Congress will require creditors to disclose:

> [E]xamples of adjustments to the regular required payment on the extension of credit based on the change in the interest rates specified by the contract for such extension of credit. Among the examples required to be provided under this clause is an example that reflects the maximum payment amount of the regular required payments on the extension of credit, based on the maximum interest rate allowed under the contract, in accordance with the rules of the Board.[26]

However, realizing that this may not be sufficient, Congress requires the Board to conduct consumer testing to determine the appropriate format for disclosures about adjustable mortgage loans.

> Prior to issuing any rules pursuant to this clause, the Board shall conduct consumer testing to determine the appropriate format for providing the disclosures required under this subparagraph to consumers so that such disclosures can be easily understood, including the fact that the initial regular payments are for a specific time period that will end on a certain date, that payments will adjust afterwards potentially to a higher amount, and that there is no guarantee that the

[25] 12 C.F.R. § 226.4(c).

[26] Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, § 2502(a)(6), 122 Stat. 2654, 2856 (to be codified at 15 U.S.C. § 1638(b)(2)).

borrower will be able to refinance to a lower amount.[27]

Unquestionably, consumers need clear disclosures about adjustable rate mortgage loans. Because the RESPA disclosures and Regulation Z disclosures about adjustable loans overlap, they will need to be coordinated if either is to be effective. If the rules differ, consumers will receive overlapping but differing disclosures. Consumers would not know which, if either, to heed. We strongly urge the Board to work with HUD to align the Regulation Z and RESPA disclosure requirements, and not to permit differing requirements about the same facts.

IV. Effective Date

We request one clarification about the new rule's effective date. The proposed regulation would, as required by the MDIA, become effective July 30, 2009. Mortgage loan applications are a process, so defining which loans would be subject to the new rules can be complicated. For clarity, we request that the Board make its new regulations applicable to loans for which a lender receives an application on or after the effective date.

Some loan applications will be made before the new rule's effective date but will be pending approval on that date. There would be substantial compliance costs involved if the new rules were applied to those applications. The new rule will require a larger number of disclosures than the current rule requires. Today, creditors correct Regulation Z disclosures, but often not within the time limits of the new proposal.

On the effective date, some loan applications may not have had the early disclosures required by the new rule. Even if consumers were to have received early disclosures, many creditors do not systemically retain the initially-disclosed APR because they always provide a final disclosure, even if redisclosure is not required. Applying the new regulation to pending loan applications would require creditors to manually calculate the APR it had earlier disclosed, to determine whether that prior disclosure is outside the rule's tolerance limits so that a corrected disclosure is required. Manual calculations of Regulation Z APRs are extremely difficult.

We therefore request clarification that the new regulation applies to loans for which a lender receives an application on or after July 30, 2009.

V. Conclusion

We support the Board's continuing efforts to improve the quality of consumer mortgage disclosures. We urge the Board to permit informed consumers to waive the waiting periods before a loan consummation when the consumer has a need to do so, without requiring creditors to determine the validity or urgency of individual consumers' needs. We urge the Board HUD to coordinate their disclosure requirements to require seamless

[27] *Id.*

disclosures under TILA and RESPA, so that consumers are clearly informed. We appreciate the opportunity to offer our comments in this rulemaking.

Sincerely,

Anne C. Canfield
Executive Director