



**Questions for the Record for Mr. David Kittle, Chairman, Mortgage Bankers Association
Hearing entitled “HUD’s Proposed RESPA Rule”
September 16, 2008**

- 1. Should compensation for each actor in the mortgage settlement process (e.g. realtor, broker, settlement agent, lender) be disclosed? Is the proposed RESPA Rule for disclosure of yield spread premiums sufficient to serve this purpose and is it beneficial to consumers? What other concerns, if any, do you have about yield spread premiums or the disclosure of yield spread premiums under RESPA?**

Disclosure of Compensation – Direct charges to the borrower paid to each actor in the mortgage settlement process, as distinguished from compensation from other sources, should be disclosed, including the charges of the realtor, broker, settlement agent and lender. In addition, where a mortgage broker receives a yield spread premium (YSP), as compensation, based on the rate or terms of the loan from the lender, the broker should clearly disclose to the borrower the fact that the broker is being compensated by a lender and the amount of the YSP. MBA does not believe, however, that a lender should be required to make a similar disclosure of its compensation from the secondary market.

This year, MBA published the attached paper “*Mortgage Bankers and Mortgage Brokers: Distinct Businesses Warranting Distinct Regulation*,” which was appended to my September 16 testimony, as Appendix D to MBA’s comment letter.¹ The paper provides information on the differences between mortgage bankers and mortgage brokers.

The paper points out that mortgage brokers are middlemen that facilitate or make arrangements for loans and that lenders, on the other hand, lend money. Consumers perceive brokers and lenders differently. Consumers regard mortgage brokers as shopping for them and ordinarily cease their own shopping when dealing with them, ceding the shopping to the broker. In contrast, consumers regard lenders (and their employees and agents) as providers of loan products which they shop and compare.

Because mortgage brokers are regarded as shopping for borrowers, and may cause consumers to stop shopping, they present a great risk of steering consumers to a higher rate loan in return for a higher YSP. Accordingly, MBA believes it is appropriate for brokers to tell borrowers the compensation they receive from lenders. MBA does not believe that lenders or their exclusive agents warrant the same

¹ The paper is also available on the Web at the following address:
http://www.mortgagelenders.org/files/News/InternalResource/62646_Paper.pdf.

treatment because borrowers do not perceive them in the same way and they do not present the same risks.

Proposed (Now Final) HUD Disclosure – As indicated in our comment letter, attached to my testimony at the September 16, 2008 hearing, MBA does not believe the disclosure of YSPs in the proposed (now final) RESPA rule is sufficient to serve the purpose of a clear disclosure of broker compensation which would be beneficial to consumers. The rule requires that on the new GFE and HUD-1, lender and mortgage broker total charges be disclosed as “our origination charge” and the YSP disclosed as a “credit or charge for the interest rate of ___%.”

MBA does not believe that the use of the term “originator” to cover lenders and brokers is helpful; the terms “lender” and “broker” on the other hand are understood by many borrowers. Moreover, treating the YSP as a credit does not make clear that the YSP is a payment from the lender based on the rate or terms of the loan.

While MBA appreciates HUD’s efforts to clarify the function of a YSP in relation to the interest rate, MBA believes that this could be accomplished without creating confusing new terminology for broker fees. Also, some brokers may be paid on a basis other than a loan’s interest rate and HUD’s form does not encompass that.

MBA submitted a draft Combined Good Faith Estimate of Settlement Costs and Truth in Lending Act Disclosure (GFE-TILA form) and a draft Combined HUD-1 Statement of Settlement Costs and the Final Truth in Lending Act Disclosure (HUD-1-TILA form) with its comment to HUD and which it appended to my testimony of September 16.

MBA’s draft GFE-TILA form discloses to the borrower in plain English the total compensation for the broker’s services and the amounts paid by the lender to the broker on the borrower’s behalf. It also makes clear that the amounts paid to the broker by the lender are paid by the borrower through the loan’s interest rate and monthly payment.

MBA understands that HUD’s approach to disclosure is shaped at least in part by concerns from mortgage brokerage industry advocates and the Federal Trade Commission (FTC) that the form should provide a “level playing field” between brokers and lenders. MBA believes that these assertions are incorrectly premised and obfuscate or do not fully comprehend the differing functions of and the differing consumer expectations regarding brokers and lenders respectively. This approach also does not appropriately address the consequently greater threat of steering by mortgage brokers. HUD’s approach to disclosure has not been shared by other regulators.²

² Both the Board, prior to withdrawal of its proposal, and the FDIC have supported different approaches as shown in the HOEPA proposed rule and the comment letter on the HUD proposal from the FDIC.

2. Should the GFE and the HUD-1 be the same format? If so, why? If not, why not?

MBA believes the GFE and the HUD-1 should be readily comparable and in similar format so that consumers can easily compare the cost estimates provided on the GFE at the time of application to the final charges on the HUD-1 at settlement. The draft forms MBA submitted with its testimony accomplish this purpose and also incorporated the material in the current disclosure under TILA. These forms were developed by MBA members who make mortgage loans and day-in and day-out and who are presented with consumer questions.

In its final RESPA rule, HUD determined, however, to adopt dissimilar forms that include references on the final HUD-1 to the GFE's estimated charges. The rule also established a new third page to the HUD-1 which, in large part, provides a chart to compare GFE and HUD-1 charges.

MBA believes the use of these comparable forms throughout the mortgage process at shopping, at or following application, following underwriting and at a day before closing is a better approach which would be more comprehensible to borrowers. It also believes that RESPA and TILA disclosures should be combined.

MBA is concerned that the three-page GFE in the final rule, though shorter than the four-page GFE originally proposed, is still too long. While it appreciates that the first page is intended to be a summary, and the second page a list of closing costs, MBA strongly believes that no matter how laudable the educational purposes of the form may be, the form's sheer length may cause borrowers to ignore its important information.

Borrowers are confronted today with a daunting pile of forms, from Government at all levels and originators. MBA believes HUD and the Board's efforts should be coordinated and focus on simplifying and combining disclosures.

3. What specific suggestions do you have as to how the RESPA rule issued by HUD and the TILA rule issued by the Federal Reserve should be harmonized?

Considering that disclosure of the costs and terms of mortgage credit are the responsibility of the Federal Reserve Board under the Truth in Lending Act (TILA) and the disclosure of settlement charges is the responsibility of HUD under RESPA, MBA believes that the best way of harmonizing the disclosures is to confine the HUD disclosures to settlement charges and the TILA forms to the terms and costs of credit. MBA believes the GFE and TILA disclosures then can be combined along the lines of the GFE-TILA form and the HUD-1-TILA form submitted with its comment and testimony. The forms embody how MBA would harmonize RESPA and TILA requirements.

The first page of the GFE-TILA form is similar to the second page of the HUD proposed GFE and lists the settlement costs. Importantly, it separately discloses lender charges and broker origination charges. The second page of the form

discloses the costs and terms of the credit in accordance with TILA requirements, including the Finance Charge and the APR (which are not included in the list of terms on the HUD forms). The HUD forms include the note interest rate and not the APR which will be confusing to borrowers when the TILA form is provided simultaneously under TILA.

The first page of the combined HUD-1-TILA form discloses the settlement charges attributable to the purchase transaction, the second page discloses the final settlement charges, and the third page discloses the final costs and terms of credit in accordance with TILA requirements.

HUD and the Board should work together to develop, reissue and simultaneously finalize joint rules and forms to simplify both the RESPA and TILA disclosures. MBA believes that only through combined, comprehensive reform can consumers take advantage of better transparency and at the same time lower costs. MBA also believes both HUD and the Board should involve industry and consumer advocates and other stakeholders to help the agencies shape their proposals and that they should utilize consumer testing to the maximum possible extent to ensure that improvements do in fact increase consumer understanding. Separate and potentially conflicting efforts will create more confusion for consumers and increase costs for everyone involved.

4. What is your estimate of the economic impact of the proposed RESPA rule on the mortgage banker industry and explain the basis for your estimate?

MBA has not arrived at its own cost estimates. Based on HUD's estimate, the costs of implementing the new GFE and HUD-1 will approach two billion dollars over the first two years considering retooling and recurring costs. Others have estimated costs higher than HUD's estimates.³

HUD's own Regulatory Flexibility Analysis estimates that the total one-time costs to the lending and settlement industries of the new GFE and HUD-1 alone will be \$571 million, \$407 million of which are estimated to be borne by small business.⁴ HUD estimates that the total recurring costs are estimated to be \$918 million annually or \$73.40 per loan.

Even if HUD's cost estimates were accurate, the costs of TILA reform, anticipated shortly, are not included. TILA reform following after the estimated costs of RESPA reform are incurred, can be expected to result in duplicative costs of similar size for retooling, retraining, re-staffing and other costs to the industry. If the forms do not complement each other, recurring costs will increase considerably.

³ See, Ann E. Schnare, "The Estimated Costs of HUD's Proposed RESPA Regulations for the National Association of Realtors, (June 3, 2008).

⁴ 73 Fed. Reg. 68262 (November 17, 2008).

If, on the other hand, RESPA and TILA changes are accomplished together, MBA believes significant economies would occur, resulting in lower costs as well as less confusion to borrowers.

In sum, considering the fragility of the market and the costs of industry changes including systems' conversions necessary to accommodate new requirements, as well as the need for borrowers to better understand both the terms of their loans and their costs, MBA strongly believes that HUD's forms should not be implemented until they are combined and harmonized with the Board's efforts to reform its TILA disclosures.

5. **Should the proposed RESPA rule allow real estate industry participants to offer incentives to create “one-stop shopping” for borrowers? Are certain industry segments hurt by the bundling of services? If bundling is not allowed do you have other suggestions about how to reduce the costs associated with real estate settlements?**

Allowing One-Stop Shopping - RESPA currently permits affiliated business arrangements as an exception to the general Section 8 prohibition against kickbacks, referral fees and unearned fees. This exception allows “one stop shopping” among affiliated settlement service providers as long as certain conditions are met. These include that a consumer referred to an affiliate receive a disclosure of the affiliation and that there be no “required use” of the affiliate. MBA does not believe it is necessary to change these provisions which permit affiliated arrangements to operate while also allowing competition from independent companies.

Harm From Bundling of Services – MBA has heard independent settlement service providers say they are harmed by the bundling of services. However, MBA is not aware of any recent study on this point. MBA favors maximum competition in the marketplace with affiliated and unaffiliated firms able to compete to provide innovation, choice and ultimately lower costs to consumers as long as arrangements are transparent and use of an affiliated settlement service provider is not required.

In its final RESPA rule, HUD changed the definition of “required use” so an economic disincentive that a consumer can only avoid by purchasing a settlement service from an affiliated provider would be as problematic under RESPA as an incentive contingent on a consumer's choice of a particular provider. The proposed rule indicates that it was particularly directed to use of homebuilder affiliates who tied a discount on a home to use of its affiliated settlement services provider, for example, a lender.

MBA believes that the formulation is too broad and may result in depriving borrowers of discounts that may indeed be *bona fide*. MBA believes it would be sufficient for HUD to indicate that under its current rules it may scrutinize discounts to assure they are *bona fide* rather than risking depriving borrowers of discounts altogether.

Other Suggestions in Lieu of Bundling – MBA does not believe bundling of services should be made illegal. As indicated, competitors offering bundled services should be able to compete in a transparent and free market.

In addition to permitting bundling, MBA believes disclosures, including those recently promulgated by HUD, should be improved considerably by combining TILA and RESPA required information. MBA believes that consumers need clear, useful information concerning mortgage offers so they can shop wisely and compare estimated costs to final costs.

MBA also believes that financial literacy efforts need to be vastly improved so that consumers can have a strong basis for understanding and utilizing information provided in disclosures.

6. Are there other regulatory or legislative changes needed for RESPA?

First and foremost, MBA believes legislative changes should be made, if necessary, to ensure that HUD and the Board of Governors of the Federal Reserve coordinate their reform efforts and that final disclosures are clear and truly useful for consumers.

As indicated, extraordinary and duplicative costs will come from separate, *seriatim*, reform efforts by HUD first and then the Federal Reserve. These costs will come at a time when the market is fragile and neither industry nor consumers should be forced to bear unnecessary and undue costs. If we are to proceed with mortgage reform, which MBA wholeheartedly supports, it is imperative that we do it right. Common sense dictates that HUD and the Board work together to reform all of the Federal disclosures to give borrowers the clearest, simplest information, under RESPA and TILA.

Additionally, MBA is developing several proposals to improve the regulatory process and restore faith in the mortgage market and the larger economy that will include proposals to vastly improve transparency and financial literacy, as well as regulation of the mortgage industry. As indicated in my testimony, our review of legislative improvements to the disclosure process, in particular, will be guided by the following principles:

- Disclosures should be streamlined and greatly simplified and uniform throughout the nation; terms that are not consumer friendly should be replaced with terms that are simple and understandable;
- Disclosures should be binding as early in the process as possible, considering that during the mortgage process information is developed and circumstances can change;
- The timing of disclosures should not result in undue delay for borrowers to receive needed credit;

- The process should facilitate competition to lower costs as well as the provision of high quality services;
- Borrowers and regulators should be appropriately empowered to prevent abuses; lenders should have a reasonable opportunity to cure errors prior to litigation; and
- Remedies for errors should not result in unduly increased costs for all consumers.