Prepared Testimony of Neill Fendly, Government Affairs Chair & Past President

National Association of Mortgage Brokers

on

HUD's Proposal to Reform RESPA

before the

Subcommittee on Housing and Community Opportunity

Committee on Financial Services

U.S. House of Representatives

Tuesday, February 25, 2003 RHOB 2128

Chairman Ney, Ranking Member Waters, Members of this Subcommittee, I am Neill Fendly, the current Government Affairs Chair and Past President of the National Association of Mortgage Brokers (NAMB), the nation's largest organization exclusively representing the interests of the mortgage brokerage industry. We appreciate the opportunity to address the Subcommittee today on behalf of the nation's mortgage brokers on the Department of Housing and Urban Development's (HUD) recently proposed rule (Proposed Rule) amending Regulation X, the implementing regulation for the Real Estate Settlement Procedures Act (RESPA).

NAMB has more than 14,000 members and 46 state affiliates nationwide. NAMB provides education, certification, industry representation, and publications for the mortgage broker industry. NAMB members subscribe to a strict code of ethics and a set of best business practices that promote integrity, confidentiality, and above all, the highest levels of professional service to the consumer.

In short, NAMB believes that HUD's Proposed Rule would limit consumer choice and access to credit, is unworkable in the real world, and would increase the regulatory burden on small business. In addition, NAMB finds the economic analysis and regulatory burden documents

prepared by HUD to be flawed, inconsistent and dubious at best.[1] HUD has received over 40,000 comment letters expressing grave concern on the merits of HUD's Proposed Rule. NAMB believes the Proposed Rule violates the Unfunded Mandates Reform Act,[2] as well as President Bush's recent Executive Order[3] to reduce regulatory burden on small business. Our testimony today centers on the Proposed Rule's negative impact on consumers and disproportionate impact on small business, especially mortgage brokers.

Who We Are and What We Do

A mortgage broker is an independent real estate financing professional who specializes in the origination of residential and/or commercial mortgages. A mortgage broker is also an independent contractor who markets and originates loans offered by multiple wholesale lenders. As a result, mortgage brokers offer consumers more choices in loan programs and products than a traditional mortgage lender. Mortgage brokers also offer consumers superior expertise and assistance in getting through the tedious and complicated loan process. Mortgage brokers also provide lenders a nationwide product distribution channel that is much less expensive than traditional lender retail branch operations (bricks and mortar).

Mortgage brokers serve the role as advisor, credit counselor, underwriter, and personal contact to the consumer. Mortgage brokers often originate loans for "difficult borrowers," those who are credit challenged, have income that is difficult to document, or are first time homebuyers. Mortgage brokers spend the time with these applicants, working together with them through credit problems, assisting those having no credit histories, and helping those individuals finance the purchase of their home.

Mortgage brokers are typically small businesses who operate in the communities in which they live. They are vital members of these communities, often operating in areas where traditional mortgage lenders may not have branch offices, such as rural communities. Were it not for mortgage brokers, many of these areas would be underserved and the dream of homeownership for these communities would not be fulfilled.

A mortgage broker does not simply press a few keys to provide the consumer with a mortgage loan. Nor are mortgage loans akin to products that can be picked from a shelf and paid for at checkout. Mortgage brokers perform a vital and unique role in assisting consumers in obtaining a mortgage loan. Indeed, this is why mortgage brokers originate more than 60% of all residential mortgages.[4]

In light of our role in placing families in homes, NAMB has great concern that HUD's Proposed Rule amending Regulation X will not serve to protect consumers but will instead further complicate the real estate settlement process and confuse the homebuyer. Introducing arbitrary and artificial price capping features and disclosure methods as set forth in HUD's Proposed Rule,

[1] *See* Attachment 1, "Discrepancies with HUD's Economic Analysis."
[2] 2 U.S.C. 1531 *et al.*
[3] Executive Order 13272, August 13, 2002.
[4] Prepared Statement of Mr. David Olson, President, Olson Research, U.S. Senate Committee on Banking, Housing, and Urban Affairs Hearing on "Predatory Lending Practices: Abusive Uses of YSPs," January 8, 2002.

could adversely impact the housing market by reducing access to credit as well as driving up costs for consumers.

First and foremost HUD's Proposed Rule recharacterizes the definition of yield spread premium which contradicts HUD's own Statements of Policy 1999-1 and 2001-1. Such a change creates an ambiguity in the marketplace that not only confuses the borrower, but also will lead to a new round of class action litigation. NAMB also believes HUD's Proposed Rule creates an unlevel playing field since it requires that indirect compensation **for mortgage brokers only** must be disclosed as a lender payment to the borrower. We are disappointed that HUD acknowledges that the Proposed Rule "results in different treatment of compensation in loans originated by lenders and those originated by mortgage brokers."[5] In addition, the burden associated with the Proposed Rule is staggering and as recognized by HUD, falls disproportionately on small business.[6] NAMB also believes that HUD's Proposed Rule's provisions on packaging are anti-competitive and will result in the largest multi-billion dollar originators dominating the mortgage industry to the detriment of consumers.

NAMB is extremely concerned that this Proposed Rule, if implemented as written, will have a dramatic impact on the cost of credit for consumers as well as small business, the mortgage financing industry and the mortgage broker industry in particular. We believe such a sweeping rewrite of RESPA at this point in time is not prudent for anyone – the homebuyer, the mortgage broker or especially, the economy.

I. NAMB's Concerns with HUD's Proposed Rule in Connection with the Enhanced Good Faith Estimate

A. Characterization of Yield Spread Premiums as a "Lender Payment to the Borrower"

HUD's Proposed Rule recharacterizes the definition of yield spread premiums as a "lender payment to the borrower for a higher interest rate." This characterization creates unintended consequences and provides less clarity to consumers than as presently disclosed. The recharacterization is also inconsistent with HUD's Statements of Policy 1999-1 and 2001-1, in which HUD states that a yield spread premium is a payment for "goods, facilities or services furnished or performed," ***for the lender*** [emphasis added] as well as the borrower. In HUD's Statement of Policy 1999-1, HUD stated that "the Department recognized that some of the goods or facilities actually furnished or services actually performed by the broker in originating a loan are 'for' the lender and other goods or facilities actually furnished or services actually performed are 'for' the borrower."[7] HUD reemphasized these statements in its Statement of Policy 2001-1.[8] Further, in the Proposed Rule, HUD stated that "as retailers, brokers also provide the borrower **and lender** [emphasis added] with goods and facilities such as reports, equipment, and office

[5] Real Estate Settlement Procedures Act, 67 Fed. Reg. 49,134, 49,148 (July 29, 2002).
[6] "Economic Analysis and Initial Regulatory Flexibility Analysis for RESPA Proposed Rule to Simplify and Improve the Process of Obtaining Mortgages to Reduce Settlement Costs to Consumers," U.S. Department of Housing and Urban Development, Office of Policy Development and Research, July 2002, p. vii.
[7] Real Estate Settlement Procedures Act, Statement of Policy 1999-1, 64 Fed. Reg. 10,080, 10,086 (March 1, 1999).
[8] Real Estate Settlement Procedures Act, Statement of Policy 2001-1, 66 Fed. Reg. 53,052, 53,055 (October 18, 2001).

space to carry out retail functions."[9] HUD further stated that "mortgage brokers essentially provide retail lending services."[10]

Yield spread premiums are used to pay the costs incurred in connection with a mortgage broker's business. Mortgage lenders save millions of dollars in facilities and employee costs by originating loans through mortgage brokers. However, these costs do not entirely disappear for the mortgage broker– a mortgage broker must pay for its employees, office facilities, and basic operations (computers, software and other such information). By characterizing the yield spread premium as a "lender payment to the borrower," HUD has discounted any payment to the broker by the lender for goods or facilities actually furnished or services actually performed for the lender.

HUD's recharacterization of the definition of yield spread premium limits consumer choice and renders mortgage brokers unable to compete with lenders. It also does not achieve the goal of simplification, but instead confuses the consumer on exactly how indirect broker compensation works and how it can benefit the consumer.

i. The Manner of Disclosure Further Unlevels the Playing Field Creating a Regulatory (*i.e.* artificial) Competitive Disadvantages for Mortgage Brokers

The Proposed Rule further unlevels the playing field in singling out indirect compensation to mortgage brokers only. By regulating that mortgage brokers must include the yield spread premium in the *calculation* of Net Loan Origination Charge, but not including the same of all originators, HUD is complicating the real estate settlement process because the consumer is unable to perform a true "apples to apples" comparison of the cost of the mortgage. This is contrary to HUD's goal of simplifying and improving the mortgage loan process.

Mortgage lenders also receive indirect compensation when a loan is sold on the secondary market. However, due to an exemption created by HUD through the regulatory process,[11] these transactions are exempt from, among other things, the disclosure requirements for yield spread premiums. This creates an unlevel playing field for mortgage brokers. HUD has even stated that "lenders are able to offer loans with low or no up-front costs required at closing by charging higher interest rates and recouping the costs by selling the loans into the secondary market for a price representing the difference between the interest rate on the loan and the par, or market, interest rate."[12] This is called a service release premium (SRP). The sale of such a loan achieves the same purpose as the yield spread premium does on a loan originated by a broker. Under HUD's Proposed Rule traditional lenders will continue to receive this indirect compensation but will not be required to disclose it in the marketplace.

[9] Real Estate Settlement Procedures Act, 67 Fed. Reg., 49,134, 49,140 (July 29, 2002).
[10] *Id.*
[11] 24 C.F.R. § 3500.5(7).
[12] Real Estate Settlement Procedures Act, Statement of Policy 2001-1, 66 Fed. Reg. 53,052, 53,056 (October 18, 2001).

If the proposed characterization of yield spread premiums is implemented, mortgage brokers will not be able to advertise certain mortgage loans and remain competitive. For example, a mortgage *broker* who makes a "no point" mortgage loan at 7% interest rate on a $100,000 loan, but collects a $1,000 yield spread premium, must advertise that this is a one-point mortgage loan. A mortgage *lender*, who originates a $100,000 mortgage loan at a 7% interest rate, but collects $1,000 in compensation when the loan is sold, can advertise a "no-point" mortgage loan. These are the exact same loans with the exact same costs to the consumer. However, due to a federally regulated mandate (*i.e.* artificial) the mortgage broker appears more expensive as he or she must advertise that this is a one-point mortgage loan.

In addition, by including a mortgage broker's indirect compensation in the calculation of the Net Loan Origination Charge, consumers will suffer a loss of available credit as many mortgage brokers will no longer be able to originate FHA and VA-insured mortgage loans. This is because direct originator compensation on these loans is limited to 1% of the loan amount in connection with FHA-insured loans, and direct originator compensation on VA-insured mortgage loans is limited to 1% of the total loan amount or closing costs. In characterizing yield spread premiums as a lender payment to the borrower, indirect compensation to a broker is artificially transformed into direct compensation and thus subject to the cap. This will impact many first time homebuyers who rely on FHA and VA-insured mortgage loans for their loan down payment requirements and force these consumers into subprime loans. This is significant as approximately 31% of all FHA-insured loans are originated by mortgage brokers.[13]

The federal government should not be in the business of picking winners and losers in the marketplace. Nor should a regulator be able to dictate the playing field by regulatory fiat. The HUD Proposed Rule does both.

ii. HUD's Recharacterization is Confusing to Consumers and Will Lead to a New Round of Class Action Lawsuits

Unfortunately, the stark reality of business is that any increase in the amount of money spent in defending any lawsuits will ultimately be passed through to the consumer in the form of higher costs for originating a mortgage loan. HUD's proposed recharacterization of yield spread premiums as a "lender payment to the borrower" will create confusion for consumers which will lead them to the question – "where is my check?" A borrower claiming fraud, when no check appears, will seek counsel to litigate the issue. HUD's recharacterization creates a clear opportunity for a new round of class action lawsuits.

The issues relative to the payment of yield spread premiums have been scrutinized a great deal by the courts. The courts, however, have relied on HUD's 1999-1 and 2001-1 Statements of Policy in determining the legality of yield spread premiums. To date, HUD's Statements of Policy 1999-1 and 2001-1 have provided structured guidance to the courts by eliminating the ambiguity relating to the legality of lender payments to mortgage brokers. They have provided certainty to the marketplace, which in effect, has helped to curb Section 8 class action lawsuits.

[13] Letter from Engram A. Lloyd, Director, Philadelphia Homeownership Center, Department of Housing and Urban Development, to Paul H. Scheiber, Blank Rome Comiskey & McCauley LLP on 8/12/2002.

However, HUD's proposed recharacterization of yield spread premiums in the Proposed Rule will only spur another round of litigation and costs associated with such litigation will eventually be passed on to the consumer. Any increase in costs to the consumer for mortgage financing can lead to a decrease in homeownership as affordable mortgage financing becomes too expensive for families to handle. NAMB fears this very real and distinct threat of liability.

B. Other Concerns with HUD's Proposed Good Faith Estimate

Please note that NAMB has other concerns with the Proposed Rule's Good Faith Estimate requirements. Currently, RESPA requires that a consumer be provided "a good faith estimate of the amount or range of charges for specific settlement services that the borrower is likely to incur in connection with the settlement" of a mortgage loan in a manner "prescribed by the Secretary."[14] The Proposed Rule would require originators to provide consumers with a *guarantee* of certain costs within three business (3) days of application. [15] HUD makes a rather large leap from requiring a "good faith estimate" disclosure of costs, as mandated by Congress, to a *guarantee* of many costs.

Mandating a guarantee of third party costs, at this early stage, is unreasonable. Loan originators cannot predict every cost of every loan. This is because every home is unique and every mortgage transaction is unique. Consider when a wholesale lender requires additional comparisons on an appraisal, or when the underwriter requests another survey? Issues may surface with the property that are not foreseeable at application, such as the need for a survey, soil inspections in the case of earthquake zones, or pest inspections. The mortgage broker should not be held responsible for these unforeseen costs.

NAMB has other concerns for certain provisions of the Proposed Rule in connection with the enhanced "good faith estimate," but for the sake of brevity, refers the Subcommittee to NAMB's comment letter to HUD on the Proposed Rule. [16]

However, we think it is important to point out that NAMB has spent countless hours and resources to strengthen, simplify and clarify the disclosure of costs provided to consumers in advance of settlement. NAMB submitted an alternative disclosure form set forth in our comment letter that satisfies the objectives of HUD to simplify the mortgage process, but not at the expense of small business or to the detriment of consumers.[17] It will allow the consumer to perform a true "apples to apples" comparison of the cost of the mortgage while maintaining a more level playing field for mortgage originators.

---

[14] 12 U.S.C. § 2604(c).
[15] Real Estate Settlement Procedures Act, 67 Fed. Reg., 49,134, 49,159 (July 29, 2002).
[16] *See* Attachment 2, Comment Letter submitted by National Association of Mortgage Brokers, on the "Real Estate Settlement Procedures Act, Simplifying and Improving the Process for Obtaining Mortgages to Reduce Settlement Costs to Consumers," U.S. Department of Housing and Urban Development, FR-4727-P-01 (July 29, 2002).
[17] *Id.*

II. NAMB's Concerns with HUD's Proposed Rule with the Packaging of Settlement Services

The Proposed Rule also sets up a new process for originating mortgages called the Guaranteed Mortgage Package Agreement. Created by regulatory fiat, this regime requires an originator to offer a guaranteed mortgage package (mortgage, third party settlement services and closing costs) for a set price. The small business owner is going to be disadvantaged in the marketplace because he or she does not have the bargaining power to enter into volume-based contracts with vendors. The end result will be additional consolidation in the mortgage industry at the expense of small business. This burden will fall disproportionately on small business and is even articulated by HUD – "$3.5 billion of the $6.3 billion in transfers to borrowers comes from small originators ($2.2 billion) such as small brokers and small settlement service providers ($1.3 billion)."[18]

NAMB believes that mortgage brokers, as small businesses, will be greatly disadvantaged by the "regulatory driven packaging" (as opposed to market driven packaging) of settlement services.[19] Mortgage brokers, as small businesses,[20] do not have the bargaining power to enter into volume-based discounts with third party settlement service providers, as do larger entities. Under the Proposed Rule, many mortgage brokers would not be able to compete with the larger entities and will be forced out of business, or become an agent for one lender or two utilizing their packages, or utilize the enhanced good faith estimate approach, which could also disadvantage mortgage brokers. This will force mortgage brokers to lose their autonomy and limit their ability to offer consumers the choice of a wide array of products and services. This impact will be passed through to the consumers in the form of higher costs and less consumer choice.

Further, the packaging of settlement services is occurring today. Thus, the removal of regulatory barriers is not necessary to allow packaging of settlement services; rather, exemption from Section 8 liability creates an incentive for entities to offer packages. While HUD contends that packaging will decrease a consumer's settlement costs as competition drives these prices down,[21] it could also work to drive prices up as packagers can "up charge" costs. HUD's longstanding prohibition against the "up charging" of third party settlement costs will cease to exist only for

---

[18] "Economic Analysis and Initial Regulatory Flexibility Analysis for RESPA Proposed Rule to Simplify and Improve the Process of Obtaining Mortgages to Reduce Settlement Costs to Consumers," U.S. Department of Housing and Urban Development, Office of Policy Development and Research, July 2002, p. vii.

[19] Recent news articles have cited a decline in small business hiring, "creating another headwind for the nation's stubbornly sluggish economy recovery." *Small-business Hiring Dip Slows Recovery*, Ariz. Republic, Oct. 25, 2002, at D-1. Further, an article cites that "small businesses make up 98 percent of all enterprises in the nation and create about 65 percent of jobs." *Id.*

[20] The majority of mortgage brokers are small businesses. The Economic Analysis cites to a study in which it stated that most mortgage broker firms consist of one office and five employees (including the owner). "Economic Analysis and Initial Regulatory Flexibility Analysis for RESPA Proposed Rule to Simplify and Improve the Process of Obtaining Mortgages to Reduce Settlement Costs to Consumers," U.S. Department of Housing and Urban Development, Office of Policy Development and Research, July 2002, p. 12. Further more, this study stated that it found "brokers as low-cost, highly competitive firms, vigorously competing with one another and with little opportunity to earn above-normal profits." *Id.*

[21] "Economic Analysis," p. vii.

those who package. Those who choose to operate under the enhanced good faith estimate will still be subject to this prohibition.

NAMB also believes that there are many unworkable provisions in HUD's Proposed Rule in connection with packaging. These provisions include, among others, the failure in allowing all originators to package, providing a index for consumers to track their interest rate, allowing a consumer thirty (30) days to shop for a loan while the package is available, providing no itemization of costs that are in the package, and allowing the package to remain viable indefinitely, after acceptance.

III. The Proposed Rule Should Not Provide Additional Barriers for Minority Homeownership

President Bush and Secretary Martinez have been very vocal in their goal of increasing minority homeownership. Minority homeownership has recently been on the rise; in a press release dated April 24, 2002, the U.S. Census Bureau released data that showed that homeownership among Hispanics rose substantially to 46 percent.[22] However, as noted in other press releases, a Bush Administration analysis showed that "a large gap still exists between minority and white households."[23] The analysis showed that "since 1994, when the black homeownership rate was 27.5 percentage points below the rate of whites and the Hispanic rate was 28.8 percentage points below, only small gains have been made."[24] The analysis further showed that "by 2001 the gap had been reduced by just 1.6 percentage points for African Americans and 1.8 percentage points for Hispanic households."[25]

HUD's analysis identified several barriers for homeownership: "(i) lack of capital for the down payment and closing costs, often the single greatest barrier to homeownership; (ii) lack of access to credit and poor credit histories, which means more minority families are rejected for a mortgage loan or given loans with high interest rates; (iii) lack of understanding and information about the homebuying process, especially for families for whom English is a second language;" and (iv) others.[26]

Mortgage brokers are the key to bridging the gap in minority homeownership. Mortgage brokers are integral members of their community and provide access to credit that most large lenders cannot. A recent study performed by Wholesale Access, a research, advisory and publishing company, on minority lending stated that two of the key findings of this research are: "(i) brokers reach more minorities than lenders; and (ii) the explanation for this is found in their locations, products and staffing."[27] Many of these communities would not have the availability of mortgage loans currently enjoyed today were it not for mortgage brokers, who originate more

[22] Press Release, Department of Housing and Urban Development, Homeownership Increase Among Hispanics (April 24, 2002) (on www.hud.gov).
[23] News Release, Department of Housing and Urban Development, New HUD Report Identifies Barriers to Minority Homeownership, Outlines Bush Administration Actions to Overcome Them (June 17, 2002) (on www.hud.gov).
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] Press Release, Wholesale Access, Study of Minority Lending Completed, (Sept. 24, 2002) (on www.wholesaleaccess.com).

than 60% of all mortgage loans.[28] Any rule implemented by HUD should not impact the ability of mortgage brokers to assist minorities in obtaining homeownership.

IV. HUD's Economic Impact Analysis is Flawed, Inconsistent and Incomplete

NAMB finds HUD's economic analysis flawed and inconsistent. NAMB believes that further analysis is necessary to ensure that the numbers professed in the analysis bear out the impact any portion of the Proposed Rule will have in the marketplace. Conceiving, constructing and implementing a rule based on flawed, inaccurate and incomplete economic analysis will - by definition - lead to a flawed and incomplete rule that can cause great potential harm to the housing market. One cannot build a house without a solid foundation. This rule is not built on the solid foundation of market realities, but instead a fundamental misunderstanding of such realities. Basing the Proposed Rule on flawed economic analysis will result in a flawed final rule that harms consumers and could have devastating repercussions in a $2 trillion housing market.

Below, NAMB cites several inconsistencies between the information in the Economic Analysis and HUD's Paperwork Reduction Act Submissions to the Office of Management and Budget (OMB). Greater analysis is called for based upon the proposed dramatic impact the Proposed Rule, if finalized, will have on the mortgage industry for both industry and consumers. Finally, the disproportionate impact on small business necessitates further analysis under the Regulatory Flexibility Act.[29] Indeed, the Small Business Administration, Office of Advocacy, submitted a comment letter encouraging HUD to issue a revised initial regulatory flexibility analysis (IRFA) "that takes into consideration the comments of affected small entities and develops regulatory alternatives to achieve HUD's objectives while minimizing the impact on small business."[30]

NAMB believes HUD has significantly underestimated the regulatory burden of its Proposed Rule. Indeed, HUD's Paperwork Reduction Act Submissions to OMB states that annual responses for Good Faith Estimates (GFEs) is 11 million.[31] However, HUD's Economic Analysis and Initial Regulatory Flexibility Analysis, states that if the rule applied in the year 2002, it would impact 19.7 million applications.[32] This is significant because the submission to OMB underestimates the paperwork burden by at least 8.7 million GFEs and an additional $57 million.

In addition, HUD's Economic Analysis states that "originators and closing agents will have to expend some minimal effort in explaining to consumers the cross walk between the new streamlined GFE and the more detailed HUD-1."[33] However, this cost is not included in the

---

[28] Prepared Statement of Mr. David Olson, President, Olson Research, U.S. Senate Committee on Banking, Housing, and Urban Affairs Hearing on "Predatory Lending Practices: Abusive Uses of YSPs," January 8, 2002.
[29] 5 U.S.C. § 601 *et seq*.
[30] *See* Attachment 3, Comment Letter submitted by the Office of Advocacy, Small Business Administration, on the "Real Estate Settlement Procedures Act, Simplifying and Improving the Process for Obtaining Mortgages to Reduce Settlement Costs to Consumers," U.S. Department of Housing and Urban Development, FR-4727-P-01 (July 29, 2002).
[31] *See* Attachment 4, "Supporting Statement for Paperwork Reduction Act Submissions," U.S. Department of Housing and Urban Development, August 2001, p. 5.
[32] "Economic Analysis," p. 9.
[33] *Id*. at p. 25.

OMB submission and the cost is not "minimal." NAMB believes a detailed and accurate estimate should be provided.

HUD states that the program change being mandated at HUD would increase burden to industry by 2,530,000 burden hours.[34] This is equal to 289 years. NAMB believes such a huge burden, by definition, will increase the cost of credit to consumers. NAMB also believes this anticipated burden triggers the Unfunded Mandates Reform Act and conflicts with President Bush's recent Executive Order to relieve the regulatory burden on, and protect, small business. [35]

The Economic Analysis states that $3.5 billion of the $6.3 billion (55%) in transfers to consumers will come from small businesses.[36] NAMB finds this very troubling in the sense that small business – particularly in the housing industry today – is one of the few pillars in this economy that has not fallen. NAMB is concerned that by arbitrarily reducing small business revenues, many will not be able to survive and will therefore reduce consumer choice and access to credit. HUD should ensure that the final regulation would not disproportionately jeopardize the small businessman currently trying to put people in homes.

This and other inconsistencies compel NAMB to ask whether HUD must undergo a more expansive and realistic review of the economic impact this rule will have on the industry, as well as small business, as mandated by the Regulatory Flexibility Act, the Paperwork Reduction Act, the Unfunded Mandates Reform Act, and President Bush's recent Executive Order to relieve the regulatory burden on, and protect, small business.

NAMB has attached a list of discrepancies with HUD's Economic Analysis to this testimony to highlight some of the flaws and inconsistencies.[37]

V. Conclusion

NAMB sincerely appreciates the opportunity to share our concerns with the Subcommittee on HUD's Proposed Rule to reform RESPA. We commend this Subcommittee for convening this hearing on this very important issue. NAMB is very concerned that if HUD proceeds to finalize the Proposed Rule in its current form, mortgage brokers will be driven out of business. As a result, consumers will experience a reduction in the availability and access to credit. We ask this Subcommittee and the Financial Services Committee to request that HUD review and revise the Proposed Rule so that it accomplishes HUD's stated goals and objectives to simplify the mortgage process and increase homeownership while not creating competitive disadvantages in the marketplace.

[34] "Supporting Statement," p. 7.
[35] Executive Order 13272, August 13, 2002.
[36] "Economic Analysis," p. 26.
[37] *See* Attachment 1.

National Association of Mortgage Brokers

Attachment 1

Discrepancies in HUD's Economic Analysis and Initial Regulatory Flexibility Analysis[1]

1. On page 22 HUD states that currently, $7.5 billion of YSP payments "is not passed through to borrowers." Under this proposal, HUD assumes that consumers will recapture half of that, or $3.75 billion. The mandate requires a dollar for dollar offset, meaning that consumers should get all $7.5 billion. Where does the other $3.75 billion go?

2. On page 22, HUD states that origination fees are estimated at $15 billion. HUD asserts that the mandate will improve a consumer's ability to shop and therefore capture five percent ($.75 billion). Why wouldn't a broker try to charge more in origination fees if HUD takes away the ability to charge a yield spread premium? In other words, the analysis is static. A small businessman is not just going to voluntarily cut his rates by half – which is what the HUD model assumes. Most small businesses do not have a 50 percent profit margin.

By not producing a more accurate and dynamic model, HUD is overstating the benefits of this proposal and understating the devastating impact on small business who provides high quality service and expertise.

3. The Proposed Rule will allegedly improve a customer's ability to shop and actually facilitate shopping. If this proposal achieves that goal – and it remains unclear at this time – then a customer could go to ABC bank get the GFE and then get in his/her car and drive to Broker X and compare GFE's.

While the ability to shop may be a desired outcome of public policy, it is difficult to accept the notion that increased shopping saves consumers $826 million. The physical act of shopping is not a costless exercise – and, more to the point of HUD's estimate, it does not *save* money. That is, no one pays a consumer for shopping. However, HUD's Economic Analysis ignores this transaction cost and arbitrarily asserts a savings.[2] This overstates the benefits of this proposal.

This is another example of how the static and questionable analysis is fundamentally flawed. As a result, HUD's Economic Analysis provides no basis to understand the real burden of the proposal.

---

[1] "Economic Analysis and Initial Regulatory Flexibility Analysis for RESPA Proposed Rule to Simplify and Improve the Process of Obtaining Mortgages to Reduce Settlement Costs to Consumers," U.S. Department of Housing and Urban Development, Office of Policy Development and Research, July 2002.
[2] "Economic Analysis," p. 54.

4. On page 54, HUD states that originators and third party settlement service providers will save time (and $850 million) by reducing the amount of time spent with a borrower. While this may be partially true, HUD does not account for the increased foot traffic and comparison shopping made possible by the new rule. An originator will spend more time answering people's questions that are "shopping." It is quite likely that originators will even be walking these shoppers through the new disclosures. This time and resources is not accounted for in HUD's analysis.

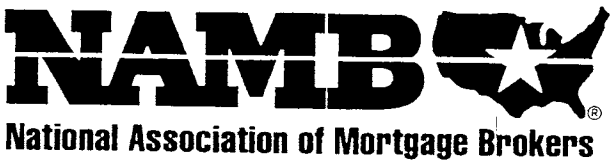
Again, HUD overstates the benefits with static analysis.

5. The last example is how HUD does not understand the marketplace and ends up creating an unlevel playing field for small business.

On page 30 HUD asserts that, "All broker income must be derived from direct fees while lenders who originate may continue to supplement their direct fees with yield spread premiums that continue to be unreported to borrowers. This may give lenders a competitive advantage over brokers." HUD goes on to say on page 32 that "A potential problem comes where a shopper is not knowledgeable. A lender trying to convince a borrower to take his loan instead of the broker's might focus the borrower's attention on the reported origination fee of the two charges…".

That is the point. Of course the lender is going to try to, as HUD says, "convince the borrower to take his loan." That is how the market works. The lender is not an unbiased party in this transaction. He is a competitor and will always try to convince the borrower to take his loan. This is why the current disclosure does not work in its current form – it creates an unlevel playing field.

Attachment 2



October 28, 2002

Rules Docket Clerk
Office of the General Counsel
Room 10276
Department of Housing and Urban Development
451 Seventh Street, SW
Washington, D.C. 20410-0500

Re: Docket No. FR-4727-P-01: Real Estate Settlement Procedures Act (RESPA); Simplifying and Improving the Process of Obtaining Mortgages to Reduce Settlement Costs to Consumers

Dear Ladies and Gentlemen:

The National Association of Mortgage Brokers (NAMB) appreciates the opportunity to comment on the referenced proposal (the Proposed Rule), which the U.S. Department of Housing and Urban Development (HUD) published on July 29, 2002. This comment letter begins with a summary of NAMB's position, some background information and general remarks and follows with specific comments on the Proposed Rule.

I. Summary of Position

NAMB has a long history of supporting the reform of the mortgage laws in our country. The laws are complex for both industry and consumers. As such, NAMB provides a proposal to strengthen, simplify and clarify the disclosures of costs provided to consumers in advance of settlement. NAMB believes that its proposal will satisfy the goals set by Secretary Martinez for RESPA reform. NAMB does not support the Proposed Rule's characterization of yield spread premiums as a "lender payment to the borrower" as it will limit consumer choice, render mortgage brokers unable to compete with lenders, and fails to meet the definition as contained in Statement of Policy 1999-1 and clarified in Statement of Policy 2001-1.

However, as a small business, NAMB cannot support the concept of packaging of settlement costs as defined in a regulatory setting. NAMB believes that packaging will lead to monopolies amongst the larger lenders, as small mortgage brokers, and other small settlement service providers, will no longer be able to compete for consumers. The very volatility of the marketplace, especially in recent times, renders many of HUD's proposals in the Proposed Rule untenable at best.[1]

[1] For example, this week alone, interest rates have increased 50 basis points.

II. Background and General Remarks

NAMB is the nation's largest organization exclusively representing the interest of the mortgage brokerage industry. NAMB has more than 13,000 members and 46 state affiliates nationwide. NAMB provides education, certification, industry representation, and publications for the mortgage broker industry. NAMB members subscribe to a strict code of ethics and a set of best business practices that promote integrity, confidentiality, and above all, the highest levels of professional service to the consumer.

Today, the nation enjoys an all-time record rate of homeownership. While many factors have contributed to this record of success, one of the principal factors has been the rise of wholesale lending through mortgage brokers. Mortgage brokers have brought consumers more choices in loan programs and products than they can obtain from a branch office of even the largest national retail lender. Brokers also offer consumers superior expertise and assistance in getting through the tedious and complicated loan process, often finding loans for borrower that may have been turned down by other lenders. Meanwhile, mortgage brokers offer lenders a far less expensive alternative for nationwide product distribution without huge investments in "brick and mortar."

In light of these realities, it is no surprise that consumers have increasingly turned to mortgage brokers. Today, mortgage brokers originate more than sixty percent of all residential mortgages. The rise of the mortgage broker has been accompanied by a decline in mortgage interest rates and closing costs, an increase in the homeownership rate, and an explosion in the number of mortgage products available to consumers. These positive developments are not mere coincidences. They would not have been possible without the advent of wholesale lending through mortgage brokers. NAMB and its members are proud of the foregoing record of accomplishment and our contribution toward consumers' greater access to mortgage finance and homeownership opportunity.

Further, NAMB has engaged in initiatives geared toward increasing the integrity and professionalism of its industry. It has drafted and promoted a model licensing statute for all mortgage brokers across the country. While 46 states and the District of Columbia maintain licensing, registration or notification requirements, NAMB seeks to standardize these requirements. NAMB supports requiring that a loan officer meet certain education requirements, including continuing education requirements. It supports background checks of loan originators to ensure that the bad actors will be forced out of the industry. While initiatives such as the one proposed by NAMB will not eliminate abuses from the mortgage industry, requiring licensing, accompanied by certain screening requirements and education requirements, as described above, will assist in decreasing abuses.

NAMB also believes that the interests of the public and private sector are best served through the voluntary observance of ethical standards of practice, and require that each member subscribe to the following Code of Ethics:

- Honesty and Integrity: NAMB members shall conduct business in a manner reflecting honesty, honor and integrity.
- Professional Conduct: NAMB members shall conduct their business activities in a professional manner.
- Honesty in Advertising: NAMB members shall endeavor to be accurate in all advertisements and solicitations.

- Confidentiality: NAMB members shall avoid unauthorized disclosure of confidential information.
- Compliance with the Law: NAMB members shall conduct their business in compliance with all applicable laws and regulations.
- Disclosure of Financial Interests: NAMB members shall disclose any equity or financial interest they may have in the collateral being offered to secure a loan.

We welcome the opportunity to improve our industry through the reform of mortgage lending laws as well as simplify the process for both consumers and industry.

III. HUD's Proposed Rule on RESPA Reform

NAMB has long supported the reform of the Real Estate Settlement Procedures Act (RESPA), and other federal mortgage lending laws. Together these laws in a valiant attempt to provide consumers with sufficient information about settlement costs and the costs and terms of credit, create more confusion and provide less clarity. NAMB, together with other industry trade groups, has led the way for mortgage reform as well as better, simpler disclosure to consumers. For several years, NAMB met with industry representatives, consumer advocates, members of government-sponsored entities, and HUD to reform RESPA. Unfortunately this process ended with no clear solution, which bespeaks of the complexity of mortgage reform.

As a result of this long history, NAMB continues its support of mortgage reform by supporting Secretary Martinez's desire to simplify the mortgage settlement process for consumers. NAMB also supports the guiding principles HUD has looked to in reforming Regulation X:[2]

- Borrowers should receive settlement cost information early enough in the process to allow them to shop for the mortgage product and settlement services that best meet their needs.
- Disclosures should be as firm as possible to avoid surprise costs at settlement.
- Regulatory amendments should be utilized to remove unintended barriers to marketing new products, competition, and technological innovations that could lower settlement costs.
- Many of the current system's problems derive from the complexity of the process; with simplification of disclosures and better borrower education, the loan origination process can be improved.
- RESPA should be vigorously enforced to protect borrowers and ensure that honest industry providers have a level, competitive playing field.

First and foremost, NAMB strives for a level playing field for all mortgage originators. It is the basic tenet of NAMB's policy towards mortgage reform. However, mortgage brokers should not be singled out and HUD's Proposed Rule does just that – indirect compensation **for mortgage brokers only** must be disclosed as a lender payment to the borrower, mortgage brokers must obtain the signature of a lender when packaging settlement services, and others. We are disappointed that HUD acknowledges that the proposed rule "results in different treatment of compensation in loans originated by lenders and those originated by mortgage brokers."[3] NAMB strives to level this playing field, equaling the opportunity for both mortgage brokers and mortgage lenders.

---

[2] Real Estate Settlement Procedures Act, 67 Fed. Reg., 4,135 (July 29, 2002).
[3] Proposed Rule, Fed. Reg. at 49,148.

IV. Increased Consumer Education and Enforcement is Paramount to Ending Abusive Practices

A. Increased Consumer Education will Create a Consumer Base More Cognizant of Abusive Lending Practices

NAMB remains convinced that consumer education is paramount in forestalling abusive lending practices. As certain television commercials stated years ago, "an educated consumer is our best customer." Greater regulation may lead to more confusion amongst consumers; the focus is better spent on consumer education.

Increased consumer education will provide a consumer base that can recognize abusive practices in the mortgage industry. NAMB has long established success in providing professional development education to our industry. As a recognized leader in grassroots education, we created a consumer education program, specifically geared to potential first-time minority homebuyers. Our program, *Are You Prepared to Head Down the Road to Home Ownership?*, is a grassroots level initiative that allows industry professionals to conduct informative presentations in local offices, churches, community centers, and other neighborhood venues. The presentation provides elementary level information on the pros and cons of homeownership, what to consider before purchasing a home, and basic information on the home-buying process.

This program will be introduced at NAMB's 1st Annual National Housing Fair in Washington, DC in March of 2003 to give the first-time homebuyer the opportunity to address the fears, hopes and concerns of homeownership. The event will include mortgage professionals and experts who can discuss the availability of affordable housing programs, strategies for obtaining a down payment as well as responsible credit repair. NAMB believes this will complement the homebuyer seminar kits its members already use to promote neighborhood housing seminars for emerging markets and first-time homebuyers.

NAMB looks forward to working with HUD to expand consumer education and hopes that HUD will make consumer education a priority in the years to come.

B. Additional Regulation is Meaningless Without Stronger Enforcement

Also, revision of Regulation X will be virtually meaningless if enforcement is not increased to a level which dramatically impacts the "bad actors" in our industry. NAMB has long been a proponent of the expulsion of members of our industry who defraud consumers. However, we have also long been proponents of the maxim that increased regulation bears no impact without increased enforcement. Bad actors will remain in the industry, flying low below the radar screens of HUD and other regulators, without increased enforcement.

Recently HUD has taken steps to increase enforcement of laws and regulations and we commend HUD for this first step. However, the past inactivity has left its hallmark in that there are members of the mortgage industry who flaunt the law. HUD should look at new an innovative methods for ensuring that these actors never enter the industry again. For example, we suggest that HUD publicize enforcement actions in local and national newspapers to alert the public of these individuals or companies. Increased awareness will assist in enforcement efforts. We urge HUD to take dramatic steps in increasing the enforcement of current laws and regulations before implementing new laws or regulations.

V. The Proposed Rule Should Not Provide Additional Barriers for Minority Homeownership

President Bush and Secretary Martinez have been very vocal in their goal of increasing minority homeownership. Minority homeownership has recently been on the rise; in a press release dated April 24, 2002, the U.S. Census Bureau released data that showed that homeownership among Hispanics rose substantially to 46 percent.[4] However, as noted in other press releases, a Bush Administration analysis showed that "a large gap still exists between minority and white households."[5] The analysis showed that "since 1994, when the black homeownership rate was 27.5 percentage points below the rate of whites and the Hispanic rate was 28.8 percentage points below, only small gains have been made."[6] The analysis further showed that "by 2001 the gap had been reduced by just 1.6 percentage points for African Americans and 1.8 percentage points for Hispanic households."[7]

HUD's analysis identified several barriers for homeownership: "(i) lack of capital for the down payment and closing costs, often the single greatest barrier to homeownership; (ii) lack of access to credit and poor credit histories, which means more minority families are rejected for a mortgage loan or given loans with high interest rates; (iii) lack of understanding and information about the homebuying process, especially for families for whom English is a second language;" and (iv) others.[8]

Mortgage brokers are the key to bridging the gap in minority homeownership. Mortgage brokers are integral members of their community and provide access to credit, especially in rural areas, that most large lenders cannot. Further, mortgage brokers are willing to take the time to work with minority consumers, who often have non-traditional sources of income, and other issues. A recent study performed by Wholesale Access, a research, advisory and publishing company, on minority lending stated that two of the key findings of this research are: "(i) brokers reach more minorities than lenders; and (ii) the explanation for this is found in their locations, products and staffing."[9] Many of these communities would not have the availability of mortgage loans currently enjoyed today were it not for mortgage brokers, who originate more than 60% of all mortgage loans today.[10] Mortgage brokers often originate loans for "difficult borrowers," those who are credit challenged, have income that is difficult to document, or are first time homebuyers. Mortgage brokers spend the time with these applicants, working together with them, to work through credit problems, having no credit histories, and other issues to help these individuals finance the purchase of their home. Any rule implemented by HUD should not disproportionately adversely impact mortgage brokers. NAMB believes that its proposal levels the playing field for all loan originators while being beneficial to consumers.

---

[4] Press Release, Department of Housing and Urban Development, Homeownership Increase Among Hispanics (April 24, 2002) (on www.hud.gov).
[5] News Release, Department of Housing and Urban Development, New HUD Report Identifies Barriers to Minority Homeownership, Outlines Bush Administration Actions to Overcome them (June 17, 2002) (on www.hud.gov).
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] Press Release, Wholesale Access, Study of Minority Lending Completed, (Sept. 24, 2002) (on www.wholesaleaccess.com).
[10] Prepared Statement of Mr. David Olson, President, Olson Research, U.S. Senate Committee on Banking, Housing, and Urban Affairs Hearing on "Predatory Lending Practices: Abusive Uses of YSPs," January 8, 2002.

VI. NAMB's Concerns with HUD's Proposed Rule in Connection with the Enhanced Good Faith Estimate

A. Characterization of Yield Spread Premiums as a Lender Payment to the Borrower

Characterizing yield spread premiums as a lender payment to the borrower creates *unintended consequences* and *provides less clarity* to consumers than as presently disclosed. In the Proposed Rule, HUD seeks meaningful disclosure of mortgage broker fees to borrowers. However, the proposed method of disclosure achieves just the opposite – it muddies the waters as to how indirect broker compensation works in reality. Under the proposed structure, indirect broker compensation is disclosed as a "lender payment to the borrower for higher interest rate."[11] Not only is this inflammatory, it seems to discount HUD's own Statement of Policy, in which it states that yield spread premiums can be payments for goods, services, and facilities provided to the lender by the mortgage broker. NAMB believes that HUD's characterization of yield spread premiums creates a multitude of problems, not the least of which is a new round of class action lawsuits.

It seems obvious that a consumer's initial reaction to this characterization will be one question – "where is my check?" As stated elsewhere in this comment letter, a cottage industry has sprung out of Section 8 litigation – class action lawsuits. In recent years, yield spread premiums have been under fire, as well as mark-ups of third party settlement service fees. Such a departure from HUD's established (in Statement of Policy 1999-1) and reemphasized (in Statement of Policy 2001-1) "definition"[12] of yield spread premiums will only spur another round of litigation. Further, a borrower claiming fraud, when no check appears, will seek counsel to litigate the issue. Unfortunately, the stark reality of business is that any increase in the amounts of money spent in defending any lawsuits will ultimately be passed through to the consumer in the form of higher costs for originating a mortgage loan. NAMB fears this very real and distinct threat of liability as well as the potential costs of defending the legitimate use of this method of compensation.

Such a characterization constitutes a reversal of HUD's definition of a yield spread premium in Statements of Policy 1999-1 and 2001-1. Yield spread premiums, and other indirect compensation, have historically not been viewed merely as payment for goods or facilities provided and services performed to the borrower. HUD states in the background on the proposed rule that "as retailers, brokers also provide the borrower **and the lender** [emphasis added] with goods and facilities such as reports, equipment, and office space to carry out retail functions."[13] In utilizing mortgage brokers, wholesale lenders can provide mortgage loan products at conceivably lower rates and lower costs to consumers. Thus, characterizing

---

[11] Proposed Rule, Fed. Reg. at 49,164.

[12] In Statement of Policy 1999-1, HUD stated that yield spread premiums were not *per se* illegal. The Statement of Policy states that "in determining whether a payment from a lender to a mortgage broker is permissible under section 8 of RESPA, the first question is whether goods or facilities were actually furnished or services were actually performed for the compensation paid." Real Estate Settlement Procedures Act, 64 Fed. Reg. 10,080, 10,084 (March 1, 1999). "The second question is whether the payments are reasonably related to the value of the goods or facilities that were actually furnished or services that were actually performed." *Id.*.

[13] Real Estate Settlement Procedures Act, Fed. Reg. at 49,140. HUD details in the proposed rule that "mortgage broker essentially provide retail lending services, including counseling borrowers on loan products, collecting application information, ordering required reports and documents, and otherwise gathering data required to complete the loan package and mortgage transaction." *Id.*

yield spread premiums as lender payments to the borrower is inaccurate as the lender may compensate the mortgage broker for providing brick and mortar, and other goods and facilities.

Also, in singling out indirect compensation to mortgage brokers only, HUD goes against its own statements in Statement of Policy 2001-1. In this Policy Statement, HUD states that it is "aware that while yield-spread premiums are not used in loans originated by lenders, lenders are able to offer loans with low or no up-front costs required at closing by charging higher interest rates and recouping the costs by selling the loans into the secondary market for a price representing the difference between the interest rate on the loan and the par, or market, interest rate. Sale of such a loan achieves the same purpose as the yield spread premium does on a loan originated by a broker. **The department strongly believes that all lenders and brokers should provide the level of consumer disclosure that the purposes of RESPA intend and that fair business practices demand [emphasis added].**"[14] Disclosure that lenders also receive indirect compensation on the sale of the loan on the secondary market should also be required.

Additional conflicts arise in connection with the following: (i) brokers will cease originating FHA and VA-insured mortgage loans due to origination fee caps; (ii) contracts between mortgage brokers and wholesale lenders in connection with "flipping" will be void, causing the only recourse to be demanding the lender payment to the borrower back from the borrower; (iii) mortgage lenders having to provide consumers with a 1099 form for income from the lender; (iv) potential tax consequences; (v) causing more loans, including some conventional loans to be subject to state predatory lending laws; (vi) causing mortgage brokers to cease advertising "no point loans" while allowing its competitors to continue to do so; and (vii) others. These points are further elaborated on in NAMB's response to Question 7 as contained in the Proposed Rule.

B. NAMB's Proposal for Reform of RESPA's Disclosure Requirements

NAMB wants to work with HUD in strengthening the good faith estimate to end abusive practices with the disclosure of settlement costs. Legislative change will ensure that there are no challenges in the courts over whether HUD has the authority to effect these changes. By strengthening the disclosure requirements to the consumer, NAMB believes that many of the abuses facing consumers will cease to exist as unscrupulous originators will no longer be able to effect a "bait and switch" to more expensive loan products. Further, we support the addition of penalties and remedies for consumers when the requirements for NAMB's proposed disclosure are not met. Finally, NAMB believes that standardization of the disclosure process and forms will benefit both consumers and industry. Detailed below is NAMB's proposal for providing for a stricter good faith estimate of settlement costs. Further, NAMB's proposed disclosure is attached to this letter as Exhibit A, and we ask that Exhibit A be included for the record.

i. Disclosure Requirements

a. Origination Costs, Settlement Costs, Interest Rate, Monthly Payment

Under NAMB's proposal, the costs to originate a mortgage loan will fall into two categories: (i) origination costs, which are paid by the consumer directly to the lender and/or the mortgage broker; and (ii) settlement costs, which are all fees paid to a third party for services rendered in originating a mortgage loan (with the exception of mortgage insurance, hazard insurance, real property taxes, escrows for the

[14] Real Estate Settlement Procedures Act, Statement of Policy 2001-1, 66 Fed. Reg. 53,052, 53,057 (October 18, 2001).

previous items, and per diem interest). These fees will be disclosed to consumers on the front page of a new form (also proposed by NAMB) in simple highlighted boxes, together with a description of what constitutes these fees.

In connection with origination costs, these fees are guaranteed unless certain events occur. These events include: (i) when a consumer is not eligible for the loan program; (ii) when the property proposed to secure the loan changes or does not qualify; (iii) the consumer chooses a different loan program, (iv) the consumer chooses a different pricing option; and (v) when the loan amount changes. These events must be documentable, maintained in the loan file, and the originator must comply with the Equal Credit Opportunity Act[15] (ECOA) and the notice requirements more fully regulated under Regulation B,[16] the implementing regulation for ECOA.

In connection with settlement costs, these costs are estimated within three (3) business days of "application," as defined under Regulation X. Once the consumer accepts the disclosure, an originator proceeds with the origination of the loan, and collects and documents the proper data for the mortgage loan. If there are any changes in the settlement costs, at a minimum of fifteen (15) days prior to closing, the originator must provide a redisclosure to the consumer (if there are no changes, an originator is not required to redisclose). At this time, the settlement charges cannot increase between redisclosure and settlement more than 10% of the total costs at settlement. NAMB believes that this provides the originator with adequate time to underwrite the loan and utilize the third party services. Further, the consumer will be notified of firmer third party costs fifteen (15) days prior to settlement. At this time, a consumer will be required to either reject the disclosure or accept the disclosure by authorizing the drawing of loan documents.

Redisclosure is also required when a consumer chooses to lock their interest rate, when the consumer does not lock their interest rate upon initial disclosure. However, the tolerance does not apply in this instance. The same fifteen (15) day rule, as described above, applies in these instances.

NAMB believes that the redisclosure requirements will be more effective in combating bait and switch than is currently required under RESPA. A consumer will have time to turn down the loan (if the loan charges do not meet their understanding), and still seek another mortgage loan. Bait and switch will never cease to exist; unscrupulous actors will always be able to engage in this practice. NAMB does offer one potential solution; we recommend that HUD work with the Federal Reserve Board in strengthening the details required to be provided in the adverse action notices and counteroffer notices.

The form will also disclose the interest rate of the mortgage loan. This rate will be subject to change, unless the consumer locks the interest rate. The form provides an opportunity for the consumer to lock the interest rate, and provides a place where the consumer may execute the agreement to lock. The amount of the lock-in fee is to be disclosed in this box. The consumer is also provided a warning that if the consumer does not choose to lock their interest rate, the interest rate may change without any notification. Consumers will be asked to acknowledge, regardless of whether the consumer locks or floats their interest rate.

---

[15] 15 U.S.C. § 1691 *et seq.*
[16] 12 C.F.R. § 202 *et seq.*

The form also discloses the amount of the monthly payment for the consumer. This box contains an opportunity to acknowledge whether the monthly payment includes principal (for interest only balloon payment loans), interest, escrows for real property taxes, hazard insurance, and mortgage insurance. This information is very helpful to consumers in that some consumers are not aware whether they must arrange for payment of these items outside of their monthly payment. Consumers will not be surprised by this information.

Finally, itemization of the fees included in origination costs and settlement costs are disclosed at the bottom of the first page of the form. We understand that HUD believes that the less numbers on the form the better for shopping, but mortgage brokers know that consumers will ask what fees constitute these two categories. NAMB supports the continued itemization of fees (please note that the fees included at the bottom of the form are representative of those charged, additional fees may be necessary that are not itemized on NAMB's proposed form). Further, consumers will be able to compare this information to the HUD-1 with much greater ease and clarity than under the Proposed Rule. However, NAMB believes that the HUD-1 should be revised to be consistent with any amendments to the good faith estimate requirement. Thus, under NAMB's proposal, the fees on the HUD-1 should be redistributed to fall into the category of origination costs, settlement costs, or other estimated costs.

b. Other Information Disclosed

The form will also discuss the services that the originator might perform in connection with the origination of the mortgage loan, as well as provide a warning to consumers to utilize the good faith estimate form at settlement for comparison purposes. The form also warns consumers that the originator does not guarantee the lowest price or the best terms available in the market.

The proposed form also provides the following information: (i) loan amount; (ii) term of the loan; (iii) assumability of the mortgage loan; (iv) property address; (v) whether the loan is for a purchase or refinance; (vi) whether the loan is a first mortgage loan or a subordinate mortgage loan; (vii) loan program; (viii) whether the loan has a prepayment penalty, and if so, the terms of the prepayment penalty; (ix) whether the loan has a balloon payment, and if so, the terms and amount of the balloon payment; (x) whether the loan is an adjustable rate mortgage loan; and (xi) an estimation of the amounts for hazard insurance, property taxes, mortgage insurance, escrow amounts, and per diem interest.

The proposed form will also disclose the maximum amount of yield spread premium that will be paid to the mortgage broker. The yield spread premium will be characterized as compensation for goods, facilities and services. Further, the proposed form will contain the following language: "An originator may be compensated by an investor for goods, facilities or services provided to you or to the investor. This will result in a higher interest rate for this loan. If you would rather pay less cash up front, you may be able to pay some or all of the originator's compensation indirectly through a higher interest rate. If you would rather have a lower interest rate, you may pay higher up-front points and fees. This amount will not exceed the amount disclosed to the left of this description. If the originator is acting as a lender in this transaction, the originator may receive additional compensation when it sells the loan for the value of the servicing rights or the value of the interest rate or a combination of both. This amount is not required to be disclosed." NAMB believes that this disclosure is more in keeping with HUD's earlier Statements of Policy (as discussed in NAMB's response to Question 7 in this letter), Further, we believe that this will eliminate many of the problems that exist with the Proposed Rule's characterization (also discussed in NAMB's response to Question 7 in this letter).

Above this disclosure, NAMB's form includes the Proposed Rule's information on "Interest Rate and Settlement Costs Options." Together with this description, the form includes a generic chart showing an example of how an increase or decrease in interest rate can affect a person's monthly payment. Currently, the HUD proposed rule requires originators to create a "sample" chart, on a loan-by-loan basis, that would provide the consumer with comparisons of the options available for payment of settlement costs to lower the consumer's interest rate. However, the volatility of the marketplace renders this requirement virtually untenable. An originator will have difficulty in complying with this requirement as the market changes too rapidly for a loan originator in the field to create in the manner contemplated in the proposed rule. NAMB, however, sees the utility for consumers to have this type of information for comparison and for the purposes of "shopping." As such, we find a workable middle ground to be the inclusion of a generic "sample" chart.

Finally, the form provides "Details of Transaction" together with a requirement that an estimation of the amount to be paid at closing be disclosed. NAMB recommends that this information be provided as a summary of the details of the transaction, which parallels the form on the Uniform Residential Loan Application Form 1003.

c. Execution Requirements

This disclosure is required to be signed by the consumer, initially and at redisclosure, and returned to the originator and maintained in the file. Further, at redisclosure, the consumer authorizes the drawing of closing documents. Consumers are provided a seven (7) day period in which to return the executed disclosure. This will prevent unscrupulous originators from merely marking the disclosure as "sent" and placing the bogus form in the file. NAMB believes that this is a flaw in the current RESPA structure.

ii. Length of Time Fees are Guaranteed Until Acceptance

In order to facilitate shopping, NAMB's proposal provides that the guaranteed origination costs will remain available to a consumer for seven (7) days from initial disclosure. At this point, the consumer either accepts the disclosure or rejects the disclosure. Once the consumer accepts the disclosure, the origination fees are guaranteed (unless certain conditions are met and documented, as described above). A consumer also at this point can elect to lock their interest rate or float their interest rate. Once a consumer accepts the disclosure, an originator can proceed with underwriting the loan. It is at this point that a consumer could be required to pay additional costs (if allowable under state law). The same seven (7) day period applies in connection with redisclosure. However, this seven (7) day period does not detract from the fifteen (15) day period; that is, if the originator rediscloses fifteen (15) days prior to settlement, and the consumer takes the full seven (7) days to return the authorization, the closing may take place in eight (8) days.

iii. Redisclosure Requirements

An originator will be required to redisclose in several instances. First, an originator must redisclose at a minimum of fifteen (15) days prior to settlement if any of settlement costs initially disclosed have increased. This is addressed above. An originator will also be required to redisclose, within three (3) business days of notification of a counteroffer, upon certain conditions, which are documentable: (i) when a consumer is not eligible for the loan program; (ii) when the property proposed to secure the loan changes or does not qualify; (iii) the consumer chooses a different loan program, (iv) the consumer

chooses a different pricing option; and (v) when the loan amount changes. As discussed above, NAMB believes that the redisclosure requirements will be effective in stopping bait and switch practices, as well as provide the originator an effective tool to combat borrower fraud. As stated later in this letter, borrower fraud is much more prevalent in this industry than assumed.

A consumer may waive the redisclosure period (i.e., the fifteen (15) day period). This can only be done if the borrower signs a waiver to this effect. While NAMB believes this can be open to abuse, many consumers, especially in a refinancing, will not want to wait fifteen (15) days to close. A consumer should be made to hand-write the reasons for the waiver and this request must be maintained in the loan file. Further, an originator is not required to redisclose if the costs disclosed initially have not increased. Thus, the fifteen (15) day period would not be applicable in this instance.

iv. Remedies and Penalties

Finally, in order to truly strengthen the disclosure of costs, NAMB's proposes that HUD include additional remedies and penalties that are available to the consumer, a limited right to cure that is available to industry, and draconian penalties that would be imposed if the originator does not exercise the right to cure. Part of the reason for the bait switch tactics that many contend are occurring today is the failure of RESPA to contain any remedies that will impact the bad actors. However, that said, good actors in the industry must be given an opportunity to cure any overpayments before penalties are waged against them.

The Proposed Rule allows that if the cost at settlement exceeds that which was disclosed on the enhanced good faith estimate, all loan-related fees can be refunded if the borrower withdraws the application.[17] This places industry at a disadvantage as certain third party fees (i.e., the credit report and appraisal) may have already been paid for services rendered. Remedies should also be available to industry. An originator should have the right to cure the overpayment. If the originator refuses to cure the overpayment, a consumer should then be able to withdraw the application and receive a refund of all loan-related fees and charges as described in the proposed rule. To allow the proposed remedy at the outset without providing a right to cure places a burden on the originator. A right to cure should be permitted under this rule.

C. NAMB Expresses Concern that HUD is Acting the Beyond Scope of its Authority Which Will Result in Legal Challenges

HUD's Proposed Rule, if implemented, would create the most extensive and far reaching changes to the mortgage settlement process since the implementation of the 1975 amendments to RESPA. Originally, RESPA required "at the time of loan commitment, but in no case later than twelve calendar days prior to settlement, ...an itemized disclosure in writing of each charge arising in connection with such settlement."[18] Further, the statute provided that "in the event the exact amount of any such charge is not

---

[17] The language is as follows: "If the cost at settlement exceeds the estimate reported on the good faith estimate, absent unforeseeable and extraordinary circumstances, the borrower may withdraw the application and receive a full refund of all loan-related fees and charges." Proposed Rule, Fed. Reg. at 49,159.

[18] Real Estate Settlement Procedures Act of 1974, Pub. L. No. 93-533, § 6(a), 88 Stat. 1724, 1726 (1974).

available, a good faith estimate of such charge may be provided."[19] The statute provided for certain remedies for failure to provide the disclosure to the consumer.[20]

In 1975, Congress passed amendments to RESPA repealing the above disclosure provisions and replacing them with the language that we are familiar with today.[21] In this language Congress requires that "a **good faith estimate of the amount or range of charges** for specific settlement services that the borrower is **likely** to incur in connection with the settlement" of the mortgage loan [emphasis added] be disclosed to consumers "as prescribed by the Secretary."[22] Further, these amendments eliminated the penalties contained in the 1974 statute.[23]

The reasoning for these changes were captured in the legislative history for the 1975 amendments which stated that "the major purpose of this provision of RESPA is to afford the buyer and the seller the opportunity and the time to shop for settlement services at prices lower than those charged for services arranged by the lender."[24] It further stated that "another purpose of this provision is to protect the buyer and the seller against unexpected or unreasonable charges which might be imposed at the time of settlement."[25] Yet, in endorsing the elimination of the early disclosure, the history relays the belief that "while advance disclosure provisions of RESPA are a logical way to reach toward these objectives they are neither necessary nor, as experience has borne out, desirable."[26]

It is uncertain as to whether HUD has the authority to make such sweeping changes to the good faith estimate requirements under RESPA. It appears that any changes to the good faith estimate requirements in order to strengthen the disclosure requirements would be ripe for judicial challenge without corresponding legislative authority.[27]

This position seems bolstered further by Congress's use of "good faith" in the statute. Even if one were to take an expansive view on what constitutes "good faith," it does not seem arguable that statutory authority expands to a guarantee or even disclosing within a prescribed tolerance of settlement costs. As HUD itself cites in the Proposed Rule, "Differing editions of Black's Law Dictionary have defined 'good faith' as 'a state of mind consisting in * * * honesty in belief or purpose * * * [and faithfulness to one's duty or obligation,' and 'freedom from knowledge of circumstances which ought to put the holder upon inquiry' as well as 'absence of all information, notice, or benefit or belief of facts which render [a transaction unconscientious.' Inherent in these definitions is the concept that where a party makes an estimate in good faith they will take into account all relevant information available to them, and will exercise reasonable

---

[19] *Id.*

[20] RESPA provided that, if a lender failed to provide a consumer with the required disclosure, the lender would be liable for "the actual damages involved or $500, whichever is greater, and in the case of any successful action to enforce the foregoing liability, the court costs of the action together with a reasonable attorney's fee as determined by the court." Real Estate Settlement Procedures Act of 1974, Pub. L. No. 93-533, § 6(b), 88 Stat. 1724, 1726 (1974).

[21] This language is as follows: "Each lender shall include with the booklet a good faith estimate of the amount or range of charges for specific settlement service the borrower is likely to incur in connection with the settlement as prescribed by the Secretary." 12 U.S.C. § 2604(c).

[22] *Id.*

[23] *Id.*

[24] H.R. Rep. No. 94-667, at 4 (1975), *reprinted in* 1975 U.S.C.C.A.N. 2448, 2451.

[25] *Id.*

[26] *Id.*

[27] This was cited to in the "Joint Report to the Congress Concerning Reform to the Truth and Lending Act [sic] and the Real Estate Settlement Procedures Act," prepared by HUD and the Federal Reserve Board in July 1998.

care in ascertaining and evaluating such information before providing such an estimate."[28] Mortgage brokers and other originators comply by this requirement today. These originators use the information gathered from the consumer, such as value of the home, the loan amount, a consumer's credit history, income and other information, to provide a consumer with an estimate in good faith of the settlement costs.

While NAMB looks forward to working with HUD to strengthen the good faith estimate of settlement costs, it seems that in order to avoid any potential challenge in the courts based upon the legislative history, and the language of the statute itself, legislative authority must be sought. NAMB hopes that it can work with HUD in promoting this proposal to Congress as a balanced proposal that benefits both industry and consumers.

V. NAMB's Concerns with HUD's Proposed Rule with the Packaging of Settlement Services

NAMB believes that mortgage brokers, as small businesses, will be greatly disadvantaged by the "regulatory driven packaging" (as opposed to market driven packaging) of settlement services.[29] Mortgage brokers, as small businesses,[30] do not have the bargaining power to enter into volume-based discounts with third party settlement service providers as do larger entities. Under the Proposed Rule, mortgage brokers would not be able to compete with the larger entities and will be forced to cease the transaction of business, become an agent for one lender or two, utilizing their packages or utilize the good faith estimate approach, which could also disadvantage mortgage brokers. This will force mortgage brokers to lose their autonomy, which is beneficial to consumers in the form of more consumer choice.[31] This impact will be passed through to the consumers in the form of higher costs and less consumer choice. As such, NAMB cannot support the "regulatory driven" concept of packaging.

Further, the packaging of settlement services is occurring today.[32] Thus, the removal of regulatory barriers is not necessary to allow packaging of settlement services;[33] rather, exemption from Section 8 liability creates an incentive for entities to offer packages. While HUD contends that packaging will decrease a consumer's settlement costs as competition drives these prices down, it could also work to

---

[28] Porposed Rule, Fed. Reg. 49,150.

[29] Recent news articles have cited a decline in small business hiring, "creating another headwind for the nation's stubbornly sluggish economy recovery." *Small-business Hiring Dip Slows Recovery,* Ariz. Republic, Oct. 25, 2002, at D-1. Further, an article cites that "small businesses make up 98 percent of all enterprises in the nation and create about 65 percent of jobs." *Id.*

[30] The majority of mortgage brokers are small businesses. The Small Business Association defines "small businesses" for "loan brokers" as being those with $5 million in annual receipts. 13 C.F.R. § 121.201. The Economic Analysis cites to a study in which it stated that most mortgage broker firms consist of one office and five employees (including the owner). "Economic Analysis and Initial Regulatory Flexibility Analysis for RESPA Proposed Rule to Simplify and Improve the Process of Obtaining Mortgages to Reduce Settlement Costs to Consumers," U.S. Department of Housing and Urban Development, Office of Policy Development and Research, July 2002, p.12. Further more, this study stated that it found "brokers as low-cost, highly competitive firms, vigorously competing with one another and with little opportunity to earn above-normal profits." *Id.*

[31] Currently, mortgage brokers work with many different lenders. This provides a consumer with a choice of hundreds of different loan products, much more than those available from a mortgage lender. This is one reason for the rise in the number of originations by mortgage brokers over recent years.

[32] Mortgage.com, a division of ABN AMRO Mortgage Group, Inc., is currently offering a guaranteed package of certain settlement services together with a mortgage loan on its website, www.mortgage.com.

[33] Proposed Rule, Fed. Reg. at 49,136.

drive prices up as packagers can "up charge" costs with no Section 8 repercussions.[34] HUD's longstanding prohibition against the "up charging" of third party settlement costs will cease to exist only for those who package. Those who choose to operate under the enhanced good faith estimate will still be subject to this prohibition.

NAMB also believes that there are many unworkable provisions in HUD's Proposed Rule in connection with packaging. These provisions include, among others, providing a index for consumers to track their interest rate, allowing a consumer thirty (30) days to shop for loan while the package is available, providing no itemization of costs that are in the package, allowing the package to remain viable, after acceptance, indefinitely, together with others. Perhaps one of the most important aspects of the Proposed Rule, which is not addressed, is the need for federal preemption of state laws of the Proposed Rule to have the effect desired. NAMB addresses the need for federal preemption in response to the Proposed Rule's Question 22.

Mandating "regulatory driven packaging" seems to eliminate competition which is one of the reasons mortgage pricing has been kept so low.[35] As mortgage brokers will not be able to participate in the packaging world, they will be driven to utilize the enhanced good faith estimate. The good faith estimate, especially the proposed characterization of yield spread premiums, is fraught with pitfalls which do not allow a mortgage broker to compete with lenders.

Finally, any changes made to the initial disclosures to consumers must be reflected in the HUD-1 Settlement Statement. In not altering the HUD-1 Settlement Statement, the consumer will be faced with the confusing compilation of costs and have a difficult time in comparing the two documents.

A. NAMB Believes that HUD's Proposed Rule's Provisions on Packaging Will Create a Monopolistic Environment to the Detriment of Consumers

HUD claims that the less efficient originators will suffer under the Proposed Rule but the more efficient originators will prosper. A mortgage broker may be the most efficient mortgage broker working today but when placed in competition for costs with a multi-billion dollar originator, the efficient mortgage broker will still be unable to compete and will lose business. Efficiency cannot beat might.

However, as stated above, under HUD's Proposed Rule, many mortgage brokers will not be able to compete. The larger entities will have the advantage of size when entering into volume-based contracts with third party settlement service providers. Thus, the larger entities will be able to cut their prices, provide consumers with packages at a lower price, and force mortgage brokers to provide the enhanced good faith estimate to consumers. Again, this is not a matter of efficiency; rather it is a matter of might. This creates a new unlevel playing field for mortgage brokers as detailed in this letter.[36] But it does not end there.

---

[34] Further, HUD's Economic Analysis contains some flawed conclusions as to the true savings to consumers which we detail below.

[35] A study cited to in HUD' "Economic Analysis" stated that it found "brokers as low-cost, highly competitive firms, vigorously competing with one another and with little opportunity to earn above-normal profits." "Economic Analysis," p. 12.

[36] As detailed in this letter, NAMB finds many provisions of the Proposed Rule's enhanced good faith estimate unworkable.

As mortgage brokers will be unable to compete with the larger entities, mortgage brokers will no longer be able to utilize the local title companies, local appraisers, local attorneys, and others for the provision of third party settlement services. The adverse impact HUD's proposed use of packaging will have an exponential impact on many small local companies.

Perhaps who will suffer the most will be the consumers. Additional consolidation will occur in the mortgage lending industry and competition will begin to slow down as the number of "originators" decreases. Lenders might be incented by market share not to pass any discounts to consumers; under HUD's Proposed Rule there would be no repercussions under Section 8 for this failure. History has shown that monopolies do not drive down costs; while in some instances it might, most monopolies drive costs up (which necessitated the passage of the Sherman Anti-Trust Act).

Another by-product of "regulatory driven packaging" is the loss of independence on the part of mortgage brokers, as well as third party service providers. Mortgage brokers, if the packaging world is the only viable alternative as opposed to risking potential lawsuits over the Proposed Rule's characterization of yield spread premiums (if the Proposed Rule is finalized in its present incarnation), will become "agents" of one or two lenders. Mortgage brokers who today can offer consumers hundreds of mortgage products, will only have a dozen or so to offer consumers. Further, settlement service providers will be subject to pressure from lenders to provide information (such as appraisals or title reports) that meet the expectations of that lender. For these reasons, NAMB cannot support the concept of "regulatory driven packaging" (as opposed to packaging driven by the market).

B. NAMB Believes that Certain Misconceptions Exist Over the Role of a Mortgage Broker

As stated above, today, the nation enjoys an all-time record rate of homeownership. While many factors have contributed to this record of success, one of the principal factors has been the rise of wholesale lending through mortgage brokers. Mortgage brokers have brought consumers more choices in loan programs and products than they can obtain from a branch office of even the largest national retail lender. Brokers also offer consumers superior expertise and assistance in getting through the tedious and complicated loan process, often finding loans for borrower that may have been turned down by other lenders. Meanwhile, mortgage brokers offer lenders a far less expensive alternative for nationwide product distribution without huge investments in "brick and mortar."

However, mortgage brokers are not merely conduits for the wholesale mortgage market. Rather, mortgage brokers serve the role as advisor, credit counselor, underwriter, personal contact, and others to the consumer. Consumers who work with large lenders frequently never even see their loan officer. Mortgage brokers often work with a consumer for long periods of time (some even up to a year or more) to obtain their mortgage loan. Mortgage brokers work with consumers through changes in the property to be secured, different economic circumstances, such as loss of a job, income that is difficult to document (such as seasonal), and challenged credit. A mortgage broker does not simply press a few keys to provide the consumer with a mortgage loan. Nor are mortgage loans akin to products that can be lifted from the shelf and paid for at checkout. Mortgage brokers perform a vital and sometimes difficult role in assisting consumers obtain a mortgage loan.

For example, a real life example of certain difficulties in originating a mortgage loan is as follows. A mortgage broker took an application from a customer in November of 2001. The consumer wanted to refinance their mortgage loan in order to renovate their home. After the loan had been approved, the

consumer had second thoughts about refinancing as opposed to selling their home. After several months, the consumer decided to sell their house and purchase a new home. The mortgage broker worked with consumer for financing for the future home purchase but the home did not sell. The consumer then decided to continue with the refinancing but ultimately refinanced their home and purchased a second home simultaneously. The mortgage broker in question worked hand in hand with the consumer for ten months in order to help with their financing needs.

C. Today's Economy

The housing market remains one of the few working aspects of our economy. A recent article entitled "House Prices Redux," in www.economy.com, stated that "quickly rising house prices have been crucial to mitigating the impact of falling stock prices on consumers. Housing has once again overtaken stocks as the largest asset in the household balance sheet. Rising house prices and homeowners' equity have also facilitated the unprecedented mortgage refinancing boom, which, in turn, has supported household cashflow as mortgage debt payments have fallen for some refiers [sic] and it has allowed others to raise cash through cash-out refis [sic]."[37] Questions arise as to whether introducing new and complex price capping features and disclosure methods will adversely impact the market slowing down access to credit as well as driving up costs for consumers to compensate for the increased costs in instituting new procedures, software and training for loan officers. Could HUD perhaps be opening a Pandora's box? Based upon HUD's Economic Analysis, it is uncertain at best.

D. HUD's Economic Impact Analysis is Flawed, Inconsistent and Incomplete

HUD's Economic Analysis provides detail on HUD's expectations as to the savings the Proposed Rule, if finalized, will Economic Analysis and Initial Regulatory Flexibility Analysis, NAMB finds that the analysis is flawed and inconsistent in many instances. While we believe that HUD had the best intentions in having this analysis performed, NAMB believes that further analysis is necessary to ensure that the numbers professed in the Analysis bear out the impact any portion of the Proposed Rule will have in the marketplace.

In accordance with the requirements of the Proposed Rule, NAMB submitted a comment letter on the impact the Proposed Rule has on the Paperwork Reduction Act of 1995.[38] In this comment letter, NAMB cited to several inconsistencies between the information in the Economic Analysis and HUD's Paperwork Reduction Act Submissions to the Office of Management and Budget (OMB). We repeat several of those in this comment letter to impress that the presence of these inconsistencies. Also, greater analysis is called for based upon the proposed dramatic impact the Proposed Rule, if finalized, will have on the mortgage industry for both industry and consumers. Finally, the disproportionate impact on small business necessitates further analysis under the Regulatory Flexibility Act.[39]

The Proposed Rule requires additional disclosures for mortgages originated by mortgage brokers. The increased regulatory burden will lead to an increase in the cost of doing business and will initially result in an increased cost to the consumer. Over time, mortgage transactions will shift away from brokers to other channels in order to avoid the increased regulations.

---

[37] Zandi, Mark, "House Prices Redux," www.economy.com (October 20, 2002).
[38] 44 U.S.C. Chapter 35 *et seq.*
[39] 5 U.S.C. § 601 *et seq.*

Further, the increased disclosure creates a regulatory (i.e., artificial) competitive disadvantage for mortgage brokers in the marketplace. This disadvantage manifests itself in many ways, from day-to-day operations to how brokers advertise. Indeed, in certain instances, HUD's mandate will not allow a mortgage broker to advertise a "no point" loan, while its competitors may continue to do so.

The Proposed Rule also sets up a new process for originating mortgages called the Guaranteed Mortgage Package Agreement. Created by regulatory fiat, this regime requires an originator to offer a guaranteed mortgage package (mortgage, third party settlement services and closing costs) for a set price. The small business owner is going to be disadvantaged in the marketplace because he or she does not have the bargaining power to enter into volume-based contracts with vendors. The end result will be additional consolidation in the mortgage industry at the expense of small business. This burden will fall disproportionately on small business and is even articulated by HUD – "$3.5 billion of the $6.3 billion in transfers to borrowers comes from small originators ($2.2 billion) such as small brokers and small settlement service providers ($1.3 billion)."[40]

NAMB believes HUD has significantly underestimated the regulatory burden of its Proposed Rule. Indeed, HUD's Paperwork Reduction Act Submissions to OMB states that annual responses for Good Faith Estimates (GFEs) is 11 million.[41] However, HUD's Economic Analysis and Initial Regulatory Flexibility Analysis, states that if the rule applied in the year 2002, it would impact 19.7 million applications.[42] This is significant because the submission to OMB underestimates the paperwork burden by at least 8.7 million GFEs and an additional $57 million.

In addition, HUD's Economic Analysis states that "originators and closing agents will have to expend some minimal effort in explaining to consumers the cross walk between the new streamlined GFE and the more detailed HUD-1."[43] However, this cost is not included in the OMB submission and the cost is not "minimal." NAMB believes a detailed and accurate estimate should be provided.

HUD states that the program change being mandated at HUD would increase burden to industry by 2,530,000 burden hours.[44] This is equal to 289 years. NAMB believes such a huge burden, by definition, will increase the cost of credit to consumers. NAMB also believes this anticipated burden triggers the Unfunded Mandates Reform Act and conflicts with President Bush's recent Executive Order to relieve the regulatory burden on and protect small business. [45]

The Economic Analysis states that $3.5 billion of the $6.3 billion (55%) in transfers to consumers will come from small businesses.[46] NAMB finds this very troubling in the sense that small business – particularly in the housing industry today – is one of the few pillars in this economy that has not fallen. NAMB is concerned that by arbitrarily reducing small business revenues, many will not be able to survive and will therefore reduce consumer choice and access to credit. HUD should ensure that the final

---

[40] "Economic Analysis and Initial Regulatory Flexibility Analysis for RESPA Proposed Rule to Simplify and Improve the Process of Obtaining Mortgages to Reduce Settlement Costs to Consumers," U.S. Department of Housing and Urban Development, Office of Policy Development and Research, July 2002, p. vii.
[41] See Exhibit 1, "Supporting Statement for Paperwork Reduction Act Submissions," U.S. Department of Housing and Urban Development, August 2001, p. 5.
[42] "Economic Analysis," p. 9.
[43] *Id.* at p. 25.
[44] "Supporting Statement," p. 7.
[45] Executive Order 13272, August 13, 2002.
[46] "Economic Analysis," p. 26.

regulation will not disproportionately jeopardize the small businessman currently trying to put people in homes.

The Economic Analysis states that the change in characterization of yield spread premiums as stated in the Proposed Rule "will reduce the incomes of those brokers who have been overcharging consumers by receiving a combination of origination fees and yield spread premium payments that is greater than that suggested by competitive markets."[47] What HUD failed to mention in their Analysis is that this will not be the case in connection with FHA and VA-insured loans. As stated later in this letter, under Question 7, those originating FHA[48] and VA-insured mortgage loans are limited to 1% total compensation (or in the case of VA-insured loans, closing costs[49]). In characterizing yield spread premiums as a "lender payment to the borrower," a mortgage broker would not be able to earn enough to cover the cost of originating the mortgage loan. Mortgage brokers will cease originating these loans. As they currently originate approximately 31% of the FHA-insured mortgage loans, additional mortgage brokers will lose additional income.[50]

This and other inconsistencies compel NAMB to ask that HUD undergo a more expansive and realistic review of the economic impact this rule will have on the industry, as well as small business, as mandated by the Regulatory Flexibility Act, the Paperwork Reduction Act, the Unfunded Mandates Reform Act, President Bush's recent Executive Order to relieve the regulatory burden on and protect small business.

NAMB has attached a list of discrepancies with HUD's Economic Analysis to this letter to highlight some of the flaws and inconsistencies. This list is included as Exhibit B to this letter. We ask that the attached document be included for the record.

E. Whether to Rely on the Section 8 Safe Harbor in the Proposed Rule

HUD relies on Section 19 and Section 8(c)(5) of RESPA for its authority in creating a safe harbor from Section 8 liability in exchange for the guarantee of virtually all settlement costs, together with a trackable interest rate, by the packager of these services. Section 19 provides that "the Secretary is authorized to prescribe such rules and regulations, to make such interpretations and to grant such reasonable exemptions for classes of transactions, as may be necessary to achieve the purposes of this Act."[51] Section 8(c)(5) provides that "Nothing in this section shall be construed as prohibiting: ... (5) such other payments or classes of payments or other transfers as are specified in the regulations prescribed by the Secretary, after consultation with the Attorney General, the Secretary of Veteran's Affairs, the Federal Home Loan Bank Board, the Federal Deposit Insurance Corporation, the Board of Governors of the Federal Reserve System, and the Secretary of Agriculture."[52] While this could provide the necessary authority for providing a safe harbor from Section 8 liability, NAMB expresses concern that HUD's reliance on these provisions will be challenged in the courts as to its validity.

---

[47] "Economic Analysis," p. 87.
[48] 24 C.F.R. § 203.27.
[49] 38 C.F.R. § 36.4312.
[50] Letter from Engram A. Lloyd, Director, Philadelphia Homeownership Center, Department of Housing and Urban Development, to Paul H. Scheiber, Blank Rome Comisky & McCauley LLP on 8/12/2002.
[51] 12 U.S.C. § 2617(a).
[52] 12 U.S.C. § 2607(c)(5).

Kickbacks and referral fees have been prohibited since the enactment of RESPA. Originally Section 7 of the RESPA, the legislative history states that "by dealing directly with such problems as kickbacks, unearned fees, ... the Committee believes that S. 3164 will ensure that the costs to the American home-buying public will not be unreasonably or unnecessarily inflated by abusive practices."[53] This express prohibition has remained in place since 1974. While HUD is provided certain authority to provide for exemptions, recent caselaw declares that deference is not always provided to an agency interpreting statutory provisions.

In *Pfennig V. Household Credit Service, Inc. and MBNA America Bank, N.A.*, the United States Court of Appeals for the Sixth Circuit found that although language in Regulation Z specifically excluded certain costs from the finance charge, the fees were within the statutory definition contained in the Truth in Lending Act and thus must be included in the calculation of the finance charge.[54] The court stated that the failure "to accurately represent the finance charge contravenes TILA's statutory goal of providing adequate disclosure in order that the consumer will knowledgeably be able to compare credit options and 'avoid the uninformed use of credit.'"[55] As such, here is an instance where an agency clearly has the authority to prescribe regulations implementing the statute[56] but the court found that it must still prescribe to the language of the statute. Further, could a court of law find that HUD's Proposed Regulation, if finalized, in contravention of the goal of RESPA, "the elimination of kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services?"[57] Similar to this case, and in light of these circumstances, as the language of RESPA does prohibit these practices, it would seem risky to rely on HUD's safe harbor only to be challenged in court.[58]

Further, it is unclear whether a mortgage broker who utilizes a third party's package would be exempt from any Section 8 liability under HUD's Proposed Rule. While it is clear that those within the package and the packager fall within the exemption, it is unclear whether a mortgage broker using a wholesale lender's package would be able to claim the safe harbor as well. Thus, it seems unlikely that a mortgage broker would rely on this exemption as he or she might rely on it to their detriment.[59]

---

[53] 12 U.S.C. § 2606 (1974).
[54] *Pfennig v. Household Credit Services, Inc. and MBNA America Bank, N.A.*, 2002 FED. App. 0123P (6th Cir.).
[55] *Id.*
[56] The Federal Reserve Board has the authority "to prescribe regulations to carry out the purposes" of TILA. 12 U.S.C. § 1604(a).
[57] 12 U.S.C. § 2601(b)(2).
[58] NAMB's fear of class action lawsuits, together with other lawsuits, is not misplaced. In the past ten years, class action lawsuits have been filed over courier fees, yield spread premiums, document preparation fees, and the "up charging" of third party fees. These lawsuits have cost the industry thousands of dollars, if not millions, in liability.
[59] NAMB understands that RESPA provides that "no provision of this Act or the laws of any State imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Secretary or the Attorney General, notwithstanding that after such act of omission has occurred, such rule, regulation, or interpretation is amended, rescinded, or determined by judicial or other authority to be invalid for any reason." 12 U.S.C.§ 2617(b). However, as was seen in *Pfennig v. Household*, this did not stop the litigation.

VI. Specific Requirements will Open Originators and other Participants to New Areas of Litigation and Potential Liability

A. The New Disclosure Forms Require the Disclosure of the Annual Percentage Rate

The calculation and disclosure of the annual percentage rate is required under the Truth in Lending Act, which is regulated by the Federal Reserve Board. Currently, mortgage brokers (non-tablefunding mortgage brokers[60]) are not required to calculate and disclose the annual percentage rate to consumers. The Truth in Lending Act requires that creditors provide a disclosure containing the annual percentage rate of the loan (as defined in the Act), as well as certain other prescribed information to consumers.[61] A "creditor" is defined as "a person (A) who regularly extends consumer credit that is subject to a finance charge or is payable by written agreement in more than four installments (not including a downpayment), and (B) **to whom the obligation is initially payable, either on the face of the note or contract** [emphasis added], or by agreement when there is no note or contract."[62] As traditional mortgage brokers are not considered "creditors" under the Truth in Lending Act, they are not required to calculate the annual percentage rate or disclose it to consumers. HUD's definition of a mortgage broker[63] is much more expansive than the Federal Reserve Board's definition under the Truth in Lending Act and certain tablefunding mortgage brokers may or may not be required to disclose the annual percentage rate to consumers. Thus, HUD would be subjecting mortgage brokers to a disclosure requirement that the law itself, and its implementing regulations, does not subject mortgage brokers to unless the mortgage broker is tablefunding the transaction.

The calculation of the annual percentage rate is one of the more difficult functions performed by an originator – not the calculation itself, rather there is difficulty in determining which fees must be included in the calculation. The Truth in Lending Act, and its implementing regulations, Regulation Z, even provide for tolerances to ensure that an originator has a harmless margin of error. One remembers a recent series of class action lawsuits brought for failure to include a courier fee in the calculation of the finance charge (upon which the annual percentage rate is based).[64] These class action lawsuits were so potentially industry threatening that Congress placed a moratorium on the lawsuits until the issue could be solved. HUD would be subjecting mortgage brokers to a new threat of litigation and a potential new area of liability. Further, it would be subjecting mortgage brokers to this threat when Congress and the Federal Reserve Board both deemed it appropriate not to subject mortgage brokers to this requirement.

---

[60] NAMB is using the term "non-tablefunding mortgage brokers" to mean mortgage brokers who originate mortgage loans in which the broker is not initially payable on the face of the note and are not using their own funds to fund the mortgage loan.

[61] 12 C.F.R. § 226.17(a)(1).

[62] 12 C.F.R. § 226.2(17).

[63] HUD defines a mortgage broker in the Proposed Rule as "a person (not an employee of a lender) who table funds or acts as an intermediary in a federally related mortgage loan. Mortgage brokers that are the real source of funds for a federally related mortgage loan are not regarded as brokers in such transactions." Proposed Rule, Fed. Reg. at 49,134.

[64] *Rodash v. AIB Mortgage Co.*, 16 F.3d 1142 (11th Cir. 1994).

B. The New Disclosure Forms Require a Transaction Specific Chart Detailing Different Methods of Payment

Currently, the HUD proposed rule requires originators to create a "sample" chart, on a loan-by-loan basis, that would provide the consumer with comparisons of the options available for payment of settlement costs to lower the consumer's interest rate. However, the volatility of the marketplace renders this requirement virtually untenable. An originator will have difficulty in complying with this requirement as the market changes too rapidly for a loan originator in the field to create in the manner contemplated in the proposed rule. Further, any error committed by an originator in completing this chart, especially for mortgage brokers in the field, will be an invitation to litigation for attorneys.

NAMB, however, sees the utility for consumers to have some information for comparison and for the purposes of "shopping." As such, we find a workable middle ground to be the inclusion of a generic "sample" chart.

C. Failure to Meet the Requirements, Even Due to Harmless Error, under the Enhanced Good Faith Estimate or the Guaranteed Mortgage Package Agreement

The Proposed Rule provides that under the enhanced good faith estimate scheme, "if the cost at settlement exceeds the estimate reported on the good faith estimate, absent unforeseeable and extraordinary circumstances, the borrower may withdraw the application and receive a full refund of all loan-related fees and charges."[65] Further, the proposed rule provides that under the guaranteed mortgage package agreement, in order to qualify for the limited Section 8 exemption, an entity must comply with all requirements for the provision of the Guaranteed Mortgage Package Agreement.[66] Both of these requirements leave no room for a right to cure in the case of harmless error on the part of the originator. This seems to be an open invitation to litigate on the part of consumers.

VII. Specific HUD Questions on the New Good Faith Estimate (GFE) Requirements

1. As proposed in Section III.A.(1), the proposed GFE form would briefly explain the originator's functions and that the borrower, not the originator, is responsible for shopping for his or her best loan. Does this language adequately convey this message? If the commenter thinks otherwise, it should provide alternative language for the form that better explains the loan originator's function to the borrower. Should the form also address agency requirements under state laws and how?

In several states, such as California[67] and New York, a mortgage broker has a statutory fiduciary duty to its customers. Also, in certain states, such as Minnesota,[68] an originator may choose to act as the agent of the consumer. Thus, in these instances, this language is not appropriate. NAMB suggests that the language state:

---

[65] Proposed Rule, Fed. Reg. at 49,159.
[66] Proposed Rule, Fed. Reg. at 49,160.
[67] Cal. Bus. & Prof. Code § 10229(q); Cal. Fin. Code § 4979.5a; Cal. Fin. Code § 50701(c).
[68] Minn. Stat. § 58.15.2.

We agree to perform or provide services, goods or facilities to assist you in the origination of a mortgage loan. The services, goods or facilities may be performed or provided for your direct benefit, or some of them may benefit you only indirectly, in that they are performed on behalf of third parties (e.g., wholesale lenders or secondary market investors) but are necessary to the objective of obtaining the mortgage loan you desire. While we seek to assist you in meeting your financial needs, we cannot guarantee the lowest price or best terms available in the market. We, as with all originators, may not offer all the products that are available in the marketplace.

2. **In Section III.B.(2) c., the proposed rule requires that the amounts estimated on the GFE for mortgage broker and lender origination charges may not vary at settlement absent unforeseeable circumstances. Should the rule provide for this "unforeseeable circumstances" exception? Are the particular circumstances specified in HUD's formulation in this proposal sufficiently encompassing? What evidence should a broker or lender be required to retain to prove the existence of such circumstances and justify any increase in charges at settlement?**

and

3. **In Section III.B.(2).c., the proposed rule establishes a 10% limit, or "tolerance," for categories of settlement services and costs including third party services that the borrower shops for and escrow/reserves by which such costs cannot exceed the GFE estimates by 10% at settlement absent unforeseeable and extraordinary circumstances. It also establishes zero tolerances for origination charges and lender required lender selected third party costs and government charges that cannot vary from estimate through settlement absent unforeseen circumstances. Are those appropriate tolerances and tolerance levels or should other tolerances/tolerance levels be established for these categories? Also, should a tolerance be established for borrower's title insurance? What alternative or additional means might be employed to ensure that loan originators take the care necessary to complete the GFE to ensure that it represents a Good Faith Estimate of final settlement costs?**

Congress required, in its passage of amendments to RESPA in 1975, that "each lender shall include with the booklet a good faith estimate of the amount or range of charges for specific settlement services the borrower is likely to incur in connection with the settlement as prescribed by the Secretary."[69] HUD bases its authority for creating the fee guarantees and tolerances (in connection with the good faith estimate) upon this solitary statement. Again, NAMB believes that HUD should seek legislative authority in any strengthening of the good faith estimate of settlement costs.

However, that said, NAMB could not support the guarantee or tolerance provisions for third party fees contained in the proposed rule. Third party fees are beyond the control of the originator and thus should not be required to be guaranteed or subject to a very low tolerance within three (3) business days of application. Loan originators have little control over third party service providers. For example, a title insurer may cease honoring pending contracts for title examination services. A loan originator who contracted with the insurer to provide title services to a consumer would now have to act quickly to replace the insurer with another provider. This provider might not be open to meeting the contracted-for price. An originator would then be forced to lose this money. While it is neither the fault of the

[69] 12 U.S.C. § 2604(c).

originator or the consumer, the originator should not be held accountable for this increase in a third party fee expense. Consider when a wholesale lender requires additional comparisons on an appraisal – should the mortgage broker be held responsible? Unfortunately, the exemption provided for in the proposed rule does not allow for these circumstances and any number of other circumstances. This could seriously harm a small business – of which most mortgage brokers are – and threaten their very existence.

Finally, any third party charge that is not selected by the originator should not be subject to a tolerance within three (3) business days of application. For example, many states require an originator to allow a consumer to choose certain third party settlement service providers.[70] This is consumer's responsibility to choose and an originator should not be responsible for estimating these fees.

In reference to the exception provided for in the Proposed Rule, "unforeseeable and extraordinary circumstances," this is an extremely high standard that does not take into account certain valid reasons for increasing or decreasing the amount of compensation received by an originator or third party settlement costs. We propose that HUD include several other exceptions to this standard, such as instances where the borrower is not eligible for a loan program based upon underwriting guidelines, the borrower asks that the loan program or loan amount be changed, a consumer is not eligible for the loan program applied for, the property offered to secure the loan changes or does not qualify, or a different pricing option is chosen.

Another exception that should be included is any instances of borrower fraud. HUD appears to gloss over the issue of borrower fraud and its impact on the industry. A recent informal survey performed by Advantage Credit "found that 23% of mortgage brokers said they received an application that contained intentionally fraudulent statements from a borrower."[71] Originators faced with fraudulent applications from borrowers might be unconscionably held to certain terms and fees disclosed in the good faith estimate.

It is a great responsibility buying a home. It is the largest financial transaction in which the majority of Americans will ever engage. However, the laws should not extend so far in one direction so as not to infuse responsibility on the consumer for the transaction. Every mortgagor should be beholden to educate themselves so as not to become a "victim." In guaranteeing virtually all mortgage fees, the only risk being borne is borne by the originator.

NAMB would support the guarantee of all originator costs to a consumer with certain exceptions that are predicated on the eligibility and consumer choice (as stated above). As an alternative to creating a tolerance for third party fees, NAMB can support a redisclosure requirement. This redisclosure requirement could be required for a period of time prior to settlement, which will allow the consumer time to find another originator should they choose not to accept the disclosure of fees. This should eliminate surprise at settlement while allowing the originator adequate time to underwrite the proposed loan to ensure that the fees disclosed are adequate representations of the amounts to be charged to the consumer.

---

[70] As stated above, as an example, in Maryland, under certain conditions, a consumer may choose their own title insurance provider. Md. Code Ann., Com. Law II §§ 12-1028(c)(1) and 12-119(b).

[71] National Mortgage News, September 1, 2002.

4. **In Section III.B.(2) d., the proposed rule would amend Regulation X to make clear that loan originators may enter into volume arrangements where such discounted prices are charged to their customers. Commenters are invited to provide their views on the ramifications, if any, of this clarification.**

Volume discounts for settlement services that are passed through to the consumer are not currently a violation of Section 8. Thus, an originator can negotiate volume discounts with settlement service providers if the savings are provided to the consumer in the form of lower costs. However, there seems to be little incentive for doing so. Section 8 litigation has become a cottage industry for certain class action attorneys and as such poses a significant economic risk to loan originators. Further, with two courts holding that a settlement service provider may mark up third party settlement service charges without violating Section 8(b) of RESPA, there seems to be a patchwork of regulation in this area.[72]

Finally, it seems that HUD would find it difficult to enforce instances in which the savings were not passed to the consumer. As HUD does not routinely perform audits or examinations of mortgage originators in this country (with the exception of FHA mortgagees), a complaint must be lodged first to trigger an investigation. This would render enforcement of these arrangements very difficult. Thus, it seems unlikely that a mortgage originator will determine that the risk is balanced by the advantages gained by entering into volume-discounts.

5. **In Section III.B.(2) c., the proposed rule requires that the tolerances will apply to the GFE from the time the form is given by the loan originator through settlement. Also, in case it takes a substantial time for the borrower to decide to use the loan originator from the date the form is given, the rule and the form provide that the GFE need only be open for borrower acceptance for a minimum of 30 days from when the document is delivered or mailed to the borrower. After that time, the GFE could be ratified or superseded by the originator at the borrower's request. Is this expiration date appropriate to protect against unnecessary costs flowing from an indeterminate liability or for other reasons? Is 30 days too long or too short? Another possibility that commenters may consider is whether the numbers on the GFE should apply only from the time the borrower enters into an agreement with the loan originator. HUD also invites commenters' views on whether HUD now should require a borrower's signature on the GFE to memorialize acceptance and begin the period during which the estimates are binding.**

NAMB can support providing the consumer with a guarantee of originator fees for seven (7) days, during which time the consumer may shop among originators. At the end of the seven days, or at any time during this seven-day (7) period, a consumer may choose to accept the loan and move forward through the origination process. However, NAMB does not support a seven-day (7) availability for third party fees and additional fees as we detailed above. These fees are frequently beyond the control of the originator and thus cannot be guaranteed. The disclosure of these fees is discussed above.

Please note that NAMB believes that the volatility of the marketplace prevents comparing a good faith estimate to one prepared thirty (30) days later. It would be similar to comparing apples and oranges. This would not be amenable to a consumer shopping. Further, while HUD believes this will increase

---

[72] *Boulware v. Crossland Mortgage*, No. 01-2318 (4th Cir.), (May 22, 2002) and *Echevaria v. Chicago Title & Trust Company*, No. 00-4087 (11th Cir.), (July 5, 2001).

competition and drive settlement prices to decrease, some originators will be less likely to negotiate discounts with third party service providers for fear of Section 8 litigation, whether warranted or not. Finally, this also provides some level of protection for the originator from borrowers fraudulently preparing false good faith estimates.

Finally, the thirty (30) day period might conflict with ECOA and Regulation B. Regulation B requires that a creditor[73] notify an applicant of action taken within thirty (30) days after receiving a completed application concerning the creditor's approval of, counteroffer to, or adverse action on the application (among others).[74] Depending on how much information a creditor has at the time it provides the consumer with the disclosure, these two time periods might directly conflict with each other.

6. **In Section III.B.(1) b.; the proposed rule simplifies the GFE by placing all loan origination costs in a small number of primary categories. This is intended to facilitate borrower understanding and shopping of major loan costs and minimize the proliferation of "junk fees" and duplicative charges. How could the GFE be made even simpler to facilitate borrower shopping? If the commenter believes greater itemization is desirable, what should be itemized and why?**

NAMB does not believe that the enhanced good faith estimate form provided for in the proposed rule will facilitate borrower understanding and shopping of major loan costs and minimize the proliferation of "junk fees" and duplicative charges. Rather, this form is confusing and busy and will only prove a disservice to the consumer. NAMB has created an alternative form for use in connection with the good faith estimate that is attached as Exhibit A to this comment letter. We believe that this form is more clear, provides the information in a simple fashion that a consumer needs in order to shop for a mortgage loan yet provides detailed information where necessary. Further, it provides a disclosure of yield spread premiums in a manner that is more in keeping with the "definition" provided for in HUD's Statements of Policy 1999-1 and 2001-1. NAMB has also incorporated several elements contained in the Proposed Rule into its proposed disclosure.

Finally, NAMB supports the continued itemization of fees for several reasons: (i) borrowers will continue to ask what comprises the origination costs as well as the settlement costs; (ii) this will provide consumers with more information in order to compare the good faith estimate to the HUD-1; (iii) provides for less conflicts with state law; and (iv) others.

---

[73] As defined under Regulation B.
[74] 12 C.F.R. § 202.9(a)(1)(i).

7. **In Section III.A.(3), the proposed rule requires that on the front of the proposed form mortgage brokers disclose the lender credit right below the total origination charges to: (a) Make the borrower aware of the effect that the credit has to reduce total origination costs; (b) avoid confusion among borrowers; and (c) avoid giving any competitive disadvantage to either a broker or a lender for the same loan. What, if any, other approach to address these concerns is better and why? Should the new GFE form disclose this credit at the bottom of the proposed form because the credit can be applied to all settlement costs?**

Characterizing yield spread premiums as a lender payment to the borrower creates *unintended consequences* and *provides less clarity* to consumers than as presently disclosed. In the Proposed Rule, HUD seeks meaningful disclosure of mortgage broker fees to borrowers. However, the proposed method of disclosure achieves just the opposite – it muddies the waters as to how indirect broker compensation works in reality. Under the proposed structure, indirect broker compensation is disclosed as a "lender payment to the borrower for higher interest rate."[75] Not only is this inflammatory, it seems to discount HUD's own Statement of Policy, in which it states that yield spread premiums can be payments for goods, services, and facilities provided to the lender by the mortgage broker. NAMB believes that HUD's characterization of yield spread premiums creates a multitude of problems, not the least of which is a new round of class action lawsuits.

As described above, HUD's characterization of yield spread premiums contradicts HUD's own statements in Statement of Policy 2001-1. This characterization does not provide a level playing field for all originators in that lenders who sell loans on the secondary market are not required to disclose the compensation received by them when they sell the loan. While we understand that HUD does not believe that it has the authority to require such disclosure by lenders, NAMB believes that as level a playing field as can be generated is necessary for all originators to remain competitive. As we stated above, we believe that HUD agrees with this statement; in the 2001 Policy Statement HUD states that "the department strongly believes that all lenders and brokers should provide the level of consumer disclosure that the purposes of RESPA intend and that fair business practices demand [emphasis added]."[76] As such, NAMB supports the inclusion of language notifying consumers that this type of compensation is paid to lenders, although we understand that HUD cannot require the amount of this compensation to be paid.

The proposed characterization, as stated in the above paragraph, places mortgage brokers on an unlevel playing field with other originators. First, many mortgage brokers will no longer be able to originate FHA and VA-insured mortgage loans. [77] Direct originator compensation on these loans is limited to 1% of the loan amount in connection with FHA-insured mortgage loans, while direct originator compensation on VA-insured mortgage loans is limited to 1% of the total loan amount or closing costs. These loans are difficult to originate due to the many additional documentation requirements (on average an additional six to ten pages of additional documentation is required), as well as the fact that many FHA-mortgagors are

---

[75] Proposed Rule, Fed. Reg. at 49,164.

[76] Statement of Policy 2001-1, Fed. Reg. at 53,057.

[77] This is significant as approximately 31% of all FHA loans are originated by mortgage brokers. Letter from Lloyd to Scheiber 8/12/2002. A recent trade press article stated that "Federal Housing Administration one- to four-family loan originations jumped 25.7% to a record $148.0 billion in fiscal year 2002, which ended Sept. 30. FHA loan endorsements totaled 1.29 million -- the third-best year ever." National Mortgage News, October 17, 2002. Further, this article stated that "in fiscal 2001, the FHA endorsed 1.01 million loans totaling $117.7 billion, according to the Department of Housing and Urban Development." *Id.*

credit impaired, first time homebuyers, or non-traditional consumers and thus need more time spent with them in answering questions and concerns.

Many mortgage brokers, in order to be compensated for the time and work involved in the origination of these loans, rely on yield spread premiums to cover these costs. In characterizing yield spread premiums as lender payments to the borrower, indirect compensation is transformed into direct compensation and thus subject to the cap. Many mortgage brokers will cease to originate FHA and VA-insured loans. This will impact many first time homebuyers who rely on FHA and VA-insured mortgage loans for their low downpayment requirements and force these consumers into subprime loans. This is significant as approximately 31% of all FHA-insured mortgage loans are originated by mortgage brokers.[78] Further, a recent trade press article stated that "Federal Housing Administration one- to four-family loan originations jumped 25.7% to a record $148.0 billion in fiscal year 2002, which ended Sept. 30. FHA loan endorsements totaled 1.29 million -- the third-best year ever."[79] Further, this article stated that, according to the Department of Housing and Urban Development, "in fiscal 2001, the FHA endorsed 1.01 million loans totaling $117.7 billion."[80]

Further, if the proposed characterization of yield spread premiums is implemented, mortgage brokers will not be able to advertise certain mortgage loans and remain competitive. For example, a mortgage broker who makes a "no point" mortgage loan at 7% interest rate on a $100,000 loan, but collects a $1,000 yield spread premium, must advertise that this is a one-point mortgage loan. A mortgage lender, who originates a $100,000 mortgage loan at a 7% interest rate, but collects $1,000 in compensation when the loan is sold, can advertise a "no-point" loan. These are the same loans and same costs to the consumer but the mortgage broker appears more expensive as he or she must advertise that this is a one-point mortgage loan. Thus, mortgage brokers will appear less competitive.

Characterizing a yield spread premium as a direct payment to the borrower will also impact certain predatory lending laws. Many state laws incorporate the Federal Reserve Board's definition of "points and fees."[81] Under the federal Home Ownership and Equity Protection Act (HOEPA), and implementing regulations, Regulation Z Section 32, the definition of "points and fees" includes "all compensation paid to mortgage brokers."[82] The commentary to the Truth in Lending Act specifically excludes "mortgage broker fees that are not paid by the consumer."[83] Under the new characterization of yield spread premiums, this amount will be paid by the consumer to the mortgage broker. Not only might this capture more loans, such as certain conforming loans, under HOEPA, but yield spread premiums will in essence be double counted as they are already included in the interest rate. Many loans that have no need for the added protections afforded high cost loans, such as conforming loans, will fall under these laws. Consumers will lose valuable choice as certain loan products are not available under these laws, such as balloon payment loans or prepayment penalty products.

---

[78] Letter from Lloyd to Scheiber on 8/12/2002.
[79] National Mortgage News, October 17, 2002.
[80] *Id.*
[81] Three recent examples include the following: Florida Senate Bill 2262, Colorado House Bill 1259, and Maryland Senate Bill 649.
[82] 12 C.F.R. § 226.32(b)(1)(ii).
[83] Regulation Z Commentary § 226.32(b)(1)(ii).

Consumers will also be disadvantaged in other ways. NAMB is unsure if HUD's characterization will require the provision of a 1099 form to consumers will be necessary as the lender will be paying money to the consumer. This could potentially trigger additional tax consequences for consumers.

Mortgage brokers maintain contracts with wholesale lenders with whom they transact business. These contracts require that a mortgage broker refund the money received from a mortgage lender if the loan is refinanced within a certain time frame. This helps to ensure that an unscrupulous mortgage broker does not engage in loan flipping in order to earn more profit. These contractual obligations will be unenforceable as the mortgage broker receives all of its compensation from the consumer. The mortgage lender will be forced to seek compensation from the consumer, which appears senseless. Further, this will be one less check against an unscrupulous mortgage broker.

Finally, indirect compensation should not be characterized in the proposed rule as "a payment for a higher interest rate." This is inflammatory and does not fully explain the purpose of a yield spread premium. HUD discusses in two Statements of Policy that yield spread premiums are not per se illegal, if the total mortgage broker compensation is for goods or facilities provided or services performed and the total compensation to the mortgage broker is reasonably related to the total set of goods or facilities actually furnished or services performed.[84] Further, these goods, facilities or services could be provided by the mortgage broker to both the lender and the borrower.[85] This would negate the proposed characterization of yield spread premiums and where the information is disclosed on the form.

NAMB supports the disclosure of yield spread premiums on the good faith estimate more in keeping with the two Statements of Policy issued by HUD – a lender payment to the mortgage broker for goods, facilities and services. This disclosure will be more accurate based upon the two-part test contained in Statement of Policy 1999-1 and 2001-1. Further, as HUD confirms in the Proposed Rule, a yield spread premium can be payment to the mortgage broker for services provided to the borrower and the lender.[86]

Further, NAMB proposes that the disclosure of yield spread premiums be disclosed as "compensation for goods, facilities and services." This reflects that indirect compensation may be paid to the mortgage broker for goods, facilities, and services performed for both the borrower and the lender. In NAMB's proposed form, which is attached to this letter as Exhibit A, we suggest that the following language be utilized to describe the yield spread premium: "An originator may be compensated by an investor for goods, facilities or services provided to you or to the investor. This will result in a higher interest rate for this loan. If you would rather pay less cash up front, you may be able to pay some or all of the originator's compensation indirectly through a higher interest rate. If you would rather have a lower interest rate, you may pay higher up-front points and fees. This amount will not exceed the amount disclosed to the left of this description. If the originator is acting as a lender in this transaction, the originator may receive additional compensation when it sells the loan for the value of the servicing rights or the value of the interest rate or a combination of both. This amount is not required to be disclosed."

---

[84] Statement of Policy 2001-1, Fed. Reg. at 53,052.

[85] As stated earlier in this letter, HUD states in the background on the proposed rule that "as retailers, brokers also provide the borrower **and the lender** [emphasis added] with goods and facilities such as reports, equipment, and office space to carry out retail functions." Thus, characterizing yield spread premiums as lender payments to the borrower is inaccurate as the lender may compensate the mortgage broker for providing brick and mortar, and other goods and facilities. In utilizing mortgage brokers, wholesale lenders can provide mortgage loan products at conceivably lower rates and lower costs to consumers.

[86] See above.

8. **As proposed in Section III.A.(3), as another step to avoid borrower confusion and any competitive disadvantage among lenders and brokers, the proposed rule breaks out on Attachment A-1, rather than on the front of the proposed form, the "Loan Origination Charges" into "Lender Charge" and "Broker Charge." How, if at all, does this approach advantage or disadvantage either lenders or brokers or confuse borrowers in comparison shopping? Would the industry and borrowers be better served if there is a breakout of "Lenders Charges" and "Broker Charges" on the front of the form and why?**

NAMB supports the continued itemization of fees on the good faith estimate. This will assist in eliminating conflicts with certain state laws. For example, California requires that a mortgage broker provide consumers with a Mortgage Loan Disclosure Statement. This statement requires that certain fees be itemized.[87] Thus, a consumer will have continuity between certain state required forms and federal disclosures.

In not itemizing origination and settlement costs, the disclosure will also conflict with the federal Truth in Lending Act. Under this Act, a creditor is required to provide an itemization of the amount financed together with its annual percentage rate disclosure.[88] Thus, consumers will be provided a disclosure that itemizes certain costs of the mortgage loan regardless of whether HUD desires it so.

However, NAMB does not agree with breaking down the charges into "Lender Charges" and "Broker Charges." This could present an unlevel playing field for mortgage brokers. Rather, NAMB proposes that the fees be broken down into "Origination Costs," which represents all direct compensation paid to a mortgage broker and a mortgage lender, and "Settlement Costs," which are all third party fees required for settlement of the mortgage loan. These fees NAMB proposes be disclosed on the first page of its proposed form, as attached as Exhibit A. This is clearer to consumers than breaking down the fees into "Broker Charges" and "Lender Charges." Further, it places no originator at a disadvantage. Finally, this should prove to be more useful as a shopping tool for consumers.

9. **As proposed in Section III.B.(2) e, the new GFE will consolidate certain charges into lump sum categories (e.g. lender required third party services). To permit the borrower to compare the new GFE to the HUD-1, it will be necessary for HUD to establish additional instructions to guide the reader so that the new GFE could be compared to the HUD-1. Would it be better to change the HUD-1 so the fee categories correspond to the groupings on the GFE and the two documents can be more easily compared? If commenters support changes to the HUD-1 to make it more comparable to and compatible with the new GFE, how extensive should these changes be and in what areas? Should the HUD-1 continue to list all charges for services or should it also be shortened and simplified as well to cover only categories of service?**

HUD identified one of the guiding principles of RESPA reform as simplification of the loan origination process. The rule amends the good faith estimate significantly yet provides no corresponding amendments to the HUD-1 or HUD-1A Settlement Statements. In the proposed rule itself, HUD admits that "the proposed new GFE ... is not readily comparable to either the HUD-1 or HUD-1A form."[89]

---

[87] Cal. Bus. & Prof. Code § 10241.
[88] 12 C.F.R. § 226.18(b).
[89] Proposed Rule, Fed. Reg. at 49,151.

HUD did not amend the HUD-1 (with the exception of minor changes to the instructions) as it states that the HUD-1 "is well accepted as a listing of settlement service charges by industry and consumers alike."[90] However, this does not seem to benefit the consumer. Corresponding changes to the HUD-1 should be effected for any changes enacted to the good faith estimate. Otherwise, consumers will find it difficult to compare the two documents.

If any changes to the good faith estimate form currently utilized by industry are effected, corresponding changes should be made to the HUD-1 Settlement Statement. The HUD-1 should be amended to reflect the changes made in the good faith estimate, such as groupings of settlement and origination costs. Also, the HUD-1 should continue to include an itemization of the costs, as discussed in NAMB's response to Question 8.

10. Should a safe harbor from Section 8 scrutiny be established for transactions where the mortgage broker signs and contractually commits to its charges on the GFE? The purpose of proposing this safe harbor would be to encourage a firm contractual commitment to borrowers, before they pay a fee and commit to a particular mortgage broker, so that the borrower can shop among mortgage brokers. Considering the proposed changes to the GFE, the proposed packaging safe harbor and HUD's current guidance on mortgage broker fees, is this safe harbor necessary for industry or borrowers and why? In light of the proposed rule's other provisions is any other additional disclosure for mortgage brokers warranted, such as an additional statement of what the broker's fees are and how they functions?

NAMB supports the guarantee of "origination costs" (as defined in NAMB's proposal as all fees paid by the consumer to the lender or the mortgage broker) under the good faith estimate, with certain exceptions, as described above. However, NAMB supports the estimation of all other costs. As stated above, third party costs are beyond the control of an originator and should not be included in any guarantee. Thus, in the area of origination costs, where it appears, at least anecdotally, most of the abuses occur, a mortgage broker will be obligating itself to these costs, with certain exceptions.

It seems that the Statement of Policy 2001-1 has finally put to rest class action lawsuits in connection with yield spread premiums. HUD has stated, and many courts have agreed that yield spread premiums are not illegal per se and must be subjected to HUD's two part test iterated in Statement of Policy 1999-1 and clarified in Statement of Policy 2001-1.

In NAMB's proposal, we have included statements that discuss what a yield spread premium is and how they function. This language is as follows: "An originator may be compensated by an investor for goods, facilities or services provided to you or to the investor. This will result in a higher interest rate for this loan. If you would rather pay less cash up front, you may be able to pay some or all of the originator's compensation indirectly through a higher interest rate. If you would rather have a lower interest rate, you may pay higher up-front points and fees. This amount will not exceed the amount disclosed to the left of this description. If the originator is acting as a lender in this transaction, the originator may receive additional compensation when it sells the loan for the value of the servicing rights or the value of the interest rate or a combination of both. This amount is not required to be disclosed." NAMB believes that

[90] Proposed Rule, Fed. Reg. at 49,152.

this information, together with the discussion on "Interest Rate and Settlement Costs Options" and the generic chart provide the consumer with considerable information on indirect broker compensation.

VIII. Specific HUD Questions on the Guaranteed Mortgage Package Agreements (GMPA)

11. Is a safe harbor along the lines proposed in Section III. C. (1) of this rule necessary to allow lump sum packages of settlement services to become available to borrowers? Would the proposed clarification by HUD that discounts may be arranged, if passed on to borrowers and not marked up, suffice to make packages available to borrowers? Would a rule change to approve volume discounts and/or markups when a package is involved suffice? Would it suffice to trim the disclosure requirements for packaging and offer the option of providing a streamlined GFE to those who packaged?

NAMB does not believe that a safe harbor as described in the proposed rule is necessary for the packaging of settlement services for consumers. Certain lenders already package settlement services and provide these guaranteed costs to consumers.[91] The market will demand these guaranteed packages if it has an appetite for it. By providing a safe harbor from Section 8 liability, HUD will be encouraging packagers to increase the cost of the package, in order to cover any losses, with no repercussions for the packager. In other words, without Section 8 liability, a packager may arbitrarily increase its price with no remedies for the consumers. While this may appear to drive down costs initially, NAMB foresees it only leading to an increase in costs as the remaining larger entities can also draw on their new found monopoly in the market that packaging has created.

Further, NAMB believes that HUD's codification of its longstanding opinion that an originator may arrange volume discounts for settlement services if the discounts are passed on to consumers will provide originators with the sufficient security to offer these discounts to consumers. The market will demand these lower prices from originators but all will be able to compete.

NAMB is interested in any responses HUD has received from other agencies in connection with the proposed Section 8 exemption for packaging. RESPA requires that HUD must consult with the Attorney General, the Secretary of Veterans' Affairs, the Federal Home Loan Bank Board, the Federal Deposit Insurance Corporation, the Board of Governors of the Federal Reserve System, and the Secretary of Agriculture prior to exempting any "payments or classes of payments or other transfers."[92] There is no mention in the Proposed Rule of HUD's contact with these agencies or their comments regarding this exemption.

---

[91] Mortgage.com, the website for retail originations for ABN AMRO Mortgage Group, Inc., currently packages settlement costs for consumers. These guaranteed package prices, which are available on the website www.mortgage.com, are available together with an interest rate for consumers. Certain of settlement service fees are contained in the package price.

[92] 24 U.S.C. § 2607(c)(5).

12. **As proposed in Section III. C. (6) is the scope of the safe harbor appropriately bounded in applying to all packagers and participants in packages? The safe harbor also currently does not apply to referrals to the package. Should there also be a bar against part time employees of other providers working for the package to steer business? How should the safe harbor apply to affiliated business arrangements to protect borrowers from steering?**

Part time employees of other providers should be barred from steering consumers to a certain package created by their employer. For example, a loan originator who works part time for a third party settlement service provider should be barred from steering consumers toward their company's package. Certain individuals exert a special sort of influence and steering might occur due to this influence. If one of the goals of packaging is shopping, it seems contradictory to not prohibit steering. This applies to affiliated business arrangements as well.

There seems to be incentive for a non-packager, such as a mortgage broker or third party settlement service provider, to utilize a third party's package when no Section 8 exemption pertains to them. This statement does not in any way negate NAMB's belief that packaging will greatly disadvantage small business and leave them unable to compete.

13. **As proposed in Section III. C (5), to qualify for the safe harbor, the packager must include an interest rate guarantee with a means of assuring that when the rate floats, it reflects changes in the cost of funds not an increase in originator compensation. For this purpose, the rule suggests tying the rate to an observable index or other appropriate means. What other means could assure borrowers that the rate of a lender was not simply being increased to increase origination profits? For example, would a lender's commitment to constantly make rates public on a web site be a useful control? If an index is the best approach, how should it be set? If an index approach is approved, should each lender be allowed to pick its own observable index?**

In NAMB's meetings with industry representatives, consumer advocates, and GSE representatives on mortgage reform over the past several years, many hours have been spent in attempting to produce a single index that a consumer may use to track interest rates. Members of our Association distinctly remember being part of meetings where representatives of Fannie Mae, Freddie Mac, and Wall Street investment companies stated that there was no one index utilized to determine mortgage interest rates. It had been the verbal consensus of industry leaders that this was an impossible task. No one index tracks mortgage rates that apply in all instances.

While we understand consumer groups' interest in creating rate "guarantees" that only fluctuate based on the movement of the cost of funds, one must understand that mortgage loans are not products that can be purchased off a shelf similar to purchasing a television from a store. Interest rates are complex risk assessments based upon underwriting of the consumer's ability to repay as well as the collateral which secures the mortgage loan. Interest rates are not merely based on an index; other factors may apply, such as warehouse line capacity, number of originations in the pipeline, product availability and others. NAMB cannot support this proposition as it will be nearly impossible with which to comply.

14. **As discussed in the preamble to the rule in Section III. C (5), if an observable index or other appropriate means of protecting borrowers from increases in lender compensation when the borrower floats in a guaranteed packaging approach is not practical, should HUD provide a packaging safe harbor only for mortgage brokers? Such a mortgage broker safe harbor would require disclosing the lender credit to the borrower in broker guaranteed packages. The theory for the safe harbor would be that any amounts in indirect fees could be credited to borrowers taking away any incentive for an increase in rates to increase compensation. Should this be offered in any event?**

Again, HUD singles out mortgage brokers in requesting responses to this question. As discussed above, earlier in this letter, NAMB does not support the characterization of the yield spread premium as a "lender payment to the borrower." This characterization is fraught with problems as described above. Further, it is not in keeping with the Statements of Policy 1999-1 and 2001-1. Thus, if disclosure of a yield spread premium as a "lender payment to the borrower" were the prerequisite to a safe harbor, NAMB could not support the safe harbor as the consequences would be too great to its industry.

15. **As proposed in section III. C (6), under the rule, mortgages with total fees or a rate covered by the Home Ownership and Equity Protection Act (HOEPA) would be subject to the new GFE disclosure requirements; however, HOEPA loans would not qualify for the guaranteed package safe harbor. Is this exclusion appropriate considering, on the one hand, that packaging promises borrowers a simpler way to shop and make transactions more transparent? On the other hand, the safe harbor could be provided for a loan that has very high rate and/or fees and may be predatory. The proposal also says that during the rulemaking other limitations may be established to exclude high cost and/or loans with predatory features from the packaging provisions. HUD invites comments on whether HOEPA loans, any other loans, or features of loans should be included or excluded from the safe harbor and why.**

As a general statement, exceptions should not be made for loans subject to HOEPA. The Truth in Lending Act has provided higher levels of protections for loans that meet the thresholds contained in HOEPA. By creating exceptions for special loans, these loans will continue to carry a stigma as they do today. Consistency among loan types will only benefit both consumers and industry. Providing different disclosure schemes for loans that are subprime, HOEPA loans, first lien mortgage loans, subordinate lien mortgage loans just leads to confusion for both consumers and industry and creates compliance difficulties.

Further, a HOEPA loan is not necessarily a "predatory" loan. Unfortunately, the words "HOEPA loan," "subprime loan," and "predatory loan" are incorrectly thought to be interchangeable. It seems that everyone's definition of what constitutes a "predatory" loan or an abusive loan practice differs. Some contend that prepayment penalties are a predatory practice as they lock consumers into loans; others contend that they are necessary loan features in order to ensure that a lender does not lose money on a loan due to "flipping." Identifying and defining predatory loans or features has been discussed among industry and consumers for years with no clear conclusions. Including any, with special protections, in the Proposed Rule would be extremely difficult and controversial. More study and analysis is necessary before HUD should take this step.

16. **As proposed in Section III. C (3), the GMPA provides that the offer must be open to the borrower for at least 30 days from when the document is delivered or mailed to the borrower. Is this an appropriate minimum time period to ensure that the borrower has an adequate opportunity to shop?**

NAMB supports allowing a consumer a certain period of time in order to shop for a mortgage loan. However, keeping guarantees of fees available to consumers for thirty (30) days or more presents several problems. Certain discounts capitalized on by originators may not be available for that length of time. As such, an originator will be forced to charge the higher fee and consumers will be disadvantaged by not having access to these lower fees. Further, unfortunately, in today's corporate environment, a great deal can happen to a company within thirty (30) days. For example, a title company, that gives all outward appearances to be in good corporate health, offers savings to originators who pass this savings through to their consumers, suddenly declares that it cannot honor its commitments. Under the Proposed Rule, an event like this, with thirty (30) day guarantees or tight tolerances in place, could destroy a small business. As such, NAMB has not supported the guarantee of third party fees (for this and other reasons) as well as maintaining the guaranteed fees availability for thirty (30) days.

Further, HUD's belief that the offer, guarantees included, can remain open for thirty (30) days, also lends support to the fallacy that mortgage loans are products that can be pulled from the shelf similar to televisions in an appliance store. These are unique products; maintaining the availability of these guarantees for thirty (30) days, will wreak havoc with lender's risk management.

Decreasing the amount of time a disclosure of fees is available to consumers does not prevent consumers from shopping for and comparing mortgage loans. Rather, a shorter period of time places some responsibility on the consumer to conduct this process in a timely manner. NAMB suggests seven (7) days availability for shopping.

17. **As proposed in Section III. C (4), the rule currently provides that the Guaranteed Mortgage Package agreement must indicate that certain reports such as the appraisal, credit report, and pest inspection are available to the borrower upon the borrower's request. Also, packagers may decide to forego such reports or services (i.e. lender's title insurance) and must inform the borrower that such reports or services are not anticipated to be included in the package price. Are these adequate protections for the borrower? HUD is aware that other laws such as Regulation B (ECOA) provide certain rights to borrowers with respect to obtaining some of these reports. In order to qualify for the safe harbor HUD has created additional reporting requirements. Are these additional reporting requirements appropriate?**

Respectfully, NAMB does not believe that all reports should be available to the consumer for the following reasons: (i) it may be against the law; (ii) the Proposed Rule disclosure does not provide the circumstances in which these reports must be disclosed; (iii) the reports are not prepared for the consumer's protection but for the lender's protection; and (iv) are superfluous in consideration of other federal disclosure requirements. First, for example, an originator might be in violation of the federal Fair Credit Reporting Act and their individual contracts with the credit resellers by providing copies of credit reports to the consumer unless the originator has taken an adverse action on the loan based on the credit report information.[93]

[93] 15 U.S.C. § 1681e(c).

Second, the language in the Proposed Rule does not include any restrictions on when a report may be available to a consumer, based on federal or state law. For example, ECOA, which is implemented by the Federal Reserve Board, provides that a consumer may obtain a copy of their appraisal. An originator[94] may either routinely provide a copy of the appraisal or a notice informing the consumer that a copy of the appraisal is available upon request.[95] However, the consumer must notify the originator within 90 days after the originator notifies the consumer about the action taken on a credit application or the consumer withdraws its application.[96] Further, ECOA allows an originator to charge for the copying and mailing of a copy of the appraisal report.[97] An originator may also charge for the copy of the appraisal report if the consumer did not pay for the appraisal.[98] A disclosure, such as one contemplated in the Proposed Rule, will directly conflict with the provisions of ECOA and Regulation B, its implementing regulation. Consumers will be led to believe that they can obtain a copy of their appraisal at any time, regardless of whether the consumer paid for the appraisal. In addition, the sample disclosure provided under ECOA is quite clear and simple for the consumer. This Proposed Rule's disclosure of the availability of this report conflicts with the parameters available to consumer under ECOA and Regulation B.

Third, many of the reports, such as credit reports, pest inspections, appraisals and others, are not for the benefit of the consumer. Rather, these reports are for the benefit of the lender. The lender requests these reports to ascertain that the consumer is a sufficient credit risk or that the value of the house meets underwriting criteria and will adequately secure the loan obtained by the consumer. While we understand that these reports might provide the consumer with certain information, a better solution to this issue is to encourage all consumers to obtain an inspection on the property. At times, especially in today's market in certain places around the country, a consumer might forgo an inspection in connection with a purchase to create an incentive for a seller to accept their offer. In a refinancing transaction, a consumer might forgo an inspection because they feel that they "know their house."

Another example of this instance is where a lender obtains or does not obtain lender's title insurance on the secured property. New products become available every day for lenders to ensure that the consumer will hold good title to their property. Other lenders may find it a calculated risk to forgo lender's title insurance based upon the location of the property or for other reasons. Lender's title insurance is required only to protect the lender's risk that the consumer will not hold good title. A consumer is free to obtain owner's title insurance on any loan. NAMB does not find it appropriate to explicitly warn consumers that their loan does not have lender's title insurance as it does not protect the consumer.

Finally, as stated above, much of this information might be superfluous. For example, ECOA requires creditors to provide consumers with either a copy of their appraisal or a notice detailing how a consumer may obtain a copy of their appraisal. Thus, the information disclosed on the proposed disclosures under the Proposed Rule will be superfluous and redundant.

---

[94] Credit unions are not required to comply with this requirement. 12 C.F.R. § 202.5a(b).
[95] 12 C.F.R. § 202.5a(a)(i).
[96] 12 C.F.R. § 202.5a(a)(ii).
[97] Regulation B Commentary § 202.5a. This is permissible unless it conflicts with state or other law. *Id.*
[98] *Id.*

18. **Should additional consumer protections be established for packaging? For example, should additional qualifications be established for "packagers" to ensure that borrowers are protected against non-performance including the unavailability of a mortgage that could result in a borrower "losing" a house? For example, should there be a requirement that a packager must have sufficient financial resources to credibly back the guarantee? Is it necessary to require a lender signature on the GMPA to ensure that the borrower receives the loan at the time of settlement? How can the borrower's interests be protected without unduly burdening the process or unduly limiting the universe of packagers?**

NAMB does not believe that packaging will benefit consumers or industry. As stated above, NAMB does not support packaging, as proposed by HUD, as it will disadvantage small business. Further, NAMB believes that this will not benefit consumers as it eliminates any Section 8 restrictions, such as the prohibition against upcharging of settlement costs. If small business is driven from the market due to packaging, larger entities will have no restrictions from engaging in these practices as they will have market share.

Further, requiring an entity to have "sufficient" financial resources to credibly back an offer amounts to requirements not unlike those a state requires for licensure. As stated above, 47 jurisdictions maintain some form of licensing, registration or notification requirement. These states have determined what standards are necessary for activity in their jurisdiction. If HUD were to impose such a requirement, it would seem to be creating barriers to entry that seem better handled by the state.

Further, NAMB does not support any instance in which a lender signature is required for a mortgage loan transaction to proceed. This creates an unlevel playing field for mortgage brokers. NAMB is concerned that some do not understand the part a mortgage broker plays in a transaction. In a mortgage broker transaction, if a mortgage lender fails to originate the mortgage loan, the consumer does not seek out the mortgage lender. Rather, the consumer holds the mortgage broker responsible for this transaction. Often, the mortgage lender, in a mortgage broker transaction, has no contact with the consumer. To a consumer, the mortgage broker is the originator. Thus, requiring a lender signature on the transaction places a consumer on an unlevel playing field with mortgage lenders and does not take into account a mortgage broker's role in the transaction.

NAMB believes that a consumer will be afforded additional protections under its proposed strengthening of the good faith estimate. The information provided to consumers will be firmer, and simpler to use for shopping purposes. It does not place extraordinarily undue burden on originators, placing them at risk to lose money with strict guarantees. NAMB believes its proposal will reduce the lure of engaging in bait and switch practices on the part of unscrupulous originators. Further, it attempts to level the playing field among originators, placing no one segment of the mortgage industry at a disadvantage. NAMB does not believe that packaging will accomplish these goals.

19. **Consistent with the HUD-Fed Report, the rule proposes that certain charges, such as hazard insurance and reserves, are outside the package as other or optional costs. Is this the right approach or should these charges be disclosed as the minimum amounts required by the lender and required to be inside the package? Would the latter better serve the objective of establishing a single figure for the borrower to shop with?**

As stated earlier, inclusion of third party settlement costs, over which the originator has little or no control, puts the originator at an economic disadvantage. If originators are to guarantee these costs, they run the risk of not covering the costs of originating a mortgage loan should an unforeseen event occur. Indeed, the fees in question, hazard insurance, reserves, taxes, mortgage insurance and per diem, should be carved out of the settlement costs and not subject to any kind of tolerance or guarantee. These fees are so dependent on different variables, such as when the loan closes, personal choice of the originator, that they cannot be held to any special tolerance.

For example, hazard insurance is typically a product that the consumer obtains of their own accord. Many states require that a consumer have the ability to choose their own insurers. Further, this amount, as cited in the HUD/Federal Reserve Board Joint Report, "depends upon consumers' choices unrelated to the credit transaction (such as the purchase of additional personal property or liability coverage)."[99] Thus, this amount should not be guaranteed or even placed within a tolerance.

NAMB's proposal provides two figures a consumer utilizes in shopping: (i) origination costs; and (ii) settlement costs. However, it carves these costs out for the above reasons. The form proposed by NAMB does estimate these costs and provides disclosure of them on the second page of the form.

20. **The rule proposed in Section III.C (3), that under Guaranteed Mortgage Packaging, the HUD-1 will list the settlement services in the package but not the specific charges for each service. Certain third party charges are excluded from the calculation of the finance charge and the APR under TILA and HOEPA. Commenters are invited to express their views on whether the approach in the rule satisfies or whether alternative approaches to cost disclosures should be established to ensure consumer's rights under TILA and HOEPA are protected while facilitating packaging. More broadly, commenters are invited to provide their views on means of better coordinating RESPA and TILA disclosures.**

NAMB does not support non-itemization of the costs included in the package. HUD inquires specifically whether the "listing" of fees satisfies the requirements under the Truth in Lending Act. The Proposed Rule provides that an originator can provide a consumer with a GMPA in lieu of a good faith estimate. Under the Truth in Lending Act, a creditor may provide a consumer with good faith estimate in lieu of an Itemization of Amount Financed.[100] The GMPA does not provide for an itemization of the costs associated with the mortgage loan, and under the Proposed Rule, the HUD-1 will mark the third party settlement services performed for the loan (but not the amounts) and will disclose on an Addendum the finance charges necessary to calculate the annual percentage rate.[101] It is unclear from the Proposed Rule whether the Addendum will include the actual amounts of the costs or just the names of the fees included

---

[99] "Joint Report to the Congress Concerning Reform to the Truth and Lending Act [sic] and the Real Estate Settlement Procedures Act," July 1998 at 24.
[100] 12 C.F.R. § 226.18(c), footnote 40.
[101] Proposed Rule, Fed. Reg. at 49,161.

in the finance charge. However, our reading of the Proposed Rule and the above question leads us to believe that the fees will be listed but not the amounts of the fees.

Based on this assumption, the consumer will be left with no avenue in which to determine that the annual percentage rate is accurate nor will the consumer be able to compare the costs included in the calculation of the annual percentage rate when shopping for a mortgage loan. Further, if an originator provides the Itemization of Amount Financed to consumers in addition to the GMPA, this might be confusing to consumers because not all fees associated with the mortgage loan are required to be included in the finance charge.[102] Will this diminish the value of the Truth in Lending annual percentage rate disclosure? Will this be a detriment of the consumer? We believe it will. We are concerned that HUD is unilaterally impacting a statute and implementing regulation over which it has no authority.

Under HOEPA, the definition of "points and fees" includes and excludes certain defined fees. As fees are only required to be listed on the GMPA and not enumerated, it provides no method to verify whether the loan meets the points and fees trigger under HOEPA based upon the fees charged. In other words, an unscrupulous lender may "alter" its list of fees charged to include fees that are excluded from the definition of "points and fees" to prevent the loan from falling under HOEPA.

Under NAMB's proposal, we continue to advance itemization of the costs involved in settlement of a mortgage loan. Not only does it provide information that mortgage brokers know from experience consumers will ask for, but it will maintain the value of the Truth in Lending annual percentage rate disclosure for consumers, as well as not create confusion for consumers. Further, unscrupulous lenders will not be able to circumvent the provisions of HOEPA by adjusting those fees contained in the calculation of "points and fees."

21. **Commenters are asked to provide their views on how the rules should treat mortgage insurance? The rule proposes in Section III. C (3), that the guaranteed package would include any mortgage insurance premiums in the APR and up-front costs of mortgage insurance in the guaranteed package. "Other Required Costs" would include reserves for mortgage insurance premiums. However, because the packager will not have an appraisal at the time the GMPA is provided, the packager may not have firm information to provide a definite figure. Another possibility is to exclude mortgage insurance from the package but notify the borrower that mortgage insurance may be an "Other Required Costs" and present the borrower an estimate subject to a tolerance, if mortgage insurance is necessary. This approach would exclude a major charge from the package. HUD recognizes that there are state laws that prohibit rebates or any splitting of commissions for mortgage insurance. How, if at all, should this impact the decision to include mortgage insurance in packages of settlement services?**

The concept of packaging relies on the premise that an originator can guarantee most third party costs and still remain competitive. Placing the obvious impact on small business in connection with the ability to compete in a packaging world aside, larger lenders are more able to absorb the losses stemming from an underestimation of the amount of mortgage insurance than small originators, such as mortgage brokers. For small businesses, incrementally, these amounts can ultimately drive an originator from the business as it is no longer profitable for them to originate mortgage loans. As such, a small originator might lean toward overestimation of these costs based on the fact that they cannot absorb losses as easily as the

[102] 12 C.F.R. § 226.4.

larger entities. This again renders small originators, such as mortgage brokers, less competitive than larger originators in the packaging regime.

Further, as one can imagine, many consumers tend to overinflate or underinflate the value of their home when seeking financing. While much of this is done innocently, it does not provide the originator with an accurate picture of the value of the property on which the originator must either estimate (within a tolerance) or guarantee the cost of mortgage insurance. Again, this will greatly impact small originators, such as mortgage brokers, who cannot absorb losses for underestimation of costs.

Mortgage insurance, and other third party fees that are also beyond the control of the originator, must be excluded from any guarantees.

22. To what extent, if any, do inconsistencies currently exist, or would they exist upon promulgation of the proposed rule between State laws and RESPA? Specifically, what types of State laws result in such inconsistencies and merit preemption? What, if any, provisions of the proposal should be revised to facilitate any necessary preemption?

RESPA provides the Secretary with certain preemption powers in connection with any conflicts of state law. Section 18 of the Act specifically allows that the Act does not preempt state laws, "except to the extent that those laws are inconsistent with any provision of this Act, and then only to the extent of the inconsistency."[103] RESPA authorizes the Secretary "to determine whether such inconsistencies exist."[104] Further, "the Secretary may not determine that any State law is inconsistent with any provision of this Act if the Secretary determines that such law gives greater protection to the consumer."[105] However, it also requires the Secretary to "consult with the appropriate federal agencies."[106] NAMB believes that the only method for achieving HUD's goals in implementing this proposed rule, is for HUD to preempt all state laws insofar as they conflict with aspects of the Proposed Rule. While an exhaustive review of all state laws and regulations, including the District of Columbia, is a time consuming venture and for which there has not been adequate time during this comment period, we have highlighted several areas of conflicts. Specific state conflicts will be enumerated on Exhibit C to this letter.

Certain states require that, in connection with a mortgage loan, a consumer be allowed to choose its own title attorney or title insurance provider. As this fee is part of the package and thus guaranteed, it is uncertain how a packager can guarantee this costs when the consumer may choose its own title attorney or title insurance provider. This creates a conflict for packagers of settlement costs. Similar arguments apply to attorney's fees, as many states allow a consumer to choose its own attorney, as well as hazard insurance.

Certain states require the provision of the itemization of fees. In HUD's Proposed Rule, under the packaging scheme, these fees would be required to be listed but not itemized. For example, in California, a mortgage broker must provide the consumer with an itemization of certain settlement costs.[107] In New York, a mortgage broker must provide the consumer, pre-application, with a disclosure of certain fees, such as an application fee, appraisal fee, and credit report fee.[108] In Texas, a mortgage broker must

---

[103] 12 U.S.C. § 2616.
[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] Cal. Bus. & Prof. Code § 10241.
[108] N.Y. Comp. Code R. & Regs. tit. 3, § 38.3.

disclose application the application fee, processing fee, appraisal fee, credit report fee, automated underwriting fee and other fees that will be charged in connection with the loan.[109] This will conflict with the requirements for the packaging world in the Proposed Rule, as enumeration of the costs of these fees is not required.

Certain states will prevent a mortgage broker from providing a loan commitment. In New York, a mortgage broker is prohibited from making a loan commitment to a consumer.[110] Thus, mortgage brokers will be unable to compete in the packaging world in the State of New York.

A major conflict occurs in connection with licensing issues for settlement service providers who wish to provide packages. As the Proposed Rule requires that a package of settlement services must be delivered with a mortgage loan, some settlement service providers will need to obtain a mortgage broker license. Most states require that mortgage brokers obtain a license, register or provide notification for the arranging of a mortgage loan. Some entities will be faced with these additional licensing requirements.

There are some very real conflicts that occur between the Proposed Rule and state law. Without federal preemption of these state laws, the packaging process will not provide the benefit sought in many states. NAMB's proposal, on the other hand, can eliminate many of the conflicts described above. For example, costs will continued to be itemized in NAMB's proposal.

23. The rule proposes that the GFE and the GMPA be given subject to appraisal and underwriting. How should the final rule address the matter of loan rejection or threatened rejection as a means of allowing the originator to change the GFE or GMPA to simply earn a higher profit?

This is a difficult issue to address and requires that a balance be sought. NAMB agrees that certain unscrupulous members of the industry will utilize this caveat as a tool to increase profitability. But in keeping with the maxim "don't throw the baby out with the bathwater," taking away exceptions leads to one conclusion – an increase in the amount of costs to eliminate loss to industry. HUD must understand that any losses sustained by industry will ultimately be passed through to consumers in the form of higher costs for the origination of a mortgage loan. Further, there are legitimate reasons for maintaining an exception: many fees are dependent on loan to value ratios, loan amount and term of the mortgage loan. Further, we believe that HUD would find it difficult to enforce this practice under RESPA.

As such, NAMB's proposal seems to provide added protection for consumers while providing a manageable process for mortgage originators with a limitation on unnecessary losses – redisclosure with enough time for consumers to accept or reject the costs before settlement. The proposal includes tight tolerances for the final disclosure of costs in order to avoid any "bait and switch" prior to settlement on the part of the originator yet provides the originator with enough information on the property and the consumer's credit to make an educated disclosure of the costs for settlement.

Further, we encourage HUD to work with the Federal Reserve Board in seeking changes to the adverse action notices and counteroffer notices. Changes can be made to these forms which provide hard and documentable reasons for a consumer not qualifying for a certain loan program or an increase in loan amount.

---

[109] 7 Tex. Admin. Code Part 80 (sample disclosure form).
[110] N.Y. Comp. Code R. & Regs. tit. 3, § 38.3.

24. To what extent, if any should direct loan programs such as those provided by the Rural Housing Service of the Department of Agriculture be treated differently under the new regulatory requirements proposed by this rule?

NAMB firmly believes in leveling the playing field for all originators as well as for all consumers. Consistency in disclosures provides the consumer with a comfort level in understanding their transaction and its origination. Congress and other agencies are free to dictate other protections for consumers or requirements for originators who originate these loans, but there should be continuity among the disclosures that are provided to consumers regardless of the type of loan being originated.

25. As proposed, the GFE and GMPA currently contain sections for loan originators and packagers to indicate the specific loan terms for adjustable rate mortgages, prepayment penalties, and balloon payments. Are these appropriate loan terms to include on these forms, and what, if any, other mortgage terms or conditions should be listed on the forms?

NAMB supports the inclusion of these loan terms and has included them in our proposal for improving the good faith estimate. These loan terms are often disclosed in other disclosures, such as the Truth in Lending annual percentage rate disclosure[111] and certain state law disclosures. However, NAMB supports their redisclosure as potentially helpful to the consumer to avoid any abusive practices of "hiding" these loan terms. NAMB supports this notwithstanding any duplicative disclosure to consumer or additional regulatory burden it may place on originators. Further, we have included disclosing whether the loan is assumable in our proposal.

26. What are the arguments for or against limiting the proposed rule to purchase money, first and second lien, and refinancing loans as opposed to offering it to home equity, reverse mortgage and other transactions? Should there be any additional requirements for so called B, C, and D loans?

One of the greatest regulatory burdens to industry is maintaining different disclosure schemes and requirements for different mortgage loans. Of course, different disclosures are inherently necessary for different loan products, such as reverse mortgage loans and home equity lines of credit. NAMB supports the maintenance of status quo as opposed to expanding RESPA's early disclosure requirements beyond its current scope. Further, NAMB supports utilizing the same disclosure scheme regardless of the type of transaction.

For example, HUD has exempted home equity lines of credit from the good faith estimate disclosure requirement under Section 3500.7(f) (please note that is unclear whether the GMPA would also be considered exempt based upon this exemption). The Federal Reserve Board, under Section 226.5b(d)(7) of Regulation Z, requires creditors to provide "an itemization of any fees imposed by the creditor to open, use, or maintain the plan, stated as a dollar amount or percentage, and when such fees are payable." Thus, settlement costs are disclosed to consumers under a separate federal law.

---

[111] Regulation Z requires the disclosure, in its annual percentage rate disclosure, whether the loan has a prepayment penalty, whether the loan is assumable, whether the loan is an adjustable rate mortgage loan, and other information. 12 C.F.R. § 226.18. Further, Regulation Z requires that an adjustable rate loan program disclosure and a "Consumer Handbook on Adjustable Rate Mortgages" be provided to a consumer for every adjustable rate loan program in which the consumer expresses an interest. 12 C.F.R. § 226.19(2).

Creating different regulatory schemes for different loan types can create confusion for consumers as well as create room for error on the part of industry. The definition of a subprime loan differs based on underwriting criteria. Each lender may have a different definition of what constitutes a subprime loan. Further additional protections are available for certain subprime loans under HOEPA.

27. **As proposed, the Guaranteed Mortgage Package includes one fee for settlement services required to complete a mortgage loan. The fee for the package will include loan origination fees, typically referred to as "points." As points are generally deductible under IRS rules, comments are invited as to how to determine which portion of the package prices should be deemed to constitute points.**

A simple answer to this question is to require the disclosure of points to consumers. This is very valuable tax tool that is utilized by consumers. NAMB maintains the disclosure of points as a line item, which is clearly identifiable, on its proposal. Further, it should continue to be disclosed on the HUD-1.

28. **To what extent do the proposed changes to the definition of application in Section III. B (2) a., and requirements for delivery of the GFE impact other federal disclosure requirements, such as those mandated by the Truth in Lending Act? How can the disclosure objectives of the proposed rule be harmonized with such other disclosure requirements?**

NAMB supports the maintenance of status quo in connection with the definition of what constitutes an "application." While NAMB understands that HUD's Proposed Rule codifies informal advice set forth by HUD, NAMB believes that enforcement of this provision will be difficult. States who maintain loan logs will be rife with loans that are never originated and loan officers might encounter difficulty with ascertaining whether an "application" was truly created. Further, as there are different definitions of what constitutes an "application" among the different federal and state laws, it creates a compliance minefield for originators.

29. **The proposed rule in Section III. B (2) c., would require a loan originator capable of offering an alternative loan product to provide a prospective borrower, upon the borrower's request, with a new GFE if, after full underwriting, the borrower does not qualify for the loan identified on the original GFE. Is this approach appropriate? What other options should be considered where borrowers do not qualify for the loan product initially sought?**

This approach is in keeping with current requirements under ECOA and RESPA. Adverse action notices or counteroffer notices are required to be provided when a borrower does not qualify for a loan product or program but does qualify for another loan product or program.[112] These notices could be amended to provide descriptive and documentable reasons for the adverse action or counteroffer. We encourage HUD to work with the Federal Reserve Board to amend these notices to provide the maximum benefit to consumers. This will benefit industry as hard and fast rules could be maintained for the documenting of these actions and the reasons surrounding them.

---

[112] 12 C.F.R. § 202.9(a).

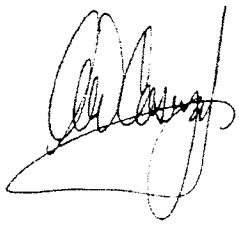
30. **The proposed rule in Section III. B (2) c., would require loan originators to provide qualified borrowers with an amended GFE, identifying any changes in costs associated with changes in the interest rate, where the borrower elects not to lock-in the interest rate quoted on the original GFE at the time it is provided. Is this an appropriate requirement? What alternatives, if any, should HUD consider?**

NAMB does not support redisclosure of changes in cost each time the interest rate changes if the consumer elects to float their interest rate. NAMB believes that the redisclosure requirements it proposes will be simpler to effect, as well as provide less paperwork for the consumer. Redisclosure is required when the loan program changes, the property changes or does not qualify, the consumer chooses a different pricing option, the consumer is not eligible for the loan, or the loan amount changes. Further, redisclosure is also required fifteen (15) days prior to settlement if the settlement costs have increased. As contemplated in this question, if this disclosure were provided for each instance of a fluctuation in the interest rate, an originator could never make more than one mortgage loan at a time for all of the disclosing required.

* * *

We thank HUD for the opportunity to comment on the Proposed Rule. If you have any questions about the forgoing discussion, please do not hesitate to contact NAMB's Legislative Committee Chair Neill Fendly at (480) 905-8882 or NAMB's Director of Legislative and Regulatory Affairs Stephanie Shaw at (703) 610-0205.

Sincerely,



Armand W. Cosenza, Jr., CRMS
President

UNIFORM MORTGAGE COSTS DISCLOSURE

Please take this disclosure with you to settlement to compare costs.

We agree to perform or provide services, goods or facilities to assist you in the origination of a mortgage loan. The services, goods or facilities may be performed or provided for your direct benefit, or some of them may benefit you only indirectly, in that they are performed on behalf of third parties (e.g., wholesale lenders or secondary market investors) but are necessary to the objective of obtaining the mortgage loan you desire. While we seek to assist you in meeting your financial needs, we cannot guarantee the lowest price or best terms available in the market. We, as with all originators, may not offer all the products that are available in the marketplace.

The information provided below reflects our disclosure of the charges you will incur at the settlement of your loan. The "Origination Costs" are fees charged by your originator or an investor for providing a mortgage loan. "Settlement Costs" are fees for third party services that are required for the mortgage loan to close. These "Total Costs" are itemized for you in the grid below.

The following disclosure is valid for _____ days (7 days or greater) from the date this form is delivered to and signed by the borrower. This disclosure is dependent upon the borrower qualifying for this mortgage based on their credit rating, appraisal, and other appropriate criteria.

Summary of Loan Terms:

Property Address: _____

This loan will be a _____ purchase _____refinance. This loan will be a _____ first mortgage _____second mortgage.

Loan Program: _____ Loan Term: _____ Mortgage Loan Amount: _____

(See appropriate disclosure form)

Interest Rate %

This is the interest rate for [today] for the loan you have selected. We will lock this rate for you for the following time period of _____ days. This interest rate lock will expire _____. I understand to obtain this interest rate loan, I may be required to pay a lock fee which is NOT INCLUDED in the costs disclosed on this form. If you choose not to lock your interest rate today, your interest rate may increase or decrease before settlement without notification.

_____I want to lock my interest rate. _____ _____
By signing above, you have agreed that this is the interest rate you will pay for this loan provided you qualify, regardless of market conditions. For this interest rate lock, you agree to pay $_____.

_____ I choose not to lock my interest rate. I understand that my interest rate may increase or decrease before settlement without prior notification. _____ _____

Initials

Origination Costs $

This is the total amount of costs being charged as origination costs. These costs are itemized below. These costs will not increase unless you are not eligible for this loan program, your property changes or does not qualify, you choose a different loan program, you choose a different pricing option, or your loan amount changes. This figure does not include any settlement costs that are paid to a third party.

Initials

Settlement Costs $

This is the total amount of costs you will incur for the settlement of this loan. These costs are itemized below. As these costs are beyond the control of the originator, they are not guaranteed. However, if these fees change from initial disclosure, the originator is required to redisclose to you at a minimum of fifteen (15) days prior to settlement. Upon final disclosure, this amount cannot increase beyond 10% of the amount of the total amount of fees at settlement. You may waive the 15-day redisclosure requirement under certain conditions.

This figure does not include the following four costs: any escrows set up for taxes, any escrows set up for homeowners insurance, any escrows set up for mortgage insurance, and any per diem interest. Please see page 2 of this disclosure for an estimation of your hazard insurance, mortgage insurance, taxes, escrow amounts, and per diem interest.

Initials

Monthly Payment $

This is your monthly payment based on the above loan amount and the above interest rate. This payment **DOES** include the following:

_____ Principal.
_____ Interest.
_____ Hazard insurance.
_____ Real estate taxes.
_____ Mortgage insurance.

Initials

After reading through the above information, please initial to the right of each box to show your acknowledgement and acceptance of the above data. Also, you need to indicate your preference by signing either the float or lock option in the "Interest Rate" section.

These estimates are provided pursuant to the Real Estate Settlement Procedures Act of 1974, as amended (RESPA). Additional information can be found in the HUD Special Information Booklet, which is to be provided to you by your mortgage broker or lender, if your application is to purchase residential real property and the lender will take a first lien on the property. The undersigned acknowledges receipt of the booklet "Settlement Costs", and if applicable the Consumer Handbook on ARM mortgages. The undersigned also acknowledges that I (we) have read both pages of this disclosure and that I (we) fully understand its terms. Further, by signing below, the undersigned authorize the originator to _____ order an appraisal, a credit report and continue the origination process___ draw documents in order to proceed to settlement.

Borrower Date Co-Borrower Date

Itemization of Total Costs

Origination Costs		Settlement Costs	
801 Loan Origination Fee		803 Appraisal Fee	
802 Loan Discount		804 Credit Report	
808 Mortgage Broker Fee		805 Lender's Inspection	
810 Processing Fee		806 Flood Zone Certification Fee	
811 Underwriting Fee		809 Tax Related Service Fee	
812 Wire Transfer Fee		1101 Closing or Escrow Fee	
		1105 Document Preparation Fee	
		1106 Notary Fees	
		1107 Attorney Fees	
		1108 Title Insurance	
		1201 Recording Fees	
		1202 City/County Tax/Stamps	
		1203 State Tax/Stamps	
		1302 Pest Inspection	
		1303 Courier Fee	

Additional Costs

Certain costs are not included in the above estimates as they are based upon personal choice on your part or are dependent upon when closing will be held. These amounts are estimated below based upon a closing date of _____:

Per Diem Interest ___ days at $_____ per day = _____
Hazard Insurance for ___ months _____ Amount to be Escrowed Each Month _____
Taxes for ____months _____ Amount to be Escrowed Each Month _____
Mortgage Insurance for ___months _____ Amount to be Escrowed Each Month _____

The total estimated amount of your monthly payment, based upon your loan program and amounts to be escrowed, is _____.

Interest Rate and Settlement Costs Options

1. Cash Payment at Settlement: You may pay all or part of your required settlement costs at settlement using your available funds.
2. Borrowing Additional Funds to Pay Settlement Costs: You may be able to pay all or part of your settlement costs by borrowing the needed funds as part of your mortgage loan principal. If you choose this option, your monthly payments will increase. This may not be available on a purchase-money loan.
3. Pay Settlement Costs Through a Higher Interest Rate: You may be able to lower your settlement costs in exchange for paying a higher interest rate on your mortgage loan. This higher interest rate will increase your monthly payments.
4. You May Lower Your Interest Rate: You may be able to lower the interest rate on your loan by paying additional funds at closing, commonly referred to as "discount points." The reduced interest rate will lower your monthly payments.

The following table provides a generic example of how higher and lower interest rates affect your loan and loan payments.

	GFE Terms You Selected	Higher Interest Rate	Lower Interest Rate
New Loan Balance	$100,000	$100,000	$100,000
Interest Rate	7.00%	7.25%	6.75%
Monthly Principal & Interest & PMI (if required)	$700.30	$717.18	$683.60
Change in Cash to Close from GFE Terms You Selected		$1,000 less	$1,000 more
Change in Monthly P&I from GFE Terms You Selected		$16.88 more	$16.70 less

$

Initials

Compensation For Goods, Facilities And Services For Your Loan

An originator may be compensated by an investor for goods, facilities or services provided to you or to the investor. This will result in a higher interest rate for this loan. If you would rather pay less cash up front, you may be able to pay some or all of the originator's compensation indirectly through a higher interest rate. If you would rather have a lower interest rate, you may pay higher up-front points and fees. This amount will not exceed the amount disclosed to the left of this description.

If the originator is acting as a lender in this transaction, the originator may receive additional compensation when it sells the loan for the value of the servicing rights or the value of the interest rate or a combination of both. This amount is not required to be disclosed.

ADDITIONAL LOAN TERMS

- ❑ This mortgage IS subject to a prepayment penalty.
- ❑ This mortgage IS NOT subject to a prepayment penalty.
- ❑ This mortgage HAS a balloon payment of _____, which will be due at the conclusion of the loan term. We may or may not refinance this mortgage.
- ❑ This mortgage DOES NOT HAVE a balloon payment.
- ❑ This mortgage IS assumable.
- ❑ This mortgage IS NOT assumable.

Adjustable Rate Mortgage (ARM) Loans

___This is an Adjustable Rate Mortgage (ARM) Loan. Your interest rate may increase or decrease depending on the market. THAT MEANS THAT YOUR MONTHLY PAYMENT MAY INCREASE OR DECREASE. Please refer to the _____loan program disclosure provided to you.

Details of Transaction

a. Purchase Price	
b. Refinance (debts to be paid off)	
c. Estimated Prepaid items	
d. Estimated Closing Costs	
e. PMI, MIP, Funding Fee	
Total costs a-e	
- Subordinate Financing	
- Costs paid by seller	
- Other credits	
- Loan amount	
Cash from/to borrower	

You will need to bring approximately $_____ with you to settlement. This amount may change. This form must be signed and returned within seven (7) days of receipt.

National Association of Mortgage Brokers

Exhibit B

Discrepancies in HUD's Economic Analysis and Initial Regulatory Flexibility Analysis[1]

1. On page 22 HUD states that currently, $7.5 billion of YSP payments "is not passed through to borrowers." Under this proposal, HUD assumes that consumers will recapture half of that, or $3.75 billion. The mandate requires a dollar for dollar offset, meaning that consumers should get all $7.5 billion. Where does the other $3.75 billion go?

2. On page 22, HUD states that origination fees are estimated at $15 billion. HUD asserts that the mandate will improve a consumer's ability to shop and therefore capture five percent ($.75 billion). Why wouldn't a broker try to charge more in origination fees if HUD takes away the ability to charge a yield spread premium? In other words, the analysis is static. A small businessman is not just going to voluntarily cut his rates by half – which is what the HUD model assumes. Most small businesses do not have a 50 percent profit margin.

By not producing a more accurate and dynamic model, HUD is overstating the benefits of this proposal and understating the devastating impact on small business who provides high quality service and expertise.

3. The Proposed Rule will allegedly improve a customer's ability to shop and actually facilitate shopping. If this proposal achieves that goal – and it remains unclear at this time – then a customer could go to ABC bank get the GFE and then get in his/her car and drive to Broker X and compare GFE's.

While the ability to shop may be a desired outcome of public policy, it is difficult to accept the notion that increased shopping saves consumers $826 million. The physical act of shopping is not a costless exercise – and, more to the point of HUD's estimate, it does not *save* money. That is, no one pays a consumer for shopping. However, HUD's Economic Analysis ignores this transaction cost and arbitrarily asserts a savings.[2] This overstates the benefits of this proposal.

This is another example of how the static and questionable analysis is fundamentally flawed. As a result, HUD's Economic Analysis provides no basis to understand the real burden of the proposal.

---

[1] "Economic Analysis and Initial Regulatory Flexibility Analysis for RESPA Proposed Rule to Simplify and Improve the Process of Obtaining Mortgages to Reduce Settlement Costs to Consumers," U.S. Department of Housing and Urban Development, Office of Policy Development and Research, July 2002.
[2] "Economic Analysis," p. 54.

4. On page 54, HUD states that originators and third party settlement service providers will save time (and $850 million) by reducing the amount of time spent with a borrower. While this may be partially true, HUD does not account for the increased foot traffic and comparison shopping made possible by the new rule. An originator will spend more time answering people's questions that are "shopping." It is quite likely that originators will even be walking these shoppers through the new disclosures. This time and resources is not accounted for in HUD's analysis.

Again, HUD overstates the benefits with static analysis.

5. The last example is how HUD does not understand the marketplace and ends up creating an unlevel playing field for small business.

On page 30 HUD asserts that, "All broker income must be derived from direct fees while lenders who originate may continue to supplement their direct fees with yield spread premiums that continue to be unreported to borrowers. This may give lenders a competitive advantage over brokers." HUD goes on to say on page 32 that "A potential problem comes where a shopper is not knowledgeable. A lender trying to convince a borrower to take his loan instead of the broker's might focus the borrower's attention on the reported origination fee of the two charges...".

That is the point. Of course the lender is going to try to, as HUD says, "convince the borrower to take his loan." That is how the market works. The lender is not an unbiased party in this transaction. He is a competitor and will always try to convince the borrower to take his loan. This is why the current disclosure does not work in its current form – it creates an unlevel playing field.

Exhibit C

State Law Conflicts

NAMB has performed an initial review and identified several areas in which state laws conflict with HUD's Proposed Rule. NAMB did not perform an exhaustive review of state laws; this would be a rather time consuming effort. Further, we have limited our research to first lien mortgage loan laws and requirements.

Certain Settlement Services Must Be Chosen By the Consumer:

Certain states require that, in connection with a mortgage loan, a consumer be allowed to choose its own title attorney or title insurance provider. As this fee is part of the package and thus guaranteed, it is uncertain how a packager can guarantee this cost when the consumer may choose its own title attorney or title insurance provider. This creates a conflict for packagers of settlement costs. Similar arguments apply to attorney's fees and hazard insurance, as many states allow a consumer to choose its own attorney and hazard insurance.

States in which a consumer must be provided the opportunity to choose its own title attorney or title insurance provider include, but are not limited to: Illinois (815 ILCS 205/244), Maine (Me. Rev. Stat. Ann. tit. 9-B, § 241.4), Maryland (Md. Code Ann., Com. Law II § 12-119(b)(2)), Rhode Island (R.I. Gen. Laws § 19-9-5), Vermont (Vt. Stat. Ann. tit. 9, § 42(b)), Texas (Tex. Ins. Code Ann.§ 342.404(c)).

States in which a consumer must be provided the opportunity to choose its own insurance provider include, but are not limited to: Alabama (Ala. Code § 5-19-20), Alaska (Alaska Stat. § 21.36.165), Arizona (Ariz. Rev. Stat. Ann. § 20-452.01), California (Cal. Ins. Code § 770), Hawaii (Haw. Rev. Stat. § 431:13-104(a)), Idaho (Idaho Code § 41-1310), Indiana (Ind. Code § 27-4-1-4(9)), Iowa (Iowa Code § 507B.5.1.a), Kentucky (Ky. Rev. Stat. Ann. § 304.12-150), Louisiana (La. Rev. Stat. Ann. § 22:1214(9)), Maine (Me. Rev. Stat. Ann. tit. 24-A, § 2169), Maryland (Md. Code Ann., Com. Law § 12-410(f)), Massachusetts (Mass. Gen. L. ch. 175, § 193E), Minnesota (Minn. Stat. § 72A.31), Montana (Mont. Code Ann. § 33-18-501), Nebraska (Neb. Rev. Stat. § 44-1526(a)), Nevada (Nev. Rev. Stat. § 686A.200), New Hampshire (N.H. Rev. Stat. Ann. § 417:4(XVI)(a)), New Mexico (N.M. Stat. Ann. § 59A-16-14), New York (N.Y. Comp. Codes R. & Regs. tit. 3, § 38.9), North Dakota (N.D. Cent. Code § 26.1-04-04.1), Ohio (Ohio Rev. Code Ann. § 3933.04), Oregon (Or. Rev. Stat. § 746.180), Tennessee (Tenn. Code Ann. § 56-8-106(a)(1)), Utah (Utah Code Ann. § 31A-23-302(5)), Vermont (Vt. Stat. Ann. tit. 9, § 42(b)), Virginia (Va. Code Ann. § 6.1-330.70), Washington (Wash. Rev. Code § 48.30.260(3a) and (3f)), Wisconsin (Wis. Stat. § 134.10(1)), and Wyoming (Wyo. Stat. § 26-13-118).

States in which a consumer must be provided the opportunity to choose its own attorney include, bust are not limited to: Connecticut (Conn. Gen. Stat. § 49-6d), Maryland (Md. Code Ann., Com. Law II § 12-119(b)(2)), New Jersey (N.J. Rev. Stat § 46:10A-6), South Carolina (S.C. Code Ann. § 37-10-102), Virginia (Va. Code § 6.1-330.70), and Wisconsin (Wis. Stat. § 708.03).

Itemization is Required Under State Law at Application:

Certain states require the provision of the itemization of fees early in the origination process. In HUD's Proposed Rule, under the packaging scheme, fees would be required to be listed but not itemized early in the process. For example, in New York, a mortgage broker must provide the consumer, pre-application, with a disclosure of certain fees, such as an application fee, appraisal fee, and credit report fee.[1] This will conflict with the requirements for the packaging world in the Proposed Rule, as enumeration of the costs of these fees is not required at this stage.

States in which a mortgage broker must itemize certain fees at application include, but are not limited to: Arizona (Ariz. Rev. Stat. § 6-906.C), California (Cal. Bus. & Prof. Code § 10241), New York (N.Y. Comp. Codes R. & Regs. tit. 3, § 38.3), and Texas (7 Tex. Admin. Code Part 80).

Further, in certain states, fees must be disclosed early in order to collect them at closing. As neither the enhanced good faith estimate or the guaranteed mortgage package under HUD's Proposed Rule provides for this early itemization, this will prove difficult for originators to collect these fees at closing. Duplicate disclosures will be provided, complicating the structure HUD strives for. These states include, but are not limited to: Massachusetts (Mass. Gen. Law ch. 183, § 63), and New Hampshire (N.H. Rev. Stat. Ann. § 397-A:16(I)).

States in Which Certain Fees are Prohibited:

Certain fees are prohibited in certain states. For example, in Maryland, a lender's inspection fee can not be charged, except under certain circumstances.[2] In several other states, a mortgage broker may only collect certain fees at application. The Proposed Rule would permit the collection of a nominal fee under both the enhanced good faith estimate and the guaranteed mortgage package agreement. However, this is not a fee that is permissible in these states. Thus, a conflict would exist in connection with the charging of this nominal fee in certain states.

States in which fees may be charged at application which do not constitute a "nominal fee" as described in the Proposed Rule include, but are not limited to: Arizona (Ariz. Rev. Stat. Ann. § 6-906.C), Florida (Fla. Stat. Ch. 494.0042(3)), Idaho (Idaho Code § 26-3113), and New York (N.Y. Comp. Codes R. & Regs. tit. § 38.3(a)(2)(iv)).

Further, most states, including Delaware and Michigan, require that all fees charged be reasonable and necessary fees, and in many instances, actual costs. Under packaging, there will be no manner for state regulators nor consumers to determine whether the fees charged to them are reasonable in keeping with state law.

---

[1] N.Y. Comp. Codes R. & Regs. tit.3, § 38(a)(1)(v).
[2] Md. Code Ann., Com. Law § 12-121(b).

States in Which a Mortgage Broker Cannot Offer a Commitment:

Certain states will prevent a mortgage broker from providing a loan commitment. In New York, a mortgage broker is prohibited from making a loan commitment to a consumer.[3] Thus, mortgage brokers will be unable to compete in the packaging world in the State of New York.

Packaging will Require Many Settlement Service Providers, and Others, who Participate in Packaging to Be Licensed as a Mortgage Broker:

A conflict occurs in connection with licensing issues for settlement service providers who wish to provide packages. As the Proposed Rule requires that a package of settlement services must be delivered with a mortgage loan, some settlement service providers will need to obtain a mortgage broker license to comply with this requirement. Most states require that mortgage brokers obtain a license, register or provide notification in order to act as a mortgage broker. Some entities will be faced with these additional licensing requirements. Currently, 46 states and the District of Columbia maintain licensing, registration or notification requirements for mortgage brokers. These requirements often include exemptions for certain entities, such as insurance agents or realtors (if the realtor does not engage in more than a certain number of transactions a year). However, the number of licensees, registrants or those providing notification will likely dramatically increase if the Proposed Rule is finalized.

Referral Fees Prohibited:

In several states,[4] a realtor cannot collect a fee for performing real estate services as well as collect a fee for acting as a mortgage broker in the same capacity. However, in HUD's proposed packaging world, the lines between a realtor and a mortgage broker will blur if the realtor participates in packaging. It will be difficult for consumers to understand, if HUD's Proposed Rule is finalized, what fees are charged for what activity. Further, in these states, a realtor will likely not engage in packaging as it will not be profitable.

Further, in certain states, it is illegal for "kickbacks" to be provided in connection with the sale of title insurance. For example, Virginia prohibits the payment of "kickbacks" in connection with title insurance.[5] This will be in direct contravention with HUD's Proposed Rule, if finalized.

---

[3] N.Y. Comp. Codes R. & Regs. tit. 3, § 38.3(a)(1)(i).
[4] Minnesota, Virginia and Connecticut are included in these states.
[5] Va. Rev. Stat. § 38.2-4614.

Attachment 3

Office of Advocacy

October 28, 2002

Richard A. Hauser, Esquire
General Counsel
Office of the General Counsel
Department of Housing and Urban Development
451 Seventh Street, SW
Washington, DC 20410-0500

Re: Department of Housing and Urban Development: Real Estate Settlement Procedures Act (RESPA); Simplifying and Improving the Process for Obtaining Mortgages to Reduce Settlement Costs to Consumers; Proposed Rule; Docket Number: FR-4727-P-01

Dear Mr. Hauser:

As part of its statutory duty to monitor and report on an agency's compliance with the Regulatory Flexibility Act of 1980 ("RFA"), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"),(1) the Office of Advocacy of the U.S. Small Business Administration ("Advocacy")(2) reviewed the Department of Housing and Urban Development's ("HUD") compliance with the RFA's requirements for the above-referenced Notice of Proposed Rulemaking ("NPRM").(3)

On July 29, 2002, the Department of Housing and Urban Development (HUD) published a proposed rule on the Real Estate Settlement Procedures Act (RESPA) in the *Federal Register*, Vol. 67, No.145, p. on page 49134. The purpose of the proposal is to simplify and improve the process of obtaining home mortgages and reduce settlement costs to consumers. The proposal addresses the issue of lender payments to mortgage brokers by changing the way that payments in brokered transactions are recorded and reported to consumers. It requires a Good Faith Estimate (GFE) settlement disclosure and allows for packaging of settlement services and mortgages.

After reviewing the NPRM and discussing it with affected small businesses,(4) Advocacy would like to encourage HUD to issue a revised initial regulatory flexibility analysis (IRFA) that takes into consideration the comments of affected small entities and develops regulatory alternatives to achieve HUD's objectives while minimizing the impact on small businesses.

RFA Requirements for a NPRM

The RFA requires agencies to consider the economic impact that a proposed rulemaking will have on small entities. Unless the head of the agency certifies that the proposed rule will not have a significant economic impact on a substantial number of small entities, the agency is required to prepare an IRFA. The IRFA must include: (1) a description of the impact of the proposed rule on

small entities; (2) the reasons the action is being considered; (3) a succinct statement of the objectives of, and legal basis for the proposal; (4) the estimated number and types of small entities to which the proposed rule will apply; (5) the projected reporting, recordkeeping, and other compliance requirements, including an estimate of the small entities subject to the requirements and the professional skills necessary to comply; (6) all relevant Federal rules which may duplicate, overlap, or conflict with the proposed rule; and (7) all significant alternatives that accomplish the stated objectives of the applicable statues and minimize any significant economic impact of the proposed rule on small entities.(5) In preparing its IRFA, an agency may provide either a quantifiable or numerical description of the effects of a proposed rule or alternatives to the proposed rule, or more general descriptive statements if quantification is not practicable or reliable.(6)

HUD's Compliance with the RFA

Pursuant to the RFA, HUD prepared an IRFA in conjunction with its Economic Analysis prepared under Executive Order 12866.(7) Section 605 of the RFA expressly permits agencies to perform an IRFA in conjunction with other analyses provided the analysis meets the requirement of the RFA. For the reasons stated below, Advocacy is of the opinion that further economic analysis prepared by HUD, in a revised IRFA, would improve the Final Rule.

Defining Small Businesses Affected by the RESPA Proposal

Section 601 of the RFA requires an agency to use the definition of small business contained in the U.S. Small Business Administration's ("SBA") small business size standards regulations,(8) promulgated by the SBA under the Small Business Act.(9) Below is a table of the SBA's definition of small business for the industries in which small businesses have contacted the Office of Advocacy to raise concerns regarding the impacts of this rule.(10)

NAICS Code	Industry Description	SBA Size Standard (revenues <=) in $ millions
531210	Mortgage Brokers (Real Estate Agents and Brokers)	6
522292	Real Estate Credit	6
541191	Title Abstract and Settlement Offices	6
531320	Offices of Real Estate Appraisers	1.5
561710	Pest Inspectors - Exterminators	6

The proposed rule will affect mortgage brokers, mortgage lenders, realtors, appraisers, pest inspectors, and settlement service providers. Although HUD acknowledged that the majority of the businesses in the industries affected by the rule are small businesses, its economic analysis would improve by a revised IRFA that clearly defines the impact on those small entities.

HUD's analysis included the overall cost of compliance for the proposal in its analysis. A revised IRFA would allow for HUD to compute the compliance cost per small entity. This would enable HUD to identify and analyze significant regulatory alternatives to minimize the potential burdens

on small businesses subject to the rule. In addition, this information would assist small entities in understanding the nature of the impact of the rule on their businesses.

Alternatives to Reduce the Impact on Small Entities

In addition to providing information about the economic impact of the action on small businesses, the RFA also requires an agency to consider less burdensome alternatives to the proposed action. In this particular rulemaking, there may be viable alternatives that HUD has not considered.

Good Faith Estimate (GFE) Provisions

Advocacy supports the notion of protecting consumers from predatory lending practices and providing the consumer with full disclosure about the mortgage lending process. Advocacy urges HUD to give full consideration to suggestions that reduce consumer confusion and are cost effective for mortgage brokers and community-based lenders.

Packaging

The purpose of packaging is to increase competition among settlement service providers and lower the cost of settlement services for the consumer. As with the GFE, Advocacy urges HUD to give full consideration to suggestions from the small business community concerning the packaging aspect of the proposal.

Conclusion

The RFA requires agencies to consider the economic impact on small entities prior to proposing a rule and to provide the information on those impacts to the public for comment. As noted above, Advocacy recommends that HUD publish a supplemental IRFA to provide small businesses with sufficient information to determine what impact, if any, the particular proposal will have on its operations. In addition to providing the public with specific information about the economic impact on the proposal, the supplemental IRFA should provide a meaningful discussion of alternatives that may minimize that impact.

Secretary Martinez, Commissioner Weicher, and members of your staff in the Office of General Counsel, deserve credit for reaching out to small businesses and consulting with my office in the development of this rule. I am confident that we will continue to work together to ensure that these improvements to the mortgage financing process stimulate small-business growth and increased opportunities for homeownership. Thank you for the opportunity to comment on this important proposal. If you have any questions, please feel free to contact the Office of Advocacy at (202) 205-6533.

Sincerely,

Thomas M. Sullivan
Chief Counsel for Advocacy

Jennifer A. Smith
Assistant Chief Counsel
for Economic Regulation

Cc: Dr. John D. Graham, Administrator, Office of Information and Regulatory Affairs

ENDNOTES

1. Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. § 601 et seq.) amended by Subtitle II of the Contract with America Advancement Act, Pub. L. No. 104-121, 110 Stat. 857 (1996). 5 U.S.C. § 612(a).

2. Congress established the Office of Advocacy of under Pub. L. No. 94-305 to represent the views of small business before Federal agencies and Congress.

3. 67 Fed. Reg. 49134 (July 29, 2002).

4. On October 9, 2002, the Office of Advocacy held a roundtable on this rule. Mortgage brokers, mortgage lenders, realtors, appraisers, and third party service providers participated in the roundtable. In addition, on October 25, 2002, Advocacy met with minority members of the real estate community in Baltimore, Maryland to discuss the impact of this rule on their businesses.

5. 5 U.S.C § 603.

6. 5 U.S.C. § 607.

7. Advocacy reviewed the summary of HUD's analysis published as an appendix to the proposed rule and the complete Economic Analysis and Initial Regulatory Flexibility Analysis for RESPA Proposed Rule to Simplify and Improve the Process of Obtaining Mortgages to Reduce Settlement Costs to Consumers, prepared by HUD's Office of Policy Development and Research and accessible on HUD's Website.

8. 13 C.F.R. § 121.

9. 15 U.S.C. § 632. Section 601 also provides that an agency can use an alternate definition if the agency obtains prior approval from Advocacy to use another standard (and publishes the standard for public comment) or the statute on which a rule is based provides a different definition of small business, then an agency may use that definition without consulting with the Office of Advocacy. 5 U.S.C. § 601 (3).

10. This information was obtained from http://www.sba.gov/size/sizetable2002.html.

ATTACHMENT 4

Supporting Statement for Paperwork Reduction Act Submissions

Real Estate Settlement Procedures Act Disclosures
OMB Control No. 2502-0265
(Forms HUD-1 and HUD-1A)

A. Justification

1. The Department is proposing a rule to simplify and improve the process of obtaining a home mortgage. The proposed rule will affect the current information collection, which consists of third party disclosures needed to inform homebuyers about the settlement process. Currently, certain disclosures are required by the Real Estate Settlement Procedures Act (RESPA) of 1974 amended by Section 461 of the Housing and Urban-Rural Recovery Act of 1983 (HURRA), and other various amendments. The statute is found at 12 U.S.C. 2601 et seq. and the implementing regulations at 24 CFR 3500. Required disclosures include: the Good Faith Estimate, Special Information Booklet , RESPA-Section 6 Model Disclosure and Acknowledgement of Probable Transfer of Loan Servicing, and the HUD-1 Settlement Statement. Other disclosures may be required under certain circumstances and include: the Initial Escrow Account Statement, Annual Escrow Account Statement, Affiliated Business Disclosure, and Escrow Account Disbursement Disclosure. The proposed rule would require a new format for the Good Faith Estimate. The rule would require a new disclosure, the "Guaranteed Mortgage Package Agreement," in lieu of the Good Faith Estimate, to be eligible for certain exemptions from Section 8 of RESPA. This exemption would exclude the requirement to give an Affiliated Business Disclosure in certain circumstances.

   Further explanations of RESPA, including statutory and regulatory documentation, is available through HUD's web page at **http://www.hud.gov/offices/hsg/sfh/res/respa_hm.cfm**

   Real Estate Settlement Procedures Act (Regulation X);
   Escrow Accounting Procedures
   Final Rule
   Federal Register Vol. 60 No.31 Feb. 15, 1995

   Real Estate Settlement Procedures Act (Regulation X);
   Escrow Accounting Procedures: Correcting Amendment and Clarifications
   Final Rule
   Federal Register Vol. 60 No.89 May 9, 1995

   Real Estate Settlement Procedures Act;
   Streamlining Final Rule
   Final Rule
   Federal Register Vol. 61 No.59 Mar. 26, 1996

   Amendments to Regulation X, Real Estate Settlement Procedures Act;
   Withdrawal of Employer-Employee and Computer Loan Origination Systems (CLOS) Exemptions
   Final Rule
   Federal Register Vol. 61 No.222 Nov. 15, 1996

   Amendments to Real Estate Settlement Procedures Act;
   Exemption for Employer Payments to Employees Who Make Like-Provider Referrals and Other Amendments
   Proposed Rule
   Federal Register Vol. 62 No. 90 May 9, 1997

   Amendments to Real Estate Settlement Procedures Act Regulation (Regulation X);
   Escrow Accounting Procedures
   Final Rule

Federal Register Vol. 63 No. 13 Jan. 21, 1998

Real Estate Settlement Procedures Act (RESPA);
Regarding Lender Payments to Mortgage Brokers'
Statement of Policy1999-1
Federal Register Mar. 1, 1999

- HUD-1/HUD-1A - Uniform Settlement Statement. Buyers and sellers receive a statement of actual charges and disbursements pursuant to the settlement (see Section 4(a) of RESPA).

- Affiliated Business Arrangement Disclosure (formerly Controlled Business Arrangement). This disclosure is required when a settlement service provider refers a borrower to an affiliated provider. Section 461 of the Housing and Urban-Rural Recovery Act of 1983 added an exemption under Section 8 of RESPA for affiliated business arrangements (AfBAs) as long as certain requirements were met. The implementing regulations at 24 CFR 3500.15, require that a disclosure be given when a settlement service provider refers a borrower to another settlement service provider, when an AfBA exists. Proposed revisions to these regulations were published in the Federal Register on June 7, 1996 and August 12, 1996. The Department published final regulations on November 15, 1996 (effective January 14, 1997), which implement Section 2103c of the Act. The proposed rule exempts this requirement under certain circumstances.

- Special Information Booklet. Homebuyers receive this disclosure regarding the nature and costs of real estate settlement services (see Section 5(d) of RESPA).

- Good Faith Estimate (GFE). Lenders must give borrowers an estimate of the settlement costs that the borrower is likely to incur in connection with settlement (see Section 5 (c) of RESPA). The proposed rule requires a new format for the GFE that would make shopping easier. It also would require that the estimate be firmer by establishing a tolerance in variance on the HUD-1, from what was estimated on the GFE.

- Guaranteed Mortgage Package Agreement (GMPA). The proposed rule would require this disclosure in lieu of the GFE when a Guaranteed Mortgage Package, including a guaranteed settlement service cost and an interest rate guarantee is offered consumers.

- Escrow Disclosures. An initial escrow account statement is provided to borrowers at the settlement of a Federally related mortgage loan, and an annual statement is provided to borrowers showing the previous year's activities in the escrow account. The lender may ask the borrower to voluntarily contribute additional funds if the charge will substantially rise in the second year; a disclosure must be signed by the borrower. Section 924 of the Cranston Gonzalez Affordable Housing Act of 1990 (P. L. 101-625, approved November 28, 1990), amended Section 10 of the Real Estate Settlement Procedures Act of 1974 (RESPA, U.S.C. 2609 (c)). Regulations allowing voluntary collection of additional funds were published January 21, 1998, FR-3236.

- Servicing Disclosures. Lender must give the borrower a disclosure at application that the servicing of the mortgage loan may be transferred and another notice when the loan is transferred (Section 941 of the Cranston Gonzalez National Affordable Housing Act, P.L. 101-625 amended Section 6 of RESPA). RESPA was amended in 1996 to allow a streamlined disclosure, however, the Department has not finalized regulations pursuant to allow this change.

2. These third party disclosures are required by statute and regulations. Settlement providers make these disclosures to homebuyers, and in some cases sellers; pursuant to transactions involving Federally related mortgages. Disclosures are not submitted to the Federal Government.

3. These third party disclosures may be submitted to consumers electronically. Additionally, many disclosures are computer generated. The HUD-1 and HUD-1A are available on the RESPA web site and private companies offer software programs which generate HUD-1s . Except for the HUD-1 and HUD-1A, settlement providers are free to develop forms that are tailored to their individual procedures and needs. Lenders/brokers may use a computer generated program to estimate costs reported on the GFE for specific settlement services. Approximately 20,000 lenders generate an estimated 11 million loan applications which would require a GFE. It is estimated that at least 50% of the GFEs are now generated by computer. Many servicers are using integrated computer systems for billing, recordkeeping, and generating escrow statements. Software manufacturers continue to market improved versions of these systems.

4. The only disclosure containing partial duplication is the annual escrow account statement. To reduce duplication, servicers may adapt HUD-required information to comply with IRS reporting requirements regarding escrow account items, such as taxes. Furthermore, the rule allows servicers to report a "short year" in the first annual statement so that HUD-required annual statements can be issued coincident with IRS forms. In open-end lines of credit, the GFE and HUD-1 are not required when certain truth-in-lending disclosures are given.

5. The collection of this information does not impact small businesses.

6. This information is not submitted to the Federal Government. These third-party disclosures are required by statute, 12 U.S.C. 2601 et. seq. and regulations. The burdens on respondents are the minimum necessary to comply with the statute, and to assist borrowers in comparison shopping for loans and tracking escrow funds.

7. Information is not reported to HUD. Respondents are required to keep records (HUD-1, HUD-1A, escrow disclosures) for five years. Information may be requested from providers as part of an investigation. There is a three-year statute of limitations for the Secretary to bring an action under Sections 6, 8 and 9. RESPA does not provide for a statute of limitations for escrow disclosures. The Inspector General recommended a five year record retention to limit the paperwork burden.

8. The Department is soliciting comments in regard to the information collection. The Department's Office of Policy Development and Research estimates that approximately 11 million loans are originated each year. The Department is taking this opportunity to request additional burden hours to take into consideration this increase over the previous estimate in 2502-0265.

9. There are no payments or gifts to respondents.

10. There are no assurances of confidentiality provided to respondents.

11. There is no information of a sensitive nature being requested.

12. Estimated Number of Respondents, Responses and Burden Hours Per Annum

Information Collection	Number of Respondents	Frequency of Response	Responses per Annum	Burden Hour per Response	Annual Burden Hours	Hourly Cost per Response	Annual Cost
Information Booklet/GFE or GMPA	20,000	550	11,000,000	.33	3,630,000	20.00	72,600,000
HUD-1 or HUD-1A	20,000	650	11,000,000	.25	2,750,000	30.00	82,500,000
AfBA	10,000	240	2,400,000	.10	240,000	20.00	4,800,000
Initial Escrow	2,000	4,290	8,580,000	.08	686,400	*0.00	0
Annual Escrow	2,000	17,500	35,000,000	.08	2,800,000	*20.00	56,000,000
Escrow Disbursement	2,000	500	1,000,000	.083	83,000	20.00	1,660,000
Servicing Disclosure	20,000	550	11,000,000	.033	363,000	10.00	3,363,000
Transfer Disclosure	20,000	2,500	50,000,000	.033	1,650,000	10.00	16,500,000
TOTALS			129,980,000		12,202,400		$237,423K

*Cost of initial escrow is included in the annual escrow cost of $20.00, which also includes staff time, mailing cost, and equipment.

Explanation of Burden:

Good Faith Estimate, Guaranteed Mortgage Package Agreement, Special Information Booklet

- It is estimated it will take 20 minutes to complete and explain the new GFE to borrowers, or to complete and explain the GMPA to borrowers. The burden hours for these disclosure are increased due to the new formats for disclosure and to take in consideration the increased estimate of 11 million transactions rather than the previous estimate of 5 million.

HUD-1/HUD-1A

- Approximately 11 million loans close per year. The Department estimates that the HUD-1 can be filled-in in a minimum of 15 minutes. There are software programs available to settlement agents which provide an interactive form, thus allowing the form to be easily completed.

Initial Escrow Account Statement

- Approximately 11 million loans close per year, 78 percent of which carry escrow accounts requiring an initial statement (according to a HUD study), 11 million loans x .78 = 8,580,000 responses.

Escrow Disbursement Statement

- The Department estimates that 1,000,000 borrowers will voluntarily contribute additional escrow funds into accounts due to anticipated increases the second year. Servicers may collect additional funds as long as borrowers agree to do so through a disclosure. The Department estimates this disclosure will (1,000,000 x .083) result in 83,000 burden hours.

Annual Escrow Account Statement

- Thirty-one million mortgages carry escrow accounts. It is estimated that 15 percent of these mortgages change servicers each year requiring a new annual escrow account statement. Thirty-one million escrowed mortgages plus 4.65 million (15 percent of 31 million) change servicers each year equals to approximately 35 million responses. Actual responses per respondent will vary according to the number of escrowed mortgages serviced by each respondent.

Initial Servicing Disclosure

- Approximately 11 million loans are closed per year which require a disclosure, 11 million loans x .033 = 363,000 burden hours.

Servicing/Transfer Disclosures

- The transferor and transferee may send this disclosure jointly. About 50 million transfers of servicing rights are affected every year, according to a knowledgeable official at the Mortgage Bankers Association. We estimate that approximately 10% of the 50 million transfers receive a single disclosure.

Affiliated Business Arrangement Disclosure

- A settlement service provider must provide the AfBA disclosure when a borrower is referred to an affiliated provider. The Regulatory Impact Analysis estimated that 4.5% of all home sales transactions will involve an affiliated relationship (1999 sales transactions 2,400,000 x .045 = 108,000). An additional 10% of all loan applications will require a AfBA disclosure (2.4 million x .10 = 240,000).

13. There are no additional costs to respondents. Although the GMPA is a new disclosure and the format for the GFE are changed, according to private companies who provide document packages to lenders and other settlement providers, updates to state and federal regulations are provided at no additional cost.

14. There are no costs to the government except for a small cost associated with keeping the Special Information Booklet and the HUD-1 or HUD-1A up-to-date. These are third party disclosures that are not reported to the government.

15. The proposed rule provides a new Good Faith Estimate (GFE) format and provides a new Guaranteed Mortgage Package agreement that under certain circumstances may be used in lieu of the GFE. Both formats include a disclosure of options the consumer has for paying settlement costs and for lowering the interest rate. It is anticipated that these new disclosures will require additional time to complete and to explain to the consumer. Additionally, the Department is taking this opportunity to make an adjustment to increase the previous estimate of 5 million loans a year to 11 million loans a year. The adjustment is based on public comment and information provided by the Office of Policy, Development and Research. Therefore, the previous submission of 6,500,000 hours are increased to 12,202,400. Of this increase, 2,530,000 hours are attributed to a program change and 3,172,400 hours are due to an adjustment of increased loan volume.

16. The results of the information collection will not be published.

17. HUD is seeking approval to not display the expiration date on the forms HUD-1 and HUD-1A because of the very large volume that is generated. The forms are not only required by RESPA but are used for virtually all one-to-four family residential transactions and have become a standard instrument for settlement procedures throughout the industry.

18. There are no other exceptions to the certification statement identified in item 19 of the OMB 83-I than what is stated in item 17 above.

B. Collections of Information Employing Statistical Methods

The collection of information does not employ statistical methods.