Statement of Henry V. Cunningham Jr., CMB

on behalf of the
Mortgage Bankers Association

House Financial Services Committee
Subcommittee on Insurance, Housing & Community Opportunity

"Mortgage Origination: The Impact of Recent Changes on Homeowners and Businesses"

July 13, 2011

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Chairwoman Biggert, Ranking Member Gutierrez and members of the subcommittee, my name is Hank Cunningham and I am the president of Cunningham and Company, an independent mortgage banking firm with offices throughout North Carolina. I have more than 37 years of professional mortgage experience and currently serve as Chairman of the Residential Board of Governors of the Mortgage Bankers Association.[1] I also serve on MBA's Board of Directors.

My testimony will focus on the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank), and specifically the Credit Risk Retention proposed rule, and its Qualified Residential Mortgage (QRM) exemption, and the Ability to Repay proposed rule, and its Qualified Mortgage (QM) safe harbor, both of which are of enormous significance to our industry. I will also address the recent SAFE Mortgage Licensing Act and Loan Originator Compensation rules, which, although they are final, deserve refinements, as well as the Interim Appraisal Rule. Finally, I would like to address the RESPA/TILA effort where a rulemaking is anticipated in the fall.

I very much appreciate the opportunity to testify and plan to address these subjects and provide MBA's views.

Background

Less than a year ago, Congress passed Dodd-Frank. While it is too early to assess the full impact of this historic legislation, it is clear that the mortgage industry has been directing very considerable resources at implementing and responding to an avalanche of new and proposed regulations.

MBA recognizes that mortgage lenders need to take responsibility for their share of excesses during the recent housing boom. We recognize that changes are needed to ensure such excesses will not be repeated in the future. Indeed, we favor both reasonable risk retention and ability to repay requirements.

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

Nevertheless, the sheer quantity of rules is placing great stress on lenders, particularly smaller lenders who serve communities throughout the nation every day. Lenders are scaling back the number of production employees as business declines, but are offsetting those cuts with new compliance hires. This kind of trade off is both undesirable and unsustainable.

Most lenders know we will never be "too big to fail" but we also wonder if we are "too small to comply," raising the very real possibility that borrowers may lose our services and the important competition we bring to the market.

As we face this avalanche, we also know the market itself has largely cleared out toxic mortgage products, credit is tight and that rules already in place have limited the availability of mortgage credit to only highly qualified borrowers. The economy is sputtering and the housing market impedes recovery.

For all these reasons, we urge that federal regulators act judiciously with respect to regulations going forward. We need to make sure that efforts to provide a safe and sound housing market do not lead to an overreaction that risks making sustainable mortgage credit unnecessarily costly and unavailable to far too many families.

All of these rules, if finalized with the proper adjustments or revised, can help facilitate the provision of sustainable mortgage credit to the widest array of qualified borrowers at the most affordable costs. But, if they follow the wrong track, they risk lessening competition, increasing the cost of credit, and harming the very people they were designed to protect.

We respectfully urge Congress to carefully monitor all these new rules – those newly proposed and others recently finalized – to make certain they do not unwittingly harm American families, the mortgage market or the nation's economic recovery.

I. Risk Retention and Qualified Residential Mortgages

The ability to repay rule and the credit risk retention rule are the two most significant mortgage-related rules to come out of Dodd-Frank. Both of these rules have been proposed and comments are due on July 22 and August 1 respectively. Because they will affect the availability and affordability of mortgage credit for years to come, these rulemakings deserve the most careful attention of the regulators and Congress.

The risk retention rule, which contains the definition of Qualified Residential Mortgage, was proposed by six federal agencies. Under Dodd-Frank, asset-backed securities may not be issued without retention of a portion of credit risk by the securitizer unless the

loan is a QRM. While estimates vary, the clear result of any risk retention rule will be that loans that are not QRMs will be costlier or not available at all.

Regrettably, the regulators have proposed a QRM definition that includes a high down payment[2] and uncommonly low loan-to-value (LTV)[3] and debt-to-income (DTI) ratios[4] that would make most loans subject to risk retention, and therefore costlier and in some cases unavailable. These effects will be worse for minority and moderate income borrowers who can least afford increased credit costs.

Like Congress, we do not believe risk retention is necessary where loans are determined to be QRM. Moreover, we believe the proposal for a narrow QRM is inconsistent with what Congress intended and would drastically limit affordable mortgage financing options to moderate income families, first-time borrowers, minorities, and many others.

The government's own data shows that the proposed regulations would hurt consumers by limiting access to credit for well-qualified borrowers.[5] Even high quality loans would not meet the proposed QRM requirements. Though 2009 was a year of highly conservative underwriting standards, only 30 percent of loans purchased by Fannie Mae and Freddie Mac would have met the proposed requirements. In effect, the QRM tightens credit in an already constricted lending environment.

Data also shows it could take moderate income borrowers, depending on where they live, up to 18 years to save for a 20 percent down payment for a moderately priced home.[6] The proposed "alternative" of ten percent down payment is not much better. It will take renters much longer to save. Borrowers also must pay closing costs, which typically add another $5,000 to the amount a borrower must save.

At the same time, borrowers who have faithfully made their mortgage payments but have little equity and may live in areas of significant home declines will find it difficult if not impossible to refinance into a QRM loan because of the proposal's 75 percent LTV requirement for refinancing.

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[2]The proposed QRM would establish minimum down payment for purchase transaction of at least 20 percent of lesser of purchase price or property value plus closing costs.

[3] Specific maximum LTV requirements for QRM of not more than 80 percent for purchase loans, 75 percent CLTV for rate and term refinancings (includes first lien and any other closed end or open end credit on property) and 70 percent of CLTV for cash out refinances.

[4] Would establish maximum front-end and back-end DTI ratio of 28 and 36 to qualify.

[5] FHFA. Mortgage Market Note 11-02: Qualified Residential Mortgages. April 11, 2011

[6] MBA analysis of Census Bureau, Bureau of Labor Statistics, and National Association of Realtors data.

MBA's Position

MBA has made it a top priority, and is working in harmony with a very wide coalition of consumer advocates, civil rights groups and other industry associations, to educate policy makers and legislators concerning this rule. We have concluded that better mortgages for investors and homeowners alike could be accomplished if the final rule simply defined a QRM to exclude loans with risky product features and required documentation and verification as part of loan underwriting. While we support reasonable credit risk retention requirements, specific down payment, LTV and DTI requirements are unnecessary and not worth the societal costs of excluding far too many qualified borrowers from the most affordable mortgage loans to achieve homeownership.

We appreciate Congress's interest in this rule, which has led to a letter from more than 300 members asking that the proposal be reconsidered. We urge you to continue pressing to have this rule re-thought and redirected by regulators. We believe it should be changed to offer similar if not identical standards to the Qualified Mortgage, discussed below, and to repropose the rule along those lines. If that does not occur, we urge Congress to act as necessary to revise the law to assure that affordable credit is available to qualified families and private capital is invited back into the market as Congress intended.

II. Ability to Repay and Qualified Mortgages (QMs)

The proposed ability to repay and QM requirements under Title14 of Dodd-Frank share the same general purpose as the Credit Risk Retention and QRM requirements. Both provisions seek to ensure that mortgages are well underwritten and present a low risk of default.

To achieve this objective, Section 1411 of Dodd-Frank prohibits a creditor from making a mortgage loan unless the originator makes a reasonable determination, in good faith, based on verified and documented information at the time the loan is consummated, that the consumer has the ability to repay the loan, including all applicable taxes, insurance and assessments. Section 1412 also provides that if the loan meets the QM definition, it is presumed to meet the ability to repay requirements. The Board of Governors of the Federal Reserve System (Board) is charged with prescribing rules to implement Section 1412. Under Dodd-Frank, authority for TILA regulation and these provisions transfers to the Bureau of Consumer Financial Protection (CFPB) on July 21, 2011.

Dodd-Frank amended TILA to increase the penalties for violations, including violations of the ability to repay and anti-steering provisions. Section 1416 allows consumers who bring timely action against a creditor for a violation of the ability to repay requirements to recover special statutory damages equal to the sum of all finance charges and fees paid by the consumer unless the creditor demonstrates failure to comply is not material. Damages may be in addition to actual damages; statutory damages in individual or class actions, up to a prescribed threshold; and court costs and attorney fees. Violations can also provide a defense by recoupment and set off in a foreclosure action, without regard to any time limits on private actions.

The proposed rule implementing these provisions was issued by the Board on April 19, 2011, and published in the Federal Register on May 11, 2011. Consistent with the statute, the proposal would amend TILA regulations (Regulation Z)[7] to prohibit creditors from making a mortgage loan without regard to the consumer's ability to repay the loan. The proposal notes that the final rule will be issued by the CFPB.

The proposal would allow creditors to comply by originating a mortgage after considering and verifying eight factors[8] and basing the mortgage payment calculation on the fully indexed interest rate or originating a QM, which would provide decreased liability. The Board offered two alternative approaches to QM that come with different degrees of protection from liability.

Alternative 1 would operate as a "legal safe harbor" that the ability to repay requirement has been met and would define a QM as a mortgage that: (1) does not include negative amortization, interest-only payments, or balloon payments (except as permitted for balloon payment qualified mortgages) or has a loan term exceeding 30 years; (2) has total points and fees not exceeding three percent of the total loan amount ; and (3) where underwriting (a) is based on the maximum interest rate in the first five years, (b) uses a payment schedule that fully amortizes the loan over the loan term, and (c) takes into account any mortgage-related obligations. The income or assets of the borrower must also be considered and verified.

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[7] 12 CFR 226

[8] These eight factors include: (1) consumer's current or reasonably expected income or assets, other than the value of dwelling that secures loan; (2) if creditor relies on income from consumer's employment in determining repayment ability, consumer's current employment status; (3) monthly payment on mortgage calculated based on fully indexed rate and monthly fully amortizing payments that are substantially equal; (4) consumer's monthly payment on any simultaneous loan creditor knows or has reason to know will be made including, HELOC payment using payment required under plan and amount of credit drawn at consummation of transaction; (5) consumer's monthly payment for mortgage-related obligations; (6) consumer's current debt obligations; (7) consumer's monthly debt-to-income ratio, or residual income; and (8) consumer's credit history.

Alternative 2 would establish a "rebuttable presumption of compliance" that the ability to repay requirement has been met for loans meeting the requirements listed in Alternative 1 and which also meets certain additional underwriting requirements including considering and verifying: (1) the consumer's employment status, (2) the monthly payment for any simultaneous mortgage, (3) the consumer's current debt obligations, (4) the monthly DTI ratio or residual income, and (5) the consumer's credit history.

Both alternatives provide that points and fees cannot exceed three percent of the loan amount. Points and fees would include: (1) compensation paid directly or indirectly by a consumer or creditor to a mortgage originator apparently including lenders and mortgage brokers as well as originator employees; (2) mortgage insurance premiums in excess of the amount payable under the Federal Housing Administration (FHA) program; and (3) the total prepayment penalty incurred by the consumer if the loan is refinanced by the existing holder of the loan. The proposal also provides exceptions to the calculation of points and fees for: (1) any bona fide and reasonable third-party charge not retained by the creditor, loan originator, or an affiliate of either, and (2) certain bona fide discount points.

As required by Dodd-Frank, the proposal would adjust the three percent limit for "smaller loans" that are defined as loans less than $75,000 on a sliding scale, or in the alternative, using a formula of up to five percent for loans under $20,000.

The rule also would: (1) provide an additional QM exception for a small creditor operating predominantly in a rural or underserved area originating a "Balloon Payment Qualified Mortgage"[9] and (2) establish an exception to the ability to repay requirement for Refinancing a "Non-standard Mortgage" into a "Standard Mortgage."[10]

MBA's Position

The ability to repay requirement will apply broadly to all mortgage loans and its violation will bring considerable liability not only to lenders but to assignees. MBA's view is that if

[9] Creditor and balloon mortgage must meet requirements in proposal including all requirements for qualified mortgage (except balloon payment allowed), including limits on points and fees; plus loan term of five years or more, and payment calculation based on scheduled periodic payments, excluding balloon payment. Creditor must be small and operating predominantly in rural or underserved area.

[10] Loans that are (1) adjustable-rate with an introductory fixed interest rate for a period of years, (2) an interest-only loan, and (3) a negative amortization loan can be refinanced into a "standard mortgage," not containing negative amortization, interest-only payments, or balloon payments; and which are subject to limits on points and fees may be refinanced without the creditor having to verify income or assets with written documentation, as long as the creditor for the existing mortgage and new mortgage are the same; borrower has a positive payment history on the existing mortgage; and payment on the new mortgage must be lower than the existing payment.

a QM definition is well structured, it will be the chosen means for lenders to comply and, therefore, the best way to incent the sound underwriting that Dodd-Frank seeks to ensure.

Safe Harbor

Having carefully considered the proposed alternatives, MBA strongly believes the QM test should be established as a safe harbor with bright lines to best ensure that the definition achieves its intended purposes. MBA's formal comments to the proposal will strongly urge that:

(1) The CFPB finalize a definition of QM as a bright line safe harbor to ensure safer, well documented, well underwritten mortgages, without unduly limiting the availability, or increasing the costs of, credit to borrowers; and including documentation and verification requirements as well as restrictions against riskier products;

(2) The limit on total points and fees in the QM alternatives proposed should be revised to provide (a) a more realistic definition of smaller loans; (b) exclusions for all third party fees regardless of affiliation with the lender; (c) exclusion of employee compensation to avoid double counting and (d) the exclusions otherwise provided in the proposal, such as certain up-front mortgage insurance premiums and up two discount points (depending on the reduction in rate); and

(3) QM safe harbor requirements be adopted as a basis for the QRM. A sound QM definition structured as a safe harbor should substitute for the QRM definition proposed. A sound safe harbor would incent sustainable mortgages that serve the interests of investors, as well as borrowers. Such a definition, covering all loans would invite private capital back into the market.

In MBA's view, a safe harbor would:

(1) Provide the strongest incentive for lenders to operate within its requirements and, at the same time, allow them to provide sustainable mortgage credit to the widest array of qualified borrowers;

(2) Still allow focused litigation, to determine whether the safe harbor requirements have been met, offering the most efficient and least costly means of resolving

claims; lenders who seek to best serve their borrowers and follow the rules should not be dogged by endless and costly litigation.

A presumption of compliance, on the other hand, would increase liability and borrower costs while lessening the availability of credit to some borrowers and increasing risks to others. Like the QRM, the presumption alternative would ultimately harm minorities, people with lower incomes, and first-time homebuyers. These effects would occur because:

(1) The mix of uncertainty about how a presumption might be resolved and available attorneys' fees would invite more extensive litigation than necessary – this will result in far greater costs being borne by all borrowers; and

(2) As a result of the threat of litigation, some lenders will act more conservatively than is necessary to meet the presumption's standards, not extending credit to borrowers who might otherwise qualify; there is real concern that some lenders may gravitate to only originating loans meeting QRM requirements.

MBA would support a safe harbor along the lines proposed by the Board, with certain adjustments to the points and fees calculation. In fact, MBA would support even stricter standards than those proposed by the Board as long as the standards are part of a clear safe harbor. Such standards might include the standards proposed to satisfy the general ability to repay standard, the presumption of compliance as well as the standards proposed for the general QM safe harbor.

We note, however, how a safe harbor is constructed is as important as the establishment of a safe harbor itself. For a safe harbor to be effective, both to guide behavior and to efficiently resolve cases in court, it must be comprised of bright-line standards, the performance of which can be evidenced by the four corners of mortgage and mortgage-related documents. A mortgage agreement, for example, could demonstrate that it does not include prohibited product features. A manual checklist and calculation sheet based on reliable third party standards or output from a recognized automated system(s) could demonstrate that underwriting standards have been followed.

The rules that ultimately emerge must allow a creditor and assignee to demonstrate compliance with the safe harbor standards with certainty, with written and/or automated compliance tools using physical or electronic records that may include: (1) the borrower's written signed application; (2) creditor or assignee's worksheets; (3) third party records;[11] (4) evidence of use of a widely accepted standards such as FHA or

[11] *Third-party record* means—

GSE guides; and/or (5) evidence of use of third-party automated systems, as appropriate, such as DU® or LP®. We emphasize that while final rules should ensure complete documentation and verification of borrower data, the requirements should not simply mandate a cumbersome manual origination process.

If litigation risks are not channeled into a clear determination of whether the standards have been complied with, they risk shutting down credit entirely. This has been the experience with the Home Ownership and Equity Protection Act (HOEPA) provisions. Because of HOEPA liability, concerning high-cost loans, HMDA data demonstrates that only approximately one-tenth of one percent of loans exceeded the HOEPA triggers for the years 2004-2009.[12]

Points and Fees

MBA believes the three percent limit on points and fees requires significant adjustment.

First, based on data that has been developed by lenders, the definition of smaller loans demanding an adjustment should be increased to $150,000.

Second, whether the customer chooses to use an affiliated provider of the lender or not, the bona fide charges for such non-lender service should be excluded from the calculation. The largest of these fees for title services are “filed fees” over which the lender has no discretion.

Third, while the compensation to originator companies should be excluded from the calculation in light of the recent loan originator compensation rule, at a minimum the payments by borrowers to creditors and brokerages as well as the compensation they in turn permit their originators should not both be counted. Double counting in this manner is simply unfair.

Fourth, MBA supports the other exclusion in Dodd-Frank, including but not limited to certain up-front mortgage insurance premiums and up to two discount points depending on the nature of the rate reduction. MBA will provide further views and documentation on this matter in its comment letter on the QM rule.

(i) A document or other record prepared or reviewed by a person other than the consumer, the creditor, or the mortgage broker, as defined in § 226.36(a)(2), or an agent of the creditor or mortgage broker;
(ii) A copy of a tax return filed with the Internal Revenue Service or a state taxing authority;
(iii) A record the creditor maintains for an account of the consumer held by the creditor; or
(iv) If the consumer is an employee of the creditor or the mortgage broker, a document or other record maintained by the creditor or mortgage broker regarding the consumer’s employment status or employment income.

[12] MBA Analysis of HMDA Data, 2011.

QM/QRM

The obvious difference between the QRM and QM proposals is that the QRM would hard wire high numerical down payment and low LTV and DTI requirements into its requirements. While the QM also requires a loan meet strict product restrictions and underwriting requirements, it appropriately does not impose specific numerical down payment, DTI or LTV requirements.

MBA believes that because both the QRM and QM constructs were intended to achieve the same purpose of ensuring better, more sustainable lending, both constructs should be essentially the same. Considering that the QRM restrictions would exclude too many borrowers from the most affordable, sustainable loans, MBA believes the QM proposal is a much better starting point for both sets of rules.

III. SAFE Act

The Secure and Fair Enforcement Mortgage Licensing Act (SAFE Act) is a major part of the new requirements affecting mortgage loan origination that deserves congressional monitoring. SAFE, which was enacted in 2008 as part of the Housing and Economic Recovery Act, establishes two parallel means of qualifying loan originators – one operated by the states and a second one currently operated by federal banking agencies.

SAFE required the states to establish licensing and registration requirements for originators employed by state regulated lenders and mortgage brokers. Under SAFE, HUD was also required to establish a backup licensing and registration system for those states that did not implement their own system by the statutory deadline. In the event a state system does not meet SAFE's minimum requirements, HUD was authorized to impose the backup system. As of this date, all states have established licensing and registration requirements.

Parallel to the state system, SAFE also requires the federal banking agencies,[13] through the Federal Financial Institutions Examination Council (FFIEC), to develop and maintain a system for registering loan originator employees of depository institutions and their owned and controlled subsidiaries regulated by federal banking agencies or the Farm Credit Administration.

[13] Under SAFE Sec. 1502,12 U.S.C. 5103, the federal banking agencies include the Board of Governors of the Federal Reserve System (Federal Reserve), the Comptroller of the Currency (OCC), the Office of Thrift Supervision (OTS), the National Credit Union Administration (NCUA) and the Federal Deposit Insurance Corporation (FDIC).

Under Dodd-Frank, both the back-up functions of HUD and the responsibilities of the federal banking agencies respecting loan originator supervision are to be reassigned to the CFPB.

The Conference of State Bank Supervisors (CSBS) and the American Association of Residential Mortgage Regulators (AARMR), both associations of state regulators, also have been key to implementing the state licensing system. In 2009, these associations developed a model state law that HUD approved – without notice to and comment by the public – setting forth minimum state law requirements.

On June 30, 2011, HUD issued its final rule[14] setting forth the minimum standards for the state licensing and registration of residential mortgage loan originators and requirements for operating the Nationwide Mortgage Licensing System and Registry (NMLSR), and HUD's federal oversight responsibilities pursuant to SAFE.

SAFE requires that registration of both federally regulated and state licensed loan originators be accomplished through the same system, the NMLSR. This system is operated through CSBS and AARMR.

Currently, requirements under the state and federal systems are inconsistent. Loan originators for state licensed regulators must be both licensed and registered. Loan originators for federally regulated lenders, however, must only be registered (because they are subject to federal requirements). Consequently, mortgage originators of federally regulated institutions, no matter how experienced, must go through training yet again and licensure before they can work for and serve customers of state regulated lenders.

At the same time, because SAFE sets only minimum standards for licensing and qualification, state requirements are inconsistent. States have varying education and licensing requirements. Some have imposed credit score requirements for originators that are inconsistent and others have differing educational and testing requirements. Because of these differences, well-qualified mortgage originators cannot serve consumers across state lines until they, too, have met training and other requirements that are essentially redundant.

For all of these reasons, state regulated companies, including smaller enterprises, are disadvantaged in attracting qualified originators from federally regulated lenders. Consumers, in turn, suffer from decreased choices and potentially increased financing costs.

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[14] 76 Fed, Reg. 38464 (June 30, 2011)

In 2010, the federal banking agencies issued a final SAFE rule and the Farm Credit Administration concluded its SAFE rulemaking. Among other things, the federal banking agencies' rule concluded that SAFE's definition of "loan originator" generally excludes employees engaged in loan modifications or assumptions and, consequently, such employees of institutions regulated by banking agencies and their subsidiaries will not be required to register with the NMLSR.[15] Some state governments have also concluded that servicers and/or those engaged in loan modifications in some form are not covered by SAFE; others have covered servicers expressly and still others await HUD's final rules.

HUD's proposed rule paradoxically asked whether loss mitigation specialists should be covered under SAFE, but in its June 30, 2011 final rule[16] left this matter for determination to the CFPB.

MBA's Position

MBA has been particularly concerned about a state-by-state approach to licensing resulting in inconsistent requirements, the failure of regulators to lessen the disadvantages that result from asymmetrical requirements under SAFE for federally-regulated versus state regulated lenders, and the extension of SAFE's requirements beyond originators to servicers.

Without revising the statute, MBA believes HUD and eventually the CFPB can do much more to achieve SAFE's central objective of establishing consistent standards for state regulated loan originators, facilitating competition among lenders and the availability nationwide of well-qualified originators. Differences in education and testing requirements among states as well as different requirements for credit scores unduly burden lenders and increase costs while interfering with the movement of qualified originators to serve consumers.

MBA believes the government's efforts going forward should encourage consistency and permit transitional licensing of federally registered originators pending state licensure and the reciprocity of out-of-state licenses. States should establish provisions for transitional licensing of registered loan originators of federally regulated entities, who are required to be registered under SAFE but not licensed, to be licensed for a reasonable period of time, on a transitional basis, while seeking to meet the state licensing requirements. Additionally, when a state has requirements that differ from

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[15] The joint final rule as adopted by the FDIC on November 12, 2009 at http://www.fdic.gov/news/board/2009nov12no8.pdf, pp. 24-25.

[16] 76 Fed, Reg. 38464 (June 30, 2011)

those of another state where an originator has been licensed, the state should either recognize the license or, at minimum, provide a transitional license to the out-of-state licensee for a reasonable period of time to permit satisfaction of licensing requirements. If necessary, the statute should be amended to achieve these ends.

Moreover, MBA has consistently taken the position that there is no basis under SAFE or its legislative history to require that mortgage servicer employees be licensed and/or registered. Additional licensure and registration requirements under SAFE for persons engaged in loan modifications or assumptions, as proposed by HUD, will unnecessarily lessen the availability of loan modification specialists and increase servicing costs. Most importantly, such coverage will hamper the ability of loan modification specialists to move between federally and state regulated companies and otherwise hinder servicers' ability to serve the needs of troubled borrowers particularly those facing foreclosure.

MBA hopes the CFPB will conclude the term "loan originator" was not intended to and does not encompass servicers, including those engaged in loan modifications and assumptions. At this point, any other result would not only be harmful to the servicing process, but would add to the asymmetry between federally-regulated and state-regulated entities.

MBA asks Congress to carefully monitor this matter and, if necessary, take steps to exempt servicer employees engaged in loan modifications from SAFE coverage. Notably, following the enactment of SAFE, servicers engaging in loss mitigation activities were excluded from the definition of "originator" under Dodd-Frank by Congress – for good reason.

Congress should also carefully monitor the other activities of the CFPB with respect to SAFE. Such monitoring should seek to ensure that SAFE is implemented in a manner that serves its purpose of providing sound, consistent qualification and registration standards across the nation for mortgage loan originators, while also fostering a level playing field between federally-regulated and state-regulated lenders to further competition and best serve consumers.

The system should (1) allow qualified loan originators to move among the states and among federally-regulated and state-licensed lenders; (2) further consistency among the states; and (3) not diminish its focus by extending unnecessarily into areas such as licensing of servicers. Congress should also ensure that the NMLSR operates as economically and efficiently as possible.

IV. LOAN ORIGINATOR COMPENSATION

During the past 18 months, two government agencies took separate actions that resulted in considerable implementation and operational costs for the mortgage industry – costs that are ultimately borne by consumers. These actions included an unanticipated and abrupt policy reversal by the Wage and Hour Division of the Department of Labor (DOL) rendering the "administrative exemption" to the Fair Labor Standards Act (FLSA) largely unavailable to mortgage loan officers,[17] as well as a final rule issued by the Federal Reserve broadly prohibiting certain longstanding compensation practices for mortgage loan originators.[18]

DOL Wage and Hour Division's Ruling

On March 24, 2010, the Acting Director of DOL's Wage and Hour Division issued an Administrative Interpretation (AI) holding that employees who perform the typical job duties of a mortgage loan officer do not qualify as *bona fide* administrative employees within the "administrative exemption" under the FLSA. This action abruptly reversed and withdrew a September 8, 2006, opinion to the MBA from the Wage and Hour Division permitting use of the administrative exemption for loan officers. The AI was issued without notice or public comment and with no time for lenders to implement the new requirements. This abrupt reversal is subjecting the industry to unnecessary litigation seeking significant alleged damages.

Employees paid on commission outside the mortgage industry are ordinarily exempt from FLSA coverage under a "retail sales" exemption, which has not been available to financial services employees. A relatively antiquated Supreme Court decision created this anomaly. For financial services employees to be exempt, another exemption – such as the "administrative exemption" or "outside sales exemption" – must apply. Forcing mortgage loan officers to be covered under the FLSA is necessitating additional administrative and reporting requirements in addition to inviting litigation that will increase costs to companies and ultimately consumers.

On January 12, 2011, MBA filed suit against DOL under the Administrative Procedure Act (APA) asking the United States District Court for the District of Columbia to set aside the AI. MBA's position is that when an agency reverses its interpretation of its own regulations, the law requires that the new interpretation be issued only after notice and an opportunity for public comment. Because this public process was not followed, the AI should be set aside. Also, because the DOL's interpretation in the AI is contrary

[17] Administrator's Interpretation No. 2010-1 (AI).

[18] 75 Fed. Reg. 58509, (September 24, 2010).

to the plain language of the DOL's regulations and the preamble interpreting them, MBA's suit urges that the AI be considered arbitrary, capricious, an abuse of discretion, and otherwise contrary to law in violation of the APA.

Recently, a U.S. District Court jury found for the lender in a major case involving the company's use of the administrative exemption. The verdict is consistent with MBA's view that overtime requirements are inapplicable to those professionals who advise consumers on mortgage loans and also consistent with DOL's 2006 opinion.

Federal Reserve's Loan Originator Compensation Rule

In 2009, as part of an overhaul of its Truth in Lending Act (TILA) disclosure rules,[19] the Federal Reserve proposed restrictions on loan originator compensation to prohibit unfair and deceptive acts and practices. It did not move forward with its overhaul of disclosures, but in August 2010 finalized the loan officer compensation proposal, knowing that additional rulemaking would be needed to implement similar and additional rules under Dodd-Frank.

The Federal Reserve rule prohibits: (1) basing compensation to a loan originator on a loan's terms or conditions, subject to an exception for loan amount; (2) compensation to a loan originator from both the consumer and a party other than the consumer for the same transaction; and (3) an originator from steering a consumer merely to receive greater compensation. It appropriately does not subject payments from the secondary market to lenders or mortgage brokers to the originator compensation restrictions where they are funding loans through deposits or warehouse lines of credit. On the other hand, it subjects creditors as well as brokerages to the rule's steering restrictions when they are simply brokering loans.

MBA opposed the Federal Reserve's loan originator compensation rule when it was proposed and favored a far more targeted approach that included better disclosure. It also opposed piecemeal rulemaking on this subject knowing these rules would be revised later under Dodd-Frank.

Moreover, since the rule was issued, countless compliance questions have arisen from creditors and loan originators. These include such very basic questions such as: What defines an 'originator'? What justifies compensation differences among products? How do the rules work with state financing programs? And how is the rule to be reconciled with the RESPA rules? The rule and its accompanying commentary did not provide clear answers to numerous important questions. While the Federal Reserve provided some verbal responses to industry questions, it made clear that only written

[19] Cite 2009 Rule

commentary could be relied on and it would not provide such clarification outside the rulemaking process prior to the rule's effective date. At the same time, many of the answers that were provided were inconsistent with the rule itself and its purposes.

MBA spent considerable time and resources seeking and providing industry guidance on the rule for its members through numerous workshops and webinars, one of which the Federal Reserve participated in. Despite continuing uncertainty, the Federal Reserve maintained its compliance deadline of April 1, 2011, for loan applications received by creditors, giving lenders less than seven months to comply.

MBA's Position

DOL Wage and Hour Division's Ruling

MBA would support legislation, if necessary, to require that DOL withdraw its Administrative Interpretation. If DOL determines, following a study of the industry, that a change in its interpretation is warranted, it should propose any revision to its 2006 interpretation for public comment. Following consideration of public comments, if DOL still determines to go forward, a sufficient period to implement the rules should be authorized before any new interpretation becomes effective.

Federal Reserve's Loan Originator Compensation Rule

Congress should carefully monitor the CFPB's implementation of the Federal Reserve's loan originator compensation rule and insist on a review of its guidance. MBA also believes Congress should carefully monitor the upcoming implementation of the Dodd-Frank provisions on loan originator compensation, to ensure that sufficient input is received from and appropriate compliance guidance is provided to lenders.

While some of the Dodd-Frank restrictions in this area overlap with recent actions by the Federal Reserve, we are very concerned about how the new anti-steering provisions will be implemented and that the follow-on rules provide an opportunity for us to correct those aspects of the Board rules that are ill-founded.

A larger point is that as responsibility for TILA and broad consumer financial regulation moves to the CFPB, it is particularly important for the CFPB to develop an orderly process for its myriad rulemaking initiatives – not only to ensure meaningful input from the industry and other key stakeholders, but to develop well-conceived rules and a process for providing timely, reliable guidance well prior to implementation.

V. APPRAISALS

MBA has long encouraged efforts to require residential property valuation practices that minimize opportunities for fraud, coercion or undue influence in the loan approval process. MBA continues to support provisions in Section 1472 of Dodd-Frank and policies outlined in the Federal Reserve's Interim Final Appraisal Rule, which became mandatory on April 1, 2011. Key provisions in the statute and the rule include maintaining appraisal independence and requiring appraisers to be paid "customary and reasonable fees."

These compliance provisions comport with many of MBA's principles for fostering the validity of property valuations and ensuring the integrity of those who conduct such valuations. MBA strongly endorses policies to ensure that appraisers conduct property valuations in a manner that is free from the influence of any party to a real estate transaction that has a financial interest in its outcome, including real estate agents, title agents, mortgage brokers, loan officers, sellers and buyers. Allowing a party with a material interest in the successful origination of the transaction to influence an appraiser hinders what must be an arms-length collateral valuation process and jeopardizes "appraiser independence" Itself. This independence is critical to protecting the lender and the borrower from valuations that misrepresent the true market worth of a property.

With respect to the provision regarding "customary and reasonable" fees, MBA strongly agrees with the Board's determination that the marketplace should be the primary determiner of the value of appraisal services. The method proposed by the Board in the rule is logical, fair, and objective. It best protects consumers from excessive fees and allows the marketplace to find and create efficiencies which ultimately result in lower consumer borrowing costs.

MBA's Position

One area of concern is the proliferation of legislative activity in the states regarding the regulation of the appraisal industry and appraisal management companies (AMCs). Many states are considering various legislative proposals aimed at dictating how appraisal/vendor management companies should operate their businesses. Increased legislative activity over the last year has resulted in a myriad of laws that have unnecessarily increased the regulatory burden on lenders as national and regional companies try to ensure compliance with often conflicting state regulations. Recent proposals for appraisal/vendor management company laws in numerous states present conflicts of interest and inconsistencies and would bring unintended consequences. Many of these proposals would neither improve the industry or safeguard the consumer

In an effort to provide reasonable and effective oversight and consistent policies, MBA recommends the regulation of appraisal valuation standards by a strong, single, federal entity, rather than a patchwork of state laws where separate and conflicting state requirements create confusion and costly compliance burdens.

MBA believes that strong, uniform national supervision of the appraisal industry is critical to achieving consistently high standards. A possible regulator could be the Appraisal Subcommittee of the Federal Financial Institutions Examinations Council (FFIEC). Effective national regulation would assist in rebuilding trust and confidence in the appraisal and mortgage industries and provide protection from unscrupulous actors who taint the home buying process and place both lenders and consumers at financial risk. Your support of such legislation would be welcome.

VI. RESPA-TILA

Under Dodd-Frank, the CFPB takes over responsibility for RESPA and TILA along with numerous other consumer financial protection laws. The law also mandates that no later than one year after the transfer date, the CFPB issue a proposed regulation to integrate and combine the TILA and RESPA disclosures at application and at settlement.

MBA has long supported much greater transparency in the mortgage process and comprehensive reform of RESPA and TILA disclosures. For that reason, we welcome Dodd-Frank's consolidation of RESPA and TILA authorities under one roof. Recent experience has shown that separating these authorities between HUD and the Federal Reserve did not result in improvements to these disclosures.

We also strongly support Dodd-Frank's mandate to integrate RESPA and TILA disclosures and the effort by Treasury Secretary Timothy Geithner and Special Advisor to the President Elizabeth Warren to make this work a high priority of the CFPB. Generations ago, Congress enacted RESPA, as HUD's responsibility, largely to ensure consumers were informed of their real estate settlement costs and TILA, as the Federal Reserve's responsibility, to ensure consumers are informed of the costs of credit. Considering that the purchase and financing of a home is the largest single financial transaction for most people, and that closing costs are intertwined with credit costs, both sets of disclosures must be effective, well coordinated and complementary.

Since these laws were enacted, in part because of the divided responsibility for regulation, RESPA and TILA disclosures have gone in different directions and are accompanied by confusing and sometimes overlapping requirements.[20]

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[20] A recent example of overlapping and problematic TILA and RESPA requirements is the new Interim Final Regulation (MDIA) issued by the Board of Governors of the Federal Reserve System (Board) under the recent

Although both agencies have recognized the need for reform, they moved separately in that direction with disappointing results. In 2008, HUD proposed and finalized rules overhauling the Good Faith Estimate (GFE) and HUD-1 Settlement Statement. Untold expenses continue to be incurred by the lending industry to implement that rule, which at this point is likely to be eclipsed by new comprehensive reforms.

In the summer of 2009, as indicated earlier, the Board proposed a complete overhaul of its TILA disclosures for most closed-end and open-end transactions and required comments at the end of that year. The following summer, the Board issued a second proposal covering transactions and topics not addressed the previous year. While there are good ideas in these proposals, both proposals required extensive review and an enormous investment of time by stakeholders to provide meaningful comment. Ultimately, however, the Federal Reserve indicated it would not finalize most of the proposals so as not to interfere with the upcoming CFPB effort. It is possible that the CFPB may reawaken some of these ideas but we believe it should only do so in the context of comprehensive reform and a new opportunity for comment.

Notably, Congress added to disclosure concerns in 2008 by requiring new requirements for TILA disclosures, which differ from the requirements and timing of RESPA disclosures. These differences were exacerbated by additional timing requirements for redisclosure of the GFE under the new RESPA rule, and proposals in the previous Congress for additional timing requirements would have made matters worse.

As a result of both legislative and regulatory requirements, consumers today receive a package of disclosures when they apply for a loan, and then continue to get a dizzying array of redisclosures and amended disclosures until their loan closes. A comprehensive look at all of the timing requirements for disclosures should occur along with the effort to redraft the disclosures themselves.

In May of this year, the CFPB's effort began with announcement of an iterative process for proposing and refining prototypes of forms combining existing RESPA and TILA disclosures over the coming months to culminate in a final set of proposed forms and issuance of accompanying rules. The first set of prototypes was issued then and

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Mortgage Disclosure Improvement Act. This rule requires disclosure of a new Interest Rate and Payment Summary form to show how an interest rate or payment amount may change. We agree disclosure of that information is important. But the new disclosure form repeats information that is already required to be disclosed on the GFE and HUD-1 under the new RESPA rule, but on a different form.

comments were invited for a week. A revised set of prototypes were issued at the end of June with a week-long comment period over the July 4th break.

While MBA appreciates that the process is moving forward, we are seeking clarification from the CFPB regarding the extent to which the forms will be governed by current RESPA and TILA requirements. That information is needed so that input by the industry and other stakeholders can be focused. MBA recently requested a meeting with the CFPB to clarify this issue and to offer an opportunity for more robust input into the process from experienced professionals.

MBA's Position

MBA believes that while this effort needs to be encouraged, Congress should monitor the CFPB's RESPA and TILA efforts carefully. MBA opposes implementing piecemeal changes to RESPA and TILA disclosures. Rather, we believe the CFPB should conduct comprehensive reforms and issue a proposed rule that includes the required simplification of RESPA and TILA disclosures mandated by Dodd-Frank.

MBA believes it is crucial that the CFPB draw on the experience of the housing finance industry as it develops its proposals. Lenders work with consumers day-in and day-out and have extensive experience in conveying information to consumers in the most useful manner at optimal times.

When the CFPB completes its proposal, it must provide sufficient opportunity for comment and deliberation. The CFPB should not implement revisions without providing both formal and informal guidance so lenders large and small can comply. Also, considering the extensive systems, retraining, legal and other costs that these changes will require – the costs of which will ultimately be borne by consumers – a reasonable period for implementation is essential.

Finally, while Congress should monitor the process, we would urge it to refrain from amending either the TILA or RESPA requirements at least until the direction of the CFPB's effort becomes clear. Premature legislative action would only serve to further confuse an already confusing process.

Conclusion

We appreciate the efforts of this subcommittee to examine these important regulations and consider our comments. No matter how well intentioned rules may be, they cannot be allowed to harm American families, the mortgage market or the nation's economic recovery. Thank you again for providing me the opportunity to testify. I look forward to your questions.

United States House of Representatives
Committee on Financial Services

"TRUTH IN TESTIMONY" DISCLOSURE FORM

Clause 2(g) of rule XI of the Rules of the House of Representatives and the Rules of the Committee on Financial Services require the disclosure of the following information. A copy of this form should be attached to your written testimony.

1. Name:	**2. Organization or organizations you are representing:**
Henry V. Cunningham, Jr.	Mortgage Bankers Association
3. Business Address and telephone number:	
[redacted]	
4. Have you received any Federal grants or contracts (including any subgrants and subcontracts) since October 1, 2008 related to the subject on which you have been invited to testify?	**5. Have any of the organizations you are representing received any Federal grants or contracts (including any subgrants and subcontracts) since October 1, 2008 related to the subject on which you have been invited to testify?**
☐ Yes ☑ No	☐ Yes ☑ No
6. If you answered .yes. to either item 4 or 5, please list the source and amount of each grant or contract, and indicate whether the recipient of such grant was you or the organization(s) you are representing. You may list additional grants or contracts on additional sheets.	
7. Signature:	

Please attach a copy of this form to your written testimony.