

National Association of Independent Housing Professionals
N.J. Association of Professional Mortgage Originators
Illinois Association of Mortgage Professionals
Washington Association of Mortgage Professionals
New York Association of Mortgage Brokers

June 4, 2012

Hon. Richard Cordray
Director
Consumer Financial Protection Bureau
1801 L Street N.W.
Washington, D.C. 20036

Re: SBREFA Review Panel Comments

Dear Director Cordray:

The National Association of Independent Housing Professionals (NAIHP), the New Jersey Association of Professional Mortgage Originators (NJPMO), the Illinois Association of Mortgage Professionals (IAMP), the Washington Association of Mortgage Professionals and the New York Association of Mortgage Brokers (NYAMB)... (collectively "Associations") appreciates the opportunity to comment on the proposals discussed during the May 23, 2012, SBREFA Review Panel.

The Associations understand and support the need for protecting consumers in the marketplace. However, in recent years, it appears a "trial and error" approach to regulating has replaced factual data, resulting in significant unintended consequences for both consumers and small business entities.

We acknowledge the CFPB only recently inherited an onslaught of certain rules and regulations from other federal agencies and have specific mandates under Dodd-Frank to finalize same. However, we strongly urge the CFPB to first carefully review the numerous independent studies, government data and expert testimony supplied by NAIHP and others, prior to proposing these regulations. This documentation, which has been in the possession of the CFPB for over a year, clearly establishes mortgage brokers, mortgage bankers and MLOs were NOT the cause of the housing crisis, nor was their compensation. These same documents were provided to the Federal Reserve Board (FRB) during the comment period for the MLO Compensation Rule. When that rule was finalized, we learned the FRB ignored these credible studies and instead chose flawed "surveys" to justify implementation of the rule. Industry warned the FRB the rule would create confusion for consumers and other substantial harm. Furthermore, because the FRB refused to submit a proper compliance guide and answer any

questions in written form regarding compliance, industry still remains confused and in legal jeopardy.

Discount Points:

According to information provided by the CFPB, the agency is “considering its exemption authority to permit consumers to pay discount points to the creditor, provided: the discount points are bon fide...” and “the creditor also offers the option of a no-discount-point loan.” While we applaud the CFPB for considering this exemption, the Associations believe another restructuring of originator compensation is an unnecessary burden and will create consumer confusion and further harm to small business. In addition, this is a disclosure issue and should be addressed under “Know before you Owe.” The use of a simple line item on the new GFE/TIL, with a brief description of discount point(s) would provide clear and transparent disclosure. In addition, consumers already have options for obtaining lower interest rates. Under the current MLO Compensation Rule, borrowers are provided with several interest rate choices, which only differ by the amount of the borrower’s credit. The lowest credit provides the lowest rate. These options have the same effect as paying discount points and are completely transparent.

Flat Fee:

The Associations are opposed to a “flat fee” of any kind, with respect to mortgage loan originator (MLO) compensation. Every level of the mortgage financing industry operates by basis points or percentage. Introducing a flat fee into the process is unworkable and will create substantial harm and confusion to consumers, especially low to moderate income borrowers. Small business will be harmed by a less competitive marketplace, dominated by larger players who aren’t burdened by the same restrictions placed on non-creditors.

During the panel discussion, the SERS were unanimous in their opposition to a flat fee. The SERS represent a cross section of small business professionals with substantial expertise in originations, on both the broker and banker sides. Ignoring the recommendations of these industry experts will lead to a continuation of what have become “trial and error” regulations.

The Associations believe a level playing field can be achieved for the betterment of consumers, by requiring all originators, including both creditors and non-creditors, to disclose on the exact same forms and in the exact same manner. However, we doubt a level playing field is obtainable, unless regulators retreat from practices of the past, which hold creditors and non-creditors to different standards.

The Loan Originator Compensation Rule strictly prohibits brokers and their originators from being compensated by both the borrower and creditor (dual compensation). The Federal Reserve Board in proposing and finalizing this rule, considered this practice to be “unfair and deceptive.” However, they continue to allow creditors to receive Service Release Premiums (SRP). While some have argued SRP is a function of the secondary market, the fact remains, SRP

is built into a consumer's interest rate. Therefore, consumers who elect to use the services of a retail originator are in fact compensating the creditor twice. This double standard can be eliminated by allowing brokers to receive dual compensation. **As a point of clarification, dual compensation is NOT double compensation.**

Allowing brokers to receive dual compensation would help more consumers obtain mortgage financing. Many consumers, who are denied financing due to higher than acceptable ratios, would qualify if allowed to separate their origination costs between the rate and upfront fees.

In addition, during the legal challenge to the MLO Compensation Rule (National Association of Independent Housing Professionals v. The Board of Governors of the Federal Reserve System), the FRB in their answer to the complaint acknowledged there was no difference between wholesale and retail indirect compensation or yield spread premiums.

The Associations request the CFPB use their exemption authority to correct this double standard.

Incentives:

The MLO Compensation Rule and the Merkley amendment under Dodd-Frank were enacted to combat alleged unethical conduct, specific to mortgage brokers. Some regulators and Members of Congress, are still under the impression brokers have an incentive to steer borrowers into a loan with less-favorable terms. Brokers have been accused of this practice, as a way to receive additional compensation.

Most of the evidence provided by consumer groups and others were either anecdotal or depicted conduct by creditors, believed to be brokers. Countrywide Home Loans and Ameriquest are just two examples. If these two creditors were in business today, they would not be subject to the same rules and regulations as brokers or non-creditors. This misconception about brokers has created a bias toward them and has led to an onslaught of rules and regulations, specific to brokers.

Another misconception is consumers lack the will and/or intelligence to understand the process and costs associated with their home loan, thereby rendering them "confused." Although, some consumers may be confused by the process, the majority of borrowers are not. The Associations believe it was unconscionable for the FRB to restructure the entire origination process to accommodate a small percentage of consumers, based on flawed testing.

The Associations further believe they have a less burdensome solution, which would establish a firewall to protect consumers from steering, while restoring consumer choices to the prime market. The Associations aver if the CFPB exercised its exemption authority under Dodd-Frank, by specifically exempting all prime/traditional and government loans from the MLO Compensation regulations, while retaining the restrictions for high cost and subprime mortgages, it would eliminate any incentive for placing a prime qualified borrower in a high

cost mortgage for the purpose of greater financial gain. We urge the CFPB to give serious consideration to this proposal.

MLO Qualification and Screening:

Most consumers believe there's no difference between banks and non-banks, with respect to mortgage financing. Therefore, consumers have the same expectations when it comes to consumer protections.

As you are aware, Dodd-Frank requires MLOs to be "qualified." When a consumer discloses their complete financial history and personal credit information to a MLO, they have certain basic expectations, specifically confidentiality, competency and trust. When a consumer works with any MLO, other than those employed by a federally chartered bank, they're working with an originator who has been vetted by government agencies and meets the standards established under the Safe Act. These same standards should be the definition for "qualified" under Dodd-Frank.

In the hope of bringing these MLOs up to the "qualified" standards, the CFPB is set to propose a rule that will allow MLOs employed by federally chartered banks to self certify on education and background investigations. During the SBREFA review panel held on 5/23/12, with the exception of one individual, all the panelists recommended all originators meet the same LICENSING standards. This includes federally chartered banks and non-profits.

Over the past several years, some federally chartered banks have proven to be less than trustworthy. In fact, they were responsible for the onerous mortgage products sold to consumers and for lax underwriting that approved unqualified borrowers. The consumer deserves to work with a qualified originator, who has been investigated and tested. Self certification is tantamount to having the fox guarding the henhouse.

During a recent call between the CFPB and major trade associations, the CFPB stated, they were proposing the self certification, because they didn't want to burden creditors. This comment has raised concerns with non-creditors and state chartered banks, as it clearly shows creditors continue to receive preferential treatment.

The Associations strongly suggest any individual, who originates a residential mortgage loan, regardless of where employed, should be subject to the Safe Act LICENSING standards.

Impact on the Cost of Business Credit:

At issue here, is NOT the impact on the Cost of Business Credit, but the cost of sustaining business operations. Every time regulators implement another rule or regulation, small business must re-educate personnel and re-tool software to accommodate the change(s). Lately, this has become a yearly occurrence.

Small business entities have the same expenses and overhead as larger industry participants. However, creditors lack the same restrictions imposed on brokers, which enables their institutions to easily meet operating expenses and grow their businesses. Furthermore, the Associations question the government's authority to not only limit or restrict a private company's compensation, but to selectively choose which entities must adhere to those restrictions.

Approximately 77% of small business mortgage professionals (brokers and their originators), have either gone out of business, and/or relocated to creditor institutions, as a direct result of rules and regulations that pick winners and losers.

The CFPB has long stated, competition and a level playing field will keep consumer costs down and promote fair lending. Following the recommendations of the undersigned Associations, will help accomplish these goals.

Should the topics under consideration by the CFPB become finalized rules, they will eliminate additional jobs and substantially reduce competition.

Although, the proposals discussed during the MLO SBREFA Review Panel, are well intentioned, industry considers same to be extreme measures for an already overregulated industry. Alternatives exist for accomplishing a less confusing origination process, without causing consumer harm and an additional burden on small business.

One of the most notable consumer advocates and creator of the CFPB recognizes the negative effects of "layering on one regulation after another." Statement by Elizabeth Warren:

"I believe that clearer, simpler regulation—regulation that is designed to work for small businesses and consumers—can help make markets work better. The financial crisis showed us what happens when regulations aren't enforced and giant Wall Street businesses have too little oversight. Deregulation certainly didn't help the small banks and credit unions that got swept up in that mess. But we also can't keep layering on one regulation after another, adding more and more complexity, without assessing the effects on families and small businesses."

We need a new approach that includes a serious assessment of the compliance cost of current regulations and whether adequate protection for consumers can be accomplished using cheaper, simpler approaches, or, in specific cases, if the regulations are so heavily layered on top of each other that some can be cut altogether." Elizabeth Warren

Again, the Associations appreciate the opportunity to comment on these important issues and look forward to working with the CFPB to resolve our differences.

Respectfully Submitted,



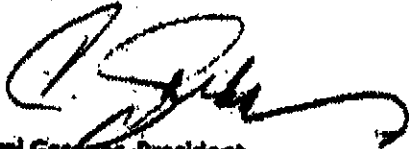
Marc S. Savitt, President

National Association of Independent Housing Professionals (NAIHP)



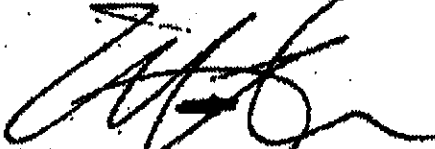
Brian Benjamin, President

N.J. Association of professional Mortgage Originators (NJPMO)



Carol Gardner, President

Illinois Association of Mortgage Professionals (IAMP)



Marty Lough, President

Washington Association of Mortgage Professionals (WAMP)



Maryann Pino, President

N.Y. Association of Mortgage Brokers (NYAMB)

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NATIONAL ASSOCIATION OF INDEPENDENT
HOUSING PROFESSIONALS, INC.,

Plaintiff,

-v-

BOARD OF GOVERNORS OF THE FEDERAL
RESERVE SYSTEM, et. al.

Defendants.

NO. 1:11 – cv – 00489 (BAH)

NATIONAL ASSOCIATION OF MORTGAGE
BROKERS,

Plaintiff,

-v-

BOARD OF GOVERNORS OF THE FEDERAL
RESERVE SYSTEM, et.al.

Defendants.

NO. 1:11 – cv – 00506 (BAH)

AFFIDAVIT OF SARAH BUTLER

I. Qualifications

1. I am a Senior Consultant at NERA Economic Consulting (“NERA”) where I participate in the Intellectual Property, Antitrust, Product Liability, and Labor Practices. My business address is 1 Front Street, San Francisco, CA 94111. NERA is a firm providing expert economic, financial, statistical, and survey research analysis.

2. Among my responsibilities, I conduct survey research, market analysis and sampling analysis on a wide range of topics regarding business and consumer decision making, consumer choice, and consumer behavior. In the course of my career, I have conducted numerous studies for leading corporations and government agencies involving research on consumers, employees, and businesses. My work has been included in numerous lawsuits involving issues of trademark and trade dress, false advertising, secondary meaning, as well as antitrust and employment related litigation. I am a member of American Association of Public Opinion Research, the American Statistical Society, the Intellectual Property Section of the American Bar Association and the International Trademark Association (INTA).

3. I have also worked as a market researcher conducting focus groups, in-depth interviews and surveys of physicians and patients. I worked as an independent consultant conducting research for the Department of Environment and Rural Affairs in the United Kingdom. I have taught courses focused on or involving research methodologies in both the United States and Europe. I hold a Master’s Degree from Trinity College, Dublin and another Master’s Degree from Temple University.

4. I have substantial experience conducting and using surveys and focus groups to measure consumer opinions and behaviors regarding products and services including purchase processes, branding and positioning, market segmentation, product attributes, new product research, and communications strategies. During my career in academic and commercial research, I personally facilitated focus groups and conducted in-depth interviews. A copy of my current resume and testimony in the last five years is attached as Exhibit A.

5. NERA is being compensated for my services in this matter at my rate of \$420 per hour. No part of NERA’s compensation depends on the outcome of this litigation.

II. Documents Reviewed

6. As part of my work, I reviewed the Board of Governors Memorandum in Opposition to Plaintiffs' Applications for Temporary Restraining Order. I also reviewed the Macro International Report, "Consumer Testing of Mortgage Broker Disclosures," (hereafter "Macro Study") and the AARP PPI Data Digest entitled, "Experiences of Older Refinance Mortgage Loan Borrowers: Broker – and Lender – Originated Loans" (hereafter "AARP Study"). A list of the specific materials I relied upon can be found in Exhibit B.

III. Assignment and Summary of Conclusions

7. I was retained by counsel to determine whether the Board of Governors of the Federal Reserve System (hereafter "Board") can reasonably rely on the Macro Study and AARP Study to support its claim that disclosures are ineffective. Specifically the Board asserts,

Based on experiences with consumer testing, and in particular the 2008 consumer testing conducted in connection with the proposed 2008 rule, the Board further concluded that disclosure alone is insufficient for most consumers to avoid the harm caused by these unfair practices.¹

8. I understand that Macro International was commissioned by the Board to conduct a series of in-depth interviews with consumers.² I further understand that the results from the AARP Study the Board relied upon were survey findings from a larger study conducted by Market Facts for AARP's Public Policy Institute and the Federal Home Loan Mortgage Corporation.³

9. Based on my review of Macro Study and the AARP Study, I conclude that the Board should not rely on these results to determine the effectiveness of broker disclosures in the relevant consumer population.

¹ *Board of Governors of the Federal Reserve System's Memorandum in Opposition to Plaintiffs' Application for Temporary Restraining Order and Preliminary Injunction* (hereafter "Board Memo") (p. 12).

² Macro International, Inc., *Consumer Testing of Mortgage Broker Disclosures*, dated July 10, 2008, (p. i).

³ AARP PPI Digest, "Experiences of Older Refinance Mortgage Loan Borrowers: Broker- and Lender- Originated Loans," Number 83, January, 2003 (p. 2).

10. As discussed in detail below, the Board's use of these studies as evidence of the lack of disclosure efficacy in the total, relevant consumer population is unreliable for the following key reasons:

- The sample of 35 interviews in the Macro Study is not adequate to represent the relevant population of consumers;
- The Macro Study was not designed or intended to measure the effectiveness or impact of disclosures in the relevant population. Instead, this research was designed as a qualitative study for testing and revising model disclosure language;
- The selection process for the interviewees in the Macro Study likely created bias;
- The AARP study can only be used to represent the attitudes and opinions of borrowers 65 and older; and
- The AARP study does not specifically address the effectiveness of disclosures in any way.

IV. Background

11. I understand that after a series of hearings and reviews, the Board proposed a rule regarding broker compensation and disclosures in January 2008. This proposal included model language which would supposedly inform the consumer that he/she would pay the broker (even if creditor paid a portion of the compensation) and that the creditor's payment to the broker could influence what products a broker decided to offer.⁴

12. The Board tested this model language and cited to this testing in its March 18, 2011 memo. The remainder of this report explains my concerns with the Board's conclusions drawn from the Macro and AARP studies.

V. Macro Study Interviewees Do Not Represent the Total Population

13. The Macro Study included a total of 35 individuals in three cities, Washington D.C., Los Angeles, CA and Kansas City, KS. These interviewees were selected after an initial phone interview qualified them for participation. Participants qualified primarily because they

⁴ Board Memo, p 14 – 15.

had obtained a mortgage or refinanced in the last two years. The Macro Study also, "...screened to include a range of ethnicities, ages, and education levels".⁵

14. The Board seems to suggest that these results can represent the entire population of U.S. consumers who have recently obtained or may obtain in the future a mortgage. This is not reasonable. It is not plausible to assert that the seven interviewees in Los Angeles can reliably represent the perceptions of all Californians or all mortgage holders on the west coast. Similarly, it is not meaningful to rely on the responses from nine individuals to represent the attitudes and opinions of all consumers who obtained a loan through a broker.

15. It is important to note that the Macro Study does not attempt to characterize or quantify any of the results by different demographic characteristics nor does the report assert that it selected its respondents to reflect the characteristics of the relevant population. Interviewees were selected to get a "mix" of people, but were not selected to be representative of the total relevant population in this matter.

16. The Macro Study was not designed to account for the variation across U.S. mortgage consumers nor was it designed to yield results which are projectable back to this population in any reliable or meaningful way.

VI. The Macro Study was Not Designed to Address Claims Made by the Board

17. The research methodology used in the Macro Study precludes the Board from using these results to make quantitative generalizations about the relevant population of consumers. The Macro Study is qualitative research and therefore, for a number of reasons, cannot reliably be used to support an assertion that disclosures are ineffective in explaining the role of a broker and broker compensation to all or a significant portion of consumers.

18. In the Executive Summary, the impetus for and purpose of the Macro Study is described as follows, "The Board contracted with Macro International to test this model language through a series of cognitive in-depth interviews with consumers. The goal of these interviews

⁵ Macro Study, p. i.

was to assess how clearly the model language communicated the intended content, and to help the Board make any necessary revisions to make the language more effective”.⁶

19. It is clear that the Macro Study was not intended to assess what percent of consumers would be informed by disclosures nor was the research conducted to determine the rate at which consumers in the relevant population were misled or deceived by any particular disclosure language or practice. Instead, the goal of this research was to gather in-depth feedback on multiple iterations of hypothetical broker documents so that revisions in the document language could be evaluated.

20. To achieve this research goal, Macro International conducted 35 in-depth interviews in three locations. The Macro Study is qualitative research intended to gather descriptive data, allowing for the research design and implementation to vary over time and across participants. This type of research is useful for determining the underlying meaning or processes behind particular thoughts or concepts, “Qualitative research thus refers to the meanings, concepts, definitions, characteristics, metaphors, symbols, and descriptions of things. In contrast, quantitative research refers to counts and measures of things”.⁷

21. Quantitative research is intended to test a defined hypothesis with precision and some degree of statistical accuracy or numerical observation. Qualitative research can inform quantitative research (and vice versa) but these two broad methodological types typically address very different research needs. An appropriately designed quantitative study could have tested the Board’s hypothesis that disclosures are not effective, but this was not the type of research conducted. Two specific ways in which qualitative research differs from quantitative research and how these differences undermine the Board’s conclusions are discussed below.

A. Qualitative Studies Are Often Iterative

22. To support the Board’s claims that a particular disclosure is ineffective in the consumer population, research would need to be designed that would allow for a comparison of the results across and between a representative sample of relevant consumers.

⁶ Macro Study, p. i.

⁷ Berg, Bruce L. *Qualitative Research Methods for the Social Sciences*. Allyn and Bacon: Boston, 2001.

23. As already discussed, the 35 total interviewees are not sufficient to represent the consumer population. Additionally, in the Macro Study, the nature of the questions asked and the materials shown varied between the different interviewees. In total, nine different disclosure texts were used. The numerous iterations and different versions of the materials mean that the results from one day and location of testing are not comparable to another.

B. Qualitative Studies Do Not Quantify the Results

24. To understand the extent to which disclosures were not effective, the research would also need to be able to show that a significant or substantial portion of the relevant consumer population did not understand substantial or significant portions of the disclosures.

25. The Macro Study provides no specific counts or tallies of findings and no way to quantify the extent to which even the small number of 35 interviewees thought or understood particular things. For example, in round one of testing the results indicate that..., “about half of participants understood that brokers would not necessarily provide a loan with a low interest rate”.⁸ Similarly, in round two the report indicates that, “A few were not surprised that the conflict existed...”.⁹ The report does not state anywhere what “about half” or a “few” actually means or provide any measure of the statistical significance of these findings.

26. Similarly, the “Summary of Overall Findings” in the Macro Report is nuanced and does not allow for generalizations. The summary indicates that while some language seemed effective for some consumers, other aspects were not helpful for some other consumers. This may be a useful finding in terms of determining possible changes to the hypothetical documents, but does not indicate in any way the extent to which any of the disclosures tested (or any other disclosures) would or would not be effective in the general population.

⁸ Macro Study, p. 7.

⁹ Macro Study, p. 12.

VII. The Macro Study Results May Be Affected by Selection Bias

27. Potential participants for the Macro Study were contacted by telephone for the initial screening interview. It is unclear how respondents were selected or located for this initial call.¹⁰

28. The screening instrument asked a series of questions to qualify potential respondents and began with the following introductory text:

Hello, I am calling on behalf of the United States Federal Reserve Board. As you may know, recently many Americans have had problems with their mortgages. In response to the recent mortgage issues, the Federal Reserve Board is sponsoring a series of consumer interviews in your area so that we can learn more about how people make decisions regarding their mortgages. We will use what we learn from these interviews to help improve the information consumers receive when they get a mortgage loan.¹¹

29. This script signaled to the respondent that the sponsor of the study was the Board, but also framed the research in terms of “problems with mortgages”. It is likely that the individuals willing to participate had a specific interest in the topic and may have had difficulties with their mortgage or difficulties with some aspect of their mortgage experience.^{12, 13}

VIII. The AARP Study Only Represents Attitudes of Consumers 65 or Older with Refinance Loans

30. The AARP Study reports on results from a larger, quantitative study. The reported results apply to only those consumers who were 65 or older and had refinanced a loan between 1999 and 2000.

¹⁰ Often firms conducting qualitative research rely on lists of individuals who have previously agreed to participate or who express an interest in future or ongoing research. These lists are not random lists of the relevant population and may themselves be biased. There is no further detail in the Macro Study as to how potential interviewees were contacted for the initial screening interview so I cannot determine at this point the extent to which this may have had an impact.

¹¹ Macro Study, Appendix A p. A-1.

¹² Questions about the individuals’ experiences were asked, but the results for these questions were not described in the Macro Study report, nor were they described in any detail in the Board’s comments.

¹³ For the ways in which interview topic can affect the participation and results, see Groves, R., Stanley Presser and Sarah Dipko, “The Role of Topic Interest in Survey Participation Decisions,” *Public Opinion Quarterly* Vol.68: Issue 1, p. 2 – 31.

31. The Board cites to the results of the AARP study to assert that consumers rely on brokers and that disclosures would be ineffective because of this reliance,

The Board concluded, based on its experiences with consumer testing and other information, that disclosures were not a reasonable alternative because they could not sufficiently explain to even well-informed consumers the complexities of yield spread premiums and how they created an incentive for loan originators to increase consumers' costs. This information included both the 2008 Macro Study as well as the findings of a 2003 survey of older borrowers who had obtained prime or subprime refinancing, which indicated the degree of reliance that consumers had on their loan originators to find them the best rate.¹⁴

32. While the AARP study appears to be an appropriately designed quantitative study,¹⁵ the reported results are limited to only those individuals who refinanced and were 65 or older between 1999 and 2000. These results cannot reliably inform the extent to which first time buyers or consumers refinancing under the age of 65 relied on brokers.

IX. The AARP Study Does Not Have Any Data on Disclosures

33. The AARP Study finds that 70 percent of the borrowers 65 or older surveyed relied on their broker "a lot" to find the best mortgage.¹⁶ There is no indication as to how precisely this question was asked and how respondents interpreted "rely" and "a lot", therefore it is unclear precisely how this result can be used.

34. More importantly, this finding provides no information about the potential effectiveness of disclosures with this population. It does not appear that this study showed consumers any disclosure materials or asked questions about the potential effectiveness or attitudes towards disclosures.

¹⁴ Board Memo, p. 14 – 15.

¹⁵ I cannot evaluate the overall reliability of this study without additional documents, including the questionnaire.

¹⁶ AARP Study, p. 3.

X. Conclusions

35. The Board cites to two studies as evidence informing its assertion that disclosures are not an effective means to explain broker compensation to consumers. The Macro Study is qualitative research consisting of 35 in-depth interviews. The AARP Study is a quantitative study of consumers 65 and older who refinanced a loan between 199 and 2000. Neither of the studies cited are sources which can reliably support the conclusion that disclosures are not effective with the relevant population of consumers.

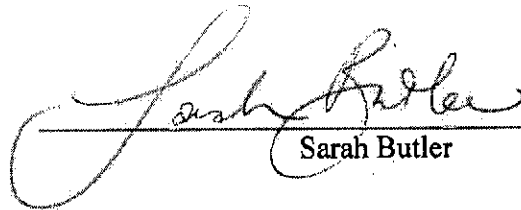
36. The Macro Study was not intended to measure the effectiveness of disclosures in the total population. The research was designed to provide qualitative feedback on particular wordings in hypothetical disclosure documents. The way in which the research was structured; a limited number of in-depth, iterative interviews conducted with a non-representative group of individuals, means the results from this study cannot support conclusions about the total relevant population at issue.

37. The AARP Study, while a quantitative study, is limited to only a portion of the relevant consumer population. The results are limited to individuals who refinanced a loan between 1999 and 2000 and were 65 years or older at the time of the interview.

38. Additionally, the AARP Study does not provide any information about the effectiveness of disclosures and includes only one, somewhat ambiguous, result on the extent to which surveyed individuals “rely on” their brokers.

39. For the above reasons, the Board cannot reasonably rely on the results of these two studies to inform conclusions about the extent to which disclosure would or would not be effective sources of information for the relevant population. My opinions and conclusions as expressed in this report are to a reasonable degree of professional certainty. My work is ongoing and my opinions will continue to be informed by any additional material that becomes available to me.

I declare under penalty of perjury that the foregoing is true and correct. Executed on
March 24, 2011.



Sarah Butler

Exhibit A

SARAH BUTLER, M.A.
SENIOR CONSULTANT

Ms. Butler is an expert in survey research, market research, sampling, and statistical analysis. She has applied her expertise in a wide range of litigation and strategic business cases. Her litigation and project experience includes survey research, market research, the design of samples, and the statistical and demographic analysis of large data files in a number of areas including:

Intellectual Property

- **Trademark and Trade Dress Infringement:** Design, analysis, and critique of surveys used to measure consumer confusion, secondary meaning, and dilution in trademark and trade design infringement cases.
- **False and Misleading Advertising:** Design, analysis and critique of surveys used to measure consumer perceptions and the materiality of advertising claims.
- **Patent Infringement:** Sample designs and surveys to the value of patented feature of a larger product and to establish rates at which infringing material exist in populations of products.
- **Copyright infringement:** Sampling plans and analysis of the rates of infringing material in populations of shared information (such as through websites or other sharing medium).

Antitrust

- **Design, analysis and critique of surveys and other market research used as evidence of consumer purchasing and switching behavior in the areas of CPG, entertainment, automobiles, public transportation, sports and consumer electronics.**
- **Design, analysis and critique of surveys used to demonstrate consumer price sensitivities and willingness to pay.**

Mass Torts/Class Actions

- Conduct surveys and design samples providing evidence on issues of commonality and consumers' awareness of key documents or facts and reliance on representations.
- Analyze large databases of claims files to generate invoices, estimate future liabilities and calculate policy shares for insurer liabilities in asbestos, tobacco and pharmaceuticals.
- Design, analyze and critique surveys and sampling plans used to evaluate employment and promotion records. Review and design surveys for purposes of estimating key facts in labor class actions including time to complete activities, exempt/nonexempt activities, and meal and rest break issues.

Prior to joining NERA, Ms. Butler worked in market research, conducting survey research, focus groups and in-depth interviews. She has recently completed an article for the ABA Trial Practice Newsletter and has written on trademark infringement and the internet and surveys in litigation.

Education

Temple University

ABD Applied Sociology, coursework, exams and dissertation proposal complete (2005).

Temple University

M.A. Sociology, (2000).

Trinity College, Dublin Ireland

M.Phil. (1997).

Wellesley College

B.A. Sociology and History (with honors). (1995).

Professional Experience

July 2006

Senior Consultant

NERA Economic Consulting
San Francisco, California, USA

Oct 2005 – May 2006

Special Consultant

NERA Economic Consulting
London, England

Jan 2003 – Oct 2005 **Senior Analyst - Consultant**
NERA Economic Consulting
Philadelphia, Pennsylvania, USA

2002 - 2003 **Consultant**
Integrated Marketing Associates
Bryn Mawr, PA, USA

Oct 1998 - Jan 2002 **Research Associate – Analyst**
NERA Economic Consulting
Philadelphia, Pennsylvania, USA

Sept 1998 – May 2003 **Adjunct Professor**
Temple University
Philadelphia, Pennsylvania, USA

Jan 1997 – Feb 1998 **Manager of Member Research**
Society for Neuroscience
Washington DC, USA

Expert Analysis and Testimony

Sciele Pharma, Inc. vs. Brookstone Pharmaceuticals, L.L.C. a/k/a Acella Pharmaceuticals, United States District Court, Northern District of Georgia, Atlanta Division. Expert report on issues of false advertising and survey used as evidence of misleading and material claims. [Expert Report: September 22nd, 2010. Deposition: December 1st, 2010]

PamLab, L.L.C. and Metabolite Laboratories, Inc. vs. Brookstone Pharmaceuticals, L.L.C. a/k/a Acella Pharmaceuticals, United States District Court, Eastern District of Louisiana. Expert report on issues of false advertising and survey used as evidence of misleading and material claims. [Expert Report: September 14th, 2010. Deposition: September 29th, 2010]

Confidential client. Design and implement survey used to determine market shares and price elasticity for brands of hair relaxers [2010].

DirecTV, Inc. vs. Elephant Group, Saveology.com et al., United States District Court, Central District of California, Western Division. Consulting expert on likelihood of confusion in a trademark dispute over sale of trademarks as keywords. [2010]

Confidential client. Design and implement survey used to establish family of marks claim for not-for-profit agency [2010].

ConsumerInfo.com vs. J Willims and Edirect, United States District Court, Central District of California, Western Division. Design and implement survey testing confusion and misleading advertising in a trademark dispute [2010].

Rosetta Stone LTD vs. Google, Inc. United States District Court, Eastern District of Virginia, Alexandra Division. Assist in design of a likelihood of confusion survey with regard to trademark or branded keyword searches using the Google search engine. [2010]

Confidential client. Advise and consult on rebuttal strategies in internet keyword case [2009].

Confidential client. Design and implement research used in false advertising suit for pre-paid international telephone calling cards [2009].

Mary Kay, Inc. vs. Amy Weber, Scott Weber, and Touch of Pink Cosmetics, United States District Court, Northern District of Texas, Dallas Division. Consulting expert on likelihood of confusion with regard to sale of branded products on a website [2008].

American Airlines, Inc. vs. Google, Inc. United States District Court, Northern District of Texas, Fort Worth Division. Consulting expert in likelihood of confusion with regard to trademark or branded keyword searches using Google [2008].

Rocky Brands, Inc. and Rocky Brands Wholesale, LLC. vs. Glen Bratcher, Westwood Footwear and Accessories, LLC and Nantong Hong Yi Wang Shoes Co., LTD., United States District Court, Southern District of Ohio, Eastern Division. Consulting expert on likelihood of confusion with regard to trade dress of footwear [2008].

Jack Branning et al. vs. Apple Computer, Inc. Expert analysis on issues of sampling records in a consumer class action. [Testimony before judge, April 2008].

Real Estate Disposition Corporation vs. National Home Auction Corporation, United States District Court, Central District of California. Consulting expert report on survey addressing materiality, confusion and misleading advertising [2008].

Faloney et al. vs. Wachovia Bank, United States District Court, Eastern District of Pennsylvania. Assist in reports on issues related to common representations allegedly made to consumers in a precertification class action lawsuit [2008].

Redwood Fire and Casualty Insurance Company vs. Personnel Plus et al. Superior Court of California, County of Los Angeles. Assist in expert report and sample design to estimate workman's compensation premiums from employee payroll records [2008].

BAA Scottish Airports Market Inquiry, U.K. Competition Commission. Expert review of sample design and survey commissioned by the U.K. Competition Commission to determine price sensitivities and potential switching to alternative airports for an inquiry into BAA ownership of airports in Glasgow and Edinburgh [2008].

Lulu Enterprises, Inc. vs. Hulu, LLC a/k/a N-F Newsite LLC et al. Eastern District of North Carolina, Western Division. Design qualitative research to evaluate consumer confusion between two website names in trademark infringement case [2007].

Federal Trade Commission vs. Whole Foods Market, Inc and Wild Oats Markets, Inc., United States District Court, District of Columbia. Assist in preparing rebuttal report on sampling and survey design issues in an antitrust proceeding related to a preliminary injunction to block a proposed merger of Whole Foods Markets Inc and Wild Oats [2007].

Zill et. al vs. Sprint Spectrum L.P. and Wireless Co. LP, Superior Court of California, County of Alameda. Review the sampling, survey design, survey implementation, and the use of contingent valuation survey to estimate damages in a wireless communications class action. Design focus group guides and telephone survey to understand consumer perception of handset locking [2007].

CRP Project 4c/d Water Framework Directive Benefits Study Department for Environment, Food and Rural Affairs – Expert member of multistage study involving consulting firms, corporate interests and academics. Survey expert asked to design cognitive interview guides, focus group guides and stated preference questionnaire to test consumer willingness to pay for environmental improvements to water bodies across the U.K. Results used to inform policy decisions on how to comply with EU regulations [2006 – 2007].

Hell's Kitchen Neighborhood Association, Martin Treat, Meta Brunzema, Dana Turner, Daniel Gutman, Rudolf Samandarov and Madison Square Garden, L.P., vs. New York City Department of City Planning, New York City Planning Commission, the City of New York, the City Council of the City of New York, and New York Metropolitan Transportation Authority Supreme Court of the State of New York County of New York. Evaluated a survey and submitted an affidavit regarding the construction of a stadium in the Hell's Kitchen section of New York City and the possible resultant traffic congestion [2005].

Energy Brands, Inc. United States Patent and Trademark Office, Trademark Examining Division. Assist in design and conduct of a survey to measure the extent to which consumers perceive Vitamin Water to be a brand name [2005].

Diamond Triumph Auto Glass, Inc. vs. Safelite Glass Corporation U.S. District Court, Middle District of Pennsylvania. Consulting expert for the design and implementation of a survey to measure the extent to which consumers are aware of and state a preference for a particular auto glass shop. Assist in sample design and analysis of telephone calls to estimate the extent to which stated glass shop preferences were honored [2004-2005].

AT&T Corp., vs. Microsoft Corporation U.S. District Court, Southern District of New York Consulting expert in two surveys conducted to examine consumer usage of various features on their personal computers' operating systems [2004].

V&V Vin and Sprit Aktiebolag, d/b/a the Absolut Company, Formansvagen 19, SE-117 97 Stockholm, Sweden vs. Cracovia Brands, Inc., 5632 N.N.W. Highway, Chicago, IL 60646, and Przedsiębiorstwo Polmos Bialystock S.A., ul. Elewatorska 20, 15-950 Bialystock, Poland U.S. District Court, Northern District of Illinois. Reviewed and critiqued a survey of vodka purchasers that was meant to assess the likelihood of confusion between two brands of vodka [2004].

Real Networks vs. Microsoft Corporation. Assist in design and implementation of surveys in the European Union and the United States to understand home computer users' media player preferences [2004].

Metro-Goldwyn-Mayer Pictures, Inc. vs. Mark Brown, Beauty Shop LLC, Renegade Pictures, Inc. and C4 Pictures, Inc. U.S. District Court, Central District of California. Assist in design and implementation of a survey to determine movie-goers associations with the work Barbershop and whether or not they could name a movie or identify the plot of a movie with the work Barbershop in the title [2003-2004].

CSC Holdings, Inc. vs. Yankees Entertainment and Sports Network, LLC. American Arbitration Association. Assist in design and implementation of three surveys to estimate the sizes of the cable television viewing audiences of New York Yankees games [2003 - 2004].

Nitro Leisure Products, LLC, a Delaware Limited Liability Company, d/b/a Golfballsdirect.com and Second Change vs. Acushnet Company, a Delaware Corporation. U.S. District Court, Southern District of Florida. Reviewed and critiqued an internet survey conducted of golfers concerning possible confusion caused by the resale of refurbished golf balls [2003].

Broadway Theater Corp. vs. Buena Vista Pictures Distribution, Inc., Columbia Pictures Distribution, Inc. and Dreamworks SKG. et al. State of Connecticut Superior Court. Assist in design and implementation of a survey to examine movie attendance at seven theaters in the New Haven, Connecticut area [2003].

Papa John's Pizza. Assist in design and implementation of a survey to assess the likelihood of consumer confusion between various pizza products [2002].

United States of America vs. Broadcast Music Inc. et. ano. U.S. District Court, Southern District of New York. Designed and analyzed a sample of radio music plays to estimate royalty shares for publishing societies [2002].

Eolas Technologies, Inc. v. Microsoft Corporation, Inc. U.S. District Court, Illinois Eastern Division. Assist in design and implementation of a survey to measure the impact of altering Internet browser technology [2002].

AM General and General Motors Corporation vs. DaimlerChrysler Corporation U.S. District Court, Northern District of Indiana. Assist in design and implementation of a survey to estimate the secondary meaning of Jeep grilles [2002].

Federal Trade Commission v. Libbey, Inc. et al. U.S. District Court, District of Columbia. Designed and conducted a sample of glassware products to determine manufacturing country of origin and cost [2001].

Office of the Attorney General for the State of New Jersey. Sampled drivers on New Jersey highway to estimate their racial composition [1999].

Gillette Razors. Designed and conducted a survey regarding possible customer confusion over razor blade advertisements [1999].

R. Griggs Group Limited vs. Sketchers USA Inc. Designed and conducted a survey regarding customer confusion between sandal designs [1999].

Publications and Presentations

“Meeting the New Standards for Reasonable Royalties,” (February, 2011) with Mario Lopez. *Law360*.

“Survey Evidence in False Advertising Cases,” (Winter, 2010). *The Antitrust Trial Practice Newsletter*.

“The Use of Surveys in Litigation: Recent Trends,” (April, 2010) with Kent Van Liere. National Economic Research Associates, Inc.

“Emerging Issues in the Use of Surveys in Trademark Infringement on the Web,” with Kent Van Liere. Paper published in the *Advanced Trademark & Advertising Law Conference* proceedings, September 2007, Seattle, WA.

“An Analysis of the Hypothetical Situations in Willingness to Pay Studies.” Paper presented at the July 2006 Thematic Seminar “Quality Criteria in Survey Research,” hosted by World Association for Public Opinion Research, Lake Como, Italy.

“Use of Surveys in Intellectual Property Disputes,” (2005) with Eugene P. Ericksen, in *Economic Approaches to Intellectual Property Policy, Litigation and Management Issues*, Gregory K. Leonard and Lauren J. Stiroh (eds.) National Economic Research Associates, Inc.

“Response Rate Standards: Lessons from the 2004 Presidential Polls.” Paper presented at the 2005 Annual Meeting of American Association of Public Opinion Research, Miami Beach, FL.

“Using Surveys to Determine Damages in Patent Infringement Cases” presented at *Calculating and Proving Patent Damages* workshop, March 2004 Charlotte, NC.

“Using Surveys to Determine Damages in Patent Infringement Cases” presented at *Calculating and Proving Patent Damages* workshop, January 2004 San Diego, CA.

“Using Surveys to Determine Damages in Patent Infringement Cases” presented at *Calculating and Proving Patent Damages* workshop, June 2003, McLean, VA .

Professional Associations

Member, American Association of Public Opinion Research and World Association for Public Opinion Research, Member, American Statistical Association

Member, American Bar Association, Intellectual Property Section

Member, International Trademark Association (INTA), Reviewer for *Trademark Reporter*

Exhibit B

Documents Relied Upon

1. *Board of Governors of the Federal Reserve System's Memorandum in Opposition to Plaintiffs' Application for Temporary Restraining Order and Preliminary Injunction*, dated March 18, 2011.
2. Macro International, Inc., *Consumer Testing of Mortgage Broker Disclosures*, dated July 10, 2008.
3. AARP PPI Digest, "Experiences of Older Refinance Mortgage Loan Borrowers: Broker- and Lender- Originated Loans," Number 83, January, 2003.
4. Berg, Bruce L. *Qualitative Research Methods for the Social Sciences*. Allyn and Bacon: Boston. 2001.
5. Groves, R., Stanley Presser and Sarah Dipko, "The Role of Topic Interest in Survey Participation Decisions," *Public Opinion Quarterly* Vol.68: Issue 1, p. 2 – 31.

C. The Loan Originator Rule

1. The Role of Loan Originators and the Yield Spread Premium¹

As the mortgage loan market currently operates, consumers seeking mortgage financing secured by a dwelling work with a loan originator. Loan originators fall into two categories, which correspond to the two ways in which creditors that fund loans deliver financing to consumers. In the so-called "retail channel," creditors deal directly with consumers through the creditors' own employees, known as loan officers, to arrange the desired financing. Many creditors also have agreements with independent loan originators to deal directly with a consumer to arrange the financing the consumer is seeking. These independent originators are known as mortgage brokers, as they are not the creditor's employees and generally have arrangements with multiple creditors from which they may obtain financing on consumers' behalf. In this category, creditors offer financing terms to brokers and the brokers choose which creditors' loan products and terms to deliver to a particular consumer. Thus, creditors refer to this type of lending as the "wholesale channel": creditors offer mortgage financing at wholesale to brokers, and brokers sell the loans at retail to consumers. Mortgage brokers may be individuals, just like creditors' loan officers, or they may be brokerage firms that in turn employ their own individual loan officers. (Such individual employees of a mortgage brokerage firm also may be referred to as mortgage brokers.)

Mortgage creditors typically offer to loan originators a range of interest rates at which they are willing to extend credit to a particular consumer, given the specific details of the proposed transaction (such as loan-to-value ratio and property type) and the consumer's credit

¹ See generally, *Real Estate Settlement Procedures Act: Simplifying and Improving the Process of Obtaining Mortgages to Reduce Settlement Costs to Consumers*, 67 Fed. Reg. 49134 (July 29, 2002), for a discussion of the roles of mortgage brokers and lenders and the compensation arrangements prevalent in the market.

risk profile. The range generally identifies the so-called "par rate" – the rate at which the creditor is able to offer credit and "break even" (including the creditor's desired profit margin), based on the creditor's current cost of funds. If a consumer wants a loan below the "par rate," the creditor will require the consumer to pay "discount points" up front to buy down the interest rate. Discount points are calculated as a percentage of the loan amount and represent the present value of the extent to which the future interest stream on a particular loan (the loan's "yield") falls below the current par rate.

When the interest rate offered exceeds the par rate, the opposite occurs. The loan will generate a "yield spread premium," also calculated as a percentage of the loan amount, which represents the present value of the extent to which the loan's yield *exceeds* the current par rate. Put another way, a yield spread premium is a form of "negative discount points." The lower the rate on the loan, the more points are required to compensate the lender for the lower yield; conversely, the higher the rate, the larger the yield spread premium generated by the loan.

In the retail channel, where the creditor deals directly with the consumer, the creditor generally controls yield spread premium funds, sometimes applying them toward the consumer's closing costs and sometimes keeping them as additional profit – and sometimes some of each. When the creditor retains some or all of the yield spread premium, it often pays a portion of it to its loan officer as compensation for originating the loan. In the wholesale channel, the mortgage broker usually controls any yield spread premium and may apply the funds generated in any or all of the same ways that a creditor may apply them in a retail transaction, including keeping the yield spread premium as compensation for originating the loan. When the yield spread premium is used to compensate the loan officer or mortgage broker's employee, that employee has a personal incentive to deliver a loan with a high interest rate in order to maximize his or her own

**Fed admits NO difference
between Banks & Brokers
regarding YSP!**

compensation. This is in direct conflict with the consumer's interest in paying the lowest interest rate possible for which the consumer qualifies.

Consumers generally are unaware of these loan-pricing mechanics, especially on the above-par end of the range of rates where yield spread premiums are generated. Loan originators typically do not disclose to consumers the ranges of rates offered by particular creditors or the yield spread premiums generated by particular rates. They simply provide a loan to a consumer at a selected rate (together with any discount points), and the consumer generally does not know where that rate falls in the currently available range. Although many consumers are familiar with paying discount points to buy down their interest rate, consumers are generally unaware of the existence of yield spread premiums, how those amounts are determined, and how the funds are used. In addition to any compensation a mortgage broker may receive from a creditor in the form of a yield spread premium, the broker often charges the consumer a separate fee for arranging the loan; because the consumer is generally unaware of the yield spread premium, the consumer often believes this direct fee is the broker's only compensation for its origination services.

2. The Board's Efforts to Address the Problem of Yield Spread Premiums

Prior to its issuance of the Loan Originator Rule, the Board had spent several years attempting to address concerns regarding the effect on consumers of loan originator compensation based on the yield spread. In the summer of 2006, the Board held public hearings on consumer protection issues in the mortgage market in four cities. During the hearings, consumer advocates urged the Board to ban yield spread premiums because of their potential to create a conflict of interest between loan originators and consumers. 75 Fed. Reg. 58509, 58510.

Bank Market Share 90%
Broker " " 10%

In light of the information gathered during the 2006 public hearings, and the rise in mortgage defaults that began sooner after, the Board held additional hearings in June 2007 to explore how the Board might use its UDAP authority to prevent abuses in the subprime lending market while still preserving responsible lending. 75 Fed. Reg. 58510. While the Board did not expressly solicit comment on mortgage broker compensation at this hearing, commenters continued to raise concerns about the fairness and transparency of creditors' practice of compensating brokers out of the yield spread premium. They stated that consumers are not aware of these payments from creditors to brokers, or that such payments increase consumers' interest rates. They also stated that consumers may mistakenly believe that a broker seeks to obtain the best interest rate available for them. Several creditors and creditor trade associations advocated requiring the broker to disclose whether the broker represented the consumer's interests, and how and by whom the broker was compensated. *Id.*

3. The 2008 Proposed Rule and Testing of Consumer Disclosures In Connection with Mortgage Broker Compensation

To address the heightened concerns regarding the conflict of interest presented by mortgage broker compensation, the Board proposed a rule in January 2008 (the "2008 proposed rule") that would have, among other things, prohibited a creditor from paying a mortgage broker any compensation greater than the amount that the consumer had previously agreed in writing that the broker would receive. 73 Fed. Reg. 1672, 1698-1700 (Jan. 9, 2008). The proposed rule provided model language for the planned written agreement, which would be entered into by the mortgage broker and the consumer before the broker accepted the consumer's loan application and paid any fee in connection with the transaction, that was intended to make the proposed disclosures in a manner that was clear and understandable to consumers. The model language proposed to disclose to the consumer both that he or she would ultimately bear the cost of the