

**National Association of Independent Housing Professionals
N.J. Association of Professional Mortgage Originators
Illinois Association of Mortgage Professionals
New York Association of Mortgage Brokers
Washington Association of Mortgage Professionals
Missouri Association of Mortgage Professionals
Virginia Association of Mortgage Brokers
New Mexico Association of Mortgage Professionals
Arizona Association of Mortgage Professionals**

October 2, 2012

Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
1700 G Street NW.,
Washington, DC 20552

Re: TRUTH IN LENDING ACT (REGULATION Z); Loan Originator Compensation

Dear Ms. Jackson:

The National Association of Independent Housing Professionals (NAIHP), the New Jersey Association of Professional Mortgage Originators (NJPMO), the Illinois Association of Mortgage Professionals (IAMP), New York Association of Mortgage Brokers (NYAMB), Washington Association of Mortgage Professionals (WAMP), Missouri Association of Mortgage Professionals (MAMP), Virginia Association of Mortgage Brokers (VAMB), New Mexico Association of Mortgage Professionals, Arizona Association of Mortgage Professionals (AZAMP)... (Collectively "Associations") appreciates the opportunity to comment on the CFPB's proposed rule known as: TRUTH IN LENDING ACT (REGULATION Z); Loan Originator Compensation.

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 inherited an onslaught of 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, when finalizing 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, finalized in 2011. 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 and the SBA Office of Advocacy warned the FRB, the rule would create confusion for consumers and other substantial harm. Furthermore, because the FRB refused to submit a credible compliance guide and answer any questions in written form regarding compliance, industry still remains confused and in legal jeopardy.

Dual Compensation:

The Associations believe a level playing field can be achieved for the betterment of consumers, by allowing all originators, including creditors and non-creditors, the ability to receive dual compensation. Dual compensation is an important tool used by originators to assist consumers, who might otherwise not qualify to become homeowners. However; we doubt a level playing field is obtainable, unless the CFPB retreats from practices of the past, which holds creditors and non-creditors to different standards.

The current Loan Originator Compensation Rule and the newly proposed rule by the CFPB, strictly prohibits brokers and their originators from being compensated by both the borrower and creditor (dual compensation). Despite full disclosure and complete transparency since 1992, as required by HUD, the Federal Reserve Board in proposing and finalizing this rule, considered this practice to be “unfair and deceptive.” However, the current rule continues to allow creditors to receive Service Release Premiums (SRP). While some have argued SRP is a function of the secondary market, the fact remains, like Yield Spread Premiums (YSP), SRP is built into and reflected in a consumer’s interest rate.

Many consumers, who are denied financing due to higher than acceptable ratios, would have a better chance at qualifying, if they were 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 acknowledged there was no difference between wholesale and retail indirect compensation or yield spread premiums.

This double standard can be eliminated by allowing brokers to receive dual compensation. **As a point of clarification, dual compensation is NOT double compensation.** The Associations request the CFPB use their exemption authority to correct this double standard.

Please Note: During the SBREFA panel held on May 23, 2012, dual compensation was discussed by the SERs for approximately 55 minutes. However, the SBREFA Report makes no mention of this issue or the discussion of same.

Studies:

On three occasions, NAIHP hand delivered two studies to the CFPB. One study was, "The Pricing of Subprime Mortgages, by Mortgage Brokers and Mortgage Lenders." This study conducted by Georgetown University in 2005, examined over one million subprime loans. The study concluded, mortgage brokers saved consumers an average of 1.13% on their annual percentage rate (APR). Brokers, who had been accused for years by consumer groups and some in Washington of taking advantage of minorities, were finally vindicated. The study revealed minorities saved up to 2% on their APR when using a broker. A second study by Harvard University-"Understanding the Boom and Bust in Non-Prime Lending," blamed relaxed underwriting, excess liquidity and risk layering, along with regulatory and market failures, as some of the factors that created the mortgage crisis. Mortgage brokers and mortgage bankers were specifically exonerated.

Steering:

In part, the MLO Compensation Rule and the Merkley Amendment under Dodd-Frank- were enacted to combat alleged unethical conduct specifically by 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.

The anti-broker evidence provided by consumer groups and others were either anecdotal or depicted conduct by creditors, thought 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 towards them and has lead to an onslaught of rules and regulations, specific to brokers. In fact, on several occasions, during public speaking events, the Deputy Director of the CFPB singled out and accused mortgage brokers of unfair and deceptive practices. Specifically, Deputy Director Raj Date stated, **"Let me give you an example from the mortgage bubble: the yield-spread premium. Too often it was the case that mortgage brokers were paid more to give borrowers a worse deal. If a borrower could qualify for a loan at, say, 6 percent, a broker might juice that rate from 6 percent up to 8 percent. As a result, the most important, most visible person in the mortgage process for many**

borrowers – the mortgage broker – had a financial stake that was confusingly and perversely in direct opposition to the interest of the consumer himself. If people are paid to treat customers poorly, it shouldn't be surprising when they do.

The Federal Reserve Board and then Congress took important steps in this area, and it's our job at the Bureau to propose and finalize regulations that end these practices. We're working hard to do just that.

Based on his remarks, it appears Mr. Date came to the CFPB with a preconceived notion about mortgage brokers. His characterization of mortgage brokers is irresponsible and without merit, as numerous, well respected independent studies, have vindicated mortgage brokers.

Perhaps, Mr. Date is confused about who developed the loan products and set the guidelines that helped create the housing crisis. These were the same entities that made the underwriting decisions and placed consumers in loans with little regard for their ability to repay same.

Mortgage Brokers don't underwrite or approve loans.

Another misconception is that 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 and an incomplete survey by AARP. Moreover, it appears the FRB's decision to implement the rule, was also about giving creditors an advantage over non-creditors.

The Associations further believe there's a less burdensome solution, which would establish a firewall to protect consumers from steering, while restoring consumer choice and options 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. If this exemption were enacted- no originator would place a prime qualified borrower in a high cost mortgage for the purpose of earning less compensation and to deal with additional onerous regulations. We urge the CFPB to give serious consideration to this common sense proposal."

Please Note: Precedent already exists with respect to exempting certain types of loans from regulations. Specifically, under Dodd-Frank, Sec. 15G (c) Regulation of Credit Risk Retention, "(ii) a total or partial exemption for the securitization of an asset issued or guaranteed by the United States, or an agency of the United States, as the Federal banking agencies and the

Commission jointly determine appropriate in the public interest and for the protection of investors...”

Prime and government loans are safe loans for consumers and should be treated differently from those programs and products- which proved to be irresponsible.

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 protection.

As you are aware, the Dodd-Frank Act requires MLOs to be “qualified.” When a consumer discloses their complete financial history and personal credit information to an 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 or exceeds the standards established under the Safe Act. These same standards should be the definition for “qualified” under Dodd-Frank.

Transparency is a word we hear a lot about these days. However, it appears there are different rules for different segments of the mortgage industry, regardless of the fact they all perform the same service.

On several occasions NAIHP and others, have advised the Bureau, loan originators who fail the standard NMLS test and/or the State components- seek employment with federally insured institutions, where “qualifications” are absent. Licensed MLOs are concerned the Bureau has chosen to overlook basic safeguards and transparency -by hiding the fact a registered loan originator does not need to meet the educational and testing requirements that a non-depository MLOs must comply with. Allowing creditors to “self-certify” their MLOs is merely a façade for consumer protection.

In a January 26, 2012 meeting with Director Cordray, the Associations brought to the Bureau’s attention, MLOs employed by creditors were misleading the consumer by implying they were licensed. The Associations suggested the Bureau could remedy this situation by altering NMLS numbers to include either an “L” or “R” to differentiate between those licensed and registered. Moreover, it was also suggested to go a step further and clearly define the difference by stating either licensed or registered. However, when the proposed rule was issued, this simple act of transparency and safety was ignored. The Associations believe the bureau failed to act, due to pressure from creditors.

It's difficult to understand why an agency that has been so carefully crafted and designed to protect the consumer allows disparate treatment to exist between the different channels of distribution.

On page 201 of the proposed rule, it states, "Individual loan originators who are not required to be licensed- generally include employees of depository institutions and organizations that a State has determined to be bona fide non-profit organization, in accordance with criteria set forth in Regulation H." On the next page it further states, the proposed requirements apply to unlicensed individual loan originators, of which the core standards are, "financial responsibility, character, and general fitness." It goes on to say, the proposed rule also requires these exempt institutions to provide periodic training to their MLOs, a requirement that is similar, but more flexible than the continuing education requirements that apply to individuals who have SAFE Act-compliant State licenses. It continues still further by stating, provisions under Regulation H, where States may exempt certain employees of bona fide non-profit organizations, are based in part **ON AN ASSUMPTION** that these institutions, banks and non-profits provide basic screening and training to their MLOs, in compliance with prudential regulatory requirements or to ensure a minimum level of protection for consumers. Unfortunately, consumers are exposed to potential threats, as a result of this "assumption."

On August 9, 2012 a Wells Fargo loan officer was charged with mortgage fraud. To be clear, the individual was a bank retail loan officer, not a mortgage broker. The DOJ and the media first incorrectly reported the accused was a mortgage broker. The DOJ charged this person with wire fraud in a \$40 million scheme that involved numerous straw buyers. This is a prime example of why all MLOs should meet the same standards.

Currently, 85% of all residential mortgage loans are originated by banks or creditors, who are the least accountable to consumers. The other 15% are originated by MLOs, who have been vetted with criminal background checks, fingerprinting and the successful passing of state and federal written examinations. Conclusion: 85% of borrowers are substantially unprotected and potential victims to unregulated MLOs.

Thank you for the opportunity to comment on this important issue. The Associations reserve the right to comment further on this proposal, prior to the expiration of the comment period.

Enclosures Attached: National Association of Independent Housing Professionals v. Board of Governors of the Federal Reserve System, et al. Affidavit of Sarah Butler, Senior Consultant- NERA Economic Consulting.

SBA Office of Advocacy. Electronic mail sent to Board of Governors of the Federal Reserve System dated December 23, 2010 and January 13, 2011.

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

Respectfully Submitted,



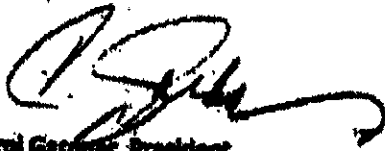
Marc S. Savitt, President

National Association of Independent Housing Professionals (NAIHP)



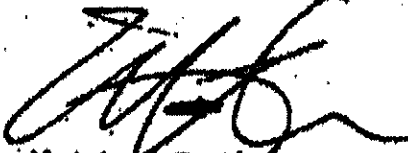
Brian Benjamin, President

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



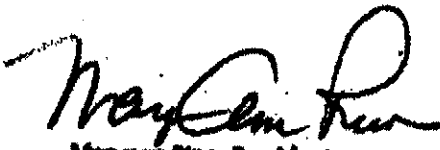
Carol Gardner, President

Illinois Association of Mortgage Professionals (IAMP)



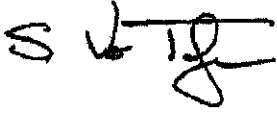
Marty Lough, President

Washington Association of Mortgage Professionals (WAMP)

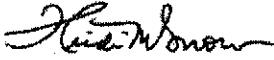


Maryann Pino, President

N.Y. Association of Mortgage Brokers (NYAMB)



Missouri Association of Mortgage Professionals



New Mexico Association of Mortgage Professionals



VIRGINIA ASSOCIATION OF MORTGAGE BROKERS (VAMB)



Aaron VanTrojen

Arizona Association of Mortgage Professionals

**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.

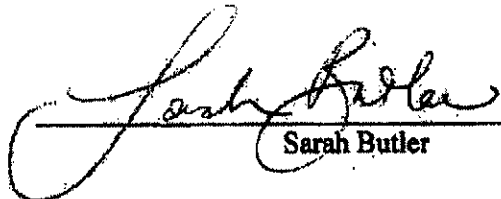

Sarah Butler

Exhibit A

NERA

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Senior Consultant

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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, Alexandria 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 Białystock S.A., ul. Elewatorska 20, 15-950 Białystock, 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.

January 13, 2011

VIA ELECTRONIC TRANSMISSION

The Honorable Ben S. Bernanke
Chairman
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551

Sandra F. Braunstein
Director
Consumer and Community Affairs Division
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Room 8201
Washington, DC 20551

Dear Chairman Bernanke and Director Braunstein:

I am writing in reference to the Board of Governors for the Federal Reserve (Board) final rule on *Regulation Z; Docket No. R-1366, Truth in Lending*, which implements regulations for loan originator compensation and steering.¹ Advocacy is concerned that the Board may not have published a compliance guide as required by the Small Business Regulatory Enforcement Fairness Act (SBREFA).² Advocacy recommends that the Board publish a compliance guide in the immediate future and extend the time for small entities to comply to reflect the delay in the availability of the guide.

Background

Congress established the Office of Advocacy under Pub. L. 94-305 to represent the views of small business before Federal agencies and Congress. Because Advocacy is an independent office within the Small Business Administration (SBA), the views expressed by Advocacy do not necessarily reflect the views of the SBA or of the Administration. Section 612 of the Regulatory Flexibility Act (RFA)³ requires Advocacy to monitor agency compliance with the Act, as amended by the SBREFA. In 1980, Congress enacted the RFA after determining that uniform federal regulations produced a disproportionate adverse economic hardship on small entities. In

¹ 75 Federal Register 58509 (Friday, September 24, 2010).

² Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612) amended by Subtitle II of the Contract with America Advancement Act, Pub. L. No. 104-121, 110 Stat. 857 (1996). 5 U.S.C. § 612(a).

³ Pub.L. No. 96-354, 94 Stat. 1164 (1981), *amended by* Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, 110 Stat. 857 (1996) (codified as amended at 5 U.S.C. §§ 601-612 (2000))

order to minimize the burden of regulations on small entities, the RFA mandates that federal agencies consider the potential economic impact of federal regulations on small entities.

In 1996, Congress amended the RFA with SBREFA. Among other things, SBREFA requires agencies to provide plain English compliance guides to clearly explain each final rule that has a significant economic impact on a substantial number of small entities. The intent of section 212 of SBREFA is to ensure that small businesses have a way to understand complex and technical federal regulations.

The Need for a Compliance Guide

The Board's final rule on loan originator compensation and steering requires major changes to industry practices and procedures by April 1, 2011. Small entities have indicated that the requirements of some of these changes are unclear and confusing. They are concerned that the lack of clarity may lead to problems in compliance.

Advocacy reviewed the Board's website. Advocacy commends the Board for having a SBREFA compliance guide page on its website. However, although there are compliance guides for Regulations C, D, E, F, H, I, J, L, M, O, P, R, V, X, AA, BB, CC, DD, and GG, Advocacy was unable to find a compliance guide for Regulation Z.⁴

Section 212(a) (3) of SBREFA requires an agency to publish each compliance guide on the same date as the date of publication of the final rule or as soon as possible after that date and not later than the date on which the requirements of the rule become effective. In this particular instance, it is imperative that the agency immediately publish a compliance guide on Regulation Z and make it available on its website. It is extremely difficult and expensive to perform the requirements of this rulemaking without proper guidance from the Board. As stated in the preamble to the final rule, this rulemaking requires small entities to "alter certain business practices, develop new business models, re-train staff, and reprogram operational systems to ensure compliance with the final rule."⁵ Without proper guidance, a small entity could develop new business models, reprogram equipment and re-train staff only to learn that the steps taken do not comply with the new regulations. In such a situation, the small entity would incur additional costs that could be avoided if they have the compliance guide. It would be a waste of valuable resources that could be used to address other needs of the business.

As noted above, the intent of section 212 of SBREFA is to ensure that small businesses have a way to understand complex and technical federal regulations. The changes in Regulation Z are complicated and present the types of problems that section 212 was meant to address. Advocacy implores the Board to provide the necessary compliance guide in the immediate future. In addition, because of the complexity of this regulation, Advocacy respectfully requests that the Board provide small entities with additional time to comply since the small entity compliance guide was not made available at the time of publication of this rule.

⁴ See, <http://www.federalreserve.gov/bankinforeg/cgdefault.htm>.

⁵ 75 Federal Register at 58533.

If you have any questions regarding these comments or if Advocacy can be of any assistance, please do not hesitate to contact Jennifer Smith at (202) 205-6943.

Sincerely,

/s/

Winslow Sargeant, Ph.D.
Chief Counsel for Advocacy

/s/

Jennifer A. Smith
Assistant Chief Counsel
For Economic Regulation & Banking

Cc: The Honorable Cass Sunstein, OIRA/OMB

December 23, 2010

VIA ELECTRONIC & REGULAR MAIL

The Honorable Jennifer J. Johnson Secretary Board of Governors of the Federal Reserve System 20th Street and Constitution Avenue, NW Washington, DC 20551 E-Mail: regs.comments@federalreserve.gov

Re: Regulation Z; Docket R-1390 Truth in Lending

Dear Secretary Johnson:

The Office of Advocacy of the U.S. Small Business Administration (Advocacy) submits this comment on the Board of Governors of the Federal Reserve System's (hereinafter, "the Board") proposed rulemaking on *Regulation Z; Docket No R-1390 Truth in Lending*.¹

Advocacy is concerned that the proposal may be extremely burdensome on small entities and that Federal Reserve has not analyzed properly the full economic impact of the proposal on small entities as required by the Regulatory Flexibility Act (RFA).² Advocacy recommends that the Board postpone the proposed rule until the Real Estate Settlement Procedures Act-Truth in Lending (RESPA-TILA) issues can be resolved by the Consumer Financial Protection Bureau (CFPB) in order to avoid duplicative and burdensome regulations.

¹ 75 Federal Register 58539.

² 5 U.S.C. §§ 601-612.

³ Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612) amended by Subtitle II of the Contract with America Advancement Act, Pub. L. No. 104-121, 110 Stat. 857 (1996). 5 U.S.C. § 612(a).

Advocacy Background

Congress established the Office of Advocacy under Pub. L. 94-305 to represent the views of small business before Federal agencies and Congress. Because Advocacy is an independent office within the Small Business Administration (SBA), the views expressed by Advocacy do not necessarily reflect the views of the SBA or of the Administration. Section 612 of the RFA requires Advocacy to monitor agency compliance with the Act, as amended by the Small Business Regulatory Enforcement Fairness Act.³ 2

In September 2010, section 604 of the RFA was amended when Congress passed the Small Business Jobs Act.⁴ Section 1601 of the Small Business Jobs Act amends section 604 by requiring a federal agency to include, in any explanation or discussion accompanying the final rule's publication in the Federal Register, the agency's response to any written comments submitted by Advocacy on the proposed rule and provide a detailed statement of any changes made in response to the comments.

⁴ Public Law 111-240.

⁵ 5 USC § 603.

⁶ 5 USC § 607.

⁷ 5 USC § 603.

Requirements of the RFA

The RFA requires agencies to consider the economic impact that a proposed rulemaking will have on small entities. Pursuant to the RFA, the federal agency is required to prepare an IRFA to assess the economic impact of a proposed action on small entities. The IRFA must include: (1) a description of the impact of the proposed rule on small entities; (2) the reasons the action is being considered; (3) a succinct statement of the objectives of, and legal basis for the proposal; (4) the estimated number and types of small entities to which the proposed rule will apply; (5) the projected reporting, recordkeeping, and other compliance requirements, including an estimate of the small entities subject to the requirements and the professional skills necessary to comply; (6) all relevant Federal rules which may duplicate, overlap, or conflict with the proposed rule; and (7) all significant alternatives that accomplish the stated objectives of the applicable statutes and minimize any significant economic impact of the proposed rule on small entities.⁵ In preparing the IRFA, an agency may provide either a quantifiable or numerical description of the effects of a proposed rule or alternatives to the proposed rule, or more general descriptive statements if quantification is not practicable or reliable.⁶ The RFA requires the agency to publish the IRFA or a summary of the IRFA in the Federal Register at the time of the publication of a general notice of proposed rulemaking for the rule.⁷

Pursuant to section 605(a), in lieu of an IRFA, the head of the agency may certify that the proposed rule will not have a significant economic impact on a substantial number of small entities. A certification must be supported by a factual basis.

The Proposed Rule

On September 24, 2010, the Board published in the Federal Register a proposed rule on Regulation Z: Truth in Lending. The proposal implements the Truth in Lending Act (TILA). The purpose of the proposal is to revise the rules for the consumer's right to rescind certain open end and closed-end loans secured by the consumer's principal dwelling.⁸ The proposed regulations would revise and enhance disclosure requirements of Regulation Z for transactions secured by a consumer's principal dwelling and the consumer's right to rescind open- and closed-end loans. The amendments are proposed in furtherance of the Board's responsibility to prescribe regulations to carry out the purposes of TILA, including promoting consumers' awareness of the cost of credit and their informed use thereof. The proposal would also revise the rules for 3

determining whether a closed-end mortgage is a higher-priced mortgage loan subject to special consumer protections, to ensure that prime loans are not incorrectly classified as higher-priced loans. Finally, the Board is proposing rules to mandate reverse mortgage counseling and prohibit reverse mortgage cross-selling. These restrictions are proposed pursuant to the Board's statutory responsibility to prohibit unfair and deceptive acts and practices in connection with mortgage loans.

Compliance with the RFA

In the RFA section of the preamble, the Board acknowledges that the proposed rule will have a significant economic impact on a substantial number of small entities and prepared an IRFA.⁹ However, the Board states that there is not a reliable source for the number of small entities that will be impacted. It also states that the effect of the revisions on small entities, including the costs of updating the specifications on current systems, is unknown.¹⁰

⁹ Id at 58685.

¹⁰ Id at 58686.

¹¹ Letter from American Bankers Association, American Financial Services Association, Community Mortgage Banking Project, Consumer Bankers Association, Consumer Mortgage Coalition, Housing Policy Council, Independent Community Bankers of America, Mortgage Bankers of America to the Honorable Timothy Geithner, The Honorable Shaun Donovan, and The Honorable Ben Bernake, November 10, 2010.

¹² Public Law 111-203.

The Proposal Will Be Burdensome

Advocacy is concerned with this proposal going forward when so little is known about its potential costs, at a time when other major changes to the industry are on the horizon.

Advocacy had a conference call with representatives from the industry on this proposal and according to the industry representatives, the industry is being inundated with regulatory changes. These burdensome changes may lead to small entities leaving the mortgage industry which could have a negative impact on the availability of mortgages, competition and the consumer.

Moreover, on November 10, 2010, several banking organizations submitted a letter to the Board, the Department of Treasury, and the Department of Housing and Urban Development requesting a comprehensive and integrated approach to TILA and the Real Estate Settlement Procedures Act (RESPA) reform. They stated that the changes to TILA, the new RESPA disclosures, and other compliance requirements were stretching the compliance capabilities of financial institutions and could possibly threaten the availability of housing finance options. They further stated that since additional changes to RESPA and TILA may considerably revise TILA, a postponement of this rulemaking was warranted.¹¹

Matter Should be Postponed until RESPA-TILA Issues Are Resolved by the Consumer Financial Protection Bureau

In July 2010, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act (Act).¹² Section 1011 of the Act establishes the Consumer Financial Protection Bureau (CFPB) to supervise certain activities of financial institutions. Pursuant to Section 1032, the new CFPB will have the authority to prescribe rules for consumer financial products and services. Section 4

1032(f) states that not later than 1 year after the designated transfer date, the Bureau shall propose for public comment rules and model disclosures that combine the disclosures required under TILA and sections 4 and 5 of RESPA into a single, integrated disclosure for mortgage loan transactions covered by those laws, unless the CFPB determines that any proposal issued by the Board and HUD carry out the same purpose. As such, this issue will be revisited again in the near future.

In addition, Section 1100G, entitled “Small Business Fairness and Regulatory Transparency,” amends 5 U.S.C. § 609(d) of the RFA, to require the CFPB to comply with the Small Business Regulatory Enforcement Fairness Act (SBREFA) panel process, making it the third agency with this responsibility, joining EPA and OSHA. When Congress amended the Regulatory Flexibility Act (RFA) in 1996, it created a requirement that EPA and OSHA conduct special outreach efforts to ensure that small entities’ views are carefully considered prior to the issuance of a proposed rule. This outreach is accomplished through the work of small business advocacy review panels, often referred to as SBREFA panels. A SBREFA panel consists of a representative from the rulemaking agency, the Office of Management and Budget’s Office of Information and Regulatory Affairs (OIRA) and the Chief Counsel for Advocacy. The panel solicits information and advice from small entity representatives (SERs), who are individuals that represent small entities affected by the proposal. SERs help the panel better understand the ramifications of the proposed rule. Invariably, the participation of SERs provides extremely valuable information on the real world impacts and compliance costs of agency proposals and viable alternatives. The product of a SBREFA panel’s work is its panel report on the regulatory proposal under review.

The panel process achieves several objectives. First, it ensures that small entities that would be affected by a regulatory proposal are consulted about the pending action and offered an opportunity to provide information on its potential effects. Second, a panel develops and recommends less burdensome alternatives to a regulatory proposal when warranted. Past panels have recommended alternatives that have saved small entities billions of dollars. Finally, the panel provides the rulemaking agency with input from both real world small entities and the panel’s report and analysis prior to publication.

Postponing this rulemaking until after TILA is transferred to the CFPB will not only minimize the potential of conflicting cumulative rulemakings, it will also allow for an opportunity to examine less burdensome alternatives. The CFPB will need to conduct a panel for the RESPA –TILA rules. That panel may provide information about the industry and real world implications of the changes to the regulations that may be useful in reducing the economic impact of this action on small entities.

The additional time would also allow the agency to perform the necessary outreach and research to garner a better understanding of the economic impact of this action. Once the economic impact is fully understood, the agency may be able to develop less burdensome alternatives which would be beneficial to the industry. In addition, it may also help the agency understand the real world implications of this action which would be beneficial to consumers. 5

Conclusion

Over the past few years, the mortgage industry has been inundated with changes to TILA, RESPA, and other mortgage-related laws. These constant changes are economically burdensome to the industry and confusing to the consumer. Postponing this rulemaking until after the upcoming RESPA-TILA proposals will allow an opportunity to fully analyze the impact of this proposal in light of the changes to the industry. In addition, since the issue would then be transferred to the CFPB, the agency would be able to obtain meaningful information from the SERs so that the economic impact could be fully ascertained and less costly alternatives could be developed.

Thank you for the opportunity to comment on this important proposal and for your consideration of Advocacy's comments. Advocacy is available to assist the agencies in their RFA compliance. If you have any questions regarding these comments or if Advocacy can be of any assistance, please do not hesitate to contact Jennifer Smith at (202) 205-6943.

Sincerely,

/s/

Winslow Sargeant, Ph.D. Chief Counsel for Advocacy

/s/

Jennifer A. Smith

Assistant Chief Counsel

For Economic Regulation & Banking

Cc: The Honorable Cass Sunstein, OIRA/OMB