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Rules Docket Clerk
Office of General Counsel
Department of Housing and Urban Development
451 Seventh Street, S.W., Room 10276
Washington, DC 20410-0500

Re: *Real Estate Settlement Procedures Act; Simplifying and Improving the Process of Obtaining Mortgages To Reduce Settlement Costs to Consumers; Proposed Rule* (67 F.R. 49134)
Docket No. FR-4727-P-01

Dear Sir or Madam:

The Mortgage Bankers Association of America ("MBA") respectfully submits these comments in response to the U.S. Department of Housing and Urban Development's ("HUD") Real Estate Settlement Procedures Act; Simplifying and Improving the Process of Obtaining Mortgages To Reduce Settlement Costs to Consumers; Proposed Rule (67 F.R. 49134) ("Proposed Rule"). MBA is a trade association representing approximately 2,700 members involved in all aspects of real estate finance. Our members include small and large institutions, national and regional lenders, mortgage brokers, mortgage conduits, and service providers. MBA encompasses residential mortgage lenders, both single-family and multifamily, and commercial mortgage lenders.

MBA commends Secretary Martinez and HUD for taking the bold step of introducing a radical but necessary proposed rule that mobilized mortgage loan-related industries, trade groups, consumer groups, other Federal agencies and even Congress, to rally around the cause of modernizing the mortgage loan origination process. As the Secretary and HUD is aware, MBA has for several years advocated fundamental mortgage reform[1]. This association continues to be the Department's partner and ally in the quest to simplify and improve the mortgage shopping process. This initiative is not only important for the industry, but also for all the consumers this industry serves.

In light of our long history of support for the reform process, it should come as no surprise that MBA sees the Proposed Rule as an opportunity to finally effectuate the long-discussed improvements to the mortgage origination process. MBA took unprecedented steps in getting the message of the Proposed Rule out to its members, and

[1] In 2000, MBA unveiled the *Plan for Comprehensive Mortgage Reform* ("the Plan"). The Plan subsequently formed the basis for an industry-wide coalition position on mortgage reform.

expended countless hours in researching, analyzing and developing the policy that is reflected in these comments. After diligent and thoughtful review of the Secretary's Proposed Rule, MBA submits its comments ("the Comments") here, in three parts.

Part A – Discussion of Major Points and Specific Position of MBA

Part A details the major points MBA believes must be brought to the forefront. Although there are a myriad of technical issues that require attention and resolution, the points outlined in this section represent the most salient issues that need to be considered in HUD's deliberation process. In summary, these points are as follows:

- First and foremost, MBA embraces the Guaranteed Mortgage Package concept ("GMPA"). MBA believes, however, that HUD must clarify and revisit many of the proposed components – particularly the interest rate "guarantee" – before issuing any final rule. As HUD is aware, MBA has vigorously sought, but not found, a workable method to effectuate consumer protections through an interest rate index that would prevent "bait and switch" tactics by unscrupulous players. In light of the complex issues involved, MBA advises that the notion of including an interest rate "guarantee" in the final rule be further studied and analyzed. In this regard, we note that MBA agrees with HUD's pro-consumer objectives, and pledges to continue to assist HUD in finding a workable solution to be implemented at a later date. To this end, MBA is now engaging in efforts to form working groups of industry experts to study the issue of mortgage rate indices and other alternative means of achieving HUD's goals.

- For numerous reasons, HUD should delay the implementation of the Revised Good Faith Estimate ("GFE") proposals. As currently drafted these proposals are extremely complex and in our opinion, unnecessary in light of the extraordinary pro-consumer reforms advanced under the GMPA proposal. We are, therefore, asking that changes to the GFE be delayed until after the market has had an opportunity to accommodate the packaging reforms. After a reasonable period of implementation, HUD should revisit the need for any additional changes to the current GFE system

- Notwithstanding our position to delay the implementation of the Revised GFE, MBA agrees with HUD that confusion regarding mortgage broker compensation continues to be a vexing issue for consumers and that greater disclosure regarding broker fees may be necessary. MBA therefore recommends that HUD adopt the Mortgage Broker Fee Agreement Disclosure already introduced by a coalition of trade associations to HUD a few months ago, with the attendant exemption for brokers and lenders from Section 8 scrutiny. This additional disclosure would achieve HUD's goals of full disclosure and greater consumer education.

- In connection with the GMPA proposal, HUD should modify certain timing requirements, as follows:

- Amend the definition of application to add, in addition to the five items of information indicated in the Proposed Rule, the collection of credit report and basic asset information;
- Amend the open-offer period for the GMPA to five business days instead of 30 days;
- Require that a signed GMPA be valid for at least 30 days after it is signed by the applicant, and allow the lender to set an expiration date after this period.

- HUD should clearly announce its intent to seek preemption of state law that conflicts with the provisions established by any final rule. HUD should also take immediate action to facilitate this preemption of state law.

- HUD should address the conflicts with other Federal laws that will result from this proposed rule. Particularly, HUD should engage the Federal Reserve Board on the implications this Proposed Rule will have with regard to the Truth in Lending Act and Regulation Z.

Part B – Ancillary Issues and Request for Further Clarification,

In the process of analyzing, discussing and debating the Proposed Rule, additional issues arose. These were typically not as complex as those as outlined in Part A, but worthy of discussion. In some cases, the Questions posed by HUD in the Proposed Rule did not provide an opportunity to capture these issues. These issues, outlined below, are discussed in Part B.

- The Mandatory Comparison chart should not be transaction-specific.

- Clarify if processing of an application is required during Offer Period.

- What is a Reasonable Fee Amount that may be collected after the GMPA is signed?

- There should not be an automatic withdrawal of the Section 8 exemption in the event of a failure to meet the GMPA requirements; An opportunity to cure should be available.

- The Impact on FHA's "one point" limitation.

- Fees excluded from GMPA lump-sum figure.

- A Lender must have the authority to withdraw any offer or even executed GMPAs if the borrower changes his loan request.

- The Recharacterization of the YSP as a Lender Credit will be Disruptive.

Part C – Detailed Response to HUD's 30 questions

In this Part, MBA provides detailed responses to all of HUD's 30 questions, as posed in the Proposed Rule. These responses allowed us to discuss and analyze several other issues not otherwise discussed or analyzed in Parts A or B.

PART A

Discussion of Major Points and Specific Positions of MBA

MBA convened its members to consider the impact – both positive and negative – that the Proposed Rule would have on the mortgage banking community. Through an extensive process of analysis and discussion, MBA has identified six key issues that HUD should resolve before issuing a final rule. With regard to these six issues, MBA:

1. Embraces the concept of packaging, but recommends that HUD not implement the Interest Rate Guarantee, as proposed in the Guaranteed Package concept;
2. Recommends that HUD delay the implementation of the Revised GFE, thus keeping the existing GFE requirements in place;
3. Recommends that HUD adopt the use of the Mortgage Broker Agreement in conjunction with the existing GFE requirements;
4. Recommends that HUD clarify and adjust some timing issues with regards to the GMPA proposal;
5. Advises HUD to facilitate Federal preemption in anticipation of potential conflicts with various state laws;
6. Advises HUD of the potential conflicts the Proposed Rule will have with Federal law, particularly the Truth in Lending Act and Regulation Z.

1. MBA embraces the concept of the Guaranteed Mortgage Package Agreement, with very important amendments.

The Proposed Rule would allow a lender the option of offering applicants[2] a "guaranteed" fee package in lieu of a GFE. This guarantee, as proposed, would disclose a single lump-sum amount that represents the total of most of the costs expected to be incurred with the originating, processing, underwriting and funding of that loan. Additionally, any person who assembles and offers such a package or whose services are included in such a package would be exempt from the restrictive provisions of Section 8 of RESPA relating to referral fees, mark-ups, volume discounts, and fee splitting. This means at least two things. First, while the disclosed lump-sum amount disclosed to the applicant must be honored by the packager, the actual total costs of the services actually incurred by the lender for each loan may be less than or equal to the amount disclosed and charged to the applicant. Second, this allows settlement service providers the flexibility to create relationships and negotiate discounts among each other without the fear of violating Section 8 of RESPA.

[2] The Comments uses the terms "applicant," "consumer," and "borrower" interchangeably, as appropriate.

The Concept of "Bundling"

MBA is encouraged by the Secretary's recognition that the "packaging" of settlement fees, if correctly structured, will go a long way toward simplifying the process for industry and consumers alike. This packaging system streamlines cost disclosures to consumers by assembling practically all required closing costs under one single figure and guaranteeing that figure early in the shopping process. This allows consumers to shop the market and effectively compare specific guaranteed prices for settlement services among various sources. Lenders and other entities would be allowed to enter into volume-based contracts and otherwise secure discounts from providers in order to ultimately produce much lower settlement costs for consumers. Since consumers would be offered "guaranteed" price disclosures, comparison-shopping and market forces will act to compress costs and reduce unnecessary fees/charges.

In order to remove any legal entanglements from deals and activities necessary to arrive at "package" guarantees, the "packages" will be exempt from the anti kick-back and anti-referral fee provisions of Section 8 of RESPA. Not only do these provisions pose uncertainties and legal risk, but more importantly, they are currently outdated and unnecessary under a system that promotes true market competition. In short, within the package of guaranteed costs, consumers would remain fully protected because engaging in any of the activities prohibited under Section 8 of RESPA will only serve to inflate the total "package" price, which in turn, will lead consumers to reject inflated-priced products for a lesser-priced alternatives. This system, therefore, creates a self-enforcing disclosure regime that saves government resources, promotes competition, and facilitates market innovation.

MBA has openly supported this concept of packaging for several years. Packaging simplifies the process for both the applicant and the lender. It also encourages market competition that benefits consumers. Our comments below address operational issues that need to be resolved to allow this system to thrive.

The "Interest Rate Guarantee"

Overall, MBA commends HUD on the disclosure system contained in the proposal. However, the Proposed Rule contains a significant new element that MBA and other industry supporters did not contemplate: The Interest Rate Guarantee. In past meetings and frank discussions with HUD and interested consumer groups, MBA did visit this issue with the Department. In that process, a brain trust of economists and capital market experts vetted out this issue. After much effort and discussion, no workable solution was developed.

MBA appreciates that which HUD is trying to accomplish with this concept. However, in the spirit of advancing the goals of achieving workable solutions to mortgage reform, MBA warns that the interest rate guarantee is the most troublesome element of the Proposed Rule for the mortgage banking industry to administer. In the proposal, HUD is not asking for a rate lock or rate guarantee *per se*, but instead a commitment to the applicant that the rate – if not otherwise locked – will fluctuate, but within predictable and verifiable parameters. In addition to statements that reflect a locked-in rate or a rate-lock offer, the GMPA must provide at least the following "guarantee":

> "If you accept this agreement, but elect not to lock-in the rate at the time of acceptance, we further guarantee that your interest rate will not exceed ___ % [over][under] the [prime][index] rate or other standard measurement in lieu of an in index when you do lock-in."

It appears that HUD's objective here is two-fold. First, HUD recognizes that increasing the interest rate is a method that lenders may employ to hedge against under-disclosing the GMPA lump-sum amount. If the amount is discovered to be too low, then the lender will just increase the yield on the interest rate. Additionally, a rate-float commitment would protect the applicant from an unscrupulous lender who quotes deceptively low rates at application, but closes with rates unjustifiably high. This "guarantee" is therefore more of an interest rate "protection" than an interest rate lock.

MBA submits that this aspect of the proposal is technically infeasible. From an economic point of view, the goal of the proposed rule, as per the objectives of the RESPA statute, is to remove unwelcome surprises at the closing table, which often take the form of unexpected, or unexpectedly high fees. Leaving aside issues such as the calculation of escrow deposits, hazard insurance, and interest due at closing, the GMPA offers lenders the opportunity to offer borrowers locked-in prices for the various costs associated with closing a mortgage loan. By allowing packagers to contract for such services in advance and free of regulatory restrictions, those packagers can offer price guarantees for these services without fear of running afoul of existing RESPA rules[3]. The marketplace will ultimately determine whether consumers favor this approach, or whether they prefer the "piecemeal shopping" approach of the existing system. The central point is, however that, due to contractual agreements and competitive factors, changes in the prices of such services will be either infrequent or absorbed by the lender or "packager." Either way they will be manageable from a risk perspective.

In contrast to ancillary settlement services, however, interest rates move continually, with intra-day changes in quoted mortgage interest rates being common. For example, it is not uncommon for rates to change to the extent lenders re-price their loans more than once a day. In proposing to combine settlement costs with interest rates in the GMPA, HUD is combining two costs with entirely different levels of volatility and risks for lenders.

[3] These fears stem from the lack of clarity in RESPA and Regulation X on how the concepts of mark-ups, volume-based compensation, and average cost pricing should be applied in given situations. These fears effectively paralyze any notion of market innovation.

Not only does the interest rate guarantee augment risk, but in the end it is of little discernable benefit to borrowers. Today, borrowers are typically able to lock in the interest rate and rate related points when they apply for a mortgage. Allowing a mechanism whereby lenders must offer a firm interest rate quote to borrowers may grant borrowers a benefit that is very similar to the one they already have available with rate locks. Most borrowers have already proven themselves adept at comparison shopping for a competitive interest rate.

From a technical point of view, the difficulty for a lender in administering this type of interest rate protection is that, even given an index buffered with a margin, a lender may not ultimately be able to deliver a rate that falls within this guarantee. The assumption that a lender is capable of making any loan at any rate at a given price on any given day is faulty. Contrary to popular belief, a lender's "inventory" of loans is not infinite. Its capacity to make certain loans at certain rates under certain programs, though numerous, may be limited.

Mandating the selection of an index creates significant compliance problems for several reasons:

- First, no readily available index exists against which lenders price all loans. No Treasury instrument index is appropriate because all such Treasury indices fail to capture the basis risk of shifts in mortgage yields relative to Treasury yields. We have already seen the problems caused for Treasury-based ARMS when Treasury yields fell much faster than the short-term funding costs of the holders of adjustable-rate mortgages.
- Second, a forward commitment market does exist for future delivery of TBA MBS securities, with price quotes and equivalent yields available from several sources. These prices, however, are valid only for Agency secondary market executions and for certain types of mortgages. They are representative market prices, not guaranteed rates for all lenders. In addition, GSE secondary market executions represent less than half of all single-family residential lending, so reliance on the limited mortgage indices available is clearly problematical for more than half of the dollar volume of mortgage lending.
- Third, borrowers are often offered a range of rate and points combinations to meet their specific needs, and often change their preferences until they actually lock into a particular rate. Thus the rate guarantee portion would require a lender to offer not just a spread over an index and a point quote, but a whole range of spread and point combinations that would have to be indexed.

In addition, loan pricing is not exclusively influenced by the movement of any particular index. Indeed, an index may be only one in a number of components used to determine the ultimate price of a loan. Other factors – such as product availability, capped investor commitments on a particular loan program, warehouse-line capacity and general capacity to name a few – have observable and meaningful influence on loan pricing. <u>These pricing factors are neither influenced nor verified against any single</u>

index. Nor are these fluctuations a result of a lender intending to "bait and switch." These are merely standard macro- and micro-economic market conditions that any tangible-product industry endures. If the borrower does not desire to lock, he will necessarily be subject to these justifiable interest rate and *market rate* fluctuations. And for those consumers who seek more of a hedge or rate guarantee, then one is often offered in the form of a rate lock.

In short, the pricing on any given loan program is not necessarily based on any verifiable index, but is instead subject to a myriad of varying market forces.

Finally, HUD must understand that the costs of dealing with the risks of the rate guarantee portion of the GMPA will be passed on to borrowers with rates that, on average, will be higher rates available with lock-ins contemporaneous with the application. Giving a potential borrower an interest rate guarantee is effectively giving that borrower an option that can be exercised solely at the borrower's discretion. Unless HUD is proposing that such options be given away free of charge, the cost of the option would be embedded in the spread over the index. With absolutely no change in rates, an individual locking in immediately would pay a lower rate than an individual using the 30-day guarantee, the difference being the value of the option. Thus there should be a clear acknowledgment that the cost of keeping the interest rate guarantee portion of the GMPA will be that borrowers will, on average, pay a somewhat high rate of interest than would otherwise be available to them.

Recommendation - Creating bona-fide, legally-binding 30-day offers, *en masse*, to the general public creates substantial risk on lenders and the mortgage industry as a whole. The "safety and soundness" impact brought about by this aspect of the proposal is obvious. The proposed rule must either abandon the interest rate guarantee proposal or provide a workable alternative that captures HUD's intentions within the confines of what lenders and secondary marketers can deliver.

MBA understands that HUD's objectives are focused on finding a way to guard against the improper manipulation of the rate portion of the disclosures in a way that nullifies the closing cost guarantee. MBA agrees that there is need to assure that we close all possible loopholes for deceptive disclosures. To this end, MBA hereby pledges to work with HUD to research the various options and alternatives in greater detail so that HUD's laudable goals can be achieved with the minimum level of risk to lenders and capital markets. MBA is now engaging in the formation of specialized working groups of industry experts to study the issue of mortgage rate indices or other possible means of achieving HUD's goals. This working group will look at such options as identifying possible formulas, possible standardized interest rate indices, or other methods that will assist in protecting consumer against abusive or bait-and-switch practices. Going forward we will share our findings with HUD and invite government and industry partners to deliberate on the full range of alternatives that are identified.

2. HUD should delay the implementation of the Revised Good Faith Estimate

The Proposed Rule would modify the Good Faith Estimate ("GFE") to include tolerances and guaranteed categories of fees, to include a transaction-specific comparison of loan terms, and recharacterize the Yield Spread Premium ("YSP") as a credit from the lender to the borrower.

It is important that HUD delay the implementation of the Revised GFE. In its application, this proposal is very complex and riddled with technicalities. After extensive polling and communications with our lenders, we submit that the proposed changes to the GFE impose operational difficulties, and more importantly, would serve to fundamentally complicate the implementation of the GMPA concept. This latter point is central to our opposition to current amendments to existing regulations. We fear that a push to immediately implement far-reaching changes to the GFE will absorb resources and immobilize institutions in their implementation of the necessary GMPA changes. Sweeping changes to the current system will bring about compliance, operational risks, and uncertainties which will be fatal to a proper launching of the key reforms under GMPA.

In addition, requiring a lender to guarantee tolerance levels– without the flexibility or benefit of a Section 8 exemption – is risky and fundamentally unfair to lenders. As explained below, the ultimate effect is that neither the lender nor the consumer will actually receive any tangible net-benefit with this Revised GFE.

Cost of Implementation - Additionally, introducing regulatory revisions to the GFE, while at the same time introducing and implementing the GMPA is far less than ideal. The cost of adapting to new compliance requirements should not be a lender's sole factor in arguing against those compliance requirements. Nevertheless, lenders are in the process of already adapting to several new or revised laws – both on the state and the Federal levels – that will substantially affect loan operations and systems.

The cost burden of requiring a lender to overhaul its operational and compliance infrastructure on a single level is always significant. *Doubling* this task – by introducing the revised GFE and the GMPA at the same time - will likely increase costs exponentially. Lenders have limited human resources in their technology departments. These resources are certainly already taxed in updating systems caused by the proliferation of law and regulation changes on the local, state and Federal levels[4].

Complicating matters further, the Proposed Rule as currently written would compel a lender to abandon time-proven, well-established existing infrastructures – such

[4] As the Secretary and HUD are likely very aware, there is a proliferation of new laws on the books on the local and state levels, most of which relate to combating predatory lending and/or the licensing of employees. Additionally, the Federal Reserve Board has recently amended Regulation Z as well as Regulation C. Regulation C, which is exclusively a reporting-requirement regulation, makes sweeping changes to the nature and type of information that must be captured by the computer system. Hence, technology resources will be stretched beyond capacity.

as the current GFE requirements. This forced change is precisely what will inhibit lenders from evolving their practices into the "superior" concept of the GMPA proposal. Although we are all certain that the packaging proposal will work and result in better shopping, it remains, ultimately, a bold experiment. Any venture into new business environments will require legal expense and incremental system developments to cover for uncharted risks and unidentifiable difficulties. The incentive to engage in new ventures will, however, be entirely trumped by the radical alterations to the existing, well-understood, regulatory system. The threat and ramifications of falling out of compliance with the far-reaching GFE changes will force prudent lenders to retreat and concentrate on immediate regulatory needs. No responsible lender is willing to jump into the unknown waters of GMPA in the face of the extreme legal and operational volatility that will be caused by the GFE amendment.

We submit that it is unnecessary for HUD to disrupt market operations in this manner[5]. It is also risky to distract lenders from focusing fully on advancing the packaging reforms. We believe that, if unrestrained by unnecessary regulatory entanglements, the mortgage market will see a significant migration towards packaging in a very short time. This should be a very important consideration for HUD. Clearly the GMPA proposal is the centerpiece of the Proposed Rule.

Remedy for Non-Compliance - The Proposed Rule states that any violation of the Revised GFE would empower the borrower to withdraw his loan, and be entitled to a refund of fees. This is, in effect, creates a new right of rescission for every mortgage transaction! MBA believes that the punishment does not fit the crime. A lender who unintentionally assesses fees at closing that are slightly greater than disclosed on the GFE must suffer the consequences of losing a loan funding, covering actual hard costs for that loan, and failing to meet a commitment to its investor. And in most cases, the cause of this "non-compliance" will be the closing agent – not the lender.

A more flexible solution is as follows:

- If the lender discovers the error first, the lender may cure without this being deemed a breach of the requirements;
- If the consumer discovers this first, the consumer must notify the lender and afford the opportunity to cure;
- If the consumer discovers and notifies lender, and the lender does not cure, then the consumer may sue for breach of contract.

Additionally, we observe that it is not at all clear on what authority HUD can wage such a remedy in the context of the GFE. The statutory language of RESPA does

[5] The "mortgage market" is a substantial force in the U.S. economy. This industry alone affects trillions of dollars each year. It employs a fair percentage of the American workforce. One of its major objectives is to put homeownership in the hands of those who want it. And it has contributed to the stabilization of the current economy. We fear, then, that this disruption will have an incalculable effect on the economy.

not provide any remedies for non-compliant GFEs. Nor does RESPA authorize HUD to create such remedies. We are concerned that this absence of authority could lead to legal entanglements against the entire reform proposal. This would be unnecessary and is avoidable.

Negotiated Discounts – GFE proposal for negotiated discounts without a full Section 8 exemption is not workable.

In the Proposed Rule, HUD encourages lenders to negotiate discounts with vendors, as long as that discounted price – and no more – is passed on to the borrower. This may be achievable for certain truly cost-standardized services such as the flood certification or tax service. But this is in no way achievable for other settlement services, such as appraisal, title or closing agent. In most cases the identity of these service providers cannot be determined with any certainty within three days of application. Take the example of the appraisal service. Within three days of application the lender will not know which appraiser will ultimately be used for the transaction. Some appraisers will offer discounts. Others cannot[6]. Thus, within three days of application the lender will not know if this transaction will be subject to a discounted appraisal.

Ironically, the heavy weight of the Proposed Rule itself squishes any incentive to negotiate discounts here. The zero-tolerance standard is so restrictive – providing for virtually no variance in charges for lender-required and lender-selected services at closing – that the lender cannot disclose a lower cost of a settlement service provider unless he is certain that the discount will apply in the transaction. Without knowing the vendor's identity – and thus not knowing if any discount will or will not flow in that transaction - how can the lender disclose anything but the full-cost amount? And a lender who discloses low but actually incurs a higher charge cannot seek solace in the "unforeseeable and extraordinary circumstances" exception. So a higher-than-discounted cost will always be selected and disclosed. Where is the incentive, with these tolerances, to guarantee and disclose a discounted fee if the originator is not even certain the discount will apply in this transaction? Unless full – not conditional – Section 8 exemption is afforded to lenders, no lender can safely endeavor to negotiate costs and achieve cost-efficient relationships. Extending full Section 8 exemption here is consistent with HUD's understanding of the fundamental purpose of RESPA. That is, the purpose of lowering settlement costs to borrowers. Even the Proposed Rule's preamble stated:

> HUD recognizes that the new GFE's requirements on estimated third party charges may cause many lenders not already doing so to seek to establish

[6] The lowest-cost appraiser, while preferable, may not always be the best fit for the transaction. To close loans in a timely manner, lenders or vendor managers often manage the number of appraisal orders open at any time with a single vendor, thereby making it difficult to specify precisely which appraiser will perform the work. In addition, if the applicant accepts the GFE later in the proposed 30-day period, the disclosed service provider may no longer be able to provide the service within the time frame required for the applicant to close. Under such circumstances, to accommodate the applicant, the lender would have to choose another appraiser.

> pricing arrangements with specific third party settlement service providers in advance, in order both to ensure they are able to meet the tolerances and to ensure lower prices for their customers[7].

Indeed this is true to achieve the objective here. But this is precisely why our industry has urged for an exemption from Section 8 of RESPA. "Pricing arrangements" as suggested by HUD are very dangerous under existing RESPA interpretations. They may constitute agreements for referrals, and depending on technical details, could be construed as referral fee schemes, punishable by criminal penalties. It is crucial that HUD understand that lenders are not seeking a safe-harbor in order to pay kickbacks. Rather, we are seeking protection against specific, out-dated laws that are uncertain in their application, and that obstruct the very arrangements that HUD recognizes as proper to effectuate the tolerance proposals. This is why the GFE proposal misses the mark – it demands that lenders comply with tight requirements without allowing them the proper tools to ensure compliance.

That's why a full exemption from all of Section 8 scrutiny - and not the contingent exemption whereby the discount MUST go to the borrower – is required here. Extending a partial exemption is a flawed plan.

Tolerances – Put simply, the zero and 10% tolerances are not workable because lenders do not have absolute control of the universe of fees charged in a mortgage loan transaction. While tolerances may not be too problematic for a lender's own fees, tight tolerances are more difficult to accept where the services and charges are in the hands of a third party. Even a 10% tolerance is difficult to comply with because the person responsible to meet the compliance requirement does not control the prices being regulated.

There are other additional difficulties. First, a lender must make a representation of fees within a zero or 10% tolerance. This may be difficult to do, since the exact services and service providers are likely not even identifiable at the time of application. For example, facts and circumstances revealed in the processing of the loan will justify the need for a "drive-by" or supplemental appraisal. Or unexpected additional courier fees will be required to accommodate the borrower. Or the loan terms and parameters will change such that additional underwriting or verifications will be required.

Additionally, requiring the amount disclosed for the escrow impounds to be accurate within a 10% tolerance is troublesome. Escrow impound is not a charge for any particular service. Thus it is not appropriate or necessary to subject this to specified tolerances in an effort to facilitate shopping. Also, and most importantly, escrow impound accounting is already heavily regulated under Regulation X[8]. This strictly limits the amounts that may be collected at loan settlement and the amounts that may be

[7] *See*, Proposed Rule, page 49151
[8] *See*, 24 C.F.R. § 3500.17

maintained during loan servicing. The current regulation leaves virtually no discretion to any lender as to the amounts collected for escrow reserves. Ironically, the 10% tolerance applied thereon, would lead to conflicting compliance requirements – contained in the same regulation no less – on how much may be collected at time of loan settlement.

Next, with all these disclosed-fee tolerances each lender must determine, in virtually each transaction, whether the GFE is indeed within the respective tolerance. As each category of fees has different tolerance levels, and some of the tolerance levels are fact specific (determined on whether the borrower uses recommended service provider or seeks own vendor, for example), compliance and compliance review for this requirement is quite burdensome. These are real complications that will invariably result in unnecessary cost increases for consumers.

These tolerance complications are unique to the Revised GFE. The GMPA, with its complete Section 8 exemption coupled with a guarantee of a single lump-sum figure made up of several fees, does not suffer acutely from these complications. Because of the Section 8 exemption, a lender using a GMPA has the flexibility to employ cost-averaging in each transaction. In this instance, the charge collected from the borrower reflects the lender's average cost for that service, and not the actual cost of that service for that transaction. In some instances the lender realizes a gain on the service charge. In other instances, a loss. While fairness of costs to the applicant is always a consideration, with cost-averaging there is no obligation to be so exacting on every single charge on a single loan. In contrast, the Revised GFE does not carry with it a full Section 8 exemption, and so does not allow cost-averaging. Without cost-averaging, the amount collected from the borrower for a specific service must be equal to or less than the actual fee incurred by the lender. The lender never has the flexibility of collecting from the borrower an amount greater than actual cost to the lender for that service. Also, in the GMPA, the single lump-sum guarantee is made of several fees, thus spreading the tolerance over a broad set of fees. In contrast, the Revised GFE tolerances are applied to very small groupings of fees, thus making the tolerances substantially more narrowly applied and harsher than the GMPA guarantee. In contrast to the GMPA guarantee, the Revised GFE's absolute inflexibility makes establishing a guaranteed figure in the Revised GFE nothing less than problematic.

<u>*Keep The Established Benchmark*</u> - How can HUD gauge the success or failure of the GMPA if the established benchmark against which to gauge this is regulated out of existence? The packaging concept has never been tried on a wide scale in the mortgage industry. In order to determine if the GMPA has actually met its goal of simplifying the process and providing meaningful disclosures to consumers is to gauge how – or if – lenders choose *the new* over the status quo. Since the Revised GFE is so difficult and lacking in lender benefit, lenders will be compelled to use the GMPA. A compelled use will not allow for a proper comparison between the two systems.

Additionally, in a world of change, keeping the established benchmark will ensure stability. As discussed in greater detail below (*State Conflict Issues*), the GFE and

GMPA will in some fashion violate or challenge existing state law in most of the states. Yes, the GMPA concept must go forward despite these conflicts. Some may be minor conflicts, some may be preempted, and yet others may be more challenging. But to ensure that lenders have a stable environment – that is, an environment in which simultaneous compliance with state and Federal law is still possible– to originate loans, HUD must keep the GFE rule in place.

Recommendation - Because of the proliferation of system and operational changes lenders already face, its implementation will only result in an unusual increase in originator-to-consumer cost. Also, how can HUD gauge the success or failure of the GMPA – which MBA supports – if the established benchmark against which to gauge this is regulated out of existence? MBA recommends the delay of the implementation of the GFE, but in the interim recommends adding the Mortgage Broker Agreement.

MBA knows that the HUD can achieve its goal here of providing consumers with meaningful disclosures without implementing the Revised GFE. HUD should leave the current GFE requirements untouched. Today's mortgage industry practice provides consumers with significant and straightforward disclosures of lender fees, third-party fees, and broker fees early in the loan process. Of course we recognize and share HUD's concern that there should be more appropriate disclosure of YSPs. We thus recommend that HUD adopt the use of the Mortgage Broker Agreement (see discussion below), delay the implementation of the Revised GFE and maintain the current GFE requirements. In addition to possible entanglements with state laws and federal laws (discussed below), and questions as to HUD's authority here to require guarantees instead of estimates, this recommendation is the best solution to achieve HUD's objective of requiring timely, accurate and meaningful disclosures.

As stated above, MBA supports the implementation of the GMPA. Thus, after a reasonable implementation period, HUD should evaluate the success of the GMPA concept in the market. After this evaluation HUD should revisit the need for any additional changes to the current GFE system[9].

3. In addition to maintaining the current GFE requirements in place, HUD should require the use of the Mortgage Broker Agreement

Notwithstanding our position to delay the implementation of Revised GFE, MBA agrees with HUD that confusion regarding mortgage broker compensation continues to be an issue for consumers and that greater disclosure regarding broker fees may be

[9] *In the Alternative, Amend Tolerances* - MBA reasserts its position that HUD should delay the implementation of the Revised GFE. If, notwithstanding the foregoing, HUD decides to implement a revised GFE, MBA submits that the tolerance level should be set at no less than 20% for the aggregated total charges on the loan that are made up of all charges and services except: Interest rate dependent payment, per diem interest, hazard insurance, and owners title insurance. There should be no zero tolerance levels, and no distinction on tolerance levels based on factual scenarios. Placing this tolerance in the aggregate allows the flexibility a lender or lender requires to make cost-efficient loans, while providing the consumer with reasonable expectations – that is, a reasonable "estimate" – of the costs he will likely incur for the selected loan.

necessary. MBA therefore recommends that HUD adopt the Mortgage Broker Agreement Disclosure.

The Mortgage Broker Agreement disclosure form was designed by a diverse working group of large and small mortgage lenders, legal experts, and practitioners. It has been approved by several lender associations, and was fashioned to expressly accommodate all of HUD's "best practices" factors while incorporating useful features of the MBA/NAMB Model Form and other state disclosures that are currently in use. Indeed this is the same Mortgage Broker Agreement MBA proffered to HUD several months ago.

We believe the Mortgage Broker Agreement sets forth the most feasible prototype for a useful consumer disclosure. It clearly discloses the nature of the relationship between the broker and the borrower, the maximum amount of the broker compensation, and the method of how that compensation will be paid. Of course, this level of commitment from a broker and lender should also come with an exemption from Section 8 scrutiny.

We believe that the attached model meets HUD's expectations and provides a balanced approach to fully disclosing the compensation paid to mortgage brokers. This additional disclosure, coupled with the existing GFE rule and requirements, would achieve HUD's goals of full disclosure and greater consumer education.

4. Certain Timing Requirements for an "application," for an "open offer period," and expiration period of an Agreement should be amended

The Proposed Rule implements certain timing requirements for the Good Faith Estimate and the GMPA. These include a delivery of a GFE or GMPA within three days of application, keeping the offer open for 30 days, and honoring a signed agreement until "settlement."

Three business days and "Application" - One of HUD's goals with this Proposed Rule is that consumers be provided useful and meaningful disclosures early in the process. MBA embraces this goal. But there is concern that requiring disclosures too early in the process will merely produce disclosures that are not accurate and thus not meaningful to the consumer.

The Proposed Rule would require lenders to provide applicants with a GFE or GMPA within three business days of application. The "3 business-day threshold" is not new. What makes the Proposed Rule so daunting and thus difficult to accept by the industry is that HUD is arguably *lowering the threshold* of what constitutes an "application" by redefining this term, while at the same time *increasing the commitment* a lender must make when application is made.

Though the current definition of application[10] is somewhat ambiguous, it is flexible and sufficient if the disclosure triggered is merely an estimate. The Proposed Rule would, however, modify this term to more-definitively mean, "the submission of credit information (Social Security number, property address, basic income information, the borrower's information on the house price or a best estimate on the value of the property, and the mortgage loan needed) by borrower in anticipation of a credit decision, whether oral, written or electronic….[11]"

The issues raised here? First, an application could now be triggered by oral statements made by the parties. A writing is no longer required. An environment can now be created in which no records are maintained, yet an "application" has been taken. Without a requirement that an application can only be triggered by a writing, there would be no record to protect the applicant or the lender in the case of a dispute about the information provided or even if an application was actually taken. This environment can be avoided by simply keeping the existing requirement that an application is one taken in writing, and not orally.

Next, it appears that *the submission of only five items of information* will constitute an "application[12]." This effectively lowers the application threshold. Query: With this limited information, can a lender issue a meaningful guarantee of fees and, in some fashion, interest rate? While in some instances it may be possible, in many cases where fees and rate are subject to risk-based pricing, this will not suffice. To avoid the proliferation of meaningless initial disclosures only to be followed by subsequent redisclosures - justified by the borrower failing to achieve "acceptable final underwriting" - MBA recommends modifying the definition of application.

Recommendation - A lender should be given the chance to provide a meaningful disclosure. Thus, the term "application" should, in addition to the other five items of information outlined in the Proposed Rule, include the collection of credit report information and basic asset information as indicated on the loan application. With this information, coupled with the five items of information already identified by HUD in the Proposed Rule, a lender is in a much better position to provide a meaningful disclosure that the lender can more readily guarantee.

Offer Period - The Proposed Rule requires that the GMPA be an open guarantee – thus an open "offer" – to the applicant for 30 days. The GMPA is a solid guarantee. It is not subject to change absent acceptable final underwriting or unforeseeable circumstances. It begs the question, then: Can a lender guarantee fees for these 30 days? Likely not without substantial risk. The lender here bears all the risk, though it does not

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[10] An application is currently defined as, "the submission of a borrower's financial information in anticipation of a credit decision, whether written or computer generated…." *See*, 24 C.F.R. § 3500.2(b).
[11] *See*, 67 F.R. 49158.
[12] It is entirely possible that HUD intended the five listed items to be examples and not an absolute list of that which constitutes an "application." If these are in fact examples of the type of information collected that may constitute an application, then HUD must expressly so state in the final rule. Certainly this approach puts flexibility in the hands of the lender.

have all the control. Additionally, is 30 days even necessary or of any added value to the applicant, where a shorter period may be sufficient?

MBA believes that maintaining offers open for 30 days is unworkable. An applicant - which incidentally is a person who is only shopping for a loan and may have submitted only as little as five items of information at time of "application" – has the unilateral power of legally binding the lender for up to 30 days. This would not be so overwhelming if the standard for the offer is made to a more committed "applicant." But by making the "application" threshold so low – even if HUD adopts MBA's recommended amendments to the definition of "application" – the sheer volume of potentially legally-binding offers floating out in the market for any given lender is unmanageable. This risk exposure would only serve to destabilize the mortgage market.

Recommendation - To better control the risk associated with this potential, MBA recommends shortening the open-offer period to five business days[13]. This would not compromise the applicant's ability to adequately shop other lenders, and yet would reduce a lender's risk exposure substantially. Of course, a lender is not prohibited from making the offer open for a period greater than five business days. This may be yet another way for the originator to increase its market advantage. Yet again, the market will ultimately create its own balance and stability.

Signed Agreement Valid until Settlement - The Proposed Rule states the GMPA must be a guarantee of a package price "through settlement." Settlement is an event not a date. So to the degree that the applicant has exclusive control of when settlement occurs, this could be problematic. An example to illustrate: The lender has processed and final-approved the loan, prepared the loan for closing, but the applicant desires to "float" the rate indefinitely. As proposed, the lender must honor the guarantee whenever settlement occurs. In this example, the applicant may finally decide to settle the loan 6 months after application. While this scenario is not probable, it is possible. This scenario is more problematic if the loan documents and loan file "expire," thus requiring re-drawing of documents, a new credit report, and possibly a new appraisal. The Proposed Rule does not expressly state who must bear the cost of these items, but it does state that the executed GMPA is valid "through settlement."

Recommendation - It does not seem that HUD contemplated this eventuality when drafting the Proposed Rule. MBA advises HUD to modify this provision to reflect something more workable. The Final Rule should reflect that the lender may make the GMPA enforceable for any amount of time, "but not less than 30 days from application." If properly drafted, this would necessarily mean that the originator may contract with the applicant for an executed GMPA expiration date, provided that the expiration date is beyond the 30 day requirement. Market forces, again, may play a part here. Some

[13] "Business days" here would be the same as that term is defined under the Truth in Lending Act and Regulation Z in implementing the three business day rescission period. *See*, 12 C.F.R. § 226. 2(a)(6).

lenders may provide longer enforceability periods than others. In any event, the applicant's expectations are established early in the loan process.

5. The Proposed Rule may conflict with state laws in several states; HUD should facilitate Federal Preemption

Preliminary research indicates that the implementation of the revised GFE and GMPA, as proposed, may result in a violation or at least a conflict of law in the majority of the states. In many cases, there could be multiple conflicts within one state.

There appear to be at least three distinct areas of state laws and regulations, with sub-categories, that seem to invite Federal preemption in order to assure that industry members are able to comply with the Proposed Rule without violating state law. They are:

- Volume Packaging and Discounting
    1. Specific laws for specific service providers and their engagement and collaboration with other industry providers.
    2. Specific laws requiring disclosure of the dollar amount of fees charged for third party services.
    3. Specific laws requiring disclosure of the dollar amount of fees charged for third party services that would be excluded in calculations required under state high cost loan legislation.

- Advance Fees
    1. Specific laws prohibiting any fee to be collected, even bona fide third party charges.
    2. Specific laws prohibiting a charge for any broker service.
       Note: Not addressed here are state laws that allow for the collecting of an up-front fee, but which label that fee as something other than a fee for the preparation of a GFE.

- Advance Disclosure Requirements and Restrictions
    1. Laws requiring the production of a GFE prior to an application or collection of any fee.
    2. Laws containing specific itemization requirements in conflict with the proposed GFE.
    3. Laws prohibiting brokers from quoting the APR.
    4. Laws requiring the itemization of certain fees on forms required to be provided by different types of licensees.
    5. Laws requiring the itemization of refundable third party and broker service fees.
    6. Laws prohibiting brokers from issuing rate commitments.

Concrete examples of some inconsistencies between aspects of the Proposed Rule and state law include:

(1) Under "Advance Disclosure Requirements and Restrictions," state laws and regulations which require lenders to provide itemized GFEs (which exist in many states, including North Carolina, Pennsylvania, South Carolina, Idaho, New Jersey, New Hampshire, Massachusetts, Georgia, Washington, New York and Florida); and

(2) Under "Volume Packaging and Discounting," a law in the State of Texas (similar to laws in New Mexico, Florida and other states) that sets title insurance rates and prohibits rebates and which the Texas State Insurance Commissioner has interpreted to prohibit the packaging or bundling of services that include title insurance, and laws in many states (including New York, the District of Columbia, South Carolina, Oklahoma, Maine, Kansas, Kentucky, West Virginia, Indiana, Delaware, Pennsylvania, New Jersey, Connecticut, Virginia, Missouri, Oregon and Mississippi) that restrict add-on fees to vendor charges.

MBA urges that HUD not underestimate the negative impact that state restrictions will have upon the implementation of the GMPA proposals. This scenario strongly justifies HUD's taking necessary actions to engage in all-encompassing Federal preemption. Without this, the Proposed Rule's goal of streamlining and clarifying the mortgage process for the consumer would appear unattainable.

HUD's authority to affect state law is in RESPA. First, RESPA affects and annuls state law to the extent that the state law is inconsistent with RESPA. Further, it seems HUD's authority to affect those state laws is limited only to making the determination that those state laws are "inconsistent" with RESPA. And finally, and in any event, HUD is prohibited from determining that a state law is "inconsistent" if that state law gives greater protection to the consumer than does RESPA[14]. All of this suggests that HUD's ability to affect any state law must be determined on a case-by-case basis.

Recommendation - Ideally HUD should preempt these state laws. MBA urges HUD to make a formal finding that state laws that are inconsistent with the package concept offer less consumer protection than the package proposal. In the meantime, and as explained above, HUD should keep the GFE requirements untouched (except for the addition of the Mortgage Broker disclosure, see above) as it would allow lenders a legally recognized method of simultaneously complying with Federal and state laws.

6. The Proposed Rule has unintended effects on other Federal laws; HUD must reconcile these effects

HUD imports certain provisions of the Truth in Lending Act and the Federal Reserve Board's implementing regulation, Regulation Z into the requirements contained

[14] *See* 12 U.S.C. § 2616

in the Proposed Rule. This overlapping of requirements – especially where there are inherent conflicts between the legal requirements – is extremely disturbing.

First, it is not clear if HUD is empowered to require lenders to include TILA/Regulation Z components into RESPA/Regulation X disclosures. Even if HUD is so empowered, how would this be enforced? To illustrate the conflict: The Proposed Rule requires a GMPA (and even revised GFE) to disclose the Annual Percentage Rate ("APR") as that term is defined in TILA/Regulation Z. While mortgage brokers are required – and would continue to be required – to provide a GFE or a GMPA under RESPA/Regulation X, TILA/Regulation Z does not even require those same brokers to calculate and disclose the APR at all. How would this conflict be resolved? Another illustration: The Proposed Rule would require the APR to be "guaranteed" on the GMPA[15]. Not only is it difficult to calculate the APR with any degree of certainty at time of application, TILA/Regulation Z specifically provides that this need not be accurate *until loan consummation*[16].

Also, there is a clear conflict of purpose between the two laws. Under the Proposed Rule, the objective is to provide the applicant with a lump-sum amount, and not an itemization of charges. TILA/Regulation Z, however, necessarily requires an "Itemization of Amount Financed" that lists the individual charges associated with obtaining the loan. This problem is further frustrated if HUD considers another effect: Under the GMPA, a lender does not itemize the fees for the settlement services used for a given loan transaction. Within the concept of cost-averaging, which is permitted if the Section 8 scrutiny is lifted, a lender may in the end collect from the borrower amounts greater for certain services than the lender actually incurred for those services. This flexibility is necessary to accomplish the goals of the GMPA. But how will this differential between cost actually incurred and cost assessed the borrower be explained to the borrower who reviews the Itemization of Amount Financed?

Recommendation - The Federal Reserve Board must weigh in on the effects the Proposed Rule will have on TILA and Regulation Z. At a minimum it should eliminate the need for a lender to provide an Itemization of Amount Financed if that originator uses GMPA, and should eliminate the need to disclose items – such as the APR – on the GMPA that is already disclosed in TILA disclosures.

[15] Note that the GMPA must be provided within three business days of application.
[16] *See*, 12 C.F.R. § 226.19(a)(2)

PART B

Ancillary Issues and Request for Further Clarification

1. The Mandatory, Transaction-Specific Comparison Chart Should not be Transaction-Specific

The Proposed Rule in some fashion requires a lender to provide a comparison chart between the exact loan program and parameters requested by the borrower, and other cost-derivatives of that same loan. This occurs in both the GFE and GMPA provision of the Proposed Rule[17].

MBA believes the idea is a good one, but the required comparison should not be transaction-specific. That is, it should not be required to be custom-tailored to the borrower's loan request. First, there may be information technology issues. The only way this will work properly is if the system automatically makes these calculations. The programming in this component is overwhelming and, as compared to the gain received by the applicant, unnecessary to meet the provision's goals. Second, some lenders may not be able to offer the "alternative" loan program disclosed. This, then, could be misleading to the applicant. Finally, loan pricing varies based on increments of one-eighth of one percent for most loan products, whereas individual settlement charges may vary in fixed dollar amounts rather than as percentages of the loan amount. Consequently, there is no one-to-one correlation between such things as interest rate buy downs, discount points, premium or above-par pricing, and actual closing costs. As an example, if a consumer elects to minimize his or her out-of-pocket expenses at closing by folding the closing costs, including mortgage broker compensation, into the interest rate, the interest rate could go up in increments of one-eighth of one percent up to approximately two or three percent of the loan amount in most interest rate environments. This increase likely would not correspond in exact dollar amount to the closing costs that would be incurred if the consumer elected to close and pay up front all closing costs, including mortgage broker compensation.

This analysis should be contained in the Settlement Costs booklet. The example of a mortgage loan, variations on a theme, falls neatly into the booklet's objective. And, even though not transaction-specific, this example would still provide a great illustration of the "teeter-totter" effect of the interaction between rates and fees. In fact, using generic, simple numbers (such as a "standard $100,000 loan") instead of the applicant's specified requested loan amount and program will be easier to understand. This is especially true as the majority of initial loan requests by applicants will change through the process.

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[17] Interestingly, the actual Proposed Rule fails to include requirements that are otherwise detailed in the Preamble, Appendices and sample disclosures. This requirement – for the Revised GFE in the Proposed Rule - is an example of this oversight.

2. Clarify if Processing of an Application is Required During Offer Period

In discussing the Proposed Rule with lenders, several questions arose concerning a lender's obligation during the "offer period" of the GMPA. HUD should clarify whether the lender is obligated during this period to process and underwrite the loan. MBA believes that a lender should not be so obligated.

Loan processing and underwriting will necessarily require funds to be expended, at least for appraisal and credit reports. Since the Proposed Rule suggests that no fee may be collected until the Agreement is signed by the borrower, and since HUD suggested in the preamble that it did not seek to put the lender in a position to commit to expending such funds from its own pocket, it would seem that HUD would not require the loan to be processed and underwritten. Also, to expect otherwise may lead the applicant to believe that he is more obligated than he really is, thus inhibiting one of the main purposes of this Proposed Rule: to promote loan shopping.

Incidentally MBA cautions that not requiring the loan to be processed or underwritten may conflict with requirements found in the Equal Credit Opportunity Act and Regulation B. ECOA/Regulation B require that a lender not only notify the borrower of the lender's final decision within 30 days of receiving the information that caused that decision,[18] but also requires that a lender act with reasonable diligence to complete the loan process[19]. So if a lender has an "application" under RESPA/Regulation X and ECOA/Regulation, the 30 day offer period may be problematic. Providing a shorter offer period – especially the five business day period MBA recommends in these Comments – may alleviate some conflict here.

3. What is a Reasonable Fee Amount that may be collected after the GMPA is signed?

HUD has clearly stated that a fee may be collected from the borrower after that borrower signs the GMPA. While RESPA is not a fee-setting statute, HUD should at least provide guidance. MBA recommends that HUD pronounce that the fee must be a reasonable amount such that it will cover appraisal and credit report costs.

4. There should not be an automatic withdrawal of Section 8 Exemption in the event of GMPA requirements not met; Opportunity to Cure should be available.

HUD must also reconsider the retroactive application of the withdrawal of the Section 8 exemption in the event the GMPA requirements are not met. The Proposed Rule would withdraw the exemption if, after the fact, it is discovered that, for instance, the actual costs assessed at closing exceeded the guaranteed amount disclosed on the

[18] *See*, 15 U.S.C. § 1691(d)(1)
[19] *See*, Official Comment five to 12 C.F.R § 202.2(f)

GMPA by any amount. This is a rather harsh result for what is likely no more than an error. The Final Rule should extend to lenders and packagers an opportunity to cure such errors, similar to the one found in the Truth in Lending Act. At a minimum, this provision must address the following points:

- If packager discovers first, may cure without a breach of contract (GMPA) existing;
- If consumer discovers, must notify packager and afford opportunity to cure;
- If consumer discovers and notifies packager, and packager does not cure, then the consumer may sue for breach of contract.

This is a far more equitable result for those inevitable instances in which, for whatever reason, the GMPA requirements were breached. By incorporating an opportunity to cure, the borrower is not harmed and the lender has no motive to cause breach or not to engage curative action.

5. The impact on FHA's "one point" limitation

HUD must reconcile how the GMPA requirement of bundling of fees will be applied on FHA loans. More specifically, how is the 1% fee cap treated on such loans? While HUD clearly would be within its authority to establish a formula to determine how the aggregate package fee would be allocated to the FHA cap, this approach would appear to have two negative consequences: First, this places an additional calculation obligation on the lender, thereby increasing the complexity of the process for the lender. Second, HUD would have no assurance that the IRS would accept the same allocation formula for tax purposes and, as a result, the lender then could be forced to make one complex calculation for determining the FHA one point cap, and a second complex calculation to determine the IRS's allocation of tax deductible points.

MBA urges HUD to consider that this may be an opportune time for HUD to reconsider the propriety of the FHA one-point rule.

6. Fees Excluded from GMPA lump-sum figure

MBA submits that the following fees must be excluded from the GMPA lump-sum figure:

Mortgage Insurance – "MI" is an unknown and volatile fee in the loan process. It may not even be required. How can an inclusion of a fee that likely will not even be assessed promote a "meaningful" disclosure? This may promote the practice of lenders and packagers merely including an amount for MI in the lump-sum figure, only to still collect that full amount even though MI was ultimately not assessed. Even if MI is known to be required, the actual cost for this unknown at time of application. Basing a guaranteed MI charge on the borrower's representation of property value does not make this amount "known." Since lenders are not permitted to have this figure increase after the GMPA is issued, and borrowers are typically incorrect (and usually optimistic) about property value, inclusion of the MI in the GMPA, as proposed, is problematic.

For these reasons, HUD should exclude MI from the costs included in the lump-sum guaranteed cost amount.

Flood Insurance – At time of application there is virtually no way of ascertaining if the loan will require flood insurance. Rather than include an amount of this insurance – that likely will not even be incurred – this should be excluded from the lump-sum amounts. After all, the nature of flood insurance is virtually identical to hazard insurance, except that it is far more likely that hazard insurance rather than flood insurance will be an incurred cost – yet hazard insurance is an excluded cost.

Additionally, the flood insurance program is a Federal program. The lender, again, has no discretion on whether this is required nor virtually any discretion on the premiums for coverage. Therefore it is not a fee or charge that is subject to comparison shopping.

To reconcile this paradox, and based on the correct logic to exclude hazard insurance, HUD should exclude flood insurance costs from the guaranteed lump-sum figured disclosed in the GMPA.

Government Fees - Government charges generally do not vary between the date disclosed and the settlement date except in certain circumstances. Such charges may change if the type or nature of the transaction changes between disclosure and settlement and such change necessitates a different recordable security instrument that has higher recordation fees.[20] Additionally, in those jurisdictions where there is a tax based on the amount of the mortgage, an increased loan amount will likewise increase the amount of mortgage tax. Expecting this to be included in the lump-sum is infeasible because of these factors. Finally, since the lender has absolutely no discretion on this charge, this should not even be considered a shoppable item. That is, an applicant is not going to consider the "government charges" when shopping the loan from vendor to vendor.

Discount Points - Points must be excluded from the lump-sum package amount, as this is exclusively an interest rate component. The borrower must have the flexibility to choose how many points, if any, he wants to pay. To be required to include these points in the GMPA would deny the borrower of that flexibility.

[20] For example, an ARM Security Instrument generally has more pages than a fixed rate security instrument, and in most jurisdictions recordation fees are based on the number of pages. Thus, if a loan was originally disclosed as a fixed-rate mortgage, but then the borrower changes the product to an adjustable rate product, the recording fees will almost certainly increase beyond the amount disclosed on the GFE due to the increase in pages to be recorded. Another example would be a situation in which a borrower changes from a straight refinance to a consolidation, which would result in more recorded documents

Lock-In Fees - Lock-in fees should not be included in the GMPA lump-sum figure. Federal law and many state laws do not prohibit lenders from charging a fee to a borrower who elects to lock-in his rate. But of course, at the time of application it is not known if the borrower will exercise his power to lock that loan later in the loan process, or wait until loan closing, at which time the rate is automatically locked. Thus a lender is unable to determine if the lock-in fee will be incurred. HUD should excuse this fee from the GMPA lump-sum figure, since it is a fee that may never be incurred, and it is the borrower who has exclusive power of when and if this fee will ultimately be incurred.

Escrow Impounds - Escrow impound is not a charge for any particular service. Thus it is not appropriate or necessary to include this in the GMPA amount to facilitate shopping. Also, and most importantly, escrow impound accounting is already heavily regulated under Regulation X[21]. This strictly limits the amounts that may be collected at loan settlement and the amounts that may be maintained during loan servicing. The current regulation leaves virtually no discretion to any lender as to the amounts collected for escrow reserves. Ironically, the 10% tolerance on escrow impounds would lead to conflicting compliance requirements – contained in the same regulation no less – on how much may be collected at time of loan settlement.

Even if HUD's rule on escrow impound accounting allowed a lender to collect from the borrower an amount less than necessary to cover future escrow-account disbursements, the borrower's windfall would be short-lived: The servicer will soon enough be contacting the borrower to make substantial payments to cover the account deficiency. The practice, then, of a lender forcing a deficiency in the escrow account to satisfy the 10% tolerance is not consumer-friendly. To avoid these complications, HUD must excuse escrow impounds from any tolerance restrictions.

Also, it would be a rare case in which the escrow impound disclosed within three business days of application would actually be the same amount as that required to be collected at closing. The elements that make up an impound charge – especially taxes – are often not subject to precise calculation at time of application. This is especially true for purchase transactions and construction loans. The tax charge is necessarily subject to assessed value. Coupled with other unknowns – such as not knowing the exact tax rate for that sub-division - it is extremely difficult to accurately estimate the escrow impound amount within a 10% tolerance.

7. A Lender must have the authority to withdraw any offer or even executed GMPAs if the borrower changes his loan request

It is accepted by the industry that, in the majority of cases, the loan a borrower originally applies for is not the same loan that is ultimately funded. Is this because the lender is unscrupulous? No. There could be a myriad of justifiable reasons for this scenario, such as borrower discretion. Borrowers will often make changes to their initial

[21] *See*, 24 C.F.R. § 3500.17

requests. They may choose different points, a different interest rate, or a different loan amount. The Proposed Rule does not expressly state what happens to the GMPA in this instance. MBA submits that the lender should have the discretion to determine if the borrower's request renders the GMPA null and void.

8. The Recharacterization of the YSP as a Lender Credit will be Disruptive

The recharacterization of the Yield Spread Premium ("YSP") will be quite disruptive. Contrary to popular belief, the law and regulations on the application of the YSP in loan transactions is well established. Case law has made its rounds on the U.S. Appellate level defining its application. HUD has commented on this issue frequently, and has gone through an extensive formal interpretive process to clarify the application of RESPA to mortgage broker payments. The Federal Reserve Board issued regulations and commentary detailing how the YSP should be treated in APR calculations and TILA's HOEPA points and fees analysis. Even state laws speak on how YSPs are excluded from certain fee restrictions and points and fees tests[22]. A recharacterization will substantially affect these laws and regulations. Loans not conceived to be "high-cost" will now be so classified since the "lender credit" flows through the transaction. States in which fee and rate limits are governed by APR caps will now see more loans hit or exceed this caps as fees usually excluded from the APR calculation are now included.

In fact, under HUD's proposal, the APR calculation will effectively double-count the interest/YSP. The YSP is a result of a higher interest rate yield incurred by the borrower. This "full" interest rate is already included in the APR calculation. This is precisely why the YSP is not a "finance charge"; in effect, the Federal Reserve Board already knows that the "extra" cost to the borrower – the higher interest rate – was included in the rate calculation. But the Proposed Rule would basically funnel the YSP through the loan transaction as a lender credit. This credit to the borrower will be used to pay the broker for his charges – charges that are currently not counted as a finance charge under TILA and Regulation Z. since this is a YSP. Payment by the borrower to the broker for these additional fees will now be deemed a finance charge under TILA and Regulation Z[23]. Thus, there is double-counting of finance charge here: First as a higher interest rate; and second as a fee paid to the broker – the funds for which came from that higher interest rate.

IN CLOSING

In closing, MBA is supportive of Secretary Martinez's and HUD's Proposed Rule. We strongly embrace the packaging concept. At the same time, we believe that HUD must make adjustments to its proposal to ensure that the Final Rule creates a process that provides meaningful disclosures to consumers and is operationally feasible

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[22] *See*, for example, California's new anti-predatory lending law, AB 489, in which co-author Senator Machado recently wrote to the California Secretary of Business, Transportation and Housing that the YSP was intended to be excluded from that law's points and fees test.
[23] *See*, 12 C.F.R. § 226.4

for lenders. The implementation of the Revised GFE should be delayed, and the current GFE rule modified to include the Mortgage Broker Agreement. Finally, HUD should also address the state and Federal issues to ensure that lenders are able to operate in a stable compliance and operational environment.

We appreciate the opportunity to comment on the Proposed Rule. We look forward to working with Secretary Martinez and HUD as this Proposed Rule advances to a Final Rule.

Respectfully submitted,

John A. Courson
Chairman, Mortgage Bankers Association of America

Part C

Detailed Response to HUD's 30 question

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

As already stated, MBA recommends HUD delay the implementation of the Revised GFE. In its place, MBA urges HUD to keep the current rule for GFEs untouched. MBA also urges HUD to adopt the inclusion of the Mortgage Broker Agreement for transactions originated by a third-party mortgage broker. This Agreement was developed by a coalition of trade groups and proffered to HUD a few months ago. In addition to disclosing the maximum broker fee compensation, this Agreement contains language similar to that contained in the Proposed Rule. Specifically, it states:

> I understand that in connection with this Agreement, you are not acting as my agent. You are also not acting as the lender's agent. Although you seek to assist me in meeting my financial needs, you may not make available the products of all lenders or all investors in the market or the lowest prices or the best terms available in the market[24].

HUD's goal of encouraging a borrower to shop the loan is accomplished here, while not disrupting the mortgage industry with the implementation of the Revised GFE.

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

RESPONSE TO QUESTION #2

[24] Alternative language in the Agreement is available to address state- or program-specific requirements.

MBA opposes any absolute-guarantee approach in making the GFE offer.

A primary concern, as discussed below in our response to Question 3, is that the "unforeseeable circumstances" exception does not account for the likelihood of unknown, yet foreseeable and ordinary, circumstances that could affect most, if not all, of the terms disclosed to a potential borrower. For example, the proposed rule's redefinition of what constitutes an "application" mandates that a lender issue a GFE at an early time when there is insufficient information to make truly informed disclosures. In this regard, the "unforeseeable circumstances" exception ignores one of the fundamental pricing realities of residential mortgage loans; namely, that lenders typically offer a variety of interest rate and point combinations for any of their many lending programs. Because the proposed regulation would require a lender to furnish a GFE to the consumer prior to his or her selection of a lender or lock-in of an interest rate, the lender would be forced to make assumptions in disclosures that could subsequently prove to be incorrect. Consumer choices at the time an interest rate is locked in could significantly affect loan origination charges. For example, in the instance of a loan for new construction, delays, whether or not anticipated, in completion of the home might induce the consumer to elect an extended lock-in period, which would necessitate a higher lock-in fee. Conversely, a consumer who experiences no delays in the construction phase might decide to float the interest rate until a few days before closing. While such circumstances are not extraordinary or unforeseeable in the general context of mortgage lending transactions on new construction homes, <u>they are beyond a lender's control in any specific transaction</u>. Thus, the lender should not be penalized through an "unforeseeable circumstances" exception.

In addition to the situations outlined above, other foreseeable and non-extraordinary circumstances might include situations where an applicant, for reasons known only to the applicant, elects to change to a different loan program than the one initially selected, alters the amount of the down payment, or elects to finance a larger or smaller portion of the anticipated closing expenses. Given the likely existence of circumstances that are not extraordinary or unforeseeable but that are unknown and beyond a lender's control, the zero tolerance policy suggested in HUD's proposed regulation would force lenders to make high estimates for all settlement charges so as to avoid running afoul of the proposed limitation.

<u>HUD QUESTION #3</u>: In Section III.B.(2) c., the proposed rule establishes a 10% limit, or ''tolerance,'' for categories of settlement services and costs including third party services that the borrower shops for and escrow/reserves by which such costs cannot exceed the GFE estimates by 10% at settlement absent unforeseeable and extraordinary circumstances. It also establishes zero tolerances for origination charges and lender required lender selected third party costs and government charges that cannot vary from the estimate through settlement absent unforeseen circumstances. Are these appropriate tolerances and tolerance levels or should other

tolerances/tolerance levels be established for these categories? Also, should a tolerance be established for borrower's title insurance? What alternative or additional means might be employed to ensure that lenders take the care necessary to complete the GFE to ensure that it represents a Good Faith Estimate of final settlement costs?

<u>RESPONSE TO QUESTION #3:</u>

For the reason already stated in Part A of these Comments, MBA recommends HUD delay the implementation of the Revised GFE. In fact, these tolerances are illustrate yet another reason why MBA cannot support the current implementation of the Revised GFE. To illustrate why these tolerances are problematic, MBA discusses here each category of fee and tolerance, and the difficulties associated with these.

Moreover, rather than limiting variations to unforeseen and extraordinary circumstances, there should be a more pragmatic and realistic exception that recognizes the actual circumstances that affect loan pricing and closing costs. Perhaps the most significant of such circumstances is that, until such time as an applicant locks in a specific combination of interest rate and discount points, there can be no truly accurate disclosure of these costs. Similarly, it is important to recognize that the applicant's election to change to a different loan program or terms, alter the down payment amount, or alter the dollar amount of his or her contribution to closing costs as compared to the financing of same through an increase in the interest rate, are beyond a lender's control and could cause the GFE to become inaccurate. Consumer protection in such cases could be provided by requiring that the lender give an updated GFE that incorporates the new disclosure amounts. Furthermore, in a situation where a mortgage broker is involved, has given initial disclosures, and may have shopped the loan among various lenders, redisclosures could be required at the time a lender is ultimately chosen and an interest rate is locked.

a. <u>Zero Tolerance</u>

i. Loan Origination Charges

As indicated above, the MBA believes that a tolerance should not be established on these or other charges (i.e., they should be "tolerance free"). We believe, however, that if HUD ultimately imposes tolerance ranges on the majority of settlement charges, additional regulation and guidance are required. Occasionally, unscrupulous lenders surprise applicants at the closing with higher and/or additional fees to those disclosed on the GFE. While a few state regulators have taken the position that fees charged at settlement must be the same or less than those disclosed on the GFE, there are still many states that look more to the timing of the GFE than to its contents because the GFE is an "estimate." There are circumstances where the lender may have to charge an additional fee for goods, facilities, or services it provides that, while not extraordinary or unforeseeable, could not have been known at the time of application. Such circumstances might include, among others:

(1). Increased document preparation/consolidation/extension fees, where a loan that is originally submitted as a straight refinance is converted to a consolidation, which requires more paperwork and underwriting.

(2). Increased administrative fees, where, after a contract is negotiated between a broker and an applicant and after the GFE is provided, the broker reviews the applicant's credit, determines that there is an outstanding judgment, obtains Satisfaction from the creditor, and files the Satisfaction with the county clerk's office.

(3). Where delays are experienced in new construction, a consumer might elect an extended lock-in period, which would necessitate a higher lock-in fee.

(4). An applicant may elect to change to a different loan program than the one initially selected, alter the amount of the down payment, or change the amount of financing, all of which would likely lead to increased costs.

Because of the tight tolerances, lenders are likely to make higher estimates than they would absent a tolerance limitation, thus defeating the GFE's value as a shopping tool. Moreover, a tolerance that is too low, such as that suggested in HUD's proposed rule, would not only result in higher costs to consumers, but would pose difficulties for a mortgage broker that uses a variety of lenders, because the broker would not know at the time of application which lender was ultimately going to fund the loan and accordingly would not know the exact amount of the lender's charges.

ii. Third-Party Services (Other than Title Services) the Lender Both Requires and Selects

Control of third-party charges is vastly more difficult than controlling a lender's own administrative loan costs. The lender, obviously, is at the mercy of the vendor and the applicant. In addition, the processing of a loan may reveal that additional vendor fees may be required to close the transaction. For instance:

(1) A "drive-by" or other form of limited appraisal (when either the appraisal becomes outdated, or a

supplemental appraisal is necessary).

(2) A courier fee that was based on two deliveries, when additional deliveries were required.

(3) Because of unexpected additional applicants or updated reporting by repositories, a lender may be required to pull additional credit reports

iii. Lender-Required Title Services and Title Insurance

Lender-Required Title Services – MBA believes that having a "zero tolerance" for lender-required title services and title insurance is inappropriate. There should be no established tolerance limitation for title charges and title insurance that are state-prescribed or industry-regulated and/or vary depending on the loan amount (i.e., they should be "tolerance free"). An increased loan amount after disclosure will increase the amount of the title insurance premium. Similarly, resolving title exceptions may necessitate a larger premium. There should be no restrictions on these types of fees provided that the premiums are the actual bona-fide charges.

Again, it is unknown exactly what charge will be assessed for the services here. In fact, the depth and nature of the service is not known at time of application. Ancillary and necessary title services – such as clearing unexpected title issues, or releases of liens - may be required depending on the additional complexities each transaction may bring. For example, in purchase money mortgage transactions, the customer may not know who is actually "in title" at the time of application, and information that a seller gives to a potential buyer or the real estate broker is often erroneous. In many states, there are separate searches and separate fee schedules for bankruptcy and judgment and lien searches, and the fees are based upon the number of searches being conducted, which in turn is multiplied by the number of individuals involved in the transaction. Accordingly, the fees will likely increase if there are multiple sellers and/or borrowers. Having "zero tolerance" for changes in fees in this area would therefore be inappropriate.

Although they may not be readily apparent, several variables affect settlement agents' charges:

(1) Different agents charge different amounts for similar settlements depending on overhead, staffing needs, time, etc.

(2) The same agent may charge different amounts depending on the type of transaction (e.g., First mortgage, second mortgage, ARM, HELOC, Purchase money mortgage, etc.). If a transaction

was originally disclosed as an adjustable rate HELOC, but closes as a fixed rate first mortgage with two parties being added to title, there will likely be different and possibly higher charges than those disclosed on the GFE.

(3) The settlement agent that the lender selected at the time of application may not be available at the time of settlement to actually conduct the settlement due to scheduling conflicts. Because agents' fees vary from agent to agent, the settlement fee may increase.[25]

(4) In the event a loan amount increases, a settlement agent may increase its fee to cover the additional risks for larger loan amounts.

<u>Borrower-Selected Title Services</u> –In practice, at the time of disclosure, a lender will not know whether the borrower is going to choose the agent or the amount such agent is likely to charge because the lender has not established any type of relationship with the title services company. Accordingly, no tolerance limitation at all (i.e., "tolerance free") is absolutely essential here.

iv. Government Charges

Government charges generally do not vary between the date disclosed and the settlement date except in certain circumstances. Such charges may change if the type or nature of the transaction changes between disclosure and settlement and such change necessitates a different recordable security instrument that has higher recordation fees.[26] Additionally, in those jurisdictions where there is a tax based on the amount of the mortgage, an increased loan amount will likewise increase the amount of mortgage tax. Having a zero tolerance is infeasible because of these factors. HUD could require a sentence on the GFE stating that government recordation charges may increase based on loan amount and/or type of mortgage selected.

Finally, since the lender has absolutely no discretion on this charge, this should not even be considered a shoppable item. That is, an applicant is not going to

[25] A settlement agent may also need or desire (in good faith) to add an adjournment fee in the event a settlement is adjourned and rescheduled after the settlement has already begun.
[26] For example, an ARM Security Instrument generally has more pages than a fixed rate security instrument, and in most jurisdictions, recordation fees are based on the number of pages. Thus, if a loan was originally disclosed as a fixed-rate mortgage, but then the borrower changes the product to an adjustable rate product, the recording fees will almost certainly increase beyond the amount disclosed on the GFE due to the increase in pages to be recorded. Another example would be a situation in which a borrower changes from a straight refinance to a consolidation, which would result in more recorded documents

consider the "government charges" when shopping the loan from vendor to vendor. Thus, this item should be tolerance free.

c. No Tolerance Limitation ("Tolerance Free")

i. Interest Rate Dependent Payment

If a mortgage broker originates a loan and the borrower selects an interest rate above par, then any payments from the lender are reflected on the GFE and the HUD-1 Settlement Statement as payments to the borrower, and are subtracted from the total origination charges. As these payments go to the borrower to use as he or she sees fit (generally to pay other origination fees), we agree with HUD that there is no need to have a tolerance limitation, because the customer will receive the benefit of the payment.

ii. Hazard Insurance

HUD correctly suggests that the estimated cost of the minimum amount of insurance required by the lender should be tolerance free, because there is no control, requirement, or suggestion by the lender as to what insurance provider to use. Moreover, the consumer does not consider this charge when selecting a lender because the charge will not vary from lender to lender.

iii. Optional Owner's Title Insurance

HUD correctly suggests that the estimated cost of optional owner's title insurance should be tolerance free. In reality, not many lenders disclose this charge on their GFEs because it is not a fee that varies from lender to lender. Additionally, this is only a concern on purchase money mortgages and has no practical relevance for refinance transactions.

d. 10% Tolerance

i. Escrow Tolerances

This was discussed at length in Part B of the Comments. MBA believes that the 10% tolerance for amounts held in escrow should be removed from consideration. HUD's extensive revision to Regulation X several years ago concerning the aggregate accounting method of calculating escrow funds under RESPA has already clarified this issue. Since a lender has virtually no discretion in what this amount should be, it is not a figure that should affect shopping. It also does not appear to be an area in which consumers are being harmed.

ii. Tolerances for Borrower-Selected Third-Party Charges

In any event, no tolerances should be based on fact-specific scenarios. That is, there should be no distinction between a tolerance based on whether the borrower selected a settlement service provider recommended by the lender or one the borrower selected on his own. This creates operational issues, as well as controversy. The administration of the differing tolerances will require additional labor, which will amount to cost-per-loan increases. Also, conflict will ensue merely by attempting to demonstrate exactly who selected the vendor if that vendor was selected because of, or in spite of, the lender's recommendation.

e. Unforeseeable and Extraordinary Circumstances

The GFE is supposed to be an "estimate," not a guarantee. As explained above, attempting to define such exceptions in "force majeure" terms fails to account for the likelihood of circumstances that are foreseeable and ordinary, yet unknown and/or beyond the lender's control, that could affect the charges estimated on the GFE. Furthermore, to avoid differences in interpretation, HUD should, at a minimum, provide concrete examples of "unforeseeable and extraordinary circumstances" that would permit lenders to exceed the tolerance.

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

RESPONSE TO QUESTION #4:

There is a split of opinion on the appropriateness of fee mark-ups, volume-based discounts and charges based on cost-averaging in loan transactions. We see here, though, that HUD recognizes the benefit of negotiated discounts in mortgage transactions. However, with the strict tolerances advocated by HUD in its Proposed Rule, the lack of full Section 8 exemption, and the realities of loan originations, it is highly unlikely discounts will ever be realized by lenders or borrowers.

Under the proposed new GFE rules, a lender is required to pass along the "entire discounted price," if any, to the consumer. This may be achievable for certain truly cost-standardized services such as the flood certification or tax service. But this is no way achievable for other settlement services, such as appraisal, title or closing agent. In most cases the identity of these service providers cannot be determined with any certainty within three days of application. Take the example of the appraisal service. Within three days of application the lender will not know which appraiser will ultimately be used for the transaction. Some appraisers will offer discounts, while others cannot[27]. Thus, within three days of application the lender will not know if this transaction will be subject to a discounted appraisal.

Ironically, it's the heavy weight of the Proposed Rule itself that douses any incentive to negotiate discounts here. The zero-tolerance standard is so restrictive – providing for virtually no variance in charges for lender-required and lender-selected services at closing – that the lender cannot disclose a lower cost of a settlement service provider unless he is <u>certain</u> that the discount will apply in the transaction. Without knowing the vendor's identity – and thus not knowing if any discount will or will not flow in that transaction - how can the lender disclose anything but the full-cost amount? And a lender who discloses low but actually incurs a higher charge cannot seek solace in the "unforeseeable and extraordinary circumstances" exception. So a higher-than-discounted cost will always be selected and disclosed. Where is the incentive, with these tolerances, to guarantee and disclose a discounted fee if the originator is not even certain the discount will apply in this transaction?

This conditional exemption is novel but unworkable. In the context of negotiating with vendors, nothing short of a full exemption of Section 8 scrutiny will achieve the goal set out as RESPA's fundamental purpose: lowering settlement costs to borrower[28].

For reasons discussed in great detail in Part A of the Comments, MBA recommends HUD allow a transitional period between the implementation of the GMPA and the implementation of Revised GFE. In this transitional period, the existing GFE requirement should remain untouched[29].

<u>HUD QUESTION #5:</u> In Section III.B.(2) c., the proposed rule requires that the tolerances will apply to the GFE from the time the form is given by the lender through settlement. Also, in case it takes a substantial time for the borrower to decide to use the lender from the date the form is given, the rule and the form provide that the GFE need only be open for borrower acceptance for a minimum of 30 days from when the document is delivered or mailed to the borrower. After that time, the GFE could be ratified or superseded by the originator at the borrower's request. Is this expiration date appropriate to protect against unnecessary costs flowing from an indeterminate liability or for other reasons? Is 30 days too long or too short? Another possibility that commenters may consider is whether the numbers on the GFE should apply only from

[27] The lowest-cost appraiser, while preferable, may not always be the best fit for the transaction. To close loans in a timely manner, lenders or vendor managers often manage the number of appraisal orders open at any time with a single vendor, thereby making it difficult to specify precisely which appraiser will perform the work. In addition, if the applicant accepts the GFE later in the proposed 30-day period, the disclosed service provider may no longer be able to provide the service within the time frame required for the applicant to close. Under such circumstances, to accommodate the applicant, the lender would have to choose another appraiser.
[28] *<u>See</u>*, 67 F.R. 49151.
[29] With the exception of requiring brokers to use the Mortgage Broker Agreement, but also affording those brokers and lenders an exemption from Section 8 scrutiny.

the time the borrower enters into an agreement with the lender. HUD also invites commenters' views on whether HUD now should require a borrower's signature on the GFE to memorialize acceptance and begin the period during which the estimates are binding.

RESPONSE TO QUESTION #5:

The 30 day "open offer" period is too long to bind a lender to the guaranteed fees and charges quoted on a GFE.

MBA reminds HUD that, in drafting its Propose Rule, it may have over-estimated a lender's control over third-party settlement service fees. For reasons discussed above, many settlement service costs may fluctuate, as there are many unknowns a lender operates under within three days of application. The identity of certain settlement service providers is one of those unknowns.

For reasons discussed in great detail in Part A of the Comments, MBA recommends HUD allow a transitional period between the implementation of the GMPA and the implementation of Revised GFE. In this transitional period, the existing GFE requirement should remain untouched[30].

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

RESPONSE TO QUESTION #6:

The itemization of fees as currently required is appropriate. MBA agrees that the disclosure of broker fees and the nature of the relationship between the broker and applicant can be improved. For this reason, MBA again urges HUD to adopt the required use of the Mortgage Broker Agreement (with the attendant exemption from Section 8 scrutiny).

HUD QUESTION #7: In Section III.A.(3), the proposed rule requires that on the front of the proposed form mortgage brokers disclose the lender credit right below the total

[30] With the exception of requiring brokers to use the Mortgage Broker Agreement, but also affording those brokers and lenders an exemption from Section 8 scrutiny.

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

RESPONSE TO QUESTION #7:

MBA premises this response with the following statement: The recharacterization of the Yield Spread Premium will be very disruptive to the mortgage origination process. Contrary to popular belief, the law and regulations on the application of the YSP in loan transactions are well established. Case law has made its rounds on the U.S. Appellate level defining its application. HUD has commented on this issue frequently. The Federal Reserve Board issued regulations and commentary detailing how the YSP should be treated in APR calculations and TILA's HOEPA points and fees analysis. Even state laws speak on how YSPs are excluded from certain fee restrictions and points and fees tests[31].

Today's mortgage industry practice provides consumers with significant and straightforward disclosures of lender fees, third-party fees, and broker fees early in the loan process. Some brokers do provide a separate disclosure to consumers describing how they will be paid in the transaction and clearly informing consumers that the broker is not their agent (except where state law otherwise requires). We believe, though, that this does not go far enough.

MBA shares HUD's concern that YSPs are not disclosed clearly enough to the consumer. This is why MBA urges HUD to adopt the Mortgage Broker Agreement. This clearly discloses to the borrower that the broker will (or at least may) be receiving compensation directly from lender for this transaction.

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

[31] *See*, for example, California's new anti-predatory lending law, AB 489, in which co-author Senator Machado recently wrote to the California Secretary of Business, Transportation and Housing that the YSP was intended to be excluded from that law's points and fees test.

RESPONSE TO QUESTION #8:

The segregation of lender and broker charges on either Attachment A-1 or the front of the GFE would not benefit any of the parties to a loan transaction. The main objective of the GFE, and the apparent objective of HUD's proposed rule, is to provide the bottom-line costs of the transaction to the consumer so that the consumer may comparison shop. The proposed additional details are unnecessary and would likely prove confusing and burdensome to consumers.

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

RESPONSE TO QUESTION #9:

MBA believes the any applicant-borrower will be best served by receiving disclosures that are harmony with each other. To achieve this, HUD must make efforts to ensure that the GFE and the HUD-1 forms are accurate reflections of each other. HUD should adopt the premise that harmonization of disclosures surely promotes disclosures that are simple and meaningful. To the consumer, there is nothing simpler and more meaningful than a straight forward, almost line-by-line comparison of the GFE to HUD-1 Settlement Statement.

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

RESPONSE TO QUESTION #10:

This is a position MBA already openly advocates. As already indicated, MBA has proffered for review and acceptance the Mortgage Broker Agreement developed by a coalition of trade groups. This was intended to clearly disclose broker fees including the YSP and the nature of the relationship between borrower and broker. In addition, MBA advocated that a broker using this Agreement should be afforded an exemption from Section 8 scrutiny.

So indeed MBA believes that a safe harbor is necessary. A safe harbor where the broker's charges are specifically disclosed as a precise dollar amount and the applicant accepts the broker's offer would clarify what goods, facilities, and services are being provided or performed. In fact, if any service provider gives a GFE to an applicant, and that provider's charges are ultimately within the acceptable parameters of variance in the GFE, they should similarly have access to a safe harbor from Section 8 liability. Finally, fixing broker compensation at the GFE stage would increase the reliability of calculations under state high cost statutes.

While we believe that a safe harbor is necessary, HUD should clarify the scope of the safe harbor. For example, HUD should clarify whether a broker's charges are limited only to the broker's origination charges or would include the charges of any of the broker's affiliates performing settlement services in connection with the loan closing. In addition, HUD should identify the parties able to claim the protection of the safe harbor. Not only should a broker enjoy a safe harbor with respect to compensation collected from the borrower, but a lender should receive a safe harbor with respect to any lender payments to the borrower that were to form a part of the broker's compensation. Note also that the safe harbor could require lenders to track broker compensation on three levels: (1) "traditional" broker compensation; (2) broker compensation subject to the safe harbor; and (3) broker compensation through the guaranteed mortgage package.

If the phrase "its charges" is intended to cover all of an originator's charges, then the proposed rule becomes more problematic. Some lenders currently re-disclose and provide a GFE separate from that provided by a broker. Under the current GFE requirements, this practice is feasible because amounts shown are merely estimates. Under HUD's proposed GFE rule, however, this practice will pose greater difficulty because of the tolerance limitations. For example, if a lender prepares redisclosures that vary from the disclosures previously provided by the broker, because the broker would be required to honor all of its charges, the lender's only course of action may be to decline to process the application in order to avoid being bound by numbers that are incorrect from the lender's perspective. Overall, brokers would need to know with greater precision what each lender and service provider charges for its services. Brokers may therefore elect to deal with fewer lenders and service providers, which could reduce competition and the availability of products to consumers.

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

RESPONSE TO QUESTION #11:

The safe harbor is indeed necessary. All parties who negotiate with settlement service providers otherwise fear scrutiny and accusations of Section 8 violations. Even though these claims are often without merit, the mere threat of scrutiny would ward off even the most bold settlement services providers in engaging in any negotiations with other parties. Even if these negotiations would ultimately benefit the borrower. This has always been the problem with the regulatory barrier. It seemed that HUD's policy was that any form of negotiations that would effectively provide volume-based discounts was prohibited, even if this benefited the consumer. Yes, we need the exemption to benefit from the full impact and potential the GMPA concept has to offer.

Merely allowing the negotiation of discounts that must be passed to the borrower will not be sufficient. First, there will remain the perception or suspicion by some that these negotiations resulted somehow in a violation of Section 8. The industry – and HUD - has weathered the litany of claims of perceived Section 8 violations on numerous occasions. Thus, it should go without saying that the full exemption is required so as to avoid even the mere perception of Section 8 impropriety. Additionally, and as discussed in response to Question 4, it's the heavy weight of the Proposed Rule itself that douses any incentive to negotiate discounts. Without the cover of the exemption, the lender cannot disclose a lower cost of a settlement service provider unless he is certain that the discount will apply in the transaction. Within three days of application the lender will not know the identity of certain vendors, - those that will and those that will not offer discounts - and thus will not offer disclose any discounted amount.

Additionally, the rule should remain silent in regard to charging a fee related to providing a GMPA, and it should let the market control any fees associated with GMPAs. In general, the market today does not allow a lender to charge a fee for a GFE, and in all likelihood this would remain the case for GFEs and GMPAs. The first sentence of Section VII of GMPA form must also be deleted to reflect this change.

***HUD QUESTION #12**: As proposed in Section III. C. (6) is the scope of the safe harbor appropriately bounded in applying to all packagers and participants in packages? The safe harbor also currently does not apply to referrals to the package.*

Should there also be a bar against part time employees of other providers working for the package to steer business? How should the safe harbor apply to affiliated business arrangements to protect borrowers from steering?

RESPONSE TO QUESTION #12:

The safe harbor is written appropriately as proposed. No additional rules are needed to achieve HUD's intent prohibiting referral fees being paid for unbeneficial steering. Attempting to place any additional limitations is unnecessary because it does not provide borrowers any additional protection, but will potentially create a larger burden for packagers, thus ultimately increasing the package cost to borrowers without adding benefit.

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

RESPONSE TO QUESTION #13:

For reasons discussed in great depth in Part A, MBA believes that creating bona-fide, legally-binding 30-day offers, *en masse*, to the general public creates substantial risk on lenders and the mortgage industry as a whole. The proposed rule must either abandon the interest rate guarantee proposal or provide a workable alternative that captures HUD's intentions within the confines of what lenders and secondary marketers can deliver.

MBA understands that HUD's objectives are focused on finding a way to guard against the improper manipulation of the rate portion of the disclosures in a way that nullifies the closing cost guarantee. MBA agrees that there is need to assure that we close all possible loopholes for deceptive disclosures. To this end, MBA, hereby pledges to work with HUD to research the various options and alternatives in greater detail so that HUD's laudable goals can be achieved with the minimum level of risk to lenders and capital markets. MBA is now engaging in the formation of specialized working groups of industry experts to study the issue of mortgage rate indices or other possible means of achieving HUD's goals. This working group will look at such options as identifying possible formulas, possible standardized interest rate indices, or other methods that will assist in protecting consumer against abusive or bait-and-switch practices. Going forward we will share our findings with HUD and invite government and industry partners to deliberate on the full range of alternatives that are identified.

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

RESPONSE TO QUESTION #14:

MBA believes that limiting the packaging safe harbor to mortgage brokers is not appropriate here. Lenders too have much to offer consumers in the form of packages. And MBA here reiterates its commitment to work with HUD to research this matter in greater detail so that HUD's intended goals can be achieved with the minimum level of risk to lenders and capital markets. MBA is now engaging in efforts to form working groups of industry experts to study the issue of mortgage rate indices or other possible means of achieving HUD's goals. Going forward, we will keep HUD apprised of our efforts in this regard.

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

RESPONSE TO QUESTION #15:

The safe harbor should be available for all types of loans, *especially* HOEPA loan. HUD proposes to make the safe harbor available to lenders in order to facilitate consumers' ability to shop for financing. It makes no sense to exclude those transactions that consumers most NEED to shop. Moreover, many lenders (especially smaller lenders) will find it operationally burdensome to continue to offer two compliance schemes. Restricting the loan programs on which GMPAs may be offered will arbitrarily force lenders to either 1) discontinue offering some loan programs or 2) force lenders to utilize only the GFE approach, thereby defeating the entire purpose of allowing GMPAs.

The GMPA alternative should be available in connection with HOEPA loans. It would seem that HOEPA loan borrowers are the type of consumers who would benefit the most from the shopping advantages provided by the GMPA proposal. HUD has also indicated in the Preamble to the Proposed Rule that it may also exclude from the GMP safe harbor "mortgages that exceed other limits, or include other features identified through this rule making, resulting in unreasonable settlement charges or loan terms inimical to the purposes of RESPA." Again, we see no reason for such exclusion for the reasons stated above. Unreasonable or abusive loan terms (which are not the result of compensated referrals) are not the subject of RESPA, but are addressed by other laws, including HOEPA, state mortgage lending laws and state unfair trade and deceptive practices acts.

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

<u>RESPONSE TO QUESTION #16:</u>

The Proposed Rule requires that the GMPA (and effectively the GFE) be an open guarantee – thus an open "offer" – to the applicant for 30 days. The GMPA is a guarantee. It is not subject to change absent acceptable final underwriting or unforeseeable circumstances. It begs the question: Can a lender guarantee fees and - possibly interest rate - for these 30 days? The answer: Not without substantial risk. The lender here bears all the risk, though it does not have all the control. Additionally, is 30 days even necessary or of any added value to the applicant, where a shorter period may be sufficient?

It seems that maintaining offers open for 30 days is unworkable. An applicant - which incidentally is a person who is only shopping for a loan and may have submitted only as little as five items of information at time of "application" – has the unilateral power of legally binding the lender for up to 30 days. This would not be so overwhelming if the standard for the offer is made to a more committed "applicant." But by making the "application" threshold so low – even if HUD adopts MBA's recommended amendments to the definition of "application" – the sheer volume of potentially legally-binding offers floating out in the market for any given lender is unmanageable. This risk exposure would only serve to destabilize the mortgage market.

Additionally, HUD should clarify the lender's obligation during this open offer period. The 30-day window may conflict with the Equal Credit Opportunity Act and Regulation B. It would seem that the lender is not required to begin processing the loan application before the applicant accepts the GMPA. To expect otherwise may lead the applicant to believe that he is more obligated than he really is, thus inhibiting one of the main purposes of this Proposed Rule: To promote loan shopping. Also, the lender is not permitted to collect any fee before applicant accepts the GMPA. Thus it is not likely that HUD intended the lender to take on the great financial liability by incurring substantial costs for appraisals and other such charges for a shopping applicant.

To better control the risk associated with this potential, MBA recommends shortening the <u>open-offer period to five business days</u>[32]. This would not compromise the applicant's ability to adequately shop other lenders, and yet would reduce a lender's risk exposure substantially. Of course, a lender is not prohibited from making the offer open for a period greater than five business days. This may be yet another way for the originator to increase its market advantage. Yet again, the market will ultimately create its own balance and stability. Additionally, HUD should clearly state whether a lender is required to process a loan during the offer period. MBA recommends that a lender in this situation is NOT required or expected to process the loan.

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

<u>RESPONSE TO QUESTION #17:</u>

There should be no indication or suggestion to the consumer that the consumer has the legal right to reports generated from these services. These are services for the benefit and purposes of the lender, not the consumer. The concern in providing reports to consumers is that the purpose or contents therein could be unfairly misinterpreted by the

[32] "Business days" here would be the same as that term is defined under the Truth in Lending Act and Regulation Z in implementing the three business day rescission period. <u>*See*</u>, 12 C.F.R. § 226.23].

consumer to detriment of the lender or service provider. Indeed, certain laws – Federal and state – may give the consumer some rights, such as a right to a copy of the appraisal. But then there is no reason for HUD to duplicate these efforts.

Additionally, there is generally no prohibition against a lender otherwise offering its borrowers a right to such reports. So in the event the lender so desires, this can be offered.

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

RESPONSE TO QUESTION #18:

MBA agrees that packagers should not be limited per se. There should be no net worth or asset requirements, as this would only complicate the matter. Who would administer this oversight? Also, lenders – and likely others similarly situated – already have similar administrations in place to monitor vendors. In the wholesale lending environment a lender qualifies then monitors its loan brokers to ensure these brokers are truly ready, willing and able to do business with that lender. The concept here would be similar. If a lender is concerned about the packager, then that lender should itself establish qualifying standards for the packagers. A packager itself should have similar standards for its vendors in the package. We believe that it is not necessary that HUD regulate this. We also agree that packagers should not be limited just to those who are licensed to lend or broker.

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

RESPONSE TO QUESTION #19:

The approach taken by HUD (i.e., excepting certain charges from the package) is the right approach to take since the amounts for certain items (including the ones suggested by HUD) can vary widely depending on the circumstances and it would not be consistent with the purpose of the “package” concept to include items and amounts that are not definite.

While including a minimum figure for these uncertain items in the package price would serve the objective of providing the borrower with a single figure, this approach would dilute the value of the single figure by making it likely to be very inaccurate.

MBA has some concerns, however, in regards to the inclusion of certain fees in the GMPA lump-sum figure.

Mortgage Insurance – “MI” is an unknown and volatile fee in the loan process. It may not even be required. How can an inclusion of a fee that likely will not even be assessed promote a “meaningful” disclosure? This may promote the practice of lenders and packagers merely including an amount for MI in the lump-sum figure, only to still collect that full amount even though MI was ultimately not assessed. Even if MI is known to be required, the actual cost for this unknown at time of application. Basing a guaranteed MI charge on the borrower’s representation of property value does not make this amount “known.” Since lenders are not permitted to have this figure increase after the GMPA is issued, and borrowers are typically incorrect (and usually optimistic) about property value, inclusion of the MI in the GMPA, as proposed, is problematic.

For these reasons, HUD must exclude MI from the costs included in the lump-sum guaranteed cost amount.

Flood Insurance – At time of application there is virtually no way of ascertaining if the loan will require flood insurance. Rather than include an amount of this insurance – that likely will not even be incurred – this should be excluded from the lump-sum amounts. After all, the nature and function of flood insurance is virtually identical same as hazard insurance, except that it is far more likely that hazard insurance rather than flood insurance will be an incurred cost – yet hazard insurance is an excluded cost.

Additionally, the flood insurance program is a Federal program. The lender, again, has no discretion on whether this is required nor virtually any discretion on the premiums for coverage. Therefore it is not a fee or charge that is subject to comparison shopping.

To reconcile this paradox, and based on the correct logic to exclude hazard insurance, HUD must exclude flood insurance costs from the guaranteed lump-sum figured disclosed in the GMPA.

Government Fees - Government charges generally do not vary between the date disclosed and the settlement date except in certain circumstances. Such charges may change if the type or nature of the transaction changes between disclosure and settlement and such change necessitates a different recordable security instrument that has higher recordation fees.[33] Additionally, in those jurisdictions where there is a tax based on the amount of the mortgage, an increased loan amount will likewise increase the amount of mortgage tax. Expecting this to be included in the lump-sum is infeasible because of these factors. Finally, since the lender has absolutely no discretion on this charge, this should not even be considered a shoppable item. That is, an applicant is not going to consider the "government charges" when shopping the loan from vendor to vendor.

Discount Points - Points must be excluded from the lump-sum package amount, as this is exclusively an interest rate component. The borrower must have the flexibility to choose how many points, if any, he wants to pay. To be required to include these points in the GMPA would deny the borrower of that flexibility.

Lock-In Fees - Lock-in fees should not be included in the GMPA lump-sum figure. Federal law and many state laws do not prohibit lenders from charging a fee to a borrower who elects to lock-in his rate. But of course, at the time of application it is not known if the borrower will exercise his power to lock that loan later in the loan process, or wait until loan closing, at which time the rate is automatically locked. Thus a lender is unable to determine if the lock-in fee will be incurred. HUD should excuse this fee from the GMPA lump-sum figure, since it is a fee that may never be incurred, and it is the borrower who has exclusive power of when and if this fee will ultimately be incurred.

Escrow Impounds - NOTE: The question suggests that escrow impound reserves are outside the package. While this is true, it also seems that the instructions to complete the GMPA states that the disclosed amount will be within a 10% tolerance. The escrow impound reserves should not be subject to any tolerance levels.

Escrow impound is not a charge for any particular service. Thus it is not appropriate or necessary to include this in the GMPA amount to facilitate shopping. Also, and most importantly, escrow impound accounting is already heavily regulated under Regulation X[34]. This strictly limits the amounts that may be collected at loan settlement and the amounts that may be maintained during loan servicing. The current regulation leaves virtually no discretion to any lender as to the amounts collected for escrow reserves. Ironically, the 10% tolerance on escrow impounds would lead to conflicting compliance requirements – contained in the same regulation no less – on how much may be collected at time of loan settlement.

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[33] For example, an ARM Security Instrument generally has more pages than a fixed rate security instrument, and in most jurisdictions, recordation fees are based on the number of pages. Thus, if a loan was originally disclosed as a fixed-rate mortgage, but then the borrower changes the product to an adjustable rate product, the recording fees will almost certainly increase beyond the amount disclosed on the GFE due to the increase in pages to be recorded. Another example would be a situation in which a borrower changes from a straight refinance to a consolidation, which would result in more recorded documents

[34] *See*, 24 C.F.R. § 3500.17

Even if HUD's rule on escrow impound accounting allowed a lender to collect from the borrower an amount less than necessary to cover future escrow-account disbursements, the borrower's windfall would be short-lived: The servicer will soon enough be contacting the borrower to make substantial payments to cover the account deficiency. The practice, then, of a lender forcing a deficiency in the escrow account to satisfy the 10% tolerance is not consumer-friendly. To avoid these complications, HUD must excuse escrow impounds from any tolerance restrictions.

Also, it would be a rare case in which the escrow impound disclosed within three business days of application would actually be the same amount as that required to be collected at closing. The elements that make up an impound charge – especially taxes – are often not subject to precise calculation at time of application. This is especially true for purchase transactions and construction loans. The tax charge is necessarily subject to assessed value. Coupled with other unknowns – such as not knowing the exact tax rate for that sub-division - it is extremely difficult to accurately estimate the escrow impound amount within a 10% tolerance.

There is ambiguity as to whether the list of "Other Required Settlement Costs" proposed by HUD is meant by way of example or is intended to be exhaustive. While the commentary suggests that only the listed items can be excluded from the package, the proposed regulation (in Section 3500.16(c)(3)(iii)) states that the GMPA form should identify and provide estimates for "other required settlement costs, *such as* per diem interest, reserves/escrow, and hazard insurance, and optional owner's title insurance. . .". The bolded language could be read as suggesting that the listed items are only by way of explanation. HUD must revise the regulatory language to clarify this issue.

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

<u>RESPONSE TO QUESTION #20:</u>

Items required to be disclosed under the TILA should NOT be again be required to be disclosed in any Regulation X disclosure. The TILA disclosure (and the items required to be contained therein) also should continue to be subject to Regulation Z, rather than Regulation X. For instance, errors in an APR given three days after application should be handled through the remedies contained in TILA and Regulation Z. Such an error, however, should not be the cause of losing the Section 8 exemption.

While borrowers should have the information needed to shop for and understand their loans, we do not believe that the GMPA should duplicate items that already are required to be set forth on the TILA disclosure. These items include the monthly payment, the section discussing whether the loan is subject to a prepayment penalty or has a balloon payment, and the information on the terms of an adjustable rate mortgage.

HUD should not attempt to incorporate TILA disclosure elements in a RESPA disclosure. This would have the effect of adding more burden on the RESPA side without eliminating any burden on the TILA side. This also would not advance consumer interests, since they would receive redundant disclosures, which may result in confusion.

For the same reasons, we also believe that HUD should eliminate the requirement for an addendum to the HUD-1 Settlement Statement. The addendum would seem to be contrary to the streamlined, non-complex nature of the package. Importantly, eliminating the addendum would not eliminate any information now provided to borrowers. To the extent eliminating the addendum creates an issue for APR calculation, the Fed rather than HUD is the proper authority to resolve it. HUD should coordinate with the Fed, as it has in the past in such situations, but HUD should not determine unilaterally the resolution of an issue that arises under TILA rather than RESPA.

Regarding how requirements in the Proposed Rule fit together with TILA requirements and how they can be better coordinated, we offer the following comments and suggestions, which we have divided into four areas:

1. APR issues in connection with the GMPA Because the GMPA will not include specific amounts for fees that have traditionally been considered finance charges, the prepaid finance charges will be impossible to calculate. The Proposed Rule suggests that "the finance charges needed to calculate the APR will be disclosed in an addendum to the HUD-1." However, this itemization will defeat the purpose of the GMPA, because lenders will not be able to cost average and the itemization will invite a challenges the amount of those fees.

Possible solutions are to: (1) include the entire amount of GMPA charges in the APR calculation (which raises concerns around relatively higher APRs, given the thresholds in various state anti-predatory legislation), (2) request the Federal Reserve to develop a safe harbor against challenges to the amount of the GMPA fees itemized on the HUD-1. In either case, the Federal Reserve Board must act here.

2. Broker Fees and impact on APR and HOEPA Calculation. Currently, YSPs are not included in the HOEPA APR Calculation because they are not paid

directly by the borrower; to prevent "double counting" of YSPs which, typically, already factor into the interest rate. Under the Proposed Rule, broker fees are to be treated as payable directly by the borrower. Thus, absent action by the Federal Reserve, implementation of the Proposed Rule would result in higher APRs for brokered loans, and, consequently, more loans classified as HOEPA loans, than under the current rules.

A possible solution to prevent double counting would be for the Federal Reserve to revise the Official Staff Commentary to Regulation Z ("Commentary") to allow for a deduction from the finance charge of the amount of any YSP paid to the borrower by the lender, thus effectively negating inclusion of the YSP portion of the broker fee in the APR calculation.

In addition, YSPs are currently not counted in the "Points and fees" test for HOEPA loans, again because they are not paid directly by the borrower. However, the Proposed Rule does not isolate the YSP in the lump-sum figure of the GMPA. Absent action by the Federal Reserve, therefore, the Proposed Rule will likely result in YSPs being counted as points and fees, thereby expanding HOEPA coverage to more loans. A possible solution would be for the Federal Reserve to allow a credit for the amount paid to the borrower by the lender (similar to how buy-downs are treated under Regulation Z), thus negating the fees paid directly to the broker by the borrower.

This solution only ensures that HOEPA coverage would not be significantly expanded as a result of the Proposed Rule. However, the HOEPA points and fees test is replicated, albeit with often lower numerical triggers, in many state and local high-cost loan legislation. To prevent similar expansions of coverage under those laws and ordinances, similar action would be needed in each such jurisdiction (or Federal preemption would have to occur).

3. Problem of duplicate disclosures. The Proposed Rule requires disclosures on the GMPA that are already required by Regulation Z. In particular, the Proposed Rule requires that the APR be disclosed on the GMPA, along with prepayment information, balloon information, and variable rate information, all of which are already required to be disclosed to the borrower up front by TILA. This increases the chance that the borrower will become confused about the details of his/her loan, and/or will lose sight of the significance of the critical information concerning his/her loan (which the TILA segregation requirement, in particular, is designed to highlight). Having to disclose the APR in the GMPA, moreover, would be particularly onerous for brokers. Brokers are not now required to – and in some cases, prohibited from – disclosing the APR.

Rather than requiring duplicate disclosures, efforts should be made to streamline borrower disclosures and make them less confusing. The APR, prepayment information, balloon information and variable rate information should all be given in the initial TIL (not in the GFE or GMPA). In addition, the GMPA should be allowed to substitute for the TILA itemization of amount financed; however, timing issues need to be considered.

4. Open End Loans. RESPA does not currently require that a GFE be given in connection with open end loans. Nevertheless, lenders should be able to offer GMPAs to HELOC borrowers. A suggestion is that borrowers be given both the GMPA and the HELOC application disclosure required under TILA, with the fees portion of the HELOC application disclosure consisting merely of a reference to the GMPA.

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

RESPONSE TO QUESTION #21:

As discussed above (and for the reasons alluded to by HUD in its question), mortgage insurance premiums should be excluded from the package price and disclosed as an “Other Required Settlement Cost.”

Mortgage insurance (“MI”) is an unknown and volatile fee in the loan process. It may not even be required. How can an inclusion of a fee that likely will not even be assessed promote a “meaningful” disclosure? This may promote the practice of lenders and packagers merely including an amount for MI in the lump-sum figure, only to still collect that full amount even though MI was ultimately not assessed. Even if MI is known to be required, the actual cost for this unknown at time of application. Basing a guaranteed MI charge on the borrower’s representation of property value does not make this amount “known.” Since lenders are not permitted to have this figure increase after the GMPA is issued, and borrowers are typically incorrect (and usually optimistic) about property value, inclusion of the MI in the GMPA, as proposed, is problematic.

For these reasons, HUD must exclude MI from the costs included in the lump-sum guaranteed cost amount.

State laws prohibiting rebates or the splitting of commissions for mortgage insurance could be interpreted to prohibit the inclusion of mortgage insurance or part of a package or bundling of settlement services. Unless mortgage insurance were removed the package, therefore, Federal preemption of such laws might be necessary.

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

<u>RESPONSE TO QUESTION #22:</u>

Preliminary research indicates that the implementation of the revised GFE and GMPA, as proposed, may result in a violation – or at lease conflict - of law in the majority of the states. In many cases, there could be multiple conflicts within one state. There appear to be at least three distinct areas of state laws and regulations, with sub-categories, that seem to invite Federal preemption in order to assure that industry members are able to comply with the Proposed Rule without violating state law. They are:

Volume Packaging and Discounting

- Specific laws for specific service providers and their engagement and collaboration with other industry providers.
- Specific laws requiring disclosure of the dollar amount of fees charged for third party services.
- Specific laws requiring disclosure of the dollar amount of fees charged for third party services that would be excluded in calculations required under state high cost loan legislation.

Advance Fees

- Specific laws prohibiting any fee to be collected, even bona fide third party charges.
- Specific laws prohibiting a charge for any broker service.

  Note: Not addressed here are state laws that allow for the collecting of an up-front fee, but which label that fee as something other than a fee for the preparation of a GFE.

Advance Disclosure Requirements and Restrictions

- Laws requiring the production of a GFE prior to application or collection of any fee
- Laws containing specific itemization requirements in conflict with the Revised GFE
- Laws prohibiting brokers from quoting the APR
- Laws requiring the itemization of refundable third-party and broker-service fees
- Laws prohibiting brokers from issuing rate commitments.

Concrete examples of some inconsistencies between aspects of the Proposed Rule and state law include:

- Under "Advance Disclosure Requirements and Restrictions," state laws and regulations which require lenders to provide itemized GFEs (which exist in many states, including North Carolina, Pennsylvania, South Carolina, Idaho, New Jersey, New Hampshire, Massachusetts, Georgia, Washington, New York and Florida); and

- Under "Volume Packaging and Discounting," a law in the State of Texas (similar to laws in New Mexico, Florida and other states) that sets title insurance rates and prohibit rebates and which the Texas State Insurance Commissioner has interpreted to prohibit the packaging or bundling of services that include title insurance, and laws in many states (including New York, the District of Columbia, South Carolina, Oklahoma, Maine, Kansas, Kentucky, West Virginia, Indiana, Delaware, Pennsylvania, New Jersey, Connecticut, Virginia, Missouri, Oregon and Mississippi) that restrict add-on fees to vendor charges.

This strongly justifies HUD to take the necessary action to engage in all-encompassing Federal preemption. Without this the Proposed Rule's goal of streamlining and clarifying the mortgage process for the consumer would appear unattainable.

RESPA affects and annuls state law only if the state law is inconsistent with RESPA. Further, it seems HUD's authority to affect those state laws is limited only to making the determination that those state laws are "inconsistent" with RESPA. And finally, and in any event, HUD is prohibited from determining that a state law is "inconsistent" if that state law gives greater protection to the consumer than does RESPA[35]. All of this suggests that HUD's ability to affect any state law must be determined on a case-by-case basis.

Thus, ideally HUD should preempt these state laws. MBA, then, urges HUD to make a formal finding that any state laws that are inconsistent with the package concept

[35] See, 12 U.S.C. § 2616

offer less consumer protection than the package proposal. In the meantime, HUD should keep the GFE requirements untouched (except for the addition of the Mortgage Broker disclosure, see above) as it would allow lenders a legally recognized method of simultaneously complying with Federal and state laws.

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

RESPONSE TO QUESTION #23:

A primary concern, as discussed above in our response to Question 3, is that the "unforeseeable circumstances" exception does not account for the likelihood of unknown, yet foreseeable and ordinary, circumstances that could affect most, if not all, of the terms disclosed to a potential borrower. For example, the proposed rule's redefinition of what constitutes an "application" mandates that a lender issue a GMPA at an early time when there is insufficient information to make truly informed disclosures. In this regard, the "unforeseeable circumstances" exception ignores one of the fundamental pricing realities of residential mortgage loans: Lenders typically offer a variety of interest rate and point combinations for any of their many lending programs. Because the Proposed Rule would require a lender to furnish a GMPA to the consumer prior to his or her selection of a lender or lock-in of an interest rate, the lender would be forced to make assumptions in disclosures that could subsequently prove to be incorrect.

Consumer choices at the time an interest rate is locked in could significantly affect loan origination charges. For example, in the instance of a loan for new construction, delays, whether or not anticipated, in completion of the home might induce the consumer to elect an extended lock-in period, which would necessitate a higher lock-in fee. Conversely, a consumer who experiences no delays in the construction phase might decide to float the interest rate until a few days before closing. While such circumstances are not extraordinary or unforeseeable in the general context of mortgage lending transactions on new construction homes, they are beyond a lender's control in any specific transaction. Thus, the lender should not be penalized through an "unforeseeable circumstances" exception.

Also, other foreseeable and non-extraordinary circumstances might include situations where an applicant, for reasons known only to the applicant, elects to change to a different loan program than the one initially selected, alters the amount of the down payment, or elects to finance a larger or smaller portion of the anticipated closing expenses. Given the likely existence of circumstances that are not extraordinary or unforeseeable but that are unknown and beyond a lender's control, the zero tolerance policy suggested in HUD's proposed regulation would force lenders to make high estimates for all settlement charges so as to avoid running afoul of the proposed limitation.

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

RESPONSE TO QUESTION #24:

To the extent that such programs compete with programs offered by private lenders, the rules should be the same.

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

RESPONSE TO QUESTION #25:

As discussed in response to Question 20, MBA believes that there is no added value – and in fact possible lost value – in placing specific loan terms already disclosed in the Truth in Lending Disclosure Statement.

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

RESPONSE TO QUESTION #26:

With the possible exception of reverse mortgages, all loans should be covered under the proposed GMP rule. There does not appear to be any good reason why the enhanced ability to shop for a loan sought to be provided by means of the GMP option should not be available to all consumers. (Reverse mortgages are sufficiently dissimilar from other mortgage loans as to merit special treatment.) Refer also to our answer to question no. 15 above.

HUD QUESTION #27**: As proposed, the Guaranteed Mortgage Package includes one fee or settlement services required to complete a mortgage loan. The fee for the**

package will include loan origination fees, typically referred to as ''points.'' As points are generally deductible under IRS rules, comments are invited as to how to determine which portion of the package prices should be deemed to constitute points.

<u>RESPONSE TO QUESTION #27:</u>

Points <u>must</u> be excluded from the lump-sum package amount, as this is exclusively an interest rate component. The borrower must have the flexibility to choose how many points, if any, he wants to pay. To be required to include these points in the GMPA would deny the borrower of that flexibility. If HUD were to establish a rule for which a portion of the aggregate package price is tax deductible, HUD would, arguably, find itself in a position of setting tax policy. Determining tax policy should be left to the Internal Revenue Service, rather than HUD.

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

<u>RESPONSE TO QUESTION #28:</u>

TILA points to RESPA in determining whether an application has been received[36]. The proposed addition of the five items of information needed to constitute an application may adversely affect the time requirement for providing the initial TIL Disclosure, ARM Program Disclosure, and CHARM Booklet under TILA. The Commentary also provides an exemption from providing an Itemization of Amount Financed for transactions subject to RESPA in which a GFE has been provided[37]. The Federal Reserve will likely remove this exemption since the new GFE would not specifically itemize the fees that comprise the Itemization of Amount Financed.

Also, to the extent that the Proposed Rule's definition of "application" results in applications being considered to have been received (and RESPA disclosures requirements being triggered) earlier than under the current definition, TILA's reliance on the RESPA definition means that, absent Federal Reserve action, TILA disclosures will also be triggered at an earlier time. Requiring that these disclosures be provided earlier in the process, however, may only serve to confuse the borrower, since lenders may not then have precise enough information to be able to make clear, concise and meaningful disclosures, with the result that multiple (and necessarily confusing) re-disclosures may have to be given. For example, if a borrower's information on the house

[36] *<u>See</u>*, Regulation Z, Commentary ¶19(a)(1)3
[37] *<u>See</u>*, Regulation Z, ¶18(c)4

price or best estimate of the value of the property is significantly off, early disclosures will not be meaningful and will likely be confusing to the borrower.

We believe that today's mortgage industry practices generally result in consumers being provided early in the loan process with significant and straightforward disclosures of lender fees, third party fees and broker fees. Most brokers provide separate disclosures to consumers describing how the broker will be paid in the transaction and clearly informing borrowers that the broker is or is not their agent.

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

<u>RESPONSE TO QUESTION #29:</u>

The new GFE proposed by HUD is in essence a guaranteed offer of certain loan terms. The lender has the choice to make that offer or not, as it sees fit. The requirement in Section III. B(2)(c) of the Preamble to the Proposed Rule to provide a new GFE if the borrower's loan application is denied (assuming the lender offers an alternative product for which the consumer might qualify) appears to fall outside HUD's authority. The lender should be free to extend a new offer of loan terms or not, as it sees fit, regardless whether or not there was a prior offer which resulted in adverse action. In any event, a requirement to make a new offer of loan terms appears to be unnecessary.

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

<u>RESPONSE TO QUESTION #30:</u>

The requirement in Section III. B(2)(c) of the Preamble to the Proposed Rule that lenders provide qualified borrowers with an amended GFE identifying changes in costs associated with a change in the interest rate (in cases where the borrower elected not to lock-in) appears to go beyond the requirement in RESPA that lenders "include with the [settlement services] booklet a good faith estimate;" i.e., there is no requirement in RESPA that lenders provide a subsequent GFE if the original GFE proves inaccurate.