Mortgage Bankers Association of America

March 9, 2001

Ms. Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th St. & Constitution Ave., NW
Washington, DC 20551

Re: Comments for Docket No. R-1090
Proposed Rule: Amendments to Provisions of Regulation Z Implementing the Home Ownership and Equity Protection Act (December 2000)

Dear Ms. Johnson:

The Mortgage Bankers Association ("MBA") appreciates the opportunity to submit comments regarding the proposed amendment to the HOEPA provisions of Regulation Z (12 CFR 226.32 *et seq.*). The MBA is a trade association representing approximately 3000 members involved in all aspects of real estate finance. Our members include national and regional lenders, mortgage brokers, mortgage conduits, and service providers. MBA encompasses residential mortgage lenders operating in the "prime" and "subprime" markets, both single-family and multifamily, and commercial mortgage lenders.

Background

In September 2000, MBA submitted comments to the Board, pursuant to the Board's solicitation for public views through an advance notice of proposed rulemaking to examine the home equity market and the adequacy of existing Truth in Lending provisions (65 FR 42889). Those comments presented MBA's analysis regarding the likely effects of a lowering of HOEPA's triggers, and were prepared after lengthy and careful consideration of our members' practices, cost structures, and legal and compliance requirements. That submission reflected our honest and forthright conclusion that, in view of the very real legal implications, compliance burdens and reputational risks involved, an expansion of the HOEPA triggers would lead to a significant negative impact on the subprime lending market. We stand by those comments and resubmit our concerns regarding the Board's decision to advance despite strong indications that regulatory action of the type proposed here will result in the constriction of credit availability to those communities that are most in need.

Summary of MBA Informal Survey

In preparation for the September Comments submitted to the Board, MBA engaged in extensive fact gathering among its members to collect solid information to assist the Board in its decision-making. As part of this fact-gathering effort, the MBA conducted an informal survey of its members on topics surrounding HOEPA and predatory lending. We believe the conclusions derived from that survey carry great informational value. We summarize them here, as an introduction to MBA's specific comments on the Boards current proposals.

In August 2000, the MBA sent a brief survey to all of its lender members regarding whether their lending included any loans falling under the definition of HOEPA. A wide variety of data were collected but the highlights of the survey are as follows. Of the responding firms, 21 percent reported making HOEPA loans. The HOEPA loans represent 11 percent of respondent business on average. If the HOEPA trigger is lowered 2 points the share of their business which meets the HOEPA definition will double.

The firms making HOEPA loans were asked whether the rate trigger, the points and fees trigger or a combination of the two triggers was most important in their business in a loan being classified as a HOEPA loan. Of the HOEPA lenders, 46 percent reported the points and fees trigger as being the most important qualifying trigger, while 31 percent cited the combination. The remaining 25 percent identified the rate trigger as most important.

The 79 percent of companies that do not make HOEPA loans cited a number of reasons for not making them. The top reason was compliance risks followed by reputation concerns. Investor requirements were the third most important reason for not being in the market.

There are a number of conclusions which can be drawn from the survey. Most important is that the regulatory change will have a real business impact and will affect the supply of credit. The lenders in this market have various market niches and will react to the changed economics.

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The MBA's comments regarding the current proposals advanced by the Board are set forth below.

Adjustment of Rate Triggers

The Board is proposing to revise 12 CFR 226.32(a)(1)(i) to lower the APR trigger to 8 percentage points.

Impact

The MBA informal survey reveals a number of economic realities that the Board should consider in connection with this proposal. As supplemented by extensive individual interviews with our lenders, the key revelation of that survey is that there are real and very significant cost burdens associated with the making of HOEPA-covered loans. First, the stringent rules and requirements inherent in Section 32 loans create complications in compliance that require specific management and due diligence attention. These include, for example, complex trigger calculations, additional disclosures, and uncertainties created by the extended right of recission. In light of HOEPA's significant penalty provisions, these added difficulties require significant time and resource allocations by lending institutions that engage in such loans. Regardless of the attention and additional resources devoted to compliance, these additional complexities invariably contribute to increased legal risks and expanded exposure to administrative penalties.

In addition, the MBA survey revealed that the mere making of HOEPA-covered loans gives rise to very adverse consequences to reputation, regardless of whether the charging of high rates and/or fees are fair and necessary in view of all circumstances of the transaction. Increasingly, the mere label of "HOEPA" infuses a pejorative connotation that associates covered loans with mortgage abuse. This stigma factor is extremely important for the lending industry since a lender's ability to attract and retain customers is directly linked to the trust and good reputation they develop in those communities they serve. In addition, the mortgage process itself is one that demands unquestionable trust from the originator due to the sensitive financial and personal information that borrowers are required to divulge. The "rogue lender" stigma that is associated with HOEPA creates, therefore, very significant risks and strong disincentives for mortgage lenders considering making HOEPA-covered loans.

It is also important that the Board understand the unfortunate trends in the media and at state and federal government levels. Increasingly, the label of "HOEPA" is used as a proxy for "predatory loan." Federal and state examiners, as well as public perception at large, are equating HOEPA-covered loans with "predatory" loans. As the Board well understands, this trend of labeling "HOEPA-as-Predatory" is entirely incorrect. In enacting HOEPA, Congress meant to increase disclosures and protections for covered loans, not to prohibit them outright. Indeed, the legislative history of that law recognizes that "high cost" loans serve legitimate credit needs. Nonetheless, the erroneous perception that HOEPA loans are inherently abusive has resulted in the development of great burdens based on the "HOEPA" label alone. For instance, countless numbers of local jurisdictions have enacted ordinances full of restrictions and prohibitions based on

the federal HOEPA triggers. Note also the various federal bills that rely on HOEPA definitions to add even more prohibitions and restrictions on mortgage loans.

Secondary Market Restrictions

There are, however, more significant burdens associated with HOEPA—these come in the form of special assurances and limits imposed by the secondary market. Increasingly, secondary market purchasers are refusing to purchase HOEPA-covered loans, regardless of whether they are otherwise fully compliant with all relevant laws and regulations. The clearest reflection of this trend is the refusal by the Government Sponsored Enterprises to purchase any loan that is covered by the HOEPA triggers. In fact, HUD has recently codified this decision in a final rule issued on October 31, 2000, disallowing affordable housing goal credits for dwelling units financed by mortgages that come within HOEPA's thresholds.[1] This official approval of repudiating "high cost loans" signals that this trend will continue and is likely to expand. Following the lead of the Government Sponsored Enterprises, a number of secondary market investors are now refusing to purchase anything that carries the pejorative label of "Section 32." Still other investors are asking for special and costly assurances to compensate for the additional risks inherent in HOEPA-covered loans.[2] In the end, these investor policies are having the very real effect of converting HOEPA triggers into absolute rate ceilings for institutions that depend on these entities for capital.

In addition, the Board has failed to address the obvious and clear impact of these HOEPA-based secondary market restrictions. Any lender that depends on GSE funding will be restricted from lending in the newly-covered areas. In the preamble to the Proposed Rule, the Board offers the simplistic observation that expanding HOEPA triggers will allow "more consumers with high-cost loans to receive HOEPA disclosures" and other protections provided by Section 32. This statement turns a blind eye to the reality that the major secondary market purchasers have been pressured into rejecting such loans. Given these restrictions, the Board must reconsider its position and take into account that which it omitted in its initial considerations—that by lowering the rate triggers, the Board is also lowering the range of loans that GSEs (and other investors) will accept. The Board must not ignore the direct and incalculable reduction in subprime credit that this action will cause.

Estimates

According to Board estimates, if the HOEPA rate trigger were lowered by 2 percentage points, HOEPA's coverage would expand from approximately 1 percent to 5 percent of subprime loans. For various reasons, MBA believes this to be an underestimated figure.

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[1] See 65 FR 65059, 65070.

[2] Recently, the FDIC issued a proposed memorandum on how to avoid purchasing predatory loans or investing in securities backed by predatory loans. The memorandum sets such a broad definition of what defines predatory loans that it is likely to encompass all subprime loans.

MBA notes that the data cited by the Board comes from the Office of Thrift Supervision, which appears to include only data received from member institutions. At minimum, the Board should factor into its decision that this estimate is, by definition, based on a non-representative sample of mortgage lending institutions. The informal survey conducted by MBA, which admittedly is, as the name implies—informal—yields results suggesting that a reduction of two percentage points in the HOEPA interest rate trigger could result in an additional 8.4% of current lending being classified as HOEPA loans. If we assume a direct correlation, this could mean a commensurate drop in loans by lenders currently lending at such levels. Although these are estimates, it must be pointed out that an 8.4 % decrease in the availability of credit is not insignificant and cannot be dismissed by the Board as trivial. There is simply no justification for the Board's assertion that "there is no evidence to date that the impact on credit availability would be significant." As described above, the burdens and disincentives associated with HOEPA triggers provide the requisite evidence and should compel the Board to engage in fuller deliberations regarding the repercussions of this proposal.

MBA notes that a number of our member institutions have terminated their subprime lending activities in those states that have lowered their triggers and added additional high-cost protections under state law. In effect, the risks and burdens associated with these state trigger changes have forced these lenders out of this market. These lenders express that if enacted nation-wide, the lower rate triggers will force them to exit from even more subprime markets. Admittedly, the evidence and data regarding lender reactions to state laws is just beginning to develop; the Board should, however, collect and analyze such data to form a more realistic picture of potential consequences before advancing with this proposal.

Legislative Direction

Although the Board is authorized to adjust the rate triggers by two percentage points, the legislative history to HOEPA clearly delineates that before doing so, the Board "must make an express determination that the increase or decrease is consistent with the consumer protections against abusive lending contained in this legislation and that the change is warranted by the need for credit."(Emphasis added.)[3] These legal pre-requisites have great impact on the actions contemplated by the Board. First, the requirement that there be an express determination mandates that the Board engage in accurate fact gathering to assure that a decrease in the triggers will address the consumer protection objectives of the Act. Second, by mandating that the Board assure that changes be "warranted by the need for credit," Congress sets forth the requirement that the Board consider the impact that any alteration of trigger levels have on the availability of credit.

MBA submits that the application of this two-prong test does not justify Board action at this time. First, there is insufficient data to support a decision to lower the triggers. Neither the Board nor any other entity, public or private, has assembled sufficient accurate data regarding rate levels at which "abusive loans" are being made. Nor are

[3] H.R. Conf. Rep. No. 652, 103d Cong. 2d Sess. 147, 165 (1994) (accompanying H.R. 3474).

there data to support the contention that abusive loans are being made just below the current triggers in order to circumvent current HOEPA rule requirements.[4]

It is instructive to go through the Board's reasoning process on this matter. The Board specifically states that relatively little information is publicly available regarding the distribution of mortgage loans by APR or fees.[5] The Board also admits that it does not know how many more loans will be covered by an expansion of the triggers.[6] Finally, the Board offers that the "extent to which lowering the HOEPA APR trigger may affect the availability of credit is difficult to ascertain.[7] From this trilogy of "unknowns," the Board concludes that the expansion of triggers are intended to assure that more borrowers receive HOEPA's protections. Regardless of whether this conclusion is or is not correct, it is a conclusion that does not flow from the record and the data that Congress intends to serve as guide and basis for this decision.

MBA submits that the findings that the Board circumvents are those that Congress mandated before making the decision to expand the triggers. It is very significant that Congress explicitly imposed specific constraints on the Board's administrative discretion to alter the existing thresholds—it demonstrates that Congress views the trigger revisions as significant and consequential. The simple listing of items that are currently "unverifiable" or the itemizing of those which are "unknown" does not relieve an agency from Congressionally delegated directives. Plainly, the Board is entirely sidestepping Congressionally mandated obligations.

MBA believes that if the Board engages in the careful weighing required by this two-pronged test, it will arrive at an entirely different outcome.

Other

The Board's deliberations are lacking in other very important respects. It is apparent, from the preamble materials and memoranda that accompany the proposed rule, that the Board has not fully considered the entire range of factors that would be affected by the proposal to lower the interest rate triggers under HOEPA. As stated above, costs, stigma, legal risks, and most importantly, federally encouraged secondary market restrictions are colluding factors that will, without a doubt, significantly reduce availability of credit in the subprime market. The Board cannot simply dismiss these factors as industry "beliefs" or "complaints." These are real and immediate factors that will have profound market-wide imports. It is incumbent upon the Board to study them more thoroughly and take them into full consideration when exercising its regulatory obligations.

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[4] Rather than "circumventing" HOEPA requirements, this pricing activity may constitute a rational pricing strategy in that the net profit from the combined lower rate plus regulatory cost saving justifies lending right below the HOEPA threshold.

[5] See Memorandum from Division or Research and Statistics to Board of Governors (December 6, 2000); Proposed Rule at 81441.

[6] See Proposed Rule at 81441.

[7] See Proposed Rule at 81441.

MBA notes a further shortcoming in the Proposal's reasoning. The Proposal states that although some creditors that do not make HOEPA loans may withdraw from lending in covered areas, "[o]ther creditors *may* fill any void left by creditors that choose not to make HOEPA loans. And others *may* have the flexibility to lower rates or fees for some loans to avoid HOEPA's coverage."[8] It is precisely this type of speculative conclusion that Congress attempted to avert by ordering that there be specific administrative findings in conjunction with any trigger alterations. To simply assume that somebody will step in to fill the void or that others may lower rates to evade coverage is insupportable in the record and cannot serve as a basis to evade the Board's responsibility to carefully consider the impact of its proposals.

More fundamentally, the statement that other creditors may step in to fill the void makes the very point that MBA has repeatedly attempted to impress upon the Board. We have consistently asserted that if regulatory burdens continue to be imposed in this sector of the market, legitimate and well-capitalized lenders will continue to flee subprime lending. The fact that others "may" step in to fill the void does not address the more important issue of the *type* of lenders that will take advantage of this open field. MBA submits that once legitimate and well-capitalized lenders depart, only those actors that are unconcerned about regulatory restrictions will enter as substitutes. In effect, the unscrupulous lenders will displace legitimate originators and the very portion of the population that the Board now attempts to protect will be significantly worse off.

MBA Position

Neither the preamble to the proposed rule nor the accompanying staff memoranda reflect any express findings that the trigger decrease is warranted or that the need for credit necessitate this move. Lowering the thresholds is therefore unjustified under the legal standards imposed by the HOEPA law, and not based on solid determinations as specifically ordered by Congress. In effect, it appears that the opposite is true. Contrary to the Board's findings, the available evidence suggests that any downward adjustment of the HOEPA triggers will constrict credit in the most credit-starved segments of the mortgage market. The preamble to the Board's Proposed Rule demonstrates that the Board has focused insufficient attention on the credit-constricting effects of these trigger changes.

MBA respectfully asks that the Board reconsider its proposed changes.

Adjustment of Fee Triggers

The Board is proposing to expand the points and fees test to include amounts paid at or before closing for optional credit life, accident, health, or loss-of-income assurance and other credit-protection products such as debt-cancellation coverage. Under the proposal, premiums paid at or before closing for credit insurance are included whether they are paid in cash or financed, and whether the amount represents the entire premium for the coverage or an initial payment.

[8] See Proposed Rule at 81441. (Emphasis added).

Effect

There have been a number of reports of abuses relating to tactics associated with single-premium credit life insurance and insurance "packing." MBA appreciates the Board's intentions to provide further protections in an area that is reportedly rife with abuse in certain sectors of the market. It is important, however, that the Board fully recognize that this proposal will create a situation where, every time that a single premium insurance product is sold in connection with a mortgage loan, that loan would come under HOEPA's purview. This, in essence, equates single premium insurance with the definition of "high cost" loans.

MBA Position

In deciding whether to finalize this provision, the Board should take into consideration that in many ways, consumers are already adequately protected because most states closely regulate credit insurance rates. In fact, insurance companies are generally restricted from writing insurance policies at higher rates than those deemed "reasonable" by the state insurance department unless the increase is warranted and specifically approved.

As the Board points out, the use of single premium insurance products is something that is valued by consumers in the market. If structured correctly and with the consumer's full knowledge, this product makes coverage available for hundreds of thousands of consumers that would, under other circumstances, be required to forego this product as unaffordable.

It simply strikes as draconian and unfair to issue regulations that in essence label single premium products as per-se unreasonably priced.[9] The MBA agrees that the "packing" of credit insurance products or the fraudulent inclusion of this product without the consumer's knowledge should be restricted and punishable. The MBA also agrees that single premium insurance is not appropriate for everyone. MBA does not agree, however, with the Board's implicit characterization that employing lump-sum methods to finance this product is inherently "high cost" and sufficient, by itself, to cast a loan into the HOEPA category.

MBA requests that the Board reconsider this proposal. At the very least, the Board should make the inclusion of this item conditional upon it being fully disclosed to the consumer and upon the consumer having full rights to cancel the coverage and obtain a full refund on the value of the "unused" coverage.

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[9] This presumption is created by the fact that the HOEPA regulations specifically exclude "reasonable closing costs" that are paid unaffiliated third parties. An unfair dichotomy would therefore result if single premium products are automatically included, regardless of whether they are reasonable and/or paid to unaffiliated entities.

“Anti-flipping” Proposal

The Board proposes a rule that prohibits a creditor or affiliate holding a HOEPA loan to refinance that loan within the first twelve months unless the refinancing is in the borrower’s interest. The Board declines to specifically define what constitutes “borrower’s interest,” stating only that such a determination must be based on the totality of the circumstances. The preamble makes clear that the Board is attempting to restrict this provision very narrowly to prevent only the most egregious of abuses.

Impossible Standard

MBA agrees with the Board that this proposed provision may prevent the most egregious of unscrupulous practices. What threatens lenders, however, is that there will never be any assurance nor any clarity that the loans fitting this description will not be judicially challenged. By the very wording of the proposed provision, the Board is allowing trial courts the authority to construe what constitutes sufficient “benefit” in any HOEPA loan that is refinanced in one year’s time. This is simply unacceptable. Lenders are being thrust in an unfair position of having to divine the definition that a judge will give to the ambiguous term of “borrower’s interest.” This will give rise to a myriad of standards and differing interpretations, and will affirmatively invite litigation on every refinance of a HOEPA loan that occurs within one year’s time. The Board’s proposal leaves the industry entirely defenseless and exposed to groundless and unsubstantiated claims.

Standard Imposes ‘Floor’

In light of the great potential for judicial challenge, this proposal will create a *“de-facto”* time limitation for refinancing a covered loan. In effect, no reputable lender will dare to enter into a standardless area to chance a lawsuit that they are incapable of defending. Only those actors willing to operate in the fringes of the law, or entirely outside of the law’s limits, will dare to risk the repercussions of this provision. Nor will secondary market investors be willing to gamble with a transaction whose legality is entirely dependent upon the sympathies of a judge or jury. Quite simply, the result of enacting this “tangible benefits” standard will be to outright prohibit same-year refinances altogether.

‘Slippery Slope’

MBA’s opposition to the enactment of a “tangible benefits” test such as the one proposed here stands regardless of how narrowly drafted the Board may consider it to be. This is, in effect, a standardless provision and is so threatening and so contrary to the proper administration of law that we strongly request that the Board refrain from codifying it. Given the heat of the current political environment surrounding “predatory” lending, it can only be expected that this new HOEPA rule will expand and elaborate, either by the Board itself through future rulemaking activities, or by states and localities as they continue to adopt federal standards and reshape them in ways that distort their balance

and destroy their original intent. MBA asks that the Board recognize that this is a very real threat—once enacted, local jurisdictions are likely to expand this restriction to three, four, or fifteen years, and lead to the point of entirely destroying the balance between benefits and burdens that the Board claims to have carefully created.

Ambiguous Provision

It is a basic premise in administrative law that all rules, in particular those that go beyond the statutory letter and set new mandates, must be specific in prescribing or proscribing behavior in individual cases. In effect, they must strive to articulate clear standards and criteria that can be uniformly applied in all cases. That is precisely where this provision goes astray. Given the very nature of a "tangible benefits" test, and given the Board's unwillingness to provide even the most basic clarification as to how the provision should be read, this item will be applied on an *ad-hoc* basis in a way that will fail to ever provide any standards that responsible lenders can use to extend credit within the confines of the law.

The MBA submits that this unguided adjudicatory standard will serve neither industry nor consumers. As stated above, the industry cannot chance to engage in lending within an environment that provides for no guidance as to what is or is not allowed. Lenders will simply opt to refrain from engaging in these transactions. In the absence of legitimate lenders willing to make these loans, needy borrowers are left entirely at the mercy of unscrupulous actors.

MBA opposes this provision and respectfully asks that the Board delete it in any final rule.

Low-Cost Loan Proposals

The Board is proposing a rule that prohibits creditors, in the first five years of a zero interest or other low-cost loan, from replacing that loan with a higher-rate loan, unless the refinancing is in the interest of the borrower.

Ambiguous

The language of this well-meaning proposal is woefully ambiguous and fails to define the scope of the prohibition. As a threshold matter, it is not clear whether the provision is restricted to low-rate loans that are refinanced into HOEPA loans, or whether it is aimed at any refinance that simply increases the interest rate from loans originated as "low cost" loans. A straightforward reading of this provision appears to state the latter—that its restrictions apply across the board regardless of HOEPA thresholds.

MBA has fundamental concerns. We submit that the eventual compliance burdens and other implications associated with this requirement could be potentially disastrous if this provision is extended beyond HOEPA. This proposal would make necessary additional verifications and reviews that will imposes a new layer of compliance due diligence to an

already burdened process. Currently, lenders need only consider whether the new loan is or is not subject to HOEPA. Under the proposed system, however, every single refinancing lender would be compelled to review the existing loan to assure that it is not a "low cost loan." In effect, all lenders would be forced to engage in additional assurances that the existing loan does not meet the specific definitions for "low cost loans," as set forth by the Board. The cost of this extra layer of compliance on an industry-wide basis is incalculable.

Definitions

In addition, this problem is compounded by the fact that the proposed provision lacks adequate definitions. The Proposed Rule defines "low-cost loans" subject to this rule as those loans carrying interest rates that are two percentage points or more below yield on comparable Treasury securities. The Proposal does not define whether the definitional formula must be applied at the point that the refinance occurs or at the point of origination. Note that if it is the former, every single refinance could fall subject the proposed rule's provision in times of increasing interest rates. In effect, all borrowers that seek to refinance their loan after rates have increased by the requisite amount would be subject to this rule. Since this provision is narrowly aimed at protecting borrowers under mortgage assistance programs, this expansive result cannot be what the Board intends.

If, on the other hand, the Board intends that the formula be applied at the point of origination, then, as described above, the proposal will multiply compliance costs for every single lender engaged in mortgage refinances. Under this interpretation, lenders would be required to ascertain origination and maturity dates, keep lists of the different Treasury rates on every particular date, and make the appropriate comparisons for every single transaction. As noted above, this would have to be done by every lender and every originator on every refinance transaction, as HOEPA triggers would no longer serve to control the applicability of this rule.

This rule is all-encompassing. It cannot be stressed enough that every lender and every borrower engaged in a refinance transaction—whether or not they operate under Section 32—would fall subject to these special provisions. The additional compliance burdens are simply incalculable. Every system in every financial institution would require alteration to fit this new layer of verification.

"Borrower's Interest"

The ambiguity described above combined with the fact that this proposal infuses yet another "borrower's interest" standard, makes this provision entirely unacceptable. The MBA's objections to the "borrower's interest" standard are set forth above and will not be repeated here. The concerns expressed *supra*, however, are expanded exponentially under this provision because the reach of this proposal is so incredibly significant. As currently drafted, the Board's proposal could potentially lead to a frightening situation where every refinance is subject to the "borrower's interest" standard.

The Board must redraft and clarify this provision.

"Pattern or Practice"

The Board proposes to require that creditors generally document and verify consumers' current or expected income, obligations, and employment to the extent applicable. Under the proposal, if a creditor engages in a pattern or practice of making HOEPA loans without documenting or verifying consumer's repayment ability, there will be a presumption that the creditor violated the rule.

MBA does not necessarily oppose the Board's attempts at clarifying a provision that currently lacks adequate definition; the issue of what constitutes a "pattern or practice" of equity based lending has been among the most controversial and difficult issues in this statute. Nor does MBA believe that the Board has erred in its approach. In fact, we support adding robust enforcement to stop abuses in this area. It is important, however, that the Board consider various consequences that arise from enacting this standard, as proposed.

First, we note that this proposal will generally ban a creditor's ability to rely on the applicant's general payment habits, profession, and general station in life as a basis for extending loans under HOEPA. These indicia often prove to be extremely reliable on their own; other times, these indicia are the only way that a consumer qualifies for a loan. Since the Board's proposal would require lenders to compile the full panoply of verification information required by traditional lenders, regardless of what the lending decision is actually based upon, this rule could result in added costs, unnecessary delays, and perhaps the denial of credit to entire classes of very viable borrowers.

MBA also notes that the great advances in automation are increasingly creating a push, as well as increased consumer expectations, towards credit decisions based upon instant and readily verifiable data. In the non-mortgage finance world, it is now standard that credit decisions be made on the spot and with no paper verifications whatsoever. This is increasingly the case with home secured loans. The trend is poised towards paperless transactions. We realize the pressures imposed upon the Board by the responsibilities to administer a consumer protection statute such as HOEPA; we urge, however, that the Board consider long-term trends that are evident in mortgage lending. The Board must take into account that it is not entirely viable to force HOEPA-covered transactions to remain frozen in time and under the current state of technology for fear that isolated abuses may be occurring.

Counseling Disclosure

The Board requests comment on whether a generic disclosure advising consumers to seek independent advice might encourage borrowers to seek credit counseling.

MBA stands in full support of the Board's efforts to provide accurate and useful information to consumers regarding the home purchase and home finance process. As expressed elsewhere in this comment, MBA believes that the root cause of mortgage abuse is that consumers are vulnerable in a mortgage process that is complex and lacking in clear disclosures.

MBA's Mortgage Reform Proposal

MBA has consistently argued that no regulatory approach will deliver true consumer protection unless underlying market defects are addressed through a comprehensive reform of the mortgage lending laws. The real key to achieving true long-term reform in the subprime market does not lie in limited efforts to drive out bad practices and bad actors from the market. Rather, the critical reform objective should be to attract reputable lenders into a marketplace of consumers that are able to make educated decisions among a wide variety of terms and options. A competitive market with informed consumers provides the best protection against predatory activity.

It is also important to understand that the real estate mortgage lending industry is one of the most heavily regulated industries today. Mortgage lending is subject to pervasive regulation and must comply with a wide array of federal consumer protection laws including the Truth in Lending Act, the Real Estate Settlement Procedures Act, the Fair Housing Act, the Fair Credit Reporting Act, the Equal Credit Opportunity Act, the Fair Credit Billing Act, the Home Mortgage Disclosure Act, the Home Ownership and Equity Protection Act, and the Fair Debt Collection Practices Act. Mortgage transactions are also subject to state and local laws against fraud and deceptive trade and practices. Rather than expanding and complicating the current federal regulatory system, the priority should be to aggressively enforce the multitude of existing laws.

In an appendix to these comments, the MBA sets forth its "Seven Point Plan" for mortgage reform. The MBA respectfully repeats its request that the Board consider joining in the discussions to achieve broader reform to achieve the important objectives of ridding the market of "predatory lenders."

Conclusion

MBA respectfully requests that the Board reconsider the proposals advanced under this rule. The Board must take into consideration the significant evidence suggesting that an expansion of HOEPA will greatly constrict subprime credit while having negligible effects in curtailing the abuses that now plague this market. The MBA requests that the Board consider the unintended consequences that are likely to flow from this action and fully weigh in the myriad of factors that appear to have been entirely overlooked in this rulemaking effort. In conclusion, the Board's proposals serve to construct *de-facto* usury limitations that will drown competition from the most underserved segments of the mortgage market.

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Once again, the MBA appreciates the opportunity to comment on this very important issue. We welcome the opportunity to discuss these comments further as the rulemaking deliberations proceed. If you or your staff have any questions about the foregoing, please feel free to contact Rod J. Alba, Director, Regulatory Affairs, at 202/557-2930.

Thank you for your consideration.

Howard Glaser
Senior Staff Vice President, Government Affairs

APPENDIX:
MBA Mortgage Reform Proposal

As currently written, both the Real Estate Settlement Procedures Act (RESPA) and the Truth in Lending Act (TILA) are confusing to consumers, cumbersome in many aspects, and, as technology develops, increasingly outdated. Comprehensive reform is necessary, not only to increase accessibility and clarity of the laws, but also to accommodate improvements in technology that have taken place in the financial sector since the passage of the original statutes.

For over three years, MBA has been engaged in an ongoing cooperative effort with other industry groups, consumer advocates, the Department of Housing and Urban Development (HUD) and the Federal Reserve (Fed) to develop recommendations for change. MBA believes that RESPA/TILA reform is even more crucial now as we seek to stem predatory lending practices. It is MBA's position that the most effective way to curb such abuses is to enact broad comprehensive reform of RESPA and TILA and provide simple, understandable disclosures so that all consumers can better understand the mortgage process.

On June 15, 2000, MBA unveiled the Association's Seven Point Plan for Mortgage Reform. MBA believes that many of the problems associated with predatory lending arise from the complexities and ambiguity inherent in the current system. That is why MBA is committed to a comprehensive approach to mortgage reform that will benefit all consumers.

The MBA Seven Point Plan for Mortgage Reform:

1. Fully Enforce Consumer Laws. Most of the abuses currently cited as "predatory" are already illegal under current federal and state law. MBA believes that full enforcement of existing laws will eliminate virtually all of the unscrupulous activity occurring in the market. Consumer protection agencies should be fully funded and given the resources necessary to enforce these laws effectively.

2. Simplify the Mortgage Transaction to Protect Consumers: the Loan Closing Costs Guarantee. In order to simplify the process of mortgage shopping and settlement, MBA supports legislation to establish a guaranteed closing costs system. Under this system, lenders would be able to provide mortgage applicants with an early price guarantee that permits consumers to effectively shop for the best mortgage product.

Under MBA's plan, the closing cost guarantee provided to consumers would include all costs required by the lender to close the loan. While costs imposed by non-lender third parties (i.e. municipal or state taxes) would not be included in the guarantee, these costs would be fully disclosed separately as estimates.

The guaranteed disclosure system would let consumers know, early in the mortgage application process, the maximum settlement costs a lender could charge. Thus, consumers would be informed of current rates and points at initial contact with the lender, and would receive a guaranteed quote for lender settlement services immediately following application.

Those lenders operating under a guaranteed costs system would be subject to reformed disclosure requirements that would replace Truth in Lending Act (TILA) notices (except for HOEPA) and front-end disclosures under the Real Estate Settlement Procedures Act (RESPA). To facilitate packaging, these lenders also would be entitled to an exemption from Section 8 of RESPA.

3. Increased Disclosures for Consumers. The Loan Closing Costs Guarantee proposal includes clearer and more effective disclosures to consumers. Under the MBA's proposals, consumers would be provided with clear and comprehensive information about the mortgage shopping process at first contact with any real estate professional, and would receive easy to understand and reliable cost disclosures as they advance through the shopping and application process.

4. Enhance Enforcement Tools/Provide Effective Remedies for Consumers. MBA supports federal legislation to prohibit unscrupulous and improper lending practices. By substantially strengthening the penalties associated with these practices and by enabling federal authorities to enforce these penalties,

MBA believes that significant steps can be taken to combat abusive lending practices. MBA's Seven Point Plan for Mortgage Reform delineates abusive practices and also includes a new system of remedies for consumers involved in a mortgage transaction.

5. Increase Availability and Quality of Counseling for Prospective Borrowers. MBA has been a leader in developing and supporting counseling programs for prospective borrowers. MBA supports expanding counseling programs. MBA has established a national partnership with the American Homeowner Education and Counseling Institute (AHECI), which provides training and certification to the homeownership counseling industry. MBA supports the development of a uniform counseling program by the Federal Reserve and HUD, the availability of which would be described in a standardized "Mortgage Information Booklet".

6. Increase Consumer Education Programs. MBA supports increased consumer education to help borrowers make informed decisions about their credit. MBA has established a national partnership with the National Council on Economic Education (NCEE) to produce a classroom curriculum that teaches school children to understand credit and assist them in developing sound financial planning and management skills.

7. Industry Commitment to Fair Lending Practices. There is much the mortgage lending industry can do to promote fairness and integrity in the mortgage process. MBA recently adopted industry guidelines to combat abusive lending practices. MBA members endorsing these "best practices" agree to conduct their business according to certain standards of conduct. These standards are meant to serve as guidelines by which MBA members will meet their business goals and objectives while providing fair and equitable treatment to consumers.