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Regulations Division
Office of General Counsel
Department of Housing and Urban Development
451 7th Street, SW, Room 10276
Washington, DC 20410-0500

RE: Docket No. FR-5180-F-05
Real Estate Settlement Procedures Act: Rule to Simplify and Improve the Process of Obtaining Mortgages and Reduce Consumer Settlement Costs; further Deferred Applicability Date for the Revised Definition of "Required Use" and Solicitation of Public Comment on Withdrawal of Required Use Provision

Dear Sir or Madam:

The American Bankers Association[1] appreciates this opportunity to comment on the Department of Housing and Urban Development's ("HUD") proposed rule to amend the definition of "required use" under the Real Estate Settlement Procedures Act regulations ("Reg. X"). These comments are submitted pursuant to the March 10, 2009 solicitation for additional public input on whether HUD should withdraw the revised definition from the November 17, 2008 final (but not yet effective) rule. *See* 74 FR 10172.

The ABA membership appreciates HUD's devoted efforts to improve the mortgage process to better protect and empower consumers. We note, however, that the current proposed rule changes pertaining to "required use" provisions have serious unintended consequences that must be adequately resolved. ABA believes that these unintended consequences result from an overly-complicated regulatory scheme that must be entirely reanalyzed, first in the context of RESPA's Section 8 structure, and second, in terms of the broader system of federal regulations that affect mortgage finance.

For the reasons we set forth below, we again strongly urge that HUD withdraw the entire final rule, as published on November 17, 2008 (73 FR 68204), and that the Department coordinate further regulatory changes with the ongoing reform efforts of the Federal Reserve Board ("Board") under the Truth in Lending Act ("TILA").

[1] The American Bankers Association brings together banks of all sizes and charters into one association. ABA works to enhance the competitiveness of the nation's banking industry and strengthen America's economy and communities. Its members—the majority of which are banks with less than $125 million in assets—represent over 95% of the industry's $13.6 trillion in assets and employ over 2 million men and women.

The current rush to achieve reforms in mortgage lending is posing a very serious threat to the banking industry's ability to deal with numerous regulatory changes emanating from various sources, and it is becoming nearly impossible to adequately comply with the conflicting, and often unmeasured, flow of new legal requirements.

The "Required Use" Provision

Under the RESPA rules finalized in November 2008, the definition of "required use" under Regulation X would be amended to include "a situation in which a person's access to some distinct service, property, discount, rebate, or other economic incentive, or the person's ability to avoid an economic disincentive or penalty, is contingent upon the person using or failing to use a referred provider of settlement services." 73 FR 68239-40.

We recognize that HUD's new rule was principally aimed at enhancing HUD's reach over steering arrangements in affiliated business arrangement contexts, especially those involving home builders. We note, however, that in light of the proposal's broadly articulated legal standards, the provision will capture scores of special arrangements between depository institutions, bank affiliates, and the customers they serve. Specifically, banks often offer deposit account clients special arrangements on mortgage and other financial products offered by the bank or the bank's family of providers. Such discounts would, in light of HUD's finalized regulations, be suspect under RESPA's Section 8 prohibitions because a "distinct service, property, discount, rebate, or other economic incentive, or the customer's ability to avoid an economic disincentive or penalty" would be made contingent upon the customer's using or failing to use a referred provider of settlement services.

Under a strict reading of the new "required use" provisions, mere offers of discounts on packages that comprise checking account and mortgage products would constitute a "required use," and would therefore subject banking institutions to heightened regulatory scrutiny. Because of the sheer breadth of these new definitions, there is strong concern that banks and depository institutions will entirely avoid any legal risk and therefore forego offerings of discounts to consumers if mortgage-related transactions are involved.

We note that, since the new language for the "required use" rules are written into the definitional section of Regulation X (and therefore not confined to the prescriptive portion of the "affiliated business arrangement provisions"), there is added concern that discounts of both affiliated and unaffiliated providers will be covered. (24 C.F.R. 3500.14) HUD's language in the new regulation (and the preamble), that providers may offer "combinations of bona fide settlement services," do not in any way calm our concerns because checking or other accounts do not fit within the definition of "settlement service," therefore rendering that exemption inapplicable to banks.

ABA appreciates that HUD, through its rulemaking, intends to clarify the reach and scope of Regulation X. ABA seeks to point out, however, that in light of the

bewildering format of the new "required use" provisions, the impact of these regulatory changes are entirely unpredictable, and since these changes deal with portions of the RESPA law that carry criminal liabilities, the unintended legal hazards are potentially astonishingly high.

Regulatory Burdens

The confusing and hazy implementation trajectory of this singular RESPA item is but one example of the massive and complex burden that our banks will be facing in the coming months with respect to all the other legal and regulatory issues currently pending in the regulatory dockets. The very urgent message that we wish to convey to HUD staff and policymakers is that banking institutions are burdened to their absolute break-point, and HUD must seriously consider the delay of this entire rule until it can properly coordinate its regulatory changes with the Federal Reserve Board and other regulatory agencies that oversee mortgage lending.

ABA understands that the unprecedented turmoil in the nation's credit and mortgage markets is adding great pressure to augment regulation and enhance federal regulations to protect consumers. Although our members are the most closely regulated entities in the market, we will continue to support efforts to ensure that the mortgage consumer is properly informed and adequately protected in this most important financial endeavor.

We ask, however, that HUD raise its awareness of the severe burdens currently being placed upon banking institutions as more and more legislative and regulatory requirements are applied. Policymakers must better focus on regulatory costs and benefits, and expand efforts to avoid prohibitive regulatory burdens. We note that the past months have seen—

- the creation of a broad new segment of lending , "higher-priced mortgage loans," that will impose new indices, price measurements, and legal repercussions of banks of all sizes;
- new rules regarding contacts with real estate appraisal professionals, issued by differing regulatory entities and pursuant to varying articulations;
- new rules imposing prohibitions on certain mortgage servicing practices;
- standards regarding the advertisement of mortgage-related products;
- new rules applicable to early mortgage disclosures that affect ability to collect fees in all covered transactions (and which are being further amended through the current rulemaking);
- a complete overhaul of the good faith estimate disclosure requirements, both in form and substance;
- a complete overhaul of mortgage settlement forms, along with a new set of preparation instructions that will apply to all mortgages;
- new upfront disclosure items that include comparison charts and term-related written recitations to consumers;

- various novel fee tolerances that apply at differing levels depending upon the type of service involved;
- new servicing-related disclosures that apply to all mortgage transactions;
- new indices for loan-price reporting purposes that will require brand new systems to measure APRs on individual loans, and that will more than double the frequency of changes in the reporting triggers; and finally
- these new rules, applicable to affiliated business transactions that can result in criminal liabilities.

We note that none of these changes, if enacted alone, would be labeled as either minor or insignificant. They are, however, being thrust upon the banking industry at once, with slightly varying effective dates, though they must all be active, and properly functioning in unison, by this year's end. Since all these changes are interrelated and the regulations interwoven in their application, their execution and implementation will require extreme synchronization and a massive commitment of resources.

In addition, we note that a withdrawal or adjournment in the application of the new regulations will make much sense as a step that will allow policymakers to analyze, with care, the contours of an optimal mortgage disclosure system. The current system is nothing short of convoluted. RESPA provides borrowers information on their settlement charges, while TILA, which is the Board's responsibility, provides borrowers information on the costs and terms of the credit transaction. Generally, disclosures under both laws are provided simultaneously to the consumer at application and at closing, and both sets of disclosures are needed to afford the shopping consumer with the full array of information required to make a good financial decision.

For these reasons, disclosures under both laws should be complementary, and must work together to achieve their common purpose of ensuring full consumer understanding. The Board has announced that it is broadly reviewing TILA disclosure requirements for both mortgages and home equity loans, with a proposed rule anticipated soon. This endeavor, above all, militates in favor of combining the RESPA and TILA reform considerations.

Also, immediately following the RESPA rule's comment period, Congress enacted the Mortgage Disclosure Improvement Act,changing the timing requirements for TILA disclosures and requiring new adjustable-rate mortgage (ARM) disclosures. The new timing rules will go into effect on July 1 of this year, and the provisions concerning ARMs to help borrowers avoid payment shock will go into effect in 2011. These changes need to be coordinated with HUD so that RESPA and TILA disclosures can be provided together in a way that makes sense to all consumers.

Considering that RESPA and TILA rules are so interrelated, successive disclosure changes, first by one agency and then the other, would be unnecessarily costly for

the industry at a time when the industry can ill-afford the costs, and would confuse consumers rather than providing greater clarity.

Finally, we note that various ABA members have advised, in confidence, that they may likely cease mortgage lending operations in light of the collection of extreme burdens and confusing changes that are being imposed at once. Many of these banks, being smaller and with less loan volume, will wait and reassess, at some future point, whether they will return to mortgage activities. Other banks have declared no such plans to return. In either case, the significant point remains that communities across the United States will lose the most trusted partner that they can have in the most important transaction that families enter in their lifetimes. The community banks and depository institutions—entities that were not involved in the excesses of subprime and predatory lending—are going to be very negatively impacted in this rapid and intense push to regulatory reform.

Conclusion

ABA again implores HUD to work together with the Board in a coordinated effort to reform the mortgage disclosure process. During the comment period on the initial RESPA rule, 244 Members of Congress, industry participants, and even the Federal Reserve Board staff, asked HUD to coordinate its rulemaking efforts with the Board. ABA once again encourages HUD to do so.

We urge that HUD accept these comments in the spirit of our industry's earnest attempt to respond to the ongoing burdens brought on by this national crisis. We urge that the Secretary strive towards real efficiencies and improvements to the federal consumer disclosure laws through a holistic approach that recognizes the interdependence of RESPA and other consumer protection laws, particularly TILA. The current assortment of mortgage disclosures required by different federal laws is disparate, uncoordinated, and frighteningly voluminous. True improvements can only come through coordinated efforts by both HUD and the Board, working together to make mortgage-related disclosures as harmonious and effective as possible.

If you have any questions, please contact Rod J. Alba, at ralba@aba.com.

Sincerely,

Robert R. Davis