NATIONAL ASSOCIATION of REALTORS®

Maurice "Moe" Veissi
2012 President

Dale A. Stinton
Chief Executive Officer

GOVERNMENT AFFAIRS DIVISION
Jerry Giovaniello, Senior Vice President
Gary Weaver, Vice President
Joe Ventrone, Vice President
Jamie Gregory, Deputy Chief Lobbyist

500 New Jersey Ave., NW
Washington, DC 20001-2020
Ph. 202-383-1194 Fax 202-3837580
www.REALTOR.org

October 16, 2012

The Honorable Richard Cordray
Director
Consumer Financial Protection Bureau
1700 G St., NW
Washington, DC 20552

Re: TILA Loan Originator Proposed Rule Docket No. CFPB-2012-0037/RIN 3170-AA13

[Transmitted electronically to www.regulations.gov.]

Dear Director Cordray:

I am writing on behalf of more than one million members of the National Association of REALTORS® (NAR) to provide comments on the loan originator compensation proposed rule issued under the Truth in Lending Act (TILA).[1]

The National Association of REALTORS® is America's largest trade association, including our eight affiliated Institutes, Societies and Councils. REALTORS® are involved in all aspects of the residential and commercial real estate industries and belong to one or more of some 1,400 local associations or boards, and 54 state and territory associations of REALTORS®.

NAR appreciates the opportunity to comment on a number of aspects of the proposed rule including efforts to harmonize and streamline competing definitions related to seller financed transactions that risk greatly impairing the availability of seller financing, the potential negative effects of restrictions on mandatory arbitration clauses, and the treatment of lender affiliates. The sheer volume of regulations surrounding the mortgage finance business has resulted in consolidating and constraining the number of individuals and institutions offering mortgage credit to consumers, and we believe our specific suggestions balance the need to protect consumers while also ensuring access to home loans and competition among lenders.

Exclusion of Real Estate Brokerage Activities
From Definition of Mortgage Originator

Section 1401 of the Dodd-Frank Act amended the Truth in Lending Act (TILA) to regulate certain aspects of mortgage originator activities and define the term "mortgage originator". TILA section 103(cc)(2)(D) excludes real estate brokerage activities from the definition of mortgage originator. The exclusion applies to a person or entity that only performs real estate brokerage activities and is licensed under State law, unless the person or entity is compensated by a lender, mortgage broker, or other mortgage/loan originator or one of their agents.

Consistent with NAR's views expressed in connection with implementation of the loan originator licensing provisions of the SAFE Act on the intended scope of a comparable exemption, the CFPB recognizes that the provision only makes sense if the compensation referred to in the law is read to relate to loan origination activities.

[1] See 77 Fed. Reg. 57200 TILA loan originator proposed rule (September 7, 2012).

Accordingly, as explained in the preamble[2] a real estate brokerage (including brokers and agents) maintains its exemption even if a lender compensates it for locating new office space for the creditor or providing a broker price opinion or if the brokerage earns a real estate commission from a consumer. Another example NAR recommends that you provide in the preamble to the final rule is where a brokerage earns a real estate commission for selling a foreclosed property owned by a lender. As in the other examples, such compensation does not turn a real estate brokerage activity into a loan origination activity.

NAR agrees with your interpretation that if any State law includes loan origination activities as real estate brokerage activities, the TILA exemption should not apply, to the extent the brokerage engages in actual loan origination activities for compensation by the lender.

Need for Regulatory Flexibility for Seller Financing

Seller financing plays a crucial role in certain markets, not only in times of economic stress. We have heard from many REALTORS® in various states, especially in the south and west, concerned that a key source of mortgage lending is at serious risk. Properties in less populated areas often have features that do not easily fit the underwriting requirements of the FHA and GSEs, including older manufactured housing, homes located on larger acreages, and unique homes (such as mountain cabins or other rural homes that do not include all modern conveniences but are nevertheless desirable to the buyer). In addition, valuation is a key challenge since rural properties often lack good home sale comparables. In the final SAFE Act rule, HUD responded to these concerns and reached a reasonable compromise that exempts occasional seller financing. We hope you will agree that more flexibility in this rulemaking is needed to keep seller financing available.
Sellers providing financing for their own property, on a limited basis, do not routinely engage in lending and are exempt from the definition of "loan originator" and "creditor," to the extent described in the preamble.[3] Those that are aware of the pending new requirements, however, are outraged that they could be subject to onerous and complex regulatory requirements aimed at corporate entities routinely engaged in lending on an ongoing and significant basis. These seller financers are typically homeowners and investors who, from time to time, sell property they own on contract to provide an income stream, often for retirement. These types of seller financers should not be subject to the same regulatory construct as applies to professional loan originators.

The definition of "mortgage originator" (which the CFPB folds into the definition of "loan originator" in the TILA regulation), as added by section 1401 of the Dodd-Frank Act, excludes seller financing for up to three properties in any 12-month period, if the loan meets certain statutory criteria. The loan may not be made by a person (including an estate or trust) that has constructed, or acted as a contractor for the construction of, the residence. The loan must be fully amortizing (no balloon mortgages) and have a fixed rate or an adjustable rate that is adjustable only after five or more years (subject to reasonable annual and lifetime limits). The seller must have determined in good faith, and documented the determination, that the buyer has a reasonable ability to repay the loan. Proposed comment 36(1)-a.v explains that the seller makes such a good faith determination by complying with the requirements of section 1026.43 of the TILA rule, which is the pending rulemaking known as the ability to repay/qualified mortgage (QM) rule.

The TILA regulation defining "creditor" covers those who regularly extend consumer credit. In the case of transactions secured by a dwelling, a person is considered to regularly extend consumer credit only if the person extends credit more than five times in a year. However, the exemption only allows one high cost HOEPA loan in a 12-month period before a person is considered to be a creditor.

The analysis in the preamble of the scope of the statute and the interplay between these two exemptions is extremely complex. As we understand it, the CFPB concludes that if a seller financer is exempt from the definition of mortgage/loan originator, under the criteria set forth above, it is also exempt as creditor. Accordingly, an exempt seller financer is not subject to any TILA regulations.[4]

Ability to Repay/QM Regulation. With respect to the ability to repay/QM rulemaking, we reiterate our view that a lender, including a seller financer, that makes five or fewer loans in a year (and no more than one high cost HOEPA loan), will not be subject to the new ability to repay/QM rule because they are not covered by the existing definition of creditor in the TILA regulations. The same justification—the need to preserve and promote limited seller financing—applies to the QM rule as well as the loan originator rule. See NAR's QM comment letter dated July 22, 2011, for a full explanation.

---

[2] 77 Fed. Reg. 55272, 55287 (September 7, 2012)
[3] 77 Fed. Reg 55272, 55287-8 (September 7, 2012)
[4] However, a creditor that makes two or three high cost HOEPA loans would not be exempt from the TILA regulatory definition of creditor and would be subject to TILA as a creditor, including the QM rule, but not to the loan originator provisions of section 1026.36 if exempt as a loan originator.

CFPB Has Flexible Authority to Modify Requirements. Under its general rulemaking authority, CFPB has the discretion, under section 1022(b)(3) of the Dodd-Frank Act, to "exempt any class of covered persons, service providers, or consumer financial products or services, from any . . . rule . . . ." The law requires the CFPB to consider various factors in issuing an exemption, including the total assets of those covered by the exemption, the volume of transactions in which the class of covered persons engages, and existing law that applies and the extent to which it adequately protects consumers. CFPB also has authority under section 105(a) of TILA to make adjustments and exceptions for all or any class of transactions.

NAR Recommends Aligning Rules for Seller Financers. The differing definitions and rules for applying the SAFE Act and the mortgage/loan originator and creditor rules under TILA are extremely confusing, even for those who study them. As a practical matter, seller financers will find these requirements impossible to comprehend. To enhance comprehension and, in turn, compliance, we recommend that you use your regulatory discretion to streamline the applicability rules under TILA for seller financers. First, we urge you to exempt anyone from the definition of mortgage/loan originator who is exempt from loan licensing requirements under state laws pursuant to the SAFE Act, as we suggested in our letter of March 5, 2012, on streamlining regulations. This would be the easiest way to address the concerns we have about both the specific individual criteria in the exemption to the definition of mortgage originator and whether it is appropriate to apply the steering provisions to seller financing, as described in the following paragraphs. Second, we urge you to allow any other seller financers that are required to be licensed pursuant to the SAFE Act to be exempt from the definition of mortgage/loan originator if they engage in five or fewer transactions in a year. This is the same test used for the definition of creditor. The different TILA rules will cause confusion and aligning them would simplify this area. We do not think seller financers typically sell multiple properties in one year, so raising the limit is not likely to exempt many more seller financers.

NAR Request for Regulatory Flexibility in Defining Mortgage/Loan Originator. While NAR welcomes the conclusion that seller financers that engage in no more than three transactions in any 12-month period and meet the statutory criteria are exempt from TILA regulations governing loan originators and creditors, it requests that CFPB exercise its authority to exempt seller financing from several statutory provisions that would have the effect of making most seller financing impracticable, which harms not only the seller but buyers where alternative financing is not otherwise available. These changes are in addition to our recommendation that you align rules for seller financing, as described in the preceding paragraph.

Two provisions raise practical problems that we believe merit relief, in light of the small size of seller financers, the low volume of seller financing, considered nationally and at the individual seller level, and the importance of seller financing to consumers as both sellers and buyers in limited circumstances.

First, requiring seller financers to comply with section 1026.43, the ability to repay/QM rule, is beyond the ability of virtually all occasional seller financers. Even large lenders are concerned about their ability to comply with the enormous volume of rules and the complexity of complying and the potential litigation risks if they make technical errors. As a practical matter, an owner seeking to sell one or a few properties and provide seller financing would not have the capacity to digest and comply with anyone's anticipated version of a final section 1026.43. As an alternative, the seller financer should be allowed to make a written determination that the buyer has a reasonable ability to repay the loan, including the basis for the determination, and keep a copy of the determination with the note. Without such flexibility aimed at the general objectives of the statute but without imposing red tape that an individual would find impossible to understand, much less comply with, seller financing will no longer be available to meet the needs of consumers, as either sellers or buyers, in appropriate circumstances.

Second, the requirement for full amortization is unduly restrictive and would significantly reduce seller financing. We note that under the ability to repay/QM statute, even the largest lenders may make loans with balloon payments in certain circumstances in rural and underserved areas. It is an anomaly of the law to forbid all balloon mortgages in the case of seller financers, but not for large national banks. More, not less, flexibility for seller financers makes sense. Rather than limit use of balloon mortgages to certain areas, we suggest that the seller be required to (a) make a written determination that the financial circumstances of the buyer are such that it is likely they will be able to refinance or pay off the loan and (b) keep a copy of the determination with the note. It may be appropriate to require a minimum loan term so the buyer is not forced to refinance in a short period of time.

What Provisions Apply to Seller Financing that Are Not Exempt from the Definition of Mortgage/Loan Originator?

The concerns described above are mitigated if there is no practical application even if an occasional seller financer is treated as a mortgage/loan originator. It remains unclear whether any of the substantive provisions would fit within the context of seller financed transactions. For example, if a seller financer is exempt from SAFE Act licensing, because the seller does not engage in the business of a loan originator, it will not be possible to comply with proposed sections 1026(f) (loan originator qualification requirements) or (g) (NMLSR ID on loan documents). Many state laws exempt seller financing of no more than a specified number of transactions in a given time period from the state loan originator licensing law enacted pursuant to the SAFE Act. We assume CFPB does not intend, through the loan originator compensation rulemaking, to override these considered state exemptions. This issue has been an extremely volatile one in many states.

In addition, the prohibition on steering and payments to loan originators doesn't seem to apply where a seller financer is not acting as a mortgage broker or mortgage bank and, therefore, is not in a position to steer the buyer to a more expensive loan. These provisions are designed to prevent steering in the context of preventing abuses where some originators were paid more for arranging for loans that were disadvantageous to the consumer. Seller financing does not involve compensation paid by third parties.

NAR requests that you clarify that a seller financer that is not required to be licensed under the SAFE Act is not subject to TILA regulations governing loan originators even if the seller does not meet all the terms of the statutory exemption in section 103cc(2)(E) of TILA. Seller financers that are licensed under the SAFE Act, which we believe will be a very small number, could comply with proposed sections 1026(f) and (g), but the anti-steering provisions would still not fit within the context of seller financing.

Restrictions on Mandatory Arbitration

NAR understands that Dodd-Frank mandates restrictions on mandatory arbitration for closed end credit transactions. Nevertheless, we fear this provision and the associated regulations will have the unintended consequence of increasing the cost of mortgage credit and possibly reducing access without a clear benefit to consumers. Furthermore, the time it takes to achieve resolutions of disputes will also likely increase without necessarily producing a result that benefits the consumer. For these reasons, NAR urges the Bureau to pursue and encourage alternative dispute resolution wherever possible and practical.

Promote Consumer Choice: Reduce Discrimination Against Affiliates

The definition of fees and points discriminates against lenders with affiliates for no obvious reason. We urge the Bureau to remove or significantly reduce this discrimination in all Dodd-Frank rulemakings, including this regulation. As the Bureau indicates, the ultimate effect of this discrimination is to create the improper perception that a creditor with affiliates involved in the transaction is charging a higher interest rate in the case of the so-called "0-0" option.[5] However, the reality is that the rate will simply be higher because of the additional charges, common to every similar transaction, which an affiliated creditor will have to include in its pricing regime that an unaffiliated creditor would not.

The definition of fees and points and how it is used throughout these regulations is critical. Industry and Congress sought to ensure that discrimination was minimized. The Federal Reserve Board (The Board) noted in the proposed ability to repay/QM regulation that there was concern regarding the definition of fees and points in the Dodd-Frank and similar legislation.[6] A legislative technical correction was included in House versions of these provisions dating back to 2007. The correction would have treated mortgage lenders with affiliates (and in particular title companies) involved in the transaction almost the same as unaffiliated lenders as long as the affiliated relationship was in compliance with the Real Estate Settlement Procedures Act (RESPA).

The Board also noted that Congress ultimately did not include a legislative technical correction for the definition that would have treated affiliated and unaffiliated providers more equally. While it is true that the legislative fix was removed in the final conference version of the legislation, its removal was largely the result of haste and not deliberate reflection as some have implied. In fact, NAR has subsequently met with key Members of Congress who inserted the provision and those in a position to remove it, and none gave any explanation or reason for its removal other than a possible staff error during the haste of the conference.

RESPA Affiliate Exception Should Be Reinstated across the Board. Using the broad authority under TILA[7], the CFPB should reinstate the RESPA affiliate exception because it maximizes consumer access and choice in mortgage providers. RESPA prohibits kickbacks and unearned fees among settlement service providers. The affiliated business exception allows affiliates to receive compensation for services rendered and for a parent owner or partner to receive a return on their ownership interest commensurate with their investment in the affiliated firm. It still prohibits unearned returns and requires significant disclosure of affiliated relationships. For this reason alone, the fears that may have inspired the inclusion of affiliate charges, such as title insurance and escrows for taxes and homeowner's insurance, are unwarranted.

---

[5] The "0-0" option is that a lender, in addition to other offers, should present the borrower with option of paying 0 points and 0 fees. This would essentially be accomplished by building any costs and charges into the interest rate.
[6] 76 Fed. Reg. 27404 (May 11, 2011).

[7] Sections 105 and 129C(b)(3)(B) of TILA.

NAR Requests Fair Treatment for Lenders With Affiliates. What is most pernicious about the disparate treatment of affiliates is that the particular affiliate or other charges ascribed to lenders with affiliates in the transaction are not likely to differ whether there is an affiliate involved or not. The item most likely to cause a lender to violate the points and fees cap or lead to a greater interest rate under the "0-0" option is title charges. The title industry is heavily regulated and competitive, and the likelihood that consumers would pay a non-market rate to an affiliate title company, as opposed to an unaffiliated firm, is slim.

In fact, in a December 2010 Harris Survey of recent home buyers, respondents said that using affiliates saves them money (78%), makes the home buying process more manageable and efficient (75%), prevents things from "falling through the cracks" (73%), and is more convenient (73%) than using separate services. This response is consistent with data from similar surveys in 2008 and 2002. Furthermore, those who used affiliates have been consistently more satisfied than those who did not. Additional studies have demonstrated that affiliates are highly competitive with unaffiliated companies.[8]

Title and certain escrow charges (including homeowner's insurance) can be significant depending on location and would certainly contribute to either a firm exceeding the 3% cap in the ability to repay/QM proposal or making a lender's interest rate uncompetitive if they must build in the true lender costs into the interest rate.

Since discrimination against affiliates will reduce competition and perhaps even increase costs to consumers and given the repeated survey data showing consumer's preferences, NAR strongly urges the CFPB to remove affiliate charges from the calculation of fees and points and in the "0-0" loan option for creditors with affiliates, using its TILA adjustment authority.

Conclusion

NAR appreciates the opportunity to comment on the CFPBs efforts to revise and clarify existing regulations and guidance. We remained concerned that the layers of regulations surrounding the mortgage finance business may result in further consolidation of the lending industry. It is important that the CFPB balance the need to protect consumers while also ensuring that regulations do not further constrain access to and competition in the mortgage market.

We would be pleased to discuss these issues in more detail at your convenience. If you have any questions, please contact Charlie Dawson, our Policy Representative for Financial Services, at cdawson@realtors.org or 202.383.7522.

Sincerely,

Maurice "Moe" Veissi
2012 President, National Association of REALTORS®

[8] "Affiliated Business Arrangements and Their Effects on Residential Real Estate Settlement Costs: an Economic Analysis" (2006); by Donald L. Martin PhD. & Richard E. Ludwick, Jr. PhD., CapAnalysis Group LLC, sponsored by the Real Estate Services Providers Council, Inc. (RESPRO®). This study analyzed title and title-related charges on over 2200 HUD-1 Settlement Statements in nine states (Alabama, Illinois, Maryland, Michigan, Minnesota, North Carolina, Ohio, South Carolina and Virginia) in 2003 and 2005 and concluded that affiliated title and title-related fees are competitive with unaffiliated title and title-related fees. See also: "Economic Analysis of Restrictions on Diversified Real Estate Services Providers (1995), by Lexecon, Inc., sponsored by the Real Estate Services Providers Council, Inc. (RESPRO®). This study analyzed title fees of over 1000 home sales transactions in seven states (Florida, Minnesota, Tennessee, Wisconsin, Mississippi, Pennsylvania and California) and concluded that affiliated title and closing costs were competitive with unaffiliated title fees.