May 16, 2008

Regulations Division
Office of General Counsel
Department of Housing and Urban Development
451 Seventh Street, SW, Room 10276
Washington, DC 20410-0001

Re: Docket No. FR-5180-P-01

To Whom It May Concern:

The Conference of State Bank Supervisors (CSBS), the American Association of Residential Mortgage Regulators (AARMR), and the National Association of Consumer Credit Administrators (NACCA) appreciate the opportunity to comment on the Department of Housing and Urban Development's proposed rule to simplify and improve the process of obtaining mortgages and reduce consumer settlement costs under the Real Estate Settlement Procedures Act (RESPA). In general, CSBS, AARMR, and NACCA support the purposes of the proposed revisions. However, we are concerned the revisions proposed by HUD are not consistent with recently proposed revisions to Regulation Z by the Federal Reserve Board of Governors (the FRB). We strongly encourage HUD to more closely coordinate with the FRB as proposed changes to RESPA and Regulation Z are made final and implemented by the industry.

CSBS, AARMR, and NACCA would also like to make the following comments on specific sections of the proposed revisions to RESPA.

RESPA—CURRENT OVERVIEW

CSBS, AARMR, and NACCA are very supportive of Section 18 of RESPA that does not annul, alter, affect, or exempt any person from complying with the laws of any State with respect to settlement practices, "except to the extent that those laws are inconsistent with any provision of [RESPA], and then only to the extent of the inconsistency." Retaining Section 18 provides a sound regulatory model in which federal regulation sets a floor, and state laws are able to provide enhanced or additional requirements as necessary.

PROPOSED REVISIONS TO RESPA

- **Generally**

We also support the general purposes of the proposed revisions as outlined by HUD. In addition, we would like to alert HUD to the fact that several states already require loan originators to provide consumers a one-page summary of terms. Finally, throughout the proposal, HUD refers to the "closing" of a loan. This term is vague and could refer to

several different moments in the loan origination process. Therefore, CSBS, AARMR, and NACCA ask HUD to define "closing," unless otherwise defined in state law.

- **Legislative Proposals Related to RESPA Reform**

CSBS, AARMR, and NACCA fully support HUD's intention to seek legislative changes to RESPA to allow the Secretary of HUD to impose civil money penalties for RESPA violations, require delivery of the HUD-1 to the borrower three days prior to closing, and create a uniform and expanded statute of limitations applicable to governmental and private actions under RESPA. We believe these statutory modifications are long overdue. With regard to the statute of limitations, we urge HUD to pursue a longer statute of limitations instead of a shorter time period. We also recommend a three year statute of limitations. With the exception of California (two year statute of limitations), three years is the lower end of the spectrum in all states for statute of limitations in contracts. In addition, CSBS, AARMR, and NACCA encourage HUD to seek Congressional authority to expand RESPA's applicability beyond "federally related mortgage loans" to encapsulate loans from all originators or settlement service providers. This will ensure a level playing field for all residential mortgage originators.

- **Federal Reserve Board Proposed Rule Amending Regulation Z**

While we certainly support HUD's promise to keep their requirements consistent, comprehensive, and complementary with the FRB rules applicable to similar topics, we do not believe the proposals are entirely consistent or parallel. For example, HUD's proposed revisions are not consistent with regard to yield spread premiums or fees related to obtaining a credit report for a consumer. We once again urge HUD to work closely with the FRB to develop seamless regulations before RESPA and Regulation Z are finalized and implemented.

- **Planned Implementation of Final Rule**

CSBS, AARMR, and NACCA understand HUD's intention to provide a 12-month transition period for the final rule but we encourage a shorter time frame. We hope mortgage providers will begin operating under the new rules as soon as possible. We believe a year-long implementation period that allows for providers to use either current requirements or revised requirements will hinder shopping during the 12-month period and cause borrower confusion. At a minimum, we ask HUD to encourage lenders to begin using the revised GFE immediately. Also, we urge HUD to coordinate the final implementation of these revisions with the implementation of the FRB's Regulation Z.

- **The GFE and GFE Requirements**
    - Changes to Facilitate Shopping

CSBS, AARMR, and NACCA are very supportive of revisions that will enable consumers to shop for the best mortgage loan available. However, we believe the creation of a "GFE application" and a "mortgage application" will cause confusion for many consumers and providers alike. Having two applications presents more opportunity for borrower confusion, and providers may also be confused when certain required disclosures are triggered under two applications. Once again, this is an area where we urge HUD to

provide more information and to more closely coordinate with other federal regulatory agencies to provide a consistent and seamless approach to regulation from loan application to loan closing.

- Addressing Up-Front Fees That Impede Shopping

In our response to the FRB's proposed changes to Regulation Z (HOEPA and TILA), CSBS, AARMR, and NACCA expressed our belief that fees collected by a creditor or an originating third party effectively locks the borrower into the transaction.[1] Therefore, we believe originators should provide the initial GFE at no cost to the consumer. However, if HUD insists on allowing originators to assess fees, the fee should only cover the actual cost of a credit report. It should be further noted that many state laws have specific requirements concerning the receipt of funds, and we hope these additional requirements will be protected under Section 18 of RESPA.

- Choosing Between a "Credit" and "Charges"

CSBS, AARMR, and NACCA believe the proposed changes to the GFE will help consumers choose the lowest settlement costs, but not necessarily the loan with the best overall terms. The GFE does not adequately disclose the negative consequences of choosing a "credit" and higher interest rate (i.e. that the overall cost of the loan and monthly payments may be higher). This problem is compounded by the use of the terms "credit" and "charges." "Credit" suggests a benefit, while "charges" has a pejorative connotation. Although the borrower is directed to the table on page three which demonstrates the "trade off," CSBS is concerned problems remain. For example, the borrower is only referred to the table in relationship to choosing the lower interest rate and paying a charge. Also, the consumer is only referred to the table on page three of the GFE to see how they can change the credit or charge. There is no disclosure showing that the choice will have an impact on the overall amount of the loan or monthly payment. At the very least, the disclosure should be highlighted and made to apply to the borrower's choice of either credit or charge. Also, the disclosure should not be in parenthesis, which tends to diminish its significance. For example, the disclosure could state: **To see how your choice of interest rate affects your monthly payment and how you can change this charge or credit, see the table on trade-offs on page 3.** This disclosure should be set out in a way that clearly applies to both credits and charges.

- Terms on the GFE (Summary of Loan Details)

CSBS, AARMR, and NACCA support HUD's goal to provide clear and valuable information to consumers regarding adjustable rate mortgages (ARMs) on the GFE. With regard to HUD's proposal to not include the annual percentage rate (APR) on the GFE, the FRB's proposed revisions to Regulation Z would include APR on required disclosures. Therefore, we once again urge HUD to work with the FRB to develop coordinated, consistent and cooperative disclosures and requirements for all loan originators to ensure consumers are not confused. Some state authorities have documented evidence of

[1] The CSBS, AARMR, NACCA comment letter can be viewed at http://www.csbs.org/Content/NavigationMenu/RegulatoryAffairs/CommentLetters/csbsaarmrnaccafinalhoeparesponse.pdf.

originators using confusing federal disclosures in a practice sometimes referred to as "lying with the truth." We feel strongly that government-developed processes should never leave the consumer uncertain as to the meaning of the information disclosed by the mortgage provider.

- Consolidating Major Categories on the GFE

While we are generally supportive of HUD's proposal to group and consolidate all fees and charges into major settlement cost categories, we do have concerns that bad actors could take advantage of this format by putting additional fees and charges in a totaled bucket or category. Such creativity to circumvent the statute might include obscuring the fees paid to an affiliate as discussed under the "Tolerances" section below.

- Option to Pay Settlement Costs

CSBS, AARMR, and NACCA are supportive of a GFE form that will advise the borrower how the interest rate of the loan affects the borrower's settlement costs. However, we have concerns regarding the requirement that originators must indicate that a higher or lower interest rate is not available on the GFE. Our concern is that a bad actor might indicate another loan is not available, when it actually is, thereby limiting the consumer's ability to shop and compare properly. We ask HUD to clarify when the loan would be considered "available" or "not available." Clarification within this section would provide a clear connection to the enforcement provisions proposed for RESPA.

- Establishing Meaningful Standards for GFEs
  - *Tolerances*

HUD's proposal to prohibit loan originators from exceeding at settlement the amount listed as "our service charge" on the GFE is well-intentioned. However, the proposal to prohibit the sum of all the other services subject to a tolerance from increasing at settlement by more than 10 percent, absent unforeseeable circumstances, is confusing and requires clarity. CSBS, AARMR, and NACCA urge HUD to clarify that actual charges for third party relationships should be the actual cost, not the costs plus an additional 10 percent. Further, as referenced under the "Consolidating Major Categories on the GFE" section above, an originator could inflate the costs of one third party on the GFE and at closing convert the inflated amount to the originator's ultimate benefit without violating the 10 percent total tolerance limit. For example: The originator could disclose on the GFE that an appraisal fee costs $600, when in reality, the fee is $500. On the HUD-1/1A, the appraisal fee would be shown accurately as $500, while increasing the fee to an affiliate (e.g. subsidiary escrow company) by $100. The result is no increase in the total charge shown on Block B, and therefore no tolerance violation, while realizing a gain inuring to the originator of $100. The states have conducted enforcement actions that included just this type of deception, and when practiced at the systemic level can result in significant amounts of consumer harm.

  - *Unforeseeable Circumstances*

CSBS, AARMR, and NACCA support the definition of "unforeseeable circumstances" provided by HUD in the proposal. However, we encourage HUD to require originators to

provide written explanation to the borrower of what "unforeseeable circumstance" has occurred that resulted in a change to the cost of the transaction. Again, we note certain state laws already carry similar provisions. If these state provisions are more restrictive, they should be protected under Section 18 of RESPA.

- Enforcement

CSBS, AARMR, and NACCA also support the proposal that any failure to follow the GFE requirements constitutes a violation of Section 5 of RESPA. Regarding the proposal to allow originators 14 business days to remedy any potential violations of the tolerances established under the rule, we understand there are situations in which this period for remedy is beneficial for those providers acting in the best interest of the borrower. For example, computer glitches or inadvertent clerical errors could create a situation where the originator is in violation of RESPA while not intending to harm consumers. We are concerned, however, that some bad actors may use this safe harbor for fraudulent or abusive purposes. We encourage HUD to clarify that repeated use of this safe harbor may result in a violation of RESPA. Such limitations will preserve the ability to take legal action for violations resulting in actual consumer harm. In addition, if HUD limits the usage of the provision, prosecutors will still be able to exercise enforcement discretion.

- **Lender Payments to Mortgage Brokers—Yield Spread Premium (YSP)**

Under the proposed definition of "mortgage broker," HUD fails to provide a specific definition of "intermediary transaction." By failing to define this term, HUD has created potential confusion among industry participants and regulators. While we support the proposed definition of "mortgage broker," HUD should define "intermediary transaction." We also applaud HUD for the extensive testing conducted on the GFE. While we recognize the results of the tests conducted indicate excluding YSP disclosure enables consumers to more accurately identify the cheapest loan offer, we are concerned that by not identifying broker compensation on the GFE, consumers may not have full awareness of how the broker is paid. Consumers should be aware there is a trade off for interest rate variations and broker compensation.

- **Modification of the HUD-1 Settlement Statement**

In theory, CSBS, AARMR, and NACCA support the addendum requiring the settlement agent to read aloud a "closing script" to the borrower. However, we believe this requirement will be very difficult to enforce. Further, it is unclear how the "closing script" will be conducted in closings handled by mail or other remote means. Perhaps of greatest concern to state supervisors, however, is if a consumer signs an acknowledgment stating they have been presented with the closing script and understand all portions therein, the lender will effectively be granted safe harbor if accused of deceptive tactics. Instead, we recommend a borrower be required to sign a statement indicating only that they were presented with the closing script. Also in the proposal, HUD indicates that upon request of the borrower, the HUD-1/1A and the closing script addendum would have to be made available for review by the borrower 24 hours prior to the settlement. We do not believe 24 hours is enough time for a borrower to adequately review the settlement documents and be able to ask questions or get clarifications. Also, the majority of borrowers are not aware

they are allowed to request the settlement information. Therefore, CSBS, AARMR, and NACCA support HUD's declaration that they will seek statutory modifications to require delivery of the HUD-1/1A and the closing script addendum three days prior to closing.

- **Permissibility of Average Cost Pricing and Negotiated Discounts**

If enacted, the proposal to allow loan originators or settlement service providers to utilize average cost pricing would be very difficult for regulators to enforce. By allowing originators and providers to utilize this pricing mechanism, individual transaction costs can be manipulated and inflated. The current regulations can be enforced by regulators because actual prices can be determined. Also, the burden of proof of compliance must be on the lender to justify the average cost.

- **Changes to Strengthen Prohibition Against Requiring the Use of Affiliates**

We agree with HUD that disincentives are a concern for consumers and we support HUD's proposal in this area. However, we feel the definition of "required use" should be expanded and enhanced to incorporate situations where the originator fails to give a required Affiliated Business Arrangements disclosure, or provides a misleading disclosure, that facilitates steering of the borrower to an affiliate. Absent information necessary to make the best decision, the borrower has effectively been "required" to use a particular provider.

ADDITIONAL COMMENTS

CSBS, AARMR, and NACCA also take this opportunity to raise comments on RESPA in areas not considered within the proposal.

1. One of the most frequently identified predatory practices is making borrowers believe their payment includes taxes and insurance when it does not. The new GFE form does not eliminate this deception. The GFE should contain an estimate of taxes and insurance even when there will be no reserve for taxes and insurance included in the monthly payment. Although the new GFE requires an estimate of the annual charge for these amounts, if the estimate is not included in the monthly payment amount, the borrower will not clearly understand whether they can afford the monthly payment.

2. Subsection 3500.21(e) covers making a qualified written request. Today more than ever, borrowers need to be able to find out why and when they have become delinquent in payment or fees have been added to their account. The qualified written request is the only mechanism under any regulation providing the borrower with this information. Although Appendix MS-2 is the form servicers use to inform borrowers about this right, it is buried too deep in the form and not blatant enough to grab the borrower's attention. CSBS, AARMR, and NACCA believe this information should be on the borrower's monthly statement. At the very least, it should be in bold font and higher up in the form. Further, subsection 3500.21(e) is in need of a timing amendment. In delinquency or default situations, timing is vital to allow a borrower to challenge foreclosure proceedings. With today's speed

of technology, the time periods for lender response to the request should be shortened from the current 20 days for acknowledgment and 60 days for action. Some state laws already include a shorter response time. We recommend HUD consider the shorter of 10 days or state law for acknowledgment, and 20 days for action.

3. Subsection 3500.21 could benefit borrowers by disclosing where payments can be made both physically and by mail. The rule should include a requirement that payments received by any means prior to the close of business must be acknowledged as received that day. The problem is twofold. First, borrowers are often instructed to make payments to a lock box. If the payment arrives after a specific pickup time (frequently midday), then the payment is not acknowledged until the next day. This can cause a borrower to be late when they were not late, and thereby trigger a host of problems. Second, borrowers should be provided with a physical address where they can make emergency payment deliveries to ensure the payment is received on time.

4. CSBS, AARMR, and NACCA believe there should be penalties for predatory servicing. This would include acts such as refusing to acknowledge timely payment receipt, resulting in delinquency. Another form of predatory servicing occurs when a lender adds insurance to a borrower's account due to a lapse in hazard insurance coverage. Further, a pattern of errors in accounting should be identified as a predatory servicing practice with enforcement provisions and penalties associated with the violation.

Thank you for the opportunity to comment. State supervisors look forward to working with HUD and other federal regulators to create a mortgage marketplace with cooperative, seamless, and transparent supervision that protects consumers and benefits financial service providers.

Best regards,

Neil Milner
President and CEO, CSBS

Joe Mulberry
President, NACCA

David Bleicken
President, AARMR