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The Premier Association of Real Estate Finance

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**Manager
Dissemination Branch
Information Management and Services Division
Office of Thrift Supervision
1700 G Street, NW
Washington DC 20552
Attention Docket No. 2000-34**

Re: Responsible Alternative Mortgage Lending, Advance Notice of Proposed Rulemaking – Comments

Ladies and Gentlemen:

Thank you for the opportunity to comment on the Advance Notice of Proposed Rulemaking (“ANPR”) regarding Responsible Alternative Mortgage Lending. The Mortgage Bankers Association of America (“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, both single-family and multifamily, and commercial mortgage lenders.

Introduction

Over the last few years, the mortgage lending industry has changed dramatically. The vast majority of these changes, which include new mortgage products and the entrance of new players into the field of mortgage lending, have increased the availability of mortgages to American families who otherwise would not have been able to afford their own home. Much of this new lending has taken place in what is called the “subprime” market. This portion of the mortgage lending industry focuses on consumers who have, for various reasons, less than stellar credit records or other flaws, but who can still be considered “reasonable” credit risks.

The percentage of Americans who own their own homes has steadily increased over the years, mirroring not only economic growth and demographic factors, but also the availability of these new mortgage options, including the expansion of subprime business. The expansion of this area of lending has been beneficial to hundreds of thousands of American consumers, leading Federal Reserve Chairman Alan Greenspan to call subprime lending the “democratization of credit.”

Subprime lending has opened up new markets and helped many consumers, and provides a legitimate and much needed source of mortgage credit for many families. Unfortunately, there are indications that the expansion of this new market area may have brought with it an increase in abusive and predatory lending practices. These abusive predatory lending practices harm all of us—borrowers whose financial lives are devastated, communities that must deal with the aftermath, and reputable lenders who suffer from “guilt by association.”

ANPR

Under the ANPR issued April 5, 2000, the OTS announced its intentions to review its mortgage lending regulations in the face of new market developments and newly developed types of mortgage products. The OTS identified a particular interest in high cost lending and the subprime market, since any changes to the existing rules will also affect activities of state-regulated housing creditors who may be making alternative mortgage transactions under the Alternative Mortgage Transactions Parity Act. In addition, the OTS expressed concerns regarding allegations that certain nonfederally chartered housing creditors often structure their loans as alternative mortgage transactions in order to escape state law restrictions under the Parity Act’s provisions.

The MBA commends the OTS for taking the initiative to resolve the very important issues surrounding predatory lending. More importantly, MBA believes that efforts by the OTS to engage in fact gathering in order to determine the true scope of the problem is the most responsible approach to rulemaking on this issue. A full understanding of the issues based on complete and reliable data—not on anecdotes—is the only way to address the important issue of mortgage lending abuse. As Federal Reserve Board Governor Gramlich stated in a recent speech before the Fair Housing Council of New York, “[b]ecause the practices are shady, information is incomplete and anecdotal. No one knows how significant a problem, national or local, that predatory lending really is.”

The MBA strongly supports these efforts to gain a more thorough understanding of the subprime market before engaging in rulemaking. This is consistent with our overall commitment—most notably evidenced by MBA’s substantial investment in the Research Institute for Housing America—to establishing credible, balanced, and objective information on this and other important issues of improving access to housing finance and opportunity. The issues of subprime and predatory lending, in particular, are particularly ill-defined and driven by anecdote, as opposed to solid, market-wide information. We note, for example, that there is currently not even consensus on a precise definition for the term “predatory lending,” nor what constitutes “subprime lending.” In the politically charged debates that surround this topic, these two terms are very often used interchangeably. This fallacy has poisoned the discourse and, unless corrected, will lead to misguided policy action.

Nonetheless, the MBA shares in the concerns about reports of abusive lending practices and is committed to eliminating unscrupulous activities. We are very concerned, however, that the imposition of more piecemeal restrictions on subprime lending activities will have the effect of constricting credit supply in this sector of the market. As generally understood in the lending industry, the "subprime" market encompasses all loans that do not meet the credit standards of the prime mortgage market as set forth by Fannie Mae and Freddie Mac. A consumer may fall out of this so-called "prime" market by virtue of temporary hardship or having credit impairments. As mentioned above, subprime lending has served as a source of loans for a portion of the market that is very much in need of credit options. In crafting solutions for the problem of abusive lending, regulators must advance thoughtfully and carefully to assure that additional rules promote, rather than restrict, credit extension.

The MBA agrees with the OTS that a vast number of loan terms that are currently labeled as "predatory," for example negative amortization or high loan-to-value loans, are terms that may be reasonable when fully understood by a borrower that has the ability to properly assess options and alternatives. Likewise, MBA concurs that lending regulations should be based on free market principles and on the assumption that loan contracts should, within the bounds of safety and soundness, be a matter of well informed negotiation between borrowers and lenders. It is also essential that abuses, including predatory lending abuses, be effectively addressed without imposing more onerous compliance burdens on the mortgage lending industry. Any changes to current laws and regulations should not have a negative impact on credit availability or place increased burdens or costs on the consumer.

Comments on Regulatory Approaches

In the ANPR, the OTS solicits public input on a wide variety of potential regulatory approaches to address predatory lending. Among these approaches are expanding the definition of "high cost loans;" imposing limits on the financing of certain fees or charges; imposing limits on refinancings; prohibiting prepayment penalties in certain circumstances; limiting inclusion of such terms as balloon payments, negative amortization or mandatory arbitration clauses; adding a "suitability" standard; imposing due diligence requirements in cases of potential loan purchases.

As a preliminary matter, the MBA believes that the general regulatory approach advanced under the ANPR places too much importance on restricting specific loan terms or activities. For various reasons, this piecemeal approach will not be effective. As discussed above, some of the loan terms targeted by the ANPR can, and do, serve legitimate consumer needs when they are used correctly. For example, prepayment penalties allow lenders to ensure against a loss in the instance where a loan is refinanced before the lender has had the opportunity to recover costs. By allowing lenders to cut this

risk of loss, such prepayment penalties actually maintain the incentive for lenders to enter into riskier loans where the consumer is in dire need of credit. When used legitimately, prepayment penalties actually allow borrowers to significantly lower the rates on their particular loans. Negative amortization, another item that the ANPR singles out as potentially deserving of limits, serves as a useful tool in structuring certain types of graduated payment mortgages or in instances where borrowers are experiencing temporary financial hardships.

As noted, by themselves, these specific loan terms are not sufficient to turn a loan into a "predatory loan." Combinations of these alternative mortgage terms can increase consumer burdens and lead to the abuse of ill-informed consumers. In either of the cases described above, prohibiting consumers' options and access to those financing tools will simply eliminate or reduce legitimate subprime credit supply, and will inevitably lead to increased rates and decreased competition for that market sector where the prohibitions apply. Broad competitive markets are one of the best consumer protection devices available.

The imposition of additional restrictions on specific loan terms will only lead to further compliance complexity in an already difficult regulatory scheme. Added confusion does not help vulnerable consumers in any way. Additionally, these restrictions will discourage legitimate lenders to enter into the subprime market to fuel competition to decrease rates and lower overall costs to consumers.

And there are other problems. Regulatory prohibitions on specific terms and fees are, by their very nature, very limited in their applicability and may not have any discernible long-term effects on eradicating abuses from the mortgage market overall. A regulatory approach that relies exclusively on specific prohibitions is dependent on constant examinations and enforcement. As the OTS admits, many of the entities engaged in subprime lending that rely on the Parity Act do not fall under the regulatory purview of any federal agency and are therefore rarely (if ever) examined.

In addition, the type of "back end" prohibitions advocated here will be effective only where individual consumers discover the violations and then initiate claims. Since predatory loans are often made to borrowers that may fail to comprehend the loan disclosures and lack even a basic understanding of the process, such discoveries are extremely unlikely. Further, regulatory prohibitions are necessarily retroactive in the sense that the protections may be accessed only after violations of the prohibitions have occurred. In short, regulatory prohibitions allow some consumers to receive restitution or damages in specific instances, but they fail to establish a broader market discipline of competition that is imperative to ultimately halting the predatory lending abuses that are allegedly occurring.

Lastly, it is important to understand that the real estate mortgage lending industry is one of the most heavily regulated industries today. Even if the provisions of the Parity Act allow particular creditors to escape state law provisions, mortgage lenders are still subject to 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, and the Fair Debt Collection Practices Act. In the ANPR, the OTS acknowledges the existence of this "comprehensive" federal network of laws and implementing regulations, and further acknowledges that its regulations can only go so far to address predatory practices. The MBA agrees. Rather than engage in expanding and complicating the current federal regulatory system, the priority should be to aggressively enforce the multitude of existing laws. The types of regulatory approaches advocated under the ANPR would do nothing but expand the laundry list of prohibitions that already exist to protect consumers under RESPA, TILA (including HOEPA), and others. Absent effective oversight and a legitimate commitment to engage in comprehensive enforcement, this approach will be of negligible impact in ridding the market of unscrupulous actors.

MBA Recommendations

Although MBA does not agree with the piecemeal regulatory approach outlined in the ANPR, the MBA does believe in the overall objectives of consumer protection and takes the position that it is absolutely essential that abusive lending practices be accurately defined and eliminated from the mortgage lending business. However, the typical characteristics of predatory lending involve outright fraud and deceptive tactics that are illegal under current law. Expanding an already long list of prohibitions will not put an end to unscrupulous activity caused by actors that operate in the outer fringes of the law. The MBA therefore believes that solutions based solely on regulatory adjustments will be unsuccessful absent real and comprehensive mortgage reform.

MBA believes that predatory lending is in many ways a symptom of a larger problem that has evolved from complicated and outdated mortgage laws. Any consumer who has ever been through a mortgage closing knows how confusing and cumbersome the process can be. Lack of reliable cost disclosures makes it difficult for prospective borrowers to ascertain true total closing costs and renders comparison shopping virtually impossible. The complexity of the current system allows unscrupulous operators to exploit information asymmetries and take advantage of consumers. These problems are exacerbated in cases of consumers that are uneducated. Without broad changes of existing laws and comprehensive reform of current cost disclosures, any efforts to address predatory lending will merely deal with the effects and not with the underlying causes of the problem.

To address these matters, MBA has recently offered far-reaching recommendations that will address the pernicious lending practices reported to be occurring in the market. In crafting these recommendations, the MBA relied on the same principles that have traditionally guided the regulatory approach of the OTS—that mortgage lenders should be allowed flexibility to encourage innovations in order to stimulate credit, and that clear disclosures and full consumer education will lead to competitive markets and sound loans.

MBA's Seven Point Plan for Mortgage Reform

MBA has developed a seven-point comprehensive approach to reform the mortgage process and increase consumer protections. This approach combines increased disclosures to borrowers, a simplified mortgage transaction, more consumer education and counseling, a commitment to fair lending practices, and increased enforcement authority. The MBA's reform recommendations is as follows—

1. FULLY ENFORCE CONSUMER PROTECTION LAWS

The MBA believes that most cited abuses, and the majority of the abuses cited as "predatory" are already illegal under current federal and state law. 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

The current process of shopping for and closing a home loan is the most complex and burdensome transaction most consumers will ever enter into. To simplify this process, MBA supports legislation to establish a "Loan Closing Costs Guarantee" program. Under this program, lenders would be able to provide mortgage applicants with an up-front loan closing price guarantee.

This price would include the guaranteed maximum lender settlement costs. Included would be all costs required by the lender to close the loan. Lenders could not charge a fee for this service. While costs imposed by non-lender third parties (e.g., municipal or state taxes) could not be included in the guarantee, these costs would be disclosed separately as estimates. The lender's guaranteed maximum loan closing price would be binding from the time of disclosure (prior to application) through the actual closing.

The guaranteed disclosure system would let consumers know up front the maximum settlement costs a lender can charge. Thus, consumers would be informed of the current rates, points, and the guaranteed lender settlement costs for a particular mortgage. This approach would allow consumers to effectively shop and compare among various mortgage offers while being afforded protection from fraud or "bait and switch" tactics.

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). These lenders also would be entitled to an exemption from Section 8 of RESPA.

Those lenders not willing (or able) to engage in the Loan Closing Costs Guarantee approach would be subject to current legal (RESPA/TILA) requirements and prohibitions.

3. INCREASED DISCLOSURES FOR CONSUMERS

The Loan Closing Costs Guarantee proposal includes clearer and more effective disclosures to consumers. Lenders offering a Loan Closing Costs Guarantee option would be required to provide:

- **Mortgage Information Booklet.** The booklet would be delivered at the first contact with any real estate professional and contain detailed information about the mortgage lending process, protections available under the law, warnings on common abuses, and information about the availability of mortgage counseling.
- **Loan Closing Costs Guarantee Disclosure.** Delivered to the consumer prior to his/her completing an application, the Disclosure would include the current rates, points, and the guaranteed lender settlement costs included in the loan. Estimates of third party costs, such as local or state taxes, also would be disclosed.

This disclosure package would replace the current confusing scheme of RESPA and TILA notices.

4. ENHANCE ENFORCEMENT TOOLS/ PROVIDE EFFECTIVE REMEDIES FOR CONSUMERS

A. Prohibited Practices.

The North Carolina Fair Housing Center, which has been a leader in combating unscrupulous lenders, has identified a number of typical improper practices. MBA supports federal legislation to prohibit these practices and to impose stiff penalties for violations. 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.

These prohibited practices should include:

- Steering borrowers to high-rate loans/lenders.
- Engaging in the practice of intentionally structuring high-cost loans with payments the borrower cannot afford.
- Falsifying loan documents.
- Making loans to mentally incapacitated homeowners.
- Forging signatures on loan documents.
- Changing the loan terms at closing.
- Requiring credit insurance.
- Falsely identifying loans as lines of credit or open end mortgages.
- Increasing interest charges when loan payments are late.
- Charging excessive prepayment penalties.

- Failing to report good payment on borrowers' credit reports.
- Failing to provide accurate loan balance and payoff amount.

B. Remedies for Consumers

MBA's plan for comprehensive mortgage reform includes a new system of remedies for consumers involved in a mortgage transaction:

- Consumers would retain the right to rescind non-purchase money loans within three days, and all current rights under HOEPA.
- Lenders who fail to honor the Loan Closing Costs Guarantee would have an opportunity to cure mistakes in the disclosure. Curing errors or omissions avoids further liability. If a consumer is unsatisfied after the lender's attempt to cure, the consumer may bring an action within one year after expiration of the lender's cure period. There would be three stages to this "curing" period:

1. If the lender discovers the error(s), they can cure it without any penalty.
2. If the borrower discovers the error(s), the lender must cure the error plus pay a minor penalty.
3. If the borrower discovers the error(s) and the lender refuses to cure the error, the borrower can litigate. If the borrower prevails in litigation, the lender would be subject to substantial penalties.

A pattern and practice of intentionally failing to make accurate disclosures of the Loan Closing Costs Guarantee would subject an originator to substantial penalties.

Federal legislation to protect consumers' equity in the case of foreclosure. Lenders could not hold a final foreclosure sale without first ensuring the right of the consumer to list the property and make a good faith effort to sell it. This right would pertain in cases of default and prior to final foreclosure sale – except in cases of bankruptcy, certain other special circumstances such as abandonment or waste, or where indebtedness is more than 80 percent of original valuation.

Lenders who do not participate in the Loan Closing Costs Guarantee program would be subject to the current legal requirements and penalties of RESPA and TILA. Lenders who use the Loan Closing Costs Guarantee program would be exempt from Section 8 of RESPA for services included in the Loan Closing Costs Guarantee.

This federal legislation would preempt state laws that, if left untouched, would preclude the uniform and consistent nationwide operation of new federal provisions.

5. INCREASE AVAILABILITY AND QUALITY OF COUNSELING FOR PROSPECTIVE BORROWERS

MBA supports expanding counseling programs, such as the American Homeowner Education and Counseling Institute (AHECI). The Federal Reserve and HUD, in coordination with industry and consumer groups, should develop a uniform counseling program, including software and other tools to enable mortgage shoppers to evaluate different loan proposals (rate, fees, terms, etc.), taking into account the borrower's financial situation. The availability of these programs would be described in a standardized "Mortgage Information Booklet" provided to the consumer at the first contact with any real estate professional (as described under item 3, above).

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. This curriculum continues to be adopted by various school systems throughout the U.S. MBA and the National Community Reinvestment Coalition (NCRC) will form a joint effort to provide financial literacy training in our nation's communities.

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. In 1997, MBA signed an historic agreement on fair lending with the U.S. Department of Housing and Urban Development that supports a variety of fair lending initiatives. In 1998, MBA launched the Research Institute for Housing America, dedicated to balanced, objective research on expanding housing opportunity for all Americans, including research on the effectiveness of consumer education in combatting predatory lending abuses and empowering borrowers to access legitimate subprime lending opportunities. (See www.housingamerica.org for more information on the Institute and its programs.) More recently, MBA adopted far-reaching industry guidelines to combat abusive lending practices. MBA and NCRC will develop a fair lending training program, specifically designed for MBA members. The program will be offered to individual companies to assist them in assuring that these practices comply with all fair-lending requirements.

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. *To ensure compliance, members who adopt these*

best practices also agree to annual self-certifications with verification by credible independent third parties.

The MBA sets forth its recommendations in the hope that OTS considers them as an alternative approach to addressing the current abusive lending issues. These recommendations are fully consistent with the regulatory objectives that were announced by OTS in the ANPR—encouraging the safe and sound, efficient delivery of low cost credit to the public free from undue regulatory duplication and burden.

The MBA notes that no regulatory approach will deliver true consumer benefit unless the underlying market defects are comprehensively addressed. “Back-end” protections such as those advanced in the ANPR may help consumers in isolated instances, but they fail to resolve the larger structural problems. The real key to achieving true long-term reform in the subprime market does not lie in limiting efforts to driving 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 with a wide variety of terms and options. A competitive market with informed consumers provides the best protection against predatory activity. This is what the MBA recommendations seek to achieve; any regulatory approach that ignores the need for broad reform will fall short of the desired goals.

Answers to Specific Requests for Public Comment

In the ANPR, the OTS requested comments and public input on a wide variety of items. Our responses are set forth below.

- *OTS urges commenters to address the advantages and disadvantages of state initiatives to protect their citizens from lending abuses. The ANPR points to the recent legislation in North Carolina and the New York proposed regulations as examples of local predatory lending initiatives.*

MBA believes that such state initiatives only serve to add burdens and further complicate mortgage laws for lenders and consumers alike. The mortgage lending industry is becoming increasingly national in its scope. Both the industry and consumers need laws that are clear, concise, and consistent. MBA believes that any reform in this area should take place at the federal level, and that comprehensive reform of the federal mortgage banking laws will provide consumers with their most effective protections against abuses.

- *OTS asks for innovative approaches to facilitate responsible lending in underserved markets and to limit predatory practices that subject borrowers to improper pressures, unduly limited options and unnecessary costs.*

As set forth above, the MBA believes that the only proper and effective way of achieving beneficial reform is through a comprehensive approach of clear and enforceable disclosures, and increased education. The MBA believes that the recommendations set forth in the ANPR are narrow and ultimately pursue only limited reform measures. The proposed piecemeal restrictions of lending terms will, in effect, restrict supply and thereby limit consumer options and raise consumer credit costs. Consumer protection efforts in the form of piecemeal prohibitions will lead to complexity, increased costs, and operational inefficiencies in the market.

- *The OTS asks whether it should adopt regulations on high cost mortgage loans.*

MBA believes that it is fundamentally flawed to assume that merely adding more limits and restrictions on particular creditors or particular types of loans will end abusive lending practices. The types of regulatory approaches advocated under the ANPR would do nothing but expand the laundry list of prohibitions that already exist to protect consumers under RESPA, TILA (including HOEPA), and others. It is worth repeating that abusive lending practices generally involve fraud and deceptive schemes that are already contrary to existing law. Absent effective oversight and a legitimate commitment to engage in comprehensive enforcement, this approach will be of negligible impact in ridding the market of unscrupulous actors. Alternatively, if broad and detailed enough, added regulations might eliminate abusive practices, but only at the cost of restricting credit and increasing consumer costs across the board.

The regulatory approach advanced under the ANPR does not recognize that the fundamental problem leading to abusive lending is the confusion created by the complexity of the mortgage process. Only by addressing the broad problem head-on will we achieve true reform and assure that consumers are truly protected. The MBA recommendations on comprehensive reform would achieve this result and streamline existing regulations. In fact, the MBA's approach would make more regulations unnecessary.

- *OTS solicits comments on how best to clarify the interaction between federal and state regulatory schemes affecting mortgage creditors.*

The MBA appreciates that OTS raises concerns regarding the confusing compliance environment created by the complicated interplay among federal and state laws. As mentioned above, the mortgage lending industry is becoming increasingly national in its scope. Although we recognize each state's right to regulate businesses that operate within its borders, it is important to guard against an unworkable patchwork of state laws and regulations. Under its proposals, MBA calls for a strong and comprehensive federal mortgage lending law that would supersede all inconsistent state laws.

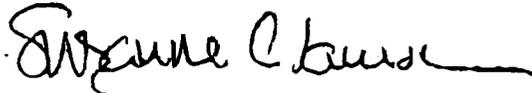
- *To what extent are housing creditors engaging in predatory or abusive lending practices that would be contrary to existing state law but for the provisions of the Parity Act?*

MBA does not have specific numbers regarding the extent to which lenders are using the Parity Act to craft alternative mortgage products that would otherwise be affected by local laws. Furthermore, MBA knows of no reliable and comprehensive industry data from any source. MBA notes, however, that even those lenders that operate under the provisions of the Parity Act are required to comply with Federal consumer protection statutes such as TILA (including HOEPA) and RESPA. The MBA therefore reiterates its position that real effort should be devoted to the enforcement of existing laws and reforming them to improve their remedial and educational impact.

CONCLUSION

Through this ANPR, the OTS is seeking input to assist it in determining how best to address some of the issues that have arisen in the alternative mortgage market. The MBA believes that there is little benefit to continue adding regulatory and other restrictions to a mortgage process that is in dire need of fundamental reform. The MBA respectfully submits its Fundamental Reform Proposals, which set forth an entirely different approach to address problems in a changed industry and a changed lending environment. Moreover, MBA believes that balanced and credible knowledge to inform rulemaking is notably absent from the discourse surrounding these issues. We encourage and invite OTS to engage with the Research Institute for Housing America to examine what we know, what we don't know, and what we need to know to establish informed and effective policy.

Sincerely,



Suzanne C. Samson
Deputy Executive Vice President