August 2, 2024

Residential Mortgage Fees Assessment
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

RE: CFPB RFI Regarding Fees Imposed in Residential Mortgage Transactions [Docket No. CFPB-2024-0021]

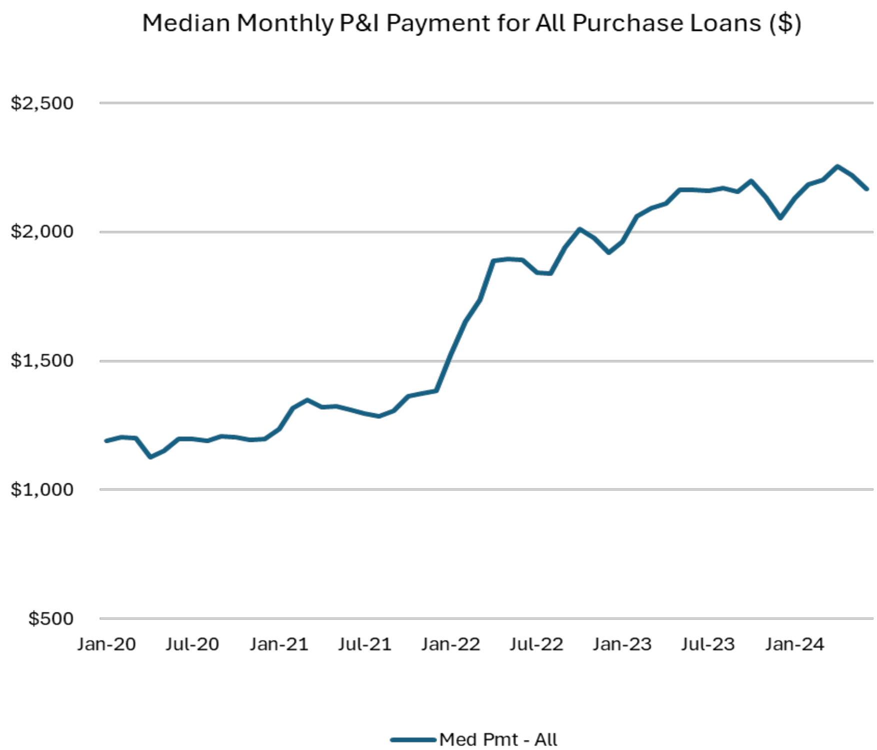
To Whom It May Concern:

The Mortgage Bankers Association (MBA)[1] appreciates the opportunity to respond to the Consumer Financial Protection Bureau's (CFPB or Bureau) request for information (RFI) regarding fees imposed in residential mortgage transactions.[2] Promoting affordable and sustainable homeownership and removing barriers to homeownership is a shared goal of MBA and the CFPB. However, the Bureau's focus on mortgage closing costs is misguided and inaccurately characterizes certain disclosed, required and necessary mortgage-related fees as "junk fees" in its press releases, blogs, circulars, advisory opinions, and public speeches. These statements suggest that the CFPB may have already arrived at predetermined conclusions about the questions in this RFI and the validity of these charges.[3]

The fundamental drivers of the current barriers to homeownership and affordability are low housing inventory and pandemic-induced macroeconomic conditions. Rising closing costs are a consequence of these issues, and in any event are not a primary driver of affordability

[1] The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 275,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets, to expand homeownership, and to extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of more than 2,000 companies includes all elements of real estate finance: independent mortgage banks, mortgage brokers, commercial banks, thrifts, REITs, Wall Street conduits, life insurance companies, credit unions, and others in the mortgage lending field. For additional information, visit MBA's website: www.mba.org.
[2] Request for Information Regarding Fees Imposed in Residential Mortgage Transactions, 89 Fed. Reg. 48400 (June 6, 2024) available at https://www.govinfo.gov/content/pkg/FR-2024-06-06/pdf/2024-12443.pdf.
[3] Consumer Financial Protection Bureau, Junk fees are driving up housing costs. The CFPB wants to hear from you, (Mar. 8 (2024), available here https://www.consumerfinance.gov/about-us/blog/junk-fees-are-driving-up-housing-costs-the-cfpb-wants-to-hear-from-you/.

challenges. Since the Great Recession, America has built far fewer homes than necessary to meet demand.[4] Additionally, since the Pandemic, we have seen steep increases in inflation, interest rates, and home price appreciation, which are the basis for how many fees are calculated. As of early this year, the US home price index had increased 47 percent[5] since early 2020, and interest rates today are about 400 basis points higher than their mid-pandemic lows in 2021.[6] As a result of these factors, the median mortgage application payment (principal and interest only) for home purchases increased from approximately $1200 per month in the first quarter of 2020 to more than $2200 per month in second quarter of 2024 – an 83% increase.



Source: MBA Monthly Purchase Application Payments Index

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[4] Mortgage Bankers Association, 2021 Housing Stock – Occupied Units by Year Build and Building Type, (Oct. 7, 2022) available here https://www.mba.org/docs/default-source/research-and-forecasts/chart-of-the-week/10-7-22-2021-housing-stock---occupied-units-by-year-built-and-building-type-(thousands).pdf?sfvrsn=311f11fe_1 (showing that around 11 million units were built from 2010-2019 versus 16-18 million in the stock that were built in each of the four proceeding decades); *see also* Zillow, The U.S. is now short 4.5 million homes as the housing deficit grows (June 18, 2024) available here https://zillow.mediaroom.com/2024-06-18-The-U-S-is-now-short-4-5-million-homes-as-the-housing-deficit-grows.

[5] The State of the Nation's Housing Report 2024 (June 2024), available https://www.jchs.harvard.edu/sites/default/files/reports/files/Harvard_JCHS_The_State_of_the_Nations_Housing_2024.pdf.

[6] Freddie Mac, Mortgage Rates (last visited July 31, 2024), available at https://www.freddiemac.com/pmms.

A lack of awareness that homeownership is achievable with a less than 20 percent down payment and a lack of savings necessary to make a down payment also continue to be some of the greatest hurdles to purchasing a home.[7] While lower closing costs may result in more available funds for a down payment, the fact that these costs are often financeable means that the ability to make a down payment is the far larger impediment to homeownership today. Addressing this knowledge gap would also help aspiring homeowners in this challenging environment.

Lender profitability has decreased in the current market despite the increase in closing costs. One reason for increased closing costs is the increased price of third-party service fees, many of which are required in order for a loan to be securitized or guaranteed. The CFPB should consider reviewing other regulations as a means to decrease closing costs. However, no matter the solution, the CFPB must address closing costs within the framework established by Congress. And any solution should reflect an accurate understanding of what is driving the costs of originating and closing loans – both collectively, and with respect to the types of specific charges the CFPB appears to be most focused on. It is against that backdrop MBA appreciates the opportunity to offer detailed comments on the CFPB's mortgage closing costs RFI.

I. Understanding The Costs of Originating and Closing Loans

Origination fees charged by lenders cover the cost of providing mortgage credit to borrowers. These fees cover operational and compliance costs, both of which have been increasing. MBA's research shows that per-loan mortgage fulfillment expenses (processing, underwriting, closing, and other fulfillment costs alone – excluding support costs such as technology, as well as corporate costs such as legal and risk management) rose to new highs between 2021 and 2023.[8] For the retail channel, fulfillment costs reached $3,483 per loan originated in 2023, while in the consumer direct channel, fulfillment costs reached $4,077 per loan originated in 2023. This cost remains high despite cost-cutting measures implemented across the industry because fewer loans are being originated while fixed costs remain at the same high level and variable costs increase. Additionally, the compliance costs of origination are substantial. As discussed further below, lenders must comply with many regulations, many of which drive up the cost of origination.

Origination fees may also act as a "cross-subsidy" for the consumers who engage, shop, or apply, but do not close loans. MBA data shows that pull-through – the percentage of closings to applications – in the retail channel dropped from 75 percent in 2021 to 69 percent in 2023, while pull-through in the consumer direct channel dropped from 60 percent

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[7] Goodman, *et. al.*, Housing Finance Policy Center, Barriers to Accessing Homeownership Down Payment, Credit, and Affordability, (Sept. 2018), available here.
[8] Mortgage Bankers Association, Chart of the Week, Lender's Loan Expense ($ per loan) for the Retail and Consumer Direct Channels (June 14, 2024), available here.

in 2021 to 43 percent in 2023.[9] Lower pull-through rates result in lenders paying for certain third-party costs on behalf of prospective borrowers who never close on a loan.

Lastly, some origination fees are optional and are only charged at the borrower's request. For example, the CFPB expressed concerns with the recent increase in borrowers paying for discount points, which lowers a borrower's interest rate in exchange for a one-time fee paid at closing.[10] It is unsurprising that more borrowers would opt to pay discount points, which lower the rate paid over the entire loan term, during a period of high or rising rates than in a period of historically low rates. Discount points allow borrowers to obtain a loan that meets their financial needs over the long term. Additionally, the points are fully disclosed and subject to inclusion in certain fee caps if they do not result in a bona fide reduction in rate for the borrower. Moreover, with the increasing prevalence of loan-level pricing adjustments, which are often driven by secondary mortgage market investors and insurers, a 'zero point' loan option may not actually exist for many consumers.

Lenders are in fact <u>not</u> benefiting from higher closing costs. In the RFI, the Bureau acknowledges that lenders are also adversely impacted by rising closing costs.[11] Lenders continue to face steep operational costs when originating a loan, even absent third-party costs. During the past couple years, the mortgage industry has been challenged by one of its worst market downturns, with annual industry originations by loan count dropping to the lowest levels in over two decades. Along with the increase in production costs per loan, most mortgage lenders have faced decreasing production revenues, leading to overall net production losses. In 2023, independent mortgage banks (IMBs) and bank subsidiaries reported a pre-tax net loss of $1,056 on each loan they originated – a significant increase from the reported loss of $301 per loan in 2022. The IMB sector has incurred net production

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[9] Mortgage Bankers Association, Chart of the Week, Lender's Loan Expense ($ per loan) for the Retail and Consumer Direct Channels (June 14, 2024), available here.

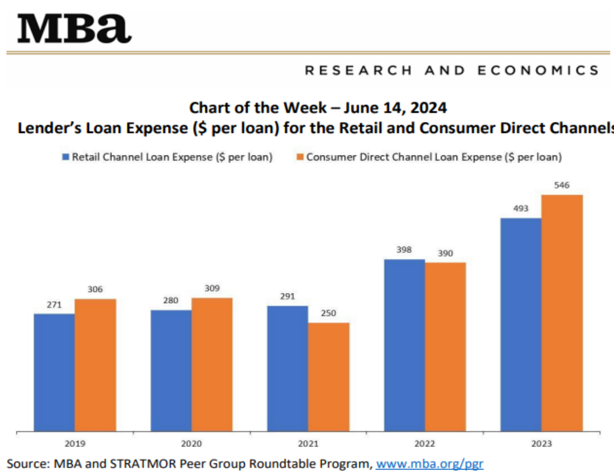
[10] Consumer Financial Protection Bureau, CFPB Finds Americans are Paying Upfront Fees Seeking to Lower Interest Rates on Mortgages, (April 5, 2024), available here; *see also* Consumer Financial Protection Bureau, Junk fees are driving up housing costs. The CFPB wants to hear from you, (Mar. 8 (2024), available here https://www.consumerfinance.gov/about-us/blog/junk-fees-are-driving-up-housing-costs-the-cfpb-wants-to-hear-from-you/. ("We are paying particular attention to the recent rise in discount points. A higher percentage of borrowers reported paying discount points in 2022 than any other years since this data point was first reported in 2018. In 2022 about 50.2 percent of home purchase borrowers paid some discount points, up from 32.1 in 2021. Borrowers are also paying more in discount points. The median discount points paid for home purchase loans in 2022 was $2,370 in 2022, up from $1,225 in 2021. Lenders sell discount points to borrowers to reduce interest rates. These points may not always save borrowers money, however, and may indeed add to borrowers' costs. The CFPB is continuing to monitor market trends in this area.").

[11] Request for Information Regarding Fees Imposed in Residential Mortgage Transactions, 89 Fed. Reg. 48400 (June 6, 2024) available at https://www.govinfo.gov/content/pkg/FR-2024-06-06/pdf/2024-12443.pdf; *see also* Dir. Chopra, Prepared Remarks of CFPB Director Rohit Chopra at the Mortgage Bankers Association (May 20, 2024), available at https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-of-cfpb-director-rohit-chopra-at-the-mortgage-bankers-association/.

losses for eight consecutive quarters including the first quarter of 2024.[12] In the first quarter of 2024, only 59 percent of the sample of 338 companies posted positive pre-tax net income.[13] The percentage of companies reporting pre-tax net financial profits decreases to 42 percent if ongoing revenues and expenses associated with servicing operations are excluded. With the significant decrease in profitability, it becomes apparent that lenders are in fact not benefiting from the increase in closing costs. Lender profitability has in fact decreased significantly.

A. Third-Party Services Fees Have Increased

In addition to the cost of origination, lenders must charge borrowers for several third-party services necessary to satisfy legal, investor, risk management and insurer requirements. Loan expenses represent the cost for appraisals, credit reports, flood certifications, homeowner's association transfer fees, tax services, termite and other inspections, and other typical "pass-through" expenses. MBA data and the chart below show that lenders' loan expenses have also increased significantly.[14] From 2019-2021, loan expenses were fairly steady, averaging $281 per loan in the retail channel and $288 per loan in the consumer direct channel. However, between 2021 and 2023, loan expenses increased by almost 70 percent in the retail channel and 118 percent in the consumer direct channel on a per-loan basis. MBA believes that this increase is the result of the decreasing pull-through rates explained above. Finally, some mortgage lenders may not be seeking reimbursement from borrowers for the full amount of pass-through costs, even as third-party service charges increase.



[12] Mortgage Bankers Association, IMBs Report Net Production Losses in the First Quarter of 2024, available at https://newslink.mba.org/servicing-newslink/2024/may/mba-servicing-newslink-tuesday-may-28-2024/mba-imbs-report-net-production-losses-in-the-first-quarter-of-2024/?utm_campaign=MBA%20Servicing%20NewsLink%20Tuesday%20May%2028%202024&utm_medium=email&utm_source=Eloqua.
[13] Mortgage Bankers Association, Chart of the Week, Percent of IMBs with Positive Pre-Tax Net income (May 24, 2024), available here.
[14] Mortgage Bankers Association, Chart of the Week, Lender's Loan Expense ($ per loan) for the Retail and Consumer Direct Channels (June 14, 2024), available here.

Next, it is important to recognize that most third-party closing costs benefit both the lender and the borrower. The CFPB has asserted, for example, that a lender's title insurance policy "protects only the lender . . . not the borrower," asserting that the borrower does not benefit from lender's title insurance.[15] However, title insurance is required by all investors, including the government insurers and guarantors, to ensure the borrower has clear title and the lender's lien position is assured. Absent title insurance, lenders and borrowers would either carry that risk or self-insure, which would be its own cost necessitating additional fees. Borrowers also derive benefits from lender's title insurance—for instance, if a lender's lien position is wiped out due to a title issue, the title company will pay off the loan and relieve the borrower from having to pay a mortgage on a property they do not have clear title on.

One source of significant closing cost expense for borrowers can be the required taxes, including county level recording fees and transfer taxes. Although these may be paid by the seller, some states or transactions require these fees to be paid by the borrower. Increases in state taxes as well as the well-documented issues with property insurance affordability also increase amounts that borrowers must put in prepaid escrows.[16]

Lastly, credit reporting companies have raised prices even during a time of dramatic origination volume decreases, as the CFPB has recognized.[17] This can be attributed to a number of factors. For example, FICO – currently the required credit score standard for all government insurers and guarantors – recently announced a cost increase for the use of a FICO score. The wholesale cost of a FICO score increased to $3.50, which appears to have led to increases throughout the chain of credit reporting agencies and resellers.[18] Additionally, the credit reporting agencies have increased the cost of soft pulls to be comparable to the cost of hard pulls, which historically have been more expensive. These increases have occurred at a time when lenders report using more soft pulls to try to avoid trigger leads, which are leads sold by credit reporting agencies that are generated as a

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[15] Consumer Financial Protection Bureau, Junk fees are driving up housing costs. The CFPB wants to hear from you, (Mar. 8, 2024), available here https://www.consumerfinance.gov/about-us/blog/junk-fees-are-driving-up-housing-costs-the-cfpb-wants-to-hear-from-you/.

[16] S & P Global, US Homeowners Insurance Rates Jump by Double Digits in 2023 (Jan. 25, 2024), available at https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/us-homeowners-insurance-rates-jump-by-double-digits-in-2023-80057804 ("Between 2018 and 2021, the countrywide yearly average rate change ranged from 2.5% to 3.8%, but this jumped to 6.2% in 2022 and 11.3% in 2023."), National Bureau of Economic Research, Property Insurance and Disaster Risk: New Evidence from Mortgage Escrow Data (June 2024), available at https://www.nber.org/papers/w32579 (noting, "[a] sharp 33% increase in average premiums from 2020 to 2023…"), Wall Street Journal, Big Jump in Insurance Costs Strikes Condos (June 17, 2024) available at https://www.wsj.com/personal-finance/big-jump-in-insurance-costs-strikes-condos-617c102a (showing that 91% of community associations surveyed said their insurance premiums increased at their last renewal).

[17] Request for Information Regarding Fees Imposed in Residential Mortgage Transactions, 89 Fed. Reg. 48400, 48401 (June 6, 2024).

[18] Lansing, FICO, FICOS's Adoption and Pricing in the Mortgage Origination Market, (Mar. 15, 2024), available here https://www.fico.com/blogs/ficos-adoption-and-pricing-mortgage-origination-market. (FICO notes that its fee is only 15% of the cost of a $70 tri-merge credit report and that any amount charged over that as part of a tri-merge score is collected and retained by others.)

result of a hard credit pull, allowing others to offer borrowers competing offers of credit.[19] The impact of the recent increase in credit reporting fees is magnified because of low pull-through rates, resulting in lenders bearing more costs when a borrower does not proceed to close a transaction. MBA has and will continue to advocate for more transparency in how credit reports are priced.[20]

B. Lenders Are Required By Government-Controlled Investors or Guarantors to Obtain Certain Services

Several of the costs lenders disclose and pass on to consumers are not within their discretion to set. Investors and guarantors require certain settlement services to be performed before they purchase, securitize, and/or insure a loan, as they are important risk mitigants. Additionally, as discussed in part C, certain laws and their implementing regulations enforced by the CFPB raise the cost of origination or prevent lenders from lowering costs.

Many fees are incurred as a result of services required by government-controlled investors or guarantors, like the Government Sponsored Enterprises (GSEs), Federal Housing Administration (FHA), or Department of Veteran's Affairs (VA). These types of loans comprise the majority of all originated loans.[21] In addition, their requirements are adopted by non-government and non-agency lenders, investors and guarantors as industry standard practices. Lenders must obtain certain goods and services per the guidelines established by these agencies.[22] For example, the FHA charges an up-front mortgage insurance premium. The Federal Housing Finance Agency (FHFA) also requires the GSEs to charge a loan level price adjustment, expressed as discount points, based on borrower and collateral characteristics. All agencies and the GSEs require lender's title insurance to close. In other instances, lenders do not have the ability to select a less costly alternative provider because the type of vendor is specified by the agencies or the GSEs. For instance, lenders are required by the agencies and GSEs to purchase credit reports from all three credit reporting

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[19] Trigger leads lead to widespread harassment of borrowers due to the overwhelming number of solicitations and misrepresentations by some that purchase them. MBA supports legislation to dramatically curtail this practice.

[20] Mortgage Bankers Association, MBA Statement Highlighting Policy Concerns on Credit Reporting Costs (Dec. 1, 2023), available at https://www.mba.org/news-and-research/newsroom/news/2023/12/01/mba-statement-on-recent-press-reports-on-credit-reporting-costs, Mortgage Bankers Association, Re: Transparency About Credit Report Pricing Increases, (Dec. 21, 2023), available at https://www.mba.org/docs/default-source/advertising/cfpb-credit-report-transparency.pdf?sfvrsn=a504d963_1.

[21] Urban Institute, Housing Finance at a Glance (June 2024), available here https://www.urban.org/sites/default/files/2024-06/Housing-Finance-At-A-Glance-Monthly-Chartbook-June-2024.pdf (showing that GSE, FHA, and VA MBS made up 65.1% of first lien originations in Q1 2024).

[22] In addition to the GSEs and federal agencies, many private investors require that loans sold in the secondary market meet certain underwriting and closing guidelines, including purchasing services to protect the investor's interest in the loan.

agencies – i.e., tri-merge credit reports – which does not give them leverage to negotiate on price.

C. There Are Other Regulatory and Policy Changes That Could Lower Closing Costs

Several statutory requirements or their implementing regulations promulgated by the CFPB can and have placed additional costs on lenders. Accordingly, the Bureau should consider revisiting and addressing these challenges faced by lenders. It would be worthwhile to undertake a holistic review on how the regulatory scheme may have raised costs to consumers and consider if the Bureau can beneficially lower costs either through regulatory changes or through suggesting that Congress amend the laws that have become outdated or proven less valuable than expected, while maintaining the core consumer protections. For instance, the Loan Originator Compensation Rule (LO Comp) prevents loan originators from voluntarily agreeing to lower their compensation in order to offer consumers more favorable terms and compete with other offers. Additionally, providing TILA-RESPA Integrated Disclosures (TRID), while necessary, places an additional compliance cost on lenders. Lastly, appraiser independence limits the ability for lenders to lower appraiser costs on behalf of the borrower.

Loan Officer Compensation Reforms

The Dodd-Frank Act prohibits loan originators from receiving compensation that varies based on the terms of the loan.[23] With its implementing regulations, the LO Comp Rule in Regulation Z, the CFPB disconnected loan originator compensation from loan terms by adopting a general rule whereby a loan originator's compensation may not be increased or decreased once loan terms have been offered to a consumer, including decreases in compensation that would help the creditor to provide the consumer with a lower-priced, more affordable loan. While the intent of this prohibition was to prevent loan originators from steering borrowers to higher cost loans for greater compensation, it also works in the inverse – limiting the ability of creditors to reduce interest rates or costs for borrowers, resulting in higher prices for consumers and ultimately diminished benefits from shopping. To address one component of affordability, the CFPB should consider amending the LO Comp Rule to permit loan originators to agree to reduce their compensation to facilitate the lender's ability to respond to price competition.[24] This exception would only work one way – that is, compensation and cost could only go down. This limited exception will allow borrowers to benefit from lender competition without the threat of being steered to disadvantageous loan terms.

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[23] 15 U.S.C. § 1639b(c).
[24] Mortgage Bankers Association, Regulation Z's Mortgage Loan Originator Compensation Rule's Negative Impact on Consumers in the Current Mortgage Market, July 1, 2024, available here (MBA has previously suggested this change).

TRID Changes

Additionally, the prescriptive nature of TRID continues to impose actual costs on the marketplace and consumers due to the highly technical nature of the due diligence and compliance reviews. As a result, the industry has spent extraordinary resources to implement and ensure continued compliance with TRID.[25] The CFPB could consider simplifying the itemization of certain settlement service costs to both reduce the cost of compliance and provide a clearer disclosure to consumers. For example, numerous fees related to title insurance can be simplified by grouping the fee types.

a) A "Title – Premium" charge, which would include title premium or endorsement costs;
b) A "Title – Real Estate Related" charge, which would include those items that are not premiums or endorsements but that are excluded from the definition of finance charge (as defined in 12 C.F.R. § 1026.4(c)(7)); and
c) A "Title – Other" charge, which would include all other items that are not covered by (a) or (b).

Such categorizations would make it easier for borrowers to shop for other title insurance providers or alternatives while still conveying the relevant information about the component costs of title insurance.

Appraisal Cost Issues

Lenders also do not have much control over appraisal pricing. The Dodd-Frank Act intentionally distanced the lender from the appraisal process.[26] Attempts to ask appraisers to lower the cost of an appraisal on the borrower's behalf may impinge on appraiser independence. In addition, Dodd-Frank introduced significant new compliance risks that discouraged lenders from retaining teams of in-house appraisers – another method of controlling costs.

However, appraisal modernization may work to lower the cost of appraisals. Greater industry adoption of Automated Valuation Models (AVMs) could not only modernize and improve the valuation process, but also reduce transaction costs for buyers and sellers alike. This is particularly true with respect to properties with lower LTVs; properties such as townhomes or planned unit developments where comparable values are easier to ascertain;

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[25] *See* Comment letter jointly submitted by the American Bankers Association, American Financial Services Association, Consumer Bankers Association, Housing Policy Council, and Mortgage Bankers Association in response to the CFPB's Request for Information Regarding the Integrated Mortgage Disclosures Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth In Lending Act (Regulation Z) Rule Assessment [Docket No. CFPB-2019-0055] (Jan. 21, 2020), available at https://www.regulations.gov/comment/CFPB-2019- 0055-0136).
[26] 15 U.S.C. § 1639e.

or in markets where a shortage of residential appraisers may result in slower turn-times, rush fees, or both. Similarly, greater adoption by the GSEs of property inspection waivers (PIWs) and hybrid appraisals in situations similar to those outlined above can also translate to significant cost savings for homebuyers.

II. Any Regulatory Action Resulting From This RFI Must Be Grounded in the Bureau's Statutory Authority

MBA welcomes a discussion on how to lower mortgage closing costs. However, any discussions must consider the CFPB's statutory authority and its limits. Congress and the Supreme Court have clearly rejected the idea of specific rate setting with respect to settlement services costs. Instead, Congress has either banned types of fees outright or offered lenders incentives to charge lower aggregate fees.

The Real Estate Settlement Procedures Act (RESPA) does not set a cap or numerical limit on fees or provide the CFPB with the authority to do so.[27] While Congress has limited specific fees, it has limited fees by type rather than amount.[28] The legislative history of RESPA evinces a clear choice to rely on disclosures rather than rate-setting fees.[29] Congress intended RESPA to guard against unreasonable and excessive settlement costs through disclosures and through prohibiting referral fees. For example, with Section 4, Congress sought to reduce or eliminate unreasonably high settlement charges by requiring advance disclosure of settlement charges, which were otherwise not known until the settlement date.[30] Additionally, Section 8 bans kickbacks, referral fees, and unearned fees as a way to protect consumers against unreasonably or unnecessarily inflated costs.[31]

Prior to the passage of RESPA, Congress directed HUD and the VA to study the possibility of setting rates for settlement services.[32] This approach was ultimately rejected because Congress believed that addressing abusive practices where they existed would address the

[27] RESPA will be 50 years old in 2024 and needs significant modernization to account for modern business practices and the digitization of mortgage shopping and closings. MBA will soon release a paper explaining how to reform RESPA to better serve modern mortgage lending.
[28] 12 U.S.C. § 2610 (prohibiting fees charged by lenders and servicers for the preparation of TRID statements).
[29] In its official review of TRID, CFPB praised the rule for improving consumer understanding and facilitating shopping. Although the CFPB has recently cast doubt on consumers' abilities to understand disclosed terms in contexts outside the mortgage industry, if the CFPB now believes that mortgage consumers do not understand the disclosures, then the CFPB should conduct a new assessment and present those findings before proposing amendments to those disclosures—particularly given that the Bureau is responsible for the creation of the disclosures. Additionally, there are strict tolerances around the costs to ensure that they do not change at the closing table that provide further consumer protection—tolerances that the CFPB itself set in the TRID Rule.
[30] S. REP. No. 93-866, 93d Cong., 2d Sess., pg. 3 (1974).
[31] S. REP. No. 93-866, 93d Cong., 2d Sess., pg. 3 (1974).
[32] Department of Housing and Urban Development and Veterans' Administration, Report on Mortgage Settlement Costs, Senate Comm. On Banking, Housing and Urban Affairs, 92d Cong., 2d Sess. (Comm. Print 1972).

issue of high costs, as opposed to rate-setting for tens of thousands of settlement services providers.[33] For these reasons, setting limits on fees would stretch the CFPB's authority regarding disclosures far beyond appropriate limits by undertaking an approach Congress has specifically rejected and has provided no authority for the Bureau to do. Moreover, the Supreme Court, in *Freeman v. Quicken Loans*, flatly rejected the idea that RESPA section 8(b) could be used to address unearned, undivided fees.[34]

The Bureau does not otherwise have the authority to require lenders to negotiate closing costs. During the passage of RESPA discussed above, Congress also considered and subsequently rejected the possibility of requiring the lender to pay the costs of required settlement services as a condition for extending credit.[35] This alternative approach was premised on the idea that lenders would use their position to negotiate lower settlement services costs, which would benefit the borrower. Rejecting this approach shows Congress's decision to forgo requiring lenders to negotiate lower settlement costs on the borrower's behalf.

Finally, the Bureau's use of its unfair, deceptive, or abusive acts or practices (UDAAP) authority must be read in the context of these Congressional statutes, not as a separate and overarching grant of authority to the Bureau to act as legislator in areas where Congress did not intend. While UDAAP authority is certainly intended to make fact-specific determinations relevant to certain institutional practices, it would stretch such authority beyond the breaking point to suggest that UDAAP should be the source for the overarching regulation or enforcement of mortgage closing cost disclosures or procurement—especially when doing so would be effectively overriding the CFPB's own disclosure regime.[36] Congress created a clear statutory framework in those areas, and Congress—rather than the Bureau—is the appropriate source of authority to amend this regime if appropriate.

The clear and conspicuous nature of mortgage disclosures, buttressed by the Bureau's own extensive consumer testing and subsequent survey research, show that consumers understand the fees associated with mortgages and the circumstances under which they might incur the fees. These facts cannot support even preliminary findings that consumers are being misled or being treated unfairly or abusively.[37]

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[33] S. REP. No. 93-866, 93d Cong., 2d Sess., pp. 4-5 (1974).
[34] Freeman, et al. v. Quicken Loans, Inc., 566 U.S. 624 (2012).
[35] S. REP. No. 93-866, 93d Cong., 2d Sess., pg. 23 (1974).
[36] *See e.g.*, Chamber of Com. of United States of Am., et al. v. Consumer Fin. Prot. Bureau, 691 F. Supp. 3d 730 (E.D. Tex. 2023) (holding that the statutory text, structure, and history of the Dodd–Frank Act's language authorizing the CFPB to regulate unfair acts or practices is not the sort of exceedingly clear language that the major-questions doctrine demands before finding a conferral of agency authority to regulate independently of the CFPB's separately conferred power in specific areas).
[37] Even if a consumer elects not to shop around, the failure to exercise a clear and disclosed right does not create grounds for a claim of UDAAP due to the outcome of that choice.

As noted above, Congress has not engaged in capping or setting individual fees or prohibited charges beyond certain amounts with a few notable aggregate exceptions. These exceptions are instructive for two reasons—they further reinforce the lack of Congressional action to limit specific fees by line item and also illustrate existing consumer protections that exist against excessive fees in the aggregate. For example, the CFPB promulgated the Ability to Repay (ATR) Rule and Qualified Mortgage (QM) Rule, which prohibited lenders from making a residential mortgage loan without making a good faith determination that the borrower has a reasonable ability to repay the loan.[38] Congress limited the costs of most creditor fees to 3 percent of the underlying loan amount to qualify as a QM. There are additional regulations around loans with points and fees greater than 5 percent in the Home Ownership and Equity Protection Act (HOEPA) Rule. The risk of liability that comes with making a non-QM loan, as well as the favorable treatment afforded securitized QM loans in the credit risk retention rules, means that the vast majority of mortgage loans made today are QMs. As most fees are reflected in the APR calculation, the QM rule and the associated safe harbor's APR-APOR spread requirements also act as a limit on the fees that mortgage companies can charge and retain if they want QM rebuttable presumption or safe harbor treatment.

Through TRID, Congress has mandated and the CFPB has implemented a regulatory regime with granular and prescriptive disclosure requirements during the mortgage origination process to facilitate consumer shopping. The TRID Rule was created to ensure more reliable, uniform estimates, which would "increase the level of shopping for mortgage loans and foster honest competition for prospective consumers among financial institutions."[39] The rule features strict provisions that require early disclosure of the fees charged and "locking in" of these fees through certain tolerance limits that generally restrict fee amounts from changing without cause to ensure that borrowers can shop and compare those fees between different lenders. Thus, lenders and settlement service providers are penalized if they underestimate fees to gain competitive advantage. The fees are also then disclosed before consummation with a mandatory waiting period to ensure borrowers have time to review and fully understand the associated costs of credit.

The CFPB rigorously tested the TRID forms through both qualitative and quantitative means during a multi-year rulemaking process early in the CFPB's lifespan. As previously mentioned, the industry has spent extraordinary resources to comply with TRID.[40] Under

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[38] Under the ATR-QM Rule, qualified mortgages are presumed to comply with the ability to repay requirement if they meet specific product feature requirements and the Annual Percentage Rate (APR) does not exceed the Average Prime Offer Rate (APOR) by more than 2.5 percent. A further class of mortgages is given a conclusive presumption of compliance, or safe harbor, if they meet these requirements and their APR does not exceed the APOR by more than 1.5 percent.
[39] Integrated Mortgage Disclosures Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth In Lending Act (Regulation Z), 78 Fed. Reg. 79730, 79822 (Dec. 31, 2013).
[40] *See* Comment letter jointly submitted by the American Bankers Association, American Financial Services Association, Consumer Bankers Association, Housing Policy Council, and Mortgage Bankers

the required Regulation Z lookback, the CFPB examined the implementation of TRID and found that disclosures improved prospective borrowers' abilities both to compare the features and costs of different mortgage offers and to compare estimated and actual loan terms and costs.[41]

In sum, the body of law and regulation shows a strong preference for early disclosures and consumer shopping over rate setting or lender-based settlement service negotiations. The Bureau must be faithful to the limits on its statutory authority and previous regulatory reviews and assessments and consider the significant implementation costs and time spent by industry in any future actions it pursues to change how closing costs are handled in the mortgage origination process.

III. Conclusion

We appreciate the Bureau's consideration of these comments. Should you have questions or wish to discuss these issues further, please contact Justin Wiseman at jwiseman@mba.org or Alisha Sears at asears@mba.org.

Sincerely,

Robert D. Broeksmit, CMB
President and Chief Executive Officer
Mortgage Bankers Association

Association in response to the CFPB's Request for Information Regarding the Integrated Mortgage Disclosures Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth In Lending Act (Regulation Z) Rule Assessment (Jan. 21, 2020), available at https://www.regulations.gov/comment/CFPB-2019- 0055-0136.

[41] Consumer Financial Protection Bureau, Request for Information Regarding the Integrated Mortgage Disclosures Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth In Lending Act (Regulation Z) Rule Assessment (Oct. 202), available at https://files.consumerfinance.gov/f/documents/cfpb_trid-rule-assessment_report.pdf.