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**Before the**  
**United States Commission on Civil Rights**  
**Briefing on**  
**“An Examination of Civil Rights Issues with Respect**  
**to the Mortgage Crisis”**  
**March 20, 2009**

Good morning Chairman Reynolds, Vice Chair Thernstrom and members of the Commission. Thank you for inviting me to join this distinguished panel to discuss abusive mortgage lending practices and their possible civil rights implications.

My name is Ken Markison and I am speaking on behalf of the Mortgage Bankers Association (MBA).<sup>1</sup> I joined MBA five years ago following a 32-year career with the U.S. Department of Housing and Urban Development (HUD) Office of General Counsel where I last served as an Assistant General Counsel for Government Sponsored Enterprises/RESPA, charged in part with advising on fair lending related matters.

MBA appreciates the opportunity to provide its perspective on the issues before the Commission today and looks forward to responding to and working with the Commission on these and other matters.

### **Introduction**

MBA has long regarded abusive lending and abusive lenders as well as abusive mortgage brokers as a stain on the industry, and illegal discrimination as wholly unacceptable. Loans are, and should be, provided consumers and priced by lenders based on legitimate business concerns. Nonprime lending based on a loan's risk is appropriate and does not equate with predatory lending.

The Home Mortgage Disclosure Act (HMDA) enables the public and regulators to review lender performance in serving borrowers fairly and MBA has been proactive in facilitating the implementation of HMDA. The sunshine shed on industry performance has helped facilitate fair lending.

MBA believes that greater consumer protection and even better fair lending performance could be achieved if a uniform national mortgage lending standard were established and a new federal mortgage regulator established to regulate independent mortgage bankers and mortgage brokers. New, more consistent, national regulation would regularize competition in the mortgage industry, better protect consumers and facilitate enforcement by both federal and state regulators nationwide.

Accordingly, in my time today, I would first like to talk about how loans are underwritten and credit is provided to consumers by mortgage lenders; second, how HMDA data, facilitates public review and enforcement of fair lending by mortgage lenders; third, how issues in the mortgage process can be addressed through much greater transparency; fourth, how a strong uniform national lending standard and more effective regulation for

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<sup>1</sup> The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 280,000 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 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 over 2,400 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, Wall Street conduits, life insurance companies and others in the mortgage lending field. For additional information, visit MBA's Web site: [www.mortgagebankers.org](http://www.mortgagebankers.org).

lenders and mortgage brokers and others in the mortgage lending process could improve lending for all; and finally, what MBA is doing to help effectuate this new regulatory paradigm.

### **Lender Pricing of Mortgages**

Lenders make and price mortgage loans based on the risk factors presented by each borrower and the particulars of the loan sought. Relevant risk factors include, but are not limited to, the borrower's income, credit history, the amount of the down payment, the value of the collateral in relation to the amount of the loan and the availability of cash reserves. Protected class membership is not a factor in loan pricing by mortgage lenders.

### **Home Mortgage Disclosure Act**

Under the Home Mortgage Disclosure Act (HMDA) mortgage lenders provide extensive loan level data annually on each loan origination and denial to the unique and extraordinarily rich HMDA data set.

Since 2004, this data also includes "rate spread" data, that is data on whether a loan is "higher priced" based upon a statutorily established threshold and, if so, the amount by which it exceeds the threshold. HMDA data also includes the race, sex, ethnicity and income for applicants and borrowers as well as the loan type, amount, income and location of properties involved. The public has access to the HMDA data for each year giving the public an opportunity to scrutinize individual lenders and the lending industry's performance in meeting credit needs.

While the HMDA data does not include all of the factors in making a loan, it does provide sufficient information for the Federal Reserve to review the data preliminarily. If the data reveals what may appear to be inexplicable disparities, the matter is referred to the lender's regulator which will review non-public data such as credit scores and other risk factors to determine if the lender's performance is acceptable.

Notably, the HMDA data has, in fact, indicated some differences in denial rates and pricing of loans between minorities and non-minorities. MBA believes these differences are largely explicable based upon a full consideration of risk factors. The HMDA process has proven to be a useful means for regulators to address any lender problem areas, as the law intends.

### **Steering and Issues of Transparency**

One issue that has been raised in conjunction with review of HMDA data has been to what extent discretionary pricing, that is yield spread premiums to mortgage brokers based on the rates of loans, may have increased pricing disparities among borrowers and steering of borrowers into higher-priced loan products. MBA believes the HMDA process and scrutiny by regulators are helping address this concern but additional matters bear consideration and additional steps should be taken.

Mortgage lenders and mortgage brokers differ and MBA has written extensively on this subject.<sup>2</sup> Lenders lend money and mortgage brokers arrange loans as intermediaries between consumers and mortgage bankers.

Regulators have required lenders to monitor and address any issues raised by discretionary pricing by loan officers and mortgage brokers. However, as a practical matter, lenders have less control over mortgage brokers concerning their contacts with borrowers than their own officers. Lenders underwrite loans after they are initiated by mortgage brokers.

It is widely believed that over the last few years that mortgage brokers originated roughly 70 percent of nonprime loans. Mortgage brokers, as distinguished from mortgage lenders, do not report under HMDA. While brokers do not underwrite loans, they do originate them and greater understanding of YSPs is needed.

MBA has long supported complete and clear disclosure to the consumer of any compensation from a lender to a mortgage broker based on a higher-rate loan. In their marketing, mortgage brokers traditionally position themselves as “trusted advisors” who will shop among mortgage bankers and arrange the best loan. For example, an AARP survey of older borrowers who had obtained refinancings found that 70 percent of respondents with broker-originated refinance loans (compared with 52 percent of respondents with lender-originated loans) reported that they had relied “a lot” on their brokers to find the best mortgage for them.<sup>3</sup>

Since mortgage brokers serve as intermediaries, shop for borrowers and help “place” borrowers in loans, the borrower is entitled to know if the broker is receiving a higher commission based on the borrower’s rate on the loan.

MBA also believes greater transparency in the mortgage process, in general, would help prevent steering.

Currently, mortgage loan disclosures are confusing. According to a 2007 Federal Trade Commission study, current mortgage cost disclosures failed to convey key mortgage costs to many consumers; prototype disclosures developed for the study significantly improved consumer recognition of mortgage costs, demonstrating that better disclosures are feasible; both prime and subprime borrowers failed to understand key loan terms when viewing the current disclosures, and both benefited from improved disclosures; and improved disclosures provided the greatest benefit for more complex

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<sup>2</sup> MBA published the attached paper “*Mortgage Bankers and Mortgage Brokers: Distinct Businesses Warranting Distinct Regulation*” available on the Web at the following address:  
[http://www.mortgagelenders.org/files/News/InternalResource/62646\\_Paper.pdf](http://www.mortgagelenders.org/files/News/InternalResource/62646_Paper.pdf).

<sup>3</sup> Kellie K. Kim-Sung & Sharon Hermanson, *Experiences of Older Refinance Mortgage Loan Borrowers: Broker- and Lender-Originated Loans*, Data Digest #83 (AARP Public Policy Inst., Washington, D.C.), Jan. 2003, at 3, available at <http://www.aarp.org/research/credit-debt/>

loans, where both prime and subprime borrowers had the most difficulty understanding loan terms.<sup>4</sup>

Consumer financial education is also critically important to prevent steering and to empower all consumers to carefully shop for themselves in what has been in the past a highly competitive market. Borrowers who understand mortgage terminology and the mortgage process are less likely to fall prey to a market participant who may not have his or her best interest at heart. For this reason, MBA has long supported a wide range of financial literacy and consumer education about the mortgage and home buying process, including a Web site at [www.homeloanlearningcenter.com](http://www.homeloanlearningcenter.com).

### **MBA Initiatives to Address Regulatory Concerns and Shortfalls**

Since today's mortgage crisis is nearly unparalleled in scale, it demands a careful look at the regulatory structure of the industry beyond improvements to transparency and consumer education, to ensure that a crisis of this nature does not happen again. Beyond the civil rights laws, which include strong national laws, today's mortgage consumers are protected by a patchwork of federal and state laws.

MBA believes a fundamental reform of mortgage regulation is needed. That reform should take into account not only the many problems exposed since the end of 2007, but also the many legal and regulatory changes that have occurred since then. Many domestic regulatory agencies, as well as the G-20 nations, have been working on regulatory reform proposals. MBA has been studying and learning from these proposals and we have concluded that a comprehensive national package is what is needed.

In July of 2008, the Federal Reserve Board (Board) undertook a review of the mortgage process. The Board then finalized comprehensive rules addressing the central issues in H.R. 3915.<sup>5</sup> These rules, which go into effect on October first of this year, include greater protections for borrowers with new requirements for underwriting, escrows, prepayment penalties, appraiser coercion and abuses in mortgage servicing and advertising. MBA believes that the Board's rules, coupled with other important requirements, should serve as the basis for a single national consumer protection standard.

A rigorous new regulatory standard should protect all consumers, regardless of where they live. Just as emergency efforts to return credit to the market have been national in scope; long-term solutions to mortgage lending challenges must also be national, with an important role for the states.

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<sup>4</sup> James M. Lacko and Janis K. Pappalardo, "Improving Consumer Mortgage Disclosures: An Empirical Assessment of Current and Prototype Disclosure Forms", Federal Trade Commission, Bureau of Economics, Staff Report, June 2007.

<sup>5</sup> H.R. 3915, Introduced in the U.S. House of Representative on October 22, 2007, Passed by the U.S. House of Representatives on November 15, 2007.

At the same time, regulation of independent mortgage bankers and mortgage brokers would be markedly improved if responsibility for their mortgage regulation were placed in hands of a federal regulatory authority, with federal and state enforcement.

To achieve these objectives, MBA has been developing a comprehensive proposal for reform and has announced the following criteria to underpin this effort:

**1) Reform proposals directed to the mortgage lending industry should be considered in a comprehensive, not piecemeal, manner.** Issues, including the type of regulatory structure, the respective roles of federal and state agencies, which rules should apply and how enforcement should be carried out, should be considered carefully to develop an optimal overall approach.

**2) Mortgage lending deserves special attention.** While consumer protection, systemic risk and safety and soundness all deserve attention, MBA believes special attention to mortgage lending is warranted.

**3) Reform legislation should provide a rigorous, single new regulatory standard that should protect consumers regardless of where they live.** States and the federal government should work together as partners in developing and enforcing uniform standards, including ensuring that civil rights concerns are addressed.

**4) A new standard should build on recent work.** MBA believes a new standard should start with the Federal Reserve's Home Ownership and Equity Protection Act (HOEPA) rules, certain proposals from H.R. 3915, passed in 2007 by the House of Representatives, along with provisions to simplify Real Estate Settlement Procedures Act (RESPA) and the Truth in Lending Act (TILA) disclosures, as well as several MBA initiatives to restore faith in the mortgage market.

**5) A single set of consumer protection rules should be dynamic and able to quickly respond to new concerns.** A national consumer protection standard should not be static and should be able to address new abuses. State and federal officials must be empowered to revisit the standard regularly to address new abuses and concerns.

**6) Standards must be clearly defined to assure investment and competition in the mortgage market to lower costs to consumers.**

**7) Regulated entities should pay the costs of regulation and enforcement at the federal and state level.** MBA favors effective regulation and enforcement to regularize the mortgage market. Regulated entities should pay these costs to assure sufficient funding as long as charges are reasonable and not duplicative.

**8) Each player in the mortgage industry depending on its functions should be subject to appropriate and consistent federal regulation.** Regulation should include

rigorous licensing, net worth and bonding requirements as well as regular review and examination.

**9) Regulatory reform must improve transparency for borrowers.** While consumer disclosures are governed by the TILA and RESPA, the Board and HUD's efforts to improve disclosures have not been coordinated. Reform must address this problem to ensure that consumers have optimal understanding of the loan process and their own loan transactions.

**10) Regulatory reform should also assure that there is a national focus and includes better resources for counseling, financial literacy and to fight mortgage fraud.** MBA supports mandatory counseling for certain products if adequate resources are available.

### **Conclusion**

In sum, MBA believes that industry and consumers would be far better served by developing legislative and regulatory changes which propose a tough, new, federal regulatory scheme to replace the current patchwork of state laws. This change would offer a steady stream of resources to effectively fund enforcement by state and federal regulators through assessments on regulated entities. These changes would assign to a federal regulatory agency responsibility for regulating non-depository mortgage bankers and mortgage brokers in all aspects of mortgage lending, including ensuring fair lending.

MBA is working hard to effectuate these proposals for mortgage reform. While there is much blame to go around, the mortgage industry is not by any measure the sole cause of today's difficulties. Nonetheless, we believe that the industry must work proactively on solutions that restore faith in the market and protect current and future borrowers. We profoundly believe that proposals along the lines I describe will achieve these ends.

I am happy to answer your questions.