RESPRO®
Real Estate Services Providers Council, Inc.

May 26, 2020

Federal Consumer Financial Law Task Force
Bureau of Consumer Financial Protection
1700 G St., NW
Washington, DC 20552

Re: Docket No. CFPB-2020-0013 (submitted electronically)
Request for Information to Assist Taskforce on Consumer Financial Law

Dear Taskforce Members:

On behalf of the members of The Real Estate Services Providers Council, Inc. (RESPRO®), I appreciate the opportunity to comment on the Request for Information to Assist the Taskforce on Consumer Financial Law.

RESPRO® represents the largest and most successful settlement services companies operating throughout the United States. We are real estate brokerages, title insurance underwriters and agents, mortgage lenders and brokers, attorneys, technology companies, and other providers. Our members and their more than 600,000 employees and agents facilitate millions of real estate and mortgage transactions each year. Our members touch nearly every real estate transaction in the country in one way or more and stand ready to be of assistance to you. RESPRO® will be focusing on specific issues relating to mortgage origination that affect consumer access and choice in these comments.

## I. Discrimination and Denial of Choice in the Ability to Repay/Qualified Mortgage Rule (QM)

More than ever consumers want choice and desire efficiency. One stop shopping in real estate transaction services is an important consumer choice. However, The Ability to Repay/QM rule discriminates against affiliate business arrangements by requiring a mortgage lender with affiliates to count the affiliate charges against the 3% cap on fees and points that is part of the QM safe harbor. So for example, if a mortgage lender has an affiliate title or insurance company involved in the transaction, it must count the title agency or insurance agency charges toward the fees and points cap. Of course, fees and points are not title or insurance charges and would not normally be considered such. The rule does not require title or insurance charges to be counted when they are charged by an unaffiliated agency creating an un-level playing field disadvantaging Affiliated Business Arrangements offering one stop shopping.

It is unclear what if anything is accomplished by this discrimination and there is no evidence in the record as to why discrimination was applied to affiliates in this case other than Congressional staff needed a definition of fees and points. The language in the QM rule dealing with points and fees simply borrows the definition from the Home Ownership and Equity Protection Act (HOEPA), a narrower 1994 law dealing only with equity loans and capping fees and points at 8%. Clearly the circumstances relating to the need to obtain a high cost equity loan in the 1990s might have opened themselves to potential abuse especially given the likely duress of the borrower and limited options. This is very different from the situation today with purchase money mortgages where there is competition between lenders and other service providers in real estate and mortgage transactions.

Furthermore, the other elements of the ATR/QM rule protect against the potential "hard money" type activities associated with HOEPA. Aside from the points and fees limit, the fact that QM loans tend to be GSE, FHA, VA, and RHS type products, underwritten to the ATR standards, makes a special standard for determining the fees and points where affiliates are involved superfluous. This is especially so given the other limits put on affiliates by their governing structure discussed later.

Indeed, the House of Representatives realized that when the HOEPA definition is applied to mortgages at 3% as opposed to 8%, it would affect numerous transactions and made changes. Congress acted to address this discrimination by including bipartisan language in Dodd-Frank to exclude certain affiliate charges.[1] This language passed the House in 2009. However, it was removed by staff at the last minute during the conference.[2] Legislation fixing the discrimination issue passed the House overwhelmingly in the 113th and 114th Congress.[3] Bipartisan legislation was introduced in the Senate in the 113th Congress but was caught up in the gridlock that has become all too common. Members of Congress from both sides of the aisle have pointed to the Bureau's broad powers to act to benefit consumers and suggested it should be the one to fix this using those powers.

It is clear that the discrimination against affiliates sometimes lead to consumers not being able to use the providers they wish. In other situations consumers do not have the same pricing options since the affiliate lender cannot give the consumer a certain rate because premium pricing is needed to maintain fidelity with the QM cap. The Bureau has broad authority under section 1405 of Dodd-Frank to do anything "…necessary or proper to effectuate the purposes of this section and section 129C, to prevent circumvention or evasion thereof, or to facilitate compliance with such sections, or are not in the interest of the borrower."[4] The Bureau should end discrimination against affiliates and expand QM options for consumers whose interests are not helped by limiting their access to credit, creditors, and choice in the mortgage marketplace.

***Existing Laws Governing and Affecting AfBAs – Another Reason to End Affiliate Discrimination***

In addition to the ATR/QM rules and other provisions that protect consumers, RESPA also protects consumers. RESPA's anti-kickback provisions govern the structure and limit activities of AfBAs. In addition, the TILA/RESPA Integrated Disclosure (TRID) provisions also apply to AfBAs in special ways that differ from unaffiliated arrangements.

***RESPA anti-kickback provision***

RESPA Section 8(a) states that "(n)o person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person." This provision governs all settlement service providers including potential referrers within an AfBA. There are exceptions and exemptions that apply in certain circumstances but for example, a real

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[1] "…(B) in subparagraph (C)(ii), by inserting "except where applied to the charges set forth in section 106(e)(1) where a creditor may receive indirect compensation solely as a result of obtaining distributions of profits from an affiliated entity based on its ownership interest in compliance with section 8(c)(4) of the Real Estate Settlement Procedures Act of 1974" before the semicolon at the end;… https://www.congress.gov/bill/111th-congress/house-bill/4173/text/eh This language was later modified to amend Dodd-Frank and passed by the House in three subsequent Congresses.

[2] Members of Congress disavowed this action or maintained they did not know it even happened. We would be happy to provide additional details if helpful.

[3] H.R. 3211/S. 1577 113th Congress, H.R. 685 114th Congress.

[4] Public Law 111-203 https://www.congress.gov/bill/111th-congress/house-bill/4173/text/pl

estate agent cannot be paid for referrals to the real estate brokerages AfBA. The only payments that are allowed are returns on investment. Here is the relevant provision:

***RESPA AfBA provision***

RESPA section 8(c)4 establishes additional requirements and creates a safe harbor for business arrangements:

> (4) affiliated business arrangements so long as (A) a disclosure is made of the existence of such an arrangement to the person being referred and, in connection with such referral, such person is provided a written estimate of the charge or range of charges generally made by the provider to which the person is referred (i) in the case of a face-to-face referral or a referral made in writing or by electronic media, at or before the time of the referral (and compliance with this requirement in such case may be evidenced by a notation in a written, electronic, or similar system of records maintained in the regular course of business); (ii) in the case of a referral made by telephone, within 3 business days after the referral by telephone,[1] (and in such case an abbreviated verbal disclosure of the existence of the arrangement and the fact that a written disclosure will be provided within 3 business days shall be made to the person being referred during the telephone referral); or (iii) in the case of a referral by a lender (including a referral by a lender to an affiliated lender), at the time the estimates required under section 2604(c) of this title are provided (notwithstanding clause (i) or (ii)); and any required written receipt of such disclosure (without regard to the manner of the disclosure under clause (i), (ii), or (iii)) may be obtained at the closing or settlement (except that a person making a face-to-face referral who provides the written disclosure at or before the time of the referral shall attempt to obtain any required written receipt of such disclosure at such time and if the person being referred chooses not to acknowledge the receipt of the disclosure at that time, that fact shall be noted in the written, electronic, or similar system of records maintained in the regular course of business by the person making the referral), (B) such person is not required to use any particular provider of settlement services, and (C) the only thing of value that is received from the arrangement, other than the payments permitted under this subsection, is a return on the ownership interest or franchise relationship…

The entire section is included here for a number of reasons. First, often commenters misstate this provision and its constraints creating the impression that real estate agents, among others, can be paid to "steer" consumers. That is not permitted. Second, only relationships organized under this section are required to disclose the relationship in a timely fashion, include information on the charges, and that one is not required to use the affiliate. This is an important additional requirement that holds AfBAs to higher standards than other providers and makes discrimination under QM even more unnecessary and excessive. To be sure there are numerous other relationships, both formal and informal where disclosure of a relationship is never made and/or the freedom to shop is omitted. Disclosure is only required with AfBAs.

Third, it is often erroneously said that 8(c)4 allows for payment for referrals or "steering." It does not, it only allows for a proportionate return on an ownership interest. Just as in other cases, the referrer cannot be paid for referrals. If they have an ownership interest they can receive a proportionate share of the profits. If they do not, they cannot receive anything. Often it is the lender or the real estate broker that has the ownership interest and commonly, the referrer is a real estate agent or loan officer. Since neither the real estate agent nor the loan officer normally have an ownership interest, neither will receive anything under the 8(c)4 safe harbor.[5]

Finally, RESPA not only protects consumers by prohibiting kickbacks and constraining compensation to ownership interest, requires disclosure of the AfBA and prohibits required use/encourages the notion that one can shop for these services. So an affiliated company cannot make a consumer use the affiliate and the disclosure also makes very clear that one can shop for services from third parties. Once again, it is the only situation where the interest is required to be disclosed. Arrangements such as MSAs that come under section 8(c)2 do not require this and of course, those engaged in illegal arrangements are not likely to disclose such arrangements.

Due to the requirements of 8(c)4, it can be fairly said that the consumer receives the most information about costs, choices, and relationships in the transaction when an affiliate is involved. That information and disclosure is only enhanced by other rules particularly with regard to AfBAs.

### *Loan Officer Compensation Rules and TRID/Know Before You Owe rules*

In addition to RESPA, which prevents payment for referrals and limits the return on affiliate business, the loan officer compensation rule also prevents steering by preventing differing compensation in most common scenarios. So loan officers cannot steer clients to loan products that provide a higher commission to them. And since they cannot be paid for referrals and cannot receive additional compensation on loan type or terms, there is no significant steering incentive to affiliates. As is the case with real estate agents and others, loan officers and other providers may recommend affiliates, but they do so when their clients and customers benefit from price, quality, peace of mind, and convenience among other things as consumer surveys show.

Also the TRID/Know Before You Owe rule requires disclosure of settlement charges in the Loan Estimate (LE) and Closing Disclosure (CD). AfBAs are held to a higher standard on affiliate charges when it comes to tolerances for later deviations. AfBA fees may not increase at the time of closing and if they do, the consumer must be refunded the difference. Unaffiliated charges come under the 10% tolerance or are not subject to tolerances at all and can rise at will. This is yet another example where AfBAs are held to a higher standard than all else. In combination with RESPA 8(c)4 disclosure, consumers are made well aware of relationships, charges, and their ability to shop. Also, with an AfBA, they know the charges they are quoted by the affiliate will be the charges they pay at closing (absent tightly governed "changed circumstances" standard that apply to all providers).

### *State Insurance Regulation*

In addition to existing federal rules, states also regulate AfBAs and in particular title and other insurance. With regard to title, most states either require title insurance rates to be filed with the state or promulgate the rates.[6] There is therefore significant state level regulation and the opportunity to do more if concerns arise. Thus if there is a concern with title insurance in general, the states are the appropriate venue to

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[5] There are other safe harbors and exemptions in section 8 and each requires an independent analysis. For example, one can be paid for services rendered, but even so, one still cannot be paid for the referral alone. And real estate agents made be page for referring real estate business under the cooperative agreement among brokers exemption but this exemption does not apply to the referral of title or mortgage services.

[6] See this 2015 Survey by the National Association of Insurance Commissioners http://www.naic.org/documents/committees_c_title_tf_related_title_survey.pdf

address those concerns, not by discriminating against a subset of title insurance providers via the QM rule as some suggest.

### *Surveys and Other Data*

Industry was asked to provide data showing the impact of the discrimination against affiliates and other results and did so. It has been argued that the data should not be relied upon "because it comes from industry." Of course this creates an impossible standard for industry to meet. Nonetheless, the data demonstrated the impact and also repeatedly demonstrated the desire of consumers to not have their choices limited and to have full access mortgage choices such as one stop shopping. It should also be noted that opponents to one stop shopping have never provided significant data backing their charges that AfBAs in some way harm consumers or supporting the efficacy of the provisions in creating a valuable protection.[7]

### *QM and 3% Cap on Fees and Points – National Association of REALTORS® (NAR) Survey of Mortgage Providers – April 2014*[8]

In late April of 2014 NAR surveyed 65 mortgage providers on the impact of the QM rule and other matters. Among the questions were ones addressing the impact of affiliate discrimination under the 3% cap on fees and points in the QM rule. Here are the highlights:

- The QM rule and in particular the 3% cap is having an impact on consumers ability to obtain mortgage credit and their choice of settlement service providers.
- Nearly half of respondents to a NAR survey reported that they were unable to close mortgages due to the QM rule.
- For loans that did not qualify initially due to the 3% cap on fees and points in fewer than half of the cases were lenders were able to gain compliance by reducing fees.
- Instead 21% of loans were simply not originated.
- In 19% of cases services were outsourced initially or at the last minute inconveniencing borrowers and possibly increasing their costs.
- In the rest either rates were raised to receive premium pricing or some other option found.
- Where services were outsourced and charges known to the lender, nearly half of loans (43.8) reported higher fees as compared to the same (12.5) or unknown (43.8).

**Anecdotes from providers:**

- In one case a buyer could not use in-house homeowner's insurance and was forced to pay $600 more in premiums.
- Borrowers were forced to use outside title simply because state law fixed the rates of title and it was impossible to adjust the rate to comply with the 3% cap.
- Several borrowers were forced to use inferior title services because of the 3% cap.

[7] One is tempted to say they have never provided any data, but anecdotes might exist.

[8] In April of 2014, NAR Research sent out a survey to a panel of 65 different mortgage originating entities. The survey instrument was sent by email on Monday the 8th of April and closed on Thursday, May 1st. Questions in the survey instrument covered the characteristics of the originators, a subset of questions focused on the qualified mortgage rule, and a set of questions focused on the FHA. There were 19 unique responses to the survey for a response rate of 29.2% and a margin of error of 11.1% at a 95% level of confidence.

- One borrower buying a $500k+ home had to use outside title because their loan amount was under $150k and the title charges associated with the $500k caused the cap to be exceeded.
- A mortgage banker who was not a direct endorsed FHA lender had to forgo transactions under $150k because of the fee received for brokering the loan in combination with title and insurance charges caused the cap to be exceeded.

***RESPRO® 2013-14 Data***

- According to a 2013 RESPRO® survey based on 2012 conforming loan originations, 25% of loans with affiliated title charges included failed as QMs; whereas only 2.97% of all loans with unaffiliated title insurance failed. Of the affiliated loans that failed, over 92% were under $200,000.

- One large east coast firm reported that, through July 15, 2014, 597 out of 3,803 loans applications exceeded the 3% cap. The firm reported the following data from its mortgage affiliate. Comparing the first 6 months of 2013 with the same period in 2014, closed-loan originations decreased 19% and the dollar volume of closed loans has decreased about 22%. The QM rules in general, and the 3% cap on points and fees in particular, have largely contributed to those declines.

***2019 Harris/Nielsen Survey (repeating surveys done in 2002, 2008, 2010, and 2015)***

Harris/Nielsen once again conducted a public opinion study of consumer preferences on one-stop shopping and affiliated business arrangements in real estate transactions. Virtually all prospective buyers surveyed, 96%, believe one stop shopping makes buying a home easier to one degree or another. The independent survey work on one stop shopping began more than a decade ago and has consistently shown greater public awareness and desire to at least have the choice of one stop shopping for real estate services. In the most recent survey in late 2019:

- 94% of buyers would consider one stop shopping.
- More importantly, those most familiar with one stop are most likely to consider it- 92%.
- 77% say one stop shopping saves them money.
- 79% say it makes the buying process more efficient and manageable.
- 76% say having one contact is easier and prevents things from falling through cracks.

When asked the top reason they would consider One Stop, convenience (31%) topped saving money (24%) though both were high on the list. In fact, nearly 3 in 4 who would consider One Stop say they <u>would be willing to pay more if they would have a better experience.</u>

In addition to realizing the significant positive benefits to one stop shopping, the survey showed that once again consumers had higher satisfaction levels with one stop shopping than consumers who did not use one stop shopping.

The data indicates that the provision of settlement services is competitive and consumers want the maximum number of options including the choice of one stop shopping. Furthermore, price is just one element along with quality, convenience, and peace of mind in selecting a settlement service provider. Removing options only frustrates consumers and force them to engage providers who might not be their first choice. Therefore, the bureau should act to open up access to one stop shopping by ending discrimination against AfBAs in the ATR/QM rule.

## II. Bureau Should Give More Consumer Access to QMs

The QM is the gold standard of mortgages. Most residential mortgages are QMs. RESPRO® supports making positive and necessary changes to the QM rule. For example, the Bureau could even tailor a QM especially for the self-employed so they too could have better access to credit. We support other fixes suggested by sister trades such as the MBA, CMLA, and others. However, our primary focus is ending the needless discrimination against AfBAs properly structured under RESPA. For these reasons, we believe the Bureau should take the opportunity to use its broad powers granted under Dodd-Frank to act in the consumer interest and end discrimination against affiliates in the calculation of fees and points. There is no evidence this provision has helped consumer and there is evidence it has needlessly constrained their choices. By ending discrimination, the Bureau will restore choice in providers for many consumers and interest rate and pricing options for many other consumers.

## III. TILA/RESPA Integrated Disclosure (TRID)

As we have commented before, TRID was intended to be far less than what it became. It was intended to simplify and consolidate the upfront consumer disclosures- the TIL and the GFE. In particular, consumers were often confused about the Annual Percentage Rate (APR) and found little value in it. Also, the GFE did not contain information that consumers really wanted to know such as the approximate cash to close the transaction. The goal of both industry and consumer groups was to simplify the disclosure and provide accurate, useful and understandable information. Furthermore, while simplification and clarification in the closing documents was also somewhat valued, it was generally felt that consumers would derive greater benefit from better initial disclosures and that fundamentally changing the closing process would be of little benefit because consumers would be so far into the process that inertia to close the deal ("moving trucks in the driveway") would override almost everything else.

While it may be too late, too costly, or too complicated to revisit TRID in its entirety, the Bureau should consider making additional fixes to this burdensome regulation:

### Disclosure of Owner's Title

The CFPB should take this opportunity to ultimately fix the confusing disclosure of owner's title insurance premiums created by the rule. Survey information shows that 40% of consumers are confused by the current method and that is the experience of RESPRO® members as well. It adds to the consumer frustration we see in the process.

One way to address the issue of disclosure is to modify the Official Interpretations for §1026.37(f)(2), §1026.37(g)(4) and §1026.38(g)(4). These comments should allow the industry to disclose title insurance the same way as every other cost. Consumers should get the actual cost the consumer will pay for the service based on the best information reasonably available. Whatever method chosen, it should allow providers to disclose the accurate cost to consumers and avoid confusion.

### 3 Day Waiting Period

Instituting a 3-day waiting period upon receipt of the final Closing Disclosure (the combined HUD-1 and final TILA disclosure) on the surface sounded like a reasonable idea. It forced lenders to issue the document in a more timely manner. However, in the complex world of real estate and mortgage transactions where many rules, regulations, parties, and other market participants all play a role in achieving consummation of the transaction, a hard and fast 3-day rule has caused more problems than any hypothetical value it achieved. While the Bureau provided some exceptions, they were far too limited or ill-defined to be of practical use. These exceptions do not cover the potential for harmless but nevertheless last minute issues that may arise with the 3-day waiting period.

Ostensibly, the Bureau wanted to give the consumer time to fully review the document prior to closing in order to prevent a rushed and unwanted outcome particularly with regard to the mortgage elements of the transaction. This is a laudable goal that is already achieved by other means. Without belaboring the issue, consumers are already protected from surprises at closing by other parts of the rule and other rules. Under RESPA, tolerances must be adhered to or cured. Under TILA, fundamental changes to the loan terms and conditions must be re-disclosed with appropriate time for consideration by the consumer.

It is our belief that there is no need to subject the entire settlement to further restriction that will lead to questions about whether a last minute change is covered by an exception or not. The Bureau could drop the three day waiting period without significant harm. At a minimum, consumers should be able to waive the three day period. This way if the consumer truly feels they need more time, they can invoke the rule. If not, they can move forward. If the right to the 3-day waiting period is made explicit enough, consumers should be able to consult and obtain advice from the numerous professionals involved in each transaction about whether to approve the waiver or proceed differently.

**Liability and Cures**

RESPRO® shares the concerns of the lending community regarding liability and creating avenues for cures. We have advocated in the past that RESPA liability should apply to RESPA related issues and TILA liability to TILA related issues. Absent a more comprehensive approach, the Bureau should take several specific actions.
The Bureau should clearly and authoritatively state that no private right of action exists for errors on the initial LE, or any CD other than the final CD provided to the consumer. The Bureau should allow correction of errors without liability for numeric and non-numeric errors on the LE using a revised LE or a CD, unless the error was associated with a closing cost subject to tolerances. It should also allow correction of clerical numeric errors that do not affect the finance charge, even if the CD provided at consummation contained the error. The Bureau, especially if it does not create a waiver provision or otherwise scrap waiting periods, should allow for the cure of untimely provision of the LE and CD. Finally, the Bureau should make clear that there is no civil liability for errors that are unknown at closing and figures must be based on the "best available information" at that time.

**Tolerances**

In meetings with the CFPB, it was made clear that the Bureau had no intention of dropping the tolerance scheme under RESPA.[9] Since industry has adapted to the tolerance structure, the most cost effective

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[9] It is worth noting that it is unclear whether RESPA itself grants sufficient legal authority to impose tolerances in the first place.

outcome could very well be to simply leave the situation as is or only make minor adjustments such as granting leeway for governmental charges, such as taxes and recording fees, which are not as readily knowable all the time at application for a loan as was thought.

The Bureau also included a zero tolerance for affiliates involved in the transaction as opposed to a 10% tolerance for unaffiliated firms. The theory is that affiliate charges are more easily knowable and accurate than unaffiliated third party charges. This is usually true. However, RESPRO® remains concerned about ongoing discrimination against affiliate businesses in this rule and other rules such as the Ability to Repay/QM rule.

If in fact it is true that affiliate charges are more accurate and the Loan Estimate is an effective shopping tool, then why does the Bureau feel the need to continue to apply a double standard to affiliate businesses in the calculation of fees and points under the Ability to Repay/QM rule? Clearly under RESPA firms are unable to hide charges in the loan estimate and would be subject to tolerance violations either way at closing. Why does it then make sense to create the impression of uncompetitiveness by forcing lenders with affiliates to calculate fees and points differently? RESPRO® believes the Bureau should seek to end discrimination against affiliates in all of its rules.

**Exempt Construction Financing**

Given the ongoing confusion about how to comply with TRID when financing new construction, the Bureau should simply exempt this type of financing from the rule. There is a shortage of construction lending and a shortage of new construction that has lasted for more than a decade. Eliminating complicated regulations for this limited area of lending would reduce one burden and may spur more lending and more needed construction. The Bureau could limit exemption to loans in the construction phase and focus only on the final long-term loan products consumers obtain/receive upon completion of the home.

**Other Issues**

Should the Bureau wish to take additional actions at some point now or in the future short of wholesale changes to the regulation, here are some suggestions:

**Total Interest Percentage**

The Bureau should use its broad exemption and modification authority to eliminate the total interest percentage (TIP) from the forms and associated rules. The TIP is a superfluous calculation that has less meaning to consumers than the APR. Keeping the TIP only causes needless confusion and adds little to consumer understanding of the loan product and terms being offered. It also adds time and cost burdens to providers as providers have to explain the calculation and its implications or lack thereof to the consumer's transaction.

**APR**

As the CFPB and other agencies have documented and the industry can attest, the APR itself is of little value to consumers. At best, it causes needless confusion. The Bureau should evaluate and consider proposing to eliminate the APR in any effort to further refine disclosures.

**Conclusion:**

Once again, RESPRO® appreciates the opportunity to comment. Thank you for your time and consideration on this matter and many others that affect RESPRO®, its members, and their clients and customers. If we may be of any assistance, please do not hesitate to contact me at Redacted or Redacted

With best regards,

Kenneth R. Trepeta Esq.
President and Executive Director