

August 1, 2012

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**Statement for the Record**

*On behalf of the*

**American Bankers Association**

*before the*

**Committee on Small Business**

*of the*

**United States House of Representatives**



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Chairman Graves, Ranking Member Velázquez and members of the Committee, the American Bankers Association (ABA) appreciates the opportunity to submit a statement for the record for this hearing to conduct oversight on the Small Business Regulatory Enforcement Act (SBREFA) process as implemented by the Consumer Financial Protection Bureau (Bureau) for the proposed RESPA-TILA rule.<sup>1</sup> ABA represents banks of all sizes and charters and is the voice for the nation's \$14 trillion banking industry and its two million employees. The majority of ABA's members are banks with less than \$165 million in assets—small entities as defined by the Small Business Administration that are the focus of this process.

ABA commends the Committee for holding this oversight hearing. ABA strongly supports the SBREFA review process that Congress chose to require for rules proposed by the Bureau and we offer some suggestions for how to make this process more effective.

ABA believes that convening a Small Business Advocacy Review Panel (Panel) is vital to ensuring that the Bureau considers the potential impact of regulatory proposals on small entities and on the cost and availability of credit. The SBREFA review process offers the possibility for important early information gathering, collaboration, and consensus building around less burdensome alternatives that may significantly improve the rules promulgated by the Bureau. Indeed, we believe that gathering this input is critical to the Bureau's commitment to being data driven, and will ensure a competitive market for all financial service providers—regardless of their size. More importantly, the input will result in rules that genuinely benefit consumers.

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<sup>1</sup> Section 1100G of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act or DFA) compels the Bureau to apply the SBREFA process to Bureau rulemaking. DFA further compels the Bureau to propose an integration of Real Estate Settlement Procedures Act and Truth In Lending Act (RESPA-TILA) disclosures. See DFA sections 1032(f) (12 U.S.C. 5532), 1098 and 1100A.

ABA is grateful for the outreach the Bureau and its fellow Panelists have pursued to involve our association members in this important regulatory process. ABA member small entities who participated in the separate Panel meetings that have been convened to date appreciate the personal courtesy and professional attentiveness that Bureau staff and other Panel representatives showed in arranging and conducting the meetings. We also wish to acknowledge the earnest engagement of fellow small entities and their respective associations in working together to make the Panel meetings productive. ABA and its members look forward to continued constructive involvement with future Panels as the Bureau proceeds with its important work.

However, we believe that the process can be improved. The RESPA-TILA rulemaking was the first occasion that the Bureau, the Chief Counsel for Advocacy of the Small Business Administration and the Office of Information and Regulatory Affairs (OIRA) convened a Panel to comply with the statutory mandate of the Dodd-Frank Act to apply the requirements of SBREFA to Bureau rulemaking. As such, all parties had lessons to learn about how to conduct the process most effectively. With this in mind, we offer the following recommendations to ensure that the process going forward affords small entities the opportunity that Congress envisioned for beneficial impact:

- **More Time Is Needed for Small Entity Review.** The Panel must ensure that there is ample time for the selection, preparation and participation of Small Entity Representatives in the SBREFA review process.
- **The Panel's Focus Should Be Advocating for Small Entities.** The Panel Report should reflect its statutory duty to minimize the impact of a proposed rule on small entities and the cost of credit.
- **Vendor Implementation Cost Data Should Be Gathered.** The Panel should insist that the Bureau gather information from third-party service providers about potential implementation costs.

We will discuss these items in detail below.

## I. More Time is Needed for Small Entity Review

For the SBREFA process to improve rulemaking and to reduce regulatory burden on small entities, ABA firmly believes that the Small Entity Representatives (SERs) must be afforded adequate time to consider the proposals, to provide detailed and specific feedback, and to reach consensus on alternative approaches to achieve the desired regulatory goal. Given adequate time, SERs could spend more time consulting with staff about required policy and process changes and with third-party vendors about anticipated software and system changes. Similarly, additional time would permit SERs to have conversations with other mortgage market participants. Such consultation would certainly allow additional issues to surface. Moreover, such consultation allows for the development of less burdensome alternatives that could then be suggested to the Bureau for consideration.

ABA believes that the timetable established for SER participation in the RESPA-TILA rulemaking unnecessarily limited their ability to provide input. In that rulemaking, the SERs were invited to participate and were provided with information about the SBREFA process and the regulatory proposals being **considered just two weeks before the convening meeting**. As the Committee is aware, small business men and women work long hours and have many demands on their time. A two-week preparation period is simply inadequate to permit a thorough review of the proposed alternatives, to consider the ramifications of each, and to try to gauge their potential impact on compliance costs and operations. Allowing only a week after the convening meeting for SERs to provide written comments to the Panel further limited the ability of SERs to provide detailed information and feedback. If SERs are to successfully fulfill their representative role, they need to be engaged earlier so that they can leverage the resources of professional networks and trade association memberships to collect relevant experience from peers.

The aspirations of the SBREFA process—information gathering, collaboration, and consensus-building around less burdensome alternatives to achieve a regulatory goal—take time, and ABA is concerned that the process and timetable established by the Bureau for SBREFA review is inadequate. ABA believes the Bureau should allow several months after SERs are identified and before the Panel is officially convened. During this pre-panel outreach period, the Bureau could facilitate SER interaction and discussion in person or by conference call. Presumably, each meeting would permit the discussion to delve further into the proposed alternatives and to identify issues for which additional discussion and data are needed. Also,

extending SER contact over a longer period would facilitate greater interaction among SERs, enable more outreach to SER colleagues to access other sources of representative information, and increase opportunities to reach consensus on a regulatory framework that will work optimally for consumers and small entities.

ABA appreciates the fact that the Dodd-Frank Act has challenged Bureau staff to complete important new mortgage regulations in a tight time frame. We believe more outreach is possible, however. For example, the RESPA-TILA integration project was initiated in the early fall of 2010 with a series of Bureau sponsored roundtables that led to the “Know Before You Owe” initiative in 2011. Despite repeated calls by ABA and other mortgage industry representatives for the Bureau to evaluate possible rule modifications simultaneous with its form redesign, the Bureau chose a different path and delayed engaging stakeholders in the rule proposal development phase. This choice, not the Dodd-Frank Act deadline, resulted in postponement of the SBREFA Panel until the end of February 2012. We believe the Bureau could have and should have recruited SERs and engaged them in interaction far earlier in the Know Before You Owe process so that they could have been better prepared to provide input.

ABA believes that the Panel Report on the RESPA-TILA rule reflects the rushed timetable and the limited opportunity SERs had to provide anything other than an initial reaction to the Bureau’s proposals. As the Report notes, there was significant discussion and disagreement about the proposed re-definition of what constitutes an application (triggering early disclosures and statutory liability for inaccuracies in those disclosures) and specifically “a lack of consensus among the SERs who opposed elimination of the seventh item about what constitutes what additional information is needed to provide a reasonably accurate Loan Estimate.”<sup>2</sup> We believe that it was the responsibility of the Panel to provide the opportunity for further discussion to facilitate the identification of a satisfactory alternative for this foundational definition, and it was insufficient for the Panel to recommend simply that “the CFPB solicit public comment on what, if any, additional specific information beyond the six items included under the proposed definition of application is needed to provide a reasonably accurate Loan Estimate.”<sup>3</sup>

Similarly, the Panel Report notes that the SERs strongly opposed requiring lenders to provide the Settlement Disclosure three days before closing, challenging its value to consumers

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<sup>2</sup> Panel Report at 29.

<sup>3</sup>*Id.*

and describing the operational inefficiencies and added costs for small lenders and settlement agents. Although the Report describes four alternatives suggested during the convening meeting and in written comments filed by the SERs, due to the limited time allotted for consultation with SERs, there was no opportunity for further consideration and discussion of these or any new alternatives that might have surfaced. Instead, the Report simply directs the Bureau to “continue to explore whether the potential impact of the three-business-day requirement on small entities can be mitigated while maintaining the benefits to consumers...”<sup>4</sup>

## II. The Panel’s Focus Should Be Advocating for Small Entities

Inherent in the SBREFA review process is an obligation for the Panel to be an advocate for small entities. Specifically, SBREFA, as amended by Dodd-Frank Act §1100G, directs the Panel to report on the comments of the small entity representatives and to recommend specific steps the Bureau may take to minimize any “significant economic impact on small entities consistent with the stated objectives of applicable statutes,” *including any increase in the cost of credit for small entities*. In addition, the Panel should evaluate specific alternatives to minimize these impacts.<sup>5</sup>

ABA believes that the Panel report for the RESPA/TILA rulemaking fails to meet these statutory objectives. The report does provide a summary of the regulatory proposals and the SER comments. However, we believe that the “Panel Findings and Recommendations” shows a reluctance to be an advocate for small entities. For example, with regard to the proposal to require lenders to provide the Settlement Disclosure three days before closing, the report states, “The Panel recognizes that statutory requirements *limit* the discretion of the CFPB to shorten the three-business-day waiting period” (emphasis added).<sup>6</sup> A closer look at the Bureau’s discussion of its integration of RESPA and TILA, however, demonstrates that the Bureau has exercised considerable discretion in interpreting Congressional intent to integrate the two statutes. In fact, forcing precise and final fee disclosures in advance of settlement is not a requirement found in the underlying statutes being integrated. The proposed three-day period exhibits inflexibility in the Bureau’s deliberations and an apparent unwillingness to analyze all of the options available. Considering the strong opposition by the SERs from all participating industry segments to the

<sup>4</sup> Panel Report at 29.

<sup>5</sup> See Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. §609(d).

<sup>6</sup> Panel Report at 29.

proposed three-day rule, ABA believes that the Panel Report should have challenged—not accepted—the Bureau’s assertion of “limits” on its discretion.

In addition, as noted above, the Panel further abdicated responsibility for providing specific direction to the Bureau. Instead, the Panel simply directed the Bureau to “continue to explore whether the potential impact of the three-business-day requirement on small entities can be mitigated.” Indeed, each of the Panel recommendations and findings concludes in a similar way. Rather than recommending that the Bureau take a specific action or accept a suggested alternative, the Panel Report recommends that the Bureau “solicit public comment,” “consider,” or “evaluate” an existing proposal.

The identification and recommendation of less burdensome alternatives—such as phased-in deadlines, reduced obligations, thresholds or exemptions for small entities—is an important objective of a SBREFA Panel. There is no question this difficult work requires a considerable commitment of time, but doing so will ensure that the small business review makes meaningful recommendations and results in consumer protection rules that work for both consumers and small businesses.

### **III. Vendor Implementation Cost Data Should Be Gathered**

ABA believes that in preparation for a SBREFA review, the Bureau should be required to gather and share with SERs information from third-party service providers about anticipated system and software changes (and potential costs) required by regulatory proposals under consideration. At the beginning of the Panel’s summary of SER comments on the RESPA-TILA rule, the Panel states that SER estimates of implementation costs often varied, noting, “Because the SERs were drawn from different industries and their experiences differed, the SERs understandably may have fanned, referred to, or described similar costs differently.”<sup>7</sup> ABA agrees with this assessment, but we do not believe that it can excuse the Panel’s failure to elicit and consider information on the anticipated economic impact of a regulatory proposal under consideration.

We understand that during the RESPA-TILA convening meeting, there were assumptions about required changes and costs, but no real information or data. ABA believes that the Bureau—whose access is far superior to that of small entities—should have an affirmative duty

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<sup>7</sup> Panel Report at 17.

to obtain this information and to provide it so that SERs can react to it and suggest how the changes might affect their business practices and fees and gauge the likely impact on the cost of credit. In addition, having this information available should minimize the variation between SER cost and burden estimates, providing the Panel greater confidence in the information it collects.

Also, extending the time period before the convening meeting will enable the Panel to delve further into cost estimates. For example, in the RESPA-TILA process, during the convening meeting the SERs strongly opposed the proposal to require lenders and settlement agents to maintain disclosures in “machine-readable” format, anticipating the costs to develop and implement the technology would be “substantial.” *However, without specific information about the technology that would be required, they could not even estimate the cost.* Not surprisingly, the Panel Report simply recommended that the “CFPB solicit public comment on those costs and explore whether an exemption from any requirement to maintain the required records in machine readable format should be provided to small entities...”<sup>8</sup>

We believe that the Panel should have insisted that the Bureau provide specific information on its expectations for machine-readable disclosures including cost estimates from service providers who have developed, or are developing, this technology. Then the SERs could have reacted to this information, describing how it would impact their practices and ultimately the cost of credit, or suggesting alternatives for mitigating this impact.

## **Conclusion**

ABA understands that the Bureau is in the process of implementing a step in its rulemaking process that has not previously been a component of consumer financial protection regulation. The implementation of the SBREFA review process is essential to the success of the Bureau’s mission, particularly since the Bureau’s rules will apply to all size institutions, but they only have supervisory experience with the largest providers. We encourage this Committee to exercise appropriate and continuing oversight of the Bureau’s SBREFA review process to ensure it is meaningful and results in consumer protection rules that work for both consumers and small businesses.

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<sup>8</sup> Panel Report at 30.