July 22, 2011

Ms. Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, DC 20551

Re: Regulation Z; Docket No. R-1417; RIN 7100-AD75

Dear Sirs/Madams:

On behalf of the Real Estate Services Providers Council, Inc. (RESPRO®), I appreciate the opportunity to submit comments in response to the Federal Reserve Board's (Board) proposed rule to implement the Ability to Repay standards set forth in Title XIV of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank), with an exemption for "Qualified Mortgages" (QMs) meeting the standards set forth in the regulation.[1]

## I. About RESPRO®

RESPRO® is a national non-profit trade association of companies from all segments of the residential home buying and financing industry, including real estate brokerage firms, homebuilders, mortgage lenders, and title companies.

The common bond of RESPRO® members is that they offer a diversified menu of services (commonly referred to as "one-stop shopping") for home buyers and home owners through wholly-owned subsidiaries or through joint ventures with other companies, both of which are regulated under the Real Estate Settlement Procedures Act (RESPA) as "affiliated business arrangements" (ABAs).[2] Many RESPRO® members are residential real estate

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[1] 76 Fed. Reg. 27,390 (May 11, 2011).

[2] Recognizing the potential benefits that affiliated businesses can offer consumers, Congress amended RESPA in 1983 to exempt from the 1974 law's referral fee prohibition (12 U.S.C. § 2607(a)). the return of an ownership interest (e.g., a dividend based on stock ownership) in an ABA as long as the following conditions are met:

- The person who refers business to an ABA discloses at or before the time of the referral the existence of the arrangement to the person being referred;
- Such person is not required to use any particular provider of settlement services; and
- The only thing of value that is received from the arrangement, other than certain other payments permitted under RESPA section 8(c), is a return on the ownership interest or franchise relationship.

brokerage firms or homebuilders that offer affiliated mortgage, title, and/or other settlement services to home buyers, or mortgage companies that offer affiliated title and other settlement services to home buyers without a real estate or homebuilder affiliation. RESPRO®'s membership also consists of mortgage, title, and other settlement service companies that enable real estate brokerage firms or homebuilders to offer affiliated services through joint ventures with these companies, or title/settlement service firms that enable mortgage companies to offer these services through joint ventures.

## II. Summary of RESPRO® Comments

Since RESPRO® represents companies that offer affiliated mortgage and title services, our comments will focus on how the Dodd-Frank Ability to Repay standards potentially discriminate against affiliated businesses in a way that would cause them to withdraw from mortgage or title markets in certain marketplaces throughout the country, particularly low-income and low-middle income marketplaces.

Federal regulators were authorized by Dodd-Frank to "revise, add to, or subtract from the criteria that define a qualified mortgage" under their jurisdiction "upon a finding that such regulations are necessary or proper to ensure that responsible, affordable, mortgage credit remains available to consumers . . . "[3]

For reasons explained below, we believe that the withdrawal of affiliated mortgage and title services from the affected marketplaces would reduce competition, which would in turn reduce the affordability of mortgage credit. This can be prevented by creating a narrow exemption for affiliated title fees from the 3% points and fees threshold in the QM definition that will not compromise the goals of Dodd-Frank and the Home Owners Equity Protection Act (HOEPA).

## III. Affiliated Businesses In the Home Buying and Financing Industry

The affiliated business model is not new in the home buying and financing industry. Over the last several decades, real estate brokerage firms, homebuilders, and mortgage lenders increasingly have recognized the value of using affiliated mortgage title, and other settlement service companies to assure that each transaction is completed as quickly and efficiently as possible.[4]

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*See* 12 U.S.C. § 2607(c)(4) (ABA exemption). In 1996, the United States Department of Housing and Urban Development (HUD) issued a RESPA Policy Statement setting forth certain guidelines on affiliated businesses. HUD stated that the ABA exemption was not intended to apply to "sham" arrangements that are not "bona fide" providers of settlement services, and attempted to provide guidance to affiliated businesses as to what factors HUD considers when making this determination. *See* HUD Statement of Policy 1996-2, Regarding Sham Controlled Business Arrangements, 61 Fed. Reg. 29,258 (June 7, 1996) ("HUD Sham Joint Venture Guidelines").

[3] Dodd Frank, Pub. L. 111–203, § 1412, 124 Stat. 1376, 2148 (2010).

[4] The latest comprehensive study of the presence of both realty-based and homebuilder-based affiliated businesses of which RESPRO® is aware was conducted in 2004 by Weston Edwards and Associates. Edwards found that in 2004: (1) 88% of the nation's largest 350 real estate brokerage firms offered affiliated mortgage services; (2) 69% of the nation's largest 50 real estate brokerage firms and 55% of

Mortgage lenders, including realty-owned or builder-owned mortgage lenders, are able to conduct transactions with greater speed and efficiency with affiliated title and title-related service businesses because they have integrated platforms that allow the affiliated companies to more efficiently communicate with each other. The buyers' names, addresses, telephone numbers, the name and address of the lender, the property address, the sellers' names, and the date and place of the closing are types of information that all settlement service providers require to render their services. Having the information available on a common platform reduces the time to complete the transaction and reduces the likelihood that errors will result from separate entries on different computer systems.

Consumer surveys have consistently shown that consumers who use one-stop shopping programs that affiliated businesses offer appreciate these benefits. In a December 2010 Harris Interactive survey, home buyers said that using affiliates saves them money (78%), makes the home buying process more manageable and efficient (75%), prevent things from "falling through the cracks" (73%), and is more convenient (73%) than using separate services.[5] These results are consistent with a 2002 survey of 2,052 recent and potential home buyers, which found that 64% of home buyers who had recently used one-stop shopping programs had a better overall experience with their home purchase transaction.[6]

## IV. The Costs of Affiliated vs. Unaffiliated Title and Title-Related Services

Economic studies over the last several two decades have shown that title services provided by affiliated businesses are competitive in cost compared to title services provided by unaffiliated businesses.

The most recent national economic study to reach this conclusion was performed in 2006 by the international economic consulting firm of CapAnalysis Group, LLC, which analyzed title and title-related charges on over 2200 HUD-1 Settlement Statements in nine states (Alabama, Illinois, Maryland, Michigan, Minnesota, North Carolina, Ohio, South Carolina and Virginia) in 2003 and 2005.[7] The CapAnalysis study concluded that title premium

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that nation's top 51 to 350 real estate brokerage firms offered title insurance; (3) all of the nation's top ten homebuilders and 76% of the top 11 to 150 homebuilders offered affiliated mortgage services; and (4) all of the nation's top ten homebuilders and 83% of the top 11 to 150 homebuilders offered affiliated title services. Weston Edwards & Associates, Significant Changes Found and Expected in the Way Houses are Bought and Sold (2004).

Furthermore, according to the independent real estate research firm REAL *Trends*, Inc., the nation's 500 largest residential real estate brokerage firms closed 150,962 mortgage loans and conducted 358,172 title closings through affiliated companies in 2010.

[5] Harris Interactive, One-Stop Shopping Consumer Preferences (Feb. 2008), performed by Harris Interactive and commissioned by the National Association of Realtors (NAR).

[6] Murray Consulting, Consumer Perspectives on Realty-Based One-Stop Shopping (2002).

[7] Donald L. Martin PhD. & Richard E. Ludwick, Jr. PhD., CapAnalysis Group LLC, Affiliated Business Arrangements and Their Effects on Residential Real Estate Settlement Costs: an Economic Analysis (Oct. 10, 2006). The nine states were chosen because they had no laws or regulations that significantly restricted affiliated businesses during the time periods of the study (2003 and 2005), and because there was

and other title-related settlement charges were statistically the same in these states whether offered by affiliated or unaffiliated businesses.

The CapAnalysis Study reinforced all known earlier economic studies on the costs of affiliated businesses.

For example, the economic research firm of Lexecon, Inc. analyzed title and closing costs of over 1000 home sales transactions for both affiliated and unaffiliated title agencies during a one-week period in September 1994. The transactions occurred in seven states -- Florida, Minnesota, Tennessee, Wisconsin, Mississippi, Pennsylvania and California. Like CapAnalysis, Lexecon concluded that title services for transactions involving affiliated title companies were competitive with those provided by unaffiliated title companies.[8] HUD reviewed the Lexecon findings and stated the following:

> "RESPRO®, an association of controlled businesses, commissioned a study by an independent contractor, Lexecon, Inc ... [The study may be] biased in favor of the unaffiliated firms. Therefore, the [study] results might suggest that affiliated firms on average have lower prices than their competitors. Consumers may benefit additionally from reduced shopping time and related hassles."[9]

In 1992, Anton Financial Economics, Inc. researched the price of title services in the Minneapolis-St. Paul marketplace by sampling 16 firms that together operated 77 offices in the Twin Cities area (70% of the offices in the marketplace) and concluded that

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enough of a RESPRO® member presence in those states to assure a reasonable data sample. CapAnalysis also incorporated controls to isolate irrelevant factors such as the purchase price of the home, the demand conditions and competitiveness of local markets, and the overall pricing characteristics of individual providers.

Under CapAnalysis' direction, RESPRO® asked its members in these states to collect completed and processed HUD-1 Settlement Statements for all transactions closed during a one-week period in June 2003 and a one-week period in June 2005. The providers were asked to identify which firms provided title and title related closing services for each individual line item on the HUD-1, and to note whether the provider was affiliated or unaffiliated. They also were asked to separately list their affiliations, other providers in their marketplace, and known affiliations of other providers in their marketplace. Other than providing CapAnalysis background information on the past and present regulatory and marketplace environment for affiliated businesses and facilitating the collection of the data from its members that was delivered directly to CapAnalysis, RESPRO® played no role in the analysis of the data or in the development of the study's conclusions.

[8] Lexecon, Inc., Economic Analysis of Restrictions on Diversified Real Estate Services Providers (Jan. 3, 1995). Lexecon found that affiliated title services were 2% lower than unaffiliated title services but concluded that this percentage was "statistically insignificant".

[9] HUD Economic Analysis accompanying HUD's 1996 Sham Joint Venture Guidelines. HUD found that because there likely was an attempt by the provider to convince the consumer to use the affiliated services that consumers who used unaffiliated title providers likely had a greater propensity to price shop compared to those who preferred the one-stop convenience of using an affiliated provider. Thus, it concluded that the price of unaffiliated title providers in the sample was likely biased downward below the actual average market price for unaffiliated title providers because those providers likely were patronized by "price shoppers" in the sample.

affiliated title companies in the Minneapolis-St. Paul marketplace charged approximately $13 less for title services than unaffiliated title companies.[10]

## V. The Potential Impact of Dodd-Frank's Ability to Repay Standard on Affiliated Businesses

Title XIV of Dodd Frank provides that a mortgage loan would *not* be a QM for purposes of the Ability to Repay standards if the total "points and fees" paid by the consumer in the transaction exceed 3% of the loan amount.[11] In determining what "points and fees" are included in the 3% threshold, Dodd-Frank adopted (with slight variations) the "points and fees" definition under HOEPA, which counts fees retained by a mortgage lender's affiliated company towards the 3% threshold, but not fees paid to an unaffiliated third party.[12]

If the "points and fees" definition relied upon by Title XIV of Dodd-Frank takes effect without a regulatory modification, loans in which a consumer uses a mortgage lender's affiliated title company would be much more likely to exceed the 3% threshold and therefore not be a QM under the Ability to Repay standards, even if the loan meets all other requirements under the QM definition and even if the cost of the services offered by the affiliated company is equal to or less than the cost of the equivalent services from unaffiliated companies.

To assess the potential impact of this new 3% threshold on affiliated mortgage businesses, RESPRO® provided its members with a list of points and fees under HOEPA as amended by Dodd-Frank, and asked them to total all applicable fees—including all applicable affiliated title and title-related fees—for one FHA and one conventional loan in which their mortgage company's affiliated title services were used in 2010 at each of the following loan levels: $50,000, $100,000, $250,000, $418,000, and $750,000.[13]

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[10] Anton Economics, Inc., Economic Issues Relating to the Title Insurance Industry in Minnesota: Would Further Regulation be Helpful? (1992).

[11] Dodd Frank, Pub. L. 111–203, §§ 1411, 1412, 124 Stat. 1376, 2142-2148 (2010).

[12] *See id* (relying on the HOEPA definition of "points and fees," section 103(aa)(4) of the Truth in Lending Act (TILA) (15 U.S.C. § 1602(aa)(4)), as amended by Dodd Frank, Pub. L. 111–203, § 1431(c), 124 Stat. 1376, 2159 (2010)).

[13] RESPRO® instructed its members to add the following fees for these sample loans to determine whether the would add up to more than 3% of the loan amount:

(1) All compensation paid directly or indirectly by a consumer or creditor to a mortgage originator from any source, including a mortgage originator that is also the creditor in a table-funded transaction (this does not include service release premiums).
(2) Any amount payable under a point, discount, or other system of additional charges, however, either of the following points can be excluded:
(I) Up to and including 2 bona fide discount points payable by the consumer in connection with the mortgage, but only if the interest rate from which the mortgage's interest rate will be discounted does not exceed by more than 1 percentage point the average prime offer rate; or
(II) Up to and including 1 bona fide discount point payable by the consumer in connection with the mortgage, but only if the interest rate from which the mortgage's interest rate will be discounted does not exceed by more than 2 percentage points the average prime offer rate.

Members that conducted the calculation reported that, depending on their marketplace, 14% to 80% of loans in which they used their affiliated title companies would exceed the 3% threshold and, consequently, would not qualify as a QM.[14] The percentage of RESPRO® members' loans that exceeded the 3% points and fees threshold was dependant on: (1) the average loan amount in their marketplace; (2) the average cost of mortgage origination fees in their marketplace; (3) the average cost of title examinations, premiums, and similar fees in their marketplace; and (4) whether any state bond or rural development programs are utilized in conjunction with the loan.

Not surprisingly, RESPRO® members reported that the percentage of loans in which the total amount of fees exceeds the 3% threshold increases as the loan amount lowers. When asked whether there was an average loan amount under which the percentage of loans exceeding the 3% threshold becomes significant enough to trigger business decisions as to whether to offer both mortgage and title services with these loans, the results varied widely – from $50,000 to $210,000.[15]

RESPRO® also asked these companies whether they would choose to (1) offer mortgages but not affiliated title services in conjunction with loans that would exceed the 3% threshold; or (2) offer title services but not mortgages in conjunction with these loans.

Many RESPRO® members replied that they would not offer affiliated title and title-related services with these loans since they would be subject to significant regulatory compliance and legal costs and since it would be more difficult for them to sell loans in

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(3) Service or carrying charge.
(4) Loan fee, finder's fee, or similar charge.
(5) Fee for an investigation or credit report.
(6) Borrower-paid mortgage broker fees, including fees paid directly to the broker or the lender (for delivery to the broker) whether such fees are paid in cash or financed.
(7) Fees or premiums for title examination, title insurance or similar purposes <u>if retained by the mortgage originator or its affiliated company</u>.
(8) Fees for preparation of loan-related documents <u>if retained by the mortgage originator or its affiliated company</u>.
(9) Fees for preparation of loan-related documents <u>if retained by the mortgage originator or its affiliated company</u>.
(10) Fees for notarizing deeds and other documents <u>if retained by the mortgage originator or its affiliated company</u>.
(11) Appraisal fees, including fees related to any pest infestation or flood hazard inspections conducted prior to closing <u>if retained by the mortgage originator or its affiliated company</u>.
(12) For conventional loans, include any PMI fees <u>but only to the extent to which they exceed the FHA insurance rate</u>. Do <u>not</u> include FHA mortgage insurance premiums for FHA loans.

[14] The percentage of loans originated by the majority of these RESPRO® members' mortgage companies in which their affiliated title companies varied, with the majority falling within 40% to 90%.

[15] The Board has proposed to exclude loans under $75,000 from the points and fees threshold. *See* 76 Fed. Reg. at 27,445. RESPRO® believes that this amount is insufficient and that an exclusion for small loans in itself would not correct the problem due to the wide discrepancy of average loan amounts throughout the county.

which an affiliated title company is used in the secondary mortgage market.[16] Some RESPRO® members that offer both mortgage and title services through their affiliated real estate brokerage operations replied that they would discontinue offering mortgages through their affiliated mortgage companies but would continue to offer title and title-related services through their affiliated title companies. Because of the negative consequences of originating a loan that is not a QM, they reported that it would be important to have certainty as to which loans would exceed the applicable thresholds. The cost of mortgage origination services is highly dependent on the customer's individual decisions and is more difficult to predict on an aggregate basis, while title fees can be more easily predicted since title premiums either are regulated or must be filed in the majority of states.

## VI. The Regulators' Authority to Create Exemptions for Certain Fees Under the "Points and Fees" Threshold

Under Dodd-Frank, the Board, FHA, VA, and the Department of Agriculture can "revise, add to, or subtract from the criteria that define a qualified mortgage" under their jurisdiction by regulation. The Act specifically allows these regulators discretion to make changes "upon a finding that such regulations are necessary or proper to ensure that responsible, affordable mortgage credit remains available to consumers . . ."[17]

In its proposed regulation, the Board acknowledged the concern of affiliated mortgage lenders over the "points and fees" test in Dodd-Frank, but did not propose an exemption at that time. Nevertheless, the Board specifically invited comments on whether it should exclude certain affiliated fees from the 3% threshold in its final regulation:

> "Consistent with the statute, the Board proposes no changes to existing [regulations], which includes in points and fees 'all items listed in § 226.4(c)(7) (other than amounts held for future payment of taxes) unless the charge is reasonable, the creditor receives no direct or indirect compensation in connection with the charge, and the charge is not paid to an affiliate of the creditor.' During outreach, creditor representatives raised concerns about the inclusion in points and fees of real estate-related fees paid to an affiliate of the creditor, such as an affiliated title company. These fees have historically been included in points and fees for high-cost mortgages under both TILA and Regulation Z, but the points and fees threshold for qualified mortgages is much lower than for the high-cost mortgage threshold. Thus, creditors that use affiliated settlement service providers such as title companies are concerned that they will have difficulty making loans that meet the qualified mortgage points and fees threshold.

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[16] In addition to actual damages and the regular statutory damages available under TILA, violations of the ability to repay requirements may be subject to enhanced HOEPA statutory damages. *See* TILA Section 130(a), as amended by Dodd Frank, Pub. L. 111–203, § 1416, 124 Stat. 1376, 2153 (2010). Furthermore, section 1413 of Dodd-Frank adds a provision making clear that a violation of the ability to repay provisions can provide a defense by recoupment and set-off in a foreclosure action, without regard to time limits on private actions. Dodd Frank, Pub. L. 111–203, § 1413, 124 Stat. 1376, 2148-49 (2010).

[17] *Id.* (emphasis added).

The Board is not proposing an exemption for fees paid to creditor-affiliated settlement services providers. The Board notes that Congress appears to have rejected excluding from points and fees real estate-related fees where a creditor would receive indirect compensation as a result of obtaining distributions of profits from an affiliated entity based on the creditor's ownership interest in compliance with RESPA . . . The Board requests comment on the proposal *not* to exclude from the points and fees calculation for qualified mortgages fees paid to creditor-affiliated settlement services providers. The Board invites commenters favoring this exclusion to explain why excluding these fees from the points and fees calculation would be consistent with the purposes of the statute."[18]

## VII. The Failure to Provide an Exemption for Affiliated Title Fees Would Negatively Affect Mortgage Affordability

As noted above, some RESPRO® members that offer affiliated mortgage and title services through their affiliated real estate brokerage operations reported that they would discontinue offering affiliated mortgages but would continue to offer affiliated title and title-related services in conjunction with loans that would exceed the 3% threshold. Their reasoning was that it would be important to have certainty as to which loans would exceed the threshold because of the negative consequences of originating a loan that is not a QM and that, whereas the cost of mortgage origination services is highly dependent on the customer's individual decisions and is more difficult to predict on an aggregate basis, the cost of title fees and premiums is more predictable because they are either regulated or filed in the majority of states.

RESPRO® believes that many real estate brokerage firms with affiliated mortgage and title businesses would reach this same conclusion and would discontinue offering mortgages in the low-income and low-middle income marketplaces that would be most affected. We believe that this potential result alone justifies an exclusion for affiliated title and title-related fees from the 3% threshold, since the withdrawal of realty-affiliated mortgage products would reduce competition in those marketplaces and therefore would affect the availability of affordable mortgage credit.[19]

Other RESPRO® members reported that they would discontinue offering affiliated title services with their mortgage products. We believe that the fact that economic studies have concluded that affiliated title and title-related services are competitive with those of unaffiliated companies is in itself is a reason not to discriminate against mortgage loans in which affiliated title and title-related services are used. But even if the Board disregards this significant factor and bases its decision on whether the withdrawal of affiliated title and title-related services from certain marketplaces would reduce the affordability of mortgage credit, RESPRO® believes that there are compelling reasons to exempt affiliated title and title-related fees in the final Ability to Repay regulation.

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[18] 76 Fed. Reg. at 27,404 (underlined emphasis added).

[19] As stated *supra* in note 2, the independent real estate research firm REAL *Trends*, Inc., reported that, in 2010, the nation's 500 largest residential real estate brokerage firms closed 150,962 mortgage loans and conducted 358,172 title closings through affiliated companies.

## A. Affiliated Title Businesses Create Cost Efficiencies that Positively Affect the Affordability of Mortgage Credit

As noted above, affiliated businesses create production efficiencies from the sharing of staff, facilities, and other assets that could not be realized if each firm provided only a single service. As CapAnalysis stated in its 2006 study, these efficiencies can reduce the cost of the entire mortgage transaction by (1) eliminating duplicative services elsewhere in the transaction; (2) increasing the mortgage company's quality assurance that decrease transaction costs from costly mistakes; (3) reducing advertising and marketing costs; and (4) providing efficiencies from the sharing of facilities, management, technology, and/or equipment:

> "Vertical integration may lower the provider's transaction costs related to settlement services through several means. First, it may eliminate duplicative services, such as recording applicant information once instead of several times, as would be required if a separate firm performed the settlement and real estate brokerage services. Second, it may increase the provider's quality assurance through internalized checks and balances among the integrated firms that decrease transaction costs related to costly mistakes. Such checks and balances would be much more difficult if not impossible to perform among separate firms. Third, vertical integration reduces the provider's transaction costs associated with marketing their settlement services to consumers. Several methods are available, each as a substitute for the other – advertising, use of a sales force, and referrals. Advertising, marketing and other sales efforts all have high transaction costs (high promotional expense relative to the number of sales realized) because very few consumers are in the market for settlement services at any time since the purchase of a home is very infrequent. To be cost effective, the sales effort must be targeted at home buyers. Thus, the emphasis is on entities that can identify the home buyers. These entities include real estate brokers, agents, mortgage lenders and others. Finally, affiliated business arrangements may produce 'economies of scope' or efficiencies derived from the provision of multiple services (in this case complementary services) that employ common resources, as in common facilities or the sharing of information, management, technology or equipment which would not be otherwise available. The existence of such economies and/or transaction cost savings from vertical integration my result in some of these efficiencies and/or cost savings being passed on to the consumer in the form of either price or non price benefits."[20]

HUD also has recognized the potential positive impact on mortgage credit affordability from the presence of affiliated title businesses in the mortgage marketplace:

> "[T]here is some reason to expect that referrals among affiliated firms may reduce costs to businesses and consumers. Businesses may benefit from lower marketing costs and the ability to share information on the home purchase or refinancing

[20] Affiliated Business Arrangements and Their Effects on Residential Real Estate Settlement Costs, cited *supra* at note 5, pp. 8-9.

among settlement service providers. In the long run, any cost savings should be passed on to consumers in most cases."[21]

### B. The Reduced Availability of Affiliated Title Services Would Negatively Impact the Affordability of Mortgage Credit

Economic studies have shown that the presence of affiliated businesses in the title marketplace creates additional competition that can put downward pressure on the overall cost of title services that may not surface in the direct comparisons of the costs of affiliated versus unaffiliated title services that separately have shown they are competitive in cost.

For example, the 1992 economic study by Anton Financial Economics noted the entry of affiliated title businesses in Minneapolis-St. Paul metropolitan area in the early 1980s increased competition in the title marketplace, with the number of title companies increasing significantly between 1981 and 1992.[22] Anton also researched title and closing rates in Wichita County, Kansas (the largest county in Kansas) before and after the effective date of Kansas legislation that caused real estate broker-owned title companies in the state to shut down in 1992. Anton found that the two largest unaffiliated title companies in Wichita County subsequently raised their rates 50-60% in their first filings after the legislation took effect, depending on the service offered.

Lexecon also concluded in its study that affiliated businesses create competition that positively affects the cost of mortgage credit:

> "[Even if diversified firms do not obtain lower costs for providing a package of services than do multiple, independent firms, they can still exert downward pressure on prices. By facilitating the entry and success of a larger number of firms, the ability to diversify could erode high prices that might otherwise result from a market containing only a few independent providers, or state regulations and price supports."[23]

Moreover, efficiencies are not always measured in price. As CapAnalysis stated in its 2006 study, "[l]ower transaction and/or search costs and greater certainty reduces the *effective price* a consumer pays for settlement services purchased from vertically integrated providers even if the actual dollar amount paid does not decrease."[24]

## VIII. The Exclusion of Affiliated Title Fees From the Points and Fees Threshold Would Not Undermine the Goals of Dodd-Frank or HOEPA

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[21] HUD Economic Analysis accompanying the HUD Sham Joint Venture Guidelines.

[22] Economic Issues Relating to the Title Insurance Industry in Minnesota, cited *supra* at note 8.

[23] Economic Analysis of Restrictions on Diversified Real Estate Services Providers, cited *supra* at note 6, p.3.

[24] Affiliated Business Arrangements and Their Effects on Residential Real Estate Settlement Costs, cited *supra* at note 5, 9-10.

As noted above, in adopting the 3% "points and fees" threshold in the Dodd-Frank Ability to Repay standards, Congress incorporated the definition of "points and fees" from HOEPA that was passed in 1994 as an amendment to the Truth in Lending Act (TILA).[25] This definition includes affiliated fees for title examination, premiums and similar purposes unless the charge is reasonable, the creditor receives no direct or indirect compensation in connection with the charge, and the charge is not paid to an affiliate of the creditor.[26]

RESPRO® understands that Congress included affiliated fees in the HOEPA points and fees definition out of concern that mortgage companies might attempt to circumvent HOEPA by moving fees to affiliated companies, which would reduce the possibility that a loan would be determined to be a "high cost" loan that was subject to HOEPA.

However, Federal regulators readily have the ability to determine if mortgage lenders have moved fees into affiliated title and title-related companies to circumvent HOEPA or Dodd Frank's Ability to Repay standards.

The definition of "points and fees" already requires that any charge that is not "reasonable" shall be included in the respective thresholds under HOEPA and Dodd Frank's Ability to Repay standard.[27]

There are numerous ways for federal regulators to enforce this "reasonableness" requirement for title charges. First, because RESPA prohibits a mortgage lender from requiring a consumer to use an affiliated title company[28], federal regulators can compare closing documents in which both affiliated and unaffiliated title providers are used by a mortgage lender. Second, 44 states require that title insurance rates be set by the state, approved by the state, or filed with the state, which enable federal regulators to determine if the affiliated title fees are reasonable. Of the remaining six states and the District of Columbia, two (Iowa and West Virginia) do not recognize title insurance and one state requires that the rates be posted.[29] Third, there are web sites where information can be obtained on the costs of title insurance and title searches for most, if not all, states.

## IX. Summary

Congress gave the Board the authority to revise, add to, or subtract from the criteria that define a QM under their jurisdiction upon a finding that such regulations are necessary and proper to ensure that responsible, affordable, mortgage credit remains available to

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[25] *See* Dodd Frank, Pub. L. 111–203, §§ 1411, 1412, 124 Stat. 1376, 2142-2148 (2010) (relying on the HOEPA definition of "points and fees," TILA section 103(aa)(4)), as amended by Dodd Frank, Pub. L. 111–203, § 1431(c), 124 Stat. 1376, 2159 (2010)).

[26] *See* TILA sections 103(aa)(4) and 105(e) (15 U.S.C. §§ 1602(aa)(4), 1605(e)).

[27] TILA section 103(aa)(4)(C)(i).

[28] 12 U.S.C. § 2607(c)(4))

[29] A.M. Best, Report to National Association of Insurance Commissioners (NAIC), 2006.

consumers. We believe that the failure to provide an exemption for affiliated fees for title examination, premiums, and other purposes under the 3% points and fees threshold would negatively impact mortgage affordability because it would lead to the withdrawal of affiliated mortgage or title services from many marketplaces in the country, particularly low-income and low-middle income marketplaces, which would reduce competition in those marketplaces and negatively impact the cost of mortgage credit. Since the HOEPA "points and fees" threshold that was incorporated into the Dodd-Frank Ability to Repay standards requires that fees be reasonable in order to be excluded from the threshold and since title fees are regulated in the majority of states, a regulatory exclusion for affiliated title fees would not undermine the goals of Dodd-Frank and HOEPA.[30]

We would be glad to provide you with any document referred to in our comments. Thank you for the opportunity to submit these comments on behalf of RESPRO®'s members.

Sincerely,

Susan E. Johnson

Susan E. Johnson, Esq.
Executive Director

[30] When the Board first issued its rule on loan originator compensation, it prohibited "dual compensation" of loan originators by consumers and any other party, including lenders. 75 Fed. Reg. 58,509 (Sept. 24, 2010). Because of a concern that this prohibition might be circumvented by paying fees through affiliates, the Board staff initially adopted an informal interpretation to consider affiliates of lenders and originators as a "single person" such that even if a consumer did not pay the loan originator any compensation whatsoever but merely purchased title services at a reasonable market rate from a title affiliate of the originator , it would qualify as a direct consumer fee because the title affiliate and the mortgage broker were considered one. This would mean that the mortgage broker could not receive any back-end compensation from the lender even if the consumer had not paid it any compensation for its loan and even if the compensation paid to the title affiliate was bona fide and reasonable.

RESPRO® and several other industry organizations groups wrote to the Board on February 28, 2011, pointing out the negative consequences that would result from this interpretation. As a result, Board staff reconsidered its staff interpretation and announced in a March 17, 2011 webinar that bona fide and reasonable charges paid to affiliates of lenders/originators would not in fact constitute consumer charges paid to the originator. We believe that the issues in this rulemaking proceeding under the Dodd-Frank Ability to Repay standards are similar and lead to a similar conclusion.