The enforceability of arbitration clauses in consumer and employment agreements has become a hot issue. Court challenges have focused primarily on allocation of the costs of arbitration. Indeed, the plaintiffs’ and consumer bar have achieved some successes in overcoming the enforceability of arbitration provisions on the basis that the potential costs of arbitration effectively bar plaintiffs from vindicating their rights. As a result of these cases, some lenders have chosen not to enforce arbitration clauses, despite the existence of an alternative dispute resolution (ADR) clause in their contracts. Others, however, are taking a different approach. They are offering to pay the arbitration costs, without regard to whether their arbitration clause originally provided cost allocation.

Generally, courts are willing to enforce arbitration provisions where the lenders agrees to pay all the costs, even if the provisions — as originally written — would not otherwise have been enforceable. Green Tree Financial Corp.-Alabama v. Randolph, 531 U.S. 79 (2001) is the leading case on the impact of costs on the enforceability of arbitration clauses in consumer contracts. In this case, the Supreme Court held that an arbitration agreement’s silence on the issue of costs and fees did not, alone, invalidate the agreement. Plaintiffs had challenged the enforceability of an arbitration clause in a consumer contract because the clause contained no instructions concerning the allocation of the costs of arbitration. Although the district court had granted Green Tree’s motion to compel arbitration, the Eleventh Circuit reversed. It found that the provision failed to provide “minimum guarantees” that the consumer could vindicate her rights because the agreement’s silence on the issue of arbitration costs put her at risk that she would
Arbitration Lives On (continued from page 1) be without a remedy due to “steep” arbitration costs. After the case was appealed to the Supreme Court, however, that Court found that the consumer had failed to meet her burden in the district court of presenting persuasive evidence of the costs of arbitration and her ability to pay. The Court stated:

[W]here, as here, a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs. ... The Court of Appeals therefore erred in deciding that the arbitration agreement’s silence with respect to costs and fees rendered it unenforceable.

After Green Tree, the Third Circuit Court of Appeals examined the enforceability of a clause in which the arbitration costs were to be shared equally by the employee and employer. In Blair v. Scott Specialty Gases, 283 F.3d 595, 602-603 (3d Cir. 2002), the Third Circuit rejected an employee’s argument that the mere existence of a fee-splitting provision satisfied the burden of proving the likelihood of incurring prohibitive costs. Instead, the court remanded the case for discovery regarding the plaintiff’s financial capacity and the probable costs of arbitration under the American Arbitration Association commercial dispute rules. The court also noted that the employer should be given the opportunity to take its own discovery as to the costs of arbitration or, “as has been suggested in other cases, offer to pay all of the arbitrator’s fees.” On remand, the employer offered unconditionally to pay all of the arbitrator’s fees and, as a result, the district court granted the motion to enforce arbitration. Blair v. Scott Specialty Gases, 2002 WL 1838486, No. 00CV3865 (E.D. Pa. June 11, 2002).

Blair appears to have signaled a trend, in which creditors, employers and other companies are now offering to pay the costs as part of their motions to compel arbitration of consumer disputes where the consumer has demonstrated financial need. See, e.g., Mattox v. Decision One Mortgage Co., 2002 WL 31121087, No. CIVA01-10657-GAO (D. Mass. Sept. 26, 2002) (enforcing arbitration); Fluehmann v. Associates Financial Services, 2002 WL 500564, No. CIVA0140076-NMG (D. Mass. Mar. 29, 2002) (same); Large v. Conseco Finance Servicing Corp., 299 F.3d 49 (1st Cir. 2002) (same). But see Popovich v. McDonald’s Corp., 2002 WL 449003, No. 01C6622 (N.D. Ill. Mar. 20, 2002) (on motion for reconsideration, refusing to enforce arbitration clause, even though employer offered to pay costs “to the extent that they exceed those provided for by AAA’s Consumer Rules”).

Discovery Regarding Arbitration Costs and Consumer’s Ability to Pay

The bottom line is that compelling arbitration of a consumer or employment dispute will frequently be more expensive than it used to be. Because of Green Tree and Blair, discovery at the motion stage is likely. The consumer bears the burden of persuasion to demonstrate that the costs of arbitration are “prohibitive” in light of the plaintiff’s resources. Thus, plaintiffs’ lawyers are likely to take discovery regarding the probable costs of AAA or another arbitration forum. Corporate defendants may then seek discovery regarding the consumer’s assets and income, in order to determine if the consumer can afford the arbitration costs.

Courts Are More Likely to Enforce an Arbitration Clause If the Company Offers to Pay Arbitration Expenses

Alternatively, some companies are now offering to pay all costs of arbitration. Such an offer may involve additional expenses of approximately $2,000 to $4,000 in a typical case, but will also streamline litigation costs by avoiding motion and discovery practice concerning the enforceability of the arbitration clause. (AAA recently developed its Consumer Due Process Protocol and Supplementary Rules for Consumer-Related Disputes, which provide a more streamlined, inexpensive process for dispute resolution than the AAA’s Commercial Dispute rules.) Moreover, the offer increases the likelihood that the corporate defendant will take advantage of the more efficient arbitration forum. To date, courts have been willing to enforce arbitration clauses, where the company makes the offer to pay expenses unconditionally.

Other Arbitration Obstacles

Cost of arbitration is not the only argument available to consumers seeking to bypass arbitration clauses. Other bases include arguing such clauses are effectively forced on consumers unable to negotiate their terms (adhesion contracts), and that such clauses are one sided in that they typically allow lenders access to the courts to pursue foreclosure while denying consumers court access (how else a lender could foreclose remains unexplained by such
an argument). In *Lytle v. CitiFinancial Services* (Oct. 24, 2002) the Pennsylvania Superior Court held for the latter proposition, although the court did allow the creditor to later brief the question of how else it could pursue foreclosure.

As you can see, drafting enforceable arbitration clauses has become an increasingly complex task. If we can assist in reviewing or preparing alternative dispute resolution provisions in your agreements and forms, please let us know.

**SETTLEMENT SERVICE MARKUPS UNDER RESPA**

The controversy surrounding widespread markups of home mortgage settlement fees continues to foment litigation. HUD has long opposed these types of markups. With two appellate courts having ruled on the issue, however, so far HUD’s position has yet to prevail.

Loan originators often contract with vendors to provide credit reports, document delivery services, appraisals and other services and bill the services to borrowers at a markup. HUD and some plaintiffs have contended that the practice violates Section 8(b) of RESPA, 12 U.S.C. § 2607(b). This statute prohibits accepting or receiving “any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service … other than for services actually rendered.”

HUD has always contended that these markups violated RESPA § 8(b), but neither HUD nor plaintiffs’ bar had been successful recently in convincing the appellate courts to agree with their view. Most recently, in its October 2001 Statement of Policy (2001 SOP), HUD reiterated its interpretation that Section 8(b) prohibited the practice. 66 Fed. Reg. 53,052 (2001). The 2001 SOP was a direct response to the decision in *Echeverria v. Chicago Title & Trust Co.*, 256 F.3d 623 (7th Cir. 2001), which ruled that section 8(b) is violated only when two or more parties split an overcharge for a settlement service and that no RESPA violation occurred when a mortgage company marks up the fees of a third party service provider and simply pockets the difference. In its 2001 SOP, HUD expressly disagreed with *Echeverria*. HUD’s stated position was that “Section 8(b) forbids the paying or accepting of any portion or percentage of a settlement service — including up to 100% — that is unearned, whether the entire charge is divided or split among more than one person or entity or is retained by a single person.”

Nevertheless, the one federal appellate court to rule on the issue since the 2001 SOP rejected HUD’s interpretation and chose to follow *Echeverria*. In *Boulware v. Crossland Mortgage Corp.*, 291 F.3d 261 (4th Cir. 2002), the federal government filed an amicus brief in support of a Maryland homeowner who challenged a $65 credit report fee assessed at settlement. She contended that Crossland had paid only $15 for the report and that the $50 markup violated RESPA § 8(b). The Fourth Circuit, however, interpreted the statute as prohibiting only a split or kickback of the overcharge, not a situation where the provider merely keeps the overcharge for itself. Thus, the court ruled, even if Crossland had pocketed the $50 markup, its actions did not violate RESPA:

The plain language of § 8(b) makes clear that it does not apply to every overcharge for a real estate settlement service and that § 8(b) is not a broad price-control provision. ... By using the language “portion, split, or percentage,” Congress was clearly aiming at a sharing relationship rather than a unilateral overcharge.

Since there was not kickback or split between Crossland and the credit reporting service, the Court ruled, there was no violation. Moreover, the *Boulware* court rejected the 2001 SOP’s interpretation. It found that the 2001 SOP — in attempting to prohibit such markups — exceeded the mandate of RESPA. The court stated, “Deference might well be due … HUD’s statement of policy if § 8(b) were ambiguous. But the text of the statute controls in this case.”

Notwithstanding the decisions in two federal circuit courts, a determined HUD is now trying again to enforce its view. The latest challenge, *Haug v. Bank of America*, is, as this newsletter goes to print, now pending before the Eight Circuit Court of Appeals, which granted an interlocutory appeal from the district court’s decision denying Bank of America’s motion to dismiss a RESPA § 8(b) claim relating to alleged markups of fees for a credit report, appraisal and document delivery services. HUD again has filed an *amicus* brief arguing that the 2001 SOP controls. The government’s brief argues that Section 8(b) is ambiguous and, therefore, the court should defer to the agency’s official interpretation, as set forth in the 2001 SOP. The case is scheduled for argument in November 2002. Stay tuned.
IS YIELD SPREAD PREMIUM LITIGATION OVER?

Although litigation over RESPA § 8(b) may be on the rise (see article above), the spate of class action cases alleging the yield spread premiums violate RESPA § 8(a) may finally be over. In *Heimmermann v. First Union Mortgage Corp.*, 305 F.3d 1257 (11th Cir. 2002), the court expressly overturned its previous *Culpepper III* decision, which favored class certification of yield spread cases. In doing so, the court relied upon HUD’s 2001 SOP, in which HUD rejected the foundation of the *Culpepper* decision and stated that a yield spread premium cannot be presumed to be a “referral fee based solely on the fact that the lender pays the broker a yield spread premium that is based upon a rate sheet, or because the lender does not have specific knowledge of what services the broker has performed.” (quoting the 2001 SOP). The Eleventh Circuit had been the only appellate court to favor class certification of yield spread cases and the *Heimmermann* decision came soon after two other federal circuit courts had similarly rejected class certification in yield spread premium cases. See *Schuetz v. Banc One Mortgage Corp.*, 292 F.3d 1004 (9th Cir. 2002) and *Glover v. Standard Federal Bank*, 283 F.3d 953 (Eighth Circuit 2002). The plaintiffs’ bar may be forced back to the books to find new grounds to sue consumer creditors.

MORTGAGE SERVICERS MAY SEE FDCPA RELIEF

The United States House of Representatives on October 7, 2002 passed H.R. 163, the Mortgage Servicing Clarification Act. This bipartisan legislation, introduced by Rep. Ed Royce (R-CA) and others, is intended to fix a problem in the mortgage servicing industry which has hampered the ability of the industry to serve its clients effectively and to conduct its business efficiently. Under current law, when a mortgage servicing company acquires the rights to service a portfolio of home loans, it is exempt from the strictures of the Fair Debt Collection Practices Act (FDCPA) if the loans are not in default.

However, in the typical loan servicing portfolio transfer, a small percentage of the loans acquired by a new servicer may be deemed delinquent or technically in default at the time of transfer. The FDCPA does not define the term “in default,” and whether a debt is in default is generally controlled by the terms of the contract creating the indebtedness and applicable state or federal law. See, e.g., FTC Staff Opinion Letter dated May 23, 2002 (“*de Mayo II*”); *Sherry v. Mass. Higher Educ. Ass’t Corp.*, 73 F. Supp. 2d 47, 53-54 (D. Mass. 1999) (applying definition of “default” in Federal Family Education Loan Program regulations to construe Section 803(6)(F)(iii)); *Jones v. InTuition, Inc.*, 12 F. Supp. 2d 775, 779 (W.D. Tenn. 1998) (same).

These loans are currently treated by the law as being subject to the FDCPA; and subsequently the new servicers of these loans are required to provide certain form notices, commonly known as “Miranda” warnings, to borrowers. Specifically, section 807(11) of the FDCPA requires third party debt collectors to provide such a warning upon initial contact with a debtor, and a shorter “mini-Miranda” in all subsequent contacts (both written and oral). The Miranda notices require the collector to identify itself as a “debt collector,” and to disclose that the contact represents an attempt to collect a debt and that any information will be used for that purpose and provide other information.

Quite recently, the United States District Court for the Northern District of Illinois concluded that because a routine monthly statement included a statement of “past-due installments,” the mini-Miranda warning was required because the communication was one “in connection with the collection of a debt,” and thus triggered the FDCPA mini-Miranda warning requirement (2002 WL 31307540 (N.D. Ill.)).

The purpose of these cookie-cutter warnings is to prevent unscrupulous debt collectors from using false or misleading tactics, such as a phony winning sweepstakes claim, to trick consumers into divulging private financial information or personal details like their home address or their home phone number. However, in the context of a mortgage servicing transfer, these Miranda notices are detrimental to consumers, unnecessary and inefficient for mortgage servicers’ operations.

For example, the notice misleads the borrower about the nature of the relationship between him or her and the new servicer. Unlike true debt collectors, mortgage servicers have a long-term relationship with their client, and these harshly worded notices often have the effect of discouraging a borrower who is slightly late on a mortgage payment from contacting their new servicer for fear that the servicer is a true third-party debt collector. This
ends up frustrating the servicer’s efforts to work with delinquent borrowers on developing strategies to bring their loans current and keep their credit ratings intact. A mortgage servicer’s biggest hurdle in helping delinquent borrowers to help themselves is getting them on the phone, and these threatening Miranda notices only contribute to that unnecessary fear without doing anything to help the borrower. Additionally, the information protected by the Miranda notice is information already in the servicer’s possession, so nothing new is truly protected by requiring these additional legalistic and threatening notices be provided.

Mortgage servicers typically send these Miranda notices along with a new customer’s “welcome” letter as required by the Real Estate Settlement Procedures Act, and this letter also includes important consumer information about the new servicer and the borrower’s monthly payment arrangements. This preliminary contact is the first opportunity that a servicer has to create a positive relationship with a new client, and the harsh language in the Miranda warning can create animosity between the servicer and the borrower where none need exist.

Finally, because the mini-Miranda is required in all subsequent contacts, it can continue for decades, even after customers bring their loans current and keep them current for years. H.R. 163 resolves this problem by creating a narrow exemption from Miranda notices for the servicers of federally related first lien mortgages whose primary function is servicing current loans, not collecting third-party debts. It exempts these servicers only from the Miranda notices, leaving all other borrower protections required by the FDCPA in place.

The House-passed legislation is consistent with previous recommendations by the Federal Trade Commission to apply FDCPA protections based on the “nature of the overall business conducted by the party to be exempted rather than the status of individual obligations when the party obtained them.” (See, Annual Report: Fair Debt Collection Practices Act, March 2001. H.R. 163 is even narrower than the FTC recommendation, exempting mortgage servicers only from the Miranda notices required by section 807(11) of the Act. All other substantive borrower protections provided by the FDCPA would remain in full force.

Blank Rome’s Washington office has been instrumental in advancing this legislation through Congress.

**HMDA EXPANSION**

The Board of Governors of the Federal Reserve Systems promulgated revisions to vastly expand the scope of data collection required under Regulation C, 12 C.F.R. Part 203, which implements the Home Mortgage Disclosure Act, 12 U.S.C. §§ 2801 et seq. (HMDA). The final rule is effective in two stages; some amendments are effective January 1, 2003, while the remainder of the amendments become effective January 1, 2004.

HMDA and Regulation C require that certain lenders collect and report consumer mortgage loan data to federal supervisory agencies. Below is a summary of several significant revisions to Regulation C.

The following revisions are effective January 1, 2003:

**2000 Census**

The use of the 2000 census in certain reporting requirements rather than the 1990 census is required as of January 1, 2003.

**Telephone Applications**

Lenders are required to ask for an applicant’s ethnicity, race and sex in connection with applications made over the telephone. This revision conforms telephone application requirements with mail and internet application requirements already in place.

The following revisions are effective January 1, 2004:

**Expanded Coverage of Non-depository Lenders**

The final rule applies to mortgage lending institutions that originate or refinance home purchase loans that equal at least 10% of their loan origination volume or originated or refinanced home purchase loans that equal at least $25 million. This expands the universe of non-depository institutions subject to HMDA by including lenders that originate a significant number of reportable loans but which are also heavily engaged in other types of lending which, under the previous rule, made them exempt from HMDA reporting.

**Pricing Data**

Starting January 1, 2004, lenders will be required to report loans based on certain rate thresholds. Lenders must report the difference between the loan’s APR and the yield on Treasury securities having comparable periods of maturity, if that difference is greater than or equal to 3 percentage points for first lien loans or 5 percentage points for junior lien loans.

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CONSUMER LENDING/RETAIL BANKING UPDATE

Lien Status
Lenders must report whether a loan is a first lien loan or a subordinate lien loan. This requirement applies to applications and originations but not to loans that are purchased.

Revised Definition of “Home Improvement Loan”
The final rule eliminates the requirement that lenders classify home improvement loans as such to fall within HMDA coverage. If the purpose is home improvement, it must be so reported.

Revised Definition of Refinancing
The term “refinancing” is redefined to include a simpler test for determining whether such a loan is subject to HMDA reporting. Under the final rule lenders must report any refinancing in which both the existing and new obligations are secured by dwellings.

Revised Definition of Application to Include Pre-approvals
The term “application” has been expanded to include certain requests for pre-approvals of home purchase loans, thereby requiring lenders to report certain pre-approval program applications. Requests for pre-approvals are included in this definition if the lender issues a written commitment to extend a home purchase loan up to a certain amount. Under pre-2004 rules, many pre-approvals did not trigger HMDA reporting.

Manufactured Homes
Lenders are required to report loans involving manufactured homes.

Counteroffers
A comment to the final rule clarifies that a lender must report a denial on the original terms requested by an applicant when the lender makes a counteroffer and the applicant does not accept the counteroffer or fails to respond.

Loans Subject to HOEPA
Lenders will be required to note whether a loan originated or purchased is subject to the Home Ownership and Equity Protection Act (HOEPA), as implemented by Section 32 of Regulation Z.

These new data collection and increased reporting obligations will require lenders to make significant changes in data collection systems, provide additional training to employees and incur substantial costs in attempting to comply with the final rule.

If you would like additional information on how to comply with the Regulation C revisions, please contact us.

RESPA REFORM: HUD’S PROPOSED RULE

On October 28, 2002, the Department of Housing and Urban Development (HUD) closed the public comment period on its recently published proposed rule calling for substantial revisions to Regulation X to the Real Estate Settlement Procedures Act (RESPA). The proposed rule applies to first and second lien transactions, purchase money loans, and refinances.

HUD issued the Proposed Rule with the stated goals of simplifying and improving the process of obtaining home mortgages and reducing settlement costs for customers. Many, however, question whether these goals will be met with the proposal. If adopted as proposed, the revisions would:

1. Address the issue of mortgage broker compensation by changing the way in which lender payments in brokered mortgage transactions are recorded and reported to borrowers;
2. Significantly change HUD’s Good Faith Estimate (GFE) settlement cost disclosure to make the GFE firmer and preclude unexpected charges to borrowers at settlement; and
3. Allow guaranteed price packages of settlement services and mortgages to be made available to borrowers.

Mortgage Broker Compensation
The proposed rule would change the way in which mortgage broker compensation is reported. The proposed rule reiterates that in all loans originated by mortgage brokers, any payments based upon an above par interest rate on the loan — payments commonly called “yield spread premiums”, be reported on the Good Faith Estimate and the HUD-1/1A Settlement Statement as a lender payment to the borrower.

Additionally, in brokered loans, any borrower payments to reduce the interest rate, e.g., discount points, must be tied directly to the actual rate reduction by the lender, and be reported on the GFE and HUD-1/1A as borrower payments to the lender.
These changes would require mortgage brokers to disclose, at the outset, the maximum amount of compensation they could receive from a transaction. Mortgage brokers would be unable to increase their compensation without the borrower’s knowledge, either by placing the borrower in an above par loan, and receiving a payment from the lender (yield spread premiums), or by retaining any part of any borrower payment intended to reduce the loan rate (discount points).

**Good Faith Estimate**

The proposed rule would change the existing RESPA disclosure scheme by establishing that the following be contained in the GFE:

1. An interest rate quote in the form of the mortgage loan’s note rate and APR, and notification of any prepayment penalties;
2. disclosure of subtotals of major categories of settlement costs (including, for example, loan origination costs and title services); and
3. a breakdown of lender and broker origination charges, title insurance and title agent charges, and identification of lender required and selected services and those third party services that can be shopped for elsewhere by the borrower.

The proposed rule would further change the existing disclosure scheme by:

1. Clarifying that certain prequalification applications trigger the requirement to provide a GFE;
2. limiting fees paid by borrowers for the GFE, if any, to the amounts necessary to provide the GFE itself and exclude amounts used to defray later appraisal or underwriting charges, in order to facilitate shopping with GFEs;
3. locking in loan originators to the amounts reported on the GFE for their total compensation, lender required and selected third party services, and government charges through settlement (absent unforeseeable and extraordinary circumstances);
4. requiring that loan originators comply with upper limits or “tolerances” for certain major settlement charge categories so they do not exceed those stated on the GFE by more than 10%; and
5. clarifying that loan originators can make arrangements with third party settlement service providers to lower prices for their customers, provided that these prices and any charges are reflected accurately on the GFE and are not “marked up” or “up charged.”

Under the proposed rule, the GFE estimates would be valid for a minimum of 30 days from when the document is delivered or mailed to the borrower. Many in the industry have raised concerns over the new GFE. Among the concerns is that it will be very difficult, if not completely unworkable, to require an originator to guarantee the rate and costs for a potential (offered but not yet accepted) loan for 30 days.

**Guaranteed Mortgage Package Safe Harbor**

The proposed rule would allow packages of settlement services, which would include mortgage loans, to be made available to borrowers. HUD believes these transactions would be simpler and more transparent for borrowers, and would foster competition to further reduce the costs of settlement services. Again, many differ with HUD in this result.

To accomplish this objective, HUD would establish a safe harbor under RESPA for “Guaranteed Mortgage Package” (GMP) transactions. Any entity (a lender, broker, other settlement service provider, or other entity, referred to as a “packager”) would qualify for the safe harbor from Section 8 of RESPA as long as it offered a GMP. The packager would be required to offer the GMP to a borrower following his or her submission of application information, but before the borrower's payment of any fee to the packager. Under the proposed rule, the GMP would be required to include:

1. A guaranteed package price for a comprehensive package of loan origination and various other settlement services required by the lender to close the mortgage (e.g. application, origination and underwriting services, the appraisal, pest inspection, flood review, title services and insurance, and any other lender required services except hazard insurance, per diem interest, and escrow deposits);
2. a mortgage loan with an interest rate guarantee, subject to change (prior to borrower lock-in) only pursuant to market changes evident from an observable and verifiable index or based on other appropriate data or means to ensure the guarantee; and

3. a contract offer in the form of a Guaranteed Mortgage Package Agreement (“GMPA”) to guarantee the price for settlement services and the mortgage interest rate through settlement, if the borrower accepts the offer.

The GMPA would describe the package as “including all services required by the lender to close the mortgage” but would not itemize the fees for the specific services to be provided. The packager would, however, be required to inform the borrower if certain non-loan settlement services are anticipated to be excluded from the package, specifically lender’s title insurance, pest inspections, and a property appraisal. Additionally, if the packager anticipated obtaining a pest inspection, appraisal, or credit report, the packager would be required to disclose that information in the GMPA. Packagers would provide the GMPA in lieu of a GFE. The HUD-1 would list the services ultimately provided, but not the charges for specific services.

The safe harbor from Section 8 of RESPA permitted for GMP transactions would permit the packager to charge for services within the package and would permit payments and volume pricing arrangements between settlement service providers participating in the package. Section 8 would, however, continue to prohibit any payments for the mere referral of business, kickbacks, splits of fees and unearned fees between the packager and any of the entities participating in the package and others.

In order for packagers to qualify for the safe harbor, packagers would be required to offer the GMP within 3 days of the borrower’s application and without an upfront fee. The GMP offer would remain open as an offer for a minimum of 30 days from when the document is delivered or mailed to the borrower. The GMPA would become a binding contractual commitment immediately upon borrower acceptance of the package and payment of a minimal engagement fee, subject only to limited final underwriting and property appraisal. Many have raised concerns that packagers under the proposed rule must guarantee the rate and costs for 30 days, problematic because rates and costs can change daily. In addition, some costs may not be predictable at the time of the initial disclosure.

The safe harbor proposed would be available only when the transaction does not result in a high cost loan as defined in the Home Ownership Equity Protection Act/ Regulation Z, Section 32. The safe harbor also will not be available to mortgages that exceed certain other limits, which HUD would need to identify in its final rulemaking.

The proposed rule in its current form would have a significant impact on the residential mortgage lending industry. HUD received tens of thousands of written comments to the proposal. Critical letters were received from virtually every segment of the residential lending industry, including realtors, lenders, brokers, credit bureaus, title companies and others. HUD is now expected to issue either a revised proposed rule or, as many believe, a final rule, with substantial revisions to the July 29 proposal. Whether it issues a revised proposal or a final rule, HUD, by law, must address the concerns raised in those comment letters.

If we can assist you in understanding how this proposal will affect your business, please contact us.