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October 29, 2009

Ms. Marjorie E. Gross
Deputy Superintendent of Banks and Counsel
New York State Banking Department
One State Street
New York, NY 10004-1511

RE: **RESPA Changes**

Dear Ms. Gross:

In light of changes to the Real Estate Settlement Procedures Act (RESPA) which go into effect on January 1, 2010, the New York Bankers Association (NYBA) is seeking clarification from the New York State Banking Department (Department), regarding the interplay with, and impact such changes to RESPA may have on New York State Banking Law. NYBA is comprised of the commercial banks and thrift institutions that do business in New York State, employing almost 300,000 New Yorkers and having assets in excess of \$9 trillion.

Pursuant to New York law, no lender fees, other than an application fee and/or lock-in fee, can be collected from an applicant prior to the acceptance by the applicant of a commitment. If an applicant accepts a commitment, the lender can then collect a commitment fee or "points". "Points" are defined to include, among other things, "origination fees" that are a percentage of the loan amount.

The amount of the application fee must be disclosed in writing prior to the collecting of any fee. Further, the application fee must be denominated as such and must be reasonably related to the services to be performed on behalf of the applicant. The foregoing disclosure requirements can be satisfied in one or more documents, including any form used to comply with applicable federal law or regulations.

After January 1, 2010, RESPA will require all lender-retained fees, other than points, to be disclosed on the GFE and HUD-1 on one line item entitled

“Origination Charge.” Since New York law permits collecting an Origination Charge at closing, there appears to be no prohibition against disclosing an Origination Charge on the revised GFE/HUD-1 and collecting the Origination Charge at closing. However, pursuant to New York law, no Origination Charge can be collected prior to closing.

Therefore, an unintended consequence of the federal law changes could be that no lender-retained fees could be charged to the consumer prior to commitment (points could be collected between commitment and closing.) New York regulations allow the lender to charge and retain an application fee prior to commitment and require that the application fee “be denominated as such.” Yet, the upcoming changes to federal law will require all lender-retained fees to be lumped together and disclosed to the consumer as an “Origination Charge.”

We believe that the federal law changes are designed for a simpler presentation of information about the costs associated with loan origination, but are not intended to effect a substantive change in the nature or character of individual fees. As such, we would appreciate confirmation from the Department that the federally-required inclusion of the application fee on the GFE and HUD-1 line item entitled “Origination Charge” (perhaps along with other lender-retained charges) does not change the character of the fee such that it would no longer be permissible to charge it prior to commitment under 3 NYCRR 38.3(b)(1)(i). Clarification that an application fee may be charged to the consumer prior to commitment pursuant to 3 NYCRR 38.3(b), notwithstanding the fact that federal law will require the same fees to be disclosed as an “Origination Charge” on the GFE and HUD-1, will help State lenders prepare for the upcoming changes and help to ward off consumer confusion and even litigation, based on allegations of impermissible fees charged in connection with the closing of a residential mortgage loan. We also believe it would be extremely helpful if the Department could develop a separate disclosure of the application fee, since State law requires these fees be disclosed using that nomenclature, while federal law will soon require that they be disclosed under another name.

We would also appreciate confirmation from the Department that this same analysis applies to collecting a rate lock fee and/or commitment fee after January 1, 2010.

Thank you for your assistance in this matter. If you would like to discuss it further, please do not hesitate to call me at (212) 297-1684, or you can call Bill Bosies at (212) 297-1664.

Sincerely,

Handwritten signature of Roberta Kotkin in blue ink.

Roberta Kotkin