A PROCLAMATION

CONCERNING THE NEW TERM "COMPENSABLE SERVICES FEE" TO DESCRIBE COMPENSATION EARNED BY MORTGAGE BROKERS IN RESIDENTIAL MORTGAGE LOAN TRANSACTIONS[13]

KNOW ALL PERSONS BY THESE PRESENTS:

WHEREAS, the mortgage broker provides goods or facilities that are actually furnished or services actually performed for the compensation paid;[14] and,

WHEREAS, those payments are reasonably related to the value of the goods or facilities actually furnished or services that are actually performed;[15] and,

WHEREAS, the Department of Housing and Urban Development has identified the following "compensable services" that are normally performed by the mortgage broker in the origination of a loan:[16]

- Taking information from the borrower and filling out the application
- Analyzing the prospective borrower's income and debt and pre-qualifying the prospective borrower to determine the maximum mortgage that the prospective borrower can afford
- Educating the prospective borrower in the home buying and financing process, advising the borrower about the different types of loan products available, and demonstrating how closing costs and monthly payments could vary under each product
- Collecting financial information (tax returns, bank statements) and other related documents that are part of the application process
- Initiating/ordering VOEs (verifications of employment) and VODs (verifications of deposit)
- Initiating/ordering requests for mortgage and other loan verifications
- Initiating/ordering appraisals
- Initiating/ordering inspections or engineering reports
- Providing disclosures (Truth-in-Lending, Good Faith Estimate, others) to the borrower
- Assisting the borrower in understanding and clearing credit problems
- Maintaining regular contact with the borrower, realtors, lender, between application and closing to appraise them of the status of the application and gather any additional information as needed
- Ordering legal documents
- Determining whether the property was located in a flood zone or ordering such service
- Participating in the loan closing; and,

WHEREAS, the aforementioned "compensable services" are not limited to even those services indicated;[17] and,

WHEREAS, the Yield Spread Premium is an indirect fee paid by consumers to mortgage brokers "based upon the interest rate of each loan" entered into by the mortgage broker;[18] and,

WHEREAS, some or all of the Yield Spread Premium is a payment for compensable services;[19] and,

WHEREAS, lender payments of the Yield Spread Premium to mortgage brokers may reduce the upfront costs to consumers;[20] and,

WHEREAS, the Yield Spread Premium has been effectively legislated out of existence;[21] and,

WHEREAS, the law now prohibits a mortgage broker from receiving compensation, such as a Yield Spread Premium, based on the terms of the mortgage loan;[22] and,

WHEREAS, the law now also effectively prevents the mortgage broker from receiving compensation from other sources if such compensation is being otherwise received, directly or indirectly, from the consumer;[23] and,

WHEREAS, a credit to the consumer has been legislated into existence to replace that part of the Yield Spread Premium that pertains to compensable services;[24] and,

WHEREAS, the particular credit to the consumer which pertains to compensable services is and by rights always ought to be understood as a fee paid for compensable services rendered by the mortgage broker;[25] and,

WHEREAS, the aforementioned credit is to be used for payment of all or a portion of the Yield Spread Premium or any other premium payable by the lender to the mortgage broker;[26]

NOW, THEREFORE, BE IT RESOLVED that, henceforth, mortgage brokers shall refer to that part of the credit to the consumer which pertains to compensable services as the **COMPENSABLE SERVICES FEE** (or CSF);[27] and,

BE IT FURTHER RESOLVED, that the term **COMPENSABLE SERVICES FEE** may be used for normal educational and promotional purposes by mortgage brokers who arrange residential mortgage loans for consumers, where such use of the term COMPENSABLE SERVICES FEE is lawfully permitted for normal educational and promotional purposes.

IN WITNESS WHEREOF, I have set my hand and caused this **PROCLAMATION** to become declared throughout all the land, on the day of its publication in the month of September 2010.

Jonathan Foxx
In Cuius Rei Testimonium

"Yield Spread Premium" is Gone!

A Proclamation declares a new term

BY JONATHAN FOXX

Now that the yield spread premium (YSP) has gone the way of nature, and a credit has taken its place, perhaps it's time to make sure that the public understands that the credit, in whole or in part, provides payment for goods and services that the mortgage broker has actually rendered.[1]

The new Good Faith Estimate (GFE), which became effective Jan. 1, 2010, reflects the change from YSP to credit. Back in November 2008, when the U S Department of Housing & Urban Development (HUD) evaluated the responses of consumer protection advocates to using a credit, several organizations asserted that "to describe lender-paid broker compensation as a credit to reduce settlement costs is misleading."[2] For example, some maintained that "there is no requirement that the lender payment will actually be used in this manner;"[3] while others stated that the proposed language "presumes a trade off through a reduction in upfront costs, and research shows that this does not occur, except in limited circumstances." In other words, public comments opined that the "characterization of the YSP as a 'credit' only exacerbates the issue of the nonexistent trade off."[4]

Industry responses to HUD varied, but were generally consistent with respect to opposing the credit. For instance, some took the position that "neither the proposed GFE, nor the proposed HUD-1, can accommodate a lender's compensation payment to the broker based on the loan amount, or based on a flat dollar amount."[5] This view held that if a lender were "to pay broker compensation that is not tied to the interest rate, there would be no way to disclose the payment without artificially inflating the charges paid by the borrower;"[6] while others stated that, among other things, if a broker intends "to rely primarily on the lender for compensation, the dollar-for-dollar offset of the YSP against other service charges will necessitate that the broker increase the disclosed consumer paid fees."[7]

In support of its position, HUD reaffirmed the view in its Policy Statement 2001-1, in which it "made clear that earlier disclosure and the entry of YSPs as credits to borrowers would 'offer greater assurance that lender payments to mortgage brokers serve borrowers' best interests.' (See 66 FR 53056.)"[8] Furthermore, HUD asserted that the revised GFE was "the result of an iterative testing process, comprised of six rounds of consumer testing of the form during the period 2003 through 2007,"[9] and it concluded that consumers were not confused by this new GFE.

The YSP is "applied as a credit to the borrower" on the GFE.[10] A "credit for the interest rate chosen (sometimes known as 'yield spread premium' or YSP)" is stated on the GFE in such a way that it contains the mortgage broker's compensation for the loan plus any lender fees for origination (except for any charge for the specific interest rate chosen)."[11] The mortgage broker's compensation on the new GFE is contained in the Origination Charge.[12] Lenders pay the credit and, of course, they are the ones that charge the discount points.

But does the applicant actually know what the credit actually pays? Because the YSP is effectively gone from disclosure and the credit is to be used to partially or fully pay for the mortgage broker's services, a new term should be used to assure the public of the unique purpose of that credit, with respect to the goods and services actually provided by the mortgage broker. Consequently, I would like to offer a new term to the industry to help assure the public's positive perception of the critical role played by mortgage brokers.

Hence, the following Proclamation!

Please be advised that this Proclamation is a work of fiction and is not an official document, doctrine, position or view of any governmental agency, employee of a governmental agency or mortgage industry association. This is my declaration of a way to improve communication between applicants for residential mortgage loans and mortgage brokers with respect to the latter's compensation, as well as to show the important role the mortgage broker plays in arranging residential mortgage loans for applicants. Although I believe there is substantial regulatory foundation on which to base the use of the new term stated in the Proclamation for educational and promotional purposes, please note that information and suggestions contained herein are not intended to be and are not a source of legal advice. Please be sure to consult a competent residential mortgage compliance professional in advance before using the new term in educational and promotional venues.

Jonathan Foxx, former chief compliance officer for two of the country's top publicly-traded residential mortgage loan originators, is the president and managing director of Lenders Compliance Group, a mortgage risk management firm devoted to providing regulatory compliance advice and counsel to the mortgage industry. He may be contacted at (516) 442-3456 or by e-mail at jfoxx@lenderscompliancegroup.com.

Footnotes

1—In a series of articles in this publication, I endeavored to show the necessary and positive role played by the Yield Spread Premium in residential mortgage originations. I argued that it was not a "kickback," as some media and politicians claimed, when legitimately used in accordance with guidelines set forth by the U S Department of Housing & Urban Development. For further reading, the series can be found as follows:

- Foxx, Jonathan, Yield Spread Premiums, Compensation or Kickback?, *National Mortgage Professional Magazine*, June 2009, Volume 1, Issue 2, pp. 18-20.
- Foxx, Jonathan, Saving the Yield Spread Premium, *National Mortgage Professional Magazine*, July 2009, Volume 1, Issue 3, pp. 26-28.
- Foxx, Jonathan, Service Release Premium Versus Yield Spread Premium: Match or Mismatch?, *National Mortgage Professional Magazine*, August 2009, Volume 1, Issue 4, pp. 34-35.

2—Real Estate Settlement Procedures Act (RESPA): Rule To Simplify and Improve the Process of Obtaining Mortgages and Reduce Consumer Settlement Costs, Final Rule, Federal Register, Volume 73, No. 222, 11/17/08, pp. 68223-68288 ("Consumer Representatives").

3—Ibid.

4—Ibid.

5—Ibid.

6—Ibid.

7—Ibid.

8—Ibid. p 68225 ("HUD Determination").

9—Ibid. p 68225.

10—New RESPA Rule FAQs, Section: GFE Block 2, Q&A # 7, 04/02/10.

11—Ibid. Section: GFE Block 1, Q&A # 1. Also, the amount shown in Block 1 "may contain all or some of the credit for the interest rate chosen."

12—Ibid. Q&A # 9: "Block 1, 'Our origination charge' on the GFE contains all charges for origination services performed by or on behalf of a lender and/or a mortgage broker. Origination services includes, but is not limited to, the following: taking of the loan application, loan processing, underwriting of the loan, funding of the loan, acting as an intermediary between a borrower and lender, obtaining verifications and appraisals, and any processing and administrative services required to perform these functions.

13—I want to thank Joel Berman, publisher of *National Mortgage Professional Magazine*, for mentioning to me the need to have the nugatory Yield Spread Premium replaced with a term that may more precisely reflect its purpose, where it is used in whole or in part to compensate the mortgage broker. However, I am solely responsible for creating the new terminology that I have advocated (and its context).

14—24 CFR Part 3500, RESPA Statement of Policy 2001-1: Clarification of Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, and Guidance Concerning Unearned Fees Under Section 8(b).

15—Ibid.

16—24 CFR Part 3500, RESPA Statement of Policy 1999-1: Regarding Lender Payments to Mortgage Brokers; Final Rule.

17—Ibid.

18—Ibid.

19—Ibid.

20—Ibid.

21—HR 4173: Dodd-Frank Wall Street Reform and Consumer Protection Act, 111th Congress (2009-2010), Title XIV, inter alia, § 1403 (Prohibition on Steering Incentives).

22—A consumer may finance origination fees or costs, as long as the fees or costs do not vary based on loan terms or the consumer's decision to finance such fees, providing this financing takes place at the consumer's option and solely through principal or rate. Also allowed are "incentive payments" to the MLO based on the number of loans originated within a specified period of time. See Second Summary of Mortgage Related Provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act (HR 4173), 07/13/10, Mortgage Bankers Association.

23—See Foxx, Jonathan, Landmark Financial Legislation: New Rules for Mortgage Originators–Part I: Reformation and Regulations, August 2010, Volume 2, Issue 8, pp. 28-42. And, inter alia, Op.cit. 21, § 1403.

24—See 24 CFR Parts 203 and 3500, Real Estate Settlement Procedures Act (RESPA): Rule To Simplify and Improve the Process of Obtaining Mortgages and Reduce Consumer Settlement Costs; Final Rule, Federal Register/Vol. 73, No. 222/Monday, Nov. 17, 2008, pp. 68204-68288. Also: Op. cit. 21.

25—In my article, published in July 2009, I suggested that there was a way the consumer (and, therefore, market forces) could have the ability to set a fair market standard for compensation payments that are "reasonably related to the value of the services actually furnished and performed." That could be done simply by crediting the YSP directly to the borrower. As I wrote: "The borrower would then have the choice to use the YSP in accordance with the borrower's own interests. Once the borrower specifically authorizes how the YSP is to be used, a standard of "reasonableness" would be established. Market forces will respond accordingly, as borrowers agree to the utilization of the YSP. Placing the control of the YSP into the hands of the borrower and letting its use be determined by the borrower will protect the borrower and provide a true 'safe harbor.'" See: Foxx, Jonathan, Saving the Yield Spread Premium, National Mortgage Professional Magazine, July 2009, Volume 1, Issue 3, pp. 26-28.

26—Op. cit.21.

27—The new term may be referred to as the "Compensable Services Fee" or by its acronym, "CSF."