CONSUMER BANKERS ASSOCIATION

The Voice of the Retail Banking Industry

February 25, 2013

Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552

Re: Docket No. CFPB-2013-0002 – Proposed Amendments to the Ability-to-Repay Standards under the Truth in Lending Act (Regulation Z)

Dear Ms. Jackson:

The Consumer Bankers Association (CBA)[1] appreciates the opportunity to submit comments in response to the proposal issued in conjunction with the January 10, 2013 ability-to-repay/qualified mortgage (QM) final rules (the Proposal). The Proposal includes a request for comment on additional clarifications regarding the inclusion of loan originator compensation within the 3 percent lender points and fees limit in the QM definition. The Proposal also outlines exemptions for certain nonprofit creditors and homeownership stabilization programs and an additional category of QM loans that would include loans made by small lenders that are held in portfolio.

The comments in this letter are limited to the changes outlined in the Proposal. We are continuing our review of the other aspects of the QM final rules issued last month and, through this process, will identify other issues of concern that we will bring to the attention of the Consumer Financial Protection Bureau (CFPB or Bureau), in coordination with the CFPB's recently announced implementation process.

Summary of CBA's Comments

- In an earlier comment letter, CBA opposed the inclusion of loan originator compensation within the 3 percent lender points and fees limit that would apply to QM loans. We support the flexibility included in the Proposal to eliminate the double counting that would occur when lenders compensate loan originators with funds collected from consumers. We also continue to urge the CFPB to resolve other

[1] The Consumer Bankers Association ("CBA") is the trade association for today's leaders in retail banking - banking services geared toward consumers and small businesses. The nation's largest financial institutions, as well as many regional banks, are CBA corporate members, collectively holding two-thirds of the industry's total assets. CBA's mission is to preserve and promote the retail banking industry as it strives to fulfill the financial needs of the American consumer and small business.

issues with regard to the points and fees limit, such as the elimination of the distinction between affiliate and non-affiliate fees.

- CBA does not support the new QM category for small lenders. The same QM criteria should apply to lenders of all sizes, as a differentiation based on the size of the lender would be of no benefit to consumers.
- CBA supports the proposed exemption for various government loan programs, but would appreciate clarification as to which programs would qualify. We also urge the CFPB expand this exemption to include other types of loan modification and refinancing programs that would benefit borrowers.

Discussion

Proposed Changes with Regard to Loan Originator Compensation

As outlined in our comment letter in response to the Federal Reserve Board's (FRB's) ability-to-repay/QM proposal, dated July 22, 2011, CBA opposed the inclusion of loan originator compensation within the 3 percent lender points and fees limit, as we believe the inclusion of this amount is unrelated to the consumer's ability to repay a mortgage loan. We also believe including this amount within the tight 3 percent limit for points and fees may have the effect of excluding more loans from QM loans without regard to the purpose of the QM rule, which is to ensure that consumers have the ability to repay the loan. In the 2011 proposal, the FRB acknowledged that including loan originator compensation within the 3 percent points and fees limit raises complex issues, and it is clear the CFPB recognizes these difficulties.

Under the final rule issued on January 10, 2013, loan originator compensation will be included within the 3 percent lender points and fees limit under the QM definition. This includes all such compensation paid directly or indirectly by a consumer or lender that can be attributed to the transaction at the time the interest rate is set.

Throughout the rulemaking process, the industry expressed concerns with the inclusion of loan originator compensation within this points and fees test. We are concerned this results in "double counting," because lenders often compensate loan originators with funds collected from consumers at the time of the loan consummation. Up-front charges collected by the creditor from consumers should not be counted a second time toward this points and fees limit when the funds are passed on to a loan originator.

In recognition of this problem, the CFPB has proposed the following:

- A payment from a consumer to a mortgage broker need not be counted toward the points and fees limit twice if it is both part of the finance charge and the loan originator compensation;

- Payments by a mortgage broker to its individual loan originator employee would not need to be counted towards the points and fees limit; and
- One of the following alternatives:
  - Compensation paid by a consumer or lender to a loan originator would be included in the points and fees limit, in addition to any fees or charges paid by the consumer to the lender; or
  - Consumer payments of up-front fees and points can offset lender payments to the loan originator for purposes of calculating the amount that would apply to this points and fees limit.

We support the CFPB's proposal with the inclusion of the second alternative, which would permit the offsetting of payments. Again, the 3 percent limit is very tight and requiring any double counting of payments, in addition to the tight limit, would result in the exclusion of mortgage loans that would otherwise qualify as a QM loan, without furthering the objective of ensuring consumers have the ability to repay these loans.

As for the second alternative outlined above, we certainly agree it is the preferable approach, but our concern here is it would still require the inclusion of individual loan originator compensation when the loan originator compensation exceeds the creditor fees included in the finance charge. In our view, the amount of loan originator compensation that may exceed creditor fees for a specific transaction does not change the fact that loan originator compensation is a creditor expense, which should instead be considered as part of the creditor's overall cost structure.

Although we generally support the proposed treatment of loan originator compensation, we request clarification of the CFPB's request for comment on the first alternative for the third bullet listed above, as outlined in the Supplementary Information (pages 65 and 66 of the version of the proposal posted on the Bureau's website). Here, the Supplementary Information states the following:

> Bureau seeks feedback as to whether, if it were to adopt the first alternative in some or all instances, the creditor should be permitted to reduce the loan originator compensation by the full amount of points and fees included in finance charges or whether the reduction should be limited to that portion of points and fees denominated as general origination charges, rather than specific fees that are passed through to affiliates.

We are confused by this request for feedback, since our reading of the first alternative is that no offsetting would be permitted, as compensation paid by a consumer or lender to a loan originator would be included in the points and fees limit, in addition to any fees or charges paid by the consumer to the lender. It seems this language may actually apply to the second alternative. Again, we support the adoption of the second alternative that would permit consumer payments of up-front points and fees to offset lender payments to the loan originator for purposes of calculating the amount that would apply to the 3 percent points and fees limit. We also support the flexibility as outlined in the Supplementary Information, cited above, in which lenders would be permitted to reduce the loan originator compensation by the full amount of the points and fees including in the finance charge, as oppose to limiting the reduction to that portion of the points and fees denominated as general origination charges and not to specific fees that are passed through to affiliates. If the CFPB adopts the first alternative, we would appreciate a clear explanation of how it would apply, since the request for feedback implies some level of offsetting may be permitted. If so, we would certainly appreciate any flexibility with regard to offsetting.

Affiliate Fees

On a related issue, CBA is still concerned that the final rule requires fees charged by affiliates of the lender to be included within the 3 percent points and fees limit, while similar fees from unrelated third parties are not included. This unequal treatment of lenders who work with affiliates will have a significant effect on the current model used by a large number of lenders in the mortgage market. For similar reasons as outlined above with regard to loan originator compensation, we do not believe such a wholesale change of this current model is warranted as this is not related to a consumer's ability to repay a mortgage loan and may exclude loans that would otherwise qualify as a QM loan.

For this reason, we urge the CFPB to again review this issue, perhaps by suspending this requirement for including affiliate fees within the 3 percent limit until after the other mortgage rules are effective. At that time, the Bureau can assess the extent all of these rules have fulfilled the goal of ensuring a mortgage lending market that is fair for consumers and whether there is still a need for including affiliate fees within the 3 percent points and fees limit.

Loans Held in Portfolio by Small Lenders

The Proposal would create a new category under the definition of "qualified mortgage." This would include loans held in portfolio by small lenders with assets of $2 billion or less at the end of the previous calendar year which, together with affiliates, originated 500 or fewer first-lien loans. For the lender to qualify under this category, these loans must be in portfolio for at least three years, although they can be sold to other lenders that meet this small lender threshold.

Loans under this category would not need to meet the 43 percent debt-to-income (DTI) ratio limitation that is included in the final rule. These loans would also not be subject to the calculation instructions outlined in Appendix Q of the final QM rule.

The Proposal would also allow these small lenders to charge a higher annual percentage rate for first-lien loans in this new category and still benefit from the "safe harbor" liability protection. Under the QM final rule, first-lien loans that are no more than 1.5 percent above the average prime offer rate (APOR) receive this safe harbor protection if they meet the QM definition. Under this Proposal, loans made by small lenders would receive this protection if the loan is up to 3.5 percent above the APOR.

CBA certainly understands that the massive regulatory burdens resulting from the rules issued under the Dodd–Frank Wall Street Reform and Consumer Protection Act can have a disproportionate effect on smaller financial institutions that do not have the resources to comply with these rules to the same extent as larger institutions. In certain contexts, such as those rules that may require significant system changes, we would understand the CFPB may want to provide regulatory relief in order to ensure these smaller financial institutions will continue to be able to provide credit and other services for consumers, especially those in rural and underserved areas.

However, CBA does not support this new category for QM loans, as outlined under this proposal. In our view, this specific deviation from the general QM thresholds would not significantly reduce the need for system changes in order to comply with the ability-to-pay rules that would justify the creation of a new category of QM loans with different thresholds. Since the number of loans per lender that can qualify will be capped at 500 per year, this new category will not generate enough volume to be of considerable benefit to consumers.

In fact, as CFPB noted, this aspect of the Proposal may disadvantage consumers. For example, a borrower who qualifies for a loan with a DTI exceeding 43 percent from a small lender under this exemption would be limited in asserting ability-to-repay claims, as compared to a lender that would not qualify for this exemption, since the small lender in this case would be protected from liability based on the safe harbor or rebuttable presumption liability standards. The result here is this creates an unlevel playing field as small lenders would be subject to different standards than those that apply to the rest of the mortgage industry, to the possible detriment of both banks and consumers.

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Proposed Exemption for Various Loan Programs

The Proposal outlines exemptions from the ability-to-repay rules for loans made under homeownership stabilization and foreclosure prevention programs, federal agency refinancing programs, and government-sponsored enterprise (GSE) refinancing programs. We support these exemptions but suggest the CFPB provide additional guidance about what programs qualify, as these programs will change and new programs may develop in the future. Specifically, we request the CFPB post a list of the specific programs that qualify for these exemptions and update this list as these programs change or new programs develop.

We also request the CFPB expand these exemptions to other types of loan modification and refinancing programs. We would be pleased to work with the Bureau to identify these additional programs and initiatives. These could be publicly announced by the CFPB to the extent they are identified or developed in the future, similar to our comments above with regard to the clarification of the current proposed language. Banks want to provide modification and refinancing options to qualified consumers, and the CFPB expanding this exemption will help them in these efforts.

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Thank you for the opportunity to comment on the proposal with regard to the ability-to-repay/QM rules. If you have any questions or wish to discuss these issues further, please feel free to contact me at (202) 255-6366 or at jbloch@cbanet.org.

Sincerely,

Jeffrey P. Bloch
Associate General Counsel