

October 30, 2013

Regulations Division  
Office of General Counsel  
Department of Housing and Urban Development  
451 7<sup>th</sup> Street, SW  
Room 10276  
Washington, DC 20410

Re: Docket No. FR 5707-P-01 – Qualified Mortgage Definition for HUD Insured and Guaranteed Single Family Mortgages

Dear Sir or Madam:

The Consumer Bankers Association (CBA)<sup>1</sup> appreciates the opportunity to submit comments in response to the proposed rule that would determine which loans would be defined as a qualified mortgage (QM) for single family mortgages insured and guaranteed by the Department of Housing and Urban Development (HUD). Under the Dodd–Frank Wall Street Reform and Consumer Protection Act, HUD and other agencies are permitted to prescribe regulations to define the loans these agencies insure, guarantee, or administer that would qualify as a QM loan, which may differ from the definition outlined in the final rules issued by the Consumer Financial Protection Bureau (CFPB) this past January.

### **Summary of CBA's Comments**

- The threshold for determining which loans receive the safe harbor liability protection is too complex. Since nearly all HUD insured or guaranteed loans will qualify for the safe harbor, we recommend safe harbor protections for all loans qualifying under the HUD QM rule. Otherwise, the threshold should be fixed and not fluctuate based on changes to the annual mortgage insurance premium (MIP).
- The rebuttable presumption standard outlined in the proposal raises a number of concerns. Those include how to apply the points and fees threshold, the status of loans that lose the HUD insurance or guarantee, and how the current HUD requirements apply to the borrower's ability to prove the lender did not make a

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<sup>1</sup> 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.

reasonable and good faith determination of repayment ability at the time the loan was made.

- HUD must work with the CFPB on a permanent solution to the issue of whether interest charged until the end of the month for FHA loans would be considered a prepayment penalty if the loan payoff occurs prior to the end of that month.

## Discussion

The QM definition outlined in the proposal applies to Title II Federal Housing Association (FHA)-insured loans, while FHA loans insured under Title 1 (home improvement loans), Section 184 (Indian housing loans), and Section 184A (Native Hawaiian housing loans) would be subject to less restrictive standards. For the Title II FHA loans, the definition will be both similar to and different than the definition under the CFPB rules, as follows:

- Consistent with the CFPB rule, the loan must not exceed 30 years or have certain features, such as interest-only, negative amortization, or balloon payments.
- However, the CFPB's 43% debt-to-income ratio requirement for QM loans will not apply to FHA-insured loans, recognizing such loans primarily serve low-income and first time buyers.
- Similar to the CFPB rule, these loans will be subject to the 3% points and fees threshold, or the applicable thresholds for small dollar loans.
- However, the threshold for determining whether a loan receives the "safe harbor" liability protection will be different. For FHA-insured loans, the "safe harbor" will apply if the annual percentage rate (APR) does not exceed the average prime offer rate (APOR) by more than the combined annual MIP and 1.15 percentage points. Unlike the CFPB rule, this threshold will not be static and will fluctuate based on future changes to the annual MIP. We recognize HUD's intent here to incorporate flexibility to ensure the number of loans qualifying for the "safe harbor" will not decrease over time.
- For loans exceeding the above threshold, the "rebuttable presumption" standard of liability will apply. However, unlike the CFPB's rule, this proposal would not permit borrowers to rebut the presumption by showing they had "insufficient residual income or assets." Instead, the borrower must prove either:
  - The loan exceeded the three percent points and fees limit, or the applicable limit for small dollar loans; or
  - The lender did not make a reasonable and good faith determination of the borrower's repayment ability at the time the loan was made by failing to consider income, debt obligations, alimony, child support, payments on simultaneous loans, and the monthly payment on the mortgage.

- Unlike the CFPB rule, the HUD proposal will not exempt streamlined refinancings.

Lenders who make FHA loans have a number of concerns with this proposal. Although interconnected, these concerns focus on two areas: 1) the threshold for determining which of these loans receives the safe harbor level of liability protection, as opposed to a rebuttable presumption level of protection; and 2) the elements borrowers must prove under the rebuttable presumption standard. Each of these concerns is outlined below.

### The Threshold for Determining Loans that Receive the Safe Harbor Protections is too Complex

Under the HUD proposal, the threshold for determining which loans receive the safe harbor level of liability protection will fluctuate over time, based on future changes in the MIP levels. Although we understand and appreciate the reasons for proposing a threshold that may change over time as these premiums change, which is to ensure loans do not lose the safe harbor protections due to increases in these premiums, we believe the complexities and the burdens of complying with a fluctuating threshold far outweigh the benefits.

As for the burdens, a fluctuating threshold would require changes in software programs each time the MIP changes. This would also require additional staff training and education each time the MIP changes and constant changes to the MIP may further increase the likelihood of lender error when determining which loans receive the safe harbor level of liability protection at any given time, especially during the transitional times when the MIP changes.

The other significant concern is HUD has not adequately described how future changes are to be implemented. The industry would need significant notice and lead time in order to implement future changes. In our view, the industry would need at least six months in order to implement the software changes and provide staff training from the time the MIP change is announced by HUD to the time the threshold change would become effective. The industry would also need guidance on certain issues, such as whether a future MIP change, and the resulting change in the threshold, would apply to loan applications received after the effective date of the change or whether another standard applies. As part of the final rule, we request HUD outline in detail the procedures for implementing any future changes if HUD were to adopt this fluctuating threshold, as well as examples of the threshold calculations.

In our view, the preferred approach would be to not have a threshold at all and for HUD to provide safe harbor liability protections for all loans that meet the proposed QM

definition. As stated in HUD's Economic Analysis Statement, 93% of loans insured or guaranteed by HUD would qualify for the safe harbor liability protection, as outlined under the proposed rule. It makes little sense to impose the significant burdens associated with a fluctuating threshold that would only affect 7% of loans insured or guaranteed by HUD.

At a minimum, HUD should initially allow all QM loans to qualify for the safe harbor liability protection and then assess at a later time whether a threshold should be imposed in order for FHA loans to receive this protection. Lenders are struggling to comply with the QM and other mortgage rules CFPB issued early this year and that are effective in January 2014, in addition to the HUD QM rule, which may also be effective at the same time. It will be especially problematic to comply with two separate QM rules that have different thresholds for which loans qualify for the safe harbor. Providing safe harbor liability protections for all loans that meet the HUD QM definition will help facilitate compliance by lenders, while preserving HUD with the ability to impose thresholds in the future if circumstances warrant.

If HUD determines a threshold is necessary at this time to distinguish between the safe harbor and rebuttable presumption liability standards, then we suggest HUD impose a fixed threshold, as opposed to one that fluctuates. Since the annual MIP is approximately 135 basis points, then HUD should impose a fixed percentage point threshold of approximately 2.5 percentage points. Under this approach, a HUD insured or guaranteed loan would receive the safe harbor protection if the loan APR is no more than 2.5 percentage points above the APOR. Establishing a fixed threshold will help alleviate the complexities of complying with the HUD QM rule, as opposed to instituting a fluctuating threshold based on a combination of basis points and the annual MIP.

### The Rebuttable Presumption Standard Raises Concerns

As described above, if a loan is subject to the rebuttable presumption liability protection, then the borrower may rebut the presumption by proving the points and fees exceeded the applicable limit or the lender did not make a reasonable and good faith determination of the borrower's repayment ability. This raises a number of issues, which are applicable to both the rebuttable presumption and safe harbor standard of liability.

One example is whether this can be interpreted to mean that if the loan APR is low enough to receive a safe harbor level of protection, then the borrower will not have the right to prove the loan exceeded the applicable points and fees limit or the lender did not make a reasonable and good faith determination of the borrower's repayment ability.

A related issue is the need for HUD to provide additional guidance as to the extent a loan would lose the safe harbor status if HUD revokes the insurance or guarantee.

We also have concerns with the specific language of the rebuttable presumption, as outlined in the proposal. Again, under the HUD rebuttable presumption proposed standard, the borrower may prove the lender did not make a reasonable and good faith determination of the borrower's repayment ability. More guidance is needed as to whether this requires the borrower to show the lender failed to follow the specific HUD requirements applicable to the borrower's repayment ability or whether the borrower may otherwise prove the lender did not consider this repayment ability, even if the lender did follow the applicable HUD requirements.

FHA Prohibited Repayment Ability

In addition to the issues raised in this letter in response to the HUD proposed rule, we also want to take this opportunity to seek clarification that interest charged through the end of the month for FHA loans will not be considered a prepayment penalty for the portion of the interest paid between the time the loan is paid off and the end of that month. Under the CFPB QM rule, there is currently an exception to the requirement to consider this amount as a prepayment penalty that will expire in January 2015. We request HUD work with the CFPB expeditiously to address this on a permanent basis so as to provide certainty to the mortgage market with regard to this issue, which will have a direct impact on the ability of FHA loans to qualify under the QM standard.

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Thank you for the opportunity to comment on the proposal that would determine which loans would be defined as a QM for single family mortgages insured and guaranteed by HUD. If you have any questions or wish to discuss these issues further, please feel free to contact me at (202) 552-6366 or at [jbloch@cbanet.org](mailto:jbloch@cbanet.org).

Sincerely,



Jeffrey P. Bloch  
Associate General Counsel