Consumer Mortgage Coalition

October 30, 2013

Legislative & Regulatory Activities Division
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Washington, D.C. 20219
Docket No. OCC–2013–0010

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Board of Governors of the Federal Reserve System
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Washington, D.C. 20551
Docket No. R–1411

Robert E. Feldman
Executive Secretary
Federal Deposit Insurance Corporation
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RIN 3064–AD74

Elizabeth M. Murphy
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Securities and Exchange Commission
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File Number S7–14–11

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RIN 2590–AA43

Re: Proposed Credit Risk Retention Regulation

Dear Messrs. and Madam:

The Consumer Mortgage Coalition ("CMC"), a trade association of national mortgage lenders, servicers, and service providers, appreciates this opportunity to comment on the interagency proposed regulation on credit risk retention. This will be a far-reaching regulation, generally requiring that securitization sponsors retain credit risk for non-exempt assets they securitize. Exempt assets will include qualified residential mortgage ("QRM") loans. The agencies proposed a risk-retention regulation in 2011 and, in response to the public reaction, now repropose a regulation. Due to the many issues that a rulemaking of this magnitude raises, we appreciate and support the agencies' decision to solicit additional public comment.

The 2011 proposal would have defined the term QRM loan narrowly, and would have required large down payments on QRM loans. In this reproposal, the agencies have broadened the proposed definition of QRM loans.

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After the 2011 proposal, the Consumer Financial Protection Bureau ("CFPB") finalized a regulation to implement a Dodd-Frank Act ability-to-repay requirement for mortgage loans. This regulation offers protection from liability for qualified mortgage ("QM") loans. By statute, the definition of a QRM loan may be no broader than the definition of a QM loan. For that reason, it was not practical for the agencies to define a QRM loan until after the QM definition was final.

In the present risk retention rulemaking, the agencies propose to define a QRM loan by incorporating the Regulation Z definition of a QM loan. We strongly support incorporating the QM loan definition because it is the broadest definition that the Dodd-Frank Act permits. The ability-to-repay regulation will largely constrain lending to safe harbor QM loans, for the reasons discussed below. Defining QRM loans more narrowly than QM loans could exacerbate this credit constraint without improving underwriting, and without causing lenders or securitizers to retain additional risk.

The agencies also seek input on an alternative, a QM-plus definition, that is considerably narrower than the proposed QRM definition. We believe the QM-plus definition would overly constrain housing finance without improving underwriting, and we oppose it for that reason.

This letter describes why the ability-to-repay regulation will restrict consumer mortgage lending largely to safe harbor QM loans, and how a narrow definition of QRM loan would exacerbate this constraint without making lending safer. The mortgage market has endured very tight underwriting standards for years, and the ability-to-pay regulation will constrain credit further. We urge the agencies to adopt the broadest possible definition of QRM loans.

The Ability-to-Repay Regulation Will Largely Restrict Consumer Mortgage Lending to Safe Harbor QM Loans

Violations of the ability-to-repay regulation can lead to harsh liability, including actual and statutory damages and attorneys' fees. Significantly, consumers may raise alleged violations of the ability-to-repay regulation as a defense to foreclosure at any time. As the agencies state:

> "The potential risk arising from the consumer's ability to raise a defense to foreclosure extends to the creditor, assignee, or other holder of the loan for the life of the loan, and thereby may provide originators and their assignees with an incentive to follow verification and other QM requirements scrupulously."[1]

The ability-to-repay regulation provides two types of protection from potential liability for QM loans. One is a safe harbor from liability, and the other is a rebuttable presumption of

[1] 78 Fed. Reg. 57928, 57990 (September 20, 2013).

compliance with the regulation. The difference between the two is defined by the annual percentage rate ("APR") on the loan, not on the underwriting or lending requirements. Non-QM loans will receive neither a safe harbor nor a rebuttable presumption of compliance.

The potential damages for an ability-to-repay violation are so great that any borrower who faces delinquency will have every incentive to allege a violation to delay foreclosure. Such an allegation will enable the consumer to live in the home without making loan payments while the litigation is pending. The QM safe harbor will aid creditors in dismissing baseless ability-to-repay claims, but under a rebuttable presumption, this would be much more difficult because the factual issues can be extensive. With rebuttable presumption QM loans, the servicer's cost of litigation, and of a delinquency while presumption litigation is pending, will both weigh heavily on the servicer's decision whether to settle or litigate, even if the allegations are meritless. Servicers will often find settling less costly even if prevailing on the merits is likely. The effectiveness of a safe harbor in preventing such litigation creates a strong incentive to limit lending to safe harbor QM loans.

A significant concern with QM rebuttal presumption litigation is that a consumer may rebut the presumption by showing "insufficient residual income . . . with which to meet living expenses, including any recurring and material non-debt obligation[.]"[2] The regulation does not define the amount of residual income that is sufficient or insufficient. It does not define living expenses or non-debt obligations. The commentary provides that living expenses can include the costs of food, clothing, gas, and health care.[3] However, it neither limits living expenses to these items nor indicates how to define or quantify them. Nor does it give examples of material non-debt obligations. Living expenses are, and non-debt obligations probably are, to some extent discretionary, so creditors do not know how courts will decide how much residual income is sufficient to cover them. Rebuttable presumption QM lending would subject creditors to liability for noncompliance with a standard that is undefined, and that would be determined piecemeal through years of litigation, often after consummation of loans to which the ever-changing judicial standards will apply.

Creditors will need substantially more clarity before they will be willing to take on significant QM rebuttable presumption litigation risk for the life of the loan based on such a vague rebuttal standard. If the CFPB were to adopt a clear residual income test into the rebuttal standard, such as the test the Veterans Administration uses, creditors may be able to broaden their lending.

[2] 12 C.F.R. § 1026.43(e)(1)(ii)(B).
[3] Regulation Z Comment 43(e)(1)(ii)-1.

A Comparison of the HOEPA and QM Rebuttable Presumptions Demonstrates the Disincentives for QM Rebuttable Presumption Lending

To foresee the low likelihood of QM rebuttable presumption lending, it is helpful to compare the Home Ownership and Equity Protection Act of 1994 ("HOEPA")[4] rebuttable presumption to the QM rebuttable presumption. Regulation Z incorporated a HOEPA rebuttable presumption of compliance in 2001.[5] In 2008, the Federal Reserve revised the presumption and expanded HOEPA and the presumption to apply to a then-new category of loans, higher-price mortgage loans ("HPMLs").[6]

The CFPB has explained that it does not foresee excessive litigation risk from rebuttable presumption QM loans. It reasons that the QM rebuttable presumption is similar to the HOEPA rebuttable presumption, and that the CFPB cannot establish that the limited amount of HPML lending is caused by litigation risk:

> "[T]he Bureau has crafted the presumption of compliance being afforded to subprime loans so that it is not materially different than the presumption that exists today under the 2008 HOEPA Final Rule. Indeed, the Bureau is defining with more particularity the requirements for rebutting this presumption. No evidence has been presented to the Bureau to suggest that the presumption under the 2008 HOEPA Final Rule has led to significant litigation or to any distortions in the market for higher-priced mortgages. As noted above, commenters noted the lack of lending in the higher-priced mortgage space since the 2008 HOEPA Final Rule took effect, but the Bureau is unaware of evidence suggesting the low lending levels are the result of the Board's rule, as compared to the general state of the economy, uncertainty over multiple regulatory and capital initiatives, and other factors."[7]

There has been very little HOEPA[8] or HPML lending.[9] HPML lending has decreased even since the CFPB's statement, despite the intervening improvements in the housing market. The Federal Reserve revised the HOEPA rebuttable presumption to "aid creditors with

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[4] Home Ownership and Equity Protection Act of 1994, Pub. L. No. 103-325, §§ 151–158, 108 Stat. 2160, 2190-2198 (1994) (codified as amended in scattered sections of the Truth in Lending Act, 15 U.S.C. §§ 1601–1667f).

[5] 66 Fed. Reg. 65604 (December 20, 2001).

[6] 73 Fed. Reg. 44522 (July 30, 2008).

[7] 78 Fed. Reg. 6408, 6513 (January 30, 2013).

[8] According to GAO, in 2004, lenders made 23,000 HOEPA loans, or only 0.003 percent of all the originations of home-secured refinance or home improvement loans. The number of HOEPA loans rose to about 36,000 in 2005 but fell every year thereafter. In 2009, these loans numbered only 6,500. *Mortgage Reform: Potential Impacts of Provisions in the Dodd-Frank Act on Homebuyers and the Mortgage Market*, GAO-11-656, pp. 56-57 (July 2011).

[9] FFIEC reports on HPML lending based on HMDA data. In 2010, the first year for which data were available, 3.3 percent of conventional, first-lien loans used to purchase site-built homes were HPMLs. In 2011, it had increased to 3.9 percent, and in 2012 it decreased to 3.2 percent. *See* FFIEC Press Release (September 22, 2011); FFIEC Press Release (September 18, 2012); and FFIEC Press Release (September 18, 2013).

compliance planning, and . . . help them mitigate litigation risk."[10] However, creditors still avoid HOEPA and HPML lending because of the litigation risk, as several agencies recently confirmed:

> "Some creditors . . . decided not to offer 'higher-priced mortgage loans' after July 2008, following the adoption of various rules regulating these loans or previously decided not to offer loans subject to the Home Ownership and Equity Protection Act after regulations to implement that statute were first adopted in 1995."[11]

As we describe below, the HOEPA and QM rebuttable presumptions differ substantially in the likelihood of successful rebuttal, resulting in more litigation risk under the QM rebuttable presumption than under the HOEPA and HPML rebuttable presumption. Given that creditors have been largely elected not to take on the litigation risk of the HOEPA and HPML rebuttal presumption, and that the QM rebuttal presumption carries more risks, it is difficult to foresee much QM rebuttable presumption lending.

The following table illustrates the differences between the two presumptions.

HOEPA and HPML[12]	**QM**
Rebuttable Presumption	
A creditor is presumed to comply with the ability-to-repay requirement if the creditor does each of the following: • Verifies income or assets relied on, using third-party documents. § 1026.34(a)(4)(iii)(A). (This is required regardless of the presumption.) • Calculates the loan payment using the largest loan payment in the first seven years, current obligations, and mortgage-related obligations. § 1026.34(a)(4)(iii)(B). • Take into account the debt-to-income ratio, income "after paying debt obligations[,]" or both. § 1026.34(a)(4)(iii)(C).	A higher-priced QM is presumed to comply with the repayment ability requirements. To be a QM loan: • The creditor must consider and verify income or assets, current debt obligations, alimony, and child support. § 1026.43(e)(2)(v). (This is required even on non-QM loans.) • The creditor must calculate the loan payment using the maximum interest rate in the first five years and mortgage-related obligations. § 1026.43(e)(2)(iv). • The debt-to-income ratio must be at least 43% or the loan must meet agency requirements. § 1026.43(e)(2)(vi), (e)(2).

[10] 73 Fed. Reg. 44522, 44545 (July 30, 2008) (final HPML regulation).
[11] Interagency Statement on Fair Lending Compliance and the Ability-to-Repay and Qualified Mortgage Standards Rule, October 22, 2013.
[12] The HPML regulation, currently in 12 C.F.R. § 1026.35, in § 1026.35(e)(1) incorporates by reference the HOEPA ability-to-repay requirement and its rebuttable presumption from § 1026.34(a)(4).

Rebuttal Standard	
"The consumer may rebut the presumption with evidence that the creditor nonetheless disregarded repayment ability despite following these procedures. For example, evidence of a very high debt-to-income ratio and a very limited residual income could be sufficient to rebut the presumption, depending on all of the facts and circumstances." Comment 34(a)(4)(iii)-1. "[T]he rule requires assessing not just the consumer's ability to pay loan principal and interest, but also the consumer's ability to pay property taxes, homeowners insurance, and similar mortgage-related expenses. Mortgage-related expenses, such as homeowner's association dues or condominium or cooperative fees, are included because failure to pay them could result in a consumer's default on his or her mortgage[.]" 73 Fed. Reg. 44522, 44543 (July 30, 2008).	A consumer may rebut the presumption of compliance by showing: "[T]he creditor did not make a reasonable and good faith determination of the consumer's repayment ability at the time of consummation, by showing that the consumer's income, debt obligations, alimony, child support, and the consumer's monthly payment (including mortgage-related obligations) on the covered transaction and on any simultaneous loans of which the creditor was aware at consummation would leave the consumer with insufficient residual income or assets other than the value of the dwelling (including any real property attached to the dwelling) that secures the loan with which to meet living expenses, including any recurring and material non-debt obligations of which the creditor was aware at the time of consummation." § 1026.43(e)(1)(ii)(B). "Specifically, it must be proven that, at the time of consummation, based on the information available to the creditor, the consumer's income, debt obligations, alimony, child support, and the consumer's monthly payment (including mortgage-related obligations) on the covered transaction and on any simultaneous loans of which the creditor was aware at consummation would leave the consumer with insufficient residual income or assets other than the value of the dwelling (including any real property attached to the dwelling) that secures the loan with which to meet living expenses, including any recurring and material non-debt obligations of which the creditor was aware at the time of consummation, and that the creditor thereby did not make a reasonable and good faith determination of the consumer's repayment ability. For example, a consumer may rebut the presumption with evidence demonstrating that the consumer's residual income was insufficient to meet living expenses, such as food, clothing, gasoline, and health care, including the payment of recurring medical expenses of which the creditor was aware at the time of consummation, and after taking into account the consumer's assets other than the value of the dwelling securing the loan, such as a savings account. Comment 43(e)(1)(ii)-1.

Default as Rebuttal	
"Section 1026.34(a)(4) prohibits a creditor from disregarding repayment ability based on the facts and circumstances known to the creditor as of consummation. In general, a creditor does not violate this provision if a consumer defaults because of a significant reduction in income (for example, a job loss) or a significant obligation (for example, an obligation arising from a major medical expense) that occurs after consummation." Comment 34(a)(4)-5. "The Board has revised the [proposed] comment . . . to delete the statement that events after consummation may be relevant to determining whether a creditor has violated § 226.34(a)(4). but events after consummation do not, by themselves, establish a violation. . . . The Board believes it is clear from the regulation and comment that a default does not create a presumption of a violation." 73 Fed. Reg. 44522, 44544 (July 30, 2008).	"In addition, the longer the period of time that the consumer has demonstrated actual ability to repay the loan by making timely payments, without modification or accommodation, after consummation or, for an adjustable-rate mortgage, after recast, the less likely the consumer will be able to rebut the presumption based on insufficient residual income and prove that, at the time the loan was made, the creditor failed to make a reasonable and good faith determination that the consumer had the reasonable ability to repay the loan. Comment 43(e)(1)(ii)-1.

Evidence of both a "very high" debt-to-income ratio *and* a "very limited" residual income can rebut the HOEPA presumption. Rebutting the QM presumption is possible by showing only that the consumer had "insufficient" residual income, with no showing of very high, or even slightly high, debt-to-income ratio. Additionally, "insufficient" residual income for a QM rebuttal is presumably or possibly more than "very limited" residual income for an HOEPA rebuttal, but if so, how much more is unknown. These differences between the two standards will create more chance for liability under the QM rebuttable presumption than under the HOEPA presumption.

Additionally, the HPML regulation is clear that "a default does not create a presumption of a violation." The QM regulation does not make this clear. On the contrary, it explicitly states that the length of time without a delinquency is relevant to rebutting the presumption. That is, a delinquency, especially an early delinquency, can rebut the QM presumption but not the HPML presumption. This is another reason the QM presumption would be easier to rebut.

The fact that payment history on the loan can rebut the QM presumption will create an incentive for borrowers with QM rebuttable presumption loans to make at least one late payment early in the life of the loan as a precaution in the event of a future desire to avoid the debt obligation through alleging ability-to-repay violations. The possibility that this could be attempted is a risk in using the QM reputable presumption that does not exist in the HOEPA presumption.

The agencies ask, in question 91, whether the proposed QRM definition would have a significant effect on the availability of credit. The regulation that will constrain the availability of consumer mortgage credit is the ability-to-repay regulation. The present rulemaking cannot reduce this ability-to-repay credit constraint because Congress required the QRM definition to be no broader than the QM definition. The present rulemaking could worsen this credit constraint by defining QRM more narrowly than the QM definition.

The agencies ask, in question 100, whether defining QM and QRM loans the same would give originators additional reasons to have reservations about non-QM lending. We do not believe so. Creditors will only rarely venture beyond the QM safe harbor into the QM rebuttable presumption. Non-QM loans offer even less protection than the rebuttable presumption, and will therefore largely not exist, regardless of the risk retention regulation.

Given the credit constraints that the ability-to-repay regulation will impose, it is important that the agencies not unnecessarily create even more constraints by applying risk retention requirements to securitized QM loans.

QM and Other Requirements Accomplish the Purposes of Risk Retention

The agencies ask, in question 92, whether the QRM definition should be limited to safe harbor QM loans. Risk retention for loans subject to the ability-to-repay regulation is unnecessary because the ability-to-repay regulation will require mortgage lenders to have "skin in the game." All QM loans will be subject to strict restrictions on loan terms, and all require thorough documentation of repayment ability. These restrictions serve the same "skin in the game" purposes as a risk retention regulation.

The following restrictions apply to both categories of QM loans:

- The loan must have substantially equal payments; rate adjustments and step-rates are not prohibited but are subject to underwriting requirements designed to prohibit unaffordable payment increases;
- The loan must not permit negative amortization or optional principal deferral;
- The loan term may not exceed 30 years;
- Balloon payments are almost always prohibited;
- Points and fees are capped, generally at three percent of the loan amount.

In addition, both categories of QM loans must meet agency underwriting requirements or must meet the following:

- The creditor must verify the applicant's income and assets, debt obligations, alimony, and child support; and
- The debt-to-income ratio must not exceed 43 percent;

Potential ability-to-repay liability lasts for the life of the loan for both safe harbor and rebuttable presumption QM loans.

The difference between safe harbor and rebuttable presumption QM loans is based on a comparison of the APR to the average prime offer rate ("APOR") on a comparable loan. The same loan term restrictions and underwriting requirements apply to both categories of QM loans. A distinction between QM safe harbor and QM rebuttable presumption loans would not improve the purposes of the risk retention regulation.

It is important to note that the APR[13] may be calculated differently than the APOR.[14] For example, adjustable-rate loans with an introductory rate that is not set by an index and margin have an APR based on the actual introductory rate, but the APOR is based on an index and margin. Incorporating this APR – APOR comparison into the QRM loan definition would not necessarily apply a risk retention requirement only to riskier loans.

As the agencies note, there are several additional regulations that will help align the interests of securitizers and investors, including loan originator compensation restrictions, anti-steering restrictions, and a proposed Securities Exchange Commission regulation that would require more detailed information to investors. The Federal Housing Finance Agency is also developing a common securitization platform that will provide investors with initial and ongoing loan-level data, as well as a contractual and disclosure framework that will enhance transparency and investor protections in residential mortgage-backed securities.

The statutory risk retention requirements permit the agencies to make exemptions, exceptions, and adjustments that "help ensure high quality underwriting standards"[15] and that "encourage appropriate risk management practices[.]"[16] The ability-to-repay regulation requires high qualify underwriting standards for all QM and non-QM loans to which it applies. It will not only require appropriate underwriting standards, but will restrict credit availability to all but borrowers with very strong credit profiles. The Dodd-Frank Act requires the agencies to define QRM loans "taking into consideration underwriting and product features that historical loan performance data indicate result in a lower risk of default[.]"[17] The QM loan underwriting and product features are strongly associated with lower default risk, making a risk-retention exemption for all QM loans appropriate.

A risk retention requirement for loans subject to the ability-to-repay requirements would be an unnecessary layer of regulation and cost.

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[13] *See* Regulation Z Comment 17(c)(1)-8 and -10 for APR calculations on adjustable-rate loans.
[14] *See* *Methodology for Determining the "Average Prime Offer Rates"*.
[15] 15 U.S.C. § 15G(e)(2)(A).
[16] 15 U.S.C. § 15G(e)(2)(B).
[17] 15 U.S.C. § 15G(e)(4)(B).

The QM-Plus and Other Alternatives Would Constrain Housing Finance Without Improving Underwriting or Lending

The agencies request input on a "QM-plus" alternative QRM definition. This alternative would exclude from the definition of QRM the following loans:

- Loans that are QM loans because they meet the GSE QM definition, the small creditor exemption, or the balloon loan provisions in the QM regulation;
- Loans not secured by the borrower's principal dwelling;
- Subordinate loans;
- Purchase loans on a property with a piggy-back or subordinate loan;
- Loans to borrowers who are 30 or more days past due on any debt obligation; who had been 60 or more days past due on any obligation in the past 24 months; or who had a foreclosure, foreclosure alternative, bankruptcy, collection judgment, or repossession in the past 36 months; and
- Purchase loans with a loan-to-value ratio, or refinances with a combined loan-to-value ratio, exceeding 70 percent.

The agencies also ask, in question 92, whether it is appropriate to include subordinate loans in the QRM definition. Closed-end subordinate loans are subject to the ability-to-repay regulation if they are secured by a dwelling (and are not reverse loans or temporary loans).

Any of these alternatives would be harmful. Mortgage lending for years has been available only to borrowers with strong credit profiles. As this letter has described, the ability-to-repay regulation will require, and its potential liability will enforce, conservative lending and underwriting standards. Creating additional lending restrictions or costs through the risk-retention rulemaking would serve to deny credit to those who are able to repay their loans or to increase its cost.

Loans that meet the GSE underwriting requirements have a very low default risk, and should therefore not be subject to a risk retention requirement when securitized. To the extent the agencies believe there is a flaw in the GSE standards, the GSEs could simply revise their standards. They are under government control, so a rulemaking would not be necessary.

A requirement that QRM loans have a 30 percent down payment is far too restrictive. Many families can make mortgage loan payments but cannot make such a large down payment, especially lower-income families and those in areas with high housing costs. The QRM definition does not need a loan-to-value restriction at all for consumer mortgage loans.

We support the agencies' decision not to propose appraisal or servicing standards in the QRM definition. The QRM definition does not need servicing constraints because the

CFPB's servicing rules and the various state laws provide sufficient protections.[18] The QRM definition does not need an appraisal requirement because there are multiple appraisal requirements.[19]

A risk retention is unnecessary for loans subject to the ability-to-repay requirements. The ability-to-repay regulation serves the same policy goals as the risk retention requirement – ensuring that lenders do not have an incentive to make and securitize loans without sufficient regard to the potential for default. We urge the agencies to define QRM as broadly as possible consistent with their Dodd-Frank Act authority.

If the agencies do include a payment history standard, we recommend that it be limited to payments on obligations that appear on a credit report or loan application because the creditor would not know of other payments or obligations. Also, we recommend that any payment history have a materiality standard. Payments that are only slightly short or that are disputed should not prevent a borrower from obtaining a mortgage loan.

Incorporating the QM Definition Would Reduce Regulatory Burden

We support the proposal to incorporate the Regulation Z QM loan definition into the risk retention regulation as the definition of QRM loan. This would make compliance far easier. Also, it would prevent the need for a risk retention rulemaking each time the CFPB amends the QM definition. Especially when the ability-to-repay regulation is new, amendments will be necessary. Even minor differences between the two definitions that last only a few weeks or months would greatly complicate compliance without necessarily bringing any consumer or marketplace benefits.

For the same reason, we recommend that the agencies make clear that the incorporated definition includes the entire definition. As proposed, the QRM definition would incorporate QM as defined in TILA § 129C and regulations issued thereunder. It should include all statutory provisions, the regulation, and the regulation's commentary and appendix. This would prevent difficult interpretive questions about whether it is possible for a loan to be a QM loan and not a QRM loan, or *vice versa.* Any such possibility would not serve borrowers, lenders, securitizers, or investors, and should not be permitted to occur.

[18] *See*, for example, two recent CFPB final regulations at 78 Fed. Reg. 10696 (February 14, 2013) (Regulation X) and 78 Fed. Reg. 10902 (February 14, 2013) (Regulation Z), as amended at 78 Fed. Reg. 25638 (May 2, 2013), 78 Fed. Reg. 60382 (October 1, 2013), and 78 Fed. Reg. 62993 (October 23, 2013).

[19] *See*, for example, the Appraisal Foundation's Appraisal Practices Board, Appraisal Standards Board, and Appraisal Qualifications Board; the Federal Financial Institution Examination Council's Appraisal Subcommittee; the Uniform Standards of Professional Appraisal Practices ("USPAP"); the states' appraiser regulatory agencies; appraisal standards in Title XI of the Financial Institution Reform, Recovery, and Enforcement Act of 1989, as amended by Dodd-Frank Act §§ 1473(a), 1473(e), 1473(f), 1473(m), 1473(q), and 1450; Dodd-Frank Act appraisal amendments at TILA § 129H as implemented in regulations at 78 Fed. Reg. 10368 (February 13, 2013) and proposed to be amended at 78 Fed. Reg. 48548 (August 8, 2013); Dodd-Frank amendments at TILA § 129E; and Dodd-Frank Act amendments at ECOA § 701(e) as implemented at 78 Fed. Reg. 78216 (February 31, 2013).

Specifically, the QRM definition should be clear that it incorporates the QM definition as expressed in TILA §§ 129C and 130, all relevant provisions of Regulation Z, including the points and fees definition in §§ 1026.4 and 1026.32 (§ 1026.32 depends on the § 1026.4 finance charge definition), as well as the Regulation Z commentary and Appendix Q. The QM definition is subject to TILA § 130(b), which provides that creditors and assignees are not liable for violations if, within 60 days of discovering an error, they correct it. The QM definition is also subject to TILA § 130(c), which provides that creditors and assignees are not liable for violations if the creditor or assignee can show by a preponderance of evidence that the violation was not intentional and resulted from *bona fide* error. All of these should be incorporated into the QRM definition.

The proposal to permit a sponsor to correct inadvertent errors by repurchasing a non-QRM loan from a pool is helpful. This will be especially important in the earlier years of the ability-to-repay regulation because the definition of QM loan is still uncertain in many areas, making inadvertent errors likely. Incorporating TILA § 130 into the QRM definition would similarly permit reasonable corrections to inadvertent errors. Any QM loan for which ability-to-repay liability under § 129C could not arise under TILA or under similar state law should be a QRM loan.

Plain Language is Helpful

The agencies ask whether the proposed regulation is clear. The QM definition is not clear. By incorporating the QM definition by reference, the QRM regulation incorporates unclear language.

We support clear regulations in any case, and there is no advantage to unclear regulations. Clear language is all the more important in the ability-to-repay regulation because consumers should be able to read and understand it. As written, the ability-to-repay regulation will be incomprehensible to consumers. For example, its definition of points and fees is difficult to understand. Its term "insufficient residual income" in the QM rebuttal presumption standard is not defined. We urge the agencies to work with the CFPB to improve the clarity of the ability-to-repay regulation.

Conclusion

We appreciate the agencies difficult work in writing a risk retention regulation. In the consumer mortgage market, the need to protect against poor underwriting ended with the high default rates of recent years. In addition, the ability-to-repay regulation will serve the same purposes as a risk retention requirement. Today, the opposite problem exists. An unnecessarily narrow QRM definition would be especially harmful to consumers with lower income or wealth. We therefore urge the broadest definition of QRM loan possible.

Sincerely,

Anne C. Canfield
Executive Director

cc: Honorable Richard Cordray
Honorable Sean Donovan
Mr. Edward DeMarco