Massachusetts
Bankers
Association

July 22, 2011

Ms. Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551

RE: Docket No. R–1417
RIN No. 7100–AD75

Dear Ms. Johnson:

On behalf of the Massachusetts Bankers Association's (MBA) more than 190 commercial, savings, cooperative banks and savings and loan associations in Massachusetts and New England, we appreciate the opportunity to comment on the Federal Reserve's proposed rule to implement amendments to the Truth in Lending Act (TILA) made by the Dodd-Frank Act (DFA or "the Act"). The proposal expands the scope of the current ability-to-repay requirements and establishes standards for complying with these requirements, including defining a "qualified mortgage," which would be subject to a safe harbor. The Fed's proposed rule also implements the DFA's limits on prepayment penalties.

The Fed's proposal is extremely complex and far-reaching and the final regulations will shape the mortgage finance system for years to come. Massachusetts and New England have a substantial number of banks that specialize in residential mortgage lending. The Fed's proposal, along with other regulatory proposals in various stages of development, will have a significant impact on these banks: traditional lenders that had nothing to do with the recent financial crisis. Our member institutions will face new and more stringent regulatory requirements and implementation of these regulations presents a major compliance challenge for banks of all sizes.

As the Fed works to develop final rules to implement these provisions of DFA, a failure to strike the correct balance will further damage an already weakened housing economy and disadvantage both lenders and consumers. The impact on all stakeholders, and the overall economy, must be considered carefully prior to finalizing these regulations.

<u>Background</u>

Section 1411 of DFA prohibits lenders from making mortgage loans unless there is a reasonable and good faith determination that the consumer will have a reasonable ability to repay the loan. In Section 1412 of the Act, Congress established a safe harbor and rebuttable presumption that a qualified mortgage (QM) will meet these ability-to-repay standards. If a mortgage loan meets the elements of a QM, the creditor and assignee of the loan would enjoy a safe harbor presumption that the loan meets the Section 1411 standards.

These provisions clearly demonstrate Congress' initiatives to address many of the abuses in the mortgage finance system that contributed to the recent problems in the financial markets. Our member

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institutions did not make subprime or "exotic" mortgages with many of the loan features that contributed to the crisis in the mortgage marketplace.

Strong underwriting criteria, compliance with federal and state consumer protection laws and robust internal controls and policies ensured that the loans made by our member banks were successful for the bank and the borrower. In fact, even now when delinquencies and foreclosures are driven more by high unemployment than particular loan features, Massachusetts and New England banks have far lower delinquency rates than many other regions of the country (1.6% vs. 4.71% nationally). This is a testament to the safe and sound underwriting procedures our member banks continue to practice.

Overview of Comments

MBA supports the strong underwriting and consumer protections in the mortgage lending area. As we have stated repeatedly, it is our belief that if more regulatory scrutiny had been focused on non-bank lenders and mortgage brokers, many of the loans now in default would not have been originated. If implemented and enforced in a balanced manner, these regulatory requirements will protect consumers, guard against systemic risk, and level the playing field between bank and non-bank lenders. However, the regulations must also ensure that qualified borrowers continue to have access to mortgage credit and that lenders are provided flexibility to assess risk in the loan process.

All mortgage loans must adhere to the minimum underwriting standards prescribed in these regulations. As such, these new provisions will completely alter the legal and underwriting foundations of the mortgage lending system. These proposed rules apply broadly to both owner-occupied and non-owner-occupied property loans. As such, these proposals have great impact on all aspects of mortgage lending—they modify the legal responsibilities of lenders and loan originators, they fundamentally impact the types of products offered to the public, they affect channels and systems used to deliver these loans to consumers, and influence the very cost and price of mortgage loans across all markets.

Our comments will focus primarily on the Qualified Mortgage provisions in the proposal, since we believe that for the vast majority of our member institutions, QMs will become the only viable loans. The QM segment will define almost all mortgage lending in the future, so that banks can ensure they are subject to the safe harbor.

MBA Comments

As we stated above, the Fed's proposed rules will alter the legal and underwriting foundations of the mortgage lending system and apply to owner-occupied and non-owner-occupied property loans. The proposals affect all aspects of mortgage lending, from the legal responsibilities of lenders and loan originators to the types of products offered to borrowers.

MBA believes that banks must comply with the QM provisions in order to access the safe harbor protections because without these protections, lenders cannot have the legal certainty required to operate in the mortgage market. The vast majority of our member banks, particularly community banks, will operate exclusively within the Qualified Mortgage segment, and will entirely avoid making loans outside this safe harbor.

Therefore, we believe that the final rule must reflect the fact that the QM loans will comprise the largest portion of mortgage lending for depository institutions. The QM must be defined broadly enough to ensure that most mortgage lending will take place inside its parameters – not as an extremely high standard that will only apply to a small segment of the market.

- **MBA Supports Safe Harbor Alternative 1**

The proposed rule suggests two alternatives for legal protections to be afforded to lenders pursuant to the qualified mortgage safe harbor provisions of Section 1412. Under the first approach, a lender that makes a mortgage loan that satisfies certain specific conditions that meet the qualified mortgage provisions would be entitled to "safe harbor" protections. Under the second proposed approach, a creditor making a qualified mortgage loan and satisfying the conditions specified in the first alternative as well as additional underwriting elements, would be entitled to "rebuttable presumption" of compliance with the repayment ability determination requirements. The Fed has asked for comment on these two alternatives, since it believes that DFA is explicit as to whether a QM is eligible for a safe harbor or a rebuttable presumption.

MBA strongly believes that the final rule should incorporate the safe harbor provisions in Alternative 1. The rebuttable presumption in Alternative 2 provides no meaningful protection to lenders since the proposed repayment provisions give borrowers the right to challenge a loan's minimum standard provisions. From a practical standpoint, if the Fed's rule does not provide a safe harbor it will result in situations in which borrowers, whose loans are delinquent or at risk of foreclosure, will file suit against the lender arguing that their loan is unaffordable and that the lender should not be permitted to foreclose on the properties. This was not the legislative intent of DFA.

Without a full safe harbor, banks will be faced with frivolous challenges every time a borrower defaults: the argument would be that the mere fact that a default occurred means that the creditor evidently did not adequately consider the borrower's ability to repay. Since the standard for rebutting the QM presumption is vague, the legal risk to banks and other lenders is substantial. We urge the Fed to adopt Alternative 1 and allow for a comprehensive safe harbor under the QM protections.

- **Definition of QM Safe Harbor**

As we stated above, MBA believes that strong underwriting standards are important in ensuring a viable mortgage market. Our member institutions have been successful at operating robust residential lending departments while maintaining low delinquency rates. That is why we recommend basing the QM standards on existing underwriting standards that are proven and have been successful.

For example, MBA believes that in order to qualify for the safe harbor, a loan cannot have certain features such as negative amortization and points and fees that exceed 3 percent of the total loan amount (with appropriate adjustments for smaller loans, etc). In addition, QM loans should be underwritten based on the highest rate during the first five years, use a payment schedule that fully amortizes the loan over the loan term and takes into account any mortgage related obligations.

In addition, lenders should verify a borrower's current or reasonably expected income and/or assets. This calculation should include the borrower's monthly payment on the covered transaction, the monthly payment for mortgage related obligations and any simultaneous loans. Banks should also be required to verify a borrower's current debt obligations and monthly debt-to-income ratio or residual income.

Conclusion

MBA strongly believes that using the base standards outlined above, and providing for flexibility for banks in certain areas, we believe that consumers will enjoy stronger consumer protections when applying for mortgages from lenders of all types. This, combined with the full safe harbor will enable banks to continue providing mortgage credit to their communities.

Thank you again for the opportunity to comment on the proposed rule. If you have any questions, please contact me at (617) 523-7595.

Sincerely,

Jon K. Skarin
Director, Legislative & Regulatory Policy