Statement of Debra Still

On behalf of the
Mortgage Bankers Association

House Financial Services Committee
Subcommittee on Financial Institutions and Consumer Credit

"The Impact of Dodd-Frank's Home Mortgage Reforms: Consumer and Market Perspectives"

July 11, 2012

1717 Rhode Island Avenue, NW, Suite 400 | Washington, DC 20036 | www.mortgagebankers.org | (202) 557-2700

Chairwoman Capito, Ranking Member Maloney and members of the subcommittee, my name is Debra W. Still and I currently serve as President and Chief Executive Officer of Pulte Mortgage, a nationwide lender that is headquartered in Englewood, Colorado. My company employs 520 individuals throughout the United States and, since 1972, has helped more than 350,000 homebuyers finance their new home purchases.

I am testifying today in my capacity as Chairman-Elect of the Mortgage Bankers Association[1] and as a Certified Mortgage Banker (CMB). MBA uniquely represents mortgage lenders of all sizes, from federally-chartered institutions to the smallest community lenders who serve the mortgage financing needs of families and neighborhoods throughout the nation.

We very much appreciate your holding this hearing on the implementation of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank). It could not be timelier. During the next month, several major rules to overhaul the disclosure process, provide new requirements for high-cost lending and servicing, as well as compensation and qualification of loan officers, will be proposed for comment.

Notably, just two days ago, MBA responded to the request of the Bureau of Consumer Financial Protection (CFPB or Bureau) for further comments regarding the Ability to Repay – Qualified Mortgage (QM) rule. The Bureau specifically sought comments on requirements that might be included in the definition of QM and the liability and risks of various approaches to crafting the rule. The Bureau has also announced that it will be finalizing the QM rule late this fall.

How it is finalized – what it contains and how it is structured – will determine how many consumers will have access to safe, affordable and sustainable mortgage credit for generations to come.

The fact is lenders are continuing to tighten credit over the 2011 book of business, which was already far tighter than we have seen in years. Access to credit is taking on some disturbing characteristics that will have long term impacts if not addressed. Without lending, the economy will not recover, especially for the middle and lower/middle class who buy starter homes and lower priced homes.

Federal Reserve Chairman Ben Bernanke has observed:

> "One reason for the very slow recovery in mortgage credit, despite monetary policy actions that have helped drive mortgage rates to historically low levels, is that many lending institutions have tightened underwriting conditions dramatically, relative to the pre-recession period. Given the lax standards during the credit boom, some tightening was doubtless appropriate to protect consumers and ensure lenders' safety and soundness.

[1] The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets; to expand homeownership and extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of over 2,200 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, Wall Street conduits, life insurance companies and others in the mortgage lending field. For additional information, visit MBA's Web site: www.mortgagebankers.org.

> However, current lending practices appear to reflect, in part, obstacles that are limiting or preventing lending even to creditworthy households."[2]

In a similar vein, Secretary of Housing and Urban Development Shaun Donovan has said he believes that in today's market 10-20 percent of potential home-buyers who could adequately carry the debt were being "locked out" of the market because credit was either not available or was available only at a restrictive price. "We had risk-amnesia going into the crisis and I think now we've gone a bit too far in the other direction," he said.[3]

While an ability to repay rule is a good protection, against this backdrop, we must find the right balance between consumer protection and access to credit.

If this rule is not finalized appropriately, the impact will likely be worse for the very borrowers we are trying to protect and hinder the availability of credit for far too many borrowers who are otherwise qualified. We will undoubtedly end up with a far more restrictive lending environment then we have today, and simultaneously harm the larger economy for years to come.

As we told the CFPB, we do not believe there can be too much deliberation on this rule. It is absolutely essential that the Bureau implements this proposal without unwittingly undermining the availability and affordability of credit and the nation's economic recovery.

I. Introduction

MBA recognizes that the mortgage industry must take responsibility for its share of excesses during the recent housing boom. We agree changes are needed to ensure such excesses cannot be repeated in the future, and we favor reasonable ability to repay requirements to achieve that end.

Even though the mortgage industry has implemented some of the most conservative underwriting standards in decades, and toxic mortgage products are no longer available, we understand the value of embedding sound product and underwriting standards into the law to assure consumers are protected going forward. Establishing an ability to repay requirement, along with an unambiguous set of standards in the form of a clear safe harbor, is the right way to accomplish this.

Nevertheless, as this process goes forward, we must be mindful of the fact that these new rules come on top of the tightest credit standards in decades. It is crucial this work does not exacerbate the situation.

When considering the QM rule, MBA has established four principles we believe should guide its completion:

- First, in order to reach as many borrowers as possible with safe, affordable and sustainable financing, the QM needs to be broadly defined.

- Second, the rule must include clear, specific and objective standards, by incorporating unambiguous requirements.

[2] Speech before the National Association of Home Builders, Orlando, FL, 2/10/12
[3] As quoted in Reuters, 5/10/12

- Third, the QM should provide lenders and borrowers the legal certainty that meeting the standards will provide them a clearly defined safe harbor.

- Finally, given the QM's massive effect on the existing market, the rule should be designed in a way that avoids unintended consequences.

II. The Ability to Repay Requirement and the Qualified Mortgage Rule

A. Background

Dodd-Frank requires that a lender may not make a residential mortgage loan unless the lender makes a reasonable and good faith determination based on verified and documented information that, at the time the loan is consummated, the consumer has a reasonable ability to repay the loan, according to its terms, and all applicable taxes, insurance (including mortgage guarantee insurance), and assessments.

The law provides great liability (and stiff remedies and penalties) for violations. For example, a mortgage lender who fails to comply with this requirement for a hypothetical $200,000 loan would face liability on the order of:

(1) $20,000 in actual damages, assuming the borrower made a 10 percent down payment;

(2) Statutory damages of up to $4,000;

(3) All loan fees and up to three years of finance charges paid by the consumer, which on an average loan of $200,000 at 4.5 percent may be approximately $25,000; and

(4) Court costs and reasonable attorney fees associated with the enforcement action, which based on the attached memorandum could be anywhere between $26, 000 and $155,000 depending on how the QM is structured).

Dodd-Frank also extends the statute of limitations for a claim based on a violation of the ability to repay requirement from one year to three years. Well beyond three years, the law allows a consumer to assert a violation as a claim in foreclosure whenever it occurs. The claim may be made against any creditor, assignee or holder of the mortgage as well.

B. The QM – Safe Harbor or Rebuttable Presumption

Against the backdrop of this enormous potential liability – considering how unpredictable litigation can be – Dodd-Frank provides a principled avenue for compliance.

Lenders who make QM loans, which under the law cannot have risky features, must be well underwritten and meet other restrictions (including limits on points and fees), may "presume" that their loans meet the ability to repay requirements.

Accordingly, great attention has been focused on how QM will be defined and how it is to be constructed.

The law grants wide discretion to the regulator for this purpose. As a result, the Federal Reserve, which originally proposed the rule for the Bureau to later finalize, offered two alternatives: "a legal safe harbor" or a "rebuttable presumption." The rule was clear that only one should be adopted.

Importantly, the "safe harbor" is misnamed. That approach, if adopted, is neither a pass for lenders, nor does it deprive consumers of an opportunity for court review. Under either a "safe harbor" or a "rebuttable presumption," a borrower may opt to go to court and seek review of an alleged violation.

The difference, however, is that in a proceeding where a safe harbor is established, the court's inquiry is focused only on whether or not the standards for the QM were met.

Under a rebuttable presumption, the scope of the inquiry is left to the court, with wide variations from one court to another on how to apply the presumption, including when and how extrinsic evidence may be brought in beyond the standards.

Such an inquiry, in all cases, is more open-ended, unpredictable and far more costly.

C. *Three Percent Limit on Points and Fees*

Before I describe these subjects in greater detail, I wish to highlight another area of particular concern. Dodd-Frank limits the points and fees that can be charged for a QM loan. The statute specifies three percent as the limit but permits adjustments including for smaller loans.

Based on our reading of the proposed rule, points and fees may include: (i) charges to affiliated (but not unaffiliated) title companies, (ii) compensation paid to loan originators, including employees; and (iii) amounts of insurance and taxes held in escrow.

This definition would be overly inclusive and will bring unintended consequences. These include that many loans, especially to low- and moderate-income borrowers, will not qualify as QMs (even if they meet all other QM requirements) and therefore may not be available, or require higher rates and payments – ironically the opposite of the rule's intention.

III. MBA's Principles for the Establishment of the QM

A. The QM Must Be Broad to Reach as Many Qualified Consumers as Possible with Safe, Affordable and Sustainable Financing

In the spring of this year, we learned that the CFPB was considering establishing a narrow QM to ensure an active non-QM market. MBA, along with a wide coalition of consumer, civil rights, and industry organizations, strongly opposes such an approach.

First, because of the very significant liability under Dodd-Frank, it is not clear to what extent there will be any non-QM lending. Some believe non-QM loans will be made only to the most qualified, wealthy borrowers and kept in institutions' portfolios. Others believe there will be lending with significant pricing premiums that will raise costs to borrowers, particularly those least able to bear them. Either way, as noted in an April 12, 2012, joint letter with our coalition partners, defining QM to be broad and inclusive is critical to ensuring maximum consumer access to safe, affordable and sustainable financing. (Attachment A).

As the letter pointed out, every version of the Ability to Repay provision introduced in Congress, including the bill that ultimately became law, paired the Ability to Repay Requirement with the QM. The reasoning was that pairing the prospect of liability with an exception for well underwritten,

safer, more sustainable loans was the best means of encouraging such lending. The law also added liability for steering consumers from QM to non-QM loans. In our view these provisions clearly demonstrate Congress's preference for QM loans.

Prohibitions against risky loan features and a host of protections are all included in the QM. For this reason, QMs should not be a subset of the market, they should *be* the market, and hopefully broaden the market that exists today.

B. The QM Must Include Clear Objective Standards

MBA believes it is essential that a sound QM must be constructed with clear standards. Our July 21, 2011, comment letter supported the original proposal that suggested that the QM could require compliance and evidence of compliance with widely accepted underwriting standards such as Fannie Mae's Desktop Underwriter® (DU) and Freddie Mac's Loan Prospector® (LP) standards. However, a mechanism must also be established to approve current and future standards available from sources other than these two companies. We still believe the incorporation of these standards, including the use of automated underwriting systems, offers a reasonable approach. The approach has the virtue of assuring that the standards are dynamic as understanding of mortgage performance and ability to repay deepens.

The other approach that has been offered would involve embedding objective, numerical standards in the definition such as a particular DTI and a "waterfall" of alternative criteria. In March 2012, some lenders and consumer groups met with the CFPB and proposed a maximum total-debt-to-income ratio (TDTI) of 43 percent that, if not met, could be satisfied through a waterfall.

While these efforts to establish clear standards for the safe harbor and bound the issues before the court are understandable, the 43 percent TDTI, which would ensure a loan is regarded as a QM, is problematic. Using Federal Housing Finance Agency (FHFA) data, from 1997-2009, 23 percent of the loans acquired by the Enterprises had DTIs of 44 percent or greater. Over the same time period, 19 percent of these loans had DTIs of 46 percent or greater.

Based on the FHFA data, there is no reason to choose 43, 44 or even 46 as a default standard. Loan performance and ability to repay does not markedly change at any of these points.

Notably, the Colorado Housing Finance Agency permits DTIs up to 50 percent, North Carolina allows lenders to presume a loan meets an ability to repay standard at 50 percent and Fannie Mae caps eligibility for their loans in its waterfall at 50 percent.

Beyond the issue of a 43 percent DTI, a fatal flaw in the proposal is that it includes its waterfall in a rebuttable presumption and it does not confine the litigation to whether the QM standards are met. Any waterfall should be embedded in a safe harbor if this approach is adopted by the CFPB.

MBA also does not believe that relying exclusively on debt-to-income (DTI) ratio is wise. What is most clear to us is that there are multiple factors that along with DTI have a significant impact on predicting mortgage performance and ability to repay.

MBA believes this effort should be a starting point, not an end. Numerous issues must be resolved. For example, trying to embed a DTI also necessitates clear, rational standards on what is to be considered debt and what is to be considered income. This is the essence of underwriting a mortgage, i.e., gaining a clear understanding of a borrower's earning power and their liabilities.

In our most recent QM comment letter, we indicated we were working on a more acceptable approach embedded in a safe harbor. We look forward to sharing it with the Bureau shortly. Unless any standards are embedded in a safe harbor, considering the enormous liability, we do not believe this approach is useful.

C. *A Safe Harbor with Clear Standards is the Best Path to Ensure that the Maximum Number of Qualified Borrowers Receive Safe, Affordable and Sustainable Financing*.

MBA has employed counsel and sought a range of opinions on different aspects of the issue of whether the QM should be structured as a safe harbor or a rebuttable presumption. All agree that the costs of litigation for consumers and lenders will be higher if the Bureau adopts a rebuttable presumption.

This is because the extent of litigation costs depends on whether a matter can be resolved at an early stage, principally on a motion, assuming the standards have been met, or whether resolution must await a more protracted process, at a summary judgment or even at trial.

If a safe harbor is established and a consumer can show the requirements were not met, the consumer is granted relief at an early stage. At the same time, if a transaction fits within the standards of a safe harbor, a lender can be reasonably certain the matter will be dismissed at an early stage as well.

Establishing the QM as a safe harbor, because of the certainty it provides, will result in lower costs for borrowers. Cases will not be brought unless performance under the standards is questionable. Those cases that are brought can likely be resolved early in the process, thus lowering costs.

Moreover, considering that attorney fees can be awarded, that a rebuttable presumption offers an opportunity to offer evidence above and beyond any QM standards, and that the potential damages are large, not only will the costs per suit in a rebuttable presumption be greater but there will be a far greater number of suits.

MBA data indicates that there were approximately 2.2 million loans in foreclosure in the first quarter of this year. Assuming such claims became perfunctory, the costs ultimately borne by consumers could be enormous.

These costs will be built into increased loan charges for all borrowers and threaten to decrease competition going forward. Raising the liability risks by establishing vague and unpredictable legal standards will make it far more difficult for smaller lenders to compete. At the same time, large institutions with choices may opt out of the mortgage business as simply not worth the cost.

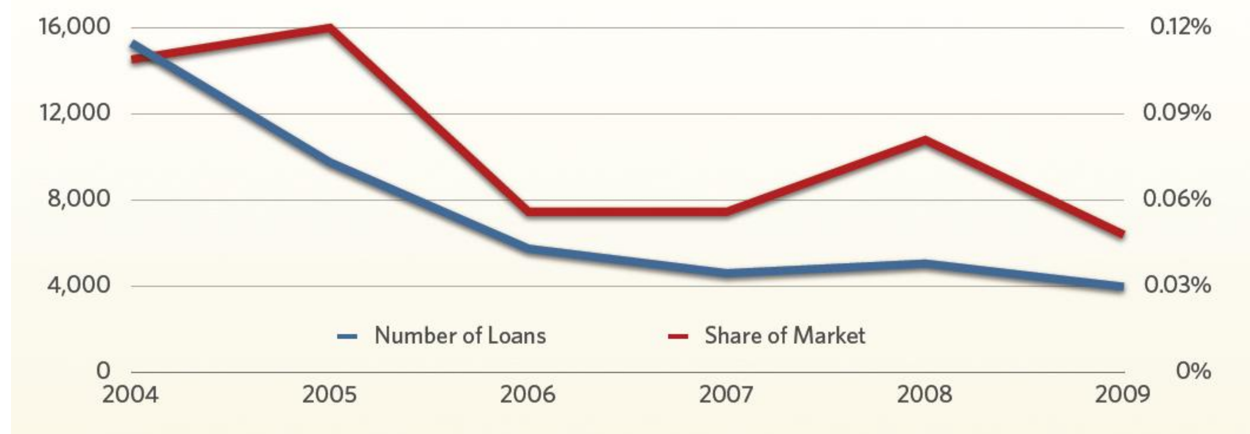
The potential costs of put back claims also should militate strongly in favor of a QM constructed as a safe harbor rather than a rebuttable presumption. If the QM is established as a safe harbor, we expect a more active secondary market with clearer standards, fewer buyback claims and far lower resultant pricing for consumers

If the QM is established with a rebuttable presumption, we expect continuation of uncertain standards, claims and counterclaims and thus increased costs. It is also likely that both investors and lenders will impose additional underwriting standards both to limit their risks as sellers and purchasers. These costs, too, will ultimately be borne by consumers.

The only check on costs – and a very regrettable one at that – will be that fewer qualified borrowers will receive loans because of the potential costs of each claim. This is because lenders will be forced to adopt more conservative lending standards than any lending standards established as part of the QM test. Fewer loans will be available, particularly to qualified borrowers at the margins. Considering that fewer loans will be available, the dollar costs will be limited somewhat as the societal costs of unduly curtailing homeownership to qualified borrowers increase.

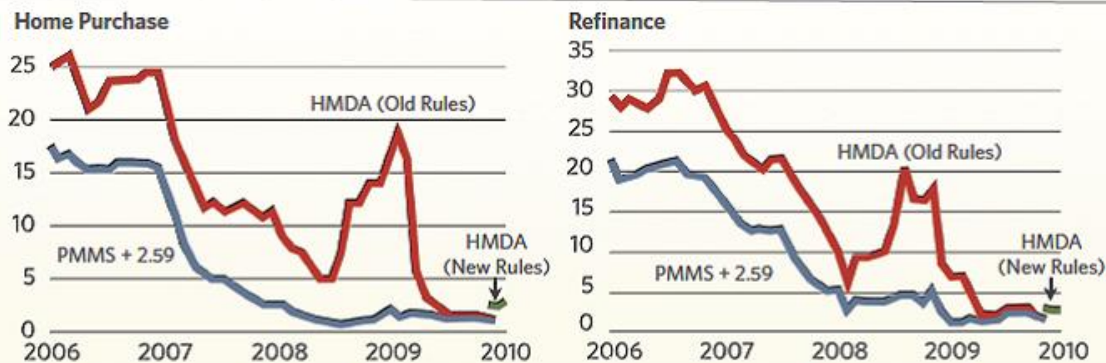
It has been asserted that state laws (such as North Carolina's), which include ability to repay provisions, have not engendered litigation and therefore, there would not be increased litigation arising from a rebuttable presumption. North Carolina law, however, does not provide for the mandatory award of attorney fees and the damages are far lower. Beyond that, the North Carolina law includes presumptions of compliance if a borrower has a DTI of 50 and it does not encompass loans in excess of $300,000 – both factors that exclude most claimants.

It is more instructive to observe the effects of the Home Ownership and Equity Protection Act (HOEPA) triggers that carried significant assignee liability and higher priced loan rules that offered a rebuttable presumption. In both cases, the result was a precipitous drop in both categories of loans, as demonstrated in the graphs below:



Higher-Priced Lending Has Been Limited Since New Rules

Higher-Priced Share of Lending, by Annual Percentage Rate Threshold, 2006-2009



Note: The data are monthly. Loans are first-lien mortgages for site-built properties and exclude business loans. Annual percentage rates are for conventional 30-year fixed-rate prime mortgages. PMMS = Freddie Mac Primary Mortgage Market Survey. HMDA = Home Mortgage Disclosure Act.
Source: Avery et al, 2010, Federal Reserve Bulletin.

- The Federal Reserve has implemented new rules for "higher-priced lending" — for first mortgages, 150 bps over the Average Prime Offer Rate.
- These rules establish "rebuttable presumption" that ability to repay is satisfied for loans if certain requirements are met.
- Before the rules were issued, share of higher-priced lending peaked above 25 percent in 2006, but has since fallen to well below five percent.

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On April 27, 2012, we wrote to the CFPB along with other associations urging a safe harbor (Attachment B).

We have heard from some that a safe harbor might not address all hypothetical cases. If that is so, then the Bureau's energies should remain focused on ensuring the standards are properly constructed and then embedding them within a safe harbor to serve all. The interests of the vast majority of consumers should not be sacrificed to allow for an as yet unspecified claim or claims by a tiny few.

D. The Definition of Points and Fees Requires Revision and Attention to Smaller Loans

As I indicated earlier, the QM requirements include a limit on points and fees that is 3 percent of the loan amount. MBA is concerned that if the current definition remains, it will cause several unintended consequences.

1. Fees of Title Affiliates

The definition as it stands includes title charges paid to an affiliate but excludes title charges paid to an unaffiliated title company. This result is both anti-consumer and anti-competitive. Economic studies have shown that affiliated title providers, which currently comprise more than 26 percent of the market, offer services that are competitive in cost with those of unaffiliated providers.

Where affiliates have been excluded from the market, title insurance charges have risen. National consumer surveys have shown that consumers who take advantage of the one-stop shopping that affiliated businesses offer have a satisfactory home purchase experience. At the same time, consumers are free to choose not to use affiliated providers. Indeed, the Real Estate Settlement Procedures Act (RESPA) requires a clear disclosure of affiliated relationships and their cost and does not permit a consumer to be required to use an affiliated entity.

Concerns that lenders may augment their fees through the charges of affiliated title companies are not valid. In fact, title insurance premiums and in many cases title services are highly regulated. Forty-four states and the District of Columbia require that title premiums be set by the state, approved by the state, or filed with the state (23 states also include title examinations and searches). Of the remaining six states, one state (Iowa) does not recognize title insurance.

2. *Compensation to Originator Employees*

One interpretation of the definition of "points and fees" in Dodd-Frank is that it requires the inclusion of all compensation paid by a lender to its individual employee loan originators as well as the sums creditors or mortgage brokers receive for the transaction.

Such a result in our view is unfair and simply unworkable.

First, much of these amounts are counted already as origination fees to lenders.

Second, while charges to these companies are appropriate for inclusion in the points and fees calculation, money paid out by lenders for compensation or otherwise is not.

Third, considering bonuses are part of loan officer compensation, creditors will be unable to accurately ascertain such compensation at the time the loan is made, making application of the limit impossible.

While the term "loan originator" encompasses both mortgage brokerage entities and individuals who perform origination functions, it appears that Congress had no intention of including employee compensation in points and fees, and only was intending to include compensation paid to entities in points and fees.

3. *Escrow Amounts*

At present, the definition of "points and fees" in Dodd-Frank is ambiguous regarding whether the dollar values for amounts paid to lenders and held for the payment of insurance and taxes in an escrow account also are included in the points and fees calculation.

There is no sound public policy rationale for them to be included. Amounts for insurance and taxes are not retained by the lender or its affiliates; they are paid to insurance companies and governmental entities. Additionally, under RESPA amounts held in escrow that exceed specified limits are returned to the consumer. Finally, these amounts historically excluded from the points and fees calculations under HOEPA.

4. H.R. 4323, the Consumer Mortgage Choice Act

MBA has urged the CFPB to amend the definition of points and fees to exclude affiliated title fees and clarify that loan officer compensation and escrow amounts from the calculation for purposes of applying the 3 percent limit.

We strongly believe action in this area is essential to: (i) maintain a competitive marketplace, (ii) prevent higher prices resulting from the withdrawal of affiliated title service providers in low- and moderate-income marketplaces; and (iii) preserve the ability of consumers to choose the benefits of one-stop shopping when they purchase or refinance their home.

Despite our belief that the CFPB can make these revisions under existing law we strongly urge your support of H.R. 4323, bipartisan legislation introduced by Representatives Bill Huizenga, David Scott, Ed Royce, and William Lacy Clay, and cosponsored by nearly 20 members of the U.S. House of Representatives, to achieve these important purposes.

5. Smaller Loans

The 3 percent limit on points and fees for QM may be adjusted for smaller loans under Dodd-Frank and MBA supports such adjustment. We believe this is the only means to ensure the availability of loans at reasonable rates to lower balance borrowers.

The original proposal would provide that the limits would be adjusted to 3.5 percent for loans lower than $75,000 on a sliding scale up to a 5 percent for loans below $20,000.

However, MBA's July 21, 2011, comment letter provided data that shows that if the limit were set at 3 percent and affiliated title insurance, loan originator compensation and appraisal fees were included the great majority of loans up to $100,000 would not meet the points and fees requirements. Moreover, high proportions of loans in virtually every state from $100,001 to $150,000 would not meet the limits.

Our comment letter points out that if the cap were raised to $150,000, less than 10 percent of loans in nearly all of the states would fail to meet the limits.

Considering that $150, 000 is near the average loan amount, and based on the chart to follow, $150,000 is the right amount to apply adjustments above the 3 percent limit. We urge members of this subcommittee to support that approach.

Purpose	Loan Balance	Share
Purchase	<=75K	12.0%
Purchase	>75K and<=100k	10.6%
Purchase	>100K and<=125k	10.2%
Purchase	>125K and<=150k	10.7%
Purchase	>150K and<=175k	8.7%
Purchase	>175K and<=200k	8.2%
Purchase	>200K and<=250k	11.1%
Purchase	>250K and<=300k	8.2%
Purchase	>300K and<=417k	12.7%
Purchase	>417K	7.7%

Purpose	Loan Balance	Share
Refinance	<=75K	10.1%
Refinance	>75K and<=100k	11.9%
Refinance	>100K and<=125k	11.9%
Refinance	>125K and<=150k	11.5%
Refinance	>150K and<=175k	9.5%
Refinance	>175K and<=200k	8.2%
Refinance	>200K and<=250k	11.6%
Refinance	>250K and<=300k	8.2%
Refinance	>300K and<=417k	11.8%
Refinance	>417K	5.2%

6. Other Issues

Because the limit on points and fees is based on the loan amount, the limit becomes tighter as the borrower increases their down payment. We believe the CFPB also should look at this issue carefully in setting the 3 percent limit. We certainly do not want to discourage borrowers from putting more equity into their homes by increasing their loan rates and payments to cover loan fees.

CONCLUSION

We appreciate the efforts of the subcommittee to examine these enormously important regulations. No matter how well intentioned these rules may be, they cannot be allowed to harm American families, the mortgage market and the nation's still fragile economic recovery.

While MBA commends the CFPB's efforts to date, we remain concerned that the QM rule may not be properly structured to truly serve consumers.

We urge your support of correspondence spearheaded by Chairwoman Capito and Representative Brad Sherman to the CFPB in support of a safe harbor, and would further urge your support of H.R. 4323 to revise the point and fees provisions.

I look forward to your questions and to MBA continuing its work with this subcommittee to ensure that our nation has a vibrant market of sustainable mortgages, for as many qualified borrowers as possible, for generations to come.

ATTACHMENT A

April 12, 2012
The Honorable Richard Cordray
Director
Bureau of Consumer Financial Protection
1700 G St. NW
Washington, DC 20552

Dear Director Cordray:

The undersigned organizations representing a very broad spectrum of lenders, investors, housing professionals, consumer advocates and civil rights groups write to you today to strongly urge that a broadly-defined Qualified Mortgage (QM) be central to the forthcoming Ability to Repay regulation.

Most economists and housing market analysts in government and in the private sector agree that today's underwriting standards are tight and are contributing to a slow housing recovery. Our organizations believe that an unnecessarily narrow definition of QM that covers only a modest proportion of loan products and underwriting standards and serves only a small proportion of borrowers would undermine prospects for a housing recovery and threaten the redevelopment of a sound mortgage market.

Admittedly, the undersigned hold different views about whether the QM should be designed as a safe harbor or a rebuttable presumption (both options were included in the proposed rule). Nevertheless, we stand united in urging the Bureau of Consumer Financial Protection (CFPB) to construct a broadly-defined QM using clear standards. We believe that is the only way to help the economy and at the same time ensure that the largest number of credit worthy borrowers are able to access safe, quality loan products for all housing types, as Congress intended in enacting the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank).

Congressional Intent Calls for Broadly Defined QM

Every version of the Ability to Repay provisions introduced in Congress, including the final version of Dodd-Frank that became law, paired the Ability to Repay Requirement with the QM. The reasoning was that pairing the prospect of liability with an exception for well underwritten, safer, more sustainable loans was the best means of ensuring sound lending for borrowers.

To add incentives for QM lending, the law also added liability for steering consumers from QM to non-QM loans. Further, the Bureau was given broad flexibility to define the QM in a manner that will "ensure that responsible, affordable mortgage credit remains available to consumers." All of these provisions demonstrate Congress's intent that all creditworthy borrowers – especially low- and moderate-income borrowers and families of color – should be extended the important protections of a QM.

Non-QMs Will Be Less Protective, Less Available and More Expensive

A narrowly defined QM would put many of today's loans and borrowers into the *non*-QM market, which means that lenders and investors will face a high risk of an ability to pay violation and even a steering violation. As a result of these increased risks, these loans are unlikely to be made. In the unlikely event they are made, they will be far costlier, burdening families least able to bear the expense. Beyond that, these higher-priced loans would not be required to include important protections against certain practices and loan features that drove the highest failures in the mortgage boom that are embedded in QM.

There is no question that some residential mortgage underwriting standards were too lax during the housing boom, and that strong regulatory standards are needed to make sure that those mistakes are not repeated. We support the establishment of such standards and we believe the establishment of the QM is central to that effort. Rather than narrowing the QM market, we believe the CFPB should work to ensure that the QM market becomes the market. Creating a broad QM, which includes sound underwriting requirements, excludes risky loan features, and gives lenders and investors reasonable protection against undue litigation risk, will help ensure revival of the home lending market.

Clear Standards are Critical to Any QM Definition

Vague parameters for the QM also will add legal uncertainty, increase costs and limit access to credit. If the parameters of the QM are not clear, risks become unpredictable, forcing lenders to decrease their risk tolerance and operate well within the standards. Such an outcome will lessen both the availability and affordability of credit for far too many borrowers. For these reasons, the CFPB should establish clearly defined standards in the QM definition that are objectively determinable at origination.

All of us would appreciate the opportunity to meet with Bureau staff at your earliest convenience to discuss all of these concerns and to share our data. We are convinced that the choices around this important rule, including in large measure the breadth of the QM standard, will affect sustainable homeownership for generations to come.

Sincerely,

American Bankers Association
American Escrow Association
American Financial Services Association
American Land Title Association
American Securitization Forum
Asian Real Estate Association of America
Center for NYC Neighborhoods
Columbus Housing Partnership
Community Associations Institute
Community Mortgage Banking Project
Community Mortgage Lenders of America
Consumer Bankers Association
Consumer Mortgage Coalition
Financial Services Roundtable
Habitat for Humanity International
Housing Policy Council

DRAFT

Independent Community Bankers of America
Leading Builders of America
Mortgage Bankers Association
Mortgage Insurance Companies of America
National Association of Hispanic Real Estate Professionals
National Association of Home Builders
National Association of Mortgage Brokers
National Association of Neighborhoods
National Association of Real Estate Brokers
National Association of Realtors®
National Community Reinvestment Coalition
National Council of State Housing Agencies
National Housing Conference
Real Estate Services Providers Council, Inc. (RESPRO®)
Real Estate Valuation Advocacy Association
The Appraisal Institute
The Realty Alliance

ATTACHMENT B

April 27, 2012

Honorable Richard Cordray
Director, Bureau of Consumer Financial Protection
1700 G Street, NW
Washington, DC

Dear Director Cordray:

The undersigned trade associations representing the financial services, home building and real estate industries as well as other concerned organizations write to you today regarding the Qualified Mortgage (QM) under the Ability to Repay rule to be issued by the Bureau of Consumer Financial Protection (CFPB). Our purpose is to reiterate our very strongly held view that the QM should be structured as a legal safe harbor with clear, well-defined standards. The standards must embody requirements for sound mortgages for consumers and specify the grounds on which there can be litigation or enforcement action as to whether those requirements have been met.

Safe Harbor versus Rebuttable Presumption

Structuring the QM as a safe harbor and focusing litigation and enforcement activity on whether the standards are met is the only means of ensuring that the largest number of borrowers possible will enjoy the safest and most affordable options for sustainable credit available through the QM. In contrast, establishing the QM as a rebuttable presumption of compliance—even with clear substantive standards but lacking clarity or limitations regarding the scope of litigation—will markedly lessen the availability and affordability of sustainable mortgages to consumers.

Effects of Rebuttable Presumption

A QM rule with a rebuttable presumption can be overridden by facts or evidence beyond, and completely unrelated to, the requirements of the QM. This unpredictability, in a setting where the potential liability for each claim can be extensive, will force lenders to retreat to far more conservative lending standards.

Smaller lenders will have great difficulty managing this degree of risk and the resultant litigation costs. A presumption can be expected to result in the exit of lenders—large and small—from the market and a reduction in credit from those remaining. This will harm consumers by depriving them of robust competition and lower costs.

Benefits of Safe Harbor

The undersigned believe the establishment of clear standards and defined proceedings, in the form of a safe harbor, is the only practicable approach. While a consumer is just as entitled to judicial review of an alleged failure to determine ability to repay through litigation involving a safe harbor, any such review would be appropriately focused only on whether the QM's standards or factors have been met. Such an approach will require the CFPB to develop the right standards rather than simply leaving the matter to the courts.

Carefully defining the standards for litigation in the form of a safe harbor also will have the advantage of reducing the number of groundless claims, whose costs are ultimately borne by all. It will allow lenders of all sizes to compete. Most importantly, it will allow lenders to comfortably operate within the boundaries of the standards prescribed, allowing the maximum number of families to qualify for traditional, affordable and sustainable loans.

Conclusion

We firmly believe the way the QM is finally structured is the most critical mortgage lending issue facing the CFPB today and will have ramifications for consumers for years to come. We urge the CFPB to carefully evaluate the potential impacts of a safe harbor versus a rebuttable presumption on consumers, financial services providers and the economy as a whole before issuing the final rule. The final rule should increase the availability and affordability of sustainable mortgage credit to consumers as Congress intended, not unduly reduce its availability or increase its costs.

We appreciate your attention to this matter. We also would welcome an opportunity to meet with you at your earliest convenience.

Sincerely,

American Bankers Association
American Escrow Association
American Financial Services Association
American Land Title Association
Community Mortgage Banking Project
Consumer Mortgage Coalition
Community Mortgage Lenders of America
Consumer Bankers Association
Financial Services Roundtable
Habitat for Humanity
Housing Policy Council
Independent Community Bankers of America
Leading Builders of America
Mortgage Bankers Association
Mortgage Insurance Companies of America
National Association of Federal Credit Unions
National Association of Hispanic Real Estate Professionals
National Association of Home Builders
National Association of Realtors®
The Realty Alliance
Real Estate Services Providers Council, Inc. (RESPRO®)
Securities Industry and Financial Markets Association
The U.S. Chamber of Commerce