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Memo

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May 6, 2009

To: Members of the House of Representatives

From: Floyd E. Stoner, Executive Vice President, Government Relations and Public Policy

Re: H.R. 1728, the Mortgage Reform and Anti-Predatory Lending Act of 2009

I am writing on behalf of the members of the American Bankers Association regarding H.R. 1728, the Mortgage Reform and Anti-Predatory Lending Act of 2009, which the House of Representatives is scheduled to consider beginning on Wednesday, May 6, 2009.

H.R. 1728 is far-reaching legislation designed to prevent a recurrence of the problems in the subprime market that have harmed many American homebuyers. We appreciate that this legislation seeks to address the source of most of these problems, the loosely regulated and largely unexamined mortgage originators operating outside of the regulatory structure within which federally insured depository institutions function.

However, we are concerned that this major legislation can have a negative impact on both insured depository institutions and credit-worthy borrowers seeking to buy homes – impacts which have the potential to impair economic recovery. In considering any new legislation, it is critical to recognize the significant regulatory and structural changes that are already underway in the mortgage industry that will provide much greater protections to consumers. It is essential to recognize that the further changes proposed in H.R. 1728 will be cumulative to the changes already being implemented under revisions to Truth in Lending Act, Real Estate Settlement Procedures Act, and Home Mortgage Disclosure Act regulations.

We have worked with the Financial Services Committee and are pleased that a number of concerns were addressed either prior to, or during, Committee consideration of the legislation.

While we greatly appreciate the comprehensive, inclusive consultation that has gone into the drafting process so far, and the desire to avoid unduly restricting credit, we remain concerned that the bill still, in our view, needs serious work.

We plan to work with the Congress as the legislation moves forward to clarify additional areas of concern. To that end, we offer the following comments.

SAFE HARBOR: The legislation creates a category of "qualified mortgages" which are given a safe harbor from the expanded liability of the legislation. "Qualified mortgages" are also exempt from certain other key restrictions in the bill, including the risk

retention requirements. While the very narrow safe harbor included in the original bill has been expanded beyond just 30 year fixed rate loans, we are concerned that it is still far too narrow. An amendment adopted during Committee consideration of the bill expanded the safe harbor to include fixed rate loans of terms other than 30 years, as well as some adjustable rate mortgages. However, the language on adjustable rate mortgages (ARMs) remains too restrictive. To qualify for the safe harbor, ARMs would have to be underwritten to the maximum rate possible during the first seven years of the loan.

Consider the example of a five year ARM with the initial rate set at 5 percent and with caps on increases in later years set at 2 percent per year. Under the pending bill, this loan would have to be underwritten at a rate of 9 percent (because in the seventh year of the loan the rate could – but by no means is likely – to go to 9 percent for that year). In this instance, even though the borrower could not pay more than 5 percent for the first five years of the loan, and not more than 7 percent in the sixth year, they would have to be able to afford the loan at 9 percent for all seven years in order to qualify. This will shut the door to affordability to many borrowers. We strongly recommend that this provision be altered to reflect a more realistic underwriting standard.

Similarly, we are concerned that to be included in the safe harbor, loan points and fees must be limited to not more than 2 percent of the loan amount. The bill should be clarified to ensure that bona fide discount points paid by a borrower to reduce the interest rate on a loan are not included in this calculation. The relevant threshold in this instance should be the annualized percentage rate (APR) as currently defined in regulation implemented pursuant to the Truth in Lending Act. We also believe that the 2 percent cap should not be statutory, but instead should be determined by the federal bank regulators to accommodate small dollar loans which may carry fixed fees taking the loan beyond a 2 percent cap. The bank regulators are better suited to determining the appropriate cap on fees paid in association with different loan products.

RISK RETENTION: We are pleased that the bill was modified during Committee consideration to provide the bank regulatory agencies with the authority to exempt loans (beyond those exempted under the safe harbor) from the 5 percent credit risk retention provisions of the bill. While this expanded regulatory discretion is a step in the right direction, we remain firm in our conviction that federally regulated and examined insured depository institutions should be exempt from risk retention requirements. Insured depositories already have significant risk retention – and the capital to back that risk. Loans sold by insured depositories into the secondary market frequently include recourse agreements, so that if there is an underwriting or other error or omission, the depository can be forced to buy the loan back. Again, because insured depositories have strong capital positions, they can and do buy back recourse loans. The same cannot be said of other lenders who lack capital. For these lenders, greater risk retention is needed. For insured depositories, it is not. We recommend excluding insured depositories from the risk retention provisions of the bill.

UNIFORM NATIONAL STANDARDS: We are gravely concerned with the enforcement provisions of the bill, especially in light of an amendment adopted in Committee which would grant state attorneys general enforcement authority over the

Truth in Lending Act provisions added by the bill. The current language of the bill will lead to conflicting enforcement actions between state attorneys general and federal banking regulators. It will cause confusion to consumers and lenders alike and will generally undermine the regulatory framework for mortgage lending in the nation. A confusing enforcement scheme is likely to harm borrowers and provide the unscrupulous with new opportunities. At a minimum, we urge you to adopt clarifying provisions which would give the federal banking regulators notice of a state attorney general's intention to act, and allow the federal regulator a reasonable time to act before the state is allowed to do so. Such a framework is needed to bring order and clarity to the process.

We anticipate a number of amendments during floor consideration. As a general rule, we oppose amendments which would increase regulatory burden on banks and their employees, and support amendments which recognize the role that regulated, insured, and examined institutions play in protecting consumers' interests and in providing products and services which benefit our national marketplace.

We appreciate the working relationship that has been established between the Members of the Committee and all interested parties, and we shall continue working with Members of Congress as this legislation moves through the legislative process.