American Bankers Association

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Ms. Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
1700 G Street, NW.
Washington, D.C. 20552

**Re: Docket No. CFPB-2014-0009; RIN 3170-AA43;**
**Amendments to the 2013 Mortgage Rules Under the Truth in Lending Act (Regulation Z)**

Dear Ms. Jackson:

The American Bankers Association (ABA)[1] appreciates this opportunity to comment on the Consumer Financial Protection Bureau's (CFPB or Bureau) proposal to amend the ability-to-repay (ATR) rule to provide a limited cure mechanism for the points and fees limit that applies to qualified mortgages.

ABA believes that the proposed cure provision would significantly improve the ATR regulations by providing banks the ability to assure compliance, control liability, and therefore offer more loans at lower cost to consumers. This proposal also incentivizes robust post-consummation quality control and audit procedures in a way that benefits both lenders and borrowers. ABA advises, however, that certain provisions be modified to ensure that lenders can provide safe and sustainable loans to as many QM-eligible consumers as possible. ABA recommends eliminating the proposed "good faith requirement," as it is duplicative of protections already contained in the law. ABA also recommends that CFPB extend the time permitted to cure an error to 180 days to better accommodate the full set of loan reviews currently applied to mortgage assets at all levels of financing. For the reasons set forth in this comment, we believe these changes will make QM loans available to a greater number of consumers, and increase the availability and affordability of mortgage credit.

**Overview of Proposal**

The above-referenced proposed rule issued by the Bureau sets forth several potential changes to the ATR regulations. The pertinent proposal analyzed in these comments involves a provision to permit a creditor or assignee to cure an inadvertent excess over the qualified mortgage points and

[1] The American Bankers Association represents banks of all sizes and charters and is the voice for the nation's $14 trillion banking industry and its 2 million employees. ABA's extensive resources enhance the success of the nation's banks and strengthen America's economy and communities. Learn more at www.aba.com.

fees limits.[2] Under proposed §1026.43(e)(3)(iii), the rule would provide that if the creditor or assignee determines, after consummation, that the total points and fees payable in connection with a loan exceed the applicable QM-related limit (under §1026.43(e)(3)(i)), the loan is not precluded from being a qualified mortgage if three conditions are met. First, the proposal would require that creditors originate the loans in “good faith” as a qualified mortgage and the loans otherwise meet the various QM requirements. Second, to cure a points and fees overage, the proposal would require that, within 120 days after consummation, the creditor or assignee must refund to the consumer the dollar amount by which the transaction's points and fees exceeded the applicable limit at consummation. Finally, the creditor or assignee must maintain and follow policies and procedures for post-consummation review of loans and for refunding to consumers amounts that exceed the applicable limit.

**Discussion**

As set forth above, ABA fully supports the CFPB’s cure proposals. In previous mortgage-related comments to the Federal Reserve Board and the Bureau, ABA had consistently advanced cure mechanisms as a proper way to control risk, help consumers, and generally expand the availability of credit. This last point is especially important—ABA believes that carefully designed cure provisions will result in more qualified borrowers receiving safe, sustainable QM loans. Lenders will be able to approve more qualified borrowers at the boundaries of the credit box without fear of inadvertently increasing their liability. In many instances, consumers will receive refunds and tangible benefits that they would not have otherwise received, and without limiting their rights or benefits under the law.

ABA believes that adopting a cure mechanism aligns the ATR regulation with the practical realities of the ongoing regulatory reforms. As recognized by the Bureau, the calculation of points and fees is extremely complex, with legal formulas that vary depending on what entity pays or what entity receives a particular fee. These calculations often involve the exercise of judgment, and the regulation is often interpreted differently by different institutions. It is not uncommon that investors will disagree with originators on alternative interpretations of whether to include or exclude a particular point and fee. The current uncertainty of the laws invariably leads to inadvertent errors with respect to charges imposed at or before consummation.

In light of the legal intricacy and the detail involved with the ATR regulations, it is increasingly common that mortgage loans are put through very meticulous post-consummation reviews by either the originating creditor or the assignee. These reviews are increasingly important in banks’ regulatory compliance procedures, and it takes time and care to ensure that all documents and all forms are accurate and complete.

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[2] The other proposals set forth in the rule but not addressed by these comments include revisions to the ATR exemptions for non-profit creditors that originate certain special loans. In addition, the proposal also would add an alternative definition of small servicer that would apply to certain nonprofit entities that service for a fee loans for which the servicer or an associated nonprofit entity is the creditor. In order to qualify as a small servicer under the proposed definition, the nonprofit must be designated as a 501(c)(3) entity and the associated nonprofit entities must, by agreement, operate using a common name, trademark, or service mark to further and support a common charitable mission or purpose.

As recognized by the Bureau, permitting creditors and assignees the ability to cure will make certain that honest lenders are afforded a realistic opportunity to achieve precise compliance, while simultaneously ensuring that consumers derive benefit by being "made whole" when oversights, miscalculations or inadvertent mistakes are made by creditors.

ABA would urge, however, that any cure mechanism must be fashioned with legally clear and objective factors to ensure that such provisions are widely adopted and properly used to the benefit of all stakeholders. ABA joins the *Mortgage Bankers Association* and other credit industry representatives to request that CFPB consider the critical points that follow.

1. *Eliminate the proposed "good faith requirement"*

ABA is concerned that the proposed "good faith" requirement injects a subjective element that negates the legal assurances and benefits provided by a cure mechanism. The need for such a "good faith" requirement is not evident given the other cure requirements outlined in the proposal. In short, and as described below, the various prongs required to execute a cure will assure that a creditor is engaging in good faith operations under the broader QM provisions of the law.

One of the chief benefits of the QM is that it provides objective standards and product requirements that, if met, gain a legal presumption that they satisfied the more subjective ATR rule requirement that a creditor make a "reasonable and good faith determination" that the borrower has "a reasonable ability to repay the loan..." Adding a good faith requirement into a cure for a regulatory defect is inconsistent with the QM's more objective standards and may cause many lenders to remain cautious in their points and fees determinations to avoid the very type of risks they sought to avoid when they opted to originate a QM.

A good faith requirement also appears to be unnecessary in light of the other requirement set forth under the proposed cure and the regulatory environment in which lenders currently operate. As written, this proposal would require a creditor to establish and follow review procedures, and to detect and resolve errors in order to avail itself of a cure. Creditors must satisfy all other requirements and conditions to qualify for the QM category. A creditor must then explicitly return any excess amount paid to the consumer. If these factors are all present, as they must under the proposed rule, they are themselves indicative of a creditor's good faith intention to originate a QM-compliant loan. In addition, all these factors together provide the requisite assurances that there can be no abuse or misuse of the cure provision itself.

In the proposal, the Bureau asserts the need for a good faith standard by citing to the possibility that creditors would be able to "exploit" the cure provision. ABA cannot envision how any creditor can create a program that systematically misuses the cure mechanism in a profitable fashion. ABA observes that should a lender somehow create a methodology for systematic misuse of the cure provision, such conduct could be addressed as an unfair or deceptive act or practice. The Bureau would have full recourse against any bad actors without unnecessarily imposing subjectivity to these standards.

Should CFPB decide that a good faith requirement is necessary, ABA would support the Bureau's approach, as set forth in the proposal, of incorporating into the rule itself (or into the staff commentaries) the bright line standards that define and describe "good faith." These bright line standards should be presented as examples of circumstances that would evidence that a loan was or was not originated in good faith. We urge that the Bureau offer examples of what constitutes "good faith," and what activity would be deemed outside of this standard.

2. *Extend the proposed 120 day timeframe*

As proposed, the cure mechanism requires that the consumer receive the refund of any points and fees in excess of the QM limit within 120 days after consummation. We respectfully urge an extension of this timeframe and observe that, in many instances, the proposed 120 day limit is insufficient given the current marketplace.

As a threshold matter, some lenders do not undertake a full quality control check on every loan that they originate in the period immediately following consummation. These lenders ensure consistency and accuracy by sampling random loans. This is an accepted methodology, and it is one that is especially important at smaller institutions. While this is a statistically valid and effective quality control method, the rare loan with miscalculated points and fees may slip through this process only to be discovered at a later date. If CFPB moves forth to require a lender to review each and every loan within a 120 day time period, the rule would either make the cure practically unavailable to many — particularly smaller community lenders — or dramatically raise the costs of compliance. In either case, consumers likely would be faced with reduced access to credit and/or more expensive loans.

We note that lenders, aggregators and securitizers all operate with distinct quality control processes. In any one creditor's asset production chain, there will likely be overlapping review phases—often undertaken sequentially—by the originating lender, the aggregator, and finally, the securitizer. We would urge that the final cure timelines fully recognize the procedural demands inherent in the mortgage securitization process. In order to have a true and operational cure mechanism, one that minimizes legal risk for lenders that benefits consumers, the timing requirements must be designed to assure that all the interests of all stakeholders are addressed.

ABA appreciates the proposal's 120-day window to cure, but for the reasons we state above, we ask that this period be elongated to 180 days. An ability to cure that is extinguished after 120 days is likely to cause many lenders to opt out of any cure mechanism, and therefore maintain the aversion to risk that the Bureau's cure provision is intended to alleviate. Revising the timeline for a cure to within 180 days of consummation would allow lenders as well as secondary market participants more time to adequately review and cure the loans that have been originated and delivered. An extended timeline would encourage more widespread adoption of the cure and its benefits for consumers.

On this point, ABA makes an additional recommendation. Considering the need to expedite the cure process, in instances where a lender or secondary market review discovers the accidental

excess after 180 days and before the initiation of an action by the consumer, the consumer could be refunded the excess of points and fees as well as an amount that is 50% of the amount refunded, with this additional amount capped at $1,000. The loans where mistakes are discovered and the refund provided within 180 days would still function as proposed in this rule.

Such an extended and revised timeline would, we believe, incent prompt quality control activities by creditors, but would not unnecessarily prevent an error that is discovered later in the process from being cured. Capping the refund to the amount of points and fees that exceed the cap in addition to a percentage of that amount (not to exceed $1,000) would make curing a loan later in the process undesirable but not impossible. In short, such an approach would both reward prompt quality control procedures as well as alleviate more of the repurchase and legal risk that is preventing too many borrowers from receiving safe, sustainable QM loans.

**Additional Clarifications**

1. *Construction-to-Permanent Financing:*

ABA requests that the Bureau clarify the application of the cure provision—particularly the limited window to cure—in instances of construction-to-permanent financing. As the Bureau is aware, construction-to-permanent transactions are often originated and disclosed as a single transaction composed of two phases—a construction phase lasting several months, and a permanent phase, lasting several years to maturity. In single transactions composed of two phases, it is unclear how lenders would apply the cure provision's time restrictions since the permanent financing phase of the loan—which is the phase that is actually subject to TILA and ATR—begins only months after the official settlement date (once the construction is complete).

ABA recommends that in such instances, the counting of the time limitation to cure should begin when the permanent phase of the loan commences. This approach would make the timing requirements legally consistent with TILA's provisions, as the temporary phase of construction-to-permanent loans is exempt from ATR coverage, and cannot, therefore, be deemed to qualify for its appurtenant cure provisions. An explicit statement on this point would be very helpful to clarify a potentially confusing matter.

2. *Consumer Discovery of Inadvertent Errors*

ABA requests that the Bureau clarify that the proposed cure provisions would equally apply when the consumer discovers an error and brings the error to the attention of the creditor or servicer, within the time window allowed under the proposal. ABA does not see a difference between instances where the error is discovered by the creditor or the consumer. In either case, the objective of the law should be to ensure that the consumer is refunded any overages, and that the consumer is placed into the best possible financing for their situation.

The wording of the proposed regulation, under §1026.43(e)(3)(iii), that the cure mechanism applies when the "creditor or assignee determines… that the total points and fees… exceed the applicable limit," need not be amended, as any consumer notification of a mistake would need to

be verified and confirmed by the creditor or assignee. ABA believes it sufficient to add a staff commentary asserting that the creditor (or assignee) retains the ability to cure inadvertent mistakes in instances where the consumer brings the error to the attention of the creditor (or assignee).

**Conclusion**

ABA commends the CFPB's continuing efforts to clarify the mortgage regulations and staff commentary. As we have communicated in past occasions, our members continue to confront interpretive and operational difficulties regarding the compendium of Dodd-Frank-related mortgage reform regulations. It is of great value that the CFPB is focused on legal and operational risks to banks, and that it continues in its effort to improve on regulatory effectiveness and clarity.

If you have any questions, please contact ABA's Rod J. Alba, at ralba@aba.com.

Sincerely,

Robert R. Davis