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May 3, 2013

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

Re: Docket No. CFPB-2013-0009 or RIN 3170-AA37
Proposed Amendments to the 2013 Escrows Final Rule Under the Truth in Lending Act (Regulation Z)

Dear Ms. Jackson:

The American Bankers Association[1] appreciates the opportunity to comment on the Consumer Financial Protection Bureau's ("CFPB" or "the Bureau") proposed amendments to the escrow rule for higher-priced mortgage loans.[2] The amendments would:

1. Clarify how to determine whether a county is considered "rural" or "underserved" for purposes of the exemptions contained in the CFPB's escrow, ability-to-repay/qualified mortgage, and appraisal rules; and
2. Establish a temporary provision to ensure that ability-to-repay requirements and the prohibition on prepayment penalties will continue to apply to higher-priced mortgage loans until the CFPB's mortgage rules establishing similar requirements for most other mortgage transactions go into effect on January 10, 2014.

ABA members are working diligently to comply with the six major mortgage-related rulemakings that the CFPB issued in January 2013. This is a significant undertaking for banks that are engaged in mortgage finance, and our members have identified many questions regarding the interpretation and implementation of the new mortgage rules. ABA appreciates the CFPB's willingness to informally address compliance inquiries and to formally amend the January 2013 rulemakings and corresponding Official Staff Interpretations to provide additional clarity to lenders and servicers. These actions by the CFPB will help banks to make informed business decisions regarding their lending operations and will improve the industry's certainty regarding compliance with the new rules. We anticipate that our members will identify additional compliance questions in the near-term, and we strongly urge the CFPB to continue to address these inquiries in a transparent manner or to formally clarify the rules as necessary.

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[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 two million employees. The majority of ABA's members are banks with less than $185 million in assets.

[2] 78 Fed. Reg. 23171 (April 18, 2013)

Additional Clarifications Requested

ABA does not have any specific comments on the proposed revisions to the escrow rule for higher-priced mortgage loans. However, in communicating with our members regarding the new rule, we have routinely received the following two questions. We request that CFPB publicly address these issues.

1. *At what point does the CFPB expect that an escrow account be opened?*

The rule provides that a creditor may not extend a higher-priced mortgage loan secured by a first lien on a consumer's principal dwelling unless an escrow account is established before consummation. Does this mean that the escrow account must be set up on a bank's computer system prior to the borrower signing all of the closing documents at consummation? Or is it sufficient that, prior to consummation, the institution take the steps necessary to establish an escrow account (e.g., provide escrow information on the Good Faith Estimate, provide the initial escrow disclosure, and collect escrow amounts at closing) but not technically set up the actual escrow account until after the loan is closed and funds are disbursed? ABA believes that the latter approach will provide maximum flexibility to covered institutions without compromising consumer protections. We note that the preamble to the final rule and the CFPB's Small Entity Compliance Guide seem to indicate that there is some latitude as to when banks may officially open the escrow account, and we recommend that CFPB clarify the escrow rule accordingly.[3]

2. *Do the escrow requirements apply to loan modifications?*

We request that CFPB specify that the escrow requirement applies to refinancings, but does not apply to loan modifications.

Small Creditor Test

In addition to recommending that CFPB address the additional issues listed above, ABA notes its concern regarding the "small creditor" test set forth in the escrow rule. Under the rule, small creditors that meet certain loan and asset limits and that operate predominately in rural or underserved areas will be exempt from the escrow requirement for higher-priced mortgage loans.[4] Based on preliminary conversations with our members, we are concerned that the "small creditor" test may be too restrictive and may not provide needed regulatory relief to many community banks, particularly those that are not located in "rural" or "underserved" areas as defined by the rule. This concern takes on added importance because exceptions to other

[3] "After reviewing the comments received, the Bureau believes that the Board's proposal is an appropriate method to implement the requirements of TILA section 129D(c)(3), as both creditor and consumer benefit if an escrow account is *established at consummation* of the transaction, rather than months or years later"(emphasis added)(78 FR 4741). "*After you originate* a higher-priced mortgage loan secured by a first lien on a principal dwelling, you must establish and maintain an escrow account for at least five years regardless of loan-to-value ratio" (emphasis added)(CFPB Small Entity Compliance Guide p. 4).

[4] To be eligible for the exemption, a creditor must: (1) make more than half of its first-lien mortgages in rural or underserved areas; (2) have an asset size less than $2 billion; (3) together with its affiliates, have originated 500 or fewer first-lien mortgages during the preceding calendar year; and (4) together with its affiliates, not escrow for any mortgage it or its affiliates currently services, except in limited instances. 12 C.F.R. §1026.35(b)(2)(iii)(A), (B), and (C).

regulatory requirements are based on the small creditor test established in the escrow rule. These other rules include:

- The allowance for balloon payment Qualified Mortgages; and
- The exemption from the balloon payment prohibition on high-cost mortgages.

As discussed in our February 25, 2013 comment letter regarding the CFPB's proposal to expand certain exemptions for balloon loans from the qualified mortgage/ability-to-repay standards, we are concerned that the definition of small creditor is too narrow (see attached). Specifically, we are concerned that the criteria for the small creditor exemption do not acknowledge the needs of small banks and their borrowers who do not fit within the CFPB's criteria for being located in "rural" or "underserved" communities. Our February 25th letter also articulated ABA's concern that the small creditor test's $2 billion asset cap and the 500 loan limit are too low.

Community banks are located in many markets across the nation, not just in rural or underserved areas as defined by the CFPB's rule. Because many small, portfolio lenders will not meet the rural and underserved test, we are concerned that the exemptions from the escrow and qualified mortgage/ability-to-repay rules will not achieve the important objectives of ensuring credit availability and providing necessary regulatory burden relief to these institutions.

Small institutions that hold covered loans in portfolio exist to serve the credit and product needs of their local communities. They have the best understanding of the local economic factors and cultures that drive those needs. For example, balloon loans have traditionally been made to borrowers with specific characteristics or for properties with specific characteristics which make the loan ineligible for sale into the secondary market, and thus are held in portfolio by the originating lender. Borrowers who are not U.S. citizens and are on a short-term work visa, or properties for which a comparable appraisal is not available, are examples of situations where a balloon loan may be the best, most affordable option for a borrower. These situations are not limited to rural and underserved areas.

We recognize that the Dodd-Frank Act requires that rural and underserved criteria be factored into the escrow and balloon exemptions for small creditors. However, we urge the CFPB to use its exemptive authority to make the small creditor exemption available to more community banks that hold covered loans in portfolio, not just those located in rural or underserved areas. Alternatively, we request that CFPB broaden its interpretation of "rural" and "underserved."

In examining the causes of the recent financial crisis, a general consensus was reached that traditional community bank lending, based on sound underwriting, conservative but fair and reasonable lending standards, and a demonstrated interest in the borrower's ability to repay were desirable features for the entire industry to follow. The cruel irony of the legislation and regulation that followed is that it imposes multiple, often overreaching regulations on banks of all sizes and geographic locations --but which will have a disproportionate impact on the community banks whose lending practices never strayed from the tried and true. These lenders will face compliance costs and time constraints for compliance which could impact their continued ability to make mortgage loans that suit the needs of their customers and communities. For these reasons, we strongly urge the CFPB to revise the small creditor test to make its regulatory burden relief available to more community banks, regardless of their physical location.

Conclusion

Thank you for the opportunity to review and comment on the CFPB's proposed revisions to the 2013 escrow requirements for higher-priced mortgage loans. We are appreciative of the CFPB's efforts to provide additional clarity to our members regarding this and other mortgage rules that banks will be implementing in the coming months. ABA will continue to monitor banker inquiries pertaining to the new rules and will continue to communicate with CFPB regarding industry implementation efforts and impacts to the mortgage market.

Sincerely,

Robert R. Davis

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Enclosures

American Bankers Association
Building Success. Together.

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February 25, 2013

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

Re: Docket No. CFPB-2013-0002 or RIN 3170-AA34
Ability to Repay Standards Under the Truth in Lending Act (Regulation Z)
Proposals to Expand Certain Definitions of Qualified Mortgages and Certain Exemptions from the Ability to Repay Standards--78 FR 6621-72 (January 30, 2013)

Dear Ms. Jackson:

The American Bankers Association appreciates the opportunity to comment on the proposals to expand certain definitions of Qualified Mortgages (QM) and certain exemptions from the Ability to Repay (ATR) standards. This comment letter is the first of two comments submitted by ABA on this solicitation for comments. The proposal also seeks further comments on the calculation of points and fees and how these impact QM status. ABA will file a separate comment letter on the issue of points and fees.

Concurrent with the publication of the final ability to repay/qualified mortgage rules, the Consumer Financial Protection Bureau released a proposed rule which would expand exemptions and qualification under the ATR/QM rule for certain institutions. Specifically, the proposal would exempt from ATR requirements loans made by Housing Finance Agencies, Community Development Financial Institutions, Community Housing Development Organizations, Designated Assistance Providers of Secondary Financing and other non-profit entities such as Habitat for Humanity. It would also exempt foreclosure and default avoidance refinance loans made under the States' Hardest Hit Funds program, as well as Federal Housing Administration (FHA), Veterans Administration (VA), United States Department of Agriculture (USDA), and targeted refinance loans made by Fannie Mae and Freddie Mac (government sponsored enterprises or GSEs).

The proposal would add a fourth Qualified Mortgage category to the three already established under the final rule. The fourth category would allow loans made and held in portfolio by lenders with less than $2 billion in assets (including affiliates) to qualify for the QM safe harbor, even if the borrower's debt to income ratio exceeded the 43 percent threshold established for other loans under the final rule, and even if the interest rate on the loan exceeded the average prime offer rate (APOR) by up to 3.5 points (as opposed to 1.5 points under the existing rule).

Finally, the proposal expands the rules set in the final rule to allow balloon loans made by lenders under $2 billion in assets (including affiliates) and made within the geographic limits defining rural and underserved markets (established in the existing rule) to qualify for the QM safe harbor even if they have an interest rate higher than 1.5 times the APOR, up to 3.5 times the APOR.

These proposed changes are modest, and generally supported by ABA and our member banks, as detailed below.

More importantly, and related to the request for comment with regard to preserving access to affordable credit, the ABA is also submitting additional comments urging the CFPB to reconsider two key points in the underlying rule: what constitutes the appropriate use of a balloon loan, and whether such loans should be granted a safe harbor under the Qualified Mortgage definition. Our proposals for expanding these key points are discussed below.

1. **Exempting certain institutions from the ability to repay requirements.** The proposal would exempt from "ability to repay" requirements loans made by Housing Finance Agencies, Community Development Financial Institutions (as defined by the U.S. Treasury), Community Housing Development Organizations, and Down payment Assistance Provider of Secondary Financing (as defined by the U.S. Department of Housing and Urban Development), and IRS designated 501 (c)3 non-profits such as Habitat for Humanity (with limits on how much individual borrowers may borrow and on how many loans may be made per year). The rationale set forth by the CFPB is that these institutions' ability to meet the customized needs of low and moderate income consumers, and promoting long term housing stability, would be hampered by the ATR requirements and that the costs of implementing and complying with ATR would result in a severe curtailment of credit offered under by these entities.

   ABA POSITION: ABA supports these exemptions from the ability to repay requirements, noting that each of the entities identified under the proposal serves a specific borrower constituency with particular borrower or loan characteristics which make the ability to repay rules unnecessarily burdensome and counter-productive to the responsible allocation of credit.

   Each of the identified entities has its own standards for determining the qualifications of their potential borrowers. While these standards differ considerably from the ability to repay requirements, the differences are justified by the unique characteristics of the borrowers and markets being served by these entities. Each of the identified entities is supervised by existing Federal agencies, primarily the United States Treasury Department, and the Department of Housing and Urban Development. ABA encourages the CFPB to work closely with these agencies to ensure that the underwriting standards being applied to these particular markets and borrowers remain adequate both to protect the borrowers and to ensure that these entities do not use the exemption from ATR in an inappropriate fashion or allow them to compete unfairly with entities which must abide by the ATR rules.

   ABA also notes a concern about the impact of the exemption from ATR on the marketability of the loans made by these entities to investors and the potential impact on secondary market access for these lenders, and we encourage the CFPB to work with investor groups to ensure that such an exemption does not pose an impediment, or create unintended consequences in the secondary market.

2. **<u>Exempting credit extended pursuant to a Homeownership Stabilization and Foreclosure Prevention Program, Federal Agency Refinancing Program or GSE Refinancing program.</u>** The proposal would exempt refinance loans made under these programs for the purpose of foreclosure or default prevention and housing stabilization from the ATR requirements. The CFPB acknowledges that these programs have unique underwriting requirements and that requiring compliance with ATR requirements may make it more difficult for many consumers to qualify and unnecessarily increase costs for those who do.

   ABA POSITION: ABA supports these exemptions from the ability to repay requirements, noting that the unique underwriting needs of the specified programs are unlikely to meet the needs of the ATR requirements, and that these are specialized programs designed for a unique, identifiable segment of the market. Further, we not only agree that applying ATR requirements to borrowers served by these program would increase the cost of credit, we believe that it would in most cases make the programs entirely unworkable, thus frustrating the public policy purposes of the programs. As with the other ATR exemptions proposed, we note that exemptions from ATR will likely raise issues with investors, and we encourage the CFPB to work with investor groups and the GSEs to ensure that this exemption does not inhibit secondary market/investor access for loans made under these programs or create unintended consequences in the secondary market.

   We also note that many portfolio lenders engage in loan refinance and modification efforts to meet the needs of borrowers in similar positions to those being assisted under the programs identified in the rule. We strongly urge the CFPB to allow exemptions from ability to repay for such similar programs offered by portfolio lenders. Troubled borrowers seeking relief should not be denied such assistance simply because their loan is held in portfolio rather than sold into the secondary market. Portfolio lenders traditionally have been more likely to assist troubled borrowers because they hold the loan in portfolio. Requiring the application of ability to repay standards to portfolio lenders seeking to help a troubled borrower, but not to loans held or guaranteed by the GSEs would harm both borrowers and portfolio lenders. CFPB should allow an exemption from ability to repay for the refinance of an existing loan by a portfolio lender which provides a tangible net benefit to the borrower. Specific factors that CFPB may want to consider should include (but not necessarily be limited to) the following:

   - Reduction of mortgage interest rate;
   - Refinancing to a fixed rate from an ARM;
   - Reduction in amortization;
   - Reduction in 1st mortgage PITI

3. **<u>Exempting loans held in portfolio by small lenders.</u>** The proposal would add a fourth category of Qualified Mortgage (with a safe harbor) for certain loans originated by lenders that:

    - Have total assets of $2 billion or less at the end of the previous calendar year; and

    - Together with all affiliates, originated 500 or fewer first lien covered transactions during the previous calendar year;

    - Eligible loans must be held in portfolio and not subject to a "forward commitment" sale unless sold to another institution meeting the asset and covered transaction limits;

    - Loans must be held in portfolio for at least 3 years or lose QM status;

    - Loans must meet all other existing QM criteria EXCEPT that the borrowers' debt to income ratio could exceed 43 percent;

    - Loans in this category could have an interest rate of up to 3.5 percentage points higher than the Average Prime Offer Rate (APOR) for both first lien and subordinate lien loans (as opposed to 1.5 percentage points for other QM loans) and still qualify for the safe harbor.

    The CFPB has proposed this exemption because it believes that it is necessary to preserve access to responsible, affordable mortgage credit, and that small lenders are a significant source of credit that for various reasons, do not qualify for government guarantees and insurance programs and cannot be sold for securitization. The CFPB also indicates that larger lenders are often unwilling to make these loans because they involve consumers or properties with unique features that make them difficult to assess using larger creditors' underwriting standards or because larger creditors are unwilling to hold the loans in portfolio. CFPB acknowledges that smaller lenders often are willing to and able to consider these consumers and properties individually and to hold the loans on their balance sheets.

    ABA POSITION: ABA supports the expansion of QM with a fourth category of loans geared toward small portfolio lenders and applauds the CFPB's acknowledgement of the willingness of small portfolio lenders to serve borrowers with specialized needs, and of the need for safe harbor protection in order for these lenders to continue to make loans meeting these needs.

    We also note that the recognition of borrowers and properties with specialized needs opens the door for additional expansions under the QM – which is further detailed below.

    ABA concurs with the CFPB that smaller lenders' relationship-based lending model and ties to their communities enable them to make more accurate assessment of consumers' ability to repay, and that portfolio lenders have a strong incentive to assess the ability to repay because the creditor retains the risk of default.

We also concur with CFPB's assessment that small lenders often charge higher interest rates and fees for legitimate business reasons, including the higher cost of lendable funds, and the higher fees necessary to offset the interest rate and other risks associated with holding a loan in portfolio.

We are concerned, however, that the definition of small lender is too narrow. Both the $2 billion limit and the 500 loan limits simply too low. To have a meaningful impact on credit availability for borrowers served by small portfolio lenders, the limits should be expanded to cover a more accurate representation of a small portfolio lender. Lenders with up to $10 billion in assets and with loan limits of at least 2000 loans should be used as the applicable benchmarks. Setting the asset size lower will have the impact of unnecessarily curtailing credit availability from many community banks. Perhaps even more harmful will be setting the loan limit cutoff too low. If a lender is faced with a cutoff of their ability to gain the QM if they exceed the 500 loan limit, they will likely limit the number of loans they are willing to make, particularly low dollar loans. This could have the unintended consequence of making it more difficult for rural and underserved borrowers who are seeking small loans ($40,000 or less) which are not generally purchased by the secondary market. A more reasonable loan limit number for banks in the $10 billion asset range is 2000 loans per year. This is still a modest number, but allows enough breathing room for small lenders to serve all of their community without the risk of losing the protection of the QM safe harbor.

4. **Higher Priced Covered Transaction Threshold for Balloon-payment covered transactions.** The CFPB is proposing to allow small creditors (under $2 billion in assets), operating predominately in rural or underserved areas to offer first-lien balloon loans with a higher annual percentage rate and still benefit from the QM safe harbor. Balloon loans offered by these lenders would benefit from the safe harbor under QM so long as the interest rate did not exceed the APOR by more than 3.5 percentage points. The CFPB states that it is concerned that many balloon-payment qualified mortgages (as defined under the existing rule) will have annual percentage rates that are too high to qualify for the safe harbor. They note that many small lenders operating in rural and underserved areas are unwilling to make mortgage loans outside of the safe harbor because of litigation risk, and thus, the inability to qualify for the safe harbor could limit access to credit for some consumers.

   ABA POSITION: ABA concurs with the CFPB's assessment of the need for expansion of the safe harbor to cover balloon loans with higher interest rates, noting that lenders costs and pricing for the risks associated with these loans make it necessary to charge a higher interest rate. We also concur that lenders would be unwilling to make such loans without the protection of a safe harbor.

   Similar to our above voiced concerns, however, we believe that the $2 billion asset threshold is too low, and should be increased to $10 billion.

Furthermore, ABA is concerned that the underlying rule's allowance for QM covered balloon loans is too narrow and does not allow lenders to address specialized borrower and property needs for which balloon loans may be best suited. The underlying rule's limitation on QM balloon loans only for small banks operating predominately in rural and underserved markets ignores the reality that there are many borrowers and properties with specialized needs in many markets across the nation, not just in rural or underserved areas. It further ignores the reality that balloon loans may be the most appropriate and desirable option for many borrowers regardless of the size of the lender offering the loan.

We recognize that the Dodd/Frank Act requires CFPB to limit QM status for balloon loans generally to rural and underserved areas. However, we note that the underlying statute, the Truth in Lending Act (TILA), does provide CFPB, at section 129C(b)(3)(B)(i), the authority to "revise, add to, or subtract from the criteria that define a qualified mortgage upon a finding that such regulations are necessary or proper to ensure that responsible, affordable mortgage credit remains available to consumers in a manner consistent with the purposes of the ability-to-repay requirements…"

We urge the CFPB to use the above referenced authority to provide a further expansion of QM safe harbor protection for balloon loans based not on size of lender and market operation predominately in rural and underserved areas, but on certain loan and borrower characteristics. We note that this approach is similar to the rationale extended by the CFPB in the proposal for excluding from ability to repay in its entirety loans made by certain types of institutions serving borrower with specifics characteristics or property features.

Feedback from our members has demonstrated that it is not necessarily the rural or underserved nature of a community that makes a balloon loan the best option for a potential borrower, (although that can certainly be a factor) but instead it is a particular characteristic of the borrower or the property that often makes the loan unsalable in the secondary market, or otherwise unattractive to investors. Banks will make loans under these circumstances, and will hold them in portfolio. Doing so, however, subjects the bank to interest rate risk, which is often difficult to offset. Making these loans as balloon loans helps to offset the interest rate risk and provides the borrower with the most easily understood, affordable credit available. We would also urge that loans in this new category also benefit from the same higher cost threshold treatment proposed by CFPB for balloon loans made by small lenders in rural and underserved areas, as these loans will also likely carry higher interest rates than other QM qualifying loans due to the costs associated with making and holding these loans in portfolio.

The following is a list of specific loans/borrowers which may be best served by a balloon loan, regardless of their location or the size of their lender:

- Loans for non-U.S. Citizens that have work visas or other residency documentation that would not be acceptable to an investor.

- A loan where occupancy is being questioned, i.e. submitted as a primary residence but the property is on a lake or in a resort area and the current primary residence is not being sold.

- Loan to Value ratio may exceed maximum permitted in the secondary market (due to product type, occupancy, FICO score).

- Cash out refinance without required six month seasoning.

- No cash out refinance to lower rate when the home is currently listed for sale.

- New borrower with good time on a job and assets but with insufficient credit established for secondary market approval.

- Financing of a condominium unit where the project may be considered to be non-warrantable.

- Borrower unable to document liquidation and deposit of funds from an investment account prior to loan origination.

- Secondary market does not allow alternate sources of income without the required two year history and established continuance.

- Non-support of value due to overall gross adjustments exceeding secondary market guidelines.

- Acreage/large site size not supported with similar comparables (considered excess land by secondary market).

- Rural nature of properties (even if not within CFPB's definition of rural) may not be considered residential in nature by secondary market.

- Distance of comparisons on the appraisal exceeds investor guidelines.

- Strong borrowers but unique property where similar comparisons are unfavorable for the appraisal.

- Refinances of any existing balloon loan to the same borrower, for the same property.

We urge the CFPB to allow these, and potentially other, property and borrower types to benefit from a QM eligible balloon loan, regardless of the size of the institution making the loan, or whether the property is located in a rural or underserved area as defined by CFPB.

CONCLUSION

The underlying ability to repay rule, finalized by CFPB in January sets a reasonable framework for determining a borrowers' ability to repay, and establishes a QM safe harbor which will broadly serve borrowers and lenders well for most loans, ensuring that fair, reasonable and affordable credit remains available. That said, not all borrower or properties will fit into the parameters delineated by the CFPB's underlying rule. For those reasons, we applaud the CFPB for this concurrent proposal recognizing the need for exceptions to ATR and expansions of the QM safe harbor to fit the needs of these specialized communities and markets.

We support the broad thrust of the CFPB's proposals, and urge the favorable consideration of the expansions of the QM safe harbor we have proposed, particularly to facilitate continued affordable credit for borrowers who are best served through balloon loans, regardless of the size of the lender, or the location of the property securing the loan.

We appreciate this opportunity to set forth our views on these important matters. If you have questions or wish to discuss any of these matters in more detail, please do not hesitate to contact the undersigned.

Sincerely,

Robert R. Davis

Robert R. Davis