

September 22, 2011

VIA EMAIL

Ms. Monica Jackson, Office of the Executive Secretary
Consumer Financial Protection Bureau
1801 L Street, NW.,
Washington, DC 20036
Docket No. CFPB-2011-0004
www.regulations.gov

RE: Alternative Mortgage Transaction Parity Act (Regulation D) Interim Rule: Docket No. CFPB-2011-0004

Dear Ms Jackson:

The American Bankers Association is pleased to submit comments on the above referenced interim rulemaking impacting the Alternative Mortgage Transaction Parity Act. *The American Bankers Association represents banks of all sizes and charters and is the voice for the nation's \$13 trillion banking industry and its two million employees. The majority of ABA's members are banks with less than \$165 million in assets.*

The CFPB (or Bureau) has published an interim final rule in order to ensure that state regulated housing creditors may continue to engage in Alternative Mortgage Transactions (AMTs) without interruption caused by the transfer of regulatory authority over AMPTA from the prudential banking regulators to the Bureau. The Bureau has also indicated that this is only a temporary measure and that a formal notice and comment process relating to AMTs made by both state and federally regulated lenders will follow.

The CFPB has requested comment on a number of issues, including definition of AMTs, modifications, scope of AMT transactions covered, scope of preemption, "rate floors" or index control, and state housing creditors reliance upon AMPTA. ABA will provide general comments in this letter on the most pressing of these issues, with the expectation that we will provide more fulsome commentary as part of the expected notice and comment process that CFPB has indicated is forthcoming.

Definition of AMT

We generally agree with the definition of AMT set forth in the rule. Rather than take a very narrow view of the applicability of AMPTA to true variable rate transactions, the rule includes renegotiated balloon and shared appreciation mortgages within the AMT definition. We believe this is both rational and desirable to ensure that such loans which are generally made to assist borrowers otherwise at risk of default, are able to be made. We commend the CFPB for this approach.

We would recommend one clarification in this area, however. The preamble to the rule notes that the definition of an AMT in 1004.2(a) includes a "variable rate transaction" as defined under Regulation Z for purposes of providing the disclosures under 12 CFR 226.19(b). In addition, the commentary to 1004.2(a), Comment 2(ii) notes that AMT includes "Transactions in which the interest rate of finance

charge may be increased or decreased after a specified period of time or under specified circumstances”. This recognizes that under the Commentary to 226.19(b) that preferred rate loans with fixed-rate, price level adjusted mortgages are considered “variable rate transactions”. While 1004.4(a)(2) seems to recognize this by allowing creditor to use a “formula or schedule identifying the amount that the interest rate or finance charge may increase and the times at which, or circumstances under which, a change may be made.” – the Commentary to this section should call out that these products meet the definition, and Reg. Z disclosures for these features satisfy “formula”, “schedule” or “circumstances” requirement.

Scope of AMPTA Preemption

Again, we feel that the Bureau has taken a rational and pragmatic approach in setting forth in this rule that AMPTA preempts state laws imposing restrictions on state housing creditors’ ability to adjust interest rates and finance charges “as the ability to make such adjustments is integral to alternative mortgage transactions.” Importantly, the Bureau states that “the interim final rule construes “prohibit” to include not only state laws banning the making, purchase, or enforcement of Alternative Mortgage Transactions, but also state laws that restrict or hinder the adjustment or renegotiation of an interest rate or finance charge.” We strongly agree with the Bureau’s approach in this regard, as laws which restrict or hinder AMTs have the effect of prohibiting them.

We note, however, that the Bureau specifically does not preempt requirements that disclosures be provided. Disclosures required by state law can also have the effect of prohibiting AMTs. For example, a state may pass a law requiring a disclosure which could have the impact of prohibiting adjustable rate mortgages. Specifically, a rate change notice could effectively restrict or hinder a lender’s ability to adjust a loan’s interest rate. We note that 12 CFR 226.20(c) provides timing requirements for ARM rate change notices. At least once each year during which an interest rate adjustment is implemented without an accompanying payment adjustment, and at least 25 but not more than 120 calendar days before payment if interest rate with payment adjustment. However, numerous state laws do not make this distinction. By way of example in Pennsylvania, 41 Pa. Stat. sec. 301(e)(8) requires notice 30 days prior to an interest rate (with or without an accompanying payment change) change; In New Jersey N.J. Stat. §§ 17:11C-76(b), N.J. Stat. § 17:9A-53.4 and N.J. Stat. § 17:9A-54 require notice of any rate adjustment (with or without a payment adjustment) at least 30 days prior to its effective date; in Kentucky Ky. Rev. Stat. sec. 360.150(12) requires notice of any rate adjustment (with or without a payment adjustment) at least one month before the rate is to take affect; In Ohio, OH ADC 1301:8-3-07(G) has extensive rate change notice/disclosure requirements including notice at least 30 days before (not more than 120 in some circumstances) notice of any rate change (with or without a payment change), except for an ARM initial rate reset which requires at least 6 or 7 months advance notice, telephone calls, etc. and Wis. Stat. Ann. sec. 138.056(4) – which requires notice within 30 days after a rate without payment change.

Such restrictions, while styled as “notices” or “disclosures” effectively restrict, hinder and prohibit a state housing creditor’s ability to adjust the interest rate/finance charge on an AMT. A lender cannot change the rate daily or monthly on a loan/line if they must provide notice 30 days in advance of such a change. What prevents a state from further prohibiting ARMS by requiring 180 or 1 year advance notice? Some may argue that such provisions are preempted under the language of the current interim final rule – but we encourage the CFPB to make such preemption explicit.

Similarly, other disclosures can hinder or restrict loans to the point of prohibiting them. For example, in the District of Columbia, the DC Code § 26–1113(a-1) requires provision of a non-conventional

mortgage loan (i.e. ARM) disclosure on red paper. Systematically, many lenders are unable to provide such a tailored disclosure in this format within the timelines required by the statute. As such, given that the disclosure is aimed specifically at ARM disclosures, rather than a generally applicable disclosure requirement, should it not be preempted by AMPTA?

Another example would be state laws that require counseling or impose other burdens simply because a loan has a variable rate of interest. Those too can “hinder” or “restrict” a loan to the point of effectively prohibiting such ARM loans. We believe that the rule’s overly broad “disclosures not preempted” language could be used by states seeking to impose such requirements as an artificial prohibition on loans and we encourage the Bureau to clarify that disclosure requirements which restrict or hinder AMTs are preempted.

Approved Index Requirements

The interim rule provides that a creditor who makes an alternative mortgage transaction with an adjustable rate or finance charge must use either: (a) an index to which the changes in interest rate are tied that is readily available to and verifiable by the borrower and beyond the control of the creditor; or (b) a formula or schedule identifying the amount that the interest rate may increase and the times at which, or circumstances under which, a change may be made.

There are some State laws that require use of a particular index, or require that the index be approved prior to use. We strongly believe that these should be preempted provided the state housing creditor complies with the requirements of the interim rule, cited above. For example, in Wisconsin, Wis. Stat. Ann. sec. 138.056 mandates the use of a particular index, restricting, hindering and effectively prohibiting a state housing creditor’s ability to adjust the interest rate/finance charge, and should be preempted.

Control Over Operation of an Index

CFPB seeks comment on whether to adopt the Board of Governors of the Federal Reserve System’s (FRB’s) somewhat recent interpretation that a floor set on a variable-rate open-end (not home-secured) credit plan would constitute “control over the operation of an index.” We strongly oppose the adoption of such interpretation for the following reasons.

First, FRB’s interpretation is only applicable to non-home secured open-end credit. Therefore, by adopting FRB’s interpretation under AMTPA, CFPB would significantly broaden the scope of such interpretation going far beyond Congress’ intended scope of AMTPA.

Second, the mere establishment of a floor should not be interpreted as an institution having control “over the operation of an index,” since an approved index still changes completely outside any input or control by any financial institution.

Third, the establishment of a floor is an important safety and soundness mechanism used to manage interest rate risk that allows lenders to still provide affordable credit products to consumers.

Fourth, many secondary market participants (e.g. Fannie Mae and Freddie Mac) require the establishment of a floor for certain variable rate loans. Thus, should CFPB adopt the FRB’s interpretation under AMTPA it could impact a *significant* number of consumer loans.

It is important to note that if the CFPB does not clarify that laws prohibiting a state housing creditor's ability to adjust the interest rate/finance charge are preempted, then the adoption of the FRB's interpretation will eliminate the possibility of rate floors in Wisconsin due to significant state law restrictions on rate adjustments under §138.056, Wis. Stats. This statute applies to both open-end and closed-end first lien and first lien equivalent residential mortgage loans. Such an interpretation under AMPTA could ultimately force Wisconsin lenders to exit the secondary mortgage market with respect to variable rate loans and, in some cases, the mortgage market altogether—a consequence surely not intended by CFPB or the Congress.

Conclusion

The Bureau is to be commended for a general approach to AMPTA and the definition of Alternative Mortgage Transactions that is rational, workable and pragmatic. We strongly urge the Bureau to revisit the overly broad language of the interim final rule which does not preempt state disclosure laws, given their ability to effectively prohibit AMTs. We appreciate this opportunity to comment and look forward to providing further input as the Bureau engages in further rulemaking with regard to these types of transactions.

If you have questions or wish to discuss any of these issues further, please do not hesitate to contact the undersigned.

Sincerely,

A handwritten signature in black ink, appearing to read "Joseph Pigg", with a stylized flourish extending from the end of the name.

Joseph Pigg
Vice President and Sr. Counsel