July 26, 2017

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

RE: Docket No. Bureau-2017-0014
Bureau of Consumer Financial Protection assessment of the ATR/QM Rule under the Truth in Lending Act (Regulation Z)

Dear Ms. Jackson:

NAMB, The Association of Mortgage Professionals ("NAMB") appreciates this opportunity to address costs and benefits of the Ability to Repay / Qualified Mortgage Rule ("ATR/QM") under the Truth in Lending Act (Regulation Z) (see Exhibit I).

NAMB is the only national trade association devoted to representing mortgage loan originators and small business owners in the mortgage industry. NAMB speaks on behalf of more than 145,000 mortgage professionals in all 50 states and the District of Columbia. Our members are loan originator employees of lenders and independent mortgage broker companies, as well as small business owners, all of whom adhere to a strict code of ethics and best lending practices when assisting consumers through the loan process. Our mortgage broker members typically maintain business relationships with various lenders to provide consumers with multiple financing options. These relationships allow our members to offer consumers the most competitive mortgage products available in the marketplace today.

I. Summary

We commend the Consumer Financial Protection Bureau ("Bureau") for its desire to assess the ATR/QM Rule under the Truth in Lending Act (Regulation Z) ("the Rule").

In this letter NAMB will address two significant unintended consequences stemming from application of the Rule – reduced competition and harm to consumers.

NAMB believes the Rule needs significant changes, primarily because of the Rule's negative impact on low- and moderate-income borrowers and smaller entities brokering mortgage loans.

NAMB, like our sister trade groups, is concerned that consumers are being harmed by various unintended consequences stemming from regulatory requirements in the Dodd-Frank Act. Specifically, the affordability and availability of mortgage credit and the complete recovery of our housing market continue to be adversely affected by a steady rise in regulatory compliance costs, loan originating entities' fear of enforcement action by the Bureau, and a lack of clear and reliable regulatory guidance.

The cost of regulatory compliance has surged beyond $7,000 per loan, and even with the most powerful software tools available there is no guarantee of compliance. As a result, mortgage broker companies, small lenders and community banks are increasingly being pushed out of the primary mortgage origination market. Small lenders and brokers are finding they need to add highly-trained staff, at considerable expense, just to deal with the minutia of details that do not make a material difference to consumers but can result in significant punitive action for the company if overlooked.

Consolidating the mortgage origination market in the hands of only the largest players is certainly not what the Dodd-Frank Act envisioned by introducing the ATR/QM concepts. With less competition consumer costs are increasing across the board. However, we are seeing a particularly disparate impact on low- and moderate-income borrowers.

NAMB believes that a simple definitional error in the Dodd-Frank Act is primarily responsible for increasing costs to consumers seeking mortgage loans under $200,000. This definitional error makes it economically unfeasible for mortgage broker companies to serve these borrowers and the resulting void in marketplace competition from the mortgage broker channel has paved the way for significant consumer cost increases.

The body of this letter focuses on the harm being suffered by consumers, the technical correction that we believe will solve this problem, and the positive impact of the non-depository mortgage broker business model generally.

II. Dodd-Frank Act - Creditor Payments to Mortgage Broker Firms – An Explanation of the Problem

One critical area of the Rule that NAMB believes must be examined is the Qualified Mortgage (sometimes referred to as "QM") points and fees cap and its harmful and disparate impact on small business mortgage brokers and low- and moderate-income borrowers.

NAMB believes there is a definitional error in the Dodd-Frank Act affecting the calculation of points and fees for Qualified Mortgages.

The Bureau demonstrates a recognition of the basis of this error in its Know Before You Owe mortgage disclosure rules, where payments from the creditor to a mortgage broker company and mortgage loan originator employee are removed from the disclosure forms. This is because payments from the creditor to a mortgage broker company are already reflected in the interest rate selected by the consumer.

NAMB is confident that a definitional error exists within the Dodd-Frank Act because Congress could not have intended to include payments from creditors to mortgage broker companies in the calculation of points and fees because such payments are already included in the interest rate established and offered by the creditor.

The Bureau specifically exempted payments to lender employee originators from the 3% cap on points and fees for Qualified Mortgages, citing "anomalous results for consumers," and there is little or no difference in how lender employee originators are paid as compared to independent third-party originators.

Yet currently under the Rule, mortgage broker companies are forced to double-count their business and operational costs within the 3% cap while all other originating entities are not. This leaves mortgage brokers, and more importantly consumers who use mortgage brokers, at a significant disadvantage, particularly those consumers seeking smaller loan amounts.

The Bureau acknowledged this problem of double-counting in another area in its final rule on Loan Originator Compensation issued May 29, 2013. In that final rule the Bureau took corrective action and excluded from the calculation of points and fees payments from mortgage broker companies to their employee loan officers.

> <u>"Because payments by mortgage brokers to their employees already have been captured in the points and fees calculation, excluding such payments will facilitate compliance with the points and fees regulatory regime by eliminating the need for further investigation into the mortgage brokers' employee compensation practices, and by making sure that all creditors apply the provision consistently. [Emphasis added]</u> It will also effectuate the purposes of TILA by preventing the points and fees calculation from being artificially inflated, thereby helping to keep mortgage loans available and affordable by ensuring that they are subject to the appropriate regulatory framework with respect to qualified mortgages and the high-cost mortgage threshold." Bureau Final Loan originator compensation rule, page 76 May 29, 2013.

This was extremely helpful and, we believe, a correct interpretation of the Dodd-Frank Act. However, despite identifying the same problem of double-counting with creditor payments to mortgage broker companies, and despite acknowledging that mortgage broker companies are at a disadvantage vis-a-vis their competitors, the Bureau has maintained that it is unable, in its estimation, to take similarly necessary corrective action with regard to creditor payments to mortgage broker companies. The reason for this, as cited by the Bureau, is because of language in the Dodd-Frank Act attempting to define which mortgage entities' fees should be included in the points and fee calculation for purposes of determining a Qualified Mortgage. In relevant part, Section 1431(c)(A) of the Dodd-Frank Act (current Section 103(bb)(4)(B) of TILA) provides:

> "(B) all compensation paid directly or indirectly by a consumer or creditor to a mortgage originator from any source, including a mortgage originator that is also the creditor in a table-funded transaction;"

Experts within and outside the Bureau believe this definitional language, which is preventing the Bureau from excluding creditor payments to mortgage broker companies from the calculation of points and fees, is actually a drafting error in the Dodd-Frank Act.

III. A Statutory Drafting Error & the Bureau's Power to Correct

There are two references to mortgage broker in the ATR/QM section of Regulation Z at §1026.32(b)(1)(ii)(A) and (B). Each refers to the definition of mortgage broker in the loan originator compensation section of Regulation Z at §1026.36(a)(2), which defines a mortgage broker as a loan originator that is not an employee of the creditor. This makes the mortgage broker company and its employee loan originators all mortgage brokers because neither is an employee of the creditor. It also is effective on a transactional basis because the same organization may be a creditor in another transaction.

The reference to loan originator in §1026.32(b)(1)(ii) also references the definition in the loan originator compensation section at §1026.36(a)(1).

NAMB believes the problem with payments to mortgage broker companies being included in the total points and fees is derived from the regulation at §1026.32(b)(1)(ii), which requires "All compensation paid directly or indirectly by a consumer or creditor to a loan originator, as defined in §1026.36(a)(1), that can be attributed to that transaction at the time the interest rate is set" be included in the total points and fees calculation unless one of four enumerated exceptions is met. The third exception at §1026.32(b)(1)(ii)(C) further compounds the problem by excepting "compensation [] paid by a creditor to a loan originator that is an employee of the creditor".

To overcome this problem in the regulations NAMB believes the Bureau could remove the reference "or creditor" from §1026.32(b)(1)(ii), which would render the third exception at §1026.32(b)(1)(ii)(C) meaningless, or the Bureau could remove the highlighted section of §1026.32(b)(1)(ii)(C), which would render the inclusion of creditor in §1026.32(b)(1)(ii) meaningless.

In any case, NAMB believes the solution to the statutory drafting error that is causing the double-counting problem is to remove "or creditor" from §1026.32(b)(1)(ii) and strike §1026.32(b)(1)(ii)(C) altogether.

The Bureau Has Power to Take Corrective Action

The Bureau has already utilized it's Congressionally-granted power to exclude from the Qualified Mortgage definition of points and fees any payments from a creditor to the creditor's employees. In its release published in the Federal Register June 12, 2013, (78 FR 35429), the Bureau specifically pointed-out that a similar result should occur for payments from lenders to mortgage broker companies and their loan originator employees since such fees are already reflected in the mortgage rate and are being counted twice.

> "The final rule excludes from points and fees loan originator compensation paid by a consumer to a mortgage broker when that payment has already been counted toward the points and fees thresholds as part of the finance charge under §1026.32(b)(1)(i). The final rule also excludes from points and fees compensation paid by a mortgage broker to an employee of the mortgage broker because that compensation is already included in points and fees as loan originator compensation paid by the consumer or the creditor to the mortgage broker."

This principle is further supported and even extended by the Bureau in its Know Before You Owe Final Rule, which took effect August 1, 2015. In that final rule, the Bureau declared that the disclosure of mortgage broker compensation is not a beneficial aspect of the transaction and only confuses the consumer as to the consumer's real costs for the transaction. The Bureau's decision was based on significant research, which was further supported by similar research conducted by the Federal Trade Commission and the Federal Reserve. As a result, since August 1, 2015 mortgage brokers have not been required to disclose on the Loan Estimate or Closing Disclosure forms any compensation received from the creditor.

The option for a consumer to select a market rate above par alleviates the need for the consumer to pay a mortgage broker company any fee out of the consumer's personal funds. The above-par rate enables the creditor to compensate the mortgage broker company in the transaction. This being the case, a payment from a creditor to a mortgage broker company should not be counted in the 3% cap on points and fees for Qualified Mortgages because this payment is already accounted-for within the interest rate chosen by the consumer. Any amount that is already reflected in the interest rate of a loan should not be included in the separate calculation of points and fees.

For a fair and competitive marketplace to be reestablished, payments from a creditor to a mortgage broker company must be excluded from the Qualified Mortgage points and fees calculation.

IV. Lack of Competition Harms Consumers

Empirical studies have shown that mortgage brokers offer better terms, on average, than depository lenders and other creditors.[1] Specifically, these studies show that in areas with a higher concentration of mortgage brokers consumer choice is greater and consumers generally receive lower interest rates from brokers in that area.[2] Conversely, where there are fewer mortgage brokers competing in a given market and thus less competition overall, consumers typically pay higher interest rates.[3]

As an example,, a recent examination of closed loans in Duval County Florida found that the average net consumer closing costs for a creditor transaction was $6,222, while the net cost to consumers in a mortgage broker transaction, after credits were applied, was $3,479. This is a greater than $3,000 per loan cost savings for consumers when obtaining a loan from a mortgage broker. We are confident that further examination and analysis of this pricing disparity between creditor and mortgage broker transactions will reveal similar results across the country.

However, NAMB is deeply concerned that without a correction to the definitional error in the Dodd-Frank Act cited above there will be fewer and fewer mortgage broker companies in many areas, and a significant negative impact will continue to be felt, in particular, by low- and moderate-income consumers..

V. Fixed Mortgage Company Compensation Already Protects Consumers

As the Bureau knows, since 2011, under the Loan Originator Compensation Rules issued by the Federal Reserve Board and the Bureau, all compensation paid by creditors to mortgage broker companies is fixed, without any possibility for variation from transaction to transaction. This is a strong consumer protection for borrowers utilizing mortgage broker companies and an additional reason why creditor compensation to a mortgage broker company does not need to be double-counted in the calculation of points and fees.

Under the Loan Originator Compensation Rules, not only are individual loan originators working for mortgage broker companies prohibited from steering consumers toward a particular loan or lender, there is no incentive for them to do so.

Making the small, but significant, correction to the calculation of points and fees for Qualified Mortgages that NAMB is encouraging will not put consumers at risk. Rather, this simple change

---

[1] Amany El Anshasy, Gregory Elliehausen & Yoshiaki Shimazaki, *The Pricing of Subprime Mortgages by Mortgage Brokers and Lenders* 12 (July 2005) (unpublished manuscript), *available at* http://www.chicagofed.org/digital_assets/others/events/2005/promises_and_ pitfalls/paper_pricing.pdf (finding that "broker-originated mortgages are less costly to the borrower than lender-originated mortgages after holding other loan terms and borrower characteristics constant")

[2] *See* M. Cary Collins & Keith D. Harvey, *Mortgage Brokers and Mortgage Rate Spreads: Their Pricing Influence Depends on Neighborhood Type*, 19 J. HOUSING RES. 153, 168 (2010) ("Our results support our hypothesis that the mortgage broker is a better-informed agent and show that in general as mortgage broker density increases, both the likelihood of a rate spread occurring and the size of a rate spread declines, while the loan approval rate increases."

[3] See id at 167–68.

in definition will work to further protect consumers from harm by restoring competition and saving consumers money at the closing table.

VI. Additional Recommendations

(a) Make the Post-Consummation Cure Permanent

NAMB respectfully urges the Bureau to make the post-consummation cure for exceeding total points and fees in §1026.43(e)(3)(iii) permanent. This section allows lenders to cure a violation of the total points and fees limitation by refunding excess fees to the consumer, with interest, within 210 days of consummation if the consumer: (i) has not been 60 days past due; (ii) has not given notice to the creditor, assignee, or servicer that the total points and fees limit was exceeded; and (iii) has not instituted any action in connection with the transaction.

(b) Convert Seasoned Non-Qualified Mortgages to Qualified Mortgages

There is a long-standing practice in mortgage securitization of permitting certain "seasoned loans" – generally loans without a missed a payment for 12-18 months – to be considered a higher-quality loan. Fannie Mae even has rules for treating certain seasoned loans as carrying acceptable risks[4].

NAMB believes loans originated as non-QM loans should be deemed Qualified Mortgages upon the borrower making timely payments for 24-36 months on fixed rate loans, and for 12-18 months after rates have fully adjusted on ARM loans.

Following the passage of such time, a borrower's inability to repay is very likely the result of one or more factors that could never be anticipated for accounted-for in the lender's ATR assessment under the Rule – namely divorce, health issues, job loss, etc.

(c) Remove the 3% Cap on Points & Fees for Qualified Mortgages

NAMB respectfully urges the Bureau to eliminate the 3% cap on points and fees for Qualified Mortgages altogether. In practice, there is no need or meaningful consumer benefit derived from maintaining the 3% cap because lenders/creditors simply build any cost they cannot keep within the 3% cap into the interest rate offered to consumers.

The 3% cap on points and fees gives consumers a false belief that their mortgage financing costs are actually capped at 3%, which they are not.

We believe the Bureau, under its present authority, has the power to unilaterally eliminate the 3% cap on points and fees, and consumer costs would be effectively controlled by fair competition

[4] https://www.fanniemae.com/content/guide/selling/b2/1.4/02.html

and existing high-cost loan limitations[5]. As a result, consumers would almost certainly suffer no harm by such action.

(d) <u>Specific Research Activities of the Bureau</u>

The Bureau has stated it plans to conduct and/or has begun conducting research activities in connection with this assessment of the Rule. Our understanding is that the primary goal of this research is to help the Bureau understand changes in pricing and underwriting strategies by creditors in response to the requirements of the Rule, and the possible resulting impact on access to credit for consumers. Further, we understand that the Bureau will be specifically interviewing <u>creditors</u> regarding their activities undertaken to comply with the requirements of the Rule.

NAMB respectfully urges the Bureau to also include the mortgage broker channel in their research and look to those entities that broker mortgage loans as a resource capable of providing meaningful insight into ways that increased competition and pricing can help consumers.

VII. Policy Recommendations & Conclusion

NAMB thanks the Bureau for this opportunity to submit comments on its assessment of the ATR/QM Rule under the Truth in Lending Act (Regulation Z).

As outlined in detail above, we believe compensation paid from a creditor to a mortgage broker company, which is already taken into account when the creditor sets the interest rate, should be eliminated from the 3% points and fees calculation for Qualified Mortgages.

We look forward to working with the Bureau to correct what we believe is merely a definitional error and resolve the unintended consequences resulting from this error in an effort to alleviate any further harm to consumers and help restore competition to the marketplace.

Respectfully submitted,

Fred Kreger, CMC
NAMB President

---

[5] The Home Ownership and Equity Protection Act (HOEPA) was enacted in 1994 as an amendment to the Truth in Lending Act (TILA) to address abusive practices in refinances and closed-end home equity loans with high interest rates or high fees. http://files.consumerfinance.gov/f/201603_cfpb_hoepa-compliance-guide.pdf

Exhibit I

A. Major Provisions of the ATR/QM Rule as outlined by the Bureau.

The ATR/QM Rule prohibits a creditor from making a mortgage loan unless the creditor makes a reasonable and good faith determination, based on verified and documented information, that the consumer will have a reasonable ability to repay the loan, including any mortgage-related obligations (such as property taxes).[(8)] The requirement does not apply to investment loans, open-end home equity lines of credit, timeshare plans, reverse mortgages, or temporary loans.

The ATR/QM Rule describes certain minimum requirements for creditors making ability-to-repay determinations, but does not dictate that they follow particular underwriting standards. At a minimum, creditors generally must consider eight underwriting factors: (i) Current or reasonably expected income or assets; (ii) current employment status, if the creditor relies on income from employment in determining repayment ability; (iii) the monthly payment on the covered transaction; (iv) the monthly payment on any simultaneous loan(s) that the creditor knows or has reason to know will be made; (v) the monthly payment for mortgage-related obligations; (vi) current debt obligations, alimony, and child support; (vii) the monthly debt-to-income ratio or residual income; and (viii) credit history. [(9)] Creditors generally must use reasonably reliable third-party records to verify the information they use to determine repayment ability.[(10)]

The ATR/QM Rule also provides for a class of "qualified mortgage" (QM) loans, for which compliance with the ATR requirement is presumed.[(11)] That presumption of compliance can be either conclusive, *i.e.* a safe harbor, for QM loans that are not "higher-priced", or rebuttable, for QM loans that are "higher-priced." [(12)]

The ATR/QM Rule defines QM loans by establishing general underwriting criteria, as well as restrictions on product features and costs. Specifically, restrictions on product features include prohibitions against negative amortization, balloon payments, interest-only payments, and terms greater than 30 years.[(13)] In addition, the total points and fees payable in connection with a QM Loan must not exceed a certain percentage of the loan amount.[(14)]

There are several categories of QM loans. One category is referred to as "General QM Loans." In its determination of borrower's income and debt obligations for a General QM Loan, a creditor must adhere to requirements provided in Appendix Q, and it must ensure that the ratio of the consumer's total monthly debt to total monthly income does not exceed 43% (DTI ceiling).[(15)] The criteria for General QM Loans further require that creditors calculate mortgage payments based on the highest payment that will apply in the first five years of the loan.[(16)]

The ATR/QM Rule provides a separate, temporary category of QM loans for loans eligible to be purchased or guaranteed by either the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation (collectively, the GSEs) while they operate under Federal conservatorship or receivership (“Temporary GSE QM” loans). This category of Temporary GSE QM loans will continue to be in effect until the earlier of: (i) The end of conservatorship; or (ii) January 10, 2021.[17]

The rule also provided a temporary category of QM loans for loans eligible to be insured by the U.S. Department of Housing and Urban Development (FHA Loans); guaranteed by the U.S Department of Veterans Affairs (VA Loans); guaranteed by the U.S. Department of Agriculture (USDA Loans); or insured by the Rural Housing Service (RHS Loans) (collectively, “Temporary Federal Agency QM” loans).[18] The category of Temporary Federal Agency QM loans no longer exists and has been replaced by the category of Federal Agency QM loans because the relevant Federal agencies (*i.e.,* FHA, VA, and USDA/RHS) have all issued their own qualified mortgage rules since 2014.[19] The Bureau is not including these Federal Agency QM rules in the assessment, which is limited to the Bureau's own ATR/QM Rule.

A fourth category of qualified mortgages provides more flexible underwriting standards for small creditor portfolio loans,[20] and a fifth category allows small creditors that operate in rural or underserved areas to make balloon-payment portfolio loans that are qualified mortgages.[21]