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STATEMENT OF THE

NATIONAL ASSOCIATION OF REALTORS®

SUBMITTED FOR THE RECORD TO

THE UNITED STATES HOUSE OF REPRESENTATIVES COMMITTEE ON FINANCIAL SERVICES SUBCOMMITTEE ON FINANCIAL INSTITUTIONS AND CONSUMER CREDIT

HEARING REGARDING

QUALIFIED MORTGAGES: EXAMINING THE IMPACT OF THE ABILITY TO REPAY RULE

MAY 21, 2013

INTRODUCTION

On behalf of the 1 million members of the National Association of REALTORS® (NAR), who are involved in all types of real estate transactions, thank you for holding this very important hearing on the Qualified Mortgage (QM)/Ability to Repay (ATR) rule.

The Dodd-Frank Wall Street Reform Act established the QM as the primary means for mortgage lenders to satisfy its "ability to repay" requirements. NAR has been generally supportive of the Consumer Financial Protection Bureau's (CFPB) efforts to craft a QM rule that is not unduly restrictive and provides a safe harbor for lenders making QM loans. NAR has had policy supporting the idea that lenders measure a consumer's ability to repay a loan since 2005.

However, Dodd-Frank also provides that a Qualified Mortgage (QM) may not have points and fees in excess of 3 percent of the loan amount. As currently defined by Dodd Frank and in the Consumer Financial Protection Agency's (CFPB) final regulation to implement the "ability to repay" requirements, "points and fees" include (among other charges): (i) fees paid to affiliated (but not unaffiliated) title companies, (ii) salaries paid to loan originators, (iii) amounts of insurance and taxes held in escrow, (iv) loan level price adjustments (LLPAs), and (v) payments by lenders to correspondent banks and mortgage brokers in wholesale transactions.

As a result of this problematic definition, many loans made by affiliates, particularly those made to low- and moderate-income borrowers, would not qualify as QMs. Consequently, these loans would be unlikely to be made or would only be available at higher rates due to heightened liability risks. Consumers would lose the ability to choose to take advantage of the convenience and market efficiencies offered by one-stop shopping.

It has been argued that CFPB has the authority to fix this problem. However, it is very clear that the CFPB feels constrained by Congress's apparent intent and the language of Dodd-Frank particularly with regard to affiliates. As the Bureau indicated in its statement in the January 2013 final rule:

> *The Bureau is adopting § 226.32(b)(1)(iii) as proposed but renumbered as § 1026.32(b)(1)(iii). TILA section 103(bb)(4) specifically mandates that fees paid to and retained by affiliates of the creditor be included in points and fees. The Bureau acknowledges that including fees paid to affiliates in points and fees could make it more difficult for creditors using affiliated service providers to stay under the points and fees cap for qualified mortgages and that, as a result, creditors could be disincented from using affiliated service providers. This is especially true with respect to affiliated title insurers because of the cost of title insurance. On the other hand, despite RESPA's regulation of fees charged by affiliates, concerns have nonetheless been raised that fees paid to an affiliate pose greater risks to the consumer, since affiliates of a creditor may not have to compete in the market with other providers of a service and thus may charge higher prices that get passed on to the consumer.* ***<u>The Bureau believes that Congress weighed these competing considerations and made a deliberate decision not to exclude fees paid to affiliates.</u>*** *This approach is further reflected throughout title XIV, which repeatedly amended TILA to treat fees paid to affiliates as the equivalent to fees paid to a creditor or loan originator. See, e.g., Dodd-Frank Act sections 1403, 1411, 1412, 1414, and 1431. For example, as noted above, TILA section 129C(b)(2)(C)(i), as added by section 1412 of the Dodd-Frank Act, provides that for purposes of the qualified mortgage points and fees test, bona fide third-party charges are excluded other than charges "retained by *** an affiliate of the creditor or mortgage originator." Similarly, TILA section 129B(c)(2)(B)(ii), added by section 1403 of the Dodd-Frank Act, restricts the payment of points and fees*

> *but permits the payment of bona fide third-party charges unless those charges are "retained by an affiliate of the creditor or originator."* ***In light of these considerations, the Bureau does not believe there is sufficient justification to use its exception authority in this instance as the Bureau cannot find, given Congress's clear determination, that excluding affiliate fees from the calculation of points and fees is necessary or proper to effectuate the purposes of TILA, to prevent circumvention or evasion thereof, or to facilitate compliance therewith.*** *(Emphasis added)*[1]

For this reason, NAR believes that only Congress can fully rectify the law's discrimination against affiliates, small and mid-size lenders, community banks, and credit unions in the calculation of fees and points.

H.R. 1077 – THE CONSUMER MORTGAGE CHOICE ACT

H.R. 1077, introduced by Representatives Huizenga (R-MI), Bachus (R-AL), Royce (R-CA), Stivers (R-OH), Meeks (D-NY), Scott (D-GA), Clay (D-MO), and Peters (D-MI), addresses this discrimination against smaller lenders, brokers, and lenders with affiliates in the calculation of fees and points for purposes of meeting the 3% cap on fees and points in the Ability to Repay/Qualified Mortgage (QM) provisions of Dodd-Frank. The bill helps maintain consumer choice in selecting the type of mortgage originator best able to meet their mortgage credit needs.

Key Components of H.R. 1077

The key components of H.R. 1077 include:

- The bill removes affiliate title charges from the calculation of fees and points. The title industry is heavily regulated and competitive. It does not make sense to discriminate against affiliates on the basis of these fees. To do so would only reduce competition and choice in title services and insurance providers.

  Furthermore, owners of affiliated businesses can earn no more than a proportionate return on their investment under RESPA. RESPA also prohibits referral fees or any compensation at all for the referral of settlement services. As a result, there is no steering incentive possible for individual settlement service providers such as mortgage brokers, loan officers or real estate professionals.

- The bill removes a manner of counting fees and points that would unfairly discriminate against Mortgage Banking and Mortgage Brokerage entities by only counting as fees and points monies paid directly by the consumer to the originator, be they a broker or a mortgage bank loan officer.

- The bill removes from the calculation of fees and points Fannie Mae and Freddie Mac Loan Level Price Adjustments (LLPAs). This money is not revenue to the lender. These adjustments are essentially risk based pricing established by the GSEs and can sometimes exceed 3 points in

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[1] **Federal Register** /Vol. 78, No. 20 /Wednesday, January 30, 2013 /Rules and Regulations pg. **6439.** It is also on page 33 of the pdf version- http://www.gpo.gov/fdsys/pkg/FR-2013-01-30/pdf/2013-00736.pdf

and of themselves. Including these LLPAs would limit access to affordable mortgage credit to many borrowers or force borrowers into FHA or Non-QM loans unnecessarily.

- The bill removes from the calculation of fees and points escrows held for taxes and insurance. The tax portion is a clarification of poor language in Dodd-Frank. In the case of insurance, these escrows are held to pay third party homeowner's insurance. They are not retained and cannot be retained under RESPA since RESPA requires excess escrows to be refunded.

This bill is essential to maintain competition and consumer choice in mortgage origination. Without this legislation, one-quarter to as much as one-half of loans currently being originated would likely not be eligible for the QM safe harbor and would likely not be made or would be concentrated amongst the largest retail lenders whose business models are protected from the fees and point definition discrimination in most cases since their retail branch employees are not compensated on a per transaction basis or if they are, the amount is not as significant. Therefore, NAR believes that Congress should pass HR 1077 before the "ability to repay" provisions take effect in January 2014.

OTHER AREAS OF CONCERN

43 Percent Debt to Income Limit (DTI) - The biggest area of concern with regard to the underwriting standards for QM will be jumbo loans with DTI in excess of 43% and other loans particularly when the exception for GSE loans expires. For lower loan amounts, FHA and other government backed loans will be the only loans that will satisfy the QM safe harbor when DTI exceeds 43%. Even if the GSE exception is maintained, jumbo loans and non-GSE or government backed loans will be subject to the 43% DTI cap making them more costly or less likely to be made.

QM and Qualified Residential Mortgage (QRM) – NAR believes that assuming the concerns above are addressed, the QRM (which does not require risk retention by securitizers) should be constructed to match the QM. Dodd-Frank establishes that the QRM can be no broader than the QM, but it does not say it cannot be substantially the same. NAR has conducted significant research and has determined that the further imposition down payment requirements and tighter debt-to-income and credit standards will greatly decrease access to credit without creating substantial improvements in loan quality. For this reason, Congress should support, and regulators should establish, a QRM that substantially mirrors the QM.

CONCLUSION

The National Association of REALTORS® supports a broad QM rule that does not discriminate against affiliates, smaller lenders, community banks, or credit union. Furthermore, NAR supports a QM rule that gives consumers maximum choice in service providers. Finally, NAR supports a QM and QRM rule that does not needlessly cause credit to be more costly or unobtainable.

We are already in a tight credit environment. The QM and other rules effectively ban the types of products and processes that led to the mortgage crisis. Congress and the CFPB should improve the QM rule to ensure that consumers who have the ability to repay their loans will have the access to affordable credit they deserve.