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June 3, 2013

The Honorable Richard Cordray
Director
Consumer Financial Protection Bureau
1700 G St., NW
Washington, DC 20552

Re: Amendments to the 2013 Mortgage Rules under RESPA (Reg X) and TILA (Reg Z), RIN 3170-AA37[1]

Transmitted electronically through www.regulations.gov.

Dear Director Cordray:

I am writing on behalf of more than one million members of the National Association of REALTORS® (NAR) to comment on the May 2, 2013, proposed rules to amend the January 2013 final mortgage rules under the Truth in Lending Act (TILA) and the Real Estate Settlement Procedures Act (RESPA). NAR supports the overall objectives of the proposed rules that are designed to clarify the obligations of creditors while assuring the continued availability of affordable mortgages for qualified consumers.

NAR is America's largest trade association, including our eight affiliated Institutes, Societies and Councils, five of which focus on commercial transactions. REALTORS® are involved in all aspects of the residential and commercial real estate industries and belong to one or more of some 1,400 local associations or boards, and 54 state and territory associations of REALTORS®.

Background

On May 2, 2013, the Consumer Financial Protection Bureau (CFPB) published a proposed rule that would amend several final mortgages rules that it issued in January 2013 and are scheduled to take effect in January 2014. These changes would clarify or correct provisions on (1) the ability of states to impose higher standards for mortgage servicing than the RESPA rule, (2) the small servicer exemption from certain servicing rules, (3) the use of government-sponsored enterprises (Fannie Mae or Freddie Mac, or the GSEs) and federal agency purchase, guarantee, or insurance eligibility for determining qualified mortgage (QM) status, and (4) the determination of debt and income for purposes of originating qualified mortgages under a revised Appendix Q of the TILA ability-to-repay (ATR) rule.

NAR supports your efforts to provide greater certainty on various requirements of the January rules to address concerns raised by lenders and others about the final rules. We have specific comments related to the QM-related aspects of the proposals.

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[1] 78 Fed. Reg. 25638 (May 2, 2013)

Use of GSE and Agency Eligibility to Qualify as a Qualified Mortgage

The final ATR rule requires creditors to make a reasonable, good faith determination of a consumer's ability to repay the mortgage. For mortgages qualifying for QM status, creditors receive certain protections from liability in connection with their ability-to-repay determinations. One way to qualify as a QM is to (1) comply with prohibitions on certain risky features, (2) come within limits on points and fees, and (3) be eligible for purchase or guarantee by the GSEs (while under conservatorship) or be eligible to be insured or guaranteed by FHA, the VA, the USDA, or the Rural Housing Service. This provision simplifying qualification of QM status sunsets when the agencies issue their own QM standards and, for GSEs, when the conservatorship ends. In any case, the authority expires no later than January 10, 2021. We defer to a later date a discussion of the possible need to extend the 2021 sunset date.

NAR supports the goals of the proposed changes and clarifications, including clarification that a determination of QM status is not voided if the creditor is later required to repurchase the loan for reasons not related to the ability of the consumer to repay the loan.

We do have a concern about one aspect of the flexibility you propose for mortgages eligible to be purchased or guaranteed by one of the GSEs or federal agencies. This clarification would allow creditors to determine eligibility for QM status if the loan meets the GSE or agency eligibility requirements under a written agreement between the creditor and a GSE or agency. These agreements exempt the creditor from the otherwise generally applicable written GSE or agency policies to the extent, and subject to any conditions, specified in the agreement. This flexibility is likely to enhance the ability of many consumers to get loans or loans on the most favorable terms available to them. We understand why the Bureau proposes not to allow other creditors to rely on the terms agreed to by the creditor signing an agreement. The circumstances will vary widely based on the capacity of the creditor that is party to the agreement and on regional and local market variations. Nevertheless, we are concerned about the potential impact of the policy.

The problem is that these written agreements may provide a competitive advantage to creditors who receive special treatment under the written agreements that vary the standard eligibility requirements. We believe that for the most part the larger creditors will be those who enter into written agreements, potentially to the disadvantage of community banks, credit unions, and other small lenders. There is historical basis for our concern. The GSEs have had a long history of charging large lenders lower guarantee fees than they charge to smaller lenders. Even where the impact is inadvertent and results from well-intentioned goals, we are concerned about any policy that could advantage one class of creditors over another. Especially in light of the continuing concern about concentration of the banking industry in a handful of institutions, we urge you to modify the proposal to minimize the impact of the proposal that we believe may give large lenders a competitive advantage.

We would oppose prohibiting the use of any written agreements to tailor the GSE and agency policies in appropriate circumstances. However, their use should be transparent so other creditors have the option to request comparable treatment. We recommend that the GSEs and agencies make each written agreement public so other lenders can assess the alternative eligibility requirements that have been approved, and the conditions imposed. Other creditors should have the opportunity to seek equivalent treatment to the extent they have the capacity to qualify. The four federal agencies and the GSEs, at least while in conservatorship, should have no objection to fully disclosing their policies and programs. If private creditors object, for business reasons, to disclosure of the content of the written agreements, they should have the choice of terminating any existing agreements and complying with the public eligibility requirements in the future. This approach will preserve the ability of the GSEs and agencies to vary their requirements through written agreements with creditors, without sacrificing useful flexibility, creating unfair competitive advantage for larger lenders, or impairing mortgage availability.

Appendix Q, Standards for Determining Monthly Debt and Income

The proposal responds to concerns about whether the January version of Appendix Q imposes unrealistic requirements on creditors, such as the need to predict the future with respect to the stability of a consumer's employment and the impact of future economic conditions on the income of self-employed individuals. The Bureau would require creditors to confirm current, ongoing employment status, not the likelihood of its continuation, which can be speculative and difficult to obtain from the employer. NAR strongly supports this more practical standard.

Similarly, the Bureau proposes to eliminate requirements that self-employed consumers provide a business credit report and that creditors evaluate the sources of a business's income and the general economic outlook for similar businesses in the area. NAR supports the Bureau's reassessment of the January rules and its conclusion that these requirements are too expensive and complex, without providing clarity.

NAR recommends additional clarification with respect to self-employed consumers. The large majority of NAR's members are self-employed contractors working in association with brokers, not as employees. It would be helpful if the final rule would provide additional clarity on how creditors should consider real estate commission income. A threshold question is whether a consumer with real estate commission income is covered by section B.7, Commission Income; Section D, General Information on Self-Employed Consumers and Income Analysis; or both.

To qualify commission income, Section B.7 requires consumers to provide (1) copies of signed tax returns for the last two years, and (2) their most recent pay stub. If this section applies to real estate brokers and agents who are not employees, the pay stub requirement should be made more flexible to allow a consumer with real estate commission income to document income with comparable evidence, such as bank statements showing deposits along with documentation that commission income was the source of the deposits. The term "pay stub" suggests an employer-employee relationship, with pay period and year-to-date information, including gross and net income and tax withholdings. That is not the typical situation for real estate professionals.

Section D governs self-employed individuals. We recommend additional flexibility for creditors when establishing a self-employed consumer's earnings trend. The proposal does not allow a creditor to consider evidence of considerably higher income than indicated on the previous year's tax return. It is not unusual for real estate professionals to experience significant income growth as their reputations grow and the number of their compensated transactions increases. Where such an increase can be shown to be based on at least six months of documented success involving a significantly larger number of transactions than in the previous tax year, we recommend that the creditor be allowed to take the increased income into account in determining the ability of the consumer to repay the loan. The current condition of the housing market, including whether sales are increasing, year over year, could be considered without imposing undue burden.

Conclusion

NAR commends your efforts to provide greater certainty in connection with the affected final rules because it will have the result of promoting responsible homeownership for consumers who otherwise would be unable to qualify for an affordable loan because their loan would not achieve QM status.

We would be pleased to discuss these issues and the state of the housing and mortgage markets in more detail at your convenience. If you have any questions, please contact Charlie Dawson, our Policy Representative for Financial Services, at cdawson@realtors.org or 202.383.7522.

Sincerely,

Gary Thomas
2013 President, National Association of REALTORS®