American Bankers Association
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July 31, 2017

Monica Jackson
Office of the Executive Secretary
Bureau of Consumer Financial Protection 1275 First Street, N.E.
Washington, DC 20002

Re: Docket No. CFPB –2017–0014
Request for Information Regarding Ability-to-Repay/Qualified Mortgage Rule Assessment

By electronic delivery to: www.regulations.gov

Dear Ms. Jackson:

The American Bankers Association (ABA)[1] appreciates the opportunity to comment on the Bureau of Consumer Financial Protection's (CFPB) plan to assess the Ability-to-Repay Rule (ATR) under TILA. The Bureau is requesting public comment on its plans for assessing this rule as well as certain recommendations and information that may be useful in conducting the planned assessment. The CFPB is conducting its assessment of the ATR rule pursuant to Section 1022(d) of the Dodd-Frank Act. Section 1022(d) requires that CFPB evaluate each significant rule it issues and publish a report of that assessment within five years of the rule's effective date. The Bureau plans to issue an assessment report not later than January 10, 2019.

Overview of Comments

The ATR rule advances the most important mortgage-related legislative reform of the Dodd-Frank Act, and establishes the principal objective of ensuring reasonable and good faith determinations in loan underwriting. ABA embraces safe and sound lending practices, and our banks support well-regulated markets where well-crafted rules are effective in protecting consumers against abuse. In this sense, ABA and its members want to assure that these regulations succeed in their objectives of ensuring that consumers have access to residential mortgage loans on terms that are fair and reasonably reflect their ability to repay. See Section 1402 of the Dodd-Frank Act, 15 U.S.C. 1639b(a)(2).

The consumer protection element is only part of the focus, however, because the Bureau must also observe the dual responsibility to ensure that markets for consumer financial products and services operate "transparently and efficiently to facilitate access and innovation," and that "responsible, affordable mortgage credit remains available to consumers." See TILA section 129B(a)(1), 15 U.S.C. 1639b(a)(1). These twin objectives must guide the analysis mandated under this assessment.

[1] The American Bankers Association is the voice of the nation's $17 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard $13 trillion in deposits and extend more than $9 trillion in loans.

ABA offers the following recommendations regarding the CFPB's assessment of ATR Rules:

- The Temporary GSE QM provisions continue to be essential in eliminating risk and facilitating proper compliance with ATR rules. This assessment should prioritize analysis of the market impact of this special segment and begin the process of identifying appropriate and uniform standards that can eventually replace these provisions without disrupting markets.
- CFPB should analyze regulatory costs in terms of the overall compliance environment, taking into account the interrelation of all mortgage reforms that currently impact lending operations.
- CFPB should consider that the full impact of these rules may not be entirely apparent as lending practices and legal interpretations are still developing in the markets and in the courts.
- ABA recommends a comprehensive review of ATR rules to refine and simplify their application. In these comments, ABA advances a series of specific areas that would benefit from immediate modifications to incentivize an expansion of safe lending activities.

General Comments:

ABA largely agrees with the assessment plan set forth in the RFI to evaluate the effectiveness of the ATR Rule. ABA is confident that the Bureau will reach valid and useful conclusions if it conducts a balanced and neutral assessment of this regulation's effectiveness, pursuant to the factors and methodologies described in the RFI.

ABA understands that the Bureau does not anticipate that this assessment report will include specific proposals to modify any rules, although the findings made in the assessment may help to inform the Bureau's thinking as to whether to consider commencing a rulemaking proceeding in the future. Concordant with this approach, ABA's goal in these comments is not to critique the ATR regulation itself, but rather, to offer constructive input to fortify the Bureau's task of assessing the rule's effectiveness, as described above.

ABA offers the following observations to enhance the analysis under this assessment:

- **Prioritize as urgent the reforms necessary to address the "GSE Patch"**:

  ABA appreciates the Bureau's initiative to analyze the 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). ABA is supportive of immediate review of this QM segment.

  As a threshold matter, ABA observes that the Temporary GSE QM is a critical provision of the law and one that prevented major disruptions in banks' transition into the new ability-to-repay standards. As the Bureau notes in the RFI, "the initial impact of the rule on costs was muted given market conditions prevailing at the time and the Bureau's decision to create a broad temporary category of QM loans, particularly the Temporary GSE QM loans." (82 FR 25246, 25248) ABA agrees with that description, and believes that the temporary provision continues to be a major necessity for most banks and many cponsumers. ABA members continue to show a keen preference towards QM lending, as the past 5 years have seen bankers making over 80% of their loans in this segment. See 2016 ABA Residential Real Estate Lending Survey, page 34). Overall, unofficial reports suggest that significant portions of bank lending fall in the QM category *because* of the fact they meet Agency guidelines and qualifications (i.e., they meet the special GSE QM category).

ABA looks forward to analyzing the Bureau's evaluation of the effectiveness of the Temporary GSE QM category. This segment is difficult to measure because institutions often rely on this special QM without formal recordation of DU or LP results. In addition, this QM category is often classified together with other Federal Agency QMs, such as FHA and VA, such that precise figures are often not attainable. ABA will analyze and compare the Bureau's findings on the use of the Temporary GSE QM, and will remain ready to provide survey assistance concerning its own members, or other support necessary to the Bureau in assessing this analysis with greater precision.

ABA appreciates the Bureau's statement that the final assessment report will not, in itself, include rule modification proposals. (See 82 F.R. 25247). We think this is the correct approach—the practices of the full market must be thoroughly understood before the Bureau advances with any regulatory restructuring. Although ABA believes that the GSE QM is essential for purposes of market support at present, the special GSE QM must eventually sunset. The ATR rules must advance towards a uniform and transparent set of guidelines, criteria, and compensating factors that are objective and policy-based, and certainly independent of any institutional market player. Ultimately the goal should be a QM designation that denotes well underwritten, safe loans that applies for all lenders, whether loans are retained in portfolio, sold to the GSEs, FHA, VA or other secondary market players. For a level playing field, the same QM should apply - and be workable - for all segments of the market. Most importantly, the new standards must not limit credit availability relative to the current standards.

- **Consider that QM cemented lending guidelines when markets were most conservative**:

  Descriptions contained in the RFI confirm that the Bureau is well aware of the important fact that mortgage lending practices were extremely conservative when the ATR rules were enacted. See 82 F.R. at 25248. The market retraction underway at the time of the rule's effective date would suggest that using the law's inception point as a baseline to measure impact could lead to erroneous conclusions—in short, the effective date for this regulation may not offer the correct reference point to measure whether mortgage lending is unduly restricted under the ability-to-repay standards. Experts have differed on the extent to which this rule caused a reduction in mortgage credit availability, particularly in the financing of low-income and minority borrowers. We note that part of the disagreement concerns whether the lending levels present in 2013, the rule's effective date, constitutes the ideal point of comparison.

Our own ABA banker survey suggests that the rule is having a downward impact in lending. When asked whether the Ability-to-Repay/QM rules are affecting credit availability, 72% of responding banks responded yes—with 7% responding that the impact is "severe." See 2016 ABA Residential Real Estate Lending Survey, page 37. It is notable that these responses were based on banks' current lending levels, not on historically high levels of lending. This point is significant because, during this same time period, the current state of U.S. homeownership has remained between 62.9% and 63.7%, a "plateau" that constitutes the lowest rate in more than 50 years, according to the Census Bureau. See https://www.census.gov/housing/hvs/files/currenthvspress.pdf.[2]

ABA recommends that the selection of a baseline for impact comparisons be carefully weighed and considered by Bureau researchers. We urge that the report adopt a multidimensional perspective that, at minimum, adopts multiple baselines that can be compared with current lending activity. The use of multiple baselines allows for broader comparisons of potential policy courses that should be considered in determining optimal solutions and regulatory restructuring.

- **Conduct credible assessment of costs caused by compliance environment**:

Among the various elements to be analyzed, the RFI sets forth that the review will "study changes in cost of credit" and examine the rule's impact on "mortgage cost." See 82 F.R. at 25249, 25250. ABA commends the Bureau on the initiative to examine the ATR rule's cost and burdens on industry participants.

It is imperative that in this assessment, CFPB analyze the burdens of these regulations via objective and neutral factors that aim at identifying scope of the full set of costs and burdens imposed on institutions. ABA's own survey data reflects that the panoply of new regulations have directly contributed to a marked decrease in product choice and elimination of financial options across the board. We note, for instance, that--

- 97% of banks responding to our surveys report that their institutions have experienced higher mortgage specific costs as a result of recent regulatory reforms.
- 84% of responding ABA banks report that they are being forced to hire additional staff as a direct result of new regulations.
- 93% of responding ABA banks report that legal/regulatory consulting costs are swelling because of new regulations.
- Reliable market studies by *Mortgage Bankers Association* and others suggest that over the past decade, the cost of originating a mortgage has increased by 72% over the past decade, from approximately $4,376 in the third quarter of 2009 to approximately $7,562 by the fourth quarter of 2016.

[2] For summary of census data, see article at https://www.housingwire.com/articles/40799-millennials-drive-up-homeownership-rate-in-q2

Industry data is corroborated by government data. The latest CSBS-Federal Reserve Survey[3] reflects that mortgage lending activity at community banks is in decline, with CSBS describing the drops in mortgage activity as "significant."[4] The CSBS-Fed survey outlines regulatory burden as the number one reason for planned exits of banks from currently offered activities. It also explains that the Real Estate Settlement Procedures Act (RESPA), the Truth in Lending Act (TILA) and the TILA-RESPA Integrated Disclosure rule collectively account for 23 percent of all compliance expenses.

The stifling burdens brought by these regulatory changes have made it difficult for institutions to stay profitable or even continue operations in their markets. Our banks do not formally report to ABA when they exit market segments, but we can confirm that a significant number of community banks have ceased mortgage operations entirely in response to the heavy regulatory burdens and increase in legal risks. Many more have discontinued specific mortgage products as a result of increased regulatory burden, leaving consumers with fewer options in the marketplace.

The elements set forth above are important is because they all have direct impact upon the consumer. The diminution of product choice, the increase in compliance costs, the elimination of bank services, bear directly on consumers and how they are served in their communities. ATR/QM Rule's objectives are clearly delineated by Congress and CFPB—they must protect, but also, they must respect the goal of preserving consumer access to responsible, affordable credit. The Bureau stated in an exhortative description of the initial January 2013 ATR Rule, the ATR/QM Rule ''will not lead to a significant reduction in consumers' access to consumer financial products and services, namely mortgage credit.'' 178 FR 6408, 6570 (Jan. 30, 2013). The results clearly are otherwise.

- **Consider that the ATR reforms have not been judicially tested**:

  An obvious point from informal survey data and discussions with bank members is that the mortgage loan market remains dominated by loans that are covered by the QM safe harbor protections.[5] This concentration of QM-covered loans is due primarily to liability concerns and uncertainties of what can happen outside of the qualified "safety zones." It is imperative to understand that, to date, there is scant litigation experience to guide the identification of legal risk for QM and non-QM loans.

  ABA believes that the rule-writers did a commendable job in eliminating specious class action probabilities. Nonetheless, creditors and investors remain uncertain as to how individual judges will interpret the myriad standards that exist in the ATR regulations, and

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[3] See https://www.csbs.org/news/press-releases/pr2016/Pages/092916.aspx

[4] See, *Fostering Economic Growth: Regulatory Perspective: Hearing before the Committee on Banking, Housing and Urban Affairs*, Senate, 115th Cong. 1 (2017) (Testimony of Charles Cooper). https://www.banking.senate.gov/public/_cache/files/6810bad0-2b53-4997-b7b9-7b041e2a8783/59F1FEABF48A0982910107339D9A7ADC.cooper-testimony-6-22-17.pdf

[5] ABA surveys reflect that in 2016, 80% of responding banks restricted lending to QM segments or originated primarily QM loans. See 2016 ABA Residential Real Estate Lending Survey, page 35.

how they will apply these to specific circumstances. Our banks anticipate that foreclosure challenges will emerge based on whether banks made a "reasonable and good-faith effort" to determine borrowers' ability to repay, and whether creditors used underwriting standards based on "empirically derived, demonstrably and statistically sound models," as required by law. It is worthy of note that applicable TILA provisions identify that all ATR penalties generally transfer to assignees, which creates legal doubts for investors as well. In this sense, potential costs of court litigation and eventual settlements must form part of the Bureau's assessment of this rule. For instance, unknown non-QM loan litigation risk has been a primary factor in the failure of investors to support a reemergence of private label secondary markets.

- **Engage in interviews with community banks**:

ABA is very encouraged that the Bureau is announcing intentions to meet and interview with creditors to augment information and understanding of the impact of this rule. ABA strongly believes that the Bureau can gain valuable insight by actually understanding bank practices at the ground level. ABA believes that banks will be well-equipped to inform the Bureau on changes that creditors have made to their business practices in connection with the requirements of the rule, the challenges in meeting the rule's requirements, and creditors' experience with the Temporary GSE QM, including their consideration of the eventual expiration of this provision. In addition, interviews can better inform Bureau staff about the systems "work-arounds" that banks have had to incorporate in order to tailor services and products to their communities. Bureau researchers will learn, first-hand, about the time and labor required to actually process a loan and steps necessary to prove compliance, not only with regulations, but also to address investor demands.

In discussing the interviews, the RFI identifies that the "primary goal of the research" is to understand any changes in pricing and underwriting strategies made by creditors in connection with the requirements of the rule and the possible impact on access to credit for consumers." (25250). ABA believes that if these interviews are done directly with community bankers, they will also reveal the ongoing confusion inherent in the panoply of applicable rules, the overlap in regulatory requirements, the complexity of required calculations, the labor-intensive process required to originate loans under the current regulatory regime, and the resulting frustrations of customers. These interviews should be summarized and detailed in appendices to the assessment report.

- **Recommendations for reforms**:

The RFI is requesting recommendations for modifying, expanding, or eliminating the ATR/QM Rule. ABA has collected a detailed list of elements that should be fixed and corrected to remove burden, legal uncertainty and unnecessary impediments to mortgage financing. ABA believes these recommendations will expand responsible lending but still maintain protections that afford consumers the assurance that they receive loans they can afford. Our targeted reform provisions can be readily enacted via regulatory channels, and would reduce burdens and boost legal certainty and ability to lend—

- ***Portfolio Loans Should Qualify as QM***: Under existing Ability-to-Repay (ATR) rules, lenders must determine whether a borrower has a reasonable ability to repay a mortgage, and must document the loan applicant's income, before the loan is consummated. Loans that are originated under specific underwriting guidelines, as defined in the regulation, qualify for more favorable safe harbor treatment as a Qualified Mortgage, or "QM." ABA believes that all mortgages originated and held in a bank's portfolio should be considered QM, and should be afforded safe harbor legal treatment. This approach is consistent with safe lending principles because holding loans in portfolio means that the bank is retaining 100% of the risk on that loan. Banks will offer portfolio products only when they can adequately assure that it is a "safe" loan and the bank is willing to absorb the full risk of repayment. Since institutions are not likely to make unsound loans in instances where the loan is held in-house, the ability-to-repay protections are inherent in the underwriting analysis that the bank chooses to apply.

- ***Raise or Eliminate the 43% Debt-to-Income Standard***: In order to attain a presumption of compliance, or "Qualified Mortgage" status (QM), a lender must assure that the DTI on the loan is no greater than 43%. Instituting such a rigid DTI limitation is arbitrary, misplaced and results in inflexible underwriting conditions that are resulting in the rejection of many creditworthy applicants. The rule's forced focus on one data point—the DTI—is not conducive to allowing banks to review a mortgage applicant's fuller credit picture. The codification of a hard-lined DTI ratio halts any ability to consider viable compensating factors that open credit possibilities for deserving consumers.

  The QM rules should not prescribe inflexible underwriting criteria. Since the Dodd-Frank legislation instructs the regulator to take into account debt-to-income ratios when setting QM standards, the solution is to increase the DTI threshold to a higher level in order to afford lenders more leeway in setting their own standards, in full consideration of their communities' needs and their appetite for risk.

  A more appropriate alternative standard for considering an individual's ability to repay would be a well-defined residual income analysis. ABA urges that the QM rules should provide that, in addition to DTI, creditors have the option of considering residual income to determine whether an applicant qualifies for a loan. For instance, the Veteran Administration's residual income test is an established and market-accepted standard that would provide an excellent model to serve as an alternative to the QM DTI requirement.

- ***Revisit and Expand Appendix Q***: Under the QM rules, Appendix Q sets forth the definitions and standards for calculating "debt" and "income" for purposes of calculating the DTI limits applicable to attaining safe harbor treatment. The guidelines set forth in Appendix Q were generally derived from the FHA Insurance program, and as such, constitute only one option among many market standards for safe underwriting. Various other guidelines currently exist—whether they be from Freddie Mac, Fannie Mae, the VA, or the Federal Home Loan Banks—that are as safe and established as the FHA guidelines. These additional alternatives should be made available as acceptable guidelines for allowing banks to certify loans into QM status.

- ***Consider Acceptable Replacement for the GSE/Agency Alternative QM***: The ATR regulations contain a special "GSE QM," which provides that loans that comply with GSE underwriting specifications automatically qualify as QM. This special GSE QM continues to be a critical QM alternative in the current market. However, this alternative is only temporary and is set to expire once GSEs are no longer in conservatorship or until 2021, whichever is earlier. ABA urges the CFPB to initiate a formal process for soliciting stakeholder input to begin the development of a workable and transparent set of criteria for the configuration of a viable QM standard that replaces the "GSE Patch." The new QM standard must be as broad as the current GSE QM, and must be sufficiently robust to completely replace it without reducing credit availability. The standard must set forth methodologies that achieve flexible underwriting standards and are fully consistent with Dodd-Frank requirements. ABA believes that this endeavor is urgent in light of the impending sunset requirements for this special provision.

- ***Eliminate the Points and Fees Test***: In order to qualify for QM's safe harbor treatment, the points and fees payable in connection with a loan cannot exceed certain thresholds. This so-called points-and-fees test is extremely complex, with definitions that are unclear and often inconsistent in their application. There should be a reconsideration of the points-and-fees thresholds as this item is among the most convoluted elements of the law and threatens high liability for banks. More importantly, this test operates as a redundant consumer protection provision, as price controls that achieve the same end are found elsewhere in mortgage regulations. The points-and-fees test often poses a significant hurdle to qualifying consumers into mortgage loans.

- ***Raise the RESPA Servicing Rule Threshold***: The new servicing rule requirements under RESPA are extensive, are an overreaction to the financial crisis when servicers could not keep up with the barrage of loans going into default, and go too far in specifying exacting detail of how to service a mortgage loan. The threshold to trigger compliance with many parts of the servicing rules is just 5000 mortgages, or just 1 mortgage whose servicing rights are purchased when the lender will be servicing for others. The servicing rules require precision to orchestrate that translates into a need for increased staffing that a small servicer cannot afford. The threshold should be increased to 25,000 mortgages, or 1000 loans whose servicing rights are purchased, so that only large servicers will be bound by the increased complexity.

Sincerely,

Rod J. Alba