Comments submitted by the
Center for Responsible Lending

to the Consumer Financial Protection Bureau
RE: Amendments to the 2013 Mortgage Rules under the Real Estate Settlement Procedure Act (Regulation X) and the Truth in Lending Act (Regulation Z)

Docket No. CFPB-2013-0010
RIN 3170-AA37

June 3, 2013

Thank you for the opportunity to submit comments concerning the Consumer Financial Protection Bureau's (CFPB) proposed rulemaking concerning amendments to the Bureau's 2013 Mortgage Rules, including the Ability to Repay and Qualified Mortgage rule and Mortgage Servicing rules.

The Center for Responsible Lending (CRL) is a nonprofit, non-partisan research and policy organization dedicated to protecting homeownership and family wealth by working to eliminate abusive financial practices. CRL is an affiliate of Self-Help, one of the nation's largest nonprofit community development financial institutions. Self Help has provided $6 billion in financing to 70,000 homebuyers, small businesses and nonprofits and serves more than 80,000 mostly low-income families through 30 retail credit union branches in North Carolina, California and Chicago.

The comments submitted below touch on the CFPB's proposed changes concerning preemption and the CFPB's mortgage servicing rules, qualified mortgage status under the special rules set out in § 1026.43(e)(4), and the requirements under Appendix Q.

1. The CFPB's Proposed Rules Properly Clarify that Mortgage Servicing Standards in RESPA are a Floor and Not a Ceiling for Borrower Protections.

The CFPB's proposed rule includes a significant provision clarifying that the recently issued Mortgage Serving rules under the Real Estate Settlement Procedure Act (RESPA) do not preempt state laws that provide additional protections to borrowers, and CRL supports this clarification. The proposed changes to the regulation and official interpretation intend to clarify that the CFPB's mortgage servicing standards provide a floor – and not a ceiling – for borrower protections. This clarification will help ensure that borrowers benefit from state laws providing greater mortgage servicing-related protections.

CRL encourages the CFPB to consider further clarifying one point in the proposed regulatory language in § 1024.5(c). This section states that RESPA only preempts state law "with respect to settlement practices" where there is a state law provision providing less protection to the consumer. It is evident from the CFPB's preamble and proposed official interpretation that "settlement practices" is intended to encompass the mortgage servicing standards promulgated under RESPA. While it may not be legally necessary to clarify that "settlement practices" encompass "mortgage servicing standards" in § 1024.5(c), we encourage the CFPB to add this clarification.

2. CFPB Should Provide Additional Guidance on How Put-Backs Impact Qualified Mortgage Status.

The CFPB's proposal raises the important issue of how repurchase or indemnification demands – frequently called put-backs – made by Fannie Mae, Freddie Mac, or a relevant government agency impacts qualified mortgage status under § 1026.43(e)(4). This temporary qualified mortgage definition under 43(e)(4) allows loans to gain qualified mortgage status if they are eligible for insurance, purchase or guarantee by Fannie Mae, Freddie Mac or relevant government agencies. This definition will expire in a maximum of seven years, with the exception that the relevant portion of this provision will automatically sunset if a government agency issues their own QM guidelines or Fannie Mae and Freddie Mac exit conservatorship. Put-back demands from one of these entities is highly relevant to determining qualified mortgage status since eligibility for insurance, purchase or guarantee by these entities is itself an element of the temporary definition under § 1026.43(e)(4).

The underlying question raised by the CFPB's proposal is whether a put-back demand alone will strip a mortgage of its qualified mortgage status. CRL supports CFPB's answer to the question that "it depends," and supports the two proposed official interpretations describing situations where the answer is "yes" (borrower income is overstated) and "no" (purely technical violation, such as in the securitization process). CRL recommends that the CFPB go further, however, and issue guidance that a loan will lose its qualified mortgage status if the resolved put-back pertains to: 1) issues related to the income or obligations of the borrower that materially impact the borrower's ability to repay the mortgage,[1] and 2) violations of the relevant qualified mortgage product restrictions, including the points and fees limit. In addition, CRL recommends that the CFPB adopt guidance stating that factors not squarely meeting either of the tests, such as credit score and appraisal requirements, do not impact a loan's qualified mortgage status.

[1] CFPB could delete the materiality requirement if it considered that necessary.

For those loans that retain their qualified mortgage status in the face of a put-back demand that does not violate either of these two tests, the same presumption of compliance with the ability to repay standard would apply – either a safe harbor for loans with an interest rate below the higher-priced mortgage loan threshold, or a rebuttable presumption for higher-priced mortgage loans.

This recommended approach builds on the CFPB's proposal, but has some key differences. These are detailed below.

A. Provide Lenders with a Clear Put-Back Standard

The CFPB's proposal does not provide sufficient clarity to lenders as to whether individual put-backs will impact qualified mortgage status. The proposed official interpretation in 43(e)(4)-5 states that put-backs are "not dispositive of qualified mortgage status."[2] In addition, the interpretation also states that a put-back can raise "evidence of whether a particular loan satisfied the § 1026.43(e)(4) criteria at consummation" and includes an example where the put-back does impact qualified mortgage status.[3] This language, including the example, provides some guidance, but it does not rise to the level of clear, bright line standards.

CRL recommends providing more definitive guidance on how put-backs impact qualified mortgage status out of concern that creditors will restrict lending by imposing additional overlays on GSE and government agency-backed mortgages without this added clarity. Put-back fears by lenders have already excessively restricted access to credit.[4] According to Ellie Mae, the average borrower who was denied a conforming loan had a FICO score of 734 and was willing to put 19% down.[5] These put-back fears and consequent credit

[2] Consumer Financial Protection Bureau Amendments to the 2013 Mortgage Rules, Proposed Rule, 78 Fed. Reg. 25638, 25661 (May 2, 2013) (hereinafter "2013 Proposed Mortgage Rule").
[3] *Id.*, at 25661-62.
[4] *See e.g.*, Kerri Ann Panchuk, *Bernanke: Fed worries about tight lending standards*, HousingWire (March 20, 2013) (quoting Ben S. Bernanke, Chairman of the Board of Governors of the Federal Reserve System, as saying "put-backs that banks may have – and uncertainties about regulation – have tightened the mortgage credit box more than desirable.") (available at www.housingwire.com/news/2013/03/20/bernanke-fed-worries-about-tight-lending-standards); National Mortgage News, *Mark Zandi: Put-Back Risk, Regulatory Issues Hold Back Recovery*, (May 22, 2013) (quoting Mark Zandi, Moody's Analytics chief economist, as saying "[t]here is still concern about put-back risk. So they have tightened up their own standards – even beyond what Fannie, Freddie and FHA require.") (available at http://www.nationalmortgagenews.com/dailybriefing/Put-Back-Risk-Regulatory-Issues-Hold-Back-Recovery-1036511-1.html). .
[5] *See* Kenneth Harney, *Mortgage lenders set higher standards for the average borrower*, The Washington Post (September 28, 2012) (available at http://www.washingtonpost.com/realestate/mortgage-lenders-set-higher-standards-for-the-average-borrower/2012/09/27/74ef973a-0676-11e2-a10c-fa5a255a9258_story.html).

tightening will become exacerbated if put-backs also impact a loan's qualified mortgage status and must be resolved through litigation.

Further tightening access to credit would cut against the CFPB's goal in creating the 43(e)(4) temporary definition in the first place. In the January 10, 2013 final qualified mortgage rule, the CFPB described creating the temporary definition "in light of the market anxiety regarding litigation risk under the ability-to-repay rules, the general slow recovery of the mortgage market, and the need for creditors to adjust their operations to account for several other major regulatory and capital regimes."[6] For the same reason the CFPB created the 43(e)(4) definition, the CFPB should also provide more detailed guidance on the impact of resolved put-back demands.

B. The CFPB Should Specify that Put-Backs Involving a Borrower's Actual Ability to Repay and QM Product Restrictions Can Strip Away a Loan's QM Status.

CRL recommends using a more tailored way to distinguish between put-back demands than suggested in the CFPB's proposal. In the proposal, the CFPB suggests that one factor in distinguishing between put-back demands that impact qualified mortgage status and those that do not is whether the put-back "relates to whether the loan satisfied relevant eligibility requirements as of the time of consummation."[7] However, the CFPB frames the distinction in a different way in the second proposed example, which states that a put-back about delivering a loan to a specific security does not impact qualified mortgage status because "[t]he reason the creditor repurchase[d] the loan is wholly unrelated to assessing a consumer's ability to repay under § 1026.43(e)(4)."[8]

The CFPB should adopt a modified version of the standard used in the second example that distinguishes between put-back demands based on whether they 1) are issues related to the income or obligations of the borrower that materially impact the borrower's ability to repay the mortgage, or 2) the product features restricted in 43(e)(4). This approach would allow finalized put-backs dealing with an incorrect DTI calculation to strip a loan's qualified mortgage status but not for other underwriting factors such as incorrect credit scores or flawed appraisals.

Designing a put-back test that focuses on whether a borrower's income, obligations, and assets were correctly calculated and verified is appropriate, because these factors

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[6] Consumer Financial Protection Bureau, Ability to Repay and Qualified Mortgage Standards Under the Truth in Lending Act (Regulation Z), 78 Fed. Reg 6408, 6533 (January 30, 2012) (hereinafter "January 2013 Final Qualified Mortgage Rule").

[7] 2013 Proposed Mortgage Rule, at 25661.

[8] *Id.*, at 25662.

strongly impact whether a borrower is able to afford a mortgage.[9] In fact, focusing on a borrower's debt-to-income ratio ties back to the underlying purpose of the Ability to Repay and Qualified Mortgage standard in the Dodd-Frank Act. This is why the CFPB focused on a borrower's debt-to-income ratio throughout the general qualified mortgage definition under 43(e)(2). The CFPB explained that providing qualified mortgages with a presumption of complying with the ability to repay standard "would not be reasonable—indeed would be imprudent—if a creditor made a mortgage loan without considering and verifying core aspects of the consumer's individual financial picture, such as income or assets and debt."[10]

CFPB's reasoning in focusing on the DTI ratio for the general rule, while temporarily permitting the agencies to use compensating factors to exceed 43% DTI, is also persuasive in determining how to address put-backs not related to a borrower's ability to repay:

> In particular, the definition of qualified mortgage in Section 1026.43(e)(2) does not specifically require consideration of . . . the consumer's credit history . . . The final rule adopts this approach [focusing on the DTI ratio] because the Bureau believes that the statute is fundamentally about assuring that the mortgage credit consumers receive is affordable. Qualified mortgages are intended to be mortgages as to which it can be presumed that the creditor made a reasonable determination of the consumer's ability to repay.[11]

Thus, put-backs involving other underwriting factors should not impact QM status, because they do not link as directly to a borrower's ability to afford a mortgage. The CFPB created the temporary qualified mortgage definition in order to "preserve[] access to credit in today's market by permitting a loan that does not satisfy the 43 percent debt-to-income ratio threshold to nonetheless be a qualified mortgage based upon an underwriting determination made pursuant to guidelines created by the GSEs while in conservatorship or one of the Federal agencies."[12] These agency guidelines include additional underwriting standards – often called "compensating factors" – in order to approve a borrower with a debt-to-income ratio above 43 percent. While these compensating factors, such as credit score and loan-to-value targets, are necessary to approve borrowers for a mortgage under 43(e)(4), put-backs concerning these other factors should not strip a mortgage of qualified mortgage status. The reason for this distinction is that a credit score or appraisal error might have resulted in a more expensive loan for the borrower or more of a credit risk for the lender, but the incorrect

[9] The CFPB could refer to GSE and government agency underwriting requirements that are comparable to the provisions in § 1026.43(e)(2)(iv), (v), and (vi).
[10] January 2013 Final Qualified Mortgage Rule, at 6516.
[11] *Id.*
[12] *Id.*, at 6506.

compensating factor itself did not make the loan unaffordable for the borrower, even if it was used as a compensating factor by the lender.

As detailed earlier, the reason to differentiate between these different kinds of put-backs is to preserve access to credit at a time when put-back fears dominate mortgage lending. Just as the CFPB considered how to create a general definition under 43(e)(2) that had clear, bright line standards, the CFPB should also create clear, bright line standards for the temporary definition under 43(e)(4). Concerning the 43(e)(2) definition, the CFPB stated in the January 10, 2013 final rule that using a specific debt-to-income ratio cut-off "provides a well-established and well-understood rule that will provide certainty for creditors and help to minimize the potential for disputes and costly litigation over whether a mortgage is a qualified mortgage."[13] The CFPB also pointed to the fact that "[a] specific debt-to-income ratio threshold also provides additional certainty to assignees and investors in the secondary market, which should help reduce possible concerns regarding legal risk and potentially promote credit availability."[14] The CFPB should provide this same kind of certainty under the temporary 43(e)(4) definition and specify how different put-backs will impact a loan's qualified mortgage status.

Defining a standard that differentiates between put-backs involving a borrower's actual ability to repay and other underwriting factors is highly unlikely to cause lenders to abuse these other underwriting factors. As an initial matter, put-backs result in lenders taking on additional credit risk and liquidity costs, which is not a low-risk proposition – lenders will still attempt to avoid put-backs apart from gaining QM status. Additionally, repeated abuse of these other underwriting criteria could impact a lender's ability to sell loans or have them insured by the relevant GSE or government agency.

In addition to put-backs involving a borrower's debt-to-income ratio, put-backs involving a loan that violated the qualified mortgage product features required under 43(e)(4) should also result in a loan losing its qualified mortgage status. This includes a put-back concerning an improper points and fees calculation, loans with negative amortization, interest only payments, balloon features or terms above 30 years. These product restrictions are specifically required under the CFPB's 43(e)(4) standard, and they provide lenders with clear, bright line standards.

3. The CFPB's Proposed Clarification Concerning Contract Variances Is Appropriate.

CRL supports the CFPB's proposal to allow written agreements with individual creditors with the GSEs to satisfy the special rules category set out in § 1026.43(e)(4). Under the

[13] *Id*., at 6505-06.
[14] *Id*., at 6527.

oversight of the GSEs, these contract variances allow lenders to responsibly expand their lending, which tends to benefit lower-income and lower-wealth borrowers. The proposed regulation puts in place the reasonable limitation that only the individual lender subject to the contract variance may apply those specific standards.

4. The CFPB's Proposed Changes Improve the Standards in Appendix Q.

CRL supports the CFPB's clarifications of Appendix Q, particularly those that remove lenders' requirements to make forecasts such as whether the borrower is expected to remain employed for three years, whether a business employing a borrower or owned by a self-employed borrower is viable, or when a borrower is expected to retire. CRL recommends, however, that the CFPB go further to clarify Appendix Q in a way that is consistent with automated underwriting. While some lenders will use manual underwriting at some times, lenders should not be required to underwrite in this manner simply to comply with the definitions of debt and income included in Appendix Q.

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