Comments submitted by the

Center for Responsible Lending[1]

Americans for Financial Reform

The Leadership Conference on Civil and Human Rights

League of United Latin American Citizens

NAACP

National CAPACD

National Community Reinvestment Coalition

National Fair Housing Alliance

National Urban League

to the Consumer Financial Protection Bureau

Look Back at Mortgage Rules under the Truth in Lending Act (Regulation Z)

Qualified-Mortgage Rule

Docket No. CFPB-2017-0014

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[1] 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 $7 billion in financing to 131,000 families, individuals, small businesses, and nonprofits and serves more than 129,000 mostly low-income families through 48 retail credit union branches in North Carolina, California, Florida and Chicago.

The signed consumer and civil rights groups thank you for the opportunity to submit comments regarding the Consumer Financial Protection Bureau's (CFPB) request for input concerning the CFPB's Qualified-Mortgage Rule under the Truth in Lending Act (Regulation Z).

The comments submitted below touch on the CFPB's proposed amendments to the qualified-mortgage (QM) rule as it relates to 1) the importance of the QM rule, 2) why the constrained lending environment is due to factors other than QM, and 3) why they should be addressed rather than weakening QM, 4) our analysis of CFPB's proposed evaluation, and 5) possible responsible changes to the Ability-to-Repay/QM rules.

I. The Qualified Mortgage Rule and Ability-to-Repay standard protect consumers, create stability in the market, and help to avoid another economic recession.

The Great Recession of 2008 has already shown us the consequences of the absence of basic rules and protections in the financial market. In the years preceding the financial crisis, mortgage lenders were driven by profits and collecting fees to offer mortgages with the lowest monthly payment and the least amount of underwriting. Lenders first started offering mortgages and refinancing offers that had lower payments that never reduced the principal balance of the loan. These loans were followed by loans that had "teaser rates" where the monthly payments were even lower for the first several years, but then increased dramatically. Finally, lenders pushed loans that had very low payments, but the loan balance actually *increased* by more than five percent every year. Lenders took these actions, particularly in communities of color even when the borrowers qualified for prime mortgages. In addition to these mortgage practices, mortgage brokers and lenders competed with each other for business by reducing underwriting requirements, streamlining the underwriting, and pushing no documentation or "no-doc" loans without any verification of income in order to make more loans and collect exorbitant profits. It was very difficult for responsible lenders to compete in this environment, and in order to maintain their businesses and some market share, they were forced to join this race to the bottom.

Subprime loans also took a devastating toll on working families and communities of color. Even prior to the crisis of 2008, homeowners with subprime loans suffered unnecessary foreclosure at alarming rates. Many subprime loans were also obtained through refinancing, meaning not only did homeownership or wealth not increase for many borrowers with subprime loans, but it took borrowers out of the stable QM-like conventional 30-year fixed interest rate market with dire consequences. CRL's research found that in the period between 2005-2006, one out of five subprime mortgages originated during that time ended in foreclosure.[2]

The result is all too well known. In the wake of the financial crisis, 7.8 million American consumers lost their homes through foreclosure.[3] Even where borrowers could keep up with payments, their housing values were reduced by the presence of foreclosures nearby. The failure to have a responsible and effective regulatory environment also resulted in taxpayers paying $7 trillion to bail out financial institutions through loans and according to some reports, an additional $22 trillion through the federal government's purchase of assets.[4] According to the Federal Deposit Insurance Corporation (FDIC), more than 500 banks shuttered their doors and most of those institutions were community banks.[5] In addition, the national economy was undermined and plunged into a severe recession. People lost their jobs, small businesses went under, once thriving neighbors became blighted, and many Americans—from small entrepreneurs to families—struggled to make ends meet while being unable to obtain the credit

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[2] ELLEN SCHLOEMER ET AL., CENTER FOR RESPONSIBLE LENDING, LOSING GROUND: FORECLOSURES IN THE SUBPRIME MARKET AND THEIR COST TO HOMEOWNERS 4 (2006), *available at* http://www.responsiblelending.org/mortgage-lending/research-analysis/foreclosure-paper-report-2-17.pdf.

[3] CORELOGIC, CORELOGIC REPORTS, UNITED STATES RESIDENTIAL FORECLOSURE CRISIS, TEN YEARS LATER 3 (2017), *available at* http://www.corelogic.com/research/foreclosure-report/national-foreclosure-report-10-year.pdf.

[4] John Carney, The Size of the Bank Bailout: $29 Trillion, *CNBC*, (2011), *available at* http://www.cnbc.com/id/45674390#.

[5] FEDERAL DEPOSIT INSURANCE CORPORATION, FAILED BANK LIST, *available at* https://www.fdic.gov/bank/individual/failed/banklist.html.

and capital they needed from financial institutions to sustain their position or expand their asset base. An entire generation of asset and wealth building via homeownership, particularly for communities of color, is now lost. While housing foreclosures and mortgage delinquencies have slowly declined[6] since the height of the foreclosure crisis, the American dream of homeownership and wealth building is still out of reach for too many creditworthy lower-wealth households.

These dynamics and consequences are why the mortgage protections of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank)[7] – the Ability-to-Repay (ATR) and QM rules - are needed to protect consumers, small businesses, taxpayers, and the nation's economy. QM and ATR define bright line standards to move the market away from high-risk, unsustainable loans and ensure borrowers have an ability to repay the loans they receive. QM and Ability-to-Repay promote product features that are reorienting the housing market back toward safe, sustainable lending for all borrowers. All financial institutions, including small depository lenders, benefit from the underlying purposes of financial regulation: protecting consumers, ensuring the safety and soundness of institutions, protecting community financial institutions from unfair competition, and defending the nation's financial market from systemic risk.

II. Mortgage credit remains overly constrained. The constrained market is due to factors other than QM, and therefore these factors should not be used as a basis to weaken QM protections.

Access to credit is constrained by tight lending standards, not QM or Ability-to-Repay.

[6] CoreLogic, CoreLogic Reports Mortgage Performance Continues Steady Improvement in April 2017 (2017), *available at* http://www.corelogic.com/about-us/news/corelogic-reports-mortgage-performance-continues-steady-improvement-in-april-2017.aspx.
[7] Public Law 111-203 (2010).

Access to credit is clearly a problem in today's market but lender overcorrections in the post-crises market, not Ability-to-Repay/QM explain constrained lending. This environment is most harmful to lower-wealth households with lower FICO scores, and fewer resources for a down payment.[8] Evidence of tight credit standards includes:

- The median credit score on new origination currently stands at 729, up 25 points from 2001. The lower bound, 10th percentile, rose from the low 600s to 645 over this same time period.[9]
- The Urban Institute's Credit Availability Index remains low, standing at 5.2 for the fourth quarter of 2016 (the most up to date value). It was near 10 in 1998, rose to over 16 in 2006 and 2007 and fell precipitously in 2008.[10]
- The MBA's Mortgage Credit Availability Index, most recently valued at 183 in April 2017, is half the value in June 2004.[11]
- Mortgage default rates on recently originated loans are near zero. The default rate for loans originated from 2011 to 1Q2016 was 0.2% for Fannie Mae loans and 0.1% for Freddie Mac loans through 4Q2016.[12]

Ultimately, millions of loans that could be responsibly made have not been due to these unnecessary credit constraints. The Urban Institute estimates more than 5.2 million more

[8] Jim Parrot and Mark Zandi, Opening up the Credit Box (2013), *available at* http://www.urban.org/UploadedPDF/412910-Opening-the-Credit-Box.pdf., see also LAURIE GOODMAN ET AL., TIGHT CREDIT STANDARDS PREVENTED 5.2 MILLION MORTGAGES BETWEEN 2009 AND 2014, *available at* http://www.urban.org/urban-wire/tight-credit-standards-prevented-52-million-mortgages-between-2009-and-2014.
[9] LAURIE GOODMAN ET AL. HOUSING FINANCE AT A GLANCE: A MONTHLY CHARTBOOK, JUNE 2017 AT 14 (2017), *available at* http://www.urban.org/research/publication/housing-finance-glance-monthly-chartbook-june-2017/view/full_report.
[10] Id. at 13.
[11] MORTGAGE BANKERS ASSOCIATION, MORTGAGE CREDIT AVAILABILITY INDEX (2017), *available at* https://www.mba.org/news-research-and-resources/research-and-economics/single-family-research/mortgage-credit-availability-index.
[12] LAURIE GOODMAN ET AL., HOUSING FINANCE AT A GLANCE: A MONTHLY CHARTBOOK, JUNE 2017 (2017), *available at* http://www.urban.org/research/publication/housing-finance-glance-monthly-chartbook-june-2017/view/full_report See pages 35 and 37.

mortgages would have been made from 2009 to 2014 if credit standards had equaled those in place in 2001.[13] Like the overall origination data discussed above, these measures show credit tightening followed the crisis, not the implementation of Ability-to-Repay/QM rules.

Credit access can and should be improved, but not by weakening QM or Ability-to-Repay.

Lack of access to credit in today's mortgage market is particularly problematic because QM rules ensure that the loans available today are safe. The Ability-to-Repay standard provides borrowers and lenders much more certainty that the loan is affordable. The elimination of products like option adjustable rate mortgages (ARMs) and teaser rate loans means borrowers receive clear information about what they will owe monthly. Additionally, overall interest rates remain low and house prices are still rebounding, resulting in affordable homebuying opportunities in many markets. The Urban Institute's maximum affordable home price ($311,453) remains well above the median sales price ($278,745). [14] Lack of access to responsible loans in this market can and should be addressed.

Post-crisis changes to credit risk pricing by Fannie Mae and Freddie Mac (the GSEs), and by private mortgage insurers has led to limited access to responsible credit. This can and should be addressed. Prices have fallen for borrowers with significant assets and high credit scores while rising for borrowers with low credit scores and/or without the resources to make a large down payment. The Federal Housing Finance Agency (FHFA) can and should revisit the loan guarantee fee policy, particularly the loan level price adjustments, in order to determine if reductions are warranted.[15] Also, the PMIERs capital standards drove private mortgage insurance

[13] LAURIE GOODMAN ET AL., TIGHT CREDIT STANDARDS PREVENTED 5.2 MILLION MORTGAGES BETWEEN 2009 AND 2014, *available at* http://www.urban.org/urban-wire/tight-credit-standards-prevented-52-million-mortgages-between-2009-and-2014.
[14] LAURIE GOODMAN ET AL., HOUSING FINANCE AT A GLANCE: A MONTHLY CHARTBOOK, JUNE 2017 (2017), *available at* http://www.urban.org/research/publication/housing-finance-glance-monthly-chartbook-june-2017/view/full_report see page 16.
[15] See CRL's comments on guarantee fees (g-fees) at: http://www.responsiblelending.org/mortgage-lending/policy-legislation/CRL-G-Fees-Request-for-Input-Submitted-9-8-14.pdf.

companies to increase the degree to which they offered different prices for borrowers with different characteristics. Today, mortgage insurance (MI) companies charge borrowers with a FICO score of 620 more than four times the price a borrower with a 760 score pays, both for coverage on a 97 loan-to-value (LTV) loan.[16] FHFA should also review these standards and their impact on access to credit. The interaction of these two credit pricing policies is particularly costly. For example, the combination of loan-level price adjustments (LLPAs) and MI premiums adds over 300 basis points to the cost of a mortgage for a borrower with a credit score of 620 and an LTV of 97 percent.[17] This has had a disproportionate impact on borrowers of color who have lower credit scores due to historic wealth inequality.

Federal Housing Administration (FHA) lending also plays an important role in providing access to responsible mortgage credit to borrowers and, unfortunately, the program is not as effective as it can be.[18] Modernization of systems and a rethinking of the use of False Claims Act authority would help provide certainty and increase lender participation in this program. Unfortunately, HUD's budget does not currently include the funds needed to modernize this important program. Sadly, the agency hasn't been able to implement the reasonable and needed changes to their quality control and Defect Taxonomy proposed and considered in 2015.[19] Improvements here would help open access to responsible mortgage credit without weakening lending standards.

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[16] GENWORTH, MONTHLY PREMIUM MI(BPMI)-FIXED, *available at* https://mortgageinsurance.genworth.com/pdfs/Rates/11370775.Monthly_Natl.FIXED.0616.pdf.

[17] 350/4+225=312.5 basis points. Fannie's Mae's LLPA for this combination of credit score and LTV is a one-time fee of 350 basis points (see page 2: https://www.fanniemae.com/content/pricing/llpa-matrix.pdf), we assumed a LLPA multiple of 4 to convert this upfront fee to an ongoing cost comparable to the MI premium. Borrower paid MI from Genworth for this combination of credit score and LTV is a continuing fee of 225 basis points (see https://mortgageinsurance.genworth.com/pdfs/Rates/11370775.Monthly_Natl.FIXED.0616.pdf).

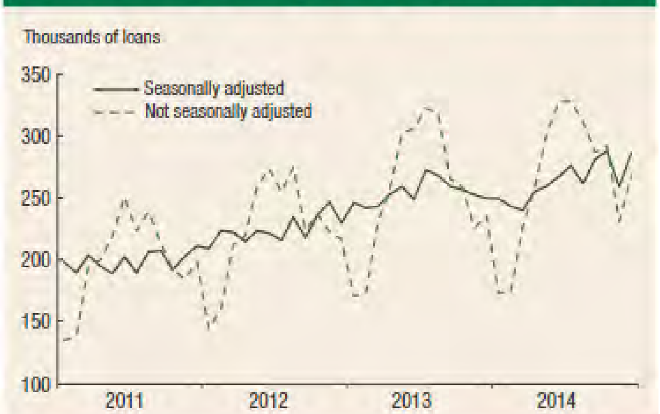
[18] Michael Calhoun, The Federal Housing Administration can do more with more, Brookings (2017), *available at* https://www.brookings.edu/research/the-federal-housing-administration-can-do-more-with-more/.

[19] See CRL's comments on this process at: http://www.responsiblelending.org/mortgage-lending/research-analysis/crl_comments_re_coalition_fha_cert_14july2015.pdf.

<u>*Research shows that the market contracted due to factors other than QM.*</u>

Three years have passed since the QM rule was implemented. Reports, including the Home Mortgage Disclosure Act (HMDA) report, show that QM has not negatively impacted mortgage lending or access to credit. In fact, (post QM) HMDA data is very much consistent with market trends immediately preceding the implementation of the QM rule and Ability-to-Repay standard. The Federal Reserve's seasonally adjusted origination numbers, in the chart below, show a slow overall increase in monthly originations from 2011 through 2015 with no discernable decrease when the rules were fully implemented in January 2014. [20]

Figure 3. Volume of home-purchase originations, 2011–14



Note: The data are monthly. Loans are first-lien home-purchase mortgage originations.

In addition, HMDA data from 2014-15 shows a modest but steady increase in mortgage lending to low and moderate-income borrowers, and African-American and Latino borrowers.[21]

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[20] Federal Reserve Bulletin, The 2014 Home Mortgage Disclosure Act Data (2015), *available at* https://www.federalreserve.gov/pubs/bulletin/2015/pdf/2014_HMDA.pdf. See also Sarah Wolff, CRL Analysis of HMDA Data 2012-2015. Loan analysis limited to: home purchase, owner-occupied, 1-4 family units, 1st lien loans, *available at* http://www.responsiblelending.org/media/new-hmda-data-shows-mortgage-market-continues-exclude-consumers-color-and-low-wealth-families.

[21] Federal Reserve Bulletin, The 2015 Home Mortgage Disclosure Act Data (2016), *available at* https://www.federalreserve.gov/pubs/bulletin/2016/pdf/2015_HMDA.pdf., see also note 21.

Researchers have looked carefully at mortgage lending after the implementation of QM and found no link to a reduction in credit. For example, researchers at the Urban Institute looked at loans that might reasonably have been affected by the QM standards (interest only or prepayment penalty loans, loans with debt-to-income (DTI) over 43 percent, or "ARM" loans) and found no decline in these categories associated with QM.[22] Researchers at the Federal Reserve similarly concluded "The HMDA data provide little indication that the new ATR and QM rules significantly curtailed mortgage credit availability."[23] Researchers at the Federal Reserve also looked at both the origination and securitization of mortgages post-crisis and find that lender asset size has become a less important factor in explaining this lending activity and conclude "smaller banks have not been, on net, deterred from engaging in the sales and securitizations of mortgages, have become a more important part of the market and have profited from their activities."[24]

The QM rule is not responsible for the decline in numbers of community banks and credit unions.

Contrary to theories that the Dodd-Frank Act has stifled growth, the financial sector posted record profits after its passage. In 2016, U.S. financial institutions had total annual profits of $171.3 billion, the highest level since 2013.[25] While this profit level is slightly lower than the profit level in the peak of the false housing boom in the years immediately prior to the financial crisis (2004-2006), it remains higher than inflation-adjusted financial sector profits for any other time period since World War II.

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[22] LAURIE GOODMAN ET AL., HAS THE QM RULE MADE IT HARDER TO GET A MORTGAGE? (2016), *available at* http://www.urban.org/research/publication/has-qm-rule-made-it-harder-get-mortgage.

[23] FEDERAL RESERVE BULLETIN, THE 2014 HOME MORTGAGE DISCLOSURE ACT DATA, *available at* https://www.federalreserve.gov/pubs/bulletin/2015/pdf/2014_HMDA.pdf.

[24] William F. Basset and John C. Driscoll, Post Crisis Residential Mortgage Lending by Community Banks (2015), *available at* https://www.communitybanking.org/documents/Session3_Paper4_Bassett.pdf.

[25] WALL STREET JOURNAL, U.S. BANKING INDUSTRY ANNUAL PROFIT HIT RECORD IN 2016 (2017), *available at*: https://www.wsj.com/articles/u-s-banking-industry-annual-profit-hit-record-in-2016-1488295836.

Community bank profitability has also rebounded strongly and meets pre-recession levels. In 2010, less than 78 percent of community banks were profitable. By the end of 2015, over 95 percent of community banks were profitable. [26] The most recent FDIC report from the 2016 third quarter notes that the percentage of unprofitable community banks sunk to 4.6 percent, which is the "lowest percentage since the third quarter of 1997."[27] Full year earnings were up 9.7 percent in 2015, which is a higher figure than the overall increase of 7.5 percent for all banks.[28]

Credit unions have also continued to grow while recovering from the financial crisis. Credit union membership has been steadily growing in recent years. In 2016, credit unions added 4.7 million new members, which amounted to "the biggest annual increase in credit union history and four times the pace set a decade earlier."[29] Operating costs for credit unions have also fallen in the period since Dodd-Frank was passed and were down to 3.1 percent in 2016 from a high of 3.59 percent in 2008.[30]

While the number of small lenders, including community banks and credit unions has decreased over the years, this cannot be reasonably attributed to Dodd-Frank or CFPB regulations. The number of community banks has declined every single year since 1984.[31] FDIC research concludes that community bank profitability since 2008 has overwhelmingly been driven by macroeconomic conditions, not regulations.[32] The FDIC study first takes a wide look

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26 FEDERAL DEPOSIT INSURANCE CORPORATION, CORE PROFITABILITY OF COMMUNITY BANKS 1985-2015 1 (2016), *available at* https://www.fdic.gov/bank/analytical/quarterly/2016_vol10_4/article1.pdf.
27 FEDERAL DEPOSIT INSURANCE CORPORATION, QUARTERLY BANKING PROFILE: THIRD QUARTER 2016 I, *available at* https://www.fdic.gov/bank/analytical/quarterly/2016_vol10_4/fdic_v10n4_3q16_quarterly.pdf.
28 Id.
29 CUNA MUTUAL GROUP, CREDIT UNION TRENDS REPORT (2017), *available at* https://www.cunamutual.com/resource-library/publications/credit-union-trends-report.
30 NATIONAL CREDIT UNION ADMINISTRATION, NCUA CHART PACK (2016), *available at* https://www.ncua.gov/analysis/Pages/industry/fact-sheets.aspx.
31 FEDERAL DEPOSIT INSURANCE CORPORATION, COMMUNITY BANKING STUDY 1 (2012), *available at* https://www.fdic.gov/regulations/resources/cbi/report/cbi-full.pdf.
32 FDIC, Core Profitability of Community Banks *supra* note 25.

at regulations that include Dodd-Frank, but also Basel III capital standards. The study states that "regulation is just one among many noneconomic factors that may contribute to structural change in community bank profitability," but conclude that 80 percent of variation in profitability is due to macroeconomic factors, and the other 20 percent includes not just changing regulations, but also "the rise of nonbank lending, competition from larger banks, and changes in loan portfolios and other business practices."[33]

III. The CFPB should reject legislative and other proposals that relax QM standards in portfolio lending, points and fees caps for title insurance, and that grant safe harbor status for all QM loans regardless of interest rate.

As stated above, QM and Ability-to-Repay have restored safety and stability to the mortgage market. In section V, we discuss recommendations for narrowly tailored adjustments. Here, we urge the CFPB to reject proposals that will significantly weaken the QM rule, which allow for the predatory conduct of the years preceding the Great Recession to return and threaten another economic downturn.

The CFPB should not adopt proposals that dangerously expand QM status to loans held on portfolio by larger institutions.

Prior to the housing crisis, lenders underwrote toxic loans, such as negative amortization loans, and ARMs based upon only an initial, artificially low payment even though dramatically higher payments commenced after a few years. Many lenders did not document the income of the borrowers, instead making "no-doc" loans. Hundreds of billions of dollars of these loans were made, and many were kept on bank portfolios. These portfolio loans soon crashed, helping to trigger the financial crisis, and devastating banks such as Washington Mutual and Wachovia.[34]

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[33] Id at 42.
[34] BEN WHITE AND ERIC DASH, WACHOVIA, LOOKING FOR HELP, TURNS TO CITIGROUP, NEW YORK TIMES (SEPTEMBER 26, 2008), *available at* http://www.nytimes.com/2008/09/27/business/27bank.html?_r=0.

Portfolio loans can still be risky for consumers and taxpayers, and automatic QM status for loans held in portfolio should not be extended to larger institutions. Many homeowners have very substantial equity in their homes, and a significant number of those have no current home debt. Current information shows that the average loan-to-value for GSE loans is roughly 74 percent with many loans having much lower levels.[35] With these loans, the borrower's equity absorbs the risk of loss rather than the lender. Therefore, the lender is protected even from very risky loan terms. Furthermore, lenders are also already making and holding loans in portfolio. Portfolio loans accounted for 30.9 percent of all originations in 2016, approximating the pre-crisis share of originations for portfolio loans.[36] Expanding QM status to all portfolio loans is not only hazardous, but is also unlikely to lead to an increase in volume.

This would be a particularly dangerous time to reduce the Ability-to-Repay/QM mortgage protections. As the economy moves through the business cycle and the recovery improves, the important protections recently put in place will provide new value. Real and nominal house prices now exceed pre-crisis trends, and at the same time interest rates are expected to rise. The home market is cyclical with home values rising and falling when measured in real inflation adjusted dollars. In the coming years, the monetary market will create pressures for the reintroduction of these unaffordable mortgages outlined above. We approach the end of a decades-long period of declining interest rates, culminating in the current market where there is a negative real interest rate and historically low mortgage rates. Undercutting the standard that borrowers should have the ability to repay loans, especially substantial loans made by federally insured institutions would invite a repeat of the recent financial crisis at the cost to the American

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[35] FANNIE MAE 2016 CREDIT SUPPLEMENT 6 (2017), *available at* http://www.fanniemae.com/resources/file/ir/pdf/quarterly-annual-results/2016/q42016_credit_summary.pdf.

[36] LAURIE GOODMAN ET AL. HOUSING FINANCE AT A GLANCE: A MONTHLY CHARTBOOK, MARCH 2017 (2017), *available at* http://www.urban.org/research/publication/housing-finance-glance-monthly-chartbook-march-2017/view/full_report.

taxpayer. Finally, provisions that grant out right legal immunity are extreme and put consumers at great risk. For example, granting QM status to portfolio loans held by larger financial actors will allow some to use relaxed standards to harm consumers and strip consumer equity, all while being insulated by QM's legal protections.

The points and fees limits on QM loans should not be altered.

The points and fees definition of the QM rule should remain unchanged. One legislative proposal which would exempt lender-affiliated title insurance from the QM points and fees cap, is costly and unnecessary for borrowers. For consumers, the title insurance market already lacks transparency, is anticompetitive[37], and expensive. In 2007, a GAO report concluded that borrowers "have little or no influence over the price of title insurance but have little choice but to purchase it." As a result, the fees are grossly inflated—recent studies have found that 70 cents of every premium dollar for title insurance goes to commissions, whereas 5 cents to 11 cents goes to paying claims.[38] Without the QM standard, title insurance regulation would be limited to the very light state and alternative federal oversight. A 2010 study from the National Association of Insurance Commissioners regarding state regulation of title insurance reports that half of all states either do not regulate title insurance rates or allow insurers to set their rates and essentially notify state regulators.[39]

Weakening or eliminating the points and fees threshold limits for affiliated title lenders also will create an even stronger culture of steering and kickbacks. While the federal Real Estate

[37] Anti-competitive practices put companies that market directly to consumers and can offer lower rates at a significant disadvantage. One such company, Entitle Direct, has roughly 0.1% of the market despite having fees that are often 35% less than the competition. Lisa Prevost, Saving on Title Insurance, New York Times (2013), available at http://www.nytimes.com/2013/03/17/realestate/saving-money-on-title-insurance.html?_r=0.

[38] U.S. GOVERNMENT ACCOUNTABILITY OFFICE, TITLE INSURANCE: ACTIONS NEEDED TO IMPROVE OVERSIGHT OF THE TITLE INDUSTRY AND BETTER PROTECT CONSUMERS 53 (2007), *available at* http://www.gao.gov/new.items/d07401.pdf.

[39] NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS TITLE TASK FORCE, SURVEY OF STATE INSURANCE LAWS REGARDING TITLE DATA AND TITLE MATTERS 8 (2010) *available at* http://www.naic.org/documents/committees_c_title_tf_survey_state_laws.pdf.

Settlement Procedures Act (RESPA) prohibits paying kickbacks to third-party title agents, the law does not prohibit payments to affiliated title firms.[40] Lenders often direct consumers to their affiliated title insurance company where they get these high premiums. The points and fees cap simply levels the playing field between affiliated and unaffiliated title insurance companies. If the CFPB removes or weakens the current QM points and fees cap and other consumer protections in the title insurance market, borrowers will pay the price in hundreds if not thousands of dollars in unnecessary costs, further stifling access to homeownership.

The CFPB should not accept other proposals that would increase the amount of fees that can be charged under QM. Specifically, the CFPB should not permit higher QM fee caps when the principle amount of the loan is higher. The current fee cap of three percent for loans above the current adjusted amount of $102,894 (with higher thresholds already allowed for loans below this amount) is already significantly higher than fees on most loans. Freddie Mac tracks average fees, and the current and past level is will under 1 point – 0.5 points on the 30 year fixed-rate mortgage as of the most recent survey.[41] Even with rising prices, average GSE loans remain relatively modest in size, currently averaging around $240,000.[42] Fees, especially unnecessary ones are also particularly harmful for consumers and access to credit. Lenders largely advertise based on interest rates, and CFPB's own research has shown that most borrowers quickly settle on a lender.[43] Similar to problems we discussed above with the title insurance market, fees generally are much less visible to the consumer and the market is much less competitive. The consumer harm of overpaying is greatly increased by the fact that fees are earned in full at

[40] 12 U.S.C. 2607(c)(4), as amended.
[41] FREDDIE MAC, MORTGAGE RATES DROP AGAIN (2017), *available at* http://www.freddiemac.com/pmms/pmms_archives.html.
[42] LAURIE GOODMAN ET AL. HOUSING FINANCE AT A GLANCE: A MONTHLY CHARTBOOK, JUNE 2017 (2017), *available at* http://www.urban.org/research/publication/housing-finance-glance-monthly-chartbook-june-2017/view/full_report See page 17.
[43] CFPB, CONSUMERS' MORTGAGE SHOPPING EXPERIENCE(2015), *available at* http://files.consumerfinance.gov/f/201501_cfpb_consumers-mortgage-shopping-experience.pdf

closing and are not refundable, even if the borrower quickly refinances an overly expensive loan. In contrast, accruing interest is earned over time, and if a borrower is overcharged in rate, they can reduce that harm through refinancing. Finally, as we will discuss in section V, there are other narrower measures that can provide more lender flexibility without unnecessary expenses or a high risk of consumer harm.

High-cost QM loans should not receive safe-harbor treatment.

The current QM rule provides that high-cost loans receive a presumption of Ability-to-Repay, but not an absolute safe harbor. This is an appropriate distinction given the well-documented high risk of these loans. With higher-cost loans, the usual lender incentives to provide affordable loans are greatly diminished. At high rates of interest, the business model remains profitable even with high defaults. There are many documented consumer loans where the most profitable operation is very high default rates, as this increases volume and revenues which more than offset the costs of defaults. Of course, in these models the extreme harm to consumers is an externality not taken into account by the lender. In addition to the need for more oversight of these high-cost loans, a wealth of evidence shows that the potential legal liability is very low and has not generated litigation at all. While we are in a relatively benign economic environment, if there was significant legal risk, at least some of this would have manifested itself in the millions of high cost loans made both under the Federal Reserve ability to repay rule (which had no legal presumption, much less a safe harbor) and the CFPB rule. In short, this proposal would provide legal immunity for lending that is inherently dangerous and has a long track record of harm.

IV. CFPB's assessment must be carefully crafted.

CFPB's assessment of these important rules will provide helpful information about how the rules are working and provide information about the state of mortgage lending today. CFPB outlines a number of challenges that current market conditions impose on the evaluation process and we agree that the assessment must be carefully crafted in order to provide meaningful information. We recommend the assessment focus on three overall areas: assessing the rules impact on loan quality, loan availability, and the safety of the financial system. We also support the CFPB's proposal to look at specific populations and analyze the rule's differential impact, if any, on certain categories of borrowers, including: self-employed, those relying on assets, part-time and seasonal workers, those with smaller-than-average loan amounts, borrowers with debt-to-income ratios above 43%, low and moderate-income borrowers, borrowers of color, and rural borrowers.

The ATR/QM rules make loans safer. The assessment should evaluate the rules' effectiveness in preventing unaffordable lending and loan defaults.

The ATR/QM rules were put in place in response to a lack of reasonable underwriting standards by the private market that filled the market with loans that proved unaffordable. Evaluating their effect on ensuring these reasonable standards and evaluating the impact of those standards on loan quality should be an important component of CFPB's evaluation. However, as the CFPB points out in the request for comment and as we discuss in section II above, credit constraints, underwriting changes in place before the rules took effect, and historically low defaults complicate the evaluation. Despite these challenges, the CFPB can and should find ways to assess loan quality as part of the ATR/QM assessment. Unfortunately, very little attention seems to be paid to this in the current assessment plan. In order to assess the impact of the rules on loan quality we recommend the following approaches:

Assess affordability of current loans. The CFPB should review underwriting quality on a random sample of loans. The CFPB describes planning a "limited request of data directly from creditors and other stakeholders" in the request for comment. This effort should include loan level underwriting information that will allow the CFPB to independently assess the quality of underwriting on loans. The CFPB should also engage directly with borrowers who received loans since the rules were put in place and ask questions specifically about loan affordability.

Model loan performance under other market conditions. The CFPB should use a modeling approach to assess the effects of the ATR/QM rules on loan quality. CRL and the Center for Community Capital undertook such a modeling exercise in 2012, looking at the performance of loans with QM-like underwriting during the crisis.[44] This analysis revealed that loans originated from 2000-2008 with QM-like qualities performed best through the crisis. Our analysis showed these loans had a default rate of just 5.8 percent through February 2011 compared to an overall rate of 11 percent, a rate of 7.7 percent for prime conventional loans, and staggeringly high default rates of 22.3 percent for Alt-A loans and 32.3 percent for subprime conventional loans.[45] This approach can be replicated and expanded upon by the CFPB using HMDA and NMDB data available to the Bureau. The CFPB can construct a set of loans originated before the crisis and categorize them as meeting various parts of the ATR/QM rules. The performance of these loans can then be followed through the crisis to provide information about the relative value of the standards on loan performance. The CFPB could also control for credit score, location and other possible confounding factors when conducting this modeling.

[44] ROBERTO QUERCIA, ET AL., BALANCING RISK AND ACCESS (2012), *available at* http://www.responsiblelending.org/research-publication/balancing-risk-and-access.
[45] Id. See Table 1.

Another useful modeling exercise would be to analyze loan underwriting standards and market conditions. As described in section II, the low interest rate environment has provided a steady stream of refinance customers to mortgage lenders post-crisis. As interest rates rise, lenders might be incented to relax underwriting to attract borrowers. The CFPB could analyze underwriting standards over time under different market environments to assess how underwriting might change absent regulatory constraints.

CFPB should build on existing approaches in assessing loan availability.

As described in section II, researchers have assessed loan availability in recent years. Research by the Urban Institute[46] and the Federal Reserve[47] in particular look at many of the same analysis questions posed in CFPBs request and can serve as models for this component of the assessment. These analyses analyze new originations overall, with particular emphasis on the time series before and after the implementation of the Ability-to-Repay and QM rules. Both also look at specific types of loans where QM impact might be most noticeable. For example, the Urban analysis looked specifically at loans with a debt-to-income ratio above 43 percent and loans with smaller loan amounts. Additionally, the CFPB should consider market conditions, such as changes in house prices or interest rates, which might help explain observed volume changes.

The assessment should consider the rules' effect on the financial system.

In defining the scope, the CFPB focuses this assessment on consumer outcomes and lender policies and procedures. These are appropriate, but not exhaustive, of the intended scope of the Ability-to-Repay and QM rules. Dodd-Frank was passed following the most severe

[46] BING BAI, ET AL., HAS THE QM RULE MADE IT HARDER TO GET A MORTGAGE? (2016), *available at* http://www.urban.org/research/publication/has-qm-rule-made-it-harder-get-mortgage.
[47] FEDERAL RESERVE BULLETIN, THE 2014 HOME MORTGAGE DISCLOSURE ACT DATA (2015), *available at* https://www.federalreserve.gov/pubs/bulletin/2015/pdf/2014_HMDA.pdf.

economic recession since the Great Depression. The impetus for reform included preventing consumer harm and preventing damage to the financial system. As such, the assessment should consider the effectiveness of the rules on preventing problems for the financial system and the economy. This could be done through modeling. As discussed above, we recommend the CFPB model the performance of QM loans under other market conditions as part of this assessment. The analysis could model financial system effects in addition to loan defaults. An example of this is examination of financial institution insolvency or closure. As discussed in Section II above, the Great Recession resulted in the closure of many small financial institutions. To the extent that ATR/QM protects against mortgage losses, the rules also could affect the safety and soundness of lenders. A modeling approach could explore how many institutions would have avoided collapse if loans in their mortgage portfolios for instance had met the QM standards. The CFPB should consider the rules' role in securing the overall financial system in addition to those described in the scope.

The assessment should include reaching out to borrowers and consumer advocates.

The CFPB identifies a number of parties that it plans to consult with in the course of this assessment including: creditors, government regulatory agencies, government sponsored enterprises, and private market participants. The CFPB should add to this list borrowers and consumer advocates. Borrowers and consumer advocates have unique perspective on the intent and effect of the Ability-to-Repay and QM standards. In particular, interviews, focus groups, or surveys of borrowers who received a loan post-rules could shed important light on loan affordability. Similar approaches could yield interesting insight from borrowers whose loan applications were denied. Similarly, consumer advocates who often work closely with borrowers seeking a loan and those borrowers struggling to pay back their loans, could provide information on the rules' effectiveness.

V. We recommend tailored and small adjustments to the rule that will create a safer lending environment for consumers and for the market.

CFPB should be very cautious about changes to the ATR/QM rule that would result in a loosening of reasonable underwriting protections. However, some tailored, small adjustments could improve upon the rule's success. We recommend that the CFPB consider the following changes:

The small lender exemptions in the rule should apply only to depository lenders.

In the review of QM, future two tier regulations should be limited to smaller depository institutions, rather than all smaller lenders. This would carry out the statutory provisions of Dodd-Frank, as well as better protect consumers from harm. In promulgating the QM rule, the CFPB created a partial exception for smaller lenders, permitting them to charge higher interest rates and enjoy other special provisions regarding QM loans. In the discussion of this provision, the CFPB based it largely on the special circumstances and lending history of community banks and credit unions. The Bureau noted that community banks used a different business model, relying on relationship banking rather than a merely transactional relationship. The Bureau also cited the strong performance of community depository mortgages through the financial crisis.[48]

The Dodd-Frank statute also recognizes these distinguishing features of small depository institutions. First, it explicitly carved these institutions out of the provisions of interchange fees- the so-called Durbin amendment. Second, it provided in the CFPB provisions that depository status was not to be considered "for purposes of enforcement." No such limitation was provided

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[48] CFPB, ABILITY-TO-REPAY AND QUALIFIED MORTGAGE STANDARDS UNDER THE TRUTH IN LENDING ACT (REGULATION Z) (2013), *available at* https://www.federalregister.gov/documents/2013/01/30/2013-00736/ability-to-repay-and-qualified-mortgage-standards-under-the-truth-in-lending-act-regulation-z.

regarding rulemaking, and standard statutory construction rules dictate that this different wording in the two sections means that different treatment was intended by Congress for rulemaking. This conclusion is further corroborated by the factors the CFPB considers in making full or partial exceptions. One of the three factors is the presence of other consumer protections. Small depository institutions are subject to robust supervision. This includes not only general consumer protection and safety and soundness, but also the specific mortgage ability to repay oversight.[49]

In contrast, other, nondepository mortgage lenders do not share these same characteristics. Many are monoline businesses that use a transactional business model, rather, than a relationship model. Many are very lightly supervised and very thinly capitalized. Finally, many of them have adverse, rather than admirable track records. This includes longstanding abuses in manufactured housing lending[50], problems with steering borrowers to unfavorable loans, and outright fraud.[51] For these reasons, the special provisions for smaller lenders should be limited to smaller insured depository institutions.

Additional Recommendations include:

- *Raising the interest rate threshold for higher price loans to 200bps from 150bps over the average prime offer rate (APOR).* This would substantially reduce the number of mortgages that are classified as higher price mortgages and that are excluded from safe harbor status.

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[49] Id.

[50] Background *available at* http://www.seattletimes.com/business/real-estate/the-mobile-home-trap-how-a-warren-buffett-empire-preys-on-the-poor/, see also http://www.seattletimes.com/seattle-news/lawmakers-call-for-federal-investigation-of-warren-buffetts-mobile-home-business/.

[51] Background *available at* https://www.washingtonpost.com/local/taylor-bean-and-whitaker-owner-guilty-in-fraud-scheme/2011/04/19/AFamtM8D_story.html?utm_term=.11ffd86977cf.

- *Changes to Appendix Q to improve clarity, particularly for underwriting for non-traditional income.* In crafting the QM rule, the Bureau adopted the provisions of Appendix Q. Providing updated provisions for determining and verifying nontraditional income, including self-employment would be helpful, especially as more mortgage consumers are working in the nontraditional economy. Updating Appendix Q for these purposes will be beneficial to extending credit to creditworthy low-income communities and communities of color. The CFPB should look carefully at how Appendix Q can be improved to provide clear guidelines for lenders in these circumstances. In doing so, it is critical that this does not become, in effect, a return to the harmful stated income loans of the past. Consumer income used in underwriting needs to be accurately determined and verified.
- *QM Patch:* The QM patch should remain and be made permanent (and consistent with any GSE reform that could impact the patch). Responsible lending, with compensating factors can and should be done above 43 DTI. The GSEs are in a position to consider compensating factors, including more sources of traditional and nontraditional credit, a strong payment history, and the absence of housing payment shock. The GSEs employ underwriting algorithms, as approved by FHFA, that cannot be easily translated into a regulatory provision to reach borrowers in such circumstances.[52]
- *Land Installment Contracts*: The Bureau should clarify that land installment contracts are credit and are residential mortgage loans, thus making clear that they are subject to many Truth in Lending Act (TILA) requirements including Ability-to-Repay. TILA, Regulation Z, and the official interpretations also already assume that land installment contracts

[52] We have noted that responsible lending, with compensating factors can and should be done above 43 DTI, and that CRL affiliate Self-Help does 15-20% of its direct lending at this level.

constitute credit. This decision will provide consumers directly the tools they need to protect against known fraud and abuse in the land installment contracts area.[53]

Conclusion

We must move forward, not backward, on the reforms that protect borrowers and promote sustainable homeownership. The need for regulatory flexibility must be balanced against the importance of consumer safeguards, the safety and soundness of financial institutions, and the security of America's financial system as a whole. The CFPB must continue to both protect the American people and ensure access to a broad, sustainable financial market. We simply cannot afford another financial crisis. The CFPB should maintain and strengthen consumer protections under Dodd-Frank that have and continue to help millions of people across the country.

Sincerely,

Center for Responsible Lending

Americans for Financial Reform

The Leadership Conference on Civil and Human Rights

League of United Latin American Citizens

NAACP

National CAPACD

National Community Reinvestment Coalition

National Fair Housing Alliance

National Urban League

[53] We cite to and agree with comments from the Consumer Federation of America (CFA) and the National Consumer Law Center (NCLC) regarding recommendations concerning Land Installment Contracts, and why the CFPB has the legal authority to do this.