CENTER FOR CAPITAL MARKETS COMPETITIVENESS

TOM QUAADMAN
EXECUTIVE VICE PRESIDENT

1615 H STREET, NW
WASHINGTON, DC 20062-2000
(202) 463-5540
tquaadman@uschamber.com

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Comment Intake
Bureau of Consumer Financial Protection
1700 G St. NW
Washington, DC 20552

Re: Qualified Mortgage Definition Under The Truth In Lending Act (Regulation Z)

To Whom It May Concern:

The U.S. Chamber of Commerce's ("the Chamber") Center for Capital Markets Competitiveness ("CCMC") appreciates the opportunity to comment on the advanced notice of proposed rulemaking ("ANPR") issued by the Bureau of Consumer Financial Protection ("Bureau") regarding the "qualified mortgage patch."[1] We are glad that the Bureau is engaging with stakeholders at this early stage of the process and is seeking feedback on how to approach a forthcoming rulemaking relating to the qualified mortgage patch. We recognize the importance of handling this important rulemaking properly, as it could have significant consequences for individual borrowers and for the economy as a whole. Given these high stakes and the broad range of options that the Bureau is currently contemplating, we would urge it to follow four key principles as it pursues this rulemaking:

- The Bureau should facilitate compliance and avoid market disruption.
- The Bureau should avoid policies that would distort the marketplace.
- The Bureau should support innovation in the mortgage marketplace.

[1] *See* Advanced Notice of Proposed Rulemaking, Qualified Mortgage Definition Under the Truth in Lending Act (Regulation Z), 84 Fed. Reg. 37155 (July 31, 2019).

- The Bureau should not attempt to manage systemic risk.

Discussion

As the Bureau describes in the ANPR, Congress granted it authority to issue rules relating to the "Qualified Mortgage" provisions of the Dodd-Frank Act. Under a provision of those rules, mortgages subject to purchase by Fannie Mae or Freddie Mac are treated as qualified mortgages and thus trigger the legal protections provided by the Dodd-Frank Act. That provision—commonly referred to as the "qualified mortgage patch," "QM patch," or "GSE patch"—is set to expire in January 2021, and the Bureau says in its ANPR that it does not intend to extend its application for any significant period of time.

As a result, the Bureau appropriately is considering potential adjustments to its existing Qualified Mortgage rule after expiration of the QM patch. The ANPR reflects a broad range of possible options that the Bureau could pursue, and we expect that stakeholders will offer an equally broad range of views on which options to pursue. As the Bureau reviews those forthcoming submissions, we would urge it to ground its judgments in principles that would ensure that consumers maintain access to responsible and affordable mortgages. To that end, we highlight below four principles that we believe deserve particular attention as the Bureau proceeds with this rulemaking process.

1. The Bureau should facilitate compliance and avoid market disruption.

The Bureau's mortgage rules impose numerous complex requirements on lenders. Significant investments are required for lenders to ensure compliance with these requirements, including through the creation of tailored software programs, the publication of guidance materials, training for responsible team members, and internal testing and auditing. These significant investments allow lenders to meet their compliance obligations. But these robust compliance operations cannot be adjusted overnight. Meeting new compliance obligations takes time. Conversely, rapid changes to the regulatory scheme governing mortgage lending are sure to create substantial compliance risk. Responsible lenders will respond by mitigating this compliance risk by avoiding activities that create that compliance risk. In short, lenders will stop issuing loans that create compliance risk until they are able to update, roll out, and test their compliance programs. If faced with the options of ensuring legal compliance and extending certain loans, lenders will have no choice but to cut back on their lending.

This is no academic matter. The mortgage market is exceptionally important to individual consumers and to the economy as a whole. Regulatory disruption to the market could leave certain consumers unable to get loans or push them into loan pricing or structures that are less favorable than those they could otherwise obtain. Such disruption in credit availability and pricing could have significant knock-on effects across the economy. Housing sale prices and volumes could be reduced, injuring consumers seeking to sell their own homes and creating risk to the economy.

The potentially negative consequences of a mistake in this field make it critical for the Bureau to ensure that any rulemaking it undertakes does not disrupt the mortgage market. We understand, of course, that the Bureau would not intend to cause such disruption through any forthcoming rulemaking. We are grateful that the Bureau already has identified avoiding market disruption as one of its priorities, with Director Kraninger confirming that the Bureau "is committed to ensuring a smooth and orderly mortgage market throughout its consideration of these issues and any resulting transition away from the GSE Patch."[2] Still, given the risks associated with any rulemaking in this area, we believe that the Bureau cannot be too careful as it works to avoid regulatory disruption. In particular, we would ask the Bureau to follow two principles that will help it avoid disrupting the mortgage market in any rulemaking on this topic.

- *The Bureau should facilitate regulatory compliance by making the rules clear.* Regulatory clarity enables regulatory compliance. Lenders can adjust their compliance systems and retrain their employees much more readily when the rules are clear. Conversely, regulatory uncertainty frustrates efforts to adapt quickly to new requirements. Time spent trying to understand a regulatory requirement and trying to determine whether it permits certain business activities only delays compliance implementation efforts. Moreover, regulatory uncertainty casts a pall over affected business activities, making it likely that the lender will abandon those activities even if the Bureau may not have intended that outcome. The Bureau consequently should ensure that any forthcoming rulemaking articulates clear requirements that mortgage lenders can readily implement. In short, lenders should be able to tell which loans are qualified mortgages, and which are not—and be able to readily explain as much to its mortgage lending teams. Moreover, we would

[2] *See* Press Release, Consumer Financial Protection Bureau Releases Qualified Mortgage ANPR, https://www.consumerfinance.gov/about-us/newsroom/bureau-releases-qualified-mortgage-anpr/ (July 25, 2019).

urge the Bureau to use its full range of tools, from informal engagement to no-action letters and other formal guidance, to answer questions that may arise after any rule is put in place.

- *The Bureau should provide lenders with sufficient time to adapt their compliance operations to revised rules.* Any rule established by the Bureau is likely to require significant adjustments by lenders in order to ensure regulatory compliance. The Bureau should not underestimate the work and investment required to make such changes, but should provide lenders with ample time to adapt to any revised rules. We would also ask the Bureau to consider an implementation approach that reflects the nature and complexity of the particular rule that the Bureau adopts. For example, to the extent appropriate based on the type of rule that the Bureau establishes, we would ask it to consider options such as a phased implementation of different elements of a rule, establishment of a regulatory grace period, or creation of a period in which multiple approaches are temporarily acceptable.

2. The Bureau should avoid policies that would distort the marketplace.

The ANPR recognizes that the Bureau has a range of possible policy levers at its disposal as it considers how to respond to the forthcoming expiration of the QM Patch. As the Bureau contemplates those various policy levers, we would urge it to avoid approaches that create artificial or arbitrary thresholds that distort the marketplace by incentivizing lending behavior that is out of step with credit risk.

For example, we would ask the Bureau to be careful to avoid creating any "cliff effect" in which a policy adopted by the Bureau relies on a single criteria or factor to determine whether a loan is a qualified mortgage. We would urge the Bureau to consider very carefully whether any such hard cut-off will serve the larger objectives of the QM rule, since it may create a significant pricing disparity for consumers with only slightly different credit profiles. Moreover, we would also ask the Bureau to consider whether any proposal it develops would have the unintended effect of incentivizing lenders to underwrite loans in a manner that is out of step with the borrower's ability to repay and credit risk.

3. The Bureau should support innovation in the mortgage market.

Congress tasked the Bureau with supporting innovation in the consumer financial services markets that it regulates.[3] That responsibility to encourage innovation applies here, as the Bureau seeks to "ensure that responsible, affordable mortgage credit remains available to consumers."[4] The Bureau acknowledged as much in its 2013 Qualified Mortgage rule, explaining that it had "sought to balance creating new protections for consumers and new responsibilities for creditors with preserving consumers' access to credit and allowing for appropriate lending and innovation."[5] The Bureau still can do more to support innovation in the mortgage market, however, all while ensuring that appropriate underwriting standards are maintained. We consequently would urge the Bureau to prioritize innovation in any forthcoming rulemaking relating to the QM Patch.

We would particularly urge the Bureau to focus on two principles as it works to support innovation in the mortgage market:

- *Give lenders flexibility to innovate*: The Dodd-Frank Act makes clear that the Bureau should ensure that consumers retain access to responsible and affordable mortgages. Congress did not proscribe a specific mechanism for achieving that goal or suggest that the Bureau should identify narrow criteria that lenders must follow if they want to benefit from the statutory safe harbor. Rather, Congress made clear that any qualified mortgage rule would establish appropriate minimum requirements, leaving lenders with the flexibility to innovate while still complying with a reasonable set of clear standards. The Bureau should ensure that any rule leaves lenders such flexibility, as it will be critical to allowing them to create innovative solutions that benefit consumers.

- *Make compliance obligations clear*: Robust competition on a level playing field enables consumer access to the innovative products they want at reasonable prices. Innovative companies thrive when they can chart a clear path forward, but such innovation cannot flourish when companies do not know the rules of the road. Uncertainty creates confusion in the marketplace, and consumers ultimately lose out because responsible, compliance-minded companies hesitate to invest in new products and services when they are unsure of the potential

[3] *See* Dodd-Frank Act § 1021(b)(5), codified at 12 U.S.C. § 5511(b)(5) (establishing, as an objective for the Bureau, that "markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation").
[4] Dodd-Frank Act § 1412, codified at 15 U.S.C. § 1639c(b)(3)(B)(i).
[5] Final Rule, Ability-to-Repay and Qualified Mortgage Standards Under the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 6408, 6505 (Jan. 30, 2013).

legal ramifications. The Bureau should work to avoid this result and should empower financial institutions to confidently lend and create new and innovative products without fear of retribution. To accomplish that goal here, the Bureau should ensure that any rulemaking it pursues establishes clear rules of the road that allow a lender to understand, without uncertainty, whether a contemplated loan meets the requirements for a qualified mortgage at the time the loan is extended.

4. The Bureau should not attempt to manage systemic risk.

The Bureau mentions in the ANPR that some stakeholders "have argued that the General QM loan definition should incorporate counter-cyclical limits, such as LTV ratio, that become more restrictive as housing prices increase."[6] As we understand this suggestion, it would mean that the Bureau would adopt a policy that would make it harder for borrowers to secure mortgages as housing prices rose, regardless of whether the borrower were able to repay the mortgage. This appears to suggest that the Bureau may focus on managing housing prices and their systemic impact on the economy, rather than on whether an individual borrower can afford an individual mortgage as contemplated by Congress when it passed the Dodd-Frank Act. We appreciate that the Bureau has not indicated that it intends to take this suggested approach. However, we highlight our concerns about this stakeholder proposal since the Bureau would stray beyond both its statutory mission and its own capabilities if it were to take such an approach.

Congress granted the Bureau wide-reaching authority to protect consumers, but even that authority has limits. Congress did not grant the Bureau authority to manage the housing market or otherwise attempt to manage systemic risk. Nor did Congress suggest that the Bureau may treat systemic risk as another consumer protection topic within its jurisdiction. Congress instead bestowed responsibility for managing system-wide economic risk upon the Financial Stability Oversight Council ("FSOC"). Indeed, Congress subjected the regulations issued by the Bureau to oversight by the FSOC to ensure that the Bureau does not unintentionally create systemic risk.[7] Thus, rather than tasking the Bureau with preventing systemic risk, Congress was concerned with ensuring that the Bureau did not cause systemic risk. Indeed, it is impossible to

[6] 84 Fed. Reg. at 37161.

[7] *See* 12 U.S.C. § 5513(a) ("On the petition of a member agency of the Council, the Council may set aside a final regulation prescribed by the Bureau, or any provision thereof, if the Council decides, in accordance with subsection (c), that the regulation or provision would put the safety and soundness of the United States banking system or the stability of the financial system of the United States at risk.")

imagine that Congress would have given a single director authority to manage systemic economic risk, particularly since it created the multi-member FSOC to focus on those issues.[8] The Bureau thus would be acting outside its legal authority if it were to attempt to manage systemic economic risk.

The Bureau also should not accept a stakeholder recommendation that would push the Bureau beyond its areas of expertise. The risks associated with such an approach are simply too great. While we recognize that the Bureau has developed strong research and analysis capabilities relating to many consumer financial protection topics, it does not have a deep and experienced team of economists that is dedicated to systemic issues. Without such a capability, the Bureau cannot act responsibly in this field. Poor decisions could wreak havoc on the economy, harming the very consumers that the Bureau is tasked with serving. The Bureau thus should reject any suggestion that it use this rulemaking process to engage in broader regulation of the housing market or of systemic risk.

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We thank you for your consideration of these comments and would be happy to discuss these issues further.

Sincerely,

Tom Quaadman

[8] The oversight responsibility of the FSOC does not relieve the Bureau of its own responsibility not to disturb the stability of the financial system. The FSOC setting aside a Bureau regulation under Section 5513(a) is an extraordinary remedy. The Bureau should not proceed with any regulatory approach that would affect the economic system broadly on the theory that the FSOC would set it aside if it were poorly considered.