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Ms. Monica Johnson
Office of the Executive Secretary
Bureau of Consumer Financial Protection
1700 G Street, NW
Washington, DC 20552

Re: Docket No. CFPB-2012-0022; RIN No. 3170-AA17
Notice of Reopening of Proposed Amendments to Regulation Z

Dear Ms. Johnson:

The American Bankers Association[1] appreciates this opportunity to comment on the Consumer Financial Protection Bureau's ("CFPB" or the "Bureau") reopening of the comment period for the proposed rule[2] that would implement the ability-to-repay requirements mandated by provisions of Title XIV of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act" or "Dodd-Frank").[3] This is a complex proposal that will significantly impact our member banks and their provision of mortgage credit in their communities.

Overview of Comments

The following bullets summarize our comments on the matters that the CFPB has reopened for public comment.

- FHFA Data. The Federal Housing Finance Agency ("FHFA") data is a relevant and reliable source of information, but like all data sets, it has limitations that will impact its usefulness in defining what constitutes a Qualified Mortgage. We also recommend that other reliable data sources, including CoreLogic, FHA, VA and FHFA data on Federal Home Loan Bank loan purchases be considered.

- DTI Ratio. ABA urges the CFPB to evaluate the impact of a bright-line debt-to-income ratio ("DTI") on a borrowers' ability to repay a mortgage loan. A required debt-to-income ratio ("DTI") that is too low may result in qualified borrowers being denied credit. Therefore, ABA strongly urges the CFPB to analyze the impact of borrowers' ability to qualify for credit with a DTI of 50 percent versus a DTI of 43 percent as proposed by some consumer groups.

- Survey Data. ABA member banks indicates that loans with DTI ratios above 43 percent constituted on average 14.3 percent of all mortgages made between October 1, 2010 and April 1, 2012, a period of conservative underwriting. Excluding loans above 43 percent DTI from the

[1] The American Bankers Association represents banks of all sizes and charters and is the voice for the nation's $13 trillion banking industry and its 2 million employees. The majority of ABA's members are banks with less than $165 million in assets. Learn more at www.aba.com.
[2] See 76 Fed. Reg. 27390 (May 11, 2011).
[3] 77 Fed. Reg. 33120 (June 5, 2012).

Qualified Mortgage definition would unacceptably deny credit to many creditworthy consumers. Bright line standards are desirable only if well-reasoned standards are selected.

- Residual Income. ABA recommends that the CFPB consider residual income as a possible factor for determining whether a loan is a Qualified Mortgage. We further recommend that the CFPB evaluate the residual income test currently used by the Veteran's Administration Home Loan Program and coordinate with FHFA to evaluate the experiences of Fannie Mae and Freddie Mac in using residual income in determining a borrower's ability-to-repay.

- Appropriate Measure of Delinquency. ABA strongly recommends that CFPB use the industry standard of 90 days as the standard for loan delinquency rather than the 60 day standard relied upon in the proposed rule.

- Estimates of Potential Lawsuits. Dodd-Frank creates a virtual strict liability standard under which a borrower is not required to demonstrate harm, be in default or otherwise show any connection between the ability-to-repay violation and the borrower's delinquency. We believe that this standard, coupled with the highly technical requirements of the proposed rule, significantly increases litigation risk to mortgage originators.

- Access to Litigation Attorneys. ABA disagrees with assertions by certain commenter groups that banks face modest litigation risk because consumers have limited access to attorneys. A proper count and inventory of ongoing litigation demonstrates that litigation risk is a key threat in mortgage finance operations, and the new ability-to-repay provisions provide ample opportunity for expanded lawsuits.

- Litigation Involving Qualified Mortgages vs. Non-Qualified Mortgages. ABA is concerned that Non-Qualified Mortgages will be subject to very significant litigation risk, and could be vulnerable to challenge every time there is a delinquency and/or foreclosure. ABA members indicate that litigation risk is a key reason that they may elect not to make mortgage loans outside the Qualified Mortgage definitions

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- Potential Outcomes of Litigation. ABA members believe that a safe harbor approach to Qualified Mortgages is essential to provide lenders with assurances necessary to originate loans to all credit-worthy borrowers. A rebuttable presumption is largely useless to lenders at the pleadings stage, provides only limited protection at summary judgment or trial stages of litigation, and will reduce credit availability.

- Damages. The level of damages imposed under the ability-to-repay provisions is substantial, and is comparable to or higher than HOEPA's high-cost provisions. HOEPA has largely eliminated mortgage lending in covered segments.

- Secondary Market Repurchase Demands. Because of Dodd-Frank's assignee liability provisions, ABA is concerned that the secondary market's repurchase demands will increase under the ability-to-repay rules. The highly technical nature of the proposed rule creates a high risk of non-compliance and related repurchase demands due to inadvertent errors.

- Fair Lending. ABA believes the Bureau must address the fair lending implications of the ability-to-repay provisions, and must adequately define the interplay of Qualified Mortgages and fair lending principles.

- Implementation Timeframes. ABA believes that this rulemaking will demand significant implementation efforts and will therefore require expanded time periods for compliance. ABA asks that the Board set a compliance date of, at minimum, 18 months from the issuance of the final rule.

Background

The CFPB reopened the comment period for the proposed rule previously published by the Board of Governors of the Federal Reserve System ("Board") on May 11, 2011. The Board's proposed rule would amend Regulation Z (Truth in Lending) to implement amendments to the Truth in Lending Act ("TILA") made by the Dodd-Frank Act.[4]

The Board's proposed rule addresses new ability-to-repay requirements that generally will apply to consumer credit transactions secured by a dwelling and defines what constitutes a "Qualified Mortgage" (or QM) that receives a presumption of compliance with the ability-to-repay requirements. The Dodd-Frank Act transferred the Board's rulemaking authority for this matter to the CFPB. The comment period to the proposed rule closed on July 22, 2011. The CFPB reopened the comment period to seek comment on new data and information submitted during or obtained after the close of the original comment period. In particular, the CFPB is seeking comment on certain mortgage loan data that it received from the Federal Housing Finance Agency ("FHFA") and is soliciting additional information regarding potential litigation costs and liability risks associated with the proposed ability-to-repay rule.

On July 22, 2011, ABA filed a comment letter cautioning that the stakes in this rulemaking are extremely high, that the final rule will dramatically affect lenders' calculations regarding the risks associated with mortgage lending, and that it is imperative to balance strong consumer protections with ensuring the availability of mortgage credit for qualified borrowers. The earlier ABA letter can be found at http://www.aba.com/Issues/commentletters/Documents/1e5985a2f3a040a18aecf51472687d8ecl_RegZ2011July.pdf

ABA appreciates, therefore, the CFPB's exceptional step of reopening the comment period to solicit additional public input for this rulemaking. ABA believes that the ability-to-repay requirement is the most significant regulatory issue affecting mortgage lending and that it is of utmost importance for policymakers to fully consider all available data and related information prior to finalizing the ability-to-repay regulation.

Comments on FHFA Mortgage Loan Data

The Bureau states that it has received a data sample drawn from the FHFA's Historical Loan Performance ("HLP") dataset along with tabulations from the entire file. The data include a one percent random sample

[4] Under the Dodd-Frank Act, a lender extending a residential mortgage loan must make a reasonable and good faith determination of a borrower's ability to repay the loan or otherwise face significant monetary consequences. Further, this determination must be based upon strict documentation and verification of the borrower's financial circumstances so as to establish that the consumer has a reasonable ability to repay the loan according to its terms as well as all applicable taxes, insurance, and assessments. Dodd-Frank also provides a presumption of compliance with the ability-to-repay requirements if the mortgage loan is a "qualified mortgage," which does not contain certain risky features and limits points and fees on the loan.

of all mortgage loans in the HLP dataset from 1997 through 2011, and tabulations of the HLP dataset by FHFA showing the number of loans and performance of those loans by year and debt-to-income ("DTI") range. The Bureau has also acquired commercially available data on mortgages securitized into private label securities, and expects to perform similar data modeling and analysis on this data.

Below are ABA recommendations and views on the questions posed in Bureau's notice—

- **The Bureau seeks comment on the dataset received from FHFA and commercially available data on mortgages securitized into private label securities, including the data source, parameters, and whether other data or studies are available or more appropriate for the purposes indicated above.**

As a general matter, ABA believes that the FHFA data is a relevant and reliable source of information, but that it, like all data sets, has limitations which will impact the degree to which it is useful in setting forth the parameters of what constitutes a QM. We would note that CoreLogic is an alternative data source that could also prove useful, but with the caveat that CoreLogic data lacks DTI information for the large majority of mortgages originated in 2001 and 2002.

ABA also recommends that the Bureau look to other data sources, including additional data available from the FHFA on the performance of loans sold into the Federal Home Loan Banks' (FHLB) Mortgage Partnership Program (MPP) and Mortgage Partnership Finance (MPF) programs. The Federal Home Loan Banks provide two semi –annual Acquired Member Asset Reports to the FHFA each year. The first half of each year's report is due at the end of August and the second half of the year's report is due by the end of February. The FHFA should have all the data through 12/31/2011 from all 12 Banks. In ABA's Annual Real Estate Survey, ABA members reported, on average, selling approximately 7 percent of their mortgage loans into these programs in 2011 (see Attachment 1). We also believe that the unique risk sharing aspects of these programs, where banks retain credit risk exposure, serve as a good proxy for the types of mortgage loans banks held in portfolio. Using this data will give CFPB a window into the loan characteristics not just of loans sold to the FHLBs, but also of loans likely to be held in portfolio. The impact of the QM on loans sold into the FHLB as well as those held in portfolio should not be overlooked or underestimated.

Other potential data sources for the Bureau to consider include data from the Veterans Administration (VA) – which we discuss in greater detail below with regard to residual income calculations, and the Federal Housing Administration (FHA). Because ability to repay and the QM designation will impact all mortgage loans, whether held in portfolio, sold into the secondary market, into a FHLB program or guaranteed by FHA, VA or other governmental program, it is essential that CFPB examine relevant data sources from all these entities in order to both know the potential impact of a rule on such loans, and to inform the crafting of the rule to make it the best it can be when applied to all such loans.

With specific regard to any data, either that from FHFA or CoreLogic, we strongly recommend caution in relying upon data from 2005 through 2008, as those years reflect aberrations in the market resulting from a period of lax underwriting standards across many lender models. We believe that data from pre-2005 and data from 2009 through the present will be based on similar, more stringent credit standards which are more reflective of prudent mortgage lending and should serve as the models for underwriting standards including QM. This is largely because of a return to more conservative underwriting standards in 2009. We would note that this data, including the 2009 to present data, does not reflect changes to underwriting and other loan and borrower qualifications mandated by Dodd-Frank, and that it can be logically inferred that underwriting will become even more conservative as those requirements are implemented.

One significant limitation of the FHFA data is that the DTI cutoff in the FHFA data only goes to 46 percent. We strongly believe that to produce a clearer picture of the impact of DTI on ability to repay, higher DTI numbers should be evaluated. A borrower's ability to repay a mortgage loan with a DTI of 43 percent, 46 percent, or 50 percent is not much different. For reasons discussed in the following section we believe that higher DTI cutoffs must be considered in order to prevent unwarranted and unnecessary restrictions to credit access, particularly among minority and lower income mortgage borrowers.

For purposes of determining the likely ability to repay of borrowers with certain DTI ratios, the Bureau used a standard, known as "Ever60+", which indicates any borrower who was ever 60 or more days delinquent when analyzing the FHFA data. ABA strongly recommends that the Bureau instead use an Ever 90+ delinquent standard. The 90+ standard is the industry standard in determining when a loan becomes seriously delinquent.

- **The Bureau seeks comment and data on any measures of loan performance and their relationship to a consumer's DTI ratio.**

ABA understands and appreciates the usefulness and desirability of using "bright line" standards for determining whether a borrower has an ability to repay. Clear bright lines help to provide certainty against legal liability and expense. We note however, that all bright line standards have limitations and unintended consequences. One of those consequences is that borrowers who may be otherwise well qualified for a loan, but who fail a specific DTI cutoff, could be denied credit. Additionally, because neither mortgage loans nor mortgage borrowers are homogenous, a hard and fast DTI will have differing effects upon different mortgage lenders and different mortgage applicants. For example, community banks, and the communities they serve, could be adversely impacted by too low a DTI. Community banks tend to engage in more relationship lending, where a long-standing relationship with a borrower and knowledge of that borrower's credit history and history with the bank is a key aspect of the underwriting of any loan. Such an institution (and their borrowers) would be far more likely to be impacted by a median DTI than would a larger institution which relies primarily on anonymous data averages in a standard underwriting model or program.

A number of other organizations, including the Center for Responsible Lending, have proposed a DTI of 43 percent as a bright line test for the QM. For purposes of our comment and to gauge the impact of a DTI, ABA has used the 43 percent number to conduct research we discuss in this comment letter.

A representative sample of ABA mortgage lenders found that on average 14.3 percent of mortgages originated between October 1, 2010 and April 1, 2012 had a DTI of 43 percent or more. About 10 percent of institutions reported 30 percent of mortgages with a DTI of 43 percent or more, including portfolio lenders with outstanding loan performance records. Given the high underwriting standards currently being utilized, it can be reasonably inferred that setting a DTI of 43 percent or lower will negatively impact a significant portion of borrowers who would otherwise qualify for credit even under today's stringent underwriting standards. For some institutions (and borrowers) a 43 percent DTI will have a pronounced impact on ability to qualify for the QM designation. The results of this survey can be found in the chart in Attachment 2.

A DTI cutoff of 43 percent will have an even more pronounced impact on low income and minority borrowers, who tend to have higher DTI ratios. For a more fulsome discussion of the impact of a higher DTI cutoff on lower income and minority borrowers see the July 2011 Government Accountability Office Report: *Mortgage Reform, Potential Impacts of Provisions in the Dodd-Frank Act on Homebuyers and the Mortgage Market* found at http://www.gao.gov/assets/330/321168.pdf.

We also note that analysis of the FHFA data supports a higher DTI, should such a bright line be adopted. For most of the data period, the differences between delinquency rates on 43 percent DTI and 46 percent DTI mortgages were only fraction of a percent. Only in 2007 did the difference exceed 1 percent, when the difference reached a high of about 1.25 percent. It appears that delinquency rates were being driven by less stringent underwriting practices (as discussed above) and macroeconomic events, not by DTI ratios in the ranges reported.

For these reasons, we strongly urge the CFPB to analyze the impact of a DTI cutoff at 43 percent versus a higher cutoff of 46 or perhaps 50 percent on borrowers' (and particularly low income and minority borrowers') ability to qualify for credit.

- **The Bureau seeks comment and data on any measures of residual income, the use of such measures in loan underwriting, the relationship of these measures to loan performance, and their relationship to measures of consumer expenditures.**

The Veterans' Administration Home Loan Program ("VA Program") uses residual income as a qualification for that program. As loans under that program have generally performed well, we believe that CFPB should look to that test and consider using the VA's residual income test as a model for determining if a loan is a Qualified Mortgage.

We note that the VA Program uses a table that sets a standard minimum residual income necessary for loan approval. The Bureau should consider using that table, along with other minimum qualifications such as income verification, restrictions on negative amortization, etc., as a basic framework for Qualified Mortgage qualifications.

We also note that the automated underwriting systems of Fannie Mae and Freddie Mac, (Desktop Underwriter and Loan Prospector, respectively) contain information on residual income. We encourage the Bureau to work with the FHFA, Fannie Mae, and Freddie Mac to access this data and use it to determine the effectiveness of residual income in determining a borrower's ability to repay. We believe this data will confirm that a residual income test is a valid and useful tool for determining ability to repay, and may serve as a better determinant than DTI. This may be particularly true for borrowers with lower income levels. Residual income is less relevant to ability-to-repay for higher income borrowers because there is, for those borrowers, more than sufficient nominal residual income to meet other expenditures. For borrowers with less income, however, residual income can be quite relevant.

To test this concept, we recommend that the CFPB access available data from the VA, FHFA, Fannie Mae, and Freddie Mac to determine how residual income at different borrower income levels affects delinquency and ability to repay. If the data proves, as we believe it will, that residual income is a reasonable guide for ability to repay, the Bureau can adopt the VA table or develop its own table with appropriate levels of residual income necessary to meet expenses for borrowers at different income levels. The table can then be used to easily determine if a loan to that borrower is a Qualified Mortgage.

Comments on Litigation Cost Estimates

In light of substantial public input received on the issue of litigation burdens, the Bureau is seeking comment and data on estimates of litigation costs and liability risks associated with claims alleging a violation of ability-to-repay requirements for mortgage loans that are not Qualified Mortgages, as well as costs and risks that might apply to Qualified Mortgages.

Overview of ABA's 2011 Comments:

ABA appreciates the Bureau's focus on the proposed rule's litigation impact. Our members believe that legal risk is the most crucial issue that the Bureau must analyze under this rulemaking. ABA's July 22, 2011 comment letter explained that the Dodd-Frank Act imposes dramatically higher levels of liability under the ability-to-repay rules, and the appurtenant legal and litigation risks will be the most important determinant in lenders' calculation of what mortgage products they offer, and whether in some cases they offer any mortgage loans at all.

The Board proposed two alternative definitions for a Qualified Mortgage. Under Alternative 1, a qualified mortgage would provide creditors with a safe harbor to establish compliance with the general repayment ability requirement. By contrast, Alternative 2 would provide a rebuttable presumption of compliance with the ability-to-repay requirement. ABA's comments on the proposal cautioned that banks will not risk legal exposure outside whatever legal protection is granted to Qualified Mortgages and that accessing the Qualified Mortgage protections would be the only viable method for banks of all sizes to avoid the potentially devastating liability imposed under Title XIV of Dodd-Frank. A mere rebuttable presumption of compliance would provide very little certainty to lenders, would be of limited use in preventing litigation, would be uncertain in its application, and would provide insufficient protective value. ABA emphasized that in order to achieve Dodd-Frank's intended protections while also providing lenders with the confidence and legal assurances they need to operate, it is crucial that the Bureau provide a clear "safe harbor," as provided under Section 1412 of the Dodd-Frank Act.

2012 Survey of ABA Chief Real Estate Lending Officers and Bank Attorneys:

To respond to the CFPB's request for additional information regarding litigation costs, ABA undertook a survey of a representative sample of ABA members to more methodically analyze the scope of lender reactions to this rulemaking. In this survey (see Attachment 3), ABA reached out to bank legal counsel and mortgage business line professionals to gather their views on the litigation and legal risks that they believe will be posed under the alternative Qualified Mortgage definitions of "rebuttable presumption" versus "safe harbor," as set forth in the proposed rule. ABA also requested that legal counsel respondents estimate potential litigation costs associated with a rebuttable presumption standard versus a safe harbor. Finally, the survey collected opinions from both legal counsel and chief real estate lending officers on the likely business decisions which may result from the alternatives presented in the proposed rule. The results of this survey, described below, decisively validate the concerns that ABA expressed in its July 2011 comments.

Costs: ABA's survey requested legal counsel to approximate historical costs of litigation of all types, on a per case basis, where the bank prevailed at the summary judgment stage. Respondents estimated the average cost to be $25,000 per case, with a maximum estimate of $75,000 per case. By comparison, the survey inquired about the historical cost of litigation on a per case basis where the bank prevailed and the case was fully litigated. In such instances, the estimates jumped to an average cost of $100,000 per case, with a maximum estimate of $400,000 per case. These figures illustrate why banks are very concerned about the potential for a high-volume of ability-to-repay litigation. For community banks, one legal challenge could cancel out years of mortgage-related profits.

Rebuttable Presumption: To collect information regarding the rule's impact on lending, ABA surveyed bank counsel and real estate lending officers on their forecast of the effect that a rebuttable presumption standard would have upon the use of risk-based pricing methodologies. The poll reflects the prediction that changes in fee structures would occur, with 52 percent of respondents stating that they expected "significant" changes in fee structure to offset litigation risk, and 46 percent expecting a "small change."

In terms of the effect that a rebuttable presumption standard would have on underwriting methodologies, respondents unanimously discarded the possibility that there would be no change from current landing standards. In fact, 71 percent believe their bank will adopt "significantly" more conservative underwriting standards, while 29 percent believe that they would adopt only "somewhat" more conservative underwriting.

Finally, 71 percent of respondents believe that a rebuttable presumption standard would lead to reductions in mortgage lending, with 45 percent asserting that the reduction would be "significant." If there is a rebuttable presumption rather than a safe harbor in the definition of a Qualified Mortgage, 10 percent of respondents believe their bank may exit the mortgage origination business. The survey revealed that only 19 percent of respondents could assert that this choice would lead to "little change" in the bank's commitment to mortgage lending.

Conclusions of Survey: These somber numerical results portend significant reductions in mortgage credit if the rule's legal standards are not clearly crafted as a safe harbor to properly shield lenders when they make safe and compliant loans. By rather wide margins, the banks' business officers and legal counsel believe that the application of a rebuttable presumption standard will result in higher fees, stricter underwriting and less credit availability.

Answers to Bureau's Questions:

ABA's responses to the Bureau's inquiries related to "analyzing estimated costs associated with litigation" are set forth below—

The Bureau believes that estimates of serious delinquency and number of homes entering foreclosure are critical to measuring the potential costs of litigation risk, and notes that aggregate data on serious delinquency and homes entering foreclosure are available from various sources such as the Mortgage Bankers Association National Delinquency Survey. The Bureau observes that more granular estimates of homes entering foreclosure can be estimated from the FHFA data and other data sources.

- **The Bureau seeks comment on the most appropriate measure of delinquency for purposes of calculating potential costs associated with ability-to-repay litigation in the foreclosure context.**

As discussed above, ABA strongly recommends that the Bureau use an Ever 90+ delinquent standard for purposes of calculating potential costs associated with ability-to-repay litigation in the foreclosure context. The 90+ standard is the industry standard in determining when a loan becomes seriously delinquent.

- **The Bureau seeks comment on estimates of potential lawsuits asserting an ability-to-repay violation during the first three years after consummation—when the borrower has not yet defaulted but nevertheless sues the lender.**

It is extremely difficult to predict how frequently ability-to-repay violations will be litigated because the ability-to-repay requirement has not become effective and because its implementing regulation has not been finalized. Nevertheless, ABA strongly believes that the proposed ability-to-repay rules significantly increase the potential for legal challenges within the first three years of the life of a loan.

As we mention elsewhere in this comment letter, a borrower who alleges that his or her mortgage loan violates the ability-to-repay requirement is not required to demonstrate consumer harm, be in default, or

show any "causal connection" between the lender's failure to consider an ability-to-repay factor and the borrower's resulting delinquency. Within the first three years of the mortgage loan, the borrower may assert any oversight of the technical rules under this rulemaking as a cause to bring suit or otherwise challenge the loan transaction.[5] This statutory scheme poses significant litigation risks to lenders and is a very concerning aspect of Dodd-Frank.

The litigation risk associated with Dodd-Frank's ability-to-repay requirement is further increased by the rigid documentation and underwriting requirements contained in the ability-to-repay rule proposed by the Board. Failure to comply with the highly technical requirements of the proposed rule could result in the loan transaction being unwound and the lender being subject to Dodd-Frank's menacing penalty provisions.

In short, Dodd-Frank creates a virtual strict liability standard, where culpability or injury is entirely immaterial to liability. This standard increases litigation risk to mortgage originators. Absent more predictable safeguards, legal challenges would be extremely costly for banks of all sizes, and the discovery process would be protracted and extremely disruptive.

- **Second, the Bureau is interested in studying the number of potential litigants and complaints filed. Consumer groups argued that due to the complexity of mortgage-related litigation, such as a violation of TILA, asserting an ability-to-repay violation would require access to a lawyer. These groups noted that appropriate proxies for the number of complaints filed would be the percentage of borrowers in foreclosure who are represented by a lawyer as well as the number of other types of TILA violation cases.**

The most comprehensive argument on this matter was filed by the Center for Responsible Lending ("CRL") and the National Consumer Law Center ("NCLC"), in a letter to the Bureau dated October 11, 2011. This letter attempts to establish that the litigation risk to mortgage lenders is insufficient to affect the policy decisions of this rulemaking, and that litigation is generally "not proactive." The letter concludes that, in light of the complex nature of mortgage regulations, homeowners' access to representation is very limited and such paucity nullifies industry concerns regarding excessive litigation burden.

ABA strongly disagrees with the letter's remarkable statement that there are insufficient numbers of lawyers to threaten risk to the lending industry. The consumer groups' analyses are not based on adequate assessments and calculations of risk to banking institutions. The letter concludes that only .00044 percent of homes have brought a TILA rebuttable presumption claim in the past 5 years. These comparisons, interposing some sub-sections of TILA cases with the overall number of foreclosures, are

[5] The determination of a consumer's ability-to-repay must be based on the following factors: the consumer's current and expected income and other financial resources excluding equity in the dwelling which secures the loan; employment status; payment of the loan based on a fully amortizing payment schedule and the fully-indexed rate; payment of any simultaneous liens; payment of applicable taxes, insurance and assessments; the consumer's current obligations; the consumer DTI ratio or residual income; and the consumer's credit history. If the documentation of any of these elements is missing or deemed insufficient under the technical instructions of the rule, the loan could be challenged. Note also that the proposed rule provides that the evaluation of repayment ability allows creditors to "look to" widely accepted governmental or nongovernmental underwriting standards, such as the Federal Housing Administration's handbook on Mortgage Credit Analysis for Mortgage Insurance on One- to Four-United Mortgage Loans. The general ability-to-repay requirement does not, therefore, limit the factors at issue to specific, clear and objective criteria.

insufficient for purposes of measuring the real impact and overall litigation risks associated with the ability-to-repay requirement, which encompass all residential lending activities. In short, the numerator (number of cases brought) and the denominator (the number of cases in foreclosure) are not adequate measures for the type or the intensity of the legal risks that bankers will face under the new "ability-to-repay" regime. The letter's use of inappropriate variables leads to irrelevant comparison and erroneous assessment of true litigation risk to bankers.

Below are ABA's concerns with the analysis contained in the CRL/NCLC letter. First, the letter focuses on only a minuscule sub-portion of all judicial activity to measure the impact of litigation upon a bank's risk decision-making. The full threat of a bank's litigation risks encompasses TILA, RESPA, Fair Lending, FCRA, and other applicable laws, and it entails an analysis of all the available provisions, not just one subsection. The item CRL and NCLC use to quantify litigation—rebuttable presumption cases under TILA—has no correlation to the full amount of litigation that exists in the mortgage lending universe. This new ability-to-repay law will become part of that wide arsenal of litigation tools available to plaintiffs.

Second, the October 11 letter measures the number of TILA cases brought at a time prior to the creation of the ability-to-repay rule. Congress enacted the ability-to-repay provisions of the Dodd-Frank Act as a key consumer protection —and we believe that the plaintiff's bar will use it aggressively. It is impossible to measure the frequency with which plaintiffs will use this cause of action until it becomes "effective" and legally available to plaintiffs. Nevertheless, we believe that the creation of this new right of action will be a significant tool in challenging mortgage lending transactions—and this is why we are asking that the right of action be fine-tuned with precision.

Third, it is incongruous to state, as the October 11 letter does, that no legal risk exists because a small number of lawsuits were brought in proportion to the whole number of foreclosures. This statement reflects a lack of understanding about risk-based decision making in the marketplace. ABA members will analyze a law and strive to fully comply with it. The reasons to comply are various, and include elements of honesty and integrity, reputational risks vis-à-vis consumers and investors, the need to demonstrate compliance to examiners, secondary market guidelines, and finally, litigation risk. With regard to this last item, bank counsel will not simply ignore a law because only a small number of banks "get sued." Their endeavor is to achieve compliance, regardless of the level of litigation involving a particular section of the law. If compliance is uncertain, a substantial portion of banks will pursue underwriting and pricing protections that reduce the activity or avoid the activity altogether. These points are reflected in the ABA survey previously discussed.

This rulemaking presents significant policy issues and will have a major impact on the availability of mortgage credit. It would not be prudent for the Bureau to base the Qualified Mortgage rule on the incorrect assertion that there are not enough lawyers to bring lawsuits, or alternatively, that there is a low level of litigation risk for most financial institutions. This is not a valid decision-making premise for an agency. The law must be based on workable and sound policy objectives and principles that are consistent with the intent of Congress.

The October 11th letter also incorrectly asserts that the lack of a safe harbor should not concern regulators because the largest proportion of case filings were investor or commercial contract claims, not borrower class-actions. This argument again misses the point. Investor and commercial contract claims are very often premised on fidelity to the laws and the regulations that underlie the transaction. If an originator cannot ascertain the precise application of a rule or regulation, then the threat is the same regardless of whether the lawsuit comes from the consumer or the investor. Banks are looking for a safe harbor to

make sure that they are safe vis-à-vis the investor as well as the consumer. If the laws and regulations are unclear, or if their penalties are uncertain, there is increased legal risk, and it is immaterial whether this risk comes from the consumer or from the investor.

Comprehensive statistics covering mortgage-related litigation are not immediately accessible, but there are readily-available resources that provide ample figures and information to approximate the litigation threat that we forewarn here. To have a better understanding of the scope of the litigation risks that this new law will generate, we undertook a search on websites that track general litigation records. For instance, ABA ran an informal search on the "Courthouse News" database for mortgage lending-related class actions filed in the past 12 months. Although the data below undercounts the true number of cases, it certainly substantiates robust filing activity all across the country.

Courthouse News Search	**No.**
"Mortgage" and "class action" within past 12 months (6/25/11-6/25/12)	202
"Real Estate Settlement Procedures" or "RESPA" and "class action" within past 12 months (6/25/11-6/25/12)	21
"Truth In Lending" or TILA and "class action" within past 12 months (6/25/11-6/25/12) (mortgage specific)	10
"Modification" and "class action" within past 12 months (6/25/11-6/25/12)	47

It should be noted that this search focuses on class actions only, but serves to immediately dispel any assertion that legal challenges are of negligible impact. The new penalty sections of the TILA provisions at play here are extremely potent, and provide for such heightened possibility of recovery that we believe cottage industries of litigation experts will develop around the ability-to-repay provisions. Under those provisions that existed prior to Dodd-Frank, TILA afforded the ability to recover damages as well as attorney's fees, and this led to marked increases in putative class action lawsuits against lenders. The changes under Dodd-Frank—making violations of ability-to-repay requirements subject to expanded HOEPA damages whether or not the loan is a HOEPA loan—will dramatically increase the potential for such suits.

- **The Bureau seeks comment or data on whether and if so, how the number of lawsuits alleging an ability-to-repay violation would vary where (a) the mortgage loan is conceded not to be a "qualified mortgage," and (b) the mortgage loan is claimed to be a "qualified mortgage."**

ABA cannot provide a numerical answer to this question, as it is not possible to predict the number of lawsuits that will be filed pursuant to a statutory provision that has not been defined or implemented.

In part, the answer to this question depends on how the Bureau defines the safe harbor or rebuttable presumption applicable to a Qualified Mortgage. A lender defending an "ability-to-pay" challenge on a loan that is conceded not to be a Qualified Mortgage would be facing a factual litigation on whether it took all the steps it was supposed to under the statute and regulation to show that the borrower had an

ability to pay, and to the extent that there was a judgment call in any of those steps, whether the lender's judgment was appropriate under the statutory standard (for example, was the written verification sufficient? Was the income determination reasonable? Was there an unwarranted presumption of ongoing income? Was there sufficient residual income?). If the Bureau protects Qualified Mortgages with a safe harbor, the litigation will focus on whether the loan in fact is in the safe harbor. If the Bureau instead provides Qualified Mortgages with a "rebuttable presumption," the litigation will presumably focus on both whether the loan met the Qualified Mortgage definition and whether it met the underlying ability to pay requirement.

From a general perspective, ABA is concerned that non-Qualified Mortgage loans will be subject to significant litigation risk because every such loan will contain the potential for a federal lawsuit. Challenges under the new ability-to-repay provisions will not be premised on the traditional and more straightforward provisions such as the accuracy or existence of the TILA disclosure; rather, they'll address the infinitely more complex decision by the lender to make the loan. We note that the proposed rules, in normal and readable format, consume 474 pages of text. The rules are enormously complex and impose specific instructions for the precise documentation and consideration of mortgage underwriting factors. As described in ABA's July 22, 2011 comment letter, the level of detail in the proposed rule is such that member banks believe that certainty of compliance could never be entirely assured. Regardless of the precise number of lawsuits that *could* be brought, our member banks report, almost unanimously, that they will not venture outside the bounds of the definition of Qualified Mortgage.

Another concern is the strong potential for the abusive use of these provisions. ABA fears that, under a non-Qualified Mortgage scenario, borrowers whose loans are delinquent or about to go into foreclosure will automatically file suit against the lender and argue that the borrower was placed into an "unaffordable" loan. As we expressed in our July 22, 2011 comments, the proposed rule would set up creditors for frivolous challenges every time a borrower enters into the default stage—the mere fact that a default occurs would serve as evidence that the creditor did not properly consider repayment ability.

ABA believes that this is a critical consideration under this rulemaking, and one that argues strongly for a safe harbor standard. Given the size and design of this law, loans "conceded not to be a 'qualified mortgage'" will face legal challenge in instances of foreclosure, and they will be vulnerable to a lawsuit every time there is a default. Notwithstanding any predictive figure that other commenters may offer on this question, our banks, especially the smaller community banks, will necessarily have to assume that every default and every foreclosure will be accompanied by an ability-to-repay challenge that will have to be defended.

Such results are borne out by our Survey of ABA Chief Real Estate Lending Officers and Bank Attorneys, which reflects that without the predictability of a safe harbor provision, the underwriting of loans will become decidedly more conservative.

- **The Bureau seeks comment on the likelihood of potential outcomes of litigation, such as dismissal, summary judgment, settlement, or judgment after trial, and the effect on costs under various scenarios including: (a) the mortgage loan is conceded not to be a "qualified mortgage," (b) the mortgage loan is claimed to be a "qualified mortgage."**

ABA has obtained a full legal opinion on issues pertaining to possible litigation outcomes, which we provide in Attachment 4.

The attached legal opinion focuses on the consequences for expected litigation by describing the effect that courts have given to "safe harbors" and "rebuttable presumptions" under current law. The ABA and

its members assume that courts will continue to rule in similar ways when these terms are used in ability-to-repay litigation in federal courts. The memorandum discusses in depth two scenarios: (1) a scenario in which the qualified mortgage provision creates only a rebuttable presumption of compliance, and (2) a scenario in which the qualified mortgage provision provides a safe harbor to the lender. The memorandum concludes that a rebuttable presumption would be largely useless to lenders at the pleadings stage and would provide only a limited defense at the summary judgment stage (or even at trial). In contrast, a "safe harbor" could allow for early disposition of non-meritorious cases at the summary judgment stage and possibly at the motion to dismiss stage.

The legal analysis in this memorandum articulates the rationale for why banks share apprehension about a rebuttable presumption standard: its application is uncertain, and in most instances, is defeated easily, through such elements as oral assertions or undefined principles of "fairness." The frail protections offered by a rebuttable presumption are made even weaker by the fact that they do not offer a way to end the litigation—rather, they provide only a tool to defeat poorly pled complaints. Once litigation commences, the full costs of such litigation would kick in, with potentially devastating effects to the sustainability of bank mortgage lending programs, especially any efforts to expand credit across all communities, as both defaults and "ability-to-repay" litigation are likely to be concentrated in the least creditworthy loans that a bank makes. We think the effects of this will be most pernicious for small community banks, which may choose to exit residential mortgages altogether, or only make residential mortgages as an accommodation to their business customers.

ABA's survey of bank attorneys illustrates how the adoption of a rebuttable presumption standard would impact banks. According to bank legal counsel responding to our survey, the cost difference between full litigation and dismissal at the preliminary stages is a rather large $75,000. This number could be higher or lower depending on the details of the case involved—but our data suggests that, on average, bank legal counsel calculate the potential costs associated with a rebuttable presumption standard ($100,000/case for full litigation) to be 400 percent higher than costs associated with a safe harbor ($25,000/case for summary judgment).

- **The Bureau seeks comment and data on assumptions about a loan, such as interest rate, purchase price, finance charges, and fees, required to calculate average amount of damages awarded in a TILA case involving a violation of the ability-to-repay requirements based on the scenarios listed above in paragraph 1.**

The litigation costs noted above do not involve any of the assumptions that the Bureau notes because they involve only the bank's own litigation costs, and assume that the bank would always win the case. The penalty structure for an "ability to pay" violation, if such were to be found, is very similar to the net effect under pre-Dodd-Frank TILA for high cost ("HOEPA") loans defined by TILA Section 103(aa) – including three years of finance charges and attorney's fees. Depending on the interest rate environment when the loan is originated, and the riskiness of the loan, three years of finance charges could amount to a substantial penalty. As the Bureau is aware, the size of these penalties under HOEPA largely eliminated the willingness of lenders to make loans subject to HOEPA, and what few loans that are made subject to HOEPA are almost all made by non-bank "hard money" lenders.

Of particular note is that "actual damages" would also be available for violations of the "ability to pay" rule. Although actual damages have been available under TILA since 1968, they have rarely been awarded because consumers have not been able to show pecuniary harms related to imperfections in the disclosures that the consumer received. In the case of a violation of the ability-to-repay rules, however, a consumer could claim that he or she has suffered substantial actual damages (for example, in the case of a

purchase money mortgage, the consumer might claim that he would not have lost his down payment if only the lender had rejected him for the loan). The theories upon which consumers will claim "actual damages" are also nearly impossible to determine in light of the lack of experience that courts, consumers and industry have with this theory. The impact of potential damages is swelled by the fact that ability-to-repay can be brought up after the three year statute of limitations in instances of recoupment at foreclosure. ABA has confidence that the plaintiff's bar will exercise its considerable creativity in developing and testing numerous theories for recovery.

- **The Bureau seeks comment on whether any additional factors should be considered in assessing the litigation-related costs associated with the ability-to-repay requirements.**

The Bureau should assess the effects of increased litigation upon a bank's consideration of whether to engage in mortgage lending activities at all. Lenders today already make relatively little profit on each loan they originate—the Mortgage Bankers Association's 2012 Quarterly Performance Report calculated such profit at an average of $1,654 per loan. In this sense, it is not enough to look to litigation and legal costs in a vacuum—the analysis is whether, given the increased legal risks associated with mortgage loans post-Dodd-Frank, the benefits (or profits from a loan) outweigh the costs (or potential losses from litigation).

Using the survey results from our Survey of ABA Chief Real Estate Lending Officers and Bank Attorneys, it would take 60.46 completed mortgage loans to pay for one challenge that draws a bank into litigation (average per case cost to defend, per case, at $100,000). Of course, the loans most likely to lead to an ability-to-repay lawsuit will be loans underwritten to the lowest credit standards. As a result, the loans that banks and other lenders will eliminate first are the loans most likely to default, so most industry participants expect that these rules will cause lenders to further tighten underwriting standards and either provide mortgage credit only to the best customers (meaning either on the basis of creditworthiness or overall profitability to the bank) or exit mortgage lending altogether if these limits lead to insufficient volume to pay for the compliance and operational structure necessary for the complexities of the current mortgage marketplace. Our ABA survey reveals that some institutions are considering this option now, in light of potential compliance and litigation costs associated with the ability-to-repay requirement. We assume that others will follow unless the risk-reward structure of the market clarifies in a positive way.

- **The Bureau seeks comment and data on any other potential costs of ability-to-repay litigation, including: (a) Costs associated with risks that loans are "put back" to originators by secondary market participants due to a potential ability-to-repay claim or proven violation. Factors that may determine the total cost of put backs may include: (i) Number and type of representation and warranty provisions in purchase and sale agreements going forward; (ii) number of loans that could potentially be put back; (iii) frequency of put backs being realized; and (iv) cost to lender net of any recovery through foreclosure or sale.**

ABA appreciates that the Bureau is considering investor impact. We believe it is important that the CFPB consider the potential for secondary market investors to increase their repurchase demands (also known as "put-backs" or "buy backs") after the CFPB's ability-to-repay requirements become effective.[6]

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[6] A repurchase demand is typically triggered when a secondary market seller/originator is alleged to have breached at least one of the numerous representations and warranties that it made to the secondary market purchaser. In its most common form, the secondary market purchaser will require the originators to take back a loan where there is

As with all legal requirements, a failure to comply with ability-to-repay requirements will inevitably lead to a repurchase request on a loan that presumably is not paying and for which the lender is liable for the substantial penalties. In the current market, even just a claim that there was a violation of applicable law in the origination of the loan will lead to a repurchase demand, as the purchaser will seek to have the seller deal with the consumer's claim. We expect sellers to reject these demands in many cases, taking the position that no violation occurred and that the consumer's claim is frivolous. It is very difficult to predict how these repurchase negotiations will proceed between buyers and sellers of loans. It is also possible that loan purchase agreements will be amended to address specifically how the buyer and seller will handle loans on which an ability-to-repay claim has been made, much as such agreements were amended to address the numerous state high costs laws as they were enacted in the late 1990s and early 2000s (most typically to add specific representations that none of the loans met the definition of any state high cost loan law).

The Bureau has also requested comment on the resale value of these loans once repurchased. Although there have been "scratch and dent" markets for many loan types, we expect that these repurchased loans would have little value to the repurchaser because, even using a very simple calculation of loan value on a defaulted loan of (A) collateral value, less (B) the cost of litigation, and further less (C) some percentage likelihood times the potential penalties. In most cases, we would expect the total to be a negative number or close enough so as not to merit the significant due diligence costs that would attend the purchase of such loans. As a result, we do not expect a robust market to form to purchase such loans.

ABA is also concerned that secondary market purchasers will adopt very stringent repurchase policies and practices regarding compliance with the ability-to-repay requirements. To the extent that the rule does not set numerical limits (for example, if the rule does not set a standard debt-to-income ratio or residual income level), secondary market purchasers are expected to set such standards in an effort to limit their risk. Such secondary market reactions are somewhat unpredictable and could have unintended consequences for banks and their customers. A community bank that really knows a customer might be willing to stretch some underwriting standards based on its knowledge of the consumer and his or her demonstrated ability to pay, or job prospects, or other factors known to a local bank. That loan, however, is unlikely to be saleable on the secondary market as the secondary market purchaser will not have (and structurally cannot have) the intimate knowledge of the customer needed to make that judgment. This means that such a loan will most likely have to be held in portfolio with attendant bank capital standing behind it.

We also note that current proposals related to Basel 3 will require significantly extra capital to be held by originators that sell loans to secondary market purchasers. The accruals will have to be maintained to address this financial risk even though the borrower defaults occur years after origination – a period of time that surely indicates that such underwriting deficiencies were insignificant. Repurchase demands are therefore a sensitive and critical issue to ABA members.

In summary, ABA is very concerned that the volume of repurchase demands will increase after the ability-to-repay rules become effective. The following points summarize why we anticipate that repurchase risk will increase—

1. Assignee Liability. When purchasing mortgages and trading in mortgage-backed securities, secondary market participants rely on the seller's contractual representations and warranties regarding the characteristics of the loans being sold. Among other things, sellers represent and

early default, fraud in the transaction, faulty origination documents, or misrepresentation of the creditworthiness of the mortgagor or appraised value of the property.

warrant that the mortgages comply with the purchaser's credit standards and all applicable laws and regulations, including laws, regulations, and guidance prescribed by the seller's regulator.

Section 1413 of Dodd-Frank subjects loan assignees to liability under the ability-to-repay provisions by allowing the consumer to assert the violation as a defense to a foreclosure or collection action.[7] As a result, the assignee liability repercussions of Dodd-Frank increase the risk that assignees will incur losses associated with the ability-to-repay rules. As noted above, where there is an ability-to-repay claim or a proven violation of the ability-to-repay requirement, we believe that secondary market purchasers will demand that the seller repurchase the loan in question due to a breach of contractual representations and warranties regarding compliance with the ability-to-repay rules.

2. <u>Risk of Inadvertent Non-Compliance</u>. The proposed ability-to-repay rules involve documentation and underwriting "consideration" requirements of such exhaustive detail that certainty of compliance may never be entirely assured. ABA is concerned that inadvertent errors or omissions from a loan file (e.g., an explanation of the seasonality of an income stream or the proper identification of the precise tax applicable) will be viewed as an irreparable breach of the law and, therefore, a breach of a seller's representations and warranties. ABA is concerned that this legally-mandated focus on the technical components of the loan file will significantly increase repurchase demands involving loans with inadvertent errors or immaterial omissions from the loan file.

   Further, even if the proposed verification requirements are satisfied, an assignee could still challenge whether the information obtained was fully and adequately "considered" by the originator. The term "consider" is not in itself defined in the proposed regulations, and could encompass calculations pertaining to non-economic borrower status or possibly, broader market and/or economic settings or trends surrounding the origination.

   It is admittedly speculative whether these challenges will arise, but it is also clear that the ability-to-repay requirements have transformed underwriting decisions into regulatory considerations that require compliance assurances.

3. <u>No Causal Connection Required</u>. As described above, the ability-to-repay rules do not require that there be a link or "causal connection" between the alleged breach of an ability-to-repay factor and the actual cause of the borrower's delinquency. As a result, small mistakes could allow an assignee to demand that the seller repurchase the loan—even in instances where an alleged oversight does not cause harm or is not related to the breach that brings about a dispute. We do not believe that it is desirable public policy to impose the full economic risk (including default risk) upon the seller for minor, unintentional, and correctable deficiencies in a loan file.

In addition to the likelihood for increased repurchase demands, ABA notes that ability-to-repay litigation will also substantially lengthen foreclosure timelines because the challenge has to be addressed before the lender will be able to continue the foreclosure. As we have noted, the degree to which the timelines will be affected will be governed by the legal standard the Bureau determines to be appropriate. If the Bureau

[7] Specifically, a violation of the ability-to-repay rule subjects both the originator and the assignee to the TILA remedies, as well as the enhanced civil remedies that apply to violations of TILA's high-cost loan (HOEPA) rules. In addition, borrowers in foreclosure proceedings may assert "ability-to-repay" violations as defense by way of recoupment or set off, without regard to the normal statute of limitations under TILA. The risk of such foreclosure defenses will therefore accrue to the secondary market participant that holds the loan at the point of default or foreclosure.

provides a "safe harbor" for qualified mortgages, a lender will be able to rapidly gather and provide to a court a summary judgment motion attaching the documentation proving that the loan was a qualified mortgage and thus does not enjoy the special protections afforded by the defense to foreclosure. We expect that this will lengthen the timeline by several months in most court systems – maybe more in crowded dockets. On the other hand, because of the difficulties involved in swiftly providing the court with the necessary documentation for ending a "rebuttable presumption" case, we would expect the challenge to add a year to the timeline in most jurisdictions, more in the most crowded dockets.[8] This places further costs on both investors, which do not get to realize on the security for many additional months, and servicers, which must maintain properties for even longer periods.

Additional Issues for CFPB Consideration

ABA requests that CFPB focus on the following important issues in its final rule.

1. *Fair Lending*: Without doubt, fair lending has become the top enforcement priority of the current Administration and the current Bureau leadership. ABA members are committed to providing qualified borrowers with equal access to credit. We ask, however, that the Bureau commit to working with banks to achieve greater clarity and more consistent results. We ask that the Bureau commit to facilitating banks' compliance efforts by adequately defining the interplay of the ability-to-repay rules and fair lending principles.

   ABA believes that this is a crucial element that must be addressed in any final rule dealing with repayment ability. As ABA identified in its July 2011 comments, the very core of the Qualified Mortgage rulemaking is to codify sensible mortgage underwriting standards and to discourage creditors from making mortgage loans outside of those standards. By design, therefore, these ability-to-repay rules narrow the alternatives to "safer" categories of loans. Such a structure, when imbedded in law, will reduce the diversity of lending products and will diminish banks' abilities to tailor financial products to fit consumers' specific needs.

   The Bureau cannot turn a blind eye to this very significant dilemma—the rigidity of these rules will mean that individuals and populations with damaged or undeveloped credit will likely be excluded from the QM portions of the market, and that will mean significantly more expensive credit, or worse, no credit at all. These distinctions will be made even within the Qualified Mortgage marketplace. All Qualified Mortgage loans will not have the same risk of default, and many banks will – justifiably – not wish to face a single lawsuit alleging that the bank made a loan that the consumer did not have the ability-to-repay.

   In our initial comments to the Bureau on this rulemaking, ABA asked that "regulators be cognizant of this point and remain vigilant of the real world impact that these new provisions will have on communities all across America." After further consultation with members and legal experts, ABA now urges more than mere recognition and vigilance. For purposes of safety and soundness, in order to achieve appropriate and orderly oversight of lending practices, in order to guard the reputational risk of the entire industry, and in order to ensure adequate levels of funding to all populations, ABA requests that the Bureau adequately discuss and define the appropriate and feasible interplay between discriminatory lending and ability-to-repay requirements.

[8] According to a RealtyTrac report, as of the end of the Third Quarter in 2011, it took 986, 974 and 748 days to complete a foreclosure in New York, New Jersey and Florida, respectively. *See* http://www.realtytrac.com/content/news-and-opinion/third-quarter-2011-top-state-foreclosure-timelines-6892

The Bureau must, for instance, carefully articulate its views on the unavoidable disparate impact that will result from the legal necessity to limit lending to Qualified Mortgage segments only. The Bureau must address the legal analysis that will apply to premium pricing in instances where lenders dare to lend outside of the Qualified Mortgage boundaries. We urge that these crucial clarifications be part and parcel of any final rule issued by the Bureau. We are not pointing out mere probabilities or hypothetical scenarios—we are referring to obvious discrepancies that are absolutely certain to arise. Ignoring or overlooking the disparate effects of this regulation will exacerbate a very crucial issue of basic fairness and will only create more confusion and disharmony in an already unsettled and highly charged issue area.

2. *Implementation Time Frames*: ABA believes that this rulemaking will demand significant implementation efforts and will therefore require expanded time periods for compliance. ABA asks that the Bureau set a compliance date of, at minimum, 18 months from the issuance of the final rule.

   ABA advances this request by noting that this rulemaking concerns loan underwriting—the most fundamental element in lending and one that will cause ripple effects across bank functions involving origination, settlement and regulatory compliance. These ability-to-repay requirements will force banks to re-analyze their product lines, retrain staff, and reorganize the processing and administrative elements of their mortgage operations. Banks will be required to make very broad system adjustments at many levels. As ABA expressed in its previous comments to the Bureau, the technology systems that ensure proper compliance with regulations and that generate the proper disclosures for individualized transactions are integrated rather than isolated. A change in a bank's documentation requirements or qualifying considerations will force a change in the compliance software. These changes must be identified, incorporated into existing systems, and tested to ensure that they respond adequately to all product lines.

   There is no question that these rules will force broad scale changes to lending guidelines—as we describe above, secondary market players and investors will have to ensure that none of the loans they purchase fall outside the standards set forth by this rulemaking. The administrative and quality assurance efforts that must be devoted to these investor guideline changes demand considerable implementation resources. Depending on the final shape of the regulations, the ability-to-repay changes will require a reconsideration of most product lines as well as their pricing. Finally, it is important to realize that the scope of the reformation undertaken here will require that regulators develop new enforcement procedures and interpretative guidelines, and examination staff will have to develop new examination procedures for all their visits.

   In summary, the scope of this rulemaking is tremendous, and ABA asks that the Bureau offer implementation periods that are commensurate with the scope and significance of this rulemaking.

Conclusion

Generally, ABA believes that the FHFA data is a relevant and reliable source of information, although we urge that the Bureau fully consider the specific data limitations outlined above and utilize additional data such as that available from FHLB and VA loan purchases.

ABA also believes that the Bureau is properly considering this market data in connection with the legal and litigation risks that are imposed by these new regulatory provisions. The Dodd-Frank Act imposes

enormous levels of liability for breaches and, as confirmed by our banker surveys, these risks are actual, ascertainable, and will dramatically affect lenders' calculations on the risks associated with mortgage lending.

The Dodd-Frank Act's ability-to-repay provisions contain the most consequential policy implications of any other mortgage-related regulation. As expressed above, this rule will effectively delineate the scope of residential mortgage lending across all market segments, making it imperative that these provisions be thoroughly weighed and accurately considered. ABA commends the Bureau's commitment in soliciting further public input, and encourages careful data analysis in the efforts to finalize these new provisions.

Sincerely,

Robert R. Davis

ABA Attachments

1. Annual ABA Real Estate Survey
2. DTI Survey Chart
3. 2012 Bank Attorneys and Officers Survey
4. Buckley-Sandler Litigation Outcomes Opinion

Attachment 1

Where is the Volume Going?
A Historical Perspective

Percentage of originations sold to each of the following buyers

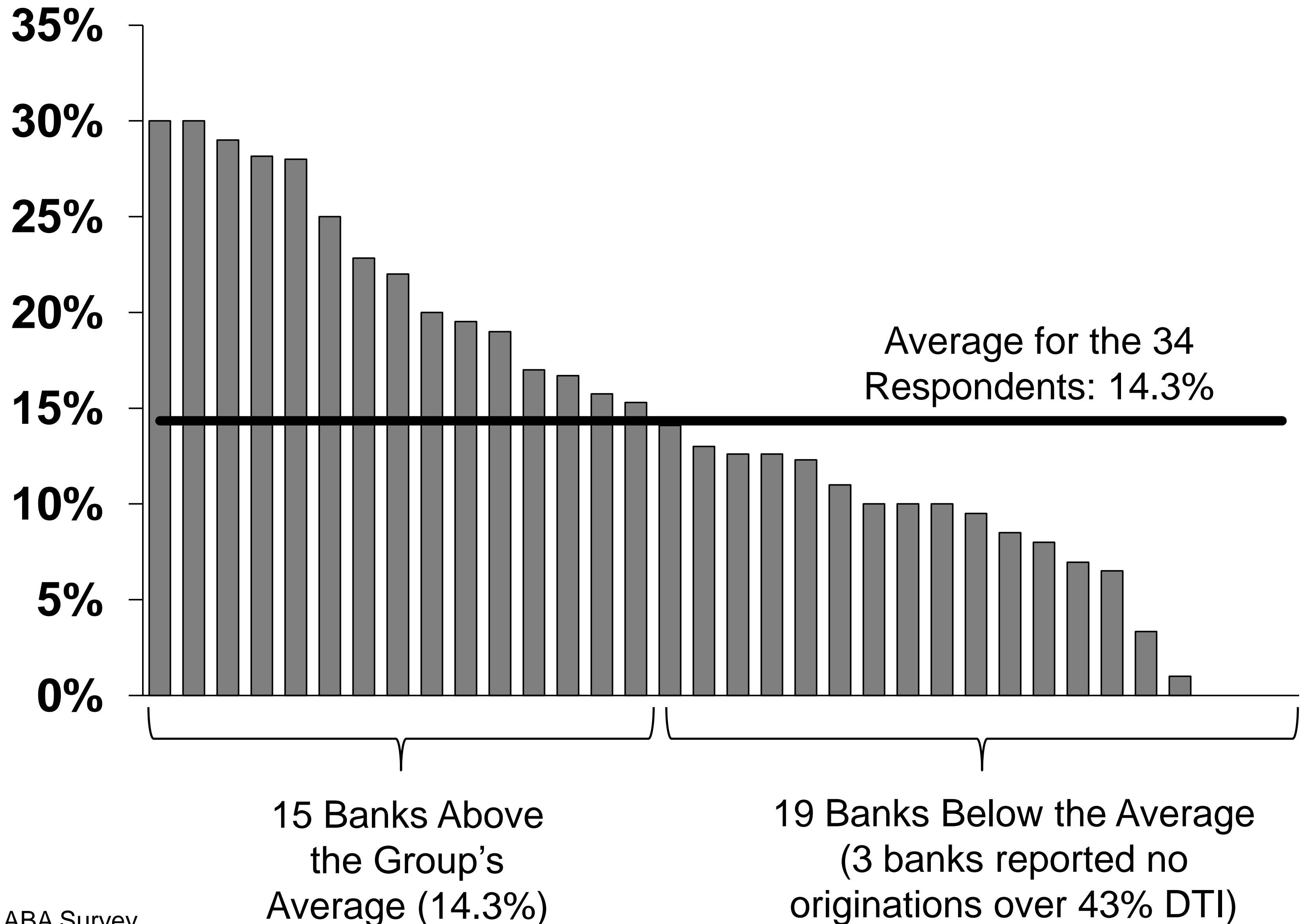
	2011	2010	2009	2008	2007	2006	2005	2004	2003
Conduits/Wholesalers	17%	22%	19%	10%	15%	10%	14%	15%	11%
Fannie Mae	15%	13%	12%	5%	4%	3%	7%	8%	16%
Freddie Mac	13%	15%	17%	5%	8%	6%	7%	10%	16%
FHLB MPF/MPP	7%	5%	5%	4%	2%	2%	4%	3%	3%
Other	7%	8%	4%	2%	3%	2%	1%	6%	1%

Source: 19th Annual ABA Real Estate Lending Survey. Data provided by 185 participating banks for calendar year 2011.

American Bankers Association.

Attachment 2

Share of Originations at or Above 43% DTI



Source: ABA Survey

Share of Originations at or Above 43% DTI

Originations between Oct 1, 2010 and April 1, 2012

Share of Originations at or Above 43% DTI

High: 30%	Low: 0%
Average: 14.3%	Median: 12.8%

34 Respondents' Asset Range:

High: +$1 Tril.	Low: $106 Mil.
Median: $1.08 Bil.	Average: $43.9 Bil.

Source: ABA Survey

Attachment 3

June 29, 2012

Survey of ABA Chief Real Estate Lending Officers and Bank Attorneys

Risks to Banks and Consequences under Proposed Ability to Repay/Qualified Mortgage (QM) Standards

* Chief real estate lending officers and bank attorneys were surveyed in a representative sample of 51 ABA member banks during the week of June 25, 2012.

1. On average, please estimate the historical cost of litigation of all types, on a per case basis, where your bank prevailed at the summary judgment stage: (answered only by bank attorneys)

#	Answer	Min Value	Max Value	Average Value	Median Value
1	per case	$10,000.00	$75,000.00	$25,000.00	$20,000.00

2. By comparison, what has been the historical cost of litigation, on a per case basis, where your bank prevailed and the case was fully litigated? (answered only by bank attorneys)

#	Answer	Min Value	Max Value	Average Value	Median Value
1	per case	$10,000.00	$400,000.00	$100,000.00	$75,000.00

3. What effect do you think a rebuttable presumption standard would have on the use of risk-based pricing methodologies?

#	Answer	%
1	No change	2%
2	Small change in fee structure to offset litigation risk	46%
3	Significant change in fee structure to offset litigation risk	52%
	Total	100%

4. What effect do you think a QM with a rebuttable presumption standard (as opposed to a safe harbor) would have on underwriting methodologies?

#	Answer	%
1	No change	0%
2	Somewhat more conservative underwriting	29%
3	Significantly more conservative underwriting	71%
	Total	100%

5. If there is a rebuttable presumption rather than a safe harbor in QM, would there be:

#	Answer	%
1	Little change in your bank's commitment to mortgage lending?	19%
2	A modest reduction in mortgage lending	26%
3	A significant reduction in mortgage lending	45%
4	Potential exit from the mortgage business	10%
	Total	100%

Attachment 4

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Rebuttable Presumption vs. Safe Harbor: What Practical Difference Does It Make?

March 22, 2012

INTRODUCTION

Section 1411 of the Dodd-Frank Act[1] amends the Truth in Lending Act ("TILA") to require any closed-end residential mortgage lender to consider a borrower's ability to repay. In particular, Section 1411 prohibits such a lender from making a residential mortgage loan unless the lender "makes a reasonable and good faith determination … [that] the consumer has a reasonable ability to repay the loan."[2] In the next section of Dodd-Frank, Congress created a "safe harbor and rebuttable presumption," which provides that a "qualified mortgage" will meet this ability-to-repay standard.[3] Taken together, these TILA provisions contemplate minimum underwriting standards, but grant lenders some degree of protection if they meet those standards.

The Consumer Financial Protection Bureau ("CFPB") is now in the process of crafting regulations to implement the ability-to-repay provisions. Consequently, mortgage industry participants, financial regulators, and the public are negotiating the contours of the qualified mortgage exemption. Among other things, these parties must determine whether the qualified mortgage exemption should (a) provide a safe harbor or (b) give rise to a rebuttable presumption.

This issue is not merely a matter of semantics. TILA will allow borrowers to assert purported violations of the ability-to-pay requirement in suits for damages and as a defense to a foreclosure proceeding.[4] The ultimate choice between a safe harbor and a presumption will significantly affect the timeframes (and perhaps outcomes) of this expensive TILA litigation. Moreover, the scope of the exemption could directly affect the availability and affordability of credit to borrowers.

This white paper focuses on the consequences for expected litigation, describing litigation paths for ability-to-repay litigation in federal courts under two scenarios: (1) a

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1 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 (2010), 124 Stat. 1376 ("Dodd-Frank").

2 15 U.S.C. § 1639C(a).

3 *See id.* § 1639C(b).

4 *Id.* § 1640.

scenario in which the qualified mortgage provision creates only a rebuttable presumption of compliance, and (2) a scenario in which the qualified mortgage provision provides a safe harbor to the lender. **As explained below, a rebuttable presumption would be largely useless to lenders at the pleadings stage and provide only a limited defense at the summary judgment stage (or even at trial). In contrast, a "safe harbor" could allow for early disposition of non-meritorious cases at the summary judgment stage and—perhaps—at the motion to dismiss stage.**

I. THE CONTEXT: THREE TYPES OF ABILITY-TO-REPAY CHALLENGES

Even though Section 1411 creates a new right under TILA, we can easily foresee essentially three types of ability-to-repay challenges that a borrower might make.[5] In the first type of challenge, a borrower might take issue with either (a) the entire actual standard used by the lender to determine a borrower's ability to repay or (b) one or more specific aspects of that standard. In the latter two types, a borrower could assert that the lender violated Section 1411, notwithstanding the lender's use of the correct ability-to-repay standard. Each of these challenges is considered in turn.

A. Challenges to Ability-to-Repay Standards Themselves

In the first type of challenge, a borrower might allege that the standard used by the lender to determine his ability to repay was inappropriate, even if the borrower met the standard. Imagine, for example, a lender who used a debt-to-income ratio ("DTI") limit of 55% to determine a borrower's ability to repay. If a borrower fell below that limit (perhaps with a DTI of 53%), then the borrower might challenge the limit as inappropriately high. The borrower could then ask that the court or jury to determine that the borrower did *not* have ability to repay, notwithstanding the fact that he or she met the lender's underwriting standards.

The regulators could address this category of challenges by providing guidance in the regulation or staff commentary. For instance, if the CFPB were to indicate that a certain DTI would definitively be viewed as meeting the ability-to-repay standard, this type of challenge would fail. If, however, the guidance is less definitive (*e.g.*, a certain DTI is only *presumed* to be appropriate)—or no such guidance is provided—lenders will not be able to select (at least with any confidence) any underwriting guidelines sufficient to defeat an ability-to-repay challenge. Consider again the issue of DTI. Would a lender be "safe" using the DTI standards set forth by the Department of Veterans Affairs for the loans it guarantees? Should the lender instead use the DTI standards set forth by the Federal Housing Administration for the loans it insures? Perhaps the lender should apply the standards set by the government-sponsored enterprises for the loans that they purchase and securitize? Or should the lender instead use the DTI standards set by the Department of the Treasury for a HAMP modification?

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[5] Borrowers will conceive and attempt other types of challenges; this paper simply discusses three expected forms of such challenges.

B. Challenges to the Application and Use of Ability-to-Repay Standards

In a second type of challenge, a borrower might allege that—even if the lender's standard was appropriate for determining that the borrower had an ability to repay the loan—the borrower did not meet that standard. For example, a borrower might claim that he or she did not actually meet the lender's unchallenged DTI standard because the lender did not properly calculate the borrower's income. This kind of calculation challenge (*e.g.*, "the lender should have discounted my overtime income even using its own guidelines") would be available even if the CFPB creates a safe harbor for a certain DTI level. In the instance of a safe harbor, this type of challenge would simply allege that the loan was not actually within the safe harbor.

In a third type of foreseeable challenge, a borrower might allege that—even if the lender's standard was appropriate for determining that the borrower had an ability to repay the loan—there was other extrinsic evidence that the lender should have used to determine the borrower could not repay the loan. Here, a borrower might claim that she had informed an employee of the lender (or even a loan broker) that she had (or her co-borrower had) an unstable job, or that the bonus or overtime income was inconsistent, or that self-employment income prospects were weakening. Alternatively, the borrower could claim that a certain DTI was inappropriate for her in light of her prior loan history, even if that DTI might be appropriate for borrowers generally. For instance, the borrower might have shown in a past loan that she was unable to meet her obligations at a similar or lower DTI.[6] Fortunately, a safe harbor would generally foreclose this type of challenge, as the lender would be able to document that the borrower met a set DTI guideline that is within the safe harbor.

II. THE REBUTTABLE PRESUMPTION: A LIMITED EVIDENTIARY TOOL

Some parties suggest that the qualified mortgage provision should give rise to only a rebuttable presumption, rather than a safe harbor. The consequences of such an approach depend on two principal concepts: (1) how a presumption is defined and (2) how courts treat such presumptions at various stages of litigation.

A. What Is A Rebuttable Presumption?

Neither the Federal Rules of Evidence nor the Federal Rules of Civil Procedure specifically define the term "presumption."[7] Generally, however, the term refers to "an

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[6] For instance, the borrower might have defaulted and needed a loan modification to take her from 38% to 28% DTI. The borrower could then contend that she had shown she could not make payments at a 38% DTI and the lender should have known this.

[7] This white paper focuses on the standards and principles applicable in federal court. State courts often apply similar standards, but there are state-by-state variances that cannot be fully addressed here. *See* Joel S. Hjelmaas, *Stepping Back from the Thicket: A Proposal for the Treatment of*

assumption of fact resulting from a rule of law which requires such fact to be assumed from another fact or group of facts found or otherwise established in the action."[8] In one sense, a presumption provides the party it benefits with an evidentiary head start: it can be thought of as a tool to give a party "the luxury of not having to produce specific evidence to establish the point at issue."[9]

Although a definition is useful, the "[t]he difficulty lies not so much in deciding what a presumption is, but in determining what a presumption does."[10] Federal Rule of Evidence 301 explains how presumptions operate in federal civil cases. Specifically, "the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption," while the actual burden of persuasion remains the same. Several courts have described this rule as embodying a "bursting-bubble" theory of presumptions.[11] Under that theory, a presumption disappears from the case once the party opposing it summons sufficient evidence:

> Rebuttable presumptions are rules of law attaching to proven evidentiary facts certain procedural consequences as to the opponent's duty to come forward with other evidence. … As Dean Wigmore has explained, the peculiar effect of a presumption of law (that is, the real presumption) is merely to invoke a rule of law compelling the trier of fact to reach a conclusion in the absence of evidence to the contrary from the opponent. If the opponent does offer evidence to the

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Rebuttable Presumptions and Inferences, 42 Drake L. Rev. 427, 450-51 (1993) ("Treatment of rebuttable presumptions in the states has been far from uniform[.]"). Even in state courts, however, the court would be interpreting a presumption created by federal law.

8 *ITC Ltd. v. Punchgini, Inc.*, 482 F.3d 135, 148 (2d Cir. 2007); *see also* Hjelmaas, *supra* note 7, at 430-31 (1993) ("A rebuttable presumption is a legal fiction that allows the finder of fact to determine the existence of one fact (the presumed fact), for which there may be no direct evidence, upon presentation of proof of other facts (the basic facts). Once the basic facts supporting the rebuttable presumption are established, the existence of the presumed fact will be assumed until the opposing party meets a specific burden to challenge the existence of the presumed fact. A rebuttable presumption is "coercive: once the basic facts are established, the trier of fact is compelled to find the ultimate fact unless evidence of the nonexistence of the ultimate fact has been introduced." (internal marks and footnotes omitted)).

9 *Routen v. West*, 142 F.3d 1434, 1440 (Fed. Cir. 1998).

10 D. Craig Lewis, *Should the Bubble Always Burst? The Need for Different Treatment of Presumptions Under IRE 301*, 32 Idaho L. Rev. 5, 5 (1995) (quoting Jack B. Weinstein, et al., *Weinstein's Evidence* § 300-1 (1982)).

11 *See, e.g.*, *City of Arlington v. FCC*, 668 F.3d 229, 256 (5th Cir. 2012); *McCann v. Newman Irrevocable Tr.*, 458 F.3d 281, 287-88 (3d Cir. 2006); *Nunley v. City of Los Angeles*, 52 F.3d 792, 796 (9th Cir. 1995); *A.C. Aukerman Co. v. R.L. Chaides Const. Co.*, 960 F.2d 1020, 1037 (Fed. Cir. 1992). The bursting bubble theory is to be contrasted with the Morgan theory, which provides that presumptions shift both the burden of proof and persuasion to the opposing party; the resisting party must provide evidence establishing his fact is *more probable* than the presumed fact. *See, e.g.*, *Pennzoil Co. v. FERC*, 789 F.2d 1128, 1138 (5th Cir. 1986).

> contrary (sufficient to satisfy the judge's requirement of some evidence), the presumption disappears as a rule of law, and the case is in the factfinder's hands free from any rule. As more poetically the explanation has been put, presumptions may be looked on as the bats of the law, flitting in the twilight, but disappearing in the sunshine of actual facts.[12]

Put more directly, a presumption exists to fill "factual vacuum," but drops out of a case once the party opposing it produces some amount of contrary evidence.[13] This is not to suggest that the evidence giving rise to the presumption actually drops out of the case. Although the presumption might disappear, that evidence can still be used in the case to support the presumed fact.[14]

B. How Do Rebuttable Presumptions Operate in Federal Litigation?

A rebuttable presumption might be relevant to three key stages of litigation: (1) on a motion to dismiss for failure to state a claim (*i.e.*, the pleadings stage), (2) on a motion for summary judgment, or (3) at trial.[15] To understand how the presumption operates at each stage, one must first understand the basic standards applicable at each step.

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[12] *Legille v. Dann*, 544 F.2d 1, 6 (D.C. Cir. 1976) (footnotes and internal marks omitted).

[13] *See, e.g.*, *Combo Mar., Inc. v. U.S. United Bulk Terminal, LLC*, 615 F.3d 599, 605 (5th Cir. 2010); *City of Chicago v. M/V Morgan*, 375 F.3d 563, 572 (7th Cir. 2004); *see also A.C. Aukerman Co.*, 960 F.2d at 1038 ("In other words, the evidence must be sufficient to put the existence of a presumed fact into genuine dispute. The presumption compels the production of this minimum quantum of evidence from the party against whom it operates, nothing more").

[14] *McCann v. Newman Irrevocable Trust*, 458 F.3d 281, 288 n.5 (3d Cir. 2006); *Am. Online v. AT&T Corp.*, 243 F.3d 812, 818 (4th Cir. 2001) ("Although evidence rebutting the presumption may neutralize the presumption itself—i.e., that the burden of proof on the fact giving rise to the presumption has been met without rebutting evidence—it does not eliminate from the case the evidence itself that gave rise to the presumption.").

[15] Theoretically, a defendant might also attempt to use the qualified mortgage provision in bringing a motion for judgment on the pleadings. *See* Fed. R. Civ. P. 12(c). But the Rule 12(c) motion has few—if any—advantages over motions to dismiss or motions for summary judgment and would not present significantly different issues. 5C Charles Alan Wright, et al., *Federal Practice and Procedure* § 1369 (3d ed. 2011 supp.) ("At this point in time the Rule 12(c) motion is little more than a relic of the common law and code eras."). Accordingly, this white paper does not consider the Rule 12(c) motion.

1. Motion to Dismiss for Failure to State a Claim.

The purpose of a motion to dismiss for failure to state a claim is to test the sufficiency of the complaint,[16] not to determine whether the plaintiff will ultimately prevail on his claim.[17] Thus, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face."[18] Even under this plausibility standard, however, a court is not free to engage in broad factual inquiry beyond the complaint. Factual allegations (as opposed to legal conclusions) must be taken as true,[19] and matters outside the pleadings generally cannot be considered—at least without converting the motion to a motion for summary judgment.[20]

Because the motion to dismiss stage does not allow the weighing of *evidence*, "courts have [usually] refused to consider presumptions in favor of the defendant on a motion to dismiss."[21] Courts seem to refuse for three basic reasons. *First*, many courts reject the use of presumptions at the pleading stage out-of-hand, "since presumptions are evidentiary standards that are inappropriate for evaluation at the pleadings stage."[22] The U.S. Court of Appeals for

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16 *See, e.g.*, *Herebian v. Berv*, 644 F.3d 122, 130 (2d Cir. 2011); *Godin v. Schnecks*, 629 F.3d 79, 89 (1st Cir. 2010); *Riverview Health Inst. LLC v. Med. Mut. of Ohio*, 601 F.3d 505, 512 (6th Cir. 2010); *Presley v. City of Charlottesville*, 464 F.3d 480, 483 (4th Cir. 2006).

17 *See Skinner v. Switzer*, 131 S. Ct. 1289, 1296 (2011).

18 *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quotation marks and citation omitted).

19 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007); *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 515 (1972).

20 Fed. R. Civ. P. 12(d). Of course, there are certain limited circumstances where a court may consider "extrinsic" matters. For instance, the court may consider any document the plaintiff attaches to his complaint. Likewise, if a document is central to the plaintiff's claim or otherwise relied upon by him, it may be considered (even if it is not attached), as long as the document's authenticity is not in dispute. And the court can consider facts of which it can take judicial notice. *See, e.g.*, *Schatz v. Republican State Leadership Comm.*, 669 F.3d 50, 52 (1st Cir. 2012); *Braun v. Maynard*, 652 F.3d 557, 559 n.1 (4th Cir. 2011); *Kerber v. Qwest Group Life Ins. Plan*, 647 F.3d 950, 959 (10th Cir. 2011); *DiFolco v. MSNBC Cable LLC*, 622 F.3d 104, 111 (2d Cir. 2010).

21 *See* 5B Charles Alan Wright, et al., *Federal Practice and Procedure* § 1357 (3d ed. 2011 supp.).

22 *Id.*; *see also, e.g.*, *Ibrahim v. MortgageIT, Inc.*, No. 11–0802 SBA, 2011 WL 2560233, at *6 (N.D. Cal. June 28, 2011) ("By definition, a rebuttal presumption involves consideration of *evidence* to determine whether the presumption has been rebutted."); *Boltz-McCarthy v. Boltz*, No. 1:10-cv-00215-jgm, 2011 WL 1361913, at *2 (D. Vt. Apr. 11, 2011); *In re Regions Morgan Keegan ERISA Litig.*, 6692 F. Supp. 2d 944, 953-54 (W.D. Tenn. 2010); *United States v. Town of Lake Park, Fla.*, No. 09-80507-CV, 2009 WL 3667071, at *4 (S.D. Fla. Oct. 23, 2009) ("The appropriate method to challenge the rebuttable presumption of the evidentiary validity of the 2000 Census data is through a presentation of competent evidence to the contrary, either at the summary judgment or trial stage of the litigation." (internal marks and citations omitted)); *Haywood v. Fremont Inv. & Loan*, No. 08 Civ. 4961, 2009 WL 706090, at *1 (E.D.N.Y. Mar. 16, 2009) ("[R]ebuttable presumptions will rarely

the Ninth Circuit took this approach in a recent TILA case concerning a required notice of the right to rescind a mortgage loan.[23] There, the Ninth Circuit rejected the defendant's effort to invoke a presumption on a motion to dismiss stemming from the borrower's signed acknowledgment of receiving the notice. In the Ninth Circuit's view, presumptions "are rebutted by evidence" and "the time for presenting evidence ha[d] not yet arrived."[24] *Second*, courts have concluded that rebuttable presumptions are premised upon extrinsic documents that cannot be considered on a motion to dismiss.[25] *Third*, and lastly, courts have sometimes found that a plaintiff's contrary allegations in his complaint are enough to defeat the presumption because those allegations must be taken as true.[26] The U.S. District Court for the District of Maryland applied this logic in *DeCosta v. U.S. Bancorp*.[27] In that case, a lender again presented an acknowledgment that gave rise to a rebuttable presumption that the borrower had received certain required notices of right to rescind. Nevertheless, the court observed that the plaintiffs' complaint "allege[d] that they received only one copy of the notice … instead of the requisite two" and concluded that "that factual allegation [wa]s enough" to defeat a motion to dismiss.[28]

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have any effect on a Rule 12(b) (6) motion; by definition, they involve a weighing of the evidence and thus play no role on a motion directed to the pleadings."); *Glucksman v. First Franklin Fin. Corp.*, 601 F. Supp. 2d 511, 514 (E.D.N.Y. 2009); *In re Hopkins*, 372 B.R. 734, 749 (Bankr. E.D. Pa. 2007); *In re Excel Energy, Inc. Sec., Derivatives, & "ERISA" Litig.*, 312 F. Supp. 2d 1165, 1180 (D. Minn. 2004).

[23] *Balderas v. Countrywide Bank, N.A.*, 664 F.3d 787 (9th Cir. 2011). Regulation Z requires lenders to give borrowers notice of their right to rescind certain mortgages; when this notice is given in written form, the borrower must get two copies. 12 C.F.R. § 226.23(b)(1). If the borrower signs a written acknowledgment that he received the notices, that acknowledgment creates "a rebuttable presumption of delivery thereof." 15 U.S.C. § 1635(c).

[24] *Id.* at 790.

[25] *See, e.g.*, *Geraghty v. BAC Home Loans Servicing LP*, No. 11–336 (JNE/TNL), 2011 WL 3920248, at *6 (D. Minn. Sept. 7, 2011) (calling a motion to dismiss premised on a signed borrower acknowledgment "premature" partly because the court could not "consider matters outside the pleadings"); *Ibrahim*, 2011 WL 2560233, at *6; *Solomon v. Falcone*, No. 09-2210, 791 F. Supp. 2d 184, 190 (D.D.C. 2011); *Morris v. Bank of Am.*, No. 09-2849, 2010 WL 761318, at *4 (N.D. Cal. Mar. 3, 2010).

[26] *See, e.g.*, *In re Kauffman Mut. Fund Actions*, 479 F.2d 257, 263 n.4 (1st Cir. 1973) ("The presumption[,] … whatever may be its effect at a trial, could not be used to contradict the complaint, if plaintiff is correct that the court so employed it."); *Smith v. United Residential Servs. & Real Estate, Inc.*, No. 10 C 5440, 2011 WL 3047492, at *3 (N.D. Ill. July 25, 2011); *Veera v. Ambac Plan Admin. Comm.*, 769 F. Supp. 2d 223, 230 (S.D.N.Y. 2011) (holding that plaintiffs' specific allegations were enough to rebut so-called *Moench* presumption on a motion to dismiss); *Briscoe v. Deutsche Bank Nat'l Trust Co.*, No. 08 C 1279, 2008 WL 4852977, at *3 (N.D. Ill. Nov. 7, 2008).

[27] No. DKC 10-0301, 2010 WL 3824224 (D. Md. Sept. 27, 2010).

[28] *Id.* at *4; *cf. Upshaw v. United States*, 669 F. Supp. 2d 32, 41 (D.D.C. 2009) (explaining that, to rebut rebuttable presumption that federal employee was acting within scope of his employment

As the cases described above reflect, courts have been especially likely to reject the use of presumptions at the motion to dismiss stage in the TILA context. There is nothing to suggest that a rebuttable presumption in an ability-to-repay case would be treated any differently. Although there have been occasional instances where courts have relied on rebuttable presumptions to dismiss a TILA complaint, those cases appear to be decidedly in the minority.[29]

Thus, if qualified mortgage status does no more than create a rebuttable presumption of lender compliance, that presumption will be of limited use at the motion to dismiss stage. Perhaps, in exceptional cases, lenders might attempt to argue that a plaintiff's claims of inability to repay are facially implausible. Yet that approach would require two circumstances unlikely to arise in a single case: (1) a plaintiff who included sufficient facts in his complaint to allow the defendant to make such a claim based on the complaint alone;[30] and (2) a court willing to take an especially aggressive approach to motions to dismiss. Such cases are likely to be rare and, in any event, would not be substantially aided by the presumption.

2. Motion for Summary Judgment.

The proposed rebuttable presumption might also be relevant at the summary judgment stage. "Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law."[31] Put differently, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial."[32] Where there is some genuine dispute over facts, the facts must of course be construed in the light most favorable to the nonmoving party, but a "metaphysical doubt" is not enough to create a genuine dispute.[33] And "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment."[34]

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created by government's certification that he was, plaintiff needed to allege specific "facts that, if true, would establish that the defendants were acting outside the scope of their employment").

29 *See Basham v. Fin. Am. Corp.*, 583 F.2d 918 (7th Cir. 1978) (affirming district court's dismissal of notice of rescission claim where lender presented written acknowledgment and borrower "failed to rebut this presumption by filing an affidavit or otherwise pleading further"); *Garcia v. Fannie Mae*, 794 F. Supp. 2d 1155, 1167 (D. Or. 2011) (listing cases wherein courts relied on TILA rebuttable presumption to dismiss complaint).

30 In other words, a plaintiff would need to "plead himself out" of federal court. *See, e.g.*, *Indep. Trust Corp. v. Stewart Info. Servs. Corp.*, 665 F.3d 930, 941-42 (7th Cir. 2012).

31 *Alabama v. North Carolina*, 130 S. Ct. 2295, 2308 (2010) (internal marks omitted).

32 *Ricci v. Destefano*, 129 S. Ct. 2658, 2677 (2009) (internal marks omitted).

33 *Scott v. Harris*, 550 U.S. 372, 380 (2007) (internal marks omitted).

34 *Id.*

If a rebuttable presumption could be used at the summary judgment stage, it might soften the blow of not being able to use the presumption at the motion to dismiss stage. Under amendments made to the Federal Rules of Civil Procedure in 2009 and 2010, a party may move for summary judgment at *any* time,[35] even at the "commencement of an action."[36] Thus, a lender could theoretically make an early motion for summary judgment, which would require the borrower to either (a) summon his contrary evidence to rebut the presumption or (b) file an affidavit (or declaration) specifically detailing the particular discovery he needs.[37]

Unfortunately, though, courts have struggled with how to handle rebuttable presumptions on motions for summary judgment.[38] Specifically, courts seem to require varying levels of evidence to rebut a presumption. Sometimes, a plaintiff's sworn statement is enough to rebut the presumption. Other times, some evidence beyond a borrower affidavit is required—but it often is not considerable evidence.[39] These different approaches render a summary judgment motion premised on any rebuttable presumption an unpredictable exercise to say the least.

The struggle probably stems from two competing interests. On the one hand, the bubble bursting approach to evidentiary presumptions seems to contemplate only a "minimal" burden for the rebutting party, as anything more would effectively shift the burden of persuasion.[40] On the other hand, judges have long been hostile to conclusory, self-serving affidavits on summary

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35 Fed. R. Civ. P. 56(b).

36 Fed. R. Civ. P. 56(b) advisory committee's note.

37 Fed. R. Civ. P. 56(d); *see also Pennsylvania v. Sebelius*, No. 10-4584, 2012 WL 8590263, at *15-16 (3d Cir. 2012).

38 One scholar suggests that presumptions have no role in the summary judgment inquiry, as presumptions were intended to be weighed by the jury. *See generally* Steven D. Smith, *The Effect of Presumptions on Motions for Summary Judgment in Federal Court*, 31 UCLA L. Rev. 1101 (1984).

39 In *Ehlis v. Shire Richwood, Inc.*, 233 F. Supp. 2d 1189, 1198-99 (D.N.D. 2002), for example, the court denied summary judgment "based on [a] rebuttable presumption" because the plaintiffs had produced "some" evidence contrary to that presumption. *See also Stutzka v. McCarville*, 420 F.3d 757, 762-63 (8th Cir. 2005) (reversing grant of summary judgment in TILA notice of right to rescind case, where plaintiff proffered contrary affidavits of borrower and borrower's guardian).

40 *See Cappuccio v. Prime Capital Funding LLC*, 649 F.3d 180, 189 (3d Cir. 2011) ("[T]he quantum of evidence needed to burst the presumption's bubble under Rule 301 is also minimal, given that the presumption's only effect is to require the party contesting it to produce enough evidence substantiating the presumed fact's absence to withstand a motion for summary judgment or judgment as a matter of law on the issue." (internal marks omitted); *see also St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 510-11 (1993) (explaining that a presumption's only role is to force the opposing party "to come forward with some response," after which it simply "drops out of the picture").

judgment.[41] Allowing a plaintiff to resist a presumption with only the weakest of sworn statements seems to run counter this basic notion while giving the presumption little respect. Indeed, the Rules Advisory Committee originally *rejected* the "bubble bursting" approach to presumptions precisely for this reason.[42]

But regardless of the broader debate over presumptions, many courts have held in TILA cases that a plaintiff's sworn assertion of a contrary fact was enough to defeat the defendant's rebuttable presumption.[43] In *Hammox v. Heartland Home Fin., Inc.*,[44] for example, the U.S. District Court for the Eastern District of Tennessee refused to grant summary judgment to the defendant in another TILA notice-of-right-to-rescind case. This refusal came even though the defendant produced signed acknowledgments from the borrowers that they had received the required notices. In denying summary judgment, the court noted that plaintiffs swore that (a)

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41 *See, e.g.*, *Angle v. Miller*, No. 10-16707, 2012 WL 833901, at *8 n.6 (9th Cir. Mar. 14, 2012) (listing cases); *Broaddus v. Shields*, 665 F.3d 846, 856 (7th Cir. 2011) ("We have repeatedly held that self-serving affidavits without factual support in the record will not defeat a motion for summary judgment."); *Frevert v. Ford Motor Co.*, 614 F.3d 466, 473 (8th Cir. 2010) ("A properly supported motion for summary judgment is not defeated by self-serving affidavits." (internal marks omitted)); *Skrzypczak v. Roman Catholic Diocese of Tulsa*, 611 F.3d 1238, 1244 (10th Cir. 2010) (same); *Kirleis v. Dickie, McCamey & Chilcote, P.C.*, 560 F.3d 156, 161 (3d Cir. 2009).

42 *See* Fed. R. Evid. 301, advisory committee's note on proposed rule ("The so-called 'bursting bubble' theory … is rejected as according presumptions too 'slight and evanescent' an effect." (citations omitted)).

43 *See Rodrigues v. Newport Lending Corp.*, No. 10-00029 HG-LEK, 2010 WL 4960065, at *6 (D. Hawaii Nov. 29, 2010); *Ianuzzi v. Am. Mortg. Network, Inc.*, 727 F. Supp. 2d 125, 135-36 (E.D.N.Y. 2010) (citing cases and observing that "[n]umerous courts applying the rebuttable presumption of 15 U.S.C. § 1635(c) have held that sworn statements by the borrowers asserting that they did not receive the requisite copies of their notice of right to rescind, despite signed acknowledgments to the contrary, are sufficient to preclude summary judgment."); *cf. United States ex rel. Westmoreland v. Amgen, Inc.*, 812 F. Supp. 2d 39, 79 (D. Mass. 2011) (explaining that recipient's sworn statement that he did not receive mail does not defeat presumption created by mailbox rule, but does create triable issue of fact); *but see, e.g.*, *Williams v. G.M. Mortg. Corp.*, No. 03-CV-74788-DT, 2004 WL 3704081, at *8 (E.D. Mich. Aug. 18, 2004) ("Because Plaintiff signed the Notice of Right to Cancel acknowledging receipt of two copies of it, she bears the burden of rebutting the statutory presumption of delivery. All that Plaintiff here offered is her bald denial of receipt. The Court is finds that a plaintiff's bare bones, self-serving denial is not sufficient to rebut § 1635(c)'s statutory presumption, particularly where, as here, Plaintiff admitted that she knew that she had to wait until three days after consummating the loan transaction (i.e., the statutory cancellation period) before the loan proceeds would be disbursed to her."); *Deutsche Bank Nat'l Trust Co. v. Lacapria*, No. 08-2174, 2010 WL 715617, at *4 (D.N.J. Mar. 1, 2010) (holding that TILA presumption was not rebutted by borrower's testimony that he did not remember receiving required notices).

44 No. 4:04-CV-113, 2005 WL 1130347 (E.D. Tenn. May 13, 2005).

they had not removed any documents from the original "packet" they received at closing and (b) the required notices were not in that packet.[45] These spare averments were enough.

The lone federal appellate court to address the TILA rebuttable presumption on summary judgment has also imposed a low standard of proof for the borrower. In *Marr v. Bank of America, N.A.*,[46] the U.S. Court of Appeals for the Seventh Circuit faced a case quite like the one presented in *Hammox*: a borrower who claimed that (a) his "folder" of loan documents was undisturbed since closing; and (b) his folder did not contain the requisite notices. Just like *Hammox*, the lender produced a signed borrower acknowledgment that the notices had been given at closing. But unlike *Hammox*, there was some suggestion that the folder had *not* been perfectly preserved, as it contained several documents post-dating the loan closing.[47] Even with this new wrinkle, the Seventh Circuit still concluded that summary judgment was inappropriate. The borrower's sworn assertions—combined with his statement that his closing did not follow the lender's standard closing procedures—was enough to foreclose summary judgment for the lender. At least in the Seventh Circuit's view, this "evidence [wa]s enough to permit a reasonable jury to find in [the plaintiff's] favor."[48]

In short, a "qualified mortgage rebuttable presumption" might be—at best—a limited and unpredictable tool at the summary judgment stage. Lenders will be unable to determine with certainty what *standard* of proof will apply and what *type* of rebutting proof the borrower will offer.[49] And, perhaps most importantly, prior TILA-specific cases suggest the presumption is easily defeated.

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45 *Id.* at *2-3

46 662 F.3d 963, 967-68 (7th Cir. 2011). *Contrast with Jackson v. New Century Mortg. Corp.*, 320 F. Supp. 2d 608, 612 (E.D. Mich. 2004) (holding that the so-called "envelope theory"—that all documents received at closing were in sealed envelope—was insufficient to rebut presumption of notice).

47 *Marr*, 662 F.3d at 968.

48 *Id.*

49 Some courts have seemed willing to dispense with presumptions based on considerations of "fairness," rending presumptions even more unpredictable. *See, e.g.*, *Panduit Corp. v. All States Plastic Mfg. Co., Inc.*, 744 F.2d 156, 1581 (Fed. Cir. 1984), *overruled on other grounds by Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424 (1985) ("Presumptions of fact have been created to assist in certain circumstances where direct proof of a matter is for one reason or another rendered difficult. They arise out of considerations of fairness, public policy, and probability, and are useful devices for allocating the burden of production of evidence between the parties. However, derived as they are from considerations of fairness and policy, they must not be given mechanical application. … We must not give undue dignity to a procedural tool and fail to recognize the realities of the particular situation at hand.")

3. Trial.

Much like summary judgment, the effect of a presumption at trial is somewhat difficult to predict.[50] But also like summary judgment, prior TILA cases suggest the presumption provides the lender with only limited comfort, as borrowers can sometimes (and perhaps oftentimes) defeat the presumption with testimony alone. A decision by the U.S. Court of Appeals for the Third Circuit, *Cappuccio v. Prime Capital Funding LLC*,[51] provides one example. There, the borrower testified at trial that she did not receive any notice of her right to rescind her mortgage loan on the night she closed her loan.[52] The Third Circuit determined that this testimony alone was enough to burst the presumption bubble despite its concededly self-serving nature. The jury, the Third Circuit concluded, was free to credit the testimony of either the borrower or the lender in such circumstances—without resort to any presumption.

Of course, a court *in a particular case* may ultimately determine that a borrower's testimony is not sufficient to defeat the presumption. Such was the case in *In re Giza*,[53] a TILA notice-of-rescission case wherein the court found the borrowers' "inconsistent, unpersuasive and confused" testimony was not enough to rebut the presumption of delivery. But by the time a court or a jury makes such a decision at the trial stage, a lender has been forced to incur significant litigation costs. What's more, the now well-understood unpredictability of trial outcomes[54] suggest defendants will be compelled to pay settlement sums to a TILA plaintiff long before the matter would ever be resolved. In other words, the distant possibility of a win at trial hardly makes the "rebuttable presumption" battle worth it. Without any means to deal with non-meritorious cases early, lenders who make *only* qualified mortgages could still be forced to make significant time and money investments in ability-to-repay TILA litigation.

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50 At least one case, *Hammox*, 2005 WL 1130347, at *3, seems to believe that presumptions are handled differently on summary judgment and at trial.

51 649 F.3d 189-90.

52 *Id.* at 184; *see also, e.g.*, *In re Sousa*, No. 06-11398-JMD, 2011 WL 917583, at *6-7 (Bankr. D.N.H. Mar. 14, 2011) (observing that "[c]ourts are split over whether a borrower's testimony of non-receipt is enough to rebut the presumption of delivery in TILA," but ultimately concluding that the plaintiffs' "credible" and "unequivocal" testimony was enough to rebut the presumption at trial).

53 458 B.R. 16, 28 (Bankr. D. Mass. 2011); *see also Williams v. First Gov't Mortg. & Invs. Corp.*, 225 F.3d 738, 751 (D.C. Cir. 2000) (affirming judgment in TILA notice-of-right-to-cancel case, where trial court found plaintiff's testimony was not credible).

54 This unpredictability would likely be exacerbated in ability-to-repay litigation, where a broad spectrum of proof could potentially be relevant to the ultimate decision. For example, a borrower might conceivably seek to introduce such things as his entire credit history, his employment history, his income information, or his general spending habits. This broad spectrum of potential rebuttal proof will render it harder for lenders to assess the merits of their cases while opening the door for greater jury prejudice via "emotional evidence" (such as significant evidence of financial hardship).

III. THE SAFE HARBOR: A CLEARER FRAMEWORK

TILA's qualified mortgage provision could also be treated as a "safe harbor." Here again, to fully comprehend the consequences of characterizing the provision as a safe harbor, one must understand two things: (1) the nature of statutory safe harbors generally and (2) their use and effect in litigation.

A. What Is A Safe Harbor?

Generally, a safe harbor provision is one that affords the beneficiary with "protection from liability or penalty."[55] Different types of safe harbors work in different ways; some are more akin to affirmative defenses, while others seem to operate as something else entirely.[56] But they all generally share a common characteristic: once the standards set for invoking the safe harbor are met, liability is foreclosed.

More likely than not, TILA's safe harbor provision would operate in the manner of an affirmative defense. "An affirmative defense is defined as a defendant's assertion raising new facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all allegations in the complaint are true."[57] Such would be the case in the instance of the qualified mortgage provision: a defendant could concede all of the *facts* alleged in an inability-to repay complaint and still defeat the claim on a showing that the mortgage was a qualified mortgage. Moreover, Congress did not include any indication in the qualified mortgage provision that it meant the provision to be something other than an affirmative defense. That absence is telling. For instance, in the Private Securities Litigation Reform Act ("PSLRA"), Congress included an explicit statutory provision indicating that courts should consider the safe harbor on a motion to

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55 *Black's Law Dictionary* (9th ed. 2009); *see also* Qian Tao, *The Knowledge Standard for the Internet Intermediary Liability in China*, 20 Int'l J.L. & Info. Tech. 1, 9 n.33 (2012) ("The term 'Safe harbor' is referred to as provision that reduces renders immune a party from liability on the condition that the party performed its actions in good faith or in compliance with defined standards.").

56 *Compare Pfeil v. State Street Bank & Trust Co.*, No. 10-2302, 2012 WL 555481, at *11 (6th Cir. Feb. 22, 2012) (explaining that safe harbor provision in Employee Retirement Income Security Act is an affirmative defense), *EEOC v. Minn. Dep't of Corr.*, 648 F.3d 910, 913 (8th Cir. 2011) (safe harbor in Age Discrimination in Employment Act is affirmative defense), *United States v. Mintmire*, 507 F.3d 1273, 1293-94 (11th Cir.2007) (explaining statutory safe harbor prohibiting liability for obstruction of justice in certain circumstances was an affirmative defense), *and 303 West 42nd St. Enters., Inc. v. IRS*, 181 F.3d 272, 278 (2d Cir. 1999) (finding safe harbor from tax liability is affirmative defense), *with Southland Sec. Corp. v. INSpire Ins. Solutions, Inc.*, 365 F.3d 353, 371 (5th Cir. 2004) (requiring plaintiffs to plead facts to avoid safe harbor in Private Securities Litigation Reform Act).

57 *Saks v. Franklin Covey Co.*, 316 F.3d 337, 350 (2d Cir. 2003) (internal marks omitted); *see also Riemer v. Chase Bank USA, N.A.*, 274 F.R.D. 637, 639 (N.D. Ill. 2011) ("An affirmative defense is one that admits the allegations in the complaint, but avoids liability, in whole or in part, by new allegations of excuse, justification or other negating matters.").

dismiss.[58] Because (as explained below) courts typically do not consider affirmative defenses on a motion to dismiss, the PSLRA's safe harbor is usually assumed to operate as something different. There is no similar "hint" in TILA.

B. How Do Safe Harbors Operate in Federal Litigation?

Were the TILA safe harbor provision to function as an affirmative defense, it would be of some limited use on a motion to dismiss. To be sure, "[c]omplaints can't be dismissed just because they ignore potential defenses; the time to deal with an affirmative defense is [ordinarily] after it has been raised [through an answer]."[59] Consequently, courts routinely decline to consider affirmative defenses on a motion to dismiss,[60] even when those defenses are premised upon safe harbors.[61] But affirmative defenses *may* be asserted on a motion to dismiss when they appear on the face of the complaint.[62] Therefore, a lender might mount a successful defense if the borrower anticipates the qualified mortgage safe harbor or otherwise provides the facts necessary to mount the defense in the complaint.[63]

More importantly, however, a safe harbor would be especially useful on summary judgment. . A lender could move for summary judgment early on—indeed, just after the complaint is filed—and the borrower's *only* argument could be that the loan did not in fact meet

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58 *See* 15 U.S.C. § 78u-5(e); *see also* Rachel Schneller Ziegler, *Safe But Not Sound: Limiting Safe Harbor Immunity for Health and Disability Insurers and Self-Insured Employers Under the Americans with Disabilities Act*, 101 Mich. L. Rev. 840, 873-74 (2002) (looking to legislative history to determine whether "safe harbor" in Americans with Disabilities Act is affirmative defense).

59 *Edgenet, Inc. v. Home Depot U.S.A., Inc.*, 658 F.3d 662, 664 (7th Cir. 2011).

60 *See, e.g.*, *In re Tower Air, Inc.*, 416 F.3d 229, 416 F.3d 229, 238 (3d Cir. 2005).

61 *See, e.g.*, *Pfeil*, 2012 WL 555481, at *12; *Feder v. Frost*, 220 F.3d 29, 35 (2d Cir. 2000); *Teoba v. Trugreen Landcare LLC*, 769 F.Supp.2d 175, 186-87 (W.D.N.Y. 2011); *Crocker v. KV Pharm. Co.*, 782 F. Supp. 2d 760, 784 (E.D. Mo. 2010); *In re Enron Creditors Recovery Corp.*, No. 01-16034, 2009 WL 3349471, at *5 (S.D.N.Y. Oct. 16, 2009); *Martin v. Caterpillar, Inc.*, No. 07-cv-1009, 2008 WL 5082981, at *5 (C.D. Ill. Sept. 25, 2008); *Ill. Bell Tel. Co. v. Village of Itasca, Ill.*, 503 F. Supp. 2d 928, 946 (N.D.Ill. 2007).

62 *Bingham v. Thomas*, 654 F.3d 1171, 1175 (11th Cir. 2011) ("A complaint may be dismissed if an affirmative defense ... appears on the face of the complaint."); *accord Iowa Pub. Emps. Ret. Sys. v. MF Global, Ltd.*, 620 F.3d 137, 145 (2d Cir. 2010); *Riverview Health Inst.*, 601 F.3d at 512; *LeFrere v. Quezada*, 582 F.3d 1260, 1263 (11th Cir. 2009); *Santana-Castro v. Toledo-Davila*, 579 F.3d 109, 113-14 (1st Cir. 2009); *Pressley v. Tupperware Long Term Disability Plan*, 553 F.3d 334, 336 (4th Cir. 2009); *Noble Sys. Corp. v. Alorica Cent., LLC*, 543 F.3d 978, 983 (8th Cir. 2008).

63 *See, e.g.*, *Hecker v. Deere & Co.*, 556 F.3d 575, 588 (7th Cir. 2009) (affirming dismissal of complaint where plaintiff anticipated safe harbor defense and provided basis for defendant to raise it); *Raeth v. Nat'l City Bank*, 755 F. Supp. 2d 899, 904-05 (W.D. Tenn. 2010) (dismissing TILA claim based on safe harbor, where borrower alleged lender violated statute by failing to consider information that did not need to be considered under safe harbor).

the definition of "qualified mortgage." Assuming the lender properly documented a loan's qualified mortgage status, that argument would be a difficult (if not an impossible) path for the borrower to take. Non-meritorious cases could be resolved early and finally. Quite simply, a safe harbor affords the predictability in standards and proof that a rebuttable presumption does not.

CONCLUSION

Safe harbors and rebuttable presumptions provide significantly different degrees of protection for their beneficiaries. Rebuttable presumptions are burdened by unavailability at the early stages of litigation and unpredictability at all stages of litigation. In contrast, safe harbors afford some degree of predictability and expedient resolution. In the qualified mortgage context, these differences are critical. If lenders are forced to wrestle with presumptions, adverse consequences are likely to follow. Lenders will likely attempt to calculate the costs of this greater unpredictability and—by necessity—pass them on to borrowers. And given the questionable usefulness of a presumption, lenders may determine that they have insufficient incentive to focus on qualified mortgages at all. That would hardly serve the interests of lenders, regulators, or consumers.