

## **Statement of Jeremiah O. Norton on Final Rule Regarding Credit Risk Retention**

I am not able to support the promulgation of the Final Rule (Rule). In defining “qualified residential mortgages,” (QRM) the Congress has instructed the Agencies that the definition shall “be no broader than the definition ‘qualified mortgage’ as the term is defined under section 129C(c)(2) of the Truth in Lending Act... and regulations adopted thereunder.”<sup>1</sup> In response to this statutory provision, the Agencies have defined QRM to mean “a ‘qualified mortgage’ (QM) as defined in section 129C of the Truth in Lending Act (15 U.S.C.1639c) and regulations issued thereunder, as amended from time to time.”<sup>2</sup>

The legal authority pursuant to which the QRM definition is being adopted, however, is not clear. While the Congress has instructed the Agencies that the definition of QRM shall be no broader than the definition of QM, the Agencies’ decision to tie the definition of QRM to QM by operation of law in perpetuity raises a serious question. Courts have held that an agency subdelegates its decision-making authority when it “shifts almost the entire determination of whether a specific statutory requirement... has been satisfied or abdicates its final reviewing authority.”<sup>3</sup> Thus, the decision by the Agencies to tie QRM to QM “as amended from time to time” by the Consumer Financial Protection Bureau (CFPB) effectively subdelegates the Agencies’ rulemaking responsibility to define QRM to the CFPB. Such subdelegation has been called into question by courts unless explicitly authorized by the Congress. As the U.S. Court of Appeals for the D.C. Circuit has held, “[w]hile federal agency officials may subdelegate their decision-making authority to subordinates absent evidence of contrary congressional

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<sup>1</sup> 15 U.S.C. § 78o-11(e)(4)(C).

<sup>2</sup> 12 C.F.R. § 373.13(a).

<sup>3</sup> *Louisiana Forestry Ass’n v. Secretary U.S. Dept. of Labor*, 745 F.3d 653, 672 (3d Cir. 2014).

intent, they may not subdelegate to outside entities—private or sovereign—absent affirmative evidence of authority to do so.”<sup>4</sup>

The insertion of a process through which to review the QRM definition by the Agencies four years after the promulgation of this rule, every five years thereafter, and at the request of any agency<sup>5</sup> does not alter the fact that under today’s rule, the QRM definition is tied to the CFPB’s QM definition on a going-forward basis by operation of law. This review mechanism does not and cannot ensure the outcome of any future rulemaking process, which further enshrines the subdelegation.

For these reasons, I am not able to support the promulgation of the Rule.

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<sup>4</sup> *U.S. Telecom Ass’n v. F.C.C.*, 359 F.3d 554, 566 (D.C. Cir. 2004).

<sup>5</sup> 12 C.F.R. § 373.22.