MBa

MORTGAGE BANKERS ASSOCIATION

October 24, 2013

Office of the Comptroller of the Currency
400 7th St, SW, Suite 3E-218, Mail Stop 9W-11
Washington, D.C. 20219
Docket No. OCC-2013-0010

Board of Governors of the Federal Reserve System
20th St. and Constitution Ave, NW
Washington, D.C. 20551
Attn: Robert deV. Frierson, Secretary
Docket No. R-1411

Federal Deposit Insurance Corporation
550 17th St., NW
Washington, D.C. 20429
Attn: Robert E. Feldman, Exec. Secretary
RIN 3064-AD74

Securities and Exchange Commission
100 F St., NE
Washington, D.C. 20549-1090
Attn: Elizabeth M. Murphy, Secretary
File Number S7-14-11

Federal Housing Finance Agency
400 7th St., SW
Washington, D.C. 20024
Attn: Alfred M. Pollard, General Counsel
RIN 2590-AA43

Department of Housing and Urban Development
451 7th St., SW, Room 10276
Washington, D.C. 20410-0500

Re: Credit Risk Retention Re-Proposal

Dear Sirs and Madam:

The Mortgage Bankers Association (MBA)[1] appreciates the opportunity to provide the perspectives of the residential and commercial/multifamily finance sectors regarding the joint agency re-proposal of the risk retention rule required by § 941 of The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank).

As the leading voice of the entire real estate finance industry, MBA represents a broad and diverse range of member companies. MBA shares the Agencies'[2] goals of

[1] The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets; to expand homeownership and extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of over 2,200 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, Wall Street conduits, life insurance companies and others in the mortgage lending field. For additional information, visit MBA's Web site: www.mortgagebankers.org.

[2] The Agencies are: the Office of the Comptroller of the Currency (OCC), Board of Governors of the Federal Reserve System (the Board), Federal Deposit Insurance Corporation (FDIC), Securities and

maintaining the integrity of the secondary mortgage market while ensuring housing finance credit remains accessible and competitively priced.

The two attachments to this letter present specific observations and recommendations of the residential and commercial/multifamily real estate finance sectors in response to the Re-Proposal. These attachments also address many of the Agencies' specific requests for comment; the specific responses to relevant questions can be found in the text of the letters and the appendix. The following is a summary of our major comments and observations:

EXECUTIVE SUMMARY

Residential

MBA strongly urges the Agencies to adopt the Preferred Approach and align the QRM definition with the QM definition for the following reasons:

1) As the data demonstrate, the QM definition sets forth a rigorous standard for sustainable mortgage lending which result in borrowers' ability to repay and significantly lowers delinquencies and defaults;

2) Aligning the QRM and QM definitions will allow a greater number of borrowers to benefit from lower mortgage costs resulting from greater access to the private investor market, as well as safer and more sustainable loans;

3) Aligning the QRM definition with the QM standard will streamline the regulatory burden on an industry where the costs of regulation have become a great concern; and

4) The respective legislative intent of QRM and QM are well satisfied by the Agencies adoption of the same definition.

MBA strongly opposes the Alternative offered for comment for the following reasons:

1) The Alternative's inclusion of a down payment requirement is inconsistent with the legislative intent;

2) The Alternative restricts too many consumers' access to the most affordable credit available;

Exchange Commission (SEC), Federal Housing Finance Agency (FHFA), and the Department of Housing and Urban Development (HUD)

3) The Alternative would exclude a greater number of minority borrowers from the most competitive loans than the Preferred Approach;

4) The Alternative is unnecessary because the investor market can easily ascertain and price transparent credit attributes like loan-to-value ratio (LTV);

5) The Alternative will raise costs to borrowers. Consumers who do not qualify for QRM will pay higher prices for ever-scarcer private label credit; and

6) The Alternative of a more restrictive QRM will increase Government and agency involvement in the mortgage market when the Government's footprint and risk should be reduced.

In addition to these points, MBA makes additional comments, including supporting the Agencies' decision to eliminate the Premium Cash Reserve Account as well as including a sunset period on a sponsor's obligation to retain risk under the Proposal. We also express our concerns with the Proposal's disclosure requirements. Finally, in the Appendix, MBA responds to the specific questions asked in the proposal with references where appropriate to relevant pages of these comments.

Commercial/Multifamily

1) MBA commends the Agencies for the beneficial changes made from the original proposal such as the elimination of the Premium Capture Cash Reserve Account (PCCRA) and increased flexibility for how risk retention can be structured. The changes will enhance the ability of CMBS market participants to implement risk retention.

2) We raise strong concerns about cash flow restrictions placed on horizontal risk retention holders. The eligible horizontal risk retention (EHRI) recovery percentage, as proposed, would severely limit cash flow to horizontal risk retention holders due restrictions linking CMBS payments to principal repayment, which for CMBS does not occur, for the most part, until near the expiration of the securitization. Should the Agencies place any cash flow restrictions on the horizontal risk retention holder, it should be linked to the par value of the horizontal risk retention position that would include both principal and interest payments.

3) We provide alternative methodologies for calculating fair value for CMBS that are closely linked to sale proceeds, which would eliminate the need for the extensive reporting requirement of the fair value assumptions.

4) We recommend that the Agencies also allow the horizontal risk retention to be split into senior and subordinate positions, in addition to the pari passu arrangement. This will provide greater flexibility for existing market participants to assume the horizontal risk retention position.

5) We recommend enhanced flexibility of underwriting parameters for a “qualified commercial real estate” loan such as the increase in the allowable amortization period from 25 years to 30 years.

6) We recommend the exclusion from risk retention single asset, single borrower CMBS and, at a minimum, recommend that the credit box for zero risk retention be expanded for this CMBS category.

7) We recommend that CMBS loan documents, such as the pooling and servicing agreement (PSA), specify the quorum necessary for bond holders to vote to replace the special servicer, rather than specify a threshold in the regulation.

8) To the extent necessary, we recommend clarifications with regard to the multifamily executions of the GSEs.

Finally, we offer our assistance to the Agencies in finalizing this rule and provide the names and contact information of staffers who can be contacted with any questions or concerns related to our comments or the development and implementation of the final rule.

Sincerely,

David H. Stevens
President and Chief Executive Officer
Mortgage Bankers Association

Attachments:

- MBA’s Comments on the Residential Real Estate Finance Aspects of the Re-Proposal
- MBA’s Comments on the Commercial/Multifamily Real Estate Finance Aspects of the Re-Proposal

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Department of Housing and Urban
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Re: Credit Risk Retention Re-Proposal

Dear Sirs and Madam:

On August 28, 2013, the Office of the Comptroller of the Currency (OCC), Board of Governors of the Federal Reserve System (the Board), Federal Deposit Insurance Corporation (FDIC), Securities and Exchange Commission (SEC), Federal Housing Finance Agency (FHFA), and the Department of Housing and Urban Development (HUD) (collectively, the Agencies) jointly issued a notice of proposed rulemaking (the Proposal) to implement § 941 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank or the Act) regarding credit risk retention including the Qualified Residential Mortgage (QRM). The Proposal is a re-proposal of a proposed rule issued in the spring of 2011 on this subject.

The Mortgage Bankers Association[3] (MBA) appreciates the opportunity to comment on this important rulemaking and particularly appreciates the Agencies' attention to redrafting the Proposal to address comments raised in response to the earlier proposal,

[3] The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets; to expand homeownership and extend

Below are MBA's comments on the Proposal as it relates to single-family, residential mortgage lending. MBA is commenting separately on the Proposal's implications for commercial and multifamily mortgage lending. Please note that MBA's responses to certain of the Agencies' specific requests for comment are contained in the attached appendix.

BACKGROUND

Section 941 of Dodd-Frank (the "risk retention provisions") amended § 15G of the Securities Exchange Act of 1934 to require that the Agencies jointly prescribe regulations to require securitizers of asset-backed securities to retain five percent of the credit risk for any mortgage assets the securitizer, through an asset-backed security, transfers, sells or conveys to a third party.[4]

The risk retention provisions exempt securities backed entirely by Qualified Residential Mortgages (QRMs) from their requirements and direct the Agencies to jointly define the term. Dodd-Frank requires that the definition "tak[e] into consideration underwriting and product features that historical loan performance data indicate result in a lower risk of default..." [5] While the Agencies are charged with crafting the definition, the power is limited; the Act explicitly provides that QRM shall be defined "no broader than" the Qualified Mortgage (QM) definition established by the Consumer Financial Protection Bureau (CFPB) pursuant to its Ability to Repay (ATR) rule.[6]

On March 30, 2011, the Agencies proposed to implement the risk retention provisions and subsequently received comments expressing serious concerns. Foremost among them was that the proposed definition of QRM was unduly restrictive in requiring the borrower to make at least a 20% down payment or have 25% equity for a refinance transaction, meet relatively low maximum debt-to-income ratios (DTI) and satisfy difficult credit history requirements. In addition, sponsors subject to the risk retention requirements would be required to hold the risk for the life of the security and the proposed manner in which the risk could be held was regarded as too restrictive as well.

access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of over 2,200 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, REITs, Wall Street conduits, life insurance companies and others in the mortgage lending field. For additional information, visit MBA's Web site: www.mba.org

[4] Dodd-Frank, §941(b)

[5] Dodd-Frank, §941(e)(4)

[6] *See* 15 USC 1639c

In contrast, the new proposed rule, issued on August 28, 2013, offers a "preferred" QRM definition that would align the definition of QRM with the definition of QM established by the CFPB (the Preferred Approach).[7] The Proposal also includes a "sunset" provision that would limit the period of time that risk retention pertains and allow responsible hedging of risk.

In addition to the Preferred Approach, the Proposal requests comment on an Alternative "QM-Plus" Approach (the Alternative). The Alternative includes a 30 percent down payment requirement, a maximum 43 percent DTI and hard-wired credit standards that taken together, as explained below, would limit the availability of QRM coverage to a small fraction of mortgage borrowers while largely excluding first-time buyers, minority borrowers, and the underserved from the most competitive and affordable mortgage financing terms that are anticipated for QRM loans.

EXECUTIVE SUMMARY

MBA strongly urges the Agencies to adopt the Preferred Approach and align the QRM definition with the QM definition. These reasons include:

1) As the data demonstrate, the QM definition sets forth a rigorous standard for sustainable mortgage lending which result in borrowers' ability to repay and significantly lowers delinquencies and defaults;

2) Aligning the QRM and QM definitions will allow a greater number of borrowers to benefit from lower mortgage costs resulting from greater access to the private investor market, as well as safer and more sustainable loans;

3) Aligning the QRM definition with the QM definition will streamline the regulatory burden on an industry where the costs of regulation have become a great concern; and

4) The respective legislative intent of QRM and QM are well satisfied by the Agencies adoption of the same definition.

MBA strongly opposes the Alternative offered for comment for the following reasons:

7) The Alternative's inclusion of a down payment requirement is inconsistent with the legislative intent;

8) The Alternative restricts too many consumers' access to the most affordable credit available;

[7] The Proposal, §13(a).

9) The Alternative would exclude a greater number of minority borrowers from the most competitive loans than the Preferred Approach;

10) The Alternative is unnecessary because the investor market can easily ascertain and price transparent credit attributes like loan-to-value ratio (LTV);

11) The Alternative will raise costs to borrowers. Consumers who do not qualify for QRM will pay higher prices for ever-scarcer private label credit; and

12) The Alternative of a more restrictive QRM will increase Government and agency involvement in the mortgage market when the Government's footprint and risk should be reduced.

In addition to these points, MBA makes additional comments, including supporting the Agencies' decision to eliminate the Premium Cash Reserve Account as well as including a sunset period on a sponsor's obligation to retain risk under the Proposal. We also express our concerns with the Proposal's disclosure requirements. Finally, in the Appendix, MBA responds to the specific questions asked in the proposal with references, where appropriate, to relevant pages of these comments.

GENERAL COMMENTS

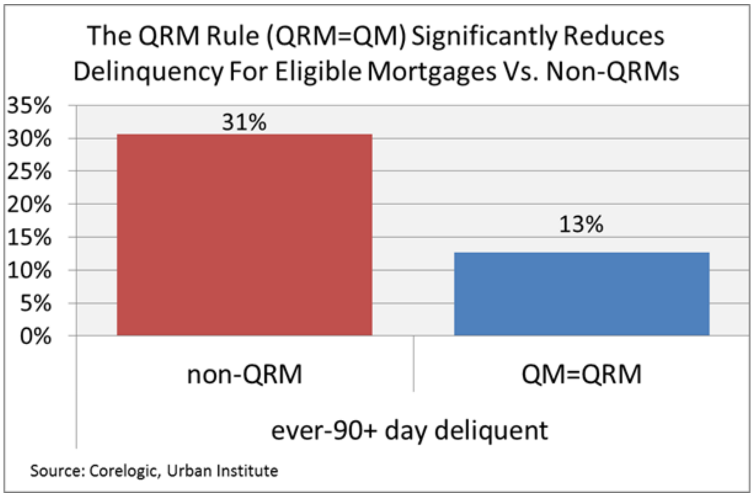
I. MBA SUPPORTS ALIGNING THE QRM DEFINITION WITH THE QM DEFINITION ESTABLISHED BY THE CFPB.

MBA strongly supports the "preferred" QRM proposal that would align the definition of QRM with the QM definition promulgated by the CFPB in the ATR rule.[8] The QM definition is central to the CFPB's ATR rule and incorporates product restrictions, documentation and underwriting requirements, such as DTI and agency standards, which are designed to ensure a borrower's ability to repay. The CFPB accomplishes this objective without including hard-wired down payment and credit history standards that would exclude a large segment of the population, particularly first-time, minority and other potentially underserved homebuyers. Considering the similar purposes of QM and QRM, MBA does not believe that there are any valid reasons for the Agencies to establish separate compliance standards.

[8] Ability-to-Repay and Qualified Mortgage Standards Under the Truth in Lending Act (Regulation Z), 78 FR 6407

(1) The QM definition sets rigorous standards for sustainable mortgage lending which ensure that borrowers have the ability to repay their mortgage, significantly lowering delinquencies and defaults.

Under Dodd-Frank, the QM is designed as a key means to allow lenders to satisfy Dodd-Frank's ATR requirement by offering sustainable loans. Under the Act and the CFPB's implementing rules, to qualify as a QM a loan must comply with specific product, documentation and underwriting requirements, limits on pre-payment penalties and exclude risky product features. The chart below covers loans originated prior to 2013 and compares the historic performance of privately label securitizations which would have met the QM definition to those that do not. It demonstrates that if the QRM incorporates QM requirements, then delinquencies would have been much lower.



Source: Corelogic, Urban Institute

Notably, QM borrowers must have a debt-to-income ratio not in excess of 43% or their loan must be eligible for purchase, insurance or guarantee under Fannie Mae and Freddie Mac (GSEs) standards or the standards of the Federal Housing Administration (FHA), Department of Veterans Affairs (VA), the Department of Agriculture (USDA), or Rural Housing Service (RHS). Under Dodd-Frank, loans meeting these standards are presumed to be repayable by borrowers resulting in significantly lower delinquencies and defaults as required for QRM loans.

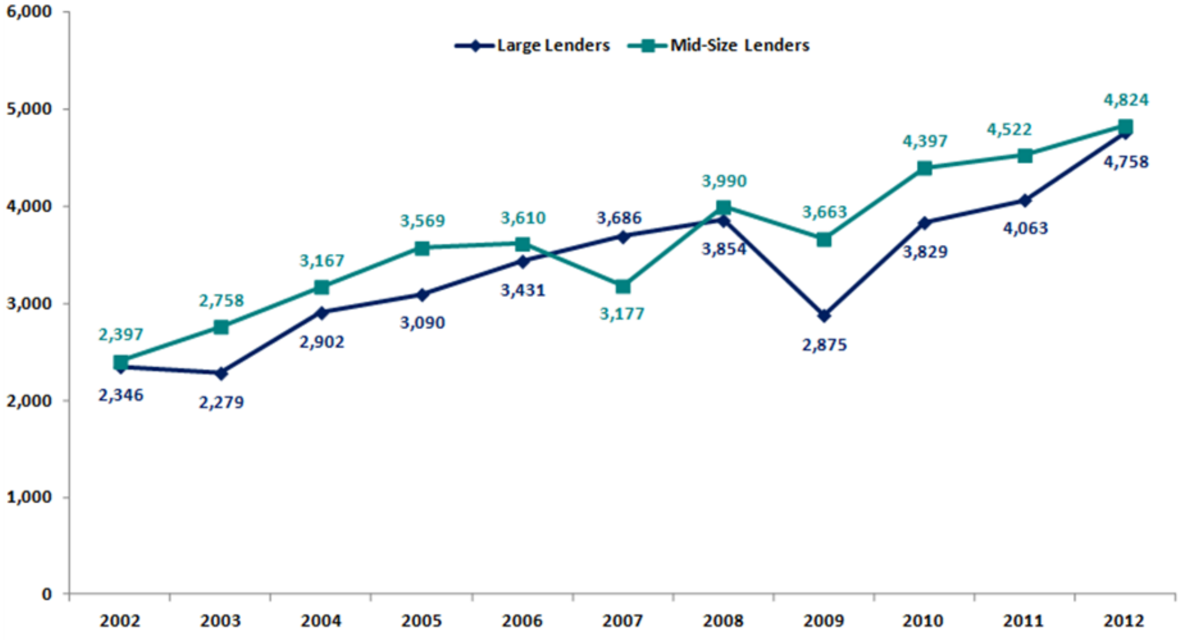
Additionally, Dodd-Frank's ATR requirement imposes severe financial penalties on lenders who fail to comply. Since QM loans gain a presumption of compliance, including a safe harbor, for loans which meet its criteria, there is an extremely strong incentive for compliance with QM. Consequently, an investor who purchases securities backed by QM loans can be reasonably assured of the borrower's ability to repay and a lowered risk of delinquency and default.

(2) Aligning QRM with QM will streamline regulatory compliance and avoid imposing undue burdens on an industry where the costs of regulation have become a great concern.

Lenders today are confronted with several new calculations and variables under Dodd-Frank, including calculations and variables regarding points and fees, average prime offer rate (APOR), bona fide discount points, and triggers for purposes of the HOEPA and the QM rules, to name a few. These are in addition to numerous other calculations and variables, including the calculation of the Annual Percentage Rate (APR) under the Truth in Lending Act (TILA). All of these calculations increase risk to the lender and costs to consumers. MBA notes below that Congress' objectives can be ably served by the Preferred Approach. Requiring market participants to incorporate yet another compliance regime would be costly and unwise.

The chart below shows the enormous increase in the costs of originating a loan today—before the introduction of QM and QRM—costs that are ultimately paid by consumers.

Retail Production Expenses ($ per Loan)



Source: MBA/STRATMOR Peer Group Survey

(3) The respective statutory mandates of QRM and QM are well satisfied by the agencies adoption of the same definition.

MBA believes the Agencies can fulfill both the objectives of the risk retention and ability to repay provisions by adopting the Preferred Approach. The statutory requirements Congress set forth for both definitions are strikingly similar. Moreover, the risk retention provisions explicitly provide the QM is the outer boundary of QRM since the QRM cannot be broader.[9] Most importantly, in its final form the QM standardizes those factors Congress expressly identified in the QRM legislation.

Specifically, the QRM statute directed the Agencies to consider “underwriting and product features that historical loan performance data indicate result in a lower risk of default” [10] in defining QRM and specifies particular factors for consideration. As the chart below illustrates, all of these factors are clearly addressed in the final QM:

QRM Statutory Factors for Consideration	Treatment in Final QM Rule
(i) documentation and verification of the financial resources relied upon to qualify the mortgagor;	The QM rule requires documentation and verification of income and assets.
(ii) standards with respect to— ‘‘(I) the residual income of the mortgagor after all monthly obligations; (II) the ratio of the housing payments of the mortgagor to the monthly income of the mortgagor; (III) the ratio of total monthly installment payments of the mortgagor to the income of the mortgagor;	QM rule establishes a 43% debt-to-income limit for QM loans unless the loan qualifies for agency purchase, insurance or guarantee. Ability to repay claims may be brought by a borrower on rebuttable presumption loans based on lack of residual income.
(iii) mitigating the potential for payment shock on adjustable rate mortgages through product features and underwriting standards;	QM’s cannot contain risky product features and must satisfy underwriting standards including that the loan must be underwritten using the maximum payment that may apply during the first 5 years after the first regular periodic payment is due.

[9] The Dodd-Frank Act, §941(e)(4)(C).

[10] § 941, The Dodd-Frank Act.

(iv) mortgage guarantee insurance or other types of insurance or credit enhancement obtained at the time of origination, to the extent such insurance or credit enhancement reduces the risk of default; and	The QM rule allows mortgage insurance premiums that do not exceed FHA's premium amount to be excluded from its points and fees calculation. The Alternative is at odds with this provision of the statute due to its failure to account for mortgage insurance or credit enhancements in its 70% LTV requirement.
(v) prohibiting or restricting the use of balloon payments, negative amortization, prepayment penalties, interest-only payments, and other features that have been demonstrated to exhibit a higher rate of borrower default.	As indicated, the QM excludes negative amortization and interest only features. It also severely restricts prepayment penalties. QM only allows balloon payments for very small creditors that hold balloon loans in portfolio for at least three years, where there is no securitization for such loans.

The alignment between the requirements of the QRM statute and the final QM is not surprising since both initiatives address essentially the same concerns.[11] Accordingly, aligning the QRM definition with the QM definition is entirely consistent with the intent of Dodd-Frank, and will protect both investors and consumers with soundly underwritten, sustainable loans.

Finally, while some have questioned whether the agencies are ceding their authority to the Bureau by adopting the Preferred Approach, MBA believes any such concern is unfounded. Agencies can and do incorporate the standards of other agencies in the interest of avoiding undue burden. Any changes to QM will be proposed for comment and the Agencies can consult with the Bureau during that process. If the direction any revision takes is unacceptable to the agencies, they may modify the QRM definition as needed.

II. MBA OPPOSES THE ALTERNATIVE BECAUSE IT IMPOSES UNNECESSARY COSTS TO CONSUMERS

In addition to the Preferred Approach addressed above,[12] the Agencies have requested comment on the Alternative. The Alternative takes a markedly different and far more restrictive approach to defining a QRM loan than does the Preferred Approach. In addition to requiring that a loan meet the QM definition, the Alternative would also require that a QRM loan have:

[11] *See* 15 U.S.C § 1639c

[12] *See* 78 Fed. Reg. 183, 57993 (September 20, 2013).

(i) A maximum loan-to-value (LTV) of 70 percent, necessitating that a borrower make a down payment of 30 percent or have that much equity in the home for a refinance transaction;
(ii) A maximum 43 DTI. Notably, there is no alternative provision proposed for a loan to qualify based on its eligibility for agency purchase, guarantee or insurance;
(iii) Hard-wired credit history requirements that would exclude many qualified applicants; and
(iv) A first-lien on a primary residence.

These standards impose a far higher cost on borrowers and lenders than is justified by their total impact on loan performance, and restrict access to credit – particularly for minority and first-time homebuyers, and borrowers with low-to-moderate income. MBA strongly opposes the Alternative and urges the Agencies to adopt the Preferred Approach as proposed.

(1) The Alternative's inclusion of a down payment requirement is inconsistent with the legislative intent.

At the outset, it must be noted that Dodd-Frank does not include a down payment requirement among the factors to be considered in developing the QRM definition. This is no accident or oversight. During Congressional debate on the bill, an amendment was offered which would have required a 5 percent down payment to be an element of the QRM definition. This proposed amendment was rejected, with then-Senate Banking Committee Chairman Chris Dodd stating that a down payment requirement "would have very serious consequences . . . for first-time homebuyers, minority homebuyers, and others seeking to attain the American dream of home ownership."[13]

Ultimately, the bill passed without a down payment or a loan-to-value requirement. Subsequently, a bipartisan group of senators involved in the drafting process of §941 commented on the down payment proposed in 2011 and stated: "We intentionally omitted a specific down payment requirement and never contemplated the rigid 20 percent or 10 percent as discussed in the March 2011 notice of proposed rulemaking."[14]

MBA opposes the inclusion of an LTV requirement in the QRM definition because Congress did not intend it, nor is it necessary to achieving the goals of the risk retention rule.[15]

[13] 156 Congressional Record S3518
[14] Cite to letter
[15] *Supra* at 13.

(2) The Alternative is not worth significantly restricting consumers' access to the most affordable credit available.

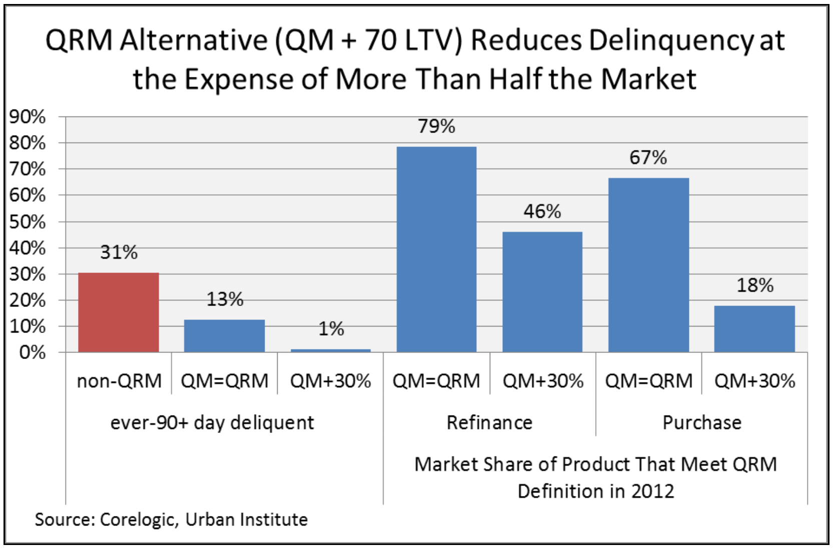
The down payment requirement in the Alternative of 30%, which is 50% greater than the down payment requirement originally proposed in 2011, would put QRM loans out of the reach of most Americans and deny them the most affordable, competitive mortgage terms. As the table below indicates, a 30 percent down payment requirement for purchase loans would make QRMs accessible to only a very small share of the market.

Percent of Homebuyers with Various Loan-to-Values

LTV at Purchase	Homebuyers
70% or less	24%
70-80%	6%
80-90%	20%
90-95%	16%
Above 95%	34%
	100%

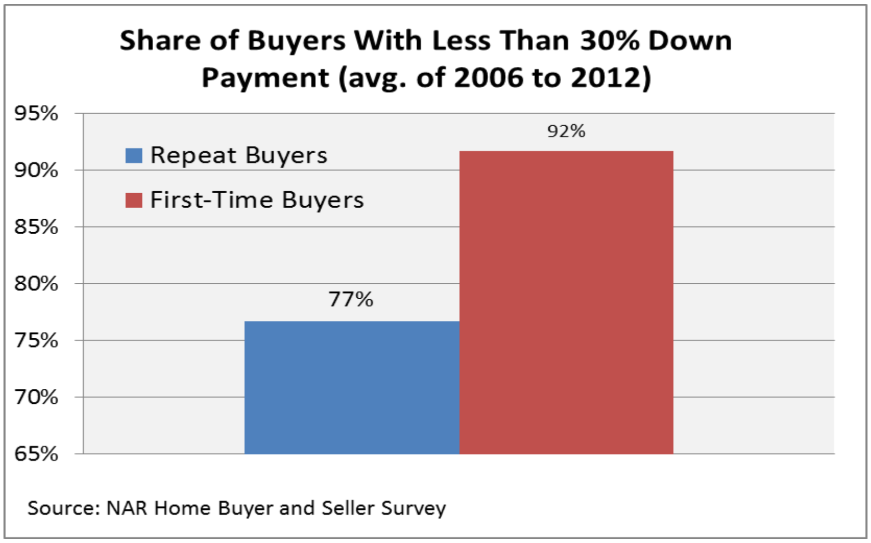
Source: 2009 American Housing Survey

The accompanying chart represents an analysis by The Urban Institute of data from the Corelogic securities database. This analysis shows that only 46% of borrowers in the refinance market and 18% of the purchase market would qualify for QRM loans if the QRM includes a 30 percent down payment requirement as proposed in the Alternative. This is in marked contrast to the 79% of refinance borrowers and the 67% of borrowers depicted that would qualify if the QRM were the same as QM.



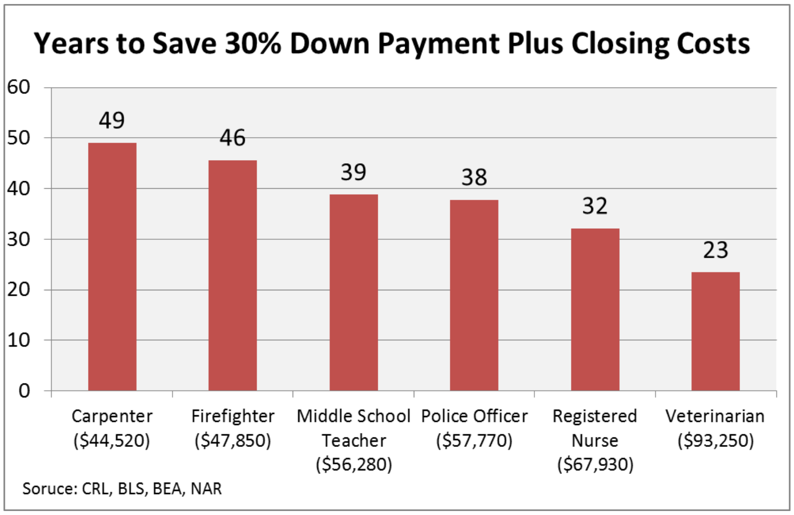
Source: Corelogic, Urban Institute

If a high down payment and low LTV requirement were included in the QRM alternative as proposed it would disproportionately impact first-time homebuyers, homebuyers with low-to-moderate incomes and others who lack inherited wealth. The following chart illustrates the impact on first-time homebuyers specifically, demonstrating that the Alternative would exclude more than 90% of this crucial borrower class from QRM loans.



Source: NAR Home Buyer and Seller Survey

The following chart demonstrates the length of time average Americans across the country would be forced to save in order to meet a 30 percent down payment requirement:



Soruce: CRL, BLS, BEA, NAR

Obviously, no borrower would wait this long to purchase a home. Rather, borrowers would likely opt for either a government loan, if it were available, or for a higher cost private loan, as many would not have the opportunity to make a larger down payment. Many borrowers would not have the opportunity to make a larger down payment.

The Alternative also imposes additional constraints on the ability of borrowers to access credit by removing the temporary GSE and government agency path to QM eligibility.[16] This reduces the maximum debt-to-income (DTI) ratio allowable under the QRM exemption to the 43% DTI allowed in the general QM requirement and would reduce credit availability despite the relatively high performance of loans with a DTI above 43 that are originated with compensating factors through agency underwriting models.

(3) The Alternative would exclude a greater number of minority borrowers from the most competitive loans than the Preferred Approach.

Recent United States Census Bureau data reveal stark differences in wealth - a primary source for a borrower's down payment - between white households and African-American and Hispanic households. The Census Bureau most recently reported that the median wealth of white households was approximately 17.5 times that of African-American households and 14 times that of Hispanic households.[17] Moreover, the median income of white households is greater than that of African-American and Hispanic households.[18]
Consequently, the impact of a down payment or LTV requirement may fall particularly harshly on African-Americans and Hispanics.

The chart below demonstrates how few African-American and Hispanic borrowers provide a 30% down payment and how few more provide a 20% down payment. Based on this data, up to 88% of African-American borrowers and 85% of Hispanics would not

[16] It should be noted that CFPB temporarily included GSE and government loans in the QM definition due to concerns about availability of credit and the fragility of the housing market recovery.

[17] United States Census Bureau, Table 1. Median Value of Assets for Households, by Type of Asset Owned and Selected Characteristics: 2011 (median net worth for white households – $110,500, African-American households – $6,314, and Hispanic households – $7,683), *available at* http://www.census.gov/people/wealth/files/Wealth_Tables_2011.xlsx. The difference in wealth between racial and ethnic groups is a persistent issue. 2005 Census Bureau data indicate a median net worth of $130,350 for white households, $11,013 for African-American households, and $17,078 for Hispanic households. *See* United States Census Bureau, Table 1. Median Value of Assets for Households, by Type of Asset Owned and SelectedCharacteristics:2005*available at* http://www.census.gov/people/wealth/files/Wealth%20Tables%202005.xls.

[18] United States Census Bureau, Table H-17. Households by Total Money Income, Race, and Hispanic Origin of Householder (median income for white households – $55,412, African-American households – $32,229, and Hispanic households – $38,624), *available at* http://www.census.gov/hhes/www/income/data/historical/household/2011/H17_2011.xls.

qualify for the most affordable rates stemming from QRM qualified if the Alternative was implemented.

Percent of Homebuyers with Various Down payments

LTV at Purchase	African-American buyers	Hispanic buyers
70% or less	12%	15%
70-80%	3%	4%
80-90%	13%	17%
90-95%	21%	19%
Above 95%	51%	44%
	100%	100%

Source: 2009 American Housing Survey

The Preferred Approach does not contain the LTV, down payment and credit requirements contained in the Alternative that may have great adverse impacts on African-American and Hispanic borrowers in terms of qualifying for QRM. The QM definition instead relies on product restrictions and underwriting requirements, as well as allowing agency loans to qualify. While the Preferred Approach is not perfect and the QM standard itself may be problematic in this area, it is clear that aligning the QRM definition to the QM standard would be a better government policy alternative to both protect investors and serve the home financing needs of the widest possible array of borrowers.[19]

(4) The Alternative is unnecessary because the investor market can easily ascertain and price transparent credit attributes like LTV.

As a matter of course, investors determine the credit parameters of loans in which they will invest. Originators meet those parameters through underwriting and delivering to the investor loans which meet the investor's requirements and are disclosed to the investor as such.

In the underwriting process, the party closest to the borrower, the originator, bears responsibility for satisfying the parameters that the investor cannot readily assess. For

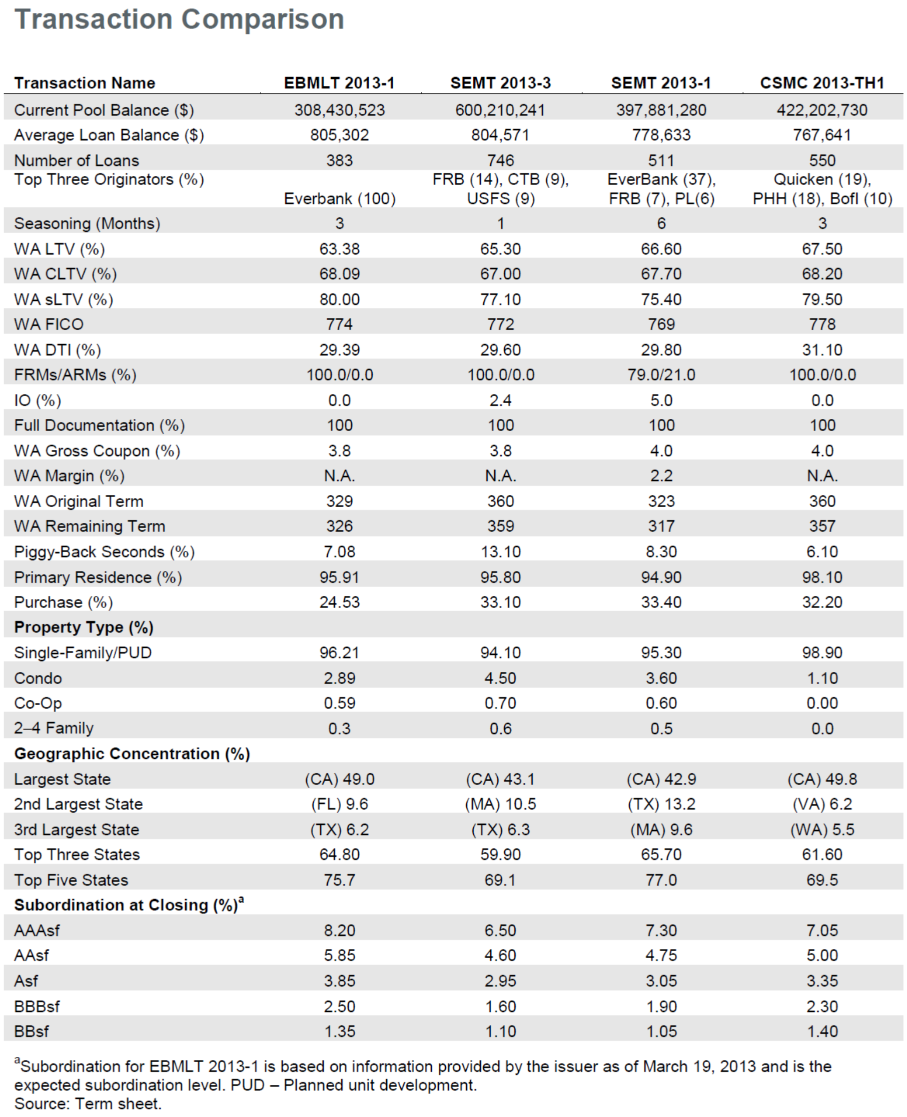
[19] MBA is concerned that since this impact may be more severe on protected classes, the result could be fair lending suits against lenders and purchasers merely for restricting their activities to remain within the QRM framework to avoid the consequences of risk retention. Such claims often settle due to reputational risk and litigation costs for large sums rather than proceeding to a trial on the merits. This potentially unbounded liability could present a safety and soundness concern for lending in the Alternative QRM paradigm. As a final note, MBA believes that disparate impact as a cause of action is not found in the Fair Housing Act and that lenders should not face liability for applying non-discriminatory risk based underwriting standards. However, MBA recognizes that there may be factors that are appropriate for the Federal government to consider when making policy choices that are not relevant to private parties.

example, documentation standards, appropriate verification of income and assets, review of property value appraisals, and other underwriting requirements are very difficult and costly for an investor to review and assess at the loan level. In light of the pre-crisis problems surrounding sound underwriting, requiring an issuer to retain some risk is one way to ensure that the investor could rely on the underwriting processes.

MBA believes that if the Preferred Approach is adopted, the alignment of QRM with QM will ensure that the very factors investors are unable to verify without undue cost are satisfied, the borrower will have an ability to repay, and the risks of default will be significantly reduced.

Moreover, because objective criteria such as LTV and credit score are available to and easily verifiable by investors, they need not be included as requirements of the QRM. For instance, the following figure illustrates the variety of criteria which are readily available to investors during the registration and marketing of residential mortgage-backed securities: [20]

[20] Source: Fitch analysis of EverBank RMBS transaction.



Transaction Comparison

Transaction Name	EBMLT 2013-1	SEMT 2013-3	SEMT 2013-1	CSMC 2013-TH1
Current Pool Balance ($)	308,430,523	600,210,241	397,881,280	422,202,730
Average Loan Balance ($)	805,302	804,571	778,633	767,641
Number of Loans	383	746	511	550
Top Three Originators (%)	Everbank (100)	FRB (14), CTB (9), USFS (9)	EverBank (37), FRB (7), PL(6)	Quicken (19), PHH (18), BofI (10)
Seasoning (Months)	3	1	6	3
WA LTV (%)	63.38	65.30	66.60	67.50
WA CLTV (%)	68.09	67.00	67.70	68.20
WA sLTV (%)	80.00	77.10	75.40	79.50
WA FICO	774	772	769	778
WA DTI (%)	29.39	29.60	29.80	31.10
FRMs/ARMs (%)	100.0/0.0	100.0/0.0	79.0/21.0	100.0/0.0
IO (%)	0.0	2.4	5.0	0.0
Full Documentation (%)	100	100	100	100
WA Gross Coupon (%)	3.8	3.8	4.0	4.0
WA Margin (%)	N.A.	N.A.	2.2	N.A.
WA Original Term	329	360	323	360
WA Remaining Term	326	359	317	357
Piggy-Back Seconds (%)	7.08	13.10	8.30	6.10
Primary Residence (%)	95.91	95.80	94.90	98.10
Purchase (%)	24.53	33.10	33.40	32.20
Property Type (%)				
Single-Family/PUD	96.21	94.10	95.30	98.90
Condo	2.89	4.50	3.60	1.10
Co-Op	0.59	0.70	0.60	0.00
2–4 Family	0.3	0.6	0.5	0.0
Geographic Concentration (%)				
Largest State	(CA) 49.0	(CA) 43.1	(CA) 42.9	(CA) 49.8
2nd Largest State	(FL) 9.6	(MA) 10.5	(TX) 13.2	(VA) 6.2
3rd Largest State	(TX) 6.2	(TX) 6.3	(MA) 9.6	(WA) 5.5
Top Three States	64.80	59.90	65.70	61.60
Top Five States	75.7	69.1	77.0	69.5
Subordination at Closing (%)[a]				
AAAsf	8.20	6.50	7.30	7.05
AAsf	5.85	4.60	4.75	5.00
Asf	3.85	2.95	3.05	3.35
BBBsf	2.50	1.60	1.90	2.30
BBsf	1.35	1.10	1.05	1.40

[a] Subordination for EBMLT 2013-1 is based on information provided by the issuer as of March 19, 2013 and is the expected subordination level. PUD – Planned unit development.
Source: Term sheet.

Disclosures on MBS provide key variables that investors need to determine credit risk and prepayment risk, including LTV and credit score. Investors can easily input these data into their pricing models. In short, the Preferred Approach would allow investors to determine their own risk appetites for LTV and other objective loan criteria while providing an important and inclusive framework to address the concerns of investors generally for sound and sustainable underwriting. MBA notes that in these recent deals, all loans are fully documented.

(5) The Alternative will raise costs to borrowers. Consumers who do not qualify for QRM will pay higher prices for ever-scarcer private label credit.

The Proposal is nominally focused on the securitization sponsor. However, in practice risk retention will raise costs for originators and ultimately be passed to consumers through either higher prices or reduced access to the secondary market. The additional costs include the cost of capital to finance retained risk and additional operating/compliance costs.

Most non-depository mortgage lenders use an originate-to-sell business model and operate very efficiently from a capital perspective, with one result being scarce balance sheet capacity for retaining any required risk. Consequently, these lenders would be forced to rely on counterparties who are able to hold risk and who will charge a premium for that service in order to lend outside of QRM. This premium would be paid by the consumer, and the narrow QRM Alternative would significantly increase the number of consumers forced to bear this cost.

Additionally, an institution holding a horizontal tranche for risk retention purposes would likely be required to consolidate the entire securitization's assets and liabilities onto its balance sheet under FAS 167, the Financial Accounting Standards Board's accounting guidance for securitizations. Nor would an institution that elects to satisfy its risk retention obligation by holding an eligible vertical interest be assured that it would not be required to consolidate a securitization's assets and liabilities onto its balance sheet as the inability to timely place even an immaterial amount of ABS interests in an offering RMBS backed by non-QRMs could result in the transaction failing to meet the requirements for sale and non-consolidation under FAS 166 and FAS 167.

The consequences of consolidation would be particularly draconian for depository institutions. Indeed, under risk-based capital rules, they would be required to hold capital for assets they do not own. Separately, even if retaining the required risk in vertical form does not trigger consolidation under FAS 167, the "lower" tranches of the vertical interest would be adversely risk weighted under the new Basel III capital rules.

Thus, the regulatory burden of risk retention will increase the cost of originating a mortgage, particularly non-QRM, for both depository and non-depository lenders, raising the prices that they will need to charge consumers.[21] Because the Alternative would drive many more borrowers into the non-QRM market, the overall cost faced by borrowers would be substantially greater than under the Preferred Approach.

[21] *See supra* at 12, which shows the steady yet dramatic escalation in the cost of originating a mortgage since 2002.

The Alternative’s exclusion of loans eligible for GSE and government agency purchase, insurance or guarantee loans will further increase these costs. Appendix Q to the ATR Rule governs how the DTI is to be calculated to meet the DTI requirement; there are serious concerns, however, that Appendix Q’s standards are not sufficiently objective to facilitate the use of automated underwriting systems. If this is the case, it will result in more expensive, labor-intensive originations and a higher legal risk premium for loans underwritten using Appendix Q. Liability concerns particular to these loans are likely to affect investor pricing of these QRMs.

Costs will likely increase due to other factors as well. For example, the Proposal requires that a depositor[22] of the security certify that all loans backing the security meet the standards of the QRM definition.[23] Where the Preferred Approach requires that this certification ensure that the depositor’s QM processes have been followed, the Alternative would require the depositor to take the additional steps of verifying LTV, first-lien and primary residence status, and credit-history attributes. There also will be additional costs to the originator in identifying the 30 day and 60 day delinquency attributes required under the Alternative.

Finally, considering that QRM loans will remain the easiest and least costly loans to securitize, it is virtually certain that consumers who do not qualify for QRM can be expected to pay higher prices for private label credit or obtain government credit if it is available.

(6) A more restrictive QRM will increase government and agency involvement in the mortgage market when the government’s footprint and risk should be reduced.

Securities issued by Fannie Mae and Freddie Mac (the GSEs) are exempt from the risk retention requirements along with securities backed by government-insured loans.[24] While MBA strongly supports these exemptions as essential to the housing market’s recovery, these exemptions coupled with the narrow Alternative will have harmful unintended consequences. In a time when most policymakers, including Members of Congress from both political parties, seek to shrink the government’s involvement in the mortgage market, a narrowly-defined QRM will force borrowers toward GSE and FHA options - extending rather than contracting the government’s role in, and thus exposure to, the residential housing finance market.

[22] The Proposal defines *depositor* as “[t]he person who receives or purchases and transfers or sells the securitized assets to the issuing entity,” the sponsor, or “the person that receives or purchases and transfers or sells the securitized assets to the issuing entity in the case of a securitization transaction where the person transferring or selling the securitized assets directly to the issuing entity is itself a trust.”

[23] 78 Fed. Reg. 183, 58037 (September 20. 2013).

[24] Such as FHA and VA loans.

Moreover, with the GSEs and government agencies financing all eligible loans, little liquidity would remain in the non-QRM market. Lending outside the QRM and government space would likely be limited to jumbo loans made to borrowers with substantial assets. Far from facilitating a deep, liquid private market for competitively-priced non-QRM loans, the Alternative would likely prevent such a market from emerging.

The proponents of the Alternative seem to believe that the Alternative will spur private capital investment in the large, currently under-served market. Even if a broader non-QRM market could produce more liquidity than a narrow one, MBA believes there are barriers to private capital formation and access to credit extend beyond this consideration. The housing finance industry is currently grappling with a myriad of sweeping rule changes and events that, along with the Alternative, could keep the private market from reviving. For example:

- Basel III requires significant capital for multi-tranche securities.
- FAS 166 makes it more difficult for securitizations to achieve sale status.
- For securitizations where the sponsor or depositor has a significant variable interest, such as a retained interest, the assets and liabilities within a securitization trust may have to be included in the sponsor's or depositor's consolidated financial statements, requiring the use of scarce capital.
- Recent fines and penalties paid by servicers under various state and Federal settlements make servicing loans riskier, and the new national servicing standards coupled with the still-fragmented state foreclosure statutes, have markedly increased servicing costs.
- Claims under seller representations and warranties continue to plague originators in an environment where claimants do not have to show a causal relationship between a minor breach and the default or loss on a loan.
- Proposed revisions to Reg AB would make investor reporting and securities registration extremely costly.
- Rules such as QM and QRM define the credit box, yet an originator may face a suit or government investigation for failing to make loans outside the box under a disparate impact theory.

In the face of all of this change, it will be difficult for the private market to reemerge to finance loans for consumers. MBA believes the Alternative represents an experiment that will not help that reemergence and would worsen the situation considerably. We again strongly urge the Agencies to reject the Alternative and adopt the Preferred Approach.

ADDITIONAL COMMENTS

I. MBA APPLAUDS THE AGENCIES FOR ELIMINATING THE PREMIUM CAPTURE CASH RESERVE ACCOUNT (PCCRA)

The Agencies proposed the PCCRA as part of the 2011 proposed rule. Issuing entities would have been required to place into the PCCRA spreads, reflected in interest-only security classes, which resulted from a securitization transaction. In effect, the PCCRA would become a first-loss position held by the issuing entity. MBA, along with a multitude of other stakeholders, strongly opposed this measure because it would effectively remove the incentive to engage in securitization. The impact to consumers would have been severe.

The Agencies responded to the concerns of MBA and other stakeholders by removing the PCCRA from the Proposal, and MBA applauds this step.

II. MBA THANKS THE AGENCIES FOR ALLOWING FLEXIBILITY IN HOLDING THE REQUIRED RISK BUT HAVE SOME CONCERNS WITH THE CURRENT PROPOSAL

MBA also thanks the Agencies for allowing sponsors greater flexibility in the manner by which they may meet the Proposal's risk retention requirements. The 2011 proposed rule would have required sponsors to choose to hold the required risk as either a single horizontal tranche, or as a 5% interest in each horizontal tranche in order to create a "vertical" tranche. The Proposal introduces a single vertical security,[25] which would allow a retaining sponsor to craft a single security to represent an equal interest in each horizontal tranche while simplifying compliance and monitoring processes.[26] Additionally, the Proposal allows the retaining sponsor to hold both horizontal and vertical tranches in order to meet the risk retention requirements, provided that the total amount held equals 5% of the fair value of the securitization transaction.[27] This flexibility will make it easier for sponsors to comply with the requirements, reducing administrative costs, which would ultimately have been passed along to the borrower.

While MBA thanks the Agencies for their flexibility, we are concerned with the disclosures that would be required of a retaining sponsor under the proposal. A retaining sponsor would be required to disclose, among other things, quantitative details about each security class issued, including:[28]

[25] A *single vertical security* is defined as "an ABS interest entitling the sponsor to specified percentages of the principal and interest paid on each class of ABS interests in the issuing entity (other than such single vertical security), which specified percentages result in the fair value of each interest in each such class being identical."

[26] 78 Fed. Reg. 183, 58027

[27] *Id*.

[28] 78 Fed. Reg. 183, 58027

- Discount rates;
- Loss given default (recovery);
- Prepayment rates;
- Defaults;
- Lag time between default and recovery; and
- The basis of forward interest rates used.

Much of this information would be unavailable to the sponsor at the time the securities are issued. Sponsors would also be required to rely upon statistical data which would not only increase the administrative cost of assembling and issuing a non-QRM security, but it would also be unnecessary considering that historical data for securities backed by similar loans is readily accessible to investors via commercial databases. Investors can use such data to make their investment decisions in line with their calculation of risk and reward.

MBA asks the Agencies to allow a post-securitization fair value report to serve the disclosure function, provided it is submitted to regulators within a reasonable time after the issue date. This will provide discipline and thereby increase the accuracy of market disclosures. Sponsors will have every incentive to ensure their pre-issue calculations are correct in order to avoid having to repurchase securities from the open market, likely at a premium.

MBA is also concerned that the calculations required of a retaining sponsor who opts to hold the risk in the form of an Eligible Horizontal Residual Interest (EHRI) may bring undue liability. The Proposal would require a retaining sponsor to certify to investors both that it has calculated a projected principal repayment rate and a projected cash flow rate, and that the projected cash flow rate for the EHRI does not exceed the projected principal repayment rate.[29] In short, the retaining sponsor holding an EHRI would be restricted to receiving a portion of total cash flows no greater than the rate at which principal was projected to be repaid on the underlying loans. MBA notes that this requirement may make the EHRI unworkable because it would significantly defer the payments owed on the EHRI due to the amortization schedule of most mortgages and the uncertainty regarding prepayment projections.[30]

This requirement may also subject the retaining sponsor to undue liability risk under Section 12 of the Securities Act of 1933. Residential mortgage-backed securities (RMBS) are subject to prepayment risk, but this risk is extremely difficult to model. A sponsor retaining an EHRI would be required to undertake the difficult task of modeling

[29] 78 Fed. Reg. 183, 58027

[30] Please see section (1) of the Horizontal Risk Retention Comments contained in our Commercial and Multifamily Comment Letter for an analysis of this issue.

projected prepayments, and then having that model subjected to scrutiny from investors in the likely event that prepayments differ from what was projected. MBA believes retaining sponsors should have a safe harbor from liability arising from these projections so long as the party utilizes a reasonable methodology.

MBA is also concerned that the operative date for determining fair value is not feasible in light of market dynamics. The Proposal would require that the fair value of the security, and thus the amount of risk to be held, be calculated "as of the day on which the price of the ABS interests to be sold to third parties is determined."[31] However, the individual tranches of a structured mortgage-backed securities transaction may not price at the same time. MBA strongly recommends that the Agencies allow fair value to be calculated at some date certain prior to the date the security is issued, or perhaps the issue date itself.

III. MBA IS PLEASED THAT THE RISK RETENTION PROVISION HAS A SUNSET DATE BUT REQUESTS THAT THE DURATION BE SHORTER

The 2011 proposed rule lacked a duration limit, requiring the retaining sponsor to hold risk for the life of the security. MBA strongly opposed this provision because the cost imposed would have been excessive. The Agencies responded by proposing that the risk retention requirement sunset beginning five years after the security is issued, and in any event after seven years from the date the securities are issued.[32]

While this is a positive step in the right direction, MBA believes the duration remains too long. In order for the risk retention requirement to be fulfilled in the period between five and seven years from the issue date, the unpaid principal balance of the pool of loans backing the security must be paid down to twenty-five percent of the original balance. Because this will rarely occur under normal market conditions before seven years, the duration requirement is effectively seven years. This is too long.

Historical data indicates that any underwriting deficiencies will likely manifest themselves within two years following origination of the loan. During that time, it will be clear whether the loan was underwritten poorly or the borrower misrepresented key information. After two years, loans are customarily said to be "seasoned." The subsequent performance of seasoned loans is rarely related to the underwriting quality

[31] 78 Fed. Reg. 183, 58027

[32] The Proposal's prohibition on sale and certain hedging of the retained risk will expire on or after the date that is the later of a) five years after the date of the closing of the securitization transaction; or the date on which the total unpaid principal balance of the mortgages collateralizing the securitization transaction has been reduced to 25 percent of the total unpaid principal balance of such residential mortgages at the closing of the securitization transaction. However, the prohibition will expire in all cases on "the date that is seven years after the date of the closing of the securitization transaction." 78 Fed. Reg. 183, 58036.

of that loan. Rather, economic or life events that are unforeseeable at the time a loan is originated become the primary factors contributing to default. Any risk retention requirement beyond this timeframe essentially operates as credit enhancement and a costly constraint on funds that could be redeployed into funding more loans to creditworthy borrowers. Thus, MBA asks the Agencies to limit the duration requirement to allow a retaining sponsor to transfer the risk being held beginning two years after the issue date.

IV. THE SEASONED LOAN EXEMPTION SHOULD APPLY SOONER.

The Proposal exempts seasoned loans from the risk retention requirements. A seasoned loan is defined by the Proposal as one that has been outstanding and performing for the longer of:

- Five years; or
- Until the outstanding principal balance of the loan has been reduced to 25 percent of the original principal balance.

In any event, a loan is a seasoned loan if it has been outstanding and performing for a period of at least seven years.[33] In order to qualify for the exemption, a security must be backed entirely by seasoned loans, the seasoned loans must not have been modified since origination, and none of the loans can have been delinquent for 30 days or more.

A loan should be able to qualify for the seasoned loan exemption sooner than the Proposal's five-to-seven year window. The Agencies state that "sound underwriting is less relevant after loans have been performing for an extended period of time." MBA wholeheartedly agrees, though as we indicate above the period of time should be confined to two years after the loan is originated. After that period of time, performance becomes almost completely dependent on outside factors such as economic and life events occurring after origination and not related to conditions that existed at origination. Reducing the period of time a loan must perform before satisfying the seasoned loan exemption to two years would satisfy the Agencies' twin goals of reducing unnecessary costs and ensuring that the loan be afforded "a sufficient period of time to prove [its] performance."[34]

The Agencies should also allow the time period to restart after a loan modification or adverse credit event. As drafted, the borrower and lender have strong incentives to avoid pursuing loan modifications because of the subsequent disqualification from "seasoned loan" treatment. That outcome is harmful to consumers.

[33] 78 Fed. Reg. 183, 58043

[34] 78 Fed. Reg. 183, 58018.

CONCLUSION

MBA strongly supports adopting the Preferred Approach. Aligning the QRM definition with the QM will ensure that all credit-worthy borrowers can access competitively priced mortgage capital that they have the ability to repay, while ensuring that investors can rely on an originator's assertion regarding the underwriting of the loan. Conversely, the Alternative would burden borrowers with restricted access to credit and added costs, neither of which can be justified by anticipated gains in loan performance.

MBA again thanks the Agencies for the opportunity to comment on this important rulemaking. Any questions should be directed to Mike Fratantoni, Vice President of Single-Family Research and Economics at (202) 557-2935 or mfratantoni@mba.org, or Dan McPheeters, Policy Advisor (202) 557-2780 or dmcpheeters@mortgagebankers.org.

Sincerely,

David H. Stevens
President and Chief Executive Officer

APPENDIX

Risk-Retention - General

1(a). Should the agencies require a minimum proportion of risk retention held by a sponsor under the standard risk retention option to be composed of a vertical component or a horizontal component? 1(b). Why or why not?

MBA's Response: No, the agencies should not require a minimum proportion of risk retention to be composed of a vertical or horizontal component. The current flexibility afforded sponsors under this proposal to determine how best to hold the risk is the best approach and should be part of any final rule. As we describe above, the added flexibility will reduce unnecessary compliance costs that would ultimately raise costs on borrowers. At issue is not just the cost of holding the security itself, but the associated risk-based capital requirements and potential consolidation that may arise if sponsors are not allowed to choose their preferred method of risk retention.

2(a). The agencies observe that horizontal risk retention, as first-loss residual position, generally would impose the most economic risk on a sponsor. Should a sponsor be required to hold a higher percentage of risk retention if the sponsor retains only an eligible vertical interest under this option or very little horizontal risk retention? 2(b). Why or why not?

MBA's Response: No, a sponsor should not be required to hold a higher percentage of risk retention if the sponsor retains only an eligible vertical interest under this option or very little horizontal risk retention. Many private investors are interested in investing in the subordinate tranche of a security because of potential yield, and the Agencies should not limit investors' choices. Moreover, because a sponsor is required to disclose the manner in which the risk is being retained, investors will be able to incorporate that information into their investment decision and price the remainder of the security appropriately. Demanding more of those sponsors who choose to hold the risk as a vertical interest would unduly burden private investment decisions.

3. Are the disclosures proposed sufficient to provide investors with all material information concerning the sponsor's retained interest in a securitization transaction and the methodology used to calculate fair value, as well as enable investors and the agencies to monitor whether the sponsor has complied with the rule?

MBA's Response: No, MBA does not believe the disclosures proposed are sufficient. Please see section II above for MBA's comments expressing concern with the new disclosure requirements.

4(a). Is the requirement for sponsors that elect to utilize the horizontal risk retention option to disclose the reference data set or other historical information that would enable investors and other stakeholders to assess the reasonableness of the key cash flow assumptions underlying the fair value of the eligible horizontal residual interest useful? 4(b). Would the requirement to disclose this information impose a significant cost or undue burden to sponsors? 4(c). Why or why not? 4(d). If not, how should proposed disclosures be modified to better achieve those objectives?

MBA's Response: Yes, this disclosure may be useful but it would be a burden on sponsors. Please see section II above for MBA's comments expressing concern with the new disclosure requirements. MBA believes retaining sponsors should have a safe harbor from liability arising from these disclosures so long as the party utilizes reasonable methodologies.

5(a). Does the proposal require disclosure of any information that should not be made publicly available? 5(b). If so, should such information be made available to the Commission and Federal banking agencies upon request?

MBA's Response: Yes, the proposal requires disclosure of information that is not publicly available and yes, the information should only be made available upon request. The Agencies should also provide a safe harbor in connection with these disclosures where the information was disclosed in good faith and based on reasonable assumptions. To the extent any disclosure could subject a sponsor to additional liability to investors under the securities laws, such disclosures should be made directly to the Commission. Please see section II above for MBA's comments expressing concern with the new disclosure requirements.

7. To what extent would the flexible standard risk retention option address concerns about a sponsor having to consolidate a securitization vehicle for accounting purposes due to the risk retention requirement itself, given that the standard risk retention option does not require a particular proportion of horizontal to vertical interest?

MBA's Response: MBA believes that the risk retention options provide sufficient flexibility to address these and other concerns to avoid consolidation of a securities assets and liabilities.

10(a). Is the restriction on certain projected payments to the sponsor with respect to the eligible horizontal residual interest appropriate and sufficient? 10(b). Why or why not?

MBA's Response: Yes, MBA believes that the approach outlined in Section 4(b)(2)(i) is appropriate for ensuring that a horizontal interest held by a retaining sponsor is a "first-loss" position. However, MBA directs the Agencies to section II, (5) above for our position concerning the costs that retaining parties may face due to asset consolidation requirements. MBA thanks the Agencies for not extending to the retaining sponsor any duty for ensuring that actual payments reflect the projections disclosed under Section 4(b)(2)(i).

11(a). The proposed restriction on certain projected payments to the sponsor with respect to the eligible horizontal residual interest compares the rate at which the sponsor is projected to recover the fair value of the eligible horizontal residual interest with the rate which all other investors are projected to be repaid their principal. Is this comparison of two different cash flows an appropriate means of providing incentives for sound underwriting of ABS? 11(b). Could it increase the cost to the sponsor of retaining an eligible horizontal residual interest? 11(c). Could sponsors or issuers manipulate this comparison to reduce the cost to the sponsor of retaining an eligible horizontal residual interest? How? 11(d). If so, are there adjustments that could be made to this requirement that would reduce or eliminate such possible manipulation? 11(e). Would some other cash flow comparison be more appropriate? 11(f). If so, which cash flows should be compared? 11(g). Does the proposed requirement for the sponsor to disclose, for previous ABS transactions, the number of times the sponsor was paid more than the issuer predicted for such transactions reach the right balance of incremental burden to the sponsor while providing meaningful information to investors? 11(h). If not, how should it be modified to better achieve those objectives?

MBA's Response: MBA has significant concerns that the restriction on certain projected payments to the sponsor may make the EHRI unworkable. Please see section (1) of the Horizontal Risk Retention Comments contained in our Commercial and Multifamily Comment Letter for an analysis of this issue.

Requiring disclosures of previous instances where the sponsor was paid more than the issuer projected could potentially raise liability issues concerning false disclosures, particularly for entities disclosing more than one instance based on a similar methodology. The risk of this liability would substantially increase costs. The Agencies should provide an explicit safe harbor for disclosures of a comparison between a projection and an actual outcome.

12(a). Does the proposed form of the single vertical security accomplish the agencies' objective of providing a way for sponsors to hold vertical risk retention without the need to perform valuation of multiple securities for accounting purposes each financial reporting period? 12(b). Is there a different approach that would be more efficient?

MBA's Response: Yes, the proposed form of the single vertical security helps accomplish the agencies' objective. MBA appreciates the added flexibility and simplicity afforded by the option to hold a single vertical security. However, MBA has concerns with the disclosure requirements, which can be found in section IV above.

13(a). Is three years after all ABS interests are no longer outstanding an appropriate time period for the sponsors' record maintenance requirement with respect to the calculations and other requirements in section 4? 13(b). Why or why not? 13(c). If not, what would be a more appropriate time period?

MBA's Response: No, MBA believes the current record retention requirement is too long. The record maintenance requirement should terminate at the same time as the risk retention requirement sunsets. In any event, sponsors should be allowed to maintain records electronically.

14(a). Would the calculation requirements in section 4 of the proposed rule likely be included in agreed upon procedures with respect to an interest retained pursuant to the proposed rule? 14(b). Why or why not? 14(c). If so, what costs may be associated with such a practice?

MBA's Response: MBA does not believe a separate agreed upon procedures report from outside auditors is appropriate or necessary. The SEC may want to consider adding this to existing Reg AB audit requirements.

15(a). Other than a cap in the priority of payments on amounts to be paid to the eligible horizontal residual interest and related calculations on distribution dates and related provisions to allocate any amounts above the cap, would there be any additional steps necessary to comply with the alternative proposal? 15(b). If so, please describe those additional steps and any associated costs.

MBA's Response: MBA notes at the outset that our responses to Requests 15 through 22 address the alternative proposal for disclosing the eligible horizontal residual interest, and not the Alternative "QM-Plus" Approach to defining QRM. MBA also notes that the alternative proposal was discussed only in the Proposal's preamble, and contained no regulatory language that would be sufficient to provide comment. However, MBA has concerns with the alternative proposal as presented. Specifically, the Agencies fail to identify the party who would bear the compliance burden under the alternative proposal; therefore, MBA cannot responsibly comment on cost or compliance steps. Moreover, MBA strongly opposes potentially subjecting parties to liability for the distribution of cash flows that are not, and are likely never, under their control.

MBA also believes that the EHRI is problematic and potentially unworkable. Please see section (1) of the Horizontal Risk Retention Comments contained in our Commercial and Multifamily Comment Letter for an analysis of this issue. We are, however, concerned with the alternative proposal as well.

16. Would the cost and difficulty of compliance with the alternative proposal, including monitoring compliance, be higher or lower, than with the proposal?

MBA's Response: It would likely be higher. The Proposed EHRI calculation is problematic and potentially unworkable. Beyond that, the alternative proposal carries certain liability risks which may raise costs. Please see MBA's response to Request for Comment 15 above.

17(a). Does the alternative proposal accommodate more or less of the current market practice than the proposal? 17(b). If there is a difference, please provide data with respect to the scale of that difference.

MBA's Response: Please see MBA's response to Request for Comment 15 above.

18. With respect to the alternative proposal, should amounts other than payment of expenses and fees to service providers be excluded from the calculations?

MBA's Response: MBA believes that the alternative proposal should only apply to payments of principal and interest due to certificate holders. All other cash flows or potential cash flows should be excluded from this calculation.

19(a). Does the alternative proposal adequately accommodate structures with unscheduled payments of principal, such as scheduled step downs? 19(b). Does the alternative adequately address structures which do not distinguish between interest and principal received from underlying assets for purposes of distributions?

MBA's Response: MBA reiterates the comments made in response to Request for Comment 15.

20(a). Are there asset classes or transaction structures for which the alternative proposal would not be economically viable? 20(b). Are there asset classes or transaction structures for which the alternative proposal would be more economically feasible than the proposal?

MBA's Response: MBA reiterates the comments made in response to Request for Comment 15.

21. Should both the proposal and the alternative proposal be made available to sponsors?

MBA's Response: MBA notes that the alternative proposal was discussed only in the Proposal's preamble, and contained no regulatory language that would be sufficient to provide comment. MBA reiterates the comments made in our response to Request for Comment 15.

22(a). The proposal includes a restriction on how payments on an eligible horizontal residual interest must be structured but does not restrict actual payments to the eligible horizontal residual interest, which could be different than the projected payments if losses are higher or lower than expected. The alternative proposal for payments on eligible horizontal residual interests does not place restrictions on structure but does restrict actual payments to the eligible horizontal residual interest. Does the proposal or the alternative proposal better align the sponsor's interests with investors' interests? 22(b). Why or why not?

MBA's Response: MBA reiterates the comments made in our response to Request for Comment 15.

Originator Allocation

71(a). If originators were allocated risk only as to the loans they originate, would it be operationally feasible to allocate losses on a loan-by-loan basis? 71(b). What would be the degree of burden to implement such a system and accurately track and allocate losses?

MBA's Response: No. Generally, tranches are developed so that tranche holders share pari passu in losses. Adding additional complexity will drive expenses up. If originators over time believe that they are being treated unfairly, let the market forces migrate the practice over time not mandate a new practice in a rule.

Hedging Provisions

72(a). Is the scope of the proposed restriction relating to majority-owned affiliates, and affiliates generally, appropriate to prevent sponsors from avoiding losses arising from a risk retention asset? 72(b). Should the agencies, instead of the majority-owned affiliate approach, increase the 50 percent ownership requirement to a 100 percent ownership threshold under a wholly owned approach?

MBA's Response: The Agencies should not require that the affiliate be wholly owned by the sponsor in order to hold risk on behalf of the sponsor. As the Agencies note, the sponsor is exposed to the overall performance of a majority owned affiliate, and thus will continue to have "skin in the game" with respect to the loans they securitize. Moreover, the majority-owned affiliate will likely have outside investors which could have a disciplining effect to ensure that any risk retained (and by extension, the pool itself) be of a high quality.

Sunset Provisions

76(a). Are the sunset provisions appropriately calibrated for RMBS (i.e., later of five years or 25 percent, but no later than seven years) and all other asset classes (i.e., 213 later of two years or 33 percent)? 76(b). If not, please provide alternative sunset provision calibrations and any relevant analysis to support your assertions.

MBA's Response: No. MBA believes that the risk retention requirement should have a sunset period, and thanks the Agencies for including one in the Proposal. But MBA believes the sunset period should be shorter because residential mortgages "season" much earlier than five-to-seven years after origination. The sunset period should begin two years after the security is issued. Please see section V above.

77(a). Is it appropriate to provide a sunset provision for all RMBS, as opposed to only amortizing RMBS? 77(b). Why or why not? 77(c). What effects might this have on securitization market practices?

MBA's Response: Yes, MBA believes that all RMBS should be eligible for the sunset. Securities disclosure requirements, even absent those contained in the Proposal, are sufficient to advise investors of the loans underlying a pool of collateral. Investors can then easily price an interest in the pool based on their risk factors. Allowing all RMBS to benefit from the sunset period will increase liquidity for home equity lines of credit, for example, as well as allow issuers to better serve the investing parameters of the market. Both of these factors will reduce costs for consumers.

QRM

89(a). Is the agencies' approach to considering the QRM definition, as described above, appropriate? 89(b). Why or why not? 89(c). What other factors or circumstances should the agencies take into consideration in defining QRM?

MBA's Response: Yes, the agencies' approach to considering the QRM definition is appropriate. MBA strongly supports the Preferred Approach. MBA believes that QRM best fulfills its purpose when it is aligned with QM. Please see MBA's comments above, in particular section I, (2).

90. Does the proposal reasonably balance the goals of helping ensure high quality underwriting and appropriate risk management, on the one hand, and the public interest in continuing access to credit by creditworthy borrowers, on the other?

MBA's Response: Yes, in MBA's view the proposal does a superior job of helping ensure high quality underwriting and appropriate risk management on the one hand while serving the public interest in continuing access to creditworthy borrowers on the other. Please see MBA's comments above, in particular section 1, (1) & (2)

MBA notes that there can be further improvements to the QM but this does not lessen the need for QM to equal QRM. For example, by including in the QM rule language saying that loans eligible for purchase by the GSEs meet the definition of a QM loan may have the unintended consequence of building into the QM rule as promulgated and the QRM rule as proposed an implicit brand bias in favor of a single credit scoring brand to the exclusion of all others. We believe this was unintended, since in the NPR the regulators say very clearly that they "do not believe it is appropriate to establish regulatory requirements that use a specific credit scoring product from a private company."[35]

This problem can be easily fixed while still ensuring the QM and QRM definitions are aligned. All that is needed is for the Federal Housing Finance Agency, as regulator and conservator of the GSEs, to require them to revise their policies and practices to accept mortgages underwritten with other validated credit scoring models in addition to the single brand currently permitted. Such a change would not only eliminate an unintended agency endorsement of "a specific credit scoring product" but would also create the potential for millions of well-qualified borrowers who are thin file or infrequent credit users who are unable to be scored by the only model currently accepted by the GSEs to be scored by other validated models and thereby become eligible for QM and QRM compliant loans.

MBA's Response: Yes. Please see above for MBA's comments on the QRM definition, in particular section I, (2).

91. Will the proposal, if adopted, likely have a significant effect on the availability of credit? Please provide data supporting the proffered view.

MBA's Response: Yes. If the proposal is adopted, it will have a very significant effect on the availability of credit. MBA and other data are included in MBA's comments on the QRM definition above in particular at section I, (2) –(4).

92(a). Is the proposed scope of the definition of QRM, which would include loans secured by subordinate liens, appropriate? 92(b). Why or why not? 92(c). To what extent do concerns about the availability and cost of credit affect your answer?

[35] *See* 78 Fed. Reg. 183, 57985 (September 20, 2013).

MBA's Response: Yes. the proposed scope of the definition of QRM is appropriate MBA believes that aligning QRM with the QM standard is the most effective means of accomplishing Congress' intentions. To separate out subordinate liens, or otherwise require market participants to develop a separate compliance regime would needlessly increase costs. Please see MBA's comments above, beginning in section I.

93(a). Should the definition of QRM be limited to loans that qualify for certain QM standards in the final QM Rule? 93(b). For example, should the agencies limit QRMs to those QMs that could qualify for a safe harbor under 12 CFR 1026.43(e)(1)? Provide justification for your answer.

MBA's Response: No. MBA believes that aligning QRM with the QM standard is the most effective means of accomplishing Congress' intentions. The agencies should not limit QRMs to those QMs that could qualify for a safe harbor. All QM borrowers should have access to QRM secondary market financing. MBA addresses the need for QRM to equal QM and concerns with the Alternative in section II (2) and (3).

94(a). Are the proposed certification requirements appropriate? 94(b). Why or why not?

MBA's Response: MBA thanks the Agencies for clarifying these responsibilities and for doing so within the existing liability paradigm governing securities disclosures. The evaluation and preparation of these documents, and the associated liabilities, are common and well recognized by market participants. MBA believes that the Agencies were wise to avoid diverging from this existing framework, and in the process saving the market from incurring substantial uncertainty and additional risk premiums, costs that will be borne by consumers while yielding little if any benefit to investors.

95(a). What difficulties may occur with the proposed repurchase requirement under the QRM exemption? 95(b). Are there alternative approaches that would be more effective? 95(c). Provide details and supporting justification.

MBA's Response: MBA strongly supports the opportunity to repurchase certified loans that are discovered to be non-QRM from a pool without the RMBS losing its risk retention exemption. We do not believe there are any undue difficulties with the process proposed.

Alternative Approach:

96(a). As documented in the initial proposal, academic research and the agencies' own analyses show that credit history and loan-to-value ratio are key determinants of mortgage default, along with the product type factors that are included in the QM definition. If QRM criteria do not address credit history and loan-to-value, would securitizers packaging QRM-eligible mortgages into RMBS have any financial incentive to be concerned with these factors in selecting mortgages for inclusion in the RMBS pool? 96(b). Is the incentive that would be provided by risk retention unnecessary in light of the securitizer incentives and investor disclosures under an approach that aligns QRM with QM as described in the previous section of this Supplementary Information?

MBA's Response: As MBA details above in section I, the QM standard and the significant penalties imposed on lenders, and potentially investors, for failure to comply with the ability-to-repay requirements provide sufficiently strong incentives to ensure quality, sustainable underwriting. Information on factors such as LTV should be available to investors. Mandating a minimum LTV does not further align incentives or protect investors, but needlessly restricts access the most favorable mortgage lending to a relatively small subset of borrowers. Please see MBA's comments on this topic in section II above.

97(a). Does the QM-plus approach have benefits that exceed the benefits of the approach discussed above that aligns QRM with QM? For example, would the QM-plus approach favorably alter the balance of incentives for extending credit that may not be met by the QM definition approach or the QRM approach previously proposed? 97(b). Would the QM-plus approach have benefits for financial stability?

MBA's Response: No. The preferred QM approach offers benefits without the detriments of the QM-plus. Please see above for MBA comments on the Alternative, in particular section II, (2)-(4).

98. Would the QM-plus approach have greater costs, for example in decreased access to mortgage credit, higher priced credit, or increased regulatory burden?

MBA's Response: Yes. The QM-plus approach would have significant costs and adverse unintended consequences. Please see above for MBA comments on the Alternative, in particular section II, (2)-(5).

99. Other than the different incentives described above, what other benefits might be obtained under the QM-plus approach?

MBA's Response: None. MBA does not believe that the Alternative offers benefits that are preferable to the Preferred Approach. Please see above for MBA comments on the Alternative in section II above.

100(a). Would setting the QRM criteria to be the same as QM criteria give originators additional reasons to have reservations about lending outside the QM criteria. 100(b). Would the QM-plus approach, which confers a distinction on a much smaller share of the market than the approach that aligns QRM with QM, have a different effect?

MBA's Response: No. The Alternative would not improve lending outside the QM criteria because all eligible loans would be sold to Fannie Mae or Freddie Mac, or be insured by FHA and thus achieve an exemption from the risk retention requirements. This would deprive the non-QRM market of liquidity and at the same time increase government lending. Please see above for MBA comments on this topic, in particular section II, (5) and (6).

101. In light of these factors, the agencies seek comment on whether the QM-plus approach would encourage a broader non-QRM market and thus mitigate concerns about the types of costs associated with a narrow QRM approach described above. Considering the number of institutions in the market with securitization capacity and expertise that already hold RMBS interests presenting the same types of risks as the RMBS interests the proposed rule now establishes as permissible forms of risk retention, would the requirement to retain risk in a greater number of securitizations under the QM-plus approach act as a restraint on the amount and cost of mortgage credit available in the market?

MBA's Response: No, the Alternative would restrain the amount and accessibility of mortgage credit, particularly private mortgage credit. The Alternative would also increase the cost of this credit. Please see above for MBA comments on the Alternative, in particular section II, (2)-(6).

102. How would the QM-plus approach influence investors' decisions about whether or not to invest in private RMBS transactions?

MBA's Response: Investors would not benefit from the additional requirements of the Alternative. Objective criteria, such as LTV, are already accessible and verifiable to investors and can be effectively and efficiently priced by market participants. Please see MBA's comments on this topic above, in particular section **I**I, (4).

103. How would the QM-plus approach affect or not affect investors' appetite for investing in private label RMBS as opposed to securitizations guaranteed by the Enterprises?

MBA's Response: MBA does not believe that the Alternative will increase investor demand. Please see above for MBA comments on the Alternative, in particular section II, (4) and (6).

104. Since more RMBS transactions would be subject to risk retention under the QM-plus approach, how would the proposed forms of risk retention affect sponsors' willingness to participate in the market?

MBA's Response: MBA believes the Alternative would have a material, negative impact on participation in the market. Please see our comments on this topic in section II, (2) - (6) above.

105. The agencies request comment whether the QM-plus approach should also include mortgages that fall within QM status only in reliance on the CFPB's provisions for GSE-eligible covered transactions, small creditors, or balloon loans. For all but the GSE-eligible covered transactions, the CFPB's rules make the mortgages ineligible for QM status if the originator sells them into the secondary market within three years of origination. For GSE-eligible loans, it appears sale to the GSEs may remain the best execution alternative for small originators (although the agencies are seeking comment on this point). The agencies request commenters advocating inclusion of these non-core QMs under the QM-plus approach to address specifically how inclusion would improve market liquidity for such loans.

MBA's Response: MBA believes that any definition of QRM should include loans that are QM due to GSE-eligibility. However, we still oppose the Alternative for reasons outlined in section II above.

106. The agencies request comment whether, notwithstanding the agencies' concern about this additional risk of default, the agencies should remove the outright prohibition on piggyback loans from the QM-plus approach.

MBA's Response: MBA believes that aligning QRM with the QM standard is the most effective means of accomplishing Congress' intentions. Piggyback loans would be treated consistently were QRM and QM aligned.. Please see MBA's comments above concerning aligning QRM with QM, in particular section I.

107(a). Commenters, including one group representing RMBS investors, expressed concern that excluding loans to a borrower that is 30 days past due on any obligation at the time of closing from the definition of QRM would be too conservative. The QM-plus approach is based on the view that these 30-day credit derogatories are typically errors, or oversights by borrowers, that are identified to borrowers and eliminated during the underwriting process. Thus a 30-day derogatory that cannot be resolved before closing is an indication of a borrower who, as he or she approaches closing, is not meeting his or her obligations in a timely way. The agencies request comments from originators as to this premise. 107(b). The agencies also request comment on whether the QM-plus approach should permit a borrower to have a single 60-day plus past-due at the time of closing, but not two. 107(c). The agencies further request comment on whether this approach should be included if the borrower's single 60-day past-due is on a mortgage obligation.

MBA's Response: MBA opposes these credit history requirements and comments on them in section II, (5). MBA instead supports aligning QM and QRM which excludes such requirements.

October 24, 2013

Office of the Comptroller of the Currency
400 7th St, SW, Suite 3E-218, Mail Stop 9W-11
Washington, D.C. 20219
Docket No. OCC-2013-0010

Board of Governors of the Federal
Reserve System
20th St. and Constitution Ave, NW
Washington, D.C. 20551
Attn: Robert deV. Frierson, Secretary
Docket No. R-1411

Federal Deposit Insurance Corporation
550 17th St., NW
Washington, D.C. 20429
Attn: Robert E. Feldman, Exec. Secretary
RIN 3064-AD74

Securities and Exchange Commission
100 F St., NE
Washington, D.C. 20549-1090
Attn: Elizabeth M. Murphy, Secretary
File Number S7-14-11

Federal Housing Finance Agency
400 7th St., SW
Washington, D.C. 20024
Attn: Alfred M. Pollard, General Counsel
RIN 2590-AA43

Department of Housing and Urban
Development
451 7th St., SW, Room 10276
Washington, D.C. 20410-0500

Re: Credit Risk Retention Re-Proposal - MBA Commercial and Multifamily Real Estate Finance Comment Letter

Dear Ladies and Gentleman:

On August 28, 2013[36], the Office of the Comptroller of the Currency (OCC), Board of Governors of the Federal Reserve System (the Fed), Federal Deposit Insurance Corporation (FDIC), Securities and Exchange Commission (SEC), Federal Housing Finance Agency (FHFA), and the Department of Housing and Urban Development (HUD) (collectively, the Agencies) jointly released a notice of proposed rulemaking (the Re-proposal) to implement section 941 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act or Act).[37] The Re-proposal follows the proposed rule issued in April 2011 (prior proposal).[38]

The Mortgage Bankers Association[39] (MBA) appreciates the opportunity to comment on this important Re-proposal. This portion of MBA's submittal will concentrate on the Re-

[36] The Re-proposal was published in the Federal Register on September 20, 2013, see 78 Fed. Reg. 57928 (September 20, 2013).
[37] Public Law 111-203, 124 Stat. 1376-2223 (July 21, 2010).
[38] 76 Fed. Reg. 24090 (April 29, 2011).
[39] The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community in the

proposal’s impact on the commercial and multifamily (commercial/multifamily) real estate finance markets.

The Re-proposal implements the credit risk retention requirements of section 15G of the Securities Exchange Act of 1934[40], as added by section 941 of the Dodd-Frank Act. Section 15G generally requires the securitizer of asset-backed securities to retain not less than 5 percent of the credit risk of the assets collateralizing the asset-backed securities. Section 15G includes a number of exemptions from these requirements, including an exemption for commercial mortgage-backed securities (CMBS) that meet certain conditions.

MBA commends the Agencies for their efforts in drafting the Re-proposal. MBA greatly appreciates the Agencies thoughtful consideration of the comments that addressed the prior proposal. From the commercial/multifamily real estate finance perspective, elements of the Re-proposal that were responsive to concerns raised with the prior proposal include:[41]

1. Withdrawal of the Premium Capture Cash Reserve Account (PCCRA)
2. Greater flexibility in the allocation of risk retention between risk retention holders
3. Adjusted risk retention for “mixed” (exempt and non-exempt loans) CMBS pools
4. For horizontal risk retention, reduction in the hold period from the life of the securitization to five years

We strongly support these changes and urge the Agencies to maintain them in the Final Rule. In addition, our comments will address ways in which certain elements of the Re-proposal can be modified or withdrawn to avoid unintended consequences and further enhance the regime governing CMBS as a critical capital source for commercial/multifamily real estate.

country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets; to expand homeownership and extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of over 2,200 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, REITs, Wall Street conduits, life insurance companies and others in the mortgage lending field. For additional information, visit MBA's Web site: www.MBA.org.

[40] 15 U.S.C. § 78o-11.

[41] For MBA’s commercial/multifamily comments on the prior proposal please see, MBA Commercial and Multifamily Mortgage Finance Comment Letter, July 11, 2011.

I. SUMMARY OF CORE RECOMMENDATIONS

A brief summary of our recommendations and observations are as follows:

9) MBA commends the Agencies for the beneficial changes made from the original proposal such as the elimination of the Premium Capture Cash Reserve Account (PCCRA) and increased flexibility for how risk retention can be structured. The changes will enhance the ability of CMBS market participants to implement risk retention.

10) We raise strong concerns about cash flow restrictions being placed on horizontal risk retention holders. The eligible horizontal risk retention interest (EHRI) recovery percentage, as proposed, would severely limit cash flow to horizontal risk retention holders due to restrictions linking CMBS payments to principal repayment, which for CMBS does not occur, for the most part, until near the expiration of the securitization. Should the Agencies place any cash flow restrictions on the horizontal risk retention holder, it should be linked to the par value of the horizontal risk retention position that would include both principal and interest payments.

11) We provide alternative methodologies for calculating fair value for CMBS that are closely linked to sale proceeds, which would eliminate the need for the extensive reporting requirement of the fair value assumptions.

12) We recommend that the Agencies also allow the horizontal risk retention to be split into senior and subordinate positions, in addition to the *pari passu* arrangement. This will provide greater flexibility for existing market participants to assume the horizontal risk retention position.

13) We recommend enhanced flexibility of underwriting parameters for a “qualified commercial real estate loan” such as the increase in the allowable amortization period from 25 years to 30 years.

14) We recommend the exclusion from risk retention single asset, single borrower CMBS and, at a minimum, recommend that the credit box for zero risk retention be expanded for this CMBS category.

15) We recommend that CMBS loan documents, such as the Pooling and Servicing Agreement (PSA), specify the quorum necessary for bond holders to vote to replace the special servicer, rather than specify a threshold in the regulation.

16) To the extent necessary, we recommend clarification with regard to the multifamily executions of the GSEs.

Each is discussed in greater detail below.

II. GENERAL COMMENTS

MBA Supports the Agencies' Flexible Approach for Risk Retention

Overall, MBA is highly supportive of the added risk retention flexibility provided in the Re-proposal. The Agencies' risk retention objective "to provide more flexibility to accommodate various sponsors and securitizations transactions"[42] was largely achieved by combining the "horizontal", "vertical", and "L-shaped" risk retention structures into a single risk retention structure. This combined structure provides the sponsor with the ability to choose how much risk retention will be held in any combination of horizontal and vertical risk retention forms provided that the 5 percent risk retention requirement is met. Under the prior proposal, sponsors that elected to retain the horizontal and vertical risk retention structures (the so called L-shaped structure), were required to evenly split the 5 percent risk retention requirement between vertical and horizontal risk retention.[43] For CMBS, risk retention can potentially be divided among the sponsor, originator (provided that the originator originated a minimum of 20 percent of the CMBS), and up to two qualified horizontal risk retention purchasers. This flexibility will allow existing CMBS market participants to divide up the risk retention requirement in a more efficient manner. In the Horizontal Risk Retention section (below), we recommend further refinements to the horizontal risk retention structure that will allow it to better accommodate existing market participants.

MBA strongly supports the Re-proposal's introduction of a "single vertical security",[44] which would allow a retaining sponsor to craft a single security to represent an equal interest in each horizontal tranche while simplifying compliance and monitoring processes.[45] This structure will make it easier for sponsors to comply with the

[42] 78 Fed. Reg. 57937 (September 20, 2013).

[43] "Specifically, the original proposal would have allowed a sponsor to meet its risk retention obligations under the rules by retaining: (1) Not less than 2.5 percent of each class of ABS interests in the issuing entity issued as part of the securitization transaction (the vertical component); and (2) an eligible horizontal residual interest in the issuing entity in an amount equal to at least 2.564 percent of the par value of all ABS interests in the issuing entity issued as part of the securitization transaction, other than those interests required to be retained as part of the vertical component (the horizontal component)." See 78 Fed. Reg. 57937 (September 20, 2013).

[44] A *single vertical security* is defined as "an ABS interest entitling the sponsor to specified percentages of the principal and interest paid on each class of ABS interests in the issuing entity (other than such single vertical security), which specified percentages result in the fair value of each interest in each such class being identical."

[45] 78 Fed. Reg. at 58027.

requirements, reducing administrative costs which would ultimately have been passed along to the borrower.

We recommend an additional modification along these lines. As a major sponsor type of CMBS and other structured securities, commercial banks could be significantly impacted by the risk retention requirement. This potential impact is amplified by the release of Basel III on July 2, 2013[46] that calls for higher risk-based capital charges for vertical risk retention. An analysis performed by MBA on a illustrative 2012 CMBS issuance revealed that for a vertical risk retention interest, the risk-based capital charge would increase from 10.1 percent (current risk-based capital treatment) to 16.3 percent (Basel III capital treatment).[47] This higher risk-based capital requirement is more than double the 8 percent risk-based capital charge for commercial bank holdings of commercial real estate whole loans.

In order to address this disparity, as indicated in MBA's prior risk retention comment letter, we recommend that a bank or other sponsor be able to retain a participation interest in lieu of a securitized interest - a participation (seller's) interest in the assets of the pool equivalent to 5 percent of fair value of each security class. Under this option, the sponsor would own a 5 percent *pari passu* interest in each loan or in the pool of loans held outside of the securitization trust. This risk retention structure may be important for certain segments of the market, including many commercial banks, because of their existing infrastructure to share risk on a *pari passu* basis and their preferable capital treatment for whole loan positions.

The Withdrawal of the PCCRA Eliminates a Major Securitization Impediment

In the Re-proposal, the Agencies indicated that withdrawing the PCCRA was made in consideration of the change from par value to fair value for risk retention as well its "unintended consequences" on the securitization and lending markets.[48] MBA commends the Agencies for their thoughtful consideration of comment letters, including MBA's, which highlighted the PCCRA's potential drastic market impacts. The withdrawal of the PCCRA eliminates a major structural obstacle to the implementation of risk retention. We would urge the Agencies to provide similar consideration to elements of the Re-proposal that also have potential negative market impacts.

Fair Value CMBS Pricing

The Agencies introduction of "fair value" for valuing risk retention was intended to provide "greater clarity for the measurement of risk retention to help prevent sponsors

[46] The FDIC version of Basel III was published in the Federal Register on September 10, 2013. See Fed. Reg. at 55340 (September 10, 2013).
[47] MBA Regulatory Capital Rules Comment Letter, p. 54, October 17, 2012.
[48] 78 Fed. Reg. at 57966.

from structuring around their risk retention requirements, by negating or reducing the amount of economic exposure that they are required to maintain".[49] The change to fair value was also predicated by the Agencies objective to "establish a simple and transparent measure" that provided "a consistent framework for calculating standard risk retention across very different securitization transactions and different classes of interests within the same type of securitization structure".[50] While we support these objectives, we will address how certain requirements associated with fair value could introduce unintended consequences.

While MBA recognizes the concerns raised by the Agencies regarding sponsors' attempts to structure CMBS to avoid economic exposure by the risk retention holder, MBA notes that the CMBS market operates in a highly competitive and efficient market environment that includes numerous balance sheet lenders (i.e. banks, life insurance companies, etc.) that compete over a variety of loan terms, including interest rates. Consequently, any attempt to "structure away" the 5 percent risk retention into a negligible economic interest, would place upward pressure on CMBS loan pricing, which in turn could negatively impact the competitive position of CMBS lenders. Accordingly, when formulating the risk retention Final Rule, we would urge the Agencies to fully consider the competitive dynamics of the commercial real estate finance market.

(1) INFORMATION DISCLOSURE

Because "fair value is a methodology susceptible to yielding a range of results depending on the key variables selected by the sponsor in determining fair value"[51], the Agencies are requiring an extensive set of disclosures by the retaining sponsor that, among other things, include:[52]

1. A description of the material terms of the eligible horizontal residual interest to be retained by the sponsor;
2. A description of the methodology used to calculate the fair value of all classes of ABS interests, including any portion of the eligible horizontal residual interest retained by the sponsor;
3. The key inputs and assumptions used in measuring the total fair value of all classes of ABS interests, and the fair value of the eligible horizontal residual interest retained by the sponsor, including but not limited to quantitative information about each of the following, as applicable:(A) discount rates; (B) loss given default (recovery); (C) prepayment rates; (D) defaults; (E) lag time between default and recovery; and (F) the basis of forward interest rates used; and,

[49] 78 Fed. Reg. at 57937.
[50] 78 Fed. Reg. at 57938.
[51] 78 Fed. Reg. at 57938.
[52] 78 Fed. Reg. at 58027.

4. The reference data set or other historical information used to develop the key inputs and assumptions.

Sponsors would be required to rely upon statistical data which would not only increase the administrative cost of assembling and issuing a CMBS security, but it would also be duplicative – historical data for CMBS performance is readily accessible to investors via commercial databases, which investors can then use to make their investment decisions in line with their calculation of risk and reward. To require the sponsor to disclose this information will then merely impose additional regulatory burden on the sponsor and issuing entity without providing additional disclosure to the market.

Should the agencies move forward with an information disclosure requirement, we strongly recommend that this information be retained on a confidential basis by the appropriate supervisory agency for regulatory compliance verification. For certain market participants, such as third-party horizontal risk retention purchasers, the algorithms used to calculate fair value, which would establish the purchase price, are highly proprietary. The Re-proposal's required disclosure of the proprietary analytical methodologies could provide a powerful deterrent for some existing market participants to assume the horizontal risk retention role.

Ultimately, such disclosures would be even less material if a methodology could be introduced that would allow the horizontal or vertical risk retention positions to closely mirror 5 percent of CMBS proceeds, which is the ultimate representation of fair value.

(2) TIMING OF THE FAIR VALUE CALCULATION

MBA is also concerned that the operative date for determining fair value is not feasible in light of market dynamics. The Re-proposal would require that the fair value of the security, and thus the amount of risk to be held, be calculated "as of the day on which the price of the ABS interests to be sold to third parties is determined."[53] However, individual tranches of a CMBS do not price at the same time. For CMBS, there is a staggered pricing timeline in which a third-party horizontal risk retention holder will negotiate the purchase price from the sponsor, therefore, seven to ten weeks prior to the date of CMBS issuance would be a reasonable example. During this period, capital market conditions can change resulting in spreads tightening or widening, which could have a material impact on pricing. Thus, the fair value of the CMBS issuance that the third-party horizontal risk retention holder is basing its 5 percent risk retention interest could materially change from their commitment date to the issuance date of the CMBS. This could potentially result in the third-party purchaser no longer holding 5 percent of the CMBS fair value at the date of issuance.

[53] 78 Fed. Reg. at 58027.

(3) ALTERNATIVE APPROACHES FOR CALCULATING FAIR VALUE

In order to address this problem, MBA recommends the following alternative approach for establishing fair value that is more closely linked to sales proceeds:

1. **Establish Estimated Fair Value For Horizontal Risk Retention** - At the time in which a commitment is made to assume the horizontal risk retention position, the third-party purchasers calculates the fair value of the securitization. They would then estimate the fair value of the bonds that they would have to purchase to meet the 5 percent risk retention requirement, i.e. $50 million for a CMBS with a fair value of $1.0 billion.

2. **Fair Value Adjustment Factor for Horizontal Risk Retention –** As part of their commitment to assume the risk retention role, the third-party purchaser would agree to adjust the amount of their $50 million estimated fair value purchase commitment up or down to reflect actual sales proceeds. In effect, if sale proceeds were $1.1 billion, required risk retention would increase to $55 million (5% x $1.1 billion). Similarly, if sales proceeds decreased to $0.90 billion, the risk retention would decrease to $45 million (5% x $0.9 billion). In order to avoid circularity problems for horizontal risk retention, fair value would be based upon sale proceeds of non-horizontal risk retention tranches plus the estimated fair value of the horizontal risk retention position.

3. **Fair Value for Vertical Risk Retention** For vertical risk retention, fair value would be determined based upon total non-risk retention sales proceeds multiplied by 5.26 percent (Total Non-Risk Retention Sales Proceeds x 5.26% = 5% risk retention).[54] In cases where not all of the bonds had been sold for a particular class, the proceeds for that bond class would be "grossed-up" based upon the weighted average sales price to reflect 95 percent of the anticipated sales proceeds of the bond class.

An alternative approach to the above would be to provide an acceptable variance of 5.0 percent to the 5 percent risk retention requirement resulting in an acceptable risk retention range from 4.75 percent to 5.25 percent when comparing fair value to actual sale proceeds. This would prevent incidental changes in a securitization's fair value brought about by customary capital market movements from disqualifying a sponsor or third-party from meeting statutory risk retention requirements.

[54] For vertical risk retention, since total sales proceeds equals 95 percent of the fair value of CMBS, this number must be multiplied by 5.26% in order to calculate the fair value of the vertical risk retention. This percentage is higher than 5.0% because total sales proceeds only represent 95% total fair value versus 100% of fair value, in which 5.0% percent would be applicable for determining 5% of fair value. In effect, the additional 0.26% (5.0% versus 5.26%) represents how much 95% must be "grossed-up" in order for it to be representative of 100% of fair value.

HORIZONTAL RISK RETENTION

The Re-proposal provides additional flexibility for the purchase of horizontal risk retention in terms of lifting the limitation on the allocation of horizontal and vertical risk retention between risk retention holders. Additionally, the number of permitted third-party horizontal risk retention holders has been increased to two. MBA commends the Agencies for this added flexibility. However, given the previously discussed dynamic nature of the commercial real estate finance market, MBA questions why cash flow restrictions should be placed on any risk retention holder.

(1) THE ELIGIBLE HORIZONTAL RESIDUAL INTEREST RECOVERY PERCENTAGE IS UNWORKABLE

As previously discussed, the commercial real estate finance market is highly competitive and efficient. Cash flow structures are carefully engineered to maximize the efficiency of the CMBS execution. According, MBA is concerned that any regulatory regime that limits or impedes interest and principal payments to CMBS investors could have significant unintended consequences. Before introducing any such regulatory requirement, the Agencies should perform a comprehensive cost/benefit assessment to appropriately identity and assess any potential unintended consequences.

MBA is concerned that the Eligible Horizontal Residual Interest (EHRI) recovery percentage, which limits cash flow to horizontal risk retention holders, is unworkable, and we recommend its elimination. The Agencies' intent for the EHRI recovery percentage is to "prohibit the sponsor from structuring a deal where it receives such amounts (cash flow) at a faster rate than the rate at which principal is paid to investors in all ABS interests in the securitization, measured for each future payment date"[55]. Essentially, the horizontal risk retention holder would be restricted in their payments by the rate in which principal is paid back to all investors in the securitization.

For CMBS, the EHRI recovery percentage is unworkable due the mechanics of the CMBS structure. Because CMBS loans can be interest-only for several years, or typically have 25- to 30-year amortization schedules, the principal payment will be lower than interest payments for most of the life of the CMBS. This is also due to restrictions on CMBS loan prepayment that results in CMBS loans typically not paying off until at or near the end of the CMBS term, which diverts the vast majority of principal repayment until this time. Consequently, the closing date cash flow rate will always be greater than the projected principal repayment rate for most of the CMBS term, which exceeds the permissible EHRI recovery percentage for this period.

[55] 78 Fed. at, 57938. Additional description of the EHRI recovery percentage mechanics is presented on pages 57938-57938 of the Proposal.

As already discussed, MBA has deep reservations about any regulatory regime that would limit CMBS cash flow to investors. Should the Agencies move forward with such a requirement, there are less onerous alternatives to the EHRI. The alternative eligible horizontal residential interest proposal (alternative proposal), with certain modifications, could be more compatible with the existing CMBS cash flow structure. Under the alternative proposal, "the cumulative amount paid to an eligible horizontal residual interest may not exceed a proportionate share of the cumulative amount paid to all holders of ABS interests in the transaction".[56] The primary difference between the EHRI and the alternative proposal is that EHRI payments are limited by principal repayments, while the alternative proposal is limited by the proportionate share of cash flow, which includes both principal and interest payments.

Since the alternative proposal is based upon fair value, for horizontal risk retention holders, it will have a limiting impact on cash flow because CMBS bonds associated with the horizontal risk retention interest are sold at a discount. [57] This means, if the horizontal risk retention bonds were sold at a 50 percent discount, the horizontal risk retention holder would have purchased bonds representing 10 percent of the bonds issued in a CMBS, or 10 percent of par value, versus 5 percent for CMBS bonds that were not discounted. Accordingly, this discounted purchase price would entitle the purchaser to the cash flow associated with 10 percent of the bonds in the most subordinate position. Given this dynamic, we would strongly urge the Agencies to base the allowable percentage of cash flow paid to the horizontal risk retention holder to be based upon the par value of their CMBS purchase. While such a change will allow the alternative proposal to be compatible with the existing CMBS structure, it should have the flexibility to accommodate ongoing changes to the CMBS structure.

(2) UP TO TWO HORIZONTAL RISK RETENTION INTEREST HOLDERS

MBA recommends that a senior and subordinate horizontal risk retention position be included in the Final Rule. Another provision of the Re-proposal that enhances risk retention flexibility is allowing up to two purchasers of horizontal risk retention. In the case of two horizontal risk retention purchasers, the Re-proposal requires that this interest be purchased on a *pari passu* basis.[58] While MBA welcomes this increased flexibility, we are concerned that this provision does not comport with existing CMBS buyer segments. We recommend an additional senior and subordinate horizontal risk retention structure to address this issue. As previously discussed, B-piece buyers specialize in the purchase of first-loss CMBS positions. Typically, the CMBS first-loss position accounts for between four and six percent of the bonds comprising a CMBS.

[56] 78 Fed. Reg. at 57941.

[57] Since the inception of the CMBS market, the most junior CMBS tranche has been sold at a significant discount to account for its first-loss position.

[58] 78 Fed. at 58031.

These bonds are typically not rated. Given that discounts ranging from 40 to 60 percent are paid for the first-loss position, the percent of sale proceeds that are accounted for by the first-loss bonds can potentially range from 1.6 percent (4% of bonds @ 60% discount) to 3.6 percent (6% of bonds at 40% discount). Under any of these scenarios, the 5 percent of fair value purchase requirement will require traditional B-piece buyers to move further up the CMBS tranche structure to fulfill the horizontal risk retention requirement.

Depending on the issuance structure and discount paid, a horizontal risk retention position that comprises 5 percent of fair value would generally represent from 7 to 9 percent of all the bonds in the CMBS. While allowing two buyers to purchase the horizontal risk retention position on a *pari passu* basis would fall within traditional purchase parameters (3.5% to 4.5% of all bonds) the required movement up the CMBS tranche structure would prevent B-piece buyers from achieving the required returns associated with a first-loss position. In fact, for a recent CMBS issuance, a risk retention purchase requirement of 7 percent of the bonds would require the purchase of bonds that progress into the BBB rating category.[59] The blended return of the non-rated, B, BB, and BBB securities would fall far below required first-loss buyer returns. Consequently, under the Re-proposal, it would be highly problematic for current first-loss buyers to assume the horizontal risk retention role.

However, a modification to the Re-proposal would address this problem. A senior and subordinate horizontal risk retention positions, would allow existing CMBS market participants to efficiently and effectively assume the risk retention role. For example, a B-piece buyer could purchase a subordinate interest totaling 50 percent of the horizontal risk retention requirement that would still meet their investing objective and the senior piece could be taken by investors specializing in BBB, BB, and B tranches. Given that the Re-proposal substantially increases the amount of risk retention that must be held for the horizontal risk retention position, due to the change from par value to fair value, we strongly recommend that this increased risk retention requirement should have the flexibility to accommodate existing market structures. Without this change, the creation of new and novel CMBS investor structures would be required solely for regulatory compliance purposes.

(3) Third-Party Horizontal Risk Retention Sale Price Disclosure

We believe that disclosure of the actual purchase price paid by the third-party purchaser would have negative unintended consequences for the CMBS market. As noted above, for CMBS, there is a group of investors that specialize in the purchase of the first-loss position - B-piece investors. The purchase price paid by B-piece investors is considered highly confidential and proprietary. Such disclosure would signal pricing

[59] Commercial Mortgage Alert, October 11, 2013, page 17

strategies to competitors in this highly competitive market segment, which would serve as a powerful deterrent for B-piece investors to assume the risk retention role. By potentially reducing the number of market participants that would be willing to assume horizontal risk retention, this requirement, in effect, is at odds with the Agencies' stated objective of creating greater "flexibility" in the forms of risk retention.

The Agencies have a reasonable interest in verifying that the purchase price meets the applicable regulatory requirements. As an alternative to public price disclosure, the issuer or third-party purchaser could provide the purchase price to the appropriate supervisory agency on a confidential basis in order for them to verify that the purchase price meets regulatory risk retention requirements. Alternatively, the B-piece investor could disclose that it has fulfilled the risk retention requirement. Either approach would strengthen compliance with the risk retention rule – which is the objective at hand – without creating unintended consequences that jeopardize the participation of an important class of investors.

HOLD DURATION FOR CMBS

(1) VERTICAL AND HORIZONTAL RISK RETENTION HOLD DURATION SHOULD BE HARMONIZED

MBA believes that the holding period should be consistent for both vertical and horizontal risk retention holders. For CMBS, the Re-proposal allows the horizontal risk retention holder to transfer their interest "on or after the date that is five years after the date of the closing of the securitization".[60] This provision is contained in § ___.7 of the Re-proposal that is specific to CMBS and does not address the hold period for vertical risk retention. Consequently, the treatment of transfers for vertical risk retention appears to be governed by the Re-proposal's general transfers provisions for asset-backed securities (ABS) that is addressed in §___.12.[61] In the case of CMBS vertical risk retention, the required hold period appears to be the later of two years or when the unpaid principal balance or obligations of the CMBS has been reduced to 33 percent. In order to create greater consistency, MBA recommends that language in §___.7 should be amended to indicate that the vertical risk retention duration period would be no longer than the horizontal risk retention duration period.

(2) RISK RETENTION HOLD DURATION

The CMBS market provides extensive and robust transparency with regard to the performance of the underlying loans. Loan-level performance data and other information are available from multiple sources including, but not limited to, servicer and trustee investor reporting sites, rating agencies and independent data providers (*e.g.*, TREPP,

[60] 78 Fed. Reg. at 58032.
[61] 78 Fed. Reg. at 58035-58036.

Intex, Bloomberg and others). Such transparency of information in CMBS allows investors the opportunity to determine loan performance and identify loans or securitizations that are not performing as expected. Much of the data used in underwriting commercial and multifamily mortgages are updated throughout the life of the loan. Properties are physically inspected and operating statements are collected (generally quarterly), "spread" into a common form and format, and analyzed. While we believe a five-year hold period is a strong improvement from the prior proposal, given this existing transparency, we believe that a three-year duration term would provide all participants in a securitization sufficient time to comprehensively assess the CMBS.

QUALIFYING COMMERCIAL REAL ESTATE (QCRE) LOANS

Although the Agencies relaxed certain loan characteristics that qualify a loan as a "low risk loan" and thus exempted from risk retention, only 5.5 percent of current mortgages comprising conduit CMBS would qualify for zero risk retention and only 2.0 percent of CMBS comprised of a single asset and a single borrower would meet this qualification.[62] These narrow passages bring into question if the Agencies have properly calibrated the underwriting characteristics of QCRE loans. We would strongly urge the Agencies to reconsider the Re-proposal's underwriting metrics for CMBS that exclude CMBS loans that were underwritten based upon customary and prudent market practices.

Underwriting is both an art and science that relies on both qualitative and quantitative analyses that should be performed by experienced professionals. The combination of both analyses results in well underwritten loans and leads to sound investment decisions. For determining underwriting metrics, we urge the Agencies to use a cautionary approach that that is not so prescriptive that high quality, low risk loans would be excluded from meeting the qualifying QCRE loan criteria.

(1) QUALIFYING COMMERCIAL MORTGAGE REAL ESTATE LOAN UNDERWRITING REQUIREMENTS

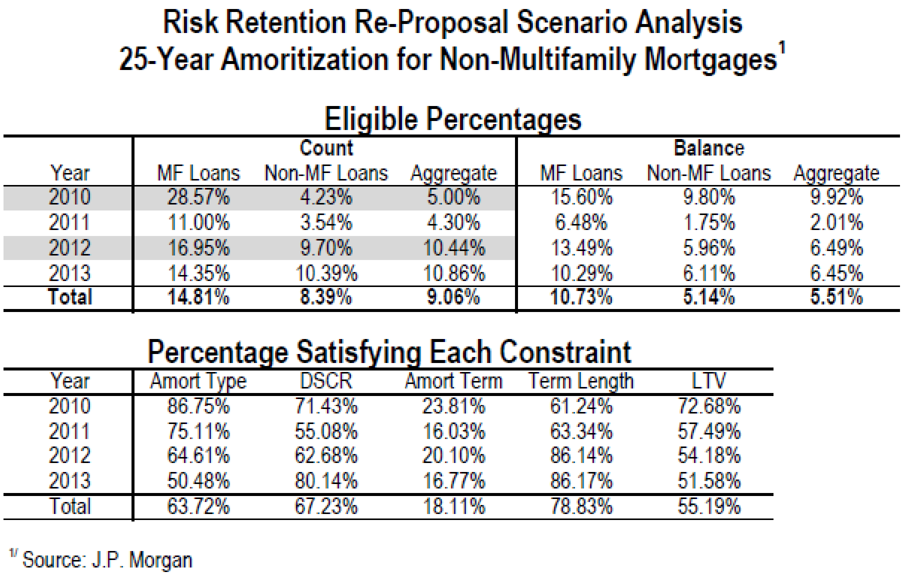
While the Re-proposal relies on a comprehensive set of requirements for a loan to qualify for QCRE status[63], our analysis will focus on, what we believe, are the most relevant underwriting parameters for determining QCRE eligibility. We examined two scenarios in which only one variable was changed - the amortization period. Both scenarios keep static the assumptions, which fit within the QCRE requirements, regarding the following: amortization; debt service coverage; loan term; and, loan to value.[64]

[62] Source: J.P. Morgan

[63] 78 Fed. Reg. at 58040 – 58042.

[64] These requirements include: amortizing loan for both commercial and multifamily loans; debt service coverage of 1.5 for commercial and 1.25 for multifamily loans; 10-year term for both commercial and multifamily loans; and, debt service coverage of 65 percent for both commercial and multifamily loans.

As indicated in the table below, only 5.5 percent of all securitized commercial loans between 2010 and June 2013, would pass the QCRE qualification tests. Driving this low QCRE qualification rate, for this period, is the low percent of loans, 18.1 percent, that would qualify under the amortization term parameter. For each of the other underwriting parameters, the percent of loans that would have met the QCRE requirement would have been no less than 55 percent.



Risk Retention Re-Proposal Scenario Analysis
25-Year Amoritization for Non-Multifamily Mortgages[1]

Eligible Percentages

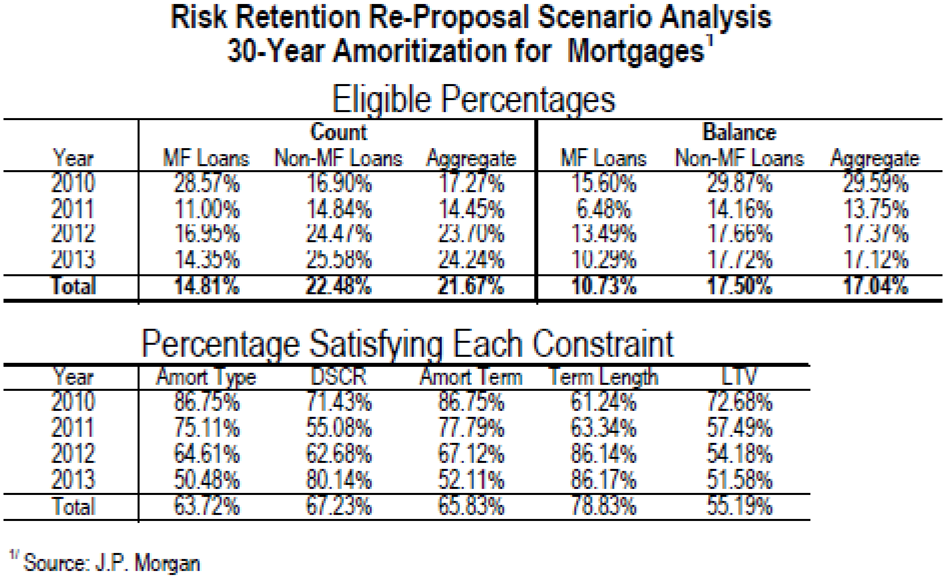
	Count			Balance		
Year	MF Loans	Non-MF Loans	Aggregate	MF Loans	Non-MF Loans	Aggregate
2010	28.57%	4.23%	5.00%	15.60%	9.80%	9.92%
2011	11.00%	3.54%	4.30%	6.48%	1.75%	2.01%
2012	16.95%	9.70%	10.44%	13.49%	5.96%	6.49%
2013	14.35%	10.39%	10.86%	10.29%	6.11%	6.45%
Total	**14.81%**	**8.39%**	**9.06%**	**10.73%**	**5.14%**	**5.51%**

Percentage Satisfying Each Constraint

Year	Amort Type	DSCR	Amort Term	Term Length	LTV
2010	86.75%	71.43%	23.81%	61.24%	72.68%
2011	75.11%	55.08%	16.03%	63.34%	57.49%
2012	64.61%	62.68%	20.10%	86.14%	54.18%
2013	50.48%	80.14%	16.77%	86.17%	51.58%
Total	63.72%	67.23%	18.11%	78.83%	55.19%

[1/] Source: J.P. Morgan

Given the low percentage of securitized loans that passed the amortization qualification test, a scenario involving a 30-year amortization period was developed to evaluate the sensitivity of QCRE eligibility to this underwriting parameter, which is shown below. For the 30-year amortization period, the number of QCRE qualified non-multifamily loans would increase from 5.1 percent in the 25-year amortization scenario to 17.5 percent in the 30-year amortization scenario, or by over 300 percent when compared to the 25-year amortization scenario. This increase in QCRE qualified loans is attributable to 65.3 percent of the securitized loans meeting the 30-year amortization requirement.



Risk Retention Re-Proposal Scenario Analysis
30-Year Amoritization for Mortgages[1]

Eligible Percentages

	Count			Balance		
Year	MF Loans	Non-MF Loans	Aggregate	MF Loans	Non-MF Loans	Aggregate
2010	28.57%	16.90%	17.27%	15.60%	29.87%	29.59%
2011	11.00%	14.84%	14.45%	6.48%	14.16%	13.75%
2012	16.95%	24.47%	23.70%	13.49%	17.66%	17.37%
2013	14.35%	25.58%	24.24%	10.29%	17.72%	17.12%
Total	**14.81%**	**22.48%**	**21.67%**	**10.73%**	**17.50%**	**17.04%**

Percentage Satisfying Each Constraint

Year	Amort Type	DSCR	Amort Term	Term Length	LTV
2010	86.75%	71.43%	86.75%	61.24%	72.68%
2011	75.11%	55.08%	77.79%	63.34%	57.49%
2012	64.61%	62.68%	67.12%	86.14%	54.18%
2013	50.48%	80.14%	52.11%	86.17%	51.58%
Total	63.72%	67.23%	65.83%	78.83%	55.19%

[1/] Source: J.P. Morgan

These scenarios demonstrate that the Re-proposal's exclusion of widely utilized loan parameters, such as the 30-year amortization period, is an unduly restrictive regime that would govern QCRE status. MBA recommends that the Agencies expand the QCRE loan parameters to include commercial loans with 30-year amortizations, which is permitted for multifamily loans in the Re-proposal. In addition, the Agencies should recalibrate other loan parameters for QCRE loan eligibility, such as LTV, in a manner that falls within prudent industry practices.

(2) Single Asset, Single Borrower Exclusion

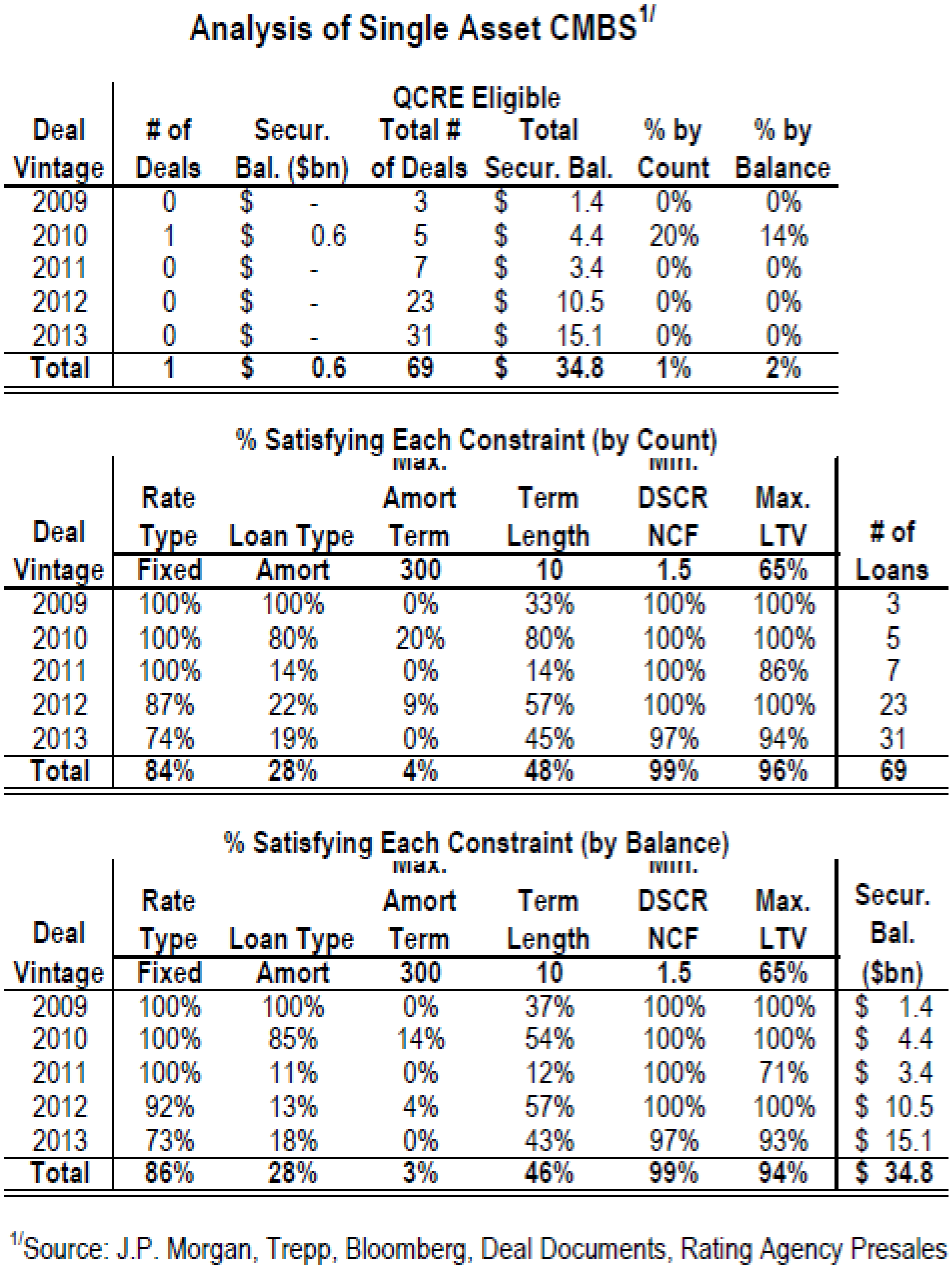
Because single asset, single borrower (SASB) CMBS are highly transparent, have outstanding performance characteristics and feature very strong underwriting, MBA strongly urges the Agencies to exempt them from risk retention or, at a minimum, set QCRE parameters for these loans that reflect their strong performance history.

SASB CMBS are by their nature highly transparent given that only a single asset has to be examined during the due diligence process. Analysis of the asset is straight forward because sophisticated analysis of a multi-property pool is not required to understand pool level risks and dynamics. In addition, "Annex A" of the offering prospectus provides detailed property information that, among other things, includes: (1) net operating income; (2) underwriting net operating income; (3) debt service coverage ratio; (4) appraised value; (5) year built; (6) building square feet; (7) occupancy rate; (8) escrow information; and, (9) certain lease data.

SASB CMBS experienced a cumulative loss rate of only 0.2 percent compared to 2.88 percent for conduit CMBS.[65] This SASB CMBS cumulative loss rate is less than 10 percent of the conduit CMBS cumulative loss rate.

Despite this remarkable performance, the Analysis of Single Asset CMBS table, below, shows that over the 2009 to August 2013 period, only one SASB CMBS would have qualified for QCRE loan status.

[65] This information provided by J.P. Morgan from the inception of the CMBS market to August 2013.



Analysis of Single Asset CMBS[1/]

			QCRE Eligible			
Deal Vintage	# of Deals	Secur. Bal. ($bn)	Total # of Deals	Total Secur. Bal.	% by Count	% by Balance
2009	0	$ -	3	$ 1.4	0%	0%
2010	1	$ 0.6	5	$ 4.4	20%	14%
2011	0	$ -	7	$ 3.4	0%	0%
2012	0	$ -	23	$ 10.5	0%	0%
2013	0	$ -	31	$ 15.1	0%	0%
Total	**1**	**$ 0.6**	**69**	**$ 34.8**	**1%**	**2%**

% Satisfying Each Constraint (by Count)

	Rate		Max. Amort	Term	Min. DSCR	Max.	
Deal	Type	Loan Type	Term	Length	NCF	LTV	# of
Vintage	Fixed	Amort	300	10	1.5	65%	Loans
2009	100%	100%	0%	33%	100%	100%	3
2010	100%	80%	20%	80%	100%	100%	5
2011	100%	14%	0%	14%	100%	86%	7
2012	87%	22%	9%	57%	100%	100%	23
2013	74%	19%	0%	45%	97%	94%	31
Total	**84%**	**28%**	**4%**	**48%**	**99%**	**96%**	**69**

% Satisfying Each Constraint (by Balance)

	Rate		Max. Amort	Term	Min. DSCR	Max.	Secur.
Deal	Type	Loan Type	Term	Length	NCF	LTV	Bal.
Vintage	Fixed	Amort	300	10	1.5	65%	($bn)
2009	100%	100%	0%	37%	100%	100%	$ 1.4
2010	100%	85%	14%	54%	100%	100%	$ 4.4
2011	100%	11%	0%	12%	100%	71%	$ 3.4
2012	92%	13%	4%	57%	100%	100%	$ 10.5
2013	73%	18%	0%	43%	97%	93%	$ 15.1
Total	**86%**	**28%**	**3%**	**46%**	**99%**	**94%**	**$ 34.8**

[1/] Source: J.P. Morgan, Trepp, Bloomberg, Deal Documents, Rating Agency Presales

Given this disconnect between SASB CMBS loan performance and QCRE eligibility, the Agencies should reconsider the QCRE eligibility requirements for SASB CMBS. MBA believes that the strong performance and high transparency of SASB CMBS clearly allow it to reasonably fit into the parameters of a "low risk" loan and thus be exempted from risk retention. At a minimum, the Agencies should significantly expand the parameters for a SASB CMBS that would be exempted from risk retention.

ROLE OF THE OPERATING ADVISOR

A concern that we raised in the prior proposal was that the Operating Advisor was provided significant powers from the inception of the securitization. We are pleased that the Re-proposal clarified the powers of the Operating Advisor, while allowing it to maintain an appropriate role representing all investors.

(1) CURRENT OPERATING ADVISOR PRACTICES AND MBA RECOMMENDATIONS

Responding to investment grade bondholder concerns, the CMBS market has evolved to allow for additional oversight, while continuing to recognize the importance of the first-loss investor position. We believe that the final framework should provide the flexibility in which the CMBS market can continue to evolve to meet the needs of all investor classes.

MBA performed a comparison of the Re-proposal's requirements for Operating Advisors with current practices that are specified in representative CMBS loan documents. As shown in the table, for those CMBS with Operating Advisors, the requirements in the Re-proposal have both similarities and deviations from current practices. We also provide recommendations for certain duties and responsibilities specified in the Re-Proposal for the Operating Advisor.

COMPARISON OF CURRENT PRACTICES FOR OPERATING ADVISORS WITH REQUIREMENTS SPECIFIED IN THE RE-PROPOSAL

Provision	Re-Proposal's Operating Advisor Requirements[66]	Current Market Driven Operating Advisor Requirements[67]	MBA Recommendation
Criteria and Responsibilities	• Limit application of Operating Advisor (OA) provisions to Special Servicer (SS) • OA required in all CMBS transactions	• Same • OA NOT required in CMBS, however a role exists in many of the post recession transactions	• MBA supports Re-proposal's conformity with existing market practices.

[66] 78 Fed. Reg. at 58031 – 58032.

[67] Based upon MBA's review of three representative Pooling and Servicing Agreements that were from different CMBS sponsors.

COMPARISON OF CURRENT PRACTICES FOR OPERATING ADVISORS WITH REQUIREMENTS SPECIFIED IN THE RE-PROPOSAL

Provision	Re-Proposal's Operating Advisor Requirements[66]	Current Market Driven Operating Advisor Requirements[67]	MBA Recommendation
Independence	- OA cannot be affiliated with other parties to the securitization transaction	- Same	- MBA supports Re-proposal's conformity with existing market practices.
	- OA prohibited from having a financial interest in the securitization other than OA fees	- Same	- MBA supports Re-proposal's conformity with existing market practices.
	- OA to act in the best interest of and for the benefit of investors as a collective whole	- Same	- MBA supports Re-proposal's conformity with existing market practices. .
Qualifications	- Transaction documents to set standards for OA experience, expertise and financial strength	- Qualifications set for replacement OA's	- Caution should be exercised in setting requirements to ensure that a sufficient number of qualified and independent operating advisors will be available to fill the role.
	- Transaction documents to describe OA compensation	- Same	- MBA supports Re-proposal's conformity with existing market practices.
	- Disclose how OA meets standards	- Qualification or performance standards? Transaction documents include termination events for OA	- Clarify the type of disclosure required. Provide in the PSA a market mechanism for acceptance of the OA (in same way that the acceptability of Master and Special Servicers are determined) , consistent with Successor

COMPARISON OF CURRENT PRACTICES FOR OPERATING ADVISORS WITH REQUIREMENTS SPECIFIED IN THE RE-PROPOSAL

Provision	Re-Proposal's Operating Advisor Requirements[66]	Current Market Driven Operating Advisor Requirements[67]	MBA Recommendation
			qualification/ performance standards.
Operating Advisor Role	• Consult with SS in connection with and prior to major investing decision o Only applies to SS o Only when eligible horizontal residual interest is 25% or less than its original principal balance	• Material decisions are defined in the transaction documents and can vary • Less oversight prior to B-piece reduction below specific balance and very little consultation	• Clarify the types of decisions that would be considered "investing" decisions. Allow market to continue to determine, through the PSA, the types of decisions that require consultation.
Evaluation of See Item (3) below Servicing Standards	• OA to have adequate and timely access to relevant information and reports	• OA receives information available to Privileged Person and generally get same amount of time as Controlling Class Representative for consultation/ review	• Clarify "issuing entity". Provide access to all reports available to investment grade bondholders.
	• OA to review actions of SS • OA to review all reports made to issuing entity • OA to review calculations made by SS for accuracy and consistency • OA to issue report on SS performance	• Consultation only • No requirement to review all reports • Same • Annual report if activity occurred during prior calendar year	• MBA supports Re-proposal's conformity with existing market practices.
Servicer Removal	• OA to recommend removal of SS if OA determines SS not in compliance with servicing standard	• Some transactions provide that the OA may recommend removal of SS when B piece below certain balance and if SS not	• We express strong concern over the Re-proposal's mandated 5% quorum. See Item (3) below

COMPARISON OF CURRENT PRACTICES FOR OPERATING ADVISORS WITH REQUIREMENTS SPECIFIED IN THE RE-PROPOSAL			
Provision	**Re-Proposal's Operating Advisor Requirements**[66]	**Current Market Driven Operating Advisor Requirements**[67]	**MBA Recommendation**
		complying with servicing standard or at a 'termination event' as defined in the transaction documents	
	• Removal subject to affirmative vote of a majority of the outstanding principal balance of all ABS interests voting, subject to 5% quorum	• Requires affirming vote as described in the transaction documents	• See Item (3) below.
	• OA recommendation to remove SS independent of whether third party purchaser is the controlling class	• Same	• MBA supports Re-proposal's conformity with existing market practices.

(2) LIMITATIONS ON THE OPERATING ADVISOR

MBA supports the requirement that the special servicer be required to consult with the Operating Advisor only after the "eligible horizontal residual interest has a principal balance of 25 percent or less of its original principal balance".[68] We believe that this is the appropriate timing for the Operating Advisor to assume a consulting role to the Special Servicer.

(3) THE TRANSACTION DOCUMENTS (E.G., PSA), RATHER THAN THE REGULATION, SHOULD SET THE QUORUM AND VOTING REQUIREMENTS REGARDING REPLACEMENT OF THE SPECIAL SERVICER

The Re-proposal describes how the special servicer would be replaced:

> …the special servicer shall be replaced upon the affirmative vote of a majority of the outstanding principal balance of all ABS interests voting on the matter, with a minimum of a quorum of ABS interests voting on the matter. For purposes of such vote, the holders of 5 percent of the outstanding principal balance of all ABS interests in the issuing entity shall constitute a quorum.[69]

[68] 78 Fed. Reg. at 58032.
[69] 78 Fed. Reg. at 58032.

MBA supports the Agencies' position that an affirmative vote is required to replace special servicers. However, we are concerned that the low 5 percent quorum requirement could result in bond holders that control only 2.51 percent of the CMBS outstanding principal balance could replace the special servicer. This small percentage brings into a number of scenarios in which a small minority of existing or new CMBS bond holders could affect a change in the special servicer.

Moreover, we believe that required quorum for the vote to take place is more appropriately specified in the PSA. We are concerned that a regulatory mandate is, by its nature, static and non-responsive to changes in the CMBS market that the PSA can be modified to address. Additionally, the PSA is widely disclosed to potential CMBS investors, which will allow them to make their own determination if the quorum specified in the PSA meets their investment criteria.

GSEs' Multifamily Securitizations

To the extent that the clarification is necessary, we recommend that the Agencies clarify that the risk retention regime does not apply to the multifamily executions of Fannie Mae and Freddie Mac ("GSEs") consistent with other federal government insured or guaranteed assets. The GSEs securitize multifamily mortgages using structures which contain various forms of risk retention, including guarantees and structured credit enhancement. Fannie Mae through its Delegated Underwriting & Servicing Program ("DUS") and Freddie Mac through its Program Plus Seller/Servicers and Multifamily K Certificates have been utilizing securitization structures to provide liquidity to the multifamily housing market and share risk with private capital sources. Notably, the multifamily businesses at both Fannie Mae and Freddie Mac have experienced superior credit performance (well below 1 percent default rate) during the downturn and thereafter.

We interpret the Re-proposal to mean that the risk retention rules do not apply to the GSEs' multifamily executions, given that the Re-proposal states: "This part shall not apply to . . . Any securitization transaction that . . . [i]s collateralized solely by residential, multifamily, or health care facility mortgage loan assets that are insured or guaranteed (*in whole or in part*) as to the payment of principal and interest by the United States . . . ."[70] While in conservatorship, both GSEs are backed by the full faith and credit of the United States and are subject to government control. If clarification in this regard is necessary, we ask the Agencies to provide it accordingly.

[70] 78 Fed. Reg. at 58043, Section __.19(b)(1)(i) (emphasis added).

III. TECHNICAL CORRECTIONS AND CLARIFICATIONS

INCLUDE PROPERTIES THAT ARE PART OF CERTAIN GROUND LEASES IN THE CRE LOAN DEFINITION

The Agencies stated in the Re-proposal that a "commercial real estate" loan does not include a loan made to the owner of a fee interest in land that is ground leased to a third party who owns the improvements on the property.[71] While the property underlying a commercial real estate structure is typically owned by the borrower, there are instances in which the borrower leases the underlying land and owns the improvements. For commercial buildings on either leased or owned land, lenders perform a high level of due diligence in their lending decisions. Accordingly, we recommend that properties with ground leases be included in the definition of commercial real estate.

MULTIPLE SPONSORS ALLOCATION OF RISK RETENTION

The Re-proposal contemplates that, in a multi-sponsor transaction, the required risk retention may be allocated among the sponsors. No particular parameters are specified with respect to the amount of any allocation among sponsors, other than that the risk be retained by "at least one sponsor," which raises the question of whether the originator allocation limitations would apply to a sponsor who is also an originator of less than all of the underlying assets.[72] MBA requests that the Agencies provide clarification on this matter in the Final Rule.

NON-ECONOMIC REMIC RESIDUAL INTERESTS SHOULD BE EXCLUDED FROM ABS INTERESTS

The Re-proposal defines an ABS interest as:

- Any type of interest or obligation issued by an issuing entity, whether or not in certificated form, including a security, obligation, beneficial interest, or residual interest, payments on which are primarily dependent on the cash flows of the collateral owned or held by the issuing entity;
- Does not include common or preferred stock, limited liability interests, partnership interests, trust certificates, or similar interests that are issued primarily to evidence ownership and whose payments, if any, are not primarily dependent on the cash flows of the collateral held by the issuing entity; and
- Does not include the right to receive payments for services provided by the holder of such right, including servicing, trustee services, and custodial services.

[71] Cadwalader, Proposed Credit Risk Retention Requirements for Asset-Backed Securities Transactions, September 13, 2013.

[72] Cadwalader, Proposed Credit Risk Retention Requirements for Asset-Backed Securities Transactions, September 13, 2013.

This definition should be modified to ensure that non-economic residual interests are not classified as ABS interests. Non-economic residual interests (NERDs) do not provide for or support on-going cash flows, and can only be held by qualified investors that must meet specific tests under the tax code. In addition, because Non-economic residual interests are structured to receive no cash but do bear the tax liability of the REMIC, you have to pay the party who agrees to hold it. Including NERDs as "ABS interests" would reduce the aggregate fair value of a REMIC securitization as they have a negative value.

While this issue may not be relevant upon the issuance of the security, there is a risk that such interests may be incorporated into payments made to investors in the event a loan underlying the security defaults and is foreclosed upon. Calculating the fair value of and monitoring these assets under the rule would be overly burdensome and not relevant to accomplishing the goals of the risk retention rule. MBA urges the Agencies to expressly exclude non-economic residual interests from the definition of ABS interests.

Uncertificated REMIC Interests

MBA urges the Agencies to clarify that uncertificated REMIC interests used in RMBS and CMBS transactions to structure cash flows for tax purposes and either held solely by one of the REMICs constituting the issuing entity or combined into a single certificated security would not be considered ABS interests for purposes of risk retention.[73]

MBA Believes That Pass-Through Re-Securitizations should be Eligible for an Exemption Even if They Contain Multiple Security Classes

The Re-proposal allows pass-through re-securitizations to be exempt from the risk retention requirements if all of the assets underlying the re-securitization satisfy the following three elements:

- The collateral must be compliant with the Re-proposal;
- The re-securitization involves the issuance of only a single class of ABS interests; and
- All principal and interest payments received on the underlying ABS interests are passed-through to the holders of such class.[74]

[73] Cadwalader, Proposed Credit Risk Retention Requirements for Asset-Backed Securities Transactions, September 13, 2013.
[74] 78 Fed. Reg. 183, 58043

MBA believes that structured re-securitizations meeting the first and third elements should be eligible for an exemption as well. These assets have already been required to satisfy the Re-proposal's risk retention requirements. There is nothing to be gained by requiring a structured security to go through the compliance process yet again.

Objective asset factors, such as LTV, are easy for an investor to ascertain and price. The structure and cash flow rights associated with a structured security are one type of objective, easy to discern factor that investors take into account in making investment decisions. The structure is objective because a sponsor is required to disclose this information as part of marketing, and perhaps registering, the security. For the same reason, this information is easy for an investor to ascertain - the priority of payments and holders' rights under each security class is available in the security's prospectus and marketing documents. Moreover, the third element above requires the re-securitization to include all of the cash flows of the underlying collateral in the re-securitization – meaning that the sponsor is participating in the same pool of assets as its investors even if the sponsor is required to retain risk or chooses to co-invest in the security.

Quite simply, the Agencies' fears of incentive misalignment are misplaced. MBA urges the Agencies to allow structured re-securitization transactions which meet the first and third elements of the current test to be exempt from having to satisfy the risk retention requirements multiple times.

* * *

Thank you for the opportunity to submit comments on this critically-important rulemaking.
Please do not hesitate to contact MBA if you have any questions or if further briefing would be helpful.

Sincerely,

David H. Stevens
President and Chief Executive Officer
Mortgage Bankers Association