April 10, 2017

The Honorable Steven Mnuchin
Secretary of Treasury
Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, D.C. 20220

Re: Presidential Executive Order on Core Principles for Regulating the United States Financial System

Dear Mr. Secretary:

The Mortgage Bankers Association[1] appreciates the opportunity to provide the following comments on President Donald J. Trump's Executive Order establishing Core Principles for financial regulation.[2] As an association representing the mortgage finance industry, including the interests of a broad cross-section of financial institutions, MBA has consistently supported reasonable requirements that will prevent a reemergence of housing and market disruptions. We believe some aspects of the Dodd-Frank Wall Street Reform and Consumer Protection Act and other statutes have made the mortgage market safer; however, in many other respects the Dodd-Frank rules have reduced the availability and affordability of mortgage credit for many American families.

While we believe some of these new regulations were needed, the pendulum has swung too far and certain aspects of the current regulatory regime warrant review and adjustment. These changes need to be considered judiciously to balance the need for appropriate consumer protections while ensuring access to safe, sustainable mortgage credit. In this regard, we strongly urge that particular attention be given to simplifying rules, providing greater clarity and certainty, and mitigating supervisory burdens. These goals are particularly important for smaller, community lenders that may not be able to sustain excessive compliance and legal infrastructures.

This letter outlines MBA's thoughts and recommendations on certain mortgage-related regulations relative to the Core Principles as set forth by the Executive Order.

[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, REITs, 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] Executive Order 13772, Core Principles for Regulating the United States Financial System, Feb. 3, 2017, available at: https://www.gpo.gov/fdsys/pkg/FR-2017-02-08/pdf/2017-02762.pdf

I. CFPB Approach to Rules and Enforcement

Since the enactment of Dodd-Frank, the mortgage industry has experienced a massive increase in regulation and the installation of a new consumer regulator with vast new regulatory and enforcement powers. Recent years have confirmed that regulation and necessary accompanying guidance, done efficiently where needed and developed with stakeholder input, benefit both consumers and the industry. While good regulation can empower consumers to make independent financial decisions, and provide needed guard rails for innovation and competition for sustainable mortgage products, many rules have also been drafted and implemented unevenly creating the need for additional clarifying rules and guidance or even considerable revision.

Over the last five years, the costs of originating a mortgage loan have increased and HMDA data indicate that the total number of lenders has declined and large institutions have pared back their participation in the market. While these changes are not entirely attributable to increased regulations, the current regulatory framework has contributed to constrained credit access, higher costs, and much of the recent decline in market participation. This ultimately impacts the American consumer, necessitating further scrutiny of the monetary costs of regulation that result in increased turn-times within the loan process as well as decreased optionality for borrowers due to less market competition.

In the alternative, although the industry has been subject to significant strains to comply with new regulations, additional regulations are still needed in key areas. Specifically, both the overhaul of consumer disclosure requirements (TRID) and the rule requiring significantly expanded data reporting on mortgages (HMDA) issued by the Consumer Financial Protection Bureau (CFPB) requires clarification and correction to avoid unnecessary confusion, costs, and harm. Though many of these rules have already resulted in enormous implementation costs, many questions remain unanswered.

Notwithstanding the CFPB's preeminent role in consumer regulation, the Bureau has, with limited exceptions, followed a policy of only offering authoritative guidance in the form of formal rules and commentary. Most other guidance in the form of webinars, handbooks, or other oral statements is prefaced with the caveat that the information does not bind the CFPB, does not create any defenses, and only formal commentary and rules can be relied upon. While MBA believes that rules and commentary with an opportunity for public comment must remain the primary means of implementing the myriad of laws for which the CFPB is responsible, its reluctance to also offer authoritative written guidance as questions arise – through interpretative rules, FAQs, or supervisory memoranda – has made lenders excessively cautious and defensive in their approach to lending.

Despite ongoing need for clarification and correction, the CFPB has made clear its commitment to "regulate by enforcement" articulating new theories of liability in enforcement cases under laws assigned to it, rather than changing the underlying rules. This approach exposes lenders to new unquantifiable risks and increases the cost to consumers.

For most financial institutions these actions have resulted in tremendous uncertainty about where and to what extent legal and reputational risks exist. Too often it is unclear how the CFPB interprets a particular statute until after an enforcement action, consent order, or settlement has occurred.[3] Rather than responding proactively to a rule or guidance, financial institutions can only

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[3] In a speech on March 9, 2015 at the Consumer Bankers Association, Director Cordray provided justification for employing agency and court orders instead of rules. He stated, "public enforcement actions have been marked by orders, whether entered by our agency or by a court, which specify the facts and the resulting legal conclusions." These orders provide detailed guidance. Director Cordray

pay for considerably more counsel and compliance advice and hope they are not used to exemplify non-compliant behavior.[4] These costs are particularly burdensome to smaller lenders.

MBA has consistently supported judicious regulations and guidance and believes that these rules are not only essential to provide lenders with fair notice of rule changes but are a far superior means of protecting consumers. Judicious use of supervisory guidance proactively prevents consumer harm and sets uniform standards that can be efficiently shared and understood across the industry by entities of all sizes: Enforcement actions, by contrast, provide reactive remedies after harm has already occurred, and are limited to the facts of a single case. Therefore, MBA recommends a reevaluation of this rulemaking approach to ensure that the current regulatory framework does not result in greater costs and harm to the American consumer.

II. Origination Regulations Are Too Restrictive or Complex

While MBA recognizes the need for clear and reasonable regulations to ensure a safe and transparent mortgage market, we also recommend that certain regulations be revisited and revised to encourage lenders to offer a greater degree of sustainable and affordable mortgage credit to consumers.

Most notable among these, the Dodd-Frank Act and the CFPB's Ability to Repay (ATR) rule requires lenders to determine whether a borrower has a reasonable ability to repay a mortgage before the loan is consummated. This obligation is coupled with significant penalties and liability for failing to meet this requirement. The ATR rule also provides a presumption of compliance for loans that are originated as Qualified Mortgages (QMs), which provides greater certainty to lenders and mortgage investors regarding potential liability where there has been compliance but a claim is made. Consequently, most lenders have limited themselves to making only QM safe harbor loans to minimize potential liability and litigation. As a result of some of the constraints in the QM definition, many borrowers who should qualify for a QM are unable to access safe, sustainable, and affordable mortgage credit.

MBA believes the ATR rule and QM standards must be improved and we continue to work with policymakers, including the CFPB, to responsibly widen the credit box. While MBA appreciates some earlier efforts to address flaws in the QM definition, we believe changes to the ATR rule should not be confined to particular types of institutions or business models. The QM definition should be fixed holistically, not revised in piecemeal fashion with special exceptions for certain categories of lenders.

Specifically, MBA has made a number of key recommendations for refining the QM definition to cover additional creditworthy borrowers:

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stated that "it would be "compliance malpractice" for executives not to take careful bearings from the contents of these orders about how to comply with the law and treat consumers fairly.

[4] One example of this practice is demonstrated in the current treatment of marketing services agreements between settlement services providers. While HUD had generally permitted these arrangements under Section 8(c) of RESPA as long as reasonable compensation was paid for the services, the Bureau asserted these arrangements were likely problematic and violative of RESPA regardless of the compensation. Moreover, the Bureau failed to provide any notice of its changed interpretation to the industry or the public prior to pressing its position in enforcement cases. Instead of issuing rules or guidance, Bureau positions have been articulated through settlements rather than through guidance or rules.

1. **Expand the Safe Harbor**
   All loans satisfying QM requirements should have a legal safe harbor regardless of their rate. The current 150 basis points over the "prime" mortgage rate limit is too narrow considering the inclusion of fees in the Annual Percentage Rate (APR).

2. **Increase the Small Loan Definition**
   The current definition of a smaller loan under the ATR rule – where points and fees may exceed three percent and still qualify as a QM – is set at $102,894 (for 2017). This metric is too low considering the average loan size is approximately $260,000. As a result, too many smaller loans do not qualify as QMs. The points and fees cap should apply only to loans of $200,000 or more, with a sliding scale that permits progressively higher points and fees caps for smaller loans. This change would increase QM lending to moderate-income borrowers who have smaller loan balances.

3. **Establish Alternatives to Appendix Q**
   For those loans not satisfying the "QM patch," underwriting of QM loans must be conducted in accordance with Appendix Q of the rule. Unfortunately, Appendix Q is generally viewed as lacking sufficient guidance and flexibility to be used as an effective underwriting standard. To rectify this problem, MBA supports regulatory or legislative changes to allow the use of other commonly accepted underwriting standards such as those acceptable to the Federal Housing Finance Agency (FHFA), Federal Housing Administration (FHA), Department of Veterans' Affairs (VA), and Rural Housing Service (RHS).

4. **Broaden Right to Cure for DTI and other Technical Errors**
   MBA has long advocated for an amendment that would permit the correction of errors where the three percent points and fees limit is exceeded. To encourage lending to the full extent of the QM credit box, MBA also urges that the right to cure or correct errors be extended to debt-to-income (DTI) miscalculations and other technical errors. There is an existing points and fees cure, but it will apply only to loans closed on or before January 10, 2021. MBA believes there is a need for both a permanent points and fees cure as well as a DTI cure.

5. **Revise the Points and Fees Definition**
   MBA supports H.R. 1153, the Mortgage Choice Act, which would exclude title insurance fees paid to lender-affiliated companies from the calculation of points and fees under the QM definition. Under the ATR rule, the QM points and fees calculation includes fees paid to lender-affiliated settlement service providers – but not to unaffiliated settlement service providers. Excluding fees paid to affiliates would result in greater competition between providers and benefit consumers. In addition, the treatment of mortgage broker fees results in identical loans being treated differently under the rules.

6. **Replace the Patch and the Default QM**
   The "QM patch" – which allows loans approved by the GSEs' underwriting systems to qualify as QM – is essential at this time, however, it is only a temporary solution while Fannie Mae and Freddie Mac (GSEs) are in conservatorship or until 2021. Loans must be consummated on or before January 10, 2021 (unless the conservatorship ends earlier). MBA urges the CFPB to start the process of working with stakeholders to develop a transparent set of criteria, including compensating factors, to define a QM – replacing both the QM patch and the 43 percent DTI standard. Such a standard must provide workable, flexible underwriting standards that are consistent with the Dodd-Frank Act without

injecting undue complexity or uncertainty into the process of serving consumers' credit needs.

III. Single-Family Servicing Market Regulations

Amidst a backdrop of intense regulatory change over the past decade, single-family mortgage servicers currently face an interconnected and sometimes conflicting landscape of regulatory requirements or government program imperatives. Consequently, this regulatory environment has in part contributed to significant increases in servicing costs. MBA data show that the cost to service a performing loan has gone from $58 in 2008 to $228 by the first half of 2016. For a non-performing loan this increase is even more dramatic, as costs have gone from $482 in 2008 to $2,522 by the first half of 2016. These additional costs ultimately get passed through to consumers in costs for new loans. Likewise, they directly impact consumer access to credit as defaulted loans cost more than 11 times as much to service as performing loans, causing lenders to reduce their exposure to borrowers that are perceived to pose greater risk.

MBA believes that mortgage servicing market regulations would also benefit from review under the Executive Order's imperative to "make regulation efficient, effective, and appropriately tailored."[5] Coordination among federal agencies and streamlining of existing regulations would go a long way towards lowering costs and increasing the availability of credit.

For example, VA, FHA, and the GSEs under the conservatorship of FHFA all have different loan modification programs despite a broad consensus on what constitutes the elements of a successful loss mitigation program. To stem these differences, MBA strongly urges government insurer and guarantor alignment toward the recently released GSE "Flex modification" program to harmonize these requirements, reduce cost for servicers, and lessen confusion as well as disparities in outcomes based on loan products.

Additionally, while the Department of Housing and Urban Development (HUD) is not a member of the Financial Stability and Oversight Council (FSOC), MBA encourages the Council to examine the impact of FHA's conflicting, complex, and antiquated servicing rules. These existing rules have resulted in higher costs for many smaller lenders that service this market segment, the exit from the program of some traditional market participants, and ultimately tighter credit availability standards. More specifically, current FHA conveyance process regulations and bifurcated timelines dramatically increase the risk of loss for FHA servicers and require different processes than those necessary to serve GSE loans. Reforms to FHA servicing are necessary to reduce costs, enhance certainty, and eliminate operational inefficiencies.

IV. Basel III

A. Mortgage Servicing Rights

In certain instances, regulations imposed on U.S. Institutions by international regulatory bodies are acting as an impediment to lending and servicing, and should be reconsidered. A prime example is demonstrated by the punitive treatment of mortgage servicing rights (MSRs) under the Basel III risk-based capital standards. These standards threaten to undermine the value of this important asset, with adverse implications for the entire mortgage finance chain. The Basel III rule increases the risk-weighting of MSRs held by banks from 100 percent to 250 percent. It also decreases the cap on MSRs that a bank may hold on its balance sheet from a 50 percent common

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[5] *Id.*

equity component of tier one capital to a more stringent 10 percent limit, with MSR assets above the limit deducted from regulatory capital. In addition, MSRs, deferred tax assets, and equity interests in unconsolidated financial entities are limited, in aggregate, to a 15 percent common equity component of tier one capital before they must be deducted from regulatory capital. This unnecessarily punitive treatment of MSRs makes them one of the most costly asset classes in the entire Basel III framework, despite any clear linkage of MSRs to the financial upheaval that Basel III is intended to address.

MSRs are not widely utilized outside of the United States but are a vital component of the American housing finance system's ability to provide a 30-year fixed-rate mortgage. These negative effects of the Basel III agreement on the mortgage market is an area particularly ripe for reevaluation in light of the President's Executive Order asking agencies to re-evaluate regulations to "enable American companies to be competitive with foreign firms in domestic and foreign markets" and "advance American interests in international financial regulatory negotiations and meetings."[6]

MBA believes that performance, capacity, and consumer service quality should be the primary drivers of which servicers gain market share, not excessively high capital standards on a particular segment of the industry. Nor should American banks be handicapped by an international agreement that discriminates against an asset that is uniquely integral to the American mortgage finance system. The current Basel treatment of MSRs, amid the backdrop of complicated and conflicting servicing rules, discourages many community banks from originating mortgages and retaining the servicing, or from acquiring servicing assets. Moreover, it impacts nonbank lenders by removing an important bid for MSR assets from the market.

B. High Volatility Commercial Real Estate (HVCRE) Loans

The final Basel III risk-based capital rule issued by the banking agencies treats commercial acquisition, development or construction (ADC) loans as "High Volatility Commercial Real Estate" (HVCRE) if certain parameters are not met. Loans characterized as HVCRE are subject to a 150 percent risk weight (12 percent capital). The specifications of the HVCRE rule are overly restrictive and allow for too much interpretive ambiguity. Based on the experience of our members, we have seen that this has resulted in inconsistency and confusion around the application of the rules, and unwarranted increases in costs to borrowers. To provide clarity to banks and to align HVCRE treatment with factors affecting credit risk, MBA recommends that the banking agencies modify the rule.

C. Other Basel Initiatives

We note that the Committee on Banking Supervision of the Bank for International Settlements (BIS) has issued or is working toward issuing consultative papers intended to be adopted by banking regulators in the U.S. and elsewhere. These include initiatives on the **Net Stable Funding Ratio**, **Step-In Risk**, and **Fundamental Review of the Trading Book**. These initiatives may not fully reflect circumstances in the U.S. and so could create unwarranted regulatory impediments to capital formation and negatively affect the financing of commercial/multifamily real estate. To prevent such unwarranted impacts, MBA recommends that U.S. regulators consider not incorporating these initiatives into their regulations or at a minimum that they make changes only where benefits demonstrably outweigh burdens and costs, and that address needs not already addressed within existing supervisory frameworks.

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[6] *Id.*

V. Small Lender Burdens Need to be Addressed

MBA also believes that nonbank mortgage lenders play a key role in the mortgage marketplace. MBA supports risk-based supervision of nonbanks, but is particularly concerned that in addition to dealing with a mountain of sometimes vexing rules, these entities must also deal with frequent and sometimes duplicative examinations from the CFPB and the states in which they operate. This increases costs and unduly strains the resources of these companies.

To this end, MBA urges rationalizing this process through either regulatory action by the CFPB or legislation that requires the CFPB to establish by rule a binding written policy of how the CFPB prioritizes the lenders it examines. The CFPB's current approach to "risk focused" examinations is neither codified in a rule nor established in other transparent formal procedural guidance to the industry. A multifactor approach – similar to how the Federal Deposit Insurance Corporation prioritizes exam resources for community banks – could include:

1. Size or market share (without setting a hard cap);
2. Referrals from state regulators;
3. Significant participation or market share in higher risk products;
4. Consumer complaint volume (relative to size, or a high volume of a specific complaint type).

MBA urges that efforts to mitigate examination burdens for nonbank mortgage companies should focus on establishing risk-based supervisory standards that ultimately would provide relief and clarity for all lenders.

In addition, MBA supports other efforts by CFPB, or by legislation if necessary, to ensure small lender concerns are addressed:

1. Establishment of notice requirements to lenders by CFPB identifying the factors that give rise to a scheduled examination;

2. Establishment of an exam appeals process for smaller lenders, including independent mortgage bankers (IMBs). MBA supports H.R. 1941 from the 114th Congress, provided IMBs are added to the bill;

3. Create an IMB Advisory Council at the CFPB, similar to the Bureau's existing Community Bank Advisory Council and Credit Union Advisory Council; and

4. Passage of H.R. 2121 from the 114th Congress, which will provide transitional licensing authority for loan officers moving between bank and nonbank lenders, helping labor mobility, and allowing nonbank lenders to compete fairly for talented loan officers.

VI. Commercial and Multifamily Lending Concerns

A. HMDA Reporting on Multifamily Lending

Historically, mandatory data collection requirements under the Home Mortgage Disclosure Act (HMDA) applied only to single-family mortgage lending. However, current Regulation C, as amended by the CFPB, requires lenders to report data on applications for multifamily mortgages (including business-to-business loans). MBA recommends that Regulation C be amended to exclude commercial mortgage loans secured by multifamily properties and commercial loans secured by dwellings from HMDA reporting.

B. Risk Retention for Commercial Real Estate

The final risk retention rule under Dodd-Frank became effective December 24, 2016 for the commercial mortgage backed securities market (CMBS). While the final rule was improved significantly from the initial 2011 proposal, we believe additional improvements are needed to avoid an unnecessarily restrictive impact on the CMBS market. For example, flexibility would be enhanced by permitting a senior/subordinate structure for purchasers of the horizontal "risk retention" residual interest. We also remain concerned that the underwriting metrics for zero risk retention for CRE loans specified in the current rule remain unduly restrictive. In addition, single asset single borrower CMBS should be exempt from risk retention.

C. Multifamily Rental Housing

Our recommendations on the financing of multifamily housing, as a category of commercial real estate, are guided by the need for affordable and workforce rental housing and by the strong credit performance of multifamily loans originated by MBA lender members in the Fannie Mae, Freddie Mac, HUD/FHA-Ginnie Mae, life insurance companies, banks, and more.

- **Support for Low Income Housing Tax Credit (LIHTC) properties.** MBA supports the successful LIHTC program, which provides for private investment in affordable housing.

- **Private sector multifamily lenders should be the preferred government partners.** We have concerns about the rapidly growing Department of Treasury's Federal Financing Bank loan program (Section 542), which involves government-to-government financing of FHA insured multifamily properties through a Treasury-to-HUD loan program in lieu of private sector FHA approved lenders. While state and local Housing Finance Agencies (HFAs) play a critically important role in the affordable housing market, the firewall intended by the legislative history for the Tax Reform Act of 1986[7] that should prevent HFAs from tying allocation of LIHTC tax credits to a use of state HFA debt financing has been permeated. HFAs have marketed the use its financing of HFA allocated LIHTCs with Federal Financing Bank funded mortgages as a "One Stop Shop." This has reduced the ability of private-sector lenders to compete for this business.

  Similarly, should there be a workforce housing tax credit program supported by the Trump Administration and approved by Congress, we would urge that distribution of such credits include a prohibition against HFAs providing both tax credits and debt financing on the same property.

VII. Conclusion

MBA appreciates the Administration's focus and attention on the support and growth of vibrant financial markets through the promulgation of effective, efficient, and appropriate regulations. We welcome the opportunity to work with the Department of Treasury and FSOC to advance the Administration's Core Principles, while ensuring the development of clear and coordinated standards to promote safe and sustainable mortgage financing. MBA believes that continued

[7] Blue Book, Joint Committee on Taxation Explanation, Tax Reform Act of 1986, p. 171.

dialogue with the industry is critical to achieving this goal. To this end, we request an opportunity to facilitate a meeting with a small group of diverse lenders and you or your staff to provide additional feedback to assist the Department of Treasury as it examines existing laws and government policies in accordance with this Executive Order.

MBA urges the Department of Treasury to consider the above recommendations. Should you have questions or wish to discuss our single-family comments, please contact Steve O'Connor at SOConnor@mba.org. For commercial/multifamily comments, please contact Tom Kim at TKim@mba.org.

Sincerely,

David H. Stevens, CMB
President and Chief Executive Officer