



MORTGAGE BANKERS ASSOCIATION

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**On behalf of the  
Mortgage Bankers Association**

**Before  
The U.S. Senate Committee on Banking, Housing, &  
Urban Affairs**

**“Regulatory Burdens to Obtaining Mortgage Credit”**

**April 16, 2015**

Chairman Shelby, Ranking Member Brown and members of the committee, my name is David Motley and I appreciate the opportunity to testify before this committee today on the topic at hand, one of critical importance to consumers.

I currently serve as President of Colonial Savings, F.A., a community bank headquartered in Fort Worth, Texas. I also serve as a member of the Board of Governors of the Mortgage Bankers Association (MBA), and have twice served as Chairman of MBA's Residential Board of Governors. Currently, I serve on the Community Bank Advisory Council for the Consumer Financial Protection Bureau (CFPB).

The Mortgage Bankers Association (MBA)<sup>1</sup> uniquely represents mortgage lenders of all sizes and business models: from small independent mortgage bankers, community banks, and credit unions to the nation's largest financial institutions. All of MBA's members have their own unique role in serving the mortgage financing needs of families across the country.

Similarly, my community bank, Colonial Savings, serves consumers in all 50 states, originating \$1.7 billion in mortgages in 2014 through retail branches for both the bank's portfolio and for sale to the secondary market, and buying loans from smaller institutions that no longer maintain the capacity or desire to engage in mortgage banking themselves. Colonial today services more than \$24 billion in single-family mortgages.

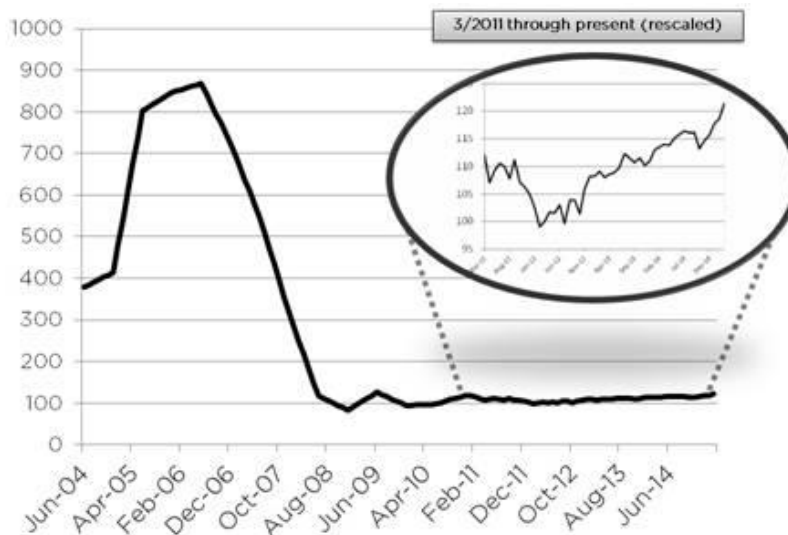
As a four-decade veteran of the mortgage banking industry, I can tell you that the regulatory demands under the Dodd-Frank Wall Street Reform and Consumer Protection Act and other statutes have made the market safer. I can also tell you that the industry is more focused on regulatory compliance than ever before. However, the new regulatory regime is also quite costly and many aspects of the Dodd Frank rules have an unnecessarily detrimental effect on the availability and affordability of mortgage credit for too many creditworthy families.

MBA data show that mortgage credit availability remains far below the levels seen prior to the mortgage crisis. Although credit has begun to loosen somewhat in recent months, particularly for jumbo borrowers, many borrowers continue to have difficulty qualifying for credit, or would pay much more for credit than was true before the crisis. No one would advocate going back to the weak credit standards that contributed to the boom

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<sup>1</sup> 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.mba.org](http://www.mba.org).

and bust. However, the pendulum has swung too far, and credit standards could safely be changed to enable loans to additional qualified borrowers.



MBA has consistently supported reasonable requirements that will prevent a reemergence of any past excesses. While we believe that the Consumer Financial Protection Bureau (“CFPB” or “the Bureau”) did commendable work in developing the Ability to Repay (ATR) rule including the Qualified Mortgage definition, we also believe the ATR rule, and other aspects of Dodd Frank, warrant strong oversight and adjustment when they unnecessarily raise costs or limit access for creditworthy consumers. We believe such changes must be made judiciously to retain appropriate consumer protections while ensuring access to safe sustainable mortgage credit in a competitive market.

As explained here, we believe other changes to the Bureau’s operations and requirements beyond the Bureau’s purview also are warranted to facilitate the availability of credit.

## I. ATR and QM Background

The ATR rule requires lenders to determine that a borrower has a reasonable ability to repay a mortgage before the loan is consummated. Dodd-Frank and this rule establish significant penalties and liability for failing to meet this requirement. The ATR rule provides a presumption of compliance with its requirements for loans that are originated as Qualified Mortgages (QMs), which provides greater certainty to lenders and mortgage investors regarding potential liability should a loan later default.

In order for a mortgage loan to qualify as a QM it cannot contain higher-risk features such as negative amortization or interest-only periods, and the sources of repayment must be fully documented. A QM must also meet specified underwriting standards including that the borrower’s debt-to-income (DTI) ratio must not exceed 43 percent or,

in the alternative, the loan must be eligible for Fannie Mae and Freddie Mac (the GSEs) purchase or Federal Housing Administration (FHA) or other government programs. This alternative is commonly referred to as the “QM patch.” In today’s market the patch is essential since it offers and weighs a broader array of relevant underwriting factors than the alternative 43 DTI approach. However, the patch effectively hides the full impact of the QM rule by making all agency loans qualified mortgages.

Further, for loans to qualify as QM, borrowers also may not be charged points and fees that exceed three percent of the loan amount for loans in excess of \$101,953 (in 2015). Loans below that amount are permitted to have fees in excess of three percent, based on a sliding scale; the lower the loan amount below the \$101,953 threshold, the greater the points and fees permitted.

The rule establishes a compliance “safe harbor” for QMs if the Annual Percentage Rate (APR) of the loan does not exceed the average prime offer rate (APOR) for that mortgage by 150 basis points (bps) or more and the loan meets the other QM requirements. A safe harbor is a well-tested means of ensuring compliance with legal requirements. In that model, regulated entities are provided specific requirements and if they meet them, they are assured that any legal inquiry will be concerned only with whether the requirements were in fact met.

Loans to borrowers whose APRs exceed the APOR by more than 150 bps are not offered a safe harbor and instead receive a rebuttable presumption of compliance if their loans otherwise qualify as QMs. The level of additional risk under this standard versus the safe harbor has not yet been tested in litigation under Dodd-Frank.

Considering the significant potential liability and litigation expenses for an ATR violation, QM safe harbor loans currently comprise nearly all of the mortgage loans available in today’s market. Few lenders are making either non-QM loans or rebuttable presumption QMs loans.

Moreover, the secondary market for non-QM loans remains extremely limited, and rate sheets from non-QM investors indicate a substantial risk premium exists for these loans. To date, affordable non-QM loans have generally been available only to higher wealth borrowers with broad financial relationships with institutions.

The CFPB recently proposed to amend its mortgage rules to facilitate lending by small and rural lenders by expanding the number of small creditors who receive QM status for loans held in their own portfolios when a consumer's DTI ratio exceeds 43 percent. Also, under the proposal an increased number of small creditors in rural or underserved areas would be able to originate QMs with balloon payments, even though loans with balloon payments are generally not permitted to qualify as QM loans.

## **II. Recommended Changes to QM**

### **A. Framework for QM Changes**

MBA believes it is time to consider changes in the QM definition to mitigate the adverse impact the initial rule has had on access to credit for some borrowers. We strongly believe these changes should be made holistically to the QM definition, and not limited to certain lenders based on charter types or business model. Consumers should not be forced to discern which institutions offer particular types of loans; their choices should not be limited to particular providers. Stratification of the market by establishing different underwriting standards for some lenders and not others only causes unnecessary consumer confusion and will lessen competition. A holistic approach to revising the QM will ensure a competitive market for all types of QM loans, and does not shift the burden to the consumer to figure out which lenders offer which QM products.

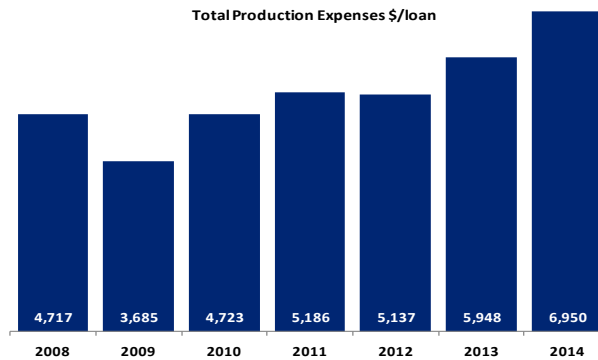
### **B. Expand the QM Safe Harbor**

Because of certain flaws in the definition of the Average Prime Offer Rate, the calculation is biased low as a measure of the typical prime mortgage in the market. In addition, the rate is pegged only weekly and therefore lags the market. In a volatile interest rate environment where interest rates can move up 50 basis points or more in few days, the 150 basis spread over the APOR may inadvertently knock many borrowers out of the QM safe harbor. MBA recommends that the spread over the APOR for defining a safe harbor QM be expanded to 200 basis points. This step alone would broaden the availability of credit by extending safe, sustainable QM loans to a greater number of creditworthy borrowers, particularly in a rising interest rate environment.

### **C. 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 \$101,953 for 2015. This definition is far too limited considering the costs of originating a loan.

Origination Production Costs – Also Up



Source: MBA's Annual and Quarterly Mortgage Bankers Performance Report

Moreover, the average loan size today is approximately \$260,000. Because of the current definition, too many smaller loans do not qualify as QMs. MBA recommends that the Bureau raise the definition to loans under \$200,000, with a sliding scale that permits progressively higher points and fees caps for smaller loans. This change – which MBA would assert the Bureau has the authority to make by rule – would do much to serve the credit needs of low- and moderate-income borrowers who have smaller loan balances.

2015 QM Points and Fees Caps		Recommended QM Points and Fees Caps	
Loan Amount	Points and Fees Cap	Loan Amount	Points and Fees Cap
		\$200,000 and up	3%
		\$150,000 to \$199,999	\$6,000
\$101,953 and up	3%	\$100,000 to \$149,000	4%
\$61,172 to \$101,952	\$3,059	\$80,000 to \$99,999	\$4,000
\$20,391 to \$61,171	5%	\$20,391 to \$79,999	5%
\$12,744 to \$20,390	\$1,020	\$12,744 to \$20,390	\$1,020
Less than \$12,744	8%	Less than \$12,744	8%
		New tiers/caps	

#### **D. Broaden Right to Cure for DTI and other technical errors**

MBA strongly advocated for an amendment to the QM rule to permit the cure or correction of errors where the three percent points and fees limit is inadvertently exceeded. We appreciate that the Bureau made this important amendment; such a change helped ameliorate any understandable conservatism that limits credit availability to borrowers. To encourage lending to the full extent of the QM credit box, MBA also urges that the right to cure or correct inadvertent errors be extended to DTI miscalculations and typographical and technical errors and omissions.

#### **E. Revise the “Points and Fees” Definition**

MBA strongly supports the passage of legislation that would exclude title insurance fees paid to lender-affiliated companies from the calculation of “points and fees” under QM. Currently, the CFPB’s ATR/QM rule points and fees calculation includes fees paid to lender-affiliated settlement service providers — but not to unaffiliated settlement service providers. Many MBA members use affiliated settlement service providers to deliver a more reliable consumer experience. This is particularly important as we transition to the new integrated TILA-RESPA disclosures where lenders are held accountable to meet narrow fee tolerances and tight disclosure timeframes. Furthermore, title insurance premiums are regulated in most states and the premium is the same whether or not the title company is an affiliate of the lender.

MBA believes that the rule should not discriminate against lenders that use affiliated settlement providers. Requiring that the affiliate’s title premium be included in lender origination charges, but not those of non-affiliated title companies does a disservice to the consumer as well as lenders with affiliate providers. Such discrimination works to lessen choice and decrease competition for consumers. Most importantly, for many lenders it makes low balance loans serving low- and moderate-income borrowers much costlier to originate and consequently less available to consumers.

#### **F. QM for Portfolio Loans**

While we prefer a holistic fix for QM, certain aspects of the QM could be modified to recognize the alignment of lender-borrower interests in portfolio lending. MBA could support proposals for QM treatment of loans that do not meet the 43 percent DTI limit, and for certain balloon loans if they are held in portfolio for three years. The fact that a loan is to be held in portfolio can be an important check against originating unsustainable loans. However, we believe some of the other parameters of the QM should be retained for portfolio loans to protect against the re-emergence of loans with risky features such as pay option ARMs, stated-income underwriting, and short-term balloon terms.

Importantly, MBA also believes that the portfolio exemptions from the QM should be extended to originators that process, fund and sell these loans to a bank (or REIT) that

will retain the loans in portfolio for the required holding period. This could be particularly important for many community banks that are finding the costs and compliance burdens of maintaining a mortgage origination operation to be excessively burdensome, but wish to offer the portfolio products to their customers.

MBA believes that independent mortgage bankers who specialize and excel in mortgage origination should be permitted to originate portfolio QMs for sale to community banks. The community banks would maintain control over the credit and underwriting standards, and would retain the ability to enforce these standards through repurchase requirements should a loan not meet the required parameters. This approach expands the availability of portfolio QMs for community banks that cannot sustain the high costs of maintaining an origination platform in today's high compliance cost environment.

### **G. Long-term Work on QM: Replace the Patch and the Default QM**

Unlike the 43 DTI test and the cumbersome guidelines set forth in Appendix Q, the QM patch provides compensating factors to better qualify consumers for affordable credit. While the QM patch is an essential feature of the ATR/QM rule at this time, it is intended to expire after seven years or when the GSEs leave conservatorship. Considering the importance of an alternative to the DTI formulation, MBA urges the CFPB to begin a process of working with stakeholders to develop a transparent set of criteria, including the use of compensating factors, to define a QM, replacing both the patch and the 43 percent DTI standard. Such a standard must provide workable, flexible underwriting standards that are consistent with Dodd-Frank but do not inject undue complexity or uncertainty into the process of serving consumers credit needs. A simpler approach would be to classify all loans for which the lender has determined the borrower's ability to repay as qualified mortgages.

## **III. Other Impediments to Credit Access for Consumers**

In addition to changes to the ATR/QM rule, there are several other areas which we believe should be addressed to facilitate access to credit.

### **A. Need for Authoritative Written Guidance Accompanying Rules**

Notwithstanding the Bureau'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 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 laws for which the Bureau is responsible, the agency's reluctance to also offer authoritative written guidance – through FAQs or supervisory memoranda -- as questions arise has made lenders excessively cautious and defensive in their approach to lending.



The final RESPA/TILA rule, comprising 1,888 pages, was issued on November 20, 2013, with an implementation date of August 1, 2015. The rule requires new, integrated disclosure forms to be provided to consumers at the time of mortgage application and settlement, known as the Loan Estimate and the Closing Disclosure, respectively. Most importantly, the rule brings major changes not just in the mortgage process, but also in the real estate transaction process. Under the new rule, both lenders and assignees face significant liability for failures to comply.

While the Bureau has produced several webinars and helpful issuances, and participated in a numerous conferences and forums, many questions regarding this uniquely detailed and complex rule have arisen and remain unanswered, and many more questions can be counted on before August 1. Notwithstanding, the Bureau has steadfastly refused to offer timely, accessible Frequently Asked Questions (FAQs) or other authoritative guidance to regulated entities as other regulators do, except for on a handful of technical amendments and commentary to address a small set of issues. The absence of timely, authoritative written guidance from CFPB has resulted in confusion and has complicated the implementation process. Most importantly, the lack of such guidance in some areas threatens to make borrower beneficial features of transactions such as lender credits toward closing costs far more difficult to sustain.

Considering the extensive liability that can arise from TILA violations, there is considerable concern that the new disclosures will open lenders to new liability. The CFPB has taken the position that the question of the nature of liability under the rule will be settled by the courts. In the meantime, however, such uncertainty can be expected to spawn litigation and ultimately increase costs for consumers.

Because of the lack of guidance on key issues and the need to review and amend parts of the rule, we have urged that the Bureau establish a reasonable grace period for enforcement and liability during the first six months of the rule's implementation. Such action would facilitate the provision of needed guidance, compliance in good faith and allow any impediments to implementation to be addressed.

## **B. The Bureau Should Issue Guidance Prior to Enforcement**

Since the Bureau was established it has moved forcefully to enforce the laws it is charged with and publicly announced numerous and costly settlements. While MBA does not question the appropriateness of these efforts, we are concerned about an over-reliance on enforcement actions to drive industry compliance with the Bureau's new rules. Instead of issuing supervisory guidance, many of the Bureau's positions have been articulated through settlements rather than through guidance or rules. This approach – particularly regarding difficult and often subjective areas such as RESPA or unfair, deceptive, or abusive acts or practices (UDAAP) actions – opens up activities not previously believed prohibited to potential challenge by state regulators, plaintiffs' attorneys, as well as the government.

Most importantly, while both enforcement and clear rules of the road protect consumers, offering guidance upfront casts a wider net and protects borrowers against harm before it occurs by ensuring the compliance of the vast majority of lenders that want to comply. With no public rulemaking or supervisory guidance, even industry counsel becomes hesitant to provide lenders with reliable compliance advice. In this environment, fear of enforcement too frequently becomes the dominant driver of lender behavior, discouraging even meritorious interpretations of the rules to serve borrowers.

MBA supports Bureau or, if necessary, Congressional action to develop an appropriate framework for the issuance of rules, policies and supervisory guidance. This would include issuing Supervisory Memoranda or Compliance Bulletins to put industry on notice regarding supervisory expectations on specific problematic practices, along with suggested compliance practices. This is especially important in connection with CFPB's UDAAP authority. Such action will ensure that access to credit for consumers will not be harmed by unnecessary confusion or fear.

### **C. Improvements Needed in CFPB Consumer Education Initiatives**

While MBA appreciates the Bureau's work to create several valuable education resources to improve consumers' choices, its recently posted "rate checker" tool and its recently announced policy to begin posting unverified consumer narratives to its complaint database threaten to mislead consumers, undermining the Bureau's other efforts.

#### *The Rate Checker*

In January of this year, the Bureau posted on its website a "rate checker" tool so borrowers could determine the interest rate for a mortgage loan in the state where the property is located. The tool was posted without any notice and opportunity to comment and notably does not include loan costs in its calculations.

Online rate checkers or trackers are inherently problematic because they tend to simplify markets and the collateral, borrower, and other factors that determine interest rates. The CFPB's rate checker is no different but raises even a greater risk of borrower confusion because it comes with the imprimatur of a government agency.

Although, the CFPB has made some minor revisions to the tool, significant problems remain, including:

- a flawed sampling methodology, which excludes independent mortgage bankers and community banks that today account for about 50 percent of the market for home purchases;
- a lack of specific data on discount points or origination fees associated with quoted rates;
- the failure to collect key data on the occupancy, property type (single family/condo), and use of proceeds (refi or purchase)

- the absence of an APR disclosure required in lender rate advertisements;
- exclusion of certain products such as the 20-year mortgage and the 5/5 ARM;
- lack of data collected about the borrower's income; and
- the absence of estimates made about a borrower's monthly principal and income payments.

### *Complaint Database*

Similar problems are presented by the CFPB's recently announced decision to expand its consumer complaint database to include unsubstantiated consumer narratives to accompany complaints about lenders. Because the vast majority of consumer complaints lodged through the Bureau's complaints portal do not require remedial action, MBA urged in its comment on this change that CFPB narrow its postings to include only those narratives where the accuracy of the complaint has been verified. MBA also urged the Bureau to treat this undertaking as necessitating rulemaking so that the effects on small business and the economy were appropriately taken into account. The CFPB moved forward nonetheless and the final policy makes no provision for ensuring that complaint narratives are valid or accurate. Moreover, the database does not allow financial institutions to provide a detailed response; instead, companies are limited to a single selection from a drop down menu. Nor is there any process for removing complaints that are inaccurate or resolved with a simple explanation.

Like the "rate checker," rather than ensuring consumers are provided accurate information, the CFPB has chosen to put the Government's imprimatur on information that can mislead consumers and result in ill-informed choices. MBA has urged Bureau to reconsider these recent "consumer education" initiatives that are doing more to confuse than enlighten American consumers. With the rate checker and the posting of unsubstantiated narratives, the Government provides information that is incomplete, undermining borrowers' choices at a time when the mortgage industry has never been safer or more transparent.

## **IV. Other Barriers to an Efficient Housing Finance Market**

### **A. SAFE Act Disparities**

MBA has long supported the establishment of a sound qualification framework for all mortgage originators serving consumers, regardless of where they work. Unfortunately, while the Secure and Fair Enforcement for Mortgage Licensing (SAFE) Act seeks that objective, in its current form the Act does not provide consumers the necessary assurance that all Mortgage Loan Officers (MLOs) have met minimum standards of competency through an objective test.

The SAFE Act requires MLOs employed by non-bank lenders to be licensed, pass a comprehensive test, undergo criminal and financial background reviews, and register in the National Mortgage Licensing System and Registry. By contrast, under SAFE, MLOs employed by federally-insured depositories or their affiliates are registered in the NMLS

but do not have to pass an objective test administered by a third party. Although most banks, including Colonial Savings, employ extensive training curriculums, a testing requirement would provide consumers assurance that their LO meets minimum standards of competency and knowledge. In addition, the different standards under the SAFE Act makes it difficult for MLOs to transition efficiently between employers of different charter types.

MBA urges Congress to amend the SAFE Act to require states to issue transitional licenses to individuals who are registered loan originators employed by a depository institution (or an affiliate). Similarly, a state-licensed loan originator in one state who takes a similar position in another state would have a transitional grace period to obtain a license in the new state. These individuals would be able to continue originating loans for a transitional period after being employed by a state-licensed non-depository entity willing to take responsibility for their activities during the transitional period.

In the long term, it is important to move toward a universal testing requirement that creates a level playing field for all MLOs. In the interim, this narrow and simple solution creating transitional licenses would allow all qualified individuals to satisfy borrowers' credit needs and maximize consumer choice while ensuring workforce mobility.

#### **B. FHFA Should Direct the GSEs to Use Updated Credit Scoring Models**

Another impediment to consumer access to credit is the use of outdated credit scoring models by the GSEs. The major consumer credit score model developers have announced changes to their credit scoring models with an eye toward making those models more accurate for today's borrowers in light of lifestyle changes and the post-recessionary risk environment. While the GSEs, in consultation with industry, have begun the process of analyzing and incorporating these new models, the continued required use of the outdated models harms today's borrowers. Among many factors, outdated credit scoring models may not accurately reflect the credit-worthiness of a borrower; for instance, medical debt and rent payment histories may not be given proper weight. The new models help to score borrowers with limited credit experience, i.e. "thin files".

MBA believes that the Federal Housing Finance Agency (FHFA) should expedite the GSEs' validation and adoption of the latest validated credit scoring models. Furthermore, the GSEs' delay in including the new scoring models into their automated underwriting systems may also cause lenders to hesitate to use them in their other lending products, as it could be viewed as an unfair practice to use different scoring models for different products.

#### **C. New Regulations Have Driven Up the Cost to Service Loans**

New servicing rules have dramatically driven up the cost to service loans and driven down efficiency in servicing operations. On the efficiency front, loans serviced per full-time equivalent employees have decreased from 1,638 in 2008 to 790 in 2014. Total

cost to service loans has increased from \$173 per loan in 2008 to \$309 in 2014. Direct costs have increased from \$55 per loan to \$170 per loan during the same timeframe. Costs to service loans in default have risen from \$423 per loan in 2008 to \$2,214 in 2014. These additional costs ultimately get passed through to consumers on new loans. Likewise, these costs directly impact consumer access because defaulted loans cost so much more to service, and lenders reduce their exposure to lower FICO borrowers as a result.

#### **D. Basel III Limits Banks' Involvement in Mortgage Finance**

The U.S. bank regulators put in place the Basel III framework in recent years. Basel III reduces a bank's potential investment in mortgage servicing assets from 50 percent of Tier 1 capital to 10 percent of the common equity component of Tier 1 capital before they must be deducted directly from capital. Regulators also raised the risk-weighting of mortgage servicing rights from 100 percent to 250 percent. Thus banks that are close to these limits will be forced to sell the servicing on incremental mortgage production, making new mortgage production less attractive. That is why MBA would support bicameral efforts to move legislation that would mandate a study into the impact of

Basel III on mortgage servicing assets owned by community banks and credit unions (a bipartisan bill, H.R. 1408 has already been introduced in the House). A moderation of Basel III's treatment of mortgage servicing assets would allow these smaller institutions to maintain responsible credit access for consumers, i.e., selling the loan asset to replenish lendable funds, while still maintaining the loan servicing relationship with the consumer.

#### **V. Conclusion**

We commend the efforts of the committee to examine the regulatory hurdles preventing consumers from accessing credit. No matter how well-intentioned they may be, we are concerned that key federal rules and practices are unduly restricting credit opportunities for qualified borrowers.

We look forward to working closely with this committee and with regulatory policymakers to improve the availability of sound mortgage credit for American families.