



Advocacy: the voice of small business in government

July 9, 2012

The Honorable Richard Cordray
Director
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20006-4702

Re: Reopening of Comment Period and Request for Comment of Truth in Lending (Regulation Z), Docket No. CFPB-2012-0022, RIN 3170-AA17

Dear Mr. Cordray:

The Office of Advocacy of the U.S. Small Business Administration (Advocacy) submits this comment on *Regulation Z; Truth in Lending*. Small businesses have contacted Advocacy about this important issue and it was discussed at a small business roundtable conducted by Advocacy. Advocacy commends the CFPB for reopening comment on the additional data that it has received on this important topic.

Advocacy Background

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),¹ as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),² gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.³ The agency must include, in any explanation or discussion

¹ 5 U.S.C. § 601 et seq.

² Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et seq.).

³ Small Business Jobs Act of 2010 (PL 111-240) § 1601.

accompanying the final rule's publication in the Federal Register, the agency's response to these written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.⁴

The Rulemaking

This matter was originally proposed by the Board of Governors of the Federal Reserve on May 11, 2011.⁵ The purpose of the proposal was to implement amendments to the Truth in Lending Act made by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank). The proposed rule addressed the new ability to repay requirements that will apply to consumer credit transactions secured by a dwelling and the definition of a qualified mortgage (QM). In the QM proposal, the Federal Reserve set forth two alternatives. Alternative 1 would provide for a legal safe harbor from the ability to repay requirements. Alternative 2 would provide a rebuttable presumption of compliance.

On June 5, 2012, the CFPB reopened the comment period.⁶ The CFPB specifically requested comment on new data that the CFPB received from the Federal Housing Finance Agency. The CFPB proposes to use the data to tabulate volumes and performance of loans with varying characteristics and to perform statistical analyses that may assist the CFPB in defining loans with characteristics that make it appropriate to presume that the lender complied with the ability to repay requirements. It may also assist the CFPB in ascertaining the costs and benefits to consumers as well as market share covered by alternative definitions of qualified mortgage.⁷ The CFPB further asserts that loan performance, as measured by the delinquency rate, is an appropriate metric to evaluate whether a consumer had the ability to repay those loans at the time that the loan was made.⁸

The Definition of QM Will Have Major Implications on the Viability of Community Banks

Small banks are particularly concerned about the definition of QM. They assert that the improper implementation could lead to a regulatory environment where only large banks will be able to absorb the additional economic burden of the compliance requirements. Small banks assert that community banks will no longer originate mortgage loans if they are only provided with a rebuttable presumption of compliance.⁹

They contend that establishing the QM as a rebuttable presumption of compliance will lessen the availability and affordability of mortgages to consumers. The rebuttable presumption can be overridden by facts that are unrelated to the requirements of the QM. This has the potential of liability and costly litigation and compliance costs. Small lenders may be unable to manage the risk and exit the market.¹⁰

⁴ Id.

⁵ 76 Fed. Reg. 27390.

⁶ 77 Fed. Reg. 33120.

⁷ 77 Fed. Reg. 33121.

⁸ Id.

⁹ Letter from community bank organizations to Richard Cordray, June 11, 2012.

¹⁰ Letter from financial industry trade groups to Richard Cordray, April 27, 2012.

Small banks assert that one way to enable community banks to compete effectively is to allow for a safe-harbor from the ability to repay requirements and to ensure that atypical loans such as balloon payments can continue to be available. A safe harbor will allow small lenders to operate within known boundaries and allow consumers to obtain affordable loans.¹¹

The CFPB's Use of the Data as a Means for Measuring a Consumers Ability to Repay

As noted above, the CFPB asserts that loan performance, as measured by the delinquency rate, is an appropriate metric to evaluate whether consumers had the ability to repay those loans at the time that the loan was made. However, a consumer's circumstances may have changed after the loan was made. For example, the consumer may have become unemployed after the loan was made. Or the consumer or a member of the consumer's family may have become seriously ill. There are a number of catastrophic things that could impact the consumer's ability to pay that may not have been present at the time that the loan was made. As such, Advocacy questions whether loan performance, as measured by the delinquency rate, is an appropriate metric to evaluate whether a consumer had the ability to repay those loans at the time that the loan was made.

Conclusion

Advocacy encourages the CFPB to give full consideration to the comments from small banks. Smaller banks provide a valuable service to lower income and rural areas where banking options are sparse.

Thank you for the opportunity to comment on this important proposal and for your consideration of Advocacy's comments. If you have any questions regarding these comments or if Advocacy can be of any assistance, please do not hesitate to contact Jennifer Smith at (202) 205-6943.

Sincerely,

/s/

Winslow Sargent, Ph.D.
Chief Counsel for Advocacy

/s/

Jennifer A. Smith
Assistant Chief Counsel
For Economic Regulation & Banking

Cc: The Honorable Cass Sunstein

¹¹ Letter from community bank organizations to Richard Cordray, June 11, 2012.