AMERICAN
LAND TITLE
ASSOCIATION

June 21, 2011

Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20511

Re: Docket No. R-1417 and RIN No. 7100-AD75

To whom it may concern:

The American Land Title Association[1] ("ALTA") appreciates this opportunity to comment on the Federal Reserve's proposed rule amending Regulation Z to implement section 1411, 1412 and 1413 of the Dodd-Frank Wall Street Reform and Consumer Protection Act's[2] new ability to repay standard and qualified mortgage safe harbor.

As part of Dodd-Frank, Congress enacted Title XIV the Mortgage Reform and Anti-Predatory Lending Act, which amended the Truth-In-Lending Act ("TILA") to prohibit creditors from making residential mortgage loans (closed-end, dwelling-secured loans) unless the creditor makes a good faith determination, based on verified and documented information, that the consumer had a reasonable ability to repay the loan according to its terms and all applicable taxes, insurance and assessments at the time the loan was consummated[3]. Absent this determination, borrowers in a foreclosure proceeding may assert a creditor's failure to comply with the ability to repay requirements as a defense by way of recoupment or set off, without regard to the normal statute of limitations under TILA.

[1] Founded in 1907, ALTA is the national trade association and voice of the real estate settlement services, abstract and title insurance industry. With more than 8,000 office locations throughout the country, ALTA members operate in every county in the United States to search, review and insure land titles and conduct closings to protect the rights of home buyers and mortgage lenders who invest in real estate. ALTA members include title insurance companies, title agents, independent abstracters, title searchers and attorneys, ranging from small, one-county operations, to large national title insurers.

[2] Public Law 111-203, 124 Stat. 1376 (2010)

[3] If the creditor knows, or has reason to know, that one or more residential mortgage loans secured by the same dwelling will be made to the same consumer, the creditor must determine the borrower's repayment ability of the combined payments of all loans on the same dwelling according to the terms of those loans.

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Because of the severity of this defense, Congress also created a safe harbor or presumption from the ability to repay requirement for all qualified mortgages ("QM") that meet certain requirements[4]. The law gives the Federal Reserve Board authority to prescribe regulations that revise, add to, or subtract from the criteria that define a qualified mortgage, in its furtherance of the availability of responsible, affordable mortgage credit.

This letter will focus on two main points.

First, ALTA believes the QM should be defined as a legal safe harbor instead of as a rebuttable presumption. Both creditors and consumers benefit from the increased certainty provided by a legal safe harbor. Creditors will benefit from the ability to protect themselves from the potentially severe liability for originating a loan in violation of the ability to repay requirements. Without clear guidance on how to comply with the rule, creditors will likely rethink whether to shift capital to less costly lines of business with less regulatory risky. Instead of protecting consumers by incentivizing creditors to safely underwrite loans, the lack of a safe harbor will likely harm consumers by restricting their access to credit.

Consumers will also benefit when creditors are incentivized to offer less costly and safer underwritten loan products. This notion was best articulated by the Board itself, "the drawback of treating a 'qualified mortgage' as providing a presumption of compliance is that it provides little legal certainty for the creditor, and thus little incentive to make a "qualified mortgage," which limits loan fees and features[5]." With a safe harbor the rule will likely achieve its desired result of ensuring that consumers are placed in loan products that they will be able to repay.

Second, while providing this safe harbor is important for limiting the creditors' liability, the QM should be improved to ensure that it is providing crucial protections for consumers. Though the proposal includes many important underwriting requirements, it is missing one crucial requirement: a title search and examination backed by a policy of title insurance to determine and ensure the legal standing of the borrower and for the lender.

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[4] These requirements include: 1)the regular periodic payments for the loan may not: (i) Result in an increase of the principal balance; or (ii) Except for certain balloon loans, allow the consumer to defer repayment of principal; 2) the terms of the loan do not result in a balloon payment (i.e., a scheduled payment that is more than twice as large as the average of earlier scheduled payments), except under certain circumstances; 3) the income and financial resources relied upon to qualify the borrowers on the loan are verified and documented; 4) in the case of a fixed rate loan, the underwriting process is based on a payment schedule that fully amortizes the loan over the loan term and takes into account all applicable taxes, insurance, and assessments; 5) in the case of an adjustable rate loan, the underwriting is based on the maximum rate permitted under the loan during the first 5 years, and a payment schedule that fully amortizes the loan over the loan term and takes into account all applicable taxes, insurance, and assessments; 6) the loan complies with any guidelines or regulations the Federal Reserve Board establishes relating to debt-to-income ratios or alternative measures of ability to pay regular expenses after payment of total monthly debt, taking into account the borrower's income levels and such other factors the Federal Reserve Board establishes; 7) the total points and fees payable in connection with the loan do not exceed 3 percent of the total loan amount (the Federal Reserve Board is required to prescribe a points and fees threshold for "smaller loans" to meet the requirements of this presumption, considering the potential impact on rural areas and other areas where home values are lower); and 8) the loan term does not exceed 30 years, except as such term may be extended under certain circumstances, such as in high-cost areas.

[5] Page 256.

A title search backed by a title insurance policy is a commonsense underwriting tool that should be included in the definition of a qualified mortgage.

The ability to repay requirement is one of the pillars of Dodd-Frank's effort to address the causes of the residential housing bubble. During the bubble, numerous creditors made loans that the borrower would never be able to repay based on the belief that if the borrower defaulted, the collateral's value would be sufficient to fully satisfy the debt. However, as housing prices fell this belief proved incorrect and cost borrowers their home and creditors significant losses.

Dodd-Frank attempts to remedy this problem by forcing creditors to take a snapshot of the borrower's financial condition at the time of the loan. The creditor is required to make a determination that, "the consumer has a reasonable ability to repay the loan, according to its terms, and all applicable taxes, insurance (including mortgage guarantee insurance), and assessments[6]." To make this determination the creditor must consider, "the consumer's credit history, current income, expected income the consumer is reasonably assured of receiving, current obligations, debt-to-income ratio or the residual income the consumer will have after paying non-mortgage debt and mortgage-related obligations, employment status, and other financial resources other than the consumer's equity in the dwelling or real property that secures repayment of the loan[7]."

While this provision recognizes the value of examining the borrower's financial history, the history of the legal title to the collateral also needs to be examined.

The title insurance process provides information that the credit report does not and can identify other debt obligations that could affect the borrower's debt-to-income ratio. Not all debts are evidenced in a credit report. Rather some debts are secured by lien against the property that will only show up after title search and examination. Unless satisfied at closing, these secured debts will become the obligation of the borrower when they take title to the collateral. Prudent underwriting of a borrower's ability to repay would require that a creditor evaluate the title to the collateral to determine what outstanding debts will need to be satisfied before the creditor can obtain the first lien mortgage. We ask regulators to clarify this important step.

Title insurance is a best practice that should be encouraged through the QM.

As a safe harbor, the QM has the ability to encourage creditors to follow mortgage underwriting best practices. The statute instructs the Board to include many product features that will benefit the borrower. However, the statutory list is not exclusive, and the Board should consider other product features that help protect consumers from losing their home, whether through a default or a title loss.

Due diligence in the form of title insurance is so fundamental to the issuance of credit that it has become a "check off" underwriting item and universal practice among mortgage originators, especially those doing business with Fannie Mae, Freddie Mac the Federal Housing

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[6] 15 USC § 1639c(a)(1).
[7] 15 USC § 1639c(a)(3).

Administration and Veterans Administration. This underwriting is recognized as a vital aspect of safe mortgage origination that should be included in the QM.

In general, the land title industry offers two types of title insurance policies, both of which are typically issued at or after the closing of a real estate or mortgage financing transaction: an Owner's Policy and a Loan Policy. An Owner's Policy insures the borrower against financial loss or damage arising from defects in the title, including the assertion of liens and claims against the property that are not otherwise excepted from policy coverage. The policy includes protection against title defects that may be found in public records but were not discovered during a search of those records or their significance was not appreciated, and against those non-record defects that even the most comprehensive search of public records would not reveal. Without a title insurance policy, a borrower would self-insure the risk of losing title. Besides losing their home, borrowers would be financially responsible for: the loss of the purchase funds and any improvements; the costs of defending their rights including legal fees and court costs; and the costs of obtaining new housing.

A Loan Policy insures the holder of the promissory note that it will have a valid, enforceable lien on the property in accordance with the mortgage rights created by the loan; that the person to whom the loan is being made has title to the property used as collateral; and that no other claimant, other than those specifically noted in the policy has a prior, superior claim. The title insurer is obligated to pay for the costs of defending the title as insured against any covered claim. Without the policy, the holder of the note would self-insure the risk of losing access to the property if the borrower defaults. Further, the loan policy follows the note and transfers to each subsequent holder of the note throughout the securitization process.

Unlike other forms of insurance, the title policy is issued for a one-time fee, paid at the closing, and there are no renewal premiums. The protection of an owner's title insurance policy continues so long as the policyholder or his or her heirs own the insured property, and can protect the policyholder even after they sell the property if the buyer later asserts claims under a warranty deed with regard to matters covered by the policy. Under both policies, the title insurer is obligated to pay for the costs of defending the title as insured against any covered claim.

This vital process breeds confidence and offers protections in the mortgage transaction. Lenders typically require title insurance as a condition of providing financing for the transaction to assure itself that the buyer, in fact, will own the property and that the mortgage lender will obtain a valid and enforceable first lien mortgage that is not subject to any other lien or claim that could adversely affect their interest. This is a testament to the inherent value of title insurance for reducing risk in the transaction.

The title insurance process reduces the risk that a borrower will not be able to repay their mortgage.

A title search and examination backed by a title insurance policy is a crucial underwriting feature that ensures the borrower will have the ability to repay the mortgage by verifying their ownership of collateral and identifying any liens superior to the creditor's mortgage. By indemnifying the creditor/investor (in the case of a Loan policy) and the borrower (in the case of

an Owner's policy) against financial harm due to a failure of title as insured, the policy reduces the risk that the mortgage will go into default due to a failure of the title.

The land title industry works to mitigate risk before closing through a title search, examination, risk identification and risk elimination which is of unquestioned benefit to the purchaser, seller, creditor, title agent, title underwriter, the public record system and the public in general. Without this process, both the borrower and creditor will be at greater risk for having their title challenged and suffering a loss. If the borrower's right to their title is successfully challenged, they will lose their ability and willingness to repay their mortgage.

ALTA and its members appreciate the opportunity to comment on the Proposed Rule, and would welcome the opportunity to further work with the Board to address these important public policy concerns. Please feel free to contact Justin Ailes with any questions at 202-261-2937.

Sincerely,

Anne Anastasi
President