



Guidance from CFPB on Excluding Affiliate Fees from QM's 3% Cap under the Final ATR Rule December 2, 2013

This document contains questions and hypothetical examples derived from oral guidance provided by Consumer Financial Protection Bureau (CFPB) staff. Please keep in mind that the CFPB advises that only rules and written commentary from the CFPB are authoritative and the Bureau has not endorsed any specific hypothetical or answer as binding on the Agency.

NOTE: There has been confusion concerning the extent to which affiliate fees are included in the points and fees calculation, particularly when only a portion or even no portion of a fee is retained by an affiliate. **The following is MBA's understanding of the CFPB's definitive position on the treatment of affiliate fees in the points and fees calculation following discussions with Bureau staff after MBA's Regulatory Compliance Conference, the CFPB/MBA Webinar on October 17, 2013, and MBA's Annual Convention.** Finally, MBA understands CFPB also will consider addressing this issue in authoritative written commentary.

ABILITY TO REPAY – QUALIFIED MORTGAGE'S TREATMENT OF AFFILIATE FEES

The CFPB's Dodd-Frank Ability to Repay/Qualified Mortgage's (QM) and the Home Ownership and Equity Protection Act (HOEPA) rules contain a cap or limit on points and fees to qualify as a QM loan and a specific points and fees threshold triggering HOEPA coverage. The calculation of points and fees under both of these laws includes certain charges paid to affiliates of creditors.

- To qualify as a QM, a loan over \$100,000 is limited to points and fees up to 3% of the loan amount. The 3% limit is increased on a sliding scale for loans under \$100,000.
- HOEPA coverage is triggered if a loan of \$20,000 or more has points and fees that exceed 5% of the loan amount or for a loan below \$20,000, the lesser of 8 % of the total transaction amount or \$1,000 (with the dollar figures also adjusted annually for inflation).

MBA ILLUSTRATIVE QUESTIONS AND ANSWERS

Question 1 (Fees to Affiliates and Third Parties): What portion of a fee is counted toward the QM's 3% cap and HOEPA's 5% threshold when a fee is paid to an affiliate of a creditor for a closing cost where part or all of the fee is passed through to a non-

affiliated third party? Is the total fee paid to the affiliate counted or only that portion paid to and retained by the affiliate?

Example - A creditor is affiliated with an appraisal management company (AMC). A fee in the amount of \$500 is paid to the affiliate for appraisal management and the appraisal itself. The appraisal itself is conducted by a non-affiliated appraiser who is paid \$400 for the appraisal with the AMC retaining \$100 for management services. In this example, is the total \$500 included in points and fees or only the \$100 retained by the AMC?

Answer 1- Only the portion of the charge paid to and retained by the affiliate of the creditor is included in the points and fees calculation.¹ Here, the \$100 retained by the affiliate needs to be included in the points and fees. **The CFPB's interpretation of "paid to" in the rule only counts sums which are paid to and ultimately retained by an affiliate.**

Question 2 (Title Insurance Premiums and Commissions): If an affiliated title services company is paid a premium for title insurance, some of which it retains as commission and some of which it remits to a non-affiliated title insurer, what amount of "fee" is counted in the points and fees?

Example - A fee in the amount of \$1500 for title insurance is paid to a title service provider affiliated with a creditor. \$1,000 is retained by the affiliate provider as commission for the policy and \$500 is paid to a non-affiliated title insurer as its portion of the premium. In this example, is only \$1,000 counted as points and fees?

Answer 2 – Yes. As indicated, the CFPB's interpretation of "paid to" in the rule covers sums which are paid to and ultimately retained by an affiliate. In Example 2, only the \$1,000 portion of the fee paid to and retained by the affiliate is counted toward points and fees.

Question 3 (Amounts Paid to an Affiliate for Escrow): Where an affiliate title services company is paid amounts to establish an escrow or impound account for

¹ MBA notes that this concept is consistent with other CFPB rules. For example, in the new RESPA-TILA final rule, comment 19(e)(3)(i)-3 states: "Fees "paid to" a person. For purposes of § 1026.19(e), a fee is not considered "paid to" a person if the person does not retain the fee. For example, if a consumer pays the creditor transfer taxes and recording fees at the real estate closing and the creditor subsequently uses those funds to pay the county that imposed these charges, then the transfer taxes and recording fees are not "paid to" the creditor for purposes of § 1026.19(e). Similarly, if a consumer pays the creditor an appraisal fee in advance of the real estate closing and the creditor subsequently uses those funds to pay another party for an appraisal, then the appraisal fee is not "paid to" the creditor for the purposes of § 1026.19(e). A fee is also not considered "paid to" a person, for purposes of § 1026.19(e), if the person retains the fee as reimbursement for an amount it has already paid to another party. If a creditor pays for an appraisal in advance of the real estate closing and the consumer pays the creditor an appraisal fee at the real estate closing, then the fee is not "paid to" the creditor for the purposes of § 1026.19(e), even though the creditor retains the fee, because the payment is a reimbursement for an amount already paid."

taxes, hazard insurance and homeowners' association dues, are any of these amounts included in points and fees? Also, what happens if additional amounts are paid to cover pro rata payments of these items for the year?

Example – An affiliated title and escrow services provider or settlement agent is paid \$5,096 representing 6 months of taxes to Maryland, half a year's hazard insurance premium payable to an unaffiliated hazard insurer and 4 months of homeowner association dues to establish an escrow account for payment of these items. The consumer also pays the affiliated title services provider her pro rata share of the annual charge for taxes, hazard insurance and homeowners association dues paid by the seller of the home for the period of such purchaser's ownership. Are any of these amounts included in the points and fees?

Answer 3 – No. Escrowed or amounts otherwise paid for taxes, hazard insurance and homeowners' association dues are excluded from the points and fees calculation unless they are retained by an affiliate.

Question 4 (Affiliate Overhead Costs) - Are amounts for overhead paid by affiliated settlement service providers excluded from the points and fees calculation?

Example – An affiliated title company receives a total of \$2000 per closing and can prove that it pays salaries and other overhead amounting to \$1000 per closing. Can it exclude its overhead from the points and fees calculation?

Answer 4 – No. Amounts for overhead are regarded as amounts retained by the affiliate. The fee the affiliate receives is not broken down or analyzed beyond the amount retained as part of the transaction.