MORTGAGE BANKERS ASSOCIATION

May 1, 2017

Honorable Jeb Hensarling
Chairman
Committee on Financial Services
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Hensarling:

The Mortgage Bankers Association appreciates the opportunity to address H.R. 10, the Financial CHOICE Act, which will be considered by the Financial Services Committee this week. We are appreciative of your committee's persistent and strong focus on improving the manner in which the mortgage industry is regulated. MBA supports many of the goals embodied in H.R. 10 and our comments will focus primarily on capital requirements, commercial/multifamily real estate, key changes to the structure of the Consumer Financial Protection Bureau — a centerpiece of the Dodd-Frank Wall Street Reform and Consumer Protection Act — as well as regulatory relief measures previously considered by the Financial Services Committee and incorporated into this new legislation.

Capital Requirements

MBA generally agrees with the legislative intent of Title VI. Too often U.S. bank regulators have enacted regulations and constraints that were initiated by the Basel Committee (BASEL). The various countries represented on Basel have unique banking structures, economic structures, and regulatory needs. One size fits all simply does not work when designing bank regulatory regimes. MBA believes the bill should also require regulators to fix what is currently wrong with the regulatory regime. For example, the Basel-like liquidity coverage ratio and net stable funding ratio should be replaced with something simpler to implement and maintain. Furthermore, the current risk-based capital rules contain several flaws that should be corrected as outlined below.

The punitive treatment of mortgage servicing rights (MSRs) under the Basel III risk-based capital standards threatens to undermine the value of this important asset, with adverse implications for the entire mortgage finance chain. The new 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 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. Furthermore, 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.

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 mortgage and retaining the servicing, or from acquiring servicing assets.

As such, MBA strongly supports Section 5 of H.R. 2133, the Community Lending Enhancement and Regulatory Relief Act (CLEARR) Act of 2017, which would completely repeal the punitive treatment of MSRs under Basel.

Furthermore, under Basel III, warehouse lines of credit secured by mortgage loans are deemed to be commercial loans and are currently risk-weighted at 100 percent since the underlying collateral is no longer included in the definition of "financial collateral." MBA recommends that H.R. 10 require prudently underwritten mortgages held for sale to be included in the definition of financial collateral.

H.R. 10 would also require the Comptroller General of the United States to conduct a study to assess the benefits and feasibility of altering the current prompt corrective action (PCA) rules and replacing the Basel-based capital ratios with the nonperforming asset coverage ratio or NACR as the trigger for specific required supervisory interventions. Bank failures are not solely about asset quality, and MBA believes that such one-dimensional coverage will give regulators an incomplete set of dashboard instruments with respect to the riskiness of a given bank.

Consumer Financial Protection Bureau

The Financial CHOICE Act proposes to fundamentally restructure the Consumer Financial Protection Bureau (CFPB) and renames it the Consumer Law Enforcement Agency (CLEA). MBA continues to support the assignment of several consumer financial protection laws to a single agency such as the CFPB or the new CLEA. However, MBA also supports refinements of the Bureau's makeup and authorities to better address consumer needs and otherwise carry out its responsibilities. In this regard MBA specifically supports:

- Subjecting the new Agency to the congressional appropriations process, as proposed in Section 713.

- Establishing an Inspector General for the Agency, as proposed in Section 714.

- Allowing private parties to compel the Agency to seek sanctions by filing in court rather than through an administrative proceeding, as proposed in Section 715.

- Allowing private parties to appeal Civil Investigative Demands to the U.S. District Court for the district in which they reside, as proposed in Section 716.

- Establishing a mandate for the Agency to implement and (where applicable) enforce federal consumer financial law consistently for the purpose of strengthening participation in markets by persons without government interference or subsidies to increase competition and consumer choice, as outlined in Section 717.

- Requiring the Agency to establish an Office of Economic Analysis to: (1) review proposed rules and their impact on choice, price and access to credit and publish such reviews in the *Federal Register*; and (2) measuring existing rules and regulations issued by the Commission to determine their success in solving the problem the rules were intended to solve and publishing such reviews in the *Federal Register*. This is contained in Section 717.

- Requiring the Agency to consider the review and assessment of the Office of Economic Analysis on a rule. This is also contained in Section 717.

- Requiring verification of the accuracy of complaint data before posting complaints publicly on its database, as proposed in Section 725.

- Requiring the Agency to obtain permission before collecting non-public personally identifiable information on consumers, as proposed in Section 731.

MBA recommends the following improvements to provisions of the Financial CHOICE Act:

- MBA is disappointed the new version of the Financial CHOICE Act retains a single director governance structure at the CLEA. We believe the governance of the current CFPB would be vastly improved if Congress replaced its single director with a bipartisan 5-member commission. This is the governing structure for numerous independent regulatory agencies including the Federal Deposit Insurance Corporation, the Securities and Exchange Commission and the Consumer Product Safety Commission, to name a few. A commission structure assures judicious consideration of a range of viewpoints in carrying out regulatory functions with appropriate involvement of representatives of both parties and a range of interests including those of both consumers and industry. We would note the original version of the Dodd-Frank Act recommended a bipartisan commission, as did the original version of the Financial CHOICE Act.

- Requiring the Chairman to establish procedures that would require the Agency to: (1) propose and finalize a "rule on rules" establishing the circumstances under which it will provide rules, interpretative opinions, bulletins, FAQs and other guidance; (2) establish procedures that require it to seek and respond to questions following the issuance of major rules; and (3) provide notice of any changes to prior legal interpretations at least 60 days prior to taking enforcement action. These steps would work to address the failure of the CFPB to provide needed guidance on new rules or interpretations it changes.

- Section 718 removes the provision giving deference to the Bureau's, and now the Agency's, interpretation of any provision of federal consumer financial law. MBA believes that if the CLEA is to enforce consumer laws it must be required to first provide authoritative guidance on its interpretations, particularly those that are novel, well prior to enforcement. The current Bureau's use of regulation through enforcement has harmed industry and consumers and should be replaced by a process of providing clear rules and necessary authoritative guidance. If those views are provided prior to enforcement and exceed the CLEA's authority, affected parties should have clear judicial and other remedies. On the other hand, by curtailing the ability to provide authoritative rules, the CLEA, like its predecessor, is likely to continue to regulate through enforcement. The CLEA's interpretative authority should be preserved only if it is exercised where the Agency has a clear statutory basis for its position.

- Section 721 requires CLEA to establish procedures to provide advisory opinions on whether prospective activities conform to consumer financial law — for fees to be established by CLEA. MBA believes this could prove useful although it does not agree that fees should be charged for this function. Moreover, MBA believes requiring the CLEA to establish procedures for providing authoritative guidance and responses to questions on rules' applicability would prove even more useful. Such advice meets a greater need and should have wider applicability.

- Section 726 repeals the mandatory advisory boards and allows the CLEA to establish advisory boards. MBA strongly believes the provision should explicitly require the establishment of an Independent Mortgage Banker Advisory Board. Such lenders provide nearly 50 percent of mortgages and should have their unique views represented through an advisory board process.

MBA does not support the following provisions of the Financial CHOICE Act:

- Section 723 transitions the CLEA to a General Schedule compensation scale. MBA believes it is important that the agency charged with overseeing complex financial institutions and products be able to attract talented staff including examination staff with the education and experience necessary to perform their functions. Notably, the staff of other financial regulatory agencies are on a separate and greater pay plan than the General Schedule.

- Section 221 increases the maximum civil and criminal penalty amounts that can be assessed under FIRREA for violations involving financial institutions from $1 million to $1.5 million. The Department of Justice's use of FIRREA has increased substantially in recent years with a special focus on residential mortgages. FIRREA does not require the government to prove that a defendant is guilty of an offense beyond a reasonable doubt. Rather, it requires only that an offense is proven by a preponderance of evidence. Given the present severity of the fines, combined with the lower burden of proof, MBA cannot support an increase in the maximum penalty.

Regulatory Relief

MBA offers the following views on the inclusion of regulatory relief measures that have previously passed either the House of Representatives or the House Committee on Financial Services.

MBA strongly supports **H.R. 2121, the SAFE Transitional Licensing Act**, from the 114th Congress. This bipartisan legislation would provide "transitional authority" to originate mortgages for mortgage loan originators (MLOs) who move from a federally-insured institution to a non-bank lender while they work to meet the SAFE Act's licensing and testing requirements. The bill also provides for similar transitional authority when MLOs move from state to state.

MBA supports **H.R. 1153, the Mortgage Choice Act**. The legislation excludes from the definition of points and fees all title charges, regardless of whether they are charged by an affiliated company, provided they are bona fide and reasonable. By amending the definition of points and fees in this manner, the legislation will: promote the availability of safe and affordable mortgage credit; maintain a competitive marketplace; prevent higher prices or the withdrawal of affiliated title service providers in low- and moderate-income marketplaces; and preserve the ability of consumers to choose the benefits of one-stop shopping when they purchase or refinance their home.

H.R. 2226, the Portfolio Lending and Mortgage Access Act, would treat mortgage loans that are kept on a depository institution's balance sheet as having met the Qualified Mortgage requirements and grant them a legal safe harbor from Dodd-Frank's ability to repay requirements. MBA appreciates efforts to improve the QM definition, and recognizes that portfolio retention can moderate the risk of unsustainable lending. However, MBA believes that any fix to the statutory QM framework should done holistically, and not based on a lender's charter type, asset size or business model.

In line with this approach, MBA testified before the Financial Services Committee in April in support of the following holistic QM fixes and has provided the committee with specific legislative language to achieve these goals.

- Provide a legal "safe harbor" to all loans that meet the Qualified Mortgage definition. Currently, some QM only receive a rebuttal presumption of compliance, a lower legal standard that has led lenders from making loans to qualified borrowers.

- Increase the points and fees test on a sliding scale for loans under $200,000 to help more small balance loans qualify for QM status.

- Fix Appendix Q standards by allowing the Federal Housing Finance Agency to set standards for documentation and verification of income and assets. This approach is reflected in Section 16 of H.R. 2133, the CLEARR Act, which was introduced last week.

Finally, if the Committee makes changes related to QM status for loans held in portfolio, it should allow for mortgage bankers to originate whole loans for sale to a portfolio holder.

MBA supports **H.R. 1699, the Preserving Access to Manufactured Housing Act**. This legislation would allow more low-balance loans to fit within the cap on points and fees under the Home Ownership and Equity Protection Act by revising those triggers. This will allow more consumers, particularly on the lower end of the economic spectrum, to gain access to safe and affordable mortgage credit.

MBA also supports, if amended, **H.R. 1941, the Financial Institutions Examination Fairness and Reform Act**, from the 114th Congress. This legislation would address a number of important concerns about the manner in which lenders are examined — including improving the timeliness of examinations, ensuring examiners adhere to their agencies' standards, and creating a new, more independent examination appeals process. We have provided the committee with specific legislative language that would amend the definition of "financial institution" to ensure that non-depository lenders will be subject to the same standards and protections as depositories under this legislation. This modest step will provide a fairer examination environment for all institutions.

Commercial & Multifamily Real Estate

MBA offers the following comments with respect the Financial CHOICE Act as it relates to regulatory issues affecting the commercial and multifamily real estate sector.

Changes to HMDA Reporting

The Home Mortgage Disclosure Act (HMDA) is a consumer-focused law enacted by Congress in 1975. As implemented by Regulation C, HMDA requires mortgage lenders to collect and report information on specific data points pertaining to their lending practices.

Historically, the data collected under HMDA pertained primarily to single-family mortgage lending. However, on October 15, 2015, the CFPB issued a final rule amending Regulation C, expanding HMDA reporting requirements for multifamily mortgages (including business-to-business loans) and expanding the range of data points collected, among other changes. We believe that these changes will impose an unwarranted burden on lenders, particularly multifamily lenders.

MBA supports the thrust of changes to HMDA under sections 571 and 576 of the Financial CHOICE Act. For example, we support the bill's limitation on data points that can be required under HMDA to those that were collected at the time the Dodd-Frank Act was passed, effectively negating the 2015 expansion of disclosure at least pending the Comptroller General's study or re-identification and other risks. We think the language should be clarified so that reporting to CLEA except for the pre-Dodd Frank data is suspended pending the study. Similarly, we support the bill's increasing the thresholds for closed-end loans from 25 to 100 in each of the preceding two calendar years, and for open-ended loans from 100 to 200 in each of the preceding two calendar years; and the change in the definition that would apply the same thresholds to all mortgage lenders, including nonbanks. These changes would reduce the reporting burden for many affected multifamily and other lenders.

In addition to those beneficial changes, we continue to believe that HMDA, as a consumer lending disclosure requirement, should not apply to commercial real estate, including multifamily real estate. In its 2015 rulemaking, the CFPB declined to exclude commercial mortgage loans secured by multifamily properties as recommended by the MBA. Accordingly, MBA has shared with the Committee legislative language that would eliminate from HMDA reporting requirements business purpose loans, including multifamily loans. We urge you to include this language in the final bill.

High Volatility Commercial Real Estate Exposures (HVCRE)

Under current bank risk-based capital rules, certain commercial acquisition, construction, and development loans (ADC loans) are classified as HVCRE ADC Loans and so are subject to a higher, 150 percent risk weight. The final HVCRE rule issued by bank regulators suffers from a lack of clarity and from flaws in the criteria for determining when an ADC loan is or is not HVCRE. Those problems have had and are having adverse impacts on bank lending that are not justified by the credit risk associated with such loans. Consequently, MBA strongly supports the relief from this and other Basel III capital requirements that the Financial CHOICE Act would provide to strongly capitalized, well managed banking organizations.

We further note the recent introduction of H.R. 2148, a bipartisan bill sponsored by Representatives Robert Pittenger and David Scott, which would provide necessary clarification around the HVCRE rule and correct flaws in how it distinguishes between ADC loans that are or are not classified as HVCRE. MBA strongly supports the Pittenger-Scott bill.

Liquidity Coverage Ratio

In September 2014, the banking agencies released the Liquidity Coverage Ratio (LCR) final rule. The LCR is a supplementary rulemaking to Basel III that creates a new bank liquidity measure. The LCR is intended to ensure large banks hold sufficient stock of "high quality liquid assets" to survive a specified liquidity stress scenario. The final rule was responsive to MBA's comment letters by eliminating the highly detrimental treatment of Special Purpose Entities (SPEs), and it provided important clarifications regarding the unfunded portions of commercial real estate development loans and acquisition credit facilities. However, MBA opposed and continues to oppose the LCR treatment of CMBS and recommends that CMBS no longer on a bank's balance sheet be excluded from the LCR calculation. Consistent with that long-held position, MBA supports the Financial CHOICE Act's relief from this and other Basel III capital requirements under Title VI – Regulatory Relief for Strongly Capitalized Well Managed Banking Organizations. Moreover, we would support including in the bill language that would exclude CMBS from the LCR calculation for banks that will remain subject to the LCR rule.

Net Stable Funding Ratio

Net Stable Funding Ratio requirements would require banks to implement certain approaches to maintain a stable funding profile in relation to their on- and off-balance sheet activities. The Basel Committee finalized its Net Stable Funding Ratio proposal in December 2014, and in 2016 U.S. regulators issued for comment their Net Stable Funding proposed rule. In its comment letter, MBA expressed concern that Net Stable Funding Ratio represents another regulatory regime that could hinder capital formation. MBA continues to hold that position and supports the Financial CHOICE Act's relief from liquidity requirements for strongly capitalized well managed banking organizations. We would also support language that would direct federal banking agencies not to implement the Basel Net Stable Funding Ratio proposal in a final rule.

Step-in Risk

Step-in risk involves the risk that a bank may provide financial support to an entity beyond or in the absence of any contractual obligations, should the entity experience financial stress. In March 2017, the Basel Committee on Banking Supervision issued a second draft consultative paper outlining a global standard for managing step-in risk, which could require affected institutions to adjust levels of capital or liquidity. MBA opposes this proposal because step-in risk is addressed by existing accounting consolidation rules and because the proposal could create an additional, prescriptive layer of regulatory regime, which could include unwarranted capital or liquidity requirements. MBA therefore supports the Financial CHOICE Act's relief from both capital and liquidity requirements for strongly capitalized, well managed banking organizations. We would also support adding language that would direct federal banking agencies not to implement the Basel Step-in Risk proposal in a final rule.

Fundamental Review of the Trading Book

In January 2016, the Basel Committee issued its final Consultative Document on the Fundamental Review of the Trading Book (FRTB). The FRTB rules could negatively impact securitized products. If adopted by U.S. regulators, this approach would dramatically increase capital requirements for bank trading book activities for CMBS and other structured securities. In November 2015, MBA participated in a coalition letter that strongly recommended modifications to the FTRB proposal — in advance of the U.S. regulatory agency consideration — in order to avoid negative impacts on the U.S. market. MBA strongly opposes the Basel Committee's FRTB proposal and therefore supports the Financial CHOICE Act's relief from capital requirements for strongly capitalized, well managed banking organizations. We would also support the addition of language that would direct federal banking agencies not to implement the Basel Fundamental Review of the Trading Book in a final rule.

Removing Insurance Companies from Federal Regulation

Life insurance companies are important sources of capital for financing the commercial and multifamily real estate that is vital to the creation of jobs and economic growth. Under Section 113 of the Dodd-Frank Act, the Financial Stability Oversight Council (FSOC) is authorized to designate non-banks, including insurance companies, as Significantly Important Financial Institutions (SIFIs), which are then subject to consolidated supervision by the Federal Reserve and enhanced prudential standards. To date, the FSOC has used that authority to designate two insurance companies as SIFIs (the SIFI designation of another insurance company is being contested in federal court). In addition, in June 2016, the Federal Reserve proposed rules that would impose enhanced prudential standards on the insurance companies designates as SIFIs (SIICs) and also published an advance notice of proposed rulemaking regarding capital requirements for SIICs.

MBA is concerned that SIFI/SIIC designations and the proposed federal regulatory regime for SIICs could create unwarranted impediments to life companies' ability to continue to be a key source of capital to commercial/multifamily real estate markets. MBA commented on both proposals, noting that both proposed rules represent a significant advancement of federal regulatory authority into the insurance industry, and raising concerns that these regimes would potentially conflict with the state level regulation of the insurance industry, which has historically been the regulatory authority for insurance companies. MBA continues to hold those views.

Risk Retention for Commercial Real Estate

Federal financial regulators issued a final risk-retention rule that was responsive to many of MBA's concerns and provided for additional risk-retention flexibility. However, there are areas of the final rule where MBA continues to seek modification to make the rule more workable within the existing CMBS market framework. We appreciate the provision in H.R. 10 that addresses nonresidential risk retention and its recognition of CMBS is an important source of capital for commercial and multifamily real estate.

MBA has also recommended changes to current risk-retention requirements, including the following:

- **Exemption for Single Asset Single Borrower CMBS.** This category of CMBS should fall under the "qualified commercial real estate loan" classification and as such should be exempt from risk retention.

- **Senior/Subordinate Horizontal Risk Retention Holders.** While the final rule permits the horizontal residual interest to be held by up two purchasers provided that it is held on a pari passu basis, flexibility in providing capital to finance affected real estate would be enhanced by also permitting a senior/subordinate structure for purchasers of the horizontal residual interest.

- **Changes to Underwriting Standards for Zero Risk Retention.** MBA remains concerned that the underwriting metrics for zero risk retention for commercial and multifamily loans specified in the final rule remain unduly restrictive. We recommend enhanced flexibility of underwriting parameters for a "qualified commercial real estate loan" for multi-property CMBS.

These recommendations are consistent with H.R. 4260, which was introduced by Representative French Hill in the prior Congress. The changes in the Financial CHOICE Act would address many of the concerns underlying those recommendations.

Conclusion

MBA supports the introduction and consideration of the Financial CHOICE Act and looks forward to working closely with Chairman Hensarling, Ranking Member Waters, and all the members of the Financial Services Committee as this bill continues to advance through the legislative process.

Sincerely,

Bill Killmer
Senior Vice President, Legislative and Political Affairs

cc: All Members, House Committee on Financial Services