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CFPB Amends Ability-to-Repay/Qualified Mortgage Rule

*By Bob Jaworski**

The Consumer Financial Protection Bureau recently published two final rules revising its Ability-to-Repay/Qualified Mortgage Rule. One of the two final rules modifies the requirements for a loan to qualify as a general qualified mortgage as well as certain other provisions and eliminates the government-sponsored enterprise qualified mortgage category. The other final rule adds a new qualified mortgage category. The author of this article provides a brief recap of the existing rule, followed by pertinent details concerning the most significant changes effected by each of the two final rules.

The Consumer Financial Protection Bureau (“CFPB”) recently published two final rules revising its Ability-to-Repay/Qualified Mortgage Rule (“ATR/QM Rule”).¹ The principal purpose of these final rules is to avoid anticipated problems concerning mortgage credit availability following the scheduled expiration on July 1, 2021 of the so-called “GSE Patch,” a temporary category of qualified mortgages (“QMs”) created as part of the original ATR/QM Rule for loans that are eligible for purchase by Fannie Mae or Freddie Mac (government-sponsored enterprises or “GSEs”), while operating under the conservatorship or receivership of the Federal Housing Finance Agency (“GSE QMs”).²

The ATR/QM Rule generally requires lenders, before making a residential mortgage loan to a consumer, to make a reasonable good faith determination of the consumer’s ability to repay the loan according to its terms. However, evaluating consumers’ ability to repay is complicated and can result in significant liability for lenders if they get it wrong.³ Because of this, the

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¹ 12 CFR 1026.43.

² 12 CFR 1026.43(e)(4)(ii)(A)(1). This category also includes loans eligible for insurance or guarantees provided by the Federal Housing Administration, Veterans Administration, U.S. Department of Government Affairs or Rural Housing Service (Other Agencies), *see* 12 CFR 1026.43(e)(4)(ii)(B)–(E), but the final rules have no impact on these loans.

³ *See, e.g., Elliott v. First Federal Community Bank of Bucyrus*, 821 Fed. Appx. 406 (2020) (Bank held to have violated ATR/QM Rule by failing to verify the borrower’s spousal support income through review of the separation agreement or reliable third-party documents, despite

ATR/QM Rule also gives lenders certain protections from such liability when making any one of several categories of “qualified mortgages” defined in the ATR/QM Rule, including a general category of QMs (“General QMs”),⁴ the aforementioned GSE QM category and several other categories that are not affected by the final rules.

One of the two final rules (“Amended General QM Rule”)⁵ modifies the requirements for a loan to qualify as a General QM as well as certain other provisions in the ATR/QM Rule and eliminates the GSE QM category (set to expire for applications received on or after the mandatory compliance date of the Amended General QM Rule). The other final rule (“Seasoned QM Rule”)⁶ adds a new QM category (“Seasoned QMs”). Both final rules became effective on March 1, 2021. However, the Amended General QM Rule has a mandatory compliance date of July 1, 2021, which means that, for applications received on or after March 1, 2021, but before July 1, 2021, lenders may continue to make GSE QMs or choose instead to make General QMs under the new Amended General QM Rule.

This article provides a brief recap of the existing ATR/QM Rule, followed by pertinent details concerning the most significant changes effected by each of the two final rules.

EXISTING ATR/QM RULE

General Rule

The ATR/QM Rule generally provides that creditors may not make a “covered transaction” (essentially, a residential mortgage loan that does not qualify for any of the exemptions in the rule) unless they make a “reasonable and good faith determination at or before consummation that the consumer

argument that it reasonably relied on 1) spouse’s assurances that couple had agreed on spousal support and she would follow through with her commitment to enter the separation agreement (which she did two months after closing), and 2) documentation that spouse would be able to make spousal-support payments). Damages for violation of ATR/QM Rule is sum of all finance charges and fees paid by borrower plus, when awarded as a matter of recoupment or set-off in a foreclosure action, borrower’s reasonable attorney’s fees and court costs. 15 U.S.C. 1640(a)(4), (k)(2)(A). Class actions alleging ATR/QM Rule violations are also a possibility.

⁴ 12 CFR 1026.43(e)(2).

⁵ 85 Fed. Reg. 86308, <https://www.govinfo.gov/content/pkg/FR-2020-12-29/pdf/2020-27567.pdf>.

⁶ 85 Fed. Reg. 86402, <https://www.govinfo.gov/content/pkg/FR-2020-12-29/pdf/2020-27571.pdf>.

will have a reasonable ability to repay the loan according to its terms.”⁷ To be considered to have made such a determination, creditors must consider, and verify (in most cases using reasonably reliable third-party records) the consumer’s: current or reasonably expected income or assets (other than the value of the dwelling); employment status; monthly payment on (1) the covered transaction, (2) any simultaneous loan that the creditor knows or has reason to know will be made, and (3) for mortgage-related obligations; current debt obligations, alimony, and child support (“Debt Obligations”); monthly debt-to-income (“DTI”) ratio or residual income; and credit history.⁸

QM Protections

Because creditors may not be certain whether their ATR determinations are reasonable in a particular case, the ATR/QM Rule defines a category of loans—QMs—for which a creditor “may presume that the loan has met” the ATR requirements. For QMs that are not “higher-priced covered transactions,” this presumption provides the creditor with a safe harbor against potential liability for violating the rule.⁹ For QMs that are “higher-priced covered transactions” (“Higher-Priced QMs”), however, the presumption may be rebutted (basically by showing that, when the loan closed, the consumer’s monthly income less his or her monthly Debt Obligations, including the monthly payment on the loan, was insufficient to cover his or her living expenses).¹⁰

General QM Definition

A loan qualifies as a General QM as defined in the ATR/QM Rule if:

1. It does not have negative amortization, interest-only or balloon payment features, a term that exceeds 30 years, or total points and fees that generally exceed three percent of the loan amount (“General QM Product Requirements”);
2. The creditor underwrites the loan based on a fully amortizing schedule

⁷ 12 CFR 1026.43(c)(1).

⁸ 12 CFR 1026.43(c)(2), (3).

⁹ Liability for material violations of the ATR/QM Rule can be significant—the sum of all finance charges and fees paid by the consumer in connection with the loan—and may be brought in an affirmative action for damages commenced within three years following the date of the violation or in any action to collect the debt, or in connection with any judicial or non-judicial foreclosure instituted by the loan holder, as a matter of defense by recoupment or set-off, without regard to the three-year time limit on a private action for damages. 15 U.S.C. 1640(a)(4), (k).

¹⁰ 12 CFR 1026.43(e)(1).

using the maximum rate¹¹ permitted during the first five years;

3. The creditor considers and verifies the consumer's income and Debt Obligations in accordance with appendix Q ("Appendix Q Requirement"); and
4. The consumer's DTI ratio is no more than 43 percent, determined in accordance with Appendix Q ("DTI Limitation").¹²

GSE QM Definition

A loan qualifies as a GSE QM if, in addition to being eligible for purchase or guarantee by a GSE, it meets the requirements set forth above in the first two prongs of the General QM definition.¹³ In particular, this means that loans do *not* have to satisfy either the DTI Limitation or the Appendix Q Requirement to qualify as GSE QMs.

AMENDED GENERAL QM RULE

In addition to eliminating the GSE QM category of QMs, the Amended General QM Rule makes several changes to the ATR/QM Rule's provisions relating to General QMs, the two most important affecting the DTI Limitation and the Appendix Q Requirement. By far the most important change is that the new rule replaces the DTI Limitation with a new, price-based limitation ("APR Limitation"). The APR Limitation is that the loan's annual percentage rate ("APR") not exceed the average prime offer rate for a comparable transaction by 2.25 percentage points or more as of the date the interest rate is set (with higher thresholds provided for smaller loans and subordinate-lien loans).¹⁴ In connection with this change, the Amended General QM Rule also clarifies that, for purposes of determining whether a loan for which the interest rate may change within the first five years after the first payment due date satisfies the APR Limitation, the loan APR must be determined by treating the maximum

¹¹ "Maximum rate" refers to the maximum rate permitted by the terms of the Note. For adjustable-rate mortgages, creditors must assume that the interest rate will increase after consummation as rapidly as possible, taking into account the terms of the legal obligation, including any individual adjustment or life-of-loan rate caps that may be applicable. *See* Comment 43(e)(2)(iv)-3.

¹² 12 CFR 1026.43(e)(2), (3). Appendix Q contains standards for calculating and verifying debt and income for purposes of determining whether a mortgage satisfies the 43 percent DTI limit for General QMs.

¹³ 12 CFR 1026.43(e)(4)(i).

¹⁴ 12 CFR 1026.43(e)(2)(vi), as amended by the General QM Rule.

interest rate that may apply during that five-year period as the interest rate for the full term of the loan.¹⁵

The CFPB made this change because of its concern that, if it did not, the DTI Limitation “would reduce the size of the QM market and likely . . . lead to a significant reduction in access to responsible, affordable credit when the . . . GSE QM [category] expires.”¹⁶ In this regard, the CFPB noted in its rule proposal that it “expects that a significant number of . . . GSE QMs would not qualify as General QMs under the current rule after the . . . GSE QM loan definition expires, either because they have DTI ratios above 43 percent or because their method of documenting and verifying income or debt is incompatible with appendix Q.”¹⁷

It seems likely, therefore, that, after the Amended General QM Rule's effective date, many loans to consumers with DTI ratios above 43 percent will likely qualify for General QM protection from liability (although creditors will still be required to consider the consumer's monthly DTI ratio or monthly residual income and, if they consider the former, to compare it against an appropriate DTI threshold that they establish as part of their underwriting standards).¹⁸

Because of its above-stated concern that some GSE QMs would not qualify as General QMs under the current rule because “their method of documenting and verifying income or debt is incompatible with appendix Q,” the CFPB also makes a significant change to the Appendix Q Requirement. That requirement is essentially that the creditor must consider the consumer's income or assets, Debt Obligations, and monthly DTI ratio or residual income, and verify the same using “reasonably reliable” third-party records and in accordance with Appendix Q and the ATR/QM Rule's general ability-to-repay requirement relating to each of those separate items.¹⁹ Agreeing with industry concerns that Appendix Q's “rigidity, ambiguity, and static nature result in standards that are both confusing and outdated,”²⁰ the CFPB has eliminated all references in the ATR/Rule to Appendix Q. New and revised Comments, however, provide detailed guidance as to how creditors can fulfill these requirements in the

¹⁵ See new Comment 43(e)(2)(vi)-4.

¹⁶ 85 Fed. Reg. 86317.

¹⁷ 85 Fed. Reg. 86320.

¹⁸ See Comment 43(c)(7)-1, as amended by the General QM Rule.

¹⁹ These requirements are found, respectively, in 12 CFR 1026.43(c)(4), (5) and (7).

²⁰ 85 Fed. Reg. 86383–86384.

absence of Appendix Q, including giving them the ability to comply by meeting the requirements in any one or more of the applicable manuals of the GSEs or Other Agencies.²¹

SEASONED QM RULE

When the CFPB conducted its mandated five-year assessment of the ATR/QM Rule, among its findings were that 1) “a robust and sizable market to support non-QM lending has not emerged,” with “private-label securitizations . . . still a fraction of their pre-crisis levels,” and 2) “it is possible that this market might not exist even with a narrower . . . GSE QM loan definition, if consumers were unwilling to pay the premium charged to cover the potential litigation risk associated with non-QM loans (which do not have a presumption of compliance with the ATR requirements) or if creditors were unwilling or lack the funding to make the loans as a result of the potential litigation risk.”²² These findings, exacerbated by the COVID-19 emergency, led the CFPB to adopt the Seasoned QM Rule, with its stated goals being to “ensure access to responsible, affordable mortgage credit” and “encourage safe and responsible innovation in the mortgage origination market, including for certain loans that are not QMs or are [Higher-Priced] QMs under the existing QM categories.”²³

To achieve these goals, the Seasoned QM Rule provides a means by which non-QMs and Higher-Priced QMs, following their origination, can acquire safe harbor protection from liability under the ATR/QM Rule based on specified performance and portfolio requirements.

The Seasoned QM Rule defines a Seasoned QM as a loan:

- That is secured by a first lien, has a fixed interest rate and is not a “high cost mortgage” as defined in 12 CFR 1026.32(a);
- That satisfies the General QM Product Requirements (i.e., no negative amortization, interest-only or balloon payment features; a term \leq 30 years; and total points and fees generally \leq three percent of the loan amount);
- For which the creditor, during the underwriting process, considered and verified the consumer’s income or assets, Debt Obligations and monthly DTI ratio or residual income in accordance with the same

²¹ See revised Comments 43(e)(2)(v)-2, -3, new Comments 43(e)(2)(v)(A), (B)-1, -2, -3. See also, new Comment 43(c)(4)-4.

²² 85 Fed. Reg. 86313.

²³ 85 Fed. Reg. 86402.

standards established in the Amended General QM Rule for General QMs;

- That is held in portfolio by the original creditor or the first purchaser²⁴ for at least 36 months (not counting periods of temporary payment accommodation due to a disaster or pandemic-related national emergency) (“Seasoning Period”), during which time the borrower had no more than two 30-day delinquencies and no delinquencies of 60 days or more.²⁵

By virtue of this definition, certain loans that at time of origination were not QMs or were Higher-Priced QMs (entitled only to a rebuttable presumption of compliance with the ATR/QM Rule) may be able to qualify for the QM safe harbor at the end of the Seasoning Period, but only if the loan applications were received on or after April 1, 2021, the effective date of the Seasoned QM Rule.

In adopting the Seasoned QM Rule, the CFPB reasoned that “in general, the earlier a delinquency occurs, the more likely it is due to a lack of ability to repay at consummation than a change in circumstances after consummation that the creditor could not have reasonably anticipated from the consumer’s application or the records used to determine repayment ability.”²⁶ And it determined that 36 months was an appropriate Seasoning Period based, in large part, on similar periods after which the GSEs and mortgage insurers release creditors of performing loans from the threat of enforcement of their required underwriting-related representations and warranties.²⁷

CONCLUSION

The ATR/QM Rule was a reaction—many would say an overreaction—to the overly liberal underwriting policies of some lenders that helped to

²⁴ If the loan is sold by the originating lender to a purchaser, the loan may only become a Seasoned Mortgage if it is not securitized as part of the sale, assignment, or transfer or at any other time before the end of the Seasoning Period and it is not sold to another purchaser. Loan transfers from the originating lender (or first purchaser) that are required by supervisory action or pursuant to a merger or acquisition may also continue to qualify to become Seasoned QMs.

²⁵ A loan that is 30 days delinquent becomes 60 days delinquent if the borrower does not make the payment that is 30 days delinquent *and* the payment for the current month before the due date of the following month’s payment. For example, assuming the borrower’s payments are due the first of every month, if the borrower makes the Jan. 1 payment on Feb. 15 but does not make the Feb. 1 payment until March 10, the borrower is then considered 60 days delinquent under the rule. The rule thus prohibits “rolling delinquencies” of 30 days or more.

²⁶ 85 Fed. Reg. 86412.

²⁷ *Id.*

precipitate the 2007–2008 subprime mortgage crisis and the wider economic crisis that followed. It succeeded in protecting many consumers from taking out loans that they could not afford to repay and having to suffer the consequences. Unfortunately, because of lender and investor concerns over significant and potential life-of-loan liability for violation of the ATR/QM Rule, it prevented other consumers from obtaining loans that they could afford to repay or caused them to have to pay a “liability premium” for such loans.

At minimum, the new final rules appear to make much-needed adjustments to the ATR/QM Rule which should result in increased mortgage credit availability and/or lower costs for some deserving consumers, while continuing to protect others most in need of the rule’s protection. Mortgage lenders and secondary market investors should be pleased, as should the segment of consumers who have been hurt by the current rule. Nevertheless, the final rules will likely not be the last word on the subject. The Biden Administration may have something to say about it, particularly if the individual who will replace CFPB Director Kathy Kraninger following her resignation believes that the new final rules fail to strike the right balance between credit availability and consumer protection that is at the heart of the ATR/QM Rule.

Finally, the changes made by the new final rules which are discussed above are by no means the only changes made by these final rules to the ATR/QM Rule. Lenders and investors should therefore carefully review the new rules in their entirety.²⁸

²⁸ On March 3, 2021, the CFPB issued a proposal to extend the mandatory compliance date of the General QM final rule to October 1, 2022, <https://www.consumerfinance.gov/rules-policy/notice-opportunities-comment/open-notices/qualified-mortgage-definition-under-truth-lending-act-regulation-qm-loan-definition-delay-of-mandatory-compliance-date/>.