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September 29, 2020

Honorable Kathy Kraninger
Director
Consumer Financial Protection Bureau (CFPB)
1700 G Street, NW
Washington, DC 20552

Re: RIN 3170-AA98; Qualified Mortgage Definition under the Truth in Lending Act (Regulation Z): Seasoned QM Loan Definition

Director Kraninger:

Thank you for the opportunity to comment on the Consumer Financial Protection Bureau's (CFPB or Bureau) Notice of Proposed Rulemaking on the Seasoned Qualified Mortgage (QM) loan definition.[1] The Housing Policy Council[2] (HPC) supports the Bureau's efforts to allow qualifying seasoned loans to secure QM safe harbor status.

I. Overall Comments

In September of last year HPC responded[3] to the Bureau's Advance Notice of Proposed Rulemaking (ANPR) on the QM definition and provided input on whether and how seasoned loans should receive QM status.

Specifically, HPC recommended that any QM seasoning proposal be supplemental to a QM designation that is assigned at the time of loan consummation. Additionally, we proposed that the Bureau consider aligning the seasoning requirement with the existing GSE representation and warranty standard that requires a three-year pay history with no more than two 30-day delinquencies. We also suggested that the Bureau stipulate that the required on-time monthly payments come from the borrower's own funds.

The proposed rule effectively addresses issues that HPC raised last year, but we respectfully request that the Bureau consider additional regulatory flexibility regarding the portfolio and effective date eligibility requirements.

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[1] 85 Fed. Reg. 53568, August 28, 2020.

[2] The Housing Policy Council is a trade association comprised of the leading national mortgage lenders and servicers, mortgage and title insurers, and technology and data companies. HPC advocates for the mortgage and housing marketplace interests of its members in legislative, regulatory, and judicial forums. Our interest is in the safety and soundness of the housing finance system, the equitable and consistent regulatory treatment of all market participants, and the promotion of lending practices that create sustainable homeownership opportunities in support of vibrant communities and long-term wealth-building for families.

[3] See HPC Letter to CFPB on Qualified Mortgage ANPR, September 16, 2019.

In summary, HPC supports the Bureau's proposal with certain modifications, all designed to advance the Bureau's identified goal of creating a new category of QMs to encourage safe and responsible innovation in the mortgage origination market. Our comments, as detailed below, are as follows:

- *Product Restrictions*: We support the Bureau's inclusion of specified loan product restrictions, as well as the inclusion of consider and verify standards;
- *Portfolio Requirements*: We do not support the inclusion of the proposed rule's portfolio requirement, as it is an unnecessary constraint;
- *Performance Standards*: While we support the primary performance requirements in the proposal, we propose minor edits to the definition of a "qualifying change" to ensure that borrowers in a COVID-19 forbearance plan are treated reasonably; and
- *Effective Date*: We recommend that loans originated prior to the adoption of the new QM definition are eligible for a seasoning pathway.

II. Product Feature Restrictions in the Proposed Rule are Appropriate

HPC supports inclusion of the product feature restrictions that would apply to Seasoned QMs. Such requirements are aligned with the existing General QM standards, as well as the Small Creditor QMs. Similarly, we support the proposed consider and verify standards, for the same reasons.

Aligning the product features, including the underwriting requirements, of different types of QMs is appropriate and helps ensure there are no perverse incentives for using one type of QM standard over another.

III. Portfolio Requirement will Limit the Impact of the Proposed Rule

The proposed rule's portfolio requirement serves as a constraint on volume that may inhibit achievement of the Bureau's stated goal to offer this QM alternative as another means to expand access to credit. The Bureau stated that it believes a portfolio requirement is appropriate in the absence of a specific DTI or pricing limit to ensure that the creditor makes a reasonable determination that the loan is within the consumer's ability to repay. The Bureau asserts that portfolio lenders are attuned to loan performance because they bear the risk of loan defaults, and therefore, the portfolio requirement would align the creditor's interest with the statutory objective to ensure the quality of the loan underwriting and the borrower's capacity to repay.

This focus on where the loan is held disregards or minimizes the impact of the product feature restrictions of this proposal, which include the consider and verify standards. Given these core requirements for non-QM loans to be eligible for seasoned QM status, this proposed portfolio requirement is likely unnecessary to meet the Bureau's stated objective. Instead, the proposed portfolio requirement introduces unequal treatment based on where the loan is held after the loan is originated, something that consumers have both little awareness of, and no ability to influence. As an illustrative example, take two loans originated with identical characteristics, but one is sold after origination and the other is held in portfolio. In spite of the indistinguishable characteristics, a factor that is irrelevant to determining a consumer's ability to repay the loan (whether the loan is held in a portfolio or in a security) is the sole differentiator determining the presumption of compliance with ATR that QM status imparts on a mortgage. HPC believes that borrowers with the exact same loan characteristics and same loan performance should not be treated differently solely based on whether a loan is sold after origination.

In addition to the core regulatory safe product requirements, market forces are also designed to ensure a creditor originates loans based on a borrower's ability to repay. Standard market practices, such as representations and warranties between loan originators and investors, reinforce responsible lending decisions and practices. Additionally, loans delivered into private label securities are likely those that would be most subject to the innovative approaches that the Bureau suggests this proposal could encourage.

Further, we are concerned that the portfolio requirement favors retail portfolio lenders, creating an unfair advantage for one type of creditor and an unlevel playing field based on those who do or do not have the capability to hold the loans in portfolio. By limiting the opportunity for future QM designation to portfolio loans only, the proposal ignores the critical role that loan aggregation and securitization play in providing liquidity to the housing market. Loan aggregators provide an additional layer of risk management across the financial system, as aggregators perform quality checks on loans and due diligence to assess the operational and financial capacity of their counterparties. In other words, aggregation enhances the soundness of the system and ensures critical cash flow – necessary elements of mortgage lending.

This is particularly harmful because although these loans are underwritten in accordance with accepted industry standards and account for approximately one-third of all loan originations, these loans would be ineligible from qualifying to receive Seasoned QM status. Since correspondent aggregators have no ability to hold loans in portfolio, these loan aggregators will not be able to pass on the pricing advantages of this seasoned QM rule to borrowers. If portfolio lenders are granted this unique competitive advantage, there will be less liquidity for borrowers, and non-QM lending is likely to become dominated by portfolio lenders, lending to a system that is less diversified and where risk is concentrated in certain market segments.

For these reasons HPC requests that the Bureau reconsider the proposed rule's portfolio requirement, as it serves as an unnecessary constraint on the usefulness of the proposal.

IV. The Performance Requirements Are Appropriate with a Minor Adjustment

HPC supports the primary performance requirement of a three-year pay history with no more than two 30-day delinquencies. The Bureau's proposed performance requirements are generally consistent with the GSE standard, and HPC supports such consistency. Additionally, HPC supports the Bureau's premise that when borrowers successfully make 36 timely payments, it is reasonable to presume that those borrowers had the ability to make their loan payments and that loans that default after 36 months aren't fairly attributable to the lender's underwriting practices/standards.

However, HPC proposes a minor modification to the definition of a "qualifying change." As proposed, to meet that definition, the servicer must waive *all* existing late charges, penalties, stop payment fees, or similar charges promptly upon the consumer's acceptance of the agreement. As written, the requirement does not distinguish between fees and charges that could be assessed during the payment forbearance period and existing fees and penalties that some borrowers accrue prior to forbearance. Some borrowers entered a temporary payment accommodation in connection with a disaster or pandemic-related national emergency already delinquent with associated late fees and penalties. We believe the regulation is intended to focus on the dismissal of any payments, fees, and charges during the temporary payment accommodation rather than any pre-accommodation charges and fees. Therefore, we propose that the Bureau modify the requirement to state that the servicer waives only late charges, penalties, stop payment fees, or similar charges accrued during the temporary payment accommodation in connection with a disaster or pandemic-related national emergency. This proposal aligns with the comments HPC provided[4] to the Bureau regarding its Regulation X Interim Final Rule on treatment of COVID-19 related loss mitigation options.

V. Effective Date

The proposed rule limits the population of mortgages for which the seasoning opportunity will apply to those for which creditors receive an application on or after the effective date. This position is not based on any loan quality distinction; in fact, the Bureau acknowledges that there is no distinction to be drawn about a borrower's ability to repay "depending on whether the three-year successful payment history occurs before or after the effective date."[5] Instead, the Bureau bases the decision not to extend a seasoning opportunity for loans already in existence on "significant reliance interests."

HPC requests reconsideration of this determination and recommends that seasoning status should apply for loans for which applications were received prior to the adoption of the new QM definition. As a general matter, HPC agrees that rules should not apply to already-existing loans "retroactively." We affirm that there is and should be a presumption against statutory retroactivity "founded upon elementary considerations of fairness dictating that individuals should have an opportunity to know what the law is and to conform their conduct accordingly."[6]

Nevertheless, we do not believe that the general rule of statutory construction applies here. As proposed, the point in time at which a loan meets the criteria for a seasoned QM loan is 36 months following consummation (at the earliest) if all other aspects of the proposal are met.

[4] See HPC Letter to CFPB on Regulation X, July 23, 2020.
[5] 85 Fed. Reg. 53582, August 28, 2020.
[6] Landgraf v. USI Film Products, 511 U.S. 244 (1994)

As part of its rationalization for adopting this new definition, the Bureau believes that it will encourage creditors to offer ATR loans to consumers who may be creditworthy but unable to qualify for QM loans. We agree this behavior should be encouraged to expand consumer access to safe, well-underwritten mortgages. However, we do not agree that this desired outcome is induced solely in a prospective manner. In fact, may creditors have already produced non-QM loans that meet the new standards and did so without a promise of future QM or QM safe harbor status for their loans, and these loans should receive the benefits of QM status as well. A relevant example of this is high credit quality loans that were originated to self-employed borrowers but may have been originated as non-QM loans due to Appendix Q documentation challenges. An approach where a seasoned loan can achieve QM status, over time, will further the Bureau's goal of encouraging sustainable mortgage lending that prove to perform over time, thereby improving liquidity for this segment of the market, which in turn, will increase opportunities for private capital to participate in this segment of the mortgage market. Improving market liquidity by rewarding mortgages that have proven to perform and helping to diversify the sources of funds available to support the US housing market, will allow lenders to more efficiently expand credit to US families.

VI. Additional Rationale for Expansion of Seasoned QM to Existing Loans

Qualified Mortgage status[7] confers three core benefits. First, a lender that originates a QM loan has either conclusive (safe harbor) or rebuttable presumption protection from affirmative claims for damages brought within three years of consummation.[8] This attribute is not relevant for this rulemaking because the Seasoned QM the loan must be aged beyond the statute of limitations for bringing claims. Therefore, providing QM status to seasoned loans should not have any material impact on affirmative claims. Second, lenders that originate QM loans have either conclusive or rebuttable presumption protection from defensive claims for the life of the loan.[9] Third, under the credit risk retention rule, securitizers must retain no less than five percent of the credit risk when they create, sell, or transfer asset-backed securities to third parties, except for securities wholly comprised of Qualified Residential Mortgages (QRMs). The definition of QRM can be "no broader than" the definition of a QM.[10]

HPC understands that risk retention and QRM status is beyond the scope of the Bureau's authority and this proposal. Nevertheless, we believe that risk retention is integral to the CFPB's analysis because QM status defines the outer boundaries of the loans that can achieve QRM status. By determining what loans are eligible for QM status under the proposal, the CFPB is indirectly determining what loans are eligible for QRM status, meaning for which loans creditors

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[7] This discussion reflects the definition of a QM loan that exists under current law with the understanding that safe harbor and rebuttable presumption distinctions could be removed in future rulemakings.
[8] 15 U.S.C. 1640.
[9] 15 U.S.C. 1640.
[10] 15 U.S.C 78o-11. We acknowledge that the CFPB is not responsible for defining what constitutes a QRM. The Federal Reserve Board, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Securities and Exchange Commission, the Federal Housing Finance Agency, and the Department of Housing and Urban Development (collectively, the "QRM Agencies") define QRMs.

need not meet the risk retention requirements. To creditors and other industry participants that are called upon to satisfy the risk retention requirements, the relief from this mandate provided by virtue of the QM designation is significant and is a key consideration for HPC members in requesting the expansion of Seasoned QM status to pre-existing loans.

VII. Conclusion

HPC and its members support the Bureau's efforts to provide another path towards QM safe harbor status for loans that do not meet the General QM criteria at the time of origination but prove through performance that the borrower has the ability to repay. This rulemaking is a modest, but useful step. HPC believes that the incremental improvements in this proposal, accompanied by the other significant changes that the Bureau is considering with QM generally, can lead to an enhanced housing finance system that encourages greater innovation and increases access to responsible and affordable mortgage credit.

If you have any questions or would like to discuss these comments, please contact Matt Douglas, Vice President for Mortgage Policy, at 202-589-1924.

Yours truly,

Edward J. DeMarco

Edward J. DeMarco
President
Housing Policy Council