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BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1026

[Docket No. CFPB-2020-0028]

RIN 3170-AA98

Qualified Mortgage Definition under the Truth in Lending Act (Regulation Z): Seasoned QM Loan Definition

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Final rule; official interpretation.

SUMMARY: With certain exceptions, Regulation Z requires creditors to make a reasonable, good faith determination of a consumer's ability to repay any residential mortgage loan, and loans that meet Regulation Z's requirements for "qualified mortgages" (QMs) obtain certain protections from liability. Regulation Z contains several categories of QMs, including the General QM category and a temporary category (Temporary GSE QMs) of loans that are eligible for purchase or guarantee by government-sponsored enterprises (GSEs) while they are operating under the conservatorship or receivership of the Federal Housing Finance Agency (FHFA). The Bureau of Consumer Financial Protection (Bureau) is issuing this final rule to create a new category of QMs (Seasoned QMs) for first-lien, fixed-rate covered transactions that have met certain performance requirements, are held in portfolio by the originating creditor or first purchaser for a 36-month period, comply with general restrictions on product features and points and fees, and meet certain underwriting requirements. The Bureau's primary objective with this final rule is to ensure access to responsible, affordable mortgage credit by adding a Seasoned QM definition to the existing QM definitions.

DATES: This final rule is effective on [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Eliott C. Ponte or Ruth Van Veldhuizen, Counsels, or Joan Kayagil, Amanda Quester, or Jane Raso, Senior Counsels, Office of Regulations, at 202-435-7700. If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov*.

SUPPLEMENTARY INFORMATION:

I. Summary of the Final Rule

The Ability-to-Repay/Qualified Mortgage Rule (ATR/QM Rule) requires a creditor to make a reasonable, good faith determination of a consumer's ability to repay a residential mortgage loan according to its terms. Loans that meet the ATR/QM Rule's requirements for QMs obtain certain protections from liability. The Bureau issued a proposal in August 2020 to create a new category of QMs, Seasoned QMs. The Bureau is now finalizing the proposal largely as proposed.[1] The final rule defines Seasoned QMs as first-lien, fixed-rate covered transactions that have met certain performance requirements over a seasoning period of at least 36 months, are held in portfolio until the end of the seasoning period by the originating creditor or first purchaser, comply with general restrictions on product features and points and fees, and meet certain underwriting requirements.

The Bureau concludes that a Seasoned QM definition will complement existing QM definitions and help ensure access to responsible, affordable mortgage credit. One QM category

[1] As explained in more detail in part VI below, the final rule differs from the proposal in certain limited respects, including by adding a new exception to the portfolio requirement that allows loans to be transferred once during the seasoning period, excluding high-cost mortgages as defined in 12 CFR 1026.32(a), and applying the same consider and verify requirements that will apply to General QM loans.

defined in the ATR/QM Rule is the General QM category. General QMs must comply with the ATR/QM Rule's prohibitions on certain loan features, its points-and-fees limits, and its underwriting requirements. Under the definition for General QMs currently in effect, the ratio of the consumer's total monthly debt to total monthly income (DTI) must not exceed 43 percent. In a separate final rule released simultaneously with this final rule, the Bureau is amending the General QM loan definition to, among other things, replace the existing General QM loan definition that includes the 43 percent DTI limit with a price-based General QM loan definition (General QM Final Rule).

A second, temporary category of QMs defined in the ATR/QM Rule is the Temporary GSE QM category, which consists of mortgages that (1) comply with the same loan-feature prohibitions and points-and-fees limits as General QMs and (2) are eligible to be purchased or guaranteed by the GSEs while under the conservatorship of the FHFA. The Temporary GSE QM loan definition was previously set to expire with respect to each GSE when that GSE ceases to operate under conservatorship or on January 10, 2021, whichever comes first. In a final rule issued on October 20, 2020 and published in the *Federal Register* on October 26, 2020, the Bureau extended the Temporary GSE QM loan definition until the earlier of the mandatory compliance date of final amendments to the General QM loan definition or the date the GSEs cease to operate under conservatorship or receivership (Extension Final Rule).[2]

The Bureau is issuing this final rule to create a new category of QMs because it seeks to encourage safe and responsible innovation in the mortgage origination market, including for certain loans that are not QMs or are rebuttable presumption QMs under the existing QM

[2] 85 FR 67938 (Oct. 26, 2020).

categories. The Bureau presumes compliance with the ability-to-repay (ATR) requirements if such loans season in the manner set forth in this final rule. Under this final rule, a covered transaction receives a safe harbor from ATR liability at the end of a seasoning period of at least 36 months as a Seasoned QM if it satisfies certain product restrictions, points-and-fees limits, and underwriting requirements, and it meets performance and portfolio requirements during the seasoning period. Specifically, a covered transaction has to meet the following product restrictions to be eligible to become a Seasoned QM:

1. The loan is secured by a first lien;
2. The loan has a fixed rate, with regular, substantially equal periodic payments that are fully amortizing and no balloon payments;
3. The loan term does not exceed 30 years; and
4. The loan is not a high-cost mortgage as defined in § 1026.32(a).

In order to become a Seasoned QM, the loan's total points and fees also must not exceed specified limits.

For a loan to be eligible to become a Seasoned QM, this final rule requires that the creditor consider the consumer's DTI ratio or residual income, income or assets other than the value of the dwelling, and debts and verify the consumer's income or assets other than the value of the dwelling and the consumer's debts, using the same consider and verify requirements established for General QMs in the General QM Final Rule.

Under this final rule, a loan generally is eligible to season only if the creditor holds it in portfolio until the end of the seasoning period. There are several exceptions to this portfolio requirement that are similar to the exceptions to the Small Creditor QM portfolio requirement under the ATR/QM Rule. This final rule also includes an additional exception for a single transfer of a loan during the seasoning period. In the event of such a transfer, the final rule requires the purchaser to hold the loan in portfolio after the transfer until the end of the seasoning period.

In order to become a Seasoned QM, a loan must meet certain performance requirements at the end of the seasoning period. Specifically, seasoning is available only for covered transactions that have no more than two delinquencies of 30 or more days and no delinquencies of 60 or more days at the end of the seasoning period. Funds taken from escrow in connection with the covered transaction and funds paid on behalf of the consumer by the creditor, servicer, or assignee of the covered transaction (or any other person acting on their behalf) are not considered in assessing whether a periodic payment has been made or is delinquent for purposes of this final rule. Creditors can, however, generally accept deficient payments, within a payment tolerance of $50, on up to three occasions during the seasoning period without triggering a delinquency for purposes of this final rule.

This final rule generally defines the seasoning period as a period of 36 months beginning on the date on which the first periodic payment is due after consummation. Failure to make full contractual payments does not disqualify a loan from eligibility to become a Seasoned QM if the consumer is in a temporary payment accommodation extended in connection with a disaster or pandemic-related national emergency, as long as certain conditions are met. However, time spent in such a temporary accommodation does not count towards the 36-month seasoning period, and the seasoning period can only resume after the temporary accommodation if any delinquency is cured either pursuant to the loan's original terms or through a qualifying change as defined in this final rule. This final rule defines a qualifying change as an agreement entered into during or after a temporary payment accommodation extended in connection with a disaster or pandemic-related national emergency that ends any preexisting delinquency and meets certain other conditions to ensure the loan remains affordable (such as a restriction on increasing the amount of interest charged over the full term of the loan as a result of the agreement).

This final rule will take effect 60 days after publication in the *Federal Register*, which aligns with the effective date provided in the General QM Final Rule. For this final rule, the revised regulations apply to covered transactions for which creditors receive an application on or after the effective date.

II. Background

A. Dodd-Frank Act Amendments to the Truth in Lending Act

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act)[3] amended the Truth in Lending Act (TILA)[4] to establish, among other things, ATR requirements in connection with the origination of most residential mortgage loans.[5] The amendments were intended "to assure that consumers are offered and receive residential mortgage loans on terms that reasonably reflect their ability to repay the loans and that are understandable and not unfair, deceptive or abusive."[6] As amended, TILA prohibits a creditor from making a residential mortgage loan unless the creditor makes a reasonable and good faith determination based on verified and documented information that the consumer has a reasonable ability to repay the loan.[7]

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

[4] 15 U.S.C. 1601 *et seq.*

[5] Dodd-Frank Act sections 1411-12, 1414, 124 Stat. 2142-49; 15 U.S.C. 1639c.

[6] 15 U.S.C. 1639b(a)(2).

[7] 15 U.S.C. 1639c(a)(1). TILA section 103 defines "residential mortgage loan" to mean, with some exceptions including open-end credit plans, "any consumer credit transaction that is secured by a mortgage, deed of trust, or

TILA identifies the factors a creditor must consider in making a reasonable and good faith assessment of a consumer's ability to repay. These factors are the consumer's credit history, current and expected income, current obligations, DTI ratio or residual income after paying non-mortgage debt and mortgage-related obligations, employment status, and other financial resources other than equity in the dwelling or real property that secures the repayment of the loan.[8] A creditor, however, may not be certain whether its ATR determination is reasonable in a particular case.[9]

TILA addresses this potential uncertainty by defining a category of loans—called QMs—for which a creditor "may presume that the loan has met" the ATR requirements.[10] The statute generally defines a QM to mean any residential mortgage loan for which:

- The loan does not have negative amortization, interest-only payments, or balloon payments;
- The loan term does not exceed 30 years;
- The total points and fees generally do not exceed 3 percent of the loan amount;
- The income and assets relied upon for repayment are verified and documented;

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other equivalent consensual security interest on a dwelling or on residential real property that includes a dwelling." 15 U.S.C. 1602(dd)(5). TILA section 129C also exempts certain residential mortgage loans from the ATR requirements. *See, e.g.*, 15 U.S.C. 1639c(a)(8) (exempting reverse mortgages and temporary or bridge loans with a term of 12 months or less).

[8] 15 U.S.C. 1639c(a)(3).

[9] A creditor that violates this ATR requirement may be subject to government enforcement and private actions. Generally, the statute of limitations for a private action for damages for a violation of the ATR requirement is three years from the date of the occurrence of the violation. 15 U.S.C. 1640(e). TILA also provides that if a creditor, an assignee, other holder, or their agent initiates a foreclosure action, a consumer may assert a violation by the creditor of the ATR requirement as a matter of defense by recoupment or set off without regard for the time limit on a private action for damages. 15 U.S.C. 1640(k).

[10] 15 U.S.C. 1639c(b)(1).

- The underwriting uses a monthly payment based on the maximum rate during the first five years, uses a payment schedule that fully amortizes the loan over the loan term, and takes into account all mortgage-related obligations; and
- The loan complies with any guidelines or regulations established by the Bureau relating to the ratio of total monthly debt to monthly income or alternative measures of ability to pay regular expenses after payment of total monthly debt.[11]

B. The ATR/QM Rule

In January 2013, the Bureau issued a final rule amending Regulation Z to implement TILA's ATR requirements (January 2013 Final Rule).[12] The January 2013 Final Rule became effective on January 10, 2014, and the Bureau has amended it several times since January 2013.[13] This final rule refers to the January 2013 Final Rule and later amendments to it collectively as the ATR/QM Rule. The ATR/QM Rule implements the statutory ATR provisions discussed above and defines several categories of QMs.[14]

1. General QMs

One category of QMs defined by the ATR/QM Rule consists of General QMs. Under the definition for General QMs currently in effect, a loan is a General QM if:

- The loan does not have negative-amortization, interest-only, or balloon-payment features, a term that exceeds 30 years, or points and fees that exceed specified limits;[15]

[11] 15 U.S.C. 1639c(b)(2)(A).

[12] 78 FR 6408 (Jan. 30, 2013).

[13] *See* 78 FR 35429 (June 12, 2013); 78 FR 44686 (July 24, 2013); 78 FR 60382 (Oct. 1, 2013); 79 FR 65300 (Nov. 3, 2014); 80 FR 59944 (Oct. 2, 2015); 81 FR 16074 (Mar. 25, 2016); 85 FR 67938 (Oct. 26, 2020).

[14] 12 CFR 1026.43(c), (e).

[15] 12 CFR 1026.43(e)(2)(i) through (iii).

- The creditor underwrites the loan based on a fully amortizing schedule using the maximum rate permitted during the first five years;[16]
- The creditor considers and verifies the consumer's income and debt obligations in accordance with appendix Q;[17] and
- The consumer's DTI ratio is no more than 43 percent, determined in accordance with appendix Q.[18]

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. Appendix Q addresses how to determine a consumer's employment-related income (*e.g.*, income from wages, commissions, and retirement plans); non-employment-related income (*e.g.*, income from alimony and child support payments, investments, and property rentals); and liabilities, including recurring and contingent liabilities and projected obligations.[19]

On June 22, 2020, the Bureau proposed amendments to the General QM loan definition, which would, among other things, replace the General QM loan definition's 43 percent DTI limit with a price-based approach and remove appendix Q.[20] In addition to soliciting comment on the Bureau's proposed price-based approach, the Bureau requested comment on certain alternative approaches that would retain a DTI limit but would raise it above the current limit of 43 percent and provide a more flexible set of standards for verifying debt and income in place of

[16] 12 CFR 1026.43(e)(2)(iv).

[17] 12 CFR 1026.43(e)(2)(v).

[18] 12 CFR 1026.43(e)(2)(vi).

[19] 12 CFR 1026, appendix Q.

[20] 85 FR 41716 (July 10, 2020).

appendix Q. Simultaneously with issuing this final rule, the Bureau is issuing the General QM Final Rule, which is discussed in part II.D below.

2. *Temporary GSE QMs*

A second, temporary category of QMs defined by the ATR/QM Rule, Temporary GSE QMs, consists of mortgages that (1) comply with the ATR/QM Rule's prohibitions on certain loan features and its limitations on points and fees;[21] and (2) are eligible to be purchased or guaranteed by either GSE while under the conservatorship of the FHFA.[22] Regulation Z does not prescribe a DTI limit for Temporary GSE QMs. Thus, a loan can qualify as a Temporary GSE QM even if the DTI ratio exceeds 43 percent, as long as the DTI ratio meets the applicable GSE's DTI requirements and other underwriting criteria, and the loan satisfies the other Temporary GSE QM requirements. In addition, income, debt, and DTI ratios for such loans generally are verified and calculated using GSE standards, rather than appendix Q. The January 2013 Final Rule provided that the Temporary GSE QM loan definition—also known as the GSE Patch—would expire with respect to each GSE when that GSE ceases to operate under conservatorship or on January 10, 2021, whichever comes first.[23] On June 22, 2020, the Bureau proposed to extend the Temporary GSE QM category until the effective date of final amendments to the General QM loan definition or the date the GSEs cease to operate under

[21] 12 CFR 1026.43(e)(2)(i) through (iii).

[22] 12 CFR 1026.43(e)(4).

[23] 12 CFR 1026.43(e)(4)(iii)(B). The ATR/QM Rule created several additional categories of QMs. The first additional category consisted of mortgages eligible to be insured or guaranteed (as applicable) by the U.S. Department of Housing and Urban Development, the U.S. Department of Veterans Affairs, the U.S. Department of Agriculture, and the Rural Housing Service. 12 CFR 1026.43(e)(4)(ii)(B) through (E). This temporary category of QMs no longer exists because the relevant Federal agencies have since issued their own QM rules. *See, e.g.*, 24 CFR 203.19. Other categories of QMs provide more flexible standards for certain loans originated by certain small creditors. 12 CFR 1026.43(e)(5), (f); *cf.* 12 CFR 1026.43(e)(6) (applicable only to covered transactions for which the application was received before April 1, 2016).

conservatorship or receivership, whichever comes first.[24] In a final rule issued on October 20, 2020, the Bureau extended the Temporary GSE QM category until the earlier of the mandatory compliance date of final amendments to the General QM loan definition or the date the GSEs cease to operate under conservatorship or receivership.[25]

3. Small Creditor QMs

In a May 2013 final rule, the Bureau amended the ATR/QM Rule to add, among other things, a new QM category—the Small Creditor QM—for covered transactions that are originated by creditors that meet certain size criteria and that satisfy certain other requirements.[26] Those requirements include many that apply to General QMs, with some exceptions. Specifically, the threshold for determining whether Small Creditor QMs are higher-priced covered transactions, and thus qualify for the QM safe harbor or rebuttable presumption, is higher than the threshold for General QMs.[27] Small Creditor QMs also are not subject to the General QM loan definition's 43 percent DTI limit, and the creditor is not required to use appendix Q to calculate debt and income.[28] In addition, Small Creditor QMs must be held in portfolio for three years (a requirement that does not apply to General QMs).[29] The Bureau

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[24] 85 FR 41448 (July 10, 2020).

[25] 85 FR 67938 (Oct. 26, 2020).

[26] 78 FR 35430 (June 12, 2013).

[27] QMs are generally considered to be higher priced if they have an annual percentage rate (APR) that exceeds the applicable average prime offer rate (APOR) by at least 1.5 percentage points for first-lien loans and at least 3.5 percentage points for subordinate-lien loans. In contrast, Small Creditor QMs are only considered higher priced if the APR exceeds APOR by at least 3.5 percentage points for either a first- or subordinate-lien loan. 12 CFR 1026.43(b)(4). The same is true for another QM definition that permits certain creditors operating in rural or underserved areas to originate QMs with a balloon payment provided that the loans meet certain other criteria (Balloon Payment QM loans). QMs that are higher priced enjoy only a rebuttable presumption of compliance with the ATR requirements, whereas QMs that are not higher priced enjoy a safe harbor.

[28] 12 CFR 1026.43(e)(5)(i)(A).

[29] 12 CFR 1026.43(e)(5)(ii), (f)(2).

made several amendments to the Small Creditor QM provisions in 2015.[30] These included: amending the small creditor definition to increase the number of loans a small creditor can originate each year to 2,000; exempting from the 2,000-loan limit any loans held in the creditor's portfolio; and revising the small creditor definition's asset threshold to include the assets of any of the creditor's affiliates.[31]

The Bureau created the Small Creditor QM category based on its determination that the characteristics of a small creditor—its small size, community-based focus, and commitment to relationship lending—and the inherent incentives associated with portfolio lending together justify extending QM status to loans that do not meet all of the ordinary QM criteria.[32] With respect to the role of portfolio lending, the Bureau stated that the discipline imposed when small creditors make loans that they will hold in portfolio is important to protect consumers' interests and to prevent evasion of the ATR requirements.[33] The Bureau noted that by retaining mortgage loans in portfolio, creditors retain the risk of delinquency or default on those loans, and as such the presence of portfolio lending within the small creditor market is an important influence on such creditors' underwriting practices.[34]

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[30] 80 FR 59944 (Oct. 2, 2015).

[31] As with Small Creditor QMs, Balloon Payment QMs must be held in portfolio for three years. In addition, Balloon Payment QMs may not have negative-amortization or interest-only features and must comply with the points-and-fees limits that apply to other QM loans. Also, Balloon Payment QMs must carry a fixed interest rate, payments other than the balloon must fully amortize the loan over 30 years or less, and the loan term must be at least five years. The creditor must also determine the consumer's ability to make periodic payments other than the balloon and verify income and assets. 12 CFR 1026.43(f).

[32] 78 FR 35430, 35485 (June 12, 2013) ("The Bureau believes that § 1026.43(e)(5) will preserve consumers' access to credit and, because of the characteristics of small creditors and portfolio lending described above, the credit provided generally will be responsible and affordable.").

[33] *Id.* at 35486.

[34] *Id.* at 35437.

C. Economic Growth, Regulatory Relief, and Consumer Protection Act

The Economic Growth, Regulatory Relief, and Consumer Protection Act (EGRRCPA) was signed into law on May 24, 2018.[35] Section 101 of the EGRRCPA amended TILA to provide protection from liability for insured depository institutions and insured credit unions with assets below $10 billion with respect to certain ATR requirements regarding residential mortgage loans.[36] Specifically, the protection from liability is available if a loan: (1) is originated by and retained in portfolio by the institution, (2) complies with requirements regarding prepayment penalties and points and fees, and (3) does not have any negative amortization or interest-only features. Further, for the protection from liability to apply, the institution must consider and document the debt, income, and financial resources of the consumer. Section 101 of the EGRRCPA also provides that the protection from liability is not available in the event of legal transfer except for transfers: (1) to another person by reason of bankruptcy or failure of a covered institution; (2) to a covered institution that retains the loan in portfolio; (3) in the event of a merger or acquisition as long as the loan is still retained in portfolio by the person to whom the loan is sold, assigned, or transferred; or (4) to a wholly owned subsidiary of a covered institution, provided that, after the sale, assignment, or transfer, the loan is considered to be an asset of the covered institution for regulatory accounting purposes.

D. General QM Final Rule

Simultaneously with this final rule, the Bureau is issuing a final rule to amend the General QM loan definition because retaining the existing General QM loan definition with the

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[35] Public Law 115-174, 132 Stat. 1296 (2018).

[36] EGRRCPA section 101, 15 U.S.C. 1639c(b)(2)(F).

43 percent DTI limit after the Temporary GSE QM loan definition expires would significantly reduce the size of the QM market and could significantly reduce access to responsible, affordable credit.[37] Readers should refer to the General QM Final Rule for a full discussion of the amendments and the Bureau's rationale for them.

In the General QM Final Rule, the Bureau is establishing a price-based General QM loan definition to replace the DTI-based approach. Under the General QM Final Rule, a loan meets the General QM loan definition in § 1026.43(e)(2) only if the annual percentage rate (APR) exceeds the average prime offer rate (APOR) for a comparable transaction by less than 2.25 percentage points as of the date the interest rate is set. The General QM Final Rule provides higher thresholds for loans with smaller loan amounts, for certain manufactured housing loans, and for subordinate-lien transactions. It retains the existing product-feature and underwriting requirements and limits on points and fees. Although the General QM Final Rule removes the 43 percent DTI limit from the General QM loan definition, the General QM Final Rule requires that the creditor consider the consumer's monthly DTI ratio or residual income; current or reasonably expected income or assets other than the value of the dwelling (including any real property attached to the dwelling) that secures the loan; and debt obligations, alimony, and child support, and verify the consumer's current or reasonably expected income or assets other than the value of the dwelling (including any real property attached to the dwelling) that secures the loan and the consumer's current debt obligations, alimony, and child support. The General QM Final Rule removes appendix Q. To prevent uncertainty that may result from appendix Q's removal, the General QM Final Rule clarifies the consider and verify requirements. The General

[37] 85 FR 41716 (July 10, 2020).

QM Final Rule preserves the current threshold separating safe harbor from rebuttable presumption QMs, under which a loan is a safe harbor QM if its APR does not exceed APOR for a comparable transaction by 1.5 percentage points or more as of the date the interest rate is set (or by 3.5 percentage points or more for subordinate-lien transactions).

E. Presumption of Compliance for Existing Categories of QMs Under the ATR/QM Rule

In the January 2013 Final Rule, the Bureau considered whether QMs should receive a conclusive presumption (*i.e.*, a safe harbor) or a rebuttable presumption of compliance with the ATR requirements.[38] The statute does not specify whether the presumption of compliance means that the creditor receives a conclusive presumption or a rebuttable presumption of compliance with the ATR provisions. The Bureau noted that its analysis of the statutory construction and policy implications demonstrated that there are sound reasons for adopting either interpretation.[39] The Bureau concluded that the statutory language is ambiguous and does not mandate either interpretation and that the presumptions should be tailored to promote the policy goals of the statute.[40] The Bureau ultimately interpreted the statute to provide for a rebuttable presumption of compliance with the ATR requirements but used its adjustment authority to establish a conclusive presumption of compliance for loans that are not "higher priced."[41]

Under the ATR/QM Rule, a creditor that makes a QM is protected from liability presumptively or conclusively, depending on whether the loan is "higher priced." The ATR/QM

[38] 78 FR 6408, 6511 (Jan. 30, 2013).

[39] *Id.* at 6507.

[40] *Id.* at 6511.

[41] *Id.* at 6514.

Rule generally defines a "higher-priced" loan to mean a first-lien mortgage with an APR that exceeded APOR for a comparable transaction as of the date the interest rate was set by 1.5 or more percentage points; or a subordinate-lien mortgage with an APR that exceeded APOR for a comparable transaction as of the date the interest rate was set by 3.5 or more percentage points.[42] A creditor that makes a QM that is not "higher priced" is entitled to a conclusive presumption that it has complied with the ATR/QM Rule—*i.e.*, the creditor receives a safe harbor from liability.[43] A creditor that makes a loan that meets the standards for a QM but is "higher priced" is entitled to a rebuttable presumption that it has complied with the ATR/QM Rule.[44]

F. The Bureau's Assessment of the ATR/QM Rule

Section 1022(d) of the Dodd-Frank Act requires the Bureau to assess each of its significant rules and orders and to publish a report of each assessment within five years of the effective date of the rule or order.[45] In June 2017, the Bureau published a request for information in connection with its assessment of the ATR/QM Rule (Assessment RFI).[46] These comments are summarized in general terms in part III below.

In January 2019, the Bureau published its ATR/QM Rule Assessment Report (Assessment Report).[47] The Assessment Report included findings about the effects of the

[42] 12 CFR 1026.43(b)(4).

[43] 12 CFR 1026.43(e)(1)(i).

[44] 12 CFR 1026.43(e)(1)(ii).

[45] 12 U.S.C. 5512(d).

[46] 82 FR 25246 (June 1, 2017).

[47] Bureau of Consumer Fin. Prot., *Ability to Repay and Qualified Mortgage Assessment Report* (Jan. 2019), https://files.consumerfinance.gov/f/documents/cfpb_ability-to-repay-qualified-mortgage_assessment-report.pdf (Assessment Report).

ATR/QM Rule on the mortgage market generally, as well as specific findings about Temporary GSE QM originations.

The Assessment Report found that the ATR/QM Rule did not eliminate access to credit for consumers with DTI ratios above 43 percent who qualify for loans eligible for purchase or guarantee by either of the GSEs, that is, Temporary GSE QMs.[48] On the other hand, based on application-level data obtained from nine large creditors, the Assessment Report found that the ATR/QM Rule eliminated between 63 and 70 percent of home purchase loans with DTI ratios above 43 percent that were not Temporary GSE QMs.[49]

One main finding about Temporary GSE QMs was that such loans continued to represent "a large and persistent" share of originations in the conforming segment of the mortgage market, and a robust and sizable market to support non-QM lending has not emerged.[50] As discussed, the GSEs' share of the conventional, conforming purchase-mortgage market was 69 percent in 2013 before the ATR/QM Rule took effect, and the Assessment Report found a small increase in that share since the ATR/QM Rule's effective date, reaching 71 percent in 2017.[51]

The Assessment Report discussed several possible reasons for the continued prevalence of Temporary GSE QM originations, including the structure of the secondary market.[52] If creditors adhere to the GSEs' guidelines, they gain access to a robust, highly liquid secondary market.[53] In contrast, while private-label securitizations have grown somewhat in recent years,

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[48] *See, e.g.*, *id.* at 10, 194-96.

[49] *See, e.g.*, *id.* at 10-11, 117, 131-47.

[50] *Id.* at 188, 198.

[51] *Id.* at 191.

[52] *Id.* at 196.

[53] *Id.*

they are still a fraction of their pre-crisis levels.[54] There were less than $20 billion in new origination private-label securities (PLS) issuances in 2017, compared with $1 trillion in 2005,[55] and only 21 percent of new origination PLS issuances in 2017 were non-QM issuances.[56] To the extent that private-label securitizations have occurred since the ATR/QM Rule took effect in 2014, the majority of new origination PLS issuances have consisted of prime jumbo loans made to consumers with strong credit characteristics, and these securities include a small share of non-QM loans.[57] The Assessment Report noted that the Temporary GSE QM loan definition may be inhibiting the growth of the non-QM market.[58] However, the Assessment Report also noted that it is possible that this market might not exist even with a narrower Temporary 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.[59]

G. Effects of the COVID-19 Pandemic on Mortgage Markets

The COVID-19 pandemic has had a significant effect on the U.S. economy. In the early months of the pandemic, economic activity contracted, millions of workers became unemployed, and mortgage markets were affected. In recent months, the unemployment rate has declined, and there has been a significant rebound in mortgage origination activity, buoyed by historically low

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[54] *Id.*

[55] *Id.*

[56] *Id.* at 197.

[57] *Id.* at 196.

[58] *Id.* at 205.

[59] *Id.*

interest rates and by an increasingly large share of government and GSE-backed loans. However, origination activity outside the government and GSE-backed origination channels has declined, and mortgage-credit availability for many consumers—including those who would be dependent on the non-QM market for financing—remains tight relative to pre-pandemic levels. While nearly all major non-QM creditors ceased making loans in March and April 2020, the market has begun to recover and many non-QM creditors—which largely depend on the ability to sell loans in the secondary market to fund new loans—have begun to resume originations, albeit with tighter underwriting requirements.[60]

In March 2020, Congress passed and the President signed into law the Coronavirus Aid, Relief, and Economic Security Act (CARES Act).[61] The CARES Act provides additional protections for borrowers with federally backed mortgages, such as those whose mortgages are purchased or securitized by a GSE or insured or guaranteed by the Federal Housing Administration (FHA), U.S. Department of Veterans Affairs (VA), or U.S. Department of Agriculture (USDA). The CARES Act mandated a 60-day foreclosure moratorium for such mortgages, which has since been extended by the agencies until the end of 2020 or January 31, 2021 in the case of the GSEs.[62] The CARES Act also allows borrowers with federally backed

[60] Brandon Ivey, *Expanded Credit Lending Inches Up in Third Quarter*, Inside Mortg. Fin. (Nov. 25, 2020), https://www.insidemortgagefinance.com/articles/219861-expanded-credit-lending-ticks-up-in-3q-amid-slow-recovery (on file).

[61] Public Law 116-136, 134 Stat. 281 (2020) (includes loans backed by the U.S. Department of Housing and Urban Development, the U.S. Department of Agriculture, the U.S. Department of Veterans Affairs, Fannie Mae, and Freddie Mac).

[62] *See, e.g.*, Fed. Hous. Fin. Agency, *FHFA Extends Foreclosure and REO Eviction Moratoriums* (Dec. 2, 2020), https://www.fhfa.gov/Media/PublicAffairs/Pages/FHFA-Extends-Foreclosure-and-REO-Eviction-Moratoriums-12022020.aspx; Press Release, U.S. Dep't of Hous. & Urban Dev., *FHA Extends Foreclosure And Eviction Moratorium For Homeowners Through Year End* (Aug. 27, 2020), https://www.hud.gov/press/press_releases_media_advisories/HUD_No_20_134; Veterans Benefits Admin., *Extended Foreclosure Moratorium for Borrowers Affected by COVID-19* (Aug. 24, 2020),

mortgages to request up to 180 days of forbearance due to a COVID-19-related financial hardship, with an option to extend the forbearance period for an additional 180 days. While forbearance rates remain elevated at 5.54 percent for the week ending November 22, 2020, they have decreased since reaching their high of 8.55 percent on June 7, 2020.[63]

For further discussion of the effect of the COVID-19 pandemic on mortgage origination and servicing markets, see part II.D of the General QM Final Rule.

III. Summary of the Rulemaking Process

The Bureau has solicited and received substantial public and stakeholder input on issues related to the ATR/QM Rule generally and the substance of this final rule. In addition to the Bureau's discussions with and communications from industry stakeholders, consumer advocates, other Federal agencies,[64] and members of Congress, the Bureau issued requests for information (RFIs) in 2017 and 2018, and in July 2019, it issued an advance notice of proposed rulemaking regarding the ATR/QM Rule (ANPR).[65] The input from these RFIs and from the ANPR is briefly summarized in the General QM Final Rule and Extension Final Rule and below. The Bureau has also received substantial additional input through three ATR/QM rulemakings this year, as discussed below and in the General QM Final Rule and Extension Final Rule.

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https://www.benefits.va.gov/HOMELOANS/documents/circulars/26-20-30.pdf; Rural Dev., U.S. Dep't of Agric., *Extension of Foreclosure and Eviction Moratorium for Single Family Housing Direct Loans* (Aug. 28, 2020), https://content.govdelivery.com/accounts/USDARD/bulletins/29c3a9e.

[63] Press Release, Mortg. Bankers Ass'n, *Share of Mortgage Loans in Forbearance Increases to 5.54%* (Dec. 1, 2020), https://www.mba.org/2020-press-releases/december/share-of-mortgage-loans-in-forbearance-increases-to-554-percent.

[64] The Bureau has consulted with agencies including the FHFA, the Board of Governors of the Federal Reserve System, the Federal Housing Administration, the Federal Deposit Insurance Corporation (FDIC), the Office of the Comptroller of the Currency (OCC), the Federal Trade Commission, the National Credit Union Administration, and the U.S. Department of the Treasury.

[65] 84 FR 37155 (July 31, 2019).

A. The Requests for Information

In June 2017, the Bureau published the Assessment RFI to gather information for its assessment of the ATR/QM Rule.[66] In response to the Assessment RFI, the Bureau received approximately 480 comments from creditors, industry groups, consumer advocate groups, and individuals.[67] The comments addressed a variety of topics, including the General QM loan definition and the 43 percent DTI limit; perceived problems with, and potential changes and alternatives to, appendix Q; and how the Bureau should address the expiration of the Temporary GSE QM loan definition. The comments expressed a range of ideas for addressing the expiration of the Temporary GSE QM loan definition. Some commenters recommended making the definition permanent or extending it for various periods of time. Other comments stated that the Temporary GSE QM loan definition should be eliminated or permitted to expire.

Beginning in January 2018, the Bureau issued a general call for evidence seeking comment on its enforcement, supervision, rulemaking, market monitoring, and financial education activities.[68] As part of the call for evidence, the Bureau published RFIs relating to, among other things, the Bureau's rulemaking process,[69] the Bureau's adopted regulations and new rulemaking authorities,[70] and the Bureau's inherited regulations and inherited rulemaking authorities.[71] In response to the call for evidence, the Bureau received comments on the

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[66] 82 FR 25246 (June 1, 2017).

[67] *See* Assessment Report, *supra* note 47, appendix B (summarizing comments received in response to the Assessment RFI).

[68] *See* Bureau of Consumer Fin. Prot., *Call for Evidence*, https://www.consumerfinance.gov/policy-compliance/notice-opportunities-comment/archive-closed/call-for-evidence (last updated Apr. 17, 2018).

[69] 83 FR 10437 (Mar. 9, 2018).

[70] 83 FR 12286 (Mar. 21,2018).

[71] 83 FR 12881 (Mar. 26,2018).

ATR/QM Rule from stakeholders, including consumer advocate groups and industry groups. The comments addressed a variety of topics, including the General QM loan definition, appendix Q, and the Temporary GSE QM loan definition. The comments also raised concerns about, among other things, the risks of allowing the Temporary GSE QM loan definition to expire without any changes to the General QM loan definition or appendix Q. The concerns raised in these comments were similar to those raised in response to the Assessment RFI.

B. The Advance Notice of Proposed Rulemaking

As noted above, on July 25, 2019, the Bureau issued an ANPR.[72] The ANPR stated the Bureau's tentative plans to allow the Temporary GSE QM loan definition to expire in January 2021 or after a short extension, if necessary, to facilitate a smooth and orderly transition away from the Temporary GSE QM loan definition. The Bureau also stated that it was considering whether to propose revisions to the General QM loan definition in light of the potential expiration of the Temporary GSE QM loan definition and requested comments on several topics related to the General QM loan definition, including: whether and how the Bureau should revise the DTI limit in the General QM loan definition; whether the Bureau should supplement or replace the DTI limit with another method for directly measuring a consumer's personal finances; whether the Bureau should revise appendix Q or replace it with other standards for calculating and verifying a consumer's debt and income; and whether, instead of a DTI limit, the Bureau should adopt standards that do not directly measure a consumer's personal finances.[73] Of relevance to this final rule, the ANPR noted that some stakeholders had suggested that the Bureau amend the ATR/QM Rule so that a performing loan, whether or not it qualified as a QM

[72] 84 FR 37155 (July 31, 2019).

[73] *Id.* at 37160-62.

at consummation, would convert to, or season into, a QM if it performed for some period of time. The Bureau also requested comment on how much time industry would need to change its practices in response to any revisions the Bureau makes to the General QM loan definition.

The Bureau received 85 comments on the ANPR from businesses in the mortgage industry (including creditors and their trade associations), consumer advocate groups, elected officials, individuals, and research centers. The General QM Proposal contains an overview of these comments.[74] Of the 85 comments received, approximately 20 comments discussed whether the Bureau should permit a mortgage that was not a QM at consummation to season into a QM on the ground that a loan's performance over an extended period should be considered sufficient or conclusive evidence that the creditor adequately assessed a consumer's ability to repay at consummation. The discussion below provides a more detailed overview of comment letters that supported a seasoning approach to QM status and those that opposed such an approach.

1. Comments Supporting Seasoning

As discussed in the General QM Proposal, commenters from the mortgage industry and its trade associations, as well as several research centers, recommended that a mortgage that is originated as a non-QM or rebuttable presumption QM should be eligible to season into a QM safe harbor loan if a consumer makes timely payments for a predetermined length of time. According to these commenters, if a loan defaults after performing for some period of time, such as three or five years, it is reasonable to conclude that the default was not caused by the creditor's failure to reasonably determine the consumer had the ability to repay at the time of

[74] 85 FR 41716 (July 10, 2020).

consummation. Rather, these commenters maintained that defaults in those cases are more likely to be caused by unexpected life events or other factors, such as general economic trends, rather than a creditor's poor underwriting or failure to make an ATR determination at consummation.

A few commenters pointed to the GSEs' representation and warranty framework.[75] Under this framework, after a loan meets certain payment requirements, the creditor obtains relief from the enforcement of representations and warranties it must make to a GSE regarding its underwriting. These commenters indicated that a creditor's legal exposure to the ATR requirements should sunset in a similar way. In addition, several commenters noted that the 2019 U.S. Department of the Treasury Housing Reform Plan report also suggested consideration of a seasoning approach to QM safe harbor loan status.[76] A few commenters asserted that allowing mortgages to season into QMs is consistent with comment 43(c)(1)-1.ii.A.*1* in the current ATR/QM Rule.[77] A comment letter jointly submitted by two research centers suggested that a seasoning approach to portfolio-held mortgages build on the EGRRCPA's portfolio loan QM category.

Further, a number of commenters stated that a seasoning approach to QM status would benefit the mortgage market. Among other things, they stated that it could reduce compliance burden. Additionally, commenters in support of seasoning suggested that seasoning could improve investor confidence by addressing the issue of assignee liability and litigation risk with

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[75] The GSEs' representation and warranty framework is discussed in greater detail in part V below.

[76] U.S. Dep't of the Treasury, *Housing Reform Plan* at 38 (Sept. 2019), https://home.treasury.gov/system/files/136/Treasury-Housing-Finance-Reform-Plan.pdf?mod=article_inline.

[77] Comment 43(c)(1)-1.ii.A ("The following may be evidence that a creditor's ability-to-repay determination was reasonable and in good faith: *1*. The consumer demonstrated actual ability to repay the loan by making timely payments, without modification or accommodation, for a significant period of time after consummation or, for an adjustable-rate, interest-only, or negative-amortization mortgage, for a significant period of time after recast . . . .").

non-QM loans and rebuttable presumption QM loans. These commenters stated that this, in turn, could enhance capital liquidity in the market, which could expand access to credit. Several commenters suggested that a seasoning rule should apply to loans even if they were originated before the adoption of the rule.

Commenters supporting a seasoning approach offered differing views on the appropriate length of the seasoning period, varying from as brief as 12 months following consummation to as long as five years following consummation. Some opposed any restrictions on loan features, while others supported some restrictions, such as limiting the seasoning approach to mortgages that follow the statutory QM product prohibitions or to fixed-rate mortgage products. Several commenters supporting a seasoning approach also supported or did not oppose a requirement for creditors to hold loans in portfolio until the conclusion of the seasoning period. For example, some research center commenters noted that keeping loans in portfolio demonstrates creditors' acceptance of the default risk associated with the loan.

Some research center commenters suggested graduated or step approaches. Under one such approach, for example, a non-QM loan would first have to season into a rebuttable presumption QM loan and then either stay in that category or be allowed to season into a QM safe harbor loan if it meets certain conditions. Commenters supporting seasoning generally acknowledged that delinquencies during the seasoning period should disqualify a loan from seasoning into a QM, but most did not offer specific suggestions regarding what it means for a loan to be performing. A comment letter from a research center suggested the Bureau use the Mortgage Bankers Association's method for determining timely payments.

Several commenters supporting a seasoning approach also addressed the possibility of creditors engaging in gaming to minimize defaults during the seasoning period. Two commenters asserted that the Bureau could require consumers to use their own funds to make monthly payments but did not provide any suggestions on how to determine whether the funds used are the consumer's funds rather than the funds of another. A research center commenter suggested that a competitive guarantor market such as the one the U.S. Department of the Treasury envisions in the long term would serve as a check on gaming by creditors. The same commenter also argued that it would be hard for creditors to game a seasoning approach because they would not be able to easily time harmful mortgages to go delinquent only after a given period following consummation.

2. Comments Opposing Seasoning

Two coalitions of consumer advocate groups submitted separate comment letters opposing a seasoning approach to QM status. The General QM Proposal described some of their concerns, including the following: (1) a period of successful repayment is insufficient to presume conclusively that the creditor reasonably determined ability to repay at consummation; (2) creditors would engage in gaming to minimize defaults during the seasoning period; and (3) seasoning would inappropriately prevent consumers from raising lack of ability to repay as a defense to foreclosure. In addition, the consumer advocate groups asserted that, depending on the length of the seasoning period, seasoning could inappropriately prevent consumers from bringing affirmative claims against creditors for allegedly violating the ATR requirements. One coalition of consumer advocate groups stated that in providing a three-year statute of limitations for consumers to bring such claims, Congress had indicated that the seasoning period could not be less than three years for rebuttable presumption or non-QM loans. Another coalition of consumer advocate groups stated that the three-year statute of limitations may be extended if equitable tolling applies and, as such, consumers may pursue affirmative claims for alleged violations of the ATR requirements beyond the three-year period. Both coalitions of consumer advocate groups stated that non-QM loans and QM loans that only receive a rebuttable presumption of compliance with the ATR requirements at consummation should not be allowed to season into QM safe harbor loans because the right a consumer has to raise the lack of ability to repay as a defense to foreclosure is not subject to the three-year statute of limitations.

The consumer advocate groups also stated that certain types of mortgages should never be allowed to season into QMs, including adjustable-rate mortgages (ARMs) and mortgages with product features that disqualify them from being a QM loan currently (*e.g.*, interest-only and negative-amortization mortgages). With respect to adjustable-rate mortgages, consumer advocate groups expressed concern stating that just because a consumer can remain current during an initial teaser-rate period or during a low-interest rate environment does not mean that the consumer has the ability to repay the loan when the interest rate rises. One coalition of consumer advocate groups noted that consumers may not have the ability to repay interest-only or negative-amortization mortgages after the teaser rate payment period ends and stated that payment shock from higher future payments is inherent in the structure of these mortgage products.

In contrast to industry commenters who argued that allowing loans to season into QMs would promote access to credit and improve market liquidity, consumer advocate groups suggested that providing a QM seasoning definition would not benefit market liquidity and could hurt underserved communities. They asserted that a seasoning rule would prevent creditors from originating loans with certainty about who ultimately bears the credit and liquidity risk and what their litigation risk will eventually be. They further asserted that the uncertainty created by such risks has a greater, negative impact on independent mortgage bankers without large balance sheets that are an important source of credit for underserved communities. One coalition of consumer advocate groups also asserted that a heightened risk of put-backs with mortgages not originated as QMs would create significant liquidity and credit risks for creditors, particularly non-depository creditors important to fully serving the market.

Lastly, the consumer advocate groups challenged the Bureau's authority to amend the definition of QM to provide seasoning as a pathway to QM status, asserting that seasoning would facilitate, not prevent, circumvention or evasion of the statute's ATR requirements. They stated that consumers can resort to extraordinary measures to stay current on mortgage payments to stay in their homes, such as foregoing spending on necessities; drawing down retirement accounts; borrowing money from family and friends; going without food, medicine, or utilities; or taking on other types of debt (such as credit card debt). These commenters stated that, as a result, even mortgages that were not affordable at consummation can perform for a long period of time. The consumer advocate groups further cited examples to show that mortgages can default due to unforeseen events. One coalition of consumer advocate groups noted that the timing of default often reflects broader economic conditions, given the procyclical nature of the mortgage market.

C. Extension Proposal, General QM Proposal, and Ensuing Final Rules

On June 22, 2020, the Bureau released the Extension Proposal, which would have extended the Temporary GSE QM loan definition to expire on the effective date of final amendments to the General QM loan definition or the date the GSEs cease to operate under conservatorship, whichever comes first.[78] On the same date, the Bureau separately released the

[78] 85 FR 41448 (July 10, 2020).

General QM Proposal, which proposed amendments to the General QM loan definition.[79] In a final rule issued on October 20, 2020, the Bureau extended the Temporary GSE QM category until the earlier of the mandatory compliance date of final amendments to the General QM loan definition or the date the GSEs cease to operate under conservatorship.[80] In another final rule issued simultaneously with this final rule, the Bureau is amending the General QM loan definition. The General QM Final Rule is discussed in part II.D above.

D. Seasoned QM Proposal

On August 18, 2020, the Bureau issued a proposed rule to create a new category of QMs, Seasoned QMs, for first-lien, fixed-rate covered transactions that have met certain performance requirements over a 36-month seasoning period, are held in portfolio until the end of the seasoning period, comply with general restrictions on product features and points and fees, and meet certain underwriting requirements (Seasoned QM Proposal). The Seasoned QM Proposal was published in the *Federal Register* on August 28, 2020, with a 30-day comment period.[81] The comment period was later extended briefly and ended on October 1, 2020.[82]

Consumer advocate groups and an organization representing State regulators further asked the Bureau to provide an extension to the comment period of up to an additional 60 days. These commenters cited the complexity of the rule, the concurrent QM rulemakings, and the difficulties presented by the COVID-19 pandemic in support of their request. The Bureau concludes that the comment period (including the brief extension) provided interested

[79] 85 FR 41716 (July 10, 2020).

[80] 85 FR 67938 (Oct. 26, 2020).

[81] 85 FR 53568 (Aug. 28, 2020).

[82] 85 FR 60096 (Sept. 24, 2020).

stakeholders with sufficient opportunity to comment on the proposal. The Bureau has previously issued other rules of similar complexity pursuant to a 30-day comment period and concludes that the data and analysis supporting the proposal were relatively straightforward for commenters to understand and comment on.

In response to the Seasoned QM Proposal, the Bureau received around 40 comments from consumer advocate groups, industry participants, industry trade associations, other nonprofit organizations, a member of Congress, and others. As discussed in more detail below, the Bureau has considered these comments in adopting this final rule.[83]

IV. Legal Authority

The Bureau is issuing this final rule pursuant to its authority under TILA and the Dodd-Frank Act. Section 1061 of the Dodd-Frank Act transferred to the Bureau the "consumer financial protection functions" previously vested in certain other Federal agencies, including the Board of Governors of the Federal Reserve System (Board). The Dodd-Frank Act defines the term "consumer financial protection function" to include "all authority to prescribe rules or issue orders or guidelines pursuant to any Federal consumer financial law, including performing appropriate functions to promulgate and review such rules, orders, and guidelines."[84] Title X of the Dodd-Frank Act (including section 1061), along with TILA and certain subtitles and provisions of title XIV of the Dodd-Frank Act, are Federal consumer financial laws.[85]

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[83] The Bureau also received a number of comments in response to the General QM Proposal that relate to the Seasoned QM Proposal. The Bureau has considered those comments as well in adopting this final rule.

[84] 12 U.S.C. 5581(a)(1)(A).

[85] Dodd-Frank Act section 1002(14), 12 U.S.C. 5481(14) (defining "Federal consumer financial law" to include the "enumerated consumer laws" and the provisions of title X of the Dodd-Frank Act), Dodd-Frank Act section 1002(12)(O), 12 U.S.C. 5481(12)(O) (defining "enumerated consumer laws" to include TILA).

A. TILA

TILA section 105(a). Section 105(a) of TILA directs the Bureau to prescribe regulations to carry out the purposes of TILA and states that such regulations may contain such additional requirements, classifications, differentiations, or other provisions and may further provide for such adjustments and exceptions for all or any class of transactions that the Bureau judges are necessary or proper to effectuate the purposes of TILA, to prevent circumvention or evasion thereof, or to facilitate compliance therewith.[86] A purpose of TILA is "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit."[87] Additionally, a purpose of TILA sections 129B and 129C is to assure that consumers are offered and receive residential mortgage loans on terms that reasonably reflect their ability to repay the loans and that are understandable and not unfair, deceptive, or abusive.[88] As discussed in the section-by-section analysis below, the Bureau is issuing certain provisions of this final rule pursuant to its rulemaking, adjustment, and exception authority under TILA section 105(a).

TILA section 129C(b)(2)(A)(vi). TILA section 129C(b)(2)(A)(vi) provides the Bureau with authority to establish guidelines or regulations relating to ratios of total monthly debt to monthly income or alternative measures of ability to pay regular expenses after payment of total monthly debt, taking into account the income levels of the borrower and such other factors as the Bureau may determine relevant and consistent with the purposes described in TILA section

[86] 15 U.S.C. 1604(a).

[87] 15 U.S.C. 1601(a).

[88] 15 U.S.C. 1639b(a)(2).

129C(b)(3)(B)(i).[89] As discussed in the section-by-section analysis below, the Bureau is issuing certain provisions of this final rule pursuant to its authority under TILA section 129C(b)(2)(A)(vi).

TILA section 129C(b)(3)(A) and (B)(i). TILA section 129C(b)(3)(B)(i) authorizes the Bureau to prescribe regulations that revise, add to, or subtract from the criteria that define a QM upon a finding that such regulations are necessary or proper to ensure that responsible, affordable mortgage credit remains available to consumers in a manner consistent with the purposes of TILA section 129C; or are necessary and appropriate to effectuate the purposes of TILA sections 129B and 129C, to prevent circumvention or evasion thereof, or to facilitate compliance with such sections.[90] In addition, TILA section 129C(b)(3)(A) directs the Bureau to prescribe regulations to carry out the purposes of TILA section 129C(b).[91] As discussed in the section-by-section analysis below, the Bureau is issuing certain provisions of this final rule pursuant to its authority under TILA section 129C(b)(3)(B)(i).

B. Dodd-Frank Act

Dodd-Frank Act section 1022(b). Section 1022(b)(1) of the Dodd-Frank Act authorizes the Bureau to prescribe rules to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof.[92] TILA and title X of the Dodd-Frank Act are Federal consumer financial laws. Accordingly, in this final rule, the Bureau is exercising its authority under Dodd-Frank Act section 1022(b) to prescribe

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[89] 15 U.S.C. 1639c(b)(2)(A).

[90] 15 U.S.C. 1639c(b)(3)(B)(i).

[91] 15 U.S.C. 1639c(b)(3)(A).

[92] 12 U.S.C. 5512(b)(1).

rules that carry out the purposes and objectives of TILA and title X and prevent evasion of those laws.

V. Why the Bureau Is Issuing this Final Rule

The Bureau is issuing this final rule to create an alternative pathway to a QM safe harbor to encourage safe and responsible innovation in the mortgage origination market, including for loans that may be originated as non-QM loans but meet certain underwriting conditions, product restrictions, and performance requirements. The Bureau is establishing this alternative definition because it concludes that many loans made to creditworthy consumers that do not fall within the existing QM loan definitions at consummation may be able to demonstrate through sustained loan performance compliance with the ATR requirements.

A. Considerations Related to Access to Responsible, Affordable Credit Discussed in the Proposal

As described in the proposal, a primary objective of the Seasoned QM alternative pathway to a QM safe harbor is to ensure the availability of responsible and affordable credit. Incentivizing the origination of non-QM loans that otherwise may not be made (or may be made at a significantly higher price) due to perceived litigation or other risks, even if a creditor has confidence that it can originate the loan in compliance with the ATR requirements, furthers the objective of ensuring the availability of responsible and affordable credit. The Bureau is concerned that, as discussed in the Assessment Report, the perceived risks associated with non-QM status at consummation may inhibit creditors' willingness to make such loans and thus could limit access to responsible, affordable credit for certain creditworthy consumers.[93] As noted in the proposal, an analysis of rejected applications in the Assessment Report suggested that the

[93] *See* Assessment Report, *supra* note 47, at 11, 118, 150.

January 2013 Final Rule's impact on access to credit among particular categories of consumers did not correlate with traditional indicators of creditworthiness, such as credit score, income, and down payment amount. Moreover, the Assessment Report also found that there was significant variation in the extent to which creditors have tightened credit for non-GSE eligible high DTI loans following the publication of the January 2013 Final Rule. This variation and its persistence in the years following the ATR/QM Rule's issuance suggest that creditors have not developed a common approach to measuring and predicting risk of noncompliance with the ATR/QM Rule, as they have accomplished for other types of risks, such as prepayment and default.[94] For instance, cross-creditor differences in both the level and the change in approval rates of high DTI applications are much larger than, for example, differences in approval rates by FICO category.[95] The lack of uniformity is likely due in part to the difficulties associated with measuring and quantifying the litigation and compliance risk associated with originating non-QM loans. Thus, the Assessment Report concluded that some of the observed effect of the ATR/QM Rule on access to credit was likely driven by creditors' interest in avoiding litigation or other risks associated with non-QM status, rather than by rejections of consumers who were unlikely to repay the loan based on traditional indicators of creditworthiness.[96]

While the proposal acknowledged that the Assessment Report analyzed the impact of the January 2013 Final Rule and its 43 percent DTI limit on access to credit, the proposal noted that specific findings related to the uncertainty of compliance and litigation risk for non-QM loans—and the resulting impact on consumers' access to credit—remain relevant regardless of any

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[94] *Id.* at 118, 147, 150.

[95] *Id.* at 147.

[96] *Id.* at 118, 150.

amendments to the General QM loan definition.[97] Indeed, while the Bureau anticipated that its General QM Proposal to replace the current 43 percent DTI limit with a price-based approach would increase access to responsible and affordable mortgage credit among consumers with DTI ratios above 43 percent, the proposal expressed concern that compliance uncertainty and litigation risk would still persist for the remaining population of loans originated as non-QM loans at consummation. Furthermore, the proposal noted that the composition of the non-QM market has continued to grow and evolve since the period covered by the Assessment Report. In recent years, the share of non-QM securitizations comprised of loans with a DTI in excess of 43 percent has fallen, while loans based on alternative income documentation has grown to become the largest non-QM subsector, comprising approximately 50 percent of securitized pools in the first half of 2019.[98] As a result, the Bureau preliminarily concluded in the proposal that providing a QM safe harbor to non-QM loans that have demonstrated sustained and timely mortgage payment histories could have a meaningful impact on improving access to credit for creditworthy consumers whose loans fall outside the other QM definitions.

The Bureau proposed to adopt a Seasoned QM definition primarily to encourage creditors to originate more responsible, affordable loans that are not QMs at consummation, and to ensure that responsible, affordable credit is not lost because of legal uncertainty in non-QM status. The Bureau also stated that a Seasoned QM definition could provide incentives for making additional

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[97] *See* 85 FR 41716 (July 10, 2020).

[98] S&P Global Ratings, *Non-QM's Meteoric Rise is Leading the Private-Label RMBS Comeback* (Sept. 20, 2019), https://www.spglobal.com/ratings/en/research/articles/190920-non-qm-s-meteoric-rise-is-leading-the-private-label-rmbs-comeback-11159125. Alternative income documentation includes alternative sources of income verification (*e.g.*, bank statements), which vary from traditional income underwriting forms/documents such as W-2 forms, paystubs, and tax returns. The variation is due to the use of non-traditional sources of documentation, such as for self-employed consumers.

rebuttable presumption QM loans. As explained in the proposal, while the GSEs purchase rebuttable presumption QM loans, and nearly half of manufactured housing originations are rebuttable presumption QM loans, large banks tend to originate only safe harbor QM loans. A Seasoned QM definition may provide an additional incentive for large banks to originate rebuttable presumption QM loans that may not be eligible for sale to the GSEs and therefore may not otherwise have been made.

The proposal explained that based on feedback from external stakeholders, the Bureau expected that a Seasoned QM definition may encourage creditors to originate more responsible, affordable loans that are not QMs at consummation, and ensure that creditors do not decide not to make responsible, affordable loans because of legal uncertainty in non-QM status. Comments on the ANPR suggested that allowing performing loans to season into QM status would provide creditors with clarity and certainty by ensuring that creditors would not have to litigate their ATR compliance long after consummation when an extensive record of on-time payments demonstrates that compliance and when default is more likely due to a change in the consumer's circumstances. Not only would allowing performing loans to season into QM status clarify a creditor's litigation risk, but external feedback suggested this could help provide certainty for secondary market participants that might otherwise be unable or unwilling to accept the litigation risk associated with assignee liability for either rebuttable presumption QM or non-QM loans.

The proposal acknowledged that creditors may be uncertain about whether certain loans fall within the existing QM definitions. For example, the U.S. Department of Housing and Urban Development (HUD), the VA, and the USDA have each promulgated QM definitions pursuant to their authority under TILA section 129C(b)(3)(B)(ii), and they have largely set their QM criteria based on eligibility criteria they apply in their respective mortgage insurance or guarantee programs. The proposal noted that a creditor may be uncertain about whether a State court would interpret and apply those criteria to a particular loan in a consumer's TILA section 130(k)[99] foreclosure defense, if the loan's QM status were ever challenged, in the same way the agency would in administering its mortgage insurance or guarantee program. As discussed in the proposal, to the extent that there is ambiguity as to whether a given loan is eligible for a QM safe harbor through other QM definitions, a Seasoned QM definition will provide additional legal certainty by providing an alternative basis for a conclusive presumption of ATR compliance after the required seasoning period.

As discussed in the proposal, to the extent that additional legal certainty provided by a Seasoned QM definition makes creditors more comfortable extending these types of loans in the future, such an effect would not only promote continued access to responsible and affordable credit, but could result in increased access to such credit. While the rationale in the proposal was primarily focused on the non-agency and non-QM markets, the proposal noted that the agency (*i.e.*, GSE and government-insured) mortgage markets in the wake of the 2008 recession can serve as a useful illustration of the chilling effect legal risk and compliance uncertainty can have on origination markets. Access to responsible mortgage credit remained tight for years after the crisis, even in the agency mortgage market in which creditors typically do not bear the credit risk of default.[100] While there is no doubt that the size and scale of the 2008 crisis impacted

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[99] 15 U.S.C. 1640(k).

[100] Jim Parrot & Mark Zandi, *Opening the Credit Box*, Moody's Analytics & the Urban Inst. (Sept. 30, 2013), https://www.urban.org/sites/default/files/publication/24001/412910-Opening-the-Credit-Box.PDF. As an illustration of the tight underwriting requirements, in 2013, the average credit score in the agency market was over 750. This is 50 points higher than the average credit score across all loans at the time, and 50 points higher than the average score among those who purchased homes a decade prior, implying that mortgage origination markets may have over-corrected relative to the economic fundamentals at the time.

creditors' willingness to take on credit risk, creditors also imposed additional, more stringent borrowing requirements due to their concerns that they could be forced to repurchase loans as a result of subsequent assertions of non-compliance. This occurred even though creditors believed the loans complied with FHA requirements for mortgage insurance and GSE standards for sale into the secondary markets without the more stringent borrowing requirements. Following GSE and FHA reforms, the proposal noted that access to responsible mortgage credit for GSE and government-insured loans has begun to rebound, with some of the biggest banks considering a return to FHA lending.[101] Similarly, the Bureau noted in the proposal that creditors may originate loans they believe to be QMs at origination, but to the extent any lingering ambiguity remains, the added compliance certainty provided by the Seasoned QM definition could further incentivize creditors to originate these loans at scale.

In addition, the Bureau preliminarily concluded in the proposal that, along with a possible increase in non-QM originations, a Seasoned QM definition might also encourage meaningful innovation and lending to broader groups of creditworthy consumers, especially those with less traditional credit profiles. As described in the proposal, the Bureau anticipates that innovations in technology and diversification of the overall economy will lead to changes in the composition of the job market and labor force, and the Bureau intends for the ATR/QM Rule to remain sufficiently flexible to accommodate and encourage developments in mortgage underwriting to reflect these changes. New technology allows creditors to assess financial information that may not be readily apparent through a traditional credit report, such as a consumer's ability to consistently make on-time rent payments. The use of new tools could broaden homeownership

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[101] *JPMorgan mulls return to FHA-backed mortgages after era of fines*, Am. Banker (Feb. 5, 2020), https://www.americanbanker.com/articles/jpmorgan-mulls-return-to-fha-backed-mortgages-after-era-of-fines.

to consumers who may have lacked credit histories with major credit reporting bureaus and so may have been less likely to obtain mortgages at an affordable price or obtain a mortgage at all. Additionally, technology platforms have led to rapid growth in the "gig economy," through which workers earn income by providing services such as ride-sharing and home delivery and through the ability to earn income on assets such as a home. Some workers participate in the gig economy for their sole source of income, while others may do so to supplement their income from more traditional employment. Creditors' methods of assessing consumers' ability to repay mortgages evolve to accommodate these changes, but creditors may be left with some uncertainty as to whether these methods constitute, or can be part of, a reasonable determination of a consumer's ability to repay under the ATR/QM Rule. Accordingly, the Bureau preliminarily concluded in the proposal that allowing an alternative pathway to a QM safe harbor may encourage creditors to lend to consumers with less traditional credit profiles at an affordable price based on an individualized determination of a consumer's ability to repay.

The proposal acknowledged that the extent to which a Seasoned QM definition may increase access to credit would be a function of the size of the eligible loan population that could benefit: the more loans that would be eligible to become Seasoned QMs, the more loans might be made that would not otherwise be made. In determining the length of time that is the appropriate seasoning period, the Bureau considered the rate at which loans terminate, to assess the potential population of loans that would be eligible to benefit from a Seasoned QM definition and thus potentially affect access to credit. Based on the data and analysis presented in part VII of the proposal, the Bureau preliminarily concluded that the majority of eligible non-QM and rebuttable presumption mortgage loans would remain active and thus be eligible to benefit from the seasoning period, across the economic cycle.

B. Considerations Related to Ability to Repay Discussed in the Proposal

The Bureau proposed to introduce an alternative pathway to a QM safe harbor for a new category of Seasoned QMs because it preliminarily concluded that, when coupled with certain other factors, successful loan performance over a number of years appears to indicate with sufficient certainty creditor compliance with the ATR requirements at consummation.

The proposal first noted that the current ATR/QM Rule provides that loan performance can be a factor in evaluating a creditor's ATR determination. Specifically, it provides that evidence that a creditor's ATR determination was reasonable and in good faith may include the fact that the consumer demonstrated actual ability to repay the loan by making timely payments, without modification or accommodation, for a significant period of time after consummation.[102] It explains further that the longer a consumer successfully makes timely payments after consummation or recast,[103] the less likely it is that the creditor's determination of ability to repay was unreasonable or not in good faith. The current ATR/QM Rule also distinguishes between a failure to repay that can be evidence that a consumer lacked the ability to repay at loan consummation, versus a failure to repay due to a subsequent change in the consumer's circumstances that the creditor could not have reasonably anticipated at consummation. Specifically, it states that a change in the consumer's circumstances after consummation (for example, a significant reduction in income due to a job loss or a significant obligation arising from a major medical expense) that cannot be reasonably anticipated from the consumer's application or the records used to determine repayment ability is not relevant to determining a

[102] Comment 43(c)(1)-1.ii.A.*1*.

[103] Section 1026.43(b)(11) provides a definition of recast.

creditor's compliance with the ATR/QM Rule.[104] Thus, the existing regulatory framework supports the relevance of loan performance, particularly during the initial period following consummation, in evaluating a creditor's ATR determination at consummation.

Second, the proposal explained that an approach that takes loan performance into consideration in evaluating ATR compliance is consistent with the Bureau's prior analyses of repayment ability. Because the affordability of a given mortgage will vary from consumer to consumer based upon a range of factors, there is no single recognized metric, or set of metrics, that can directly measure whether the terms of mortgage loans are within consumers' ability to repay.[105] The Bureau's Assessment Report concluded that early borrower distress was an appropriate proxy for the lack of the consumer's ability to repay at consummation across a wide pool of loans. Likewise, in the General QM Proposal and General QM Final Rule, the Bureau focused on an analysis of delinquency rates in the first few years to evaluate whether a loan's price, as measured by the spread of APR over APOR (herein referred to as the loan's rate spread), may be an appropriate measure of whether a loan should be presumed to comply with the ATR provisions. The incorporation of loan performance requirements in a Seasoned QM definition in turn reflects the Bureau's view that across a wide pool of loans, early distress supports an inference that consumers lacked the ability to repay at consummation.

As discussed in the proposal, 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. However, there is neither an

[104] Comment 43(c)(1)-2.

[105] Assessment Report, *supra* note 47, at 83.

exact period of time after which all delinquencies can be attributed to a lack of ability to repay at consummation, nor an exact period after which no delinquencies can be attributed to a lack of ability to repay at consummation. The Bureau proposed a seasoning period of 36 months based on a range of policy considerations, rather than any singular measure of delinquency, as discussed in the section-by-section analysis of § 1026.43(e)(7)(iv)(C). The Bureau preliminarily decided in the proposal to grant a safe harbor to these loans because 36 months of loan performance, combined with the product restrictions and underwriting requirements as defined in the proposal, appeared to indicate with sufficient certainty creditor compliance with the ATR requirements at consummation. The Bureau acknowledged that some meaningful percentage of non-QM loans may end up delinquent in later years. But, given the increasing likelihood that intervening events meaningfully contributed to such delinquencies, the proposal noted the Bureau does not view delinquency at that point in the lifecycle of a loan product as undermining the presumption of creditor compliance with the ATR requirements at consummation.

The proposal also explained that the current practices of market participants with respect to remedies for deficiencies in underwriting practices also support the Bureau's adoption of a seasoning period to evaluate a creditor's ATR determination. Each GSE generally provides creditors relief from its enforcement with respect to representations and warranties a creditor must make to the GSE regarding its underwriting of a loan. The GSEs generally provide creditors that relief after the first 36 monthly payments if the consumer had no more than two 30-day delinquencies.[106] Similarly, the master policies of mortgage insurers generally provide that

[106] Fed. Hous. Fin. Agency, *Representation and Warranty Framework*, https://www.fhfa.gov/PolicyProgramsResearch/Policy/Pages/Representation-and-Warranty-Framework.aspx (last visited Nov. 30, 2020).

the mortgage insurer will not issue a rescission with respect to certain representations and warranties the originating lender made if the consumer had no more than two 30-day delinquencies in the 36 months following the consumer's first payment, among other requirements.[107] These practices, which extend to a significant portion of covered transactions, suggest that the GSEs and mortgage insurers have concluded, based on their experience, that after 36 months of loan performance, a default should not be attributed to underwriting, but rather a change in the consumer's circumstances that the creditor could not have reasonably anticipated from the consumer's application or the records.

Based on these considerations, the Bureau preliminarily concluded in the proposal that a consumer's timely payments for 36 months, in combination with compliance with the product restrictions and underwriting and portfolio requirements in the proposal, indicate that the consumer had the ability to repay the loan at consummation, such that granting of safe harbor QM status to the loan is warranted subject to certain limitations. As discussed in the proposal, the Bureau focused on loans that would be eligible to be Seasoned QMs and that have an interest rate spread in excess of 150 basis points, and therefore would be outside the safe harbor threshold in the General QM Proposal and General QM Final Rule. These non-QMs and rebuttable presumption QMs are the population whose ATR compliance presumption status would be affected by becoming Seasoned QMs. The proposal noted that two-thirds (66 percent) of loans that experience a disqualifying event (*i.e.*, an event that would prevent a loan from becoming a Seasoned QM under the proposed criteria described in the section-by-section

[107] Fannie Mae, *Amended and Restated GSE Rescission Relief Principles for Implementation of Master Policy Requirement #28 (Rescission Relief/Incontestability)* (Sept. 10, 2018), https://singlefamily.fanniemae.com/media/16331/display.

analysis of § 1026.43(e)(7)) do so within 36 months, and the rate at which loans disqualify diminishes beyond 36 months. The proposal explained that this may suggest that a failure to repay that occurs more than three years after consummation can generally be attributed to causes other than the consumer's ability to repay at loan consummation, such as a subsequent job loss or other change in the consumer's circumstances that could not reasonably be anticipated from the records used to determine repayment ability. Furthermore, while the proposal acknowledged that it is possible that a consumer could continue making on-time payments for some period of time despite lacking the ability to repay, such as by forgoing payments on other obligations, the Bureau noted that it believes it is unlikely that a consumer could continue doing so for more than three years following consummation, especially in the absence of circumstances that would be disqualifying under the proposal (such as a 60-day delinquency), as explained below in part VI.

Notwithstanding this evidence and these considerations, the proposal acknowledged that a consumer might lack an ability to repay at loan consummation and yet still make timely payments for three years. For example, a consumer could at consummation lack the ability to make a fully amortizing mortgage payment but manage to make interest-only payments in the first three years. The proposal noted that the prospect that at consummation a consumer may lack the ability to repay a loan yet still make timely payments for three years, as well as the potential benefits that a Seasoned QM definition might offer in terms of fostering access to responsible, affordable mortgage credit, would tend to vary depending on the loan characteristics. To address this, the proposal limited the Seasoned QM definition to first-lien, fixed-rate covered transactions that are held in the originating creditor's portfolio (with specified exceptions), satisfy the existing product-feature requirements and limits on points and fees under the General QM loan definition, and meet the underwriting requirements applicable to Small Creditor QMs.

C. Comments in Support of a Seasoned QM Definition

Numerous industry commenters supported the Bureau's proposal to create a pathway to a QM safe harbor for loans that demonstrate a satisfactory performance history, subject to certain product feature restrictions and underwriting requirements. Commenters who supported the Seasoned QM definition generally supported the Bureau's rationale for the proposal, which is described in parts V.A and V.B above. With respect to encouraging responsible innovation and expansion in the non-QM market, commenters supporting the proposal generally agreed that a Seasoned QM definition would provide an important incentive for industry to originate loans that are considered non-QMs at origination, while appropriately balancing access to credit with meaningful consumer protections. With respect to ability to repay, these commenters also generally agreed that a borrower's demonstrated ability to make three years of mortgage payments indicates that the creditor made a reasonable, good faith determination of the borrower's ability to repay at consummation and should therefore warrant a conclusive presumption of compliance.

Individual financial institutions as well as industry trade associations argued that a Seasoned QM definition would increase access to credit without undermining protections for consumers. Some of these commenters stated that a Seasoned QM definition would reduce non-QM litigation exposure and reward responsible underwriting. While industry commenters offered varying assessments of the extent to which this reduction in compliance uncertainty and litigation exposure would increase access to credit, many industry commenters indicated that the proposal would encourage origination of more loans that may be considered non-QM or rebuttable presumption QM at origination without weakening the rule's ability to protect consumers from unaffordable mortgage loans.

Several industry commenters agreed that the proposal would provide a meaningful incentive for creditors to use innovative underwriting techniques to increase access to credit and reduce the costs of credit for the substantial share of the broader population who may lack traditional credit profiles or income sources and therefore struggle to qualify for mortgage credit through GSE and government mortgage programs. These commenters also noted that because these borrowers are more likely to fall outside the GSE and government underwriting guidelines, their loans are also more likely to be higher priced and therefore fall outside of the Bureau's price-based thresholds for determining General QM status. An industry trade association noted that market data show creditors have a lower willingness to originate non-QM and rebuttable presumption QM loans. Examples provided by commenters of these credit-worthy borrowers who have limited credit history include younger consumers without a long credit history, elderly borrowers who have paid down their debts and pay their expenses with cash, and other consumers who may have used more informal means of borrowing in the past. Examples provided of borrowers with non-traditional income include those with income sources that are not reported on W-2 forms who have difficulty qualifying under standard underwriting guidelines due to variable amount and timing of their income, such as "gig economy" workers, seasonal employees, and self-employed borrowers.

Three industry commenters supported the proposal but suggested that its impact on access to credit may be marginal. One of these commenters described the proposal as a "modest, but useful step" that would bring incremental improvement. Generally, these commenters expressed concern that the risk of litigation would remain because the Seasoned QM definition would not confer safe harbor status at consummation. These commenters indicated that some creditors would be less willing to originate additional loans even if the proposal were finalized, and even if the borrower has the requisite ability to repay based on prudent underwriting practices, given that these loans would lack a QM safe harbor at consummation.

Several commenters stated that access to credit would increase because the proposal would increase marketability to the secondary market of loans that are originated as non-QM or rebuttable presumption QM loans but season into a QM safe harbor, thereby increasing the ability of creditors to access secondary market liquidity to originate new loans. These commenters noted that the secondary market for non-QM loans is less liquid due to litigation and compliance risks as well as the costs of additional due diligence that many secondary market investors require prior to purchase. According to these commenters, eliminating assignee liability and litigation risks related to the ATR/QM Rule for Seasoned QMs that are sold in the secondary market would improve the marketability of these loans and reduce the transaction costs associated with buying and selling Seasoned QMs. These commenters stated that this would have the effect of increasing the number of market participants, in both the primary and secondary markets.

Commenters in support of the proposal also agreed with the Bureau's rationale for proposing a conclusive presumption of compliance with the ATR/QM Rule after three years of demonstrated loan performance. These commenters stated that if a borrower makes timely payments for an extended period of time, any subsequent default cannot reasonably be attributed to a creditor's underwriting or ATR determination at consummation. Some commenters noted that because the legal standard for the ATR/QM Rule requires a creditor to make its ATR determination at consummation, subsequent defaults due to economic disruptions or a change in life circumstances that cannot be attributed to an underwriting or ATR deficiency at the time of consummation.

While these commenters agreed that performance over time is sufficient evidence of a creditor's ATR determination at consummation, they had varying opinions on the necessity of some of the additional consumer protections in the proposal, as discussed in greater detail in part VI below. While industry commenters generally supported maintaining the statutory product restrictions (such as the exclusion for loans with interest-only or negative amortization features, balloon payments, or terms that exceed 30 years), they expressed a range of views on whether ARMs and subordinate-lien loans should be eligible to season into QM status. They also expressed varying opinions on whether the proposed portfolio requirement is a necessary consumer protection or overly restrictive.

D. Comments in Opposition to a Seasoned QM Definition

A number of consumer advocates and other non-profit organizations as well as an academic commenter opposed the Bureau's proposed Seasoned QM definition. These commenters generally expressed concerns over the evidentiary support for the proposed Seasoned QM definition, the Bureau's legal authority, the concept that demonstrated loan performance over an extended period of time can warrant a conclusive presumption of compliance with the ATR/QM Rule, and the impact on minority borrowers. Most of these commenters stated that if the Bureau were to finalize a Seasoned QM definition, the Bureau should retain the underwriting requirements, product restrictions, portfolio requirement, and other consumer protections included in the proposal. A joint comment from a number of non-profit organizations suggested that if the Bureau were to finalize a Seasoned QM definition, the final rule should incorporate a two-tiered approach, such that non-QM loans at consummation could only season into rebuttable presumption QM loans and only loans originated as rebuttable presumption QM loans could season into safe harbor QM loans.

Nearly all commenters that opposed the Seasoned QM definition questioned the Bureau's legal authority to issue a rule that would limit a consumer's private right of action and foreclosure defense for violations of the ATR/QM Rule after three years. Commenters asserted that TILA's statutory requirements allow borrowers to raise a violation of the ATR/QM rule as a defense at any time in response to a foreclosure, and that Congress intended that these claims not be cut off. In addition, they maintained that, by extending the general one-year statute of limitations under TILA to three years for ability-to-repay claims, Congress recognized that it could take consumers a minimum of three years to recognize the right to bring an action against a creditor. Finally, commenters asserted that the performance requirements in the final rule are beyond the Bureau's authority to define QMs because Congress intended to limit the definition of QM to only those conditions that could be determined at or prior to the consummation of a loan. These commenters suggested that the Bureau's proposal is contrary to Congressional intent and exceeds the Bureau's authority.

Many of these commenters also asserted that the Bureau did not provide enough evidentiary support and data analysis demonstrating that Seasoned QMs are the types of high-quality, low-cost loans for which Congress intended the Bureau to exercise its exemption authority. Commenters stated that the proposal could afford a QM safe harbor and a release from risk retention requirements to loans that are higher cost, have high DTIs, and have limited income documentation. These commenters asserted that the analysis in part VII of the proposal demonstrated that a meaningful percentage of loans suffer a disqualifying event after three years and that the proposal's three-year seasoning period is arbitrary. They also maintained that the

Bureau's objective to increase access to credit and innovation in the mortgage market is not a sufficient justification absent a clearer explanation of how the proposal advances the statutory objective of affordable and responsible mortgage lending.

One consumer advocate commenter argued that the proposal could have unanticipated disparate impacts on borrowers of color and would likely burden these borrowers with higher mortgage costs without affording them the underwriting and assessment protections that the Dodd-Frank Act sought to provide. The commenter pointed to historical evidence that minority borrowers have been steered into predatory, higher-priced mortgage products, and that the foreclosure crisis preceding the Dodd-Frank Act resulted in a significant loss in housing wealth among minority homeowners. The commenter stated that the proposal would target vulnerable consumers and remove their statutorily provided life-of-loan defense to foreclosure.

Several consumer advocates also stated that the proposal could restrict remedies for high cost loans under the Home Ownership and Equity Protection Act of 1994 (HOEPA).[108] They asserted that the Bureau has not made the necessary case to restrict remedies under HOEPA for violations of HOEPA's ability-to-repay requirements.

Commenters also argued that loan performance should not be equated with ability to repay. They pointed to survey data and anecdotal evidence that many consumers take extraordinary measures to pay an unaffordable mortgage, such as drawing down retirement accounts, foregoing food, medicine, and utilities, or borrowing from relatives and friends. One consumer advocate commenter cited its survey of housing counselors and attorneys, which showed that 70 percent of respondents reported that their clients had forgone or decreased

[108] Public Law 103-325, tit. I, subtit. B, 108 Stat. 2190 (1994).

essential expenses in order to make payments for the first three years. Several commenters also asserted that the proposal is inconsistent with the statutory mandate that ability to repay is determined at origination, and that a change in circumstance (*e.g.*, winning the lottery) whereby a borrower is able to pay a loan that was unaffordable at origination should not relieve creditors of their obligation to conduct a prudent ability-to-repay evaluation at origination. Several consumer advocates also expressed concern that the Seasoned QM definition may restrict the ability of the Bureau and other agencies to conduct supervisory examinations beyond the three-year seasoning period when the loan obtains QM safe harbor status.

Several commenters also questioned the Bureau's use of the GSE representation and warranty framework as a model for the proposal's three-year seasoning period. They stated that the FHFA and GSE analysis is based on an investor's view of the aggregate financial impact on the GSEs' portfolios, as opposed to Congress's objective in enacting the ATR mandate to protect individual consumers from harm. They also noted that the GSE representation and warranty framework includes life-of-loan exclusions for more material defects such as misstatements, misrepresentations, and omissions. Lastly, the commenters pointed out that the GSEs perform post-purchase quality control checks and audits shortly after acquiring the loans and before loans have defaulted, to ensure they are able to require creditors to repurchase defective loans within the three-year sunset. These commenters asserted that the proposal lacked similar quality control checks and exceptions for misconduct and fraud.

Several commenters maintained that the proposal's assessment of the litigation risks associated with originating non-QM loans and the impact on cost of credit are unproven and inconsistent with the Bureau's findings in the January 2013 Final Rule. They noted that Congress has balanced the interest of consumers and creditors over the years, as evidenced by the limitations that TILA's general rules of liability place on possible litigation exposure. They also pointed out that there are practical limitations on litigation exposure for non-compliance with ability-to-repay violations, such as access to a limited supply of legal services and public interest attorneys.

E. The Final Rule

The Bureau is creating a Seasoned QM definition in this final rule because it concludes that providing a pathway to a QM safe harbor for performing non-QM and rebuttable presumption QM loans at consummation will maintain or expand access to responsible and affordable mortgage credit for loans that were originated in compliance with the ATR/QM Rule. The Bureau observed in the January 2013 Final Rule that increased legal certainty may benefit consumers if, as a result, creditors are encouraged to make loans that satisfy the statutory QM criteria, and further, that increased legal certainty may result in loans with a lower cost than would be charged in a context of legal uncertainty.[109] Consistent with that earlier finding, the Bureau finds here that the increased compliance certainty and reduction in litigation risk associated with providing a conclusive presumption of compliance for Seasoned QMs will encourage creditors to lend to consumers whose loans may fall outside of the QM safe harbor at consummation but who nonetheless have the ability to repay. In particular, the Bureau concludes that there are a significant number of creditworthy consumers who are unable to readily obtain mortgage financing because they fall outside of the GSE and government lending guidelines, particularly those with non-traditional credit or income sources and self-employed borrowers. The Bureau also concludes that if combined with certain other factors, successful loan

[109] 78 FR 6408, 6507 (Jan. 30, 2013).

performance over a number of years indicates sufficient certainty to presume that loans were originated in compliance with the ATR/QM Rule.

This final rule provides a conclusive presumption of compliance for loans that are originated as non-QM or rebuttable presumption QM loans, that meet certain performance criteria and portfolio requirements over the seasoning period of at least 36 months, and that satisfy certain product restrictions, points-and-fees limits, and underwriting requirements. Specifically, the Seasoned QM definition is limited to fixed-rate, first-lien mortgages that also satisfy the product-feature requirements and limits on points and fees under the General QM loan definition. Under the final rule, creditors are required to consider the consumer’s DTI ratio or residual income, income or assets other than the value of the dwelling, and debts and verify the consumer’s income or assets other than the value of the dwelling and the consumer’s debts, using the same consider and verify requirements established for General QMs in the General QM Final Rule. The final rule generally requires the original creditor or purchasing institution to hold the loan in portfolio until the end of the seasoning period, except that it permits a single whole-loan transfer, as further described in the section-by-section analysis of § 1026.43(e)(7)(iii) below.

The Bureau adopts a Seasoned QM definition because it concludes that the definition strikes the best balance between the competing consumer protection and access-to-credit considerations described herein. Specifically, the Bureau concludes that, if coupled with other consumer protections, a seasoning period of at least 36 months provides a sufficient length of time to conclusively presume that a creditor reasonably determined a consumer’s ability to repay at the time of consummation, while promoting continued access to credit and incentivizing creditors to make certain loans that may not have otherwise been made in the absence of potentially greater ability-to-repay compliance certainty.[110] As discussed in further detail in the section-by-section analysis of § 1026.43(e)(7)(ii), the Bureau concludes that, for loans that meet the eligibility requirements to season into a QM safe harbor, it is reasonable to attribute any subsequent default after the 36-month seasoning period to a change in economic conditions or consumer circumstances that a creditor could not reasonably have anticipated from the consumer's application or the records used to determine repayment ability rather than to a failure by the creditor to make a reasonable determination of ability to repay at consummation.

The Bureau concludes that the Seasoned QM definition will maintain or expand access to credit for non-QM and rebuttable presumption QM loans that otherwise may not have been made due to perceived litigation or compliance risks, even if the creditor has confidence that it could originate the loan in compliance with the ATR requirements. Indeed, many industry commenters specifically indicated in their comments that they anticipated that the proposal would do so. The Bureau concludes that the Seasoned QM definition will also facilitate innovation in underwriting in the non-QM market to better serve consumers with non-traditional credit profiles, allow for more flexibility to adapt to future changes in the work force and technology, and better support emerging research and technologies into alternative mechanisms to assess a consumer's ability to repay, such as cash flow underwriting. Several commenters noted that the impacts on access to

[110] This final rule, like the Assessment Report and the General QM Final Rule, reflects a shared underlying rationale that early payment difficulties indicate higher likelihood that the consumer may have lacked ability to repay at origination, and that delinquencies occurring soon after consummation are more likely indicative of a consumer's lack of ability to repay than later-in-time delinquencies. The Assessment Report and the General QM Final Rule measure early distress as whether a consumer was ever 60 days or more past due within the first two years after origination. The performance requirements for Seasoned QMs reflect the Bureau's consideration of this measure of early distress, but also its view of what requirements strike the best balance between facilitating responsible access to the credit in question while assuring protection of the consumer interests covered by ATR requirements. Similarly, the Bureau recognizes that the definition of delinquency and performance requirements in § 1026.43(e)(7) differ in some respects from the measure of early distress used in the Assessment Report, but concludes that this final rule's definition and performance requirements further the specific purposes of this final rule for the reasons explained in the section-by-section analyses of § 1026.43(e)(7)(ii) and (iv)(A) below.

credit are uncertain or unproven given these loans would be consummated without a conclusive presumption of compliance, and that therefore uncertainty and legal risk will persist with respect to these loans. The Bureau acknowledges that not every creditor may seek to expand their product offerings as a result of this final rule, but the Bureau nonetheless concludes the final rule will further its policy objectives, as many industry commenters indicated in their comments.

Furthermore, the Bureau concludes that the objective of increasing access to responsible non-QM lending is of particular importance in light of recent contractions in that segment of the market. As described in the proposal, the non-QM market has been further reduced by the recent economic disruptions associated with the COVID-19 pandemic, with most mortgage credit now available in the form of loans that obtain QM status at consummation. During periods of economic stress, investors seek safer assets such as cash and government-backed securities. Because non-QM loans are generally perceived as riskier by investors in part for the reasons discussed in the proposal, the decreases in originations related to the pandemic were particularly acute in the non-QM sector of the mortgage market. While the non-QM market has begun to recover, recent events have illustrated how investors' perception of risk—including uncertainty over compliance and litigation risk—can exacerbate the impacts on access to credit, particularly during periods of economic distress. The Bureau concludes that the Seasoned QM definition in this final rule should help counteract these impacts.

The Bureau acknowledges the concerns expressed by some commenters that the Seasoned QM definition will limit a consumer's foreclosure-related defense by recoupment or set off for alleged violations of the ATR requirements after three years under TILA section

130(k).[111] These commenters suggested that availability of this defense indicates that Congress contemplated that consumers would default later than the ability-to-repay three-year statute of limitations period, and intended for consumers who defaulted at any point to be able to raise the creditor's failure to reasonably determine ability to repay as a defense against foreclosure.

The Bureau disagrees with this understanding of TILA section 130(k) and its implications regarding the scope of the Bureau's authority to define a QM. TILA section 130(k) authorizes a consumer to assert a violation of the ATR requirements in section 129C(a) as a defense in the event of judicial or nonjudicial foreclosure, without regard for the time limit on a private action for damages for such a violation. With TILA section 130(k), Congress provided consumers with a degree of relief from the finality generally associated with a statute of limitations period so that they may assert a violation of TILA section 129C(a) as a matter of defense by recoupment or set off in connection with judicial or nonjudicial foreclosure. TILA section 130(k) thus conditions a consumer's actual right to obtain recoupment or set off on a finding that a creditor in fact violated TILA section 129C(a). But, on this matter of substantive law, TILA section 129C(b)(1) expressly provides that a creditor may presume its compliance with TILA section 129C(a) with respect to any mortgage that falls within the definition of a QM. TILA section 129C(b)(2) and (3) grant the Bureau broad authority to revise, add to, or subtract from the criteria defining a QM

[111] One academic commenter indicated that under the proposal, loans could season during pending litigation, cutting off affirmative claims filed within the statute of limitations period. Acknowledging this possibility, the Bureau nonetheless concludes that the final rule should not be revised to prevent that possibility in all cases. The reasoning underlying this final rule—that satisfaction of the seasoning requirements for the duration of the seasoning period demonstrates that the creditor made a reasonable determination of the consumer's ability to repay at consummation—is not any less applicable when litigation is initiated during the seasoning period, but the consumer continues making on-time payments for the remainder of the seasoning period. The mere filing of the lawsuit itself does not indicate the creditor failed to make a reasonable determination of ability to repay at consummation. Accordingly, the Bureau does not believe there is a good reason to create and administer potentially complex rules managing the effects that various court or litigant actions should have on the seasoning period.

for purposes of presuming compliance with TILA section 129C(a). Consistent with that authority, the final rule concludes that—if coupled with certain product restrictions and other factors—successful loan performance over a number of years indicates with sufficient certainty creditor compliance with TILA section 129C(a).

Consequently, creditors of loans satisfying the final rule's requirements may lawfully invoke the loan's status to show that there is no "violation" for the purposes of TILA section 130(k), just as creditors properly originating loans under other QM categories have been able to do since the effective date of the January 2013 Final Rule. Consumers in turn may respond with evidence and argument establishing that a loan in fact does not satisfy the final rule's requirements to qualify as a Seasoned QM. But the Bureau does not read TILA section 130(k) to preserve for consumers a right to assert a violation of TILA section 129C(a) when the Bureau has determined as a matter of substantive law to conclusively presume the loan's compliance with TILA section 129C(a).[112] This regulatory regime, under which QM status may affect a consumer's ability to raise a defense to foreclosure under TILA section130(k), is precisely what Congress intended and the introduction of a Seasoned QM category in no way alters that regime.

The Bureau also disagrees with the concerns expressed by some commenters that the performance requirements in the final rule are beyond the Bureau's authority to define QMs because Congress intended to limit the definition of QM to only those conditions that could be determined before a loan is consummated. These commenters specifically point to the statutory

[112] Likewise, the Bureau disagrees with commenters who suggest that the final rule is a statute of limitations or statute of repose. In contrast to statutes of limitations or repose—which limit liability based solely on the passage of time measured *after* a certain event occurs—the performance requirements in the final rule are based on a series of events, periodic payments, that must occur before a loan can season. Moreover, whereas a statute of limitations or repose cuts off a consumer's right to raise a claim for reasons unrelated to the merits of a claim, the performance requirements in the final rule are probative of the merits of a section 129C(a) violation.

QM provisions, which they argue are conditions directly related to underwriting that can be met prior to consummation, unlike the performance requirements in the final rule.

The Bureau concludes that nothing in the text of TILA section 129C(b) prevents the Bureau from creating categories of QMs that are based on conditions that can be observed after a loan is consummated. The Bureau instead believes that QM conditions that are indicative of creditor compliance with the ATR requirements at consummation, regardless of when they are satisfied, are consistent with the text and structure of TILA section 129C(b). Congress only required that additional QM conditions be necessary or proper to ensure responsible, affordable mortgage credit remains available to consumers in a manner consistent with the purposes of TILA section 129C or necessary and appropriate to effectuate the purposes of TILA sections 129B and 129C. And although some of the statutory QM conditions focus on underwriting,[113] most of these statutory conditions instead focus on prohibiting risky product features that may be probative of a creditor's non-compliance with the ATR requirements, such as interest-only loans, or loan terms that exceed 30 years.[114] The final rule goes beyond these statutory QM conditions with performance requirements and restrictions on creditors that, like the statutory product restrictions, are probative of whether a consumer was offered and received a loan on terms that the creditor reasonably determined reflected the consumer's ability to repay the loan. The Bureau does not believe that Congress intended to allow certain QM conditions that provide prospective evidence of creditor compliance with the ATR requirements but prohibit conditions that instead provide retrospective evidence of the same.[115] Thus, while a creditor undoubtedly

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[113] 15 U.S.C. 1639c(b)(2)(A)(iii) through (v).

[114] 15 U.S.C. 1639c(b)(2)(A)(i) through (ii), (vii) through (viii); *see* 78 FR 6408, 6503-04 (Jan. 30, 2013).

[115] *See* 78 FR 6408, 6462 (Jan. 30, 2013).

must determine a consumer's ability to repay at consummation, there is no indication that Congress intended to preclude or limit the Bureau's authority to defer its decision on the merits of presuming such compliance until the occurrence of later-in-time events.

Commenters' insistence that QM status be determined at consummation is an approach the Bureau could have taken in the final rule. But the Bureau concludes that it has as much authority under TILA to grant QM status at consummation and to later withdraw it based on later-in-time events, on the one hand, as it does to condition the same presumption on the occurrence of post-consummation events, so long as the later-in-time event is probative of or related to creditor compliance with the ATR requirements at consummation.[116] The Bureau further concludes that the wait-and-see approach adopted in this final rule is the most reasonable approach in this context. As already noted above, consumer distress during the first three years of a loan supports an inference that consumers lacked the ability to repay at consummation. By withholding the presumption during the first three years of a loan, the final rule ensures that consumers are afforded greater consumer protections by being able to assert their rights without being forced to first default on their loan. The final rule also ensures that creditors benefit from the presumption only once there is enough evidence that the creditor made a reasonable ATR determination at consummation. The Bureau thus concludes that creating a new category of QMs for seasoned loans that meet the statutory QM requirements and other appropriate criteria is consistent with the Bureau's authority under and the purposes of TILA sections 129B and 129C.

[116] For example, if justified by the merits, the final rule could have mimicked the QM category adopted by Congress in EGRRCPA and granted QM status to all covered loans at consummation with the caveat that the loan could lose QM status if a borrower fails the performance requirements. 15 U.S.C. 1639c(b)(2)(F)(ii)(I)(aa), (iii).

The Bureau recognizes the concerns expressed by many consumer advocate commenters that loan performance does not always equate to ability to repay and that consumers may take extraordinary measures to make payments on their mortgage. The Bureau acknowledged in the proposal that it is possible that a consumer could continue making on-time payments for some period of time despite lacking the ability to repay by foregoing payments on other obligations, and that a meaningful percentage of non-QM loans may end up delinquent in later years. However, as discussed in part VIII below, in general, the later a delinquency occurs, the less likely it is due to a lack of ability to repay at consummation rather than a change in circumstance after consummation that the creditor could not have reasonably anticipated from the consumer's application or the records at consummation.[117]

Furthermore, the Bureau finds that the final rule's inclusion of additional consumer protections mitigates the risks cited by commenters that a consumer lacks ability to repay but is nonetheless able to make timely payments for at least 36 months. As discussed further in the section-by-section analysis of § 1026.43(e)(7)(i)(A) and (B), this final rule's product restrictions prohibit loan features such as adjustable rates, interest-only payments, and negative amortization that can lead to sharp payment increases shortly after consummation, and limits Seasoned QM status to first-lien loans. The final rule also generally requires the creditor or first purchaser to hold the loan in portfolio until the end of the seasoning period. As discussed in the section-by-section analysis of § 1026.43(e)(7)(iii), this requirement gives creditors a greater incentive to

[117] As illustrated in Figure 3 in part VIII below, the Bureau estimates that nearly two-thirds of loans that experience delinquencies that would prevent a loan from becoming a Seasoned QM under the final rule do so within 36 months, and the rate at which loans disqualify diminishes beyond 36 months.

make responsible and affordable loans at consummation by ensuring that the creditor or first purchaser of the loan bears the risk if the loan defaults during the seasoning period.

Lastly, the final rule maintains the requirement that a creditor consider the consumer's DTI ratio or residual income, income or assets other than the value of the dwelling, and debts and verify the consumer's income or assets other than the value of the dwelling and the consumer's debts. As discussed in the section-by-section analysis of § 1026.43(e)(7)(i)(B), this final rule aligns the Seasoned QM consider and verify requirements with that of the General QM Final Rule, which will help to ensure that loans for which the creditor has not made a good faith determination of the consumer's ability to repay do not season into a QM safe harbor.

A number of commenters expressed concern that the Bureau lacks the evidentiary support and data analysis to demonstrate that Seasoned QMs are safe and high-quality loan products. These concerns are addressed in greater detail in part VIII below. The Bureau concludes that the delinquency and foreclosure analysis presented in part VIII, combined with the consumer protections discussed above, provides sufficient support to presume compliance with the ATR requirements when a loan performs over a seasoning period of at least 36 months and meets the other requirements in this final rule.

Some consumer advocate commenters expressed concern about the potential effects of this final rule given that minority homeowners historically have had higher-priced mortgage products relative to White consumers with similar credit characteristics. These commenters stated that this final rule could result in unanticipated disparate impacts on borrowers of color if they lose their set off or recoupment rights after three years. The Bureau recognizes that some creditors may violate Federal fair lending laws by charging certain borrowers higher prices on the basis of race or national origin compared to non-Hispanic White borrowers with similar credit characteristics, and the Bureau affirms its commitment to consistent, efficient, and effective enforcement of Federal fair lending laws.[118] The Bureau further emphasizes that the QM criteria, including the Seasoned QM definition added by this final rule, do not create an inference or presumption that a loan satisfying the QM criteria is compliant with any Federal, State, or local anti-discrimination laws that pertain to lending. A creditor has an independent obligation to comply with the Equal Credit Opportunity Act[119] and Regulation B,[120] and an effective way for a creditor to minimize and evaluate fair lending risks under these laws is by monitoring its policies and practices and implementing effective compliance management systems.

This final rule's performance criteria, product restrictions, underwriting criteria, and portfolio requirements are designed to ensure that Seasoned QMs do not contain risky product features identified in TILA section 129C(b)(2) and that they are underwritten with appropriate attention to consumers' resources and obligations. Moreover, as discussed in the section-by-section analysis of § 1026.43(e)(7)(i)(E), this final rule also clarifies that the Seasoned QM definition does not extend to high-cost mortgages covered by HOEPA, thus excluding the highest cost loans on the market from eligibility for Seasoned QM status.

As discussed above, commenters expressed differing views on the utilization of the GSE representation and warranty framework as an analog or model for the Seasoned QM definition. Many industry commenters supported the Seasoned QM definition, citing consistency with the

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[118] *See, e.g.*, Consent Order, *U.S.* v. *Bancorpsouth Bank*, No. 1:16-cv-00118, ECF No. 8 (N.D. Miss. July 25, 2016), https://files.consumerfinance.gov/f/documents/201606_cfpb_bancorpSouth-consent-order.pdf (joint action for discriminatory mortgage lending practices including charging African-American customers more for certain mortgage loans than non-Hispanic White borrowers with similar loan qualifications).

[119] 15 U.S.C. 1691 *et seq.*

[120] 12 CFR part 1002.

industry standards set by the GSE representation and warranty framework and the mortgage insurers' rescission relief policies. One consumer advocate commenter, on the other hand, pointed out several differences relative to the Seasoned QM definition and questioned the utility of the GSE model as a precedent, as described above. The Bureau acknowledges that the GSE framework may have been developed based on an aggregate analysis of the GSE portfolio to provide certainty for lenders by clarifying when a loan may be subject to repurchase. However, the GSE framework nonetheless illustrates a recognition based on experience by both GSEs and lenders that after 36 months of strong loan performance, a default should fairly be attributed to a change in consumer's circumstances that the creditor could not have reasonably anticipated from the consumer's application or the records at consummation or other cause besides that of the lender's underwriting. The FHFA's stated purpose for the framework is to "provide more certainty for lenders, facilitate greater liquidity to the primary market, and help increase access to credit without compromising safety and soundness."[121] Furthermore, although commenters are correct that the GSE representation and warranty framework includes life-of-loan exclusions for more material defects, this final rule includes many important and consumer-protective loan-level requirements, some of which are not required under the GSE framework, such as the portfolio requirement and exclusion for adjustable-rate mortgages.

The Bureau also acknowledges that the GSEs have developed a robust post-purchase quality control and audit framework to identify loan defects typically within a few months of consummation and well within the 36-month representation and warranty relief sunset.

[121] Fed. Hous. Fin. Agency, *Representation and Warranty Framework*, https://www.fhfa.gov/PolicyProgramsResearch/Policy/Pages/Representation-and-Warranty-Framework.aspx (last visited Nov. 30, 2020).

However, the Bureau concludes that this final rule's portfolio requirement provides similar incentives for creditors to originate loans with ability to repay. That is, if a financial institution purchases a loan from a creditor that it is required to hold in portfolio for 36 months, that purchaser has similar incentives to perform loan-level due diligence as the GSEs given the purchaser, like the GSEs, bears the credit risk of default. The prospect of being able to sell the loan only if it passes that due diligence creates a strong incentive for the creditor to employ rigorous underwriting at consummation akin to post-purchase quality control and audit under the GSE representation and warranty framework. In fact, given the size and scale of the GSEs' credit risk transfer programs whereby much of the risk of default for a large portion of the GSEs' guaranteed portfolio is syndicated to private market participants,[122] purchasers that are required to hold the loan in portfolio for 36 months may have an even greater incentive to ensure the loans they purchase will perform well than the GSEs do. Moreover, like the GSEs, financial institutions have similar remedies to require the originating creditor to repurchase loans that were consummated with defects, including a lack of ability to repay. For these reasons, the Bureau has decided to base its adoption of a 36-month seasoning period in part on the 36-month representation and warranty sunset for GSE loans.

Some consumer groups suggested that the Bureau's concern regarding potential and perceived litigation risks associated with originating non-QM loans and their impact on access to credit is inconsistent with the Bureau's findings in the January 2013 Final Rule and unproven. However, as discussed in the proposal, the analysis that the Bureau subsequently published in the Assessment Report found that some of the observed effect of the January 2013 Final Rule on

[122] Fed. Hous. Fin. Agency, *Credit Risk Transfer*, https://www.fhfa.gov/PolicyProgramsResearch/Policy/Pages/Credit-Risk-Transfer.aspx (last visited Nov. 30, 2020).

access to credit was likely driven by creditors' interest in avoiding litigation or other risks associated with non-QM status, rather than by creditors' determinations that consumers were unlikely to repay the loan based on traditional indicators of creditworthiness.[123] Many industry commenters also reaffirmed the impact of compliance uncertainty and litigation risk on creditors' willingness to originate non-QM and rebuttable presumption QM loans as well as the secondary market's willingness to purchase them. They asserted that the conclusive presumption of compliance for a Seasoned QM after 36 months would result in higher secondary market liquidity for these loans as investors are extended the liability protections that QM status provides. Based on its Assessment Report, external feedback to the Bureau, and the comments, the Bureau has concluded that many secondary market investors are unable or unwilling to accept the litigation risk associated with assignee liability particularly with respect to non-QM loans, which has in turn contributed to the relative scarcity of non-QM loans.

VI. Section-by-Section Analysis

1026.43 Minimum Standards for Transactions Secured by a Dwelling

43(e) Qualified Mortgages

43(e)(1) Safe Harbor and Presumption of Compliance

Section 1026.43(e)(1) currently provides that a creditor that makes a QM loan receives either a conclusive or rebuttable presumption of compliance with the repayment ability requirements of § 1026.43(c), depending on whether the loan is a higher-priced covered transaction. Section 1026.43(e)(1)(i) currently provides that a creditor that makes a QM loan that is not a higher-priced covered transaction is entitled to a safe harbor from liability under the

[123] *See* Assessment Report, *supra* note 47, at 118, 147, 150.

ATR provisions. The Bureau proposed to add § 1026.43(e)(1)(i)(B), identifying Seasoned QMs as a separate category of QMs for which a creditor receives a conclusive presumption of compliance with ATR requirements, regardless of whether the loan is a higher-priced covered transaction. The proposal would have redesignated current § 1026.43(e)(1)(i) as § 1026.43(e)(1)(i)(A). To conform with these changes, the Bureau proposed to revise comment 43(e)(1)-1 to add a reference to proposed § 1026.43(e)(7). The Bureau also proposed to make a technical correction to comment 43(e)(1)-1 to add references to § 1026.43(e)(5) and (6). The Bureau further proposed to remove the first sentence of comment 43(e)(1)(i)-1, which would have been duplicative of regulatory text, and to redesignate that comment as comment 43(e)(1)(i)(A)-1. For the reasons discussed below, the Bureau is finalizing the amendments to § 1026.43(e)(1) and related commentary as proposed, with minor technical changes to the proposed commentary.

The Bureau's Proposal

TILA section 129C(b) provides that loans that meet certain requirements are "qualified mortgages" and that creditors making QMs "may presume" that such loans have met the ATR requirements. As discussed above, TILA does not specify whether the presumption of compliance means that the creditor receives a conclusive presumption or a rebuttable presumption of compliance with the ATR provisions. The Bureau concluded in the January 2013 Final Rule that the statutory language is ambiguous and does not mandate either interpretation and that the presumptions should be tailored to promote the policy goals of the statute.[124] In the January 2013 Final Rule, the Bureau interpreted TILA to provide for a

[124] 78 FR 6408, 6511 (Jan. 30, 2013).

rebuttable presumption of compliance with the ATR provisions but used its adjustment and exception authority under TILA to establish a conclusive presumption of compliance for loans that are not "higher-priced covered transactions."[125]

In the January 2013 Final Rule, the Bureau identified several reasons why the performance of QMs that are not higher-priced loans could suggest consumers have the ability to repay and should receive a safe harbor.[126] The Bureau noted that the QM requirements would ensure that the loans do not contain certain risky product features and are underwritten with careful attention to consumers' DTI ratios.[127] The Bureau also noted that a safe harbor would provide greater legal certainty for creditors and secondary market participants and might promote enhanced competition and expand access to credit.[128] The Bureau noted that it was not possible to define by a bright-line rule a class of mortgages for which each consumer would have the ability to repay.[129]

In the Seasoned QM Proposal, the Bureau preliminarily concluded that, in conjunction with the QM statutory and other requirements in proposed § 1026.43(e)(7), a loan's satisfaction of portfolio and seasoning requirements provides sufficient grounds for supporting a conclusive presumption that the creditor made a reasonable determination that the consumer had the ability to repay, in compliance with the ATR requirements. The Bureau also preliminarily concluded that satisfaction of the seasoning requirements—in particular, the fact that the consumer made timely payments for the duration of the seasoning period—supports the inference that the

[125] *Id.* at 6514.

[126] *Id.* at 6511.

[127] *Id.*

[128] *Id.*

[129] *Id.*

consumer was offered and received a loan on terms that the creditor reasonably determined reflected the consumer's ability to repay the loan. The Bureau noted that proposed § 1026.43(e)(7) would require creditors to comply with TILA requirements applicable to QMs and minimum underwriting requirements. The Bureau also noted that the proposed requirements would ensure that the loans do not contain risky product features identified in TILA section 129C(b)(2), the loans are underwritten with attention to consumers' resources and obligations, and the conclusive presumption would be available to creditors only after the loans have performed for a substantial period of time.

In the proposal, the Bureau stated that providing creditors with an alternative pathway to greater ATR compliance certainty for loans that satisfy the criteria set forth in proposed § 1026.43(e)(7) may result in greater access to responsible, affordable mortgage credit. For example, creditors may be more willing to maintain or expand access to credit to consumers with non-traditional income or a limited credit history, or to employ innovative methods of assessing financial information, as these loans could season into safe harbor QMs with satisfactory performance. In addition, the Bureau noted in the proposal that, similar to the Small Creditor QM definition and the pathway to QM status provided in EGRRCPA section 101, the Seasoned QM definition would include a requirement for the creditor to hold the loan in portfolio. Finally, in the proposal the Bureau preliminarily concluded that, in combination with the other Seasoned QM requirements in proposed § 1026.43(e)(7), the proposed portfolio requirement would provide an added layer of assurance that the Seasoned QM definition would encourage responsible non-QM lending and creditors would not make unaffordable loans.

The Bureau sought comment on all aspects of the proposal that would be applicable to determining whether, by meeting the requirements of § 1026.43(e)(7) for a particular loan, a creditor has demonstrated that the consumer had a reasonable ability to repay the loan according to its terms and the loan should be accorded safe harbor QM status. In addition, the Bureau sought comment on whether there are other approaches to providing QM status to seasoned loans that would better accomplish the Bureau's objectives.

Comments Received

The Bureau received a number of comments relating to the proposed amendments to § 1026.43(e)(1). As discussed in greater detail in part V above, industry commenters generally supported the proposed amendments to § 1026.43(e)(1), and consumer advocate commenters generally opposed the proposed amendments to § 1026.43(e)(1).

Industry commenters generally expressed support for the Bureau's preliminary conclusion that a loan's satisfaction of the proposed seasoning requirements provides sufficient grounds for supporting a conclusive presumption that the creditor made a reasonable determination that the consumer had the ability to repay, in compliance with the ATR requirements. These commenters stated that the proposed amendments to § 1026.43(e)(1), and the proposal in general, retain consumer safety considerations and legal protections consistent with the existing ATR/QM Rule. Industry commenters agreed that providing safe harbor QM status to loans that season would incentivize responsible non-QM lending, while maintaining market stability. Several of these commenters noted that safe harbor QM status would provide legal certainty to loans that previously did not receive safe harbor QM status at consummation, and thereby remove risk associated with originating non-QM loans.

Consumer advocate commenters opposed the Bureau's proposal, cautioning that a seasoning period is not an adequate basis for determining compliance with the ATR requirements. They also suggested that ATR determinations should remain a case-by-case determination, because there may be situations in which borrowers remain current on their loan for 36 months but did not have an ability to repay the loan at consummation.

A joint comment from a number of consumer advocates and other non-profit organizations suggested that the Bureau adopt a two-tiered approach to seasoning instead of providing all loans that season with safe harbor QM status. A two-tiered approach would allow non-QM loans to season into rebuttable presumption QM loans, and loans that are originated as QMs under other QM categories to season into safe harbor QM loans, after meeting the requirements for seasoning.

Some commenters made suggestions to modify proposed § 1026.43(e)(7), which are discussed and addressed in the section-by-section analysis of § 1026.43(e)(7) below.

The Final Rule

For the reasons discussed above and, pursuant to its authority under TILA section 105(a) as discussed below, the Bureau is finalizing § 1026.43(e)(1) as proposed. As finalized, § 1026.43(e)(1) provides that loans meeting the Seasoned QM requirements in § 1026.43(e)(7) obtain a conclusive presumption of compliance with the repayment ability requirements of § 1026.43(c).

Since the January 2013 Final Rule, the Bureau has noted that a safe harbor provides greater legal certainty for creditors and secondary market participants and may promote enhanced competition and expand access to credit. As discussed in part V above, the Bureau concludes that a Seasoned QM definition will encourage creditors to originate more responsible, affordable loans that are not QMs at consummation, and to ensure that responsible, affordable credit is not lost because of legal uncertainty in non-QM status.

The Bureau declines to adopt the two-tiered approach that some commenters suggested that would provide only rebuttable presumption status to Seasoned QMs originated as non-QM loans. Adopting such a two-tiered approach would lessen the prospect of legal certainty for loans originated as non-QMs and could thereby undermine the final rule's primary objective, which is to promote continued and potentially increased access to responsible and affordable credit by incentivizing the origination of non-QM loans that otherwise may not be made. The Bureau recognizes that it has decided in the General QM Final Rule not to provide a similar safe harbor at consummation to General QMs priced 1.5 percentage points or more above APOR. That decision reflects a balancing of the relevant consumer protection and access-to-credit considerations in view of the Bureau's findings that (i) such loans have higher delinquency rates than lower-priced loans and (ii) it lacks sufficient evidence to suggest that having provided those loans with only a rebuttable presumption of ATR compliance since the January 2013 Final Rule took effect has resulted in a significant disruption of access to responsible, affordable mortgage credit. A balance of the same statutory considerations leads the Bureau to a different conclusion with respect to Seasoned QMs. The final rule's performance requirements will ensure that only loans with strong early performance receive the Seasoned QM safe harbor. When coupled with the final rule's other requirements, the Bureau concludes that loans meeting the Seasoned QM definition will have demonstrated that the creditor made a reasonable determination of the ability to repay, regardless of the loan's QM or non-QM status at origination. The Bureau also recognizes that the prospect of a safe harbor three years after origination will provide a stronger incentive to originate loans that will be non-QM for at least the first three years than the prospect of a rebuttable presumption three years after origination. In light of these considerations, the Bureau concludes that extending Seasoned QMs a safe harbor strikes the best balance between consumer protection and ensuring continued access to responsible, affordable credit. The Bureau is therefore finalizing the amendments to § 1026.43(e)(1) and related commentary as proposed, with minor technical changes to the proposed commentary.

Legal Authority

The Bureau is revising § 1026.43(e)(1) pursuant to its adjustment authority under TILA section 105(a) to establish a conclusive presumption of compliance for loans that meet the criteria in proposed § 1026.43(e)(7). The Bureau concludes that providing a safe harbor for seasoned loans is necessary and proper to facilitate compliance with and to effectuate the purposes of section 129C and TILA, including to assure that consumers are offered and receive residential mortgage loans on terms that reasonably reflect their ability to repay the loans. The Bureau also concludes that providing such a safe harbor is consistent with the Bureau's authority under TILA section 129C(b)(3)(B)(i) to prescribe regulations that revise, add to, or subtract from the criteria that define a QM upon a finding that such regulations are necessary or proper to ensure that responsible, affordable mortgage credit remains available to consumers in a manner consistent with the purposes of this section, necessary and appropriate to effectuate the purposes of TILA sections 129B and 129C, to prevent circumvention or evasion thereof, or to facilitate compliance with such sections.

43(e)(2) Qualified Mortgage Defined—General

Section 1026.43(e)(2) sets out the general criteria for meeting the definition of a QM and provides exceptions for QMs covered by requirements set out in other specific paragraphs in § 1026.43(e). The Bureau proposed a conforming amendment to § 1026.43(e)(2) to include a reference to § 1026.43(e)(7), which sets out the requirements applicable to Seasoned QMs and is described in the section-by-section analysis below. The Bureau did not receive comments specifically relating to proposed § 1026.43(e)(2). To conform with the other amendments in this final rule, the Bureau is adopting the amendment to § 1026.43(e)(2) as proposed.

43(e)(7) Qualified Mortgage Defined—Seasoned Loans

The Bureau is adding § 1026.43(e)(7) to define a new category of QMs, Seasoned QMs, for covered transactions that meet certain criteria. The Bureau concludes that providing creditors an alternative path to a QM safe harbor for these types of loans is likely to increase creditors' willingness to make these loans despite their ineligibility for a QM safe harbor at consummation. The Bureau recognizes that there is some risk that a consumer can lack an ability to repay at loan consummation yet manage to make timely payments for the seasoning period defined in § 1026.43(e)(7)(iv)(C) of this final rule. The Bureau concludes that such risk, as well as the potential benefits that a Seasoned QM might offer in terms of fostering access to responsible, affordable mortgage credit, would vary depending on the loan characteristics. To mitigate this risk, the Bureau is limiting Seasoned QMs to first-lien covered transactions that satisfy the other requirements in § 1026.43(e)(7), as explained below.

The Bureau concludes that adding a definition of Seasoned QM for covered transactions, as well as establishing the requirements for Seasoned QMs in § 1026.43(e)(7) discussed below, is consistent with the Bureau's authority under TILA section 129C(b)(3)(B)(i) to prescribe regulations that revise, add to, or subtract from the criteria that define a qualified mortgage upon a finding that such regulations are necessary or proper to ensure that responsible, affordable mortgage credit remains available to consumers in a manner consistent with the purposes of TILA section 129C, necessary and appropriate to effectuate the purposes of TILA sections 129B and 129C, to prevent circumvention or evasion thereof, or to facilitate compliance with such sections. The Bureau finds that the provisions in § 1026.43(e)(7) establishing criteria to define a

Seasoned QM are necessary or proper to ensure that responsible, affordable mortgage credit remains available to consumers in a manner consistent with and appropriate to the purposes of TILA sections 129B and 129C, which include assuring that consumers are offered and receive residential mortgage loans on terms that reasonably reflect their ability to repay the loan and that responsible, affordable mortgage credit remains available to consumers. In particular, the Bureau has concluded that establishing a QM safe harbor pathway for seasoned loans is likely to increase creditors' willingness to make additional loans that do not qualify for a QM safe harbor at origination, or to make such loans with better pricing. The Bureau finds that limiting Seasoned QMs to covered transactions that meet the requirements in § 1026.43(e)(7) provides assurance that those loans that may qualify for Seasoned QM status after the seasoning period are made to creditworthy consumers.

In addition, TILA section 129C(b)(3)(A) provides the Bureau with authority to prescribe regulations to carry out the purposes of the qualified mortgage provisions—to ensure that responsible, affordable mortgage credit remains available to consumers in a manner consistent with the purposes of TILA section 129C. TILA section 105(a) also provides authority to the Bureau to prescribe regulations to carry out the purposes of TILA, including the purposes of the qualified mortgage provisions, and states that such regulations may contain such additional requirements, classifications, differentiations, or other provisions and may further provide for such adjustments and exceptions for all or any class of transactions that the Bureau judges are necessary or proper to effectuate the purposes of TILA, to prevent circumvention or evasion thereof, or to facilitate compliance therewith. TILA section 129C(b)(2)(A)(vi) provides authority to the Bureau specifically to establish guidelines or regulations relating to ratios of total monthly debt to monthly income or alternative measures of ability to pay regular expenses after payment of total monthly debt, taking into account the income levels of the borrower and such other factors as the Bureau may determine are relevant and consistent with the purposes described in TILA section 129C(b)(3)(B)(i). Accordingly, the Bureau exercises its authority under TILA sections 105(a), 129C(b)(2)(A)(vi), (3)(A), and (3)(B)(i) to adopt § 1026.43(e)(7) for the reasons discussed above and below.

43(e)(7)(i) General

The Bureau proposed adding § 1026.43(e)(7) to define a new category of QMs for covered transactions that meet certain criteria. The Bureau proposed as initial criteria under § 1026.43(e)(7)(i) that Seasoned QM status would be available for first-lien covered transactions that meet certain additional requirements. Additional proposed requirements were set out generally in § 1026.43(e)(7)(i)(A) through (D) and included restrictions on product features and points and fees, as well as certain underwriting and performance requirements. The proposed criteria and related public comments are discussed below.

In its proposal the Bureau tentatively concluded that limiting Seasoned QMs to first-lien covered transactions that satisfy the other requirements in proposed § 1026.43(e)(7) recognizes both the risk of consumers lacking an ability to repay at consummation and the potential benefits of fostering access to responsible, affordable mortgage credit through a Seasoned QM category. This final rule adopts in the introductory text for § 1026.43(e)(7)(i) the requirement that a Seasoned QM be a first-lien covered transaction as proposed.

Comments Received

A significant number of industry commenters and industry trade associations requested that the Bureau extend Seasoned QM eligibility to subordinate liens that otherwise meet the criteria. Several of these commenters noted that closed-end subordinate liens are included within the broader scope of requirements in § 1026.43. One industry commenter stated that its subordinate liens have better repayment and lower delinquencies than the overall first-lien industry and noted that the demand for cash-out subordinate-lien loans may grow as consumers looking to equity as a source of funds in a future, higher-interest-rate environment also want to retain the advantage of current, historically low rates on the remaining balance of their first-lien mortgages. Although two industry commenters suggested generally that the Bureau could make extension of Seasoned QM eligibility to subordinate liens more acceptable by tailoring the performance requirements for subordinate liens, the commenters did not provide specific suggestions. Commenters supporting extension of Seasoned QM eligibility to subordinate liens stated that doing so would encourage innovation, reduce litigation risk, and expand access to credit. An industry commenter, without elaboration, expressly supported limiting Seasoned QMs to first-lien loans, while a consumer advocate commenter stated that, if a Seasoned QM definition is finalized, the loan characteristics included in the proposal to limit the scope of the definition should be retained, even though those characteristics would not adequately protect consumers.

The Final Rule

For the reasons stated below, the Bureau adopts in § 1026.43(e)(7)(i) the requirement that a Seasoned QM be a first-lien covered transaction, as proposed. The Bureau continues to recognize, as it did in the proposal, that the potential risks and benefits of a Seasoned QM category will tend to vary depending on loan characteristics. The Bureau is exercising its discretionary authority to establish an additional way in which covered transactions can achieve qualified mortgage status under the ATR requirements of TILA and Regulation Z. However, it is not apparent that extending Seasoned QM eligibility to subordinate lien loans can be done in a manner that improves access to credit without introducing unnecessary complexity in application.[130] Subordinate-lien loans may be an example of loans with an elevated risk of showing timely payments even when a consumer lacks ability to repay. A consumer may make on-time payments on the second-lien loan but fail to make payments on the first-lien loan because the consumer is unable to afford the combination of the two periodic payments and the second-lien payment is often smaller than the first-lien payment.[131] In light of the significant changes being made in the General QM Final Rule, the Bureau concludes that limiting Seasoned QM status to first-lien transactions will provide an opportunity for the market to gain experience with how access to credit and consumer ability-to-repay protections will be affected by both the portfolio and performance criteria in the new Seasoned QM definition and the revised underwriting requirements and other criteria in the General QM Final Rule. This experience could help inform any future changes to the Seasoned QM criteria that may be in accordance with the purposes of TILA.

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[130] The Bureau currently has limited data to use in analyzing the interaction of first- and subordinate-lien loans and how that interaction affects the consumers' ability to repay those mortgages over time. As discussed in part VIII below, the primary data source relating to loan performance that the Bureau has relied upon in the Seasoned QM Proposal and this final rule is the National Mortgage Database (NMDB), which does not include subordinate-lien mortgages. The NMDB data include de-identified performance information for a nationally representative 5 percent sample of active first-lien mortgages. *See* Bureau of Consumer Fin. Prot., *Sources and Uses of Data at the Bureau of Consumer Financial Protection* at 55-56 (Sept. 2018), https://files.consumerfinance.gov/f/documents/bcfp_sources-uses-of-data.pdf; Robert B. Avery *et al.*, *National Mortgage Database Technical Report 1.2*, at 1 (Nat'l Mortg. Database, Bureau of Consumer Fin. Prot., and Fed. Housing Fin. Agency, Technical Report Series, 2017), https://www.fhfa.gov/PolicyProgramsResearch/Programs/Documents/NMDB-Technical-Report_1.2_10302017.pdf.

[131] For example, a 2012 New York Federal Reserve Bank study noted that among consumers who are seriously delinquent on their first-lien loans for more than a year and have a second-lien loan, about 20 to 30 percent of consumers are current on their second-lien loans. The authors suggested possible explanations for why some consumers remain current on their subordinate-lien loans even a year beyond a continuing delinquency on their first-lien loan, including that (1) consumers may choose to pay as many bills as possible each month so will prioritize smaller bills over first-lien mortgages with likely larger payments; and (2) consumers may strategically default on first-lien loans in order to qualify for targeted modification programs. Donghoon Lee *et al.*, Fed. Reserve Bank of New York, *A New Look at Second Liens* (Staff Report No. 569) (Aug. 2012), https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr569.pdf.

The Bureau notes, as it did in the proposal, that loans that satisfy another QM definition at consummation also could be Seasoned QMs, as long as the requirements of § 1026.43(e)(7) are met.[132] A loan that becomes a Seasoned QM after seasoning might have been eligible as a QM at consummation under the General QM, Small Creditor QM, or EGRRCPA QM definitions. Although the various QM categories may overlap, each QM category is based on a particular set of factors that support a presumption that the creditor at consummation complied with the ATR requirements, and each QM category imposes requirements of varying degrees of restrictiveness relative to others. For example, EGRRCPA section 101 provides a presumption of compliance starting at consummation and is available only to insured depository institutions and insured credit unions with assets below $10 billion who hold those loans in portfolio, except that transfer of the loans is permitted in certain limited circumstances. QM status under EGRRCPA section 101 is available to both fixed and variable rate mortgages, as well as subordinate-lien loans, and section 101 also does not impose any requirements on post-consummation loan performance. The Seasoned QM category established in this final rule, by contrast, is not limited by creditor size, and is available only for fixed-rate, first-lien loans that meet a portfolio requirement, and only after a seasoning period during which the loans must meet performance requirements. The Bureau concludes that the Seasoned QM category and the EGRRCPA QM category, therefore, identify unique and discrete factors that, for different reasons, support a presumption of creditor compliance with the ATR requirements. The Bureau similarly concludes that because each QM category is based on a distinct set of factors that support a presumption of compliance with ATR requirements, it is possible for some transactions

[132] 85 FR 53568, 53581-82 (Aug. 28, 2020).

to fall within the scope of multiple QM categories. Accordingly, the Bureau determines that it is appropriate to exercise its authority under TILA sections 105(a), 129C(b)(2)(A)(vi), (3)(A), and (3)(B)(i) to make the Seasoned QM definition available to any first-lien covered transaction that meets the requirements in § 1026.43(e)(7), including transactions that might be eligible at consummation for the General QM loan definition, the Small Creditor QM definition, or the EGRRCPA QM definition.

43(e)(7)(i)(A)

The Bureau proposed to add § 1026.43(e)(7)(i)(A) which would limit the Seasoned QM definition to fixed-rate mortgages with fully amortizing payments. Proposed § 1026.43(e)(7)(i)(A) would have applied the definition of fixed-rate mortgage set out in § 1026.18(s)(7)(iii). Section 1026.18(s)(7)(iii) defines fixed-rate mortgage as a transaction secured by real property or a dwelling that is not an adjustable-rate mortgage or a step-rate mortgage.[133] In addition, proposed § 1026.43(e)(7)(i)(A) would have applied the definition of fully amortizing payments set out in § 1026.43(b)(2). Section 1026.43(b)(2) defines fully amortizing payments as a periodic payment of principal and interest that will fully repay the loan amount over the loan term.

Proposed comment 43(e)(7)(i)(A)-1 would have clarified that a covered transaction that is an adjustable-rate mortgage or a step-rate mortgage would not be eligible to become a Seasoned QM. Proposed comment 43(e)(7)(i)(A)-2 would have clarified that loans could become Seasoned QMs only if the scheduled periodic payments on them do not require a balloon

[133] As applicable to the definition of fixed-rate mortgage, § 1026.18(s)(7)(i) defines adjustable-rate mortgage as a transaction for which the APR may increase after consummation, and § 1026.18(s)(7)(ii) defines step-rate mortgage as a transaction for which the interest rate will change after consummation, and the rates that will apply and the periods for which they will apply are known at consummation.

payment to fully amortize the loan within the loan term. Proposed comment 43(e)(7)(i)(A)-2 also would have clarified that the requirement that a Seasoned QM have fully amortizing payments does not prohibit a qualifying change, as defined in the proposal, that is entered into during or after a temporary payment accommodation in connection with a disaster or pandemic-related national emergency.[134]

The Bureau adopts § 1026.43(e)(7)(i)(A) and comments 43(e)(7)(i)(A)-1 and -2 as proposed, except that comment 43(e)(7)(i)(A)-2 is revised to clarify that § 1026.43(e)(7)(i)(A) does not prohibit a qualifying change that is entered into during or after a temporary payment accommodation in connection with a disaster or pandemic-related national emergency, even if the qualifying change involves a balloon payment or lengthened loan term.

Comments Received

Some industry commenters recommended amending the proposed criteria to permit ARMs to become Seasoned QMs, with a couple of these commenters suggesting that the seasoning period begin from the date of the new payment when the interest rate first adjusts. One industry commenter suggested that the Bureau could draft the final rule in a way that would extend eligibility to ARMs at least for purposes of relieving securitizers of separate risk retention requirements on those loans, so as to allow resultant cost savings to be passed on to consumers at origination.[135] Other industry commenters and a number of consumer advocate commenters supported the proposal's limitation to fixed-rate loans. Consumer advocate commenters that

[134] Qualifying changes are discussed more fully below in the section-by-section analysis of § 1026.43(e)(7)(iv).

[135] The commenter noted that the definition of qualified residential mortgage (QRM) used by other Federal regulatory agencies to exempt securities from Dodd-Frank Act section 941 risk retention requirements is limited by the Bureau's definition of QM. An industry trade association also addressed the separate QRM requirements but suggested only that the Bureau should work with other regulators to reform assignee liability and develop a mechanism that enables investors to put back loans with defects at origination.

were not supportive of adding a Seasoned QM definition generally nonetheless supported excluding from any final rule adjustable-rate and balloon features, which they described as exacerbating the risks of unaffordable and irresponsible lending. One industry commenter supportive of the limitation to fixed-rate loans stated that the General QM loan definition should be applied to ARMs because payments can increase over time beyond the proposed seasoning period.

Commenters generally supported the Bureau's proposal to allow only loans with fully amortizing payments to become Seasoned QMs. Several industry and industry trade association commenters, however, requested that the Bureau clarify that the restriction on balloon payments does not affect a loan's eligibility for Seasoned QM status if the loan is restructured to include a balloon payment as part of a qualifying change that is entered into during or after a temporary payment accommodation in connection with a disaster or pandemic-related national emergency.

The Final Rule

For the reasons stated below, the Bureau adopts § 1026.43(e)(7)(i)(A) as proposed. The final rule limits Seasoned QMs to fixed-rate mortgages, excluding ARMs. ARMs typically have an introductory interest rate that is applicable for several years. The introductory interest rate for a typical ARM could be in place for some or all of the seasoning period and could extend beyond the seasoning period. After the introductory interest rate expires, the interest rate adjusts periodically and could increase through the life of the loan.

The Bureau concludes that a consumer's payment history immediately after consummation of an ARM would not be a reliable indicator of whether at consummation the creditor reasonably determined the consumer's continuing ability to repay the loan after any interest rate adjustment, which could increase the consumer's periodic payment amount. In addition, because an ARM may continue to reset periodically after the first interest rate reset date, even a seasoning period that begins on the first reset date would not necessarily be sufficient to assure a consumer's ability to repay after the seasoning period. Given this possibility for increases in payment amounts in later years, therefore, timely payments during the seasoning period are not as strong of an indicator on an ARM as they are on a fixed-rate mortgage of the consumer's ability to repay at the time of consummation. Although a few commenters provided suggestions concerning how the Bureau might provide some Seasoned QM eligibility to ARMs, the suggestions were only general in nature and did not include analyses that would support modification of the proposal. The Bureau therefore is not extending eligibility for the new Seasoned QM category to ARMs.

Similarly, the Bureau remains concerned that, as a general matter, the ability of a consumer to stay current on mortgage payments during the seasoning period would not be reliable as an indicator that at consummation a consumer had the ability to meet balloon payment obligations beyond the seasoning period. In this final rule, the Bureau is not extending eligibility for the new Seasoned QM category to loans that do not provide for fully amortizing payments. As highlighted by several commenters, however, the Bureau understands that, in instances of financial hardship, including during the current COVID-19 pandemic, creditors and consumers often agree to restructure loans to defer delinquent amounts and create a balance due at maturity or payoff of the loan. As suggested by these commenters, the Bureau is revising proposed comment 43(e)(7)(i)(A)-2 to clarify that the general Seasoned QM criteria set out in § 1026.43(e)(7)(i)(A) do not prohibit a qualifying change that is entered into during or after a temporary payment accommodation in connection with a disaster or pandemic-related national emergency, even if the qualifying change involves a balloon payment or lengthened loan term.

Qualifying changes are discussed in more detail in the section-by-section analysis of § 1026.43(e)(7)(iv)(B), below.

43(e)(7)(i)(B)

TILA section 129C(b)(1) provides a presumption of compliance with ATR requirements if a loan is a qualified mortgage. TILA section 129C(b)(2)(A) defines a qualified mortgage as a loan that includes general restrictions on product features and points and fees and meets certain underwriting requirements. Regulation Z § 1026.43(e)(2) codifies these criteria in the Bureau's definition of a General QM. In the Seasoned QM Proposal, the Bureau proposed adding § 1026.43(e)(7)(i)(B) to extend to Seasoned QMs the same general restrictions on product features and points and fees that exist under the General QM and Small Creditor QM definitions, and to impose the same or similar requirements to consider and verify certain consumer information as part of the underwriting process.[136] Proposed comment 43(e)(7)(i)(B)-1 stated that a loan that complies with the consider and verify requirements of any other qualified mortgage definition would be deemed to comply with the consider and verify requirements applicable to a Seasoned QM.

For the reasons described below, the Bureau adopts § 1026.43(e)(7)(i)(B) as proposed, except that the criteria relating to prohibited product features, points-and-fees cap, and requirements to consider and verify certain consumer information are established by direct cross-reference to the relevant General QM requirements in § 1026.43(e)(2), as amended by the

[136] Proposed § 1026.43(e)(7)(i)(B) would have incorporated by cross-reference the QM requirements set out for Small Creditor QMs in § 1026.43(e)(5)(i)(A) and (B). Those Small Creditor QM requirements generally cross-referenced the existing General QM requirements in § 1026.43(e)(2), except for the requirements in paragraph (e)(2)(vi) of that section, which established a DTI limit. In the Seasoned QM Proposal, the Bureau noted that it had recently proposed certain conforming changes to § 1026.43(e)(5)(i)(A) and (B) in the General QM proposal. 85 FR 53568, 53583 n.120 (Aug. 28, 2020). As discussed above, the Bureau is issuing this final rule simultaneously with the General QM Final Rule.

General QM Final Rule. The Bureau has decided not to adopt proposed comment 43(e)(7)(i)(B)-1 because, with the revisions made to § 1026.43(e) in the General QM Final Rule and this final rule, the comment is unnecessary and could be confusing.

Comments Received

Additional Criteria, Generally. Commenters generally agreed that only loans with QM product protections should be allowed to season. Some of those commenters objected to the addition of a Seasoned QM definition—with one consumer advocate commenter stating that the additional loan features are not a bulwark against improvident lending—but stated that if the rule is adopted, the additional required characteristics in § 1026.43(e)(7)(i)(A) through (D) should be retained. An industry trade association stated that the product restrictions and continuance of underwriting requirements, along with performance requirements, provide sufficient assurance of ATR compliance. Another industry trade association noted that aligning the product features and underwriting requirements of different kinds of QMs is appropriate and avoids inappropriately incentivizing any particular category of QMs.

Product and Points-and-Fees Restrictions. A few commenters addressed particular aspects of the Seasoned QM criteria that the Bureau proposed to adopt by cross-reference to other QM requirements. Several industry commenters requested that the Bureau clarify that limiting the Seasoned QM definition to loans with terms not exceeding 30 years does not affect a loan's eligibility for Seasoned QM status when the loan is restructured to include a longer repayment period as part of a qualifying change that is entered into during or after a temporary payment accommodation in connection with a disaster or pandemic-related national emergency. One industry commenter recommended that the limit on points and fees be eliminated, while another supported including the limit in the proposal. One industry trade association advocated generally to include only points and fees paid directly by the consumer in the calculation of the 3 percent cap, and another stated that the calculation should exclude fees paid to affiliated service providers. An academic commenter expressed concern that the proposal did not address separate Dodd-Frank Act prepayment penalty restrictions and requested that the Bureau affirm the applicability of those restrictions.

Underwriting Requirements. Several commenters referenced and incorporated the comments they had submitted on the consider and verify requirements in the General QM Proposal and indicated that the requirements in the General QM and Seasoned QM rules should be aligned. Comments on the underwriting requirements generally were consistent between the General QM Proposal and the Seasoned QM Proposal. Commenters widely recognized the importance of the consider and verify requirements in underwriting a QM loan. An industry trade association supported the proposal's avoidance of using the appendix Q methodology for calculating consumer income and debts and commented that underwriting requirements should provide flexibility to allow for innovation. An industry trade association noted a concern that the final language should not inadvertently introduce a reasonableness standard for the DTI ratio through application of the § 1026.43(c)(7) calculation requirement. Some consumer advocate commenters cautioned that lax underwriting requirements, especially if in combination with relaxed product features, would not comply with TILA and would not be consistent with congressional intent. On the other hand, commenters noted that alignment of underwriting requirements and product features among different QM categories would help ensure these requirements do not create an incentive to make one type of QM loan rather than another.

The Final Rule

For the reasons stated below, the Bureau adopts in § 1026.43(e)(7)(i)(B) the proposed prohibited product features and points and fees and underwriting requirements as part of the Seasoned QM definition. In this final rule, however, the Bureau is adopting those additional criteria by direct cross-reference to the provisions in § 1026.43(e)(2)(i) through (v) of the General QM loan definition, rather than by indirectly cross-referencing the same requirements as adopted in § 1026.43(e)(5)(i)(A) and (B) for Small Creditor QMs, as the Bureau had proposed.[137] The General QM Final Rule issued simultaneously with this final rule revises the General QM loan definition. As a result of these changes, the Bureau concludes that referencing the General QM criteria directly in § 1026.43(e)(7)(i)(B) is preferable. The General QM criteria will be widely used by creditors in connection with General QMs, and creditors will be able to apply those criteria consistently in connection with Seasoned QMs.

In addition to applying the previously established criteria, discussed above, that a Seasoned QM be a first-lien covered transaction with a mortgage that has a fixed rate and fully amortizing payments, applying the relevant criteria in § 1026.43(e)(2)(i) through (v) will mean that a covered transaction can qualify as a Seasoned QM only if:

1. The covered transaction provides for regular periodic payments that are substantially equal;
2. There is no negative amortization and no interest-only or balloon payment;
3. The loan term does not exceed 30 years;

[137] The Bureau did not propose to adopt in this final rule any DTI limit, pricing threshold, or similar requirement applicable under § 1026.43(e)(2)(vi) to covered transactions in the General QM loan definition. The Small Creditor QM definition also does not include any such criteria.

4. The total points and fees generally do not exceed 3 percent of the loan amount; and
5. The creditor considers the consumer's DTI ratio or residual income, income or assets other than the value of the dwelling, and debts and verifies the consumer's income or assets other than the value of the dwelling and the consumer's debts.[138]

The Bureau concludes that these additional criteria deriving from the statutory definition of QM best assure that consumers have a reasonable ability to repay their Seasoned QMs. With few exceptions, commenters did not raise issues about whether these criteria should be applied to Seasoned QMs and were supportive of their inclusion. As discussed above, in response to commenter requests the Bureau is revising and adopting comment 43(e)(7)(i)(A)-2 to clarify that § 1026.43(e)(7)(i)(A) does not prohibit a qualifying change that is entered into during or after a temporary payment accommodation in connection with a disaster or pandemic-related national emergency, even if the qualifying change involves a balloon payment or lengthened loan term.

The Bureau declines to remove or adjust the requirement for Seasoned QMs to meet the points-and-fees cap as set out in § 1026.43(e)(2)(iii) of the General QM loan definition. Only one commenter recommended that the points-and-fees cap be eliminated for Seasoned QMs, and the commenter did not provide supporting rationale or data. Changes recommended by a few commenters relate to a calculation methodology for points and fees that is beyond the scope of this rule. The Bureau also declines to revise the proposal to address the statutory prepayment penalty restrictions added separately by the Dodd-Frank Act and codified in § 1026.43(g).[139] Those restrictions continue to apply in accordance with that section and are not affected by the

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[138] In addition, because § 1026.43(e)(7)(i)(B) incorporates the requirements of § 1026.43(e)(2)(iv), the underwriting for the loan must use a payment schedule that fully amortizes the loan over the loan term and takes into account the monthly payment for mortgage-related obligations.

[139] Dodd-Frank Act section 1414, adding TILA section 129C(c), 15 U.S.C. 1639c(c).

addition of a Seasoned QM definition that includes a requirement for a seasoning period of at least 36 months.[140]

By incorporating the requirements of § 1026.43(e)(2)(iv) and (v), this final rule implements the QM definition requirements in TILA section 129C(b)(2)(A)(iii) and (iv). TILA section 129C(b)(2)(A)(iii) includes a requirement for verifying and documenting the income and financial resources relied upon to qualify the obligors on the loan. For a fixed-rate QM, TILA section 129C(b)(2)(A)(iv) requires in part that the underwriting process take into account all applicable taxes, insurance, and assessments. The Bureau also finds that incorporation of the requirements in § 1026.43(e)(2)(v) is authorized by TILA section 129C(b)(2)(A)(vi), which permits, but does not require, the Bureau to adopt guidelines or regulations relating to DTIs or alternative measures of ability to pay regular expenses after payment of total monthly debt.

In the General QM Final Rule issued separately today, the Bureau modifies the requirements for General QMs relating to consideration of the consumer's DTI ratio or residual income, income or assets other than the value of the dwelling, and debts and verification of the consumer's income or assets other than the value of the dwelling and the consumer's debts. The Bureau is adopting those same requirements for Seasoned QMs in this final rule. As such, it should be clear that, in defining Seasoned QMs as a new category of QMs, the Bureau is not substituting performance requirements applicable during a seasoning period for the underwriting requirements applicable at or before consummation. Rather, the Bureau concludes that a sustained period of successful payments, combined with underwriting requirements and product

[140] Pursuant to § 1026.43(g)(1), a covered transaction must not include a prepayment penalty unless: (1) the prepayment penalty is otherwise permitted by law; and (2) the transaction: (A) has an annual percentage rate that cannot increase after consummation; (B) is a qualified mortgage under § 1026.43(e)(2), (4), (5), (6), or (f); and (C) is not a higher-priced mortgage loan, as defined in § 1026.35(a).

restrictions, supports presuming that the creditor complied with ATR requirements at consummation and made loans that warrant QM status. Unlike other QM definitions that confer QM status upon consummation, though, the Seasoned QM definition confers QM status only after the consumer makes on-time payments, with limited exceptions, for at least 36 months.

The Bureau continues to believe that sufficient consideration of a consumer's DTI ratio or residual income, income or assets other than the value of the dwelling, and debts is fundamental to any determination of ability to repay. Neither the General QM Final Rule nor this final rule requires that creditors apply specific DTI ratios or pricing thresholds in their underwriting criteria in order for their loans to be eligible for QM status. Stakeholders are encouraged to review the section-by-section analyses of § 1026.43(e)(2)(v) and (v)(A) and (B) in the General QM Final Rule, as well as the regulatory text and accompanying commentary for those sections, for a more complete discussion of the consider and verify requirements as they are being incorporated in this final rule.

The General QM Final Rule requires a creditor to consider the consumer's DTI ratio or residual income and to consider and verify the debt and income used to calculate DTI or residual income as part of the General QM loan definition. When this final rule and the General QM revisions take effect, creditors will no longer be required to consider and verify this information in accordance with complex rules set out as appendix Q to Regulation Z.[141] Instead, to comply with the revised General QM consider requirements, a creditor is required to take into account

[141] *See* 12 CFR part 1026, appendix Q. The effective date of the General QM Final Rule is 60 days after publication in the *Federal Register*, although creditors will not have to comply with the revised requirements until July 1, 2021. The effective date of this final rule is discussed in part VII below.

income, assets, debt obligations, alimony, child support, and monthly DTI ratio or residual income in its ATR determination.

The revised General QM requirements do not prescribe how a creditor must take these factors into account, but a creditor must maintain written policies and procedures for how it takes into account the factors and retain documentation showing how it took into account the factors for a given loan. The General QM Final Rule also does not impose a particular standard or threshold applicable to the requirement that a creditor calculate and consider DTI or residual income, and it includes commentary to make clear that creditors have flexibility in how they consider income or assets, debt obligations, alimony, child support, and monthly DTI ratio or residual income.[142] With the revisions made by the General QM Final Rule to the General QM loan definition, as adopted in the Seasoned QM definition, for purposes of determining the consumer's monthly DTI or residual income, the consumer's monthly payment on the covered transaction is calculated in accordance with § 1026.43(e)(2)(iv).

Creditors are also required to verify income and debt consistent with the general ATR standard.[143] Creditors will receive a safe harbor for compliance with the verification requirements if they comply with verification standards in manuals specified in the General QM Final Rule, as well as with revised versions of those manuals that are substantially similar.[144] The General QM Final Rule also provides a safe harbor for compliance with the verification standards to creditors that "mix and match" the verification standards in the specified manuals.

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[142] *See* comment 43(e)(2)(v)(A)-2 in the General QM Final Rule.

[143] *I.e.*, consistent with § 1026.43(c)(3) (debt, alimony, and child support) and (4) (income and assets).

[144] The General QM Final Rule provides the verification safe harbor in connection with specified provisions of the GSE, FHA, VA, and USDA underwriting manuals.

The General QM Final Rule discusses that permitting creditors to mix and match standards for verifying income, assets, debt obligations, alimony, and child support from each of the manuals would provide creditors with greater flexibility without undermining consumer protection. Further, in the General QM Final Rule, the Bureau encourages stakeholders, including groups of stakeholders, to develop additional verification standards that it could review for inclusion in the verification safe harbor.

The Bureau's primary objective in providing the new Seasoned QM definition is to increase access to responsible and affordable credit by incentivizing the origination of non-QM loans for which creditworthy consumers have an ability to repay, but that may not otherwise be eligible for QM status for various reasons. The Bureau notes that the proposal included proposed comment 43(e)(7)(i)(B)-1 as a possible clarification that a loan that complies with the consider and verify requirements of any other QM definition also would have complied with the consider and verify requirements in the Seasoned QM definition. In the proposal the Bureau also requested comment on whether the final rule should cross-reference the consider and verify requirements for General QMs on which the General QM Proposal had requested comment. For the reasons discussed above, this final rule adopts the revised General QM consider and verify requirements, which the Bureau expects will facilitate consistent use in connection with Seasoned QMs, so the Bureau is not finalizing proposed comment 43(e)(7)(i)(B)-1.

43(e)(7)(i)(C) and (D)

The Bureau proposed § 1026.43(e)(7)(i)(C) to include in the Seasoned QM criteria that covered transactions would have to meet certain performance requirements set out in detail in § 1026.43(e)(7)(ii). The Bureau proposed § 1026.43(e)(7)(i)(D) to include in the Seasoned QM criteria that covered transactions would also have to meet certain portfolio requirements set out in detail in § 1026.43(e)(7)(iii).

The Bureau adopts § 1026.43(e)(7)(i)(C) and (D) as proposed. The Bureau discusses the final performance requirements and related public comments more fully in the section-by-section analysis of § 1026.43(e)(7)(ii) below. The Bureau discusses the final portfolio requirements and related public comments more fully in the section-by-section analysis of § 1026.43(e)(7)(iii) below.

43(e)(7)(i)(E)

Prior to the enactment of the Dodd-Frank Act, HOEPA amended TILA to add a prohibition against originating a high-cost mortgage without regard to a consumer's repayment ability, as more specifically set out in TILA section 129(h).[145] The Dodd-Frank Act created a new ATR requirement for mortgage loans within TILA, as discussed above, but did not amend the HOEPA ability-to-repay provision relating specifically to high-cost mortgages. Regulation Z currently defines high-cost mortgage[146] and implements the HOEPA ability-to-repay requirement for closed-end high-cost mortgages by providing that a creditor must comply with the ATR/QM Rule's repayment ability requirements set forth in § 1026.43.[147] The proposal did not explicitly address whether Seasoned QM status would extend to high-cost mortgages subject to HOEPA, but the Bureau is adding § 1026.43(e)(7)(i)(E) to clarify that it does not.

[145] 15 U.S.C. 1639(h).

[146] Under 12 CFR 1026.32(a), there are several ways that a loan secured by the consumer's principal dwelling can be a high-cost mortgage subject to HOEPA. One is if the APR exceeds the relevant APOR by a specific amount, which is 6.5 percentage points for most first-lien mortgages. The other ways relate to points and fees and prepayment penalties. 12 CFR 1026.32(a)(1).

[147] 12 CFR 1026.34(a)(4) (exempting temporary or "bridge" loans with terms of twelve months or less from this requirement).

Three consumer advocate commenters noted that the proposal did not explicitly address whether Seasoned QM status would extend to high-cost mortgages subject to HOEPA. These commenters also asserted that the Bureau had not made the necessary case to restrict remedies under HOEPA for violations of HOEPA's ability-to-repay requirement.

The Bureau's purpose in this rulemaking is not to change the ability-to-repay requirement under HOEPA, which governs high-cost mortgages that constitute a very small percentage of the overall mortgage market.[148] Although HOEPA gives the Bureau the authority to make certain exemptions from HOEPA's requirements,[149] the Bureau has not sought to use that authority in this rulemaking. To clarify the scope of the final rule, the Bureau is adding § 1026.43(e)(7)(i)(E), which excludes high-cost mortgages as defined in § 1026.32(a) from the Seasoned QM definition.

43(e)(7)(ii) Performance Requirements

Proposed § 1026.43(e)(7)(ii) set forth the following proposed performance criteria that a covered transaction must meet to be a Seasoned QM under proposed § 1026.43(e)(7): the covered transaction must have no more than two delinquencies of 30 or more days and no delinquencies of 60 or more days at the end of the seasoning period. In the proposal, the Bureau tentatively concluded that the proposed standard for the number and duration of delinquencies would strike the appropriate balance of allowing flexibility for issues unrelated to a consumer's

[148] According to HMDA data, there were only 6,507 HOEPA loans total originated in 2019, and many of those loans would be ineligible for seasoning even if they were not subject to HOEPA due to other features (for example, because they have an adjustable rate or are secured by a subordinate lien). Bureau of Consumer Fin. Prot., *Data Point: 2019 Mortgage Market Activity and Trends* at 55 (June 2020), https://files.consumerfinance.gov/f/documents/cfpb_2019-mortgage-market-activity-trends_report.pdf.

[149] 15 U.S.C. 1639(p)(1) (authorizing the Bureau to make certain exemptions from HOEPA's requirements, if the Bureau finds that the exemption "is in the interest of the borrowing public" and "will apply only to products that maintain and strengthen home ownership and equity protection").

repayment ability while treating payment histories that more clearly signal potential issues with ability to repay as disqualifying. It also noted that the proposed performance standards would be consistent with the GSEs' representation and warranty framework and the master policies of mortgage insurers, which reflect market experience. For the reasons set forth below, the Bureau adopts in the final rule these performance criteria as proposed.

Comments Received

The Bureau received a number of comments on the proposed performance criteria, expressing a variety of views. Among the commenters that supported the proposed performance criteria, several industry commenters and consumer advocate commenters expressed support for how the proposed criteria would be consistent with the GSEs' representation and warranty framework. Another industry commenter agreed with the Bureau's tentative conclusion that the proposed limits on the number of delinquencies during the seasoning period appropriately balanced the need to limit the Seasoned QM safe harbor to loans with strong evidence of a consumers' ability to repay and the practical reality that some brief delinquencies do not indicate the consumer lacks the ability to repay. Additionally, some industry commenters joined several consumer advocate groups to urge the Bureau not to loosen the criteria in a final rule. Further, an industry commenter expressed general support for limiting the seasoning pathway to QM status to loans with three years of performance with minor delinquencies.[150]

[150] This commenter asked the Bureau to clarify that certain delinquencies during the seasoning period are not counted for purposes of the performance criteria if they occur during or immediately preceding periods of forbearance. Several other industry commenters also suggested adjustments to the proposed definitions of delinquency, qualifying change, and temporary payment accommodation extended in connection with a disaster or pandemic-related national emergency. These comments are addressed in the section-by-section analysis of § 1026.43(e)(7)(iv)(A), (B), and (D) below.

With respect to commenters that did not support the criteria as proposed, several industry commenters asked the Bureau to increase the number of permissible 30-day delinquencies. An industry commenter suggested that the Bureau could increase the number of 30-day delinquencies to three or four because the Bureau's own analysis in the proposal showed that such an increase would have modest effects on the number of loans that would season while providing for additional flexibility during the seasoning period. Another industry commenter asserted that increasing the number of permissible 30-day delinquencies to three would benefit consumers whose jobs involve travel and who may miss payments because they have limited access to technology on job-rated travel. Several industry commenters urged the Bureau to increase the number of permissible 30-day delinquencies to three or four, asserting that such increase would accommodate consumers who need additional flexibility due to the COVID-19 pandemic's negative economic impacts. One industry commenter argued that there should be no restriction on the number of delinquencies as long as a consumer cures them before the end of the seasoning period.

On the other hand, two consumer advocate commenters expressed the concern that the proposed performance criteria would not be restrictive enough. They stated that the Bureau should clarify that rolling delinquencies (*i.e.*, certain delinquencies that continue month after month) would not be permitted. They also suggested that the Bureau revise the proposed performance standards to limit permissible late payments to no more than two payments outside of a loan's grace period.

Lastly, an industry commenter suggested that the Bureau undertake additional research to examine the risks of aligning the proposed performance standards with the existing GSE representation and warranty framework. It stated that it believes a careful market analysis must be done to consider empirical evidence of minor and severe delinquencies which later cure and that the Bureau and industry must understand the unintended consequences of potentially altered borrower behavior with a seasoning approach to QMs.

The Final Rule

The Bureau is adopting the performance standards as proposed. Final § 1026.43(e)(7)(ii) is adopted based on the legal authorities discussed in the section-by-section analysis of § 1026.43(e)(7)(i) above.

As explained in the proposal, the Bureau considered the existing practices of the GSEs and mortgage insurers in developing the 36-month period for successful payment history. As described in part V, each GSE generally provides creditors relief from its enforcement with respect to certain representations and warranties a creditor must make to the GSE regarding its underwriting of a loan. The GSEs generally provide creditors that relief after the first 36 monthly payments if the borrower had no more than two 30-day delinquencies and no delinquencies of 60 days or more. Similarly, the master policies of mortgage insurers generally provide that the mortgage insurer will not issue a rescission with respect to certain representations and warranties made by the originating lender if the borrower had no more than two 30-day delinquencies in the 36 months following the borrower's first payment, among other requirements.[151]

The Bureau recognizes that the payment history conditions laid out in the GSEs' representation and warranty framework and the mortgage insurers' master policies reflect market

[151] Fannie Mae, *Amended and Restated GSE Rescission Relief Principles for Implementation of Master Policy Requirement #28 (Rescission Relief/Incontestability)* (Sept. 10, 2018), https://singlefamily.fanniemae.com/media/16331/display.

experience. Consistent with the GSEs' representation and warranty framework and the master policies of mortgage insurers, the final rule provides that more than two delinquencies of 30 days or more during the seasoning period or any delinquency of 60 days or more disqualifies a covered transaction from being a Seasoned QM under § 1026.43(e)(7).[152]

The Bureau concludes that the number and duration of delinquencies set forth in the performance criteria requirement strike the best balance between allowing flexibility for issues unrelated to a consumer's repayment ability (*e.g.*, a missed payment due to vacation or to a mix-up over automatic withdrawals) and treating payment histories that more clearly signal potential issues with ability to repay as disqualifying. The Bureau disagrees with the industry commenter who suggested that there should be no restrictions on the number of delinquencies as long as a consumer cures them before the end of the seasoning period. The Bureau concludes that the ability of consumers to consistently make timely payments in accordance with a mortgage loan's terms is an important indication of the consumer's ability to repay. The Bureau also declines to increase the number of permissible 30-day delinquencies, because it concludes that market experience, as reflected through the GSEs' representation and warranty framework and the master policies of mortgage insurers, strongly suggests that if a loan has more than two 30-day delinquencies in a 36-month period, it may indicate issues related to the underwriting of the loan. For the same reason, the Bureau also declines to adopt delinquency and performance standards that are based on a loan's grace period, as suggested by some consumer advocate commenters.

[152] As discussed in the proposal and in part VIII below, the Bureau considered alternative seasoning periods and alternative performance requirements of allowable 30-day delinquencies. Each of the alternatives permits no 60-day delinquencies. The analysis of alternatives found that varying the number of allowable 30-day delinquencies could have some impact on foreclosure risk, even though the Bureau also found that varying the length of the seasoning period may have a greater impact.

The Bureau has decided to base the definition of delinquency for purposes of § 1026.43(e)(7) on the date that payment becomes due, even if the consumer is afforded a period after the due date to pay before the servicer assesses a late fee.

The Bureau's adoption of the performance criteria as proposed is also informed by its analysis of potential impacts if the number of permissible 30-day delinquencies were increased from two to three or four 30-day delinquencies. As discussed in more detail in part VIII below, the Bureau concluded that in light of the General QM Final Rule, there would be little benefit in terms of access to credit from increasing the number of permissible 30-day delinquencies, while there would be some negative impact in the form of increased foreclosure risk. The Bureau noted that increasing the number of allowable 30-day delinquencies by one increases the relative foreclosure start rate[153] between Seasoned QMs and loans that were safe harbor QM loans at consummation by approximately 4 percent.

Further, with respect to commenters who suggested that the Bureau increase the number of permissible 30-day delinquencies to accommodate consumers who need additional flexibility due to the COVID-19 pandemic's economic impacts, the Bureau concludes that the final rule's exclusion of periods of temporary payment accommodation due to a disaster or pandemic-related national emergency from the seasoning period pursuant to § 1026.43(e)(7)(iv)(C)(*2*) will be sufficient in providing such requested flexibility.[154]

[153] The term "foreclosure start rate" used in this final rule refers to the rate at which mortgage loans first entered into any one of the following: foreclosure proceeding, deed in lieu of foreclosure, foreclosure, voluntary surrender, or repossession, as tracked by the NMDB.

[154] The exclusion of any period during which the consumer is in a temporary payment accommodation extended in connection with a disaster or pandemic-related national emergency from the seasoning period is discussed more fully in the section-by-section analysis of § 1026.43(e)(7)(iv)(C)(*2*).

Lastly, the Bureau notes that the proposal would have not permitted, and the final rule does not permit, rolling delinquencies of 30 days or more. As further discussed in the section-by-section analysis of § 1026.43(e)(7)(iv)(A) below, a periodic payment is 60 days delinquent under this final rule if the consumer is more than 30 days delinquent on the first of two sequential scheduled periodic payments and does not make both sequential scheduled periodic payments before the due date of the next scheduled periodic payment after the two sequential scheduled periodic payments. Under the delinquency definition in § 1026.43(e)(7)(iv)(A) and the performance requirements in § 1026.43(e)(7)(ii), a loan could not season if, for example, a consumer was 30 days or more delinquent on a monthly periodic payment due on January 1 and subsequently failed to make both the periodic payment due on January 1 and the periodic payment due on February 1 before March 1. In this example, if the consumer made the January 1 periodic payment on February 5, but did not make the payment due on February 1 by March 1, the loan would be considered 60 days delinquent as of March 1 and therefore would not be eligible to become a Seasoned QM. Rolling delinquencies of 30 days or more are therefore not permitted under this final rule due to a combination of the definition of delinquency for purposes of the rule and the prohibition on any delinquencies of 60 days or more.

43(e)(7)(iii) Portfolio Requirements

Proposed § 1026.43(e)(7)(iii) set forth certain proposed portfolio requirements for a covered transaction to be a Seasoned QM. It provided that to be a Seasoned QM, the loan must satisfy the following requirements. First, at consummation, the loan must not have been subject to a commitment to be acquired by another person. Second, legal title to the loan could not be sold, assigned, or otherwise transferred to another person before the end of the seasoning period, except in circumstances specified in proposed § 1026.43(e)(7)(iii)(B)(*1*) and (*2*). Proposed

§ 1026.43(e)(7)(iii)(B)(*1*) provided that the loan may be sold, assigned, or otherwise transferred to another person pursuant to a capital restoration plan or other action under 12 U.S.C. 1831o; actions or instructions of any person acting as conservator, receiver, or bankruptcy trustee; an order of a State or Federal government agency with jurisdiction to examine the creditor pursuant to State or Federal law; or an agreement between the creditor and such an agency. Proposed § 1026.43(e)(7)(iii)(B)(*2*) provided that the loan may be sold, assigned, or otherwise transferred pursuant to a merger of the creditor with another person or acquisition of the creditor by another person or of another person by the creditor.

The Bureau also proposed to add comments 43(e)(7)(iii)-1 through -3 to clarify the proposed portfolio requirement. Proposed comment 43(e)(7)(iii)-1 would have explained that a loan is not eligible to season into a QM under proposed § 1026.43(e)(7) if legal title to the debt obligation is sold, assigned, or otherwise transferred to another person before the end of the seasoning period, unless one of the exceptions in proposed § 1026.43(e)(7)(iii)(B) applies. Proposed comment 43(e)(7)(iii)-2 would have clarified the application of proposed § 1026.43(e)(7)(iii) to subsequent transferees. Proposed comment 43(e)(7)(iii)-3 would have explained the impact of supervisory sales. For the reasons discussed below, the Bureau adopts proposed § 1026.43(e)(7)(iii) and comments 43(e)(7)(iii)-1 through -3 with changes that allow a single transfer during the seasoning period provided that certain requirements are met, as discussed below.

Comments Received

Consumer advocate commenters and some industry commenters supported the proposed portfolio requirement and agreed with the Bureau's rationale that the proposed requirement would provide an important incentive for creditors to make diligent ATR determinations at origination. Some consumer advocate commenters supported adopting the proposed portfolio requirement as proposed to mitigate some of the risks they anticipated in a Seasoned QM final rule.

However, various industry commenters and a United States senator opposed the proposed portfolio requirement. They asserted that it would reduce the number of loans eligible to season and, as such, diminish the potential of the final rule to lower mortgage prices and increase market liquidity. They also asserted that the requirement would create an unfair playing field, disadvantaging non-bank lenders that rely on warehouse lending and secondary market sales for liquidity. Several commenters asserted that loan performance is sufficiently probative of a consumer's ability to repay even without a portfolio requirement, and some suggested that the Bureau has not shown why the fact that a loan is held in portfolio is evidence that the consumer had the ability to repay the loan at consummation. Commenters also asserted that other factors would sufficiently ensure responsible lending by creditors, including the following: the proposed product restrictions and underwriting requirements for Seasoned QMs; the interagency credit risk retention rule; due diligence performed by loan aggregators; and originators' concerns about indemnification and reputational risks that result if the loans they sell to third parties fail. One industry commenter asserted that if the final rule is limited to portfolio lenders, non-QM mortgage lending is likely to become dominated by portfolio lenders, which would lead to a system that is less diversified and in which risk is concentrated in certain market segments.

An industry trade association and another industry commenter proposed broadening the portfolio requirement to include a one-time sale by the creditor to a third-party purchaser that then holds the loan for the requisite 36-month seasoning period. They asserted that a whole loan sale model as they described is considerably less risky than a securitization model for several reasons. Specifically, they noted that, as compared to investors in mortgage-backed securities, whole loan purchasers have a more direct relationship with the originator, are better positioned to understand and evaluate a loan's underlying fundamentals, and have strong incentives to be prudent as they own all of the credit risk. One industry commenter also sought to broaden the list of proposed exceptions to the portfolio requirement to permit transfers pursuant to a creditor's default or breach of loan covenants in situations where the loan serves as collateral securing the financing the creditor uses to fund the loan.

Meanwhile, an academic commenter asserted that the proposed portfolio requirement would be substantially weaker than the EGRRCPA's portfolio requirement because the proposal lacked the same resale restrictions that Congress established in the EGRRCPA. Moreover, the commenter asserted that the proposal did not contain evidence to support the Bureau's assertion that the proposed requirement would make creditors underwrite mortgages more carefully. An industry commenter referenced a study by the Board in which researchers found that large lenders were more apt to reduce quality and receive government bailouts in the 2008 financial crisis. This commenter expressed concern that the proposed portfolio requirement may not be sufficient to incentivize large banks to engage in responsible lending because banks that are deemed too-big-to-fail do not face sufficient negative consequences if loans they hold in portfolio fail.

Lastly, several industry commenters expressed concern that mortgage loans that bank creditors pledge as collateral to the Federal Home Loan Banks or the Board may not meet the proposed portfolio requirement and sought clarification or confirmation that such pledged loans are deemed to be held in the bank creditors' portfolios.

The Final Rule

Under the proposal, for a covered transaction to become eligible for Seasoned QM status, the creditor that originates the transaction would have to hold the transaction in its portfolio, unless one of two exceptions, set forth in proposed § 1026.43(e)(7)(iii)(B)(*1*) (transfers of ownership pursuant to certain supervisory sales) or § 1026.43(e)(7)(iii)(B)(*2*) (transfers of ownership pursuant to certain mergers or acquisitions), applied. Proposed § 1026.43(e)(7)(iii)(B)(*1*) and (*2*) are adopted as proposed.

However, the Bureau is adopting in § 1026.43(e)(7)(iii)(B)(*3*) an additional exception, which provides that the covered transaction may be sold, assigned, or otherwise transferred once before the end of the seasoning period, so long as the covered transaction is not securitized as part of the sale, assignment, or transfer or at any other time before the end of the seasoning period. In light of this change, this final rule makes a related change to proposed § 1026.43(e)(7)(iii)(A) to provide that § 1026.43(e)(7)(iii)(B)(*3*) is an exception to the general prohibition against subjecting the covered transaction, at consummation, to a commitment to be acquired by another person to become a Seasoned QM under § 1026.43(e)(7). Conforming changes are also made to proposed comments 43(e)(7)(iii)-1 through -3 in light of the adoption of § 1026.43(e)(7)(iii)(B)(*3*).

The exception in § 1026.43(e)(7)(iii)(B)(*3*) may only be used one time for a covered transaction during the seasoning period. This means that until the end of the seasoning period, a purchaser that acquires the covered transaction pursuant to § 1026.43(e)(7)(iii)(B)(*3*) may not subsequently transfer the covered transaction to any other entity and maintain the covered transaction's eligibility to become a Seasoned QM, except that the purchaser may transfer the covered transaction pursuant to § 1026.43(e)(7)(iii)(B)(*1*) or (*2*). Section

1026.43(e)(7)(iii)(B)(*3*) also provides that the covered transaction may not be securitized as part of a transfer permitted under § 1026.43(e)(7)(iii)(B)(*3*) or at any other time before the end of the seasoning period. For an illustrative example, a covered transaction is considered to be securitized under this final rule if it is transferred to an entity such as a securitization trust, and interests in the trust are held by investors, even if legal title to the covered transaction is retained by the securitization trust.

As noted in the discussion of comments received on the proposed portfolio requirement, two industry commenters suggested the Bureau permit a one-time sale of the covered transaction to another purchaser as long as the owner or purchaser holds the covered transaction in its portfolio for the requisite 36-month seasoning period and does not securitize the covered transaction. The Bureau has concluded that a one-time transfer of a whole loan should not preclude the loan from becoming a Seasoned QM for the following reasons. First, a fundamental goal of creating the Seasoned QM category is to encourage creditors to increase the origination of non-QM loans in a responsible manner. Many creditors, particularly non-banks, rely on borrowed funds to make loans and then sell these loans in order to originate additional new loans. Further, non-banks are particularly active in the non-QM market, with only one depository institution included among the 10 largest non-QM originators.[155] Allowing a one-time transfer as permitted in this final rule broadens the category of responsible, non-QM originations that could benefit from this final rule to include loans made by such creditors and thus furthers the Bureau's goal of increasing such originations. Additionally, the Bureau notes

[155] Inside Mortg. Fin., *Top Originators of Securitized Expanded-Credit Mortgages: 2019-3Q20*, https://www.insidemortgagefinance.com/products/300059-top-originators-of-securitized-expanded-credit-mortgages-2019-3q20-pdf (last visited Nov. 19, 2020). The only depository institution included amongst the 10 largest non-QM originators is JPMorgan Chase.

that non-banks play a key role in expanding access to credit as evidenced by the lower average FICO scores and higher DTIs associated with their loans as compared to depositories.[156]

Second, while allowing a single transfer may mean that the originating creditor has a somewhat weaker incentive to originate affordable loans, relative to the proposal, the Bureau concludes that requiring the purchaser of the covered transaction to hold the transaction in its portfolio until the end of the seasoning period will ensure that the originating creditor and the purchaser together have sufficient incentive to ensure that the originating creditor makes a diligent ATR determination. The whole-loan transfer puts the purchaser in a similar position to the original creditor in the legal and credit exposure the purchaser faces if a consumer defaults on the covered transaction. As such, to the extent that all or part of the seasoning period remains after the transfer, the purchaser will have an incentive to ensure the loan is high quality, which in turn will incentivize the creditor to make a diligent ATR determination at consummation.

One of the industry commenters that suggested the single transfer exception indicated that, as part of the exception, the Bureau could specifically require the purchaser to hold the loan for 36 months after the date of transfer. The type of transfers that § 1026.43(e)(7)(iii)(B)(*3*) permits commonly occur before or around the due date for the first periodic payment. For such transactions, § 1026.43(e)(7)(iii) as finalized requires the purchaser to hold the loan in portfolio for approximately 36 months after the date of transfer, because § 1026.43(e)(7)(iv)(C) provides that the seasoning period does not end until at least 36 months after the due date for the first periodic payment. Additionally, as the proposal explained, given the increasing likelihood that intervening events contribute to delinquencies, the Bureau generally does not view delinquency

[156] Urban Inst., *Housing Finance at a Glance*, at 17-18, (Oct. 2020), https://www.urban.org/sites/default/files/publication/103123/october-chartbook-2020_2.pdf.

after 36 months in the lifecycle of a loan product as undermining the presumption of creditor compliance with the ATR requirements at consummation. In light of these considerations, and the incentives discussed above that the initial 36-month seasoning period creates for the originating creditor and the purchaser, the Bureau has determined it is unnecessary to extend or reset the seasoning period for loans transferred after the first payment date pursuant to § 1026.43(e)(7)(iii)(B)(*3*) to include a period of 36 months beginning on the date of the transfer.

The Bureau concludes that it is appropriate to exclude loans that are securitized because it recognizes whole loan purchasers will likely have a more direct relationship with the originator than investors in mortgage-backed securities and may therefore have more visibility into the seller's underwriting process and be better positioned to use remedies to make the originating creditor buy back the loan if the loan performs poorly or is otherwise defective. The Bureau believes that a whole loan purchaser's incentive remains regardless of whether there is a mandatory commitment between the seller and purchaser to deliver a mortgage loan at a predetermined price by a specified date. Even in the case of mandatory commitments, the seller has an obligation to deliver the loan in accordance with the investor requirements and in compliance with applicable State and Federal requirements. The Bureau acknowledges that purchasers are often incentivized to preserve their business relationship by attempting to cure loan defects without requiring the seller to repurchase the loan. However, in the event of a material and uncurable defect, purchasers can and do exercise remedies requiring the seller to repurchase the loan, rather than assume the liability of a non-compliant loan or retain a defective loan in portfolio that they anticipate will perform worse than expected.

The Bureau declines to adopt a final rule without any portfolio requirement, as a number of industry commenters urged the Bureau to do. As discussed in greater detail in the section-by-section analysis of § 1026.43(e)(7)(i) above, the final rule does not impose a DTI limit or a pricing limit on loans that are eligible to become Seasoned QMs. In this respect, the Seasoned QM definition is similar to some other QM definitions such as the Small Creditor QM definition. While covered transactions are subject to certain product restrictions, limitations on points and fees, and underwriting requirements, in the absence of a specific DTI or pricing limit applicable at consummation, the Bureau has decided to impose a portfolio requirement to help ensure the creditor makes a reasonable determination that the loan is within the consumer's ability to repay. As discussed above, it is conceivable that under certain circumstances, the record of a consumer's payments could make it appear that the consumer had the ability to repay at consummation even when that is not in fact the case. Other provisions of this final rule attempt to reduce that possibility (such as by providing that payments made by a servicer or from a consumer's escrowed funds are not considered as on-time payments), but the Bureau has decided to provide further assurance that the creditor's ATR determination at consummation was a diligent and reasonable one by including a portfolio requirement.

Further, although the Bureau recognizes that the interagency credit risk retention rule[157] provides an indirect incentive to originate responsible and affordable loans for sale and

[157] The QM definition is related to the definition of qualified residential mortgage (QRM). Section 15G of the Securities Exchange Act of 1934, added by section 941(b) of the Dodd-Frank Act, generally requires the securitizer of asset-backed securities (ABS) to retain not less than 5 percent of the credit risk of the assets collateralizing the ABS. 15 U.S.C. 78o-11. Six Federal agencies (not including the Bureau) are tasked with implementing this requirement. Those agencies are the Board, the OCC, the FDIC, the Securities and Exchange Commission, the FHFA, and HUD (collectively, the QRM agencies). Section 15G of the Securities Exchange Act of 1934 provides that the credit risk retention requirements shall not apply to an issuance of ABS if all of the assets that collateralize the ABS are QRMs. *See* 15 U.S.C. 78o-11(c)(1)(C)(iii), (4)(A) and (B). Section 15G requires the QRM agencies to jointly define what constitutes a QRM, taking into consideration underwriting and product features that historical loan performance data indicate result in a lower risk of default. *See* 15 U.S.C. 78o-11(e)(4). Section 15G also provides that the definition of a QRM shall be "no broader than" the definition of a qualified mortgage, as the term is defined under TILA section 129C(b)(2), as amended by the Dodd-Frank Act, and regulations adopted thereunder. 15 U.S.C. 78o-11(e)(4)(C). In 2014, the QRM agencies issued a final rule adopting the risk retention requirements.

securitization in the secondary markets, the Bureau concludes that limiting the Seasoned QM definition to loans that are held in portfolio by the originating creditor or first purchaser will provide stronger incentives to originate responsible and affordable loans.

Moreover, while not necessary for the Bureau's conclusion to retain a portfolio requirement, that conclusion is consistent with the Bureau's analysis of the foreclosure start rates of mortgage loans originated between 2003 and 2015 that were designated to be held in portfolio at origination and mortgage loans originated during the same time period that were designated for private-label securitization. The loans the Bureau evaluated had fixed interest rates, were first-lien transactions, were not high-cost mortgages subject to HOEPA, and did not have any features that disqualified them from being QMs. The results are shown in Figure 1 below.

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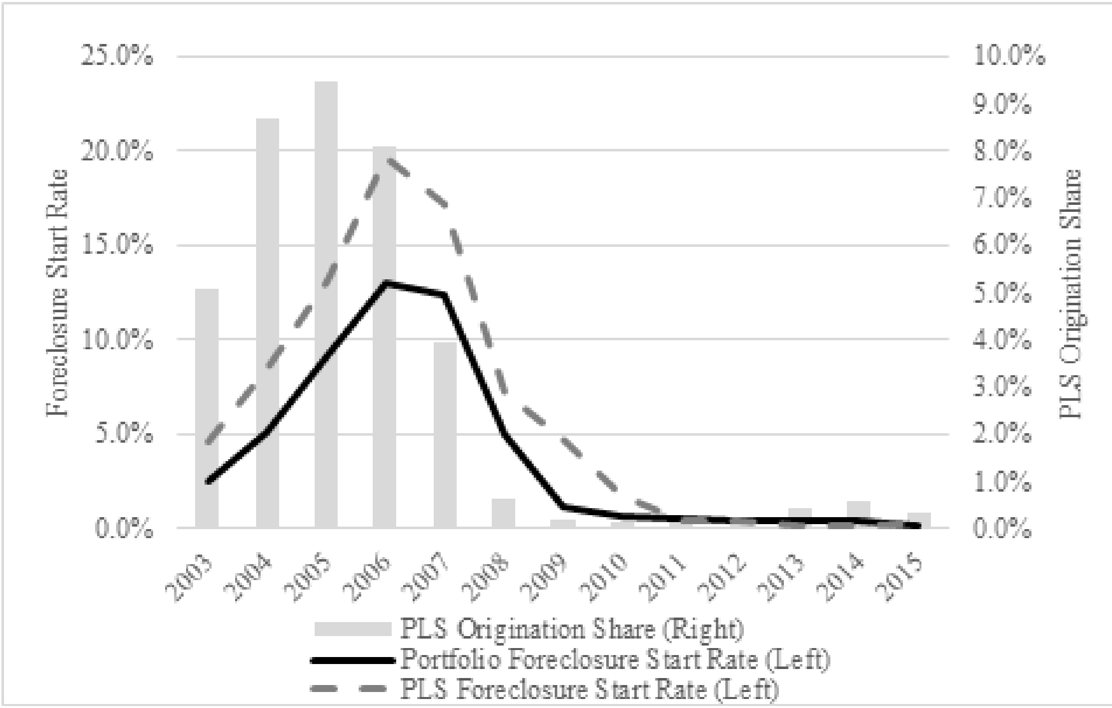
79 FR 77601 (Dec. 24, 2014). The final rule aligns the QRM definition with the QM definition defined by the Bureau in the ATR/QM Rule, effectively exempting securities comprised of loans that meet the QM definition from the risk retention requirement. The final rule also requires the agencies to review the definition of QRM no later than four years after the effective date of the final risk retention rules. In 2019, the QRM agencies initiated a review of certain provisions of the risk retention rule, including the QRM definition, and have extended the review period until June 20, 2021. 84 FR 70073 (Dec. 20, 2019). Among other things, the review allows the QRM agencies to consider the QRM definition in light of any changes to the QM definition adopted by the Bureau.

Figure 1: Foreclosure Start Rates of Portfolio and PLS Loans by Vintage



Source: NMDB 10.0. Loans with restricted features or high-cost mortgages subject to HOEPA are excluded from computation of foreclosure rates and market share. PLS loans are classified as such if they are ever placed in a private label security, which usually occurs soon after consummation. Portfolio loans are privately held loans that were not sold to a PLS.

Figure 1 shows that loans designated to be held in portfolio at origination consistently foreclosed at lower rates for eight of the 13 years that made up the period of time that the Bureau evaluated, from 2003 through 2010. Although the foreclosure start rates in the years 2011 through 2015 of loans designated to be held in portfolio and loans designated for private-label securitization appear to be similar, the number of such securitized loans during those years is too small to be informative.[158] These data further support the Bureau's determination that creditors are more likely to do diligent ATR determinations when loans are held in portfolio rather than securitized.

The Bureau also declines to create an additional exception in § 1026.43(e)(7)(iii) to permit transfers pursuant to a creditor's default or breach of loan covenants in situations in which the loan serves as collateral securing the financing the creditor uses to fund the loan, as one industry commenter requested. Such transfers may fall within the single-transfer exception in § 1026.43(e)(7)(iii)(B)(*3*) if the requirements for that exception are met, and the Bureau concludes an additional exception for circumstances involving default or breach of loan covenants is not warranted.

Lastly, the Bureau has decided that no change to the proposal is required to address whether loans pledged as collateral to the Federal Home Loan Banks or the Board are deemed to be held in the bank creditors' portfolios for purposes of the Seasoned QM portfolio requirement. Whether a given covered transaction meets the portfolio requirement depends generally on (1) whether the transaction is subject, at consummation, to a commitment to be acquired by

[158] The numbers of loans designated for private-label securitization from 2011 through 2015 that met the criteria described above (*i.e.*, non-HOEPA, first-lien, fixed-rate loans that did not have features that would make them ineligible to be QMs) were as follows: 9,700, 17,500, 25,720, 22,900, and 16,800. In contrast, the numbers of loans designated to be held in portfolio during those years and that met the same criteria were between 1.4 and 2.2 million.

another person and (2) whether legal title is sold, assigned, or otherwise transferred to another person before the end of the seasoning period, outside of the specified exceptions. This general test is modeled on the test set forth in the Small Creditor QM and Balloon Payment QM definitions, and, as explained above, the Bureau has also added a single-transfer exception to the Seasoned QM portfolio requirement if the standards articulated above are met. If loans pledged to the Federal Home Loan Banks or the Board comply with the general test or comply with any of the three specified exceptions set forth in § 1026.43(e)(7)(iii)(B), then they are considered to be held in portfolio until the end of the seasoning period pursuant to § 1026.43(e)(7)(iii).

43(e)(7)(iv) Definitions

The Bureau proposed to adopt several definitions for purposes of proposed § 1026.43(e)(7). The Bureau solicited comments on all of its proposed definitions. The Bureau addresses each of the proposed definitions in turn below.

Paragraph 43(e)(7)(iv)(A)

As explained above, § 1026.43(e)(7)(i)(C) and (ii) as finalized provides that only covered transactions that have no more than two delinquencies of 30 or more days and no delinquencies of 60 or more days at the end of the seasoning period can become Seasoned QMs. Proposed § 1026.43(e)(7)(iv)(A) would have defined delinquency as the failure to make a periodic payment (in one full payment or in two or more partial payments) sufficient to cover principal, interest, and, if applicable, escrow by the date the periodic payment is due under the terms of the legal obligation. The proposed definition in § 1026.43(e)(7)(iv)(A) would have excluded other amounts, such as late fees, from the definition. Proposed § 1026.43(e)(7)(iv)(A)(*1*) through (*5*) would have addressed additional, specific aspects of the definition of delinquency, which are discussed in the section-by-section analyses that follow. Proposed comment 43(e)(7)(iv)(A)-1 would have clarified that, in determining whether a scheduled periodic payment is delinquent for purposes of proposed § 1026.43(e)(7), the due date is the date the payment is due under the terms of the legal obligation, without regard to whether the consumer is afforded a period after the due date to pay before the servicer assesses a late fee.

Industry commenters generally supported proposed § 1026.43(e)(7)(iv)(A), while consumer advocate commenters opposed the Seasoned QM Proposal as a whole. Both industry and consumer advocate commenters raised concerns about specific aspects of the definition that are discussed in the section-in-section analyses of § 1026.43(e)(7)(iv)(A)(*1*), (*2*), and (*4*) below. The Bureau did not receive comments on proposed comment 43(e)(7)(iv)(A)-1.

The Bureau concludes that the definition of delinquency in § 1026.43(e)(7)(iv)(A) provides a clear method of assessing delinquency for purposes of § 1026.43(e)(7). Accordingly, the Bureau is finalizing § 1026.43(e)(7)(iv)(A) and comment 43(e)(7)(iv)(A)-1 as proposed, with minor technical changes and one modification to § 1026.43(e)(7)(iv)(A)(*4*) as discussed below.

*Paragraphs 43(e)(7)(iv)(A)(*1*) and (*2*)*

Proposed § 1026.43(e)(7)(iv)(A)(*1*) and (*2*) specified when periodic payments are 30 days delinquent and 60 days delinquent, respectively, for purposes of proposed § 1026.43(e)(7)(iv). Proposed § 1026.43(e)(7)(iv)(A)(*1*) provided that a periodic payment would be 30 days delinquent if it is not paid before the due date of the following scheduled periodic payment. Proposed § 1026.43(e)(7)(iv)(A)(*2*) provided that a periodic payment would be 60 days delinquent if the consumer is more than 30 days delinquent on the first of two sequential scheduled periodic payments and does not make both sequential scheduled periodic payments before the due date of the next scheduled periodic payment after the two sequential scheduled periodic payments. Proposed comment 43(e)(7)(iv)(A)(*2*)-1 provided an illustrative example of the meaning of 60 days delinquent for purposes of proposed § 1026.43(e)(7).

The Bureau received a few comments that related to proposed § 1026.43(e)(7)(iv)(A)(*1*) and (*2*). An industry commenter noted that the proposed definition of delinquency refers to 30 and 60-day delinquency periods and asked the Bureau to modify proposed § 1026.43(e)(7)(iv)(A) to account for non-monthly payments schedules (*e.g.*, bi-weekly or quarterly payment schedules). Two consumer advocate commenters stated that the Bureau should provide clarifying commentary to address rolling delinquencies. They explained that it is very common for struggling homeowners to have rolling delinquencies, paying somewhat late month after month, but never bringing the loan current. These commenters indicated that borrowers who pay 29 or 30 days late every month maintain a persistent delinquency, showing clear signs of financial distress, and not demonstrating an ability to repay.

The Bureau concludes that the approach set forth in proposed § 1026.43(e)(7)(iv)(A)(*1*) and (*2*) and proposed comment 43(e)(7)(iv)(A)(*2*)-1 provide appropriate standards for determining whether a periodic payment is 30 or 60 days delinquent that would be relatively easy to apply. The Bureau also finds that proposed § 1026.43(e)(7)(iv)(A) is flexible enough to account for non-monthly payment schedules and therefore declines to provide additional flexibilities to account for non-monthly payment schedules. Proposed § 1026.43(e)(7)(iv)(A)(*1*) and (*2*) define 30 days delinquent and 60 days delinquent based on whether payments are made before the next periodic payment due date. Thus, under the proposed § 1026.43(e)(7)(iv)(A)(*1*), a bi-weekly or quarterly periodic payment would be 30 days delinquent when the periodic payment is not paid before the due date of the following bi-weekly or quarterly payment. Similarly, under proposed § 1026.43(e)(7)(iv)(A)(*2*), a bi-weekly or quarterly periodic payment would be 60 days delinquent if the consumer is more than 30 days delinquent, as defined under proposed § 1026.43(e)(7)(iv)(A)(*1*), on the first of two sequential scheduled periodic payments and does not make both sequential scheduled periodic payments before the due date of the next scheduled periodic payment after the two sequential scheduled periodic payments. The Bureau also does not believe any change is necessary to address rolling delinquencies because the performance standards in § 1026.43(e)(7)(ii) and the definition of 60 days delinquent in § 1026.43(e)(7)(iv)(A)(*2*) already capture rolling delinquencies, as discussed in the section-by-section analysis of § 1026.43(e)(7)(ii) above. Comment 43(e)(7)(iv)(A)(*2*)-1 illustrates the meaning of 60 days delinquent for purposes of § 1026.43(e)(7) by providing an example. The Bureau is adopting § 1026.43(e)(7)(iv)(A)(*1*) and (*2*) and comment 43(e)(7)(iv)(A)(*2*)-1 as proposed, with minor technical changes in the comment.

*Paragraph 43(e)(7)(iv)(A)(*3)

As the Bureau noted in the proposal, some servicers elect or may be required to treat consumers as having made a timely payment even if the payment is a small amount less than the full periodic payment. For purposes of proposed § 1026.43(e)(7), proposed § 1026.43(e)(7)(iv)(A)(*3*) provided that for any given billing cycle for which a consumer's payment is less than the periodic payment due, a consumer is not delinquent if: (1) the servicer chooses not to treat the payment as delinquent for purposes of any section of subpart C of Regulation X, 12 CFR part 1024, if applicable, (2) the payment is deficient by $50 or less, and (3) there are no more than three such deficient payments treated as not delinquent during the seasoning period. The Bureau did not receive any comments on proposed § 1026.43(e)(iv)(A)(*3*) and, for the reasons explained below, is now finalizing § 1026.43(e)(iv)(A)(*3*) as proposed.

The Bureau concludes that the approach to small periodic payment deficiencies in § 1026.43(e)(iv)(A)(*3*) will result in less burden for financial institutions seeking to avail themselves of the Seasoned QM definition, in the event that their servicing systems and practices already make allowances for treating a payment as not delinquent when the payment is deficient by a small amount. For example, a servicer may have systems in place to accept minimally deficient payments and not count them as delinquent for purposes of calculating delinquency under subpart C of Regulation X, 12 CFR part 1024. Further, the Bureau is concerned that, absent § 1026.43(e)(7)(iv)(A)(*3*), creditors might find it very unlikely that many of their loans would fully meet the requirements to be a Seasoned QM, undermining the rule's objectives.

Required periodic payments for covered transactions can vary over time as tax and insurance amounts change. For example, a consumer could overlook an annual escrow statement reflecting an escrow payment increase and pay the previously required amount instead of the new amount. The Bureau believes that small deficiencies in a limited amount of periodic payments often do not mean that the consumer was unable to repay the loan at the time of consummation.

The Bureau has decided, however, that unless limits are imposed, servicers and creditors could use payment tolerances to mask unaffordability in a way that might undermine the purposes of this final rule. The Bureau understands that Fannie Mae and Freddie Mac servicing guidance allows servicers to apply periodic payments that are short by $50 or less.[159] Fannie Mae limits the usage of the payment tolerance to three monthly payments during a 12-month

[159] Fannie Mae, *Servicing Guide* 218-19 (July 15, 2020), https://singlefamily.fanniemae.com/media/23346/display (July 2020 Servicing Guide); Freddie Mac, *Seller/Servicer Guide* at 8103-3 (Aug. 5, 2020), https://guide.freddiemac.com/ci/okcsFattach/get/1002095_2.

period,[160] while the National Mortgage Settlement generally required acceptance of at least two periodic payments that were short by $50 or less.[161] In light of these practices and the considerations discussed above, the Bureau is adopting a cap of no more than three periodic payment deficiencies of $50 or less during the seasoning period to ensure that use of payment tolerances does not mask unaffordability. The Bureau concludes that allowing up to three payments deficient by $50 or less over the course of the seasoning period provides appropriate flexibility for small deficiencies such as those related to variations in tax and insurance amounts.[162]

*Paragraph 43(e)(7)(iv)(A)(*4*)*

Proposed § 1026.43(e)(7)(iv)(A)(*4*) provided that unless a qualifying change is made to the loan obligation, the principal and interest used in determining the date a periodic payment sufficient to cover principal, interest, and, if applicable, escrow becomes due and unpaid are the principal and interest payment amounts established by the terms and payment schedule of the loan obligation at consummation. Proposed § 1026.43(e)(7)(iv)(A)(*4*) focused on the principal and interest payment amounts established by the terms and payment schedule of the loan obligation at consummation because the performance requirements in proposed § 1026.43(e)(7)(ii) were designed to assess whether the creditor made a reasonable and good faith determination of the consumer's ability to repay at the time of consummation.[163]

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[160] July 2020 Servicing Guide, *supra* note 159, at 218-19.

[161] *See, e.g.*, *United States* v. *Bank of Am. Corp.*, No. 1:12-cv-00361-RMC, 2012 U.S. Dist. LEXIS 188892, at *32 (D.D.C. Apr. 4, 2012).

[162] The Bureau also notes that a deficient periodic payment does not trigger a delinquency of 30 days or more under § 1026.43(e)(7)(iv)(A)(*1*) if the consumer pays the deficient amount before the next periodic payment comes due.

[163] The Bureau is not requiring that the escrow amount (if applicable) be considered in determining whether a delinquency exists for purposes of § 1026.43(e)(7) be the amount disclosed to the consumer at consummation, because escrow payments are subject to changes over time.

The Bureau concludes that using a principal and interest amount that has been modified or adjusted after consummation would not provide a basis for presuming that the creditor made such a determination. For example, if a consumer has a modified payment that is much lower than the original contractual payment amount, the consumer might be able to make the modified payments even though the contractual terms at consummation were not affordable.

The Bureau recognizes, however, that certain unusual circumstances involving disasters or pandemic-related national emergencies warrant using a principal and interest amount that has been modified or adjusted after consummation. Accordingly, the Bureau proposed that if a qualifying change as defined in proposed § 1026.43(e)(7)(iv)(B) is made to the loan obligation, the principal and interest used in determining the date a periodic payment sufficient to cover principal, interest, and, if applicable, escrow becomes due and unpaid would be the principal and interest payment amounts established by the terms and payment schedule of the loan obligation at consummation as modified by the qualifying change. The Bureau is finalizing § 1026.43(e)(7)(iv)(A)(*4*) with one modification as explained below and minor technical changes.

Although the Bureau did not receive many comments relating to proposed § 1026.43(e)(7)(iv)(A)(*4*), one industry commenter cautioned that proposed § 1026.43(e)(7)(iv)(A)(*4*) was not flexible enough to apply to a small subset of loans the Bureau intended to cover within the scope of the proposal. Specifically, an industry trade association pointed out that proposed § 1026.43(e)(7)(iv)(A)(*4*), which relies on the first payment due date in the legal obligation at consummation to determine when a loan could be first delinquent, would not account for changes in the first payment due date typically associated with the delivery of new manufactured housing. This commenter also noted that proposed § 1026.43(e)(7)(iv)(A) would not account for courtesy due date changes extended by creditors, such as from the 1st to the 5th of the month for a borrower who receives Social Security benefits on the 3rd of the month.

After considering the comments received, the Bureau is finalizing § 1026.43(e)(7)(iv)(A)(*4*) with minor technical changes and one modification as described below to address the commenter's concern that creditors making loans for the purchase of new manufactured homes often estimate the first payment due date in the legal obligation signed at consummation. These dates may be uncertain at consummation due to potential delays involved with the delivery, set up, and availability for occupancy of the dwelling that secures the loan. The Bureau understands that, in these circumstances, creditors may modify the first payment date after consummation when those dates become clear so that the first payment date is not due until after the consumer occupies the home. Proposed § 1026.43(e)(7)(iv)(A)(*4*) required delinquency to be calculated based on the first payment due date established by the terms and payment schedule of the loan obligation at consummation. Thus, a loan to purchase a new manufactured home might be considered delinquent under proposed § 1026.43(e)(7)(iv)(A)(*4*), even though the consumer has not missed a payment under the terms of a modified agreement.

A primary objective of the proposal was to ensure the availability of responsible and affordable credit by incentivizing the origination of non-QM loans that otherwise might not be made. In the proposal, the Bureau noted that half of manufactured housing originations are rebuttable presumption QM loans, and that large banks tend to originate only safe harbor QM loans that are held in portfolio. The Bureau concludes that modifying proposed § 1026.43(e)(7)(iv)(A)(*4*) to allow creditors to modify the first payment due date in certain limited circumstances furthers the objective of the proposal. Accordingly, if, due to reasons related to the timing of delivery, set up, or availability for occupancy of the dwelling securing the obligation, the creditor modifies the first payment due date before the first payment due date under the legal obligation at consummation, the modified first payment due date, rather than the first payment due date under the legal obligation at consummation, is used in determining whether a periodic payment is delinquent.

The Bureau declines to make any changes to proposed § 1026.43(e)(7)(iv)(A)(*4*) to accommodate courtesy due date changes extended by creditors. As stated in the section-by-section analysis of § 1026.43(e)(7)(ii), a loan that seasons into QM status may not have more than two delinquencies of 30 or more days or any delinquencies of 60 or more days at the end of the seasoning period. The Bureau concludes that this performance standard already provides sufficient flexibility to accommodate courtesy shifts to a different date within a month (such as from the 1st to the 5th of the month), because delinquencies of less than 30 days do not affect whether a loan can season under § 1026.43(e)(7)(ii).

Paragraph 43(e)(7)(iv)(A)(5)

Proposed § 1026.43(e)(7)(iv)(A)(*5*) addressed how to handle payments made from certain third-party sources in assessing delinquency for purposes of proposed § 1026.43(e)(7). Specifically, proposed § 1026.43(e)(7)(iv)(A)(*5*) provided that, except for making up the deficiency amount set forth in proposed § 1026.43(e)(7)(iv)(A)(*3*)(*ii*), payments from the following sources would not be considered in assessing delinquency under proposed § 1026.43(e)(7)(iv)(A): (1) funds in escrow in connection with the covered transaction, or (2) funds paid on behalf of the consumer by the creditor, servicer, or assignee of the covered transaction, or any other person acting on behalf of such creditor, servicer, or assignee.

In the proposal, the Bureau tentatively concluded that proposed § 1026.43(e)(7)(iv)(A)(*5*) would help to ensure that payments made by consumers during the seasoning period actually reflect the consumer's ability to repay. The Bureau further noted similarities between the proposed provision and the GSEs' representation and warranty framework. As discussed below, the Bureau is adopting § 1026.43(e)(7)(iv)(A)(*5*) as proposed in this final rule.

Comments Received

The Bureau received two comments on this aspect of the proposal from industry commenters. One commenter agreed with the Bureau's rationale for the proposed requirement. The other commenter stated that the proposed provision adequately addressed its suggestion in response to the ANPR that the Bureau impose a requirement that mortgage payments come from consumers' own funds.

The Final Rule

The Bureau is finalizing § 1026.43(e)(7)(iv)(A)(*5*) as proposed because it concludes that § 1026.43(e)(7)(iv)(A)(*5*) helps to ensure that the performance history considered in assessing delinquency for purposes of § 1026.43(e)(7) reflects the consumer's ability to repay rather than payments made by the creditor, servicer, or assignee or persons acting on their behalf that could mask a consumer's inability to repay. As the Bureau explained in the proposal, the GSEs' representation and warranty framework generally prohibits lenders and third parties with a financial interest in the performance of a loan escrowing or advancing funds on a borrower's behalf to be used to make principal and interest payments to satisfy the framework's payment history requirement.[164] Similar to the GSEs' representation and warranty framework, the Bureau concludes that payments made from escrow accounts established in connection with the loan should not be considered in assessing performance for seasoning purposes because a creditor could escrow funds from the loan proceeds to cover payments during the seasoning period even if the loan payments were not actually affordable for the consumer on an ongoing basis. If a creditor needs to take funds from an escrow account to cover a periodic payment that is due on the account, the Bureau does not believe that the payment from escrow indicates the consumer is able to make the periodic payment.

Accordingly, pursuant to § 1026.43(e)(7)(iv)(A)(*5*), any payment received from one of the identified sources is not considered in assessing delinquency, except for making up the deficiency amount set forth in proposed § 1026.43(e)(7)(iv)(A)(*3*)(*ii*). Thus, for example, if a creditor or servicer advances $800 to cover a specific periodic payment on the consumer's behalf, it is treated as if the advanced $800 were not paid for purposes of assessing whether that periodic payment is delinquent under proposed § 1026.43(e)(7). However, § 1026.43(e)(7)(iv)(A)(*5*) does not prohibit creditors from making up a deficiency amount as part of a payment tolerance of $50 or less under the circumstances set forth in § 1026.43(e)(7)(iv)(A)(*3*)(*ii*).

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[164] For example, in addition to imposing conditions around the number and duration of delinquencies, Fannie Mae's lender selling representation and warranty framework provides that:

> With the exception of mortgage loans with temporary buydowns, neither the lender nor a third party with a financial interest in the performance of the loan . . . can escrow or advance funds on behalf of the borrower to be used for payment of any principal or interest payable under the terms of the mortgage loan for the purpose of satisfying the payment history requirement.

Fannie Mae, *Selling Guide* at 56 (Aug. 5, 2020), https://singlefamily.fanniemae.com/media/23641/display (*Selling Guide*).

Paragraph 43(e)(7)(iv)(B)

Proposed § 1026.43(e)(7)(iv)(C)(*2*) provided that the seasoning period does not include certain periods during which the consumer is in a temporary payment accommodation extended in connection with a disaster or pandemic-related national emergency, provided that during or at the end of the temporary payment accommodation there is a qualifying change or the consumer cures the loan's delinquency under its original terms. Proposed § 1026.43(e)(7)(iv)(C)(*2*) provided that, under those circumstances, the seasoning period consists of the period before the accommodation begins and an additional period immediately after the accommodation ends, which together must equal at least 36 months. Proposed § 1026.43(e)(7)(iv)(B) defined a qualifying change as an agreement that meets the following conditions: (1) the agreement is entered into during or after a temporary payment accommodation in connection with a disaster or pandemic-related national emergency as defined in § 1026.43(e)(7)(iv)(D), and must end any pre-existing delinquency on the loan obligation when the agreement takes effect; (2) the amount of interest charged over the full term of the loan does not increase as a result of the agreement; (3) the servicer does not charge any fee in connection with the agreement; and (4) the servicer waives all existing late charges, penalties, stop payment fees, or similar charges promptly upon the consumer's acceptance of the agreement. The Bureau is finalizing § 1026.43(e)(7)(iv)(B) largely as proposed, with modifications to the fees and charges that must be waived pursuant to § 1026.43(e)(7)(iv)(B)(*3*) and additional commentary to clarify that an agreement can be a qualifying change even if it is not in writing and that the inclusion of a balloon payment or lengthened loan term as part of a qualifying change does not disqualify a loan from seasoning. The Bureau is also making minor technical revisions to § 1026.43(e)(7)(iv)(B).

Many commenters supported the proposal's approach of restarting the seasoning period if the loan undergoes a qualifying change. Some industry commenters suggested modifying proposed § 1026.43(e)(7)(iv)(B)(*4*) so that an agreement can meet the definition of a qualifying change even if the servicer does not waive charges, penalties, and fees that were incurred prior to a delinquency caused by a disaster or pandemic-related national emergency. Some industry commenters asked that the Bureau clarify whether an agreement needs to be in writing in order to constitute a qualifying change. Some industry commenters also suggested that the Bureau clarify whether the inclusion of a balloon payment or an extension of the loan term beyond 30 years as part of a qualifying change would disqualify the loan from seasoning. Lastly, one industry commenter urged the Bureau to modify § 1026.43(e)(7)(iv)(B)(*2*) to allow for the amount of interest charged over the full term of the loan to increase in certain circumstances, such as when certain amounts are capitalized into a new loan balance.

The Bureau understands that a variety of options may be available to bring current a loan that is subject to a temporary payment accommodation extended in connection with a disaster or pandemic-related national emergency. These options include, but are not limited to, curing the delinquency according to the terms of the original obligation, entering into a repayment plan, or entering into a permanent modification. In determining how to define a qualifying change, the Bureau seeks to establish standards that will reasonably ensure that any changes in the terms of a loan re-entering the seasoning period after a temporary payment accommodation extended in connection with a disaster or pandemic-related national emergency will not significantly change the affordability of the loan as compared to the loan terms at consummation. Accordingly, the Bureau concludes that such a qualifying change must end any pre-existing delinquency, must not add to the amount of interest charged over the full term of the loan, and must not involve an additional fee charged to the consumer in connection with the change.

Section 1026.43(e)(7)(iv)(B) references an agreement that must meet specific conditions in order to meet the definition of a qualifying change. Some commenters expressed concern that the term agreement could be interpreted to mean that a qualifying change is required to be in writing. Section 1026.43(e)(7)(iv)(B) does not require that an agreement be in writing in order for it to meet the definition of a qualifying change. The Bureau is adding comment 43(e)(7)(iv)(B)-1 to clarify that an agreement that meets the conditions specified in § 1026.43(e)(7)(iv)(B) is a qualifying change even if it is not in writing.

Some commenters expressed concern that the inclusion of a balloon payment or lengthened loan term as part of a qualifying change may disqualify a loan from seasoning due to the product restrictions listed in proposed § 1026.43(e)(7)(i)(A). Proposed comment 43(e)(7)(i)(A)-2 explained that proposed § 1026.43(e)(7)(i)(A) would not prohibit a qualifying change as defined in § 1026.43(e)(7)(iv)(B). In response to commenter concerns, the Bureau is adding additional language to comment 43(e)(7)(i)(A)-2 to clarify more specifically that § 1026.43(e)(7)(i)(A) does not disqualify a loan from seasoning eligibility if the loan undergoes a qualifying change as defined in § 1026.43(e)(7)(iv)(B), even if such a qualifying change involves a balloon payment or lengthened loan term. Although one commenter suggested that the Bureau address the applicability of certain loss mitigation protections under Regulation X in this final rule, the Bureau concludes it is not necessary to do so. Section 1026.43(e)(7)(iv)(B) defines qualifying change solely for purposes of the Seasoned QM definition in the ATR/QM Rule and does not affect other requirements, such as those in Regulation X, that may affect the servicing of a loan.

One commenter suggested that the Bureau should allow an agreement to meet the definition of a qualifying change even if the agreement allows for the capitalization of delinquent amounts and thereby causes the amount of interest charged over the full loan term to increase. As stated in the proposal, in establishing standards for a qualifying change, the Bureau sought to reasonably ensure that any such change would not significantly change the affordability of the loan as compared to the loan terms at consummation. Proposed § 1026.43(e)(7)(iv)(B)(*2*) would have required that, to meet the definition of a qualifying change, the amount of interest charged over the full term of the loan could not increase as a result of the agreement. The Bureau concludes that capitalization which leads to an increase in the total amount of interest charged as compared to the loan terms at consummation would make loans less affordable, such that the loans should not be eligible for seasoning. The Bureau is therefore adopting § 1026.43(e)(7)(iv)(B)(*2*) as proposed.

Proposed § 1026.43(e)(7)(iv)(B)(*4*) would have required the waiver of all existing late charges, penalties, stop payment fees, or similar charges promptly upon the consumer's acceptance of the agreement in order for the agreement to meet the definition of a qualifying change. As with the other criteria outlined in § 1026.43(e)(7)(iv)(B), the Bureau proposed this provision in the definition of a qualifying change to ensure that loans that ultimately become Seasoned QMs remain affordable after a temporary payment accommodation extended in connection with a disaster or pandemic-related national emergency.

The Bureau has decided to modify proposed § 1026.43(e)(7)(iv)(B)(*4*) to allow an agreement to meet the definition of a qualifying change even if servicers do not waive fees, penalties, and charges incurred prior to a delinquency caused by a disaster or pandemic-related national emergency. Adopting this change suggested by commenters is unlikely to significantly impact the affordability of a loan that enters into a qualifying change for two reasons.

First, loans with large balances for fees and charges related to delinquency (such as foreclosure preparation expenses) will likely already be disqualified from seasoning eligibility based on the performance requirements in § 1026.43(e)(7)(ii). Second, even if such fees are capitalized, § 1026.43(e)(7)(iv)(B)(*2*) will ensure that the amount of interest charged over the full term of the loan cannot increase as a result of the agreement. For these reasons, the Bureau is finalizing § 1026.43(e)(7)(iv)(B)(*4*) to provide that an agreement can meet the definition of a qualifying change if, in addition to the other requirements outlined in § 1026.43(e)(7)(iv)(B), promptly upon the consumer's acceptance of the agreement, the servicer waives a more limited set of charges than those listed in proposed § 1026.43(e)(7)(iv)(B)(*4*). Specifically, § 1026.43(e)(7)(iv)(B)(*4*) as finalized lists the following charges: all late charges, penalties, stop payment fees, or similar charges incurred during a temporary payment accommodation in connection with a disaster or pandemic-related national emergency, as well as all late charges, penalties, stop payment fees, or similar charges incurred during the delinquency that led to a temporary payment accommodation in connection with a disaster or pandemic-related national emergency.

Paragraph 43(e)(7)(iv)(C)

Section 1026.43(e)(7) requires that, to become a Seasoned QM, a covered transaction must meet certain requirements during and at the end of the seasoning period. Proposed § 1026.43(e)(7)(iv)(C) defined the seasoning period as a period of 36 months beginning on the date on which the first periodic payment is due after consummation of the covered transaction, except that: (1) if there is a delinquency of 30 days or more at the end of the 36th month of the seasoning period, the seasoning period does not end until there is no delinquency; and (2) the seasoning period does not include any period during which the consumer is in a temporary payment accommodation in connection with a disaster or pandemic-related national emergency, provided that during or at the end of the temporary payment accommodation there is a qualifying change or the consumer cures the loan's delinquency under its original terms. The Bureau is adopting § 1026.43(e)(7)(iv)(C) largely as proposed.

Many industry commenters expressed support for the proposed general seasoning period of 36 months. These commenters agreed with the Bureau's rationale relating to consistency with the GSEs' representation and warranty framework, and expressed a belief, consistent with the Bureau's proposal, that default after 36 months is not likely to be related to underwriting deficiencies. Some industry commenters joined several consumer advocate groups to express general opposition to the adoption of a Seasoned QM rule, and these commenters urged the Bureau not to adopt a shorter seasoning period if it finalized such a rule. Some consumer advocate commenters generally asserted that three years of performance history was not sufficient to establish that a creditor had made a reasonable determination of ability to repay at origination. These commenters pointed to anecdotal and survey evidence of loans that were unaffordable at origination but did not default until after three years. These commenters did not suggest a longer seasoning period, but instead expressed opposition to the adoption of any Seasoned QM rule. One industry commenter advocated for a shorter seasoning period of two years, but only for Small Creditor QMs.

As explained in the proposal, in defining the length of the seasoning period, the Bureau seeks to balance two objectives. First, it seeks to ensure that safe harbor QM status accrues to loans for which the history of sustained, timely payments is long enough to conclusively presume that the consumer had the ability to repay at consummation. Second, in accomplishing its first objective, the Bureau seeks to avoid making the seasoning period so long that the Seasoned QM definition fails to incentivize increased access to credit, especially through increased originations of non-QM loans to consumers with the ability to repay them.

As explained in part V above, in evaluating the length of a seasoning period that is long enough to demonstrate a consumer's ability to repay, the Bureau considered the practices of market participants. These market participants typically require loans to meet certain requirements, such as a timely payment history, for a period of at least three years before releasing the loans' creditors from potential penalties and other remedies for deficiencies in underwriting practices. The Bureau also focused on the timing of the first disqualifying event from the Seasoned QM definition as well as the rate at which loans terminate, either through prepayment or foreclosure, to assess the potential population of loans that would be eligible to benefit from this proposal, as discussed in part V above and illustrated in Figures 2 and 3 of part VIII below. Based on these considerations and for the reasons discussed in part V above, the Bureau has decided to define the seasoning period generally as a period of at least 36 months, beginning on the date on which the first periodic payment is due after consummation. The Bureau declines to generally shorten or lengthen the proposed seasoning period. The Bureau concludes that the practices of market participants and the available loan performance data generally support a seasoning period of 36 months.

*Paragraph 43(e)(7)(iv)(C)(*1*)*

The Bureau proposed a seasoning period generally of 36 months beginning on the date on which the first periodic payment is due after consummation, unless an exception applies. The first proposed exception extended the seasoning period if the loan is 30 days or more delinquent at the point when the seasoning period would otherwise end. Specifically, proposed § 1026.43(e)(7)(iv)(C)(*1*) provided that if there is a delinquency of 30 days or more at the end of the 36th month of the seasoning period, the seasoning period does not end until there is no delinquency. The Bureau did not receive comments specifically addressing proposed § 1026.43(e)(7)(iv)(C)(*1*). For the reasons explained below, the Bureau is adopting § 1026.43(e)(7)(iv)(C)(*1*) as proposed.

If a delinquency of 30 days or more exists in the last month of the seasoning period, it is possible that the delinquency will be resolved quickly after the seasoning period ends or that the delinquency will continue for an extended period. In situations in which the delinquency is not resolved quickly, the Bureau concludes that the loan does not become a Seasoned QM, because the extended delinquency, if considered with the consumer's prior payment history, suggests that the creditor failed to make a reasonable, good faith determination of ability to repay at consummation. The Bureau is, therefore, extending the seasoning period under these circumstances until the loan is no longer delinquent. The loan would then have to meet the performance requirements under § 1026.43(e)(7)(ii) at the conclusion of the extended seasoning period based on performance over the entire, extended seasoning period.[165] The Bureau believes that extending the seasoning period until any delinquency of 30 days or more is resolved will help to ensure that loans for which a creditor failed to make a reasonable, good faith determination of ability to repay at consummation do not season into QMs under this final rule. As finalized, § 1026.43(e)(7)(iv)(C)(*1*) provides that, notwithstanding any other provision of

[165] A loan is eligible to season under the performance requirements in § 1026.43(e)(7)(ii) only if it has no more than two delinquencies of 30 or more days and no delinquencies of 60 or more days at the end of the seasoning period.

§ 1026.43(e)(7), if there is a delinquency of 30 days or more at the end of the 36th month of the seasoning period, the seasoning period does not end until there is no delinquency.

Paragraph 43(e)(7)(iv)(C)(2)

The Bureau proposed § 1026.43(e)(7)(iv)(C)(*2*) to address how the time during which a loan is subject to a temporary payment accommodation extended in connection with a disaster or pandemic-related national emergency[166] affects the seasoning period. Proposed § 1026.43(e)(7)(iv)(C)(*2*) provided that any period during which the consumer is in a temporary payment accommodation extended in connection with a disaster or pandemic-related national emergency would not be counted as part of the seasoning period. Proposed § 1026.43(e)(7)(iv)(C)(*2*) also stated that, if the seasoning period is paused due to a temporary payment accommodation defined in proposed § 1026.43(e)(7)(iv)(D), a loan must undergo a qualifying change[167] or the consumer must cure the delinquency under the loan's original terms before the seasoning period can resume. Proposed § 1026.43(e)(7)(iv)(C)(*2*) further explained that, under these circumstances, the seasoning period consists of the period from the date on which the first periodic payment was due after consummation of the covered transaction to the beginning of the temporary payment accommodation and an additional period immediately after the temporary payment accommodation ends, which together must equal at least 36 months. For the reasons discussed below, the Bureau is finalizing § 1026.43(e)(7)(iv)(C)(*2*) as proposed.

[166] As further discussed in the section-by-section analysis of § 1026.43(e)(7)(iv)(D) below, the Bureau is defining a temporary payment accommodation extended in connection with a disaster or pandemic-related national emergency as temporary payment relief granted to a consumer due to financial hardship caused directly or indirectly by a presidentially declared emergency or major disaster under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, Public Law 93-288, 88 Stat. 143 (1974), or a presidentially declared pandemic-related national emergency under the National Emergencies Act, Public Law 94-412, 90 Stat. 1255 (1976).

[167] As further discussed in the section-by-section analysis of § 1026.43(e)(7)(iv)(B) above, the Bureau is establishing specific requirements for the type of qualifying change that can restart the seasoning period.

Many commenters were supportive of the Bureau's proposal to pause the seasoning period during a temporary payment accommodation extended in connection with a disaster or pandemic-related national emergency. Some industry commenters suggested that the Bureau allow the seasoning period to pause as soon as a delinquency occurs that is related to the type of disaster or pandemic-related national emergency defined in proposed § 1026.43(e)(7)(iv)(D), regardless of whether the consumer enters into a temporary payment accommodation. These commenters noted that after a disaster or emergency, consumers may not immediately enter a temporary payment accommodation, or they may not be placed in a temporary payment accommodation prior to receiving a permanent modification.

The Bureau has decided to exclude the period of time during which a loan is subject to certain temporary payment accommodations from the seasoning period for the three primary reasons stated in the proposal. First, the Bureau concludes that financial hardship experienced as a result of a disaster or pandemic-related national emergency is not likely to be indicative of a consumer's inability to afford a loan at consummation. Second, the Bureau concludes that the assessment of an entire 36-month seasoning period during which the consumer is obligated to make full periodic payments (whether based on the terms of the original obligation or a qualifying change) is necessary to demonstrate that the consumer was able to afford the loan at consummation. The Bureau concludes that a loan's performance during time spent in a temporary payment accommodation due to a disaster or pandemic-related national emergency should be excluded from this period because such accommodations typically involve reduced payments or no payment and are therefore not likely to assist in determining whether the creditor made a reasonable assessment of the consumer's ability to repay at consummation. Third, absent the exclusion of periods of such temporary payment accommodations from the seasoning period definition, financial institutions might have an incentive to delay offering these types of accommodations to consumers.

The Bureau concludes that not making payments because of financial hardship experienced as a result of a disaster or pandemic-related national emergency is not likely to be indicative of the consumer's inability to afford the loan at consummation. The consumer's failure to make payments does not indicate that the creditor did not comply with the ATR requirements at the time of consummation, because the disaster or pandemic-related national emergency is a change in the consumer's circumstances after consummation that the creditor could not have reasonably anticipated at consummation. This determination is consistent with the ATR/QM Rule's distinction between failure to repay due to a consumer's inability to repay at the loan's consummation, versus a consumer's subsequent inability to repay due to unforeseeable changes in the consumer's circumstances. Comment 43(c)(1)-2 states that "[a] change in the consumer's circumstances after consummation . . . that cannot be reasonably anticipated from the consumer's application or the records used to determine repayment ability is not relevant to determining a creditor's compliance with the rule." As such, the Bureau determines that periods of temporary payment accommodation attributable to financial hardship related to a disaster or pandemic-related national emergency should not jeopardize the possibility of the loan seasoning into a QM if the consumer brings the loan current or enters into a qualifying change.

In evaluating how to treat periods of temporary payment accommodation for purposes of the seasoning period, the Bureau also considered how market participants address temporary payment accommodations with respect to penalties and other remedies for deficiencies in underwriting practices. The GSEs generally treat temporary and permanent payment accommodations as disqualifying for purposes of representation and warranty enforcement relief, but they make certain exceptions for accommodations related to disasters.[168] Similarly, the master policies of mortgage insurers generally provide rescission relief after 36 months of satisfactory payment performance, but a loan that has been subject to a temporary or permanent payment accommodation is typically not eligible for 36-month rescission relief, unless the accommodation was the result of a disaster. These practices, which extend to a significant portion of covered transactions, suggest that the GSEs and mortgage insurers have concluded, based on their experience, that payment accommodations resulting from disasters are not likely to be attributed to underwriting.[169]

Temporary payment accommodations entered into for reasons other than disasters or emergencies meeting the definition in § 1026.43(e)(7)(iv)(D) may be a sign of ongoing consumer financial distress that could indicate that the creditor did not make a reasonable assessment of the consumer's ability to repay at consummation. As such, the Bureau has decided to treat periods of temporary payment accommodation for reasons other than disasters or pandemic-related national emergencies as part of the seasoning period.

In defining limits for the types of temporary payment accommodations that qualify to be excluded from the seasoning period, the Bureau is also mindful of its goal of ensuring access to

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[168] Fannie Mae's Selling Guide states that loans subject to non-disaster related payment accommodations "may be eligible [for representation and warranty enforcement relief] on the basis of a quality control review of the loan file" if certain other requirements are met. *See Selling Guide*, *supra* note 164, at 56. For purposes of representation and warranty enforcement relief, the GSEs allow disaster-related forbearance plans to count as part of seasoning periods, but only if the subject loan is brought current (via reinstatement, a repayment plan, or a permanent modification) after the forbearance plan ends. *See id.* at 57; Freddie Mac, *Seller/Servicer Guide* at 1301-19 (Aug. 5, 2020), https://guide.freddiemac.com/ci/okcsFattach/get/1002095_2.

[169] Although both the GSEs and mortgage insurers appear to count time spent in a disaster-related forbearance plan towards the 36-month time period, the Bureau believes that excluding temporary payment accommodations related to a disaster or pandemic-related national emergency from the seasoning period will best advance its goal of ensuring that the seasoning period allows enough time to assess whether the creditor made a reasonable determination of the consumer's ability to repay at consummation.

responsible, affordable mortgage credit by establishing requirements which enable a financial institution to obtain a reasonable degree of certainty as to whether a loan has met the definition of a Seasoned QM at the end of the seasoning period. The Bureau is concerned that establishing a broader exclusion from the seasoning period (such as, for example, excluding a period of temporary payment accommodation entered into as the result of financial hardship arising from circumstances not foreseeable at origination) could lead to an uncertain standard whereby financial hardships resulting in temporary payment accommodations would need to be evaluated on a case-by-case basis to determine whether a loan subject to such accommodations could season into a QM. Therefore, the Bureau has decided to exclude from the seasoning period temporary payment accommodations only for disasters and pandemic-related national emergencies meeting the definition in § 1026.43(e)(7)(iv)(D). Some commenters raised concerns related to how the Bureau proposed to define the types of temporary payment accommodations that would be excluded from the seasoning period. Those comments, as well as the Bureau's responses to them, are addressed in the section-by-section analysis of § 1026.43(e)(7)(iv)(D).

The Bureau also emphasizes that, absent the exclusion of periods of temporary payment accommodations extended in connection with a disaster or pandemic-related national emergency from the seasoning period definition, financial institutions may be disincentivized from promptly offering these types of accommodations to consumers. Specifically, financial institutions may delay the provision of such payment accommodations until and unless affected loans are disqualified from seasoning into QM status due to accumulating two delinquencies of 30 or more days or one delinquency of 60 or more days. This final rule's exclusion of temporary payment accommodations related to a disaster or pandemic-related national emergency from the seasoning period is consistent with the Bureau's prior statements and actions encouraging financial institutions to move quickly to assist consumers affected by the urgent circumstances surrounding these types of events.[170]

At the same time, the Bureau recognizes that QM status is typically reserved for loans that meet various requirements designed to ensure affordability and wants to ensure that loans that season into QMs are affordable. For that reason, the Bureau is allowing loans to re-enter the seasoning period after a temporary payment accommodation ends only when the consumer cures the loan's delinquency under its original terms or specific qualifying changes are made to the loan obligation. As discussed further in the section-by-section analysis of § 1026.43(e)(7)(iv)(C), the limitation to qualifying changes is meant to ensure that any changes made to the loan terms after a temporary payment accommodation related to a disaster or pandemic-related national emergency do not make loans unaffordable. The Bureau is also requiring a seasoning period generally of 36 months, excluding the period of temporary payment accommodation, to ensure that there is sufficient information to evaluate the consumer's performance history using the performance requirements in § 1026.43(e)(7)(ii).

As noted above, some commenters suggested that delinquencies attributable to disasters or pandemic-related national emergencies should pause the seasoning period regardless of whether the consumer enters into a temporary payment accommodation. In developing the

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[170] *See, e.g.*, Bureau of Consumer Fin. Prot., *Statement on Bureau Supervisory and Enforcement Response to COVID-19 Pandemic* (Mar. 26, 2020), https://files.consumerfinance.gov/f/documents/cfpb_supervisory-enforcement-statement_covid-19_2020-03.pdf; Press Release, Bureau of Consumer Fin. Prot., *Agencies Provide Additional Information to Encourage Financial Institutions to Work with Borrowers Affected by COVID-19* (Mar. 22, 2020), https://www.consumerfinance.gov/about-us/newsroom/agencies-provide-additional-information-encourage-financial-institutions-work-borrowers-affected-covid-19; *see also* 85 FR 39055 (June 30, 2020) (the Bureau's June 2020 interim final rule amending Regulation X to allow mortgage servicers to finalize loss mitigation options without collecting a complete application in certain circumstances).

proposal, the Bureau evaluated the practices of market participants, such as mortgage insurers and the GSEs, with respect to penalties and other remedies for deficiencies in underwriting practices. Though mortgage insurers and the GSEs make allowances for temporary payment accommodations related to certain disasters, they do not extend these allowances to disaster-related delinquencies absent a temporary payment accommodation.

Additionally, as previously noted, the Bureau wants to avoid discouraging servicers from providing timely temporary payment accommodations after disasters or emergencies. Allowing for the seasoning period to pause for delinquencies related to disasters or emergencies even if consumers are not in a temporary payment accommodation may reduce the incentive of servicers to timely provide temporary payment accommodations.

Finally, the Bureau reiterates its goal of establishing requirements that enable financial institutions to obtain a reasonable degree of certainty as to whether a loan has met the definition of a Seasoned QM at the end of the seasoning period. Allowing an exclusion from the seasoning period for delinquencies related to certain disasters or emergencies without tying the exclusion to a temporary payment accommodation may introduce uncertainty as to whether a loan qualifies to season. Temporary payment accommodations are typically documented (for example, in servicing notes). Absent a temporary payment accommodation, it may be difficult for a creditor to retroactively demonstrate when a particular delinquency that was related to a disaster or pandemic-related national emergency began. For these reasons, the Bureau declines to adopt commenters' suggestion that delinquency relating to a disaster or pandemic-related national emergency be excluded from the seasoning period even if the consumer does not enter into a temporary payment accommodation.

Proposed comment 43(e)(7)(iv)(C)(*2*)-1 provided an example illustrating when the seasoning period begins, pauses, resumes, and ends for a loan that enters a temporary payment accommodation extended in connection with a disaster or pandemic-related national emergency. The example used a three-month temporary payment accommodation and subsequent qualifying change to illustrate that, in such circumstances, the seasoning period would end at least three months later than originally anticipated at the loan's consummation. The Bureau did not receive any substantive comments addressing proposed comment 43(e)(7)(iv)(C)(*2*)-1 and is finalizing comment 43(e)(7)(iv)(C)(*2*)-1 as proposed, with minor changes to conform to § 1026.43(e)(7)(iv)(C)(*1*).

Paragraph 43(e)(7)(iv)(D)

Proposed § 1026.43(e)(7)(iv)(D) addressed how a temporary payment accommodation made in connection with a disaster or pandemic-related national emergency is defined. The definition of the seasoning period in proposed § 1026.43(e)(7)(iv)(C)(*2*) does not include the period of time during which a consumer has been granted temporary payment relief due to a temporary payment accommodation made in connection with a disaster or pandemic-related national emergency. Proposed § 1026.43(e)(7)(iv)(D) defined a temporary payment accommodation in connection with a disaster or pandemic-related national emergency to mean temporary payment relief granted to a consumer due to financial hardship caused directly or indirectly by a presidentially declared emergency or major disaster under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act) or a presidentially declared pandemic-related national emergency under the National Emergencies Act.

Several commenters stated that they supported the Bureau's proposed approach of excluding from the seasoning period time spent in a temporary payment accommodation made in connection with a disaster or pandemic-related national emergency. Some industry commenters recommended that the Bureau expand the definition of a temporary payment accommodation to include accommodations related to disasters and emergencies declared on the State and local level. Some industry commenters requested that the Bureau expand the definition of a temporary payment accommodation to include accommodations related to more general financial emergencies, such as sudden job loss due to the closure of a consumer's place of employment.

The Bureau is finalizing § 1026.43(e)(7)(iv)(D) as proposed to refer only to presidentially declared emergencies or major disasters under the Stafford Act or presidentially declared pandemic-related national emergencies under the National Emergencies Act. The Bureau believes that defining a temporary payment accommodation in this way is necessary to provide sufficient certainty for financial institutions to ascertain what events can lead to financial hardships that result in temporary payment accommodations qualifying to be excluded from the seasoning period. The Stafford Act, which has been used for over 30 years to facilitate Federal disaster response, including disaster response for emergencies and major disasters affecting only certain States or localities, contains detailed definitions of what are considered to be emergencies or major disasters under that statute.[171] The National Emergencies Act, which has been in place for more than 40 years, was invoked to declare a national emergency due to the COVID-19 pandemic.[172] The Bureau has decided that referring to these two statutes is necessary to provide sufficient certainty for financial institutions to ascertain what events can lead to financial

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[171] Stafford Act section 102(1) and (2), 88 Stat. 144.

[172] Proclamation No. 9994, 85 FR 15337 (Mar. 13, 2020). The Stafford Act was also invoked to declare an emergency due to the COVID-19 pandemic. *See* Press Release, The White House, *Letter from President Donald J. Trump on Emergency Determination Under the Stafford Act* (Mar. 13, 2020), https://www.whitehouse.gov/briefings-statements/letter-president-donald-j-trump-emergency-determination-stafford-act/.

hardships that result in temporary payment accommodations qualifying to be excluded from the seasoning period.

Furthermore, the Bureau's intent is that Seasoned QM eligibility standards apply clearly and consistently on the national level. The Bureau notes that the Stafford Act has frequently been invoked to declare emergencies and major disasters that affect only certain States or localities. The Bureau intends to include such federally declared emergencies and major disasters in § 1026.43(e)(7)(iv)(D)'s definition, using the nationally applicable definitions outlined in the Stafford Act. However, while the Stafford Act and National Emergencies Act provide nationally applicable standards for emergency and disaster declarations, State and local standards for emergency and disaster declarations vary widely. Expanding the definition in § 1026.43(e)(7)(iv)(D) to State and local emergency and disaster declarations would therefore make Seasoned QM eligibility inconsistently available based on the location of the consumer's property. And as discussed above, expanding the definition to encompass a more general financial emergency standard would lead to uncertainty as to whether a loan qualifies to become a Seasoned QM. The Bureau therefore declines to expand the definition in § 1026.43(e)(7)(iv)(D) to include State and local emergency and disaster declarations or a more general financial emergency standard and is adopting § 1026.43(e)(7)(iv)(D) as proposed.

Proposed comment 43(e)(7)(iv)(D)-1 provided a non-exclusive list of examples of the types of temporary payment accommodations in connection with a disaster or pandemic-related national emergency that can be excluded from the seasoning period if they meet the definition in proposed § 1026.43(e)(7)(iv)(D) and the requirements of proposed § 1026.43(e)(7)(iv)(C)(*2*). The Bureau did not receive comments addressing proposed comment 43(e)(7)(iv)(D)-1 and is finalizing comment 43(e)(7)(iv)(D)-1 as proposed.

VII. Effective Date

The Bureau proposed that a final rule relating to this proposal would take effect on the same date as a final rule amending the General QM loan definition. In the General QM Proposal, the Bureau proposed that the effective date of a final rule relating to the General QM Proposal would be six months after publication in the *Federal Register*. The Bureau proposed that both the Seasoned QM Final Rule and the General QM Final Rule would apply to covered transactions for which creditors receive an application on or after the effective date.

Several commenters supported aligning this final rule's effective date with that of the General QM Final Rule. An industry commenter requested that the Bureau make this final rule immediately effective to take advantage of the benefits as soon as possible, while another industry commenter suggested that this final rule not take effect until 18 to 24 months after issuance to allow time for implementation.

Many industry commenters requested that the Bureau apply this final rule to loans existing before the effective date. Such commenters noted, for example, that the proposal included robust consumer protections and suggested that such protections would apply equally well to existing loans as they do to future loans. On the other hand, consumer advocate commenters urged the Bureau not to apply the rule to loans in existence before the effective date, suggesting that doing so would likely violate the vested rights of non-QM borrowers.

This final rule will take effect 60 days after publication in the *Federal Register*, which aligns with the effective date provided in the General QM Final Rule. The Bureau declines to adopt a later effective date because the Bureau concludes that 60 days will provide creditors and the secondary market adequate implementation time for this final rule, which adds a new QM definition but does not require creditors or other stakeholders to take any action if they do not intend to rely upon the new QM definition. The Bureau also declines to make the rule effective earlier than 60 days after publication in the *Federal Register*, because it wants to ensure that creditors and other stakeholders have adequate time to become familiar with this final rule before it takes effect.

Consistent with many of the industry comments received, the Bureau does not believe that there is any reason to conclude that the inference to be drawn as to ability to repay is any different depending on whether a 36-month successful payment history begins before or after the effective date. However, the Bureau continues to believe that parties to loans existing at the time of the effective date may have significant reliance interests related to the QM status of those loans.[173] In light of these potential reliance interests, the Bureau has decided not to apply the final rule to loans in existence prior to the effective date. Thus, this final rule applies to covered transactions for which creditors receive an application on or after the effective date.

An industry trade association also asked that the Bureau use the definition found in the TILA-RESPA Integrated Disclosure Rule (TRID) to provide clarification on the meaning of "application date" in this final rule. The General QM Final Rule adds comment 43-2 to Regulation Z, which clarifies that, for transactions subject to TRID, creditors determine the date the creditor received the consumer's application, for purposes of the General QM Final Rule's effective date and mandatory compliance date, in accordance with § 1026.2(a)(3)(ii), which is the definition of application that applies to transactions subject to TRID. Comment 43-2 also

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[173] As indicated in the proposal, the Bureau also recognizes that there could be legal issues related to the application of rules governing mortgage origination to loans existing prior to the effective date. *See, e.g.*, *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 269 (1994) (holding that a rule is impermissibly retroactive when it "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past") (citation omitted); *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (holding that an agency cannot "promulgate retroactive rules unless that power is conveyed by Congress in express terms").

clarifies that, for transactions that are not subject to TRID, creditors can determine the date the creditor received the consumer's application, for purposes of the General QM Final Rule's effective date and mandatory compliance date, in accordance with either § 1026.2(a)(3)(i) or (ii). The Extension Final Rule added a similar comment (comment 43(e)(4)-4) for purposes of § 1026.43(e)(4)(iii)(B), as revised by the Extension Final Rule, which takes effect on December 28, 2020. For purposes of the effective date of this final rule, the Bureau is using "application" in a manner consistent with new comments 43-2 and 43(e)(4)-4. Thus, for transactions subject to § 1026.19(e), (f), or (g), creditors determine the date the creditor received the consumer's application for purposes of the effective date of this final rule in accordance with TRID's definition of application in § 1026.2(a)(3)(ii). For transactions that are not subject to TRID, creditors can determine the date the creditor received the consumer's application for purposes of the effective date of this final rule in accordance with either § 1026.2(a)(3)(i) or (ii).

VIII. Dodd-Frank Act Section 1022(b) Analysis

A. Overview

In developing this final rule, the Bureau has considered the potential benefits, costs, and impacts as required by section 1022(b)(2)(A) of the Dodd-Frank Act. Specifically, section 1022(b)(2)(A) of the Dodd-Frank Act requires the Bureau to consider the potential benefits and costs of a regulation to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services, the impact on depository institutions and credit unions with $10 billion or less in total assets as described in section 1026 of the Dodd-Frank Act, and the impact on consumers in rural areas. The Bureau consulted with appropriate prudential regulators and other Federal agencies regarding the consistency of this final rule with prudential, market, or systemic objectives administered by such agencies as required by section 1022(b)(2)(B) of the Dodd-Frank Act.

This final rule defines a new category of QMs for first-lien, fixed-rate, covered transactions that have fully amortizing payments and do not have loan features proscribed by the statutory QM requirements, such as balloon payments, interest-only features, terms longer than 30 years, or points and fees above prescribed amounts. High-cost mortgages subject to HOEPA are not eligible to season. Creditors will have to satisfy consider and verify requirements and keep the loans in portfolio until the end of the seasoning period, excepting a single whole-loan transfer, transfers related to mergers and acquisitions, and certain supervisory sales during the seasoning period. The loans will also have to meet certain performance requirements. Specifically, loans can have no more than two delinquencies of 30 or more days and no delinquencies of 60 or more days at the end of the seasoning period. Covered transactions that satisfy the Seasoned QM requirements will receive a safe harbor from ATR liability at the end of the seasoning period.

As discussed above, a goal of this final rule is to enhance access to responsible, affordable mortgage credit. This final rule incentivizes the origination of non-QM and rebuttable presumption QM loans that a creditor expects to demonstrate a sustained and timely mortgage payment history by providing a separate path to safe harbor QM status for these loans if creditors' expectations are fulfilled. This final rule therefore may encourage meaningful innovation and lending to broader groups of creditworthy consumers that would otherwise not occur.

1. Data and evidence

The impact analyses rely on data from a range of sources. These include data collected or developed by the Bureau, including the Home Mortgage Disclosure Act of 1975 (HMDA)[174] and National Mortgage Database (NMDB)[175] data as well as data obtained from industry, other regulatory agencies, and other publicly available sources. The Bureau also conducted the Assessment and issued the Assessment Report as required under section 1022(d) of the Dodd-Frank Act. The Assessment Report provides quantitative and qualitative information on questions relevant to the analysis that follows, including the share of lenders that originate non-QM loans. Consultations with other regulatory agencies, industry, and research organizations inform the Bureau's impact analyses.

The data the Bureau relied upon provide detailed information on the number, characteristics, pricing, and performance of mortgage loans originated in recent years. In response to the Seasoned QM Proposal, the Bureau did not receive additional information or data that could inform quantitative estimates such as APRs or other costs like those associated with private mortgage insurance.

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[174] Public Law 94-200, tit. III, 89 Stat. 1125 (1975). HMDA requires many financial institutions to maintain, report, and publicly disclose loan-level information about mortgages. These data help show whether creditors are serving the housing needs of their communities; they give public officials information that helps them make decisions and policies; and they shed light on lending patterns that could be discriminatory. HMDA was originally enacted by Congress in 1975 and is implemented by Regulation C. *See* Bureau of Consumer Fin. Prot., https://www.consumerfinance.gov/data-research/hmda (last visited Nov. 30, 2020).

[175] The NMDB, jointly developed by the FHFA and the Bureau, provides de-identified loan characteristics and performance information for a 5 percent sample of all mortgage originations from 1998 to the present, supplemented by de-identified loan and borrower characteristics from Federal administrative sources and credit reporting data. *See* Bureau of Consumer Fin. Prot., *Sources and Uses of Data at the Bureau of Consumer Financial Protection* at 55-56 (Sept. 2018), https://www.consumerfinance.gov/documents/6850/bcfp_sources-uses-of-data.pdf. Differences in total market size estimates between NMDB data and HMDA data are attributable to differences in coverage and data construction methodology.

The data provide only limited information on the costs to creditors of uncertainty related to legal liability that this final rule may mitigate. As a result, the analysis of impacts of this final rule on creditor costs from reduced uncertainty related to legal liability relies on simplifying assumptions and qualitative information as well as the limited data that are available. This analysis indicates the relative magnitude of the potential effects of this final rule on these costs.

Finally, as discussed further below, the analysis of the impacts of this final rule requires the Bureau to use current data to predict the number of originations of certain types of non-QM loans and the performance of these loans. It is possible, however, that the market for mortgage originations may shift in unanticipated ways given the changes considered below.

2. Description of the baselines

The Bureau considers the benefits, costs, and impacts of the final rule against two baselines. The first baseline (Baseline 1) takes into account that the Bureau's final rule amending the General QM loan definition is adopted. The second baseline (Baseline 2) assumes that the Bureau does not amend the General QM loan definition and the Temporary GSE QM loan definition expires when the GSEs cease to operate under conservatorship.

Under each baseline, there are different numbers of loans that would be originated, and which would meet all of the requirements for a Seasoned QM at consummation except for the performance and portfolio requirements of this final rule. These are the loans under each baseline that are first-lien, fixed-rate covered transactions that comply, as described above, with certain general restrictions on product features, points-and-fees limits, and underwriting requirements. Further, only some of these loans would benefit if they met the performance and portfolio requirements for a Seasoned QM, meaning that as a result of meeting those requirements, they would obtain QM status or a stronger presumption of compliance, or would not need to satisfy the portfolio retention requirements that would be necessary to maintain safe harbor QM status under the EGRRCPA. The analysis below predicts the annual number of loan originations under each baseline, in years similar to 2018, that would meet all of the requirements of a Seasoned QM at consummation (except for the performance and portfolio requirements) and would benefit if they met the performance and portfolio requirements during the seasoning period. Upon satisfying all the requirements of the Seasoned QM definition, these loans would obtain QM status or a stronger presumption of compliance, or would not need to satisfy the portfolio retention requirements of the EGRRCPA.[176] Relative to the proposal, the Bureau has updated its methodology in two ways. First, the estimates for Baseline 1 have been updated to reflect updates to the pricing thresholds in the General QM Final Rule. Second, the Bureau has also adjusted its analysis to reflect an improved methodology to identify creditors eligible to originate loans as small creditors under § 1026.43(e)(5), consistent with the section 1022(b) analysis accompanying the General QM Final Rule.

As stated above, under Baseline 1, the General QM Final Rule is adopted. Consider first all of the non-QM loans under Baseline 1 that would meet all of the requirements at consummation for a Seasoned QM and would benefit if they met the performance and portfolio requirements of the seasoning period.[177] To count these loans, the Bureau used 2018 HMDA data to identify all residential first-lien, fixed-rate conventional loans for one-to-four unit housing that do not have prohibited features or other disqualifying characteristics; are not Small

[176] Thus, the analysis estimates the maximum number of loans under each baseline that would become Seasoned QMs if the loans met the performance and portfolio requirements. The Bureau has discretion in any rulemaking to choose an appropriate scope of analysis with respect to benefits, costs, and impacts, as well as an appropriate baseline or baselines.

[177] Analysis of HMDA data for Baseline 1 excludes loans where rate spread is not observed.

Creditor QMs or entitled to a presumption of compliance under the EGRRCPA QM definition;[178] and for which the APR exceeds APOR by the amounts specified in the General QM Final Rule's amendments to § 1026.43(e)(2)(vi)(A) through (F). The Bureau estimates that there are 21,269 of these loans. These loans would benefit from this final rule by obtaining safe harbor QM status if they meet the performance and portfolio requirements of the seasoning period, and not otherwise.[179]

Consider next all of the rebuttable presumption QM loans under Baseline 1 that would meet all of the requirements at consummation for a Seasoned QM and would benefit if they met the performance and portfolio requirements of the seasoning period. To count these loans, the Bureau has used 2018 HMDA data to identify two groups of loans. The first group is all fixed-rate, higher-priced covered transactions that meet the proposed General QM loan definition but are not Small Creditor QM loans or loans entitled to a presumption of compliance under the EGRRCPA QM definition. The Bureau estimates that there are 108,020 of these loans. The second group is all fixed-rate rebuttable presumption Small Creditor QMs. The Bureau estimates that there are 3,137 of these loans. Thus, the Bureau estimates that 111,157 loans would benefit from this final rule by obtaining safe harbor QM status instead of rebuttable presumption QM status if they meet the performance and portfolio requirements of the seasoning period, and not otherwise.[180]

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[178] EGRRCPA section 101 provides that loans must be originated and retained in portfolio by a covered institution, except for limited permissible transfers. Although EGRRCPA section 101 took effect upon enactment, the Bureau has not undertaken rulemaking to address any statutory ambiguities in Regulation Z.

[179] Note that the analysis uses 2018 data, but this final rule does not apply to these loans since this final rule applies to covered transactions for which creditors receive an application on or after the effective date.

[180] The Bureau assumes solely for purposes of this section 1022(b) analysis that all loans originated under the EGRRCPA QM definition will obtain a safe harbor in the form of a conclusive presumption of compliance with the ATR requirements. To the extent some subset of such loans should qualify for a lesser presumption, however, these

Finally, consider all of the loans under Baseline 1 that are entitled to a presumption of compliance under the EGRRCPA QM definition and that (1) meet all of the requirements at consummation for a Seasoned QM and (2) do not otherwise satisfy the criteria to qualify for a safe harbor under the General QM Final Rule or the Small Creditor QM definition. The Bureau estimates that there are 23,200 loans in this category. This set of loans could obtain a safe harbor as Seasoned QMs without satisfying the portfolio retention requirements that would be necessary to obtain protection from liability under the EGRRCPA, provided they meet the performance and portfolio requirements of the seasoning period, and not otherwise.

Thus, under Baseline 1, approximately 155,626 loans would meet all of the requirements at consummation for Seasoned QMs and would obtain QM status or a stronger presumption of compliance, or would not need to satisfy the portfolio retention requirements of the EGRRCPA, if they subsequently meet the performance and portfolio requirements of the seasoning period. This is the expected annual number of loan originations under Baseline 1 in years similar to 2018 that meet all of the requirements of a Seasoned QM at consummation and would benefit if they met the performance and portfolio requirements of the seasoning period. Some of these loans very likely will meet those performance and portfolio requirements, and some very likely will not.[181]

Now consider Baseline 2. As stated above, under Baseline 2, no amendments to the General QM loan definition are adopted, and the Temporary GSE QM loan definition expires

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loans would comprise a third group for consideration here, since these loans would benefit if they met the performance and portfolio requirements of the seasoning period.

[181] The Bureau cannot reliably measure the full expansionary effect of this final rule on loan originations. One effect might be that this final rule would cause the share of loan applications that lead to originations of non-QM loans under the baseline (88 percent) to match the overall share (95 percent for loan applications for which Bureau data include the rate spread). This would lead to an additional 1,800 non-QM originations not accounted for above.

when the GSEs cease to operate under conservatorship. The Bureau estimates effects under Baseline 2 subsequent to the expiration of the Temporary GSE QM loan definition. While there is not a fixed date on which the Temporary GSE QM loan definition will expire in the absence of the final rule amending the General QM requirements, the Bureau anticipates that the GSEs will eventually cease to operate under conservatorship. Consider first all of the non-QM loans under Baseline 2 that would meet all of the requirements at consummation for a Seasoned QM and would benefit if they met the performance and portfolio requirements of the seasoning period.[182] To count these loans, the Bureau has used 2018 HMDA data to identify all residential first-lien, fixed-rate conventional loans for one-to-four unit housing that do not have prohibited features or other disqualifying characteristics; are not Small Creditor QMs or originated under the EGRRCPA QM definition; and do not satisfy the DTI requirement specified in § 1026.43(e)(2)(vi) of the current General QM loan definition. The Bureau estimates that there are 718,509 of these loans. These loans would benefit from this final rule by obtaining safe harbor QM status if they meet the performance and portfolio requirements of the seasoning period, and not otherwise.

Consider next all of the rebuttable presumption QM loans under Baseline 2 that would meet all of the requirements at consummation for a Seasoned QM and would benefit if they met the performance and portfolio requirements of the seasoning period. To count these loans, the Bureau has used 2018 HMDA data to identify two groups of loans. The first group is all first-lien, fixed-rate higher-priced covered transactions that meet the current General QM loan definition, but which are not Small Creditor QMs or loans entitled to a presumption of

[182] Analysis of HMDA data for Baseline 2 excludes loans where rate spread or DTI are not observed.

compliance under the EGRRCPA QM definition. The Bureau estimates that there are 87,122 of these loans. The second group is all first-lien, fixed-rate rebuttable presumption Small Creditor QMs. The Bureau estimates that there are 3,137 of these loans. Thus, the Bureau estimates that 90,259 loans would obtain safe harbor QM status instead of rebuttable presumption QM status if they meet the performance and portfolio requirements of the seasoning period, and not otherwise.[183]

Finally, consider all of the loans under Baseline 2 that are entitled to a presumption of compliance under the EGRRCPA QM definition and that (1) meet all of the requirements at consummation for a Seasoned QM and (2) do not otherwise satisfy the criteria to qualify for a safe harbor under the General QM Final Rule or the Small Creditor QM definition. The Bureau estimates that there are 123,875 loans that would fall into this category. This set of loans could obtain a safe harbor as Seasoned QMs without satisfying the portfolio retention requirements that would be necessary to obtain protection from liability under the EGRRCPA, provided they meet the performance and portfolio requirements of the seasoning period, and not otherwise.

Thus, under Baseline 2, approximately 932,643 loans would meet all of the requirements at consummation for Seasoned QMs and would obtain QM status, a stronger presumption of compliance, or relief from portfolio retention requirements, if they subsequently meet the performance and portfolio requirements of the seasoning period. This is the expected annual number of loan originations under the baseline in years similar to 2018 that meet all of the requirements of a Seasoned QM and would benefit if they met the performance and portfolio

[183] The same caveat with respect to EGRRCPA section 101 discussed for Baseline 1 applies here as well.

requirements of the seasoning period. Some of these loans very likely will meet those performance and portfolio requirements, and some very likely will not.

B. Potential Benefits and Costs to Covered Persons and Consumers

This final rule reduces the chance a consumer will assert or succeed when asserting violations of ATR requirements in a defense to foreclosure. This section considers the potential benefits and costs of this final rule on creditors first and then consumers. The analysis begins by assessing how this final rule could potentially affect creditors' litigation risk, cost of origination, and the price of borrowing, holding originations constant. The analysis then considers the potential impacts of this final rule on originations and the benefits and costs of this effect. The Bureau cannot reliably quantify this effect, so the analysis considers qualitatively the potential benefits to both creditors and consumers of market expansion.

Several commenters noted that the proposal lacked an analysis that quantified market expansion and subsequently weighed the consumer value of those effects against the consumer value of changes to foreclosure defense. The Bureau agrees that it would be valuable to conduct such an analysis. However, the Bureau is not aware of data that would permit it to reliably do so. One would first need to estimate how this final rule will change creditors' cost savings by decreasing litigation risk. Second, one needs to estimate how much of those cost savings will be passed through to consumers, for which consumers, and via which mortgage products. Third, one needs to estimate how many new consumers would obtain mortgage loans and which loans they would obtain. Fourth, one would need to estimate how much these new consumers value their newfound access to credit. Fifth, an analysis needs two pieces of information for two classes of borrowers: those who would borrow regardless of whether the Bureau promulgates this final rule and those who are induced to borrow as a result of it. For each class, one would need to estimate the rate at which such borrowers experience foreclosure and the value to such borrowers of an ATR defense in foreclosure. If the Bureau does not have the data that would be needed to produce these estimates, the Bureau provides a qualitative discussion below based on economic principles and the Bureau's experience within and expertise in the mortgage markets.

1. *Benefits and costs to covered persons*

Benefits from reduced litigation risk

Covered persons, specifically mortgage creditors, primarily benefit from decreased litigation risk under this final rule. Generally, the statute of limitations for a private action for damages for a violation of the ATR requirement is three years after the date on which the violation occurs. In the proposal, the Bureau anticipated that the Seasoned QM definition would not curtail the ability of consumers to bring affirmative claims seeking damages for alleged violations of the ATR requirements because the proposed seasoning period would generally coincide with the statute of limitations. One academic commenter indicated that under the proposal, loans could season during pending litigation, cutting off claims filed within the three-year statute of limitations period. The Bureau acknowledges that because litigation takes time, it is possible that some loans could season under § 1026.43(e)(7) after an ATR/QM claim is timely filed, cutting off claims filed prior to the statute of limitations. Nevertheless, the aggregate effects of consumers' loans seasoning during litigation are likely to be small under current levels of originations and rates of affirmative claims. However, because the Bureau does not have either the data to quantify the new loans that will be originated as a result of the final rule nor the rate at which claims will be brought against creditors of those loans, it also cannot reliably forecast these economic impacts on consumers in the case of market expansion or changing market conditions.

TILA also authorizes a consumer to assert a violation of the ATR requirements as a defense in the event of a foreclosure without regard for the time limit on a private action for damages for such a violation. For Seasoned QMs that are non-QM loans or rebuttable presumption QM loans at consummation, this final rule will effectively limit the consumer's ability to establish non-compliance with the ATR requirements after the seasoning period has run as a general matter.

The creditors' economic value of the reduction of litigation risk is related to how each of three factors changes with this final rule relative to the baseline: (1) the fraction of consumers that enter foreclosure, (2) the likelihood that ATR defenses are successful in foreclosure lawsuits, and (3) the costs associated with the lawsuits. The Bureau analyzed NMDB data to assess the first factor and, in the Seasoned QM Proposal, sought pertinent information related to ATR defenses in foreclosure proceedings and related costs. One consumer advocate commenter argued that the value of ATR defense can be ascertained from past experiences with ATR litigation. Noting only a single case of ATR litigation since the ATR/QM Rule went into effect, the commenter offered several case studies from prior to the January 2013 Final Rule. Given the differences in legal circumstances between before and after the Dodd-Frank Act, it is not clear that ATR litigation from prior to the Dodd-Frank Act provides a sound basis for assessing changes in aggregate litigation risk from this final rule.

An academic commenter asserted that if the proposal were adopted, the resulting new non-QM originations could reflect riskier features and suggested that, as a result, those that would season would also enter foreclosure at a rate higher than the Bureau's foreclosure analysis suggests. The Bureau acknowledges that its foreclosure analysis reflects characteristics of loans originated in the past and not necessarily those that would be originated as a result of this final rule. However, the Bureau does not agree with the commenter's premise that if this final rule resulted in an expansion of credit, the new loans would necessarily reflect riskier features, and default and foreclosure start rates would increase. Accompanying the consider and verify requirements, product restrictions (such as the limitation to first-lien, fixed-rate loans), and points-and-fees restrictions of this final rule, the portfolio and performance requirements incentivize creditors to originate loans that will perform, since otherwise they will not season and obtain a safe harbor. Nonetheless, the Bureau is unaware of data that would allow it to forecast new originations' characteristics or the fraction that would meet the performance requirements to become Seasoned QMs. Correspondingly, the Bureau cannot assess how the foreclosure start rate of the subsequent non-QM loans, seasoned or otherwise, would differ from the foreclosure start rate of loans originated in the past. Finally, the overall foreclosure start rate reflects foreclosure starts of both loans that would be originated as a result of this final rule's expansion of credit and those that would be originated regardless. If this final rule results in an expansion of credit of only a few loans, the foreclosure analysis would be relatively unaffected regardless of the foreclosure risk of those loans. Conversely, the Bureau's foreclosure analysis may be less reliable if this final rule results in a major expansion of credit. As stated previously, the Bureau is unaware of data that would allow it to quantify the size of market expansion.

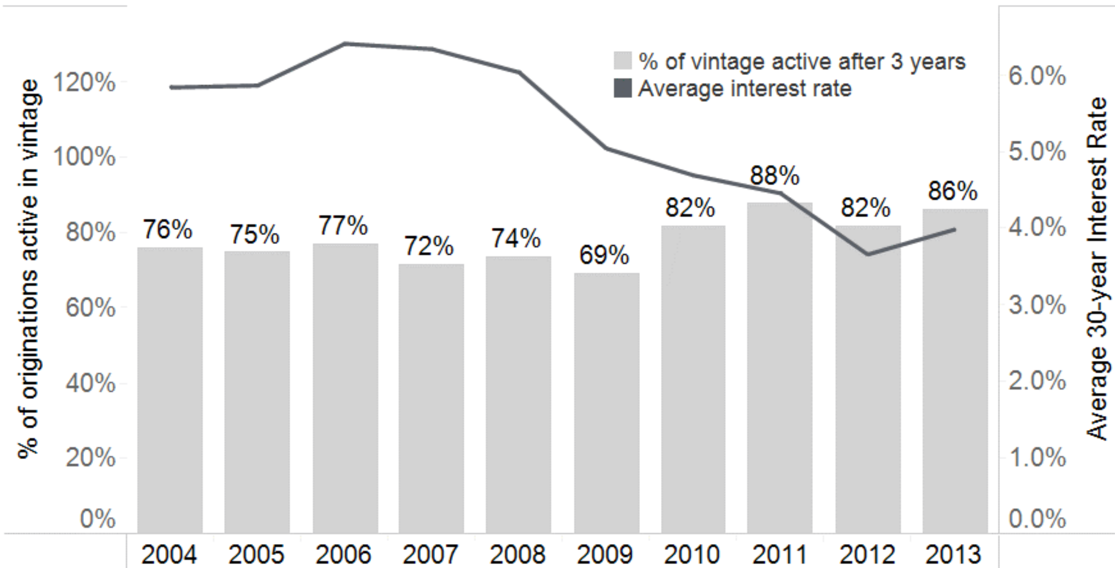
The full NMDB data are a nationally representative sample of mortgages from 1998 to 2020, covering periods with differing economic and interest rate environments. Of these mortgages, the analysis focuses on conventional, fixed-rate purchase and refinance loans with no prohibited features that were privately held at consummation. Due to data limitations in the NMDB, the analysis of loan performance makes three assumptions. First, loans would continue to be originated under each baseline with the same characteristics regardless of QM status.

Second, potentially seasonable loans are ineligible for the portfolio requirements of the EGRRCPA and thus can only achieve safe harbor status via this final rule. The proposal would have required that loans be held in portfolio unless transfers are related to mergers and acquisitions and certain supervisory sales during the seasoning period. This final rule additionally allows a single whole-loan transfer. The change does not affect the analysis.[184]

The likely quantitative impact of this final rule depends in part on the rate of attrition for loans during the first three years, as well as on the performance of the loans that are active for at least three years. Figure 2 plots the fraction of higher-priced loans, those with an interest rate 150 basis points or more over the Primary Mortgage Market Survey (PMMS), that were open after three years between 2004 and 2013 in order to provide context for the quantitative foreclosure analysis that follows.

[184] NMDB data do not permit one to ascertain the number of times ownership of privately held loans that were not securitized was transferred between institutions. Whereas the analysis in the proposal assumed that unsecuritized, privately held loans were held in portfolio by a single party, this analysis assumes that the same loans were not transferred more than once.

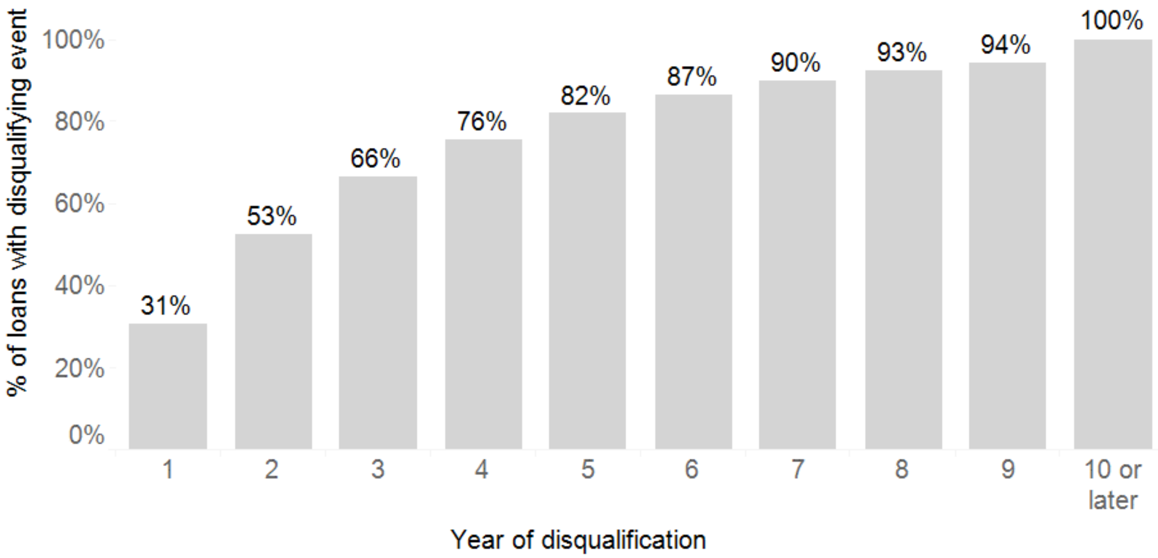
Figure 2: Percentage of Higher-Priced Active Loans by Year



Source: NMDB (percent active) and Federal Reserve Economic Data (FRED), Federal Reserve Bank of St. Louis (average interest rate); NMDB numbers show fixed-rate conventional loans held in portfolio with no restricted product features; higher-priced loans are defined as those with an interest rate 150 basis points or more over the PMMS, which is a slightly different rate spread measure from those that use APR; loans with imputed loan purpose or ARM-flag are not included.

Figure 2 serves as a reminder that, over time, the effects of this final rule will depend on trends in interest rates. Loans originated between 2004 and 2009 were typically originated at higher interest rates and therefore would receive a significant benefit from refinancing when interest rates declined during and after the 2008 financial crisis. Loans originated in these same years also experienced elevated foreclosure start rates during the 2008 financial crisis. As a result, a lower share of loans remained active beyond three years, and so the potential effects of this final rule would be smaller. This contrasts to post-crisis origination years where initial mortgage rates and foreclosure start rates remained low and a larger share of loans remained active beyond three years.

Figure 3: Percentage of higher-priced loans originated between 1998–2008 that had suffered a disqualifying event among those that ever suffer a disqualifying event



Source: NMDB; fixed-rate conventional loans held in portfolio with no restricted product features; higher priced loans are defined as those with an interest rate 150 basis points or more over the PMMS, which is a slightly different rate spread measure from those that use APR; loans with imputed loan purpose or ARM-flag are not included; disqualifying event could be either the third 30-day late payment, the first rolling 30-day delinquency, or the first 60-day delinquency.

Figure 3 provides additional context for the quantitative foreclosure analysis. The figure considers higher-priced loans originated between 1998 to 2008, all of which incur sufficient late payments or delinquencies to disqualify them from seasoning depending on the specified length of the seasoning period. Figure 3 shows, for example, that 66 percent of loans with these performance problems would have been disqualified from seasoning under this final rule's seasoning period of 36 months. This compares to 53 percent of such loans if the seasoning period were 24 months and 76 percent if the seasoning period were 48 months.

Foreclosure risk of loans that meet Seasoned QM's performance requirements in Baseline 1

To assess this final rule's potential effect on foreclosure risk, the Bureau analyzed data from the NMDB on the 1,275,480 conventional fixed-rate, first-lien loans that were originated between 2012 and 2013 without prohibited features. The loans potentially would have met this final rule's Seasoned QM performance criteria in 2015 and 2016.

The analyses first classify loans by whether they would have satisfied the General QM Final Rule's requirements for safe harbor and rebuttable presumption in Baseline 1 at consummation.[185] Ten percent of loans would have been either rebuttable presumption or non-QM loans and would have potentially benefited from the Seasoned QM definition's pathway to safe harbor if they had met the final rule's performance requirements.

[185] The NMDB data do not enable the Bureau to ascertain whether loans were originated by creditors that meet the size criteria for originating QM loans under the Small Creditor QM or EGRRCPA QM definitions.

Table 1: Share of loans under Baseline 1 that were open and had not entered foreclosure after three years and would have met performance criteria

Type of Loan	Open and had not entered foreclosure after three years	Met performance criteria (cond. on open)
Safe Harbor	78%	99%
Seasonable Loans	78%	92%
Rebuttable Presumption	81%	94%
Non-QM	73%	86%
Missing Rate Spread	61%	87%
All Loans	77%	97%

Classifying loans according to their status under Baseline 1, Table 1 reports the fraction of loans that were open and had not entered foreclosure after three years and of those open loans, the fraction that would have met the performance criteria of this final rule. Seventy-eight percent of loans that would have been originated as either rebuttable presumption QM loans or non-QM loans were still open after three years, and of those, 92 percent satisfied the performance criteria to qualify for Seasoned QM status under this final rule. By way of comparison, the corresponding fractions for loans originated as safe harbor were 78 percent and 99 percent, respectively. Altogether, 71 percent of the loans that would have been rebuttable presumption QM loans and non-QM loans under Baseline 1 would have performed well enough to gain safe harbor status via Seasoned QM under this final rule.

The relief from litigation risk depends in part on the fraction of these loans that would eventually enter foreclosure proceedings. Table 2 reports the share of loans under Baseline 1 that entered foreclosure between origination and the first quarter of 2020 among all loans consummated between 2012 and 2013, those that were still open and had not entered foreclosure three years after origination, and those that met the performance criteria of this final rule. 0.2 percent of loans open for at least three years enter foreclosure proceedings before March 2020. Among the loans that would have satisfied this final rule's Seasoned QM performance requirements, foreclosure proceedings began for 1.6 percent of loans that would be non-QM loans in Baseline 1 and for 0.5 percent of loans that would be rebuttable presumption QM loans under Baseline 1. Combined, 0.8 percent of loans that met the performance requirements and were potentially seasonable at consummation would have started foreclosure proceedings. By comparison, for loans that were still open, had not entered foreclosure after three years, and would have been originated as safe harbor under Baseline 1, only 0.1 percent of loans entered foreclosure after year three. Thus, the average foreclosure start rate among open loans with safe harbor status after three years—either from General QM status at consummation or from Seasoned QM status—would be higher than under Baseline 1, reflecting the inclusion of Seasoned QMs.

Table 2: Share of loans that entered foreclosure under Baseline 1

Type of loan	All Loans	… open and had not entered foreclosure after 3 years	… and met performance criteria
Safe Harbor	0.3%	0.2%	0.1%
Seasonable Loans	2.3%	2.3%	0.8%
Rebuttable Presumption	1.1%	1.1%	0.5%
Non-QM	4.5%	4.7%	1.6%
Missing Rate Spread	3.8%	1.8%	0.4%
All Loans	0.7%	0.5%	0.2%

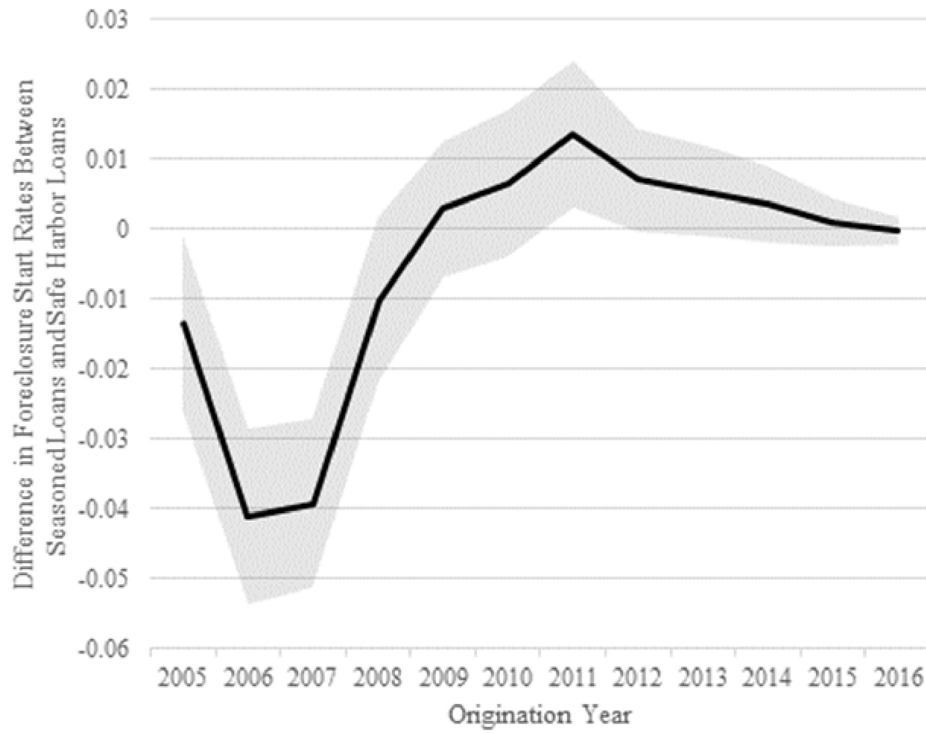
The Bureau analyzed loans originated in 2012 and 2013 instead of other periods for several reasons. This period likely predicts the benefits and costs of this final rule during a period of normal economic expansion. The Bureau excluded later vintages because the analysis requires both a minimum three-year look-forward period to assess Seasoned QM's performance requirements as well as additional time to see whether foreclosures eventually emerge. As the Bureau explained in the proposal,[186] the Bureau excluded earlier vintages whose loan performance may have been affected by the 2008 financial crisis. The crisis years were somewhat unusual in the high number of homes with negative equity and the slow pace of the subsequent economic recovery. Thus, the number of loans that would have disqualifying events would be overstated compared to those in a typical business cycle. Using data from an even earlier cycle of expansion and contraction might be more informative about average benefits and costs over the long term, but older data would also reflect the features of the housing and mortgage markets of an earlier time that may no longer be relevant to current market conditions. The analysis below should be understood with this background in mind.

Notwithstanding these considerations, one commenter asserted that the narrow selection of vintages would lead one to overstate the effectiveness of the proposed Seasoned QM performance criteria in limiting foreclosure. Instead, the Bureau's analysis of loan vintages from periods of economic distress such as the 2008 financial crisis suggests that their exclusion had the opposite effect. Continuing to limit the analysis to conventional, fixed-rate purchase and refinance loans with no prohibited features that were privately held at consummation, open, and had not entered foreclosure after three years, Figure 4 plots the difference in foreclosure start

[186] 85 FR 53568, 53596 n.154 (Aug. 28, 2020).

rates between loans that would have had a safe harbor at origination under Baseline 1 with loans that would have met the performance criteria of this final rule and obtained a safe harbor from Seasoned QM status. Among loans that were originated between 2005 and 2009, those that would have obtained a safe harbor from seasoning entered foreclosure at a lower rate than loans that would have obtained a safe harbor from satisfying the General QM requirements at origination. Loan vintages from the 2008 financial crisis overstate rather than understate this final rule's effectiveness for two reasons. First, a greater share of potentially seasonable loans became delinquent within 36 months, and thus a smaller share of potentially seasonable loans met the performance criteria of this final rule. Second, while the remainder did enter foreclosure at a higher rate than in other periods, lower priced loans that would have had a safe harbor from origination became delinquent and entered foreclosure at an even higher rate.

Figure 4: Foreclosure start rate of loans that meet Seasoned QM eligibility and performance criteria minus foreclosure start rate of loans that obtain a QM safe harbor at origination under Baseline 1



Source: NMDB; the loans analyzed are those held in portfolio with no restricted product features that were open and had not entered foreclosure after 3 years; loans that enter foreclosure are those that enter into any one of the following after the third year: foreclosure proceeding, a deed in lieu of foreclosure, foreclosure, voluntary surrender, or repossession, as tracked by the NMDB. Ninety-five percent confidence intervals of the differences are plotted in grey.

Foreclosure risk of loans that meet Seasoned QM's performance requirements in Baseline 2

Paralleling the analyses of this final rule relative to Baseline 1, the analyses here classify loans by whether they would have satisfied the General QM requirements for safe harbor and rebuttable presumption QM loans in Baseline 2 and whether they would have satisfied the performance requirements of this final rule. Eight percent of analyzed loans would have been non-QM loans or rebuttable presumption QM loans at consummation under Baseline 2 and would have potentially gained safe harbor status if they had met this final rule's Seasoned QM performance criteria. Most of these loans (92 percent) would be non-QM at consummation. These estimates likely overestimate the fraction of non-QM loans that would be originated under Baseline 2.

Table 3: Share of loans under Baseline 2 that were open and had not entered foreclosure after three years and meet performance criteria

Type of loan	Open and had not entered foreclosure after three years	Met performance criteria (cond. on open)
Safe harbor	85%	99%
Seasonable loans	86%	98%
Rebuttable presumption	58%	92%
Non-QM	89%	99%
Missing rate spread	76%	97%
All loans	77%	97%

Classifying loans according to their status under Baseline 2, Table 3 reports the fraction of loans that were open and had not entered foreclosure after three years and of those open loans, the fraction that would have met the performance criteria of this final rule. Eighty-six percent of the loans that would have been potentially seasonable at consummation under Baseline 2 were still open after three years, of which 98 percent would have satisfied this final rule's Seasoned QM performance requirements.

Table 4 reports the share of loans under Baseline 2 that entered foreclosure between origination and the first quarter of 2020 among all loans consummated between 2012 and 2013, those that were still open and had not entered foreclosure three years after origination, and those that met the performance criteria of this final rule. Among the loans that satisfied this final rule's performance requirements, foreclosure proceedings began for 0.2 percent of loans that would have been potentially seasonable at consummation under Baseline 2. By comparison, 0.1 percent of loans that would have already met General QM's safe harbor requirements entered foreclosure after year three.

Table 4: Share of loans that enter foreclosure under Baseline 2

Type of loan	All Loans	… open and had not entered foreclosure after 3 years	… and met performance criteria
Safe Harbor	0.2%	0.2%	0.1%
Seasonable Loans	0.4%	0.5%	0.2%
Rebuttable Presumption	2.3%	4.0%	0.0%
Non-QM	0.2%	0.2%	0.2%
Missing Rate Spread	0.7%	0.5%	0.2%
All Loans	0.7%	0.5%	0.2%

The analysis suggests that the foreclosure start rate for open loans with safe harbor status after three years—either from General QM at consummation or from Seasoned QM—would not be appreciably different than under Baseline 2.

As explained above, the Bureau cannot translate the reduction in foreclosure start rates into dollar savings on litigation costs because the Bureau lacks data on the likelihood each consumer would successfully challenge foreclosure and on the cost of each subsequent case of litigation. In the January 2013 Final Rule, the Bureau estimated litigation costs under the ability-to-repay standards for non-QM loans. The Bureau concluded that to reflect the expected value of these litigation costs, the costs of non-QM loans would increase by 10 basis points or $212 for a $210,000 loan.[187] However, the estimates set forth in the January 2013 Final Rule do not predict changes in costs from Baseline 1 on non-QM loans that obtain QM status by seasoning or on the remaining non-QM loans. In response to the Seasoned QM Proposal, the Bureau did not receive comments on methods or data that would allow the Bureau to quantify potential changes in costs.

Benefits to covered persons from market expansion

The Bureau's analysis of the NMDB holds constant the quantity and composition of loans. However, creditors could potentially gain from originating loans that would not be profitable without this final rule. Such loans may be directly more profitable because they are less costly due to the decreased litigation risk discussed in the previous section. Among these loans, loans that achieve a stronger presumption of compliance via seasoning may also be

[187] One commenter contrasted the proposal's analysis with that from the January 2013 Final Rule, 78 FR 6408, 6569 (Jan. 30, 2013). The 2013 analysis's conclusion of a 10 basis point and $212 cost associated with non-QM litigation risk came from three assumptions: 1.5 percent of loans would foreclose, 20 percent of consumers who entered foreclosure would claim violations of ATR as a defense, and consumers would succeed 20 percent of the time. As noted previously, to the Bureau's knowledge there has been a single ATR claim made in litigation, a rate of litigation far smaller than that implied by the assumptions. The Bureau cannot reliably forecast the rate of ATR defenses in foreclosure litigation under expanded non-QM lending that would arise if litigation risk were curtailed.

indirectly more profitable because they can more easily be sold on the secondary market, creating liquidity for creditors. Increased liquidity may come from both loans that were non-QM from origination and loans that achieved a safe harbor by fulfilling the portfolio requirements of the EGRRCPA. The Assessment Report found that while non-depository institutions sold non-QM loans on the secondary market, almost all surveyed depository institutions kept non-QM loans in their portfolio.

Altogether, the Bureau cannot reliably predict how many additional loans would be originated under this final rule's additional incentives and subsequently how much potential profit creditors would accrue relative to either baseline.[188] In the Seasoned QM Proposal, the Bureau sought comment as to whether these effects could be ascertained but received no additional data to quantify the effects. One academic commenter expressed skepticism that the proposal would provide enough incentive to generate more non-QM lending because lenders would still be potentially liable for ATR violations in the first three years. However, several industry commenters indicated that they would increase non-QM lending as a result of this final rule.

Other Costs to Covered Persons

The Bureau concludes that this final rule will not directly impose additional costs to creditors relative to the baseline. This final rule offers a pathway for performing mortgages to gain a safe harbor presumption. Loans meeting this final rule's Seasoned QM definition will

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[188] Assessment Report, *supra* note 47, at 117. In the Assessment Report, the Bureau estimated that the ATR/QM Rule eliminated between 63 and 70 percent of non-GSE eligible, high DTI loans for home purchase over the period of 2014 to 2016, accounting for 9,000 to 12,000 loans. The Bureau does not believe it can reliably estimate whether the number of additional loans would be less than, the same as, or more than those that the Assessment Report found were lost as a result of the ATR/QM Rule. The pool of loans analyzed in the Assessment Report is somewhat different from the 150,628 loans in Baseline 1 that would meet all of the requirements at consummation for Seasoned QMs derived above, and the benefit of seasoning would vary across these loans.

have at least as much of a presumption of compliance as under either baseline. However, if this final rule succeeds in expanding non-QM loans originations by causing new creditors to enter the market for non-QM loans, existing creditors' profits may be eroded by competitive pressures.

2. Benefits and costs to consumers

Consumers will primarily benefit from this final rule indirectly via the potential expansion of rebuttable presumption and non-QM loans originated due to decreased litigation risk to creditors. As noted in the January 2013 Final Rule, increased legal certainty may benefit consumers if it encourages creditors to make loans that satisfy the QM criteria, as such loans cannot have certain risky features and have a cap on upfront costs. Furthermore, increased certainty may result in loans with a lower cost than would be charged in a context of legal uncertainty. Thus, a safe harbor may also allow creditors to provide consumers additional or more affordable access to credit by reducing their expected total litigation costs. Applied here, for consumers that choose to pursue high APR loans without safe harbor QM status at origination, borrowing may be cheaper or more widely available relative to either baseline. However, the Bureau cannot ascertain the additional number of consumers who would choose loans without safe harbor QM status under this final rule relative to the baselines as stated in the previous section.

Consumers who would select loans without safe harbor QM status under either baseline and this final rule may or may not benefit from this final rule. On the one hand, decreased litigation risk may translate into lower costs in competitive mortgage markets.[189] However,

[189] One academic study examined how lower secondary market costs passed through to consumers in markets with different amounts of competition. David S. Scharfstein & Adi Sunderam, *Market Power in Mortgage Lending and the Transmission of Monetary Policy*, Mimeo (Aug. 2016),

decreased litigation risk for creditors would come from limiting the ability of consumers who make payments throughout the seasoning period to raise violations of ATR requirements as defenses, should they enter foreclosure after the third year. The Bureau neither has the data to estimate consumers' value of using such violations in foreclosure defense, nor to estimate this final rule's potential to decrease loan prices.

Several industry commenters suggested that workers who earn income via sources not reportable on W-2 forms (*e.g.*, self-employed or gig economy workers) would potentially benefit from expanded access to credit. Others argued that ATR arguments in foreclosure defense can be pivotal to the outcome of individual cases, and thus very valuable to individual consumers, but that in aggregate, there is not enough foreclosure litigation to substantially lower costs that would be passed on to consumers *en masse*. Even in markets where mortgage lending is competitive and cost savings are passed to consumers, evaluating the benefits to consumers in the form of increased access to credit against the costs to consumers in terms of eliminating potentially winning arguments in foreclosure defense requires information on how consumers and creditors value litigation risk. The Bureau is not aware of data that would allow it to quantify how consumers and creditors value litigation risk, and the commenters did not offer supplementary evidence to quantify those effects.

3. Consideration of alternatives

The Bureau considered alternative seasoning periods of various numbers of years and alternative performance requirements of various numbers of allowable 30-day delinquencies. None of the alternatives permits 60-day delinquencies. The Bureau assesses each alternative

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https://www.hbs.edu/faculty/Publication%20Files/Market%20Power%20in%20Mortgage%20Lending%20and%20the%20Transmission%20of%20Monetary%20Policy_8d6596e6-e073-4d11-83da-3ae1c6db6c28.pdf.

along two different measures: (1) the estimated fraction of loans that would be originated as non-QM or rebuttable presumption QM loans in each baseline that would satisfy the performance requirements; and (2) the differences in foreclosure start rates between those loans that would gain safe harbor status and those that were safe harbor at consummation.

Mirroring the approach of the foreclosure analysis in part VIII.B.1 above, the Bureau analyzes the same data on conventional, fixed-rate, first-lien purchase and refinance mortgage loans without prohibited features that were originated in 2012 and 2013 and held privately in portfolio at consummation. The analyses of alternatives also make the same assumptions on how loans with certain characteristics can obtain safe harbor status and hold constant the quantity and composition of the loans. Specifically, the consideration of alternatives is similar to the analysis of this final rule in that the Bureau cannot reliably predict how many additional loans would have been originated under its alternatives.

Table 5: Percentage of potentially seasonable loans under Baseline 1 that would have satisfied this final rule's Seasoned QM performance criteria under alternative seasoning periods and allowable 30-day delinquencies

Seasoning Period (months)	Allowable 30-day Delinquencies 0	1	2	3	4	5
12	91.7%	93.1%	93.9%	94.3%	94.4%	94.5%
24	79.5%	81.3%	82.4%	82.8%	83.0%	83.4%
36	68.1%	70.4%	71.3%	71.7%	72.2%	72.5%
48	57.3%	59.7%	60.7%	61.3%	61.7%	61.9%
60	47.7%	49.7%	50.7%	51.4%	51.8%	52.1%

Table 5 reports the fraction of loans originated as either non-QM or rebuttable presumption QM loans under the General QM standards of Baseline 1 that would have met the seasoning requirements under various alternatives. Allowing for different 30-day delinquencies has modest effects on the fraction of loans that would have seasoned. In contrast, varying the seasoning period from 12 months to 60 months captures vastly different numbers of loans that would have seasoned.

Some industry commenters noted that similar analyses of alternatives in the Seasoned QM Proposal showed only minor differences in the estimated fraction of seasonable loans that meet the performance criteria under two, three, or four 30-day delinquencies. Accordingly, the commenters suggested increasing the number of allowable 30-day delinquencies. The Bureau interprets the same data to suggest that there also would be little benefit in terms of access to credit from expanding the proposed performance criteria to allow more delinquencies and encompass more loans. Instead, inconsistent repayment reflected in more than two 30-day delinquencies could signal borrower distress or difficulties with ability to repay that do not necessarily culminate in foreclosure.

Table 6: Difference in percentage points of loans under Baseline 1 that entered foreclosure between potentially seasonable loans that meet this final rule's Seasoned QM performance criteria and loans that had safe harbor from consummation and were open and had not entered foreclosure after three years

Seasoning Period (months)	Allowable 30-day Delinquencies					
	0	1	2	3	4	5
12	1.00	1.13	1.31	1.38	1.41	1.41
24	0.56	0.61	0.74	0.78	0.82	0.90
36	0.32	0.46	0.47	0.49	0.51	0.53
48	0.10	0.20	0.23	0.25	0.25	0.27
60	-0.07	0.00	0.03	0.06	0.06	0.06

Varying the number of allowable 30-day delinquencies does have some impact on foreclosure risk. Table 6 reports the difference in the share of foreclosures among loans that would have qualified for Seasoned QM status under this final rule with the share of foreclosures among loans that would have been originated as safe harbor QM loans under Baseline 1. For example, under this final rule, among loans that were open for at least three years, the Bureau estimates that with a performance standard of no more than two 30-day delinquencies, 0.47 of a percentage point more Seasoned QMs would enter foreclosure proceedings than would loans that had safe harbor status from consummation.

Holding constant the seasoning period, decreasing the number of allowable 30-day delinquencies by one decreases the differences in foreclosure share between loans that would have seasoned and loans that were safe harbor QM loans from origination by approximately 4 percent. Similarly, increasing the number of allowed 30-day delinquencies by one increases the difference by approximately 4 percent. Changing the length of the seasoning period generally has a larger effect on the relative foreclosure start rate than does changing the number of allowable 30-day delinquencies.

Table 7: Percentage of potentially seasonable loans under Baseline 2 that would have satisfied this final rule's Seasoned QM performance criteria under alternative seasoning periods and allowable 30-day delinquencies

Seasoning Period (months)	Allowable 30-day Delinquencies 0	1	2	3	4	5
12	96.3%	96.5%	96.7%	96.7%	96.7%	96.7%
24	91.1%	91.6%	91.8%	92.2%	92.2%	92.2%
36	83.3%	84.6%	84.6%	84.6%	84.8%	84.8%
48	76.1%	77.6%	77.6%	77.6%	77.8%	77.8%
60	71.0%	72.6%	72.6%	72.8%	73.0%	73.0%

Table 7 repeats the analysis of Table 5 using Baseline 2. A larger fraction of loans—about 13 percentage points—originated as either non-QM or rebuttable presumption QM loans under the General QM standards would have met the seasoning requirements under this final rule. This reflects the fact that not only are there significantly more non-QM loans under Baseline 2 than under Baseline 1 but also that the additional non-QM loans have relatively stronger credit characteristics at consummation. The amendments to the General QM loan definition will provide many of these loans with a pathway to QM status.

Table 8: Difference in percentage points of loans under Baseline 2 that entered foreclosure between potentially seasonable loans that meet this final rule's Seasoned QM performance criteria and loans that had safe harbor from consummation and were open and had not entered foreclosure after three years

Seasoning Period (months)	Allowable 30-day Delinquencies					
	0	1	2	3	4	5
12	0.06	0.06	0.26	0.26	0.26	0.26
24	0.08	0.08	0.08	0.08	0.08	0.08
36	0.13	0.13	0.13	0.13	0.13	0.13
48	-0.09	-0.09	-0.09	-0.09	-0.09	-0.09
60	-0.09	-0.09	-0.09	-0.09	-0.09	-0.09

Table 8 shows that under Baseline 2, non-QM and rebuttable presumption QM loans that would have achieved safe harbor status through this final rule or alternatives with a seasoning period of at least three years have a 0.13 percentage point higher foreclosure start rate than open loans that were safe harbor QM loans at consummation. The difference in the foreclosure start rates does not dramatically vary with different numbers of allowable 30-day delinquencies.

C. Potential Impact on Depository Institutions and Credit Unions With $10 Billion or Less in Total Assets, as Described in Section 1026

Depository institutions and credit unions that are also creditors making covered loans (depository creditors) with $10 billion or less in total assets are expected to benefit from this final rule. As stated above, under each baseline, smaller institutions can originate Small Creditor QM loans or QM loans under the requirements of the EGRRCPA. Thus, they will likely not benefit from this final rule's providing a pathway to safe harbor status for non-QM loans, but they will benefit from the pathway to safe harbor status for rebuttable presumption QM loans. As a result of this final rule, certain loans that have a safe harbor from origination from the EGRRCPA would not have to continue to be held in portfolio after the seasoning period to maintain that safe harbor status if they meet the requirements to be a Seasoned QM.

D. Potential Impact on Rural Areas

As with the analysis of this final rule's benefits and costs overall, the Bureau can generally not predict how much or how little this final rule will cause the market in rural areas to expand under either Baseline 1 or Baseline 2. The Bureau analyzed HMDA data mirroring the description of the baselines in part VIII.A.2, continuing to assume that loans continue to be originated under each baseline with the same characteristics. Under Baseline 1, relatively more loans in rural areas than in urban areas will achieve only a stronger presumption of compliance or relief from portfolio retention requirements by meeting the performance criteria of this final rule. This share of loans is 9 percent for rural markets relative to 5 percent of the market overall. The rural share includes relatively more loans that do not meet the portfolio requirements under the EGRRCPA that will be either rebuttable presumption QMs under the revised General QM loan definition's requirements or non-QM (7.9 percent vs. 4.0 percent) and loans that will meet the portfolio and other requirements under the EGRRCPA (1.5 percent vs. 0.7 percent).

However, under Baseline 2, the difference in the share of potentially seasonable loans between rural areas (27.5 percent) and the market as a whole (27.8 percent) is relatively modest. This reflects relatively fewer loans being originated without QM status or with a rebuttable presumption that would gain the stronger presumption of compliance of safe harbor if they met the performance requirements of this final rule than under Baseline 2 alone (22.8 percent vs. 24.2 percent) and relatively more that were originated under the EGRRCPA QM definition and could potentially gain relief from the portfolio requirements (4.7 percent vs. 3.7 percent).

IX. Regulatory Flexibility Act Analysis

The Regulatory Flexibility Act (RFA),[190] as amended by the Small Business Regulatory Enforcement Fairness Act of 1996,[191] requires each agency to consider the potential impact of its regulations on small entities, including small businesses, small governmental units, and small not-for-profit organizations. The RFA defines a "small business" as a business that meets the

[190] 5 U.S.C. 601 *et seq.*

[191] Public Law 104-121, tit. II, 110 Stat. 857 (1996).

size standard developed by the Small Business Administration pursuant to the Small Business Act.[192]

The RFA generally requires an agency to conduct an initial regulatory flexibility analysis (IRFA) and a final regulatory flexibility analysis (FRFA) of any rule subject to notice-and-comment rulemaking requirements, unless the agency certifies that the rule would not have a significant economic impact on a substantial number of small entities (SISNOSE).[193] The Bureau also is subject to certain additional procedures under the RFA involving the convening of a panel to consult with small business representatives before proposing a rule for which an IRFA is required.[194]

Neither an IRFA nor a small business review panel was required for the proposal, because the Director certified that the proposal, if adopted, would not have a SISNOSE.

Similarly, a FRFA is not required for this final rule, because this final rule will not have a SISNOSE. The Bureau does not expect that this final rule will impose costs on small entities relative to any of the baselines. This final rule defines a new category of QMs. All methods of compliance with the ATR requirements under a particular baseline will remain available to small entities under this final rule. Thus, a small entity that is in compliance with the rules under a given baseline will not need to take any different or additional action under this final rule.

Accordingly, the Director certifies that this final rule will not have a SISNOSE.

[192] 5 U.S.C. 601(3) (stating also that the Bureau may establish an alternative definition after consultation with the Small Business Administration and an opportunity for public comment).

[193] 5 U.S.C. 603 through 605.

[194] 5 U.S.C. 609.

X. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA),[195] Federal agencies are generally required to seek, prior to implementation, approval from the Office of Management and Budget (OMB) for information collection requirements. Under the PRA, the Bureau may not conduct or sponsor, and, notwithstanding any other provision of law, a person is not required to respond to, an information collection unless the information collection displays a valid control number assigned by OMB.

The Bureau has determined that this final rule does not contain any new or substantively revised information collection requirements other than those previously approved by OMB under OMB control number 3170-0015. This final rule will amend 12 CFR part 1026 (Regulation Z), which implements TILA. OMB control number 3170-0015 is the Bureau's OMB control number for Regulation Z.

XI. Congressional Review Act

Pursuant to the Congressional Review Act,[196] the Bureau will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to the rule's published effective date. The Office of Information and Regulatory Affairs has designated this rule as not a "major rule" as defined by 5 U.S.C. 804(2).

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[195] 44 U.S.C. 3501 *et seq.*

[196] 5 U.S.C. 801 *et seq.*

XII. Signing Authority

The Director of the Bureau, Kathleen L. Kraninger, having reviewed and approved this document, is delegating the authority to electronically sign this document to Grace Feola, a Bureau Federal Register Liaison, for purposes of publication in the *Federal Register*.

List of Subjects in 12 CFR Part 1026

Advertising, Banks, banking, Consumer protection, Credit, Credit unions, Mortgages, National banks, Reporting and recordkeeping requirements, Savings associations, Truth-in-lending.

Authority and Issuance

For the reasons set forth above, the Bureau amends Regulation Z, 12 CFR part 1026, as set forth below:

PART 1026—TRUTH IN LENDING (REGULATION Z)

1. The authority citation for part 1026 continues to read as follows:

Authority: 12 U.S.C. 2601, 2603-2605, 2607, 2609, 2617, 3353, 5511, 5512, 5532, 5581; 15 U.S.C. 1601 *et seq.*

Subpart E—Special Rules for Certain Home Mortgage Transactions

2. Amend § 1026.43 by revising paragraph (e)(1) and the introductory text of (e)(2) and adding paragraph (e)(7) to read as follows:

§ 1026.43 Minimum standards for transactions secured by a dwelling.

*   *   *   *   *

(e) *Qualified mortgages*—(1) *Safe harbor and presumption of compliance*—(i) *Safe harbor for loans that are not higher-priced covered transactions and for seasoned loans*. A creditor or assignee of a qualified mortgage complies with the repayment ability requirements of paragraph (c) of this section if:

(A) The loan is a qualified mortgage as defined in paragraph (e)(2), (4), (5), (6), or (f) of this section that is not a higher-priced covered transaction, as defined in paragraph (b)(4) of this section; or

(B) The loan is a qualified mortgage as defined in paragraph (e)(7) of this section, regardless of whether the loan is a higher-priced covered transaction.

*   *   *   *   *

(2) *Qualified mortgage defined—general*. Except as provided in paragraph (e)(4), (5), (6), (7), or (f) of this section, a qualified mortgage is a covered transaction:

*   *   *   *   *

(7) *Qualified mortgage defined—seasoned loans*.

(i) *General.* Notwithstanding paragraph (e)(2) of this section, and except as provided in paragraph (e)(7)(iv) of this section, a qualified mortgage is a first-lien covered transaction that:

(A) Is a fixed-rate mortgage as defined in § 1026.18(s)(7)(iii) with fully amortizing payments as defined in paragraph (b)(2) of this section;

(B) Satisfies the requirements in paragraphs (e)(2)(i) through (v) of this section;

(C) Has met the requirements in paragraph (e)(7)(ii) of this section at the end of the seasoning period as defined in paragraph (e)(7)(iv)(C) of this section;

(D) Satisfies the requirements in paragraph (e)(7)(iii) of this section; and

(E) Is not a high-cost mortgage as defined in § 1026.32(a).

(ii) *Performance requirements.* To be a qualified mortgage under this paragraph (e)(7) of this section, the covered transaction must have no more than two delinquencies of 30 or more days and no delinquencies of 60 or more days at the end of the seasoning period.

(iii) *Portfolio requirements.* To be a qualified mortgage under this paragraph (e)(7) of this section, the covered transaction must satisfy the following requirements:

(A) The covered transaction is not subject, at consummation, to a commitment to be acquired by another person, except for a sale, assignment, or transfer permitted by paragraph (e)(7)(iii)(B)(*3*) of this section; and

(B) Legal title to the covered transaction is not sold, assigned, or otherwise transferred to another person before the end of the seasoning period, except that:

(*1*) The covered transaction may be sold, assigned, or otherwise transferred to another person pursuant to a capital restoration plan or other action under 12 U.S.C. 1831o, actions or instructions of any person acting as conservator, receiver, or bankruptcy trustee, an order of a State or Federal government agency with jurisdiction to examine the creditor pursuant to State or Federal law, or an agreement between the creditor and such an agency;

(*2*) The covered transaction may be sold, assigned, or otherwise transferred pursuant to a merger of the creditor with another person or acquisition of the creditor by another person or of another person by the creditor; or

(*3*) The covered transaction may be sold, assigned, or otherwise transferred once before the end of the seasoning period, provided that the covered transaction is not securitized as part of the sale, assignment, or transfer or at any other time before the end of the seasoning period as defined in § 1026.43(e)(7)(iv)(C).

(iv) *Definitions.* For purposes of paragraph (e)(7) of this section:

(A) *Delinquency* means the failure to make a periodic payment (in one full payment or in two or more partial payments) sufficient to cover principal, interest, and escrow (if applicable) for a given billing cycle by the date the periodic payment is due under the terms of the legal obligation. Other amounts, such as any late fees, are not considered for this purpose.

(*1*) A periodic payment is 30 days delinquent when it is not paid before the due date of the following scheduled periodic payment.

(*2*) A periodic payment is 60 days delinquent if the consumer is more than 30 days delinquent on the first of two sequential scheduled periodic payments and does not make both sequential scheduled periodic payments before the due date of the next scheduled periodic payment after the two sequential scheduled periodic payments.

(*3*) For any given billing cycle for which a consumer's payment is less than the periodic payment due, a consumer is not delinquent as defined in this paragraph (e)(7) if:

(*i*) The servicer chooses not to treat the payment as delinquent for purposes of any section of subpart C of Regulation X, 12 CFR part 1024, if applicable;

(*ii*) The payment is deficient by $50 or less; and

(*iii*) There are no more than three such deficient payments treated as not delinquent during the seasoning period.

(*4*) The principal and interest used in determining the date a periodic payment sufficient to cover principal, interest, and escrow (if applicable) for a given billing cycle becomes due and unpaid are the principal and interest payment amounts established by the terms and payment schedule of the loan obligation at consummation, except:

(*i*) If a qualifying change as defined in paragraph (e)(7)(iv)(B) of this section is made to the loan obligation, the principal and interest used in determining the date a periodic payment sufficient to cover principal, interest, and escrow (if applicable) for a given billing cycle becomes due and unpaid are the principal and interest payment amounts established by the terms and payment schedule of the loan obligation at consummation as modified by the qualifying change.

(*ii*) If, due to reasons related to the timing of delivery, set up, or availability for occupancy of the dwelling securing the obligation, the first payment due date is modified before the first payment due date in the legal obligation at consummation, the modified first payment due date shall be considered in lieu of the first payment due date in the legal obligation at consummation in determining the date a periodic payment sufficient to cover principal, interest, and escrow (if applicable) for a given billing cycle becomes due and unpaid.

(*5*) Except for purposes of making up the deficiency amount set forth in paragraph (e)(7)(iv)(A)(*3*)(*ii*) of this section, payments from the following sources are not considered in assessing delinquency under paragraph (e)(7)(iv)(A) of this section:

(*i*) Funds in escrow in connection with the covered transaction; or

(*ii*) Funds paid on behalf of the consumer by the creditor, servicer, or assignee of the covered transaction, or any other person acting on behalf of such creditor, servicer, or assignee.

(B) *Qualifying change* means an agreement that meets the following conditions:

(*1*) The agreement is entered into during or after a temporary payment accommodation in connection with a disaster or pandemic-related national emergency as defined in paragraph (e)(7)(iv)(D) of this section and ends any pre-existing delinquency on the loan obligation upon taking effect;

(*2*) The amount of interest charged over the full term of the loan does not increase as a result of the agreement;

(*3*) The servicer does not charge any fee in connection with the agreement; and

(*4*) Promptly upon the consumer's acceptance of the agreement, the servicer waives all late charges, penalties, stop payment fees, or similar charges incurred during a temporary payment accommodation in connection with a disaster or pandemic-related national emergency, as well as all late charges, penalties, stop payment fees, or similar charges incurred during the delinquency that led to a temporary payment accommodation in connection with a disaster or pandemic-related national emergency.

(C) *Seasoning period* means a period of 36 months beginning on the date on which the first periodic payment is due after consummation of the covered transaction, except that:

(*1*) Notwithstanding any other provision of this section, if there is a delinquency of 30 days or more at the end of the 36th month of the seasoning period, the seasoning period does not end until there is no delinquency; and

(*2*) The seasoning period does not include any period during which the consumer is in a temporary payment accommodation extended in connection with a disaster or pandemic-related national emergency, provided that during or at the end of the temporary payment accommodation there is a qualifying change as defined in paragraph (e)(7)(iv)(B) of this section or the consumer cures the loan's delinquency under its original terms. If during or at the end of the temporary payment accommodation in connection with a disaster or pandemic-related national emergency there is a qualifying change or the consumer cures the loan's delinquency under its original terms, the seasoning period consists of the period from the date on which the first periodic payment was due after consummation of the covered transaction to the beginning of the temporary payment accommodation and an additional period immediately after the temporary payment accommodation ends, which together must equal at least 36 months.

(D) *Temporary payment accommodation in connection with a disaster or pandemic-related national emergency* means temporary payment relief granted to a consumer due to financial hardship caused directly or indirectly by a presidentially declared emergency or major disaster under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 *et seq.*) or a presidentially declared pandemic-related national emergency under the National Emergencies Act (50 U.S.C. 1601 *et seq.*).

*   *   *   *   *

3. In Supplement I to Part 1026—Official Interpretations, under *Section 1026.43—Minimum Standards for Transactions Secured by a Dwelling*:

a. Revise *43(e)(1) Safe harbor and presumption of compliance*;

b. Remove *43(e)(1)(i) Safe harbor for transactions that are not higher-priced covered transactions;*

c. Add *43(e)(1)(i)(A) Safe harbor for transactions that are not higher-priced covered transactions;*

d. Add the heading *43(e)(7) Seasoned Loans* and add *paragraphs 43(e)(7)(i)(A)*, *43(e)(7)(iii)*, *43(e)(7)(iv)(A), 43(e)(7)(iv)(A)*(2), *43(e)(7)(iv)(B)*, *43(e)(7)(iv)(C)*(2), *and 43(e)(7)(iv)(D)* after paragraph 43(e)(5).

The revision and additions read as follows:

Supplement I to Part 1026—Official Interpretations

*   *   *   *   *

Section 1026.43—Minimum standards for transactions secured by a dwelling

*   *   *   *   *

43(e)(1) Safe harbor and presumption of compliance.

1. *General.* Section 1026.43(c) requires a creditor to make a reasonable and good faith determination at or before consummation that a consumer will be able to repay a covered transaction. Section 1026.43(e)(1)(i) and (ii) provide a safe harbor or presumption of compliance, respectively, with the repayment ability requirements of § 1026.43(c) for creditors and assignees of covered transactions that satisfy the requirements of a qualified mortgage under § 1026.43(e)(2), (4), (5), (6), (7), or (f). *See* § 1026.43(e)(1)(i) and (ii) and associated commentary.

43(e)(1)(i)(A) Safe harbor for transactions that are not higher-priced covered transactions.

1. *Higher-priced covered transactions.* For guidance on determining whether a loan is a higher-priced covered transaction, see comments 43(b)(4)-1 through -3.

*   *   *   *   *

43(e)(7) Seasoned loans.

Paragraph 43(e)(7)(i)(A)

1. *Fixed-rate mortgage*. Section 1026.43(e)(7)(i)(A) provides that, for a covered transaction to become a qualified mortgage under § 1026.43(e)(7), the covered transaction must be a fixed-rate mortgage, as defined in § 1026.18(s)(7)(iii). Under § 1026.18(s)(7)(iii), the term "fixed-rate mortgage" means a transaction secured by real property or a dwelling that is not an adjustable-rate mortgage or a step-rate mortgage. Thus, a covered transaction that is an adjustable-rate mortgage or step-rate mortgage is not eligible to become a qualified mortgage under § 1026.43(e)(7).

2. *Fully amortizing payments*. Section 1026.43(e)(7)(i)(A) provides that for a covered transaction to become a qualified mortgage as a seasoned loan under § 1026.43(e)(7), a mortgage must meet certain product requirements and be a fixed-rate mortgage with fully amortizing payments. Only loans for which the scheduled periodic payments do not require a balloon payment, as defined in § 1026.18(s), to fully amortize the loan within the loan term can become seasoned loans for the purposes of § 1026.43(e)(7). However, § 1026.43(e)(7)(i)(A) does not prohibit a qualifying change as defined in § 1026.43(e)(7)(iv)(B) that is entered into during or after a temporary payment accommodation in connection with a disaster or pandemic-related national emergency, even if such a qualifying change involves a balloon payment or lengthened loan term.

Paragraph 43(e)(7)(iii)

1. *Requirement to hold in portfolio*. For a covered transaction to become a qualified mortgage under § 1026.43(e)(7), a creditor generally must hold the transaction in portfolio until the end of the seasoning period, subject to the exceptions set forth in § 1026.43(e)(7)(iii)(B)(*1*) through (*3*). Unless one of these exceptions applies, a covered transaction cannot become a qualified mortgage as a seasoned loan under § 1026.43(e)(7) if legal title to the debt obligation is sold, assigned, or otherwise transferred to another person before the end of the seasoning period.

2. *Application to subsequent transferees*. The exception contained in § 1026.43(e)(7)(iii)(B)*(3)* may be used only one time for a covered transaction. The exceptions contained in § 1026.43(e)(7)(iii)(B)(*1*) and (*2*) apply not only to an initial sale, assignment, or other transfer by the originating creditor but to subsequent sales, assignments, and other transfers as well. For example, assume Creditor A originates a covered transaction that is not a qualified mortgage at origination. Six months after consummation, the covered transaction is transferred

to Creditor B pursuant to § 1026.43(e)(7)(iii)(B)(*3*). The transfer does not fail to comply with the requirements in § 1026.43(e)(7)(iii) because the loan is not securitized as part of the transfer or at any other time before the end of the seasoning period. If Creditor B sells the covered transaction before the end of the seasoning period, the covered transaction is not eligible to season into a qualified mortgage under § 1026.43(e)(7) unless the sale falls within an exception set forth in § 1026.43(e)(7)(iii)(B)(*1*) or (*2*) (*i.e.*, the transfer is required by supervisory action or pursuant to a merger or acquisition).

3. *Supervisory sales*. Section 1026.43(e)(7)(iii)(B)(*1*) facilitates sales that are deemed necessary by supervisory agencies to revive troubled creditors and resolve failed creditors. A covered transaction does not violate the requirements in § 1026.43(e)(7)(iii) if it is sold, assigned, or otherwise transferred to another person before the end of the seasoning period pursuant to: a capital restoration plan or other action under 12 U.S.C. 1831o; the actions or instructions of any person acting as conservator, receiver or bankruptcy trustee; an order of a State or Federal government agency with jurisdiction to examine the creditor pursuant to State or Federal law; or an agreement between the creditor and such an agency. Section 1026.43(e)(7)(iii)(B)(*1*) does not apply to transfers done to comply with a generally applicable regulation with future effect designed to implement, interpret, or prescribe law or policy in the absence of a specific order by or a specific agreement with a governmental agency described in § 1026.43(e)(7)(iii)(B)(*1*) directing the sale of one or more covered transactions held by the creditor or one of the other circumstances listed in § 1026.43(e)(7)(iii)(B)(*1*). For example, a covered transaction does not violate the requirements in § 1026.43(e)(7)(iii) if the covered transaction is sold pursuant to a capital restoration plan under 12 U.S.C. 1831o before the end of seasoning period. However, if the creditor simply chose to sell the same covered transaction as

one way to comply with general regulatory capital requirements in the absence of supervisory action or agreement, then the covered transaction cannot become a qualified mortgage as a seasoned loan under § 1026.43(e)(7), unless the sale met the requirements of § 1026.43(e)(7)(iii)(B)(*3*) or the covered transaction qualifies under another definition of qualified mortgage.

Paragraph 43(e)(7)(iv)(A)

1. *Due date.* In determining whether a scheduled periodic payment is delinquent for purposes of § 1026.43(e)(7), the due date is the date the payment is due under the terms of the legal obligation, without regard to whether the consumer is afforded a period after the due date to pay before the servicer assesses a late fee.

Paragraph 43(e)(7)(iv)(A)(2)

1. *60 days delinquent.* The following example illustrates the meaning of 60 days delinquent for purposes of § 1026.43(e)(7). Assume a loan is consummated on October 15, 2022, that the consumer's periodic payment is due on the 1st of each month, and that the consumer timely made the first periodic payment due on December 1, 2022. For purposes of § 1026.43(e)(7), the consumer is 30 days delinquent if the consumer fails to make a payment (sufficient to cover the scheduled January 1, 2023 periodic payment of principal, interest, and escrow (if applicable)) before February 1, 2023. For purposes of § 1026.43(e)(7), the consumer is 60 days delinquent if the consumer then fails to make two payments (sufficient to cover the scheduled January 1, 2023 and February 1, 2023 periodic payments of principal, interest, and escrow (if applicable)) before March 1, 2023.

Paragraph 43(e)(7)(iv)(B)

1. *Qualifying change.* An agreement that meets the conditions specified in § 1026.43(e)(7)(iv)(B) is a qualifying change even if it is not in writing.

Paragraph 43(e)(7)(iv)(C)(2)

1. *Suspension of seasoning period during certain temporary payment accommodations.* Section 1026.43(e)(7)(iv)(C)(*2*) provides that the seasoning period does not include any period during which the consumer is in a temporary payment accommodation extended in connection with a disaster or pandemic-related national emergency, provided that during or at the end of the temporary payment accommodation there is a qualifying change as defined in § 1026.43(e)(7)(iv)(B) or the consumer cures the loan's delinquency under its original terms. Section 1026.43(e)(7)(iv)(C)(*2*) further explains that, under these circumstances, the seasoning period consists of the period from the date on which the first periodic payment was due after origination of the covered transaction to the beginning of the temporary payment accommodation and an additional period immediately after the temporary payment accommodation ends, which together must equal at least 36 months. For example, assume the consumer enters into a covered transaction for which the first periodic payment is due on March 1, 2022, and the consumer enters a three-month temporary payment accommodation in connection with a disaster or pandemic-related national emergency, effective March 1, 2023. Assume further that the consumer misses the March 1, April 1, and May 1, 2023 periodic payments during the temporary payment accommodation period, but enters into a qualifying change as defined in § 1026.43(e)(7)(iv)(B) on June 1, 2023, and is not delinquent on June 1, 2023. Under these circumstances, the seasoning period consists of the period from March 1, 2022 to February 28,

2023 and the period from June 1, 2023 to May 31, 2025, assuming the consumer is not 30 days or more delinquent on May 31, 2025.

Paragraph 43(e)(7)(iv)(D)

1. *Temporary payment accommodation in connection with a disaster or pandemic-related national emergency.* For purposes of § 1026.43(e)(7), examples of temporary payment accommodations in connection with a disaster or pandemic-related national emergency include, but are not limited to a trial loan modification plan, a temporary payment forbearance program, or a temporary repayment plan.

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Dated: December 10, 2020.

/s/Grace Feola

Grace Feola,

Federal Register Liaison, Bureau of Consumer Financial Protection.