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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: Proposed rule with request for public comment.

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 QM loans) 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 proposal 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. The Bureau's primary objective with this proposal is to ensure access to responsible, affordable mortgage credit by adding a Seasoned QM definition to the existing QM definitions.

DATES: Comments must be received on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by Docket No. CFPB-2020-0028 or RIN 3170-AA98, by any of the following methods:

- *Federal eRulemaking Portal*: https://www.regulations.gov. Follow the instructions for submitting comments.
- *Email*: 2020-NPRM-SeasonedQM@cfpb.gov. Include Docket No. CFPB-2020-0028 or RIN 3170-AA98 in the subject line of the message.
- *Mail/Hand Delivery/Courier*: Comment Intake—Seasoned QM, Bureau of Consumer Financial Protection, 1700 G Street NW, Washington, DC 20552. Please note that due to circumstances associated with the COVID-19 pandemic, the Bureau discourages the submission of comments by mail, hand delivery, or courier.

Instructions: The Bureau encourages the early submission of comments. All submissions should include the agency name and docket number or Regulatory Information Number (RIN) for this rulemaking. Because paper mail in the Washington, DC area and at the Bureau is subject to delay, and in light of difficulties associated with mail and hand deliveries during the COVID-19 pandemic, commenters are encouraged to submit comments electronically. In general, all comments received will be posted without change to https://www.regulations.gov. In addition, once the Bureau's headquarters reopens, comments will be available for public inspection and copying at 1700 G Street NW, Washington, DC 20552, on official business days between the hours of 10 a.m. and 5 p.m. Eastern Time. At that time, you can make an appointment to inspect the documents by telephoning 202-435-9169.

All comments, including attachments and other supporting materials, will become part of the public record and subject to public disclosure. Proprietary information or sensitive personal information, such as account numbers or Social Security numbers, or names of other individuals, should not be included. Comments will not be edited to remove any identifying or contact information.

FOR FURTHER INFORMATION CONTACT: Eliott C. Ponte or Ruth Van Veldhuizen, Counsels, or Joan Kayagil, Amanda Quester, Jane Raso, or Steve Wrone, 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 Proposed Rule

The Ability-to-Repay/Qualified Mortgage Rule (ATR/QM Rule or 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 Rule's requirements for qualified mortgages (QMs) obtain certain protections from liability. The Bureau is issuing this proposal 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.

The Bureau believes that a Seasoned QM definition could complement existing QM definitions and help ensure access to responsible, affordable mortgage credit upon the expiration of one of the existing QM definitions. One QM category defined in the Rule is the General QM loan category. General QM loans must comply with the Rule's prohibitions on certain loan features, its points-and-fees limits, and its underwriting requirements. Under the definition for General QM loans currently in effect, the ratio of the consumer's total monthly debt to total monthly income (DTI) ratio must not exceed 43 percent. A second, temporary category of QM loans defined in the Rule consists of mortgages that (1) comply with the same loan-feature restrictions and points-and-fees limits as General QM loans and (2) are eligible to be purchased or guaranteed by the GSEs while under the conservatorship of the FHFA (Temporary GSE QM loans). Under the Rule, the Temporary GSE QM loan definition expires with respect to each GSE when that GSE exits conservatorship or on January 10, 2021, whichever comes first.

In a separate proposal (Extension Proposal) released in June 2020,[1] the Bureau proposed to extend the Temporary GSE QM loan definition to expire upon the effective date of final amendments to the General QM loan definition or when the GSEs exit conservatorship, whichever comes first. In another proposal (General QM Proposal)[2] released simultaneously with the Extension Proposal, the Bureau proposed the amendments to the General QM loan definition that are referenced in the Extension Proposal.

The Bureau is issuing this proposal 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 only rebuttable presumption QMs under the existing QM categories. The Bureau preliminarily concludes that it is appropriate to presume compliance with the ability-to-repay (ATR) requirements when such loans season in the manner set forth in the proposal. Under the proposal, a covered transaction would receive a safe harbor from ATR liability at the end of a 36-month seasoning period as a Seasoned QM if it satisfies certain

[1] 85 FR 41448 (July 10, 2020).

[2] 85 FR 41716 (July 10, 2020).

product restrictions, points-and-fees limits, and underwriting requirements, and it meets performance and portfolio requirements during the seasoning period. Specifically, a covered transaction would have 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 fully amortizing payments and no balloon payment;
3. The loan term does not exceed 30 years; and
4. The total points and fees do not exceed specified limits.

For a loan to be eligible to become a Seasoned QM, the proposal would require that the creditor consider the consumer's DTI ratio or residual income and verify the consumer's debt obligations and income. Similar to provisions in the Rule that create a QM category for certain portfolio loans originated by certain small creditors (Small Creditor QM definition), the proposal would not specify a DTI limit, nor would it require the creditor to use appendix Q to Regulation Z in calculating and verifying debt and income.

Under the proposal, a loan generally would only be eligible to season if the creditor holds it in portfolio until the end of the seasoning period. The proposed portfolio requirements are similar to those that apply to Small Creditor QMs under the Rule.

In order to become Seasoned QMs, loans would have to meet certain performance requirements at the end of the seasoning period. Specifically, seasoning would be 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) would not be considered in assessing whether a periodic payment has been made or is delinquent for purposes of the proposal. Creditors could, 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 the proposal.

The proposal 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.[3] Failure to make full contractual payments would 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 would not count towards the 36-month seasoning period, and the seasoning period could 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 the proposal.[4]

The Bureau proposes that a final rule relating to this proposal would take effect on the same date as a final rule amending the General QM 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 revised regulations would apply to covered transactions for which creditors receive an application on or after the effective date,

[3] However, if there is a delinquency of 30 days or more at the end of the final month of the seasoning period, the seasoning period would be extended until there is no delinquency.

[4] The proposal 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.

which aligns with the approach the Bureau proposed to take in the General QM Proposal. The Bureau requests comment on this proposed effective date for a final rule relating to this proposal.

Comments on the General QM Proposal should be filed on the docket for that proposal, which closes on September 8, 2020, including comments on the specific subject of whether anything in this proposal affects how the Bureau should finalize the General QM Proposal. Comments on that specific subject may also be submitted to this docket, but any other comments concerning the General QM Proposal will be considered outside of the scope of and will not be considered in this rulemaking.

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)[5] amended the Truth in Lending Act (TILA)[6] to establish, among other things, ATR requirements in connection with the origination of most residential mortgage loans.[7] 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."[8] As amended, TILA prohibits a creditor from making a residential mortgage loan unless the creditor makes a reasonable and good faith determination based on

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

[6] 15 U.S.C. 1601 *et seq.*

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

[8] 15 U.S.C. 1639b(a)(2).

verified and documented information that the consumer has a reasonable ability to repay the loan.[9]

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 repayment of the loan.[10] A creditor, however, may not be certain whether its ATR determination is reasonable in a particular case, and it risks liability if a court or an agency, including the Bureau, later concludes that the ATR determination was not reasonable.[11]

TILA addresses this uncertainty by defining a category of loans—called QMs—for which a creditor "may presume that the loan has met" the ATR requirements.[12] The statute generally defines a QM to mean any residential mortgage loan for which:

- There is no negative amortization, interest-only payments, or balloon payments;
- The loan term does not exceed 30 years;

[9] 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 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).

[10] 15 U.S.C. 1639c(a)(3).

[11] 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).

[12] 15 U.S.C. 1639c(b)(1).

- 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;
- 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.[13]

B. The Ability-to-Repay/Qualified Mortgage Rule

In January 2013, the Bureau issued the ATR/QM Rule, which amended Regulation Z to implement TILA's ATR requirements (January 2013 Final Rule).[14] The Rule became effective on January 10, 2014, and the Bureau amended it several times through 2016.[15] The ATR/QM Rule implements the statutory ATR provisions discussed above and defines several categories of QM loans.[16]

1. General QM Loans

One category of QM loans defined by the Rule consists of "General QM loans." A loan is a General QM loan if:

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[13] 15 U.S.C. 1639c(b)(2)(A).

[14] 78 FR 6408 (Jan. 30, 2013).

[15] *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).

[16] 12 CFR 1026.43(c), (e).

- 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;[17]
- The creditor underwrites the loan based on a fully amortizing schedule using the maximum rate permitted during the first five years;[18]
- The creditor considers and verifies the consumer's income and debt obligations in accordance with appendix Q;[19] and
- The consumer's DTI ratio is no more than 43 percent, determined in accordance with appendix Q.[20]

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 QM loans. 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.[21]

On June 22, 2020, the Bureau proposed amendments to the General QM definition, which would, among other things, replace the General QM loan definition's 43 percent DTI limit with a price-based threshold and remove appendix Q.[22] In addition to soliciting comment on the Bureau's proposed price-based approach, the Bureau requested comment on certain alternative

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[17] 12 CFR 1026.43(e)(2)(i) through (iii).

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

[19] 12 CFR 1026.43(e)(2)(v).

[20] 12 CFR 1026.43(e)(2)(vi).

[21] 12 CFR 1026, appendix Q.

[22] 85 FR 41716 (July 10, 2020).

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 appendix Q.

2. *Temporary GSE QM Loans*

A second, temporary category of QM loans defined by the Rule, Temporary GSE QM loans, consists of mortgages that (1) comply with the Rule's prohibitions on certain loan features and its limitations on points and fees;[23] and (2) are eligible to be purchased or guaranteed by either GSE while under the conservatorship of the FHFA.[24] Unlike for General QM loans, Regulation Z does not prescribe a DTI limit for Temporary GSE QM loans. Thus, a loan can qualify as a Temporary GSE QM loan 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. In addition, income and debt for such loans, and DTI ratios, generally are verified and calculated using GSE standards, rather than appendix Q. The Temporary GSE QM loan category—also known as the GSE Patch—is scheduled to expire with respect to each GSE when that GSE exits conservatorship or on January 10, 2021, whichever comes first.[25] On June 22, 2020, the Bureau proposed to extend the Temporary GSE QM category to expire upon the effective date of final

[23] 12 CFR 1026.43(e)(2)(i) through (iii).

[24] 12 CFR 1026.43(e)(4).

[25] 12 CFR 1026.43(e)(4)(iii)(B). The ATR/QM Rule created several additional categories of QM loans. 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 QM loans 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 QM loans 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).

amendments to the General QM definition or when the GSEs exit conservatorship or receivership, whichever comes first.[26]

3. Small Creditor QM Loans

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.[27] Those requirements include many that apply to General QM loans, with some exceptions. Specifically, the threshold for determining whether Small Creditor QM loans are higher-priced covered transactions, and thus qualify for the QM safe harbor or rebuttable presumption, is higher than the threshold for General QM loans.[28] Small Creditor QM loans also are not subject to the General QM definition's 43 percent DTI limit, and the creditor is not required to use appendix Q to calculate debt and income.[29] In addition, Small Creditor QM loans must be held in portfolio for three years (a requirement that does not apply to apply to General QM loans).[30] The Bureau made several amendments to the Small Creditor QM provisions in 2015.[31] These

[26] 85 FR 41448 (July 10, 2020).

[27] 78 FR 35430 (June 12, 2013).

[28] 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 QM loans 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.

[29] 12 CFR 1026.43(e)(5)(i)(A).

[30] 12 CFR 1026.43(e)(5)(ii), (f)(2).

[31] 80 FR 59944 (Oct. 2, 2015).

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.[32]

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.[33] 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.[34] 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.[35]

[32] As with Small Creditor QM loans, Balloon Payment QM loans must be held in portfolio for three years. In addition, Balloon Payment QM loans 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 QM loans 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. *See* 12 CFR 1026.43(f).

[33] 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.").

[34] *Id.* at 35486.

[35] *Id.* at 35430.

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.[36] 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.[37] Specifically, the protection from liability is available if a loan: (1) is originated by and retained in portfolio by the institution,[38] (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 safe harbor 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.

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

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

[38] EGRRCPA's legislative history contains the following testimony from Senator Pat Toomey with respect to the portfolio requirement: "[I]f the bank is keeping the loan on its own books, then it should be obvious to everyone that the bank has every incentive to make sure the loan is made to someone who can repay it." 164 Cong. Rec. S1719-20 (daily ed. Mar. 14, 2018).

D. General QM Proposal

On June 22, 2020, the Bureau proposed to amend the General QM loan definition because it was concerned that retaining the existing General QM loan definition with the 43 percent DTI limit after the Temporary GSE QM loan definition expired would significantly reduce the size of the QM market and could significantly reduce access to responsible, affordable credit.[39] Readers should refer to that proposed rule for a full discussion of the proposed amendments and the Bureau's rationale for them. In summary, in that proposed rule, the Bureau proposed a price-based General QM loan definition to replace the DTI-based approach because it preliminarily concluded that a loan's price, as measured by comparing a loan's annual percentage rate (APR) to the average prime offer rate (APOR) for a comparable transaction, is a strong indicator of a consumer's ability to repay and is a more holistic and flexible measure of a consumer's ability to repay than DTI alone.

Under the General QM Proposal, a loan would meet the General QM loan definition in § 1026.43(e)(2) only if the APR exceeds APOR for a comparable transaction by less than 2 percentage points as of the date the interest rate is set. The proposal would provide higher thresholds for loans with smaller loan amounts and for subordinate-lien transactions. The proposal would retain the existing product-feature and underwriting requirements and limits on points and fees. Although the General QM Proposal would remove the 43 percent DTI limit from the General QM loan definition, the proposal would require that the creditor consider and verify the consumer's income or assets, debt obligations, alimony, child support, and monthly DTI ratio or residual income. The proposal would remove appendix Q. To mitigate the

[39] 85 FR 41716 (July 10, 2020).

uncertainty that may result from appendix Q's removal, the proposal would clarify the requirements to consider and verify a consumer's income, assets, debt obligations, alimony, and child support. The proposal would preserve the current threshold separating safe harbor from rebuttable presumption QMs, under which a loan is a safe harbor QM if its APR exceeds APOR for a comparable transaction by less than 1.5 percentage points as of the date the interest rate is set (or by less than 3.5 percentage points for subordinate-lien transactions).

The Bureau proposed a price-based approach to replace the specific DTI limit because it was concerned that imposing a DTI limit as a condition for QM status under the General QM loan definition may be overly burdensome and complex in practice and may unduly restrict access to credit because it provides an incomplete picture of the consumer's financial capacity. In particular, the Bureau was concerned that conditioning QM status on a specific DTI limit may impair access to responsible, affordable credit for some consumers for whom it might be appropriate to presume ability to repay their loans at consummation. For the reasons set forth in the General QM Proposal, the Bureau preliminarily concluded that a price-based General QM loan definition is appropriate because a loan's price, as measured by comparing a loan's APR to APOR for a comparable transaction, is a strong indicator of a consumer's ability to repay and is a more holistic and flexible measure of a consumer's ability to repay than DTI alone.

In addition, 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 appendix Q.

E. Presumption of Compliance for Existing Categories of QM Loans Under the Rule

In the January 2013 Final Rule, the Bureau considered whether QM loans should receive a conclusive presumption (*i.e.*, a safe harbor) or a rebuttable presumption of compliance with the

ATR requirements.[40] 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 demonstrates that there are sound reasons for adopting either interpretation.[41] 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.[42] The Bureau 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."[43]

Under the Rule, a creditor that makes a QM loan is protected from liability presumptively or conclusively, depending on whether the loan is "higher priced." The 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.[44] A creditor that makes a QM loan that is not "higher priced" is entitled to a conclusive presumption that it has complied with the Rule—*i.e.*, the creditor receives a safe harbor from liability.[45] A creditor that makes a

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[40] 78 FR 6408, 6511 (Jan. 30, 2013).

[41] *Id.* at 6507.

[42] *Id.* at 6511.

[43] *Id.* at 6514.

[44] 12 CFR 1026.43(b)(4).

[45] 12 CFR 1026.43(e)(1)(i).

loan that meets the standards for a QM loan but is "higher priced" is entitled to a rebuttable presumption that it has complied with the Rule.[46]

F. The Bureau's Assessment of the Ability-to-Repay/Qualified Mortgage 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.[47] In June 2017, the Bureau published a request for information in connection with its assessment of the ATR/QM Rule (Assessment RFI).[48] 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).[49] The Assessment Report included findings about the effects of the ATR/QM Rule on the mortgage market generally, as well as specific findings about Temporary GSE QM loan originations.

The Assessment Report found that the Rule did not eliminate access to credit for high-DTI consumers—*i.e.*, 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 QM loans.[50] On the other hand, based on application-level data obtained from nine large creditors, the

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[46] 12 CFR 1026.43(e)(1)(ii).

[47] 12 U.S.C. 5512(d).

[48] 82 FR 25246 (June 1, 2017).

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

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

Assessment Report found that the Rule eliminated between 63 and 70 percent of high-DTI home purchase loans that were not Temporary GSE QM loans.[51]

One main finding about Temporary GSE QM loans was that such loans continued to represent a "large and persistent" share of originations in the conforming segment of the mortgage market.[52] As discussed, the GSEs' share of the conventional, conforming purchase-mortgage market was large before the ATR/QM Rule, and the Assessment Report found a small increase in that share since the Rule's effective date, reaching 71 percent in 2017.[53] The Assessment Report noted that, at least for loans intended for sale in the secondary market, creditors generally offer a Temporary GSE QM loan even when a General QM loan could be originated.[54]

The continued prevalence of Temporary GSE QM loan originations is contrary to the Bureau's expectation at the time it issued the ATR/QM Rule in 2013.[55] The Assessment Report discussed several possible reasons for the continued prevalence of Temporary GSE QM loan originations. The Assessment Report first highlighted commenters' concerns with the perceived lack of clarity in appendix Q and found that such concerns "may have contributed to investors'—and at least derivatively, creditors'—preference" for Temporary GSE QM loans instead of originating loans under the General QM loan definition.[56] In addition, the Bureau has not

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

[52] *Id.* at 188. Because the Temporary GSE QM loan definition generally affects only loans that conform to the GSEs' guidelines, the Assessment Report's discussion of the Temporary GSE QM loan definition focused on the conforming segment of the market, not on non-conforming (*e.g.*, jumbo) loans.

[53] *Id.* at 191.

[54] *Id.* at 192.

[55] *Id.* at 13, 190, 238.

[56] *Id.* at 193.

revised appendix Q since 2013, while other standards for calculating and verifying debt and income have been updated more frequently.[57] ANPR commenters also expressed concern with appendix Q and stated that the Temporary GSE QM loan definition has benefited creditors and consumers by enabling creditors to originate QMs without having to use appendix Q.

The Assessment Report noted that a second possible reason for the continued prevalence of Temporary GSE QM loans is that the GSEs were able to accommodate the demand for mortgages above the General QM loan definition's DTI limit of 43 percent as the DTI ratio distribution in the market shifted upward.[58] According to the Assessment Report, in the years since the ATR/QM Rule took effect, house prices have increased and consumers hold more mortgage and other debt (including student loan debt), all of which have caused the DTI ratio distribution to shift upward.[59] The Assessment Report noted that the share of GSE home purchase loans with DTI ratios above 43 percent has increased since the ATR/QM Rule took effect in 2014.[60] The available data suggest that such high-DTI lending has declined in the non-GSE market relative to the GSE market.[61] The non-GSE market has constricted even with respect to highly qualified consumers; those with higher incomes and higher credit scores are representing a greater share of denials.[62]

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[57] *Id.* at 193-94.

[58] *Id.* at 194.

[59] *Id.*

[60] *Id.* at 194-95.

[61] *Id.* at 119-20.

[62] *Id.* at 153.

The Assessment Report found that a third possible reason for the persistence of Temporary GSE QM loans is the structure of the secondary market.[63] If creditors adhere to the GSEs' guidelines, they gain access to a robust, highly liquid secondary market.[64] In contrast, while private market securitizations have grown somewhat in recent years, their volume is still a fraction of their pre-crisis levels.[65] There were less than $20 billion in new origination private-label securities (PLS) issuances in 2017, compared with $1 trillion in 2005,[66] and only 21 percent of new origination PLS issuances in 2017 were non-QM issuances.[67] To the extent that private 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 have a low share of non-QM loans.[68] The Assessment Report noted that the Temporary GSE QM loan definition may itself be inhibiting the growth of the non-QM market.[69] 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-QMs, 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.[70]

The Bureau expects that each of these features of the mortgage market that concentrate

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[63] *Id.* at 196.

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] *Id.* at 197.

[68] *Id.* at 196.

[69] *Id.* at 205.

[70] *Id.*

lending within the Temporary GSE QM loan definition will largely persist through the current January 10, 2021 sunset date.

G. Effects of the COVID-19 Pandemic on Access to Mortgage Credit

The COVID-19 pandemic has had a significant effect on the U.S. economy. Economic activity has contracted, some businesses have partially or completely closed, and millions of workers have become unemployed. The pandemic has also affected mortgage markets and has resulted in a contraction of mortgage credit availability for many consumers, including those that would be dependent on the non-QM market for financing. While nearly all major non-QM creditors ceased making loans in March and April, beginning in May, issuers of non-agency MBS began to test the market with deals collateralized by non-QM loans largely originated prior to the crisis. Moreover, several 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 a tighter credit box.[71] For further discussion of the effect of the COVID-19 pandemic on mortgage origination markets, see part II.D of the General QM Proposal.[72]

III. The Rulemaking Process

The Bureau has solicited and received substantial public and stakeholder input on issues related to the ATR/QM Rule generally and seasoning of loans specifically in connection with that rule. In addition to the Bureau's discussions with and communications from industry stakeholders, consumer advocates, other Federal agencies,[73] and members of Congress, the

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[71] Brandon Ivey, *Citadel, Verus Resume Originating Non-QMs* (Aug. 7, 2020), https://www.insidemortgagefinance.com/articles/218819-citadel-verus-resume-originating-non-qms (on file).

[72] 85 FR 41716, 41721-23 (July 10, 2020).

[73] 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

Bureau issued requests for information (RFIs) in 2017 and 2018 and in July 2019 issued an advance notice of proposed rulemaking regarding the ATR/QM Rule (ANPR).[74] The input from these RFIs and from the ANPR is briefly summarized in the General QM Proposal and Extension Proposal and below.

A. The Requests for Information (RFIs)

In June 2017, the Bureau published an RFI in connection with the Assessment Report (Assessment RFI).[75] In response to the Assessment RFI, the Bureau received approximately 480 comments from creditors, industry groups, consumer advocacy groups, and individuals.[76] 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, from making the definition permanent, to applying the definition to other mortgage products, to extending it for various periods of time, or some combination of those suggestions. 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

Comptroller of the Currency (OCC), the Federal Trade Commission, the National Credit Union Administration, and the U.S. Department of the Treasury.

[74] 84 FR 37155 (July 31, 2019).

[75] 82 FR 25246 (June 1, 2017).

[76] *See* Assessment Report, *supra* note 49, appendix B (summarizing comments received in response to the Assessment RFI).

education activities.[77] As part of the call for evidence, the Bureau published RFIs relating to, among other things, the Bureau's rulemaking process,[78] the Bureau's adopted regulations and new rulemaking authorities,[79] and the Bureau's inherited regulations and inherited rulemaking authorities.[80] In response to the call for evidence, the Bureau received comments on the ATR/QM Rule from stakeholders, including consumer advocacy 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. 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. These topics included: (1) whether and how the Bureau should revise the DTI limit in the General QM loan definition; (2) whether the Bureau

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[77] *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).

[78] 83 FR 10437 (Mar. 9, 2018).

[79] 83 FR 12286 (Mar. 21,2018).

[80] 83 FR 12881 (Mar. 26,2018).

should supplement or replace the DTI limit with another method for directly measuring a consumer's personal finances; (3) whether the Bureau should revise appendix Q or replace it with other standards for calculating and verifying a consumer's debt and income; and (4) whether, instead of a DTI limit, the Bureau should adopt standards that do not directly measure a consumer's personal finances.[81] Of relevance to this proposal, 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 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 changes 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 advocacy groups, elected officials, individuals, and research centers. The General QM Proposal contains an overview of these comments.[82] 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.

[81] 84 FR 37155, 37155, 37160-62 (July 31, 2019).

[82] 85 FR 41716 (July 10, 2020).

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, when 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 origination. 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,[83] which after a loan meets certain payment requirements provides the creditor relief from the enforcement of representations and warranties it must make to a GSE regarding its underwriting, as precedent for seasoning. 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.[84] A few commenters asserted that allowing mortgages to season into QM loans is consistent with comment 43(c)(1)-

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

[84] U.S. Department of the Treasury, *Housing Reform Plan* 38 (Sept. 2019), https://home.treasury.gov/system/files/136/Treasury-Housing-Finance-Reform-Plan.pdf?mod=article_inline.

1.ii.A.*1* in the current ATR/QM Rule.[85] 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 their belief 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 non-QMs and rebuttable presumption QMs. 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.

[85] 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 . . . .").

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 what constitutes such funds. 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 advocacy 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 advocacy 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 advocacy 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 advocacy 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 advocacy groups stated that non-QMs and QMs 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 advocacy groups also stated that certain types of mortgages should never be allowed to season into QMs, including adjustable-rate mortgages 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, the consumer advocacy groups expressed concern that the fact that 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 advocacy 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 advocacy 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 advocacy groups also asserted that a heightened risk of material 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 advocacy 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 advocacy groups further cited examples to show that mortgages can default due to unforeseen events. One coalition of consumer advocacy groups noted that the timing of default often reflects broader economic conditions, given the procyclical nature of the mortgage market.

C. June 2020 Proposals

On June 22, 2020, the Bureau issued the Extension Proposal, which would extend the Temporary GSE QM loan definition to expire upon the effective date of final amendments to the General QM loan definition or when the GSEs exit conservatorship, whichever comes first.[86] On the same date, the Bureau also separately proposed amendments to the General QM loan definition in the General QM Proposal.[87] Those proposed amendments are discussed in part II.D above.

IV. Legal Authority

The Bureau is proposing to amend Regulation Z 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."[88] Title X of the Dodd-Frank Act (including section 1061), along with TILA and certain subtitles

[86] 85 FR 41448 (July 10, 2020).

[87] 85 FR 41716 (July 10, 2020).

[88] 12 U.S.C. 5581(a)(1)(A).

and provisions of title XIV of the Dodd-Frank Act, are Federal consumer financial laws.[89]

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.[90] 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."[91] 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.[92] As discussed in the section-by-section analysis below, the Bureau is proposing to issue certain provisions of this proposed 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

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[89] 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).

[90] 15 U.S.C. 1604(a).

[91] 15 U.S.C. 1601(a).

[92] 15 U.S.C. 1639b(a)(2).

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 129C(b)(3)(B)(i).[93] As discussed in the section-by-section analysis below, the Bureau is proposing to issue certain provisions of this proposed 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.[94] In addition, TILA section 129C(b)(3)(A) directs the Bureau to prescribe regulations to carry out the purposes of TILA section 129C(b).[95] As discussed in the section-by-section analysis below, the Bureau is proposing to issue certain provisions of this proposed 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.[96] TILA and

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[93] 15 U.S.C. 1639c(b)(2)(A).

[94] 15 U.S.C. 1639c(b)(3)(B)(i).

[95] 15 U.S.C. 1639c(b)(3)(A).

[96] 12 U.S.C. 5512(b)(1).

title X of the Dodd-Frank Act are Federal consumer financial laws. Accordingly, the Bureau is proposing to exercise its authority under Dodd-Frank Act section 1022(b) to prescribe 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 Proposal

The Bureau is issuing this proposal to introduce an alternative pathway to a QM safe harbor because it seeks 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 proposing this alternative definition because it preliminarily concludes that many loans made to creditworthy consumers that do not fall within the existing safe harbor QM loan definitions at consummation may be able to demonstrate through sustained loan performance compliance with the ATR requirements.

Under this proposal, certain transactions could become Seasoned QMs and obtain safe harbor status if, among other criteria, they meet certain performance requirements over a 36-month seasoning period. Providing creditors with this proposed alternative pathway to a QM safe harbor for these types of loans seems likely to improve access to responsible and affordable mortgage credit by increasing creditors' willingness to make loans that are considered as non-QM at consummation, but for which consumers have demonstrated an ability to repay. Additionally, if a loan has performed for a long enough period of time and meets certain underwriting conditions and product restrictions, it appears warranted to conclusively presume that the creditor's determination of a consumer's ability to repay at consummation was reasonable and to designate the loan as a safe harbor QM, even if the loan did not necessarily meet the criteria of one of the other QM definitions at the time of consummation. As discussed in part VI, the Bureau tentatively determines that the proposed 36-month seasoning period may provide a sufficient length of time to demonstrate that a creditor reasonably determined a consumer's ability to repay at the time of consummation, while incentivizing creditors to make certain loans that may not otherwise have been made in the absence of potentially greater ATR compliance certainty.

A. Considerations Related to Access to Responsible, Affordable Credit

A primary objective of the proposed alternative pathway to a QM safe harbor is to ensure the availability of responsible and affordable credit by 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 where a creditor has confidence that the consumer would repay the loan. The Bureau is concerned that, as discussed in the Assessment Report analyzing the impact of the January 2013 Final Rule on access to credit, 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.[97] Indeed, an analysis of rejected applications in the Assessment Report suggested that the 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 Rule's publication suggest that creditors have not developed a

[97] *See* Assessment Report, *supra* note 49, at 11, 118, 150.

common approach to measuring and predicting risk of noncompliance with the Rule, as they have accomplished for other types of risks, such as prepayment and default.[98] 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.[99] 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 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.[100]

Although the Assessment Report analyzed the impact of the January 2013 Final Rule and its 43 percent DTI limit on access to credit, the 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 whether and how the Bureau may amend the General QM loan definition.[101] Indeed, while the Bureau anticipates 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 high-DTI consumers, compliance uncertainty and litigation risk would still persist for the remaining population of loans originated as non-QMs at consummation. Furthermore, the composition of the non-QM market has continued to

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

[99] *Id.* at 147.

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

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

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 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.[102] As a result, the Bureau preliminarily concludes 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 is proposing 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 believes that a Seasoned QM definition may provide incentives for making additional rebuttable presumption loans. While the GSEs purchase rebuttable presumption QM loans, and nearly half of manufactured housing originations are rebuttable presumption QMs, large banks tend to originate only safe harbor QM loans that are held in portfolio. A Seasoned QM definition may provide an additional incentive for large banks to originate rebuttable presumption loans that may not be eligible for sale to the GSEs and therefore may not otherwise have been made.

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[102] 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 alternate sources of income verification (*e.g.*, bank statements), which vary from traditional income underwriting forms/documents such as W-2s, paystubs and tax returns. The variation is due to the use of non-traditional sources of documentation, such as for self-employed consumers.

In addition, the Bureau preliminarily concludes that, along with a possible increase in non-QM originations, the proposal may also encourage meaningful innovation and lending to broader groups of creditworthy consumers, especially those with less traditional credit profiles. 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 it intends for the Rule to remain sufficiently flexible to accommodate and encourage developments in mortgage underwriting to reflect these changes. For example, 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 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' income and their 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 concludes that allowing an alternative pathway to a QM safe harbor may encourage creditors to lend to consumers with less traditional credit profiles and income sources at an affordable price based on an individualized determination of a consumer's ability to repay.

Further, the Bureau preliminarily concludes that another benefit of this proposal would be to provide additional legal certainty for loans that are made in accordance with other QM definitions. The Bureau recognizes that creditors may be uncertain about whether certain loans fall within the existing QM definitions for different reasons. For example, the U.S. Department of Housing and Urban Development (HUD), the U.S. Department of Veterans Affairs, and the U.S. Department of Agriculture (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. A creditor may have uncertainty about whether a State court would interpret and apply those criteria to a particular loan in a consumer's TILA section 130(k) 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 part III.B above, research centers and industry commenters that commented on the ANPR expressed concern about litigation risk and potential liability and suggested that a seasoning approach could limit liability and provide legal certainty. Several research institutions suggested that a rule 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 the default is more likely due to a change in consumer circumstances. A secondary market trade association commented that a rule allowing performing loans to season into QM status could clarify a creditor's litigation risk and suggested this could also help to bring certainty to secondary market participants that might otherwise be unable or unwilling to accept the litigation risk associated with assignee liability under both rebuttable presumption QM and non-QM loans. 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 would provide additional legal certainty by providing an alternative basis for a conclusive presumption of ATR compliance after the required seasoning period. It would also extend a conclusive presumption of compliance to the subset of the higher-priced covered transactions that are afforded only a rebuttable presumption of ATR compliance at consummation through other QM definitions.

To the extent that additional legal certainty provided by this proposal 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 this proposal is focused on the non-agency and non-QM markets, 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 where creditors typically do not bear the credit risk of default.[103] While there is no doubt that the size and scale of the 2008 crisis impacted 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

[103] Jim Parrot & Mark Zandi, *Opening the Credit Box*, Moody's Analytics and 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 credit box, 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.

though creditors believed the loans complied with Federal Housing Administration (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, 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.[104] Similarly, the Bureau anticipates 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 an additional Seasoned QM definition could further incentivize creditors to originate these loans at scale.

The Bureau anticipates that the extent to which the proposal may increase access to credit would be a function of the size of the eligible loan population that could benefit from the seasoning proposal: 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 has therefore also considered 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 and thus potentially affect access to credit. Figure 1 in part VII below illustrates the percentage of loans that remain active 36 months after consummation, the length of the proposed seasoning period. Based on the data and analysis presented in part VII, the Bureau preliminarily concludes that the majority of eligible non-QM and rebuttable presumption mortgage loans would remain active and thus be eligible to benefit from the proposed seasoning period, across the economic cycle.

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[104] *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.

B. Considerations Related to Ability to Repay

The Bureau is also proposing to introduce an alternative pathway to a QM safe harbor for a new category of Seasoned QMs because it preliminarily concludes 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.

First, the current ATR/QM Rule explains that loan performance can be a factor in evaluating a creditor's ATR determination. Comment 43(c)(1)-1.ii.A.*1* 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. The comment explains further that the longer a consumer successfully makes timely payments after consummation or recast, 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. Comment 43(c)(1)-2 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 creditor's compliance with the ATR/QM Rule. 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, 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 its June 2020 General QM Proposal, 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 this proposal in turn reflects the Bureau's view that across a wide pool of loans early distress is an appropriate proxy for the lack of the consumer's ability to repay at consummation.

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 circumstance after consummation. However, there is neither an 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 reached its proposed seasoning period of 36 months based on a range of policy considerations, rather than any singular measure of

[105] Assessment Report, *supra* note 49, at 83.

delinquency, as discussed in the section-by-section analysis of § 1026.43(e)(7)(iv)(C).[106] The Bureau has preliminarily concluded that granting a safe harbor to these loans is appropriate because three years of loan performance combined with the product restrictions and underwriting requirements as defined in this proposal appear to indicate with sufficient certainty creditor compliance with the ATR requirements at origination. The Bureau acknowledges 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 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.

As mentioned in the prior section, the current practices of market participants with respect to remedies for deficiencies in underwriting practices also support the Bureau's proposed 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-

[106] The proposal, like the Assessment Report and the June 2020 General QM Proposal, 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 June 2020 General QM Proposal measure early distress as whether a consumer was ever 60 days or more past due within the first two years after origination. The proposed performance requirements for Seasoned QM loans reflect the Bureau's consideration of this measure of early distress, but also its preliminary view of what requirements strike the appropriate 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 proposed § 1026.43(e)(7) differ in some respects from the measure of early distress used in the Assessment Report, but preliminarily concludes that the proposed definition and performance requirements are appropriate for the specific purposes of this proposal for the reasons explained in the section-by-section analyses of proposed § 1026.43(e)(7)(ii) and (v)(A) below.

day delinquencies.[107] 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 consumer had no more than two 30-day delinquencies in the 36 months following the consumer's first payment, among other requirements.[108] 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 fairly be attributed to a change in the consumer's circumstances or other cause besides that of the underwriting.

Based on these considerations, and as discussed in more detail in parts VI and VII, the Bureau preliminarily concludes that a consumer's timely payments for 36 months, in combination with provisions to assure the consumer's own ability to make the payments due and the loan's compliance with other proposed provisions, 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. In making this preliminary determination, the Bureau focused on loans that would be eligible to be Seasoned QMs based on the proposal as described in part VI. Of these loans, the Bureau focused on loans with an interest rate spread in excess of 150 basis points, and therefore outside the proposed safe harbor threshold in the General QM proposal. These non-QMs and rebuttable presumption QMs are the population whose ATR compliance presumption status would be affected by becoming Seasoned QMs. As illustrated in

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[107] Fed. Hous. Fin. Agency, *Representation and Warranty Framework*, https://www.fhfa.gov/PolicyProgramsResearch/Policy/Pages/Representation-and-Warranty-Framework.aspx. (last visited Aug. 14, 2020).

[108] 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.

Figure 2 of part VII, nearly two-thirds (66 percent) of loans that experience a disqualifying event as explained in part VI (*i.e.*, an event that would prevent a loan from becoming a Seasoned QM under the proposed criteria described in the section-by-section analyses of § 1026.43(e)(7)) do so within 36 months, and the rate at which loans disqualify diminishes beyond 36 months. This may suggest that a failure to repay that occurs more than three years after consummation can generally be attributable 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, although 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 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 this proposal, as explained below in part VI.

Notwithstanding this evidence and these considerations, the Bureau recognizes 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 Bureau expects the prospect that at consummation a consumer may lack an 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. As discussed in part VI, the Bureau is therefore proposing to limit the Seasoned QM definition to first-lien, fixed-rate covered transactions that are held in the originating creditor's portfolio, satisfy the existing product-feature requirements and limits on points and fees under the General QM definition, and meet the underwriting requirements applicable to Small Creditor QMs.

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) 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. Higher-priced covered transaction is defined in § 1026.43(b)(4) to mean a first-lien mortgage with an APR that exceeds APOR for a comparable transaction as of the date the interest rate is set by a specified number of percentage points.[109] The ATR/QM Rule provides in § 1026.43(e)(1)(i) 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 ATR provisions. Under § 1026.43(e)(1)(ii), a creditor that makes a QM loan that is a higher-priced covered transaction is entitled to a rebuttable presumption that the creditor has complied with the ATR provisions.

As discussed above, the Bureau is proposing to allow first-lien covered transactions that meet certain conditions to become QMs that receive a conclusive presumption of compliance after meeting established performance standards for a specified length of time. In other words, such transactions would become QM safe harbor loans. The Bureau is proposing to revise

[109] For purposes of General QM loans under § 1026.43(e)(2), a first-lien covered transaction generally is "higher priced" if its APR exceeds APOR by 1.5 or more percentage points. Section 1026.43(b)(4) also provides that a first-lien covered transaction that is a QM under § 1026.43(e)(5), (e)(6), or (f) is "higher priced" if its APR is 3.5 percentage points or more above APOR.

§ 1026.43(e)(1)(i) to add § 1026.43(e)(1)(i)(B), identifying such seasoned loans as a separate category of QMs for which creditors receive a conclusive presumption of compliance with ATR requirements, regardless of whether the loan is a higher-priced covered transaction. Under this proposal, current § 1026.43(e)(1)(i) would be redesignated as § 1026.43(e)(1)(i)(A) and would continue to provide a conclusive presumption of compliance with ATR requirements for QM loans that are not higher-priced covered transactions. To conform with these changes, the Bureau is proposing to revise comment 43(e)(1)-1 to add a reference to proposed § 1026.43(e)(7). The Bureau also proposes to make a technical correction to comment 43(e)(1)-1 to add references to § 1026.43(e)(5) and (6). The Bureau further proposes to remove the first sentence of comment 43(e)(1)(i)-1, which would be duplicative of regulatory text, and to redesignate that comment as comment 43(e)(1)(i)(A)-1.

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, 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 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.[110] In the January 2013 Final Rule, the Bureau interpreted the statute to provide for a rebuttable presumption of compliance with the ATR provisions but used its adjustment and

[110] 78 FR 6408, 6511 (Jan. 30, 2013).

exception authority to establish a conclusive presumption of compliance for loans that are not "higher-priced covered transactions."[111]

In the January 2013 Final Rule, the Bureau identified several reasons relating to the performance of QM loans that are not higher-priced loans for why such loans could be suggestive of the consumer's ability to repay and should receive a safe harbor.[112] The Bureau noted that the QM requirements will ensure that the loans do not contain certain risky product features and are underwritten with careful attention to consumers' DTI ratios.[113] The Bureau also 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.[114] The Bureau noted that it is not possible to define by a bright-line rule a class of mortgages for which each consumer will have the ability to repay.[115]

The Bureau preliminarily concludes 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. As discussed above, the Bureau preliminarily concludes that meeting these criteria—in particular, the fact that a consumer has made timely payments for the duration of the seasoning period—indicates that the consumer was offered and received a loan on terms that the creditor reasonably determined reflected the consumer's ability to repay

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[111] *Id.* at 6514.

[112] *Id.* at 6511.

[113] *Id.*

[114] *Id.*

[115] *Id.*

the loan. As discussed below in the section-by-section analyses of proposed § 1026.43(e)(7), creditors would be required to comply with statutory requirements applicable to QMs and minimum underwriting requirements. The proposed requirements would ensure that the loans 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. In addition, the conclusive presumption proposed to be added in § 1026.43(e)(1)(i)(B) would be available to creditors only after the loans have performed for a substantial period of time.

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) also 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 convert to safe harbor QMs with satisfactory performance. Further, similar to the Small Creditor QM definition and the pathway to QM status provided in EGRRCPA section 101, the Seasoned QM definition would not be subject to any DTI limits or the limitations on pricing in the General QM Proposal but would instead include a requirement for the creditor to hold the loan in portfolio. As discussed in greater detail below, the Bureau preliminarily concludes 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 unaffordable loans would not be made.

As it did in the January 2013 Final Rule, the Bureau proposes to use 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 preliminarily 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 preliminarily 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.

The Bureau requests comment on all aspects of the proposed rule 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. The Bureau also requests comment on whether there are other approaches to providing QM status to seasoned loans that would accomplish the Bureau's objectives, such as providing a rebuttable presumption to non-QM loans that meet the requirements after a seasoning period, perhaps with a further seasoning period to gain safe harbor status.

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 is proposing a conforming amendment to § 1026.43(e)(2) to include a reference to § 1026.43(e)(7), which would set out the requirements applicable to Seasoned QMs.

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

43(e)(7)(i) General

Proposed § 1026.43(e)(7) would define a new category of QMs for covered transactions that meet certain criteria. As discussed above, under proposed § 1026.43(e)(7)(i) only first-lien covered transactions could qualify as Seasoned QMs. Similar to Small Creditor QMs, Seasoned QMs would include certain loans held in portfolio by creditors for a prescribed period of time, but unlike Small Creditor QMs, Seasoned QMs would not be limited to small creditors. Additional criteria proposed for Seasoned QMs are set out generally in § 1026.43(7)(i)(A) through (D). The additional criteria for Seasoned QMs include restrictions on product features and points and fees, as well as certain underwriting and performance requirements.

Providing creditors with an alternative path to a QM safe harbor for these types of loans may 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 lacked an ability to repay at loan consummation yet managed to make timely payments for the seasoning period defined in proposed § 1026.43(e)(7)(iv)(C). The Bureau tentatively 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 tend to vary depending on the loan characteristics. The Bureau is therefore proposing to limit Seasoned QMs to first-lien covered transactions that satisfy the other requirements in proposed § 1026.43(e)(7).

The Bureau preliminarily concludes that tailoring Seasoned QMs to only first-lien covered transactions, as well as establishing the other requirements for Seasoned QMs in

§ 1026.43(e)(7) discussed below, is consistent with 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(b), 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.

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 is proposing to exercise its authority under TILA sections 105(a), 129C(b)(2)(A)(vi), (3)(A), and (3)(B)(i) to adopt proposed § 1026.43(e)(7) for the reasons summarized below and discussed in more detail above.

The Bureau notes that loans that satisfy another QM definition at consummation also could be Seasoned QM loans, as long as the requirements of proposed § 1026.43(e)(7) are met. For example, a Seasoned QM might also 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. Each QM category imposes requirements of varying degrees of restrictiveness relative to others. Section 101 of the EGRRCPA, for example, 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 proposed Seasoned QM category, by contrast, would not be limited by creditor size, and would be available only for fixed-rate, first-lien loans held in portfolio, and only after a seasoning period during which the loans must meet performance requirements. The Bureau tentatively concludes that the proposed Seasoned QM category and the EGRRCPA QM category, therefore, identify unique and discrete factors that, for different reasons, would support a presumption of creditor compliance with the ATR requirements. The Bureau preliminarily concludes that, similarly, 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 to fall within the scope of multiple QM categories. Accordingly, the Bureau tentatively determines that it is appropriate to exercise its authorities under TILA sections 105(a), 129C(b)(2)(A)(vi), (3)(A), and (3)(B)(i) to make the proposed Seasoned QM definition available to any first-lien covered transaction that meets the requirements in proposed § 1026.43(e)(7), including transactions that might be eligible at consummation for the General QM definition, the Small Creditor QM definition, or the EGRRCPA QM definition. The Bureau further notes that some consumer advocacy groups responding to the ANPR commented that the Bureau could not define a QM in a manner that would permit a non-QM loan at consummation to later season into a QM loan because TILA section 130(k)[116] provides a right of recoupment permitting a consumer to bring at any time an ATR claim as a defense against foreclosure. These commenters suggested this right of recoupment 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 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. TILA section 129C(b)(1) provides that a creditor may presume a loan has met the ATR requirements in section 129C(a) if a residential mortgage loan is a QM. As described above, TILA section 129C(b)(2) and (3) grants the Bureau authority to determine the precise contours of the QM definition. Since the

[116] 15 U.S.C. 1640(k).

effective date of the ATR/QM Rule, creditors properly originating QMs have been able to rely on the loan's QM status in responding to a defense against foreclosure under TILA section 130(k). The proposed Seasoned QM definition is consistent with the structure of that statutory regime. The Bureau thus preliminarily concludes that proposing 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.

Proposed § 1026.43(e)(7) would not apply to loans in existence prior to the effective date. Instead, as stated in part I above, the revised regulations would apply to covered transactions for which creditors receive an application on or after the effective date. This would align with the proposed application of the General QM Proposal because the Bureau also proposed that the regulations revised by the General QM Proposal would apply to covered transactions for which creditors receive an application on or after the effective date.[117] This proposed approach would ensure that the proposed rule applies only to transactions begun after the proposed rule takes effect.

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 the three-year successful payment history occurs before or after the effective date. The Bureau believes that parties to existing loans at the time of the effective date may have significant reliance interests related to the QM status of those loans. In light of these possible reliance interests, the Bureau has opted not to apply the proposal to loans in existence prior to the effective date.[118] The Bureau requests

[117] 85 FR 41716, 41717 July 10, 2020).

[118] 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

data on the nature and extent of any such reliance interests. The Bureau also requests data on the number of loans that would be in existence as of the proposed effective date and would meet the specifications of the proposal but for the effective date, as well as comment on any legal or policy considerations that the Bureau should take into account relating to those loans.

The Bureau requests comment on whether the proposed Seasoned QM definition should exclude other subsets of covered transactions that might pose heightened consumer protection risks, or should be extended beyond first-lien mortgages in a manner that improves access to credit without introducing undue complexity in application. The Bureau also requests comment on whether and to what extent it should allow covered transactions that qualify as QMs under existing QM categories, including the EGRRCPA QM loan definition, to qualify for QM status under the proposed Seasoned QM category.

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

Proposed § 1026.43(e)(7)(i)(A) would limit the Seasoned QM definition to fixed-rate mortgages with fully amortizing payments. Proposed § 1026.43(e)(7)(i)(A) would apply 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.[119]

(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").

[119] 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.

Proposed § 1026.43(e)(7)(i)(A) would apply 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. Therefore, under proposed § 1026.43(e)(7)(i)(A), only loans for which the scheduled periodic payments do not require a balloon payment to fully amortize the loan within the loan term could become Seasoned QMs.

As stated above, the Bureau proposes limiting 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 would be in place for some or all of the proposed seasoning period and could extend beyond the seasoning period. After the introductory interest rate expires, the rate adjusts periodically and can increase through the life of the loan. Consequently, the performance of an ARM during the proposed seasoning period would not be reliable as an indicator that a consumer, at consummation, had the ability to repay the loan. Similarly, the Bureau also recognizes that 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.

Proposed comment 43(e)(7)(i)(A)-1 would clarify that covered transactions that are adjustable-rate or step-rate mortgages would not be eligible to become Seasoned QMs. Proposed comment 43(e)(7)(i)(A)-2 would clarify that loans that require balloon payments would not be eligible to become Seasoned QMs. Proposed comment 43(e)(7)(i)(A)-2 would also clarify, however, that proposed § 1026.43(e)(7)(i)(A) does not prohibit a qualifying change, as defined in proposed § 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.

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

The Bureau invites comment on whether allowing other types of loans and payment schedules would facilitate appropriate access to credit while assuring protection of consumers' interests covered by ATR requirements. Commenters who recommend alternative approaches are encouraged to submit data and analyses to support their recommendations.

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

Proposed § 1026.43(e)(7)(i)(B) would require that Seasoned QMs comply with general restrictions on product features and points and fees and meet certain underwriting requirements. The requirements proposed for Seasoned QMs would be similar in several respects to the requirements established for Small Creditor QMs in § 1026.43(e)(5). Proposed § 1026.43(e)(7)(i)(B) makes this clear by incorporating directly the QM requirements set out for Small Creditor QMs in § 1026.43(e)(5)(i)(A) and (B).[120]

Currently, and as applicable to the proposed Seasoned QM definition, § 1026.43(e)(5)(i)(A) and (B) provide generally that a covered transaction can qualify as a Small Creditor 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 payments;

[120] The Bureau proposed certain conforming changes to § 1026.43(e)(5)(i)(A) and (B) in the General QM Proposal, which would be incorporated by reference into § 1026.43(e)(7)(i)(B) if both this proposal and the General QM Proposal are finalized as proposed. 85 FR 41716, 41773, 41766 (July 10, 2020). However, the proposed conforming changes to § 1026.43(e)(5)(i)(A) and (B) in the General QM Proposal would not change the substantive requirements in § 1026.43(e)(5)(i)(A) and (B).

3. The loan term does not exceed 30 years;

4. The total points and fees generally do not exceed 3 percent of the loan amount;

5. The underwriting uses a payment schedule that fully amortizes the loan over the loan term and takes into account mortgage-related obligations; and

6. The loan complies with certain requirements relating to consideration and verification of the consumer's monthly income and debt.[121]

The Seasoned QM proposal, by incorporating the requirements of § 1026.43(e)(5)(1)(A) and (B), would implement 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.

Notably, Small Creditor QMs are not subject to any specific QM DTI ratio or alternative pricing, or similar, threshold for QMs that is currently in the General QM definition in § 1026.43(e)(2)(vi). Small Creditor QMs also are not currently required to use appendix Q to calculate the consumer's debt and income. The Bureau's recent proposal to revise the General QM definition, including by revising § 1026.43(e)(2)(vi), did not propose to introduce requirements for Small Creditor QMs for specific DTI or pricing thresholds or the use of appendix Q. Similarly, the Bureau is not proposing to require loans to meet specific DTI ratios or pricing thresholds, or to use appendix Q, to be eligible to obtain Seasoned QM safe harbor status. For a loan to be eligible to become a Seasoned QM, however, the proposal would require

[121] *See* § 1026.43(e)(5) (incorporating in part § 1026.43(e)(2)).

that the creditor consider the consumer's DTI ratio or residual income and verify the debt obligations and income in the same way as is required under the Small Creditor QM provisions in § 1026.43(e)(5)(i)(A) and (B).

The Bureau notes that TILA's QM definition does not require that QM loans meet specific DTI ratios or pricing thresholds. Rather, the statute authorizes, but does not require, the Bureau to establish additional criteria relating to monthly DTI ratios or alternative measures of ability to repay. In its recent proposal to revise the General QM definition, the Bureau explained that it is concerned that conditioning General QM loan status on a specific DTI limit may be overly burdensome and complex in practice and may unduly restrict access to credit because it provides an incomplete picture of a consumer's financial capacity.[122] In particular, the Bureau explained that it is concerned that a specific DTI limit may impair access to responsible, affordable credit for some consumers for whom it might be appropriate to presume ability to repay their loans at consummation.[123] While the Bureau's recent proposal would replace a specific DTI threshold with certain pricing thresholds, the Bureau preliminarily concludes that the proposed product restrictions, performance requirements, and requirements to consider DTI ratio or residual income and verify income and debts suffice to presume ATR compliance for Seasoned QMs. Unlike other QM definitions that confer QM status upon consummation, the proposed Seasoned QM definition would confer safe harbor QM status only after the consumer makes on-time payments, with limited exceptions, for 36 months. The proposal also includes additional provisions intended to assure that a consumer's record of sustained, on-time payments during a seasoning period in fact evidences the consumer's own ability to make the payments

[122] *See, e.g.*, 85 FR 41716, 41717 (July 10, 2020).

[123] *Id.*

due both during and after the seasoning period. These additional provisions include requirements intended to eliminate creditor attempts to evade the seasoning period requirement and a further requirement that loans season in a creditor's portfolio until the end of the seasoning period.

The Bureau preliminarily concludes that a consumer's record of sustained, on-time payments that meet the proposed requirements, taken together with the loan's compliance with other proposed provisions, indicates that the creditor made a reasonable determination at consummation of the consumer's ability to repay the loan. The Bureau's primary objective in providing the proposed 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 preliminarily concludes that it is unnecessary, and would be inconsistent with the purposes of the proposal, to impose specific DTI ratios, pricing thresholds, or similar criteria in addition to the other conditions for Seasoned QM status.

The Bureau also preliminarily concludes that, in the absence of proposed requirements that would establish specific DTI ratios, pricing thresholds, or similar criteria, it is not necessary to propose a precise methodology for calculating or verifying their components. As such, for the Seasoned QM definition, the Bureau is proposing to include consider and verify requirements that allow some latitude in application. In its recent General QM Proposal, the Bureau acknowledged the difficulties in using the rigid definitions in appendix Q, and, therefore, the Bureau has proposed that creditors be able to use a more flexible approach than appendix Q for the General QM definition. The Bureau preliminarily concludes here for similar reasons that the purposes of the Seasoned QM proposal would be better met by allowing more flexibility in how creditors consider and verify information relating to the consumer's ability to repay. As discussed above, the Bureau anticipates that innovations in technology and diversification of the economy will facilitate and encourage creditors to assess consumers' financial information and repayment ability in new ways.

Further, the Bureau preliminarily concludes that the consider and verify requirements included in the Small Creditor QM definition are suitable for purposes of the Seasoned QM definition. The Small Creditor QM requirements are more flexible than the General QM requirements because they allow additional latitude in calculating the payment on the covered transaction. The Bureau proposes to adopt for the Seasoning QM definition the same consider and verify requirements as are set out in the Small Creditor QM definition but notes that the General QM Proposal includes minor proposed conforming changes to the Small Creditor QM consider and verify requirements. The Bureau also proposes to provide in proposed comment 43(e)(7)(i)(B)-1 that a loan that complies with the consider and verify requirements of any other QM definition will also comply with the consider and verify requirements in the Seasoned QM definition, so that creditors will be required to comply with only one applicable set of consider and verify requirements to achieve Seasoned QM status. The Bureau requests comment on whether the final rule, in addition to or instead of this approach, should cross-reference the consider and verify requirements for General QMs, such as those in any final rule stemming from the General QM Proposal.

The Bureau preliminarily concludes that the requirements to consider the consumer's DTI ratio or residual income and verify the debt obligations and income remain important to making a reasonable and good faith determination that the consumer will have a reasonable ability to repay the loan according to its terms. Although the proposed Seasoned QM definition would not require loans to meet a specific DTI ratio or pricing threshold, the Bureau tentatively concludes that the consider and verify requirements are sufficiently consumer-protective especially when coupled with the proposed performance and portfolio requirements. As discussed in greater detail below, the proposed performance and portfolio requirements would provide an added incentive for creditors to originate affordable loans and practice responsible lending.

The Bureau preliminarily concludes that defining Seasoned QMs to include the same requirements as those established in § 1026.43(e)(5)(i)(A) and (B) for Small Creditor QMs would be consistent with Bureau's authority under TILA sections 129C(b)(2)(A)(vi), (3)(A), and (3)(B)(i) and TILA section 105(a), as discussed above. The Bureau's objective with this proposal is to ensure continued and improved access to responsible, affordable mortgage credit, including through innovation in the mortgage origination market. The Bureau preliminarily concludes that compliance with the general requirements proposed to be adopted for Seasoned QMs based on the statutory QM definition, in combination with the proposed performance and portfolio requirements discussed below, indicates with sufficient certainty that a creditor complied with the ATR requirements at origination. The Bureau tentatively finds that these provisions would be necessary and proper to ensure that responsible, affordable mortgage credit remains available to consumers in a manner that is consistent with the purposes of TILA section 129C and are necessary and appropriate to effectuate the purposes of TILA section 129C, which includes assuring that consumers are offered and receive residential mortgage loans on terms that reasonably reflect their ability to repay the loan.

In addition to requesting comment on the general requirements that would be established for Seasoned QMs under this proposal, the Bureau requests commenters to suggest any areas in which commentary may further clarify the proposed general requirements.

43(e)(7)(i)(C)

Proposed § 1026.43(e)(7)(i)(C) would require that Seasoned QMs meet certain performance requirements. These proposed performance requirements are discussed more fully in the section-by-section analysis of proposed § 1026.43(e)(7)(ii) below.

43(e)(7)(i)(D)

Proposed § 1026.43(e)(7)(i)(D) would require that Seasoned QMs meet certain portfolio requirements. These proposed portfolio requirements are discussed more fully in the section-by-section analysis of proposed § 1026.43(e)(7)(iii) below.

43(e)(7)(ii) Performance requirements

As discussed in the section-by-section analysis of proposed § 1026.43(e)(7)(i) above, a covered transaction must meet, among other things, the conditions set forth in proposed § 1026.43(e)(7)(ii) to be a QM under proposed § 1026.43(e)(7). Proposed § 1026.43(e)(7)(ii), which would be based on the legal authorities discussed in the section-by-section analysis of proposed § 1026.43(e)(7)(i) above, establishes performance requirements relating to the number and duration of delinquencies that a covered transaction may have at the end of the seasoning period. Specifically, it provides that to be a 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.

Several ANPR commenters identified the GSEs' framework for representations and warranties as well as mortgage insurers' rescission relief principles as possible models that the

Bureau might consider in establishing performance standards for a seasoning approach to QM status for non-QMs and rebuttable presumption QMs. One noted, for example, that the structure used by the GSEs has been tested and proven to demonstrate that loans with the type of payment history specified by the GSEs demonstrate the ability to repay that the ATR/QM Rule requires a creditor to determine at consummation.

Consistent with these comments, the Bureau considered the existing practices of the GSEs and mortgage insurers in developing the time period for successful payment history to include in this proposal. 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.[124]

The Bureau recognizes that the payment history conditions laid out in the GSEs' frameworks and the mortgage insurers' master policies reflect market experience. Consistent with the GSEs' representation and warranty framework and the master policies of mortgage insurers, the Bureau is proposing that more than two delinquencies of 30 days or more during the

[124] 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.

seasoning period or any delinquency of 60 days or more would disqualify a covered transaction from being a QM under proposed § 1026.43(e)(7).[125] The Bureau tentatively concludes 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 repayment ability (*e.g.*, a missed payment due to vacation or to a mix-up over automatic withdrawals) while treating payment histories that more clearly signal potential issues with ability to repay as disqualifying.[126] The Bureau requests comment on whether no more than two 30-day delinquencies and no 60-day delinquency is the appropriate standard for the number and duration of delinquencies that a covered transaction may have at the end of the seasoning period for purposes of proposed § 1026.43(e)(7).

43(e)(7)(iii) Portfolio requirements

As discussed above, the Bureau preliminarily concludes that if a loan performs for a certain period of time and meets certain other requirements, it may be reasonable to presume conclusively that the creditor made a reasonable and good faith ATR determination at consummation, and that a future default may be attributed to factors that the creditor could not have reasonably anticipated at consummation. The Bureau anticipates that many borrowers who have the ability to repay, such as those with non-traditional credit profiles or income sources, may fall outside existing QM definitions. With a Seasoned QM definition, the Bureau seeks to

[125] As discussed in greater detail in part VII below, the Bureau considered alternative seasoning periods to the proposal 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.

[126] As noted above in part V, the current ATR/QM Rule already demonstrates that the Bureau recognizes that a consumer making timely payments, without modification or accommodation, for a significant period of time may be evidence that a creditor's ATR determination was reasonable and in good faith. *See* comment 43(c)(1)-1.ii.A.*1*.

encourage innovation and the growth of a responsible and affordable non-QM market. However, additional protections may be helpful to ensure that creditors who seek to use the flexibility that would be provided under this proposal have an additional incentive to engage in responsible lending and make affordable loans. Accordingly, for reasons discussed below, proposed § 1026.43(e)(7)(iii) would impose certain portfolio requirements for a covered transaction to be a Seasoned QM. Proposed § 1026.43(e)(7)(iii) would be based on the legal authorities that are discussed in the section-by-section analysis of proposed § 1026.43(e)(7)(i) above.

To be a QM under proposed § 1026.43(e)(7), the covered transaction must satisfy the following requirements. First, at consummation, the covered transaction must not be subject to a commitment to be acquired by another person. Second, legal title to the covered transaction cannot 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*) states that 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. Proposed § 1026.43(e)(7)(iii)(B)(*2*) provides that 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.

The Bureau is proposing a portfolio requirement that would last until the end of the seasoning period for the following reasons. As discussed in greater detail in the section-by-section analysis of § 1026.43(e)(7)(i) above, the proposal would not impose a DTI limit or a pricing limit on loans that would be eligible to become Seasoned QMs. In this respect, the proposed Seasoned QM definition is similar to some other QM definitions such as the Small Creditor QM definition.[127] While covered transactions would be 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 believes it may be appropriate 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 the Small Creditor QM definition does. 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 proposal would attempt to reduce that possibility (such as by providing that payments made by a servicer or from a consumer's escrowed funds would not be considered as on-time payments), but the Bureau preliminarily concludes that it may be appropriate to provide further assurance that the creditor's ATR determination at consummation was a diligent and reasonable one by including a portfolio requirement. The Bureau believes that requiring creditors who seek to use the Seasoned QM definition to hold their loans in portfolio would give such creditors a greater incentive to make responsible and affordable loans at consummation. By ensuring that such creditors bear the risk if the loan defaults while the loan is in portfolio, the proposed requirement would align the creditor's interest with the statutory goal of ensuring the affordability of the loan.

[127] The proposed Seasoned QM definition is also similar to the Balloon Payment QM definition in this respect. *See* 12 CFR 1026.43(f).

The Bureau is concerned that, in the absence of a portfolio requirement, creditors may have a reduced incentive to make diligent ATR determinations, thereby increasing the likelihood that some loans will lack ATR, and that some of the loans lacking ATR would nonetheless result in records of on-time payment that would otherwise appear to meet the criteria of a Seasoned QM definition. This is because, once a loan is sold in the secondary markets, the creditor does not have the same financial stake in the cost of subsequent default. As such, a creditor that plans to sell a loan may lack some of the incentives that a portfolio lender would have to make loans that perform for a significant amount of time.

The Dodd-Frank Act sought to address these deficiencies in the mortgage origination markets by requiring the Bureau to promulgate the ATR/QM Rule and requiring six financial regulators to promulgate a credit risk retention rule that would require securitizers of asset-backed securities (ABS) to retain not less than 5 percent of the credit risk of the assets collateralizing the ABS to address the originate-to-distribute models that contributed to the deterioration in underwriting quality during the housing bubble.[128] A "Qualified Residential

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[128] 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 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. 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

Mortgage" (QRM) is exempt from the credit risk retention requirement. The Bureau recognizes that the risk retention requirements that were finalized in 2014 provide creditors with an indirect incentive to originate responsible and affordable loans for sale and securitization in the secondary markets, and criteria defining QRMs also help increase the likelihood that loans will reflect a consumer's ability to repay at consummation. Nonetheless, the Bureau preliminarily concludes that it may be important for the Seasoned QM definition to be limited to loans that are held in a creditor's portfolio. This would ensure that creditors that seek to use the Seasoned QM definition have greater incentives to ensure that the loans they make are responsible and affordable, which the Bureau preliminarily believes is appropriate for the reasons stated above and below.

The Bureau is proposing that the portfolio requirement would remain in place until the end of the seasoning period. As discussed elsewhere in this 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 circumstance after consummation. As illustrated in Figure 2 in part VII, nearly two-thirds of loans that experience delinquencies that would prevent a loan from becoming a Seasoned QM under the proposal do so within 36 months, and the rate at which loans disqualify diminishes beyond 36 months. To encourage creditors that seek to use the Seasoned QM definition to exercise discipline in considering consumers' ability to repay at origination, the Bureau believes that it may be appropriate for such creditors to bear the risk of the consequences of their ATR decision-making by requiring them to hold the loan in portfolio until the end of the

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.

seasoning period. Doing so ensures that they are incentivized to minimize deficient ATR determinations, whereas a shorter portfolio requirement could shield them from the consequences of some deficient ATR determinations and therefore weaken the intended incentive. The Bureau is not proposing to require creditors that seek to use the Seasoned QM definition to continue to hold loans in portfolio after the seasoning period ends because, as explained in part V above, it appears more likely that a failure to repay that occurs more than three years after consummation would be attributable to causes other than the consumer's ability to repay at loan consummation, such as a subsequent job loss. Moreover, a loan that seasons from non-QM to safe harbor QM status may increase in value and may be easier or more profitable to sell, thereby potentially encouraging the origination of new loans that would not have otherwise been made. The Bureau notes that the proposed length of the portfolio requirement under § 1026.43(e)(7)(iii) aligns with the duration of the portfolio requirement in the Small Creditor QM, which is also designed to ensure that lenders retain litigation risk.[129]

Therefore, for all the reasons discussed above, the Bureau proposes that to the extent creditors would like to use the flexibility afforded by the seasoning approach to achieve safe harbor QM status for the loans they originate, the loans must be held in portfolio until the end of the seasoning period except in specific circumstances. As noted, the portfolio requirement for the Seasoned QM definition is similar to the portfolio requirements in the current ATR/QM Rule for Small Creditor QMs, and the Bureau has modeled proposed § 1026.43(e)(7)(iii) on those provisions.[130]

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[129] The proposed Seasoned QM definition is also similar to the Balloon Payment QM definition in this respect. *See* 12 CFR 1026.43(f).

[130] *See* 12 CFR 1026.43(e)(5) and (f).

The Bureau requests comment on whether it is appropriate to impose a portfolio requirement on creditors in light of the other proposed consumer protections in the proposal and the existing risk retention requirements for asset-backed securities. As discussed above, the Bureau's reason for proposing a portfolio requirement is to provide creditors an additional incentive to originate loans that are affordable for consumers and provide consumers with an additional layer of protection. But the Bureau requests comment on whether the proposed requirements regarding consideration of the consumer's DTI ratio or residual income and verification of the consumer's debt obligations and income would be sufficient to ensure a similar outcome. The Bureau is interested in specific reasons for and against imposing a portfolio requirement and how a portfolio requirement would affect the magnitude of the expansion of QM safe harbor loans associated with the Seasoned QM definition. The Bureau is especially interested in the potential impact of a portfolio requirement on access to credit, specifically whether the potential requirement would augment or diminish the potential of a Seasoned QM definition to expand access to credit by encouraging creditors to make affordable non-QMs in a responsible manner, which is a fundamental goal behind the proposal. The Bureau additionally seeks comment on the duration of the portfolio requirement and arguments for and against the proposed requirement that creditors hold loans in portfolio until the end of the seasoning period in order for such loans to be eligible to become Seasoned QMs.

The Bureau also proposes to add comments 43(e)(7)(iii)-1 through -3 to clarify the proposed portfolio requirement. Proposed comment 43(e)(7)(iii)-1 would explain that a covered transaction is not eligible to season into a qualified mortgage 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 clarify the application of proposed § 1026.43(e)(7)(iii) to subsequent transferees. Proposed comment 43(e)(7)(iii)-3 would explain the impact of supervisory sales. Similar commentary exists for the Small Creditor QM regulatory provisions to facilitate compliance, and the Bureau preliminarily determines that proposed comments 43(e)(7)(iii)-1 through -3 would facilitate compliance with proposed § 1026.43(e)(7)(iii).

43(e)(7)(iv) Definitions

Section 1026.43(e)(7)(iv) provides several definitions for purposes of proposed § 1026.43(e)(7). These proposed definitions are discussed below. The Bureau solicits comment on all of the definitions it proposes in § 1026.43(e)(7)(iv).

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

Under proposed § 1026.43(e)(7)(i)(C) and (ii), status as a Seasoned QM would depend on the extent to which a covered transaction has a delinquency. 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 could become Seasoned QMs. The Bureau proposes to define delinquency in § 1026.43(e)(7)(iv)(A) 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 exclude other amounts, such as late fees, from the definition. Proposed § 1026.43(e)(7)(iv)(A)(*1*) through (*5*) would address additional, specific aspects of the definition of delinquency, which are discussed in turn in the section-by-section analyses that follow. Proposed comment 43(e)(7)(iv)(A)-1 would clarify 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.

The Bureau believes that the proposed definition of delinquency in § 1026.43(e)(7)(iv)(A) would provide a clear and appropriate method of assessing delinquency for purposes of § 1026.43(e)(7) and that many elements of the proposed definition are already familiar to the mortgage industry from other Bureau regulations. For example, similar to the proposed definition in § 1026.43(e)(7)(iv)(A), the definition of delinquency in Regulation X § 1024.31 considers whether a periodic payment sufficient to cover principal, interest, and, if applicable, escrow is unpaid as of the due date and does so without regard to whether the consumer is afforded a period after the due date to pay before the servicer assesses a late fee.

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

Proposed § 1026.43(e)(7)(iv)(A)(*1*) and (*2*) would provide 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*) would provide that a periodic payment would be 30 days delinquent when it is not paid before the due date of the following scheduled periodic payment. Proposed § 1026.43(e)(7)(iv)(A)(*2*) would provide 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 would provide an illustrative example of the meaning of 60 days delinquent for purposes of proposed § 1026.43(e)(7). The Bureau believes that the approach set forth in proposed

§ 1026.43(e)(7)(iv)(A)(*1*) and (*2*) and comment 43(e)(7)(iv)(A)(*2*)-1 would provide clear standards for determining whether a periodic payment is 30 or 60 days delinquent that would be relatively easy to apply.

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

The Bureau is aware that some servicers elect or may be required to treat consumers as having made a timely payment even if the payment is less than the full periodic payment due by a small amount. For purposes of proposed § 1026.43(e)(7), proposed § 1026.43(e)(7)(iv)(A)(*3*) would provide 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 believes that this proposed approach to small periodic payment deficiencies would 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 proposed § 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.

Even though only fixed-rate covered transactions could become Seasoned QMs pursuant to proposed § 1026.43(e)(7)(i), the required periodic payments for such transactions could 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 would not necessarily mean that the consumer was unable to repay the loan at the time of consummation.

The Bureau is concerned, 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 proposal. The Bureau understands that Fannie Mae and Freddie Mac servicing guidance allows servicers to apply periodic payments that are short by $50 or less.[131] Fannie Mae limits the usage of the payment tolerance to three monthly payments during a 12-month period,[132] while the National Mortgage Settlement generally required acceptance of at least two periodic payments that were short by $50 or less.[133] In light of these practices and the considerations discussed above, the Bureau is proposing 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 believes that allowing up to three deficient payments over the course of the seasoning period may provide appropriate flexibility for small deficiencies such as those related to variations in tax and insurance amounts.[134]

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[131] 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* 8103-3 (Aug. 5, 2020), https://guide.freddiemac.com/ci/okcsFattach/get/1002095_2.

[132] July 2020 Servicing Guide, *supra* note 131, at 218-19.

[133] *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).

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

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

Proposed § 1026.43(e)(7)(iv)(A)(*4*) would provide 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*) focuses 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) are 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.[135] The Bureau is concerned 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.

As explained in the section-by-section analysis of proposed § 1026.43(e)(7)(iv)(B), the Bureau preliminarily concludes that certain unusual circumstances involving disasters or pandemic-related emergencies warrant using a principal and interest amount that has been modified or adjusted after consummation. Accordingly, the Bureau proposes that if a qualifying change as defined in proposed § 1026.43(e)(7)(iv)(B) is made to the loan obligation, the

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

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 as modified by the qualifying change.

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

Proposed § 1026.43(e)(7)(iv)(A)(*5*) addresses 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*) provides 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 are not 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, assignee of the covered transaction, or any other person acting on behalf of such creditor, servicer, or assignee.

Because a seasoning approach would condition protection from liability on performance, some commenters that responded to the ANPR expressed concern that creditors might take steps to make it appear that consumers were making payments on their mortgage loans during the seasoning period to ensure those loans season even in situations where consumers were in fact struggling. As discussed in part III above, several consumer advocacy groups suggested that creditors might engage in gaming to minimize defaults during the seasoning period. They noted, as an example, that creditors might place some portion of the loan's proceeds in escrow to be used to fund monthly loan payments. Similarly, two industry commenters that supported a seasoning approach suggested the Bureau could require consumers to use their own funds to make monthly payments.

The Bureau is aware that the GSEs have specific requirements to address these types of concerns in their representation and warranty frameworks. 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.[136]

The Bureau tentatively concludes that proposed § 1026.43(e)(7)(iv)(A)(*5*) is an appropriate step to ensure that the performance history considered in assessing delinquency for purposes of proposed § 1026.43(e)(7) reflects the consumer's ability to repay rather than payments made by the creditor, assignee or servicer or persons acting on their behalf, potentially masking a consumer's inability to repay. Similar to the GSEs' representation and warranty framework, the Bureau believes 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.

Pursuant to proposed § 1026.43(e)(7)(iv)(A)(*5*), any payment received from one of the identified sources would not be 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

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

behalf, it would be 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, proposed § 1026.43(e)(7)(iv)(A)(*5*) would 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 proposed § 1026.43(e)(7)(iv)(A)(*3*)(*ii*).

The Bureau seeks comment on whether it should include other sources of funds in proposed § 1026.43(e)(7)(iv)(A)(*5*) as an additional measure to ensure payments in fact reflect ability to repay. Specifically, the Bureau is interested in whether it should include funds from subordinate-lien credit transactions made to the consumer by the creditor, servicer, or assignee of the covered transaction, or a person acting on such creditor, servicer, or assignee's behalf; the reasons for or against treating such funds in the same way as proposed § 1026.43(e)(7)(iv)(A)(*5*) would treat funds paid on behalf of a consumer by such persons; and how such a provision could be structured so as not to impact negatively consumers' ability to access credit.

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

Proposed § 1026.43(e)(7)(iv)(C)(*2*) would provide 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*) would provide 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. For the reasons discussed below, proposed § 1026.43(e)(7)(iv)(B) defines 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 proposed § 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 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, which 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 sought to propose standards that would 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 would not significantly change the affordability of the loan as compared to the loan terms at consummation. As such, the Bureau preliminarily concludes that such a qualifying change should end any pre-existing delinquency, not add to the amount of interest charged over the full term of the loan, not involve an additional fee charged to the consumer in connection with the change, and generally provide a waiver of accumulated fees upon the consumer's acceptance of the change. The Bureau preliminarily determines that these standards would help to ensure that, consistent with the underlying purposes of the ATR and QM requirements, loans that ultimately become Seasoned

QMs after a temporary payment accommodation extended in connection with a disaster or pandemic-related national emergency are affordable.

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

Proposed § 1026.43(e)(7) would require 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) would define 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; (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. These exceptions are further discussed in the section-by-section analysis of proposed § 1026.43(e)(7)(iv)(C)(*1*) and (*2*) below.

In defining the length of the proposed 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 with respect to penalties and other remedies for deficiencies in underwriting practices. The Bureau also focused on the timing of the first disqualifying event from the proposed 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 1 and 2 of part VII below. Based on these considerations and for the reasons discussed in part V above, the Bureau is proposing to define the seasoning period generally as a period of 36 months beginning on the date on which the first periodic payment is due after consummation.

The Bureau solicits comment on its proposal to define the seasoning period generally as a period of 36 months beginning on the date on which the first periodic payment is due after consummation. The Bureau also requests comment on alternative lengths that the Bureau should consider for the seasoning period; considerations and data that the Bureau should consider in determining the length of the seasoning period; and whether the length of the seasoning period should depend on the type of loan or QM status at origination (for example, whether the Bureau should provide a longer seasoning period for loans that are non-QM at origination than for loans that are rebuttable presumption loans at origination).

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

As explained in the section-by-section analysis of proposed § 1026.43(e)(7)(iv)(C) above, the Bureau is proposing a seasoning period of 36 months beginning on the date on which the first periodic payment is due after consummation, unless one of two exceptions applies. The first proposed exception would extend 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*) provides 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.

When a delinquency of 30 days or more exists in the 36th 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 where the delinquency is not resolved quickly, the Bureau believes that it may not be appropriate for the loan to become a Seasoned QM, as the extended delinquency, when considered with the consumer's prior payment history, could suggest that the creditor failed to make a reasonable, good faith determination of ability to repay at consummation. The Bureau is, therefore, proposing to extend the seasoning period under these circumstances until the loan is no longer delinquent. The loan would then have to meet the performance requirements under proposed § 1026.43(e)(7)(ii) at the conclusion of the extended seasoning period based on performance over the entire, extended seasoning period. The Bureau believes that extending the seasoning period until any delinquency of 30 days or more is resolved would 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 the proposal.

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

Proposed § 1026.43(e)(7)(iv)(C)(*2*) addresses 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[137] affects the seasoning period. For the reasons set forth below, proposed § 1026.43(e)(7)(iv)(C)(*2*) provides 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 states 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[138] or the consumer must cure the delinquency under the loan's original terms before the seasoning period can resume. 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 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.

The Bureau is proposing to exempt the period of time during which a loan is subject to certain temporary payment accommodations from the seasoning period for three primary reasons, which are further discussed below. First, the Bureau believes 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 preliminarily believes that the assessment of an entire 36-month seasoning period during which

[137] As further discussed in the section-by-section analysis of § 1026.43(e)(7)(iv)(D) below, the Bureau is proposing to define 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 (Stafford 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).

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

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 believes 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 may be disincentivized from offering these types of accommodations to consumers in a prompt manner.

The Bureau believes that 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, since it constitutes a change in the consumer's circumstances after 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 a change 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 tentatively 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. Absent an exclusion from the seasoning period for these types of loans, loans that do not meet the proposed performance requirements in proposed § 1026.43(e)(7)(ii) due to a disaster or pandemic-related national emergency would lose their seasoning eligibility even if a temporary payment accommodation could have assisted in resolving the loan's delinquency.

In evaluating how it would propose 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.[139] 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.[140]

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[139] 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* Fannie Mae, *Selling Guide* 56 (Aug. 5, 2020), https://singlefamily.fanniemae.com/media/23641/display. 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* 1301-19 (Aug. 5, 2020), https://guide.freddiemac.com/ci/okcsFattach/get/1002095_2.

[140] 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

The Bureau is concerned that temporary payment accommodations entered into for reasons other than disasters or emergencies meeting the definition in proposed § 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 origination. As such, the Bureau believes it may be appropriate to treat periods of temporary payment accommodation for reasons other than disasters or pandemic-related 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 responsible, affordable mortgage credit by proposing 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 proposing 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 proposes to exclude from the seasoning period temporary payment accommodations only for disasters and pandemic-related national emergencies meeting the definition in proposed § 1026.43(e)(7)(iv)(D).

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to a disaster or pandemic-related national emergency from the seasoning period may best advance its goal of ensuring that the seasoning period allows enough time to assess whether the creditor made a reasonable assessment of the consumer's ability to repay at origination.

The Bureau is also concerned 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 offering these types of accommodations to consumers in a prompt manner. Specifically, the Bureau is concerned that 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. The proposed rule's exclusion of temporary payment accommodations related to a disaster or pandemic-related national emergency from the proposed 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.[141]

At the same time, the Bureau recognizes that the 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 have affordable terms. For that reason, the Bureau is proposing to allow 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 proposed § 1026.43(e)(7)(iv)(C), the proposed limitation to qualifying changes is meant to

[141] *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).

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 undermine the affordability that the QM statutory requirements are designed to ensure. The Bureau is also proposing to require a total cumulative seasoning period 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 proposed § 1026.43(e)(7)(ii).

Proposed comment 43(e)(7)(iv)(C)(*2*)-1 provides 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 uses 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 invites comment on the proposal to exclude from the seasoning period the period of time during which a loan is subject to a temporary payment accommodation extended in connection with a disaster or pandemic-related national emergency.

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

Proposed § 1026.43(e)(7)(iv)(D) addresses 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*), would 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 a pandemic-related national emergency. For the reasons set forth below, proposed § 1026.43(e)(7)(iv)(D) would define 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.

The Bureau is proposing to reference in § 1026.43(e)(7)(iv)(D) presidentially declared emergencies or major disasters under the Stafford Act or presidentially declared pandemic-related national emergencies under the National Emergencies Act to provide financial institutions with a reasonable degree of certainty regarding what types of financial hardships lead to temporary payment accommodations that qualify to be excluded from the seasoning period. The Stafford Act, which has been used for over 30 years to facilitate Federal disaster response, contains detailed definitions of what are considered to be emergencies or major disasters under that statute.[142] 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.[143] The Bureau preliminarily determines that referring to these two statutes will 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.

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

[143] 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/.

The Bureau also preliminary concludes that a presidentially declared emergency or major disaster under the Stafford Act, or a pandemic-related national emergency under the National Emergencies Act, are likely to be events of a scale that warrant the timely provision of temporary payment accommodations for consumers experiencing financial hardship because of them.

The Bureau is aware that various types of temporary payment accommodations may be offered to consumers during a disaster or pandemic-related national emergency. Proposed comment 43(e)(7)(iv)(D)-1 provides 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 invites comment generally on the proposed definition of a temporary payment accommodation in connection with a disaster or pandemic related national emergency.

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

A. Overview

In developing this proposal, 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 the proposed rule with prudential, market, or systemic objectives administered by such agencies as required by section 1022(b)(2)(B) of the Dodd-Frank Act. The Bureau requests comment on the preliminary analysis presented below as well as submissions of additional data that could inform the Bureau's analysis of the benefits, costs, and impacts.

The proposal 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. Creditors would have to satisfy consider and verify requirements and keep the loans in portfolio until the end of the seasoning period. The loans also would have to meet certain performance requirements. Specifically, loans could 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 proposed Seasoned QM requirements would receive a safe harbor from ATR liability at the end of the seasoning period.

As discussed above, a goal of the proposal is to enhance access to responsible, affordable mortgage credit. The proposal incentivizes the origination of non-QM and rebuttable presumption QM loans that a lender expects to demonstrate a sustained and timely mortgage payment history, by providing a separate path to safe harbor QM status for these loans if lenders' expectations are fulfilled. The proposal 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)[144] and National Mortgage Database (NMDB)[145] 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. However, it would be useful to supplement these data with more information relevant to pricing and APR calculations, particularly private mortgage insurance (PMI) costs, for originations before 2018. PMI costs are an important component of APRs, particularly for loans with smaller down payments, and thus should be included or estimated in calculations of rate spreads relative to

[144] Public Law 94-200, tit. III, 89 Stat. 1125. 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/.

[145] 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* 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.

APOR. The Bureau seeks additional information or data that could inform quantitative estimates of PMI costs or APRs for these loans.

The data provide only limited information on the costs to creditors of uncertainty related to legal liability that the proposal may mitigate. As a result, the analysis of impacts of the proposal 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 the proposal on these costs.

Finally, as discussed further below, the analysis of the impacts of the proposal 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 potential changes considered below. The Bureau seeks additional information or data which could inform its quantitative estimates of the effects of the proposal.

2. Description of the baseline

The Bureau considers the benefits, costs, and impacts of the proposal against two baselines. The first baseline (Baseline 1) assumes that the Bureau's recent proposals to extend the expiration date of the Temporary GSE QM loan definition and to amend the General QM definition are both adopted as proposed. The second baseline (Baseline 2) assumes that neither proposal is adopted, so the Temporary GSE QM loan definition expires on January 10, 2021 or when the GSEs exit conservatorship, whichever occurs first, and the current General QM definition persists.

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 loan except for the performance and portfolio requirements of the seasoning period. 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 loan, meaning that as a result of meeting those requirements, they would obtain QM status, a stronger presumption of compliance, or would not need to satisfy the portfolio retention requirements that would be necessary to obtain 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 meet all of the requirements of a Seasoned QM loan and would benefit if they met the performance and portfolio requirements of 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.[146]

As stated above, under Baseline 1, both the proposal to extend the expiration date of the Temporary GSE QM loan definition and the proposal to amend the General QM definition are adopted as proposed. Consider first all of the non-QM loans under Baseline 1 that meet all of the requirements at consummation for a Seasoned QM loan and would benefit if they met the performance and portfolio requirements of the seasoning period.[147] To count these loans, the Bureau has used 2018 HMDA data to identify all residential first-lien, fixed-rate conventional

[146] Thus, the analysis estimates the maximum number of loans under each baseline that would become Seasoned QM loans 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.

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

loans for 1-4 unit housing that do not have prohibited features or other disqualifying characteristics; are not Small Creditor QM loans or entitled to a presumption of compliance under the EGRRCPA QM definition;[148] and for which the APR exceeds APOR by the amounts specified in the General QM Proposal's proposed amendments to § 1026.43(e)(2)(vi)(A) through (E). The Bureau estimates that there are 22,816 of these loans. These loans would benefit from the proposal by obtaining safe harbor QM status if they meet the performance and portfolio requirements of the seasoning period, and not otherwise.[149]

Consider next all of the rebuttable presumption QM loans under Baseline 1 that meet all of the requirements at consummation for a Seasoned QM loan 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 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 73,590 of these loans. The second group is all fixed-rate rebuttable presumption Small Creditor QM loans. The Bureau estimates that there are 30,183 of these loans. Thus, the Bureau estimates that 103,773 loans would benefit from the proposal 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.[150]

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[148] 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.

[149] Note that the analysis uses 2018 data, but the proposal (if adopted) would not apply to these loans since the proposal would apply to covered transactions for which creditors receive an application on or after the effective date.

[150] 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

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 loan and (2) do not otherwise satisfy the criteria to qualify for a safe harbor under the proposed General QM definition or the Small Creditor QM definition. The Bureau estimates that there would be 24,039 loans in 2018 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 1, approximately 150,628 loans originated in 2018 would meet all of the requirements at consummation for Seasoned QM loans and would obtain QM status, 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 the baseline in years similar to 2018, that meet all of the requirements of a Seasoned QM loan and would benefit if they met the performance and portfolio requirements of the seasoning period. Some of these loans will meet those performance and portfolio requirements, and some will not.[151]

ATR requirements. To the extent some subset of such loans should qualify for a lesser presumption, however, these 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.

[151] The Bureau cannot reliably measure the full expansionary effect of the proposal on loan originations. One effect might be that the proposal would cause the share of loan applications that lead to originations of non-QM loans under the baseline (90 percent) to match the overall share (97 percent for loan applications for which Bureau data include the rate spread). This would lead to an additional 1700 non-QM originations not accounted for above.

Now consider Baseline 2. As stated above, under Baseline 2, neither the proposal to extend the expiration date of the Temporary GSE QM loan definition nor the proposal to amend the General QM definition is adopted, and the Temporary GSE QM loan definition expires on January 10, 2021, or when the GSEs exit conservatorship, whichever occurs first. Consider first all of the non-QM loans under Baseline 2 that meet all of the requirements at consummation for a Seasoned QM loan and would benefit if they met the performance and portfolio requirements of the seasoning period.[152] To count these loans, the Bureau has used 2018 HMDA data to identify all residential first-lien, fixed-rate conventional loans for 1-4 unit housing that do not have prohibited features or other disqualifying characteristics; are not Small Creditor QM loans or originated under the EGRRCPA QM definition; and do not satisfy the DTI requirement specified in § 1026.43(e)(4)(vi) of the current General QM definition. The Bureau estimates that there are 705,915 of these loans. These loans would benefit from the proposal 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 meet all of the requirements at consummation for a Seasoned QM loan 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 definition, but which 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 63,646 of these loans.

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

The second group is all first-lien, fixed-rate rebuttable presumption Small Creditor QM loans. The Bureau estimates that there are 30,183 of these loans. Thus, the Bureau estimates that 93,829 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.[153]

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 loan and (2) do not otherwise satisfy the criteria to qualify for a safe harbor under the proposed General QM definition or the Small Creditor QM definition. The Bureau estimates that there would be 127,887 loans in 2018 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 927,631 loans originated in 2018 would meet all of the requirements at consummation for Seasoned QM loans 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 loan and would benefit if they met the

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

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

B. Potential Benefits and Costs to Covered Persons and Consumers

The proposal 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 the proposal on creditors first and then consumers. The analysis begins by assessing how the proposal may potentially affect creditors' litigation risk, cost of origination, and the price of borrowing, holding originations constant. The analysis then considers the potential impacts of the proposal 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.

1. *Benefits and costs to covered persons*

Benefits from reduced litigation risk

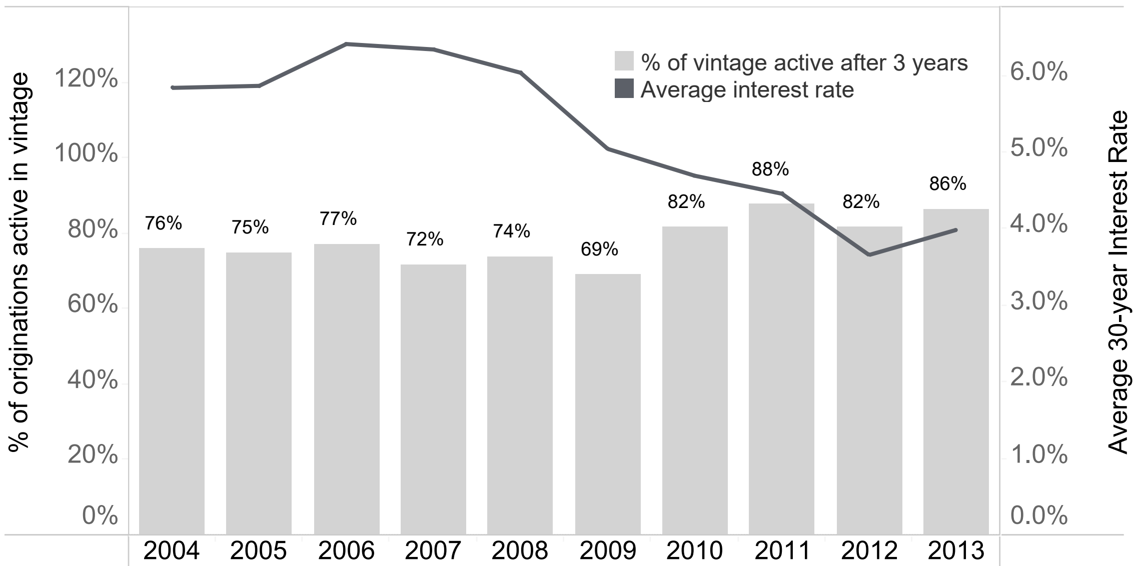
Covered persons, specifically mortgage lenders, primarily benefit from decreased litigation risk under the proposal. Generally, the statute of limitations for a private action for damages for a violation of the ATR requirement is three years after the date on which the violation occurs. As such, the Bureau anticipates that the proposal would not curtail the ability of consumers to bring affirmative claims seeking damages for alleged violations of the ATR requirements. However, TILA also accords consumers the right to assert violations of the ATR requirements as defenses against foreclosure by recoupment or setoff, subject to no statute of limitations. For Seasoned QM loans that are non-QM loans or rebuttable presumption QM loans at consummation, the proposal would effectively limit these rights to approximately three years as a general matter.

The creditors' economic value of the reduction of litigation risk is related to how each of three factors changes with the proposal 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 seeks pertinent information related to ATR defenses in foreclosure proceedings and related costs.

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 the proposal. Finally, loans held in portfolio at consummation would not later be sold on the secondary market.

The likely quantitative impact of the proposal 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 1 plots the fraction of loans open after three years between 2004 and 2013 in order to provide context for the quantitative foreclosure analysis that follows.

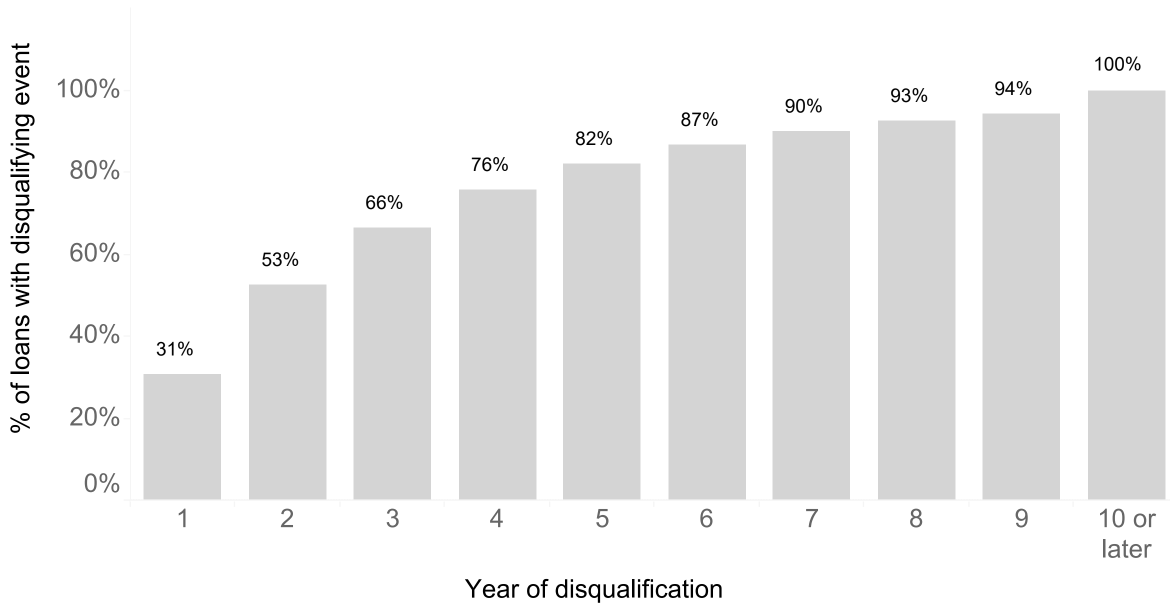
Figure 1: Percentage of Higher-Priced Active Loans by Year



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

Figure 1 serves as a reminder that, over time, the effects of the proposal would 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 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 the proposal would be smaller. This contrasts to post-crisis origination years where initial mortgage rates and foreclosure rates remained low and a larger share of loans remained active beyond three years.

Figure 2: Percentage of loans originated between 1998–2008 that had suffered a disqualifying event among those that ever suffer a disqualifying event



Source: NMDB; privately held, fixed-rate conventional loans with no restricted product features; high interest rate loans are defined as those with an interest rate 150 basis points or more over the Primary Mortgage Market Survey (PMMS) and 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 2 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 2 shows, for example, that 53 percent of loans with these performance problems would be disqualified from seasoning if the seasoning period were 24 months, 76 percent would be disqualified if the seasoning period were 48 months, and 66 percent would be disqualified from seasoning under the seasoning period of the proposal of 36 months.

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

To assess the proposal'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.[154] The loans potentially would have met the Seasoned QM proposal's performance criteria in 2015 and 2016.

The analyses first classify loans by whether they would satisfy the General QM requirements for safe harbor and rebuttable presumption in Baseline 1 at consummation.[155] Four percent of loans would be either rebuttable presumption or non-QM loans and would potentially benefit from the Seasoned QM definition's pathway to safe harbor if they performed.

Table 1: Share of loans under Baseline 1 that are open after three years and meet performance criteria

Type of Loan	Open after three years	Meet performance criteria (cond. on open)
Safe Harbor	78%	99%
Seasonable loans	78%	92%
Rebuttable Presumption	80%	94%
Non-QM	73%	87%
Missing Rate Spread	61%	87%
All Loans	77%	97%

[154] 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 the proposal 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 plus some time to see whether foreclosures eventually emerge. The Bureau excluded earlier vintages whose loan performance may have been affected by the financial crisis. This period was somewhat unusual in the number of homes with negative equity and the slowness 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. The analysis below should be understood with this background in mind, and the Bureau welcomes comment on the choice of time frame for the analysis.

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

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 the proposal. By way of comparison, the corresponding fractions for loans originated as safe harbor were 78 percent and 99 percent, respectively. Altogether, 77 percent of the loans that would be rebuttable presumption QM loans and non-QM loans under Baseline 1 would perform well enough to gain safe harbor via Seasoned QM under the proposal.

The relief from litigation risk depends in part on the fraction of these loans that would eventually enter foreclosure proceedings. Table 1 reports the share of loans that enter foreclosure between origination and the first quarter of 2020 among all loans consummated between 2012 and 2013, those that were still open three years after origination, and those that met the performance criteria of the proposal. 0.2 percent of loans open for at least three years enter foreclosure proceedings before March 2020. Among the loans that satisfy the proposed Seasoned QM definition's performance requirements, foreclosure proceedings begin for 1.4 percent of loans that would be non-QM loans in Baseline 1 and for 0.5 percent of loans that would be rebuttable presumption loans under Baseline 1. Combined, 0.8 percent of loans that met the performance requirements and were potentially seasonable at consummation would foreclose. By comparison, for loans that were still open after three years and originated as safe harbor under Baseline 1, only 0.1 percent of loans enter foreclosure after year three. Thus, the average foreclosure 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 QM loans.

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

Type of loan	All Loans	… open for 3 years	… and meet 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	4.4%	4.5%	1.4%
Missing Rate Spread	3.8%	1.8%	0.4%
All Loans	0.7%	0.5%	0.2%

In the January 2013 Final Rule, the Bureau estimated litigation costs under the ability-to-repay standards for non-QMs. The Bureau concluded that to reflect the expected value of these litigation costs, the costs of non-QMs would increase by 10 basis points or $212 for a $210,000 loan.[156] This model does not predict changes in costs from this baseline on non-QM loans that obtain QM status or on the remaining non-QM loans. The Bureau seeks comments on methods and data that would allow the Bureau to do so.

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

Paralleling the analyses of the proposal relative to Baseline 1, the analyses here classify loans by whether they would satisfy the General QM requirements for safe harbor and rebuttable presumption QM loans in Baseline 2 and whether they would satisfy the performance requirements of the proposal. Eight percent of analyzed loans would be non-QM loans or rebuttable presumption QM loans at consummation in Baseline 2 and potentially could gain safe harbor status via the proposed Seasoned QM performance criteria. Most of these loans

[156] 78 FR 6408, 6569 (Jan. 30, 2013).

(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 are open after three years and meet performance criteria

Type of loan	Open after three years	Meet 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%

Eighty-six percent of the loans that would be potentially seasonable at consummation under Baseline 2 are still open after three years, of which 98 percent would satisfy the proposed performance requirements of Seasoned QM.

Among the loans that satisfy the proposed Seasoned QM definition's performance requirements, foreclosure proceedings begin for 0.2 percent of loans that would be 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 enter foreclosure after year three.

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

Type of loan	All Loans	… open for 3 years	… and meet 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 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.

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 the proposal. Such loans potentially have not only the decreased litigation risk discussed in the previous section, but loans that achieve safe harbor status via the proposal are likely more easily sold on the secondary market, freeing liquidity for creditors. This includes both non-QM loans that achieve safe harbor status and loans that achieved safe harbor status through 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. The Bureau seeks further information about whether litigation risk from non-QM status impedes depositories' sale of non-QM loans to the secondary market.

Altogether, the Bureau cannot reliably predict how many additional loans would be originated under the proposal's additional incentives and subsequently how much potential profits creditors would accrue relative to either baseline.[157] The Bureau seeks comment as to whether these effects can be ascertained.

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[157] Assessment Report, *supra* note 49, 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 QM loans derived above, and the benefit of seasoning would vary across these loans.

Other Costs to Covered Persons

The Bureau preliminarily concludes that the proposal would not directly impose additional costs to mortgage creditors relative to the baseline. The proposal offers a pathway for performing mortgages to gain a safe harbor presumption. Loans meeting the proposed Seasoned QM definition would have at least as much of a presumption of compliance as under the baseline. However, if the proposal succeeds in expanding the market for non-QM loans, certain lenders' profits may be eroded by competitive pressures.

2. *Benefits and costs to consumers*

Consumers primarily benefit from the proposal indirectly via the potential expansion of rebuttable presumption and non-QM loans from decreased litigation risk to creditors. For consumers that choose to pursue high APR loans without safe harbor QM status, borrowing may be cheaper or more widely available relative to the baseline. However, the Bureau cannot ascertain the additional number of consumers who would choose loans without safe harbor QM status under the proposal relative to the baselines as stated in the previous section.

Consumers who would select loans without safe harbor QM status under both the baseline and the proposal may or may not benefit from the proposal. On the one hand, decreased litigation risk may translate into lower costs in competitive mortgage markets.[158] However, 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

[158] David S. Scharfstein & Adi Sunderam, *Market Power in Mortgage Lending and the Transmission of Monetary Policy*, Mimeo (Aug. 2016) (study how passthrough of lower secondary market costs of funding are passed through to consumers), https://www.hbs.edu/faculty/Publication%20Files/Market%20Power%20in%20Mortgage%20Lending%20and%20the%20Transmission%20of%20Monetary%20Policy_8d6596e6-e073-4d11-83da-3ae1c6db6c28.pdf.

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 the proposal's potential decreases in price.

3. Consideration of Alternatives

The Bureau considered alternative seasoning periods to the one proposed and alternative performance requirements of allowable 30-day delinquencies. Each of the alternatives permits no 60-day delinquencies. The Bureau assesses each alternative 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 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 section VII.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 the proposal in that the Bureau cannot reliably predict how many additional loans would be originated under its alternatives.

Table 5: Percentage of potentially seasonable loans under Baseline 1 that would satisfy the proposed Seasoned QM definition's 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 season. In contrast, varying the seasoning period from 12 months to 60 months captures vastly different numbers of loans that would still be open.

Table 6: Difference in percentage points of loans under Baseline 1 that enter foreclosure between potentially seasonable loans that meet the proposed Seasoned QM definition's performance criteria and loans that had safe harbor from consummation and are open 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 the proposal with the share of foreclosures among loans that would have been originated as safe harbor QM loans under Baseline 1. For example, under the proposal, 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 QM loans 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 rate than does changing the number of allowable 30-day delinquencies.

Table 7: Percentage of potentially seasonable loans under Baseline 2 that would satisfy the proposed Seasoned QM definition's 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 meet the seasoning requirements under the proposed 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 proposed amendments to the General QM definition would provide many of these loans with a pathway to QM status.

Table 8: Difference in percentage points of loans under Baseline 2 that enter foreclosure between potentially seasonable loans that meet the proposed Seasoned QM definition's performance criteria and loans that had safe harbor from consummation and are open 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 achieve safe harbor status through the proposal or alternatives with a seasoning period of at least three years have a 0.13 percentage point higher foreclosure rate than open loans that were safe harbor QM loans at consummation. The difference in the foreclosure 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 would be expected to benefit from the proposal. 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 would likely not benefit from the proposal's providing a pathway to safe harbor status for non-QM loans. However, the proposal would allow loans to obtain safe harbor status without having to satisfy the portfolio retention requirements of the EGRRCPA.

D. Potential Impact on Rural Areas

As with the analysis of the proposal's benefits and costs overall, the Bureau can generally not predict how much or how little the proposal would cause the market to expand under either baseline. The Bureau analyzed HMDA data mirroring the analysis discussed above, 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 would achieve only a stronger presumption of compliance or relief from portfolio retention requirements by meeting the performance criteria of the proposal. This share of loans is 20 percent for rural markets relative to 16 percent of the market overall. This includes relatively more loans that do not meet the portfolio requirements under the EGRRCPA that would be either rebuttable presumption under the General QM loan definition's requirements or non-QM (2.9 percent vs. 2.7 percent) and loans that would meet the portfolio and other requirements under the EGRRCPA (16.7 percent vs. 13.3 percent).

However, the overall relative differences under Baseline 2 are modest (34 percent vs. 35 percent). If they met the performance requirements of the proposal, relatively fewer loans would gain a stronger presumption of compliance from the proposal than under Baseline 2 alone (21.7 percent vs. 17.1 percent), and relatively more would gain relief from the portfolio requirements under the EGRRCPA (16.7 percent vs. 13.4 percent).

VIII. Regulatory Flexibility Act Analysis

The Regulatory Flexibility Act (RFA),[159] as amended by the Small Business Regulatory Enforcement Fairness Act of 1996,[160] 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 size standard developed by the Small Business Administration pursuant to the Small Business Act.[161]

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).[162] 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.[163]

An IRFA is not required for this proposal because the proposal, if adopted, would not have a SISNOSE. The Bureau does not expect that the proposed rule would impose costs on small entities relative to any of the baselines. The proposed rule defines a new category of QMs. All methods of compliance with the ATR requirements under a particular baseline would remain

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[159] 5 U.S.C. 601 *et seq.*

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

[161] 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).

[162] 5 U.S.C. 603 through 605.

[163] 5 U.S.C. 609.

available to small entities if the proposal is adopted. Thus, a small entity that is in compliance with the rules under a given baseline would not need to take any different or additional action if the proposal is adopted.

Accordingly, the Director certifies that this proposal, if adopted, would not have a SISNOSE. The Bureau requests comment on its analysis of the impact of the proposal on small entities and requests any relevant data.

IX. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA),[164] 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 proposal does not contain any new or substantively revised information collection requirements other than those previously approved by OMB under OMB control number 3170-0015. The proposal would 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.

The Bureau welcomes comments on these determinations or any other aspect of the proposal for purposes of the PRA.

[164] 44 U.S.C. 3501 *et seq.*

X. Signing Authority

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

List of Subjects in 12 CFR Part 1026

Advertising, Banking, Banks, 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 proposes to amend 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 paragraphs (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 paragraphs (e)(2), (e)(4), (e)(5), (e)(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), (e)(5), (e)(6), (e)(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)(5)(i)(A) and (e)(5)(i)(B) 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; and

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

(ii) *Performance requirements*. To be a qualified mortgage under this paragraph (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.

(iii) *Portfolio requirements.* To be a qualified mortgage under this paragraph (e)(7), 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; 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; or

(*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.

(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, if applicable, escrow 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, 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. 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, 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 as modified by the qualifying change.

(*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, 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 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.

(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*) 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;

(*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. Delete *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* after *43(e)(1) Safe harbor and presumption of compliance;*

d. Add the heading *43(e)(7) Seasoned Loans* and add *Paragraphs 43(e)(7)(i)(A)*, *43(e)(7)(i)(B), 43(e)(7)(iii)*, *43(e)(7)(iv)(A), 43(e)(7)(iv)(A)*(2), *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 and 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), (e)(4), (e)(5), (e)(6), (e)(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 comment 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). Section 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.

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

1. For purposes of § 1026.43(e)(7)(i)(B), a loan that complies with the consider and verify requirements of any other qualified mortgage definition is deemed to comply with the consider and verify requirements in § 1026.43(e)(7)(i)(B).

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 two exceptions set forth in § 1026.43(e)(7)(iii)(B)(*1*) and (*2*). 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 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)(*2*). The transfer does not violate the requirements in § 1026.43(e)(7)(iii) because the transfer is pursuant to a merger or acquisition. 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), though it could qualify 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, if applicable, escrow) 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, if applicable, escrow) before March 1, 2023.

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 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 forbearance 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 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: August 18, 2020.

/s/ Laura Galban

Laura Galban,

Federal Register Liaison, Bureau of Consumer Financial Protection.