

September 8, 2020

The Honorable Kathleen L. Kraninger
Bureau of Consumer Financial Protection
1700 G Street, NW
Washington, DC 20552

RE: Qualified Mortgage Definition under the Truth in Lending Act (Regulation Z): General
QM Loan Definition, Docket No. Docket No. CFPB-2020-0020, RIN 3170-AA98

Dear Director Kraninger:

On behalf of the clients and communities we represent, the undersigned organizations respectfully submit the attached term sheet. The term sheet identifies fair lending and “consider and verify” provisions we agree should be included in any modified Qualified Mortgage rule. We urge the Bureau to incorporate these provisions into any final rulemaking, whether by regulation or official interpretation.

Each of the undersigned organizations believes that a meaningful consider and verify requirement in the CFPB’s final rule is of critical importance to ensuring that a revised QM definition remains faithful to the ability-to-repay framework that Dodd-Frank created. Thank you for your consideration of our comments.

Sincerely,

Americans for Financial Reform Education Fund
Center for Responsible Lending
Consumer Federation of America
NAACP
NAACP Legal Defense and Educational Fund, Inc. (LDF)
National CAPACD
National Community Stabilization Trust
National Consumer Law Center (on behalf of its low-income clients)
National Community Reinvestment Coalition (NCRC)
National Fair Housing Alliance
National Urban League
UnidosUS

Joint Civil Rights-Consumer Groups Term Sheet on Fair Lending and Consider and Verify Requirements for QM

September 8, 2020

Fair Lending Proposal:

- **No presumption or inferences relating to fair lending:** The CFPB has a separate, yet equally important, responsibility to ensure that the pricing consumers receive for mortgages does not discriminate against applicants on the basis of characteristics protected by law. By statute, one of the functions of the Office of Fair Lending and Equal Opportunity is to coordinate the fair lending efforts of the Bureau with other Federal agencies and State regulators “to promote consistent, efficient, and effective enforcement of Federal fair lending laws.” Accordingly, the CFPB should make clear that the QM safe harbor established by this regulation should not be construed to create an inference or presumption that a loan satisfying the identified criteria is compliant with the Equal Credit Opportunity Act, the Fair Housing Act, or state or local anti-discrimination laws that pertain to lending. A QM safe harbor loan may still violate the requirements of the Equal Credit Opportunity Act, the Fair Housing Act or state and local anti-discrimination laws, as well as other federal and state laws regulating mortgage lending.
- **Diminishing negative impacts on a borrower’s Ability to Repay:** The CFPB has an obligation to mitigate actions, like pricing discrimination, that can negatively impact a borrower’s ability to repay their debt obligation. The CFPB should therefore limit the ability of a financial institution to receive the QM safe harbor in instances where pricing discrimination has occurred, as set forth below.

If a financial institution, or creditor as defined by the Equal Credit Opportunity Act (ECOA), originates a loan that meets the Safe Harbor thresholds outlined in the regulation and discovers a likely violation of the ECOA resulting from pricing discrimination related to the loan, the financial institution shall self-report the likely violation to the CFPB and its prudential regulator within 30 days of the discovery of the likely violation. The financial institution shall have 30 days, from the date of discovery, to remediate the harm resulting from the likely violation.

Should a financial institution fail to self-report a likely violation and remediate the harm resulting from a likely violation within 30 days of the date of discovery of the likely violation, and a judicial, administrative, or regulatory body, through a final adjudication, determines that pricing discrimination in violation of ECOA has occurred, the Safe Harbor will not apply to the loan(s) related to that violation. Loans related to that violation may still qualify as QM loans, but they are not afforded a conclusive presumption of compliance.

Consider and Verify:

- **Early defaults:** Creditors should be required to track early defaults and maintain records showing this tracking and any responses to increases in early defaults to ensure link between pricing and ATR.
- **Reasonable and good faith determination:** CFPB should affirm that creditors making QM loans must nonetheless comply with the underlying statutory requirement to make a reasonable and good faith determination of ATR.
 - Consistent with CFPB’s request for examples of what “not meaningfully consider” means, outer bounds of what could be consider and verify documentation inconsistent with a reasonable and good faith interpretation of ATR:
 - 100% DTI loans, including 100% at maximum loan payment on current income, and including full DTI for all known debts, including simultaneous loans;
 - Zero or negative residual income (after-tax monthly income less debt payments), after accounting for all known debt obligations, including simultaneous loans;
 - Documentation that is falsified or subject of fraud by or with the knowledge and consent of the lender, broker, or their agents;
 - Statements by borrower that they cannot pay projected payments or can only pay the minimum ARM payment, as reflected in the underwriting file;
 - Promises by lender, broker, or their agents that the lender will refinance the loan upon any stated future event (e.g., ARM reset, financial difficulty experienced by borrower, borrower’s retirement), as reflected in the underwriting file;
 - If ARMs are not excluded from QM, CFPB should state that consider and verify, like ATR, has to be based on the maximum payment in the first five years;
 - Escrow requirements must, per the statute, reflect all applicable taxes, insurance, and assessments, including any known post-closing upward adjustments reflecting a new assessment/ loss of exemptions, etc.; and
 - Statements by borrower or other documented evidence that the borrower expects a reduction of income soon unless the underwriting is done in accordance with borrower’s projected income drop, as reflected in the underwriting file.

- **Record retention:** At a minimum, the creditor's record retention of how it considered and verified income or assets and DTI or residual income must meet the following standards:
 - As CFPB says, the creditor must verify anything it considers;
 - There must be detailed enough record retention that an examiner could review the underwriting to confirm that it was done in accordance with the creditor's procedures, based on verified information, and that DTI or residual income were considered;
 - The considerations for pricing and an explanation for the pricing must be maintained, including any role played by LTV or equity in the home. Examiners should be able to determine and verify from reviewing the retained documentation the basis of the pricing decision, any applicable weight given to various factors in the consideration (including minimally which factors played a role in determining pricing), and, if present, any mathematical relationships. For example, a printout from the underwriting system saying the loan is approved by itself should be inadequate to demonstrate pricing considerations, if the printout only indicates that the loan was approved and not how it was priced.
 - On any individual loan, to the extent discretionary pricing was permitted and occurred, including any deviations from rate sheets, both any rate sheets used and explanations for deviations from those rate sheets or other discretionary pricing must be retained.
 - To combat the risk of discriminatory pricing, any fair lending analysis conducted on pricing or loans originated must be retained and available for supervisory examinations on QM compliance.
 - In order to maintain the safe harbor against a borrower raising the ATR as a defense to foreclosure, documentation must be retained. If the documentation is not maintained, the creditor or assignee loses the presumption that a good faith determination of ATR was conducted.
- **No asset-based lending:** CFPB should affirm prior interagency guidance that lending on LTV/asset value alone is per se predatory and cannot satisfy the requirements of consider and verify.