August 10, 2020

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

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Re: Qualified Mortgage Definition under the Truth in Lending Act (Regulation Z):
Extension of Sunset Date
Docket No. CFPB-2020-0021, RIN 3170-AA98
85 Fed. Reg. 41,448 (July 10, 2020)

Dear Director Kraninger:

Thank you for the opportunity to comment on the Bureau's proposal. On behalf of our low-income clients, we encourage the Bureau to extend the sunset date for the GSE-QM patch further than proposed in the above Federal Register notice because the proposed one is too short and unpredictable. We also encourage the Bureau to redo the cost benefit analysis used for this proposal. The analysis published in the Federal Register is deeply flawed, resulting in an erroneous conclusion and a defective rulemaking.

Currently, Regulation Z §1026.43(e) defines the term "qualified mortgage" (QM). An important exception allows a loan to have QM status even if it does not meet the definition so long as it is eligible for purchase or guarantee by Fannie Mae or Freddie Mac (the GSEs).[1] This exception is commonly known as "the GSE-QM patch." Currently, the patch is scheduled to expire at the earlier of two points: January 10, 2021 or the end of Federal Housing Finance Administration (FHFA) conservatorship over the GSEs.

But, in conjunction with a separate rulemaking to revise the definition of "qualified mortgage,"[2] the Bureau now proposes to change the sunset date for the patch. Under the proposal, there would remain two triggers for expiration of the patch, the earlier of

- The end of the conservatorship; or
- The effective date of the QM definition rulemaking.

Neither of these dates are certain, nor entirely within the Bureau's control.

Although we agree that the sunset date should be extended beyond January 2021, we believe the GSE-QM patch should remain in effect until the *latest* of the following events:

- a date certain that is at least January 2022, preferably 2023;
- six months after the end of the COVID-19 national emergency, or

[1] Reg. Z § 1026.43(e)(4).
[2] 85 Fed. Reg. 41,716 (July 10, 2020).

- the effective date of the new definition rulemaking.[3]

Terminating the conservatorship should not trigger an earlier sunset, for reasons discussed below.

The proposed sunset rule is too unpredictable. The QM rulemaking took years of extensive analysis and debate. The logic of complying with the rule is now programmed into all major computer underwriting systems; industry personnel and compliance officers have been trained on it; and the secondary market has evolved around it. Now the Bureau proposes changing the QM definition. Assuming that the Bureau's proposal for a new QM definition, 85 Fed. Reg. 41,716 (July 10, 2020), is not a foregone conclusion, revising the QM rule cannot—and should not—be done on short notice. The mortgage industry is a massive part of the U.S. economy. Uncertainty is destabilizing and tends to reduce access to credit. For this reason, the new sunset date should give the industry plenty of time to prepare[4] and be as predictable as possible. Instead, the Bureau proposes leaving the sunset date entirely undefined.

The end of the conservatorship is not an appropriate sunset date because the Bureau has no control over when the conservatorship ends or how much notice anyone will have. In addition, the FHFA has no obligation to consult with the Bureau over either question or the implications for consumer protection as to the ending of the conservatorship. Using the fate of the conservatorship as a trigger means the GSE-QM patch could end before the new definition is finalized (or effective).

Retaining the end of the conservatorship as a sunset date thus risks a profound destabilization of the mortgage market. Yet, the Bureau not only proposes to retain this date, but states that it will not even consider comments on the wisdom of doing so.[5] We believe the Bureau's glossing over the real risk to the market and to traditionally underserved communities if the conservatorship ends before a new QM definition is in place, without any meaningful analysis, and only a vague promise to revisit the issue if it becomes a problem,[6] is an abrogation of its legal duties if not an admission of prejudgment of both the timetable and outcome of the QM definition rulemaking.

The other component of the proposed sunset date is equally unpredictable. As proposed, § 1026.43(e)(4)(iii)(B) would provide that

> the special rules in this paragraph (e)(4) [the GSE-QM patch] are available only for covered transactions consummated on or before the effective date of a final rule issued by the Bureau amending paragraph (e)(2) of this section. The Bureau will also amend this paragraph as of that effective date to reflect the new status.

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[3] It is also vital that the new rule have an effective date set far enough into the future to allow industry to prepare.

[4] *See, e.g.,* Comment letter from the Minnesota Credit Union Network (July 22, 2020) (Regulations.gov comment ID CFPB-2020-0021-0002); Comment letter from the Community Mortgage Lenders Association (July 30, 2020) (Regulations.gov comment ID CFPB-2020-0021-0005).

[5] 85 Fed. Reg. 41,448, 41,456 (July 10, 2020) ("Comments on § 1026.43(e)(4)(ii)(A) are outside the scope of this rulemaking and will not be considered.").

[6] *See, e.g.,* 85 Fed. Reg. 41,448, 41,456 n. 105 (July 10, 2020).

But this is nothing more than a long-winded way of saying "to be determined." The comment period on the pending QM re-definition has not yet closed so the Bureau cannot yet know when the new definition will be effective and how much time industry will need to implement it. Currently, unless the conservatorship ends sooner, the GSE-QM patch will end on January 10, 2021. This deadline is clear and predictable. But if the proposed rulemaking is finalized, nobody will know when the patch will expire until after the Bureau finalizes the other rulemaking. If litigation or Congressional action delays the new definition, the patch could last indefinitely or end suddenly if the GSEs exit conservatorship.

A more straightforward approach would be to extend the patch indefinitely in this rulemaking and, in the QM definition rulemaking, set the final sunset date of the patch as part of the overall implementation strategy of a new QM definition. Doing the two together would allow the Bureau to adjust its approach to the termination of the patch based on comments regarding implementation of the new QM definition instead of doing so in a relative vacuum of information and analysis. Instead of ensuring a smooth transition in tandem with any new definition of QM and preserving the possibility that the Bureau might yet be convinced by comments to leave the General QM definition in place, the Bureau summarily notes that it does not "intend" to leave the patch in place indefinitely.[7] The Bureau fails to either justify its desire not to leave the patch in place "indefinitely" or to consider reasonable alternatives, such as providing a date certain (which would allow all stakeholders to better plan for a transition away from the patch) or to defer explicitly to the QM definition rulemaking on when and how industry will be required to transition from the patch.

The Bureau's "concerns" and "intentions" are all very well and good, but they do not demonstrate a full consideration of all reasonable alternatives. By tying the patch's extension to the QM rulemaking, the Bureau ties its hands. The artificial urgency the Bureau creates in its refusal to consider decoupling the patch from the conservatorship forecloses a full and robust debate, on the timing of and the substance of changes to the QM definition itself.

The proposal does not consider adequately the current state of the market. While the Bureau expects the market to make a smooth transition to the new QM definition, the Bureau's proposal does not take into account adequately the turmoil our nation is going through due to the COVID-19 pandemic. The Bureau should not presume that the economic fallout from the COVID-19 emergency will not affect the mortgage market or affect it only in a single, predictable way. The proposal also fails utterly to consider that growing calls for racial justice may lead to changes in mortgage lending practices. For those reasons, the GSE-QM patch should remain in place until the Bureau assesses the impact of these economy-wide and earth-shaking events.

As the Bureau acknowledges, the non-QM market, which has grown slowly since adoption of the current rule, has essentially evaporated in the wake of COVID-19. Loans backed by the

[7] 85 Fed. Reg. 41,448, 41,456 n. 105 (July 10, 2020).

government through FHA or the GSEs remain the overwhelming majority of originations.[8] This means that primary market creditors already are using the GSE underwriting standards for the largest share of their business. This alone argues for a longer delay in forcing the market to switch to a new QM standard, and not, as the Bureau suggests, a rush to judgment.

The residential mortgage market is by far the largest and most complex of all the consumer financial services markets within the Bureau's jurisdiction. We have seen in recent memory how misalignments in this market can cause lasting damage to our economy while destroying generations of accumulated wealth in African American communities. Any adjustments to the QM definition pose the risk of upsetting a market that is at the center of our national economy. At this time, particularly, assuring that creditors follow sound underwriting practices using well-known standards, carefully reviewed by a regulator, is of special importance to both the markets and the traditionally underserved communities to which the Bureau has a special obligation. Given that the Bureau's current rulemaking priorities are "intended to protect the stability of the financial sector and enhance its recovery,"[9] we believe that the Bureau will want to assure robust engagement on every aspect of the QM proposal. And that can only be done in the light of actual data regarding the state of the mortgage market—not speculation.

The Bureau should redo the cost benefit analysis when more data is available. The Dodd-Frank Act requires the Bureau to perform a cost-benefit analysis when making or amending rules.[10] Doing so requires data about the market. But many aspects of the mortgage finance system are in flux. We have seen during the pandemic both a large boom in refinancing and a tightening of certain aspects of the credit box, particularly for mortgage originations. Before the Bureau reviews the comments on its proposal for the new QM definition and finalizes a new definition, it cannot even have a well-informed view as to how disruptive this change is likely to be or how much time is needed to transition from the GSE-QM patch.

It is possible that the effective date of a new QM definition will be an appropriate time to end the patch definition. It is possible a different date will be more appropriate. What is clear, however, is that the Bureau's cost-benefit analysis does not explain why tying the patch extension to the new QM definition is the right or most effective answer. Without more quantification as to the impacts of extending the patch indefinitely (albeit while hinting that the Bureau plans to end it in April 2021), the Bureau's cost benefit analysis fails to provide reasoned support for its proposal.

Over 4 million homeowners—more than 8% of the residential mortgage market (and higher for private-label and non-GSE agency loans)—are in forbearance, and more than another million

[8] "The share of portfolio originations was 27.9 percent in Q1 2020, a significant decline from the 37.3 percent share in the same period of 2019. The Q1 2020 GSE share stood at 47.2 percent, up from 39.6 percent in Q1 2019. The FHA/VA share grew to 23.1 percent, compared to 21.0 percent last year. Private-label securitization currently tallies 1.9 percent, down from 2.9 percent one year ago, and a fraction of its share in the pre-bubble years." Urban Institute, *Housing Finance at a Glance: A Monthly Chartbook,* July 2020, page 8.

[9] Blog on Unified Agenda by Assistant Director Susan M. Bernard, June 30, 2020, *available at* https://www.consumerfinance.gov/about-us/blog/spring-2020-rulemaking-agenda/.

[10] 12 U.S.C. § 5512(c).

are more than 60 days late on their mortgages but not in forbearance. The ability of mortgage servicers to successfully transition this many homeowners back to regular payments or through foreclosure is uncertain at best. Any disruption on the servicing side of the business could impact in unpredictable ways the origination side of the business, including the market's risk appetite or ability to adapt to what may seem to the Bureau as minor adjustments.

Many more questions make this the wrong time to revise the GSE-QM patch:

- What is the future role of the GSEs in the mortgage market?
- What will the mortgage market will look like after the pandemic?
- What regulations can best implement the statutory ability to repay requirement?
- Can lenders rely on credit scores in light of the CARES Act forbearance rule? and
- How should disaster codes be weighed in scoring?

Any assessment of the Bureau's proposal to use price as an indirect measure of ability-to-repay will be mere speculation until the current economic conditions settle down. We note that the Bureau's proposal itself signals the lack of reliable data to measure the costs and benefits of its proposals. There is more data analysis to be done to fulfill its responsibility to evaluate ability-to-repay in the QM context. Congress required the Bureau to study ability-to-repay, and it must complete this evaluation before any proposal can be made. This rulemaking should also consider the cost and benefit of all reasonable options, including explicitly extending the GSE-QM patch indefinitely, but the published notice includes no discussion of that option.

The current economic uncertainty, the strain on the resources of advocacy groups and industry in responding to the current crises in our country, and the relative weakness of the available data on critical aspects of the rulemaking all counsel for extending the GSE-QM patch until the market is sufficiently stable to allow charting a safe course forward. Such a delay would allow full and rigorous comment on the important policy and macroeconomic concerns raised by the Bureau's proposal. In the patch extension notice of proposed rulemaking, the Bureau cites no evidence, and performs no analysis, supporting the need for a short extension of the patch versus a longer extension of the patch. We know of no evidence that an earlier change will generate any significant positive outcomes, and thus there is no reasoned basis for the Bureau's rush to judgment. Absent a delay, the Bureau cannot realistically hope for a full, robust, and transparent dialogue on an issue of central importance to our economy, as well as the stability of neighborhoods across the country and the aspirations of millions of families. The Bureau should maintain an open mind and err on the side of ensuring market stability and certainty at a time of great instability.

The Bureau believes that its proposed revision to the QM rule will not affect access to credit. But that assessment is made on incomplete data and assumptions that are already outdated. The GSE-QM patch is currently working well. There is no risk to allowing a longer sunset period, but there is a tremendous risk of rushing the transition to a new rule. We urge the Bureau to redo the pending sunset date proposal with a more complete analysis of all reasonable options. Barring that, the Bureau should establish a much later sunset date than proposed or delete the

sunset provision entirely. The GSE-QM patch should remain in place until vital questions can be answered, the market has stabilized, and industry has enough time for a smooth transition.

Sincerely,

Consumer Federation of America

National Consumer Law Center (on behalf of its low-income clients)