



MORTGAGE BANKERS ASSOCIATION

October 1, 2020

Submitted via Federal eRulemaking Portal: <http://www.regulations.gov>

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

**Re: Request for Comment: Seasoned QM Loan Definition
Docket No. CFPB-2020-0028**

Dear Director Kraninger:

The Mortgage Bankers Association (MBA)¹ appreciates the opportunity to comment on the Consumer Financial Protection Bureau's (CFPB or Bureau) proposed rule to amend Regulation Z by creating a new "seasoning" path to Qualified Mortgage (QM) status. MBA commends the Bureau for this proposal and its commitment to enabling innovation and the broad availability of sustainable mortgage credit.

I. Background

The Bureau's Ability-to-Repay/Qualified Mortgage (ATR/QM) Rule, issued in 2013, implemented the ATR standard in the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act)² that intended to ensure borrowers have a reasonable ability to repay their mortgage loans at origination as well as protect lenders from certain borrower litigation. The QM construct in the Rule created a presumption that a lender has met the Regulation Z requirement to make reasonable, good faith determinations of each borrower's ability to repay by creating QM loans that meet certain criteria established by the Bureau. For all QM loans, points and fees must be

¹ The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community in the country. Headquartered in Washington, DC, the association works to ensure the continued strength of the nation's residential and commercial real estate markets, to expand homeownership, and to extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of over 2,100 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, credit unions, thrifts, REITs, Wall Street conduits, life insurance companies, and others in the mortgage lending field. For additional information, visit MBA's website: www.mba.org.

² 15 U.S.C. 1639b.

less than or equal to 3 percent of the loan amount; the loan may not contain risky features such as negative amortization, interest-only payments, or balloon payments; and the maximum loan term must be less than or equal to 30 years.³

Regulation Z also recognizes categories of loans eligible for QM status, provided that they also meet the product features described above. These currently include:

- the General QM definition—which is in the process of being revised⁴—requiring that borrowers have a debt-to-income (DTI) ratio below 43 percent;
- the temporary “GSE Patch” category, applying QM status regardless of a borrower’s DTI ratio for any loan that meets the product feature requirements and is eligible for purchase or guarantee by Fannie Mae or Freddie Mac (the government-sponsored enterprises, or GSEs);
- the respective agency QM definitions from the Federal Housing Administration (FHA), Department of Veterans Affairs (VA), and Rural Housing Service of the Department of Agriculture (USDA);
- the “small creditor” QM created by the 2018 Economic Growth, Regulatory Relief, and Consumer Protection Act (EGRRCPA)⁵ for depository institutions that have less than \$10 billion in assets and hold the loans in portfolio; and
- a balloon loan QM for certain rural creditors.

II. Seasoned QM Loan Proposal⁶

This proposed rule would add a new path to QM safe harbor qualification through a demonstrated record of timely payments by the borrower following origination, also known as loan “seasoning.” The opportunity to obtain QM safe harbor status through the Seasoned QM category would extend to loans originated as non-QMs or rebuttable presumption QMs, as well as to loans originated as safe harbor QMs under other QM categories. To qualify as a Seasoned QM, the originating institution must hold the loan in portfolio for at least 36 months (*i.e.*, the “seasoning period”), with limited exceptions. During the seasoning period, the loan must have no more than two delinquencies of 30 or more days and no delinquencies of 60 or more days.

³Ability-to-Repay and Qualified Mortgage Standard Under the Truth in Lending Act (Regulation Z), 12 CFR §1026 (2014).

⁴ 85 Fed. Reg. 41716 (July 10, 2020).

⁵ Public Law 115-174, 132 Stat. 1296 (2018).

⁶ 85 Fed. Reg. 53568 (August 28, 2020).

Eligibility for the Seasoned QM category is limited to fixed-rate, fully amortizing loans, with no balloon payments, terms not exceeding thirty years, and total points and fees normally not exceeding 3 percent of the loan amount (with some variations for smaller loan sizes). While the proposal does not include a specific DTI ratio threshold, the creditor would be required to consider the borrower's monthly DTI ratio or residual income, as well as verify the borrower's income and debt obligations.

This framework is consistent with the Bureau's statutory duties and the goals of the Truth in Lending Act's (TILA) ability to repay provisions. First, a history of timely loan payments, documented over a significant period of time, is a strong indicator of the loan's affordability at origination. Should a loan experience material delinquency long after origination, such delinquency is likely the result of unexpected events unique to the borrower's personal circumstances or of broader economic trends, rather than the lender's risky underwriting. Creating a QM category based on demonstrated loan performance is, therefore, entirely consistent with the goal of the statute to ensure "consumers are offered and receive residential mortgage loans on terms that reasonably reflect their ability to repay[.]"⁷

Moreover, the Seasoned QM category will, as the proposal states, increase "creditors' willingness to make loans that are considered as non-QM at consummation, but for which consumers have demonstrated an ability to repay."⁸ In this way, the proposed Seasoned QM will expand access to credit in a responsible manner that does not weaken the Rule's ability to protect consumers from unaffordable mortgage loans. Finally, the Seasoned QM proposal includes clear requirements that will facilitate compliance, providing a bright line for QM safe harbor eligibility.

III. Generally Reasonable Proposed Standards

a. Loan Product Feature Limitations

MBA supports the restrictions on loan product features reflected in the proposal. Limiting eligibility for the Seasoned QM category to fixed-rate mortgages with fully amortizing payments is a reasonable restriction. The Seasoned QM concept is rooted in the idea that a borrower's history of timely loan payments is indicative of the borrower's ability to repay based on a lender's knowledge of his or her circumstances and information at the time of origination. This premise is only appropriate if, in general, the payments made during the seasoning period closely resemble the payments due for the remainder of the life of the loan. This is not the case with adjustable-rate loan products, loans with balloon payments, or other loan products that lack fully amortizing payments.⁹ For loans with these features, the payments made during the seasoning

⁷ 15 U.S.C. 1639b(a)(2).

⁸ 85 Fed. Reg. 53568, 53567 (August 28, 2020).

⁹ The proposal states that loans that require a balloon payment to fully amortize the loan within the loan term are ineligible for the Seasoned QM category. While MBA supports this requirement, we ask that the Bureau clarify that the restriction on balloon payments refers to the original note structure and that a post-origination restructuring,

period may vary from those due for the remainder of the life of the loan. Considering the possibility for changes to the loan payment amount for these products, a history of timely payments during the seasoning period would not be as strong an indicator of the borrower's ability to repay at origination sufficient to grant that loan "Qualified Mortgage" status.

b. Seasoning Period

Likewise, MBA supports the performance requirements proposed for the Seasoned QM category. First, the seasoning period—generally 36 months with some flexibility for borrower payment accommodations granted in connection with disasters or pandemic-related emergencies—is appropriate. A record of timely loan payments for three years is strong evidence that the borrower can afford the payments and had the ability to repay the loan at its origination.

The Bureau's analysis of performance data for loans with annual percentage rates (APRs) more than 150 basis points over the average prime offer rate (APOR) (*i.e.*, loans that are ineligible for QM safe harbor and thus may benefit from the proposed Seasoned QM definition) suggests 36 months is an appropriate seasoning period. If a borrower experiences serious delinquency—delinquency that would make a loan ineligible for Seasoned QM status (*i.e.*, three or more delinquencies of 30 or more days or a delinquency of 60 or more days)—it is most likely to occur within three years of origination. Specifically, "*nearly two-thirds (66 percent) of loans that experience a disqualifying event [i.e., three or more delinquencies of 30 or more days or a delinquency of 60 or more days] do so within 36 months*" of origination. Disqualifying delinquency events for the remaining third of borrowers are much less concentrated towards the first three years after origination.

Widely accepted industry practices also support the proposed 36-month seasoning period. In general, loans sold to Fannie Mae or Freddie Mac receive representation and warranty relief for borrower underwriting and documentation requirements once the borrower makes 36 consecutive on-time monthly payments. Likewise, mortgage insurance policies generally provide relief for certain representations and warranties after 36 months of timely monthly payments. These practices, based on the experiences of institutions that either guarantee or insure a substantial share of the overall mortgage market, strongly suggest "*that after 36 months of loan*

made in response to a permissible payment accommodation (*i.e.*, a payment forbearance related to a disaster or pandemic), does not affect a loan's eligibility for the Seasoned QM category. This is important given that restructurings following a disaster-prompted payment accommodation often result in the skipped payments being added to the end of the loan as a balloon payment. Similarly, the Bureau should clarify that the restriction on loan terms greater than 30 years refers to the original term, not inclusive of the effect of a permissible payment forbearance where a) the maturity date is extended by the same amount of time as the forbearance, b) the maturity date is extended sufficiently to maintain the same or lower monthly principal and interest payment, or c) the maturity date is extended to cover escrow shortages.

*performance, a default should fairly be attributed to a change in the consumer's circumstances or other cause besides that of the underwriting."*¹⁰

c. Loan Performance Requirements

The proposal to condition eligibility for the Seasoned QM category on the borrower making the first 36 monthly payments, with no more than two 30-day delinquencies and no delinquencies of 60 days or more, is appropriate. It makes sense to require strong indicia of a borrower's ability to repay before providing QM safe harbor status to loans originated as non-QM or rebuttable presumption QM loans. As previously addressed, a 36-month seasoning period provides an appropriate time to establish whether a borrower can afford a loan. While requiring 36 perfectly timely payments during the seasoning period would provide strong certainty of a borrower's ability to repay, conditioning eligibility on perfection ignores the reality that a borrower may experience a brief delinquency for a reason unrelated to his or her ability to repay. On this point, the examples offered by the Bureau—"a missed payment due to vacation or to a mix-up over automatic withdrawals"—are two of the numerous situations that may cause a delinquent payment that does not reflect a borrower's financial circumstances.¹¹ By allowing some limited flexibility, the proposed delinquency triggers reasonably balance the need to reserve the QM safe harbor presumption for loans with strong evidence of the borrower's ability to repay and the practical reality that some brief delinquencies do not indicate that a borrower lacks the ability to repay the loan to the degree it would be inappropriate to allow it to season into a Qualified Mortgage.

i. Allowance for temporary payment accommodations

In addition to allowing limited payment flexibility, the Bureau appropriately observes that certain events, such as natural disasters or pandemics, may cause disruptions to a consumer's short-term ability to make his or her mortgage payments. These disruptions, which are outside the control of the consumer or the creditor, are unrelated to whether the consumer had a reasonable ability to repay the loan under its terms at consummation. The widespread impact of the COVID-19 pandemic on employment and consumer finances, and the resulting forbearances and other loss mitigation approaches that have followed, are evidence of this reality.

The Bureau strikes a reasonable balance in the proposed rule by neither counting time in a temporary payment accommodation towards the 36-month seasoning period nor penalizing consumers for their use of a temporary payment accommodation. A "pause" in the seasoning period for purposes of the Seasoned QM definition recognizes that a period without borrower payments should not be used to satisfy the requirement for a history of timely payments.

¹⁰ 85 Fed. Reg. 53568, 53579 (August 28, 2020).

¹¹ 85 Fed. Reg. 53568, 53585 (August 28, 2020).

Similarly, this “pause” is unrelated to the underwriting of the loan and should not preclude such loans from ultimately achieving Seasoned QM status.

In certain situations following a disaster or a national emergency, some consumers will be best served by a modification to the original terms of the loan. The Bureau appropriately allows for modified payments to be used in the Seasoned QM analysis in these situations.¹² Taken together, the provisions in the proposed rule related to disasters or national emergencies are reasonable and well-balanced.

ii. Payment source requirements

The conceptual underpinning of the Seasoned QM approach is that a history of timely payments by the consumer is evidence of that consumer’s ability to repay his or her loan. As such, it is critical that the payments used to determine Seasoned QM status are made by the consumer using his or her own funds. The proposed rule addresses this concern by ensuring that certain payments do not count towards the required 36-month history of timely payments. The exclusion of payments sourced from funds in escrow or from funds paid by a creditor, servicer, or assignee reflects the fact that these payments do not provide sufficient evidence of a consumer’s ability to repay the loan to consider them in an analysis of a loan’s seasoning. Further, as is noted by the Bureau, this approach aligns with existing, widely-accepted approaches in the industry, such as those of the Fannie Mae and Freddie Mac representation and warranty frameworks.

d. Underwriting Requirements

The proposed rule requires creditors to consider consumers’ income and debts, as is appropriate for any QM definition, but wisely refrains from applying a specific DTI ratio threshold. As MBA has noted extensively in prior comments on the General QM definition, a consumer’s DTI ratio is a relatively poor ATR indicator as a stand-alone measure.¹³ The Bureau’s analysis of early delinquencies over multiple time periods confirms this fact, particularly when the effects of DTI ratios are compared to more holistic measures such as rate spreads.

Further, the rationale for the proposed rule is not consistent with the use of a specific DTI ratio threshold. If a consumer with a comparatively high DTI ratio is able to show a consistent ability

¹² The proposal would allow modified payments, provided they are the result of a “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.” 85 Fed. Reg. 53568, 53569 (August 28, 2020). MBA supports this flexibility and asks that the Bureau clarify that “an agreement” need not necessarily involve a written contract, but could, depending on how the disaster or pandemic-related forbearance program is designed, include a verbal agreement.

¹³ See MBA’s comments in response to the CFPB’s Proposed Rule: Qualified Mortgage Definition Under the Truth in Lending Act (Regulation Z): General QM Loan Definition; Docket No. CFPB-2020-0020; RIN 3170-AA98.

to make timely payments over 36 months, it is unlikely that the level of debt is unmanageable or otherwise impedes the consumer's ability to service his or her mortgage debt.

The proposal also appropriately refrains from requiring creditors to use the Appendix Q methodology for calculating consumers' income and debts. Again, as previously noted by MBA, Appendix Q represents a rigid, inflexible, and outdated approach to the evaluation of income and debt. As a result, reliance on Appendix Q would create implementation challenges for creditors while unnecessarily restricting access to credit for consumers with non-W-2 income, including those consumers with self-employment income, retirement income, and rental income.

e. Eligibility for Multiple QM Categories

The Bureau makes clear in the proposed rule that Seasoned QM status is not reserved for loans originated as non-QM or rebuttable presumption QM loans. In other words, loans originated with a conclusive presumption of ATR compliance can become Seasoned QM loans if they otherwise meet the criteria in the proposed rule. This provision is appropriate, as there is no clear reason why a loan that meets the Seasoned QM parameters should not be granted this status simply because it meets the parameters of one or more additional QM definitions.

As is noted in the proposed rule, Seasoned QM status could "*provide additional legal certainty for loans that are made in accordance with other QM definitions.*"¹⁴ The Seasoned QM approach could, in effect, serve as an important, albeit limited "back-up" option should a discrepancy arise with a loan's QM status achieved under one of the other QM categories. As such, this provision of the proposed rule will enhance clarity for creditors, providing them with greater incentives to originate loans for which they are confident that Seasoned QM status can be achieved.

IV. Innovation in Underwriting and Broadening of Access to Credit

The proposed rule's potential to spur innovation in underwriting and increase access to credit for consumers is an important benefit. Under the Seasoned QM approach, creditors can implement new underwriting methodologies and allow these methodologies to "prove their worth" through their track record of loan performance. This empirical approach will provide creditors with new opportunities to expand their loan offerings to broader populations while gaining a measure of longer-term legal certainty. The product feature limitations in the proposed rule, meanwhile, will continue to ensure that product designs eligible for QM treatment remain relatively standard.

The use of innovative underwriting techniques is particularly important for consumers with limited credit history or consumers with income that is difficult to reconcile with existing requirements in place in the government-supported channels. These consumers may not qualify for financing through the federal housing agencies, for example, and therefore cannot access QM

¹⁴ 85 Fed. Reg. 53568, 53577 (August 28, 2020).

loans through the QM categories in place at FHA, VA, or USDA. Similarly, a limited credit history or non-traditional income could necessitate rate spreads that exceed the safe harbor threshold that will determine eligibility under the revised General QM definition.

Ongoing changes in economic conditions, employment trends, and credit markets have increased the importance of ensuring that these populations of consumers are able to access sustainable mortgage financing. Many consumers are so-called “thin file” individuals because their limited credit history makes it difficult to generate a robust credit score. Their limited credit history could be attributable to any of several scenarios—younger consumers without extensive borrowing, elderly consumers who have not utilized credit after many years of paying down debts, or consumers who have relied on more informal means of obtaining credit in the past, among others. Many consumers also earn income from non-W-2 sources that can be difficult to underwrite because it is variable in amount and timing. These consumers include those who maintain seasonal employment, those who work in “gig economy” roles, and those who are self-employed. These groups of consumers represent a substantial share of the broader population, and it is critical that they not be shut out from opportunities to access sustainable, affordable mortgage credit.

While it may be possible for some consumers in these populations to access mortgage credit through rebuttable presumption QM loans or non-QM loans, market data over the past six years demonstrate lenders’ lower willingness to originate such loans. Many lenders do not offer rebuttable presumption or non-QM loans, thereby limiting choices, in terms of both lenders and products, for these populations. For those consumers who can access rebuttable presumption QM or non-QM loans, they are likely to face higher costs than would be the case if their loans were potentially eligible for QM safe harbor at a later date. The availability of Seasoned QM status likely would expand the set of lenders willing to lend to consumers with limited credit histories or consumers with non-traditional incomes, as well as reduce the cost of that credit.

The presence of an alternative pathway to a safe harbor QM that provides a backward-looking option based on a loan’s actual performance is a sensible approach to broadening access to credit for these populations of consumers. If a creditor employs underwriting techniques that it believes can accommodate or better evaluate income from seasonal employment, for example, its willingness to hold in portfolio loans that make use of these techniques, despite the lack of a safe harbor at the time of consummation, is a strong indicator of the creditor’s confidence in these techniques. If the creditor is originating loans that it expects will achieve Seasoned QM status, it maintains significant incentives to ensure its underwriting techniques translate into a reliable pattern of timely payments by consumers.¹⁵

¹⁵ As will be discussed in greater detail below, MBA believes this rationale for the Seasoned QM definition is equally valid in situations in which loans are transferred and subsequently held in portfolio by the transferee. If an institution purchases a loan with the expectation that it will become a Seasoned QM loan, it maintains significant incentives to ensure that the underwriting techniques used by the originating lender are sound and reliable.

The broader QM framework should encourage the continued development of innovative underwriting techniques that can better serve a wider range of borrowers. This innovation must be sustainable and affordable for consumers, and therefore the Seasoned QM construct is an appropriate one. This construct will encourage the development of new underwriting techniques and reward those who show positive results through strong loan performance.

V. Recommended Enhancements to Seasoned QM Proposal

a. Revise the Proposed ‘Consider and Verify’ Requirement

In determining how creditors must consider and verify consumers’ income and debts for purposes of the Seasoned QM designation, the Bureau proposes to allow the use of the requirements associated with any other QM category. Specifically, the Official Commentary states that “[f]or 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).”¹⁶ MBA supports this approach, as a new or separate set of requirements for Seasoned QMs is not necessary and would add operational complexity. The Bureau has codified the existing requirements for consideration and verification of consumers’ income and debts through prior rulemakings; there is no reason that these previously approved requirements would not be satisfactory in the context of Seasoned QMs. Further, as is noted above, some loans that eventually become Seasoned QMs are likely to be originated as other types of QMs. In these scenarios, the use of a single set of consideration and verification requirements is far more sensible than a requirement that creditors undertake two distinct approaches for the same consumer.

While MBA believes the approach described in the Official Commentary—*i.e.*, allowing creditors to use the consider and verify requirements associated with any other QM category—is reasonable and appropriate, it appears to conflict with the proposed regulatory text of § 1026.43(e)(7)(i)(B), which does not permit creditors to use the consider and verify requirements of any other QM definition. Instead, that paragraph indicates that creditors *must* satisfy “*the requirements in paragraphs (e)(5)(i)(A) and (e)(5)(i)(B) of this section.*”¹⁷ Proposed paragraph (e)(5)(i)(B), which the Bureau seeks to amend as part of the new General QM definition, states:

“(B) For which the creditor:

(1) * * *

(2) * * *

¹⁶ 85 Fed. Reg. 53568, 53603 (August 28, 2020).

¹⁷ 85 Fed. Reg. 53568, 53602 (August 28, 2020).

- (3) ***Considers at or before consummation the consumer's monthly debt-to-income ratio or residual income and verifies the debt obligations and income used to determine that ratio in accordance with paragraph (c)(7) of this section, except that the calculation of the payment on the covered transaction for purposes of determining the consumer's total monthly debt obligations in paragraph (c)(7)(i)(A) shall be determined in accordance with paragraph (e)(2)(iv) of this section instead of paragraph (c)(5) of this section;***¹⁸

As explained in MBA's comments in response to the General QM rulemaking, we continue to have serious concerns with the regulatory text and Official Commentary associated with these paragraphs. Specifically, we believe that the reference to § 1026.43(c)(7) and its proposed commentary introduce a reasonableness standard to the consider and verify requirement that critically undermines the value of QM qualification. As MBA's comments on the General QM rulemaking explain¹⁹ –

This outcome is due to the proposed Official Commentary, which states:

*“Monthly debt-to-income ratio or monthly residual income. Under § 1026.43(c)(2)(vii), the creditor must consider the consumer's monthly debt-to-income ratio, or the consumer's monthly residual income, in accordance with the requirements in § 1026.43(c)(7). Section 1026.43(c) does not prescribe a specific monthly debt-to-income ratio with which creditors must comply. **Instead, an appropriate threshold for a consumer's monthly debt-to-income ratio or monthly residual income is for the creditor to determine in making a reasonable and good faith determination of a consumer's ability to repay.**”*²⁰

This proposed Commentary is identical to the current Official Commentary to the ATR/QM Rule, with the sole revision being the elimination of references to the 43 percent DTI ratio requirement that would be replaced with the proposed APR-APOR spread. This Commentary may have been appropriate under a QM construct featuring a specific DTI ratio threshold, as any other DTI ratio determinations that exceeded that threshold were thus governed by the ATR standard (or qualified through the GSE Patch). The elimination of the General QM definition's DTI ratio threshold and the subsequent proposed inclusion of the 12 CFR 1026.43 (c)(7) DTI ratio calculation methodology and its Commentary introduces an uncertain ATR standard into the bright-line requirements of the QM construct.

Put simply, this Commentary provision might be read to state that any QM loan could be subject to an inquiry into or challenge based on the reasonableness or good faith of the creditor when

¹⁸ 85 Fed. Reg. 41716, 41773 (July 10, 2020) (emphasis added).

¹⁹ See MBA's comments in response to the CFPB's Proposed Rule: Qualified Mortgage Definition Under the Truth in Lending Act (Regulation Z): General QM Loan Definition; Docket No. CFPB-2020-0020; RIN 3170-AA98.

²⁰ 85 Fed. Reg. 41716, 41774 (July 10, 2020) (emphasis added).

determining the appropriate DTI ratio of a QM loan. This outcome would substantially impair the benefits of QM status to lenders and investors, introducing significant legal uncertainty into a regime meant to provide clear eligibility parameters. Such a provision in the General QM definition might result in credit-tightening overlays or higher pricing as lenders and investors attempt to quantify the risk. This result is contrary to the Bureau's stated objectives in promulgating the proposed rule.

The Bureau should finalize the Seasoned QM proposed rule in a way that addresses these concerns. First, the Bureau should resolve the inconsistencies between the proposed regulatory text of § 1026.43(e)(7)(i)(B) and its Official Commentary. If the intent is to allow compliance with any other QM consider and verify standard, an approach MBA supports, then the Seasoned QM rule itself should provide for that, and not state that satisfying the requirements of § 1026.43(e)(5)(i)(B) is necessary.

Next, consistent with MBA's comments in response to the General QM rulemaking, the Bureau should revise the Official Commentary to § 1026.43(c)(7). Specifically, the Bureau should eliminate the reasonableness standard implied by the Commentary's reference to "*making a reasonable and good faith determination of a consumer's ability to repay*" as part of the creditor's consideration of "*the consumer's monthly debt-to-income ratio, or the consumer's monthly residual income[.]*"²¹

b. Extend Eligibility to Subordinate-Lien Mortgage Loans

As proposed, eligibility for the Seasoned QM category is limited to first-lien mortgage loans. The decision to exclude subordinate-lien loans, while not addressed in the Bureau's proposal, is inconsistent with the statutory framework articulated by Congress in the Dodd-Frank Act amendments to TILA. Under the statute, the ability to repay requirements and the QM standard apply to "*residential mortgage loan[s]*," a term that covers first- and subordinate-lien loans. While the current ATR/QM Rule establishes a higher rate spread threshold for determining whether a subordinate-lien loan receives a rebuttable or safe harbor presumption of ATR compliance, the rule otherwise does not distinguish between first- and subordinate-lien loans. Both are residential mortgage loans eligible for protection under any of the existing QM categories. MBA believes a similar approach is warranted for the Seasoned QM category. The arguments in favor of creating a QM category based on loan seasoning for first-lien loans—*e.g.*, expanded access to credit, encouraging innovation, etc.—justify extending the opportunity to achieve QM safe harbor status through loan seasoning to subordinate-lien loans.

²¹ 85 Fed. Reg. 41716, 41774 (July 10, 2020)

c. Broaden the “Held in Portfolio” Requirement

The logic underlying a seasoned loan attaining QM status is sound. This logic, however, should not be limited to originators that hold loans in portfolio. The Bureau could—and should—allow Seasoned QM eligibility for non-QM loans or rebuttable presumption QM loans transferred to those institutions that hold them in portfolio for the requisite 36-month seasoning period. Allowing Seasoned QM eligibility for such transfers would increase access to credit by expanding the universe of institutions that could originate sustainable loans for sale to other institutions that hold these loans in portfolio.

Indeed, the rationale that supports seasoning as a reasonable proxy for the borrower’s ability to repay at consummation supports allowing transfers of loans, particularly if they are held continuously on one institution’s portfolio for 36 months to achieve QM status. All of the Bureau’s conclusions related to the inherent incentives to ensure sound underwriting apply equally well whether an institution originates a loan and holds it for 36 months or whether an institution purchases a loan with the intent to hold it for at least 36 months. In both cases, the institution is exposed to the entirety of the credit risk associated with that loan for a lengthy period of time.

An approach that permits transfers but maintains a 36-month seasoning requirement on one institution’s portfolio can only increase the period of time that the loan has exhibited timely payments prior to achieving QM status. A loan that was held by an originating institution for 12 months and then sold and held by a different institution for 36 months, for example, would have 48 months of timely payments before it achieved QM status—providing even stronger evidence that the borrower maintains the ability to repay the loan.

Such an approach has precedent in EGRRCPA, which amended TILA to provide ATR safe harbor for loans held in portfolio by particular types of small creditors. Under EGRRCPA, a loan can retain this safe harbor upon a transfer if the transferee is a “covered institution” that retains the loan in portfolio. While EGRRCPA limited the types of institutions to which this safe harbor could apply, Congress recognized that the principle underlying the Seasoned QM concept is equally valid if the purchaser of the loan intends to hold it in portfolio and accept the credit risk associated with the loan.

The Bureau has included certain features in the proposed rule that would ensure a borrower’s payment history prior to the transfer to the holder is reliable, such as the prohibition from counting advanced or escrowed funds as a “timely” payment for the purposes of seasoning. This, coupled with the robust product protections that remain in place, should ensure that the acquiring institution has a clear understanding of the loan that it is purchasing.

Finally, allowing for transferred loans to achieve QM status through seasoning does not create inappropriate market incentives. One common concern resulting from the financial crisis is that

some originators did not have a stake in the performance of their loans and thus had incentives to cut corners on the loans sold into securitizations, leaving the security holders with the risk of default. This concern was a motivating factor behind the Credit Risk Retention Rule²² that established the Qualified Residential Mortgage (QRM) standard, which the Bureau cites as part of its justification for limiting this qualification path to originating portfolio holders.²³

While this explanation is arguably more plausible when applied to the more remote holder of a mortgage-backed security (MBS), it is far less plausible when applied to a purchaser of whole loans that intends to hold such loans in portfolio. Indeed, while the Bureau cites the QRM standard, this *only* applies to risk retention for loan sold into securities, *not* whole loans purchased and held in portfolio. This is because a whole loan purchaser is markedly different than an MBS investor.²⁴ The whole loan purchaser has a more direct relationship with the originator/seller, is better positioned to understand and evaluate a loan's underlying fundamentals, and has strong incentives to be prudent as it owns all of the credit risk.²⁵ This is why it is appropriate to allow for loans to be transferred and maintain their eligibility for Seasoned QM status. Said differently, sales or transfers should not, on their own, disqualify loans from seasoning into QM safe harbor loans.

d. Expand the Involuntary Transfers Exception to the Portfolio Retention Requirement

The proposal describes two exceptions to the general requirement that loans must be retained in portfolio until the end of the seasoning period. Loans “*may be sold, assigned, or otherwise transferred pursuant to a merger ... or acquisition of the creditor*” without losing eligibility to qualify as Seasoned QMs.²⁶ In addition, a sale, assignment, or transfer required by supervisory action, or by a “*any person acting as conservator, receiver or bankruptcy trustee[,]*” is permissible under the proposed rule.²⁷ Transfers under these circumstances do not violate the requirement that loans be retained in portfolio for the 36-month seasoning period—*i.e.*, assuming the borrower continues to make timely payments, a loan would continue to accrue time toward the 36-month requirement despite being held in a new portfolio.

These exceptions are reasonable. Unlike a typical loan sale, transfers pursuant to a merger or capital restoration plan are involuntary. MBA supports the proposed exception for such transfers and encourages the Bureau to expand the exception so as to allow transfers under similar,

²² 12 C.F.R. § 1234.

²³ 85 Fed. Reg. 53568, 53586 (August 28, 2020).

²⁴ The reference to “investor” here refers to the ultimate purchaser of the mortgage-backed security, not an issuer that acquires the mortgage for securitization. Those issuers have legal, financial and reputational exposure and are usually very strict in their due diligence requirements, credit qualifications and required seller representations.

²⁵ This contrasts with securities that have different risk tranches with different associated potential yields.

²⁶ 85 Fed. Reg. 53568, 53602 (August 28, 2020).

²⁷ 85 Fed. Reg. 53568, 53604 (August 28, 2020).

involuntary circumstances. Specifically, a transfer pursuant to a lender's default or breach of loan covenants, which would likewise be involuntary, also should be permitted. These types of arrangements, in which a loan serves as collateral securing the financing the creditor uses to fund the loan, are a common feature in the warehouse lending model. The involuntary transfer of a loan from the creditor to the warehouse lender (creditor's financier) should not make a loan ineligible to qualify as a Seasoned QM. A transfer made under such circumstances is, in essence, the same as a transfer made pursuant to an order from a bankruptcy trustee, which would qualify for the exception as currently proposed.

e. Extend Eligibility to Loans Originated Prior to the Effective Date

As proposed, the Seasoned QM rule would not apply to loans originated before its effective date. While MBA agrees that rules generally should not operate retroactively, an exception is warranted in this case. Extending eligibility to any loan that satisfies the seasoning and loan feature restrictions, regardless of when the loan was originated, is consistent with the conceptual framework underpinning the Seasoned QM proposal. Most importantly, the basic premise of the Seasoned QM construct is that, for certain loans, a three-year period of timely payments is a close proxy for the borrower's ability to repay, which is valid for loans originated before or after the proposal's effective date. Further, there is no reason why creditors that extended credit to non-QM borrowers, who have demonstrated an ability to repay, should be ineligible for the Seasoned QM category. At the very least, the Bureau should make the implicit logical conclusion clear by adding Official Commentary that suggests such seasoning is very strong evidence of a borrower's ability to repay for loans originated prior to the rule's effective date that otherwise meet its qualifications.

f. Adopt the TRID Definition for Application Date

Like the General QM proposal, the Seasoned QM proposed rule "*would apply to covered transactions for which creditors receive an application on or after the effective date[.]*"²⁸ While MBA supports the proposal to use application date to determine coverage under both proposed rules, it is crucial that the Bureau clarify how application date will be determined. To this end, MBA recommends that the Bureau use the definition found in the TILA-RESPA Integrated Disclosure (TRID) Rule. As explained in previous MBA comments, using the TRID definition will facilitate compliance and minimize implementation burden given that the TRID application date is recorded and maintained by creditors.

²⁸ 85 Fed. Reg. 53568, 53569 (August 28, 2020).

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MBA appreciates the opportunity to contribute to the Bureau's efforts to create a path to QM safe harbor status based on loan performance. We look forward to our continued engagement with the Bureau as the Seasoned QM proposal is made final and implemented.

Sincerely,

A handwritten signature in black ink, appearing to read "R. Broeksmit", with a stylized flourish at the end.

Robert D. Broeksmit, CMB
President and Chief Executive Officer
Mortgage Bankers Association