

October 1, 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): Seasoned QM Loan Definition, Docket No. CFPB-2020-0028, RIN 3170-AA98, 85 Fed. Reg. 53568

Dear Director Kraninger:

On behalf of the clients, consumers, and communities we represent, we strongly oppose the Bureau's proposed rule allowing loans to "season" into qualified mortgage (QM) status.

The Dodd-Frank Act prohibits creditors from making a mortgage without first determining the borrower's ability to repay it.¹ The CFPB's QM rule bars borrowers from raising violations of that requirement when a loan meets the QM definition, even when the borrower is harmed by the lender's failure to comply with the statute. The Bureau proposes to extend the QM definition to loans that do not qualify as QM loans at origination, so long as a borrower manages to pay for at least three years.

This rule will mislabel a significant number of unaffordable, high-priced loans as affordable QM loans. We have seen clients draw down retirement accounts, borrow money from family and friends, and go without food, medicine, utilities, or basic furniture to make their mortgage payments, often maintaining the mortgage in current status over a number of years only to face foreclosure when they could no longer continue with this level of sacrifice and deprivation. While these extreme measures may make sense in a short-term emergency, they do not reflect a borrower's ability to repay the mortgage over the life of the loan and should not be the basis for giving the lender any legal protection. The CFPB's proposal, if adopted, threatens significant harm to the most vulnerable mortgage borrowers.

The Dodd-Frank Act does not authorize the Bureau to expand QM status to "seasoned" loans. The law specifically recognizes that loan performance beyond the three-year statute of limitations does not equate to a good faith, reasonable determination by the lender of the borrower's ability to repay, as required by the statute. That is why 15 U.S.C. § 1640(k) gives borrowers the right to assert violations of the ability-to-repay statute as a defense to foreclosure *throughout* the life of the loan. The language creating that right is emphatic and unambiguous:

Notwithstanding any other provision of law, when a creditor, assignee, or other holder of a residential mortgage loan or anyone acting on behalf of such creditor, assignee, or holder, initiates a judicial or nonjudicial foreclosure of the residential mortgage loan, or any other action to collect the debt in connection with such loan, a consumer may assert a violation . . . of section 1639c(a) of this title, as a matter of defense by recoupment or set off without regard for the time limit on a private action for damages under subsection (e).²

¹ 15 U.S.C. § 1639c(a)(1).

² 15 U.S.C. § 1640(k)(1).

What's more, because TILA's statute of limitations already bars affirmative claims on the basis of ability to repay after three years, the only effect the Bureau's proposal would have is to prevent borrowers from raising this claim defensively.

The defense against foreclosure throughout the life of the loan is a significant protection for both individual borrowers and communities—most often African American and Latinx communities—targeted by predatory lenders. We note as well that the Bureau's proposal, by allowing creditors to obtain a safe harbor for even the most expensive loans, challenges long-standing interpretations of the Home Ownership and Equity Protection Act of 1994, permitting borrowers to raise as a defense to foreclosure, at any time, the original creditor's failure to assess the borrower's ability to repay. The Bureau's authority to define "qualified mortgage" does not allow it to bar the courthouse door to borrowers facing foreclosure.

But even if the Bureau had the authority to override 15 U.S.C. § 1640(k), the Bureau does not provide an evidentiary basis for the proposal. Rather than analyzing the available information on measuring affordability, the Federal Register notice focuses on how the proposal will promote access to credit and spur innovation. Access and innovation, while important, are not the policy goals of the QM definition. Congress required the Bureau to ensure access to mortgage loans that are affordable and responsible. As the Bureau indicated in its proposed rule and request for public comment, the Dodd-Frank Act amended the Truth in Lending Act to accomplish several major goals in response to the 2008 market collapse and foreclosure crisis. Chief among the purposes of the Dodd-Frank Act was "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."³ The Bureau's proposal fails to demonstrate that "seasoned" loans are affordable, reasonable, understandable, fair, and not deceptive or abusive when made.

Finally, we note that our response to this proposal is severely constrained by its timing. This proposal was published in the Federal Register in August, with just a thirty-day comment period, overlapping with the comment period on the proposed General QM redefinition. All of our organizations are strained by addressing client and community needs in the pandemic, as well as making our own necessary internal adjustments to the changed circumstances created by the pandemic. We do not have the capacity, on this time frame at this time, to provide the full engagement this proposal merits.

We thank you for the opportunity to submit these comments.

Sincerely,

National Consumer Law Center (on behalf of its low-income clients)
Americans for Financial Reform Education Fund
Atlanta Legal Aid Society, Inc.
Bay Area Legal Aid
California Reinvestment Coalition
Community Legal Services, Inc. of Philadelphia
Connecticut Fair Housing Center
Consumer Action
Indiana Legal Services, Inc.

³ 15 U.S.C. § 1639b(a)(2).

The Legal Aid Society of Cleveland
Legal Aid Society of Southwest Ohio
Michigan Poverty Law Program
Mountain State Justice (West Virginia)
National Community Stabilization Trust
National Fair Housing Alliance
National Housing Law Project
North Carolina Justice Center
Pine Tree Legal Assistance (Maine)
Prosperity Now