**Seasoned QM Loan Definition:**

**Qualified Mortgage Definition under the Truth-in-Lending Act (Regulation Z)**

**Comments**

**of the**

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

**and**

**Consumer Federation of America**

**regarding**

**Docket No. CFPB-2020-0028**

**12 CFR Part 1026, RIN 3170-AA98**

**85 Fed. Reg. 53568 (Aug. 28, 2020)**

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## I. Introduction

Thank you for the opportunity to comment on the Consumer Financial Protection Bureau's proposed rule, "Qualified Mortgage Definition under the Truth in Lending Act (Regulation Z): Seasoned QM Loan Definition." The National Consumer Law Center[1] (on behalf of its low-income clients) and the Consumer Federation of America[2] submit these comments based on the experiences of our organizations as well as developments that advocates and housing counselors in the field have reported to us.

We write these comments with a sense of urgency. The last great wave of irresponsible, unaffordable lending stripped communities of color—particularly Black communities—of more than a generation of wealth.[3] We remember both individual clients and entire neighborhoods whose vitality was destroyed by the irresponsible lending of the 1990s and early 2000s. Many of the foreclosures we defended were initiated after three or more years of payments. We saw firsthand the devastating impact on families straining for years to keep up unaffordable mortgage payments.

Nothing in the current proposal would prevent a recurrence of this lending or the harm it visits on families and communities. Rather, this proposal would purport to set an arbitrary cutoff for depriving homeowners of their ability to defend a foreclosure and thus would encourage intentionally predatory practices. Our sense of urgency is inescapably heightened by the high levels of delinquency and default among homeowners and the disparate financial impact the coronavirus pandemic is having on Black and Brown communities. We cannot afford to repeat the mistakes of the past if we wish to build a more financially inclusive future.[4]

The CFPB's explicit goal in the proposed rule is to include higher-priced mortgage loans in the safe harbor when they otherwise fail to meet either the statutory or regulatory QM definition.[5] This is shockingly irresponsible. Risk of default increases with price. Incentives to engage in predatory practices increase with price. Higher prices by definition provide greater

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[1] Since 1969, the nonprofit National Consumer Law Center® (NCLC®) has used its expertise in consumer law and energy policy to work for consumer justice and economic security for low-income and other disadvantaged people in the United States. NCLC's expertise includes policy analysis and advocacy; consumer law and energy publications; litigation; expert witness services, and training and advice for advocates. NCLC works with nonprofit and legal services organizations, private attorneys, policymakers, and federal and state government and courts across the nation to stop exploitative practices, help financially stressed families build and retain wealth, and advance economic fairness. These comments were written by Alys Cohen, Andrew Pizor, and Steve Sharpe, NCLC staff attorneys, and Cecilia Bole, NCLC legal intern.

[2] The Consumer Federation of America (CFA) is an association of nearly 300 nonprofit consumer groups that was established in 1968 to advance the consumer interest through research, advocacy and education.

[3] *See, e.g.,* Dedrick Asante-Muhammad, Chuck Collins, Josh Hoxie, & Emanuel Nieves, Prosperity Now, *The Road to Zero Wealth: How the Racial Wealth Divide Is Hollowing Out the Middle* Class 8 (Sept. 2017), available at https://prosperitynow.org/sites/default/files/PDFs/road_to_zero_wealth.pdf (showing decline in both African-American and Latino household wealth over the period from 2007-2013 to levels below household wealth thirty years earlier).

[4] *See* Kathleen L. Kraninger, *The Bureau is taking action to build a more inclusive financial system* (July 28, 2020), available at https://www.consumerfinance.gov/about-us/blog/bureau-taking-action-build-more-inclusive-financial-system/.

[5] 85 Fed. Reg. 53568, 53580 (Aug. 28, 2020).

room for price gouging. Higher-priced mortgages are less likely to be either affordable or responsible mortgages. Higher prices extract more wealth from vulnerable consumers and communities and afford fewer opportunities to build wealth. Higher-priced mortgage loans are subject to more regulation at the state and federal level, by statute as well as through rulemaking, precisely because they are riskier for borrowers.[6]

We note that the risks of higher-priced mortgages have historically been and continue to be borne disproportionately by borrowers of color, particularly Black homeowners.[7] Thus, the CFPB's proposal will, if finalized and upheld, inevitably amplify existing racial disparities in pricing and outcomes. It will once again embolden portfolio lenders to strip wealth from Black communities.[8] This rule, if finalized, will accelerate the increase in the racial wealth divide, depress Black homeownership, and deprive borrowers of color of their day in court.

**We strongly urge the Bureau to withdraw its seasoned Qualified Mortgage (QM) proposal. The seasoned QM proposal exceeds the Bureau's legal authority and is without sufficient evidentiary support. The statute as drafted by Congress explicitly allows**

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[6] *See* Nat'l Consumer L. Ctr., *Truth in Lending* § 9.5 (10th ed. 2019).

[7] For current HMDA analysis, see Bureau of Consumer Fin. Prot., *An Updated Review of the New and Revised Data Points in HMDA: Further Observations using the 2019 HMDA Data* 223, Table 7.1.3 (Aug. 2020), available at https://files.consumerfinance.gov/f/documents/cfpb_data-points_updated-review-hmda_report.pdf. *See also* Marsha J. Courchane, *The Pricing of Home Mortgage Loans to Minority Borrowers: How Much of the APR Differential Can We Explain?,* 29 J. Real Estate Res. 399 (2007) (African Americans more than two and a half times as likely and Hispanics roughly twice as likely as Whites to receive a subprime loan); Thomas P. Boehm, Paul D. Thistle, & Alan Schlottman, *Rates and Race: An Analysis of Racial Disparities in Mortgage Rates,* 17 Housing Pol'y Debate 109, 126 (2006) (finding that African Americans in the conventional market pay 20 basis points more for purchase loans and 94 basis points more for refinances, and Latinos pay 12 basis points more for purchase loans, than Whites with similar income and education); First Nations Dev. Inst., *Borrowing Trouble: Predatory Lending in Native Communities* 14-16 (2008), *available at* https://www.firstnations.org/publications/borrowing-trouble-predatory-lending-in-native-american-communities/ (American Indians receive subprime loans at roughly twice the rate Whites do); Carsey Inst., *Subprime and Predatory Lending in Rural America: Mortgage Lending Practices That Can Trap Low-Income Rural People*, Pol'y Brief No. 4 (2006), *available at* www.carseyinstitute.unh.edu/documents/PredLending.pdf (rural Latinos, Native Americans, and African Americans all disproportionately receive subprime loans, with African Americans nearly three times as likely as Whites to receive subprime loan); Howell E. Jackson & Laurie Burlingame, *Kickbacks or Compensation: The Case of Yield Spread Premiums,* 12 Stan. J.L. Bus. & Fin. 289, 350 (2007) (Black and Latinx borrowers pay more, on average, in broker compensation than Whites); Robert B. Avery, Kenneth P. Brevoort & Glenn B. Canner, *Higher Priced Home Lending and the 2005 HMDA Data,* Fed. Res. Bull. A123, A157-A158 (2006) (pricing disparities between whites and minorities highest for broker originated loans); Debbie Gruenstein Bocian, Keith S. Ernst & Wei Li, Ctr. for Responsible Lending, *Unfair Lending: The Effect of Race and Ethnicity on the Price of Subprime Mortgages* 21-23 (May 31, 2006); Elvin K. Wyly, Mona Atia, Holly Foxcroft, Daniel J. Hamme, & Kelly Phillips Watts, *American Home: Predatory Mortgage Capital and Neighborhood Spaces of Race and Class Exploitation in the United States, 88 Geografiska Annaler, Series B: Human Geography* 105 (2006); Binyamin Appelbaum & Ted Mellnik*, The Hard Truth in Lending*, Charlotte Observer, (Aug. 28, 2005), at 1A.

[8] *See, e.g*. Hargraves v. Capital City Mortg. Corp., 140 F. Supp. 2d 7 (D.D.C. 2000). It's worth noting that many of the loans in *Hargraves* would probably have passed muster under this proposal, but they were neither responsible nor affordable.

**homeowners to raise a lender's failure to make a good faith and reasonable determination of a borrower's ability to repay[9] as a defense to foreclosure at any point during the life of the loan. The seasoned loan QM proposal purports to prevent all borrowers from raising ability to repay as a defense to foreclosure after three years, thus vitiating an explicit directive from Congress. Nor does the proposal have a sufficient basis for a conclusive presumption that three years of seasoning equates with a good faith and reasonable determination of ability to repay. This proposal, if finalized, poses great risk to consumers and vulnerable communities.**

The proposed seasoning model is built on market-wide early default rates and does not ensure that any particular individual has the ability to repay a loan, much less that any individual creditor has, as required by the statute, made a good faith and reasonable determination of the borrower's ability to repay. The Bureau assumes, without documentation, that the one-third of defaults that occur after the proposed rule's three-year window are generally due to subsequent events. While that may often be true, it is an inadequate basis for a conclusive presumption that bars the courthouse doors. The Bureau's analysis, based as it is on historical default rates, without any analysis of the underwriting of individual loans or a borrowers' financial capacity, fails to account for how the safe harbor will inevitably shift creditor incentives—not towards loans that are inherently safe but to loans that perform for just long enough.

The additional loan features included in the seasoning proposal are not a bulwark against improvident lending. While abusive features exacerbate the challenges faced by a homeowner who was not properly reviewed for ability to repay, many borrowers have received patently unaffordable loans separate and apart from the loan's other bells and whistles. Nor is the absence of other abusive characteristics independent evidence that a loan is by definition either affordable or responsible, much less that the creditor has, as required by the statute, made a good faith and reasonable determination of the borrower's ability to repay.

The Bureau lacks both legal and factual support for this proposal, and it should be abandoned in its entirety. To the extent the Bureau proceeds to finalization, we strongly encourage it to maintain the minimal protections built into the proposal for statutory compliance and consumer protection.

We note that our resources have been strained responding to this proposal during a pandemic, on top of two other QM proposals. While we appreciate the three-day extension the Bureau afforded to accommodate the observance of Yom Kippur, the otherwise 30-day comment period is not adequate for an extremely consequential and mostly unexplored proposal. The Qualified Mortgage rule will play a significant role in the shape of the mortgage market going forward. The seasoning proposal, in particular, raises questions about whether homeowners who have been harmed by unsustainable loans—the types of loans targeted by the Dodd-Frank Act—will be able to obtain affordable mortgages and have recourse to protect their homes from foreclosure or whether mortgage lending will revert to a mechanism for transferring wealth from poorer communities of color to wealthier white communities. We note as well that the Bureau has

[9] For simplicity, these comments sometimes use "ability to repay" or "ATR" as shorthand when referring to the creditor's duty to make a good faith and reasonable determination that the consumer has a reasonable ability to repay the loan being offered.

largely failed to support its proposal with data, suggesting that its staff is strained as well and could benefit from a more deliberative process.

## II. The seasoning QM proposal is contrary to Congressional intent and exceeds the Bureau's authority.

### A. The Bureau's authority to adjust the QM definition does not override the explicit statutory grant to injured homeowners of a remedy for ATR violations beyond three years.

#### 1. TILA's statutory scheme permits borrowers to bring defensive actions at any time in response to a foreclosure or other collection action.

Congress created a private right of action for specific violations in § 1640 of the Truth in Lending Act (TILA). The statute has long allowed consumers to assert violations by way of recoupment or set-off in response to a debt collection action or foreclosure, to the extent permitted by state law.[10] The vast majority of state and federal courts interpreting that language have held that it permits borrowers to raise violations of TILA as a defense to foreclosure, even after the expiration of the statute of limitations.[11] If Congress intended to bar homeowners from raising ATR claims in defense of foreclosures and mobile home repossessions, it would have said so.

Instead, Congress, in the Dodd-Frank Act, explicitly added ATR violations to § 1640, thus bringing them within the ambit of the statutory provision permitting borrowers to raise TILA claims defensively at any time. Congress also extended the general one-year statute of limitations under TILA to three years for ATR claims, recognizing both their importance and the reality that it could take a borrower a minimum of three years to recognize the right to bring an action against a creditor.

The CFPB's proposal, which would bar the right of setoff or recoupment for a class of borrowers, defies the statutory remedial scheme. It would challenge long-standing case law from a majority of state jurisdictions and interfere with state law determinations about the ability of borrowers to raise defenses to foreclosure or repossession. The CFPB's proposal is in direct contravention of Congressional intent and exceeds its authority.

#### 2. The current proposal directly contravenes the statutory mandate in 15 U.S.C. § 1640(k).

As discussed above, TILA provides a general right for borrowers to bring claims by way of recoupment or setoff after the statute of limitations. Congress affirmed that right with respect to ATR violations in the Dodd-Frank Act. Congress's mandate regarding ATR violations elaborated on the general provisions for recoupment and setoff. In TILA § 1640(k), added by the Dodd-Frank Act, Congress explicitly provided that a borrower could raise, "without regard for

[10] 15 U.S.C. § 1640(c).

[11] Nat'l Consumer L. Ctr., *Truth in Lending* § 12.2.5.3 n. 278 (10th ed. 2019) (citing cases from 32 states and the District of Columbia and covering a full page).

the [three-year] time limit on a private action for damages" ATR violations by way of recoupment or setoff.

Section 1640(k)(1) reads in its entirety:

> 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 by a creditor 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).

This provision is unambiguous. Borrowers may assert a defense based on ATR violations beyond the three-year statute of limitations, "notwithstanding any other provision of law."

Congress even specified how damages were to be calculated in such a case, capping damages at the amount available as of the day preceding the expiration of the statute of limitations.[12] There is simply no reason for this "special rule" if Congress contemplated that borrowers could be barred, by administrative rulemaking, from raising recoupment and setoff claims after the expiration of the three-year statute of limitations.

The CFPB's proposal, which would terminate a borrower's right to assert ATR violations beyond three years, contradicts the clear terms of § 1640(k). If Congress had intended to limit § 1640(k) to borrowers who defaulted within the three-year limitations period, it could easily have done so. Instead, paragraph (k) clearly applies regardless of when the default takes place. Congress anticipated that ATR violations could cause borrowers to default more than three years after origination. And Congress intended to permit those borrowers to be able to raise the creditor's violation as a defense to foreclosure. The Bureau does not have authority to countermand this Congressional directive.

**3. The Bureau's QM definition authority does not extend to creating a statute of repose for creditors.**

The Bureau does not argue that it generally has authority to alter Congress's remedial scheme under TILA. Nor does the Bureau argue that Congress granted it the authority to define when defenses may be asserted by way of setoff or recoupment under state law. The Bureau's proposal does not engage with the language of § 1640(k) or its damages provisions. Instead, the Bureau asserts that its authority to define the term "qualified mortgage" permits it to define away borrower access to the courts and redress in the face of foreclosure and repossession.[13] That

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[12] 15 U.S.C. § 1640(k)(2)(B).

[13] 85 Fed. Reg. at 53582. We note that the Bureau undermines its claim that it is simply redefining QM, separate from barring the courthouse doors by its reliance on hypothetical litigation risk to justify the proposal. *See id.* at 53577. To the extent the Bureau is animated by reducing litigation risk through this proposal, it is absolutely and entirely substituting its judgment as to the statute of limitations for that of Congress.

reading exceeds the Congressional grant of authority. It also runs contrary to black letter law providing that agencies receive no deference when interpreting statutes of limitations.[14]

The statutory ATR and QM provisions address underwriting—conduct that occurs exclusively before a loan is consummated. Whether a loan meets the QM definition is also determined as of consummation. Therefore, if the lender violates the ATR requirement, the borrower's cause of action will accrue at consummation. Unless there is some basis for tolling,[15] the borrower is barred from raising an affirmative claim three years from consummation, regardless of when the borrower defaults. However, in § 1640(k), Congress explicitly provided that the borrower can raise ATR claims defensively at any time. This is in contrast to TILA's three-year extended right of rescission, which the Supreme Court has found creates a statute of repose, such that a borrower may not rescind a loan, not even defensively, three years after the right to rescind arises.[16]

By moving loans to the safe harbor not at origination, but after three years, the seasoning proposal would, in effect, create a statute of repose. A statute of repose takes away a plaintiff's cause of action after the passage of a fixed period of time.[17] Under the Bureau's seasoning proposal, consumers who sued in the first three years would still be able to challenge the lender's good faith and reasonable determination of their ability to repay. Consumers who in good faith struggled to make their payments for three years before defaulting would lose their right, under both state and federal law, to defend against a foreclosure.[18] Not only does that exceed the Bureau's statutory authority, it is also directly contrary to the terms of § 1640(k)(1), which explicitly preserves the borrower's cause of action for as long as the borrower is vulnerable to foreclosure or repossession.

Consumers are entitled to assert the right set forth in § 1640(k)(1) "[n]otwithstanding any other provision of law."[19] As the U.S. Supreme Court has observed about the same clause in other contexts, "a clearer statement is difficult to imagine."[20] A cause of action for ATR

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[14] *See, e.g.*, Adams Fruit Co. v. Barrett, 494 U.S. 638 (1990).

[15] In some circumstances, courts have permitted tolling of TILA's statute of limitations. *See generally* Nat'l Consumer L. Ctr., *Truth in Lending* § 12.2.3 (10th ed. 2019). The Bureau's proposal, by cutting off access to the courts after three years of performance, would also interfere with these state common law doctrines.

[16] Beach v. Ocwen, 523 U.S. 410 (1998); *see generally* Nat'l Consumer L. Ctr., *Truth in Lending* § 10.3.3 (10th ed. 2019).

[17] West's ALR Digest Limitation of Actions k1, ALRDG 241K1 ("a "statute of repose" extinguishes a plaintiff's cause of action after the passage of a fixed period of time, usually measured from one of the defendant's acts.").

[18] We note that the Bureau's proposal thus creates an incentive for borrowers to sue their creditors or default on their loans within three years. This incentive could dampen the appetite of lenders to make seasoned QM loans—that is, if the litigation risk from borrowers suing lenders is real.

[19] 15 U.S.C. § 1640(k)(1).

[20] Cisneros v. Alpine Ridge Grp., 508 U.S. 10, 123 L.Ed.2d 572, 113 S. Ct. 1898, 1903 (1993). *See* Ohio Neighborhood Fin., Inc. v. Scott, 13 N.E.3d 1115, 1125 (Ohio 2014) ("The precedence afforded a 'notwithstanding' clause is effective regardless of whether that clause predates the conflicting provision."); State ex rel. PIA Psych. Hosps., Inc. v. Ohio Certificate of Need Rev. Bd., 573 N.E.2d 14

violations accrues at consummation. The "notwithstanding" clause overrides any authority the Bureau many otherwise have to limit that cause of action once it has accrued.

### 4. The current proposal is contrary to the statutory mandate that the creditor make a reasonable and good faith determination of a borrower's ATR *at origination*.

The creditor's good faith and reasonable determination of a borrower's ATR is measured at origination.[21] To do otherwise would penalize creditors for unforeseeable events. In its current form, Regulation Z § 1026.43(c)(1) establishes the clear ban on making a loan unless the creditor determines "at or before consummation that the consumer will have a reasonable ability to repay the loan according to its terms." Comment 43(c)(1)-2 clarifies that a change in the consumer's repayment ability after consummation "is not relevant to determining a creditor's compliance with the rule."

The converse, however, must also be true: If a creditor fails to properly underwrite an application and consummates the loan even though the consumer does *not* have the ability to repay it, the creditor's violation does not evaporate if the consumer later wins the lottery[22] and becomes able to repay the loan.

The proposed seasoning rule would contradict the statute's requirement that ATR is determined at origination, not by reference to subsequent events. This inconsistency affords maximum protection for creditors and minimum protection for consumers.

## B. The Bureau has not made the necessary case to restrict remedies under HOEPA, as this proposal could do.

Although TILA's § 1639c authorizes the Bureau to modify the definition of qualified mortgage and the scope of the safe harbor, that section does not affect the scope of the Bureau's authority over high-cost mortgages under TILA § 1639. Section 1639 was adopted by Congress in 1994 and since that time has provided a remedy for borrowers with high-cost mortgages who can demonstrate that their creditors engage in a pattern and practice of making loans without regard to ability to repay.[23] As with other TILA remedies, borrowers may assert HOEPA claims defensively, at any time, even more than three years from consummation.

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(Ohio 1991) (holding that a later-adopted bill did nothing to change the General Assembly's intent that certificate-of-need applications were governed by an earlier bill, which included a 'notwithstanding' provision).

[21] 15 U.S.C. § 1639c(a)(1) ("[N]o creditor shall make and a residential mortgage loan unless the creditor makes a reasonable and good faith determination . . . that, at the time the loan is consummated, the consumer has a reasonable ability to repay the loan.").

[22] Or gets a second job, takes out a second mortgage, takes in a boarder, or gets assistance from a family member, etc.

[23] 15 U.S.C. § 1639(h).

Subsection (p) of § 1639 allows the Bureau to exempt certain categories of mortgages from the prohibition on extending credit without regard to ability to repay in (h), but only after finding that "the exemption is in the interest of the borrowing public" and "will apply only to products that maintain and strengthen home ownership and equity protection."[24] The Bureau makes no such showing. The notice of proposed rulemaking does not mention high-cost mortgages, HOEPA loans, or § 1639 even once, although the Bureau is explicit about its intention to provide a safe harbor from ATR claims for loans regardless of price.

It is not clear to us how removing a longstanding right to challenge loans made by a lender engaged in a pattern and practice of lending without regard to ATR could be in the interest of the borrowing public or be conclusively deemed to apply only to products that maintain and strengthen homeownership. Borrowers have long had the right to challenge HOEPA loans, under a Congressional mandate, and the Bureau has produced no evidence that restricting this right would meet the standard set forth in TILA § 1639(p).

Nor can the Bureau rely on its general exemption authority in § 1604(f). Section 1604(f) explicitly carves out the high-cost mortgages covered under HOEPA from the Bureau's general exemption authority.

The Bureau at best is leaving it to the courts to determine how its limit on general ATR claims three years past consummation fits or doesn't fit with the remedies Congress created for HOEPA borrowers over 20 years ago. At worst, the Bureau is attempting to eviscerate those Congressionally-provided remedies for the riskiest mortgages through back door deregulation using the QM definition. Because the Bureau has not sought comment on this definitional interplay, the Bureau cannot remedy this defect in the final rule. The only way the Bureau can address this oversight without violating the Administrative Procedures Act is to issue a revised notice of proposed rulemaking.

### C. The Bureau's exemption authority does not permit it to close the courthouse doors to injured homeowners.

#### 1. The Bureau's exemption authority is circumscribed.

Sections 1603(5) and 1604(f) provide the Bureau's general exemption authority. The Bureau does not anywhere in its proposal discuss its general exemption authority, relying instead on its limited authority to adjust the QM definition. Indeed, in acknowledgment that these sections do not support its proposal, the Bureau's Federal Register notice does not even cite them. Reliance on these sections for this proposal would be futile, in any event.

Section 1603(5) permits the Bureau to exempt transactions for which the Bureau determines that coverage is not necessary to carry out the purposes of the chapter. As the Bureau has made no showing that permitting loans to season into QM safe harbor status will ensure

[24] 15 U.S.C. § 1639(p).

affordable and responsible mortgage lending, much less promote informed use of credit, the Bureau cannot rely on § 1603(5).

Section 1604(f) also sets out the Bureau's exemption authority. Section 1604 is captioned "Disclosure guidelines," so it is perhaps doubtful that the exemption authority in § 1604 was intended to cover the substantive protections later provided by Congress in § 1639c in the Dodd-Frank Act. Nonetheless, stepping through the factors that the Bureau "shall consider," there is no justification for terminating borrowers' rights to defend a foreclosure.

Among the factors the Bureau is to consider in exercising its exemption authority under § 1604(f) is the benefit provided to the borrower of the provisions.[25] The Bureau notes that it does not know how much benefit borrowers obtain from exercising their ability to defend a foreclosure or repossession by using the ability to raise defensively at any time the creditor's failure to consider ATR in originating the loan.[26] As we discuss later in these comments, there is evidence that the benefit to individual borrowers is consequential and large.[27]

The Bureau is also required to consider, before exercising its exemption authority "the financial sophistication of the borrower," "the importance to the borrower of the credit, related supporting property, and coverage under this subchapter," "whether the loan is secured by the principal residence of the borrower," and "whether the goal of consumer protection would be undermined by such an exemption." In any event, the Bureau has not attempted to make the requisite showing for any of these factors, nor do we believe the Bureau could. Therefore, it cannot exercise this exemption authority. Nor can the Bureau remedy this failure by reciting its exemption authority in the final rule, as the Bureau's failure to make the case in the NPRM has deprived the public of any meaningful opportunity to comment on its findings.

**2. Promoting increased access to, or innovation in, credit that is not necessarily affordable or responsible is not a permissible basis for adjusting the QM definition.**

The Bureau's primary justification for its proposal is that shielding creditors from litigation risk facilitates innovation and may, at the margins, increase access.[28] But the Bureau has not measured the scope of that litigation risk and concedes that it is more "perceived" than actual,[29] The Bureau also fails to make the case, as it is required to do under § 1639c(3)(B), that providing this enlarged safe harbor will ensure that loans made under the expanded definition are both affordable and responsible. Indeed, it cannot, as whether a borrower pays or not is entirely independent of whether it was a responsible loan and only weakly correlates with affordability.[30]

[25] 15 U.S.C. § 1604(f)(2)(A).
[26] 85 Fed. Reg. at 53599 ("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.").
[27] *See* § III.A.2, *infra.*
[28] 85 Fed. Reg. at 53576 (The Bureau's goal is to "encourage safe, responsible innovation in the mortgage origination market, including for loans that may be originated as non-QM loans").
[29] *Id.*
[30] *See* § III.B.3

The Bureau divides its rationale for the rule into two sections, one on "access to affordable, responsible credit" and one on ability to repay.[31] The discussion of access to credit primarily focuses on the financial industry's desire to increase QM safe harbor market share, especially in the non-GSE market, and limit any possible exposure to liability. Although the Bureau recites "affordable" and "responsible," it nowhere explains why or how loans that perform for three years are known to be either affordable or responsible at the time of origination. Indeed, the Bureau seems to adopt entirely the perspective of the creditor. It states:

> 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.[32]

But the test is not whether the creditor has confidence the borrower will pay. Borrowers may pay because they feel a moral obligation to do so. Borrowers may pay because they do not wish to lose their home, even if they must do without food, medicine, furniture, and utilities, or beg and borrow money from family and friends. The creditor's subjective belief that the borrower may pay has, on its face, nothing to do with the mandatory good faith and reasonable determination of a borrower's ability to repay. A loan does not become affordable or responsible simply because the creditor thinks it can extract its pound of flesh from the borrower.

In discussing its proposal, the Bureau substitutes "safe and responsible innovation in the mortgage market" for "responsible, affordable mortgage credit." There is simply no basis in the statute for the Bureau to consider innovation separately from the provision of mortgage credit. Nor is asserting that such innovation is "safe and responsible" the same as ensuring the availability of "responsible, affordable mortgage credit." Innovation can lead to lower prices; it can also lead to higher prices. And innovation can both expand and contract markets.

The Bureau asserts that the ability to season into QM status will encourage responsible lending, without defining what constitutes responsible lending. Indeed, by encouraging the safe harbor for high priced loans, the Bureau directly undermines what most people would consider a hallmark of responsible lending: fairly priced credit, absent the taint of price gouging. Price gouging may sometimes be affordable, but it surely is not responsible. Yet nothing in the Bureau's proposal guards against price gouging.

The Bureau "preliminarily concludes" that its seasoning proposal is appropriate because many loans that are outside the current QM safe harbor *may* perform.[33] But performance, both analytically and empirically, is not the equivalent of affordable or responsible. Moreover, the high-priced mortgage loans, manufactured housing loans, and other non-QM loans that the Bureau seeks to capture generally have higher default rates than loans in the current QM category and even below those in the proposed QM pricing threshold. The originators of these

[31] 85 Fed. Reg. at 53576 and 53578.
[32] *Id.* at 53576.
[33] *Id.* at 53578.

loans also are subject to less supervision oversight because they are often made by nonbanks. These borrowers therefore are at greater risk and there is less reason to equate performance with affordable and responsible lending.

In assessing the benefits to creditors and consumers, the Bureau relies almost exclusively on analysis of foreclosure rates over various periods, coupled with delinquencies. Beyond the foreclosure rate and the number of delinquencies, the Bureau does not evaluate whether the loans included in the seasoned QM safe harbor would be either affordable or responsible, as required by the statute. The Bureau's discussion focuses only on one prong of the proposal's economic value to creditors: the fraction of consumers that enter foreclosure, ignoring "the likelihood that ATR defenses are successful" and "the costs associated with the lawsuits."[34]

In 2013, the Bureau engaged with these questions in some depth, as well as the significant externalities created by unaffordable, irresponsible lending. The Bureau cannot now ignore that prior work in pursuit of an extra-statutory objective, innovation, without first explaining how this proposal advances the statutory objective of affordable and responsible mortgage lending and why it disregards its prior analysis.

**3. There is no statutory basis for equating performance with ability to repay.**

The Bureau's proposal conflates repayment of the loan, the borrower's "creditworthy" status, and the lender's "confidence" that a borrower will repay the loan, with a lender's good faith and reasonable determination of ability to repay.[35] But experience proves that many borrowers who lack ATR find ways to continue paying on their loans. Just as failure to repay is not conclusive proof that the borrower lacked ATR at origination (or that the lender failed to comply with the ATR requirement),[36] three years of repayment, by itself, does not conclusively demonstrate ATR or that the creditor complied with the statute.

A creditor may well have "confidence" that an individual homeowner will repay a loan based on something entirely separate from ATR: the equity in the home, the ability of the homeowner to liquidate other assets, the willingness of a borrower to borrow from family and friends, a borrower's reluctance to default on a loan. Being creditworthy in general does not mean that you can repay a particular loan.

The Bureau also assumes, without evidence, that a seasoned QM definition will "likely improve access to responsible and affordable mortgage credit."[37] Yet the statutory mandate is not to "improve access" but "to assure that consumers are offered and receive residential

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[34] *Id.* at 53594.
[35] *See, e.g., id.* at 53576 ("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"; "a creditor has confidence that the consumer would repay the loan).
[36] *See, e.g.,* Reg. Z § 1026.43(c)(1)-1, 2 (emphasizing that ATR is measured as of consummation, not with reference to subsequent events).
[37] 85 Fed. Reg. at 53576.

mortgage loans on terms that reasonably reflect their ability to repay the loans."[38] Nothing in this proposal assures that consumers will be offered and receive residential loans on terms that reasonably reflect their ATR; rather, the Bureau substitutes performance over time for ATR.

**4. The Bureau has not provided a reasoned basis for changing its position from the 2013 QM Final Rule where it found that the ATR litigation risk would not meaningfully impact the cost of credit.**

The Bureau here seeks to relieve what it recognized in its 2013 rulemaking as "market anxiety"[39] suffered by many creditors that a borrower may, someday, somewhere, sue them for making a loan without regard to ability to repay.[40] The Bureau does not provide any concrete evidence of actual litigation risk, or the benefits to borrowers from such litigation.[41] Indeed, the Bureau's reference to "perceived risk" makes clear that concerns about litigation risk have been greatly exaggerated.[42]

As the Bureau found in its 2013 rule, there is no meaningful litigation risk associated with the ATR rule.[43] The current Bureau provides no new evidence and no reasoned justification that would support a finding that the litigation risk has any actual impact on either competition or access to credit. Indeed, the Bureau acknowledges that it has no evidence on the impact of litigation risk on pricing,[44] despite a lengthy analysis of how often loans at various price points enter foreclosure at what point in time.[45] But whether loans entering foreclosure equals litigation risk, or what those costs are, the Bureau does not know.[46] The Bureau's failure to produce evidence supporting this proposal at the NPRM stage for public notice and comment hampers any meaningful opportunity to comment and suggests that the evidence produced is merely pretextual. Absent clear evidence supporting the proposal, commenters are left to guess at the Bureau's actual rationale.[47]

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[38] 15 U.S.C. § 1639b(a)(2).

[39] 78 Fed. Reg. 6408, 6533 (Jan. 30, 2013). *See also id.* at 6505 (suggesting the "widespread fear" expressed by creditors in regard to litigation risk is largely baseless).

[40] 85 Fed. Reg. at 53577 (The Bureau's goal is "ensuring that creditors would not have to litigate their ATR compliance long after consummation . . . .").

[41] *See id.* at 53599 ("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.").

[42] *Id.* at 53576.

[43] *See* 78 Fed. Reg. at 6511 ("[T]he Bureau believes the litigation costs will be small and manageable . . . ."); *id.* at 6513 ("[Litigation] costs . . . will not affect either the pricing of the loans or the availability of a secondary market for these loans.").

[44] 85 Fed. Reg. at 53599 ("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.").

[45] *Id. at* 53594-53598.

[46] *Id.* at 53594.

[47] The Bureau's current cost-benefit analysis also fails utterly to engage with the market failure analysis of the 2013 rule or the evidence cited therein that both creditors and borrowers failed to adequately internalize the risks and costs of mortgage lending. These considerations are relevant to whether the Bureau's decision now is based on evidence and reasoned analysis; whether it meets the statutory criteria

In fact, risk for ATR violations under TILA is circumscribed. Congress has repeatedly balanced the interests of lenders and consumers over many years. Just as the market has learned to tolerate risk from liability due to disclosure and rescission violations, [48] so too the market, given a chance, can learn to price and thereby tolerate the risk of ATR violations.[49] TILA's general rules on liability already limit possible exposure:

- The general provision on statutory damages caps those damages at $4,000 for closed-end mortgages.[50]
- Though actual damages are available, in fact they are very rare due to the extremely high evidentiary hurdles courts have imposed.[51]
- Class action exposure for statutory damages is limited in amount.[52] (And, of course, any purported class action would also have to meet the standards of commonality and other requirements for a certifiable class action under Rule 23 of the Federal Rules of Civil Procedure.)[53]
- There is no liability for any violation if the lender establishes that the violation was not intentional and resulted from a "bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid such errors."[54]

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and purpose for an adjustment to the QM definition; and whether the Bureau can meet the standards for exercise of its exemption authority under 15 U.S.C. § 1604(f).

[48] *See, e.g.,* Bureau of Consumer Fin. Prot., Ability-to-Repay and Qualified Mortgage Rule Assessment Report, at 118 (Jan. 2019), available at https://files.consumerfinance.gov/f/documents/cfpb_ability-to-repay-qualified-mortgage_assessment-report.pdf ("[I]ndustry has not developed a common approach to measuring and predicting ATR risk, as it has accomplished for other types of risk, such as prepayment and default.").

[49] Although the ATR-QM rule has been in effect for six years, the prevalence of lending under the GSE Patch has meant that most loans were made inside the QM safe harbor, thus delaying any experience of the market with actual litigation risk. *See, e.g.,* Bureau of Consumer Fin. Prot., Ability-to-Repay and Qualified Mortgage Rule Assessment
Report, at 118 (Jan. 2019), available at https://files.consumerfinance.gov/f/documents/cfpb_ability-to-repay-qualified-mortgage_assessment-report.pdf.

[50] 15 U.S.C. § 1640(a)(2)(A)(i). Open-end mortgages are not subject to the ability-to-pay rule.

[51] 15 U.S.C. § 1640(a)(1). *See generally* Nat'l Consumer L. Ctr., *Truth in Lending* § 11.5 (10th ed. 2019) (on proof requirements for actual damages.)

[52] 15 U.S.C. § 1640(a)(2)(B) (lesser of $1 million or 1% of creditor's net worth, as amended by Dodd-Frank).

[53] Since ability to pay evaluations inherently deal with individual circumstances of borrowers, class actions are extremely unlikely in this context. They would be maintained only if the lender policies in place encourage non-compliance or there is a widespread pattern and practice of non-compliance. For class actions not subject to the general statutory damages cap, courts look to other factors to limit exposure when warranted. 15 U.S.C. § 1640.

[54] 15 U.S.C. § 1640(c).

- The lender or assignee can avoid liability if it discovers the error on its own and promptly corrects it.[55]
- Assignees have an additional layer of protection in that, in many cases, they are liable for monetary damages for violations only where the violation is apparent on the face of the documents.[56]
- Additional "enhanced" damages for an ATR violation are limited to an amount equal to the sum of all finance charges and fees paid by the consumer within three years of consummation and are available only if the charges and fees were actually paid.[57]
- There is no liability if the creditor demonstrates that the failure to comply was "not material."[58]

As the Bureau noted in the 2013 rule, the number of potential claims is small, the potential claims are themselves of low dollar value, and there is a "low likelihood of claims being filed and successfully prosecuted."[59] The Bureau in 2013 discussed at length the evidence that "litigation under TILA generally and under the most directly analogous federal and state laws has been very limited," even during the peak years of the foreclosure crisis, when a large number of borrowers had strong incentives to bring such claims.[60] The Bureau has not produced any evidence to support reconsideration of those evidentiary findings.

We note that there remain very real practical limitations on litigation exposure for non-compliance with the ability-to-pay provisions. The number of lawyers available to help individual home owners in consumer credit cases is only a fraction of the demand. The overall supply of lawyers able to handle such cases has decreased from the peak years of the foreclosure crisis, as foreclosure defense funding has dried up and the plaintiffs' bar has turned its attention elsewhere. While TILA's statutory attorneys fees bring consumer representation at least theoretically within reach of the average consumer, as a practical matter, many attorneys themselves cannot afford to wait months or even years for the attorney-fee awards to be paid, even assuming they establish the claim successfully. Legal services and public interest attorneys, who have historically formed the core of the consumer credit bar, have always been stretched for resources, and are even more so today, and will be in the foreseeable future. Economic realities limiting consumer access to representation provide even greater insulation. That is beyond the

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[55] 15 U.S.C. § 1640(b).
[56] 15 U.S.C. § 1641(a), (b), (e). The rescission remedy is available against assignees even if not apparent on the face of the documents, and there is expanded (though capped) liability against assignees on HOEPA loans.
[57] 15 U.S.C. § 1640(a)(4) (describing enhanced damages), (e)(three-year statute of limitations), (k)(allowing consumers to raise claim in defense to foreclosure after the three year statute of limitations, but capping the amount of the damages at three-years.)
[58] 15 U.S.C. § 1640(a)(4).
[59] 78 Fed. Reg. at 6512.
[60] *Id.* at 6568.

power of the Bureau to cure, but it is extremely relevant when the Bureau evaluates the potential impact of litigation risk.

To the extent the Bureau relies on litigation risk in establishing the QM safe harbor, its decision to do so is not reasonably supported by any available evidence. Moreover, the Bureau fails to provide a reasoned justification in this regard for its departure from the judgments made in the 2013 Rule. While non-QM lending has not emerged, that does not necessarily mean that the litigation risk is real; indeed, there has been nothing but mere speculation about litigation risk under ATR for the last seven years.

### D. The safe harbor for seasoned loans could restrict the ability of the CFPB and other agencies to conduct supervisory examinations, including for safety and soundness.

A broad definition of QM also unnecessarily limits the Bureau's supervision ability. Under the Bureau's current supervision guidance, CFPB's Supervision and Examination Manual, the Bureau reviews loans "[t]o determine the financial institution's compliance with the Truth in Lending Act (TILA) and Regulation Z."[61] This authorizes Bureau staff to review whether a lender property accorded QM status to a loan.[62] Once the Bureau determines that the loan meets QM status, it looks no further. For this reason, a very broad QM rule limited to whether a borrower makes three years of payments severely limits the scrutiny on a particular loan, and thus, will limit an examiner's ability to detect problems that arise after the QM status is verified. If these loans consistently fail after three years, they likely will be outside of the scope of examinations.

## III. The Bureau lacks an adequate evidentiary basis to support its proposal.

The cost-benefit analysis in the proposed rule makes clear that the Bureau lacks vital data needed to finalize the rule:

- The Bureau cannot estimate the value to consumers of using such violations in foreclosure defense, an opportunity it would be taking away with this rule.
- It cannot estimate how removing litigation risk would decrease pricing.
- It cannot estimate how removing litigation risk through this rule would increase lending.
- And it has not established the extent to which seasoned loans correlate with loans made after a good faith and reasonable determination by the creditor of a borrower's ATR.

The Bureau cannot make rules based on vague speculation or mere assumptions. Instead, the Bureau should not finalize this rule until it has adequate evidence to make a reasoned and factually grounded decision about how this proposal will impact consumers and the market.

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[61] Bureau of Consumer Fin. Prot., Supervision and Examination Manual 1409 (March 2019), available at https://files.consumerfinance.gov/f/documents/cfpb_supervision-and-examination-manual.pdf
[62] *Id.* at 1527.

### A. The Bureau has more work to do on assessing the costs and benefits of the proposal to consumers.

#### 1. The Bureau should not finalize the proposed rule until it obtains adequate data on how the proposal will impact consumers.

The Dodd-Frank Act requires the Bureau to conduct a cost-benefit analysis of proposed regulations.[63] The notice of this proposed rule includes a lengthy discussion of the anticipated benefits to creditors and finds no significant cost to them. But the notice includes no real discussion of the cost or benefit to consumers. We suggest that the Bureau is unable to find any quantifiable benefit to consumers because there isn't any. The Bureau also admits it has no data on the value of using ATR violations as defense to foreclosure or the value of any alleged price decreases.[64]

The notice describes the Bureau's attempt to obtain data and identifies some of the sources consulted, but it does not mention any attempt to get information from consumers. It appears that the Bureau did not consult members of the Consumer Advisory Board, conducted no consumer surveys, and did no outreach to consumer advocates or housing counselors. The only post-origination data appears to be on loan performance from the National Mortgage Database (NMDB).[65] Without adequate data on the costs or benefits to consumers, the Bureau cannot comply with the cost-benefit mandate and should not attempt to finalize this rulemaking until a proper analysis can be done.

As discussed above, the Bureau has not even engaged in any meaningful way with the cost-benefit analysis produced in support of the 2013 rule. That cost-benefit analysis identified a widespread market failure justifying creation of the ATR rules. That cost-benefit analysis also documented the extremely limited nature of any litigation risk. Absent a reasoned basis, the Bureau should not now set aside its prior analysis.

#### 2. The ability to assert an ATR violation has significant, quantifiable value to consumers and their communities.

The proposed rule will take away a protection granted by Congress. The ability to assert that protection has value. Taking it away will impose measurable costs. These costs will fall hardest on one class of consumers: those who receive a loan made in violation of the ATR rule but who still manage to make timely payments for at least three years. The Bureau's proposal does not mention any attempt to gather data on the number of consumers in this class or the cost of losing this defense.

We have attempted to gather data on these topics in the limited time allowed to respond to this rulemaking. Based on a survey of consumer advocates (attorneys and housing counselors) and research on Westlaw—all limited by the constricted timeline of this rulemaking—we have

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[63] Section 1022(b)(2)(A) of the Dodd-Frank Act; 85 Fed. Reg. at 53592.
[64] 85 Fed. Reg. at 53599.
[65] 85 Fed. Reg. at 53595.

found evidence strongly suggesting that the number of consumers in this class is significant and that the ATR defense has real value, both quantitative and qualitative.

The clearest measurable data on the value of the ATR defense comes from litigation where consumers asserted it. Given that there has been virtually no ATR litigation since the ATR rule went into effect (we are aware of only one reported case, and that one was against the borrower),[66] we look to analogous rules under state and federal law, much as the CFPB did in 2013 in quantifying litigation risk. Because state law claims were not universally available, these cases can represent only a fraction of the potential value to consumers. Additionally, many state law claims did not provide for attorney fees, unlike TILA, further depressing their value to homeowners.

Prior to the Dodd-Frank Act, only HOEPA contained a clear ATR requirement. Therefore, consumers with non-HOEPA loans depended on ATR-like defenses under state law and common law. Such defenses were often rejected by courts, or consumers were discouraged from asserting them. We have identified and describe below a number of lawsuits in which a consumer or government agency successfully asserted an ATR-like challenge to predatory lending. We include citations where possible, but many of these examples come from out-of-court or confidential settlements.

Even though these cases are only a small sample of what was possible before the Dodd-Frank ATR requirement, they clearly show that the ability to assert ATR violations is worth millions of dollars to consumers, in addition to the obvious qualitative and quantitative value of maintaining homeownership:

- In one case, an immigrant with limited ability to understand English-language loan documents bought her home in 2006 with a first and second mortgage loan combination that a reasonable lender would have known was unaffordable from the outset. She sought legal assistance when she could no longer afford the payments. In litigation, her attorney asserted ATR-like claims and defenses. As a result, the entire second mortgage was eliminated (saving her $71,800), the interest rate on the first mortgage was reduced from 8.125% to 2%, and unpaid principal balance on the first loan reduced by $84,000.

- Another consumer bought a home in 2004, making a $15,000 down payment and financing the rest. Less than one year later he was convinced to refinance into a predatory loan that was clearly unaffordable. Litigation asserting an ATR-like claim resulted in loan modifications that eliminated the arrearage, reduced the unpaid principal balance on his loan by $117,000 and lowered the interest rate to a more reasonable 4%.

- In another suit, Quicken Loans, one of America's largest lenders, extended an unaffordable mortgage to a West Virginia woman by falsely promising to refinance the

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[66] Elliott v. First Fed. Cmty. Bank of Bucyrus, 2019 WL 1367659 (S.D. Ohio Mar. 26, 2019), *reconsideration denied, stay granted sub nom.* Elliot v. First Fed. Cmty. Bank of Bucyrus, 2019 WL 2590572 (S.D. Ohio June 25, 2019) (granting summary judgment for the creditor on an ability-to-repay claim when the borrower defaulted due to divorce less than two years after entering into the loan transaction).

loan in a few months on better terms after she had proven she could make payments (and improve her credit).[67] A lawsuit asserting ATR-like claims and defenses, among others, resulted in a judgment for $2.1M in punitive damages (upheld on appeal) and $17,000 in compensatory damages. Litigating this case through trial and appeals would have been prohibitively expensive for the consumer had the attorney not been able to recoup $596,000 in attorney fees and costs from the defendants under a fee-shifting statute similar to TILA.[68]

- In a major case against a foreclosure-rescue scammer who tricked consumers into signing unaffordable mortgages, the Federal Trade Commission obtained a stipulated judgment for $2,791,040, (the "estimated minimum total consumer injury") for violations of HOEPA's ATR requirement and other claims.[69]

- A Massachusetts bankruptcy court found a 1991 mortgage transaction for $149,150 to be unconscionable because it was made without regard to the borrower's ability to repay it. As a remedy, the court allowed the borrower to rescind the loan by way of recoupment.[70]

This brief list of cases shows that the ability to assert ATR violations in response to predatory lending is worth millions of dollars. Before the Dodd-Frank Act, few consumers could assert ATR violations. If their loan was not subject to HOEPA, their ability to do so depended largely on whether a judge could be convinced to allow such claims through other laws or common law principles. Today, many more consumers are protected by the ATR requirement. When the Bureau evaluates the baseline, it must recognize that the numbers we provide are below any reasonable lower bound of values to consumers, coming, as they do, from a time when ATR-like defenses were only available in a few states and even then only to consumers who were able to find attorneys willing to bring aggressive and creative claims.[71]

The monetary value is not the only benefit to consumers or their communities.[72] Even more important is the ability to save a family home from foreclosure. Foreclosure resulting from predatory lending has many negative consequences that are more difficult to quantify. It uproots a family, causes significant emotional distress, and likely interferes with the education of any

[67] Quicken Loans, Inc. v. Brown, 737 S.E.2d 640, 649 (2012).
[68] 15 U.S.C. § 1640(a)(3).
[69] Stipulated Order for Permanent Injunction and Final Judgment, Federal Trade Commission v. Safe Harbour Foundation of Florida, No. 08-C-1185 (N.D. Ill. Nov. 2009), available at https://www.ftc.gov/sites/default/files/documents/cases/2009/11/091124silverstoneorder.pdf.
[70] Maxwell v. Fairbanks Capital Corp. (*In re* Maxwell), 281 B.R. 101 (Bankr. D. Mass. 2002). *See generally* Nat'l Consumer L. Ctr., *Unfair and Deceptive Acts and Practices* § 6.3.3 (9th ed. 2016); Nat'l Consumer L. Ctr., *Mortgage Lending* § 6.2.7 (3d ed. 2019).
[71] While this could be taken to suggest that the Bureau's initial estimates of litigation risk were too low, we believe that the overall number of lawyers prepared to represent clients on ATR claims, and the likely skepticism of judges as to whether there was a true lack of ATR if the borrower is able to pay for three years or more, continues to depress the actual litigation costs.
[72] G. Thomas Kingsley, Robin E. Smith, & David Price, Urban Inst., *The Impacts of Foreclosures on Families and Communities: A Primer* (July 2019), available at https://www.urban.org/sites/default/files/publication/30431/411910-The-Impacts-of-Foreclosures-on-Families-and-Communities-A-Primer.PDF.

children in the home.[73] It also has lasting impact on the borrower's credit, making it difficult for them to find safe replacement housing.

The consequences of the last housing bubble and subprime lending binge show that foreclosure also damages entire communities. Surrounding homes lose nearly one percent of their value for each foreclosure within one-eighth of a mile.[74] Foreclosures hurt cities and towns by reducing property tax bases and adding costs associated with vacant homes.[75]

The ATR requirement—and the ability to assert violations—can prevent foreclosures. The Bureau's proposal will harm consumers by limiting those protections. If the Bureau does not abandon this misguided rule, it should at least conduct more comprehensive research to properly measure the scope of the impact and afford the public a chance to comment on that evidence. The Bureau should also explain why it is rejecting its factual findings in 2013 regarding the costs, benefits, and impacts of the ATR rule.

### B. "Seasoning" is not an adequate proxy for a good faith, reasonable determination of a borrower's ability to repay.

#### 1. Paying for three years does not establish ATR under the statute.

In relying on early loan performance to determine the QM status of a loan, the Bureau implicitly assumes that, if the consumer did not go delinquent during the observation period, the mortgage was "affordable" for the consumer. But that assumption misunderstands the statutory scheme and lacks a basis in empirical observation. Making mortgage payments by itself does not demonstrate ATR, either under the statutory scheme or in reality.[76]

The statutory scheme requires the Bureau to ensure affordable and responsible mortgage lending, but it does not set an acceptable level of default. Nor does it set a time limit past which there is a conclusive presumption of ATR.[77] Rather, creditors are required to assess consumers' ability to repay the mortgage. Under the statute, a consumer has the ability to repay a mortgage if and only if the consumer has the capacity to make the payments on that mortgage and still meet

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[73] Julia B. Isaacs, Brookings Inst., *The Ongoing Impact of Foreclosures on Children* 4-6 (April 2012), available at https://www.brookings.edu/wp-content/uploads/2016/06/0418_foreclosures_children_isaacs.pdf.

[74] Dan Immergluck & Geoff Smith, *The External Cost of Foreclosure: The Impact of Single-Family Mortgage Foreclosures on Property Values*, 17 Housing Pol'y Debate 57, 58 (2006).

[75] *See, e.g.*, Kathleen Conti, *Revere: Foreclosure Costs*, Boston Globe, Sept. 4, 2008, at T2. *See generally* 78 Fed. Reg. at 6559-6560 (discussing at length the varies externalities imposed on communities by unaffordable and irresponsible lending).

[76] *See, e.g.,* Kristopher Gerardi, Kyle F. Herkenhoff, Lee E. Ohanian & Paul S. Willen, *Can't Pay or Won't Pay Unemployment, Negative Equity, and Strategic Default* 4 (Nat'l Bureau of Econ. Research, Working Paper No. 21630, 2015),available at https://www.nber.org/papers/w21630 ("Specifically, 80 percent of households that need to cut their consumption to subsistence levels to make their mortgage payments ('cant [sic] pay' borrowers) are current on their payments.").

[77] *See* 15 U.S.C. § 1640(k) (providing that borrowers may raise a creditor's failure to make a good faith reasonable determination of ATR as a defense to foreclosure at any time, explicitly overriding the three year statute of limitations for affirmative ATR and TILA rescission claims).

their other pre-existing obligations, with enough left over to cover basic living expenses.[78] Thus, the fact that a consumer did not miss two consecutive mortgage payments during the first three years of a mortgage does not in and of itself answer the question of whether the mortgage was affordable when made. Evidence that the consumer struggled with making other debt payments or reduced consumption to subsistence levels or below should be sufficient to establish a lack of ATR, even if the consumer successfully made all the mortgage payments, in full and on time. The seasoning proposal ignores this.

Borrowers without ability to repay from current income and assets sometimes take heroic measures to eke out payments for a number of years, before defaulting. As we illustrate in section III.B.3 below, legal services attorneys and housing counselors report clients drawing down retirement accounts, taking in boarders, borrowing money from family and friends, and going without food, medicine, utilities, or basic furniture. While these extreme measures may make sense in an emergency, they do not reflect an ability to repay the mortgage over the life of the loan. Consumers should be congratulated for trying so hard to meet their obligations—not punished, as the Bureau's proposal would do.

### 2. The Bureau lacks the data needed to establish a seasoning period.

The notice of proposed rulemaking includes no data on why borrowers default. Instead the Bureau speculates that the 33 percent of defaults occurring more than three years after consummation are due to post-consummation events.[79] The Bureau admits "that there is some risk that a consumer lacked an ability to repay at loan consummation yet managed to make timely payments for the [proposed] seasoning period . . . ."[80] The Bureau only points to the incidence of foreclosure over various periods of seasoning; it does not produce evidence correlating foreclosure with either lack of ATR or subsequent events.[81] Without data showing a correlation between why and when borrowers default, any seasoning period will be arbitrary. Nor does the Bureau make clear why, given the risk that seasoning will mis-identify loans with ATR, borrowers should be conclusively denied their day in court.

### 3. Borrowers lacking ATR nonetheless pay their mortgages.

The Bureau assumes that payment or nonpayment during the first three years of a mortgage serves as a reliable proxy for compliance with the ATR rule at origination. That assumption is false. Whether borrowers default or pay is determined far more by macroeconomic

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[78] *See, e.g.,* 15 U.S.C. § 1639c(b)A)(vi) (Bureau authority to establish for QM "alternative measures of ability to pay regular expenses after payment of total monthly debt, taking into account the income levels").

[79] 85 Fed. Reg. at 53579 ("[N]early two-thirds (66 percent) of loans that experience a disqualifying event ... do so within 36 months, and the rate at which loans disqualify diminishes beyond 36 months. This 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.").

[80] *Id.* at 53581.

[81] *See id.* at 53595-53601.

conditions than ATR at origination.[82] While early defaults may suggest a lack of ATR, absent a change in macroeconomic conditions, the converse—that borrowers who continue paying their mortgage have ATR or whose ATR was properly determined by the creditor at origination—is not true.

*a) Research shows that borrowers lacking ATR continue to pay their mortgages.*

The reality is that most consumers have multiple obligations and categories of expenses and, when money is tight, they face tough, even agonizing choices. For example, the Federal Reserve Board's 2019 Survey of Household and Economic Decisionmaking ("SHED") found that even at the peak of the economic expansion, one in four households went without needed medical care during the prior twelve months because it was unaffordable.[83] The Urban Institute found that a similar percentage faced food insecurity during this time period.[84] The Bureau's own Making Ends Meet survey noted that one-third of those who had trouble paying bills also went without food.[85]

Focusing more specifically on homeowners, the Urban Institute's 2017 Well Being and Basic Needs survey found that fully 35% of homeowners faced a material hardship during the prior twelve months. Of particular importance, these consumers were almost twice as likely to identify the hardship as an unmet need for medical care and more than twice as likely to identify the hardship as food insecurity than to report the hardship as a partial or late mortgage payment.[86] This underscores the lengths that consumers will go to preserve their homes and the error in the Bureau's assumption that the absence of two consecutive missed mortgage payments equates to affordable payments.

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[82] *See, e.g.,* Bureau of Consumer Fin. Prot., Ability-to-Repay and Qualified Mortgage Rule Assessment Report, at 83 (Jan. 2019), https://www.consumerfinance.gov/documents/7165/cfpb_ability-to-repay-qualified-mortgage_assessmentreport.pdf (Assessment Report or Report) (explaining that, in the assessment, the Bureau relied on delinquency and early foreclosure statistics as proxies for ability to repay, while recognizing that both are influenced by macro trends that have no bearing on the loan's affordability).

[83] Board of Governors of the Federal Reserve System, *Report on the Economic Well-Being of U.S. Households in 2019* (May 2020), https://www.federalreserve.gov/publications/files/2019-report-economic-well-being-us-households-202005.pdf.

[84] Michael Karpman, Stephen Zuckerman, & Dulce Gonzalez, Urban Inst., *Despite Labor market Gains in 2018, There Were Only Modest Improvements in Families' Ability to Meet Basic Needs* (May 2019), https://www.urban.org/sites/default/files/publication/100216/despite_labor_market_gains_in_2018_there_were_only_modest_improvements_in_families_ability_to_meet_basic_needs_0.pdf.

[85] Bureau of Consumer Fin. Prot., Office of Research, *Insights From the Making Ends Meet Survey* (July 2020), available at https://files.consumerfinance.gov/f/documents/cfpb_making-ends-meet_survey-results_2020-07.pdf.

[86] Corianne Payton Scally and Dulce Gonzalez, Urban Inst., *Homeowner and Renter Experience of Material Hardship* (Nov. 2018), available at https://www.urban.org/sites/default/files/publication/99271/homeowner_and_renter_experiences_of_material_hardship_implications_for_the_safety_net_5.pdf

Of course, before having to forego food or medical care, consumers are likely to take other measures to cope with an unaffordable mortgage payment. The Making Ends Meet research documented that, when consumers are struggling to pay a particular bill, such as a mortgage payment, a common coping mechanism is to skip or be late in paying another bill.[87] Consistent with that finding, the SHED asked consumers who said that they would not be able to pay all their bills in the month the survey was administered (16% of consumers just that single month) which bill the consumer would be unable to pay. Credit card payments ranked first (45%); followed by phone or cable bills (34%); water, gas and electric bills (32%); and only then mortgage or rent (23%).[88]

Researchers have struggled to define what it means for a family not to be able to pay their mortgage.[89] The Bureau could , if it chose, make substantial progress on this question using datasets available to it, including the Consumer Credit Panel (CCP) and the National Mortgage Database (NMDB). At a minimum, the Bureau could at least examine correlations between mortgage originations and delinquencies on other types of credit obligations that are visible in credit reporting data in assessing the extent to which mortgages at different price points and DTI levels are consistent with an assessment of the consumer's ability to repay. This data would be highly probative in determining the limits of the Bureau's largely ungrounded assumption that a lack of default on the mortgage payment equals affordability for borrowers. Few outside researchers, and certainly not thinly staffed nonprofits responding to the pandemic, have either the access or the capacity to conduct this research and test the Bureau's conclusory assumptions.[90]

A recent study of consumer "payment hierarchy" by Experian highlights the importance of such an analysis. In that study, Experian drew samples of consumers at various points in time and with various combinations of credit obligations and followed those consumers for a period of

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[87] Bureau of Consumer Fin. Prot., Office of Research, *Insights From the Making Ends Meet Survey* (July 2020), available at https://files.consumerfinance.gov/f/documents/cfpb_making-ends-meet_survey-results_2020-07.pdf

[88] Board of Governors of the Federal Reserve System, *Report on the Economic Well-Being of U.S. Households in 2019* (May 2020), available at https://www.federalreserve.gov/publications/files/2019-report-economic-well-being-us-households-202005.pdf.

[89] *See, e.g.,* Kristopher Gerardi, Kyle F. Herkenhoff, Lee E. Ohanian & Paul S. Willen, *Can't Pay or Won't Pay Unemployment, Negative Equity, and Strategic Default* 17 (Nat'l Bureau of Econ. Research, Working Paper No. 21630, 2015), available at https://www.nber.org/papers/w21630 ("It seems reasonable to call a default strategic if a household has free cash flow that exceeds the cost of the mortgage. However, would it be equally appropriate to call a default strategic if the household could only "afford" the mortgage payment by drawing down its retirement savings or borrowing on credit cards? In other words, is default strategic unless the household has exhausted all of its savings and borrowed up to the maximum amount available on all available credit lines?").

[90] *See, e.g.,* Kristopher Gerardi, Kyle F. Herkenhoff, Lee E. Ohanian & Paul S. Willen, *Can't Pay or Won't Pay Unemployment, Negative Equity, and Strategic Default* 17 (Nat'l Bureau of Econ. Research, Working Paper No. 21630, 2015), available at https://www.nber.org/papers/w21630 ("In principle, one could answer this question with data, but to assess the sources of funds for payments, one would need much higher frequency wealth information than the biennial data from the PSID." Note that both the NMDB and the CCP provide the Bureau with access to data much more frequently than biennially.).

two years to observe their relative performance on different types of obligations. The findings of the study are striking. For example, with respect to the most recent cohort—those followed from February 2018 to February 2020—Experian found that among those with a mortgage, auto loan, retail card and general purpose credit card, 0.81% became 90 days delinquent on their mortgage whereas five times that number (4.26%) became 90 days delinquent on their bankcard. For those with a mortgage, bankcard, and personal loan, the disparities were roughly the same (1.35% vs. 6.81%).[91] This suggests that originating a mortgage where the consumer lacks a reasonable ability to repay may manifest itself in delinquencies on *other* obligations rather than on the mortgage itself.

The recent phase 2 data from the U.S. Census Bureau's Household Pulse Survey estimate that more than 10 million adults are borrowing money to pay their bills right now, and this phenomenon is more common among those who are also not highly confident that they can pay their next mortgage payment.[92]

Research supports our empirical experience: the vast majority of households that cannot afford their mortgages nonetheless keep paying them.[93] Such sacrifices have real life consequences in terms of limiting options for investment in education and retirement and often health and nutrition.[94]

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[91] Experian, *Consumer payment hierarchy by trade type: Time-series analysis* (July 2020), available at http://images.go.experian.com/Web/ExperianInformationSolutionsInc/%7Ba6ad2c78-e1da-46eb-b97b-bf2d953ce38d%7D_Payment_Hierarchy_Report.pdf. The Experian report confirms prior research indicating consumers' payment hierarchy are responsive to economic conditions and varied during the Great Recession. *See* TransUnion, *Payment Hierarchy Analysis* (2012), available at https://www.transunion.com/docs/rev/business/marketperspectives/smallbusiness/Payment_Hierarchy_White_Paper.pdf*;* TransUnion, *Consumers Place Personal Loans Atop the Credit Mountain* (May 2017), available at https://newsroom.transunion.com/consumers-place-personal-loans-atop-the-credit-mountain/. The recent Experian report appears to contradict the second of the TransUnion reports.

[92] U.S. Census Bureau, Household Pulse Survey, Table A2, *available at* https://www.census.gov/data/tables/2020/demo/hhp/hhp13.html#tables.

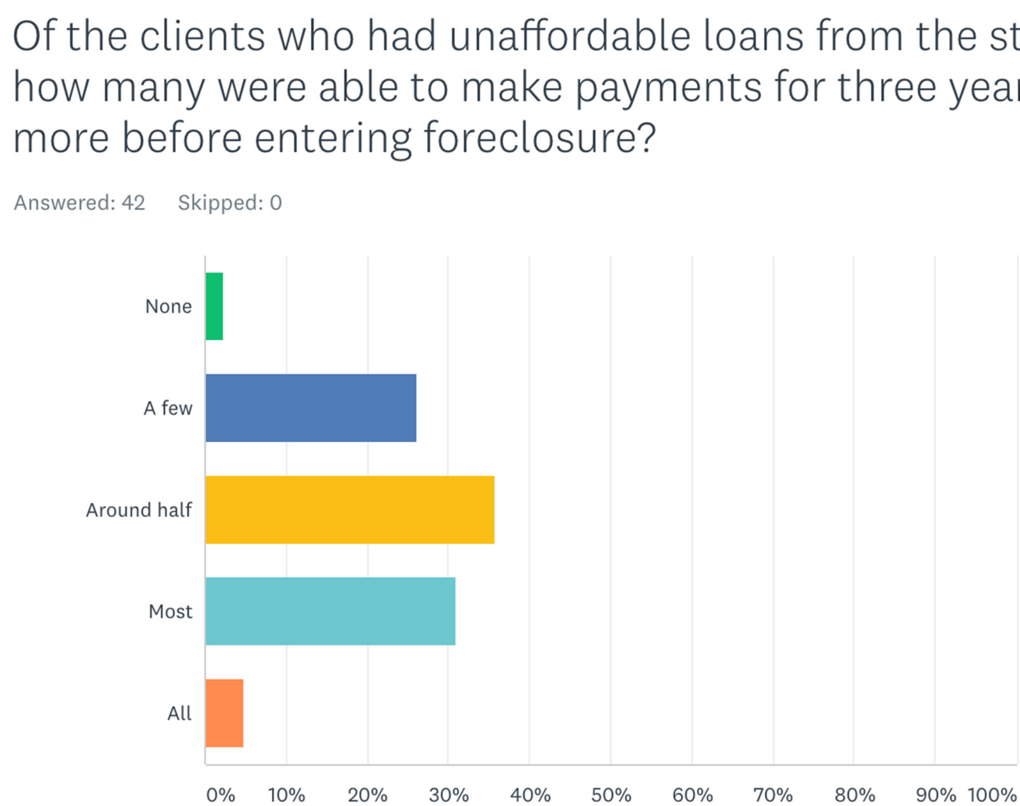
[93] Kristopher Gerardi, Kyle F. Herkenhoff, Lee E. Ohanian & Paul S. Willen, *Can't Pay or Won't Pay Unemployment, Negative Equity, and Strategic Default* 4 (Nat'l Bureau of Econ. Research, Working Paper No. 21630, 2015), available at https://www.nber.org/papers/w21630 ("Specifically, 80 percent of households that need to cut their consumption to subsistence levels to make their mortgage payments ('cant [sic] pay' borrowers) are current on their payments.").

[94] *See,* Kristopher Gerardi, Kyle F. Herkenhoff, Lee E. Ohanian & Paul S. Willen, *Can't Pay or Won't Pay Unemployment, Negative Equity, and Strategic Default* 17 n. 20 (Nat'l Bureau of Econ. Research, Working Paper No. 21630, 2015), available at https://www.nber.org/papers/w21630 ("[A] 'can pay' household is diverting money from saving and, therefore, future consumption by making its monthly payment. If along some future path, such a lack of saving results in destitution, then some 'can pay' households, as we have defined them, really cannot afford their mortgage payments.").

*b) Evidence from the field confirms that borrowers lacking ATR continue to pay their mortgages.*

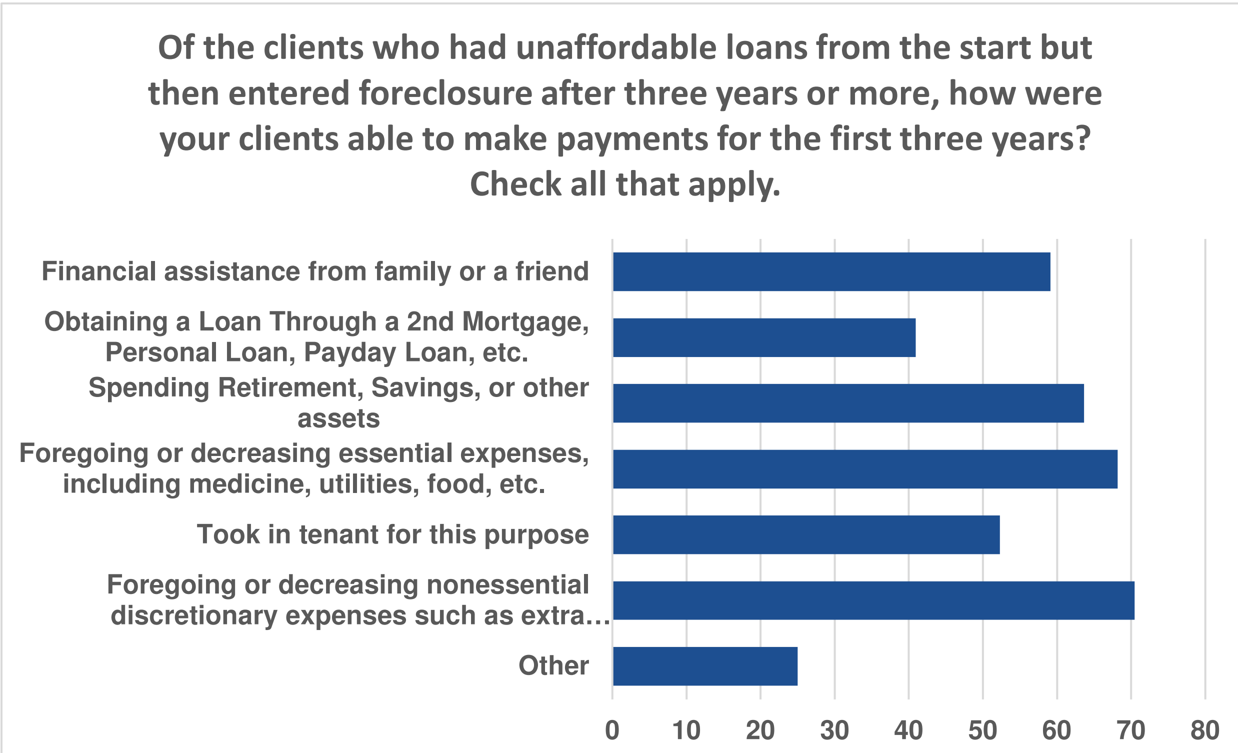
NCLC surveyed housing counselors and consumer attorneys about their experiences working with homeowners facing foreclosure. Of the survey's 42 respondents drawn from 17 states, 42% stated that they had represented more than 100 homeowners in their career and 38% have worked with over 500 homeowner clients. Collectively, the survey represents the experiences of at least 10,066 homeowners.[95] The survey results highlight the relatively high incidence of cases in which homeowners received loans that were unaffordable from the outset but were able to make payments for several years nevertheless.

Almost 50% of the survey respondents reported that about half of their clients received mortgages that were unaffordable from the start, and another 12% said that most of their clients received unaffordable mortgages from the start. As depicted in the graph below, one-third of respondents reported that most of their clients with unaffordable mortgages were able to pay the loan for three years, and another one-third reported that around half paid for at least three years.




[95] This figure is a conservative calculation based on the minimum number for each respondent (for example, using 500 for those who said at least 500).

The experience of the respondents was that many homeowners who are not properly reviewed for their ability to repay a mortgage loan nevertheless manage to make payments for at least three years. The survey then asked the respondents to identify how homeowners were able to make such payments. A graph depicting the results follows.




Almost 70% of respondents reported that one step that their clients took in order to make payments for the first three years was to forego or decrease essential expenses, including medicine, utilities, and food. Almost the same percentage reported that clients spent retirement savings. More than half of respondents stated that homeowners received financial assistance from family or friends, and over one-third took out a second mortgage or other loan to pay their mortgages.

This data shows that a significant number of homeowners continue to make timely payments on their mortgages for at least three years even though they did not have the ability to repay at consummation. The survey results reflect what we and our colleagues have seen in the field for many years:  three years of seasoning does *not* "conclusively" prove ability to repay at consummation.

Some advocates provided examples of borrowers who were able to pay their mortgage for at least three years even though they received unaffordable loans that clearly were not reasonably reviewed for ability to repay:

- A Georgia borrower was given a $58,000 fixed-rate loan with no documentation of her income. But she was able to pay her mortgage for several years by using her credit cards to pay for food, utilities, and other expenses. She only sought help from legal services after reaching the limit on her credit cards.
- An attorney in private practice described a mentally disabled Connecticut woman who had previously been able to meet her expenses from regular income and then was refinanced into an unaffordable mortgage that forced her to live off her credit cards for several years.
- A legal services attorney in Georgia described a client who avoided default on a fixed-rate, first mortgage by using his savings and getting a second mortgage after two years.
- The same attorney also reported having an elderly client who received a fixed-rate, 30-year mortgage that she managed to pay for at least four years with help from her daughter, even though the $947 mortgage payment was 115% of her income at closing.

In addition to the above examples, there are other reported cases demonstrating that three years or more of payments on a loan lacking a good faith and reasonable determination of ATR at origination is not so rare as to justify a conclusive presumption:

- An elderly New Jersey couple paid for about three years before defaulting even though their lender was alleged to have made the loan "without undertaking even minimal due diligence to see what [they] would be able to afford."[96]

- Another borrower refinanced her mortgage with Washington Mutual in 2005 and kept paying until 2008 even though she alleged that the lender "knew at the inception of the loan that she would never be able to repay it."[97]

- An Ohio borrower kept paying on a 1998 loan for several years until filing for bankruptcy in 2002. The borrower alleged numerous origination problems including improvident lending.[98]

Under the circumstances—a 30 day comment period on the heels of two other QM proposals during a national health and economic emergency—we were unable to conduct a broader study. But the data available and the collective experience of advocates who work with homeowners in foreclosure strongly indicate that the assumptions underlying the seasoning proposal are wrong. Rather than promote responsible lending, the proposed seasoning rule will encourage risky and predatory lending by providing a road map to insulation from legal challenge. While not all homeowners will be resourceful enough to continue paying unaffordable loans for three years, many will.

[96] Graddy v. Deutsche Bank, 2013 WL 1222655 (D.N.J. Mar. 25, 2013).
[97] O'Brien v. Select Portfolio Servicing, Inc., 2019 WL 267475 (D. Mass. Jan. 18, 2019), *aff'd sub nom.* O'Brien v. Deutsche Bank Nat'l Tr. Co., 948 F.3d 31 (1st Cir. 2020).
[98] Price v. EquiFirst Corp., 2009 WL 917950 (N.D. Ohio Apr. 1, 2009).

**4. The GSE sunset for reps and warranties is not a valid model for the seasoning rule.**

The Bureau cites the three-year sunset period used by Fannie Mae and Freddie Mac (the "GSEs") for terminating certain seller liability for new loan representations and warranties.[99] But that comparison only emphasizes how the Bureau's decision is unsupported and inappropriate.

Loan sellers represent and warrant that mortgages sold to the GSEs comply with the GSEs' requirements, including underwriting and documentation standards. If a mortgage is not compliant, the GSEs have the right to direct the seller to repurchase the mortgage. Effective January 1, 2013, the GSEs have a three-year sunset period on repurchase demands related to underwriting defects for certain types of loans.[100] The Federal Housing Finance Administration (FHFA) chose the three-year period based on data produced by the two GSEs. But the FHFA Office of Inspector General criticized FHFA for failing to properly analyze or validate the data.[101] By relying on FHFA's decision, the Bureau is compounding FHFA's mistake.

Even if the GSEs' data was valid and reliable, there are still significant differences between the GSEs' sunset period and the proposed seasoning rule. FHFA's decision was based on the aggregate financial impact on the GSEs' assets as a guarantor[102] and on the taxpayers' exposure under the conservatorship. The GSEs have significant control over the type of risks they accept from sellers. In contrast, the Congressional ATR mandate was intended to protect individual homeowners who lack the sophistication of the GSEs. To the FHFA, a single foreclosure is a small loss, the cost of doing business. But to a single homeowner who needs to assert the ATR defense to save their home, it is catastrophic. In evaluating its proposal, the Bureau should observe the time-honored interpretive perspective of TILA, that of the "ordinary" consumer, not the creditor or investor.[103] This is particularly true given that the Bureau proposes a conclusive presumption against consumers, justified almost entirely on the basis of benefits to creditors.[104]

Also, unlike the Bureau's proposal, the GSEs' repurchase relief policy excluded some representations and warranties, including misstatements, misrepresentations, and omissions.

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[99] The Bureau also refers to a similar practice in the mortgage insurance industry but we do not have access to documents analyzing or explaining the decision behind that practice. The Bureau's notice suggests that it has only taken that decision at face value, without any understanding of the assumptions or policy decisions behind it.

[100] Federal Housing Finance Agency, *News Release: FHFA, Fannie Mae and Freddie Mac Launch New Representation and Warranty Framework* (Sept. 11, 2012), available at https://www.fhfa.gov/Media/PublicAffairs/Pages/FHFA-Fannie-Mae-and-Freddie-Mac-Launch-New-Representation-and-Warranty-Framework.aspx.

[101] Federal Housing Finance Agency, Office of Inspector General, FHFA's Representation and Warranty Framework, AUD-2014-016 at 23 (Sept. 17, 2014), available at https://www.fhfaoig.gov/Content/Files/AUD-2014-016.pdf.

[102] The mortgage insurance industry likewise assesses risk of loss on a portfolio-wide basis, not solely on the risk associated with an individual loan.

[103] *See* Nat'l Consumer L. Ctr, *Truth in Lending*, § 4.2.4.2 (10th ed. 2019).

[104] The Bureau's cost-benefit analysis covers five federal register pages. Approximately one column of one page is devoted to the costs and benefits to consumers. *See* 85 Fed. Reg. at 53594-53599.

Those remain in effect for the life of the loan. Even though misstatements, misrepresentations, and omissions were common forms of loan originator mortgage fraud during the subprime lending boom, the Bureau's rule would likely prevent consumers from asserting a TILA defense even if the lender's failure to assess ATR is compounded by this type of misconduct as a defense to foreclosure.

Even more importantly, the GSE sunset rule is premised on the assumption that during the first three years after a loan is acquired, the GSEs will perform quality control checks and audits on loans. Before adopting the sunset period, the GSEs did not audit a loan for underwriting problems until after a default. But now FHFA requires the GSEs to conduct quality reviews within months of acquiring loans.[105] This may include demanding loan files from the seller for review; evaluating "loan files on a more comprehensive basis to ensure a focus on identifying significant deficiencies[;]" and "[l]everag[ing] data from the tools currently used by Fannie Mae and Freddie Mac to enable earlier identification of potentially defective loans."[106]

In summary, the GSEs have agreed to waive their right to demand repurchase of loans that have remain current for three years, but during that period, the GSEs have committed to rigorously examine new loans to catch and reject those with deficiencies *before* they default. As a result, the GSEs will assume that loans passing this quality control process and going three years without a disqualifying delinquency are in compliance with their underwriting standards (with critical exceptions). In contrast, the Bureau's proposal includes no quality control to weed out the bad loans and has no exceptions for known forms of misconduct. Worse, in using the GSE standards, meant to balance risk over a portfolio of loans, the Bureau conflates risk to the investor with borrower protection and a creditor's good faith and reasonable determination of ATR.

## IV. The additional elements proposed beyond 36 months of performance provide minimal protection for borrowers without ensuring ability to repay.

The Bureau's proposal seeks to mitigate the harm caused by a three-year seasoning rule by adding loan characteristic requirements to the rule. The Bureau tentatively concludes that the risk of a borrower making timely payments on a loan that lacked ATR is lessened by requiring these characteristics. If the rule is adopted, the additional required characteristics, set forth in proposed Reg. Z § 1026.43(e)(7)(i)(A)-(D), should be retained. But they are not a panacea. The additional loan features will not ensure the loans satisfy the Dodd-Frank ATR requirement or adequately protect borrowers or the communities they live in from risky, predatory loans or high foreclosure rates.

The rule, if finalized, should retain the loan performance requirements. But those requirements should be tightened to better comport with the intent of the rule and the goals of the statute. The CFPB should enhance the "consider and verify" requirement to match the new

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[105] Federal Housing Finance Agency, Office of Inspector General, FHFA's Representation and Warranty Framework, AUD-2014-016 at 14 (Sept. 17, 2014), available at https://www.fhfaoig.gov/Content/Files/AUD-2014-016.pdf.
[106] *Id*. at 15.

General QM requirement, which should incorporate our proposal (described in the appendix to our General QM comments) to ensure a meaningful consider and verify standard.

### A. A fixed rate loan, even without a balloon, does not ensure ability to repay.

While in the years immediately before the Great Recession, many abusive, unaffordable loans included exotic features such as adjustable rate mortgages with severe step increases, interest-only periods, negative amortization, and balloon payments, these characteristics are not a prerequisite for making a loan unaffordable. In the heyday of the subprime years in the 1990s, unaffordable fixed-rate loans were quite common. While balloon provisions made it harder to refinance out of some of these loans, it was the unaffordable payment itself that was the core problem, one that Dodd-Frank sought to address.

Here are two examples typical of many we have seen in which homeowners received fixed-rate loans that were unaffordable but the borrower was able to make payments for at least three years:

- Ms. W had paid off her mortgage and then in 2005 took out another mortgage loan. In 2009 she sought help from legal services. When she sought help, her monthly income was $820 from her pension and $181 from SSA; her income was lower when she received the loan in 2005 and her new loan then had a fixed rate and monthly payments of $947.19 per month, essentially exceeding her income. While the company had offered to refinance her because she had continued making payments, the monthly payment on the refinance of over $700 was still unaffordable.

- Ms. G, an eighty-year old retired widow, lived in her home for approximately 20 years. In 2004, American Freedom Mortgage extended her a fixed-rate mortgage loan of $58,000, with monthly payments, including for property taxes and homeowner's insurance, of approximately $427. The loan was apparently sold immediately after closing to Ohio State Bank, and then to Wells Fargo. Her income at that time was comprised of Social Security retirement income of $814 that she supplemented with limited part-time work as a caregiver for home-bound adults, although it was clear such work could not continue long in light of her age. Once she stopped doing the caregiver work, her monthly mortgage payment consumed over 50% of her monthly income. Ms. G managed to stay current on the mortgage until late in 2009 only by incurring large amounts of credit card debt. Her credit cards reached their limit, and she was no longer able to rely on them as a means to pay her other expenses, such as utilities, food, and medical expenses, placing her at imminent risk of default and foreclosure, and the loss of her home of twenty years.

Even without a balloon provision, defaulting on a loan that violates ATR, even if it is fixed rate, precludes the option to refinance and presents serious challenges to home retention. Thus, including this fixed-rate feature as a required element for seasoning does not ensure that seasoned loans meet an ATR standard. Nonetheless, the fixed-rate features and the ban on balloon payments should be included in any final rule. Adjustable or balloon features exacerbate the risks of unaffordable and irresponsible lending.

### B. Holding a loan in portfolio does not guarantee ability to repay.

The Bureau proposes that loans must be held in portfolio for three years in order to be eligible for seasoned QM status. As with other loan features, holding the loan in portfolio does not guarantee that the creditor made a good faith and reasonable determination of ATR at origination. For example, Washington Mutual and Wachovia failed in the aftermath of the financial crisis because of their portfolio loans, underwritten without any meaningful consideration of the borrower's ability to repay.[107] Indymac also failed with a portfolio of poorly underwritten loans.[108] Holding loans in portfolio is not conclusive evidence of ATR. Moreover, the expectation of eventually selling these loans to the secondary market, free of any ATR claims, undercuts any incentive to underwrite responsibly.

Nonetheless, the Bureau should retain the portfolio requirements. While not sufficient to ensure affordable, responsible mortgage lending, as required by the statute, holding loans in portfolio does provide some incentive to underwrite them appropriately. Removing even this weak incentive would increase risk to homeowners and the larger economy from this proposal.

### C. The proposed loan performance requirement should be tightened.

The Bureau should ensure that its definition of loan performance does not have loopholes. Under the proposal, a borrower will be considered to have performed on the loan if the loan does not have more than two 30-day late payments and no 60-day lates. Yet, it is very common for struggling homeowners to have rolling delinquencies, paying a bit late month after month, never quite catching up. The Bureau's proposal is silent on such scenarios.

The Bureau should provide clarifying commentary to address rolling lates. Borrowers who pay 29 or 30 days late every month maintain a persistent delinquency, showing clear signs of financial distress, not ability to repay. The Bureau should revise the rule to limit payment delinquencies to no more than two payments outside the grace period for late payments. This approach is more in line with the limit on deficient payments of not more than $50.

### D. If the seasoning rule is adopted, the requirement to consider and verify income and expenses should incorporate a rigorous set of standards in line with the General QM rule and not the vague rules in the current small creditor rule.

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 Bureau justified the small creditor QM definition by reference to specific practices, including "high-touch" lending that it believed correlated with being rooted in a specific community or region, as opposed to the "too big to fail" institutions that may functionally have minimal accountability to anyone. The Bureau fails to explain why that set of assumptions would or

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107 Ben White and Eric Dash, *Wachovia, Looking for Help, Turns to Citigroup*, New York Times (Sept. 26, 2008), available at http://www.nytimes.com/2008/09/27/business/27bank.html?_r=0.

108 David Min, *How Government Guarantees in Housing Finance Promote Stability*, 50 Harv. J. Legis. 437, 478 n.227 (2013), available at https://scholarship.law.uci.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1036&context=faculty_scholarship.

should translate across the mortgage market to include the Indymacs, Wachovias, and World Savings Banks of tomorrow.

Because the Seasoned QM proposal provides no direct ATR requirement and, by design incorporates more expensive and riskier loans than those eligible for the already broad General QM rule, there is no basis to use a lower standard for "consider and verify." The three years of seasoning plus loan characteristics do not transform loans into "safer than General QM" loans. To the contrary, as discussed throughout these comments, loans subject to the Seasoning QM proposal remain risky. Thus, the Bureau must require a higher consider and verify standard for seasoned loans than is required of small creditors, instead of merely proposing that a loan will comply with the consider and verify requirements in the Seasoned QM definition if it complies with the consider and verify requirements of any other QM definition.[109] At a minimum, the consider and verify standard for seasoned QM loans should adopt the joint civil rights and consumer advocate term sheet proposal, as provided on page 35 of our General QM comments.

### E. The Bureau should not apply the seasoning safe harbor retroactively.

The Bureau asks whether it should afford the safe harbor to loans made before the effective date. We agree that—if the Bureau adopts the proposed rule—it should not apply to loans in existence before the effective date. Doing otherwise would likely violate the vested rights of non-QM borrowers.[110]

## V. Conclusion

The Bureau's proposal is in direct contravention of Congressional intent. The Bureau has not cited any authority for the proposition that it can, in effect, create a new statute of limitations to bar the courthouse door to all homeowners after an arbitrary period of time. Nor does the Bureau produce evidence to demonstrate that a conclusive presumption of a good faith, reasonable determination of ATR is warranted after three years of payments. The proposal should be withdrawn.

[109] *See* proposed comment 43(e)(7)(i)(B)-1

[110] Landgraf v. USI Film Prods., 511 U.S. 244 (1994).