Comments of the

Atlanta Legal Aid Society, Inc.,

Consumer Federation of America,

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

the National Association of Consumer Advocates, and the

National Community Stabilization Trust

on

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

84 Fed. Reg. 37,155 (July 31, 2019)

Docket No. CFPB–2019–0039

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I. Introduction and Principles

Thank you for the opportunity to submit comments on this advanced notice of proposed rulemaking (ANPRM). These comments are submitted by the Atlanta Legal Aid Society, Inc.,[1] the Consumer Federation of America,[2] the National Consumer Law Center[3] (on behalf of its low-

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[1] Atlanta Legal Aid Society, Inc. is a nonprofit organization that provides civil legal assistance to persons of limited financial means in the Atlanta metropolitan area (including Fulton, DeKalb, Gwinnett, Cobb, and Clayton counties). The Home Defense Program, a specialty unit of Atlanta Legal Aid, provides legal advice, representation, and referrals to homeowners who are at risk of foreclosure, have been targeted for predatory mortgage lending or servicing practices, have been victims of real estate-related fraud, or have been wrongfully denied loan modifications or other foreclosure prevention alternatives.

[2] Consumer Federation of America (CFA) is a nonprofit association of some 250 national, state, and local pro-consumer organizations created in 1968 to represent the consumer interest through research, advocacy, and education. Barry Zigas worked on these comments for CFA. Barry Zigas worked on these comments for CFA.

[3] 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, including older adults, 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 exploitive practices, help financially stressed families build and retain wealth, and advance

income clients), the National Association of Consumer Advocates ("NACA"),[4] and the National Community Stabilization Trust.[5]

We appreciate the opportunity to provide comments on possible revisions to the Qualified Mortgage (QM) definition at the advanced notice of proposed rulemaking stage. The expiration of the GSE patch is perhaps the most significant issue for consumers, the mortgage markets, and the global economy that the Bureau will address during the current Director's tenure. The issues are complex and not capable of simple resolution. Whatever the Bureau does here will have a lasting impact on access to credit, particularly for low-income communities and communities of color.

In addressing the expiration of the patch and any possible re-definition of Qualified Mortgages, the Bureau must keep the dual purposes of the Dodd-Frank Act mortgage origination rules, access and ability to repay, front and center. As the Dodd-Frank Act recognized, access to responsible, affordable credit, which builds wealth, is dependent on creditors making reasonable determinations of ability to repay when originating safe and sustainable products. Access to unaffordable credit is destructive, as the financial crisis that led to the Dodd-Frank Act showed. The Dodd-Frank Act mortgage rules therefore have as their central purpose and fundamental consumer protection "to assure that consumers are offered and receive residential mortgage loans on terms that reasonably reflect their ability to repay the loans."[6]

The following principles represent key tenets for the Bureau's QM rulemaking:

1. **The Bureau has a dual mandate regarding mortgage regulations.**

   - To promote access to responsible, affordable credit, including for communities of color and low-income communities where fair and sustainable access is far too limited; and

   - To ensure that mortgage loans are only offered on terms that reasonably reflect borrowers' ability to repay.

2. **Ability to repay must remain part of the Qualified Mortgage.** Any changes to the Bureau's Qualified Mortgage (QM) rules must advance these purposes and therefore must ensure that lenders assess a borrower's ability to repay before a loan can benefit from qualified mortgage status.

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economic fairness. NCLC publishes a series of consumer law treatises including *Truth in Lending*, *Mortgage Lending*, and *Foreclosures*. Alys Cohen worked on these comments for NCLC.

[4] The National Association of Consumer Advocates (NACA) is a non-profit corporation whose members are private and public sector attorneys, legal services attorneys, law professors, and law students, whose primary focus involves the protection and representation of consumers. NACA's mission is to promote justice for all consumers.

[5] The National Community Stabilization Trust is a non-profit organization that aims to support families and communities by restoring distressed single-family homes, strengthening neighborhoods, and increasing sustainable, affordable homeownership. NCST pursues its mission through real estate transactions and policy advocacy. Julia Gordon worked on these comments for NCST.

[6] TILA §129B(a)(2).

3. **Credit risk is distinct from the statutory requirement of consideration of ability to repay.** While ability to repay should be an important component of the credit risk assessment that lenders make and reflect in loan pricing, lenders must also be required to independently reasonably determine ability to repay, as required under the statute, and, at a minimum, consider verified debts and income in order to receive QM status. The Bureau must retain the power to examine for ATR compliance on all loans.

4. **Restrictions on high-risk products and features should not be altered.** The Bureau should retain and not change the statutory qualified mortgage product restrictions. Creditors wishing to offer higher risk products or features outside of the current rule's definitions should comply with the full ATR requirement.

5. **Seasoning is not an ATR measure.** That Congress included in its ATR rules the provision for recoupment in foreclosure at any point in the loan demonstrates that it did not view seasoning—the presumption that a loan is affordable if it does not default within a period of time—as a substitute for assessing the ability to repay. Moreover, seasoning does not offer a "bright line" at origination, is not an option for lenders without large balance sheets, and would hit independent mortgage bankers, who are an important source of credit to underserved communities, particularly hard.

6. **A single DTI threshold in the absence of the patch or other broader underwriting would undermine the statute and constrict access to credit.** Abandoning the patch, as the Bureau has said it intends to do, while leaving in place a hard DTI cut off would be a serious blow to both congressional intent and to practical access to home finance for millions of qualified borrowers, especially borrowers of color.

   The Bureau should not maintain Appendix Q. Appendix Q's cumbersome and outdated approach creates barriers to QM lending, especially for borrowers with non-traditional W-2 income. An alternate approach should be adopted.

The Bureau has stated that it intends to terminate the GSE patch that allows loans eligible for purchase and securitization by Fannie Mae and Freddie Mac to receive an irrebutable presumption of compliance with the Ability to Repay requirements of the Dodd-Frank Act. It has sought comment on what bright line test, if any, should replace it. We believe that the patch has been a successful approach to assuring a balance between creditors' demands for a bright line qualified mortgage definition and the critical importance of assessing ability to repay with a sound and robust consideration of a consumer's financial condition. Creditors that do not take advantage of the patch but wish to take advantage of the Qualified Mortgage safe harbor are restricted to loans with debt to income ratios not greater than 43%and must underwrite the loans according to the Bureau's Appendix Q. The former is an overly rigid and inappropriate measure of ability to repay; the latter has been broadly criticized as outdated and too complex to support broad, scalable use by creditors. We believe any single measure like DTI to assess ability to repay is likely to underassess ability to repay for many consumers, particularly low-income consumers and communities of color and that therefore the Bureau should explore a more flexible and nuanced approach. At the same time, we recognize that, in order to facilitate compliance, significant changes to Appendix Q are needed. We strongly endorse the product restrictions incorporated in the current QM definition and urge the Bureau not to tamper with these important restrictions, although preserving a direct ability to repay measure inside of QM as well is essential.

II. Before Allowing the Patch to Expire, the Bureau Must Consider and Address Its Duty to Promote Access to Responsible, Affordable Credit, Particularly in Low-Income Communities and Communities of Color.

The expiration of the GSE patch poses a critical challenge to the provision of responsible, affordable mortgage credit to all consumers, but especially to communities of color and low-income communities.[7] The existing QM definition, with its unitary reliance on an arbitrary DTI threshold, is likely to drive these consumers out of the conventional market.[8] Assuming that FHA, VA, and RHS maintain their current lending practices and do not restrict loan amounts or tighten underwriting requirements, many of these consumers may be able to obtain higher priced fully government insured loans, increasing the overall cost of their credit and the amount of risk taken by taxpayers. Consumers who do not fit the requirements of these government-insured lenders will be forced into the still nascent non-QM market.[9] The Bureau must address the question of where these loans would go, if they would be made at all, and on what terms, before the expiration of the patch, if the Bureau is to fulfill its statutory mandate to assure access to responsible, affordable mortgage credit for all consumers. There is a real risk that hasty or ill-considered action by the Bureau in adjusting the Qualified Mortgage definition could make access to credit worse for communities of color and low-income communities, either immediately with a market shock that severely restricts access to these traditionally underserved communities or over a longer term by blessing predatory practices that further strip wealth from these communities.

The foreclosure crisis brought on by the last great wave of irresponsible, unaffordable lending stripped communities of color – particularly African-American communities – of more than a generation of wealth.[10] Now, more than a decade since the end of the Great Recession, the gap

[7] *See* Laurie Goodman, Housing Fin. Pol'y Ctr., Urban Inst. New Data Confirm the Urgency of Addressing the Expiration of the GSE Patch (Mar. 25, 2019) https://www.urban.org/urban-wire/new-data-confirm-urgency-addressing-expiration-gse-patch; Archan Prachan, *Expiration of the CFBP's Qualified Mortgage 'GSE Patch' – Part 3,* CoreLogic Insights Blog (July 26, 2019), https://www.corelogic.com/blog/2019/07/expiration-of-the-cfpbs-qualified-mortgage-gse-patch-part-3.aspx (reporting that more than a third of mortgage applications by African-American and Hispanic borrowers, and almost 40% of applications by low-income borrowers, have DTI ratios over 43%; "[T]he share of African-American and Hispanic/ Latino borrowers that applied for a loan in the GSE Patch is higher than the share of non-Hispanic White and Asian borrowers. Similiarly, low-income borrowers' share of GSE Patch loans is higher compared with middle- and upper-income borrowers' shares.").

[8] Peter Carroll, *Expiration of the CFBP's Qualified Mortgage 'GSE Patch' – Part 1,* CoreLogic Insight Blog (July 11, 2019), https://www.corelogic.com/blog/2019/07/expiration-of-the-cfpbs-qualified-mortgage-gse-patch-part-1.aspx ("[I]f the GSE Patch had expired at the beginning of 2018, $260B of 2018 mortgage loan origination volume would have had to have been originated as Non-QM loans, as they would not have been QM-eligible.").

[9] Karan Kaul & Laurie Goodman, Housing Fin. Pol'y Ctr., Urban Inst., Updated: What, If Anything, Should Replace the Patch 8 (Oct. 2018), https://www.urban.org/sites/default/files/publication/99268/2018_10_30_qualified_mortgage_rule_update_finalized_4.pdf ("At the very least, this suggests that today's non-QM market would have to undergo a massive multiyear expansion and transformation to adequately serve the void left behind by the GSE patch.").

[10] *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), https://prosperitynow.org/sites/default/files/PDFs/road_to_zero_wealth.pdf (showing decline in both African-

between white rates of homeownership and Hispanic and African-American rates has not closed. On the contrary, the homeownership gap between African Americans and whites, which had been shrinking for decades before the foreclosure crisis, is now greater than it was during the Jim Crow era.[11] Hispanic homeownership has also not reached its pre-crisis levels.[12] The clear majority of white households—73%—live in homes they own.[13] But only 46.6% of Hispanics households and only 40.6% of African American households live in homes they own.[14]

This large gap in homeownership denies those communities the opportunity for economic mobility offered by homeownership, which provides the ability to build equity, provide stable homes for children, and pass wealth on to heirs. While there are several reasons for this gap, including a wage gap as well as structural discrimination such as that caused by exclusionary zoning, one of the most important reasons for the gap is differential access toresponsible, affordable, mortgage credit. Hispanics and African Americans continue to be denied mortgage credit at disproportionately high rates, even after accounting for basic indicators of creditworthiness, and to be overcharged for the mortgage credit they do receive.[15] The most recent HMDA data confirm that Hispanics and African Americans are denied at rates higher than whites and pay more for every kind of mortgage loan reported under the HMDA data.[16]

The Bureau has a statutory mandate to facilitate access to credit.[17] Specifically, Congress charged the Bureau with facilitating access to "…responsible, affordable mortgage credit"[18] that "reasonably reflect[s] . . . ability to repay."[19] While the Bureau has an obligation to do so for all consumers, the

American and Latino household wealth over the period from 2007-2013 to levels below household wealth thirty years earlier).

[11] Aaron Glantz & Emmanuel Martinez, *For people of color, banks are shutting the door to homeownership*, Reveal News, Ctr. for Investigative Reporting (Feb. 15, 2018), https://www.revealnews.org/article/for-people-of-color-banks-are-shutting-the-door-to-homeownership/.

[12] Unidos US, Fact Sheet, Latino Homeownership Hanging in the Balance: Observations from the Home Mortgage Disclosure Act (Mar. 2018), http://publications.unidosus.org/bitstream/handle/123456789/1838/Latino%20HMDA%20Fact%20Sheet.pdf?sequence=4&isAllowed=y.

[13] U.S. Census Bureau, Quarterly Residential Vacancies and Homeownership, Second Quarter 2019, CB19-98 at 9 (July 25, 2019), https://www.census.gov/housing/hvs/files/currenthvspress.pdf.

[14] U.S. Census Bureau, Quarterly Residential Vacancies and Homeownership, Second Quarter 2019, CB19-98 at 9 (July 25, 2019), https://www.census.gov/housing/hvs/files/currenthvspress.pdf.

[15] Consumer Fin. Prot. Bureau, Data Point: 2017 Mortgage Market Activity and Trends 41, 50 (May 2018), https://files.consumerfinance.gov/f/documents/bcfp_hmda_2017-mortgage-market-activity-trends_report.pdf. (reporting that African-American borrowers are denied loans at more than twice the rate of white borrowers, and Hispanic and African-American borrowers are more than twice as likely as white borrowers to have high-priced loans as well).

[16] Feng Liu, Jason Dietrich, Young Jo, Akaki Skhirtladze, Misha Davies, & Corinne Candilis, Consumer Fin. Prot. Bureau, Introducing New and Revised Data Points in HMDA: Initial Observations from New and Revised Data Points in 2018 HMDA 58, 63 (Aug. 2019) (noting that the elevated denial rates for Hispanics and African-Americans compared to white borrowers hold true even after accounting for credit score).

[17] Dodd-Frank Act § 1021(a) ("The Bureau shall seek to implement . . . Federal consumer law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services . . . .").

[18] TILA §§ 129B(a)(1), 129C(b)(3)(B)(i).

[19] TILA §129B(a)(2).

statute intentionally required the Bureau to focus on "traditionally underserved consumers and communities,"[20] which include communities of color and low-income communities.

The Bureau uniquely has the tools both to determine the cause of the gap and to address it. It has the ability to obtain new data;[21] conduct original research; reshape the incentives of market participants through rulemaking, supervision, and enforcement; enhance consumer decision making; and address functional inefficiencies in related markets that are impinging on consumer access to responsible, affordable mortgage credit.

In any adjustment of the Qualified Mortgage definition, the Bureau must address the very real problem of limited access to responsible, affordable mortgage credit for communities of color and low-income communities. Yet adjusting the Qualified Mortgage definition, while crucial to this mission, is only one of many methods of addressing the Bureau's statutory obligation to assure access to responsible, affordable mortgage credit. To do so most effectively, the Bureau must also use its other tools.

The Bureau is not limited to a single approach or tool in addressing market inequalities and promoting access to responsible, affordable mortgage credit. For example, in the face of concerns in connection with the General Qualified Mortgage definition that debt-to-income ratios (DTI) are by themselves insufficiently correlated to ability to repay, the Bureau could, conduct research on alternative measures of ability to repay,[22] such as residual income or cash flow, in order to lay the groundwork for a viable substitute for DTI. It could encourage the provision of responsible, affordable credit to communities of color and low-income communities by engaging in vigorous supervision and enforcement for fair lending violations, including redlining and overpricing. It could look at the role student loan debt or faulty credit reporting is playing in denials or pricing increases to consumers, particularly in communities of color and low-income communities. It could enhance consumer decision making and competition in the market through the refinement of its existing online tools to help consumers shop for mortgages.

Despite this wide array of tools, the Bureau is failing to protect communities of color and low-income communities. Congress recognized the role discrimination has played in mortgage lending and the creation and maintenance of the racial wealth gap, yet the Bureau has pulled back from any meaningful effort to combat discrimination. Under Director Cordray, the Bureau pursued eleven fair lending cases, providing $618,726,890 in consumer relief. Just one case (and one based on faulty HMDA reporting rather than ECOA violations) has been brought under the combined tenure of Acting Director Mulvaney and Director Kraninger.[23] Under their leadership, the Bureau has publicly

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[20] Dodd-Frank Act § 1013(b)(2) (creating the unit of Community Affairs). *See also* Dodd-Frank Act § 1013(c) (creating the Office of Fair Lending and Equal Opportunity).

[21] *See, e.g.,* Dodd-Frank Act § 1022(c)

[22] *See* TILA §129C(b)(2)(A)(vi) (authorizing the Bureau to promulgate regulations relating to DTI or "alternative measures of ability to repay.")

[23] *See* Chris Peterson, Consumer Fed. of America, Dormant: The Consumer Financial Protection Bureau's Law Enforcement Program in Decline 26 (Mar. 2019) https://consumerfed.org/wp-content/uploads/2019/03/CFPB-Enforcement-in-Decline.pdf. Professor Peterson's survey identified no fair lending enforcement cases under either Acting Director Mulvaney or Director Kraninger. A search of the Bureau's website listing of enforcement cases with the topic "fair lending" selected returns one under their combined tenue, a June 2019 settlement with Freedom Mortgage providing for a payment to the civil monetary penalty fund, but no restitution or, apparently and more relevantly for a HMDA case, no requirement of corrected reporting.

announced a desire to re-evaluate the use of disparate impact in fair lending cases,[24] which would further limit the ability of both the Bureau and private plaintiffs to root out invidious discrimination. The statutorily required office charged with promoting fair lending has had its enforcement powers stripped from it, and the Bureau has even suggested reducing the basic data available to assess patterns of discriminatory lending.[25]

The Bureau is also not using f its other tools to address the racial wealth gap. For example, the Bureau has not released public evaluation of alternative measures of ability to repay, including residual income, which might do much to open up access to responsible, affordable credit for traditionally underserved communities.[26] Worse perhaps, the Bureau has failed to meaningfully protect student loan borrowers,[27] even though the data is mounting that student loan debt delays household formation[28] and may be a particular impediment in mortgage lending to African-Americans..[29] Work appears to have stopped on the Bureau's Owning a Home tool, which could do more to assist consumer decision making.[30]

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[24] *See* Statement of the Bureau of Consumer Financial Protection on Enactment of S.J. Res. 57 (May 21, 2018), https://www.consumerfinance.gov/about-us/newsroom/statement-bureau-consumer-financial-protection-enactment-sj-res-57/; Consumer Fin. Prot. Bureau, Fall 2018 Semi-Annual Regulatory Agenda, https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/201810/Preamble_3170.html ("For example, the Bureau announced in May 2018 that it is reexamining the requirements of the Equal Credit Opportunity Act concerning the disparate impact doctrine in light of recent Supreme Court case law and the Congressional disapproval of a prior Bureau bulletin concerning indirect auto lender compliance with ECOA and its implementing regulations.").

[25] 84 Fed. Reg. 20,972 (May 13, 2019).

[26] The Bureau's assessment notes support from industry trade groups, consumer advocates, and creditors for inclusion of residual income in the Qualified Mortgage definition, but provides no further discussion as to the feasibility of residual income as an alternative or supplement to DTI. Bureau of Consumer Fin. Prot., Ability-to-Repay and Qualified Mortgage Rule Assessment Report, at 260 (Jan. 2019), https://www.consumerfinance.gov/documents/7165/cfpb_ability-to-repay-qualified-mortgage_assessmentreport.pdf (Assessment Report or Report). *See also id.* at 19 ("This report does not generally consider the potential effectiveness of alternative requirements
on the origination of consumer mortgages that might have been or might be adopted.")

[27] *See, e.g.,* Kate Berry, *CFPB Names Student Loan Servicing Exec as Ombudsman*, Am. Banker, Aug. 16, 2019 (noting a nearly year long gap between the resignation of the prior student loan ombudsman and the appointment of a new one).

[28] *See* Alvaro Mezza, Daniel Ringo, & Kamila Sommer, *Can Student Loan Debt Explain Low Homeownership Rates for Young Adults?* 1 *Consumer and Community Context* 3 (Jan. 2019), *available at* https://www.federalreserve.gov/publications/files/consumer- community-context-201901.pdf (estimating that about 20% of the decline in homeownership among young adults is due to heavy student loan debt).

[29] While student debt is a barrier to homeownership for all young adults, *see* Alvaro Mezza, Daniel Ringo, & Kamila Sommer, *Can Student Loan Debt Explain Low Homeownership Rates for Young Adults?* 1 *Consumer and Community Context* 3 (Jan. 2019), *available at* https://www.federalreserve.gov/publications/files/consumer- community-context-201901.pdf (estimating that about 20% of the decline in homeownership among young adults is due to heavy student loan debt), African American have higher levels of student loan debt and higher default rates, which are likely to restrict their ability to obtain mortgage loans. *See* Ctr. for Responsible Lending & NAACP, Quicksand: Borrowers of Color and the Student Debt Crisis (July 20, 2019) https://www.responsiblelending.org/research-publication/quicksand-borrowers-color-student-debt-crisis.

[30] The Bureau's excellent Owning a Home toolkit, https://www.consumerfinance.gov/owning-a-home/ stops short of full functionality for borrowers. For example, more detailed information about loan pricing would be helpful, as would more information on settlement costs. The guide by definition is focused on purchasing a home and doesn't cover the refinance market. Work on Owning a Home, and further developing robust consumer comparison shopping tools in the mortgage space, appears to have virtually stopped under Acting Director Mulvaney and Director Kraninger.

III. If the Bureau Wishes to Follow the Director's Stated Goal of Prevention of Consumer Harm and also Let the Patch Expire, Adjustments to the QM Definition Must Be Made that Retain and Reinforce Ability to Repay.

A. The GSE Patch Functioned Well to Provide Access to Responsible, Affordable Credit.

A key part of QM's success in encouraging lenders to lend more broadly is the adoption of the "GSE patch." Allowing lenders to rely on the well-established underwriting criteria in the GSE (and other agency) automated underwriting engines provides both a bright-line safe harbor and the flexibility needed to meet the needs of multiple borrower populations.[31] Also, because the only requirement for this safe harbor is that the loan be eligible for sale to the GSEs, not that it actually be sold to a GSE, the patch permits the emergence of other secondary market participants, who can also benefit from the assurances provided by the patch.[32]

The GSEs have a comparative advantage over a regulatory agency like the CFPB in developing and updating underwriting criteria, as well as a comparative advantage over most lenders, because they are able to adjust their standards in real time, providing for greater flexibility and innovation than a regulatory agency could ever accomplish.[33] For example, as the Bureau obliquely references in the ANPRM,[34] in late 2017, Fannie Mae experimented with reducing required compensating factors at DTI levels between 45% and 50%.[35] After evaluating the results of this experiment, Fannie Mae reversed course on this change, re-instituting additional underwriting requirements at DTI levels above 45%.[36] It would be extremely unwise, even if possible, for the CFPB to execute the necessary rulemaking to permit similar changes to the general QM definition in a similar time frame.[37]

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[31] *See, e.g,* Advanced Notice of Proposed Rulemaking, 84 Fed. Reg. 37,155, 37,157 (July 31, 2019) (citing comments from industry participants praising the GSE patch for these two qualities).

[32] The Bureau's assessment notes that the GSE's market share has grown only slightly during the years since the patch was put in place, suggesting that the patch is not by itself driving market dominance. Bureau of Consumer Fin. Prot., Ability-to-Repay and Qualified Mortgage Rule Assessment Report, at 191 (Jan. 2019), https://www.consumerfinance.gov/documents/7165/cfpb_ability-to-repay-qualified-mortgage_assessmentreport.pdf (noting an increase in market share from 69% in 2013 to 71% in 2017).

[33] Bureau of Consumer Fin. Prot., Ability-to-Repay and Qualified Mortgage Rule Assessment Report, at 193 (Jan. 2019), https://www.consumerfinance.gov/documents/7165/cfpb_ability-to-repay-qualified-mortgage_assessmentreport.pdf (noting that the GSEs update their underwriting guidelines monthly and sometimes more frequently).

[34] 84 Fed. Reg. 37,155, 37,159 (July 31, 2019) (asserting that "one GSE loosened its underwriting standards in ways that proved unsustainable").

[35] *See generally*); Edward Golding, Laurie Goodman, & Jun Zhu, Fannie Mae Raises the DTI Limit: A Win for Expanding Access to Credit, Housing Fin. Pol'y Ctr., Urban Inst. (July 2017), https://www.urban.org/sites/default/files/publication/91936/fannie_mae_raises_dti_limit_0.pdf (discussing the experiment in more detail).

[36] Bureau of Consumer Fin. Prot., Ability-to-Repay and Qualified Mortgage Rule Assessment Report, at 243 (Jan. 2019), https://www.consumerfinance.gov/documents/7165/cfpb_ability-to-repay-qualified-mortgage_assessmentreport.pdf (Assessment Report or Report) (discussing the history of this seven-month experiment; no characterization of the increased lending during this period as "unsustainable")

[37] The Fannie Mae experiment lasted seven months.

Given the dominance of the mortgage market by the GSEs and their chartered purpose of providing liquidity in mortgage credit and standardization in underwriting, the GSE patch streamlined and simplified compliance. Creditors could be assured that loans eligible for sale to the GSEs met the requirements of the Qualified Mortgage definition as well as the secondary market.[38] The patch satisfied creditor demands for a "bright line" that would be easily understood, scalable, and reliable, while also providing the necessary flexibility. Unsurprisingly, most mortgages made since the rules went into effect in January 2014 were eligible for Qualified Mortgage status under the GSE patch.[39]

The Bureau adopted the patch as a temporary approach expecting that the market's dependence on the GSEs would diminish with the reemergence of a robust private label market in mortgage backed securities.[40] That market has not emerged,[41] which means a rapid shift to a different regulatory compliance protocol poses a very real risk of significant disruption to credit markets and individual creditors, as well as to individual consumers and the communities they live in. The Bureau must provide for a measured transition from the patch if it is to avoid the significant economic and market shocks the patch was put in place to avoid.[42]

The Bureau provides no specific analysis supporting its stated determination to let the patch expire. The Bureau cites one instance of a GSE "loosening" credit standards to an "unsustainable" level, while, in the next breath, expressing an interest in loosening ability to repay standards for the entire industry to promote innovation.[43] Yet a seven-month trial of relaxed requirements for compensating standards between 45% and 50% DTI is hardly unsustainable,. Indeed, experimenting with the best use of compensating standards in the 45% to 50% DTI range is exactly the sort of controlled, real world experiment that is necessary to conduct if we are to understand

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[38] Bureau of Consumer Fin. Prot., Ability-to-Repay and Qualified Mortgage Rule Assessment Report, at 196 (Jan. 2019), https://www.consumerfinance.gov/documents/7165/cfpb_ability-to-repay-qualified-mortgage_assessmentreport.pdf ("A final reason for the continued use of the Temporary GSE QM relative to the General QM is the immediate liquidity available to creditors through the robust secondary market available for loans originated to the GSE standards.").

[39] Bureau of Consumer Fin. Prot., Ability-to-Repay and Qualified Mortgage Rule Assessment Report, at 191 (Jan. 2019), https://www.consumerfinance.gov/documents/7165/cfpb_ability-to-repay-qualified-mortgage_assessmentreport.pdf.

[40] 78 FR 6408, 6534 (Jan. 30, 2013).

[41] Bureau of Consumer Fin. Prot., Ability-to-Repay and Qualified Mortgage Rule Assessment Report, at 191 (Jan. 2019), https://www.consumerfinance.gov/documents/7165/cfpb_ability-to-repay-qualified-mortgage_assessmentreport.pdf. While the Bureau's assessment did not address the reasons that the market has not rebounded, others have noted that investor confidence in the private label market was badly shaken by the foreclosure crisis. Investors have also not yet had sufficient time to adjust to and price accordingly the many regulatory and policy changes that came out of the foreclosure crisis. *See, e.g.,* Laurie Goodman, *The Rebirth of Securitization: Where is the Private-Label Mortgage Market*, (Hous. Fin. Pol'y Ctr., Urb. Inst., Research Paper, 2015), *available at* https://www.urban.org/research/publication/rebirth-securitization-where-private-label-mortgage-market/view/full_report; *see also* Azar Abramov et al., Private-Label Mortgage Securitization Market Challenges and the Implications for Insurers and Insurance Regulation, (Nat'l Ass'n of Insurance Comm'rs, CIPR Study Series 2016–2, 2016), *available at* http://www.naic.org/documents/cipr_study_161208_private-label_mortgage_securitization.pdf. Note that this analysis suggests that changing the Qualified Mortgage definition, even to loosen it, may delay rather than expedite a return to a highly liquid private label securitization market, by further disrupting an emerging equilibrium.

[42] 78 FR 6408, 6533-34 (Jan. 30, 2013) (discussing the market risks the patch was designed to avoid).

[43] 84 Fed. Reg. 37,155, 37,159 (July 31, 2019) ("In addition, the Bureau is concerned that making the Temporary GSE QM loan provision permanent could stifle innovation and the development of competitive private sector approaches to underwriting.")

how best to underwrite loans for ability to repay, given the uncertainty about the utility of DTI and where appropriately to draw the line.[44] The Bureau's assessment notes other examples of the GSEs promoting industry innovation.[45] The Bureau gives no reason why industry participants, with less experience, less market share, and less data than the GSEs will be able to promote innovation in a safe and sustainable way while the GSEs' experiments—public, documented, and overseen by the FHFA—are a reason to mistrust them. Nor does the Bureau explain why, in the mortgage context, the non-statutory goal of innovation trumps the statutory purposes of "assur[ing] that consumers are offered and receive residential mortgage loans on terms that reasonably reflect their ability to repay the loan . . . ."[46]

The patch has functioned well in providing market stability and access to responsible, affordable mortgage credit. It has protected both lenders and consumers, and it has facilitated innovation. Now, there are signs that a non-QM secondary market is emerging,[47] so a further temporary extension of the patch could give this market time to develop and the Bureau time to conduct research on alternative measures of ability to repay. For example, the Administration's recently released housing reform plan contemplates FHFA developing an extensive set of underwriting criteria for use by the GSEs.[48] The Bureau could leverage FHFA's expertise and effort in adjustments to the patch while the Bureau develops a stable, long-term solution and a transition plan.

B. Letting the Patch Expire without Adjusting the QM Definition and Providing for Adequate Transition Time Would Invite Consumer Harm and Violate the Bureau's Statutory Mandate.

[44] *See, e.g.,* Bureau of Consumer Fin. Prot., Ability-to-Repay and Qualified Mortgage Rule Assessment Report, at 114 (Jan. 2019), https://www.consumerfinance.gov/documents/7165/cfpb_ability-to-repay-qualified-mortgage_assessmentreport.pdf (noting that the early delinquency rate, which the Bureau used as a partial proxy for ability to repay, decreased for loans with a DTI greater than 45% compared to loans with a DTI between 44% and 45%); Marsha J. Courchane, et al., Underwriting, Loan Products, and Performance: What Have We Learned? 25 (Harvard Bus. Sch., HBTL-11, Oct. 2013) (noting that prime rate loans with "acceptable risk" profiles have a DTI ranging from "around" 47% to 56%); Karan Kaul & Laurie Goodman, Housing Fin. Pol'y Ctr., Urban Inst., Updated: What, If Anything, Should Replace the Patch 8 (Oct. 2018), https://www.urban.org/sites/default/files/publication/99268/2018_10_30_qualified_mortgage_rule_update_finalized_4.pdf (noting lower 90 day default rate for GSE loans with DTI above 45% compared to GSE loans with DTI between 30% and 45%); Eric Stein & Michael Calhoun, Ctr. for Responsible Lending, A Smarter Qualified Mortgage Can Benefit Borrowers, Taxpayers, and the Economy 9-10 (July 2019), https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-a-smarter-qualified-mortgage-july2019.pdf (discussing small increase in defaults associated with increase in DTI above 50%).

[45] Bureau of Consumer Fin. Prot., Ability-to-Repay and Qualified Mortgage Rule Assessment Report, at 191 (Jan. 2019), https://www.consumerfinance.gov/documents/7165/cfpb_ability-to-repay-qualified-mortgage_assessmentreport.pdf (discussing other ways the GSEs have promoted industry innovation in underwriting and assessing ability to repay).

[46] TILA § 129B(a)(2).

[47] Bureau of Consumer Fin. Prot., Ability-to-Repay and Qualified Mortgage Rule Assessment Report, at 196 (Jan. 2019), https://www.consumerfinance.gov/documents/7165/cfpb_ability-to-repay-qualified-mortgage_assessmentreport.pdf; Ben Eisen & Telis Demos, *Banks Warm to Mortgage Bonds That Burned Them in 2008: Citigroup, Goldman Sachs and Wells Fargo are getting back into the business,* Wall St. J., Sept. 16, 2019.

[48] U.S. Department of Treasury, Housing Reform Plan 36 (Sept. 2019), https://home.treasury.gov/system/files/136/Treasury-Housing-Finance-Reform-Plan.pdf.

Director Kraninger has set forth as the lodestar of her approach to her work at the Bureau the prevention of consumer harm.[49] The path the Bureau seems determined to embark on—letting the patch expire—is fraught with the possibility of consumer harm. Most commentators agree that letting the patch expire under the existing general QM definition, with its hard DTI cutoff at 43%, would prevent a large number of loans from being made.[50] Moreover, the group of loans not made would be disproportionately loans to people of color and low-income consumers.[51] Allowing the patch to expire without a clear path for the share of the market represented by loans that would likely not have been made absent the patch would invite consumer harm in the form of diminished access to credit and increased cost of available credit.[52]

Industry might over time be able to transition from the flexible, evolving approach, closely linked to underwriting, for assessing ability to repay offered by the GSE patch to a more rigid, bright line test, such as the 43% DTI limit in the General QM definition. But it is questionable whether a rigid bright line test on any single factor would serve either industry or consumers well. Good underwriting assesses a number of factors to assess credit and default risk. Reliance on any single indicator of creditworthiness flies in the face of long-standing experience in mortgage credit underwriting. The classic compensating factor model used by the GSEs, as well as many other market participants such as private mortgage insurers and the FHA, requires reduction of risk in one area when risk is rising in another.

Such full-file underwriting is particularly important when considering applicants with thin credit histories and low wealth that makes large down payments impractical. Without the ability to consider compensating factors, these limitations would structurally restrict credit to the traditionally underserved groups that will increasingly make up a larger share of new mortgage consumers.[53] Reliance on any single factor in assessing creditworthiness excludes many otherwise creditworthy borrowers from the marketplace. DTI in particular will have a disparate impact on racial minorities and lower income borrowers. We should expect similar results from any single-factor assessment of ability to repay.

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[49] Kathleen L. Kraninger, Director, Consumer Fin. Prot. Bureau, Speech at the Bipartisan Policy Center (Apr. 17, 2019) ("As Director, I believe that the best application of these tools is to focus on prevention of harm to consumers.").

[50] *See, e.g.,*; Karan Kaul & Laurie Goodman, Housing Fin. Pol'y Ctr., Urban Inst., Updated: What, If Anything, Should Replace the Patch (Oct. 2018), https://www.urban.org/sites/default/files/publication/99268/2018_10_30_qualified_mortgage_rule_update_finalized_4.pdf ; Ardhan Pradhan, *Expiration of the CFBP's Qualified Mortgage 'GSE Patch' – Part 3,* CoreLogic Insight blog, July 26, 2019, https://www.corelogic.com/blog/2019/07/expiration-of-the-cfpbs-qualified-mortgage-gse-patch-part-3.aspx.

[51] *See, e.g.,* Feng Liu, Jason Dietrich, Young Jo, Akaki Skhirtladze, Misha Davies, & Corinne Candilis, Consumer Fin. Prot. Bureau, Introducing New and Revised Data Points in HMDA: Initial Observations from New and Revised Data Points in 2018 HMDA 205 (Aug. 2019) (the median DTI for African-American and Hispanic borrowers is 42%, suggesting that close to half the mortgages made to African Americans and Hispanics would not have been made but for the patch).

[52] *See* Peter Carroll, *Expiration of the CFBP's Qualified Mortgage 'GSE Patch' – Part 1,* CoreLogic Insight Blog (July 11, 2019), https://www.corelogic.com/blog/2019/07/expiration-of-the-cfpbs-qualified-mortgage-gse-patch-part-1.aspx (estimating the market share of loans that would not have been made absent the GSE patch at 16% of all loans).

[53] *See, e.g.,* Unidos US, Fact Sheet, Latino Homeownership Hanging in the Balance: Observations from the Home Mortgage Disclosure Act (Mar. 2018), http://publications.unidosus.org/bitstream/handle/123456789/1838/Latino%20HMDA%20Fact%20Sheet.pdf?sequence=4&isAllowed=y ("Since 2010, growth in Latino homeownership has accounted for 60% of total homeownership growth in the United States,2 and Latinos are expected to compose half of new homeowners in the coming decade.").

There is, of course, a principled argument for a small QM.[54] Some of us have made that argument in the past.[55] A small QM could promote access to responsible, affordable mortgage credit across all consumers. But those arguments depend on the emergence of a robust non-GSE secondary market, which in turn depends on the secondary market's willingness and ability to price liability risk for ability-to-repay claims. While the evidence for any meaningful legal liability in connection with ability-to-repay claims is vanishingly small,[56] a robust, non-GSE secondary market has not yet emerged, and lenders and investors continue to shy away from any lending with any potential consumer or investor litigation risk.[57] In the absence of such a market, a small QM will just shrink available conventional credit, likely at the expense of communities of color and low-income communities[58] and could result in those communities being pushed disproportionately into the risky products and practices that are prohibited in the QM space. Shrinking access to responsible, affordable mortgage credit is harmful to communities and contravenes the Bureau's statutory mandate to ensure access to responsible, affordable mortgage credit to all consumers.[59]

Others have argued that we should let the patch expire because, if fewer borrowers can access credit, there will be less upward pressure on home prices, thereby making homes more affordable for those who can get credit.[60] Regardless of the economic merits of that argument, it is not the Bureau's mandate to manage the supply and demand curve for homes. It is the Bureau's mandate "to assure that consumers are offered and receive residential mortgage loans on terms that reasonably reflect their ability to repay the loans . . . ."[61]

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[54] By small QM, we mean a Qualified Mortgage definition that would, in line with the Bureau's hypothesis in the original rule, not define the outer limit of responsible, affordable mortgage lending, and so encourage robust lending in the non-QM space.

[55] *See, e.g.,* Supplemental Comments on Ability-to-Pay and Qualified Mortgages of the Nat'l Consumer Law Ctr. (on behalf of its low income clients) and the Nat'l Ass'n of Consumer Advocates (July 9, 2012), https://www.nclc.org/images/pdf/foreclosure_mortgage/predatory_mortgage_lending/comments-ability-to-pay-2012.pdf.

[56] There is very little litigation to date on ability-to-repay claims, and most of it has favored creditors. *See, e.g.,* Elliott v. First Fed. Cmty. Bank of Bucyrus, (S.D. Ohio Mar. 26, 2019), *reconsideration denied, stay granted sub nom.* Elliot v. First Fed. Cmty. Bank of Bucyrus, 2019 WL 2590572, at *3 (S.D. Ohio June 25, 2019). We note that the Bureau in its Assessment did not identify actual litigation risk as an impediment to lending, but the fear of litigation. Bureau of Consumer Fin. Prot., Ability-to-Repay and Qualified Mortgage Rule Assessment Report, at 12, 206 (Jan. 2019), https://www.consumerfinance.gov/documents/7165/cfpb_ability-to-repay-qualified-mortgage_assessmentreport.pdf (noting that creditors and other industry commenters observed that there has been too little litigation to date for industry to be able to price the risk).

[57] To give another, non-QM example, of the strength of the desire to avoid any potential liability risk whatsoever, lender uncertainty about FHA's defect taxonomy and apprehension of False Claim Act prosecutions for inadvertent or immaterial mistakes in FHA loan origination has led most large regulated lenders to sharply constrain their participation in the FHA program due to liability concerns.

[58] Goodman, *supra* note 18. Because FHA, VA and RHS all have the authority to create their own Qualified Mortgage definitions, unless they follow whatever new rule the Bureau might establish, another effect of defining QM narrowly could be to drive significant amounts of credit to those government insurance programs, increasing consumer costs and taxpayer risk.

[59] Dodd-Frank Act § 1021(a) ("The Bureau shall seek to implement . . . Federal consumer law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services . . . ."); TILA § 129B(a)(1) ("The Congress finds that economic stabilization would be enhanced by the protection, limitation, and regulation of the terms of residential mortgage credit . . .while ensuring that responsible, affordable mortgage credit remains available to all consumers.").

[60] *See, e.g.,*Edward J. Pinto, BankThink, *Dear CFPB, Let the QM 'Patch' Expire*, Am. Banker, May 7, 2019, https://www.americanbanker.com/opinion/dear-cfpb-let-the-qm-patch-expire

[61] TILA §129B(a)(2).

There is no evidence that loans being made under the GSE Patch are being made without assessing ability to repay . In contrast, it is clear that the loans made under the GSE patch are being made with a reasonable ability to repay. Lending in the years leading up to the Great Recession, particularly by participants in the private label securitization market, is widely acknowledged to have been irresponsible and unaffordable, often based on inflated income or without income documentation and rife with per se risky products, like negative amortization loans. Those are not the products or the practices making up GSE patch lending. Absent compelling evidence that the credit extended under the GSE patch is not responsible, affordable mortgage credit, and is not being made considering ability to repay, a Bureau looking to prevent consumer harm and comply with its statutory mandate would seek to maintain the current level of responsible, affordable mortgage lending and use the current level of GSE patch lending as a benchmark in adjusting the QM definition. Any constriction in the scope of QM due to removal of the patch will undermine the Bureau's mandate and harm borrowers and the market.

C. Removing Any Assessment of Ability to Repay from the QM Definition Would Leave Consumers Vulnerable to Abuse.

The statute provides that QM loans have a presumption of compliance with ability to repay. The Bureau has made that presumption irrebuttable for loans that are priced below 150 basis points above the Average Prime Offer Rate.[62] Creditors have an absolute right to rely on their compliance with the Qualified Mortgage definition in obtaining and maintaining qualified mortgage status; under current law, they do not need to demonstrate compliance with the general rules of ability to repay to anyone if they can show compliance with the Qualified Mortgage definition. Absent inclusion of some ability-to-repay requirements in the Qualified Mortgage definition,[63] neither the Bureau, nor other regulators, nor harmed consumers can look behind the safe harbor to confirm that loans that otherwise meet QM definition are being originated in compliance with the Dodd-Frank Act ability to repay provisions.[64]

For that reason, it is critical, both from the perspective of meeting the statutory mandate of ability to repay and from the perspective of preventing consumer harm that some measure of ability to repay remain within the Qualified Mortgage definition. The Bureau, other regulators, and the courts must have some verifiable assurance that Qualified Mortgages are in fact made with ability to repay considered, and the Bureau must maintain the ability to examine for compliance with ability to repay. The Qualified Mortgage definition, both within and outside the safe harbor, must preserve the central importance of sound underwriting using well understood and validated criteria to

[62] 12 CFR 1026.43(e)(1)(i).

[63] For comparison, the Bureau's small creditor exemption, 12 C.F.R. § 1026.43(e)(5), contains a requirement that the creditor consider the verified debt and income of the borrower, which allows the Bureau and other regulators to examine for compliance with that prong.

[64] We understand that many lenders are advised by their counsel to comply with the ability to repay regulations in addition to the Qualified Mortgage definition. This advice could be tendered to protect the creditor in the event that a creditor was found not to have complied with the Qualified Mortgage definition so that the creditor would then be able to demonstrate compliance under the ability to repay rules; to shield a creditor from state litigation on ability to repay (although exceedingly rare, such suits were brought and very occasionally won before Dodd-Frank); to ensure regulatory or investor concerns regarding safety and soundness are met. These are all valid reasons for a creditor to be cautious, but they are not legally binding requirements.

maintain the Dodd-Frank Act's intention to align interests and protect consumers from abusive or careless creditor behavior.

The last crisis is rife with examples of the harm occasioned to consumers by the failure of even reputable, national lenders to consider ability to repay in the absence of an external mandate to do so.[65] Safety and soundness concerns did not prevent the largest foreclosure crisis in this country's history or a global recession. It was precisely in reaction to the failure of lenders to consider ability to repay that Dodd-Frank was enacted, as reflected in the clear statutory mandate to the Bureau to enforce meaningful ability to repay requirements.[66] Permitting creditors to take advantage of an absolute safe harbor from liability, examination, or enforcement of the Dodd-Frank Act ability to repay requirements, without some mandated and verifiable consideration of ability to repay, invites abuse. Such abuses were common before the crisis. For example, the Atlanta Legal Aid Society, in the years immediately preceding the Great Recession, represented many consumers on fixed incomes who had prime or near-prime mortgages extended to them by national lenders at DTIs ranging from 78% to over 200%. The loans were not high-cost mortgages: some were prime; others near prime. The income was, in most instances, documented in the file. The LTVs ranged from 25% to 81%. In the event of foreclosure, the creditor was well-positioned to recover. But the homeowner had no realistic ability to repay.[67] Removing any requirement to assess for ability to repay would invite a resurgence of abusive lending to our most vulnerable communities and consumers, who have still not recovered from the last crisis.

IV. Any Adjustment of the Qualified Mortgage Definition Must Include a Measurement of Ability to Repay and Maintain and Enhance the Statutory Product Limitations.

The Dodd-Frank Act adoption of the ability-to-repay requirements was one of its most important consumer protections and the keystone of the mortgage origination provisions. Even in providing for loans that could be presumed to meet the ability-to-repay requirements, Congress limited the Bureau's rulemaking to that which was addressed to facilitating responsible, affordable mortgage credit and advancing measurement of ability to repay. The Bureau may not substitute other objectives for ability to repay. Nor may the Bureau, in adjusting the Qualified Mortgage definition, substitute measures of credit risk for measures, however imprecise, of ability to repay.

A. The Bureau Must Follow Its Statutory Mandate in Rulemaking on the Qualified Mortgage Definition: Regulatory Adjustments to the Definition May Only Be Made to Promote Responsible, Affordable Credit, Prevent Evasion of the Ability-to-Repay Requirements, or Facilitate Compliance with the Ability-to-Repay Requirements.

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[65] NCLC's Mortgage Lending treatise discusses the harm occasioned by the crisis in § 1.2.5 and provides examples of the failure to consider ability to repay in §§ 1.3.4.2, 6.2.1.

[66] *See* TILA §§ 129B(a) (findings and purpose for Dodd-Frank mortgage origination requirements focused on ability to repay) 129C(b)(2)(vi) (authorizing the Bureau to promulgate ability to repay regulations for Qualified Mortgages); 129C(b)(3) (authorizing the Bureau to adjust the QM definition if doing so furthers ability to repay).

[67] E-mail from Karen E. Brown, Director and Managing Attorney, Home Defense Program, Atlanta Legal Aid Society, Inc (Sept. 11, 2019).

TILA Section 129C(b)(3)(B)(i) provides that the Bureau may adjust the QM definition "upon a finding that such regulations are necessary or proper to ensure that responsible, affordable mortgage credit remains available to consumers in a manner consistent with the purposes of this section, necessary and appropriate to effectuate the purposes of this section and section 1639b of this title, to prevent circumvention or evasion thereof, or to facilitate compliance with such sections." TILA Section 129B(a)(2) specifies the purposes for both section 129B and section 129C: "to assure that consumers are offered and receive residential mortgage loans on terms that reasonably reflect their ability to repay the loans and that are understandable and not unfair, deceptive, or abusive." Any adjustment to the Qualified Mortgage Definition cannot evade this central requirement of ability to repay and must focus on whether the adjustment promotes responsible, affordable credit, with loans that reasonably reflect consumers' ability to repay.

Notably, the provisions granting the Bureau rulemaking authority over the Qualified Mortgage definition do not reference innovation, reduction of regulatory burden, or a robust private label securitization market for mortgages. While these considerations come within the general ambit of the Bureau's objectives under the Dodd-Frank Act,[68] Congress provided more specific guidance in promulgating the Qualified Mortgage provisions. The Dodd-Frank mortgage origination provisions specifically limited rulemaking addressing the Qualified Mortgage definition to rulemaking that assures the availability of responsible, affordable credit and is focused on the purposes of TILA sections 129B and 129C, including that consumers receive credit that reflects their ability to repay.

Proposals to adjust the Qualified Mortgage definition must be evaluated through the lens of whether they promote responsible, affordable mortgage credit. If the Bureau focuses only on access without ensuring that it is primarily available through responsible, affordable mortgage credit on terms that reasonably reflect consumers' ability to repay, it will fail communities of color and low-income communities and fail to meet its statutory mandate.

At the same time, the Bureau may not use the ability to repay requirement to restrict access to otherwise responsible, affordable credit, as is currently available under the patch. Only after the Bureau has addressed the linked statutory purposes of access and ability to repay may the Bureau consider other, non-statutory policy preferences, whether reducing the government lending footprint, increasing affordable housing supply, or fostering innovation in credit markets, and only if those non-statutory purposes do not limit the Bureau's primary obligation to assure the availability of responsible, affordable credit.

B. Credit Risk Assessment Is Distinct from the Statutory Mandate to Consider Ability to Repay.

Assessment of ability to repay, although generally conducted in conjunction with underwriting, is emphatically not the same as assessing or pricing credit risk, nor can this assessment be demonstrated post hoc based on default or generalized loan performance of a portfolio of loans. Credit risk assessment is geared to sizing the risk of loss to the creditor and investors upon any default. An ability to repay analysis, by contrast, looks at the individual borrower's income, assets, and expenses and evaluates whether the borrower has, right now, today, the ability to repay the

[68] Dodd-Frank Act § 1021(b).

loan.[69] While ability to repay, as measured by the consumer's income and expenses, is or should be one important component of a credit risk assessment, it is only one measure of credit risk.

Indeed, the most common criteria for underwriting that are also most obviously linked to ability to repay, both in the statutory language and in common sense, DTI and income, are far less relevant to determining credit risk than criteria such as loan-to-value ratio (LTV) and credit score.[70] Credit score and LTV are, conversely, poor indicators of ability to repay, however predictive they may be of default risk. A credit score says something about a borrower's payment history, but, even if it is accurate, it tells nothing about a borrower's ability to repay a given loan.[71] Low-income consumers, for example, will by definition have limited ability to repay a loan with large monthly payments, but they may nonetheless have a high credit score upon entering into such a loan. LTV is particularly problematic as a basis for assessing ability to repay, even though it is highly relevant as a measure of credit risk. LTV is explicitly excluded from the factors a creditor may consider in making a determination of ability to repay.[72] Lending based solely or primarily on the loan-to-value ratio is per se predatory.[73]

Congress, in enacting the Dodd-Frank Act, neither specified underwriting criteria nor set a default target. Instead, Congress instructed the Bureau and creditors to look to income, debts, DTI, residual income, employment, and assets other than the home in making a reasonable determination of ability to repay. Under the Dodd-Frank ability-to-repay requirements, then, the creditor's reasonable determination is decoupled from sizing or pricing the credit risk.

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[69] *See, e.g.,* TILA §129(a)(3) (specifying that consideration of ability to repay "shall include consideration of the consumer's credit history, current income, expected income the consumer is reasonably assured of receiving, current obligations, debt-to-income ratio or the residual income the consumer will have after paying non-mortgage debt and mortgage-related obligations, employment status, and other financial resources other than the consumer's equity in the dwelling or real property that secures repayment of the loan"); TILA § 129c(b)(2)(A)(vi) (providing that the Bureau may further define Qualified Mortgages based on "total monthly debt to monthly income or alternative measures of ability to repay regular expenses after payment of monthly debt taking into account the income levels of the borrower); TILA § 129(h) (prohibiting a pattern of lending without regard to ability to repay, "including consumers' current and expected income, current obligations, and employment" for HOEPA loans); Elliott v. First Fed. Cmty. Bank of Bucyrus, (S.D. Ohio Mar. 26, 2019), *reconsideration denied, stay granted sub nom.* Elliot v. First Fed. Cmty. Bank of Bucyrus, 2019 WL 2590572, at *3 (S.D. Ohio June 25, 2019) ("Plaintiff may be unable to make his payments at this time. Though this is an unfortunate outcome, it is not the responsibility of the Bank, which met its statutory obligations.").

[70] *See, e.g.,* 76 Fed. Reg. 27390, 27454 (May 1, 2011) (noting that credit score, LTV, and loan product are more determinative of credit risk than DTI); Edward Golding, Laurie Goodman, & Jun Zhu, Fannie Mae Raises the DTI Limit: A Win for Expanding Access to Credit, Housing Fin. Pol'y Ctr., Urban Inst. 7 (July 2017), https://www.urban.org/sites/default/files/publication/91936/fannie_mae_raises_dti_limit_0.pdf (reporting that modest increases in credit score or LTV are more than three times more predictive of default than increases in DTI).

[71] While TILA § 129C(a)(3) authorizes "credit history" as one component of determining ability to repay, that is a broader term than "credit score," and is the only non-income and expenses related item on a list of eight factors.

[72] TILA § 129C(a)(3).

[73] *See* Office of the Comptroller of the Currency, Advisory Letter No. AL 2000-7, Abusive Lending Practices 1(July 25, 2000). *Cf.* TILA § 129(h) (prohibiting lending based on the value of the collateral without regard to consumer's ability to repay for high-cost mortgages); TILA § 129B(c)((3)(B)(ii) (giving examples of "predatory characteristics or effects" "such as equity stripping"); Unif. Consumer Credit Code § 5-108(4)(a) cmt. ¶4 (1974).

C. Seasoning Is Not a Measure of Ability to Repay.

In the ANPRM, the Bureau asks about seasoning, the length of time a loan performs before default, as the basis for presuming ability to repay.[74] Neither subsequent default nor its timing are good measures of ability to repay. Borrowers may lack ability to repay and never default. Leading up to the foreclosure crisis, serial refinancing both delayed default on unaffordable loans and contributed to the magnitude of the foreclosure crisis.[75]

Borrowers without ability to repay from current income and assets can take heroic measures to eke out payments for a number of years, before defaulting. Legal services attorneys report clients drawing down retirement accounts, borrowing money from family and friends, and going without food, medicine, utilities, or basic furniture.[76] 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.

Conversely, borrowers who have ability to repay at origination may nonetheless default due to unforeseen life events[77] or even strategically default in changing market circumstances. More broadly, as the Bureau notes in the Assessment, the timing of default often reflects macroeconomic conditions rather than ability to repay.[78]

Importantly, because seasoning is backwards looking, and can only be determined in retrospect, it is unlikely to be helpful in improving market liquidity. Seasoning does not offer a bright line at origination, is not an option for lenders without large balance sheets, and would hit independent mortgage bankers, who are an important source of credit to underserved communities, particularly hard.

Seasoning is even less useful in gauging ability to repay for products other than a fixed-rate mortgage. An ARM that adjusts after the seasoning period, whether two years or three years or five

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[74] 84 Fed. Reg. 37,155, 37,161-62 (July 31, 2019) (referencing a *Forbes* article that suggested "when a loan defaults after performing for two or three years, it is not reasonable to conclude that the default was caused by the creditor's failure to consider the consumer's ability to repay"). *See also* U.S. Department of Treasury, Housing Reform Plan 38 (Sept. 2019), https://home.treasury.gov/system/files/136/Treasury-Housing-Finance-Reform-Plan.pdf ("Another approach, perhaps as a complement to the first, might be to provide that a mortgage loan conclusively becomes a qualified mortgage after a specified seasoning period under the rationale that most defaults after that period would be a result of a change in the borrower's circumstances and not due to the lender's initial assessment of the borrower's ability to repay.").

[75] *See generally* Nat'l Consumer L. Ctr., Mortgage Lending: Loan Origination, Preemption, and Litigation § 6.4 (2nd ed. 2014 & Supp.) (discussing examples of loan churning and the harm done by it).

[76] Legal services attorneys report clients undertaking all of these strategies to make mortgage payments, including households with no beds or a kitchen table and no electricity, who were nonetheless making mortgage payments.

[77] *See, e.g.,* 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).

[78] 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).

years, for example, may be predictably unaffordable when it adjusts.[79] Each reset period effectively restarts the clock for time to default based on affordability alone.

Seasoning is not a permissible proxy for ability to repay in the Qualified Mortgage definition. The Dodd-Frank Act itself made clear that seasoning is insufficient for a presumption of statutory compliance. Congress provided two special statute of limitations rules for violations of § 129C. First, in TILA § 130(a), Congress provided that the statute of limitations for violations of the ability to repay requirements was three years, compared to TILA's general one-year statute of limitations.[80] Thus, at a bare minimum, consumers have a statutory right to bring ability-to-repay claims up to three years after origination, or later if equitable tolling rules apply.[81] There is no statutory ambiguity that would permit the Bureau to cut off consumers' statutory rights at an earlier point.

Second, Congress provided a recoupment provision in TILA § 130(k) that permits a consumer to bring an ability-to repay claim at any time as a defense against foreclosure. This unlimited, statutory right of recoupment makes plain that Congress contemplated that consumers would default based on the creditor's failure to reasonably determine ability to repay more than three years after origination, when the statute of limitations runs, and furthermore that Congress intended for consumers who defaulted at any point in the loan to be able to raise the creditor's failure as a defense against foreclosure.

Seasoning as a measure of ability to repay also does not meet the statutory mandate that adjustments to the Qualified Mortgage definition prevent circumvention or evasion of the ability-to-repay requirements.[82] A lender can easily defeat a seasoning requirement by using the loan proceeds to fund payments sufficient to meet the seasoning requirement.[83] Nothing in the statute authorizes the Bureau to vitiate congressional intent, encourage evasion of the ability to repay requirements, and close the courthouse doors to consumers on the basis of timing of default.

D. Loan Pricing by Itself Is Not a Measure of Ability to Repay.

Encouraging cheaper loans is a worthy and statutory goal as the Bureau contemplates adjusting the Qualified Mortgage definition. Lower-priced loans leave more money in consumers' pockets and help build wealth in traditionally underserved communities. But loan pricing by itself is neither a reliable nor a statutorily permissible measure of ability to repay.

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[79] *See, e.g.,* Assurance of Discontinuance at ¶ 20, Commonwealth v. Morgan Stanley & Co., No. 10-2538 (Mass. Super. Ct. June 24, 2010), *available at* https://massdocs-digital-mass-gov.s3.amazonaws.com/s3fs-public/2018/2010-06-24-ms-settlement-attachment3.pdf?1CR0JvhTrJ9.WUrq0rcUcy1diP53ebLg (recounting Morgan Stanley's predictions that nearly half of New Century's loans would become unaffordable at reset, two to three years after origination); Aames Mortgage Trust 2001-1 Mortgage Pass-Through Certificates, Series 2001-1, Aames Capital Corporation as Sponsor, Countrywide Home Loans, Inc., as Servicer, Prospectus Supplement to Prospectus Dated Mar. 13, 2001, S-10 (predicting high rates of pre-payment at rate reset, two to three years after origination).

[80] TILA also provides for a three year statute of limitations in the case of rescission, TILA's most powerful consumer remedy, only available for the most serious disclosure violations. TILA § 125(a),(f).

[81] While courts do not generally equitably toll the statute of limitations in TILA cases, they will do so in cases of gross lender overreaching and deception. *See generally* Nat'l Consumer L. Ctr., Truth-in-Lending § 12.2.3 (9th ed. 2015 & Supp.).

[82] TILA §129C(b)(3)(B)(1).

[83] *See, e.g.,* Boender v. Hardin, 2012 WL 2990703 (D. Mass. July 19, 2012) (seven payments made out of escrow before borrower defaulted); Kennedy v. Monterey Bay Res., 2012 WL 2343661, at *2 (N.D. Cal. June 20, 2012) (only payments made on loan were those funded by second loan).

Lower-priced loans generally have lower default rates.[84] But default by itself, as the Bureau recognized in the Assessment, is not a reliable indicator of ability to repay.[85] Moreover, nothing in the statute sets a level of default that is acceptable or permissible or suggests that prime loans should be exempt from the ability-to-repay requirements. Indeed, the statutory requirements for enhanced protections for high-cost mortgages[86] suggest the reverse, that Congress regarded the ability to repay requirements in TILA § 129C as a floor and added additional protections for more expensive loans.

Loan pricing alone cannot serve to "ensure[s]re that responsible affordable mortgage credit remains available to consumers in a manner consistent with the purposes of this section . . . [or] prevent circumvention or evasion."[87] Even a low-priced loan can be unaffordable, depending on the size of the principal amount and monthly payments and the borrower's available income to make payments. Absent a requirement of an ability to repay analysis, creditors and others could be incentivized to upsell homebuyers to more expensive houses and larger loans, as lenders, loan brokers, and all the other players involved in closing a mortgage loan generally make more money if the home is more expensive and the loan is larger. Everyone except the consumer benefits from a larger loan, and, if the LTV is low enough, the creditor faces no risk from such upselling. Nor are prime or near prime-loans exempt from predation.[88] Loan pricing, as the sole measure of ability to repay, would provide a safe harbor for asset-based, equity-stripping lending, which are per se predatory practices.[89]

Loan pricing is a holistic assessment of credit risk.[90] In assessing the risk of loss to creditors and investors, creditors quite properly rely on LTV and the collateral value.[91] Low LTV loans are

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[84] *See* Ctr. for Cmty. Capital, Community Advantage Panel Study: Good Business and good Policy: Finding the Right Ways to Serve the Affordable mortgage Market 6 (2009) (relationship between the market rate and mortgage interest rate is "a leading predictor of default"); U.S. Gov't Accountability Office, Pub. No. GAO 09-741, Home mortgages: Provisions in a 2007 Mortgage Reform Bill (H.R. 3915) Would Strengthen Borrower Protections, But Views on Their long-Term Impact Differ 29-30 (2009) (finding that, as the rate spread between the rate and the comparable index increased, so did the default rate). *Cf.* Donald P. Morgan & Michael R. Strain, *Payday Holiday: How Households Fare after Payday Credit Bans* 12-13 (Fed. Reserve Bank of New York Staff Report No. 309, Feb. 2008), *available at* www.newyorkfed.org/research/staff_reports/sr309.pdf (discussing the economic model for how increased interest rates may push households into default).

[85] 84 Fed. Reg. 37,155, 37,161-62 (July 31, 2019) (referencing a *Forbes* article that suggested "when a loan defaults after performing for two or three years, it is not reasonable to conclude that the default was caused by the creditor's failure to consider the consumer's ability to repay"). *See also* U.S. Department of Treasury, Housing Reform Plan 38 (Sept. 2019), https://home.treasury.gov/system/files/136/Treasury-Housing-Finance-Reform-Plan.pdf ("Another approach, perhaps as a complement to the first, might be to provide that a mortgage loan conclusively becomes a qualified mortgage after a specified seasoning period under the rationale that most defaults after that period would be a result of a change in the borrower's circumstances and not due to the lender's initial assessment of the borrower's ability to repay.").

[86] *See, e.g.,* TILA § 129.

[87] TILA §129C(b)(3)(B)(i).

[88] For example, Atlanta Legal Aid represented a grandmother living on Social Security whose 2006 loan from a major national lender was less than 50 basis points above APOR but required her to spend 78%, or all but $267 of her monthly income, on principal and interest payments alone. A few months later, another major national lender extended a second mortgage that brought her combined mortgage DTI, excluding taxes and insurance, to 112%. That second loan was priced higher than the first, but was still less than 200 basis points above APOR. E-mail from Karen E. Brown, Director and Managing Attorney, Home Defense Program, Atlanta Legal Aid Society, Inc (Sept. 11, 2019).

[89] *See, e.g.,* TILA § 129B(c)((3)(B)(ii) (giving examples of "predatory characteristics or effects" "such as equity stripping").

[90] *See, e.g.,* Karan Kaul & Laurie Goodman, Housing Fin. Pol'y Ctr., Urban Inst., Updated: What, If Anything, Should Replace the Patch 7 (Oct. 2018),

generally cheaper precisely because the creditor's risk of loss is lower: in the event of default, the creditor can foreclose and recover any losses from the sale of the home. But this credit risk analysis is not about the borrower's ability to repay. Indeed, LTV and collateral value are specifically excluded from the list of factors creditors may consider in making an ability to repay assessment.[92] To the extent that creditors rely on LTV in pricing, pricing is therefore an impermissible basis for determining ability to repay.

Even if we substitute the creditor's risk in making the loan for the borrower's risk of being made an unaffordable loan (a dazzling sleight of hand when one considers that Dodd-Frank was enacted to protect consumers from creditor overreaching), basing a presumption of Qualified Mortgage on loan pricing alone requires an assumption that creditors price risk correctly and fairly. As Goodman notes, an assumption that creditors price risk accurately "is hardly assured."[93] The most recent HMDA data confirms that African-Americans and Hispanics continue to pay more for mortgage credit than whites.[94] Unsupported perceptions about who is risky and who is not cut against traditionally underserved communities, in particular. Fundamentally, loan pricing as a substitute for underwriting was tried once before, and it ended in disaster.[95]

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https://www.urban.org/sites/default/files/publication/99268/2018_10_30_qualified_mortgage_rule_update_finalized_4.pdf (noting that mortgage rates reflect credit risk more holistically than DTI); Eric Stein & Michael Calhoun, Ctr. for Responsible Lending, A Smarter Qualified Mortgage
Can Benefit Borrowers, Taxpayers, and the Economy 16 (July 2019), https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-a-smarter-qualified-mortgage-july2019.pdf (same).

[91] *Cf.* 76 Fed. Reg. 27390, 27454 (May 1, 2011) (noting that credit score, LTV, and loan product are more determinative of credit risk than DTI); Edward Golding, Laurie Goodman, & Jun Zhu, Fannie Mae Raises the DTI Limit: A Win for Expanding Access to Credit, Housing Fin. Pol'y Ctr., Urban Inst. 7 (July 2017), https://www.urban.org/sites/default/files/publication/91936/fannie_mae_raises_dti_limit_0.pdf (reporting that modest increases in credit score or LTV are more than three times more predictive of default than increases in DTI).

[92] TILA § 129C(a)(3).

[93] Karan Kaul & Laurie Goodman, Housing Fin. Pol'y Ctr., Urban Inst., Updated: What, If Anything, Should Replace the Patch 10 (Oct. 2018), https://www.urban.org/sites/default/files/publication/99268/2018_10_30_qualified_mortgage_rule_update_finalized_4.pdf ("Mispricing could also occur because of perceptions that certain borrowers are riskier or less risky, steering borrowers into high-cost loans, or other market failures. Finally, a rate spread–based regime could give lenders an incentive to price mortgages just below the threshold to qualify for the safe harbor."). *See generally* Nat'l Consumer L. Ctr., Mortgage Lending: Loan Origination, Preemption, and Litigation (2nd ed. 2014 & Supp.)§ 1.3.4 (discussing the factual evidence demonstrating that credit risk is often not correctly priced for mortgage loans).

[94] Feng Liu, Jason Dietrich, Young Jo, Akaki Skhirtladze, Misha Davies, & Corinne Candilis, Consumer Fin. Prot. Bureau, Introducing New and Revised Data Points in HMDA: Initial Observations from New and Revised Data Points in 2018 HMDA 58, 63 (Aug. 2019) (noting that the elevated denial rates for Hispanics and African-Americans compared to white borrowers hold true even after accounting for credit score).

[95] *Cf.,* Edward Goldberg, Richard K. Green & Douglas A. McManus, Imperfect Information and the Housing Finance Crisis 11-12 (Feb. 1, 2008), *available at* www.jchs.harvard.edu/research/publications/imperfect-information-and-housing-finance-crisis (describing the dynamic whereby lenders outsourced origination of subprime loans to brokers, who having limited financial and legal risk, cared only about volume; note that the Qualified Mortgage safe harbor repeats this dynamic but in reverse by removing legal risk for failure to underwrite and thus incenting volume production in the Qualified Mortgage space, regardless of other financial or social welfare considerations).

E. The Product Restrictions Are a Core Component of the Qualified Mortgage Definition and Must Be Retained and Enhanced.

The Bureau should retain the statutory qualified mortgage product restrictions[96]. Creditors wishing to offer higher risk products or features outside of the current rule's definitions should comply with the full ability-to-repay requirements. Congress, in setting forth the statutory minimum for the Qualified Mortgage definition, deliberately excluded the products that contributed disproportionately to the last crisis. These are generally the same products that are poorly understood by consumers and for which disclosure is most limited in its efficacy.[97] Measuring ability to repay for these products is particularly uncertain, as well, given limited market experience with them and variable payment amounts, for example. Easing the product restrictions for the Qualified Mortgage definition would not serve the purposes of the statute and therefore would be outside the Bureau's rulemaking authority to adjust the Qualified Mortgage definition.[98]

In adjusting the Qualified Mortgage definition, the Bureau could limit consumer harm by carving out two additional categories of risky loans. First, the Bureaus should consider carving out from Qualified Mortgage status HOEPA loans. HOEPA loans are by definition high-cost mortgages, and so do not fall under the safe harbor. But there is no reason to give HOEPA loans even a rebuttable presumption of QM status. Congress provided for extra protections, including ability to repay protections (enacted over a decade before Dodd-Frank)[99] and extended assignee liability,[100] for these high-cost mortgage. There is no reason to presume that they are made with ability to repay and to shift any burden to the consumer in litigation.

The Bureau should also exclude from the QM definition any adjustable rate loans that do not have a fixed rate for at least the first five years. Currently, in order to receive QM status, the creditor must underwrite the loan for five years, using the maximum payment during that time.[101] This is an important protection. Nonetheless, adjustable rate loans are inherently more complex instruments than fixed rate loans and are poorly understood by consumers. Creditors and investors may also have difficulty modeling the credit and default risk posed by ARMs, particularly at a time when levels of uncertainty about the economy are at a high point. The data is substantial that ARMs foreclose at higher rates and faster than fixed rate mortgages, even before any rate reset.[102] Qualified Mortgages are those for which we can presume ability to repay; ARMs, even underwritten for the first five years, do not meet that presumption.

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[96] TILA § 129C(b)(2)(A) (generally excluding negative amortization loans, loans with balloon payments, and loans with a term greater than 30 years and requiring underwriting to includes taxes and insurance andARMs to be underwritten to the maximum rate for the first five years).
[97] *See generally* Nat'l Consumer L. Ctr., Mortgage Lending: Loan Origination, Preemption, and Litigation § 1.3.3.1 (2nd ed. 2014 & Supp.) (discussing limits of consumer understanding and disclosure of complex mortgage products).
[98] TILA§129C(b)(3)(B)(i).
[99] TILA § 129(h).
[100] TILA § 131(d).
[101] 12 C.F.R. § 1026.43(e)(2)(iv)(A).
[102] *See* Nat'l Consumer L. Ctr., Mortgage Lending: Loan Origination, Preemption, and Litigation § 6.2.5.1.1 (2nd ed. 2014).

V. In Developing a Revised Qualified Mortgage Definition, There Are a Range of Possible Ways for the Bureau to Incorporate Ability to Repay while Promoting Access to Affordable, Responsible Credit

Adjusting the Qualified Mortgage definition to best promote responsible, affordable mortgage credit is a complex problem, which will likely require a range of responses, involving multiple approaches. There is an inherent tension between the ways in which both ability to repay and credit risk are measured in the real world and the understandable desire for a clear, regulatory bright line to simplify compliance and oversight. Neither ability to repay nor credit risk are best determined by looking a single factor or applying a rigid test. Instead, both are best assessed in a dynamic, holistic manner, looking at the interplay of multiple factors, including debt load, residual income, cash flow, employment tenure, and other assets.[103]

While we offer some suggestions below, we believe the Bureau is in the best position to do the research and balance the risks. The Bureau will have to determine the feasibility of incorporating a bright line rule while complying with its statutory mandate to assure that consumers are offered and receive mortgage loans on terms that reasonably reflect their ability to repay.

A. At a Minimum, Creditors Must Be Required to Consider Validated Debts and Income in Making a Reasonable Determination of Ability to Repay

Any QM definition must include a specific direction that creditors must use consistent and validated credit factors as laid out in the Dodd-Frank Act to assess a borrower's ability to repay in order to be eligible for safe harbor protection. This is consistent with the approach that the Bureau took in crafting the small creditor exemption for loans held in portfolio.[104] It is also similar to the small creditor exemption recently approved by Congress in the Economic Growth, Regulatory Reform, and Consumer Protection Act.[105] These small creditor exemptions must be a floor for ability to repay requirements in the Qualified Mortgage definition, which are applicable to all creditors.

B. The Bureau Could Set Forth an Alternative to the Patch Based on Compensating Factors.

Most objections to the DTI limit in the General Qualified Mortgage definition turn on the rigidity of its approach. DTI is a blunt tool for a complex problem. As the Bureau recognized when it issued the final rule, there is considerable room for responsible, affordable mortgage lending

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[103] *Cf.* 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) ("Because the affordability of a given mortgage will vary from consumer to consumer based upon a range of factors, there is no recognized metric that can directly measure whether the terms of mortgage loans . . . reasonably reflect consumers' ability to repay.") *See generally* Karan Kaul & Laurie Goodman, Housing Fin. Pol'y Ctr., Urban Inst., Updated: What, If Anything, Should Replace the Patch Karan Kaul & Laurie Goodman, Housing Fin. Pol'y Ctr., Urban Inst., Updated: What, If Anything, Should Replace the Patch 10 (Oct. 2018), https://www.urban.org/sites/default/files/publication/99268/2018_10_30_qualified_mortgage_rule_update_finalized_4.pdf (noting the improvement of underwriting for credit risk when more factors are included).

[104] 12 C.F.R. § 1026.43(e)(5).

[105] Economic Growth, Regulatory Relief, and Consumer Protection Act, Pub. L. No: 115-174 § 101 (2018).

beyond the 43% DTI cap. But in the absence of a robust non-QM market in which creditors themselves are willing to forego the safe harbor and rebuttable presumptions of QM loans, the CFPB is in the position of needing to align its QM standards more closely with good underwriting.

Good underwriting uses a multivariate approach.[106] The Bureau could set standards of its own. For example, USMI has supported a list of compensating factors that a creditor could use in meeting Qualified Mortgage status.[107] While we are not sure of the precise balance among the factors proposed by USMI and have particular concerns about suggestion of a minimum five percent down payment required for Qualified Mortgage status, we agree that the principle of compensating factors is valid and one the Bureau should investigate. The Bureau could, after research on the existing standards and notice and comment, propose a multipronged Qualified Mortgage definition that more closely aligned the QM approach with that used more generally in underwriting. The Bureau could also delegate this authority to another governmental or quasi-governmental entity with greater expertise. For example, standards are set for the appraisal industry by an independent non-profit, the Appraisal Foundation. Treasury has also suggested that FHFA develop detailed underwriting criteria for the GSEs, which already have extensive guides for manual underwriting of loans that are not assessed through their automated underwriting engines.[108] The CFPB could piggyback off the FHFA's expertise and work.

C. The Bureau Could Create a Flexible Requirement to Use One of an Enumerated List of Validated Underwriting Models.

The Bureau could provide that any validated underwriting model that met certain criteria would satisfy the Qualified Mortgage definition. This would build on the approach in the patch, which incorporates into the Qualified Mortgage definition the dominant underwriting models in the industry, and Appendix Q, which was based on FHA's standards, but provide greater flexibility. The Bureau could have a fixed list of underwriting models and procedures, including the GSEs, FHA, VA, and RHS, and also create a procedure for validating - either independently or in concert with an independent nonprofit or the FHFA - the underwriting models used by creditors. This would build on the work done prior to conservatorship by the GSEs in validating and approving the models used by individual creditors and would provide room for greater flexibility and innovation than currently available.

D. The Bureau Could Revise Appendix Q.

Simplifying Appendix Q—which prescribes how income and debt are measured for purposes of QM--to authorize greater flexibility and incorporating other standards beyond the FHA rules from nearly a decade ago should help ease credit tightness in the General QM space. Even without DTI, a simpler Appendix Q may also have some continued vitality in terms of providing certainty about how to verify debts and income, which is an independent statutory requirement. As

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106 *See, e.g.,* Karan Kaul & Laurie Goodman, Housing Fin. Pol'y Ctr., Urban Inst., Updated: What, If Anything, Should Replace the Patch (Oct. 2018), https://www.urban.org/sites/default/files/publication/99268/2018_10_30_qualified_mortgage_rule_update_finalized_4.pdf .

107 U.S. Mortgage Insurers, MI Industry's Observations & Recommendations for Replacing CFPB's QM Patch (Sept. 16, 2019, 3:31 pm), http://www.usmi.org/mi-industrys-observations-recommendations-for-replacing-cfpbs-qm-patch/

108 U.S. Department of Treasury, Housing Reform Plan 36 (Sept. 2019), https://home.treasury.gov/system/files/136/Treasury-Housing-Finance-Reform-Plan.pdf

long as verification of income and debts remains part of the Qualified Mortgage definition, creditors will want guidance on what constitutes compliance with those verification requirements. Moreover, given the statute's heavy emphasis on DTI as a measure of ability to repay,[109] creditors may want guidance on how to measure DTI. Sensible revisions to Appendix Q could facilitate lending under the General QM.

E. The Bureau Could Investigate Alternative Measures.

Traditional underwriting typically includes assessing the consumer's ability to repay by examining the total percentage of income devoted to debt, including the mortgage. But this approach yields a significantly different result for a high earning family than for a low-wage worker, and especially so for those whose wages fluctuate. Additionally, changing market conditions, including the prevalence of multiple-earner households and variability in both income and expenses, have made it harder for lenders to assess ability to repay accurately using historical models based on DTI.

Both cash flow and residual income have significant promise for more accurate assessment of ability to repay than DTI. For example, the Consumer Federation of America commissioned the Center for Financial Services Innovation (now known as the Financial Health Network) to look at whether and how residual income could be incorporated into mortgage underwriting. The findings were encouraging, but inconclusive with respect to a working model that could be easily adopted and scaled by creditors. Recent rapid developments in fintech applications that enable creditors to use consumer-permissioned data from demand accounts offer the prospect of more easily verifiable data draws, but unanswered questions remain about how much remaining income is enough, for instance. Similarly, early work by FinRegLab on cash flow is encouraging.[110] The Bureau's engagement in developing these models through research and guidance could be quite helpful in facilitating both innovation and ability to repay. Following are considerations for such research.

1. Income Is Becoming More Variable and "Lumpy."

Determining ability to repay using data points that do not anticipate the dynamic nature of most consumers' income streams can add risk to any assessment. The current mortgage lending model evolved at a time when mortgage borrowers generally enjoyed regular paychecks throughout the year. But incomes for many workers today are significantly less dependable. This is especially true for workers in the service economy, where schedules and hours can change, often without warning. Increasing levels of part-time and freelance income magnify these fluctuations. As the US Financial Diaries project concluded from its ongoing study of a sample of low- and moderate-income households:

> [H]ousehold incomes are complex. Incomes often fluctuate from month to month in both amount and timing, and in ways that are often outside of the households' control. Income fluctuations create problems even for households whose finances are adequate on average over the course of the year. Households regularly experience swings in their ability to cover basic expenses, pay down debt or save for the future. In this context, budgeting and planning become quite difficult.[111]

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[109] *See, e.g.,* TILA § 129C(a)(3), (b)(2)(A)(vi).

[110] FinRegLab, The Use of Cash-Flow Data in Underwriting Credit: Empirical Research Findings (July 2019), https://finreglab.org/wp-content/uploads/2019/07/FRL_Research-Report_Final.pdf.

[111] Jonathan Morduch and Rachel Schneider, US Financial Diaries Project, *Spikes and Dips: How Income Uncertainty Affects Households*, http://www.usfinancialdiaries.org/issue1-spikes

They also found that, while the frequency of these fluctuations shows an inverse relationship to income, fluctuations still are a significant factor in households with incomes 300 percent or more of the regionally-adjusted Supplemental Poverty Measure.[112] And the study concluded that these swings are not likely to be ameliorated, but rather exacerbated, when there are multiple adult earners in the household.

2. Household Costs Are Lumpy, Too.

Understanding consumers' ability to repay mortgage debt can be difficult when there is lack of clarity around ongoing expenses, both in their size and frequency. The income variability that is becoming more common among US households is matched by variability in expenses. The US Financial Diaries project documented in their sample that expenses, too, spike and dip, on an unpredictable schedule, and that the income and spending cycles are unlikely to coincide. Using data from 25 million customers, the JPMorgan Chase & Co. Institute closely examined income and payment patterns for a selected set of 100,000 households in 2015. According to the report,

> [F]or only a minority of the population did income and consumption move together; and …individuals needed a significant financial cushion – roughly $4,800 among middle-income earners – to weather the degree of volatility in income and spending observed in our data.[113]

Not surprisingly, the Institute's data show that few households can or do maintain such high liquid asset balances. This will be doubly true for moderate and low wealth households that have newly become homeowners and mortgage holders.

3. The Mortgage Payment Takes a Big Bite.

The impact that monthly mortgage obligations have on a household's finances can vary greatly and mortgages generally provide no flexibility in terms of making the full payment, further complicating any ATR analysis that relies on static measures. The monthly mortgage payment is a large obligation for any family, with increasingly dramatic impact as a household's income decreases. Whatever DTI number is chosen, it represents significant portions of any household's income. In nominal terms, it becomes a very big number for low-to-moderate income households. And the mortgage payment is expected every month, at the same time and in the same amount. Unlike credit card or other consumer debt, there is no "minimum payment" that can keep a borrower current on a mortgage debt without making a payment of the full amount due on a standard fixed rate or adjustable rate mortgage. Failure to make a full payment generally results in a penalty, and lenders typically will not accept or credit a partial payment.

Most households manage this proportionately very large payment without problems. But for many low-to-moderate-income families the current mortgage payment model can be a constantly ticking time bomb. Mortgage servicing's lack of flexibility or adaptation will lead to predictably

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112 Anthony Hannagan and Jonathan Morduch, *Income Gains and Month-to-Month Income Volatility: Household Evidence from the U.S. Financial Diaries,* March 16, 2015 http://static1.squarespace.com/static/53d008ede4b0833aa2ab2eb9/t/553521dae4b048e6faa46cdb/1429545456581/paper1.pdf

113 Diana Farrell and Fiona Gregg, JPMorgan Chase & Co. Inst., *Weathering Volatility – Big Data on the Financial Ups and Downs of U.S. Individuals,* at 6 (May 2015).

higher delinquencies driven by the impact of these mismatched cycles on households with little cushion. In turn, these will lead to even greater costs as late fees and interest are piled onto the already formidable mortgage payment. Better assessment of ability to repay using both cash flow and residual income could help allay some of these problems.

F. The Bureau Could Remove the Safe Harbor, Either Generally or for Originators.

The safe harbor adopted by the Bureau unsettles the Act's intention to align the interests of consumers, lenders and investors. If creditors and assignees did not have an irrebutable presumption of compliance with the ability-to-repay requirement in the Qualified Mortgage definition for prime loans, but rather only a presumption, the stakes for allowing innovation would be much lower, and it would become possible to allow market forces to emerge. If lenders were required, upon challenge by the CFPB or a consumer, to prove that their loan pricing model did reasonably reflect the borrower's ability to repay and did not rely on impermissible factors such as LTV, the use of loan pricing to create a presumption of compliance would be much less concerning. The safe harbor as constituted bars any oversight of compliance and creates an artificial space with no consequences for illegal acts. Removing the safe harbor would be one way to meet the industry's need for flexible underwriting standards in assessing ability to repay without undercutting the vitality of the Dodd-Frank Act's ability-to-repay requirements.

While much has been made of litigation risk, we are aware of only a handful of cases in the last five years where the ability-to-repay requirements of the Dodd-Frank Act have been raised by consumers.[114] The Bureau cited none in its Assessment report. Unsubstantiated concerns about litigation risk do not justify eroding the congressional mandate to ensure that mortgage credit is made on terms that reasonably reflect consumers' ability to repay their loans.[115]

VI. Conclusion

Thank you for the opportunity to comment on the Bureau's advanced notice of proposed rulemaking on the Qualified Mortgage definition. We appreciate the difficulty of balancing the competing concerns here in designing a solution that promotes both a robust market and rigorous statutory compliance and commend the Bureau for seeking public input before commencing on a rulemaking of such import. For further discussion, please contact Alys Cohen at the National Consumer Law Center at acohen@nclc.org or 202-452-6252.

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[114] *See, e.g.,* Elliott v. First Fed. Cmty. Bank of Bucyrus, (S.D. Ohio Mar. 26, 2019) (granting summary judgment on ATR claim to creditor), *reconsideration denied, stay granted sub nom.* Elliot v. First Fed. Cmty. Bank of Bucyrus, 2019 WL 2590572, at *3 (S.D. Ohio June 25, 2019)

[115] The Bureau's authority on the Qualified Mortgage definition is under TILA, which only provides a private right of action for consumers, not investors. The Bureau does not have authority through TILA to adjust suits by investors against originators and others nor to mandate changes in terms as to buy back agreements or other liability allocating provisions in the pooling and servicing agreements.