
Banking and Finance Law Daily Wrap Up

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The Consumer Bankers Association generally supports the Bureau’s new proposal while recommending modifications. In contrast, Better Markets opposes the proposal, viewing it as "arbitrary and capricious" and "contrary to the Dodd-Frank Act."

In their respective October 2020 comment letters to the Consumer Financial Protection Bureau, the Consumer Bankers Association and Better Markets weigh in on the CFPB’s proposal to amend Regulation Z—Truth in Lending (12 CFR Part 1026)—to create a new "seasoned qualified mortgage (Seasoned QM) category that would encompass first-lien, fixed-rate covered transactions that have met certain performance requirements over a "36-month seasoning period." The CBA agrees with the Bureau that a Seasoned QM definition would "complement existing qualified mortgage definitions," "help ensure access to responsible, affordable mortgage credit," and encourage "safe and responsible innovation in the mortgage origination market." At the same time, the CBA recommends several modifications to the proposed rule. In contrast, the Better Markets organization asserts that the CFPB’s new proposal "is little more than an unlawful and unnecessary gift to the mortgage industry, a gift that comes at the expense of homeowners in distress." Maintaining that the Bureau’s proposal "would allow mortgage lenders to escape liability for failure to adequately consider a borrower’s ability to repay a mortgage loan" under certain circumstances, Better Markets contends that the proposal "rests on a faulty premise," "lacks a credible supporting rationale," is "arbitrary and capricious," and is "contrary to the Dodd-Frank Act."

In August 2020, the CFPB issued a Notice of Proposed Rulemaking in connection with the new category of Seasoned QMs. To be considered a Seasoned QM under the proposal, loans would have to be first-lien, fixed-rate covered transactions that have met certain performance requirements over a 36-month seasoning period. Also, these covered transactions would have to: (i) be held on the creditor’s portfolio during the seasoning period; (ii) comply with general restrictions on product features and points and fees; and (iii) meet certain underwriting requirements. Further, to be eligible to become a Seasoned QM, the creditor would be required to consider and verify the consumer’s debt-to-income ratio or residual income at the loan origination (see Banking and Finance Law Daily, Aug. 19, 2020).

CBA’s recommendations. In the comment letter authored by CBA Vice President and Regulator Counsel André Cotton, the CBA offers several suggestions to the CFPB on improving the Seasoned QM proposal. For instance, the CBA recommends that the Bureau’s proposal:

- expand the definition of "covered transactions" receiving a "safe harbor" under the Seasoned QM to include subordinate liens;
- clarify what "held in portfolio" means for the Seasoned QM requirements;
- clarify when mortgage payments are temporarily waived under various COVID-19 relief programs in connection with the Seasoned QM requirements;
- clarify that "no balloon payment" refers only to the original note structure, considering COVID-19 relief programs; and
- develop a grandfathering clause "to include all covered transactions" and not just those from "applications received after the effective date."
**Better Markets: additional letter highlights.** Better Markets describes itself as a "non-profit, non-partisan, and independent organization founded in the wake of the 2008 financial crisis to promote the public interest in the financial markets, support the financial reform of Wall Street and make our financial system work for all Americans again."

On behalf of Better Markets, Dennis Kelleher (President & CEO), Stephen Hall (Legal Director and Securities Specialist), and Jason Grimes (Senior Counsel) transmitted the organization’s 11-page comment letter to the Bureau. Among other things, Better Markets emphasizes that:

- the CFPB does not have the authority to adopt the proposal because the ability-to-repay (ATR) requirements of the Dodd-Frank Act "are crystal clear" that a lender is obligated to determine a borrower’s ATR "at the time the loan is consummated";
- the proposal is arbitrary and capricious because it "benefits industry at the expense of consumers and does not plausibly provide any consumer benefit"; and
- from a policy perspective, the premise for the Bureau’s proposal—that "a lack of serious delinquencies over some period of time must mean that the loan was affordable for the borrower at its origination"—is "flawed" and "ignores reality."

Companies: Better Markets; Consumer Bankers Association