

# REFJ

## The Real Estate Finance Journal

A THOMSON REUTERS PUBLICATION

FALL 2021

FROM THE EDITOR

### An Update on LIBOR

Roger S. Chari, Joel N. Ephross, Amelia (Amy) H. Huskins, and Phuong (Michelle) Ngo

### Commercial Real Estate Loan Forbearance by Banks During COVID-19

William C. Handorf, Ph.D., and W. Harmon Handorf

### Negative Pledges in Commercial Real Estate Financings – Why Do We Need Them?

William Lo

### Pandemic Fuels Real Estate and Hospitality Turnaround M&A Activity

Brice Engel, Eugene J.M. Leone, David J. Pezza, and Holger Wolf

### Surging Sustainable Finance Market Presents Opportunities for Energy and Infrastructure

Alexandra N. Farmer, Jennie Morawetz, Rachael L. Lichman, P.C., Sara K. Orr, Kelann Brook Stirling, and Emilie A. Jones

### Fast Facts on the Top 10 Relevant Regulatory Areas for Real Estate Fund Managers

Matthew J. Ertman and Max Brunner

### LSTA Issues Revised Sustainability Linked Loan Principles

Deborah P. Low and Jacob Pearlman

### Window Widens for Completing Construction on Renewable Energy Projects

Maureen Linch, Julia R. Balas, and Shane M. Shelley

### New York City's Article XI Real Property Tax Exemption Program: Providing Attractive Real Property Tax Benefits for Multi-family Properties

Martin Siroka and Scott M. Vetri

### No Time Runs Against the King (IRS): The Golden Creditor Rule and Its Discontents

Robert J. Lemons and Alex Xiao

### A "How-To" Primer on Reducing Real Estate Coverage Costs with Parametric Insurance

Kimberly Gore

### Debt or Equity? Bankruptcy Court Finds "Equity" in a Recent Case Involving Recharacterization of a Party's Debt Claim

Kevin Bostel and Justin Kanoff

### Supreme Court Holds FHFA's Structure Is Unconstitutional but Declines to Unwind the Net-Worth Sweep

Brad S. Karp, Susanna M. Buerger, Kannon K. Shanmugam, and William T. Marks

### GAO Recommends CFPB Evaluate Trump Era Fair Lending Reorganization

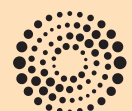
Jennifer Kennedy Park, Nowell D. Bamberger, Pascale Bibi, Mijin (Jacqueline) Kang, and Daniel James Lee

### The QM Patch Is Down for the Count

Stephen Ornstein

### A Legal Update for the Title Insurance Industry

Michael J. Heller, Peter P. McNamara, and Matthew V. Spero



THOMSON  
REUTERS

# REFJ

---

## The Real Estate Finance Journal

A THOMSON REUTERS PUBLICATION

Fall 2021

<i>FROM THE EDITOR</i>	<b>3</b>	<b>New York City's Article XI Real Property Tax Exemption Program: Providing Attractive Real Property Tax Benefits for Multi-family Properties</b>	
<b>An Update on LIBOR</b> <i>Roger S. Chari, Joel N. Ephross, Amelia (Amy) H. Huskins, and Phuong (Michelle) Ngo</i>	<b>7</b>	<i>Martin Siroka and Scott M. Vetri</i>	<b>49</b>
<b>Commercial Real Estate Loan Forbearance by Banks During COVID-19</b> <i>William C. Handorf, Ph.D., and W. Harmon Handorf</i>	<b>15</b>	<b>No Time Runs Against the King (IRS): The Golden Creditor Rule and Its Discontents</b> <i>Robert J. Lemons and Alex Xiao</i>	<b>55</b>
<b>Negative Pledges in Commercial Real Estate Financings – Why Do We Need Them?</b> <i>William Lo</i>	<b>25</b>	<b>A “How-To” Primer on Reducing Real Estate Coverage Costs with Parametric Insurance</b> <i>Kimberly Gore</i>	<b>59</b>
<b>Pandemic Fuels Real Estate and Hospitality Turnaround M&amp;A Activity</b> <i>Brice Engel, Eugene J.M. Leone, David J. Pezza, and Holger Wolf</i>	<b>29</b>	<b>Debt or Equity? Bankruptcy Court Finds “Equity” in a Recent Case Involving Recharacterization of a Party’s Debt Claim</b> <i>Kevin Bostel and Justin Kanoff</i>	<b>61</b>
<b>Surging Sustainable Finance Market Presents Opportunities for Energy and Infrastructure</b> <i>Alexandra N. Farmer, Jennie Morawetz, Rachael L. Lichman, P.C., Sara K. Orr, Kelann Brook Stirling, and Emilie A. Jones</i>	<b>33</b>	<b>Supreme Court Holds FHFA’s Structure Is Unconstitutional but Declines to Unwind the Net-Worth Sweep</b> <i>Brad S. Karp, Susanna M. Buerger, Kannon K. Shanmugam, and William T. Marks</i>	<b>65</b>
<b>Fast Facts on the Top 10 Relevant Regulatory Areas for Real Estate Fund Managers</b> <i>Matthew J. Ertman and Max Brunner</i>	<b>37</b>	<b>GAO Recommends CFPB Evaluate Trump Era Fair Lending Reorganization</b> <i>Jennifer Kennedy Park, Nowell D. Bamberger, Pascale Bibi, Mijin (Jacqueline) Kang, and Daniel James Lee</i>	<b>69</b>
<b>LSTA Issues Revised Sustainability Linked Loan Principles</b> <i>Deborah P. Low and Jacob Pearlman</i>	<b>41</b>	<b>The QM Patch Is Down for the Count</b> <i>Stephen Ornstein</i>	<b>75</b>
<b>Window Widens for Completing Construction on Renewable Energy Projects</b> <i>Maureen Linch, Julia R. Balas, and Shane M. Shelley</i>	<b>45</b>	<b>A Legal Update for the Title Insurance Industry</b> <i>Michael J. Heller, Peter P. McNamara, and Matthew V. Spero</i>	<b>79</b>

## EDITOR

Robert G. Koen  
Mintz, Levin, Cohn, Ferris,  
Glovsky and Popeo, P.C.

## MANAGING EDITOR

Erbayne W. Jarvis  
Thomson Reuters

## SUBMISSIONS EDITOR

Steven A. Meyerowitz  
Meyerowitz Communications Inc.  
All editorial correspondence, manuscripts, etc.,  
should be sent to:  
Steven A. Meyerowitz, Esq.  
President/Meyerowitz Communications Inc.  
26910 Grand Central Parkway, # 18R  
Floral Park, NY 11005  
631.291.5541  
smeyerowitz@meyerowitzcommunications.com

THE REAL ESTATE FINANCE JOURNAL  
(ISSN 0898-0209) is published quarterly by Thomson  
Reuters, 610 Opperman Drive, Eagan, MN 55123-1396.

*Editorial Offices:* Thomson Reuters, 50 Broad Street  
East, Rochester, NY 14694. All editorial correspondence,  
manuscripts, etc., should be sent to this address.  
Although the utmost care will be given material  
submitted, we cannot accept responsibility for unsolicited  
manuscripts.

*Subscription:* For subscription information or for customer  
service, call 1-800-328-4880. Periodicals postage paid at  
St. Paul, MN.

© 2021 Thomson Reuters. No part of this journal may be  
reproduced in any form—by microfilm, xerography, or  
otherwise—or incorporated into any information retrieval  
system without the written permission of the copyright  
owner. This publication is designed to provide accurate  
and authoritative information in regard to the subject  
matter covered. It is sold with the understanding that the  
publisher is not engaged in rendering legal, accounting  
or other professional service. If legal or accounting  
advice or other expert assistance is required, the  
services of a competent professional should be sought.

Nothing contained herein is intended or written to be  
used, and may not be used, for the purposes of 1)  
avoiding penalties imposed under the Internal Revenue  
Code, or 2) promoting, marketing or recommending to  
another party any transaction or matter addressed  
herein.

## CONTRIBUTING EDITORS

**Ronald B. Bruder**  
President  
The Brookhill Group

**Stevens A. Carey**  
Partner  
Pircher, Nichols & Meeks

**Jonathan L. Kempner**  
Fellow, Advanced Leadership Initiative  
Harvard University

**Yonguo Liang, Ph.D.**  
Head, Global Research and  
Public Markets  
Abu Dhabi Investment Authority (ADIA)

**Stephen Rushmore**  
President and CEO  
HVS

**Stuart M. Saft**  
Partner  
Holland & Knight LLP

**Joshua Stein**  
Partner  
Joshua Stein PLLC

## BOARD OF ADVISORS

**Jason Barnett**  
Vice Chairman & General Counsel  
RXR Realty LLC

**Cia Buckley**  
Partner  
Dune Capital Management

**Dino P. Christoforakis**  
Head of Transactions, North America  
AFIAA U.S. Investment, Inc.

**Frederick N. Cooper**  
Senior Vice President  
Toll Brothers, Inc.

**Louis M. Dubin**  
Managing Partner  
Redbrick LMD

**Andrew L. Farkas**  
CEO  
Island Capital

**Kyle Gore**  
Managing Director, Real Estate Finance  
CGA Group

**David Hamm**  
Senior Managing Director  
WAFRA, Inc.

**Ross Hilton Kemper**  
President  
Kingswood Capital LLC

**Ronald J. Kravit**  
Chairman and President  
RJK Partners Inc.

**Richard J. Mack**  
Mack Real Estate Group

**Joseph Mizrahi**  
Managing Member  
Third Millennium Group

**Anthony Orso**  
President, Capital Markets Strategies  
Newmark

**Shelby E.L. Pruett**  
CEO  
Capri EGM, LLC

**Lorenz Reibling**  
Chairman and Senior Partner  
Taurus Investment Holdings LLC

**Stephen Siegel**  
Chairman, Global Brokerage  
CB Richard Ellis

**Rick H. Singer**  
President  
Winter Properties

**David R. Soares**  
President and CEO  
Lexden Capital, LLC

# The QM Patch Is Down for the Count

*Stephen Ornstein\**

**Somehow, the qualified mortgage (“QM”) rules have become even more complicated. This article parses how the death of the QM Patch will affect creditors seeking to originate residential mortgage loans under Fannie Mae, Freddie Mac, or Consumer Financial Protection Bureau regulations.**

Whether they realize it or not, creditors are no longer be able to originate qualified mortgage loans using the “QM Patch.” The reason for this dramatic event is that on April 8, 2021, Fannie Mae and Freddie Mac announced in separate pronouncements that effective for loans with application dates after June 30, 2021 (for Fannie Mae; for Freddie Mac, applications received on or after July 1, 2021), the loans must conform with the revised qualified mortgage (“QM”) loan rules - and cannot be QM Patch loans.

Stated another way, since the Federal Housing Finance Agency (“FHFA”) is terminating the QM Patch, loans underwritten to the QM Patch after July 1, 2021 will no longer be eligible for sale to the government-sponsored enterprises (“GSEs”), and in effect, the QM Patch disappears after that date. This development contradicts the Consumer Financial Protection Bureau’s (“CFPB”) final rulemaking delaying the mandatory effective date of the revised QM rules until October 1, 2022. Under that CFPB rulemaking, during the period between March 1, 2021 and October 1, 2022,

the CFPB intends for creditors to have the option of originating QM loans either under the legacy QM rules, including the QM Patch, or the revised QM rules.

## Background

On December 10, 2020, former CFPB director Kathy Kraninger issued the revised QM rules that replaced Appendix Q and strict 43 percent debt-to-income ratio (“DTI”) underwriting threshold with a priced-based QM loan definition. The revised QM rules also terminated the QM Patch, under which certain loans eligible for purchase by Fannie Mae and Freddie Mac do not have to be underwritten to Appendix Q or satisfy the capped 43 percent DTI requirement. The rule was to take effect on March 1, 2021, but compliance would not be mandatory until July 1, 2021. Under the rulemaking, the QM Patch would have expired on the earlier of July 1, 2021, or the date that the GSEs exit conservatorship.

On April 27, 2021, the CFPB promulgated a final rule delaying the mandatory compliance

\*Stephen Ornstein, a partner at Alston & Bird LLP and co-leader of the firm’s Consumer Financial Services Team, concentrates on federal and state mortgage banking, consumer credit, and ancillary services regulatory issues. He may be reached at [stephen.ornstein@alston.com](mailto:stephen.ornstein@alston.com).

date of the revised QM rule from July 1, 2021 to October 1, 2022. Notably, under this rule, the QM Patch is extended to October 2022, which gives creditors the option of originating QM rules under either the legacy QM rules or the revised QM rules between March 1, 2021 and October 1, 2022.

This “optionality” has been partially negated by the GSEs’ April 2021 pronouncements in which they announced that they, in effect, will adhere to the mandatory effective date of the revised QM rules as originally promulgated by Kraninger in December 2020. In particular, in Fannie Mae Lender Letter 2021-09, Fannie Mae indicated it will no longer acquire loans that are QM Patch loans that do not meet the revised QM rules.

To be eligible for purchase by Fannie Mae, QM Patch loans must:

- Have application dates on or before June 30, 2021, and
- Be purchased as whole loans on or before August 31, 2021, or in mortgage-backed security pools with an issue date on or before August 1, 2021.

Similarly, in Freddie Mac Bulletin 2021-13, Freddie Mac noted that it will no longer purchase QMs under the QM Patch effective for mortgages with “Application Received Dates” on or after July 1, 2021 and all mortgages with “Settlement Dates” after August 31, 2021.

On May 26, 2021, Fannie Mae and Freddie Mac issued additional guidance<sup>1</sup> reiterating that QM Patch loans that do not meet the revised QM rule must have application dates on or before June 30, 2021. This GSE guidance indicates that single-closing construction-

to-permanent loans with application dates before July 1, 2021 that meet the QM Patch (and do not meet the revised QM rules) can be purchased or securitized on or before February 28, 2022.

Under the relevant CFPB regulations governing the QM Patch,<sup>2</sup> a loan must, among other things, be eligible to be “purchased or guaranteed” by Fannie Mae or Freddie Mac. Stated another way, if the loan is not eligible for purchase or guarantee by Fannie Mae or Freddie Mac, the creditor may not avail itself of the QM Patch. Therefore, the GSEs’ April 2021 pronouncements indicating that effective July 1, 2021, QM Patch loans would no longer be eligible for sale to Fannie Mae and Freddie Mac sounds the death knell for the QM Patch notwithstanding the CFPB’s intention to extend it to October 2021.

### The Takeaway

Therefore, creditors have the following options for originating QM loans:

- Commencing March 1, 2021, creditors may underwrite to the revised QM rules.
- At this juncture, for non-agency loans, the revised QM rules become mandatory on October 1, 2022.
- For Fannie Mae and Freddie Mac, however, the revised QM rules became mandatory on July 1, 2021, meaning that the QM Patch effectively terminated on July 1, 2021—and that all loans sold to Fannie and Freddie must comply with the revised QM rules, effective July 1, 2021.
- From March 1, 2021 until October 1, 2022, creditors not selling loans to Fan-

nie and Freddie may continue to underwrite to the legacy QM rules; however, commencing July 1, 2021, legacy QM loans must be underwritten to Appendix Q and not to the QM Patch. Stated another way, since the FHFA terminated the QM Patch, loans underwritten to the QM Patch after July 1 are no longer eligible for sale to the GSEs, and in effect, the QM Patch disappeared after that date, notwithstanding the CFPB's intent for it to continue until October 1, 2022.

- Hence, for non-agency loans, from July 1, 2021 until October 1, 2022, legacy QM loans must be underwritten in accordance with Appendix Q.

### Consider and Verify Requirements

Creditors originating loans under the revised QM rules should recognize that they will no longer be able to rely on a valid underwriting recommendation provided by a GSE automated underwriting system ("AUS") or an AUS that relies on an agency underwriting tool to satisfy the "consider" and "verify" components of the new QM underwriting requirements. In lieu of underwriting to Appendix Q, the revised QM rules require that the creditor consider the consumer's current or reasonably expected income or assets other than the value of the dwelling (including any real property attached to the dwelling) that secures the loan, debt obligations, alimony, child support, and DTI ratio or residual income as well as verify the consumer's current or reasonably expected income or assets other than the value of the dwelling (including any real property attached to the dwelling) that secures the loan and the consumer's current debt obligations, alimony, and child support.

As part of the consider requirement, a creditor must maintain policies and procedures for how it takes into account the underwriting factors enumerated above, as well as retain documentation showing how it took these factors into account in its ability-to-repay determination.

The CFPB indicates that this:

documentation may include, for example, an underwriter worksheet or a final automated underwriting system certification, in combination with the creditor's applicable underwriting standards and any applicable exceptions described in its policies and procedures, that shows how these required factors were taken into account in the creditor's ability-to-repay determination.

The revised QM rules do not prescribe specific methods of underwriting that a creditor must use, as long as the creditor uses third-party records that provide reasonably reliable evidence of the consumer's income or assets. Indeed, the rule permits the creditor to use any "reasonable verification method and criteria."

Nevertheless, the CFPB provides a "safe harbor" to creditors using verification standards from relevant provisions from:

- Fannie Mae's Single Family Selling Guide;
- Freddie Mac's Single-Family Seller/Servicer Guide;
- The Federal Housing Administration's Single Family Housing Policy Handbook;
- The U.S. Department of Veterans Affairs' Lenders Handbook; and
- The Field Office Handbook for the Direct Single Family Housing Program and

Handbook for the Single Family Guaranteed Loan Program of the U.S. Department of Agriculture.

In other words, under the rule, a creditor is deemed to have complied with this verify requirement if it complies with the verification standards in one or more of these agency manuals.

To comply with these “consider” and “verify” requirements, we recommend that the creditor promulgate the requisite written policies and procedures and related documentation such as underwriter worksheets, and that if the creditor intends to use the verification safe

harbor, its written policies and procedures specify the precise agency handbooks that it is relying on with specific references to the particular provisions addressing income, assets, debt obligations, alimony, and child support using specified documents or to classify and count particular inflows, property, and obligations as income, assets, debt obligations, alimony, and child support.

**NOTES:**

<sup>1</sup> <https://singlefamily.fanniemae.com/media/25856/display>.

<sup>2</sup> <https://www.consumerfinance.gov/rules-policy/regulations/1026/2021-02-17/43/#e-4>.