



Financial Services & Products ADVISORY ■

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Complying with the “Consider” Requirement Under the Revised Qualified Mortgage Rules

by [Stephen Ornstein](#)

Purchasers of residential mortgage loans who are conducting audits of residential mortgages that they buy in the secondary market loans are struggling to determine what documentation satisfies the “consider” requirement of the revised qualified mortgage (QM) standards that became mandatory on October 1, 2022. In fact, originators of residential mortgage loans are not in agreement regarding what particular written policies and procedures they must promulgate and maintain and the documentation that they should include in the loan files. We set forth what we believe are the policies and procedures and the documentation that creditors must maintain and provide to their counterparties to comply with the consider requirement.

The Revised QM Rules

As a threshold matter, on December 10, 2020, Kathy Kraninger, who was the director of the Consumer Financial Protection Bureau (CFPB), issued the revised QM rules that replaced Appendix Q and the strict 43% 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% DTI requirement. Compliance with the new rules became mandatory on October 1, 2022.

Under the revised rules, for first-lien transactions, a loan receives a conclusive presumption that the consumer had the ability to repay (and hence receives the safe harbor presumption of QM compliance) if the annual percentage rate does not exceed the average prime offer rate (APOR) for a comparable transaction by 1.5 percentage points or more as of the date the interest rate is set. A first-lien loan receives a “rebuttable presumption” that the consumer had the ability to repay if the APR exceeds the APOR for a comparable transaction by 1.5 percentage points or more but by less than 2.25 percentage points. The revised QM rules provide for higher thresholds for loans with smaller loan amounts, for subordinate-lien transactions, and for certain manufactured housing loans.

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To qualify for QM status, the loan must continue to meet the statutory requirements regarding the 3% points and fees limits, and it must not contain negative amortization, a balloon payment (except in the existing limited circumstances), or a term exceeding 30 years.

Consider and Verify Consumer Income and Assets

In lieu of underwriting to Appendix Q, the revised rule requires 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. The final rule also requires the creditor to 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.

In particular, to comply with the consider requirement under the rule, the CFPB provides creditors the option to consider either the consumer's monthly residual income or DTI. The CFPB imposes no bright-line DTI limits or residual income thresholds. As part of the consider requirement, a creditor must maintain policies and procedures for how it takes into account the underwriting factors enumerated above and 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."

CFPB Staff Commentary

Paragraph 43(e)(2)(v)(A) of the CFPB Staff Commentary to Regulation Z requires creditors to comply with the consider requirement of the new QM rule by doing the following:

a creditor must take into account 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 monthly debt-to-income ratio or residual income in its ability-to-repay determination. *A creditor must maintain written policies and procedures for how it takes into account, pursuant to its underwriting standards, income or assets, debt obligations, alimony, child support, and monthly debt-to-income ratio or residual income in its ability-to-repay determination. A creditor must also retain documentation showing how it took into account income or assets, debt obligations, alimony, child support, and monthly debt-to-income ratio or residual income in its ability-to-repay determination, including how it applied its policies and procedures, in order to meet this requirement to consider and thereby meet the requirements for a qualified mortgage under § 1026.43(e)(2). 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 show how these required factors were taken into account in the creditor's ability-to-repay determination* [emphasis added].

The Secondary Market's Review of Creditors' Policies and Procedures and File Documentation

The revised rules suggest that, *at a minimum*, to ensure that the creditor has satisfied the "consider" requirement, a creditor must promulgate and 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. Ideally, the creditor should make these written policies and procedures available to the creditor's secondary market counterparties.

Further, and more importantly, the revised rules indicate that the individual loan files should contain a worksheet, Automated Underwriting Systems (AUS) certification, or *some other written evidence* documenting how the enumerated factors were taken into account in meeting the enhanced ability-to-repay standards. The underwriters should document their use of applicable exceptions to the creditor's general policies and procedures in underwriting the loan.

Notwithstanding the foregoing, it is our understanding that compliance with these requirements has been uneven in the industry and that certain creditors have not promulgated the requisite written policies and procedures related to the consideration of income, assets, and debt. In addition, documentation (i.e., worksheets and AUS certifications) of these factors in individual loan files has been haphazard and inconsistent.

In March 2023, the Structured Finance Association convened an ATR/QM Scope of Review Task Force, comprising rating agencies, diligence firms, issuers, and law firms, to develop uniform best practice testing standards for performing due diligence on QM loans. Discussion topics included the documentation of the consider requirement of the revised QM rules.

In its early meetings, the participants in the task force confirmed that creditors have not uniformly developed written policies and procedures documenting the consider requirement. Participants have focused more on the creditor's actual documentation of income, assets, and debt in individual loan files they believe would demonstrate substantive compliance with the underwriting requirements of the revised rules.

At this early juncture (compliance with the revised rule became mandatory in October 2022), it may be premature for secondary market purchasers of residential mortgage loans to cite their sellers or servicers for substantive noncompliance with the revised QM rules if these entities have not developed robust written policies and procedures that show how they consider income, assets, and debt.

It may be more fruitful for the secondary market to focus on the actual file documentation itself and determine whether the creditors have satisfied the consider requirement by properly underwriting the loans in accordance with the requisite elements and documenting the file with the appropriate worksheets and other written evidence.

The creditor's failure to maintain the general policies and procedures does not necessarily render the subject loans non-QM if the loan files are adequately underwritten and amply documented. Compliance with the new QM rules and the documentation of the consider requirement is still at a rudimentary stage, and the secondary market will have to periodically revisit the way it audits mortgage loans.

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