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The New Ability-to-Repay and Qualified Mortgage Rules Under Dodd-Frank and Regulation Z: An Overview

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On January 30, 2013, the Consumer Financial Protection Bureau ("CFPB") issued the first of five final rules concerning new "Ability to Repay" requirements under Regulation Z ("ATR Rule").[1] The ATR Rule was enacted in response to the 2008 financial crisis, following a period when credit standards in residential mortgage lending deteriorated and loans allegedly were made to consumers without adequately considering their ability to repay the loans.[2] Even though creditors already seemed to have reduced their appetites for risk,[3] Congress believed stricter, legally-mandated lending standards were necessary to ensure that creditors remained vigilant in their lending practices and to avoid another recession as severe as the one that hit in 2008.[4]

The ATR Rule is about curbing reckless lending.[5] The rule requires a creditor to make a "reasonable and good faith determination" based on verified and documented information that a consumer will be reasonably able to repay a mortgage loan before extending credit to the consumer.[6] From this common sense principle flowed forth a body of long and complex regulations.

This article briefly summarizes the substance of the new ATR Rule (Part 1) and then speculates a bit on the internal risk and compliance management measures all residential mortgage lenders will need to take to minimize their troubles under the new rules (Part 2).

The ATR Rule applies to more than just banks and credit unions; it applies to "creditors" of all types. Regulation Z defines a "creditor" as a person who regularly extends consumer credit subject to a finance charge or payable by written agreement in more than four installments, and to whom the initial obligation is initially payable on the face of the note or the contract.[7] Individual home sellers who finance the buyer's purchase, either through a loan or an installment sale, are not covered by the ATR Rule.[8] Apart from that, most institutional mortgage lenders-- banks, credit unions, mortgage and finance companies-- regardless of type of charter or license, are covered by the ATR Rule.

The ATR Rule generally applies to consumer purpose closed-end loans that are secured by a one-to-four-unit residential structure, but there are a number of exemptions worth considering.[9] The following types of loans and lines of credit are exempt: (i) home equity lines of credit;[10] (ii) timeshare loans; (iii) reverse mortgages; (iv) temporary loans or "bridge" loans with a term of twelve months or less; (v) the construction phase of twelve months or less of a construction-permanent loan; (vi) a loan made according to a Housing Finance Agency program; (vii) loans originated by certain nonprofit creditors; and (viii) loans made pursuant to programs authorized by the Emergency Economic Stabilization Act of 2008.[11]

The ATR Rule became effective on January 10, 2014.[12]

Part 1: Three Approaches to ATR Compliance

Three methods are available to a creditor seeking to comply with the ability-to-repay requirements. The first establishes a "general ability-to-repay standard," which requires the creditor to consider eight identified underwriting criteria but is otherwise relatively flexible.[13] The second involves the origination of a "qualified mortgage" under any one of five qualified mortgage categories.[14]

The third allows for a refinancing of a "nonstandard" mortgage into a "standard" mortgage.15 Each method is discussed in more detail below.

Senior management and boards of directors of lenders of all types, regardless of charter, should make a strategic decision as to which approach or approaches to the ATR Rule they will follow. Each approach is associated with different levels of compliance expense and potential liability.16 Therefore, lenders must determine the amount of risk they are willing to take on when selecting their approach17 and consider whether the market will allow creditors to "price in" any additional risk they choose to accept.

A. First Approach: General Ability to Repay Standard

The first approach for complying with the ATR Rule requires the creditor to consider eight identified underwriting criteria before making the loan.18 This is the "general ATR standard," not to be confused with qualified mortgages described below. The eight criteria will strike most readers as reasonable and possibly even common sense:

(1) *Income or assets.* A creditor may consider any type of current or reasonably expected income, including salary, wages, self-employment income, bonus pay, tips, commissions, interest payments, and dividends.19 Additionally, the creditor may also consider a consumer's assets, such as savings or checking accounts, securities, and the amount available to the consumer from a trust fund.20 The creditor may not, however, consider the value of the dwelling (or any related real property) that will secure the loan.21 In short, the ATR Rule effectively prohibits making a home loan that is wholly dependent on the collateral. In contrast, the ability to rely on a consumer's assets, apart from income, means loans may be made under the general ability-torepay standard to retirees who have substantial balance sheets or to other high net worth individuals who have limited incomes, provided that the creditor duly "considers" the applicant's debtto- income ratio (see factor (8) below).

When evaluating a consumer's income or assets, the creditor must verify the information with third-party records that provide reasonably reliable evidence of the income or assets.22 This may be the most significant change from prior practice. While the standard affords considerable underwriting flexibility to the creditor, one thing the creditor may not do is "take the borrower's word" for any claimed assets or income. The creditor must review reasonably reliable third-party records. In short, "no doc" and "low doc" loans are now dead.

(2) *Employment status.* If a creditor relies on a consumer's employment income, the creditor must consider and verify the consumer's employment status.23

(3) *Monthly payment on the subject loan.* The creditor must consider the monthly payment on the loan under consideration in comparison to the consumer's income and other debts, the goal being to assure that the consumer will have enough income to make the payments due on the subject loan.24 This closely relates to Item (8) below where the creditor is required to consider the consumer's debt-to-income ratio or residual income (income remaining after debt service), all with the goal of ensuring that the consumer will have the ability to repay the new loan.

(4) *Monthly payment on any simultaneous loan.* The creditor must consider the monthly payments due on a "simultaneous loan," if any.25 A "simultaneous loan" is another closed-end mortgage loan or a home equity line of credit that will be secured by the same dwelling and made to the same consumer at or before consummation of the subject loan.26 A loan is also simultaneous if it is to be made after consummation and will cover the closing costs of the subject loan.27 A simultaneous loan can even be one made by another creditor if the subject creditor "knows or has reason to know" that the loan will be or has been made at or before consummation of the covered transaction.28

(5) *Mortgage-related obligations.* Creditors must also consider and verify the consumer's monthly payments for what the ATR Rule calls "mortgage-related obligations."29 These are defined as a consumer's recurring expenses in connection with maintaining property, including property taxes, mortgage insurance, homeowners association dues, ground rents, and other similar expenses.30 Mortgage-related obligations must be included in an ability-to-repay evaluation regardless of whether the amounts are included in the monthly payment or whether the subject loan will have an escrow account.31

(6) *Current debts.* A creditor must consider the consumer's other current debts, which include payments on credit cards, student loans, automobile loans, and mortgages not paid off by the subject loan.32 Alimony and child support payments are also considered.33

(7) *Credit history.* Creditors must evaluate a consumer's credit history in making an ability-to-repay determination.34 Creditors must obtain the consumer's credit report from a reliable third party such as one of the nationwide credit bureaus or a reputable seller.35 A consumer's credit history does not necessarily mean a credit score.36 It includes factors such as the number and age of credit lines, payment history, and any judgments, collections, or bankruptcies.37 The ATR Rule does not indicate which aspects of a consumer's credit history a creditor must consider or how various aspects of credit history should be weighed against other underwriting factors.38 Creditors are therefore free to give whatever weight to various aspects of a credit history that is necessary to reach a reasonable, good faith determination of the consumer's ability to repay.39 Of course, a flexible standard like this can also expose the creditor to being second guessed if the loan later goes delinquent.

(8) *Monthly DTI ratio or residual income.* The creditor must consider the consumer's monthly debt-to-income ("DTI") ratio or residual income.40 The regulation sets no maximum DTI ratio or minimum residual income standard under the general abilityto-repay standard (for example, no forty-three percent maximum, which applies only to Qualified Mortgages, as discussed below).41 It is up to the creditor to establish an appropriate threshold for a DTI ratio or residual income in making its reasonable and good faith determination of the consumer's ability to repay.42 Again, one person's flexibility is another's opportunity to sue for alleged non-compliance.

In addition to enumerating and detailing the eight factors, the commentary to the regulation explains what may or may not be evidence that a creditor's determination was reasonable and made in good faith.43 Among other things, the fact that a creditor used standards that have historically resulted in comparatively low rates of delinquency and default during adverse conditions, or standards based on empirically derived, demonstrably and statistically sound models, is evidence (but not conclusive evidence) of reasonableness and good faith.44 These provisions of the commentary, which ironically may have been intended to provide comfort to lenders, can also be construed as a roadmap for future litigation.

A potential obstacle to following the general ability-torepay approach is that the ATR Rule does not set forth specific guidelines to apply the underwriting factors discussed above.45 This is likely due to the fact that a one-size-fits-all approach is not appropriate when financial institutions must evaluate ability to repay in the context of the facts and circumstances relevant to their market, organization, and individual consumers.46 The lack of comprehensive guidance allows creditors the flexibility to determine how the eight factors will be applied when underwriting consumer mortgage loans.47 In fact, the CFPB's official comments to the regulation specifically explain that as long as the creditor complies with the text of the regulation, the creditor can use its own definitions and other underwriting criteria.48 Additionally, a creditor can, but is not required to, look to guidance issued by any regulatory entity, such as the Federal Housing Administration or Veterans Administration.49 This considerable leeway is what distinguishes this method of compliance from the other methods discussed below.

While underwriting flexibility may be a good thing, it has its disadvantages as well. For example, a creditor should not mistake the flexibility allowed by the regulation to mean that the creditor has no reason to establish its own internal underwriting standards. In the event of questions from a regulator or in the event of litigation, a creditor who used the general ability-to-repay approach will want to be able to point to its own documented determinations in support of its own underwriting criteria. For example, suppose a creditor believes, perhaps based on its own lending experience, that debt-to-income ratios as high as fortyeight percent are consistent with a reasonable ability-to-repay determination. Prudence suggests that such a creditor document how it reached that conclusion. Failure to do so could expose the creditor to being second guessed in a regulatory forum or a courtroom.

B. Second Approach: Originating Qualified Mortgages

The second approach for complying with the ATR Rule allows a creditor to originate a qualified mortgage ("Qualified Mortgage").50 The Qualified Mortgage approach is more "cookie cutter," but it provides creditors with some legal protection under a safe harbor or rebuttable presumption of compliance depending on whether the Qualified Mortgage is a higherpriced covered transaction. The Qualified Mortgage approach, as adopted, may be a reaction to the banking industry's stated concern over the litigation risks associated with the abilityto- repay requirements.51 The CFPB responded by developing detailed Qualified Mortgage rules.52

A Qualified Mortgage is a consumer credit transaction, secured by a residential structure containing one to four units (i) that calls for regular (fully amortizing) periodic payments; (ii) that has a loan term that does not exceed thirty years; (iii) in which the points and fees do not exceed a certain threshold (typically, three percent of the loan amount); (iv) that is underwritten using the maximum, fully amortizing payment based upon the maximum interest rate that can apply to the loan during the five-year period following consummation; (v) for which the creditor considers and verifies the consumer's current or reasonably expected income and assets as well as current debt obligations, in each case, using a highly-detailed new Appendix Q to Regulation Z; and (vi) for which the consumer's debt-to-income ratio does not exceed forty-three percent at consummation.53

There are five categories of Qualified Mortgages, each with slightly different features: (1) general Qualified Mortgages; (2) temporary Qualified Mortgages (government sponsored enterprise loans); (3) small creditor balloon-payment Qualified Mortgages; (4) small creditor portfolio Qualified Mortgages; and (5) temporary balloon-payment Qualified Mortgages.

A significant benefit of following the Qualified Mortgage approach is the level of legal protection that creditors can enjoy. Originating a Qualified Mortgage gives creditors either a safe harbor or at least a rebuttable presumption of compliance with the ATR Rule.54 The CFPB afforded these protections because Qualified Mortgages do not contain certain "toxic" features considered to increase risk to consumers.55 The level of protection provided by a Qualified Mortgage depends on whether the Qualified Mortgage is a higher-priced covered transaction ("HPCT"). An HPCT is a loan with an annual percentage rate that exceeds the published "average prime offer rate" by 1.5 percent or more.56

If the Qualified Mortgage is an HPCT, the ATR Rule provides a rebuttable presumption of compliance.57 This means that while the creditor is presumed to comply with the ATR Rule, the consumer may show that at the time the loan was originated, the consumer's income and debt obligations left insufficient residual income or assets to meet the consumer's living expenses.58 However, if the Qualified Mortgage is not an HPCT, the ATR Rule provides a safe harbor, conclusively presuming that the creditor made a good faith and reasonable determination of the consumer's ability to repay.59

Even with the safe harbor (or rebuttable presumption) afforded to Qualified Mortgage loans, it remains unclear how valuable that protection will actually prove to be in court. Lawyers for borrowers will presumably be able to set forth a "litany of charges" asserting that the loan is not a Qualified Mortgage in one respect or another.60 Lenders would then be forced to offer proof (presumably after extensive discovery) that the loan meets the detailed Qualified Mortgage requirements. Therefore, the best, it seems, that a lender can hope for is to prevail after a motion for summary judgment, and then only if the court finds there to be no triable issue of fact as to the lender's adherence to all of the Qualified Mortgage rules. While this may be better than having to take a case to trial, only time will reveal the actual value of the Qualified Mortgage legal protections.61

C. Third Approach: Refinancing Non-Standard Mortgage into Standard Mortgage

The third approach available to creditors to comply with the ATR Rule is to refinance a "non-standard mortgage" into a "standard mortgage."62 The CFPB adopted this approach to incentivize lenders to refinance borrowers out of non-standard mortgages. The goal is to enable creditors to offer consumers a new loan with lower monthly payments without going through the full underwriting process.63

A non-standard mortgage is defined as an adjustable rate mortgage with an introductory fixed rate for one year or longer (a "hybrid mortgage"), an interest-only loan, or a negative amortization loan.64 A standard mortgage is a covered loan which has: (i) regular periodic payments, with no "toxic" features (negative amortization, interest-only payments, or balloon payments); (ii) total points and fees not in excess of the Qualified Mortgage limits (usually three percent); (iii) a term up to forty years; (iv) a fixed interest rate for at least the first five years; and (v) loan proceeds used to solely pay off the outstanding balance on the non-standard mortgage, plus closing or settlement charges.65

On top of the restrictions built into the definitions above, to use the refinancing approach to comply with the ATR Rule, the loan must meet the following conditions: (1) the creditor remains the same; (2) the monthly payment on the refinancing is materially lower than on the non-standard mortgage; (3) the creditor must receive the refinancing application no later than two months after the non-standard mortgage is recast; and (4) the consumer is not delinquent on the non-standard mortgage payments (additional requirements will apply if the non-standard mortgage was consummated on or after January 10, 2014).66 The creditor must also consider whether the refinancing will likely prevent the consumer's default.67

An alternative to the refinancing approach that would allow the creditor to avoid compliance with the ATR Rule altogether is to use a change-in-terms agreement to modify an existing loan. The ATR Rule does not apply when a creditor uses a change-interms agreement to modify an existing mortgage loan without refinancing it.68

Part 2: Compliance and Risk Management Issues for the Lender

Underwriting is now a form of compliance. The ATR Rule represents a completely new approach to mortgage lending compliance. The process of underwriting is no longer simply a matter of prudence or safety and soundness; it is now a matter of compliance. Errors or missteps in underwriting will be seen as compliance violations, regardless of whether the error results in any financial loss to the lender. Therefore, creditors must ensure that they closely review the ATR Rule and establish procedures that will lessen risks of non-compliance for residential mortgage lending operations.

Can we make that loan? The ATR Rule will affect mortgage product selections offered by lenders, as well as new product design, since the rule codifies certain underwriting factors rather than merely suggesting them as part of a loan's credit quality evaluation.69 For example, it may now be harder to design a mortgage product that is tailored to recent immigrants. The fact that many immigrants lack a reported credit history, regardless of their income or assets, may disqualify them for a qualified mortgage and also presents a hurdle under the general ATR standard, as both standards require consideration of the loan applicant's credit history.

ATR and your Enterprise Risk Manager. Lenders can be subject to a range of penalties for violating the ATR Rule. For example, a lender is subject to all of the standard damages provisions under the Truth in Lending Act ("TILA") for failing to comply with the ATR Rule, including civil liability for actual damages, statutory damages (which are in the nature of punitive damages), and, if the consumer is successful, attorney's fees and court costs.70 While actual damages have been rare in prior TILA litigation, one must consider the possibility if a lender is found to have made a loan that the borrower could not be reasonably expected to repay and, as a result, has lost the home to foreclosure.

Lenders may find foreclosure more difficult. A consumer can allege a violation of the ATR Rule as a defense to a judicial or non-judicial foreclosure.71 In other words, even when the foreclosure is non-judicial, the consumer apparently will be able to go to court and assert a "defense" to the foreclosure based on the creditor's alleged violation of the ATR Rule. This is troubling because any borrower whose loan is being foreclosed will have, it seems, a *prima facie* argument that he or she was unable, as things turned out, to repay the loan. The lender might have a difficult time explaining to a judge or jury how, subsequent developments notwithstanding, the creditor made a "reasonable and good faith determination" that the consumer had the ability to repay at the time the loan was *made*.

Additionally, a consumer that brings a timely action against a creditor for violating the ATR Rule may be able to recover statutory damages equal to the sum of all finance charges and fees paid by the consumer.72 The enhanced penalties and liability for failing to comply with the ATR Rule demonstrate the need for the rule to be integrated into overall risk-management decisions at the institutional level.73 In short, complying with the ATR Rule should not be left to the "compliance department" but must be considered at the board of directors level.

In choosing which approach to follow to comply with the ATR Rule, lenders should consider the implications of making a non-Qualified Mortgage loan. It may be more difficult for creditors to prove compliance with ability-to-repay requirements when making a non-Qualified Mortgage loan. As noted above, loans made under the general ATR standard but which are not Qualified Mortgages enjoy greater flexibility in underwriting (no forty-three percent maximum DTI ratio), as well as in loan structures and pricing (no caps on fees), but lenders will need to evaluate the sufficiency of their underwriting standards and how they will implement them in considering loan applications.74 Lenders will also need to seriously consider whether they want to operate outside of Qualified Mortgage loans, as the terrain will likely be ripe for borrower claims.75 Or lenders may choose to steer towards a more conservative course with Qualified Mortgage loans until they receive greater certainty from case law and agency guidance as to the subtleties of the ATR Rule. In every context, financial institutions will have to evaluate regulatory, legal, business and operational issues when making decisions on how to comply with the ATR Rule.76

Compliance management staffing. Finally, lenders who choose to stay in the mortgage lending business may need to enhance their compliance staffing to conform to the new ATR Rule. Because of the complexity and novelty of the new rules, lenders may be compelled to engage an experienced real estate lending compliance manager, who, in addition to having compliance management experience, has particular expertise in residential real estate lending. Compliance management personnel will need to have enough substantive background in mortgage underwriting to understand and apply the new ATR Rule. Additionally, the compliance manager will need dedicated compliance staff to handle the more routine compliance monitoring and internal compliance auditing. In sum, the simple human resources costs entailed by making any residential mortgage loans on or after January 10, 2014 may be substantially greater than in the past.

Conclusion

Mortgage lenders should familiarize themselves with the new requirements imposed by the ATR Rule and implement them into their policies and procedures. The ATR Rule provides creditors with three basic compliance options. The first option is the general ability to repay standard, which will require creditors to consider eight identified underwriting factors but will give them some leeway in applying the method. The second option permits creditors to originate a Qualified Mortgage, affording them either a safe harbor or a rebuttable presumption of compliance against consumer claims of non-compliance but is relatively restrictive in terms of loan structure and fees. The third option allows creditors to refinance a non-standard mortgage into a standard mortgage. Since each method has costs that could expose lenders to liability, creditors should carefully evaluate the available options to determine which method is best suited to their organization.

In implementing the ATR Rule, residential mortgage lenders should consider the impact on their loan products and their personnel needs. Product offerings will likely need to be revised to comply with the rule. Lenders may need to employ more experienced individuals that can integrate the ATR Rule into lending practices and oversee compliance. In any event, lenders should take action to comply with the ATR Rule to avoid penalties and litigation.

Further guidance on how to implement the ATR Rule will become apparent as case law develops concerning individual loans. Financial institutions should therefore stay apprised of developments in the wake of the ATR Rule.

Endnotes

1 Ability-to-Repay and Qualified Mortgage Standards Under the Truth in Lending Act (Regulation Z), 78 Fed Reg. 6408 (Jan. 30, 2013) (to be codified at 12 C.F.R. pt. 1026). Back

2 *Id.* at 6410 ("In the mid-2000s, the market experienced a steady deterioration of credit standards in mortgage lending, with evidence that loans were made solely against collateral, or even against expected increases in the value of collateral, and without consideration of ability to repay"); 78 Fed. Reg. 6415 ("The statutory ability-to-repay standards reflect Congress's belief that certain lending practices (such as low-or-nodocumentation loans or underwriting loans without regard to principal repayment) led to consumers having mortgages they could not afford, result in high default and foreclosure rates.") Back

3 *Id.* at 6411 ("[A]pproximately $1.28 trillion in mortgage loans were originated in 2011.") Back

4 *Id.* at 6410 ("[W]hen the housing market collapsed in 2008, it sparked the most severe recession in the United States since the Great Depression"); *Id.* at 6412. Back

5 Richard Cordray, *Assuring consumers have access to mortgages they can trust*, CFPB (Jan. 10, 2013), http://www.consumerfinance.gov/blog/2013/01/. Back

6 12 C.F.R. § 1026.43 (2013) (emphasis added). Back

7 12 C.F.R. § 1026.2(a)(17) (2013). Back

8 Ability-to-Repay and Qualified Mortgage Standards Under the Truth in Lending Act (Regulation Z), 78 Fed. Reg. at 6447. Back

9 12 C.F.R. § 1026.43(a) (2013). Back

10 Home equity lines of credit have consistently had lower delinquency rates than other forms of consumer credit and thus are not subject to the ATR rule. Ability-to-Repay and Qualified Mortgage Standards Under the Truth in Lending Act (Regulation Z), 78 Fed. Reg. at 6448. Back

11 *Id.* Back

12 *Id.* Back

13 12 C.F.R. § 1026.43(c) (2013). Back

14 12 C.F.R. § 1026.43(e) (2013). Back

15 12 C.F.R. § 1026.43(d) (2013). Back

16 Rod J. Alba, Thomas Vartanian & Robert Ledig, *Understanding and Implementing the CFPB's New Ability-to- Repay and Qualified Mortgage Rule*, ABA Bank Compliance, Jul.-Aug. 2013, at 11. Back

17 *Id.* Back

18 12 C.F.R. § 1026.43(c) (2013). Back

19 Comment 43(c)(2)(i)-1 to 12 C.F.R. § 1026.43(c)(2)(i). Back

20 *Id.* Back

21 *Id.* Back

22 12 C.F.R. § 1026.43(c)(4) (2013). Third party-records can include tax return transcripts, W-2s, payroll statements, financial institution records, records from the consumer's employer, or governmental records stating the consumer's income from benefits or entitlements. Back

23 The consumer's employment can be full-time, parttime, seasonal, irregular, military, or self-employment, so long as the creditor considers those characteristics of the employment. Comment 43(c)(2)(ii)-1 to 12 C.F.R. § 1026.43(c)(2)(ii) (2013). Back

24 12 C.F.R. § 1026.43(c)(2)(iii) (2013). Back

25 12 C.F.R. § 1026.43(c)(2)(iv) (2013). Back

26 Comment 43 (c)(2)(iv)-1 to 12 C.F.R. § 1026.43(c)(2) (iv) (2013). Back

27 Comment 43 (c)(2)(iv)-3 to 12 C.F.R. § 1026.43(c)(2) (iv) (2013). Back

28 Comment 43(c)(2)(iv)-2 to 12 C.F.R. § 1026.43(c)(2) (iv) (2013). Back

29 12 C.F.R. § 1026.43(c)(2)(v) (2013). Back

30 12 C.F.R. § 1026.43(b)(8) (2013). Back

31 Comment 43(c)(2)(v)-1 to 12 C.F.R. § 1026.43(c)(2)(v) (2013). Back

32 12 C.F.R. § 1026.43(c)(2)(vi) (2013); comment 43(c)(2) (vi)-1 to 12 C.F.R. § 1026.43(c)(2)(vi) (2013). Back

33 *Id.* Back

34 12 C.F.R. § 1026.43(c)(2)(viii) (2013). Back

35 Comment 43(c)(2)(viii)-1 to 12 C.F.R. § 1026.43(c)(2) (viii) (2013). Back

36 *Id.* Back

37 *Id.* Back

38 *Id.* Back

39 *Id.* Back

40 12 C.F.R. § 1026.43(c)(2)(vii) (2013). Back

41 Comment 43(c)(7)-1 to 12 C.F.R. § 1026.43(c)(7) (2013) Back

42 *Id.* Back

43 *See* comment 43(c)(1)-1.ii to 12 C.F.R. § 1026.43(c)(1) (2013). Back

44 *Id.* Back

45 Comment 43(c)(1)-1 to 12 C.F.R. § 1026.43(c)(1) (2013) ("[F]or example, the rule and commentary do not specify how much income is needed to support a particular level of debt or how credit history should be weighed against other factors.") Back

46 Ability-to-Repay and Qualified Mortgage Rule: Small Entity Compliance Guide, CFPB 18 (2013), http://www.consumerfinance.gov/f/201308_cfpb_atr-qmimplementation- guide_final.pdf. Back

47 For example, creditors are given considerable flexibility in how they consider a consumer's debts based upon the consumer's particular facts and circumstances. Comment 43(c) (2)(vi)-1 to 12 C.F.R. § 1026.43(c)(2) (2013). Back

48 Comment 43(c)(2)-1 to 12 C.F.R. § 1026.43(c)(2) (2013). Back

49 *Id.* Back

50 12 C.F.R. § 1026.43(e) (2013). Back

51 Ability-to-Repay and Qualified Mortgage Standards Under the Truth in Lending Act (Regulation Z), 78 Fed. Reg. at 6405. Back

52 *Id.* Back

53 12 C.F.R. § 1026.43(e)(2) (2013). Back

54 See 12 C.F.R. § 1026.43(e)(1) (2013). Back

55 Ability-to-Repay and Qualified Mortgage Standards Under the Truth in Lending Act (Regulation Z), 78 Fed. Reg. at 6416. Back

56 *Id.* at 6408 ("The final rule provides a safe harbor for loans that satisfy the definition of a qualified mortgage and are not 'higher priced'. . . . The final rule provides a rebuttable presumption for higher-priced mortgage loans . . . ."). 12 C.F.R. § 1026.43(b)(4). Back

57 *Id.* at 6409. Back

58 *Id.* The longer period of time that the consumer shows an actual ability to repay the loan, the less likely that the consumer will be able to rebut the presumption based on insufficient residual income. *Id.* Back

59 CFPB, *supra*, note 46 at 30. Back

60 American Bankers Association & Dechert LLP, *A Strategic Guide to the ATR/QM Rules*, Dechert LLP 14 (June 20, 2013), http://www.dechert.com/files/Uploads/Documents/ Strategic_Guide_to_ATR_QM_Rules_-_Dechert_2013.pdf. Back

61 *Id.* Back

62 12 C.F.R. § 1026.43(d) (2013). Back

63 Ability-to-Repay and Qualified Mortgage Standards Under the Truth in Lending Act (Regulation Z), 78 Fed. Reg. at 6489. Back

64 12 C.F.R. § 1026.43(d)(1) (2013). Back

65 *Id.* Back

66 12 C.F.R. § 1026.43(d)(2) (2013). Back

67 12 C.F.R. § 1026.43(d)(3) (2013). Back

68 CFPB, *supra* note 46 at 44. Back

69 Alba, *supra* note 16, at 14 ("While compliance requirements were used to delineate the product offering once they were designed, this new rule requires that the regulatory considerations actually guide the types of products offered by the bank.") Back

70 Truth in Lending Act, Pub. L. No. 90-321, § 130(a). Back

71 Truth in Lending Act, Pub. L. No. 90-321, § 130(k). Back

72 Ability-to-Repay and Qualified Mortgage Standards Under the Truth in Lending Act (Regulation Z), 78 Fed Reg. at 6504. Back

73 *Id.* Back

74 Alba, *supra* note 16, at 14. Back

75 *Id.* Back

76 American Bankers Association, *supra* note 60 at 4. Back

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