Consumer Federation of America

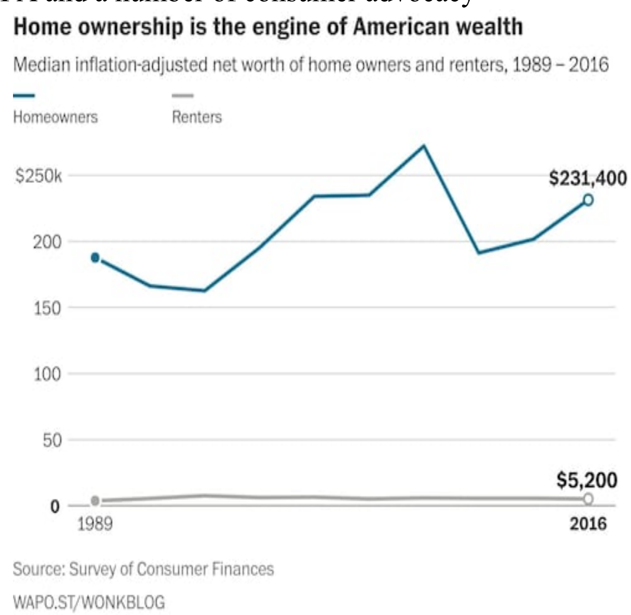
Kathy Kraninger, Director
Bureau of Consumer Financial Protection
1700 G Street, NW
Washington, DC 20552

September 30, 2020

**Re: Qualified Mortgage Definition under the Truth-in-Lending Act (Regulation Z): Seasoned QM Loan Definition, Docket No. CFPB-2020-0028, RIN 3170-AA98, 85 FR 53568 (Aug. 28, 2020)**

Dear Director Kraninger,

On behalf of the Consumer Federation of America and our members, thank you for providing the opportunity to comment on the Consumer Financial Protection Bureau's proposed rulemaking, RIN 3170-AA98, Qualified Mortgage Definition under the Truth-in-Lending Act (Regulation Z): Seasoned QM Loan Definition. The Consumer Federation of America (CFA) is a nonprofit association comprised of approximately 250 national, state, and local organizations who actively represent pro-consumer interests in the financial markets through research, advocacy, and education. CFA, and our members, have been fulfilling that mission since our founding in 1968. For the reasons explained in this letter and a more detailed, joint comment letter concurrently submitted by CFA and a number of consumer advocacy organizations, we write to express our strong opposition to the seasoning proposal.




For the vast majority of American consumers, homeownership remains the most significant asset in their wealth portfolio. Thus, it's no surprise that the Federal Reserve's Survey of Consumer Finances found that, in 2016, the average net worth of a family who owned their own home stood at $231,400, while renters had a net worth of only $5,200.[1] Simply put, homeownership matters. And, as a result, the Consumer Financial Protection Bureau's (CFPB or Bureau) proposal to modify the definition of a "Qualified Mortgage" is of key significance to millions of consumers across this Nation and their ability to

[1] Christopher Ingraham, "The One Surefire Way to Grow Wealth in the U.S., "https://www.washingtonpost.com /news/wonk/wp/2017/09/28/the-one-surefire-way-to-grow-your-wealth-in-the-u-s/

responsibly generate wealth through owning a home. With this in mind, CFA has significant concerns regarding the CFPB's seasoning proposal and its ability to expand access to mortgage credit responsibly.

## I. Summary of the Bureau's Seasoning Proposal

If finalized, the CFPB's seasoning QM rule would include higher-priced mortgage loans in the legal safe harbor when they otherwise fail to meet the regulatory QM definition.[2] Specifically, a covered transaction by financial institutions of any size would receive a safe harbor from ability-to-repay liability at the end of a 36-month seasoning period as long as it:

- is secured by a first lien;
- has a fixed rate, with fully amortizing payments and no balloon payment;
- does not exceed a 30-year loan term;
- does not include a total of points and fees that exceeds the restrictions established by the existing QM rule; and
- the consumer does not default within the 36-month seasoning period.

For a loan to be eligible to become a Seasoned QM, the proposal would also require that the creditor consider the consumer's DTI ratio or residual income and verify the consumer's debt obligations and income. Yet, unlike existing QM guidelines, the Bureau's proposal would not specify a DTI limit, nor would it require the creditor to use appendix Q to Regulation Z in calculating and verifying debt and income. Instead, under the proposal, the loan would generally be eligible to season if the creditor holds it in portfolio until the end of the 36-month seasoning period. Should the Bureau proceed with finalizing its proposal, we strongly encourage it to maintain the minimal protections for statutory compliance and consumer protection that exist in this current proposal.

## II. There Are Safer Ways to Expand Access to Responsible Mortgage Credit; Enforcing Fair Lending Laws is Key Among Them.

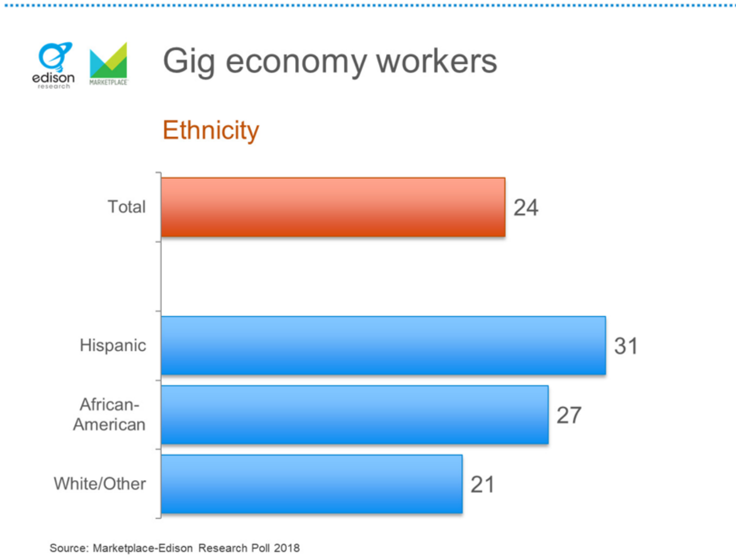
Experience suggests, however, that these protections alone will not be enough to ensure that the expanded access to mortgage credit that the proposal seeks to accomplish will actually result in consumers receiving responsible, rather than predatory, home loans. That concern rings especially true for the very category of consumers that the Bureau's proposal purports to help.

In explaining the rationale behind this proposed change to the Qualified Mortgage definition, the Bureau notes that, "along with a possible increase in non-QM mortgage originations, the proposal may also encourage meaningful innovation and lending to broader groups of credit-worthy consumers, especially those with less traditional credit profiles." [3] In particular, the CFPB emphasizes that:

[2] 85 Fed. Reg. 53568, 53580.
[3] *Id*. at 53578.

> technology platforms have led to rapid growth in the 'gig economy,' through which workers earn income by providing services such as ride-sharing and home delivery and through the ability to earn income on assets such as a home….Accordingly, the Bureau preliminarily concludes that allowing an alternative pathway to a QM safe harbor may encourage creditors to lend to consumers with less traditional credit profiles and income sources at an affordable price…[4]

The bulk of America's gig workers are, in fact, racial minorities. According to a 2018 Marketplace-Edison research poll,[5] Hispanics (31%) and African-Americans (27%) comprise the majority of gig workers in the United States.[6] Thus, to the extent that the Bureau's assumption is correct that the seasoning proposal will induce creditors to make mortgage credit more available to gig workers, it follows that racial minorities are more likely to be affected by the proposal than White borrowers.




Yet, history has repeatedly shown that these racial groups, in particular, have faced significant access and pricing discrimination in the mortgage lending market despite having similar credit characteristics to white consumers who go on to receive loans on more favorable terms.[7] Most importantly, minorities have routinely been steered into predatory, higher-priced mortgage products.[8] The consequences of this reality have been devastating for the wealth portfolios of mortgage consumers of color. For example, in the last

[4] *Id*.
[5] Edison Research, "The Gig Economy," (December 2018), available at http://www.edisonresearch.com/wp-content/uploads/2019/01/Gig-Economy-2018-Marketplace-Edison-Research-Poll-FINAL.pdf, (last accessed September 25, 2020).
[6] *Id.* at 4.
[7] *See, e.g.,* Quillian, L., Lee, J.J. & Honoré, B., Racial Discrimination in the U.S. Housing and Mortgage Lending Markets: A Quantitative Review of Trends, 1976–2016. Race Soc Probl 12, 13–28 (2020). https://doi.org/10.1007/s12552-019-09276-x (finding that racial disparities in the mortgage market suggest that discrimination in loan denial and cost has not declined much over the previous 30 to 40 years).
[8] *See*, *e.g*., Steil, J., Albright, L. Rugh, J. & Massey, D., The Social Structure of Mortgage Discrimination. Hous Stud. 2018; 33(5): 759–776.

great wave of irresponsible, unaffordable mortgage lending, communities of color—especially African-American communities of color—were stripped of more than a generation of household wealth.[9]

By enabling creditors to use the seasoning option, rather than comply with the broader requirements of an eventual final QM rule, this proposal could once again have unanticipated disparate impacts on borrowers of color. And, to the extent that it permits QM loans with margins above APOR that are higher than those permitted in the current proposed QM rule, it will likely burden borrowers of color with higher mortgage costs without affording them the very underwriting and assessment protections that the Dodd-Frank Wall Street Reform and Consumer Protection Act sought to provide.[10] Given these consequences, the Bureau's decision to strip consumers of the statutorily provided life-of-the-loan defense to foreclosure in an effort to expand access to "responsible" mortgage credit seems dubious, at best. Even more troubling is the fact that the Bureau—without producing any supporting empirical data or analysis—has chosen to base its rationale for depriving vulnerable consumers of critical consumer protections on the notion that litigation risk is the primary reason why these consumers have been unable to obtain responsible mortgage loans.

Regulation should be based on data, not conjecture. Therefore, it is both perplexing and troubling that, in a purported effort to benefit traditionally underserved consumers, the Bureau has chosen to attempt to expand access to mortgage credit by addressing speculation about creditors' perceived litigation risk while ignoring empirical data suggesting an alternative explanation for the lack of access. Specifically, the challenge that creditors have faced in lending to consumers with less traditional credit profiles and income sources at an affordable price is equally, if not more, likely to be a result of the continued existence of racial discrimination in mortgage lending rather than the perceived litigation risk for portfolio loans that the Bureau's seasoning proposal seeks to address.

Empirical research actually exists to support this conclusion. Specifically, history is rampant with examples showing that Black and Latino mortgage borrowers pay more for loans than similarly situated White borrowers.[11] In fact, in the years leading up to the financial crisis, studies found that African-American and Latino borrowers were 105 and 78 percent, respectively, more likely to have high-cost mortgages for home purchases despite controlling for credit score and other key risk factors.[12] And, even

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

[10] Pub.L. 111–203.

[11] *See, e.g.,* Robert G. Schwemm & Jeffrey L. Taren, *Discretionary Pricing, Mortgage Discrimination, and the Fair Housing Act*, 45 HARV. C.R.–C.L. L. REV. 375, 389–390 (2010); Cheryl L. Wade, *How Predatory Mortgage Lending Changed African American Communities and Families*, 35 HAMLINE L. REV. 437, 440 (2012).

[12] *Id.*

in the aftermath of Dodd-Frank, ATR, and the QM safe harbor, studies have continued to confirm that mortgage pricing differences between races remain after controlling for credit scores, loan-to-value ratios, the existence of subordinate liens, and housing and debt expenses relative to individual income.[13] Similar empirical studies concerning access to mortgage credit also continue to confirm racial discrepancies.[14] These findings suggest an inescapable conclusion: *far too often, the question of mortgage access and mortgage pricing is both inextricably tied to and illegally rooted in the race of the borrower.*

Rather than seeking to remove critical consumer protections in its effort to expand "responsible" mortgage access, consumers would benefit far more by the Bureau undertaking a rulemaking that seeks to tackle the identified, empirically supported, and ongoing racial discrimination in the mortgage lending market. With respect to the latter, the CFPB certainly has both the legal obligation and legal authority to do so.

12 U.S.C. § 5511(b)(2) grants the Bureau specific authority to ensure that consumers of financial products and services are protected from discrimination. As a mechanism for accomplishing that statutory objective, 15 U.S.C. § 1691c grants the CFPB power to enforce the Equal Credit Opportunity Act (ECOA),[15] including authority to act with the same larger financial institutions that the Bureau's current proposal seeks to encourage to make loans to consumers with less traditional credit profiles and income sources at an affordable price—namely, consumers of color. Properly enforced, ECOA would prohibit lenders from discriminating against credit applicants on the basis of protected characteristics, including race, color, religion, national origin, sex, marital status, and age.[16] Yet, despite the CFPB's enforcement authority, the Bureau has failed to act under the statute in any meaningful way. Between 2012-2017, for example, the CFPB referred a total of 40 cases to the U.S. Department of Justice under ECOA.[17] The Bureau referred no cases to the U.S. Department of Justice for ECOA in 2018 and only three cases in 2019, less than half as many as the average referred under the Bureau's initial Director.[18] This track record of increasingly lax enforcement of fair-lending requirements in the mortgage market suggests that the Bureau has failed to do what it should; namely, fully pursue a much safer vehicle for expanding access to responsible mortgage credit that already exists within its current regulatory toolbox.

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[13] *See, e.g.*, Bayer, Patrick, Fernando Ferreira, and Stephen L. Ross. 2016. "*The Vulnerability of Minority Homeowners in the Housing Boom and Bust.*" American Economic Journal: Economic Policy, 8 (1): 1-27.

[14] *See, e.g.,* Quillian, L., Lee, J.J. & Honoré, B. Racial Discrimination in the U.S. Housing and Mortgage Lending Markets: A Quantitative Review of Trends, 1976–2016. Race Soc Probl 12, 13–28 (2020). https://doi.org/10.1007/s12552-019-09276-x (finding that racial disparities in the mortgage market suggest that discrimination in loan denial and cost has not declined much over the previous 30 to 40 years).

[15] 15 U.S.C. § 1691c (a)(9).

[16] 15 U.S.C. § 1691 *et seq*.

[17] Kate Berry, *Where have all the CFPB fair-lending cases gone?,* AM. BANKER, Dec. 16, 2019, https://www.americanbanker.com/news/where-have-all-the-cfpb-fair-lending-cases-gone).

[18] *Id*.

## III. Conclusion

Like the CFPB, CFA recognizes the importance of expanding access to responsible mortgage credit to America's consumers. But we fundamentally reject the notion that the best way to do so is by depriving consumers of their ability to raise claims of recoupment in response to a foreclosure at any time during the life of the higher-priced loans that the CFPB's seasoning proposal would insulate by granting QM safe harbor status after 36 months. Prudence cautions against the Bureau's proposal. Moreover, both history and current market realities continue to demonstrate that resolving racial discrimination, rather than speculative litigation risk, remains the key to expanding access to responsible and affordable mortgage credit for consumers with less traditional credit profiles and income sources. Doing so would fulfill the Bureau's statutory mission in a way that protects consumers, investors, and the mortgage market overall.

Thank you again for providing us with the opportunity to express our views on the Bureau's proposed rulemaking.

Sincerely,

Mitria Wilson-Spotser

Director of Housing Policy
Consumer Federation of America