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CFPB Eases "Ability-to-Repay" Requirements for Small Creditors

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The Consumer Financial Protection Bureau ("CFPB") has issued a final rule modifying certain provisions of the "ability-to-repay" ("ATR") mortgage requirements issued last January. The final rule eases some restrictions on small creditors, creates certain exceptions for calculating loan originator compensation in total fees and points for purposes of determining what is a "qualified mortgage," and exempts certain nonprofit and community-based lenders from the ATR requirements. The modifications will take effect with the rest of the ATR requirements on January 10, 2014.

I. Background

The CFPB issued a final rule in January of this year implementing the ATR requirements of the Dodd-Frank Act. That final rule amended Regulation Z to require creditors to make a reasonable, good faith determination of a consumer's ability to repay a closed-end consumer residential mortgage, and established certain protections from liability under this requirement for "qualified mortgages."

The ATR requirements apply to all consumer-purpose, closed-end loans secured by a dwelling, including home-purchase loans, refinances, and home equity loans—whether first- or subordinate-lien. The rule does not apply to open-end loans, such as home equity lines of credit, and does not apply to loan modifications, except if the modification constitutes a "refinancing" under Regulation Z.

A creditor may satisfy the ATR requirements in one of four ways: (a) by considering eight identified underwriting factors and verifying the information considered, (b) by making a "qualified mortgage," which is a mortgage that meets certain specific criteria, (c) by refinancing a "non-standard mortgage" into a "standard mortgage," and (d) for certain small creditors serving primarily rural or underserved areas, by making a qualifying balloon mortgage in such areas.

The CFPB has now issued amendments modifying the ATR requirements in certain respects.

II. Modifications to ATR Requirements

The final rule issued by the CFPB on May 29, 2013 eases some restrictions on small creditors, creates certain exceptions for calculating loan originator compensation in total fees and points for purposes of determining

what is a "qualified mortgage," and exempts certain nonprofit and community-based lenders from the ATR requirements. These modifications are discussed below.

A. Small Creditors

The final rule makes several adjustments to the ATR requirements with respect to small creditors. Small creditors are creditors that have less than $2 billion in assets and each year make 500 or fewer first-lien mortgages subject to the ATR requirements.

First, the rule generally extends "qualified mortgage" status to certain loans that small creditors hold in their own portfolios for at least three years (subject to certain limited exceptions) even if the consumers' debt-to-income ratio exceeds 43 percent. The loans must meet the general restrictions on "qualified mortgages" with regard to loan features and points and fees, and creditors must evaluate consumers' debt-to-income ratio or residual income. However, the loans are not subject to a specific debt-to-income ratio as they would be under the general "qualified mortgage" definition.

Second, the final rule provides a two-year transition period during which small lenders may make balloon loans under certain conditions and those loans will meet the definition of "qualified mortgages" if the loans are held in portfolio. (Balloon loan are otherwise generally not considered "qualified mortgages.") The CFPB expects to continue to study issues concerning access to credit and balloon lending by small creditors.

Third, the final rule allows small creditors to charge a higher annual percentage rate for certain first-lien "qualified mortgages" while maintaining a safe harbor for the ATR requirements. Generally, if a first-lien mortgage loan exceeds 1.5 percentage points over the Average Prime Rate Offer Rate ("APOR"), but is otherwise deemed a "qualified mortgage," the creditor will is entitled to a rebuttable presumption that the loan meets the ATR requirements (as opposed to the more advantageous safe harbor that applies if the interest rate is not more than 1.5 percentage points over the APOR). Under the final rule, small creditors will be entitled to the safe harbor if the interest rate does not exceed 3.5 percentage points over the APOR.

B. Calculation of Loan Originator Compensation in Fees and Points

In order for a mortgage to be deemed a "qualified mortgage" and thus eligible for the protection from liability under the ATR requirements, the total fees and points charged on the mortgage have to be within certain thresholds. Compensation paid to loan originators, such as loan officers and brokers, is included in points and fees. The final rule issued by the CFPB provides certain exceptions to the requirement that loan originator compensation be included in the total permissible points and fees for "qualified mortgages."

The final rule provides that payments by consumers to mortgage brokers need not be counted as loan originator compensation where such payments already have been included in points and fees as part of the finance charge. In addition, compensation paid by a mortgage broker to its employees, and compensation paid by a creditor to its own loan officers, need not be included in points and fees. However, the CFPB has not modified the requirement that compensation paid by a creditor to a mortgage broker be included in points and fees in addition to any origination charges paid by a consumer to the creditor. That compensation will still be included

in calculating points and fees for purposes of determining whether a loan is deemed a “qualified mortgage.”

C. Exemption for Certain Nonprofit Creditors

The final rule exempts from the ATR requirements certain nonprofit and community-based lenders. Among other conditions, the exemptions generally apply to designated categories of community development lenders and to nonprofits that make no more than 200 loans per year and lend only to low- and moderate-income consumers. Similarly, mortgage loans made by or through a housing finance agency or through certain homeownership stabilization and foreclosure prevention programs are exempted from the ATR requirements.

III. Further Information

Please note that this advisory is an overview of the final rule, and does not address all aspects and details of the rule. Creditors will need to carefully review the final rule in order to determine what changes may be needed to policies, procedures and systems.

As noted above, the modifications made by the final rule are effective with the other ATR requirements on January 10, 2014. If you have any questions regarding the final rule, please feel free to contact Joseph D. Simon at 516-357-3710 or via email at jsimon@cullenanddykman.com.

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