



July 30, 2020

**To:** Clients and Friends

**From:** David F. Dulock

**Subject:** CFPB Proposed Rule to Amend General Qualified Mortgage Loan Definition

8584 Katy Freeway, Suite 420

Houston, TX 77024

Phone: 713-871-0005

Fax: 713-871-1358

**Partners**

Thomas E. Black, Jr.<sup>1</sup>

Gregory S. Graham<sup>2</sup>

Shawn P. Black<sup>3</sup>

**Managing Attorney Houston**

Ryan Black<sup>4</sup>

**Senior Lawyers**

David F. Dulock

Diane M. Gleason

Daniel S. Engle<sup>5</sup>

Margaret Noles

**Associates**

Nick Stevens

Sydney Davis

Brandon Pieratt

**Of Counsel**

David M. Tritter

Calvin C. Mann, Jr.

**Retired Partner(s)**

Calvin C. Mann, Jr.

<sup>1</sup> Also Licensed in Iowa, New York, and Washington

<sup>2</sup> Also Licensed in Georgia

<sup>3</sup> Also Licensed in Kentucky and New York

<sup>4</sup> Also Licensed in Washington D.C.

<sup>5</sup> Also Licensed in New York

In the July 10, 2020 issue of the *Federal Register* (85 FR 41716, [click here](#)) the Bureau of Consumer Financial Protection (Bureau) published a proposed rule, with a request for public comment, that proposes to amend the General Qualified Mortgage Loan definition in §1026.43(e)(2) of Regulation Z (General QM Loan) by removing the General QM Loan definition’s 43 percent total monthly debt to total monthly income ratio (DTI Limit) in paragraph (e)(2)(vi) and replacing it with a price-based threshold. The proposed rule also proposes to remove from paragraph (e)(2)(v) the requirement to use Appendix Q in verifying the consumer’s current or reasonably expected income or assets (subparagraph (e)(2)(v)(A)) and the consumer’s current debt obligations, alimony, and child support (subparagraph (e)(2)(v)(B)).

The proposed rule discussed in this memorandum was published simultaneous with a separate proposed rule in another section of the above cited *Federal Register* that is the subject of the firm’s July 16, 2020 memorandum posted on the firm’s website <https://www.bmandg.com/> under the “Resources” tab. That separate proposed rule proposes to extend the January 10, 2021 sunset date for the Temporary GSE Qualified Mortgage Loan category until the effective date of the final rule amending the General Qualified Mortgage Loan definition the subject of the proposed rule discussed herein.

Comments on the proposed rule must be received by the Bureau on or before September 8, 2020, be identified by Docket No. CFPB–2020–0020 or RIN 3170–AA98, include the Bureau’s name and be submitted by any of the following methods:

- *Federal eRulemaking Portal:* <https://www.regulations.gov>. Follow the instructions for submitting comments.
- *Email:* 2020-NPRM-ATRQM-GeneralQM@cfpb.gov. Include Docket No. CFPB–2020–0020 or RIN 3170–AA98 in the subject line of the message.
- *Mail/Hand Delivery/Courier:* Comment Intake—General QM Amendments, Bureau of Consumer Financial Protection, 1700 G Street NW, Washington, DC 20552.

The proposed rule proposes to remove Appendix Q to Part 1026 and make the following amendments to §1026.43 and its Official Interpretations in Supplement I to Part 1026:

- Revise §1026.43 paragraphs (b)(4), (e)(2)(v) and (vi), (e)(4), (e)(5)(i)(A) and (B), and (f)(1)(i) and (iii);
- Revise Official Interpretations paragraphs 43(b)(4), 43(c)(4), 43(c)(7), 43(e)(2)(v), 43(e)(2)(vi), 43(e)(4), 43(e)(5), 43(f)(1)(i) and 43(f)(1)(iii);
- Add Official Interpretations paragraphs 43(e)(2)(v)(A) and 43(e)(2)(v)(B) (after paragraph 43(e)(2)(v)).

Below is a summary of the proposed rule taken from the *Federal Register* publication:

**§1026.43 paragraph (b)(4):** This paragraph defines higher-priced covered transactions for the purposes of §1026.43, including qualified mortgages defined in paragraphs (e)(2), (e)(4), (e)(5), (e)(6), and (f). The proposed rule would revise paragraph (b)(4) to add a special rule for those General QM Loans for which the interest rate may or will change within the first five years after the date on which the loan’s first regular periodic

(7 pages)

payment will be due. For such General QM Loans, the creditor would be required to determine the annual percentage rate, for purposes of determining whether the loan is a higher-priced covered transaction under paragraph (b)(4), by treating the maximum interest rate that may apply during that five-year period as the interest rate for the full term of the loan.

Official Interpretations Comment 43(b)(4): The proposed rule would add proposed comment -4 to comment 43(b)(4) to explain that provisions in subpart C, including commentary to §1026.17(c)(1), address how to determine the annual percentage rate disclosures for closed-end credit transactions and that provisions in §1026.32(a)(3) address how to determine the annual percentage rate to determine coverage under §1026.32(a)(1)(i). It further explains that the proposed revision to §1026.43(b)(4) requires, for purposes of a qualified mortgage under paragraph (e)(2), a different determination of the annual percentage rate for purposes of paragraph (b)(4) for a loan for which the interest rate may or will change within the first five years after the date on which the first regular periodic payment will be due and it cross-references proposed comment 43(e)(2)(vi)-4 for how to determine the annual percentage rate of such a loan.

§1026.43 paragraph (e)(2)(v): The proposed rule would amend the definition of a General QM loan under paragraph (e)(2) by deleting current paragraphs (e)(2)(v)(A) and (B), including the requirement to use Appendix Q to verify the consumer's current or reasonably expected income or assets and the consumer's current debt obligations, alimony, and child support. It would add revised paragraphs (e)(2)(v)(A), (B)(1) and (2), which provide as follows:

- Revised paragraph (e)(2)(v)(A) would require the creditor to consider the consumer's income or assets, debt obligations, alimony, child support, *and monthly debt-to-income ratio or residual income*, using the amounts verified pursuant to revised paragraph (e)(2)(v)(B)(1) and (2); determine the consumer's monthly debt-to-income ratio or residual income in accordance with paragraph (c)(7); and, calculate the consumer's monthly payment on the covered transaction, including the monthly payment for mortgage-related obligations, in accordance with paragraph (e)(2)(iv).

- Revised paragraph (e)(2)(v)(B)(1) and (2) would require the creditor to (1) 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, using third-party records that provide reasonably reliable evidence of the consumer's income or assets, in accordance with paragraph (c)(4); and (2) verify the consumer's current debt obligations, alimony, and child support using reasonably reliable third-party records in accordance with paragraph (c)(3).

Official Interpretations Comment 43(c)(4): The proposed rule would add proposed comment -4 to comment 43(c)(4) to clarify that a creditor does not meet the requirements of §1026.43(c)(4) if it observes an inflow of funds into the consumer's account without confirming that the funds are income. Proposed comment 43(c)(4)-4 contains the following example: "a creditor would not meet the requirements of §1026.43(c)(4) where it observes an unidentified \$5,000 deposit in the consumer's account but fails to take any measures to confirm or lacks any basis to conclude that the deposit represents the consumer's personal income and not, for example, proceeds from the disbursement of a loan."

Official Interpretations Comment 43(c)(7): The proposed rule would remove from the second sentence of comment 43(c)(7)-1 the reference to §1026.43(e) because pursuant to the proposed

rule a General QM loan under §1026.43(e)(2) would no longer “prescribe a specific monthly debt-to-income ratio with which creditors must comply.”

Official Interpretations Comment 43(e)(2)(v): The proposed rule would remove comments -2 and -3 from comment 43(e)(2)(v) because these comments would no longer be needed considering the proposed revisions to §§1026.43(e)(2)(v) and (vi). The proposed rule proposes to add comments 43(e)(2)(v)(A)-1 to -3 and 43(e)(2)(v)(B)-1 to -3, which are summarized below:

- Comment 43(e)(2)(v)(A)-1: Proposed comment 43(e)(2)(v)(A)–1 would explain that, in order to comply with the requirement in §1026.43(e)(2)(v)(A), a creditor must take 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. Proposed comment 43(e)(2)(v)(A)–1 would further explain that, according to requirements in §1026.25(a) to retain records showing compliance, a creditor must retain documentation showing how it took into account these factors in its ability-to-repay determination. As examples of such documentation, proposed comment 43(e)(2)(v)(A)–1 cites an underwriter worksheet or a final automated underwriting system certification, alone or in combination with the creditor’s applicable underwriting standards, that shows how these required factors were taken into account in the creditor’s ability-to-repay determination.

- Comment 43(e)(2)(v)(A)-2: Proposed comment 43(e)(2)(v)(A)–2 would explain that creditors have flexibility in how they consider monthly debt-to-income ratio or residual income and that the proposed rule does not prescribe a specific monthly debt-to-income ratio or residual income threshold. Proposed comment 43(e)(2)(v)(A)–2 proposes two examples of how to comply with the requirement to consider monthly debt-to-income ratio or residual income. In the first example, a creditor may consider monthly debt-to-income ratio or residual income by establishing monthly debt-to-income or residual income thresholds for its own underwriting standards and documenting how it applied those thresholds to determine the consumer’s ability to repay. In the second example, a creditor may also consider these factors by establishing monthly debt-to-income or residual income thresholds and exceptions to those thresholds based on other compensating factors, and documenting application of the thresholds along with any applicable exceptions.

- Comment 43(e)(2)(v)(A)-3: Proposed comment 43(e)(2)(v)(A)–3 would explain that the requirement in §1026.43(e)(2)(v)(A) to consider income or assets, debt obligations, alimony, child support, and monthly debt-to-income ratio or residual income does not preclude the creditor from taking into account additional factors that are relevant in making its ability-to-repay determination. Proposed comment 43(e)(2)(v)(A)–3 further provides that creditors may look to comment 43(c)(7)–3 for guidance on considering additional factors in determining the consumer’s ability-to-repay. (*Comment 43(c)(7)–3 explains that creditors may consider additional factors when determining a consumer’s ability to repay and provides an example of looking to consumer assets other than the value of the dwelling, such as a savings account.*)

- Comment 43(e)(2)(v)(B)-1: Proposed comment 43(e)(2)(v)(B)–1 would explain that §1026.43(e)(2)(v)(B) does not prescribe specific methods of underwriting that creditors must use. Proposed comment 43(e)(2)(v)(B)–1 would clarify that, so long as a creditor complies with the provisions of §1026.43(c)(3) with respect to debt obligations, alimony, and child support and §1026.43(c)(4) with respect to income and assets, the creditor is permitted to use any reasonable verification methods and criteria.

- Comment 43(e)(2)(v)(B)-2: Proposed comment 43(e)(2)(v)(B)–2 would clarify that “current and reasonably expected income or assets other than the value of the dwelling (including

any real property attached to the dwelling) that secures the loan” is determined in accordance with §1026.43(c)(2)(i) and its commentary and that “current debt obligations, alimony, and child support” has the same meaning as under §1026.43(c)(2)(vi) and its commentary. The proposed comment would further clarify that §1026.43(c)(2)(i) and (vi) and the associated commentary apply to a creditor’s determination with respect to what inflows and property it may classify and count as income or assets and what obligations it must classify and count as debt obligations, alimony, and child support, pursuant to its compliance with §1026.43(e)(2)(v)(B).

- Comment 43(e)(2)(v)(B)-3.i: Proposed comment 43(e)(2)(v)(B)-3.i would explain that a creditor also complies with §1026.43(e)(2)(v)(B) if it complies with specific verification standards in one or more of the documents that would be set forth in the final rule. The proposed rule refers to these documents as “[List to be Determined, as Discussed in Preamble].” The Preamble to the proposed rule sets forth the following documents on page 41751 of the above cited *Federal Register*: “These standards may include relevant provisions in specified versions of the Fannie Mae Single Family Selling Guide, the Freddie Mac Single-Family Seller/Servicer Guide, the FHA’s Single Family Housing Policy Handbook, the VA’s Lenders Handbook, and the USDA’s Field Office Handbook for the Direct Single Family Housing Program and the Handbook for the Single Family Guaranteed Loan Program,” current as of the date of this proposed rule’s public release.

- Comment 43(e)(2)(v)(B)-3.ii: Proposed comment 43(e)(2)(v)(B)-3.ii would clarify that a creditor complies with §1026.43(e)(2)(v)(B) if it complies with requirements in the standards listed in comment 43(e)(2)(v)(B)-3.i for creditors to verify income, assets, debt obligations, alimony and child support using specified documents or to include or exclude particular inflows, property, and obligations as income, assets, debt obligations, alimony, and child support.

- Comment 43(e)(2)(v)(B)-3.iii: Proposed comment 43(e)(2)(v)(B)-3.iii would clarify that, for purposes of compliance with §1026.43(e)(2)(v)(B), a creditor need not comply with requirements in the standards listed in comment 43(e)(2)(v)(B)-3.i other than those that require creditors to verify income, assets, debt obligations, alimony, and child support using specified documents or to classify particular inflows, property, and obligations as income, assets, debt obligations, alimony, and child support.

- Comment 43(e)(2)(v)(B)-3.iv: Proposed comment 43(e)(2)(v)(B)-3.iv would clarify that a creditor also complies with §1026.43(e)(2)(v)(B) if it complies with revised versions of the standards listed in comment 43(e)(2)(v)(B)-3.i, provided that the two versions are substantially similar.

- Comment 43(e)(2)(v)(B)-3.v: Proposed comment 43(e)(2)(v)(B)-3.v would clarify that a creditor complies with §1026.43(e)(2)(v)(B) if it complies with the verification standards in one or more of the documents specified in comment 43(e)(2)(v)(B)-3.i. and that a creditor may, but need not, comply with §1026.43(e)(2)(v)(B) by complying with the verification standards from more than one document (in other words, by “mixing and matching” verification standards).

§1026.43 paragraph (e)(2)(vi): The proposed rule would amend the definition of a General QM loan under paragraph (e)(2) by removing from paragraph (e)(2)(vi) the specific 43 percent ratio of consumer total monthly debt to total monthly income (DTI Limit) and the use of Appendix Q and would replace them with the following price-based thresholds that would define a covered transaction under §1026.43 as a General QM loan for which the annual percentage rate does not exceed the average prime offer rate for a comparable transaction as of the date the interest rate is set by the applicable threshold, so that loans priced below the applicable thresholds set out below would be eligible for General QM status under paragraph (e)(2) and loans priced at or above the

applicable thresholds set out below would not be eligible for General QM status under paragraph (e)(2):

- For a first lien covered transaction with a loan amount greater than or equal to \$109,898, 2 or more percentage points;
- For a first lien covered transaction with a loan amount greater than or equal to \$65,939 but less than \$109,898, 3.5 or more percentage points;
- For a first lien covered transaction with a loan amount less than \$65,939, 6.5 or more percentage points;
- For a subordinate lien covered transaction with a loan amount greater than or equal to \$65,939, 3.5 or more percentage points;
- For a subordinate lien covered transaction with a loan amount less than \$65,939, 6.5 or more percentage points.

The proposed rule, however, would preserve the current thresholds in paragraph (e)(1)(i) that separate safe harbor qualified mortgages from rebuttable presumption qualified mortgages in paragraph (e)(1)(ii), so that, for example, a loan that otherwise meets the General QM loan definition is a safe harbor qualified mortgage if its annual percentage rate exceeds the average prime offer rate for a comparable transaction as of the date the interest rate is set by less than 1.5 percentage points for first-lien transactions, or 3.5 percentage points for subordinate-lien transactions. All other General QM loans would continue to be considered rebuttable presumption qualified mortgages under paragraph (e)(1)(ii).

Proposed revised paragraph (e)(2)(vi) would provide that the above specified loan amounts would be adjusted annually on January 1 by the annual percentage change in the Consumer Price Index for All Urban Consumers (CPI-U) that was reported on the preceding June 1. It also would provide that for purposes of paragraph (e)(2)(vi), the creditor would be required to determine the annual percentage rate for a loan for which the interest rate may or will change within the first five years after the date on which the first regular periodic payment will be due by treating the maximum interest rate that may apply during that five-year period as the interest rate for the full term of the loan (*the special rule*).

Official Interpretations Comment 43(e)(2)(vi): Proposed comment 43(e)(2)(vi) would remove current comment 43(e)(2)(vi)-1 and would add new comments 43(e)(2)(vi)-1 to -4 summarized below:

- Comment 43(e)(2)(vi)-1: Proposed comment 43(e)(2)(vi)-1 would replace current comment 43(e)(2)(vi)-1 by providing guidance on determining the average prime offer rate for a comparable transaction as of the date the interest rate is set by a cross-reference to comments 43(b)(4)-1 through -3.
- Comment 43(e)(2)(vi)-2: Proposed comment 43(e)(2)(vi)-2 would provide that a creditor must determine the applicable rate spread threshold based on the face amount of the note, which is the “loan amount” as defined in §1026.43(b)(5), and provides an example.
- Comment 43(e)(2)(vi)-3: Proposed comment 43(e)(2)(vi)-3 would publish the annually adjusted loan amounts to reflect changes in the CPI-U.
- Comment 43(e)(2)(vi)-4: Proposed comments 43(e)(2)(vi)-4.i to -4.iv would explain the special rule in proposed §1026.43(e)(2)(vi) that the creditor must determine the annual percentage rate for a loan for which the interest rate may or will change within the first five years after the date on which the first regular periodic payment will be due (“short-reset loans”) by treating the

maximum interest rate that may apply during that five-year period as the interest rate for the full term of the loan:

- Comment 43(e)(2)(vi)-4.i would explain that this special rule for determining the annual percentage rate for General QM short-reset loans under proposed §1026.43(e)(2)(vi) would not modify other provisions in Regulation Z for determining the annual percentage rate for other purposes. It also would explain that an identical special rule for determining the annual percentage rate for General QM short-reset loans applies to General QM short-reset higher-priced loans in proposed revised §1026.43(b)(4).

- Comment 43(e)(2)(vi)-4.ii would explain that this special rule for General QM short-reset loans applies to adjustable-rate mortgages that have a fixed-rate period of five years or less within that first five year period and to step-rate mortgages for which the interest rate changes within that five-year period.

- Comment 43(e)(2)(vi)-4.iii would explain that, to determine the annual percentage rate for short-reset General QM loans for purposes of proposed §1026.43(e)(2)(vi), a creditor must treat the maximum interest rate that could apply at any time during that first five-year period as the interest rate for the full term of the loan, regardless of whether the maximum interest rate is reached at the first or subsequent adjustment during that five-year period and cross-references comments 43(e)(2)(iv)-3 and -4 for additional instruction on how to determine the maximum interest rate during that five-year period.

- Comment 43(e)(2)(vi)-4.iv provides an example of a short-reset General QM loan to demonstrate the special rule maximum interest rate during that first five-year period as the interest rate for the full term of the loan for the purpose of determining the annual percentage rate for the loan.

§1026.43 paragraph (e)(4): The proposed rule would revise the agency qualified mortgage provisions in paragraph (e)(4) as follows:

- First, the proposed rule would remove the Temporary GSE Qualified Mortgage Loan definition in paragraph (e)(4)(ii)(A). This is because if a final rule is issued by the Bureau in connection with this proposed rule, it is anticipated that the Temporary GSE QM loan definition may expire upon the effective date of the final rule if it has not expired before that date. (*see* the firm's July 16, 2020 memorandum referred to in the second paragraph on page one of this memorandum).

- Second, because the January 10, 2021 sunset date for the agency qualified mortgage loan categories in current paragraphs (e)(4)(ii)(B), (C), (D), and (E) has expired because each agency has issued a rule to define a qualified mortgage pursuant to its authority under TILA section 129C(b)(3)(ii) (*see* current paragraph (e)(4)(iii)(A)), the proposed rule would amend paragraph (e)(4) to state that, notwithstanding §1026.43(e)(2), a qualified mortgage is a covered transaction that is defined as a qualified mortgage by HUD under 24 CFR 201.7 and 24 CFR 203.19, by VA under 38 CFR 36.4300 and 38 CFR 36.4500, or by USDA under 7 CFR 3555.109.

Official Interpretations Comment 43(e)(4): The proposed rule would amend comments 43(e)(4)-1 and -2 as summarized below:

- Comment 43(e)(4)-1: Proposed comment 43(e)(4)-1 would be revised to reflect the cross references to the qualified mortgage definitions of HUD, VA, and USDA disclosed in proposed §1026.43(e)(4) and to acknowledge that a covered transaction that meets one of those agencies qualified mortgage definitions is a qualified mortgage for purposes of §1026.43(e)(4).

- Comment 43(e)(4)-2: Proposed comment 43(e)(4)-2 would be revised to clarify that covered transactions that met the requirements of §1026.43(e)(2)(i) through (iii), were eligible for purchase or guarantee by Fannie Mae or Freddie Mac (or any limited-life regulatory entity succeeding the charter of either), and were consummated prior to the effective date of any final rule promulgated as a result of this proposed rule would still be considered a qualified mortgage for purposes of §1026.43(e)(4) after the adoption of such final rule.
- Current Comments 43(e)(4)-3, -4, and -5: The proposed rule would remove the text of these comments and would state that they are reserved for future use.

§1026.43 paragraph (e)(5)(i)(A) and (B): The proposed rule would make conforming changes to the small creditor qualified mortgage provisions in paragraph (e)(5)(i). Existing paragraph (e)(5)(i) provides that as part of its qualified mortgage definition, loans must comply with the requirements to consider and verify debts and income in existing paragraph (e)(2)(v). The proposed rule's conforming changes to paragraph (e)(5)(i) would generally insert the substantive requirements of existing paragraph (e)(2)(v) into proposed paragraph (e)(5)(i) and would provide that loans under proposed paragraph (e)(5)(i) do not have to comply with proposed paragraphs (e)(2)(v) and (e)(2)(vi). The proposed conforming changes would also delete the reference to Appendix Q because the proposed rule would remove Appendix Q from Regulation Z.

Official Interpretations Comment 43(e)(5): The proposed rule would make conforming changes to comments 43(e)(5)-1 and -2 that small creditor qualified mortgage loans under proposed paragraph (e)(5)(i) would not have to comply with proposed paragraphs (e)(2)(v) and (e)(2)(vi) and would also delete the reference to Appendix Q.

§1026.43 paragraphs (f)(1)(i) and (iii): The proposed rule also would make conforming changes to the balloon-payment qualified mortgage provisions in paragraph (f)(1). Existing paragraph (f)(1) provides that as part of its qualified mortgage definition, loans must comply with the requirements to consider and verify debts and income in existing paragraph (e)(2)(v). The proposed rule's conforming changes to paragraphs (f)(1)(i) and (iii) would generally insert the substantive requirements of existing paragraph (e)(2)(v) into proposed paragraphs (f)(1)(i) and (iii) and would provide that loans under proposed paragraph (f)(1) do not have to comply with proposed paragraph (e)(2)(v). The proposed conforming changes would also delete the reference to Appendix Q because the proposed rule would remove Appendix Q from Regulation Z.

Official Interpretations Comment 43(f)(1): The proposed rule would make conforming changes to comments 43(f)(1)(i)-1 and 43(f)(1)(iii)-1 that balloon-payment qualified mortgages made by certain creditors under proposed paragraph (f)(1)(i) would not have to comply with proposed paragraph (e)(2)(v) and would also delete the reference to Appendix Q.

Appendix Q to Part 1026: Appendix Q contains standards for calculating and verifying debt and income for purposes of determining whether a mortgage satisfies the 43 percent DTI Limit for General QM loans. The proposed rule would remove Appendix Q entirely from Regulation Z.

**This Memorandum is provided as general information regarding the subject matter covered, but no representations or warranty of the accuracy or reliability of the content of this information are made or implied. Opinions expressed in this memorandum are those of the author alone. In publishing this information, neither the author nor the law firm of Black, Mann & Graham L.L.P. is engaged in rendering legal services. While this information concerns legal and regulatory matters, it is not legal advice and its use creates no attorney-client relationship or any other basis for reliance on the information. Readers should not place reliance on this information alone but should seek independent legal advice regarding the law applicable to matters of interest or concern to them. The law firm of Black, Mann & Graham L.L.P. expressly disclaims any obligation to keep the content of this information current or free of errors.**