

INFOBYTES SPECIAL ALERT: CFPB GUIDANCE STATES THAT SUCCESSORS ARE NOT SUBJECT TO THE ATR/QM RULE

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On July 8, 2014, the CFPB issued an [interpretive rule](#) stating that the addition of a successor as an obligor on a mortgage does not trigger the Ability-to-Repay/Qualified Mortgage Rule ("ATR/QM Rule") requirements if the successor previously received an interest in the property securing the mortgage by operation of law, such as through inheritance or divorce. Creditors may rely on the interpretive rule as a safe harbor under section 130(f) of the Truth in Lending Act ("TILA").

In adopting the interpretations described below, it appears that the CFPB primarily intended to respond to inquiries from the industry and consumer advocates about situations where one family member inherits a home from another and, in order to keep the home, requests to be added to the mortgage and to modify its terms, such as by reducing the rate or payments. As the Bureau noted:

There can be significant consequences for a successor that is not able to become an obligor on a mortgage. For instance, if the successor seeks a modification of the existing transaction as part of trying to retain the home, the creditor may refuse to modify the terms of the debt on the grounds that the successor is not a party to the existing obligation and therefore cannot enter into a modification agreement.

The rule confirms that the creditor can generally add a successor and modify a loan without first requiring the successor to prove an ability to make the payments under the ATR/QM Rule. However, because the interpretive rule defines "successor" broadly and interprets a provision of Regulation Z that applies to all closed-end credit transactions, the rule appears to affect the application of a number of the CFPB's mortgage origination rules, including the new mortgage disclosures that are scheduled to take effect in August 2015.

BACKGROUND

The Bureau's Commentary to the ATR/QM Rule makes clear that the ability-to-repay requirements do not apply to changes in loan terms unless the changes to the loan constitute a "refinancing" under Regulation Z. Under 12 C.F.R. § 1026.20(a), a "refinancing" occurs when an existing obligation is "satisfied and replaced by a new obligation undertaken by the same consumer." A reduction in rate or a loan modification for a delinquent borrower generally does not constitute a refinancing.¹

Neither the ATR/QM Rule nor its Commentary expressly addressed the circumstances under which a change of obligors would trigger the rule's requirements, although CFPB staff has stated in informal guidance that only a change that constitutes an "assumption" under Regulation Z would be subject to the

¹ 12 C.F.R. § 1026.20(a)(2) and (4); comment 20(a)(4)-1.

ATR/QM Rule.² Under 12 C.F.R. § 1026.20(b), an assumption occurs when three elements are present: (1) a written agreement; (2) an express acceptance of the subsequent consumer by the creditor; and (3) a residential mortgage transaction.³

THE BUREAU'S INTERPRETATIONS

In the interpretive rule, the Bureau confirms that a change in obligors does not trigger the ability-to- repay requirements unless the change satisfies Regulation Z's definition of an "assumption." The Bureau's interpretation hinges on the highly technical question of what constitutes a "residential mortgage transaction." Under Regulation Z, a "residential mortgage transaction" is "a transaction in which a mortgage ... or equivalent consensual security interest is created or retained in the consumer's principal dwelling to *finance the acquisition or initial construction of that dwelling*."⁴ Importantly, however, the analysis "look[s] to the assuming consumer in determining whether a residential mortgage transaction exists."⁵ A transaction is not a residential mortgage transaction "if the consumer had previously purchased and acquired some interest to the dwelling, even though the consumer had not acquired full legal title."⁶

The Bureau defined "successor" broadly as "a person who receives legal interest in a property, typically by a transfer from a family member, by operation of law upon another's death, or under a divorce decree or separation agreement," including "an inter vivos trust, created by a borrower who transfers his or her property into the trust in which the obligor is or remains a beneficiary." Interestingly, the CFPB did not attribute this definition to any source.

The Bureau reasoned that, because the successor's acquisition of a legal interest in the property *precedes* the addition of the successor as an obligor on the mortgage, the addition is not a residential mortgage transaction as to the successor, and therefore the change in obligors is not an assumption.

The rule provides a contrasting example of when an assumption exists:

[I]f a consumer without an existing interest takes on the obligation of the existing borrower in order to finance the acquisition of the consumer's principal dwelling, the transaction is a residential mortgage transaction. In such a case, where the creditor expressly agrees in writing to the new primary obligor, an assumption has occurred under § 1026.20(b), and it is subject to the ability-to- repay requirements in § 1026.43, in addition to other requirements of Regulation Z.

The CFPB emphasized, however, that regardless of whether the addition of a successor is subject to the ATR/QM Rule, the loan remains a consumer credit transaction subject to the applicable requirements of Regulation Z, including the requirement to provide monthly statements under § 1026.41 and the requirements to notify obligors of adjustments in § 1026.20(c) and (d).

² An unofficial transcription of this informal guidance can be found on our website. See Unofficial CFPB Staff Guidance: Origination Rules Inquiries, at 23 (presented in MBA webinar on Oct. 17, 2013) (transcript available at <http://www.infobytesblog.com/wp-content/uploads/2013/11/CFPB-Webinar-Transcription-Origination-with-Slides-.pdf>).

³ Comment 20(b)-1.i.

⁴ 12 C.F.R. § 1026.2(a)(24) (emphasis added).

⁵ Comment 20(b)-2.

⁶ Comment 2(a)(24)-5.

Finally, as noted in the interpretive rule, the CFPB [previously issued guidance](#) addressing a servicer's obligations with respect to successors. In the rule, the CFPB acknowledged that there are other questions related to a servicer's obligations with respect to successors under the mortgage servicing rules and stated that it is "monitoring these issues to determine whether they require further guidance or rulemaking."

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Questions regarding the matters discussed in this Alert may be directed to any of our lawyers listed below, or to any other BuckleySandler attorney with whom you have consulted in the past.

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