

# Mortgage Regulation Developments: Qualified Mortgage Updates and COVID-19 Assistance

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## INTRODUCTION

Throughout the past year, the Consumer Financial Protection Bureau (“CFPB”) continued to actively issue rules and other guidance applicable to the mortgage industry. This survey highlights recent developments related to qualified mortgages (“QM”), specifically the publication of four final rules that extended the applicability of the Temporary Government-Sponsored Enterprise (“GSE”) QM,<sup>1</sup> updated the definition of General QM loans,<sup>2</sup> added a new Seasoned QM loan category,<sup>3</sup> and delayed the General QM mandatory compliance date.<sup>4</sup> Additionally, the CFPB provided COVID-19 assistance by way of an interim final rule amending Regulation X regarding loss mitigation,<sup>5</sup> a final COVID-19 focused mortgage servicing rule under Regulation X,<sup>6</sup> and the release of a housing insecurity bulletin to provide guidance as servicers resume foreclosure activities.<sup>7</sup>

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1. Qualified Mortgage Definition Under the Truth in Lending Act (Regulation Z): Extension of Sunset Date, 85 Fed. Reg. 67938 (Oct. 26, 2020) (to be codified at 12 C.F.R. § 1026.43(e)(4)(iii)(B)) [hereinafter Patch Extension Final Rule].

2. See Qualified Mortgage Definition Under the Truth in Lending Act (Regulation Z): General QM Loan Definition, 85 Fed. Reg. 86308 (Dec. 29, 2020) (to be codified at 12 C.F.R. § 1026.43) [hereinafter General QM Final Rule].

3. Qualified Mortgage Definition Under the Truth in Lending Act (Regulation Z): Seasoned QM Loan Definition, 85 Fed. Reg. 86402 (Dec. 29, 2020) (to be codified at 12 C.F.R. pt. 1026) [hereinafter Seasoned QM Final Rule].

4. Qualified Mortgage Definition Under the Truth in Lending Act (Regulation Z): General QM Loan Definition; Delay of Mandatory Compliance Date, 86 Fed. Reg. 22844 (Apr. 30, 2021) (to be codified at 12 C.F.R. pt. 1026) [hereinafter April 2021 Final Rule].

5. Treatment of Certain COVID-19 Related Loss Mitigation Options Under the Real Estate Settlement Procedures Act (RESPA) (Regulation X), 85 Fed. Reg. 39055 (June 30, 2020) (to be codified at 12 C.F.R. § 1024.41) [hereinafter July 2020 IFR].

6. Protections for Borrowers Affected by the COVID-19 Emergency Under the Real Estate Settlement Procedures Act (RESPA), Regulation X, 86 Fed. Reg. 34848 (June 30, 2021) (to be codified at 12 C.F.R. §§ 1024.31, 1024.39, 1024.41) [hereinafter June 2021 Final Rule].

7. Bulletin 2021-02: Supervision and Enforcement Priorities Regarding Housing Insecurity, 86 Fed. Reg. 17897 (Apr. 7, 2021) [hereinafter Housing Insecurity Bulletin].

## QUALIFIED MORTGAGE UPDATES

The Ability to Repay/Qualified Mortgage Rule (“ATR/QM Rule”)<sup>8</sup> generally requires mortgage creditors to make a reasonable, good faith determination of a consumer’s ability to repay a residential mortgage loan.<sup>9</sup> It provides liability protection for loans that meet the ATR/QM Rule’s requirements for qualified mortgages (“QM”).<sup>10</sup> Regulation Z contains several categories of QM loans. To qualify as a General QM, a loan must contain certain loan features and satisfy specific underwriting requirements, including, significantly, that the consumer’s total monthly debt to total monthly income ratio (“DTI ratio”) not exceed 43 percent under the standards in Appendix Q of Regulation Z.<sup>11</sup>

A residential mortgage loan eligible for purchase or guaranty by a GSE (Fannie Mae or Freddie Mac) falls into the category of “Temporary GSE QM” loans.<sup>12</sup> The CFPB established this category as a temporary measure set to expire at the earlier of January 10, 2021, or the date the applicable GSE exits conservatorship<sup>13</sup> (“GSE Patch”) to capture loans that would otherwise not fall into the category of General QM loans.

In July 2020, the CFPB proposed modifying the definition of a General QM loan by removing the 43 percent DTI ratio limit, among other changes,<sup>14</sup> and adding a pricing requirement so that the annual percentage rate (“APR”) on the loan could not exceed the average prime offer rate (“APOR”) for a comparable transaction by certain percentages for various loan amounts.<sup>15</sup> The same day, the CFPB proposed amendments to extend the sunset date of the Temporary GSE QM category so that this category would continue to exist until the amended definition for the General QM category became effective.<sup>16</sup> Notably, the CFPB did not propose to amend the provision stating that the Temporary GSE QM category would expire if the GSEs exited conservatorship, thereby leaving open the possibility that this could occur before the amendments to the General QM category went into effect.<sup>17</sup> The CFPB stated that these proposals were made in order to “facilitate a smooth and orderly transition away from

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8. 12 C.F.R. § 1026.43 (2021).

9. *Id.* § 1026.43(c)(1).

10. *See id.* § 1026.43(e)(1).

11. *Id.* § 1026.43(e)(2).

12. *Id.* § 1026.43(e)(4)(ii)(A).

13. *Id.* § 1026.43(e)(4)(iii).

14. Qualified Mortgage Definition Under the Truth in Lending Act (Regulation Z): General QM Loan Definition, 85 Fed. Reg. 41716, 41754–55 (proposed July 10, 2020) (to be codified at 12 C.F.R. § 1026.43) [hereinafter QM Definition NPRM]; *see* Christine M. Acree & Peter L. Cockrell, *Mortgage Regulation Developments in the COVID-19 Era*, 76 *BUS. LAW.* 627, 627–29 (2021) (in the 2021 Annual Survey).

15. QM Definition NPRM, *supra* note 14, at 41754–55 (to be codified at 12 C.F.R. § 1026.43(e)(2)(vi)); *see* Acree & Cockrell, *supra* note 14, at 627–28.

16. Qualified Mortgage Definition Under the Truth in Lending Act (Regulation Z): Extension of Sunset Date, 85 Fed. Reg. 41448 (proposed July 10, 2020) (to be codified at 12 C.F.R. § 1026.43) [hereinafter QM Patch NPRM]; *see* Acree & Cockrell, *supra* note 14, at 628–29.

17. *See* QM Patch NPRM, *supra* note 16, at 41448.

the Temporary GSE QM loan definition and to ensure access to responsible, affordable mortgage credit upon its expiration.”<sup>18</sup>

### TEMPORARY GSE QM EXTENSION

In October 2020, in order to “ensure that responsible, affordable mortgage credit remains available to consumers who may be affected if the Temporary GSE QM loan definition expires before the amendments to the General QM loan definition take effect,”<sup>19</sup> the CFPB released a final rule<sup>20</sup> that removed the January 10, 2021, sunset date of the Temporary GSE QM category. It stated that this category is only available for transactions with applications received before the mandatory compliance date of the amendments to the General QM definition.<sup>21</sup> The provision regarding the Temporary GSE QM category expiring upon the relevant GSE exiting conservatorship remained unmodified.<sup>22</sup>

### GENERAL QM FINAL RULE

The General QM Final Rule, published in December 2020, removed the 43 percent DTI ratio limit and any requirements to use Appendix Q’s standards for determining monthly debt and income for General QM loans and replaced such requirements with “price-based thresholds.”<sup>23</sup> The CFPB previously stated that such changes would help to “facilitate a smooth and orderly transition away from the Temporary GSE QM loan definition.”<sup>24</sup> Under the General QM Final Rule, a loan meets the revised General QM definition only if the APR exceeds the APOR for a comparable transaction by less than the threshold set forth as of the date the interest rate is set.<sup>25</sup> This threshold is 2.25 percentage points generally, but the General QM Final Rule allows for higher thresholds with smaller loan amounts as well as for certain manufactured housing loans and subordinate-lien transactions.<sup>26</sup> The General QM Final Rule sets forth percentage point thresholds for first lien, covered loan transactions with a loan amount: (a) greater than or equal to \$110,260, 2.25 percentage points; (b) greater than or equal to \$66,156 but less than \$110,260, 3.5 percentage points; (c) less than \$66,156, 6.5 percentage points; and (d) less than \$110,260 (and secured by a manufactured home), 6.5 percentage points.<sup>27</sup> Additionally, if the loan’s interest rate may or will change during the first five years

18. QM Definition NPRM, *supra* note 14, at 41716.

19. Patch Extension Final Rule, *supra* note 1, at 67939.

20. *Id.* at 67938.

21. *Id.* at 67958 (to be codified at 12 C.F.R. § 1026.43(e)(4)(iii)(B)).

22. *Id.* at 67948.

23. General QM Final Rule, *supra* note 2, at 86337, 86385; *see id.* at 86309.

24. *Id.* at 86316 (citing QM Patch NPRM, *supra* note 16, at 41449).

25. *Id.* at 86394 (to be codified at 12 C.F.R. § 1026.43(e)(2)(vi)).

26. *Id.* (to be codified at 12 C.F.R. § 1026.43(e)(2)(vi)). *See generally id.* (to be codified at 12 C.F.R. § 1026.43(b)(4) (defining “higher-priced covered transaction”).

27. *Id.* (to be codified at 12 C.F.R. § 1026.43(e)(2)(vi)). Note that these loan amounts will be adjusted for inflation annually. *Id.*

following the due date of the first periodic payment, the General QM Final Rule requires a creditor to treat the highest interest rate that may apply during that five-year period as the loan's interest rate for the entire loan term when calculating the APR for threshold purposes.<sup>28</sup>

The General QM Final Rule clarified how the existing ATR/QM Rule's "consider and verify" requirements apply under the revised General QM definition.<sup>29</sup> Creditors must consider the consumer's current or reasonably expected income, assets (other than the subject real property), debt, child support, alimony, and residual income or DTI ratio.<sup>30</sup> Under the General QM Final Rule, a creditor must use reasonably reliable third-party records and reasonable methods and criteria, and can only consider amounts that the creditor has verified according to Regulation Z's requirements.<sup>31</sup> Existing product-feature and underwriting requirements and points-and-fees limits were not revised.<sup>32</sup> The General QM Final Rule became effective March 1, 2021, with a mandatory compliance date of July 1, 2021.<sup>33</sup>

### SEASONED QM FINAL RULE

In order to "ensure access to responsible, affordable mortgage credit," the CFPB created a new category of qualified mortgage by publishing its Seasoned QM Final Rule in December 2020.<sup>34</sup> This rule, effective March 1, 2021, provides a safe harbor from liability under the ATR/QM Rule if particular restrictions are met regardless of whether the loan is a higher-priced loan.<sup>35</sup> However, a loan cannot qualify under the Seasoned QM Final Rule if it is a high-cost mortgage as defined in Regulation Z.<sup>36</sup> Rather, a residential mortgage loan is a Seasoned QM if it is secured by a first lien; has a fixed interest rate with regular, substantially equal, fully-amortizing periodic payments; has a loan term of thirty years or less; and has no negative amortization and no balloon payment.<sup>37</sup> Additionally, a Seasoned QM cannot exceed a points-and-fees limit, must satisfy underwriting requirements, and, aside from a few enumerated exceptions, must be held in portfolio until the end of the thirty-six month seasoning period.<sup>38</sup> A loan is eligible to become a Seasoned QM if it meets the requirements of the Seasoned QM

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28. *Id.* (to be codified at 12 C.F.R. § 1026.43(e)(2)(vi)).

29. *Id.* (to be codified at 12 C.F.R. § 1026.43(e)(2)(v)(A)–(B)).

30. *Id.* (to be codified at 12 C.F.R. § 1026.43(e)(2)(v)(A)).

31. *Id.* (to be codified at 12 C.F.R. § 1026.43(e)(2)(v)(B) (cross-referencing 12 C.F.R. § 1026.43(c)(3), (4)); *id.* at 86348 (discussing 12 C.F.R. § 1026.43(c)(3), (4)).

32. *Id.* at 86334–35.

33. *Id.* at 86308.

34. Seasoned QM Final Rule, *supra* note 3, at 86402.

35. *Id.* at 86452 (to be codified at 12 C.F.R. § 1026.43(e)(1)(i)(B)).

36. *Id.* (to be codified at 12 C.F.R. § 1026.43(e)(7)(i)(B)); 12 C.F.R. § 1026.32(a) (2021) (setting forth requirements for "high-cost mortgages").

37. Seasoned QM Final Rule, *supra* note 3, at 86452 (to be codified at 12 C.F.R. § 1026.43(e)(7)(i)).

38. *Id.* (to be codified at 12 C.F.R. § 1026.43(e)(7)(i), (iii)); *see id.* at 86453 (to be codified at 12 C.F.R. § 1026.43(e)(7)(iv)(C) (defining "seasoning period")).

Final Rule at the end of the seasoning period regardless of whether it meets the definition of another QM loan category at consummation.<sup>39</sup>

### QM DEFINITION COMPLIANCE DATE EXTENDED FINAL RULE

In April 2021, the CFPB issued a final rule extending the General QM Final Rule’s mandatory compliance date from July 1, 2021, to October 1, 2022.<sup>40</sup> Because the General QM Final Rule was already effective as of March 1, 2021,<sup>41</sup> loans with applications received between March 1, 2021, and before October 1, 2022 can be originated as a General QM loan under either the original, total DTI ratio definition, or under the revised, price-based definition.<sup>42</sup> However, beginning October 1, 2022, only the revised definition option will be available for General QM loans.<sup>43</sup> The April 2021 Final Rule also extended the expiration of the Temporary GSE QM category to the earlier of October 1, 2022 (which previously had been January 10, 2021) or the date the applicable GSE exits conservatorship.<sup>44</sup>

Regardless of the April 2021 Final Rule’s extension of the mandatory compliance deadline, the U.S. Department of Treasury amended its Preferred Stock Purchase Agreements to add new limits on the GSEs so that QM loans they purchase with an application received on or after July 1, 2021, must comply with the revised, price-based definition General QM.<sup>45</sup>

## COVID-19 ASSISTANCE

### ALIGNING REGULATION X WITH FEDERAL COVID-19 LOSS MITIGATION OPTIONS

Effective July 1, 2020, the CFPB issued an interim final rule amending Regulation X to temporarily allow mortgage servicers to offer loss mitigation options based upon incomplete applications.<sup>46</sup> Prior to the July 2020 IFR, servicers generally could not evaluate a borrower for loss mitigation prior to receiving a complete loss mitigation application, with certain limited exceptions for short-term loss mitigation options.<sup>47</sup> However, in May 2020, the Federal Housing Finance Agency (“FHFA”) created a payment deferral program for borrowers affected

39. *See id.* at 86421–22.

40. April 2021 Final Rule, *supra* note 4, at 22845; *see also* General QM Final Rule, *supra* note 2, at 86308 (establishing prior mandatory compliance date of July 1, 2021).

41. April 2021 Final Rule, *supra* note 4, at 22845; General QM Final Rule, *supra* note 2, at 86308 (establishing effective date of March 1, 2021).

42. April 2021 Final Rule, *supra* note 4, at 22845; *id.* at 22859–60 (to be codified at 12 C.F.R. § 1026 supp. I, cmt. 43).

43. *Id.* at 22845; *id.* at 22859 (to be codified at 12 C.F.R. § 1026 supp. I, cmt. 43).

44. *Id.* at 22845–46, 22851; *see* Patch Extension Final Rule, *supra* note 1, at 67938 (referencing original sunset date of January 10, 2021).

45. April 2021 Final Rule, *supra* note 4, at 22851.

46. July 2020 IFR, *supra* note 5, at 39055 (noting purpose of the IFR and specifying an effective date of July 1, 2020).

47. *Id.* at 39056 (citing 12 C.F.R. pt. 1024 (Regulation X)).

by the COVID-19 pandemic, and the GSEs established streamlined application procedures that allowed servicers to offer these deferrals without collecting a complete borrower response package.<sup>48</sup> Recognizing that the FHFA and GSE programs conflicted with the then-existing loss mitigation rules, the CFPB issued the July 2020 IFR.

The rule allows servicers to offer loss mitigation options prior to receiving a complete loss mitigation application if the borrower is “experiencing a financial hardship due, directly or indirectly, to the COVID-19 emergency.”<sup>49</sup> To qualify under the July 2020 IFR, a loss mitigation option must satisfy three criteria. First, the loss mitigation option must allow the borrower to delay repaying principal and interest until the earliest of when the mortgage loan is refinanced, the mortgaged property is resold, or—with respect to a mortgage loan insured by the Federal Housing Administration (“FHA”)—the mortgage insurance terminates.<sup>50</sup> Second, the servicer may not charge interest on the deferred amounts, may not charge a fee as part of the loss mitigation option, and must waive all existing late charges, penalties, stop payment fees, or similar charges upon the borrower’s acceptance of the loss mitigation option.<sup>51</sup> Third, a borrower’s acceptance of the loss mitigation option must resolve any preexisting delinquency on the mortgage loan.<sup>52</sup>

If the borrower accepts a loss mitigation option under the July 2020 IFR, the creditor need not review and respond to the incomplete application at that time.<sup>53</sup> However, the CFPB cautioned servicers that a borrower can reject an interim offer and complete a full loss mitigation application, triggering the existing loss mitigation requirements in Regulation X.<sup>54</sup> Similarly, if a borrower who has accepted an interim loss mitigation option submits another loss mitigation application, the servicer must follow the Regulation X rules requiring loss mitigation evaluations to be based on completed applications.<sup>55</sup>

## JUNE 2021 REGULATION X REVISIONS TO ASSIST BORROWERS AFFECTED BY COVID-19

Following up on its July 2020 IFR, in June 2021, the CFPB issued a final rule to provide more comprehensive protections to borrowers affected by the COVID-19 emergency.<sup>56</sup> The June 2021 Final Rule made several changes to Regulation X to address the CFPB’s concerns that an “unprecedented” number of borrowers will

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48. *Id.* at 39058 (citing *Lender Letter (LL-2020-07)*, FANNIE MAE, <https://singlefamily.fanniemae.com/media/22916/display> (last updated Nov. 18, 2020); *Bulletin 2020-15: Freddie Mac COVID-19 Payment Deferral*, FREDDIE MAC (May 13, 2020), [https://guide.freddiemac.com/app/guide/bulletin/2020-15?\\_ga=2.76149522.621170394.1590694543-1945440177.1590694543](https://guide.freddiemac.com/app/guide/bulletin/2020-15?_ga=2.76149522.621170394.1590694543-1945440177.1590694543)).

49. July 2020 IFR, *supra* note 5, at 39061.

50. 12 C.F.R. § 1024.41(c)(2)(v)(A)(1) (2021).

51. *Id.* § 1024.41(c)(2)(v)(A)(2).

52. *Id.* § 1024.41(c)(2)(v)(A)(3).

53. *Id.* § 1024.41(c)(2)(v)(B).

54. July 2020 IFR, *supra* note 5, at 39062.

55. *Id.*

56. June 2021 Final Rule, *supra* note 6, at 34848.

exit various state, federal, and GSE forbearance programs within a short window and will strain servicers' ability to respond to the expected flood of loan modification and loss mitigation applications during that time.<sup>57</sup> The June 2021 Final Rule went into effect August 31, 2021.<sup>58</sup>

While the July 2020 IFR created a new loss mitigation option for borrowers with incomplete applications facing a COVID-19 hardship, the June 2021 Final Rule modified the anti-evasion provisions of Regulation X to allow servicers to offer borrowers with incomplete applications a loan modification as well.<sup>59</sup> With these changes, the CFPB allowed servicers to move eligible borrowers into "streamlined loan modifications that do not cause additional financial hardship."<sup>60</sup>

For a loan modification to qualify under the June 2021 Final Rule, the modification must meet certain criteria. Specifically, the modification cannot extend the loan term by more than 480 months from the modification date; the modification cannot increase the borrower's principal and interest payments; any deferred amounts cannot accrue interest; the servicer cannot charge fees for the modification; the servicer must waive all existing charges; and the modification must bring the loan current.<sup>61</sup> These loan modification requirements are intended to mirror the terms of the loan modifications offered by the GSEs and the FHA.<sup>62</sup> As under the July 2020 IFR, if a borrower accepts a loan modification offer under the June 2021 Final Rule, the servicer need not go through the required steps for an incomplete application. However, if the borrower fails to complete a trial loan modification under the new rule or requests further assistance, the servicer must then resume reasonable diligence to complete the loss mitigation application.<sup>63</sup>

In addition, the June 2021 Final Rule modified Regulation X's early intervention requirements.<sup>64</sup> While the June 2021 Final Rule did not change the timing of early intervention live contact attempts, it required mortgage servicers to communicate additional information during live contact based upon whether the borrower is in a forbearance plan.<sup>65</sup> For borrowers who are not in a forbearance plan at the time of live contact, if the servicer of the borrower's loan makes a forbearance program available to borrowers facing COVID-19 hardships, the servicer must list and briefly describe any forbearance programs available to the borrower and what actions the borrower must take to be evaluated for such programs.<sup>66</sup> If the borrower already is in a forbearance plan, the servicer must inform the borrower of the end date for the current forbearance plan, as well as

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57. *Id.* at 34875.

58. *Id.* at 34848.

59. *Id.* at 34899–900 (to be codified at 12 C.F.R. § 1024.41(c)(2)(vi)(A)).

60. *Id.* at 34869.

61. *Id.* at 34899–900 (to be codified at 12 C.F.R. § 1024.41(c)(2)(vi)(A)).

62. *Id.* at 34869.

63. *Id.* at 34900 (to be codified at 12 C.F.R. § 1024.41(c)(2)(vi)(B)); *see also id.* at 34873–74.

64. *Id.* at 34899 (to be codified at 12 C.F.R. § 1024.39).

65. *Id.* (to be codified at 12 C.F.R. § 1024.39(e)(1)–(2)).

66. *Id.* (to be codified at 12 C.F.R. § 1024.39(e)(1)).

any other forbearance extension, repayment options, and other loss mitigation options, as well as the steps the borrower must take to be evaluated for such programs; such communication must occur during the last live contact between ten and forty-five days before the end of the forbearance period.<sup>67</sup> Although Regulation X's prior early intervention requirements gave servicers discretion to determine whether it is appropriate to provide borrowers with information on certain loss mitigation options, the June 2021 Final Rule limited that discretion so that the servicer would be required to provide this information to borrowers during this live contact.<sup>68</sup> This provision will expire on October 1, 2022.<sup>69</sup>

Finally, the June 2021 Final Rule created an emergency pre-foreclosure review period that limits servicers' ability to make a first notice or filing in a foreclosure action before January 1, 2022.<sup>70</sup> This pre-foreclosure review period only applies to loans that were more than 120 days delinquent on or after March 1, 2020, and for which the state statute of limitations for a foreclosure action expires on or after January 1, 2022.<sup>71</sup> For loans covered by this pre-foreclosure review requirement, the servicer may proceed with foreclosure only if it has evaluated a complete loss mitigation application, if the mortgaged property is abandoned, or if the borrower is unresponsive to the servicer's contact efforts.<sup>72</sup>

#### COMPLIANCE BULLETIN: STAFFING AND BORROWER ENGAGEMENT

The CFPB's concerns about protecting borrowers at the end of foreclosure moratoria and forbearances have not been limited to rulemaking. In April 2021, the CFPB released a bulletin entitled *Supervision and Enforcement Priorities Regarding Housing Insecurity* to provide guidance as servicers resume foreclosure activities.<sup>73</sup> The Housing Insecurity Bulletin requires servicers "to dedicate sufficient resources and staff to ensure they can communicate clearly with borrowers, effectively manage borrower requests for assistance, promote loss mitigation, and ultimately reduce avoidable foreclosures and foreclosure-related costs."<sup>74</sup> While the Housing Insecurity Bulletin does not create new requirements for mortgage servicers, the CFPB nevertheless identified several specific provisions of Regulation X, the Consumer Financial Protection Act, and the Equal Credit Opportunity Act where it will watch servicers closely for violations related to borrowers' emergence from COVID-19 relief plans.<sup>75</sup>

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67. *Id.* (to be codified at 12 C.F.R. § 1024.39(e)(2)).

68. *Id.* at 34901 (to be codified at 12 C.F.R. § 1024 *supp.* 1, cmt. 39(a)-4).

69. *Id.* at 34899 (to be codified at 12 C.F.R. § 1024.39(e)).

70. *Id.* at 34900 (to be codified at 12 C.F.R. § 1024.41(f)(3)).

71. *Id.* (to be codified at 12 C.F.R. § 1024.41(f)(3)(i)).

72. *Id.* (to be codified at 12 C.F.R. § 1024.41(f)(3)(ii)).

73. Housing Insecurity Bulletin, *supra* note 7, at 17897.

74. *Id.*

75. *Id.* at 17898.