**Comments**

**of the**

**National Consumer Law Center (on behalf of its low-income clients)**

**Center for Responsible Lending**

**and**

**National Housing Law Project**

**on**

**Request for Information Regarding Mortgage Refinances and Forbearances**

**87 Fed. Reg. 58487**

**Docket No. CFPB-2022-0059**

## I. Introduction

On behalf of the clients and communities that we represent, we write to urge the Bureau to update the mortgage servicing regulations in Regulation X to incorporate the lessons learned from the pandemic and promote streamlined refinancing when it truly benefits homeowners to provide access to lower interest rates and lower mortgage payments. Overall, the Bureau's policies should reduce unnecessary foreclosures, stabilize neighborhoods, and reduce the racial wealth gap.

Borrowers who have faced financial hardship have benefited from the new "streamlined" loss mitigation products developed in response to the COVID-19 pandemic by the Government Sponsored Enterprises (GSEs), FHA, VA, USDA, and some private investors, and we applaud the Bureau for adjusting Regulation X to allow those servicing options to work. To build on this success, we strongly encourage the Bureau to engage in rulemaking to establish a more coherent framework for Regulation X, with consistent rules for the various exemptions that have been put in place since the 2013 inception of the rule.

We also urge the Bureau to amend the ATR-QM provisions in Reg. Z to facilitate streamline refinancing and to make certain other changes to the rule. For borrowers who are current on their mortgage and looking to improve their financial situation, streamlined refinances with reduced paperwork can help them save money on interest and reduce the size of their monthly payments. As the Bureau noted in its September 2022 Request for Information (RFI), Black and Hispanic borrowers did not refinance as often as white borrowers when low interest rates were available. Making streamlined refinancing more easily available should help these communities lower their loan payments when market interest rates decrease. However, the Bureau should impose specific protections to ensure that the refinancing provides a true benefit to the borrower.

Specifically, we ask the Bureau to:

- Conduct a new rulemaking for Regulation X to update the structure of the rule to explicitly permit servicers to offer streamlined loss mitigation options, with consistent requirements for notice and procedural protections for homeowners;
- Affirm that existing regulations allow offering streamlined loss mitigation options to homeowners without a COVID hardship if the option has been made available to those with COVID hardships;
- Strengthen RESPA's existing loss mitigation framework to address several gaps;
- Specifically address the need for streamlined loss mitigation options in areas impacted by natural disasters and allow for automatic, short-term forbearance for borrowers in disaster areas once those borrowers become 60 days past due;
- Allow for increased access to streamlined refinancing products as long as consumer protections are in place to ensure that the refinancing benefits the borrower;
- Rescind the Seasoned Qualified Mortgage (QM) rule for loans originated after the effective date of the new rule; and
- Remove the Ability-to-Repay (ATR) Exemption for Community Development Financial Institutions (CDFIs).

This comment will first address the servicing questions in the Bureau's RFI and then will address specific issues related to the origination questions.

## II. The Bureau should initiate a new rulemaking for Regulation X to update the structure of the rule to incorporate lessons learned from the pandemic.

On behalf of our low-income clients, we commend the Bureau for taking steps to evaluate the best framework for streamlined loss mitigation reviews beyond the COVID-19 pandemic. In response to questions 1, 5, and 11, we provide detailed feedback about the existing RESPA framework and the ways it should be modified to allow for streamlined loss mitigation options on a permanent basis. Updating RESPA to reflect recent innovations in loss mitigation is essential to promoting foreclosure prevention in current and future markets and to developing a more holistic set of regulations. Further, while we believe the existing provisions in 12 C.F.R. §§ 1024.41(c)(2)(v) and (vi) allow offering streamlined loss mitigation options to homeowners without a COVID hardship if the option has been made available to those with COVID hardships, Bureau guidance affirming that this is permissible would provide market continuity and access before a comprehensive revised mortgage servicing rule can be finalized. The comments continue with specific recommendations related to borrower communications, credit reporting, automatic forbearances, and other issues raised in the RFI.

1. **Streamlined loss mitigation reviews should become a permanent feature of RESPA, available for a broad range of hardships, but only with certain protections in place.**
    a. *Streamlined reviews, with consumer protections, benefit consumers*.

The RFI refers to both streamlining and automation. As we understand it, automation of loss mitigation review includes reviewing eligibility based solely on information in the servicer's possession, such as whether it is possible to reduce the monthly payment by 20% by following certain steps. Automated loss mitigation reviews have been happening as far back as 2016, usually leading to a "blind offer" as defined by RESPA, for example through the GSE Flex Modification. Servicers have been permitted to make a "blind offer" of a loan modification, after following those automated steps, under the existing RESPA framework.

Streamlining, on the other hand, involves offering a loss mitigation option based on some limited information from the borrower, without collecting a complete application. During the pandemic, servicers and investors wanted the ability to make an offer based on receiving certain limited information from the borrower – such as answers to questions like, "can you afford to resume your regular payment?" and "is this potential loan mod affordable to you?" The primary RESPA framework, for policy reasons discussed below in section (2)(a), has not permitted servicers to evade their obligation to collect a complete application and review borrowers for all options. The Bureau's approach under the time pressure of the pandemic was to allow these streamlined offers as an exception to the anti-evasion rule. The only protections that applied to these reviews were limitations on the terms of the deferral or loan mod that could be offered.

There are significant benefits to borrowers from not having to submit a complete application (i.e. a streamlined process). Particularly during the pandemic, but also at other times, the burden of collecting income documentation has not been well managed by servicers. Because of the economics of mortgage servicing, servicers do not generally maintain staffing levels that enable them to handle full-documentation loss mitigation applications effectively. Borrowers sometimes give up and fail to complete the process, especially if they are being asked to submit the same documents over and over again. Moreover, some borrowers may see their foreclosure proceed to conclusion as they try to complete their application to the servicer's (often evolving) standards.

However, there are also downsides to allowing servicers to conduct a sequential review of a limited set of options (or one preferred option) rather than reviewing simultaneously for the full array of available options. Asking borrowers whether they can afford a certain payment is likely to lead to unrealistically optimistic answers, born out of desperation, if they are not given sufficient information about the other available options. Homeowners don't always know what they can afford, especially if they have not had the benefit of budget counseling and have been triaging expenses during a period of reduced wages. Moreover, even if they know a payment will be difficult or impossible to afford, borrowers are likely to say they can afford the payment if they believe their only other options are to pay the arrearage in full or lose the home to foreclosure. Even though the GSEs gave servicers a sample deferral offer letter and guidance for such letters that clearly requires servicers to notify borrowers that payment-reduction options may be available, servicers have at times sent deferral offer letters that convey the misimpression that the only options are deferral, lump sum payment, or foreclosure.[1] Servicers' phone scripts likely suffer from the same lack of clarity.

Borrowers can make the best decision about which loss mitigation option is most suitable when they are informed of all available options. This is the logic that led the Bureau to require a simultaneous review for all options, rather than a sequential review for one option at a time, when it issued the RESPA loss mitigation rule.[2] The Bureau recognized that borrowers should not be expected to identify the most appropriate loss mitigation option without complete information (a difficult task, even with the benefit of the details), and that servicers should not be permitted to steer borrowers to apply for one particular loss mitigation option when the borrower will lack full information.[3]

The pandemic post-forbearance options have also been determined and communicated almost entirely through phone communication. While some level of reliance on phone conversations is necessary, written notices play an important role in clarifying the borrowers' rights and options and the terms of any option being offered. Legal services attorneys and housing counselors report that phone conversations with servicers often are not giving borrowers complete or accurate information regarding available loss mitigation options.[4]

Another problem with offering one option based on an incomplete application is the perception (and perhaps reality) that the borrower may have to forfeit that one option if they ask to be reviewed for other available options. Borrowers are made to give up the "bird in the hand" (a streamlined offer) in order to be reviewed for possible, uncertain, other options. The Bureau should not permit servicers to condition any loss mitigation offer on giving up the right to be reviewed for all options. In the section that follows we discuss the core protections that should apply to streamlined reviews to prevent potential harm to borrowers.

### b. *Certain key protections of RESPA should apply to streamlined reviews*.

In order to minimize the harms to consumers and maximize the benefits to all parties of streamlined reviews, the Bureau should create a permanent pathway for streamlined reviews that would incorporate the core protections of § 1024.41. These core protections are:

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[1] *See* Fannie Mae Lender Letter 2020-07 at 6 (Updated Nov. 18, 2020). *See also* Exhibit A, Coalition Letter to Acting Director Uejio, Mar. 12, 2021, at https://www.nclc.org/wp-content/uploads/2022/08/CFPB_RESPA_Ltr.pdf (Example of Deferral Offer letter sent to a Fannie Mae borrower on Feb. 3, 2021 mentioning loan modification on the cover page, but in the specific deferral offer letter giving the impression that if the borrower does not accept the deferral, they should prepare to pay the lump sum of $13,027.67).

[2] Section-by-Section Analysis, § 1024.41, 78 Fed. Reg. 10,696, 10,859 (Feb. 14, 2013).

[3] 78 Fed. Reg. 10,696, 10,828 ("The Bureau simply does not believe that permitting servicers to steer borrowers to apply for particular loss mitigation options, when the servicer has a far superior capacity to make the relevant determination, reasonably protects the borrower's interest.")

[4] *See* Coalition Comments to the CFPB Regarding Protections for Borrowers Impacted by the COVID-19 Emergency under RESPA, Regulation X, Appendices A & B (May 10, 2021), at ttps://www.nclc.org/resources/coalition-comments-on-the-cfpbs-proposed-rule-to-protect-homeowners-impacted-by-the-covid-19-emergency.

- Written offer and denial notices;
- Appeal rights;
- Dual tracking protections; and
- The right to be reviewed for all options later without giving up the streamlined option.

When a servicer reviews the borrower for streamlined options, it should be required to send a written notice offering any option that is approved and stating the specific reasons for denial for any options for which the borrower has been denied. Borrowers should then have a right to appeal any such denial and to have the servicer conduct a reasonable investigation of that appeal. The notice should also list the options for which a borrower was not reviewed, but which they could seek by submitting a complete application. Borrowers should then have a right to appeal any such denial and to have the servicer conduct a reasonable investigation of that appeal.

Especially important, the Bureau must protect borrowers from dual tracking while they are being reviewed for, and offered (or denied/appealing) a streamlined option and while they are appealing a denial of such an option or seeking a review for all options. Most borrowers coming out of a forbearance now are not protected during that time, because the procedural safeguards provided under § 1024.41(f)(3) were temporary and have expired. Going forward, it is very important for borrowers exiting a forbearance to have dual tracking protections while the servicer is reviewing and offering any streamlined options. Protections should continue through the period to appeal or seek a review for all options, and, if the borrower takes one of those steps, until the appeal or review is concluded.

One way to prevent dual tracking during the period of any streamlined review and offer would be to prevent the initiation of foreclosure for 60 days after the end of a forbearance, establishing a 60-day buffer period. This could be done by amending 12 C.F.R. § 1024.41(c)(2)(iii). If this approach is adopted, borrowers being reviewed for streamlined options but that never entered a forbearance should have dual tracking protections from the date a streamlined offer or denial notice is sent to the borrower through the borrower's deadline to accept or through the end of any timely appeal.

Another approach would be for the Bureau to extend §§ 1024.41(f) and (g) dual tracking protections to any borrower who is offered a forbearance, through the latest of these three events: a) the servicer has reviewed the borrower for any available post-forbearance streamlined options, b) the servicer has sent a (b)(2) notice (within 30 days of the end of forbearance if no streamlined options will be offered; or within 30 days after the borrower is rejected for streamlined options), and c) the reasonable deadline for the borrower to submit any additional documents listed in the (b)(2) notice has expired. If the borrower completes an application within that time period, the usual protections of §§ 1024.41(f) and (g) would apply. This approach is similar to the one the Bureau adopted for servicing transfers that occur during a pending loss mitigation application in § 1024.41(k)(2)(ii).

Whichever approach the Bureau takes, preventing dual tracking during a streamlined review period would allow for the most efficient process: completing any streamlined review **before** a servicer has to resume reasonable diligence efforts to obtain a complete application under § 1024.41(b)(1). The reasonable diligence duty should be delayed if the servicer is offering streamlined options; but dual tracking protections should extend during that time period and until reasonable diligence efforts have resumed and the borrower has had time to complete an application if they are not obtaining a streamlined option.

Another risk of harm to borrowers posed by sequential review that the Bureau should address is the risk that borrowers might lose one definite option (a streamlined option) by virtue of asking to be evaluated for all available options. In its final rule, the Bureau should provide that a borrower who asks to be considered for all available options does not lose the right to accept a streamlined option as a condition of that full review. It should also require that servicers evaluate the borrower simultaneously for all available streamlined options. The Bureau had good reasons for requiring a simultaneous review for all options, rather than a sequential review for one option at a time, when it issued the RESPA loss mitigation rule.[5] The Bureau recognized that borrowers should not be expected to identify the most appropriate loss mitigation option without full information, and that servicers should not be permitted to steer borrowers to one particular loss mitigation option when the borrower lacks full information.[6]

For these reasons, RESPA currently requires that a borrower be evaluated for all available options *simultaneously*. If the Bureau creates a permanent exception to allow for a review for one of several options, it should ensure that borrowers are protected from the harms of that kind of sequential review by making it clear that all streamlined options must be reviewed simultaneously and that a streamlined offer cannot be revoked (or deemed rejected) if the borrower requests a review for all available options. Streamlined options should be included among the review for all available options, and servicers should be required to communicate that fact to borrowers.

A flow chart depicting the possible sequence of loss mitigation reviews, and borrower rights at different points in this proposed framework, is attached as Appendix A.

### c. *Certain protections should also apply to "blind offers."*

In addition to comprehensively addressing the streamlined review process, the following key protections of RESPA should extend to blind offers. A blind offer is a loss mitigation offer that is not based on any information provided by the borrower. For example, the GSEs require servicers to review borrowers for the Flex Mod when the loan becomes 90-105 days delinquent.

The following core protections of RESPA should apply to blind offers:

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[5] Section-by-Section Analysis, § 1024.41, 78 Fed. Reg. 10,696, 10,859 (Feb. 14, 2013).

[6] 78 Fed. Reg. 10,696, 10,828 ("The Bureau simply does not believe that permitting servicers to steer borrowers to apply for particular loss mitigation options, when the servicer has a far superior capacity to make the relevant determination, reasonably protects the borrower's interest.")

- Written offer/denial;
- Appeal rights;
- Protection against dual tracking once an offer or denial is sent, until the end of the appeal window or the acceptance window; and
- Preservation of the right to accept the blind offer if the borrower asks to be reviewed for all options.

A major risk of blind offers is that the servicer could offer any option it wants (declining to offer other options), or could find the borrower ineligible and offer nothing, and the borrower would never know. The review conducted by servicers is shrouded in mystery. Borrowers will be harmed by the lack of information about which options they have been reviewed for and even determined to be ineligible for. Examples abound of borrowers who have been wrongfully found ineligible for a streamlined modification or have been offered a modification with the wrong terms. In NCLC's 2021 nationwide survey of homeowner advocates, 61 advocates responded that they had seen homeowners wrongfully denied for a Flex Modification at least once. Thirty-two advocates had managed to get a wrongful denial reversed through their advocacy.[7]

The opacity of most Flex Modification reviews means that these problems do not come to light in most instances. Experienced legal services attorneys and housing counselors who know the rules of the Flex Modification program have, however, reported many instances in which borrowers were offered a Flex Modification with incorrect, disadvantageous, and unaffordable terms because the servicer used an inaccurate property valuation. The biggest factor that determines modification terms in the Flex Modification is the loan to value ratio. Borrowers with an LTV below 80% are offered no principal forbearance. Therefore, reliance on an inaccurate automated valuation can result in a dramatically worse loan modification offer than the borrower should have been given, or even in an outright denial. Fannie and Freddie borrowers who have had a Flex Modification in the past six years and are determined by the servicer to have a MTM LTV below 80% are likely to see a payment increase and will therefore be found ineligible for the Flex Modification.[8]

If a servicer has determined based on the information available to it that the borrower is not eligible for a Flex Modification (because, for example, the modification would result in a payment increase), the borrower is much better off knowing that information immediately. A borrower who disagrees can appeal the denial and provide information (for example, proof of the home's value) that might change the outcome. If there is no basis to overturn the decision, the borrower is better off knowing that they are not eligible for the Flex Modification now, rather than going through the months-long process of trying to submit an application that will be deemed "complete," and falling several more months behind, before learning that this option is not

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[7] *See* Coalition Comments to the CFPB, *supra* note 4, Appendix A at 2 and Appendix B at 4 (example of Ms. B, from Rachel Scott, Atlanta Legal Aid Society).

[8] This is true because Fannie and Freddie are currently not allowing principal forbearance resulting in a MTM LTV below 80%. If 12 to 18 months of missed payments are capitalized, and the term is already close to 480 months due to a prior Flex Mod, the very slight term extension from a new Flex Mod is not sufficient to offset the payment increase due to capitalized arrears. Fannie and Freddie estimate that roughly 85% of their loans are currently below 80% LTV.

available. The total lack of transparency in the current blind offer system presents a substantial risk of harm to consumers. This can be addressed by requiring a written notice of any offer or denial of any blind review (a review not initiated because of a borrower application). Streamlined offers and unsolicited (blind) offers also should not trigger the "duplicative request" limitation in § 1024.41(i), because they are not based on a review of a complete application.

**2. RESPA's existing loss mitigation framework advances important consumer protection goals and should be strengthened to address several gaps.**

a. *The existing framework of § 1024.41 provides reasonable procedural protections and simultaneous review for all available options*.

The RESPA loss mitigation rule has made a significant, positive impact in the lives of homeowners and has contributed to preventing avoidable foreclosures. Adopted in the wake of the 2008 foreclosure crisis, the rules were intended to preserve homeownership for borrowers in distress and to limit the losses of investors and guarantors. In a survey of consumer advocates conducted by NCLC in June 2017, 85% of respondents believed that the servicing rules had benefited homeowners, and 86% believed that they had helped more homeowners avoid foreclosure.[9] The rule has improved transparency and accountability in the loss mitigation process and has helped align the incentives of servicers with investors, homeowners, and communities. While further improvements to the rule are needed, as discussed below, many benefits of the rule should not be eroded.

When it issued § 1024.41, the Bureau wisely required servicers to conduct a simultaneous review for all available loss mitigation options, rather than allowing piecemeal reviews of one option at a time. Borrowers have benefited from this system. In addition, borrowers gain substantial protections from the requirement of a written offer or denial letter, including the specific reasons for any denial (§§ 1024.41(c) and (d)) and a specified appeal window (§ 1024.41(h)). Dual tracking protections have served as an essential guard rail against servicers conducting a foreclosure sale despite a pending loss mitigation application. As it considers expanding streamlined loss mitigation reviews beyond those made available for COVID-related hardships and making them permanent, the Bureau should take care not to undercut these important goals.

[9] There were 233 respondents to the survey from 41 states. Of the respondents, 171 were housing counselors, 49 were attorneys, and 13 were employees of other nonprofits. *See* detailed discussion of survey results in Section III, Comments of the National Consumer Law Center in Response to the Notice of Assessment of 2013 RESPA Servicing Rule and Request for Public Comment (Docket No. CFPB-2017-0012), July 10, 2017, available at https://www.nclc.org/resources/comments-2013-respa-rule/.

b. *The Bureau should strengthen the loss mitigation rule by addressing certain gaps and problems*.

- The CFPB should clearly define the documents required to establish a "complete" application.

Since the loss mitigation rule took effect, there have been persistent problems with servicers improperly dragging out the process of getting to a complete application. Reliance on submission of a complete application as defined by each servicer confounds attempts to address dual-tracking and wrongful foreclosures due to the lack of an objective standard for when an application is complete and inconsistent implementation by servicers. Moreover, it creates exactly the wrong incentive—to drag out the application process in order to increase servicers' default servicing fee income. It has also generated unnecessary litigation, as borrowers seek court determinations that servicers have improperly treated applications as incomplete.

The current system of tying dual tracking protections only to a complete application according to individual servicers' requirements leaves borrowers open to too much uncertainty and servicer gamesmanship. Instead of defining a complete application as one where the servicer "has received all information the servicer requires from a borrower" in evaluating the borrower for available options, 12 C.F.R. § 1024.41(b)(1), the Bureau should create a list of documents that are presumed to constitute a complete application. These could include the documents typically required by investors: reasonable proof of household income and an attestation of the borrower's hardship. This type of "bright-line" rule would provide clarity to borrowers and servicers.

- Borrowers need an end-of-forbearance notice.

When the loss mitigation rule was first drafted, the Bureau envisioned short-term forbearances of roughly three to six months. However, during the pandemic and even before it, forbearances were routinely being extended to 12 months or longer. This highlights a major omission in the sequence of RESPA notices: a notice tied to the end of the forbearance period. Servicers should be required to send a notice at least 30 days before the end of a forbearance explaining the borrower's options, including how to extend the forbearance (if available), how to be reviewed for streamlined options (if available), or how to complete an application and be reviewed for all options. While oral outreach has been required, written notice done well gives borrowers information they can consider at their own pace and share with trusted advisors and family members. It also offers another opportunity for homeowners who were not reached by a call.

- The right to appeal a loss mitigation denial must be open for more than 14 days and must require a reasonable investigation.

The current system for appealing a wrongful loss mitigation denial does not lead to servicers correcting their mistakes. The rule simply requires the appeal to be reviewed by "different personnel than those responsible for evaluating the borrower's complete loss mitigation application."[10] But that is not sufficient. The Bureau should require servicers to respond to an appeal by conducting a reasonable investigation – using the same standard of reasonableness that applies to responding to Notices of Error.

If a servicer fails to conduct a reasonable investigation and continues to improperly deny a loss mitigation option for which the borrower is eligible under investor rules, the addition of a reasonable investigation requirement in § 1024.41 will give borrowers a right of action. This is necessary because the Bureau has taken the position that borrowers should not use a Notice of Error to challenge the improper denial of a loss mitigation option or the failure to conduct a reasonable investigation in handling an appeal.[11]

Moreover, a 14-day window for appeal is not sufficient. Especially in light of mailing delays (some caused by the postal service and others caused by third party vendors used by servicers), borrowers often do not receive a notice until 10 or 12 days after it was dated.[12] The Bureau should lengthen the minimum appeal window to 30 calendar days.

- Applications for assistance from third party entities (like HAF and similar programs) should trigger dual tracking protections if the servicer is notified of the application.

Right now it is not clear that an "application" to a public mortgage assistance program triggers any protections of RESPA. Borrowers applying for the Homeowner's Assistance Fund (HAF) have been at risk of foreclosure while they are under review.

HAF programs are permitted to operate through September 2026, and many states have used only a small fraction of their available funds. For mortgage assistance, a state HAF program communicates with the servicer, and cannot move forward with final approval of assistance until the servicer responds with certain information. Therefore, the servicer can delay the approval while also starting the foreclosure process.

The Bureau should address this gap by defining complete application to include a situation where an external program has communicated to the servicer that the borrower has submitted to that entity all information required from the borrower to establish eligibility for mortgage assistance.

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[10] *See* 12 C.F.R. § 1024.41(h)(3)

[11] *See* Section-by-Section Analysis, § 1024.35(b)(11), 78 Fed. Reg. 10,696, 10,744 (Feb. 14, 2013) (discussing the Bureau's reasoning for not including a servicer's failure to correctly evaluate a borrower for a loss mitigation option as a specific covered error in section 1024.35(b), noting that the "appeals process set forth in § 1024.41(h) provides an effective procedural means for borrowers to address issues relating to a servicer's evaluation of a borrower for a loan modification program.")

[12] As we have noted before, the CFPB should prevent such unfair vendor mailing delays by requiring that a letter be deposited into the mail on the same day it is dated. See NCLC Comments Regarding the Notice of Assessment of 2013 RESPA Servicing Rule and Request for Public Comment (Docket No. CFPB-2017-0012), available at: https://www.nclc.org/wp-content/uploads/2022/11/comments-to-cfpb-servicing-assessment-respa.pdf.

- Successors in interest should be protected from unreasonable refusal to confirm successor status.

The Bureau's successor in interest rule, which took effect in October 2017, has led to significant improvements for successors attempting to obtain mortgage information and apply for loss mitigation. However, advocates from around the country continue to report problems with servicers requesting unreasonable documents to confirm a successor's status. These problems include demanding probate documents where none are required (e.g., where the transfer occurred through a right of survivorship deed, where an affidavit of descent has been recorded, or where the property is in a living trust), and other difficulties getting servicers to communicate with successors.

Advocates have reported that delays in confirmation have essentially operated as a means to continue dual tracking even where clearly reasonable documentation of the successor's status has been submitted. Successors must be able to enforce their rights once they have provided documentation establishing their identity and ownership interest in the home.

The Bureau should amend the rule to provide successors with an enforcement mechanism for servicer abuse and unreasonable delay in the process of confirming (or failing to confirm) a successor's identity and ownership interest. The Bureau should address this problem by explicitly defining "confirmed successor in interest" as a person who has submitted reasonable proof of successor status.

3. **Automatic forbearance should be extended to borrowers in a disaster area who reach 60 days delinquent and are not in a bankruptcy (response to question 3).**

We support a borrower's ability to access forbearance without needing to submit financial documentation. Prior to the pandemic, Fannie Mae and Freddie Mac did not impose a documentation requirement on forbearance requests, and this standard was adopted in the CARES Act. As noted in a recent Urban Institute paper, forbearance access helped the housing market avoid a foreclosure wave.[13]

We do not support the wide-spread use of automatic forbearance, which would immediately place borrowers into payment forbearance once they fall behind on their loans. Borrowers who are not in contact with their servicer may be confused by automatic forbearance and may believe, for example, that their obligation to make payments is canceled rather than suspended. In addition, automatic forbearance can confuse borrowers who are working to resolve a short term hardship or applying for a final loss mitigation option by suggesting that no further action is necessary.

Automatic forbearance should be available to borrowers who are very likely to have significant impediments in their ability to communicate with their mortgage servicer due to circumstances

[13] Alexei Alexandrov, Laurie Goodman, & Ted Tozer, Urban Institute, *Normalizing Forbearance* (Aug. 2022), available at https://www.urban.org/sites/default/files/2022-08/Normalizing%20Forbearance.pdf.

outside their control. In those cases, the risk that the borrower may not want or understand the automatic assistance is outweighed by the external barriers these borrowers face.

As a result, we suggest the Bureau limit permission for automatic forbearance to borrowers in a Presidentially-Declared Major Disaster Area (PDMDA) who fall more than 60 days behind on their loans. We recommend that the automatic forbearance period be limited to three months so that borrowers are encouraged to contact their servicer in a relatively timely manner. We suggest excluding borrowers in a chapter 13 bankruptcy because of the fact that borrowers in chapter 13 bankruptcy are operating under a bankruptcy plan that is designed to cure the mortgage arrearage. Such borrowers might elect to amend their bankruptcy plan rather than seeking a forbearance or loan modification. Therefore, automatic forbearance is not appropriate for borrowers in an active chapter 13 bankruptcy.

4. **The Bureau should create a detailed guide to loss mitigation (response to question 4).**

In question 4 of the servicing section, the Bureau asks about the tension between providing immediate payment relief and the challenges of addressing growing mortgage arrearages. It is true that it becomes increasingly difficult to provide payment relief as the past-due balance grows. Borrowers, however, often need time to resolve their hardships. Fortunately, federal investors have worked to provide flexible loss mitigation options that work in several circumstances. The streamlined procedures we suggest above also can work to address this tension.

We believe the Bureau could help address this tension through the development of comprehensive consumer guides to loss mitigation. The Bureau is a trusted source for consumer education material and could help explain options in a way that would help consumers understand the implications of falling behind on their mortgage and how to weigh options.

In order to be effective, these guides would have to provide detailed, accessible explanations of complicated financial considerations. The Bureau has already successfully provided similar detailed material in the home purchase context.[14] The Bureau's home purchase material walks borrowers through the steps of the home buying process and provides tools so that consumers understand each step.

We recognize that developing a similar guide to loss mitigation would require a significant amount of resources from the Bureau, but we believe it would be an extremely valuable tool for homeowners facing the stress of falling behind on their mortgage payments.

[14] CFPB, Buying a house: Tools and resources for homebuyers, available at https://www.consumerfinance.gov/owning-a-home/.

5. **The Bureau should evaluate measures for putting PLS and portfolio borrowers on equal footing with federally-backed borrowers (in response to questions 2 and 7).**

The current version of Regulation X allows owners and investors of loans to determine the details of loss mitigation options and the eligibility requirements for those options. This system allows owners and investors to tailor relief options based on their financial structure. For example, in developing loss mitigation options, FHA, VA, and USDA must contend with the terms of Ginnie Mae securities. In addition, the current system allows owners and investors to adapt their options based on housing market considerations without having to seek amendments to CFPB regulations. The current volatility in mortgage interest rates demonstrates the need for such flexibility. An option like FHA's Advance Loan Modification, which had the potential to provide deep payment relief in November of 2021, no longer works so alternative options must be quickly developed.

With respect to Fannie Mae, Freddie Mac, FHA, VA, and USDA loans ("federally-backed" loans), borrowers are able to access detailed guidance that explains the options available and the eligibility requirements for those options. This allows borrowers and their advocates to make informed decisions about what is available and whether the loan servicer is making correct determinations. It also allows stakeholders to engage with the federally-backed investors on whether the loss mitigation options are reaching a proper balance.

Borrowers with loans held in private label securities (PLS) or in lender portfolios do not have access to the same information as borrowers with federally-backed loans. Since the end of the Home Affordable Modification Program (HAMP) in 2016, PLS and portfolio borrowers have no guaranteed access to eligibility rules for loss mitigation for their loans and, thus, cannot make informed financial decisions.

The Bureau should evaluate options for putting private and PLS borrowers on equal financial footing as federally-backed borrowers. This may be through requiring public disclosure of the loss mitigation eligibility requirements for PLS and portfolio borrowers. While the loss mitigation roadmap suggested above will help borrowers, a place where the full set of guidelines can be found is still essential.

6. **Responses to other specific servicing questions**

In response to question 8, we have not seen data suggesting that original creditors who retain servicing are able to provide more payment relief to borrowers, especially given that loss mitigation options are generally determined by investors. It is critically important for borrowers' experiences across servicers to be consistent, and our recommendations herein promote consistent treatment of borrowers across servicers.

In response to question 10 regarding additional mortgage products that could help borrowers with hardships, we do not have any options to promote at this time that are substantially different from those that the federally-backed investors have developed and those that they are developing in response to rising interest rates.

## III. The Bureau should initiate a new rulemaking under Reg. Z to allow for increased access to streamlined refinancing products as long as consumer protections are in place to ensure that the refinancing benefits the borrower.

### 1. We recommend that the CFPB amend the Ability-to-Repay (ATR) rule to create a new category of qualified mortgages for streamlined refinances, with consumer protections.

Rate/term refinances benefit borrowers by reducing their monthly payments, lenders by reducing mortgage default rates, and, during a downturn, the broader economy by inducing an increase in spending. However, many homeowners fail to capture the benefits of refinancing because they cannot meet the financial pre-conditions or the process is too burdensome. In recognition of the benefits of refinancing, the federal government created streamlined refinance programs for certain government-backed loans with simplified eligibility requirements to ease the cost and burden of refinancing for borrowers and lenders. These programs ensure that the borrowers have the ability to repay the mortgage even without providing income and other documentation because they successfully paid their existing mortgage for 12 months and would be refinancing into a new mortgage with a lower payment that would be insured or guaranteed by the same government agency (i.e. the Federal Housing Administration and the Department of Veterans Affairs) as the existing loan.

Analysis of borrowers with a mortgage backed by one of the Government-Sponsored Enterprises (GSEs) during the 2020 – 2021 refinancing wave demonstrates the considerable inequity by income, race/ethnicity, and loan size present in the current refinancing system. GSE borrowers with lower-incomes, low-balance loans, or who are Black or Hispanic refinanced less frequently and therefore subsidize borrowers who are higher-income, white, or have larger loan balances. Note that although the GSEs could have created streamlined refi programs under the QM Patch, virtually none of these refinances were streamlined.[15] Now that the Patch has expired, non-governmental risk guarantors, including the GSEs, are prohibited by Dodd-Frank from offering streamlined refinances. As a result, unless the ATR and QM rules are amended, it will be difficult or impossible to address these disparities. In response, the Bureau should create a new QM category that permits the GSEs and private lenders to also offer streamlined refinance programs. Doing so would encourage lenders to provide rate/term refinances to low-balance, lower-income, and lower-wealth borrowers.

Pursuant to its authority to establish eligibility conditions for QMs, the Bureau should require important consumer protections to protect borrowers from lenders seeking to generate fees by

[15] The GSE streamlined refinance programs in existence only applied to high LTV loans and had little volume during the pandemic-induced refinance wave, in part because LTVs were falling due to rapid house price appreciation. The programs were paused in mid-2021 due to low volumes and the impact of the Revised QM Rule.

executing serial refinances. The protections should follow those established by Dodd-Frank for government streamlined refinances and those that the Bureau built into the exception created for the refinancing of "non-standard mortgages," including a payment history that demonstrates an ability to repay, a test assuring that there is net tangible benefit to the borrower, and limits on term extensions, cash back to the borrower, and points and fees incurred in originating the new loan.

By permitting homeowners with non-government mortgages to complete a streamlined refinance, the Bureau would allow more borrowers to benefit from the payment savings created by refinancing, which in turn would reduce mortgage defaults and provide an economic stimulus during a downturn. Furthermore, streamlining the refinancing process by removing the unnecessary eligibility requirements will help alleviate the income-, race/ethnicity-, and loan-balance-based inequities and reverse cross-subsidies that plague the current system.

2. **Rate/term refinances are beneficial to borrowers and lenders alike, and help stabilize the economy.**

In the typical rate/term refinance, when the prevailing mortgage rate is sufficiently below the rate on the homeowner's mortgage, the homeowner can take out a new mortgage at the current, lower rate and use the proceeds to prepay her existing loan.[16] In doing so, the lower mortgage rate and longer term creates a permanent reduction in the homeowner's monthly principal and interest payment. While the longer term may slow the pace of equity accumulation, the homeowner obtains an immediate benefit in the form of a lower monthly payment.

Rate/term refinances provide benefits to the borrower, the lender, and the broader economy. Borrowers benefit from lower monthly payments, which can either be saved or spent. For example, record-low mortgage rates during the COVID-19 pandemic led to a massive refinancing wave. Between March 2020 and August 2021, 8.8 million homeowners completed a rate/term refinance, saving an average of $148 per month, or $1,776 a year.[17] Many were able to use the savings to offset a contemporaneous loss of income, whereas others spent some or all of their savings. And unlike a one-time or temporary stimulus measure, monthly savings from mortgage refinancing persist for as long as the homeowner remains in their mortgage, and therefore act as a permanent increase in income and a vital component of wealth-building.

Lenders benefit from rate/term refinances because the lower monthly payments reduce the probability that the borrower defaults. Research indicates that the payment savings from refinancing has reduced subsequent default rates by between 30 and 60 percent.[18] Fewer mortgage defaults results in fewer foreclosures and the associated claims.

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[16] Throughout this document, refinance is meant to convey a rate/term refinance rather than a cash-out refinance, unless the latter term is used explicitly.
[17] Black Knight, Mortgage Monitor (Sept. 2021), available at https://www.blackknightinc.com/wp-content/uploads/2021/11/BKI_MM_Sept2021_Report.pdf?
[18] For example, Joshua Abel and Andreas Fuster, *How Do Mortgage Refinances Affect Debt, Default, and Spending? Evidence from HARP,* American Economic Journal: Macroeconomics, 13 (2): 254-91 studies mortgages backed by Fannie Mae and Freddie Mac that were eligible for HARP, and finds that refinancing reduced the probability of mortgage default by roughly 40 percent and of delinquency on non-mortgage debts by around 25 percent. Similarly,

Mortgage refinances also act as an economic stabilizer. During periods of economic weakness, mortgage rates usually fall and cause refinancing waves. As a consequence, since borrowers tend to spend at least some if not all of the resulting savings, refinances boost the economy. And given the persistence of the monthly savings noted above, the stimulative effects from refinancing on the economy are long lasting. For example, between the start of the pandemic and the end of 2022, the 8.8 million homeowners noted above who completed a rate/term refinance will have saved $35 billion in aggregate; one estimate of the resulting *ongoing* economic stimulus is $16 billion per year.[19]

### 3. Many homeowners fail to capture the benefits of refinancing because they cannot meet the financial preconditions or find the process too burdensome.

Despite the substantial benefits, many homeowners who have a financial incentive to refinance are still unable to do so, particularly in the absence of a streamlined refinance program. First, not every borrower who has a financial incentive to refinance meets the eligibility requirements. In order to be eligible for a refinance, borrowers must meet certain financial preconditions. Some of the preconditions are required to satisfy QM requirements, such as the requirement to consider income, debts, and credit history. Other requirements fall outside the purview of the CFPB, such as the need to satisfy a credit score and loan-to-value threshold and provide employment verification. Many homeowners are unable to meet these preconditions, particularly during an economic slowdown when lower mortgage rates tend to make refinancing attractive.

Second, even among those borrowers who do qualify, many don't refinance because the process is burdensome or because the upfront costs do not seem worth the benefits. *For example, despite record low mortgage rates during the 2020 – 2021 refinance wave, about half of the borrowers who could have realized a significant rate reduction and could have met the eligibility requirements noted above failed to refinance.*[20] While the exact reasons are hard to pinpoint, it is likely that, for some, the process of obtaining their first mortgage was daunting and

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Kadiri Karamon, Douglas McManus, and Jun Zhu, R*efinance and Mortgage Default: A Regression Discontinuity Analysis of HARP's Impact on Default Rates*, *Journal of Real Estate Finance and Economics* Volume 55, Pages 457–475, 2017 finds that borrowers with a Freddie Mac mortgage who obtained a refinance through HARP experienced a 48 – 62 percent reduction in their monthly default hazard. Gabriel Ehrlich and Jeffrey Perry, *Do Large-Scale Refinancing Programs Reduce Mortgage Defaults? Evidence from a Regression Discontinuity Design*, Working Paper (2015) examines borrowers with a mortgage insured by the Federal Housing Administration (FHA), finds that a 10 percent payment reduction from refinancing reduced conditional default rates by 27.5 percent, and provides suggestive evidence that the default reduction is larger for homeowners with lower credit scores or less home equity.

[19] Black Knight, Mortgage Monitor (Sept. 2021), available at https://www.blackknightinc.com/wp-content/uploads/2021/11/BKI_MM_Sept2021_Report.pdf?

[20] Between March 2020 and October 21, 2021, 49% of homeowners who had at least a 75 basis point refinance incentive, an LTV below 80%, and a 720+ credit score refinanced. The calculation is based on 8.8 million completed rate/term refinances, 5.5 million completed cash-out refinances, 11.5 million remaining refinance-eligible homeowners, and 3.4 million refinance candidates lost due to rising rates. *See* Black Knight, Mortgage Monitor (Sept. 2021), available at https://www.blackknightinc.com/wp-content/uploads/2021/11/BKI_MM_Sept2021_Report.pdf? Our figure overestimates the percentage of homeowners who failed to refinance despite having a financial incentive because we cannot identify and remove those homeowners for whom the financial incentive was reduced or eliminated because they expected to move before enough monthly savings accumulated to offset closing costs or their mortgage was close to maturity. However, our figure underestimates the number of homeowners who would have a financial incentive to refinance if a streamlined refinance program were in place because the credit score and LTV thresholds would no longer apply.

stressful, and they chose not to pursue a refinance. For others, the failure to refinance could have been due to inattention, overestimating the cost, underestimating the monthly savings, the complexity of determining when refinancing is appropriate, or the misperception that they would not qualify, among many other reasons.

4. **Streamlined refinance programs help homeowners refinance by eliminating the eligibility requirements and easing the burden.**

With the benefits of refinancing in mind, streamlined refinance programs aim to simplify the refinancing process for the borrower and lender alike and thereby increase uptake.[21] A streamlined refinance is premised on three conditions:

1) the borrower must have demonstrated their ability-to-repay by successfully making the mortgage payments on their existing loan for the last 12 months;[22]
2) the new loan must remain with the existing guarantor or risk holder (i.e. Fannie Mae, Freddie Mac, or the private lender holding the credit and collateral risk); and
3) the refinance must decrease the borrower's monthly payment.

As long as these three conditions are met, there is no need for a full underwriting to assure that the borrower will have the ability to repay the new loan. The borrower has already proven through their payment history that they can afford the current loan with the higher payment, a fortiori the new loan with a lower payment. The guarantor already owns the associated credit and collateral risk and has first-hand knowledge of the borrower's ability to repay the loan. As such, streamlined refinances typically have no credit score minimum or LTV limit. The borrower need not supply employment verification, income documentation, or complete an appraisal.

By removing the re-underwriting requirement, streamlined refinances can be much more cost-effective for borrowers compared to a traditional refinance. Furthermore, some streamlined refinance programs – as well as some non-streamlined programs –allow closing costs to be rolled into the new loan balance, which eliminates out-of-pocket costs for the borrower. Because refinance waves tend to occur during economic downturns when savings are depleted, allowing lower-income and lower-wealth borrowers to roll the closing costs of a refinance into the balance of their new loan will increase uptake and therefore takes on added importance.[23] (While the financing of closing costs padded loan amounts during the predatory mortgage flipping before the Great Recession, the consumer protections outlined below will facilitate access to more affordable monthly payments in a safe context.)

In recognition of their benefits, the Federal government has created several streamline refinancing programs. Dodd-Frank included a provision permitting government streamlined

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[21] The benefits of streamlined refinance programs are well documented, for example in Kristopher Gerardi, Lara Loewenstein and Paul S. Willen, *Evaluating the Benefits of a Streamlined Refinance Program*, Housing Policy Debate, 31:1, 51-65 (2021) and Edward Golding, Laurie S. Goodman, Richard Green, and Susan Wachter, *The Mortgage Market as a Stimulus Channel in the COVID-19 Crisis*, Housing Policy Debate, 31(1), 66-80 (2021).
[22] Streamlined refinance programs typically require that the borrower be current on their mortgage, with no delinquencies in the most recent 6 months and no more than one 30-day delinquency in the previous 6 months.
[23] As discussed in Kenneth P. Brevoort, *Do Low Mortgage Balances Limit Refinancing Opportunities?* (July 14, 2022), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4163151.

refinance programs with designated consumer protections, which are in use by the Federal Housing Administration (FHA) and the Department of Veterans Affairs (VA) today.[24] Homeowners with a loan insured by FHA can make use of the FHA Streamline Refinance program, which does not require a credit check, income or employment documentation, or an appraisal.[25] Homeowners with a loan guaranteed by the VA can make use of the VA's Interest Rate Reduction Refinance Loan (IRRRL), which is a truly streamlined and popular program.[26]

The Home Affordable Refinance Program (HARP) was arguably the most successful of the government's post-Great Recession housing programs. Introduced by the Department of Treasury in 2009 and expanded in 2011, HARP was designed to allow underwater GSE borrowers who were current on their payments to streamlined refinance their mortgage and reduce their monthly payments regardless of the LTV, in turn reducing the government's mortgage risk. Research indicates that the average borrower saved about $175 per month, or $2,100 a year (an 11% decrease in monthly payment), which led to a 40% reduction in subsequent default rates, thereby reducing the government's losses from foreclosures.[27] The GSEs were able to offer streamlined refinances through HARP because the Bureau established Temporary GSE QMs through the "GSE Patch" in 2013. However, when the CFPB amended Regulation Z to include the Revised QM definition in 2021 and allowed the Patch to expire, the GSEs lost the ability to offer streamlined refinances. The GSEs are now required to consider and verify an applicant's current or reasonably expected income, debt obligations, alimony and child support.[28]

When the Bureau issued its original ATR-QM Rule, it also issued a concurrent proposal that included an exemption from the ATR requirements for refinancings that satisfied certain conditions and that were eligible for purchase or guarantee by the GSEs.[29] The Bureau ultimately decided not to adopt that exemption because it concluded that the Patch would accommodate most streamlined refinances and "strikes the appropriate balance" between protecting consumers from unaffordable mortgages and ensuring access to responsible credit.[30]

In reaching this conclusion the Bureau expressly recognized the value of streamlined refinance programs, noting that "Federal agency refinancing programs have helped stabilize the housing

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[24] The Dodd-Frank Wall Street Reform and Consumer Protection Act (2010) 15 U.S.C. § 1639c(a)(5). We have attached a chart comparing consumer protections in the refinance programs as Appendix B.

[25] For additional program details, *see* HUD, Streamline Refinance Your Mortgage, available at https://www.hud.gov/program_offices/housing/sfh/ins/streamline. FHA could take certain steps to improve uptake of their program, as described in Center for Responsible Lending, *Adjustments to Help the FHA Streamline Refinance Program Reach More Low-Wealth Families* (Apr. 18, 2022), available at https://www.responsiblelending.org/research-publication/adjustments-help-fha-streamline-refinance-program-reach-more-low-wealth.

[26] For additional program details, see VA, Interest Rate Reduction Refinance Loan (updated Oct. 12, 2022), available at https://www.va.gov/housing-assistance/home-loans/loan-types/interest-rate-reduction-loan/. As discussed in a subsequent section, the VA IRRRL has been overused by some lenders, as it lacks some of the consumer protections the CFPB should include to protect borrowers in non-government programs from lenders seeking to generate fees by executing serial refinances.

[27] Joshua Abel and Andreas Fuster, *How Do Mortgage Refinances Affect Debt, Default, and Spending? Evidence from HARP*, American Economic Journal: Macroeconomics, 13 (2): 254-91, 2021.

[28] 12 C.F.R. § 1206.43(e)(2)(v).

[29] 78 Fed. Reg, 6621, 6668 (Jan. 30, 2013).

[30] 78 Fed. Reg. 3430, 35473 (June 12, 2013).

and real estate markets."[31] But rather than finalizing a separate streamlined refinancing exemption, the Bureau determined that the Patch was sufficient to "maintain the status quo in the Federal agency refinancing market" and would "lead to more of these types of loans being originated and encourage broad participation in such programs."[32] The Bureau was also concerned that creating an exemption in addition to the Patch could leave the door open for refinancings into mortgages with risky features, long terms, or up-front costs that exceeded the QM points-and-fees cap.[33]

As noted above, the expiration of the Patch fundamentally changes this calculus. The GSEs no longer have the flexibility to create streamlined documentation and verification rules for refinances or underwriting requirements based on a borrower's prior payment history. Thus, an accommodation is now needed in order to allow for such streamlined programs. At the same time, the VA and FHA programs include robust consumer protections (as did HARP) that protect borrowers from undue risk and abuse when refinancing.

By creating a new QM category for streamlined refinances and requiring that such refinances satisfy core QM requirements, the Bureau can guard against refinances into risky or costly products while permitting streamlined refinances to address the inequities in the current refinancing system described below. And by adding necessary consumer protections, as described in subsection (g) below, the Bureau can "ensure that responsible, affordable mortgage credit remains available to a consumer" on terms that "reasonably reflect their ability to repay the loans and that are understandable and not unfair, deceptive or abusive."[34]

### 5. The current refinancing system is plagued by considerable inequity by income, race/ethnicity, and loan size.

Despite record low mortgage rates, analysis of GSE borrowers during the 2020 – 2021 refinancing wave provides compelling evidence that there is considerable inequity in the current GSE refinancing system. Lower-income, Black and Hispanic, and low-loan-balance GSE borrowers were far less likely to refinance their mortgage to lower their monthly payments and default risk as compared to higher-income, white, and higher-loan-balance borrowers. As a consequence, lower-income, Black and Hispanic, and low-loan-balance borrowers cross-subsidize loans made to other borrowers.

*Income-based Inequity*

In general, low-to-moderate income (LMI) homeowners are much less likely to refinance their mortgage compared to higher-income homeowners. As might be expected, LMI homeowners tend to have lower credit scores, higher LTVs, and less liquidity to cover out-of-pocket refinancing costs, all of which impede their ability to meet the financial preconditions to refinance. However, in 2020, even after controlling for differences in typical underwriting

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[31] *Id.*
[32] *Id.* at 35473.
[33] *Id.*
[34] *See* 15 U.S.C. §§ 1639b(a)(2) & 1639c(b)(3)(B)(i).

variables, Freddie Mac borrowers in the highest income quintile were 14 times more likely to refinance compared to borrowers in Freddie Mac's lowest income quintile.[35] The impact of income-based inequity in refinancing on wealth is significant: a back-of-the-envelope estimate suggests that, had homeowners in the lower income quintiles refinanced and received the same savings as those in the top income quintile, they would have captured an additional $5 billion in wealth.[36]

The Freddie Mac data on refinancing applications also indicate that its lower-income borrowers are considerably less likely to *apply* for a refinance compared to its higher-income borrowers. For example, a study that divided the portfolio of Freddie Mac borrowers with an active mortgage into income deciles and then computed the percentage of refinance applications from each income decile indicates that in 2019, about 12 percent of refinance applicants were from Freddie Mac's highest income decile compared to 7 percent from its bottom income decile; in 2020, as the refinance wave gathered momentum and most refinances occurred, the underrepresentation of lower-income borrowers increased: 16 percent of Freddie Mac refinance applicants were from its highest income decile compared to just 4.5 percent from its bottom income decile.[37]

With respect to countermeasures, the authors of this study note "our results suggest that there is room for targeted policies that promote refinancing activity of low-income borrowers in the early stages of the application-funding process, such as incentives for lenders to deliver loans to borrowers that meet a target profile, financial education efforts, and automation of refinancing processes to bypass the effects of behavioral biases."[38]

*Race/Ethnicity-based Inequity*

Black and Hispanic homeowners are less likely to refinance than white homeowners. In part, the differences in refinancing activity are due to race-based differences in credit score, LTV, and debt-to-income (DTI) ratio, which persist beyond origination and make it harder for Black and Hispanic borrowers to meet the eligibility requirements to refinance.[39] However, research based on GSE loans finds that *even after controlling for differences in credit score, LTV, and DTI, Black and Hispanic homeowners were still less likely to refinance than their white counterparts, suggesting that additional factors impede their propensity to refinance*.[40]

The result of differences in race-based refinancing propensities is that, over time, Black and Hispanic homeowners with a GSE-backed mortgage are likely to pay a higher mortgage rate than their white counterparts. Research indicates that, for the stock of GSE mortgages originated between 2005 and 2015, by 2015 the note rate for Black borrowers was nearly 0.50%

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[35] Sumit Agarwal, Souphala Chomsisengphet, Hua Kiefer, Leonard C. Kiefer, and Paolina C. Medina, *Refinancing Inequality During the COVID-19 Pandemic*, Working Paper, 2021. Lower-income borrowers were more likely to use CARES Act forbearance, restricting their ability to refinance, which may explain some but not all of the income-based refinancing gap.
[36] *Id*.
[37] *Id*.
[38] *Id*.
[39] Kristopher Gerardi, Paul Willen, and David Hao Zhang, *Mortgage Prepayment, Race, and Monetary Policy*, Federal Reserve Bank of Boston Research Department Working Papers No. 20-7, 2020.
[40] *Id*.

higher than the note rate for white borrowers.[41] While 0.50% may sound like a modest difference, the impact on wealth-building over time is material: A homeowner who pays 5.00% instead of 4.50% on a $250,000 mortgage for 15 years would have paid an extra $13,500 in monthly payments and have $4,100 less in home equity due to slower amortization.

It is notable that, based on their analysis, the authors state that "policies that make it easier and less costly to refinance such as streamlined refinancing programs may also be effective in closing these [race/ethnicity-based refinancing] rate disparities."[42]

*Loan-balance-based Inequity*

Compared to borrowers with larger loan balances, homeowners with low-balance GSE loans are less likely to refinance despite paying higher rates at origination. Due to capacity constraints that become binding during a refinancing wave, lenders tend to focus on refinancing higher balance loans that have higher returns first, at the expense of lower balance loans. Moreover, for borrowers with low-balance loans, refinancing closing costs are a higher proportion of their loan balance and the interest rates offered to refinance are higher than for borrowers with larger loans. As a result, borrowers with low-balance loans may need a larger interest rate differential between their existing loan and new loan to ensure the monthly savings are large enough relative to closing costs to make refinancing worthwhile.[43]

Loan size and borrower income at origination are positively correlated, which means that low-balance loans are more likely to be held by low-income or Black homeowners, who face the eligibility- and liquidity-related obstacles to refinancing noted above.[44] As such, the financial preconditions to refinancing create an additional incentive for lenders to prioritize the loans of higher-income borrowers with strong credit, who also tend to have larger balances.

These factors combine to reduce the refinance propensity of GSE borrowers with low-balance loans,[45] which naturally leads to slower prepayment speeds for mortgage-backed securities (MBS) composed of low-balance loans. To capture the value created by slower expected prepayment speeds, originators create specified pools composed of only lower balance GSE loans which they can sell at a price premium, or "payup," to standard MBS, which are typically composed of larger balance loans. Payups increase as loan balance decreases, which indicates that originators and MBS investors recognize the value in the slower prepayment speeds of lower balance loans.[46]

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[41] *Id*.

[42] *Id*.

[43] *See* Kenneth P. Brevoort, *Do Low Mortgage Balances Limit Refinancing Opportunities?* (July 14, 2022), (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4163151).

[44] *See* Kenneth P. Brevoort, *Do Low Mortgage Balances Limit Refinancing Opportunities?* (July 14, 2022), (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4163151) and Eric Stein and Kanav Bhagat, *Adjustments to Help the FHA Streamline Refinance Program Reach More Low Wealth Families*, at 16 (December 6, 2021), crl-adjustments-fha-streamline-refi-mar2022.pdf (responsiblelending.org).

[45] Kristopher Gerardi, Paul Willen, and David Hao Zhang, *Mortgage Prepayment, Race, and Monetary Policy*, Federal Reserve Bank of Boston Research Department Working Papers No. 20-7, 2020 finds that refinancing propensities fall with loan balance.

[46] Eric Stein and Kanav Bhagat, *Adjustments to Help the FHA Streamline Refinance Program Reach More Low Wealth Families*, at 16-18 (December 6, 2021), available at crl-adjustments-fha-streamline-refi-mar2022.pdf (responsiblelending.org).

However, the payups for low-balance loans are not passed along to GSE borrowers in the form of a lower mortgage rate at origination. Instead, GSE borrowers who take out low-balance loans on average get higher, rather than lower, mortgage rates.[47] And while the higher initial note rate should *increase* the refinance incentive when rates fall compared with loans with larger balances and lower initial note rates, it does not in fact translate into a higher refinance propensity for low-balance loans. An analysis of mortgages active between 2012 and 2019 shows that low-balance borrowers were 50% more likely to remain in their mortgage at the end the period compared to high-balance borrowers, despite paying a mortgage rate that was 0.40% higher, and that differences in credit score and LTV explain only a small portion of the difference.[48] A streamlined refinance program for GSE borrowers that specifically targets low-balance loans could be an effective countermeasure, and the monthly savings from refinancing would increase the pace of wealth-building for homeowners with low-balance loans.

*Refinancing Reverse Cross-subsidies*

The inequities noted above, when combined with the fact that note rates offered at origination do not reflect varying refinancing propensities at the borrower level, suggest that not only do lower-income, Black and Hispanic, and low-loan balance GSE borrowers not experience the benefits of refinancing at the same rate as their counterparts, but they also subsidize the mortgage rate of higher-income, white, and larger loan-balance borrowers.[49] A streamlined refinance program for GSE borrowers that increased the refinance propensity of lower-income, Black and Hispanic, and low-loan balance GSE borrowers could reduce this reverse cross-subsidy.

Mortgage note rates can vary according to the borrower's credit score, DTI, and the loan's LTV. However, note rates generally *do not* reflect the differences in refinance propensities by borrower income, race/ethnicity, or loan size described above. In theory, if note rates did adjust to reflect different refinance propensities, borrowers who are unlikely to refinance regardless of the financial incentive would be offered a lower rate at origination, $Rate_{LowRefi}$, while borrowers who were very likely to refinance when given a financial incentive would be offered a higher rate at origination, $Rate_{HighRefi}$, where $Rate_{HighRefi} > Rate_{LowRefi}$. In practice, however, note rates at origination do not reflect differences in refinancing propensities; every borrower gets about the same *Rate*, adjusted for their credit score, DTI, LTV, and any other underwriting considerations.

Consequently, the lower income, Black and Hispanic, and low-balance loan borrowers who are less likely to refinance pay more than $Rate_{LowRefi}$, whereas other borrowers pay less than $Rate_{HighRefi}$. The difference between the rate that lower income, Black and Hispanic, and low-balance loan borrowers pay at origination and the theoretical rate they would pay if the rate reflected their lower propensity to refinance, or $Rate - Rate_{LowRefi}$, is a cross-subsidy and, in this case, an overpayment, which is why we call it a *reverse* cross-subsidy. The higher income,

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[47] *Id*.

[48] Kenneth P. Brevoort, *Do Low Mortgage Balances Limit Refinancing Opportunities?* (July 14, 2022), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4163151 (studies active mortgages that did not prepay or default between 2012 and 2019).

[49] The cross-subsidy is described, for example, as being from naïve to sophisticated households in John Campbell, *Housing Finance*, Journal of Finance, Vol. 61, Issue 4 (2006) at 1586 – 1587, *available at* https://onlinelibrary.wiley.com/doi/10.1111/j.1540-6261.2006.00883.x.

white, and higher-balance borrowers receive the reverse cross-subsidy equal to $Rate_{HighRefi}$ - *Rate*; they underpay given their higher refinance propensity through a mortgage rate that is lower by the reverse cross-subsidy amount.[50]

A streamlined refinance program for GSE borrowers would reduce the financial preconditions and other frictions that reduce the refinancing rates of lower-income, Black and Hispanic, and smaller-loan-balance borrowers. By evening out the refinancing rates of these and other borrowers, the program would also serve to reduce or eliminate the reverse cross-subsidies noted above.

6. **The Bureau should amend the ATR and QM rule to create a new category of QMs to permit GSEs and private lenders to offer streamlined refinance programs to better address these inequities.**

The Bureau should amend the ATR and QM rule to create a new QM category that would permit the GSEs and private lenders to offer streamlined refinance programs to encourage lenders to provide rate-term refinances to low-balance, lower-income, and lower-wealth borrowers. Taking this step would allow the GSEs to better address the inequities present in the current GSE refinancing system and reduce or eliminate the resulting reverse cross-subsidy.

A streamlined refinance program for borrowers with GSE-backed or private mortgages with no documentation requirements would encourage lenders to automate the refinancing process to reduce their costs and eliminate the out-of-pocket expenses and burdensome steps for the borrower. Taken together, these factors would help lenders reach deeper into their loan book to solicit smaller loans for refinancing and increase borrower uptake.

Permitting the GSEs to offer streamlined refinances would allow them to adjust their refinance programs to counteract the inequities noted above and open up for consideration several socially beneficial options. For example, the RefiNow and Refi Possible programs, which were introduced in mid-2021 as the refinancing wave was winding down, offer borrowers with an income below 100% of AMI easier access to less expensive refinances. However, in light of the uncertainty surrounding the expiration of the GSE Patch, both programs are not streamlined and include many of the financial preconditions noted above that dissuade borrowers from refinancing. Both programs require consideration of the borrower's income and debts, an appraisal, and, until it was dropped in April 2022, a minimum credit score of 620.[51] As a result, neither program can or will reduce the refinancing inequities described above.

Should the Bureau permit the GSEs to offer streamlined refinances, the RefiNow and Refi Possible programs could be adjusted to address the lower refinance propensities of borrowers

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[50] The reverse cross-subsidy is not one-for-one between loans—the subsidy amount is aggregated by the loan volume of those who overpay, with that aggregated amount then divided across those loans that receive the subsidy.
[51] Program eligibility requirements include income documentation and a DTI below 65%, as described in Fannie Mae, RefiNow: Expanding refinance eligibility for qualifying homeowners, available at https://singlefamily.fanniemae.com/originating-underwriting/mortgage-products/refinow-expanding-refinance-eligibility-qualifying-homeowners and Freddie Mac, Refi Possible℠, available at https://sf.freddiemac.com/working-with-us/origination-underwriting/mortgage-products/refi-possible.

with low-balance loans. For example, the GSEs could expand the RefiNow and Refi Possible eligibility requirements to permit borrowers with loan balances below $250,000 to qualify, regardless of their income. Borrowers who qualify based on loan balance and positive payment history would not need to submit any documentation related to income or debt obligations, creating a less burdensome and less expensive process for refinancing small loans. The GSEs could further improve the process and reduce the cost by eliminating the need for employment verification or an appraisal.

As a second example, the GSEs could reinstitute the two streamlined programs that replaced HARP: the Fannie Mae High LTV Refinance Option and the Freddie Mac Enhanced Relief Refinance Mortgage.[52] These programs allowed borrowers to refinance a 97%+ LTV mortgage with no upper LTV limit and no verification requirements for employment, income, or assets, but have been temporarily "paused" since the Revised QM Rule prevents the GSEs from providing streamlined refinances.[53] Should home prices depreciate and interest rates decline, these programs would become critically important again, as they reduce the monthly payment and default risk for GSE borrowers with the high LTV mortgages that will be most costly to the GSEs should they end in foreclosure or a foreclosure alternative.

Allowing private lenders to offer streamlined refinances would permit more of their borrowers to benefit from the associated monthly savings and reduce future defaults. In addition, it would increase the ability of private lenders to retain servicing that otherwise might be lost to competitors offering streamlined refinance options.

### 7. Any streamlined refinancing rule must include strong consumer protections.

In addition to meeting the basic statutory requirements for qualified mortgages,[54] a new QM category for streamlined refinance programs should include additional protections to prevent originators from abusing the program. Experience with the VA's IRRRL program shows that, when given the opportunity, originators will in some cases take advantage of streamlined underwriting rules to generate extra fees through unnecessary and inappropriate refinancing transactions.[55]

To prevent this, the QM exemption for streamlined refinances should apply only to refinances that are clearly beneficial to the borrower and that have a lower risk of default than the loan being refinanced. For refinances that meet the required standard, both borrower and lender get the benefit of a simplified process without the documentation and underwriting burdens associated with a traditional refinance. However, borrowers who desire a refinance that does

[52] *See* Fannie Mae, High LTV Refinance Option, available at https://singlefamily.fanniemae.com/originating-underwriting/mortgage-products/high-ltv-refinance-option and Freddie Mac, Enhanced Relief Refinance Mortgage, available at https://sf.freddiemac.com/working-with-us/origination-underwriting/mortgage-products/enhanced-relief-refinance-mortgage.
[53] *See* Fannie Mae Lender Letter 2021-11 and Freddie Mac Bulletin 2021-19.
[54] 15 U.S.C. § 1639c(b)(2)(A).
[55] *See* National Consumer Law Center, *Mortgage Lending* § 8.7.3; House Comm. on Veterans' Affairs, Home Loan Churning Practices and How Veteran Homebuyers are Being Affected, Serial No. 115-43 (Jan. 10, 2018) (hereinafter "Churning Report"), available at https://www.congress.gov/event/115th-congress/house-event/106744/text.

not fully align with the required streamlined refinance standard are not prohibited from refinancing their loan. Instead they would simply need to take out a traditional refinance and meet the associated ATR/QM and documentation requirements.

If the Bureau creates a new QM category for streamlined refinances, we urge the Bureau to include specific requirements to protect consumers from lenders that seek to generate fees through serial refinances that have limited benefits for the borrower.[56] These requirements also ensure that streamlined refinances provide a meaningful benefit to the borrower at a reduced cost. The government streamlined refinance programs and the GSE's special refinance programs provide an important and useful precedent. Based on analysis shown in Appendix B, the Bureau should, at minimum, require five essential consumer protections:

- a demonstrated ability to repay,
- a net tangible benefit to the borrower,
- limits on the length of term extension,
- limited cash back to the borrower, and
- a hard dollar-cap on points and fees.[57]

The following five subsections elaborate on these protections.

*a. The borrower must have demonstrated an ability to repay.*

To be eligible for a streamlined rather than fully documented refinance, borrowers must have demonstrated their ability to repay their existing mortgage at the current monthly payment by successfully making their mortgage payments for the last 12 months.

For a streamlined refinance, the borrower's ability to repay the new loan (at a lower payment) will have been established at origination of the existing loan through compliance with either the ATR or QM requirements and then confirmed by the borrower's 12-month payment history at the pre-existing monthly payment amount. For example, non-standard mortgage refinances and FHA streamlined refinances require that the borrower had no late payments in the most recent 6 months and no more than one 30-day late payment in the most recent 12 months.[58] We recommend adopting this standard for a QM streamlined refinancing rule.

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[56] The practice of serial refinancing with limited borrower benefit is described in the above-cited Churning Report.
[57] In addition to the five recommended consumer protections, the Bureau could also choose to include the protections put in place for the refinancing of non-standard mortgages into a standard mortgage, as described in 12 C.F.R. § 1026.43(d)(1)(ii).
[58]12 C.F.R. § 1026.43(d)(2)(iv) and HUD, Single Family Housing Policy Handbook 4000.1, available at https://www.hud.gov/sites/dfiles/OCHCO/documents/4000.1hsgh-062022.pdf, RefiNow, and the Enhanced Relief Refinance Mortgage have similar payment history requirements, while Refi Possible and the High LTV Refinance Option include the added restriction that the borrower cannot have been 60 or more days delinquent in the most recent 12 months.

In addition to establishing the borrower's ability to repay, requiring an on-time payment history reduces the risk that a borrower facing financial hardship and potentially in need of a loan modification is instead offered and pays for a streamlined refinance.

Because the Bureau is relying on the borrower's past payment history as an indicator of their ability to repay the lower payment on the new loan, the new loan associated with a streamlined refinance should be limited to fixed rate (for the life of the loan) fully amortizing loans with substantially equal monthly payments. While a new adjustable-rate mortgage (ARM) may begin with a lower payment than the existing loan, the adjustable nature of the interest rate may result in a higher future monthly payment that exceeds the existing payment. Therefore, the Bureau should not permit streamlined refinances into ARMs. A borrower who wants to refinance into an ARM should be subject to the traditional underwriting process through which the borrower provides documentation and demonstrates their ability to repay under the ATR-QM rule.

In addition, streamlined refinance programs should be limited to the same guarantor or risk holder, meaning the party responsible for the credit and collateral risk of the loan will also have the risk for the refinance.[59] For example, this limitation would require that a loan guaranteed by Fannie Mae could only be streamlined refinanced into a new Fannie Mae loan. The existing risk holder is the party with direct knowledge of the borrower's payment history and, in most cases, initially underwrote the loan, or had a delegated lender do so. Therefore, the payment history is available for the refinancing, thereby enabling the homeowner to access the refinancing if their payment history qualifies without the usual documentation for a new loan. If another party would like to refinance a borrower's loan, it is free to do so but should be required to fully document that transaction.

*b. The borrower must receive a net tangible benefit from the refinance.*

A streamlined refinance must provide for a clearly defined minimum net tangible benefit to the borrower of (a) a substantial interest rate reduction, defined as at least 50 basis points, *and* (b) no increase in the monthly principal and interest payment.

*50 basis point lower interest rate.* The 50 basis point minimum interest rate reduction is sufficiently large to create a monthly payment savings that will balance some or all of any increased interest expense caused by term extension,[60] yet still small enough that it will not preclude most borrowers who want to complete a streamlined refinance from doing so in a

[59] The requirement that a streamlined refinance only be permissible if the loan remains with the same creditor (risk holder) need not be mandated under ATR, as a new creditor could observe the borrower's payment history on their credit report and establish ATR. However, the Bureau requires that non-standard mortgage refinances remain with the existing creditor (12 C.F.R. § 1026.43(d)(2)(i)) and all other streamlined refinance programs share this requirement. Our belief is that inclusion of this restriction as a consumer protection reduces the likelihood that the Bureau creates an ATR provision that could be abused. It would also reduce the risk that appraisal requirements and credit score or LTV thresholds increase the cost or reduce the availability of a streamlined refinance. However, CFPB could eliminate this requirement if necessary.
[60] Depending on the amount of interest rate reduction and term extension, refinancing can increase or decrease the borrower's lifetime interest costs.

favorable interest rate environment. The FHA Streamline Refinance program, RefiNow, and Refi Possible all require a minimum 50 basis point interest rate reduction.[61]

*Same or lower monthly payment.* The streamlined refinance must result in the same or lower monthly principal and interest payment. Along with the other protections, this ensures that streamlined refinances are limited to circumstances where the borrower's payment history demonstrates an ability to repay the new mortgage. The same or lower payment also allows the borrower to demonstrate that they can afford the new mortgage based on previously paying the same or a higher amount. The RefiNow and Refi Possible programs include this requirement.[62]

Non-cash-out refinances that increase monthly payments can benefit borrowers, but do not meet the rationale for a streamlined refinance. For example, some borrowers may choose to refinance into a shorter-term mortgage in order to reduce their lifetime interest costs. Such a refinance is less common, particularly since borrowers already have the option to make extra principal payments on their existing mortgage without paying the closing costs associated with a refinance. Borrowers who choose to enter into a term-reducing refinance that increases their monthly payment should have to meet the eligibility requirements of a traditional refinance; the lender should be required to collect income, asset, and employment documentation and evaluate the borrower's ability to repay the loan or satisfy the QM criteria.

*c. The term extension of the loan should be limited.*

The term of the new mortgage should be limited to the *lesser* of (1) 30 years and (2) the remaining maturity of the existing loan plus 12 years.

The maximum 30-year term would be consistent with the FHA Streamline Refinance, the VA IRRRL, RefiNow, and Refi Possible, and would be required for the new origination to comply with QM.

Term extension is a powerful tool to reduce a borrower's monthly payment. However, should the borrower remain in the mortgage until the new, longer maturity, they may pay additional lifetime interest. Capping term extension at 12 years limits the increase in the amount of lifetime interest paid by the borrower due to refinancing. The 12-year term extension restriction would be consistent with the FHA Streamline Refinance program[63] and slightly less restrictive than the

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[61] *See* HUD, Single Family Housing Policy Handbook 4000.1, available at https://www.hud.gov/sites/dfiles/OCHCO/documents/4000.1hsgh-062022.pdf; Fannie Mae, RefiNow: Expanding refinance eligibility for qualifying homeowners, available at https://singlefamily.fanniemae.com/originating-underwriting/mortgage-products/refinow-expanding-refinance-eligibility-qualifying-homeowners; Freddie Mac, Refi Possible℠, available at https://sf.freddiemac.com/working-with-us/origination-underwriting/mortgage-products/refi-possible.

[62] *See* Fannie Mae, RefiNow: Expanding refinance eligibility for qualifying homeowners, available at https://singlefamily.fanniemae.com/originating-underwriting/mortgage-products/refinow-expanding-refinance-eligibility-qualifying-homeowners; Freddie Mac, Refi Possible℠, available at https://sf.freddiemac.com/working-with-us/origination-underwriting/mortgage-products/refi-possible.

[63] See HUD, Single Family Housing Policy Handbook 4000.1, available at https://www.hud.gov/sites/dfiles/OCHCO/documents/4000.1hsgh-062022.pdf

maximum 10-year term extension permitted under the VA IRRRL.[64] We prefer the 12-year term extension limit because it would increase slightly the payment reduction for borrowers with more than 18 but less than 20 years remaining on their mortgage, but either governmental precedent would be appropriate.

Borrowers who have fewer than 18 years remaining on their mortgage and want to refinance into a new 30-year mortgage would have the total term of their mortgage obligation (including the initial loan) potentially exceeding 42 years and an increase in the likelihood that the lifetime interest costs will grow. A borrower could certainly obtain such a loan, but since it does not meet the streamlined refinance standard of clearly beneficial for the borrower, it should go through the normal underwriting process of a traditional refinancing.

*d. Cash-out refinancing should not be allowed, except for a nominal sum allowed for administrative convenience, and escrow protections should prevent cash-back inducements.*

The amount of cash back to the borrower should be limited to a nominal amount, such as $250 or $500. This standard would effectively prohibit using the streamlined refinance program for cash-out refinancing. A nominal amount should be allowed only to ease the administrative risk that, after accounting for closing costs and per diem interest, the new loan balance may not perfectly match the old balance being paid off. RefiNow and Refi Possible limit cash back to $250, and the FHA Streamline Refinance program limit is $500.

Prohibiting cash-out refinancing is in accord with the baseline requirement that a streamlined refinance should be clearly beneficial for the borrower. Furthermore, lenders should not be permitted to provide borrowers with cash back as an additional incentive to complete a streamlined refinance. While cash-out refinances can be helpful for borrowers who need to access their equity and can afford the increased payments, they can also have negative consequences for the borrower.

Even if the borrower can execute a cash-out refinance without increasing their monthly payment, the reduction in equity and resulting increase in LTV raise the probability that a default leads to the borrower losing their home to foreclosure.[65] Therefore, cash-out refinances should not be permitted under the standard for streamlined refinances. Instead, cash-out refinances should be subject to the traditional underwriting process through which the borrower provides documentation and demonstrates the ability to repay under the ATR-QM rule.

Limiting the cash back to the borrower would be also consistent with the condition required by the Dodd-Frank Act for federal government streamlined refinances, which provide that the

[64] See VA Lenders Handbook, Chapter 6, available at https://www.benefits.va.gov/WARMS/pam26_7.asp.
[65] For a borrower who defaults on their mortgage, the lower their equity and higher their LTV, the less likely they will be able to sell their home at a profit to avoid foreclosure.

refinancing may not increase the principal balance outstanding on the existing loan, except to the extent by permissible fees and charges incurred in originating the loan.[66]

Similarly, the Bureau's rule for non-standard mortgage refinances only permits the proceeds from the new loan to be used to pay off the outstanding balance of the old loan or closing or settlement charges.[67] Our proposal would similarly limit the cash back to the borrower, but still allow (but not require) the outstanding principal balance of the new loan to increase through the inclusion of closing costs.[68]

The Bureau should further buttress the cash-back limit by requiring that any excess proceeds from the refinancing must be applied as a curtailment to the new loan, meaning that if the proceeds from the new loan exceed the balance of the old loan, the balance of the new loan would be reduced by the excess amount rather than allowing the excess to be provided as cash to the borrower. This restriction is included in the RefiNow, Refi Possible, and FHA Streamline Refinance programs.[69]

In addition, the Bureau should provide escrow account protections that inhibit the ability of lenders to use escrow account refunds to create a cash-back inducement for completing a streamlined refinance. First, the Bureau should require lenders to ensure that if a loan has an escrow account, the new loan must also have an escrow account. Next, any funds held in escrow on the existing loan must be used to fund the escrow account of the new loan or, if this is not possible, must be used to reduce the balance of the existing loan. Such a requirement would prevent servicers from returning an escrow account balance from the existing loan to the borrower as a cash inducement to complete a refinance, only to increase the LTV on their new loan to fund the new escrow account. Note that this permissible use of excess proceeds would be in addition to the curtailment noted above.

To this point, the VA IRRRL permits lenders to refund to the borrower funds held in escrow for the existing mortgage, which can be several thousand dollars.[70] Lenders can use the refund to motivate borrowers to take an IRRRL that otherwise may be of limited benefit to the borrower. Although we question the wisdom of this provision of the IRRRL, at least it is in the context of a government program administered by an agency devoted to the benefit of its veteran borrowers, and the VA has the ability to make changes to its program when it perceives abuses. The CFPB should not permit lenders to engage in this practice for the GSEs, which may have different

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[66] The Dodd-Frank Wall Street Reform and Consumer Protection Act (2010) 15 U.S.C. § 1639c(a)(5)(B).
[67] 12 C.F.R. § 1026.43(d)(1)(ii)(E).
[68] Unlike the VA IRRRL and GSE special refinance programs, the FHA Streamline Refinance program does not permit borrowers to roll closing costs associated with the refinancing into the balance of the new loan, which reduces uptake of the program. FHA should consider adjusting the program as described in Eric Stein and Kanav Bhagat, *Adjustments to Help the FHA Streamline Refinance Program Reach More Low Wealth Families*, (December 6, 2021), crl-adjustments-fha-streamline-refi-mar2022.pdf (responsiblelending.org).
[69] As described in Freddie Mac, Single-Family Seller/Servicer Guide at Chapter 4302, available at https://guide.freddiemac.com/ci/okcsFattach/get/1002095_2; HUD, Single Family Housing Policy Handbook 4000.1 at 452, available at https://www.hud.gov/sites/dfiles/OCHCO/documents/4000.1hsgh-062022.pdf.
[70] *See* VA Lenders Handbook, Chapter 6, available at https://www.benefits.va.gov/WARMS/pam26_7.asp.

incentives especially if they were to exit conservatorship, or private lenders, since they lack this direct governmental oversight.

e. *Points and fees on the new loan should not exceed a hard dollar-cap and discount points should not be allowed.*

Limiting the points and fees incurred in originating a streamline refinance to a fixed dollar amount will have several benefits. It will encourage originators to be as efficient as possible, thereby making the refinancing of low-balance loans more viable. By capping closing costs at a fixed amount irrespective of the size of the new loan, the Bureau will reduce the incentive for lenders to prioritize the refinancing of larger loans over smaller ones, making streamlined refinances more available to all borrowers. A hard dollar-cap may also reduce borrower misperceptions about the cost of completing a streamlined refinance, and better help them assess the cost against the potential monthly savings.

To determine the appropriate cap amount, the Bureau should analyze the cost components of a typical rate/term refinance. Importantly, the cap amount should be based only on those components that would be required for a streamlined refinance under the Bureau's new rule. As described above, the borrower should not be required to submit, and the lender should not be required to process, documentation related to income or employment. Furthermore, in light of the requirement that a streamlined refinance remain with an existing risk guarantor, the borrower should not be charged for a credit report or an appraisal. Given the reduced documentation and process requirements, lenders should be able to further automate the streamlined refinance process and pass on their reduced costs to the borrower in the form of lower closing costs. Based on their analysis, the Bureau may wish to adjust the cap amount according to an inflation measure.

The Bureau should not permit the use of discount points to reduce the rate on the new loan, as doing so would allow lenders to circumvent the interest rate reduction portion of the net tangible benefit test described above.

Collectively, the five consumer protections noted above and summarized below provide important safeguards that create a standard for a streamlined refinance that ensures the borrower will benefit. These safeguards also reduce if not eliminate the ability of lenders to engage in the "loan churn" that has plagued some streamlined refinance programs.[71] In sum, the Bureau should include the following requirements to protect consumers:

- Demonstrated ability to repay
    - Require twelve months of payment history on the existing loan, with no late payments in the most recent 6 months and no more than one 30-day late payment in the most recent 12 months.

[71] As described in House Comm. on Veterans' Affairs, Home Loan Churning Practices and How Veteran Homebuyers are Being Affected, Serial No. 115-43 (Jan. 10, 2018) (hereinafter "Churning Report"), available at https://www.congress.gov/event/115th-congress/house-event/106744/text..

- The new loan payment must be a fully amortizing, fixed-rate loan.
    - The new loan must have the same guarantor or risk holder, meaning the party responsible for the credit and collateral risk of the loan will also have the risk for the refinance.
- Net tangible benefit to the borrower
    - The rate on the new loan must be at least 50 basis points lower than the rate on the existing loan.
    - The monthly principal and interest payment on the new loan must not increase.
- Limits on the length of term extension
    - The term of the new loan should be limited to the lesser of (1) 30 years and (2) the remaining maturity of the existing loan plus 12 years.
- Limited cash back to the borrower
    - The principal balance of the new loan must not exceed the balance on the existing loan, other than by permissible closing costs incurred in refinancing.
    - Cash-out refinancing should not be permitted, with the exception of a nominal amount no greater than $500. Any excess proceeds from the refinancing must be applied as a curtailment of the new loan.
- Any escrow account and escrow account balance on the existing loan must be re-established with the new loan.
- A hard dollar cap on points and fees
    - Closing costs should be capped at a fixed dollar amount to be determined by the Bureau
    - No discount points may be charged on the new loan.

**8. Additional ways for the Bureau to support mortgage refinancing**

*a. The Bureau should help educate consumers about streamlined refinance programs.*

To increase borrower awareness of both existing government and new private streamlined refinance programs, the Bureau could amend the educational material available to consumers on consumerfinance.gov to include information about the potential benefits, reduced eligibility requirements, and lower costs of a streamlined refinance. For example, the CFPB handout entitled “Should I refinance?” includes a discussion of falling home values and credit scores, neither of which would be relevant for a streamlined refinance.[72]

As noted above, borrowers may fail to refinance due to inattention, overestimating the cost, underestimating the monthly savings, the complexity of determining when refinancing is appropriate, or misperceptions about eligibility requirements. A CFPB-led educational initiative that includes a simple, interactive calculator to help borrowers measure the important factors when considering any refinance—the current mortgage rate, closing costs, monthly benefit from refinancing, recoupment period, and the impact on interest costs and equity accumulation—

[72] CFPB, Should I refinance? available at https://files.consumerfinance.gov/f/documents/cfpb_should_i_refinance_handout.pdf.

would help bring down the information barriers and reduce the misperceptions that may prevent many eligible borrowers from refinancing.

*b. The Bureau should support mortgage industry stakeholders in the development of new products to facilitate beneficial refinances.*

As the Bureau notes, new products such as the auto-refi mortgage could be introduced specifically to promote refinances. The auto-refi mortgage is in many respects the ultimate streamlined refinance, as it would automatically refinance when certain market conditions are met, unless the borrower opts out.

Given the complexity of the mortgage ecosystem, development of new mortgage products should be left to the industry stakeholder collective within the bounds of consumer protection regulation. Beyond the Bureau, the introduction of such a product would require substantial coordination amongst the agencies that play a critical role in mortgage finance (FHFA, FHA, VA, and Ginnie Mae), the GSEs, and mortgage originators, servicers, investors, and insurers. However, to support innovations such as the auto-refi mortgage, the Bureau should amend the ATR/QM rules such that, should it become a viable product, the auto-refi mortgage would be permissible under the rules.

To promote innovation in refinance programs and products, the Bureau should amend the ATR rule to create a new category of qualified mortgages for non-government streamlined refinances as described above, which could include the auto-refi mortgage as well. Furthermore, the five categories of consumer protections described above should equally apply to the new loan created when the auto-refi mortgage is triggered.

In order to address concerns regarding significant, automatic term extensions, any auto-refi product should include limits on term extension. The term of the new loan should depend on the remaining term of the existing mortgage. For example one suggested approach could be that if the existing mortgage has 20 or more years remaining to maturity, the new term would be 30 years; if existing mortgage has between 15 and 20 years remaining to maturity, the auto-refi would be a “rate-only” refinance, as described below; and if the remaining mortgage term is between 10 and 15 years, the auto-refi term would be 15 years.[73] The auto-refi trigger would not apply to mortgages with less than 10 years in remaining maturity.

Should the Bureau wish to ensure that the auto-refi mortgage be permitted only where it produces an absolute borrower benefit, it could require that the originator only solicit the borrower for and only automatically complete a “rate-only” refinance. In a rate-only refinance, the new loan has a lower interest rate but the same maturity date as the existing loan.

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[73] Kanav Bhagat, *Extending the Benefits of Mortgage Refinancing: The Case for the Auto-Refi Mortgage* (October 6, 2021), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3927174 (describing how an auto-refi mortgage might govern term extension based on the remaining maturity of the existing loan).

Therefore, a rate-only refinance can benefit the borrower through a lower monthly payment, lower cumulative interest costs, and faster equity accumulation.[74]

The Bureau could implement an additional consumer protection to reduce the likelihood that lenders abuse the auto-refi mortgage by providing an off-market interest rate when the auto-refi is triggered. For example, the Bureau might require that a lender's refinance rate for the auto-refi mortgage be no more than a fixed fraction of an interest rate (e.g., 0.125% or 0.25%) above the rate for a similar term purchase loan on their rate sheet, on a points-adjusted basis. Such a restriction would prevent a lender from automatically refinancing borrowers into a mortgage with a well above-market rate.

## IV. The Bureau should rescind the seasoned Qualified Mortgage rule for loans originated after the effective date because it undermines the purposes of the rule and is not authorized by the Dodd-Frank Act.

The original CFPB rule on ability to repay (ATR) and the qualified mortgage (QM) safe harbor prevents borrowers from raising violations of the ATR requirement when a loan meets the origination standards in the QM definition. Roughly two years ago, the Bureau adopted the "seasoned QM" rule, which extends the same protection from liability to non-compliant loans simply based on loan performance. Where the borrower manages to pay for at least three years, the rule—in effect—retroactively eliminates liability for lender violations of the ATR rule. The rule applies to first-lien, fixed-rate covered transactions that have met certain performance requirements, are held in portfolio by the originating creditor or first purchaser for a 36-month period, comply with general restrictions on product features and points and fees, and meet certain underwriting requirements. The safe harbor is based in large part on loan performance.

Contrary to Congressional intent and the general principles underlying the other QM regulations, the seasoning rule is structured in a manner that can and will mislabel a significant number of unaffordable, high-priced loans as affordable QM loans. We have seen clients draw down retirement accounts, borrow money from family and friends, and go without food, medicine, utilities, or basic furniture to make their mortgage payments, often maintaining the mortgage in current status over a number of years only to face foreclosure when they could no longer continue with this level of sacrifice and deprivation. While these extreme measures may make sense in a short-term emergency, they do not reflect a borrower's ability to repay the mortgage over the life of the loan and should not be the basis for giving the lender any legal protection.

The CFPB's seasoned QM rule threatens significant harm to the most vulnerable mortgage borrowers and should be withdrawn, with loans made after such withdrawal no longer qualifying for QM status. While the Bureau justified this rule on the basis of access to credit, programs to promote access must also be built for sustainability, so as not to repeat the harms of the Great Recession and exacerbate the losses of the COVID national emergency.

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[74] In *Bhagat*, *supra* note 84, the author discusses the benefits and disadvantages of a rate-only auto-refi in the Appendix.

In addition to being bad policy, the seasoning rule also contravenes judgments Congress made in enacting the Dodd-Frank Act. Specifically, Congress determined that loan performance beyond the Truth in Lending Act's three-year statute of limitations does not establish that a borrower had the ability to repay the loan when it was made. Accordingly, TILA section 130(k), 15 U.S.C. § 1640(k), gives borrowers the right to assert violations of the ability-to-repay statute as a defense to foreclosure throughout the life of the loan.

In adopting the seasoning exemption the Bureau stated that it did not "read TILA section 130(k) to preserve for consumers a right to assert a violation of TILA section 129C(a) when the Bureau has determined as a matter of substantive law to conclusively presume the loan's compliance with TILA section 129C(a)."[75] As a formalistic matter that may be true. But that begs the question of whether TILA section 130(k) limits the Bureau's authority to conclusively presume that the three years of satisfactory performance establishes that the lender made a reasonable and good faith determination of the borrower's ability to repay. For the reasons explained above, we believe section 130(k) has precisely such limiting effect. By disregarding the import of Section 130(k) the seasoning rule strips individual borrowers and communities who are targeted by predatory lenders —most often Black and Latino communities—of the protection Congress sought to provide them.

We also note that the Bureau's rule, by allowing creditors to obtain a safe harbor for even the most expensive loans, challenges long-standing interpretations of the Home Ownership and Equity Protection Act of 1994, permitting borrowers to raise as a defense to foreclosure, at any time, the original creditor's failure to assess the borrower's ability to repay.

The Bureau's authority to define "qualified mortgage" does not allow it to re-write a clear statute or to bar the courthouse door to borrowers facing foreclosure. We urge the Bureau to withdraw the seasoned QM rule.

## V. The CFPB should remove the Ability-to-Repay (ATR) Exemption for Community Development Financial Institutions (CDFIs).

We recommend that the CFPB remove the ATR exemption for CDFIs. Mission-driven CDFIs do not use or need the ATR Exemption to serve communities that otherwise lack access to mortgage financing. The ATR requirements, coupled with the expansive QM definition, already provide sufficient flexibility for CDFIs to develop underwriting processes appropriately suited to the communities they serve while still considering and documenting the borrower's ability to repay their mortgage.

The CDFI ATR Exemption creates an unnecessary loophole that lenders can and will exploit to capture mortgage origination volume in an increasingly competitive market. While the U.S. Treasury Department does admirable work in vetting CDFIs before giving them Treasury-certified CDFI status, the Treasury Department must strictly apply written criteria that may not

[75] 85 Fed. Reg. 86402,86416 (Dec. 29, 2020)

reflect the intent of the CDFI category. Further, unlike bank regulatory agencies, the Treasury Department does not provide ongoing oversight of CDFI activities.

By closing the loophole created by the CDFI ATR Exemption, the Bureau can ensure that lenders do not return to the risky underwriting practices that precipitated the Great Recession. Without the ATR exemption, CDFIs would share the same litigation and market-based incentives to make QM loans as other lenders. The QM product protections constitute the safest mortgages available and are particularly important for the vulnerable borrowers served by CDFIs.

### 1. The CFPB ATR Exemption

The CFPB exempts loans made by several types of community-focused lenders from the ATR Requirement. Specifically, there are exemptions for loans made by housing finance agencies (HFAs); Community Housing Development Organizations (CHDOs) under the HOME program or Downpayment Assistance Providers (DAPs); 501(c)(3) organizations that serve LMI borrowers where the organization does no more than 200 loans per year; a creditor under the Emergency Economic Stabilization Act (EESA) program such as a state Hardest Hit Fund (HHF); and CDFIs.[76]

Our recommendation that the CFPB remove the ATR exemption only for CDFIs is based on three distinctions between CDFIs and the other types of exempt organizations. First, unlike CDFIs, HFAs and state HHFs are government-controlled entities, and therefore do not share the same potential for abuse as CDFIs. Second, CHDOs, DAPs, and 501(c)(3) organizations are non-profits, whereas about half of CDFIs are for-profit companies, and there is naturally less risk of abusive lending with non-profits relative to private companies with a profit-maximizing incentive.[77] Third, CHDOs, DAPs, and 501(c)(3) organizations that make no more than 200 loans per year are sufficiently small that the CFPB would not create a significant risk should they continue the ATR exemption for them.

At the time that the rule was developed, the Bureau took great care to ensure that the new ATR-QM rule did not inadvertently reduce the provision of credit by important mission-based lenders, and the ATR exemption was part of this effort. However, in the ensuing years it has become evident that the rule would not materially interfere with mission-based lending, and so the exemption from ATR is no longer necessary. Moreover, we have seen evidence that for-profit mortgage lenders may obtain CDFI status and thereby use the ATR loophole in ways that have the potential to harm LMI borrowers. Therefore, we believe the CFPB should act to close the loophole now, before the harm materializes. For the reasons described above, we focus our recommendation that CFPB repeal the ATR exemption for CDFIs, but the Bureau may want to consider repealing the exemption in its entirety.

[76] 78 Fed. Reg. at 35464.
[77] Annie Donovan, Center for Community Investment, *The Best Kept Secrets of the CDFI Sector* (May 22, 2019), available at https://centerforcommunityinvestment.org/blog/best-kept-secrets-cdfi-sector.

2. **CDFIs do not need or use the ATR Exemption to meet the needs of their borrowers.**

As a remedy for the lax underwriting standards that precipitated the housing crash and Great Recession, the Dodd-Frank Act included a provision that mortgage lenders should, as part of their standard underwriting process, make a reasonable and good faith determination that the borrower is able to pay back a loan. Under the rule, lenders must collect, consider, and document the borrower's income, assets, debts, and employment when assessing their ability to repay.

As part of their standard underwriting practice, mission-driven CDFIs already consider and verify borrower debts, income, employment, and assets to assess their ability to repay their mortgage in a manner consistent with the ATR requirements. As currently written, the ATR requirements provide CDFIs with sufficient flexibility to make underwriting decisions that reflect the unique characteristics and circumstances of the economically disadvantaged communities they serve.

For example, requiring CDFIs to abide by the ATR rules would not inhibit innovation in underwriting, such as relying on qualitative compensating factors, alternative data, or alternative credit models to qualify borrowers. CDFIs need not strictly adhere to mainstream underwriting criteria. In fact, as the CFPB stated in the ATR/QM final rule, unlike creditors that rely on industry-wide underwriting guidelines, which generally do not account for the unique credit characteristics of LMI consumers, CDFIs "typically engage in a lengthy underwriting process that is specifically tailored to the needs of these consumers by incorporating a variety of compensating factors."[78] The CDFI underwriting process does not ignore documentation and ability to repay, but enables more inclusive access to credit for borrowers underserved by traditional underwriting and credit scoring mechanisms.

Further, like all creditors, CDFIs can achieve a safe harbor from potential ATR liability by making qualified mortgages. For loans meeting the product and pricing features of the QM rule, this requires only that CDFIs consider and verify income and debts – hardly a debilitating requirement.

3. **The CDFI ATR Exemption opens an unnecessary regulatory loophole.**

CDFIs should not be permitted to disregard affordability and the ability of borrowers to repay a mortgage loan. Indeed, considering that CDFIs are mission-based organizations with a particular aim to provide underserved borrowers with access to financing, arguably it is even more vital to ensure they assess and verify the borrower's ability to repay.[79]

We recognize that the majority of entities that have achieved CDFI certification are truly mission-driven entities. However, there is existing evidence and a genuine risk that some institutions have pursued and others will obtain CDFI certification to skirt certain requirements, including complying with the ATR rule. Lenders can and have obtained CDFI certification with the express intent of underwriting mortgages without verifying and documenting the borrower's ability to repay the loan. Once certified as CDFIs, these lenders are able to approve borrowers

[78] *78 Fed. Reg. at 35564*.
[79]Kroll Bond Rating Agency, *CDFIs and the Return of the No-Doc Loan* (May 31, 2022).

for a mortgage without consideration or documentation of their income, assets, or employment. In the Appendix C, we provide a case study of a non-depository, for-profit mortgage bank already advertising the "unfair advantage" they have created by becoming certified as a CDFI.[80] The Kroll Bond Rating Agency (KBRA) describes the loophole and captures the associated paradox succinctly:

> the CDFI ATR exemption leaves open the door for the extension of credit on a no documentation basis, or for other product/underwriting features disallowed by ATR for non-CDFI lenders. At the same time, paradoxically, no-doc lending remains explicitly illegal under the current ATR framework to mitigate potential borrower harm arising from this type of underwriting. The question of how to fulfill a mission to assist an underserved community with no-doc lending while not harming the very borrowers the CDFI exemption is designed to help has been difficult to answer. Historically, a borrower is simply more likely to experience serious delinquency when the lender does not have good visibility into the borrower's income and employment situation at origination.[81]

**4. A competitive or stressed market environment increases the incentive for lenders to use the ATR Exemption.**

The rapid rise in mortgage rates coupled with unprecedented house price appreciation has created a volume and profit problem for lenders and an affordability problem for homebuyers. However, even under typical market conditions, competition between lenders encourages lenders to take greater risks to get more market share.[82] These factors increase the incentive for lenders to become certified as a CDFI in order to exploit the ATR Exemption and capture origination volume. Higher mortgage rates and house prices have also made qualifying for a mortgage loan more difficult for many LMI, lower-wealth, or first-time homebuyers, which may make them susceptible to lenders who are willing to qualify them using low- or no-documentation loans of the pre-crisis era.

Mortgage rates have more than doubled since the turn of the year, reducing the volume of refinances to below pre-pandemic levels.[83] Furthermore, the substantial rise in house prices since the onset of the pandemic, coupled with the rise in the mortgage rate, has crimped purchase loan volumes as well.[84] As origination volumes plummet, mortgage lender's profit

[80] From https://changewholesale.com/ as of July 30, 2022.
[81] Kroll Bond Rating Agency, *CDFIs and the Return of the No-Doc Loan* (May 31, 2022).
[82] *See* 13 FDIC Quarterly at 60, 63 (2019), https://www.fdic.gov/analysis/quarterly-banking-profile/fdic-quarterly/2019-vol13-4/fdic-v13n4-3q2019-article3.pdf (describing how lenders have loosened underwriting standards in response to competition). *See also* Brad Finkelstein, National Mortgage News (3/16/22) ("As the potential mortgage origination market shrinks because of rising interest rates, some wholesale lenders are coming out with products to serve borrowers outside of the conforming footprint.").
[83] See, for example, the Fannie Mae Refinance Application-Level Index (RALI) as of November 4, 2022, available at https://www.fanniemae.com/research-and-insights/surveys-indices/refinance-application-level-index.
[84] Mortgage Bankers Assoc., press release, Mortgage Applications Decrease in Latest MBA Weekly Survey (July 27, 2022), available at https://www.mba.org/news-and-research/newsroom/news/2022/07/27/mortgage-applications-decrease-in-latest-mba-weekly-survey.

margins naturally get squeezed[85] and competition for the marginal loan increases. In this increasingly-competitive environment, mortgage lenders have a greater incentive to find any advantage. As a result, becoming certified as a CDFI to skirt the ATR requirements is likely to become more attractive to lenders looking to increase their volumes.

Should CDFIs begin to market their ability to make loans without verifying or documenting income, assets, or employment to LMI, lower-wealth, or first-time homebuyers, it would mark an unfortunate return to the very lending practices that the ATR requirements of Dodd-Frank were meant to address. While it is conceivable that the lenders who obtain CDFI status would use the ATR Exemption only for a wealthy subset of their borrowers who have sufficient reserves or other compensating factors, the competitive pressures on mortgage lenders noted in the previous section suggest it may only be a matter of time before these loans are marketed downstream.

Indeed, KBRA has noted that current market conditions have increased the risk that lenders will use the CDFI ATR Exemption to pursue mortgage products with features that increase the initial affordability (at the cost of built-in payment shock) and underwriting practices that skirt traditional ATR requirements.[86] Their commentary further notes that mortgages with these initial affordability features coupled with low- or no-doc underwriting have historically been more likely to result in serious delinquency, more difficult to modify, and therefore more likely to end in foreclosure.[87] That is precisely what happened with no doc loans, interest-only loans, and payment option ARMs during the pre-crisis housing boom, and CFPB should not permit it to occur again.

While it is helpful that market commentators are attuned to the potential risks presented by the CDFI ATR Exemption, it may not be sufficient to mitigate the risks of a return to the pre-Dodd-Frank lending practices described above to lower-wealth, LMI, or first-time homebuyers that CFDIs are intended to serve. Relying on market discipline and investors' risk management practices to prevent abusive lending has not proven to be effective in the past. And in any case,

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[85] Mortgage Bankers Assoc., MBA, press release, IMB Production Profits Decrease in the First Quarter of 2022 (May 24, 2022), available at https://www.mba.org/news-and-research/newsroom/news/2022/05/24/imb-production-profits-decrease-in-the-first-quarter-of-2022.

[86] See Kroll Bond Rating Agency, *CDFIs and the Return of the No-Doc Loan* (May 31, 2022) (noting that "today's housing market is exhibiting historically high home prices due to low housing supply, high inflation, and rising interest rates, which are all exacerbating affordability challenges. We expect this will spur increased mortgage product features focused on affordability, including interest-only (IO) and hybrid-adjustable rate mortgages (ARM). Moreover, we are seeing loans that stray from traditional debt-to-income (DTI) metrics as well as low- or no-doc loans (together, non-full doc) from CDFIs, which we also expect to increase.").

[87] See Kroll Bond Rating Agency, *CDFIs and the Return of the No-Doc Loan* (May 31, 2022) (noting that "a borrower that was not robustly underwritten from an ability-to-repay standpoint is less likely to be a good candidate for a subsequent loan modification, should it become necessary. Unfortunately, this means the loan must be modified at terms well below market value and inconsistent with the risk level of the loan, which may harm investors. Alternatively, the lender will have no option but to foreclose on the borrower—the exact course of events that occurred far too frequently during the GFC, which the ATR rule and related regulations were developed to prevent. In fact, KBRA has observed that many pre-crisis no-doc and post-crisis limited documentation NQM loans employed low LTVs as a mitigant for the increased risk of reduced documentation. We expect this will be the case for CDFI no-doc loans as well. However, this raises the specter of pre-crisis 'hard money lending' where a lender's primary (and not unlikely) exit from the loan is a foreclosure action in which the lender could be reasonably assured of being in the money due to the low LTV of the loan.")

even if investors choose not to purchase the private label mortgage-backed securities created from such loans and CDFIs are left with the credit risk, the negative consequences associated with foreclosure for the consumers saddled with these loans will be significant.

5. **CDFIs that provide non-QM mortgages should be subject to the associated greater risk of lender liability.**

By removing the ATR exemption, CDFIs would share the same litigation and market-based incentives as other lenders to make QM loans. This is important since the QM product protections, which when followed likely result in the safest mortgage available, are particularly important for the vulnerable borrowers that CDFIs serve.

In general, we believe that CDFIs should, and if they are not exempt from ATR, will, be offering responsible mortgage products that abide by the QM product protections, which specify that 1) the loan cannot have negative amortization, interest-only payments, or balloon payments; 2) ARMs must be underwritten at the maximum rate in the first five years; 3) the original mortgage term must be 30 years or less; and 4) total points and fees generally cannot exceed 3 percent of the loan amount.

The QM statutory product protections provide for the most transparent and sustainable mortgages. In contrast, non-QM mortgages may build in payment increases and high fees. In fact, non-QM loans can include temporarily lower payments through product structures that inherently cause payments to rise when they begin amortizing or teaser rates expire – the precise opposite of what legitimate CDFIs should offer their borrowers. While there may be room for product innovation in the non-QM space that complies with fair lending laws, non-QM is usually the province of jumbo loans and specialized products for wealthier borrowers – not the borrowers CDFIs are mission-bound to serve. Certainly, CDFIs should not be permitted to devise complex products that ostensibly permit underserved borrowers to access homeownership through lower initial payments, yet in reality are prone to cause harm for underserved communities by product design, without also accepting the greater liability associated with those loans.

The importance of QM product protections is illustrated by recent history. During the subprime lending boom, lenders steered millions of families into abusive loans that were not sustainable and that were inconsistent with the QM product protections, even when those borrowers would have qualified for safer and more affordable credit. Leading up to the crisis, these dangerous niche products that lenders mass-marketed included interest-only loans; ARM loans that combined “teaser” rates with subsequent large jumps in payments; negative amortization loans; and loans made with limited or no documentation of the borrower’s income or assets.[88] These are exactly the types of loans being made by the for-profit mortgage bank using the CDFI ATR exemption as described in the Appendix. Studies have shown that these products and underwriting practices in and of themselves caused about half of the increased risk in mortgage

[88] Financial Crisis Inquiry Commission, The Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States, at 104-111 (2011), available at https://www.govinfo.gov/content/pkg/GPOFCIC/pdf/GPO-FCIC.pdf.

lending that led to the Great Recession.[89] Moreover, the Bureau's ATR/QM Assessment Report concludes that more than half of loans originated between 2005 and 2007 that foreclosed within 2 years of origination had features that the rule subsequently restricted or eliminated.[90]

## VI. Conclusion

We urge the Bureau to update the mortgage servicing regulations in Regulation X to incorporate the lessons learned from the pandemic and promote streamlined refinancing when it truly benefits homeowners. The Bureau should act expeditiously to update its mortgage servicing regulations in a comprehensive manner, especially with regard to streamlined loss mitigation procedures. In the meantime, we request that the Bureau affirm that existing regulations allow offering streamlined loss mitigation options to homeowners without a COVID hardship if the option has been made available to those with COVID hardships. Overall, the Bureau's policies should reduce unnecessary foreclosures, stabilize neighborhoods, and reduce the racial wealth gap. We thank you for the opportunity to comment and look forward to working with you to update the Bureau's oversight of the mortgage market.

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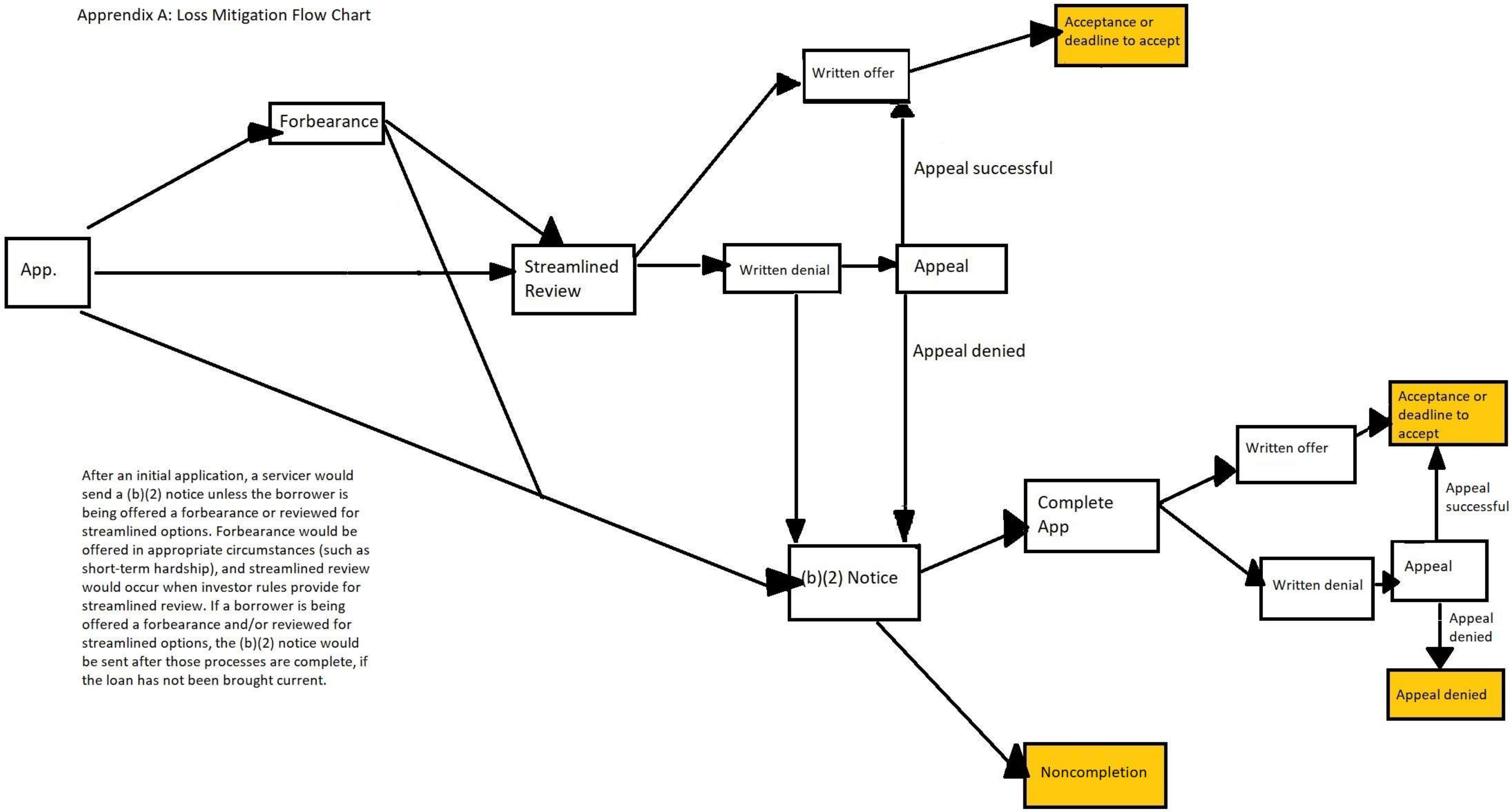
[89] Morris A. Davis, William D. Larson, Stephen D. Oliner, and Benjamin R. Smith, A Quarter Century of Mortgage Risk, FHFA Staff Working Paper 19-02, at p. 35, October 2019 (revised) January 2019 (original) (finding that "risky product features accounted for more than half of the rise in risk during the boom years," defining "risky product features" as those ineligible for QM status). The definition of "risky product features" is conservative because it does not include many loans that would also be ineligible for QM status. Namely, the definition excludes the 22% of subprime loans that were 30-year ARMs (40% of subprime loans were) and that were fully documented (60% of subprime loans were, and 40% times 56% equals 22%). These loans would not have been QM because they almost certainly were not underwritten at the maximum interest rate for the first five years of the loan and a high percentage had prepayment penalties and did not escrow for taxes and insurance. Prepayment penalties are prohibited and escrows are required for loans over 1.5% over APOR by Dodd-Frank. For characteristics of subprime loans, see Testimony of Eric Stein before the U.S. Senate Committee on Banking, Housing and Urban Affairs, Turmoil in the U.S. Credit Markets: The Genesis of the Current Economic Crisis, Center for Responsible Lending (October 16, 2008) at pp. 11-14, 34-39, [https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/senate-testimony-10-16- 08-hearing-stein-final.pdf](https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/senate-testimony-10-16-08-hearing-stein-final.pdf). *See also* Lei Ding, Roberto Quercia, Wei Li, and Janneke Ratcliffe, *Risky Borrowers or Risky Mortgages Disaggregating Effects Using Propensity Score Models*, at 245-277, Journal of Real Estate Research: Vol. 33, No. 2 (2011).

[90] CFPB, Ability-to-Repay and Qualified Mortgage Rule Assessment Report, at 86 (2019), available at https://files.consumerfinance.gov/f/documents/cfpb_ability-to-repay-qualified-mortgage_assessment-report.pdf.

Apprendix A: Loss Mitigation Flow Chart




After an initial application, a servicer would send a (b)(2) notice unless the borrower is being offered a forbearance or reviewed for streamlined options. Forbearance would be offered in appropriate circumstances (such as short-term hardship), and streamlined review would occur when investor rules provide for streamlined review. If a borrower is being offered a forbearance and/or reviewed for streamlined options, the (b)(2) notice would be sent after those processes are complete, if the loan has not been brought current.

**Appendix B:  Comparison of Consumer Protections in Refinance Programs**

| **Consumer Protection** | **Fannie Mae High LTV Refinance (currently paused)*** | **RefiNow / Refi Possible (not streamlined)** | **FHA Streamline Refinance** | **VA IRRRL** |
|---|---|---|---|---|
| Seasoning | • Existing loan must be seasoned at least 15 months. | • Existing loan must be seasoned at least 12 months. | • At least six full months must have passed since the first payment due date of the Mortgage that is being refinanced; and<br>• At least 210 Days must have passed from the Closing Date of the Mortgage that is being refinanced. | • First payment date of refinance loan occurs no earlier than 210 days after the first payment due date of the initial loan (Ginnie Mae APM 17-06) and six consecutive monthly payments have been made. |
| Net Tangible Benefit | At least one of:<br>• Reduced monthly principal and interest payment<br>• Lower interest rate<br>• Shorter amortization term<br>• More stable product (e.g., ARM to FRM).<br><br>ARM-to-ARM:<br>• An ARM can refinance an ARM if the new ARM has a minimum 5-year fixed term. | • New loan is fixed-rate<br>• A reduction in interest rate of at least 50 basis points; and<br>• A reduction in the monthly payment that includes principal, interest, and the mortgage insurance payment (if applicable). | • For a fixed-rate mortgage without a term reduction or with a term reduction of less than 3 years, net tangible benefit to the borrower must be a new combined rate that is 50 bps lower than the existing combined rate, where the combined rate refers to the interest rate on the mortgage plus the MIP.<br>• For a fixed-rate mortgage with a term reduction of 3 years or more, net tangible benefit to the borrower must be a new combined rate that is below the existing combined rate and the combined P&I + MIP payment of the new mortgage must not exceed that of the existing mortgage by more than $50.<br>• FHA permits fixed-to-ARM, ARM-to-ARM, and ARM-to-fixed, with varying interest rate requirements (see FHA Handbook). | • Fixed-to-fixed IRRRLs:  the refinance loan's interest rate must be not less than 0.50% lower than the existing rate.<br>• Fixed-to-ARM IRRRLs:  the refinance loan's interest rate must be not less than 2% lower than the existing rate, with restrictions on how discount points may be used to reach the lower interest rate.<br>• The lender may also set the interest rate on the new loan high enough to enable the lender to pay all closing costs, as long as the requirements for lower interest rate and payments (or one of the exceptions to those requirements) are met.<br>• Principal and interest payment must be less than the principal and interest payment on the loan being refinanced unless:<br>o the IRRRL is refinancing an ARM,<br>o term of the IRRRL is shorter than the term of the loan being refinanced, or<br>o energy efficiency improvements are included in the IRRRL.<br>• A significant increase in the veteran's monthly payment may occur with any of these three exceptions, especially if combined with one or more of the following:<br>o financing of closing costs,<br>o financing of up to two discount points,<br>o financing of the funding fee, and/or<br>o higher interest rate when an ARM is being refinanced. |

| | | | | |
|---|---|---|---|---|
| Maximum Term on New Loan | • Cannot exceed 30 years. | • None. [since GSE limit is 30 years, this is implied 30 years].<br>• *Note: a requirement that stated the maximum seasoning on existing loan was 10 years was removed effective 1/31/22.* | • The lesser of the remaining term of the existing loan + 12 years, or 30 years. | • Original term + 10 years, subject to a 30 year + 32 day cap. |
| Cash Out | • Limited cash out refinance with cash out less than or equal to $250. Excess proceeds may be applied as a curtailment on the new loan. | • Limited cash out refinance with cash out less than or equal to $250. Excess proceeds may be applied as a curtailment on the new loan. | • No cash out option, cash back limited to $500, with cash in excess of $500 used to reduce the borrower's outstanding principal balance.<br>• Cash to the Borrower resulting from the refund of Borrowers unused escrow balance from the previous mortgage must not be considered in the $500 cash back limit whether received at or subsequent to mortgage Disbursement. | • No cash out, but VA does not object to borrower receiving cash in the event of errors, changes in final payoff figures, or a refund of the escrow balance of the old loan.<br>• Consult VA if borrower is to receive more than $500. |
| Closing Costs | • Closing costs and points of up to $5,000 can be rolled into the UPB of the new loan. | • Closing costs can be rolled into the UPB of the new loan.<br>• *Note: A $5,000 cap on financing closing costs was removed effective 10/18/21.* | • Closing costs cannot be rolled into the UPB of the new loan. | • Closing costs can rolled into the UPB of the new loan.<br>• Up to 2 discount points can be included in the loan amount. |
| Recoupment Period Requirement | • None. | • None. | • None. | • The sum of all fees, closing costs, or expenses, whether included in the UPB of the new loan or paid outside of closing, divided by the reduction in the borrower's monthly P&I must not exceed 36.<br>• Lender credits may be used to offset allowable fees and charges.<br>• For an IRRRL that results in the same or a higher monthly payment, the veteran cannot be charged any fees, closing costs, or expenses. |
| Restriction on the Number of Streamline Refinances | • No restriction. | • 1-time use only. | • No restriction. | • No restriction. |

| | | | | |
|---|---|---|---|---|
| Payment History Eligibility Requirement | Must be current and have:<br>• No 30 days DQ in the most recent 6 months; and<br>• No more than one 30 day DQ in the most recent 12 months and no delinquency greater than 30 days. | Must be current and cannot have been:<br>• 30 days DQ in the most recent 6 months;<br>• 30 days DQ more than once in the most recent 12 months; or<br>• 60+ days DQ in the most recent 12 months | Must be current and have:<br>• No 30 days DQ in the most recent 6 months; and<br>• No more than one 30 day DQ in the previous 6 months. | • No 30 days DQ in the most recent 6 months; and<br>• No more than one 30 day DQ in the previous 6 months.<br>• Delinquent loans can be refinanced with approval from VA and by providing evidence and analysis that the cause of the delinquency has been resolved and the veteran is willing and able to make the proposed loan payments. |

*The Freddie Mac Enhanced Relief Refinance Mortgage program (description available at Enhanced Relief Refinance Mortgage - Freddie Mac Single-Family) is similar to the Fannie Mae High LTV Refinance Option but has a 15 month seasoning requirement and requires the borrower has no 30 day delinquencies in the most recent 6 months and has not been 30 days delinquent more than once in the most recent 12 months. The Enhanced Relief Refinance Mortgage program has also been paused.

Sources: Fannie Mae High LTV Refinance Option: display (fanniemae.com), RefiNow: display (fanniemae.com), Refi Possible: Freddie Mac Single-Family Seller/Servicer Guide (Chapter 4302), FHA Streamline Refinance Program: FHA Single Family Housing Policy Handbook, available at 4000.1hsgh-062022.pdf (hud.gov), VA IRRRL: Chapter 6 of the VA Lenders Handbook, available at Lenders Handbook - VA Pamphlet 26-7 - Web Automated Reference Material System and VA Circular 26-19-22 available at Circular 26-19-22 (va.gov).

**Appendix C: A Case Study of a CDFI Exploiting the ATR Exemption.**

In this Appendix we provide a case study of how a non-depository mortgage bank is already advertising the "unfair advantage" they have created by becoming certified as a CDFI.[1] Change Lending LLC d/b/a Change Wholesale – a for-profit limited liability corporation which has raised $129 million in equity through private placements[2] and which boasts that it was "certified as CDFI by U.S. Department of Treasury in 2018" – advertises nationally that they can close loans with just the first page of a bank statement, don't use DTI ratios, and can get 1099 borrowers (usually the self-employed or independent contractors) approved.[3] They go further, advertising that "the ground breaking Community Mortgage from Change Wholesale is the only owner-occupied mortgage that doesn't require income, employment, or DTI [documentation]."[4]

In case there was any doubt about their strategy to use their CDFI status to their advantage, a "Partner Insight" aimed at mortgage brokers in National Mortgage News written by Change Wholesale describes it succinctly: "Many may not know this, but Community Development Financial Institutions (CDFIs) are not subject to certain consumer financing rules and regulations of Dodd-Frank, including documentation requirements and the ability-to-repay (ATR) rules. These exemptions provide an avenue for brokers to gain an unfair advantage in today's highly competitive market. Get an edge on the competition by offering solutions other banks and lenders could only dream of—like offering more prime, credit-worthy borrowers alternative qualification methods that are much more practical than traditional mortgage programs."[5]

So far, the presale reports that accompany Change Wholesale's sale of private label mortgage-backed securities backed by these loans earlier this year indicate that the majority of these loans are not going to the lower-wealth, LMI, or first-time homebuyers that CDFIs are intended to serve. Less than 30% of the loans in the pool are to first-time homebuyers, and the average loan size (about $550,000) and average level of liquid reserves (nearly $350,000) indicate that these loans were made to wealthier borrowers.[6] Furthermore, the average FICO score (about 735) and average CLTV (about 70%) suggest these loans may not be high risk.[7] However, it is also worth noting that about 30% of the loans are interest-only that could not satisfy the Qualified Mortgage product protections and that would have to be underwritten as if fully amortizing in order to satisfy the ATR requirement.[8]

However, with the ATR Exemption in place, the risk remains that lenders like Change Wholesale extend their use of the exemption to make loans to lower wealth, LMI, or first-time homebuyers.

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[1] *See* Change Wholesale, at https://changewholesale.com/ as of July 30, 2022.
[2] https://www.sec.gov/Archives/edgar/data/0001840132/000184013222000002/xslFormDX01/primary_doc.xml
[3] *Id*.
[4] *Id*.
[5] *See* Jon Irvine, *Get an Unfair Advantage by Partnering with a CDFI*, National Mortgage News (June 23, 2022). This is attached to this Appendix
[6] DBRS Morningstar, CHNGE Mortgage Trust 2022-2: Presale Report, available at https://www.dbrsmorningstar.com/research/392584/chnge-mortgage-trust-2022-2-presale-report.
[7] *Id*.
[8] *Id*.

PARTNER INSIGHTS BY CHANGE WHOLESALE

# Get an Unfair Advantage by Partnering with a CDFI

June 23, 2022, 3:01 a.m. EDT    3 Min Read

PARTNER INSIGHTS FROM

By Jon Irvine

How are some borrowers getting approved with just the first page of their bank statement? How are some brokers closing loans without requiring income or employment documentation? Many may not know this, but Community Development Financial Institutions (CDFIs) are not subject to certain consumer financing rules and regulations of Dodd-Frank, including documentation requirements and the ability-to-repay (ATR) rules. These exemptions provide an avenue for brokers to gain an unfair advantage in today's highly competitive market. Get an edge on the competition by offering solutions other banks and lenders could only dream of—like offering more prime, credit-worthy borrowers alternative qualification methods that are much more practical than traditional mortgage programs.

## About CDFIs

The Community Development Financial Institutions Fund (CDFI Fund) was established by the Riegle Community Development and Regulatory Improvement Act of 1994 in an effort to promote economic revitalization and community development. Mission-driven organizations that receive CDFI certification from the Department of Treasury can participate in special CDFI Fund programs designed to help a range of underserved borrowers achieve their dreams of homeownership.

Traditional underwriting methods do not consider the same qualifiers that CDFIs do. For example, not all borrowers will receive a W2 at the end of the year. Some borrowers are paid in cash, while others are on a fixed income. Change Wholesale understands that every situation is unique and requires special attention in different areas, which is why we offer a range of lending solutions as diverse as the borrowers we serve.

## CDFIs reach more prime, credit-worthy borrowers

Change Wholesale is proud to be America's CDFI. We continue to innovate by offering proprietary programs that help put more Americans into their dream homes. Our flexible lending solutions help non-traditional buyers finance a home when most other lenders and banks simply cannot. These high-quality borrowers include America's hardworking 1099 employees, gig workers, foreign nationals, investors, retirees, and more. Borrowers who do not fit into the traditional mortgage mold need brokers who are familiar with available alternatives that can help them benefit from less stringent documentation requirements and other exemptions exclusive to CDFIs.

**The Community Mortgage**

The most innovative product in the market today is the Community Mortgage. It is a powerful program that helps brokers expand their business and allows more quality borrowers to be approved for non-traditional mortgage loans. With Community Mortgage, borrowers can get approved for a loan without showing income or employment documentation. They can even get approved with just the first page of their bank statement. Best of all, the Community Mortgage is the only type of loan in the marketplace for primary and second homes. It almost sounds too good to be true, but rest assured, the Community Mortgage is far from one of those awful subprime loans that disrupted the industry years ago. Unlike subprime loans, the Community Mortgage was designed for prime, credit-worthy borrowers who happen to have a unique set of circumstances that make it difficult to secure a traditional loan using typical qualifiers.

Since CDFIs are exempt from certain documentation requirements, Change Wholesale is able to create custom lending programs that use an alternative set of requirements which include verifying FICO scores, loan-to-value (LTV) ratios, and reserves. Having the flexibility to do our own underwriting with custom criteria is a gamechanger that allows brokers to close more loans faster than ever before.

### Gain an unfair advantage in today's market

Who knew gaining an unfair advantage in today's competitive market could be this simple? Partnering with a CDFI allows brokers to open the doors of homeownership to those who may not have qualified otherwise. Thanks to lending partners like Change Wholesale, brokers can get an unfair advantage and offer solutions their competitors cannot.

Why limit your business to qualified mortgage loans when you can expand your reach and close loans for more prime buyers? Your business is only as strong as the products it offers, so be sure to partner with the right CDFI partner and offer the most unique programs available in the industry.

Ready to get an unfair advantage that will help you close more loans, faster? Get started at ChangeWholesale.com today!

### About the author

Jon Irvine is Chief Production Officer for Change Wholesale, where he oversees the sales and marketing departments for all of the institution's origination channels. For more information, visit ChangeWholesale.com.