

FAQs On ATR & QM Rules For Small Entities – Part Three

By

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***Introduction.** The FAQs below come directly from the most recent CFPB guidelines for January 2014. Parts One and Two can be found [here](#) and [here](#). As I go through the rules I will supplement the FAQs. This information does not apply to the Big Banks, e.g. B of A, Morgan Stanley, JPMorgan, etc. Rather, it applies to “small creditors” such as community banks. Unfortunately, the regulators have sought to apply the ATR/QM rules even to Mom and Pop who may sell an occasional rental unit or two.¹ The CFPB gives “small creditors” or “small entities” certain underwriting latitude in the application of the ATR/QM rules. Generally, these are persons or entities with no more than \$2 billion in assets that make no more than 500 mortgage loans per year. Originally, the small entity exceptions were intended to apply only to “rural or underserved counties,” but until January 10, 2016, the exceptions will apply to all small creditors, regardless of location. Caveat: This material below is informational only and does not constitute “legal advice.” Moreover, it is summary only; for more information, the actual regulations should be reviewed.*

21. Which types of creditors and loan programs are exempt from the ATR requirements? *Extensions of credit made by certain types of creditors are exempt from the ATR requirements:*

- *Extensions of credit made by creditors designated by the U.S. Department of the [Treasury as Community Development Financial Institutions](#) and creditors designated by HUD as either a [Community Housing Development Organization](#) or a [Downpayment Assistance Provider of Secondary Financing](#) are exempt from the ATR requirements, under certain conditions.*
- *Extensions of credit made by creditors designated as nonprofit organizations under section 501(c)(3) of the Internal Revenue Code of 1986 that extend credit no more than 200 times annually, provide credit only to low-to-moderate income consumers, and follow their own written procedures to determine that consumers have a reasonable ability to repay their loans are also generally exempt from the ATR requirements.*
- *Extensions of credit made pursuant to certain loan programs are exempt from the ATR requirements.*
 - *Extensions of credit made by housing finance agencies directly to consumers, as well as extensions of credit made by other creditors pursuant to a program administered by a housing finance agency, are exempt from the ATR requirements. [This ATR exemption applies to extensions of credit made pursuant to a program administered by a housing finance agency, regardless of the funding source (e.g., Federal, State, or other sources)].*
 - *Extensions of credit made pursuant to an [Emergency Economic Stabilization Act program](#), such as extensions of credit made pursuant to a [State Hardest Hit Fund program](#), are also exempt from the ATR requirements.*

¹ I maintain vehemently that on the state and federal levels, the CFPB rules should *not* apply to the occasional sale of residential property owned by persons who are not in the business of making such loans, when they “carry back the paper,” e.g. on a contract or note and trust deed. The fact that Oregon’s DFCS insists otherwise is a sad and disturbing commentary on the uber-regulatory mindset of governmental bureaucrats who would rather regulate than cogitate. Any sentient human being who has a passing familiarity with the housing and credit crisis would know that the occasional sale of residential property by Mom and Pop who carry back the paper was never meant to be subject to the ATR/QM and mortgage loan originator laws.

Note the following points:

- The exemptions above apply to all loans made by these creditors or pursuant to these loan programs, provided the conditions for the exemption are satisfied. An exempt loan remains exempt even if it is sold, assigned, or otherwise transferred to a creditor that would not qualify for the exemption.
- The ATR requirements do not apply to these exempt loans. Thus, a loan that is eligible for one of these exemptions is not eligible for QM status, as the QM provisions are only applicable to loans subject to the ATR requirements. A consumer who obtained a loan that was exempt from the ATR requirements would have no ability-to-repay claim under the ATR/QM rule.
- Although these loans are not subject to the ATR requirements, they still are subject to the restrictions on prepayment penalties and may not be structured as open-end credit plans to evade those restrictions.

22. What is a Qualified Mortgage? It is one that provides the lender with a “presumption of compliance” with the ATR requirements. This means that if a consumer files a claim against his/her lender saying that it failed to properly vet his/her ability to repay the loan, if it qualified as a QM loan, it will be legally presumed to have complied with the ATR requirements. In other words, the claimant has a much tougher case to prove.

- The QM requirements generally focus on prohibiting certain risky features and practices, such as negative amortization, interest-only payments, and loan terms extending longer than 30 years.

23. Are There Different Types of Qualified Mortgages? There are four (4) types of Qualified Mortgages. The type of “presumption of compliance” for a QM depends on whether it is “higher-priced.”

- Two types, the “General” and “Temporary” QM definitions, can be originated by all creditors.
 - QMs under these definitions are considered higher-priced if they have an [Annual Percentage Rate](#) of the loan (“APR”) that exceeds the Average Prime Offer Rate. [According to Freddie Mac](#): “The APOR is published at least weekly by the Federal Reserve Board and is derived from pricing terms obtained from a survey of prime mortgage lenders.” (“APOR”²) [\[see tables here for APOR\]](#) by 1.5 percentage points or more for first-lien loans and 3.5 percentage points or more for subordinate-lien loans.
- “Small Creditor” and “Balloon-Payment” QMs, can only be originated by small creditors.[See discussion below.]
 - QMs under these definitions are considered higher-priced if they have an APR that exceeds the APOR by 3.5 percentage points or more for both first-lien and subordinate-lien loans.
- To calculate whether a loan’s APR exceeds the APOR for a comparable loan by more than the 1.5 or 3.5 percentage-point spreads, go to: <http://www.ffiec.gov/ratespread/>.
- There are two types of presumptions of compliance for QMs:
 - A QM that is not higher priced receives a “conclusive presumption” of compliance with the ATR rules. This means that it is an absolute “safe harbor” loan, and the borrower will be unable to attack the lender for failure to comply with the ATR rules
 - A QM that is higher priced receives a “rebuttable presumption” of compliance. This means that the lender is “presumed” to have complied, but the borrower may, by a showing of sufficient evidence, rebut that presumption. This is called a “rebuttable presumption,” and though not absolute, still give substantial protection to the lender.

² [According to Freddie Mac](#): “The APOR is published at least weekly by the Federal Reserve Board and is derived from pricing terms obtained from a survey of prime mortgage lenders.”

- Note that if the loan is determined not be a QM at all, there is no presumption of compliance, and the lender is left to defend the borrower's claim by trying to prove that it did make a good faith effort to determine the borrower's ability to repay.
- In addition, for all types of QMs, points and fees generally may not exceed 3 percent of the total loan amount, but higher thresholds are provided for loans below \$100,000. [Points and fees caps are discussed at FAQs #29 and #30, below.]

24. Are There Restrictions Common to All Four QMS, Regardless of Size of the Lender? Yes, the following features are prohibited:

- Negative amortization;
- Interest-only payments;
- Loan terms in excess of 30 years; and
- Limitations on points and fees: The threshold is generally 3 percent of the loan balance, but larger amounts are allowed for loans under \$100,000

25. What are the differences between the "General QM" and the "Temporary QM" definitions?

- General QM loans may not have any of the following prohibited features:
 - Negative-amortization;
 - Interest-only;
 - Balloon-payments; or
 - Terms that exceed 30 years;
 - They also may **not** have points and fees that exceed specified limits. In addition, in order for a loan to be a General QM loan, the following must occur:
 - Loan underwriting must:
 - Be based on a fully-amortizing schedule using the maximum rate permitted during the first five (5) years after the date of the first periodic payment;
 - Consider and verify the consumer's income or assets, current debt obligations, alimony and child-support obligations;
 - Determine that the borrower's total monthly debt-to-income ratio ("DTI") is no more than 43 percent, "...using the definitions and other requirements provided in [appendix Q](#),³ which is derived from the Federal Housing Administration manual."
- The Temporary QM definition gives QM status to loans that are originated during a transitional period⁴ if they are eligible for purchase or guarantee by Fannie Mae or Freddie Mac ("GSEs") or for insurance or guarantee by certain federal agencies.⁵
 - Loans that receive QM status under this temporary provision will retain that status after the temporary provision expires, but new loans will not receive QM status after that date under the temporary provision. So, after expiration of the temporary provision, loans must meet the requirements for one of the other categories of Qualified Mortgages to be QMs.
 - Loans falling under the Temporary QM definition must meet the same requirements as General QM loans regarding prohibitions on risky features [negative-amortization, interest-

³ Note: The CFPB amended Appendix Q. For details, [see link here](#).

⁴ The date that the GSEs exit federal conservatorship/receivership or on January 10, 2021, whichever first occurs.

⁵ The temporary provision for loans eligible for insurance or guarantee by specified federal agencies is a transition measure designed to give the agencies time to exercise separate authority under the Dodd-Frank Act to determine which of their loans will receive QM status. This temporary provision will expire on the date that the relevant agency's own QM rules take effect or on January 10, 2021, whichever occurs first.

only, and balloon-payment features, a maximum loan term of 30 years, and points-and-fees restrictions.]

- They must also meet at least one of these additional requirements:
 - Eligible for purchase or guarantee by the Federal National Mortgage Association (Fannie Mae) or the Federal Home Loan Mortgage Corporation (Freddie Mac) while operating under federal conservatorship or receivership
 - Eligible for Federal Housing Administration (FHA) insurance
 - Eligible to be guaranteed by the U.S. Department of Veterans Affairs (VA)
 - Eligible to be guaranteed by the U.S. Department of Agriculture (USDA)
 - Eligible to be insured by the Rural Housing Service
 - Eligibility for purchase or guarantee by a GSE or insurance or guarantee by an agency can be established based a series of methods described in the rules;
 - To meet the Temporary QM definition, loans must be underwritten using the required guidelines of the entities above, including any relevant DTI guidelines. They do **not** have to meet the 43 percent debt-to-income ratio threshold that applies to General QM loans.
 - The creditor does not have to satisfy GSE or agency standards which are wholly unrelated to the credit risk or underwriting of the loan or any standards which apply after the consummation of the loan.

26. For purposes of Small Creditor QMs, who qualifies as a “Small Creditor?” *Small creditors are defined as follows:*

- *Having assets below \$2 billion [to be adjusted annually for inflation by the CFPB at the end of the last calendar year].*
- *The lender and its affiliates⁶ together may not have originated more than 500 first-lien, closed-end residential mortgages that are subject to the ATR requirements in the preceding calendar year.*
- *In addition there are the following miscellaneous rules:*
 - *To determine if you meet the asset size requirement, count only your assets. Do not count your affiliate’s assets.*
 - *To determine if you meet the number of originations requirement, count all first-lien, closed-end mortgages made by you and made by your affiliates that are subject to the ATR requirements.*
 - *Do not count subordinate-lien mortgages. Also do not count mortgages that are not subject to the ATR/QM rule, such as HELOCs, time-share plans, reverse mortgages, or temporary or bridge loans with terms of 12 months or less.*

27. Type 1 and 2 Loans for Small Creditors: What are the limitations on them?

- **Type 1: Small Creditor QMs** may not have any of the following features:
 - Negative-amortization; Interest-only;
 - Balloon-payment features; or
 - Repayment terms that exceed 30 years.

⁶ An affiliate is any company that controls, is controlled by, or is under common control with, the lender. This generally means that affiliates are a parent company, subsidiaries, or sister companies. For example, if the organization is a bank owned by a bank holding company that also owns another bank, both the bank holding company and the other bank are the bank’s affiliates.

- They also may not have points and fees that exceed the specified QM limits. [See FAQs #29 and #30, below.]
- A Small Creditor QM loan has the following additional limitations:
 - Underwriting must be based on a fully-amortizing schedule using the maximum rate permitted during the first five years after the date of the first periodic payment;
 - The loan must not be subject to a “forward commitment” [i.e. an agreement made at or prior to consummation of a loan to sell the loan after consummation, other than to a creditor that itself is eligible to make Small Creditor QMs].
 - The lender must consider and verify the consumer’s income or assets, and debts, alimony, and child support.
 - The lender must consider the consumer’s debt-to-income ratio (“DTI”) or residual income, although the rule sets no specific threshold for DTI or residual income.
 - Note that Small Creditor QMs generally lose their QM status if they are sold or otherwise transfer less than three years after consummation.
 - However, a Small Creditor QM keeps its QM status if it meets one of these criteria:
 - It is sold more than three years after consummation;
 - It is sold to another creditor that meets the criteria regarding number of originations and asset size, at any time.
 - It is sold pursuant to a supervisory action or agreement, at any time.
 - It is transferred as part of a merger or acquisition of or by the creditor, at any time.
- **Type 2: Small Creditor Balloon QMs** [Generally, it appears that the primary distinction between Small Creditor QMs and Small Creditor Balloon QMs, is that the latter may make loans with a 5-year call. Other than that, they appear much the same]
 - The CFPB is providing a two-year transition period during which all small creditors can make Balloon-Payment QMs, regardless of where the small creditor operates. After that two-year period expires, only small creditors that operate predominantly in rural or underserved areas will be able to make Balloon-Payment QMs.
 - On or before January 10, 2016 [two years after the effective date of the ATR/QM rules], all small creditors, regardless of location, can originate Balloon-Payment QMs.
 - Balloon-Payment QMs that are originated during this two-year period [Jan. 10, 2014 – Jan. 10, 2016] will retain their QM status after January 10, 2016, assuming the requirements to hold the loan in portfolio are met.
 - After January 10, 2016, lenders may originate Balloon-Payment QMs only if they meet the asset size and number of originations criteria as well as the requirement that they operate predominantly in rural or underserved areas.⁷
 - Balloon-Payment QMs may not have any of the following features:

⁷ The CFPB provides the following “Implementation Tip”: After January 10, 2016, in order to make Balloon-Payment QMs, more than half of your organization’s first-lien covered transactions during any of the three preceding calendar years must have been secured by properties in rural areas (equivalent to the [USDA’s Economic Research Service Urban Influence Codes](#) 4, 6, 7, 8, 9, 10, 11, or 12) or underserved areas (counties where no more than two creditors extend five or more first-lien covered transactions in a calendar year). The Bureau will publish an annual list of rural or underserved counties. This is not the same definition of “rural” used for [Home Mortgage Disclosure Act](#) (HMDA) reporting or used by other agencies. For example, you may not be considered rural under this definition even though you are considered rural under HMDA and are not a HMDA reporter.

- *Negative- amortization;*
- *Interest-only;*
- *And they must comply with the points-and-fees limits for Qualified Mortgages [See, FAQs #29 and #30, below].*
- *In addition:*
 - *The loan must have a fixed interest rate and periodic payments [other than the balloon payment] that would fully amortize the loan over 30 years or less.*
 - *The loan must have a term of five years or longer;*
 - *The loan must not be subject to a forward commitment [an agreement made at or prior to consummation of a loan to sell the loan after consummation, other than to a creditor that itself is eligible to make Balloon-Payment QMs].*
 - *Underwriting: The Small Creditor must determine that the consumer will be able to make the scheduled periodic payments [including “mortgage-related obligations,” such as insurance, taxes and HOA assessments] other than the balloon payment. Unlike the calculation of balloon loan monthly payments for determining ATR, the Balloon-Payment QM calculation excludes the balloon payment even if the loan is a higher-priced loan.*
 - *The lender must consider and verify:*
 - *The consumer’s income or assets, and debts, alimony, and child support;*
 - *The consumer’s debt-to-income ratio (DTI) or residual income, although the rule sets no specific threshold for DTI or residual income.*
 - *Like Small Creditor QMs, Balloon-Payment QMs generally lose their QM status if they are sold or transferred less than three years after consummation.*
 - *However, a Balloon-Payment QM keeps its QM status if it meets one of these criteria:*
 - *It is sold more than three years after consummation;*
 - *It is sold to another creditor that meets the criteria regarding operating in rural or underserved areas, number of originations, and asset size, at any time;*
 - *It is sold pursuant to a supervisory action or agreement, at any time; or*
 - *It is transferred as part of a merger or acquisition of or by the creditor, at any time.*

28. Are there any special requirements for calculating the DTI ratio on QM loans? *The General QM definition requires that a borrower’s total debt-to-income ratio not exceed 43 percent. Keep in mind that different DTI rules apply to loans complying under the ATR standard and to the other QM definitions:*

- *To satisfy the general ATR standard, Small Creditors must consider DTI or residual income.*
- *To originate a QM under the temporary definition [eligible for sale to or guarantee by a GSE or insured or guaranteed by a specified federal agency], you must meet the relevant entity’s applicable DTI and other requirements.*
- *To originate a Small Creditor or Balloon-Payment QM, you must consider DTI or residual income, but you do not have to meet a specific threshold requirement.*

29. What are the QM points-and-fees caps? *For a loan to be a QM, the points and fees may not exceed certain points-and-fees caps. The points- and-fees caps are higher for smaller loans. The dollar amounts listed above will be adjusted annually for inflation and published each year.*

- *A loan of \$100,000 or more: 3 percent of the total loan amount*
- *A loan between \$60,000 but less than \$100,000: \$3,000*

- A loan between \$20,000 but less than \$60,000: 5 percent of the total loan amount
- A loan between \$12,500, but less than \$20,000: \$1,000
- A loan less than \$12,500: 8 percent of the total loan amount
 - To determine whether a loan is within the QM points-and-fees caps, follow these steps:
 - First, determine which of the caps applies to the loan amount on the face of the note.
 - Second, calculate the maximum points and fees for that loan amount:
 - For a loan amount that has a **fixed-dollar cap** [e.g. \$3,000 cap for loan amounts of \$60,000 but less than \$100,000], that fixed-dollar cap is the maximum allowable points and fees.
 - For a loan amount that has a **percentage cap** [e.g. 5 percent of the total loan amount for loan amounts greater than or equal to \$20,000 but less than \$60,000] determine the “total loan amount” for your transaction.
 - The “total loan amount” equals the “amount financed” (See [12CFR § 1026.18](#)) minus any points and fees that are rolled into the loan amount.
 - Multiply the total loan amount by the percentage cap to determine the maximum allowable points and fees.
 - Third, calculate the total points and fees for your transaction. If the total points and fees for your transaction exceed the maximum allowable points and fees, then the loan cannot be a QM.

30. How are the QM points and fees caps calculated? You use the same approach used for calculating points and fees for closed-end loans under the Home Ownership and Equity Protection Act (HOEPA) thresholds in the CFPB’s High-Cost Mortgage and Homeownership Counseling Amendments to the Truth in Lending Act (Regulation Z) and Homeownership Counseling Amendments to the Real Estate Settlement Procedures Act (Regulation X) rulemakings. Those rules are available online at: <http://www.consumerfinance.gov/regulations/>.

- Unless specified otherwise, include amounts that are known at or before consummation of the loan, even if the consumer pays them after consummation by rolling them into the loan amount.
- In addition, unless specified otherwise, closing costs advanced by the lender and recouped from the borrower over time through the interest rate are not counted in points and fees.
- To calculate points and fees, add together the amounts paid in connection with the transaction for the six (6) categories of charges listed below:
 - **1. Finance charge:** In general, include all items included in the finance charge. However, you may exclude the following types and amounts of charges, even if they normally would be included in the finance charge:
 - Interest or the time-price differential;
 - Mortgage insurance premiums (“MIPs”);
 - Federal or state government-sponsored MIPs: For example, exclude up-front and annual FHA premiums, VA funding fees, and USDA guarantee fees.
 - Private mortgage insurance (“PMI”) premiums: Exclude monthly or annual PMI premiums. You may also exclude up-front PMI premiums if the premium is refundable on a prorated basis and a refund is automatically issued upon loan satisfaction. However, even if the premium is excludable, you must include any portion that exceeds the up-front MIP for FHA loans. Those amounts are published in HUD Mortgage Letters, which you can access on HUD’s website.

- beneficiary of the insurance.
- **4. Maximum prepayment penalty** ([§1026.32\(b\)\(1\)\(v\)](#)) Include the maximum prepayment penalty that a consumer could be charged for prepaying the loan.
 - **Prepayment penalty paid in a refinance** ([§1026.32\(b\)\(1\)\(vi\)](#)) If you are refinancing a loan that you or your affiliate currently holds or is currently servicing, then include any penalties you charge consumers for prepaying their previous loans.
 - **5. Charges paid by third parties.** (Comment 32(b)(1)-2)) Include charges paid by third parties that fall within the definition of points and fees in [§1026.32\(b\)\(1\)\(i\) through \(vi\)](#), including charges included in the finance charge. Charges paid by third parties that fall within the exclusions to points and fees in [§1026.32\(b\)\(1\)\(i\)\(A\) through \(F\)](#) do not have to be included in points and fees. Seller's points are excluded from the finance charge (See [§1026.4\(c\)\(5\)](#)) and therefore can be excluded from points and fees, but charges paid by the seller should be included if they are for items listed as points and fees in [§1026.32\(b\)\(1\)\(ii\) through \(vi\)](#).
 - **6. Creditor-paid charges.** (Comment 32(b)(1)-2) Charges paid by the creditor, other than loan originator compensation paid by the creditor that is required to be included in points and fees under § 1026.32(b)(1)(ii), can be excluded from points and fees.

[To be continued]

