

| <b>DODD-FRANK "ABILITY TO REPAY" COMPLIANCE ALTERNATIVES</b><br><b>Rule: All covered loans require a reasonable &amp; good faith determination of borrower's repayment ability by lender ("ATR"). 1026.43 (c) [ATR p647]</b> Note: Publication=804 pages. See actual regulations on pages 639-663 (25 pages) | Must Have Substantially Equal Payments [ATR p655] | No Negative Amort [ATR p656] | No Balloons [ATR p656] | 30yr Max Amort [ATR p656] | 3% Max Fees & Points 43(e)(3) [ATR p656 and 657] | Appendix Q underwriting etc. [ATR p656] | 43% Max DTI (Using ALL MRO & all Simultaneous Loans | 1-8 Underwriting Cond. (43)(c)(2)-(viii) [ATR p647] | Verification Using 3rd Party Records 43(c)(3) [ATR p648] | Balloon/Interest Only/Neg Amort Underwriting 43(c)(5)(ii) [ATR p648] | Rural Lender Test [ATR p659] | Rural Balloon Underwriting [ATR p660] | Interest Rate Can't Increase [ATR p660] | 5Yr Min Balloon Term [ATR p660] |
|--|---|------------------------------|------------------------|---------------------------|--|---|---|---|--|--|------------------------------|---------------------------------------|---|---------------------------------|
| <b>QM-General 43(e)(2)</b> [ATR p655]  | X   | X                            | X                      | X                         | X  | X                                       | X   |   | X  |  |                              |                                       |   |                                 |
| <b>QM GSE or GSE Eligible 43(e)(4)</b> [ATR p658]  | X   | X                            | X                      | X                         | X  |   |   |   | Per GSE  |  |                              |                                       |   |                                 |
| <b>QM Rural Balloon Payment 43(f)</b> [ATR p659]   |   | X                            |                        | X                         | X  |   |   | X   | X  |  | X                            | X                                     | X                                       | X                               |
| <b>QM Small Creditor</b> (less than \$2 Billion in assets; 500 or fewer 1 <sup>st</sup> lien loans; portfolio limitations)   | X   | X                            | 2 year transition      | X                         | X  |   |   | X   | X  |  |                              |                                       |   |                                 |
| <b>Non QM "General or "Standard" ATR Requirement" ATR Compliance 43(c)</b> [ATR p647]  |   |                              |                        |                           |  |   |   | X   | X  | X  |                              |                                       |   |                                 |

**ATR Coverage 43(a)** [ATR p644]

- Consumer
- Owner occupied dwelling (Principle, 2nd Home & Vacation)
- Purchase & Refinances
- 1st and Subordinate Liens

**ATR Exemptions** [ATR p644]

- HELOCS 43(a)(1)
- Timeshares 43(a)(2)
- Reverses 43(a)(3)(i)
- Temporary/Bridge if 1yr or less 43(a)(3)(ii)
- Initial construction if 1yr or less 43(a)(3)(ii)
- Refinance of "Non-standard mortgage" to "Standard mortgage" 43(d) [ATR p651]
- Investment properties
- HFAs, DFIs, DAs, CHDOs, and certain non-profits

**HOEPA (12 CFR § 226.32) "Section 32 Loans"**

**High-Cost Mortgage Loans**

- Consumer primary dwelling including HELOC
- Exemptions: Reverse mortgage, initial construction of dwelling, USDA Direct Lending, Housing Finance Authority
- Lower percentage for APR vs. APOR
  - 6.5% first lien \$50,000 or more
  - 8.5% first lien under \$50,000
  - 8.5% for subordinate

**Section 32 Points & Fees**

- 5% for loan \$20,000 or more
- 8% for less than \$20,000
- No balloon unless "rural lender"
- No negative amortization, default rate increase, limited prepayment penalty
- Homeownership counseling required

**HPML (12 CFR § 226.35) "Section 35 Loans"**

**Higher-Priced Mortgage Loans** [ATR p645]

- First lien: APR equal or exceeds APOR by 1.5% 43(b)(4)\*
- Subordinate Lien: APR equal or exceeds APOR by 3.5%
- APOR link: <http://www.ffiec.gov/ratespread/aportables.htm>
- APOR 4-1-13 examples: 30yr rate=3.6%, 15yr rate=2.82% \*3.5% for "Small Creditor"

**Max Points and Fees Known At or Before Consummation**

- Includes 1026.32(b)(1)(i)-(vi) [ATR p640]
- MAX:<12.5=8%, 12.5k-20k=1k, 20k-60k=5%, 60k-100k=3k, >100k=3%
- 1. 1026.4(a)&(b) previous TILA fin charges + "mortgage broker fees" not already included in TILA fin charges
- 2. 1026.4(c)(7) All real estate related fees unless they are
  - a) reasonable, b) creditor receives no direct/indirect compensation, and c) not paid to an affiliate (iii)
- 3. credit life (iv)
- 4. prepayment penalty on current loan in 1<sup>st</sup> 36 months (v)
- 5. prepayment penalty on loan being paid off if paid to note holder, servicer or affiliate (vi)

**Excludes 1026.32(b)(1)(i)(A)-(F)**

1. interest or time price differential (A)
2. gov mort insurance or guaranty (B)
3. non-gov mort ins or guaranty if post-closing (C)(1)
4. non-gov mort ins or guaranty at closing if a) does not exceed government rate and b) prorated refund on early payoff (C)(2)
5. bona fide 3rd party real estate fees not retained by the creditor, loan originator or affiliate if not specifically required to be included above (D)
6. up to 2 discount points if rate does not exceed APOR by more than 1%(E)\*\*
7. up to 1 discount point if rate does not exceed APOR by more than 2%(F)\*\*

\*\*rate must be reduced according to "established industry practices" (i.e. ¼% interest rate per 1 discount fee)

**Presumptions of Compliance**

- QM-Non-HPML (Prime loans) = Safe harbor and presumption of compliance. 43(e)(1)(i) [ATR p654]
- QM-HPML (Sub Prime Loans) = Rebuttable presumption of compliance. 43(e)(1)(ii) [ATR p655]
- Non-QM = No presumption of compliance.

**Consequences of Non Compliance**

- Damages-Actual [TILA 130\(a\)](#)
- Can "emotional distress" be part of TILA "actual damages"? See dicta in unpublished [Butler v. Sterling, Inc., 210 F.3d 371, 2000 WL 353502 \(6th Cir. 2000\)](#)
- Damages-Attorney fees & court costs TILA 130(a)
- Damages-2 x amount of finance charges TILA 130(a)
- Defense to foreclosure TILA 130(k)
- Assignee liability [TILA 131](#)
- Regulatory scrutiny

**Miscellaneous**

**Record Retention:** 3 years after disclosures if secured by a dwelling [ATR p639]

**Mortgage Related Obligation ("MRO") for 43% Limit Includes:**

- Property taxes
- Property insurance
- Condo/Co-op/HOA dues
- Ground lease and leasehold payments

**Prepayment Penalties Only Permitted in a Covered Transaction if:**

- APR cannot increase post-closing
- QM loan
- Not an HPML
- 2% allowed within first 2 years
- 1% allowed during 3<sup>rd</sup> year
- Not allowed at all after 3 years

**Small Creditor definition**

- Assets of 2B or less at end of previous year
- Together with affiliates, originate 500 or fewer 1<sup>st</sup> lien loans
- Exemption would apply only to loans held in portfolio