

July 9, 2012

The Honorable Richard Cordray
Director
C/O Monica Jackson,
Office of the Executive Secretary,
Bureau of Consumer Financial Protection,
1700 G Street, NW,
Washington, DC 20552

Re: Docket No. CFPB-2012-0022 – Notice of Re-opening comment period and request for comment

Submitted electronically via Regulations.gov

Dear Director Cordray:

The National Association of REALTORS¹ and the Community Mortgage Banking Project² appreciate the Bureau's efforts to ensure the final Ability to Repay (ATR) rule and Qualified Mortgage (QM) definition establish the proper balance between establishing sustainable lending standards and preserving access to affordable mortgage credit. The reopening of the comment period focuses on two critical issues: the proper standard for assessing a borrower's capacity to afford their monthly mortgage payments under the QM standard, and the legal protections accorded lenders for originating QMs.

The Qualified Mortgage definition will shape access to and the cost of mortgage credit for the foreseeable future. Even if the rule is done perfectly, it will tighten access to credit in an already tight lending environment. It is critical therefore that the Consumer Financial Protection Bureau (CFPB) strongly lean towards maximum consumer access to mortgage credit in the final QM definition. The broadest possible QM, consistent with sustainable lending standards, combined with strong and clear legal protections for lenders, will ensure maximum access to credit and minimal market disruption.

Any effort to form the QM rule around the debt-to-income (DTI) ratio must be undertaken with extreme care and in the context of the numerous other elements of the ATR rule, the Home Ownership Equity Protection Act (HOEPA) as modified and strengthened by the Dodd Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), and the Federal Reserve's Loan Officer Compensation Rule (LO Comp). While all of these laws and rules have provided additional consumer protections, they have also resulted in a sharp tightening of lending standards. Some restraint was, of course, appropriate. However, legal and compliance uncertainty stemming from these rules have resulted in additional tightening that is constraining a housing recovery. Furthermore, much of the data analyzed, including the data below contain loans that simply would not be made any more because of the laws and rules above and other changes in existing rules and the market structure.

¹ The National Association of REALTORS® is America's largest trade association representing 1.1 million members involved in all aspects of the residential and commercial real estate industries.

² The Community Mortgage Banking Project (CMBP) is a public policy organization representing the interests of independent, community-based mortgage bankers.

I. DTI Analysis

Historically, the DTI -- especially the “back-end” or total debt-to-income (TDTI) ratio have been key metrics used to gauge a borrower’s ability to repay a mortgage. A borrower’s ability to stay current on mortgage, consumer credit, or student debt obligations diminishes as the amount of debt service required rises relative to the borrower’s income. This measure has been incorporated into both manual and automated underwriting systems used in the industry. Other measures of a borrower’s ability to repay, including cash and near-cash reserves, residual income and stability of income, have also been used, but public data on these factors and their link to loan performance is scarce.

A. Performance Metric

The FHFA’s use of the ever 60-day delinquency metric for measuring loan performance is consistent with a broad selection of recent research on this issue. However, some analysts have utilized measures of survival such as hazard models as well as other measures of performance relating mortgage performance to time elapsed from origination. We feel that this latter practice may provide additional valuable insights.

B. HLP Data Provided by the CFPB

The HLP data set used by the FHFA to analyze the performance of mortgages backed by Fannie Mae and Freddie Mac is limited in its representation of the sub-prime and jumbo markets. What’s more, the performance of loans sold to the GSEs has been observed to differ from those held in bank portfolios and those sold into private label securities (PLS).³ However, a unique dataset studied by Jian, Nelson, and Vytlačil⁴ might provide insights. The dataset used by the authors is proprietary to an unspecified bank, but “contains all information obtained at origination including the loan contract terms, property data, and borrower financial and demographic data, as well as monthly performance data through 2009.” The authors point out that the dataset includes “income, cash reserves, employment status, etc.” In their analysis, they use front-end DTI, but the authors find that cash reserves are a statistically significant and negatively correlated with default. In other words, higher cash reserves do correlate with fewer defaults. This data set would at a minimum help to clarify the impact of cash reserves on delinquency, but it might also shed light on other factors not mentioned by the authors.

C. Other Data Sources

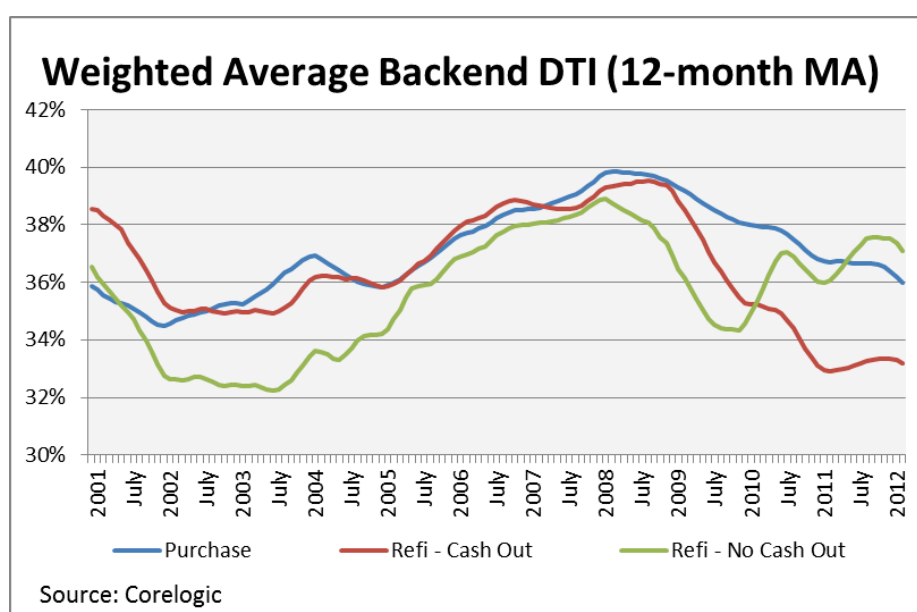
The mortgage datasets from Corelogic and Lender Processing Services (LPS) are both limited in their coverage of the market in that the underlying data comes from the largest mortgage servicers and agencies. The datasets include mortgages held in portfolio as well as those from a broad cross section of borrower quality, but the Blackbox data set can be used to supplement the data for subprime borrowers. Based on conversations with staff of the two organizations, neither has the ability to derive the performance of loans made by the USDA (Rural Development) or Office of Public and Indian Housing. The Corelogic and LPS datasets are derived from data used and provided by servicers, but they have two short coming that would hinder the intended analysis: neither has information on either residual income or reserves, and the debt-to-income ratio is not complete for a large share of both datasets. Furthermore, the LPS dataset is limited to front-end DTI.

³ John Krainer and Elizabeth Laderman, “Mortgage Loan Securitization and Relative Loan Performance.” 2009

⁴ Wei Jiang, Ashlyn Aiko Nelson, and Edward Vytlačil, “Effects of Origination Channel and Information Falsification on Mortgage Delinquencies”

D. Insights from Available Data

Despite limitations, the aggregated data provided by Corelogic, LPS, and the CFPB can provide valuable insights. Charted below is the 12-month moving average for the weighted average TDTI. This measure rose steadily for purchase production as well as for both cash out and non-cash out refinance production from the cyclical lows in 2002 and 2003 to their highs in 2008. Since 2008, the measure fell sharply for purchase originations as well as cash-out refinances, but remains elevated for non-cash out refinances. The persistence of the high average TDTI for non-cash out refinances likely reflects the record low rates attracting borrowers who originated in the previous five years and the slow income growth during the economic correction. In addition, these data likely include streamline refinances that reduce the risk on the underlying existing mortgage exposure, even in the presence of high levels of nonmortgage debt. The cyclical nature of the TDTI measure is apparent in this chart as originators have sought to tighten requirements and adhere to upper bounds for TDTI prescribed by the GSEs, the FHA, the VA and the USDA.



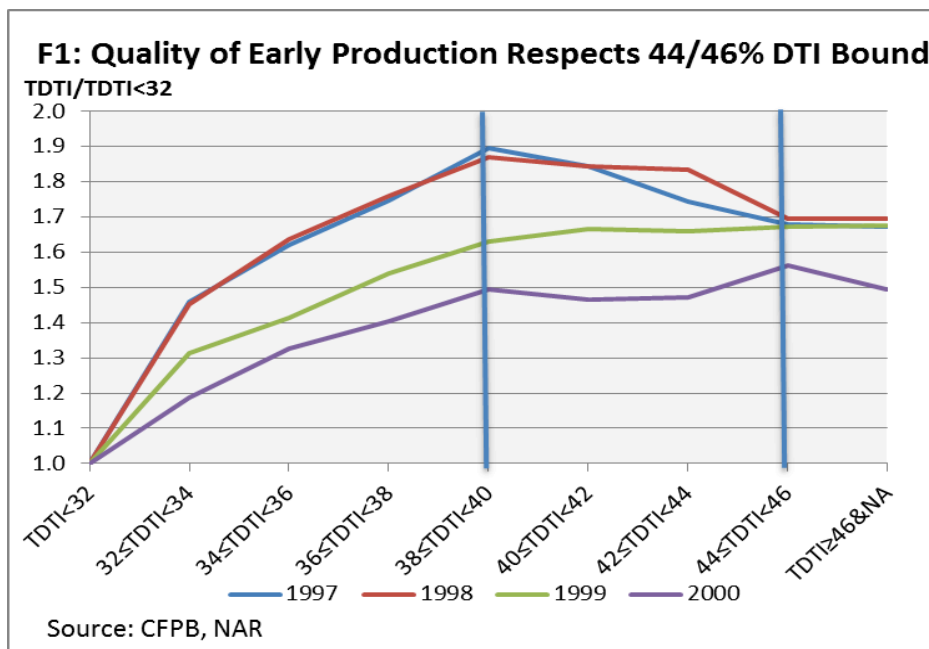
While the aggregate increase in TDTIs subsided for purchase originations and cash-out refinances, the growth of TDTIs during the boom is important. As illustrated below by the data provided from the CFPB, the share of loans with a back-end debt-to-income ratio greater than or equal to 42% rose between 1997 and 2007. The share of mortgages by dollar volume of borrowers with a TDTI of 46% or higher jumped from 14% in 2001 to a peak of 31% in 2007 before falling back to 15% in 2009. Meanwhile the share of mortgages by dollar volume for borrowers with a TDTI less than 32% fell from 50% in 2003 to 28% in 2007 before rising to 49% in 2009.⁵

⁵ The color scale for the TDTI columns below 32 and greater than or equal to 46 are done separate from those between 32 and 46 to allow for insight into shifts in the central portion of the market by TDTIs versus the large cohorts at either end of the spectrum.

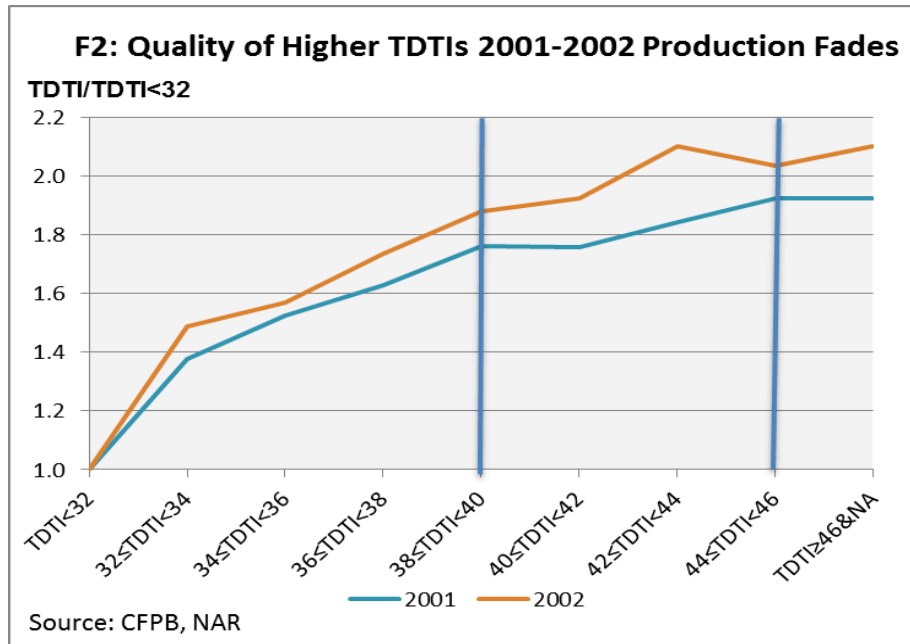
T1: High TDTI Lending Expanded During the Boom at the Expense of Low TDTI: TDTI Share by Dollar Volume									
	DTI < 32	32 ≤ DTI < 34	34 ≤ DTI < 36	36 ≤ DTI < 38	38 ≤ DTI < 40	40 ≤ DTI < 42	42 ≤ DTI < 44	44 ≤ DTI < 46	DTI ≥ 46
1997	49%	8%	9%	9%	8%	6%	4%	2%	2%
1998	55%	7%	7%	7%	6%	5%	4%	2%	3%
1999	48%	7%	7%	7%	6%	5%	4%	3%	8%
2000	39%	7%	7%	7%	7%	6%	5%	5%	16%
2001	47%	6%	6%	6%	6%	5%	5%	4%	14%
2002	48%	6%	6%	6%	5%	5%	4%	4%	14%
2003	50%	6%	5%	5%	5%	4%	4%	4%	14%
2004	40%	6%	6%	6%	6%	5%	5%	5%	21%
2005	34%	6%	6%	6%	6%	6%	6%	5%	24%
2006	29%	6%	6%	6%	6%	6%	6%	6%	28%
2007	28%	5%	6%	6%	6%	6%	6%	6%	31%
2008	34%	6%	6%	6%	6%	6%	6%	5%	26%
2009	49%	6%	6%	5%	5%	5%	4%	4%	15%

Source: CFPB, NAR

Market Share only tells part of the story. The ever 60+ day delinquency data provided by the CFPB from the HLP data set enable review of the performance of loans originated with higher TDTIs. To aid analysis, the loan performance by TDTI as measured by the ratio of each TDTI bucket's 60+ day delinquency rate relative to the delinquency rate for the under 32% TDTI bucket is charted below. For the 1997 and 1998 vintages, the relative delinquency rate declines as the TDTI approaches the 45% mark where the GSEs have historically restricted originations. Delinquency rates eased or plateaued thereafter indicating that other measures likely had been taken to reduce default risk at higher TDTI levels such as additional underwriting or reserve requirements.

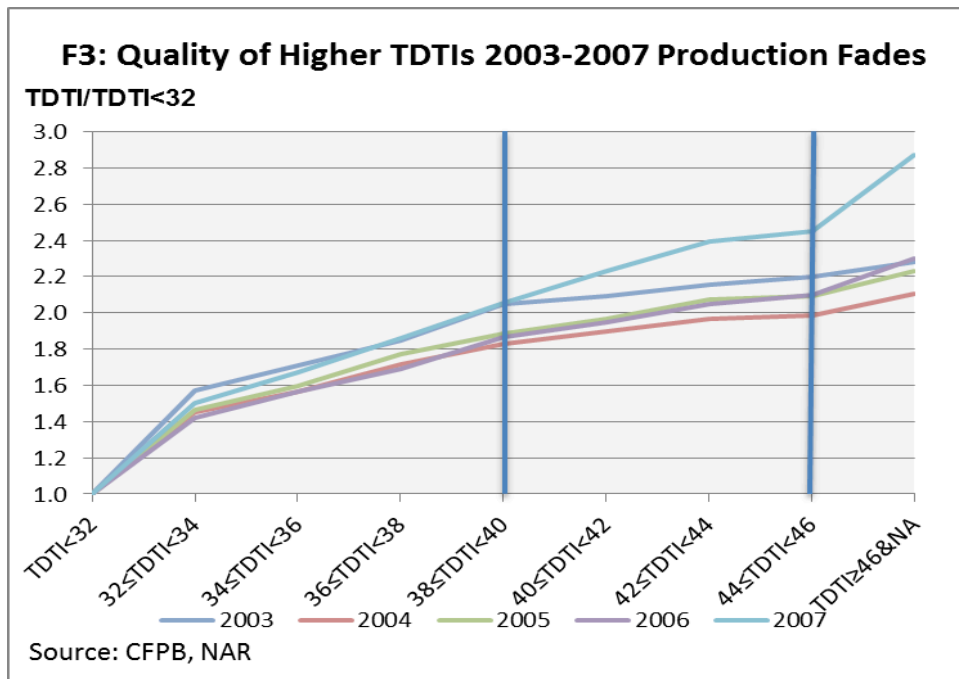


By 2001, the change in performance was apparent. The relative delinquency rates increased between the 38 ≤ TDTI < 40 cohort and 44 ≤ TDTI < 46 cohort. In addition, relative delinquency rates above the latter cohort rose in 2002.

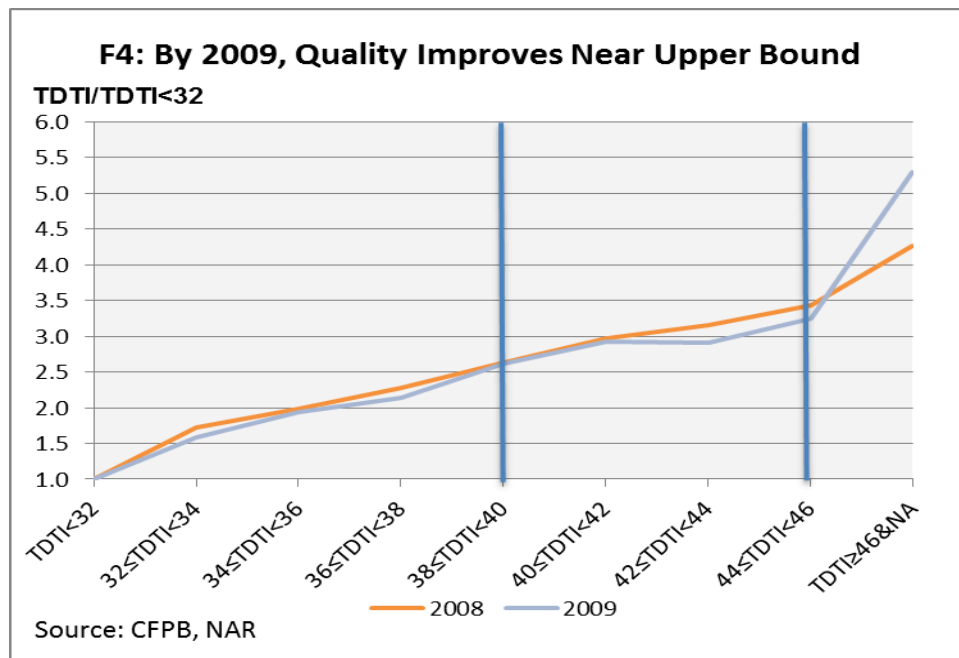


Researchers Demyanyk and Hemert⁶ illustrate the monotonic decline in loan quality from 2001 to 2006, adjusted for observable characteristics, in a data set consisting of subprime loans held in private label securities. While the HLP data set would not include mortgages in PLS securities, the fact that there is no consistent definition of subprime and the large shares of high DTI loans as reflected in table T1 above suggests that the prime and near-prime borrowers in the HLP dataset might also reflect this decline in loan quality. The chart below depicts the steady upward creep in delinquency rates between the $38 \leq \text{TDTI} < 40$ and $44 \leq \text{TDTI} < 46$ cohorts between 2003 and 2007. In addition, relative delinquency rates for TDTIs above the 46% in all origination years in this range rose over this period.

⁶ Yuliya Demyanyk and Otto Van Hemert. "Understanding the Subprime Mortgage Crisis"

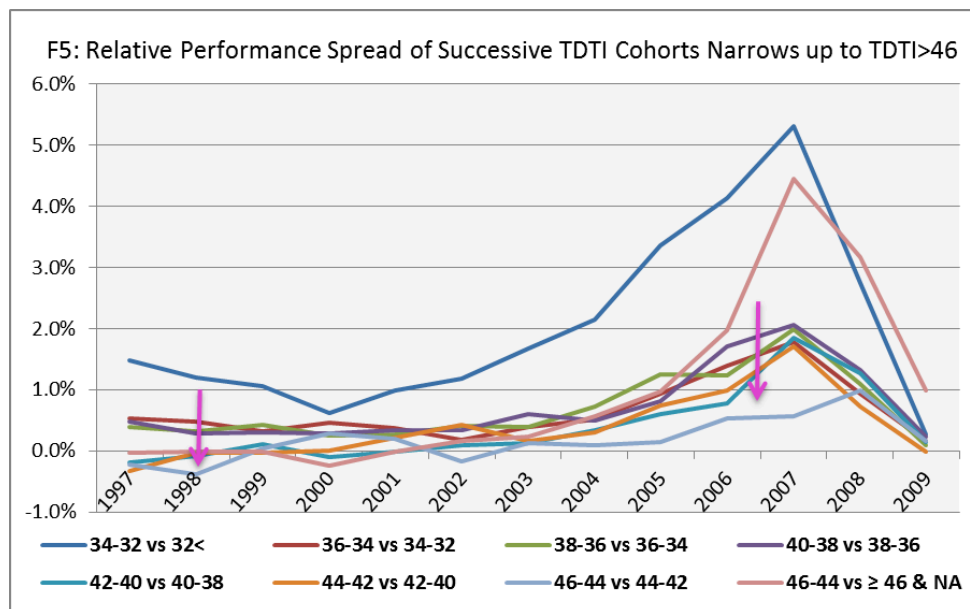


By 2008, the magnitude of the relative delinquencies jumped significantly, but this observation is likely a result of the sharp increase in unemployment during this period.⁷ It is worth noting that relative delinquency rates in 2009 appear to ease relative to the 40≤TDTI<44 TDTI cohorts in a pattern reminiscent of the 2000 and 2001 originations before rising sharply thereafter. It is not clear what caused the sharp increase in relative delinquency rates above 46%, but that trend may reflect the poor performance of loans refinanced in 2009.



⁷ The seasonally adjusted unemployment rate rose from 5.0% in January of 2008 to 7.3% by years end. That rate jumped to 9.9% by December of 2009.

This sequence of graphs depicts how in pre-boom periods the relative delinquency rate declined as the TDTI peaks prior to and declines approaching the $44 \leq \text{TDTI} < 46$ cohort before plateauing thereafter and how this relationship broke down over time. This pattern likely reflects the usage of a 45% TDTI metric as the acceptable bounds for by automated underwriting at both Fannie Mae and Freddie beyond which loans are still made, but with greater scrutiny. An alternative method to view originator behavior around the upper TDTI bounds is to look at the performance of TDTI cohorts relative to the next lowest cohort as depicted in chart F5. For most years, the highest cohorts show the lowest relative increase in delinquency. For instance, the line representing the difference between “46-44 vs. 44-42” is the lowest line in most years, while the “44-42 vs. 42-40” in chart F5 is the next in succession. The smaller differences in this metric as the 45% bound is approached suggest that originators were taking steps to



limit risk as TDTI increased, but that this relationship changed over time. By 2004, the spread between the performance of mortgages with a TDTI between 44 and 46 and those greater than or equal to 46 had changed dramatically and it was second only to the difference in performance of the lowest two cohorts. However, the relative order of the other groups was reasonably persistent suggesting an effort to mediate risk as TDTI increased. Concurrent additional risk factors likely contributed to the upward creep in spreads of the TDTI ranges and increase in relative delinquency at and above 46% TDTI.

E. Insights from Recent Literature

Using data from LPS (front-end DTI), Amromin and Paulson⁸ found that, “**the DTI for prime loans is not significantly correlated with defaults, except for loans originated in 2007, but it matters consistently for subprime loans.**” Foote et al⁹ also found that the front-end DTI measured at origination was not a strong predictor of default, but that it was more important for sub-prime borrowers with low credit scores. Likewise, Demyanyk, Koijen, and Van Hemert¹⁰ found that the back-end DTIs were insignificant in most cases. More recently, work done by Jian, Nelson, and Vytlačil has shown that income falsification among low documentation loans and by inference the ability to manipulate DTIs, a factor

⁸ Gene Amromin and Anna Paulson, “Comparing Patterns of Default Among Prime and Subprime Mortgages.”

⁹ Christopher Foote, Kristopher Gerardi, Lorenz Goette, and Paul Willen. “Reducing Foreclosures: No Easy Answers”

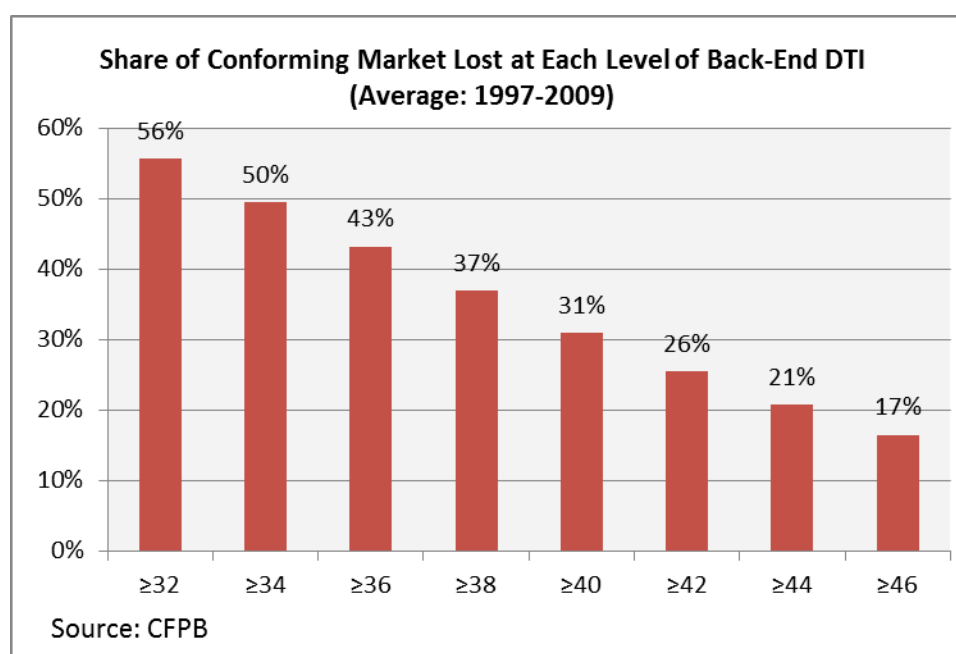
¹⁰ Demyanyk, Koijen, and Van Hemert, “Determinants and Consequences of Mortgage Default”

controlled for in the QM, distorted the traditional relationship between income and delinquency. The authors also found that cash reserves are statistically significant and negatively correlated with default and suggest that the lack of distortion of cash reserves is likely due to the fact that borrowers and brokers better understand the effects of income on loan qualification and pricing and that assets are more easily verified than income.

There is evidence that during the housing boom the share of borrowers who would otherwise have qualified for conventional loans with better credit terms, but who chose higher cost subprime loans was substantially larger than in previous years.¹¹ In addition, research by Ding, Quercia, Li, and Ratcliffe¹², who compared the performance of CRA loans and subprime loans, suggested that, “similar borrowers holding more sustainable products exhibit significantly lower default risks.” The authors found that while a DTI greater than or equal to 28% had significant explanatory power for default in the 2003 to 2004 period, it did not for the period from 2005 to 2006.

In summary, these studies indicate that while debt-to-income is a meaningful measure of risk, it does not appear to be the driving element in the recent surge of defaults. Rather, other factors, particularly the layering of multiple risk factors, appear to contribute more significantly to default.

F. Impact of Setting DTI Standards on the Market

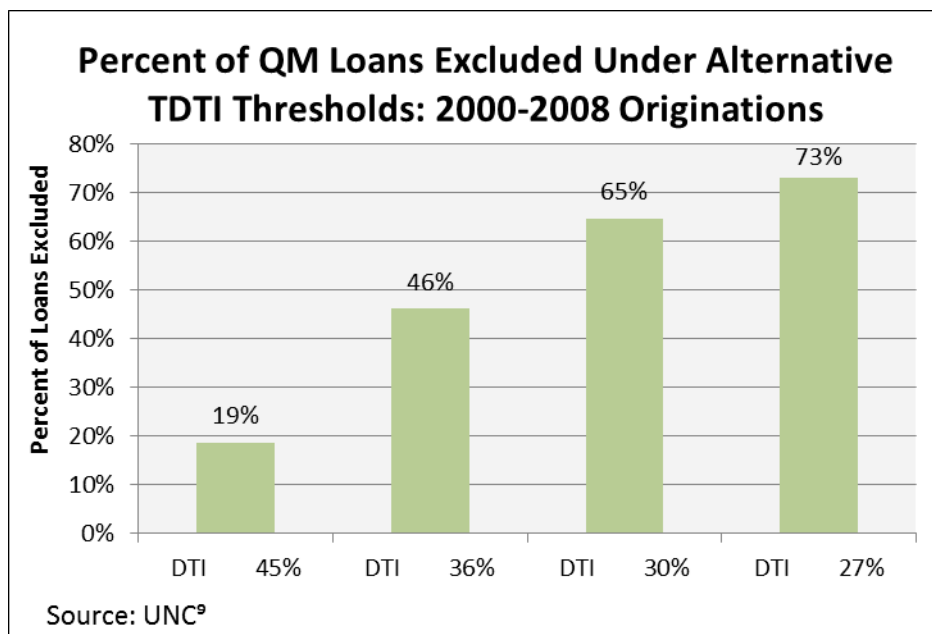


Historically, originations outside of the 45% bound were made, but required more in-depth underwriting as evidenced in chart F1 above. As depicted above, 26% of the mortgages in the HLP data set in the years between 1998 and 2009 had a back-end or total DTI equal to or greater than 42%; 17% of the market had a TDTI greater than or equal to 46%. Similar bounds that delineate the need for

¹¹ Brooks, R. and R. Simon. “Subprime Debacle Traps Even Very Credit-Worthy,” Wall Street Journal, December 3, 2007

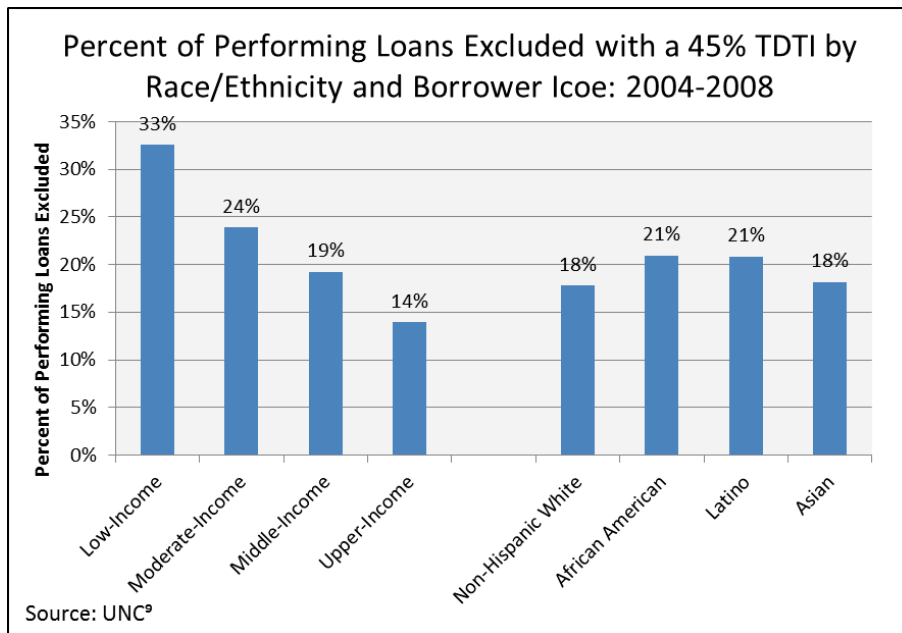
¹² Lei Ding, Roberto G. Quercia, Wei Li, and Janneke Ratcliffe. “Risky Borrowers or Risky Mortgages: Disaggregating Effects using Propensity Score Models”

compensating factors exist for the FHA and VA (e.g. 43% or 41%, respectively) and their performance likely reflect this. However, given policy makers desire to reduce the government's large role in the secondary mortgage market, a greater role for banks and private securitizations will be needed, making it critical to get the DTI standard in the QM right so that credit is not unnecessarily constrained (i.e., ensure that high quality loans with higher TDTIs are included in the QM).



The HLP dataset does not include subprime lending, which would likely increase the share of lending done at high TDTI portion of the market. An analysis performed by the University of North Carolina (UNC) and the Center for Responsible Lending (CRL)¹³ utilized the Corelogic and BlackBox datasets, which provide the best available picture of the subprime market, to show that 19% of borrowers over the period for 2000 to 2008 had a back-end DTI greater than 45%. Furthermore, the authors found that the higher TDTI requirements would be disproportionately born by low, moderate and middle-income borrowers as well as African Americans and Latinos.

¹³ Roberto Quercia, Lei Ding, and Carolina Reid (2012). "Balancing Risk and Access: Underwriting Standards for Qualified Residential Mortgages," UNC Center for Community Capital Research Report, January 2012.



G. QM in Context

An inflexible and/or overly restrictive DTI requirement is a specific example of unduly tightening credit. Notably, the UNC/CRL analysis did not identify DTIs as a major driver of risk. Using the core QM requirements as identified by the UNC/CRL study addresses the product features and elements that mitigate the riskiest aspects of the loans that harmed consumers during the mortgage crisis:¹⁴

- 1) They must have full documentation,
- 2) They are not interest-only or negative amortizing loans,
- 3) They do not include a balloon payment,
- 4) They do not have adjustable interest rates with fixed terms less than five years (recall the 2/28 and 3/27 products that were abused widely during the boom),
- 5) They do not have a maturity of greater than 30 years, and
- 6) They do not include a prepayment penalty.

Many of these provisions and their related problems have already been addressed in the market and via existing regulations. Dodd-Frank simply codifies these standards and, importantly, prevents their return to the market defined by the QM standard. While the UNC/CRL study was applying the QM standards in the context of QRM, their conclusion is relevant, “When we consider alternate DTI ratio thresholds, we find that, across the board, (the above) QM restrictions alone reduce the greatest percentage of foreclosures while minimizing the percent of borrowers excluded from the market.”¹⁵

In addition, the 3% cap on fees and points along with loan officer compensation and new HOEPA rules will strongly restrict deviation from standard mortgage or so-called “plain vanilla” products offered within a consistent interest rate structure. The 3% cap alone will likely restrict access to credit and if not properly structured to prevent discrimination via access to both affiliated and un-affiliated lenders, will restrict consumer choice and thus access to credit with no measurable benefit.

¹⁴ Id. At 13.

¹⁵ Id at 22-23.

H. Recommendations

To impose an inflexible or unduly restrictive requirement on DTI or TDTI appears to be unwarranted in the context of all that has been done already to reduce risky lending practices. One cannot eliminate all risk under any system of regulation or governance. To try to do so only serves to squelch opportunity and access to credit, especially for those Americans who most need and desire such opportunity.

We note that some consumer and banking organizations have jointly proposed a 43% total debt-to-income ratio as part of a “waterfall test” for defining a QM. However, based on data provided by FHFA to the CFPB, it is clear that a 43% TDTI QM standard would have eliminated from QM eligibility approximately 25% of the loans originated between 1997 and 2009. Even in 2009 and the pre-bubble years (1997 – 2002) – years marked by sensible underwriting standards and good loan performance – more than 20% of the loans originated would have exceeded the 43% standard. Clearly, a 43% TDTI in the QM definition would significantly reduce access to credit in the current market, a burden that would fall most heavily on low- and moderate-income families and first-time homebuyers.

Based on the performance data provided by FHFA, DTIs of as high as 46% would not appreciably increase the Ever 60 delinquency rate compared to DTIs in high thirty percent range. Moreover, the FHFA data also suggest that any inflection point for a steep rise in Ever 60 delinquencies is somewhere north of a 46% TDTI. Indeed, the other research cited herein suggests a weak correlation between TDTIs and loan performance, especially when other risk factors are controlled (as is done with the other features of the QM definition). Based on these data and the other research cited, we would encourage the CFPB to set the TDTI standard no lower than 46%, and to continue to evaluate the FHFA data and other sources to identify the point above 46% where loan performance begins to deteriorate significantly. The research may support an even higher TDTI standard.¹⁶

II. Need for Legal/Compliance Certainty and a Safe Harbor

To ensure that the consumer benefits of a broadly defined QM are not defeated by legal uncertainty and unpredictable litigation risk, we also urge the Bureau to adopt the QM as a safe harbor that affords lenders real protections when making the types of loans that government policy clearly seeks to encourage.

A. Rebuttable Presumption Concerns

Under the Dodd Frank Act, the liability for a violation of the ability-to-repay standard is intended to be harsh. Moreover, it is constructed in a way to provide individual borrowers and their counsel with a strong arsenal to stop foreclosure, obtain substantial compensation, and cover the attorney’s fees. No longer would borrowers have to await resolution of complex class action litigation to obtain relief. Any borrower that wishes to delay or stop a foreclosure, and any attorney representing such a borrower, has an incentive to raise an ability to pay violation. In fact, a competent consumer attorney handling a foreclosure would be compelled to scour the loan file to find a basis for such a claim.

Adding such a significant element of legal risk to every single underwriting decision a lender makes, and to every loan an investor buys, has the potential to drive capital away from the mortgage market. Recognizing this, Congress created the QM and conferred protections to lenders making these loans in

¹⁶ We note that several state housing finance agencies, as well as state anti-predatory lending laws, have set a 50% standard.

order to encourage lenders to make QMs broadly available as the “preferred” product in the market. Under this incentive structure, borrowers should seek them out, and lenders should make them widely available; conversely, lenders that don’t make QMs or steer borrowers to non-QMs would be subject to significantly enhanced legal risks.

However, for this incentive structure to work properly there needs to be a significant difference in the legal risks between QMs and non-QMs. The QM needs to provide lenders with a robust tool to stop meritless ability-to-repay litigation as early as possible in the legal process, and to eliminate the “settlement value” of such litigation. Unfortunately, in the wide majority of TILA-specific cases reviewed the courts have set a very low bar for plaintiffs to defeat the presumption in the early stages of litigation (see the legal review: <http://www.aba.com/aba/documents/news/LegalOpinion41312.pdf>).

As a result, establishing the QM as a rebuttable presumption would be of very limited value to lenders and investors in defending ability-to-pay litigation, even when making only qualified mortgages. Every borrower complaint filed – even a meritless one – has the potential to cost the lender or investor tens of thousands of dollars to defend or settle. If the QM provides a weak and ineffective tool for lenders to dispense with non-meritorious cases early in the process, even lenders who make only qualified mortgages will be faced with incurring major costs defending ability to pay litigation. We think this is precisely the result the “protections” of the QM were intended to avoid.

B. Implications of a Rebuttable Presumption

Creating a QM as a rebuttable presumption will have a significant impact on the cost and availability of credit, and on the structure of the housing finance market. First, the increased cost of defaulted loans and defending against meritless litigation will be passed on to all borrowers in the form higher rates and fees.

Second, without greater legal certainty, the primary tool lenders will have to reduce their exposure to these costs will be to tighten credit standards well inside those established by the QM itself. Just as doctors practice defensive medicine (e.g., ordering costly but unneeded tests) to head off the prospect of litigation, legal risk and uncertainty causes mortgage originators and investors to practice “defensive lending” by establishing stricter underwriting standards than might otherwise be implied by the underlying credit risk alone.

Significant credit overlays to address heightened litigation and repurchase risk are already a problem in the market, and are a major impediment to a more robust housing recovery. These overlays prevent thousands of otherwise creditworthy borrowers from purchasing a home or refinancing into a lower rate loan -- a burden that falls most heavily on low- and moderate-income borrowers and communities. If the QM is established with the very limited protections afforded by a rebuttable presumption, this already difficult credit-availability situation will grow significantly worse. Borrowers with modest credit blemishes, lower financial reserves, or nontraditional income sources (e.g., tips, boarder income, self-employment, etc.) will be hardest hit.

Lenders will also respond to the litigation risk by imposing substantial amounts of additional paperwork for borrowers to read, sign, acknowledge, notarize, etc. These would be designed to further buttress the lender’s defenses that the borrowers provided accurate information in loan application, that no other information was provided orally or in writing that could impact the underwriting decision, etc. Such disclosures are costly to implement and maintain, and run contrary to the Bureau’s efforts to simplify the mortgage process, reduce borrowers’ information overload, and eliminate excessive or

unnecessary paperwork. Bottom line – lenders and secondary market purchasers will do what they can to protect against the increased legal risk and uncertainty associated with a weak presumption, and the new costs will be borne by borrowers.

Finally, a QM established as a rebuttable presumption could also alter the competitive landscape in the mortgage market. Smaller, community-based lenders will have a particularly difficult time managing the unpredictable legal risks associated with originating QMs. These lenders do not maintain the in-house legal resources to manage frequent litigation, cannot afford the settlements required to dispense with meritless claims, and do not have large loan production operations across which to spread these costs.

As noted in the attached Chart, even if small lenders ultimately “win” a meritless ATR litigation case, the costs of defense (including discovery) can run \$50,000 on average (see chart). The Chart tracks the flow of litigation and the estimated range of costs at each step. As noted in the Buckley Sandler analysis of TILA litigation (referenced above and also attached), because borrowers have had little difficulty overcoming the rebuttable presumption, it is difficult for small lenders to avoid steep litigation costs. Under a rebuttable presumption, a motion to dismiss is likely effective only *after* the costly process of discovery (which can typically range \$35,000 to \$65,000). As a result, a single litigation case that is won can wipe out the profitability of 50 or more other loans – this is not a sustainable operating model for small lenders.

While the largest banks have the deep pockets to manage legal risk exposure and negotiate for settlement value, smaller lenders are simply forced to avoid these risks and costs. Community-based lenders would be faced with either leaving the market or confining their lending only to the highest quality, lowest risk segment of the QM market (i.e., QMs with strict overlays), while the rest of the market would be robbed of robust competition. In the end, the QM as a rebuttable presumption will likely further increase consolidation in the mortgage market into the hands of the biggest banks.

Arguments have been advanced that, based on experiences with state anti-predatory lending laws, ATR litigation will be rare and a safe harbor is therefore unnecessary. We believe that these state-law corollaries likely will not carry over to ATR litigation. The federal ATR/QM standards are unique, particularly with the provisions providing a life of loan defense to foreclosure, significant monetary relief (up to three years of finance charges, plus actual damages), and the payment of attorneys’ fees. In short, given the ability to halt foreclosure and potentially recover a large award, the incentive structure is to litigate, even if only for the foreclosure delay and settlement value. State high-cost home loan laws, patterned after the federal HOEPA law, simply do not provide for this expanse of liability on any holder of a subject loan, for the life of the loan.

We believe suggestions that state high-cost home loan laws are not generating litigation are off the mark, since very few such loans are even being made. For example, no federal government-sponsored or government run investor or insurer, including Fannie Mae, Freddie Mac, the Federal Home Loan Banks, VA, FHA and USDA, will purchase, insure or invest in any loan subject to a state anti-predatory lending law. In addition, many of the provisions of state anti-predatory lending laws provide the lender with a right to cure a violation and avoid protracted litigation. Some of these laws actually prevent recovery of attorneys’ fees if a lender cures a violation. Such a right is not present in the Dodd Frank Act or the ATR rule. For these reasons, lenders and investors reject suggestions that ATR litigation will be rare and inexpensive to resolve.

C. Benefits of a Safe Harbor

Establishing the QM as a safe harbor with clear, objective standards will provide lenders and investors with an affirmative defense that would be effective in defeating non-meritorious claims early in the legal process. As noted in the Chart and in the Buckley Sandler analysis, a safe harbor would ensure meritless cases could be dismissed earlier with a simple review of the loan documents to determine whether the loan, in fact, met the QM requirements.

Borrowers would still be able to bring ability-to-pay claims on QMs if they believe that their loan did not meet the QM standards due to errors in underwriting or documentation, or misrepresentations by the lender about the product features required to meet the QM. However, the safe harbor would provide lenders and investors with an affirmative defense that will allow non-meritorious cases to be resolved early and with finality, provided the loan was indeed a properly documented and originated QM. More importantly, over time, this would discourage meritless claims designed solely to extract a settlement or delay an otherwise legitimate foreclosure action.

Eliminating the uncertainty associated with QM litigation should reduce lenders' and investors' reliance on credit overlays that have contributed to excessively tight credit standards and the decline of what most market participants consider "common-sense" lending standards. In short, a safe harbor would bring to the mortgage market predictability in lending standards that a rebuttable presumption simply cannot.

III. Conclusion

We believe a broadly defined QM that encompasses the vast majority of the high quality lending being done today is essentially and unduly restrictive and inflexible DTI limits or cap are unnecessary. We also believe the incentive structure underlying a rebuttable presumption will undermine the objective of a broad QM. An effective ability to repay rule that provides strong incentives for lenders to focus on making well-underwritten QMs affordable and abundantly available to all creditworthy borrowers will require both a legal safe harbor for lenders and investors, and a clear, objective definition of the QM that itself is not unduly restrictive.

We appreciate the Bureau's efforts to re-open the comment period and consider the additional data and the concerns about the need for clear legal standards. If you have any questions, please contact Ken Trepeta at NAR at 202-383-1294, or Pete Mills at the Community Mortgage Banking Project at 571-357-1034.

Sincerely,

National Association of REALTORS®
Community Mortgage Banking Project

Attachments:

- 1) Rebuttable Presumption vs. Safe Harbor: What Practical Difference Does It Make?, by Buckley Sandler, LLP.
- 2) Chart: Estimated Legal Expenses at Each Stage of Litigation