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Debate Continues over Liability Protection for Lenders: Safe Harbor verses Rebuttable Presumption for "Qualified Mortgages"

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Fifteen months after the Federal Reserve Board proposed its initial ability-to-repay rule as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, no final rule has been adopted due in large part to the continuing debate over how to protect lenders who originate qualified mortgages—i.e., mortgages with no negative amortization, balloon payments, or terms exceeding 30 years, among other criteria—from lawsuits alleging violations of Dodd-Frank's new ability-to-repay requirement.

Mortgage banking advocates have urged the Consumer Financial Protection Bureau to adopt a QM rule that establishes a safe harbor, or complete liability protection, for lenders who originate qualified mortgages against lawsuits alleging ability-to-repay violations. Meanwhile, consumer advocates have urged the CFPB to adopt a QM rule that establishes only a rebuttable presumption of protection, which borrowers or investors could overcome by showing some particular deficiency in a lender's ability-to-repay determination.

The CFPB has invited comment on the litigation risk that lenders will face if it finalizes a QM rule that includes only a rebuttable presumption. Lenders predict substantial litigation will result; however, consumer advocates predict otherwise. Unwittingly or not, consumer advocates appear to be pressing for a final rule that will restrict access to the very market that they wish to expand due to the threat (real or perceived) of substantial litigation resulting from the adoption of a QM rule that includes only a rebuttable presumption standard.

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