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(Final Rule now published in Federal Register [79 FR 65300](#))

To: Clients and Friends

From: David F. Dulock

Subject: CFPB Issues Qualified Mortgage Points and Fees Cure Amendments

As a follow-up to our May 6, 2014, memorandum on the CFPB's proposed rule to add a cure provision to the qualified mortgage points and fees limitation in §1026.43(e)(3) of Regulation Z, this is to inform you that on October 22, 2014, the CFPB issued a final rule to that effect. This final rule is now published in the *Federal Register* ([click here](#)) and is effective on November 3, 2014, except as set out below. We have updated this memorandum on our website to advise you of that fact and of the final rule's November 3, 2014 effective date.

Although substantially similar to the proposed rule's cure provisions, the final rule contains the following modifications:

- Sunsets the cure provision, so that the cure will not be available for transactions consummated after January 10, 2021.
- Eliminates the condition that the creditor originate the loan in "good faith" as a qualified mortgage.
- Increases the cure period from 120 days to 210 days after consummation.
- Cuts off the ability to cure upon one or more of the following events: (i) the consumer's institution of a legal action in connection with the loan; (ii) the creditor, assignee, or servicer's receipt of the consumer's written notice that the loan's points and fees exceeded the qualified mortgage limit; or (iii) the consumer becoming 60 days past due on the loan.
- Requires the creditor or assignee to also pay interest to the consumer on the dollar amount by which the points and fees exceed the qualified mortgage limit, for the period from consummation until the cure payment is made to the consumer.

Amendments to §1026.43(e)(3)

For transactions consummated on or after November 3, 2014 – *i.e.*, the date the final rule is published in the *Federal Register* – the final rule amends §1026.43(e)(3) by revising the introductory text of paragraph (e)(3)(i) and adding new paragraphs (e)(3)(iii) and (e)(3)(iv). (**Note:** These amendments will not apply, however, to transactions consummated prior to November 3, 2014.) The text of the final rule's points and fees cure amendments to §1026.43(e)(3) is set out below:

(3) *Limits on points and fees for qualified mortgages.* (i) Except as provided in paragraph (e)(3)(iii) of this section, a covered transaction is not a qualified mortgage unless the transaction's total points and fees, as defined in §1026.32(b)(1), do not exceed:

* * * * *

(iii) For covered transactions consummated on or before January 10, 2021, if the creditor or assignee determines after consummation that the transaction's total points and fees exceed the applicable limit under paragraph (e)(3)(i) of this section, the loan is not precluded from being a qualified mortgage, provided:

(A) The loan otherwise meets the requirements of paragraphs (e)(2), (e)(4), (e)(5), (e)(6), or (f) of this section, as applicable;

(B) The creditor or assignee pays to the consumer the amount described in paragraph (e)(3)(iv) of this section within 210 days after consummation and prior to the occurrence of any of the

following events:

- (1) The institution of any action by the consumer in connection with the loan;
 - (2) The receipt by the creditor, assignee, or servicer of written notice from the consumer that the transaction's total points and fees exceed the applicable limit under paragraph (e)(3)(i) of this section; or
 - (3) The consumer becoming 60 days past due on the legal obligation; and
- (C) The creditor or assignee, as applicable, maintains and follows policies and procedures for post-consummation review of points and fees and for making payments to consumers in accordance with paragraphs (e)(3)(iii)(B) and (e)(3)(iv) of this section.
- (iv) For purposes of paragraph (e)(3)(iii) of this section, the creditor or assignee must pay to the consumer an amount that is not less than the sum of the following:
- (A) The dollar amount by which the transaction's total points and fees exceeds the applicable limit under paragraph (e)(3)(i) of this section; and
 - (B) Interest on the dollar amount described in paragraph (e)(3)(iv)(A) of this section, calculated using the contract interest rate applicable during the period from consummation until the payment described in this paragraph (e)(3)(iv) is made to the consumer.

Amendments to Official Interpretations of §1026.43(e)(3)

For transactions consummated on or after November 3, 2014 – *i.e.*, the date the final rule is published in the *Federal Register* – the final rule amends the Official Interpretations to §1026.43(e)(3) by adding new comments 43(e)(3)(iii)-1, -2, and -3 and new comments 43(e)(3)(iv)-1 and -2. (**Note:** These amendments will not apply, however, to transactions consummated prior to November 3, 2014.) The text of the final rule's new comments to §1026.43(e)(3) is set out below:

Paragraph 43(e)(3)(iii).

1. *Payment to the consumer.* The creditor or assignee, as applicable, complies with §1026.43(e)(3)(iii)(B) if it pays to the consumer the amount described in §1026.43(e)(3)(iv) within 210 days after consummation and prior to the occurrence of any of the events in §1026.43(e)(3)(iii)(B)(1) through (3). A creditor or assignee, as applicable, does not comply with §1026.43(e)(3)(iii)(B) if it pays to the consumer the amount described in §1026.43(e)(3)(iv) more than 210 days after consummation or after the occurrence of any of the events in §1026.43(e)(3)(iii)(B)(1) through (3). Payment may be made by any means mutually agreeable to the consumer and the creditor or assignee, as applicable, or by check. If payment is made by check, the creditor or assignee complies with §1026.43(e)(3)(iii)(B) if the check is delivered or placed in the mail to the consumer within 210 days after consummation.

2. *60 days past due.* Section 1026.43(e)(3)(iii)(B)(3) provides that, to comply with §1026.43(e)(3)(iii)(B), the creditor or assignee must pay to the consumer the amount described in §1026.43(e)(3)(iv) prior to the consumer becoming 60 days past due on the legal obligation. For this purpose, "past due" means the failure to make a periodic payment (in one full payment or in two or more partial payments) sufficient to cover principal, interest, and, if applicable, escrow under the terms of the legal obligation. Other amounts, such as any late fees, are not considered for this purpose. For purposes of §1026.43(e)(3)(iii)(B)(3), a periodic payment is 30 days past due when it is not paid on or before the due date of the following scheduled periodic payment and is 60 days past due when, after already becoming 30 days past due, it is not paid on or before the due date of the next scheduled periodic payment. For purposes of §1026.43(e)(3)(iii)(B)(3), the creditor or assignee may treat a received payment as applying to the oldest outstanding periodic payment. The following example illustrates the meaning of 60 days past due for purposes of §1026.43(e)(3)(iii)(B)(3):

i. Assume a loan is consummated on October 15, 2015, that the consumer's periodic payment is due on the 1st of each month, and that the consumer timely made the first periodic payment due on

December 1, 2015. For purposes of §1026.43(e)(3)(iii)(B)(3), the consumer is 30 days past due if the consumer fails to make a payment (sufficient to cover the scheduled January 1, 2016 periodic payment of principal, interest, and, if applicable, escrow) on or before February 1, 2016. For purposes of §1026.43(e)(3)(iii)(B)(3), the consumer is 60 days past due if the consumer then also fails to make a payment (sufficient to cover the scheduled January 1, 2016 periodic payment of principal, interest, and, if applicable, escrow) on or before March 1, 2016. For purposes of §1026.43(e)(3)(iii)(B)(3), the consumer is not 60 days past due if the consumer makes a payment (sufficient to cover the scheduled January 1, 2016 periodic payment of principal, interest, and, if applicable, escrow) on or before March 1, 2016.

(Note: Comment 43(e)(2)(i)-1 in explaining that a qualified mortgage must provide for *regular periodic payments*, states that it must require the consumer to make payments of principal and interest, *on a monthly or other periodic basis*, that will fully repay the loan amount over the loan term. Comment 43(e)(3)(iii)-2 above explains that 30 and 60 days past due mean when the payment is not paid on or before the due date of the next scheduled periodic payment. This begs the question of how to calculate the 30 and 60 day past due requirements when the scheduled periodic payments are other than monthly. The preamble to the final rule is also silent on this issue.)

3. *Post-consummation policies and procedures.* The policies and procedures described in §1026.43(e)(3)(iii)(C) need not require that a creditor or assignee, as applicable, conduct a post-consummation review of all loans originated by the creditor or acquired by the assignee, nor must such policies and procedures require a creditor or assignee to apply §1026.43(e)(3)(iii) and (iv) for all loans for which the total points and fees are found to exceed the applicable limit under §1026.43(e)(3)(i).

Paragraph 43(e)(3)(iv).

1. *Interest rate.* For purposes of §1026.43(e)(3)(iv)(B), interest is calculated using the contract interest rate applicable during the period from consummation until the payment described in §1026.43(e)(3)(iv) is made to the consumer. In an adjustable-rate or step-rate transaction in which more than one interest rate applies during the period from consummation until payment is made to the consumer, the minimum payment amount is determined by calculating interest on the dollar amount described in §1026.43(e)(3)(iv)(A) at each such interest rate for the part of the overall period during which that rate applies. However, §1026.43(e)(3)(iv) provides that, for purposes of §1026.43(e)(3)(iii), the creditor or assignee can pay to the consumer an amount that exceeds the sum of the amounts described in §1026.43(e)(3)(iv)(A) and (B). Therefore, a creditor or assignee may, for example, elect to calculate interest using the maximum interest rate that may apply during the period from consummation until payment is made to the consumer. See comment 43(e)(3)(iii)-1 for guidance on making payments to the consumer.

2. *Relationship to RESPA tolerance cure.* Under Regulation X (12 CFR 1024.7(i)), if any charges at settlement exceed the charges listed on the good faith estimate of settlement costs by more than the amounts permitted under 12 CFR 1024.7(e), the loan originator may cure the tolerance violation by reimbursing the amount by which the tolerance was exceeded at settlement or within 30 calendar days after settlement. The amount paid to the consumer pursuant to §1026.43(e)(3)(iv) may be offset by the amount paid to the consumer pursuant to 12 CFR 1024.7(i), to the extent that the amount paid to the consumer pursuant to 12 CFR 1024.7(i) is being applied to fees or charges included in points and fees pursuant to §1026.32(b)(1). However, a creditor or assignee has not satisfied §1026.43(e)(3)(iii) unless the total amount described in §1026.43(e)(3)(iv), including any offset due to a payment made pursuant to 12 CFR 1024.7(i), is paid to the consumer within 210 days after consummation and prior to the occurrence of any of the events in §1026.43(e)(3)(iii)(B)(1) through (3).

Amendment to Official Interpretations Comment 43(e)(3)(iv)-2 Effective August 1, 2015
Effective August 1, 2015, comment 43(e)(3)(iv)-2 is amended to read as follows:

2. *Relationship to RESPA tolerance cure.* Under Regulation X (12 CFR 1024.7(i)), if any charges at settlement exceed the charges listed on the good faith estimate of settlement costs by more than the amounts permitted under 12 CFR 1024.7(e), the loan originator may cure the tolerance violation by reimbursing the amount by which the tolerance was exceeded at settlement or within 30 calendar days after settlement. Similarly, under §1026.19(f)(2)(v), if amounts paid by the consumer exceed the amounts specified under §1026.19(e)(3)(i) or (ii), the creditor complies with §1026.19(e)(1)(i) if the creditor refunds the excess to the consumer no later than 60 days after consummation. The amount paid to the consumer pursuant to §1026.43(e)(3)(iv) may be offset by the amount paid to the consumer pursuant to 12 CFR 1024.7(i) or §1026.19(f)(2)(v), to the extent that the amount paid to the consumer pursuant to 12 CFR 1024.7(i) or §1026.19(f)(2)(v) is being applied to fees or charges included in points and fees pursuant to §1026.32(b)(1). However, a creditor or assignee has not satisfied §1026.43(e)(3)(iii) unless the total amount described in §1026.43(e)(3)(iv), including any offset due to a payment made pursuant to 12 CFR 1024.7(i) or §1026.19(f)(2)(v), is paid to the consumer within 210 days after consummation and prior to the occurrence of any of the events in §1026.43(e)(3)(iii)(B)(1) through (3).

The final rule also makes the following amendments to Regulation Z not addressed in this memorandum:

1. Amendments to the small servicer exemption in §1026.41(e)(4) by revising paragraph (e)(4)(ii) and the introductory text of paragraph (e)(4)(iii) to provide an alternative definition of the term “small servicer,” that would apply to certain nonprofit entities that service for a fee loans on behalf of associated nonprofit entities. (*Note:* the CFPB states on page 19 in the preamble to the final rule that “Regulation X cross-references the definition of small servicer in §1026.41(e)(4) for the purpose of exempting small servicers from several mortgage servicing requirements. Accordingly, in amending the small servicer definition in Regulation Z, the [CFPB] is also effectively amending the current Regulation X exemptions for small servicers. Specifically, the [CFPB] is exempting nonprofit small servicers from the requirements of Regulation X §§1024.38 through 41, except as otherwise provided in §1024.41(j), see §1024.30(b)(1), as well as certain requirements of §1024.17(k)(5).”)

2. Amendments to the ability-to-repay requirements in §1026.43(a)(3) by revising paragraph (a)(3)(v)(D)(1) and adding new paragraph (a)(3)(vii) to provide that certain interest-free, contingent subordinate liens originated by nonprofit creditors will not be counted towards the credit extension limit that applies to the nonprofit exemption from the ability-to-repay requirements.

3. Amendments to the Official Interpretations by revising comment 41(e)(4)(ii)-2 and adding comment 41(e)(4)(ii)-4; revising comments 41(e)(4)(iii)-2 and -3 and adding comments 41(e)(4)(iii)-4 and -5; and adding comment 43(a)(3)(vii)-1.

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