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To: Clients and Friends

From: David F. Dulock

Subject: CFPB Publishes Qualified Mortgage Points and Fees Proposed Amendments in May 6, 2014, *Federal Register* (79 FR 25730)

As a follow-up to our April 30, 2014, memorandum ([click here](#)) notifying you of 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 the CFPB has now published this proposed rule for public comment in the May 6, 2014, issue of the *Federal Register* ([click here](#)). The text of the proposed amendments and their proposed official interpretations are set out below:

Proposed Amendments

(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) If the creditor or assignee determines after consummation that the total points and fees payable in connection with a loan 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 creditor originated the loan in good faith as a qualified mortgage and the loan otherwise meets the requirements of paragraphs (e)(2), (e)(4), (e)(5), (e)(6), or (f) of this section, as applicable;

(B) Within 120 days after consummation, the creditor or assignee refunds to the consumer the dollar amount by which the transaction's points and fees exceeded the applicable limit under paragraph (e)(3)(i) of this section at consummation; and

(C) The creditor or assignee, as applicable, maintains and follows policies and procedures for post-consummation review of loans and refunding to consumers amounts that exceed the applicable limit under paragraph (e)(3)(i) of this section.

Proposed Official Interpretations

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

1. *Originated in good faith as a qualified mortgage.* i. The following may be evidence that a creditor originated a loan in good faith as a qualified mortgage:

A. A creditor maintains and follows policies and procedures designed to ensure that points and fees are correctly calculated and do not exceed the applicable limit under §1026.43(e)(3)(i); or

B. The pricing for the loan is consistent with pricing on qualified mortgages originated contemporaneously by the same creditor.

ii. In contrast, the following may be evidence that a loan was not originated in good faith as a qualified mortgage:

A. A creditor does not maintain, or the creditor has, but does not follow, policies and procedures designed to ensure that points and fees are correctly calculated and do not exceed the applicable limit under §1026.43(e)(3)(i); or

B. The pricing for the loan is not consistent with pricing on qualified mortgages originated contemporaneously by the same creditor.

2. *Policies and procedures for post-consummation review and refunding.* A creditor or assignee satisfies §1026.43(e)(3)(iii)(C) if it maintains and follows policies and procedures for post-consummation quality control loan review and for curing (by providing a refund) errors in points and fees calculations that occur at or before consummation.

Clients interested in commenting on the proposed rule must submit comments, identified by Docket No. CFPB–2014–0009 or RIN 3170–AA43, by any of the following methods:

- *Electronic:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Mail/Hand Delivery/Courier:* Monica Jackson, Office of the Executive Secretary, Consumer Financial Protection Bureau, 1700 G Street NW., Washington, DC 20552.

All comments must be received on or before June 5, 2014, and should include the CFPB’s name.

Comments may be submitted on any or all aspects of the proposed amendments, but in submitting comments please take into consideration the following requests for comment contained in the CFPB preamble published with the proposed rule:

1. Page 25741 – Third Column

[T]he Bureau seeks comment on whether the good faith element of §1026.43(e)(3)(iii)(A) is necessary in light of the other proposed limitations on the cure provision. The Bureau also seeks comment on the proposed examples in comment 43(e)(3)(iii)–1, specifically including whether additional guidance regarding the term “contemporaneously” in comments 43(e)(3)(iii)–1.i.B and 43(e)(3)(iii)–1.ii.B is necessary, and whether additional examples would be useful.

2. Page 25742 – First Column

In outreach to industry stakeholders prior to this proposal, the Bureau learned that 120 days is a time period within which post-consummation quality control reviews generally are completed. The Bureau specifically requests comment more broadly, however, on whether 120 days is an appropriate time period for post-consummation cure of a points and fees overage, or whether a longer or shorter period should be provided; what factors would support any recommended time period; and, if the cure were available for a longer period, whether additional conditions should be applied beyond those in this proposal.

3. Page 25742 – Second Column

The Bureau solicits comment on whether [the] cure should be permitted only prior to receipt of written notice of the error from or the institution of any action by the consumer.

4. Page 25742 – Second/Third Column

The Bureau recognizes that, where points and fees have been financed as part of the loan amount and an overage is refunded to the consumer after consummation, the consumer will continue to pay interest on a loan amount that includes the overage. As a result, the consumer may pay more interest over the life of the loan than would have been paid absent the inadvertent points and fees overage. ... [T]he Bureau is not proposing that the cure provision require any means of restitution other than a refund of the actual overage amount to the consumer. However, the Bureau solicits comment on other appropriate means of restitution and in what circumstances they may be appropriate.

5. Page 25742 – *Third Column*

The Bureau requests comment on all aspects of the proposal ... including whether a post-consummation cure should be permitted, and whether different, additional, or fewer conditions should be imposed upon its availability, such as whether the consumer must be current on loan payments at the time of the cure.

Also in the proposed rule, the CFPB is proposing the following amendments to Regulation Z that are not addressed in this memorandum:

1. Proposed amendment to §1026.41(e)(4) 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:* This proposed change will also affect several provisions of Regulation X, which cross reference the Regulation Z small servicer exemption.)

2. Proposed amendment to §1026.43(a)(3) 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.

Those interested in commenting on either or both of the above proposed amendments to §1026.41(e)(4) and §1026.43(a)(3), respectively, must submit comments in accordance with the methods and time period set out on page 2 above.

Lastly, the CFPB is seeking comment on the following provisions in Regulation Z:

1. Whether and how to provide a limited, post-consummation cure or correction provision for general qualified mortgages originated under §1026.43(e)(2) that at consummation exceed the 43 percent monthly debt-to-income ratio limit in §1026.43(e)(2)(vi). The CFPB is not issuing a proposed rule for a specific debt-to-income ratio cure or correction at this time; it is only requesting comments on a potential cure and correction provision. See pages 25743 - 25745 of the CFPB’s preamble published with the proposed rule for a discussion of this issue and the CFPB’s request for comments.

2. The credit extension limit for the small creditor definition in §1026.35(b)(2)(iii)(B) and (C) - *i.e.*, 500 or fewer first lien covered transactions - which also will affect small creditor qualified mortgages under §1026.43(e)(5), (e)(6) and (f). See pages 25745 and 25746 of the CFPB’s preamble published with the proposed rule for a discussion of this issue and the CFPB’s request for comments.

Those interested in commenting on the above issues must submit comments in accordance with the methods set out on page 2 above. Comments must be received by July 7, 2014.

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