

SPECIAL ALERT: CFPB FINALIZES POINTS-AND-FEES CURE AND OTHER MORTGAGE RULE AMENDMENTS

OCTOBER 28, 2014

Last week, the CFPB [finalized](#) an important amendment to its ATR / QM Rule that provides a mechanism for curing points-and-fees overages on qualified mortgage (“QM”) loans, as well as more minor amendments to its mortgage origination and servicing rules. The new rules, which were [proposed](#) in April, are detailed below. The discussion below regarding the new origination rules, including the points-and-fees cure, will also appear with the American Bankers Association / BuckleySandler publication, *The New CFPB Mortgage Origination Rules Deskbook*. ([Click here](#) for information about obtaining copies of the *Deskbook*.)

I. EFFECTIVE DATES

The points-and-fees cure mechanism will be available for transactions consummated on or after the date the amendments are published in the Federal Register (except for a minor provision that applies only with respect to the forthcoming TILA-RESPA Integrated Disclosures (“TRID”) regime, which will be effective when that regime becomes effective in August of next year). The Bureau explicitly declined to permit the cure mechanism to apply to previously consummated loans. Also, as discussed below, the cure mechanism will sunset in 7 years. Last week’s other amendments will be effective on the date of the Federal Register publication.¹

II. POINTS AND FEES CURE

A. Mechanism

To cure a points-and-fees overage on a loan that would otherwise be a QM, the creditor or assignee must do two things:

1. *Make a timely compensation payment*: “within 210 days after consummation” — or sooner, as described below — the creditor or assignee must “pay[] to the consumer” both
 - (A) The dollar amount by which the transaction’s total points and fees exceeds the applicable [QM] limit ...; and
 - (B) Interest on [that] amount ..., calculated using the contract interest rate applicable during the period from consummation until the payment [is made].²

¹ CFPB, Final rule, *Amendments to the 2013 Mortgage Rules under the Truth in Lending Act (Regulation Z)* 1, 68-70, 81 (published Oct. 22, 2014), available at http://files.consumerfinance.gov/f/201410_cfpb_amendments_mortgage-rules-under-truth-in-lending-act.pdf (“*Amendments Release*”).

² § 43(e)(3)(iii), (iv). The Bureau came up with 210 days on the theory that post-consummation reviews are conducted within 180 days, and that creditors should be afforded 30 additional days to process and provide cure payments. *Amendments Release* at 51.

and

2. *Maintain and follow Ps & Ps*: the creditor or assignee must “maintain[] and follow[] policies and procedures for”
 - “post-consummation review of **points and fees** and”
 - “making payments to consumers” by the time and in the amount required by the cure mechanism.³

Note, however, that the policies and procedures need not require either (i) “a post-consummation review of all loans originated by the creditor or acquired by the assignee,” or (ii) that the creditor or assignee cure all points-and-fees overages.⁴

B. *When the Compensation Payment Must be Made*

While the creditor or assignee will never have *more than 210* days after consummation to make the compensation payment, it may have less time. That is because, for the cure to be effective, the payment also must be made “prior to the occurrence of any of the following events”:

1. “The institution of any action by the consumer in connection with the loan.” Note that regulatory action with respect to the loan does not cut off the right to cure.⁵
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” QM limit.⁶ or
3. “The consumer becoming 60 days past due on the legal obligation.”⁷ Determining when this “60 days past due” event has occurred can be tricky. We explain how to do it in the footnote.⁸

Calculating “Interest” on Variable-Rate Loans

“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 [amount by which points and fees exceeded the QM limit] at each such interest rate for the part of the overall period during which that rate applies.” Cmt. 43(e)(3)(iv)-1. Note, however, that a creditor or assignee is permitted to take the conservative route of simply “elect[ing] to calculate interest using the maximum interest rate that may apply during the period from consummation until payment is made.” *Id.*

³ § 43(e)(3)(iii)(C).

⁴ Cmt. 43(e)(3)(iii)-3.

⁵ § 43(e)(3)(iii)(B); see *Amendments Release* at 53.

⁶ § 43(e)(3)(iii)(B). Note that “[u]nlike the cut-off event related to the institution of legal action described above, the notice cut-off event is triggered only where the consumer specifically gives notice that points and fees exceed the applicable limit, and not by notice of any defect with the loan more generally.” *Amendments Release* at 54

⁷ § 43(e)(3)(iii)(B).

⁸ “Past due” in this context “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.” Cmt. 43(e)(3)(iii)-2. Here is an example:

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. ...

- 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.

C. Method and Effective Date of Payment

The payment always may be made “by check.”⁹ Alternatively, it may be made by any other means “agreeable to the consumer.” “If payment is made by check,” the check must be either “delivered or placed in the mail to the consumer within 210 days after consummation.”¹⁰ Presumably, then, a creditor also will comply with the timing requirement if the check is placed in the mail – even if not delivered – before any of the other events listed above.

D. Relationship to Tolerance Cure

Sometimes, an excess of points and fees paid by the consumer can also give rise to a “tolerance violation” under either Regulation X or, after August 1, 2015, under the TILA-RESPA Integrated Disclosures (“TRID”) Rule.¹¹ A “tolerance violation” occurs when the amount paid at closing by a consumer exceeds the creditor’s estimate by more than a prescribed tolerance. Tolerance violations, like the assessment of an excess of points and fees, may be cured, as described in the following footnote.¹²

To clarify the relationship between the cure provisions for tolerance violations and the new cure for points and fees, the Rule now provides that the amount paid to the consumer under the points-and-fees cure mechanism described above “may be offset by the amount paid to the consumer” to cure tolerance violations, to the extent that the amount paid to cure the tolerance violation is applied to fees or charges that fit within the “points and fees” definition.¹³ For example, assume a creditor would have to pay \$1,000 to cure a points-and-fees overage, and \$700 to cure a tolerance violation. Further assume that of the \$700 tolerance overage, \$200 constituted points and fees. Once the creditor reimburses the consumer with \$700 to cure the tolerance violation, the creditor can cure the points-and-fees overage by paying only an additional \$800. In other words, the \$200 in points and fees need not be repaid twice.

Note the important difference between these two cure provisions, however. A creditor *must* cure a tolerance violation; otherwise, it will be in violation of a CFPB rule. But a creditor is never obligated to

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- 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.
 - 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.

Id. (emphasis added). Note, as the example reflects, that “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.” *Id.* In addition, “the creditor or assignee may treat a received payment as applying to the oldest outstanding periodic payment.” *Id.*

⁹ Cmt. 43(e)(3)(iii)-1; see *Amendments Release* at 52 (“[T] the creditor or assignee (as applicable) may make the cure payment to the consumer by check without the agreement of the consumer.”).

¹⁰ Cmt. 43(e)(3)(iii)-1.

¹¹ *Amendments Release* at 67.

¹² Under Regulation X (12 C.F.R § 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 C.F.R. § 1024.7(e), the loan originator may cure the tolerance violation by reimbursing the amount by which the tolerance was exceeded within 30 days after settlement. Similarly, when the TRID Rule goes into effect on August 1, 2015, § 1026.19(f)(2)(v) will provide for most closed-end loans that “if amounts paid by the consumer exceed” estimates by more than the thresholds in § 1026.19(e)(3)(i) or (ii), the creditor must refund the excess to the consumer no later than 60 days after consummation. See also Cmt. 43(e)(3)(iv)-2 (effective Aug. 1, 2015).

¹³ Cmt. 43(e)(3)(iv)-2. Portions of this comment relating to the TRID Rule are not effective until it is, on August 1, 2015.

cure a points-and-fees overage, because failing to make a QM violates nothing. Creditors make QMs only to secure greater protection under the ATR / QM Rule.

E. Rationale and Sunset

Rationale. The Bureau believed a cure was needed because “some creditors seeking to originate and some secondary market participants seeking to purchase [QMs] may [otherwise] establish buffers, set at a level below the applicable points and fees limit.” And, as a result, creditors “may simply refuse to extend mortgage credit to consumers whose loans would exceed the buffer threshold (even though such loans, if under the applicable Regulation Z points and fees limit, would otherwise be [QMs]),” or “may charge more for loans exceeding the buffer threshold.” The Bureau was concerned that, where such buffers are established, “access to credit might be negatively affected.”¹⁴

Sunset. The point-and-fees cure mechanism only applies to transactions “consummated on or before January 10, 2021.”¹⁵ That date — exactly 7 years after the ATR/QM Rule became effective — is also the expiration date of the so-called “GSE / Agency” underwriting option for QMs. The Bureau included the sunset provision because it believed that

over time, creditors will develop greater confidence in compliance systems and also with originating loans that are not [QMs ...]. As this occurs, creditors should be able to relax internal buffers on points and fees that are predicated on the [QM] threshold and to provide consistent pricing for [QMs] that are at the margin of the points and fees limits. Additionally, the risk of repurchase demands based on points and fees overages should decrease with experience.¹⁶

III. STILL NO CURE FOR DTI OVERAGES

In the April proposal, the Bureau requested comment on the need for a cure for loans that inadvertently exceed the 43% debt-to-income limit for QMs made under Appendix Q. The Bureau deferred action on this issue, stating that it is considering the comments and whether to address the matter in a future rulemaking.

IV. NON-PROFIT EXEMPTION

Certain 501(c)(3) nonprofit organizations that lend to low- and moderate-income consumers are already exempt from the Ability-to-Repay rule if, among other conditions, the organization makes no more than 200 mortgages a year. The final rule amends this exemption to allow certain nonprofit lenders to continue extending certain interest-free, forgivable or deferrable loans, also known as “soft seconds,” without regard to the 200-mortgage loan limit.¹⁷

¹⁴ *Amendments Release* at 30.

¹⁵ § 43(e)(3)(iii).

¹⁶ *Amendments Release* at 36.

¹⁷ 12 C.F.R. § 1026.43(a)(3)(v)(D)(1), (vii); Cmt. 43(a)(3)(vii)-1.

V. SMALL SERVICER DEFINITION

Certain small servicers are exempt from some of the CFPB's new mortgage servicing rules, so long as they (and their affiliates) service 5,000 or fewer mortgage loans and they (or their affiliate) are the creditor or assignee for all of the loans. However, some non-profit organizations do not meet this exemption because they service loans, for a fee, from other associated non-profit lenders that are not considered "affiliates," even though they operate under mutual contractual obligations to serve the same charitable mission, and use a common name, trademark, or servicemark. Because of this unique corporate structure, these non-profit organizations did not qualify for the small servicer exemption, unlike their for-profit counterparts with similar arrangements. The final rule expands the small servicer exemption to include these non-profit organizations, so long as they are 501(c)(3) non-profits that service loans on behalf of other non-profits within a common network or group of nonprofit entities, and meet other requirements.¹⁸

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Questions regarding the matters discussed in this Alert may be directed to any of our lawyers listed below, or to any other BuckleySandler attorney with whom you have consulted in the past.

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¹⁸ 12 C.F.R. § 1026.41(e)(4)(ii)(C); see also Cmt. 41(e)(4)(ii)-2, 4.