

ANSWERS TO QUESTIONS RECEIVED DURING THE MAY BCG SEMINAR

The following questions came up during the May 2013 BCG Seminar on Compliance Management.

1. *Under the final rules the CFPB issued in January 2013, are lenders prohibited from imposing prepayment penalties on HELOCs? If so, are prepayment penalties prohibited in connection with all HELOCs or just HELOCs that meet the definition of a “high-cost mortgage”?*

Non-high-cost HELOCs

For HELOCs that do not meet the definition of high-cost mortgages, prepayment penalties do not appear to be prohibited under Regulation Z. Although the ability-to-repay final rule will impose prepayment penalty restrictions under new Section 1026.43(g)(1), HELOCs will be exempt from the ability-to-repay rule pursuant to new Section 1026.43(a)(1).

High-cost HELOCs

Beginning January 10, 2014 a high-cost HELOC may not have a prepayment penalty of any duration or in any amount. In January 2013, the CFPB issued a final rule that, among other things, effective January 10, 2014, will include certain HELOCs in the definition of a “high-cost mortgage.” 78 FR 6855. It also will revise the definition of “high-cost mortgage” by adding a new test that triggers coverage—a prepayment penalty test. This prepayment penalty test will be in addition to the APR test and points and fees test, both of which were revised under the final rule. Under this new prepayment penalty test, a loan is considered a high-cost mortgage loan under Section 1026.32 if under the loan contract the creditor can charge:

- A prepayment penalty more than 36 months after consummation; or
- Prepayment penalties that can exceed, in total, more than two percent of the amount prepaid.

For open-end credit plans (such as HELOCs), “prepayment penalty” means a charge imposed by the creditor if the consumer terminates the open-end credit plan prior to the end of its term, other than a waived bona fide third-party charge that the creditor imposes if the consumer terminates the open-end credit plan sooner than 36 months after account opening. New Section 1026.43(b)(6)(ii).

At the same time, the final rule retained the total prohibition of prepayment penalties on high-cost mortgages under revised Section 1026.32(d)(6). This makes one scratch their head—how can a prepayment penalty trigger coverage but also be prohibited? The CFPB’s attempted answer lies in new Comment 32(a)(1)(iii)-1. This comment clarifies that the new prepayment penalty test “effectively establishes a maximum period during which a prepayment penalty may be imposed and a maximum prepayment penalty amount that may be imposed.” More importantly, the comment also points out that a HELOC which meets any of the APR, points-and-fees, or prepayment-penalty tests will be prohibited from having any prepayment penalty. New Comment 32(a)(1)(iii)-2 provides examples of how to calculate whether the terms of an open-end credit agreement comply with these maximum prepayment penalty periods and amounts.

2. Under the CFPB’s Regulation Z Mortgage Servicing Rule, are HELOCs included in determining whether a servicer made 5,000 or fewer mortgage loans and, thus, meets the small servicer exemption?

Under the Regulation Z Mortgage Servicing Rule (specifically, new Section 1026.41(e)(4)(i)), small servicers will be exempt from the requirement to provide periodic statements for residential mortgage loans. 78 FR 10902. New Section 1026.41(e)(4)(ii) will define small servicers as a servicer that either:

- Services 5,000 or fewer mortgage loans, for all of which the servicer (or an affiliate) is the creditor or assignee; or
- Is a Housing Finance Agency, as defined in 24 CFR 266.5.

The CFPB’s Supplementary Information to the Regulation Z Mortgage Servicing Rule specifically provides that the “loan threshold is determined by counting loans that would be subject to the periodic statement requirement, thus any HELOCs would not be included in the count (because HELOCs are not subject to the periodic statement requirement).” 78 FR at 10976.