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Are You Ready to Comply with the CFPB's Final Amended Mortgage Servicing Rules?

Highlights from 900 + Pages of Regulation

By Gerald S. Sachs & Sara K. Weed

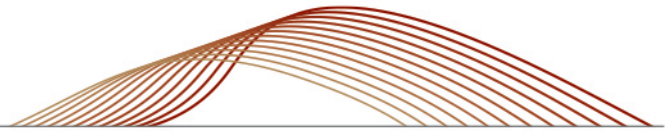
The Consumer Financial Protection Bureau (the "Bureau" or "CFPB") released final amendments to its 2013 Mortgage Servicing Rules (the "Final Amended Rules"). Pursuant to the Dodd-Frank Wall Street Reform and Consumer Financial Protection Act of 2010 and the authority granted to the CFPB pursuant to the Real Estate Settlement Procedures Act, the Truth in Lending Act, and their respective implementing regulations, Regulation X and Regulation Z,[1] the Final Amended Rules focus on providing homeowners with stronger foreclosure protections.

The most significant change entails the specific protections for confirmed successors in interest. Notwithstanding a general willingness to work with successors in interest to identify foreclosure alternatives, the mortgage servicing industry has been significantly limited in its ability to directly communicate with non-borrowers due to limits imposed by data privacy and state-specific laws governing legal liability for mortgage debt. Consumer advocates have been noting for quite some time that many surviving spouses and other family members who were not signatories to the mortgage, for example, were having a difficult time asserting the standing necessary to communicate with servicers to prevent foreclosures.

The Bureau's common sense approach allows servicers to communicate and otherwise interact with a successor in interest to the same extent as if he/she were the borrower, provided the successor in interest's status can be validated. The Final Amended Rules require servicers to (1) respond to a written request from a successor in interest by providing a description of the documents the servicer reasonably believes will be required to confirm the person's identity and ownership interest and (2) maintain policies and procedures designed to facilitate communication with successors in interest to provide the documents described above and to provide notification as to whether successor in interest status has been confirmed. By enacting a relatively general standard and providing examples, the Bureau has shown that it understands identification requirements vary depending on state law.

The Bureau also addressed other specific concerns relating to successors in interest.

- **Broadened Definition of "Successor in Interest."** Modeled on categories of transfers protected under the Garn-St. Germain Act,[2] successors in interest subject to protections under the Final Amended Rules include a surviving spouse, as well as the following: (1) a spouse or child of the borrower that becomes the owner of the property directly by death of the borrower; (2) a spouse of the borrower that becomes an owner of the property (resulting from a decree of a dissolution of marriage, legal separation agreement, or from an incidental property settlement agreement); and (3) a beneficiary of an *inter vivos*



trust into which the mortgage is transferred (in which the borrower remains a beneficiary and which does not transfer of rights of occupancy in the property).[3] The Bureau declined to adopt the suggestion that these transferees be required to assume the mortgage to be eligible for successor in interest status. Thus, these parties stand in the shoes of the borrower on the basis of their interest in the asset securing the mortgage (notwithstanding their lack of obligation under the mortgage itself).

- **Debt Collection.** The Fair Debt Collections Practices Act ("FDCPA") generally prohibits communication with third-parties during the collection of the debt.[4] The Bureau acknowledging that this prohibition would necessarily restrict the ability of servicers to communicate with successors in interest. Thus, the Bureau issued an advisory opinion pursuant to Section 813(e) of the FDCPA which effectively puts a confirmed successor in interest in the shoes of the "consumer" for the purposes of communicating about the collection of a debt.[5] A servicer can communicate with a confirmed successor in interest without committing a *per se* violation of the FDCPA.

- **Data Privacy.** In recognizing servicers' concerns, the Bureau has made it clear that servicers can disclose information to confirmed successors in interest pursuant to the Gramm-Leach Bliley Act and its implementing regulation, Regulation P. The Bureau specifically included disclosure of protected information to successors in interest as allowable pursuant to federal law—without the need to offer a standard opt-out.[6]

- **Policies and Procedures.** Finally, because the successor in interest rules hinge on confirmation of the identity and ownership interest of a successor in interest, the rules require that mortgage servicers adopt policies and procedures related to the evaluation of potential successors in interest.

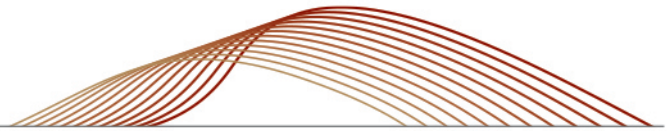
Other notable changes implemented by the rulemaking include the following:

- **Delinquency.** The Bureau's 2013 Mortgage Servicing Rules did not have a generally applicable definition of "delinquency." While the rules did identify certain procedures triggered by a delinquency, such as 120 days of delinquency before the first notice of filing foreclosure, this gap in the regulation created regulatory uncertainty. The Bureau has now defined "delinquency" as "a period of time during which a borrower and a borrower's mortgage loan obligation are delinquent." The Final Amended Rules further provide that that "a borrower and a borrower's mortgage obligation are delinquent beginning on the date a periodic payment sufficient to cover principal, interest, and, if applicable, escrow becomes due and unpaid, until such time as no periodic payment is due and unpaid."[7]

- **Early Intervention.** The Final Amended Rules keep the live contact obligation for as long as the borrower remains delinquent, including during servicing transfers. However, the Bureau has recognized that this requirement is in conflict with both the FDCPA, which allows a borrower to direct that communication regarding the debt be exclusively through an attorney or in writing, and the Bankruptcy Code automatic stay provision. Thus, the Bureau has exempted the live contact obligation in these situations, while continuing to require that servicers provide written early intervention notices.

- **Loss Mitigation.** The Bureau has also finalized a number of changes to the loss mitigation requirements.

  - Life of Loan. The mortgage servicer now has a duty to engage in loss mitigation over the life of the loan, meaning one-time loss mitigation offer over the life of the loan is



no longer. Provided a borrower brings the loan current, the loss mitigation offer must be provided every time the borrower becomes delinquent and meets the loss mitigation qualifications. This concept is reinforced by the general purpose definition of "delinquency," which treats any past due payment as delinquent.

- Dual Track Prohibition. The loss mitigation amendments also reinforce the prohibition imposed by the 2013 Mortgage Servicing Rules on "dual-tracking" (i.e. continuing to proceeding towards foreclosure while contemporaneously working with borrowers to consider loss mitigation alternatives). The Final Amended Rules clarify that upon timely submission by a borrower of a complete loss mitigation application, the mortgage servicer cannot proceed with a foreclosure judgment or order of sale, or conduct a sale (even if by a third-party), unless the borrower's loss mitigation application is properly denied, withdrawn, or the borrower otherwise fails to perform on a loss mitigation agreement. Any progress towards foreclosure would violate the rule. Servicers are responsible for the conduct of their counsel, thus it is essential that servicers have clear policies and procedures relating to communication with and obligations of their outside counsel. Loss mitigation obligations must be exhausted before any action on the foreclosure (re)commences.

- Notice of Complete Application. Within five days (excluding Saturdays, Sundays, or legal holidays) of receipt of a loss mitigation package, servicers must provide written notice to the borrower of such receipt.

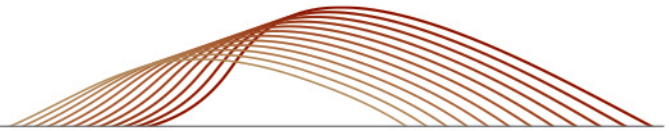
- Third-Party Information. The Final Amended Rules require mortgage servicers to exercise reasonable diligence to obtain information not in the borrower's control, mandate that servicers attempt to evaluate an application while waiting for third-party information, and prohibit servicers from denying borrowers loss mitigation solely on the basis of not having third-party information. There are certain limited exceptions.

- Repayment Plans. Acknowledging that interim solutions are beneficial to consumers, the Final Amended Rules permit mortgage servicers to provide short-term repayment plans based on the evaluation of incomplete loss migration applications.

- Collection of Documents. Upon receipt of information confirming that the borrower is ineligible for a loss mitigation option (but not solely on the basis of the borrower's stated preference), the mortgage servicer may stop collecting documents or other information in connection with a particular loss mitigation option.

- Transferred Loans. The Final Amended Rules make it clear that servicers must transfer all loss mitigation applications—whether complete—and that the recipient servicers (transferee) must complete or accept the "mods in flight."[8] A transferee servicer cannot deny a loss mitigation option or delay a loss mitigation approval if the borrower provided the required information to the transferor prior to the transfer of the loan portfolio.

- **Prompt Payment Crediting.** The Final Amended Rules would require that payments made subject to a temporary program, such as a trial modification or forbearance, be credited in accordance with the terms of the original loan contract, while any payments pursuant to a permanent loan modification would be credited subject to the terms of a permanent loan modification agreement.



- **Periodic Statements.** The Bureau addressed the application of the periodic statement requirements in the context of specific scenarios: (1) loans that have been accelerated, are in temporary loss mitigation programs, or have been permanently modified must set forth the amount due with the understanding that such amount may only be accurate for a specific period of time (e.g., when the loan has been accelerated or modified); (2) borrowers in bankruptcy must be sent modified periodic statements (or coupon books for those permitted to do so in lieu of periodic statements) depending on whether the filing is subject to Chapter 7 or Chapter 11 of the Bankruptcy Code (and includes sample forms); and (3) servicers are exempt from the periodic statement requirement for charged-off accounts if (i) the servicer will not charge any additional fees or interest and (ii) the servicer provides additional disclosures related to the effect of the charge-off.

- **Lender-Placed Insurance.** The Bureau modified the model disclosure forms covering lender-placed or force-placed insurance when there is insufficient hazard insurance coverage (versus an expiring or expired policy).

- **Expanding the Small Servicer Exemption.** While the Mortgage Servicing Rule includes an exemption that generally applies to those that service 5,000 or fewer mortgage loans for which the mortgage servicer is the creditor or the assignee, the amended final rule eliminates from the 5,000 loan limit certain seller-financed transactions and mortgage loans that are voluntarily serviced on behalf of a non-affiliate, even in the case that the non-affiliate is not a credit or assignee.

Action Items

Large-Bank and Non-Bank mortgage servicers that must comply with the CFPB's comprehensive mortgage servicing rules should review their policies and procedures to ensure full compliance with the new requirements.[9] The effective date has not been set, but the CFPB will require compliance either by 12 months (for most of the rule) or 18 months (for successor in interest and period statements for borrowers in bankruptcy) from the official publication in the Federal Register. Any grace period for compliance is unlikely.

Those entities supervised by the CFPB should consider the following action items:

- Review all relevant compliance policies and procedures to ensure that they are updated with the new servicing requirements;

- Continue to monitor and evaluate consumer complaints related to areas affected by the Final Amended Rule, including those raising issues related to the validation of potential successors in interest;

- Develop an internal tool for tracking inquiries from potential successors in interest and monitor validation rates associated with such inquiries; and

- Utilize internal and external audit findings to continue to refine your Compliance Management System.

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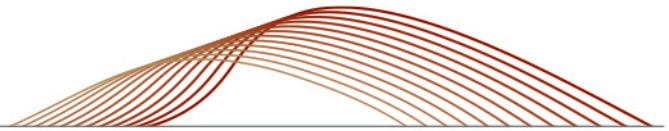

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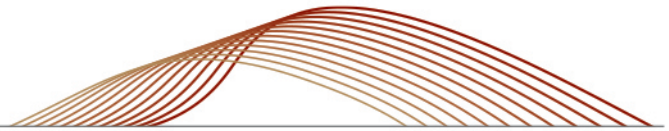

[1] 12 CFR Parts 1024 and 1026, Amendments to the 2013 Mortgage Rules under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), available at: http://files.consumerfinance.gov/f/documents/20160804_cfpb_Final_Rule_Amendments_to_the_2013_Mortgage_Rules.pdf

[2] 12 U.S.C.1701j-3(d)(8)(The Garn St. Germain Depository Institutions Act of 1982)("... a lender may not exercise its option pursuant to a due-on-sale clause upon ... a transfer into an *inter vivos* trust in which the borrower is and remains a beneficiary and which does not relate to a transfer of rights of occupancy in the property").

[3] *See* Memorandum on Ensuring Equal Treatment for Same-Sex Married Couples (Same-Sex Married Couple Policy)(June 25, 2014)(the Bureau interprets "Spouse" to include married same-sex spouses).

[4] 15 U.S.C. 1692c(b)(generally prohibits debt collectors from communicating with third parties in connection with the collection of a debt, in the absence of a court order or prior consumer consent given directly to the debt collector).

[5] *See* Bureau of Consumer Fin. Prot., Official Bureau Interpretations: Safe Harbors from Liability Under the Fair Debt Collection Practices Act for Certain Actions Taken in Compliance with Mortgage Servicing Rules under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z) (Aug. 4, 2016). Regulation X, Section 1024.31 and Regulation Z, Section 1026(a)(27)(ii).

[6] 15 U.S.C. 6802(e)(8); 12 CFR 1016.15(a)(7)(i)(establishing an exception to the general prohibition on the disclosure of nonpublic personal information to a non-affiliated third party absent notice and opportunity to opt out, where the disclosure is to comply with Federal, State, or local laws, rules, and other applicable legal requirements).

[7] 12 CFR § 1024.31

[8] "Mods in flight" are transferred loans for which there is loss mitigation application pending at the time of a servicing transfer.

[9] Large-banks are any financial depository institution with total assets over $10 billion (including subsidiaries and all other affiliates of these institutions) and non-bank servicers are any non-depository financial institution that provides mortgage serving either directly or as a service provider to a depository institution.