

CFPB Issues Final Mortgage Servicing Rule to Provide Greater Protections to Borrowers

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The Consumer Financial Protection Bureau (“CFPB”) has issued a final rule (“2016 Mortgage Servicing Rule”) which clarifies, revises, and amends certain mortgage servicing provisions under the Real Estate Settlement Procedures Act (“RESPA”) and the Truth in Lending Act (“TILA”) to provide greater protections to borrowers. Concurrently with the 2016 Mortgage Servicing Rule, the CFPB has issued an interpretive rule under the Fair Debt Collection Practices Act (“FDCPA Interpretive Rule”) relating to servicers’ compliance with certain mortgage servicing rules.

Most of the provisions of the 2016 Mortgage Servicing Rule are effective 12 months after publication in the Federal Register. However, the provisions relating to successors in interest and periodic statements for borrowers in bankruptcy will take effect 18 months after publication in the Federal Register.

Below is a brief discussion of the existing CFPB mortgage servicing rules, and a summary of the key provisions of the 2016 Mortgage Servicing Rule and the FDCPA Interpretive Rule.

I. Background on Mortgage Servicing Rules

In January 2013, the CFPB issued several final rules addressing the servicing of mortgage loans under RESPA and TILA (“Mortgage Servicing Rules”). The Mortgage Servicing Rules imposed certain requirements on servicers regarding force-placed insurance, general servicing policies and procedures, error resolution and information requests, early intervention with delinquent consumers, continuity of contact with delinquent consumers, and loss mitigation under Regulation X (the regulation implementing RESPA); and interest rate adjustment notices, prompt crediting of mortgage payments and responses to requests for payoff amounts, and periodic statements under Regulation Z (the Regulation implementing TILA).

In addition, the Mortgage Servicing Rules defined the term “small servicer” and created an exemption for small servicers from the periodic statement provisions, general servicing policies and procedures provisions, continuity of contact provisions, some of the loss mitigation provisions, and the prohibition on purchasing force-placed insurance where a servicer could continue a consumer’s existing hazard insurance coverage by advancing funds to escrow under certain circumstances.

In November 2014, the CFPB issued proposed amendments to the Mortgage Servicing Rules. The 2016 Mortgage Servicing Rule finalizes those proposed amendments, with additional clarifications and revisions to address

questions raised by industry, consumer advocacy groups, and other stakeholders.

II. 2016 Mortgage Servicing Rule

1. Expanded Protection to Successors in Interest

Mortgage servicers are required to have policies and procedures in place to promptly confirm the identity and ownership interest of the family members or heirs known as “successors in interest” who gain a legal interest in a property upon a borrower’s death. The 2016 Mortgage Servicing Rule expands the definition of a successor in interest to include persons who receive property as a result of a divorce or legal separation, through a family trust, from a living spouse or a parent, or when a borrower who is a joint tenant dies. The final rule also establishes requirements relating to confirming successors in interest. After confirmation of identity and ownership interest, the successor in interest, including those who obtain ownership through a transfer protected from acceleration and foreclosure, will generally have the same protections under the Mortgage Servicing Rules as the original borrower.

2. Definition of Delinquency

The 2016 Mortgage Servicing Rule adds a general definition of delinquency which applies to all of the servicing provisions under Regulation X and the provisions regarding mortgage loan periodic statements under Regulation Z.

Delinquency begins 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. The 2016 Mortgage Servicing Rule also allows servicers the discretion, under certain circumstances, to consider a borrower as having made a timely payment even if the borrower’s payment falls short of the full periodic payment. However, if the servicer chooses to utilize this discretion, the borrower cannot be treated as “delinquent” under the new definition described above.

3. Request for Information

The 2016 Mortgage Servicing Rule changes how a servicer must respond to requests for information asking for ownership information for loans in trust for which Fannie Mae or Freddie Mac is the trustee, investor, or guarantor.

Under the revised provision, a servicer may provide the borrower with the name and contact information for Fannie Mae or Freddie Mac without providing the name of the trust if the request does not specifically inquire about the name or number of the trust or pool. However, if the request for information does expressly request the name or number of the trust or pool, a servicer must respond to a request for information by providing the name of the trust and the name, address, and appropriate contact information for the trustee, regardless of whether or not Fannie Mae or Freddie Mac is the trustee, investor, or guarantor.

4. Force-Placed Insurance

The current Mortgage Servicing Rules require servicers to furnish proper notifications to borrowers before assessing a charge for hazard insurance purchased on behalf of a borrower when the borrower's insurance has expired or is about to expire. The 2016 Mortgage Servicing Rule broadens this force-placed insurance requirement to apply when the insurance coverage is insufficient under the mortgage loan contract requirement.

5. Early Intervention

Under the current Mortgage Servicing Rules, servicers must attempt to make live contact with delinquent borrowers regarding available remediation possibilities or foreclosure alternatives no later than 36 days after the delinquency begins. The 2016 Mortgage Servicing Rule clarifies that a servicer's early intervention live contact obligation recurs in each billing cycle after each payment due date for the duration of the borrower's delinquency. Furthermore, it finalizes exemptions for servicers from complying with the live contact requirements for certain borrowers who are either in bankruptcy or have invoked the right to cease communication under the Fair Debt Collection Practices Act (but requires servicers to provide written early intervention notices in certain situations).

6. Loss Mitigation

The 2016 Mortgage Servicing Rule changes how servicers should process borrowers' loss mitigation applications and prevent wrongful foreclosures.

First, servicers are required to meet the loss mitigation requirements more than once in the life of a loan for borrowers who become current on payments at any time between the borrower's prior complete loss mitigation application and a subsequent loss mitigation application.

Second, servicers must provide written notification to the borrower within five (5) days (excluding Saturdays, Sundays or legal holidays) of receiving a complete loss mitigation application so that the borrower is informed about the status of the application and related deadlines.

Third, for any incomplete loss mitigation applications, servicers may choose to offer certain short-term repayment plans.

Fourth, servicers may stop collecting application information regarding a loss mitigation option once they confirm that the borrower is ineligible for that option.

Fifth, if a transferee servicer acquires the servicing of a mortgage loan for which a loss mitigation application is pending as of the transfer date, the transferee servicer must comply with the loss mitigation requirements within the same timeframes that applied to the transferor servicer, with limited exceptions.

Sixth, servicers are required to take reasonable affirmative steps to delay a foreclosure sale in order to prevent wrongful foreclosures, either by themselves or through foreclosure counsel. The foreclosure must be dismissed if services fail to take reasonable steps to delay the foreclosure sale.

Seventh, a subordinate-lien servicer will be allowed to join the foreclosure action of a senior lien servicer notwithstanding the prohibition against foreclosure on loans that are less than 120 days delinquent.

Eighth, servicers are required to exercise reasonable diligence to obtain certain information from third parties that are not in the borrower's control. Subject to certain exceptions, servicers are prohibited from denying borrowers for loss mitigation solely due to the lack of such information.

Ninth, if a borrower timely submits a complete loss mitigation application after the servicer has made the first notice or filing, the servicer must not move for foreclosure judgment or order of sale, or conduct of a foreclosure sale unless the loss mitigation application is properly denied, withdrawn or the borrower fails to perform on a loss mitigation agreement.

7. Prompt Payment Crediting

Under the 2016 Mortgage Servicing Rule, periodic payments made by consumers who are in a temporary loss mitigation program will continue to be credited based on the original loan contract but may be credited as partial payments by servicers if appropriate. Periodic payments made pursuant to a permanent loan modification, however, must be credited according to the permanent loan agreement.

8. Periodic Statements

The 2016 Mortgage Servicing Rule contains several changes regarding periodic statements.

First, the amount due in the periodic statements of mortgage loans that have been accelerated, are in a temporary loss mitigation program, or have been permanently modified, will vary depending on the legal obligation in each of those circumstances (e.g., whether a servicer agrees to accept a reduced amount). If a servicer will accept a reduced amount to reinstate a loan that had been accelerated, the amount due in the periodic statement must be the lesser amount that will be accepted in order to reinstate the loan. The periodic statement for such loans must be accurate when provided and should indicate, if applicable, that the amount due is accurate only for a specified period of time. In a periodic statement for a loan in a temporary loss mitigation program, the amount due will be either the reduced amount or the amount under the loan contract. The statement for such a loan must also include an explanation that the amount due is being disclosed as a different amount because of the temporary loss mitigation program. If a permanent modification is in place, the amount due in a periodic statement will be the payment due under that modification.

Second, servicers must modify periodic statements to certain consumers in bankruptcy according to the particular kind of bankruptcy (e.g., Chapter 7 or 13).

Third, periodic statements will not be necessary for charged-off mortgage loans if a servicer had provided a final charge-off notice and will not charge any additional fees or interests.

9. Small Servicer Exemption

The current Mortgage Servicing Rules provide a small servicer exemption for any small servicer who services no more than 5,000 loans as either a creditor or assignee. The 2016 Mortgage Servicing Rule excludes from the 5,000 loan limit mortgage loans voluntarily serviced for a non-affiliate that is not a creditor or assignee, and also certain seller-financed transactions.

III. FDCPA Interpretive Rule

The FDCPA Interpretive Rule clarifies the interaction of the FDCPA and certain mortgage servicing rules under TILA, RESPA, and Regulations X and Z.

The FDCPA Interpretive Rule provides safe harbors from liability for servicers acting in compliance with specified mortgage servicing rules. Specifically, servicers do not violate the FDCPA when: (1) communicating about a mortgage loan with confirmed successors in interest in compliance with mortgage servicing rules set forth in Regulations X or Z; (2) providing the written early intervention notice required by Regulation X to a borrower who has invoked the cease communication right under the FDCPA; or (3) responding to borrower-initiated communications concerning loss mitigation after the borrower has invoked the cease communication right under the FDCPA.

IV. Further Information

Please note that this advisory is a general overview of the 2016 Mortgage Servicing Rule and is not intended as a comprehensive explanation of all aspects of the 2016 Mortgage Servicing Rule or as formal legal advice. If you have any questions regarding the 2016 Mortgage Servicing Rule or mortgage rules in general, please feel free to contact Joseph D. Simon at 516-357-3710 or via email at jsimon@cullenanddykman.com, Kevin Patterson at 516-296-9196 or via email at kpatterson@cullenanddykman.com, Elizabeth Murphy at 516-296-9154 or via email at emurphy@cullenanddykman.com, or Mandy Xu at 516-357-3850 or via email at mxu@cullenanddykman.com.

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