

CFPB Issues New Mortgage Servicing Requirements

February 19, 2013

The Consumer Financial Protection Bureau (“CFPB”) has issued two final rules that impose significant new mortgage servicing requirements in connection with residential mortgages to consumers. The rules implement amendments made by the Dodd-Frank Act to the Real Estate Settlement Procedures Act (“RESPA”) and the Truth in Lending Act (“TILA”) and are effective January 10, 2014.

I. Scope and Overview

A. Generally

The final rules generally address nine major mortgage servicing topics: (1) periodic billing statements; (2) interest rate adjustment notices; (3) prompt crediting of payments and prompt issuance of payoff letters; (4) requirements on force placing of insurance; (5) error resolution and borrower information requests; (6) general servicing policies, procedures and requirements; (7) early intervention with delinquent borrowers; (8) continuity of contact with delinquent borrowers; and (9) loss mitigation procedures.

The final rules generally apply to mortgage loans subject to RESPA and TILA. This generally means loans made to consumers primarily for personal, family, or household purposes and secured by a one-to-four family dwelling or an individual cooperative or condominium unit. Some of the new requirements are only applicable to closed-end loans and not to open-end loans (such as home equity lines of credit), and some of the requirements only apply to loans secured by a borrower’s principal residence.

For mortgage servicers subject to New York law, the new federal requirements will need to be considered in light of New York’s own mortgage servicing regulations. Part 419 of the New York Superintendent’s Regulations (“Part 419”), which has been adopted on an emergency basis, imposes several requirements on mortgage servicers that are similar to, and in some cases more burdensome than, the new federal requirements.

B. Small Servicer Exemption

The final rules exempt small servicers – those servicers that service 5,000 or fewer mortgage loans and only service mortgage loans that the servicer or an affiliate originated or owns – from several (but not all) of the new requirements. “Mortgage loans” for purposes of this exemption are generally closed-end consumer credit

transactions secured by a residential structure consisting of a one-to-four family home or an individual cooperative or condominium unit.

The determination of whether a servicer services 5,000 or fewer mortgage loans is made as of January 1 of each year. A servicer that crosses the 5,000 threshold will have six months after crossing the threshold or until the next January 1, whichever is later, to comply with the requirements for which the servicer is no longer exempt.

If the small servicer exemption applies, then the servicer generally does not have to comply with the new requirements for sending periodic statements, maintaining general servicing policies and procedures, intervening early for certain delinquent borrowers, maintaining continuity of contact with certain delinquent borrowers, and implementing several of the loss mitigation procedures. Some of the provisions that are not exempt for small servicers are the requirements for sending interest rate adjustment notices, timely crediting of payments, and resolving errors within certain timeframes.

Please note that New York's Part 419 does not have a small servicer exemption.

II. Summary of Major Servicing Topics

A. Periodic Billing Statements

Creditors, assignees, and servicers must provide a periodic statement for each billing cycle containing, among other things, information on payments currently due and previously made, fees imposed, transaction activity, application of past payments, contact information for the servicer and housing counselors, and, where applicable, information regarding delinquencies. These statements must meet specific timing, form, and content requirements. The rule contains sample forms that may be used.

The periodic statement requirement generally applies to closed-end consumer credit transactions secured by a dwelling. However, there is an exemption for fixed-rate loans if the servicer provides a coupon book, so long as the coupon book contains certain required information and certain other information is made available to the consumer. The periodic billing statement requirement does not apply to small servicers.

B. Interest Rate Adjustment Notices

Creditors, assignees, and servicers must provide a consumer whose mortgage has an adjustable rate with a notice between 210 and 240 days prior to the first payment due after the rate first adjusts. This notice may contain an estimate of the new rate and new payment. Creditors, assignees, and servicers also must provide a notice between 60 and 120 days before payment at a new level is due when a rate adjustment causes the payment to change. The current annual notice that must be provided for adjustable-rate mortgages for which the interest rate, but not the payment, has changed over the course of the year will no longer be required. The rule contains model and sample forms that servicers may use.

These interest rate adjustment notices generally apply to closed-end consumer credit transactions secured by the consumer's principal dwelling in which the annual percentage rate may increase after consummation. The

small servicer exemption does not apply to these new notice requirements.

C. Prompt Payment Crediting and Payoff Statements

Servicers must promptly credit periodic payments from borrowers as of the day of receipt. A periodic payment consists of principal, interest, and escrow (if applicable). If a servicer receives a payment that is less than the amount due for a periodic payment, the payment may be held in a suspense account. When the amount in the suspense account covers a periodic payment, the servicer must apply the funds to the consumer's account.

In connection with a consumer credit transaction secured by a consumer's dwelling (including open-end loans and loans secured by non-principal residences), creditors, assignees, and services (as applicable) must provide an accurate payoff balance to a consumer within a reasonable time, but no later than seven business days after receipt of a written request from the borrower (or someone acting on the consumer's behalf) for such information. The seven day deadline does not apply if the loan is in bankruptcy or foreclosure, or if there are delays due to a natural disaster or similar circumstances. For those services subject to Part 419, Section 419.9 requires provision of a payoff statement within five business days, and there is no exception for foreclosures, bankruptcies and natural disasters.

Small servicers are not exempt from these requirements.

D. Force-Placed Insurance

Servicers are prohibited from charging a borrower for force-placed insurance coverage unless the servicer has a reasonable basis to believe the borrower has failed to maintain hazard insurance, as required by the loan agreement, and the servicer has provided required notices.

An initial notice must be sent to the borrower at least 45 days before charging the borrower for force-placed insurance coverage, and a second reminder notice must be sent no earlier than 30 days after the first notice. The rule contains model forms that servicers may use.

If a borrower provides proof of hazard insurance coverage, the servicer must cancel any force-placed insurance policy and refund any premiums paid for overlapping periods in which the borrower's coverage was in place. The rule also provides that charges related to force-placed insurance (other than those subject to state regulation as the business of insurance or authorized by federal law for flood insurance) must be for a service that was actually performed and must bear a reasonable relationship to the servicer's cost of providing the service.

Where the borrower has an escrow account for the payment of hazard insurance premiums, the servicer is prohibited from obtaining force-placed insurance where the servicer can continue the borrower's homeowner insurance, even if the servicer needs to advance funds to the borrower's escrow account to do so.

The rule against obtaining force-placed insurance in cases in which hazard insurance may be maintained through an escrow account exempts small servicers, so long as any force-placed insurance purchased by the small servicer is less expensive to a borrower than the amount of any disbursement the servicer would have made to maintain hazard insurance coverage. The other provisions on force-placed insurance do apply to small servicers.

E. Error Resolution and Information Requests

Servicers are required to meet certain procedural requirements for responding to written information requests or complaints of errors. The rule requires servicers to comply with the error resolution procedures for certain specific errors as well as any error relating to the servicing of a mortgage loan. Servicers may designate a specific address for borrowers to use. Servicers generally are required to acknowledge the request or notice of error within five days. Servicers also generally are required to correct the error asserted by the borrower and provide the borrower written notification of the correction, or to conduct an investigation and provide the borrower written notification that no error occurred, within 30 to 45 days. Further, within a similar amount of time, servicers generally are required to acknowledge borrower written requests for information and either provide the information or explain why the information is not available.

Small servicers are not exempt from these requirements.

F. General Servicing Policies, Procedures, and Requirements

Servicers are required to establish policies and procedures reasonably designed to achieve certain specified objectives with respect to servicing practices. The reasonableness of a servicer's policies and procedures should take into account the size, scope, and nature of the servicer's operations. Examples of the specified objectives include accessing and providing accurate and timely information to borrowers, investors, and courts; properly evaluating loss mitigation applications in accordance with the eligibility rules established by investors; facilitating oversight of, and compliance by, service providers; facilitating transfer of information during servicing transfers; and informing borrowers of the availability of written error resolution and information request procedures.

In addition, servicers are required to retain records relating to each mortgage loan until one year after the mortgage loan is discharged or servicing is transferred, and to maintain certain documents and information for each mortgage loan in a manner that enables the servicer to compile it into a servicing file within five days.

Small servicers are exempt from the requirement to establish these policies and procedures.

G. Early Intervention with Delinquent Borrowers

Servicers must establish or make good faith efforts to establish live contact with borrowers by the 36th day of their delinquency and promptly inform such borrowers, where appropriate, that loss mitigation options may be available. In addition, a servicer must provide a borrower a written notice with information about loss mitigation options by the 45th day of a borrower's delinquency. The rule contains model language servicers may use for the written notice.

Small servicers are exempt from this requirement.

H. Continuity of Contact with Delinquent Borrowers

Servicers are required to maintain reasonable policies and procedures with respect to providing delinquent borrowers with access to personnel to assist them with loss mitigation options where applicable. The policies and procedures must be reasonably designed to ensure that a servicer assigns personnel to a delinquent borrower by the time a servicer provides such borrower with the written notice required by the early intervention requirements, but in any event, by the 45th day of a borrower's delinquency.

These personnel should be accessible to the borrower by phone to assist the borrower in pursuing loss mitigation options, including advising the borrower on the status of any loss mitigation application and applicable timelines. The personnel should be able to access all of the information provided by the borrower to the servicer and provide that information, when appropriate, to those responsible for evaluating the borrower for loss mitigation options.

Small servicers are exempt from this requirement.

I. Loss Mitigation Procedures

Servicers are required to follow specified loss mitigation procedures for a mortgage loan secured by a borrower's principal residence. If a borrower submits an application for a loss mitigation option, the servicer is generally required to acknowledge the receipt of the application in writing within five days and inform the borrower whether the application is complete and, if not, what information is needed to complete the application. The servicer is required to exercise reasonable diligence in obtaining documents and information to complete the application.

For a complete loss mitigation application received more than 37 days before a foreclosure sale, the servicer is required to evaluate the borrower, within 30 days, for all loss mitigation options for which the borrower may be eligible in accordance with the investor's eligibility rules, including both options that enable the borrower to retain the home (such as a loan modification) and non-retention options (such as a short sale).

The servicer must provide the borrower with a written decision, including an explanation of the reasons for denying the borrower for any loan modification option offered by an owner or assignee of a mortgage loan with any inputs used to make a net present value calculation to the extent such inputs were the basis for the denial. A borrower may appeal a denial of a loan modification program so long as the borrower's complete loss mitigation application is received 90 days or more before a scheduled foreclosure sale.

The rule restricts "dual tracking," where a service is simultaneously evaluating a consumer for loan modifications or other alternatives at the same time that it prepares to foreclose on the property. Specifically, the rule prohibits a servicer from making the first notice or filing required for a foreclosure process until a mortgage loan account is more than 120 days delinquent. Even if a borrower is more than 120 days delinquent, if a borrower submits a complete application for a loss mitigation option before a servicer has made the first notice or filing required for a foreclosure process, a servicer may not start the foreclosure process unless (1) the servicer informs the borrower that the borrower is not eligible for any loss mitigation option (and any appeal has been exhausted), (2) a borrower rejects all loss mitigation offers, or (3) a borrower fails to comply with the terms of a loss mitigation option such as a trial modification. If a borrower submits a complete application for a loss

mitigation option after the foreclosure process has commenced but more than 37 days before a foreclosure sale, a servicer may not move for a foreclosure judgment or order of sale, or conduct a foreclosure sale, until one of the same three conditions has been satisfied. In all of these situations, the servicer is responsible for promptly instructing foreclosure counsel retained by the servicer not to proceed with filing for foreclosure judgment or order of sale, or to conduct a foreclosure sale, as applicable.

Small servicers are exempt from most of these provisions, but are required to comply with two requirements: (1) a small servicer may not make the first notice or filing required for a foreclosure process unless a borrower is more than 120 days delinquent, and (2) a small servicer may not proceed to foreclosure judgment or order of sale or conduct a foreclosure sale, if a borrower is performing pursuant to the terms of a loss mitigation agreement.

III. Further Information

Please note that this advisory is an overview of the final rules, and does not address all aspects and details of the rules. Creditors will need to carefully review the final rules in order to determine what changes may be needed to policies, procedures, and systems.

As noted above, the rules are effective on January 10, 2014. If you have any questions regarding the rules, please feel free to contact Joseph D. Simon at [516-357-3710](tel:516-357-3710) or via email at jsimon@cullenanddykman.com.

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