

---

## CFPB Calls for Changes to Mortgage Servicing with Proposed Rule

NOVEMBER 21, 2014

**Summary:** On November 20, 2014, the Consumer Financial Protection Bureau (“CFPB” or the “Bureau”) proposed changes to the rules governing mortgage servicing and foreclosures—Regulation X, which implements the Real Estate Settlement Procedures Act (“RESPA”), and Regulation Z, the implementing regulation for the Truth in Lending Act (“TILA”). The most significant parts of the proposal would expand the number of times a borrower may receive foreclosure protection through loss mitigation, thereby delaying the foreclosure process. The proposed rule would put in place additional servicing transfer protections, take steps to protect borrowers from a wrongful foreclosure sale, and help ensure that surviving family members and others who inherit or receive property have the same protections under the mortgage servicing rules as the original borrower. Other parts of the proposal will present unique operational challenges, such as providing periodic statements to bankrupt borrowers.

---

On November 20, 2014, the Consumer Financial Protection Bureau (“CFPB” or the “Bureau”) proposed changes to the rules governing mortgage servicing and foreclosures—Regulation X, which implements the Real Estate Settlement Procedures Act (“RESPA”), and Regulation Z, the implementing regulation for the Truth in Lending Act (“TILA”).<sup>1</sup> The most significant parts of the proposal would expand the number of times a borrower may receive foreclosure protection through loss mitigation, thereby delaying the foreclosure process. The proposed rule would put in place additional servicing transfer protections, take steps to protect borrowers from a wrongful foreclosure sale, and help ensure that surviving family members and others who inherit or receive property have the same protections under the mortgage servicing rules as the original borrower. Other parts of the proposal will present unique operational challenges, such as providing periodic statements to bankrupt borrowers.

This proposal marks the third time this year the CFPB has addressed mortgage servicing on the regulatory side, and another round of mortgage servicing changes may further strain compliance resources and present implementation challenges to the banks and nonbank mortgage servicers. Much of the proposed rule is a codification of existing best practices, but the proposed

requirement that servicers offer loss mitigation to borrowers more than once throughout the life of the loan appears to be a new and unexpected change. The CFPB believes this proposed rule is necessary to expand protection to and ensure open information-sharing with borrowers and their families, in addition to providing clarification to other rules and requirements applicable to mortgage servicing. According to CFPB Director Richard Cordray, "[t]he Consumer Bureau is committed to ensuring that homeowners and struggling borrowers are treated fairly by mortgage servicers and that no one is wrongly foreclosed upon."

## Background

In January 2013, the CFPB issued two sweeping mortgage servicing rules under RESPA (Regulation X) and TILA (Regulation Z).<sup>2</sup> The Regulation X amendments implemented Dodd-Frank Act sections addressing mortgage servicers' obligations relating to error correction, information availability, loss mitigation, forced-placed insurance, and required servicers establish a single-point-of-contact model for distressed borrowers. The amendments also required development of policies and procedures in several areas, including review of loss mitigation options, and it streamlined certain servicing-related provisions of Regulation X.

The amendments to Regulation Z implemented Dodd-Frank Act sections addressing initial rate adjustment notices for adjustable-rate mortgages, periodic statements for residential mortgage loans, prompt payment crediting, and responses to requests for payoff amounts. The amendments also included rules governing the scope, timing, content, and format of disclosures to consumers regarding the interest rate adjustments of their variable-rate transactions.

The CFPB has continued to clarify and revise those rules through notice and comment rulemaking and guidance over the course of 2013 and 2014 in order to address important questions raised by industry, consumer advocacy groups, and other stakeholders:

- The July 2013 mortgage final rule clarified, corrected, or amended provisions on the relation to state law of Regulation X's servicing requirements; implementation dates for certain adjustable-rate mortgage servicing notices under Regulation Z; and the small servicer exemption.<sup>3</sup>
- The September 2013 mortgage final rule modified provisions of Regulation X related to error resolution, information requests, and loss mitigation procedures.<sup>4</sup>
- An October 2013 interim final rule provisionally suspended the effectiveness of certain requirements of the mortgage servicing rules with respect to consumers in bankruptcy and consumers who had exercised their rights under the Fair Debt Collection Practices Act ("FDCPA") to direct that debt collectors cease contacting them.<sup>5</sup>
- An October 2013 servicing bulletin clarified compliance requirements regarding successors in interest, early intervention live contact requirements, and the FDCPA.<sup>6</sup>
- In October 2014, the CFPB added an alternative definition of "small servicer" that applies to certain nonprofit entities that service, for a fee, only loans for which the servicer or an associated nonprofit entity is the creditor.<sup>7</sup>

Since the January 10, 2014 effective date of the mortgage servicing rules, the CFPB has continued to engage in ongoing outreach and monitoring with industry, consumer advocacy groups, and other stakeholders, including holding many individual meetings as well as hosting a bankruptcy roundtable discussion on June 16, 2014. As a result, the CFPB has identified further issues that continue to pose implementation challenges or require clarification to address important questions raised by industry, consumer advocacy groups, or other stakeholders.

## Highlights

### *Loss Mitigation Modifications*

The proposed rule would expand loss mitigation protections by increasing the number of times a borrower can receive an evaluation for loss mitigation. Currently, foreclosure protection through this process is only required one time over the course of a mortgage loan. Under the proposed rule, the protection would renew every time the consumer became current on his or her mortgage following a prior loss mitigation application, with no limitations as to the number of times the protection would restore over the course of the loan period. The proposed rule includes other consumer-favoring loss mitigation provisions:

- Servicers must notify a borrower upon the completion of the loss mitigation application so that a consumer knows when foreclosure protections begin.
- If a servicer does not have third party information 30 days after a loss mitigation application is completed, the servicer would be prohibited from denying the application and beginning foreclosure procedures until it has provided written notice to the borrower and completed an evaluation of the application after receiving the third party information.
- The proposed rule would permit servicers to offer, based on an evaluation of an incomplete application, a short-term repayment plan that permits the borrower to repay past due payments over a specified period of time until the mortgage is current.

Not all proposals would benefit consumers, as the proposed rule would also give servicers flexibility in the due dates they can set for required documents under the loss mitigation process. Also, as soon as a servicer determines that a consumer is not eligible for loss mitigation protections, the servicer is no longer required to receive documents with respect to the application.

Servicers would receive another benefit under the proposed rule, as they would be permitted to join a foreclosure action of a senior lienholder prior to the former 120-day subordinate lien delinquency requirement. However, existing dual-tracking protections would be clarified under the proposed rule, such that a servicer (and its foreclosure counsel) may not foreclose on a borrower: (i) after receiving a complete loss mitigation application; or (ii) if the servicer does not receive an application, until it has taken "all reasonable affirmative steps...to delay the sale."<sup>8</sup>

Finally, the proposed rule would cover the transfer of mortgages between servicers during the loss mitigation process. Regarding timeliness of the review, in a voluntary transfer, the new servicer

would be required to observe the date the application became complete with the old servicer (*i.e.*, the application evaluation must generally be completed within 30 days after receipt). The new servicer would be provided an additional five days to provide the acknowledgment notice. However, if the transfer is involuntary, the new servicer would be guaranteed at least 15 days to evaluate the transferred loss mitigation applications; and if more information were needed to evaluate the application, the borrower would be entitled to foreclosure protection during that extra time.

### *Bankrupt Customer Disclosures*

The CFPB's proposed rule would provide protections to borrowers who have filed for bankruptcy protection by requiring servicers to provide them with periodic statements tailored to bankruptcy (subject to certain conditions).<sup>9</sup> The proposed rule also contains sample periodic statement forms.<sup>10</sup> In addition, the proposed rule also would guarantee that bankrupt borrowers receive early written intervention notices, further discussed herein.

The proposed rule would require bankruptcy periodic statements in chapter 7, 11, 12 and 13 cases, with an exemption for surrenders, lien-strips, discharged debtors and debtors who sent written requests to cease all statements. However, a discharged debtor, particularly a chapter 7 ride-through, may opt in and request periodic statements. It is presently open for comment whether the servicer should also be required to provide the periodic statement to the chapter 13 trustee overseeing the case. The periodic statement requirements for bankruptcy accounts include disclosures specific to bankruptcy and the following information

- pre-petition payments received since the last billing cycle, total pre-petition payments received year to date, and the current balance of the pre-petition arrearage;
- the current post-petition amount due, including the amount to be applied to principal, interest, and escrow;
- the total post-petition amount due, including any past due post-petition payments and potentially amounts due under a stipulated agreement if there is an accompanying explanation;
- total post-petition fees and charges; and
- transaction activity that includes (without designating the source of such funds): pre-petition payments received, post-petition payments received, and payments of post-petition fees and charges.

The proposed rule also reinstates certain early intervention loss mitigation requirements for borrowers in bankruptcy. While it maintains an exemption from live contact, it requires written outreach to both borrowers in bankruptcy and discharged borrowers to provide notice of loss mitigation options, with an exemption for surrenders, lien-strips, or accounts for which no loss mitigation options are available.

### *Successors In Interest Expansion*

The proposed rule would expand the definition of "successors in interest" (currently someone who inherits a property subject to a mortgage) from family members, heirs, and other parties who have a legal interest when the borrower dies, to anyone with a legal interest when the property is transferred after a divorce or legal separation, between spouses, from a parent to a child, when a joint tenant dies, or through family trust. Under this new expanded definition, any successor in interest would be entitled to the same protections as those of the original borrower, and would be protected from acceleration and foreclosure. The proposed rule seeks to apply all of the CFPB's mortgage servicing rules to a successor in interest, once confirmed by the servicer, and sets forth rules on how to make this confirmation. The proposal would require servicers to maintain policies and procedures that are reasonably designed to ensure that the servicer can, upon notification of the death of a borrower or of any transfer of the property securing a mortgage loan, promptly identify and facilitate communication with any potential successors in interest regarding the property.

#### *Force-Placed Hazard Insurance and Early Intervention*

The proposed rule seeks to amend the force-placed insurance disclosures to account for situations where a servicer wishes to force-place insurance because the borrower has insufficient hazard insurance and not limit the disclosure, as currently drafted, to only state that the hazard insurance is expiring or has expired. In addition, the proposed rule would allow the option to include a borrower's mortgage loan account number on the disclosure notices. The CFPB seeks comment on whether other modifications are needed to force-placed insurance notices.

Regarding early intervention, the CFPB hopes to make in-person and written early intervention notice obligations clearer and more concise for delinquent borrowers. In addition, written early intervention notices would be required for some borrowers in bankruptcy and those who are no longer in communication under the FDCA.

#### *Prompt Payment Crediting and Periodic Statements*

The proposed rule would clarify how servicers must treat periodic payments made by borrowers who are performing under either temporary or permanent loan modifications. For temporary loss mitigation programs, periodic payments made by the borrower would continue to be applied as specified in the loan contract, and could be applied as partial payments. For permanent loan modifications, periodic payments would have to be applied under the terms of the modification, and could not be applied as partial payments.

The proposed rule would also contain several clarifications and new requirements concerning a servicer's obligation to provide periodic statements under the mortgage servicing rules. If a mortgage is accelerated, any periodic statement's "amount due" would need to include the lesser amount that would be accepted by a servicer to reinstate the mortgage if the servicer has decided to lower the requirement below the total value of the mortgage (not the entire accelerated balance). For permanently modified mortgages, the "amount due" would need to include only the amount due under the modification terms. For loans in a temporary loss mitigation program, the "amount due"

could reflect either the amount due under the mortgage or the amount due under the loss mitigation program. Further, servicers would be required to send periodic statements<sup>11</sup> to bankrupt borrowers, subject to certain exceptions (as discussed above).

Finally, any charged-off loans would be exempt from the periodic statement requirement if a servicer does not charge any additional fees or interest on the account and provides a final notice of charge-off to the consumer.

#### *Definition of Delinquency*

Under the proposed rule, a borrower is delinquent beginning on the date a payment sufficient to cover principal, interest, and, if applicable, escrow, becomes due and unpaid, and the borrower remains delinquent until such time as the payment is made. Delinquency under the proposed definition would not be triggered by a borrower's failure to pay a late fee. If a servicer applies a consumer's payment to the oldest outstanding delinquency, the servicer must advance the date of the consumer's delinquency for purposes of calculating the length of a borrower's delinquency under the various applicable provisions of Regulation X's mortgage servicing rules.

#### *Small Servicer Definition*

The proposed rule would insert more flexibility to the small servicer definition. Rather than the current rule that a small servicer is any servicer that services 5,000 or fewer mortgages (for which it is the creditor or assignee), the proposed rule would exclude certain seller-financed transactions from being counted toward the 5,000 loan limit. This would allow servicers that would otherwise qualify for small servicer status to keep their exemption while servicing those particular transactions.

#### *Requests for Information*

The proposed rule sets forth amendments that would change how a servicer must respond to requests for information asking for ownership information for loans in trust for which the Federal National Mortgage Association ("Fannie Mae") or Federal Home Loan Mortgage Corporation ("Freddie Mac") is the trustee, investor, or guarantor.

#### *Public Comments*

The proposed rule will be open for public comment for 90 days after its upcoming publication in the *Federal Register*. We expect numerous comments from various industry participants and other observers since the rules could expose mortgage servicers to increased liability and litigation costs, not to mention compliance costs.

#### *Effective Date*

To give mortgage servicers adequate time to comply with all aspects of the proposed rule, the CFPB has proposed that the changes take effect 280 days after publication of a final rule in the *Federal Register*, with the exception of the periodic statement requirement for certain bankrupt borrowers, which the CFPB has proposed should take effect one year after publication. The CFPB seeks comment on whether these proposed effective dates are appropriate, or whether the CFPB should adopt alternative effective dates.

Once the comment period closes 90 days after the proposed rule is published in the *Federal Register*, the CFPB will review and analyze the comments received and decide whether any adjustments are needed before issuing a final rule. Because we anticipate that it will likely take the CFPB at least several months to finalize the proposed changes, which will likely become effective 9-12 months later, it appears that the earliest implementation date would be mid-to-late 2016.

---

<sup>1</sup> Consumer Financial Protection Bureau, Amendments to the 2013 Mortgage Rules under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z) (November 20, 2014), *available at* [http://files.consumerfinance.gov/f/201411\\_cfpb\\_proposed-rule\\_mortgage-servicing.pdf](http://files.consumerfinance.gov/f/201411_cfpb_proposed-rule_mortgage-servicing.pdf).

<sup>2</sup> 78 Fed. Reg. 10,695 (Feb. 14, 2013); 78 Fed. Reg. 10,901 (Feb. 14, 2013).

<sup>3</sup> 78 Fed. Reg. 44,685 (July 24, 2013).

<sup>4</sup> 78 Fed. Reg. 60,381 (Oct. 1, 2013).

<sup>5</sup> 78 Fed. Reg. 62,993 (Oct. 23, 2013).

<sup>6</sup> Consumer Financial Protection Bureau, CFPB Bulletin 2013-12, Implementation Guidance for Certain Mortgage Servicing Rules (Oct. 15, 2013), *available at* [http://files.consumerfinance.gov/f/201310\\_cfpb\\_mortgage-servicing\\_bulletin.pdf](http://files.consumerfinance.gov/f/201310_cfpb_mortgage-servicing_bulletin.pdf).

<sup>7</sup> 79 Fed. Reg. 65,300, 65,304 (Nov. 3, 2014).

<sup>8</sup> Under 12 C.F.R. § 1024.41(g), servicers are currently required to take reasonable steps to prevent a scheduled foreclosure sale from going forward when a timely loss mitigation application has been received, and such steps include sending the borrower a notice that the borrower is not eligible for any loss mitigation option and the appeal process is not applicable, the borrower has not requested an appeal within the applicable time period for requesting an appeal, or the borrower's appeal has been denied; ensuring that the borrower has rejected all loss mitigation options offered by the servicer; or ensuring that the borrower has failed to perform under an agreement on a loss mitigation option.

<sup>9</sup> The consumer (i) "must be a debtor in a bankruptcy case, must have discharged personal liability for the mortgage loan through bankruptcy, or must be a primary obligor on a mortgage loan for

which another primary obligor is a debtor in a Chapter 12 or Chapter 13 case," and (ii) "(1) the consumer requests in writing that the servicer cease providing periodic statements or coupon books; (2) the consumer's confirmed plan of reorganization provides that the consumer will surrender the property securing the mortgage loan, provides for the avoidance of the lien securing the mortgage loan, or otherwise does not provide for, as applicable, the payment of pre-bankruptcy arrearages or the maintenance of payments due under the mortgage loan; (3) a court enters an order in the consumer's bankruptcy case providing for the avoidance of the lien securing the mortgage loan, lifting the automatic stay pursuant to 11 U.S.C. 362 with respect to the property securing the mortgage loan, or requiring the servicer to cease providing periodic statements or coupon books; or (4) the consumer files with the overseeing bankruptcy court a Statement of Intention pursuant to 11 U.S.C. 521(a) identifying an intent to surrender the property securing the mortgage loan."

<sup>10</sup> Pursuant to 12 U.S.C. § 5532, which requires consumer testing for model disclosure forms, the CFPB intends to conduct consumer testing on the proposed sample forms.

<sup>11</sup> The proposed rule would allow servicers to send coupon books, where servicers are otherwise permitted to send coupon books instead of periodic payments.

---

## *Authors*



**Franca Harris  
Gutierrez**

**PARTNER**

Chair, Financial Institutions  
Practice

Co-Chair, Securities and  
Financial Regulation Practice

✉ [franca.gutierrez@wilmerhale.com](mailto:franca.gutierrez@wilmerhale.com)

☎ +1 202 663 6557