PUBLICATION

CFPB Refines Mortgage Rules to Resolve Conflicts and Inconsistencies

October 30, 2013

On October 15, 2013, the Consumer Financial Protection Bureau (CFPB) issued an interim final rule[1] and bulletin[2] refining and making technical changes to certain provisions of its January 2013 mortgage rules. The interim rule addressed three areas of concern: (1) the conflict between the servicing rules and protections afforded to consumers by bankruptcy law and the Fair Debt Collection Practices Act (FDCPA); (2) "early intervention" requirements for delinquent borrowers; and (3) policies which guide identification and evaluation of, and communications with, a deceased borrower's heirs.

The public has 30 days to provide comments on the amendments to the mortgage servicing rules upon publication of the amendments in the Federal Register.[3] After considering the public comments and adjusting the rules accordingly, the final form of these amendments will take effect with the mortgage servicing rules on January 10, 2014.[4]

Rule Changes and Guidance on Bankruptcy and FDCPA

The interim rule is intended to resolve concerns raised by mortgage servicers and bankruptcy trustees on how to comply with the servicing rules governing loans involved in Chapter 11 bankruptcy proceedings, and loans where the servicer is subject to the FDCPA and the borrower has sent a "cease communication" notice under 12 U.S.C. § 1692c(c). The CFPB proposes to resolve the conflict between complying with the cease notice and the servicing rules' notice requirements established by bankruptcy law by exempting servicers from both the periodic statements and the early intervention requirements for borrowers who have filed for bankruptcy.

Yet, certain communications are still required even when a borrower simply provides a general "cease communications" request: notices regarding initial interest rate adjustment of adjustable-rate mortgages, information requests, error resolution, requests for loss mitigation, lender-placed insurance and periodic statements. The following table summarizes the CFPB's conclusions on the interplay between the mortgage servicing rules, bankruptcy law and the FDCPA.

Mortgage Servicing Rules	Borrower Filed for Bankruptcy	Borrower Sent "Cease Communications" Notice
Error Resolution Procedures (12 C.F.R. § 1024.35)	No exemption from servicing rules	Must comply with servicing rules unless borrower specifically withdraws error notice[5]
Requests for Information (12 C.F.R. § 1024.36)	No exemption from servicing rules	Must comply with servicing rules unless borrower specifically withdraws "cease communication" request[6]
Force-Placed Insurance (12 C.F.R.	No exemption from servicing rules	No exemption from servicing rules[7]

§ 1024.37)		
Early Intervention Requirements (12 C.F.R. § 1024.39)	Exempt from servicing rules once bankruptcy petition is filed until the case is dismissed or closed, or borrower receives a discharge[8]	Exempt from serving rules[9]
Loss Mitigation Procedures (12 C.F.R. § 1024.41)	No exemption from servicing rules	Must comply with servicing rules unless borrower specifically withdraws request for loss mitigation[10]
ARM Payment Adjustment Notice (12 C.F.R. § 1026.20(c))	No exemption from servicing rules	Exempt from serving rules[11]
ARM Initial Rate Adjustment Notice (12 C.F.R. § 1026.20(d))	No exemption from servicing rules	No exemption from servicing rules[12]
Periodic Statements (12 C.F.R. § 1026.41)	Exempt from servicing rules once bankruptcy petition is filed until the case is dismissed or closed, or borrower receives a discharge[13]	No exemption from servicing rules[14]

The CFPB, however, did not go so far as to analyze when bankruptcy law or the FDCPA may prohibit certain communications required by the servicing rules. Instead, it encouraged servicers to continue communicating with delinquent borrowers even in instances when compliance with the servicing rules is not required.[15] Further analysis of the interplay between the servicing rules and the FDCPA is expected in an upcoming rulemaking on debt collection.[16]

Early Intervention Guidance (12 C.F.R. § 1024.39)

The Bulletin additionally provided guidance on how a servicer can comply with the early intervention requirements of the servicing rules to establish live contact with the borrower. Once the rule goes into effect, for each billing cycle in which a borrower is delinquent for at least 36 days, servicers are required to make good faith efforts to establish live contact with the borrower by the 36th day and, if appropriate, to inform the borrower about the availability of loss mitigation options.[17] While the Bulletin provided specific guidance, the CFPB acknowledged that contact methods should be tailored to the particular circumstances, and, thus, the rule is designed to give servicers flexibility in developing and implementing communication processes.[18]

To clarify the CFPB's expectations, the Bulletin provided illustrative examples of what the CFPB would consider "reasonable steps" to reach delinquent and unresponsive borrowers. For example, in cases where a borrower falls delinquent under a loss mitigation plan or becomes delinquent after curing a default, the servicer must resume efforts – telephone calls and written communications – to contact the borrower within 36 days of the delinquency and continue those efforts so long as the borrower remains in default.[19] Nevertheless, after six or more consecutive delinquencies, "good faith" efforts may consist of no more than a single telephone call or a sentence in a periodic statement or other written communication asking the borrower to contact the servicer.[20] Such minimal efforts, the CFPB advised, should be limited to circumstances where all loss mitigation options have been exhausted and there is little to no hope of home retention.[21] Additionally, servicers may meet the live contact requirement by establishing and maintaining on-going communications with a delinquent borrower regarding the borrower's loss mitigation application or the servicer's evaluation of that application. The CFPB also explained that the live contact requirement may be satisfied by piggy-backing "good faith" efforts onto other communications with the borrower, such as adding information on loss mitigation options to collection calls or including a sentence in a written communication requesting that the borrower contact the servicer.[22]

Policies and Procedures Regarding Successors in Interest (12 C.F.R. § 1204.38(b)(1)(vi))

The final area in which the CFPB provided clarification pertain to a servicer's responsibility under the mortgage servicing rules to develop and implement home retention efforts after a borrower dies. Policies and procedures must be in place to ensure that family members, heirs or other parties with a legal interest in the property are promptly identified and contacted.[23] According to the Bulletin, after a borrower's death is confirmed, sufficient home retention efforts would be designed to promptly identify the borrower's successor in interest and provide the successor with information on the current status of the mortgage.[24] Servicers must then provide a successor with any documents, forms or other materials that are needed to allow the successor to continue making payments on the mortgage and, where appropriate, for servicers to evaluate the successor for loss mitigation options or assumption of the mortgage.[25]

Clearly, these refinements to the mortgage servicing rules are intended to increase the rate of home retention by family members or other heirs after the death of borrowers. Yet, because many successors in interest are likely to be unable to qualify for assumption – given the CFPB's current application of the ability-to-repay rule to assumptions – these efforts may not succeed.

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[1] Bureau of Consumer Financial Protection, Interim Final Rule, Amendments to the 2013 Mortgage Rules under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z)(October 15, 2013), http://files.consumerfinance.gov/f/201310_cfpb_mortgage-servicing_interim.pdf (publication in the Federal Register forthcoming)("Release").
[2] CFPB Bulletin 2013-12, *Implementation Guidance for Certain Mortgage Servicing Rules* (October 15, 2013), http://files.consumerfinance.gov/f/201310_cfpb_mortgage-servicing_bulletin.pdf ("Bulletin").
[3] Release at 1.
[4] *Id*. at 11.
[5] Bulletin at 6 - 7.
[6] *Id*.
[7] *Id*.
[8] *Id*.
[9] New 12 C.F.R. § 1024.39(d)(1); Cmts. 39(d)(1)-1 through -3, Release at 44 - 46.
[10] Bulletin at 6 - 7.
[11] New 12 C.F.R. § 1026.20(c)(1)(ii)(C) Bulletin at 6.
[12] Bulletin at 6 - 7.
[13] New 12 C.F.R. § 1026.41(e)(5); Cmts 41(e)(5)-1 through -3.
[14] Bulletin at 6 - 7.
[15] *Id*. at 16, 19, 22 and 31. The CFPB "believes that further study of these issues is warranted but cannot be concluded quickly enough to provide further calibration of the requirements before January 2014." *Id*. at 16.
[16] *Id*. at 20 and 22.
[17] 12 C.F.R. §1024.39(a)
[18] Bulletin at 4 – 4 and n. 16.
[19] Bulletin at 5- 6.

[20] *Id.*
[21] *Id.*
[22] Bulletin at 5.
[23] 12 C.F.R. § 1204.38(b)(1)(vi).
[24] Bulletin at 1 – 4.
[25] *Id.*