

PUBLICATION

How Does the CFPB View Private Label Servicing?

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As mortgage servicing compliance costs have risen year after year, lenders have looked for a way to decrease costs while retaining their customer visibility and brand awareness. In response to this demand, private label servicing has grown in popularity. Private label servicing products come in an array of offerings, ranging from a simple co-branding of billing statements which include your institution's name and logo all the way through private borrower facing payment portals linked from your lender's homepage with ACH drafts, credit reporting and collection activity all done in your institution's name by said private label servicer. With the most comprehensive offerings of private label servicing, the borrower never knows the subservicer exists, and that's the point. The wide spectrum of how this service is offered, along with its increase in popularity, calls for regulatory guidance.

Earlier this year the U.S. Government Accountability Office (GAO) issued a report which emphasized the fact that the share of mortgages serviced by non-banks increased from 6.8 percent in 2012 to 24.2 percent in 2015. They also stated that it is important for CFPB to take steps to identify all non-bank entities and collect more comprehensive data to further ensure that all non-bank servicers comply with federal laws governing mortgage lending and consumer protection. This rise in market share by non-bank servicers leads many to believe that the practice of private label servicing is ripe to be reviewed by the CFPB under their "risk based" approach to supervision and enforcement.

The CFPB does not address the practice of private label servicing in their guidance or any regulation. If you informally inquire with the Bureau, a common response is that the practice is not a violation per se. Those that are currently performing private label servicing or utilizing the service rely on the argument that a subservicer providing private label servicing is acting as a "service provider" or "vendor" of the servicer who retains the Mortgage Servicing Rights (MSRs). As a "service provider" or "vendor" they are not acting as a traditional subservicer. The argument, while formally untested, is a valid one. There are "service providers" who perform activities for servicers every day that do the work in the name of servicer. However, there is an argument to be made that outsourcing the entire servicing business escalates you from a "service provider" to a "subservicer."

Regulation X defines "master servicer" and "subservicer" but fails to address private label servicing. Master Servicer is defined as "the owner of the right to perform servicing. A master servicer may perform the servicing itself or do so through a subservicer." Subservicer is defined as "a servicer that does not own the right to perform servicing, but that performs servicing on behalf of the master servicer." While "service provider" is defined in section 1002(26) of the Dodd-Frank Act as "Any person that provides a material service to a covered person in connection with the offering or provision by such covered person of a consumer financial product or service." The industry needs to know where the line in which private label servicing moves from a service provided by a vendor to being provided by a subservicer.

Without formal guidance, various regulatory questions arise to which there is no clear answer:

1. Are you required to issue a Notice of Transfer of servicing rights when loan boards with a private label servicer?

2. Can the private label servicer furnishing credit reporting in the name of the holder of the MSR without violating the Fair Credit Reporting Act (FCRA)?
3. Which entity's name should appear on a debt validation notices or mini Miranda warnings when acting a collector on defaulted loans under the FDCPA?
4. How will the practice of private label servicing be treated under UDAAP, and what would be the best practices for both the subservicer and the master servicer to avoid a UDAAP violation?
5. Who issues a privacy notice under the GLBA, as well as many other regulatory issues?

As the market share of non-bank servicers continues to grow along with the popularity of private label servicing, so will the CFPB supervision and enforcement focus on these issues. The industry should be demanding clear guidance as these services are currently being offered with no mal intent towards the consumer, but market participants will need indications as to how each party should approach the practice. This is an opportunity for the Bureau to move away from the practice of regulation through enforcement and issue guidance that good actors in the space can use to avoid any unnecessary regulatory violations.

For small originators who currently utilize private label servicing, it's important to note that the CFPB is very clear about vendor liability, as they have issued guidance on the topic in [CFPB Bulletin 2012-03](#). The use of a subservicer for private label servicing does not absolve your institution of the compliance and/or regulatory risk. Prior to engagement, your institution should have a complete audit of policies, procedures and controls your private label servicer has in place, including loan boarding, payment application, servicing transfer, loss mitigation, escrow analysis, complaint handling and escalation procedures, LPI processes, collection and so on. These reviews should be completed on a regular basis. Controls like these reviews will limit regulatory exposure, but not eradicate it. Conversely, if you are a subservicer offering private label servicing, you should be assessing if you have sufficiently reviewed your procedures and product offering under all applicable consumer lending regulations at both the state and federal level to ensure you are comfortable with your compliance.

Eventually the mortgage industry will see guidance and regulations which address the issues raised in private label servicing at the state level and/or the federal level, but until then, the industry should be very attentive to the risks associated with the practice and push for more guidance on the topic. If you have any questions regarding your organization's current compliance under any of the CFPB current rules, or issues with an examination or investigation, please contact a member of Baker Donelson's CFPB Team.