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CFPB Finalizes New Mortgage Servicing Rules

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The authors explore new rules that impose strict requirements on servicers to provide detailed information regarding a borrower's mortgage loan and options to avoid foreclosure.

Earlier this year, the Consumer Financial Protection Bureau ("CFPB") finalized rules implementing the mortgage loan servicing requirements of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"). The final rules amend Regulation X, which implements the Real Estate Settlement Procedures Act of 1974 (the "RESPA Amendments") and Regulation Z, which implements the Truth-in-Lending Act (the "TILA Amendments"). The amendments will provide borrowers with detailed information regarding their loans, ensure that mortgage servicers do not unexpectedly assess borrowers with charges and fees, and ensure that borrowers are informed of alternatives to avoid foreclosure. Furthermore, the final rules will provide borrowers with more timely and accurate responses to their complaints by requiring servicers to follow certain error resolution procedures. The rules become effective January 10, 2014.

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RESPA AMENDMENTS

Scope

The RESPA Amendments apply to any "mortgage loan," with certain exceptions. For example, the RESPA Amendments do not apply to open-end lines of credit, such as home equity plans, small servicers,[1] mortgages serviced by qualified lenders,[2] or reverse mortgage loans.

Error Resolution Procedures

The RESPA Amendments require servicers to follow certain procedures when a borrower asserts that a "covered error" has occurred on his or her mortgage loan account by submitting a notice ("notice of error"). Covered errors include, among other things, failures to: accept conforming payments; apply or credit payments properly; pay taxes, insurance, or others fees; or provide accurate information regarding loss mitigation options and foreclosures. Covered errors also include the imposition of fees or charges without a reasonable basis. Servicers may designate an address where borrowers can send error notices.

Within five business days (excluding holidays) of a borrower submitting a "notice of error," the servicer must provide the borrower with a written response acknowledging its receipt. The servicer must also send a separate notice that states the final disposition of the notice of error — whether an error has been found, a different or additional error has been detected, or if the error has been corrected. As an alternative, the servicer may request additional information from the borrower to further assist it in investigating the error.

Generally, the servicer is required to inform the borrower of the final disposition of the "notice of error" within 30 days of its receipt. If, however, the "notice of error" asserts a failure to provide an accurate payoff balance upon the borrower's request, the servicer must update the borrower of the status of the "notice of error" no later than seven days after receiving it. Additionally, if the "notice of error" asserts an error that involves a notice or filing of foreclosure, the servicer must send its notice before the foreclosure due date or within 30 days of receiving the "notice of error," whichever is earlier. Under certain circumstances, if the servicer informs the borrower in writing the servicer may extend the time period for responding to the borrower.

Servicers are also required to follow similar guidelines when a borrower makes a written request for information regarding his or her account. One difference is that if a borrower requests the identity of, and contact information for, the owner or assignee of his or her mortgage loan, servicers must respond to this request within ten days. Servicers are not required to follow these notice requirements if a borrower sends a duplicate notice of error, an untimely notice, or an overly broad notice of error in which the servicer is unable to reasonably determine the specific error asserted.

Force-placed Insurance

The RESPA Amendments also prohibit servicers from charging a borrower for force-placed insurance[3] unless there is a reasonable basis to believe that such a borrower has not complied with the mortgage contract's requirement to maintain hazard insurance. In addition, a servicer may not purchase force-placed insurance if it can continue a borrower's current insurance, even if the servicer must advance the funds.[4]

Upon establishing a reasonable basis to purchase force-placed insurance, the servicer must send an initial notice to the borrower 45 days before the servicer assesses a fee. The notice must include the date of the notice, the servicer's and borrower's contact information, a physical description of the property, and a request that the borrower provide proof of hazard insurance. The notice must also, among other things, inform the borrower that hazard insurance is required, and, if applicable, provide a statement explaining that hazard insurance has been purchased, the coverage of the insurance may be less than if purchased by the borrower, and may cost significantly more than if purchased by the borrower.

In addition to the initial notice, servicers must also send a reminder notice to borrowers at least 15 days prior to charging the borrower for force-placed insurance. Among other things, the reminder notice must contain the information provided in the initial notice and inform the servicer that the reminder notice is the second and final notice before a charge for force-placed insurance will be assessed. The servicer must also provide the borrower with the annual premium or a reasonable estimate of the force-placed insurance.

All charges related to the force-placed insurance must be *bona fide* and reasonable. Insurance regulated by states as "the business of insurance" or charges authorized by the Flood Disaster Protection Act are considered *per se* reasonable. Before renewing or replacing existing force-placed insurance, a servicer must comply with similar notice requirements, except that a reminder notice is not required. If the borrower provides proof of hazard insurance coverage, the servicer must cancel the force-placed insurance and return any premiums for the period during which coverage has overlapped.

General Servicing Policies and Procedures

The RESPA Amendments also require servicers to establish and maintain policies and procedures that would achieve certain objectives set by the CFPB, which include assessing and providing timely and accurate information, properly evaluating loss mitigation applications, facilitating oversight of, and compliance by, service providers, facilitating the transfer of information during service transfers, and processing information requests and error notifications. Servicers may adopt policies that take into account the size, nature, and scope of their operations. Additionally, servicers are required to retain certain records and information regarding a borrower's mortgage loan until one year after the loan is discharged or transferred to another servicer. The documents must be maintained in a manner that will facilitate the servicer compiling a service file within five days. A servicer's failure to comply with these requirements does not provide borrowers with a private right of action.

Early Intervention Requirements for Certain Borrowers

Servicers are required to make a good faith effort to establish live contact within 36 days of a borrower's delinquency to inform him or her of loss mitigation procedures, if applicable. The delinquency period begins on the first day that a payment sufficient to cover principal, interest, and escrow is not paid when due, regardless of any grace period afforded to the borrower. The servicer must also provide a written notice within 45 days of a borrower's delinquency that encourages the borrower to contact the servicer. The notice must contain the servicer's contact information, a brief description of loss mitigation options, and instructions on how to obtain more information about the loss mitigation options. The notice must also include the CFPB's website to access either the CFPB list or the United States Department of Housing and Urban Development ("HUD") list of homeownership counselors or counseling organizations. In addition, servicers must provide HUD's toll-free number so that borrowers can access the HUD list of homeownership counselors or counseling organizations.

Continuity of Contract

In addition to early intervention for delinquent borrowers, servicers must also provide assigned representatives who are responsible for answering a borrower's inquiries and assisting the borrower through the loss mitigation process until two consecutive payments in accordance with the loss mitigation contract have been received in a timely manner. The assigned representative must be made available to the borrower by the time the borrower receives the written notice described above, but in any event, no later than 45 days after the borrower's delinquency.

Loss Mitigation Procedures

The RESPA Amendments also require servicers to follow certain procedures during the loss mitigation process. If a servicer receives a loss mitigation application at least 45 days before a foreclosure sale, the servicer must, within five days, acknowledge receipt of the application and promptly review the application to ensure it is complete and, if not, inform the borrower of what documents or information are necessary for completion. The servicer must also inform the borrower that he or she should contact servicers of any other mortgage loans secured by the same property to discuss available loss mitigation options. Furthermore, the servicer must disclose the time period in which it must receive the necessary documentation or information — on the 120th day of the borrower's delinquency, 90 days before the foreclosure date, or 38 days before a foreclosure sale, whichever date is earliest.

A servicer must evaluate a completed loss mitigation application for all loss mitigation options and provide a written notice of those options within 30 days of receipt if the application is received at least 37 days before a foreclosure sale. If the application remains incomplete for a significant period of time and the servicer exercised due diligence to obtain the information necessary to complete the information, the servicer may evaluate and offer loss mitigation options based upon the incomplete application. If the borrower fails to submit an application at least 37 days before a foreclosure sale, the servicer may proceed with the foreclosure process.

If a servicer denies a loss mitigation application, it must state the specific reasons for the determination, inform the borrower that he or she has a right to appeal the servicer's decision, and explain the appeal process, if applicable. A borrower may only appeal the servicer's decision if the application was submitted at least 90 days before the foreclosure sale or during the pre-foreclosure review period (as defined below). On appeal, the application must be reviewed by different personnel than those responsible for denying the application. The servicer must provide a written notice of its decision on the appeal within 30 days. If the servicer offers the borrower loss mitigation options, it may require that the borrower accept an option within 14 days after receiving the notice.

The RESPA Amendments also prohibit "dual tracking." Specifically, servicers are prohibited from initiating a foreclosure action unless the borrower is at least 120 days delinquent. This 120-day period is known as the "pre-foreclosure review period." If a loss mitigation application is submitted during the pre-foreclosure review period, the servicer may not initiate foreclosure unless the application is denied and either: (1) the borrower has not taken advantage of an appeal or his or her appeal has been denied, (2) the borrower has rejected all of the loss mitigation options offered, or (3) the borrower failed to comply with the loss mitigation agreement. If the servicer has initiated the foreclosure process and the borrower submits a loss mitigation application at least 37 days prior to the foreclosure sale, the servicer may not move for a judgment or order of sale or conduct a foreclosure sale unless the three requirements above have been satisfied. Although small servicers are generally exempt from the RESPA Amendments, small servicers are prohibited from initiating the foreclosure process if the borrower is less than 120 days delinquent or is complying with the terms of a loss mitigation agreement.

TILA AMENDMENTS

Periodic Statements for Residential Mortgage Loans

The TILA Amendments impose a new requirement for Loan Holders[5] to provide certain residential mortgage loan borrowers with periodic billing statements that clearly explain the details of the borrower's loan. The statements must be mailed or delivered within a reasonably prompt time after the payment is due or after any courtesy period afforded to the borrower.

The TILA Amendments provide exemptions for certain Loan Holders and types of mortgages. Small Loan Holders (those who service fewer than 5,000 mortgages in a calendar year, which are all owned or originated by that Loan Holder or its affiliates as well as Loan Holders who qualify as a Housing Finance Agency, as defined in 24 C.F.R. § 266.5) are exempt from the requirements. Statements are also not required for reverse mortgages or timeshare plans. In addition, fixed rate loans are exempt if Loan Holders provide borrowers with coupon books that contain most of the information that is required to be included in the periodic billing statement, as described below. The Loan Holder must also provide delinquency information to the borrower, in writing, during the billing cycle stating that the borrower is more than 45 days delinquent to qualify for the exemption.

The periodic statement must contain detailed information concerning a borrower's mortgage account. Loan Holders are required to provide the disclosures set forth below.

- *Payment Information*. Loan Holders must provide information regarding the borrower's past and currently due payments. The information must include the amount due, the due date, an explanation of any late payment fees that may be assessed, and an explanation of how payments are applied to principal, interest, and escrow. Where a borrower has multiple payment options, information for each option must be provided on whether the borrower's payments will increase, decrease, or remain the same. If a partial payment is received, the Loan Holder must also explain what actions the borrower must take to have the funds applied to the loan.
- *Transaction Activity*. The periodic statement must include all the transaction activity that has occurred since the last billing statement. Transac-

tion activity is defined as any account activity that causes a debit or credit to the amount due.

- *Account Information*. Loan Holders must provide the borrower with account information, such as the principal balance, the current interest rate of the loan, the date of any interest rate change, and any prepayment penalty fees. The statement must also include information about a website where borrowers can access either the CFPB's or HUD's list of homeownership counselors and counseling organizations and the HUD toll-free number where the borrower may access the HUD contact information for homeownership or counseling organizations.
- *Contact Information*. The periodic statement must contain the Loan Holder's toll-free number and, if applicable, an email address where a borrower may obtain information about his or her account.
- *Delinquency Information*. If a borrower's payment is more than 45 days delinquent, the statement must contain, among other things, the date of delinquency, an explanation of the risks that may be incurred if the delinquency is not resolved, and the amount needed to bring the account current. If applicable, the statement must also indicate any loss mitigation programs that the borrower has agreed to and whether the Loan Holder has initiated the foreclosure process. The Loan Holder may elect to send this information in a separate letter instead of including it in the periodic statement.

Interest Rate Adjustment Notices

The TILA Amendments also amend the current rules by adding to the disclosures required for rate adjustments with a corresponding change in payment. Creditors, assignees, and servicers are required to provide borrowers who have adjustable rate mortgages ("ARMs") with disclosures in connection with this type of interest rate increase. An ARM is defined as "a closed-end consumer credit transaction secured by the borrower's principal place of dwelling in which the annual percentage rate may increase after consummation."[6] Creditors, assignees, and servicers are not required to send notices for ARMs with terms of one year or less. Such parties are also not required to make disclosures for the first initial rate adjustment if (1) the loan's first payment at the adjusted level is due 210 days after the loan is consummated; (2) the creditor, assignee, or servicer disclosed the new rate at the time the loan was consummated; and (3) the rate disclosed was not an estimate.

The timing of the required disclosures varies under certain conditions. Generally, creditors, assignees, and servicers must send notices at least 60 days, but no more than 120 days, before the first payment at the adjusted level is due. For ARMs with uniformly scheduled payments that occur every 60 days or more frequently, notices must be delivered at least 25 days, but no more than 120 days, before the first payment is due at the adjusted level. This timing requirement also applies to ARMs, with look back periods of less than 45 days if originated prior to January 10, 2015. For ARMs where the first adjustment occurs within 60 days after the loan's consummation and the servicer disclosed the new interest rate (which was not an estimation) at time of consummation, notices must be delivered as soon as practicable, but not less than 25 days before the payment at the adjusted level is due. The notices must include the following information:

- An estimate of the new interest rate if the new interest rate is unknown at the time the notice is sent;
- The date the creditor, assignee, or servicer sent the notice to the borrower;
- A statement explaining that the borrower's current interest rate is ending, the new terms of the ARM, and the effective date of the new terms;
- A table displaying the current and new interest rates, the current and new payment, the date the payment is due, and for interest-only or negatively amortizing loans, a statement explaining the allocation of the current and new payment to principal, interest, taxes, and insurance, as applicable;
- Any limits on interest rates or any payment increases at each interest rate adjustment, as applicable;
- An explanation of how the new payment and interest rate is determined;
- If applicable, a statement that the new payment will not pay the loan principal or reduce the loan balance; and
- An explanation of any prepayment penalties.

In addition to adding the disclosures required above, the TILA amendments eliminate the annual notice requirement for interest rate adjustments that occur without a corresponding change in payments. Instead, the rules impose a new requirement on creditors, assignees, and servicers (who currently own either an ARM or the servicing rights of an ARM) to provide borrowers with disclosures regarding the initial rate adjustment of the loan. This requirement does not apply to ARMs with terms of one year or less. Loan modifications and conversions are also exempt from the disclosure requirements, unless, pursuant to a modified contract, the rate is adjusting for the first time. Notices must be delivered or mailed between 210 and 240 days prior to the date the first payment at the adjusted level is due. If the first payment is due within the first 210 days after the loan is consummated, the disclosures must be made at the loan's consummation.

With the exception of a few technical requirements within each content category, the content of the initial rate adjustment notices is very similar to the disclosures required for rate adjustments that result in a corresponding change in payment. In addition to the informational requirements described above, creditors, assignees, and servicers must also provide borrowers with:

- A telephone number of the creditor, servicer, or assignee for borrowers to call if they anticipate that they will not be able to make the payments;
- An explanation of alternatives to not paying the new rate, such as refinancing the loan, selling the property and using the funds to pay the mortgage in full, modifying the terms of the loan and arranging for payment forbearance; and
- Website information so that borrowers will have access to either the CFPB's or HUD's list of homeownership counselors and counseling organizations, HUD's toll-free number to access the HUD list of homeownership counselors and counseling organizations, as well as the CFPB's website to access contact information for state housing finance authorities.

Prohibited Mortgage Servicing Acts and Practices

The TILA Amendments prohibit certain acts and practices in connection with transactions of credit secured by a dwelling. With the exception of nonconforming payments or situations where a delay in crediting a payment will not result in the imposition of a fee or a negative report to a consumer reporting agency, servicers must credit periodic payments to a borrower's loan account on the date of receipt. Periodic payments are defined as a payment sufficient to pay the principal, interest, and escrow (if applicable) for any billing cycle. For a payment to qualify as a periodic payment, it is not necessary for the payment to cover late fees, non-escrow payments, or other fees.

If a servicer receives a partial payment (any payment less than a periodic payment) from a borrower and retains it in a suspense or unapplied funds account, the servicer must disclose to the borrower on a periodic statement the amount held in such an account. Once the servicer has accumulated funds in the suspense or unapplied funds account sufficient to cover a periodic payment, those funds must be applied to the borrower's loan account. Furthermore, if a servicer provides a borrower with written instructions for making payments and then accepts a nonconforming payment, the servicer must credit the payment within five days of receipt of the payment.

CONCLUSION

The RESPA and TILA Amendments impose strict requirements on servicers to provide detailed information regarding a borrower's mortgage loan and options to avoid foreclosure. The final rules are aligned with the CFPB's goals to ensure that borrowers have access to timely and accurate information when dealing with mortgage servicers. Although the rules become effective January 10, 2014, they will require servicers to implement significant software, training, and other changes. Therefore, creditors, servicers, and assignees should start preparing now for compliance with the final rules.

NOTES

[1] Small servicers are defined as those servicers who service fewer than 5,000 mortgages in a calendar year, which are all owned or originated by that servicer or its affiliates, as well as servicers who qualify as a Housing Finance Agency, as defined in 24 C.F.R. § 266.5. Generally, small servicers are exempt from the RESPA Amendments' requirements, however, three rules are applicable. First, small servicers are prohibited

from making the first notice or file for any judicial or non-judicial foreclosure during the pre-foreclosure review period (as defined below). Second, small servicers must not file a first notice or file for any judicial or non-judicial foreclosure if a borrower is performing his or her obligations under a loss mitigation agreement. Lastly, small servicers must comply with certain force-placed insurance requirements (as described below).

[2] Qualified lender is defined as a "(1) [s]ystem institution, except a bank for cooperatives, that makes loans as defined in this section; and (2) [e]ach bank, institution, corporation, company, credit union, and association described in section 1.7(b)(1)(B) of the Act (commonly referred to as another financing institution), but only with respect to loans discounted or pledged under section 1.7(b)(1)." *See* 12 C.F.R. § 617.7000.

[3] Forced-placed insurance is defined as "hazard insurance obtained by a servicer on behalf of the owner or assignee of a mortgage loan that insures the property securing the loan." *See Mortgage Servicing Rules Under the Real Estate Settlement Act (Regulation X),* 78 Fed. Reg. 10,880 (Feb. 14, 2013) (to be codified at 12 C.F.R. § 1024.37).

[4] Generally, small servicers are exempt from the RESPA Amendments. Small servicers, however, must comply with this prohibition unless the force-placed insurance purchased by the small servicer is less expensive than the amount the servicer would have advanced to continue the borrower's current insurance.

[5] For purposes of providing periodic statements only, the term "servicer" includes creditors and assignees if such parties own the mortgage loan or the mortgage servicing rights ("Loan Holder"). Although each Loan Holder is subject to the rule, only one statement per billing cycle is required to be sent to the borrower. If more than one party is subject to the rule, the parties may choose among themselves who will be responsible for complying with the rule.

[6] *Mortgage Servicing Rules Under the Truth-in-Lending Act (Regulation Z)*, 78 Fed. Reg. 11,004 (Feb. 14, 2013) (to be codified at 12 C.F.R. § 1026.20(c)(1)(i)).