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Consumer Financial Protection Bureau Clarifies New Mortgage Servicing Rules

BRIAN McCORMALLY AND MICHAEL MIERZEWSKI

A new interim final rule from the Consumer Financial Protection Bureau, and an explanatory bulletin, details and clarifies the requirements of the CFPB's mortgage servicing rules, which were finalized in January 2013.

The Consumer Financial Protection Bureau (“CFPB”) recently issued an interim final rule,¹ as well as an explanatory bulletin,² to further detail and clarify the requirements of the agency’s mortgage servicing rules that were finalized in January 2013 (the “Servicing Rules”).³ The Servicing Rules implement the provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”) amending the Real Estate Settlement Procedure Act of 1974 (“RESPA”) and the Truth in Lending Act (“TILA”) to provide borrowers with more detailed information regarding their loans, ensure that borrowers are not unexpectedly assessed charges or fees, and inform borrowers of alternatives to foreclosures.

After issuing the final Servicing Rules, the CFPB received a large number of inquiries from servicers regarding how they can best comply with the Rules. The interim final rule and bulletin address many of the issues raised in those inquiries, including the permissible communications with successors-in-interest when a borrower dies, the appropriate procedures to contact delinquent borrowers, and the proper treatment of borrowers who have filed for bankruptcy or invoked the protections of the Fair Debt Collection Practices Act (“FDCPA”).

The authors, attorneys with Arnold & Porter LLP, can be reached at Brian.McCormally@aporter.com and Michael.Mierzewski@aporter.com, respectively.

HOME RETENTION EFFORTS AFTER A BORROWER DIES

Beginning in January 2014, the Servicing Rules will require servicers to implement policies and procedures to promptly identify and contact successors-in-interest upon notification of a borrower's death. This requirement is intended to promote home retention by ensuring that successors-in-interest are able to pursue assumption of a deceased borrower's loan or, if applicable, loan mitigation efforts. In its bulletin, the CFPB provides examples of practices that it would consider "reasonably designed" to achieve the objectives of the Servicing Rules, such as:

- Informing any person claiming to be a successor-in-interest of all documents and other evidence that the servicer requires to establish the death of the borrower and the identity and legal interest of the successor-in-interest. The information required by the servicer should be reasonable considering the laws of the relevant jurisdiction.
- Promptly providing successors-in-interest with information regarding the loan, including whether the loan is current or delinquent, whether there is a loss-mitigation option in place, and whether there is a planned or pending foreclosure proceeding. The servicer should also provide information regarding the successor-in-interest's eligibility to continue making payments on the loan, for loss-mitigation options, or to assume the loan.
- Providing employees with information regarding laws or other requirements that may affect the servicer's obligations following the death of a borrower.

In addition, the CFPB encourages servicers to consider whether they would postpone or withdraw any planned or pending foreclosure proceedings so that the successor-in-interest would have a reasonable opportunity to establish ownership rights and pursue assumption of the loan or loss-mitigation options, and whether they would promptly provide a successor-in-interest with information about the possible consequences of assuming the mortgage loan.

EARLY INTERVENTION FOR DELINQUENT BORROWERS

The CFPB has also clarified how servicers may comply with the early intervention requirements of the Servicing Rules, under which servicers must make good faith efforts to establish live contact with a delinquent borrower within 36 days of the delinquency to inform the borrower of the availability of the servicer's loss-mitigation options. The Servicing Rules provide that the servicer must attempt to contact the borrower each time he or she misses a payment. In its new bulletin, however, the CFPB explains that servicers have "significant flexibility in tailoring their contact methods to particular circumstances."⁴ Examples of the types of approaches a servicer might take include establishing and maintaining ongoing contact with a borrower to complete a loss-mitigation application and evaluate loss-mitigation options, or combining contacts, such as adding a brief script to a collections call to inform borrowers of loss-mitigation options.

In the case of borrowers who are unresponsive to attempts at communication, the bulletin clarifies that with respect to those who become delinquent again after six or more consecutive delinquencies, the servicer might meet the requirements of the rule simply by "making a single telephone call or including a sentence requesting the borrower to contact the servicer with regard to the delinquencies in the periodic statement or in an electronic communication."⁵ This policy may be most appropriate when home retention is a remote possibility, such as when all loss-mitigation options have been exhausted.

INTERPLAY BETWEEN BANKRUPTCY LAW, FDCPA, AND THE SERVICING RULES

To address the possibility that the Servicing Rules might conflict with bankruptcy law and the FDCPA, the CFPB has exempted servicers from certain requirements of the Servicing Rules through the interim final rule, and provided an advisory opinion interpreting the FDCPA's "cease communication" requirement in relation to the Servicing Rules in the bulletin.

Specifically, the interim final rule exempts servicers from the periodic statement and early intervention requirements of the Servicing Rules for

those borrowers who are in bankruptcy. In the interim final rule, the CFPB makes clear that in providing this exemption, it is not taking a position on whether intervention efforts violate the automatic stay or discharge injunction, and it encourages servicers to continue intervention efforts to the extent that bankruptcy law permits. Servicers are required to resume early intervention efforts after the first delinquency once the case is dismissed, closed, or the debt is discharged.

Additionally, the interim final rule exempts servicers from complying with certain provisions of the Servicing Rules when a borrower instructs the servicer to “cease communication” under the FDCPA. Specifically, servicers will not be required to contact borrowers under the early intervention requirements or to send interest-rate adjustment notices. This exemption, however, does not apply to other communications required under the Servicing Rules. The CFPB has concluded in the bulletin that servicers who are deemed debt collectors under the FDCPA will not be liable, notwithstanding a “cease communication” instruction, if they, in compliance with the Servicing Rules, communicate with a borrower in regards to requests for loss-mitigation, information requests, error resolution, force-placed insurance, initial interest rate adjustment of adjustable-rate mortgages, and periodic statements. These communications are either specifically requested by the borrower (and therefore excluded from the cease-communication instruction) or mandated by the Dodd-Frank Act, which, according to the CFPB, “presents a more recent and specific statement of legislative intent regarding disclosures than the FDCPA.”⁶ With respect to information requested by the borrower, servicers may cease to comply with the requirements of the Servicing Rules to respond to the borrower’s information requests if the borrower specifically withdraws the requests.

The relevant portions of the Servicing Rules become effective on January 10, 2014.

NOTES

¹ Amendments to the 2013 Mortgage Rules under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 62993 (Oct. 23, 2013).

² Consumer Financial Protection Bureau, Implementation Guidance for Certain

Mortgage Servicing Rules, CFPB Bulletin 2013-13 (Oct. 15, 2013) [hereinafter “Bulletin”].

³ Mortgage Servicing Rules Under the Real Estate Settlement Act (Regulation X), 78 Fed. Reg. 10695 (Feb. 14, 2013) (to be codified at 12 C.F.R. § 1024.39); Mortgage Servicing Rules Under the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 10902 (Feb. 14, 2013).

⁴ Bulletin at 4.

⁵ *Id.* at 5.

⁶ *Id.* at 6-7.