# Special Alert: CFPB Finalizes Amendments to Mortgage Servicing Rules

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***This alert has been updated to incorporate the effective dates for the amendments. These dates are measured from publication of the amendments in the Federal Register, which had not occurred when the alert was originally issued.***

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On August 4, 2016, the CFPB issued its long-awaited final amendments to the mortgage servicing provisions of Regulations X and Z. The Bureau had sought comment on the proposed rule in December 2014, more than 18 months ago. Spanning 900 pages, the final rule makes significant changes that will impact servicers even as it clarifies several points of confusion with the existing regulations.

Most significantly, the amendments extend existing protections to successors in interest and borrowers who have previously been evaluated for loss mitigation under the rules, brought their loans current, and then experienced new delinquencies. The amendments also require servicers to provide modified periodic statements to borrowers in bankruptcy.

In coordination with the final amendments, the Bureau published an interpretive rule under the Fair Debt Collections Practices Act (FDCPA) to address industry concerns about conflicts with the servicing rules.

The amendments were published in the Federal Register on October 19, 2016. A summary of the key amendments is provided below.

## I. CONFIRMED SUCCESSORS IN INTEREST ARE BORROWERS AND CONSUMERS FOR ALL PURPOSES

These provisions are effective on April 19, 2018, which is 18 months after publication of the rule in the Federal Register.

- **Successors in interest are a broad class of transferees and receive all protections in the rules.** The final rule provides that confirmed successors in interest are "borrowers" and "consumers" entitled to the protections of the servicing rules in Regulation Z and in subpart C (Mortgage Servicing) and 12 C.F.R. § 1024.17 (Escrow Accounts) of Regulation X. "Successors in interest" are defined broadly to include most of the persons protected by the Garn-St Germain Act. Successors include persons who receive an ownership interest in the property securing the mortgage by (i) devise or descent, or by inheritance from a deceased relative; (ii) right of survivorship from a deceased joint tenant; (iii) transfer from a spouse or a parent; (iv) transfer incident to a divorce, legal separation, and/or property settlement; and (v) transfer into an inter vivos trust for the benefit of the successor in interest.
- **Process for confirming a person's status as a successor in interest.** A servicer must act promptly to communicate with a possible successor in interest who contacts the servicer, provide a written list of information the servicer reasonably needs to confirm the person's status, and subsequently confirm the person's status. In addition, servicers must have policies and procedures to facilitate their compliance with these requirements. However, servicers are not required to proactively search for or solicit potential or possible successors in interest.

- **Servicers must consider a confirmed successor's application for loss mitigation.** A servicer may not condition its review of a loss mitigation application on a confirmed successor's assumption of the loan, but may condition a modification or other loss mitigation option on the confirmed successor's assumption.

- **Certain notices are not required for confirmed successors if servicers are providing them to other borrowers.** If the servicer is providing the notices listed below to another borrower, the servicer is not required to provide duplicative notices to a confirmed successor in interest: (i) escrow disclosures and statements under §§ 1024.17 and 1024.34 of Regulation X; (ii) notices regarding transfers under § 1024.33 of Regulation X and § 1026.39 of Regulation Z; (iii) notices regarding forced-place insurance under § 1024.37 of Regulation X; (iv) early intervention notices under § 1024.39(b) of Regulation X; (v) rate adjustment and escrow cancellation notices under § 1026.20 of Regulation Z; and (vi) periodic statements or coupon books under § 1026.41 of Regulation Z. However, as noted below, a successor can request information under § 1024.36 of Regulation X, including the notices, and the servicer must comply, with certain redactions for privacy purposes.
- **A servicer is not required to make good faith attempts to make live contact with a successor in interest if it is already making such attempts with respect to another borrower on the loan.**
- **Communications with confirmed successors in interest may account for the FDCPA's anti-harassment provisions.** The CFPB did not provide a safe harbor from the FDCPA's prohibition on harassment for servicers who are debt collectors under the FDCPA—or for servicers concerned with UDAAP issues more generally-- and who communicate with a confirmed successor in interest before the successor assumes the loan. Instead, the final rule allows a servicer to adjust the notices that are sent to a confirmed successor who has not assumed the loan to avoid the implication that the successor is liable. In addition, a servicer may send the notice and acknowledgement form described in new § 1024.32(c) of Regulation X to potential successors in interest and then need not send any other notices or make attempts at live contact with the successor until the successor assumes the loan or the successor returns the acknowledgement form to the servicer.
- **A servicer may disclose nonpublic personal information relating to the mortgage loan with confirmed successors in interest, but can limit the information to exclude financial, contact, or location information about other borrowers.** The servicer is not required to enter into an agreement with the recipient of the information to prevent the recipient from redisclosing the information. The CFPB did not provide a safe harbor from GLBA or Regulation P liability.
- **Regulation X's error resolution and information requests are available to confirmed successors in interest.** Confirmed successors in interest may receive information about the loan through Regulation X's error resolution and information request provisions in §§ 1024.35 and 1024.36. However, the final rule permits a servicer to withhold location and contact information to protect the borrower's and the successor's privacy interests.

## II. LOSS MITIGATION REQUIREMENTS

These provisions are effective on October 19, 2017, which is 12 months after publication of the rule in the Federal Register.

- **Servicers must evaluate a borrower for loss mitigation more than once in certain circumstances.** A borrower is entitled to the loss mitigation procedures and protections from foreclosure in Regulation X more than once in the life of the loan. Thus, a servicer must apply the loss mitigation procedures in § 1024.41 a second time for borrowers who become current on payments between the borrower's prior complete loss mitigation application and a subsequent loss mitigation application. In addition, a transferee servicer must comply with § 1024.41– within the relevant timelines – even if a borrower was previously evaluated for loss mitigation by the transferor servicer.
- **Servicers must affirmatively prevent foreclosure judgments and/or sales while complete loss mitigation applications are pending.** A servicer who has received a complete loss mitigation application after making the first notice or filing is responsible for ensuring that the loan does not proceed to foreclosure judgment or sale while the application is pending, and/or the borrower is performing under a loss mitigation option. The servicer must instruct foreclosure counsel accordingly, and is not absolved of responsibility because counsel fails to follow instructions.
- **Foreclosure filings by servicers who are subordinate lien holders.** The final rule modifies an existing exception to the 120-day prohibition on foreclosure filing to allow a servicer of a subordinate lien to join the existing foreclosure action of a superior lienholder.
- **More specific guidance is provided on what constitutes a "reasonable date" for the borrower to return documents to complete an application for loss mitigation.** Under the final rule, a servicer will have provided a reasonable date for a borrower to return documents and information needed to complete a loss mitigation application if the servicer's notice requests the documents within the earlier of 30 days or the next "milestone" (the date a document would be stale, the 120$^{th}$ day of the borrower's delinquency, the 90$^{th}$ day before a foreclosure sale, or the 38$^{th}$ day before a foreclosure sale). In no case may the servicer provide the borrower with less than 7 days to return information.
- **Servicers must notify borrowers when loss mitigation applications are complete.** A servicer who receives a completed loss mitigation application must notify the borrower in writing within 5 days that the application is complete. The notice must include, among other things, a statement that the application is complete, the date the application is considered complete, and statements that the servicer will evaluate the application within 30 days of receipt of the completed application and that the borrower is entitled to protections from foreclosure while the application is pending.
- **The final rule permits servicers to offer a short-term repayment plan based upon an evaluation of an incomplete loss mitigation application.** The servicer must offer the plan in writing, informing the borrower that other loss mitigation options may be available and that the borrower may submit a complete application to be evaluated for those options. The servicer cannot make the first notice or filing if the borrower is performing under the payment plan.
- **Servicers are required to use reasonable diligence to obtain third party information and may not deny a borrower solely because such information is lacking unless the servicer is unable to obtain the information for a significant period of time.** Under the current rule,

servicers are required to use reasonable diligence to obtain information from third parties that is needed to evaluate a loss mitigation application, and generally cannot deny the application solely because such information is lacking. The final rule provides, however, that if the servicer is unable to obtain necessary third party information after exercising reasonable diligence to obtain the information "for a significant period of time," the servicer may deny the borrower's application for loss mitigation. Unfortunately, the Bureau does not provide any guidance as to what constitutes "a significant period of time."

- **Servicers must collect information for all loss mitigation options even if the borrower states a preference for a single option.** The final rule provides that a servicer cannot stop collecting information for any loss mitigation option based solely on the borrower's stated preference for a different option. For example, the servicer cannot stop collecting income information related to a loan modification because the borrower informs the servicer that she wishes to sell her home in a short sale. However, a servicer may stop collecting information for an option after learning that the borrower is ineligible for the option.
- **Servicers may suspend efforts to complete an application during short term forbearance and repayment plans, but must resume their efforts immediately if the borrower defaults or requests assistance.** Servicers are permitted to offer borrowers short term forbearance programs and short term repayment plans on the basis of an incomplete application. Although servicers are required to use reasonable diligence to ensure that an incomplete application is completed, they may suspend such efforts while a borrower is in compliance with a short term payment forbearance program or a short term repayment plan offered based on an incomplete application. However, the servicer must resume its efforts if the borrower fails to comply with the program or requests further assistance. A servicer must contact a borrower near the end of a forbearance program if the borrower is still delinquent to determine if the borrower wishes to complete an application and move forward with a full loss mitigation evaluation.

## III. LIVE CONTACT AND EARLY INTERVENTION NOTICE REQUIREMENTS

These provisions are effective on October 19, 2017, which is 12 months after publication of the rule in the Federal Register.

- **Servicers are not required to make live contact attempts if any borrower on the loan is in bankruptcy.**
- **Servicers who are covered by the FDCPA are not required to make live contact attempts if any borrower on the loan has invoked the FDCPA's cease communication provisions.**
- **"Good faith efforts" to establish live contact depend on length of delinquency.** The Bureau reiterated its position that a servicer is expected to make good faith efforts to establish live contact with a delinquent borrower no later than 36 days after each missed payment due date/period of delinquency. However, the length of delinquency and the borrower's responsiveness to past attempts are taken into account in determining whether a servicer's efforts to establish live contact with a delinquent borrower are in good faith. The Bureau states that, for example, whereas "good faith efforts" to establish live contact with a borrower with two consecutive missed payments might require a telephone call, "good faith efforts" to establish live contact with an unresponsive borrower with six or more consecutive missed payments might require no more than including a sentence requesting that the borrower contact the servicer concerning the delinquencies in the periodic statement or in an electronic

communication. In addition, if the borrower is in the process of loss mitigation, the servicer need not make attempts to achieve live contact, but the servicer must resume attempts at live contact if the borrower becomes delinquent after curing a prior delinquency.

- **Servicers generally must send modified early intervention notices for borrowers who have filed for bankruptcy and/or have invoked FDCPA's cease communications rights.**
  - **Bankruptcy.** Servicers are not required to send the early intervention notice if any borrower on the loan has filed for bankruptcy protection, and either (i) no loss mitigation option is available or (ii) the servicer is subject to the FDCPA and a borrower on the loan has invoked the FDCPA's cease communication right. In all other cases when a borrower is in bankruptcy, the servicer must send the early intervention notice if the borrower is more than 45 days delinquent, but must modify the notice so that it does not include a request for payment. The servicer is not required to send more than one notice during the bankruptcy.
  - **FDCPA rights.** If any borrower has invoked cease communication rights and the servicer is subject to the FDCPA, the servicer is not required to send the early intervention notice if either (i) a borrower on the loan has also filed for bankruptcy protection or (ii) no loss mitigation option is available. In all other cases, the servicer must send the early intervention notice, without a request for payment, but with a statement that the servicer may or will pursue foreclosure.
  - **Servicers must send early intervention notices during prolonged delinquencies.** Under the final rule, a servicer generally must provide the early intervention notice at least once every 180 days to a borrower who is 45 days or more delinquent.

## IV. PERIODIC STATEMENTS AND COUPON BOOKS

These provisions are effective on April 19, 2018, which is 18 months after publication of the rule in the Federal Register.

- **With some exceptions, servicers must send periodic statements or coupon books to borrowers in bankruptcy or who have discharged the loan, with content that varies depending on whether the consumer is in bankruptcy under Chapters 12 or 13.**
  - **Modifications for all borrowers in bankruptcy or who have discharged personal liability for the loan:**
    - The periodic statement or a coupon book must include a statement identifying the consumer's status as a debtor in bankruptcy or the discharged status of the loan and noting that the periodic statement is provided for informational purposes only.
    - The periodic statement or a coupon book may omit the information about late payment fees, certain delinquency information, and the notice of whether the servicer has issued the first notice or filing for foreclosure. In addition, the amount due need not be shown more prominently than any other disclosures on the statement or book.
  - **Additional modifications for borrowers in bankruptcy under Chapters 12 or 13:**
    - **Delinquency information.** The periodic statement or coupon book may omit all of the information regarding delinquency.
    - **Amount due.** The periodic statement or coupon book may be further modified by: (i) limiting the amount due information to the date and amount of the post-petition payment

due and any post-petition fees and charges; (ii) limiting the amount due explanation to the monthly post-petition amount (including a breakdown between principal, interest, and escrow), the post-petition charges imposed since the last statement, and any post-petition past due amount.

- **Transaction activity.** The periodic statement or coupon book must show all the payments received since the last statement, both pre- and post-petition, as well as all charges the servicer has imposed since the last statement.
- **Pre-petition arrearage.** For the periodic statement, the servicer must disclose any pre-petition arrearage in close proximity to the total of all pre-petition payments received since the last statement, and the total of all pre-petition payments received since the beginning of the bankruptcy case.
- **Additional disclosures required.** The periodic statement must disclose a statement that, as applicable: (i) the amount due includes only post-petition payments and not other payments due under the bankruptcy plan; (ii) the consumer should send post-petition payments to the trustee if the consumer's plan so requires; (iii) the statement may be inconsistent with the trustee's records and may not reflect payments made to the trustee; (iv) encourages the consumer to contact her attorney or trustee with questions; and (v) if the consumer is more than 45 days delinquent on post-petition payments, the servicer has not received all payments that became due since the bankruptcy filing.

- **Exceptions to requirement to send periodic statements or coupon books for borrowers in bankruptcy.** A servicer is not required to send periodic statements or coupon books if the consumer has filed for bankruptcy protection under any chapter, and one or more of the following occurs: (i) the consumer requests the servicer to cease sending statements; (ii) the bankruptcy plan provides that the consumer will surrender the home securing the loan, will avoid the lien, or otherwise does not provide for payment of pre-bankruptcy arrearage or maintenance of payments due under the loan; (iii) the bankruptcy court orders the lien avoided, lifts the automatic stay, or requires the servicer to stop providing statements; or (iv) the consumer files a statement of intent to surrender the home securing the loan and has not made any payment on the loan after filing for bankruptcy.
- **Servicers are not required to send periodic statements or coupon books if the loan is charged off, provided the servicer meets certain conditions.** A servicer need not send periodic statements or coupon books for a loan that is charged off, provided that the servicer will not impose additional fees or interest and sends a final statement to the consumer. The rule mandates certain content for the final periodic statement or book, including statements that the loan has been charged off, the servicer will not impose any new fees or interest on the loan, the lien remains in place and that the borrower is liable for the loan and related obligations such as taxes.
- **For consumers in temporary loss mitigation programs, the periodic statement or coupon book must show payments according to the loan contract.** The periodic statement or coupon book must show how payments are applied according to the loan agreement and without regard to the temporary loss mitigation program. The payments may, if appropriate, be credited as partial payments. However, for the amount due, the periodic statement or coupon book may show either the amount due under the temporary loss mitigation program or the loan agreement.

- **For consumers in permanent loss mitigation programs, the servicer should show payments according to the permanent loss mitigation program.**
- **Specific guidance for accelerated mortgages and reinstatement.** If a mortgage has been accelerated but the servicer will accept a lesser amount to reinstate the loan, the periodic statement must show only the lesser amount the servicer will accept to reinstate the loan.

## V. SERVICING TRANSFERS

These provisions are effective on October 19, 2017, which is 12 months after publication of the rule in the Federal Register.

- **In general.** Transferee servicers must meet all of the deadlines and requirements for loss mitigation under § 1024.41 of Regulation X based on the date the application was received by the transferor servicer.
- **Loans with applications pending.** A transferee servicer who receives a loan with a complete loss mitigation application pending as of the transfer date must evaluate the borrower for all loss mitigation options within 30 days of the transfer date. The transfer date is defined as the date the transferee servicer will accept payments relating to a mortgage loan. If an application is incomplete or facially complete as of the transfer date, a transferor servicer must use reasonable diligence to obtain any information that is not in the borrower's control and that is needed to evaluate the borrower for loss mitigation options.
- **Loans with pending loss mitigation offers.** A transferee servicer must allow a borrower to accept a loss mitigation option that was pending as of the transfer date, during the unexpired balance of the time the transferor servicer had given the borrower to accept the offer.
- **Loans transferred with pending appeals or appeals filed after the transfer date.** A transferee must make a determination on an appeal if it is able to, within the later of 30 days of the transfer date or 30 days of the appeal date. If the servicer is not able to make a decision, it must treat the appeal as a pending complete loss mitigation application.
- **Exception for acknowledgement notices.** If the acknowledgement period has not expired as of the transfer date and the transferor servicer has not provided the notice, the transferee servicer must send the acknowledgement notice within 10 days of the transfer date.
- **Prohibition on notice or first filing.** A transferee servicer may not make the first notice or filing for foreclosure until after the date disclosed to the borrower for submitting the documents the transferee servicer requires for a complete loss mitigation application.

## VI. OTHER PROVISIONS OF THE FINAL RULE

These provisions are effective on October 19, 2017, which is 12 months after publication of the rule in the Federal Register.

- **Definition of delinquency.** According to the rule, delinquency begins on the day that a periodic payment sufficient to cover principal, interest, and escrow (if applicable) is due and unpaid, until such time as no periodic payment is due and unpaid. The rule provides that a servicer may consider a borrower not delinquent if the borrower makes only a partial payment. Unlike the proposal, the final rule does not specify how a servicer must make up the shortfall in the payment, but cautions servicers not to use escrow funds in such a way as to result in tax delinquency.

- Servicers may credit payments to the oldest missed payment, with the result that the borrower's delinquency is advanced by the number of payments credited. In addition, the 120-day foreclosure referral waiting period in § 1024.41(f) (1)(i) of Regulation X is advanced.
- A borrower's failure to pay the full amount due following the servicer's exercise of an acceleration clause would begin or continue a delinquency.

- **Requests for information about ownership interest in loans.** The final rule provides that if a person requests information about a loan but did not expressly request the name or number of the trust or pool, and Fannie Mae or Freddie Mac is the owner of the loan or the trustee of the securitization trust in which the loan is held, the servicer may comply with the regulation by providing the name and contact information for Fannie Mae or Freddie Mac, as applicable, without also providing the name of the trust.
- **Lender-placed insurance when borrower's insurance is insufficient.** The final rule amends the lender-placed insurance disclosures and model forms to account for circumstances in which a servicer wishes to place insurance when the borrower has insufficient, rather than expiring or expired, hazard insurance coverage on the property. Servicers may now, at their option, include a borrower's mortgage loan account number on the required notices.
- **Small Servicer Exemptions.** The small servicer exemption generally applies to servicers who service 5,000 or fewer mortgage loans for which the servicer is the creditor or assignee. The final rule excludes certain seller-financed transactions and mortgage loans voluntarily serviced for a non-affiliate, even if the non-affiliate is not a creditor or assignee, from being counted toward the 5,000 loan limit. These changes allow servicers that would otherwise qualify for small servicer status to retain their exemption while servicing those transactions.
- **Principal residence.** The final rule confirms that, if a property securing a loan ceases to be a borrower's principal residence, the protections under Regulation X would not apply. However, the commentary notes that a vacant property may still be a borrower's principal residence.

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