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CFPB Issues Last-Minute Changes to Mortgage Servicing Rules

As we previously reported, on October 19, 2016, the Consumer Financial Protection Bureau (CFPB) published in the *Federal Register* final amendments to its Mortgage Servicing Rules (Final Rule). The Final Rule, weighing in at 900 pages (or 242 pages of the *Federal Register*), makes significant updates to the Mortgage Servicing Rues in nine areas:

- Successors in interest
- Definition of delinquency
- Early intervention
- Loss mitigation procedures (including transfers of servicing)
- Periodic statement requirements
- Information requests
- Payment processing
- Force-placed insurance
- Small servicers

The CFPB also issued an interpretive rule under the Fair Debt Collection Practices Act (FDCPA) relating to compliance with certain provisions in the Final Rule.

The Final Rule took effect on October 19, 2017, except for the periodic statement requirements for borrowers in bankruptcy and the successor in interest provisions, which will take effect on April 19, 2018. The CFPB chose not to set an effective date with optional early compliance. However, it did issue policy guidance on June 27, 2017, which recognized that the October 19, 2017, and April 19, 2018, effective dates both fell on Thursdays, which could cause operational challenges for servicers. The CFPB stated that it does not intend to take supervisory or enforcement action for violations of existing Regulation X or Regulation Z resulting from a servicer's compliance with the 2016 amendments to the mortgage servicing rules occurring up to three days before the applicable effective dates to allow servicers time to implement and test their systems over the weekend before the effective dates. The CFPB did not make any changes to the guidance it published with the Final Rule; however, in the instances where the Final Rule adopts new commentary to the existing Mortgage Servicing Rules that clarifies, reinforces or does not conflict with the existing rule and commentary, the CFPB will permit servicers either to continue those practices in compliance with the existing rule or to conform with the new commentary in the Final Rule before the effective date.

On October 4, 2017, only two weeks before the first effective date, the CFPB published an interim final rule with a request for public comment amending the timing for servicers to provide modified written early intervention notices

to borrowers who have invoked their cease communication rights under the FDCPA, which will take effect along with the rest of the early intervention changes on October 19, 2017. Also on October 4, 2017, the CFPB published a proposed rule with a request for public comment relating to the timing for servicers to transition to providing modified or unmodified periodic statements and coupon books in connection with a consumer's bankruptcy case. The 2016 Final Rule provided for a single-cycle billing exemption to the requirement to provide a periodic statement if the payment due date for that billing cycle was no more than 14 days after the date on which one of three triggering events occurred. The proposed rule would instead provide an exemption from the requirements to provide a periodic statement or coupon book for one statement, but thereafter must provide modified or unmodified periodic statements or coupon books that comply with the requirements of Section 1026.41. The deadline for public comments is 30 days from the date of publication in the *Federal Register*. If finalized, the amended rule would take effect with the rest of the requirements for periodic statements for borrowers in bankruptcy on April 19, 2018.

Given that the implementation of the bulk of the Final Rule is now upon us, we have provided a brief synopsis of the changes in each of the main categories to ensure that servicers are aware of their new obligations.

Successors in Interest

The Final Rule makes three principal changes to the provisions regarding successors in interest.

First, an individual need not assume the mortgage loan obligation — that is, the legal liability for the mortgage debt—under state law, or otherwise be legally obligated on the mortgage loan, in order to qualify as a successor in interest. For purposes of Regulation X and Regulation Z, a person is a successor in interest if a borrower transfers an ownership interest in property securing a mortgage loan to the person by one of the following means:

- A transfer by devise, descent or operation of law on the death of a joint tenant or tenant by the entirety.
- A transfer to a relative resulting from the death of a borrower.
- A transfer where the spouse or children of the borrower become an owner of the property.
- A transfer resulting from a decree of a dissolution of marriage, legal separation agreement or an incidental property settlement agreement, by which the spouse of the borrower becomes an owner of the property.
- A transfer into an inter vivos trust in which the borrower is and remains a beneficiary and which does not relate to a transfer of rights of occupancy in the property.

The definition includes transfers during the life of the transferor only if the recipient is a spouse, former spouse or child of the transferor, or the beneficiary of an inter vivos trust. Note that this definition generally aligns with that under the Garn–St Germain Act, although it does not include certain scope limitations under that statute.

Second, the Final Rule creates requirements relating to confirmation of successors in interest. Generally, a servicer must respond to a person's written request indicating that he or she may be a successor in interest by providing a written description of the documents needed to confirm the person's identity and ownership in the property. Additionally, a servicer must have policies and procedures reasonably designed to ensure that it can:

- Upon receiving notice of the death of a borrower or of any transfer of the property, promptly facilitate communication with potential or confirmed successors in interest.

- Upon receiving notice of the existence of a potential successor in interest, promptly determine the documents the servicer reasonably requires to confirm the person's identity and ownership interest in the property (which the commentary provides examples of) and promptly provide to the potential successor in interest a description of those documents and how the person may submit a written information request (including the appropriate address).
- Upon receiving those documents, promptly make a confirmation decision and notify a potential successor in interest of the servicer's determination regarding the potential successor's status (whether confirmation is made/declined or whether additional documents are needed to make confirmation).

The CFPB declined to define "promptly" in this context; therefore, it is based on the facts and circumstances. Note also that a servicer does not have an affirmative obligation to search for potential successors in interest if the servicer has not received actual notice (whether written or oral) of their existence.

Third, the Final Rule clarifies how mortgage servicers must treat successors in interest. A confirmed successor in interest is treated as the borrower for purposes of Regulation X and the consumer for purposes of Regulation Z in the same way they would apply to another borrower or consumer once the servicer has confirmed the successor in interest's identity and ownership interest in the property. However, the Final Rule does not take away any existing rights that transferor borrowers or their estates may have under Regulation X or Regulation Z, even after confirming a successor in interest. The Final Rule specifically addresses the rights of successors in interest regarding loss mitigation, information requests and disclosures, among other topics.

- **Loss mitigation:** While the successor in interest provisions are intended to prevent unnecessary foreclosures, the Final Rule does not extend dual tracking protections during the process of confirming a successor in interest. The Final Rule does not require a servicer to review a loss mitigation application until a successor in interest has been confirmed, but a servicer must preserve any loss mitigation application received during the confirmation process so that it can timely review the application once the successor in interest has been confirmed.
- **Information requests:** The Final Rule permits a successor in interest to obtain information about a mortgage loan through requests for information and notice of error procedures, but a servicer may omit location, contact and some personal financial information if the information pertains to a potential or confirmed successor in interest who is not the requester, or the requester is a confirmed successor in interest and the information pertains to any borrower who is not the requester.
- **Disclosures:** The Final Rule authorizes a servicer, upon confirming a successor in interest, to provide to the individual a written notice explaining his or her confirmed status as a successor in interest, as well as an optional notice and acknowledgment form for the confirmed successor in interest to return. A servicer that provides the optional notice and acknowledgment form need not send certain disclosures otherwise required under the Mortgage Servicing Rules (to exclude loss mitigation notices) or comply with the live contact requirement until the confirmed successor in interest either assumes the mortgage loan obligation under state law or executes an acknowledgment and provides it to the servicer. However, if a confirmed successor in interest assumes the mortgage obligation under state law, the information in the initial notice is no longer applicable and an obligation arises for the servicer to provide notices under the Mortgage Servicing Rules. A servicer does not have a separate obligation to provide most disclosures to a successor in interest if the servicer is providing the same specific disclosures to another borrower on the account.

Alston & Bird observations

The successor in interest provisions of the Final Rule will likely require servicers to revisit and revise their practices regarding such individuals.

First, a servicer may not require a confirmed successor in interest to assume the mortgage loan obligation under state law to be considered a borrower. That means a servicer cannot condition review and evaluation of a loss mitigation application on a confirmed successor in interest's assumption of the mortgage obligation. However, a servicer may condition an offer for a loss mitigation option on the successor in interest's assumption of the mortgage loan obligation, or may offer loss mitigation options to a successor in interest that differ based on whether the successor in interest would simultaneously assume the mortgage loan obligation. For the loss mitigation protections in Section 1024.41 to apply, the property must be the confirmed successor's primary residence.

Second, the CFPB recognizes that language in certain disclosures in Regulation X or Regulation Z could suggest that the recipient of that disclosure is liable on the mortgage obligation and that such language could be confusing if not modified. The CFPB recognizes that there are several ways to address this issue, including adjusting language in the disclosures (if permitted by law) to clarify that a confirmed successor who has not assumed the mortgage loan under state law is not otherwise liable and has no personal liability. The CFPB's optional notice and acknowledgement form is designed to address this issue.

Third, the Final Rule does not provide potential successors in interest with a private right of action for claims that a servicer made an inaccurate determination about successor status or failed to comply with the Mortgage Servicing Rules. However, the CFPB declined to create a safe harbor from liability for claims alleging unfair, deceptive or abusive acts or practices (as prohibited by the Dodd–Frank Act) relating to determinations of successors in interest.

Fourth, the FDCPA prohibits a debt collector from communicating with third parties about the collection of a debt without a court order or prior consumer consent given directly to the debt collector. However, the CFPB's interpretive rule provides a safe harbor from liability under Section 805(b) of the FDCPA for a servicer communicating with a confirmed successor in interest about a mortgage loan secured by property in which the confirmed successor in interest has an ownership interest.

Definition of Delinquency

To ensure consistency, the Final Rule creates a definition of delinquency applicable to all sections of the Regulation X Mortgage Servicing Rules, as well as to the periodic statement requirement under Regulation Z. Delinquency means the period of time during which a borrower and the borrower's mortgage loan are delinquent, beginning on the date a periodic payment sufficient to cover principal, interest and, if applicable, escrow becomes due and unpaid; the delinquency continues until no periodic payment is due and unpaid.

The Final Rule clarifies the operation of the definition of delinquency in several typical situations:

- **Multiple unpaid periodic payments:** If more than one periodic payment is due and unpaid, and the servicer applies the borrower's payment to the oldest outstanding periodic payment, that payment advances the date of delinquency regardless of whether another periodic payment remains due and unpaid.

- **Grace periods:** The existence of a grace period does not affect delinquency. If a borrower's payment is due on the first day of the month, the loan is delinquent as of the second day of the month if a payment has not been made, even if the servicer will not assess a late fee until the fifteenth day of the month.
- **Breaches of other terms:** A borrower's breach of other terms of the mortgage loan obligation does not trigger the definition of delinquency. Under the Final Rule, however, a servicer may accelerate the mortgage loan obligation for such a breach, in which case the total amount due after acceleration becomes the periodic payment used to determine delinquency. In that case, the total accelerated amount becomes the relevant periodic payment for purposes of determining delinquency.
- **Payment tolerances:** The Final Rule does not require a servicer to treat a partial payment as a timely payment, regardless of the amount of the underpayment. However, a borrower and a loan may not be considered delinquent for any billing cycle in which the servicer treats a partial payment as a timely payment.

Alston & Bird observations

Under the Final Rule, a servicer (including a small servicer) cannot make the first notice or filing to begin foreclosure unless the mortgage loan is more than 120 days delinquent, the foreclosure is based on the borrower's violation of a due-on-sale clause or the servicer is joining another lienholder's foreclosure action. The Final Rule requires servicers to use this new definition of delinquency to calculate when a loan is 120 days delinquent. The CFPB declined to adopt an exception to the foreclosure referral for rolling deficiencies (situations in which a borrower becomes delinquent, then resumes making payments but does not fully cure a delinquency, and the servicer's application of payments to the oldest outstanding payment advances the borrower's delinquency). The CFPB's reasoning for doing so was to avoid encouraging a servicer to proceed to foreclosure if a borrower has missed only one or two payments, but recognizes that servicers may use alternative means—such as accelerating a loan when permitted under contract and applicable law—to achieve initiation of foreclosure where warranted.

The CFPB declined to set a payment tolerance limit in the rule, although it recognized that servicers generally use an amount between $10 and $50. The CFPB also warns that a servicer cannot change its decision to treat a payment as timely for determining the date on which the borrower's delinquency began, but the servicer can later collect the difference from the borrower.

A servicer can use other definitions of the term delinquency for operational purposes. This definition also does not affect the requirements imposed by laws or regulations other than the Regulation X Mortgage Servicing Rules or the Regulation Z periodic statement requirement, such as the Fair Credit Reporting Act.

Early Intervention

In the Final Rule, the CFPB clarifies servicers' obligations for live contact, the frequency of written early intervention notices, borrowers in bankruptcy and loans subject to the FDCPA.

First, the Final Rule clarifies servicers' recurring obligation to make "good faith efforts" to establish "live contact" with a delinquent borrower no later than the thirty-sixth day of a borrower's delinquency and again no later than 36 days after each payment due date so long as the borrower remains delinquent. The recurring obligation ceases if the servicer has ongoing contact with the borrower regarding a loss mitigation application or has denied the borrower for a loss mitigation option; however, the live contact obligation resumes if a borrower cures the delinquency but

subsequently becomes delinquent again. The Final Rule also codifies guidance from an October 2013 CFPB bulletin that permits a servicer to combine live contact attempts with attempts to contact a borrower for other purposes (such as providing information about loss mitigation options or discussing a borrower's loss mitigation application) and to time the live contact attempts to apply to two periods of delinquency.

Second, the Final Rule clarifies that a servicer must provide a written notice within 45 days after each missed periodic payment. The servicer need provide the notice only once in any 180-day period, however, beginning on the date the written notice was provided, even if the borrower becomes current but then subsequently becomes delinquent again. Similarly, a transferee servicer must provide a written notice if the borrower is 45 days or more delinquent, regardless of whether the transferor servicer provided a written notice in the preceding 180-day period, unless the transferor servicer provided the notice within 45 days of the transfer date.

Third, the Final Rule provides servicers with a partial exemption from the early intervention requirements for borrowers in bankruptcy:

- A ***loan-level exemption*** from the live contact requirements exists while the borrower on a mortgage loan is a debtor in bankruptcy under any chapter of the U.S. Bankruptcy Code.
- A ***limited exemption*** from the written early intervention notice exists if no loss mitigation option is available or any borrower on the mortgage loan has provided a cease communication notice under the FDCPA for that mortgage loan and the servicer is subject to the FDCPA for that borrower's loan. A servicer that is exempt from the early intervention requirements during the pendency of a bankruptcy must resume compliance after the next payment due date following the dismissal of the bankruptcy case, the closing of the bankruptcy case or the borrower's reaffirmation of personal liability on the mortgage loan, whichever is earliest.
- A servicer that does not meet the conditions of the written early intervention notice exemption must provide a modified notice with the following timing and content requirements:
  - For a borrower who is delinquent when he or she becomes a debtor, the servicer must provide the modified written notice within 45 days of the filing of the bankruptcy petition.
  - For a borrower who is not delinquent when he or she files for bankruptcy, but who becomes delinquent during the bankruptcy, the servicer must provide the modified written notice within 45 days of the delinquency.

  The timing requirements apply regardless of whether the servicer provided an earlier written notice in the preceding 180-day period. A servicer only has an obligation to provide one written notice during a single bankruptcy case, however, and cannot include in that notice a demand for payment (in light of concerns about violating the automatic stay). If two or more borrowers are joint obligors with primary liability on a mortgage loan, a servicer may provide the modified written early intervention notice if any one borrower is a debtor in bankruptcy.

Fourth, in connection with any mortgage loan for which the borrower has invoked cease communication rights under the FDCPA and for which the servicer is subject to the FDCPA, the servicer is exempt from the live contact requirement, generally. The servicer is also exempt from the written early intervention notice, but only if there are no loss mitigation options available and while any borrower on the loan is a debtor in bankruptcy. To rely on these exemptions, the servicer must both receive a cease communication request and act as a debt collector under the FDCPA for the loan.

If there are loss mitigation options available, and none of the borrowers on the mortgage loan are in bankruptcy, then the Final Rule requires the servicer to provide the modified written notice after a borrower invokes his or her cease communication rights. The modified notice must include, among other things, a statement encouraging the borrower to contact the servicer, a brief description of examples of loss mitigation options that may be available from the servicer and a statement that the servicer may or intends to invoke its specified remedy of foreclosure. The CFPB has created a safe harbor for servicers to provide this modified written notice, which is contingent on the written notice not containing a request for payment and the servicer not providing the notice more than once in any 180-day period.[1] The interim final rule now gives servicers an extra 10 days (i.e., until the 190th day after providing the prior written notice) to provide a new written notice if the borrower is 45 days or more delinquent at the end of the 180-day period, or if the borrower is less than 45 days delinquent at that time, the servicer must provide the new notice no later than 45 days after the payment due date for which the borrower remains delinquent or 190 days after provision of the prior written notice, whichever is later.

Alston & Bird observations

The CFPB reiterates its belief that early intervention provides critically important benefits to borrowers. To that end, the CFPB is narrowing the exemption from this requirement. The CFPB does not believe that compliance with the live contact requirement with borrowers in bankruptcy would generally violate the Bankruptcy Code's automatic stay. However, it was persuaded by commenters that, given the interactive and potentially unscripted nature of live contact, in addition to the fact that the conversations do not necessarily include a discussion of loss mitigation options, borrowers or courts could view a servicer's live contact attempts as prohibited by the automatic stay. The CFPB therefore felt that it was appropriate to provide an exemption from engaging in live contact with borrowers in bankruptcy. For "ride-through" borrowers in bankruptcy (i.e., those who have discharged personal liability for the mortgage loan but continue to make mortgage payments to avoid foreclosure of the lien and retain the home), a servicer is required to resume sending the written early intervention notice if the borrower has made any partial or periodic payment on the mortgage loan after commencement of the bankruptcy case.

For those borrowers who have invoked the cease communication right under the FDCPA, several elements of the exemption must be satisfied; otherwise, the servicer must continue to comply with the early intervention requirements. For example, the servicer must be a debt collector for that loan—the servicer must have acquired the loan at the time it was in default. No loss mitigation option may be available. For purposes of this exemption, a loss mitigation option is available if the owner or assignee of a mortgage loan offers an alternative to foreclosure that is made available through the servicer and for which a borrower may apply, *even if he or she ultimately does not quality for that option*. The borrower must also have provided the servicer a timely, written cease communication notification under Section 805(c) of the FDCPA.

Moreover, the CFPB asserts in the preamble to the Final Rule that to the extent a state law would prevent early intervention as required under Section 1024.39 of Regulation X, it is preempted. The CFPB acknowledges that it is not aware of any such conflicts and notes that certain state laws requiring communications through counsel when a borrower is represented do not conflict with the requirement to provide early intervention. Moreover, consistent

[1] In a separate interpretive rule on the FDCPA published at the same time as the Final Rule, the CFPB created a safe harbor from liability under the FDCPA for servicer debt collectors who are required to provide the written early intervention notice, notwithstanding a borrower's invocation of the cease communication protection.

with the Real Estate Settlement Procedures Act (RESPA), state laws that give greater protection to consumers are not inconsistent with Section 1024.39, and where RESPA affords an opportunity to comply with both state law and RESPA's early intervention provision, servicers should do so.

Loss Mitigation Procedures

The Final Rule establishes a life-of-loan obligation for a servicer to comply with the loss mitigation procedural requirements for any borrower who becomes current after delinquency, subsequently becomes delinquent again and then submits a new loss mitigation application. The obligation does not arise when a borrower has been delinquent at all times since the submission of a previous loss mitigation application. In adopting the Final Rule substantially as proposed, the CFPB explained that a borrower who is performing on a temporary modification may still be delinquent as that term is defined in the Final Rule, but a borrower who is performing on a permanent modification would not be delinquent under the modified contract. The Final Rule clarifies the operation of loss mitigation requirements in several key areas:

- **Subordinate-lien loans:** The Final Rule expands the existing exemption to the 120-day prohibition on foreclosure filings, permitting the servicer of a mortgage secured by a subordinate lien to join the foreclosure action of a senior lienholder, even if the subordinate lien is not delinquent. The effect of this exemption is to permit a servicer to make the first notice or filing for foreclosure before a loan is 120 days delinquent if the servicer is joining the foreclosure action of a superior lienholder.
- **Completing loss mitigation applications:** The Final Rule provides much higher standards for a servicer working with the borrower and third parties to complete an otherwise incomplete loss mitigation application. A servicer has some flexibility to set a date for a borrower to return documents and complete an otherwise incomplete loss mitigation application. The CFPB suggests that 30 days is generally reasonable as a return deadline, unless any of four milestones will occur within 30 days, in which case the reasonable date must be no later than the earliest of the milestones, but at least seven days. The four milestones are the date documents will become stale, the one-hundred-twentieth day of delinquency, 90 days before a foreclosure sale and 38 days before a foreclosure sale. A servicer may stop collecting documents and information pertaining to a particular loss mitigation option after receiving information confirming that the borrower is ineligible for that option. However, the servicer must continue its efforts to obtain information that pertains to all other available options and may not stop collecting documents for a particular loss mitigation on the basis of a borrower's preference alone. The Final Rule also:
  - Requires a servicer to provide a borrower with a notice of complete application setting forth certain information within five days (excluding Saturdays, Sundays and legal holidays) of every time a loss mitigation application becomes complete.
  - Imposes reasonable due diligence standards on a servicer to collect both information from the borrower to complete an application and information not in the borrower's control that the servicer requires to determine the loss mitigation options it will offer to the borrower. A servicer must request third-party documents or information promptly upon determining that the servicer requires it to determine which loss mitigation options to offer the borrower, if any; to the extent possible, the servicer must request such documents and information as close to 30 days after receiving a complete loss mitigation application as possible. A servicer that has exercised reasonable diligence under a "heightened efforts" standard (e.g., by promptly verifying that it has contacted the appropriate party and determining whether it should obtain the required documents

or information from a different party), and that is absolutely unable to obtain the information from the third party, may deny the borrower's application. (However, this exception is inapplicable to information within the servicer's own control.) The servicer also has to provide notice to the borrower based on the delay in receiving the requested information from third parties.

- **Short-term forbearance:** The Final Rule creates an exception to the Mortgage Servicing Rules' general prohibition against offering a loss mitigation option based on an evaluation of an incomplete application. Specifically, based on evaluation of an incomplete loss mitigation application, a servicer may offer short-term repayment plans in addition to, or combined with, the current option for short-term forbearance programs.[2] Promptly (not later than five days, excluding Saturdays, Sundays and legal holidays) after making such offer that the borrower has not rejected, the servicer must provide the borrower a written notice stating the specific terms and duration of the plan the servicer offered based on an evaluation of an incomplete application, that other loss mitigation options may be available and that the borrower has the option to submit a complete loss mitigation application and receive an evaluation for all loss mitigation options available to the borrower, regardless of whether the borrower accepts the offered plan. Even if the borrower accepts the offer, the servicer remains obligated to comply with the loss mitigation procedural requirements for an incomplete loss mitigation application or complete loss mitigation application, as applicable (including additional diligence and contact requirements near the end of the plan or program). A servicer may not make the first notice or filing required for judicial or non-judicial foreclosure or move for foreclosure judgment or order of sale, or conduct a foreclosure sale if a borrower is performing pursuant to the terms of the forbearance program or repayment plan.
- **Service providers handling foreclosure:** Under the Final Rule, when a court orders a foreclosure sale date that does not afford sufficient time for the servicer to evaluate a complete loss mitigation application, a servicer has an obligation to avoid having a court rule on a dispositive motion, or issue a judgment order of sale or to delay a foreclosure sale, until the servicer has completed its loss mitigation evaluation. When a servicer—or its foreclosure counsel—does not take such steps, the servicer may have to dismiss the foreclosure proceeding in order to avoid completing the foreclosure sale during the pendency of the loss mitigation application. The Final Rule eliminates the "reasonable steps" standard included in the proposed version of the rule in favor of a bright-line rule prohibiting a foreclosure sale during the pendency of a loss mitigation application and providing that a servicer is not excused from compliance because it acts through a service provider (including foreclosure counsel).
- **Dual tracking:** If a servicer has already made the first notice or filing, and a borrower timely submits a complete application, the Final Rule requires the servicer to stop a foreclosure sale unless one of three conditions is met: (1) the borrower's loss mitigation application is properly denied; (2) the borrower withdraws his or her loss mitigation application; or (3) the borrower fails to perform under a loss mitigation agreement. Once again, the CFPB declined to incorporate into the Final Rule the "reasonable steps" standard included in the proposed version of the rule, emphasizing that the primary goal of the dual tracking prohibition is to protect borrowers from foreclosure during the loss mitigation evaluation process.

[2] A short-term payment forbearance program is one that allows a borrower to forgo making certain payments due over periods of no more than six months regardless of the time a servicer allows the borrower to make up the missing payments. A short-term repayment plan is one that allows for the repayment of no more than three months of past due payments and allows a borrower to pay the arrearages over future payments for a period lasting no more than six months.

- **Policies and procedures:** The Final Rule requires a servicer to maintain policies and procedures to ensure that it has in place appropriate mechanisms to identify and collect from third parties information that is not in the borrower's control, ensure that servicer personnel handling foreclosure proceedings know when a complete loss mitigation application is received, and promptly instruct foreclosure counsel to stop a foreclosure sale while a complete loss mitigation application is pending.
- **Servicing transfers:** The Final Rule codifies the existing position of the CFPB that a transfer of servicing should not adversely affect a borrower's pursuit of loss mitigation. As a result, the Final Rule generally requires a transferee servicer to meet the deadlines and procedural requirements applicable to the transferor servicer as of the transfer date, which the CFPB defines as the day on which the transferee servicer will begin accepting payments for the mortgage loan as disclosed to the borrower in the notice of loan transfer. However, there are a few notable exceptions:
  - Acknowledgment notices: A transferee servicer must provide the notice acknowledging receipt of a loss mitigation application within 10 days (excluding Saturdays, Sundays and legal holidays) if the transferee acquires the servicing of a mortgage loan for which the acknowledgment period—five days after receipt of the loss mitigation application, excluding Saturdays, Sundays and legal holidays—has not expired as of the transfer date and the transferor servicer has not provided the acknowledgment notice of receipt of a loss mitigation application.
  - Prohibition on notice filings: To mitigate potential harm to a borrower caused by extending the timeline for providing the acknowledgment notice, in a comment to the Final Rule the CFPB prohibits a transferee servicer from making the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process until after the reasonable date disclosed to the borrower for providing the documents necessary for a complete loss mitigation package.
  - Complete loss mitigation applications pending at transfer: The proposed version of the rule required a transferee servicer to evaluate a complete loss mitigation application based on the date the transferor servicer received the application, subject to two exceptions for involuntary loan transfers and circumstances in which a transferee servicer's completion of the evaluation of the application within the specified timeframes was impractical. By contrast, the Final Rule states that a transferee servicer that receives a loan with a complete loss mitigation application pending as of the transfer date has 30 days from such date to evaluate the borrower for loss mitigation options. The CFPB adopted the bright-line rule with the intent of easing the compliance burden for borrowers and servicers. The Final Rule also requires a transferee servicer to exercise reasonable diligence to complete a loss mitigation application (including a facially complete application), informing the borrower of any changes to the application process (e.g., a change of the address to which documents must be submitted) and which documents are necessary to complete the application.
  - Applications subject to appeal: If a loan has a pending loss mitigation appeal as of the transfer date, or if an appeal is filed after the transfer date, the Final Rule requires a transferee servicer to make a determination on the appeal by the later of 30 days after the transfer date or 30 days of the date the borrower made the appeal. (This timeline is extended from the proposed version of the rule.) A transferee servicer that is unable to make a determination on an appeal (e.g., because the transferee servicer lacks sufficient information to review the appeal) must treat the appeal as a pending complete loss mitigation application. Notably, in addition to any loss mitigation options that it offers to the borrower based on its evaluation of the borrower's complete loss mitigation application, the transferee servicer must permit the borrower to accept or reject

any loss mitigation options offered by the transferor servicer, even if the transferee does not offer such loss mitigation option, in addition to any loss mitigation options that the transferee servicer offers to the borrower based on its evaluation of the borrower's complete loss mitigation application.

– Pending loss mitigation offers: A transfer of servicing does not affect a borrower's ability to accept or reject a loss mitigation option offered by the transferor servicer. A transferee servicer that acquires servicing of a mortgage loan for which the borrower's timeframe for accepting or rejecting such an offer has not expired must allow the borrower to accept or reject the offer during the unexpired balance of the applicable time period. Consistent with the requirements for policies and procedures discussed above, the transferor servicer must timely transfer, and the transferee servicer must obtain, documents and information regarding such acceptances and rejections; additionally, the transferee servicer must provide the borrower with any timely accepted loss mitigation option, even if the borrower submitted the acceptance to the transferor servicer.

Alston & Bird observations

The Final Rule on loss mitigation will create added burdens on servicers, both in terms of potentially having to review multiple loss mitigation applications for a borrower over the life of the loan and having to send additional written notices of completion of the loss mitigation application. The life-of-loan obligation is intended to balance additional and more uniform protections for borrowers who are delinquent under the new definition of delinquency, become current and then become delinquent again, with the additional burden on servicers. The CFPB also tried to encourage both borrowers and servicers to dedicate appropriate resources to the initial loss mitigation application to avoid placing borrowers into an inappropriate loss mitigation option, only to have them become delinquent again.

The CFPB has tried to provide added clarity about the notice of complete application so borrowers know when to expect a decision on their application since applications are rarely complete when first submitted and become complete only after additional collection of documents. The notice should still provide servicers with some flexibility, however, should they later determine that they need additional documents during the evaluation process. The CFPB declined, however, to take action on comments requesting clarification on the exact timing of mailing the notices, such as when a servicer uses a vendor to send the notice.

The Final Rule creates parity in the rights of junior lienholders to join the foreclosure action of a senior lienholder, with the reciprocal right already in the current rule for senior lienholders to join the foreclosure action of a junior lienholder, even if the former is not delinquent.

The CFPB has tried to maintain some consistency in establishing the timelines for when a borrower needs to complete an otherwise incomplete application by using the same four benchmarks that are in the current commentary. The CFPB has made adherence to the benchmarks more rigid, however, eliminating some of a servicer's flexibility in establishing deadlines in the current rule.

The CFPB's clarifications to dual tracking emphasize the absolute nature of the prohibition on conducting a foreclosure sale. The CFPB firmly stated that the servicer is not excused from compliance because it acts through a service provider, including foreclosure counsel, so miscommunications or delays in conveying information about the status of loss mitigation applications will not be any excuse for foreclosure counsel proceeding with the foreclosure, and that servicers may need to take the ultimate step of dismissing the foreclosure action if necessary, though the CFPB believed that such dismissals would be rare.

The Final Rule codifies what had previously been addressed in commentary and guidance about the transferee servicer's obligations for in-flight loss mitigation applications. While the rule and new commentary are directed toward transferee servicers, the transferor servicers still have an obligation to have policies and procedures in place that are designed to ensure the timely transfer of relevant information and to facilitate the transferee's compliance with the loss mitigation rules. Transferor servicers share responsibility for compliance with the loss mitigation rules to ensure that borrowers are not adversely affected by a servicing transfer.

Periodic Statement Requirements

The Final Rule clarifies the periodic statement requirements for loans that have been accelerated, are in temporary loss mitigation programs, have been permanently modified, have been charged off or are for borrowers in bankruptcy or successors in interest.

- **Accelerated loans:** When a servicer has accelerated the balance of the mortgage loan, but will accept a lesser amount to reinstate the loan, the "amount due" in the periodic statement must identify only the lesser amount that will be accepted to restate the loan. The periodic statement must be accurate when provided. Considering comments about the frequency with which the reinstatement amount may change, the CFPB attempted to create flexibility in the Final Rule by permitting a servicer to include an "as of [date]" or "good through [date]," which may differ from the due date of the periodic payment; alternatively, a servicer may include in the statement a disclosure that the reinstatement amount is only accurate for a specified length of time. The periodic statement's "explanation of amount due" must list both the reinstatement amount that is disclosed in the amount due and the accelerated amount that will be accepted through the "as of [date]" or "good through [date]," as well as an explanation that the servicer will accept the reinstatement amount to reinstate the loan and any special instructions for submitting the reinstatement payment.
- **Loans in temporary loss mitigation programs:** When a borrower has agreed to a temporary loss mitigation program, the servicer may identify in the periodic statement's "amount due" either the payment due under the temporary loss mitigation program or the amount due according to the loan contract. If the amount due identifies the payment due under the temporary loss mitigation program, the explanation of amount due must include both amounts as well as an explanation that the amount due is disclosed as a different number because of the temporary loss mitigation program.
- **Permanently modified loans:** For a borrower whose loan has been permanently modified, the Final Rule provides that servicer should identify only the amount due under the modified loan contract as the "amount due."
- **Charged-off loans:** Obligations relating to periodic statements do not apply to any loan that a servicer has charged off in accordance with loan-loss provisions (meaning that the creditor or servicer no longer considers the mortgage loan to be an asset) and for which the servicer will charge no additional fees or interest. To be eligible for the exemption, within 30 days of the charge off or most recent statement, the servicer must provide the consumer with a periodic statement clearly and conspicuously labeled "Suspension of Statements & Notice of Charge Off—Retain This Copy for Your Records," with an explanation of the consequences of charge off for the borrower, as applicable. Should the servicer no longer qualify for the exemption—for example, because it resumes assessing interest or fees on the loan account—the servicer must resume sending periodic statements and may not retroactively assess fees or interest for the time period for which it was exempt. The Final Rule also addresses a servicer's rights and obligations regarding charged-off loans when there is a change in ownership or servicing of the loan.

- **Borrowers in bankruptcy:** The Final Rule exempts a servicer from providing a periodic statement to a borrower in bankruptcy, provided a two-part test is satisfied. First, any consumer on the loan must be a debtor in bankruptcy or must have discharged personal liability for the mortgage loan through bankruptcy. Second, one of the following conditions must apply to any borrower on the loan:
  - The borrower requests in writing that the servicer cease providing periodic statements or coupon books.
  - The borrower's bankruptcy plan provides that the borrower will surrender the property, provides for avoidance of the lien or does not otherwise provide for the payment of pre-bankruptcy arrearages or payments due under the mortgage loan.
  - A court order provides for the avoidance of the lien, lifts the automatic stay or requires the servicer to cease providing periodic statements or coupon books.
  - The borrower files with the bankruptcy court a statement of intent to surrender the property.

  A servicer ceases to qualify for the exemption relating to a mortgage loan for which the consumer reaffirms personal liability or any consumer requests in writing that the servicer provide a periodic statement or coupon book, unless a court enters an order in the bankruptcy case requiring the servicer to cease providing a periodic statement or coupon book. The Final Rule also allows a servicer to establish an exclusive mailing address for a debtor in bankruptcy to use to submit a written request to opt into or out of receiving periodic statements.

  In the case of a consumer reaffirming personal liability, the Final Rule clarifies the form the periodic statement must take, permitting the servicer to omit from or adjust certain information in the modified periodic statement to better suit borrowers in bankruptcy or who have discharged personal liability for a mortgage loan through bankruptcy. The content of the modified periodic statement will vary according to the type of bankruptcy case the consumer filed:
  - For a debtor in Chapter 7 bankruptcy, the servicer may omit the amount of any late payment fees and much of the delinquency information and must add in a statement identifying the consumer's status as a debtor in bankruptcy and a statement that the periodic statement is for informational purposes only.
  - For a debtor in Chapter 12 or 13 bankruptcy, in addition to the changes permitted for a debtor in Chapter 7 bankruptcy, the servicer may omit the rest of the delinquency information, may limit the amount due and explanation of amount to the date and amount of post-petition payments and fees due, must include all payments received since the last statement in the transaction activity and must make certain additional disclosures, including certain information about the pre-petition arrearage.

  The Final Rule currently includes a one-billing-cycle exemption for switching from the modified periodic statement used during bankruptcy to an unmodified periodic statement at the conclusion of the bankruptcy case or after the consumer's reaffirmation of the debt if the payment due date for that billing cycle is no more than 14 days after the date on which one of three triggering events occurred. However, the CFPB's proposed rule would change this exemption to a one-statement exemption, whereby the servicer could skip the next statement or coupon book, even if the payment due date is more than 14 days after the date of the triggering event, but then the next month would need to provide a modified or unmodified periodic statement or coupon book that complies with the requirements of Section 1026.41.

- **Successors in interest:** The Final Rule requires a servicer to provide periodic statements to a confirmed successor in interest unless the servicer is providing the periodic statements to another consumer on the account or the confirmed successor in interest is not liable on the mortgage loan, the servicer has provided a written notice and acknowledgement form (described above in connection with the successor in interest provisions), and the confirmed successor in interest has provided the servicer an executed acknowledgement that has not been revoked. The servicer may also modify the language in the sample periodic statement forms to remove language that could suggest liability under the mortgage loan agreement if such language is not applicable to a confirmed successor in interest who has not assumed the mortgage and is not otherwise liable on it.

Alston & Bird observations

The Final Rule provides some helpful commentary to address situations where the current rule was silent on how to address accelerated and charged-off loans on periodic statements. For accelerated loans, the CFPB believes that if the borrower receives a periodic statement with the full accelerated amount as the amount due, rather than just the lesser amount needed to reinstate the loan, the borrower may be deterred from reinstating, believing that the payment of the full amount is impossible, which may lead to unnecessary foreclosure. The CFPB clarified that if any information necessary for an accurate disclosure is unknown to the servicer, the servicer must make the disclosure based on the best information reasonably available at the time of disclosure and clearly state that the disclosure is an estimate (consistent with the requirements of Regulation Z for the disclosure of estimates). The CFPB did provide some flexibility, however, in response to comments about the changing nature of a reinstatement amount due to accruing interest so that servicers may caveat the reinstatement amount with an expiration date.

The Final Rule also establishes a limited exemption for providing periodic statements for charged-off loans. There is no grandfathering of charged-off loans such that unless the lien is released, the periodic statement is required for all charged-off mortgage loans, regardless of whether the loan was charged off before the effective date of the original Mortgage Servicing Rules on January 10, 2014. Servicers are also prohibited from retroactively assessing fees or interest on the account during the period of time the exemption applied. The CFPB believes that the requirement to provide a periodic statement will keep borrowers informed as additional fees and interest accrue.

For borrowers in bankruptcy, the Final Rule differs from its proposed version in three ways. First, the exemption applies at the mortgage level rather than at the consumer level. Second, a consumer's proposed bankruptcy plan—and not only a confirmed plan—can trigger the exemption. Third, the exemption generally applies upon the consumer's filing a statement of intention identifying an intent to surrender the dwelling only if the consumer has not made any partial or periodic payments on the loan after the commencement of the bankruptcy case. The CFPB believes that these changes will streamline the requirement for servicers and alleviate concerns that providing this modified statement may violate the Bankruptcy Code's automatic stay or discharge injunction.

For borrowers who have reaffirmed personal liability, the Final Rule makes clear that the rule applies equally to coupon books, not just periodic statements. Therefore, a servicer ceases to qualify for the exemption if the consumer reaffirms personal liability on the loan or requests in writing that the servicer provide a coupon book, unless expressly ordered otherwise by a court.

Information Requests

The Final Rule clarifies the information that a servicer must provide in response to information requests. When Fannie Mae or Freddie Mac is not the owner of the loan or the trustee of the securitization trust in which the loan is held, a servicer may respond by providing the name of the trust and the name, address and appropriate contact information for the trustee. If Fannie Mae or Freddie Mac is the owner of the loan or the trustee of the securitization trust in which the loan is held, a servicer may respond to a request about the owner or assignee of the loan by providing only the name of and contact information for Fannie Mae or Freddie Mac, as applicable, without identifying the name of the trust. However, if the borrower expressly requests the name of the trust or pool for a loan in which Fannie Mae or Freddie Mac is the owner of the loan or the trustee of the securitization trust in which the loan is held, a servicer must provide the name of the trust and the name, address and appropriate contact information for the trustee.

Alston & Bird observations

The CFPB's stated intent by referring to the "owner or the trustee of the securitization trust in which the loan is held" is to permit a servicer to respond to a nonspecific request for information by providing only the name and contact information for Fannie Mae and Freddie Mac for those loans subject to their guides and be able to obtain information on loss mitigation and foreclosure processes.

Payment Processing

The Final Rule clarifies how servicers must treat periodic payments for loans under loss mitigation programs. For a loan that is under a temporary loss mitigation program, but that has not been permanently modified, a servicer must credit periodic payments according to the loan contract. If a periodic payment is insufficient to cover the payment due, the servicer should treat it as a partial payment (as under the current Mortgage Servicing Rules). For a loan that is under a permanent loan modification, a servicer must credit periodic payments according to the terms of the permanent modification.

Alston & Bird observations

This change is consistent with the proposed rule where the CFPB acknowledged that it previously suggested payments under temporary loss mitigation should be credited according to the terms of the loss mitigation agreement.

Force-Placed Insurance

The Final Rule expands the scope of requirements for force-placed insurance to account for situations where the borrower has insufficient insurance. A servicer also will have the option to include the borrower's mortgage loan account number on force-placed insurance notices.

Alston & Bird observations

The Final Rule provides helpful clarification on force-placed insurance, but does not significantly increase servicers' compliance obligations. Servicers should ensure that their practices regarding the forced placement of insurance address all applicable situations, including insufficient coverage.

Small Servicers

When determining whether a servicer is eligible for the small-servicer exemption, the Final Rule excludes mortgage loans that a servicer voluntarily services for a non-affiliate without requiring that the non-affiliate be a creditor or assignee, provided that the servicer does not receive any compensation or fees. The Final Rule also excludes certain transactions serviced for a seller-financer[3] from the calculation of the 5,000 loan limit. For instance, a seller-financer may provide seller financing for the sale of only one property in any 12-month period.

Alston & Bird observations

In excluding transactions serviced for non-affiliates that are not a creditor or assignee and also seller-financers, the CFPB expressed a belief that servicing cost savings would be passed on to consumers and that consumers may benefit from having a depository institution that otherwise would qualify as a small servicer voluntarily service loans for a non-affiliate that is not a creditor or assignee. Likewise, the CFPB noted that the exclusion would also support transactions in small or rural communities where consumers would have limited options for service providers in the state. In such arrangements, a depository institution would receive scheduled periodic payments from the purchaser and deposit the payments into the account of the seller-financer, which would be a customer of the depository institution. Such transactions will therefore likely increase consumers' access to financing and benefit the purchaser by providing a more independent accounting by having the payments processed by a third party rather than the seller-financer.

Conclusion

A few final notes are worth keeping in mind for servicers as they anticipate implementing the Final Rule's provisions into their business practices. First, while the Final Rule will apply broadly, it does not preempt any state law that affords borrowers broader consumer protections relating to mortgage servicing than those conferred under the Mortgage Servicing Rules. Servicers should be mindful of obligations that permit compliance with both the Mortgage Servicing Rules (specifically, Regulation X) and state law. Second, although the CPFB did not include mandatory language translation requirements or other language access requirements in the Final Rule, it did reiterate the importance of servicers communicating with all consumers in a clear and nondiscriminatory manner. Servicers should therefore ensure that they are in compliance with all applicable Limited English Proficiency requirements of federal and state laws. Overall, the Final Rule provides some useful guidance for complying with the current Mortgage Servicing Rules, but it will also pose operational challenges, particularly for compliance with the new rules for confirming successors in interest and whether and how to provide information to borrowers in bankruptcy and who have exercised their cease communication rights under the FDCPA.

[3] To be considered a seller-financer, a person must provide financing for the sale of only one property in any 12-month period, not have constructed a residence on the property in the ordinary course of business, and provide financing that meets certain interest rate criteria and does not result in negative amortization.

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