INFOBYTES SPECIAL ALERT:

CFPB FINALIZES ADDITIONAL AMENDMENTS TO THE 2013 MORTGAGE RULES

September 17, 2013

On September 13, 2013, the Consumer Financial Protection Bureau ("CFPB") finalized another set of amendments (the "Amendments") to its January 2013 mortgage rules.[1] Whereas previous amendments focused largely on the ability-to-repay/qualified mortgage rule, these Amendments – originally proposed in late June 2013[2] – principally address several important questions that have emerged during the implementation process for the mortgage servicing and loan originator compensation rules.[3]

The Amendments provide helpful guidance on complying with the rules and, in several cases, the CFPB revised the proposed amendments in response to concerns raised by the industry during the comment period. Nevertheless, the volume and complexity of the new requirements and the number of outstanding issues still present a daunting task for many industry participants as they work to implement the rules by January 2014. The CFPB declined industry requests to provide additional time for compliance and, except as discussed below, has not indicated whether additional amendments will be forthcoming.

KEY AMENDMENTS

Mortgage Servicing

First Notice or Filing in Foreclosure Process. The rule adopted by the CFPB in January 2013 prohibits a servicer from making the "first notice or filing" required for foreclosure unless the loan is more than 120 days delinquent.[4] The CFPB's proposed amendment would have interpreted this prohibition to prevent servicers from providing any notice that "would be used by the servicer as evidence of compliance with foreclosure practices required pursuant to State law" during the 120-day period.[5] This proposal, however, met with universal opposition from industry, state governments, and consumer

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1 Bureau of Consumer Financial Protection, Final Rule, Amendments to the 2013 Mortgage Rules under the Equal Credit Opportunity Act (Regulation B), Real Estate Settlement Procedures Act (Regulation X), and the Truth in Lending Act (Regulation Z) (Sept. 13, 2013), http://files.consumerfinance.gov/f/201309_cfpb_titlexiv_updates.pdf (publication in the Federal Register forthcoming) [hereinafter "*September Amendments Release*"].

2 Bureau of Consumer Financial Protection, Proposed Rule with Request for Public Comment, Amendments to the 2013 Mortgage Rules under the Equal Credit Opportunity Act (Regulation B), Real Estate Settlement Procedures Act (Regulation X), and the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 39902 (July 2, 2013) [hereinafter "*Proposed Amendments Release*"].

3 Bureau of Consumer Financial Protection, Final Rule, Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. 10696 (Feb. 14, 2013) [hereinafter "*2013 RESPA Servicing Rule*"); Bureau of Consumer Financial Protection, Final Rule, Mortgage Servicing Rules Under the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 10902 (Feb. 14, 2013) [hereinafter "*2013 TILA Servicing Rule*," and together with the 2013 RESPA Servicing Rule, "*2013 Mortgage Servicing Rules*"]; Bureau of Consumer Financial Protection, Loan Originator Compensation Requirements under the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 11280 (Feb. 15, 2013) [hereinafter "*2013 Loan Originator Compensation Rule*"].

4 § 1024.41(f). In this footnote and hereafter, this Alert uses the shortened citations "§ 1024.__" and "§ 1026.__" to mean "12 C.F.R. § 1024.__" and "12 C.F.R. § 1026.__" in effect on January 10, 2014. Similarly, unless otherwise specified, the shortened citations "Part 1024, Cmt. __" and "Part 1026, Cmt.__" refer to the Comments to Parts 1024 and 1026, respectively.

5 Prop. Part 1024, Cmt. 41(f)-1.

advocates, who pointed out that, among other things, it would prevent consumers from receiving notices intended to help avoid foreclosure (such as notices regarding state-mandated pre-foreclosure programs) until after the 120th day of delinquency.

In response, the CFPB adopted an interpretation of "first notice or filing" that varies with the type of state foreclosure process:

- **In judicial foreclosure states, the first notice or filing is the complaint or other document filed with the court to commence the foreclosure proceeding.**
- **In non-judicial foreclosure states, the first notice or filing is the earliest document required to be recorded or published to initiate the foreclosure process.**
- **In all other states, the first notice or filing is the first document that establishes, sets, or schedules the foreclosure sale date.**[6]

The CFPB specifically stated that a breach letter, notice of right to cure, or other document is not the "first notice or filing" solely because it must be included as an attachment to a document that is subsequently filed, recorded, published, or otherwise used to start the foreclosure process, as discussed above.[7]

Incomplete Loss Mitigation Applications. The rule adopted by the CFPB in January 2013 would have required servicers to review a borrower's loss mitigation application within five business days and provide a notice informing the borrower that either: (1) the application is complete; or (2) the application is incomplete and the borrower should submit specified information by the earliest of four specific dates.[8] The rule issued in January also generally prohibited a servicer from offering the borrower *any* loss mitigation option until the application is complete and from requesting additional information after having informed the borrower that the application is complete.[9]

In response to concerns about these aspects of the rule, the CFPB proposed and has now adopted certain exceptions and amendments.

- ***Short-term forbearance programs.*** **Like the proposal, the Amendments generally allow servicers to offer a borrower a short-term forbearance program even if the borrower has not yet submitted sufficient information to complete the application for all loss mitigation options.**[10] **Furthermore, in response to concerns from industry and consumer advocates that the proposed exception was too narrow, the CFPB expanded it to cover forbearance programs of up to six months (as opposed to the proposed limit of two months).**[11] The CFPB also stated in the Preamble to the Amendments that "this six-month period may cover time both before and after the payment forbearance was granted (for example, if a borrower is one month delinquent when a servicer offers a payment forbearance

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6 Part 1024, Cmt. 41(f)-1.

7 Part 1024, Cmt. 41(f)-1.iv; *September Amendments Release* at 89.

8 § 1024.41(b).

9 § 1024.41(c).

10 § 1024.41(c)(2).

11 Part 1024, Cmt. 41(b)(2)(iii)-1.

program, the program may only extend 5 months into the future)."[12] The CFPB further stated that:

> [T]he new rule does not preclude a servicer from offering multiple successive short-term payment forbearance programs. . . . Commenters strongly felt that a short forbearance period would not provide much additional benefit to borrowers, and further explained that a payment forbearance of less than a year may interfere with existing programs under HUD, HAMP, and the GSEs. The Bureau acknowledges that a borrower will generate a significant unpaid debt over the course of a long forbearance period. However, the Bureau notes that a borrower who believes the circumstances warrant cutting a long forbearance short can receive a full review for all loss available mitigation options by submitting a complete loss mitigation application. In addition, the Bureau believes that the risk servicers would attempt to evade the full loss mitigation procedures by offering sequential six-month forbearances to delinquent borrowers is low. Thus, the Bureau believes that borrowers benefit more from renewable forbearance agreements than they would benefit from any limit the Bureau might impose at this time on the maximum number of forbearances. The Bureau notes, however, that while the final rule does not prohibit a servicer from offering multiple short-term forbearances under this provision, the Bureau intends to monitor how temporary forbearances are used after this final rule becomes effective and, if it determines servicers are inappropriately offering sequential payment forbearances, may address the issue in a later rulemaking or by other means at a later date.[13]

- *Requesting additional information after application was deemed complete.* The Amendments also adopt a proposed exception generally permitting servicers who receive an application that appears to be complete to inform the borrower of such, and to later request additional information if needed.[14]
- *Reasonable date to complete application.* When a servicer notifies a borrower that additional information is needed to complete an application, the notice must state what additional information is needed and provide a "reasonable date" by which the consumer should provide that information.[15]

In response to industry concerns about the ambiguity of both the current and proposed methods for determining the "reasonable date," the CFPB adopted an amendment providing that the servicer must disclose the date that "preserves the maximum borrower rights" under the rule based on the following "milestones":

1. The date by which any document or information previously submitted by the borrower will be considered state or invalid
2. Day 120 of the delinquency
3. Day 90 before a foreclosure sale

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12 *September Amendments Release* at 71.

13 *Id.* at 72-73.

14 § 1024.41(c)(2)(iv).

15 § 1024.41(b)(2)(ii).

4. Day 38 before a foreclosure sale.[16]

> However, if it would be "impracticable" for the borrower to obtain and submit the necessary information by the upcoming milestone (*e.g.*, the milestone is less than 7 days from the request for the information), the servicer should generally disclose the date of the next milestone.[17]

Notice of Denial. The CFPB adopted a proposed amendment clarifying that, when notifying a borrower that he or she has been denied for a loss mitigation option, the servicer need only disclose the actual reasons for the denial and not other potential reasons.

Loan Originator Compensation

Effective Date. The CFPB adopted its proposal to: (1) move the effective date for the provisions governing loan originator compensation and qualification forward from January 10, 2014 to January 1, 2014; and (2) generally apply the revised compensation restrictions to transactions consummated and for which the employer paid compensation on or after January 1, 2014 (although 401(k) and similar contributions made during 2014 can be based on profits from transactions consummated during 2013 or earlier). These revisions, which were generally supported by commenters, are intended to permit employers of loan originators to make changes to their compensation, registration, licensing, and training practices at the start of the calendar year.[18]

Disclosure of Loan Originator Information. The CFPB retained the January 10, 2014 effective date for the requirement that a loan originator organization (such as a mortgage brokerage) must disclose on the application, note, and certain other loan documents: (1) its name and Nationwide Mortgage Licensing System and Registry identification number (NMLSR ID); and (2) the name and NMLSR ID of the individual loan originator with primary responsibility for the loan when the disclosure is provided. The CFPB acknowledged, however, that some uncertainty exists with respect to the application of this provision in circumstances where more than one loan originator organization is involved. Specifically, the CFPB stated in the Preamble to the Amendments that:

> The Bureau understands that some loan originator organizations are planning to comply by including the name and [NMLSR ID] (where the NMLSR has provided one) for *multiple* loan originator organizations involved in originating the transaction on the loan documents, while others are planning to comply by including the name and NMLSR ID (where the NMLSR has provided one) for just *one* of the loan originator organizations involved in originating the transaction on the loan documents. The Bureau believes that either approach complies with the rule in its current form. However, the Bureau is considering proposing to clarify at some point in the future that the name and NMLSR ID (where the NMLSR has provided one) for *multiple* loan originator organizations involved in originating the transaction must be included on the loan documents. If the Bureau ultimately adopts such a clarification, it will provide adequate time for compliance.[19]

Definition of Loan Originator. The CFPB adopted its proposed clarifications about who is and is not a "loan originator" covered by the rule. In particular, the CFPB has clarified that employees of a creditor or

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[16] Part 1024, Cmt. 41(b)(2)(ii)-1.

[17] *Id.*

[18] *September Amendments Release* at 19.

[19] *Id.* at 31.

loan originator in certain administrative or clerical roles (such as tellers or greeters) do not become loan originators solely by: (1) providing an application form; (2) discussing general credit terms with consumers (*e.g.*, "We offer rates as low as 3% to qualified consumers"); or (3) directing consumers to a loan originator.[20] Instead, to be a loan originator, the employee would need to assist the consumer in completing the form, discuss particular credit terms selected based on the consumer's financial characteristics, or direct the consumer to a particular loan originator based on an assessment of the consumer's financial characteristics.[21] However, the CFPB narrowed the proposal in one respect, clarifying that an employee of a creditor or loan originator that provides an application form from a different entity or directs a consumer to a loan originator employed by a different entity is a loan originator under the rule.[22]

Other Rules

Points and Fees for Qualified Mortgages and High-Cost Mortgages. The CFPB adopted its proposed amendments clarifying the treatment of charges paid by parties other than the consumer and of loan originator compensation paid to retailers of manufactured homes and their employees. In particular, the Amendments make clear that seller's points are excluded from the finance charge component of points and fees and that creditor-paid charges other than for loan originator compensation are excluded from points and fees entirely. In addition, in response to concerns that creditors would otherwise have had difficulty determining how to allocate a seller's or other third-party's payment among charges that would and would not count as points and fees, the Amendments provide that creditors may rely on written statements from the borrower or third party (including the seller) as to the purpose of the payment.[23]

Rural and Underserved Areas. The CFPB also adopted its proposed amendments revising the exceptions available to small creditors (creditors with no more than $2 billion in assets that, along with affiliates, originate no more than 500 first-lien mortgages per year covered under the ability-to-repay rule) operating in predominantly "rural" or "underserved" areas. Specifically, the CFPB is allowing all small creditors, regardless of whether they operate predominantly in "rural" or "underserved" areas, to continue originating balloon high-cost mortgages if the loans meet the requirements for balloon qualified mortgages.[24] In addition, the CFPB is allowing more small creditors to take advantage of the exemption from the requirement to establish escrow accounts for higher-priced mortgage loans. The revised exceptions are temporary and will apply while the CFPB re-examines the underlying definitions of "rural" or "underserved" over the next two years.[25]

Limitations on Financing Credit Insurance. In January 2013, the CFPB adopted a prohibition on the financing of certain credit insurance premiums for mortgages and home equity lines of credit, effective June 1, 2013.[26] The CFPB later delayed the effective date to January 10, 2014 while it considered the application of the prohibition to transactions where premiums are collected on a monthly basis rather than added to the initial loan amount as a lump sum at consummation. The CFPB has now amended the

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20 Part 1026, Cmts. 1026.36(a)-1.i and -4.i-iv.

21 *Id.*

22 Part 1026, Cmt. 1026.36(a)-4.i and ii.B.

23 Part 1026, Cmt. 32(b)(1)-2.

24 Part 1026, Cmt. 43(e)(6).

25 *September Amendments Release* at 120-21.

26 § 1026.36(i).

prohibition to provide that: (1) a premium is financed only if the creditor provides the consumer the right to defer payment beyond the monthly period in which the premium is due; and (2) premiums are calculated on a monthly basis if they are determined mathematically by multiplying a rate by the actual monthly outstanding balance.[27] Although the CFPB sought comment on whether to move the effective date to January 1, 2014, it ultimately retained the January 10, 2014 effective date.[28]

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Questions regarding the matters discussed in this Alert may be directed to any of our lawyers listed below, or to any other BuckleySandler attorney with whom you have consulted in the past.

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[27] § 1026.36(i)(2)(ii).

[28] *September Amendments Release* at 32.