

PUBLICATION

CFPB Amends Mortgage Servicing Rules

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After years of requests for clarification, last week the CFPB finally issued an amendment to their mortgage servicing rules. As early as October 2013 the CFPB began to clarify said rules when they issued [Bulletin 2013-12](#) which addressed some of the industry's concern. Less than 12 months after the effective date of the initial 2013 servicing rules, the Bureau published, "Amendments to the 2013 Mortgage Rules under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z)" in the federal register in December 2014. These amendments were finalized last week and include a concrete definition of delinquency, how to deal with successors in interest, what information must be provided to those borrowers in bankruptcy and a host of other changes. The final rule comes in at a little more than 900 pages and can be found [here](#).

Delinquency Defined

The lack of consistent definition of delinquency in the CFPB's 2013 mortgage serving rules has been a continued source of frustration for mortgage servicers. The CFPB's amendment defines delinquency as "a period of time during which a borrower and a borrower's mortgage loan obligation are delinquent." The Bureau further explains that "a borrower and a borrower's mortgage loan obligation are delinquent beginning on the date a periodic payment sufficient to cover principal, interest, and, if applicable, escrow becomes due and unpaid, until such time as no periodic payment is due and unpaid." At first blush it appeared that this definition addresses rolling delinquencies, a common concern in the mortgage industry.

The ABA best summarized the rolling delinquency issue in their October 2014 letter to the CFPB stating that "mortgage servicers have adopted a variety of policies for accepting and crediting payments and partial payments on rolling delinquencies. Likewise, there are multiple methods for determining when to commence foreclosure on loans that have been delinquent on a rolling basis." This is also not just an inconvenience to a mortgage bank, as the ABA pointed out that "loans are generally considered nonaccrual when, based on information and events, a bank determines it is probable that it will be unable to collect on all principal and interest amounts due according to the original contractual terms of the loan agreement. Loans are normally placed on nonaccrual status when payments are 90 days or more past due, or earlier if the timely collection of interest and/or principal appears doubtful. The Basel III capital requirements require a 150 percent risk weighting on nonaccrual loans." This places a very real financial impact to the banks that are carrying loans classified as nonaccrual and cannot move to liquidate those loans due to the rolling delinquency of the borrower. The CFPB seems to have ignored this concern and included the following language: "If a servicer credits a payment by a delinquent borrower to the oldest missed payment, the result is that the 120-day foreclosure referral waiting period in § 1024.41(f)(1)(i) is advanced."

Protecting Successors in Interest

Dealing with successors in interest has also been another point of frustration for many mortgage servicers. The lack of guidance and clear regulation has led to confusion and an inconsistent treatment of borrowers depending on who the investor of the loan was; this in turn makes it difficult for servicers who are acting on the behalf of multiple investors. Also, there are the privacy concerns raised by servicers substantially interacting with successors in interest.

To address the privacy issues, the Bureau states in their amendment that, "disclosing information to successors in interest as required under the final rule will not cause a servicer to violate the GLBA or Regulation P." They are also concurrently issuing an [interpretation of FDCPA](#) section 805 that creates a safe harbor pursuant to FDCPA section 813(e).

A. Who Is a Successor in Interest?

To define who is a successor in interest, the Bureau looked towards the definitions of successor in interest found in the Garn-St. Germain Act, but the rule does not reference the Garn-St. Germain Act directly. These definitions include:

1. A transfer by devise, descent or operation of law on the death of a joint tenant or tenant by the entirety;
2. A transfer to a relative resulting from the death of a borrower;
3. A transfer where the spouse or children of the borrower becomes an owner of the property;
4. A transfer resulting from a decree of a dissolution of marriage, legal separation agreement or from an incidental property settlement agreement, by which the spouse of the borrower becomes an owner of the property; (important to note that the CFPB interprets "spouse" to include married same-sex spouses; or
5. 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.

B. How Do You Confirm a Successor in Interest's Identity and Ownership Interest?

The final rules provides that "servicers are generally required (1) to respond to a written request from a person that indicates that the person may be a successor in interest by providing that person with a description of the documents the servicer reasonably requires to confirm the person's identity and ownership interest in the property and (2) to have policies and procedures reasonably designed to ensure that the servicer can provide promptly upon request, a description of what documents the servicer reasonably requires to confirm the person's identity and ownership interest in the property, and, upon the receipt of such documents, notify the person promptly, as applicable, that the servicer has confirmed the person's status, has determined that additional documents are required (and what those documents are), or has determined that the person is not a successor in interest."

C. What Is Required Once You Confirm the Successor in Interest's Status?

Confirmation of a successor in interest will give said successor access to a host of the loss mitigation protections afforded borrowers in the 2013 rules, while not hindering servicers operations. For example, the identification of a successor will not reset the 180-day period found in § 1024.39(b) or the 120-day period found in § 1024.41(f)(1)(i). While the new treatment of successors in interest will create more obligations for servicers, it will remove the common complaint where successors in interest are told that they cannot apply for loss mitigation without assuming the loan and cannot assume the loan without said loan being current, but they cannot bring the loan current without access to loss mitigation. This issue alone has driven a lot of borrower complaints and scrutiny from various State Attorneys General offices.

Providing More Information to Borrowers in Bankruptcy

The new rules require servicers to communicate with borrowers who are currently in bankruptcy. This is a departure from previous rules and will go against most servicers' procedures who most likely have coding in place to cease communication with all borrowers in bankruptcy. For borrowers in bankruptcy, the rule requires

servicers to provide written early intervention notices under certain circumstances, as well as provide statements to borrowers with specific information tailored for bankruptcy. The early intervention notices to borrowers will also be required for borrowers who have a cease and desist in place under the FDCPA.

Other points of interest in the amendments are the removal of the "one and done" approach to loss mitigation, where if a borrower had been approved for a previous modification, servicers would not have to comply with a majority of the loss mitigation rules upon default under an approved modification; this will no longer be the case. Also building off the CFPB's previous guidance issued in [Bulletin 2014-01](#), which addressed mortgage servicing transfers, the Bureau now states, "if a transferee servicer acquires the servicing of a mortgage loan for which a loss mitigation application is pending as of the transfer date, the transferee servicer must comply with the requirements of this section for that loss mitigation application within the timeframes that were applicable to the transferor servicer based on the date the transferor servicer received the loss mitigation application."

The revisions to the servicing rules are substantial and a full review is recommended along with the designation of dedicated team or individual to oversee and monitor the amendment's implementation. If you have any questions regarding your organization's current compliance under the 2013 mortgage servicing rules, best practices on these upcoming amendments or any issues with best practices under the CFPB rules, please contact a member of Baker Donelson's CFPB team.