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Did CFPB Have Authority To Issue New Regs Under RESPA?

By Laurence Platt (June 12, 2018, 2:14 PM EDT)

It has been over 35 years since I took Administrative Law in law school, but I remember well the basic legal maxim that an executive agency, independent or otherwise, derives its power and authority to regulate from the U.S. Congress. The threshold question for any agency's regulatory initiative is whether Congress delegated specific or general authority to that agency to regulate in the contemplated manner. The swarm of recent requests for information issued by the "new" Consumer Financial Protection Bureau triggered this memory when I read the CFPB's request for views on the manner in which the CFPB previously had exercised this rulemaking authority. I want to highlight one area where I think the CFPB went too far — namely, its extensive default servicing regulations under the Real Estate Settlement Procedures Act, or RESPA, which became final on Jan. 1, 2014, with subsequent revisions and as to which RESPA provides a private right of



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action for violations. However well-motivated in light of the concern over foreclosures, these regulations are a classic example, I believe, of regulatory overreach.

The 2010 Dodd-Frank Act, or DFA, gave broad rule-making authority to the CFPB. It transferred rulemaking authority to the CFPB for virtually all of the existing consumer credit laws, such as RESPA and the Truth in Lending Act, or TILA. It imposed new statutory obligations on the consumer credit industry and delegated mandatory authority to the CFPB to issue regulations to implement these new statutory requirements, such as the "ability to repay" rules on the residential mortgage industry. It also empowered the CFPB to police unfair, deceptive and abusive acts and practices, or UDAAPs, and provided discretionary authority to the CFPB to issue regulations if it wanted to specify with more detail what constitutes an illegal UDAAP.

Many of those who have been highly critical of the CFPB's rapid fire regulations over the first several years of its existence forget that Congress mandated the CFPB to promulgate many of the new regulations it promulgated. That does not mean that the CFPB had to be so gleeful in its response. Little wonder, though, that the enactment of the DFA without bi-partisan support, coupled with the establishment of a new independent agency with a single purpose — to protect consumers against the backdrop of the raw wounds from the financial crisis — would result in an activist agency. But, laws are laws, and the CFPB still had to operate within the authority given to it by Congress. So, what does the DFA say about mortgage loan servicing?

The DFA imposed several new servicing prohibitions and new requirements on residential mortgage servicers in new Subtitle E of Title XIV through amendments of TILA and RESPA. Subtitle E amended TILA to require creditors to establish five-year escrow or impound accounts to pay taxes, hazard insurance and any other necessary insurance in many situations. For consumers who have the authority to waive escrow services, the creditor must provide the consumers with disclosures that clearly explain the consumers' responsibilities. Servicing amendments of TILA also require prompt crediting of borrower mortgage payments on the day of receipt, except where the failure to credit promptly does not have adverse impact on the borrower, prompt mailings of pay-off requests within seven days of request and monthly mailing of periodic billing statements that contain specified content.

Section E amended Section 6 of RESPA to require servicers to refund balances in escrow accounts within 20 days after payoff. It also amended Section 6 of RESPA to prohibit mortgage servicers from obtaining force-placed insurance without a reasonable basis to believe that the borrower has not maintained property insurance, charging fees to borrowers for responding to valid written requests, failing to promptly respond to requests about errors in payment allocation, and failing to respond within 10 business days to a request to provide information about the loan owner.

Sticking out like a sore thumb is any provision in Subtitle E's amendments to RESPA or TILA imposing substantive requirements regarding the handling of loans in default, such as a continuity of contact requirement through a single point of contact or a prescriptive mandate to meet strict deadlines for notice, consideration, evaluation, decisioning and appeals of available loss mitigation options. Yet a large part of the CFPB servicing regulations comprises these provisions. What is their origin?

The amendment of RESPA through the DFA's Subtitle E of Title XIV added a "catch all" provision — Section 6 (k)(1)(E) — prohibiting a servicer from failing to comply with any other obligation found by the CFPB "... by regulation to be appropriate to carry out the consumer protection purposes of this act [RESPA]." So how did the CFPB squeeze detailed loss mitigation requirements out of RESPA? What does RESPA have to do with loss mitigation as an alternative to foreclosure?

Enacted in 1974, neither the purposes nor the provisions of RESPA addressed residential mortgage loan servicing, with one narrow exception. Quite the contrary. Congress originally enacted RESPA to reform the real estate settlement process to insure that consumers are provided with greater and more timely information on the nature and costs of the settlement process and are protected from unnecessarily high settlement charges caused by certain abusive practices in some parts of the country, such as kickbacks for the referral of real estate settlement services. The one exception related to servicing pertained to escrow accounts.

Section 10 of the original RESPA prescribed limits on the amounts a lender, in connection with a federally related mortgage loan, could require the borrower or prospective borrower to deposit in any escrow account established for the purpose of assuring payment of real estate taxes and insurance premiums. Several years later, in 1990, Congress amended RESPA to add a new Section 6 requiring notices of transfers of servicing and responses by servicers to borrowers "qualified written requests" within a prescribed time period.

The CFPB glossed over this important background of RESPA in the proposed regulation promulgated by the agency in 2012. According to the preamble to the proposed regulation:

[[t]his provision gives the Bureau broad authority to adopt additional regulations to govern the conduct of servicers of federally related mortgage loans. In light of the systemic problems in the mortgage servicing industry, the Bureau is proposing to exercise this authority to require servicers of federally related mortgages to: establish reasonable information management policies and procedures; undertake early intervention with delinquent borrowers; provide delinquent borrowers with continuity of contact with staff equipped to assist them; and require servicers that offer loss mitigation options in the ordinary course of business to follow certain procedures when evaluating loss mitigation applications.

Interestingly, the CFPB did not cite any foundation within the consumer protection purposes of RESPA to support the proposed regulations on loss mitigation. It instead focused on the existence of "systemic problems in the mortgage servicing industry" without reference to or grappling with the actual more limited delegation of authority in the DFA to provide legal support. Think about the contorted logic. The syllogism goes like this: (1) if there is a social problem, there is legal authority to regulate a solution under RESPA. (2) Default mortgage servicing presents a social problem. (3) Therefore, there is legal authority under RESPA to regulate default servicing.

The CFPB did not have to overreach to address certain of its concerns with default servicing. It did and does have explicit statutory authority to engage in UDAAP rulemaking, and the CFPB could have sought to stake out a case under UDAAP principles to regulate default servicing. There, however, were two problems with using UDAAP. First, it is possible that the CFPB could not have relied on UDAAP to develop an as detailed, prescriptive approach as it ultimately promulgated. Second, and perhaps more importantly, Section 6 of RESPA provides a federal private right of action for violations that enable consumers to sue for damages. A federal private right of action for violations of UDAAP is not available.

Servicers have over time integrated the CFPB's servicing regulations on loss mitigation into their day-today operations, and they may be reluctant to undertake the time, energy, effort and expense to undo these operational requirements even if the CFPB were willing to modify the default servicing regulations. Moreover, the protections afforded consumers through the servicing regulations clearly have value, even if perhaps they are overbroad and not supported by RESPA as the DFA required. Lastly, states have codified many of these requirements, and more states likely would do so if the federal requirements were diluted. But, regardless of whether the default servicing regulations make policy, economic or practical sense, my aim is to address the narrow legal issue of whether the CFPB overreached its statutory delegation of authority. I think it did.

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