

CFPB Servicing Rules Episode VI: Return of the Rulemakings

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September 2016

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DEFINITION OF DELINQUENCY

Definition of Delinquency: General

- Reg X has no generally-applicable definition
- Defines delinquency for early intervention and continuity of contact provisions
- Does not define for other sections of Subpart C of Regulation X, including the provision (§ 1024.41(f)(1)) that prohibits servicers from making the first foreclosure notice or filing until the loan is more than 120 days delinquent
- Posed uncertainties for servicers

Definition of Delinquency: General

- Now general definition of delinquency in § 1024.31 will apply to all sections of Subpart C:
 - “a borrower and a borrower’s mortgage loan are delinquent beginning on the date a periodic payment sufficient to cover principal, interest, and escrow becomes due and unpaid, until no periodic payment is due and unpaid”
- Primary distinction
 - substantially the same, with primary distinction on when the payment is due and unpaid for a given billing cycle, versus until no periodic payment is due and unpaid.

Definition of Delinquency: General

- Will impact servicers:
 - timing of when servicers must assign personnel to a delinquent borrower within 45 days of the borrower’s delinquency
 - when the servicer may initiate foreclosure proceedings
- The preparation of periodic statements under Regulation Z, since essentially the same definition of “delinquency” as applies to Subpart C of Regulation X also applies to Regulation Z’s periodic statement provisions
- Definition not intended to alter existing requirements imposed by other laws or regulations

Definition of Delinquency: Other Issues

- *Grace Period*

- Date of delinquency is measured from the date the periodic payment becomes due and unpaid, without regard to any grace period

- *Application of Payments*

- If servicer applies payments to oldest outstanding payment (required by Fannie Mae, Freddie Mac and some states), a payment by a delinquent borrower will advance the date the borrower's delinquency began
- In short, 120-day foreclosure referral waiting period is also advanced

Definition of Delinquency: Other Issues

- *Short Payments*

- If servicer chooses not to treat a short payment as delinquent, borrower is not delinquent
- Once servicer has established the policy, the servicer may not change its decision to treat the payment as timely for purposes of determining the date on which the borrower's delinquency began

Definition of Delinquency: Other Issues

- *Right to Accelerate*

- Servicer is not prohibited from exercising contractual right to accelerate, and failure to pay amount due after acceleration will begin or continue delinquency
- If borrower reinstates or cures following acceleration, borrower is no longer delinquent and delinquency period ends

- *Loan Modification*

- Even though contractual payments remain unpaid, has made all periodic payments due and owing under modified contract so not delinquent

Jeremy McLaughlin

PROMPT PAYMENT CREDITING

Payment Crediting

- Payment processing for borrowers under temporary loss mitigation programs
 - Clarifies 2013 Rule comments
 - Payments should generally be treated as partial payments (New Comment .36(c)(1)(i)-4)
- Payment processing for borrowers under modified loan contract
 - Periodic payment is determined under new contract terms (New Comment .36(c)(1)(i)-5)

Jeremy McLaughlin

PERIODIC STATEMENTS

Periodic Statements: Layout

- “Close proximity” standard for certain disclosures
 - Current Comment: no intervening text
 - Revised Comment (.41(d)-1): no unrelated text
- Text is unrelated if it does not explain or expand upon the required disclosures

Periodic Statements: Content

- Borrowers under temporary loss mitigation program
 - Disclosures regarding how payments are applied should be based on the loan contract, not on payment due under loss mitigation program (New Comment .41(d)-4)
- Disclosures concerning account activity “since the last statement”
 - What about after a § 1026.41 exemption expires?
 - Disclosures need cover only account activity since the last payment due date that occurred during the exemption (New Comment .41(d)-5)
 - So, not *literally* “since the last statement,” i.e., the duration of the entire exemption period

Periodic Statements: Amount Due – Acceleration

- Must identify only the lesser amount that will be accepted, if applicable (New Comment .41(d)(1)-1)
- Should indicate, if applicable, the amount due is accurate only for a specified period of time. *E.g.*:
 - “as of [date]”
 - “good through [date]”

Periodic Statements: Explanation of Amount Due – Acceleration

- Must include both the reinstatement amount and the accelerated amount, and must not include the monthly payment amount (New Comment .41(d)(2)-1)
 - *Contra* the actual disclosure
- Must include an explanation that reinstatement amount will be accepted to reinstate the loan through a certain date, if applicable
- Must include any special instructions for submitting payment
- May not be provided in separate letter
- May include related information

Periodic Statements: Amount Due – Temporary Loss Mitigation Program & Loan Modification

- Temporary Loss Mitigation: may identify either:
 - Payment due under temporary loss mitigation program, or
 - Payment due under loan contract
 - (New Comment .41(d)(1)-2)
- Loan Modification
 - Must identify only the amount due under the modified contract (New Comment .41(d)(1)-3)

Periodic Statements: Explanation of Amount Due – Temporary Loss Mitigation Program

- Must include both the amount due under the loan contract and the payment due under the temporary loss mitigation program (New Comment .41(d)(2)-2)
- Must explain that, if applicable, the disclosed amount due is different because of the loss mitigation program
- Various options for how and where to provide the explanation

Periodic Statements: Bankruptcy Exemption – Applicability

- Now applies only if two criteria are met:
 - Must be a debtor in bankruptcy under Title 11 or must have discharged personal liability pursuant to 11 U.S.C. § § 727, 1141, 1228, or 1328; and
 - One of the following conditions must apply:
 - Consumer requests in writing that the servicer cease providing periodic statements;
 - Bankruptcy plan provides that the consumer will surrender the dwelling, provides for the avoidance of the lien securing the loan, or otherwise does not provide for payment of pre-bankruptcy arrearage or the maintenance of payments under the loan;
 - Bankruptcy court orders the lien avoided, lifts the automatic stay, or requires the servicer not to provide periodic statements; or
 - Consumer files statement of intention to surrender the dwelling and has not made partial or periodic statement since commencement of bankruptcy

Periodic Statements: Bankruptcy Exemption – Modified Statements

- If the exemption (as now modified) does not apply, servicer may alter periodic statement to account for bankrupt status
 - May omit certain delinquency information
 - Must include certain informational disclosures about bankruptcy
 - Special modification required for borrowers in bankruptcy under Chapter 12 or 13

Christopher Shelton

EARLY INTERVENTION

Early Intervention: Live Contact – Timing

- CFPB “has always understood [the rule] to require servicers to make repeated attempts to contact a borrower who remains delinquent for more than one billing cycle”
- Make “good faith efforts” no later than 36 days after each payment due date so long as the borrower remains delinquent

Early Intervention: Live Contact – “Good Faith Efforts”

- Can consider borrower’s failure to respond to servicer’s repeated attempts at communication in considering amount of effort required
- Do not consider likelihood of home retention
- Ongoing contact with the borrower under the loss mitigation procedures is generally sufficient
- If the servicer denied a borrower for all loss migration options, further attempts at live contact are not required. But if a borrower cures a delinquency and then becomes delinquent again, attempts at live contact must resume

Early Intervention: Written Notice – General Timing Requirements

- CFPB revisions to “add more clarity”
- Provide first notice by 45th day of borrower’s delinquency
- If borrower is 45 days or more delinquent at 180 days after prior notice, provide new notice by the 180-day mark
- If borrower is less than 45 days delinquent at 180 days after prior notice, provide new notice no later than 45 days after the payment due date for which the borrower is delinquent

Early Intervention: Written Notice – Special Process for Transferee Servicers

- If transferor did not provide notice within the 45 days before the transfer date, transferee should provide notice to delinquent borrower within 45 days after the last due date that the borrower missed before the transfer
- If transferor did provide notice within the 45 days before the transfer date, transferee can wait to provide notice to delinquent borrower within 45 days after the first due date that the borrower misses after the transfer

Early Intervention: Written Notice – Special Process for FDCPA Cease Communication Request

- If servicer is subject to the FDCPA and (1) a borrower has made a cease communication request, (2) at least one loss mitigation option is available, and (3) the borrower is not in bankruptcy, servicer must send a written early intervention notice with specific customized language
- This notice must not be sent more than once in any 180-day period

Early Intervention: Written Notice – Special Process for Bankruptcy

- If (1) a borrower is in bankruptcy, (2) at least one loss mitigation option is available, and (3) the borrower has not made a cease communication request under the FDCPA, servicer must send a written early intervention notice with specific customized language not later than the 45th day after the borrower files a bankruptcy petition (or, if the borrower first becomes delinquent during bankruptcy, not later than the 45th day of the borrower's delinquency)
- These requirements apply even if the servicer last provided a notice less than 180 days before, although no more than one notice is required during a single bankruptcy case
- Compliance with the normal early intervention requirements must resume after the next payment due date after: (1) the bankruptcy case is dismissed or closed; (2) the borrower reaffirms personal liability for the mortgage loan; or (3) in certain narrow circumstances, after a bankruptcy discharge

Melanie Brody

LOSS MITIGATION

Successors in Interest

- The CFPB is concerned that successors in interest are vulnerable and often must make complicated decisions in a time of emotional distress
- To help prevent unnecessary foreclosures against successors in interest, the CFPB decided to provide guidance on how to handle them during the loss mitigation process
- New Comment 41(b)-1.i: a servicer may, but is not required to, evaluate a loss mitigation application from a successor in interest before confirming identity and property ownership

Successors in Interest

- If the servicer evaluates the application before confirmation, the rule's limitation on duplicative requests will apply unless there would have been a different result due to the confirmation
- New Comment 41(b)-1(ii): If the servicer does not evaluate the application before confirmation, it must retain the application materials, and after confirmation, it must review the application as if it received the application on the date of confirmation
 - If the application is incomplete at confirmation because documents have become stale, and confirmation occurs 45 days or more before a foreclosure sale, the servicer must provide the § 1021.41(b)(2) disclosure identifying documents that must be updated

When May Servicers Stop Collecting Loss Mitigation Application Material?

- Current Commentary: servicers must exercise reasonable diligence to complete a loss mitigation application
- Revised Comments .41(b)(1)-1-3:
 - A servicer may stop collecting material for a particular loss mitigation option if the borrower is ineligible for that option
 - Servicers may not stop collecting material based solely on borrower's stated preference
 - Servicer may stop collecting based on borrower preference plus other information

Incomplete Loss Mitigation Application: What is a “Reasonable Date” for Completion?

- Current Mortgage Servicing Rules: when a servicer receives an incomplete loss mitigation application, it must disclose a “reasonable date” by which the borrower must complete the application
- Current Commentary contains some guidance on how servicers should set the reasonable date, but the CFPB concluded that more guidance would be helpful
- New Comment .41(b)(2)(ii)-1: 30 days after the servicer provides notice acknowledging receipt of a loss mitigation application generally qualifies as a reasonable date

Incomplete Loss Mitigation Application: What is a “Reasonable Date” for Completion?

- BUT: the reasonable date cannot be later than the earliest of the four milestone dates, i.e., the date that:
 - Any borrower-submitted document becomes stale or invalid
 - 120th day of delinquency
 - 90 days before a foreclosure sale
 - 38 days before a foreclosure sale
- BUT: the reasonable date must never be less than seven days after the servicer provides the acknowledgement notice

Evaluation of Incomplete Loss Mitigation Application

- Current Mortgage Servicing Rules: prohibit servicers from evading their obligation to evaluate a complete loss mitigation application by offering an option based on an incomplete application, except:
 - A servicer may offer a short term forbearance program based on an incomplete application
 - A servicer may not initiate foreclosure or move for a judgment or sale if the borrower is performing under the program
- Revised § 1024.41(c)(2)(iii) : extends this exception to include short term repayment plans, and to require the servicer to provide a notice describing the term or duration of the program or plan, state that the offer was based on an incomplete application, and state that the borrower can submit a complete application and be evaluated for all options

Facially Complete Application

- Current Mortgage Servicing Rules:
 - If a borrower provides all of the material listed in the § 1024.41(b)(2)(i)(B), the application must be deemed “facially complete”
 - If the servicer later discovers that it needs other material, certain § 1024.41 protections that apply as of the date the servicer receives a “complete application” continue to run from the date the application was facially complete and until the borrower has a reasonable opportunity to complete the application
- Revised § 1024.41(c)(2)(iv): adds additional circumstances in which an application will be deemed facially complete and addresses cases when an application becomes facially complete more than once

Notice of Complete Application

- The CFPB determined that borrowers are often confused about when a loss mitigation application is complete and that clarity on this point is important because certain foreclosure protections are triggered off of this date
- New § 1024.41(c)(3):
 - Within five days of receiving a complete application, the servicer must provide the borrower with a notice of complete application
 - Exception: the notice is not required if:
 - The servicer already provided an acknowledgment of receipt under § 1024.419B)(2)(i)(B) indicating that the application is complete and has not subsequently requested additional information
 - The application was not complete or facially complete 37 days before foreclosure sale
 - The servicer has already notified the borrower of which loss mitigation options, if any, the servicer will offer

Information Not in Borrower's Control

- Current Mortgage Servicing Rules:
 - Servicers must evaluate complete loss mitigation applications within 30 days of receipt
 - Complete loss mitigation application = servicer has all information needed from the borrower
 - Silent on information needed from other parties (e.g., investor approval)
- New § 1024.41(c)(4) :
 - Servicer must exercise “reasonable diligence” to obtain information needed from third parties
 - Servicer generally prohibited from denying a complete loss mitigation application because of missing third-party information

Information Not in Borrower's Control

- But: if the servicer has been unable to obtain the third-party material after exercising reasonable diligence and is unable to determine whether the borrower qualifies without such material, the servicer may decline the application
- In such rare cases, the servicer must notify the borrower that s/he is ineligible for loss mitigation

Prohibition on Foreclosure Referral

- Current Mortgage Servicing Rules: prohibit a servicer from making first notice or filing to initiate foreclosure unless the borrower is more than 120 days delinquent, except when servicer is joining the action of a subordinate lienholder
- New § 1024.41(f)(1) adds a parallel exception for when a servicer is joining the action of a superior lienholder

Prohibition on Foreclosure Sale

- Current Mortgage Servicing Rules: if a borrower submits a complete loss mitigation application after servicer made first notice or filing to initiate foreclosure, but more than 37 days before a foreclosure sale, the servicer may not move for a foreclosure judgment or order of sale, or conduct a sale, unless the borrower's loss mitigation application is properly denied, withdrawn, or the borrower does not perform on the loss mitigation agreement

Prohibition on Foreclosure Sale

- Revised Comment .41(g)-3: In such situations, the servicer must promptly instruct foreclosure counsel not to make a dispositive motion for foreclosure judgment or order of sale
 - If a dispositive motion is pending, the servicer must promptly instruct counsel to avoid a ruling or order of sale; if a sale is scheduled, the servicer must promptly instruct counsel to prevent it
- New Comment .41(g)-5: servicer is prohibited from conducting a foreclosure sale even if a third-party is handling it

Servicing Transfers: Overview

- Current Mortgage Servicing Rules: Servicing transfers are covered briefly in the Commentary
- New § 1024.41(k) and Commentary
 - If a transferee servicer acquires servicing rights when a loss mitigation application is pending as of the transfer date, the transferee servicer must comply with all the requirements in § 1024.41 within the timeframes that applied to the transferor servicer based on the date the transferor servicer received the loss mitigation application

Servicing Transfers: General Rule

- Transfer date: The date that the transferee servicer will begin accepting payments
- Pending: A loss mitigation application is pending if it was subject to § 1024.41 and not fully resolved before the transfer date
- All of the borrower's rights under § 1024.41(c)-(h) before the transfer continue to apply notwithstanding the transfer

Servicing Transfers: General Rule

- The transferee servicer must exercise reasonable diligence to complete a loss mitigation received via a servicing transfer
 - Reasonable diligence: includes ensuring that the borrower is informed of any application process changes (e.g., address changes) and what materials are necessary to complete the application
- A borrower may provide materials to complete an application to the transferor servicer after the transfer date, and the transferor servicer must deliver them to the transferee servicer
- Transferee servicer does not have to provide any § 1024.41 notices that the old servicer provided before the transfer

Servicing Transfers: Acknowledgement Notices

- New § 1024.41(k)(2):
 - If a transferee servicer acquires servicing, the deadline for the § 1024.41(b)(2)(i)(B) notice has not expired, and the transferor servicer has not provided the notice, the transferee servicer must provide the notice within 10 days of the transfer date
 - In such cases, the transferee servicer:
 - May not make the first foreclosure notice or filing until after the “reasonable date” disclosed to the borrower pursuant to § 1024.41(b)(2)(ii)

Servicing Transfer: Complete Loss Mitigation Application Pending at Transfer

- New § 1024.41(k)(3):
 - If a complete loss mitigation application is pending on the transfer date, the transferee servicer must comply with § 1024.41 (c)(1) and (4) within 30 days of the transfer date
- New Comments .41(k)(3)-1 and 2:
 - If the transferee servicer needs additional or corrected information, the application must still be treated as facially complete as the date it was first facially complete or complete for the transferor servicer
 - If the application was incomplete as to the transferor servicer, but complete as to the transferee servicer, the transferee servicer must treat the application as complete as of the transfer date

Servicing Transfer: Applications Subject to Appeal Process

- New § 1024.41(k)(4):
 - If a loss mitigation application is subject to an unresolved appeal as of the transfer date, or if an appeal is timely filed after the transfer date, the transferee servicer must make a determination on the appeal or, if it cannot do so, treat the appeal as a pending loss mitigation application
 - In such cases, the transferee servicer must complete the determination within the later of 30 days of the transfer date or the date the borrower made the appeal
 - If the transferee servicer must treat the appeal as a pending complete loss mitigation application, it must comply with § 1041.41, including evaluating the borrower for all loss mitigation options available from the transferee servicer

Servicing Transfer: Pending Loss Mitigation Offers

- New § 1024.41(k)(5):
 - A servicing transfer does not affect a borrower’s right to accept or reject a pending loss mitigation offer
 - If the borrower’s time to accept or reject a transferor servicer’s loss mitigation offer has not expired by the transfer date, the transferee servicer must allow the borrower to accept or reject the offer during the remaining unexpired balance of the applicable time period
 - The borrower’s acceptance is effective whether it is sent to the transferor or transferee servicer

Duplicative Requests

- Current Mortgage Servicing Rules: a servicer must only comply with § 1021.24 for a single loss mitigation application from any given borrower
- The CFPB was concerned about borrowers who became current on their loans and then subsequently became delinquent
- Revised Rule § 1021.41(i): a servicer must comply with §1024.41 even if it has already done so for a completed loss mitigation application so long as the borrower was current at any time between the prior loss mitigation application and a subsequent loss mitigation application

Christopher Shelton

FDCPA SAFE HARBOR

FDCPA Safe Harbor

- Servicers generally do not violate the FDCPA's prohibition on communicating with third parties by 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, in compliance with Mortgage Servicing Rules
- A borrower's invocation of the FDCPA's cease communication right generally does not prevent a servicer from responding to borrower-initiated communications concerning loss mitigation, provided that the servicer's response is limited to a discussion of any potentially available loss mitigation option

David Tallman

SUCCESSORS IN INTEREST

Successors in Interest

- Expanded definition of “successor in interest”
 - Current rule only refers to successor of deceased borrower
 - New rule mirrors Garn-St. Germain Act (due-on-sale clauses)
 - 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 child of the borrower becomes 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; or
 - 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

Successors in Interest

- Confirming successor in interest status
 - New rule remains non-prescriptive, but provides a more robust procedural framework
 - Servicers must:
 - Respond to a written request from a putative successor by providing that person with a written description of the documents required to confirm the person's identity and ownership interest in the property
 - Maintain procedures to promptly facilitate communication with potential or confirmed successors (but no need to affirmatively search)
 - Maintain procedures to promptly determine the documents needed and promptly inform the potential successor of those documents and how to submit a written request to be treated as a successor (but no need to provide legal advice)
 - Maintain procedures to promptly make a determination and notify the person of that determination
 - Servicer may request additional documentation if necessary

Successors in Interest

- Servicing Rule requirements generally will apply to a confirmed successor in interest. Exceptions:
 - Except in response to an information request, no need to provide disclosures if the servicer is providing the same disclosure to another borrower or consumer
 - No need to comply with the loss mitigation live contact requirements if already complying with respect to another borrower on the account
 - May take steps to avoid sending disclosures which imply personal liability (e.g., revising text, including affirmative disclosure, explanatory notice and acknowledgement form)
- CFPB clarifies that communicating with successor in interest will not violate GLBA or FDICPA

Jonathan Jaffe

REQUESTS FOR INFORMATION

Requests for Information

- Final Rule changes how servicer must respond to requests for ownership information when Fannie or Freddie is the owner of the loan or the trustee of the securitization trust in which the loan is held
 - Where Fannie or Freddie is not owner or trustee, servicer must provide the name of the trust and the trustee's name, address, and appropriate contact information
 - Where Fannie or Freddie is owner or trustee, but request does not expressly ask the name or number of the trust or pool, servicer may provide name and contact information for Fannie or Freddie, without providing trust's name

Requests for Information

- For a request for ownership information where Fannie or Freddie is the owner or trustee, and the request expressly requests the name or number of the trust or pool, servicer must provide the name of the trust, and the trustee's name, address, and appropriate contact information for the trustee
- Not information many servicers have traditionally compiled, but servicers will now need to track in future

David Tallman

FORCE-PLACED INSURANCE

Lender-Placed Insurance

- New rules make several changes to content of lender-placed insurance notices:
 - Revising text to account for situations in which the borrower has insufficient, rather than expired or expiring, hazard insurance coverage on the property
 - Accommodating the inclusion of mortgage loan account number
 - Technical edits to more closely conform the model forms to the text of the regulation
- If reminder notice is put into production a “reasonable time” prior to delivery, the servicer is not required to update the notice with new insurance information received. Final Rule clarifies that five days is the maximum period of time that would be considered reasonable.

Christopher Shelton

SMALL SERVICER

Small Servicers

- A small servicer is generally an entity that services, together with any affiliates, 5,000 or fewer mortgage loans, for all of which the servicer (or an affiliate) is the creditor or assignee, as of January 1 of each calendar year
- Certain categories of loans, including loans voluntarily serviced by the servicer for a non-affiliated creditor or assignee for which the servicer does not receive any compensation or fees, are not counted toward the 5,000-loan threshold. Final Rule removes the requirement that the non-affiliated entity for which the small servicer voluntarily services be a creditor or assignee
- Final Rule adds an additional category of loans that are not counted toward the 5,000-loan threshold, which is transactions serviced for a “seller financier”

Questions?

- Please feel free to reach out to us with any questions:



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