

## INFOBYTES SPECIAL ALERT: CFPB ISSUES MORTGAGE SERVICING RULE AMENDMENTS AND GUIDANCE ADDRESSING CONFLICTS WITH BANKRUPTCY AND DEBT COLLECTION RULES

October 16, 2013

On October 15, 2013, the Consumer Financial Protection Bureau (“CFPB”) issued [an interim final rule](#) amending certain provisions of its mortgage servicing rules and making technical changes to other January 2013 mortgage rules (the “Interim Amendments”).<sup>1</sup> In particular, the amendments address issues raised by bankruptcy trustees and industry about the incompatibility of the servicing rules with protections afforded to consumers by bankruptcy law and the Fair Debt Collection Practices Act (“FDCPA”). The CFPB also issued [a bulletin](#) providing guidance on other aspects of the servicing rules and an advisory opinion on the interaction between the rules and the FDCPA (the “Bulletin”).<sup>2</sup> In addition, on October 16, 2013, CFPB staff provided unofficial oral guidance on [specific questions](#) about the mortgage servicing rules in a webinar hosted by the Mortgage Bankers Association. BuckleySandler attorneys attended the webinar and can address any questions you may have.

Like the mortgage servicing rules, the Interim Amendments will take effect on January 10, 2014.<sup>3</sup> The CFPB issued the Interim Amendments without advance notice and public comment because of the impending effective date.<sup>4</sup> The public will have 30 days to provide comments after publication of the amendments in the Federal Register (which has not yet occurred).<sup>5</sup> After the comment period, the CFPB may make adjustments to the Interim Amendments before adopting them in final form.

### AMENDMENTS AND GUIDANCE ON BANKRUPTCY AND FDCPA

In its Interim Amendments and Bulletin, the CFPB clarified the application of certain requirements in its mortgage servicing rules to: (1) loans where the borrower is a debtor in bankruptcy under Title 11 of the United States Code; and (2) loans where the servicer is subject to the FDCPA and the borrower has sent a “cease communication” notice under 12 U.S.C. § 1692c(c). The following table summarizes the Interim Amendments and Bulletin.

Notably, however, even where the CFPB concluded that compliance with the servicing rules is not required, it specifically stated that it was not taking any position on whether the communications required by the servicing rules were prohibited by bankruptcy law or the FDCPA and encouraged servicers to

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<sup>1</sup> Bureau of Consumer Financial Protection, Interim Final Rule, Amendments to the 2013 Mortgage Rules under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z) (Oct. 15, 2013), [http://files.consumerfinance.gov/f/201310\\_cfpb\\_mortgage-servicing\\_interim.pdf](http://files.consumerfinance.gov/f/201310_cfpb_mortgage-servicing_interim.pdf) (publication in the Federal Register forthcoming) [hereinafter “Interim Amendments Release”].

<sup>2</sup> CFPB Bulletin 2013-12, *Implementation Guidance for Certain Mortgage Servicing Rules* (Oct. 15, 2013), [http://files.consumerfinance.gov/f/201310\\_cfpb\\_mortgage-servicing\\_bulletin.pdf](http://files.consumerfinance.gov/f/201310_cfpb_mortgage-servicing_bulletin.pdf) [hereinafter “Bulletin 2013-12”].

<sup>3</sup> *Interim Amendments Release* at 11.

<sup>4</sup> *Id.* at 8-11.

<sup>5</sup> *Id.* at 1.

continue communicating with delinquent borrowers to the extent permitted by law.<sup>6</sup> The CFPB also noted that the interaction between the servicing rules and the FDCPA would be further addressed in an upcoming rulemaking on debt collection.<sup>7</sup>

| Mortgage Servicing Rules                               | Borrower Has Filed for Bankruptcy  | Borrower Has Sent FDCPA “Cease Communication” Notice   |
|--|--|--|
| Error Resolution Procedures (12 C.F.R. § 1024.35)      | No exemption from servicing rules  | Must comply with servicing rules unless borrower specifically withdraws error notice <sup>8</sup>                  |
| Requests for Information (12 C.F.R. § 1024.36)         | No exemption from servicing rules  | Must comply with servicing rules unless borrower specifically withdraws request <sup>9</sup>                       |
| Force-Placed Insurance (12 C.F.R. § 1024.37)           | No exemption from servicing rules  | No exemption from servicing rules <sup>10</sup>  |
| Early Intervention Requirements (12 C.F.R. § 1024.39)  | Exempt from servicing rules once bankruptcy petition is filed until: (1) case is dismissed or closed; or (2) borrower receives a discharge under 11 U.S.C. §§ 727, 1141, 1228, or 1328 <sup>11</sup> | Exempt from servicing rules <sup>12</sup>  |
| Loss Mitigation Procedures (12 C.F.R. § 1024.41)       | No exemption from servicing rules  | No exemption from servicing rules unless borrower specifically withdraws request for loss mitigation <sup>13</sup> |
| ARM Payment Adjustment Notice (12 C.F.R. § 1026.20(c)) | No exemption from servicing rules  | Exempt from servicing rules <sup>14</sup>  |

<sup>6</sup> *Id.* at 16, 19, 22, 31. The CFPB “believes that further study of these issues is warranted but cannot be concluded quickly enough to provide further calibration of the requirements before January 2014.” *Id.* at 16.

<sup>7</sup> *Interim Amendments Release* at 20, 22.

<sup>8</sup> *Bulletin 2013-12* at 6-7.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> New 12 C.F.R. § 1024.39(d)(1); Cmts. 39(d)(1)-1 through -3, *Interim Amendments Release* at 44-46. Comment 39(d)(1)-2 further provides that the requirement to resume compliance with § 1024.39 after dismissal, closure, or discharge “does not require a servicer to communicate with a borrower in a manner that would be inconsistent with applicable bankruptcy law or a court order in a bankruptcy case. To the extent permitted by such law or court order, a servicer may adapt the requirements of § 1024.39 in any manner believed necessary. Compliance with § 1024.39 is not required for any portion of the mortgage debt that is discharged under applicable provisions of the U.S. Bankruptcy Code. If the borrower’s bankruptcy is revived—for example if the court reinstates a previously dismissed case, reopens the case, or revokes a discharge—the servicer is again exempt from the requirement in § 1024.39.” In addition, Comment 39(d)(1)-3 states that, when two or more borrowers are joint obligors with primary liability on a mortgage loan, the exemption applies if any of the borrowers is in bankruptcy.

<sup>12</sup> New 12 C.F.R. § 1024.39(d)(2), *Interim Amendments Release* at 44; *see also Bulletin 2013-12* at 6.

<sup>13</sup> *Bulletin 2013-12* at 6-7.

<sup>14</sup> New 12 C.F.R. § 1026.20(c)(1)(ii)(C); *see also Bulletin 2013-12* at 6.

| Mortgage Servicing Rules                                    | Borrower Has Filed for Bankruptcy  | Borrower Has Sent FDCPA “Cease Communication” Notice |
|---|--|--|
| ARM Initial Rate Adjustment Notice (12 C.F.R. § 1026.20(d)) | No exemption from servicing rules  | No exemption from servicing rules <sup>15</sup>      |
| Periodic Statements (12 C.F.R. § 1026.41)                   | Exempt from servicing rules once bankruptcy petition is filed until: (1) case is dismissed or closed; or (2) borrower receives a discharge under 11 U.S.C. §§ 727, 1141, 1228, or 1328 <sup>16</sup> | No exemption from servicing rules <sup>17</sup>      |

## OTHER KEY GUIDANCE

In addition to addressing the interaction between the servicing rules and either the FDCPA or the Bankruptcy Code, the Bulletin also provided the following guidance:

*Early Intervention Requirements (12 C.F.R. § 1024.39).* The January 2013 mortgage servicing rules require that servicers “establish or make good faith efforts to establish live contact with a delinquent borrower not later than the 36th day of the borrower’s delinquency and, promptly after establishing live contact, inform such borrower about the availability of loss mitigation options if appropriate.”<sup>18</sup> Under the rule, “[g]ood faith efforts to establish live contact consist of reasonable steps under the circumstances to reach the borrower and may include telephoning the borrower on more than one occasion or sending written or electronic communication encouraging the borrower to establish live contact with the servicer.”<sup>19</sup>

As an initial matter, the Bulletin states that “[s]ervicers are not required to comply with [§ 1029.39 or the continuity of contact requirements in § 1024.40] with regard to a billing period prior to January 10, 2014, for which a borrower is delinquent. For example, a borrower whose payment is due and unpaid on January 9, 2014 for that particular billing cycle, compliance is not required under either rule unless the borrower is delinquent again for a later billing cycle.”<sup>20</sup>

The CFPB also emphasizes that “the rule is specifically designed to give servicers significant flexibility in tailoring their contact methods to particular circumstances.”<sup>21</sup> Nevertheless, the Bulletin provides the following guidance regarding compliance with the “good faith efforts” requirement:

<sup>15</sup> *Bulletin 2013-12* at 6-7.

<sup>16</sup> New 12 C.F.R. § 1026.41(e)(5); Cmts. 41(e)(5)-1 through -3. Comments 41(e)(5)-1 through -3 provide the same guidance regarding the scope and duration of the exemption as Comment 39(d)(1)-1 through -3, which are discussed above.

<sup>17</sup> *Bulletin 2013-12* at 6-7.

<sup>18</sup> 12 C.F.R. § 1024.39(a).

<sup>19</sup> Cmt. 39(a)-2.

<sup>20</sup> *Bulletin 2013-12* at 4-5 and n. 16.

<sup>21</sup> *Id.* at 4.

- *Combining live contact with other communications.* The live contact requirement is satisfied in cases where the borrower is delinquent in consecutive billing cycles if the servicer has established and is maintaining ongoing contact with the borrower about the completion of a loss mitigation application or the servicer's evaluation of the application. In addition, the requirement may be satisfied through communications initiated by the borrower or with contact initiated by the servicer for other reasons, such as collection calls.<sup>22</sup>
- *Borrower becomes delinquent after being placed on loss mitigation plan or curing prior delinquency.* Although a borrower is not considered delinquent under § 1024.39 while performing as agreed on a loss mitigation plan that is designed to bring the borrower current,<sup>23</sup> the servicer must resume good faith efforts to contact the borrower within 36 days after the borrower fails to make a loss mitigation payment and for any subsequent billing cycles for which the borrower's obligation is due and unpaid. Similarly, if a borrower has cured a delinquency, the servicer must resume good faith efforts if the borrower again becomes delinquent.<sup>24</sup>
- *Unresponsive borrowers.* The CFPB states that a borrower's failure to respond to a servicer's repeated attempts at communication pursuant to the "good faith efforts" requirement is "a relevant circumstance to consider." As an example, the CFPB states that "'good faith efforts' to establish live contact with regard to delinquencies occurring after six or more consecutive delinquencies might require no more than making a single telephone call or including a sentence requesting the borrower to contact the servicer with regard to the delinquencies in the periodic statement or in an electronic communication."<sup>25</sup> The CFPB further states that "[s]uch efforts might be appropriate where there is little hope or no hope of home retention, such as when all applicable loss mitigation possibilities have been exhausted (including a short sale or deed in lieu of foreclosure), as may occur in the later stages of foreclosure."<sup>26</sup>

*Policies and Procedures Regarding Successors in Interest (12 C.F.R. § 1204.38(b)(1)(vi)).* In its January 2013 mortgage servicing rules, the CFPB required that servicers maintain policies and procedures that are reasonably designed to ensure that, among other things, the servicer can "[u]pon notification of the death of a borrower, promptly identify and facilitate communication with the successor in interest of the deceased borrower with respect to the property secured by the deceased borrower's mortgage loan."<sup>27</sup> In the Bulletin, the CFPB provided the following examples of servicer practices that would satisfy this requirement:

- Promptly providing anyone claiming to be a successor in interest a list of all documents or other evidence the servicer requires for the person to establish the death of the borrower and the identity and legal interest of the putative successor. The requirements must be reasonable in

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<sup>22</sup> *Id.* at 5.

<sup>23</sup> Cmt. 39(a)-1.ii.

<sup>24</sup> *Bulletin 2013-12* at 5.

<sup>25</sup> *Id.* at 5-6. In particular, the CFPB states that "this statement could appear [on the periodic statement] at the bottom of the delinquency box or in a section reserved for messages from the servicer.... Placement of the statement at the bottom of the delinquency box would not conflict with the 'close proximity' requirement applicable to delinquency information [under 12 C.F.R. §] 1026.41(d)(8)." *Id.* at 5 n. 12.

<sup>26</sup> *Id.* at 5-6.

<sup>27</sup> 12 C.F.R. § 1024.38(b)(1)(vi).

light of the laws of the relevant jurisdiction and may include a death certificate, executed will, or court order.

- Upon notification of the borrower's death, promptly identifying, evaluating, and providing successors in interest with information about any issues the servicer must consider with respect to the successor, including: (1) receipt of acceptable proof of the successor's identity and legal interest in the property and the mortgage (consistent with investor requirements); (2) whether the mortgage is delinquent, subject to a loss mitigation plan, or subject to a foreclosure action; and (3) whether the successor in interest is eligible to continue making payments on the loan, to assume the loan, and/or to receive loss mitigation.
- Promptly providing successor with any documents, forms, or other materials the servicer requires for the successor to continue making payments and to apply for assumption and loss mitigation and promptly evaluating the successor once the required materials have been received.
- Providing employees with information and training regarding compliance with relevant laws, investor requirements, and other requirements, including servicing guidelines, the Garn-St. Germain Act of 1982 (12 U.S.C. § 1701j-3(d)(3)) limits on application of due-on-sale clauses, and Federal and State law restricting disclosure of the deceased borrower's non-public personal information.<sup>28</sup>

In addition, the Bulletin states that servicers "should consider whether best practices with regard to their policies and procedures regarding successors in interest would include" the following items:

- Upon notification of death of the borrower, promptly evaluating whether to postpone or withdraw any pending or planned foreclosure proceeding to provide the successor in interest with reasonable time to establish ownership rights and pursue assumption and loss mitigation options.
- Promptly providing the successor in interest with information about the possible consequences of assuming the mortgage loan, such as any costs and the fact that a later loss mitigation option is not guaranteed.<sup>29</sup>

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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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<sup>28</sup> *Bulletin 2013-12* at 1-4.

<sup>29</sup> *Id.* at 4.