



# Point of view

Analyzing Strategic Regulatory Policy Shifts

**Americas FS Regulatory Center of Excellence**

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Amendments to 2013 Mortgage Servicing Rules under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z)

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# 1. Executive summary

The Consumer Financial Protection Bureau (CFPB or Bureau) has finalized a rule to clarify, revise, and amend a variety of mortgage servicing rules originally issued in 2013.<sup>1</sup> This final rule covers provisions regarding force-placed insurance notices, policies and procedures, early intervention, and loss mitigation requirements under Regulation X, which implements the Real Estate Settlement Procedures Act (RESPA), and prompt crediting and periodic statement requirements under Regulation Z, which implements the Truth in Lending Act (TILA). The final rule also addresses how to properly comply with servicing requirements when a person is a potential or confirmed successor in interest, is a debtor in bankruptcy, or sends a cease communication request under the Fair Debt Collection Practices Act (FDCPA). Several technical corrections were made to provisions within Regulations X and Z as well.

Concurrent with the release of the final rule, the CFPB issued an interpretive rule that addresses the interaction of the mortgage servicing rules under Regulations X and Z and the FDCPA. The interpretive rule provides safe harbors from liability for servicers acting in compliance with specified mortgage servicing rules in certain situations. Additionally, the Bureau has published an updated version of the Mortgage Servicing Small Entity Compliance Guide, which incorporates the amendments outlined below.

The amendments will generally become effective in October 2017 (and April 2018 in some cases). A timing delay is possible as the final rule was released ahead of the recent presidential election and the incoming administration has called for a temporary freeze on new regulations.

# 2. Compliance management challenges and expectations

Keeping technology current with regulation is a challenge which never ceases. In June 2016, the CFPB released a special mortgage servicing edition of its Supervisory Highlights, stating “examiners found that one or more servicers failed to send any loss mitigation acknowledgment notices due to a repeated loss mitigation processing platform malfunction over a significant period of time.” As a direct result, servicers were required to provide restitution to harmed consumers, reinforcing for servicers that it is critical they actively monitor the effectiveness of loan servicing platforms’ technology. Some additional challenges institutions face when servicing mortgage loans include, but are not limited to:

- Reviewing loss mitigation applications on a timely basis;

- Appropriately approving or denying borrower requests for loan modifications;
- Working with customers to identify appropriate repayment schedules;
- Disclosing all fees accurately and on a timely basis;
- Appropriately handling foreclosure or bankruptcy activities;
- Gaining and maintaining consumers’ consent to debit bank accounts for payments; and
- Monitoring and accurately applying forced-placed insurance.

Many of the provisions and amendments in the CFPB’s final rule impose new requirements in these already challenging areas, which will require institutions to strengthen loss mitigation efforts

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<sup>1</sup> See Amendments to the 2013 Mortgage Servicing Rules, Consumer Financial Protection Bureau, final rule, 81 FR 72160

as well as policies, procedures, and controls mitigating the risk of compliance failures. Servicers should also be mindful of potential new and additive mortgage servicing requirements arising from rulemakings currently under CFPB consideration, including additional changes to the mortgage disclosure requirements implemented in Regulation Z as part of the TILA-RESPA Integrated Disclosures (TRID) rule, new implementing regulations under the FDCPA, and amendments to the Telephone Consumer Protection Act (TCPA) that address debt servicing and debt collection.

Moreover, it is important to note that mortgage servicing is consistently among the top three consumer complaints submitted to the Bureau. In April 2016, the CFPB's Monthly Complaint Snapshot highlighted the following common complaints regarding mortgage servicing:

- Over fifty percent of complaints submitted to the Bureau have addressed problems consumers faced when having difficulty making payments. In particular, consumers

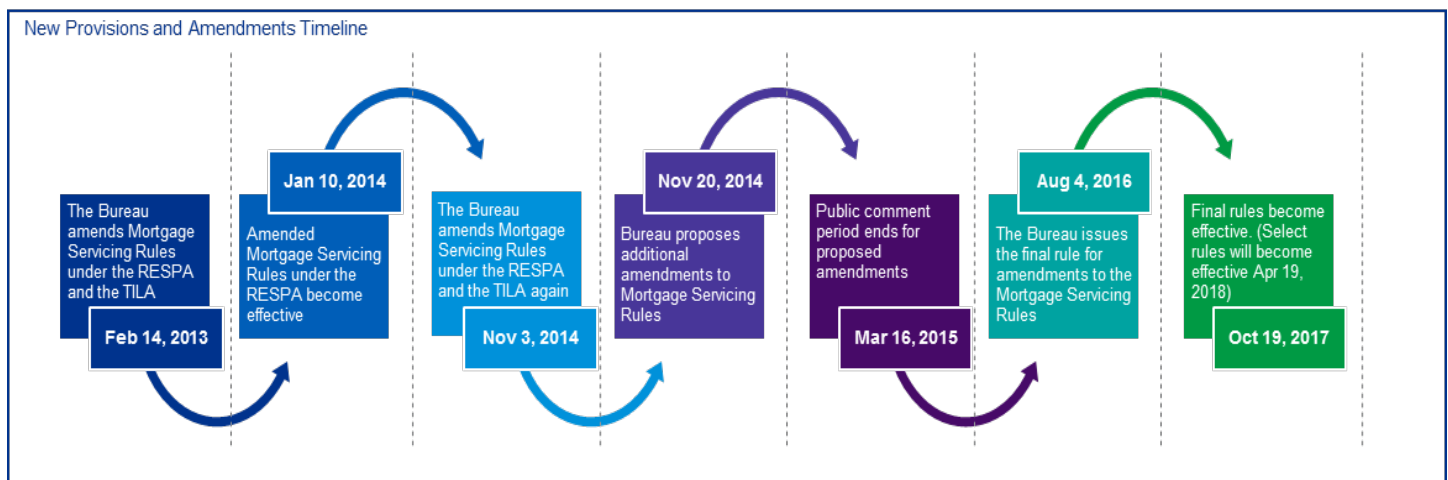
complained of prolonged loss mitigation review processes in which servicers repeatedly requested the same documentation. Consumers also complained they received conflicting and confusing foreclosure notifications during the loss mitigation review process.

- Nearly a third of complaints have addressed issues associated with making payments, such as obtaining credit for payments made around the time that loans are transferred to another servicer or when payments are made following approval for loss mitigation programs.

Consumer complaints also addressed issues associated with: proper notification when loans are transferred amongst servicers; proper transfer of information/documentation during loan transfers; confusing, inadequate, or contradictory information provided by servicers in response to consumer inquiries; and managing escrow accounts, including settling insurance claims.

## 3. New provisions and amendments

Most of the new rules, including the Bureau's accompanying FDCPA Interpretive Rule, take effect October 19, 2017, whereas the provisions related to successors in interest and periodic statements for borrowers in bankruptcy become effective on April 19, 2018.



Highlights of the final rule are discussed below. A more detailed summary follows at the end of the document.

### 3.1 Foreclosure Process Deceleration

Regardless of the Bureau's intent, changes to loss mitigation rules, payment crediting requirements, and the new definition of delinquency may substantially decelerate the foreclosure process. Notably, one significant change allows for an extension of loss mitigation protections under the rule to consumers more than once during the life of the loan. In addition, the Bureau has enhanced loss mitigation application requirements to prevent wrongful or premature initiation of the foreclosure process.

## 3.2 Enhanced Communication Standards for Delinquent Borrowers and Successors in Interest

The Bureau's amendments define successors in interest, provide a basic structure for effective communication between successors and mortgage servicers, and extend to confirmed successors the same rights borrowers and consumers have under the Regulations X and Z mortgage servicing rules. In addition, the amendments partially remove previous exemptions for bankrupt borrowers so those who intend to keep their homes are provided with loan and other information.

## 3.3 New Key Exemption

Finally, the amendments modify the definition of a "small servicer" so loans serviced for a non-affiliate will not count towards the 5,000 limit if serviced voluntarily and without compensation. The amendments also exclude transactions serviced by a seller financier meeting all of the criteria identified in the definition provided under Regulation Z.

# 4. Considerations and Solutions

Collectively, the compliance challenges noted above, the volume and consistency of related consumer complaints, and the breadth of the CFPB's new rules and amendments make it apparent that mortgage servicing and debt collection remain a primary focus for regulators. To that end, Richard Cordray, CFPB Director, revealed on October 25, 2016, that ensuring lenders are taking appropriate action on consumer complaints and maintaining compliance with RESPA are two of the Bureau's primary supervisory focus areas for 2017.<sup>2</sup> It is imperative institutions proactively make the necessary adjustments to current policies, procedures, and mortgage servicing systems to reflect the provisions of the final rule and strengthen overall compliance. Complying with these amendments along with existing mortgage servicing obligations will require maintaining a robust Compliance Management Program (CMP) scaled to the size of the institution. Specific components of a robust CMP include:

- An involved and effective board of directors and adequate management oversight;
- Written policies and procedures;
- Training on existing and new debt collection laws, rules, and regulations;
- Strong fair lending programs, inclusive of policies and procedures;
- Continuous monitoring and testing;

- Timely corrective action that remediates identified issues, as well as attempts to prevent future compliance issues; and
- Consumer complaint response, root cause analysis, and enterprise-wide action.

KPMG works closely with both compliance professionals and key stakeholders to help design and implement customized compliance solutions. Services include:

- Compliance risk culture;
- Compliance program assessment;
- Compliance design and transformation;
- Compliance integration;
- Information and technology enablement;
- Compliance controls; and
- Compliance transformation management.

In addition, KPMG has the scale, industry insight, and multidisciplinary range of services to help your institution make informed proactive business decisions, timely compliance architecture choices, and better realize long-term value. In order to present a cross-functional team able to deliver results, our team

<sup>2</sup> Richard Cordray, "Prepared Remarks of CFPB Director Richard Cordray at the Mortgage Bankers Association" (speech, Boston, Massachusetts, October 25, 2016), CFPB, <http://www.consumerfinance.gov/about->

[us/newsroom/prepared-remarks-cfpb-director-richard-cordray-mortgage-bankers-association/](http://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-cfpb-director-richard-cordray-mortgage-bankers-association/).

leverages the strength of KPMG's Financial Risk Management Practice to provide:

- Regulatory insights, including deep knowledge of regulatory expectations and how to work with regulators;
- Expansive mortgage leadership with direct experience related to implementing significant regulatory changes;
- Business process design specialists that can effectively articulate regulatory change requirements into precise business process and control impacts;
- Regulatory/compliance testing strategies and tools that promote a servicer's ability to achieve compliance, such as KPMG's:
  - Regulatory Compliance Tool;
  - Automated TRID compliance testing technology;
  - Compliance Transformation Framework; and,
  - Regulatory Change Transformation Framework.

- Project management capabilities with a proven track record of leading cross functional teams that successfully execute required changes within a given timeframe.



# Appendix

## Summary of CFPB Final Mortgage Servicing Rule 2016

The rule changes issued by the CFPB seek to clarify and/or revise regulatory provisions and official interpretations related to the mortgage servicing rules across a broad range of topics. Some of the key amendments follow.

**Successors in interest.** The CFPB is expanding the definition of “successor in interest” to include persons to whom an ownership interest in a property securing a mortgage loan is transferred from a borrower to that person as the result of the borrower’s death (including joint tenants), a divorce or legal separation, the creation of certain trusts, or from a spouse or parent. The final rules do not limit a successor in interest to persons that have assumed the loan obligation. The mortgage servicing rules apply to successors in interest in the same manner as they do to other borrowers after the servicer has confirmed the status of a successor in interest.

**Definition of “delinquency”.** The final rules clarify that a borrower and a borrower’s mortgage loan obligation are deemed to be delinquent beginning on the date a periodic payment sufficient to cover principal, interest (and escrow, if applicable) becomes due and unpaid, until such time as no periodic payment is due and unpaid. A borrower performing on a permanent loan modification is not delinquent. If a servicer applies payments to the oldest outstanding periodic payment (it is not required to do so), a payment by a delinquent borrower advances the date the borrower’s delinquency began.

**Early intervention.** The final rules clarify a servicer’s early intervention live contact obligation with regard to a delinquent borrower, and require that the obligation is recurring after each billing cycle so long as the borrower remains delinquent. Similarly, the rules clarify the frequency for a servicer’s written early intervention notice requirement in delinquency, including with regard to a servicing transfer. Servicers are exempt from complying with the live contact obligations when the borrower is in any chapter of bankruptcy or has invoked cease communication rights under the FDCPA, but must provide written early intervention notices to these borrowers under certain circumstances.

**Loss mitigation.** Multiple amendments to the loss mitigation requirements have been finalized. Some of the significant changes include:

- Requiring servicers to meet the loss mitigation requirements each time a borrower becomes delinquent (more than once in the life of a loan) for borrowers that become current on their payments after completing a loss mitigation application before becoming delinquent again.
- Creating an exception to the 120-day prohibition on foreclosure filing by permitting servicers to join the foreclosure action of a superior or subordinate lienholder.
- Clarifying how servicers select the reasonable date by which a borrower should return documents and information to complete an application.
- Clarifying that if a servicer has made the first notice or filing, and a borrower timely submits a complete loss mitigation application, the servicer must not move for foreclosure judgment or order of sale, or conduct a foreclosure sale. The rules also clarify what steps servicers and their foreclosure counsel must take to protect borrowers from a wrongful foreclosure sale.
- Requiring servicers to provide a written notice to a borrower within five days after receiving a complete loss mitigation application.
- Setting forth how servicers must attempt to obtain information not in the borrower’s control.
- Permitting short-term repayment plans to be based on an evaluation of an incomplete loss mitigation application.
- Clarifying when a servicer may or may not stop collecting documents and information for a particular loss mitigation option.
- Clarifying how loss mitigation procedures and timelines apply when a transferee servicer receives a mortgage loan for which there is a loss mitigation application pending at the time of transfer.

**Periodic statements.** Provisions addressing periodic statements include:

- An exemption from the periodic statement requirement for certain charged-off loans.
- A requirement to provide tailored periodic statements to borrowers in bankruptcy and loss mitigation programs.
- A requirement to provide a periodic statement to a confirmed successor in interest unless the specific periodic statement is being provided to another consumer on the account or the confirmed successor in interest is not liable on the mortgage.
- Clarification that if the balance of a mortgage loan has been accelerated but the servicer will accept a lesser amount to reinstate the loan, the amount due must identify only the lesser amount that will be accepted to reinstate the loan and indicate that the amount is accurate only for a specified period of time.

**Prompt payment crediting** - Periodic payments made pursuant to temporary loss mitigation programs must continue to be credited according to the loan contract, while payments made pursuant to a permanent loan modification must be credited under the terms of the permanent loan agreement.

**Force-placed insurance** - The force-placed disclosures and model forms have been amended to address situations where the borrower has insufficient insurance coverage. Force-placed insurance notices must include a statement that the borrower's hazard insurance is expiring, has expired, or provides insufficient coverage, as applicable, and that the servicer does not have evidence that the borrower has hazard insurance coverage past the expiration date or evidence that the borrower has hazard insurance that provides sufficient coverage, as applicable. Servicers may, at their discretion, include the mortgage loan account number in the notices but may not include any other additional information, including any shortfall in the amount of insurance coverage.

**Requests for information** – The final rules set forth how servicers must respond to requests for information seeking ownership information for loans in trust for which Fannie Mae or Freddie Mac is the owner or a trustee of the securitization trust in which the loan is held.

**Definition of "small servicer"** – Certain seller-financed transactions and mortgage loans that a servicer voluntarily services for a non-affiliate will not be counted toward the 5,000 mortgage loan limit that distinguishes a small servicer.

### **Concurrent Rule Interpretation**

The interpretive rule constitutes an advisory opinion under the FDCPA. It seeks to provide a safe harbor from liability under the FDCPA for servicers acting in compliance with a specified mortgage servicing rule when:

- Communicating about the mortgage loan with confirmed successors in interest;
- Providing a written early intervention notice to a borrower that has invoked the cease communication right under the FDCPA; and
- Responding to a borrower-initiated communication concerning loss mitigation after the borrower has invoked the cease communication right under the FDCPA.

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