Americans for Financial Reform

Top Priorities for CFPB Servicing Regulations

April 2014

1. *Apply protections to each new hardship.* Homeowners should be able to avail themselves of the new servicing protections each time they face a new hardship, not only the first time. While some have suggested that the CFPB could impose as part of this requirement a prescribed waiting period between hardship requests, a standard relying on a "material change in circumstances" would better serve that function without creating arbitrary lines. The current rule punishes many homeowners who seek forbearance and then later seek a loan modification, as well as those with changed circumstances after a modification. Any determination regarding whether a material change in circumstance has or has not occurred must be promptly communicated to the borrower on a designated timeline and documented in the mortgage file and servicing system.

2. *Apply protections to homeowners who have shown good faith and submitted initial paperwork.* The CFPB dual track protections should apply when a homeowner has submitted initial paperwork (which could also be called a "substantially complete" application). The documented problems with lost documents and repeated requests for documents already submitted make clear that the current rule, keyed to a "complete application" and defined in the CFPB rule to be whatever a servicer subjectively considers to be complete, can too easily undermine efficient loss mitigation reviews. The "facially complete" application rule does not cure these problems as servicers will be able to claim that documents alleged to be missing were not submitted within the time set by the servicer to complete the application. An initial package should include: a request for modification assistance or similar application, documentation of income, and an IRS Form 4506-T, authorizing release of the homeowner's tax returns.

3. *Apply protections to successors in interest.* Servicers should be required to provide full information and complete loss mitigation options to homeowners who are successors in interest, such as surviving spouses and children. These new homeowners are protected from an acceleration of the mortgage under the federal Garn St Germain law. Moreover, such protections promote stable homeownership while maximizing investor returns. Servicers should be required to review successors in interest for loss mitigation and provide a decision prior to requiring the homeowner to assume the mortgage so that the homeowner assumes with knowledge of the payment options. Current rules do not clearly protect the broad array of homeowners who are successors in interest, nor do they clearly require servicers to evaluate successors in interest for a modification prior to an assumption. The Bureau should also clarify in the staff interpretation of the regulation that modifications for successors in interest do not need to comply with the Qualified Mortgage definition since they do not meet the TILA definition of assumption. Finally, as with other provisions, private liability by servicers for non-compliance, including for damages, would substantially increase compliance with such requirements.

4. *Enhance protections for homeowners with limited English proficiency.* First, servicers should be required to provide free, contemporaneous oral interpretation services for homeowners who request it, including but not limited to referral to a HUD-approved housing counseling agency with appropriate language capacity. Second, any file where a borrower has communicated or sought to communicate with the servicer or lender in a language other than English should be flagged, including the language of the borrower. Third, servicers should be required to provide key documents in translation, including the periodic statement, the loss mitigation application, denial notices, and loss mitigation offers, including but not limited to the trial period plan. Translated documents should be provided in a basic number of languages nationally and, in addition, any servicer with a customer base where a sizeable niche of the customers in a local market are speakers of a non-English native language should also provide services in such language(s). Fourth, servicers should be required to accept key documents in languages other than English, especially where the document provided to the applicant was in such language, where the documents are in such language as part of routine business practice (such as bank statements in Puerto Rico), or where they are issued by a government (such as Social Security income documentation or HAMP applications). Finally, as with other provisions, private liability by servicers for non-compliance, including for damages, would substantially increase compliance with such requirements.

5. *Servicers should be required to acknowledge receipt of loss mitigation applications and conduct appeals for homeowners who submit loss mitigation applications at least 37 days prior to sale* (and that 37-day window should be reduced to expand access to loss mitigation). Servicers are only required to acknowledge receipt where applications are received more than 45 days prior to sale, and are only required to conduct appeals with applications received more than 90 days prior to sale. These rules should be aligned with the existing dual track rule (which itself should be strengthened). Without such revisions, the rule creates incentives for shoddy loan modification reviews and communication with the homeowner. Because loss mitigation reviews and appeals are all subject to significant time constraints, alignment of these three rules would not substantially change foreclosure timelines. A significant upside to such alignment is the increase in compliance ease for market participants as well as clarity for homeowners.

6. *Homeowners in bankruptcy should be covered by all of the servicing protections including the periodic statement and early intervention requirements.* The CFPB got it right when it issued the final rule, but the interim final rule—issued without a full rulemaking—misapplies principles first applied correctly in the final rule. The Bankruptcy Code and CFPB rules are not irreconcilably in conflict and thus they can work together, with adjustments as needed. The CFPB should issue clarifying guidance in the staff interpretation rather than a full exemption, enabling servicers to communicate with borrowers in a manner that also is consistent with the Code. Loan servicing information, such as about partial payments, is essential for homeowners in bankruptcy and will not be confusing. To the contrary, periodic statements help borrowers in bankruptcy keep track of payments made. Minor adjustments

can be made to periodic statements to allow for the specifics of bankruptcy, for example to clarify that payments will be made pursuant to a bankruptcy plan and in some cases disbursed by the bankruptcy trustee. The CFPB did not exempt borrowers in trial period plans from the periodic statement requirement, but rather provided guidance on how to describe the status of payments to the borrower. Borrowers in bankruptcy should be treated similarly, especially since their payment status is in fact less complicated than a borrower in a trial period plan. Before the Interim Final Rule, many bankruptcy courts had local rules requiring servicers to provide periodic statements to borrowers in bankruptcy so that they would be treated like all other borrowers. These rules will be undermined by the CFPB's bankruptcy exemption. In response to the Interim Final Rule, some servicers have suddenly stopped providing periodic statements even after providing them to borrowers for years after they had completed their bankruptcy cases. Providing such information does not violate the automatic stay or a discharge injunction. The regulation could be amended to also require that text be included in periodic statements for borrowers currently in bankruptcy or with a discharge indicating that it is for information purposes only and is not an attempt to collect a debt. In addition, as with the periodic statement exemption, the new exemption from early intervention requirements for homeowners in bankruptcy removes key protections while creating a stark departure from existing rules such as GSE loss mitigation. The exemption also prevents borrowers who have completed their bankruptcy cases years earlier from getting information about loss mitigation options. The initial CFPB rule was consistent with the CFPB's position that borrowers in bankruptcy or who have completed bankruptcy are eligible for loss mitigation and that compliance with RESPA and the Bankruptcy Code is still possible. This approach should be restored for the early intervention requirement.

7. *Exercise of FDCPA Rights Should Not Trigger Exemption from the Servicing Protections.* The Bureau has exempted servicers who are debt collectors under the federal FDCPA from the early intervention requirements (as well as the rate reset notice requirement) in the CFPB servicing rule where the borrower has exercised rights under the FDCPA to have the debt collector cease communications. We are grateful that the Bureau has been careful not to opine on the reach of the FDCPA. However, there should not be an explicit carveout from the servicing requirements for loans on which the debtor has requested that the debt collector stop debt collection activities. The Bureau's servicing rulemaking under Regulations X and Z should not be used to limit judicial interpretation of what activities are covered debt communications under the CFPB. Servicers do not need to be excused from providing the reset notices with important information to homeowners out of unsubstantiated fear of litigation risk. Servicers who are careful to send only mandated notices in compliance with the Bureau's forms are unlikely to face any litigation risk. The reset notice is distinguishable from debt collection communications because it is sent to all homeowners, not just those who are behind in their payments. The early intervention notice also is distinguishable because it is, by definition, sent pre-collection as an effort to avert the need for collections.

8. *Improve Protections in Transfers of Servicing.* The CFPB's measures on transfers of servicing have been a significant improvement over previous oversight, however clear, enforceable rules

regarding routine and default servicing transfers are still needed. Strong, clear transfer rules will enhance the efficiency and transparency of the servicing market. Enforceable regulations should clearly require the servicer to ensure that the transferee servicer is obligated to continue all loss mitigation the transferor is required to do and should require the transferor servicer to provide all necessary documents and other information required to effectuate such requirement. If the borrower is in the loss mitigation process when the mortgage is transferred, the transferee servicer must obtain any documents and information submitted by the borrower to the transferor servicer in connection with the loss mitigation application and must continue the evaluation of the borrower's application. The existing staff interpretation that the evaluation should only continue to the extent practicable should be removed because it provides a broad, ambiguous loophole that will create substantial opportunities to avoid compliance. Further, the transferring servicer should be required to forward all payments received from borrowers after the transfer date to the appropriate servicer. Transfer notices must provide information about the default status of the loan, and include a full payment history. Finally, fees not included in a payment history provided at transfer should be deemed waived.