

Client Alert

May 2020

CFPB Issues Additional Guidance for Mortgage Servicing Transfers during National Emergency

On April 24, 2020, citing heightened concerns given the COVID-19 pandemic and the following declaration of a national emergency on March 13, 2020 (the National Emergency), the Consumer Financial Protection Bureau (CFPB) issued CFPB Bulletin 2020-02¹ regarding guidance to servicers involved in mortgage servicing transfer transactions (the Guidance). The Guidance discusses the CFPB's intention to continue to use its supervisory authority to monitor servicers' compliance with federal consumer protection laws applicable to servicing transfers, and emphasizes that servicers should implement uniform policies and procedures both prior to and following servicing transfers. In particular, the CFPB advises that servicers must ensure adequate pre-transfer testing and post-transfer monitoring and validation of loss mitigation data and documentation.

The rights to service mortgage loans are bought and sold among a number of market participants, including banks and nonbank investors. These transfers may occur in connection with servicing-released whole loan sales or the sale of just the servicing rights themselves. The transfer of servicing of a mortgage loan may also occur if the owner of mortgage servicing rights elects to use a different subservicer to service the mortgage loans. Consumers, while not participants in these mortgage servicing transfers, are nonetheless affected by the transactions, including new payment instructions and a new point of contact to administer and process any loan modification or forbearance requests. In 2014, the CFPB addressed servicing transfers when it revised Regulation X (the regulations implementing the Real Estate Settlement Procedures Act) to address various servicing policies, procedures and requirements.² To ensure servicers take appropriate steps to minimize the risks to consumers arising in connection with servicing transfers, particularly those consumers that have been or may become subject to loss mitigation efforts, Regulation X requires servicers to maintain policies and procedures *reasonably* designed to achieve the objectives of facilitating the transfer of information during mortgage servicing transfers and of properly evaluating loss mitigation applications.

The Guidance provides specific examples of servicing transfer policies and procedures that the CFPB believes reflect the objectives of the servicing rules and other federal laws relevant to servicing transfers, builds on the CFPB's Bulletin 2014-01³ and highlights servicing practices the CFPB believes are inconsistent with those objectives.⁴

In supervisory examinations conducted since the implementation of Regulation X, the CFPB has continued to find weaknesses in compliance management systems (CMS), and violations of Regulation X

¹ [CFPB Bulletin 2020-02](#) provides updated findings and highlights concerns following the implementation of CFPB Bulletin 2014-01, which was released August 19, 2014, and addressed servicing transfers. Bulletin 2014-01 replaced the earlier Bulletin 2013-01, released in February 2013. Note that the CFPB states that Bulletin 2020-02 does *not* impose any new or revise any existing recordkeeping, reporting or disclosure requirements.

² See [12 CFR 1024.38](#)

³ See Hunton & Williams LLP (now Hunton Andrews Kurth LLP) 2014 "[CFPB Issues Updated Guidance for Mortgage Servicing Transfer and Alerts Servicers of CFPB Review of Servicing Transfers.](#)"

⁴ The Guidance notes that the examples are not intended to be exhaustive and that CFPB examiners will consider a servicer's transfer-related policies and procedures as a whole in determining if they are reasonably designed to achieve the objectives of the servicing rules.

related to mortgage servicing transfers due to inadequacies in servicers' policies and procedures for transferring *all* the loan information and documents to the new servicer in a timely and accurate manner. The primary objective of the Guidance is to ensure servicers take appropriate steps to minimize the risks to consumers arising in connection with servicing transfers.

The Guidance is organized into four broad sections:

A. *Background*, which provides an overview regarding the transfer of mortgage servicing rights, the implementation of Regulation X and observed violations related to servicing transfers.

B. *General Transfer-Related Policies and Procedures*, which provides examples of general transfer-related policies and procedures that CFPB examiners may consider in evaluating whether servicers have satisfied the servicing rules applicable to servicing transfers.

C. *Loan Information and Documents to be Transferred or Received*, which provides examples for ensuring the timely and accurate transfer of all information and documents in the possession or control of the servicer transferor relating to a transferred mortgage loan to a servicer transferee, describes certain areas of focus for the CFPB and offers guidance for servicers to minimize their compliance risk.

D. *Appendix A - Examples of Information and Data to be Transferred or Received*, which provides examples of information and documents grouped by subject area which the CFPB uses to assess compliance with Regulation X.

We summarize below some of the highlights of the Guidance:

Violations of Rules under Regulation X; Good Faith Efforts by Servicers

Since 2014 the CFPB has observed inadequacies in servicers' policies and procedures for transferring loan information and documents to the new servicer in a timely and accurate manner. The seamless, correct and prompt transfer of consumer loan documents is particularly important in the current economic climate given the National Emergency and its impact on mortgage loan borrowers and the mortgage servicing market. Millions of borrowers have requested and received temporary forbearances on their obligations to make monthly mortgage payments and it is likely that requests for permanent loan modifications and other loss mitigation options will follow.⁵

While the Guidance provides numerous policies and procedures aimed at facilitating the objectives outlined in Regulation X, the CFPB acknowledges that as the composition and complexity of servicers' portfolios vary, servicers may not need to implement all of these practices into their respective CMS. Interestingly, the CFPB indicated that it will consider the challenges that servicers face because of the National Emergency (and for 120 days thereafter), including operational and time constraints related to transfers that may be required or requested by a federal regulator or government-sponsored enterprise, such as Fannie Mae or Freddie Mac, and that the CFPB will be "sensitive" to good faith efforts by the servicers that are demonstrably designed to transfer the servicing without adverse impact to consumers.

Servicing Rules under Regulation X

The focus of the Guidance is with respect to servicers' compliance with the servicing transfer-related objectives of the servicing rules, and considers policies and procedures the CFPB believes may best achieve those objectives. As we highlight below, the Guidance specifically describes several requirements of the servicing rules that will receive the CFPB's supervisory attention.

⁵ Under the CARES Act, which became law on March 27, 2020, borrowers under federally backed mortgage loans may request forbearance for up to 180 days and may request a further extension for an additional 180 days if they are experiencing financial hardship due to the National Emergency. Lenders for private mortgage loans have also announced programs allowing for forbearances as a result of the National Emergency.

Transfer-Related Policies and Procedures. Under Regulation X, servicers' policies and procedures must be reasonably designed to facilitate the *timely* and *accurate* transfer of information, documents and loan data between servicers before, during and after the servicing transfer. The CFPB strongly encourages servicers to transfer information and documentation before the servicing transfer date, and the CFPB emphasizes the importance of post-transfer monitoring to ensure that transferred data is complete, accurate and functional for the servicer transferee. Some points of emphasis highlighted by the CFPB include:

- Servicers must maintain documents and data on each mortgage loan account serviced by the servicer in a manner that facilitates compiling such documents and data into a servicing file within five (5) days.
- A servicing file should include, among other things, a schedule of all transactions credited or debited to the mortgage loan account, a copy of the security instrument, copies of any loan modifications, any notes created by servicer personnel reflecting communications with the borrower about the mortgage loan account and, to the extent applicable, a report of the data fields relating to the borrower's mortgage loan account.
- Servicer transferors must retain records that document actions taken with respect to a borrower's mortgage loan account until one (1) year after the mortgage is discharged or transferred to a servicer transferee.

Proper Handling of Loans in Loss Mitigation. The servicing rules require servicers to properly handle loans that are transferred during the loss mitigation process. These obligations apply to any accounts for which the servicers' determination of the borrower's eligibility for loss mitigation is in process, including any short-term payment forbearance program or a short-term repayment plan that the servicer may offer based on an evaluation of an incomplete loss mitigation application. The foregoing is crucial in the current economic climate given the unprecedented number of forbearances and related loss mitigation efforts. Servicers must ensure that all relevant data and documentation is transferred from the servicer transferor to the servicer transferee.

Loan Information and Documents for Ensuring Accuracy. Regulation X requires servicer transferors provide the transferred mortgage loan to a servicer transferee in a form and manner that: (i) ensures the accuracy of the information and documents transferred; and (ii) enables a servicer transferee to comply with the terms of the servicer transferee's obligations to the owner or assignee of the mortgage loan and applicable law. The CFPB recommends the use of a uniform data standard and definitions like the Mortgage Industry Standards Maintenance Organization standard,⁶ which would increase data compatibility and strengthen compliance across the servicing industry by fostering more consistency in the data fields used by servicers.

The Guidance includes an appendix that sets forth data and documentation that usually would be relevant for servicing transfers and indicates that the CFPB will use this information as a basis for evaluating compliance with Regulation X. The Guidance suggests this information can be used by servicers as a baseline for evaluating the soundness of their policies and procedures relating to servicing transfers. In other words, a servicer should have a good reason for not accounting for any of the items listed on the appendix in their servicing transfer policies and procedures. The CFPB also notes that the relevant data and documentation for any servicing transfer should be customized to take into account the composition and complexity of the servicing portfolio being transferred.

The CFPB emphasizes the importance of maintaining policies and procedures that allow for the transfer of information reflecting the current status of discussions with a borrower regarding loss mitigation options, any agreements entered into with a borrower on a loss mitigation option and any analysis done with respect to potential recovery from a nonperforming mortgage loan, as appropriate.

⁶ The Mortgage Industry Standards Maintenance Organization is a not-for-profit, wholly owned subsidiary of the Mortgage Bankers Association responsible for developing standards for exchanging information and conducting business in the US mortgage finance industry.

Managing Regulation X Compliance

The issuance of the Guidance is timely given the surge of forbearances and increased strain on the mortgage servicing industry. The Guidance suggests that although the CFPB will consider the challenges faced by servicers during the National Emergency, it will continue to scrutinize whether servicers involved in servicing transfers have adopted and are following appropriate policies and procedures designed to meet the objectives of relevant consumer protection laws. The Guidance is a nonbinding general statement of policy, and the CFPB will determine compliance on a case-by-case basis, taking into account the circumstances of each servicer. Any adverse impact to consumers will be critical in determining the good-faith efforts by servicers and compliance with Regulation X.

The CFPB encourages parties participating in servicing transfers to take appropriate steps prior to the servicing transfer to ensure that the transfer satisfies applicable requirements. However, given the current economic climate, it is vital that servicer transferors ensure loss mitigation-related documents are provided to servicer transferees in a timely and accurate manner.

In addition to establishing and updating servicing transfer policies and procedures as outlined in the Guidance, servicers engaged in transfer activities should include appropriate provisions in servicing transfer agreements and instructions that directly address and allocate responsibility for complying with all of the legal requirements applicable to servicing transfers.

Servicers are expected to maintain robust CMS designed to ensure compliance with the servicing rules and other federal consumer protection laws, including those laws applicable to servicing transfers. Such a system, among other things, should permit the timely identification and remediation of any instances of noncompliance arising in connection with a servicing transfer, and enable corrective action designed to prevent future violations.

Hunton Andrews Kurth LLP frequently advises clients on servicing matters, including the acquisition, disposition and financing of mortgage servicing assets, subservicing and other vendor arrangements, servicing transfer matters, investor and borrower issues and disputes and regulatory inquiries.

Hunton Andrews Kurth attorneys will continue to monitor regulations and updates from the CFPB and other regulators and government agencies in this area during these unprecedented times. For questions regarding this client alert or servicing matters generally, please contact one of the following:

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