

CFPB Bulletin 2013-12

Date: October 15, 2013

Subject: Implementation Guidance for Certain Mortgage Servicing Rules

The Consumer Financial Protection Bureau (CFPB) is issuing this bulletin to provide guidance in implementing certain of the 2013 Real Estate Settlement Procedures Act (RESPA) and Truth in Lending Act (TILA) Servicing Final Rules.¹ The CFPB issued the 2013 RESPA and TILA Final Rules in January 2013 and they take effect on January 10, 2014.

This bulletin provides guidance regarding:

1. Policies and procedures servicers must maintain regarding the identification of and communication with any successor in interest of a deceased borrower with respect to the property secured by the deceased borrower's mortgage loan.²
2. Communication with borrowers under the Early Intervention Rule.³
3. Servicers' obligation to provide certain notices/communications to borrowers who have exercised their right under the Fair Debt Collection Practices Act (FDCPA)⁴ barring debt collectors from communicating with them.⁵

1. Policies and Procedures Regarding Successors in Interest to the Property of a Deceased Borrower

In response to inquiries it has received, the CFPB is issuing guidance regarding the policies and procedures servicers of mortgage loans must have in place to comply with requirements

¹ 78 FR 10695 (Feb. 14, 2013) (RESPA Servicing Final Rule); 78 FR 10901 (Feb. 14, 2013) (TILA Servicing Final Rule), collectively the 2013 RESPA and TILA Servicing Final Rules. Regulations X and Z implement RESPA and TILA, respectively. RESPA and Regulation X generally refer to "borrowers" and TILA and Regulation Z to "consumers;" for simplicity those terms are used interchangeably in this bulletin.

² 12 CFR 1024.38(b)(1)(vi), as published in 78 FR 10695 (Feb. 14, 2013).

³ 12 CFR 1024.39, as published in 78 FR 10695 (Feb. 14, 2013).

⁴ 15 U.S.C. 1692 *et seq.*

⁵ Section 805(c) of the FDCPA prohibits a debt collector from most communications with a consumer regarding the debt at issue, if the consumer has sent a "cease communication" request. 15 U.S.C. 1692c(c).

in the Policies and Procedures Rule regarding successors in interest.⁶ Starting on January 10, 2014, a servicer must have policies and procedures reasonably designed to ensure that, upon notification of the death of a borrower, the servicer promptly identifies and facilitates communication with a successor in interest⁷ of the deceased borrower with respect to the property that secures the deceased borrower's mortgage loan. In issuing this guidance, the CFPB seeks both to assist servicers in implementing these policies and procedures and to promote home retention whenever possible for successors in interest faced with the loss of their homes due to the death of a borrower.

The CFPB adopted the successor in interest provision of the Policies and Procedures Rule after learning about difficulties that some surviving spouses, children, or other successors in interest experienced in attempting to communicate with servicers.⁸ The CFPB has received reports of servicers either outright refusing to speak to a successor in interest or demanding documents to prove the successor in interest's claim to the property that either do not exist (*e.g.*, probate court documents for an estate that is not required to go through probate) or are not reasonably available. These practices often prevent a successor in interest from pursuing assumption of the mortgage loan and, if applicable, loss mitigation options—potentially resulting in the avoidable loss of the home. In applying the Policies and Procedures Rule, the CFPB seeks to reduce the number of unnecessary defaults and foreclosures, including those following the death of a borrower.

The following are examples of servicer practices the CFPB would consider to be components of policies and procedures that are reasonably designed to achieve the objectives of the successor in interest provision:

- Promptly providing to any party claiming to be a successor in interest a list of all documents or other evidence the servicer requires, which should be reasonable in light of the laws of the relevant jurisdiction, for the party to establish (1) the death of the borrower and (2) the identity and legal interest of the successor in interest. Such documents might include, for example, a death certificate, an executed will, or a court order determining a succession to real property.
- Upon notification of the death of a borrower, promptly identifying and evaluating any issues that the servicer must consider in reviewing the rights and obligations of successors in interest with respect to the property and mortgage loan, including, for example:
 - Receipt of acceptable proof of the successor in interest's identity and legal interest in the property.⁹

⁶ 12 CFR 1024.38(b)(1)(vi), as published in 78 FR 10695 (Feb. 14, 2013).

⁷ A successor in interest is the spouse, child, or heir of a deceased borrower or other party with an interest in the property.

⁸ While the CFPB recognizes that some of these experiences involved reverse mortgages, which are exempt from the requirements of the Policies and Procedures Rule, others involved mortgage loans that will be subject to the rule when it goes into effect. *See* 12 CFR 1024.30(b)(2), as published in 78 FR 10695 (Feb. 14, 2013).

⁹ The servicer may be subject to specific investor requirements with respect to the successor in interest's rights and obligations. For example, a February 2013 bulletin from Freddie Mac requires servicers to refer to it any case "where the servicer is unsure as to whether a purported transferee has a legal or beneficial interest in the

- Standing of the mortgage loan as current or delinquent.
 - Eligibility of the successor in interest to continue making payments on the mortgage loan.
 - Whether a trial modification or other loss mitigation option was in place at the time of the borrower's death.
 - Whether there is a pending or planned foreclosure proceeding.
 - Eligibility of the successor in interest for loss mitigation options.
 - Eligibility of the successor in interest to assume the mortgage loan, with or without a simultaneous loan modification or other loss mitigation option.
- Promptly providing successors in interest with information about the above issues, including any servicer prerequisites for the successor in interest to: continue payment on the mortgage loan, assume the mortgage loan, and, where appropriate, qualify for available loss mitigation options.
 - Promptly providing successors in interest with any documents, forms, or other materials the servicer requires for the successor in interest to continue making payments and to apply and be evaluated for an assumption and, where appropriate, loss mitigation options.
 - Upon receipt from the successor in interest of required documents, forms or other materials, promptly evaluating the successor in interest for and, where appropriate, implementing options set forth above.
 - Providing employees with information and training regarding the effect of laws and investor and other requirements on the servicer's obligations following the death of a borrower, and complying with those laws and requirements, including:
 - Servicing guidelines, such as those published by Fannie Mae and Freddie Mac,¹⁰

property, but that person is willing to assume the Mortgage obligation.” Freddie Mac Bulletin No. 2013-3 (Feb. 15, 2013), available at <http://www.freddie.mac.com/sell/guide/bulletins/pdf/bl1303.pdf> (“Freddie Mac Bulletin”).

¹⁰ For example, in February 2013, Fannie Mae published guidance requiring servicers to “to allow the new owner to continue making mortgage payments and pursue an assumption of the mortgage loan as well as a foreclosure prevention alternative, if applicable.” Where a successor in interest cannot bring the loan current without a foreclosure prevention alternative, including a loan modification, the guidance states that “the servicer must collect a Borrower Response Package from the new property owner and evaluate the request as if they were a borrower.” Fannie Mae, Lender Letter LL-2013-04 (Feb. 27, 2013), available at <https://www.fanniemae.com/content/announcement/ll1304.pdf>. See also Fannie Mae, Servicing Guide Announcement SVC-2013-17 (Aug. 28, 2013) available at <https://www.fanniemae.com/content/announcement/svc1317.pdf>. Also in February 2013, Freddie Mac published guidance requiring servicers to follow similar procedures regarding assumptions and loss mitigation options for successors in interest. See n.27. Both Fannie Mae and Freddie Mac require servicers to submit recommendations to them for approval of a simultaneous mortgage assumption and loss mitigation option.

- The Garn-St. Germain Act of 1982,¹¹ which imposes certain limits on the application of due-on-sale clauses when real property is transferred as a result of the death of a borrower, and
- Federal or State law restricting the disclosure of the deceased borrower’s non-public personal information.

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

- Upon notification of the death of a borrower, promptly evaluating whether to postpone or withdraw any pending or planned foreclosure proceeding to provide a successor in interest with reasonable time to establish ownership rights and pursue assumption and, if applicable, loss mitigation options.
- Promptly providing a 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 if the successor in interest assumes the loan without a loss mitigation option already in place or arranged to commence simultaneous with the assumption.

2. Communications with Borrowers under the Early Intervention Rule

The CFPB is issuing guidance to clarify how a servicer may comply with the requirements in the Early Intervention Rule to make good faith efforts to establish live contact with a borrower.¹² For purposes of the Early Intervention Rule, “[d]elinquency begins on the day a payment sufficient to cover principal, interest, and, if applicable, escrow for a given billing cycle is due and unpaid.”¹³ Thus, once the rule goes into effect, for each billing cycle for which a borrower is delinquent for at least 36 days, servicers are required to make good faith efforts to establish live contact with the borrower by the 36th day and, if appropriate, to inform the borrower about the availability of loss mitigation options.¹⁴

Commentary to the Early Intervention Rule states that good faith efforts to establish live contact consist of “reasonable steps under the circumstances to reach a 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.”¹⁵ The CFPB emphasizes that the rule is specifically designed to give servicers significant flexibility in tailoring their contact methods to particular circumstances. For delinquencies that begin

¹¹ 12 U.S.C. 1701j-3(d)(3).

¹² 12 CFR 1024.39, as published in 78 FR 10695 (Feb. 14, 2013).

¹³ 12 CFR 1024.39, Supplement I to Part 1024—Official Bureau Interpretations, Comment 39(a)-1, as published in 78 FR 10695 (Feb. 14, 2013). Note that this interpretation of delinquency is particular to the Early Intervention Rule and the Continuity of Contact Rule. *Id.* at 1024.40 and Comment 1024.40(a)-3.

¹⁴ The Early Intervention Rule also requires that a written notice be sent to the borrower not later than the 45th day of delinquency, unless the borrower has submitted payment in the meantime. However, in contrast to the live contact rule, the written notice is required no more than once during any 180-day period. Thus, written notice provided to a borrower pursuant to the rule need not be provided again for 180 days, even if another delinquency occurs and the 45th day after that delinquency falls within the 180-day timeframe.

¹⁵ 12 CFR 1024.39, Supplement I to Part 1024—Official Bureau Interpretations, Comment 39(a)-2, as published in 78 FR 10695 (Feb. 14, 2013).

on or after January 10, 2014,¹⁶ the CFPB would consider the following communications reasonable steps under the circumstances to establish live contact:

Borrower working with servicer to obtain loss mitigation: The live contact requirement is satisfied with regard to cases in which a borrower is delinquent in consecutive billing cycles if the servicer has established and is maintaining ongoing contact with the borrower with regard to the borrower's completion of a loss mitigation application and the servicer's evaluation of that borrower for loss mitigation options.

Borrower stops paying under a loss mitigation plan or becomes delinquent after curing a prior default: As specified in the commentary to the final rule, a borrower is not delinquent under the rule if “performing as agreed under a loss mitigation option designed to bring the borrower current on a previously missed payment”¹⁷ This includes forbearance plans and trial modifications. However, if the borrower fails to make a loss mitigation payment, a new delinquency begins and the servicer has an obligation to make good faith efforts to contact the borrower within 36 days of the start of the delinquency—and for each of any subsequent billing periods for which the borrower's obligation is due and unpaid. Similarly, if a borrower successfully cures a prior default but becomes delinquent again, the servicer has an obligation to make good faith efforts to contact the borrower within 36 days for each of the subsequent billing periods for which the borrower's obligation is due and unpaid.

Communication in conjunction with other contact: A servicer may, but need not, rely on live contact established at the borrower's initiative to satisfy the live contact requirement. Servicers may also combine contacts made pursuant to the Early Intervention Rule with contacts made with borrowers for other reasons, for instance by adding a brief script to collection calls to inform consumers that loss mitigation options may be available in accordance with the rule.

Unresponsive borrower: The CFPB believes that a borrower's failure to respond to a servicer's repeated attempts at communication pursuant to the Early Intervention Rule is a relevant circumstance to consider. For example, “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 statement¹⁸ or in an electronic communication. Such

¹⁶ Servicers are not required to comply with the Early Intervention Rule and the Continuity of Contact Rule with regard to a billing period prior to January 10, 2014, for which a borrower is delinquent. For example, for 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 and until the borrower is delinquent again for a later billing cycle.

¹⁷ 12 CFR 1024.39, Supplement I to Part 1024—Official Bureau Interpretations, Comment 39(a)-1.ii, as published in 78 FR 10695 (Feb. 14, 2013).

¹⁸ 12 CFR 1024.41, as published in 78 FR 10695 (Feb. 14, 2013) and amended by the final rule issued on September 13, 2013, available at http://files.consumerfinance.gov/f/201309_cfpb_titlexiv_updates.pdf. For example, this statement could appear at the bottom of the delinquency box or in a section reserved for messages from the servicer. 12 CFR 1026.41(d)(8) and 1026.41(c)-2, respectively, as published in 78 FR 10901 (Feb. 14, 2013). Placement of the statement at the bottom of the delinquency box would not conflict with the “close proximity” requirement applicable to delinquency information.” *Id.* at 1026.41(d)(8).

efforts might be appropriate where there is little 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.

3. Servicing Rule Requirements with Regard to Borrowers Prohibiting Debt Collectors from Communicating with Them.

The CFPB is issuing guidance regarding the interplay between certain of the 2013 RESPA and TILA Servicing Final Rules and the Fair Debt Collection Practices Act (FDCPA).¹⁹ The CFPB is providing this bulletin as an advisory opinion interpreting the FDCPA “cease communication” requirement in relation to the 2013 Mortgage Servicing Final Rules discussed below, under FDCPA section 813(e), 15 U.S.C. 1692k(e). As provided in that section, no liability arises under the FDCPA for an act done or omitted in good faith in conformity with an advisory opinion of the CFPB while that advisory opinion is in effect.

The FDCPA grants debtors the right generally to bar debt collectors from communicating with them.²⁰ To the extent the FDCPA applies to a servicer’s activities regarding a borrower, the “cease communication” provision of the FDCPA may make such a servicer uncertain whether it will be liable under the FDCPA for carrying out certain communications required by the servicing rules. This bulletin addresses such a servicer’s obligation with regard to certain provisions of the servicing rules requiring disclosures to and communications with borrowers who have defaulted on the payments of their mortgage loans when they have instructed the servicer to cease communicating with them.

The CFPB concludes that the FDCPA “cease communication” option does not generally make servicers that are debt collectors liable under the FDCPA if they comply with certain provisions of Regulation X (12 CFR 1024.35 (error resolution), 1024.36 (requests for information), 1024.37 (force-placed insurance), and 1024.41 (loss mitigation)) and Regulation Z (12 CFR 1026.20(d) (adjustable-rate mortgage (ARM) initial interest rate adjustment) and 1026.41 (periodic statement)). For the reasons discussed below, the CFPB concludes that a servicer that is considered a debt collector under the FDCPA with respect to a borrower that provides disclosures to and communicates with the borrower pursuant to the provisions listed above, notwithstanding a “cease communication” instruction sent by the borrower, is not liable under the FDCPA. This conclusion does not extend to the notices/communications required by 12 CFR 1024.39 (Early Intervention Rule) and 12 CFR 1026.20(c) (ARM Interest Rate Adjustment with Corresponding Payment Change Rule). See Interim Final Rule, available at <http://www.consumerfinance.gov/regulations>.

Error Resolution, Information Requests, and Loss Mitigation Rules²¹

¹⁹ 15 U.S.C. 1692 *et seq.*

²⁰ Section 805(c) of the FDCPA generally prohibits debt collectors from communicating with consumers regarding a debt after having received a written “cease communication” request. 15 U.S.C. 1692c(c).

²¹ 12 CFR 1024.35 and 1024.36, as published in 78 FR 10695 (Feb. 14, 2013), and 12 CFR 1024.41, as published in 78 FR 10695 (Feb. 14, 2013) and amended by the final rule issued on September 13, 2013, available at http://files.consumerfinance.gov/f/201309_cfpb_titlexiv_updates.pdf.

These servicing rule provisions, respectively, require servicers to (1) investigate and resolve certain borrower-reported errors relating to the servicing of the borrower's mortgage loan, (2) respond appropriately to borrower requests for information with respect to a borrower's mortgage loan, and (3) consider appropriately a borrower's loss mitigation application. The CFPB believes that a borrower's "cease communications" request pursuant to the FDCPA should ordinarily be understood to exclude these categories of communication, because the borrower has specifically requested the communication at issue. Even if the borrower sends a "cease communications" request while a specific action the borrower requested of the servicer is in process, the borrower usually should be understood to have excluded the specific action from the general request to cease communication. Thus, only if the borrower sends a communication to the servicer specifically withdrawing the request for such action may a servicer cease to carry out the requirements of these provisions.

Force-Placed Insurance, ARM Initial Interest Rate Adjustment, and Periodic Statement Rules²²

These servicing rule provisions, respectively, require the servicer to provide borrowers with (1) disclosures regarding the forced placement of hazard insurance, (2) a disclosure regarding an ARM's initial interest rate adjustment, and (3) a periodic statement for each billing cycle. The CFPB has determined that a servicer acting as a debt collector would not be liable under the FDCPA for complying with these requirements despite a consumer's "cease communication" request. These disclosures are specifically mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act),²³ which makes no mention of their potential cessation under the FDCPA and presents a more recent and specific statement of legislative intent regarding these disclosures than does the FDCPA. Moreover, the CFPB believes that these notices provide useful information to consumers regardless of their collections status.

For more information about the implementation of the 2013 RESPA and TILA Servicing Final Rules and other new mortgage rules issued by the CFPB, visit <http://www.consumerfinance.gov/regulatory-implementation>. Guidance inquiries may be directed to CFPB_reginquiries@cfpb.gov or (202) 435-7700.

²² 12 CFR 1024.37, as published in 78 FR 10695 (Feb. 14, 2013); 12 CFR 1026.20(d), as revised by 78 FR 10901 (Feb. 14, 2013) and 12 CFR 1026.41, as published in 78 FR 10901 (Feb. 14, 2013), respectively.

²³ Public Law 111-203, secs. 1418, 1420, 1463, 124 Stat. 1376 (2010). Dodd-Frank Act sections 1418 (ARM initial interest rate adjustment), 1420 (periodic statements), and 1463 (force-placed insurance). Servicers are not required to provide periodic statements to borrowers in bankruptcy. See Interim Final Rule, available at <http://www.consumerfinance.gov/regulations>.