

# Client Alert

September 2014

## CFPB Issues Updated Guidance for Mortgage Servicing Transfers and Alerts Servicers of CFPB Review of Servicing Transfers

Citing the continuing high volume of residential mortgage loan servicing transfers, on August 19, 2014, the Consumer Financial Protection Bureau (“CFPB”) issued CFPB Bulletin 2014-01 (the “Guidance”)<sup>1</sup> to provide compliance and policy guidance to servicers involved in such transactions. The Guidance emphasizes the CFPB’s intention to use its supervisory authority to monitor servicers’ compliance with federal consumer financial laws applicable to servicing transfers, and indicates that the CFPB also may require servicers to submit written compliance plans in connection with significant servicing transfers.

The CFPB’s revised Regulation X (implementing the Real Estate Settlement Procedures Act), effective as of January 10, 2014, among other things, 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 CFPB refers to the revisions as its “new servicing rule”). The Guidance provides specific examples of servicing transfer policies and procedures that the CFPB believes reflect the objectives of the new servicing rule and other federal laws relevant to servicing transfers, and highlights servicing practices it believes are inconsistent with those objectives.<sup>2</sup> 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, particularly those consumers that have been or may become subject to loss mitigation efforts.

The Guidance is organized into four parts:

- A. *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 new servicing rule provisions applicable to servicing transfers.
- B. *Applicability of the New Servicing Rule to Transfers*, which answers certain frequently asked questions regarding the application of the new servicing rule to servicing transfers, describes certain areas of focus for the CFPB, and offers guidance for servicers to minimize their compliance risk.
- C. *Protections under Federal Consumer Financial Laws*, which describes other federal consumer financial laws relevant to servicing transfers and the potential consequences if servicers are not satisfying their obligations under such laws in connection with such transfers.

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<sup>1</sup> CFPB Bulletin 2014-1 replaces CFPB Bulletin 2013-1, which was released in February 2013 and also addressed servicing transfers.

<sup>2</sup> 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 new servicing rule.

D. *Plans for Handling Servicing Transfers*, which notifies servicers involved in significant servicing transfers that the CFPB will, in certain cases, require them to submit informational plans describing how they will manage the related risks to consumers.

We summarize below some of the highlights of the Guidance:

### **Application of Federal Laws to Different Types of Parties and Servicing Transfers**

The Guidance confirms that the CFPB will construe federal laws related to servicing transfers as broadly applicable to buyers and sellers of mortgage servicing rights, as well as parties involved in the delegation of servicing obligations through subservicing arrangements, and buyers and sellers of whole mortgage loans in “servicing released” whole loan transactions. The application of the laws will vary depending on whether the servicer is the transferor or the transferee of the servicing being transferred.

### **New Servicing Rule Under Regulation X**

The first two parts of the Guidance focus on servicers’ compliance with the servicing transfer-related objectives of the new servicing rule, 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 new servicing rule that will receive the CFPB’s supervisory attention.

Timely Transfer of Documents and Data. Under the new servicing rule, 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 will carefully scrutinize the policies and procedures of any servicer that regularly waits until after loan boarding to transfer information it had in its possession prior to loan boarding.<sup>3</sup>

Proper Handling of Loans in Loss Mitigation. The new servicing rule requires servicers to properly handle loans that are transferred during the loss mitigation process. CFPB examiners will give particular attention to the transfer of such loans and servicers’ related policies and procedures. Several points of emphasis highlighted by the CFPB include:

- Transferee servicers must identify all loans with pending and approved loss mitigation plans.
- Transferee servicers must evaluate and process all borrowers who have submitted loss mitigation applications. The CFPB will “carefully scrutinize” evaluations that take longer than 30 days from the date the prior servicer received the complete application.
- Transfer agreements should provide the timely delivery by the transferor servicer and receipt by the transferee servicer of all documentation generated by transferor servicers and borrowers in connection with loss mitigation efforts, including pending applications, trial modifications and permanent modification agreements. The CFPB recommends that all loss mitigation notices, borrower applications, information related to the status of loss mitigation applications and foreclosure sales, and finalized loss mitigation agreements be delivered to the transferee no later than the transfer date. CFPB examiners will view unfavorably practices that require borrowers to resubmit information provided to the prior servicer, endure substantial delays due to re-underwriting, or accept inferior modification terms.

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<sup>3</sup> The Guidance suggests that best practice is to provide the requisite information prior to the sale date, which often is well before the loan boarding date.

- Servicers should carefully monitor newly transferred loans to determine whether apparent partial payments are actually full installments made pursuant to modification agreements.
- Transferee servicers should honor permanent and trial modifications offered by the transferor servicer, regardless of whether the modification complies with investor criteria.

Error Resolution Procedures and Requests for Information. CFPB examiners will confirm that the transferor and transferee servicers have adhered to regulatory requirements and timeframes when responding to a notice of error or requests for information from a borrower or its agent. The Guidance specifically notes that the transferor servicer is not relieved of its obligations under the servicing rules as a result of the servicing transfer, nor is the transferee servicer absolved of its compliance obligations when the alleged error or event about which information is requested occurred prior to the servicing transfer. All procedures addressing these requirements should provide for escalation consistent with complaint protocols.

Force-Placed Insurance. The new servicing rule includes certain notice and other requirements regarding force-placed insurance that are applicable to servicing transfers. We note that this activity has been highly scrutinized in the past for enforcement actions by regulatory authorities.

Early Intervention and Continuity of Contact with Delinquent Borrowers. Transferee servicers must implement procedures to establish contact with borrowers by the 36th day of delinquency and provide written notice by the 45th day, even if the delinquency began prior to the servicing transfer. Transferee servicers should be prepared to assist delinquent borrowers immediately upon servicing transfer, ensuring that loss mitigation personnel are available and equipped to assist borrowers and have full access to borrowers' payment histories and previously provided loss mitigation information.

### **Other Federal Consumer Financial Laws; Maintenance of Compliance Management System**

In addition to Regulation X, the Guidance reiterates that a servicer's policies and procedures should address compliance with other applicable consumer financial laws, including Regulation Z, the Fair Credit Reporting Act, the Fair Debt Collection Practices Act, the Truth in Lending Act and the Dodd-Frank Wall Street Reform and Consumer Protection Act's prohibitions on unfair, deceptive or abusive acts or practices.

Servicers are expected to maintain robust compliance management systems ("CMS") designed to ensure compliance with the new servicing rule and other federal consumer financial 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. The Guidance states that entities with a robust CMS have strong policies and procedures, effective board oversight, regular and properly directed training, internal monitoring, external audits and complaint review.

### **CFPB May Require Submission of Servicing Transfer Plans**

In connection with its enforcement of the new servicing rule, the CFPB announced that it will "in appropriate cases" require servicers "engaged in significant servicing transfers" to submit a written plan providing information about the servicing transfer (the Guidance does not define a *significant* transfer or describe what may constitute an *appropriate case*). While CFPB approval generally is not required for a servicing transfer, the CFPB will utilize these plans in examinations of servicer compliance with the new servicing rule. Written plans submitted to the CFPB will generally be required to include the following information:

- the size of the servicing transfer (including number of loans and unpaid principal balance);

- a detailed description of the servicer's plans to comply with the new servicing rule provisions applicable to transfers;
- information about the transferor's servicing platform and compatibility with the transferee's system, and details of the transaction and system testing to be conducted to ensure accurate data transfers;
- plans for identifying and correcting errors arising from the transfer, including specified time periods for reviewing files and resolving errors;
- descriptions of the training plans and materials for personnel involved in activities related to the transferred loans; and
- a customer-service plan, tailored to the transferred portfolio, establishing procedures for the proper handling and resolution of loss mitigation requests and applications.

### **Managing Compliance Risks**

The CFPB has previously publicized its concerns regarding risks to consumers resulting from poorly executed servicing transfers and has taken enforcement actions in cases in which servicers were found not to have complied with applicable law. The issuance of the Guidance alerts the servicing industry to the CFPB's continuing concerns relating to servicing transfers and its intention 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 financial laws. 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. From the CFPB's perspective, it is not sufficient to merely perform certain servicing transfer functions; servicers must do so in a timely and accurate manner.

In addition to establishing and updating servicing transfer policies and procedures as outlined in the Guidance, we recommend that servicers engaged in transfer activities 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. For example, parties should consider adding provisions to transfer agreements that prescribe:

- requirements to transfer loss mitigation data prior to boarding;
- plans for data transfer testing before and after transfer, especially for delinquent loans and loans in loss mitigation;
- procedures and responsibility for responding to and resolving borrower complaints or questions, including complaints or questions arising prior to the transfer date; and
- cooperation and further assurances with respect to information required to complete and submit a servicing transfer plan.

The CFPB noted that it is continuing to monitor the mortgage servicing market and may engage in additional rulemaking related to servicing transfers. Hunton & Williams attorneys will continue to monitor proposed regulations and updates from regulators in this area.

Finally, it is also worth noting recent guidance from the Comptroller of the Currency relating to loan sales.<sup>4</sup> Servicers should consider the applicability of such guidance in constructing their servicing transfer policies and procedures.

Hunton & Williams frequently advises clients on servicing matters, including the establishment of CMS-related policies and procedures; the acquisition, disposition and financing of mortgage servicing assets; subservicing arrangements; investor issues; and regulatory inquiries. For questions regarding this client alert or servicing matters generally, please contact one of the following:

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<sup>4</sup> OCC Bulletin 2014-37