InBrief

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CFPB Proposes Amendments to Mortgage Servicing Rules

Taylor Hamilton

On November 20, 2014, the Consumer Financial Protection Bureau (CFPB) proposed several important amendments to their Mortgage Servicing Rules under Regulation X and Regulation Z. These amendments are geared towards addressing issues that remain after the January 10, 2014, effective date of the CFPB's rule enactments pursuant to its authority under the Dodd-Frank Act.

One important proposal is to add a general **definition of delinquency** that will apply to all of the servicing provisions of Regulation X and the periodic statement provisions of Regulation Z. Many of the consumer protections under the CFPB's rules depend on how long a customer has been delinquent on the mortgage. M&P and its clients have sought clarification on this issue since the new rules went into effect. Under the proposed definition, delinquency begins on the day a borrower fails to make a periodic payment (sufficient to cover principal, interest, and if applicable, escrow) and remains delinquent until such time as the payment is made. Thus, if a borrower misses a payment but later makes it up and the servicer applies that payment to the oldest outstanding periodic payment, the date of the delinquency advances.

The newly proposed amendments would also affect **loss mitigation procedures** that servicers must follow for mortgage loans secured by a borrower's principal residence. The proposal would require servicers to notify borrowers in writing when they receive a complete loss mitigation application so that borrowers know the status of the application and their protections. Also, the proposal would require servicers to evaluate borrowers for loss mitigation under the CFPB's rules more than once in the life of the loan for borrowers who have brought loans current at any time since the last loss mitigation application. Next, the proposal would allow a servicer who is a subordinate lien holder to join a foreclosure action filed by a senior lien holder, even if the borrower is not 120 days delinquent on the subordinate lien. Finally, the proposal would address and clarify how loss mitigation

procedures and timelines would apply when a mortgage is transferred from one servicer to another during the loss mitigation process.

The CFPB has also proposed three sets of rule changes with respect to **successors in interest** – persons who inherit or receive property when there is still an outstanding mortgage loan. First, the CFPB is proposing that all of the existing Mortgage Servicing Rules will apply to the successor once the bank confirms that they are, in fact, a successor in interest. Second, the proposed amendments state how the determination of whether a person is a successor is made. Third, the proposal ensures that those confirmed as successors generally receive the same protections under the CFPB's Mortgage Servicing Rules as the original borrower. Most importantly, the new definition of successor in interest would include homeowners who receive property through inheritance from a family member or upon the death of a joint tenant, after a divorce or legal separation, through a family trust, or through a transfer from a parent to a child.

Also worth specific mention is a proposal relating to **force-placed insurance disclosures**. The amendment would require a servicer to account for situations in which it wishes to force-place insurance because the borrower has insufficient, rather than lapsed or expiring, hazard insurance coverage. Other topics addressed in the proposed amendments include efforts to avoid dual-tracking and prevent wrongful foreclosures, efforts to provide more information to borrowers in bankruptcy,

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Community Bank Lenders Need to Prepare Now for Upcoming Regulatory Changes

Branden Gross

As president-elect of the Kentucky Land Title Association (KYLTA), I recently had the opportunity to attend the American Land Title Association (ALTA) Annual Convention. The event is the largest networking and education opportunity in the land title industry. With several major legislative and regulatory changes facing the real estate underwriting and settlement closing business, 2014 was a key year to attend.

My practice focuses on real estate law, so it's important that I help my clients stay informed of the latest regulations. One of my key takeaways from the ALTA convention is that community bank lenders need to be proactive in addressing upcoming regulatory changes. Preparing now will make transitions easier down the road. Settlement closing agents are being tasked with new compliance responsibilities and helping lender clients comply is one of my top priorities. One of the biggest changes coming is the Consumer Financial Protection Bureau's Integrated Mortgage Disclosure Rule.

The CFPB's final rule, which goes into effect on August 1, 2015, will affect everyone in the real estate industry. The final rule establishes new disclosure and form requirements, and according to the CFPB, was issued to implement the Dodd-Frank Wall Street Reform and Consumer Protection Act's amendments to the Truth in Lending Act and the Real Estate Settlement Procedures Act.

The goal is to make mortgage disclosures easier for consumers; but for lenders, it's a new way of doing business and an ongoing learning process. The Final Rule for Integrated Mortgage Disclosures is so significant to the real estate industry that the ALTA has added a countdown clock on its website to count the number of days (and hours, minutes and seconds!) until it goes into effect.

The ALTA's Title Insurance and Settlement Company Best Practices are policies and procedures tailored to coincide with new regulations, like the CFPB's final rule, for settlement closing agents. M&P is implementing ALTA's Best Practices, and as a leader of the KYLTA, I ensure that staying at the forefront of regulatory changes to protect our lender clients and their consumers is our top priority.

I'm also proud to note that the KYLTA took home an award from the annual convention this year for the largest growth of all the states at 180% from 2013!

Please contact me with questions, seminar requests and more on real estate law.

P. Branden Gross

Mortgage Servicing Rules *(Continued from cover)*

additional clarifications and requirements regarding servicers' obligations to provide periodic statements under the Mortgage Servicing Rules, and changes to the small servicer definition to exclude certain seller financed transactions from being counted toward the mortgage loan limit.

The proposed rules and disclosures will be open for public comment for 90 days from the date of their publication in the Federal Register. A copy of the proposed rule, which includes information on how to submit comments, is available at http://files.consumerfinance.gov/f/201411_cfpb_proposed-rule_mortgage-servicing.pdf.

Taylor Hamilton

Update On New York's Enactment of the 2010 Amendments to UCC Article 9

The New York legislation to enact the 2010 Amendments to Article 9, along with Revised Articles 1 and 7, has now been transmitted to the Governor's office. The bill will take effect immediately upon being signed by the Governor. This is significant as the legislation did not include any transition rules. Thus, a secured party must be in compliance with the new law on the date it becomes effective, including the new rules on debtor names.

There remain questions about the appropriate filing forms to use in New York as well. Unlike most other states, New York will continue to require organizational information, such as the type and jurisdiction of the organizational debtor. At this time, the New York Department of State has not announced which forms it will accept once the law goes into effect; however, it is believed that it will not approve the 2011 form revisions that accompanied the 2010 Amendments as they no longer include organizational information. This is problematic if a secured party is filing on an estate or trust as the old forms do not include the new requirements found in §9-503(a)(2) and (3). M&P recommends submitting a paper filing on the old forms with the new indications relating to trusts or estates in the collateral field on the financing statement, in the miscellaneous field on the addendum, or on an attached exhibit.

John T. McGarvey & Melinda T. Sunderland

M&P Celebrates 40th Anniversary

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M&P is celebrating its 40th Anniversary this year. It's been a wonderful 40 years, and we wanted to take this opportunity to thank the many loyal clients who have worked with us over the years and the talented attorneys who focus on providing quality legal services every day.

M&P has served the banking and finance industry in Kentucky and Indiana since the firm was founded in 1974. M&P attorneys have led or actively participated in every substantial revision of the state's banking laws and Kentucky's Uniform Commercial Code since 1986.

In addition to banking and finance law, the firm has expanded successfully into other practice areas such as equine law, appellate law, real estate law and white collar criminal defense.

Subpoenas Duces Tecum – How should a bank respond? How can it protect itself?

Tom Coffey

Banks often struggle with how to appropriately respond to a subpoena duces tecum for customer records while also complying with federal law that protects a customer's information. A bank may be required to comply with the subpoena, it may choose to comply in order to accommodate the court or it may refuse to comply all together if it has sufficient legal reasons to do so.

A bank may be served with a subpoena duces tecum from several different parties, including federal or state grand juries and third party litigants. Its response will vary depending on the party issuing the subpoena, those involved in the lawsuit and the content of the subpoena. Receipt of a grand jury subpoena involving a criminal matter can be especially alarming for a bank and requires special attention

Subpoenas can come with a variety of problems for a bank. For example, the request for documents may be so vague that a bank has difficulty figuring out how to respond. In the alternative, a subpoena may request so many documents that it might be deemed oppressive by a court. In particular, a subpoena may be written in such a way that compliance would cause the bank to violate a federal consumer protection statute. There are obviously many factors that a bank must take into consideration when deciding how to appropriately respond.

In making that decision, a bank should consider whether it has any grounds to move to quash or modify the subpoena duces tecum as being oppressive or unreasonable. Those grounds can include: (1) that the requested documents are irrelevant; (2) that the subpoena fails to allow reasonable time to comply; (3) that the subpoena requires disclosure of privileged or other protected matter; (4) that the subpoena subjects the bank to an undue burden; or (5) that the subpoena fails to identify the desired documents. If there are sufficient legal grounds, a bank should strongly consider making such

a motion. This will allow a bank time to consult with its attorney and, if permissible, notify its customer of the request. By notifying its customer, a bank provides the customer with the opportunity to contest the disclosure. Additionally, the motion gives the bank an opportunity to argue that the cost of the production should be borne by the requesting party.

Tom Coffey

If your institution has received a subpoena duces tecum and has questions about how to comply with the subpoena and how to best protect itself, please call Tom Coffey at (502) 560-6742.

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FirmNews

M&P IS PLEASED TO ANNOUNCE:

The opening of a new office in Bowling Green, Kentucky. **Brad Salyer** will lead the new office, located at 2501 Crossings Blvd., Ste. 209, Bowling Green, Kentucky, (270) 842-9005.

Several of the firm's attorneys have been named **2014-2015 Kentucky Super Lawyers®**, recognizing excellence in various practice areas. The following M&P attorneys were recognized:

Emily H. Cowles - *Creditor Debtor Rights*
Eric M. Jensen - *Business Litigation*
John T. McGarvey - *Banking*
M. Thurman Senn - *Business Litigation*
Melinda T. Sunderland - *Banking*

Six of the firm's attorneys have been named **"Kentucky Rising Stars" by Super Lawyers®** for 2014-2015. They are:

Thomas R. Coffey - *Civil Litigation: Plaintiff*
P. Branden Gross - *Real Estate*
Taylor M. Hamilton - *Real Estate*
Sarah S. Mattingly - *Business Litigation*
J. Morgan McGarvey - *Business Litigation*
Bradley S. Salyer - *Bankruptcy: Business*

The Kentucky Land Title Association (KYLTA) Board of Directors elected M&P attorney **Branden Gross** as the organization's president-elect.

MAY THE PEACE AND JOY OF THIS HOLIDAY SEASON BE YOURS THROUGH THE NEW YEAR.

If you would like to receive future editions of M&P InBrief electronically, please e-mail us at newsletter@morganandpottinger.com.