

K&L GATES

# CFPB's PROPOSED RULE ON SERVICING STANDARDS

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## FRB'S ATTEMPT TO ADDRESS ABUSIVE SERVICING

In 2008, the Federal Reserve Board used its delegation of authority under HOEPA to regulate unfair, deceptive and abusive practices to address servicing:

- Establish and maintain escrow account for taxes and insurance for “higher priced” loans
- Credit mortgage loan payments on date received except where delay would not be detrimental to consumer
- Deliver accurate payoff statement within reasonable time of a payoff request
- Not impose late fee or delinquency charge on the consumer when the consumer’s payment was timely and made in full but for any previously assessed late fees (i.e., prohibits “pyramiding of late fees”)

The exercise did not address systemic servicing issues or default servicing.

## CONGRESS GETS INTO THE ACT – THE DODD-FRANK ACT

In 2010, the Dodd-Frank Act amended TILA and RESPA to codify the 2008 regulatory changes and add a few other servicing requirements.

Like the 2008 FRB regulations, the Dodd-Frank amendments did not address systemic servicing issues or default servicing. And, while it addressed certain aspects of HAMP (e.g., require disclosure of NPV inputs and NPV calculator), it did not seek to codify the loss mitigation construct of HAMP into federal law.

However, the amendments further prohibited servicers from failing to comply with any other obligation found by the CFPB “to be appropriate to carry out the consumer protection provisions of the Act.” [RESPA].

- In other words, it created a federal private right of action against servicers that failed to comply with prohibitions that Congress itself failed to identify.

## **WHO NEEDS LAWS AND REGULATIONS TO ADDRESS SERVICING?**

Roll forward, and the servicing world has changed based on the facts and circumstances that resulted in the OCC/FRB Consent Orders, state barriers to foreclosure, supplements to HAMP, FHA enforcement actions, GSE default servicing requirements, global foreclosure settlement, and now, the CFPB.

## REGULATION THROUGH ENFORCEMENT – THE CONSENT ORDERS

The impetus for the banking agency reviews was faulty documentation in judicial foreclosures. The Consent Orders do not supplement state foreclosure laws but instead mandate compliance with such laws, explicitly requiring that:

- all factual assertions made in pleadings, declarations, or affidavits filed by or on behalf of servicer are accurate and that affidavits are based on personal knowledge or a review of servicer's books and records when the affidavit or declaration so states
- affidavits filed in foreclosure actions are executed and notarized in accordance with applicable law
- servicer has properly documented ownership of the promissory note and security instrument under applicable state law, or is otherwise a proper party to the action
- a clear and auditable trail exists for all factual information contained in each affidavit or declaration, in support of each of the charges that are listed
- foreclosure sales and post-sale confirmations are in accordance with the terms of the mortgage loan and applicable state and federal law requirements

## **Consent Orders**

The Consent Orders also addressed a hot topic that had been lightly touched in the FRB regulations and the Dodd-Frank Act – fees and charges.

In addition, the Consent Orders went beyond the loan level and laid the groundwork for new regulatory requirements relating to the general operation of a servicer, which is consistent with banking regulators' focus on safety and soundness issues.

## **REGULATION THROUGH ENFORCEMENT – THE GLOBAL FORECLOSURE SETTLEMENT**

The global foreclosure settlement incorporated virtually all of the servicing issues that had come before it under the FRB regulations, the Dodd-Frank amendments to TILA and RESPA, the loss mitigation requirements of HAMP, and the Consent Orders, although with excruciatingly greater detail.

## Global Foreclosure Settlement

Like the Consent Orders, the global settlement:

- includes general operational requirements
- imposes several restrictions on fees charged to borrowers for servicing-related activity, including late fees, property inspection, property preservation, valuation, attorneys, default, foreclosure and bankruptcy-related fees
- explicitly addresses documentation in foreclosures, such as ensuring that factual assertions made in pleadings are accurate and complete and are supported by competent and reliable evidence
  - Although not addressed in the Consent Orders, the Settlement Agreement also provided detailed document requirements relating to proofs of claim and motions for relief from stay in bankruptcy proceedings

## Global Foreclosure Settlement

But the global settlement raised the ante over the Consent Orders by imposing detailed loss mitigation requirements, in part by borrowing from HAMP, including obligations to:

- make reasonable and good faith efforts to engage in available loss mitigation activities and foreclosure prevention for delinquent loans
- make publicly available information on its related qualification processes and requirements
- design proprietary first-lien loan modification programs that are intended to produce sustainable modifications according to investor guidelines and previous results, and track outcomes and maintain records regarding characteristics and performance of proprietary first-lien loan modifications

## Global Foreclosure Settlement

But the global settlement raised the ante over the Consent Orders by imposing detailed loss mitigation requirements, in part by borrowing from HAMP, including obligations to *(cont.)*:

- communicate with the borrower and evaluate requests for loan modification within rigid time frames
- offer and facilitate loan modifications for borrowers when such loan modifications for which they are eligible are NPV positive and meet other applicable requirements
- afford borrowers appeals of denials of loan modifications
- delay initiation of foreclosure proceedings until having exhausted consideration of loss mitigation alternatives
- if a borrower does not qualify for modification, develop a cooperative short sale process which allows the borrower the opportunity to engage with the servicer to pursue a short sale evaluation prior to putting the home on the market

## **AND NOW THE CFPB ENTERS THE FRAY-Proposed Regulations**

Most assumed that the global settlement would be the foundation for CFPB rulemaking but wondered how it would get there. Given the relatively small number of legislative changes regarding servicing in the Dodd-Frank Act, how could the CFPB address such topics as general operational requirements, default servicing and fees and charges?

## CFPB Proposed Rule

- The proposed servicing regulations generally address those 2008 FRB regulations and the statutory provisions in the Dodd-Frank Act
- It is important to note what the proposed regulations did not incorporate from the Consent Orders and global settlement:
  - There are no express requirements regarding adequate staffing, except with respect to a SPOC
  - There are very limited requirements related to documentation in bankruptcy and foreclosure proceedings
  - There are limited requirements related to fees and charges assessed to borrowers
  - The provisions regarding loan modifications are much less prescriptive and rules based

## 9 Major Topics Covered by Proposed Rule

- 1) Periodic Billing - TILA
- 2) ARM Notices - TILA
- 3) Payment Crediting and Payoff - TILA
- 4) Force-placed Insurance - RESPA
- 5) Error Resolution & Information Requests - RESPA
- 6) Information Management - RESPA (pattern or practice standard)
- 7) Early Intervention - RESPA
- 8) Continuity of Contact (SPOC) - RESPA (pattern or practice standard)
- 9) Loss Mitigation - RESPA

We will address the last five topics in this webinar.  
Comments are due on October 9, 2012

## Error Resolution and Borrower Requests for Information

RESPA requires servicers to respond to a QWR for information which must be in writing and must relate to the “servicing of the mortgage loans.”

- In 2010, the Dodd-Frank Act amends RESPA to provide that a servicer shall not fail to take timely action to “correct errors relating to allocation of payments, final balances for purposes of paying off the loan, or avoiding foreclosure, or **other standard servicer's duties.**”

It is under this authority that the CFPB proposed substantial requirements that expand and standardize servicer responsibilities on error resolution and requests for information.

## **Error Resolution and Borrower Requests for Information**

Proposed error resolution (1024.35) and information request requirements (1024.36) are structured similarly to:

- Define the scope of communications to which a servicer must respond
- Set out timelines and notice requirements for responding to qualifying borrower communications
- Carve out duplicative, overbroad or unduly burdensome, and untimely notices and requests
- Allow the servicer to establish one or more telephone numbers/addresses which borrowers must use to submit notices of errors and requests for information
- Limit the fees a servicer may charge for responding to a notice of error or request for information

Note: Servicers should not rely on the borrower's classification of a request as a notice of error or a request for information. It could be both!

## Error Resolution: Notice of Error

Generally, a servicer must comply with the error resolution requirements for any oral or written notice from the borrower that asserts a covered error and that includes the borrower's name, information sufficient to identify the borrower's mortgage loan account, and the error the borrower believes has occurred (but not the reasons for his/her belief).

Timing requirements generally follow QWR (although not statutorily required):

- acknowledge receipt within 5 business days
- respond to notice of error within 30 business days (shorter time-frames for certain types of errors; possibly 15 day extension)

A servicer must respond to a notice of error by (i) correcting the error or (ii) conducting a reasonable investigation and determining that no error occurred, or correcting a different or additional error uncovered.

Unlike the global settlement, the CFPB's proposed rule does not expressly address inquiries from AGs, regulators or US Trustees. The Commentary does say that a notice of error is deemed to be submitted by a borrower if the notice of error is submitted by an agent of the borrower.

## Error Resolution: Nine Covered Errors

- Failure to accept a payment that conforms to the servicer's written requirements for the borrower to follow in making payments
- Failure to apply an accepted payment to principal, interest, escrow, or other charges under the term of the mortgage loan and applicable law
- Failure to credit a payment to a borrower's mortgage loan account as of the date of receipt, where such failure has resulted in a charge to the consumer or the furnishing of negative information to a consumer reporting agency
- Failure to pay taxes, insurance premiums, or other charges, including charges that the borrower and servicer have voluntarily agreed that the servicer should collect and pay, in a timely manner, or to refund an escrow account balance
- Imposition of a fee or charge that the servicer lacks a reasonable basis to impose upon the borrower
- Failure to provide an accurate payoff amount upon a borrower's request when required by TILA
- Failure to provide accurate information to a borrower for loss mitigation options and foreclosure
- Failure to accurately and timely transfer information relating to the servicing of a borrower's mortgage loan account to a transferee servicer
- Failure to suspend a scheduled foreclosure sale when required (for example, the borrower is performing under a loss mitigation agreement)

CFPB determined that the failure to accurately and timely provide a disclosure required by applicable law is not a covered error

## Information Request

A servicer must:

- Respond to any oral or written information request that includes the borrower's name, sufficient information to identify the account and states the information the borrower is requesting by:
  - providing the borrower with the requested information, or
  - conducting a reasonable search for the requested information.
  
- Acknowledge receipt of a request for information within 5 business days of receiving such request unless the servicer provides the borrower with the information requested within that time frame.
  
- Respond to information requests:
  - within 10 business days of a request for the identity of, and contact information for, the owner or assignee of a mortgage loan
  - for all other information requests, within 30 business days (possibly 15 day extension).

## Error Resolution: No Required Response

A servicer is not required to respond to either notices of error or requests for information that are:

- Duplicative
- Overly or unduly burdensome
- Untimely

(Subjective determinations may be required)

Additionally, a servicer is not required to respond to a request for irrelevant information or information that is confidential, proprietary or general corporate information.

A servicer is not required to respond to a notice of error that is not a “covered error” such as an error relating to: (i) the origination of a mortgage loan; (ii) the underwriting of a mortgage loan; (iii) a subsequent sale or securitization of a mortgage loan or (iv) a determination to sell, assign, or transfer the servicing of a mortgage loan.

Applicability of requirements to component servicers is unclear.

## Information Request and Impact on Fees

A servicer shall not charge a fee or require a borrower to make any payment that may be owed on a borrower's account:

- As a condition of investigating and responding to a notice of error.
- As a condition of responding to a valid information request except for a fee for providing a payoff statement or beneficiary notice as allowed under applicable state law.
  - Would this prohibit certain customer service fees and expedited delivery fees?

## Reasonable Information Management P&P

Certain but not all of the general operational requirements of the Consent Orders and global settlement are included in the proposed regulations.

Servicers are obligated to establish *reasonable* policies and procedures for maintaining and managing information and documents related to borrower loan accounts, including policies relating to:

- Accessing and providing accurate information
- Evaluating loss mitigation options
- Facilitating oversight of, and compliance by, service providers
- Facilitating servicing transfers

## Focus on “Reasonable”

Importantly, the regulatory requirement of establishing *reasonable* policies and procedures is met if the servicer's policies are reasonably designed to achieve the objectives to ensure compliance.

- In other words, the focus is not on loan level violations but appropriate policies and procedures.

Reasonable will be judged in light of the:

- size,
- nature, and
- scope of the servicer's operations

## Reasonable Information Management P&P: Records

Servicers also will be required to comply with two standard requirements:

A servicer would be required to maintain, and to provide the borrower, upon request, a defined "servicing file" containing:

- a schedule of all payments
- the borrower's note and deed of trust
- collection notes
- a report of any data fields
- copies of information and documents provided to the borrower in accordance with error resolution and loss mitigation requirements.

A servicer must retain records for one year after the mortgage loan is discharged or the servicing of the mortgage loan is transferred.

## Reasonable Information Management P&P: Safe Harbor

A safe harbor is available if a servicer does not engage in a “pattern or practice” of failing to achieve the stated objectives or the standard record requirements.

- “Pattern or practice” is not defined although it is a trigger under RESPA for statutory damages.
- The Commentary provides “examples of pattern or practice failures” and suggests that “regular” or “routine” failures would be a pattern or practice.
- While a few isolated examples may not be a pattern or practice, how many mistakes constitute a pattern or practice?

## Scope of Default Servicing Standards

The CFPB expands the default servicing standards (early intervention, SPOC, loss mitigation) beyond the global settlement to apply to:

- First- and second-lien loans
- Loans secured by non-owner occupied properties

Also proposes to impose a duty to identify senior or subordinate lienholders once a servicer receives a complete application by the “deadline”

- Servicer receiving initial application must provide other servicer with a copy of the application
- Servicer receiving application from another servicer must comply with the loss mitigation requirements as if the application was received from the borrower

## Early Intervention

Early intervention for delinquent borrowers is required, as it is under HAMP and the global settlement

- If a borrower is 30 days late, the proposal would require servicers to make a good faith effort to notify the borrower orally and to let the borrower know that loss mitigation options may be available.
- If the borrower is 40 days late, the servicer would be required to provide the borrower with a written notice with certain specific information, including examples of loss mitigation options available, if applicable, and information on how to obtain more information about loss mitigation options.
  - CFPB proposal provides model notice.

What about borrowers in bankruptcy or borrowers subject to FDCPA?

## Continuity of Contact/SPOC

Similarly, the appointment of a SPOC is required as it is under HAMP, the global settlement and the Consent Orders.

- SPOC would be assigned no later than 5 days after providing the oral early intervention notice
- The SPOC may be a team of personnel
- Servicer's policies and procedures satisfy the requirements regarding SPOC if the servicer personnel do not engage in a "pattern or practice" of failing to perform the SPOC functions
  - These specified functions include, among others (1) accessing the borrower's records and (2) providing the borrower with information about how and when to apply for a loss mitigation option and about the status of the application.

CFPB asks whether different SPOC rules should apply to borrowers in bankruptcy.

## Loss Mitigation

The focus of the loss mitigation obligations of the proposed rule is on *process*:

- sending out incomplete application notices
- evaluating borrowers timely
- providing borrowers denial notice
- providing borrowers a right to appeal (a decision re: loan modification)
- Not proceeding to foreclosure sale while evaluating the borrower for loss mitigation

Further, these loss mitigation obligations above only if the borrower submits a complete application before the “deadline”

- Note that the “deadline” is determined by the servicer, but may be no earlier than 90 days before a scheduled foreclosure

If the servicer receives a complete application after the deadline, no express obligations under the rule.

## Loss Mitigation

The proposed regulations do not require servicers to offer specific forms of loss mitigation at all or on any specific terms.

- Servicers will not be required to evaluate borrowers for any programs for which a borrower does not qualify based on eligibility criteria established by investors or guarantors.

The CFPB's proposal does not mandate outcomes of the loss mitigation process.

- For example, it does not suggest that if a loan modification results in a "positive NPV," the servicer must offer a loan modification.

Generally, as currently proposed, a borrower is only entitled to an evaluation based on a single complete application (i.e., no accounting for changed circumstances).

## Appeal Process

Within 30 days of receiving a borrower's complete application before the "deadline," the servicer would be required to evaluate the borrower for all available options.

- If a denial pertains to a requested *loan modification*, servicer would notify the borrower of the reasons for the servicer's decision, and provide the borrower with at least a 14-day period within which to appeal the decision.
- The proposal would require that appeals be decided within 30 days by different personnel than those responsible for the initial decision.
  - CFPB asks whether appeal process should be expanded to apply to all loss mitigation (e.g., short sales, DILs).

Unlike in the global settlement, no requirement to independently review denial *before* sending borrower a denial notice.

## Dual Tracking

The dual tracking requirements are much less rules based than the global settlement (or GSE guides).

If the servicer makes loss mitigation available, a servicer may not conduct a foreclosure sale if a borrower has submitted a complete loss mitigation application **within the servicer's deadline** until:

- the servicer has rejected the application and appeal process is not applicable, the borrower has not requested an appeal, or time for appeal has expired;
- servicer denies the borrower's appeal;
- borrower rejects the servicer's offer; or
- the borrower fails to perform under the loss mitigation option.

The proposed rule does not *expressly* prohibit the servicer from foreclosure *referral*, or taking the next legal action after referral.

The “sliding scale” rules found in the global settlement and GSE guides will likely apply after the servicer's “deadline.”

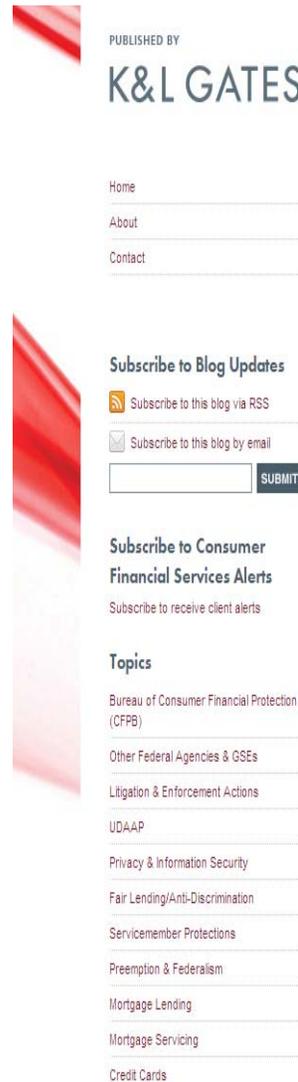
## **Conclusion**

Note, again, that comments are due on October 9, 2012

Do you have any questions?

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### Is It Illegal Under Federal Law to Opt Out Of Jurisdictions Exercising Eminent Domain?

By K&L Gates on September 11th, 2012  
Posted in Mortgage Servicing

By: [Laurence E. Platt](#)

Is a refusal to make or buy residential mortgage loans from jurisdictions that seize loans through eminent domain a federal crime or a reasoned response to excessive government intervention? That's the question that people are asking today in light of the comments of Lt. Governor of California Gavin Newsom. Yesterday, he asked the U.S. Department of Justice to investigate and prosecute those in the industry who advocate staying away from jurisdictions exercising eminent domain. Did he expect the industry instead to send thank you notes?

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TAGS: California Lieutenant Governor, eminent domain, foreclosure, Gavin Newsom, loan modification, mortgage loans, principal writedown, San Bernadino

### Servicemembers' Civil Relief Act Protections Extended