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THE 2013 MORTGAGE SERVICING FINAL RULES

DENYSE JONES

While there is plenty of blame to spread around for the 2008 financial crisis, mortgage servicers, in particular, have taken the brunt of it. The mortgage industry is the single largest market for consumer financial products and services, with approximately \$10.3 trillion in outstanding loans¹ for mortgages on homes, which are typically consumers' most significant purchases. Thus, mortgage servicers play a vital role in the mortgage market.² Consumers, however, do not have the luxury of choosing their mortgage servicer or taking their business elsewhere if dissatisfied with the service received. Poor customer service, often the result of inadequate staffing and training, is common for servicers with a high-volume, low margin business model. Additionally, enhancement of revenue streams through the collection of a myriad of fees, lean staffing, and incomplete documentation resulting in communication breakdowns further undermines a robust customer-service structure believed necessary to protect consumers, and more particularly, delinquent consumers.³ The Consumer Protection Finance Bureau (the "CFPB") attempts to shake things up.

The 2013 Mortgage Servicing Rules are designed to curtail the abusive practices identified after the 2008 financial crisis by amending Regulation X, which implements the Real Estate Settlement Procedures Act ("RESPA"), and Regulation Z, which implements the Truth in Lending Act ("TILA"). The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank"), a sweeping piece of legislation designed to overhaul the nation's financial system, amended RESPA and TILA, and created the CFPB to which rulemaking authority for RESPA and TILA have been transferred.⁴ The CFPB amended Regulation X and Regulation Z and implemented a commentary setting forth the official interpretation of each regulation.⁵ These rules became effective on January 10, 2014.⁶

RESPA is a consumer protection statute enacted in response to findings that significant reform in the real estate settlement process was needed to ensure consumers are provided with greater and more timely information on the nature and costs of the residential real estate settlement process and are protected from unnecessarily high settlement charges caused by certain abusive practices.⁷ In 1990, the scope of RESPA expanded to cover servicers of federally related mortgage loans.⁸ Section 6 imposed new obligations on servicers.⁹ Disclosures regarding whether the lender intended to service the loan or transfer the servicing rights were required for the first time. In addition, servicers were obligated to respond to borrowers' qualified written requests.¹⁰ The recent Dodd-Frank amendments to RESPA establish requirements ensuring servicers have a reasonable basis for undertaking actions that may harm borrowers and establish servicers' duties to borrowers with respect to federally related mortgage loans.¹¹

TILA was enacted based on findings that informed use of credit resulting from consumers' awareness of the costs of credit would enhance economic stability and competition among consumer credit providers.¹² TILA, which expressly applies to loans secured by homes, is designed to promote the informed use of consumer credit by requiring disclosures about its costs and terms and to protect consumers against unfair



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credit billing practices.¹³ TILA requires, among other things, interest rate adjustment disclosures on ARMs, periodic statements, and prompt crediting.¹⁴

The CFPB is not the only player regulating or otherwise weighing in on servicer obligations. The National Mortgage Settlement of the 2010 action brought by the federal government and forty-nine state attorneys general against Bank of America, JP Morgan Chase, Wells Fargo, Citi, and Alley Financial/GMAC Mortgage, the nation's five largest servicers, obligates the defendant-servicers to comply with settlement terms, providing additional consumer protection to borrowers.¹⁵ The Office of the Comptroller of Currency and the Federal Housing Finance Agency have issued guidance on servicing and loan modifications.¹⁶ States are involved as well. For example, the 2012 California Homeowner Bill of Rights sets forth requirements regarding evaluations of borrowers for loss mitigation before commencing the foreclosure process.¹⁷ Navigating all of these requirements, which overlap in some areas and possibly conflict in others, will present its challenges. The CFPB and other federal agencies have discussed developing national mortgage servicing standards through interagency regulations and guidance.¹⁸ For now, however, servicers must focus on complying with the 2013 Mortgage Servicing Rules. A summary of each rule follows.

Section 1024.33 Mortgage Servicing Transfers

Section 1024.33 requires mortgage servicers to provide to any person applying for a first lien mortgage loan, within thirty days of the application, a servicing disclosure, setting forth whether servicing will be assigned, sold, or transferred.¹⁹ When the decision to transfer servicing is made, the transferor servicer, at least fifteen days before the effective date, and the transferee servicer, not more than fifteen days after the effective date, must notify the borrower of the transfer.²⁰ Certain enumerated transfers, including transfers between affiliates, are exempt.²¹ The notices must include the effective date of the transfer, contact information for the transferor and transferee servicers, the date when the transferor servicer will cease accepting payments, whether the transfer will affect the availability of insurance, and a statement that the transfer does not affect any terms or conditions of the mortgage loan.²²

Payments received by the transferor servicer during the sixty days from the effective date will not be treated as late for any purpose.²³ The transferor servicer can either forward the misdirected payment to the transferee servicer or return it to the borrower with information regarding the transferee servicer.²⁴ With the exception of notice requirements to insurance companies or taxing authorities, compliance with section 1024.34 is deemed compliance with state law.²⁵

Section 1024.34 Timely Escrow Payments and Treatment of Escrow Account Balances in General

Section 1024.34(a) provides that if the terms of any federally related mortgage require the borrower to make payments into an escrow account for payment of taxes, insurance premiums and other charges, the servicer shall make timely payments when due to avoid a penalty.²⁶ If there is a balance in the borrower's escrow account at the time the loan is paid off, the servicer shall either return the balance within twenty days of the payoff or, with the borrower's oral or written consent,²⁷ credit any amount within servicer's control to a similar account for a new mortgage loan

with the same lender (i.e., the lender to whom the prior loan was initially payable, a lender that is the owner or assignee of the prior loan or a lender that uses the same servicer that serviced the prior loan to service the new loan).²⁸ Servicers can net escrow funds against the payoff, which alleviates, in part, the borrower's financial burden to pay off the mortgage loan.²⁹

Section 1024.35 Error Resolution Procedures and Section 1024.36 Requests for Information

Notices of errors and requests for information were previously handled jointly as qualified written requests.³⁰ Under the new rule, they will be treated separately. However, to avoid potential confusion and frustration posed by different procedures, the CFPB promulgated comprehensive, parallel requirements for each scenario that are consistent with the spirit of the original qualified written requests requirements.³¹

Similar to qualified written requests, these requirements are applicable to written requests only.³² The CFPB recognizes that the inclusion of oral requests would increase servicers' obligations exponentially, given that the majority of borrowers assert claims orally. Thus, oral requests are excluded from the scope of these requirements. In exchange, however, the scope of covered errors is broader and servicers are obligated to maintain policies and procedures reasonably designed to ensure that the servicer can investigate, respond to, and, as appropriate, make corrections in response to, complaints asserted by a borrower.³³ Servicers can designate a specific office to handle complaints and request intakes, thereby facilitating timely responses by having notices sent directly to the office qualified to handle them.³⁴

Covered errors relate to standard servicing duties, including failure to accept conforming payments, misapplication of payments, failure to make escrow disbursements, failure to provide accurate pay-off balances, imposition of unjustified fees, and failure to suspend foreclosure sales upon borrowers' submission of complete loss mitigation applications.³⁵ There is a catchall category to allow for flexibility to reach other issues currently unknown.³⁶ Matters unrelated to servicing, e.g., origination, underwriting, and a subsequent sale or securitization of a mortgage loan, are excluded because mortgage servicers typically are not in a position to address these matters.³⁷

Acknowledgement of receipt of notice must be sent within five days, a reduction from the twenty-day notice for qualified written requests.³⁸ The CFPB justifies this reduction because the contents of the acknowledgement are minimal.³⁹ A servicer must correct the error, investigate and notify the borrowers if

it determines that no error exists, or correct additional errors identified during the investigation within seven days for errors related to payoff balances, within thirty days or before foreclosure for foreclosure errors, and within thirty days for all other errors.⁴⁰ Duplicative, overbroad, and untimely notices are excluded from this requirement.⁴¹ Servicers cannot charge for responding to error notices or furnish adverse information to a consumer reporting agency for sixty days, but are allowed to pursue remedies under applicable law.⁴² Prohibiting servicers' pursuit of remedies while error notices are pending would undermine a purpose of RESPA—responsiveness to complaints and requests.⁴³

Similar conditions, timelines, and exclusions exist for responses to requests for information.⁴⁴

Section 1024.37 Force-Placed Insurance

Frequent improper placement⁴⁵ and its ability to drive struggling borrowers into default has caused force-placed insurance, which provides less coverage at a higher cost, to become a consumer protection concern.⁴⁶ Before charging borrowers for force-placed insurance, servicers must have a "reasonable basis to believe that the borrower has failed to comply with the mortgage loan contract's requirement to maintain hazard insurance" and send the required notices.⁴⁷ This belief can arise from information received from the borrower or the borrower's insurance provider, or from the absence of information, along with reasonable efforts to ascertain the status of the borrower's hazard insurance.⁴⁸ The CFPB recognizes that there will be occasions when servicers incorrectly conclude that there is a reasonable basis to charge for force-placed insurance.⁴⁹ Violation of this requirement, however, turns on whether a servicer had a reasonable belief at the time charges were assessed.⁵⁰

During the forty-five day notice period, servicers must provide borrowers with initial, reminder, and renewal notices.⁵¹ The requirement identifies the timing, format, and the exclusive contents of each notice.⁵² Additional initial, reminder, and renewal notices can be included on separate paper in a given transmittal.⁵³ Servicers do not have to bear the cost of the force-placed insurance during the forty-five-day notice period.⁵⁴ Charges may be retroactive to the first day the borrower's insurance lapsed.⁵⁵

Force-placed insurance must be bona fide and reasonable.⁵⁶ The CFPB included this limitation on charges so that "servicers do not try to inflate the already high cost of force-placed insurance by assessing charges to borrowers that are not for services actually performed, do not bear a reasonable relationship

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to the servicer's cost of providing the service, or are prohibited by applicable law."⁵⁷ Upon receipt of evidence demonstrating the borrower's hazard insurance coverage, a servicer has fifteen days to cancel force-placed insurance and refund borrower all fees paid for any period of overlapping coverage.⁵⁸

Section 1024.38 General Servicing Policies, Procedures and Requirements

The CFPB believes consumer protection problems across the mortgage servicing industry arise from servicers' lack of investment in resources and infrastructure necessary to service large numbers of delinquent loans, and that borrowers have suffered as a result of servicers' lack of adequate policies and procedures to provide servicer personnel with appropriate borrower information.⁵⁹ Thus, general servicing policies, procedures, and requirements are necessary to achieve the consumer protection purposes of RESPA.⁶⁰

Section 1024.38 obligates servicers to maintain objective-based policies and procedures that are reasonably designed to achieve four objectives—accessing and providing timely and accurate information, properly evaluating loss mitigation applications, facilitating oversight of and compliance by service providers, and facilitating transfer of information during servicing transfers.⁶¹ The CFPB gives servicers flexibility to design procedures that are reasonable in light of the size, nature and scope of their operations, rather than create a prescriptive one-size-fits-all regime.⁶² Recognizing concerns that flexible objective-based standards would create compliance challenges and expose servicers to significant litigation risk, a private right of action for single failures is not available.⁶³ Rather, the CFPB believes compliance can be enforced by federal regulators who will supervise and work with servicers to assure servicers have implemented effective systems to protect consumers and manage servicing portfolios.⁶⁴ Servicers must retain records on a loan for one year following discharge or transfer of the servicing and maintain a servicing file with specified documentation on each loan.⁶⁵

Section 1024.39 Early Intervention Requirements for Certain Borrowers

The early intervention notices set out in section 1024.39 are not expressly required under Dodd-Frank, but are designed to achieve the consumer protection purposes of RESPA—avoidance of unwarranted or unnecessary costs and facilitation of review of borrowers for foreclosure options.⁶⁶ The CFPB's early intervention goal is to ensure that borrowers have a meaningful opportunity to avoid foreclosure.⁶⁷

By day thirty-six of delinquency, the servicer shall establish, or make good faith efforts to establish, live contact to discuss loss mitigation, if appropriate.⁶⁸ Good faith efforts may include telephoning the borrower on more than one occasion or sending the borrower correspondence encouraging him or her to establish live contact with the servicer.⁶⁹ By day forty-five of delinquency, the servicer must send the borrower a written notice encouraging him or her to contact the servicer and providing the servicer's contact information, a description of available loss mitigation options, instruction on how to obtain more information, and the manner to access the CFPB or HUD lists of homeownership counselors or counseling organizations.⁷⁰

Section 1024.40 Continuity of Contact

Servicers, no later than the forty-fifth day of delinquency, must assign borrowers a person who is available via telephone to respond to inquiries in a timely manner and discuss loss mitigation until the borrower has made two consecutive mortgage payments, without incurring a late charge, under a permanent loss mitigation agreement.⁷¹ The enumerated tasks include providing accurate information regarding loss mitigation options, actions the borrower must complete to be considered for loss mitigation, providing a complete record of the borrower's payment history, and providing information about how to submit a notice of error or an information request.⁷² Successful compliance with this rule will require adequately trained staff that can handle the needs of borrowers in a timely manner. Violations will not give rise to civil liability.⁷³

Section 1024.41 Loss Mitigation Procedures

Section 1024.41 is designed to ensure borrowers receive timely information regarding loss mitigation and that applications are reviewed timely, to prohibit servicers from completing foreclosures until loss mitigation discussions have terminated, and to set timelines for evaluation that could be completed without the need to suspend foreclosures.⁷⁴ Notably, this section does not obligate servicers to offer borrowers any specific loss mitigation option.⁷⁵

Within five days of receiving a loss mitigation application, servicers must acknowledge receipt in writing and notify borrowers whether the application is complete.⁷⁶ If incomplete, servicers must identify the additional information needed and the response date, based on one of four benchmarks.⁷⁷ Servicers must evaluate a complete application within thirty days of receipt if a foreclosure sale is more than thirty-seven days out and identify all loss mitigation options available to the borrower.⁷⁸

If the application is denied, the servicer must state the specific reasons for denial and detail the appeal process. Depending on the foreclosure status, borrowers must respond within seven to fourteen days.⁷⁹ Foreclosure proceedings cannot be initiated until the 121st day of delinquency.⁸⁰ Submission of a complete loss mitigation application will halt the foreclosure process until servicer has notified the borrower of ineligibility, the borrower rejects all options, or the borrower fails to perform under a loss mitigation agreement.⁸¹ Denials can be appealed if the application was received more than ninety days before a foreclosure sale.⁸² Borrowers have fourteen days after receipt of loss mitigation options to appeal, which must be reviewed by different personnel.⁸³

Section 1026.20 Disclosure Requirements Regarding Post Consummation Events (ARM Disclosures)

Initial interest rate adjustments must be disclosed at least 210 days before their effective date.⁸⁴ Subsequent rate adjustments resulting in a payment change must be disclosed at least sixty days (previously twenty-five days) before the first new payment is due.⁸⁵ The additional time will afford consumers a greater opportunity to adjust finances or pursue refinancing or loss mitigation.⁸⁶ Based upon a forty-five-day look-back period (when index value for rate adjustment is selected), a thirty-day billing cycle, and a three to ten-day verification period to confirm the index rate, CFPB determined that a sixty-day notice period is feasible.⁸⁷ There are two exceptions to the sixty-day notice requirement. The minimum notice period is twenty-five days when (1) the first adjustment is within sixty days of consummation and the rate disclosed at consummation was an estimate, and (2) the first adjustment has a look-back period of less than forty-five days.⁸⁸ The initial and subsequent disclosures must include, among other information, the effective date of the adjustment, when future adjustments will occur, the current and new interest rates, how the rate was determined, any limits on the interest rate or payment increases at each interest rate adjustment and over the life of the loan, a statement that the new payment will not be allocated to loan principal, and the circumstances under which a prepayment penalty may be imposed.⁸⁹

Section 1026.36 Prohibited Acts or Practices in Connection with Credit Secured by a Dwelling

Servicers must promptly credit periodic payments, defined as payments in the amount to cover principal, interest, and escrow (though not late fees, other fees or non-escrow payments) to a consumer's account as of the date of receipt unless delay will not result in a late fee or negative credit reporting.⁹⁰ Any

servicer that retains a partial payment, defined as a payment less than the periodic payment, shall disclose the amount held, and upon accumulation of an amount sufficient to cover a periodic payment, treat such funds as periodic payment.⁹¹ Servicers must provide payoff statements within seven days after receipt of a written request for such information.⁹²

Section 1026.41 Periodic Statements for Residential Mortgage Loans

Periodic statements provide an accounting of payments received since the previous periodic statement and remind consumers of upcoming charges.⁹³ To achieve these purposes, the periodic statement must be received during the narrow window after the last payment was received and before the next payment is due.⁹⁴ Thus, servicers are required to deliver or mail the periodic statement in a reasonably prompt time, interpreted to be four days after the close of the courtesy period of the previous billing cycle.⁹⁵ For each billing cycle, servicers must provide a periodic statement that contains, among other things, the amount due and an explanation thereof, a past payment breakdown, and transaction activity and account information, including outstanding principal balance and current interest rate.⁹⁶ Delinquency information must be included for consumers more than forty-five days delinquent.⁹⁷ Statements can be sent in writing or electronically.⁹⁸ While consumers cannot opt out of periodic statements altogether, they can opt out of receiving notification that their statements are ready.⁹⁹

Conclusion

As evidenced above, consumer protection has been greatly enhanced by the 2013 Mortgage Servicing Rules. Essentially, these rules require servicers to disclose more in less time, which will likely lead to higher servicing costs. While these rules are significant, more are likely to come, given the fluidity of the mortgage market, the interplay of these rules on other statutes,¹⁰⁰ and the impact on borrowers. Thus far, the CFPB has primarily taken an objective-based approach that permits servicers to develop policies and procedures appropriate for their operations. Thus, there is room for the CFPB to be even more prescriptive in its regulations. The one variable that Congress cannot regulate, however, is the borrower. In order for these rules to achieve their intended purposes, delinquent borrowers will have to feel empowered to do their part by timely responding and submitting complete loss mitigation applications. As with all legislation, time will reveal the efficacy of these rules as viewed from the often

differing perspectives of the two primary market participants—consumers and mortgage servicers. ■

Endnotes

1 Mortgage Servicing Rules under the Real Estate Settlement Act (Regulation X), 78 Fed. Reg. 10696, 10699 (Feb. 14, 2013) (to be codified at 12 C.F.R. pt. 1024).

2 *Id.*

3 The abusive practices are viewed as a large servicer problem. Small servicers, defined as servicers that service 5,000 or fewer mortgage loans, for all of which the servicer (or an affiliate) is the creditor or assignee or a Housing Finance Agency, often operate under a high-touch customer-service model, notably different from their larger counter-parts. Mortgage Servicing Rules under the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 10902, 11008 (Feb. 14, 2013) (to be codified at 12 C.F.R. pt. 1026). As a result, the CFPB exempted small servicers from compliance with sections 1024.38, 1024.39, 1024.40 and reduced the requirements for small servicers in sections 1024.37 and 1026.41.

4 RESPA Mortgage Servicing Rules, 78 Fed. Reg. at 10702; TILA Mortgage Servicing Rules, 78 Fed. Reg. at 10909.

5 RESPA Mortgage Servicing Rules, 78 Fed. Reg. at 10876-99; TILA Mortgage Servicing Rules, 78 Fed. Reg. at 11004-21.

6 RESPA Mortgage Servicing Rules, 78 Fed. Reg. at 10696; TILA Mortgage Servicing Rules, 78 Fed. Reg. at 10902.

7 12 U.S.C. § 2601(a).

8 Publ. L No. 101-625, 104 Stat. 4079 (1990), § § 941-42.

9 RESPA Mortgage Servicing Rules, 78 Fed. Reg. at 10702.

10 *Id.*

11 *Id.* at 10709.

12 TILA Mortgage Servicing Rules, 78 Fed. Reg. at 10908.

13 15 U.S.C. §§ 1601(a) & 1638a.

14 15 U.S.C. § 1638.

15 RESPA Mortgage Servicing Rules, 78 Fed. Reg. at 10701.

16 *Id.* at 10702.

17 *Id.* at 10703.

18 *Id.* at 10702.

19 *Id.* at 10876-77.

20 *Id.* at 10877.

21 RESPA Mortgage Servicing Rules, 78 Fed. Reg. at 10877.

22 *Id.*

23 *Id.*

24 *Id.*

25 *Id.*

26 RESPA Mortgage Servicing Rules, 78 Fed. Reg. at 10877.

27 *Id.* at 10736.

28 *Id.* at 10877-78.

29 *Id.* at 10735.

30 *Id.* at 10736-37.

31 RESPA Mortgage Servicing Rules, 78 Fed. Reg. at 10736.

32 *Id.* at 10738; 10753-54.

33 *Id.* at 10738.

34 *Id.* at 10744, 10878.

35 *Id.* at 10878.

36 *Id.* at 10744, 10878.

37 RESPA Mortgage Servicing Rules, 78 Fed. Reg. at 10740.

38 *Id.* at 10745, 10878.

39 *Id.* at 10745.

40 *Id.* at 10878-89.

41 *Id.* at 10879.

42 *Id.*

43 *Id.* at 10752.

44 RESPA Mortgage Servicing Rules, 78 Fed. Reg. at 10879-80.

45 *Id.* at 10762.

46 *Id.* at 10763.

47 *Id.* at 10880.

48 *Id.* at 10765.

49 *Id.* at 10766.

50 RESPA Mortgage Servicing Rules, 78 Fed. Reg. at 10766.

51 *Id.* at 10880-82.

52 *Id.*

53 *Id.*

54 *Id.* at 10881-82.

55 *Id.* at 10767, 81-82.

56 RESPA Mortgage Servicing Rules, 78 Fed. Reg. at 10882.

57 *Id.* at 10775.

58 *Id.* at 10882.

59 *Id.* at 10777.

60 *Id.*

61 *Id.* at 10882-83.

62 RESPA Mortgage Servicing Rules, 78 Fed. Reg. at 10779.

63 *Id.*

64 *Id.*

65 *Id.* at 10883.

66 *Id.* at 10787.

67 *Id.* at 10789.

68 RESPA Mortgage Servicing Rules, 78 Fed. Reg. at 10883.

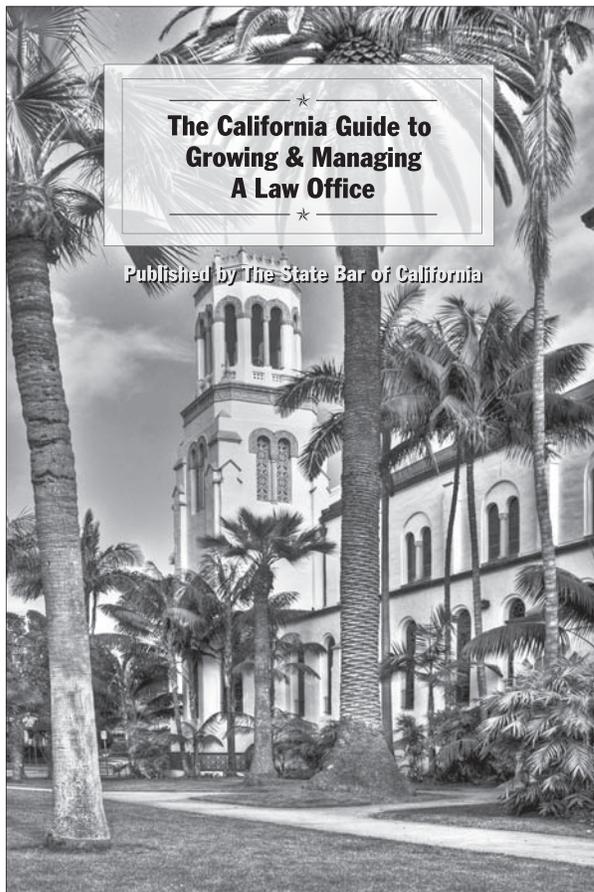
69 *Id.* at 10894

70 *Id.* at 10883.

- 71 *Id.* at 10883-84.
- 72 *Id.* at 10884.
- 73 *Id.* at 10814.
- 74 RESPA Mortgage Servicing Rules, 78 Fed. Reg. at 10815.
- 75 *Id.* at 10884.
- 76 *Id.*
- 77 *Id.*
- 78 *Id.*
- 79 *Id.* at 10885.
- 80 RESPA Mortgage Servicing Rules, 78 Fed. Reg. at 10885.
- 81 *Id.*
- 82 *Id.*
- 83 *Id.*
- 84 TILA Mortgage Servicing Rules, 78 Fed. Reg. at 11005-06.
- 85 *Id.* at 11004-05.
- 86 *Id.* at 10924.
- 87 *Id.*
- 88 *Id.* at 11005.
- 89 *Id.*
- 90 TILA Servicing Rules, 78 Fed. Reg. at 11004-05.
- 91 *Id.* at 11006-07.
- 92 *Id.* at 11007.

- 93 TILA Mortgage Servicing Rules, 78 Fed. Reg. at 10961.
- 94 *Id.*
- 95 *Id.* at 11020.
- 96 *Id.* at 11007-08.
- 97 *Id.* at 11008.
- 98 *Id.* at 11020.
- 99 TILA Mortgage Servicing Rules, 78 Fed. Reg. at 10963.

100 In October, the CFPB clarified compliance requirements with the 2013 Mortgage Servicing Rules in relation to the Fair Debt Collection Practices Act (the “FDCPA”) and bankruptcy law. Amendments to the 2013 Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 62993, 62995 (Oct. 23, 2013) (to be codified at 12 C.F.R. pts. 1024 and 1026): Servicers are provided a safe harbor from liability for responding to communications expressly required by Dodd-Frank after a borrower has sent a cease communications request under the FDCA. *Id.* In addition, servicers are exempt from sections 1026.20(c) and 1024.39 communications after borrowers properly invoke the cease communications request, and from sections 1024.39 and 1026.41, while borrowers are in bankruptcy. *Id.*



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