

July 10, 2017

By electronic delivery to: www.regulations.gov

Monica Jackson
Office of the Executive Secretary
Bureau of Consumer Financial Protection
1275 First Street, N.E.
Washington, DC 20002

Re: Docket No. CFPB-2017-0012
Request for Information Regarding 2013 Real Estate Settlement Procedures Act
Servicing Rule Assessment

Dear Ms. Jackson:

The American Bankers Association (“ABA”)¹ appreciates the opportunity to comment on the Bureau of Consumer Financial Protection’s (“CFPB”) plan² to assess the 2013 RESPA Servicing Rule. The CFPB is conducting its assessment of the RESPA Servicing Rule pursuant to Section 1022(d) of the Dodd-Frank Act. Section 1022(d) requires that the CFPB evaluate each significant rule it issues and publish a report of that assessment within five years of the rule’s effective date. In the case of the Servicing Rules, the CFPB must issue its report by January 10, 2019.

ABA offers the following recommendations regarding the CFPB’s assessment:

- **Scope.** The CFPB should incorporate all of the Servicing Rules into its review, including the rules that implement the Truth and Lending Act (the “TILA Rules”) and the amendments that the CFPB adopted to the Servicing Rules in 2016 (the “2016 Amendments”).
- **Impacts to Consumers.** When evaluating potential borrower benefits, the CFPB should study whether the Rules improved the response and engagement of delinquent borrowers. The CFPB should also evaluate the effectiveness of model disclosures and impacts to a borrower’s ability to pursue a preferred loss mitigation option. In addition,

¹ The American Bankers Association is the voice of the nation’s \$17 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard \$13 trillion in deposits and extend more than \$9 trillion in loans.

² 82 Fed. Reg. 21952 (May 11, 2017).

the CFPB should take the National Mortgage Settlement into consideration when weighing the extent to which the Servicing Rules achieved their stated objectives.

- Market Impacts. ABA also recommends that the CFPB analyze how the Servicing Rules affected the servicing market, including changes in business models of market participants, the increased cost to service mortgage loans, and changes in valuations and sales of mortgage servicing rights (“MSRs”).
- Lessons Learned and Opportunities for Improvement. Finally, ABA recommends that the CFPB utilize the assessment as an opportunity to evaluate and document the various lessons learned from the adoption and rollout of the Servicing Rules. We also identify several ways that the Servicing Rules can be improved.

I. Background

Section 1022(d) of the Dodd-Frank Act requires that the CFPB evaluate, among other relevant factors:

- The effectiveness of the Servicing Rules in meeting the purposes and objectives of the Dodd-Frank Act; and
- The CFPB’s specific goals in implementing the Servicing Rules.

In addition, Section 1021 sets forth the Bureau’s objectives, which are to ensure that:

- Consumers are provided with timely and understandable information to make responsible decisions about financial transactions;
- Consumers are protected from unfair, deceptive, or abusive acts and practices and from discrimination;
- Outdated, unnecessary, or unduly burdensome regulations are regularly identified and addressed in order to reduce unwarranted regulatory burdens;
- Federal consumer financial law is enforced consistently, without regard to the status of a person as a depository institution, in order to promote fair competition; and that
- Markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation.

The assessment must “reflect available evidence and any data that the CFPB reasonably may collect.” In addition, prior to publishing the assessment, the CFPB must “invite public comment on recommendations for modifying, expanding, or eliminating” the rule being assessed.

II. Scope and Timing of the Assessment

ABA offers several comments below regarding the scope and timing of the Servicing Rule assessment. The CFPB is conducting a parallel review of the ATR/QM Rule. Even though these regulatory assessments are independent projects, we recommend that the CFPB take into consideration the trickle-down effect of the underwriting requirements of the ATR/QM Rules on mortgage servicing.

For example, some lenders no longer originate mortgages due to increased compliance costs and/or legal and regulatory uncertainty. Some of these lenders stopped originating and servicing loans, while others elected to continue to service existing mortgages even though they are not making new loans. In the latter case, new borrowers in those communities will no longer have their mortgages serviced by the local bank. Thus, while the ATR/QM Rules and the Servicing Rules are separate rulemakings, the CFPB should take a broad view of their collective impacts. Furthermore, we anticipate that the new ATR/QM Rules will curtail the need for widespread loss mitigation for financially distressed borrowers.

We also recommend that the CFPB take a comprehensive approach to reviewing the Servicing Rules. In particular, the CFPB’s assessment should take all of the Servicing Rules into consideration – including the TILA Servicing Rules and the 2016 Amendments that have not yet gone into effect.

A. Evaluate the Servicing Rules in Their Entirety

1. TILA Rules

On February 14, 2013, the CFPB issued the “Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act” (the “RESPA Servicing Rules”). That same day, the CFPB also issued “Mortgage Servicing Rules Under the Truth in Lending Act” (the “TILA Servicing Rules”). Collectively, these rulemakings are referred to as the Servicing Rules.

Section 1022(d) of Dodd-Frank requires the CFPB to assess each significant rule or order adopted by the Bureau under Federal consumer financial law. The CFPB has determined that the RESPA Servicing Rules constitute a significant rule for this purpose, but that the TILA Servicing Rules do not.

CFPB intended that the RESPA and TILA Servicing Rules work together as a collective whole to provide borrowers with certain procedural rights and remedies as well as information about their mortgage loans. The servicing processes and protections established in the Rules should be viewed as creating a comprehensive set of protections that apply over the life of a borrower's mortgage loan; they should not be viewed as separate rulemakings for purposes of the CFPB's assessment. We also note that the Servicing Rules were issued simultaneously and had the same January 10, 2014 effective date. In addition, on five occasions, the CFPB issued simultaneous amendments or interpretations to the RESPA and TILA Servicing Rules. Without reviewing the Servicing Rules in their entirety, the CFPB's assessment will present an incomplete analysis of the benefits, costs, and impacts of the regulations.

2. 2016 Amendments

Since 2013, the CFPB has issued seven amendments and interpretive rules to the Servicing Rules. Most recently, the CFPB adopted sweeping revisions that will go into effect in October 2017 and April 2018 (the "2016 Amendments").³ These comprehensive changes address successors in interest, the definition of delinquency, information requests, force-placed insurance, early intervention, loss mitigation, prompt payment crediting, periodic statements, and the Small Servicer exemption. The 2016 Amendments expressly prohibit servicers from early implementation of many of the new provisions.

We understand that the CFPB is launching its assessment of the servicing rules now—before the upcoming effective dates—in order to comply with Dodd-Frank's January 2019 reporting deadline. While this approach is logical from a project planning perspective, we are concerned that excluding these amendments from the regulatory review would not provide a complete picture of the costs and benefits of the Servicing Rules. Likewise, omitting the amendments would not help to assess whether the Rules meet the purposes and objectives of Dodd-Frank and the goals articulated by CFPB.

For these reasons, we urge the CFPB to revise its assessment plan to incorporate an evaluation of the new amendments. To accomplish this, and to stay on track with the reporting deadline, the CFPB could begin its evaluation in 2017 and use the second half of 2018 to incorporate a review of the 2016 Amendments.

B. Timing of the Assessment Plan

³ The regulatory revisions were issued on seven different dates. In some cases, the CFPB published separate *Federal Register* Notices for changes to Regulation X and Regulation Z. As a result, one could argue that the CFPB actually published 12 amendments and interpretive rules since releasing the initial set of Servicing Rules in 2013.

We recognize that the CFPB issued its assessment plan for comment in May 2017 in order to provide ample time for the CFPB to gather data and conduct the assessment. However, it is important that the CFPB be aware that the timing of its request for input is not ideal.

Servicer personnel are focused on building systems to implement the 2016 Amendments, which go into effect three months and nine months from now. Many of these rules are very technical and challenging to operationalize. As a result, providing thoughtful input on CFPB's assessment methodology has not been a top priority for servicer personnel who are leading implementation efforts, particularly since the CFPB does not anticipate that the assessment report will include recommendations for modifying the Rules.

III. Impacts to Consumers

The CFPB intends that the assessment will emphasize provisions of the RESPA Servicing Rule that are of particular relevance to delinquent borrowers. ABA recommends that the CFPB incorporate the following considerations into this aspect of the assessment.

A. Assess Borrower Benefits

ABA urges the CFPB to take the National Mortgage Settlement into consideration when evaluating borrower benefits and the overall effectiveness of the Servicing Rules. In particular, we note that the CFPB adopted the Servicing Rules after 49 state attorneys general, the District of Columbia, and the federal government finalized this joint state-federal settlement with the country's largest mortgage servicers. In fact, many provisions of the Servicing Rules parallel or are patterned after the National Mortgage Settlement. As a result, we recommend that the CFPB evaluate and quantify the benefits that the Servicing Rules provided to borrowers whose banks were subject to the National Mortgage Settlement before the Servicing Rules went into effect.

Along these same lines, we also suggest that the CFPB evaluate the extent to which the Servicing Rules benefitted borrowers whose loans the servicer held in portfolio. In these situations, the borrower's interest is aligned with the interest of the lender/servicer. Therefore, we recommend that the CFPB consider key data, such as the percentage of servicers that service loans for their own portfolio, the percentage of mortgage loans outstanding that are serviced for lender/servicers' portfolios, and whether the costs to these servicers outweigh the benefits that the Servicing Rules provide in this situation, particularly considering that the lender/servicer owns 100 percent of the credit risk if the loan defaults.

B. Assess Borrower Engagement and Promote Consistent Federal Policy

For the servicing rules to be effective and helpful, they must accommodate changes in consumer preferences for using various digital communications platforms, such as tablets and smart phones. The ability of servicers to assist financially troubled borrowers hinges on borrower engagement; this is what drives the loss mitigation process. Federal policy must allow—and encourage—servicers to provide information via communications channels that will be most likely to encourage borrowers to read the material and respond when necessary. Accordingly, ABA recommends that the CFPB:

- Evaluate whether the Servicing Rule’s disclosure and procedural requirements have meaningfully improved borrower engagement;
- Evaluate whether the required content and format of servicing disclosures are compatible with modern communications channels;
- Assess the “pull through” rate for delinquent borrowers and determine how borrower response and engagement rates can be improved; and
- Take a leadership role in coordinating with other federal agencies to harmonize federal policy regarding how servicers communicate with delinquent borrowers. In particular, we recommend that the CFPB coordinate with the Federal Communications Commission (“FCC”) to better balance the CFPB’s requirement to contact distressed borrowers with the FCC’s restrictions on contacting borrowers on their mobile telephones. We also recommend that the CFPB lead coordination with other regulatory stakeholders, such as FHA, VA, USDA, and FHFA to ensure consistency in servicing standards, particularly with respect to timelines for borrower communications and related procedural requirements.

C. Assess Impact on Borrower Choice

ABA also recommends that the CFPB analyze the extent to which the Servicing Rules have impacted the ability of borrowers to pursue their preferred loss mitigation option in an efficient manner.

Under the Servicing Rules, a servicer may not stop collecting documents and information for any loss mitigation option based solely upon the borrower’s stated preference for a particular loss mitigation alternative. However, a servicer may stop collecting documents and information for any loss mitigation option based on the borrower’s stated preference in conjunction with other information, as prescribed by any requirements established by the owner or assignee.⁴

⁴ Supplement I to Part 1024 – Official Bureau Interpretations, Comment 41(b)(1)-1.

ABA understands that the CFPB's objective is to ensure that borrowers receive information regarding the full range of loss mitigation options available. However, we are concerned that the pendulum may have swung too far on this aspect of the Servicing Rules.

Short sales and deeds-in-lieu of foreclosure are unlikely to be financially favorable for the lender. However, if a borrower has expressed a desire for a particular loss mitigation alternative, it will not always be beneficial for the servicer to continue to request documents and information to support a loss mitigation application in spite of the borrower's request. Some situations just do not need to be run through the gambit (e.g., a job loss, serious illness, or a borrower who approaches a servicer with a short sale offer in-hand). In such circumstances, borrowers do not understand why they continue to receive information and document requests from the servicer after requesting a particular loss mitigation option. This aspect of the Servicing Rules creates borrower confusion and dissatisfaction and does not necessarily enhance the borrower experience. We request that the CFPB permit a more streamlined approach in these situations.

D. Evaluate the Effectiveness of Model Forms and Issue Additional Forms Where Needed

CFPB intended that the Servicing Rules provide borrowers with information about their mortgage loan accounts and help them avoid unnecessary costs and fees. To accomplish these goals, the CFPB mandated certain consumer disclosures and provided several model forms to help facilitate compliance. Servicers who adopt the model forms will receive the benefit of a safe harbor. While servicers generally welcome the model forms and the protections of the safe harbor, some of the forms could be improved. In particular:

- Servicing Transfer Disclosure. Servicing transfer disclosures assume a sophisticated understanding by consumers and present unclear information regarding changes that consumers may experience after the transfer.
- Force-Placed Insurance Disclosures. Our members have also expressed concern that the tone of the force-placed insurance letters is too harsh. It is not uncommon for borrowers to be surprised and angered by the tone of these letters. Because few servicers are willing to forego the safe harbor provided by the model form, CFPB should revisit the content of the force-placed insurance disclosure.

In addition to revising certain model forms, ABA recommends that the CFPB create new model periodic statement forms to address the following circumstances:

- Trial period plans;

- Loans that have been accelerated;
- Loans in active bankruptcy but also on a modification plan; and
- Loans that have been charged off.

IV. Market Impacts

In addition to assessing borrower outcomes, ABA recommends that the CFPB analyze how the Servicing Rules have impacted the servicing market, including the characteristics and business models of market participants, the increased cost to service mortgage loans, and changes in MSR valuations and sales. Evaluating the market impacts of the Servicing Rules will be key to providing a comprehensive review of these regulations.

A. Analyze Regulatory Disincentives to Service Mortgages

The Mortgage Bankers Association has compiled detailed data on the cost to service mortgage loans. Between 2008 and 1H2016, the cost to service performing loans increased 286.4% and the cost to service non-performing loans increased 423.2%. In addition to studying actual costs, CFPB should evaluate whether the Servicing Rules created disincentives for some servicers to service mortgages – particularly delinquent loans. For example, as noted above, some banks have exited mortgages completely (origination and servicing) due to increased cost as well as increased legal and compliance risk. ABA understands that some servicers automatically transfer delinquent loans to specialty servicers for similar reasons. We urge the CFPB to incorporate into its report an assessment of ways in which the Servicing Rules have contributed to disincentives to service mortgage loans and associated shifts in the servicing market, namely, the migration of servicing from banks to specialty servicers.

MSR Sales. The increased cost to service could have other market impacts. For approximately a decade, the United States has enjoyed historically low interest rates. When interest rates are low, the value of MSRs decline due to increased prepayment speeds. As a result, some financial institutions may have decided to hold their MSRs with the goal of obtaining a better price as interest rates increase. These institutions may elect to sell their servicing as pricing becomes more favorable in a rising rate environment—particularly in light of the dramatic increase in the cost to service mortgage loans. As the U.S. prepares for rising interest rates, ABA urges the CFPB to monitor MSR sales, including those by small and midsize market participants.

Servicing Transfers & MSR Value. We also recommend that the CFPB study the market impacts of the Bureau's servicing transfer regulations. The CFPB's servicing transfer regulations subject both transferor and transferee servicers to many regulatory requirements

and associated risks. The CFPB should study whether the servicing transfer regulations reduced the liquidity of the MSR market, thereby impairing the value of MSRs that servicers are holding.

V. Lessons Learned and Recommendations for Improvement

The Servicing Rule assessment also presents an opportunity to identify and document lessons learned from the adoption, rollout, and amendments to the Servicing Rules. Topics for study could include:

- Why were seven sets of amendments needed over a three-year period? How could the Rules have been promulgated with more efficiency and fewer revisions?
- How did the CFPB's decision to provide mostly oral, unofficial guidance in lieu of FAQs or other written guidance impact the ability of servicers to obtain interpretations or clarifications from the Bureau? What did this approach mean for smaller servicers who have limited compliance staff available to attend industry meetings?
- How could CFPB have encouraged national and regional third-party service providers to provide timely delivery of products necessary to comply with the Servicing Rules and their subsequent amendments?

Before publishing a report of its assessment, the CFPB must invite public comment on recommendations for modifying, expanding, or eliminating the Servicing Rules. Unfortunately, the CFPB's request for input on its assessment methodology said that the Bureau's report would most likely not include a list of recommendations for modifying the Rules. Nevertheless, ABA offers the following preliminary recommendations for ways to improve the Servicing Rules. We look forward to continuing to work with the CFPB to identify additional recommendations to make the Rules more effective and efficient.

- Successors in Interest. We continue to be concerned with new regulations that require servicers to treat non-obligor successors in interest the same as a borrower for purposes of the Servicing Rules. We urge the CFPB to revisit these requirements in situations where a borrower is still living. These rules are also problematic where a borrower dies intestate.
- "Posse Letters." Some servicers have received numerous Information Requests and Notices of Error that are overly broad. These requests are very labor-intensive and are not an effective way of responding to a consumer. They also take resources away from helping other borrowers. We recommend that CFPB revise the Rules to exclude posse letters from a servicer's Information Request and Error Resolution obligations.

- Rolling Delinquencies. Servicers continue to struggle with situations where borrowers are chronically delinquent but do not ever reach more than 120 days past due. Some servicers accelerate the loan in this situation, but feel that they must re-accelerate the loan if the borrower makes a payment. We urge CFPB to explore this issue further.
- Five-Day Acknowledgment Notice. We also urge CFPB to review the Five-Day Notice. The Servicing Rules require that servicers review a borrower's loss mitigation application and provide the borrower with a written notice stating whether the application is complete or incomplete. The servicer must provide the notice within five business days of receiving the borrower's loss mitigation application. Often, the short period of time limits a comprehensive review from the servicer. This requires a follow-up with the borrower and multiple requests for additional documents. Additionally, parts of this time sensitive process are out of the control of the servicer and the borrower, such as confirming information with government offices or third parties. We recommend that the CFPB evaluate ways to improve the process and timeline by which servicers confirm receipt of loss mitigation applications.

Conclusion

ABA appreciates the opportunity to comment on the CFPB's plan to assess the Servicing Rules. In addition to assessing borrower benefits, we hope that the CFPB will take the opportunity to conduct a comprehensive assessment of the Rules that includes all of the Servicing Rules and their amendments. We also urge the CFPB to evaluate how the Rules impacted the servicing market.

Sincerely,

A handwritten signature in black ink, appearing to read "Krista J. Shonk". The signature is written in a cursive style with a large initial "K".

Krista J. Shonk