Mortgage Regulation Update: New "Qualified Mortgage" and Ability-to-Pay Regulations, and Loan Servicing/Loss-Mitigation Regulations

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2015

ABILITY TO REPAY STANDARDS AND THE "QUALIFIED MORTGAGE" AND THE NEW COMBINED TRUTH IN LENDING AND REAL ESTATE PROCEDURES ACT DISCLOSURE RULES

THE "TRID" (COMBINED TILA-RESPA INTEGRATED DISCLOSURE)

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ABILITY TO REPAY ("ATR") AND THE QUALIFIED MORTGAGE ("QM")

Sections 1411 and 1412 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") amended the federal Truth-in-Lending Act ("TILA") to add a requirement that creditors assess and determine borrowers have the ability to repay certain residential mortgage loans. Creditors must make a reasonable and good faith determination, at or before the closing, that the borrower will have a reasonable ability to repay the loan according to its terms. The changes also provide for a "qualified mortgage" which will be protected from liability under the ability to repay requirements.

The Dodd-Frank Act caused the creation of the Consumer Financial Protection Bureau ("CFPB"), and the CFPB is responsible for implementation of regulations (also referred to as "rules") for TILA and for the Real Estate Settlement Procedures Act ("RESPA"). The CFPB issued the final rule on January 10, 2013, and it was effective on January 10, 2014.

Ability to Repay

The Ability to Repay ("ATR") review must be made for all closed-end consumer credit transactions secured by a dwelling, but it does not apply to HELOCS, timeshare loans, reverse mortgages, bridge loans, construction loans, business purpose loans and to certain loans involving non-profits and community development corporations.

Complying with the Ability to Repay Standard

To comply with the Ability to Repay standard, creditors have two options: either make a mortgage loan that is a "Qualified Mortgage" or the general ATR option which requires that the loan and borrower meet 8 general underwriting factors before the creditor can make the loan. A Qualified Mortgage (or "QM") is presumed to comply with the Ability to Repay rule so it is either a safe harbor from liability or the fact that the creditor made a loan which is a QM gives the lender a rebuttable presumption that the loan and borrower met the ATR standard.

Penalties for Violating the Ability to Repay Standard

Borrowers may be able to recover special statutory damages equal to the sum of all finance charges and fees paid by the consumer, unless the creditor can demonstrate that the failure to comply with the ATR standard is not material. Borrowers who are successful in recovery for violation of the ATR standard are also liable for actual damages, statutory damages and court costs and attorneys' fees.

The statute of limitations for violations of the ATR standard under TILA is 3 years from the date of the violation. There is no time limit for the borrower to use the violation of ATR as a defense to a creditor who is foreclosing, but the borrower will be limited to recovering no more than 3 years of finance charges and fee (plus actual damages, legal fees and costs).

Evaluating a Loan Using the Ability to Repay Standard

The creditor must review and verify 8 underwriting factors to make a reasonable and good faith determination of whether or not the borrower has the ability to repay using reasonably reliable third-party records for the consumer including (1) current or expected income or assets; (2) employment status; (3) expected monthly payment for the mortgage loan; (4) monthly payments on loans that are made simultaneously with the mortgage loan; (5) monthly payments for mortgage related items like taxes and insurance; (6) other monthly debt; (7) debt-to-income ratio; (8) borrower's credit history.

Qualified Mortgages "QM'S"

Starting with loans closed on or after January 10, 2014, lenders must assess borrowers' ability to repay most closed-end residential mortgage loans. Mortgages which meet the definition of "Qualified Mortgages" are presumed to have met the ATR test.

Mandatory Product Feature of Qualified Mortgages "QM's"

There are features required for all loans that are qualified mortgages.

- Points and fees are less than 3% of the loan amount (higher percentage thresholds allowed for loans under $100,000)
- Loan cannot have any "risky features" like negative amortization, interest-only or balloon loans (exception for certain balloon loans if originated by creditors defined as "small creditors")
- Maximum loan term must be 30 years or less

Three Categories of Qualified Mortgages

In addition to having the mandatory product features, to be a "qualified mortgage", the loan must in one of the following 3 categories:

- The 'general definition" category which is any mortgage loan which has the mandatory product features and a debt-to-income ratio of 43% or less.
- The "GSE-eligible" category which is any mortgage loan which has the mandatory product features and is eligible for purchase by a GSE (a government sponsored entity) regardless of the debt-to-income ratio. This category includes loans eligible for purchase, guaranty or insurance by a GSE (Fannie or Freddie), the FHA, the VA or the USDA.
- The 'small creditor" category. Lenders who are "small creditors" have less than $2 billion in assets and originate 500 or fewer first mortgages annually and lender must verify borrower's debt-to-income ratio.

Safe Harbor from Liability for QM's and Cure Provisions

Mortgages that meet the QM criteria have a safe harbor from liability under the ATR standards of TILA provided the annual percentage rate ("APR") is less than the average prime offer rate or APOR plus 1.5% for first mortgages or the APOR plus 3.5% for second mortgages. There are also safe harbors for loans insured by the by the Federal Housing Administration

("FHA") and for loans that satisfy the criteria for a "Small Creditor QM" or a "Small Creditor Balloon QM".

The CFPB released an amendment the ATR and QM provisions of Regulation Z on October 22, 2014 for mortgage loans closed on or after November 3, 2014. The amendment provides for a limited points and fees cure for creditors (and their assignees) allowing them to refund inadvertent points and fee overages after the loan closes so that the loan is not precluded from meeting the QM standards. The ability to cure provisions expire on January 10, 2021.

THE NEW COMBINED TRUTH IN LENDING ("TILA") AND REAL ESTATE SETTLEMENT PROCEDURES ACT ("RESPA") DISCLOSURE RULES AND THE TILA-RESPA INTEGRATED DISCLOSURE A/K/A "TRID"

On November 20, 2013, the Consumer Financial Protection Bureau (the "CFPB") finalized the rules which combine TILA required mortgage disclosures with the disclosures required by the RESPA rule.[1] TILA and Regulation Z had previously been administered by the Federal Reserve Board, while HUD had control over the RESPA Rule (Regulation X). The 2010 Dodd-Frank Act transferred authority for TILA and RESPA to the CFPB, and the CFPB was directed to create new regulations and model forms that would combine the disclosures and the closing statement for residential mortgage loan closings. In other words, the old Good Faith Estimate (the "GFE") and the HUD-1 Settlement Statement are being replaced. The CFPB began working on the new rule in December 2010, numerous prototypes for the new disclosures went through rounds of testing, and ultimately the proposed rule which amends the TILA Rules (Regulation Z) and the RESPA Rules (Regulation X) was released in 2013. After the public comment period, amendments to the rule were adopted by the CFPB in January 2015, and the final rule (referred to as the "TRID Rule" which stands for "TILA-RESPA Integrated Disclosure") is now set to apply to covered residential real estate mortgage loan transactions where the creditor or the mortgage broker receive an loan application on or after **August 1, 2015**.[2]

The TRID Rule does not apply to home equity credit lines, reverse mortgages, mortgage loans made by mobile home that is not attached to real property, loans made by a lender who

[1] Practice pointer – practitioners often refer to "the regulation" as "the rule". When you see a reference to the "RESPA rule", the RESPA regulation or Regulation Z is what is being referred to. When you see references to "the rule" in this summary, I am referring to the amendments to the RESPA and TILA regulations.

[2] See www.consumerfinance.gov under the "Law and Regulation" tab for the regulations, commentary and more information.

makes five or less mortgage loans a year, and certain no-interest second mortgages made for downpayment assistance, property rehabilitation, energy efficiency or foreclosure avoidance.

Use of the CFPB's forms is mandatory for most transactions, and only limited modifications to the forms are allowed. It is not clear in the TRID Rule or in the official commentary to the Rule as to which disclosures are subject to TILA liability and which are subject to RESPA liability.

New Forms for Disclosures (Replacing the Good Faith Estimate (a/k/a the GFE) and the HUD-1 Settlement Statement)[3]

Loan Estimate Form (12 C.F.R. 1026.37)

This new form combines some of the disclosures that are currently included in the initial TILA statement with disclosures that are currently provided in the RESPA Good Faith Estimate. Other items required to be given the consumers are included in the new Loan Estimate. These include the Total Interest Percentage required by TILA, the appraisal notice required by the Equal Credit Opportunity Act and the transfer of servicing notice required by RESPA. The Loan Estimate is given out in advance of the closing, and this reminder is printed on the top of page one "Save this Loan Estimate to compare with your Closing Disclosure". The new Loan Estimate is a 3-page form. The GFE and the early or initial TIL are being replaced by the new Loan Estimate.

Loan Estimate Rule

[3] Go to http://www.consumerfinance.gov/regulatory-implementation/tila-respa/#disclosures to view copies of the new forms, instructions and examples for completing the forms.

The citations for the new Rule are found in 12 C.F.R. Section 1026 et seq. The Loan Estimate must provide a "good faith estimate" of the loan's cost and loan terms. Until the Loan Estimate is provided to the consumer and the consumer indicates the intent to proceed with the loan, creditors are prohibited from charging any fees other than a credit reporting fee. Creditors are also prohibited from requiring the consumer to submit verification documentation until the Loan Estimate has been provided.

Timing for Loan Estimate

The Loan Estimate must be placed in the mail not more than 3 business days after the receipt of an application and not less than 7 business days before consummation of the loan.

Loan Estimate Tolerances and Changes Permitted

A charge listed in the Loan Estimate is considered a "good faith estimate" if the charge ultimately paid by the consumer does not exceed the amount originally disclosed, EXCEPT in the following circumstances:

- 10% increases for certain third-party charges
- Unlimited increases allowed for charges for prepaid interest, property insurance, escrow amounts, and certain payments to certain third-party service providers
- Other exceptions for revisions to estimates where there are certain changed circumstances affecting eligibility or settlement charges; changes requested by the consumer, interest rate dependent changes, expiration and delays due to new construction loans

Revised estimates mean the lender must provide revised Loan Estimates within 3 business days of receiving information sufficient to establish reason for revision. Revised Loan Estimates cannot be given to borrower after Closing Disclosure is given to borrower; therefore, borrower must receive the revised Loan Estimate no later than 4 business days prior to the closing.

Closing Disclosure (12 C.F.R. Section 1026.19(f) and 12 C.F.R. 1026.38)

This new form is a 5-page form which combines the disclosures that are currently included in the final TILA statement (given at the closing) with the disclosures that are currently provided in the HUD-1 settlement statement (a/k/a the "RESPA statement"). The new 5-page disclosure must be utilized on the effective date for the revised rule on August 1, 2015 (for loans where the lender or mortgage broker receives a loan application on or after August 1, 2015).

The Closing Disclosure must state the actual terms of the loan transaction, and the actual costs association with the "settlement" of the loan transaction. The "settlement" is the closing or consummation of the loan. Lenders may disclose estimates for costs they have done their best to obtain.

Timing for Closing Disclosure

The borrower must receive the Closing Disclosure no later than 3 business days before the closing. The 3-day period may be waived or modified due to a bona fide personal financial emergency (like a foreclosure).

Responsibility for Providing the Closing Disclosure

The Closing Disclosure must be provided be either the lender or the settlement agent (also referred to as the "closing attorney"). The lender retains the ultimate responsibility for making sure the Closing Disclosure was provided.

Changes Permitted

The proposed rule required a revised Closing Disclosure would mean an additional 3-business day waiting period for most changes to the information in the Closing Disclosure. After lending industry concerns about the negative affect that requiring another 3-day waiting period for all changes resulting in a revised Closing Disclosure, the Bureau revised the final rule to provide that most changes in costs discovered AFTER the Closing Disclosure is given to the borrower but BEFORE the closing of the loan do not require redisclosure and a new 3-day waiting period. The exceptions which require a revised Closing Disclosure and a new 3-day waiting period are:

- a change in the APR of more than 1/8 of 1 percentage point above or below the disclosed APR;
- a change in the loan product
- the addition of a prepayment penalty

Changes After the Loan Closes

There are 30- and 60-day periods following the closing during which lenders are required to redisclose inaccuracies in the Closing Disclosure, and if the estimated costs from the Loan Estimate increase beyond permitted levels when the loan closes, the lender is required to refund the excess payment to the borrower and issue a corrected Closing Disclosure within 60 days of the closing.

Record Retention Requirements for Loan Estimates and Closing Disclosures

Lenders must keep evidence that they complied with the disclosure rules for 3 years after the loan closing, but for the final Closing Disclosure and any related documents, those must be maintained for 5 years after the closing by the Lender or any assignee.

MORTGAGE LOAN SERVICING UPDATE – 2015

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The CFPB (Consumer Financial Protection Bureau) has amended Regulation X, which implements the Real Estate Settlement Procedures Act of 1974, and implemented a commentary that sets forth an official interpretation to the regulation. The CFPB has also amended Regulation Z, which implements the Truth in Lending Act and the official interpretation to the regulation, which interprets the requirements of Regulation Z. These final rules implement provisions of the Dodd-Frank Act regarding mortgage loan servicing. These amendments focus primarily on clarifying, revising, or amending provisions regarding force-placed insurance notices, policies and procedures, early intervention, and loss mitigation requirements under Regulation X's servicing provisions; and periodic statement requirements under Regulation Z's servicing provisions. The amendments also address proper compliance regarding certain servicing requirements when a consumer is a potential or confirmed successor in interest, is in bankruptcy, or sends a cease communication request under the Fair Debt Collection Practices Act. The proposed rule makes technical corrections to several provisions of Regulations X and Z.

Specifically, the Regulation X final rule implements Dodd-Frank Act sections addressing servicers' obligations to correct errors asserted by mortgage loan borrowers; to provide certain information requested by such borrowers; and to provide protections to such borrowers in connection with force-placed insurance. Additionally, this final rule addresses servicers' obligations to establish reasonable policies and procedures to achieve certain delineated objectives; to provide information about mortgage loss mitigation options to delinquent borrowers; to establish policies and procedures for providing delinquent borrowers with continuity of contact with servicer personnel capable of performing certain functions; and to evaluate borrowers' applications for available loss mitigation options. Further, this final rule modifies and streamlines certain existing servicing-related provisions of Regulation X.

The Regulation Z final rule implements Dodd-Frank Act sections addressing initial rate adjustment notices for adjustable-rate mortgages, periodic statements for residential mortgage loans, prompt crediting of mortgage payments, and responses to requests for payoff amounts. This final rule also amends current rules governing the scope, timing, content, and format of disclosures to consumers regarding the interest rate adjustments of their variable-rate transactions.

The clarifications address communications with family members after a borrower dies, contact with delinquent borrowers, and treatment of consumers who have filed for bankruptcy or invoked certain protections under the Fair Debt Collection Practices Act.

"As servicing implementation enters its final phases, we heard from many sources that it was important to address these remaining issues to ensure a smooth transition and provide certainty to the market," said CFPB Director Richard Cordray. "When mortgage servicers better understand the rules they have to follow, that is better for consumers."

Mortgage servicers are responsible for collecting payments from mortgage borrowers on behalf of loan owners. They also typically handle customer service, escrow accounts, collections, loan modifications, and foreclosures. Generally, borrowers have no say in choosing their mortgage servicers. Even before the financial crisis, the mortgage servicing industry experienced problems with bad practices and sloppy recordkeeping. Today, many borrowers continue to experience serious problems seeking loan modifications or other alternatives to avoid foreclosure.

In January 2013, the CFPB issued rules to establish new, strong protections for struggling homeowners, including those facing foreclosure. The rules protect mortgage borrowers from costly surprises and runarounds by their servicers.

These new clarifications respond to requests for further explanation on three servicing issues:

- **Home retention efforts after a borrower dies:** In cases in which a borrower dies, the rules the CFPB issued in January require servicers to have policies and procedures in place to ensure that they promptly identify and communicate with family members, heirs, or other parties who have a legal interest in the home. Today's bulletin provides examples of such servicer policies and procedures, including allowing for continued payment on the mortgage as well as evaluating the heir (or whomever the legal interest in the home passes to) for assumption of the mortgage and, if appropriate, for loss mitigation measures.
- **Early intervention requirement to contact delinquent borrowers:** The CFPB's new rules require servicers to attempt contact with borrowers each time they miss a payment to provide important information that can help get them on track. Today's bulletin clarifies that this requirement may be met through other contact that servicers have with such borrowers, for example, when evaluating them for loss mitigation or during collection calls. Also, the method of attempted contact may vary depending on how long a borrower is delinquent or on whether the borrower has responded to earlier servicer attempts to communicate.
- **Interplay between the servicing rules, bankruptcy code, and the Fair Debt Collection Practices Act (FDCPA):** Both the FDCPA and bankruptcy law provide significant protections for consumers who decide to invoke them and restrict certain types of communications regarding their debts. The Bureau has received a large number of questions about how these other protections intersect with the servicing rules and how to

communicate effectively with borrowers who have invoked their other rights. Among the clarifications the CFPB is responding to, the CFPB is:

- Clarifying that even if delinquent borrowers have instructed servicers to stop communicating with them pursuant to the FDCPA, certain notices and communications mandated by the CFPB servicing rules and the Dodd-Frank Wall Street Reform and Consumer Protection Act are still required. Specifically, servicers must communicate with the borrower with regard to requests for loss mitigation, information requests, error resolution, force-placed insurance, initial interest rate adjustment of adjustable-rate mortgages, and periodic statements. However, servicers will not be required to provide certain early intervention contacts or ongoing notices of interest rate adjustments to delinquent borrowers who have instructed the servicer to stop communicating with them.
- Exempting servicers from being required to provide periodic account statements and certain early intervention contacts with borrowers who are in bankruptcy. The Bureau believes further assessment is warranted regarding how bankruptcy protections intersect with these servicing requirements and how to ensure that the servicing communications do not confuse consumers regarding the status of their loans.

Among other things, the final rule also clarifies regulations issued by the Bureau in January to implement a provision of the Dodd-Frank Act that requires consumers to receive housing counseling before taking out a high-cost mortgage. The rule specifies which federally required disclosure must be used as the basis for counseling for a small subset of closed-end loans that are not subject to the Real Estate Settlement Procedures Act.

These rules also clarify loss mitigation and explain in depth that mortgage servicers must tell the borrower in writing when their loss mitigation application is complete, requiring servicers to gather information from third parties promptly to avoid delays, and clarifying protections for borrowers during servicing transfers and in the face of a foreclosure

§1024.41 Loss mitigation procedures. – 10/21/2014 –

http://www.ecfr.gov/cgi-bin/text-idx?node=12:8.0.2.8.18&rgn=div5/#se12.8.1024_141

(a) ***Enforcement and limitations.*** A borrower may enforce the provisions of this section pursuant to section 6(f) of RESPA (12 U.S.C. 2605(f)). Nothing in §1024.41 imposes a duty on a servicer to provide any borrower with any specific loss mitigation option. Nothing in §1024.41 should be construed to create a right for a borrower to enforce the terms of any agreement between a servicer and the owner or assignee of a mortgage loan, including with respect to the evaluation for, or offer of, any loss mitigation option or to eliminate any such right that may exist pursuant to applicable law.

(b) ***Receipt of a loss mitigation application.***

(1) *Complete loss mitigation application.* A complete loss mitigation application means an application in connection with which a servicer has received all the information that the servicer requires from a borrower in evaluating applications for the loss mitigation options available to the borrower. A servicer shall exercise reasonable diligence in obtaining documents and information to complete a loss mitigation application.

(2) *Review of loss mitigation application submission.*

(i) *Requirements.* If a servicer receives a loss mitigation application 45 days or more before a foreclosure sale, a servicer shall:

(A) Promptly upon receipt of a loss mitigation application, review the loss mitigation application to determine if the loss mitigation application is complete; and

(B) Notify the borrower in writing within 5 days (excluding legal public holidays, Saturdays, and Sundays) after receiving the loss mitigation application that the servicer acknowledges receipt of the loss mitigation application and that the servicer has determined that the loss mitigation application is either complete or incomplete. If a loss mitigation application is incomplete, the notice shall state the additional documents and information the borrower must submit to make the loss mitigation application complete and the applicable date pursuant to paragraph (b)(2)(ii) of this section. The notice to the borrower shall include a statement that the borrower should consider contacting servicers of any other mortgage loans secured by the same property to discuss available loss mitigation options.

(ii) *Time period disclosure.* The notice required pursuant to paragraph (b)(2)(i)(B) of this section must include a reasonable date by which the borrower should submit the documents and information necessary to make the loss mitigation application complete.

(3) *Determining Protections.* To the extent a determination of whether protections under this section apply to a borrower is made on the basis of the number of days between when a complete loss mitigation application is received and when a foreclosure sale occurs, such determination shall be made as of the date a complete loss mitigation application is received.

(c) ***Evaluation of loss mitigation applications.***

(1) *Complete loss mitigation application.* If a servicer receives a complete loss mitigation application more than 37 days before a foreclosure sale, then, within 30 days of receiving a borrower's complete loss mitigation application, a servicer shall:

(i) Evaluate the borrower for all loss mitigation options available to the borrower; and

(ii) Provide the borrower with a notice in writing stating the servicer's determination of which loss mitigation options, if any, it will offer to the borrower on behalf of the owner or assignee of the mortgage. The servicer shall include in this notice the amount of time the borrower has to accept or reject an offer of a loss mitigation program as provided for in paragraph (e) of this section, if applicable, and a notification, if applicable, that the borrower has the right to appeal the denial of any loan modification option as well as the amount of time the borrower has to file such an appeal and any requirements for making an appeal, as provided for in paragraph (h) of this section.

(2) *Incomplete loss mitigation application evaluation.—*

(i) *In general.* Except as set forth in paragraphs (c)(2)(ii) and (iii) of this section, a servicer shall not evade the requirement to evaluate a complete loss mitigation application for all loss mitigation options available to the borrower by offering a loss mitigation option based upon an evaluation of any information provided by a borrower in connection with an incomplete loss mitigation application.

(ii) *Reasonable time.* Notwithstanding paragraph (c)(2)(i) of this section, if a servicer has exercised reasonable diligence in obtaining documents and information to complete a loss mitigation application, but a loss mitigation application remains incomplete for a significant period of time under the circumstances without further progress by a borrower to make the loss mitigation application complete, a servicer may, in its discretion, evaluate an incomplete loss mitigation application and offer a borrower a loss mitigation option. Any such evaluation and offer is not subject to the requirements of this section and shall not constitute an evaluation of a single complete loss mitigation application for purposes of paragraph (i) of this section.

(iii) *Payment forbearance.* Notwithstanding paragraph (c)(2)(i) of this section, a servicer may offer a short-term payment forbearance program to a borrower based upon an evaluation of an incomplete loss mitigation application. A servicer shall not make the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process, and shall not move for foreclosure judgment or order of sale, or conduct a foreclosure sale, if a borrower is performing pursuant to the terms of a payment forbearance program offered pursuant to this section.

(iv) *Facially complete application.* If a borrower submits all the missing documents and information as stated in the notice required pursuant to §1026.41(b)(2)(i)(B), or no additional information is requested in such notice, the application shall be considered facially complete. If the servicer later discovers additional information or corrections to a previously submitted document are required to complete the application, the servicer must promptly request the missing information or corrected documents and treat the application as complete for the purposes of paragraphs (f)(2) and (g) of this section until the borrower is given a reasonable opportunity to complete the application. If the borrower completes the application within this period, the application shall be considered complete as of the date it was facially complete, for the purposes of paragraphs (d), (e), (f)(2), (g), and (h) of this section, and as of the date the application was actually complete for the purposes of paragraph (c). A servicer that complies with this paragraph will be deemed to have fulfilled its obligation to provide an accurate notice under paragraph (b)(2)(i)(B).

(d) ***Denial of loan modification options***. If a borrower's complete loss mitigation application is denied for any trial or permanent loan modification option available to the borrower pursuant to paragraph (c) of this section, a servicer shall state in the notice sent to the borrower pursuant to paragraph (c)(1)(ii) of this section the specific reason or reasons for the servicer's determination for each such trial or permanent loan modification option and, if applicable, that the borrower was not evaluated on other criteria.

(e) ***Borrower response.***

(1) *In general.* Subject to paragraphs (e)(2)(ii) and (iii) of this section, if a complete loss mitigation application is received 90 days or more before a foreclosure sale, a servicer may require that a borrower accept or reject an offer of a loss mitigation option no earlier than 14 days after the servicer provides the offer of a loss mitigation option to the borrower. If a complete loss mitigation application is received less than 90 days before a foreclosure sale, but more than 37 days before a foreclosure sale, a servicer may require that a borrower accept or reject an offer of a loss mitigation option no earlier than 7 days after the servicer provides the offer of a loss mitigation option to the borrower.

(2) *Rejection.*

(i) *In general.* Except as set forth in paragraphs (e)(2)(ii) and (iii) of this section, a servicer may deem a borrower that has not accepted an offer of a loss mitigation option within the deadline established pursuant to paragraph (e)(1) of this section to have rejected the offer of a loss mitigation option.

(ii) *Trial Loan Modification Plan.* A borrower who does not satisfy the servicer's requirements for accepting a trial loan modification plan, but submits the payments that would be owed pursuant to any such plan within the deadline established pursuant to paragraph (e)(1) of this section, shall be provided a reasonable period of time to fulfill any remaining requirements of the servicer for acceptance of the trial loan modification plan beyond the deadline established pursuant to paragraph (e)(1) of this section.

(iii) *Interaction with appeal process.* If a borrower makes an appeal pursuant to paragraph (h) of this section, the borrower's deadline for accepting a loss mitigation option offered pursuant to paragraph (c)(1)(ii) of this section shall be

extended until 14 days after the servicer provides the notice required pursuant to paragraph (h)(4) of this section.

(f) ***Prohibition on foreclosure referral.—***

(1) *Pre-foreclosure review period.* A servicer shall not make the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process unless:

(i) A borrower's mortgage loan obligation is more than 120 days delinquent;

(ii) The foreclosure is based on a borrower's violation of a due-on-sale clause; or

(iii) The servicer is joining the foreclosure action of a subordinate lienholder.

(2) *Application received before foreclosure referral.* If a borrower submits a complete loss mitigation application during the pre-foreclosure review period set forth in paragraph (f)(1) of this section or before a servicer has made the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process, a servicer shall not make the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process unless:

(i) The servicer has sent the borrower a notice pursuant to paragraph (c)(1)(ii) of this section that the borrower is not eligible for any loss mitigation option and the appeal process in paragraph (h) of this section is not applicable, the borrower has not requested an appeal within the applicable time period for requesting an appeal, or the borrower's appeal has been denied;

(ii) The borrower rejects all loss mitigation options offered by the servicer; or

(iii) The borrower fails to perform under an agreement on a loss mitigation option.

(g) ***Prohibition on foreclosure sale.*** If a borrower submits a complete loss mitigation application after a servicer has made the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process but more than 37 days before a foreclosure sale, a servicer shall not move for foreclosure judgment or order of sale, or conduct a foreclosure sale, unless:

(1) The servicer has sent the borrower a notice pursuant to paragraph (c)(1)(ii) of this section that the borrower is not eligible for any loss mitigation option and the appeal process in paragraph (h) of this section is not applicable, the borrower has not requested an appeal within the applicable time period for requesting an appeal, or the borrower's appeal has been denied;

(2) The borrower rejects all loss mitigation options offered by the servicer; or

(3) The borrower fails to perform under an agreement on a loss mitigation option.

(h) ***Appeal process.***

(1) *Appeal process required for loan modification denials.* If a servicer receives a complete loss mitigation application 90 days or more before a foreclosure sale or during the period set forth in paragraph (f) of this section, a servicer shall permit a borrower to appeal the servicer's determination to deny a borrower's loss mitigation application for any trial or permanent loan modification program available to the borrower.

(2) *Deadlines.* A servicer shall permit a borrower to make an appeal within 14 days after the servicer provides the offer of a loss mitigation option to the borrower pursuant to paragraph (c)(1)(ii) of this section.

(3) *Independent evaluation.* An appeal shall be reviewed by different personnel than those responsible for evaluating the borrower's complete loss mitigation application.

(4) *Appeal determination.* Within 30 days of a borrower making an appeal, the servicer shall provide a notice to the borrower stating the servicer's determination of whether the servicer will offer the borrower a loss mitigation option based upon the appeal and, if applicable, how long the borrower has to accept or reject such an offer or a prior offer of a loss mitigation option. A servicer may require that a borrower accept or reject an offer of a loss mitigation option after an appeal no earlier than 14 days after the servicer provides the notice to a borrower. A servicer's determination under this paragraph is not subject to any further appeal.

(i) ***Duplicative requests.*** A servicer is only required to comply with the requirements of this section for a single complete loss mitigation application for a borrower's mortgage loan account.

(j) ***Small servicer requirements***. A small servicer shall be subject to the prohibition on foreclosure referral in paragraph (f)(1) of this section. A small servicer shall not make the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process and shall not move for foreclosure judgment or order of sale, or conduct a foreclosure sale, if a borrower is performing pursuant to the terms of an agreement on a loss mitigation option.

[78 FR 10876, Feb. 14, 2013, as amended at 78 FR 60437, Oct. 1, 2013]

RESPA, CFPB and Reverse Mortgages:

§ 1024.2 Definitions….
(b)
…*Federally related mortgage loan* means:

(1) Any loan (other than temporary financing, such as a construction loan):

(i) That is secured by a first or subordinate lien on residential real property, including a refinancing of any secured loan on residential real property, upon which there is…

(A) Located or, following settlement, will be constructed using proceeds of the loan, a structure or structures designed principally for occupancy of from one to four families (including individual units of condominiums and cooperatives and including any related interests, such as a share in the cooperative or right to occupancy of the unit)… and…

(ii) For which one of the following paragraphs applies. The loan:…

(F) Is the subject of a home equity conversion mortgage, also frequently called a "reverse mortgage," issued by any maker of mortgage loans specified in paragraphs (1)(ii)(A) through (D) of this definition….

...*Servicing* means receiving any scheduled periodic payments from a borrower pursuant to the terms of any federally related mortgage loan, including amounts for escrow accounts under section 10 of RESPA (12 U.S.C. 2609), and making the payments to the owner of the loan or other third parties of principal and interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the mortgage servicing loan documents or servicing contract. In the case of a home equity conversion mortgage or reverse mortgage as referenced in this section, servicing includes making payments to the borrower

Subpart C—Mortgage Servicing

Sec.

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§ 1024.30 Scope.

(a) In general. Except as provided in paragraph (b) and (c) of this section, this subpart applies to any mortgage loan, as that term is defined in § 1024.31.

(b) Exemptions. Except as otherwise provided in § 1024.41(j), §§ 1024.38 through 41 of this subpart shall not apply to the following:

(1) A servicer that qualifies as a small servicer pursuant to 12 CFR 1026.41(e)(4);

(2) A servicer with respect to any reverse mortgage transaction as that term is defined in § 1024.31; and

§ 1024.31 Definitions.

For purposes of this subpart:

Reverse mortgage transaction has the meaning set forth in 12 CFR 1026.33(a).

§1026.33 Requirements for reverse mortgages.

(a) Definition. For purposes of this subpart, reverse mortgage transaction means a nonrecourse consumer credit obligation in which:

(1) A mortgage, deed of trust, or equivalent consensual security interest securing one or more advances is created in the consumer's principal dwelling; and

(2) Any principal, interest, or shared appreciation or equity is due and payable (other than in the case of default) only after:

(i) The consumer dies;

(ii) The dwelling is transferred; or

(iii) The consumer ceases to occupy the dwelling as a principal dwelling.

Loss Mitigation: Additional Defenses to Outcome Challenges?

When crafting the long awaited mortgage servicing rules — portions of which will live within Regulation X, which implements the Real Estate Settlement Procedures Act of 1974 — the CFPB elected to mandate a process for loss mitigation, rather than prescribe the outcome.

In 12 CFR § 1024.41, Loss Mitigation Procedures, the CFPB imposed an application, review, and appeal period, which the CFPB itself has estimated to take approximately 90 days. While homeowner advocates pushed for detailed loss mitigation criteria, specified waterfalls, debt-to-income targets or net present value models or assumptions, they were unsuccessful. What Regulation X does is prescribe deadlines and time frames, enabling borrowers to sue servicers who fail to comply with these time frames when reviewing, evaluating, and deciding loss mitigation applications. Also, § 1024.41(a) prohibits a borrower from enforcing the terms of any

agreement between a servicer and the owner or assignee of a mortgage loan. These might be effective arguments for those who have been defending lawsuits and claims that the borrower deserved a loan modification because of a certain net present value calculation presented during foreclosure mediation — assuming a judge is persuaded by the CFPB's approach to loss mitigation regulation.

Clarity re Foreclosure Cases in Progress

The CFPB also realized that some strategic borrowers might wait until the last minute to submit their loss mitigation applications; and, for these reasons, Regulation X will not allow the late submission of a loss mitigation application to completely kill a foreclosure process. After reviewing the commentary to the proposed rules, the CFPB was persuaded that some borrowers might not be willing to "come to terms with their situations" and would not explore loss mitigation unless a foreclosure was close at hand. The CFPB even admitted that some borrowers might tactically stall foreclosure, factoring this into its rulemaking process.

Therefore, under § 1024.41(g), the submission of a complete loss mitigation application after the first notice or filing required by applicable law will bar the servicer from moving for dispositive judgment or taking any action to cause the foreclosure sale, but will not prohibit the servicer (and presumably its legal counsel) from continuing with mediation, publication, or any other non-dispositive motion that might be necessary to avoid a restart. This, of course, may be easier to accomplish in a non judicial state where counsel doesn't have to deal with a court interested in keeping the docket moving along.

Pre-foreclosure Processes

The CFPB is implementing a 50-state pre-foreclosure review period under § 1024.41(f) by restricting the first notice or filing requirement until after a loan is 120 days delinquent. The CFPB intends to preempt any state law that allows for an earlier first notice or legal filing period. This could raise some interesting legal challenges. Practically speaking, it might also cause a shift in the GSE timelines, since those are calculated based on last payment installment. Foreclosure counsel will undoubtedly be asked to weigh in on what constitutes the first notice or filing requirement; and, for those states that have instituted pre-foreclosure processes, counsel may be asked to advise on the servicer's ability to move on those processes during this 120-day period.

It is also interesting to note that the CFPB advises servicers to comply with the most restrictive of all loss mitigation processes to which they are subject, acknowledging that the national mortgage settlement and GSE requirements require a fast track review process for loss mitigation applications received 37 days or less before a foreclosure sale, whereas § 1024.41 does not.

Under the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), all covered persons or service providers are legally required to refrain from committing unfair, deceptive, or abusive acts or practices (collectively, UDAAPs) in violation of the Act. The Consumer Financial Protection Bureau (CFPB or Bureau) issued the amendments to clarify the contours of that obligation in the context of collecting consumer debts.

A. Background

UDAAPs can cause significant financial injury to consumers, erode consumer confidence, and undermine fair competition in the financial marketplace. Original creditors and other covered persons and service providers under the Dodd-Frank Act involved in collecting debt related to any consumer financial product or service are subject to the prohibition against UDAAPs in the Dodd-Frank Act.[1]

In addition to the prohibition of UDAAPs under the Dodd-Frank Act, the Fair Debt Collection Practices Act (FDCPA) also makes it illegal for a person defined as a "debt collector" from engaging in conduct "the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt,"[2] to "use

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[1] *See* Dodd-Frank Act, §§ 1002, 1031 & 1036(a), codified at 12 U.S.C. §§ 5481, 5531 & 5536(a). It is also prohibited for any person, even if not a covered person or service provider, to knowingly or recklessly provide substantial assistance to a covered person or service provider in violating section 1031 of the Dodd-Frank Act. *See* Dodd-Frank Act, § 1036(a)(3), 12 U.S.C. § 5536(a)(3). The principles of "unfair" and "deceptive" practices in the Act are informed by the standards for the same terms under Section 5 of the Federal Trade Commission Act (FTC Act). *See* CFPB Examination Manual v.2 (Oct. 2012) at UDAAP 1 (CFPB Exam Manual). To the extent that this Bulletin cites FTC guidance or authority, such references reflect the views of the FTC, and are not binding upon the Bureau in interpreting the Dodd-Frank Act's prohibition on UDAAPs.

[2] FDCPA § 806, 15 U.S.C. § 1692d.

any false, deceptive, or misleading representation or means in connection with the collection of any debt,"[3] or to "use any unfair or unconscionable means to collect or attempt to collect any debt."[4] The FDCPA generally applies to third-party debt collectors, such as collection agencies, debt purchasers, and attorneys who are regularly engaged in debt collection.[5] All parties covered by the FDCPA must comply with any obligations they have under the FDCPA, in addition to any obligations to refrain from UDAAPs in violation of the Dodd-Frank Act.

Although the FDCPA's definition of "debt collector" does not include some persons who collect consumer debt, all covered persons and service providers must refrain from committing UDAAPs in violation of the Dodd-Frank Act. [6]

B. Summary of Applicable Standards for UDAAPs

1. Unfair Acts or Practices

The Dodd-Frank Act prohibits conduct that constitutes an unfair act or practice. An act or practice is unfair when:

(1) It causes or is likely to cause substantial injury to consumers;

(2) The injury is not reasonably avoidable by consumers; and

(3) The injury is not outweighed by countervailing benefits to consumers or to competition.[7]

A "substantial injury" typically takes the form of monetary harm, such as fees or costs paid by consumers because of the unfair act or practice. However, the injury does not have to be monetary.[8] Although emotional impact and other subjective types of harm will not ordinarily amount to substantial injury, in certain circumstances emotional impacts may amount to or contribute to substantial injury.[9] In addition, actual injury is not required; a significant risk of concrete harm is sufficient.[10]

[3] FDCPA § 807, 15 U.S.C. § 1692e. This provision also imposes affirmative obligations on "debt collectors" under the FDCPA when collecting consumer debts.

[4] FDCPA § 808, 15 U.S.C. § 1692f. This provision also imposes affirmative obligations on "debt collectors" under the FDCPA when collecting consumer debts.

[5] *See* FDCPA § 803(6), 15 U.S.C. § 1692a(6). The FDCPA also covers, as a "debt collector," a creditor who, in collecting its own debts, uses any name other than its own which would indicate that a third person is attempting to collect the debts.

[6] The FDCPA also reaches any person who designs, compiles, or furnishes forms knowing such forms would be used to create the false belief in a consumer that a person other than the creditor is participating in collecting the creditor's debts. *See* FDCPA § 812, 15 U.S.C. § 1692j.

[7] Dodd-Frank Act §§ 1031, 1036, 12 U.S.C. §§ 5531, 5536.

[8] CFPB Exam Manual at UDAAP 2; *see also FTC v. Accusearch, Inc.,* 06-cv-105-D, 2007 WL 4356786, at *7- 8 (D. Wyo. Sept. 28, 2007); FTC Policy Statement on Unfairness (Dec. 17, 1980), *available at* http://www.ftc.gov/bcp/policystmt/ad-unfair.htm.
[9] CFPB Exam Manual at UDAAP 2.
[10] *Id.*

An injury is not reasonably avoidable by consumers when an act or practice interferes with or hinders a consumer's ability to make informed decisions or take action to avoid that injury.[11] Injury caused by transactions that occur without a consumer's knowledge or consent is not reasonably avoidable.[12] Injuries that can only be avoided by spending large amounts of money or other significant resources also may not be reasonably avoidable.[13] Finally, an act or practice is not unfair if the injury it causes or is likely to cause is outweighed by its consumer or competitive benefits.[14]

Established public policy may be considered with all other evidence to determine whether an act or practice is unfair, but may not serve as the primary basis for such determination.[15]

2. *Deceptive Acts or Practices*

The Dodd-Frank Act also prohibits conduct that constitutes a deceptive act or practice. An act or practice is deceptive when:

(1) The act or practice misleads or is likely to mislead the consumer;

(2) The consumer's interpretation is reasonable under the circumstances; and

(3) The misleading act or practice is material.[16]

To determine whether an act or practice has actually misled or is likely to mislead a consumer, the totality of the circumstances is considered.[17] Deceptive acts or practices can

take the form of a representation or omission.[18] The Bureau also looks at implied representations, including any implications that statements about the consumer's debt can be supported. Ensuring that claims are supported before they are made will minimize the risk of omitting material information and/or making false statements that could mislead consumers.

To determine if the consumer's interpretation of the information was reasonable under the circumstances when representations target a specific audience, such as older Americans or financially distressed consumers, the communication may be considered from the perspective of a reasonable member of the target audience.[19] A statement or information can be misleading even if not all consumers, or not all consumers in the targeted group, would be misled, so long as a significant minority.

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11 *Id.*
12 *Id.*
13 *See id.* at 2-3.
14 Dodd-Frank Act § 1031(c)(1)(B), 12 U.S.C. § 5531(c)(1)(B); *see also* CFPB Exam Manual at UDAAP 2.
15 Dodd-Frank Act § 1031(c)(2), 12 U.S.C. § 5531(c)(2); *see also* CFPB Exam Manual at UDAAP 3.
16 The standard for "deceptive" practices in the Dodd-Frank Act is informed by the standards for the same terms under Section 5 of the FTC Act. *See* CFPB Exam Manual at UDAAP 5.
17 CFPB Exam Manual at UDAAP 5.
18 *Id.*
19 *See id.* at 6.

would be misled.[20] Likewise, if a representation conveys more than one meaning to reasonable consumers, one of which is false, the speaker may still be liable for the

misleading interpretation.[21] Material information is information that is likely to affect a consumer's choice of, or conduct regarding, the product or service.

Information that is likely important to consumers is material.[22]

Sometimes, a person may make a disclosure or other qualifying statement that might prevent consumers from being misled by a representation or omission that, on its own, would be deceptive. The Bureau looks to the following factors in assessing whether the disclosure or other qualifying statement is adequate to prevent the deception: whether the disclosure is prominent enough for a consumer to notice; whether the information is presented in a clear and easy to understand format; the placement of the information; and the proximity of the information to the other claims it qualifies.[23]

3. *Abusive Acts or Practices*

The Dodd-Frank Act also prohibits conduct that constitutes an abusive act or practice. An act or practice is abusive when it:

(1) Materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or

(2) Takes unreasonable advantage of –

(A) a consumer's lack of understanding of the material risks, costs, or conditions of the product or service;

(B) a consumer's inability to protect his or her interests in selecting or using a consumer financial product or service; or

(C) a consumer's reasonable reliance on a covered person to act in his or her interests.[24]

It is important to note that, although abusive acts or practices may also be unfair or deceptive, each of these prohibitions are separate and distinct, and are governed by separate legal standards.[25]

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[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*; *see also* CFPB Bulletin 12-06, Marketing of Credit Card Add-On Products (July 12, 2012), *available at* http://files.consumerfinance.gov/f/201207_cfpb_bulletin_marketing_of_credit_card_addon_products.pdf.
[24] Dodd-Frank Act § 1031(d), 12 U.S.C. § 5531(d); *see also* CFPB Exam Manual at UDAAP 9; Stipulated Final Judgment and Order, Conclusions of Law ¶ 12, 9:13-cv-80548 and Compl. ¶¶ 55-63, *CFPB v. Am. Debt Settlement Solutions, Inc.*, 9:13-cv-80548 (S.D. Fla. May 30, 2013), *available at* http://files.consumerfinance.gov/f/201305_cfpb_proposed-order_adss.pdf and http://files.consumerfinance.gov/f/201305_cfpb_complaint_adss.pdf. The Stipulated Final Judgment and Order was signed by U.S. District Judge Middlebrooks and entered on the court docket on June 6, 2013. *See* Stipulated Final J. & Order [ECF Docket Entry No. 5], 9:13-cv-80548 (S.D. Fla.).
[25] CFPB Exam Manual at UDAAP 9.

C. Examples of Unfair, Deceptive and/or Abusive Acts or Practices

Depending on the facts and circumstances, the following non-exhaustive list of examples of conduct related to the collection of consumer debt could constitute UDAAPs. Accordingly, the CFPB will be watching these practices closely.

- **Collecting or assessing a debt and/or any additional amounts in connection with a debt (including interest, fees, and charges) not expressly authorized by the agreement creating the debt or permitted by law.[26]**

- **Failing to post payments timely or properly or to credit a consumer's account with payments that the consumer submitted on time and then charging late fees to that consumer.[27]**
- **Taking possession of property without the legal right to do so.**
- **Revealing the consumer's debt, without the consumer's consent, to the consumer's employer and/or co-workers.[28]**
- **Falsely representing the character, amount, or legal status of the debt.**
- **Misrepresenting that a debt collection communication is from an attorney.**
- **Misrepresenting that a communication is from a government source or that the source of the communication is affiliated with the government.**
- **Misrepresenting whether information about a payment or non- payment would be furnished to a credit reporting agency.[29]**
- **Misrepresenting to consumers that their debts would be waived or forgiven if they accepted a settlement offer, when the company does not, in fact, forgive or waive the debt.[30]**
- **Threatening any action that is not intended or the covered person or service provider does not have the authorization to pursue, including**

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[26] *See* Compl. ¶¶ 34-38 & 43-44, *FTC v. Fairbanks Capital Corp.*, 03-12219 (D. Mass. Nov. 12, 2003) (alleging that the charging of late fees and other associated charges was unfair practice under Section 5 of the FTC Act and a violation of §§ 807 and 808 of the FDCPA), *available at* http://www.ftc.gov/os/2003/11/0323014comp.pdf.

[27] *Id.* ¶¶ 22-25.

[28] *See, e.g.*, Compl. ¶¶ 24 & 30-31, *FTC v. Cash Today, Ltd.*, 3:08-cv-590 (D. Nev. Nov. 12, 2008), *available at*

http://www.ftc.gov/os/caselist/0723093/081112cmp0923093.pdf, (asserting that Cash Today engaged in unfair collection practices in violation of Section 5 of the FTC Act by, among other things, disclosing the existence of consumer's debt to employers, co-workers, and other third parties despite being told by consumers not to contact their workplaces); *FTC v. LoanPointe, LLC.*, 2:10 CV 00225-DAK, 2011 WL 4348304, at *5 -6 (D. Utah Sept. 16, 2011) (finding that disclosure of existence and amount of debt to consumer's employer without consumer's prior approval constitutes an unfair practice under the FTC Act).

29 *See, e.g., In re Am. Express Centurion Bank*, Joint Consent Order at 3 (Oct. 1, 2012), *available at* http://files.consumerfinance.gov/f/2012-CFPB-0002-American-Express-Centurion-Consent-Order.pdf.

30 *Id.*

false threats of lawsuits, arrest, prosecution, or imprisonment for non-payment of a debt.

Again, the obligation to avoid UDAAPs under the Dodd-Frank Act is in addition to any obligations that may arise under the FDCPA. Original creditors and other covered persons and service providers involved in collecting debt related to any consumer financial product or service are subject to the prohibition against UDAAPs in the Dodd-Frank Act. The CFPB will continue to review closely the practices of those engaged in the collection of consumer debts for potential UDAAPs, including the practices described above. The CFPB will use all appropriate tools to assess whether supervisory, enforcement, or other actions may be necessary.