



Financial Services & Products ADVISORY ■

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Maryland Proposes Heightened Requirements for Residential Mortgage Servicing Transfers

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On January 23, 2015, Maryland released a set of new proposed regulations (the Maryland Proposed Regulations)¹ for transfers and sales of mortgage servicing rights, which go well beyond the requirements released in the Consumer Financial Protection Bureau's (CFPB) Bulletin 2014-01 (August 2014) or in the CFPB's new proposed mortgage servicing rules, released in November 2014.² On top of complying with the CFPB guidance, the Maryland Proposed Regulations would:

- Require transferee servicers to report advance information to the state Commissioner of Financial Regulation for large transfers of at least 5,000 loans;
- Impose additional reporting obligations if Maryland loans are included in the transfer; and
- Obligate transferor and transferee servicers to maintain certain policies and procedures.

While Maryland licensees would be directly subject to the regulations, they would also impact non-licensees who conduct transfers with a Maryland licensed entity. The Maryland Proposed Regulations highlight the growing focus on servicing transfers at both the federal and state levels and serve as notice to mortgage servicers that other states may soon follow suit. **Comments on the proposed rules may be submitted to the Division of Financial Regulation, Department of Labor, Licensing and Regulation through March 2, 2015. No public hearing has been scheduled yet.**

¹ Maryland Dep't of Labor, Licensing and Regulation, Regulation 09.03.12 (proposed Jan. 23, 2015) <http://www.dllr.state.md.us/regs/propreg-finreg-comar090306jan23.shtml>.

² Consumer Fin. Prot. Bureau, Amendments to the 2013 Mortgage Rules under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z) (proposed Nov. 20, 2014), available at http://files.consumerfinance.gov/f/201411_cfpb_proposed-rule_mortgage-servicing.pdf (describing new proposed rule 12 C.F.R. § 1024.41(k) on mortgage servicing transfers); Consumer Fin. Prot. Bureau, Bulletin 2014-01 (Aug. 19, 2014), available at http://files.consumerfinance.gov/f/201408_cfpb_bulletin_mortgage-servicing-transfer.pdf. For a more complete discussion of the CFPB's mortgage servicing transfer requirements, see our October 7, 2014, advisory, available at <http://www.alston.com/advisories/CFPB-mortgage-servicing>.

Mortgage Servicer

If promulgated, the new regulations would apply to all “licensed mortgage servicers” in Maryland, which is not defined specifically under the proposed regulation. The regulations would be promulgated under the Maryland Mortgage Lender Law, which requires a license to act as a mortgage servicer and defines a “mortgage servicer,” under Md. Code Ann., Fin. Inst. § 11-501(n), as a “person who: (1) [e]ngages in whole or in part in the business of servicing mortgage loans for others; or (2) [c]ollects or otherwise receives payments on mortgage loans directly from borrowers for distribution to any other person.” The Maryland Proposed Regulations define “mortgage servicers” as not only those collecting payments, but also those evaluating eligibility for loss mitigation options, communicating with borrowers regarding loss mitigation options and protecting the security interest by, for example, maintaining hazard and mortgage insurance and conducting foreclosures. Keep in mind that Maryland’s statute on mortgage servicing transfer notices under Md. Code Ann., Com. Law § 13-316 contains yet a third definition of “servicer.”

Reporting Requirements for Bulk Transfers

While the reporting rules would be limited to large transfers involving 5,000 or more loans, they would apply regardless of whether the transferred loans include any Maryland loans. This number excludes those loans transferred before the first payment is due under the applicable security instrument. If there are Maryland loans among those transferred, transferees would have to comply with additional requirements.

For all transfers hitting the 5,000-loan threshold, the transferee servicer (the servicer obtaining the rights to service the loans under either a sale or servicing agreement) would need to disclose the following to the commissioner at least 60 days before the transfer date:

- Whether the arrangement is a sale or servicing agreement for the mortgage servicing rights;
- The names of all parties to the agreement;
- The total number of loans to be transferred;
- The total unpaid principal balance for the loans to be transferred;
- The total number of additional personnel who have been or would be hired to service the loans; and
- Whether the pool of loans includes any Maryland loans.

The transferee servicer can only get a waiver of the 60-day requirement upon submitting a written request to the commissioner demonstrating extenuating circumstances, such as when a court or regulator required the transfer. It is unclear if a transfer between affiliates or from a merger or acquisition would qualify for the waiver.

Additional Requirements for Maryland Loans

For each transfer of servicing rights that is subject to the general reporting requirements (i.e., it contains at least 5,000 loans), but which also includes Maryland loans, additional requirements apply to the transferee servicer. The transferee must also provide the following information within the same timeframe—at least 60 days before the transfer date:

- The total number of Maryland loans in the pool of transferred loans;
- A breakdown of those loans by investor type and FICO score;
- The number of the Maryland loans that are delinquent, broken down by timeframe;
- The number of Maryland loans with a permanent loan modification already in place;

- The number of Maryland loans for which the borrower completed a trial loan modification, but the transferor servicer has not provided an executed copy of the permanent loan modification to the borrower;
- The number of Maryland loans with loan modifications that are currently in a trial period;
- The number of Maryland loans for which the borrower has already submitted a complete loss mitigation application and the transferor servicer has not yet made a decision regarding eligibility for the loss mitigation option;
- The number of Maryland loans with incomplete loss mitigation applications; and
- The number of Maryland loans that have an escrow for taxes, insurance, ground rent or other charges or levies.

The same 60-day waiver request applies to these reporting requirements. In addition to these extra reporting requirements, the transferee servicer must also designate an officer, director or member of senior management as a contact person with authority to resolve complaints related to the servicing of the Maryland loans in the pool. After the commissioner receives the reported information and the contact information, he may request follow-up information before the transfer date, including information about specific Maryland loans or a plan from the transferee servicer for managing certain risks associated with the transfer. Should a transferee try to get around these extra Maryland loan requirements by breaking up the loan transfers into smaller batches to come in under the initial 5,000-loan threshold, the proposed regulations also provide a catch-all such that if, at the end of a calendar year the transferee has acquired a total of 5,000 or more loans, it must still provide the Maryland-loan-specific and contact information.

Policy and Procedure Requirements

The Maryland Proposed Regulations would also require licensees to implement policies and procedures for mortgage servicing transfers, and here there is no 5,000-loan threshold, so arguably all servicing transfers would be subject to these requirements. While these policies appear similar to those suggested in the CFPB bulletin, there are some important differences servicers will want to be aware of. Under the proposed rules, both transferees and transferors should have policies and procedures in place:

- Requiring the other party to provide all necessary documents and information before the transfer date;
- Flagging all loans with pending or approved loss mitigation options;
- Ensuring that the transferee servicer receives all discussions with borrowers and any loss mitigation requests, applications or documentation;
- Testing the transferee and transferor systems to ensure compatibility of transferred data;
- Identifying and promptly addressing data errors, missing information or documents and other loan level issues;
- Creating a customer service plan for responding to borrower inquiries and for identifying whether a loan has a pending loss mitigation application or an offered or approved loss mitigation option;
- Creating a customer service plan for responding to and processing loss mitigation requests or inquiries from successors in interest of borrowers; and
- Remediating actual harm to borrowers resulting from a transfer of servicing rights.

Most of these requirements are present in some form in the CFPB bulletin, but for example, a customer service plan under the CPFB would only potentially be required if the CFPB requests a written plan, whereas here, it would be for all loan transfers.

Additionally, transferor servicers should do each of the following on or before the transfer date:

- Provide all necessary loan level documents and information, including all loss mitigation activity, to the transferee servicer;
- Provide an itemization of all payments applied to the borrower's account, including any fees incurred by the borrower;
- Flag for the transferee servicer all loans with:
 - A pending loss mitigation application;
 - An approved loss mitigation option;
 - A pending written complaint; or
 - A pending notice of error;
- Provide descriptions to the transferee servicer of loss mitigation options that are unique to the transferor servicer, including eligibility criteria; and
- Describe specific regulatory and settlement agreement requirements that are applicable to some or all of the transferred loans.

For their part, transferee servicers would need to comply with each of the following proposed requirements on or after the transfer date:

- Accept and continue processing pending loss mitigation applications within the timeframes that were applicable to the transferor servicer under relevant state and federal law;
- Honor trial and permanent loan modification agreements entered into by the transferor servicer;
- Provide borrowers with general information about the transfer process, including notice of a borrower's rights to complaint resolution;
- Confirm the amount and status of scheduled payments, including any fees incurred before the transfer date, with information and documents provided by the transferor servicer; and
- Respond, within the timeframes established by applicable state and federal law, to any pending written complaint or notice of error sent to the transferor servicer.

A key difference here would be the requirement for the *transferee servicer* to respond to written complaints and notices of error sent to the *transferor servicer* with no time limit. Under the CFPB requirements, the transferee servicer must respond if it receives the complaint or request, even if the transferor servicer was still servicing the loan at the time the error or event took place. The transferor servicer is not, however, relieved of the duty to respond to written complaints and notices of error it receives until one year after the date of transfer. In Maryland, the onus would be shifted to the transferee servicer to respond upon the date of transfer, without the one-year window.

Alston & Bird Observations

The commissioner has stated that the proposed regulations are aimed at overseeing the rapid growth in the market share of non-bank, state-regulated mortgage servicers, while imposing minimal additional cost on the servicers to comply. However, failure to comply with either these proposed requirements or the CFPB's requirements will surely invite closer scrutiny by the commissioner. Should an examiner find a failure to comply, and as a result a borrower

suffers harm, the proposed regulations provide that the servicer could be responsible for restitution of money or property to the affected borrower and taking steps to repair the borrower's credit score. A violation of the Maryland Proposed Regulations would also subject the servicer to enforcement under Md. Code Ann., Fin. Inst. § 11-517, which permits the commissioner to suspend or revoke a licensee's license, and Md. Code Ann., Fin. Inst. § 11-523, which makes any willful violation a felony carrying a maximum \$50,000 fine or up to 10 years' imprisonment, or both.

These proposed regulations emphasize the continued attention regulators are paying to the high volume of servicing transfers and the perceived associated risks to borrowers. Mortgage servicers will need to keep an eye on the shifting regulatory landscape as states impose new servicing rules that may go beyond the CFPB's requirements. With a growing diversity of regulations certainly comes increased costs for mortgage servicers; however, the costs of noncompliance will surely be higher. We would be delighted to assist in drafting or reviewing comments to submit to the Maryland Commissioner of Financial Regulation.

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