



Bankruptcy & Financial Restructuring / Financial Services & Products ADVISORY ■

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Changes for Servicing Mortgages for Consumers in Bankruptcy: Are You Prepared for Compliance?

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As part of the Mortgage Servicing Rules promulgated by the Consumer Financial Protection Bureau (CFPB), [12 C.F.R. § 1026.41](#) governs the requirements for periodic statements (or coupon books) for residential mortgage loans. Presently, Section 1026.41(e)(5) provides that a servicer is exempt from the requirement to send periodic statements “while the consumer is a debtor in bankruptcy under Title 11 of the United States Code.”

Effective April 19, 2018, Section 1026.41 is amended (the “Amended Rule”) to eliminate the blanket exemption and require the servicer to provide a periodic statement or coupon book with certain bankruptcy-specific modifications in certain circumstances. The servicer will need to transition between unmodified periodic statements and modified periodic statements when the borrower enters or exits bankruptcy. On March 6, 2018, the CFPB finalized additional changes to the Amended Rule relating to the timing for servicers to transition to providing modified or unmodified periodic statements and coupon books in connection with a consumer’s bankruptcy case.

No More Blanket Exemption

The Amended Rule provides for the periodic statement exemption to apply when the consumer is a debtor in bankruptcy under Title 11 of the United States Code or has discharged personal liability for the mortgage loan *and* one of the following conditions exists:

- Any consumer on the mortgage requests in writing that the servicer cease sending periodic statements.
- The consumer’s bankruptcy plan provides for surrender of the dwelling, provides for avoidance of the mortgage lien, or does not otherwise provide for payment of pre-bankruptcy arrearages or maintenance payments.
- The court enters an order avoiding the mortgage lien, lifting the automatic stay on the dwelling securing the mortgage lien, or requiring that the servicer cease sending periodic statements.
- The consumer files a notice with the bankruptcy court indicating an intent to surrender the dwelling *and* the consumer has not made any partial or periodic payment after commencement of the bankruptcy case.

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However, even if one of these conditions is met, the servicer *ceases to qualify for the exemption* if either:

- The consumer reaffirms personal liability for the loan.
- Any consumer on the loan requests a periodic statement in writing (subject to court order to the contrary).

Further, the Amended Rule provides for specific modifications to periodic statements, including permitted and required changes, while a borrower is a debtor in bankruptcy or has been discharged from personal liability for the mortgage loan. New provisions governing periodic statements to consumers in Chapter 12 or 13 include detailed requirements regarding amounts due, transaction activity, pre-petition arrearages, and specified disclosures.

Transitioning to and from a Modified Periodic Statement

Under the Amended Rule, a servicer must transition to or from providing modified periodic statements when one of the following *trigger events* occurs:

- The consumer enters bankruptcy under Title 11 of the United States Code.
- The consumer exits bankruptcy.
- The servicer ceases to qualify for one of the periodic statement exemptions.

Originally, the Amended Rule included a single-billing-cycle exemption from transitioning to and from modified periodic statements based on when during the billing cycle the triggering event occurs. However, in response to servicers' operational concerns, the March 6 amendments now provide for a single-statement exemption for the next periodic statement or coupon book that a servicer would otherwise have to provide following a triggering event, regardless of when in the billing cycle the triggering event occurs. Therefore, as of the date on which one of the triggering events occurs, a servicer is exempt from the periodic statement requirements in Section 1026.41 for the next periodic statement or coupon book that would otherwise be required, but thereafter must provide modified or unmodified periodic statements or coupon books.

For example, assume that a mortgage loan has a monthly billing cycle and each payment is due on the first day of the month with a 15-day grace period:

- If a triggering event occurs on October 6 (before the end of the 15-day grace period provided for the October 1 due date) and the servicer hasn't provided a periodic statement or coupon book for the billing cycle with a November 1 payment due date, the servicer is exempt from providing a periodic statement or coupon book for that billing cycle but would need to resume providing periodic statements or coupon books that comply with Section 1026.41 by providing a modified or unmodified periodic statement or coupon book for the billing cycle with a December 1 payment due date within a reasonably prompt time after November 1 or by the end of the grace period.
- If a triggering event occurs on October 20 (after the 15-day grace period) and the servicer timely provided a periodic statement or coupon book for the billing cycle with a November 1 payment due date, the servicer is not required to correct the periodic statement or coupon book already provided and is exempt from providing the next periodic statement or coupon book, which is the one that would otherwise be required for the billing cycle with a December 1 payment due date. However, the servicer is required to then resume providing periodic statements or coupon books that comply with Section 1026.41 by providing a modified or unmodified periodic statement or coupon book for the billing statement with a January 1 payment due date within a reasonably prompt time after December 1 or the end of the grace period.

There are a few other things to keep in mind:

- For servicers who provide coupon books instead of periodic statements, the rules require a servicer to provide a new coupon book after one of the triggering events occurs only if the servicer has not previously provided the consumer with a coupon book that covers the upcoming billing cycle.
- The single-statement exemption might apply more than once over the life of the loan, such as when the borrower enters bankruptcy and starts receiving modified statements and again when the borrower exits bankruptcy and starts receiving unmodified statements.
- Regulation Z does not prohibit a servicer from providing a periodic statement or coupon book while the single-statement exemption applies so long as it is accurate and complies with all applicable laws. The CFPB also notes that servicers aren't prohibited from adding language to a periodic statement or coupon book that may be helpful in limiting any potential liability.

Questions to Consider

Operationalizing periodic statements for borrowers entering or exiting bankruptcy is not simple. On March 20, the CFPB [provided answers to frequently asked servicer questions](#). However, other, more fact-specific questions may arise, such as:

- Can the modified statements include important messages/state-required disclosures typically included on standard statements?
- What should a servicer do if it provided a standard periodic statement to a consumer who recently filed for bankruptcy?
- If the borrower surrenders the property and is not making payments, periodic statements aren't required. Would a servicer be subject to penalty if the servicer continues to send statements?
- What fees and costs may or should be included on the modified periodic statement? For example, may fees/costs that haven't been approved by the bankruptcy court be included?
- If you have one borrower who is in one chapter of bankruptcy and another borrower who is in a different chapter, how do you determine what set of modifications to include?

The answers to these questions and others may require more in-depth analysis.

Conclusion

Care should be taken to review and understand the many nuances of the Amended Rule and the March 6, 2018, amendments to ensure compliance beginning April 19, 2018. For example, while many of the modifications to periodic statements for borrowers in bankruptcy are optional, servicers will need to make an analysis of whether such statements, if included, would pose a risk of violating the automatic stay. As always, care should be taken to avoid sending a noncompliant statement containing impermissible communications to a consumer in bankruptcy, so timely transitioning to appropriately modified statements is key. Alston & Bird's Bankruptcy and Consumer Finance Regulatory teams are well versed in these requirements.

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