

## INFOBYTES SPECIAL ALERT: CFPB BULLETIN RE-EMPHASIZES FOCUS ON MORTGAGE SERVICING TRANSFERS

AUGUST 21, 2014

On August 19, 2014, the CFPB issued [Bulletin 2014-01](#) to address “potential risks to consumers that may arise in connection with transfers of residential mortgage servicing rights.” The bulletin, which is the latest in a series of CFPB regulations, statements, and guidance on this subject, replaces the Bureau’s [February 2013 bulletin](#) on mortgage servicing transfers and states that “the Bureau’s concern in this area remains heightened due to the continuing high volume of servicing transfers.” It further states that “the CFPB will be carefully reviewing servicers’ compliance with Federal consumer financial laws applicable to servicing transfers” and “may engage in further rulemaking in this area.”

The bulletin contains the following information, which is summarized in great detail below:

- Examples of policies and procedures that CFPB examiners may consider in evaluating whether the servicers on both ends of a transfer have complied with the CFPB’s new regulations requiring, among other things, policies and procedures reasonably designed to facilitate the transfer of information during servicing transfers and to properly evaluate loss mitigation applications.
- Guidance regarding the application of other aspects of the new servicing requirements to transfers.
- Descriptions of other Federal consumer financial laws that apply to servicing transfers, such as the Fair Credit Reporting Act, the Fair Debt Collection Practices Act, and the prohibition on unfair, deceptive, and abusive acts or practices (“UDAAPs”).
- A statement that “[s]ervicers engaged in significant servicing transfers should expect that the CFPB will, in appropriate cases, require them to prepare and submit informational plans describing how they will be managing the related risks to consumers.” This largely reiterates the Bureau’s statements in its February 2013 bulletin.

In a [press release](#) accompanying the bulletin, CFPB Director Richard Cordray stated that: “At every step of the process to transfer the servicing of mortgage loans, the two companies involved must put in appropriate efforts to ensure no harm to consumers. This means ahead of the transfer, during the transfer, and after the transfer. We will not tolerate consumers getting the runaround when mortgage servicers transfer loans.”

### BACKGROUND

As discussed previously [here](#) and [here](#), the CFPB has been somewhat inconsistent in its message to the servicing industry, shifting between promises of a cooperative approach and vigorous enforcement. However, one consistent thread in the Bureau’s public statements has been an emphasis on protecting consumers whose loans are transferred from one servicer to another, particularly consumers who are in

the process of applying for loss mitigation assistance or have a loss mitigation plan in place. The Bureau has repeatedly suggested that borrowers are not in a position to protect themselves from harmful servicing practices because, as it stated in the press release accompanying the bulletin, “[g]enerally, borrowers have no say in choosing their mortgage servicers.”

## SERVICING TRANSFER POLICIES AND PROCEDURES

The bulletin notes that new requirements for mortgage servicing transfers do “not prescribe any specific policies or procedures that a servicer must implement” and that “CFPB examiners will consider a servicer’s transfer-related policies and procedures as a whole, in light of the servicer’s particular facts and circumstances, in determining whether they are reasonably designed to achieve the rule’s objectives.” However, the Bureau provides the following examples of “policies and procedures that CFPB examiners may consider in future examinations as contributing to meeting these requirements.”

### *Transfer of Loan Information Generally*

- Ensuring that contracts require the transferor to provide all necessary documents and information at loan boarding.
- Developing tailored transfer instructions for each deal and conducting meetings to discuss and clarify key issues with counterparties in a timely manner; for large transfers, this could be months in advance of the transfer. Key issues may include descriptions of proprietary modifications, detailed descriptions of data fields, known issues with document indexing, and specific regulatory or settlement requirements applicable to some or all of the transferred loans.
- Using specifically tailored testing protocols to evaluate the compatibility of the transferred data with the transferee servicer’s systems and data mapping protocols.
- Engaging in quality control work after the transfer of preliminary data to validate that the data on the transferee’s system matches the data submitted by the transferor.
- Recognizing when the transfer cannot be implemented successfully in a single batch and implementing alternative protocols, such as splitting the transfer into several smaller transactions, to ensure that the transferee can comply with its servicing obligations for every loan transferred.
- Implementing a post-transfer process for validating data to ensure it transferred correctly and is functional, as well as developing procedures for identifying and **addressing** data errors for inbound loans. (Emphasis in original.)
- Effectively organizing and labeling incoming information, as well as ensuring that the transferee servicer uses any transferred information before seeking information from borrowers.
- Conducting regularly scheduled calls with transferor servicers to identify any loan level issues and to research and resolve those issues within a few days of them being raised.

### *Transfer of Loss Mitigation Information*

The bulletin states that “[t]here is heightened risk inherent in transferring loans in loss mitigation, including the risk that documents and information are not accurately transferred.” Therefore, CFPB examiners will “pay particular attention to servicers’ handling of loss mitigation in the context of transfers.” The bulletin further states that, “[i]n cases where servicers choose to engage in transfers of loans with pending loss mitigation applications or approved trial modification plans, CFPB examiners may consider the following policies and procedures:”

- As a transferor, specifically flagging all loans with pending loss mitigation applications (complete and incomplete) or approved loss mitigation plans (including trial modification plans) through previously agreed upon means, and assisting in ensuring that the transferee's systems can process the loss mitigation data upon transfer.
- As a transferee, requiring that the transferor servicer supply a detailed list of loans with pending loss mitigation applications or approved loss mitigation plans.
- As a transferee, requiring that appropriate documentation for loans with pending loss mitigation applications or approved loss mitigation plans be transferred preboarding. For example, the CFPB reports that one transferor servicer that has engaged in large volumes of transfers has provided advance access to a web portal containing loan documentation for such loans 45-60 days before transfer.
- As a transferee, ensuring receipt of information regarding any loss mitigation discussions with borrowers, including any copies of loss mitigation documents. The transferee servicer's policies and procedures must address obtaining any such missing information or documents from a transferor servicer before attempting to obtain such information from borrowers.
- Importantly, the bulletin specifically states that the CFPB expects transferee servicers to ensure that they review transferred documents to determine if the documents may be used in loss mitigation efforts and that the following actions by a transferee servicer following a transfer indicate that the servicer is unlikely to be in compliance:
  - Requiring borrowers to resubmit loss mitigation application materials previously submitted to the transferor servicer.
  - Failing to identify documents and information previously submitted to the transferor servicer that are required for a complete loss mitigation application.
  - Failing to properly evaluate borrowers who submit complete loss mitigation applications.
- As a transferee, monitoring newly transferred loans and determining if partial payments received are actually payments pursuant to trial or permanent modification agreements.

### ***Transfer of Information After Loan Boarding***

The bulletin states that the CFPB has “received questions regarding a policy of transferring relevant data or documents to a transferee during the days following loan boarding, even though the transferor had the information in its possession prior to loan boarding.” According to the Bureau, “[s]uch a transfer practice may prevent the transferor servicer from complying with its obligation to have policies and procedures reasonably designed to **timely** transfer all information and documents.” (Emphasis in original.) In the Bureau's view, “[i]t also may prevent the transferee servicer from complying with its obligation to have policies and procedures reasonably designed to achieve the objective of properly evaluating loss mitigation applications.”

The bulletin states that “CFPB examiners will carefully scrutinize the policies and procedures of any institution that regularly waits until after loan boarding to transfer information that it had in its possession prior to boarding.” However, “[t]he CFPB recognizes that servicers may not legally be able to provide certain information prior to the sale date; in that event, the CFPB will expect that servicers will still make every effort to transfer information prior to loan boarding, subject to those limitations.”

### ***Examples of Deficient Policies and Procedures***

The bulletin also provides the following examples of conduct that occurred prior to the effective date of the new servicing requirements but that CFPB examiners have identified as violating the prohibition on UDAAPs. The bulletin states that, if this conduct occurred after the effective date, it may also violate the new requirements.

- Failing to properly identify loans that were in a trial or permanent modification with the prior servicer at time of transfer.
- Failing to honor trial or permanent modification offers unless the transferee servicer could independently confirm that the prior servicer properly offered a modification or that the offered modification met investor criteria. In some of these instances, the CFPB's examination determined that the transferee servicers did not obtain all of the information they needed from the transferor servicer. As a result, the servicers required borrowers to submit additional paperwork or to provide copies of financial documents they had already submitted to the transferor servicer. These servicers also subjected some borrowers to substantial delays while re-underwriting their loans. In some cases, the borrowers subsequently received a new modification with inferior terms, and in others, the servicer actually conducted a foreclosure sale.

The bulletin states that, in all of the cases discussed above, CFPB examiners directed the servicer to “adopt policies and procedures to prevent continued unfair practices in this area and to remediate harmed consumers.” It is not clear, however, how remediation was accomplished.

## APPLICATION OF OTHER SERVICING RULES TO TRANSFERS

The bulletin also provides what it describes as “[a]nswers [to] certain frequency asked questions” about the application of other new servicing requirements to mortgage servicing transfers. Specifically:

- Error Resolution & Requests for Information: A servicer must comply with the applicable requirements even if: (i) it was not servicing the loan at the time of the alleged error or the event about which information was requested; (ii) it was servicing the loan at the time the error notice or information request was received but servicing was transferred shortly thereafter; or (iii) it was no longer servicing the loan at the time the error notice or information request was received but servicing was transferred one year or less before receipt.
- Lender-Placed Insurance:
  - If a servicer replaces a prior servicer's insurance policy with its own after transfer, the new servicer must comply with the applicable requirements, including “having a reasonable basis to conclude the borrower has failed to comply with the mortgage loan contract's requirement to maintain hazard insurance” and sending the required notices. Significantly, the Bureau notes that “[c]hanges to the terms of an existing force-placed insurance policy, such as selecting a new provider, changing the scope of coverage, or changing the premium owed by the borrower, may meet the standards for replacement of the existing force-placed insurance policy depending on the particular circumstances.”
  - If the prior servicer provided one or both of the required notices, the new servicer does not need to resend those notices. However, the new servicer “must ensure that the borrower has been sent all required notices within the applicable timeframes before it may assess any premium charge or fee related to force-placed insurance.”

- Early Intervention: A new servicer “must comply with the written notice requirement regardless of whether the delinquency began while the loan was being serviced by the transferor servicer.”
- Continuity of Contact: The bulletin states that, “[i]n future examinations, CFPB examiners may consider the following policies and procedures, among others, as contributing to meeting [the continuity of contact] requirement:”
  - Identifying which borrowers are 45 days or more delinquent at transfer and ensuring that personnel are available to assist such borrowers starting at loan boarding.
  - Ensuring that these servicer personnel can provide the borrower with accurate information, including information relating to loss mitigation applications started at the transferor servicer.
  - Ensuring that servicer personnel can retrieve, in a timely manner: (1) a complete record of the borrower’s payment history, including with the transferor servicer and all prior servicers; and (2) all written information the borrower has provided to the transferor servicer and all prior servicers in connection with a loss mitigation application.
  - Servicers also should consider how to inform delinquent borrowers of the availability of servicer personnel. For example, the customer service telephone number could be included in the Welcome Letter, early intervention communications, or other communications following the transfer.
- Loss Mitigation: A servicer “that obtains the servicing of a mortgage loan for which an evaluation of a complete loss mitigation option is in process should continue the evaluation of the complete loss mitigation application to the extent practicable.” The bulletin states that “CFPB examiners will carefully scrutinize any evaluations that take longer than 30 days from the date the **transferor** received the borrower’s complete application, especially where the borrower suffered negative consequences attributable to the delay.” (Emphasis in original.)

The bulletin goes on to state that “[o]ne way to help manage [the risk of non-compliance] is by ensuring that all applicable loss mitigation information was sent to the transferee by the date of transfer, including, for example:” (i) all applicable loss mitigation notices and when they were sent; (ii) all documents and information submitted by a borrower to be evaluated for loss mitigation options; and (iii) documents and information sufficient to show, as applicable:

- If a borrower submitted an application and when that application was received by the transferor servicer;
- Whether documentation and information submitted by a borrower constituted a complete application or not;
- The date the transferor servicer received a complete application;
- If, and when, the servicer requested additional documents or information, and if, and when, the borrower provided them;
- Whether an evaluation had been completed and if a loss mitigation offer was made to a borrower;
- If the borrower was denied for a loan modification option, whether the borrower appealed and, if so, the status of the appeal;
- If a foreclosure sale is pending: (a) the current date of the foreclosure sale; (b) whether a borrower submitted a complete application more than 37 days before the foreclosure sale;

and (c) instructions to and from foreclosure counsel, including instructions and status of all necessary stays, continuances and/or dismissals;

- All loss mitigation agreements, including trial and permanent loan modification agreements, forbearance agreements, short sale agreements, deed-in-lieu of foreclosure agreements, or other applicable agreements; and
- Documents and information sufficient to show, as applicable, whether the borrower accepted an offer, and whether the borrower was performing in accordance with the terms of the offer.

## APPLICATION OF OTHER LAWS TO TRANSFERS

The bulletin notes that “other federal consumer financial laws may also apply in the transfer context.” In particular, the Bureau states that:

- Fair Credit Reporting Act: “Servicers, like other furnishers, must appropriately investigate such disputes and report their existence along with any other information reported to consumer reporting agencies.”
- Fair Debt Collection Practices Act (“FDCPA”): “The FDCPA imposes obligations on servicers to the extent they act as debt collectors within the meaning of the FDCPA. Among other obligations, the FDCPA requires that within five days after the initial communication with a borrower in connection with the collection of any debt, a debt collector must send the borrower a notice including the amount of the debt, the creditor’s name, the borrower’s right to request verification of the debt, and other required information. CFPB examiners have identified a number of entities that failed to send the notices within five days of initial contact and some entities that failed to send them at all.”
- Prohibition on UDAAPs: “The CFPB emphasizes that conduct that does not violate one of the specific prohibitions in the laws discussed above may nonetheless constitute a UDAAP.”

## COMPLIANCE MANAGEMENT SYSTEMS

The bulletin states that the CFPB “expects all servicers under its jurisdiction, including those with significant transfer volume, to maintain a robust Compliance Management System (CMS).” It further states that “[a] robust CMS must, among other things, both ensure that violations of Federal consumer financial law do not occur during a transfer and must contain mechanisms for promptly identifying and remediating any violations of Federal consumer financial law that do occur.”

The CFPB “expects servicers that identify any potential violations during a transfer to undertake all necessary corrective measures,” including “both steps to prevent the violation from occurring for subsequently transferred loans and to remediate any actual harm the violation may have caused the consumer whose loan was transferred.” In determining the appropriate action when violations are discovered, “the CFPB will consider a variety of factors, including the timeliness of identification and the timeliness and scope of remediation of the violation by the servicer.”

## SERVICING TRANSFER PLANS

The bulletin states that, “in appropriate cases,” the CFPB will require “servicers engaged in significant servicing transfers to prepare and submit written plans to the CFPB detailing how they will manage the

associated consumer risks.” The Bureau will use these plans “to assess consumer risk and inform further examination planning.” However, the bulletin states that “[s]ervicers do not need approval from the CFPB before moving forward with servicing transfers unless specifically required to do so (e.g. by a consent order).”

The CFPB states that “the information included in a plan would depend on the circumstances of the particular transfer.” However, the Bureau will generally request information regarding:

- The number of loans involved in the transfer;
- The total servicing volume being transferred (measured by unpaid principal balance);
- The name(s) of the servicing platform(s) on which the transferor stored all relevant account-level information for transferred loans prior to transfer and information about compatibility with the transferee's systems;
- A detailed description of how the servicer will ensure that it is complying with the applicable new servicing rule provisions on transfers;
- A detailed description of the transaction and system testing to be conducted to ensure accurate transfer of electronic information and a description of the summary report resulting from the transferee or transferor's testing;
- A description of how the transferee will identify and correct errors identified in connection with the transfer, including a specified time period for reviewing files and resolving errors;
- A description of the training plan and actual training materials for staff involved in reviewing, assessing, utilizing, or communicating information regarding the transferred loans; and
- A customer-service plan, specific to the transferred loans, that provides for responding to loss mitigation requests or inquiries and for identifying whether a loan is subject to a pending loss mitigation resolution or application.

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Questions regarding the matters discussed in this Alert may be directed to any of our lawyers listed below, or to any other BuckleySandler attorney with whom you have consulted in the past.

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