

## The Consumer Financial Protection Bureau (CFPB): The New Federal Landscape For Lenders and Servicers

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Following the recession and financial crisis of the late 2000s, the “Bureau of Consumer Financial Protection”—commonly known as the Consumer Financial Protection Bureau (CFPB)—was created.<sup>1</sup> Aimed at promoting “fairness and transparency”<sup>2</sup> for a wide variety of consumer products,<sup>3</sup> the CFPB consolidated most consumer financial protections from seven federal agencies into one.<sup>4</sup> And the CFPB gave consumers unprecedented access to information<sup>5</sup> and a *right* to consistently-applied loss mitigation procedures.<sup>6</sup>

These CFPB changes far exceed those provided elsewhere and often conflict with other laws. While the CFPB recognizes such conflicts and potential preemption issues, there is currently little, if anything, being done to address them. Instead, the CFPB insists on a floor—not ceiling—upon which other regulators can build greater consumer protections.<sup>7</sup> Only when those protections directly conflict, as with federal bankruptcy law,<sup>8</sup> did the CFPB issue very narrow exemptions.<sup>9</sup>

### CFPB’s Scope And Interplay Among Regulators

The CFPB has primary enforcement authority over depository institutions (banks, thrifts and credit unions) with more than \$10 billion in assets (including affiliates).<sup>10</sup> Even where other regulators maintain primary examination and enforcement authority over smaller entities,<sup>11</sup> CFPB rules are still binding and CFPB regulators can participate in such smaller investigations.<sup>12</sup> Further, the CFPB has authority to supervise nonbanks, regardless of size, in certain specific markets like home mortgages (including originators, brokers, servicers, and providers of loan modifications or foreclosure relief services).<sup>13</sup> And the CFPB may subject others to full CFPB supervision on grounds that they have engaged or are engaging in “conduct that poses risks to consumers.”<sup>14</sup> So, while CFPB primarily targets the very largest financial institutions, all must take careful note of its far-reaching impact.<sup>15</sup>

### CFPB Trends, Policies And Procedures

The CFPB has already received more than 309,700 consumer complaints.<sup>16</sup> The trend is strikingly upwards with an 80 percent increase between 2012 and 2013 and over 20,000 consumer complaints in February 2014 alone.<sup>17</sup> Of the 163,700 consumer complaints submitted in 2013, 69 percent (or 113,200) were sent to companies for review and response (generally required

within 15 days).<sup>18</sup> In 2013, the response rate was 93 percent.<sup>19</sup> While consumers get 30 days to review and dispute a company’s response, most do not.<sup>20</sup> In fact, only 21 percent of consumers disputed a company’s response in 2013.<sup>21</sup> From there, the CFPB reviews and investigates consumer complaints and then analyzes and reports its findings.<sup>22</sup> These reports reveal major regulatory issues and common threads among consumer complaints, together with percentages, medians and types of monetary or nonmonetary relief provided.<sup>23</sup>

Recently, Meredith Fuchs, Associate Director and General Counsel for the CFPB, explained that the CFPB is not just regulating, but honoring and rewarding those who proactively implement consumer protection.<sup>24</sup> Those who self-report and self-correct consistently fare *much* better than those who do not.<sup>25</sup>

### Key RESPA Provisions

The CFPB made several key changes to the Real Estate Settlement Procedures Act (RESPA) (Regulation X) that generally applies to all residential mortgage servicers.<sup>26</sup> Some of the highlights include detailed rules and procedures for:

- **Mortgage servicing transfers**—requiring extremely prompt (usually within three days) servicing disclosure statements, timely notices to the consumer from the transferor *and* transferee and details on how to apply mortgage payments during the 60-day transfer period.<sup>27</sup>
- **Error resolution procedures and requests for information**—requiring a prompt investigation and response to a consumer’s *written* notice of error or request for information within five to 30 days.<sup>28</sup>
- **Force-placed insurance**—procedures *before* servicers can assess any premium charge or fee related to force-placed insurance and then for cancelling and refunding consumers for any overlapping coverage.<sup>29</sup>
- **General servicing policies, procedures, and requirements**—requiring servicers to establish “reasonable” policies and procedures given the size, scope and nature of their operations in order to ensure servicers can properly: (1) provide accurate and timely disclosures, (2) investigate, respond to, and make corrections based on consumer complaints, (3) provide accurate and timely information and

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documents to consumers who request them, (4) provide owners or assignees of mortgage loans with accurate and current information and documents about the mortgage loans they own, (5) submit accurate and current documents and filings required for a foreclosure process, and (6) upon notification of the death of a borrower, promptly identify and facilitate communication with the successor in interest.<sup>30</sup>

- **Early intervention requirements**—requiring servicers to timely contact (or make good faith efforts to contact) certain delinquent consumers about the availability of loss mitigation options.<sup>31</sup>
- **Continuity of contact**—requiring procedures for servicers to have and maintain available personnel to respond to consumer inquiries and assist with loss mitigation options.<sup>32</sup>
- **Loss mitigation procedures**—requiring consistently-applied loss mitigation options, detailed procedures for evaluating, denying and appealing loss mitigation applications, and certain restrictions on “dual-tracking” and foreclosure referrals and sales (including small servicers).<sup>33</sup>

#### Key TILA Provisions

Similarly, the CFPB made significant changes to the Truth in Lending Act (TILA) (Regulation Z) that generally affects not only servicers, but also any owner or assignee of residential mortgage loans. Only one must comply, but all are held liable if none complies.<sup>34</sup> Some of the key provisions include:

- **Disclosure requirements regarding post-closing events**—requiring detailed procedures and disclosures on certain adjustable rate mortgages (ARMs).<sup>35</sup>
- **Prohibited acts or practices and requirements for credit secured by a dwelling**—requiring servicers to promptly credit periodic payments (usually as of the date of receipt), promptly provide (within seven business days) accurate payoff statements upon written request and establishing detailed partial payment application guidelines.<sup>36</sup>
- **Periodic statements for residential mortgage loans**—requiring detailed periodic statements on closed-end consumer transactions secured by a dwelling.<sup>37</sup>

#### CFPB’s Limited Bankruptcy Exemptions

Following an outcry among bankruptcy trustees and others, the CFPB issued certain bankruptcy exemptions affecting key RESPA and TILA provisions.<sup>38</sup> Specifically, these exemptions stay the effective date for the early intervention (RESPA) and periodic statement (TILA) requirements discussed above. These exemptions, however, are narrowly construed and apply only *while* the borrower is in bankruptcy.<sup>39</sup>

Meanwhile, bankruptcy courts often impose harsh penalties on those who improvidently communicate with debtors in bankruptcy without sufficiently tailoring such communications based on *both* content and circumstances. As a result, lenders and servicers should consult experienced bankruptcy counsel to comply with CFPB regulations without violating the automatic stay or discharge injunction, which may lead to significant punitive damages or sanctions. Such communications are often tailored specifically for which, if any, federal laws may apply. Simply stated, there is no one-size-fits-all answer.

#### Summary

The CFPB is here to stay.<sup>40</sup> So, depository institutions and others must proactively and consistently apply consumer protections to avoid unnecessary and costly investigations and remedial measures. In doing so, however, due consideration must be afforded federal bankruptcy law that may prohibit these very same communications and actions. For many, the initial goal will be to avoid potential gaps in federal law that may expose them to significant liability. While time will tell just how many of these conflicts get challenged and ultimately resolved, those who proactively address such issues will continue to fare much better than those who merely wait, watch and hope to avoid scrutiny. Needless to say, the federal consumer landscape has dramatically changed. Lenders and servicers once content with proficiency in bankruptcy must now address a new crossroads of unprecedented consumer rights, information and remedies created by the CFPB.



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<sup>1</sup> Created by the Dodd-Frank Wall Street Reform and Consumer Financial Protection Act of 2010, Pub. L. No. 111-203, tit. X (“Title X”), § 1011(a), codified at 12 U.S.C. § 5491(a).

<sup>2</sup> See Title X § 1021(a), 12 U.S.C. § 5511(a). Per the U.S. Treasury Department, the CFPB “promote[s] fairness and transparency for mortgages, credit cards, and other customer and financial products and services.” See, e.g., “Consumer Financial Protection Bureau Website Launched and Open for Suggestions,” Mybanktracker.com (Feb. 7, 2011).

<sup>3</sup> Currently, products regulated by the CFPB include (with dates the products were added): credit cards (July 21, 2011); mortgages (December 1, 2011); bank accounts and services, private student loans, and consumer loans (March 1, 2012); credit reporting (October 22, 2012); money transfers (April 4, 2013); debt collection (July 10, 2013); and payday loans (November 6, 2013). Recent CFPB releases suggest prepaid cards will be added soon.

<sup>4</sup> These seven federal agencies are: (1) Federal Reserve, (2) Federal Deposit Insurance Corporation (FDIC), (3) Federal Trade Commission (FTC), (4) Department of Housing and Urban Development (HUD), (5) National Credit Union Administration (NCUA), (6) Office of the Comptroller of the Currency (OCC) and (7) Office of Thrift Supervision (OTS).

<sup>5</sup> See, e.g., 12 CFR §§ 1024.36, 1024.38, 1024.40, 1026.20 and 1026.41.



<sup>6</sup> See, e.g., 12 CFR § 1024.41.

<sup>7</sup> See, e.g., Title X § 1041(a)(2), 12 U.S.C. § 5551(a)(2).

<sup>8</sup> See Title 11 of the United States Code.

<sup>9</sup> See, e.g., 12 CFR §§ 1024.39(d) and 1026.41(e)(5), discussed *infra*.

<sup>10</sup> See Title X § 1025(a), 12 U.S.C. § 5515(a).

<sup>11</sup> The “prudential regulators”—OCC, FDIC, Federal Reserve and NCUA—retain primary examination and enforcement authority over depository institutions with total assets of \$10 billion or less (including affiliates). Title X §§ 1026-1027, 12 U.S.C. §§ 5516-5517. Other limitations on CFPB authority are given in Title X §§ 1028-1029, 12 U.S.C. §§ 5518-5519.

<sup>12</sup> The CFPB may join banking regulators on a “sampling basis” and provide input on the scope and conduct of their examinations and reports. See, e.g., Title X §§ 1026(a), (c), 12 U.S.C. §§ 5516(a), (c). Notably, CFPB supervision is driven by product type, not business type, with a focus entirely on consumer protection.

<sup>13</sup> See, e.g., Title X at Subtitles F and H; see also 12 CFR §§ 1024.30 and 1026.36.

<sup>14</sup> See, e.g., 12 CFR § 1091.

<sup>15</sup> Per Title X § 1042(a), 12 USC § 5552(a), even state regulators can bring Dodd-Frank actions in federal court. And many state regulators do so: (1) for greater remedies (additional claims with larger civil penalties); (2) to overcome potential preemption challenges by suing in federal court on *federal* claims; and (3) to attract the CFPB to join such actions (with its much greater abilities to gather and analyze consumer information).

<sup>16</sup> CFPB’s “Consumer Response Annual Report (January 1 – December 31, 2013),” March 2014, p. 6.

<sup>17</sup> *Id.* at 6-7.

<sup>18</sup> *Id.* at 11 (fn. 9), 12 and 32.

<sup>19</sup> *Id.*, at 33, fn. 17.

<sup>20</sup> *Id.*, at 37.

<sup>21</sup> *Id.* For mortgages specifically, the dispute rate was slightly higher at 23 percent.

<sup>22</sup> *Id.*, at 11 and 38.

<sup>23</sup> *Id.* at 33 and 35. See also Supervisory Highlights and Compliance Bulletins on CFPB’s website ([www.consumerfinance.gov](http://www.consumerfinance.gov)).

<sup>24</sup> Remarks given April 28, 2014 at the University of Chicago.

<sup>25</sup> Compare, e.g., Ocwen Financial Corporation and subsidiaries (consent order to provide \$2 billion in principal reductions to “underwater borrowers” and refund \$125 million to the nearly 185,000 borrowers who already lost their homes to foreclosure) with 1<sup>st</sup> Alliance Lending, LLC (ordered to pay an \$83,000 penalty for illegally splitting real estate settlement fees, as mitigated because lender “self-reported these violations to the [CFPB], admitted liability, and provided information related to the conduct of other actors that has facilitated other enforcement investigations”). Information on these (and other) cases is available in the “Newsroom” on CFPB’s website.

<sup>26</sup> See 12 CFR § 1024.30.

<sup>27</sup> See 12 CFR § 1024.33.

<sup>28</sup> See 12 CFR §§ 1024.35 and 1024.36.

<sup>29</sup> See 12 CFR § 1024.37.

<sup>30</sup> See 12 CFR § 1024.38.

<sup>31</sup> See 12 CFR § 1024.39.

<sup>32</sup> See 12 CFR § 1024.40. Other laws (like California’s Homeowners Bill of Rights) require more, including a “single point of contact.”

<sup>33</sup> See 12 CFR §§ 1024.30 and 1024.41. “Dual tracking” refers to pursuing a loan modification and foreclosure sale simultaneously.

<sup>34</sup> See, e.g., 12 CFR §§ 1026.1 and 1026.31(a), (e).

<sup>35</sup> See 12 CFR § 1026.20.

<sup>36</sup> See 12 CFR § 1026.36(c).

<sup>37</sup> See 12 CFR § 1026.41.

<sup>38</sup> See CFPB’s “Amendments to the 2013 Mortgage Rules Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z),” October 15, 2013.

<sup>39</sup> See 12 CFR §§ 1024.39(d) and 1026.41(e)(5) (both limited by “while” the consumer/borrower is a debtor in bankruptcy).

<sup>40</sup> Early challenges to the constitutionality of the CFPB have been rejected. See, e.g., *Morgan Drexen, Inc. v. Consumer Fin. Prot. Bureau*, 2013 U.S. Dist. LEXIS 149387 (C.D. Cal. 01/10/14).