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Factsheet on Delinquency and the 2016 Mortgage Servicing Rule

The mortgage servicing provisions of Regulation X and Regulation Z include requirements that are triggered by a borrower's delinquency. On August 4, 2016, the Consumer Financial Protection Bureau (Bureau) issued a final rule (2016 Mortgage Servicing Rule) that defines the term "delinquency" for specified mortgage servicing provisions of Regulation X, including the early intervention and continuity of contact requirements, as well as the 120-day prohibition on making the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process. The 2016 Mortgage Servicing Rule also makes corresponding changes to specific mortgage servicing provisions of Regulation Z regarding delinquency-related disclosures on periodic statements for mortgage loans. The changes relating to delinquency in the 2016 Mortgage Servicing Rule are effective 12 months after the 2016 Mortgage Servicing Rule's publication in the *Federal Register*.

This factsheet discusses the 2016 Mortgage Servicing Rule's definition of delinquency and how it applies to Regulation X's specified mortgage servicing provisions and Regulation Z's periodic statement provisions for mortgage loan. However, this factsheet is not a substitute for the 2016 Mortgage Servicing Rule. The 2016 Mortgage Servicing Rule, available at <http://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/amendments-2013-mortgage-rules-under-real-estate-settlement-procedures-act-regulation-x-and-truth-lending-act-regulation-z/>, is the definitive source regarding its requirements.

Delinquency

DEFINITION

The 2016 Mortgage Servicing Rule defines "delinquency" as a period of time during which a borrower and the borrower's mortgage loan obligation are delinquent, and states that a

borrower and a borrower's mortgage loan obligation are delinquent beginning on the date a periodic payment sufficient to cover principal, interest, and (if applicable) escrow becomes due and unpaid, until such time as no periodic payment is due and unpaid. The delinquency begins on the date the periodic payment becomes due and unpaid even if the servicer will not assess a late charge if the borrower makes the periodic payment within a certain time frame after the periodic payment is due.

Example: Borrower's mortgage loan requires borrower to make periodic payments of principal, interest, and escrow by the first of each month. However, borrower will not incur a late fee if borrower makes the periodic payment by the 15th of the month. If borrower fails to make the January periodic payment, the period of delinquency for purposes of Regulation X's specified mortgage servicing provisions and Regulation Z's periodic statement provision begins on January 2, not January 16.

PAYMENT TOLERANCES

The 2016 Mortgage Servicing Rule does not require a servicer to treat a periodic payment as timely if the amount paid is not sufficient to cover principal, interest, and (if applicable) escrow. It does, however, address how a servicer calculates a delinquency for purposes of the specified mortgage servicing provisions if the servicer has a policy of treating such payments as timely. It provides that, in this circumstance, the period of delinquency does not begin and a borrower is not delinquent for purposes of the specified mortgage servicing provisions if the servicer treats as timely a payment that is insufficient to cover a periodic payment of principal, interest, and (if applicable) escrow for any given billing cycle. Additionally, a servicer cannot rescind or change its decision to treat the payment as timely for purposes of determining the date on which the borrower's delinquency began, but may later collect the amounts included in a payment tolerance from the borrower.

Example: Borrower's mortgage loan requires borrower to make periodic payments of principal, interest, and escrow in the amount of \$1010 by the first of each month. On June 1, the borrower makes a payment in the amount of \$1001. In accordance with its policy, servicer treats the payment of \$1001 as timely payment of the periodic payment due on June 1. Assume borrower does not have any other periodic payments that are due and unpaid as of June 1. Borrower is not delinquent for purposes of Regulation X's specified mortgage servicing provisions or Regulation Z's periodic statement provision. However, servicer may require borrower to pay the \$9.00 difference.

Although the Bureau understands that servicers generally treat payments as timely only if the difference between the full amount of the periodic payment and the amount the borrower actually pays is a small amount, the 2016 Mortgage Servicing Rule does not require that the difference be within any specific dollar range.

BREACHES OF OTHER TERMS OF THE MORTGAGE LOAN OBLIGATION

The definition of delinquency does not address whether a borrower can be delinquent under the specified mortgage servicing provisions due to other breaches of the mortgage loan obligation, such as a failure to pay property taxes or maintain required insurance outside of escrow, committing waste or violations of law on the property, or failing to occupy the property when required by the mortgage loan. Although a breach other than the failure to meet the periodic payment obligation will not begin a period of delinquency under the specified mortgage servicing provisions, a servicer may be able to exercise its rights to accelerate payment for such a breach if permitted by the mortgage loan contract and other applicable law. The 2016 Mortgage Servicing Rule does not prohibit a servicer from accelerating the mortgage loan in such circumstances. If a servicer properly accelerates a mortgage loan, the periodic payment used to calculate the period of delinquency is the total amount due after acceleration. However, if the borrower reinstates the mortgage loan or cures the arrearage following acceleration, the borrower is no longer delinquent and the delinquency period ends.

Example: Borrower's mortgage loan requires that the property securing the loan must be maintained in a habitable condition, but borrower fails to meet this obligation. Assume borrower does not have any periodic payments that are due and unpaid. Also, assume the mortgage loan and applicable law permit the servicer to accelerate the amount due on the mortgage loan because of the failure to maintain the property in a habitable condition. Servicer accelerates the amount due in accordance with the mortgage loan and applicable law, and the full balance of the mortgage loan becomes due on June 1. Borrower fails to pay the full amount due or reinstate the loan. On June 2, borrower and borrower's mortgage loan are one day delinquent for purposes of Regulation X's specified mortgage servicing provisions and Regulation Z's periodic statement provision.

“ROLLING” DELINQUENCIES

The Bureau understands that many servicers apply a borrower's payment to the oldest outstanding periodic payment due on the mortgage loan. Although the 2016 Mortgage Servicing Rule does not require a servicer to apply payments in this manner, it does address how a servicer calculates the period of delinquency in those circumstances. If a servicer applies a borrower's payment to the oldest outstanding periodic payment, the borrower's payment advances the date that the borrower's delinquency began, regardless of whether there is a period during which a periodic payment is due and unpaid.

Example: Borrower's mortgage loan requires borrower to make periodic payments of principal, interest, and escrow by the first of each month. Borrower does not make the payment that is due on January 1. On January 31, borrower is 30 days delinquent. On February 3, borrower makes a periodic payment. The servicer applies payments to the oldest outstanding periodic payment (*i.e.*, the periodic payment that was due on January 1). On February 4, borrower is 3 days delinquent for purposes of Regulation X's specified mortgage servicing provisions and Regulation Z's periodic statement provision.

LOAN MODIFICATIONS

For permanently modified mortgage loans, the periodic payment due is the periodic payment amount that the modified loan contract requires, not the periodic payment amount that the pre-

modified loan contract required. If the borrower has made the periodic payment that is due under the permanently modified loan contract, no periodic payment is due and unpaid. Because a delinquency only exists until no periodic payment is due and unpaid, a borrower performing on a permanent loan modification is not delinquent. In contrast, a temporary loss mitigation program does not modify the existing loan contract. A borrower may continue to accumulate a delinquency according to the loan contract during the duration of the temporary loss mitigation program.

Applying the Definition of Delinquency

To ensure that the term “delinquency” is interpreted consistently throughout Regulation X’s specified mortgage servicing provisions, the 2016 Mortgage Servicing Rule adds a definition of delinquency that applies to all sections of subpart C of Regulation X. The 2016 Mortgage Servicing Rule also defines the term for purposes of Regulation Z’s periodic statement provision.

Servicers may continue to use different definitions for operational purposes or may use different terms when referring to a borrower who has failed to meet other obligations on a mortgage loan. Furthermore, the 2016 Mortgage Servicing Rule’s definition does not affect the requirements imposed by laws or regulations other than Regulation X’s specified mortgage servicing provisions or Regulation Z’s periodic statement provision. For example, the 2016 Mortgage Servicing Rule does not affect the requirements of the Fair Credit Reporting Act or Regulation V.

PROHIBITION ON FORECLOSURE REFERRALS

The 2016 Mortgage Servicing Rule prohibits a servicer, including a small servicer, from making the first notice or filing required under applicable law for any judicial or non-judicial foreclosure process unless: (1) the mortgage loan is more than 120 days delinquent; (2) the foreclosure is based on a borrower’s violation of a due-on-sale clause; or (3) the servicer is joining the foreclosure of a superior or subordinate lienholder.¹ The 2016 Mortgage Servicing Rule requires servicers to apply the new definition of delinquency when determining if the mortgage loan is more than 120 days delinquent.

¹ The 2016 Mortgage Servicing Rule amends 12 CFR 1024.41(f)(1)(iii), which discusses joining the foreclosure of a superior or subordinate lienholder.

Example: Borrower's mortgage loan requires borrower to make periodic payments of principal, interest, and escrow in the amount of \$1500 by the first of each month.

Borrower does not make the periodic payments that are due on January 1, February 1, or March 1. On April 1, borrower is 90 days delinquent. On April 29, borrower makes a payment in the amount of \$1500. Assume servicer has a policy of applying payments to the oldest outstanding periodic payment and that borrower's only failure to meet the terms of the mortgage loan obligation is the failure to make the January 1, February 1, and March 1 periodic payments. On April 30, borrower is 88 days delinquent, and servicer cannot make the first notice or filing required for any foreclosure process unless servicer is joining the foreclosure of a superior or subordinate lienholder.

EARLY INTERVENTION REQUIREMENTS

Generally, the Regulation X requires servicers to comply with early intervention requirements. If a borrower has been delinquent for more than a set period of time, servicers² must establish or make good faith efforts to establish live contact with and send a written notice to the borrower.³ When determining if a borrower is delinquent and calculating the length of the delinquency for the early intervention live contact and written notice requirements, a servicer must apply the 2016 Mortgage Servicing Rule's definition of delinquency.

² Certain servicers, such as small servicers, are not subject to the early invention requirements. See 12 CFR 1024.30(b).

³ Generally, a servicer must establish or make good faith efforts to establish live contact no later than the 36th day of a borrower's delinquency and 36 days after each payment due date so long as the borrower remains delinquent, and must provide a written notice by the 45th day of the borrower's delinquency, and again no later than 45 days after each payment due date so long as the borrower remains delinquent. However, a servicer need not provide the written notice more than once during any 180-day period. 12 CFR 1024.39(a), (b). The 2016 Mortgage Servicing Rule includes exemptions that may apply if a borrower is a debtor in bankruptcy or has invoked cease communication protections under the Fair Debt Collection Practices Act. See 12 CFR 1024.39(c), (d).

Examples: Borrower's mortgage loan has a monthly billing cycle. Periodic payments of principal, interest and escrow in the amount of \$2000 are due on the first of each month. Borrower fails to make the payment that was due on March 1, and does not make any payments in March. Borrower also fails to make the payment that was due on April 1, but makes a payment of \$2000 on April 2. Assume servicer has a policy of applying payments to oldest outstanding periodic payment. The payment received on April 2 is applied to the periodic payment that was due on March 1, and borrower is only 1 day delinquent. Servicer must establish or make good faith efforts to establish live contact if the borrower fails to make an additional payment of \$2000 within 36 days of April 1, which would be on or before May 7. If servicer does not have a policy of applying payments to the oldest outstanding payment and instead applies the \$2000 to the periodic payment that was due on April 1, servicer must establish or make good faith efforts to establish live contact on or before April 6.

CONTINUITY OF CONTACT

In general, servicers⁴ must have policies and procedures that are reasonably designed to assign personnel to a delinquent borrower not later than the 45th day of the borrower's delinquency and to ensure that the assigned personnel can provide the delinquent borrower with accurate information about specified loss mitigation issues and can retrieve a complete record of the borrower's payment history, among other things.⁵ Servicers may need to revise their policies and procedures to account for the revised definition of delinquency to ensure that they comply with the continuity of contact requirements.

⁴ Certain servicers, such as small servicers, are not subject to the continuity of contact requirements. See 12 CFR 1024.30(b).

⁵ For more information on the continuity of contact requirements, see 12 CFR 1024.40.

PERIODIC STATEMENTS

In general, servicers⁶ must provide consumers with periodic statements that contain specific information about the consumer's mortgage loan.⁷ When the consumer is more than 45 days delinquent, servicers must include in the periodic statement specific information about a consumer's delinquency, including the date on which the consumer became delinquent. For fixed-rate loans, servicers may provide coupon books with specific information about the consumer's mortgage loan instead of periodic statements. When the consumer is more than 45 days delinquent, servicers using coupon books must provide the consumer the required information about the consumer's delinquency in a separate written notice.

The 2016 Mortgage Servicing Rule revises the delinquency information that must be included on the periodic statement or in the written notice provided in addition to the coupon book, and it clarifies the method for calculating the length of the delinquency. Under the 2016 Mortgage Servicing Rule, if the servicer is providing periodic statements, the periodic statement must include the length of the consumer's delinquency (as of the date of the periodic statement) if the consumer is more than 45 days delinquent. If the servicer is providing coupon books, the delinquency information that the servicer provides in the written notice in addition to the coupon book if the consumer is more than 45 days delinquent must include the length of the consumer's delinquency (as of the date of the written notice). In either case, the servicer must determine the length of the consumer's delinquency as required in the 2016 Mortgage Servicing Rule.

⁶ Certain servicers, such as small servicers, are not subject to the periodic statement requirements. See 12 CFR 1026.41(e).

⁷ Certain types of loans are not subject to the periodic statement requirements. See 12 CFR 1026.41(e).