Complications with Customer Communications in Context of Credit Conveyances (a/k/a Problems with Notices to Borrowers in Default or Bankruptcy When Loans or Servicing are Transferred)

Related Services

Bankruptcy, Restructuring and Distressed Situations

Related Industries

Financial Institutions

AUTHORED ARTICLE | Winter 2017

Published in the Winter 2017 issue of *The Bankers' Statement*

If your bank is in the process of a merger or has agreed to buy or sell a portfolio of mortgage loans, notices must be provided to the borrowers before and after the transaction closes. Care must be taken to determine the notices required and how they are worded to avoid violating potentially conflicting laws.

The Real Estate Settlement Procedures Act of 1974 (RESPA), as amended, requires, with limited exceptions, that when a bank or loan servicer transfers the servicing of a residential mortgage loan, both the transferor and the transferee must provide written notice of the transfer to the borrower. The notice must contain:

- the effective date of the transfer;
- the name, address and collect or toll-free telephone number of the transferor that can be contacted by the borrower to obtain answers to servicing transfer questions;
- the date on which the transferor will cease to accept payments and the date on which the transferee will begin to accept payments;
- whether the transfer will affect the terms or the continued availability of mortgage life or disability insurance or other optional insurance, and actions the borrower must take to maintain coverage; and
- a statement that the transfer of servicing does not affect any term or condition of the mortgage loan other than the terms directly related to the servicing of the loan.

The notice generally must be provided by the transferor of the servicing not less than 15 days before the effective date of the transfer, and the transferee must provide notice not more than 15 days after the effective date of the transfer. Alternatively, the transferor and the transferee may provide a joint notice at least 15 days before the effective date of the transfer.

Under the Federal Truth in Lending Act (TILA), when a mortgage loan is transferred, including in a merger, with certain exceptions, the purchaser of the loan must provide to the borrower written notice of the transfer. The notice must be sent not later than 30 days after the date of transfer and include:

- an identification of the loan;
- the date of transfer;
- the name, address and telephone number of the new owner of the loan;
- the name, address and telephone number of a party authorized to resolve issues concerning payments on the loan;
- where the transfer of ownership of the loan is recorded in public documents; and
- the owner's partial payment policy.

Banks must be careful to make sure that the transfer of servicing disclosure or the transfer of loan disclosure sent to consumer borrowers does not trigger the disclosure obligations under the Fair Debt Collection Practices Act (FDCPA). The FDCPA imposes obligations on a "debt collector" to provide certain information about the loan, either in the initial communication or within five days thereafter by written notice when a debt collector sends an "initial communication with a consumer in connection with the collection of any debt." In lawsuits brought by borrowers, courts have been divided over whether the specific notice before the court providing the information required by RESPA or TILA had the purpose of merely conveying information required by those laws or was an attempt to collect a debt.

Complying with the RESPA and TILA notice requirements can also get banks into trouble under laws designed to protect people who are currently in bankruptcy proceedings or have been granted bankruptcy discharges. The U.S. Bankruptcy Code provides for an automatic stay that begins the moment that a bankruptcy petition is filed. As most banks are all too aware, the automatic stay is an injunction that halts actions by creditors, with certain exceptions, to collect debts from a debtor who has declared bankruptcy. Failure to comply with this automatic stay may result in sanctions against the creditor. Further, once a debtor goes through a bankruptcy proceeding, he or she may be granted a bankruptcy discharge. The bankruptcy discharge is an injunction against certain actions relating to debts that existed before the bankruptcy was filed. The lender must make sure that the bankruptcy discharge is not violated as that may also result in sanctions for the lender or servicer.

The Consumer Financial Protection Bureau (CFPB) implements and enforces the federal consumer financial laws. The CFPB has adopted new regulations and interpretations, which go into effect in 2017 and 2018. Among other things, the new regulations attempt to address the issue of conflicting communication requirements under other provisions of RESPA and TILA, including those with respect to early intervention and periodic statements. The new regulations do not, however, eliminate the possibly conflicting requirements with respect to the notices in connection with the transfer of loans or servicing. Therefore, banks transferring or acquiring mortgage loans or servicing should carefully determine what notices are required and how to draft them to minimize the risk of liability.

Of course, with the new administration, the CFPB's future is unclear. So stay tuned for future developments!