Get Ready for CFPB Periodic Statements

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Servicers, sharpen your pencils: now is the time to gather resources for development and deployment with regard to bankruptcy periodic statements. While compliance with the Consumer Financial Protection Bureau (CFPB or Bureau) mandate is not required until April 19, 2018, the reality is that rollout should occur well before that deadline. There are still many unanswered questions and further CFPB clarification is unlikely. The industry will have to rely on logic and reason, as well as prior holdings to formulate statements and implement policies and procedures that will (hopefully) ensure the highest likelihood of consistent compliance.

A small contingent of mortgage creditor representatives met with the CFPB last October, with a goal of obtaining clarity on significant statement requirements. Several questions were presented to the CFPB in advance of the meeting. While the Bureau representatives were careful not to engage in any prohibited ex parte communication, they were also prepared and willing to provide guidance by pointing to alternative Rule provisions. They also indicated that the Bureau would further consider possible unintended negative consequences of the Rules, and whether additional commentary was warranted. Below is a summary of the questions and responses from that meeting.

A request that statement requirements be suspended for up to 90 days following a servicing transfer of loans in bankruptcy. This would permit servicer system and payment reconciliation, and allow trailing trustee funds to hit the new servicer account (as transfer of claims are generally not filed with the court until after the actual transfer date).
CFPB Response: The Bureau representatives indicated that they did not intend to make a change to the requirement at this time. It was suggested that Section 1026.31(d)(2) allows for an estimate based on the best information available. Servicers must note on the statement that the data is an estimate. It was also suggested that leaving fields blank is not considered to be in the spirit of compliance. There was no definitive response from the CFPB as to whether use of estimates was a possible FDCPA violation, but they indicated this would be under further review for commentary.

A request for comment on whether servicers *could* or *should* use the Chapter 12/13 model format in a Chapter 11 case where the debtor proposes to cure a default over time.
CFPB Response: The Bureau representatives indicated that no official comment was anticipated; however, parties should look to section 41(f); and, if additional information does not violate 41(c) comment 2, then servicers could include additional loan level details normally reserved for Chapter 12 and Chapter 13 statements. Moreover, it was stressed that all loan level detail called for in the Chapter 11 model form must still be provided.

A request for clarification as to whether it is permissible to continue to send the Chapter 11 bankruptcy statement during the period where a Chapter 11 case has been "administratively closed," but no final decree or discharge has been entered.
CFPB Response: The Bureau representatives referenced 41(f) comment 4, which provides that a periodic statement can be modified to comply with bankruptcy rules. Further, it was suggested that if a case is still considered "active," despite an administrative close, then servicers should be sending the required modified statement.

A request for Rule amendment for a statement exemption in Chapter 12 and 13 cases until after case confirmation. The request was based on FDCPA concerns, lack of finalized case information, and the likelihood of consumer confusion.
CFPB Response: The Bureau representatives again referenced section 1026.31(d)(2), which allows for the disclosed use of estimated data; i.e., where "information necessary for an accurate disclosure is unknown to the creditor, the creditor shall make the disclosure based on the best information reasonably available at the time the disclosure is provided, and shall state clearly that the disclosure is an estimate."

A request for clarification as to whether the exemption to sending periodic statements in a "property surrender" situation is similarly applicable to early intervention notice requirements in surrender situations.
CFPB Response: No. The Bureau representatives made it clear that the difference in treatment between periodic statements and early intervention notices was intentional. They believe that sending an early intervention notice to a discharged debtor would not be a violation of the discharge injunction as only one notice is required, and there is nothing in the Rule that would require the inclusion of a demand for payment. It was further pointed out that section 1024.39 of Regulation X provides servicers with the flexibility to adjust the notice, so as to not violate the discharge injunction.

A request for confirmation of applicability of successors-in-interest (SII) rules to bankruptcy cases.
CFPB Response: The Bureau representatives indicated that confirmed SII who filed bankruptcy would trigger the bankruptcy rule requirements. Thus, confirmed SII should be added to bankruptcy (and SCRA) search requirements.

The CFPB further reminded the attendees that where there is a surviving borrower or an estate of the deceased borrower, there is no requirement to send information/notices to the SII; however, this may fly in the face of bankruptcy requirements to file a claim and/or participate in a bankruptcy case.

A request for additional clarification of the ability to add disclaimers and other language to charge-off final statements to avoid an unintended violation of the automatic stay or discharge injunction.
CFPB Response: The Bureau representatives indicated that this provision would be revisited to determine whether additional commentary is necessary. In the interim, however, they indicated that they believed servicers would use the modified discharge statement and add the charge-off disclosures. Thus, the bankruptcy disclaimers already set forth within the underlying modified periodic statement would/should protect the servicer from potential stay violation and discharge injunction risk.

A request for additional clarification on the transitional single-billing-cycle exemption.
CFPB Response: The Proposed Interim Rule for a single-statement exemption, as published in the Federal Register on October 16, 2017 (and released the same day as the industry's face-to-face meeting with CFPB), addressed this request. Under the proposed change, servicers receive a one-month waiver/exemption on sending any statement when a transition event occurs. Transition events include (but are not limited to) the initial filing, surrender, stay termination, and case dismissal. There will likely be several transition trigger events in a case, which may lead to multiple (and even successive) exemption periods. If a statement has already been sent prior to the transition event, there is no need to correct the already-issued statement, and the exemption will roll to the following month.

Note: the Public Comment period closed on November 17, 2017. Comments can be found on the CFPB website. Servicers will need to implement system and procedure enhancements to effectively track the multiple transition trigger events so as to accurately manage statement production. ■

New Round of Federal Bankruptcy Rule and Form Changes Expected in 12/2019

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The mortgage industry now has two months under its belt adapting to the big changes to the Federal Rules of Bankruptcy Procedure (FRBP) that took effect in December 2017. These rule changes ushered in accelerated proof of claim filing deadlines and changes to Chapter 13 plans, nationally. But get ready, more changes are likely to come, and the USFN Bankruptcy Committee is already analyzing them.

In late 2017, further amendments to the FRBP and forms suggested by the Advisory Committee on Bankruptcy Rules (Advisory Committee) were unveiled for comment. The new proposed rules, if adopted, would impact how notice of filings in bankruptcy cases is received; how abandonments are secured; and how personal information inadvertently filed with the court is redacted.

Notice: Email Instead of Paper Mail

The Advisory Committee has been looking at the ongoing electronic filing, notice, and service cost-saving initiatives of other federal courts for ways to reduce the expense and burden of noticing in bankruptcy courts. Out of the nearly 150 FRBP that address noticing or service issues, the Advisory Committee decided to test the waters and phase in electronic noticing and service, using the proof of claim form (Official Form 410) to allow parties to opt into electronic notice and service. Specifically, a revised proof of claim form, which includes a box to check allowing the creditor to opt into electronic notice and service, is being proposed.

Uniform Abandonment Process

The FRBP provide that "the trustee or debtor in possession" shall give notice of a proposed abandonment or disposition of property. It is common practice in the industry to file a "motion to abandon" or a "motion to compel abandonment." In considering the motions, some courts struggle with the view that only the trustee or debtor in possession can abandon the property. The Advisory Committee pointed out that differences have been observed "in how courts proceed once a motion to compel abandonment is granted — e.g., whether the trustee must file a notice to abandon property or, rather, the abandonment process is complete upon entry of the order granting the motion to compel." The proposed rule amendment clarifies that no further action is necessary to notice or effect the abandonment of property ordered

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