

# Rules and Regulations

Federal Register

Vol. 81, No. 202

Wednesday, October 19, 2016

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

## BUREAU OF CONSUMER FINANCIAL PROTECTION

### 12 CFR Part 1006

[Docket No. CFPB–2014–0033]

RIN 3170–AA49

#### Safe Harbors From Liability Under the Fair Debt Collection Practices Act for Certain Actions Taken in Compliance With Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z)

**AGENCY:** Bureau of Consumer Financial Protection.

**ACTION:** Official Bureau interpretations.

**SUMMARY:** The Bureau of Consumer Financial Protection (Bureau) is issuing this interpretive rule under the Fair Debt Collection Practices Act (FDCPA) to clarify the interaction of the FDCPA and specified mortgage servicing rules in Regulations X and Z. This interpretive rule constitutes an advisory opinion for purposes of the FDCPA and provides safe harbors from liability for servicers acting in compliance with specified mortgage servicing rules in three situations: Servicers do not violate FDCPA section 805(b) when communicating about the mortgage loan with confirmed successors in interest in compliance with specified mortgage servicing rules in Regulation X or Z; servicers do not violate FDCPA section 805(c) with respect to the mortgage loan when providing the written early intervention notice required by Regulation X to a borrower who has invoked the cease communication right under FDCPA section 805(c); and servicers do not violate FDCPA section 805(c) when responding to borrower-initiated communications concerning loss mitigation after the borrower has invoked the cease communication right under FDCPA section 805(c).

**DATES:** This rule is effective on October 19, 2017, except that the interpretation contained in Part II.A is effective on April 19, 2018.

**FOR FURTHER INFORMATION CONTACT:** Dania L. Ayoubi, Counsel, or Laura A. Johnson or Amanda E. Quester, Senior Counsels; Office of Regulations, at (202) 435–7700.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

In January 2013, the Bureau issued several final rules concerning mortgage markets in the United States (2013 Title XIV Final Rules), pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Public Law 111–203, 124 Stat. 1376 (2010). Two of these rules were (1) the Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X) (2013 RESPA Servicing Final Rule);<sup>1</sup> and (2) the Mortgage Servicing Rules Under the Truth in Lending Act (Regulation Z) (2013 TILA Servicing Final Rule).<sup>2</sup>

The Bureau clarified and revised those rules through notice and comment rulemaking during the summer and fall of 2013 in the (1) Amendments to the 2013 Mortgage Rules under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z) (July 2013 Mortgage Final Rule)<sup>3</sup> and (2) Amendments to the 2013 Mortgage Rules under the Equal Credit Opportunity Act (Regulation B), Real Estate Settlement Procedures Act (Regulation X), and the Truth in Lending Act (Regulation Z) (September 2013 Mortgage Final Rule).<sup>4</sup> In October 2013, the Bureau clarified compliance requirements in relation to successors in interest, early intervention requirements, bankruptcy law, and the Fair Debt Collection Practices Act (FDCPA)<sup>5</sup> through an Interim Final Rule (IFR)<sup>6</sup> and a contemporaneous compliance bulletin (October 2013 Servicing Bulletin).<sup>7</sup> Among other things, the IFR provisionally exempted

servicers from the early intervention requirements when a borrower has properly invoked the FDCPA's cease communication protections and indicated that the Bureau expected to explore the potential utility and application of such requirements in comparison to the FDCPA protections in a broader debt collection rulemaking.<sup>8</sup> In October 2014, the Bureau added an alternative definition of small servicer in the Amendments to the 2013 Mortgage Rules under the Truth in Lending Act (Regulation Z).<sup>9</sup> The purpose of each of these updates was to address important questions raised by industry, consumer advocacy groups, and other stakeholders.

##### A. Proposed Rule

On December 15, 2014, the Bureau published for notice and comment a proposed rule to amend Regulations X and Z.<sup>10</sup> Among other things, the Bureau proposed three sets of rules relating to successors in interest. First, the Bureau proposed rules to define successors in interest for purposes of Regulation X's subpart C and Regulation Z as those persons who acquired an ownership interest in the property securing a mortgage loan in a transfer protected from due-on-sale enforcement by the Garn-St Germain Depository Institutions Act of 1982. Second, the Bureau proposed rules relating to how a mortgage servicer confirms a successor in interest's identity and ownership interest in the property. Third, the Bureau proposed to apply specified mortgage servicing rules in Regulations X and Z to successors in interest whose identity and ownership interest in the property have been confirmed by the servicer. The Bureau proposed these changes to address the significant problems that successors in interest continue to encounter with respect to the servicing of mortgage loans secured by their property—such as lack of access to information about the mortgage loan—which can lead to unnecessary foreclosures.

The Bureau also proposed to maintain the IFR's exemption from the live contact requirements of § 1024.39(a)

<sup>1</sup> 78 FR 10695 (Feb. 14, 2013).

<sup>2</sup> 78 FR 10901 (Feb. 14, 2013).

<sup>3</sup> 78 FR 44685 (July 24, 2013).

<sup>4</sup> 78 FR 60381 (Oct. 1, 2013).

<sup>5</sup> 15 U.S.C. 1692 *et seq.*

<sup>6</sup> 78 FR 62993 (Oct. 23, 2013).

<sup>7</sup> Bureau of Consumer Fin. Prot., CFPB Bulletin 2013–12, *Implementation Guidance for Certain Mortgage Servicing Rules* (Oct. 15, 2013), available at [http://files.consumerfinance.gov/f/201310\\_cfpb\\_mortgage-servicing\\_bulletin.pdf](http://files.consumerfinance.gov/f/201310_cfpb_mortgage-servicing_bulletin.pdf).

<sup>8</sup> 78 FR 62993, 62994 (Oct. 23, 2013). The Bureau received comments in response to the IFR that it took into account in developing the proposed rule and sample forms for consumers in bankruptcy.

<sup>9</sup> 79 FR 65300, 65304 (Nov. 3, 2014).

<sup>10</sup> 79 FR 74176 (Dec. 15, 2014).

with regard to a mortgage loan for which a borrower has invoked the cease communication protections of FDCPA section 805(c), for a servicer subject to the FDCPA with respect to that loan, while partially eliminating the exemption from the written early intervention notice requirements of § 1024.39(b) to require that a servicer provide a modified written notice to the borrower, if loss mitigation options are available. In addition to the information set forth in § 1024.39(b)(2), the proposal would have required that the modified written early intervention notice include a statement that the servicer may or intends to invoke its specified remedy of foreclosure.

#### B. Final Rule

Concurrent with issuing this interpretive rule, the Bureau is finalizing the proposed changes described above, with certain adjustments in the Amendments to the 2013 Mortgage Rules under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z) (2016 Servicing Final Rule).<sup>11</sup> Among other things, the 2016 Servicing Final Rule includes the proposed three sets of rule changes relating to successors in interest, with modifications to address concerns raised in comments the Bureau received. First, the 2016 Servicing Final Rule adds definitions of successor in interest to Regulations X and Z that are modeled on the categories of transferees that are protected from due-on-sale enforcement by the Garn-St Germain Depository Institutions Act of 1982.<sup>12</sup> Consistent with the proposal, successors in interest, as defined in the 2016 Servicing Final Rule, will not necessarily have assumed the mortgage loan obligation (*i.e.*, legal liability for the mortgage debt) under State law or otherwise be legally obligated on the mortgage loan.

Second, the 2016 Servicing Final Rule includes new rules relating to how a mortgage servicer confirms a successor in interest's identity and ownership interest. It also defines confirmed successor in interest under subpart C of Regulation X and under Regulation Z as a successor in interest once a servicer

has confirmed the successor in interest's identity and ownership interest in the relevant property.

Third, the 2016 Servicing Final Rule provides that a confirmed successor in interest is considered a borrower for purposes of Regulation X subpart C and § 1024.17 and a consumer for purposes of Regulation Z §§ 1026.20(c) through (e), 1026.36(c), 1026.39, and 1026.41 (collectively referred to herein as the Mortgage Servicing Rules). Under the 2016 Servicing Final Rule, confirmed successors in interest can obtain information about the mortgage loan through requests for information and notice of error procedures.<sup>13</sup> Confirmed successors in interest are also generally entitled to receive notices required under the Mortgage Servicing Rules to the extent applicable, if the servicer is not providing the same specific notices to another borrower on the account.<sup>14</sup> Applying these protections to confirmed successors in interest will further the purposes of RESPA and TILA by helping to prevent unnecessary foreclosures and other consumer harm by keeping confirmed successors in interest informed of the status of the mortgage loans on their property.

The 2016 Servicing Final Rule also finalizes the proposed partial exemption from the early intervention requirements with regard to a mortgage loan for which any borrower has invoked the cease communication right pursuant to FDCPA section 805(c), for a servicer subject to the FDCPA with respect to that loan, with modifications to address concerns raised in comments the Bureau received. Under the 2016 Servicing Final Rule, if a borrower has invoked the cease communication right pursuant to FDCPA section 805(c), a servicer subject to the FDCPA with respect to that loan is exempt from the

live contact requirements with respect to that mortgage loan. If no loss mitigation option is available or while any borrower on the mortgage loan is a debtor in bankruptcy under title 11 of the United States Code, a servicer is also exempt from the written notice requirements with respect to that mortgage loan. If these conditions are not met, the servicer is required to provide a modified written early intervention notice pursuant to § 1024.39(d)(3), as described in more detail below.

## II. Application of Interpretive Rule

While many mortgage servicers are not subject to the FDCPA, mortgage servicers that acquired a mortgage loan at the time that it was in default are subject to the FDCPA with respect to that mortgage loan. The Bureau is issuing this interpretive rule to clarify the interaction between certain provisions of the FDCPA and the Mortgage Servicing Rules. This interpretive rule constitutes an advisory opinion under FDCPA section 813(e) and provides a safe harbor from liability for actions done or omitted in good faith in conformity with the opinion, even if the opinion is rescinded or amended in whole or in part after the act or omission occurs, or is determined invalid by a judicial authority.<sup>15</sup> The interpretations contained in this rule are included in relevant commentary to Regulations X and Z.<sup>16</sup>

### A. Confirmed Successors in Interest

In the 2016 Servicing Final Rule, the Bureau is extending certain protections of Regulations X and Z to cover confirmed successors in interest whether or not a successor has assumed the mortgage loan obligation.<sup>17</sup> For

<sup>15</sup> FDCPA section 813(e).

<sup>16</sup> Regulation X comments 30(d)–1 and 39(d)–2; Regulation Z comment 2(a)(11)–4.ii.

<sup>17</sup> For purposes of Regulation X subpart C, successor in interest is defined as:

A person to whom an ownership interest in a property securing a mortgage loan subject to this subpart is transferred from a borrower, provided that the transfer is:

- A transfer by devise, descent, or other operation of law on the death of a joint tenant or tenant by the entirety;
- A transfer to a relative resulting from the death of a borrower;
- A transfer where the spouse or children of the borrower become an owner of the property;
- A transfer resulting from a decree of a dissolution of marriage, legal separation agreement, or from an incidental property settlement agreement, by which the spouse of the borrower becomes an owner of the property; or
- A transfer into an *inter vivos* trust in which the borrower is and remains a beneficiary and which does not relate to a transfer of rights of occupancy in the property.

<sup>11</sup> See Bureau of Consumer Fin. Prot., Final Rule: Amendments to the 2013 Mortgage Rules under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z) (Aug. 4, 2016), 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>.

<sup>12</sup> Regulation X § 1024.31; Regulation Z § 1026.2(a)(27)(i).

<sup>13</sup> The 2016 Servicing Final Rule provides that, in responding to a request for information under § 1024.36 or a request for documentation under § 1024.35(e)(4), a servicer may omit location and contact information and personal financial information (other than information about the terms, status, and payment history of the mortgage loan) if: (i) The information pertains to a potential or confirmed successor in interest who is not the requester; or (ii) the requester is a confirmed successor in interest and the information pertains to any borrower who is not the requester.

<sup>14</sup> The same exemptions and scope limitations apply to confirmed successors in interest as to other borrowers under the Mortgage Servicing Rules. Additionally, if a servicer provides an initial written notice and acknowledgment form to a confirmed successor in interest upon confirmation in compliance with the requirements of Regulation X § 1024.32(c)(1) through (3), the 2016 Servicing Final Rule allows the servicer not to provide notices under the Mortgage Servicing Rules to the confirmed successor in interest until the confirmed successor in interest requests such notices through the acknowledgment.

example, servicers generally will have to comply with Regulation X's requirements for loss mitigation and Regulation Z's requirements for periodic statements with respect to confirmed successors in interest.<sup>18</sup> This interpretive rule clarifies the interaction between the requirements in the 2016 Servicing Final Rule applicable to confirmed successors in interest and FDCPA section 805(b)'s general prohibition on communicating with third parties in connection with collection of a debt.

FDCPA section 805(b) generally prohibits debt collectors from communicating with third parties in connection with the collection of a debt in the absence of a court order or prior consumer consent given directly to the debt collector. FDCPA section 805(b) permits debt collectors to communicate with a person who is a consumer for purposes of section 805. FDCPA section 805(d), in turn, states that the term consumer for purposes of section 805 includes the consumer's spouse, parent (if the consumer is a minor), guardian, executor, or administrator.<sup>19</sup> The use of the word "includes" indicates that section 805(d) is an exemplary rather than exhaustive list of the categories of individuals that are "consumers" for purposes of FDCPA section 805.

FDCPA section 805 thus recognizes the importance of permitting debt collectors to communicate with a narrow category of other persons who, by virtue of their relationship to the obligor or the debt in question, may need to communicate with the debt collector in connection with the collection of the debt.

In light of its expertise as the agency that Congress has charged with interpreting and implementing the FDCPA, RESPA, and TILA, the Bureau interprets the term consumer for purposes of FDCPA section 805 to

include a confirmed successor in interest as that term is defined in Regulation X § 1024.31 and Regulation Z § 1026.2(a)(27)(ii). Given their relationship to the obligor, the mortgage loan, and the property securing the mortgage loan, and given the Bureau's extension of certain protections of Regulations X and Z to them, the Bureau concludes that confirmed successors in interest are—like the narrow categories of persons enumerated in FDCPA section 805(d)—the type of individuals with whom a servicer needs to communicate about the mortgage loan. As the Bureau notes in the 2016 Servicing Final Rule, a servicer's failure to provide information to a successor in interest about the status of a mortgage loan or to evaluate the successor in interest for available loss mitigation options could result in unnecessary foreclosure and loss of the successor in interest's ownership interest. Under this interpretive rule, servicers subject to the FDCPA with respect to a mortgage loan do not violate FDCPA section 805(b)'s prohibition on communicating with third parties by communicating with a confirmed successor in interest about a mortgage loan secured by property in which the confirmed successor in interest has an ownership interest, in compliance with the Mortgage Servicing Rules.<sup>20</sup>

Because this interpretive rule applies only to the use of the term consumer in section 805, it does not affect the definition of consumer under the remaining FDCPA provisions. Moreover, this interpretive rule applies only to confirmed successors in interest as defined in Regulation X § 1024.31 and Regulation Z § 1026.2(a)(27)(ii) to facilitate their access to information about the mortgage loan encumbering their property. It does not expand the definition of consumer for purposes of FDCPA section 805 beyond confirmed successors in interest as defined in Regulations X and Z. Furthermore, this interpretation does not relieve servicers that are debt collectors of their obligations under the FDCPA, including

their obligations under FDCPA sections 806 through 808.<sup>21</sup>

#### B. Required Early Intervention Notice

As explained in the 2016 Servicing Final Rule, the Bureau is, in part, eliminating the exemption from the written early intervention requirements with regard to a mortgage loan for which any borrower has invoked the cease communication right under FDCPA section 805(c), for a servicer subject to the FDCPA with respect to that loan. A servicer that is a debt collector with respect to that loan is exempt from the written notice requirements with regard to that loan if no loss mitigation option is available<sup>22</sup> or while any borrower on the mortgage loan is a debtor in bankruptcy under title 11 of the United States Code. If these conditions are not met, the servicer is required to provide a modified written early intervention notice that, among other things, includes statements encouraging the borrower to contact the servicer, provides a brief description of examples of loss mitigation options that may be available from the servicer, and states that the servicer may or intends to invoke its specified remedy of foreclosure.<sup>23</sup> The servicer is legally required to provide a delinquent borrower with the written notice not later than the 45th day of the borrower's delinquency. As a general matter, this written notice must be provided well before the servicer may initiate foreclosure: In most cases, the servicer is legally required to wait until a borrower's mortgage loan obligation is more than 120 days delinquent, after the written notice has been sent, to make the first notice or filing required by applicable law for any judicial or non-

<sup>21</sup> For example, servicers that are debt collectors must not: Engage in conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt; use any false, deceptive, or misleading representation or means in connection with the collection of a debt; or use unfair or unconscionable means to collect or attempt to collect any debt.

<sup>22</sup> See Regulation X comment 39(d)-1 (explaining availability of loss mitigation options).

<sup>23</sup> Regulation X § 1024.39(d)(3). The 2016 Servicing Final Rule provides the following model language that servicers that are debt collectors may use:

This is a legally required notice. We are sending this notice to you because you are behind on your mortgage payment. We want to notify you of possible ways to avoid losing your home. We have a right to invoke foreclosure based on the terms of your mortgage contract. Please read this letter carefully.

Appendix MS-4(D). Use of this model clause or another statement in compliance with § 1024.39(d)(3)(i), on a written notice as required by and in compliance with the other requirements of § 1024.39(d)(3), provides a safe harbor from FDCPA liability under section 805(c) for providing the required statement.

Regulation X § 1024.31. The 2016 Servicing Final Rule's definition of successor in interest for Regulation Z is identical, except that the Regulation Z definition substitutes "a dwelling securing a closed-end consumer credit transaction is transferred from a consumer" for "a property securing a mortgage loan is transferred from a borrower." Regulation Z § 1026.2(27)(i). The categories included in these definitions track the categories of transfers protected by section 341(d) of the Garn-St Germain Depository Institutions Act of 1982. The 2016 Servicing Final Rule also defines confirmed successor in interest as a successor in interest once a servicer has confirmed the successor in interest's identity and ownership interest in the relevant property. Regulation X § 1024.31, Regulation Z § 1026.2(a)(27)(ii).

<sup>18</sup> Regulation X §§ 1024.30(d) and 1024.41; Regulation Z §§ 1026.2(a)(11) and 1026.41.

<sup>19</sup> 15 U.S.C. 1692c(d). In general, the FDCPA defines consumer as "any natural person obligated or allegedly obligated to pay any debt." FDCPA section 803(3), 15 U.S.C. 1692b(3).

<sup>20</sup> As a consequence of this interpretation, the protections in FDCPA sections 805(a) and (c), which apply to consumers for purposes of section 805, apply to confirmed successors in interest. Under FDCPA section 805(a), a debt collector may not—without the prior consent of the consumer or the express permission of a court—communicate with the consumer in connection with the collection of any debt in certain circumstances, including at any unusual or inconvenient time or place. And, as explained in greater detail below, FDCPA section 805(c) provides that, if a consumer refuses in writing to pay a debt or requests that a debt collector cease communicating with the consumer about the debt, the debt collector must generally cease communicating with the consumer.

judicial foreclosure process. This written notice may not contain a request for or suggestion of payment, other than for purposes of loss mitigation, and the servicer is not required to provide it to the borrower more than once during any 180-day period.<sup>24</sup>

Section 805(c) of the FDCPA provides that, if a consumer refuses in writing to pay a debt or requests that a debt collector cease communicating with the consumer about the debt, the debt collector must discontinue communicating with the consumer, subject to enumerated exceptions. As relevant here, the prohibition does not apply where a debt collector communicates with a consumer who has invoked the cease communication right to notify the consumer that the debt collector or creditor may invoke specified remedies which are ordinarily invoked by such debt collector or creditor<sup>25</sup> or, where applicable, to notify the consumer that the debt collector or creditor intends to invoke a specified remedy.<sup>26</sup>

Because failure to provide the written early intervention notice required by § 1024.39(d)(3) is closely linked to a servicer's ability to invoke its specified remedy of foreclosure, the Bureau concludes that the notice falls within the exceptions in FDCPA sections 805(c)(2) and (3).

This interpretation is limited to the specific situation where a servicer that is a debt collector with respect to a mortgage loan is required by § 1024.39(d)(3) to provide a modified written early intervention notice to a borrower who has invoked the cease communication right under FDCPA section 805(c) with regard to that loan. It is a narrow safe harbor, based only upon the interplay between these two specific federal consumer protections—the early intervention requirements of § 1024.39 of Regulation X and the cease communication provision and statutory exceptions of section 805(c) of the FDCPA. All other provisions of the FDCPA, including the prohibitions contained in FDCPA sections 805 through 808, are unaffected by this interpretation, and a servicer that is a debt collector with respect to the particular mortgage loan remains liable to the extent that anything in the notice violates any other provision of the FDCPA.<sup>27</sup>

The Bureau concludes that, in the limited circumstances where a servicer is subject to the FDCPA with respect to a borrower's mortgage loan and the borrower has invoked the cease communication right pursuant to FDCPA section 805(c) with regard to that mortgage loan, and where the servicer complies with the requirements of the modified written early intervention notice under § 1024.39(d)(3) of Regulation X, the modified written early intervention notice required under § 1024.39(d)(3) is within the statutory exceptions of FDCPA section 805(c)(2) and (3) and thus does not violate section 805(c) with respect to the mortgage loan.

### *C. Borrower-Initiated Communications Concerning Loss Mitigation After Invocation of Cease Communication Rights*

Even after a borrower has invoked the cease communication right under section 805(c) of the FDCPA, the borrower may contact the servicer to discuss or apply for loss mitigation. For instance, as noted above, § 1024.39(d)(3) requires servicers subject to the FDCPA with respect to a borrower's mortgage loan to provide a written early intervention notice to borrowers who have invoked the FDCPA's cease communication right with regard to that loan if any loss mitigation option is available and no borrower on the mortgage loan is a debtor in bankruptcy under title 11 of the United States Code. The written notice must include a statement encouraging the borrower to contact the servicer.<sup>28</sup> The Bureau believes that, when borrowers respond to such a notice by contacting the servicer to discuss available loss mitigation options or otherwise initiate communication with the servicer concerning loss mitigation, such a borrower-initiated communication should not be understood as within the category of communication that borrowers generally preclude by invoking the cease communication right under FDCPA section 805(c). The Bureau therefore concludes that a borrower's invocation of the FDCPA's cease communication right with regard to a mortgage loan does not prevent a servicer that is a debt collector with respect to that mortgage loan from responding to borrower-initiated communications concerning loss mitigation.

As noted above, FDCPA section 805(c) empowers borrowers to direct debt collectors to cease contacting them with respect to a debt and frees borrowers from the burden of being subjected to unwanted communications regarding collection of a debt. Borrower-initiated conversations about loss mitigation options do not give rise to the burden of unwanted communications that FDCPA section 805(c) protects against. Rather, they are sought out by borrowers for this narrow purpose. The Bureau therefore concludes that a borrower's cease communication notification pursuant to FDCPA section 805(c) should ordinarily be understood to exclude borrower-initiated communications with a servicer concerning loss mitigation because the borrower has specifically requested the communication at issue to discuss available loss mitigation options. Accordingly, when a servicer that is a debt collector with respect to a mortgage loan responds to a borrower-initiated communication concerning loss mitigation after the borrower's invocation of FDCPA section 805(c)'s cease communication protection with regard to that loan, the servicer does not violate FDCPA section 805(c) with respect to such communications as long as the servicer's response is limited to a discussion of any potentially available loss mitigation option. For example, a servicer may discuss with a borrower any available loss mitigation option that the owner or assignee of the borrower's mortgage loan offers, instructions on how the borrower can apply for loss mitigation, what documents and information the borrower would need to provide to complete a loss mitigation application, and the potential terms or details of a loan modification program, including the monthly payment and duration of the program. These borrower-initiated communications, although variable, are unlikely to be perceived as within the scope of the cease communication request given the borrower's initiation of communications concerning loss mitigation information.

This is the case even if the borrower provides a cease communication notification during the loss mitigation application and evaluation process under § 1024.41. The borrower usually should be understood to have excluded the loss mitigation application and evaluation process under § 1024.41 from the general request to cease communication, and therefore a servicer should continue to comply with the procedures under § 1024.41. Only if the borrower provides a communication to the servicer specifically withdrawing

<sup>24</sup> Regulation X § 1024.39(d)(3).

<sup>25</sup> FDCPA section 805(c)(2).

<sup>26</sup> FDCPA section 805(c)(3).

<sup>27</sup> For example, servicers that are debt collectors must not: Engage in conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt; use any false, deceptive, or misleading

representation or means in connection with the collection of a debt; or use unfair or unconscionable means to collect or attempt to collect any debt.

<sup>28</sup> See Regulation X § 1024.39(b)(2)(i).

the request for loss mitigation does the cease communication prohibition apply to communicating about the specific loss mitigation action.<sup>29</sup>

The Bureau notes that this interpretation provides a safe harbor from FDCPA section 805(c) for servicers that are debt collectors with respect to a particular mortgage loan communicating with the borrower in connection with a borrower's initiation of communications concerning loss mitigation. Preceding a borrower's loss mitigation application and during the evaluation process, a servicer may respond to borrower inquiries about potentially available loss mitigation options and provide information regarding any available option. Similarly, if that borrower submits a loss mitigation application, the servicer's reasonable diligence obligations under § 1024.41(b)(1) require the servicer to request additional information from the borrower, including by contacting the borrower, and these communications by the servicer to complete a loss mitigation application do not fall within the cease communication prohibition. The servicer may also seek information that will be necessary to evaluate the borrower for loss mitigation, though the servicer may not seek a payment unrelated to the purpose of loss mitigation. Once the borrower's loss mitigation application is complete, a servicer's communications with a borrower in accordance with the procedures in § 1024.41 are not subject to liability under FDCPA section 805(c) because they arise from the borrower's application for loss mitigation.

The Bureau recognizes that, in order for a borrower to engage in meaningful loss mitigation discussions with a servicer, the servicer may discuss repayment options, the borrower's ability to make a payment, and how much the borrower can afford to pay as a part of a loss mitigation option for which the servicer is considering the borrower. Furthermore, the Bureau understands that any offer for a loan modification or repayment plan is likely to include a specific payment amount the borrower must pay under the terms of the loss mitigation agreement. Such communications, as long as for the purpose of loss mitigation, are permissible because they should not be understood as within the scope of the cease communication request.

<sup>29</sup> See Bureau of Consumer Fin. Prot., Implementation Guidance for Certain Mortgage Servicing Rules, CFPB Bulletin 2013-12 (Oct. 15, 2013), available at [http://files.consumerfinance.gov/f/201310\\_cfpb\\_mortgage-servicing\\_bulletin.pdf](http://files.consumerfinance.gov/f/201310_cfpb_mortgage-servicing_bulletin.pdf).

The Bureau emphasizes, however, that the cease communication prohibition continues to apply to a servicer's communications with a borrower about payment of the mortgage loan that are outside the scope of loss mitigation conversations. The Bureau's interpretation does not protect a servicer that is a debt collector with respect to a mortgage loan and is using borrower-initiated communications concerning loss mitigation as a pretext for debt collection in circumvention of a borrower's invoked cease communication right under FDCPA section 805(c) with regard to that loan. Seeking to collect a debt under the guise of a loss mitigation conversation is not exempt from liability under FDCPA section 805(c) under this interpretation. Thus, in subsequently communicating with a borrower concerning loss mitigation, the servicer is strictly prohibited from making a request for payment that is not immediately related to any specific loss mitigation option. Some examples of impermissible communications include initiating conversations with the borrower related to repayment of the debt that are not for the purposes of loss mitigation, demanding that the borrower make a payment, requesting that the borrower bring the account current or make a partial payment on the account, or attempting to collect the outstanding balance or arrearage, unless such communications are immediately related to a specific loss mitigation option.<sup>30</sup> Additionally, all other provisions of the FDCPA, including the prohibitions contained in FDCPA sections 805 through 808, continue to apply.<sup>31</sup>

### III. Regulatory Requirements

This rule articulates the Bureau's interpretation of the FDCPA. It is exempt from notice and comment rulemaking requirements under the Administrative Procedure Act pursuant to 5 U.S.C. 553(b). Because no notice of proposed rulemaking is required, the Regulatory Flexibility Act does not require an initial or final regulatory

<sup>30</sup> See 53 FR 50097, 50103 (Dec. 13, 1988) (Section 805(c)-2 of the Federal Trade Commission's (FTC) Official Staff Commentary on FDCPA section 805(c)) ("A debt collector's response to a 'cease communication' notice from a consumer may not include a demand for payment, but is limited to the three statutory exceptions [under FDCPA section 805(c)(1) through (3)].").

<sup>31</sup> For example, servicers that are debt collectors must not: Engage in conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt; use any false, deceptive, or misleading representation or means in connection with the collection of a debt; or use unfair or unconscionable means to collect or attempt to collect any debt.

flexibility analysis.<sup>32</sup> The Bureau has determined that this rule does not impose any new or revise any existing recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would be collections of information requiring OMB approval under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

Dated: August 2, 2016.

**Richard Cordray**,  
Director, Bureau of Consumer Financial  
Protection.

[FR Doc. 2016-18902 Filed 10-18-16; 8:45 am]

**BILLING CODE 4810-AM-P**

## SMALL BUSINESS ADMINISTRATION

### 13 CFR Parts 121, 124, and 126

RIN 3245-AG24

#### Small Business Mentor Protégé Programs; Correction

**AGENCY:** U.S. Small Business  
Administration.

**ACTION:** Correcting amendments.

**SUMMARY:** The U.S. Small Business Administration (SBA) published a final rule in the **Federal Register** on July 25, 2016 (81 FR 48557), amending its regulations to establish a new Government-wide mentor-protégé program for all small business concerns, consistent with SBA's mentor-protégé program for Participants in SBA's 8(a) Business Development (BD) program. The rule also made several additional changes to current size, 8(a), Office of Hearings and Appeals, and HUBZone regulations, concerning among other things, ownership and control, changes in primary industry, economic disadvantage of a Native Hawaiian Organization (NHO), standards of review, and interested party status for some appeals. This document makes several technical corrections to that final rule, including correcting citations, eliminating a paragraph that conflicts with a new provision added by that final rule, and making conforming amendments.

**DATES:** Effective October 19, 2016.

**FOR FURTHER INFORMATION CONTACT:** Michael McLaughlin, Office of Policy, Planning & Liaison, U.S. Small Business Administration, 409 Third Street SW., Washington, DC 20416; 202-205-5353; [michael.mclaughlin@sba.gov](mailto:michael.mclaughlin@sba.gov).

**SUPPLEMENTARY INFORMATION:** The final rule published on July 25, 2016, at 81 FR 48557, contained several errors,

<sup>32</sup> 5 U.S.C. 603(a) and 604(a).