



Financial Services Webinar Series

CFPB Mortgage Servicing Amendments

Part 3. What You Need to Know: Bankruptcy

September 27, 2016

Presented by:

Jonathan Kolodziej, Chris Hawkins, and Alexandra Dugan

©Bradley Arant Boult Cummings LLP

THIS IS NOT INTENDED TO PROVIDE LEGAL ADVICE

Timeline

- November 20, 2014
 - CFPB issues proposed rule and opens comment period
- March 16, 2015
 - Comment period on proposal closes
 - To date, CFPB has received and posted 200 comments
- April 26, 2016
 - Report summarizing testing of bankruptcy periodic statement forms is published in the Federal Register and reopens comment period
- May 26, 2016
 - Comment period on report and testing method/results closes
 - To date, CFPB has received and posted 20 comments
- August 4, 2016
 - CFPB releases final amendments to existing rules in Regulations X and Z, along with interpretive rule on FDCPA compliance



Summary

Initial release of Mortgage Servicing Rules did not contain exemptions for borrowers in bankruptcy, but Interim Final Rule issued October 2013 granted a reprieve with respect to problematic communication requirements

The 2016 Final Rule contains bankruptcy requirements covering primarily two key topics:

1. Early Intervention
2. Periodic billing statements

In the absence of a bankruptcy exemption or bankruptcy-specific modification, the Mortgage Servicing Rules apply to loans in bankruptcy

Effective date:

- 18 months from date published in Federal Register for periodic billing statement requirements for borrowers in bankruptcy
- 12 months from date published in Federal Register for early intervention requirements



3

Early Intervention



4

Early Intervention – Live Contact

Current Rule

- A servicer shall contact the borrower no later than the 36th day of delinquency, and promptly inform the borrower of loss mitigation options, if appropriate
 - This is a recurring obligation for each delinquency
- Servicers are exempt from the early intervention requirements while the borrower is a debtor in bankruptcy

Amended Rule

- Exemption for live contact remains intact while any borrower on an account is a debtor in bankruptcy
- Adds clarity regarding when a servicer must resume compliance

Bradley

5

Early Intervention – Written Notice

Current Rule

- A servicer must provide the borrower with an early intervention written notice not later than the 45th day of the borrower's delinquency
 - This is a recurring obligation, but the written notice does not have to be sent more than once during any 180-day period
- Servicers are exempt from this requirement while the borrower is a debtor in bankruptcy.

Amended Rule

- Partial exemption for the written notice obligation
- Modified timing requirements
- Modified content for written notice
- Provides clarity regarding when a servicer must resume full compliance

Bradley

6

Early Intervention – Written Notice

Partial Exemption

- While any borrower on a mortgage loan is a debtor in bankruptcy, the servicer, with respect to that mortgage loan, is exempt from the written notice requirement if
 - No loss mitigation option is available, **or**
 - Any borrower on the mortgage loan has provided a cease communication request in accordance with Section 805(c) of the FDCPA

7


Early Intervention – Written Notice

Modified Timing

- If a borrower **is** delinquent when the bankruptcy petition under title 11 of the United States Code is filed, written notice must be sent no later than 45 days after the filing
- If the borrower **is not** delinquent when the bankruptcy petition is filed, but subsequently becomes delinquent while a debtor in bankruptcy, written notice must be provided not later than the 45th day of the borrower's delinquency
- Modified timing requirements apply regardless of whether the servicer provided the written notice in the preceding 180-day period
- Early Intervention written notice is not required more than once during a single bankruptcy case

8


Early Intervention – Written Notice

Modified Content

- Content requirements of § 1024.39(b)(2) still apply:
 - Statement encouraging borrower to contact servicer;
 - Telephone number for assigned servicer personnel;
 - If applicable, a brief description of examples of loss mitigation options that may be available;
 - If applicable, either application instructions or statement regarding how the borrower can obtain more information; and
 - HUD counseling information
- Early Intervention written notice may not contain a request for payment when sent to a borrower that is a debtor in bankruptcy

Bradley

9

Early Intervention

Resuming Compliance

- A servicer that was exempt due to a borrower's bankruptcy must resume compliance after the next payment due date that follows the earliest of the following events:
 - The bankruptcy case is dismissed;
 - The bankruptcy case is closed; and
 - The borrower reaffirms personal liability for the mortgage loan
- Live contact and written notice exemptions continue to apply with respect to a mortgage loan for which the borrower has discharged personal liability
 - Must resume compliance with the modified written notice requirements if the borrower has made any partial or periodic payment after commencement of the bankruptcy case

Bradley

10

Early Intervention

CFPB Rationale for Written Notice Requirements

- The CFPB sought to balance the desire to provide information about loss mitigation options to borrowers in bankruptcy with the concerns about sending communications that could be viewed as stay violations

Key Considerations/Takeaways

- Servicers should ensure that bankruptcy milestones are accurately and quickly updated in the system of record
- The early intervention amendments become effective 12 months after the publication date

11



Periodic Billing Statements

12



Periodic Billing Statements

Borrowers in Bankruptcy

Current Rule

- Periodic billing statements must be provided for each billing cycle, unless an exemption applies
- A servicer is exempt from sending periodic billing statements for a mortgage loan while the consumer is a debtor in bankruptcy

Amended Rule

- Servicers **must send** modified periodic billing statements to borrowers in bankruptcy, unless the borrower is **exempt**
- Modified content requirements
- When a modified statement is required, the modified statement may be sent to any or all primary obligors, even if one of the primary obligors is not a debtor in bankruptcy

Bradley

13

Periodic Billing Statements

Bankruptcy Exemption

- Billing statements are not required if:
 - The borrower is in a bankruptcy case or the borrower has discharged personal liability for the mortgage loan pursuant to 11 U.S.C. 727, 1141, 1228, or 1328; **and**
 - The borrower requests that the servicer **cease providing a periodic statement** or coupon book in writing;
 - The plan provides for a **surrender, avoidance** of the lien or does not provide for, the payment of pre-bankruptcy arrearage or the maintenance of payments due;
 - The bankruptcy court order provides for the lien to be **avoided**, the stay to be **lifted** or for the servicer to cease providing a periodic statement or coupon book in writing; **or**
 - A statement of intention is provided for **surrender** and the borrower has not made a partial or complete payment after the bankruptcy case

Bradley

14

Periodic Billing Statements

Bankruptcy Exemption

- Exemption no longer applies if:
 - The debtor reaffirms personal liability; or
 - Any consumer on the loan requests in writing that the servicer provide periodic statements
 - Unless a court enters an order requiring the servicer to cease sending statements
- A servicer may establish an address that the consumer must use to request to opt in or opt out of periodic statements
 - Same address must be designated for opt-in and opt-out requests
 - Servicer must notify the consumer of the address in a manner that is reasonably designed to inform the consumer of the address
 - A consumer's written request to opt-in or opt-out is effective as of the date of receipt by the servicer

Bradley

15

Periodic Billing Statements

Bankruptcy Exemption

- Servicer must transition to sending a modified billing statement, or back to an unmodified billing statement, when any of the following triggers applies:
 - Borrower becomes a debtor in bankruptcy
 - Borrower ceases to be a debtor in bankruptcy
 - Servicer ceases to qualify for an exemption from the billing statement requirements
- Transitional single-billing-cycle exemption
 - Servicers are exempt from sending a billing statement for a single billing cycle when one of the above trigger events occurs within 14 days of the next payment due date
- Timing of first modified or unmodified statement after transition
 - Mailed within a reasonably prompt time after first payment due date or end of courtesy period

Bradley

16

Periodic Billing Statements

Bankruptcy Exemption

CFPB Rationale for Exemption Requirements

- The exemptions are tailored to apply to borrowers who have provided some indication that they do not intend to retain the property or affirmatively requested not to receive periodic statements

Key Considerations/Takeaways

- Servicers should ensure that their system of record accurately tracks data points to determine whether an exemption applies, such as surrender or lift of stay.
- Servicers should ensure that reliable logic is utilized to identify when a borrower in bankruptcy is exempt from the periodic statement requirement.

Bradley

17

Periodic Billing Statements

Content

- Servicers must provide a periodic statement or coupon book to consumers in bankruptcy (or that have received a discharge in bankruptcy), with modifications to account for the bankruptcy status and the specific chapter of bankruptcy in which the consumer is a debtor
- Sample forms
 - CFPB provided a sample form for accounts in Chapter 7 or 11, and a separate sample form for accounts in Chapter 12 or 13
- Servicers may use terminology other than that found on the samples, so long as the new terminology is commonly understood
- Statements may be modified as necessary to facilitate compliance with applicable law or a court order

Bradley

18

Periodic Billing Statements

Content

- CFPB rationale for modified content requirements:
 - The benefit to consumers of providing the modified information in the periodic statements outweighs the burden on servicers
 - The disclosures and modifications to the account information will mitigate the risk that a statement violates the automatic stay and/or discharge order
 - The information required on the modified Chapter 12/13 periodic statements will assist consumers in making timely payments and tracking progress in their cases
 - Even with respect to Chapter 7 cases in which the consumer has received a discharge, periodic statements can assist the consumer in making the payments necessary to retain the residence.



19

Periodic Billing Statements

Content

Key Considerations/Takeaways

- Modified statements remove essentially all references to delinquency/late payments
- The servicer may use “contractual” basis for applying all payments received instead of a “bankruptcy” basis.
- The servicer still must be able to provide a running accounting with respect to the consumer’s progress toward repaying the prepetition arrearage
- There still may be a gap with respect to when post-petition “ongoing” payments from a trustee should be considered delinquent.



20

Periodic Billing Statements

Content – All Bankruptcy Types

- Statement (or coupon book) **may omit**:
 - The amount of any late payment fee, and the date on which that fee will be imposed if payment has not been received
 - The length of the consumer's delinquency
 - The possible risks, such as foreclosure, and expenses, that may be incurred if the delinquency is not cured
 - A notice of whether the servicer has made the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process, if applicable

21

Periodic Billing Statements

Content – All Bankruptcy Types

- Statement (or coupon book) **must include**:
 - A statement identifying the consumer's status as a debtor in bankruptcy or the discharged status of the mortgage loan
 - A statement that the periodic statement is for informational purposes only

Bankruptcy Message

Our records show that either you are a debtor in bankruptcy or you discharged personal liability for your mortgage loan in bankruptcy.

We are sending this statement to you for informational and compliance purposes only. It is not an attempt to collect a debt against you.

If you want to stop receiving statements, write to us.

22

Periodic Billing Statements

Content – Chapters 12 and 13

- With respect to a mortgage loan in which any consumer with primary liability is a debtor in a **Chapter 12 or Chapter 13** case, additional modifications apply
- Statements (or coupon books) **may omit** certain information that is normally required when the consumer is more than 45 days delinquent:
 - Account history showing the previous six months or the period since the last time the account was current, whichever is shorter
 - A notice indicating any loss mitigation program to which the consumer has agreed, if applicable
 - The total payment amount needed to bring the account current
 - HUD counseling information

Bradley

23

Periodic Billing Statements

Content – Chapters 12 and 13

- Amount Due on statement (or coupon book) may be limited to:
 - Date and amount of post-petition payment due; and
 - Any post-petition fees and charges imposed by the servicer
- Explanation of Amount Due on statement (or coupon book) may be limited to:
 - Monthly post-petition payment amount, including a breakdown showing how much, if any, will be applied to principal, interest and escrow;
 - Total sum of any post-petition fees or charges imposed since the last statement; and
 - Any post-petition payment amount past due

Account Number	1234567
Payment Date	9/1/2015
Payment Amount	\$3,569.88

Explanation of Payment Amount (Post-Petition Payment)	
Principal	\$511.63
Interest	\$1,053.31
Escrow (Taxes and Insurance)	\$975.00
Regular Monthly Payment	\$1,939.94
Total Fees and Charges	\$190.00
Past Unpaid Amount	\$1,439.94
Total Payment Amount	\$3,569.88

The Payment Amount does not include any amount that was past due before you filed for bankruptcy.

Bradley

24

Periodic Billing Statements

Content – Chapters 12 and 13

- Transaction Activity on statement (or coupon book) **must include:**
 - All post-petition payments
 - All pre-petition payments
 - Payments of post-petition fees and charges
 - Post-petition fees and charges the servicer has imposed since last statement
- Source of payments need not be identified

Transaction Activity (7/20 to 8/19)

Date	Description	Charges	Payments
8/10/15	Partial Payment Received*	\$336.43	
8/13/15	Partial Payment Received*		\$500.00
8/16/15	Late Fee (charged because full payment not received by 8/15/15)	\$190.00	

25



Periodic Billing Statements

Content – Chapters 12 and 13

- If applicable, servicer **must disclose** information regarding the pre-petition arrearage:
 - Total of all pre-petition payments received since last statement
 - Total of all pre-petition payments received since beginning of the consumer's bankruptcy case
 - Current balance of the consumer's pre-petition arrearage
- These items must be grouped in close proximity to each other and located on the first page of the statement, or, alternatively, on a separate page enclosed with the periodic statement or in a separate letter

Summary of Amounts Past Due Before Bankruptcy Filing (Pre-Petition Arrearage)

Paid Last Month	\$336.43	This box shows amounts that were past due when you filed for bankruptcy. It may also include other allowed amounts on your mortgage loan. The Trustee is sending us the payments shown here. These are separate from your regular monthly mortgage payment.
Total Paid During Bankruptcy	\$1,345.72	
Current Balance	\$10,765.88	

26



Periodic Billing Statements

Content – Chapters 12 and 13

- Statement (or coupon book) **must include**, as applicable:
 - A statement that the amount due includes only post-petition payments and does not include other payments that may be due under the terms of the consumer's bankruptcy plan

The Payment Amount does not include any amount that was past due before you filed for bankruptcy.
 - If the consumer's bankruptcy plan requires the consumer to make the post-petition mortgage payments directly to a bankruptcy trustee, a statement that that the consumer should send the payment directly to the trustee and not the servicer

If your bankruptcy plan requires you to send your regular monthly mortgage payments to the Trustee, do not send your payment to us. Instead, you should send your payment to the Trustee.

27

Periodic Billing Statements

Content – Chapters 12 and 13

- Statement (or coupon book) **must include**, as applicable:
 - A statement that the information disclosed on the periodic statement may not include payments made to the trustee and may not be consistent with the trustee's records
 - A statement that encourages the consumer to contact his/her attorney or the trustee regarding the application of payments
 - If the consumer is more than 45 days delinquent on post-petition payments, a statement that the servicer has not received all the payments that became due since the consumer filed for bankruptcy

Important Messages

We have not received all of your mortgage payments due since you filed for bankruptcy.

This statement may not show recent payments you sent to the Trustee that the Trustee has not yet forwarded to us. Please contact your attorney or the Trustee if you have questions.

***Partial Payments:** Any partial payments listed here are not applied to your mortgage, but instead are held in one or more separate suspense accounts. Once we receive funds equal to a full monthly payment, we will apply those funds to your mortgage.

28

Periodic Billing Statements

Coupon Books

- Required disclosures may be included anywhere in the coupon book provided to the consumer, or on a separate page enclosed with the coupon book
- Upon request, servicer must make available to the consumer (by telephone, in writing, in person, or electronically if consumer consents) the pre-petition arrearage information
- The same “general” bankruptcy modifications apply to coupon books
 - Delinquency/foreclosure information may be omitted
 - Other accounting information
 - Amount Due
 - Explanation of Amount Due
 - Transaction Activity
 - Additional Disclosures

29



Periodic Billing Statements

Sample Forms

Chapter 7/11 Sample Periodic Statement

Springside Mortgage
 Customer Service: 1-800-555-1234
www.springsidemortgage.com

Jordan and Dana Smith
 4700 Jones Drive
 Memphis, TN 38109

Mortgage Statement
 Statement Date: 8/20/2015

Account Number	1234567
Payment Date	9/1/2015
Payment Amount	\$3,839.13

Bankruptcy Message
Our records show that either you are a debtor in bankruptcy or you discharged personal liability for your mortgage loan in bankruptcy.
We are sending this statement to you for informational and compliance purposes only. It is not an attempt to collect a debt against you.
If you want to stop receiving statements, write to us.

Explanation of Payment Amount	
Principal	\$386.46
Interest	\$1,048.07
Escrow (Taxes and Insurance)	\$285.18
Regular Monthly Payment	\$1,669.71
Total Fees and Charges	\$160.00
Past Unpaid Amount	\$2,009.42
Total Payment Amount	\$3,839.13

Account Information	
Outstanding Principal	\$265,544.78
Interest Rate (Until October 2015)	4.75%
Prepayment Penalty	Yes

30



Periodic Billing Statements

Sample Forms

Chapter 7/11 Sample Periodic Statement (continued)

Transaction Activity (7/20 to 8/19)			
Date	Description	Charges	Payments
8/13/15	Partial Payment Received*	\$1,000.00	
8/16/15	Late Fee (charged because full payment not received by 8/15/2015)	\$160.00	

Past Payments Breakdown		
	Paid Last Month	Paid Year to Date
Principal	\$0.00	\$2,268.95
Interest	\$0.00	\$6,338.23
Escrow (Taxes and Insurance)	\$0.00	\$1,411.08
Fees	\$0.00	\$160.00
Partial Payment (Unapplied)*	\$1,000.00	\$1,490.00
Total	\$1,000.00	\$11,668.26

Account History	
<i>Recent Account History</i>	
• Payment due 5/1/15: Fully paid on time	
• Payment due 6/1/15: Fully paid on 7/3/15	
• Payment due 7/1/15: Unpaid balance of \$339.71	
• Payment due 8/1/15: Unpaid balance of \$1829.71	
• Current payment date 9/1/15: \$1,669.71	
• Total: \$3,839.13 unpaid amount that, if paid, would bring your loan current.	

If You Are Experiencing Financial Difficulty: See back for information about mortgage counseling or assistance.

Important Messages		
<p>*Partial Payments: Any partial payments that you make are not applied to your mortgage, but instead are held in a separate suspense account. If you pay the balance of a partial payment, the funds will then be applied to your mortgage.</p>		

Springside Mortgage

Springside Mortgage
P.O. Box 11111
Los Angeles, CA 90010

Payment Amount	
Payment Date:	9/1/2015
Payment Amount:	\$3,839.13
Additional Principal	\$. .
Additional Escrow	\$. .
Total Amount Enclosed	\$. .

If you are making a payment, make your check payable to Springside Mortgage.



31

Periodic Billing Statements

Sample Forms

Chapter 12/13 Sample Periodic Statement

Springside Mortgage
Customer Service: 1-800-555-1234
www.springsidemortgage.com

Mortgage Statement
Statement Date: 8/20/2015

Jordan and Dana Smith
4700 Jones Drive
Memphis, TN 38109

Account Number	1234567
Payment Date	9/1/2015
Payment Amount	\$3,569.88

Bankruptcy Message	
Our records show that you are a debtor in bankruptcy. We are sending this statement to you for informational and compliance purposes only. It is not an attempt to collect a debt against you.	
If your bankruptcy plan requires you to send your regular monthly mortgage payments to the Trustee, you should pay the Trustee instead of us. Please contact your attorney or the Trustee if you have questions.	
If you want to stop receiving statements, write to us.	

Explanation of Payment Amount (Post-Petition Payment)	
Principal	\$511.63
Interest	\$1,053.31
Escrow (Taxes and Insurance)	\$375.00
Regular Monthly Payment	\$1,939.94
Total Fees and Charges	\$190.00
Past Unpaid Amount	\$1,438.94
Total Payment Amount	\$3,569.88

The Payment Amount does not include any amount that was past due before you filed for bankruptcy.

Account Information	
Outstanding Principal	\$269,126.91
Interest Rate (Until October 2015)	4.75%
Prepayment Penalty	Yes

Transaction Activity (7/20 to 8/19)			
Date	Description	Charges	Payments
8/10/15	Partial Payment Received*	\$336.43	
8/13/15	Partial Payment Received*	\$500.00	
8/16/15	Late Fee (charged because full payment not received by 8/15/15)	\$190.00	



32

Periodic Billing Statements

Sample Forms

Chapter 12/13 Sample Periodic Statement (continued)

Breakdown of Past Payments	
	Paid Year to Date
Last Month	
Principal	\$0.00
Interest	\$0.00
Escrow (Taxes and Insurance)	\$8,592.62
Fees	\$0.00
Partial Payment (Unapplied)*	\$386.43
Total	\$386.43
	\$16,711.06

Important Messages	
We have not received all of your mortgage payments due since you filed for bankruptcy.	
This statement may not show recent payments you sent to the Trustee that the Trustee has not yet forwarded to us. Please contact your attorney or the Trustee if you have questions.	
* Partial Payments: Any partial payments listed here are not applied to your mortgage, but instead are held in one or more separate suspense accounts. Once we receive funds equal to a full monthly payment, we will apply those funds to your mortgage.	

Summary of Amounts Past Due Before Bankruptcy Filing (Pre-Petition Arrearage)

Paid Last Month	\$336.43	This box shows amounts that were past due when you filed for bankruptcy. It may also include other allowed amounts on your mortgage loan. The Trustee is sending us the payments shown here. These are separate from your regular monthly mortgage payment.
Total Paid During Bankruptcy	\$1,345.72	
Current Balance	\$10,765.88	

Springside Mortgage

Springside Mortgage
P.O. Box 11111
Los Angeles, CA 90010

If your bankruptcy plan requires you to send your regular monthly mortgage payments to the Trustee, do not send your payment to us. Instead, you should send your payment to the Trustee.

Payment Amount	
Payment Date:	9/1/2015
Payment Amount:	\$3,569.88
Additional Principal	\$.
Additional Escrow	\$.
Total Amount Enclosed	\$.

If you are sending us a payment, make your check payable to Springside Mortgage.

Bradley

Key Considerations & Takeaways

Bradley

Borrowers in Bankruptcy

Key Considerations & Takeaways

- Successfully implementing the requirements specific to borrowers in bankruptcy will be a challenge
 - CFPB recognized that, with respect to billing statement requirements:
 - “[S]ervicers and third-party service providers need sufficient time to coordinate, develop, and test systems required to modify periodic statements for consumers in bankruptcy”
 - Servicers “also need sufficient time to train employees regarding the bankruptcy periodic statement requirements”
- Servicers should begin implementation efforts as soon as possible
 - Map out applicable requirements
 - Conduct gap analyses
 - Evaluate system and technological needs
 - Coordinate with impacted areas of business
- Monitor for additional CFPB guidance

35



Questions?



Alexandra Dugan
adugan@bradley.com
 615.252.4638



Chris Hawkins
chawkins@bradley.com
 205.521.8556



Jonathan Kolodziej
jkolodziej@bradley.com
 205.521.8235



Thank You

See below for upcoming webinars in this series.

Date	Webinar
October 6, 2016 11:30 AM - 12:30 PM CST	What You Need to Know: Loss Mitigation Jonathan Kolodziej, Jason Bushby

Bradley