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CFPB Crusade Continues: Mortgage Servicers and "Junk Fees"

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MIKE G. SILVER
WASHINGTON:
202.378.5854
MIKE.G.SILVER@
HUSCHBLACKWELL.COM

LESLIE A. SOWERS
WASHINGTON:
202.378.2384
LESLIE.SOWERS@
HUSCHBLACKWELL.COM

Continuing its vigorous effort to eliminate so-called “junk fees,” and detailing other problematic mortgage servicer activities, the Consumer Financial Protection Bureau (CFPB) recently released its Spring 2024 Supervisory Highlights, Mortgage Servicing Edition (Supervisory Highlights). This deliverable comes almost a year after the CFPB identified concerns about illegal fees charged by mortgage servicers in its Winter 2023 Supervisory Highlights Junk Fees Special Edition. The Supervisory Highlights colloquially defines “junk fees” as “exploitative illegal fees charged by banks and financial companies” and addresses five types of fees the agency views as problematic including: (1) unfair property inspection fees; (2) unfair late fee overcharges; (3) fees charged following acceptance of COVID-19 loan modifications; (4) inadequately disclosed fee; and (5) fees associated with untimely escrow disbursements. The Supervisory Highlights details other mortgage servicer activity identified as either unfair, deceptive, and abusive acts or practices (UDAAPs) or violations of RESPA and Regulation X by the CFPB, including, but not limited to, deceptive loss mitigation eligibility notices, deceptive delinquency notices, and other loss mitigation violations.

The CFPB’s renewed interest in mortgage servicer fees appears to be part of a larger CFPB focus on anticompetitive mortgage fees. The most prominent indication of this new CFPB priority was a blog post describing the CFPB’s concerns with title insurance, discount points, and other mortgage origination “junk fees,” which was the subject of a prior Client Update.

Junk fee focus: where do mortgage servicing fees fall?

For the past several years, the CFPB has prioritized combatting so-called “junk fees” across the consumer financial services sector. The CFPB recently finalized the Regulation Z credit card late fee rule and released its overdraft and NSF rule proposals. It also has highlighted examination work from

February to August 2023 that it claims resulted in $140 million refunded to consumers for unlawful junk fees. Until recently, however, the CFPB's "junk fee" focus had been outside the mortgage market.

In the Supervisory Highlights, the CFPB scrutinizes the following fees charged to consumers by mortgage servicers:

Property inspection fees – CFPB examiners found that servicers engaged in unfair acts or practices in violation of UDAAP by charging consumers property inspection fees on Fannie Mae loans, despite the fact that such inspections were prohibited by Fannie Mae investor guidelines.

Late fee overcharges – CFPB examiners found that servicers engaged in unfair acts or practices in violation of UDAAP by charging consumers unauthorized late fees. The CFPB explained that the fees were unauthorized because they either exceeded the amount allowed in the loan agreement or were charged even though the consumers had entered into loss mitigation agreements that required late fee waivers.

Existing fees not waived after COVID-19 loan modification acceptance – Servicers offered streamlined loan modifications for consumers experiencing COVID-19 related hardship, which were subject to the Regulation X requirement that the servicer waive "all existing late charges, penalties, stop payment fees, or similar charges that were incurred on or after March 1, 2020, promptly upon the borrower's acceptance of the loan modification." Nevertheless, the CFPB found that servicers failed to waive existing fees after consumers entered into loan modification agreements.

Inadequately disclosed fees – Examiners found that servicers failed to provide a brief description of certain fees and charges as required by Regulation Z and instead used the general label "service fee" for 18 different fee types without any additional description.

Fees associated with untimely escrow disbursements – Examiners found that because servicers failed to make timely escrow disbursements under RESPA and Regulation X, consumers were assessed unlawful penalties for late payments that servicers only reimbursed after borrower complaints.

Other servicing-related regulatory violations

The Supervisory Highlights goes on to identify other practices by mortgage servicers that the CFPB determined to be deceptive practices or violations of Regulation X, which include:

Failing to make timely escrow account disbursements as required by Regulation X;

Sending loss mitigation eligibility notices prior to deciding as to whether the consumers were eligible for such loss mitigation options;

Sending unnecessary and deceptive delinquency notices;

Engaging in loss mitigation violations, including failing to send borrowers a notice specifying whether the borrowers' applications were complete or incomplete, failing to send timely notice regarding the servicer's determination for loss mitigation options, and failing to maintain policies and procedures designed to ensure servicers can properly evaluate borrowers who submit applications for all available loss mitigation options for which they might be eligible;

Failing to make good faith efforts to establish live contact with delinquent borrowers (no later than the 36th day of delinquency); and

Failing to maintain records documenting actions taken on mortgage loan accounts for the required one year after the date the loan was discharged, or the loan was transferred to another servicer.

Other takeaways

The CFPB appears to implicate the unique relationship between mortgage servicers and consumers as an origin point for fee-related issues. In particular, in the accompanying press release, CFPB Director Rohit Chopra notes that consumers cannot just simply switch mortgage servicers, as the choice of mortgage servicer is determined by the lender or investor who owns the mortgage and not the homeowner. This results in homeowners being a captive market, which makes the avoidance of improper fees foisted by a mortgage servicer difficult. While not expressly stated in the Supervisory Highlights discussion, the captive nature of the market appears to be an important, implied element of the CFPB's unfairness exam findings under UDAAP, particularly focusing on the harm not being reasonably avoidable by consumers.

Notably, none of the practices highlighted in the Supervisory Highlights were deemed to be abusive. However, we note that the 2023 Policy Statement on Abusive Acts or Practices discusses the captive nature of the consumer in a third-party mortgage servicing relationship as an example of where a consumer may have an inability to protect their interest in the selection or use of a consumer financial product or service.

Finally, the CFPB's focus on mortgage servicing "junk fees" dovetails with its February 2024 amicus filing in the Eleventh Circuit, where it took the position that a mortgage servicer violated the Fair

Debt Collection Practices Act by charging consumers fees for paying their mortgage online or by phone, instead of by mailing a check. In a blog post, CFPB General Counsel Seth Frotman framed the filing as part of CFPB's efforts to "combat the proliferation of junk fees" and "ensure that mortgage companies don't tack on unlawful fees."

What this means for you

Even though the CFPB's press release accompanying the Supervisory Highlights focused on junk fees, many of the specific violations cited in the Supervisory Highlights did not involve the charging of fees. Nevertheless, in view of the CFPB's messaging, it is clear the CFPB is now focused on rooting out perceived non-competitive fees in the mortgage market, in both the origination and servicing processes, after initially prioritizing "junk fees" in other markets. This takeaway is reinforced by how the Supervisory Highlights follows soon after the CFPB's announcement that it will potentially target mortgage origination "junk fees." Therefore, mortgage lenders and servicers are encouraged to review their policies and practices, as well as any subservicing agreements and vendor management procedures, to evaluate whether anything would potentially run into the crosshairs of the CFPB's "junk fee" initiative.

Contact us

If you have any questions regarding recent CFPB guidance, please contact Mike G. Silver, Leslie Sowers, Jacob Huston, or your Husch Blackwell attorney.