

May 17, 2016

**TO:** Board of Directors

**FROM:** Bret D. Edwards   
Director  
Division of Resolutions and Receiverships

Charles Yi   
General Counsel

**SUBJECT:** Final Rule to Revise 12 C.F.R. § 360.6

**RECOMMENDATION**

Staff recommends that the Board approve and authorize for publication in the *Federal Register* a final rule to revise 12 C.F.R. § 360.6 (the “Securitization Safe Harbor Rule”) to clarify that it does not conflict with the Consumer Financial Protection Bureau’s (“CFPB’s”) regulations regarding servicing of residential mortgages. Specifically, it would clarify that the Securitization Safe Harbor Rule’s requirement that a servicer of securitized assets take loss mitigation action within 90 days after an asset becomes delinquent does not require that the securitization documents direct a servicer to act contrary to the CFPB’s mortgage loan servicing requirements set forth in 12 C.F.R. § 1024 (“Regulation X”).

**DISCUSSION**

The Securitization Safe Harbor Rule provides special treatment by the FDIC, as receiver or conservator of an insured depository institution, for securitization transactions that satisfy specified conditions. With respect to certain transfers of financial assets in connection with securitization transactions, it provides that the FDIC, in the exercise of its authority to repudiate contracts, will not seek to recover or reclaim such financial assets if the conditions set forth in § 360.6 are satisfied. For other transfers that comply with its requirements, the Securitization Safe

Harbor Rule provides for the exercise of remedies on an expedited basis. The Securitization Safe Harbor Rule was amended and restated in 2010 and grandfathered certain transactions. For transactions which were not grandfathered, § 360.6 as amended and restated included additional conditions for special treatment. Among others, a credit risk retention requirement was added, as well as requirements relating to residential mortgage loan servicing, disclosure and credit rating agency compensation.

The Securitization Safe Harbor Rule, at § 360.6(b)(3)(ii), also sets forth the conditions that are applicable to the servicing of residential mortgage loans. One condition is that the securitization documents must require the servicer to commence action to mitigate losses *no later than* 90 days after a mortgage loan first becomes delinquent (unless all delinquencies are cured within the 90-day period). The Securitization Safe Harbor Rule does not define what constitutes loss mitigation actions, but the preamble to the notice of proposed rulemaking relating the Securitization Safe Harbor Rule states that action to mitigate losses may include contact with the borrower or other steps designed to return the asset to regular payments. Although the Securitization Safe Harbor Rule does not require that a servicer take foreclosure steps in order to discharge its loss mitigation obligation, it is possible that such action may be the appropriate loss mitigation action in some situations.

Regulation X was issued to implement the Real Estate Settlement Procedures Act of 1974, as amended,<sup>1</sup> which protects consumers who finance the purchase of residential real estate. In 2013, the CFPB amended Regulation X by adopting certain mortgage loan servicing requirements that became effective on January 10, 2014.<sup>2</sup> Section 1024.41 of Regulation X

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<sup>1</sup> 12 U.S.C. 2610 *et. seq.*

<sup>2</sup> 78 Fed. Reg. 10696 (February 14, 2013).

generally prohibits a mortgage loan servicer from making the first notice or filing required for a foreclosure unless a mortgage loan is *more than* 120 days delinquent.

In a situation where the only appropriate loss mitigation action is foreclosure, the Securitization Safe Harbor Rule's requirement that a loss mitigation action be initiated no later than 90 days after uncured default could conflict with the provision of Regulation X prohibiting foreclosure within 120 days after a loan first becomes delinquent. In order to resolve this conflict, staff recommended that the Securitization Safe Harbor Rule be amended to clarify that securitization documents need not include any provision concerning loss mitigation that would conflict with Regulation X. The Board approved a notice of proposed rulemaking to this effect, which was published in the Federal Register on November 25, 2015 with a 60-day comment period (the "NPR"). No comments were received in response.

Staff now recommends that the Board adopt a final rule that would amend section 360.6 exactly as proposed (the "Final Rule"). The amendment would harmonize the Securitization Safe Harbor Rule with Regulation X and clarify that the documents governing a securitization transaction need not require an action prohibited by Regulation X in order to satisfy the conditions for safe harbor treatment.

## **CONCLUSION**

The Director of the Division of Resolutions and Receiverships and the General Counsel recommend that the Board of Directors adopt the Final Rule and authorize publication in the *Federal Register*.

### **Staff Contacts**

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## **ATTACHMENTS**

**A – Resolution**

**B – Final Rule for Publication in the Federal Register**