

Scare Mail: Beware of QWRs (August 6, 2009)

“Qualified Written Requests” under RESPA put mortgage servicers in a troublesome place. But there’s law on their side to help distinguish legitimate issues from abuse and harassment

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The past several months have seen mortgage lenders and servicers come under an unusual form of legal assault—one bearing the name of “QWR”, or in its unabbreviated form, the “qualified written request”;

QWRs have emerged as a troublesome legal and regulatory issue for banks, involving a somewhat obscure legal provision that is not widely understood by compliance professionals, nor much written about in compliance or legal journals.

Though obscure, they will get your attention if your institution begins receiving them.

How a QWR attack begins

In a typical—and growing—scenario, a bank will receive a letter from a mortgage borrower, or from an attorney or other agent purporting to act on behalf of that borrower. The letter will generally demand that the lender provide the inquirer with a wide-ranging amount of information concerning the borrower’s loan and the transaction in general.

The communication may assert that there is a defect or mistake in the borrower’s account, and then demand that immediate action be taken to correct that mistake.

The letters often assert the existence of predatory lending and/or fraudulent activities that have hurt or negatively affected the borrower. The letters may make detailed demands for enormous amounts of information relating to all aspects of the loan’s origination and processing.

At other times, the letters may be simpler, asserting only slight oversights in the borrower's escrow account calculation.

In all cases, the letters are marked as "Qualified Written Request" under Section 6 of RESPA. Whereas mere customer inquiries or complaints are not generally worrisome in the regulatory sense, the "QWR" label stirs legal consequences that servicers and lenders cannot ignore.

Bankers need to be prepared to properly handle this type of correspondence, and be able to distinguish between abusive or harassing letters versus those communications that carry legitimate consumer complaints and that are valid inquiries under federal law.

What the law says

QWRs are special and important because they arise under specific consumer protection law contained in Section 6 of the Real Estate Settlement Procedures Act (RESPA). Section 6 was added to RESPA in 1990, and generally imposes standards and requirements regarding the assignment sale or transfer of mortgage loan servicing. (12 U.S.C. Section 2605.) Under Section 6 of RESPA, borrowers are afforded a dispute resolution mechanism that gives rise to specific duties on the part of servicers where certain conditions are met.

RESPA's Section 6 and Section 3500.21(e) of RESPA's implementing regulations (Regulation X), provide that consumer inquiries would constitute QWRs where:

1. They are submitted in writing.
2. They include, or allow the servicer to identify, the name and account of the borrower.
3. They include a statement of the reasons for the borrower's belief that the account is in error or must provide sufficient detail to the servicer about other information the borrower is seeking. (12 U.S.C. Section 2605(e)(1)(B)(ii))

Where all such items are included in correspondence to a mortgage loan servicer, the servicer must then provide written acknowledgment to the consumer within 20 business days of receipt of the request. The receipt of a QWR triggers an

affirmative duty to investigate the problem identified by the consumer, which must be rectified or explained not later than 60 business days after the receipt of the request.

The relevance of the RESPA provisions set forth above is that, unlike other inquiries from consumers, the duties that arise from inquiries that qualify as a QWR have potent legal consequences.

Under RESPA, borrowers can institute a private lawsuit for a Section 6 violation. They can potentially then recover actual and statutory damages (up to \$1,000 per violation), plus attorney's fees.

Furthermore, class-action lawsuits are available in instances of pattern and practices of non-compliance, within three years, of the violation against a loan servicing company who refuses to comply with Section 6.

Lawsuits for violations of Section 6 may be brought in any federal district court in the district in which the property is located or where the violation is alleged to have occurred.

Finally, either HUD, a state attorney general, or state insurance commissioner may bring an injunctive action to enforce violations of Section 6 within three years.

Proper use? Or manipulation?

A quick internet search of the phrase "qualified written request" brings forth over 15 million "hits" on different websites that provide information, advice, and counsel regarding QWRs. The sites' operators range from law firms to consumer protection outfits offering actual copies of QWR forms and instructions on how to use them.

This level of notice and interest on QWRs is increasingly apparent in bank operations as well, where loan servicers are finding themselves entangled in litigation or legal complaints that are premised on lengthy and elaborate requests from borrowers that demand information about their loans.

It is certainly no coincidence that the marked uptick in QWR filings is occurring in an economic environment of depressed market conditions and record defaults and foreclosures.

Banks very actively engage in outreach efforts to assist delinquent or financially stressed borrowers, in order to modify existing mortgage obligations. However, banking institutions also report marked increases in borrowers, at various stages of loan delinquency, that retain third-party loan workout or modification professionals to represent their interest in managing the default process and communications with the lender.

ABA member banks report that these “foreclosure and default specialists” operate by delivering to the servicer some sort of written correspondence, introducing themselves as representing the borrowers, and then advancing with very aggressive demands for information. Such demands for information are ostensibly made pursuant to “qualified written requests” under Section 6 of RESPA.

Although many borrower requests are simple inquiries for relevant servicing information, an alarmingly increasing share of these requests have evolved into full-fledged complaints that demand action by the servicing bank on a broad range of elements dealing with the mortgage loan that exceed the intended scope of the QWR process. In many instances, these abusive QWRs falsely assert misrepresentation and fraud at the loan origination stage and seek extraneous information about the securitization process. In still other cases, the sender hopes to use the purported QWR to obtain information with which to delay or stop a pending foreclosure.

Banks report that some requests resemble a legal complaint, demanding paragraph-by-paragraph responses to numerous and meticulous queries. Such requests are often frivolous and based on fictitious claims. The complaints are extremely burdensome and time-consuming in terms of response time and effort.

In many instances QWRs interrupt legitimate efforts to accommodate mortgage modification requests by deserving individuals and divert bank resources from helping qualified borrowers to wasting time on individuals that intend to simply game the process to their own ends.

Clearly then, any correspondence received by a bank that is marked as “QWR” should not be ignored.

The proper handling of these qualified requests is crucial for purposes of controlling legal risk and for the public relations interest of the bank. The important question for compliance professionals is, therefore, how should an institution respond to the QWR, and equally important, how should the institution handle requests that are plainly abusive or harassing?

Recognizing a QWR

How do you spot a true QWR?

1. The first step in managing written requests is to identify which filings constitute "qualified written requests" under RESPA and which do not.

As a preliminary matter, a request must specify the particular errors or omissions in the account, along with an explanation from the borrower of why he believes an error exists, in order to qualify as a QWR. A list of unsupported demands for information is not sufficient.

"A qualified written request must ... include a statement of the reasons for the belief of the borrower that the account is in error." Walker v. Equity 1 Lenders Group, 2009 WL 1364430 *4-5 (S.D.Cal. 2009); Morilus v. Countrywide Home Loans, Inc., 2007 WL 1810676 at *3 (E.D.Pa. June 20, 2007); Harris v. Am. Gen. Fin., Inc., 2007 WL 4393818 *1 (10th Cir.2007); Pettie v. Saxon Mortg. Services, 2009 WL 1325947 *2, fn. 3 (W.D.Wash. 2009).

Thus, not all borrower inquiries or requests qualify as QWRs. Compliance professionals must therefore screen correspondence for proper identification.

2. Please note that if your institution is not a mortgage loan servicer, these provisions do not apply to you.

By coverage and definition, the RESPA provisions under Section 6 apply to only "servicers" as defined by the statute. If you do not service mortgage loans, the requirements described herein are inapplicable to your institution.

3. The bank must consider certain explicit statutory definitional elements. They are:

- A notice on a payment coupon or other payment medium supplied by the servicer does not constitute a QWR. 12 U.S.C. § 2605(e)(1)(B).

- A request made more than "[one] year after either the date of transfer of servicing or the date that the mortgage servicing loan amount was paid in full, whichever date is applicable" is likewise not a QWR. 24 C.F.R. § 3500.21(e)(2)(ii). (This language leaves unclear whether this one-year limitation applies to only the transferor or to both the transferor and the transferee. Some HUD guidance suggests that a loan's current servicer must respond to a QWR at any time. See HUD-398-H(4), Buying Your Home: Settlement Costs and Helpful Information, 13 (June 1997) ("If you have a question during the life of your loan, RESPA requires [your servicer] to respond to you."))

• The QWR provision applies only to mortgages secured by a first lien, thereby excluding subordinate-lien loans and open-end lines of credit. (See 24 C.F.R. §§ 3500.21(a) and (e). See also Appendix A, *infra*, giving an overview of loans which are exempt from all RESPA requirements.)

Generally, then, if the loan is not a first mortgage, the inquiry does not constitute a QWR.

4. Banks and servicers must identify the proper scope of the request in determining whether the correspondence qualifies as a QWR.

Even where written requests meet all the explicit statutory tests set out above, RESPA still restricts such inquiries from becoming boundless requests for vague and indeterminate information.

RESPA requires a QWR to request information “relating to the servicing of the loan.” (See 12 U.S.C. Section 2605(e)(1)(A)).

“Servicing” is defined as “receiving any scheduled periodic payments from a borrower pursuant to the terms of any loan, including amounts for escrow accounts described in Section 10 [of RESPA], and making the payments of principle and interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the loan.”

(See 12 U.S.C. Section 2605(i)(3); see also *MorEquity v. Nameem*, 118 F. Supp. 2d 885, 901 (N.D. Ill. 2000).)

A QWR which requests no information related to servicing is not a valid QWR. In particular, requests related to origination do not qualify as QWRs.

“[C]orrespondence about the validity of a loan does not constitute a qualified written request.” *Kee v. Fifth Third Bank*, 2009 WL 735048 *6 (D.Utah 2009).

Although judicial cases have explicitly recognized this limitation when no information relating to servicing was requested, Regulation X explicitly recognizes that borrowers may use the QWR process to generally access information about the loan’s escrow account. (See 24 C.F.R. Section 3500.17(l)(4).)

Certain courts have noted that the QWR process relates to any request for information related to servicing. *Cortez v. Keystone Bank, Inc.*, 2000 U.S. Dist. Lexis 5705, *36-37 (E.D. Pa. May 2, 2000).

(“[The] RESPA borrower inquiry provision applies . . . to any request for information relating to the servicing of a federally related mortgage loan, while the billing error notice provision of TILA applies only to billing errors.”).

A leading case discussing this issue, *MorEquity v. Nameem* (118 F. Supp. 2d 885 (N.D. Ill. 2000)), reached the important conclusion that borrowers fail to state a claim where the borrower’s request merely seeks information concerning the validity of the underlying loan and mortgage documents, but does not seek any information as to the status of the account balance. In such instances, the requests are not QWRs because “the request did not relate to the servicing of the loan.” (See 188 F. Supp. 2d at 901.)

In summary, requests made in a QWR must relate to servicing and escrow matters; those requests that relate to extraneous issues dealing with the items relating to the loan’s settlement or secondary market information, for instance, are simply outside the proper scope of the QWR process.

In addition, the initial interim rule setting forth implementing regulations for RESPA assumed that the QWR procedure would be limited to servicing and not very burdensome. In promulgating the interim rule, the Department of Housing and Urban Development estimated the compliance costs of two aspects of the servicer regulation—disclosure of projections and historical information about transfer of servicing and notices of servicing transfer—but did not even estimate a compliance cost for QWR responses outside of those bounds. (See Interim Rule, “Real Estate Settlement Procedures Act, Section 6 Transfer of Servicing of Mortgage Loans,” 56 Fed. Reg. 19, 506.)

As a final, critical, note, if after considering all the elements listed above, a bank discards a request as not qualifying under RESPA’s QWR provisions, most legal experts recommend that the bank’s rationale should be well explained, and that the bank should document the reasons for rejecting the supposed QWR. Such rejections should, where possible, be sent back in writing. Legal counsel should be involved in ensuring that this procedure meets legal standards.

Dealing with the legitimate QWR

When a servicer receives and properly identifies a valid QWR, the servicer must, by law, both acknowledge receipt of a QWR and respond to the substance of any claims or requests included in the QWR.

In addition, the law directs servicers not to provide information to a consumer reporting agency during the 60 days following receipt of the QWR concerning overdue payments related to that period or to the QWR. (See RESPA Section 2605(e)(3))

In establishing procedures to comply with RESPA's QWR provisions, banks should keep in mind that, contrary to some claims, the QWR process does not require a lender or servicer to stop foreclosure proceedings or other legal action on the loan.

(See 24 C.F.R. Section 3500.21(e)(4)(ii); see also Webster Bank v. Linsley, 2001 Conn. Super. Lexis 2407 (Super. Ct. 2001) (holding that "RESPA violations do not discharge mortgage debt and provide no defense to mortgage foreclosure."); Security Pac. Nat'l Bank v. Robertson, 1997 Conn. Super. LEXIS 2306 (Super. Ct. 1997) (holding that "a violation of RESPA, however, by the terms of the act, does not invalidate the mortgage agreement and thus, does not provide a defense to a foreclosure action."))

In fact, loan accounts that are deemed in default are generally considered to be out of the scope of RESPA's escrow and servicing requirements.

To properly respond to the QWR:

1. A servicer must, within 20 business days, provide a written response acknowledging receipt of the QWR. (12 U.S.C. Section 2605(e)(1)(A))

2. Within 60 business days the servicer must investigate the account, make any appropriate corrections, and provide the consumer with a report of their action. (Id. at Section 2605(e)(2)(A))

3. If the servicer corrects the account, the servicer must provide a written explanation of the corrections. (Id.)

4. If the servicer does not correct the account, it must provide an explanation or clarification that includes a statement of reasons why the account is correct and the name and telephone number of an employee of the servicer who can be contacted to further assist the borrower. (Id. at Section 2605(e)(2)(B))

5. If other information was requested, the servicer must send a clarification or explanation, including the information requested by the borrower or an explanation why the information is unavailable, and the name and telephone number of an employee who can further assist the borrower. (Id. at Section 2605(e)(2)(C)) Also, if the 60-day response is ready within 20 days, the two responses may be combined. (Id. at § 2605(1)(A))

It is worth noting, however, that a servicer may be able to charge a reasonable fee to prepare a response to a legitimate QWR. *Watt v. GMAC Mortg. Corp.* (8th Cir. 2006) 457 F.3d 781, 783.

In addition, it is also worth repeating that during the 60-day investigation period, RESPA prohibits the servicer from providing negative information to a consumer reporting agency. RESPA seeks to protect consumers from any confusion that may exist in the account while the inquiry in the problem is going forth.

Parting thoughts

Borrowers and consumers deserve the best possible care and attention from their lending institutions. Such attention includes speedy and thorough answers to all inquiries involving their loan accounts.

However, current laws also contain provisions to recognize that consumer inquiries should be valid and legitimate in intent. RESPA's qualified written request mechanism has, unfortunately, become a primary tool to harass lenders and mortgage loan servicers. Banks should therefore bear in mind that the law is clear in establishing that QWRs were never intended to be used in a harassing manner or in an effort to delay or dispute foreclosure proceedings.

To be well protected, banks must properly understand the elements of this law, and must carefully implement its provisions in order to effectuate its balance of protecting borrowers while avoiding the negative impact brought about by those that intend to abuse its application. While it may be somewhat more costly to prepare detailed responses to legitimate QWRs and letter objections to improper QWRs, doing so is certainly more cost effective in the long run as it deters potential lawsuits and legal actions.

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