

**Alert | Financial Regulatory & Compliance/
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CFPB Intensifies Focus on Pandemic Mortgage Servicing

Over the last week, the Consumer Financial Protection Bureau (“CFPB” or the “Bureau”) has sharpened its focus on the mortgage servicing industry. Knowing that millions of mortgage borrowers will exit COVID-19 moratoriums and forbearance plans in the fall, the Bureau first issued a compliance bulletin putting servicers on notice that it will use all supervisory and enforcement tools against those not ready to process loss mitigation requests from these borrowers. The CFPB followed by issuing a proposed rule that would amend the Real Estate Settlement Procedures Act (RESPA) Regulation X so as to prevent “avoidable foreclosures” on this borrower cohort.

I. CFPB Warns Mortgage Servicers: ‘Unprepared is Unacceptable’

On April 1, 2021, the CFPB issued [Bulletin 2021-02: Supervision and Enforcement Priorities Regarding Housing Insecurity](#) (“Bulletin”). The Bulletin warns mortgage servicers to take all necessary steps now to prevent “a wave of avoidable foreclosures in the fall” when those borrowers exiting COVID-19 moratoriums and forbearance plans begin to request loss mitigation options. In the Bulletin, the CFPB “recognizes that mortgage servicers have [] experienced challenges as a result of the pandemic and intends to support servicers in their efforts to provide timely assistance to mortgage borrowers” and acknowledges that “some foreclosures are unavoidable.” However, the Bureau nevertheless states clearly that “companies that are unable to adequately manage loss mitigation can expect the Bureau to take enforcement or supervisory action to address violations under Regulation X, CFPA, or other authorities.” The CFPB’s warning in the Bulletin accords with not only its more aggressive posture generally but also

Acting Director David Uejio and presumptive Director Rohit Chopra’s prior statements on immediate Bureau supervisory and enforcement priorities.

Specific Areas of CFPB Focus

When evaluating whether to take supervisory or enforcement action against a mortgage servicer, the CFPB states it will “look at a servicer’s overall effectiveness at helping consumers manage loss mitigation, along with other relevant factors.” The CFPB further highlights eight specific areas on which it will focus its attention. They are whether servicers:

- (1) Provide clear and readily understandable information to borrowers about their options for payment assistance;
- (2) Comply with the outreach requirements in Regulation X to ensure that borrowers are getting needed information about loss mitigation options;
- (3) Comply with the Equal Credit Opportunity Act’s (“ECOA”) prohibition against discriminating against any applicant, with respect to any aspect of a credit transaction;
- (4) Promptly handle loss mitigation inquiries and avoid unreasonably long hold times on phone lines; for example, the Bureau plans to scrutinize servicer conduct where hold times are significantly longer than industry averages;
- (5) Maintain policies and procedures that are reasonably designed to achieve the continuity of contact objectives to ensure that delinquent borrowers receive accurate information about their loss mitigation options;
- (6) Evaluate the applications of those borrowers who complete loss mitigation applications consistent with the Regulation X requirements to promote timely and consistent evaluations;
- (7) Comply with foreclosure restrictions in Regulation X and other Federal or State foreclosure restrictions; AND
- (8) Comply with the Fair Credit Reporting Act’s requirements to report the credit obligation or account appropriately.

The Bureau has long focused on some of these topics, such as whether servicers are complying with loss mitigation and foreclosure restrictions of Regulation X, or whether they are complying with ECOA in terms of properly evaluating loss mitigation applications without discriminating against certain types of income. However, the Bureau is also emphasizing new areas, such as whether borrowers in financial distress are receiving quality customer service, including whether servicers’ “hold times are significantly longer than industry averages.”

II. CFPB Proposed Mortgage Servicing Changes to Prevent COVID-19 Foreclosures

On April 5, 2021, the Bureau issued a **proposed rule** amending its mortgage servicing rules, 12 CFR 1024, to require substantial new protections for borrowers experiencing a COVID-19-related hardship (“Proposed Rule”). While this is a proposed rule, which may change prior to the final rule, the Bureau clearly has a sense of urgency around this topic, setting a deadline for comments of May 20, 2021, and a proposed effective date of August 31, 2021. The Proposed Rule has several key components:

A) Prohibition on New Foreclosures Through End of 2021.

The Proposed Rule would essentially prevent new foreclosure filings until after Dec. 31, 2021, unless certain criteria are met. Currently, Regulation X prohibits a servicer from making a first notice or filing for foreclosure (as required by varying state foreclosure laws) until the borrower is more than 120 days delinquent. The new rule would add a temporary blanket protection on making any such first notice or filing until after Dec. 31, 2021.¹

While the Proposed Rule has no carve-outs or exceptions for covered loans (the Proposed rule does not apply to small servicers or to properties that are not secured by a borrower's principal residence), the Bureau solicited comments on two different potential carve-outs that would allow a servicer to commence a foreclosure prior to Dec. 31, 2021:

- (1) If the servicer has completed a loss mitigation review of the borrower and the borrower is not eligible for any non-foreclosure option; or
- (2) If the servicer has made certain efforts to contact the borrower and the borrower has not responded to the servicer's outreach.

B) New Early Intervention Procedures for COVID-19-Related Hardships.

The Proposed Rule would require servicers to take additional actions for certain borrowers during the early intervention efforts under § 1024.39(a). The current mortgage servicing rule already requires that servicers establish, or make good faith efforts to establish, live contact with a delinquent borrower no later than 36 days after each payment due date so long as the borrower remains delinquent, and that the servicer inform the borrower about the availability of loss mitigation options during or promptly after such live contact. The Proposed Rule would require additional actions at the time of live contact:

- (1) For borrowers not yet in a forbearance plan offered by the servicer, the servicer would be required to ask the borrower if they are experiencing a COVID-19-related hardship. If the borrower responds affirmatively, the servicer would be required to list and describe forbearance programs available, including the actions a borrower must take to be evaluated for such programs.
- (2) For borrowers in a forbearance plan at the time of live contact, the servicer would be required to identify the date the borrower's forbearance program ends and list and describe loss mitigation options made available to the borrower to resolve any delinquency the borrower will have at the end of the forbearance period, including steps the borrower must take to be evaluated for such loss mitigation programs.

The Proposed Rule makes these early intervention requirements temporary, sunseting after Aug. 31, 2022, one year after the proposed effective date.

C) Streamlined Loss Mitigation Options Permitted.

The Proposed Rule permits (but does not require) servicers to offer certain streamlined loan modification options to borrowers with COVID-19-related hardships, based on the evaluation of an incomplete

¹ The Proposed Rule does not apply to small servicers as defined by Regulation Z, and only applies to mortgage loans secured by a property that is a borrower's principal residence. See 12 CFR 1026.41(e)4 and 12 CFR 1024.30(c)(2).

application, something that would be prohibited under the current mortgage servicing rule (which typically only allows loss mitigation decisions based on a complete application).

Any such loan modification options must satisfy several criteria in order to qualify for this exception:

- (1) the borrower must be experiencing a COVID-19-related hardship, as defined in the regulation;
- (2) the loan modification must not cause the borrower's monthly required principal and interest payment to increase;
- (3) the loan modification may not extend the term of the loan by more than 480 months from the date the loan modification is effective;
- (4) any amounts that the borrower may delay paying until the mortgage loan is refinanced, the mortgaged property is sold, or the loan modification matures (in other words, any balloon payments) must not accrue interest;
- (5) the servicer may not charge any fee in connection with the modification, and must waive all existing late charges, penalties, stop payment fees, or similar charges promptly upon the borrower's acceptance; and
- (6) the borrower's acceptance of an offer of the loan modification must terminate any existing delinquency of the mortgage loan upon satisfaction of the servicer's requirements for completing any trial loan modification plan and permanent loan modification.

Any loan modification offers accepted under this exception would exempt servicers from various requirements, including exercising reasonable diligence to complete the incomplete loss mitigation application, and sending the acknowledgement letters required by § 1024.41(b)(2). Servicers would, however, be required to resume such reasonable due diligence if the borrower fails to perform under a trial loan modification or requests further assistance.

D) Other Requirements.

The Proposed Rule also imposes specific requirements for servicers of borrowers currently in short-term payment forbearance programs that were offered based on incomplete loss mitigation applications. No later than 30 days before the end of such a short-term payment forbearance program, the servicer would be required to contact the borrower and to determine if the borrower wants to complete their loss mitigation application and proceed with a full evaluation. If the borrower requests further assistance, the servicer would be required to exercise reasonable diligence to complete the application before the end of the forbearance program.

Conclusions

Taken together, the Bulletin and Proposed Rule show that the Bureau views protecting borrowers against the impacts of the COVID-19 pandemic as among its top priorities, and is prepared to use every tool in its considerable toolbox to accomplish that, whether via supervision, enforcement, or new rulemakings. These developments demonstrate that mortgage servicers should be planning and preparing now for the wave of loss mitigation requests to come in the fall, so that they comply with both the Bulletin and the Proposed Rule. Specifically, servicers should ensure:

- They have adequate resources and trained staff in place to handle existing early intervention, loss mitigation, and due diligence requirements as well as the new requirements contained in the Proposed Rule.
- Compliance management systems are adequate to meet coming demands, including, but not limited to, making sure they have identified at-risk borrowers and put in place an omni-channel plan for communicating with them that is consistent in approach and message and includes appropriate regulatory disclosures.
- They document proof of their compliance efforts in an easily accessible and demonstrable manner. Covered entities subject to Bureau supervision are expected not only to comply with the applicable regulations but also to respond promptly to requests for documentation in the context of examinations and investigatory/enforcement proceedings. A failure to promptly produce requested information can, by itself, be a basis for an adverse examination finding.
- They can document that their loss mitigation and related operations are at or better than industry standard.
- They recognize that plans and systems put in place now must remain dynamic. As servicers monitor loss mitigation trends and compliance effectiveness, they must be able to make needed adjustments swiftly, as the rules may change over the next few months until a final rule becomes effective.

Authors

This GT Alert was prepared by:

- [Benjamin M. Saul](#) | +1 202.331.3123 | saulbe@gtlaw.com
- [Andrew S. Wein](#) | +1 561.650.7977 | weina@gtlaw.com

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