

## **Alert** | Financial Regulatory & Compliance/ Financial Services Litigation



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### **Update: CFPB Finalizes Pandemic Mortgage Servicing Rules**

On June 28, 2021, the Consumer Financial Protection Bureau (CFPB, or the Bureau) issued its **Final Rule amending RESPA Regulation X** to provide significant foreclosure protections to borrowers. Our **April GT Alert** discussed this proposed rule, and how it reflected the Bureau's sharpened focus on mortgage servicing, in particular how it could use its rulemaking and enforcement powers to prevent "avoidable foreclosures." The Final Rule, which only applies to mortgage loans secured by a property that is a borrower's principal residence, largely tracks the Bureau's April 2021 proposal, although it contains several carve-outs from the foreclosure moratorium that were only suggested in the earlier proposal.

#### **CFPB's Final Rule**

The Final Rule becomes effective Aug. 31, 2021, leaving mortgage servicers relatively little time to adjust their policies, procedures, and compliance systems to ensure that they can operate consistently with this new rule. Just as with the proposed rule, the Final Rule contains four major components:

A) Restrictions on New Foreclosures Through End of 2021

The Final Rule bars new foreclosure filings until after Dec. 31, 2021, unless certain criteria are met, or an exception applies. Regulation X already 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, but the new rule provides a temporary blanket protection on making any such first notice or filing until after Dec. 31, 2021.<sup>1</sup>

While the earlier proposal contained no carve-outs or exceptions for covered loans, the Bureau indicated it would be open to carve-outs in certain circumstances. The Final Rule reflects the Bureau's consideration of such comments, and instead uses a structure where all foreclosures must satisfy one of three "temporary procedural safeguards" to commence prior to 2022, or otherwise be covered by an exception to the rule. The **procedural safeguards** are:

- (1) The borrower has been evaluated based on a complete loss mitigation application, and existing foreclosure protection conditions are met. To meet this safeguard, the servicer must confirm that:
  - a) The borrower submitted a complete loss mitigation application, and the servicer evaluated the application.
  - b) The borrower remained delinquent since submission of the loss mitigation application.
  - c) All other timing rules and foreclosure protection conditions in the existing Mortgage Servicing Rules are satisfied.
- (2) The property has been determined to be abandoned under state or local law.
- (3) The borrower has not responded to servicer outreach. To meet this safeguard, the servicer must not have received any communications from the borrower in the 90 days prior to the foreclosure referral, and the servicer must confirm that:
  - a) it has complied with the early intervention live contact requirements in the Mortgage Servicing Rules during that 90-day period.
  - b) it has provided the early intervention 45-day written notice required by the Mortgage Servicing Rules. The servicer must have sent the notice at least 10 but no more than 45 days before foreclosure referral.
  - c) it has complied with all loss mitigation notice requirements in the Mortgage Servicing Rules during that 90-day period, such as the notice of an incomplete loss mitigation application.
  - d) The borrower's forbearance program, if applicable, ended at least 30 days before foreclosure referral.

The Final Rule also contains **exceptions** to the foreclosure moratorium. If any of these exceptions applies, then a servicer may commence a foreclosure prior to Jan. 1, 2022, even without satisfying any of the procedural safeguards. The exceptions are:

1. The borrower was more than 120 days delinquent prior to March 1, 2020. In other words, if a servicer can document that a borrower was significantly delinquent even prior to the COVID-19 pandemic, the final rule does not prohibit a referral to foreclosure.

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<sup>1</sup> The Final 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).

2. The applicable statute of limitations will expire before Jan. 1, 2022. If a first filing or notice will be required to avoid a fatal statute of limitations problem, the servicer can commence foreclosure.

#### B) Early Intervention

The Final Rule also requires 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 Final Rule does not differ significantly from the April proposed rule, and requires additional actions at the time of live contact both for borrowers not yet in a forbearance plan (in order to advise them of the potential availability of such plans) and for those in an active forbearance (to ensure they are aware of when the plan will end and what other options exist to resolve the delinquency). The Final Rule adds a requirement that a servicer provide at least one way for a borrower to find contact information for homeownership counseling services during that period, although such information can be referenced in the borrower's periodic statement.

#### C) Streamlined Loss Mitigation Options Permitted

The Final 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 application, something that would be prohibited under the current mortgage servicing rule (which typically only allows loss mitigation decisions based on a complete application). The restrictions on such loan modifications are largely unchanged from the proposed rule, and 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 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.

## D) Other Requirements

The Final 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 must contact the borrower 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 is required to exercise reasonable diligence to complete the application before the end of the forbearance program.

## Conclusions

The Final Rule continues to demonstrate the Bureau's focus on protecting borrowers against the impacts of the COVID-19 pandemic. However, the Bureau also appears to be responding to an improving economy, and concerns from commenters in the mortgage and real estate industries that a complete hold on all foreclosures through the end of 2021 would be excessive. Instead, the Bureau appears to have taken a middle path of allowing foreclosures to proceed during 2021, but only with significant new procedural safeguards.

However, given the urgency with which the Bureau views this topic (as reflected by issuing a final rule just over two months before the rule is effective), it is critical that mortgage servicers not only document their policies and procedures to ensure compliance with the Final Rule but also maintain easily accessible records that can demonstrate compliance at the loan level. Given the relatively short period before which these temporary provisions take effect, servicers should expect formal and informal requests for information and examinations by the CFPB on this new rule.

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