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New Federal Protections Adopted for Mortgage Borrowers Experiencing COVID-19 Hardships

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The Consumer Financial Protection Bureau ("CFPB") has amended its mortgage servicing rules to assist mortgage borrowers experiencing a COVID-19-related hardship (the "Amendments"). The Amendments add temporary provisions that are designed to help borrowers avoid foreclosure in the wake of many state and federal COVID-19-related protections ending. The Amendments:

- require special COVID-19 loss mitigation procedural safeguards to ensure that a borrower has a meaningful opportunity to apply for loss mitigation before the mortgage account is referred to foreclosure after national foreclosure moratoria have ended,
- provide servicers the ability to offer borrowers certain COVID-19-related streamlined loan modifications without a complete loss mitigation application,
- require the provision of additional information promptly after early intervention live contacts are established with certain delinquent borrowers, and
- establish timing requirements for when servicers must renew reasonable diligence efforts to obtain complete loss mitigation applications from certain borrowers.

The Amendments are effective August 31, 2021 and generally apply through December 31, 2021.

I. Background

The CFPB's mortgage servicing rules (the "Rules") address the servicing of residential mortgage loans. Among other things, the Rules provide for early intervention with delinquent borrowers and impose certain loss mitigation requirements, including setting procedures for reviewing loss mitigation applications and providing borrower protections during those reviews. The Rules generally apply only to a mortgage loan secured by a borrower's principal residence and, as such, generally do not apply to investment properties or second homes. In addition, mortgage servicers meeting the definition of a "small servicer" are generally not subject to many parts of the Rules.[1]

In the preamble to the Amendments, the CFPB has noted that various federal and state protections for mortgage borrowers are beginning to phase out, and the Amendments are designed to "ensure a smooth and orderly transition…by providing borrowers with a meaningful opportunity to explore ways to resume making payments and avoid foreclosure."

A summary of the Amendments is set forth below.

II. The Amendments

A. Loss Mitigation: Temporary Special COVID-19 Procedural Safeguards

Currently, the Rules prohibit servicers from making a foreclosure referral (i.e., making the first notice or filing) or completing certain foreclosure actions (i.e., moving for foreclosure judgment or order of sale, making a dispositive motion for foreclosure judgment, conducting a foreclosure sale) in certain circumstances. Generally, a servicer may not make a foreclosure referral until the borrower is more than 120 days delinquent. In addition, if the borrower submits a complete loss mitigation application before foreclosure referral, generally the servicer must wait an additional period before initiating foreclosure in order to satisfy certain conditions to allow the borrower an opportunity to pursue loss mitigation. Specifically, the servicer must determine that the borrower is not eligible for any loss mitigation options and notify the borrower of such, determine that the borrower has exhausted the appeal process, or if a loss mitigation offer is made, the borrower must reject all offered loss mitigation options or fail to perform under a loss mitigation option agreement (the "foreclosure protection conditions"). Similarly, if a borrower submits a complete application after foreclosure referral but at least 37 days before foreclosure sale, the servicer must not complete certain foreclosure actions until these foreclosure protection conditions are met.

The Amendments temporarily add to the foreclosure protection conditions in certain circumstances. From August 31, 2021 through December 31, 2021, unless an exception applies, before referring certain 120-day delinquent accounts for foreclosure the servicer must make sure at least one of the temporary procedural safeguards has been met.

Procedural Safeguards. The three temporary procedural safeguards are:

1. *The borrower was evaluated based on a complete loss mitigation application and existing foreclosure protection conditions are met*. To meet this safeguard, the servicer must confirm that:
    - The borrower submitted a complete loss mitigation application, and the servicer evaluated the application.
    - The borrower remained delinquent since submission of the loss mitigation application.
    - The foreclosure protection conditions in the existing Rules discussed above, are met, such that a servicer is permitted by the Rules to make a foreclosure referral.
2. The property is abandoned. To meet this safeguard, applicable state or local law must consider the property securing the mortgage abandoned when referred to foreclosure.
3. *The borrower is unresponsive 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:
    - It has complied with the early intervention live contact requirements in the Mortgage Servicing Rules during that 90-day period.
    - 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.

- 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.
- The borrower's forbearance program, if applicable, ended at least 30 days before foreclosure referral.

Exceptions. The temporary procedural safeguards are not required if:

- The foreclosure referral occurs (as permitted by applicable law) on or after January 1, 2022.
- The borrower was more than 120 days delinquent prior to March 1, 2020.
- The applicable statute of limitations will expire before January 1, 2022.

If the servicer has met the temporary procedural safeguards, or if the safeguards do not apply, the servicer may proceed with foreclosure referral, to the extent permitted by other law and the existing foreclosure protections in the Rules. If the temporary procedural safeguards apply, a servicer is required to maintain records that evidence the servicer complied with them.

B. Loss Mitigation: COVID-19-related Streamlined Loan Modifications

Currently, the Rules generally prohibit a servicer from evading the requirement to evaluate a complete loss mitigation application for all loss mitigation options available to the borrower by offering a loss mitigation option based on the evaluation of any information provided by a borrower in connection with an incomplete loss mitigation application. However, the Rules offer certain exceptions to this general prohibition, allowing some loss mitigation offers that are not based on the evaluation of a complete application, such as offers of certain short-term payment forbearance programs and certain COVID-19-related loss mitigation options.

The Amendments add a new exception, permitting servicers to offer certain COVID-19-related loan modification options based on the evaluation of an incomplete application. To qualify for this exception, the loan modification program must:

1. *Limit loan term* The loan modification must not extend the loan term more than 40 years from the date the modification is effective.
2. *Limit periodic payment* The loan modification must not increase the borrower's monthly principal and interest payment beyond the amount that was required prior to the modification.
3. *Prohibit interest accrual on delayed* If the loan modification allows the borrower to delay payment of any portion of the amount owed until the property is sold, the mortgage is refinanced, the modification matures, or, for FHA insured loans, until the mortgage insurance terminates, then the loan modification must not allow interest to accrue on those amounts. Such amounts could include, for example, forborne periodic payments.
4. *Be available to borrowers with COVID-19-related* The loan modification must be made available to borrowers experiencing COVID-19-related hardships, although it need not be only available to those borrowers.
5. *End (or be designed to end) pre-existing* The loan modification must end any pre-existing delinquency when the borrower accepts the modification offer. If a trial period applies, the loan modification must be

designed to end any pre-existing delinquency when the borrower satisfactorily completes any trial period requirements and accepts the permanent loan modification.

6. *Not include certain* The servicer must not charge fees in connection with the loan modification and must promptly waive certain existing fees the borrower owes, such as late fees, penalties, or stop-payment fees, that were incurred on or after March 1, 2020.

Offering a loan modification under this exception does not constitute offering a loan modification based on a complete application. If a borrower becomes delinquent after accepting such a loan modification, the servicer must resume reasonable diligence efforts to obtain a complete loss mitigation application. Additionally, a subsequent submission of a complete loss mitigation application does not count as a duplicative request under the Rules, and the borrower must still be evaluated and receive all the protections that follow under the Rules for that subsequent application. For example, if a borrower submits a complete loss mitigation application after failing a trial period for an applicable COVID-19-related streamlined loan modification offered under this exception, the borrower is not considered to have submitted a duplicative request and the servicer must review the complete application and the foreclosure protection conditions must be met before the servicer can make a foreclosure referral or complete certain foreclosure actions.

C. Loss Mitigation: COVID-19-related Reasonable Diligence

Currently, when a servicer receives an incomplete loss mitigation application from the borrower, the servicer is required to exercise reasonable diligence to complete the application. However, a servicer is permitted to suspend reasonable diligence efforts while a borrower is complying with a short-term payment forbearance program offered based on an incomplete application until the borrower is near the end of that forbearance program.

Under the Amendments, if a borrower is in a short-term payment forbearance program made available to borrowers with a COVID-19-related hardship, and that program was offered based on an evaluation of an incomplete application, the Rules specify more precisely when the servicer must renew reasonable diligence efforts. For such borrowers, if the borrower remains delinquent, the servicer is required to contact the borrower no later than 30 days before the scheduled end of the forbearance period to determine if they wish to complete the loss mitigation application. If the borrower chooses to do so, the servicer must reinstate reasonable diligence efforts to complete the loss mitigation application before the end of the forbearance period.

D. Early Intervention: Additional Temporary COVID-19-related Live Contact Information

Currently, the Rules require a servicer to make good faith efforts to establish live contact with delinquent borrowers no later than the borrower's 36th day of delinquency and again no later than 36 days after each payment due date so long as the borrower remains delinquent. Promptly after establishing live contact, the servicer must inform the borrower about the availability of loss mitigation options, although it has discretion to determine if providing this information is appropriate and the level of specificity provided. Separately, the Rules also require servicers to maintain policies and procedures that, among other things, ensure the servicer personnel assigned to a delinquent borrower can identify all loss mitigation options available from the owner or assignee of the borrower's mortgage, and the actions the borrower must take to be evaluated for those options.

The policies and procedures must ensure the servicer has the ability to provide that information accurately.

The Amendments will require a servicer, promptly after establishing live contact under the existing Rules, to provide some delinquent borrowers with specific, additional information. This requirement only applies until October 1, 2022.

Borrowers not in forbearance. For borrowers that are not in a forbearance program at the time live contact is established under the existing Rules, if the owner or assignee of the mortgage provides forbearance programs for borrowers with a COVID-19-related hardship, then promptly after establishing live contact, the servicer must inform the borrower of the following:

1. *Program availability* That forbearance programs are available for borrowers experiencing a COVID-19-related hardship. For example, the servicer could say, "We wanted to let you know that forbearance programs are available for borrowers that are having difficulty making their payments because of the COVID-19 emergency."
2. *List and description of applicable* Unless the borrower states that they are not interested in receiving information about such programs, the servicer must then list and briefly describe to the borrower the applicable programs and the actions the borrower must take to be evaluated. The servicer is only required to list forbearance programs available at the time the live contact is established and does not need to include any programs that have already expired.
3. *Homeownership counseling* Additionally, the servicer must tell the borrower at least one way that they can find contact information for homeownership counseling services, such as referencing the borrower's periodic statement.

Borrowers in forbearance. For borrowers in a forbearance program made available to those experiencing a COVID-19-related hardship at the time live contact is established, the servicer must provide additional information during the live contact that occurs 10 to 45 days before the *scheduled* end of the borrower's program. When live contact is established, the servicer must inform the borrower of:

1. *Scheduled end* When the forbearance program is scheduled to end.
2. *List and description of applicable* A list and brief description of any loss mitigation programs, including forbearance extensions and repayment options, that are available through the owner or assignee of the mortgage, and how the borrower can apply for those options. The servicer is only required to list loss mitigation options available at the time the live contact is established and does not need to include any options that have already expired.
3. *Homeownership counseling* At least one way that the borrower can find contact information for homeownership counseling services, such as referencing the borrower's periodic statement.

III. Further Information

The Amendments can be found here. If you have any questions regarding the Amendments or mortgage servicing requirements in general, please feel free to contact Joseph D. Simon at (516) 357-3710 or via email at **jsimon@cullenllp.com**, Elizabeth A. Murphy at (516) 296-9154, or via email at **emurphy@cullenllp.com**, or Mandy Xu at (516) 357-3850 or via email at **mxu@cullenllp.com**.

Please note that this is a general overview of the Rules and Amendments and does not constitute legal advice.

Footnote

[1] A “small servicer” generally includes a servicer that, together with any affiliates, services 5,000 or fewer mortgage loans for which the servicer or an affiliate is the creditor or assignee.

Practices

- Regulatory and Compliance

Attorneys

- Joseph D. Simon
- Elizabeth A. Murphy