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CFPB Proposes Complete Overhaul of Requirements for Servicing Delinquent Mortgages

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On July 10, 2024, the Consumer Financial Protection Bureau (CFPB) issued a proposed rule that, if implemented, would completely revise the current regulatory framework governing how mortgage servicers assist delinquent borrowers. While the proposal aims to give servicers flexibility in developing solutions for delinquent borrowers beyond those set forth in the current rules, servicers also would be subject to significant new limitations and increasingly exposed to borrower-initiated challenges to such determinations. The CFPB also is proposing – although it did not issue draft regulatory text – comprehensive document translation and interpretation service requirements to facilitate assistance for Spanish-speaking borrowers and borrowers more comfortable in other commonly spoken non-English languages in the US.

Proposed loss mitigation framework empowers borrowers to challenge servicer evaluations, gives servicers additional loss mitigation flexibility

The long-awaited proposal would completely remove the loss mitigation application and evaluation process in place since 2014 and replace it with a new framework. Under the proposed framework, a borrower must be placed into a "loss mitigation review cycle" in response to an oral or written request for assistance and evaluated for loss mitigation with a goal of bringing the borrower current. Once in the review cycle, the servicer generally would be prohibited from initiating a foreclosure or advancing a pending foreclosure until one of the following occurred:

- The borrower has been reviewed for all available loss mitigation options, none remain, and the borrower has exhausted the appeals process.
- The borrower has not communicated with the servicer for at least 90 days despite the servicer's regular outreach to assist the borrower.

The CFPB broadly defines "communication" as any written or electronic communication, telephone call, or payment. The servicer would be prohibited from assessing the borrower fees during the review cycle beyond the amounts scheduled or calculated as if the borrower had made all contractual payments on time and pursuant to the terms of the mortgage contract. It also appears under the proposal that a borrower's subsequent requests for loss mitigation assistance could create a new loss mitigation review cycle, thereby retriggering the foreclosure protections.

While the borrower is in the loss mitigation review cycle, the servicer would only be obligated to send the borrower a notice about the loss mitigation options for which the borrower was approved or denied. However, the proposal also would require the notice to disclose, among other things, information about the key inputs – both borrower (e.g., income) and nonborrower provided (e.g., credit scores or property values) – that served as a basis for the determination, as well as information about the remaining loss mitigation options that still might be available to the borrower after the determination. Servicers would no longer be obligated to acknowledge receipt of a loss mitigation application or wait until an application is deemed "complete" to evaluate the borrower for all available loss mitigation options.

The proposal also would give borrowers expanded rights and protections to challenge loss mitigation evaluations. First, a borrower's claim that the servicer's loss mitigation determination was incorrect would constitute a "notice of error," thereby triggering existing servicer acknowledgement, research, and response obligations. Second, the CFPB is proposing expanding the borrower's right to appeal any loss mitigation option determination – not just loan modification denials – a right enhanced by the obligation to disclose the inputs that

went into making the determination.

Finally, the CFPB proposes enhanced record retention requirements obligating servicers to retain records documenting actions taken with respect to delinquent borrowers and evidencing compliance with Regulation X. Although a seemingly innocuous requirement, the CFPB has utilized record retention obligations to facilitate the examination and investigations process, and has cited an inability to affirmatively prove compliance with Regulation X as a stand-alone violation.

Proposal would heighten borrower communication obligations, create translation requirements

The proposal would expand and significantly complicate existing servicer obligations to engage in outreach to delinquent borrowers in a number of ways, as outlined below.

Spanish language translation

Servicers would be required to translate regulatorily required written communications into Spanish and provide Spanish versions to all consumers along with the English versions.

Availability of translation to other languages

Servicers would be required to translate documents and offer translation services to borrowers speaking one of the five languages most frequently used by a significant majority of their borrowers with limited English proficiency, other than English or Spanish. Servicers also would be required to offer interpretation services to borrowers upon request and to make available translations in additional languages to the extent borrowers received marketing for their loan in that language.

Investor-specific early intervention notices

Written notices servicers send to delinquent borrowers would need to specify the name of the loan's owner or assignee and include a brief description of each loss mitigation option generally made available by the investor to that borrower.

Forbearance-specific communications

Where a borrower is on forbearance, the servicer could pause outreach during the bulk of the forbearance period, but it must reengage with the borrower between 30 and 45 days before the end of the forbearance to discuss forbearance exit options.

CFPB considering additional areas for servicing rulemaking

The CFPB also seeks comment on related servicing topics, although it did not issue concrete proposals. With respect to furnishing credit report information, the CFPB seeks input on how servicers can more uniformly report information about delinquent borrowers active in the loss mitigation process. Although the CFPB has previously issued guidance on "zombie mortgages" (as we explained in a May 2023 client alert), it is now seeking input on whether to propose rules governing collection activities for long-dormant second mortgages. The CFPB also seeks input on improved consistency between state and federal servicing requirements, whether it could enhance disclosures to borrowers regarding outstanding deferred balances that come due at the end of their loan – an important topic given the prevalence of deferrals during the pandemic – and how to improve protections for successors in interest.

Looking ahead

While the proposal would give servicers additional flexibility regarding the manner in which they evaluate borrowers for loss mitigation options, it also does away with a decade of investment in servicing systems designed to ensure an orderly loss mitigation process consistent with today's Regulation X requirements. Furthermore, the proposal could give customers a greater choice in selecting a loss mitigation option they desire, and invite challenges to servicer evaluations that nevertheless honor the investor's loss mitigation requirements. Prolonging the borrower's time in the "loss mitigation review cycle" would expand foreclosure

timelines, even where borrowers are unlikely to ultimately receive loss mitigation, and it would limit a servicer's ability to assess charges for even activities that protect the collateral while the borrower is delinquent. Finally, while many servicers already offer services in languages other than English, creating formal regulatory requirements around document translation and interpretation could further expose servicers to liability and will increase compliance burdens.

Comments on the proposal are due September 9, 2024. The CFPB proposes that any final rule would take effect 12 months after publication in the Federal Register, but it would give servicers 18 months to comply with new translation and language access requirements.

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