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Locke Lord QuickStudy: CFPB Proposes Changes to Loss-Mitigation Rules Under Reg. X; Are There *Loper* Implications?

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On July 10, 2024, the Consumer Financial Protection Bureau issued a proposed rule that would scuttle the current Regulation X mortgage servicing procedures in favor of a system that broadly construes requests for assistance and stays foreclosure proceedings during the loss mitigation review cycle. The CFPB asserted that the new proposed rule would "streamline and simplify Regulation X's loss mitigation procedures by removing most of the existing requirements regarding incomplete and complete loss mitigation applications and replacing them with a new framework based on foreclosure procedural safeguards."[1]

The rule introduces a broad notion of "request for loss mitigation assistance" that does not require a complete application

The rule fundamentally changes when borrower protections kick in after a borrower requests loss mitigation. The CFPB notes that currently, "only if a servicer receives a complete application more than 37 days before a foreclosure sale must the servicer halt certain foreclosure activity while evaluating the borrower for all available loss mitigation options."[2]

Under the proposed rule, borrower protection begins when the borrower makes a "request for loss mitigation"; this is defined as "any oral or written communication, occurring through any usual and customary channel for mortgage servicing communications, whereby a borrower asks a servicer for mortgage relief."[3] The proposed rule specifies that the term should be "construed broadly" and includes any communication where the borrower: "expresses an interest in pursuing a loss mitigation option"; indicates that "they have experienced a hardship and asks the servicer for assistance with making payments, retaining their home, or avoiding a foreclosure"; or in response to a servicer's unsolicited loss mitigation offer, a borrower "expresses an interest in pursuing either the loss mitigation offered or any other loss mitigation option."[4]

The rule bars servicer foreclosure action during the "loss mitigation review cycle"

The borrower protections in the proposed rule are also broader than Regulation X currently provides. If a borrower makes a request for loss mitigation more than 37 days before a foreclosure sale, the proposed rule imposes a "loss mitigation review cycle".[5] During this time, the servicer is barred from making the first "notice or filing required by applicable law" for a foreclosure, and from "advancing the foreclosure process".[6]

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Facially, “advancing the foreclosure process” is broader than what Regulation X currently prohibits; the regulation currently bars moving for foreclosure judgment or order of sale, and conducting a sale.[7] And the current Official Interpretation of Regulation X specifies that nothing in the regulation “prevents a servicer from proceeding with the foreclosure process, including any publication, arbitration, or mediation requirements established by applicable law.”[8] In contrast, the proposed rule’s Official Interpretation explains that “scheduling a sale date or conducting a sale” improperly advances the foreclosure process.[9]

Finally, the loss mitigation review cycle adds fee protection for the borrower. During the review cycle, no fees beyond “the amounts scheduled or calculated as if the borrower made all contractual payments on time and in full” can accrue.[10]

The protections imposed by the loss mitigation review cycle persist until one of two events occurs: (1) the borrower has been reviewed for loss mitigation and no available loss mitigation options remain; or (2) the borrower is unresponsive.[11] Specifically, loss mitigation review is exhausted when no available loss mitigation options remain, the servicer has sent the borrower all notices required under the proposed rule, if applicable, and the borrower either did not appeal any loss mitigation review denial or the appeal has been denied.[12] The servicer must issue a notice determining the request for loss mitigation assistance containing eleven distinct pieces of information, including the specific reason for an offer or denial, contact information, and a list of all other loss mitigation options that may remain available to the borrower.[13]

A borrower is deemed unresponsive if the servicer has regularly taken steps to identify and obtain information and documents necessary to determine which loss mitigation options it will offer the borrower (or it has made a determination and has regularly taken steps to contact the borrower about its decision), and the borrower has not communicated with the servicer for at least 90 days.[14] The proposed rule’s Official Interpretation specifies that a “communication” means any written or electronic communication or telephone call about the mortgage loan, or a received payment on the loan.[15]

Unlike the current version for Regulation X, which specifies that the servicing procedures do not apply if the servicer has previously complied with the procedures for a complete loss mitigation application,[16] the proposed rule does not specify that a loss mitigation review cycle only applies once. Instead, it states that a servicer must comply with the loss mitigation request requirements “during the same loss mitigation review cycle” until the procedural safeguards have been met.[17] But presumably, the loss mitigation review cycle would only apply once for a borrower who has previously been reviewed for loss mitigation and no available loss mitigation options remain.

Loper’s **potential impact on the prosed rule**

In the aftermath of *Loper Bright Enterprises v. Raimondo*, agency interpretations of federal law are no longer binding on judges.[18] However, the Supreme Court warned that a federal statute may explicitly delegate certain authority to an agency—that the statute’s meaning “may well be that the agency is authorized to exercise a degree of discretion.”[19] It gave examples of a statute giving the agency authority to give meaning to a particular term, or to fill up the details of a statutory scheme, and in those cases the role of the judge is “to independently interpret the statute and effectuate the will of Congress subject to constitutional limits. The court fulfills that role by recognizing constitutional delegations, ‘fixing the boundaries of the delegated authority.’”[20]

Notably, RESPA's requirements for mortgage loan servicing appear in section 2605.[21] And Section 2605(j)(3) mandates that the CFPB "shall establish any requirements necessary to carry out this section."[22] Read broadly, this agency delegation would cause a court to give significant weight to the new rule, even post-*Loper*. However, a delegation to establish necessary requirements is broader than the Supreme Court's example of giving meaning to a particular term, so a challenge might still be made under constitutional-limit grounds.

The comment period for the proposed rule is open through September 9, 2024. If issued, the proposed rule would mark a significant change for how servicers would need to handle requests for loss mitigation by delinquent mortgage borrowers.

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[1] Proposed Rule, located at 9.

[2] *Id.* at 27.

[3] *Id.* at 155.

[4] *Id.* at 155.

[5] *Id.* at 155; *id.* at 165 (proposed 12 C.F.R. § 1024.41(f)(2)).

[6] *Id.* at 165-66 (proposed 12 C.F.R. § 1024.41(f)(2)).

[7] 12 C.F.R. § 1024.41(g).

[8] Supplement I to 12 C.F.R. § 1024, Paragraph 41(g), 2.

[9] Proposed Rule, located at 189-90 (proposed Supplement I to 12 C.F.R. § 1024, Paragraph 41(f), 4).

[10] Proposed Rule, located at 166 (proposed 12 C.F.R. § 1024.41(f)(3)).

[11] *Id.* at 165-66 (proposed 12 C.F.R. § 1024.41(f)(2)).

[12] *Id.* at 166 (proposed 12 C.F.R. § 1024.41(f)(2)(i).

[13] *Id.* at 161-62 (proposed 12 C.F.R. § 1024.41(c).

[14] *Id.* at 166 (proposed 12 C.F.R. § 1024.41(f)(2)(ii).

[15] *Id.* at 191 (proposed Supplement I to 12 C.F.R. § 1024, Paragraph 41(f), 7).

[16] 12 C.F.R. § 1024.41(i).

[17] Proposed Rule, located at 167 (proposed 12 C.F.R. § 1024.41(i)).

[18] Nos. 22-451 and 22-1219, 2024 U.S. LEXIS 2882 (U.S.S.C. June 28, 2024).

[19] *Id.* at *37.

[20] *Id.* (quoting H. Monaghan, *Marbury* and the Administrative State, 83 Colum. L. Rev. 1, 27 (1983)) (internal brackets omitted).

[21] 12 U.S.C. § 2605.

[22] *Id.* § 2605(j)(3).

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