

Locke Lord QuickStudy: Loss-Mitigation Communications to Mortgage Borrowers During COVID-19 Pandemic

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Concern regarding the outbreak and economic impact of COVID-19 on homeowners nationwide has prompted several significant entities in the residential mortgage industry to issue guidance and temporary loss-mitigation policies to banks and mortgage servicers.

Experience has taught that as servicers rapidly mobilize to implement emergency and temporary policies and guidance such as those currently being promulgated, it is critical that banks and servicers focus careful attention on ensuring that both verbal and written communications with borrowers accurately and consistently reflect the available loss-mitigation options and the circumstances under which borrowers may or may not be eligible for those options, to avoid future litigation over alleged misrepresentations. What follows is a brief summary of some of the recently issued policies, as well as cautions regarding potential pitfalls that banks and servicers should avoid when communicating with borrowers. Specific, unambiguous guidance regarding the meaning and ultimate impact of “forbearance” or “deferral” plans is critical to efforts to avoid regulatory questions or disputes down the road.

Fannie Mae and Freddie Mac

At the direction of the Federal Housing Finance Agency, Fannie Mae and Freddie Mac issued temporary policies, effective on March 18, 2020, and until further notice, to enable servicers to better assist borrowers impacted by COVID-19.¹ These policies expand eligibility for a forbearance plan for borrowers impacted by COVID-19, clarify what loan modifications must be considered near the conclusion of a forbearance plan term, clarify that servicers must suspend credit reporting when the hardship is related to COVID-19, and instruct servicers to not allow any foreclosure sales for 60 days.

Importantly, servicers are still required to comply with most existing guidelines in Fannie Mae’s and Freddie Mac’s respective servicing guides,² including those relating to eligibility for forbearance plans and loan modifications. For example, both Fannie Mae and Freddie Mac require that when a forbearance plan is complete, one of the following must occur: (1) the loan is brought current through a reinstatement, (2) the borrower is

approved for another workout option, (3) the loan is paid in full, or (4) the servicer refers the loan to foreclosure. See *Servicing Guide, Fannie Mae Single Family D2-3.2-01, Forbearance Plan*; *Freddie Mac Single-Family Seller/Servicing Guide* 9203.13. Neither allows the servicer to extend the maturity date by tacking on the forbearance payments to the end of the loan. Consequently, it is essential that servicers accurately communicate to borrowers what their options will (and will not) be at the end of any forbearance plan that might be implemented in response to a COVID-19 hardship.

Federal Housing Administration / U.S. Department of Housing and Urban Development

HUD clarified, in its COVID-19 Questions and Answers,³ that servicers should offer its existing suite of loss-mitigation options to eligible borrowers affected by COVID-19, as they would with any other event that negatively impacts a borrower's ability to pay their monthly mortgage payment. HUD has not, however, provided any exceptions to existing eligibility requirements or terms that are applicable to those options. Accordingly, servicers of FHA-insured mortgage loans should proceed as they normally would, being careful not to give borrowers the impression that there are loss-mitigation options that are special or uniquely tailored to a COVID-19 hardship.

New York Department of Financial Services

The New York Department of Financial Services (NY DFS) issued guidance to all New York State regulated and exempt mortgage servicers in an industry letter regarding support for borrowers impacted by COVID-19.⁴ The NY DFS is urging mortgage servicers "to do their part during this outbreak to alleviate the adverse impact caused by COVID-19 on those mortgage borrowers ('mortgagors') who demonstrate they are not able to make timely payments, including taking reasonable and prudent actions, and subject to the requirements of any related guarantees or insurance policies, to support those adversely impacted mortgagors by:

- Forbearing mortgage payments for 90 days from their due dates;
- Refraining from reporting late payments to credit rating agencies for 90 days;
- Offering mortgagors an additional 90-day grace period to complete trial loan modifications, and ensuring that late payments during the COVID-19 pandemic does not affect their ability to obtain permanent loan modifications;
- Waiving late payment fees and any online payment fees for a period of 90 days;
- Postponing foreclosures and evictions for 90 days; and
- Ensuring that mortgagors do not experience a disruption of service if the mortgage servicer closes its office, including making available other avenues for mortgagors to continue to manage their accounts and to make inquiries; and
- Proactively reaching out to mortgagors via app announcements, text, email or otherwise to explain the above-listed assistance being offered to mortgagors."

Because the NY DFS does not have authority to require mortgage servicers to take any of these actions, the most it can do is provide encouragement and reassurance that taking such actions "under these unusual and extreme circumstances are consistent with safe and sound banking practices as well as in the public interest and will not be subject to examiner criticism."

Conclusion/Recommendation

Many consumers are experiencing unprecedented obstacles with COVID-19. As always, banks and servicers should treat their borrowers with compassion and understanding during this difficult time. At the same time, we strongly recommend that all banks and servicers carefully consider the precise language contained in their oral communications, written communications, and customer service scripts as they attempt to implement forbearance plans, loan modification programs, or any other loss-mitigation options mandated or encouraged by governing or regulatory entities. Banks and servicers should clearly communicate the ultimate impact to a borrower of any forbearance or other plan to avoid later disputes.

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1. Fannie Mae's Lender Letter (LL-2020-02)? is available at <https://singlefamily.fanniemae.com/media/22261/display>. Freddie Mac's Bulletin 2020-4 is available at <https://guide.freddiemac.com/app/guide/bulletin/2020-4>.
2. One notable exception to existing guidelines is that forbearance plans may be approved for all property types, whereas only primary residences are eligible for forbearance plans under existing guidelines.
3. Available at https://www.nrmlaonline.org/wp-content/uploads/2020/03/SFH_COVID_19_QA_03_13_20-1.pdf.
4. Available at https://www.dfs.ny.gov/industry_guidance/industry_letters/il20200319_coronavirus_mortgage_relief.

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