

Proposed Mortgage Assistance Rule: Tips for Servicers

Law360

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Louis Manetti, a Chicago lawyer in Locke Lord's Financial Services Litigation Practice Group, authored an article featured as an "Expert Analysis" in Law360. The article examines the procedural modifications needed to comply with the Consumer Financial Protection Bureau's proposed servicing amendments to Regulation X, streamlining payment assistance processes for borrowers in distress, adding safeguards and revising existing borrower assistance requirements.

"Servicers should also anticipate specific notices in connection with requests for loss mitigation assistance," he writes. "[W]hen the borrower requests loss mitigation assistance, the servicer must promptly send a written notice stating the determination to offer or deny any loss mitigation."

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On July 10, the [Consumer Financial Protection Bureau issued a proposed rule](#) that would alter 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]

If the changes are incorporated into Regulation X, mortgage servicers will need to make notable procedural changes to comply.

A Broad Notion of "Request for Loss Mitigation Assistance" That Does Not Require a Complete Application

The rule fundamentally changes when borrower protections begin. 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 broadly construed, 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, “expresses an interest in pursuing either the loss mitigation offered or any other loss mitigation option.”^[4]

Barring 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 moving forward with the foreclosure process.^[6]

Also, 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.^[7]

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.^[8]

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.^[9]

The servicer must issue a notice determining the request for loss mitigation assistance containing 11 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.^[10]

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.^[11]

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.^[12]

Loper Bright’s Potential Impact on the Proposed Rule

In the aftermath of the [U.S. Supreme Court’s](#) decision earlier this year in *Loper Bright Enterprises v. Raimondo*, agency interpretations of federal law are no longer binding on judges.^[13] However, the court warned in its ruling 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.”^[14]

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.’”^[15]

Notably, the Real Estate Settlement Procedures Act’s requirements for mortgage loan servicing appear in Section 2605.^[16] Section 2605(j)(3) mandates that the CFPB “shall establish any requirements necessary to carry out this section.”^[17]

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.

Compliance Takeaways for Servicers

Servicers should prepare for modified compliance practices if these proposed amendments become part of Regulation X. Below are the major proposed changes to Regulation X that will require servicers to alter their compliance practices.

Screening for Requests for Loss Mitigation

First, given the broad meaning of “request for loss mitigation,” servicers would need to have screening practices in telephone and written communications to flag when a borrower has made such a request.

For example, requests such as asking for a specific loss mitigation option — e.g., “Would I be able to get a loan modification?” — or a general statement of hardship and asking to avoid the foreclosure — e.g., “I just got a new job after being out of work; can I get out of the foreclosure?” — would both presumably qualify as requests for loss mitigation. Servicers would need to be able to screen oral and written communications to catch these requests.

Required Notices

Servicers should also anticipate specific notices in connection with requests for loss mitigation assistance. As noted, above, when the borrower requests loss mitigation assistance, the servicer must promptly send a written notice stating the determination to offer or deny any loss mitigation.^[18]

This must include, among other things, a list of all other loss mitigation options that remain available to the borrower — and a clear statement describing the steps the borrower must take to be reviewed for those options — or a statement that the servicer has reviewed the borrower for all available loss mitigation options and none remain.^[19]

Similarly, if 90 days pass and the servicer, despite regular attempts to obtain required documents or information, cannot determine which loss mitigation options it will offer the borrower without the information, it must provide

written notice to the borrower.^[20]

The missing information denial letter must specify the specific documents the servicer is lacking, and state that if the servicer receives the missing information within 14 days of the written notice, the servicer will complete its evaluation.^[21]

Avoiding Advancing the Foreclosure Process

Servicers should also be cautious regarding actions that would be seen as progressing the foreclosure under the proposed amendments. 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.^[22]

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.”^[23]

In contrast, the proposed rule’s official interpretation explains that scheduling a sale date or conducting a sale improperly advances the foreclosure process.^[24] Servicers would need to review their current practices to ensure that no actions take place to advance the foreclosure under the amended regulation.

Loss Mitigation Review When a Loan Is Transferred

Finally, servicers should be aware that they may be obligated to review the borrower for loss mitigation options, even if the servicer just obtained the loan via a transfer.

The proposed amendments state that if a transferee servicer acquires the servicing of a mortgage loan for which the request for loss mitigation assistance is pending as of the transfer date, it must “comply with the requirements of this section for that request within the timeframes that were applicable to the transferor servicer based on the date the transferor servicer received the request for loss mitigation assistance.”^[25]

The transfer date is the date on which the transferee servicer will begin accepting payments, as disclosed on the goodbye/hello letters pursuant to Regulation X Section 1024.33.^[26]

Because of this, servicers need to build in procedures so that the prior servicer notifies them if a request for loss mitigation request is pending, and if so, the details about the request, so that the new servicer can comply with the procedural safeguards.

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[1] Proposed rule, located at https://files.consumerfinance.gov/f/documents/cfpb_mortgage-servicing-nprm-proposed-rule_2024-07.pdf 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] Proposed rule, located at https://files.consumerfinance.gov/f/documents/cfpb_mortgage-servicing-nprm-proposed-rule_2024-07.pdf at 166 (proposed 12 C.F.R. § 1024.41(f)(3)).

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

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

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

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

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

[13] *Loper Bright Enterprises v. Raimondo*, Nos. 22-451 and 22-1219, 2024 U.S. LEXIS 2882 (U.S.S.C. June 28, 2024).

[14] Id. at *37.

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

[16] 12 U.S.C. § 2605.

[17] Id. § 2605(j)(3).

[18] Proposed rule, located at https://files.consumerfinance.gov/f/documents/cfpb_mortgage-servicing-nprm-proposed-rule_2024-07.pdf at 161 (proposed 12 C.F.R. § 1024.41(c)).

[19] Id. at 162 (proposed 12 C.F.R. § 1024.41(c)(1)(vi)).

[20] Id. at 163 (proposed 12 C.F.R. § 1024.41 (c)(2)(ii)-(iii)).

[21] Id. at 163-64 (proposed 12 C.F.R. § 1024.41(c)(2)(iii)(2), (4)).

[22] 12 C.F.R. § 1024.41(g).

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

[24] Proposed rule, located at https://files.consumerfinance.gov/f/documents/cfpb_mortgage-servicing-nprm-proposed-rule_2024-07.pdf at 189-90 (proposed Supplement I to 12 C.F.R. § 1024, Paragraph 41(f), 4).

[25] Id. at 168 (proposed 12 C.F.R. § 1024.41(k)(1)(i)).

[26] Id. at 168 (proposed 12 C.F.R. § 1024.41(k)(1)(ii)).

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