COVID-19 and Housing Policies in Place Affecting the Mortgage Industry

Presented by the Legal League 100
Special Initiatives Working Group
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Dear Colleagues,

The Legal League 100 (LL100) is the nation's premier collection of financial services law firms, organized to further its members' commitment to supporting the mortgage servicing industry through education, communication, and relationship development. The LL100's membership at large, council, and Special Initiatives Working Group (SIWG) work tirelessly to be a leading force for industry standards, education, and market research.

In advancement of this mission, this whitepaper from the LL100's SIWG provides information about the American Rescue Plan Act. This paper also discusses each of the agencies' current loss mitigation options, including information related to borrowers exiting forbearance and an overview of the CFPB's Interim Rule Regulation X.

As this new legislation and related loss mitigation options remain extremely important, the SIWG's goal is that the following information will provide useful insights and assistance to the industry.

Sincerely,

Legal League 100's Special Initiatives Working Group

COVID-19 and Housing Policies in Place Affecting the Mortgage Industry

This article covers the recently enacted American Rescue Plan Act (ARP), along with a discussion of current forbearance plan policies in place from the agencies (Fannie Mae, Freddie Mac, FHA, VA, and USDA) along with any relevant loss-mitigation discussion that falls under the purview of the Consumer Financial Protection Bureau (CFPB).

American Rescue Plan Act Overview

Section 3204: Housing Counseling

In section 3204 of the ARP, Congress appropriated $100 million to the Neighborhood Reinvestment Corporation (the Corporation), to be used for purposes of providing "housing counseling." In addition to any money previously allocated, this money is to remain available until September 30, 2025.

The money is to be used for grants to housing counseling intermediaries approved by the Department of Housing and Urban Development, state housing finance agencies, and NeighborWorks organizations for providing housing counseling services, as authorized under the Neighborhood Reinvestment Corporation Act, 42 U.S.C. §§ 8101–8107.

For the purposes of section 3204, Congress has defined the term "housing counseling services" to mean:

- housing counseling provided directly to households facing housing instability, such as eviction, default, foreclosure, loss of income, or homelessness;
- education, outreach, training, technology upgrades, and other program-related support; and
- operational oversight funding for grantees and subgrantees that receive funds under this section.

See § 3204(d).

Of the grant funds made available under section 3204, not less than 40% shall be provided to counseling organizations that:

- target housing counseling services to minority and low-income populations facing housing instability; or
- provide housing counseling services in neighborhoods having high concentrations of minority and low-income populations.

See § 3204(a).

The section provides that the corporation may retain a portion of the amounts provided in a proportion consistent with its standard rate for program administration in order to cover the corporation's expenses related to program administration and oversight. *See* § 3204(c).

This section of the ARP is an allocation of funds to provide for counseling services related to housing and includes funds for counseling for persons facing foreclosure. This particular section does not directly allocate or commit funds for purposes of cash assistance to those in need with regard to their housing, as section 3206 of the ARP deals with direct homeowner assistance. This allocation for funds for purposes of counseling also extends out to the fiscal year 2025, at a time when COVID-19 will presumably have passed.

Section 3205: Homelessness Assistance and Supportive Services Program

Section 3205, titled “Homelessness Assistance and Supportive Services Program (Section 3205),” allocates $5 billion to the Secretary of Housing and Urban Development in order to assist individuals or families qualified for assistance under the Cranston-Gonzalez National Affordable Housing Act. Allocation of the funding begins in 2021 and remains available until September 30, 2025, except that $50 million remains available until September 30, 2029, in order to cover administrative costs of the program. As an aside, up to 15% of funds can be used for administrative costs.

The Cranston-Gonzalez National Affordable Housing Act (Cranston-Gonzalez), enacted in 1990 (signed by President George H.W. Bush, found at hud.gov/sites/documents/19576_HOMELAWS.PDF) and as amended in 1998, created programs to empower low-income people through a variety of economic incentives, low-income homeownership opportunities, and other housing and economic development programs.

Cranston-Gonzalez seeks to “...expand the supply of decent, safe, sanitary, and affordable housing, with primary attention to rental housing, for very low-income and low-income Americans.” Cranston-Gonzalez aims for coordination among federal, state, and local governments to utilize federal—and some private—funding for rental assistance, construction and rehabilitation of affordable housing, and to overall support programs and organizations who promote and develop “... decent, safe, sanitary and affordable housing ... and assist very low-income and low-income families ... to become responsible homeowners and tenants.”

Funds may be used to provide incentives to develop and support affordable rental housing and homeownership affordability, including property acquisition, improvement, conversion, demolition, and related expenses, including relocation expenses. Affordable housing also includes permanent housing for disabled homeless persons, transitional housing, and single-room occupancy housing (presumably hotels). See Cranston-Gonzalez purposes.

Examples:
Cranston-Gonzalez created the Home Investment Partnership Program (HOME), which provides grants to cities, counties, and states. The grants are awarded to the municipalities that partner with local nonprofit groups who build, buy, and rehabilitate affordable housing for rent or homeownership, and which provide direct rental assistance to low-income people. California’s Sonoma County and the Home Consortium in Wisconsin are examples of a municipality and nonprofit group, respectively, that utilize these funds. See here and here.

The state of Texas Department of Housing and Community Affairs administers the HOME program for the state, primarily in rural parts of the state. See tdhca.state.tx.us/home-division/home.htm.

What Is Covered?

Section 3205 directs the HUD Secretary to spend funds for the following activities:

- Tenant-based rental assistance
- Development and support of affordable housing pursuant to section 212(a) of Cranston-Gonzalez

Services to the homeless population, including counseling, prevention services, and acquisition of shelters and affordable housing, under the McKinney-Vento Homeless Assistance Act (McKinney-Vento), enacted in 1987, and found here.

About half of Section 3205 discusses funding conditions for the $5 billion allocated to affordable housing and homelessness. For example, a grantee can use up to 5% of funds for operating expenses if certain conditions are met. Up to $25 million of the total funds shall be used, without competitive bidding, to make new awards or increase prior awards to existing technical providers to further the objectives of the section.

Furthermore, the HUD Secretary can waive or specify alternative requirements for any provision of Cranston-Gonzalez or McKinney-Vento, or for any regulation for use of the funds, except for fair housing and nondiscrimination requirements.

As the ARP was recently enacted on March 11, 2021, municipalities and nonprofit groups do not have information regarding the implementation and rollout of funding yet. The U.S. Congressional Budget Office estimated the budgetary effects of the act just before its passage. That information can be found here.

Section 3206: Homeowner Assistance Fund

Section 3206 of the ARP allocates $9,961,000 to the Secretary of the Treasury for a Homeowner Assistance Fund. This money is to remain available until September 30, 2025, for qualified expenses (to be discussed in more detail below). The funds are appropriated to eligible entities (i.e., state or local governments) for the purpose of preventing homeowner mortgage delinquencies, defaults, foreclosures, loss of utilities or home energy services, and displacements of homeowners experiencing financial hardship after January 21, 2020, through qualified expenses related to mortgages and housing.

These qualified expenses include the following:

a. Mortgage payment assistance
b. Financial assistance to allow a homeowner to reinstate a mortgage or to pay other housing-related costs related to a period of forbearance, delinquency, or default
c. Principal reduction
d. Facilitating interest rate reductions
e. Payment assistance for utilities, gas, home energy, water, broadband internet services, homeowner's insurance, flood insurance, and mortgage insurance, as well as homeowner's association and condominium association fees

Moreover, it also includes a provision for reimbursement of funds expended by state, local governments, or other designated entities during the period of January 21, 2020, and ending on the date the first funds are disbursed by the eligible entity under the Homeowners Assistance Fund.

Targeting

The ARP mandates that not less than 60% of amounts made to each eligible entity shall be used for qualified expenses that assist homeowners having incomes equal to or less than 100% of the area median income for their household size, or equal to or less than 100% of the median income for the United States, as determined by the Secretary of Housing and Urban Development, whichever is greater. It further provides that any remaining funds shall be prioritized to socially disadvantaged individuals.

Allocation to States

Funds will be allocated to each state of the United States, the District of Columbia, and the Commonwealth of Puerto Rico, based on homeowner need, for such state relative to all states of the United States, the District of Columbia, and the Commonwealth of Puerto Rico, as of the date of the enactment of the act, which is determined by:

a. The average number of unemployed individuals measured over a period of time not fewer than three months and not more than 12 months; and
b. The total number of mortgagors with: (1) mortgage payments that are more than 30 days past due; or (2) mortgages in foreclosure.

Notwithstanding the above, each state of the United States, the District of Columbia, and the Commonwealth of Puerto Rico shall receive no less than $50,000,000 for qualified expenses described above.

Disbursement of Funds

The Secretary of State shall make payments, beginning not later than 45 days after enactment of the ARP, to eligible entities that have notified the Secretary that they request to receive payment from the Fund and that the eligible entity will use the payments in compliance with the ARP.

On the other hand, if a state does not request allocated funds by the 45th day after the date of the enactment of the ARP, such state shall not be eligible for a payment from the Secretary pursuant to this section, and the Secretary shall, by the 180th day after the date of enactment of this ARP, reallocate any funds that were not requested by such state among the states that have requested the funds.

Section 3207: Relief Measures for Section 502 and 504 Direct Loan Borrowers

In addition to the above, there are also relief measures for Section 502 and 504 Direct Borrowers. Please see below for the relevant portions of this Section:

- Appropriation—In addition to amounts otherwise available, there is appropriated to the Secretary of Agriculture (in this section referred to as the "Secretary") for fiscal year 2021, out of any money in the Treasury not otherwise appropriated, $39,000,000, to remain available until September 30, 2023, for direct loans made under sections 502 and 504 of the Housing Act of 1949 (42 U.S.C. 1472, 1474).

- Administrative Expenses—The Secretary may use not more than 3% of the amounts appropriated under this section for administrative purposes.

Overview of Current Forbearance Plans by the Agencies

Forbearance Plan Exit: The Enterprises

Given that the ARP does not directly address the forbearance plans promulgated by Fannie Mae and Freddie Mac (collectively, the Enterprises), we need to look to the coinciding initiatives undertaken by the Enterprises.

As we addressed, borrowers who qualified for COVID relief (i.e., not being in default before the COVID-19 pandemic) are eligible for forbearance plans whose relief can come in the form of reduced payments or no payments during the approved period. Borrowers may qualify to be allowed up to 18 months of hardship forbearance, but how do they exit these programs? The simple answer is, "it depends" on the ability to repay.

The borrower(s) are reviewed approximately 30 days before the expiration of the last approved forbearance period. At this time, the borrowers are provided with options based on their ability to repay the outstanding amounts accrued. Those options generally take the form of a plan to *reinstate* the forborne amounts or a *modification* of the loan itself.

Reinstatement: Two options generally involve reinstatement without modifying the loan. One option would be paying all the delinquency at once and continuing with the pre-COVID payment amount. This would involve paying all the past due amounts at once in a full reinstatement. The late charges and penalties are waived and the borrower(s) are in the same position they were before the hardship. The alternative way to reinstate the loan would be a traditional *repayment* plan allowing borrowers to make partial payments against the reinstatement balance in addition to regular monthly payments. They would continue this until the loan is fully reinstated and current.

Modification/Deferral: The other options involve modification and/or "deferral." In the case of a deferral such as Freddie Mac Covid-19 Payment Deferral, all the outstanding monthly payments to include escrow advances are placed at the end of the loan, thus making it current moving forward. This creates a balloon payment at the end of the loan term. This would be for borrowers who can continue with the regular monthly payments but are unable to resolve the accumulated payments in a repayment plan.

The traditional modification option is an avenue for borrowers with a continuing financial hardship who want to have their overall monthly payments reduced as well as incorporating the accumulated missed payments into the loan either at the end or added to the principal.
In summary, the important part of the forbearance plan exit is determining what the best option is for the borrower at the termination of the forbearance period. At least 30 days prior, a financial analysis is imperative to determine what plan or strategy is preferred to make the loan current.

U.S. Department of Housing and Urban Development (HUD) Forbearance

The CARES act provided for borrowers with loans insured by FHA to obtain an initial six-month forbearance, which could be extended an additional six months. In its most recent Mortgagee Letter ML 2021-05, HUD extended the deadline to request a forbearance until June 30, 2021, and allowed borrowers who had obtained a forbearance prior to June 30, 2020, to request two additional three-month extensions of the forbearance. For borrowers that obtained their initial forbearance prior to June 30, 2020,, the forbearance could not extend beyond December 31, 2021, and others could not extend beyond June 30, 2022. During the forbearance plan, the lender must waive all late charges, fees, and penalties.

Placing a borrower into a forbearance plan is the easy part. The more difficult step in COVID-related borrower assistance is how to have borrowers exit the forbearance plans and begin the resumption of payments. HUD in ML 2021-05 outlined the options for servicers and borrowers to exit forbearance. HUD created a waterfall of options in the following order of priority:

- Owner-occupant borrowers are eligible to be reviewed for the:
  - COVID-19 Standalone Partial Claim;
  - COVID-19 Owner-Occupant Loan Modification;
  - COVID-19 Combination Partial Claim and Loan Modification; and
  - COVID-19 FHA Home Affordable Modification Program (FHA-HAMP) Combination Loan Modification and Partial Claim with Reduced Documentation, which may include principal deferment and requires income documentation.
- Non-occupant borrowers are eligible to be reviewed for the COVID-19 Non-Occupant Loan Modification.
- COVID-19 Home Disposition Options provide options for the disposition of a property if the borrower is unable to reinstate the mortgage. The following COVID-19 Home Disposition Options are available to owner-occupant and non-occupant borrowers:
  - COVID-19 Pre-Foreclosure Sale (PFS); and
  - COVID-19 Deed-in-Lieu (DIL) of Foreclosure.

Once the borrower's forbearance period has ended, the servicer has 120 days to complete one of the loss mitigation options. Below are more detailed descriptions and the qualification for each option.

COVID-19 Standalone Partial Claims

HUD's first choice of loss mitigation options is the COVID-19 Standalone Partial Claim (Partial Claim). The Partial Claim places a second, subordinate lien on the property, which does not bear interest and is not due and payable until the borrower pays the primary loan in full, sells the property, or the primary loan matures. This allows borrowers to simply resume making payments per the original terms of the loan, with the deferred amount to be recouped at a later date.

To qualify for a Partial Claim, the servicers must ensure the property is owner-occupied and the borrower indicates they have the ability to resume making on-time payments. The partial claim must fully reinstate the mortgage and only include principal, interest, taxes, and insurance. It also cannot exceed the 30% maximum statutory value of all Partial Claims for an FHA-insured mortgage, as listed in Statutory Maximum for Partial Claims (III.A.2.k.v(D)(2)(a)). The servicer must waive all late charges, fees, and penalties incurred after March 1, 2020.

Most borrowers whose incomes have recovered from any pandemic disruptions and who have not been in default prior to the pandemic will qualify for the partial claim. This will cause the least amount of disruption to borrowers financially and allow borrowers to retain their homes.

COVID -19 Owner-Occupant Loan Modification

The second option HUD has provided for lenders and borrowers to exit forbearance for those borrowers that do not qualify for the partial claim is the COVID-19 Owner-Occupant Loan Modification. The eligibility requirements for the COVID-19 Owner Occupied Loan Modification is that the borrower has indicated they have the ability to make the modified mortgage payment and the property is owner-occupied.

The modification must waive all post-March 1, 2020, late charges, fees, and penalties, and note that the loan capitalized only accrued interest, advances for escrow items, and an escrow shortage that falls below the target balance, calculated during an escrow analysis, that exceeds the amount of the mortgagee's advances already capitalized in the modified mortgage. The modified mortgage must be a fixed rate that is no greater than the market rate and cannot be for a term longer than 360 months. The borrower's principal and interest payments cannot increase unless the borrower has exhausted the 30% maximum for partial claims.

Like the partial claim, the Owner-Occupant Loan Modification should cause limited disruption to the borrower's finances post-forbearance. In some cases, it may even lower the interest rate and payments of borrowers.

COVID-19 Combination Partial Claim and Loan Modification

For borrowers that do not meet the eligibility requirements individually for the partial claim or loan modification, servicers can offer a COVID-19 Combination Partial Claim and Loan Modification. To be eligible, the borrower must not have exceeded the 30% maximum for partial claims and must indicate they have the ability to make the modified mortgage payments and that the property is owner-occupied.

The servicer must waive all late charges, fees, and penalties incurred post-March 1, 2020. It may only capitalize into the modification accrued interest, escrow advances, and an escrow shortage that falls below the target balance, calculated during an escrow analysis, that exceeds the amount of the mortgagee's advances already capitalized in the modified mortgage. The servicer must also determine the max available under the 30% partial claim cap and apply the remaining amount toward arrearages first and capitalize the remainder.

The partial claim and modification must fully reinstate the loan and must be set at a fixed rate not to exceed the HUD market rate. The term cannot be for more than 360 months. The borrower's payment, however, may increase under this option.

The Combination option will likely be utilized for borrowers that have seen their income return, but who may have had a previous partial claim. The servicer can utilize the partial claim up to the remaining available amount and modify the remaining balance. The primary downside of this option is that the borrower's payment can and may increase under certain scenarios.

COVID-19 FHA-HAMP Combination Loan Modification and Partial Claim with Reduced Documentation

For borrowers that would otherwise qualify for either a loan modification, partial claim, or combination but indicate they cannot resume the regular or modified monthly payment, HUD has offered a COVID-19 FHA-HAMP Combination Loan Modification and Partial Claim with Reduced Documentation. The terms are the same as a standard Combination Loan Modification and Partial Claim, but the servicer must review the borrower for an affordable monthly mortgage payment using Step 5 of the Loss Mitigation Home Retention Waterfall Options (III.A.2.j.iii). A principal deferral may be used to bring the borrower's payment in line with the affordability requirements, but then no portion of the Partial Claim can be used.

COVID-19 Non-Occupant Loan Modification

For properties that are not owner-occupied, the only option is the COVID-19 Non-Occupant Loan Modification. The terms and eligibility are the same as an occupied property with the exception of additional documentation required. The borrower must provide a copy of the rental agreement, if applicable, and a written statement that they are the landlord and the renter is unable to make payments due to COVID, or that the property is a secondary residence or vacation home of the borrower.

COVID-19 Home Disposition Options

If a borrower is unwilling or unable to keep the property, HUD has offered two Home Disposition options.

The first option is a pre-foreclosure sale or short sale. To be eligible, a borrower must indicate a financial hardship and not qualify for a home retention option. The servicer must also confirm the standard pre-foreclosure sale eligibility requirements outlined in Borrower Eligibility (III.A.2.l.ii(B)(3). The terms must also meet Streamlined PFS program requirements outlined in Pre-Foreclosure Sales (III.A.2.l.ii), with the exception that the servicer may utilize any available means of communication to provide the borrower with form HUD-90035 and there are no servicer incentives.

The second option is a COVID-19 Deed in Lieu of Foreclosure. This option is available to borrowers who are unable to complete the pre-foreclosure sale by the end of the marketing period. The borrower must meet the standard DIL requirements with the exception of Borrower Eligibility Streamlined DIL Standards (III.A.2.l.iii(B)(2)(a)(ii)) and servicers are not required to submit a request for National Servicing Center (NSC) approval via Extensions and Variances Automated Requests System (EVARS) for approval to offer a COVID-19 DIL Option to a borrower who owns more than one FHA-insured property as outlined in DIL Exceptions for Borrowers With More Than One FHA-Insured Mortgage (III.A.2.l.iii.(B)(2)(d)). There is no DIL compensation allowed under a COVID-19 DIL. The DIL must also be completed or foreclosure initiated within 90 days of the termination or expiration of the PFS ATP Agreement (form HUD-90045).

Veteran Benefits Administration (VA: Forbearance Requests for Veterans Affected by COVID-19

VA expects servicers to approve a veteran's request for COVID-19 forbearance, or continued forbearance, if a veteran is experiencing financial hardship, directly or indirectly, due to COVID-19, and if the hardship negatively affects the veteran's ability to make on-time loan payments. Veterans with VA-guaranteed loans may be eligible for COVID-19 forbearance, regardless of the delinquency status of the VA-guaranteed loan.

The veteran's initial request for COVID-19 forbearance may be granted for up to six months. If needed by the veteran, the veteran may request, and VA expects the servicer to approve, additional COVID-19 forbearance for up to six months. Servicers may approve a veteran's initial COVID-19 forbearance if the request is made on or before June 30, 2021.

A COVID-19 forbearance period may extend through June 30, 2022. For Veterans who requested their initial COVID-19 forbearance on or before June 30, 2020, VA expects that, if needed, the veteran may request, and the servicer will approve, up to two additional three-month COVID-19 forbearance periods, after 12 months of COVID-19 forbearance. The veteran must request each three-month extension individually. Neither of the two additional three-month COVID-19 forbearance periods may extend beyond December 31, 2021.

Important items to note about the forbearances:

- Any period of COVID-19 forbearance may be shortened at the veteran's request;
- The servicer should waive all late charges, fees, and penalties, if any, that might otherwise accrue because of payments missed during a COVID-19 forbearance; and
- The COVID-19 forbearance described in this guidance does not supersede or otherwise eliminate the special forbearance loss mitigation option defined in 38 C.F.R. § 36.4301.

Additionally, per VA Circular 26-21-07, servicers now have the flexibility to offer loan deferment in cases where a borrower missed one or more payments because of the pandemic, regardless of whether such payment was subject to a CARES Act forbearance.

To offer loan deferment, the servicer must defer payment of the total amount of missed payments (principal, interest, taxes, and insurance) to the loan maturity date, or until a borrower refinances the loan, transfers the property, or otherwise pays off the loan, whichever occurs first. Servicers cannot charge any added costs, fees, or interest to the borrower. Servicers cannot impose any penalty for the borrower's early payment of the deferred amount. Servicers can only utilize the loan-deferment option in cases where the borrower is able to return to normal loan repayment under the loan contract.

For VA's purposes, the servicer does not need and should not enter into a modification agreement that alters the terms of the existing loan for the purposes of a loan deferment option. In consideration of the COVID-19 national emergency and to relieve undue prejudice to a debtor, holder, or another person, for the purpose of providing this loan deferment option, VA is temporarily waiving the requirement that a final loan installment payment shall not be in excess of two times the average of the preceding installments.

U.S. Department of Agriculture (USDA): Forbearance Overview

For the USDA SFH Guaranteed Servicing Loans for borrowers who request an initial forbearance on or before June 30, 2021, lenders are expected to grant payment forbearance based on a borrower's attestation (verbal or written) to financial hardship caused by the COVID-19 emergency. The initial forbearance period may be up to 180 days, and the borrower may request an extension of up to an additional 180 days.

Borrowers who received an initial CARES Act forbearance before June 30, 2020, may be granted up to two additional three-month payment forbearances. The borrower must request each extension individually.

The term of the initial forbearance and any extension may be shortened at the borrower's request.

Fees, penalties, or interest (beyond the amounts calculated as if the borrower had made all contractual payments in a timely fashion) should not accrue during the forbearance.

Upon completion of the forbearance, the lender should communicate with the borrower and determine if they are able to resume making regular contractual payments. If so, the lender may offer the borrower either a written re-payment plan to resolve any amount due or, at the borrower's request, evaluate the borrower for one of the three options outlined in Chapter 18.15 of the Handbook-1-3555.

Loan servicers seeking to assist borrowers after their CARES Act forbearance may pursue any of the Special Relief Alternatives/Measures referenced in Chapter 18 of the program Handbook (HB-1-3555 SFH Guaranteed Loan Program Technical Handbook):

- Term extension
- Capitalization of delinquency and term extension
- Mortgage Recover Advance (MRA)
    - Assistance for borrowers who were current prior to the COVID-19 forbearance fall into Special Relief Alternatives/Measures as outlined in the handbook. A financial review is not required.

Regular loss mitigation review is required if the borrower was delinquent prior to the COVID-19 forbearance.

CFPB Interim Rule Regulation X

COVID-19 forbearances bump up against CFPB loss mitigation and Fair Credit Reporting Act (FCRA) rules too. CFPB's complete/incomplete loss mitigation application and short-term forbearance rules require servicers to take certain actions to acknowledge or complete an application and notice borrowers within five days about the receipt of an application and lack of documents, if any, along with providing a deadline by which additional documents are due. The rules also prohibit a servicer from offering loss mitigation based upon an incomplete application, except for a short-term forbearance plan. In theory, the CARES Act does not violate this CFPB rule because the Act requires that 180-day successive forbearance plans be provided upon borrowers' requests, but forbearance plans should not exceed the six-month period allowed by the CFPB.

The CARES Act added requirements under FCRA that require a servicer to report a current forbearance as "current," but to continue to report a prior delinquent account now in forbearance as "delinquent." As credit reporting is not mandatory, the requirement to report seems to put servicers at risk, so the best practice is to review current guidance from the CFPB about whether to note a COVID-19 forbearance.

Servicers of all mortgages also must comply with CFPB/Regulation X's anti-evasion clause, which limits the loss mitigation options that can be offered with an incomplete loss mitigation package. Recognizing the unprecedented nature of pandemic mortgage forbearances, the Bureau issued an interim final rule on COVID-19 related loss mitigation options that gives servicers more flexibility with COVID-19 relief options. This interim rule excuses servicers from continuing with an incomplete package process if a borrower accepts a workout option that is consistent with COVID-19 payment deferral, limited only to deferral and partial claim workouts but not to loan modifications.

So, What Rule Was Implemented by the CFPB due to COVID-19?

On or around June 23, 2020, the CFPB issued an interim final rule (IFR) for consumers to transition out of financial hardship caused by the COVID-19 pandemic and to make it easier for mortgage servicers to assist those consumers. The IFR made it clear that servicers do not violate Regulation X by offering certain COVID-19-related loss mitigation options based on an evaluation of limited application information collected from the borrower. Normally, with certain exceptions, Regulation X would require servicers to collect a complete loss mitigation application before making an offer.

The IFR specifies that the loss mitigation option must meet certain criteria to qualify for an exception from the typical requirement to collect a complete application. Among other things, the option must allow the borrower to delay paying all principal and interest payments that were forborne or became delinquent as a result of a financial hardship due, directly or indirectly, to the COVID-19 emergency. Servicers may not charge any fees to borrowers in connection with the option, and the borrower's acceptance ends any pre-existing delinquency. The exception is not limited to payments forborne under the CARES Act.

The IFR also provides servicers relief from certain requirements under Regulation X that normally would apply after a borrower submits an incomplete loss mitigation application. Once the borrower accepts an offer for an eligible program under the IFR, the servicer need not exercise reasonable diligence to obtain a complete application and need not provide the acknowledgment notice that is generally required under Regulation X when a borrower submits a loss mitigation application.

Servicers still must comply with Regulation X's other requirements after a borrower accepts a loss mitigation offer. For example, if the borrower becomes delinquent again after accepting the offer, the servicer would have to satisfy Regulation X's early intervention requirements. Similarly, if the servicer receives a new loss mitigation application from the borrower, the servicer would have to comply with Regulation X's loss mitigation procedures.

Please see below for the applicable Interim Rule 12 CFR 1024.41(c)(2)(v):

> Certain COVID-19-related loss mitigation options.
>
> (A) Notwithstanding paragraph (c)(2)(i) of this section, a servicer may offer a borrower a loss mitigation option based upon evaluation of an incomplete application, provided that all of the following criteria are met:
>
> (1) The loss mitigation option permits the borrower to delay paying covered amounts until the mortgage loan is refinanced, the mortgaged property is sold, the term of the mortgage loan ends, or, for a mortgage loan insured by the Federal Housing Administration, the mortgage insurance terminates. For purposes of this paragraph (c)(2)(v)(A)(1), "covered amounts" includes, without limitation, all principal and interest payments forborne under a payment forbearance program made available to borrowers experiencing a financial hardship due, directly or indirectly, to the COVID-19 emergency, including a payment forbearance program made pursuant to the Coronavirus Economic Stabilization Act, section 4022 (15 U.S.C. 9056); it also includes, without limitation, all other principal and interest payments that are due and unpaid by a borrower experiencing financial hardship due, directly or indirectly, to the COVID-19 emergency. For purposes of this paragraph (c)(2)(v)(A)(1), "COVID-19 emergency" has the same meaning as under the Coronavirus Economic Stabilization Act, section 4022(a)(1) (15 U.S.C. 9056(a)(1)). For purposes of this paragraph (c)(2)(v)(A)(1), "the term of the mortgage loan" means the term of the mortgage loan according to the obligation between the parties in effect when the borrower is offered the loss mitigation option.
>
> (2) Any amounts that the borrower may delay paying as described in paragraph (c)(2)(v)(A)(1) of this section do not accrue interest; the servicer does not charge any fee in connection with the loss mitigation option; and the servicer waives all existing late charges, penalties, stop payment fees, or similar charges promptly upon the borrower's acceptance of the loss mitigation option.

(3) The borrower's acceptance of an offer made pursuant to paragraph (c)(2)(v)(A) of this section ends any preexisting delinquency on the mortgage loan.

(B) Once the borrower accepts an offer made pursuant to paragraph (c)(2)(v)(A) of this section, the servicer is not required to comply with paragraph (b)(1) or (2) of this section with regard to any loss mitigation application the borrower submitted prior to the servicer's offer of the loss mitigation option described in paragraph (c)(2)(v)(A) of this section.

The new administration proposes extending foreclosure and eviction moratoriums until September 30, 2021. Coming into the end of 2020, servicers struggled with credit-reporting issues as well as the interplay between investor/insurer COVID-19 new rules and CFPB loss mitigation requirements. Servicers continue to navigate federal, state, and investor/insurer requirements to determine the best options for borrowers while offering these options legally and efficiently. The jury is still out about how all of this will end, even while non-default servicing continues alongside increased default servicing, due to increased originations caused by low interest rates.

THE LEGAL LEAGUE 100

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The Legal League would like to recognize the following members of the Special Initiatives Working Group for their contribution to this project.

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