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Still not final

Despite proposed amendments, problematic CFPB servicing rules remain

By Jason Bushby and Jonathan Kolodziej

ON JAN. 17, 2013, the Consumer Financial Protection Bureau released amendments to regulations X and Z, together known as the Final Servicing Rules.

These new rules touch upon a wide variety of areas, including loss mitigation, force-placed insurance, escrow, and general servicing policies and procedures. They are scheduled to go into effect Jan. 10, 2014.

Since the release of the Final Servicing Rules, mortgage servicers, law firms and industry trade associations have identified provisions that may not have the CFPB's desired effect, and others that may, in fact, be harmful to consumers. Thankfully, on June 21 the CFPB issued proposed amendments to the rules, many of which directly address the industry's concerns.

For example, the CFPB proposed allowing servicers the ability to offer short-term payment forbearances to borrowers who have submitted incomplete loss mitigation applications.

Initially, the CFPB generally prohibited offering any loss mitigation options based upon an evaluation of an incomplete application. The proposed amendments would also allow servicers who initially believe they have received a complete loss mitigation application but later realize that information is missing, to request that additional information from the borrower.

Prior to this proposal, the rules generally did not allow for any back-and-forth once the application was deemed complete.

The CFPB's recent effort to improve the Final Servicing Rules is certainly a step in the right direction. However, even if these recent amendments are adopted, a number of problematic rules remain. For example, in the loss mitigation context, the CFPB requires a servicer to provide a borrower with a determination of which loss mitigation options, if any, it will offer within 30 days after receiving a complete loss mitigation application.

The CFPB makes clear, however, that a servicer receives a complete application once it obtains all information required from the borrower.

This regulatory framework puts servicers in a precarious position when unable to obtain third-party information within the 30-day evaluation window. For instance, if it has been 30 days since a borrower submitted all required information and the servicer is still waiting on the results of an escrow analysis or broker price opinion, that servicer will be forced to make a decision. The servicer can either ignore crucial information and proceed with an offer of loss mitigation, or the servicer will be forced to deny the borrower's request for assistance.

This example highlights a scenario that worries many mortgage servicers — and should worry many borrowers. By complying with the CFPB rules, servicers will often be forced to unnecessarily deny borrowers for loss mitigation for which they otherwise may qualify.

To make matters worse, once a borrower submits a complete application and goes through the entire evaluation process, the Final Servicing Rules provide that a servicer has no obligation to undertake additional reviews or accept additional applications. Therefore, a borrower who is denied based upon a lack of third-party information may never get another opportunity for assistance.

Another area that is not addressed by the recent proposed amendments relates to the definition of a loss mitigation application. The Final Servicing Rules provide that a loss mitigation application "means an oral or written request for a loss mitigation option that is accompanied by any information required by a servicer for evaluation for a loss mitigation option." Through the official interpretations, the CFPB has clarified that a borrower submits an application for loss mitigation any time an interest in loss mitigation is expressed and information that the servicer would evaluate in connection with an application for loss mitigation is provided.

The CFPB definition of a loss mitigation application is arguably vague and ambiguous. The lack of guidance and clarity from the CFPB becomes a bigger problem when you consider that borrowers are now granted a private right of action to enforce many of the procedural provisions of the Final Servicing Rules, including the procedural rules that are triggered when borrowers submit loss mitigation applications.

Upon receipt of an application, a servicer must send the borrower a written notice acknowledging the application and identifying any deficiencies. Servicers must then act with reasonable diligence to obtain any information or documentation needed to complete the application. Without clearly defined parameters of what actually constitutes a loss mitigation application, servicers will be subject to heightened levels of litigation risk because of disagreement.

Indeed, it is not hard to imagine a scenario where borrowers walk into a bank's retail branch saying they are interested in a loan modification and currently make $2,000 per month. That borrower has clearly provided an interest in loss mitigation, as well as information that the servicer would evaluate. Based upon that conversation, does the servicer now have to send an acknowledgement notice?

These examples highlight issues the CFPB has continuously been confronted with since releasing the Final Servicing Rules. The proposed amendments certainly signify progress toward a sensible set of regulations. But there are many other provisions that still need significant work. The June 2013 amendments presented the perfect opportunity for this. Instead, the mortgage servicing industry is left wanting more. ■

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