

# INTERPLAY OF THE CARES ACT'S FORBEARANCE FRAMEWORK AND REGULATION X'S LOSS MITIGATION RULES

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On March 13, 2020, President Donald Trump declared a national emergency in response to the novel coronavirus disease (COVID-19).<sup>1</sup> Shortly thereafter, to assist consumers impacted by the COVID-19 pandemic, Congress passed the Coronavirus Aid, Relief, and Economic Security Act (CARES Act).<sup>2</sup> Although the law provides relief to various industries and populations of United States citizens, for mortgage loan borrowers, the CARES Act established a streamlined forbearance framework.<sup>3</sup> Many borrowers experiencing a financial hardship due directly or indirectly to COVID-19 were afforded the opportunity to request and obtain forbearance of mortgage payments for up to 360 days.<sup>4</sup>



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However, the CARES Act does not work in isolation. Agreeing to forbear upon mortgage payments in lieu of foreclosure is a form of loss mitigation, which directly implicates certain federal mortgage servicing laws. Regulation X, the implementing legislation for the Real Estate Settlement Procedures Act (RESPA), contains detailed procedural requirements that mortgage servicers must abide by when interacting with borrowers in connection with loss mitigation applications and negotiations.<sup>5</sup> The CARES Act and the loss mitigation rules in Regulation X working in tandem certainly helped in some ways. However, it also posed challenges and created a more complicated and confusing experience for mortgage loan borrowers needing assistance during the pandemic.

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1. Proclamation No. 9994, 85 Fed. Reg. 15,337 (Mar. 18, 2020).

2. Coronavirus Economic Stabilization (CARES Act), 15 U.S.C. §§ 9001–9141 (2020).

3. *Id.* § 9056(b).

4. *Id.*

5. See 12 C.F.R. § 1024.41 (2021).

This Article will provide an overview of the CARES Act's payment forbearance program and the relevant loss mitigation requirements in Regulation X. It will also explain the interplay of the two laws and how servicers have to navigate both sets of requirements. Finally, the Article will examine ways in which the dual framework of the CARES Act and Regulation X created positive outcomes and ways in which it may have further complicated an already delicate situation for mortgage loan borrowers and servicers alike.

### I. THE CARES ACT

One of the hallmarks of the CARES Act—at least at it relates to the mortgage market—was the streamlined forbearance framework. The relief framework that was created by the CARES Act did not apply to all mortgage loans. Rather, Congress limited the law's applicability to “[f]ederally backed mortgage loan[s],” which generally means loans insured, guaranteed, made, purchased or securitized by the Federal Housing Administration (FHA), Department of Veterans Affairs (VA), Department of Agriculture (USDA), Federal Home Loan Mortgage Corporation (FHLMC), or the Federal National Mortgage Association (FNMA).<sup>6</sup> Estimates indicate that federally-backed mortgage loans make up approximately 80% of the mortgage market.<sup>7</sup>

Through the CARES Act, borrowers of federally-backed mortgage loans were granted the opportunity and right to request and receive forbearance of mortgage payments, provided that they were experiencing a financial hardship due, directly or indirectly, to the COVID-19 emergency.<sup>8</sup> This forbearance right applied to any federally-backed mortgage loan, regardless of delinquency status.<sup>9</sup> In order to obtain forbearance, borrowers were only required to submit a request for forbearance to the servicer and affirm that they were experiencing a financial hardship caused by the COVID-19 emergency.<sup>10</sup> Servicers were prohibited from requiring any additional documentation from covered borrowers, making this a simple and streamlined method for borrowers to obtain temporary relief.<sup>11</sup>

Once a borrower properly requested forbearance, the loan's servicer was required by the CARES Act to provide an initial forbearance period of up to 180 days.<sup>12</sup> Borrowers also had the right to request and obtain a 180-day extension of the forbearance period, along with the right to shorten either

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6. 15 U.S.C. § 9056(a)(2).

7. 85 Fed. Reg. 39,055, 39,057 (June 30, 2020).

8. 15 U.S.C. § 9056(b)(1).

9. *Id.*

10. *Id.*

11. *Id.* § 9056(c)(1).

12. *Id.*

the initial or extended period upon request.<sup>13</sup> To protect borrowers while in forbearance, the CARES Act prohibited servicers from assessing any fees, penalties, or interest “beyond the amounts scheduled or calculated as if the borrower made all contractual payments on time and in full under the terms of the mortgage contract.”<sup>14</sup>

## II. LOSS MITIGATION UNDER REGULATION X

In response to perceived servicing deficiencies that arose after the financial crisis in the late 2000s, the Consumer Financial Protection Bureau (Bureau) created detailed mortgage servicing rules that became effective in January 2014.<sup>15</sup> Within those rules, the Bureau crafted detailed procedures that servicers must follow when engaging with borrowers who are interested in, or seeking, assistance from their servicers to avoid foreclosure.<sup>16</sup> Borrowers seeking an alternative to foreclosure often need a “loss mitigation option” to help address a hardship that is negatively impacting the borrower’s ability to make mortgage payments.<sup>17</sup> Examples of loss mitigation options include “refinancing, trial or permanent modification, repayment of the amount owed over an extended period of time, forbearance of future payments, short-sale, deed-in-lieu of foreclosure, and loss mitigation programs sponsored by a locality, a State, or the Federal government.”<sup>18</sup>

While the Bureau noted that “forbearance of future payments” is an example of a loss mitigation option, the Bureau also generally explained that “a payment forbearance program is a loss mitigation option pursuant to which a servicer allows a borrower to forgo making certain payments or portions of payments for a period of time.”<sup>19</sup> When a forbearance program forbears upon up to six months of payments, it is considered to be a “short-term payment forbearance program.”<sup>20</sup> A forbearance program is considered to be “short-term” regardless of how long the borrower is given to repay the forborne amounts.<sup>21</sup>

If a mortgage loan borrower requests a loss mitigation option from the loan’s servicer, either verbally or in writing, and the request “is accompanied by any information required by a servicer for evaluation for a loss

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13. *Id.* § 9056(b)(2).

14. *Id.* § 9056(c)(1).

15. 78 Fed. Reg. 10,696, 10,701 (Feb. 14, 2013); *see also* 78 Fed. Reg. at 10,842.

16. *See* 12 C.F.R. § 1024.41 (2021).

17. *Id.* § 1024.31 (defining loss mitigation option as “an alternative to foreclosure offered by the owner or assignee of a mortgage loan that is made available through the servicer to the borrower”).

18. 12 C.F.R. Pt. 1024, Supp. I, cmt. § 1024.31(1).

19. *Id.* at cmt. 41(c)(2)(iii)-1.

20. *Id.*

21. *Id.*

mitigation option,” then that is considered to be the submission of a “loss mitigation application” under Regulation X.<sup>22</sup> The official Bureau commentary to Regulation X notes that what constitutes a loss mitigation application ought to be “considered broadly” and further explains that if a “borrower expresses an interest in applying for a loss mitigation option and provides information the servicer would evaluate in connection with a loss mitigation application, the borrower’s inquiry or prequalification request has become a loss mitigation application.”<sup>23</sup>

Taking the broad definition of what constitutes a loss mitigation option and the expansive definition of a loss mitigation application together, it becomes clear that the Bureau created a wide entry point for borrowers to be brought into the loss mitigation process. Essentially, Regulation X creates a two-prong test: a loss mitigation application is submitted if a borrower (1) requests, or perhaps just expresses an interest in, an alternative to foreclosure and (2) provides any information that the servicer would evaluate. In connection with loss mitigation applications, mortgage servicers often request a wide range of information from the applicant, including information about a borrower’s income, any existing hardship that is impacting the borrower, and the borrower’s preference for certain types of options or programs.<sup>24</sup> Therefore, because a loss mitigation application can be initiated—per the regulatory definition—verbally, many conversations where borrowers discuss their interest in receiving assistance and describe why they have not been able to make their regular monthly mortgage payments are considered to be loss mitigation applications under the law.

An application is considered complete when the “servicer has received all the information that the servicer requires from a borrower in evaluating applications for the loss mitigation options available to the borrower.”<sup>25</sup> Because loss mitigation applications typically require the submission of substantial information and documentation from the borrower applying, when a conversation or other initial request for assistance is classified as a loss mitigation application, it is frequently going to be considered an incomplete application.

### III. INTERPLAY OF CARES ACT FORBEARANCE REQUIREMENTS WITH REGULATION X, PART I

Hypothetically, if a borrower of a federally-backed mortgage loan contacted the loan’s servicer in April 2020, and affirmed that the person was

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22. 12 C.F.R. § 1024.31 (2021) (defining loss mitigation application as “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”).

23. 12 C.F.R. Pt. 1024, Supp. I, cmt. 41(b)(1)-2.

24. See e.g., *Fannie Mae/Freddie Mac Form 710: Mortgage Assistance Application*, FREDDIE MAC SINGLE-FAMILY, (June 2020), <https://singlefamily.fanniemae.com/media/document/pdf/form-710> [<https://perma.cc/M6PC-JQLV>].

25. 12 C.F.R. § 1024.41(b)(1).

suffering from a COVID-19-related hardship—unexpected medical bills or loss of wages due to local shutdowns, for example—and requested a forbearance, that servicer would have been required to offer the borrower a CARES Act forbearance. In response, the servicer would have been obligated to provide the borrower with an initial forbearance period of up to 180 days. By the end of April 2020, some estimates indicate that more than 2.9 million borrowers of federally-backed mortgage loans had entered into forbearance plans with their servicers.<sup>26</sup>

From the mortgage servicer's perspective, the interaction with the borrower described above not only implicated the mandates of the CARES Act but also the loss mitigation requirements of Regulation X. More specifically, the two-prong test to determine whether an interaction must be considered a loss mitigation application is satisfied. The borrower's request for forbearance was a request for a loss mitigation option and the affirmation that the borrower was impacted by COVID-19 was information that the servicer needed to evaluate whether the borrower was eligible for the forbearance program.

This application of the two laws was confirmed by the Bureau in the early days of the pandemic. In an emergency joint policy statement with other federal financial institution regulators and state regulators, the Bureau first confirmed that “[a] CARES Act forbearance qualifies as a short-term payment forbearance program under Regulation X.”<sup>27</sup> Next, the statement explained that “the CARES Act requires borrowers to make a request to the servicer for a forbearance and affirm that they are experiencing a financial hardship during the COVID-19 emergency. This request and affirmation constitute an incomplete loss mitigation application for purposes of Regulation X.”<sup>28</sup>

Interpreting the definition of a loss mitigation application in Regulation X to cover verbal conversations and other minimal interactions with borrowers may have come as a surprise to many servicers. For example, a servicer may have claimed that it requires all information in connection with a loss mitigation application to be submitted in writing. Therefore, the servicer may argue that discussing certain things over the phone would not actually be information that the servicer evaluates in connection with loss mitigation. However, the law does not specify that a servicer can mandate that information only be submitted in a certain format, and it also

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26. *Mortg. Monitor: March 2020 Report*, BLACK KNIGHT, 1, 5 (2020), [https://cdn.blackknightinc.com/wp-content/uploads/2020/05/BKI\\_MM\\_Mar2020\\_Report.pdf](https://cdn.blackknightinc.com/wp-content/uploads/2020/05/BKI_MM_Mar2020_Report.pdf) [<https://perma.cc/Q453-Z5VA>] [hereinafter March 2020 Report].

27. Consumer Fin. Prot. Bureau et al., *Joint Statement on Supervisory and Enforcement Practices Regarding the Mortgage Servicing Rules in Response to the COVID-19 Emergency and the CARES Act*, CONSUMER FIN. PROT. BUREAU 1, 4 (Apr. 3, 2020), [https://files.consumerfinance.gov/f/documents/cfpb\\_interagency-state-ment\\_mortgage-servicing-rules-covid-19.pdf](https://files.consumerfinance.gov/f/documents/cfpb_interagency-state-ment_mortgage-servicing-rules-covid-19.pdf) [<https://perma.cc/S2QB-MRNY>].

28. *Id.* at 5.

does not specify that an application is only triggered when a borrower provides information in the servicer's required format. To the contrary, the definition of a loss mitigation in Regulation X begins by covering an "oral or written request for a loss mitigation option."<sup>29</sup> Regardless, the Bureau's interpretation meant that the interactions between servicers and mortgage loan borrowers, which led to millions of CARES Act forbearances in April 2020 alone, constituted loss mitigation applications under Regulation X.

#### IV. REGULATION X REQUIREMENTS AND PROHIBITIONS UPON RECEIPT OF A LOSS MITIGATION APPLICATION

Once a servicer has determined that it has received a loss mitigation application, it must be mindful of various requirements and prohibitions that flow from that event. First, the servicer must promptly evaluate the application and determine whether it is complete or incomplete.<sup>30</sup> Within five days (excluding legal public holidays, Saturdays, and Sundays) of receiving the application, the servicer must provide the borrower with a written acknowledgment letter specifying whether the application is complete or incomplete.<sup>31</sup> If the application is incomplete, additional content, including the information and documentation needed to complete the application and a reasonable date by which the borrower should submit it, must be included in the acknowledgment.<sup>32</sup> The servicer also has a general obligation under the law to "exercise reasonable diligence in obtaining documents and information to complete a loss mitigation application."<sup>33</sup>

In addition to quickly evaluating the submitted application and sending a compliant acknowledgment letter, mortgage servicers must also be aware of certain restrictions that Regulation X imposes in relation to the application. Most importantly, the law generally restricts a servicer's ability to evaluate an incomplete loss mitigation application and offer a borrower a loss mitigation option.<sup>34</sup> The provision of Regulation X that imposes this limitation is commonly referred to as the anti-evasion requirement or the anti-evasion clause.<sup>35</sup> Although there are limited exceptions to the anti-evasion clause, mortgage servicers generally must obtain a complete ap-

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29. 12 C.F.R. § 1024.31.

30. *Id.* § 1024.41(b)(2)(i)(A).

31. *Id.* § 1024.41(b)(2)(i)(B). Many applicable loss mitigation requirements in Regulation X that are subject to timing limitations refer to a certain number of days and then exclude legal public holidays, Saturdays, and Sundays. Hereinafter, that standard will be referred to as business days. For example, an acknowledgment letter generally must be provided within five business days of receipt of a loss mitigation application.

32. *Id.*

33. 12 C.F.R. § 1024.41(b)(1).

34. *Id.* § 1024.41(c)(2)(i).

35. *See*, 85 Fed. Reg. 39,055, 39,059 (June 30, 2020); 86 Fed. Reg. 34,848, 34,866 (June 30, 2021).

plication from a borrower and evaluate the borrower for all loss mitigation options that are available.<sup>36</sup> Evading that requirement by evaluating an incomplete application and offering a loss mitigation option based upon that review would run afoul of Regulation X.

One of the exceptions to the anti-evasion clause is for a loss mitigation option that qualifies as a short-term forbearance program.<sup>37</sup> “A short-term payment forbearance program . . . allows the forbearance of payments due over periods of no more than six months. Such a program would be short-term regardless of the amount of time a servicer allows the borrower to make up the missing payments.”<sup>38</sup> If a servicer offers a short-term forbearance program, it must promptly—generally within five business days—provide the borrower a written offer letter that, among other things, states:

[T]he specific payment terms and duration of the program or plan, that the servicer offered the program or plan based on an evaluation of an incomplete application, that other loss mitigation options may be available, and that the borrower has the option to submit a complete loss mitigation application to receive an evaluation for all loss mitigation options available to the borrower regardless of whether the borrower accepts the program or plan.<sup>39</sup>

A servicer is not alleviated of its other loss mitigation-related obligations under Regulation X just because it offered a short-term forbearance program to a borrower.<sup>40</sup> That includes sending an acknowledgment letter when appropriate and exercising reasonable diligence to help a borrower complete the application.<sup>41</sup>

With respect to the general reasonable diligence obligation in connection with a short-term forbearance program that was offered based upon an evaluation of an incomplete application, the commentary to Regulation X specifies:

[A] servicer may suspend reasonable diligence efforts until near the end of the payment forbearance program . . . . Near the end of a short-term payment forbearance program . . . and prior to the end of the forbearance period, if the borrower remains delinquent, a servicer must contact the borrower to determine if the borrower wishes to complete the loss mitigation application and proceed with a full loss mitigation evaluation.<sup>42</sup>

Put simply, if a borrower initiates a loss mitigation application and is offered a short-term forbearance program based upon that information, the servicer has an obligation to send an acknowledgment letter and an offer

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36. 12 C.F.R. § 1024.41(c)(2)(i); *id.* § 1024.41(c)(1).

37. *Id.* § 1024.41(c)(2)(iii).

38. 12 C.F.R. Pt. 1024, Supp. I, cmt. 41(c)(2)(iii)-1.

39. 12 C.F.R. § 1024.41(c)(2)(iii); 12 C.F.R. Pt. 1024, Supp. I, cmt. 41(c)(2)(iii)-6.

40. 12 C.F.R. Pt. 1024, Supp. I, cmt. 41(c)(2)(iii)-2.

41. *Id.*

42. *Id.* at cmt. 41(b)(1)-4.iii.

letter to the borrower but can suspend its reasonable diligence efforts until near the end of the forbearance term.

## V. INTERPLAY OF CARES ACT FORBEARANCE REQUIREMENTS WITH REGULATION X, PART II

As discussed above, when a mortgage servicer received the hypothetical request for forbearance from a borrower in April 2020, along with the borrower's affirmation of a COVID-19-related hardship, the servicer had to offer the borrower a forbearance pursuant to the CARES Act and treat the interaction as a loss mitigation application pursuant to Regulation X. Upon receipt of that application, Regulation X would then require that both an acknowledgment letter and an offer letter be sent to the borrower. Although a servicer is typically required to immediately begin exercising reasonable diligence to help the borrower complete the application, because a CARES Act forbearance is a short-term forbearance program for Regulation X purposes, the servicer would be able to suspend those efforts until near the end of the plan.

Whether intentional or not, the reality for mortgage servicers is that the CARES Act and the loss mitigation rules in Regulation X necessarily interact and work together when forbearance programs are offered during the COVID-19 pandemic. There were arguably some benefits to this overlay, particularly when viewing the landscape from an ordinary consumer's lens, because in many ways the loss mitigation rules in Regulation X fill in gaps that otherwise would have been left open-ended in a world with just the CARES Act. However, the interplay of the CARES Act and the loss mitigation rules in Regulation X also caused some challenges for borrowers and servicers alike.

### A. Benefits of the Combined CARES Act and Regulation X Framework.

While the CARES Act set forth a streamlined process for mortgage loan borrowers to acquire forbearance and required servicers to offer forbearance once those minimal requirements were satisfied, the CARES Act did not require any formal offer letter or other memorialization of the agreed-upon terms. In that regard, the offer letter that is required by Regulation X serves the useful purpose of providing borrowers with a written record of the arrangement. This might include, for example, the number of months in which payments would be forborne and when the borrower might be expected to resume making regularly monthly payments.

The offer letter also provides borrowers with important information about their rights to submit a complete application and be evaluated for all loss mitigation options that are available. This is information that an ordinary consumer might not otherwise know. At the same time, the servicer would be required to send a loss mitigation acknowledgment letter that lays out the information and documentation needed from the borrower to complete the application. Again, this is useful information that borrow-



ers may utilize to receive other, more permanent, assistance and information that borrowers otherwise may not be privy to.

Additionally, while the CARES Act allowed borrowers to receive up to 180 additional days of forbearance after the initial 180-day period, servicers were only required by the CARES Act to grant the extension if the borrower requested it. Regulation X's reasonable diligence requirements could have, theoretically, helped facilitate extension requests. Although reasonable diligence efforts can generally be suspended while a borrower is in forbearance, a servicer is required to contact the borrower near the end of the forbearance term. That contact may simply seek to determine whether the borrower is interested in submitting a complete application and being evaluated for all available loss mitigation options, but it also is very likely to spur conversations about the borrower's option to extend the forbearance term. At the very least, requiring some form of outreach on the part of the servicer near the end of the forbearance fills a gap that otherwise would have been left by the CARES Act.

Finally, Regulation X also provided borrowers with some protections that the CARES Act did not. Namely, when a borrower is performing on a loss mitigation option that was offered, either after a review and evaluation of a borrower's complete application or after an evaluation of an incomplete application, the servicer of the borrower's loan cannot initiate foreclosure proceedings with respect to that borrower's mortgage loan.<sup>43</sup> If foreclosure proceedings had already been initiated when the borrower entered into forbearance, then the servicer would be prohibited from moving for foreclosure judgment or order of sale, or conducting a foreclosure sale while the borrower is performing on the forbearance.<sup>44</sup> These prohibitions from Regulation X apply to a borrower who was offered a CARES Act forbearance. In essence, while the CARES Act granted the right to receive forbearance, Regulation X stepped in to provide critical dual tracking protections.

#### B. Challenges Caused by the Combined CARES Act and Regulation X Framework.

The interplay of the CARES Act and Regulation X was not all positive. In many ways, the existence and overlay of the two laws caused certain challenges for both mortgage servicers and borrowers. While the CARES Act provided important relief to many mortgage loan borrowers impacted by the COVID-19 pandemic, the strict mandates of the loss mitigation rules in Regulation X placed an added burden on servicers that likely stressed limited resources. By treating all CARES Act forbearance requests as loss mitigation applications, Regulation X then stepped in to require that two additional notices—an acknowledgment letter and a short-term forbearance offer letter—be provided within a short, five business day period for

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43. 12 C.F.R. § 1024.41(c)(2)(iii) (2021); *id.* § 1024.41(f)(2)(iii).

44. 12 C.F.R. § 1024.41(c)(2)(iii); *id.* § 1024.41(g).

each forbearance that was offered.<sup>45</sup> As of April 2021, some estimates indicate that mortgage servicers have issued over seven million forbearances since the CARES Act was enacted.<sup>46</sup> These high volumes came at the same time servicers were dealing with their own limitations, including shifting employees to remote work in response to the pandemic.<sup>47</sup> Whether the benefits of those notices to consumers outweigh the added burden on servicers, particularly during the early days of the pandemic, is certainly debatable.

Regardless, the combination of sudden volume increases, strict regulatory requirements with tight turnaround times, and internal workforce limitations exposed servicers to considerable risks. For instance, if a servicer was unable to always send out the required acknowledgment letters or short-term forbearance offer letters within five business days, the servicer was likely exposed to both regulatory risks and litigation risks. To its credit, in its joint policy statement, the Bureau did commit to not taking supervisory or enforcement action against servicers for timeline violations.<sup>48</sup> In other forums though, the Bureau has since emphasized that the flexibility it committed to is based upon an expectation that servicers expend good faith efforts to comply with the various requirements and perhaps even whether a servicer has an effective loss mitigation framework in place during the latter months of 2021.<sup>49</sup> However, even if the Bureau does not take action for some violations, other entities with the authority to enforce the law, such as state agencies and state attorneys general, were not signatories to the Bureau's joint statement. This means that servicers may still be exposed to considerable risks of regulatory enforcement.

Additionally, the loss mitigation requirements in Regulation X are subject to private enforcement by individual borrowers or classes of borrowers.<sup>50</sup> Successful individual litigants can recover actual damages, statutory penalties of up to \$2,000, and the costs of the action.<sup>51</sup> Nothing that the

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45. 12 C.F.R. § 1024.41(b)(2)(i)(B); *id.* § 1024.41(c)(2)(iii).

46. *Mortg. Monitor: April 2021 Report*, BLACK KNIGHT 1, 10 (Apr. 2021), [https://cdn.blackknightinc.com/wp-content/uploads/2021/06/BKI\\_MM\\_Apr2021\\_Report.pdf](https://cdn.blackknightinc.com/wp-content/uploads/2021/06/BKI_MM_Apr2021_Report.pdf) [<https://perma.cc/A5AS-6AEU>].

47. 86 Fed. Reg. 34,848 (June 30, 2021).

48. Consumer Fin. Prot. Bureau et al, *supra* note 27, at 6.

49. See Allison Brown et al, *CFPB Speaks: Expectations for Servicers in the Age of COVID-19* (Oct. 14, 2020), <https://www.bradley.com/insights/publications/2020/10/cfpb-speaks-expectations-for-servicers-in-the-age-of-covid19-webinar-recording> [<https://perma.cc/CNR6-P38Q>]; Bureau of Consumer Fin. Prot., *Bulletin 2021-02: Supervision and Enforcement Priorities Regarding Housing Insecurity 4-5* (Apr. 1, 2021), [https://files.consumerfinance.gov/f/documents/cfpb\\_bulletin-2021-02\\_supervision-and-enforcement-priorities-regarding-housing\\_WHcae8E.pdf](https://files.consumerfinance.gov/f/documents/cfpb_bulletin-2021-02_supervision-and-enforcement-priorities-regarding-housing_WHcae8E.pdf) [<https://perma.cc/U66Z-3AH2>].

50. 12 C.F.R. § 1024.41(a) (2021).

51. 12 U.S.C. § 2605(f)(1).

Bureau did eliminated or reduced the exposure that servicers may face with respect to individual borrowers. Taken together, the combination of the CARES Act and the loss mitigation requirements in Regulation X may have exposed servicers to unknown levels of risks.

Another challenge that may have been created by the interplay of the CARES Act and the loss mitigation requirements in Regulation X is borrower confusion. Since the passage of the CARES Act, millions of borrowers have learned about and taken advantage of the streamlined process established by the CARES Act to obtain forbearance. However, they likely were not expecting a brief conversation with a customer service representative to constitute the start of an application. Receiving an acknowledgment letter with various information related to the application process, including the need for the borrower to submit additional information and documentation to complete the application, may have been confusing for many borrowers. Although it is not necessarily direct evidence of borrower confusion, it is noteworthy that the number of mortgage-related consumer complaints submitted through the Bureau's portal at the start of the pandemic in March and April 2020 represented an increase of approximately 17% from the numbers of complaints submitted in January and February 2020.<sup>52</sup>

To make matters worse, Regulation X also has an early intervention written notice obligation that mortgage servicers were still required to comply with while a borrower was on a CARES Act forbearance.<sup>53</sup> This letter is generally sent on a recurring basis and encourages the borrower to contact the servicer.<sup>54</sup> The Bureau's own model language for the early intervention written notice says: "Call us today to learn more about your options and instructions for how to apply. [The longer you wait, or the further you fall behind on your payments, the harder it will be to find a solution.]"<sup>55</sup> Receiving a notice with the Bureau's proposed language, or something to the same effect, likely caused confusion for some borrowers during the early stages of forbearance when no further action was actually required of the borrower.

## VI. CONCLUSION

The passage of the CARES Act was an important event in response to the COVID-19 emergency. It established a quick, streamlined framework for borrowers to obtain assistance and relief from mortgage payments.

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52. See *Consumer Complaint Database*, CONSUMER FIN. PROT. BUREAU (July 14, 2021) <https://www.consumerfinance.gov/data-research/consumer-complaints> (click on "view complaint data") [<https://perma.cc/JZX2-AEY6>].

53. 12 C.F.R. § 1024.39(b).

54. *Id.*

55. 12 C.F.R. Pt. 1024, App. MS-4(A).

Whether it was done intentionally or not, the CARES Act's forbearance framework necessarily implicates the Bureau's loss mitigation requirements in Regulation X. While the interplay of the two laws likely has been helpful in some ways, including by providing borrowers with additional protections that were not contemplated in the CARES Act, it has likely also caused some borrower confusion along the way and posed unique burdens on servicers.