

Mortgage Forbearance in the Age of COVID-19



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THERE ARE NUMEROUS, complex operational and compliance challenges for mortgage servicers as a result of the COVID-19 pandemic. Perhaps no topic has received more consumer, regulatory or industry attention than mortgage payment forbearances. Servicers offering forbearance programs—whether by force or choice—must be able to navigate the ever-changing federal, state and government-sponsored entity (GSE)/investor/insurer rules and regulations. This article addresses some of the key compliance considerations related to COVID-19 forbearance programs and provides tips for overcoming the same.

What is a Forbearance?

Generally speaking, a forbearance is the loss mitigation option when the servicer agrees to reduce or suspend the borrower's contractual monthly payment for a specific period of time. During the forbearance period, late charges typically do not accrue and foreclosure activity is suspended. Also generally prohibited are additional fees, penalties, or interest beyond the amounts scheduled or calculated as if the borrower made all contractual payments on time and in full. Forbearances are generally offered to borrowers facing short-term hardships and typically last 90-180 days. Not surprisingly, the specific terms of the forbearance plan and the methods for implementation are often dictated by state, federal, and GSE/investor/insurer requirements.

COVID-19 Forbearance Compliance

Required Documentation

As a threshold matter, servicers must determine what information and documentation, if any, they

will require from the borrower when processing a forbearance. Under the Coronavirus Aid, Relief, and Economic Security Act, Public Law 116-136 (the "CARES Act"), servicers of federally-backed single family mortgages are required to provide forbearances to borrowers impacted, directly or indirectly, by COVID-19. A borrower experiencing a COVID-19-related hardship may request forbearance by: (1) submitting a request to the servicer; and (2) affirming that the borrower is experiencing a financial hardship during the COVID-19 emergency. Once the servicer receives the request for forbearance with the borrower's "attestation," the servicer must grant the forbearance requested "with no additional documentation required." Some state and local jurisdictions have enacted forbearance requirements that are similar to or expand upon the CARES Act provisions. (See malegislature.gov/Laws/SessionLaws/Acts/2020/Chapter65.)

The first point to note is that the borrower must request a forbearance in order to be eligible for the federal protections. Servicers are not automatically required to place borrowers in forbearances based



on delinquency status or any other criteria. At least one state authority has considered expanding to automatic forbearances, but there are currently no express requirements mandating lenders take this approach. (See ag.ny.gov/sites/default/files/servicer_letter_-_all_35_recipients_-_mailed_4.22.20.pdf.) This is likely due to the compliance issues that arise by altering the borrower's payment obligations without the borrower's consent. This includes but is not limited to, the potential credit reporting and creditworthiness implications of placing a borrower in forbearance.

Under the CARES Act, borrowers must attest that they are experiencing a financial hardship due to COVID-19. Federal law does not define what form this attestation can or should take. Most servicers appear to be taking a fairly liberal approach, relying on any attestation of a COVID-19-related hardship provided verbally or in writing. Servicers of non-federally-backed loans theoretically have greater flexibility with their forbearance programs, including the ability to request additional documentation evidencing the borrower's COVID-19 hardship (e.g. bank statements, pay stubs, etc.). Servicers of non-federally-backed loans may find it prudent, however, to adopt the CARES Act standard. Doing so arguably provides somewhat of a safe harbor from unfair and unequal treatment claims. For entities that service both federally-backed and non-federally-backed loans, adopting the CARES Act standard across the board also allows the servicer to streamline its process.

Eligibility Based on Delinquency/Foreclosure Status

Under current guidance, borrowers in default prior to a COVID-19 hardship may be eligible for federal or state forbearance programs. The CARES Act, for example, expressly provides that borrowers may request a forbearance "regardless of delinquency status." Fannie Mae and Freddie Mac followed suit by easing their restrictions on forbearances resulting in delinquencies greater than 12 months. (See e.g., Fannie Mae COVID-19 Frequently Asked Questions—Servicing, Question 9, available at singlefamily.fanniemae.com/media/22361/display.) As a result, servicers of federally-backed

loans must process forbearance requests from borrowers who are delinquent—perhaps severely delinquent—even if the initial delinquency was not the result of a COVID-19 hardship.

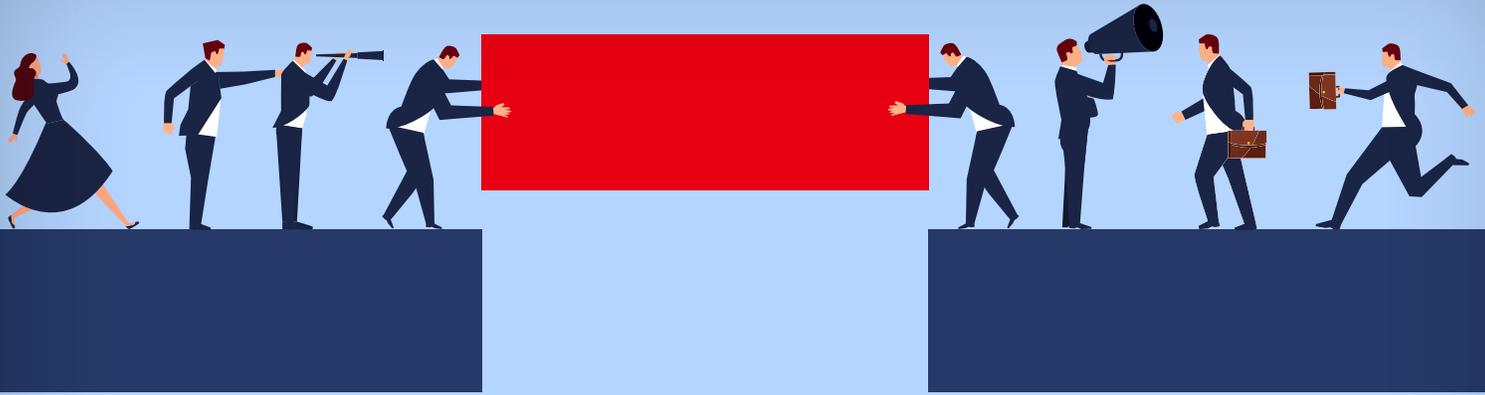
Forbearance requests from borrowers that are well into the foreclosure process present additional challenges. The CARES Act does not expressly exclude accounts in foreclosure and, as noted above, goes so far as to say that servicers must provide forbearance programs irrespective of delinquency status. If a loan has been accelerated—which typically occurs in the event of foreclosure—there are arguably no monthly payments to forbear. While this argument has some appeal, forbearance of the entire debt is still arguably a forbearance. Servicers that choose to offer forbearance programs to borrowers in foreclosure face separate challenges, including, but not limited to, ensuring judicial and non-judicial foreclosure processes are postponed and resumed in accordance with applicable law.

Forbearances and the Consumer Financial Protection Bureau's (CFPB's) Loss Mitigation Rules

COVID-19 Forbearances do not exist in a vacuum; they must fit into the existing (non-COVID-related) regulatory framework. Under the CFPB's loss mitigation rules, if a borrower requests a forbearance and indicates a financial hardship, the servicer must treat the request as an incomplete loss mitigation application under Regulation X. This triggers, among other things, the obligation to send an acknowledgement notice within five days of receiving the incomplete application.

In its April 3, 2020 Interagency Joint Statement, the CFPB indicated that it does not intend to take supervisory or enforcement action against servicers that fail to provide an acknowledgment notice within the required five-day period, so long as the servicer provides the acknowledgment before the end of the forbearance term. (See files.consumerfinance.gov/f/documents/cfpb_interagency-statement_mortgage-servicing-rules-covid-19.pdf.) While this is undoubtedly a welcomed reprieve for the in-

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During the forbearance period, late charges typically do not accrue and foreclosure activity is suspended. Additional fees, penalties, or interest beyond the amounts scheduled or calculated as if the borrower made all contractual payments on time and in full are also generally prohibited.

dustry, servicers should keep in mind that Regulation X affords borrowers a private right of action to pursue violations of its loss mitigation provisions. Servicers, therefore, must weigh the operational challenges associated with providing the acknowledgement notice in the standard timeframe with the potential litigation risk of failing to do so.

Servicers must also navigate the CFPB's anti-evasion clause and short-term forbearance rules. With respect to the anti-evasion clause, Regulation X generally prohibits servicers from offering loss mitigation options based on an incomplete application, unless the option qualifies as a short-term repayment plan or a short-term payment forbearance plan. A short-term payment forbearance plan under Regulation X allows for the forbearance of payments due over periods of no more than six months, irrespective of the amount of time a servicer allows the borrower to make up the missing payments. Under the CARES Act, servicers of federally-backed loans must provide the borrower with a forbearance for up to 180 days and must extend the forbearance for an additional period of up to 180 days at the request of the borrower. The borrower has the right to shorten the forbearance period if he or she so chooses. As written, the CARES Act does not violate the anti-evasion requirement because the Act can be read to contemplate two or more successive short-term forbearance offers of six months or less. The distinction between multiple short-term offers and one extended period is subtle but important. Servicers that fail to understand the difference run the risk of implementing forbearance plans based on incomplete applications that go beyond the permissible six-month period outlined in Regulation X.

Credit Reporting

Background on COVID-19 Reporting Guidance

One of the biggest sources of frustration for servicers offering COVID-19 forbearances is the confusion around credit reporting.

Fannie Mae, Freddie Mac, and the Veterans Administration were the first major federal entities to announce a change in policy for credit reporting for COVID-19-affected loans. Each entity instructed servicers offering forbearance to COVID-19-affected borrowers to suppress credit reporting for the affected accounts. Not long after, the CARES Act implemented additional and arguably conflicting credit reporting requirements by adding a new subsection to Section 623(a)(1) of the Fair Credit Reporting Act (FCRA). Specifically, the CARES Act provides:

- [I]f a furnisher makes an accommodation with respect to one or more payments on a credit obligation or account of a consumer, and the consumer makes the payments or is not required to make one or more payments pursuant to the accommodation, the furnisher shall:
- Report the credit obligation or account as current; or
 - If the credit obligation or account was delinquent before the accommodation, then maintain the delinquent status during the period in which the accommodation is in effect. And if the consumer brings the credit obligation or account current during the period described, report the credit obligation or account as current.

These amendments to the FCRA apply to all consumer credit obligations and accounts that receive an "accommodation," regardless of whether those obligations are federally-backed or proprietary.

Credit Reporting Compliance Hurdles

On its face, the CARES Act seems to suggest that credit reporting suppression—like the one outlined by Fannie Mae, Freddie Mac and the Veterans Administration—would be improper. While furnishers do not generally have an obligation to furnish credit information (the FCRA standards generally apply to information that *is* reported), the language added by the CARES Act implies a mandate to report ("the furnisher shall report...").

But the CARES Act mandate carries some absurd results. For borrowers who were already delinquent when they enrolled in a forbearance, the mandate appears to be worse than existing industry practice. Under Consumer Data Industry Association (CDIA) guidance in effect at the time the CARES Act was implemented, a consumer who is delinquent at the time he or she enters forbearance would be reported with an Account Status of 11 (“current”), with a notation that the consumer is in forbearance. Under the CARES Act, that same consumer is instead reported as delinquent for the duration of the forbearance period unless he or she cures the delinquency. That is an especially odd result for loans owned or secured by Fannie Mae, Freddie Mac or insured by the Veterans Administration, where the pre-CARES Act guidance mandated a suppression of reporting, which would generally be better for borrowers than a delinquent status. (It’s worth noting that the CDIA has revised its guidance since the passage of the CARES Act to accommodate a strict reading of § 4021 of the CARES Act. This does not address the fundamental issue, however, that the CARES Act appears to mandate reporting that is arguably worse for the borrower than common industry practice.)

This raises several questions. First, is credit reporting for COVID-19 affected loans truly mandatory in light of the long-established general rule that there is no affirmative obligation to provide credit reporting? While it’s difficult to know precisely what Congress intended, it seems logical to assume that Congress did not intend to create a credit-reporting mandate, but instead only sought to clarify the requirements if a company did decide to report a consumer’s credit.

Second, does the CARES Act require furnishers to report accounts that were delinquent at the time they entered forbearance period as delinquent? The phrasing of that section of the Act is odd; it states that if the furnisher offers the consumer an “accommodation,” it “shall report the credit obligation or account as current; or, if the credit obligation or account was delinquent before the accommodation,” then the furnisher shall maintain the delinquent status at the beginning of the forbearance period. Seeking to avoid the odd result of mandatory adverse credit reporting, some furnishers have interpreted this section as giving the furnisher the option to report any account in forbearance as current.

Additional CFPB “Guidance”

Following the implementation of the CARES Act, the CFPB released two additional credit reporting resources:

1. Statement on Supervisory and Enforcement Practices Regarding the Fair Credit Reporting Act and Regulation V in Light of the CARES Act available at files.consumerfinance.gov/f/documents/cfpb_credit-reporting-policy-statement-cares-act_2020-04.pdf; and
2. Consumer Reporting FAQs related to the CARES Act and COVID-19 Pandemic, available at files.consumerfinance.gov/f/documents/cfpb_fcra_consumer-reporting-faqs-covid-19_2020-06.pdf.

Unfortunately, the CFPB’s guidance does not provide definitive answers. The CFPB statement recognizes that “companies generally are not legally obligated to furnish information to consumer reporting agencies,” and also describes the CARES Act as “generally requir[ing] furnishers to report as current certain credit obligations for which furnishers make payment accommodations to consumers affected by COVID-19 ...” Thus, the CFPB’s statement is broad enough to cover all three interpretations of the Act:

- Credit reporting can be suppressed;
- All accounts given an accommodation can be reported as current; or
- Furnishers must report delinquent accounts in forbearance as delinquent.

The CFPB goes on to say that it will not cite in examinations or take enforcement actions against those who furnish information to consumer reporting agencies that accurately reflects the payment relief measures they are employing. On its face, this language seems to provide an opening for furnishers to report accounts that receive an accommodation in accordance with pre-existing CDIA guidance (i.e. reporting accounts in a forbearance as “current” under a forbearance), but questions remain about whether such reporting is “accurate” in light of conflicting guidance.

The CFPB’s FAQs also leave unanswered questions. For example, FAQ number six purports to explain the furnisher’s credit reporting obligations under the CARES Act but does not address whether a furnisher may report a delinquent account under an accommodation as current; it simply states that the furnisher may not “advance the delinquent status.” In FAQ number seven, the CFPB notes that furnishers should consider all information that is reported on an account for compliance with the CARES Act. That is, the furnisher should ensure that its reporting on

RESOURCES

ABA, Industry Experts Review CFPB Action on Reg X Flexibility for Servicers

In a recent conference call with ABA’s Mortgage Markets and Mortgage Servicing and Compliance Committees, ABA staff experts and outside counsel discussed the CFPB’s recent action to grant flexibility under Regulation X for servicers to offer deferral options to borrowers as they transition from forbearances for financial hardships due to the coronavirus pandemic.

In an interim final rule—which took effect July 1—the CFPB said it would temporarily permit servicers to offer certain deferral options for forborne payments based on an evaluation of an incomplete loss mitigation application. Among other things, such loss mitigation options must permit borrowers to defer forborne payments—including principal, and interest—until the loan is refinanced, the mortgaged property is sold, the term of the loan ends or, for FHA-insured mortgages, the mortgage insurance terminates. Member banks can access the recording here: www.aba.com/training-events/online-training/aba-industry-experts-review-cfpb-action-on-reg-x-flexibility-for-servicers

all data fields (such as the account's payment status, scheduled monthly payment, and the amount past due) is updated consistent with the CARES Act. Unfortunately, the CFPB does not answer the fundamental question: What is "consistent with the CARES Act"? Similarly, FAQ number eight states that using a special comment code is not a substitute for complying with the CARES Act's requirements, but the CFPB does not address the more practical question of whether special comment codes noting an accommodation are permitted at all. Does a furnisher violate the CARES Act by using a special comment code to note that a consumer received an accommodation? The CFPB's FAQs do not address this. Without further information, it seems reasonable to assume that special comment codes may be used along with reporting an account consistent with the CARES Act but cannot be used alone to achieve compliance.

Conclusion

COVID-19 forbearance programs—and the rules, regulations and requirements that govern them—present a host of new and unique compliance challenges for mortgage servicers. Mortgage servicers should take care when implementing forbearance programs to ensure compliance with new and existing guidance. Confronting these issues not only mitigates risk but is also instructive as servicers will undoubtedly face similar hurdles as borrowers move from forbearances to post-forbearance options and beyond. ■

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This article is the first in a two-part series. In the next issue, the authors will discuss issues related to COVID-19 loss mitigation solutions following a forbearance, including issues surrounding the recently-issued CFPB Interim Rule on Regulation X.