Obtaining Mortgage Relief for Victims of Disasters

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By

Alys Cohen and Margot Saunders
National Consumer Law Center®

ABOUT THE AUTHORS

Alys Cohen is a staff attorney in the National Consumer Law Center's Washington office, where she advocates for fair and sustainable mortgage lending and foreclosure prevention. She is the co-author of NCLC's *Truth in Lending*, *Consumer Credit Regulation*, *Credit Discrimination*, and *Mortgage Lending*. Prior to joining NCLC, Ms. Cohen worked for the Federal Trade Commission. She is a graduate of the University of Pennsylvania Law School.

Margot Saunders is senior counsel to NCLC. Ms. Saunders has testified before Congress on dozens of occasions regarding a wide range of consumer law matters, including predatory lending, payments law, electronic commerce, and other financial credit issues. She is a co-author of NCLC's *Consumer Banking and Payments Law* and a contributor to numerous other legal manuals. Margot regularly serves as an expert witness in consumer credit cases, providing opinions on predatory lending, electronic benefits, servicing, and credit math issues. She is a graduate of Brandeis University and the University of North Carolina School of Law.

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ABOUT THE NATIONAL CONSUMER LAW CENTER

Since 1969, the nonprofit National Consumer Law Center® (NCLC®) has used its expertise in consumer law and energy policy to work for consumer justice and economic security for low-income and other disadvantaged people, including older adults, in the United States. NCLC's expertise includes policy analysis and advocacy; consumer law and energy publications; litigation; expert witness services, and training and advice for advocates. NCLC works with nonprofit and legal services organizations, private attorneys, policymakers, and federal and state government and courts across the nation to stop exploitive practices, help financially stressed families build and retain wealth, and advance economic fairness.

Essential Web Resources

Is your home located in a disaster area? https://www.disasterassistance.gov/

National Legal Aid & Defender Association (NLADA) disaster legal aid
https://www.disasterlegalaid.org/

FEMA individual disaster aid
https://www.fema.gov/individual-disaster-assistance

Freddie Mac
http://www.freddiemac.com/singlefamily/service/natural_disasters.html
and
http://www.freddiemac.com/singlefamily/service/pdf/Disaster_Relief_Bullet_Points.pdf

Fannie Mae http://www.fanniemae.com/portal/about-fm/hurricane-relief.html
and https://www.fanniemae.com/singlefamily/disaster-assistance
and https://www.knowyouroptions.com/relief

FHA https://www.hud.gov/program_offices/housing/sfh/nsc/qaho0121
and https://www.hud.gov/program_offices/housing/sfh/ins/203h-dft
and
https://www.hud.gov/sites/dfiles/Housing/documents/wb_Servicing%20FHA-Forward%20Mortgages_10-18-17.PDF

VA
https://www.benefits.va.gov/HOMELOANS/documents/circulars/26_17_23.pdf
and
https://www.benefits.va.gov/HOMELOANS/resources_circulars_valeri.asp

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1. Introduction

1.1 Overview

When homeowners are struggling to make their mortgage payments after a major disaster, it is critical for their advocates to understand the different programs and protections enacted for their support.

The majority of mortgage loans (three out of five) made in the United States are government-sponsored or government-insured,[1] and, as a result, the rules governing how homeowners with these mortgages will be treated after disasters are somewhat uniform:

- Freddie Mac and Fannie Mae, the guarantors of most mortgage loans, provide some protections after natural disasters: Both[2] authorize their servicers to permit a 90-day suspension of foreclosure proceedings immediately after a natural, or other, disaster.[3] Servicers are instructed to work closely with homeowners to develop workout or relief plans to cure the delinquency. Unfortunately, it appears that there is no absolute right to the forbearance. Typically, however, a homeowner will be offered a forbearance plan that temporarily reduces or suspends the monthly mortgage payment for at least 90 days. Sections 3.1 and 3.2, respectively, provide more specifics on the protections provided by each of these mortgage owners.

- Government-insured mortgage agencies, such as the Federal Housing Administration (FHA), Department of Veterans Affairs (VA) and Rural Housing Service (RHS), also provide protections against default and foreclosure for victims of disasters, although these protections may not be as clearly delineated as those provided by Freddie Mac and Fannie Mae. Sections 3.3, 3.4 and 3.5 cover the rules for these mortgages.

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[1] https://www.valuewalk.com/2016/03/fannie-mae-who-owns-the-u-s-mortgage-markets/.

[2] https://www.pennymacusa.com/blog/understanding-the-roles-of-fannie-mae-and-freddie-mac.

[3] *See generally* Freddie Mac 2016 Single-Family Seller/Servicer Guide at 8404.4, Delinquency Management Activities Following a Disaster (effective Mar. 2, 2016) [hereinafter Single-Family Seller/Servicer Guide]; Fannie Mae 2015 Single-Family Servicing Guide at D1-3-02, Providing Relief to a Borrower Who is Affected by a Disaster (effective Nov. 12, 2014) [hereinafter Single-Family Servicing Guide].

The remaining third of mortgage loans made in the United States are not provided by these government-related entities. Relief from foreclosure after non-payment resulting from a disaster for homeowners with these mortgages will be left to the discretion of the owners and servicers of these mortgages, subject to the rules for mortgage modifications issued by the Consumer Financial Protection Bureau (CFPB). These rules are discussed in section 2.2. However, federal, state and local relief for all affected homeowners in a disaster area may be helpful. Such relief is discussed in section 2.3.

It is also necessary to determine homeowners' rights to use payments from their insurance companies for repairs or replacement of their homes. Different mortgage owners have varying rules for the distribution of insurance proceeds, often based on the default status of the mortgage before the disaster occurred. Section 2.4 describes the general rules for the distribution of insurance proceeds. Additionally, separate subsections on insurance are included within the discussion of each mortgage owner's disaster relief rules.

1.2 First questions

In order to determine the relief to which a homeowner may be entitled after a natural disaster, one must first address several questions:

- **Is the home located in a disaster area?** FEMA has a website that provides information about whether a particular address is included. This website is: https://www.disasterassistance.gov/.

- **Who owns the mortgage?** The following websites provide instruction on how to determine whether Freddie Mac or Fannie Mae owns the mortgage: https://ww3.freddiemac.com/loanlookup and https://www.knowyouroptions.com/loanlookup. If the loan does not appear on either website, and the mortgage documents do not indicate that the loan was government-insured or -guaranteed by the FHA, VA or RHS, then the loan likely is a private-label mortgage.

1.3 Resources for lawyers helping disaster victims

The National Disaster Legal Aid Resource Center[4] is a collaboration of Lone Star Legal Aid, the American Bar Association, the Legal Services Corporation, the National Legal Aid and Defender Association NLADA), the Texas Legal Services Center and Pro Bono Net. This online resource provides readily available legal information about disaster recovery regarding housing, insurance claims, employment and other vital issues. The site incorporates lessons learned from past experiences and continually improves on procedures during natural disasters and responses to future emergencies, and it seeks to ensure that the inevitable longer-term needs are met. The site provides access to FEMA information, explanation of which counties are considered covered counties, online resources for additional assistance, and much more. It also recommends that pro bono and legal services attorneys who are working on disaster-related cases and have questions tap into the expertise and experience of the National Disaster Legal Aid Advisory Group.[5]

2. Disaster assistance applicable to all mortgages

2.1 FEMA assistance to homeowners

FEMA provides housing assistance to individuals and families who have lost their homes as a result of a presidentially-declared disaster. Renters and homeowners both may qualify for assistance. By law, FEMA assistance cannot duplicate the assistance received from insurance coverage, but homeowners and renters may receive assistance for items not covered by insurance.[6]

Generally speaking, an applicant for assistance will receive a call from FEMA within 10 days of submitting the application in order to schedule an appointment for a home inspector visit,[7] although it may take longer in catastrophic disasters.[8]

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[4] https://www.disasterlegalaid.org/.

[5] https://www.disasterlegalaid.org/advisorygroup/.

[6] https://www.fema.gov/individual-disaster-assistance.

[7] Applications for FEMA assistance are made here: https://www.disasterassistance.gov.

[8] https://www.fema.gov/individual-disaster-assistance.

Some housing assistance funds are available through FEMA's Individuals and Households Program. Most disaster assistance from the federal government is in the form of low-interest disaster loans administered by the Small Business Administration.[9]

FEMA housing-related assistance includes:

> **Temporary Housing** (a place to live for a limited period of time): Financial assistance may be available to homeowners or renters to rent a temporary place to live.
>
> **Lodging Expenses Reimbursement:** Reimbursement of hotel expenses for homeowners or renters may be available for short periods of time due to inaccessibility or utility outage if not covered by insurance or any other program.
>
> **Repair**: Financial assistance may be available to homeowners to repair disaster-caused damage to their primary residence that is not covered by insurance. The goal is to make the damaged home safe, sanitary, or fit to occupy.
>
> **Replacement:** Financial assistance may be available to homeowners to replace their home destroyed in the disaster that is not covered by insurance. The goal is to help the homeowner with the cost of replacing their destroyed home.
>
> **Permanent or Semi-Permanent Housing Construction**: Direct assistance or money for the construction of a home. This type of help occurs only in insular areas or other locations specified by FEMA, where no other type of housing assistance is possible.[10]

2.2 Minimum rules applicable to all homeowners in disaster areas

The rules implemented by the CFPB are applicable to all mortgages. Regulation X, which implements the Real Estate Settlement Procedures Act (RESPA), provides the most relevant provisions.

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[9] https://www.fema.gov/individual-disaster-assistance.

[10] https://www.fema.gov/individual-disaster-assistance.

Regulation X does allow a servicer to offer loss mitigation (also known as "workout") options to a borrower who has not submitted an application. A servicer also may offer loss mitigation options to a borrower when the offer is not based on any evaluation of information submitted by the borrower in connection with a loss mitigation application.[11]

The CFPB has stated that "[t]his regulatory flexibility permits servicers to offer relief to borrowers affected by a major disaster or emergency without first having to collect a complete application. These borrowers in particular may have difficulty timely obtaining and submitting application documents and information."[12]

In contrast, the general rule is that servicers obtain a complete loss mitigation application before evaluating a borrower for a loss mitigation option, such as a loan modification or short sale. Servicers generally may not offer a loss mitigation option based upon an evaluation of any information provided in connection with an incomplete application.[13] However, Regulation X permits servicers to offer certain short-term options based upon an evaluation of an incomplete application.[14]

2.3 State assistance for homeowners in natural disaster areas

After past disasters, states have used HUD funds to develop new programs to aid victims. Immediately after Hurricanes Harvey and Irma, HUD announced that it had redirected resources to the impacted regions.[15] It is likely that affected states

[11] Reg. X, 12 C.F.R. § 1024.41, cmt. 41(c)(2)(i)-1.

[12] *See* Consumer Fin. Prot. Bureau, Statement on supervisory practices regarding financial institutions and consumers affected by Hurricanes Harvey and Irma, Sept. 8, 2017, *available at* www.consumerfinance.gov/policy-compliance/guidance/implementation-guidance/statement-supervisory-practices-affected-hurricane-harvey. *See also* Consumer Fin. Prot. Bureau, Statement on supervisory practices regarding financial institutions and consumers affected by Hurricane Maria, Sept. 22, 2017, *available at* https://www.consumerfinance.gov/policy-compliance/guidance/implementation-guidance/statement-supervisory-practices-regarding-financial-institutions-and-consumers-affected-hurricane-maria/.

[13] Reg. X, 12 C.F.R. § 1024.41(c)(2)(i).

[14] Reg. X, 12 C.F.R. § 1024.41(c)(2)(iii).

[15] *See* HUD Exchange, OHC Resources for Housing Counseling Agencies Dealing with the Impact of Hurricane Irma, Sept. 12, 2017, *available at* https://www.hudexchange.info/news/ohc-resources-for-housing-counseling-agencies-dealing-with-the-impact-of-hurricane-irma/; Press Release, U.S. Dep't of Hous. & Urban Dev., HUD Announces Disaster Assistance for Victims of Hurricane Harvey, HUD No. 17-068 (Aug. 28, 2017), *available at* https://www.hud.gov/press/press_releases_media_advisories/2017/HUDNo_17-068.

will develop specific grant and aid programs targeted at this population.[16]

After Hurricanes Katrina and Rita, in 2005, the state of Louisiana used federal Community Development Block Grant (CDBG) disaster funds to assist affected homeowners. Under the state's plan, eligible homeowners received a one-time grant payment of up to $150,000 for damage to the home not covered by property insurance, FEMA grants, or other federal, state, or local government programs. In exchange, homeowners were required to agree to covenants and restrictions running with and encumbering the property. The covenants include requirements that the property be rebuilt and repaired according to housing codes and ordinances, as well as requirements regarding the elevation of the building in compliance with FEMA standards and homeowner occupation of the property for three years.[17]

Mississippi had a similar program. The state used CDBG funds to assist homeowners whose primary residence suffered flood damage as a result of Hurricane Katrina. The Mississippi Development Authority permitted lenders to reduce the amount homeowners receive by any past-due installments on the mortgage or taxes owed.[18]

2.4 Distribution of insurance proceeds

Almost all mortgage loans require borrowers to maintain hazard insurance to protect the lender's interest in the property. The typical security instrument language gives the lender[19] broad discretion to determine what types of insurance

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[16] HUD provides states with CBDG Disaster Recovery Assistance grants to help states supplement recovery assistance provided by other federal programs like FEMA. States may use these funds to provide relief to homeowners. *See* U.S. Dep't of Hous. & Urban Dev., Community Development Block Grant Disaster Recovery: CDBG-DR Overview, Oct. 20, 2017, *available at* https://www.hudexchange.info/resources/documents/CDBG-Disaster-Recovery-Overview.pdf.

[17] More information about the Road Home program is available at https://www.road2la.org/. The program is currently focused on compliance and monitoring of existing participants.

[18] Under the Mississippi program eligible homeowners whose homes were located outside a FEMA designated 100-year flood zone were eligible to receive a one-time grant payment of up to $150,000 for flood damage not covered by property insurance or FEMA grants. In exchange for the grant payment, homeowners were required to agree to covenants on their property that required compliance with building codes, elevation of the building, and flood insurance. More information about the program is available at https://archives.hud.gov/news/2006/pr06-036ms.pdf and http://sos.ms.gov/ACProposed/00014485b.pdf.

[19] Though the standard security instrument refers to the "lender," the mortgage servicer is generally responsible for ensuring compliance with the security instrument, including the insurance provisions.

are required (fire, flood, earthquake, wind, etc.) and the amount of coverage.[20]

After a covered loss occurs, the insurance company issues a claim check identifying both the borrower and the mortgage lender, or servicer, as payee.[21] Because the lender or servicer is also a payee, it effectively controls the disbursement of the proceeds to the borrower.

Freddie Mac and Fannie Mae, as well as the FHA, have general rules governing the distribution of insurance proceeds after claims have been made.[22] However, there are also special rules regarding the distribution of insurance proceeds after disasters, discussed below, respectively, in sections 3.1.4 and 3.2.4.

The general rule is reflected in the Fannie Mae standard security instrument, which provides that insurance proceeds will be applied to the restoration of the property as long as the restoration and repair[23] are "economically feasible" and the lender's "security is not lessened." If the repairs do not satisfy both conditions, then the security instrument directs the lender to apply the insurance proceeds to the debt. The term "economically feasible" is not defined in the instrument, and there is no explanation of what it means to lessen the security. Most courts have interpreted the term to mean whether the cost of repairs will exceed the insurance proceeds, and whether the value of the repaired home will at least exceed its value prior to loss.[24] Like many mortgage servicing issues, the question of who bears the burden of demonstrating economic infeasibility or reduced security may depend on the procedural posture of the case.[25]

If the proceeds are to be used for restoration and repair, the servicer may disburse proceeds in a single payment or in a series of progress payments as the work is

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20 *See* Single Family-Fannie Mae/Freddie Mac Uniform Instrument, ¶ 5 (01/01).

21 For a description of variations in insurance policy mortgage clauses, see Costanzo v. Property & Casualty Insurance Company of Hartford, 2014 WL 1151717 (D.N.M. Oct. 1, 2014).

22 *See, e.g.,* Fannie Mae, Single-Family Servicing Guide section B-5-01.

23 Courts have construed the terms restoration and repair narrowly at times. *See* Green Tree Servicing, L.L.C., v. Mann, 2008 WL 793632 (W.D. Ky. Mar. 24, 2008) (replacement of mobile home did not constitute restoration or repair therefore lender did not need to disburse insurance proceeds for that purpose); Cox v. Wightman, 2007 WL 708611 (W.D. La. Mar. 5, 2007) (insurance proceeds not required to be used for mold testing as "testing" was not restoration and repair).

24 *See* Vongohren v. Citimortgage, Inc., 2016 WL 739070 (D. Md. Feb. 25, 2016); Alvarez-Mejia v. Bellissimo Properties, L.L.C., 208 So. 3d 797 (Fla. Dist. Ct. App. 2016).

25 *See* Music v. Bank of America, 2015 WL 8477614 (N.D. Cal. Dec. 9, 2015) (placing burden on borrower-plaintiff to show economic feasibility).

completed. Typically, disbursement schedules call for the release of one third of the proceeds up front, the next one third at 50% completion (and after inspection), and the last one third at completion (and after inspection).[26]

Delays in distributions of funds can wreak havoc with rebuilding efforts, and may give rise to claims of breach of contract or breach of good faith and fair dealing.[27] However, courts have held that once the borrower defaults, the lender is under no further obligation to disburse insurance proceeds.[28] Lenders generally may not keep insurance proceeds that exceed the outstanding loan balance, and should not keep any funds attributable to loss of personal property.[29] The lender is not required to pay interest on undisbursed funds unless "applicable law" so requires.[30]

Another issue arises as to when the servicer must apply the insurance proceeds if the repairs do not satisfy the stated conditions. Mortgage servicers have allowed insurance proceeds to languish for years in suspense accounts. Courts have implied a "reasonable time" to perform under this contract provision.[31]

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[26] For current loans with loss proceeds in excess of $40,000, Fannie Mae requires installment distributions up to $40,000 or 10% of the unpaid principal balance, whichever is greater. Fannie Mae, Single-Family Servicing Guide section B-5-01: Insured Loss Events (Apr. 12, 2017). Note that Fannie Mae, in its stated effort "to get insurance proceeds for insured loss events to the borrower as expeditiously as possible," has made temporary changes to its loss proceeds disbursement policies. These changes are described in section 3.2.4 of this report and in Fannie Mae Lender Letter LL-2017-09, Nov. 2, 2017, *available at* https://www.fanniemae.com/content/announcement/ll1709.pdf. Freddie Mac has made comparable temporary changes. See *infra* at section 3.1.4.

[27] Pressler v. American Home Mortg. Serv., Inc., 2013 WL 1320462 (N.D. Cal. Apr. 1, 2013) (denying breach of contract and breach of good faith and fair dealing for pre-default conduct).

[28] *See, e.g.*, Music v. Bank of America, 2015 WL 8477614 (N.D. Cal. Dec. 9, 2015); Everidge v. Wells Fargo Bank, 2015 WL 5786738 (M.D. Ga. Sept. 29, 2015) (suggesting that paying over proceeds and delaying foreclosure constituted sufficient impairment of security to justify applying proceeds to debt); Pressler v. American Home Mortg. Serv., Inc., 2013 WL 1320462 (N.D. Cal. Apr. 1, 2013). *But see* Fannie Mae, Single- Family Servicing Guide section B-5-01: Insured Loss Events (Apr. 12, 2017) (requiring release of loss proceeds for repair and evaluation of the borrower for workout options).

[29] *See, e.g.*, Fannie Mae, Single-Family Servicing Guide section B-5-01.

[30] State law may require payment of interest on insurance proceeds held by the servicer. *See, e.g.*, Cal. Civ. Code §2954.8; Md. Code, Com. Law § 12-109; Or. Rev. Stat. §§ 86.205.3, 86-245; Utah Code § 7-17-2; Vt. Stat. tit. 8, § 10404(b). Some banks have argued that payment of such interest is preempted; however, preemption principles should not apply to the bank's contractual obligation to pay interest.

[31] *See, e.g.*, Vongohren v. Citimortgage, Inc., 2016 WL 739070 (D. Md. Feb. 25, 2016).

3. Mortgage relief based on ownership of mortgage

3.1 Freddie Mac disaster relief[32]

3.1.1 Mandates to servicers

Freddie Mac authorizes its mortgage servicers, after a natural disaster, to take certain actions, but it only mandates the following specific borrower protections:

- Foreclosure sale moratorium: Initially, Freddie Mac stated that servicers were required to suspend all foreclosure sales for borrowers whose mortgaged premises were located in an Eligible Disaster Area and affected by Hurricane Harvey or Irma through December 31, 2017, unless the property was identified as vacant or abandoned prior to the disaster, or the servicer had completed its property inspection and confirmed that there was no insurable damage or ability to receive FEMA funds.[33] On December 20, Freddie Mac extended the foreclosure sale suspension date until March 31, 2018 for mortgaged premises in Eligible Disaster Areas in Puerto Rico and the U.S. Virgin Islands as a result of Hurricane Irma or Maria.[34] On March 7, 2018, Freddie Mac again extended the suspension of all foreclosure sales for mortgaged premises located in Eligible Disaster Areas in Puerto Rico and the U.S. Virgin Islands as a result of Hurricane Irma or Maria, this time through May 31, 2018. However, the servicer may proceed with foreclosure if the premises have been identified as vacant or abandoned, or if the servicer has completed its property inspection and confirmed that there is no insurable damage or ability to receive FEMA funds.[35]

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[32] A primary resource for information is the Natural Disaster Relief page on the Freddie Mac website. This page, which describes disaster relief policies and Freddie Mac policies for major disaster declarations, references chapter 8404 of the Single-Family Seller/Servicer Guide. *See* http://www.freddiemac.com/singlefamily/service/natural_disasters.html. *See also* http://www.freddiemac.com/singlefamily/service/pdf/Disaster_Relief_Bullet_Points.pdf.

[33] *See* Freddie Mac Bulletin 2017-19, Sept. 13, 2017, *available at*. http://www.freddiemac.com/singlefamily/guide/bulletins/pdf/bll1719.pdf.

[34] *See* Freddie Mac Bulletin No. 2017-29, Dec. 20, 2017, *available at* http://www.freddiemac.com/singlefamily/guide/bulletins/pdf/bll1729.pdf.

[35] *See* Freddie Mac Bulletin No. 2018-4, Mar. 7 2018, *available at* http://www.freddiemac.com/singlefamily/guide/bulletins/pdf/bll1804.pdf.

- Foreclosure eviction suspension: Initially, Freddie Mac required the suspension of foreclosure evictions on real estate owned properties in areas impacted by Hurricanes Harvey and Irma until further notice.[36] On September 25, 2017, this protection was expanded to areas impacted by Hurricane Maria.[37]
- Credit reporting suspension: Freddie Mac requires that a servicer must not report a borrower who is participating in a disaster-related forbearance plan, repayment plan or Trial Period Plan to credit repositories.[38]
- Late charge suspension: Freddie Mac requires that a servicer must not assess late charges if the borrower is on a forbearance plan or paying as agreed on a repayment plan or Trial Period Plan.[39]

3.1.2. Mortgage forbearance

Freddie Mac has *authorized* its servicers to provide a forbearance period of up to 12 months for borrowers affected by Hurricanes Harvey, Irma and Maria, although it has not required servicers to do so. When the borrower is unable to send or receive documentation, the servicer may waive the requirement that the forbearance plan be in writing.[40]

The terms of the forbearance will depend upon whether or not the servicer has been in contact with the borrower, or obtained "quality right party contact" (QRPC).

3.1.2.1 Where QRPC has been obtained

Where the servicer is in contact with the borrower, the servicer has the discretion to place the borrower in a forbearance plan for up to 12 months based on the circumstances.[41] The servicer may offer up to six months of forbearance without obtaining a complete Borrower Response Package, but must attempt to obtain a complete Borrower Response Package if forbearance exceeds six months. If the borrower is unable to produce financial documentation, the servicer may offer

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[36] *See* Freddie Mac Bulletin No. 2017-19, *supra* note 33, at 3.

[37] *See* Freddie Mac Bulletin No. 2017-21, Sept. 25, 2017, *available at* http://www.freddiemac.com/singlefamily/guide/bulletins/pdf/bll1721.pdf.

[38] Freddie Mac, Single-Family Seller/Servicer Guide section 8404.5(a).

[39] Freddie Mac, Single-Family Seller/Servicer Guide sections 8404.4(d) and 9206.11(b)(i).

[40] Freddie Mac, Single-Family Seller/Servicer Guide section 8404.4(c).

[41] Freddie Mac, Single-Family Seller/Servicer Guide section 8404.4(b).

successive forbearance plans (not to exceed 12 months in total) without obtaining a complete Borrower Response Package. If the servicer believes that forbearance beyond a period of 12 months is warranted, it should present that recommendation to Freddie Mac for consideration.[42]

3.1.2.2 Where QRPC has not been obtained

Where the servicer is not in contact with a borrower who is or becomes 31 or more days' delinquent, it has the discretion to place the borrower in a short-term forbearance plan, as provided in sections 9203.12 through 9203.16 of the Single-Family Seller/Servicer Guide.[43]

3.1.3 Transition following forbearance requirements

The servicer must contact a borrower on a periodic basis, and prior to the end of the forbearance period, in order to see if the hardship has been resolved or if further loss mitigation measures are appropriate to resolve the delinquency. The servicer must consider a number of factors, including the ability to achieve quality right party contact, the borrower's current financial circumstances and ability to resume making monthly payments, and the status of the mortgage at the time of the disaster.[44] When offering forbearance relief, a servicer must utilize the requirements set forth in chapter 9203 of the Single-Family Seller/Servicer Guide, which—importantly—includes the opportunity to resolve delinquencies through a simple reinstatement process.[45] Transition requirements will depend upon whether or not the servicer has obtained QRPC with the borrower, and whether or not the borrower was on a Trial Period Plan (TPP) at the time of the disaster.

If QRPC is made, and the borrower cannot resolve the delinquency through reinstatement or a repayment plan, the servicer must evaluate the borrower for loss mitigation options according to the following disaster evaluation hierarchy:

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[42] Freddie Mac, Single-Family Seller/Servicer Guide section 8404.4(a), (b).

[43] A servicer should determine whether to provide short-term forbearance and the length of such forbearance by assessing: (1) the extent of the property damage, as derived through property inspections, and/or (2) the financial impact to the borrower as a result of the eligible disaster. Freddie Mac, Single-Family Seller/Servicer Guide section 8404.4(a).

[44] Freddie Mac, Single-Family Seller/Servicer Guide section 8404.6.

[45] Freddie Mac, Single-Family Seller/Servicer Guide section 9203.1.

(1) Extend Modification (*see* section 3.1.3.4, below); (2) Disaster Relief Modification; (3) Flex Modification; (4) short sale; (5) deed-in-lieu of foreclosure.

3.1.3.1 Transition requirements where QRPC has been obtained

Where the servicer is in contact with the borrower at the end of the disaster-related forbearance period, the servicer must evaluate the borrower for the most appropriate relief or workout option to cure the delinquency in accordance with the Freddie Mac loss mitigation evaluation hierarchy set forth in section 9201.2 of the Single-Family Seller/Servicer Guide.

If the borrower was current or fewer than 31 days' delinquent at the time of the disaster and is able to resume making the contractual monthly payments, the servicer must consider the borrower for a Capitalization and Extension Modification for Disaster Relief ("Disaster Relief Modification") if a reinstatement or repayment plan is not a viable option.[46]

The Disaster Relief Modification capitalizes arrearages and incrementally extends the mortgage term until the modified principal and interest (P&I) equals the pre-modified contractual principal and interest (P&I) payment amount. The actual post-modified P&I may be slightly less than the pre-modified P&I if the servicer is unable to attain an exact match based on the term extension.[47]

If the borrower is not eligible for, or declines, a Disaster Relief Modification, and the borrower has provided a Borrower Response Package, the servicer should evaluate the borrower in accordance with the Freddie Mac loss mitigation evaluation hierarchy in section 9201.2 of the Single-Family Seller/Servicer Guide.[48]

If the borrower is not eligible for, or declines, a Disaster Relief Modification, and the borrower has *not* provided a Borrower Response Package, the servicer must evaluate the borrower for a streamlined offer for a Flex Modification, provided that the borrower is 90 or more days delinquent.[49]

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[46] See Freddie Mac, Single-Family Seller/Servicer Guide section 9206.4 for the requirements for a Disaster Relief Modification.

[47] Freddie Mac, Single-Family Seller/Servicer Guide sections 8404.6(a) and 9206.4.

[48] Freddie Mac, Single-Family Seller/Servicer Guide section 8404.6(a).

[49] *Id.*

3.1.3.2 Transition requirements where QRPC has not been obtained

Where the servicer is not in contact with the borrower at the end of the disaster-related forbearance period to determine financial status and eligibility for a Disaster Relief Modification, the servicer must evaluate the borrower to determine if he or she is eligible for a Streamlined Modification, provided the borrower is 90 or more days' delinquent.[50]

Where the servicer is not in contact with the borrower at the end of the disaster-related forbearance period, and the servicer determines that the borrower is eligible for a Streamlined Modification in accordance with section 9206.3 of the Single-Family Seller/Servicer Guide, the servicer must send the borrower a Streamlined Modification TPP Notice, as provided in Exhibit 93, Evaluation Model Clauses. The TPP Notice should be amended as set forth in Exhibit 93 for post-disaster forbearance modification.[51]

3.1.3.3 Transition requirements for borrowers who were on a TPP at the time of the disaster

Within 30 days prior to the end of the forbearance period, the servicer must determine whether the borrower's financial circumstances continue to be adversely impacted by the disaster, based on verbal confirmation with the borrower about his/her current financial condition and the most recent property inspection.

If the borrower was on a HAMP TPP at the time of the disaster and the borrower's financial circumstances have not adversely changed (*e.g.*, the borrower's income is not less than it was at the time of the pre-forbearance TPP evaluation), then the servicer must offer the borrower a new HAMP TPP that includes the same TPP payment as the pre-forbearance TPP.

The servicer must not conduct a new NPV or Forbearance Limit analysis. For reporting purposes, the servicer should utilize the NPV determined for the pre-forbearance (or pre-disaster) TPP analysis and may report anticipated forbearance amounts in excess of the Forbearance Limit, but only to the extent necessary to achieve the Target Payment. All other HAMP eligibility rules continue to apply, including that the complete Borrower Response Package used for the evaluation

[50] *Id.*

[51] Freddie Mac, Single-Family Seller/Servicer Guide section 8404.6(b).

was submitted on or before December 30, 2016, and that the HAMP Modification Effective Date is on or before December 1, 2017. Additionally, the servicer must not cancel the previous TPP but, rather, must keep the borrower's previous TPP in approved status in order to avoid re-underwriting the borrower. When preparing the modification agreement, the servicer must calculate the modification terms using updated delinquent interest and non-interest arrearage amounts that must be capitalized (*i.e.*, through the day prior to the modified interest rate change date), as applicable, and in this instance only the servicer may forbear principal beyond the Forbearance Limit, but only to the extent necessary to achieve the Target Payment.

If the borrower was on a HAMP TPP at the time of the disaster but the borrower's financial circumstances have adversely changed (*e.g.*, the borrower's income is less than it was at the time of the pre-forbearance TPP evaluation), the servicer must obtain an updated Borrower Response Package from the borrower and re-evaluate the borrower for HAMP in accordance with the requirements of chapter 9205 of the Single-Family Seller/Servicer Guide. If the borrower is no longer eligible for HAMP, then the servicer must evaluate the borrower for another foreclosure alternative in accordance with the loss mitigation evaluation hierarchy set forth in section 9201.2.

If the borrower was on a Freddie Mac Flex Modification at the time of the disaster, the servicer must make a new streamlined offer to the borrower for a Flex Modification TPP meeting the requirements of section 9206.5.

Regardless of the borrower's financial circumstances, the borrower must complete a new three-month TPP that begins immediately following the forbearance plan in order to be eligible for a permanent modification.[52]

Borrowers will be considered for a Disaster Relief Modification, along with a Flex Modification, provided the borrower is 90 or more days' delinquent.

If the borrower was on a Flex Modification at the time of the disaster, the servicer must make a new streamlined offer for a Flex Modification TPP that meets the requirements of section 9206.5.

[52] Freddie Mac, Single-Family Seller/Servicer Guide section 8404.6(c).

Regardless of the borrower's financial circumstances, the borrower must complete a new three-month TPP that begins immediately following the forbearance plan in order to be eligible for a permanent modification.[53]

Note that disaster requirements for the Flex Modification permit the servicer to waive most eligibility criteria. However, there are exclusions from eligibility.[54]

3.1.3.4 New, Temporary Freddie Mac Extend Modification for Disaster Relief

In coordination with Fannie Mae, Freddie Mac, on November 2, 2017, introduced a temporary offering for disaster-impacted borrowers who were current or fewer than 31 days' delinquent when the disaster occurred. Servicers must consider eligible borrowers for the Extend Modification for Disaster Relief once the borrower's hardship is resolved and the borrower has the ability to resume making monthly payments, but reinstatement or a repayment plan is not an option. This Extend Modification is similar to the Capitalization and Extension Modification for Disaster Relief (Disaster Relief Modification), described above, with the primary difference being that the Disaster Relief Modification requires the capitalization of arrearages in accordance with section 9206.5, while the Extend Modification does not allow the servicer to capitalize arrearages. Instead, the Extend Modification extends the mortgage term by a number of months equal to the number of missed monthly payments. The Extend Modification is the first modification option available in Freddie Mac's evaluation hierarchy for borrowers whose mortgaged premises or places of employment are located in an Eligible Disaster Area.

Servicers must begin evaluating borrowers for this new modification program no later than February 1, 2018, and must utilize the requirements – included in a November 2, 2017 Bulletin[55] -- until otherwise instructed by Freddie Mac.

Before the borrower's forbearance period ends, a servicer must try and contact the borrower. If QRPC is made with a borrower who was 31 days' or more delinquent prior to the disaster, the borrower is not eligible for the Extend Modification.

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[53] *Id.*

[54] For details on the Flex Modification waterfall, see Freddie Mac, Single-Family Seller/Servicer Guide section 9206.10, and see Chapter 9206 for a review of complete requirements for the Flex Modification, *See also* Freddie Mac Flex Modification Reference Guide (Jan. 2018), *available at* http://www.freddiemac.com/learn/pdfs/service/flex_mod_ref_guide.pdf.

[55] *See* Freddie Mac Bulletin No. 2017-25, Nov. 2, 2017, *available at* http://www.freddiemac.com/singlefamily/guide/bulletins/pdf/bll1725.pdf.

If QRPC is not made with a borrower at the end of forbearance, and the borrower is eligible for a streamlined offer for a Flex Modification, the servicer must send the borrower an offer for a Flex Modification.[56] The solicitation must include high-level information about the alternative disaster modification options that may be available. As noted in the November 2, 2017 Bulletin, the special Flex Modification requirements for borrowers impacted by disasters[57] continue to apply, but they have been updated to include the Extend Modification. The servicer must evaluate the borrower for a streamlined offer for a Flex Modification if the borrower is 90 days or more delinquent, or the borrower has a Step-Rate Mortgage and is at least 60 days delinquent within 12 months following the first payment due date resulting from an interest rate adjustment, provided a Borrower Response Package has not been submitted and one of the following conditions is met: (1) the borrower is not eligible for an Extend Modification or a Disaster Relief Modification; (2) the borrower declines the Extend Modification and the Disaster Relief Modification; or (3) the servicer is unable to obtain QRPC with the borrower at the end of the forbearance period to determine financial status and eligibility for an Extend Modification and a Disaster Relief Modification.

A borrower is eligible for an Extend Modification if: he or she was current or fewer than 31 days delinquent at the time of the disaster and the hardship was caused by the disaster; the mortgage premises were located in an eligible disaster area on or after August 25, 2017; the borrower was at least 30 days delinquent and fewer than 360 days delinquent at the time of evaluation for the modification; and the borrower indicates that he or she can continue making payments (including projected monthly payments for delinquent taxes and insurance premiums).

The modified mortgage must be a fully amortized, fixed-rate mortgage. It must be a conventional first lien mortgage currently owned or guaranteed, in whole or in part, by Freddie Mac, and it may be secured by a primary residence, second home, or investment property (including one that is vacant or condemned). A servicer does not have to obtain a property valuation in order to offer an Extend Modification.

A borrower is ineligible for an Extend Modification if he or she was more than 31 days delinquent at the time of the disaster, or if he or she is currently performing under another TPP, forbearance plan or repayment plan. Ineligible mortgages

[56] *Id.* at 2.

[57] *See* Freddie Mac, Single-Family Seller/Servicer Guide section 9206.5(e).

include: FHA, VA and Guaranteed Rural Housing mortgages; mortgages subject to recourse; and mortgages subject to an approved short sale or deed-in-lieu foreclosure transaction.[58]

3.1.4 Distribution of insurance proceeds after disaster

Freddie Mac's rules for the distribution of insurance proceeds after a disaster are outlined in section 8202.11 of the Single-Family Seller/Servicer Guide. However, in the wake of the 2017 hurricanes, Freddie Mac has *temporarily* revised certain requirements so as to assist borrowers who need upfront insurance proceeds to repair or rebuild their homes. These revisions are reflected in the following:

- For borrowers who were fewer than 31 days delinquent at the time of the Eligible Disaster, servicers are required to release up to the greater of \$40,000, 33% of the insurance proceeds, or the amount by which the release funds exceed the sum of the unpaid principal balance (UPB), accrued interest and advances on the loan. Remaining funds may be distributed based on the repair plan reviewed and approved by the servicer. A final inspection is required to ensure that all repairs are completed, but inspection and a repair plan are not required if the total insurance proceeds are less than or equal to \$20,000. If cosmetic (non-structural) work items adding up to less than \$5,000 are outstanding when the final inspection occurs, the inspection may be considered final and the inspector must estimate completion dates for any unfinished items.[59]
- For borrowers who were 31 or more days' delinquent at the time of the Eligible Disaster, the servicer may make an initial disbursement of 25% of the insurance proceeds up to the greater of \$10,000 or the amount by which the release funds exceed the sum of the UPB, accrued interest and advance on the loan. Remaining funds may be distributed in increments not to exceed 25% of the proceeds. Final inspection is required[60]
- Insurance loss settlements that are intended for contents losses or off-residence living expenses must be released to the borrower without delay.[61]

[58] *See* Freddie Mac Bulletin No. 2017-25, *supra* note 55.

[59] *Id.* at 8. Note that these requirements reflect temporary changes made to the Freddie Mac Single-Family Seller/Servicer Guide.

[60] *Id.*

[61] http://www.freddiemac.com/singlefamily/service/natural_disasters.html.

3.2 Fannie Mae disaster relief[62]

3.2.1 Mandates to servicers

Like Freddie Mac, Fannie Mae requires certain borrower protections:

- Foreclosure sale moratorium: Initially, Fannie Mae stated that servicers were required to suspend all foreclosure sales for borrowers whose mortgaged premises were located in an Eligible Disaster Area and affected by Hurricane Harvey for a period of 90 days.[63] On September 13, 2017, a Fannie Mae Lender Letter stated that the suspension applied to properties affected by Hurricane Harvey or Irma and was to last until December 31, 2017, unless the property was identified as vacant or abandoned prior to the disaster, or the servicer had completed its property inspection and confirmed that there was no damage to the property or the damage was not covered by insurance or eligible to receive state or federal disaster assistance. The Lender Letter added that, when applicable, servicers must receive pre-approval by the mortgage insurer or guarantor to suspend the foreclosure sale to avoid jeopardizing benefits of any applicable insurance or guaranty.[64] On December 20, 2017, Fannie Mae extended the suspension of all foreclosure sales for mortgaged premises located in an Eligible Disaster Area in Puerto Rico and the U.S. Virgin Islands as a result of Hurricane Irma or Maria until March 31, 2018. On March 7, 2018, Fannie Mae again extended the suspension of all foreclosure sales for mortgaged premises located in a FEMA-declared disaster area in Puerto Rico and the U.S. Virgin Islands as a result of Hurricane Irma or Maria, this time until May 31, 2018. However, the servicer may proceed with foreclosure if the premises have been identified as vacant or abandoned, provided that a property inspection has confirmed that there is not damage to the property

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[62] A primary resource for information is the Disaster Relief page on the Fannie Mae website. *See* http://www.fanniemae.com/portal/about-fm/hurricane-relief.html; *See also* Fannie Mae, Single-Family Servicing Guide, *available at* https://www.fanniemae.com/content/guide/svc091317.pdf.

[63] *See* Fannie Mae, Lender Letter LL-2017-03, Aug. 29, 2017, *available at* https://www.fanniemae.com/content/announcement/ll1703.pdf.

[64] *See* Fannie Mae, Lender Letter LL-2017-06, Sept. 13, 2017, *available at* https://www.fanniemae.com/content/announcement/ll1706.pdf.

or the damage to the property is not covered by insurance or eligible for state or federal disaster assistance.[65]

- Foreclosure eviction suspension: Initially, Fannie Mae required the suspension of foreclosure evictions for real estate owned properties in areas impacted by Hurricane Harvey for 90 days from the date the disaster occurred.[66] On September 13, 2017, a Lender Letter stated that the suspension applied to properties affected by Hurricanes Harvey and Irma and was to last until January 2, 2018.[67] The Fannie Mae Single- Family Servicing Guide states that where the servicer "has any doubt about the effect of the disaster on the condition of a property or the borrower's employment or income status, it must suspend any legal proceedings already in process until it can determine the accurate status, and make its final decision on the appropriate course of action based upon its findings."[68]
- Credit reporting suspension: Fannie Mae requires that a servicer must temporarily suspend credit reporting of delinquencies to credit bureaus "if it is aware that the delinquency is attributable to a hardship as a result of the disaster."[69]
- Late charge suspension: Fannie Mae requires that a servicer waive late charges if the payment is late because the borrower "incurred additional expenses or loss of income due to the disaster, or needs additional time to receive a pending insurance settlement."[70]

Unlike Freddie Mac, which seems less protective of homeowners suffering a disaster, Fannie Mae mandates that a servicer *must* grant disaster relief when:

- the servicer is unable to contact a borrower who may have been impacted by a catastrophe that was caused by nature or a person other than the borrower; and

65 *See* Fannie Mae, Lender Letter LL-2018-01, Mar. 7, 2018, *available at* https://www.fanniemae.com/content/announcement/ll1801.pdf.

66 *See* Fannie Mae, Lender Letter LL-2017-03, *supra* note 63.

67 *See* Fannie Mae, Lender Letter LL-2017-06, *supra* note 64, at 3.

68 Fannie Mae, Single-Family Servicing Guide section D1-3-02.

69 *See id.*

70 *Id.*

- the servicer has determined that such an event may adversely affect either the value or habitability of a property securing a mortgage loan, or the borrower's ability to make further payments or payment in full on a mortgage loan.

The servicer must receive Fannie Mae's approval before granting disaster relief that exceeds 90 days.[71] However, the issue of whether to grant a forbearance is still in the discretion of the servicer.

3.2.2 Mortgage forbearance

Fannie Mae has *authorized* a forbearance period of up to 12 months for borrowers affected by Hurricanes Harvey, Irma and Maria.[72] The servicer "must use its discretion to determine the appropriate duration of the forbearance plan based on the extent of damage to the property and/or the financial impact to the borrower" and must receive Fannie Mae's approval before granting disaster relief that exceeds 90 days.[73]

The terms of the forbearance will depend upon whether or not the servicer has been in contact with the borrower, or obtained "quality right party contact" (QRPC).

3.2.2.1 Where QRPC has been obtained and the loan is current, fewer than, or equal to 90 days' delinquent, or under a Trial Period Plan

Where the servicer is in contact with the borrower during the disaster relief period, and the loan is current, fewer than, or equal to 90 days delinquent, or under a TPP, the servicer is authorized to offer a forbearance plan of up to six months. Note that if the borrower is unable to provide a complete Borrower Response Package at the end of the initial six months of forbearance, the servicer

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[71] Fannie Mae, Single-Family Servicing Guide section D1-3.

[72] Press Release, Fannie Mae, Fannie Mae Offers Relief Options for Homeowners and Servicers in Areas Impacted by Hurricanes Harvey and Irma (Sept. 14, 2017); Press Release, Fannie Mae, Fannie Mae Reminds Homeowners and Servicers of Mortgage Assistance Options for Gulf Coast Area Impacted by Hurricane Harvey (Aug. 25, 2017), *available at* http://www.fanniemae.com/portal/media/corporate-news/2017/hurricane-forbearance-relief-6593.html; Fannie Mae, For Homeowners Affected by Hurricanes Harvey, Irma, or Maria (affected consumers are eligible to stop making monthly mortgage payment for three-month intervals (up to 12 months); at end of temporary payment break, consumer will have no late fees, will not have delinquencies reported to credit bureaus, and will not have to catch up on all payments at once), *available at* http://www.fanniemae.com/resources/file/aboutus/pdf/hurricane-relief-consumer-gses.pdf.

[73] Fannie Mae, Single-Family Servicing Guide section D1-3-02.

may offer a successive forbearance up to six months in length (but not to exceed 12 months) without obtaining a complete Borrower Response Package.[74]

3.2.2.2 Where QRPC has been obtained and the loan is more than 90 days delinquent

Where the servicer is in contact with the borrower during the disaster relief period, and the loan is more than 90 days delinquent, the servicer is authorized to offer a forbearance plan of up to six months.[75]

3.2.2.3 Where QRPC has not been obtained and the loan is current, fewer than, or equal to 90 days delinquent, or under a Trial Period Plan

Where the servicer is not in contact with the borrower during the disaster relief period, and the loan is current, fewer than, or equal to 90 days delinquent, or under a TPP, the servicer is authorized to offer a forbearance plan of up to three months.[76]

3.2.2.4 Where QRPC has not been obtained and the loan is more than 90 days' delinquent

Where the servicer is not in contact with the borrower during the disaster relief period, and the loan is more than 90 days delinquent, the servicer is authorized to offer a forbearance plan of up to three months.[77]

3.2.3 Transition following forbearance requirements

After a disaster-related forbearance plan is granted, the servicer must continue to work with the borrower to determine what additional steps can be taken (for example, application of insurance claim settlements to repair the property). The servicer must evaluate the loan for a workout option prior to the expiration of the forbearance plan.[78]

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[74] *See id.*

[75] *See id.*

[76] *See id.*

[77] *See id.*

[78] Fannie Mae, Single-Family Servicing Guide section D1-3-02.

The servicer must attempt to establish QRPC with the borrower during the forbearance plan and must analyze each case carefully before determining which workout option is most appropriate.[79] This analysis should be conducted according to Fannie Mae's workout hierarchy. When offering forbearance relief, a servicer must utilize the requirements set forth in chapter F-2-11 of the Single-Family Seller/Servicer Guide, which—importantly—includes the opportunity to resolve delinquencies through a simple reinstatement process.[80] Transition requirements will depend upon whether or not the servicer has obtained QRPC with the borrower.

3.2.3.1 Transition requirements where QRPC has been obtained

Where the servicer is in contact with the borrower during the disaster-related forbearance period, and the servicer determines that the borrower is capable of maintaining the current contractual monthly payment for principal, interest, taxes and insurance (PITI), including any escrow amounts disbursed by the servicer as a result of the disaster and escrow shortage needed to pay future escrow that is required to be repaid by the borrower over the 60-month escrow repayment period, the servicer must consider the borrower for an Extend Modification, which is described in section 3.2.3.4, below. The servicer must disclose how the escrow analysis was determined, and that disbursed escrow amounts will not be capitalized but will be added to the escrow shortage needed to pay future escrow amounts resulting in an increase of the current PITI payment over the 60-month escrow repayment period.[81]

If the servicer determines that the borrower is capable of maintaining the PITI payment, but cannot manage the additional escrow payment obligation to cover amounts disbursed by the servicer as a result of the disaster, the servicer must evaluate the borrower for a Fannie Mae Cap and Extend Modification for Disaster Relief.[82]

If the servicer determines that the borrower is *not* capable of maintaining the PITI payment, the servicer must evaluate the borrower for a Fannie Mae Flex

[79] Fannie Mae, Single-Family Servicing Guide section D2-3.1-01.

[80] Fannie Mae, Single-Family Servicing Guide section F-2-11.

[81] *See* Fannie Mae Lender Letter LL-2017-09, Nov. 2, 2017, *available at* https://www.fanniemae.com/content/announcement/ll1709.pdf.

[82] *See id*. S*ee also* Fannie Mae, Single-Family Servicing Guide section D2-3.2-10.

Modification based on the Unique Requirements for a Property Impacted by an Eligible Disaster.[83]

3.2.3.2 Transition requirements where QRPC has not been obtained

Where the servicer is not in contact with the borrower during the disaster-related forbearance period and the mortgage is 90 or more days delinquent, the servicer must evaluate the borrower for a Fannie Mae Flex Modification based on the Unique Requirements for a Property Impacted by an Eligible Disaster.[84]

3.2.3.3 Transition requirements for borrowers who were on a TPP at the time of the disaster

If the borrower converts from an active TPP to a forbearance plan, the borrower may subsequently be eligible for a Fannie Mae workout option upon completion of the forbearance plan. If the borrower is eligible for a loan modification, the servicer must commence a new TPP.[85]

3.2.3.4 New, Temporary Extend Modification for Disaster Relief

A November 2, 2017 Lender Letter introduced the new, temporary Extend Modification for Disaster Relief. This option results in a fixed-rate modification extending the loan term in monthly increments to match the number of delinquent payments (not exceeding 12 months). This modification is for borrowers who were current or fewer than 31 days' delinquent at the time of the disaster and meet the eligibility requirements that are described in the Lender Letter. Servicers must begin evaluating borrowers for this new modification program no later than February 1, 2018.[86]

If the servicer is able to establish QRPC with the borrower during the disaster-related forbearance period and determines that the borrower can maintain the monthly payments, including any escrow shortage needed to pay future escrow that is required to be repaid by the borrower over the 60-month escrow repayment

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[83] *See* Fannie Mae Lender Letter LL-2017-09, *supra* note 81, at 2. *See also* Fannie Mae, Single Family Servicing Guide section D2-3.2-09.

[84] *See* Fannie Mae Lender Letter LL-2017-09, *supra* note 81, at 2. *See also* Fannie Mae, Single Family Servicing Guide section D2-3.2-09.

[85] Fannie Mae, Single-Family Servicing Guide section D1-3-02.

[86] *See* Fannie Mae Lender Letter LL-2017-09, *supra* note 81.

period, then the servicer must evaluate the borrower for an Extend Modification. The servicer must disclose how the escrow analysis was made, and that disbursed escrow amounts will not be capitalized but, instead, added to the escrow shortage needed to pay future escrow amounts resulting in an increase of the borrower's current monthly payment over the 60-month escrow repayment period.[87]

A borrower is eligible for a Fannie Mae Extend Modification if: the loan is a first-lien mortgage loan; the loan was current or fewer than 31 days' delinquent when the disaster occurred and is 31 or more days' delinquent but fewer than 360 days' delinquent when the disaster-related forbearance plan is completed; the loan cannot have been previously modified with an Extend Modification as a result of the same disaster and then become delinquent; the loan is not a VA, FHA or Rural Development loan; the loan is not subject to a recourse or indemnification arrangement under which Fannie Mae purchased or securitized the loan or that was imposed by Fannie Mae after the loan was purchased or securitized; the loan is not subject to a current offer for another workout option (except for a Streamlined Modification Post Disaster Forbearance); the loan must not be subject to an approved liquidation workout option; and the loan must not be subject to an active repayment plan or other non-disaster-related forbearance plan.[88]

The Extend Modification TPP must be three months in duration. The servicer may not charge administrative fees for the Extend Modification, but may assess late charges during the TPP. The servicer must waive all late charges, penalties, stop payment fees, or similar charges upon the borrower's conversion to a permanent loan modification.[89]

3.2.4 Distribution of insurance proceeds after disaster

Fannie Mae's rules for the distribution of insurance proceeds after a disaster are outlined in section B-5-01 of the Servicing Guide. However, in the wake of the 2017 hurricanes, Fannie Mae has *temporarily* revised certain requirements so as to assist borrowers who need upfront insurance proceeds to repair or rebuild their homes. These revisions are reflected in the following:

[87] *Id.* at 2.

[88] *Id.* at 3.

[89] *Id.* at 8.

- For borrowers who were fewer than 31 days delinquent at the time of the Eligible Disaster, if the insurance proceeds are less than or equal to $40,000 the servicer must determine if, based on the type of repairs (*e.g*., damage affecting the safety, soundness, or structural integrity of the property), a licensed contractor is required to restore or repair the property **and** the servicer is authorized to release the insurance loss proceeds payable only to the borrower.[90]

- For borrowers who were fewer than 31 days delinquent at the time of the Eligible Disaster, if the insurance proceeds are equal to or greater than $40,000, the servicer must ensure that a licensed contractor is used to restore or repair the property, and the servicer must release up to the greater of $40,000, 33% of the insurance proceeds, or the amount by which the release funds exceed the sum of the unpaid principal balance (UPB), accrued interest and advances on the loan. Remaining funds may be disbursed based on periodic inspections of the progress of the repair work. A final inspection is required to ensure that all repairs are completed, but inspection and a repair plan are not required if the total insurance proceeds are less than or equal to $20,000. If cosmetic (non-structural) work items adding up to less than $5,000 are outstanding when the final inspection occurs, the inspection may be considered final and the inspector must estimate completion dates for any unfinished items.[91]

- For borrowers who were 31 or more days' delinquent at the time of the Eligible Disaster, if the proceeds are less than or equal to $5,000, the servicer is authorized to make the disbursement in one payment. If the proceeds are greater than $5,000, the servicer must release an initial disbursement of insurance loss proceeds of 25% of the total insurance loss proceeds, but no more than $10,000, or the amount by which the release funds exceed the sum of the UPB, accrued interest and advances on the loan, and must disburse the remaining funds in increments not to exceed 25% of the insurance loss proceeds following inspection of the repairs.[92]

[90] *Id.* at 10.

[91] *Id.*

[92] *Id.* at 11. Note that these requirements reflect temporary changes made to the loss proceeds disbursement policies contained in the Fannie Mae, Single-Family Servicing Guide at section B-5-01.

3.3 FHA disaster relief[93]

The HUD website page entitled "Disaster Relief Options for FHA Homeowners" states that a homeowner whose home was damaged in the disaster or who will not be able to make the monthly loan payment(s) because of adversely affected finances should contact the lender immediately to request assistance.

> Borrowers who were injured or whose income relied on individuals who were injured or died in the disaster will be asked for documentation such as medical records or death certificates, if available. The lender will ask for financial information to help evaluate what assistance can be provided to reinstate the loan.[94]

3.3.1 Mandates to servicers

- Foreclosure sale moratorium: HUD initially granted a 90-day moratorium on foreclosures after the September 2017 hurricanes.[95] The moratorium was effective as of the date of the disaster declaration for a particular area. This moratorium applied both to the initiation of foreclosures and foreclosures already in progress.[96] On October 23, 2017, HUD announced that it was extending the initial 90-day moratorium for FHA-insured homeowners impacted by the hurricanes for an additional 90 days as follows: for Hurricane Harvey, until February 21, 2018; for Hurricane Irma, until March 9, 2018; and for Hurricane Maria, until March 19, 2018. This extension applies both to foreclosures already initiated and to new foreclosures.[97] On

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[93] Some primary resources for information about FHA disaster relief are available at https://www.hud.gov/program_offices/housing/sfh/nsc/qaho0121

and https://www.hud.gov/program_offices/housing/sfh/ins/203h-dft

and https://www.hud.gov/sites/dfiles/Housing/documents/wb_Servicing%20FHA-Forward%20Mortgages_10-18-17.PDF

[94] U.S. Dep't of Hous. & Urban Dev., Disaster Relief Options for FHA Homeowners, *available at* https://www.hud.gov/program_offices/housing/sfh/nsc/qaho0121.

[95] *See* Press Release, U.S. Dep't of Hous. & Urban Dev., HUD Announces Disaster Assistance for Victims of Hurricane Harvey, HUD No. 17-068 (Aug. 28, 2017), *available at* https://www.hud.gov/press/press_releases_media_advisories/2017/HUDNo_17-068.

[96] U.S. Dep't of Hous. & Urban Dev., FHA Single Family Housing Policy Handbook 4000.1, section III.A.3.c.ii(A).

[97] *See* Press Release, U.S. Dep't of Hous. & Urban Dev., FHA Extends Foreclosure Relief for Homeowners Impacted by Recent Hurricanes, HUD No. 17-094 (Oct. 23, 2017), *available at* https://www.hud.gov/press/press_releases_media_advisories/2017/HUDNo_17-094.

March 1, 2018, HUD extended its then-current 180-day foreclosure moratorium for areas impacted by Hurricane Maria for an additional 60 days. This extension applies only to Individual Assistance Areas in Puerto Rico and the U.S. Virgin Islands. This extension will expire on May 18, 2018, and applies to the initiation of foreclosures and foreclosures already in progress.[98] On May 16, 2018, HUD extended the foreclosure timelines through August 16, 2018 for FHA-insured properties in Puerto Rico and the U.S. Virgin Islands. The extension applies to the initiation of foreclosures and foreclosures already in progress.. This extension is applicable if the mortgage was no more than 60 days past due as of the date of the disaster, and the borrower has not already been approved for a forbearance or other loss mitigation option.[99] Also on May 16, 2018, HUD extended foreclosure timelines through August 16, 2018 for Home Equity Conversion Mortgages (HSCM) on impacted properties in Puerto Rico and the U.S. Virgin Islands. This extension applies to HECMS that became due and payable for reasons other than the death of the last surviving borrower and eligible non-borrowing spouse.[100] The HUD Handbook also requires that a mortgagee "must take no action to initiate or complete foreclosure proceedings, after expiration of a disaster-related foreclosure moratorium, if such action will jeopardize the full recovery of a hazard or flood insurance settlement."[101]

- Credit reporting suspension: The mortgagee must suspend reporting of delinquencies to consumer reporting agencies for a borrower who is granted disaster-related mortgage payment relief and is otherwise

[98] *See* Dep't of Hous. & Urban Dev. Mortgagee Letter 2018-02 (Mar. 1, 2018), *available at* https://www.hud.gov/sites/dfiles/OCHCO/documents/18-02ml.pdf.

[99] *See* Dep't of Hous. & Urban Dev. Mortgagee Letter 2018-03 (May 16, 2018), *available at* https://www.hud.gov/sites/dfiles/OCHCO/documents/18-03ml.pdf.

[100] See Dep't of Hous. & Urban Dev. FHA Info #18-21 (May 16, 2018), *available at* https://www.hud.gov/sites/dfiles/SFH/documents/SFH_FHA_INFO_18-21.pdf.

[101] U.S. Dep't of Hous. & Urban Dev., FHA Single Family Housing Policy Handbook 4000.1, section III.A.3.c.ii(C).

performing as agreed, unless such reporting is required for a loan modification.[102]

- Late charge suspension: The mortgagee must waive late charges as long as the borrower is on a forbearance plan or paying as agreed on a loss mitigation option.[103]

3.3.2 Mortgage forbearance

In a letter to Texas residents in the wake of Hurricane Harvey, the HUD Secretary stated: "HUD has already granted a 90-day moratorium on foreclosures for FHA-insured properties in disaster-affected areas. In addition, we offer loan forbearance and loan modifications for borrowers struggling to make payments in disaster-affected areas."[104] The Disaster Relief Options for FHA Homeowners page on HUD's website states: "Your lender may enter into a forbearance plan, or execute a loan modification or a partial claim, if these actions will help retain and pay for your home."[105]

The HUD Handbook states: "Should Presidentially-Declared Major Disasters adversely impact a Borrower's ability to make on-time Mortgage Payments, the Mortgagee must provide the Borrower with forbearance and HUD loss mitigation assistance, where appropriate, as provided in applicable FHA policy guidance."[106]

The Handbook states further that before considering an affected borrower for a permanent solution utilizing one of FHA's Loss Mitigation Home Retention Options, the mortgagee must first evaluate the borrower for a forbearance, allowing for one or more periods of reduced or suspended payments without specific terms of repayment. The mortgagee may offer forbearance relief to a

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[102] U.S. Dep't of Hous. & Urban Dev., FHA Single Family Housing Policy Handbook 4000.1, section III.A.3.c.iv(F).

[103] U.S. Dep't of Hous. & Urban Dev., FHA Single Family Housing Policy Handbook 4000.1, section III.A.3.c.iv(G).

[104] U.S. Dep't of Hous. & Urban Dev., Letter From HUD Secretary Ben Carson to the People of Texas on Harvey Relief, *available at* https://www.hud.gov/press/speeches_remarks_statements/2017/letter_100417.

[105] U.S. Dep't of Hous. & Urban Dev., Disaster Relief Options for FHA Homeowners, *available at* https://www.hud.gov/program_offices/housing/sfh/nsc/qaho0121.

[106] U.S. Dep't of Hous. & Urban Dev., FHA Single Family Housing Policy Handbook 4000.1, section III.A.3.c.iv.

borrower with a mortgaged property or place of employment located within a Presidentially-Declared Major Disaster Area (PDMDA).[107]

The HUD Handbook makes reference to both informal and formal forbearance. A mortgagee "may consider Borrowers in PDMDAs for an Informal Forbearance and may offer additional Informal Forbearance periods if the foreclosure moratorium is extended."[108] A mortgagee "may consider Formal Forbearance for Borrowers in PDMD while homeowners are pursuing home repairs and/or resolving verifiable difficulties related to the disaster" as long as: (1) the forbearance period does not exceed the estimated time needed to complete home repairs as supported by a contract or repair estimate; and (2) the total accumulated mortgage arrearages during the forbearance period does not exceed the equivalent of 12 months of (payment for principal, interest, taxes and insurance) PITI."[109]

Servicers may waive late fees for borrowers who may become delinquent on their loans as a result of the disaster, but apparently are not required to do so. The HUD website states: "HUD is confident that your mortgage lender will make every attempt possible to assist you. If you are not satisfied after discussing possible relief actions with your lender, please call a HUD-approved counseling agency toll free at (800) 569-4287 or contact HUD's National Servicing Center."[110]

3.3.2.1 Loss mitigation owner occupant requirement

Although loss mitigation for FHA home loans usually requires occupancy in the home, in cases of loss mitigation in PDMDAs, this requirement is relaxed where homes may not be immediately inhabitable in the wake of the disaster.[111] The HUD Handbook provides that a mortgagee must not deny a borrower any loss mitigation option solely for failure to occupy a mortgaged property if the following conditions are met:

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[107] U.S. Dep't of Hous. & Urban Dev., FHA Single Family Housing Policy Handbook 4000.1, section III.A.3.c.iv.B.

[108] U.S. Dep't of Hous. & Urban Dev., FHA Single Family Housing Policy Handbook 4000.1, section III.A.3.c.iv.B(1).

[109] U.S. Dep't of Hous. & Urban Dev., FHA Single Family Housing Policy Handbook 4000.1, section III.A.3.c.iv(B).

[110] U.S. Dep't of Hous. & Urban Dev., Disaster Relief Options for FHA Homeowners, *available at* https://www.hud.gov/program_offices/housing/sfh/nsc/qaho0121.

[111] Bruce Reichstein, FHA News and Views, FHA Loans and Natural Disasters: What You Should Know (Aug. 30, 2017), *available at* https://www.fhanewsblog.com/2017/08/fha-loans-natural-disasters-know.

- the property is located within a disaster area;
- the dwelling was the borrower's principal residence immediately prior to the disaster;
- the borrower intends to reoccupy the property upon restoration of the home to habitable condition; and
- the total accumulated mortgage arrearages have not exceeded the equivalent of 12 months of PITI.[112]

3.3.2.2 Loan modification without financial evaluation

Eligibility. A homeowner may be eligible to apply for certain kinds of loss mitigation that do not require a financial evaluation. The mortgagee must ensure that borrowers and their FHA-insured mortgages meet the following eligibility requirements for a loan modification without a financial evaluation:

- the mortgage was current or fewer than 30 days' past due as of the date of the disaster declaration;
- the mortgagee obtains a Verification of Employment (VOE) confirming that the borrower's employment status is the same as prior to the disaster[113];
- home damages have been repaired; and
- the dwelling is owner-occupied.[114]

Terms. The mortgagee must modify the mortgage as follows:

- the total PITI on the modified mortgage must be less than or equal to the existing payment on the FHA-insured mortgage;

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[112] U.S. Dep't of Hous. & Urban Dev., FHA Single Family Housing Policy Handbook 4000.1, section III.A.3.iv(A).

[113] However, Mortgagee Letter 2018-01 provides for reduced income documentation for Disaster Loan Modifications. In lieu of the VOE, a mortgagee may confirm the borrower's employment and income using either the borrower's most recent pay stub for wage income reflecting year-to-date earnings, the borrower's most recent bank account statement, or other documentation (*e.g.,* statement of Social Security benefits, monthly pension statement) reflecting the amount of income. *See* Dep't of Hous. & Urban Dev. Mortgagee Letter 2018-01 (Feb. 22, 2018), *available at* https://www.hud.gov/sites/dfiles/OCHCO/documents/18-01ml.pdf.

[114] U.S. Dep't of Hous. & Urban Dev., FHA Single Family Housing Policy Handbook 4000.1, section III.A.3.c. iv(C).

- the borrower must successfully complete a three-month Trial Payment Plan (TPP)[115];
- the mortgagee must capitalize into a modified mortgage balance (the accumulated arrearages for unpaid accrued interest; and eligible unreimbursed mortgagee advances and related fees and costs chargeable to the mortgage);
- the mortgagee waives late fees if the borrower satisfies all conditions of the TPP;
- the mortgagee extends the term of the mortgage to 360 months from the modification effective date;
- the mortgagee sets the interest rate at the market rate as defined by HUD[116]; and
- the mortgagee must ensure that the borrower repairs the home damages and occupies the dwelling as an owner-occupant before completing the loan modification.[117]

3.3.2.3 Requirements for loss mitigation options

Eligibility. The mortgagee must evaluate other loss mitigation home retention options for borrowers who meet one of the following criteria:

- they are not eligible for the "Loan Modification without a Financial Evaluation" option;
- they are eligible for "Loan Modification without a Financial Evaluation" and experiencing a continuation of lower income or higher living expenses following the disaster; or
- they are eligible for "Loan Modification without a Financial Evaluation" but have not successfully completed the required TPP.

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[115] However, the February 22, 2018 Mortgagee Letter states that a TPP is not required before completion of a Disaster Loan Modification for a borrower who was current or fewer than 30 days' past due as of the date of the applicable disaster declaration. Note that elimination of the TPP requirement is not applicable for disaster-affected borrowers receiving an FHA-HAMP option. *See* Mortgagee Letter 2018-01, *supra* note 113, at 3.

[116] U.S. Dep't of Hous. & Urban Dev., FHA Single Family Housing Policy Handbook 4000.1, section III.A.3.c. iv(C).

[117] U.S. Dep't of Hous. & Urban Dev., FHA Single Family Housing Policy Handbook 4000.1, section III.A.3.c. iv(D).

Borrowers who do not have an increase in living expenses but are delinquent due to a forbearance received following a disaster declaration are deemed to satisfy the eligibility conditions for FHA loss mitigation options.[118]

The servicer must ensure that the borrower repairs the home damage and occupies the dwelling as an owner-occupant before the servicer completing the loan modification.

3.3.2.4 New "Disaster Standalone Partial Claim" option

On February 22, 2018, the FHA announced a new option for FHA-insured homeowners who live or work in areas impacted by Hurricanes Harvey, Irma and Maria, as well as the California wildfires and subsequent flooding and mudslides.[119] This option, entitled "Disaster Standalone Partial Claim," is intended to help struggling borrowers resume pre-disaster mortgage payments. It covers up to 12 months of missed payments through an interest-free second loan that is payable only when the borrower sells the property or refinances the mortgage. The servicer waives the borrower's accumulated late fees.

The servicer must evaluate a borrower for a Disaster Standalone Partial Claim at the end of the forbearance period if the borrower does not qualify for a Disaster Rate and Term Loan Modification.[120] A TPP is not required before completion of a Disaster Standalone Partial Claim for borrowers who were current or fewer than 30 days delinquent as of the date of the disaster.[121]

Eligibility for the Disaster Standalone Partial Claim option is limited to borrowers who became delinquent on their mortgage due to the disaster and whose initial mortgage forbearance periods are ending. In addition, the following requirements

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[118] U.S. Dep't of Hous. & Urban Dev., FHA Single Family Housing Policy Handbook 4000.1, section III.A.3.c. iv(D).

[119] *See* Press Release, U.S. Dep't of Hous. & Urban Dev., FHA Expands Foreclosure Relief for Victims of 2017 Disasters (Feb. 22, 2018), *available at* https://www.hud.gov/press/press_releases_media_advisories/HUD_No_18_016. *See also* Mortgagee Letter 2018-01, *supra* note 113. The Mortgagee Letter states that the guidance applies to "all FHA Title II forward mortgages of borrowers whose property or employment is located in the Presidentially-Declared Major Disaster Areas of Louisiana Hurricane Harvey DR-4345, Texas Hurricane Harvey DR-4332, Florida Hurricane Irma DR-4337, Georgia Hurricane Irma DR-4338, Puerto Rico Hurricane Irma DR-4336, South Carolina Hurricane Irma DR-4346, Virgin Islands Hurricane Irma DR-4335, Puerto Rico Hurricane Maria DR-4339, Virgin Islands Hurricane Maria DR-4340, California Wildfires DR-4344 or California Wildfires, Flooding, Mudflows, and Debris Flows FEMA-DR-4353." Mortgagee Letter 2018-01, *supra* note 113, at 2.

[120] *See* Mortgagee Letter 2018-01, *supra* note 113, at 4. The "Disaster Rate and Term Loan Modification" referred to in the Mortgagee Letter appears to be the modification described above, in section 3.3.2.2.

[121] Mortgagee Letter 2018-01, *supra* note 113, at 3.

must be met: (1) the borrower must have been current on payments at the date of the disaster; (2) the borrower's income must be equal to or more than his or her pre-disaster income; (3) the borrower must demonstrate the ability to resume total PITI payments; (4) the property must be owner-occupied; (5) a Disaster Rate and Term Loan Modification over a 30-year period at the Market Rate would provide a monthly payment (*i.e.*, including PITI) that is greater than the pre-disaster payment; (6) the existing rate on the mortgage is lower than the Market Rate; and (7) the total amount of the Disaster Standalone Partial Claim does not exceed the equivalent of 12 total monthly payments (*i.e.*, including PITI).[122] Note that the Disaster Standalone Partial Claim option is *not* available for borrowers experiencing a loss of income or long-term delinquency (*i.e.*, 12 months of missed payments).[123] Borrowers who do not meet the Disaster Standalone Partial Claim option may yet be eligible for a loan modification under the FHA-HAMP option.[124]

The Disaster Standalone Partial Claim option also streamlines income documentation and other requirements in order to expedite loss mitigation relief. A verification of employment (VOE) is not required to confirm that a borrower's employment status and income is the same as it was before the disaster. Instead, a servicer may confirm this information using either the borrower's most recent pay stub showing year-to-date earnings, the borrower's most recent bank statement showing deposits of income from applicable sources, or other documentation (such as Social Security monthly income benefits or a monthly pension statement).[125]

3.4 VA hurricane-related materials

3.4.1 Overview

On August 29, 2017, the Department of Veterans Affairs distributed Circular 26-17-23 in the wake of Hurricane Harvey in order to describe measure that mortgagees may take to provide relief to affected borrowers.[126] The Circular

[122] *See id.* at 4.

[123] *See id.* at 2-3.

[124] *See id.* at 5. *See also* U.S. Dep't of Hous & Urban Dev., FHA-Home Affordable Modification Program (FHA-HAMP), *available at* https://www.hud.gov/hudprograms/fhahamp.

[125] *See* Mortgagee Letter 2018-01, *supra* note 113, at 3.

[126] U.S. Dep't of Veterans Affairs, Special Relief Following Hurricane Harvey, Circular 26-17-23, Aug. 29, 2017, *available at* https://www.benefits.va.gov/HOMELOANS/documents/circulars/26_17_23.pdf.

directs servicers and borrowers to review the VA Guidance on Natural Disasters.[127] The Circular is effective until July 1, 2018, when it will be rescinded.

On September 18, 2017, the Department of Veterans Affairs distributed Circular 26-17-27 regarding Hurricane Irma. It contains substantially the same material as Circular 26-17-23, except that its rescission date was October 1, 2018.

References to "the Circular," below, are to Circular 26-17-23, but since the information is the same as that in Circular 26-17-27, it essentially applies to both Hurricanes Harvey and Irma.

3.4.2 Foreclosure moratorium requested

The VA Circular requested[128] that loan holders establish a 90-day moratorium (from the date of the disaster) on initiating new foreclosures, citing "VA regulation 38 CFR 36.4324(a)(3)(ii) which allows additional interest on a guaranty claim when eventual termination has been delayed due to circumstances beyond the control of the holder, such as VA-requested forbearance. Because of the widespread impact of Hurricane Harvey, holders should review all foreclosure referrals to ensure that borrowers have not been affected significantly enough to justify delay in referral. Any questions about impact should be discussed with the VA Regional Loan Center (RLC) of jurisdiction."[129]

The VA Guidance on Natural Disasters states: "Although the loan holder is ultimately responsible for determining when to initiate foreclosure and complete termination action, VA encourages holders to establish a 90 day moratorium on initiating new foreclosures in the disaster area." [130]

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[127] U.S. Dep't of Veterans Affairs, VA Guidance on Natural Disasters, *available at* https://www.benefits.va.gov/homeloans/documents/docs/va_policy_regarding_natural_disasters.pdf.

[128] U.S. Dep't of Veterans Affairs, VA Home Loans (containing a link to VA Guidance on Natural Disasters), *available at* https://www.benefits.va.gov/homeloans/.

[129] U.S. Dep't of Veterans Affairs, Special Relief Following Hurricane Harvey, Circular 26-17-23, Aug. 29, 2017, *available at* https://www.benefits.va.gov/HOMELOANS/documents/circulars/26_17_23.pdf.

[130] U.S. Dep't of Veterans Affairs, VA Guidance on Natural Disasters, *available at* https://www.benefits.va.gov/homeloans/documents/docs/va_policy_regarding_natural_disasters.pdf.

In October 2017, the VA extended its requested initial 90-day moratorium for loans affected by Hurricanes Harvey, Irma and Maria to 180 days from the dates the respective disasters occurred.[131]

3.4.3 Credit reporting suspension encouraged

The VA encourages servicers to suspend credit reporting on affected loans, promising that the VA "will not penalize affected servicers for any late default reporting to VA as a result."[132]

3.4.4 **Waiver of late charges encouraged**

The VA "believes that many servicers plan to waive late charges on affected loans, and encourages all servicers to adopt a policy" for affected loans.[133]

3.4.5 Mortgage forbearance encouraged

The VA "encourages holders of guaranteed loans to extend forbearance to borrowers in distress as a result of Hurricane Harvey." Servicers are advised to reference 38 CFR § 36.4311, which allows the reapplication of prepayments to cure or prevent a default, and 38 CFR § 36.4315 which "allows the terms of any guaranteed loan to be modified without the prior approval of VA, provided conditions in the regulation are satisfied."[134]

When members of the National Guard are called to active duty as part of recovery efforts, the VA "encourages servicers to extend special forbearance to National Guard members who experience financial difficulties as a result of their service."[135]

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131 U.S. Dep't of Veterans Affairs, Special Relief Following Hurricane Harvey, Circular 26-17-23, Oct. 23, 2017, *available at* https://www.benefits.va.gov/HOMELOANS/documents/circulars/26_17_23_change1.pdf; U.S. Dep't of Veterans Affairs, Special Relief Following Hurricane Irma, Circular 26-17-27 (Oct. 23, 2017), *available at* https://www.benefits.va.gov/HOMELOANS/documents/circulars/26_17_27_change1.pdf; U.S. Dep't of Veterans Affairs, Special Relief Following Hurricane Maria, Circular 26-17-28 (Oct. 23, 2017), *available at* https://www.benefits.va.gov/HOMELOANS/documents/circulars/26_17_28_change1.pdf.

132 U.S. Dep't of Veterans Affairs, Special Relief Following Hurricane Harvey, Circular 26-17-23, Aug. 29, 2017, *available at* https://www.benefits.va.gov/HOMELOANS/documents/circulars/26_17_23.pdf.

133 *Id.*

134 *Id.*

135 *Id.*

Helpful references include VA regulations on:

- prepayments (38 CFR § 36.4311);
- advances (38 CFR § 36.4314);
- loan modifications (38 CFR § 36.4315); and
- supplemental loans (38 CFR § 36.4359) (may be of assistance in appropriate cases).[136]

3.4.6 New disaster loan modification option

The VA disaster loan modification in place prior to November 27, 2017 allows servicers to grant permanent payment relief to impacted delinquent borrowers who have not submitted complete loss mitigation applications. This modification carries with it the requirement of a three-month trial payment plan (TPP).

On November 27, 2017, the VA announced a new disaster loan modification option that gives servicers the choice to offer modifications to delinquent borrowers impacted by a disaster *without* the three-month TPP requirement. The Circular announcing this new option states: "A permanent modification must meet the following terms to be eligible for execution without the three-month TPP. The term of the loan is extended equal to the number of months the loan is delinquent. For example, if the loan is four-months delinquent, the loan term may only be extended by four months. The loan must have been current at the time of the disaster that caused the delinquency. The servicer waives the delinquent interest accrued on the loan as a result of the delinquency. The liability of the Secretary will not be increased when servicers waive the delinquent interest allowing for the modification to be completed without a TPP. The limit of the term extension is 12-months without prior approval from VA. The desired result is that Veteran borrowers are able to resume the same regular monthly installments without feeling as though they have been financially penalized due to a disaster. A three month TPP will still be required for all Disaster Loan Modifications that do not forgive the delinquent interest."[137]

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[136] U.S. Dep't of Veterans Affairs, VA Guidance on Natural Disasters, *available at* https://www.benefits.va.gov/homeloans/documents/docs/va_policy_regarding_natural_disasters.pdf.

[137] U.S. Dep't of Veterans Affairs, Updated Disaster Modification Guidance, Circular 26-17-39, Nov. 27, 2017, *available at* https://www.benefits.va.gov/HOMELOANS/documents/circulars/26_17_39.pdf.

3.5 USDA/Rural Development hurricane-related materials

The type of relief available depends upon the type of loan involved, *i.e.*, a Rural Development single family housing direct loan, a Rural Development guaranteed mortgage loan, or a farm loan.

3.5.1 RD Single Family Housing Direct Loans

The USDA's website has a page entitled Rural Development Disaster Assistance.[138] This page lists the various types of assistance available for loan borrowers who are impacted by a disaster and have a RD Single Family Housing Direct loan. This page advises guaranteed loan borrowers in Rural Development areas to contact their lenders immediately ("Your lender will work closely with you on alleviating all matters regarding your situation."), file an insurance claim, and apply for disaster assistance available through FEMA, or state or local government.[139]

Foreclosure moratorium: The website states: "If you have excessive, non-reimbursed expenses resulting from damage to your property, non-reimbursed medical expenses, or have lost your job as a result of the disaster, you may be eligible for a moratorium for up to 180 days where you are not required to make your house payment."[140]

Payment assistance: The website states: "If your income has been reduced by more than 10% and will be for the foreseeable future, you may be eligible for payment assistance or an increase in the assistance that you currently receive."[141]

On September 1, 2017, USDA Rural Development issued a letter that outlines how the agency can assist homeowners affected by Hurricane Harvey. It states: "If you have excessive, non-reimbursed repair expenses or have lost your job as a result of the storm, you can request a moratorium package. We will review the information you provide us to determine if you may be eligible for a moratorium on your payments. This moratorium is a suspension of your payment for a period of time

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138 https://www.rd.usda.gov/programs-services/services/rural-development-disaster-assistance.

139 U.S. Dep't of Agriculture, Rural Development Disaster Assistance, *available at* https://www.rd.usda.gov/programs-services/services/rural-development-disaster-assistance.

140 *Id.*

141 U.S. Dep't of Agriculture, Rural Development Disaster Assistance, *available at* https://www.rd.usda.gov/programs-services/services/rural-development-disaster-assistance. *See also* U.S. Dep't of Agriculture, Letter to USDA Homeowners Impacted by a Natural Disaster, *available at* https://www.rd.usda.gov/files/USDARDHARVEYLetter09-01-2017.pdf.

and is subject to repayment at a later date. Contact us to request an application."[142] The agency issued similar letters after Hurricanes Irma and Maria.[143]

3.5.2 RD Guaranteed Mortgage Loans

Foreclosure moratorium: The Rural Development SFH Guaranteed Loan Program Technical Handbook (HB-1-3555) requires servicers of RD's single-family guaranteed loans to suspend all foreclosure-related actions for 90 days. This includes the initiation of new foreclosures as well as foreclosures already in process. To be eligible for a suspension of foreclosure activities, the property or the borrower's place of employment must be directly affected by the disaster.[144] In October 2017, USDA Rural Development extended the initial moratorium on foreclosures in the disaster areas impacted by the hurricanes as follows: for Hurricane Harvey, until February 21, 2018; for Hurricane Irma, until March 9, 2018; and for Hurricane Maria, until March 19, 2018. These extensions apply both to foreclosures already initiated and to new foreclosures.[145]

Mortgage forbearance: Servicers are encouraged, but not required, to consider a forbearance plan. To be eligible for forbearance the borrower's home or place of employment must be directly affected by the disaster. The forbearance plan should take into account a wide range of factors including the borrower's ability to find alternative housing, increase in living expenses as well as income going forward. Servicers may use existing workout options to reinstate a borrower ready to resume mortgage responsibilities. Late fees will not be assessed while the borrower is on a forbearance plan or paying as agreed on a repayment plan, nor should a borrower on a disaster-related plan be reported to the credit reporting agencies.[146]

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[142] *See* U.S. Dep't of Agriculture, Letter to USDA Homeowners Impacted by a Natural Disaster, *available at* https://www.rd.usda.gov/files/USDARDHARVEYLetter09-01-2017.pdf.

[143] *See* https://www.rd.usda.gov/files/HurricaneIrmaLtrEnglish508.pdf; https://www.rd.usda.gov/files/HurricaneMariaLtrEnglish508.PDF.

[144] Foreclosure can be suspended beyond 90 days with prior approval from Rural Development. *See* U.S. Dep't of Agriculture, Rural Development, SFH Guaranteed Loan Program Technical Handbook HB-1-3555, chapter 18, *available at* https://www.rd.usda.gov/publications/regulations-guidelines/handbooks#hb13555.

[145] *See* Press Release, U.S. Dep't of Agriculture, Rural Development, USDA Foreclosure Moratoriums Extended for Areas Impacted by Hurricanes Harvey, Irma and Maria (Oct. 24, 2017), *available at* https://www.rd.usda.gov/newsroom/news-release/usda-foreclosure-moratoriums-extended-areas-impacted-hurricanes-harvey-irma. This news release directs those with questions to contact the USDA Rural Development Customer Service Center at 866-550-5887 or the National Office at 202-720-1452.

[146] *See* U.S. Dep't of Agriculture, Rural Development, Handbook HB-1-3555 SFH Guaranteed Loan Program Technical Handbook section 18.11.

Loss mitigation after forbearance: After the forbearance period ends, borrowers who were current (or fewer than 30 days past due) as of the date of the disaster may be offered rate and term modifications without the standard financial evaluation required subject to the following requirements: the servicer performs a Verification of Employment (VOE) to determine the borrower's employment status remains unchanged as of the disaster; home damages have been repaired and the borrower is occupying the subject property; total modified mortgage payment including taxes and insurance (PITI) is less than or equal to the payment prior to modification; and the borrower successfully completes a three month trial period.[147] Accumulated arrearages of delinquent interest and eligible unreimbursed servicer advances, fees and costs shall be capitalized into the modified mortgage balance, and the following steps should be completed to an extent that the target monthly modified payment is achieved: extend term up to 360 months; reduce rate down to no less than 50 basis points greater than the most recent Freddie Mac Weekly Primary Mortgage Market Survey (PMMS) Rate for 30-year fixed-rate conforming mortgages (US Average), rounded to the nearest one-eighth or one percentage (0.125%), as of the date a trial payment plan is offered to the borrower.[148]

On February 20, 2018, USDA Rural Development issued an announcement entitled "Special Relief for Natural Disasters."[149] This announcement stated that the agency, in response to recent natural disaster events, will amend the SFH Guaranteed Loan Technical Handbook (chapter 18, section 4), to add special relief measures. These additions, which will be published in the Handbook on May 1, 2018,[150] are designed for servicers to respond immediately to borrowers who are near the end of their forbearance periods.

Eligible borrowers may now be offered certain special relief measures in addition to standard workout options. These special relief measures may be offered without the required standard financial evaluation as long as the following

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[147] *See id.*

[148] *See id.*

[149] U.S. Dep't of Agriculture, Rural Development, SFH Guaranteed Servicing, Special Relief for Natural Disasters, Feb. 20, 2018.

[150] Details on these changes are provided in the advance copy of chapter 18, which will be published on May 1, 2018, and is available at https://content.govdelivery.com/attachments/topic_files/USDARD/USDARD_429/2018/03/07/file_attachments/969613/3555-1%2BChapter18%2B5%2B1%2B2018%2BEffective__969613.pdf.

conditions are met: (1) the loan was current or fewer than 30 days' delinquent as of the date of the disaster; (2) the servicer receives verification that the hardship (employment and/or property) has been resolved; and (3) the total modified principal and interest payment is less than or equal to the payment prior to modification.

There is a hierarchy for consideration of special relief measures. First in order is Term Extension. This measure provides that if the servicer determines that the borrower is able to maintain the current contractual payment including any escrow shortage created by advancements during the forbearance period (can be spread over 60 months), then the loan term may be extended an equal number of months to the term of the forbearance provided. Any interest accrued during the forbearance period should be waived, and the servicer may re-amortize the loan if necessary to meet any investor restrictions. Second in order is Capitalization of Delinquency and Term Extension. This measure provides that if the servicer determines that the borrower is able to maintain the current contractual payment but cannot manage to pay the additional escrow repayment amount, then the servicer may offer a Cap and Extend Modification under the following terms. The servicer must: (1) capitalize the accumulated arrearages and eligible unreimbursed servicer advances, fees and costs into the modified mortgage balance; (2) extend the term up to 360 months; and (3) reduce the rate to no greater than 50 basis points greater than the most recent Freddie Mac Weekly Primary Mortgage Market Survey (PMMS) rate for 30-year, fixed-rate conforming mortgages (US Average), rounded to the nearest one eighth of one percentage (0.125%), as of the date a plan is offered to the borrower. Note that the post-modified PITI payment must be equal to or less than the pre-disaster payment.

If the servicer is unable to offer the borrower either the Term Extension or the Capitalization of Delinquency and Term Extension, the servicer may use a mortgage recovery advance to settle the delinquency and return the borrower to current status. The mortgage recovery advance is limited to an amount no greater than what is necessary to resolve any accumulated interest and unreimbursed servicer advances made during the forbearance, and it must meet all of the requirements included in paragraph 6.R. of the Loss Mitigation Guide found in Attachment 18-A of chapter 18.

3.5.3 Farm loans

On September 13, 2017, the Secretary of Agriculture announced that the USDA will provide "additional flexibility to assist farm loan borrowers."[151] "Financially stressed FSA farm loan borrowers affected by the hurricanes who have received primary loan servicing applications may be eligible for 60 day extensions."

A USDA Notice explains: "A borrower who has received a PLS (primary loan servicing) application, but has not returned it, or has submitted a partial but incomplete application, and was within the 60 day response timeframe as of August 23, 2017, in the case of Hurricane Harvey, or as of September 4, 2017, for Hurricane Irma, will receive an additional 60 days from the otherwise applicable due date to submit or complete the borrower's PLS application. All borrowers in affected counties who are notified of PLS availability after these dates, through December 31, 2017, will receive 120 days, rather than 60 days to respond to the notice."[152]

"A borrower who was sent a response to a PLS request (offer of restructuring, market value buy-out, etc.) and whose response timeframe was still open as of August 23, 2017, for Hurricane Harvey, or September 4, 2017, for Hurricane Irma will be provided an additional 60 days from the otherwise applicable due date to respond to the PLS offer."[153]

"A borrower with an open PLS offer will be contacted before closing to determine whether the hurricane affected the offer. For example, in the case of a restructuring offer, the disaster may have impacted the borrower's ability to follow the farm business plan supporting restructuring. If a borrower's PLS application is denied and is in an affected county, the borrower will be given an additional 60 days from the otherwise applicable due date to request reconsideration, mediation or appeal. All outstanding PLS applications that are contingent on security value (such as current market value buyout or debt writedown) will require FSA to reevaluate the security. If the security value has

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151 Press Release, U.D. Dep't of Agriculture, Farmers and Ranchers Affected by Hurricanes Harvey, Irma Granted Extra Time, Procedures, to Document and Claim Disaster Losses (Sept. 13, 2017), *available at* https://www.usda.gov/media/press-releases/2017/09/13/farmers-and-ranchers-affected-hurricanes-harvey-irma-granted-extra.

152 U.S. Dep't of Agriculture, Assisting Borrowers and Applicants Affected by Hurricanes Harvey and Irma, Notice FLP-769, Sept. 13, 2017, *available at* https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdafiles/Disaster-Assist/pdfs/flp_769.pdf.

153 *Id.*

changed, FSA will make a new PLS determination based upon the updated security value."[154]

Disaster Set Aside "response deadlines that were open on August 23, 2017, for Hurricane Harvey, and September 4, 2017, for Hurricane Irma will be extended 60 calendar days from the otherwise applicable due date."[155]

[154] *Id.*

[155] *Id.*

Boston Headquarters:
7 Winthrop Square
Boston, MA 02110-1245
Phone: 617/542-8010
Fax: 617/542-8028
www.nclc.org

NCLC®
NATIONAL CONSUMER LAW CENTER®
Advancing Fairness in the Marketplace for All

Washington Office:
1001 Connecticut Ave, NW
Suite 510
Washington, DC, 20036
Phone: 202/452-6252
Fax: 202/463-9462