Comments

of the

National Consumer Law Center (on behalf of its low-income clients)

and

National Housing Law Project

on

Request for Information Regarding Mortgage Refinances and Forbearances

87 Fed. Reg. 58487

Docket No. CFPB-2022-0059

November 28, 2022

The National Consumer Law Center, on behalf of its low-income clients, and the National Housing Law Project submit this comment specifically addressing the loss mitigation notices and credit reporting aspects of the mortgage servicing portion of the Request for Information. As the Bureau considers how best to incorporate streamlined and automation into the RESPA loss mitigation framework while protecting consumers from unnecessary harms and minimizing avoidable foreclosures, particularly in communities of color, clear consumer notices and credit reporting requirements are extremely important.

One significant potential drawback of the streamlining of loss mitigation is the lack of clarity for borrowers about how the streamlined options relate to (and differ from) other loss mitigation options that could be offered based on a complete application. In order to mitigate potential harm from confusion and misdirection, it is crucial to embed in the revised RESPA framework a clear written notice to the borrower providing a roadmap of the loss mitigation options and process. This roadmap notice, relevant to questions 1, 5, and 11 in the RFI, is discussed in section 1 below.

In section 2 below, we respond to the Bureau's question regarding what credit reporting changes should be considered related to forbearances and other short-term loss mitigation options. During the COVID-19 pandemic, Congress acted to protect consumers from undue credit harm by preventing negative credit reporting if a borrower obtained an accommodation from the lender or servicer, such as a forbearance or modification agreement, after experiencing a pandemic-related hardship. For the same reasons, we urge the Bureau to implement permanent changes to credit reporting that will reflect the policy goals of protecting borrowers who enter a short-term payment forbearance or are impacted by natural disasters and states of emergency.

1. Communications with borrowers regarding loss mitigation must include a roadmap of the loss mitigation process at certain key points (in response to questions 1, 5, and 11).

Borrowers need clearer information about the loss mitigation options available for their loan, especially in light of the expanded use of automated and streamlined loss mitigation reviews. A borrower who is entering or exiting a forbearance, for example, should receive clear information about what kinds of post-forbearance options they could pursue, either with or without a complete application. The notice we urge the Bureau to require would be a more tailored version of the existing Early Intervention notice required by 12 C.F.R. § 1024.39(b). The Bureau already recognizes that borrowers in default need a written notice providing a brief description of available loss mitigation options and how to apply for these options. However, in practice, that 39(b) notice has not given borrowers sufficiently clear or specific information to be useful. We ask that the Bureau create an improved notice, which we refer to as the roadmap notice, that would serve as the Early Intervention notice and would be sent at several other key points in time.

Upon certain triggering events, servicers should be required to send borrowers a written notice that provides information about loss mitigation. We call this key information the "loss mitigation roadmap." For some of these triggers, servicers already must give borrowers a form of written notice. The content of the notice described here would be in addition to any content now required for a notice upon the same triggering event.

a. Triggers for the loss mitigation roadmap notice

The triggers we propose for the loss mitigation roadmap notice include:

- The borrower's 45th day of delinquency and periodically while the loan remains delinquent;[1]
- The borrower's inquiry about loss mitigation;[2]
- Approval or denial of the borrower for forbearance;[3]

[1] Regulation X currently requires the servicer to send an Early Intervention notice at these times. 12 C.F.R. § 1024.39(b).

[2] Regulation X currently requires the servicer to give the borrower a notice with very limited content about loss mitigation upon receipt of an incomplete application. 12 C.F.R. §1024.41(b)(2)). Under current Regulation X, a communication from a borrower is deemed an "application" for loss mitigation if it meets two requirements. First, the borrower must express an interest in seeking to avoid foreclosure. Second, the communication must include some information that a servicer would typically use to evaluate whether a borrower qualified for loss mitigation. Official Interpretation Reg. X § 1024.41(b)(1)-3.

[3] Upon approval of a forbearance, Regulation X currently requires the servicer to give the borrower a notice describing the terms of the forbearance. 12 C.F.R. §1024.41(c)(2)(iii)).

- The approaching expiration of the borrower's forbearance, i.e., a fixed number of days before forbearance is scheduled to end;[4]
- A blind offer made upon an automated review;[5]
- An offer made upon consideration of limited borrower information, such as the borrower's affirmation that a proposed payment is affordable;[6]
- A denial of an option upon an automated review;[7]

With the exception of the notices related to blind offers and to the end of forbearance, Regulation X or investor rules already require that servicers provide a written notice to borrowers upon the events listed above. The loss mitigation roadmap notice does not create any significant new burden for servicers. Once the servicer has adapted the notice to the type of loan the borrower has, the servicer does not have to redraft the basic content for each transmittal, but can just select the roadmap applicable to the borrower's loan.

b. The content of the loss mitigation roadmap notice

The loss mitigation roadmap notice should include the following content:

- The identity of the entity that owns the loan and the identity of any federal entity that owns, insures, or guarantees the loan;
- A summary of the forbearance, post-forbearance, and other loss mitigation options that are available for the loan, including references to where the complete loss mitigation guidelines are available to the public. The summary should:
    - Include 2-3 sentences for each option: e.g., what is a forbearance, a deferral, a modification, retail sale, short sale, deed in lieu;
    - Mention any limit on the number of times a borrower can be considered for an option;

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4 The GSE servicing guides currently direct servicers to establish "Quality Right Party Contract" with a borrower when the end of a forbearance approaches. However, the guides allow but do not require a written notice. *See e.g.* Fannie Mae Lender Letter 2021-02 at 3-4, 99 (Feb. 25, 2021).

5 The current GSE Flex Mod blind offer letter to a borrower describes the terms offered but does not describe other home retention options available, including options available if the borrower submits a complete application.

6 Under current Regulation X the servicer must inform the borrower in writing of the type of option approved only if the borrower submitted a complete application. 12 C.F.R. §1024.41(c)(1)(ii). If an application is complete and the servicer denies a modification, the servicer must give written notice of reasons for denial of the modification and inform the borrower of appeal rights. However, the notice of denial, grounds for denial, and appeal rights are not required for denials of non-modification options. 12 C.F.R. §1024.41(d).

7 Under Regulation X and under current GSE and federal agency servicing guidelines there is currently no requirement for any form of notice to a borrower upon denial of a loss mitigation option upon the servicer's blind review.

    - Inform the borrower how to submit a RFI for more information on options available for the loan.[8]
- Information about how to request available loss mitigation options, including:
    - What is required for a complete application;
    - Which options are available without a complete application;
    - Which borrower actions trigger dual tracking protections.
- The outcome of any review for a loss mitigation option, including:
    - Identify the options the servicer reviewed;
    - Identify the options available but not reviewed;
    - Which options were approved and the calculations used for the terms approved;
    - Which options were denied and the calculations that led to the denial, including the valuation the servicer used for the borrower's property.

An important goal of the loss mitigation roadmap notice is to give the borrower information about the investor behind the loan - the entity that makes the loss mitigation rules for the loan. This information was critical for borrowers during the COVID-19 pandemic. Since the options available for COVID relief depended significantly on whether the borrower's loan was "federally related," borrowers needed to know whether a GSE or a federal agency, such as FHA, the VA, or RHS owned, guaranteed, or insured their loans. This information becomes even more critical in the post-forbearance context where options are less uniform than forbearances. The entire system of loss mitigation procedures created by the RESPA rules is based on servicers identifying the loss mitigation options available for a type of loan and reviewing borrowers for those options. Given the incidence of errors in the system, requiring servicers to provide this vital information to borrowers will promote accountability when a problem arises.

The roadmap notice combines short summaries of available options with information about where to go for more detailed information. The notice can designate publications or links where the details about options such as deferrals and modifications can be found. The Bureau, the GSEs, and federal guarantee agencies were able to create these summaries and directives during the COVID-19 pandemic.[9] Provision of such information by the servicer will provide transparency to enable borrowers, especially the many who are not being assisted by a professional already familiar with the loss mitigation options, to navigate the process. The Bureau can do consumer testing to find the best way to present the information.

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[8] The option of using an RFI to obtain information about options specific to this investor would be particularly useful for borrowers with non-federally backed loans.

[9] For example, the CFPB prepared written guidance for borrowers describing types of forbearance programs available by category of loan and included links for more detailed information. https://www.consumerfinance.gov/coronavirus/mortgage-and-housing-assistance/help-for-homeowners/learn-about-forbearance/. A servicer's loss mitigation roadmap notice could be more concise, as it would be tailored to the type of loan the borrower has. The GSEs prepared a similar tool for borrowers, summarizing forbearance, post-forbearance options available for their loans: https://www.fanniemae.com/here-help-single-family/options-after-forbearance-plan-or-resolved-covid-19-hardship.

The roadmap description of the application process and related protections is also critical. As described above, a nebulous “complete application” standard has frustrated buyers in need of help. It is assumed that servicers have guidelines that define what constitutes a complete application. The roadmap notice simply requires that the servicer identify those guidelines so the borrower can follow them. Moreover, explaining that protections attach when certain steps in the process have been satisfied will be helpful information for borrowers.

2. Forbearances and short-term loss mitigation should not result in detrimental credit reporting (response to question 6).

In Question 6, the Bureau asks:

> What changes, if any, should be considered relating to the impact that forbearances and other short-term loss mitigation solutions would have on a consumer's credit reporting?

We have two responses to this question, which are summarized below.

a. *If a consumer enters into a forbearance or other short-term loss mitigation option, then the lender or loan servicer should report the same status for the account as it stood prior to the accommodation*.

Accounts subject to forbearances and other short-term loss mitigation solutions should not be reported with additional or progressively worsening delinquencies on credit reports. Instead, the credit reporting treatment established by Section 4021 of the Coronavirus Aid, Relief, and Economic Security (CARES) Act[10] should apply, i.e., the account should be reported with the same status as it stood just prior to the forbearance or other accommodation.

The CARES Act provided that, if the consumer was current at the time they entered into a payment accommodation, such as a forbearance, the servicer was required to continue to report them as current so long as the consumer complied with the terms of the accommodation. If the consumer was 30 days or more overdue on a payment, a servicer would report the same past due status during the accommodation and, if the consumer brought the account current during that period, the servicer would report them as current. These protections prevented the credit report from showing the account falling further behind each month; the reporting would essentially freeze the credit reporting status at the time the consumer entered into the temporary accommodation.

Consumer report information is critical to consumers in accessing new credit, insurance, housing, and even employment. A homeowner who faces a financial hardship and receives temporary loss mitigation assistance in the form of a forbearance or other short-term plan should not be further harmed by having their credit report show they are falling further and further behind each month. The forbearance or short-term plan should pause the credit reporting clock to allow the homeowner to take full advantage of the temporary reprieve from making payments and eventually gain back their financial footing.

[10] As codified in Section 621(a)(1)(F) of the Fair Credit Reporting Act, 15 U.S.C. § 1681s-2(a)(1)(F).

COVID forbearance programs offered by the federally backed loans and some private lenders during the pandemic helped over 8 million borrowers gain a temporary financial reprieve from their monthly mortgage payments. Forbearance and other short-term relief programs are essential for homeowners whether they are in the midst of a national or personal economic crisis.

The CARES Act's credit reporting treatment should continue for forbearance or other short-term loss mitigation solutions after the national emergency is terminated. A short-term loss mitigation solution is designed to provide immediate, temporary relief for a financially struggling consumer to figure out the best course of action to regain their financial stability, including the difficult question of whether they can retain or must exit their home. It would defeat the purpose of providing this relief to a consumer if the consumer's credit report kept showing that they were falling further and further behind during the forbearance plan. It would limit the consumer's ability to a) access new credit to help ease other financial burdens and free up money to pay the loan, b) obtain a job that could help them afford the loan, or c) find new rental housing if they have to exit the home.

Lenders, servicers and the credit reporting industry have already instituted the systems and procedures necessary to follow the CARES Act, and they now have three years of experience in such reporting. Continuing such practices should be of little burden. Indeed, the Federal Reserve Board appears to have supported this approach for survivors of Hurricane Fiona and Ian by endorsing the practice of "Offering payment accommodations, such as allowing loan customers to defer or skip some payments or extending the payment due dates, which would avoid delinquencies and negative credit bureau reporting caused by disaster-related disruptions."[11]

b. Upon a Presidential declaration of a state emergency, lenders and loan servicers should be prohibited from reporting past due monthly mortgage payments for consumers in the designated emergency areas.

During times of a natural disaster or state of emergency, such as Hurricane Fiona in Puerto Rico and Hurricane Ian in Florida, or national emergencies such as the COVID-19 pandemic, homeowners need additional protections on credit reporting. Thousands of Americans are severely impacted both physically and financially by natural disasters such as hurricanes, and millions were impacted by the COVID-19 pandemic. As a result of these disasters, homeowners can face death or illness of loved-ones, severe damage to their homes, interruption or loss of their job, significant unexpected expenses, and dislocation for many months. From 2010 to 2019, the U.S. experienced 119 unique billion-dollar weather and climate-related disaster events with total costs in excess of $800 billion. Likewise, the unprecedented COVID-19 pandemic caused economic, emotional and physical upheaval to millions of homeowners.

The last thing these beleaguered homeowners need during such times of crisis is damage to their credit reports and scores from mortgage payments that they unavoidably missed, through no fault of their own. They also cannot be expected to expend the time and energy necessary to immediately obtain a short-term loss mitigation option for their mortgages. In such times of crisis, a family's focus must be on their immediate safety and wellbeing; a borrower has little time or energy to wait on the phone,

[11] Federal Reserve Board, Disaster Preparedness and Recovery Resources - Hurricanes Fiona and Ian (2022), https://www.federalreserve.gov/supervisionreg/hurricanes-fiona-and-ian-2022.htm.

potentially for hours, to discuss loss mitigation options with a loan servicer. At the height of the COVID pandemic, some homeowners and advocates waited five or more hours to even speak to a loan servicer representative, let alone obtain some type of relief. Immediate, automatic protection of distressed homeowners' credit reports and scores is imperative to increase their ability to regain their financial footing.

As discussed, the CARES Act provided an important mandate to all creditors to limit reporting to the status of the debt when the borrower entered a short-term loss mitigation plan. More should be done, however, to protect homeowners' credit reports and scores during times of both natural disasters and national emergencies. Upon a Presidential declaration of a state emergency, lenders and loan servicers should be prohibited from reporting past due monthly mortgage payments on the credit reports of consumers who reside in the designated emergency areas, regardless of their ability to access a short-term loss mitigation option. The Bureau should also issue an official interpretation clarifying that withholding such information from credit reports does not cause an inaccuracy under the Fair Credit Reporting Act.

For natural disasters, it is not sufficient to merely place the natural disaster code (AW) on an account, as described in the Consumer Data Industry Association's FAQ 58 –Reporting of Natural or Declared Disaster.[12] First, a 2018 report by the Consumer Financial Protection Bureau found that, since the AW code is optional on the part of lenders, many were choosing not to use it.[13] Second, the AW code is essentially useless to protect a disaster survivor's credit score with respect to FICO scores. FICO has stated that the code does not affect a FICO Score; thus negative information (e.g., 30 or 60 day late) during a disaster period will still lower the consumer's score despite the code's presence.[14] The AW code does help protect a consumer's VantageScore, because that model will not score accounts flagged with the code.[15] However, FICO is the dominant scoring model, used in 90% of lending decisions.[16] Consumers impacted by natural disasters need more than an optional code that--even when the lender uses it--does not protect their FICO score from harm.

In conclusion, we are grateful for the Bureau's attention to the need for a clear roadmap of loss mitigation options and the need to mitigate the credit reporting impacts of short-term hardships and

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[12] See https://crrg.s3.amazonaws.com/FAQ+58.pdf.

[13] CFPB, Natural Disasters and Credit Reporting (Nov. 2018), available at https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/bcfp_quarterly-consumer-credit-trends_report_2018-11_natural-disaster-reporting.pdf.

[14] FICO, *Credit Reporting in the U.S. During the COVID-19 Pandemic* (June 16, 2020), available at https://www.fico.com/en/covid-19-credit-reporting-impact-US.

[15] FinRegLab, *Disaster-Related Credit Reporting Options* (May 2020), available at https://finreglab.org/wp-content/uploads/2020/05/FinRegLab-Disaster-Related-Credit-Reporting.pdf.

[16] Mercator Research, FICO® Scores Used in Over 90% of Lending Decisions According to New Study (Feb. 27, 2018), available at https://www.mercatoradvisorygroup.com/fico-scores-used-in-over-90-of-lending-decisions-according-to-new-study.

natural disasters. We urge the Bureau to implement the changes described above, drawing from the lessons of the COVID-19 pandemic.