Loss Mitigation Procedures and Foreclosure Hurdles

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What does the loss mitigation rule require?

- Rule does not require servicer or owner to offer any specific loss mitigation option, nor does it require you to use any particular criteria to evaluate consumer for loss mitigation.
- However, if it applies to you then you are required to maintain policies and procedures reasonably designed to achieve the objective of properly evaluating consumers for loss mitigation options.

What does the loss mitigation rule require?

- Work with consumers to complete timely applications for loss mitigation.
- Evaluate applications (that are complete) within 30 days.
- Inform consumer whether servicer will offer consumer a loss mitigation option or, if denied, why.
- Timely evaluate any appeals to denial of loss mitigation.
- Refrain from beginning or completing foreclosure in some circumstances.

When does loss mitigation apply?

- Applies to federally related mortgage loans.
- Does not apply HELOCs and open-end lines of credit.
- Reverse mortgages.
- Where servicer is qualified lender under Farm Credit Act of 1971.
- Does not apply to loan secured by property that is not the consumer's principal residence.

When doesn't loss mitigation apply?

- Small servicers are exempt from most of the loss mitigation rules.

- However – Applies to rules prohibiting foreclosure actions unless consumer **<u>120 days</u>** delinquent and rules prohibiting servicer from moving for judgment of foreclosure if consumer is performing under loss mitigation…more on this in a bit.

A Note on Early Intervention with Delinquent Consumers

- (Unless you are a small servicer) you must establish or make good faith efforts to establish live contact with consumers by the 36^{th} day of delinquency
- And "if appropriate" promptly inform them of loss mitigation options.
- In addition (again, unless you are a small servicer) you must provide consumers with written information about available loss mitigation options by the 45^{th} day of delinquency.

Loss Mitigation Application

- When? – Must acknowledge receipt of application and review if you receive it 45 days or more before a foreclosure sale is scheduled or at any time when no foreclosure sale is scheduled.

Loss Mitigation Application

- What is considered an "Application"
  - Oral or written request
  - Accompanied by any information required by a servicer for the evaluation of loss mitigation options.

Loss Mitigation Application

- Then what:
  - Determine if the application is complete.
  - If incomplete, within 5 days of receipt notify consumer.
  - Inform consumer what additional documents are necessary to complete.
  - Identify a reasonable date by which the consumer should submit the missing information.

More on incomplete applications

- Servicer receiving an incomplete application may not evade the requirement to review all complete applications by reviewing only the incomplete application.
- Instead, must seek the information needed.
- If servicer has exercised reasonable diligence to complete the application and the application remains incomplete for a “significant period of time” the servicer may – in its discretion – review the incomplete application.

Loss Mitigation Application

- What are obligations when complete application received?
  - Complete review of application within 30 days.
  - 37 day cutoff → If application received less than 37 days prior to scheduled foreclosure sale there is no requirement (at least under these new rules) that the application must be assessed.

Review for all available loss mitigation options

- Must review a borrower for all loss mitigation options available to the borrower from the owner or assignee of a borrower's mortgage loan including home retention and non-home retention options.
- "Types of loss mitigation options. Loss mitigation options include temporary and long-term relief, including options that allow borrowers who are behind on their mortgage payments to remain in their homes or to leave their homes without a foreclosure, such as, without limitation, refinancing, trial or permanent modification, repayment of the amount owed over an extended period of time, forbearance of future payments, short-sale, deed-in-lieu of foreclosure, and loss mitigation programs sponsored by a locality, a State, or the Federal government." 12 CFR Part 1024 Supplement I (Official interpretation)

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How long does consumer have to respond?

It depends on how far in advance of a foreclosure sale the servicer receives a complete application:

- More than 90 days before sale – Consumer has at least 14 days to accept or reject offer.
- Between 37 and 90 days prior to sale – Consumer has 7 days to reject or accept.
- If consumer does nothing, then deemed rejected.

Denial of Loan Modification

- Must state the specific reasons for decision.
- If denial is based on a net present value calculation, servicer must include in notice the specific inputs used to determine value.
- If investor requirement is the basis for a denial then must describe investor requirements.
- If appeal is available, must state that the consumer may appeal and identify the deadline for appeal.

Consumer may appeal denial

- If a servicer receives a complete application 90 days or more before a scheduled foreclosure sale, the consumer may appeal the denial of a loan modification if the consumer does so within 14 days of the denial.

Who decides appeal?

- Appeal must include an independent evaluation which means that servicer cannot use the same personnel who evaluated the application.
- Must notify consumer within 30 days of the appeal of decision on appeal.

120 Delinquency Rule

- Prohibits servicer of a first lien residential mortgage loan for a home occupied by the borrower as a principal residence from making "the first notice or filing required by applicable law for any . . . foreclosure process unless the loan is more than **120-days delinquent**."

First Notice or Filing

- The new rule also prohibits servicers from making a first notice or filing at any time when the borrower is performing under a loss mitigation agreement.

- Prevents lender from moving for judgment or conducting a foreclosure sale if borrower performing.

Who does this rule apply to?

- All mortgage loan servicers, **including** banks that qualify for the small servicer exemption.
- Applies to all of you.
- Purpose of the rule – according to the regulators – to allow delinquent borrowers a period to submit a loss mitigation application and review available options.

Damages available for violation

- Consumers may sue for damages and recover actual damages or statutory damages of $2,000 in individual actions or up to 1% of the servicer's net worth in class actions.
- Consumers can also recover attorneys' fees.

What does delinquency mean?

- Rule is less than clear.
- Comments focus only on payment default – principal, interest, and escrow.

When does delinquency clock begin to run?

- “Delinquency begins on the day a payment sufficient to cover principal, interest, and if applicable, escrow for a given billing cycle is due and unpaid, even if the borrower is afforded a period after the due date to pay before the service assesses a late fee.” 12 C.F.R. Part 1024 Supplement (Official interpretation)

Endless cycles of delinquency…

- New rule appears to permit borrower to remain perpetually delinquent with no consequences.
- For example, what happens under these new rules when a borrower is 119 days delinquent and makes a payment to bring himself only 100 days delinquent?
- Probably can't foreclose under these facts.

What about other defaults?

- The rule refers to delinquency which is defined as payment default.
- What about failure to pay taxes? Failure to maintain insurance? Waste?
- Do you have to wait 120 days after these other default?

Questions?

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