A new CFPB interim final rule amending RESPA Regulation X, found at 12 C.F.R. § 1024.41(c)(2)(v) has the practical effect of providing new rights to homeowners exiting a mortgage loan forbearance related to the COVID-19 pandemic. See 85 Fed. Reg. 39,062 [1] (June 30, 2020); NCLC’s Mortgage Servicing and Loan Modifications § 3.8.2.10.3 [2]. The rule actually provides servicers with a new exception from mortgage servicing requirements, but also provides a number of consumer rights where a servicer seeks to take advantage of the new exception.

The General Rule as to Loss Mitigation Applications, the New Exception, and Why It Was Issued

When a homeowner seeks help from a servicer in making mortgage payments, existing CFPB rules require that the servicer obtain a complete application from the consumer. Most servicers are required to adhere to guidelines for loss mitigation options set by owners of loans, investors, or government insurers. Once the application is complete, the servicer must review the borrower not only for any specific loss mitigation option for which the borrower asked, but for all options offered by the owner or assignee of the homeowner’s mortgage. See NCLC’s Mortgage Servicing and Loan Modifications § 3.8.2.8 [3].

A servicer must not evade this duty as to complete applications by offering the borrower an option based on an incomplete application, called the anti-evasion rule. See Reg. X § 1024.41(c)(2). The anti-evasion rule already had two narrow exceptions and the new rule creates a third. For a discussion of these exceptions, see NCLC’s Mortgage Servicing and Loan Modifications § 3.8.2.10 [4].

Since over 5 million homeowners were given forbearances during the pandemic, servicers anticipate a flood of requests from homeowners asking for help with their mortgage payments. Under normal circumstances, this will require the servicer to work with each homeowner to obtain a good amount of information and then evaluate that information for possible loss mitigation. The CFPB issued the interim final rule creating the third exception to the anti-evasion rule out of concern that servicers would not be able to handle the large number of borrowers exiting COVID-19 forbearances, if they had to obtain for each homeowner a complete application and evaluate for each homeowner all loss mitigation options.

The new CFPB rule instead allows the servicer the option of not obtaining additional application information or evaluating various loss mitigation options, but instead to offer a “payment deferral,” as described below. While the interim final rule became effective on July 1, 2020, it is just now beginning to be used as borrowers exit forbearances.

Widespread Implications of the New Rule

Where a mortgage servicer seeks to take advantage of this new exception, this article explains the new options and rights homeowners have in repayment of their mortgage obligation. Because the new rule amends Reg. X § 1024.41, it is not limited to forbearance programs authorized by the CARES Act. It also applies to borrowers who were given COVID-19 forbearances by servicers of non-federally-backed mortgage loans, including loans held in private-label securitization trusts. Moreover, the exception may apply to a payment deferral option given to a borrower who had not received a forbearance but has owed mortgage payments that were incurred while the borrower was experiencing financial hardship due, directly or indirectly, to the COVID-19 emergency.

Where a mortgage servicer seeks to take advantage of the new exception, but fails to comply with the conditions for that exception, the consumer has a private right of action under RESPA for attorney fees, out of pocket and emotional distress damages, plus up to $2000 statutory damages where there is a pattern or practice. Statutory damages in class actions are capped at $1 million. For more information on RESPA mortgage servicing requirements and private remedies, see NCLC’s Mortgage Servicing and Loan Modifications Chapter 3 [5].

When Servicer Takes Advantage of Exception, Consumer Entitled to a “Payment Deferral”

To take advantage of the exception, the mortgage servicer must offer the homeowner a “payment deferral” that allows the homeowner to resume regular mortgage payments when a forbearance or delinquency ends and accounts for the months of missed payments by placing them at the end of the loan term. This prevents the borrower from facing a balloon payment immediately after the forbearance ends, but instead requires that the borrower must pay the deferred amount when the
mortgage loan is refinanced, the loan term has ended, the mortgaged property is sold, or any mortgage insurance on an FHA-

In addition, the amount deferred to the end of the loan must not accrue interest, the servicer must not charge any fees for the
deferral option, and the servicer must waive all existing late fees, penalties, stop payment fees, and other similar charges upon
the borrower’s acceptance of the deferral option. See Reg. X § 1024.41(c)(2)(v)(A)(2).

The new rule does not place any restrictions on the repayment method for the deferred amount once it becomes due. The
deferral option may require repayment either in a lump sum or over a period at the end of the loan term through additional
installment payments that would extend the loan term.

Support for payment deferrals is based on the view that most borrowers who are exiting COVID-19 forbearances did not have
payment problems before they faced unemployment and other financial hardships caused by the pandemic. Once these
borrowers return to work and resolve other financial hardships, it is believed they will be able to resume making their pre-
forbearance contractual installment payments. Of course, this deferral option is not suitable for borrowers who need other loss
mitigation assistance, such as a loan modification, because they are unable to resume making the regular payments.

**Amounts Subject to Payment Deferral**

The amount being deferred, which the new rule refers to as “covered amounts,” must include all principal and interest
payments forborne under a COVID-19 forbearance program. Reg. X § 1024.41(c)(2)(v)(A)(1). It also includes all other
principal and interest payments that are due and unpaid by a borrower experiencing financial hardship due, directly or
indirectly, to the COVID-19 emergency. Id.

If the amount being deferred was incurred under a forbearance, the forbearance given to the borrower must have been under a
program made available to borrowers experiencing a financial hardship due, directly or indirectly, to the COVID-19
emergency. Reg. X § 1024.41(c)(2)(v)(A)(1) adopts the definition of “COVID-19 emergency” found in the CARES Act. See
disease (COVID-19) outbreak declared by the President on March 13, 2020 under the National Emergencies Act (50 U.S.C.
1601 et seq.”).

**Escrow Amounts Not Required to Be Included in Payment Deferral**

The definition of “covered amounts” in new Reg. X § 1024.41(c)(2)(v)(A)(1) requires only that forborne and COVID-19
emergency-related principal and interest payments be included, and does not address how escrow deficiencies and shortages
arising from the forbearance will be paid. The CFPB stated that this was done to give servicers flexibility in how escrow
amounts are treated. Unfortunately, this means that some servicers can qualify for the exception from the anti-evasion rule
even if they demand a lump sum or additional installment payments to recover (1) escrow advances that were made by the
servicer during the forbearance period (which create an escrow account deficiency), and (2) any additional amounts to cover
escrow shortages that arise from the forbearance when an escrow analysis is conducted.

This potential for payment shock from escrow payment demands should not be a concern for borrowers with FHA loans
because the deferred amount under a COVID-19 National Emergency Standalone Partial Claim includes the full amount of the
periodic payments forborne during the forbearance period, including the escrow portion of each periodic payment. See FHA
Mortgagee Letter 2020-06 [6], at 4 (Apr. 1, 2020) (all arrearage amounts, which “consists of Principal, Interest, Taxes, and
Insurance”). A summary of the various foreclosure alternatives for borrowers with COVID-19 hardships is provided in
NCLC’s Summary of Foreclosure Alternatives for Borrowers with COVID-19 Hardships chart [7].

In addition, Fannie Mae and Freddie Mac have required that escrow advances made by the servicer during a COVID-19
forbearance must be included in the deferred amount. See Fannie Mae LL-2020-07 [8], at 4 (May 13, 2020); Freddie Mac
Bulletin, 2020-15 [9], at 4 (May 13, 2020). See also NCLC’s Summary of Foreclosure Alternatives for Borrowers with
COVID-19 Hardships chart [7].

For other loans, homeowners and their advocates should urge servicers to include escrow advances and shortages in the
defferred amount, or at least permit the borrower to pay these amounts in installments over a period longer than one year. See
NCLC’s Mortgage Servicing and Loan Modifications § 3.5.4.3 [10].
Deferral Must End Delinquency

The final requirement for the exception from the anti-evasion rule to apply is that the homeowner’s acceptance of a COVID-19 deferral offer must end any preexisting delinquency. Reg. X § 1024.41(c)(2)(v)(A)(3). While borrowers are not required to make periodic payments when they are in a forbearance program, the loan nevertheless becomes delinquent if payments are missed based on the definition of “delinquency” in Regulation X. See NCLC’s Mortgage Servicing and Loan Modifications § 3.7.2 [11].

Borrowers who are in forbearance for a period of four months or more without making payments, who then exit the forbearance without bringing the loan current, can face imminent foreclosure. This is because their loan is more than 120 days delinquent and the servicer is therefore not prohibited by Reg. X § 1024.41(f)(1)(i) from making the first notice or filing required under applicable law to initiate the foreclosure process. See NCLC’s Mortgage Servicing and Loan Modifications § 3.8.7.2 [12].

The new rule addresses this problem by providing that any prior delinquency is cured when the borrower accepts an offer for a COVID-19 deferral option that meets the requirements of the rule. This effectively gives the borrower a new 120-day pre-foreclosure review period under Reg. X § 1024.41(f)(1)(i) if the borrower later becomes delinquent after accepting the deferral option.

Servicer Compliance with Other Loss Mitigation Provisions When Opting for Exception from Anti-Evasion Rule

If the borrower accepts a COVID-19 deferral option that meets the requirements of the new rule, new Reg. X § 1024.41(c)(2)(v)(B) provides that the servicer is not required to continue the reasonable diligence efforts under section 1024.41(b)(1), or send an acknowledgement notice under section 1024.41(b)(2), with respect to a loss mitigation application the borrower submitted prior to acceptance of the offer. See NCLC’s Mortgage Servicing and Loan Modifications § 3.8.2.3 [13].

Note, however, that if the borrower does not accept a COVID-19-related deferral option offered under new Reg. X § 1024.41(c)(2)(v)(A) and the loan forbearance ends, the anti-evasion exception based on the forbearance under Reg. X § 1024.41(c)(2)(iii) no longer applies, and the servicer then has an immediate duty to act with reasonable diligence to collect information needed to complete the application. See NCLC’s Mortgage Servicing and Loan Modifications § 3.8.2.3 [13].

This duty to resume reasonable diligence efforts would also apply if the servicer does not offer the borrower a deferral option because, for example, the servicer cannot confirm that the borrower is able to continue making the full regular installment payment or the borrower does not satisfy other eligibility requirements for the deferral option set by the investor or regulator. In this situation the servicer must either offer the borrower a forbearance extension (if this option is available to the borrower) or immediately exercise reasonable diligence in obtaining documents and information to complete the application as required by Reg. X § 1024.41(b)(1).

The servicer must then evaluate the borrower for all available loss mitigation options within 30 days of receipt of a complete application as required by Reg. X § 1024.41(c)(1). See NCLC’s Mortgage Servicing and Loan Modifications §§ 3.8.2.3 [13], 3.8.2.7 [14].

“One-Bite” Exclusion Does Not Apply

A final note relates to the interplay between the new exception to the anti-evasion rule and the duplicative request exclusion under Reg. X § 1024.41(i). See NCLC’s Mortgage Servicing and Loan Modifications § 3.8.9 [15]. If the borrower is offered a COVID-19-related deferral option that qualifies for the exception, this offer and any acceptance of the offer is based upon an incomplete loss mitigation application. In fact, the CFPB stated that the “exception described under new § 1024.41(c)(2)(v)(A) is available only if the loss mitigation application is incomplete.” 85 Fed. Reg. 39,062 (June 30, 2020) [1].

Importantly, this means that the duplicative request exclusion under Reg. X § 1024.41(i) is not triggered by the borrower’s incomplete application that gave rise to the loan forbearance or payment deferral option. The servicer therefore must comply
with section 1024.41 for any application that is subsequently submitted by the borrower (at least until any subsequent application is fully evaluated and section 1024.41(i) then applies). Thus, a borrower who has accepted a COVID-19-related deferral loss mitigation option offered under section 1024.41(c)(2)(v)(A), but later finds that this option is not suitable because additional loss mitigation assistance is needed, may submit a new loss mitigation application, and the servicer must comply with section 1024.41 for that application.

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