CFPB Proposes Foreclosure Moratorium Through End of 2021

The CFPB has proposed a moratorium on most residential mortgage foreclosures until January 1, 2022. Specifically, the proposal would amend Regulation X, which implements RESPA, to prohibit a "large" servicer from commencing a foreclosure (whether judicial or nonjudicial) on any delinquent consumer-purpose loan secured by a borrower's principal residence until after December 31, 2021. The moratorium would not apply when a foreclosure is based on a borrower's violation of a due-on-sale clause or the servicer is joining a subordinate lienholder's foreclosure action.

The CFPB is worried about the unprecedented number of mortgage forbearances that will end in the coming months. On April 7, 2021, the agency issued "Bulletin 2021-02: Supervision and Enforcement Priorities Regarding Housing Insecurity," and on April 9, 2021, it issued its proposal to amend Regulation X. 86 FR 17897; 86 FR 18840. We are providing this article as a BCG Important Update because there is one aspect of the proposal that small servicers may want to comment on before the comment period expires on May 10, 2021.

Proposed Rule Amendments; Foreclosure Moratorium. The CFPB proposed to revise the early intervention and loss mitigation requirements in Regulation X's mortgage servicing rules (Sections 1024.39 and 1024.41). With two exceptions, those requirements only apply to large servicers, not small servicers. The two exceptions (that is, the two rules that also apply small servicers) are: (i) Section 1024.41(f)(1), which prohibits servicers from making the first notice or filing for any judicial or nonjudicial foreclosure process unless: (a) a borrower's mortgage loan obligation is greater than 120 days delinquent; (b) the foreclosure is based on a borrower's violation of a due-on-sale clause; or (c) the servicer is joining a subordinate lienholder's foreclosure action; and (ii) Section 1024.41(j), which, in short, prohibits dual tracking.

Under Regulation X, a small servicer is generally a servicer that services no more than 5,000 mortgage loans, consisting only of loans that the servicer or an affiliate owns or originated. This article focuses only on the aspects of the CFPB's issuances that would impact small servicers since most BCG members are small servicers, unless they service no mortgages at all.

The most interesting aspect of the April 2021 proposal is the foreclosure moratorium it would impose until the end of 2021. As noted above, the proposal would prohibit a large servicer from making the first notice or filing for foreclosure (judicial or nonjudicial) on all delinquent loans secured by a borrower's principal residence until after December 31, 2021. The Bureau is seeking comments on the proposal, including its proposed approach of excluding small servicers from the foreclosure moratorium. 86 FR at 18867. Thus, the CFPB has left the door open to expanding the foreclosure moratorium to apply to <u>small servicers</u> too. As a result, small servicers may wish to weigh in on this particular aspect of the proposal. The comment period ends <u>May 10, 2021</u>.

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In addition, the proposal would require a large servicer to discuss any forbearance options with a borrower when it establishes live contact with the borrower pursuant to Regulation X Section 1024.39 and would add a second temporary COVID-19 exception to Section 1024.41's loss mitigation rules. Those rules prohibit a large servicer from offering a loss mitigation option based on a borrower's incomplete loss mitigation application. Back in July 2020, the CFPB added one COVID-19 exception to this prohibition to permit mortgage servicers to offer loss mitigation options without obtaining a complete loss mitigation application if certain criteria are met. (Refer to the August 2020 BCG Newsletter for details regarding that exception.) If adopted, the recent proposed rule would codify a second COVID exception to allow a servicer to offer a loss mitigation option based on a partial (incomplete) application.

Bulletin 2021-02. In this Bulletin the CFPB noted that its supervision and enforcement will focus on how servicers respond to borrowers' loss mitigation requests and process loss mitigation applications. The CFPB urges servicers to allocate resources and to staff up loss mitigation departments to handle the potential onslaught of troubled borrowers. For example, the CFPB says it will be paying particular attention to:

- Whether servicers are providing clear and readily understandable information to borrowers about their payment assistance options;

- Whether servicers are complying with ECOA's prohibition against discrimination, such as managing communication with limited English proficient borrowers and not discounting protected income;

- Long hold time on phone lines that are significantly longer than industry averages;

- Whether servicers comply with federal and state foreclosure restrictions, such as the Regulation X foreclosure restrictions discussed above; and

- Whether servicers comply with the FCRA's accurate credit reporting requirements, including the CARES Act's requirement to report as current borrowers who are performing under a deferral agreement.

For large servicers, the CFPB will be paying close attention to their compliance with Regulation X's loss mitigation rules. Although the CFPB's goal is for servicers to prevent avoidable foreclosures, it recognizes that some foreclosures are unavoidable because borrowers will not be able to resume making payments post-forbearance.

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