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New Rules on the Horizon: NYDFS Proposes Overhaul to Mortgage Loan Servicer Business Conduct Rules

Almost 10 years after they were first adopted, the New York mortgage loan servicer conduct rules – Part 419 of the Superintendent of Financial Services' Regulations – may be undergoing significant change. The superintendent of the New York Department of Financial Services (NYDFS) has proposed for comment changes to Part 419 with the potential to expand the obligations of servicers operating in the state. Comments on the proposed changes are due **June 29, 2019**.

An Overview of the Rules and the Proposed Changes

New York first adopted Part 419 on an emergency basis on October 1, 2010 pursuant to the authority granted under the New York Mortgage Lending Reform Law that took effect a year earlier (July 2009). The Mortgage Lending Reform Law amended Section 590 of the New York Banking Law to require any person or entity engaged in the servicing of mortgage loans in the state to register with the NYDFS and to authorize the NYDFS to adopt a new regulatory framework for mortgage loan servicers. The NYDFS established application and registration procedures and financial responsibility requirements for servicers in Part 418 and regulates the business conduct of those servicers in Part 419. Every 90 days since initially adopting Part 419 on an emergency basis, the NYDFS has renewed the adoption, only once making adjustments to the rule text.

Below we generally address each of the topics covered by Part 419, in turn noting differences between the current and proposed versions of the rules. Before we do so, a few general notes on Part 419 merit mention.

First, the NYDFS has not proposed to change the types of loans Part 419 applies to. As with the current rules, the proposed version of Part 419 encompasses the servicing of first- and subordinate-lien forward and reverse mortgage loans.

Second, although Part 419 does not exempt federally chartered institutions (even if such institutions are not subject to registration under New York law), federal law may preempt certain provisions of Part 419 for these institutions.

Third, as amended in 2009, the Mortgage Lending Reform Law provides the NYDFS broad rulemaking authority, providing that the superintendent is "authorized and empowered to promulgate such rules and regulations as may in the judgment of the superintendent be consistent with the purposes of this article, or appropriate for the effective administration of this article," including rules and regulations applicable to regulated entities "as may be necessary and appropriate for the protection of consumers in this state" or as may be "necessary and appropriate to interpret and implement" or to enforce the applicable provisions of the Banking Law. The initial adoption of Part 419 represented one exercise of that rulemaking authority; with the proposed changes, the NYDFS would further expand its use of the authority.

Fourth, while Part 419 has long presented compliance challenges for traditional mortgage loan servicers, it is other entities that may meet the statutory definition of a "servicer" (for instance, passive investors such as holders of mortgage servicing rights) that may find the proposed amendments most difficult to address in their practices. Proposed requirements relating to topics such as affiliated business relationships, vendor management, and servicing transfers appear to apply with equal force to such entities, even though they may not otherwise engage in the underlying activities normally associated with such requirements.

Escrow Accounts

The current version of Part 419 includes abbreviated requirements relating to escrow accounts, namely: (1) in Section 419.5, a requirement for a servicer to make timely payments from an escrow account, in accordance with the provisions of the Real Estate Settlement Procedures Act (RESPA) and its implementing Regulation X and applicable New York law; and (2) in Section 419.7, which relates to the statement of account, a requirement for a servicer to treat escrow shortages, surpluses, or deficiencies in accordance with the provisions of RESPA and Regulation X.

The NYDFS proposes to establish in Section 419.2 dedicated escrow account requirements consistent with the requirements of federal law. Specifically, like the current version, Section 419.2 would require a servicer to address a shortage, surplus, or deficiency in a borrower's escrow account in accordance with RESPA and Regulation X or, with the borrower's consent, to apply a surplus to the principal balance of the borrower's mortgage loan. Additionally, the section would require a servicer identifying a deficiency in a borrower's escrow account that is not the result of a borrower's payment deficiency to conduct an escrow account analysis to determine the reasons for and extent of the deficiency. A servicer would have to provide a written explanation of the analysis to the borrower and would be precluded from seeking payment of the funds necessary to correct the deficiency from the borrower until 30 calendar days after delivery of the explanation.

Crediting of Payments

Section 419.6 sets forth requirements relating to the crediting of payments, including: (1) a general timeline for crediting payments; (2) clarification on the establishment of reasonable payment requirements; (3) guidance on the crediting of nonconforming payments and late payments; (4) a requirement for notice of noncredit; and (5) a requirement for a servicer to establish written policies and procedures for the handling of payment overages and shortages.

The NYDFS proposes to move payment crediting requirements to Section 419.3 and to make certain adjustments to the payment crediting requirements:

- Under the existing version of the rule, a servicer must ensure that payments are "accepted and credited, or treated as credited, on the business day received." By contrast, the proposed version of the regulation would require payments to be "credited on the business day received," with no exception for treating payments as credited.
- The NYDFS would remove the provision that under reasonable payment requirements, "[i]t should not be difficult for most consumers to make conforming payments." Further, the proposed regulation would deem a 5 p.m. cut-off time for receipt of mailed checks reasonable, rather than providing that such a cut-off "would be considered reasonable," providing greater certainty for servicers.
- The NYDFS would not adjust the timeline for crediting nonconforming payments (no later than five days after receipt), but would revise the language of the requirement to emphasize the consequences of a borrower's failure to comply with a servicer's reasonable payments requirements (which must be *provided* to the borrower in writing, as opposed to being "written," as under the current version of Part 419).

- The NYDFS proposes to clarify that late payments be credited "to interest, principal, taxes, insurance and other fees" – rather than merely being "credited" – before the collection of a late fee.

- The NYDFS would expand on the existing requirement that a servicer establish written policies and procedures for payment overages and shortages, clarifying that: (1) such policies and procedures must address unapplied funds and payments held in suspense accounts; and (2) if a servicer retains but does not apply a partial payment, the servicer shall, on accumulation of sufficient funds in a suspense or unapplied funds account to cover a periodic payment, treat the accumulated funds as a periodic payment and credit that payment to the borrower's loan.

- The NYDFS proposes to prohibit a servicer from applying funds from a suspense or unapplied funds account to pay fees until: (1) all unpaid principal, interest, and escrow amounts (if available) are paid and brought current; or (2) the loan is discharged or foreclosed.

The NYDFS has not proposed substantive changes to the requirements relating to use of the scheduled method of accounting or notice of noncredit.

Statement of Account

Currently, Section 419.7 sets forth requirements relating to a statement of account, including that a servicer must provide each borrower with an annual statement and, when requested by the borrower, payment histories. The NYDFS proposes to expand on these requirements, which would be moved to Section 419.4.

First, Section 419.4 would continue to require the provision of annual statements within 30 days of the end of the computation year. By contrast to the current version of the rule, however, Section 419.4 would require such statements to include (among other information required under the current version) "the application of all payments during such period." The NYDFS also proposes to update the reference to the relevant Regulation X requirement to reflect its reorganization into the Consumer Financial Protection Bureau's (CFPB) Mortgage Servicing Rules (12 C.F.R. § 1024.17(i)(l) and (j)).

Second, the NYDFS proposes to remove the requirement that a servicer "promptly provide a borrower with an accurate accounting in plain English of the debt owed when requested by the borrower or the borrower's authorized representative." Under the proposed Section 419.4, only the borrower could request a payment history, which would have to show the application of all payments made during the period (in addition to the date and amount of such payments, as under the current version).

Third, the NYDFS proposes to add expansive requirements for periodic statements, in keeping with the requirements of the Mortgage Servicing Rules. Specifically, for each billing cycle, Section 419.4 would require a servicer to provide a borrower with a periodic statement that includes:

- The amount due, including: (1) the payment due date; (2) the amount of any late payment fee, and the date on which a late payment fee will be imposed if payment has not been received; (3) if the transaction has multiple payment options, the amount due under each option; and (4) an explanation of the amount due, including the monthly payment amount (broken out by its application to principal, interest, and escrow), the total sum of any fees or charges imposed since the last statement, and any payment amount past due.

- A past payment itemization, including: (1) the total of all payments received since the last payment; and (2) the total of all payments received since the beginning of the current calendar year, including, for each itemization, a breakdown of the amounts applied to principal, interest, escrow, and fees and charges, and the amount currently held in any suspense or unapplied funds account, if applicable.

- A list of any transaction activity that causes a debit or credit to the amount currently due, including the date, a brief description, and the amount of the transaction for each listed activity.
- If the statement reflects a partial payment that was placed in a suspense or unapplied funds account, an explanation for how the borrower can have the funds applied to the loan balance provided: (1) on the front page of the statement; (2) on a separate page enclosed with the periodic statement; or (3) in a separate letter.
- Account information, including the outstanding principal balance, the current interest rate in effect for the mortgage loan, the date after which the interest rate may next change, and the existence of any potentially applicable prepayment penalty.
- An escrow statement, including the amounts deposited into and disbursed from escrow during the applicable period.
- If the borrower is more than 45 days delinquent, information including: (1) the date on which the borrower became delinquent; (2) a notification of possible risks that may be incurred if the borrower does not cure the delinquency (e.g., foreclosure); (3) an account history for the previous six months (or, if shorter, since the account was last current) showing the amount remaining past due from each billing cycle or, if any payment was fully paid, the date such payment was credited as fully paid; (4) if applicable, a notice indicating any loss mitigation program the borrower has agreed to; (5) if applicable, a notice of whether the servicer has made the first notice or filing for foreclosure; and (6) a breakdown of the total payment amount needed to bring the loan current (including actual fees and charges claimed), as well as the date upon which such amount will expire and will no longer be sufficient to bring the loan current.

Fourth, the NYDFS proposes to incorporate into Section 419.4 requirements from existing Section 419.9 relating to payoff balances. By contrast to the existing requirements for payoffs, we note that NYDFS proposes to: (1) require a "plain language" payoff statement, whereas currently the statement must be "clear, understandable and accurate"; (2) expand the timeline for providing a payoff statement from five business days to seven business days; and (3) limit the authority to request a payoff statement to the borrower (and not, as under the current version of Part 419, to include the borrower's authorized representative).

Fifth, and again consistent with the Mortgage Servicing Rules, Section 419.4 would clarify that its requirements do not apply to a borrower in Chapter 11 bankruptcy.

Fees

The NYDFS is considering widespread changes to the provisions relating to servicing fees, found in proposed Section 419.5 (as compared to Section 410.10).

Section 419.5 would update fee schedule requirements. Under the current version of Part 419, a servicer must maintain a current schedule of standard or common fees and make that schedule available on its website and to a borrower upon request. The proposed rule would clarify that the schedule must identify each fee, provide a "plain language" explanation of when and why the fee will be charged and state the amount of the fee or, if there is no standard fee, how the fee is calculated or determined. (The NYDFS proposes to define "plain language" to mean "a clear and coherent manner using words with common and every day meanings, appropriately divided and captioned reflecting its various sections, and understandable to those parties that will be receiving the content.") The proposed rule would no longer provide flexibility by permitting the expression of fees as a range of amounts. The proposed rule does not clarify whether foreclosure or bankruptcy fees qualify as "standard or common fees."

Proposed Section 419.5 would further clarify the types of fees a servicer may charge. The proposed section would require a fee to also be reasonably related to the cost of rendering a service, in addition to meeting one of the following conditions: "(1) the fee is expressly authorized and clearly and conspicuously disclosed by the loan instruments and not prohibited by law; (2) the fee is expressly permitted by law and not prohibited by the loan instruments; or (3) the fee is not prohibited by law or the loan instruments and is for a specific service requested by the borrower that is assessed only after disclosure of the fee is provided … and the borrower expressly consents to pay the fee in exchange for the service."

In Section 419.5 the NYDFS proposes to make three changes to the restriction on attorneys' fees. First, the proposed rule incorporates the restriction in Civil Practice Law and Rules 3408(h) that prohibits a party to a foreclosure action from requiring payment from the other party for any costs, including attorneys' fees for appearance at or participation in the settlement conference. Second, the restriction on attorneys' fees charged in connection with a foreclosure action is removed. Third, attorneys' fees charged in connection with a loss mitigation option, reinstatement, or loan satisfaction (rather than "payment in full" in the current rule, which arguably could extend to partial satisfactions) must be (1) reasonable and customary for the work that is actually performed *by an attorney*; and (2) disclosed to the borrower before entering into the agreement governing the loss mitigation option, reinstatement, or loan satisfaction.

The proposed rules align the requirements under proposed Part 419 with the limitation on late charges found under New York Real Property Law Section 254-b. Notably, proposed Section 419.5(d)(2) would exempt from the 2 percent limitation on late fees "loans or forbearances insured by the federal housing commissioner or for which a commitment to insure has been made by the federal housing commissioner or to any loan or forbearance insured or guaranteed pursuant to the provisions of an act of congress entitled 'Servicemen's Readjustment Act of 1944.'"

Proposed Section 419.5 would restrict a servicer from charging a property valuation fee to a borrower more than once in a 12-month period. However, a servicer may charge a reasonable fee for a property valuation to facilitate a borrower's application for a loss mitigation option provided that the servicer previously provided a property valuation without charge in the preceding 12 months.

Finally, proposed Section 419.5 would prohibit a servicer from charging a borrower for the annual escrow statement or for one payment history provided to a borrower in a 12-month period. To the extent the request for a payment history is a valid information request, the CFPB Mortgage Servicing Rules also prohibit such a fee.

Borrower Complaints and Inquiries

Existing Section 419.4 requires a servicer, in addition to following the RESPA requirements relating to "Qualified Written Requests," to "have procedures and systems in place to respond to and resolve borrower inquiries and complaints in a prompt and appropriate manner," including through designated customer service personnel and a toll-free or collect calling telephone number; the superintendent has discretion to waiver or modify that requirement. Proposed Section 419.6 would neither provide such discretion nor specifically require compliance with RESPA. As proposed, the section would require servicers to establish and maintain: "(1) procedures and systems to respond to and resolve borrower complaints and inquiries in accordance with the requirements of [Part 419]; (2) a customer service department staffed by trained personnel to whom borrowers may direct complaints and inquiries; and (3) a toll-free number or collect calling service that enables borrowers to speak with a living person, during regular business hours, trained to answer inquiries and instruct borrowers on how to file written complaints." These requirements may be particularly difficult for those that meet the definition of a servicer but do not have borrower-facing contact, such as passive investors and holders of mortgage servicing rights.

Additionally, the proposed section would require a servicer to provide "clear and conspicuous" disclosure to borrowers in its monthly mortgage statement or annual coupon book, annual statement, and website of where a borrower can direct complaints or inquiries, a toll-free number or collect calling service, or whether the servicer is registered with the superintendent. The NYDFS defines "clearly and conspicuously" as "that the statement, representation or term being disclosed is of such size, color, and contrast and is so presented to be readily noticed and understood by an ordinary consumer."

Residential Mortgage Loan Delinquencies and Loss Mitigation Efforts

Proposed Section 419.7 would broaden the requirements under existing Section 419.11, which governs the handling of residential mortgage loan delinquencies and loss mitigation efforts, including an obligation to make reasonable and good-faith efforts to pursue appropriate loss mitigation options, including loan modifications. Proposed Section 419.7 includes requirements for procedures and protocols for handling loss mitigation, including providing borrowers with information about the servicer's loss mitigation process, decision-making, and available counseling programs and resources. In many respects, proposed Section 419.7 largely mirrors the requirements under the Mortgage Servicing Rules, with some notable exceptions:

- ***Single Point of Contact:*** Proposed Section 419.7(b) largely adopts the federal continuity of contact requirements under 12 C.F.R. § 1024.40, requiring that a servicer assign a single point of contact (SPOC) to certain delinquent borrowers. However, proposed Section 419.7(b) goes beyond the federal requirements in several important respects. First, it requires that a SPOC be assigned to borrowers *who are at least 30 days delinquent or have requested a loss mitigation application* (or earlier at the servicer's option). Under the federal rules, a servicer is only required to assign a SPOC by the forty-fifth day of a borrower's delinquency. Second, proposed Section 419.7(b) would require an assigned SPOC to have *direct and immediate access* to personnel with the authority to stop foreclosure proceedings in accordance with proposed Sections 419.10(a)(4) and (5) and an obligation to *communicate immediately* to such personnel any information received by the SPOC indicating that it may be necessary or appropriate to stop a foreclosure proceeding. If adopted, servicers will need to review and update their policies, procedures, and controls to ensure that SPOCs comply with their obligation to immediately communicate any information they receive indicating that it may be necessary or appropriate to stop a foreclosure proceeding.

- ***Late Payment Notice:*** Proposed Section 419.7(c) would require a servicer to send a late payment notice to a borrower, at the borrower's last known address, no later than 17 days after the payment becomes due and remains unpaid. However, a servicer is exempt from this requirement in two situations. First, a servicer is not required to provide the notice if it is inconsistent with the automatic stay provisions of the U.S. bankruptcy laws. Second, once a servicer has provided a borrower with a late payment notice, it is not required to send another notice until after the borrower becomes current on all payment obligations and then does not make another scheduled payment for 17 calendar days after it becomes due.

- ***Early Intervention Notice:*** Proposed Section 419.7(c) would largely adopt the federal early intervention notice requirements imposed under 12 C.F.R. § 1024.39. For example, the proposed section would require a servicer to provide the borrower with a written notice no later than the forty-fifth day of a borrower's delinquency. Notably, while existing Section 419.11(a) requires a servicer to provide much of the same information to delinquent borrowers, proposed Section 419.7(c) would require such information to be provided in written form. Moreover, proposed Section 419.7(c) appears to exceed the federal requirements in certain respects. First, the written notice must include the following additional information: (1) the nature and extent of the delinquency; (2) the servicer's loss mitigation protocols; and (3) information on the availability of housing counseling services and that such information can be obtained by contacting the NYDFS. Second, proposed Section 419.7(c) does not appear to provide a partial exemption

for borrowers in bankruptcy or for mortgage loans for which any borrower has provided a cease and desist notice pursuant to the Fair Debt Collection Practices Act. This would appear to be a notable departure from the federal rules and could create compliance challenges when a servicer is partially exempt from the federal requirements but arguably still required to comply with New York law.

- ***Acknowledgment Notices:*** Proposed Section 419.7(d) largely retains the requirements under current Section 419.11(c), relating to acknowledgment notices, with some notable exceptions. First, a servicer would be required to provide a written acknowledgement *within five business days* after receiving the borrower's loss mitigation application, a significant reduction from the 10 business days that a servicer currently has. Moreover, if a servicer determines that a borrower's loss mitigation application is incomplete, the notice must also:
  - Identify with specificity any additional documents or information that the borrower must submit to make the loss mitigation application complete and a reasonable date by which the borrower should submit the documents and information necessary to make the loss mitigation application complete.
  - State the effect of the borrower's failure to submit all required documentation, including potential denial of the loss mitigation application, commencement of a foreclosure action, or continuation of pending foreclosure action.
  - State the action that the servicer will take if the borrower does not submit the documents or information necessary to make the loss mitigation application complete within the time specified in the letter.
- ***Evaluation of Loss Mitigation Applications:*** Proposed Section 419.7(e) largely adopts the Mortgage Servicing Rules' requirements for the evaluation of loss mitigation applications, with some additional borrower protections. For example, a servicer would be required to evaluate loss mitigation applications received more than 37 days before a foreclosure sale within 30 days of receiving the application. However, a servicer would also be required to review any initial determination to deny a loss mitigation option by supervisory personnel who were not involved in the initial determination.

  Additionally, similar to the Mortgage Servicing Rules, proposed Section 419.7(e) would allow a servicer to evaluate an incomplete application if, despite the servicer's reasonable diligence, the loss mitigation application remains incomplete. However, this proposed provision appears to depart from its federal counterpart in one notable respect. Specifically, under 12 C.F.R. § 1024.41(c)(2)(ii), a servicer may evaluate an incomplete application only when the application remains incomplete "for a significant period of time under the circumstances." The official commentary to Regulation X provides that a significant period of time under the circumstances may include consideration of the timing of the foreclosure process. By way of example, the official commentary indicates that "if a borrower is less than 50 days before a foreclosure sale, an application remaining incomplete for 15 days may be a more significant period of time under the circumstances than if the borrower is still less than 120 days delinquent on a mortgage loan." By establishing a bright-line 30-day requirement, there may be circumstances when proposed Section 419.7(e) conflicts with the timing requirements under the federal rules. Nevertheless, we note that neither proposed Section 419.7(e) nor its federal counterpart requires a servicer to evaluate an incomplete application.

- ***Notice of Loss Mitigation Application Determination:*** Proposed Section 419.7(f) would also expand the notice requirements when a borrower's loss mitigation application is either approved or denied. In particular, if a servicer grants a loss mitigation application, it must provide the borrower with a written notice that discloses the following information:

  i. the nature of the loss mitigation option being offered to the borrower;

  ii. … the amount of time the borrower has to accept or reject the offered loss mitigation option;

  iii. the material terms, costs and risks of the loss mitigation option offered and any material changes the loss mitigation option would make to the borrower's mortgage loan, including but not limited to:

    a. changes to the term of the mortgage loan;

    b. a breakdown of the loan balance and an itemization of any fees or charges assessed; and

    c. any amounts capitalized and applied to the balance of the mortgage loan.

  If a servicer denies a borrower's loss mitigation application, proposed Section 419.7(f) would require, in addition to the requirements under current Section 419.11(d), the servicer's written notice to disclose that the borrower has a right to appeal the denial, what the borrower must do to appeal, and the amount of time the borrower has to appeal. In addition, the notice must disclose the borrower's right to obtain, upon his or her request, the result of any evaluation of the net present value of a loan modification performed by the servicer.

- ***Borrower Response to Servicer's Loss Mitigation Offer:*** Proposed Section 419.7(g) would largely adopt the provisions under the Mortgage Servicing Rules relating to the timeframe within which a borrower must respond to a servicer's loss mitigation offer. Notably, if a servicer receives a complete loss mitigation application 90 days or more before a foreclosure sale, the servicer may require a borrower to accept or reject an offer of a loss mitigation option *no earlier than 30 days after the loss mitigation option is offered to the borrower*. This would more than double the 14-day time period applicable under the federal rules.

- ***Appeals:*** Proposed Section 419.7(h) would largely retain the requirements in current Section 419.11(d) but would more closely align the appeal process requirements with those under federal law. Notably, however, it would allow a borrower to appeal a denial of any loss mitigation option. This provision greatly expands a borrower's right to appeal under federal law, which only permits a borrower to appeal a servicer's determination to deny a borrower's loss mitigation application for any trial or permanent loan modification program.

Volume of Servicing Report

Proposed Section 419.8 maintains the requirement for each servicer (registered or exempt) to compile and submit a quarterly report of its servicing activity in the state within 30 days of the end of each calendar quarter in a format required by the superintendent. The provisions of current Section 419.12, enumerating the types of information covered by these reports, would be repealed.

Books and Records and Annual Reports

Both registered servicers and exempt entities are subject under Part 419 to extensive recordkeeping requirements to facilitate the superintendent's supervision of activities. The NYDFS proposes to move these requirements from Section 419.13 to Section 419.9 and to adjust certain requirements, specifically by:

- Specifying that a servicer must maintain records of all telephone and written communications for three years.
- Clarifying that the scope of communications with the borrower that are within the scope of the retention requirement include:

  all communication and information relating to a complaint and documentation reflecting the date the servicer received the complaint, the name(s) of the servicer personnel assigned to investigate the complaint, the nature of the complaint, the status of the complaint (*e.g.,* open, resolved), and the action the servicer has taken with respect to the complaint.

- Expanding the scope of the required delinquency and foreclosure reporting and analysis, including loss mitigation activity, and requiring a servicer to compare such data (and not only its foreclosure and delinquency rates, as under current regulations) to reports published by industry, investors, and others.

Servicing Prohibitions and the Duty of Fair Dealing

Proposed Section 419.10 combines the servicer's duty of fair dealing (current Section 419.2), servicer prohibitions (current Section 419.14), and certain modification and foreclosure provisions (current Section 419.11) into new Section 419.10. Rather than a suggestion, as currently phrased, this section would impose a duty on a servicer to: (1) structure a modification that, at the time of modification, results in payments that are "reasonably affordable and sustainable for the borrower"; and (2) consider foreclosure alternatives when a borrower demonstrates "imminent risk of delinquency … as the result of a financial hardship or has experienced a financial hardship and is unable to maintain the [current] payments … under the mortgage loan or is unable to make up the delinquent payments and … [when] the net present value of the income stream expected from a loss mitigation option is greater than the net present value of the income stream that is expected" as a result of a foreclosure sale.

Currently the rules provide that a servicer *should* avoid initiating a foreclosure action "if the borrower has requested and is being considered for a loss mitigation option or if the borrower is in a trial or permanent modification and is not more than 30 days in default under the modification agreement." The proposal would prohibit a servicer from initiating a foreclosure action against a borrower if the borrower submits a complete loss mitigation application to the servicer unless the servicer has determined and provided notice that no loss mitigation options are available and the borrower has exhausted any appeal rights, the borrower has rejected all loss mitigation options offered, or the borrower is more than 30 days in default under a trial or permanent modification. A servicer also would be prohibited for a single incomplete loss mitigation application from a borrower from initiating foreclosure when a borrower submits an incomplete loss mitigation unless the borrower hasn't provided the documents necessary for a complete loss mitigation application within 15 business days after the servicer's request.

Additionally, the proposed section would prohibit a servicer from moving for a judgment of foreclosure and sale or conducting a foreclosure sale when: (1) a borrower is in compliance with a trial modification, forbearance, or repayment plan; (2) all the parties have agreed to a short sale or deed in lieu, and proof of funds or financing has been supplied to the servicer; or (3) a borrower submits a complete loss mitigation application more than 37 days before a foreclose sale unless the servicer has determined and provided notice that no loss mitigation options are available and the borrower has exhausted any applicable appeal rights, the borrower has rejected all loss mitigation options offered, or the borrower is more than 30 days delinquent under a trial or permanent modification.

Oversight of Third-Party Providers

Proposed Section 419.11 would provide broad and detailed requirements for overseeing a servicer's "third-party provider," meaning "*any* person or entity retained by or on behalf of the servicer, including, but not limited to, foreclosure firms, law firms, foreclosure trustees, and other agents, independent contractors, *subsidiaries and affiliates*, that provides insurance, foreclosure, bankruptcy, mortgage servicing, including loss mitigation, or other products or services, in connection with the servicing of a borrower's loan." The proposed section would require a servicer to maintain policies and procedures overseeing third-party providers generally and more specific requirements for overseeing counsel and trustees of foreclosure proceedings. More generally, a servicer's policies and procedures would have to require:

- The servicer to perform "appropriate due diligence" of the service provider's "qualifications, expertise, capacity, reputation, complaints, information systems, document custody practices, quality assurance plans, financial viability, and compliance" with applicable laws.
- The third-party provider to comply with the servicer's "applicable policies and procedures and applicable New York and federal laws."
- The servicer to "remain responsible for all actions" taken by the third-party provider.
- Clear and conspicuous disclosure to borrowers if it uses a third-party provider and that the servicer "remains responsible for all actions taken" by the provider.
- Periodic reviews, not less than annually, of each third-party provider by servicer employees "who are separate and independent of employees who prepare foreclosure or bankruptcy" documents (such as affidavits) covering certain types of information.
- All third-party providers to have "appropriate and reliable contact information" for relevant servicer employees.
- The servicer to take "appropriate remedial steps if the servicer identifies any problems" through the periodic reviews or otherwise, including terminating the relationship with the third party.

Additionally, policies overseeing and communicating with counsel and trustees of foreclosure proceedings would have to, at a minimum:

- Ensure that foreclosure and bankruptcy counsel have an appropriate servicer contact to assist in legal proceedings and to facilitate loss mitigation questions on a borrower's behalf.
- Address "how notice will be provided to foreclosure attorneys and trustees regarding a borrower's status for consideration of a loss mitigation option and whether the borrower is being evaluated for" or is in a modification.
- Through policy and procedures, require foreclosure attorneys to comply with all applicable legal requirements, including New York law regarding mandatory settlement conferences in residential foreclosure actions, and "all relevant Administrative Orders of the Chief Administrative Judge of the Courts of New York."

Mortgage Servicing Transfers

Proposed Section 419.12, which addresses pending loan modifications, would require a transferee servicer to provide to the borrower with the first monthly statement a copy of its welcome packet and a Section 419.4-compliant payment history. First, if at the time of a servicing transfer a borrower is complying with the terms of a trial loan modification, the transferee must allow the borrower to continue to make those payments for the remainder of the trial modification period. Second, for a borrower who successfully completed a trial modification before servicing transfer but has not received a permanent loan modification, the transferor servicer must allow the borrower to continue to make trial modification payments until the transferee can provide a permanent modification. On the topic of trial modification conversions, the CFPB has cited servicers for UDAAP risk when a significant portion of borrowers who met the requirements for a permanent modification faced conversion delays greater than 30 days. Third, a transferee servicer cannot refuse to consider a borrower for a loss mitigation option because of the denial by the transferor servicer.

Affiliated Business Arrangements

In what may be the first of its kind, proposed Section 419.13 would effectively expand RESPA's affiliated business provisions that apply in the origination context to mortgage servicing. First, the proposed section would require all affiliated business relationships to be negotiated at market rate. Second, it would prohibit a servicer from giving or accepting any fee or thing of value pursuant to such arrangement other than a return of ownership interest (as defined), bona fide dividends and capital and equity distributions related to ownership interest or franchise relationship, and bona fide business loans that are not fees for the referral of settlement service business or unearned fees. Third, servicers would be required to provide *each* borrower whose mortgage is subject to an affiliated business arrangement a written disclosure of the relationship, including an explanation of the ownership and financial interest between the parties to the arrangement and an estimated charge or range generally made by such affiliate. Proposed Section 419.1 would define an "affiliated business arrangement" as "any business arrangement between a servicer or mortgagee and a person or entity that directly, or indirectly, through one or more intermediaries, controls, or is controlled by or is under common control with the servicer or mortgagee."

Conclusion

The NYDFS's initial promulgation of Part 419 reflected the investment of significant time and consideration of public comment, given the potential for the adoption to impact servicers doing business in the state. Since the proposed changes are significant in scope, we expect a similar undertaking by the NYDFS, as it once again would alter how servicers do business.

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