



Financial Services & Products ADVISORY ■

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Regulatory Agencies Issue Mortgage Servicing Guidance and FAQs for the CARES Act

On April 3, 2020, in response to the COVID-19 pandemic and the recent enactment of the Coronavirus Aid, Relief, and Economic Security (CARES) Act, the federal financial institution regulatory agencies (Consumer Financial Protection Bureau, Federal Reserve, Federal Deposit Insurance Corporation, National Credit Union Administration, and Office of the Comptroller of the Currency) and the Conference of State Banking Supervisors (CSBS) issued a [joint policy statement](#) announcing a flexible supervisory and enforcement approach to certain consumer communications required by Regulation X mortgage servicing rules.

According to the agencies, the joint policy statement and guidance is intended to facilitate mortgage servicers' ability to place consumers in forbearance programs such as the one required by the CARES Act. Section 4022 of the CARES Act [grants forbearance rights and protection against foreclosure](#) to borrowers with a "federally backed mortgage loan." During the covered period, borrowers who are experiencing a financial hardship during the coronavirus pandemic may request initial forbearance from their servicers to defer their loan payments for up to 180 days.

The policy statement clarifies that a CARES Act forbearance qualifies as a short-term payment forbearance program under Regulation X, so it is excluded from some of the otherwise applicable loss-mitigation requirements. The agencies state that they do not intend to take supervisory or enforcement action against mortgage servicers for:

- Failing to provide the acknowledgment notice described in Regulation X, 12 CFR 1024.41(b) within five days of the receipt of an incomplete application (whether the servicer receives the incomplete application before or during the forbearance or repayment plan period), provided the servicer sends the acknowledgment notice before the end of the forbearance period, for a short-term payment forbearance program (or the end of the repayment period, for a short-term repayment plan).
- Delays in sending the loss mitigation-related notices and taking the actions described in Regulation X, 12 CFR 1024.41(b)-(d), (h)(4), and (k), which, among other things, include the five-day acknowledgement notice, the 30-day evaluation and notice, and the appeals notice, provided that servicers are making good faith efforts to provide these notices and take the related actions within a reasonable time.

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- Delays in establishing or making good faith efforts to establish live contact with delinquent borrowers as required by Regulation X, 12 CFR 1024.39(a), provided that servicers are making good faith efforts to establish live contact within a reasonable time.
- Delays in sending the written early intervention notice to delinquent borrowers required by Regulation X, 12 CFR 1024.39(b) (the 45-day letter), provided that servicers are making good faith efforts to provide this notice within a reasonable time.
- Delays in sending the annual escrow statement required by Regulation X, 12 CFR 1024.17(i), provided that servicers are making good faith efforts to provide these statements within a reasonable time.

Concurrent with the release of the joint policy statement, the CFPB separately issued additional compliance guidance ([The Bureau's Mortgage Servicing Rules FAQs Related to the COVID-19 Emergency](#)). In addition to its FAQs, the CFPB also recently released a [consumer guide to coronavirus mortgage relief options](#) and a [video](#) for consumers seeking to understand the CARES Act forbearance provisions.

The mortgage servicing FAQs address the following topics:

- Short-term forbearance program and short-term repayment plan requirements under the CFPB Servicing Rules
- Loss-mitigation requirements applicable to an evaluation of an incomplete loss-mitigation application
- Live contact and written notice early intervention requirements
- Continuity of contact
- Escrow administration
- Electronic delivery of servicing notices
- Payoff statements
- Small servicer exemption

These actions are the latest taken by the agencies to address mortgage servicing issues resulting from the COVID-19 pandemic. While helpful, many servicer questions and concerns remain.

What is the "covered period" for purposes of Section 4022 of the CARES Act?

While "covered period" is defined in other sections of the CARES Act, Section 4022 lacks its own definition. One can argue that there is an implied "covered period" within Section 4022 because (1) the borrower must attest to a financial hardship *during* the "COVID-19 emergency"; and (2) a "COVID-19 emergency" is defined as the national emergency declared by President Trump on March 13, 2020 under the National Emergencies Act (NEA). Under the NEA, unless the President requests an extension, an emergency declaration terminates: (1) if the President issues a proclamation rescinding it; (2) if Congress passes a joint resolution terminating the emergency within six months of its issuance; or (3) automatically one year following the date of issuance. Accordingly, there appears to be an implied covered period associated with this section: March 13, 2020 until the earlier of March 12, 2021 or action by either the President or Congress to terminate the emergency declaration, unless the President requests an extension. To add further confusion, the President's [Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease COVID-19 Outbreak](#) proclaims "that the COVID-19 outbreak in the United States constitutes a national emergency, beginning March 1, 2020."

Can a servicer require that the borrower provide a written attestation to a COVID-19 hardship?

Section 4022 provides that a servicer shall provide a borrower's requested forbearance "with no *additional documentation* required *other than* the Borrower's attestation to a financial hardship caused by the COVID-19 emergency." It would seem permissible under the CARES Act—and even prudent for record-retention purposes—to request a borrower to attest in writing to a COVID-19 hardship. The joint policy statement sidesteps this question, however, providing that "[s]ervicers *must* provide a CARES Act forbearance if the borrower makes this request and affirms that the borrower is experiencing a financial hardship during the COVID-19 emergency. Servicers *may not* require any *additional information* from the borrower before granting a CARES Act forbearance."

Should servicers report the status of loans on forbearance that are related to COVID-19 hardship?

The CARES Act amends the Fair Credit Reporting Act to provide that when a forbearance is offered, the furnisher shall "report the credit obligation or account as current." Left unclear, however, is whether an account can also be marked deferred if the account is in forbearance or deferred due to natural disaster. The CFPB previously issued a [supervisory statement on credit reporting](#). While the CFPB encourages furnishers to continue to furnish information to credit reporting agencies despite the current crisis, there is scarce guidance from the CFPB on the nuts and bolts of reporting a CARES Act forbearance.

What is being done to address mortgage servicer liquidity concerns?

On April 4, 2020, a broad coalition of housing industry trade associations released a [statement](#) "calling on government regulators to provide a source of liquidity to those mortgage servicers that may need additional capacity to support homeowners and renters impacted by COVID-19."

The Mortgage Bankers Association has also [requested](#) that the Treasury Department and the Federal Reserve develop a liquidity facility to support the mortgage servicing sector in anticipation of widespread borrower payment forbearance.

On March 27, 2020, Ginnie Mae [announced](#) that it would be creating a Pass-Through Assistance Program (PTAP) through which issuers with a principal and interest (P&I) shortfall may request that Ginnie Mae advance the difference between available funds and the scheduled payment to investors. According to Ginnie Mae, "PTAP's purpose will be to support the forbearance and loss mitigation programs of our insuring agency partners (FHA, VA and USDA) by minimizing potential disruption in the mortgage servicing market so that those federal mortgage insurance and guarantee programs can be administered efficiently and with maximum help to borrowers."

This program, once launched, will be effective immediately for single-family program issuers, with additional program terms for reverse mortgages (HMBS) and multifamily issuers announced shortly after. Advancing funds will not be considered an event of default under the program. In return for any payments advanced under the PTAP, issuers must agree to repay the advance with interest within a specified time. Ginnie Mae describes this program as "last resort" financing, so it is unlikely to be a long-term solution to severe servicer liquidity challenges.

Alston & Bird has formed a multidisciplinary [task force](#) to advise clients on the business and legal implications of the coronavirus (COVID-19). You can [view all our work](#) on the coronavirus across industries and [subscribe](#) to our future webinars and advisories.

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