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Steven A. Meyerowitz

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New York Overhauls Mortgage Loan Servicer Business Conduct Regulations

Nanci L. Weissgold, Morey Barnes Yost, and Anoush Garakani*

New York's amended mortgage loan servicer regulations are a substantial departure from previous versions and could go beyond federal rules. This article delves into the technicalities and ramifications of the new rules.

Nearly 10 years after its initial adoption, the New York Department of Financial Services (“NYDFS”) has finalized Part 419 of the Superintendent of Financial Services Regulations.¹ Part 419, which sets forth business conduct requirements for mortgage loan servicers operating in the state, now includes expansive obligations that may exceed obligations under the Consumer Financial Protection Bureau’s (“CFPB”) mortgage servicing rules. The new version of the rules became effective on December 18, 2019; however, the NYDFS provided in Section 419.14 for a 90-day transition period to implement the new requirements (subsequently the NYDFS extended the mandatory compliance date to June 2020 as a result of the COVID-19 pandemic). The transition period applies to servicers that comply with the version of Part 419 that was in effect on the effective date of the new regulations.

BACKGROUND ON PART 419

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 the previous June. The measure 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. Pursuant to its authority to adopt a new regulatory framework for mortgage loan servicers, the NYDFS established: (1) application and registration proce-

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¹ https://www.dfs.ny.gov/system/files/documents/2019/12/bf419text_0.pdf.

dures and financial responsibility requirements for servicers in Part 418 of the Superintendent's Regulations; and (2) regulations for the business conduct of those servicers and those exempt from registration in Part 419. Since the initial adoption of Part 419, the NYDFS had only made one adjustment to the rule text. The new adoption represents a substantial departure from the previous version of Part 419.

APPLICABILITY

Before addressing the provisions of new Part 419, we note that as with the previous version of the regulations, the new version applies to the servicing of first- and subordinate-lien forward and reverse mortgage loans. Unlike the CFPB's servicing rules, there are no exemptions for small servicers, open-end lines of credit, or reverse mortgage loans. Moreover, we note that Part 419 defines the term "borrower" to include a successor in interest, raising some ambiguity about whether a servicer must provide every successor in interest on a loan with all the disclosures otherwise required under Part 419.

ESCROW ACCOUNTS

Section 419.2 aggregates previous requirements relating to escrow accounts into a single rule. Consistent with the provisions of the Real Estate Settlement Procedures Act ("RESPA") and Regulation X, Section 419.2 requires a servicer to: (1) address a shortage, surplus, or deficiency in a borrower's escrow account in accordance with RESPA and Regulation X; or (2) with the borrower's consent, apply a surplus to the principal balance of the borrower's mortgage loan.

The section also requires a servicer advancing funds in paying a disbursement to conduct an escrow account analysis to determine the extent of the deficiency if the servicer's advance was not necessitated by a borrower's payment default under the underlying mortgage document. A servicer must provide a written explanation of the analysis to the borrower; a servicer cannot seek 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 419.3 incorporates and makes adjustments to payment crediting requirements previously found in Section 419.6. Like the previous version, Section 419.3 requires a servicer to ensure that payments are credited, or treated as credited, on the business day received, to the extent the borrower has provided sufficient information to credit the account.

Section 419.3: (1) no longer includes a requirement that “[i]t should not be difficult for most consumers to make conforming payments”; and (2) expressly deems an end-of-business-day cutoff for receipt of a mailed check as reasonable. Section 419.3 now requires a servicer’s reasonable payments requirements to be “*provided* to the borrower in writing,” as opposed to being “*written*,” as under the previous version, before a servicer is permitted to credit a nonconforming payment “as soon as commercially practicable, but in no event later than 5 days after receipt.” Section 419.3 requires a servicer to credit late payments “to interest, principal, taxes, insurance and other fees” – rather than merely being “credited” – before collecting a late fee.

Section 419.3 expands on the existing requirement that a servicer establish written policies and procedures for payment overages and shortages. Specifically, the rule requires such policies and procedures to address unapplied funds and payments held in suspense accounts. Further, if a servicer retains but does not apply a partial payment, Part 419.3 requires the servicer to, on accumulation of sufficient funds in a suspense or unapplied funds account to cover a periodic payment: (1) treat the accumulated funds as a periodic payment; and (2) credit that payment to the borrower’s loan.

Section 419.3 prohibits 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.

Section 419.3 does not make substantive changes to existing requirements for notices of noncredit; however, it does permit the required notice to be provided electronically, in accordance with Article III of the New York Technology Law, if the borrower has previously opted for paperless billing.

By comparison to the previous version of the regulations, Section 419.3 does not include substantive changes to the requirements for using the scheduled method of accounting.

STATEMENT OF ACCOUNT

Section 419.4 builds on requirements relating to a statement of account previously found in Section 419.7.

As under the previous version of the regulations, Section 419.4 requires a servicer to provide annual statements within 30 days of the end of the escrow account computation year, which must comply with the format and content requirements under RESPA and Regulation X. In addition to information required under the previous version of the rules, Section 419.4 requires such statements to include “the application of all payments during such period.”

Section 419.4(b) requires a servicer to deliver to the borrower a payment history for the preceding 36 months (unless a different period is requested) within 30 days of a request from the borrower. The payment history must show the application of all payments made during the period (in addition to the date and amount of such payments, as under the previous version). As adopted, the section also clarifies that the timeline for delivery of a payment history is 60 days (rather than 30) if “the request is for a period longer than the preceding 36 months and the servicing rights to the loan were transferred within that 36 month period.”

Similarly, Section 419.4 also expands on requirements for periodic statements when compared to the previous version. Although these requirements are similar to the CFPB’s mortgage servicing rules, they neither exclude open-end loans or reverse mortgages nor include a coupon-book exception. For each “billing cycle” (which is defined in alignment with the Truth in Lending Act), Section 419.4 requires 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 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:
 - The date the borrower became delinquent.
 - A notification of possible risks that may be incurred if the borrower does not cure the delinquency (e.g., foreclosure).
 - 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.
 - If applicable, a notice indicating any loss mitigation program the borrower has agreed to.
 - If applicable, a notice of whether the servicer has fulfilled the pre-foreclosure notice requirements of Section 1304 of the New York Real Property Actions and Proceedings Law or Section 9-611(f) of the Uniform Commercial Code.
 - A breakdown of the total payment amount needed to bring the loan current (including actual fees and charges claimed), as well as the date such amount will expire and will no longer be sufficient to bring the loan current.

Section 419.4 builds on the requirements for payoff balances found in the previous version of the regulations by: (1) requiring a “plain language” (rather than a “clear, understandable and accurate”) payoff statement; and (2) requiring a payoff statement to be provided within seven, rather than five, business days.

Finally, Section 419.4 clarifies that its requirements do not apply to a borrower in Chapter 11 bankruptcy if compliance would violate its automatic stay provisions. In 2018, the CFPB amended its mortgage servicing rules to

eliminate the blanket exemption from the periodic statement requirement for borrowers in bankruptcy; as a result, a servicer must provide a periodic statement or coupon book with certain bankruptcy-specific modifications in certain circumstances. In the absence of additional guidance, it is unclear if New York is providing a blanket exemption or if compliance with the CFPB's requirements for borrowers in bankruptcy would satisfy its requirement. Moreover, unlike the CFPB's mortgage servicing rules, Part 419.4 does not provide an apparent exemption for successors in interest or charged-off loans.

FEES

Section 419.5 expands on the servicing fee provisions previously found in Section 410.10.

First, Section 419.5 clarifies that the current schedule of standard or common fees that a servicer must maintain and must make available on its website and to a borrower upon request must:

- (1) Identify each fee;
- (2) Provide a "plain language" explanation of when and why the fee will be charged; and
- (3) State the amount of the fee or range of amounts or, if there is no standard fee, how the fee is calculated or determined.

The rule does not clarify whether foreclosure or bankruptcy fees qualify as "standard or common fees."

Second, Section 419.5 clarifies the types of fees a servicer may charge. As with the previous version of the regulation, a fee must be:

- (1) "[E]xpressly authorized and clearly and conspicuously disclosed by the loan instruments and not prohibited by law";
- (2) "[E]xpressly permitted by law and not prohibited by the loan instruments"; or
- (3) "[N]ot 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."

Additionally, any fee that a servicer charges must be for a service that is actually rendered to the borrower and be reasonably related to the cost of rendering a service.

Third, the Section 419.5 attorneys' fee provision begins with the above restrictions and Civil Practice Law and Rules Section 3408(h); the latter

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. In addition to these limitations, any such fees that a servicer imposes in connection with a loss mitigation option, a reinstatement, or a loan satisfaction must: (1) "be reasonable and customary for work that is actually performed by an attorney"; and (2) be disclosed – along with a breakdown of the tasks performed – to the borrower "prior to entering into the agreement governing the loss mitigation option, reinstatement or loan satisfaction." By contrast to the previous version of the rule, Section 419.5 no longer includes a restriction on attorneys' fees charged in connection with a foreclosure action that is removed.

Fourth, Section 419.5 aligns the late fee provisions of Part 419 with Section 254-b of the New York Real Property Law. The two percent limitation on late fees found in that section does not apply to "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.'"

Fifth, Section 419.5 only permits a servicer to charge property valuation fees to a borrower 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 so long as the servicer provided a property valuation without charge in the preceding 12 months.

Finally, Section 419.5 prohibits 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. This is consistent with the requirements of the CFPB's mortgage servicing rules, to the extent the request for a payment history is a valid information request.

BORROWER COMPLAINTS AND INQUIRIES

Section 419.6 incorporates requirements for borrower complaints and inquiries, previously addressed (consistent with RESPA) in Section 419.4.

First, Section 419.6 requires 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."

The new section does not clarify:

- (1) How an entity that meets the definition of a “servicer” but that does not have a borrower-facing contact – i.e., a passive investor – could comply with these requirements;
- (2) What falls within the scope of a “complaint” (e.g., whether a complaint includes origination-related issues); and
- (3) Whether the timing/procedural requirements of Section 419.6 apply if a complaint is received other than at the address for the receipt of complaints that a servicer designates in accordance with the CFPB’s mortgage servicing rules.

Second, Section 419.6 requires a servicer to provide “clear and conspicuous” disclosure to borrowers in its monthly mortgage statement or annual coupon book, annual statement, and any website maintained by the servicer of:

- (1) An address where a borrower can direct complaints or inquiries;
- (2) A toll-free number or collect calling service provided by the servicer;
- (3) Whether the servicer is registered with the superintendent; and
- (4) Information that the borrower may file complaints and obtain further information about the servicer by contacting the NYDFS Consumer Assistance Unit.

Section 419.1 defines “clearly and conspicuously” to mean “that the statement, representation or term being disclosed is of such size, color, and contrast and is so presented as to be readily noticed and understood by an ordinary consumer.”

Section 419.6 requires that, within 10 days of receiving a written request from a borrower, a servicer must provide the borrower with the name, address, phone number (or email address, if available), and other relevant contact information for the mortgagee and the holder of the promissory note executed by the borrower.

Finally, Section 419.6 clarifies that the timeline for a servicer’s response to a borrower complaint is the earlier of: (1) the date of a schedule foreclosure sale; or (2) 15 business days after the servicer receives the complaint, for complaints relating to the commencement of a residential foreclosure action against the borrower, in violation of Section 419.10(a)(4), or a motion for foreclosure judgment or an order of sale, or the conduct of a foreclosure sale, in violation of Section 419.10(a)(5). The timeline for all other complaints may be extended by up to seven business days (past the 30-day period generally provided) if the servicer notifies the borrower in writing of the extension before the expiration of the 30-day period.

RESIDENTIAL MORTGAGE LOAN DELINQUENCIES AND LOSS MITIGATION EFFORTS

Section 419.7 expands on the requirements for loan delinquencies and loss mitigation previously found in Section 419.11 and generally follows the requirements of the CFPB's mortgage servicing rules. However, unlike the CFPB's mortgage servicing rules, the requirements of Part 419 do not appear to contain an exemption for small servicers, reverse mortgage loans, or open-end lines of credit. Similarly, it is unclear whether Section 419.7's requirements and protections apply to a mortgage loan that is not secured by the borrower's primary residence.

First, Section 419.7 requires a servicer to make reasonable and good-faith efforts to provide borrowers with appropriate loss mitigation options, in accordance with Section 3408 of the New York Civil Practice Law and Rules.

Second, following the continuity-of-contact requirements under 12 C.F.R. § 1024.40, Section 419.7(b) requires a servicer to assign a single point of contact ("SPOC") to certain delinquent borrowers. However, in contrast to the federal requirement, Section 419.7(b): (1) requires a servicer to assign a SPOC to borrowers who are *at least* 30 days delinquent or have requested a loss mitigation application (or earlier at the servicer's option), rather than to borrowers who are 45 days delinquent; and (2) requires an assigned SPOC to have *direct and immediate access* to personnel with the authority to stop foreclosure proceedings in accordance with Sections 419.10(a)(4) and (5) and 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 as required by Sections 419.10(a)(4) and (5). The SPOC's responsibilities include communicating to the borrower the available loss mitigation options, the actions the borrower must take to be considered for such options, "detailed information on the eligibility criteria for any given loss mitigation option," and the current status of the servicer's evaluation of the borrower for loss mitigation.

Third, Section 419.7(c) requires 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 not required to provide this notice: (1) to the extent it is inconsistent with the automatic stay provisions of the U.S. bankruptcy laws; or (2) if the servicer has already provided a borrower with a late payment 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.

Fourth, Section 419.7 builds on the intervention notice requirements found in 12 C.F.R. § 1024.39. Exceeding the federal requirements, Section 419.7(c) requires the written notice that a servicer must provide no later than the 45th day of a borrower's delinquency to include:

- (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.

A servicer is exempt from the requirements of Section 419.7(c) for a mortgage loan while any borrower on the mortgage loan is a debtor in bankruptcy under Title 11 of the U.S. Code. However, in contrast to 12 C.F.R. § 1024.39, Section 419.7(c) does not contain a partial exemption from the early intervention notice requirements for a borrower who has provided a cease and desist notice pursuant to the Fair Debt Collection Practices Act. This discrepancy may present a compliance challenge to servicers that must reconcile the limited disclosure requirements under the CFPB's mortgage servicing rules with the disclosure requirements of Section 419.7(c).

Fifth, Section 419.7(d) addresses requirements for acknowledgment notices. By contrast to the previous version of the regulation, the rule now requires a servicer to: (1) provide a written acknowledgement within five (rather than 10) business days after receiving the borrower's loss mitigation application; and (2) upon determining that a borrower's loss mitigation application is incomplete, include in the notice:

- A specific identification of 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.
- A statement of 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.
- A statement of the action 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.

Sixth, Section 419.7(e) follows the CFPB's mortgage servicing rules requirements for the evaluation of loss mitigation applications. However, Section 419.7(e) requires a servicer to: (1) evaluate loss mitigation applications received

more than 37 days before a foreclosure sale within 30 days of receiving the application; and (2) review any initial determination to deny a loss mitigation option by supervisory personnel who were not involved in the initial determination. Further, Section 419.7(e) sets forth the circumstances under which a servicer may evaluate an incomplete loss mitigation application – but does not require a servicer to do so. However, by contrast to the federal requirement (found in 12 C.F.R. § 1024.41(c)(2)(ii)), the rule permits a servicer to do so only if the application remains incomplete for a “reasonable time,” identified as 30 days, “without the borrower making reasonable progress to complete the application.”

Seventh, Section 419.7(f) expands the notice requirements when a borrower’s loss mitigation application is 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 nature of the loss mitigation option being offered to the borrower.
- Consistent with Section 419.7(g), the amount of time the borrower has to accept or reject the offered loss mitigation option.
- 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 changes to the term of the mortgage loan, to the extent such changes are known to the servicer, after due diligence by the servicer at the time the notice is provided; a breakdown of the loan balance and an itemization of any fees or charges assessed; and any amounts capitalized and applied to the balance of the mortgage loan.

If a servicer denies a borrower’s loss mitigation application, Section 419.7(f) requires that the servicer include in the notice of denial a statement:

- (1) Consistent with Section 419.7(h), that the borrower has a right to appeal the denial or any loan modification option;
- (2) What the borrower must do to appeal the denial;
- (3) The amount of time the borrower has to appeal;
- (4) A specific statement, which must be printed in boldface type and in print no smaller than the largest print used elsewhere in the main body of the denial, advising the borrower that they may file a complaint with the NYDFS if the borrower believes their loss mitigation request was wrongfully denied; and
- (5) That the borrower has the right to obtain, upon request, the result of any evaluation of the net present value of a loan modification performed by the servicer.

Eighth, Section 419.7(g) largely adopts the provisions of the CFPB's mortgage servicing rules relating to the timeframe within which a borrower must respond to a servicer's trial or permanent loss mitigation offer. However, by contrast to the 14-day timeframe that the federal rules grant a borrower to respond, Section 419.7(g) permits a servicer to require a borrower to accept or reject an offer of a trial or permanent loss mitigation option no earlier than 30 days after the loss mitigation option is offered to the borrower, if the servicer receives a complete loss mitigation application 90 days or more before a foreclosure sale.

Finally, Section 419.7(h) includes one divergence of note from the previous version of the regulations. The rule permits a borrower to appeal a denial of *any* loss mitigation option – and not, as under federal law, only a servicer's determination to deny a borrower's loss mitigation application for any trial or permanent loan modification program. The rule clarifies that an appeal application must be made within 14 days of the date the notice of denial was postmarked.

VOLUME OF SERVICING REPORT

Like previous Section 419.12, Section 419.8 requires each servicer (regardless of whether subject to registration) 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.

BOOKS AND RECORDS AND ANNUAL REPORTS

Section 419.9 addresses recordkeeping requirements that apply to both registered servicers and exempt entities. By contrast to the previous version of the regulations, Section 419.9 requires a servicer to:

- Maintain a log of all telephone calls and a file of all written correspondence, including fax transmissions and email correspondence, relating to the servicing of each mortgage loan for three years.
- Include in the records that it maintains 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 on the complaint.
- Provide more extensive reporting and analysis on delinquency and foreclosure activity, including loss mitigation activity, and compare all

such data (and not only its foreclosure and delinquency rates) to reports published by industry, investors, and others.

SERVICING PROHIBITIONS AND THE DUTY OF FAIR DEALING

Section 419.10 addresses servicing prohibitions and a servicer's duty of fair dealing, combining provisions previously found in Sections 419.2, 419.11, and 419.14 of the regulations. Specifically, this section imposes a duty on a servicer to:

- Structure a modification that, at the time of modification, results in payments that are “reasonably affordable and sustainable for the borrower.”
- 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] payment . . . under the mortgage loan or is unable to make up the delinquent payments” as a result of a foreclosure sale.

Second, Section 419.10 prohibits 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:

- (1) The borrower has exhausted any appeal rights;
- (2) The borrower has rejected all loss mitigation options offered;
- (3) The borrower is more than 30 days in default under a trial or permanent modification; or
- (4) The foreclosure is based on a borrower's violation of a due-on-sale clause.

The rule also prohibits a servicer from initiating foreclosure when a borrower submits an incomplete loss mitigation unless, within 15 business days after the servicer's request, the borrower fails to provide the documents necessary for a complete loss mitigation application.

Further, Section 419.10 prohibits a servicer from moving for a judgment of foreclosure and sale or conducting a foreclosure sale when any of the following occurs:

- A borrower is in compliance with a trial modification, forbearance, or repayment plan.
- 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.

- A borrower submits a complete loss mitigation application more than 37 days before a foreclosure sale, unless:
 - (1) The servicer has determined and provided notice that no loss mitigation options are available and the borrower has exhausted any applicable appeal rights;
 - (2) The borrower has rejected all loss mitigation options offered; or
 - (3) The borrower is more than 30 days delinquent under a trial or permanent modification.

One question that Part 419 does not address is whether a servicer's failure to comply with the prohibitions on initiating foreclosure or moving for a judgment of foreclosure could constitute a defense to foreclosure.

OVERSIGHT OF THIRD-PARTY PROVIDERS

Section 419.11 addresses a servicer's oversight of "third-party providers." For purposes of Part 419, "third-party provider" means "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 mortgage loan."

Specifically, Section 419.11 requires a servicer to maintain policies and procedures overseeing third-party providers generally, including:

- The servicer must 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 must comply with the servicer's "applicable policies and procedures and applicable New York and federal laws."
- The servicer must "remain responsible for all actions" taken by the third-party provider.
- The servicer must clearly and conspicuously disclose to borrowers if it uses a third-party provider and that the servicer "remains responsible for all actions taken" by the provider.
- The servicer must conduct periodic reviews, not less than annually, of each third-party provider, and such reviews must be conducted 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 must have “appropriate and reliable contact information” for relevant servicer employees.
- The servicer must 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, Section 419.11 requires a servicer to develop and implement policies and procedures detailing how the servicer will oversee and communicate with counsel and those with authority to fully dispose of the case concerning foreclosure proceedings. Such policies and procedures must, at a minimum:

- Detail how notice of a borrower’s status for consideration for loss mitigation will be provided to foreclosure attorneys and trustees, including whether the borrower is being evaluated for or is currently in a trial or permanent modification.
- 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.
- 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

First, Section 419.12 requires a mortgage transferee servicer to provide to the borrower with the first monthly statement a copy of its welcome packet and a payment history compliant with Section 419.4. If as of the effective date of the servicing transfer a borrower is complying with the terms of a trial loan modification, the transferee servicer must allow the borrower to continue to make those payments for the remainder of the trial modification period.

Second, for a borrower who has successfully completed a trial modification before servicing transfer but has not received a permanent loan modification

from the transferor servicer, the transferee servicer must allow the borrower to continue to make trial modification payments until the transferee servicer can provide a permanent modification to the borrower. On the topic of trial modification conversions, the CFPB has cited servicers for Unfair or Deceptive Acts or Practices (“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 solely because of the denial by the transferor servicer.

AFFILIATED RELATIONSHIPS

Section 419.13 extends RESPA’s affiliated business provisions to mortgage servicing. NYDFS defines “affiliated relationships” as “a relationship between two or more entities where one such entity, directly, or indirectly, through one or more intermediaries, controls, or is controlled by or is under common control with another such entity.” Further, the final version of Part 419 includes an explicit definition of “settlement service,” meaning “any service provided in connection with a prospective or actual settlement,” and includes 15 categories of activities enumerated in Section 419.1(n).

First, the rule requires a servicer to provide notice to each affected borrower within 10 days of entering into an affiliated relationship. The notice must include “a written disclosure of the nature of the relationship (explaining the ownership and financial interest) between the parties to the arrangement and . . . an estimated charge or range generally made by such affiliate.”

Second, Section 419.13 requires all affiliated relationships to be negotiated at market rate. Further, the rule prohibits a servicer from giving or accepting any fee or thing of value pursuant to such relationship 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.

CONCLUSION

By contrast to the proposed version of the rules issued last spring, the final version of Part 419 includes some important clarifications on the scope of the new obligations that it imposes – such as the “settlement service” activities implicated by new Section 419.13. However, the new version of Part 419 leaves unanswered some questions raised during the comment period – such as the interaction of certain disclosure obligations with provisions of the federal Fair Debt Collection Practices Act.

Given the breadth of the new obligations under Part 419, servicers should carefully examine the regulations and evaluate necessary changes to their policies and procedures.