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To: Clients and Friends
From: David F. Dulock
Subject: Loss Mitigation Opinions under Regulation X Amended by CFPB Interim Final Rule Adding Certain COVID-19-related Loss Mitigation Options

8584 Katy Freeway, Suite 420

Houston, TX 77024

Phone: 713-871-0005

Fax: 713-871-1358

Partners

Thomas E. Black, Jr.1
Gregory S. Graham2
Shawn P. Black3

Managing Attorney Houston

Ryan Black4

Senior Lawyers

David F. Dulock
Diane M. Gleason
Daniel S. Engle3
Margaret Noles

Associates

Nick Stevens
Syndy Davis
Brandon Pieratt

Of Counsel

David M. Tritter
Calvin C. Mann, Jr.

Retired Partner(s)

Calvin C. Mann, Jr.

1 Also Licensed in Iowa, New York, and Washington

2 Also Licensed in Georgia

3 Also Licensed in New York

4 Also Licensed in Washington D.C.

In the June 30, 2020 issue of the Federal Register (85 FR 39055, click here), the Bureau of Consumer Financial Protection (CFPB) issued an interim final rule (IFR) amending §1024.41 of Regulation X by revising paragraph (c)(2)(i) and adding paragraph (c)(2)(v) to temporarily permit mortgage servicers to offer certain loss mitigation options based on the evaluation of an incomplete loss mitigation application (IFR Loss Mitigation Option).

This IRA is effective as of July 1, 2020.

The pre-July 1, 2020 paragraph (c)(2)(i) provided that servicers may not offer a loss-mitigation option based upon an evaluation of any information provided in connection with an incomplete application, except as set forth in paragraphs (c)(2)(ii) and (c)(2)(iii.) The IFR revises paragraph (c)(2)(i) by adding a reference to the temporary exception for the IFR Loss Mitigation Option in new paragraph (c)(2)(v).

The IFR Loss Mitigation Option in new paragraph (c)(2)(v) must satisfy the following three criteria:

- 1) The IFR Loss Mitigation Option must permit the borrower to delay paying "covered amounts" until the mortgage loan is refinanced, the mortgaged property is sold, the term of the mortgage loan ends, or, for a mortgage insured by FHA, the mortgage insurance terminates. "Covered amounts" include, without limitation, all principal and interest payments forborne under a payment forbearance program made available to borrowers experiencing a financial hardship due, directly or indirectly, to the COVID-19 emergency, including a payment forbearance program made pursuant to section 4022 of the CARES Act (15 U.S.C. 9056). "Covered amounts" also include, without limitation, all other principal and interest payments that are due and unpaid by a borrower experiencing financial hardship due, directly or indirectly, to the COVID-19 emergency. For purposes of this criterion, the term of the mortgage loan means the term of the mortgage loan according to the obligation between the parties in effect when the borrower is offered the IFR Loss Mitigation Option. (Paragraph (c)(2)(v)(A)(1))
2) Any amounts that the borrower may delay paying through the IFR Loss Mitigation Option do not accrue interest; the servicer does not charge any fee in connection with the IFR Loss Mitigation Option; and the servicer waives all existing late charges, penalties, stop payment fees, or similar charges promptly upon the borrower's acceptance of the IFR Loss Mitigation Option. (Paragraph (c)(2)(v)(A)(2))
3) The borrower's acceptance of the IFR Loss Mitigation Option offer must end any preexisting delinquency on the mortgage loan. (Paragraph (c)(2)(v)(A)(3))

The IFR also provides that once the borrower accepts the IFR Loss Mitigation Option offer, the servicer is not required to continue the reasonable diligence efforts otherwise required by §1024.41(b)(1) or send the acknowledgement notice otherwise required by §1024.41(b)(2) with regard to any loss mitigation application the borrower submitted prior to the servicer's offer of the IFR Loss Mitigation Option. (Paragraph (c)(2)(v)(B))

In the preamble to the IFR, the CFPB states that the IFR Loss Mitigation Option criteria are intended to align with the criteria outlined in the FHFA COVID–19 payment deferral program that also took effect on July 1, 2020 (*see footnote 34 on page 39058 of the above hyperlinked Federal Register regarding Fannie Mae Lender Letter 2020-07 and Freddie Mac Bulletin 2020-15*) and other comparable programs, such as FHA’s COVID–19 partial claim program. The CFPB states further in the preamble that it understands that the FHFA COVID–19 payment deferral program and the FHA’s COVID–19 partial claim program satisfy the criteria in new paragraph (c)(2)(v)(A)(1) through (3); but that the IFR exception is not limited to those programs as servicers may offer loss mitigation options under other programs, as long as the loss mitigation options offered meet the criteria described in new paragraph (c)(2)(v)(A). (*See page 39062 of the above hyperlinked Federal Register.*)

In the preamble to the IFR, the CFPB also states that although the IFR does not specify how servicers must treat any forborne or delinquent escrow amounts, a loss mitigation option would qualify for the new exception if it also defers repayment of escrow amounts, in addition to principal and interest payments, as long as it otherwise satisfies new paragraph (c)(2)(v)(A). (*See page 39061 of the above hyperlinked Federal Register.*)

In addition, the CFPB states in the preamble that although the IFR does not specify how a servicer must structure repayment of the deferred amounts, requiring repayment either in a lump sum at the end of the loan term or over a specified period at the end of the loan term through additional periodic payments would satisfy new paragraph (c)(2)(v)(A)(1) because it specifically defines the mortgage loan term to mean the loan term in effect when the borrower is offered the loss mitigation option. As a result, according to the CFPB preamble, the exception under new paragraph (c)(2)(v)(A) is available for eligible loss mitigation options that would technically extend the term of the loan in accommodating repayment of forborne or delinquent amounts. (*See page 39061 of the above hyperlinked Federal Register.*)

The text of the IFR amendments to §1024.41 are reprinted below:

§1024.41 Loss mitigation procedures.

(c) ***

(2) *Incomplete loss mitigation application evaluation*—(i) *In general.* Except as set forth in paragraphs (c)(2)(ii), (iii), and (v) of this section, a servicer shall not evade the requirement to evaluate a complete loss mitigation application for all loss mitigation options available to the borrower by offering a loss mitigation option based upon an evaluation of any information provided by a borrower in connection with an incomplete loss mitigation application.

(v) *Certain COVID–19-related loss mitigation options.* (A) Notwithstanding paragraph (c)(2)(i) of this section, a servicer may offer a borrower a loss mitigation option based upon evaluation of an incomplete application, provided that all of the following criteria are met:

(1) The loss mitigation option permits the borrower to delay paying covered amounts until the mortgage loan is refinanced, the mortgaged property is sold, the term of the mortgage loan ends, or, for a mortgage loan insured by the Federal Housing Administration, the mortgage insurance terminates. For purposes of this paragraph (c)(2)(v)(A)(1), “covered amounts” includes, without limitation, all principal and interest payments forborne under a

payment forbearance program made available to borrowers experiencing a financial hardship due, directly or indirectly, to the COVID–19 emergency, including a payment forbearance program made pursuant to the Coronavirus Economic Stabilization Act, section 4022 (15 U.S.C. 9056); it also includes, without limitation, all other principal and interest payments that are due and unpaid by a borrower experiencing financial hardship due, directly or indirectly, to the COVID–19 emergency. For purposes of this paragraph (c)(2)(v)(A)(1), “COVID–19 emergency” has the same meaning as under the Coronavirus Economic Stabilization Act, section 4022(a)(1) (15 U.S.C. 9056(a)(1)). For purposes of this paragraph (c)(2)(v)(A)(1), “the term of the mortgage loan” means the term of the mortgage loan according to the obligation between the parties in effect when the borrower is offered the loss mitigation option.

(2) Any amounts that the borrower may delay paying as described in paragraph (c)(2)(v)(A)(1) of this section do not accrue interest; the servicer does not charge any fee in connection with the loss mitigation option; and the servicer waives all existing late charges, penalties, stop payment fees, or similar charges promptly upon the borrower’s acceptance of the loss mitigation option.

(3) The borrower’s acceptance of an offer made pursuant to paragraph (c)(2)(v)(A) of this section ends any preexisting delinquency on the mortgage loan.

(B) Once the borrower accepts an offer made pursuant to paragraph (c)(2)(v)(A) of this section, the servicer is not required to comply with paragraph (b)(1) or (2) of this section with regard to any loss mitigation application the borrower submitted prior to the servicer’s offer of the loss mitigation option described in paragraph (c)(2)(v)(A) of this section.

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