Consumer Finance Monitor (Season 7, Episode 45): CFPB’s Proposed Mortgage Servicing Rule Amendments: Understanding the Impact on Loss Mitigation, Foreclosure, and Language Access

Speakers: Richard Andreano, Reid Herlihy, and Matthew Morr

Richard Andreano:
Welcome to the Consumer Finance Monitor Podcast, where we explore important new developments in the world of Consumer Financial Services and what they mean for your business, your customers and the industry. This is a weekly show brought to you by the Consumer Financial Services Group at Ballard Spahr law firm. I’m your host, Rich Andreano, the practice group leader of the Mortgage Banking Group here at Ballard. I’ll be moderating today’s program.

For those of you who want even more information, don’t forget about our blog, Consumer Finance Monitor.com. We’ve hosted the blog since 2011, in fact starting on the day the CFPB opened for business, so there is a lot of relevant industry content there. We also regularly host webinars on subjects of interest to those in the industry. Now to subscribe to our blog or to get on the list for our webinars, please visit us at ballardspahr.com. If you like our podcast, let us know. Leave us a review on Apple Podcasts, YouTube, Spotify, or wherever you get your podcasts. Also, please let us know if you have ideas for other topic that we should consider covering or speakers that we should consider inviting as guests on our show.

Today’s episode is a repurposed webinar that we did on August 14th, entitled CFPB’s Proposed Mortgage Servicing Rule Amendments: Understanding the Impact on Loss Mitigation, Foreclosure, and Language Access. Now let's take a look at our presenters for today. Joining is first Reid Herlihy, who's a partner and a member of our mortgage banking and consumer financial services groups. Reid is based in both our Atlanta and Washington, DC offices. Among various things that Reid helps clients with are the mortgage servicing rules and related mortgage servicing requirements. Also, joining us today is Matt Morr, a partner, again, member of our mortgage banking and consumer financial services groups based in our Denver office. Matt is a litigator and often handles matters defending industry members, lenders and services are well given the various regulatory and other issues that are challenges for this industry. Again, I'm Rich Andreano, also a member of the mortgage banking and consumer financial services groups based in our Washington, DC office and focus on mortgage regulatory matters.

On to today's presentation. Now, the Bureau for quite some time has indicated that it was going to revisit its mortgage servicing rules. In particular, it had indicated that based on the COVID-19 pandemic and efforts to address borrowers in distress as a result of that, it wanted to examine taking some of the concepts and the lessons learned and putting them into the standard mortgage servicing rules to be more standardized going forward. And in fact, it did so. On July 10th, it announced on its website the proposed rule. To give you an idea of the way it's focusing, the headline in the news release was CFPB Proposes Rules to Help Homeowners Avoid Foreclosure. Get you a pretty good idea of what they're focusing on. Now, the rule its proposal rather itself appears in the July 24th Federal Register, so you can get the Federal Register version there. And importantly, upcoming September 9th is the deadline for comments.

So not a lot of time. I think it'd be better if they had given a longer comment period, but unfortunately currently to September 9th. And we do encourage members to comment whether you do just so directly or through one or more trade associations. Now here's the list of the specific topics that we will address. As you will see from our presentation, if this proposal is implemented anywhere near the way it's proposed, it will present significant challenges for the industry. With that, I first turn the presentation over to Reid Herlihy to address some of the specifics. Reid, take it away.

Reid Herlihy:
Thank you, Rich. Hi everybody. Thanks for joining us today. So I'm going to jump right into the big chunk of changes here and that's the loss mitigation process. There's a huge overhaul here of the loss mitigation procedures in 1024.41. Basically the entire application-based framework that the industry has implemented over the years is kind of thrown out. And so we no longer have a lot of things like the five-day express acknowledgement letter requirement when you receive an application. There's no triggering event when you receive a complete loss mitigation application, that's all gone. Instead, the procedures and the foreclosure protections that we'll discuss a bit later are triggered on any quote request for loss mitigation assistance. That's the new term. That's the new triggering event. So this is a very broad concept. They want it to be that way, easily triggered.

It covers any oral or written communications through what they say is any usual or customary channel for servicing communications where the borrower asks for relief. And they further clarify that includes, but it's not limited to just expressing an interest in the loss mitigation option, a borrower indicating some hardship and asking for assistance or a borrower expressing an interest in any loss mitigation option in response to an unsolicited offer. So any sort of streamlined proactive offer. So again, very broad. For reasons we'll discuss later regarding how you have to treat an account once this very low bar is triggered, there's some very significant impacts. And you really have to treat any communication with a delinquent borrower as one of these requests for loss mitigation assistance triggering all the protections and procedures. The preamble actually states that. It says in there, and I read a quote, "A servicer should presume that a borrower who experiences a delinquency as defined in Section 1024.31 has made a request for loss mitigation assistance when they contact the servicer unless they clearly express some other intention."

So a very low bar, it's any communication here. So start by saying there are a lot of points and a lot of issues that we think really need some clarification here and refinement. I can't get into all of those on this webinar, but I'll note a few. And one of those being, it would really be helpful to at least limit communication channels here through which a request for loss mitigation assistance can be received triggering all these requirements. So perhaps something kind of like the notice of error or an information request requirements under Reg X, which allows you to designate a channel. Something like that would be pretty great. But back to the rule. So once that occurs, again, as long as it occurs more than 37 days before a scheduled sale, all the procedures and foreclosure protections are triggered and you are now in what the proposed rule calls the loss mitigation review cycle.

They kind of use that term in sort of odd ways, but that's where you're at. That's the protection cycle. And the important part here is it's completely different from the rigid process in place now where you have scripted notices and time frames for acknowledgment and for review and for sending notices, and for all that, this is a very free form process. So once you're in this review cycle, you can review the borrower for loss mitigations sequentially one at a time, or you can do them all at once or in chunks and there's really no rules around that. And you also can whenever you need to or want to issue requests for necessary information or follow up on those requests. So it's not like a set acknowledgment letter where you have to list the requirements or what else is needed.

With the timeframe by which they should provide and all that, it's just really sort of a free form process here, at least it's currently proposed. But as we'll discuss that flexibility looks like it will come at some significant cost. Let's talk about the loss mitigation evaluation notice. So they've dispensed with a lot of the other notice requirements, really limiting it to one main evaluation notice. So whenever you make a determination regarding one option or multiple options or all of them, there's a new notice requirement for that determination. The timing requirement is vague too. It just says you have to promptly provide it after you make any determination. This is going to create some significant operational headaches and significant costs for servicers. So one is that you'd be required to provide determination reasons for any denied loss mitigation option, but also any offered loss mitigation option. So currently under Reg X you only have to provide determination reasons for denials of loan modifications.

It's obviously going to add a lot of complexity to your notices, which I think will be very challenging. Frankly, I think it's kind of odd to require that to provide determination reasons for an offer instead of just a denial. And the commentary clarifies if an option is offered or denied, you can't just say it's based on investor requirements. You have to identify the requirement under investor guidelines. That's the basis for the determination or the requirements, further that you have to disclose the actual reason or reasons for the offer or the denial. So that makes sense with a denial which we're already doing here and the borrower likely is going to fall short on maybe one of the prongs of criteria or maybe two, so you can more readily populate that into a letter and you can tailor it for the borrower. For an offer though obviously to be offered... To make a determination for an offer, the borrower has to meet all the criteria for a loss mitigation option.

I don't know, based on this rule how you can differentiate which of those you should or should not include. I'm not sure how to proceed otherwise than just sort of including all of them for an offer. So let's say you offer a Fannie Mae Flex Modification, you then have to list all of the eligibility criteria because those are the reasons that are the basis of the determination to offer them the option. So you have to say your loan is a conventional first lien loan. Your loan was originated more than 12 months prior to this determination. Your loan is not subject to any other loss mitigation option or trial payment plan. Your loan wasn't previously modified three times or more. And then when we capitalized your arrearages change the interest rate and extend the term 480 months, we were able to achieve a monthly P&I payment that's less than or equal to your current P&I payment.

So it's an odd requirement the way it's drafted. I don't really get the intent there and it'll obviously provide some pretty muddled notices, particularly because as Rich will discuss later, you have to translate this all into Spanish as well under the proposal. So one of the next new features, you have to disclose the "key borrower-provided inputs" if any that serves as the basis for the determination. I'm honestly not sure what that's supposed to mean or what a key borrower-provided input is versus a regular borrower provided input. What they seem to have in mind is that you convey the income information the borrower provided and other stuff that is the basis for the determination. So a borrower can look at that and say, oh, you actually made a mistake there. My income is this or I can afford that and sort of correct it after the offer or take a different approach.

I don't think it takes much imagination to see how difficult that's going to be to operationalize. And again, I think that the terminology used is kind of strange for key borrower-provided input. One of the very cost intensive details, you have to provide a phone number, mailing address and website where the borrower can access a list of the non borrower provided inputs if any, used by the servicer in making the loss mitigation determination. So through this notice requirement, they are basically indirectly requiring borrower specific consumer web portals with apparently real time investor specific and option specific loss mitigation evaluation and criteria information. I have a feeling your current platforms don't have that capability. On a similar note, there's also a requirement to include the phone number and the website where the borrower can obtain investor specific lists of all of the loss mitigation options available to the borrower.

Another new feature. So you have to include a list of the other available loss mitigation options and a description of the next steps to be evaluated for those options. And those have to be specific to the investor on the borrower's loan. You have to include a list of any other options that you previously offered the borrower and that remain available to the borrower but that the borrower did not previously accept. And if you offer the borrower loss mitigation option in this notice, you have to include a statement informing the borrower whether that offered option will still be available if the borrower instead requests to be reviewed for a different loss mitigation option prior to accepting or rejecting the offer at hand.

This is another interesting one and I'll get into this a little bit later. What they really want you to do, despite seemingly having some flexibility there. I mean, they use the term weather, so that tells me you can not allow them to accept it later if they want to be reviewed for something different, but we'll see. And then finally, you have to include the name of the investor certain term and payment information if there's a forbearance offer, things like that. So again, a lot of new complexity here. Some incredibly specific borrower, specific investor specific information that they envision going to these notices and some pretty significant I think, website capabilities that have to be synced into your loss mitigation platform. Real quick, these aren't super important details, but I just wanted to touch on them a bit.

The proposed rule details, what you have to include in an unsolicited loss mitigation offer or called streamlined offers. So this is just a proactive offer based on the loan file, not in response to any information in an application or from the borrower when they request loss mitigation assistance. So something like the FHA advanced loan modification option. You essentially have to include the amount of time the borrower has to accept or reject the option.

And then certain elements from the normal loss mitigation evaluation notice that I just talked about, including a list of the other investor specific options with the next steps, the list of any other options that were previously offered and that still are on the table. The website where the borrower can obtain the list of options available and the name of the investor. Another one, it's not a huge revision, but I think there's some interesting underpinnings to this that I'll again discuss later, but the borrower response timeframes. They've generally kept those the same, but you saw that 14 day minimum timeframe, but now it's based on when the request for loss mitigation assistance occurs instead of when the complete application is received.

It's notable because as I just discussed, they seem to contemplate these running sequential one-off evaluations where you can offer an option and you have to tell the borrower if it still remains available, if they seek another option. And here we still have this 14 day borrower response timeframe and if they don't respond, it's deemed to be rejected by the borrower. I'm a little wary of this and I have a feeling that CFPB, despite the plain language of this proposal, may be a little more skeptical or critical or using UDAP authority if you are engaged in these one by one evaluations and then you take the offer off the table unless you have a real good reason to if the borrower wants to be reviewed for a different option. So I'm not sure if to think about this and whether services will really have some of the flexibility indicated by this proposed rule, at least on the plain language of the reg or what's in the actual commentary.

Foreclosure protections, significant changes here. These are the foreclosure holds that are triggered in 1024.41. Again, this happens on that very broad standard of any request for loss mitigation assistance more than 37 days before a sale. As with the current rule, just to note, you still have that 120 day delinquency rule before you can refer to foreclosures, that hasn't changed. But then separately upon a request for loss mitigation assistance, once these protections are triggered, you're still not allowed to make the first notice you're filing for foreclosure, that's the same. But you also cannot advance the foreclosure process in any way. That differs from the current rule, which says you just can't move for a judgment or order of sale or actually conduct the foreclosure sale when the hold is in place. So this is an expanded prohibition on really not doing anything behind the scenes even to really move the process along while you were in this loss mitigation review cycle.

They talk about it in the preamble and really the goal here is to prevent the account from accruing any attorney's fees or foreclosure costs or other third party costs that may be triggered by moving down the road towards foreclosure short of a sale or motion for order of sale. So that's really the goal here, but it's a total stop of anything to advance the process behind the scenes. They clarify the expansiveness of this in the preamble and I'll just read a bit of it. So one quote. "Under the proposed rule, advancing the foreclosure process would include any judicial or non-judicial actions that advance the foreclosure process and were not yet completed prior to the borrowers request for loss mitigation option. Such actions might include, for example, certain filings such as those related to mediation, arbitration or reinstatement that take place prior to a final order or sale. Certain affidavits motions and responses that advance the foreclosure process or recordings or public notices that occur before a final judgment or sale."

So this is a substantially expanded foreclosure hold which may present a range of issues particularly for contested foreclosures. It may raise issues under state mediation, state law mediation requirements. It could complicate the ability to comply with investor or insurer imposed foreclosure timelines, possibly meeting judicial filing deadlines if it's not clear what advances or what doesn't advance the foreclosure process. And again, in a contested foreclosure that may be more challenging and then perhaps some statute of limitations considerations. But moving on, so when do these protections expire? Well, either can bring the borrower current through a loss mitigation option. But if not, the only way you can proceed to a foreclosure is if either of the two procedural safeguards are satisfied. So the first one is there are no remaining loss mitigation options. This is similar to the existing provision whereby you basically exhausted the loss mitigation procedures.

So you've evaluated and offered or denied the borrower for all available options. Nothing remains, and all the appeal rights have been exhausted. So they either didn't request an appeal in the right timeframe or all appeals have been denied. One sort of interesting side note, it may not be that interesting, but I noticed it and I want to flag it, something in the preamble that's not reflected in the body of the reg or commentary. They talk a bit about what constitutes an available loss mitigation option and the definitional language in the reg is not changed. It's basically just an option that the borrower can get through the servicer but may not ultimately qualify. But then the preamble says, interestingly, for purposes of proposed 1024.41, a loss mitigation option is not available if... And it lists several scenarios, including the borrower affirmatively opts out of review for that option.

This is a different approach than they've currently taken. The bureau made it clear previously that you have to evaluate the borrower for everything available despite the borrower's wishes. So if the borrower initially says, I don't want a particular option, I don't want stay in my house, I want to [inaudible] or I don't want to be considered for liquidation option, that doesn't matter. The position was the borrower is not... Doesn't know what's good for them, right? They may not know what they could qualify for. You have to evaluate them for everything. So this sort of paternalistic approach of don't listen to the borrower, and that was a big issue before... In part because a lot of the loss mitigation application forms had the checkboxes, right? For I want liquidation only, I want retention only. I want both. And so a lot of servicers had procedures in place where the borrower could choose and be limited to certain types of options.

So it looks like they're kind of changing the stance here. It would still be helpful to see this approach in somewhere clarified in the commentary or in the reg in some way instead of just a side note in the preamble. But something I noticed and I thought it's a little bit interesting. The second safeguard option is the unresponsive borrower. Satisfy this, you have to do a bunch of regular things, right? You have to regularly take steps to identify and obtain information needed to make your determination, figure out what you're going to offer the borrower. If you've made a determination, you have to regularly take steps to reach the borrower regarding that determination. But despite all these regular actions, the borrower has not communicated with the servicer for at least 90 days. Some important things to note, communicate for purposes of this carve out is very, very broad.

It includes any communication by phone, in writing or electronically about the mortgage loan obligation, just the loan obligation. It doesn't have to have anything to do with loss mitigation. So it could be anything they could call and ask for their loan balance. They could perhaps call to change their mailing address that seems to qualify to kick this down the road and prolong this protection. There's also nothing specific on the channel of communication. There's nothing specific on what information needs to be included in the communication. Hopefully at least it has to include enough information where you can identify the borrower in the account, that would be helpful. And also they specify communication also includes a payment on a loan obligation. There are also standards for the kind of regular contact you have to engage in order to use this unresponsive borrower option. The body of regs has all these vague things regularly... As I said, regularly take steps to get the information, regularly takes steps to reach the borrower.

The commentary ads and services have to regularly communicate the status of the loss mitigation review to the borrower, which includes requesting documentation and information that the servicer requires and communicating available options. It's all kind of vague and again, there isn't the scripted notice sort of cadence right under the current rule where you have letters including certain information as docs come in. So you have a lot of leeway to figure out how to do all these things and what communications go out when to ask for information or to follow up for what's needed or set timeframes for that kind of stuff. And the bureau hints, it's kind of aware that it's a little vague. The preamble specifically asks for input on whether these requirements are specific enough and whether they should add content to clarify how to determine whether these regular steps were taken. I think they absolutely have to.

I mean, it'd be great to have some safe harbor examples. It would be nice to have some specific minimum notice and call requirements, but because it's so free form, it may be challenging to do that, but that's something I think comments to the bureau should emphasize. More broadly though, frankly, I think the way this provision is drafted is not really workable or acceptable. I mean, it's so clearly leaves the door open for abuse by borrowers to be able to prolong these really significant foreclosure protections. And somewhat I think are pretty extreme fee protection that Matt's going to talk about on the next slide by as little as calling the servicer at least every 89 days and asking an unrelated question about the loan, that's a lot. I think they could do better in drafting that frankly, and they should.

And it's weird as justification for all this, they continually talk in the preamble about these features, right? This foreclosure hold and the fee protections that again, Matt will talk about as being sort of features of the CARES Act and that being a positive and that was an act of Congress. I mean, that was during a global pandemic. This is a little different. What they've effectively done here is it looks like they're allowing a borrower to impose a forbearance on the servicer, an investor for kind of an undefined length of time potentially without ever meaningfully moving towards an actual loss mitigation evaluation. But stepping back to the broader process, it's sort of a free-form process here. I think there's a lot of potential for very confusing scenarios for the borrower where they're offered one option, but then they say they want to be evaluated for a different option, and so they either reject that first option or let it expire.

I think at least that will make for some very confusing borrower communications. And as I mentioned before, I think they're being a little opaque about what they want you to do and how to proceed with loss mitigation evaluations. So let's step back, right? I mean, the plain language of the proposed rule and commentary we have... You're still allowed to impose a minimum 14-day acceptance timeframe. The borrower doesn't... Within that timeframe accepted, they're deemed to reject the offer. Your loss mitigation determination letter, when you make an offer, you have to tell the borrower whether the option will still be on the table if they ask to be reviewed for something else and don't accept it in time. I understand that to mean it's okay in some cases to tell them that if they don't accept the current offer to be reviewed for something else, they may no longer be eligible a later date.

They use the word weather, right? In the requirement, but then they include some language in the preamble that makes me kind of wary and a little uncertain, particularly for these sequential evaluations. And I'll read some excerpts here. "They say the CFPB recognizes that more complex situations may arise. For example, under the proposed framework, a borrower may decline an offer for a specific type of loss mitigation and seek first to learn what other options exist. Servicer may evaluate the borrower for additional options and the borrower may decide later that they would like to accept the offer that they previously declined." And their solution in there is talking about this new convoluted loss mitigation determination letter to clarify all those things. Then they go on that same paragraph to say, "The CFPB encourages servicers to work with borrowers throughout the loss mitigation process, including by allowing borrowers to select an option that the borrower previously rejected subject to investor requirements."

Then in the next paragraph, the preamble says, "Similarly, the CFPB encourages a servicer to re-review a borrower for an option for which the borrower was previously denied during the same loss mitigation review cycle. Such a review may be due to change borrower circumstances or other reasons." Again, ending with subject to investor requirements. A little wary of that. And then they sort of oddly throw in removing... They mentioned removing the duplicative request protection, which seems like a non-sequitur there, and I'm not sure they really understand what that provision currently says.

All that said, I'm a little concerned about what they really expect servicers to do, particularly with sequential loss mitigation evaluations. And I'm not sure they completely marry up with what seems to be permitted and the flexibility touted by the plain language of the rule. So with the sequential rule, you're going to have to think about to what degree you can keep an offer on the table even after a borrower rejected it or didn't accept in time in case they changed their minds or in some way periodically re-reviewing borrowers for certain loss mitigation options while the review cycle and foreclosure protections are in place, in case circumstances changed.

And depending on the option, that could be a pretty messy process. I mean, that's what they say they're encouraging or indicating that's what they want to see, but always sort of with the punting of subject to investor requirements. And that's really the key language here of what do they really mean... When do investor requirements carry the day and allow you to finally proceed to a foreclosure. Okay, so let's say for example, the investor requirement is that the loan has to be modified to certain economic terms. And that's just not possible at a later date because the interest rate or an increased arrearage that you have to capitalize, that's more of a sound basis.

But they sort of... And it may be less certain for other options, but they seem to be almost hinting at sort of procedural requirements from the investor, which seem to be more in the purview of 1024.1, which are loss mitigation procedures. So I'm a bit more wary of imposing procedural requirements like repeat reviews and timeframes for acceptance. And that's really covered in the regulation and using that to deny a borrower under the guise of them being investor requirements for loss mitigation criteria. And I think that language of the preamble is sort of fuels that suspicion. I've been talking for a while and apologize for that. So I'll go ahead and hand it over to Matt to talk about some of the fee protections and other things under the revised process.

Matthew Morr:
Thanks, Reid. As Reid and Rich both mentioned, these proposed rules present significant challenges and tension within themselves and with other laws and with contracts. So for example, part of the proposed rule is that during any loss mitigation review cycle as Reid explained was very, very broad. There can be no accrual of interest, penalties or fees during this cycle. This is problematic. The borrower's entered into contracts that provide lenders with rights if a borrower doesn't pay on time or they need to incur expenses. So this proposal will conflict with the party's contracts. Something very similar was done during the CARES Act for forbearances, but the circumstances now are very different. The CARES Act was enacted by Congress due to a national emergency to help the country deal with uncertainty about what the pandemic would do to the economy. But it was also done at a time with historically low interest rates that allowed servicers and lenders some flexibility to get borrowers back to paying their loans or to refinancing and paying off their loans.

Here, we're not in a national emergency, interest rates are higher, they are getting better, but it is still harder to get somebody into a modification and this isn't coming from Congress. This is coming from the CFPB proposing a rule that will rewrite contracts. And the CFPB doesn't even hide what they're trying to do. In the preamble, they go far as to say, this broad prohibition may result in servicers making payments to third party companies for delinquency related servicers that servicers may not be able to recoup. So they're up front saying that the servicers are likely to lose money on this issue. In some of the commentary they say the servicer may "be able to recoup fees and foreclosure." But that's not certain and certainly could be ripe for notice of errors or arguments about what's properly in the foreclosure fees. The CFPB tries to justify this by saying incurring these expenses will incentivize the servicers to process loss mitigation applications and to mitigate overall expenses as well as servicers and borrowers.

This is a little backwards in that the CFPB seems to want the servicers to have enough resources to very quickly look at these loss mitigation application and perform very quickly, but at the same time they're putting them in a situation to lose money. So sort of two things I think servicers will need to consider their servicing contracts and what happens with these fees and who bears that expense. I think right now it's certainly is not going to be the investor. And I also think that it is ripe for notice of errors and for litigation. The proposed rules also would change the current rules related to appeals. The current rules permit a borrower to appeal a denial of a loan modification if the borrower's submitted a complete application and if it was timely received. Now the CFPB wants to significantly expand this and say that it needs to be considered regardless of when it was received.

So instead of the prior 90 days before a scheduled sale, it gives them greater time and the borrower greater time in order to make that appeal. It also expands what can be appealed. As Reid discussed, the prior rules really were looking at only loan modifications and that's where the appeal rules were centered, which is you could appeal a denial of a loan modification. But now that's expanded to include any loss mitigation assistance. So we're talking about a request for forbearance or any number of other things. We view this as a change. The CFPB claims that loss mitigation determinations was already included in the catch-all of notice of errors and claim that courts have interpreted inconsistently and that they want to want clarity on this issue. We don't really view it that way. We view this as an expansion and for the folks responding to notice of errors, they'll need to make sure that this is now included in what they do.

I think another consideration, although Chevron changes this a little bit, is the CFPB is saying even under rules, right? Even under the current rules that loss mitigation issues are covered by the catch-all, so folks should be considering and thinking about including those in their responses to notice of errors. The borrower still needs to request the appeal. I think 14 days of the loss mitigation determination, but it also works in that a loss mitigation determination can also be a notice of error. So it's combined those two concepts which Reid and I are going to discuss a little bit more later on about some of the tension and lack of clarity that we'll create.

The proposed rules now delete some of the commentary about not needing to respond to duplicative requests for loss mitigation assistance. And the rule now says that the servicer needs to review loss mitigation options with the borrower unless one of the two safe harbors that Reid discussed earlier met, meaning that all of the loss mitigation options have been looked at and none remain or there's been no communication between the borrower and the servicer for 90 days despite the servicer making efforts to communicate with them.

The next piece I want to talk about is servicing transfers. In my current practice, I see a lot of litigation come up on mortgage loans during service transfers. And this happens with loss mitigation application, loan modification applications, notice of errors where the servicer is switching and those switches can result in litigation and occasionally liability because of delays in time. And what the CFPB wants to do here is say the person that's taking over servicing must comply with all of these requirements in the same time frames that apply to the prior servicer.

So what this means from a practical standpoint is when these big service transfers are taking place, folks on both sides need to really prioritize making sure that there's communications about what loss mitigation assistance... Where they are in the loss mitigation assistance process so that they get a timely response. I've seen cases now where there's a transfer of servicing while an application is pending and it results in litigation because there's a delay in getting a response. Well, now it's even more stringent because the CFPB is saying you need to comply with these same time frames. Reid, do you want to take the next one?

Reid Herlihy:
Yeah, real quick on that duplicative request, it's really odd the way... As I said before, this provision doesn't really make sense to me the way it's drafted and it doesn't get at the actual issue that it was intended to cover before. The only time they mention in the preamble for duplicative requests is to say, well, you may have to subject to investor requirements, review a borrower again for a loss bid option during the same review cycle. But they don't address the important part is scenario, you have a request for loss mitigation assistance, you've exhausted the process, you've met the foreclosure safeguards, you can continue foreclosure, and then five days later the borrower makes another request for loss mitigation assistance. You then have to... And has been delinquent the whole time. You then have to stop everything again. And that's the protection that's important, that needs to be reviewed and it almost looks like they just didn't understand what their regulation said, at any rate-

Matthew Morr:
Well, and beyond that, it's ripe for delay and for... I'll call the internet lawyers and the plaintiffs bar to abuse to continue getting delays to a foreclosure.

Reid Herlihy:
100%, yeah. So I'll move along with just a few sort of quick less important ones. There's a process in here for missing information, not in the borrower's control. The general rule is don't deny them for loss of mitigation just because you lack documents from a source other than the borrower. But if you regularly take steps to obtain that information but can't get it in 90 days and you for that reason can't make a determination, you can deny a request for assistance if you send a written notice. I'm not going to describe it too much. Frankly, having to use this option should be a very, very, very rare occurrence if you ever do including under the current rule. So the only thing to know it is kind of strange. They talk about, and I think it's just bad drafting, applying completely to a request for loss mitigation assistance holistically.

So they say if you follow these steps, you can deny a borrower for a request for loss mitigation assistance, which seems possibly all of the options available as opposed to saying you can deny them for a particular option. So I think they just hand-handed that one. And then moving on to early intervention, there are some changes. We have some new content required in the written notices. So first, like the loss mitigation notice, you have to include that phone number and website where the borrower can access the list of all the investor-specific information options available to the borrower. You also have to include the name of the investor on the notice and a brief description of each type of loss mitigation option that it's generally available from the investor. Contemplating two different lists, I don't know practically how those lists of options are really going to change, so whatever.

And then you have some specific early intervention requirements for borrowers on an active forbearance plan. So you're exempt from live contact and from the written notice early intervention requirements while the borrower is performing under forbearance. Then between 30 and 45 days prior to the end of the forbearance, you have to take certain steps. You got to try to make live contact and during the live contact you have to inform the borrower of the end date of the forbearance and of the availability of loss mitigation options. And then you have to send a written notice again with the forbearance end date and then basically the other information otherwise required for written early intervention notice. And then they just clarify that when the exemption ends, you have to resume the early intervention requirements after the next payment due date. That's it for that. And I'll hand it back to Matt to talk about some of those notice of error changes.

Matthew Morr:
Yeah, there's really two pieces of it. The notice of error now includes advancing the foreclosure process if you shouldn't have because of any of these loss mitigation efforts. It also includes a failure to make an accurate loss mitigation determination. So this creates a very odd tension if an appeal constitutes a notice of error. Normally an appeal would be you'd have a response within a couple of weeks and that would end the process. You now have an issue where someone in theory could send a notice of error regarding that loss mitigation determination months down the line, so that the same identifying what could be in an appeal in a notice of error that comes out later. And so you have a problem where you have a bit of a conflicting timetable, but taking it at its word, if you then need to investigate as part of your duties to respond to a notice of error and make that reasonable investigation. What do you do if you determine there was an error?

You're past the timeframe. And so correcting that error could be extremely difficult. You're going to have somebody that's likely not made payments, they're going to have an increased loan balance. You're going to have changes in the market related to interest rates. So it may be virtually impossible to essentially correct something due to the passage of time. And this is really poor drafting and a conflict within itself because there was already a process to appeal with a short timeframe, and now it's pushing it much farther out and create some problems. I would anticipate when servicers get the letters from plaintiffs lawyers or borrowers are pulling out templates from the internet that it's always going to include now some sort of notice of error relating to loss mitigation determinations. And that won't just be loan mod agreements, but it could be any number of possible loss mitigation determinations. And so I suspect we'll probably see some litigation about this issue. Reid, I can turn it back to you and-

Reid Herlihy:
Actually hand it over to Mr. Andreano here to talk about the exciting new language access proposal.

Richard Andreano:
Yes. Yes, indeed. And if you read the actual proposed language of the rule, you'll see nothing. And why is that? Because it doesn't appear there. It only appears in the preamble. Very, very strange to have done that. Now with the other requirements, you've talked about the Bureau's thinking about a 12-month effective date after publication in the Federal Register, but for these requirements, they're suggesting 18 months, which indicates to me they might be thinking of going from preamble to final rule, which would be most inappropriate. But let's take a look at what they're looking... Quickly, it's basically going to be Spanish automatic five additional languages based on your borrower population. And they don't really give a whole lot of guidance, but they request comments on should they be more rigid in how the services select those five additional languages plus potentially other languages that are beyond Spanish plus five.

Now here we've listed what would be required for the automatically in Spanish. It's the early intervention notices in those cited sections, notices for borrows whose forbearances are about to end, and the lost mitigation notices. Similarly, upon request, same notices, written notices in the five other languages. You could go beyond that if you want, but at least five. And then also these oral communications, you can see the live contact communications and the continuity of contact requirements would all require that. Now, would you have to tell the borrowers that they're available? Yes, five brief statements and it's not five separate. It's really the same statement in the five different languages or more if you provide for more, you'd be allowed to do that again. But it could be more than Spanish plus five. If the servicer knows or has reason to know whatever that means that there was marketing done to the consumer. In another language, then they would have to upon request, communicate in that language as well.

The preamble uses Navajo as an example to give you an idea of how broad this might be. Now in the preamble, they acknowledge, gee, the servicer may not exactly know what was used in the marketing of the loan. I take no comfort in that. I think the Bureau will take a very broad view of what the servicer knew or should have known and diligence that the servicer should have engaged in when acquiring servicing as to Navajo form of languages were used in the marketing alone. So I think this is a very, very broad requirement. Now, let's look at a few of the Bureau's statements regarding this requirement. Now, the failure to provide an accurate translation or interpretation would not only violate the language access requirement, it would violate the underlying substantive requirement as well. So very important. Now, currently, the Bureau is only proposing to limit the language access requirements to delinquency-related communications, but it is reserving the right to expand that at some point in the future.

So this is just the tip of the iceberg folks. They say they're not proposing specific format requirements and how to do this good and bad. We'll get into that in a moment. Now also, why isn't this in the proposed language? Why is it just in the preamble? And here's what the borough says well, the proposed regulatory text, there could be multiple ways to do this depending on what options result. And we really... Let's get input on this. Well, here's what the Bureau should have done. Instead of including this in the preamble and a proposed rule, it should have separately included this in an advance notice of proposed rulemaking, taking stakeholder input, then issue a proposed rule and then go final. Now, if they want to do that here, if they want to go from this input to a proposed rule, fine. They want to go from this to a final rule, not fine, and I think that would violate the Administrative Procedures Act.

Now, overall, what authority exists for this? None that I can find. They cite general resp authroity, general Dodd-Frank authority. Congress hasn't gone here yet, and I don't think the Bureau can go here yet. So I think that's also going to be an issue and we'll get to potential challenges in a little bit. Also, however they adopt this, should they go forward. The servicing provisions of Reg X, some have private rights of actions, some do not. Depends what provision they adopt it under in Reg A. They should adopt this under a provision that does not have a private right of action. Maybe we'll get there someday. We're not there yet. This should only be something that would be subject to administrative enforcement. Now, let's see also where we're going to go here. Obviously this would be very significant, very cost-intensive. Bureau does ask for a lot of comments on this.

Now, let's see. Who could actually provide help here? Well, you know who could provide help here? The Bureau. They came out with a language access plan last November where they tout everything they do, how they've made various communications available in various languages. How they have translated on their website, not just Spanish, but Arabic, Chinese, Haitian, Creole, Korean, Russian, Tagalog, Vietnamese. Isn't that wonderful? They could process complaints. I think over 180 different languages. They have millions and millions of dollars, hundreds of million dollar budget. They can do this. What have they proposed to reach out to the industry to help this, which would help consumers? Nothing, absolutely nothing. This is where the comments have to be very stern. Bureau, if you want to do this, you have to meet the industry. Okay, there are a lot of loss mitigation plans. There are a lot of service requirements.

We have Fannie, we have Freddie, we have FHA, we have VA. Why don't you at least take those as models and come up with interpretations in your 180 languages of standard servicing requirement clauses, standard loss mitigation clause, and publish those? Put them in an appendix to Reg X or Reg Z or both and do that. Meet the industry halfway. Just don't impose these requirements with no resources offered to the industry at all, and no authority to do this in the first place. Comments should be very strong on this. We get it. We get limited English proficiency. It's an issue that needs to be addressed, but the regulator has to meet us halfway in getting to that. With that, let me turn it back over to Matt to address the credit reporting aspects of this proposal.

Matthew Morr:
So just like Rich mentioned with the language, they don't propose a rule. They request comments regarding reporting for borrowers under loss mitigation review. This has the same issues that Rich mentioned about enacting a rule without comment, but overall, assuming that they do it properly, I think it could be a good thing. There was lots of questions and some litigation about reporting a CARES Act forbearance where it said you needed to report the borrower's current if they were in a forbearance. And so we had... Reid and I both dealt with lots of questions about, well, if you're reporting the borrower current, can you then in the monthly payment spot indicate that there was no payment or that there was no data, and whether it was appropriate to report special comment codes like in forbearance or forbearance related to a natural disaster. And so if the CFPB could provide a framework where there was guidance about what was appropriate and what was not, it could avoid a lot of needless litigation.

Richard Andreano:
Let's now move on. As I mentioned, there could be some potential challenges to this rule. One, do they have the legal authority in the first place to do this question that the bureaus always lacks in their cost-benefit analysis and impact on the industry? My guess is there'll be no different here. That will probably serve another aspect for challenge, but we'll be in a post-Chevron world. Now, the Loper Bright decision, which overturned Chevron was only based on the Administrative Procedure Act, meaning Congress can step in because it wasn't a constitutional ruling. My guess is I'll have to wait until the next Congress. A lot of bills introduced so far. We'll have to see what... Congress could implement Chevron as a statutory format. It also in specific legislation could within the bounds of the Constitution delegate interpretive authority to agencies. It can do that, and the Supreme Court confirmed they could do that. Case we had recently on it, which was Townstone, which was the ECOA case where the Seventh Circuit ruled ECOA does apply to pre-application conduct prospective applicants.

Minimalistic, all the courts said is it's de novo. We applied de novo root. They didn't address the Skidmore doctrine, which is an old Supreme Court case, which in Loper Bright, the Supreme Court said still exists, which is deference tied to the expertise of an agency and the persuasion of an agency. It's not mandatory, but the more an issue in the expertise of an agency and the more persuasive an agency's argue it is, the more respect a court should give to that agency position, but they're not bound to do it. Do courts adopt that or something in between? Frankly, we're just going to have to wait and see. I think whatever the Bureau does likely will be challenged. And if you want to put money on it on a federal district court in Texas that are most likely where it would occur.

Thank you speakers, Reid Herlihy and Matthew Morr.

To make sure you don't miss our future episodes, subscribe to our show on your favorite podcast platform; Apple Podcasts, YouTube, Spotify, or wherever you listen. Don't forget to check out our blog, Consumer Finance Monitor.com for daily insights of the Financial Services Industry. If you have any questions or suggestions for the show, please email podcast@ballardspahr.com. Stay tuned each Thursday for a new episode.

Thank you for listening. Have a good day!