

The Banking Law Journal

Established 1889

An A.S. Pratt™ PUBLICATION

NOVEMBER/DECEMBER 2021

EDITOR'S NOTE: CLIMATE CHANGE

Victoria Prussen Spears

ESG AND BANKING: THE DISCLOSURE DEBATE

Robert C. Azarow, Erik Walsh, Sarah Grey, and Paul Nabhan

FEDERAL RESERVE VICE CHAIR ADDRESSES CLIMATE-RELATED FINANCIAL RISKS

Travis P. Nelson and Lara M. Rios

NEW PRIVATE FLOOD INSURANCE GUIDANCE ON HORIZON FOR BANKS

Michael J. Heller

LEGAL IMPACT OF FFIEC UPDATE TO AUTHENTICATION GUIDANCE FOR INTERNET-BASED FINANCIAL SERVICES

Scott R. Fryzel, Lindsay S. Henry, and Lauren E. Quigley

SBA GUARANTY PURCHASES AND LENDER SERVICING RESPONSIBILITIES FOR PPP LOANS

Martin Teckler and Grant E. Buerstetta

CFPB FINALIZES COVID-19 MORTGAGE SERVICING RULES

Abigail M. Lyle and Taylor Williams

MOST DE NOVO BANKS WILL BE FORMED BY PAYMENTS AND FINTECH COMPANIES

James W. Stevens, David S. Idokogi, and Brenna She field

TEMPORARY RELIEF FOR DEBT COLLECTORS: ELEVENTH CIRCUIT WITHHOLDS *HUNSTEIN* MANDATE

Daniel F. Gottlieb, Sam Siegfried, and Mark E. Schreiber

NEW CENTRAL BANK GUIDANCE FOR UAE FINANCIAL INSTITUTIONS ON SUSPICIOUS ACTIVITY/ TRANSACTION REPORTING

Benjamin D. Wood, Kevin P. McCart, Claiborne W. Porter, and Richard J. Gibbon



THE BANKING LAW JOURNAL

VOLUME 138

NUMBER 10

November/December 2021

Editor's Note: Climate Change Victoria Prussen Spears	551
ESG and Banking: The Disclosure Debate Robert C. Azarow, Erik Walsh, Sarah Grey, and Paul Nabhan	554
Federal Reserve Vice Chair Addresses Climate-Related Financial Risks Travis P. Nelson and Lara M. Rios	562
New Private Flood Insurance Guidance on Horizon for Banks Michael J. Heller	565
Legal Impact of FFIEC Update to Authentication Guidance for Internet-Based Financial Services Scott R. Fryzel, Lindsay S. Henry, and Lauren E. Quigley	576
SBA Guaranty Purchases and Lender Servicing Responsibilities for PPP Loans Martin Teckler and Grant E. Buerstetta	582
CFPB Finalizes COVID-19 Mortgage Servicing Rules Abigail M. Lyle and Taylor Williams	586
Most De Novo Banks Will Be Formed by Payments and Fintech Companies James W. Stevens, David S. Idokogi, and Brenna Sheffield	591
Temporary Relief for Debt Collectors: Eleventh Circuit Withholds <i>Hunstein</i> Mandate Daniel F. Gottlieb, Sam Siegfried, and Mark E. Schreiber	595
New Central Bank Guidance for UAE Financial Institutions on Suspicious Activity/Transaction Reporting Benjamin D. Wood, Kevin P. McCart, Claiborne W. Porter, and Richard J. Gibbon	600

QUESTIONS ABOUT THIS PUBLICATION?

For questions about the **Editorial Content** appearing in these volumes or reprint permission, please call:

Matthew T. Burke at (800) 252-9257
Email: matthew.t.burke@lexisnexis.com
Outside the United States and Canada, please call (973) 820-2000

For assistance with replacement pages, shipments, billing or other customer service matters, please call:

Customer Services Department at (800) 833-9844
Outside the United States and Canada, please call (518) 487-3385
Fax Number (800) 828-8341
Customer Service Website <http://www.lexisnexis.com/custserv/>

For information on other Matthew Bender publications, please call
Your account manager or (800) 223-1940
Outside the United States and Canada, please call (937) 247-0293

ISBN: 978-0-7698-7878-2 (print)

ISSN: 0005-5506 (Print)

Cite this publication as:

The Banking Law Journal (LexisNexis A.S. Pratt)

Because the section you are citing may be revised in a later release, you may wish to photocopy or print out the section for convenient future reference.

This publication is designed to provide authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis and the Knowledge Burst logo are registered trademarks of RELX Inc. Matthew Bender, the Matthew Bender Flame Design, and A.S. Pratt are registered trademarks of Matthew Bender Properties Inc.

Copyright © 2021 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved. No copyright is claimed by LexisNexis or Matthew Bender & Company, Inc., in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material may be licensed for a fee from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, Mass. 01923, telephone (978) 750-8400.

Editorial Office
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862
www.lexisnexis.com

MATTHEW  BENDER

Editor-in-Chief, Editor & Board of Editors

EDITOR-IN-CHIEF

STEVEN A. MEYEROWITZ

President, Meyerowitz Communications Inc.

EDITOR

VICTORIA PRUSSEN SPEARS

Senior Vice President, Meyerowitz Communications Inc.

BOARD OF EDITORS

BARKLEY CLARK

Partner, Stinson Leonard Street LLP

CARLETON GOSS

Counsel, Hunton Andrews Kurth LLP

MICHAEL J. HELLER

Partner, Rivkin Radler LLP

SATISH M. KINI

Partner, Debevoise & Plimpton LLP

DOUGLAS LANDY

White & Case LLP

PAUL L. LEE

Of Counsel, Debevoise & Plimpton LLP

TIMOTHY D. NAEGELE

Partner, Timothy D. Naegele & Associates

STEPHEN J. NEWMAN

Partner, Stroock & Stroock & Lavan LLP

THE BANKING LAW JOURNAL (ISBN 978-0-76987-878-2) (USPS 003-160) is published ten times a year by Matthew Bender & Company, Inc. Periodicals Postage Paid at Washington, D.C., and at additional mailing offices. Copyright 2021 Reed Elsevier Properties SA., used under license by Matthew Bender & Company, Inc. No part of this journal may be reproduced in any form—by microfilm, xerography, or otherwise—or incorporated into any information retrieval system without the written permission of the copyright owner. For customer support, please contact LexisNexis Matthew Bender, 1275 Broadway, Albany, NY 12204 or e-mail Customer.Support@lexisnexis.com. Direct any editorial inquiries and send any material for publication to Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway, #18R, Floral Park, NY 11005, smeyerowitz@meyerowitzcommunications.com, 631.291.5541. Material for publication is welcomed—articles, decisions, or other items of interest to bankers, officers of financial institutions, and their attorneys. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher.

POSTMASTER: Send address changes to THE BANKING LAW JOURNAL, LexisNexis Matthew Bender, 230 Park Ave, 7th Floor, New York, NY 10169.

POSTMASTER: Send address changes to THE BANKING LAW JOURNAL, A.S. Pratt & Sons, 805 Fifteenth Street, NW, Third Floor, Washington, DC 20005-2207.

CFPB Finalizes COVID-19 Mortgage Servicing Rules

*Abigail M. Lyle and Taylor Williams**

The Consumer Financial Protection Bureau has issued the 2021 Mortgage Servicing COVID-19 Final Rule. The authors of this article provide a brief overview of the key components of the final rule.

The Consumer Financial Protection Bureau (the “CFPB”) previously issued a proposed rule that would, among other things, establish a temporary COVID-19 emergency pre-foreclosure review period until December 31, 2021, for principal residences. The CFPB accepted public comments through May 10, 2021, and, in response to the comments received, the CFPB issued the 2021 Mortgage Servicing COVID-19 Final Rule (the “Final Rule”) on June 28, 2021. The Final Rule took effect August 31, 2021. Below is a brief overview of the key components of the Final Rule.

NEW PROCEDURAL SAFEGUARDS FOR FORECLOSURE INITIATION

Unlike the Proposed Rule, the Final Rule does not implement a blanket prohibition on foreclosure actions. Nonetheless, the Final Rule only allows servicers to proceed with foreclosures upon satisfaction of a prescribed “procedural safeguard.” Beginning August 31, 2021, through December 31, 2021, unless an exception applies, a servicer must ensure that at least one of the following procedural safeguards has been met before referring certain 120-day delinquent accounts for foreclosure. Broadly, the following three procedural safeguards apply to first notice or first filings to initiate foreclosures:

- *Submission of Loss Mitigation Application.* The borrower must have submitted a completed loss mitigation application, the borrower must have remained delinquent at all times since submitting the application, and 12 CFR § 1024.41(f)(2) permits the servicer to make the first notice or filing required for foreclosure.

* Abigail M. Lyle, a partner in the financial services litigation and compliance practice group in the Dallas office of Hunton Andrews Kurth, focuses her practice on regulatory compliance and defending financial institutions in enforcement actions and litigation related to consumer protection laws. Taylor Williams is an associate in the financial institutions corporate and regulatory practice group in the firm’s Dallas office, focusing on counseling financial service providers on regulatory and compliance matters. The authors may be reached at alyle@huntonak.com and twilliams@huntonak.com, respectively.

- *Abandonment.* The property securing the mortgage loan must be considered to be abandoned by applicable state or local law.
- *Unresponsiveness.* The borrower must have been unresponsive to servicer outreach for at least 90 days before the servicer makes the foreclosure referral, including no response to the outreach required by 12 CFR § 1024.39(a) and (b) and § 1024.41(f)(3). Further, the borrower's forbearance program (as applicable), must have ended at least 30 days before the servicer makes the foreclosure referral.

Servicers are not required, however, to comply with the procedural safeguards if (a) the foreclosure referral (as permitted by applicable law) occurs on or after January 1, 2022, (b) the borrower was more than 120 days delinquent prior to March 1, 2020, or (c) the statute of limitations applicable to the foreclosure will expire before January 1, 2022.

STREAMLINED LOAN MODIFICATION

The Final Rule codifies the streamlined loan modification options set forth in the Proposed Rule to borrowers with COVID-19-related hardships based on the evaluation of an incomplete application. If requisite criteria are met, servicers can offer the loan modification to a borrower based upon an evaluation of an incomplete application. Pursuant to the Final Rule, a loan modification made in reliance upon this exception must meet the following requirements:

- *COVID-19-Related Hardship:* The borrower must be experiencing a COVID-19-related hardship.
- *Term and Payment Limitations:* The modification may not cause the borrower's monthly principal and interest payment to increase and may not extend the term of the loan by more than 480 months from the date the loan modification is effective.
- *Non-Interest-Bearing Deferred Amounts:* Any amounts that a borrower may delay paying until the loan is refinanced, the property is sold, or the loan modification matures must not accrue interest.
- *Fee Restrictions:* The servicer may not charge any fee in connection with the modification and must waive any existing late charges, penalties, stop payment fees, or any similar charges that were incurred on or after March 1, 2020, upon a borrower's acceptance of the loan modification.
- *Delinquency Cure:* A borrower's acceptance of the loan modification must end any preexisting delinquency on the loan or the modification must be designed to end any preexisting delinquency upon the borrower satisfying the servicer's requirements for completing a trial

loan modification plan and accepting a permanent loan modification.

If a borrower accepts an offer made pursuant to this exception, the Final Rule excludes servicers from certain requirements with respect to any loss mitigation application that was submitted prior to the loan modification offer, such as exercising reasonable diligence to complete the loss mitigation application and sending the required acknowledgment notice as required by 12 CFR 1024.41(b)(2). The Final Rule, however, will require servicers to immediately resume reasonable diligence efforts to obtain a complete loss mitigation application if a borrower becomes delinquent after accepting a loan modification or requests further assistance.

EARLY INTERVENTION REQUIREMENTS

The Final Rule imposes new early intervention requirements to ensure servicers are communicating timely and accurate information to borrowers about their loss mitigation options. The specific communications hinge on whether a borrower is currently in a forbearance program or not.

If a borrower is not in a forbearance program at the time live contact is established by the servicer and a forbearance program is available to borrowers experiencing a COVID-19-related hardship, the servicer must ask the borrower whether they are experiencing such a hardship. If the borrower indicates that they are experiencing a COVID-19-related hardship, the servicer must list and briefly describe any available forbearance programs and what action the borrower must take to be evaluated for such program. The servicer is also required to identify at least one way the borrower can find contact information for homeownership counseling services (for example, referencing the borrower's periodic statement).

Conversely, if a borrower is currently participating in a forbearance program made available to borrowers experiencing a COVID-19-related hardship, during the live contact made pursuant to 12 CFR 1024.39(a), the servicer must provide certain information to the borrower, which includes:

- Informing the borrower of the date the borrower's current forbearance program ends;
- Providing a list and brief description of each of the types of forbearance extensions, repayment options, and other loss mitigation options, including but not limited to COVID-19-related options, made available to the borrower to resolve a borrower's delinquency at the end of the forbearance program and the actions the borrower must take to be evaluated for such loss mitigation options; and
- Informing the borrower of at least one way the borrower can find

contact information for homeownership counseling services (for example, referencing the borrower's periodic statement).

This provision, however, is temporary and ends on October 1, 2022.

REASONABLE DILIGENCE OBLIGATIONS

The Final Rule codifies a servicer's reasonable diligence obligations when the borrower is in a short-term payment forbearance program based on the evaluation of an incomplete application. Under the Final Rule, a servicer must contact the borrower no later than 30 days before the end of the forbearance period to determine whether the borrower wishes to complete the loss mitigation application and proceed with a full loss mitigation application. If a borrower requests further assistance, the Final Rule requires that a servicer exercise reasonable diligence to complete the application before the end of the forbearance program period.

DEFINITION OF "COVID-19-RELATED HARDSHIP"

Finally, the Final Rule codifies "COVID-19-related hardship" to mean, "a financial hardship due, directly or indirectly, to the national emergency for the COVID-19 pandemic declared in Proclamation 9994 on March 13, 2020 (beginning on March 1, 2020) and continued on February 24, 2021 in accordance with section 202(d) of the National Emergencies Act (50 U.S.C. 1622(d))."

KEY TAKEAWAYS

While the Final Rule is not as far-reaching as the blanket foreclosure prohibition initially suggested in the Proposed Rule, it is nonetheless apparent that the CFPB's clear focus is still on preventing foreclosures. Servicers impacted by the Final Rule should be aware of the new procedural safeguards before initiating foreclosures between August 31, 2021 and December 31, 2021. Further, the additional flexibility provided by the Final Rule is an additional tool for lenders and servicers to develop alternative work-out and modification programs with borrowers. As expected, the Final Rule covers loans on principal residences and generally excludes small servicers.

Servicers should also be mindful of the relevant record retention requirements as they pertain to the Final Rule. Specifically, Regulation X imposes additional record retention requirements for servicers, particularly in connection with demonstrating compliance with the procedural safeguards. If a servicer makes the first notice or filing required by law for any judicial or

non-judicial foreclosure process before January 1, 2022, a servicer must ensure its records include evidence demonstrating compliance with, among other things, the satisfaction of one of the procedural safeguards described above. For example, if the procedural safeguards are met due to a borrower's unresponsiveness, a servicer must ensure its records include evidence demonstrating that the servicer did not receive communications from the borrower during the applicable time period.

Accordingly, it is important that servicers implement appropriate policies and procedures to address the new Final Rule requirements, with particular focus on building out new processes to be able to document compliance with the procedural safeguards.