CARES Act Forbearance & Foreclosure

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CARES Act Forbearance Provisions

The mortgage relief provided by the CARES Act[1] has prompted questions regarding the Act's forbearance provisions. Mortgage companies navigating federally backed mortgage lending and servicing requirements during the National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak, must, among other things, abide by the CARES Act, federal regulations, and investor servicing guidelines.

Statutory Overview

The CARES Act provides protections for borrowers with federally-backed mortgages, which are mortgage loans purchased or securitized by Fannie Mae or Freddie Mac and loans made, insured, or guaranteed by the Department of Housing and Urban Development, Department of Veterans Affairs, or Department of Agriculture.[2] Servicers of federally-backed mortgages must provide forbearance as follows:

1. Forbearance must be granted upon receiving a request for forbearance from a borrower and the borrower's attestation to a financial hardship caused by the COVID–19 emergency.
2. The CARES Act mandates that the forbearance period for borrowers with COVID-related hardships can last as long as two consecutive 180-day periods.
3. No additional interest, fees, or penalties can be charged beyond the amounts scheduled or calculated as if the borrower made all contractual payments on time and in full under the terms of the mortgage contract.

Relevant Rules & Guidelines

How the CARES Act interacts with rules or guidelines from regulators may not always be clear. Regardless, there are several regulations and guidelines that pertain to servicers' determinations as to how to implement the CARES Act requirements, including:

- Regulations X and Z
- CFPB, OCC, FDIC, FRB, NCUA, and CSBS Joint Statement on Supervisory and Enforcement Practices Regarding the Mortgage Servicing Rules in Response to the COVID-19 Emergency and the CARES Act
- CFPB Mortgage Servicing Rules FAQs related to the COVID-19 Emergency
- Fannie Mae Lender Letter (LL-2020-02)
- Freddie Mac Bulletin 2020-10 Temporary Servicing Guidance Related to COVID-19
- Federal Housing Administration COVID-19 Questions and Answers
- Veterans Benefits Administration Extended Relief Under the CARES Act for those Affected by COVID-19

Questions and Answers

The following Q&A's are prefaced with context related to observed or anticipated actions by mortgage servicers.

Context: Some servicers are granting a CARES Act forbearance for an initial period shorter than the 180-day period referenced in the CARES Act (e.g. 3 months), followed by review and potential extension by the servicer.

Q: *Given that the CARES Act says, "up to 180 days," are servicers allowed to provide forbearances in shorter increments?*

A: According to investor guidelines, servicers can grant CARES Act forbearance periods for less than 180-days at the borrower's request or with the borrower's consent. However, servicers must default to the term requested by the borrower (not to exceed 180 days) if the borrower and servicer cannot agree on an appropriate forbearance length or communication with the requesting borrower is not possible under the circumstances. Servicers are obligated to provide a CARES Act forbearance if: (1) a borrower requests forbearance, and (2) the borrower affirms financial hardship due to the COVID-19 emergency.[3] Because the statutory language qualifies the period as "up to" 180-days, servicers can grant forbearance in separate, shorter increments than the 180-day period with borrower consent, but must extend those shorter periods unless agreed by the borrower with no further borrower attestation required.

Servicers must effectively manage compliance with CARES Act forbearance requirements and related operational activities of the institution over the full life-cycle of the forbearance period. When granting a period other than 180 days with the borrower's consent, the servicer's board of directors and management must provide the additional resources necessary to continue forbearance as required under the CARES Act. In order to be responsive to borrowers and to ensure compliance with law, management should assess its ability to adequately perform under shorter, incremental forbearance periods, including any supplemental systems or human resources needed.

Context: Some servicers are asking for documentation of the need for forbearance or proof that the borrower can't make their payment.

Q: *May servicers request information supporting the need for forbearance?*

A: No. Forbearance must be granted if requested and the borrower attests to a COVID- related hardship. However, servicers may work with the borrower to better understand the borrower's situation so long as (i) borrowers are not misled about the requirements of, or dissuaded from proceeding with, a CARES Act forbearance if they have a COVID-related hardship and (ii) any information obtained from the borrower has no bearing on the servicer's provision of a CARES Act forbearance.

Q: *Do borrowers need to prove hardship?*

A: No. Attestation of hardship due to COVID-19 is the exclusive requirement established by the CARES Act for forbearance.[4]

Q: *May servicers determine that a borrower does not need a CARES Act forbearance and limit the amount of forbearance given?*

A: No. A servicer must grant forbearance to any requesting borrower with a federally backed mortgage loan attesting to a COVID-19 related hardship regardless of delinquency status.

Context: some servicers are steering borrowers away from requesting forbearance.

Q: *Should a servicer steer a borrower away from a CARES Act forbearance?*

A: The CARES Act dictates that forbearance must be granted upon request by an attesting borrower. Examiners will evaluate communications between borrowers and their servicers, including the servicer's communication of repayment options for legal compliance or resulting consumer harm. A servicer that offers very limited repayment options when others are reasonably available could depending on the facts and circumstances, be at risk of legal violation or causing consumer harm.[5]

Context: some originators are reported to structure closing attestations in a manner designed to discourage borrowers that subsequently experience a COVID-related hardship from requesting forbearance.

Q: *Should an originator use loan closing attestations, notices or other communications to discourage borrowers from seeking forbearance under the CARES Act following loan closing.*

A: Examiners will evaluate originator communications with borrowers for legal compliance or causing consumer harm. An originator that misleads a borrower concerning her rights under the CARES Act could, depending on the facts and circumstances, be at risk of committing a legal violation or causing consumer harm.

Footnotes

1 Coronavirus Aid, Relief, and Economic Security Act, Public Law No: 116-136 (27 March 2020) ("CARES Act").
Available at https://www.congress.gov/bill/116th-congress/house-bill/748/text.

2 CARES Act §4022(a)(2).

3 CARES Act § 4022(b)(1).

4 See, e.g. Joint Statement on Supervisory and Enforcement Practices Regarding the Mortgage Servicing Rules in Response to the COVID-19 Emergency and the CARES Act ("Servicers may not require any additional information from the borrower before granting a CARES Act forbearance.") ; Fannie Mae Lender Letter 2020-02 ("[N]o additional documentation other than the borrower's attestation to a financial hardship caused by the COVID-19 emergency is required."; Freddie Mac Temporary Servicing Guidance Related to COVID-19 ("In the event the Servicer and Borrower cannot agree on an appropriate forbearance length, or further communication with the Borrower is not possible under the circumstances, the Servicer must provide the term requested by the Borrower, not to exceed 180 days."

5 Fannie Mae, Freddie Mac, the Federal Housing Administration, the U.S. Department of Veterans Affairs, and the
U.S. Department of Agriculture have provided guidance for repayment of forborne payments.

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