

**NEW YORK STATE
DEPARTMENT OF FINANCIAL SERVICES
PROPOSED
3 NYCRR 419**

SERVICING MORTGAGE LOANS: BUSINESS CONDUCT RULES

I, Linda A. Lacewell, Acting Superintendent of Financial Services, pursuant to the authority granted by Sections 10, 11, 14, and Article 12-D of the Banking Law and Sections 102, 201, 202, 301, and 302 of the Financial Services Law, do hereby promulgate Part 419 of Title 3 of the Official Compilation of Codes, Rules and Regulations of the State of New York, to take effect upon publication of the Notice of Adoption in the State Register, to read as follows:

(ALL OF THE FOLLOWING MATERIAL IS NEW)

§ 419.1	Definitions
§ 419.2	Escrow accounts
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§ 419.1 Definitions

For purposes of this part, unless otherwise stated herein, terms shall have the same meaning as set forth in Part 418 of this title.

(a) “*Affiliated business arrangements*” means any business arrangement between a servicer or mortgagee and a person or entity that directly, or indirectly, through one of more intermediaries, controls, or is controlled by or is under common control with the servicer or mortgagee.

(b) “*Authorized representative*” means a person, including an attorney, employee or agent of a government agency, not-for-profit housing counseling organization, or legal services organization, designated by a borrower in a written authorization signed by the borrower, or any other form of verifiable authorization, to share information and communicate with a servicer on behalf of the borrower.

(c) “*Borrower*” means a natural person obligated to pay a mortgage loan and, if applicable, such person’s successor in interest or authorized representative when acting on behalf of such person.

(d) “*Business day*” means any day of the week except for Saturday, Sunday and any legal holiday.

(e) “*Complete loss mitigation application*” means a loss mitigation application for which a servicer has received the information that the servicer reasonably requires from a borrower to evaluate the loss mitigation options available to the borrower.

(f) “*Clearly and conspicuously*” means 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.

(g) “*Loss mitigation application*” means an oral or written request for a loss mitigation option that is accompanied by any information required by a servicer to evaluate the loss mitigation options available to the borrower.

(h) “*Loss mitigation option*” means an alternative to foreclosure, including, but not limited to, a loan modification, shared appreciation mortgage modification agreement, reinstatement, forbearance, deed-in-lieu, or short sale.

(i) “*Mortgagee*” shall mean the owner or assignee of a mortgage loan.

(j) “*RESPA*” means the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. section 2601 et seq. and regulations adopted thereunder, also sometimes known as Regulation X, and found at 12 C.F.R. Part 1024.

(k) “*Servicer*” means a person engaging in the servicing of mortgage loans in this State whether or not registered or required to be registered pursuant to paragraph (b-1) of subdivision two of Banking Law section 590.

(l) “*Servicing mortgage loans*” means receiving any scheduled periodic payments from a borrower pursuant to the terms of any mortgage loan, including amounts for escrow accounts under Section 6-k of the Banking Law, Title 3-A of Article IX of the Real Property Tax Law or section 10 of 12 U.S.C. 2609, and making payments to the owner of the loan or other third parties of principal and interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the mortgage loan documents or servicing contract. In the case of a home equity conversion mortgage or reverse mortgage as referenced in Section 6-h of the Banking Law, Sections 280 and 280-a of the Real Property Law or 24 CFR 3500.2, servicing includes making payments to the borrower. The term includes a Person who makes or holds a Mortgage Loan if such Person also directly or indirectly is the holder of the mortgage servicing rights or has been delegated servicing functions for the Mortgage Loan.

(m) “*Single point of contact*” means an individual or designated group of servicer personnel each of whom has the ability and authority to perform the responsibilities described in subdivision (b) of section 419.7 of this Part.

(n) “*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 borrower’s loan.

(o) “*Transferee servicer*” means a servicer that has agreed to obtain the right to service a mortgage loan pursuant to an agreement or understanding.

(p) “*Transferor servicer*” means a servicer that has agreed to, or informed that it must, transfer the right to service a mortgage loan to another servicer.

(q) “*Plain language*” means written in a clear and coherent manner using words with common and every day meanings, appropriately divided and captioned reflecting its various sections, and understandable to those parties that will be receiving the content.

§ 419.2 Escrow Accounts

(a) A shortage, surplus or deficiency in a borrower’s escrow account shall be addressed by a servicer in accordance with the provisions of RESPA, 12 C.F.R. section 1024.17(f). Alternatively, with the consent of the borrower, an escrow account surplus may be applied to the principal balance.

(b) Whenever a servicer identifies a deficiency in a borrower’s escrow account that is not the result of a borrower’s payment delinquency, the servicer shall conduct an escrow account analysis to determine the reasons for and extent of the deficiency and shall provide a written explanation to the borrower. The servicer shall wait 30 calendar days after providing the written explanation to the borrower before seeking payment of the funds necessary to correct the deficiency from the borrower.

§ 419.3 Crediting of payments

(a) *In general.* All mortgage loan payments received by a servicer at the address where the borrower has been instructed in writing to make payments shall be credited on the business day received, to the extent that the borrower has provided sufficient information to credit the account. For all mortgage loans originated after January 1, 2011, except when inconsistent with federal law or regulation or as provided in subdivision (d) of this section, such payments shall be credited by the servicer to the interest and principal due on the home loan before crediting the payments to taxes, insurance, or fees.

(b) *Reasonable payment requirements.* Requirements imposed by a servicer for making payments must be reasonable. A cut-off time at the end of the business day for receipt of a mailed check at the location specified by the servicer for receipt of such check is deemed to be reasonable.

(c) *Non-conforming payments.* If a borrower fails to comply with a servicer's reasonable payments requirements that have been provided to the borrower in writing, the servicer shall credit any payment accepted by the servicer as soon as commercially practicable, but in no event later than 5 days after receipt.

(d) *Late payments.* Late payments must be credited to interest, principal, taxes, insurance and other fees before any late fee is collected.

(e) *Scheduled method of accounting.* If a servicer uses the scheduled method of accounting, any regularly scheduled payment made prior to the scheduled due date shall be credited no later than the due date or 30 days from the date of receipt, whichever is earlier.

(f) *Notice of noncredit.* If a servicer receives any payment on a mortgage loan and does not credit it or treat it as credited by the due date or within 30 days from the date of receipt, whichever is earlier, the servicer shall, within 10 business days of receipt, send the borrower notice by mail to the borrower's last known address indicating the reason the payment was not credited or treated as credited to the account, and any actions the borrower needs to take to make the loan current.

(g) *Payment overages and shortages.* A servicer shall establish written policies and procedures for payment overages and shortages, including unapplied funds and payments held in suspense accounts. If a servicer retains a partial payment in a suspense or unapplied funds account, the servicer shall, on accumulation of sufficient funds in any suspense or unapplied funds account to cover a periodic payment, treat such funds as a periodic payment and credit the periodic payment to the borrower's loan.

(h) A servicer shall not apply funds from a suspense or unapplied funds account to pay fees until all unpaid principal, interest, and escrow amounts (if available) are paid and brought current or the loan is discharged or foreclosed.

§ 419.4 Statement of account

(a) *Annual statements.* At least once annually, within 30 days of the end of the computation year, a servicer shall deliver to each borrower a plain language statement of the borrower's account that lists the unpaid principal balance of the mortgage loan at the end of the immediately preceding 12-month period, the interest paid during such period, and the application of all payments during such period; and the amounts deposited into escrow and disbursed from escrow during the period. The escrow statement may be provided separately from the statement showing the unpaid principal and interest paid. The format and content of the annual escrow statement shall comply with the requirements of RESPA and 12 C.F.R. section 1024.17(i)(1) and (j).

(b) *Payment Histories.* Within 30 days of receipt of a request from the borrower, a servicer shall deliver to the borrower a payment history for the preceding 36 months (unless a different period is requested) of the borrower's account showing the date, amount, and application of all payments credited to the account and the total unpaid balance during this period. The servicer

shall have 60 days to deliver a payment history when the request is for a period longer than the preceding 36 months.

(c) *Periodic Statements.* A servicer shall provide each borrower, for each billing cycle, a periodic statement which shall include:

1. The amount due, including, but not limited to:
 - i. The payment due date;
 - ii. The amount of any late payment fee, and the date on which that fee will be imposed if payment has not been received;
 - iii. If the transaction has multiple payment options, the amount due under each of the payment options;
 - iv. An explanation of the amount due, including
 - (a) The monthly payment amount, including the amount, if any, that will be applied to principal, interest, and escrow and, if a mortgage loan has multiple payment options, a breakdown of each of the payment options along with information on whether the principal balance will increase, decrease, or stay the same for each option listed;
 - (b) The total sum of any fees or charges imposed since the last statement; and
 - (c) Any payment amount past due.
2. A past payment itemization, including:
 - i. The total of all payments received since the last statement, including the amount, if any, that was applied to principal, interest, escrow, fees and charges, and the amount, if any, sent to any suspense or unapplied funds account; and
 - ii. The total of all payments received since the beginning of the current calendar year, including the amounts, if any, that were applied to principal, interest, escrow, fees and charges, and the amount, if any, currently held in any suspense or unapplied funds account.
3. A list of any transaction activity that causes a credit or debit to the amount currently due. This list must include the date of the transaction, a brief description of the transaction, and the amount of the transaction for each activity on the list.
4. If a 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. The explanation must be provided on the front page of the statement or, alternatively, may be included on a separate page enclosed with the periodic statement, or in a separate letter.

5. Account information, including:
 - i. The amount of the outstanding principal balance;
 - ii. The current interest rate in effect for the mortgage loan;
 - iii. The date after which the interest rate may next change; and
 - iv. The existence of any prepayment penalty that may be charged.
6. An escrow statement, including the amounts deposited into escrow and disbursed from escrow during the applicable period.
7. If the borrower is more than 45 days delinquent, the following information:
 - i. The date on which the borrower became delinquent;
 - ii. A notification of possible risks, such as foreclosure, and expenses, that may be incurred if the delinquency is not cured;
 - iii. An account history showing, for the previous six months or the period since the last time the account was current, whichever is shorter, the amount remaining past due from each billing cycle or, if any such payment was fully paid, the date on which it was credited as fully paid;
 - iv. A notice indicating any loss mitigation program to which the borrower has agreed, if applicable;
 - v. A notice of whether the servicer has made the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process, if applicable; and
 - vi. A breakdown of the total payment amount needed to bring the account current, including a detailed breakdown of the actual fees and charges claimed, as well as, a date upon which the payment amount specific will expire and no longer be sufficient to bring the account current.

(d) *Payoff Balances.* A servicer shall provide a plain language statement of the total amount that is required to pay off the mortgage loan as of a specified date, within a reasonable time, but in any event no more than seven business days after receipt of a request from the borrower. A servicer shall not charge a fee for providing a payoff statement or for issuing a release upon full prepayment, provided that a servicer may charge a reasonable fee for providing a payoff statement after issuing five or more payoff statements to a borrower in any calendar year. The

requirements of this section are in addition to the requirements of section 274-a of the Real Property Law regarding the written instrument to be provided by the holder of a mortgage upon real property in connection with a bona fide written demand as defined by section 274-a(2)(b)(iii) therein.

(e) *Modified Periodic Statement For Borrowers In Bankruptcy.* The requirements of this section shall not apply to a borrower who is a debtor in bankruptcy under Title 11 of the United States Code.

§ 419.5 Fees

(a) *Schedule of fees.* A servicer shall maintain and keep current a schedule of standard or common fees that may be charged to a borrower. A servicer shall make its schedule available on its public website and to a borrower upon request. The schedule shall identify each fee, provide a plain language explanation of when and why the fee will be charged and state the amount of the fee or, if there is no standard fee, how the fee is calculated or determined.

(b) *Authorized fees.* A servicer may only collect a fee if it is for a service that is actually rendered to the borrower, reasonably related to the cost of rendering that service, and it meets one of the following conditions:

1. the fee is expressly authorized and clearly and conspicuously disclosed by the loan instruments and not prohibited by law;
2. the fee is expressly permitted by law and not prohibited by the loan instruments; or
3. the fee is not 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 to the borrower and the borrower expressly consents to pay the fee in exchange for the service.

(c) *Attorneys' Fees.* In addition to the limitations in subdivision (b) and Civil Practice Law and Rules 3408(h), the following rules apply to attorneys' fees charged in connection with a loss mitigation option, a reinstatement or loan satisfaction:

(1) the fee must be reasonable and customary for work that is actually performed by an attorney; and

(2) the fee must be disclosed to the borrower prior to entering into the agreement governing the loss mitigation option, reinstatement or loan satisfaction.

(d) *Late and delinquency fees.* (1) A servicer shall not impose any late or delinquency fee when the only delinquency is attributable to late or delinquency fees assessed on an earlier payment, and any subsequent payment is otherwise a full payment for the applicable period and is paid on its due date or within any applicable grace period.

(2) Except for 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," late fees shall be in accordance with and not exceed the two percent limit as specified in the Real Property Law section 254-b.

(3) Late fees shall not be (i) based on an amount greater than the past due amount; (ii) collected from the escrow account or from escrow surplus without the approval of the borrower; (iii) deducted from any regular payment or; (iv) assessed if a borrower is making timely trial modification payments.

(e) *Property Valuation Fees.* (1) Except as provided in paragraph (2), a servicer shall not charge a property valuation fee to a borrower more than once in a twelve month period. (2) A servicer may charge a reasonable fee for a property valuation to facilitate a borrower's application for a loss mitigation option provided that the servicer has already provided without charging a fee one property valuation within preceding 12-month period.

(f) *Statements.* A fee shall not be charged to a borrower for the annual escrow statement or for one payment history furnished to a borrower in a 12-month period.

§ 419.6 Borrower complaints and inquiries

(a) Servicers shall establish and maintain:

1. procedures and systems to respond to and resolve borrower complaints and inquiries in accordance with the requirements of this Part;
2. a customer service department staffed by trained personnel to whom borrowers may direct complaints and inquiries; and
3. a toll-free telephone 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.

(b) Every welcome packet and periodic statement, including as applicable either the monthly mortgage statement or annual coupon book, and annual statement pursuant to subdivision (a) of section 419.5 of this Part that is provided to a borrower, and any website maintained by the servicer, shall clearly and conspicuously state:

1. an address to which borrowers can direct complaints and inquiries;
2. the toll-free telephone number or collect calling services provided by the servicer;
3. whether the servicer is registered with the Superintendent;

4. that the borrower may file complaints and obtain further information about the servicer by contacting the New York State Department of Financial Services Consumer Assistance Unit at 1-800-342-3736 or by visiting the Department's website at www.dfs.ny.gov.

(c) Within 10 days of receiving a request in writing from a borrower, a servicer shall 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.

(d) In addition to the information required to be disclosed under this section, a servicer may, at its option, provide any other information regarding the servicing of the loan that it believes would be helpful to a borrower, provided that such additional information does not contradict or obscure the required disclosures.

(e) **Borrower Complaints** – A servicer shall comply with the requirements of this section for any written complaint, including those transmitted electronically, from a borrower that includes the name of the borrower, information that enables the servicer to identify the borrower's mortgage loan account, and the nature of the borrower's complaint.

1. *Acknowledgement of complaint.* Within 5 business days of receiving a complaint from a borrower, the servicer shall provide to the borrower a written response that:
 - i. acknowledges receipt of the borrower's complaint;
 - ii. informs the borrower of any additional information or documentation required by the servicer to review and address the complaint; and, if applicable,
 - iii. informs the borrower that the complaint has been reassigned to the borrower's single point of contact or escalated to a supervisor.
2. A servicer may request supporting documentation from a borrower in connection with the investigation of a complaint, but may not:
 - i. Require a borrower to provide such information as a condition of investigating a complaint; or
 - ii. Determine that no error occurred because the borrower failed to provide any requested information without conducting a reasonable investigation pursuant to paragraph (3) of this subdivision.
3. *Response to complaint.*
 - i. Upon receiving a borrower complaint, a servicer must conduct a reasonable investigation and either:

- (a) Correct any error or other servicing-related issue identified and provide the borrower with a written notification of the correction, the effective date of the correction, and contact information, including a telephone number, for further assistance; or
- (b) If the servicer has determined that no error occurred or that no action is warranted to correct a servicing-related issue, inform the borrower, in writing, of the results of the servicer's investigation and provide a statement of the reason or reasons for this determination, a statement of the borrower's right to request documents relied upon by the servicer in reaching its determination, information regarding how the borrower can request such documents, and contact information, including a telephone number, for further assistance.

ii. *Time limits.*

(a) *In general.* A servicer shall comply with the requirements of subparagraph (i) of this paragraph:

- 1) Not later than seven business days after the servicer receives a complaint relating to the servicer's failure to provide an accurate payoff balance amount in violation of subdivision (d) of section 419.5 of this Part;
- 2) Prior to the date of a scheduled foreclosure sale or within thirty business days after the servicer receives the complaint, whichever is earlier, for complaints relating to:
 - i. the commencement of a residential foreclosure action against the borrower in violation of subdivision (a)(4) of section 419.10 of this part; or
 - ii. moving for a foreclosure judgment or order of sale, or conducting a foreclosure sale in violation of subdivision (a)(5) of section 419.10 of this part.
- 3) For all other complaints, not later than thirty business days after the servicer receives the complaint.

(b) *Extension of time limit.* For complaints governed by the time limit in subclause (a)(3) of this subparagraph, a servicer may

extend the time period for responding by an additional fifteen business days if, before the end of the thirty day period, the servicer notifies the borrower of the extension and the reasons for the extensions in writing. A servicer may not extend the time period for responding to complaints set forth in subclauses (a)(1) or (a)(2) of this subparagraph.

iii. If the servicer has determined that no error occurred or that no action is warranted to correct a servicing-related issue, the servicer shall provide a borrower with copies of documents and information relied upon by the servicer in making its determination that no error occurred or that no corrective action is warranted within 15 business days of receiving the borrower's request for such documents. If a servicer withholds documents relied upon because it has determined that such documents constitute confidential, proprietary or privileged information, the servicer must:

(a) Notify the borrower of its determination in writing within 15 business days of receipt of the borrower's request for such documents; and

(b) Include in such notification a reasonable description of the contents of the each withheld document and the basis for withholding the document.

4. A servicer shall not charge a fee, or require a borrower to make any payment that may be owed on a borrower's account, as a condition of responding to a complaint or to providing copies of documents and information relied upon by the servicer in determining that no error occurred or no corrective action was needed in response to a complaint.

5. *Supervisory Review* – A servicer shall have a process that enables borrowers to escalate complaints or pending loss mitigation matters for a supervisory level review.

§ 419.7 Residential mortgage loan delinquencies and loss mitigation efforts

(a) *In general.* A servicer shall make reasonable and good faith efforts to provide appropriate loss mitigation options to help borrowers avoid foreclosure consistent with usual and customary industry standards, the lawful terms of the note, mortgage or contract for the servicing of a mortgage loan, and subdivision (c) of this section.

(b) *Single point of contact*

1. Servicers shall assign a single point of contact to any borrower who is at least 30 days delinquent or has requested a loss mitigation application (or earlier at a servicer's option).

2. The single point of contact shall attempt to initiate contact with the borrower promptly following the assignment of the single point of contact to the borrower.
3. The single point of contact shall have access to all records containing current information about the borrower's account, including, but not limited to, records relating to loss mitigation applications, pending foreclosure actions, documentation requests, and details of missing or incomplete documentation.
4. The single point of contact shall have primary responsibility for coordinating the servicer's actions to resolve the borrower's delinquency or imminent risk of delinquency until all available home retention and non-foreclosure liquidation options have been exhausted and for communicating those actions to the borrower. The single point of contact's responsibilities shall include:
 - i. Communicating the loss mitigation options available to the borrower, the actions the borrower must take to be considered for loss mitigation, and the status of the servicer's evaluation of the borrower for loss mitigation options;
 - ii. Coordinating tracking and maintenance of all documents associated with loan modification or loss mitigation activities so that the borrower will not be unreasonably required to resubmit the same documented information, and that the borrower is notified promptly of the need for additional information;
 - iii. Being knowledgeable about the borrower's situation throughout the entire delinquency or imminent risk of delinquency resolution process; and
 - iv. Coordinating with other personnel (in-house or third-party provider) responsible for ensuring that a borrower is considered for all available loss mitigation options, including proprietary loss mitigation options.
5. The single point of contact shall have direct and immediate access to personnel with the authority to stop foreclosure proceedings to comply with paragraphs (a)(4) and (a)(5) of section 419.10 of this Part, and an obligation to communicate immediately to such personnel any information received by the single point of contact indicating that it may be necessary or appropriate to stop a foreclosure proceeding as required by paragraphs (a)(4) and (a)(5) of section 419.10 of this Part.
6. The single point of contact shall transfer a borrower to an appropriate supervisor upon the request of the borrower. Such transfer shall comply with paragraph (e)(5) of section 419.6 of this Part.
7. The single point of contact shall remain assigned and available to the borrower until the borrower's account becomes current or the servicer determines that all loss mitigation options offered by, or through, the servicer have been exhausted.

8. A servicer may assign a group of people to be a borrower's single point of contact provided that the servicer shall ensure that each member of the group is knowledgeable about the borrower's situation and current status in the loss mitigation process, including the content and outcome of any communication with the borrower.

(c) Notices.

1. Except when inconsistent with the automatic stay provisions of Title 11 of the U.S. Code, a servicer shall 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, provided that a servicer is not required to send another 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.

2. No later than the 45th day of a borrower's delinquency, a servicer shall provide the borrower with a written notice that informs the borrower of:

- i. the nature and extent of the delinquency;
- ii. the servicer's loss mitigation protocols,
- iii. information on the availability of housing counseling services and that such information can be obtained by contacting the New York State Department of Financial Services Consumer Assistance Unit at 1-800-342-3736 or by visiting the Department's website at www.dfs.ny.gov.
- iv. the loss mitigation options and services offered by the servicer;
- v. all documents and information that a borrower must submit to be considered for any given loss mitigation option;
- vi. a toll-free telephone number and at least one other method by which the borrower may directly contact the single point of contact; and
- vii. the preferred means by which documents should be delivered to the servicer.

(d) Receipt of loss mitigation application.

1. A servicer shall exercise reasonable diligence in obtaining documents and information to complete a loss mitigation application, including but not limited to promptly following up with the borrower to obtain any information the borrower has not submitted that is necessary to make the application complete and to ensure that the servicer timely receives any necessary third-party information or approvals.

2. If a servicer receives a loss mitigation application 45 days or more before a foreclosure sale, the servicer shall:
 - i. Promptly review the loss mitigation application to determine if the loss mitigation application is complete; and
 - ii. Notify the borrower within 5 business days after receiving the loss mitigation application that the servicer has received the loss mitigation application. Such notice shall:
 - a. State whether the loss mitigation application is complete or incomplete; and
 - b. Explain the key elements of the loss mitigation process, including, as appropriate, the following:
 1. Third-party approvals that may be required for the servicer to evaluate and offer a loss mitigation option;
 2. The average length of time for a decision to be made regarding the borrower's loss mitigation application; and
 3. A notification of the actions the servicer, lender or mortgagee of the mortgage may take during the loss mitigation process, such as whether the borrower may continue to receive collection letters or foreclosure notices, whether the foreclosure process will continue or whether, and to what extent collection and foreclosure will be stayed.
 - c. If a servicer determines that the loss mitigation application is incomplete, the notice required by this subparagraph shall also:
 1. Identify with specificity 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;
 2. State 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; and
 3. State the action that 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 period specified in the letter.

(e) *Evaluation of loss mitigation applications.*

1. *Complete loss mitigation application.* If a servicer receives a complete loss mitigation application more than 37 days before a foreclosure sale, then, within 30 days of receiving the complete loss mitigation application, a servicer shall:

- i. Evaluate the borrower for all loss mitigation options available to the borrower;
- ii. Review any initial determination to deny a loss mitigation option. Such a review shall be performed by supervisory personnel who were not involved in making the initial determination; and
- iii. If the servicer denies the borrower's loss mitigation application, the servicer shall, upon the borrower's request, provide to the borrower the result of any evaluation of the net present value of a loss mitigation option if the servicer performed such an evaluation.

2. *Incomplete loss mitigation application.*

i. *In general.* 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 information provided by a borrower in connection with an incomplete loss mitigation application.

ii. *Reasonable time.* A servicer may evaluate an incomplete loss mitigation application only if, despite the servicer's reasonable diligence to obtain necessary documents and information, the loss mitigation application remains incomplete for 30 days without the borrower making reasonable progress to complete the application. Any such evaluation and offer is not subject to the requirements of this section and shall not constitute an evaluation of a complete loss mitigation application for purposes of paragraph (e)(1) of this section.

iii. *Facially complete application.* A loss mitigation application shall be deemed to be facially complete at the time that the borrower submits all the documents and information identified by the servicer pursuant to subparagraph (c)(2)(v) of this section or all of the documents and information specified in the notice required pursuant to subparagraph (d)(2)(ii) of this section. If the servicer reasonably determines that additional information or corrections to a previously submitted document are required to complete the application, the application shall be treated as complete for the purposes of paragraphs (a)(4) and (a)(5) of section 419.10 of this Part until the borrower has been given a reasonable opportunity to complete the application. If the borrower completes the application within this period, the application shall be considered complete as of the date it was facially

complete for the purposes of paragraphs (a)(4) and (a)(5) of section 419.10 of this Part and subdivisions (f) and (g) of this section, and as of the date the application was actually a complete loss mitigation application for purposes of paragraph (e)(1) of this section. A servicer that complies with this paragraph will be deemed to have fulfilled its obligation to provide an accurate notice under subparagraph (d)(2)(ii) of this section.

iv. *Payment forbearance.* Notwithstanding subparagraph (e)(2)(i) of this section, a servicer may offer a short-term payment forbearance program to a borrower based upon an evaluation of an incomplete loss mitigation application. A servicer shall not commence a foreclosure action, and shall not move for foreclosure judgment or order of sale, or conduct a foreclosure sale, if a borrower is performing pursuant to the terms of a payment forbearance program.

(f) *Notice of loss mitigation application determination.*

1. *Grant of a loss mitigation application.* If a servicer grants a loss mitigation application, it shall provide the borrower with a notice, in writing, that clearly and conspicuously discloses:

- i. the nature of the loss mitigation option being offered to the borrower;
- ii. consistent with subdivision (g) of this section, the amount of time the borrower has to accept or reject the offered loss mitigation option;
- iii. 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 but not limited to:

(a) changes to the term of the mortgage loan;

(b) a breakdown of the loan balance and an itemization of any fees or charges assessed; and

(c) any amounts capitalized and applied to the balance of the mortgage loan.

2. *Denial of a loss mitigation application.* If a servicer denies a loss mitigation application, it shall provide the borrower with a notice, in writing, that clearly and conspicuously discloses:

- i. consistent with subdivision (h) of this section, that the borrower has the right to appeal the denial of any loan modification option, what the borrower has to do to appeal the denial, and the amount of time the borrower has to file an appeal;

ii. the specific reasons for the servicer's determination for each such loss mitigation option, instructions on how the borrower can appeal the denial, any other loss mitigation options for which the borrower may be considered, and the following statement, in boldface type and in print no smaller than the largest print used elsewhere in the main body of the denial: If you believe your loss mitigation request has been wrongly denied, you may file a complaint with the New York State Department of Financial Services at 1-800-342-3736 or <http://www.dfs.ny.gov>; and

iii. the borrower's right to obtain, upon the borrower's request, the result of any evaluation of the net present value of a loan modification performed by the servicer.

(g) Borrower response to a servicer's offer of a loss mitigation option.

1. *In general.* Subject to subparagraphs (g)(3)(ii) and (g)(3)(iii) of this section, if a servicer receives a complete loss mitigation application 90 days or more before a foreclosure sale, the servicer may require that a borrower accept or reject an offer of a loss mitigation option no earlier than 30 days after the loss mitigation option is offered to the borrower. If a complete loss mitigation application is received less than 90 days before a foreclosure sale, but more than 37 days before a foreclosure sale, a servicer may require that a borrower accept or reject an offer of a loss mitigation option no earlier than 7 days after the loss mitigation option is offered to the borrower.

2. A servicer shall respond to a request for further information concerning a loss mitigation option the servicer offered to a borrower within 5 business days of receiving such a request.

3. *Rejection.*

i. *In general.* Except as set forth in subparagraphs (g)(3)(ii) and (g)(3)(iii) of this section, a servicer may deem a borrower that has not accepted an offer of a loss mitigation option within the deadline established pursuant to paragraph (g)(1) of this section to have rejected the offer.

ii. *Trial Loan Modification Plan.* A borrower who does not satisfy the servicer's requirements for accepting a trial loan modification plan, but submits the payments that would be owed pursuant to any such plan within the deadline established pursuant to paragraph (1) of this subdivision, shall be provided a reasonable period of time to fulfill any remaining requirements for acceptance of the trial loan modification plan beyond the deadline established pursuant to paragraph (1) of this subdivision. The servicer shall notify the borrower of any such remaining requirements within 5 business days of receiving such a payment.

iii. *Interaction with appeal process.* If a borrower appeals a servicer's determination to deny the borrower's loss mitigation application for any loss

mitigation option pursuant to subdivision (h) of this section, the borrower's deadline for accepting a loss mitigation option offered pursuant to subparagraph (f)(1)(ii) of this section shall be extended until 14 days after the servicer provides the notice required pursuant to paragraph (h)(4) of this section.

(h) *Appeal process.*

1. *Appeal process required for loss mitigation denials.* If a servicer receives a complete loss mitigation application 90 days or more before a foreclosure sale or before the servicer commences a foreclosure action against a borrower, a servicer shall process an appeal of the servicer's determination to deny a borrower's loss mitigation application for any loss mitigation option.
2. *Deadlines.* A servicer shall permit a borrower to appeal a denial of a loss mitigation application within 14 days after the servicer provides the notice required by subparagraph (e)(1)(iii) of this section.
3. *Independent evaluation.* An appeal shall be reviewed by different personnel than those responsible for evaluating the borrower's complete loss mitigation application.
4. *Appeal determination.* Within 30 days of receiving a timely appeal, the servicer shall provide a notice to the borrower stating the servicer's determination of whether the servicer will offer the borrower a loss mitigation option based upon the appeal and, if applicable, how long the borrower has to accept or reject such an offer or a prior offer of a loss mitigation option. A servicer may require that a borrower accept or reject an offer of a loss mitigation option after an appeal no earlier than 14 days after the servicer provides the notice to a borrower. A servicer's determination under this paragraph is not subject to any further appeal.

(i) *Borrower programs and counseling.* A servicer shall take reasonable steps to ensure that its staff is aware of programs designed to help borrowers avoid foreclosure or resolve delinquency. A servicer shall make available to borrowers who are at least 60 days delinquent and borrowers who the servicer has reason to believe are experiencing a financial hardship and are in imminent risk of delinquency a list of government approved not-for-profit housing counselors in the homeowner's geographic area as listed on the Department of Financial Services website (www.dfs.ny.gov) or the Division of Homes and Community Renewal's website (www.hcr.ny.gov).

(j) *Waiver of legal claims and defenses.* A servicer shall not require a homeowner to waive legal claims and defenses as a condition of a loan modification, reinstatement, forbearance or repayment plan.

(k) *Servicer Protocols.* A servicer shall maintain a system for servicing delinquent loans that includes at a minimum the following:

1. An accounting system that promptly alerts the servicer that a mortgage is delinquent;

2. Procedures for identifying and working with borrowers who are at risk of foreclosure or delinquency in order to help such borrowers, including procedures for making borrowers aware of programs and counseling as set forth above;
3. Procedures and controls for sending delinquency notices, assessing late fees, handling partial payments, maintaining collection histories, and reporting delinquencies to credit bureaus;
4. Guidelines for analyzing delinquencies and applicable loss mitigation options in a consistent and systematic manner; and
5. Procedures for management review and evaluation of decisions regarding appropriate loss mitigation options or commencement of foreclosure actions.

§ 419.8 Volume of Servicing Report

The Superintendent may require each servicer that is either registered or required to be registered with the Superintendent or that is an exempt organization regulated by the Superintendent to compile and submit, within 30 days of the end of each calendar quarter, a report in the format required by the Superintendent, that contains information regarding the servicer's mortgage loans servicing activities.

§ 419.9 Books and records and annual reports

(a) *In general.* This section applies to each servicer that is either registered or required to be registered with the Superintendent or that is an exempt organization regulated by the Superintendent. Each servicer shall:

1. keep such books and records in a manner that will allow the Superintendent to determine whether the servicer is complying with applicable laws and regulations; and
2. preserve its books and records for at least three years after making the final entry with respect to any New York mortgage loan being serviced by the servicer, unless a longer period is provided by statute. At a minimum, books and records must provide information regarding:
 - i. Loan payments received, disbursements made and the dates of transactions for each account;
 - ii. The principal balance of each loan account;
 - iii. The amount and due date of each loan installment for each loan serviced;
 - iv. The servicing history for all mortgage loans serviced by the servicer, including the servicing history of loans acquired from another entity, provided that the servicer is only required to maintain records of any prior

servicer of a loan to the extent that such information is reasonably available; and

- v. The servicing of delinquent loans, including loans in foreclosure.

(b) *Telephone and written communications.* The servicer must, for three years, maintain a log of all telephone calls and file of all written correspondence, including fax transmissions and e-mail correspondence, relating to the servicing of each mortgage loan, including, but not limited to communications and correspondence between it and

1. Any previous loan servicer;
2. The lender or mortgagee of such loan;
3. The holder of the mortgage or person acting on the holder's behalf;
4. The borrower, including but not limited to 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 with respect to the complaint; and
5. A governmental entity.

(c) *Quality control and internal audit function.* The servicer must have internal controls (commensurate with the size and complexity of the servicing operations) which periodically assess the servicer's loan servicing to ensure that servicing standards and procedures are being met. At least annually, the servicer shall conduct an internal risk assessment of all its servicing activity. The servicer shall also conduct periodic audits of payment processing functions to ensure payments are properly credited, including payments remitted to the servicer via certified mail.

(d) *Delinquency and foreclosure reports.* In addition to the quarterly reports required pursuant to section 419.8, the servicer shall collect, maintain and analyze appropriate data on delinquency and foreclosure rates, as well as, its loss mitigation activity to enable it to (1) evaluate the effectiveness of its collection efforts and overall performance of its servicing portfolio and (2) identify discriminatory trends. The servicer shall further determine how this data compares with rates in reports published by the industry, investors and others and analyze significant variances between its data and that found in reports and publications and take appropriate corrective action.

(e) *Quarterly Financial Report and Net Worth Certification.* Within 45 days of the end of each fiscal quarter, the servicer must submit to the Department, in a format, prescribed by the Superintendent, a quarterly financial report and certification of net worth.

(f) *Annual audited financial statements.* Unless the Superintendent in his or her sole discretion determines that other financial information may be substituted, the servicer shall submit an

annual audited financial statement as of its fiscal year end to the Department within 90 days of the close of the fiscal year. The financial statement shall be prepared in accordance with generally accepted accounting principles and audited by an independent certified public accountant in accordance with generally accepted auditing standards.

(g) *Annual and other reports.* The Superintendent may require servicers to file other regular or special reports, including reports with respect to mortgage delinquencies and foreclosures, annually or as otherwise requested by the Superintendent. Such reports shall be in a form prescribed by the Superintendent and, except as permitted by the Superintendent, shall be subscribed and affirmed as true under the penalty of perjury.

§ 419.10 Servicing prohibitions & the duty of fair dealing

(a) A servicer is prohibited from:

1. engaging in unfair or deceptive business practices or misrepresenting or omitting any material information in connection with the servicing of a mortgage loan, including, but not limited to, misrepresenting the amount, nature or terms of any fee or payment due or claimed to be due on the loan, the terms and conditions of the servicing agreement or the borrower's obligations under the loan;
2. requiring funds to be remitted by means more costly to the borrower than a bank or certified check or attorney's check from an attorney's account;
3. refusing to communicate with an authorized representative of the borrower who provides a written authorization signed by the borrower, provided that the servicer may adopt procedures reasonably related to verifying that the representative is in fact authorized to act on behalf of the borrower;
4. commencing a residential foreclosure action against a borrower
 - i. If a borrower submits a complete loss mitigation application to a servicer before the servicer has commenced a residential foreclosure action against the borrower, unless:
 - (a) The servicer has sent the borrower a notice pursuant to subdivision (f)(2) of section 419.7 of this Part that the borrower is not eligible for any loss mitigation option and the appeal process in subdivision (h) of section 419.7 of this Part is not applicable, the borrower has not requested an appeal within the applicable time period for requesting an appeal, or the borrower's appeal has been denied;
 - (b) The servicer has complied with subdivision (f)(1) of section 419.7 of this Part and the borrower rejects all loss mitigation options offered by the servicer; or

7. failing to make the filings with the Superintendent as required by Real Property Actions and Proceedings Law section 1306 and in accordance with the rules prescribed by the Superintendent.

(b) A servicer shall act in good faith and deal fairly in its course of dealings with each borrower in connection with the servicing of the borrower's mortgage loan. However, nothing in this subsection shall be considered a derogation of the affirmative duty to negotiate in good faith mandated by New York Civil Practice Laws & Rules Section 3408. This includes, but is not limited to, the duty to:

1. Safeguard and account for any payment made by or any money belonging to the borrower;
2. Follow reasonable and lawful instructions from the borrower consistent with the underlying note and mortgage;
3. Act with reasonable skill, care and diligence;
4. Consider alternatives to foreclosure when (i) a borrower demonstrates that he or she is in imminent risk of delinquency on the mortgage loan as a result of a financial hardship or has experienced a financial hardship and is unable to maintain the payment at the current amount required under the mortgage loan or is unable to make up the delinquent payments and (ii) the net present value of the income stream expected from a loss mitigation option is greater than the net present value of the income stream that is expected to be recovered through the disposition of the property through a foreclosure sale.
5. Structure loan modifications to result in payments that are reasonably affordable and sustainable for the borrower at the time the modification is made.

§ 419.11 Oversight of third-party providers

A servicer shall adopt and maintain policies and procedures to oversee and manage third-party providers, including:

(a) A servicer shall perform appropriate due diligence of third-party providers' qualifications, expertise, capacity, reputation, complaints, information systems, document custody practices, quality assurance plans, financial viability, and compliance with licensing requirements and applicable rules and regulations.

(b) A servicer shall require third-party providers to comply with a servicer's applicable policies and procedures and applicable New York and federal laws and rules.

(c) A servicer utilizing third-party providers shall remain responsible for all actions taken by the third-party providers.

(d) A servicer shall clearly and conspicuously disclose to borrowers if it utilizes a third-party provider and shall clearly and conspicuously disclose to borrowers that the servicer remains responsible for all actions taken by third-party providers.

(e) A servicer shall conduct periodic reviews, not less than annually, of each third-party provider the servicer retains. The review shall be conducted by servicer employees who are separate and independent of employees who prepare foreclosure or bankruptcy affidavits, sworn documents, declarations, or other foreclosure or bankruptcy documents. The review shall include:

1. A review of a sample of the foreclosure and bankruptcy documents prepared by the third-party provider for compliance with applicable New York and federal laws and rules and the accuracy of the facts contained in such documents;
2. A review of the fees and costs assessed by the third-party provider to provide that only fees and costs that are lawful, reasonable, and actually incurred are charged to borrowers and that no portion of any fees or charges incurred by any third-party provider for technology usage, connectivity, or electronic invoice submission is charged as a cost to the borrower;
3. A review of the third-party provider's processes to provide for compliance with the servicer's policies and procedures;
4. A review of the security of original loan documents maintained by the third-party provider;
5. A review of customer complaints concerning third-party providers; and
6. A requirement that the third-party provider disclose to the servicer:
 - i. Any instance where any party requests the imposition of sanctions or that professional disciplinary action be taken against the third-party provider for misconduct related to the services the third-party provider provides to the servicer, and
 - ii. Any imposition of sanctions or professional disciplinary action taken against the third-party provider for misconduct related to the services the third-party provider provides to the servicer.

(f) A servicer shall ensure that all third-party providers have appropriate and reliable contact information for servicer employees who possess information relevant to the services provided by the third-party provider. A servicer shall ensure that foreclosure and bankruptcy counsel have an appropriate servicer contact to assist in legal proceedings and to facilitate loss mitigation questions on behalf of a borrower.

(g) A servicer shall take appropriate remedial steps if a servicer identifies any problems through the review required by subdivision (e) of this section or otherwise, including terminating its relationship with a third-party provider.

(h) A servicer shall develop and implement policies and procedures detailing how the servicer will oversee and communicate with counsel and trustees concerning foreclosure proceedings. Such policies shall, at a minimum:

1. detail 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 currently in, a trial or permanent modification;
2. ensure that its foreclosure attorneys comply with the requirements of New York Civil Practice Law and Rules Section 3408 with regard to mandatory settlement conferences in residential foreclosure actions; and
3. A servicer shall develop and implement policies and procedures to ensure that its foreclosure attorneys comply with all applicable legal requirements including all relevant Administrative Orders of the Chief Administrative Judge of the Courts of New York.

§ 419.12 Mortgage servicing transfers

(a) The first monthly statement provided by a transferee servicer to a borrower shall include a copy of the transferee servicer's welcome packet and a payment history containing the information detailed in subdivision (b) of section 419.4 of this Part.

(b) A transferee servicer shall allow a borrower that is complying with the terms of a trial loan modification as of the effective date of transfer of the servicing of the borrower's mortgage loan to the transferee servicer to continue making existing trial loan modification payments for the remainder of the trial modification period.

(c) A transferee servicer shall allow a borrower who has successfully completed a trial modification prior to the effective date of transfer of the servicing of the borrower's mortgage loan to the transferee servicer, but who has not yet received permanent modification documents from the transferor servicer, to continue making trial modification payments until the transferee servicer can provide permanent modification documents to the borrower.

(d) A transferee servicer shall not refuse to consider for a loss mitigation option a borrower who was previously denied for a loss mitigation option by a transferor servicer by reason of the denial by the transferor servicer.

§419.13 Affiliated business arrangements

(a) Within 10 days of entering into an affiliated business arrangement, servicers must provide to each borrower whose mortgage loan is subject to such arrangement, a written disclosure of the nature of the relationship (explaining the ownership and financial interest) between the parties to the arrangement and of an estimated charge or range of charges generally made by such affiliate.

(b) All affiliated business arrangements must be negotiated at market rate and a servicer shall neither give nor accept any fee, kickback or other thing of value pursuant to any affiliated business arrangements other than payments listed in section 419.5 of this Part and:

1. A return on an ownership interest which does not include:
 - i. Any payment which has as a basis of calculation no apparent business motive other than distinguishing among recipients of payments on the basis of the amount of their actual, estimated or anticipated referrals;
 - ii. Any payment which varies according to the relative amount of referrals by the different recipients of similar payments; or
 - iii. A payment based on an ownership, partnership or joint venture share which has been adjusted on the basis of previous relative referrals by recipients of similar payments.
2. Bona fide dividends, and capital or equity distributions, related to ownership interest or franchise relationship, between entities in an affiliate relationship; or
3. Bona fide business loans, advances, and capital or equity contributions between entities in an affiliate relationship (in any direction), so long as they are for ordinary business purposes and are not fees for the referral of settlement service business or unearned fees.