

New York State Department of Financial Services Mortgage Servicing Regulations “Part 419”



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Servicing Mortgage Loans: Business Conduct Rules

Origin & History:

- Mortgage Lending Reform Law (Chp. 472 of the Laws of 2008)
 - Amended Banking Law Article 12-D – created framework for regulating servicing of mortgage loans; Banking Law sec. 590(3)(a) authorizes DFS to promulgate regs.
 - **Emergency rules** were written, effective Oct. 1, 2010, and adopted on an emergency basis until 2019
 - **Final rule** adopted, effective **December 18, 2019** - *regs provided a 90 day transition period for servicers to change practices between emergency regs and final regs (Part 419.14)*

Cite: 3 NYCRR 419

Available at: <http://www.banking.state.ny.us/legal/adptregu.htm>



Covered Servicers

- Definition of **“Servicer”** (*Sec. 419.1(l)*)
 - A person engaging in the servicing of mortgage loans in NY whether or not registered or required to be registered pursuant to Banking Law sec. 590(2)(b-1).
 - Basically, all entities that perform mortgage loan servicing with respect to NY mortgages (possible exception – portfolio held loans with no escrow)
- What about **national banks**?
- What about an **individual** who holds a private mortgage?

What the Regs Cover

- **Definitions (19 terms defined)**
- **Crediting of payments**
- **Escrow accounts**
- **Statements of Account**
- **Fees**
- **Delinquencies and loss mitigation**
- **Borrower complaints and inquiries**
- **General prohibitions**
- **Mortgage servicing transfers**
- **Oversight of third-party providers, and affiliated relationships**
- **Reports and recordkeeping**

Duty of Good Faith & Fair Dealing

- “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.”
- **This includes, but is not limited to:**
 - Safeguard and account for all money
 - Follow B’s instructions (within law and contracts)
 - Act with reasonable skill, care and diligence
 - **“Consider alternatives to foreclosure** when 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.”
 - **“Structure loan modifications to result in payments that are reasonably affordable and sustainable** for the borrower at the time the modification is made.”
- Nothing in this section shall be considered a derogation of duty to negotiate in good faith pursuant to CPLR sec. 3408.

Sec. 419.10(b)



Crediting of Payments

- **Timing:** Payments must be **credited** on business day received
 - For loans made after 1/1/10, must be credited to P&I first, then to escrow & fees
- **Payment requirements** must be “reasonable” (by end of business day is reasonable)
- **Non-conforming payments** – if accepted, must be credited as soon as “commercially practicable,” within 5 days
- **Late payments** – must be credited to PITI first, before late fee collected
- **Early payments** – credited by earlier of due date or 30 days of receipt (scheduled method of accounting)
- **Noncredit** – must notify B w/in 10 days of date it should have been credited by mail, why it was not and what B must do to bring account current (notice can be electronic if B opted for paperless billing, in compliance with Art. II of the Technology Law).
- **Overages and shortages** – must have written procedures for handling; if held in suspense, once enough funds for a payment are collected, must apply as payment. Must apply funds held to PITA first until loan brought current, before applying to late fees.

Escrow Accounts

(Shortages, Deficiencies & Surpluses)

- Must be handled pursuant to **RESPA**, 24 C.F.R. sec. 1024.17(f)
 - **Surplus**
 - (i) If greater than or equal to 50 dollars (\$50), servicer must refund within 30 days from the date of the analysis
 - (ii) if the surplus is less than 50 dollars (\$50), servicer may refund or credit such amount against the next year's escrow payments.
 - **Shortage** (less than expected)
 - (i) If less than one month's escrow account payment, servicer may:
 - (A) allow shortage to exist and do nothing,
 - (B) require B to repay within 30 days, or
 - (C) require B to repay in equal monthly payments over at least a 12-month period.
 - (ii) If greater than or equal to one month's escrow account payment, servicer may:
 - (A) allow a shortage to exist and do nothing, or
 - (B) require B to repay in equal monthly payments over at least a 12-month period.

Escrow –cont.

- **Deficiency** (negative balance)

- (i) If less than one month's escrow payment, servicer may:

- (A) allow shortage to exist and do nothing,

- (B) require B to repay within 30 days, or

- (C) require B to repay deficiency in 2 or more equal monthly payments.

- (ii) If greater than or equal to 1 month's escrow payment, servicer may:

- (A) allow a shortage to exist and do nothing, or

- (B) require B to repay in 2 or more equal monthly payments.

- **If a deficiency occurs**, servicer must do analysis to determine extent of deficiency, provide a **written explanation**, and wait **30 days** thereafter before seeking payment of funds to correct deficiency.

Other sources of NY law on escrow accounts:

- NYS Banking Law sec. 6-k (Real Property Insurance Escrow Accounts) (“mortgage investing institution”)
- Real Property Tax Law, Article 9, Title 3-A



Statements of Account

■ Annual Account Statements must:

- ❑ Be provided **within 30 days** from end of escrow account computation year.
- ❑ Be a “**plain language**” statement, listing unpaid principal balance, interest paid during last 12 months, application of payments during period, and amounts deposited into and disbursed from escrow.
- ❑ Escrow statement may be separate from statement (but in compliance with RESPA sec. 1024.17(i)(1) and (j)).
- ❑ Include information about filing complaints and inquiries (see *Sec. 419.6*)

■ Payment History:

- ❑ Must be provided **within 30 days** of receipt of request
- ❑ Provide past **36 months**, unless other period requested
- ❑ Show date, amount and application of all payments, and total unpaid principal balance
- ❑ If longer than 36 months and servicing transferred during that period, have **60 days**
- ❑ **No fee** for 1 payment history or escrow statement per 12-month period

Sec. 419.4



Periodic Statements

- **Periodic Statements** – must be provided for **each billing cycle** and include:
 - **Amount due**, including:
 - Payment due date, late fee and date it will be imposed
 - PITA breakdown, fees charged, amounts past due; if multiple pmt options, each amount
 - **Past Payment itemization** – for most recent payment, **and** for payments since beginning of calendar year, and how they were applied.
 - **Transaction activity that causes credit or debit** (date, description, amount)
 - If payment in **suspense**, explanation how B can have funds applied to balance (must be on first or separate page)
 - **Account information**, including:
 - Outstanding principal balance, interest rate and change date if ARM, and prepayment penalty
 - **Escrow statement** with amts. deposited into and disbursed from escrow within period.
 - Information about **filing complaints and inquiries** (see Sec. 419.6)
- **If B more than 45 days delinquent, statement must contain additional info including:**
 - Delinquency date and payment history for past 6 months or since account was current
 - “Detailed breakdown” of amount needed to get current and date valid through
 - What could happen (ie. foreclosure, fees, etc) and if servicer sent RPAPL sec. 1304/UCC sec. 9-611(f) notice
 - Notice of loss mitigation program if B has agreed to one

Sec. 419.4 (c)



Payoff Balance Requests

- When requested, servicer must provide a “**plain language statement of total amount**” to payoff loan as of a specified date, **within 7 days** of received request.
- **Fees** – No fee for first **4** requests in calendar year;
No fee for issuing release upon full prepayment
- See *also* NYS Real Property Law, sec. 274-a

Note: Bankruptcy caveat – Sec. 419.4 regarding Account Statement requirements does not apply if it would violate the automatic stay provision when a B is in bankruptcy.

Sec. 419.4(d)



Fees

- **Fee schedule** must be on website and provided upon request in “**plain language**”
 - Include when and why applied, the amount or range, and if no set amount, how fee is calculated.
- **Authorized fees** - may only collect fees for **services rendered and “reasonably related” to cost of service**, and **must be**:
 - Authorized & conspicuously disclosed in loan docs,
 - Permitted by law and not prohibited by loan docs, or
 - For service requested by B and fee was clearly disclosed ahead of time and B expressly consented.
- **Attorneys fees** – in addition to above and CPLR sec. 3408(h):
 - Must be “**reasonable and customary for work that is actually performed by an attorney**” and
 - Fee and **breakdown of tasks performed** must be disclosed to B prior to entering into the agreement governing the loss mitigation option, reinstatement or loan satisfaction.
- **Property Valuation Fees** –
 - May only charge once in 12 mo. period, or
 - May charge a “reasonable fee” if valuation is to facilitate a B’s loss mit. application only if the servicer already conducted a valuation within the preceding 12 mo. period for no charge.
- **Fees for Statements** – **no fee** for annual escrow statement or 1st payment history in a 12 mo. period.

Late and Delinquency Fees

- Late fees and delinquency charges may **not** be:
 - Charged **if only delinquency is outstanding late fee** or delinquency charge, and subsequent pmt. is a full, on-time pmt.
 - **Exceed 2% of pmt.** (as specified in RPL sec. 254-b and unless otherwise allowed for some federally backed and other loans)
 - **Based on amount greater than** past due amount
 - Collected from of **escrow account** (without approval from B)
 - **Deducted from any regular payment**
 - Assessed if B is making **timely trial mod payments**
 - *(Removed: May not impose **more than 1 time** for any single delinquent payment due)*
- Must comply with **NYS Real Property Law, sec. 254-b**

Sec. 419.5(d)



Loss Mitigation

- **Servicers must engage in some sort of loss mitigation.**

*“A servicer shall make **reasonable and good faith efforts**, in accordance with the requirements set forth in Civil Practice Laws & Rules sec. 3408, to provide 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.”*

- **Requirements:**

- **SPC (may be a group)** – must be assigned to B who is **at least 30 days past due or who requests** loss mit., reach out to B “promptly,” have access to all records; responsible for communicating with B, coordinating and tracking application, knowing B’s situation, and have access to supervisors.
- **Required Notices** (does not apply if B in **BR**):
 - **Late payment notice** - at least **17 days after** payment due date.
 - **Informational notice** – at least **45 days** from delinquency; include referral to housing counseling services (DFS listing), servicer’s loss mit protocols and options, listing of documents and information B need provide for loss mit and how to send, and a toll-free number
 - **Loss mit applications** – within **5 days** of receipt, servicer must send notice to B that application was received, request specific documents needed and what happens if they are not, give average time for decision to be made, and notify B of actions servicer or lender may take during the loss mit process (ie. further notices or foreclosure will continue). (Applies if application made more than 45 days prior to foreclosure sale)



Loss Mitigation (cont)

■ Evaluation

- “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 additional information, and necessary third-party information or approvals.
- **Timing:** within **30 days** of receipt of complete application (provided more than 37 days before foreclosure sale).
 - If initial review results in a denial, the denial must be **reviewed by supervisor**.
- **Incomplete applications:** Special rules apply for evaluating applications that remain incomplete after 30 days when documents were due or if servicer requires supplemental documents following their first review, but servicers are required to be diligent in trying to obtain all necessary documentation.
- Servicers may offer **forbearance agreements** to B’s with incomplete applications, and may not proceed with foreclosure during these agreements.

■ Determinations

- **Granted** - servicer must provide B with notice that “**clearly and conspicuously**” sets forth the offer, how much time the B has to decide, material terms of offer including costs and risks, and material changes to the mortgage loan (change in terms, new loan balance and fees).
- **Denied** – servicer must provide B with notice that “**clearly and conspicuously**” sets for right to appeal and information on how to do so, specific reasons for denial, B’s right to obtain NPC valuation, and the statement in bold face type:

“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://dfs.ny.gov>.”

Loss Mitigation (cont)

■ Borrower's Response, if approved:

- ❑ **Deadline** – B must be given at least **30 days** to accept or reject an offer. If B requests more information, servicer must respond within **5 days**. (different rules apply if closer to sale date)
- ❑ **Rejection** – Failure to accept may be deemed a rejection, however if B commences timely payments under an offered trial modification plan, the servicer must notify B within **5 days** of what is required to accept the offer and the B shall be given a “**reasonable time**” to complete.

■ Appeal Process

- ❑ **Required** – if application was received 90 days or more prior to foreclosure sale
- ❑ **Deadline** - B must appeal **within 14 days of date denial notice was postmarked**
- ❑ **Independent evaluation** - Must be reviewed by different personnel
- ❑ **Determination** – Must provide within **30 days**; if offer made, B must have at least **14 days** to accept.
- ❑ **No second appeal** has to be given.

■ Additional loss mit. requirements

- ❑ **Housing counseling** (DFS listing) – must know of and inform B's who have financial hardship.
- ❑ **May not** require homeowner to **waive legal claims and defenses** as condition of a loss mitigation offer
- ❑ **Servicer must have system** to ensure they are promptly aware when a B falls behind, procedures and controls for identifying and working with Bs and sending notices, guidelines for analyzing delinquencies and options available, and procedures for management review.

Sec. 419.7(g),(h),(i),(j),(k)



PRIOR TEXT REMOVED!

Loan Modifications

- **ALL** servicers should consider when:
 - B is in imminent risk of default as result of financial hardship, and
 - NPV of income from a loan mod is expected to be greater than NPV of income expected to be recovered through f/c sale.

- Payment under mod should be “**affordable and sustainable** for the borrower.”

- **HAMP-participating servicers** shall comply with HAMP
 - and use reasonable efforts to remove prohibitions or impediments to their authority and to obtain third party consents and waivers that are required

Sec. 419.11(b)

Complaints and Inquiries

- **Servicers must have:**
 - **Procedures and systems** in place to respond to and resolve B complaints and inquiries
 - A **customer service dept.** with trained personnel, and
 - **Toll-free number** borrowers can call to talk with a live rep during business hours to advise B on how to file complaints.

- **Welcome packets, annual statements, periodic statements and websites must contain information “clearly and conspicuously” stating:**
 - Address to send complaints and inquiries
 - Toll-free number
 - Whether servicer is registered with DFS, and
 - B may file complaints and obtain more info about servicer from DFS and provide DFS number and website.

- **Mortgagee/owner/assignee information** – must respond **within 10 days** to written inquiry from B. May provide additional info as long as it does not contradict or obscure required disclosures.

Sec. 419.6(a),(b),(c),(d)



Complaints and Inquiries (cont)

- **Borrower's complaints** – written (including electronic), must include B's account info. and nature of complaint
 - Servicer must acknowledge within **5 business days** of receipt, and tell B in writing what additional information is needed, and if complaint has been assigned to B's SPC or a supervisor
 - Servicer may request additional documentation (with parameters), and
 - Must conduct a "**reasonable investigation**" and either correct issue or provide written explanation if no error determined including reasons for determination, statement of B's right to request documentation relied upon and how the B can request. If further information is requested by the B, servicer must provide within **15 business days**.
 - If complaints relates to servicer's failure to provide accurate payoff, must provide within **7 business days**.
 - If complaint relates to start of a foreclosure, or moving for judgment, must provide within **15 business days** or prior to date of foreclosure sale, whichever is earlier.
 - For all other complaints, must respond within **30 business days** (may extend 7 days with notice to B).
- **NO Fees** – **no fee can be charged** (including for providing copies of documentation relied upon), nor can servicer require any payment as condition of responding to a complaint.
- **Supervisory review** – must have process to enable B to escalate complaint or pending loss mit. matters to a supervisory level for review.

General Prohibitions

- **Unfair, deceptive or abusive practices**, or misrepresenting amount owed, nature of fees and other material information.
- Requiring **funds to be sent by means costlier** than certified check or attorney's check
- Refusing to communicate with **authorized rep** who provides written authorization (may have procedures but **may not** require rep to provide their SSN).
- **Initiating foreclosure if** the B submitted complete loss mit application, unless servicer has sent proper notice that B is ineligible and there is no appeal remedy, or if B rejected loss mit offer, or B is more than 30 days in default under a trial or permanent mod, or B in violation of due on sale clause.
- **Moving for judgment** when B is in compliance with a loss mit option, a short-sale or DIL has been approved, or B submitted complete loss mit more than 37 days before a sale unless. . . (see above)
- Failing to provide **90 day notice** pursuant to RPAPL sec.1304 or UCC sec. 9-611
- Failing to **file with DFS** pursuant to RPAPL sec. 1306

Sec. 419.10



Mortgage Servicing Transfers

- **First monthly statement:** When servicing is transferred, the first monthly statement from new servicer must contain a copy of the new servicer's **welcome packet** and a **payment history** for the preceding 36 months and total unpaid principal balance (*as required in 419.4(b)*).
- **Borrowers in trial loan mods** when servicing is transferred:
 - shall be able to **continue** making payments under the agreement.
 - If trial mod is completed, but permanent mod not yet granted, B shall continue to make trial mod payments until new servicer can provide permanent mod.
- **New bite at loss mit:** A new servicer cannot deny or refuse to consider a B for loss mitigation based solely on the fact that prior servicer denied B a loss mitigation option.

Sec. 419.12



Oversight over Third Parties

- Servicers must have **policies and procedures to oversee and manage TP providers**, and must:
 - Perform appropriate **due diligence** of TP 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."
 - Require TP providers to **comply with servicers' policies**, and the law
 - **Remain responsible** for all actions of TP providers
 - **"Clearly and conspicuously" disclose** to B if it utilizes a TP provider, and that it remains responsible for the TP's actions
 - Conduct at least **annual reviews** of each TP provider by staff who are separate and independent from foreclosure staff, and take appropriate steps if problems are identified.
 - Ensure TP's have appropriate contact information, and **particularly that foreclosure and BR counsel have appropriate contact info for servicer reps for legal proceedings and loss mit.**
 - **"[D]evelop and implement policies and procedures detailing how the servicer will oversee and communicate with counsel and those with the authority to fully dispose of the case concerning foreclosure proceedings,"** including details of notifying counsel and trustees regarding loss mit applications, and ensuring their lawyers comply with CPLR 3408, all legal requirements and administrative orders of the courts.

Affiliated Relationships

Affiliated Relationships def – “a relationship between two or more entities where one such entity, directly, or indirectly, through one or more intermediaries, controls, or is controlled by or is under common control with another such entity.”

- **Within 10 days** of entering into an “Affiliated Relationship” - servicers must provide each B whose mortgage is subject to the arrangement a written notice setting forth the nature of the relationship (ownership and financial interest), and estimate charge or range of charges generally made by such affiliate.

- **Affiliated Relationships must be negotiated at market rate**
 - Servicers are prohibited from giving or accepting any fee, kickback or other thing of value,
 - Servicers may receive payments from:
 - Fees that are set forth in the servicer’s fee schedule (pursuant to 419.5), and
 - An ownership interest as long as the payment isn’t tied to or calculated based on referrals
 - Bona fide dividends or other income related to ownership interest or other relationship
 - Bona fide business loans, advances as long as they are not tied to referrals.

Reports and Recordkeeping

- **Volume of Servicing Report** – DFS may require quarterly reporting (Sec. 419.8)

- **Books and Records**
 - Maintain records for DFS inspection
 - Servicer must maintain records for at least 3 years after final entry
 - Maintain **telephone log and written correspondence** for each loan serviced, including communications with previous servicer, owner, holder, borrower and gov. entity.
 - Must maintain delinquency and f/c reports to enable it to be able to **evaluate effectiveness of programs**
 - Must conduct an **annual internal risk assessment**, periodic audits of payment processing systems, and have internal controls to assess if standards are being met.

- **Additional Reports:**
 - **Delinquency & foreclosure reports** – must maintain records to evaluate effectiveness, identify discriminatory trends, and compare against industry standards.
 - **Quarterly Financial Report and Net Worth Certification** – quarterly to DFS
 - **Annual audited financial statements** – annually to DFS
 - **Annual and other reports** – DFS may require additional reports

Sec. 419.9



Noncompliance and Remedies

- **No prescribed private right of action for violations**
 - Attorney General has authority to enforce regulations
 - DFS has authority to pursue enforcement against their regulated entities.
 - Deceptive practice pursuant to NYS GBL Sec. 349?
(A.2428A(Dinowitz)/S2143A(Kavanagh) – would create a private right of action, passed Senate in 2021)
- **Raise violations in settlement conferences** – to evidence failure to negotiate in good faith or other unfair dealing by servicer