



BILLING CODE 8320-01

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 36

RIN 2900-AR97

Loan Guaranty: Servicer Regulation Changes

AGENCY: Department of Veterans Affairs

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) is proposing to rename and clarify certain loss-mitigation terms used in VA's regulations. VA is proposing these changes to align the names and definitions with their general use in the housing finance industry. VA believes that these proposed revisions would help avoid confusion and enable servicers and veterans to address loan defaults more quickly and effectively.

DATES: Comments must be received on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: Comments must be submitted through www.regulations.gov. Except as provided below, comments received before the close of the comment period will be available at www.regulations.gov for public viewing, inspection, or copying, including any personally identifiable or confidential business information that is included in a comment. We post the comments received before the close of the comment period on the following website as soon as possible after they

have been received: <http://www.regulations.gov>. VA will not post on Regulations.gov public comments that make threats to individuals or institutions or suggest that the commenter will take actions to harm an individual. VA encourages individuals not to submit duplicative comments. We will post acceptable comments from multiple unique commenters even if the content is identical or nearly identical to other comments. Any public comment received after the comment period's closing date is considered late and will not be considered in the final rulemaking.

FOR FURTHER INFORMATION CONTACT: Andrew Trevayne, Assistant Director for Loan and Property Management, and Stephanie Li, Assistant Director for Regulations, Legislation, Engagement, and Training, Loan Guaranty Service (26), Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420, (202) 632-8862. (This is not a toll-free telephone number.)

SUPPLEMENTARY INFORMATION:

I. Background

VA's Loan Guaranty Service offers home loan programs that assist eligible veterans, service members, and certain surviving spouses (hereinafter collectively referred to as "veteran") to buy, build, improve, or refinance a home. When a VA-guaranteed loan goes into default, the servicer may attempt to resolve the default using a loss-mitigation option that enables the veteran to remain in their home (e.g., repayment plan, special forbearance, or loan

modification) or avoid foreclosure through compromise sale or deed in lieu of foreclosure.¹

While regulations in 38 CFR part 36 are specific to VA-guaranteed loans, the loss-mitigation options outlined are typical across the housing finance industry. VA has received feedback that the names of certain servicing terms used in VA regulations are not aligned with how those terms are named in the housing finance industry, occasionally leading to confusion amongst stakeholders and veterans.

Additionally, VA's inconsistency in using the terms "written" and "documented" to reference various agreements in servicing regulations may be confusing for servicers as to whether new technologies enabling certain loss-mitigation agreements to be established and documented in non-written formats are acceptable to VA. For example, as part of the final rule implementing the VA Loan Electronic Reporting Interface (VALERI) and corresponding regulations, VA updated its regulation pertaining to acceptance of partial payments by removing the requirement for a repayment plan to be "written" and adding that it must be "documented."² However, other references to repayment plan and other loss-

¹ See 38 CFR 36.4319.

² See 38 CFR 36.4316(b). As background, VA amended its regulation pertaining to partial payments as part of an overhaul of existing VA loan guaranty program requirements. On February 18, 2005 (70 FR 8472, 8475), VA proposed amendments to then-existing 38 CFR 36.4315. Thereafter, on June 1, 2007 (72 FR 30505), VA published a supplemental proposed rule outlining VA's plan to phase-in the new 38 CFR part 36 regulations. This plan included temporarily designating then-existing provisions found at 38 CFR 36.4300 through 36.4393 (the "36.4300 series") as a new subpart B and establishing a new subpart F to include new 38 CFR 36.4800 through 36.4393 (the "36.4800 series"). See 72 FR 30505. On February 1, 2008 (73 FR 6294), VA published a final rule establishing the 36.4800 series, including 38 CFR 36.4816, which contained the proposed amendments to then-existing 38 CFR 36.4315. On June 15, 2010 (75 FR 33704), VA redesignated the 36.4800 series to replace the 36.4300 series in its entirety. Thus, 38 CFR 36.4315 became 38 CFR 36.4816, which became 38 CFR 36.4316.

mitigation agreements, such as loan modifications, still contain references to a “written” requirement.³

With this proposed rulemaking, VA would make revisions throughout 38 CFR part 36 to better align certain loss-mitigation and servicing terms with the industry. VA is also proposing amendments to clarify that written signatures are not required in order to execute certain loss-mitigation agreements.

II. Legal Authority

Congress has authorized VA to oversee and regulate the servicing of VA guaranteed loans. See 38 U.S.C. 501 and chapter 37. This includes implementing or clarifying program requirements for the mortgage servicing industry such as determining the acceptable documentation for a VA guaranteed loan and clarifying servicing loan procedures. During the last several years, the mortgage servicing industry has undergone various technological advancements which caused necessary procedural adjustments. Therefore, VA is proposing these amendments pursuant to its statutory authority found in section 501 and chapter 37 of title 38, United States Code.

III. Summary of Proposed Changes

A. Amend “compromise sale” to “short sale”

VA is proposing to amend the term “compromise sale” to “short sale” to be consistent with the name the housing finance industry uses to refer to this type of

³ See 38 CFR 36.4301 (definitions of “repayment plan” and “special forbearance”); see also 38 CFR 36.4315, 36.4316(b)(6).

transaction.⁴ Specifically, in § 36.4301, VA would remove the definition for “Compromise sale” and add a definition for “Short sale” to read as follows: “A sale to a third party for an amount less than is sufficient to repay the unpaid balance on the loan where the holder has agreed in advance to release the lien in exchange for the proceeds of such sale.” Also, in the definition for liquidation sale in § 36.4301, VA would revise the third sentence to refer to “short sale” instead of “compromise sale.” Similarly, VA would remove the references to compromise sale and add in its place short sale each place it appears in §§ 36.4317(c)(21); 36.4319(a), (b), and (c)(4); and 36.4322(e)(1), (1)(ii), (2), and (f)(1)(iii).

B. Amend “refund” to “VA purchase”

Loan Guaranty Service regulations currently use the term “refund” to denote two separate types of transactions that are entirely different in context and purpose. First, in 38 CFR 36.4320, VA uses the term “refund” to refer to a transaction when VA pays a holder the current unpaid principal balance of a VA-guaranteed loan in exchange for transfer and assignment of the guaranteed loan to VA. Another way of understanding this transaction is that VA purchases the loan from the holder and becomes the new loan holder. VA also uses the term “refund” as it is more commonly understood when referring to instances in which VA requires the holder to return certain monetary amounts to a veteran.⁵

⁴ National Association of Realtors, *Short Sales & Foreclosures*, <https://www.nar.realtor/short-sales-foreclosures> (last visited Jan. 4, 2023) (“A short sale is a transaction in which the lender, or lenders, agree to accept less than the mortgage amount owed by the current homeowner. In some cases, the difference is forgiven by the lender, and in others the homeowner must make arrangements with the lender to settle the remainder of the debt.”).

⁵ See, e.g., 38 CFR 36.4303(l)(1)(i)(B), 36.4353(b)(2)(v).

To avoid confusion, VA is proposing to remove the term “refund” and add in its place “VA purchase” whenever that term is used to refer to a transaction described in § 36.4320. Specifically, VA would amend the heading for § 36.4320 by removing “Refunding” and adding “VA purchase” in its place. In § 36.4320(c), VA would remove “refund” and add in its place “purchase.” Additionally, VA proposes to amend § 36.4317(c)(30) and (31) to clarify how those terms are used for servicer reporting requirements. In choosing the term “VA purchase,” VA notes that the relevant statutory authority for this transaction (38 U.S.C. 3732(a)) does not refer to the transaction as a refund. Instead, section 3732(a)(2)(A) describes a transaction where VA, at its own option, “pay[s] the holder of the obligation the unpaid balance of the obligation plus accrued interest and receive[s] an assignment of the loan and security,” which is much more consistent with the common definition of purchase.⁶

C. Removing references to “written” and “executed” agreements

VA is also proposing to remove the references to “written” and “executed” in regard to repayment plans and special forbearance agreements and replace with a requirement that an agreement be documented. A written, executed agreement can seem more specific and limiting in its form and manner of establishment; that is, it may be understood as a requirement for the servicer and veteran to sign the agreement in writing. Servicers who have interpreted VA’s

⁶ Black's Law Dictionary (11th ed. 2019) (noting the definition of purchase as “[t]he acquisition of an interest in real or personal property by sale, discount, negotiation, mortgage, pledge, lien, issue, reissue, gift, or any other voluntary transaction”).

current regulations in such manner have indicated that this leads to additional time and costs to prepare and execute VA loss-mitigation agreements.

VA's main concern is that there is an audit trail of the acceptance of the agreement between the servicer and the veteran, not that the agreement remain restricted to outmoded methods of memorializing agreements. VA simply requires that evidence of the agreement between the parties be presented to VA in written form, such as documentation through email or mobile application (with e-signatures, such as DocuSign), or during a recorded phone call (agreed verbally, then documented in a letter/notice, and later acted upon).

Therefore, VA is proposing to clarify VA's expectations regarding the establishment of these agreements. The proposed changes would more clearly provide servicers and veterans flexibility in utilizing industry-prevalent technologies to establish loss-mitigation agreements.

More specifically, VA proposes to remove references to "a written executed agreement" and "written agreement" in the definitions of "repayment plan" and "special forbearance," respectively, in § 36.4301 and add in those places "a documented agreement." Additionally, in the definition of "repayment plan," VA proposes to make minor grammatical edits so that the text is consistent with the framework for the definition of "special forbearance." In § 36.4315(a), Loan modifications, VA proposes to remove the reference to a "written agreement" and add in its place "a documented agreement."

In § 36.4316(b)(2) through (4), VA proposes to remove the references to "documented" as this term would be incorporated into the definition of

“repayment plan” under this proposed rule. VA also proposes to remove the term “written” in § 36.4316(b)(6) in reference to a repayment plan.

In § 36.4317(c)(18), VA proposes to remove the term “agreement” when referencing a “special forbearance” as this term, by the proposed definition, would be an agreement. For similar reason, in § 36.4319(a), VA proposes to remove the term “special forbearance agreements” and add in its place “special forbearances.”

D. Technical amendment to update information collection reference

Finally, VA proposes to use this rule as an opportunity to correct an outdated reference to an approved information collection in § 36.4320. Currently, § 36.4320 states the Office of Management and Budget (OMB) has approved the information collection requirements in this section under control number 2900-0362. However, in 2010, VA submitted to OMB a request to incorporate the information collected in § 36.4320 (specifically, VA Form 26-1874, Claim Under Loan Guaranty, and VA Form 26-1874a, Claim Form Addendum – Adjustable Rate Mortgages), into another information collection under OMB control number 2900-0021.⁷ VA’s request was approved in March 2011, and the information collection remains active. VA, therefore, proposes to update the OMB control number to 2900-0021.

Executive Orders 12866, 13563 and 14094

⁷ See 75 FR 17832 (Apr. 7, 2010); 75 FR 33898 (June 15, 2010).

Executive Order 12866 (Regulatory Planning and Review) direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 14094 (Executive Order on Modernizing Regulatory Review) supplements and reaffirms the principles, structures, and definitions governing contemporary regulatory review established in Executive Order 12866 of September 30, 1993 (Regulatory Planning and Review), and Executive Order 13563 of January 18, 2011 (Improving Regulation and Regulatory Review). The Office of Information and Regulatory Affairs has determined that this rulemaking is not a significant regulatory action under Executive Order 12866, as amended by Executive Order 14094. The Regulatory Impact Analysis associated with this rulemaking can be found as a supporting document at www.regulations.gov.

Regulatory Flexibility Act

The Secretary hereby certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act (5 U.S.C. 601-612). However, this rulemaking would have a direct impact on a number of industries that service VA

loans. VA defines a servicer as a mortgage company that collects funds for a debt incurred by a borrower to purchase a home. When a loan becomes delinquent after a borrower misses one or more mortgage payments, servicers are responsible for servicing delinquent loans and working with the borrower to reach an agreement that will bring the loan current or avoid foreclosure whenever feasible.

A recent analysis indicated there are currently 450 servicers in varying industries that will be impacted by this rulemaking. This proposed rule would impose a one-time rule familiarization cost to servicers in 2024, estimated at \$55.91 per servicer regardless of size. The \$55.91 cost is derived by dividing the cost of rule familiarization, which is estimated to be \$25,157, by the 450 servicers VA currently works with. To estimate the one-time rule familiarization cost, VA multiplies the number of servicers by the time needed for in-house or retained legal counsel to review and ensure compliance with the rule and their compensation rate. VA assumes that it would take 30 minutes for a lawyer to review the rulemaking. The compensation rate of the lawyers is estimated by multiplying their hourly wage rate (\$78.74) by the fringe benefits factor, 1.42. Multiplying the number of servicers (450) by the time to review the rule (30 minutes) and their total compensation rate (\$111.81 per hour) results in a one-time total cost of \$25,157 in FY2024. This one-time cost in FY2024 is offset by the long-term cost savings of this rulemaking from reduced agreement preparation and sharing efforts.

VA considers a rulemaking to have a “significant economic impact” when the impact associated with the rulemaking for a small entity equals or exceeds 1 percent of annual revenue. Thus, this rulemaking is not expected to have a significant economic impact on the participating small servicers. After the first year of implementation, there will be a monetary benefit realized by servicers due to the reduction in burden this rulemaking will accomplish. Therefore, under 5 U.S.C. 605(b), the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604 do not apply.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year. This proposed rule would have no such effect on State, local, and tribal governments, or on the private sector.

Paperwork Reduction Act

Although this proposed rule contains collections of information under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521), there are no provisions associated with this rulemaking constituting any new collection of information or any revisions to the existing collection of information. The collections of information for 38 CFR 36.4317, 36.4319, and 36.4320 are

currently approved by OMB and have been assigned OMB control number 2900-0021.

List of Subjects in 38 CFR Part 36

Condominiums, Housing, Indians, Individuals with disabilities, Loan programs—housing and community development, Loan programs—Indians, Loan programs—veterans, Manufactured homes, Mortgage insurance, Reporting and recordkeeping requirements, Veterans.

Signing Authority:

Denis McDonough, Secretary of Veterans Affairs, approved and signed this document on June 23, 2023, and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs.

Jeffrey M. Martin,

Assistant Director,

Office of Regulation Policy & Management,

Office of General Counsel,

Department of Veterans Affairs.

For the reasons stated in the preamble, the Department of Veterans Affairs proposes to amend 38 CFR part 36 as set forth below:

PART 36 – LOAN GUARANTY

Subpart B -- Guaranty or Insurance of Loans to Veterans with Electronic Reporting

1. The authority citation for part 36, subpart B continues to read as follows:

Authority: 38 U.S.C. 501 and 3720.

2. Amend § 36.4301 by:

- a. Removing the definition of “Compromise sale”;
- b. Revising the third sentence of “Liquidation sale”;
- c. Revising the definition of “Repayment plan”;
- d. Adding, in alphabetical order, the definition for “Short sale”; and
- e. Revising the definition of “Special forbearance”.

The revisions and addition read as follows:

§ 36.4301 Definitions.

* * * * *

Liquidation sale. * * * This term also includes a short sale.

* * * * *

Repayment plan. This is a documented agreement by and between the borrower and the holder to reinstate a loan that is 61 or more calendar days delinquent, by requiring the borrower to pay each month over a fixed period (minimum of three months duration) the normal monthly payments plus an agreed upon portion of the delinquency each month.

* * * * *

Short sale. A sale to a third party for an amount less than is sufficient to repay the unpaid balance on the loan where the holder has agreed in advance to release the lien in exchange for the proceeds of such sale.

Special forbearance. This is a documented agreement executed by and between the holder and the borrower where the holder agrees to suspend all payments or accept reduced payments for one or more months, on a loan 61 or more calendar days delinquent, and the borrower agrees to pay the total delinquency at the end of the specified period or enter into a repayment plan.

* * * * *

§ 36.4315 [Amended]

3. Amend § 36.4315(a) by removing “written” and adding in its place “a documented”.

§ 36.4316 [Amended]

4. Amend § 36.4316 by:

- a. Removing “documented” in paragraphs (b)(2), (3), and (4); and
- b. Removing “written” in paragraph (b)(6).

5. Amend § 36.4317 by:

- a. Removing “agreement” in paragraph (c)(18);
- b. Removing “Compromise sale” and “compromise sale” and adding “Short sale” and “short sale”, respectively, in paragraph (c)(21); and
- c. Revising paragraphs (c)(30) and (31).

The revisions read as follows:

§ 36.4317 Servicer reporting requirements.

* * * * *

(c) * * *

(30) Basic claim information - when the servicer files a claim under guaranty. The servicer shall report this event within 365 calendar days of loan termination for non-VA purchase claims, and within 60 calendar days of the approval date for VA purchase claims.

(31) VA purchase settlement - when VA purchases a loan and the servicer reports the tax and insurance information. The servicer shall report this event within 60 calendar days of the VA purchase approval date.

* * * * *

§ 36.4319 [Amended]

6. Amend § 36.4319 by:

a. Removing “special forbearance agreements” and “compromise sales” and adding their place “special forbearances” and “short sales”, respectively, in paragraph (a);

b. Removing “Compromise Sale” and adding in its place “Short Sale” in the table in paragraph (b); and

c. Removing “compromise sale” and adding in its place “short sale” in paragraph (c)(4).

§ 36.4320 [Amended]

7. Amend § 36.4320 by:

- a. Removing “Refunding” and adding in its place “VA purchase” in the heading;
- b. Removing “refund” and adding in its place “purchase” in paragraph (c); and
- c. Removing “2900-0362” and adding in its place “2900-0021” in the parenthesis at the end of the section.

§ 36.4322 [Amended]

8. Amend §§ 36.4322(e)(1), (1)(ii), (2), and (f)(1)(iii) by removing “compromise sale” each place it appears and adding “short sale” in its place.

[FR Doc. 2023-14478 Filed: 7/19/2023 8:45 am; Publication Date: 7/20/2023]