August 2012

CFPB Proposes Comprehensive Mortgage Servicing Regulations

On August 9, 2012, the Consumer Financial Protection Bureau (CFPB) issued two notices of proposed rulemaking (NPRs)[1] implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act's (Act) amendments to the Truth in Lending Act (TILA) and the Real Estate Settlement Procedures Act (RESPA) regarding mortgage loan servicing.[2] The TILA NPR contains the CFPB's proposed amendments to Regulation Z (which implements TILA) and the related official interpretations. The RESPA NPR sets forth the CFPB's proposed amendments to certain provisions and the official interpretation[3] of Regulation X (the rules implementing RESPA). Together, the NPRs propose new or amended rules covering loan servicers' obligations with respect to nine major topics:

- periodic billing statements
- adjustable-rate mortgage loan (ARM loan) interest-rate adjustment notices
- prompt payment credit and payoff statements
- force-placed insurance
- error resolution and information requests
- information management policies and procedures
- early intervention with delinquent borrowers
- continuity of contact with delinquent borrowers
- loss mitigation procedures

The NPRs represents the CFPB's first step toward the goal of establishing uniform minimum national standards for mortgage servicing. Notably, the RESPA NPR incorporates many of the servicing

[1] The proposed rules are available at http://www.consumerfinance.gov/blog/putting-the-serviceback-in-mortgage-servicing/ or at Regulations.gov.

[2] Sections 1418, 1420 and 1464 of the Act amend or add certain provisions of TILA and Section 1463 of the Act amends or adds provisions of RESPA and also gives the CFPB discretionary authority to develop additional servicing rules.

[3] In the RESPA NPR, the CFPB states in its commentary and at the beginning of its official interpretations that "good faith compliance with [the official interpretations] affords protection from liability under section 19(b) of [RESPA]." *See* comment 1 in Supplement I to Part 1024 ─ Official Bureau Interpretations.

provisions of the March 2012 National Mortgage Settlement (the "Settlement") among 49 of the 50 state attorneys general, the federal government, and five of the largest mortgage loan servicers.[4]

Comments to both NPRs are due by October 9, 2012, and the CFPB expects to issue final rules in January 2013.[5] The CFPB acknowledges that implementation of the amendments proposed in the NPRs may require systemic changes to the practices and procedures currently used by participants in the mortgage loan servicing industry and specifically requests comment from industry participants about the length of time it could take to establish and implement policies and procedures to comply with the final regulations. The NPRs do not specify when the new rules would take effect; however, the CFPB does indicate that it believes the rules should become effective as soon as possible and likely no longer than 12 months from the issuance of final rules.

Introductory Q&A

To which loans do the proposed rules apply? The proposed Regulation X amendments generally apply to closed-end residential mortgage loans, with certain exceptions (and would not apply to open-end lines of credit, construction loans and business purpose loans). Under the Regulation Z amendments, the periodic statement and ARM loan disclosure provisions apply only to closed-end mortgage loans, but the prompt crediting and payoff statement provisions apply to both open-end and closed-end mortgages loans. Reverse mortgages and timeshares are excluded from the periodic disclosure requirements and certain construction loans are excluded from the ARM disclosure requirements.

To which entities do the proposed rules apply? Generally, the TILA rules apply to servicers, owners, and assignees (such as trustees) of mortgage loans. A securitization trust would be responsible for compliance with the proposed changes to Regulation Z applicable to the owner of the mortgage loan. The proposed RESPA rules expressly apply to servicers and subservicers.

Who qualifies as a "servicer" under the proposed rules? In the RESPA NPR, the CFPB notes that "[w]hen adopted in final form, the Bureau's rules will apply to all mortgage servicers, whether depository institutions or nondepository institutions, and to all segments of the mortgage market, regardless of the ownership of the loan." The RESPA NPR defines a "servicer" as "the person responsible for the servicing of a … mortgage loan"[6] and "servicing" is defined as "receiving any scheduled periodic payments from a borrower pursuant to the terms of any … mortgage loan, … 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 by the mortgage servicing loan documents or servicing contract."[7] Proposed new Subpart C of

[4] More information about the Settlement is available at http://www.nationalmortgagesettlement.com/.

[5] Under the Act, Sections 1418, 1420, 1463 and 1464 become effective on January 21, 2013, whether or not the implementing rules are in effect.

[6] The term excludes, however, certain government agencies and Fannie Mae and Freddie Mac in cases in which the assignment, sale or transfer of servicing is preceded by termination of the servicing contract for cause or certain insolvency events.

[7] CFPB specifically seeks comment about the need for certain exemptions for small servicers (defined by the CFPB as one that services less than 1,000 mortgage loans that it owns or originated). In CFPB's view, and consistent with small servicers' comments to the Small Business Regulatory Enforcement Fairness Act Panel, small servicers are considered "high-touch" and do not typically engage in the problematic practices CFPB is targeting

Regulation X defines a "subservicer" as "a servicer who does not own the right to perform servicing, but who performs servicing on behalf of the master servicer."[8] Under this definition, a subservicer must comply with the proposed changes to Regulation X to the same extent as a servicer.

New Subpart C of Regulation X also would define "service provider" to mean "any party retained by a servicer that interacts with a borrower or provides a service to a servicer for which a borrower may incur a fee." The proposed new rule requires servicers to establish and maintain reasonable information management policies and procedures to facilitate oversight of, and "compliance by," service providers. This proposal is consistent with a recent CFPB supervisory guidance bulletin announcing that the CFPB expects servicers to exercise appropriate oversight over subcontractors and notes that the CFPB has authority to pursue enforcement actions against servicers whose subcontractors are not servicing in compliance with federal regulations.[9] In addition, we note that federal agencies have initiated enforcement actions against servicer providers.[10]

The TILA NPR does not use the term "servicer" uniformly: The proposed amendments to § 1026.20 have no express definition of the term (though the term is used regularly in the text of the amendment), the proposed amendments to § 1026.36 defer to the definition in RESPA and the proposed amendments to § 1026.41 define servicer broadly as "creditor, assignee, or servicer, as applicable."

Despite this varied approach, it seems clear that the CFPB will look to servicers to ensure that their subservicers and other service providers who are performing servicing activities on behalf of the "named" servicer comply with the proposed new rules. Thus, servicers will want to carefully review their contractual arrangements with these parties after the proposed rules are finalized.

What are the consequences of failure to comply with the proposed rules? The Dodd-Frank Act increased the statutory penalties available under RESPA from $1,000 to $2,000 per individual violation and from $500,000 to $1,000,000 in a class action. The statutory penalties available under TILA, previously between $100 and $1,000, were increased to between $200 and $2,000 per individual violation. The class action cap was increased to match the new RESPA cap. The

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with these NPRs. Although the text of the rule indicates that CFPB would require that these exempt servicers have "strong consumer service safeguards" in place, it does not describe any requirements in that regard.

[8] It is unclear why the definition of subservicer refers to master servicers and not servicers. "Master servicer" is defined in new Subpart C as "the owner of the right to perform servicing [and who] may perform the servicing itself or do so through a subservicer." The definition appears to have been added to address whether any required notice to borrowers of a transfer of servicing includes the transfer of a master servicer role.

[9] The CFPB's official supervisory guidance bulletin regarding servicer oversight of third-party service providers' compliance with federal regulations can be found here: http://files.consumerfinance.gov/f/201204_cfpb_bulletin_service-providers.pdf. Of particular note, the CFPB states in the bulletin that "the mere fact that a supervised bank or nonbank enters into a business relationship with a service provider does not absolve the supervised bank or nonbank of responsibility for complying with Federal consumer financial law to avoid consumer harm… Depending on the circumstances, legal responsibility may lie with the supervised bank or nonbank as well as with the supervised service provider."

[10] OCC Press Release, OCC Takes Enforcement Action Against Eight Servicers for Unsafe and Unsound Foreclosure Practices (April 13, 2011), available at http://www.occ.treas.gov/news-issuances/news-releases/2011/nrocc-2011-47.html, and Federal Reserve Board Press Release, Federal Reserve Issues Enforcement Actions Related to Deficient Practices in Residential Mortgage Loan Servicing (April 13, 2011), available at http://www.federalreserve.gov/newsevents/press/enforcement/20110413a.htm.

proposed rules do not create any separate remedies for failure to comply or impose any penalties in addition to the statutory penalties.

We summarize below each of the CFPB's proposed rules.

TILA NPR

INTEREST-RATE ADJUSTMENT NOTICES, 12 CFR § 1026.20

The TILA NPR proposes to amend § 1026.20(c) and (d) of Regulation Z regarding adjustment notices to consumers with ARM loans. Section 1020(d) sets forth the requirements for initial ARM loan interest-rate adjustment notices, and § 1020(c) sets forth the requirements for subsequent notices.

Under the provisions of the proposed § 1026.20(d), servicers of ARM loans must provide notice to consumers at least 210 but no more than 240 days[11] prior to the initial interest-rate adjustment. If an interest-rate adjustment is, by the terms of the applicable mortgage, scheduled to occur within 210 days of the consummation of the mortgage, the disclosures must be provided at the time of consummation. If the initial interest-rate adjustment notice provides estimated rate and payment information, the servicer must send the consumer a second notice of adjustment setting forth the actual rate and payment.

Initial ARM loan interest-rate adjustment notices must include:

- the date of disclosure and contact information for the servicer or creditor.
- an explanation that the fixed-rate period of the mortgage is ending and that the rate and payment may now change as a result.
- when the adjustment will take effect, the date of scheduled future adjustments, and any other concurrent changes to the mortgage loan terms, features or options.
- a table with the current and new interest rates and payment amounts and the date the first new payment is due.
- a detailed explanation of interest rate and new payment are determinations, including the index or formula used, any limitations on the rate or payment increases applicable over the life of the mortgage loan, and the expected mortgage loan balance and term at the date of adjustment, including any change in maturity due to the adjustment.
- a statement that any estimated rate and payment disclosure will be followed up with a second disclosure stating the actual rate and payment.

Additional information is required for interest-only and negatively amortizing mortgage loans. The notice must also provide the consumer with "alternatives to paying at the new rate," an explanation of each, and the website address for a list of housing counselors available from the CFPB or the Department of Housing and Urban Development. Finally, the servicer also must provide information about any prepayment penalties, including the circumstances triggering the penalty, the time period in which the penalty applies, and the maximum amount of the penalty. A distinct written correspondence, mailed separately from any other correspondence to the consumer, is required for the initial ARM adjustment notice.

Subsequent annual adjustment notices under § 1026.20(c) do not require the same disclosures listed above and are limited to the information currently required by Regulation Z. The proposed rule would eliminate the requirement to deliver annual notices where the interest-rate adjustment does not result in a payment increase.

[11] Under the TILA NPR the term "day" refers to "calendar days" except in instances where "business day" is used. Under the RESPA NPR, "day" means "calendar day" unless legal public holidays, Saturdays and Sundays are expressly excepted in a proposed rule (which we refer to in this summary as "business day").

Does this provision apply to open-end and close-end mortgages? No. The proposed rule applies only to close-end consumer credit transactions secured by the consumer's principal dwelling, including hybrid ARMs. Coverage, however, is not limited to purchase money mortgages. The rule includes a specific exception for construction loans with a term of less than 1 year. The CFPB also proposes to exempt adjustable-rate home equity plans from the initial disclosure requirements.

Are servicers subject to the requirements of § 1026.20? Yes. The rules were amended to include servicers because the servicer is the party directly interfacing with the consumer. The proposed rule states that creditors, assignees and servicers are subject to its requirements.

Are all variable-rate transactions subject to this provision? Generally, the TILA NPR uses the term variable-rate and adjustable-rate interchangeably, with certain exceptions noted in the Official Interpretations.

Do annual notices need to include the actual or estimated rate and payment? Actual. The requirement to include estimated rate and payment applies to only the first disclosure under proposed §1026(d).

When must the actual rate and payment be disclosed? If the first disclosure provides good faith estimates of the rate and payment information, a second disclosure is required 2 to 4 months prior to the change date setting forth the actual rate and payment.

What is a "good faith" estimate? An estimate of the rate and payment based on accepted industry standards. The payment amount must be calculated using the disclosed index figure no more than 15 business days prior to making the disclosure.

Is the table format required to be used in the initial notice? Yes. Disclosure must be provided in table format in the same order as the model forms, and include the same headings.

Must a servicer state alternatives to paying the new rate? Yes. The mortgage loan servicer must inform the consumer of the following alternatives to rate adjustments: refinancing with the current or a new lender, selling the property, mortgage loan modification and forbearance. As drafted, the rule does not expressly exempt servicers who do not offer modification or forbearance options from making these disclosures.

PERIODIC BILLING STATEMENTS, 12 CFR § 1026.41

The TILA NPR proposes to insert into Subpart E of Regulation Z a new § 1026.41 requiring that servicers issue periodic billing statements to consumers for each billing cycle. The proposed § 1026.41 sets forth specific content and format for the statements. The statement must be sent within "a reasonably prompt time" after the due date or end of any grace period. The initial periodic statement must be sent at least 10 days before the due date for the first payment.

The rule describes the categories of information that must be disclosed in the periodic statement and how.

Amount Due: The payment due date, payment amount, the amount of any late payment fee and the date on which the fee will be imposed must be grouped together on the top of the first page of the statement.

Explanation of the Amount Due: A breakdown of the monthly payment into principal, interest and escrow amounts, the total fees imposed since the last statement, and any past-due amount must be grouped together on the first page.

Past Payment Breakdown: The total of all payments received since the last statement and received since the beginning of the calendar year, and a breakdown of how those were applied among principal, interest, escrow, fees and charges, and partial payment or suspense accounts must be grouped together on the first page.

Transaction Activity: All credits or debits to the account since the last statement, along with the transaction date, amount and a description. This information may be grouped together anywhere in the statement.

The following additional information also must be included in the statement: (1) the outstanding principal balance, the current interest rate, the date of the next scheduled rate adjustment, and any prepayment penalty; (2) a statement informing the consumer of any payment directed to a suspense account and what must be done to have the funds applied; (3) a toll-free phone number and email address, if applicable, for obtaining information about the mortgage loan; and (4) housing counselor information.

Q&A Regarding Proposed Rules on Periodic Billing Statements

Who is responsible for compliance with this provision? Though only one statement is required, the rule applies to the creditor, any assignee and the servicer of each mortgage loan.

Is a statement required for open-end credit? Not under this rule. Section 1026.7 of Regulation Z prescribes to periodic statements for open-end credit.

Is a statement required for all close-end credit? No. The periodic billing statement requirement is not applicable to reverse mortgages, timeshares, where a coupon book is provided and meets the requirements set out in the regulation, and for small servicers of less than 1,000 mortgage loans that the servicer owns or originated.

Is it sufficient to make the statement available to the consumer on a website? No. It must be "transmitted" to the consumer, but this may be accomplished through an email stating that the statement is available to the consumer for printing or download.

Does "periodic" mean monthly? In most cases, yes. If the mortgage loan requires quarterly payments, however, then billing statements would be required only quarterly. If the mortgage loan is billed more frequently than monthly (bi-monthly, for example), only monthly billing statements are required.

What constitutes a "reasonably prompt" billing statement? Within 4 days of the close of the grace period. The first statement must be sent no later than 10 days before the first payment is due.

Is a list of housing counselors required with every statement? The statement must include the state housing finance authority for the state where the property is located and information to access counselor lists from HUD or CFPB.

What if the mortgage loan has multiple payment options? Each payment option must be broken down into principal, interest and escrow. That information must be provided in the statement, along with an explanation of whether that option would increase, decrease or have no effect on the principal balance.

Are any additional disclosures required for delinquent mortgage loans? Yes. The following special disclosures (grouped together on the first page of the statement) are required when the consumer is more than 45 days delinquent: (1) the date the account became delinquent; (2) a statement alerting the consumer to the potential for foreclosure and additional expenses if the delinquency is not cured; (3) an account history through the last time the account was current, but no longer than 6 months; and (4) a notice of available mortgage loan modification programs.

PAYMENT CREDITING, 12 CFR § 1026.36(c)

Regulation Z continues to require prompt crediting of payments ─ on the day received or within 5 days for any payment that does not comport with the servicer's written requirements for payment, except when a delay in crediting does not result in any charge to the consumer or in the reporting of negative information to a consumer reporting agency. The proposed rule provides that partial payments may be held in a suspense or unapplied funds account. When a partial payment is received, the servicer is obligated to notify the consumer in the next monthly statement that the payment is being held in suspense, and was not applied to the consumer's account. Once a full payment is received by the servicer (including the partial payment held in suspense), the payment must be credited to the oldest payment owed by the consumer.

Q&A Regarding Proposed Rules on Payment Crediting

What is included in a full contractual payment? Principal, interest and escrow, but not late fees.

Does this provision mandate what a servicer must do with a partial payment? No. A servicer may credit the payment, return it, or hold it in suspense.

Does this provision apply to open-end and close-end mortgages? Yes.

PAYOFF STATEMENTS, 12 CFR § 1026.36(c)(3)

This proposed rule, applicable to both open-end and close-end mortgages, requires the servicer to provide the consumer an accurate payoff statement within 7 business days of receipt of the consumer's written request.

Q&A Regarding Proposed Rules on Payoff Statements

Who is responsible for compliance with this provision? The payoff requirements apply to creditors, assignees and servicers.

Does this provision apply only to loans secured by the consumer's principal dwelling? No. The proposed rule would apply to any loan secured by a dwelling.

Does the rule retain the safe harbor for certain circumstances where it may take longer to respond to a payoff request? No. Although the rule extends the period from 5 to 7 days, there is no safe harbor for certain circumstances where it may take longer to respond.

Does the rule apply to a consumer's oral requests for payoff statements? No, only to written requests. Neither the rule nor the Official Interpretation elaborate on what constitutes a valid written request.

RESPA NPR

The proposed rule would create three subparts within Regulation X: Subpart A, containing certain definitions and general information applicable to the other two parts and otherwise unchanged by the RESPA NPR; Subpart B, titled "Mortgage settlement and escrow accounts," which will include current RESPA §§ 1024.6-1024.21; and Subpart C, titled "Mortgage servicing." The RESPA NPR contains only a few, mostly technical, changes to the provisions of the new Subpart B, except as noted below.

New Subpart C contains largely the same definitions currently found in other sections of RESPA, including master servicer, subservicer, qualified written request and the like. These definitions will now be included in § 1024.31. The definition of "servicer" in § 1024.2 remains largely unchanged and would include, we believe, as discussed above, parties acting as subservicers. "Service provider," new to

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RESPA, is defined as any party retained by the servicer that interacts with the borrower or provides a service for which the borrower may incur a fee.

The general disclosure section, § 1024.32, requires that all disclosures be clear, conspicuous and in writing. The disclosures may be provided electronically, so long as they are in a format the consumer can retain. Model forms for each of the required disclosures below are also included in the RESPA NPR. The CFPB notes that servicers are not required to use the model forms, but those servicers properly using such forms will be deemed to be in compliance with the applicable disclosure rule.

ESCROW ACCOUNTS, 12 CFR § 1024.17(k)

Regulation X includes requirements for making payments from borrower escrow accounts. CFPB proposes to amend Regulation X by adding a new provision requiring servicers to make timely disbursements from borrowers' escrow accounts (or to advance funds as necessary) to pay a borrower's insurance premium for any required hazard insurance unless there is a reasonable basis for the servicer to believe the borrower's hazard insurance policy was cancelled or not renewed for a reason other than non-payment of the premium.

Q&A Regarding Proposed Rules on Escrow Accounts

> *What constitutes a "reasonable basis" to believe that a hazard insurance policy was cancelled or not renewed for reasons other than non-payment?* Examples provided in the comments to the proposed rules include situations where the servicer receives notice of cancellation from the insurer prior to the premium coming due, where the insurance company elects to stop writing policies for the borrower's geographical area, and where the insurer chooses not to renew based on underwriting criteria.
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> *Is the servicer subject to §1024.37 (regarding force-placed insurance) if it advances the borrower's hazard insurance premium?* No. Paying the borrower's premium under §1024.17(k) is not considered force-placed insurance and the servicer is not required to comply with § 1024.37.
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> *Must a servicer advance funds for hazard insurance under this provision even where the borrower is more than 30 days delinquent?* Yes. The proposed rule has deleted the qualification that payment is only required "as long as the borrower's payment is not more than 30 days overdue."

MORTGAGE SERVICING TRANSFERS, 12 CFR § 1024.33

This section requires notification to a borrower when servicing of the borrower's mortgage loan is transferred. Notice must be provided by both the transferor servicer and the transferee servicer. The transferee's notice must be delivered 15 days prior to the effective date of the transfer and the transferor's notice 15 days after (although 30 days' notice is permitted under the circumstances specified in the proposed rule). As an alternative, both the transferor servicer and the transferee servicer may provide a single notice to the borrower not less than 15 days before the effective date of the transfer of servicing of the mortgage loan. The notice must be sent to the address listed on the borrower's loan documents or any new address specified by the borrower and must include:

- the effective date of the transfer of servicing.
- the name, address and a toll-free telephone number for an employee or department of both the transferee and transferor servicers for borrower inquiries.
- the date on which the transferor servicer will no longer accept payments and the date on which the transferee servicer will begin to accept such payments.
- information as to whether the transfer of servicing will affect the terms or the continued availability of mortgage life or disability insurance or any other type of optional insurance, and any action the borrower must take to maintain coverage.

- a statement that the transfer of servicing does not affect any term or condition of the mortgage loan other than terms directly related to the servicing of the mortgage loan.

Notice is not required for a transfer between affiliates, a transfer that results from mergers or acquisitions of servicers or subservicers, or a transfer that occurs between master servicers without a change in the subservicer, in each case so long as there is no change to the payee, payment address, account number or payment amount. In addition, no notice is required if a mortgage loan insured under the National Housing Act is assigned to the Federal Housing Administration.

During the 60-day period after the effective transfer date, payments made to the transferor servicer cannot be considered late, except for the purposed of determining whether to send the early intervention notice under § 1024.39. The transferor servicer must promptly transfer the payment to the transferee servicer for application to the borrower's account or return the payment to the borrower.

All state laws and regulations regarding notice of transfer to the borrower are preempted and compliance with this provision is deemed compliance with any such state law. Other provisions of state law, including those laws requiring additional notices to insurance companies or taxing authorities, are not preempted.

This regulation also includes a new rule specifically applying to reverse mortgages. The lender or broker originating the loan must provide a servicing disclosure statement within 3 days (excluding legal public holidays, Saturdays and Sundays) of the application, stating whether the servicing rights may be assigned, sold or transferred to any other person at any time.

Q&A Regarding Proposed Rules on Mortgage Servicing Transfers

If there are two applicants or borrowers with respect to a mortgage loan, must a servicing disclosure statement or notice of servicing transfer be provided to both persons? No. Where there is more than one applicant or borrower, only one servicing disclosure statement or notice of servicing transfer is required. The notice of disclosure must be provided to the primary applicant or borrower, if readily identifiable.

Are servicers required to send two transfer notices where the applicant and co-applicant have different addresses? No. While the prior rule required two notices, the proposed rule requires only one notice, to the primary applicant.

Should a notice of servicing transfer be provided if a transferor servicer plans to service a mortgage loan for only a short period of time after settlement? Yes. If a notice of servicing transfer is provided at settlement by the transferor servicer and the transferee servicer (either separately or jointly), then the timing requirements with respect to the notices of servicing transfer will be satisfied.

Is a servicing disclosure statement required for mortgages other than reverse mortgages? Yes. The CFPB's July 9 proposed rules regarding TILA and RESPA disclosures required at origination would cover mortgage loans other than reverse mortgages. CFPB included the requirement for reverse mortgage loans in this RESPA NPR to make the requirements consistent.

Is the servicer required to provide a phone number for collect calls? No. The CFPB views the requirement for a collect call number as obsolete.

Where the National Credit Union Administration has commenced proceedings to appoint a conservator or receiver for the prior servicer, is notice of a servicing transfer required? Yes, but the extended 30-day notice period applies.

TIMELY PAYMENTS BY SERVICERS, 12 CFR § 1024.34

The servicer is obligated to make timely payments of escrowed funds to avoid any penalties for late payment. When the borrower has paid the mortgage loan in full, any remaining escrowed funds must be

returned within 20 business days. Alternatively, the funds may be applied to an escrow account for a new mortgage with the same lender or servicer.

Q&A Regarding Proposed Rules on Timely Payments

> *Who is considered the lender in a table funding transaction?* Where the mortgage loan is originated by a mortgage broker in its own name, the lender is the person to whom the mortgage loan is initially assigned for the purposes of determining whether escrowed funds may be transferred to a new account.
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> *Does the 20-day window apply when the escrow balance is transferred to a new mortgage?* No. The transfer should occur as of the settlement date for the new mortgage.

ERROR RESOLUTION PROCEDURES, 12 CFR § 1024.35

Proposed § 1024.35 sets out detailed procedures a servicer must follow when it receives a notice of error about the borrower's mortgage loan. The types of errors subject to this provision are specifically enumerated, but generally cover issues with payments and payment crediting; tax, insurance and other escrow-related disputes; fees or other charges assessed by the servicer; and failure to comply with the proposed RESPA provisions related to payoff statements, loss mitigation, transfer of servicing information and foreclosure (which the CFPB notes it considers to be fundamental servicer duties).

Upon receipt of a notice of error, the servicer must acknowledge the notice within 5 days and conduct an investigation. Generally, within 30 business days (subject to one 15 business-day extension upon notice to the borrower), the servicer must investigate the claimed error and the borrower must be sent notice of the result. If the investigation reveals the borrower's claim was correct, or that some other error occurred, the borrower must be sent a notice describing the error the servicer identified, the correction undertaken, the date of the correction and a contact for further information or assistance. If the servicer determines that no error occurred, the borrower must be provided a notice explaining the servicer's determination. The notice must also inform the borrower that he or she has the right to request the documents relied on by the servicer and information about how to request the documents. The servicer must provide any requested documentation within 15 business days of a borrower's request.

The servicer may also respond by requesting additional information from the borrower. The servicer may not, however, fail to investigate or deny that an error occurred based on the lack of additional information from the borrower.

Special rules apply where the notice of error relates to the failure to suspend a foreclosure sale while loss mitigation efforts are pending. The servicer must respond to such a notice of error within 30 business days or prior to the sale, whichever is earlier. Where the notice of error is provided within seven days of the scheduled foreclosure sale, the servicer is not required to provide the acknowledgment or resolution notices if the servicer responds to the error notice orally or in writing prior to the sale.

The servicer may, upon notice to the borrower, designate a telephone number and address for the purposes of receiving notices of error. The CFPB points out that if the servicer does not specify a contact number, then calls by borrowers to any office of the servicer regarding errors will constitute notices of error requiring the servicer to respond in accordance with the proposed rule.

The servicer is not required, however, to comply with this proposed rule with respect to duplicative, overbroad, unduly burdensome or untimely notices of error. If the servicer believes it is not required to comply for one of these reasons, it must provide notice to the borrower of the servicer's basis for that determination within 5 business days of making the determination.

Where the servicer has received notice of error, the servicer may not furnish any information to a credit reporting agency related to any payment disputed in the notice for a period of 60 days after the notice. In addition, the proposed rule would prohibit servicers from charging fees to borrowers for responding to notices of error.

Q&A Regarding Proposed Rules on Error Resolution

Are servicers required to respond only to written notices of error or notices that constitute "qualified written requests?" No. Prior to adoption of the Act, RESPA and Regulation X required a servicer to respond to an error notice about a mortgage loan only if the request was in writing and satisfied the definition of "qualified written request."[12] Under proposed §1024.35, a servicer must respond to an oral or written notice of error so long as the servicer can reasonably identify the borrower, the loan and the alleged error.

Does the 30-day response period apply where the notice of error relates to a payoff statement request? No. Where the error asserted is the failure to provide a timely payoff statement, the servicer must take corrective action, as necessary, within 5 business days. The servicer may not use the 15-business day extension period for this type of error.

What constitutes an overbroad or unduly burdensome notice of error? A notice of error is overbroad if the servicer cannot reasonably determine that the asserted error is one covered in the enumerated list. The notice is unduly burdensome if a "diligent servicer" could not respond within the time permitted or without incurring costs "unreasonable in light of the circumstances," including costs associated with dedicating resources to the notice.

What constitutes an untimely notice of error? Any notice of error received more than 1 year after servicing was transferred or the mortgage loan was paid in full is untimely.

Is a servicer required to provide documentation about the error if it takes corrective action? No. The servicer is only obligated to provide documents to the borrower if requested and if the servicer has determined no error occurred.

REQUESTS FOR INFORMATION, 12 CFR § 1024.36

Proposed § 1024.36 requires servicers to acknowledge in writing any request for information from a borrower, whether the request is oral or written, within 5 business days (unless the mortgage loan servicer provides the borrower with the information requested within that time, in which case, no acknowledgment is required). Servicers must reply to any request for information seeking the name, address or other contact information for the owner or assignee of a borrower's mortgage within 10 business days. For all other requests, the servicer must respond within 30 business days, which may be extended by an additional 15 business days if the servicer notifies the borrower of the reason an extension is necessary.

In response to any request for information, the servicer must either provide the borrower with the information requested or, after conducting a reasonable search, a notice stating that the information requested is not available and an explanation of why it is not available. The servicer's response also must contain contact information for the appropriate personnel of the servicer who can provide further assistance.

Servicers are not required to search for or provide information that has already been provided pursuant to a previous request; is confidential, proprietary or general corporate information; or that is not directly related to the related borrower's mortgage loan account. In addition, servicers are not required to conduct overly broad or unduly burdensome searches. However, if a servicer identifies a valid information request in an otherwise overbroad or unduly burdensome request, then the servicer must respond to the valid portion of the information request. Servicers also may decline to search for or provide information requested regarding mortgages for which the servicing has been transferred or which have been paid in full. If the servicer determines that it is not required to search for or provide any

[12] "Qualified written request" is defined in proposed § 1024.31, and can refer to either an alleged error or a request for information.

requested information for any of the above reasons, it must notify the borrower within 5 business days of the servicer's determination and state its rationale.

Q&A Regarding Proposed Rules on Borrower Requests for Information

> *Are servicers required to respond only to written requests for information or requests that constitute "qualified written requests?"* No. Prior to adoption of the Act, RESPA and Regulation X required a servicer to respond to a request for information about a loan only if the request was in writing and satisfied the definition of qualified written request. Under proposed § 1024.36, a servicer must respond to an oral or written request for information so long as the servicer can reasonably identify the borrower, the loan and the information requested.
>
> *Are servicers permitted to charge borrowers requesting information a fee to search for and provide such information?* No. Servicers are prohibited by § 1024.36 from charging any fee for responding to borrowers' requests for information. This prohibition, however, does not extend to fees servicers are allowed to charge pursuant to applicable state law for preparing and delivering payoff statements and other notices to borrowers.
>
> *What constitutes an "overbroad or unduly burdensome" request for information?* Under § 1024.36 an information request is overbroad if the request is for an unreasonable volume of documents or information and a request is unduly burdensome if a diligent servicer could not respond to the request without either exceeding the time limits set forth in the proposed rule or incurring costs or dedicating resources that would be unreasonable in light of the circumstances.

FORCE-PLACED INSURANCE, 12 CFR § 1024.37

Proposed § 1024.37 requires a servicer to have a "reasonable basis" to believe that a borrower has failed to maintain appropriate hazard insurance on the related mortgaged property prior to obtaining force-placed insurance. If a servicer determines that force-placed insurance is necessary, it must notify the borrower in writing at least 45 days prior to charging the borrower any premium or fee relating to the insurance. The notice must include, among other things:

- a statement requesting the borrower to provide proof of insurance.
- a statement that the borrower's insurance is expiring or has expired and, if necessary, specifying the type of insurance coverage that is then lacking.
- a statement that insurance is required and the servicer has obtained or will obtain the required insurance at the borrower's expense.
- a statement requesting that the borrower promptly provide the servicer with the borrower's insurance company, agent and policy information.
- instructions as to how the borrower can provide proof of insurance.
- the annual premium (or if not known, a good faith estimate) for the force-placed insurance policy the servicer will obtain on behalf of the borrower.
- a statement that the force-placed insurance may cost significantly more than and may not provide as much coverage as the borrower's prior insurance.

If the servicer has not received proof of insurance following the initial notice, § 1024.37 requires the servicer to send the borrower a reminder notice no fewer than 30 days after the date of the initial notice, setting forth all the information above as well as a statement that this is the final notice before the servicer will obtain force-placed insurance for the property. If the servicer renews or replaces a force-placed policy, the servicer must send the borrower a renewal notice no fewer than 45 days prior to such renewal. The notice must contain the same information as in the first 45-day notice, but with respect to the force-placed policy. This notice is required only for the first renewal.

If the servicer receives proof of insurance from the borrower after force-placing insurance, the servicer must within 15 days cancel the policy and credit the borrower any charges or fees related to the force-placed policy for any time period the borrower's policy was in effect.

All charges related to a force-placed policy must be bona fide (for a service actually performed) and reasonable (in relationship to the cost of providing the service).

Q&A Regarding Proposed Rules on Force-Placed Insurance

Are open-end mortgage loans subject to this provision? No. Open-end mortgage loans are expressly excluded from the definition of "mortgage loan" for the purposes of Subpart C.

Is flood insurance required by the Flood Disaster Protection Act subject to this provision? No.

What constitutes a "reasonable basis" to believe the borrower has not maintained insurance? Examples provided in the Official Bureau Interpretations include situations where the servicer receives notice of cancellation or non-renewal from the insurer, or where the servicer has not received an insurance bill 30 days before payment is due.

Is the borrower obligated to pay for any insurance purchased by the servicer during the 45-day period if the borrower had no other insurance for the property during that time? No. If the first notice is mailed on day 1, the borrower may not be charged any fees that accrue before day 46.

Can the borrower submit proof of insurance via telephone? Yes, unless the servicer requires written proof of insurance, in which case the servicer must state that requirement in its initial 45-day notice.

If the actual cost of insurance is higher than the estimated cost, will the servicer be allowed to recoup the higher amount from the borrower? Maybe. The servicer may charge the borrower the actual costs, even if that exceeds the estimated cost, so long as the estimate was based on the best information available to the servicer at the time, including information as to the amount of coverage required.

REASONABLE INFORMATION MANAGEMENT POLICIES, 12 CFR § 1024.38

Proposed § 1024.38 requires every servicer to establish reasonable policies and procedures for managing information and documents relating to mortgage loans it services. These policies and procedures are intended to be tailored to the size, nature and scope of the servicer's operations. The proposed rule is aimed at ensuring that servicers comply with the four objectives contained in paragraph (b) of Section 1024.38 and with the section's record retention and servicing file standards in paragraph (c).

The four objectives are:

- *Accessing and providing accurate information*: The servicer must provide accurate disclosures and timely response to borrower requests under § 1024.36. They must investigate and correct errors asserted by borrowers under § 1024.35. Servicers are also obligated to provide accurate information to mortgage loan owners and in all foreclosure proceedings.
- *Evaluating loss mitigation options*: The servicer must identify all loss mitigation options it offers and for which a borrower is eligible and the documents required to apply for such loss mitigation options, provide access to the borrower's information to the borrower's point of contact under § 1026.40, and evaluate the borrower's loss mitigation application as required by § 1026.41.

- *Facilitating and overseeing compliance by service providers*: The servicer must ensure the communication of current and accurate information between the servicer and its service providers and conduct periodic reviews of each service provider's operations.
- *Facilitating servicing transfers*: The servicer must ensure timely transfer of all information necessary for any transferee servicer to comply with all servicing requirements.

Under paragraph (c), each servicer must maintain documents related to each mortgage loan serviced by it for a period of one year after the mortgage loan is discharged or servicing is transferred. Upon request from a borrower, the servicer must furnish to the borrower a copy of the related servicing file.

Q&A Regarding Proposed Rules on Information Management Policies

What constitutes "reasonable" policies and procedures under this section? The proposed rule includes a "safe harbor": a servicer satisfies the requirements of this section if it does not engage in a pattern or practice of failing to achieve any of the objectives identified in the section and does not engage in a pattern or practice of failing to comply with any of the requirements in paragraph (c) of the section.

Is a servicer required to review the operations of foreclosure counsel? Yes; the Official Bureau Interpretations note that the term "service provider" includes an attorney engaged to represent the servicer or owner of the loan in a foreclosure proceeding. Additionally, the rules would seem to require that the servicer retain or at least have access to relevant documents maintained by foreclosure counsel.

What constitutes the "servicing file?" A schedule of all payments credited or debited on the mortgage loan account, including any escrow or suspense account; a copy of the mortgage note and deed of trust; any collection notes reflecting communications with borrowers; a report of any data fields relating to a borrower's mortgage loan account created by a servicer's electronic systems in connection with collection practices, including records of phone calls; and copies of any information or documents provided in connection with the error resolution and loss mitigation procedures.

Is a servicer required to retain only "servicing files?" No. The proposed record retention rule is more comprehensive and requires a servicer to retain "records that document actions taken by the servicer with respect to a borrower's mortgage loan."

EARLY INTERVENTION REQUIREMENTS FOR CERTAIN BORROWERS, 12 CFR § 1024.39

The CFPB believes that the longer a borrower remains delinquent, the more difficult it is to avoid foreclosure and that most (but not all) servicers already have obligations pursuant to their servicing agreements to conduct early intervention with delinquent borrowers. The early intervention rule in proposed § 1024.39 is designed to set minimum and uniform standards for the industry in dealing with delinquent borrowers.

Under the proposed rule, a servicer must orally notify (or make a good faith effort to contact) the borrower within 30 days after the first missed payment date. The oral notice must be followed by written notice if the payment has not been received by the servicer within 40 days of the payment's due date. Only one written notice is required in a 180-day period.

The written notice to the borrower must include: (1) a statement encouraging the borrower to contact the servicer; (2) the servicer's address and phone number; (3) a description of loss mitigation options offered by the servicer and an explanation about how to obtain more information about or apply for any available option; (4) an explanation that foreclosure will terminate the borrower's interest in the property; (5) an estimated number of days from the missed payment until the borrower would be referred to foreclosure; and (6) the web address and phone number for any state housing finance authority, and a list of housing counselors from CFPB or HUD.

Q&A Regarding Proposed Rules on Early Intervention

What information is the servicer required to orally provide to a borrower about loss mitigation options? At the oral notice stage, the servicer is only required to tell the borrower that such options exist, although more information may be provided.

If the borrower's payment is late but received prior to the 30- and 40-day deadlines, is the servicer still required to provide the notices? No. Once payment is received by the servicer, no further notices are required.

Are early intervention notices required where the borrower has made a payment sufficient to cover principal, interest and escrow, but not late fees? No. Because revisions to Regulation Z will preclude "pyramiding" of late fees, the CFPB does not believe that a delinquency with respect to a late fee only is likely to put the borrower in a position where he or she will be unable to catch up on payments and that the delinquency will ultimately result in foreclosure.

How does any grace period affect the timing of the required notices? It does not. Oral notice must be provided within 30 days after the missed due date.

What steps are required to provide oral notice? The servicer must make good faith efforts to contact the borrower. The servicer satisfies its obligation under this provision by attempting to call the borrower on at least three separate days. The servicer may also conduct an in-person meeting.

Is a written description of the available loss mitigation options required even if the servicer provides this information in the oral notice? Yes. The CFPB believes written notice is necessary to assist the borrower in assessing his options.

Can notice be provided early for borrowers the servicer deems to be "high-risk"[13]? Yes. The proposed rule only sets the maximum time frame for oral and written notices. Servicers may choose to provide oral notice at any time within 30 days after the missed payment date, written notice at any time within 45 days after the missed payment date or written notice in advance of the oral notice.

Are notices required under this section when the borrower is performing under an existing loss mitigation agreement? No.

If the borrower contacts the servicer anticipating that he or she will be unable to make a payment, is written or oral notice of loss mitigation options then required? No. Notices are only required after the missed payment.

Must all loss mitigation options be described in the written notice? No. The proposed rule requires a servicer to briefly describe loss mitigation options that "may be available from the servicer." The servicer is only required to provide a description of examples (which may be a generic list or description) of loss mitigation options it offers. No minimum number of examples is required. If the servicer provides a generic list or description of all its loss mitigation options, the notice should clearly indicate that the borrower may not qualify for all listed options.

CONTINUITY OF CONTACT REQUIREMENTS, 12 CFR § 1024.40

Under proposed § 1024.40, the servicer must assign a point of contact within 5 days of the oral notice provided pursuant to § 1024.39(a) to a borrower who is 30 days delinquent. The point of contact is

[13] The CFPB does not define what constitutes a "high risk" borrower but refers to provisions in the Fannie Mae and Freddie Mac servicing guides relating to borrowers considered to be at high risk for default.

responsible for responding to all borrower inquiries and assisting the borrower with loss mitigation options. This point of contact is modeled after the provisions in the National Mortgage Settlement.

The same point of contact for the mortgage loan must be provided until the borrower refinances or pays off the mortgage; the mortgage has become and stayed current for "a reasonable time"; the borrower and servicer enter into a permanent loss mitigation agreement; title to the property is transferred via a completed foreclosure, a deed-in-lieu, sale, or short sale; or a reasonable time has passed since a servicing transfer.

The point of contact must be available to the borrower by telephone and voicemail. The point of contact is responsible for giving the borrower accurate information about loss mitigation options, including what the borrower must do (and by when) to pursue any loss mitigation option, the status of any loss mitigation application, and the circumstances under which the servicer may deny loss mitigation and move to foreclose.

The point of contact also is responsible for providing the borrower with records related to the borrower's account, including a payment history and any loss mitigation documents submitted to the servicer or any prior servicer (to the extent available).

The point of contact must inform the borrower, following a request from the borrower, of the phone number and address available for the borrower to assert an error or make an information request. In addition, the point of contact is responsible for ensuring that any documents submitted by the borrower for loss mitigation purposes are provided to the persons authorized to evaluate the borrower for the various loss mitigation options offered.

Q&A Regarding Proposed Rules on Point of Contact Requirements

What happens when servicing of a delinquent mortgage loan is transferred? The new servicer must appoint a point of contact for the borrower "within a reasonable time," but not later than 30 days after the transfer.

May the servicer appoint more than one point of contact? Yes. The servicer may designate an individual or a team to respond to the borrower.

What if the servicer cannot maintain a consistent point of contact? The rule states that a servicer does not violate the section when the failure to comply is "caused by conditions beyond a servicer's control."

When must a point of contact respond to a borrower's inquiry? The point of contact must respond to any borrower inquiry within 3 business days following receipt of the inquiry.

Is the point of contact required to evaluate the borrower's loss mitigation application himself? No. The point of contact is only required to provide the application to the appropriate personnel.

What if the point of contact does not have complete information about the borrower's payment history or loss mitigation application due to delays in processing paperwork? This is not a violation of Regulation X so long as the servicer has policies and procedures in place to ensure that the point of contact does not engage in a pattern or practice of failing to meet the requirements of the regulation. Occasional errors are not considered a violation of this requirement.

What constitutes a reasonable time for the mortgage loan to be current before a point of contact is no longer required? The Official Bureau Interpretation to the proposed rule states that once the mortgage loan is current for three consecutive months, a point of contact is no longer necessary, but the CFPB is specifically seeking comment on whether this time frame is appropriate.

LOSS MITIGATION PROCEDURES, 12 CFR §1024.41

Where a servicer makes loss mitigation options available to borrowers in the ordinary course of business, proposed § 1024.41 contains detailed requirements applicable to each step to be used in the servicer's loss mitigation process.

Loss Mitigation Applications: The servicer must use "reasonable diligence" in obtaining a *complete* loss mitigation application from the borrower. Upon receipt of a loss mitigation application, the servicer has 5 business days to determine whether the application is complete and notify the borrower of any missing information. Notification may be oral or in writing, and must identify any other documentation required in order to complete the application and the date by which the information must be submitted.

Once a completed application is received, the servicer must, within 5 business days, use "reasonable diligence" to determine whether there are other liens on the property and provide the application to the servicers for any other liens. The servicer may obtain this information as part of the loss mitigation application.

Loss Mitigation Deadlines: The servicer may establish a deadline for the borrower's submission of a complete loss mitigation application. The deadline for submission of a complete loss mitigation application can be no earlier than 90 days before a scheduled foreclosure sale.

Loss Mitigation Evaluation: Within 30 days of receiving a complete loss mitigation application, the servicer must evaluate the borrower for all loss mitigation options available from the servicer and notify the borrower in writing of its determination.

Acceptance: The servicer may set a deadline by which the borrower must accept or decline any offer of loss mitigation, but must allow at least 14 days after notification to the borrower. The borrower is deemed to have accepted if the borrower makes the initial payment required by the modification even if the borrower fails to act within the deadline.

Denial – Mortgage Loan Modification: If the servicer denies the borrower's application for a loan modification (whether a trial modification or permanent), the servicer must state the specific reasons for the denial. The proposed rules include the right to appeal a denial, and the notice must inform the borrower of this right, tell the borrower the deadline by which to appeal and explain how to make an appeal.

Appeal: The proposed rule requires the servicer to establish a process for the borrower to have one appeal of the denial of a loan modification application. The appeal must be conducted by personnel who were not involved in making the initial denial decision. The servicer must complete the appeal evaluation within 30 days of the borrower's request for appeal and notify the borrower. The rule does not expressly require written notice.

Foreclosure: If the borrower submits a *completed* loss mitigation application within the applicable deadline, a foreclosure sale may not proceed unless the application is denied and no appeal is pending, the borrower rejects the loss mitigation option offered by the servicer, or the borrower fails to perform under any loss mitigation agreement.

Q&A Regarding Proposed Rules on Loss Mitigation Procedures

What loss mitigation options must a servicer provide? This section sets out proposed standards the servicer must adhere to *if* it makes loss mitigation options available in its ordinary course of business. In its Official Bureau Interpretations, the CFPB notes that a servicer offers loss mitigation options in the ordinary course of its business if it either has a duty to the owner of the loan to engage in loss mitigation to improve recovery on the loan or engages in a practice of evaluating borrowers for loss mitigation options. The proposed rule does not obligate any servicer (and hence, any person for whom the servicer is servicing the loan) to make any particular loss mitigation option available, or to

provide loss mitigation at all. Likewise, the proposed rules would not mandate any particular result.

What if a servicer offers only forbearance plans or waiver of late fees in its ordinary course of business? Even though these programs may appear to be the "economic equivalent" of loss mitigation, the CFPB does not consider such practices to qualify as loss mitigation under § 1024.41.

If the borrower qualifies for a mortgage loan modification, is it necessary to evaluate other forms of loss mitigation offered by the servicer? Yes. The proposed rule would require that the servicer evaluate the borrower for all programs for which the borrower is eligible so that the borrower may evaluate all the available options. This process is consistent with the requirements of the National Mortgage Settlement and prevents the requirement that borrowers submit multiple applications for different loss mitigation programs.

Is the servicer required to make multiple requests for information from a borrower? In some instances, yes. The servicer is required to use "reasonable diligence" (a standard that is not defined by the CFPB) in obtaining information necessary to complete the application. For example, where the servicer learns during the loss mitigation process that the borrower is self-employed, the servicer would be obligated to make a second request to the borrower for profit and loss statements (in addition to any other information already requested) if a profit and loss statement is necessary to complete the loss mitigation evaluation. The servicer also may be required to send multiple requests for the same information if the borrower fails to provide any necessary documentation with the initial application.

Does the borrower have a right to institute suit over the denial of a loss mitigation application? No. The rule, as drafted, is not intended to create in the borrower a right to sue the servicer for shortcomings in the loss mitigation process. CFPB believes that doing so would have negative effects on the availability and structure of loss mitigation options.

Can the servicer begin the foreclosure process before loss mitigation is completed? Yes. The foreclosure process may begin before the loss mitigation process is completed, but no foreclosure sale may occur until the borrower and servicer have concluded discussions regarding loss mitigation options.

If the servicer conducts a foreclosure sale prior to the conclusion of loss mitigation, what are the borrower's rights? The borrower may contest the foreclosure and seek relief under the error resolution provisions of § 1024.35.

Are the servicing standards set out in § 1024.41 consistent with the National Mortgage Settlement? Although the CFPB has adopted some provisions of the National Mortgage Settlement, the CFPB notes that the proposed rule is intended to set only a floor of minimum consumer protections in mortgage servicing. For example, the National Mortgage Settlement requires automatic review of a loan modification denial and the proposed rule requires the borrower to request review. In addition, the National Mortgage Settlement restricts dual tracking of loss mitigation and foreclosure proceedings at the same time, while the proposed rule permits dual tracking so long as the foreclosure sale does not occur prior to the conclusion of the loss mitigation process.

May a borrower appeal the servicer's denial of a short sale? The rule requires only that servicers implement an appeal process with respect to denial of a loan modification application.

Is the servicer required to comply with the processes set out in § 1024.41 for each application submitted by the borrower? No. The servicer is required to comply with these procedures only for a single completed loss mitigation application. If the application is denied, then no further loss mitigation is required. Presumably, if the loan is brought current and subsequently goes into default, the servicer would be required to comply with

the loss mitigation procedures. If servicing is later transferred, the new servicer will be required to comply with the loss mitigation procedures, unless the effective date of the servicing transfer occurs after the deadline that the transferee servicer sets for receiving a completed loss mitigation application.

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