

DECEMBER 18, 2013

# Help For Struggling Borrowers

A guide to the mortgage servicing rules effective on January 10, 2014



Consumer Financial  
Protection Bureau

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**This guide summarizes certain mortgage rules finalized by the CFPB in 2013, but it is not a substitute for the rules. Only the rules and their official interpretations can provide complete and definitive information regarding their requirements.**

# Introduction

In January 2013, the Consumer Financial Protection Bureau issued several final rules concerning mortgage markets in the United States (2013 Title XIV Final Rules), pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Public Law No. 111-203, 124 Stat. 1376 (2010).<sup>1</sup> The Bureau issued various amendments to these rules that are available on the Bureau's website at <http://www.consumerfinance.gov/mortgage-rules-at-a-glance/>. This guide is concerned primarily with the new mortgage servicing rules, which are meant to address consumer harm that took place in the mortgage servicing market.<sup>2</sup>

The rules contain specific requirements, discussed in this guide. The rules also require servicers to adopt policies and procedures reasonably designed to achieve objectives relating to, among

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<sup>1</sup> Specifically, on January 10, 2013, the Bureau issued Escrow Requirements Under the Truth in Lending Act (Regulation Z), 78 FR 4726 (Jan. 22, 2013) (2013 Escrows Final Rule), High-Cost Mortgage and Homeownership Counseling Amendments to the Truth in Lending Act (Regulation Z) and Homeownership Counseling Amendments to the Real Estate Settlement Procedures Act (Regulation X), 78 FR 6856 (Jan. 31, 2013) (2013 HOEPA Final Rule), and Ability-to-Repay and Qualified Mortgage Standards Under the Truth in Lending Act (Regulation Z), 78 FR 6407 (Jan. 30, 2013) (2013 ATR Final Rule). The Bureau concurrently issued a proposal to amend the 2013 ATR Final Rule, which was finalized on May 29, 2013. See 78 FR 6621 (Jan. 30, 2013) and 78 FR 35430 (June 12, 2013). On January 17, 2013, the Bureau issued the Real Estate Settlement Procedures Act (Regulation X) and Truth in Lending Act (Regulation Z) Mortgage Servicing Final Rules, 78 FR 10901 (Regulation Z) (Feb. 14, 2013) and 78 FR 10695 (Regulation X) (Feb. 14, 2013) (2013 Mortgage Servicing Final Rules). On January 18, 2013, the Bureau issued the Disclosure and Delivery Requirements for Copies of Appraisals and Other Written Valuations Under the Equal Credit Opportunity Act (Regulation B), 78 FR 7215 (Jan. 31, 2013) (2013 ECOA Final Rule) and, jointly with other agencies, issued Appraisals for Higher-Priced Mortgage Loans, 78 FR 10367 (Feb. 13, 2013). On January 20, 2013, the Bureau issued the Loan Originator Compensation Requirements under the Truth in Lending Act (Regulation Z), 78 FR 11280 (Feb. 15, 2013) (2013 Loan Originator Compensation Final Rule).

<sup>2</sup> Bureau of Consumer Financial Protection, Mortgage Servicing Rules under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. 10696, 10700 (February 14, 2013).

other things: accessing and providing timely and accurate information,<sup>3</sup> properly evaluating loss mitigation applications,<sup>4</sup> facilitating oversight of and ensuring compliance with the rules by service providers,<sup>5</sup> facilitating transfer of information when servicing is transferred to a different servicer,<sup>6</sup> and informing borrowers of error resolution and information request procedures.<sup>7</sup> The rules also set forth requirements on record retention and the contents of a servicing file.<sup>8</sup> A copy of the rule, setting forth the specific items that must be covered in the servicer's policies and procedures, is attached to this outline as Appendix A.<sup>9</sup>

These new rules become effective on January 10, 2014. Any borrower who is more than 37 days from a foreclosure sale on January 10, 2014 and files a complete loss mitigation application before 37 days before a foreclosure sale is entitled to an evaluation of the complete loss mitigation application for all available loss mitigation options under 12 C.F.R. 1024.41, as described more fully in section 1.5 of this guide.

Small servicers are exempt from some of the new rules. A chart showing which servicers are subject to which rules is attached to this Guide as Appendix B. A small servicer is either:

- A servicer that, together with affiliates, services 5,000 or fewer mortgage loans and services only mortgage loans that they or an affiliate originated or own, or

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<sup>3</sup> 12 C.F.R. § 1024.38(b)(1).

<sup>4</sup> 12 C.F.R. § 1024.38(b)(2).

<sup>5</sup> 12 C.F.R. § 1024.38(b)(3).

<sup>6</sup> 12 C.F.R. § 1024.38(b)(4).

<sup>7</sup> 12 C.F.R. § 1024.38(b)(5).

<sup>8</sup> 12 C.F.R. § 1024.38(c).

<sup>9</sup> 12 C.F.R. § 1024.38.



- A servicer that is a housing finance agency as defined in 24 C.F.R. 266.5.<sup>10</sup>

This guide will aid in determining when a borrower is delinquent for purposes of Regulation X's early intervention requirement, sets forth a step-by-step guide to the loss mitigation process under the new servicing rules, and discusses when a servicer can initiate a foreclosure under the new rules. The guide also discusses how to resolve servicer errors and how to request information from a servicer.

This guide is divided into six parts, as follows:

1. The loss mitigation application process;
2. Foreclosure prohibitions under the rule;
3. Charges and fees that can be imposed on a borrower
4. The process for resolving errors by a servicer;
5. The process for requesting information from a servicer; and
6. Requests for payoff statements

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<sup>10</sup> 12 C.F.R. § 1026.41(e)(4).

# 1. Applying for loss mitigation

## 1.1 Introduction

This section sets out the early intervention, continuity of contact, and loss mitigation procedures contained in the new rules, as well as periodic statement requirements for borrowers who are delinquent on their mortgage. Borrowers should be encouraged to take full advantage of the contacts and processes provided for in these rule. While some of these rules apply only to delinquent borrowers, a borrower can apply for loss mitigation relief whether or not the borrower is delinquent.

The Federal regulations discussed here are meant to be minimum requirements for servicers, and states may adopt regulations that offer greater consumer protection.<sup>11</sup> Individual mortgage lenders and owners are also free to adopt additional requirements for servicers.

The rules provide that “A servicer is only required to comply with the requirements [in the loss mitigation procedures – 12 C.F.R. 1024.41] for a single complete loss mitigation application for a borrower’s mortgage loan account.”<sup>12</sup>

This means that if a borrower submits a complete loss mitigation application, and later seeks additional loss mitigation assistance, the borrower may not be entitled to a second full loss mitigation process under the rules.

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<sup>11</sup> Consumer Financial Protection Bureau, 2013 Real Estate Settlement Procedures Act (Regulation X) and Truth in Lending Act (Regulation Z) Mortgage Servicing Final Rules, Small Entity Compliance Guide at 11 (November 27, 2013); 12 C.F.R. 1024.5(c) and Comment 5(c)(1)-1.

<sup>12</sup> 12 C.F.R. § 1024.41(i).

However, if servicing on the account is transferred to a new servicer, the borrower may be able to apply for loss mitigation again.<sup>13</sup>

- Documents and information transferred from the old servicer to the new servicer may count as an application for loss mitigation, triggering all of the responsibilities of section 1024.41.

Small servicers do not have to comply with the loss mitigation rules, except that small servicers must comply with the requirements in 24 C.F.R. 1024.41(f)(1)(prohibition on foreclosure referral, including the 120-day limit)<sup>14</sup> and cannot “make the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process and shall not move for foreclosure judgment or order of sale or conduct a foreclosure sale if a borrower is performing pursuant to the terms of an agreement on a loss mitigation option.”<sup>15</sup>

If a servicer maintains an exclusive address that the borrower must use to assert an error against the servicer, or request information from the servicer, the servicer must include this exclusive address in any written communications with the borrower required by 12 C.F.R. 1024.39 and 12 C.F.R. 1024.41 in which the servicer gives the borrower the servicer’s contact information for assistance.<sup>16</sup>

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<sup>13</sup> 12 C.F.R. part 1024 Supplement I, Comment 41(i) – 1 (“A transferee servicer is required to comply with the requirements of § 1024.41 regardless of whether a borrower received an evaluation of a complete loss mitigation application from a transferor servicer.”).

<sup>14</sup> 12 C.F.R. § 1024.41(j); 12 C.F.R. § 1024.41(f)(1).

<sup>15</sup> 12 C.F.R. § 1024.41(j); Mortgage Servicing Rules: Coverage, available at <[http://files.consumerfinance.gov/f/201306\\_cfpb\\_comparison-chart\\_servicing-rules-applicability-regulation-x-and-regulation-z.pdf](http://files.consumerfinance.gov/f/201306_cfpb_comparison-chart_servicing-rules-applicability-regulation-x-and-regulation-z.pdf)>;

<sup>16</sup> 12 C.F.R. part 1024 supplement 1, Comments 35(c) – 2(iv) and 36(b) – 2(iv).

## 1.2 Loss mitigation: General requirements on servicers

The new rules set forth the process that must be followed by a servicer who offers loss mitigation options to borrowers. The owner or assignee of a loan determines what options will be available.

A servicer has no duty “to provide any borrower with any specific loss mitigation options.”<sup>17</sup>

“Nothing in section 1024.41 [the loss mitigation section] should be construed to create a right for a borrower to enforce the terms of any agreement between a servicer and the owner or assignee of a mortgage loan, including with respect to the evaluation for, or offer of, any loss mitigation option or to eliminate any such right that may exist pursuant to applicable law.”<sup>18</sup>

The loss mitigation application rules only apply to loss mitigation applications submitted on or after January 10, 2014.

A borrower does not have to be delinquent to apply for loss mitigation.

## 1.3 Identifying key dates for loss mitigation and foreclosure

Several key dates have to be identified, because the timing on various parts of the modification and foreclosure process is tied to these dates. Some of the timing is based on how many days it is AFTER the borrower becomes delinquent. Other timing requirements are based on the scheduled date of a foreclosure sale, and how many days BEFORE that date a loss mitigation application is submitted. These crucial dates are:

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<sup>17</sup> 12 C.F.R. § 1024.41(a).

<sup>18</sup> 12 C.F.R. § 1024.41(a).

- The date of delinquency<sup>19</sup>
- 36 days after the date of the missed or partial payment
- 45 days after the date of the missed or partial payment
- 120 days after a borrower becomes delinquent
- The scheduled date of the foreclosure sale
  - If no foreclosure sale is set at the time the borrower submits a complete loss mitigation application, the loss mitigation application is treated as if it was received by the servicer more than 90 days before any foreclosure sale.<sup>20</sup> This treatment remains true even if a foreclosure sale is later actually scheduled or re-scheduled.<sup>21</sup>
- 37 days before any scheduled foreclosure sale
- 45 days before any scheduled foreclosure sale
- 90 days before any scheduled foreclosure sale
- The date the servicer received a completed loss mitigation application, or the date a loss mitigation application is facially complete.
- The date the servicer provided the borrower with a loss mitigation offer.

While there is no deadline for completing a loss mitigation application, the sooner the loss mitigation application is completed the more rights and time the borrower may have in the loss

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<sup>19</sup> Keep in mind that that the rule does not explicitly define “delinquency,” although the commentary does explain what constitutes a delinquency for certain specific purposes. See section 1.4 of this guide.

<sup>20</sup> 12 C.F.R. § 1024.41(b)(3) and Comment 41(b)(3) – 1.

<sup>21</sup> 12 C.F.R. part 1024 Supplement I, Comment 41(b)(3) – 2.

mitigation process. Borrowers who submit a completed application 37 days or less before a foreclosure sale are not entitled to have the servicer comply with the loss mitigation requirements contained in 12 C.F.R. 1024.41 with respect to that application,<sup>22</sup> although the servicer will still have to comply with any investor guidelines for loss mitigation applications received during this period.

## 1.4 When is a borrower delinquent?

The rules do not provide an explicit definition of “delinquency,” but the commentary does explain what constitutes a delinquency for two specific purposes. If a borrower becomes delinquent, a servicer has certain obligations to attempt contact with the borrower and assign personnel to be continually available to discuss the borrower’s loan. A borrower is delinquent for purposes of these early intervention (12 C.F.R. 1024.39) and continuity of contact (12 C.F.R. 1024.40) requirements when the borrower fails to make a payment sufficient to cover principal, interest and, if applicable, escrow on the date that the payment is due.<sup>23</sup>

A borrower is delinquent on the day a full payment is due and not fully paid, “even if the borrower is afforded a period after the due date to pay before the servicer assesses a late fee.”<sup>24</sup>

- For example, 12 C.F.R. 1024.39 provides that a servicer must “establish or make good faith efforts to establish live contact with a delinquent borrower not later than the 36<sup>th</sup> day of the borrower’s delinquency...”<sup>25</sup> This means that if the borrower’s payment was due on January 1 “and the amount due is not fully paid during the 36-day period after January 1, the servicer must establish or make good faith efforts to establish live contact

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<sup>22</sup> 12 C.F.R. part 1024 Supplement I, Comment 41(g) – 4.

<sup>23</sup> 12 C.F.R. part 1024 Supplement I, Comments 39(a) – 1(i); 39(b)(1) – 1 and 40(a) – 3.

<sup>24</sup> 12 C.F.R. part 1024 Supplement I, Comment 39(a) – 1(i).

<sup>25</sup> 12 C.F.R. § 1024.39(a).

not later than 36 days after January 1 – i.e., by February 6.”<sup>26</sup> This means that January 2 is day one, January 3 is day 2, etc.

## 1.5 The loss mitigation process

### 1.5.1 Step one – The loss mitigation process: Live contact from the servicer to the borrower

#### REQUIREMENT

Between the day the borrower’s mortgage payment is due and not paid in full and 36 days later the servicer must make a good faith effort to reach the borrower, or an authorized agent of the borrower, by telephone (not just leave a message) or talk to the borrower in an in-person meeting to discuss the circumstances of the borrower’s delinquency.<sup>27</sup>

- Servicers are encouraged to reach out more than once to a delinquent borrower to establish live contact, so a borrower should not be surprised to receive more than one phone call or electronic communication from the servicer if the borrower has not responded to the servicer’s efforts to reach the borrower.<sup>28</sup>

#### EXCEPTIONS

This rule does not require contact with a borrower who:

- has filed for bankruptcy relief or whose joint obligor has filed for bankruptcy relief;<sup>29</sup>

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<sup>26</sup> 12 C.F.R. part 1024 Supplement I, Comment 39(a) – 1(i).

<sup>27</sup> 12 C.F.R. § 1024.39(a) and Comment 39(a) – 2. Contacting an agent is permitted by 12 C.F.R. part 1024 Supplement I, Comment 39(a) - 4.

<sup>28</sup> Id.

<sup>29</sup> 12 C.F.R. § 1024.39(d)(1) and Comment 39(d)(1) – 3.

- has instructed the servicer in writing to cease communications with the borrower pursuant to the Fair Debt Collection Practices Act, if the servicer is a debt collector subject to the Fair Debt Collection Practices Act with respect to that borrower;<sup>30</sup>
- is making payments as agreed on any loss mitigation contract;<sup>31</sup>
- sent a timely payment to a former servicer within 60 days before the current servicer took over the loan, and if the current servicer learns of this payment and documents the misdirected payment in the servicer's files;<sup>32</sup>
- cures a delinquent payment during this 36-day initial contact period.<sup>33</sup>

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<sup>30</sup> 12 C.F.R. § 1024.39(d)(2). The FDCPA cease communications rule can be found at 15 U.S.C. § 1692c(c).

<sup>31</sup> 12 C.F.R. part 1024 Supplement I, Comment 39(a) – 1(ii).

<sup>32</sup> 12 C.F.R. part 1024 Supplement I, Comment 39(a) – 1(iii).

<sup>33</sup> 12 C.F.R. part 1024 Supplement I, Comment 39(a) – 1(iv).



## 1.5.2 Step two – The loss mitigation process: General information about loan workout and modification possibilities

### REQUIREMENT

#### What and When?

Promptly after the servicer makes live contact with the borrower the servicer must tell the borrower, or an authorized agent of the borrower, about the availability of loss mitigation options if appropriate.<sup>34</sup>

- It is within the servicer’s “reasonable discretion” to decide if it is appropriate under the circumstances to inform the borrower about the availability of loss mitigation options.<sup>35</sup>  
The commentary to the rule gives examples:
  - If a borrower has had a “material adverse change in the borrower’s financial circumstances that is likely to cause the borrower to experience a long-term delinquency for which loss mitigation options might be available,” the servicer should tell the borrower about those options.<sup>36</sup>
  - If the borrower says simply that a payment will be late, the servicer does not have to inform the borrower about the availability of loss mitigation options.<sup>37</sup>
- The information given to the borrower at this stage does not have to be about specific workout options. Rather, the servicer can just tell the borrower “generally that loss mitigation options may be available.”<sup>38</sup>

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<sup>34</sup> 12 C.F.R. § 1024.39(a); contacting an agent is permitted by 12 C.F.R. part 1024 Supplement I, Comment 39(a) – 4.

<sup>35</sup> 12 C.F.R. part 1024 Supplement I, Comment 39(a) – 3.

<sup>36</sup> 12 C.F.R. part 1024 Supplement I, Comment 39(a) – 3(i)(A).

<sup>37</sup> 12 C.F.R. part 1024 Supplement I, Comment 39(a) – 3(i)(B).

### How Given?

- The servicer can give the borrower the information about loss mitigation options “orally, in writing, or through electronic communication.”<sup>39</sup>
- The servicer can comply with this obligation by giving the written notice required by 12 C.F.R. 1024.39(b) (discussed in section 1.5.3) to the borrower promptly after establishing live contact.<sup>40</sup>

### EXCEPTIONS

This early intervention rule does not require contact with a borrower who:

- has filed for bankruptcy relief or whose joint obligor has filed for bankruptcy relief;<sup>41</sup>
- has instructed the servicer in writing to cease communications with the borrower pursuant to the Fair Debt Collection Practices Act, if the servicer is a debt collector subject to the Fair Debt Collection Practices Act with respect to that borrower;<sup>42</sup>
- is making payments as agreed on any loss mitigation contract;<sup>43</sup>
- sent a timely payment to a former servicer within 60 days before the current servicer took over the loan, and if the current servicer learns of this payment and documents the misdirected payment in the servicer’s files.<sup>44</sup>

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<sup>38</sup> 12 C.F.R. part 1024 Supplement I, Comment 39(a) – 3(ii).

<sup>39</sup> 12 C.F.R. part 1024 Supplement I, Comment 39(a) – 3(ii).

<sup>40</sup> 12 C.F.R. part 1024 Supplement I, Comment 39(a) – 3(ii).

<sup>41</sup> 12 C.F.R. § 1024.39(d)(1) and Comment 39(d)(1) – 3.

<sup>42</sup> 12 C.F.R. § 1024.39(d)(2). The FDCPA cease communications rule can be found at 15 U.S.C. § 1692c(c).

<sup>43</sup> 12 C.F.R. part 1024 Supplement I, Comment 39(a) – 1(ii).

<sup>44</sup> 12 C.F.R. part 1024 Supplement I, Comment 39(a) – 1(iii).

### 1.5.3 Step three – The loss mitigation process: Assigning personnel and written notice

Between the day of the borrower’s missed mortgage payment and 45 days later the servicer should assign personnel to the mortgage, and must send a written notice.

#### **ASSIGNING PERSONNEL**

##### **Requirement**

In order to provide continuity of contact, the servicer should<sup>45</sup> assign personnel (which can be one or more persons)<sup>46</sup> to the delinquent borrower, or an authorized agent of the borrower,<sup>47</sup> who will be available via telephone, immediately or in a “timely manner”.<sup>48</sup>

- The servicer must “maintain policies and procedures that are reasonably designed ...to ensure that” the servicer can:
  - provide the assigned personnel with access to all documents and information the borrower submits in connection with a loss mitigation option; and<sup>49</sup>
  - facilitate the sharing of accurate and current information about the borrower’s loss mitigation application and the status of any foreclosure proceeding between the assigned personnel and other appropriate personnel, such as those handling a foreclosure.<sup>50</sup>

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<sup>45</sup> 12 C.F.R. § 1024.38(a)( the servicer shall “maintain policies and procedures reasonably designed to achieve” these requirements).

<sup>46</sup> 12 C.F.R. part 1024 Supplement I, Comment 40(a) – 2.

<sup>47</sup> Contact with an agent is permitted by 12 C.F.R. part 1024 Supplement I, Comment 40(a) – 1.

<sup>48</sup> 12 C.F.R. § 1024.40(a).

<sup>49</sup> 12 C.F.R. §§ 1024.38(a) & (b)(2)(iii).

<sup>50</sup> 12 C.F.R. §§ 1024.38(a) & (b)(3)(iii).

The personnel assigned should be able to respond to the borrower's inquiries and assist the borrower with available loss mitigation options by doing the following:<sup>51</sup>

- Giving the borrower accurate information about loss mitigation options;
- Telling the borrower what the borrower has to do to apply for these options;
- Telling the borrower what the mortgage owner's deadlines are for applying for and processing the borrower's application;
- Telling the borrower how to appeal if the servicer denies the borrower's loss mitigation application;
- Telling the borrower the status of any loss mitigation application;
- Being able to retrieve and provide to anyone considering the borrower for loss mitigation a complete record of the borrower's payment history;
- Being able to retrieve and provide to anyone considering the borrower for loss mitigation all written information the borrower has submitted to any servicer in connection with a loss mitigation application; and
- Giving the borrower information about the procedures for error resolution<sup>52</sup> and requesting information from the servicer.<sup>53</sup>

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<sup>51</sup> 12 C.F.R. §§ 1024.40(a) & (b).

<sup>52</sup> See 12 C.F.R. § 1024.35.

<sup>53</sup> See 12 C.F.R. § 1024.36.

The personnel assigned should remain assigned to the borrower until the borrower has made two consecutive mortgage payments under a permanent loss mitigation plan without incurring a late charge.<sup>54</sup>

### **Exceptions**

Personnel do not have to be assigned to a borrower who has already refinanced or paid off the loan, brought the loan current, or if the property has been transferred to a new owner through sale or a deed in lieu of foreclosure.<sup>55</sup>

Small servicers are exempt from this requirement.<sup>56</sup>

## **WRITTEN NOTICE**

### **Requirement**

#### **When sent?**

Between the day of the borrower's missed mortgage payment and 45 days later the servicer must send a written notice to the borrower, or an authorized agent of the borrower.<sup>57</sup>

- The notice must be sent even if the servicer gave the borrower loss mitigation information orally during the initial live contact with the borrower (section 1.5.2).<sup>58</sup>

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<sup>54</sup> 12 C.F.R. § 1024.40(a)(2).

<sup>55</sup> 12 C.F.R. part 1024 Supplement I, Comment 40(a)(1).

<sup>56</sup> Mortgage Servicing Rules: Coverage, available at <[http://files.consumerfinance.gov/f/201306\\_cfpb\\_comparison-chart\\_servicing-rules-applicability-regulation-x-and-regulation-z.pdf](http://files.consumerfinance.gov/f/201306_cfpb_comparison-chart_servicing-rules-applicability-regulation-x-and-regulation-z.pdf)>.

<sup>57</sup> 12 C.F.R. § 1024.39(b)(2). Contacting an agent is permitted by 12 C.F.R. part 1024 Supplement I, Comment 39(b)(1) – 3.

<sup>58</sup> 12 C.F.R. part 1024 Supplement I, Comment 39(b)(1) – 4.

## Notice Content

The notice **must**:

- Encourage the borrower to contact the servicer;
- Give the borrower the telephone number for the personnel assigned to the borrower and the servicer’s mailing address;
- Give the borrower examples of the loss mitigation options that might be available to the borrower; and
- Give the borrower a loss mitigation application, if the servicer does loss mitigation, or tell the borrower how to get more information about loss mitigation options;
  - This requirement can be complied with by simply telling the borrower to “contact us for instructions on how to apply,”<sup>59</sup>
  - The commentary to the rule suggests that servicers might expedite the loss mitigation process by telling the borrower what documents the borrower might need to apply, and “an estimate of how quickly” the servicer would expect to be able to evaluate and make a decision on a complete application.<sup>60</sup>
- Give the borrower a website address and the HUD toll-free telephone number where the borrower can access the CFPB or HUD list of housing counselors and organizations.
- Note that if the servicer maintains an exclusive address that the borrower must use to assert an error against the servicer, or request information from the servicer, the servicer must include this exclusive address in any written early intervention

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<sup>59</sup> 12 C.F.R. part 1024 Supplement I, Comment 39(b)(2)(iv) – 1.

<sup>60</sup> 12 C.F.R. part 1024 Supplement I, Comment 39(b)(2)(iv) – 1.

communications with the borrower required by 12 C.F.R. 1024.39 in which the servicer gives the borrower the servicer's contact information for the assistance.<sup>61</sup>

The notice **may also**:

- Give the borrower additional information that the servicer thinks would be helpful to the borrower;<sup>62</sup>
- Give the borrower additional information required by other law, or the owner or assignee of the mortgage.<sup>63</sup>

#### **Notice Form**

The **form** of the notice:

- Must be clear and conspicuous, but otherwise can be in any form, size, etc., and can be combined with other notices.<sup>64</sup>
- The regulation has model clauses that may be used by servicers to comply with the written notice form.<sup>65</sup>

#### **Exceptions**

The servicer does NOT have to send a written notice:

- to a borrower who has filed or whose joint obligor has filed for bankruptcy relief;<sup>66</sup>

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<sup>61</sup> 12 C.F.R. part 1024 Supplement I, Comments 35(c) – 2(iv) and 36(b) – 2(iv).

<sup>62</sup> 12 C.F.R. part 1024 Supplement I, Comment 39(b)(2) – 1.

<sup>63</sup> 12 C.F.R. part 1024 Supplement I, Comment 39(b)(2) – 1.

<sup>64</sup> 12 C.F.R. part 1024 Supplement I, Comments 39(b)(2) – 2 & 3.

<sup>65</sup> 12 C.F.R. § 1024.39(b)(3); 12 C.F.R. § 1024.39, Appendices MS-4(A); MS4(B) and MS-4(C).

<sup>66</sup> 12 C.F.R. § 1024.39(d)(1) and Comment 39(d)(1) – 3.

- to a borrower who has instructed the servicer in writing to cease communications with the borrower pursuant to the Fair Debt Collection Practices Act, if the servicer is a debt collector subject to the Fair Debt Collection Practices Act with respect to the borrower;<sup>67</sup>
- to a borrower who is making payments as agreed on any loss mitigation contract designed to bring the borrower current on a previously missed payment;<sup>68</sup>
- to a borrower who sent a timely payment to a former servicer within 60 days before the current servicer took over the loan, and if the current servicer learns of this payment and documents the misdirected payment in the servicer’s files;<sup>69</sup>
- if the servicer has sent a written notice under this section of the statute to a borrower in the last 180 days. (Only one notice is required during any 180-day period.)<sup>70</sup>

#### 1.5.4 Step four – The loss mitigation process: Periodic statements with delinquency information

##### REQUIREMENT

The new rules require servicers to send a monthly periodic statement to most borrowers.<sup>71</sup> But if the servicer provides the borrower with a coupon book that meets certain requirements, the servicer does not have to send a periodic statement to the borrower.<sup>72</sup> Upon the borrower’s delinquency, the rules do not alter whether a periodic statement has to be sent to the borrower.

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<sup>67</sup> 12 C.F.R. § 1024.39(d)(2). The FDCPA cease communications rule can be found at 15 U.S.C. § 1692c(c).

<sup>68</sup> 12 C.F.R. part 1024 Supplement I, Comment 39(a) – 1(ii).

<sup>69</sup> 12 C.F.R. part 1024 Supplement I, Comment 39(a) – 1(iii).

<sup>70</sup> 12 C.F.R. § 1024.39(b)(1) and Comment 39(b)(1) – 2.

<sup>71</sup> See generally, 12 C.F.R. § 1026.41.

<sup>72</sup> 12 C.F.R. § 1026.41(e)(3)



However, the rules require that once the borrower has been delinquent for more than 45 days the servicer or mortgage owner or assignee must send the borrower “the following items, grouped together in close proximity to each other and located on the first page of the [periodic] statement or, alternatively, on a separate page enclosed with the periodic statement or in a separate letter”<sup>73</sup>:

- The date the borrower became delinquent;<sup>74</sup>
- The possible risks, such as foreclosure, and expenses that might be incurred by the borrower if the delinquency is not cured;<sup>75</sup>
- An account history covering the period since the account was last current or for the last six months, whichever is shorter, and showing for that period the amount past due from each billing cycle and the date on which any payment was credited as fully paid;<sup>76</sup>
- Whether the servicer has made the first “notice or filing required by applicable law for any judicial or non-judicial foreclosure process, if applicable”;<sup>77</sup>
- How much must be paid by the borrower to bring the account current;<sup>78</sup>
- A website address and the HUD toll-free telephone number where the borrower can access the CFPB or HUD list of housing counselors and organizations;<sup>79</sup>

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<sup>73</sup> 12 C.F.R. § 1026.41(d)(8); 12 C.F.R. § 1026.41(e)(3)(iv).

<sup>74</sup> 12 C.F.R. § 1026.41(d)(8)(i).

<sup>75</sup> 12 C.F.R. § 1026.41(d)(8)(ii).

<sup>76</sup> 12 C.F.R. § 1026.41(d)(8)(iii).

<sup>77</sup> 12 C.F.R. § 1026.41(d)(8)(v).

<sup>78</sup> 12 C.F.R. § 1026.41(d)(8)(vi).

- Information about any loss mitigation programs that the borrower has already agreed to.<sup>80</sup>

Note that unlike the other rules in this guide, which apply to servicers only, this rule applies to the mortgage owner or assignee as well.<sup>81</sup>

If the servicer sends the borrower a periodic statement, it can use the Sample Form of Periodic Statement with Delinquency Box that is appendix H-30 to the new regulations.<sup>82</sup>

- A servicer who uses this form properly is deemed to have complied with the delinquency periodic statement rules.<sup>83</sup>

## EXCEPTIONS

- The servicer does NOT have to send this delinquency information to a borrower who has filed or whose joint obligor has filed for bankruptcy relief.<sup>84</sup>
- This notice does have to be sent even if the servicer is a debt collector with respect to the borrower and the borrower has sent a cease communication instruction in writing under the FDCPA.<sup>85</sup>

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<sup>79</sup> 12 C.F.R. § 1026.41(d)(8)(vii). The regulation says that what must be provided is “a *reference* to the homeownership counselor information disclosed pursuant to....” the section on housing counselors.

<sup>80</sup> 12 C.F.R. § 1026.41(d)(8)(iv).

<sup>81</sup> 12 C.F.R. § 1026.41(a)(2).

<sup>82</sup> 12 C.F.R. § 1026.41(c); 12 C.F.R. § 1026, Appendix H-30(B).

<sup>83</sup> 12 C.F.R. § 1026.41(c).

<sup>84</sup> 12 C.F.R. § 1026.41(e)(5) and Comment 41(e)(5) – 3.

<sup>85</sup> CFPB bulletin 2013-12 at 6, available at [http://files.consumerfinance.gov/f/201310\\_cfpb\\_mortgage-servicing\\_bulletin.pdf](http://files.consumerfinance.gov/f/201310_cfpb_mortgage-servicing_bulletin.pdf).

## 1.5.5 Step five – The borrower applies for loss mitigation

Determining when a borrower has applied for loss mitigation is crucial because once the borrower has applied the servicer has certain obligations, as described in this guide.

### **WHAT IS AN APPLICATION?**

An inquiry about loss mitigation, in which the borrower provides no information to the servicer, is not an application.<sup>86</sup>

But if the borrower does provide any information that would be evaluated as part of a loss mitigation application, the provision of the information IS an application.<sup>87</sup>

- The commentary gives examples of communications from the borrower to the servicer that would be considered an application, and says that “a loss mitigation application is considered expansively.”<sup>88</sup>

If servicing on a mortgage account is transferred to a new servicer, documents and information transferred from the old servicer to the new servicer may count as an application for loss mitigation, triggering all of the responsibilities of section 1024.41.<sup>89</sup>

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<sup>86</sup> 12 C.F.R. part 1024 supplement 1, Comment 41(b)(1) – 3.

<sup>87</sup> 12 C.F.R. part 1024 supplement 1, Comment 41(b)(1) – 2.

<sup>88</sup> 12 C.F.R. part 1024 supplement 1, Comment 41(b)(1) – 2.

<sup>89</sup> 12 C.F.R. part 1024 supplement 1, Comment 41(i) – 1.

### 1.5.6 Step six – The servicer acknowledges receipt of the application and/or helps the borrower complete the borrower’s application

In general, servicers must “maintain policies and procedures that are reasonably designed ...to ensure that the servicer can... identify documents and information that a borrower is required to submit to complete a loss mitigation application...”<sup>90</sup>

#### **SERVICER’S OBLIGATIONS IF AN APPLICATION IS RECEIVED 45 DAYS OR MORE BEFORE ANY SCHEDULED FORECLOSURE SALE**

If the application is received 45 days or more before any scheduled foreclosure sale, the servicer must review the loss mitigation application to determine if it is complete.<sup>91</sup> This must be done promptly after receipt of the application.

If the application is received 45 days or more before any scheduled foreclosure sale, the servicer is also required to send the borrower a written acknowledgement that the servicer received the application.<sup>92</sup> This written acknowledgement must tell the borrower whether the application is complete. The written acknowledgement must be sent within five days after receipt of the application, not including weekends and legal public holidays.

If the application is incomplete:

- the servicer has to tell the borrower what additional documents and information must be submitted to complete the application;<sup>93</sup>

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<sup>90</sup> 12 C.F.R. §§ 1024.38(a) & (b)(2)(iv).

<sup>91</sup> 12 C.F.R. § 1024.41(b)(2)(i)(A).

<sup>92</sup> 12 C.F.R. § 1024.41(b)(2)(i)(B).

<sup>93</sup> 12 C.F.R. § 1024.41(b)(2)(i)(B). The servicer is also required to “maintain policies and procedures that are reasonably designed ...to ensure that the servicer can... facilitate compliance with” this notice requirement. 12 C.F.R. §§ 1024.38(a) & (b)(2)(iv).

- The servicer has to give the borrower a date by which the application should be completed.<sup>94</sup>
- This date has to be a “reasonable date.”<sup>95</sup>
  - A reasonable date is a one that “preserves the maximum borrower rights under 1024.41” based on several milestones, “except when doing so would be impracticable to permit the borrower sufficient time to obtain and submit the type of documentation needed.”<sup>96</sup> The milestones are:
    - The date by which documents already submitted as part of the loss mitigation application will become stale or invalid;<sup>97</sup>
    - The date that is the 120<sup>th</sup> day of the borrower’s delinquency;<sup>98</sup>
    - The date that is 90 days before a foreclosure sale;<sup>99</sup>
    - The date that is 38 days before a foreclosure sale;<sup>100</sup>
    - If this date is not known the servicer can use a reasonable estimate of this date.<sup>101</sup>
- The commentary says it is generally “impracticable for a borrower to obtain and submit documents in less than seven days.”<sup>102</sup>

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<sup>94</sup> 12 C.F.R. §§ 1024.41(b)(2)(i)(B) & 1024.41(b)(2)(ii).

<sup>95</sup> 12 C.F.R. §§ 1024.41(b)(2)(i)(B) and (b)(2)(ii).

<sup>96</sup> 12 C.F.R. part 1024 supplement 1, Comment 41(b)(2)(ii) – 1.

<sup>97</sup> 12 C.F.R. part 1024 supplement 1, Comment 41(b)(2)(ii) – 1(i).

<sup>98</sup> 12 C.F.R. part 1024 supplement 1, Comment 41(b)(2)(ii) – 1(ii).

<sup>99</sup> 12 C.F.R. part 1024 supplement 1, Comment 41(b)(2)(ii) – 1(iii).

<sup>100</sup> 12 C.F.R. part 1024 supplement 1, Comment 41(b)(2)(ii) – 1(iv).

<sup>101</sup> 12 C.F.R. part 1024 supplement 1, Comment 41(b)(2)(ii) – 1(i).

<sup>102</sup> 12 C.F.R. part 1024 supplement 1, Comment 41(b)(2)(ii) – 1.

- The servicer must “exercise reasonable diligence” in getting the documents and information to complete the loss mitigation application.<sup>103</sup>
  - The commentary to the rules gives examples of due diligence, such as contacting a borrower for a missing employer address to verify employment, or checking for missing information in a file transferred to the current servicer by a former servicer.<sup>104</sup>

### **SERVICER’S REQUIREMENTS IF THE APPLICATION IS RECEIVED LESS THAN 45 DAYS BEFORE A SCHEDULED FORECLOSURE SALE**

Servicers are not required to provide the written acknowledgement described above for applications received fewer than 45 days before any scheduled foreclosure sale.

If the application is incomplete when received during this time the servicer continues to have an obligation to “exercise reasonable diligence in obtaining documents and information to complete a loss mitigation application.”<sup>105</sup>

### **1.5.7 Step seven – The borrower completes the loss mitigation application**

The borrower must provide the servicer with a **complete** loss mitigation application in order to be evaluated for loss mitigation programs. While the rules impose no deadline for completing a loss mitigation application, the sooner the loss mitigation application is completed the more rights and time the borrower may have in the loss mitigation process. For example, a borrower who submits a complete loss mitigation application before a foreclosure sale is scheduled or 90 days or more before a scheduled foreclosure sale gets a longer period to accept or reject loss

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<sup>103</sup> 12 C.F.R. § 1024.41(b)(1).

<sup>104</sup> 12 C.F.R. part 1024 supplement 1, Comment 41(b)(1) – 4.

<sup>105</sup> 12 C.F.R. § 1024.41(b) and Comment 41(b)(1) – 4.

mitigation offers, and is allowed to appeal a denial of a loss mitigation application.<sup>106</sup> These same rights are not extended to borrowers who file a completed application at a later date. Borrowers who submit a completed application 37 days or less before a foreclosure sale are not entitled to have the servicer comply with the loss mitigation requirements contained in 12 C.F.R. 1024.41 with respect to that application.<sup>107</sup>

### **WHEN IS AN APPLICATION COMPLETE?**

An application is complete when the borrower gives the servicer ALL of the information it requires *from the borrower*.<sup>108</sup>

- If the servicer is waiting for information from a third party, such as a credit reporting agency, the application is still complete once the borrower submits everything required from the borrower.<sup>109</sup>
- The servicer can establish its own COMPLETE application requirements.<sup>110</sup>

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<sup>106</sup> 12 C.F.R. 1024.41(e); 12 C.F.R. § 1024.41(h)(1); 12 C.F.R. § 1024.41(b)(3) and Comments 41(b)(3) – 1 & 2.

<sup>107</sup> 12 C.F.R. part 1024 Supplement I, Comment 41(g) – 4.

<sup>108</sup> 12 C.F.R. § 1024.41(b)(1) and Comment 41(b)(1) – 5; 12 C.F.R. § 1024.41(c)(2)(iv).

<sup>109</sup> 12 C.F.R. part 1024 Supplement I, Comment 41(b)(1) – 5.

<sup>110</sup> 12 C.F.R. part 1024 Supplement I, Comment 41(b)(1) – 1.

## 1.5.8 Step eight – The servicer evaluates the borrower’s complete the loss mitigation application

### EVALUATION OF COMPLETE APPLICATIONS RECEIVED MORE THAN 37 DAYS BEFORE ANY SCHEDULED FORECLOSURE SALE

All complete applications that are received more than 37 days before any scheduled foreclosure sale, or before any foreclosure sale is scheduled,<sup>111</sup> must be evaluated for all loss mitigation options available to the borrower.<sup>112</sup>

This evaluation must be conducted by the servicer within 30 days of the servicer receiving the complete loss mitigation application.<sup>113</sup>

- How to conduct the evaluation is at the discretion of the servicer.<sup>114</sup>

▪ Any borrower who is more than 37 days from a foreclosure sale on January 10, 2014 and files a complete loss mitigation application before 37 days before a foreclosure sale is entitled to an evaluation of the complete loss mitigation application under 12 C.F.R. 1024.41, as described more fully in section 1.5 of this guide.

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<sup>111</sup> If no foreclosure sale is set at the time the borrower submits a **complete** loss mitigation application, the loss mitigation application is treated as if it was received by the servicer more than 90 days before any foreclosure sale, (and so the borrower’s application is treated as one that was made more than 37 days before any foreclosure sale). 12 C.F.R. § 1024.41(b)(3) and Comment 41(b)(3) – 1. This treatment remains true even if a foreclosure sale is later actually scheduled or re-scheduled. 12 C.F.R. part 1024 Supplement I, Comment 41(b)(3) – 2.

<sup>112</sup> 12 C.F.R. § 1024.41(c)(1)(i). (This will include only those programs available from the borrower’s lender for which the borrower qualifies. 12 C.F.R. part 1024 Supplement I, Comment 41(c)(1) – 2.) The servicer is also required to “maintain policies and procedures that are reasonably designed ...to ensure that the servicer can... [p]roperly evaluate a borrower who submits an application for a loss mitigation for all loss mitigation options for which the borrower may be eligible pursuant to any requirements established by the owner or assignee of the borrower’s mortgage loan. 12 C.F.R. §§ 1024.38(a) & (b)(2)(v). This includes evaluation procedures that are lender specific and are not imposed by 12 C.F.R. § 1024.41. 12 C.F.R. part 1024 Supplement I, Comment 38(b)(2)(v) – 1.

<sup>113</sup> 12 C.F.R. § 1024.41(c)(1)(i).

<sup>114</sup> 12 C.F.R. part 1024 Supplement I, Comment 41(c)(1) – 1.



## **EVALUATION OF COMPLETE APPLICATIONS RECEIVED 37 DAYS OR LESS BEFORE ANY SCHEDULED FORECLOSURE SALE**

If the borrower submits a complete loss mitigation application **37 days or LESS** before a foreclosure sale, the servicer does NOT have to follow the loss mitigation requirements in 1024.41 with respect to that application.<sup>115</sup>

The investors or owner or assignee of the mortgage may have requirements for dealing with loss mitigation applications that are received 37 days or less before a foreclosure sale. If this is the case the servicer must maintain policies and procedures that are reasonably designed to abide by such requirements.<sup>116</sup>

## **TRANSFER OF SERVICING WHILE COMPLETE LOSS MITIGATION APPLICATION IS BEING EVALUATED**

If servicing is transferred while the borrower's complete loss mitigation application is being evaluated, the transferee servicer must get all the documents and information the borrower gave to the old servicer as part of the loss mitigation process, and, if the documents constitute a complete loss mitigation application for the new servicer, treat the documents and information as if they were submitted to the new servicer on the date that they were submitted to the old servicer.<sup>117</sup> The transferee servicer "should continue the evaluation to the extent practicable."<sup>118</sup>

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<sup>115</sup> 12 C.F.R. part 1024 Supplement I, Comment 41(g) – 4.

<sup>116</sup> 12 C.F.R. §§ 1024.38(a) & (b)(2)(v) ("A servicer shall maintain policies and procedures that are reasonably designed to... Properly evaluate a borrower who submits an application for a loss mitigation option for all loss mitigation options for which the borrower may be eligible pursuant to any requirements established by the owner or assignee of the borrower's mortgage loan and, where applicable, in accordance with the requirements of § 1024.41.") and 12 C.F.R. part 1024 Supplement I, Comment 41(g) – 4 ("Such evaluation may be subject to requirements applicable to a review of a loss mitigation application submitted by a borrower 37 days or less before a foreclosure sale.").

<sup>117</sup> 12 C.F.R. part 1024 Supplement I, Comment 41(i) – 2.

<sup>118</sup> 12 C.F.R. part 1024 Supplement I, Comment 41(i) – 2.

## **FACIALLY COMPLETE APPLICATIONS OR SUPPLEMENTING A COMPLETE APPLICATION**

The acknowledgement letter from the servicer must list all the missing information required to complete the borrower's loss mitigation application, if any. However, a servicer may later determine additional information or corrected documents are necessary to complete a loss mitigation application. The facially complete provision of the regulation explains what the servicer must do, and what protections are given to a borrower in such a situation.<sup>119</sup>

If a borrower has submitted all the information requested in the acknowledgement letter (if any), or the acknowledgment letter did not request any additional information, but the servicer later determines additional information or corrected documentation is required to complete the application, the application must be considered facially complete.

The servicer must promptly request the missing information or corrected documents. The servicer must treat the application as though it was complete for the purposes of the foreclosure protections in 1024.41(f)(2) and (g) (see Foreclosure Prohibitions in Section 2 of this guide) until the borrower is given a reasonable opportunity to complete the application.

If a borrower completes the application during this period:

- The foreclosure protections will continue;
- The application must be considered complete as of the date it was facially complete for the following purposes:
  - Determining if a borrower may appeal the determination to deny a borrower for any trial or permanent loan modification program available to the borrower pursuant to 1024.41(h);
  - Determining the minimum amount of time a borrower has to accept or reject an offer of a loss mitigation option pursuant to 1024.41(e).
- The 30 day evaluation timeline (required by 1024.41(c)) will not begin until the date the application is actually complete.

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<sup>119</sup> 12 C.F.R. § 1024.41(c)(2)(iv).

## REVIEW OF INCOMPLETE APPLICATIONS

Except in the two situations identified below, the servicer cannot evade its obligations to evaluate a complete loss mitigation application by “offering a loss mitigation option based upon an evaluation of any information provided by a borrower in connection with an incomplete loss mitigation application.”<sup>120</sup>

In the following two scenarios a servicer can offer a loss mitigation option based on an evaluation of an incomplete application:

1. Limited Circumstance for evaluating an incomplete application 1 – application incomplete for a significant period of time:
  - If a servicer has fulfilled its due diligence obligations to help the borrower complete the loss mitigation application, and the application remains incomplete for a “significant period of time under the circumstances,” the servicer is *permitted* to evaluate the incomplete application and offer a loss mitigation plan to the borrower.<sup>121</sup>
    - What is a “significant period of time” may vary, taking into consideration things such as the “timing of the foreclosure process.”<sup>122</sup>
    - Example: an application that remains incomplete for 15 days would be more significant if the borrower was 50 days before a foreclosure sale, as opposed to less than 120 days delinquent on the mortgage.
2. Limited Circumstance for evaluating an incomplete application 2 – Short-term help
  - A servicer is *permitted* to “offer a short-term payment forbearance program to a borrower based upon an evaluation of an incomplete loss mitigation application.”<sup>123</sup>

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<sup>120</sup> 12 C.F.R. § 1024.41(c)(2).

<sup>121</sup> 12 C.F.R. § 1024.41(c)(2)(ii).

<sup>122</sup> 12 C.F.R. part 1024 Supplement I, Comment 41(c)(2)(ii) – 1.

- A short-term payment forbearance program is “a loss mitigation option for which a servicer allows a borrower to forgo making certain payments or portions of payments for a period of time” – not longer than 6 months.<sup>124</sup>

A review of the borrower’s incomplete loss mitigation application is within the servicer’s discretion, and is not required by 12 C.F.R. 1024.41 (although such a review may be required by the owner or assignee of a mortgage loan).<sup>125</sup>

### 1.5.9 Step nine – The servicer offers or denies a loss mitigation option to the borrower

Within 30 days of receiving a complete application the servicer must give the borrower a written notice.<sup>126</sup> The content of this notice depends on whether a loss mitigation offer is made or not.

#### **IF AN OFFER IS MADE**

If an offer is made the written notice must:

- Say what loss mitigation offers the servicer is making.<sup>127</sup>
- Notify the borrower of “the amount of time the borrower has, to accept or reject the offer of a loss mitigation program as provided for in [12 C.F.R. 1024.41(e)]”.<sup>128</sup>
  - An offer that involves non-home retention, such as a short sale, can be conditioned on receipt of further information “not in the borrower’s possession and necessary to establish the parameters of a servicer’s offer.”<sup>129</sup>

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<sup>123</sup> 12 C.F.R. § 1024.41(c)(2)(iii).

<sup>124</sup> 12 C.F.R. part 1024 Supplement I, Comment 41(c)(2)(iii) – 1.

<sup>125</sup> 12 C.F.R. part 1024 Supplement I, Comment 41(c)(2)(i) – 2.

<sup>126</sup> 12 C.F.R. § 1024.41(c)(1)(ii).

<sup>127</sup> 12 C.F.R. § 1024.41(c)(1)(ii).

<sup>128</sup> 12 C.F.R. § 1024.41(c)(1)(ii).

- Example: the servicer might offer the borrower the chance to enter into a listing for a short sale, but state that “the specifics of an acceptable short sale transaction may be subject to further information obtained from an appraisal or title search.”<sup>130</sup>

## **IF THE APPLICANT IS DENIED FOR ANY AVAILABLE LOAN MODIFICATION PROGRAM**

If the applicant is denied for any available loan modification program the written notice must meet the following requirements:<sup>131</sup>

- The notice must give specific reasons for denial if the borrower’s application is denied for **any** loan modification program (trial or permanent).<sup>132</sup>
- If the borrower is rejected because of investor or mortgage owner requirements, the servicer has to identify the specific owner, assignee, investor or guarantor whose rules mandated the rejection, and specifically identify the requirement that is the basis of the denial.
  - It is not sufficient for the servicer to say that denial of the modification is based on “an investor requirement.”<sup>133</sup>
- If a borrower is offered one loan modification option but denied others because the owner or assignee has a rule that if the borrower qualifies for one modification the borrower cannot qualify for other options ranked below the offered option, the servicer simply has to tell the borrower that the borrower was denied other options because “the investor’s requirements include the use of such a ranking and that an

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<sup>129</sup> 12 C.F.R. part 1024 Supplement I, Comment 41(c)(1) – 3.

<sup>130</sup> 12 C.F.R. part 1024 Supplement I, Comment 41(c)(1) – 3.

<sup>131</sup> “A servicer’s determination not to offer a borrower a loan modification available to the borrower constitutes a denial of the borrower for that loan modification option,” even if other offers are made to the borrower.” 12 C.F.R. part 1024 Supplement I, Comment 41(d) – 3.

<sup>132</sup> 12 C.F.R. § 1024.41(d).

<sup>133</sup> 12 C.F.R. part 1024 Supplement I, Comment 41(d) – 1.

offer of a loan modification option necessarily results in a denial for any other loan modification options below the option for which the borrower is eligible in the rankings.”<sup>134</sup>

- “If a trial or permanent loan modification is denied because of a net present value calculation,” the servicer has to provide the borrower with the inputs used in the net present value calculation.<sup>135</sup>
- If the servicer has various criteria for evaluating a borrower for a loan modification, and the borrower is rejected based on one criterion, the servicer does not have to determine whether the borrower would have been rejected based on any of the other criteria. When the servicer tells the borrower why the borrower was rejected for loss mitigation, it only has to give the borrower the “reason or reasons with respect to which the borrower was actually evaluated and rejected,” and tell the borrower that the borrower was not evaluated on the other criteria for a loan modification.<sup>136</sup>
- The servicer has to notify the borrower of any rights to appeal the decision, requirements for appealing, and the time the borrower has for appealing.<sup>137</sup>

### 1.5.10 Step ten—Borrower’s acceptance or rejection of an offer made by the servicer

Once an offer is made the borrower has to accept or reject the servicer’s loss mitigation offer.

If the servicer decides to offer a loss mitigation option to the borrower, the servicer may prescribe a deadline by which the borrower must accept or reject the offer. The minimum length of time a servicer may give the borrower to accept or reject the servicer’s offer varies

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<sup>134</sup> 12 C.F.R. part 1024 Supplement I, Comment 41(d) – 1.

<sup>135</sup> 12 C.F.R. part 1024 Supplement I, Comment 41(d) – 2.

<sup>136</sup> 12 C.F.R. § 1024.41(d) and Comment 41(d) – 4.

<sup>137</sup> 12 C.F.R. § 1024.41(d); 12 C.F.R. § 1024.41(c)(1)(ii).

depending on the number of days between the date the servicer receives a complete loss mitigation application from the borrower and the date of a foreclosure sale.

- If no foreclosure sale is set at the time the borrower submits a complete loss mitigation application, the loss mitigation application is treated as if it was received by the servicer more than 90 days before any foreclosure sale.<sup>138</sup> This treatment remains true even if a foreclosure sale is later actually scheduled or re-scheduled.<sup>139</sup>

### **TIMING OF BORROWER’S ACCEPTANCE/REJECTION**

If the completed loss mitigation application was received by the servicer 90 days or more before the foreclosure sale or before the date for a foreclosure sale is set, the servicer has to give the borrower at least 14 days after the servicer provides the offer to accept or reject the offer.<sup>140</sup>

If the completed loss mitigation application was received by the servicer during the period that is less than 90 and more than 37 days before the foreclosure sale – the servicer has to give the borrower at least 7 days after the servicer provides the offer to accept or reject the offer.<sup>141</sup>

The rule does not include an explicit definition of “provides.”

### **EXTENSION TO ACCEPT OR REJECT LOSS MITIGATIONS PLANS UNDER CERTAIN CIRCUMSTANCES**

If the completed loss mitigation application was received by the servicer 90 days or more before the foreclosure sale, or before the date for a foreclosure sale is set, the borrower was denied for a trial or permanent loan modification program, and the borrower appeals the denial within 14 days, the deadline for the borrower to accept any original or newly offered loss mitigation

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<sup>138</sup> 12 C.F.R. § 1024.41(b)(3) and Comment 41(b)(3) – 1.

<sup>139</sup> 12 C.F.R. part 1024 Supplement I, Comment 41(b)(3) – 2.

<sup>140</sup> 12 C.F.R. § 1024.41(e)(1); 12 C.F.R. § 1024.41(b)(3) and Comments 41(b)(3) – 1&2.

<sup>141</sup> 12 C.F.R. § 1024.41(e)(1).

plan(s) is extended to **14** days after the servicer gives the borrower notice of the appeal decision.<sup>142</sup>

### **CONSEQUENCES OF NOT RESPONDING TO LOSS MITIGATION OFFER**

If the borrower does not respond by the deadline for acceptance given by the servicer, a servicer can treat this as a rejection of the offer, except in two circumstances.<sup>143</sup>

Exception 1- Effect of payment by borrower: A servicer cannot treat the borrower’s silence as rejection of a *trial* loan mitigation offer if the borrower “submits a payment that would be owed” under the offered loan mitigation plan within the time the borrower had to accept the loan offer.<sup>144</sup>

- If the borrower does submit a payment under the offered plan in the time required the servicer must give the borrower “a reasonable period of time to fulfill any remaining requirements of the servicer for acceptance of the trial loan modification plan beyond” the times dictated by the regulation.<sup>145</sup>

Exception 2 – Effect of certain appeals: If the completed loss mitigation application was received by the servicer 90 days or more before the foreclosure sale, or before the date for a foreclosure sale is set, the borrower was denied for a trial or permanent loan modification program, and the borrower appeals the denial within 14 days, the deadline for the borrower to accept any original or newly offered loss mitigation plan(s) is extended to **14** days after the servicer gives the borrower notice of the appeal decision.<sup>146</sup>

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<sup>142</sup> 12 C.F.R. § 1024.41(e)(2)(iii); 12 C.F.R. § 1024.41(c)(1)(ii); 12 C.F.R. § 1024.41(h)(4).

<sup>143</sup> 12 C.F.R. § 1024.41(e)(2)(i).

<sup>144</sup> 12 C.F.R. § 1024.41(e)(2)(ii).

<sup>145</sup> 12 C.F.R. § 1024.41(e)(2)(ii).

<sup>146</sup> 12 C.F.R. § 1024.41(e)(2)(iii); 12 C.F.R. § 1024.41(c)(1)(ii); 12 C.F.R. § 1024.41(h)(4).



## 1.5.11 Borrower’s appeal rights if loss mitigation is denied

If the servicer has denied a borrower a loan modification, the borrower may be able to appeal the servicer’s denial. The regulation does not provide an appeal right for any other loss mitigation denial (e.g., a short sale).

### **WHO CAN APPEAL**

A borrower whose complete loss mitigation application results in a denial for any loan modification has a right to appeal the denial if the servicer received the complete loss mitigation application 90 days or more before a foreclosure sale or before the date for a foreclosure sale is set.<sup>147</sup>

If the borrower is denied a loss mitigation option other than a loan modification, such as a short sale, the borrower is not entitled to an appeal.

### **TIMING OF THE APPEAL**

The appeal must be taken “within 14 days after the servicer provides” the written notice to the borrower telling the borrower that the loss mitigation application has been denied.<sup>148</sup> The rule does not include an explicit definition of “provides.”

### **WHO CONDUCTS THE APPEAL**

The appeal must be conducted by personnel who were not responsible for evaluating the loss mitigation application in the first place.<sup>149</sup>

A supervisor of the personnel who evaluated the application may perform the appeal evaluation so long as the supervisor was not “directly involved in the initial evaluation of the borrower’s complete loss mitigation application.”<sup>150</sup>

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<sup>147</sup> 12 C.F.R. § 1024.41(h)(1); 12 C.F.R. § 1024.41(b)(3) and Comments 41(b)(3) – 1&2.

<sup>148</sup> 12 C.F.R. § 1024.41(h)(2).

<sup>149</sup> 12 C.F.R. § 1024.41(h)(3).

## NOTIFICATION WHEN APPEAL IS FINISHED

Within 30 days of the borrower making the appeal the servicer has to notify the borrower in writing whether it will offer a loss mitigation option or not.<sup>151</sup>

- If an offer is made the servicer has to tell the borrower how long the borrower has to accept or reject the offer or prior offers.<sup>152</sup>
  - The servicer has to give the borrower at least 14 days to accept or reject any offer.<sup>153</sup>

The servicer's decision on appeal is not appealable any further.<sup>154</sup>

## 1.6 Offers of loss mitigation where the borrower has not applied for loss mitigation or where the borrower has submitted an incomplete loss mitigation application but the offer is not based on this incomplete application

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<sup>150</sup> 12 C.F.R. part 1024 Supplement I, Comment 41(h)(3) – 1.

<sup>151</sup> 12 C.F.R. § 1024.41(h)(4).

<sup>152</sup> 12 C.F.R. § 1024.41(h)(4).

<sup>153</sup> 12 C.F.R. § 1024.41(h)(4).

<sup>154</sup> 12 C.F.R. § 1024.41(h)(4).

A servicer is free to offer a loss mitigation option to a borrower who has not applied for loss mitigation or who has applied for loss mitigation but has an incomplete application, where the offer is not based on what is in the incomplete application.<sup>155</sup>

- An example of this might be a loss mitigation program offered to all borrowers who are a certain number of days delinquent.<sup>156</sup>

If a program like this is offered, the servicer does not need to comply with the loss mitigation rules in 1024.41 with respect to that program offer.<sup>157</sup>

## 1.7 The servicer's obligation to comply with the loss mitigation rules if the borrower has sent a cease communication writing to the servicer

Even if a servicer is a debt collector and the borrower has sent a cease communication instruction in writing under the FDCPA, the servicer must comply with the loss mitigation rules in 1024.41 unless the borrower specifically withdraws the borrower's loss mitigation application.<sup>158</sup>

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<sup>155</sup> 12 C.F.R. part 1024 Supplement I, Comment 41(c)(2)(i) – 1.

<sup>156</sup> 12 C.F.R. part 1024 Supplement I, Comment 41(c)(2)(i) – 1.

<sup>157</sup> 12 C.F.R. part 1024 Supplement I, Comment 41(c)(2)(i) – 1.

<sup>158</sup> CFPB bulletin 2013-12 at 6, available at [http://files.consumerfinance.gov/f/201310\\_cfpb\\_mortgage-servicing\\_bulletin.pdf](http://files.consumerfinance.gov/f/201310_cfpb_mortgage-servicing_bulletin.pdf).

## 1.8 Liability for failure to comply with 12 C.F.R. 1024.41

Borrowers have a private right of action to enforce the loss mitigation rules in 12 C.F.R. 1024.41 under the Real Estate Settlement Procedures Act, 12 U.S.C. 2605(f), which provides for damages, costs and attorneys fees.

## 2. Foreclosure prohibitions

Please reference section 1.3 of this guide regarding identifying key dates for loss mitigation and foreclosure.

### 2.1 Introduction

#### 2.1.1 General

In general, servicers must “maintain policies and procedures that are reasonably designed ...to ensure that the servicer can:...(v) submit documents or filings required for a foreclosure process, including documents or filings required by a court of competent jurisdiction, that reflect accurate and current information and that comply with applicable law.”<sup>159</sup>

The Federal regulations discussed here are meant to be minimum requirements for servicers, and states may adopt regulations that offer greater consumer protection.<sup>160</sup> Individual mortgage lenders and owners are also free to adopt additional requirements for servicers.

Small servicers do not have to comply with the loss mitigation rules, except that small servicers must comply with the requirements in 24 C.F.R. 1024.41(f)(1)(prohibition on foreclosure

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<sup>159</sup> 12 C.F.R. §§ 1024.38(a) & (b)(1)(v).

<sup>160</sup> Consumer Financial Protection Bureau, 2013 Real Estate Settlement Procedures Act (Regulation X) and Truth in Lending Act (Regulation Z) Mortgage Servicing Final Rules, Small Entity Compliance Guide at 9 (June 7, 2013).

referral, including the 120 -day limit)<sup>161</sup> and cannot “make the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process and shall not move for foreclosure judgment or order of sale or conduct a foreclosure sale if a borrower is performing pursuant to the terms of an agreement on a loss mitigation option.”<sup>162</sup>

## 2.1.2 What does it mean to “file” a foreclosure

In this guide the word “*file*” or “*filed*” is used to represent the following rules regarding initiation of the foreclosure process.

A servicer cannot make “the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process” until the borrower is more than 120 days delinquent. A servicer also cannot make that first notice or filing if the borrower has filed a complete loss mitigation application, until the servicer has finally denied the application (including any appeals, if applicable); the borrower has rejected all loss mitigations the servicer offered; or the borrower has failed to perform under an agreement on a loss mitigation option.

“Whether a document is considered the first notice or filing is determined on the basis of foreclosure procedures under the applicable State law.”<sup>163</sup>

- In a state where foreclosure is initiated by court process, this is the first document filed in court or with another judicial body.<sup>164</sup>
- In a state where foreclosure does not require a court action, this would be the “earliest document required to be recorded or published to initiate the foreclosure process.”<sup>165</sup>

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<sup>161</sup> 12 C.F.R. § 1024.41(j); 12 C.F.R. § 1024.41(f)(1); 12 C.F.R. 1024.5(c) and Comment 5(c)(1)-1.

<sup>162</sup> 12 C.F.R. § 1024.41(j); Mortgage Servicing Rules: Coverage, available at <[http://files.consumerfinance.gov/f/201306\\_cfpb\\_comparison-chart\\_servicing-rules-applicability-regulation-x-and-regulation-z.pdf](http://files.consumerfinance.gov/f/201306_cfpb_comparison-chart_servicing-rules-applicability-regulation-x-and-regulation-z.pdf)>;

<sup>163</sup> 12 C.F.R. part 1024 Supplement I, Comment 41(f) – 1.

<sup>164</sup> 12 C.F.R. part 1024 Supplement I, Comment 41(f) – 1(i).

- In a state where there is no court filing and no document recorded or published, this would be “the earliest document that establishes, sets, or schedules a date for the foreclosure sale.”<sup>166</sup>
- A document that must be sent to a delinquent borrower but is not initially required to be filed, recorded, or published is not a “first notice or filing” just because it must later be attached to another document that IS required to be filed, recorded or published to foreclose.<sup>167</sup>

## 2.2 When is a servicer prohibited from filing a foreclosure action?

### 120 DAY PROHIBITION

A servicer, including a small servicer,<sup>168</sup> cannot *file* for any judicial or non-judicial foreclosure during the first 120 days that the borrower is delinquent.<sup>169</sup>

Exceptions to the 120-day rule:

- A servicer CAN foreclose sooner than 120 days after delinquency if the failure to pay is based on a borrower’s violation of a due on sale clause.<sup>170</sup>
- A servicer CAN foreclose sooner than 120 days after delinquency if the servicer is joining a foreclosure of a subordinate lienholder.<sup>171</sup>

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<sup>165</sup> 12 C.F.R. part 1024 Supplement I, Comment 41(f) – 1(ii).

<sup>166</sup> 12 C.F.R. part 1024 Supplement I, Comment 41(f) – 1(iii).

<sup>167</sup> 12 C.F.R. part 1024 Supplement I, Comment 41(f) – 1(iv).

<sup>168</sup> 12 C.F.R. § 1024.41(j).

<sup>169</sup> 12 C.F.R. § 1024.41(f)(1)(i).

<sup>170</sup> 12 C.F.R. § 1024.41(f)(1)(ii).

This rule applies to loans that are delinquent when the new rules go into effect on January 10, 2014.

### **PROHIBITION ON FILING FORECLOSURE DURING EVALUATION OF COMPLETE LOSS MITIGATION APPLICATION**

A servicer, who is not a small servicer,<sup>172</sup> cannot file for any judicial or non-judicial foreclosure if the borrower submits a complete loss mitigation application before a foreclosure is filed.<sup>173</sup>

This prohibition applies whether the completed loss mitigation application was filed by the borrower during the first 120 days that the borrower is delinquent or any time after the first 120 days but before a foreclosure is filed.<sup>174</sup>

This prohibition on filing foreclosure lasts until one of the following has happened:

- The servicer has denied the borrower's application for loss mitigation and
  - the appeal process is not available to the borrower whose loss mitigation application was denied;<sup>175</sup> or
  - the time for appeal of the denial has expired;<sup>176</sup> or
  - the borrower has appealed a loss mitigation denial and the appeal was denied.<sup>177</sup>
- The borrower has rejected all loss mitigation options offered to the borrower by the servicer;<sup>178</sup> or

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<sup>171</sup> 12 C.F.R. § 1024.41(f)(2).

<sup>172</sup> 12 C.F.R. § 1024.41(j).

<sup>173</sup> 12 C.F.R. § 1024.41(f)(2)(i).

<sup>174</sup> 12 C.F.R. § 1024.41(f)(2)(i).

<sup>175</sup> 12 C.F.R. § 1024.41(f)(2)(i).

<sup>176</sup> 12 C.F.R. § 1024.41(f)(2)(i).

<sup>177</sup> 12 C.F.R. § 1024.41(f)(2)(i).



- The borrower does not perform as required under a loss mitigation agreement.<sup>179</sup>
  - A borrower IS performing during the listing or marketing period of a short sale or other similar agreement.<sup>180</sup>
  - A borrower may be deemed to have failed to perform if there is no approved short sale transaction at the end of the listing or marketing period.<sup>181</sup>

**PROHIBITION ON FILING FORECLOSURE IF THE BORROWER IS PERFORMING PURSUANT TO A SHORT-TERM PAYMENT FORBEARANCE PROGRAM OR A LOSS MITIGATION AGREEMENT**

A servicer cannot file for any judicial or non-judicial foreclosure at any time if the borrower is performing pursuant to a short-term payment forbearance program.<sup>182</sup>

- A short-term payment forbearance program is “a loss mitigation option for which a servicer allows a borrower to forgo making certain payments or portions of payments for a period of time – not longer than 6 months.”<sup>183</sup>

A servicer cannot file for any judicial or non-judicial foreclosure if a borrower is performing pursuant to the terms of a loss mitigation agreement.<sup>184</sup>

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<sup>178</sup> 12 C.F.R. § 1024.41(f)(2)(ii).

<sup>179</sup> 12 C.F.R. § 1024.41(f)(2)(iii).

<sup>180</sup> 12 C.F.R. part 1024 Supplement I, Comment 41(g)(3) – 1.

<sup>181</sup> 12 C.F.R. part 1024 Supplement I, Comment 41(g)(3) – 2.

<sup>182</sup> 12 C.F.R. § 1024.41(c)(2)(iii).

<sup>183</sup> 12 C.F.R. part 1024 Supplement I, Comment 41(c)(2)(iii) – 1.

<sup>184</sup> 12 C.F.R. § 1024.41(f)(2)(iii); 12 C.F.R. § 1024.41 (g)(3); 12 C.F.R. § 1024.41(j).

## 2.3 What happens if the borrower submits a complete loss mitigation application after foreclosure has been filed?

### 2.3.1 More than 37 days before a foreclosure sale

If a foreclosure has already been filed, AND it is more than 37 days before a foreclosure sale, AND the borrower submits a complete loss mitigation application, a servicer cannot “move for a foreclosure judgment [including a dispositive motion like a motion for default judgment, on the pleadings or summary judgment] or order of sale, or conduct a foreclosure sale”<sup>185</sup> until one of the following has happened:

- The servicer has denied the borrower’s application for loss mitigation and
  - the appeal process is not available to the borrower whose loss mitigation application was denied;<sup>186</sup> or
  - the time for appeal of the denial has expired;<sup>187</sup> or
  - the borrower has appealed a loss mitigation denial and the appeal was denied.<sup>188</sup>or
- The borrower has rejected all loss mitigation options offered to the borrower by the servicer;<sup>189</sup> or
- The borrower does not perform as required under a loss mitigation agreement.<sup>190</sup>

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<sup>185</sup> 12 C.F.R. § 1024.41(g) and Comment 41(g) – 1.

<sup>186</sup> 12 C.F.R. § 1024.41(g)(1).

<sup>187</sup> 12 C.F.R. § 1024.41(g)(1).

<sup>188</sup> 12 C.F.R. § 1024.41(g)(1).

<sup>189</sup> 12 C.F.R. § 1024.41(g)(2).

- A borrower IS performing during the listing or marketing period of a short sale or other similar agreement.<sup>191</sup>
- A borrower may be deemed to have failed to perform if there is no approved short sale transaction at the end of the listing or marketing period.<sup>192</sup>

Once the servicer receives a complete loss mitigation application, the servicer must “promptly” instruct any lawyers it has retained not to proceed with filing for a foreclosure judgment or order of sale, or conducting a foreclosure sale, and if necessary, to file for a continuance (delay) with respect to any deadlines for filing a dispositive motion.<sup>193</sup>

The servicer can continue litigating, arbitrating, mediating, etc. the foreclosure during the loss mitigation process so long as this does “not cause or directly result in the issuance of a foreclosure judgment or order of sale, or the conduct of a foreclosure sale in violation of § 1024.41.”<sup>194</sup>

If the servicer has already made a dispositive motion at the time the borrower completes the loss mitigation application, the servicer has to “take reasonable steps to avoid a ruling on such motion or issuance of such order” until the loss mitigation procedures are completed.<sup>195</sup>

- If a servicer does this, it has not violated the prohibition on moving for judgment, even if the court goes ahead and grants the servicer’s dispositive motion.<sup>196</sup>

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<sup>190</sup> 12 C.F.R. § 1024.41(g)(3).

<sup>191</sup> 12 C.F.R. part 1024 Supplement I, Comment 41(g)(3) – 1.

<sup>192</sup> 12 C.F.R. part 1024 Supplement I, Comment 41(g)(3) – 2.

<sup>193</sup> 12 C.F.R. part 1024 Supplement I, Comment 41(g) – 3.

<sup>194</sup> 12 C.F.R. part 1024 Supplement I, Comment 41(g) – 2.

<sup>195</sup> 12 C.F.R. part 1024 Supplement I, Comment 41(g) – 1.

<sup>196</sup> 12 C.F.R. part 1024 Supplement I, Comment 41(g) – 1.

## 2.3.2 37 days or less before a foreclosure sale

If a foreclosure has already been filed, and the borrower submits a complete loss mitigation application **37 days or LESS** before a foreclosure sale, the servicer does NOT have to follow the loss mitigation requirements in 1024.41 with respect to that application.<sup>197</sup>

If the investors or owner or assignee of the mortgage have requirements for dealing with loss mitigation applications that are received 37 days or less before a foreclosure sale, the servicer must maintain policies and procedure that are reasonably designed to abide by such requirements.<sup>198</sup>

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<sup>197</sup> 12 C.F.R. part 1024 Supplement I, Comment 41(g) – 4.

<sup>198</sup> 12 C.F.R. §§ 1024.38(a) & (b)(2)(v) (“A servicer shall maintain policies and procedures that are reasonably designed to... Properly evaluate a borrower who submits an application for a loss mitigation option for all loss mitigation options for which the borrower may be eligible pursuant to any requirements established by the owner or assignee of the borrower’s mortgage loan and, where applicable, in accordance with the requirements of § 1024.41.”) and 12 C.F.R. part 1024 Supplement I, Comment 41(g) – 4 (“Such evaluation may be subject to requirements applicable to a review of a loss mitigation application submitted by a borrower 37 days or less before a foreclosure sale.”).

# 3. Charges and fees that can be imposed on a borrower

## 3.1 Rules regarding processing and applying payments

### 3.1.1 Full periodic mortgage payments

Full periodic mortgage payments must be credited by the servicer (including a small servicer) as of the day they are received except in the two limited circumstances noted below as limited exceptions.

- A full mortgage payment (called a periodic payment under Regulation Z) is a payment that is sufficient to cover principal, interest, and escrow, if applicable.<sup>199</sup>
  - A payment is still a full mortgage payment even if the borrower does not pay amounts required to be paid for late fees, other fees, or “non-escrow payments a servicer has advanced on a consumer’s behalf.”<sup>200</sup>
  - A non-escrow payment might include payment by a servicer for force-placed insurance or property taxes if such payment was not made via the escrow account.

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<sup>199</sup> 12 C.F.R. § 1026.36(c)(1)(i).

<sup>200</sup> 12 C.F.R. § 1026.36(c)(1)(i).

- Payments are received when the payment instrument reaches the mortgage servicer.<sup>201</sup>
  - Example: A payment by check is received when the check reaches the servicer, not when the funds come out of the borrower’s account.<sup>202</sup>
  - If the servicer doesn’t indicate otherwise payments can be made at “any location where the servicer conducts business; any time during the servicer’s normal business hours, and by cash, money order, draft, or other similar instrument in properly negotiable form, or by electronic fund transfer if the servicer and consumer have so agreed.”<sup>203</sup>

### LIMITED EXCEPTIONS

Full periodic mortgage payments can only be credited as of a date later than the day they are received if:

- Later crediting does not lead to a charge being imposed on the borrower or a negative report to a credit reporting agency;<sup>204</sup> or
- The borrower makes a payment that does not conform to reasonable payment requirements the servicer gave to the borrower in writing, such as that the payment be accompanied by a coupon or an account number, setting cutoff hours, and specifying an address for receiving payments.<sup>205</sup>

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<sup>201</sup> 12 C.F.R. part 1026 Supplement I, Comment 36(c)(1)(i) – 3.

<sup>202</sup> 12 C.F.R. part 1026 Supplement I, Comment 36(c)(1)(i) – 3.

<sup>203</sup> 12 C.F.R. part 1026 Supplement I, Comment 36(c)(1)(iii) – 3.

<sup>204</sup> 12 C.F.R. § 1026.36(c)(1)(i) and Comment 36(c)(1)(i) – 1.

<sup>205</sup> 12 C.F.R. §§ 1026.36(c)(1)(i)&(iii) and Comment 36(c)(1)(iii) – 1 & 2.

- In this case the payment has to be credited within five days after the payment is received.<sup>206</sup>

### 3.1.2 Partial periodic mortgage payments

The servicer can decide what to do with a partial payment it receives. So long as not prohibited by other law or the contract between the parties to a mortgage, a partial mortgage payment can be:

- Credited upon receipt;<sup>207</sup>
- Returned to the borrower;<sup>208</sup>
- Put in a suspense or unapplied funds account until the borrower has paid the servicer enough money to cover a full mortgage payment.<sup>209</sup>

The servicer also has to indicate on any periodic statement it is required to send to the borrower:

- the total amount that is being held in a suspense account;<sup>210</sup>
- the total of all payments received since the last periodic statement sent to a suspense or unapplied funds account;<sup>211</sup> and
- the total of all payments received since the beginning of the current calendar year being held in a suspense or unapplied funds account.<sup>212</sup>

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<sup>206</sup> 12 C.F.R. § 1026.36(c)(1)(iii).

<sup>207</sup> 12 C.F.R. part 1026 Supplement I, Comment 36(c)(1)(ii) – 1(i).

<sup>208</sup> 12 C.F.R. part 1026 Supplement I, Comment 36(c)(1)(ii) – 1(ii).

<sup>209</sup> 12 C.F.R. § 1026.36(c)(1)(ii) and Comment 36(c)(1)(ii) – 1(iii).

<sup>210</sup> 12 C.F.R. § 1026.36(c)(1)(ii)(A).

<sup>211</sup> 12 C.F.R. § 1026.41(d)(3)(i).

<sup>212</sup> 12 C.F.R. § 1026.41(d)(3)(ii).

Once enough money has been paid into a suspense or unapplied funds account to cover a full periodic mortgage payment the servicer must treat the funds like a full mortgage payment.<sup>213</sup>

## 3.2 Limitations on pyramiding late fees

When late fees are pyramided the servicer applies money that comes in to make the mortgage payment to existing late fees, causing the current mortgage payment to be partial, not complete. New fees are then imposed on the borrower, and continue to be imposed since the servicer considers the borrower to be continuously delinquent, even if the borrower is making scheduled payments and the only shortage is due to late fees.

Servicers are not allowed to impose a late fee or a delinquency charge on a mortgage payment if the “fee or charge is attributable solely to failure of the consumer to pay a late fee or delinquency charge on an earlier payment”<sup>214</sup> and the payment is otherwise a full periodic mortgage payment received when it is due or during any courtesy period.<sup>215</sup>

## 3.3 Limitations on force-placed insurance

This section describes what force-placed insurance is, when, generally, a servicer can charge a borrower for force-placed insurance, how a borrower can demonstrate that the borrower has hazard insurance, the procedure servicers must follow before purchasing force-placed insurance in the first instance, and the procedure that servicers must follow before renewing force-placed insurance.

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<sup>213</sup> 12 C.F.R. § 1026.36(c)(1)(ii)(B).

<sup>214</sup> 12 C.F.R. § 1026.36(c)(2)(i).

<sup>215</sup> 12 C.F.R. § 1026.36(c)(2)(ii).



### 3.3.1 What is Force-placed Insurance?

Force-placed insurance is “hazard insurance obtained by a servicer on behalf of the owner or assignee of a mortgage loan that insures the property securing such loan.”<sup>216</sup>

Force-Placed insurance is NOT:

- Hazard insurance required by the Flood Disaster Protection Act of 1973;<sup>217</sup>
- Hazard insurance purchased by the borrower but required to be renewed by the servicer out of funds in escrow or partially advanced by the servicer;<sup>218</sup>
- Hazard insurance purchased by the borrower but renewed by the servicer, with the borrower’s consent, even though the servicer is not required to renew the insurance.<sup>219</sup>

### 3.3.2 When can the servicer purchase and charge the borrower for force-placed insurance?

A servicer is allowed to purchase and charge the borrower a premium and fee for force-placed insurance if the servicer has “a reasonable basis to believe that the borrower has failed to comply with the loan contract’s requirement to maintain hazard insurance.”<sup>220</sup>

A servicer “may” have a reasonable basis to believe the borrower doesn’t have hazard insurance if the servicer:

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<sup>216</sup> 12 C.F.R. § 1024.37(a)(1).

<sup>217</sup> 12 C.F.R. § 1024.37(a)(2)(i).

<sup>218</sup> 12 C.F.R. § 1024.37(a)(2)(ii); 12 C.F.R. § 1024.17(k)(1), (2) and (5).

<sup>219</sup> 12 C.F.R. § 1024.37(a)(2)(iii) and Comment 37(a)(2)(iii) – 1 .

<sup>220</sup> 12 C.F.R. part 1024 Supplement I, Comment 37(b) – 1.

- Is told this by the borrower, the insurance company or the insurance agent;<sup>221</sup>
- Acts with “reasonable diligence to ascertain a borrower’s hazard insurance status” and the borrower does not give the servicer evidence of insurance coverage within 15 days of the servicer delivering or placing in the mail the second written notice about hazard insurance required by the rules.<sup>222</sup>
  - A servicer has acted with reasonable diligence if the servicer complies with the notice requirements described below.<sup>223</sup>

A servicer cannot purchase force-placed for a borrower whose mortgage payment is more than 30 days overdue if the servicer has established an escrow account for the payment of hazard insurance “unless a servicer is unable to disburse funds from the borrower's escrow account to ensure that the borrower's hazard insurance premium charges are paid in a timely manner.”<sup>224</sup>

- A servicer is unable to disburse funds if “the servicer has a reasonable basis to believe either that the borrower's hazard insurance has been canceled (or was not renewed) for reasons other than nonpayment of premium charges or that the borrower's property is vacant.”<sup>225</sup>
- A servicer is not considered unable to disburse funds from the borrower's escrow account “because the escrow account contains insufficient funds for paying hazard insurance premium charges.”<sup>226</sup>

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<sup>221</sup> 12 C.F.R. part 1024 Supplement I, Comment 37(b) – 1.

<sup>222</sup> 12 C.F.R. part 1024 Supplement I, Comment 37(b) – 1; 12 C.F.R. § 1024.37(c)(1)(iii).

<sup>223</sup> 12 C.F.R. part 1024 Supplement I, Comment 37(b) – 1; 12 C.F.R. §§ 1024.37(c)(1)(i) & (ii).

<sup>224</sup> 12 C.F.R. § 1024.17(k)(5)(i).

<sup>225</sup> 12 C.F.R. § 1024.17(k)(5)(ii)(A).

<sup>226</sup> 12 C.F.R. § 1024.17(k)(5)(ii)(B).

If the servicer advances funds for paying hazard insurance the servicer can seek repayment of the funds advanced unless the servicer is prohibited from doing so by applicable law.<sup>227</sup>

“A servicer that qualifies as a small servicer pursuant to 12 CFR 1026.41(e)(4) may purchase force-placed insurance and charge the cost of that insurance to the borrower if the cost to the borrower of the force-placed insurance is less than the amount the small servicer would need to disburse from the borrower's escrow account to ensure that the borrower's hazard insurance premium charges were paid in a timely manner.”<sup>228</sup>

### 3.3.3 How can the borrower prove that the borrower has hazard insurance coverage in order to avoid force-placed insurance?

In order to prove that the borrower has continuous hazard insurance coverage, a servicer can require the borrower to give the servicer a copy of:

- the insurance policy declaration page;
- the insurance certificate;
- the insurance policy; or
- other similar forms of written confirmation of insurance coverage.<sup>229</sup>

A servicer may reject evidence of hazard insurance coverage submitted by the borrower if:

- The insurance company or agent does not confirm the information submitted by the borrower; or
- The terms of the insurance do not comply with the insurance requirements in the borrower's contract.<sup>230</sup>

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<sup>227</sup> 12 C.F.R. § 1024.17(k)(5)(ii)(C).

<sup>228</sup> 12 C.F.R. § 1024.17(k)(5)(iii).

<sup>229</sup> 12 C.F.R. part 1024 Supplement I, Comments 37(c)(1)(iii) – 2 and 37(e)(1) – 1.

<sup>230</sup> 12 C.F.R. part 1024 Supplement I, Comment 37(c)(1)(iii) – 2.

A borrower is deemed to have had continuous coverage even if the borrower paid the required premium after the due date if the insurance company accepted the premium payment pursuant to laws or insurance policy terms that give the borrower an extension of time to make the premium payment and there was no lapse in insurance coverage.<sup>231</sup>

### 3.3.4 Purchasing and charging the borrower for force-placed insurance

#### **STEP ONE – FORCE-PLACED INSURANCE PURCHASE: FIRST NOTICE FROM THE SERVICER**

At least forty-five days before charging the borrower a force-placed insurance charge or fee, the servicer must “deliver to the borrower or place in the mail” (at least first class mail)<sup>232</sup> a written notice that has the following information, some of which has to be in bold type:<sup>233</sup>

- The date of the notice;
- The servicer's name and mailing address;
- The borrower's name and mailing address;
- A request that identifies the property by its address and, in bold, asks the borrower to provide hazard insurance information for the property;
- A statement that the borrower's hazard insurance is expiring or has expired, as applicable, and that the servicer does not have evidence that the borrower has hazard insurance coverage past the expiration date;
  - If the borrower is required to have more than one kind of insurance (i.e. basic hazard insurance and another policy covering hazards not covered under the

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<sup>231</sup> 12 C.F.R. part 1024 Supplement I, Comment 37(c)(1)(iii) – 1.

<sup>232</sup> 12 C.F.R. § 1024.37(f).

<sup>233</sup> 12 C.F.R. § 1024.37(c)(1)(i); 12 C.F.R. §1024.37(c)(2)(i-xi). The bold type requirement is in 12 C.F.R. § 1024.37(c)(3).

main policy) the statement must identify for which insurance the servicer lacks evidence of coverage.<sup>234</sup>

- “A statement that hazard insurance is required on the borrower's property, and that the servicer has purchased or will purchase, as applicable, such insurance at the borrower's expense” (in bold);
- “A statement requesting the borrower to promptly provide the servicer with insurance information;”
- “A description of the requested insurance information and how the borrower may provide such information, and if applicable, a statement that the requested information must be in writing;”
- A warning to the borrower (in bold) that if the servicer purchases hazard insurance it may cost more and provide less coverage than an insurance policy purchased by the borrower;
- “The servicer's telephone number for borrower inquiries.”
- If additional information is given to the borrower with this notice, a statement telling the borrower to review the additional material.
  - Any additional material, including any notice required by the Flood Disaster Protection Act of 1973, has to be on a separate piece of paper from the notice.<sup>235</sup>

The servicer may use form MS-3A when it sends this written notice.<sup>236</sup>

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<sup>234</sup> 12 C.F.R. § 1024.37(c)(2)(v) and Comment 37(c)(2)(v) – 1.

<sup>235</sup> 12 C.F.R. § 1024.37(c)(4); 12 C.F.R. § 1024.37(i).

<sup>236</sup> 12 C.F.R. § 1024.37(c)(3).

This notice has to be sent even if the servicer is a debt collector and the borrower has sent a cease communication writing under the FDCPA.<sup>237</sup>

## **STEP TWO – FORCE-PLACED INSURANCE PURCHASE: SECOND/REMINDER NOTICE FROM THE SERVICER**

No sooner than 30 days after “delivering to the borrower or placing in the mail” (at least first class mail)<sup>238</sup> the first notice, and at least 15 days before charging the borrower a force-placed insurance charge or fee, the servicer must “deliver to the borrower or place in the mail” a written reminder notice, some of which has to be in bold type.<sup>239</sup> The content of the notice is determined by whether the borrower has provided the servicer with no information (Option 1 below), or has not demonstrated continuous coverage (Option 2 below).<sup>240</sup>

### **Reminder notice if the borrower has provided the servicer with no information.**

If the borrower has provided no insurance information to the servicer after receiving the first letter, the reminder letter must have the following information, some of which has to be in bold type:<sup>241</sup>

- The date of the notice;
- A statement (in bold) that this is the second and final notice;
- All of the information from the first notice,<sup>242</sup> including:
  - The servicer's name and mailing address;

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<sup>237</sup> CFPB bulletin 2013-12 at 6, available at [http://files.consumerfinance.gov/f/201310\\_cfpb\\_mortgage-servicing\\_bulletin.pdf](http://files.consumerfinance.gov/f/201310_cfpb_mortgage-servicing_bulletin.pdf).

<sup>238</sup> 12 C.F.R. § 1024.37(f).

<sup>239</sup> 12 C.F.R. § 1024.37(c)(1)(ii); 12 C.F.R. § 1024.37(d)(1); 12 C.F.R. § 1024.37(d)(2). The bold type requirement is in 12 C.F.R. § 1024.37(d)(3).

<sup>240</sup> See 12 C.F.R. part 1024 Supplement I, Comment 37(d)(1) – 1 for examples of when each of the notices is appropriate.

<sup>241</sup> 12 C.F.R. § 1024.37(d)(2)(i)(A-D). The bold type requirement is in 12 C.F.R. § 1024.37(d)(3).

<sup>242</sup> 12 C.F.R. § 1024.37(d)(2)(i)(C).

- The borrower's name and mailing address;
  - A request that identifies the property by its address and, in bold, asks the borrower to provide hazard insurance information for the property;
  - “A statement that the borrower's hazard insurance is expiring or has expired, as applicable, and that the servicer does not have evidence that the borrower has hazard insurance coverage past the expiration date, and that, if applicable, identifies the type of hazard insurance for which the servicer lacks evidence of coverage”;
  - “A statement that hazard insurance is required on the borrower's property, and that the servicer has purchased or will purchase, as applicable, such insurance at the borrower's expense” (in bold);
  - “A statement requesting the borrower to promptly provide the servicer with insurance information;”
  - “A description of the requested insurance information and how the borrower may provide such information, and if applicable, a statement that the requested information must be in writing;”
  - A warning to the borrower (in bold) that if the servicer purchases hazard insurance it may cost more and provide less coverage than an insurance policy purchased by the borrower.
  - “The servicer's telephone number for borrower inquiries.”
- The annual cost or, if unavailable, the estimated annual cost of force-placed insurance, in bold.<sup>243</sup>
    - The actual cost of the force-placed insurance may vary from an estimate under this paragraph “so long as the estimated cost is based on the information reasonably available to the servicer at the time the disclosure is provided.”<sup>244</sup>

If additional information is given to the borrower with this notice, a statement telling the borrower to review the additional material.

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<sup>243</sup> 12 C.F.R. § 1024.37(d)(2)(i)(D).

<sup>244</sup> 12 C.F.R. part 1024 Supplement I, Comment 37(d)(2)(i)(D) – 1.

Any additional material, including any notice required by the Flood Disaster Protection Act of 1973, has to be on a separate piece of paper from the notice.<sup>245</sup>

The servicer may use form MS-3B when it sends this written notice.<sup>246</sup>

**Reminder notice if the borrower has not demonstrated continuous coverage**

If the borrower has provided hazard insurance information to the servicer after receiving the first notice, but has not demonstrated that the borrower has had continuous hazard insurance coverage, the reminder letter must have the following information, some of which has to be in bold type:<sup>247</sup>

- The date of the notice;<sup>248</sup>
- Some of the information from the first notice,<sup>249</sup> including:
  - The servicer's name and mailing address;
  - The borrower's name and mailing address;
  - A request that identifies the property by its address and, in bold, asks the borrower to provide hazard insurance information for the property;
  - “The servicer's telephone number for borrower inquiries;”
  - If additional information is given to the borrower with this notice, a statement telling the borrower to review the additional material.
    - Any additional material, including any notice required by the Flood Disaster Protection Act of 1973, has to be on a separate piece of paper from the notice.<sup>250</sup>

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<sup>245</sup> 12 C.F.R. § 1024.37(c)(4); 12 C.F.R. § 1024.37(d)(4); 12 C.F.R. § 1024.37(i).

<sup>246</sup> 12 C.F.R. § 1024.37(d)(3).

<sup>247</sup> 12 C.F.R. § 1024.37(d)(2)(ii)(A-E). The bold type requirement is in 12 C.F.R. § 1024.37(d)(3).

<sup>248</sup> 12 C.F.R. § 1024.37(d)(2)(ii)(A).

<sup>249</sup> 12 C.F.R. § 1024.37(d)(2)(ii)(B); 12 C.F.R. § 1024.37(c)(2)(ii-iv); 12 C.F.R. § 1024.37(c)(2)(x-xi).



- A statement (in bold) that this is the second and final notice;<sup>251</sup>
- The annual cost or, if unavailable, the estimated annual cost of force-placed insurance, in bold.<sup>252</sup>
  - The actual cost of the force-placed insurance may vary from an estimate under this paragraph “so long as the estimated cost is based on the information reasonably available to the servicer at the time the disclosure is provided.”<sup>253</sup>
- “A statement that the servicer has received the hazard insurance information that the borrower provided;”<sup>254</sup>
- “A statement that requests the borrower to provide the information that is missing;”<sup>255</sup>
- A statement that the servicer will charge the borrower for any insurance it has to purchase for any period of time when the servicer cannot verify insurance coverage.<sup>256</sup>

The servicer may use form MS-3C when it sends this written notice.<sup>257</sup>

If the servicer receives new information after it has prepared the reminder notice but before it has sent the reminder notice, the servicer does not have to update the reminder notice so long as the reminder notice was prepared “a reasonable time prior to the servicer delivering the [reminder] notice to the borrower or placing the notice in the mail.”<sup>258</sup>

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<sup>250</sup> 12 C.F.R. § 1024.37(c)(4); 12 C.F.R. § 1024.37(d)(4); 12 C.F.R. § 1024.37(i).

<sup>251</sup> 12 C.F.R. § 1024.37(d)(2)(ii)(B); 12 C.F.R. § 1024.37(d)(2)(i)(B).

<sup>252</sup> 12 C.F.R. § 1024.37(d)(2)(ii)(B); 12 C.F.R. § 1024.37(d)(2)(i)(D).

<sup>253</sup> 12 C.F.R. part 1024 Supplement I, Comment 37(d)(2)(i)(D) – 1.

<sup>254</sup> 12 C.F.R. § 1024.37(d)(2)(ii)(C).

<sup>255</sup> 12 C.F.R. § 1024.37(d)(2)(ii)(D).

<sup>256</sup> 12 C.F.R. § 1024.37(d)(2)(ii)(E).

<sup>257</sup> 12 C.F.R. § 1024.37(d)(3).

<sup>258</sup> 12 C.F.R. § 1024.37(d)(5).

Five days excluding legal holidays, Saturdays and Sundays is a reasonable time.<sup>259</sup>

### **STEP THREE – FORCE-PLACED INSURANCE PURCHASE: SERVICER CHARGES BORROWER FOR FORCE-PLACED INSURANCE PREMIUM AND/OR FEES**

No sooner than 15 days after “delivering to the borrower or placing in the mail” the reminder notice, the servicer may charge the borrower for force-placed insurance premiums and/or fees if the servicer has not received “evidence demonstrating that the borrower has had in place, continuously, hazard insurance coverage that complies with the loan contract’s requirements to maintain hazard insurance.”<sup>260</sup>

The amount charged has to be “bona fide and reasonable”.<sup>261</sup>

- Bona fide and reasonable means it has to be “a charge for a service actually performed that bears a reasonable relationship to the servicer’s cost of providing the service, and is not otherwise prohibited by applicable law.”<sup>262</sup>
  - The only exception to the bona fide and reasonable rule is for charges “subject to State regulation as the business of insurance and charges authorized by the Flood Disaster Protection Act of 1973.”<sup>263</sup>

If not prohibited by state or other applicable law, the servicer can charge for insurance purchased “retroactive to the first day of any period of time in which the borrower did not have hazard insurance in place.”<sup>264</sup>

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<sup>259</sup> 12 C.F.R. part 1024 Supplement I, Comment 37(d)(4).

<sup>260</sup> 12 C.F.R. § 1024.37(c)(1)(iii).

<sup>261</sup> 12 C.F.R. § 1024.37(h)(1).

<sup>262</sup> 12 C.F.R. § 1024.37(h)(2).

<sup>263</sup> 12 C.F.R. § 1024.37(h)(1).

<sup>264</sup> 12 C.F.R. part 1024 Supplement I, Comment 37(c)(1)(i)-(1).

### 3.3.5 Force-placed insurance renewals and replacements

#### STEP ONE – FORCE-PLACED INSURANCE RENEWAL OR REPLACEMENT: NOTICE FROM THE SERVICER

At least forty-five days before charging the borrower a charge or fee for renewing or replacing force-placed insurance, the servicer must “deliver to the borrower or place in the mail” (at least first class mail)<sup>265</sup> a written notice that has the following information, some of which has to be in bold type<sup>266</sup>:

- The date of the notice;
- The servicer's name and mailing address;
- The borrower's name and mailing address;
- A request that identifies the property by its address and, in bold, asks the borrower to update the hazard insurance information for the borrower’s property;
- “A statement that the servicer previously purchased insurance on the borrower’s property and assessed the cost of the insurance to the borrower because the servicer did not have evidence that the borrower had hazard insurance coverage for the property;”
- A statement that the earlier force-placed insurance is expiring or has expired, and a statement (in bold) that because hazard insurance is required the servicer intends to renew or replace the existing force-placed insurance;
- A warning to the borrower (in bold) that if the servicer purchases hazard insurance it may cost more and provide less coverage than an insurance policy purchased by the borrower;

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<sup>265</sup> 12 C.F.R. § 1024.37(f).

<sup>266</sup> 12 C.F.R. § 1024.37(e)(1)(i); 12 C.F.R. § 1024.37(e)(2)(i-xi). The bold type requirement is in 12 C.F.R. § 1024.37(e)(3).

- The annual cost or, if unavailable, the estimated annual cost of force-placed insurance, in bold;
  - The actual cost of the force-placed insurance may vary from an estimate under this paragraph “so long as the estimated cost is based on the information reasonably available to the servicer at the time the disclosure is provided.”<sup>267</sup>
- A statement that the borrower should promptly provide the servicer with insurance information if the borrower purchases hazard insurance;
- “A description of the requested insurance information and how the borrower may provide such information, and if applicable, a statement that the requested information must be in writing;”
- “The servicer's telephone number for borrower inquiries.”
- If additional information is given to the borrower with this notice, a statement telling the borrower to review the additional material.
  - Any additional material, including any notice required by the Flood Disaster Protection Act of 1973, has to be on a separate piece of paper from the notice.<sup>268</sup>

The servicer may use form MS-3D when it sends this written notice.<sup>269</sup>

This notice has to be provided before each anniversary of the servicer purchasing force-placed insurance, but not more than once per year.<sup>270</sup>

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<sup>267</sup> 12 C.F.R. part 1024 Supplement I, Comment 37(e)(2)(vii) – 1.

<sup>268</sup> 12 C.F.R. § 1024.37(e)(4); 12 C.F.R. § 1024.37(i).

<sup>269</sup> 12 C.F.R. § 1024.37(e)(3).

<sup>270</sup> 12 C.F.R. § 1024.37(e)(5).

## **STEP TWO - FORCE-PLACED INSURANCE RENEWAL OR REPLACEMENT: SERVICER CHARGES BORROWER FOR FORCE-PLACED INSURANCE PREMIUM AND/OR FEES**

No sooner than 45 days after “delivering to the borrower or placing in the mail” the renewal or replacement notice, the servicer may charge the borrower for force-placed insurance premiums and/or fees related to renewing or replacing the insurance if the servicer has not received “evidence demonstrating that the borrower has purchased hazard insurance coverage that complies with the loan contract’s requirements to maintain hazard insurance.”<sup>271</sup>

In order to prove that the borrower has hazard insurance coverage that complies with the loan contract’s requirements, a servicer can require the borrower to give the servicer a copy of:

- the insurance policy declaration page;
- the insurance certificate;
- the insurance policy; or
- other similar forms of written confirmation of insurance coverage.<sup>272</sup>

A servicer may reject evidence of hazard insurance coverage submitted by the borrower if:

- The insurance company or agent does not confirm the information submitted by the borrower; or
- The terms of the insurance do not comply with the insurance requirements in the borrower’s contract.<sup>273</sup>

There is an exception to the general prohibition on charging for force-placed insurance renewal or replacement before the end of the 45-day notice period discussed above. If the servicer has renewed or replaced existing force-placed insurance and receives evidence that the borrower

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<sup>271</sup> 12 C.F.R. § 1024.37(e)(1)(ii).

<sup>272</sup> 12 C.F.R. part 1024 Supplement I, Comment § 1024.37(c)(1)(iii) – 2; Comment § 1024.37(e)(1) – 1.

<sup>273</sup> 12 C.F.R. part 1024 Supplement I, Comments 37(c)(1)(iii) – 2 and 37(e)(1) – 1.

lacked insurance coverage for a period of time after the existing force-placed insurance expired (including during the 45 day notice period), the servicer may go ahead and charge the borrower for the renewal or replacement insurance for that period of time “promptly” on receiving the evidence.<sup>274</sup> For example, assume the servicer sends the renewal or replacement notice on January 2, and the existing force-placed insurance the servicer had purchased expired at 12:01am on January 12, so the servicer replaces that policy with a new policy. On February 5, the servicer receives evidence that the borrower has had hazard insurance effective only since 12:01am on January 31. The servicer may go ahead and charge the borrower as early as February 5 for force-placed insurance covering the period from 12:01am January 12 to 12:01am January 31.<sup>275</sup>

The amount charged has to be “bona fide and reasonable”.<sup>276</sup>

- Bona fide and reasonable means it has to be “a charge for a service actually performed that bears a reasonable relationship to the servicer’s cost of providing the service, and is not otherwise prohibited by applicable law.”<sup>277</sup>
  - The only exception to the bona fide and reasonable rule is for charges “subject to State regulation as the business of insurance and charges authorized by the Flood Disaster Protection Act of 1973.”<sup>278</sup>

If not prohibited by state or other applicable law, the servicer can charge for insurance purchased “retroactive to the first day of any period of time in which the borrower did not have hazard insurance in place.”<sup>279</sup>

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<sup>274</sup> 12 C.F.R. § 1024.37(e)(1)(iii).

<sup>275</sup> 12 C.F.R. part 1024 Supplement I, Comment 37(e)(1)(iii) – 1.

<sup>276</sup> 12 C.F.R. § 1024.37(h)(1).

<sup>277</sup> 12 C.F.R. § 1024.37(h)(2).

<sup>278</sup> 12 C.F.R. § 1024.37(h)(1).

### 3.3.6 Cancelling force-placed insurance

Within 15 days of the servicer receiving evidence from the borrower or otherwise (e.g., from the borrower's insurance agent) that the borrower has purchased the hazard insurance required by the loan contract, the servicer has to:<sup>280</sup>

- Cancel the force-placed insurance;
- Refund to the borrower any force-placed insurance premiums or related fees paid by the borrower for any period of time covered by both the borrower's insurance and the servicer's force-placed insurance;
- Remove from the borrower's account all force-placed insurance premium charges and related fees that the servicer has assessed to the borrower for any period of time covered by both the borrower's insurance and the servicer's force-placed insurance.

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<sup>279</sup> Supplement I, Comment 37(c)(1)(i) – 1.

<sup>280</sup> 12 C.F.R. § 1024.37(g) and 12 C.F.R. part 1024 Supplement I, Comment 37(g)(2) – 1.

# 4. The error resolution process

## 4.1 Step one –Written notice from borrower

### 4.1.1 Notice content

The borrower, or the borrower’s agent,<sup>281</sup> has to send a written notice to the servicer that does the following:

- Asserts an error
- Includes the name of the borrower
- Includes information that “enables to servicer to identify the borrower’s mortgage loan account”
- Describes the error the borrower believes was made by the servicer
- Is not substantially the same as a prior allegation of error to which the servicer properly responded, unless the borrower is providing new and material information with the notice that is reasonably likely to change the outcome<sup>282</sup>

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<sup>281</sup> 12 C.F.R. part 1024 Supplement I, Comment 35(a) – 1.

<sup>282</sup> 12 C.F.R. § 1024.35(g)(1)(i) and Comment 35(g)(1)(i) – 1.



- Is not overbroad – meaning the servicer cannot “reasonably determine from the notice of error the specific error that the borrower asserts has occurred”<sup>283</sup>
  - A notice may be overbroad if it asserts errors relating to the crediting of every payment and escrow transaction, or if it comes in the form of a discovery request or other part of a lawsuit that requires that all paragraphs be answered, or if there is “voluminous tangential discussion or requests for information.”<sup>284</sup>
- Is sent within one year after the servicer transfers the mortgage to a new servicer or both the debt and all corresponding liens have been extinguished or released.<sup>285</sup>

## 4.1.2 What is an error?

The alleged error can be any of several specified categories of error or any other error relating to servicing.<sup>286</sup>

The following errors are specifically listed in the regulation:

- servicer’s failure to accept a payment made according to the servicer’s written requirements<sup>287</sup>
- servicer’s failure to properly apply a payment<sup>288</sup>

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<sup>283</sup> 12 C.F.R. § 1024.35(g)(1)(ii).

<sup>284</sup> 12 C.F.R. part 1024 Supplement I, Comment 35(g)(1)(ii) – 1.

<sup>285</sup> 12 C.F.R. § 1024.35(g)(1)(iii).

<sup>286</sup> 12 C.F.R. § 1024.35(b)(11).

<sup>287</sup> 12 C.F.R. § 1024.35(b)(1).

<sup>288</sup> 12 C.F.R. § 1024.35(b)(2).

- servicer’s failure to credit a payment as of the day it was received if failing to credit the payment as of that date results in a charge to the borrower or a negative credit report on the borrower<sup>289</sup>
  - The servicer must credit a payment as of 5 days after receipt if the borrower did not follow the servicer’s written requirements for making a payment but the servicer accepts it anyway.<sup>290</sup>
- servicer’s failure to pay taxes or insurance premiums or other charges in a timely manner<sup>291</sup>
- servicer’s failure to refund money in an escrow account (or credit it to a new escrow account under certain circumstances) within 20 days of the borrower paying off the mortgage in full<sup>292</sup>
- a fee imposed by the servicer where the servicer did not have a “reasonable basis” to impose the fee<sup>293</sup>
  - Examples of fees where there is no reasonable basis for the fee are: a late fee when payment was not late, a charge for a service not provided, a property management fee for a borrower not in a delinquency status that would justify the charge, and a charge for force-placed insurance that is not permitted.<sup>294</sup>

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<sup>289</sup> 12 C.F.R. § 1024.35(b)(3); 12 C.F.R. § 1026.36(c)(1).

<sup>290</sup> 12 C.F.R. § 1024.35(b)(3); 12 C.F.R. § 1026.36(c)(1)(iii).

<sup>291</sup> 12 C.F.R. § 1024.35(b)(4); 12 C.F.R. § 1024.34(a).

<sup>292</sup> 12 C.F.R. § 1024.35(b)(4); 12 C.F.R. § 1024.34(b)(1) and (2).

<sup>293</sup> 12 C.F.R. § 1024.35(b)(5).

<sup>294</sup> 12 C.F.R. part 1024 Supplement I, Comment 35(b) – 2.

- servicer’s failure to provide the borrower with an accurate mortgage payoff amount within seven days after the servicer receives a written request for one from the borrower<sup>295</sup>
  - The servicer has longer to provide this statement if the borrower is in bankruptcy or foreclosure, if the loan is a reverse mortgage or shared appreciation mortgage, or if there is a natural disaster or other such emergency situation.<sup>296</sup>
- servicer’s failure to provide accurate loss mitigation information to a delinquent borrower when the servicer is making its early intervention live contact and written contact with the delinquent borrower<sup>297</sup>
- servicer’s failure to accurately and timely transfer information about servicing the borrower’s loan when loan servicing is transferred to a new servicer<sup>298</sup>
- servicer violating the prohibitions on foreclosure referral or foreclosure sale contained in the CFPB loss mitigation rules.<sup>299</sup>

Errors that are not subject to notice of error requirements for acknowledgment, investigation or response, or limits on furnishing adverse information to credit reporting agencies, include errors relating to loan origination, loan underwriting, sale or securitization of the loan, and decisions to sell, assign or transfer servicing of the loan.<sup>300</sup>

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<sup>295</sup> 12 C.F.R. § 1024.35(b)(6); 12 C.F.R. § 1026.36(c)(3).

<sup>296</sup> 12 C.F.R. § 1024.35(b)(6); 12 C.F.R. § 1026.36(c)(3).

<sup>297</sup> 12 C.F.R. § 1024.35(b)(7); 12 C.F.R. § 1024.39.

<sup>298</sup> 12 C.F.R. § 1024.35(b)(8).

<sup>299</sup> 12 C.F.R. § 1024.35(b)(9)-(10); 12 C.F.R. § 1024.41(f)(g) and (h).

<sup>300</sup> 12 C.F.R. part 1024 Supplement I, Comment 35(b) – 1.

### 4.1.3 What counts as a written notice?

A notice from the borrower to the servicer on a payment coupon or other payment form supplied by the servicer does NOT have to be treated as a written error notice.<sup>301</sup>

A Qualified Written Request from the borrower to the servicer that asserts there was an error DOES count as a written error notice.<sup>302</sup>

- A Qualified Written Request (QWR) is written correspondence that a borrower sends to the servicer that includes, or enables the servicer to identify, the name and account of the borrower and either states the reasons the borrower believes there is an error or provides enough detail to the servicer regarding the information the borrower is asking for relating to the servicing of the loan.<sup>303</sup>

A submission from the borrower may be a notice of error even if the borrower calls it something else. The servicer must determine if the submission is a notice of error based on the content of the submission.<sup>304</sup>

### 4.1.4 Where should the borrower send the written notice?

If the servicer gave the borrower a written notice with an address that the borrower MUST use when sending the servicer the borrower's written notice of error, the borrower must use that address.<sup>305</sup>

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<sup>301</sup> 12 C.F.R. § 1024.35(a).

<sup>302</sup> 12 C.F.R. § 1024.35(a).

<sup>303</sup> 12 C.F.R. § 1024.31.

<sup>304</sup> 12 C.F.R. part 1024 Supplement I, Comment 35(a) – 2.

<sup>305</sup> 12 C.F.R. § 1024.35(c).

- The notice with the address must be clear and conspicuous.<sup>306</sup>
- The notice CAN be included with other notices, such as a notice of transferring servicing.<sup>307</sup>
- The address MUST be provided in any periodic statement or coupon booklet that the servicer has to give to the borrower.<sup>308</sup>
- The address must be posted on the servicer's website.<sup>309</sup>
- The address must be included in any notices required under the early intervention rules (12 C.F.R. 1024.39) and the loss mitigation rules (12 C.F.R. 1024.41) that contain contact information for the servicer.<sup>310</sup>

If the servicer designates more than one address, a borrower may initiate a notice of error process by sending a notice of error to any of the designated addresses, even if the one to which the borrower sends the notice of error is not the one the servicer intended the borrower to use.<sup>311</sup>

If the servicer does not designate an address the borrower may send the notice of error to any office of the servicer and the servicer has to respond.<sup>312</sup>

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<sup>306</sup> 12 C.F.R. part 1024 Supplement I, Comment 35(c) – 2.

<sup>307</sup> 12 C.F.R. part 1024 Supplement I, Comment 35(c) – 2.

<sup>308</sup> 12 C.F.R. part 1024 Supplement I, Comment 35(c) – 2(ii); 12 C.F.R. § 1026.41.

<sup>309</sup> 12 C.F.R. § 1024.35(c) and Comment 35(c) – 2(iii).

<sup>310</sup> 12 C.F.R. part 1024 Supplement I, Comment 35(c) – 2(iv).

<sup>311</sup> 12 C.F.R. part 1024 Supplement I, Comment 35(c) – 3.

<sup>312</sup> 12 C.F.R. part 1024 Supplement I, Comment 35(c) – 1.

If the servicer designates a specific address for notices of error, the address has to be the same one the servicer has told the borrower to use to request information from the servicer.<sup>313</sup>

A servicer can also designate an online intake process, but this must be in addition to and not in lieu of the process for receiving notices by mail.<sup>314</sup>

A servicer has to give written notice to the borrower before it changes the address it says the borrower must use for notices of error.<sup>315</sup>

## 4.2 Step two – The servicer acknowledges receipt of the notice of error

The servicer has to send the borrower a written acknowledgement saying that the servicer received the notice of error from the borrower.<sup>316</sup>

This written acknowledgement has to be provided to the borrower within five days of the servicer receiving the notice of error, excluding legal public holidays, Saturdays and Sundays.<sup>317</sup>

If the servicer has determined that it does not have to respond to the notice of error because the notice is substantially the same as a prior allegation of error to which the servicer properly responded,<sup>318</sup> is overbroad,<sup>319</sup> or was sent more than one year after the servicer transferred the

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<sup>313</sup> 12 C.F.R. § 1024.35(c); 12 C.F.R. § 1024.36(b).

<sup>314</sup> 12 C.F.R. part 1024 Supplement I, Comment 35(c) – 4.

<sup>315</sup> 12 C.F.R. § 1024.35(c).

<sup>316</sup> 12 C.F.R. § 1024.35(d).

<sup>317</sup> 12 C.F.R. § 1024.35(d).

<sup>318</sup> 12 C.F.R. § 1024.35(g)(1)(i).

<sup>319</sup> 12 C.F.R. § 1024.35(g)(1)(ii).

mortgage to a new servicer or both the debt and all corresponding liens have been extinguished or released<sup>320</sup> the servicer must instead send a written notice to the borrower saying it has determined that it does not have to review the notice of error and giving the reason why the servicer does not think it has to review the notice of error.<sup>321</sup>

- This notice must be provided not later than five days after the servicer has determined that it does not have to review the notice of error, excluding legal public holidays, Saturdays and Sundays.<sup>322</sup>

## 4.3 Step three – The servicer investigates the notice of error and responds to the notice of error

### 4.3.1 Investigation

The servicer must correct the error or conduct a reasonable investigation.<sup>323</sup>

The servicer *can* ask the borrower for documentation that supports the borrower’s error allegation.<sup>324</sup>

The servicer *cannot* require the borrower to provide information as a condition to investigating the error.<sup>325</sup>

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<sup>320</sup> 12 C.F.R. § 1024.35(g)(1)(iii).

<sup>321</sup> 12 C.F.R. § 1024.35(g)(2).

<sup>322</sup> 12 C.F.R. § 1024.35(g)(2).

<sup>323</sup> 12 C.F.R. § 1024.35(e)(1).

<sup>324</sup> 12 C.F.R. § 1024.35(e)(2).

The servicer *cannot* require the borrower to pay a fee or make any payment that may be owed on the account as a condition to investigating the error.<sup>326</sup> But the borrower is still obligated to make any scheduled payments.<sup>327</sup>

If the servicer asks the borrower to provide documentation or information backing up the alleged error, and the borrower does not provide that information or documentation, the servicer must still conduct a reasonable investigation before concluding there was no servicer error, and cannot conclude that no servicer error occurred simply because the borrower did not respond to the servicer's request for information or documentation.<sup>328</sup>

## 4.3.2 Response

If the servicer concludes the error *was* made the servicer has to:<sup>329</sup>

- Correct the error
- Provide the borrower with a written notice of the correction that gives the:
  - Effective date of the correction and
  - Contact information including a telephone number, in case the borrower needs further assistance.

If the servicer concludes that a different or additional error was made, the service has to:<sup>330</sup>

- Correct the error
- Provide the borrower with a written notice of the correction that

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<sup>325</sup> 12 C.F.R. § 1024.35(e)(2)(i).

<sup>326</sup> 12 C.F.R. § 1024.35(h).

<sup>327</sup> 12 C.F.R. part 1024 Supplement I, Comment 35(h) – 1.

<sup>328</sup> 12 C.F.R. § 1024.35(e)(2)(ii).

<sup>329</sup> 12 C.F.R. § 1024.35(e)(1)(i)(A).

<sup>330</sup> 12 C.F.R. § 1024.35(e)(1)(ii).



- Describes the error
- Identifies the action taken to correct the error
- gives the effective date of the correction and
- gives the borrower contact information including a telephone number, in case the borrower needs further assistance.

If the servicer concludes the error *was NOT* made the servicer has to:<sup>331</sup>

- Have conducted a reasonable investigation
- Provide the borrower with a written notice that:
  - Tells the borrower that the servicer has determined that no error occurred
  - Gives the reason or reasons for finding that no error occurred
  - Tells the borrower that the borrower has the right to request documentation that the servicer relied on in determining that no error occurred
  - Tells the borrower how the borrower can request that documentation
  - Gives the borrower contact information for the servicer, including a telephone number, in case the borrower needs further assistance
- Provide the borrower, on the borrower's request, with copies of documents and information relied on in deciding there was no error.<sup>332</sup>
  - This may include information entered into the servicer's collection system, such as a screen shot of the account showing amounts credited, etc.<sup>333</sup>
  - This must be provided at no charge.<sup>334</sup>
  - This must be provided within 15 days after the borrower requests it, excluding public holidays, Saturdays and Sundays.<sup>335</sup>

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<sup>331</sup> 12 C.F.R. § 1024.35(e)(1)(i)(B).

<sup>332</sup> 12 C.F.R. § 1024.35(e)(4).

<sup>333</sup> 12 C.F.R. part 1024 Supplement I, Comment 35(e)(4) – 1.

<sup>334</sup> 12 C.F.R. § 1024.35(e)(4).

- Documents that the servicer determines are confidential, proprietary or privileged information can be withheld from the borrower, but the servicer has to let the borrower know it has decided to withhold the documents in writing within 15 days after the borrower requests the documents, excluding public holidays, Saturdays and Sundays.<sup>336</sup>

### 4.3.3 Timing

How quickly the servicer must investigate and respond to the notice of error depends on what kind of error is alleged by the borrower. Here are the various requirements.

#### Alleged error

Failure to provide an accurate payoff balance

#### Required time to respond

Not later than 7 days after the notice of error is received excluding legal public holidays, Saturdays and Sundays<sup>337</sup>

#### Alleged error

Initiating an improper foreclosure or improperly filing for a foreclosure judgment or sale.

#### Required time to respond

Before the foreclosure sale or within 30 days after the notice of error is received excluding legal public holidays, Saturdays and Sundays, whichever is earlier.<sup>338</sup>

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<sup>335</sup> 12 C.F.R. § 1024.35(e)(4).

<sup>336</sup> 12 C.F.R. § 1024.35(e)(4).

<sup>337</sup> 12 C.F.R. § 1024.35(e)(3)(i)(A); 12 C.F.R. § 1024.35(b)(6).

<sup>338</sup> 12 C.F.R. § 1024.35(e)(3)(i)(B); 12 C.F.R. §§ 1024.35(b)(9) & (10); 12 C.F.R. §§ 1024.41(f), (g) and (h).

- If the servicer cannot investigate and respond within these deadlines the servicer can comply with these deadlines by cancelling or postponing the foreclosure sale and investigating and responding before the re-scheduled foreclosure sale or within 30 days after the notice of error is received, excluding legal public holidays, Saturdays and Sundays, whichever is earlier.<sup>339</sup>

### Alleged error

All other errors

### Required time to respond

Not later than 30 days after the notice of error is received excluding legal public holidays, Saturdays and Sundays.<sup>340</sup>

This can be extended by 15 days if the servicer sends the borrower a written notice of the extension and the reason for the extension within the first 30 days.<sup>341</sup>

## 4.3.4 Responding to multiple allegations of error

A servicer can respond to multiple allegations of error, or different or additional errors discovered in investigating a notice of error, in a single response or separate responses.<sup>342</sup>

## 4.3.5 Exceptions

The servicer does not have to acknowledge receipt of the notice of error or respond to the notice of error if the servicer corrects the error alleged by the borrower and notifies the borrower in

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<sup>339</sup> 12 C.F.R. part 1024 Supplement I, Comment 35(e)(3)(i)(B) – 1.

<sup>340</sup> 12 C.F.R. § 1024.35(e)(3)(i)(C).

<sup>341</sup> 12 C.F.R. § 1024.35(e)(3)(ii); *see also*, 12 C.F.R. part 1024 Supplement I, Comment 35(e)(3)(ii) – 1 on extensions for notices that allege multiple errors.

<sup>342</sup> 12 C.F.R. part 1024 Supplement I, Comments 35(e)(1)(i) – 1 and (e)(1)(ii) – 1.

writing that it has corrected the error within five days of the servicer receiving the notice of error, excluding legal public holidays, Saturdays and Sundays.<sup>343</sup>

The servicer does not have to acknowledge receipt of the notice of error or respond to the notice of error if the error that is asserted relates to the servicer initiating a foreclosure or filing for a foreclosure judgment or order of sale in violation of 12 C.F.R. 1024.41(f), (g) and (j) AND the notice of error is received 7 or fewer days before a foreclosure sale.<sup>344</sup>

- In this case the servicer is still required to make a good faith attempt to respond to the borrower's notice (orally or in writing) and either correct the error or tell the borrower the reason that it believes no error occurred.<sup>345</sup>

## 4.4 Intersection of the error resolution rules and other laws

Once the servicer receives a notice of error it cannot furnish adverse information about any payment that is the subject of the notice of error to a credit reporting agency for 60 days.<sup>346</sup>

A servicer who has received a notice of error can still pursue remedies it has under the law, including initiating a foreclosure proceeding or moving forward with a foreclosure sale, except if the notice of error alleges that a servicer initiated a foreclosure or filed for a foreclosure judgment or order of sale in violation of 12 C.F.R. 1024.41(f), (g) or (j).<sup>347</sup>

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<sup>343</sup> 12 C.F.R. § 1024.35(f)(1).

<sup>344</sup> 12 C.F.R. § 1024.35(f)(2); 12 C.F.R. § 1024.35(b)(9)-(10); 12 C.F.R. § 1024.41(f)-(h).

<sup>345</sup> 12 C.F.R. § 1024.35(f)(2); 12 C.F.R. § 1024.35(b)(9)-(10); 12 C.F.R. § 1024.41(f)-(h).

<sup>346</sup> 12 C.F.R. § 1024.35(i)(1).

<sup>347</sup> 12 C.F.R. § 1024.35(i)(2); *see* 12 C.F.R. § 1024.35(b)(9)-(10); 12 C.F.R. §§ 1024.41(f)-(h).

Even if a servicer is a debt collector with respect to a borrower and the borrower has sent a cease communication writing under the FDCPA, the servicer must comply with the error resolution rules in 1024.35 unless the borrower specifically withdraws the borrower's error notice.<sup>348</sup>

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<sup>348</sup> CFPB bulletin 2013-12 at 6, available at [http://files.consumerfinance.gov/f/201310\\_cfpb\\_mortgage-servicing\\_bulletin.pdf](http://files.consumerfinance.gov/f/201310_cfpb_mortgage-servicing_bulletin.pdf).

# 5. Requests for information

## 5.1 Step one: Written request for information from borrower

### 5.1.1 Request content

The borrower, or the borrower’s agent,<sup>349</sup> has to send a written request for information to the servicer that:<sup>350</sup>

- Includes the name of the borrower
- Includes information that “enables to servicer to identify the borrower’s mortgage loan account.”
- States the information the borrower is requesting from the servicer.

The servicer will not have to respond to the request in the following cases:

- If the request is substantially the same as a prior request for information to which the servicer properly responded, unless the information requested is of the type that can change over time and the request covers a different time period than the earlier request.<sup>351</sup>

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<sup>349</sup> 12 C.F.R. part 1024 Supplement I, Comment 36(a) – 1.

<sup>350</sup> 12 C.F.R. § 1024.36(a).

<sup>351</sup> 12 C.F.R. § 1024.36(f)(1)(i) and Comment 36(f)(1)(i) – 1.

- If the request asks for information that is confidential, proprietary or privileged.<sup>352</sup>
  - Examples of this type of information include information about the servicer’s management, profitability or information provided to investors; information about servicer personnel, including compensation, bonuses or personnel actions; records relating to examination reports, compliance audits, borrower complaints and internal or external investigations; and information protected by the attorney/client privilege.<sup>353</sup>
  
- If the request asks for irrelevant information.<sup>354</sup>
  - Information is irrelevant if it does not directly relate to the borrower’s loan account. Examples of irrelevant information include information related to the servicing of other borrowers’ loans(including information reported to a mortgage owner about individual or aggregate loans being serviced), training programs for servicer personnel, servicing program guides, and investor instructions to the servicer regarding criteria for loss mitigation programs.<sup>355</sup>
  
- If the request is overbroad or unduly burdensome.<sup>356</sup>
  - An overbroad request asks for an unreasonable volume of documents or information.<sup>357</sup>
  - An unduly burdensome request is one to which the servicer could not respond without exceeding the time limits set for responding to a request for

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<sup>352</sup> 12 C.F.R. § 1024.36(f)(1)(ii) and Comment 36(f)(1)(ii) – 1.

<sup>353</sup> 12 C.F.R. part 1024 Supplement I, Comment 36(f)(1)(ii) – 1(i)-(iv).

<sup>354</sup> 12 C.F.R. § 1024.36(f)(1)(iii).

<sup>355</sup> 12 C.F.R. § 1024.36(f)(1)(iii) and Comment 36(f)(1)(iii) – 1(i)-(iv).

<sup>356</sup> 12 C.F.R. § 1024.36(f)(1)(iv).

<sup>357</sup> 12 C.F.R. § 1024.36(f)(1)(iv).

information,<sup>358</sup> or without incurring unreasonable costs or dedicating unreasonable resources in light of the circumstances.<sup>359</sup>

- Examples of unduly burdensome or broad requests include:
  - requests that relate to substantially all aspects of origination, servicing, sale, securitization and foreclosure, such as requests for all the documents in the mortgage loan file, all recorded mortgage instruments, etc.<sup>360</sup>
  - requests that are not reasonably understandable<sup>361</sup>
  - requests that accompany “voluminous tangential discussion or assertions of errors”<sup>362</sup>
  - requests that the servicer provide information in a specific format when the servicer doesn’t ordinarily store that information in that format<sup>363</sup>
  - requests that are “not reasonably likely to assist a borrower with the borrower’s account”<sup>364</sup>
    - Examples of this include a request for a copy of the front and back of all payment instruments showing payments by the borrower, or payments by the servicer to the mortgage owner.<sup>365</sup>
- The servicer does have to respond to a request that is overly broad or burdensome if the servicer can “reasonably identify a valid information request” in the submission by the borrower.<sup>366</sup>

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<sup>358</sup> See 12 C.F.R. § 1024.36(d).

<sup>359</sup> 12 C.F.R. § 1024.36(f)(1)(iv).

<sup>360</sup> 12 C.F.R. part 1024 Supplement I, Comment 36(f)(1)(iv) – 1(i).

<sup>361</sup> 12 C.F.R. part 1024 Supplement I, Comment 36(f)(1)(iv) – 1(ii).

<sup>362</sup> 12 C.F.R. part 1024 Supplement I, Comment 36(f)(1)(iv) – 1(ii).

<sup>363</sup> 12 C.F.R. part 1024 Supplement I, Comment 36(f)(1)(iv) – 1(iii).

<sup>364</sup> 12 C.F.R. part 1024 Supplement I, Comment 36(f)(1)(iv) – 1(iv).

<sup>365</sup> 12 C.F.R. part 1024 Supplement I, Comment 36(f)(1)(iv) – 1(iv).



- If the request is sent more than one year after the servicer transfers the mortgage to a new servicer or both the debt and all corresponding liens have been extinguished or released.<sup>367</sup>

## 5.1.2 What counts as a request for information?

A request for information from the borrower to the servicer on a payment coupon or other payment form supplied by the servicer does NOT have to be treated as a request for information.<sup>368</sup>

A request from the borrower for a payoff balance does not have to be treated as a request for information.<sup>369</sup>

A Qualified Written Request from the borrower to the servicer that requests information DOES count as an information request.<sup>370</sup>

- A Qualified Written Request (QWR) is written correspondence that a borrower sends to the servicer that includes, or enables the servicer to identify, the name and account of the borrower and either states the reasons the borrower believes there is an error or provides enough detail to the servicer regarding the information the borrower is asking for relating to the servicing of the loan.<sup>371</sup>

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<sup>366</sup> 12 C.F.R. § 1024.36(f)(1)(iv).

<sup>367</sup> 12 C.F.R. § 1024.36(f)(1)(v).

<sup>368</sup> 12 C.F.R. § 1024.36(a).

<sup>369</sup> 12 C.F.R. § 1024.36(a).

<sup>370</sup> 12 C.F.R. § 1024.36(a).

<sup>371</sup> 12 C.F.R. § 1026.31.

### 5.1.3 Where should the borrower send the written notice?

If the servicer gave the borrower a written notice with an address that the borrower **MUST** use when sending an information request, the borrower must use that address.<sup>372</sup>

- The notice with the address must be clear and conspicuous.<sup>373</sup>
- The notice **CAN** be included with other notices, such as a notice of transferring servicing.<sup>374</sup>
- The address **MUST** be provided in any periodic statement or coupon booklet that the servicer has to give to the borrower.<sup>375</sup>
- The address must be posted on the servicer’s website.<sup>376</sup>
- The address must be included in any notices required under the early intervention rules (12 C.F.R. 1024.39) and the loss mitigation rules (12 C.F.R. 1024.41) that contain contact information for the servicer.<sup>377</sup>

If the servicer designates more than one address, a borrower can initiate an information request process by sending a request for information to any of the designated addresses, even if the one to which the borrower sends the request is not the one the servicer intended the borrower to use.<sup>378</sup>

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<sup>372</sup> 12 C.F.R. § 1024.36(b).

<sup>373</sup> 12 C.F.R. part 1024 Supplement I, Comment 36(b) – 2.

<sup>374</sup> 12 C.F.R. part 1024 Supplement I, Comment 36(b) – 2.

<sup>375</sup> 12 C.F.R. part 1024 Supplement I, Comment 36(b) – 2(ii); 12 C.F.R. § 1026.41.

<sup>376</sup> 12 C.F.R. § 1024.36(b) and Comment 36(b) – 2(iii).

<sup>377</sup> 12 C.F.R. part 1024 Supplement I, Comment 36(b) – 2(iv).

<sup>378</sup> 12 C.F.R. part 1024 Supplement I, Comment 36(b) – 3.

If the servicer does not designate an address the borrower can send the request for information to any office of the servicer and the servicer has to respond.<sup>379</sup>

If the servicer designates a specific address for information requests, the address has to be the same one the servicer has told the borrower to use to send a notice of error.<sup>380</sup>

A servicer can also designate an online intake process, but this must be in addition to and not in lieu of the process for receiving notices by mail.<sup>381</sup>

A servicer has to give written notice to the borrower before it changes the address it says the borrower must use for information requests.<sup>382</sup>

## 5.2 Step two: The servicer acknowledges receipt of the request for information

### 5.2.1 Requirements

The servicer has to send the borrower a written acknowledgement saying that the servicer received the request for information from the borrower.<sup>383</sup>

This written acknowledgement has to be provided to the borrower within five days of the servicer receiving the information request, excluding legal public holidays, Saturdays and Sundays.<sup>384</sup>

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<sup>379</sup> 12 C.F.R. part 1024 Supplement I, Comment 36(b) – 1.

<sup>380</sup> 12 C.F.R. § 1024.36(b); 12 C.F.R. § 1024.35(c).

<sup>381</sup> 12 C.F.R. part 1024 Supplement I, Comment 36(b) – 4.

<sup>382</sup> 12 C.F.R. § 1024.36(b).

<sup>383</sup> 12 C.F.R. § 1024.36(c).

If the servicer has determined that it does not have to respond to the request for information because the request asks for duplicative information, asks for confidential, proprietary or privileged information, asks for irrelevant information, is overbroad or unduly burdensome or is untimely,<sup>385</sup> the servicer must instead send a written notice to the borrower saying it has determined that it does not have to respond to the request for information and giving the reason why the servicer does not think it has to respond to the request for information.<sup>386</sup>

This notice must be provided not later than five days after the servicer has determined that it does not have to respond, excluding legal public holidays, Saturdays and Sundays.<sup>387</sup>

## 5.2.2 Exceptions

The servicer does not have to acknowledge receipt of the information request if the servicer provides the borrower with the information requested and the servicer's contact information, including a telephone number, within five days of the servicer receiving the request for information, excluding legal public holidays, Saturdays and Sundays.<sup>388</sup>

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<sup>384</sup> 12 C.F.R. § 1024.36(c).

<sup>385</sup> 12 C.F.R. § 1024.36(f)(1).

<sup>386</sup> 12 C.F.R. § 1024.36(f)(2).

<sup>387</sup> 12 C.F.R. § 1024.36(f)(2).

<sup>388</sup> 12 C.F.R. § 1024.36(e).

## 5.3 Step three: The servicer responds to the information request

### 5.3.1 Response

The servicer must provide the borrower with the requested information and give the borrower contact information including a telephone number, in case the borrower needs further assistance.<sup>389</sup>

If the information request asks for the identity of, and address or other relevant contact information for the owner or assignee of a mortgage loan, the servicer must provide this information.<sup>390</sup>

- Because determining and describing ownership of a mortgage can be complex if the mortgage is securitized, the commentary gives guidance on who should be identified in relation to a request for information such as this.<sup>391</sup>

If the servicer concludes the requested information is not available, the servicer has to<sup>392</sup>:

- Have conducted a reasonable search for the information
- Provide the borrower with a written notice that:
  - Tells the borrower that the servicer has determined that the requested information is not available to the servicer;
  - Information is not available if it is not in the servicer's control or possession or if the information cannot be retrieved "in the ordinary course of business through reasonable efforts."<sup>393</sup>

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<sup>389</sup> 12 C.F.R. § 1024.36(d)(1)(i).

<sup>390</sup> 12 C.F.R. § 1024.36(a); 12 C.F.R. § 1024.36(d)(2)(i)(A) and Comment 36(a) – 2.

<sup>391</sup> 12 C.F.R. part 1024 Supplement I, Comment 36(a) – 2.

<sup>392</sup> 12 C.F.R. § 1024.36(d)(1)(ii).

- Examples of available information include transcripts or tapes of phone calls accessible in the ordinary course of business where the phones calls referred to by the borrower can be identified through reasonable business efforts<sup>394</sup> or documents stored offsite that the servicer has a right to access through reasonable efforts in the ordinary course of business.<sup>395</sup>
  - Examples of information that is not available include information stored on electronic backup media that cannot be accessed by the servicer without “undertaking extraordinary efforts to identify and restore the information.”<sup>396</sup>
- Gives the reason why the servicer has determined the information is not available
  - Gives the borrower contact information for the servicer, including a telephone number, in case the borrower needs further assistance

## 5.3.2 Timing

How quickly the servicer must respond to the request for information depends on what kind of information is requested by the borrower. Here are the various requirements.

### Requested information

Identity of, and address or other relevant contact information for, the owner or assignee of a mortgage loan.

### Required time to respond

Not later than 10 days after the information request is received excluding legal public holidays, Saturdays and Sundays<sup>397</sup>

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<sup>393</sup> 12 C.F.R. part 1024 Supplement I, Comment 36(d)(1)(ii) – 1.

<sup>394</sup> 12 C.F.R. part 1024 Supplement I, Comment 36(d)(1)(ii) – 2(i).

<sup>395</sup> 12 C.F.R. part 1024 Supplement I, Comment 36(d)(1)(ii) – 2(iii).

<sup>396</sup> 12 C.F.R. part 1024 Supplement I, Comment 36(d)(1)(ii) – 2(ii).

<sup>397</sup> 12 C.F.R. § 1024.36(d)(2)(i)(A).

### Requested Information

All other requests for information

### Required time to respond

Not later than 30 days after the request for information is received excluding legal public holidays, Saturdays and Sundays.<sup>398</sup>

This can be extended by 15 days excluding legal public holidays, Saturdays and Sundays, if the servicer sends the borrower a written notice of the extension and the reason for the extension within the first 30 days.<sup>399</sup>

## 5.3.3 Exceptions

The servicer does not have to acknowledge receipt of the information request if the servicer provides the borrower with the information requested and the servicer's contact information, including a telephone number, within five days of the servicer receiving the request for information, excluding legal public holidays, Saturdays and Sundays.<sup>400</sup>

## 5.4 Other information request requirements

### 5.4.1 Fee for information

The servicer *cannot* require the borrower to pay a fee or make any payment that may be owed on the account as a condition to responding to the borrower's request for information, except that

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<sup>398</sup> 12 C.F.R. § 1024.36(d)(2)(i)(B).

<sup>399</sup> 12 C.F.R. § 1024.36(d)(2)(ii).

<sup>400</sup> 12 C.F.R. § 1024.36(e).

the servicer can charge a fee for providing a beneficiary notice under applicable State law if a charge like this is not prohibited by state law.<sup>401</sup>

## 5.4.2 Intersection of the information request rules and other laws

While it is responding to the request for information, the service CAN furnish adverse information to a credit reporting agency.<sup>402</sup>

A servicer who has received a request for information can still pursue remedies it has, including initiating a foreclosure proceeding or moving forward with a foreclosure sale if permitted by the mortgage loan instruments.<sup>403</sup>

Even if a servicer is a debt collector with respect to a borrower and the borrower has sent a cease communication instruction in writing under the FDCPA, the servicer must comply with the request for information rules in 1024.36 unless the borrower specifically withdraws the borrower's information request.<sup>404</sup>

## 5.5 Information available on the Periodic Statement

While this guide does not go into detail about periodic statements, it is important to note here that some borrowers will receive monthly periodic statements from their servicer that contain information that may be useful, including the total amount of all payments received since the beginning of the current calendar year, and a breakdown of the total showing amounts applied

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<sup>401</sup> 12 C.F.R. § 1024.36(g).

<sup>402</sup> 12 C.F.R. § 1024.36(h).

<sup>403</sup> 12 C.F.R. § 1024.36(h).

<sup>404</sup> CFPB bulletin 2013-12 at 6, available at [http://files.consumerfinance.gov/f/201310\\_cfpb\\_mortgage-servicing\\_bulletin.pdf](http://files.consumerfinance.gov/f/201310_cfpb_mortgage-servicing_bulletin.pdf).



to principal, interest, escrow, fees and charges, and the amount of any money currently held in a suspense account (an account set up when a partial payment is made and not immediately credited toward the mortgage payment).<sup>405</sup>

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<sup>405</sup> *See, e.g.*, 12 C.F.R. § 1026.41(d)(3)(ii).

# 6. Requests for payoff statements

## 6.1 Step one:

The borrower or the borrower’s agent sends a written request to the servicer, creditor or assignee.<sup>406</sup>

The servicer, creditor or assignee can designate a certain email or mail address or fax number, or specify other reasonable requirements, for making a payoff request.<sup>407</sup>

## 6.2 Step two:

The recipient of the request must send an “accurate statement of the total outstanding balance that would be required to pay the consumer’s obligation in full as of a specified date.”<sup>408</sup>

### 6.2.1 Accuracy

Accuracy means the statement must be accurate when issued.<sup>409</sup>

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<sup>406</sup> 12 C.F.R. § 1026.36(c)(3); and Comment 36(c)(3)(1).

<sup>407</sup> 12 C.F.R. part 1026 Supplement I, Comment 36(c)(3) – 2.

<sup>408</sup> 12 C.F.R. § 1026.36(c)(3).

## 6.2.2 Timing

In most cases the statement has to be sent “within a reasonable time” but no later than 7 business days after receiving the request.<sup>410</sup>

If the loan is in bankruptcy or foreclosure or is a reverse or shared appreciation mortgage and because of this the payoff statement can’t be sent within 7 business days, the payoff statement must be provided “within a reasonable time.”<sup>411</sup>

If the payoff statement can’t be sent within 7 business days because of “natural disasters or other similar circumstances,” the payoff statement must be provided “within a reasonable time.”<sup>412</sup>

The time to respond may be longer if the servicer, creditor or assignee designates a certain email or mail address or fax number, or specifies other reasonable requirements, for making a payoff request and the borrower does not follow the requirements.<sup>413</sup>

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<sup>409</sup> 12 C.F.R. part 1026 Supplement I, Comment 36(c)(3) – 3.

<sup>410</sup> 12 C.F.R. § 1026.36(c)(3).

<sup>411</sup> 12 C.F.R. § 1026.36(c)(3).

<sup>412</sup> 12 C.F.R. § 1026.36(c)(3).

<sup>413</sup> 12 C.F.R. part 1026 Supplement I, Comment 36(c)(3) – 2.

# APPENDIX A:

## **12 C.F.R. § 1024.38 General servicing policies, procedures, and requirements.**

(a) Reasonable policies and procedures. A servicer shall maintain policies and procedures that are reasonably designed to achieve the objectives set forth in paragraph (b) of this section.

(b) Objectives.

(1) Accessing and providing timely and accurate information. The policies and procedures required by paragraph (a) of this section shall be reasonably designed to ensure that the servicer can:

(i) Provide accurate and timely disclosures to a borrower as required by this subpart or other applicable law;

(ii) Investigate, respond to, and, as appropriate, make corrections in response to complaints asserted by a borrower;

(iii) Provide a borrower with accurate and timely information and documents in response to the borrower's requests for information with respect to the borrower's mortgage loan;

(iv) Provide owners or assignees of mortgage loans with accurate and current information and documents about all mortgage loans they own;

(v) Submit documents or filings required for a foreclosure process, including documents or filings required by a court of competent jurisdiction, that reflect accurate and current information and that comply with applicable law; and

(vi) Upon notification of the death of a borrower, promptly identify and facilitate communication with the successor in interest of the deceased borrower with respect to the property secured by the deceased borrower's mortgage loan.

(2) Properly evaluating loss mitigation applications. The policies and procedures required by paragraph (a) of this section shall be reasonably designed to ensure that the servicer can:

(i) Provide accurate information regarding loss mitigation options available to a borrower from the owner or assignee of the borrower's mortgage loan;

(ii) Identify with specificity all loss mitigation options for which borrowers may be eligible pursuant to any requirements established by an owner or assignee of the borrower's mortgage loan;

(iii) Provide prompt access to all documents and information submitted by a borrower in connection with a loss mitigation option to servicer personnel that are assigned to assist the borrower pursuant to [§ 1024.40](#);

(iv) Identify documents and information that a borrower is required to submit to complete a loss mitigation application and facilitate compliance with the notice required pursuant to [§ 1024.41\(b\)\(2\)\(i\)\(B\)](#); and

(v) Properly evaluate a borrower who submits an application for a loss mitigation option for all loss mitigation options for which the borrower may be eligible pursuant to any requirements established by the owner or assignee of the borrower's mortgage loan and, where applicable, in accordance with the requirements of [§ 1024.41](#).

(3) Facilitating oversight of, and compliance by, service providers. The policies and procedures required by paragraph (a) of this section shall be reasonably designed to ensure that the servicer can:

(i) Provide appropriate servicer personnel with access to accurate and current documents and information reflecting actions performed by service providers;

(ii) Facilitate periodic reviews of service providers, including by providing appropriate servicer personnel with documents and information necessary to audit compliance by service providers with the servicer's contractual obligations and applicable law; and

(iii) Facilitate the sharing of accurate and current information regarding the status of any evaluation of a borrower's loss mitigation application and the status of any foreclosure proceeding among appropriate servicer personnel, including any personnel assigned to a borrower's mortgage loan account as described in [§ 1024.40](#), and appropriate service provider personnel, including service provider personnel responsible for handling foreclosure proceedings.

(4) Facilitating transfer of information during servicing transfers. The policies and procedures required by paragraph (a) of this section shall be reasonably designed to ensure that the servicer can:

(i) As a transferor servicer, timely transfer all information and documents in the possession or control of the servicer relating to a transferred mortgage loan to a transferee servicer in a form and manner that ensures the accuracy of the information and documents transferred and that enables a transferee servicer to comply with the terms of the transferee servicer's obligations to the owner or assignee of the mortgage loan and applicable law; and

(ii) As a transferee servicer, identify necessary documents or information that may not have been transferred by a transferor servicer and obtain such documents from the transferor servicer.

(iii) For the purposes of this paragraph (b)(4), transferee servicer means a servicer, including a master servicer or a subservicer, that performs or will perform servicing of a mortgage loan and transferor servicer means a servicer, including a master servicer or a subservicer, that transfers or will transfer the servicing of a mortgage loan.

(5) Informing borrowers of the written error resolution and information request procedures. The policies and procedures required by paragraph (a) of this section shall be reasonably designed to ensure that the servicer informs borrowers of the procedures for submitting written notices of error set forth in [§ 1024.35](#) and written information requests set forth in [§ 1024.36](#).

(c) Standard requirements.

(1) Record retention. A servicer shall retain records that document actions taken with respect to a borrower's mortgage loan account until one year after the date a mortgage loan is discharged or servicing of a mortgage loan is transferred by the servicer to a transferee servicer.

(2) Servicing file. A servicer shall maintain the following documents and data on each mortgage loan account serviced by the servicer in a manner that facilitates compiling such documents and data into a servicing file within five days:

(i) A schedule of all transactions credited or debited to the mortgage loan account, including any escrow account as defined in [§ 1024.17\(b\)](#) and any suspense account;

(ii) A copy of the security instrument that establishes the lien securing the mortgage loan;

(iii) Any notes created by servicer personnel reflecting communications with the borrower about the mortgage loan account;

(iv) To the extent applicable, a report of the data fields relating to the borrower's mortgage loan account created by the servicer's electronic systems in connection with servicing practices; and

(v) Copies of any information or documents provided by the borrower to the servicer in accordance with the procedures set forth in [§ 1024.35](#) or [§ 1024.41](#).

# APPENDIX B:

## MORTGAGE SERVICING RULES: Coverage<sup>1</sup>

Regulation X (12 CFR 1024)	Closed-End, Principal Residence	Closed-End, Non-Principal Residence	Open-End	Servicers and Loan Types Exempt from Coverage
<b>Error Resolution and Information Requests</b> (.35 and .36)	X	X		
<b>Force-Placed Insurance</b> (.37)	X	X		Small Servicer <sup>2</sup> must comply with requirements of 1024.37 but, per 1024.17(k)(5)(iii), is permitted to purchase force-placed insurance if less expensive than escrow payment for borrower's hazard insurance.
<b>Policies, Procedures, and Requirements</b> (.38)	X	X		<b>Small Servicer, Reverse Mortgages, Qualified Lender<sup>3</sup></b>
<b>Early Intervention</b> (.39)	X			<b>Small Servicer, Reverse Mortgages, Qualified Lender</b>
<b>Continuity of Contact</b> (.40)	X			<b>Small Servicer, Reverse Mortgages, Qualified Lender</b>
<b>Loss Mitigation Procedures</b> (.41)	X			<b>Small Servicers</b> (except, per 1024.41(j), small servicers may not file for foreclosure if borrower is performing pursuant to a loss mitigation agreement OR is 120 or fewer days delinquent), <b>Reverse Mortgages, Qualified Lender</b>
<b>Mortgage Servicing Transfers</b> (.33)	X	X		<b>Certain Transfers:</b> between affiliates; resulting from servicer/subservicer mergers or acquisitions; OR between master servicers without changing subservicer. Servicing Disclosure Statement required for first lien only.
<b>Escrow Accounts</b> (.17 and .34)	X	X	X (.17 only)	Small servicer is permitted to purchase force-placed insurance if less expensive than escrow payment for borrower's hazard insurance, per 1024.17(k)(5)(iii).



## MORTGAGE SERVICING RULES: Coverage<sup>1</sup>

Regulation Z (12 CFR 1026)	Closed-End, Principal Residence	Closed-End, Non-Principal Residence	Open-End	Servicers and Loan Types Exempt from Coverage
<b>Periodic Statement</b> (.41)	X	X		<b>Small Servicer, Reverse Mortgages, and Timeshares. Fixed-Rate Loans with Coupon Books</b> exempt from some requirements.
<b>ARM Disclosures</b> (.20(c) and (d))	X			<b>ARM with term of 1 year or less</b>
<b>Prompt Crediting</b> (.36)	X		X (principal dwelling only)	
<b>Payoff Statement</b> (.36)	X	X	X	

<sup>1</sup> This chart is not a substitute for the rules. Only the rules and the Official Interpretations can provide complete and definitive information regarding their requirements. The complete rules, including the Official Interpretations and small entity compliance guide, are available at <http://www.consumerfinance.gov/regulations/2013-real-estate-settlement-procedures-act-regulation-x-and-truth-in-lending-act-regulation-z-mortgage-servicing-final-rules/>.

<sup>2</sup> Small Servicer (1026.41(e)(4)(ii)): Servicer or affiliate services 5,000 or fewer mortgage loans and the servicer or affiliate owns or originated all 5,000 loans OR the servicer is a Housing Finance Agency per 24 CFR 226.5.

<sup>3</sup> Qualified Lender per 12 CFR 617.7000.

June 7, 2013

