



**Special Alert:  
Detailed Analysis of  
CFPB's Mortgage Servicing Rules**

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On January 17, the Consumer Financial Protection Bureau (“CFPB” or the “Bureau”) issued final rules (the “Final Rules” or “Rules”) implementing various mortgage servicing requirements under the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”) and addressing other perceived deficiencies in the mortgage servicing industry.

As contemplated in the proposed rules issued by the CFPB on August 10 of last year (the “Proposed Rules”), the Final Rules create new requirements covering nine broad topics. Three of these topics arise out of provisions added by the Dodd-Frank Act to the Truth in Lending Act (“TILA”) and, therefore, will reside within TILA’s implementing regulation, Regulation Z, 12 C.F.R. Part 1026 (“Reg. Z”).<sup>1</sup> The remaining six topics arise out of Dodd-Frank Act amendments to the Real Estate Settlement Procedures Act (“RESPA”) and will reside in RESPA’s implementing regulation, Regulation X, 12 C.F.R. Part 1024 (“Reg. X”).<sup>2</sup>

## **I. Effective Date**

Effective Date of Final Rules: The Final Rules go into effect January 10, 2014.<sup>3</sup>

## **II. Background: Views Expressed by the Bureau in the Final Rules**

In assessing the Final Rules, it may be informative to consider views expressed by the Bureau about the servicing industry in the Supplementary Information accompanying the Rules. In those pages, the Bureau makes clear its view that the new rules were needed in large part because the mortgage servicing industry had been failing consumers even before the industry saw a spike in delinquencies as a result of the financial crisis.<sup>4</sup>

Specifically, the CFPB notes three general concerns regarding the servicing industry. First, the Bureau remarks that contractual obligations sometimes hinder servicers’ ability to offer certain loss mitigation options to borrowers. Second, the Bureau opines that servicers’ compensation structures generally limit their incentives to provide customer service and motivate them to seek opportunities to impose fees on borrowers. Finally, the Bureau comments that

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<sup>1</sup> Bureau of Consumer Financial Protection, Mortgage Servicing Rules under the Truth in Lending Act (Regulation Z) (2013) (hereinafter *TILA Release*), available at [http://files.consumerfinance.gov/f/201301\\_cfpb\\_final-rule\\_servicing-tila.pdf](http://files.consumerfinance.gov/f/201301_cfpb_final-rule_servicing-tila.pdf).

<sup>2</sup> Bureau of Consumer Financial Protection, Mortgage Servicing Rules under the Real Estate Settlement Procedures Act (Regulation X) (2013) (hereinafter *RESPA Release*), available at [http://files.consumerfinance.gov/f/201301\\_cfpb\\_final-rule\\_servicing-respa.pdf](http://files.consumerfinance.gov/f/201301_cfpb_final-rule_servicing-respa.pdf).

<sup>3</sup> In order to coordinate implementation of the rules issued under Title XIV of the Dodd-Frank Act, the CFPB is using January 10, 2014 as the implementation date for most, though not all, of its required Title XIV rulemakings. See *TILA Release* at 43 and 282.

<sup>4</sup> *Id.* at 16.

servicers generally are not subject to market discipline from consumers because consumers generally cannot switch servicers.<sup>5</sup>

### III. The Rules as National Servicing Standards

While acknowledging the role that other regulators have played in the standardization of the servicing market through initiatives like the FRB/OCC Servicer Consent Orders and the 49 AG Servicer Settlement, the Bureau views the Final Rules as the culmination of recent efforts to craft national mortgage servicing standards.<sup>6</sup>

For example, in its Final RESPA Servicing Rules (the “Final RESPA Rules”), the CFPB writes:

[T]he Bureau has developed these final rules to serve as national mortgage servicing standards. The Bureau believes that because so many borrowers are more than 90 days delinquent and in need of consideration for loss mitigation, because borrowers often are not able to choose the servicer of their mortgage loan, and because the manner in which loss mitigation is handled has such potentially significant impacts on both individual consumers and the health of the larger housing market and economy, establishing national mortgage servicing standards is necessary and appropriate to protect borrowers and achieve the consumer protection purposes of RESPA.<sup>7</sup>

Likewise, in its Final TILA Servicing Rules (the “Final TILA Rules”), the CFPB argues that “[t]he market failure in mortgage servicing provides an economic rationale for establishing nation servicing standards, including standards for disclosures, with a limited number of exceptions.”<sup>8</sup>

### IV. The Three TILA Rules

With one notable exception, the provisions in the Final TILA Rules discussed below apply not only to a loan’s “servicer”<sup>9</sup> but also to the “creditor”<sup>10</sup> (if it still owns the loan) and to

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<sup>5</sup> *Id.* at 13-16.

<sup>6</sup> *RESPA Release* at 435.

<sup>7</sup> *Id.* at 436.

<sup>8</sup> *TILA Release* at 286.

<sup>9</sup> Reg. Z does not define “servicer,” except in and only for the purposes of 12 C.F.R. § 1026.36(c), which contains Reg. Z’s Rules regarding Prompt Payment Crediting and Payoff Statements. There, the meaning is cross-referenced to Reg. X’s definition of “servicer.” Presumably, the Bureau has in mind the Reg. X definition in its other uses of “servicer.” The Final RESPA Rules did not change the Reg. X definition of the term, except in technical respects relating to the status of the National Credit Union Administration. *RESPA Release* at 54.

any “assignee”<sup>11</sup> (if it purchased and still owns the loan). This means that while only one such party need comply, each may be held liable if none comply. The one exception is the rule regarding Prompt Payment Crediting, which applies to “servicers” only.

## A. Adjustable Rate Mortgage (“ARM”) Adjustment Disclosures

The ARM adjustment disclosure requirements may be found at amended § 1026.20(c) and new § 1026.20(d).<sup>12</sup>

### 1. The Disclosures

Currently, Reg. Z requires that a consumer be provided with notice of an interest rate adjustment for an ARM at least 25, but no more than 120, calendar days before a payment at a new level becomes due. The Final TILA Rules will require earlier and more fulsome notices of ARM payment changes, as described in detail below.

Current Reg. Z also requires servicers to provide consumers with an adjustment notice at least once each year during which an interest rate adjustment is implemented *without resulting in a corresponding payment change*. The Final TILA Rules will eliminate that requirement (including related commentary), because the Bureau deems it unnecessary in view of other amendments made by the Final TILA Rules, particularly the enhanced billing statement requirements contained in § 1026.41.

#### a) Initial Adjustment Notices

The Final TILA Rules substantially increase the minimum time for providing advance notice to consumers of an *initial* interest rate adjustment (whether it results in a payment change or not), from 25 calendar days to 210 (but no more than 240) days before the first payment at the adjusted level is due. This change means that the notice must be delivered or placed in the mail between 210 and 240 days prior to the due date for the first payment at the newly adjusted rate.<sup>13</sup> If the first payment at the newly adjusted rate is due within 210 days of consummation, then the initial notice must be provided at consummation.<sup>14</sup>

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<sup>10</sup> Reg. Z currently defines “creditor,” and no amendment was made to that definition in the Final TILA Rules.

<sup>11</sup> Reg. Z does not define “assignee,” but generally uses the term to mean an entity that purchases a debt from a creditor (or from a previous assignee). *See, e.g.*, 12 C.F.R. Part 1026, Cmt. 1026.2(a)(17)(i)-2.

<sup>12</sup> In this sentence and hereafter, this Alert uses the shortened citations “§ 1024.\_\_\_\_” and “§ 1026.\_\_\_\_” to mean “12 C.F.R. § 1024.\_\_\_\_” and “12 C.F.R. § 1026.\_\_\_\_” in effect on January 10, 2014. Similarly, unless otherwise specified, the shortened citations “Part 1024, Cmt. \_\_\_\_” and “Part 1026, Cmt. \_\_\_\_” refer to the Comments to Parts 1024 and 1026 respectively.

<sup>13</sup> Part 1026, Cmt. 20(d)-3.

<sup>14</sup> § 1026.20(d).

*Estimates.* If the new interest rate (or the new payment calculated from the new interest rate) is not known as of the date of the initial notice, then an estimate, labeled as such, must be provided. The estimate must be based on a calculation of the pertinent index or formula within 15 business days prior to the date of the disclosure.<sup>15</sup>

*Format and Content.* The Final TILA Rules also add model and sample initial notices (Forms [H-4\(D\)\(3\)](#) and [\(4\)](#)). The contents and format of the notices are prescribed in § 1026.20(d)(2)(i)-(xi), § 1026.20(d)(3) and in the model and sample forms.

## **b) Payment Adjustment Notices**

The Final TILA Rules change the minimum time for providing advance notice of all adjustments that result in a payment change from 25 to 60 calendar days before payment at a new level is due (including payments that change due to the conversion of an ARM to a fixed-rate transaction). The maximum time for advance notice remains the same, 120 days.

With one exception, it appears that the 60-120 day notice is required even where, in cases of an initial adjustment, the borrower previously received an initial adjustment notice. The exception is where the borrower received the initial adjustment notice at consummation (which the borrower would in all cases where the first payment arising from an initial adjustment is due within 210 days of consummation) and the notice disclosed the actual, not estimated, new interest rate.<sup>16</sup> Thus, if only an estimated rate appeared in the initial adjustment notice at consummation, the borrower must receive a 60-120 day notice too. That second notice, in cases where the first payment at the adjusted level is due within the first 60 days of consummation, must be provided “as soon as practicable but not less than 25 days before” the payment is due.<sup>17</sup> In all cases, and as with the initial adjustment notice, a requirement to deliver the notice within a certain timeframe means that it must be delivered or placed in the mail within that timeframe.<sup>18</sup>

The 25-day minimum notice period would still apply to (i) grandfathered ARMs (*i.e.*, ARMs originated before January 10, 2015 with look-back periods of less than 45 days) and (ii) frequently adjusting ARMs, specifically ARMs with uniformly scheduled interest adjustments occurring every 60 days or more frequently.<sup>19</sup>

*Format and Content.* The Final TILA Rules include model and sample payment adjustment notice forms (Forms [H-4 \(D\)\(1\)](#) and [\(2\)](#)). The contents and format of the notices are prescribed in § 1026.20(c)(2)(i)-(vii), § 1026.20(c)(3) and in the model and sample forms. The contents overlap with and expand on those currently required for adjustment notices, but are not as extensive as those required for the initial adjustment notices.

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<sup>15</sup> § 1026.20(d) (2).

<sup>16</sup> § 1026(c)(1)(ii)(B); Part 1026, Cmt. 20(c)(1)(ii)-2.

<sup>17</sup> § 1026.20(c)(2).

<sup>18</sup> Part 1026, Cmt. 20(c)(2)-1.

<sup>19</sup> *Id.*

## 2. Entity and Product Coverage

Entity Scope: As noted above, the adjustment notice requirements contained in the Final TILA Rules apply to “creditors, assignees and servicers.”

Product Scope:

- The Final TILA Rules apply only to closed-end loans secured by the consumer’s principal dwelling where the annual percentage rate (APR) may increase after consummation.<sup>20</sup>
- Deviating from the Proposed TILA Rules, which only would have exempted construction loans with a term of one year or less, the Final TILA Rules preserve Reg. Z’s existing exemption of all loans with terms of one year or less.<sup>21</sup>
- Because the disclosure requirements apply only to rate and payment changes occurring pursuant to the loan contract, there need be no disclosures for interest rate adjustments occurring in loan modifications, *i.e.*, in cases where the original loan contract is modified. The disclosure requirements do, however, apply to any later adjustments occurring pursuant to the new, modified loan contract.<sup>22</sup>

### B. Periodic Billing Statements

Requirements for periodic billing statements may be found at new § 1026.41.

#### 1. The Disclosures

The Final TILA Rules implement the Dodd-Frank requirement that the Bureau “develop and prescribe a standard form for” periodic statements.<sup>23</sup> The Final TILA Rules require that consumers receive a prescribed periodic statement for each billing cycle. For billing cycles shorter than 31 days (*e.g.*, bi-weekly cycles), a periodic statement covering the entire month may be used.<sup>24</sup>

*Timing.* The statement must be delivered or placed in the mail “within a reasonably prompt time after the payment due date or the end of any courtesy period provided for the

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<sup>20</sup> §§ 1026.20(c)(1), 1026.20(d)(1). When an open-end account converts to a closed-end ARM, the initial disclosure is required in connection with the implementation of the initial interest rate adjustment post-conversion, and subsequent disclosures are required if and when a post-conversion interest rate adjustment results in a corresponding payment change. Part 1026, Cmts. 20(c)-3, 20(d)(3).

<sup>21</sup> §§ 1026.20(c)(1)(ii)(A), 1026.20(d)(1)(ii).

<sup>22</sup> Part 1026, Cmts. 20(c)-1, 20(d)(2).

<sup>23</sup> Dodd-Frank Act, Pub. L. No. 111-203, § 1420 (2010).

<sup>24</sup> § 1026.41(a)(2).



previous billing cycle.”<sup>25</sup> (According to Comment 41(b)-1, this means that statements generally must be delivered or mailed within 4 days of the close of the courtesy period of the previous cycle.)

The Final TILA Rule did not implement the Bureau’s proposal that a first periodic statement be sent no later than 10 days before the first payment is due.<sup>26</sup>

*Electronic Delivery.* Statements may be provided electronically with a borrower’s “affirmative consent.”<sup>27</sup>

*Format and Content.* The Final TILA Rules include four sample periodic statement forms (Forms [H-30\(A\)](#), [\(B\)](#), [\(C\)](#), and [\(D\)](#)). The contents and format of the forms are prescribed in § 1026.41(c) and (d), and in the sample forms. Note that borrowers more than 45 days delinquent receive additional information.

## 2. Entity and Product Coverage

Entity Scope: The Final TILA Rules, as noted above, apply to “creditors, assignees and servicers.” There is an exemption, however, for a “small servicer,” defined to mean a servicer that (i) together with affiliates, services 5,000 or fewer loans in a calendar year; and (ii) only services mortgage loans that it (or its affiliate) either originated or now owns.<sup>28</sup> Note that in the case of a master-servicer / sub-servicer arrangement, the sub-servicer cannot claim the exemption for loans that are master serviced by an entity that does not qualify as a small servicer.<sup>29</sup>

Product Scope: This requirement applies to all closed-end loans secured by a dwelling, except (i) reverse mortgages (as defined by § 1026.33(a)), (ii) timeshare plans (as defined in the bankruptcy code, 11 U.S.C. § 101(53(D))), and (iii) subject to some qualifications, fixed-rate loans where the consumer uses a coupon book.<sup>30</sup>

## C. Prompt Payment Crediting and Payoff Statements

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<sup>25</sup> § 1026.41(b).

<sup>26</sup> *TILA Release* at 220.

<sup>27</sup> § 1026.41(c). In the Final TILA Rules, the Bureau requires that servicers obtain only a customer’s affirmative consent to receive statements electronically rather than full compliance with the verification procedures contained in the Electronic Signatures in Global National Commerce Act (the “E-Sign” Act). The Bureau’s rationale for its decision is that TILA does not mandate the E-Sign Act’s heightened verification procedure. *TILA Release* at 226.

<sup>28</sup> § 1026.41(e)(4). The Proposed TILA Rules only defined small servicers as servicers that (i) together with affiliates, service 1,000 or fewer loans in a calendar year; and (ii) only service mortgage loans that it (or its affiliate) either originated or now owns.

<sup>29</sup> Part 1026, Cmt. 41(e)(4)(ii)-2.

<sup>30</sup> § 1026.41(e).

The prompt payment crediting and payoff statement requirements appear at amended § 1026.36(c).

## 1. The Requirements

Prompt Payment Crediting: The Final TILA Rules amend Reg. Z to clarify how servicers should handle partial payments. Under Reg. Z as amended by the Final TILA Rules, if the servicer retains the partial payment in a suspense or unapplied funds account (rather than credits or returns it), then the servicer must (1) disclose on the periodic statement the total amount retained in such suspense or unapplied funds account and (2) when sufficient funds accumulate to cover a full payment, promptly credit the retained funds to the oldest outstanding payment.<sup>31</sup> Note that a payment is deemed “full” rather than “partial” — and therefore must be credited promptly in all cases — as long as it covers the outstanding principle, interest, and escrow amounts for a given billing cycle, *i.e.*, even if it fails to include amounts required to cover late fees or other fees assessed by the servicer.<sup>32</sup>

Prompt Provision of Payoff Statements. Even before the Final TILA Rules, Reg. Z required payoff statements to be provided “within a reasonable time after receiving” a request, including an oral request. The Final TILA Rules clarify the meaning of the phrase “reasonable time” by stating that it may never mean more than 7 business days. They also require that the request be in writing.<sup>33</sup>

## 2. Entity and Product Coverage

Entity Scope: Previously, the requirements for both prompt crediting and prompt provision of payoff statements applied only to “servicers.” Under the Final TILA Rules, the requirements regarding the prompt crediting of payments continue to apply only to servicers, but the requirements regarding prompt provision of payoff statements now apply to “creditors, assignees and servicers.”<sup>34</sup>

Product Scope: All §1026.36(c) requirements apply to both open- and closed-end loans secured by a consumer’s principal dwelling.<sup>35</sup> The requirements regarding prompt payoff statements also apply in instances where the dwelling securing the loan is not the consumer’s principal dwelling.<sup>36</sup>

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<sup>31</sup> §1026.36(c)(1)(ii).

<sup>32</sup> *TILA Release* at 191-95.

<sup>33</sup> § 1026.36(c)(3).

<sup>34</sup> *Id.*

<sup>35</sup> § 1026.36(c)(1); § 1026.36(c)(3).

<sup>36</sup> § 1026.36(c)(3).

## V. Re-Organization of and Commentary to Regulation X

### A. Re-Organization into Three Sub-Parts

As it proposed to do, the Bureau in the Final RESPA Rules is reorganizing Regulation X into three distinct subparts (whereas previously it had no subparts). Subpart A, “General” (covering §§ 1024.1 through 1024.5) will include general provisions of Regulation X, including provisions that apply to both Subparts B and C. Subpart B, “Mortgage Settlement and Escrow Accounts” (covering §§ 1024.6 through 1024.20), will include provisions relating to settlement services and escrow accounts, including disclosures provided to borrowers relating to settlement services. Finally, Subpart C, “Mortgage Servicing” (covering §§ 1024.30 through 1024.41), will include provisions relating to obligations of mortgage servicers.<sup>37</sup>

### B. Official Commentary and Additional Organizational Changes

The Final RESPA Rules include, for the first time in Regulation X, official commentary to the regulation — much like the official commentary found in regulations that (unlike Regulation X) had been the responsibility of the Federal Reserve before the creation of the Bureau. This practice of adopting official commentary to Regulation X will, according to the Bureau, “substitute[] for the prior practice of HUD of publishing Statements of Policy with respect to interpretations of RESPA.”<sup>38</sup> “The Bureau does not,” however, “intend that the publication of the [commentary] would withdraw or otherwise affect the status of any prior interpretations of RESPA [by HUD] not set forth in the” commentary.<sup>39</sup>

The commentary itself provides that it will be “the primary vehicle by which the Bureau of Consumer Financial Protection issues official interpretations of Regulation X,” and that good faith “compliance with this commentary affords protection from liability under” RESPA § 19(b), 12 U.S.C. § 2617(b).<sup>40</sup> The commentary added by the Final RESPA Rules consists only of introductory paragraphs and comments on the provisions of Regulation X that those Rules add or amend. In other words, no commentary has been added with respect to Regulation X provisions not addressed by the Rules.

The Final RESPA Rules also make a few other organizational changes, including changes that affect the following sections:

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<sup>37</sup> *RESPA Release* at 33, 52.

<sup>38</sup> *RESPA Release* at 51-52. The new official commentary itself provides that “[e]xcept in unusual circumstances,” “official interpretations will not be issued separately but will be incorporated in the official commentary to” Regulation X, “which will be amended periodically.” Part 1024, Cmt. I-2; *accord* New § 1024.4(a)(1)(ii).

<sup>39</sup> *RESPA Release* at 52 n.61.

<sup>40</sup> Part 1024, Cmt. I-1; *see also* *RESPA Release* at 51. As the Bureau notes, § 19(a) of RESPA, 12 U.S.C. § 2617(a), authorizes it to make such reasonable interpretations of RESPA as may be necessary to achieve the consumer protection purposes of RESPA. *RESPA Release* at 51. *See* 12 U.S.C. § 2617(a) (“The Bureau is authorized to ... make such interpretations ... as may be necessary to achieve the purposes of” RESPA.”).

- § 1024.3 (“*Questions or Suggestions from Public and Copies of Public Guidance Documents.*”). The Bureau is deleting Current § 1024.3, which had directed “questions or suggestions from the public regarding RESPA” and “[l]egal questions concerning the interpretation of” Regulation X to a Bureau address, and is moving its substance, with some modifications, to New Comment I-2. That new comment provides an address for “request[s] for official interpretation,” and states that a “request shall contain a complete statement of all relevant facts concerning the issue, including copies of all pertinent documents.”<sup>41</sup>
- § 1024.4(b) (*Unofficial Interpretations; Staff Discretion.*) This subsection concerning unofficial interpretations is being moved, in substance, to the new official commentary, at Comment I-3.<sup>42</sup>
- § 1024.23 (*ESIGN Applicability*). In connection with the re-organization of Regulation X into Subparts, and in view of the Bureau’s belief that this section is “applicable to all provisions in Regulation X,” the Bureau is moving it, in substance, to New § 1024.3 (and therefore to Subpart A, “General”), which was made vacant by the Bureau’s decision to delete Current § 1024.3 as described above.<sup>43</sup>

## VI. The Six RESPA Rules

Entities Covered: Unlike the Final TILA Rules, which generally would apply to any “creditor, assignee or servicer” on the pertinent loan, the Final RESPA Rules apply to the “servicer” only. Reg. X’s definition of “servicer” remains unchanged, except in technical respects relating to the status of the National Credit Union Administration.<sup>44</sup>

Products Covered: The Final RESPA Rules cover “mortgage loans,” a new term defined to mean:

- a “federally related mortgage loan,”
- subject to RESPA’s standard exemptions in § 1024.5(b), such as the exemptions for loans on vacant land and for business-purpose loans, but
- excluding open-end lines of credit (home equity plans).<sup>45</sup>

This new term, “mortgage loan,” replaces the term “mortgage servicing loan” throughout RESPA’s servicing provisions, including provisions not otherwise proposed to be amended. The principal effect of this change is that RESPA’s servicing provisions also will cover *subordinate-lien* closed-end mortgage loans, because the prior rules — using the “mortgage servicing loan”

<sup>41</sup> Part 1024, Cmt. I-2.

<sup>42</sup> See also *RESPA Release* at 55-56.

<sup>43</sup> *RESPA Release* at 55.

<sup>44</sup> *RESPA Release* at 54.

<sup>45</sup> § 1024.30; § 1024.31.

concept — covered only *first-lien* closed-end mortgage loans.<sup>46</sup> While this provision clearly covers more loans, it also avoids most state law notice requirements. A specific preemption provision added by the Final RESPA Rules, § 1024.33(d), will preempt state law requirements that require notices to *borrowers* on transfers of subordinate lien loans. The Final RESPA Rules make clear, however, that state law provisions requiring notices to insurance companies or taxing authorities are not preempted, and that additional information may be added to a notice if permitted under state law.<sup>47</sup>

## A. Force-Placed Insurance

The Final RESPA Rules add new requirements regarding force-placed insurance at new paragraph (5) of subsection § 1024.17(k) and at new § 1024.37.

### 1. Advancement of Funds

Most significantly, the Final RESPA Rules provide that where a borrower on a loan with an escrow account fails to pay an amount sufficient to fund hazard insurance premiums, the servicer of the loan will have to *advance funds* to that escrow account to keep the hazard insurance current, *even on delinquent accounts*.<sup>48</sup> (Currently, a servicer is required to advance funds to make hazard insurance and other escrow payments as necessary, but only if the borrower's contribution to the escrow account is less than 30 days overdue.) Exceptions apply where the servicer has a reasonable basis to believe either (i) that the borrower's hazard insurance has been cancelled (or was not renewed) for reasons unrelated to nonpayment of premium charges or (ii) that the borrower's property is vacant.<sup>49</sup>

### 2. Obtaining and Renewing or Replacing Force-Placed Insurance

The new rule on advancement of funds reduces the number of occasions where a servicer would need to force-place hazard insurance. On those occasions, however, the servicer would be required, prior to obtaining the hazard insurance, to have a “reasonable basis to believe” that the borrower has failed to comply with his or her contractual obligation to maintain hazard insurance.<sup>50</sup> In addition, before charging a borrower for force-placed insurance, the servicer would have to:

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<sup>46</sup> RESPA Release at 137.

<sup>47</sup> § 1024.33(d).

<sup>48</sup> “Hazard insurance” is defined to mean “insurance on the property securing a mortgage loan that protects the property against loss caused by fire, wind, flood, earthquake, theft, falling objects, freezing, and other similar hazards for which the owner or assignee of such loan requires insurance.” § 1024.31.

<sup>49</sup> § 1024.17(k)(5).

<sup>50</sup> § 1024.37(b). Significantly, this requirement and those described below regarding force-placement do not apply to (i) hazard insurance to protect against flood loss obtained by a servicer as required by the Flood Disaster Protection Act of 1973, (ii) hazard insurance renewed pursuant to § 1024.17(k)(5), and (iii) hazard insurance obtained by the borrower but renewed by the servicer with the borrower's consent. § 1024.37(a)(2).

- deliver or place in the mail to the borrower a written notice at least 45 days before the premium or any fee is assessed;<sup>51</sup>
- deliver or place in the mail, 30 or more days later, a reminder notice;<sup>52</sup> and
- not have received verification that the borrower has had hazard insurance in place continuously, taking account of any grace period.<sup>53</sup>

Similarly, before charging a borrower for renewing or replacing force-placed insurance, the servicer must:

- mail or deliver to the borrower a written renewal notice at least 45 days before the premium or any fee is assessed;<sup>54</sup> and
- not have received verification that the borrower has obtained hazard insurance.<sup>55</sup>

### 3. Cancelling Force-Placed Insurance

Within 15 days of receiving verification that the borrower has hazard insurance in place, a servicer must: (1) cancel the force-placed insurance; and (2) for any period of overlapping coverage, refund to the borrower all premium charges and related fees paid by the borrower for such period and remove from the borrower's account any assessed charges and related fees for such period.<sup>56</sup>

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<sup>51</sup> § 1024.37(c)(1)(i). The Final RESPA Rules include a model notice (Form [MS-3\(A\)](#)). The contents and format of the disclosures are prescribed in § 1024.37(c)(2), (3) and in the model notice.

<sup>52</sup> § 1024.37(c)(1)(ii). The prescribed content of the reminder notice differs depending on whether, since sending the initial notice, the servicer has received (i) no insurance information or (ii) some insurance information but no verification that the borrower has had hazard insurance in place continuously. The Final RESPA Rules include a model for each type of reminder notice (Forms [MS-3\(B\)](#) and [MS-3\(C\)](#)). The contents and format of the reminder notices are prescribed in § 1024.37(d)(2), (3) and in the model forms.

The Final RESPA Rules also provide that if a servicer receives hazard insurance information from a borrower after the reminder notice has been put into production, the servicer is not be required to update the notice so long as the notice was put into production within a reasonable time prior to the servicer delivering the notice to the borrower or placing the notice in the mail. § 1024.37(d)(5).

<sup>53</sup> § 1024.37(c)(1)(iii).

<sup>54</sup> § 1024.37(e)(1)(i). The Final RESPA Rules include a model renewal notice (Form [MS-3\(D\)](#)). The contents and format of the renewal notice are prescribed in § 1024.37(e)(2), (3) and in the model form. This notice also must be delivered or placed in the mail before the first anniversary of the servicer's obtaining force-placed insurance; subsequently, the servicer is not be required to send the renewal notice more than once every 12 months. § 1024.37(e)(5).

<sup>55</sup> § 1024.37(e)(1)(ii). A servicer that has renewed or replaced existing force-placed insurance during this 45-day notice period may charge the borrower for the renewal or replacement promptly after the servicer receives verification that any hazard insurance obtained by the borrower did not provide the borrower with insurance coverage for any period of time following the expiration of the existing force-placed insurance. § 1024.37(e)(1)(iii).

<sup>56</sup> § 1024.37(g)

#### **4. Charges Must Be “Bona Fide and Reasonable”**

Finally, all charges for forced-placed insurance must be “bona fide and reasonable,” meaning “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>57</sup> There are exceptions to this rule for charges subject to State regulation and charges authorized by the Flood Disaster Protection Act of 1973.<sup>58</sup>

#### **B. Error Resolution and Information Requests**

Section 1463(a) of the Dodd-Frank Act amended RESPA to add new servicer prohibitions regarding borrowers’ assertions of error and requests for information. Specifically, § 1463(a) of the Dodd-Frank Act added § 6(k)(1)(C) to RESPA, which states that a servicer shall not “fail to take timely action to respond to a borrower’s requests to correct errors relating to allocation of payments, final balances for purposes of paying off the loan, or avoiding foreclosure, or other standard servicer’s duties.” In addition, § 1463(a) of the Dodd-Frank Act added § 6(k)(1)(D) to RESPA, which states that a servicer shall not fail to provide information regarding the owner or assignee of a borrower’s loan within 10 business days of a borrower’s request. To define servicers’ obligations to correct errors and respond to information requests, the Bureau adopted §§ 1024.35 and 1024.36 as part of its Final RESPA Rules.

Sections 1024.35 and 1024.36 differ from the versions of those sections put forth in the Bureau’s Proposed RESPA Rules. The most significant differences between the proposed rules and the final rules are outlined below.

##### **1. Oral Notices**

Both §§ 1024.35 and 1024.36 of the Proposed RESPA Rule would have instituted error resolution and information request procedures to address oral communications from borrowers. However, the Final RESPA Rules do not contain these requirements.

##### **2. Response Time Limits**

The Final RESPA Rules modify the time limits for responses to error notices and information requests by adding the following requirements:

- with respect to § 1024.35, servicers must respond to:

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<sup>57</sup> § 1024.37(h).

<sup>58</sup> *Id.*



- error notices regarding a failure to provide an accurate payoff balance within 7 days;<sup>59</sup> and
- error notices regarding alleged violation of the new loss mitigation requirements in §§ 1024.41(f), (g), and (j) (regarding foreclosure referral, foreclosure sale, or small servicer requirements respectively) within 30 days or before the foreclosure sale, whichever is earlier.
- with respect to § 1024.36, servicers must provide information regarding the contact information for the owner or assignee of a mortgage within 10 days.

However, for all other notices and requests, the Final RESPA Rules maintain the response deadlines of the Proposed TILA Rules, meaning that under both sections the time to respond to all other notices and requests is 30 days (with an extension to 45 days in most cases if, before the end of the 30 day period, the servicer notifies the borrower of the extension and the reasons for the extension).<sup>60</sup>

Additionally, like the Proposed RESPA Rules, the Final RESPA Rules require that:

- servicers acknowledge receipt of a borrower request or notice of error within 5 days; and
- servicers provide, at no charge, copies of documents and information relied upon in responding to notices of errors within 15 days of receiving a borrower request for such documents.

### 3. Carve Outs

The Final RESPA Rules only change the carve outs provided in the Proposed RESPA Rules by removing the exemption for “unduly burdensome” error notices from § 1024.35. Otherwise, the Final Rules closely follow the carve outs provided by the Proposed Rules, meaning that:

- with respect to § 1024.35, a servicer is not obligated to respond to a notice of error if it “reasonably determines” that the notice of error is:

<sup>59</sup> The response time limits in §§ 1024.35 and 1024.36 exclude public holidays and weekends. However, the following provisions in §§ 1024.35 and 1024.36 do not exclude public holidays and weekends:

- § 1024.35(f)(2), which relates to errors asserted 7 days or fewer before a foreclosure sale,
- § 1024.35(g)(iii), which relates to notices of error received more than a year after servicing was transferred from the servicer or the loan was paid in full,
- §1024.35(i), which places a 60 day restriction on furnishing adverse information regarding payment information subject to a notice of error, and
- § 1026.36(f)(v), which relates to information requests received more than a year after servicing was transferred from the servicer or the loan was paid in full.

<sup>60</sup> §§ 1024.35(e)(3)(i)(c), 1024.35(e)(3)(ii), 1024.36(d)(2)(i)(B), 102.36(d)(2)(ii).



- duplicative of one previously made or asserted;
  - “overbroad,” meaning that the servicer cannot reasonably determine what the alleged error is, or the borrower requests an “unreasonable volume” of documents or information; or
  - “untimely,” meaning that the request or notice is delivered more than one year after (i) servicing for the loan was transferred; or (ii) the loan was paid in full.
- with respect to § 1024.36, a servicer would not be obligated to respond to an information request if it “reasonably determines” that the request is:
    - duplicative of one previously made or asserted;
    - overbroad;
    - “unduly burdensome,” meaning that a diligent servicer could not respond in the allotted time or would incur unreasonable costs in doing so;
    - untimely; or
    - confidential, proprietary, general corporate information, or not directly related to the borrower’s loan account.

Additionally, like the Proposed RESPA Rules, the Final RESPA Rules provide that if a servicer determines based on the above criteria that it is not required to respond to a request or notice, it must (i) notify the borrower in writing not less than five days of its determination and (ii) provide the basis for its determination.

### **C. Information Management Policies and Procedures**

The Final RESPA Rules add new § 1024.38, which requires servicers to have policies and procedures for maintaining and managing information and documents related to borrower accounts. The Final RESPA Rules set forth the five “objectives” and two “standard requirements” for the policies and procedures in § 1024.38(b) and (c).

The five objectives are:

- accessing and providing timely and accurate information to borrowers and investors;
- properly evaluating loss mitigation applications;
- facilitating oversight of and compliance by service providers;
- facilitating the transfer of information during servicing transfers; and
- informing borrowers of written error resolution and information request procedures.

The two standard requirements are:

- retaining servicing records for a year after the discharge or transfer of a loan; and
- meeting certain specified standards for the servicing file.

Even though the Final RESPA Rules require servicers' policies and procedures to be "reasonably designed" to achieve RESPA's "objectives" and to ensure compliance with the "standard requirements," it also provides a safe harbor. Under the safe harbor, a servicer satisfies § 1024.38's requirements as long as it does not engage in a pattern or practice of (i) failing to achieve any of the "objectives" or (ii) failing to ensure compliance with any of the "standard requirements." Comment 38(a)-1 notes that in designing the required policies and procedures, servicers have "flexibility to determine such policies and procedures and methods in light of the size, nature, and scope of the servicer's operations," including "the servicer's history of consumer complaints."

#### **D. Early Intervention with Delinquent Borrowers**

At § 1024.39, the Final RESPA Rules create the following new early intervention requirements:

##### **1. Oral Notice**

No later than the 36th day of the borrower's delinquency, the servicer must make "good faith efforts" to establish live contact with the borrower in order to notify the borrower promptly about the availability of loss mitigation options, if appropriate.<sup>61</sup> In Comment 39(a)(2), the Bureau states that "good faith efforts to establish live contact consist of reasonable steps under the circumstances to reach a borrower and may include telephoning the borrower on more than one occasion or sending written or electronic communication encouraging the borrower to establish live contact with the borrower."

##### **2. Written notice**

By the 45th day after the missed payment's due date, the servicer must provide the borrower with a prescribed written notice.<sup>62</sup> (The servicer does not have to provide the written notice more than once in any 180-day period.) Among other things, the specified content of the notice must include a brief description of any loss mitigation options that may be available, and contact information for counseling organizations.<sup>63</sup> The Final RESPA Rules include model clauses for the notice (Clauses [MS-4\(A\), \(B\), and \(C\)](#)). The full contents of the written notice are prescribed in § 1024.39(b)(2), and in the model clauses.

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<sup>61</sup> § 1024.39(a). The Final RESPA Rules increase the maximum delinquency period for live contact by 6 days as compared to the Proposed RESPA Rules.

<sup>62</sup> § 1024.39(b). The Final RESPA Rules increases the maximum delinquency period for written notice by 5 days as compared to the Proposed RESPA Rules.

<sup>63</sup> § 1024.39(b)(2).

## **E. Continuity of Contact with Delinquent Borrowers**

In the proposed version of §1024.40, the Bureau put forward specific continuity of contact requirements that would have compelled servicers to assign specific loss mitigation personnel to borrowers in default and to make those personnel available by phone. The proposed version of §1024.40 also would have established safe harbors and protections for servicers who met certain conditions.

In its Final RESPA Rules, the CFPB significantly modifies its approach to § 1024.40 by eliminating the section's specific continuity of contact requirements and its safe harbor provisions. Instead, the final version of § 1024.40 requires servicers to maintain policies and procedures reasonably designed to:

- assign a delinquent borrower to specific loss mitigation personnel within 45 days of the borrower's delinquency;
- make the assigned loss mitigation personnel available to the borrower by phone to assist with available loss mitigation options until the borrower has made, without incurring a late charge, two consecutive mortgage payments in accordance with the terms of a loss mitigation agreement;
- provide the borrower with accurate information about prescribed matters, including loss mitigation options; and
- allow timely retrieval and access to borrower records, including all documents submitted by borrower.

## **F. Loss Mitigation Procedures**

### **1. Scope Note**

In the Proposed RESPA Rules, § 1024.41 would have applied only to servicers that made loss mitigation options available to borrowers in the ordinary course of business. However, in the Final RESPA Rules, the CFPB expanded the scope of § 1024.41 to apply to all servicers.<sup>64</sup>

Additionally, the Final RESPA Rules narrow the scope of § 1024.41 to apply only to a borrower's principal residence and exempt from the section's loss mitigation procedures requirements (1) small servicers (with exception of § 1024.41(j) (which prohibits certain legal actions if a borrower is less than 121 days delinquent or performing on a loss mitigation agreement)), (2) reverse mortgage transactions, and (3) "qualified lenders" that are required to comply with Farm Credit Administration regulations relating to distressed borrowers.<sup>65</sup>

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<sup>64</sup> *RESPA Release* at 448.

<sup>65</sup> *RESPA Release* at 465.

## 2. Dual Tracking

In its Final RESPA Rules, the Bureau is implementing restrictions on dual tracking that go beyond those put forward in its Proposed RESPA Rules.

First, the Bureau is prohibiting servicers from initiating the foreclosure process unless a borrower is more than 120 days delinquent. Once a borrower is 120 days delinquent, a servicer may initiate foreclosure unless the borrower has submitted a complete loss mitigation application, in which case the servicer must complete the review and appeal procedures set forth in § 1024.41 before starting the foreclosure process. A servicer also cannot commence the foreclosure process if a borrower is performing under a loss mitigation agreement.

Second, the Bureau is expanding and clarifying its foreclosure sale restrictions. Under the Final RESPA Rules, if a borrower submits a complete loss mitigation application by the applicable deadline, a servicer must complete the loss mitigation procedures before proceeding to a foreclosure judgment, obtaining an order of sale for the property, or conducting a foreclosure sale. The Bureau also has clarified that proceeding to a foreclosure judgment includes filing a dispositive motion, such as a motion for a default judgment, judgment on the pleadings, or summary judgment, which may result in the issuance of a foreclosure judgment. If such a motion is pending when a servicer receives a complete loss mitigation application, the servicer must take reasonable steps to avoid a ruling on such motion until completing the loss mitigation procedures described below. The servicer also cannot proceed with a foreclosure sale if a borrower is performing under a trial modification or other agreed upon loss mitigation option.

Third, the Bureau is implementing procedures applicable to the evaluation of complete loss mitigation applications submitted by borrowers less than 90 days before a foreclosure sale, but more than 37 days before a foreclosure sale.

## 3. Loss Mitigation Timelines

The Final RESPA Rules implement a series of timelines that provide different loss mitigation processes at certain stages of the foreclosure process. These requirements are:

- for any loss mitigation application received 45 days or more before a foreclosure sale, a servicer, within 5 days (excluding legal public holidays and weekends) of receipt and in writing, must acknowledge the application and provide notice of any additional information required to complete it;<sup>66</sup>
- for any application received more than 37 days before a foreclosure sale, a servicer must evaluate any complete application with 30 days;<sup>67</sup>

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<sup>66</sup> § 1024.41(b)(2). Unless otherwise indicated, the timing requirements for § 1024.41 do not exclude legal public holidays and weekends.

<sup>67</sup> § 1024.41(c)(1).

- for any complete loss mitigation application received 90 days or more before a foreclosure sale, the servicer must provide the borrower at least 14 days to accept or reject a loss mitigation offer; if a servicer receives a complete loss mitigation application less than 90 days before a foreclosure sale but more than 37 days before a foreclosure sale, the servicer must provide the borrower at least 7 days to accept or reject a loss mitigation offer;<sup>68</sup> and
- a servicer must comply with the appeal process for any complete loss mitigation application received 90 days or more before a foreclosure sale.<sup>69</sup>

#### **4. Private Right of Action**

In the Final RESPA Rules, the Bureau underscores that borrowers have a private right of action under § 6(f) of RESPA to enforce the loss mitigation procedures.<sup>70</sup>

#### **5. Denials and Appeals of Denials**

Under the Final RESPA Rules, a servicer that denies a borrower's loss mitigation application for any trial or permanent loan modification program offered by the servicer must state in its notice of denial (i) the specific reasons for its determination for each such modification program; and (ii) that, if the application was received 90 days or more before foreclosure sale, the borrower may appeal. Additionally, the denial letter also must describe the deadline set by the servicer for the appeal (which must be at least 14 days after providing the notice of denial) and any requirements for making the appeal.<sup>71</sup>

Appeals must be reviewed by different personnel than those responsible for evaluating the application. Within 30 days of a borrower making an appeal, the servicer must provide a notice to the borrower stating the servicer's determination. That determination would not be subject to any further appeal, and the servicer would not be obligated to consider any second loss mitigation application.<sup>72</sup>

#### **6. Approvals**

If a servicer receives a complete loss mitigation application 90 days or more before a foreclosure sale, the servicer may not require the borrower to accept or reject an offer of loss mitigation earlier than 14 days after the servicer make the offer. If the servicer receives a complete loss mitigation application less than 90 days before a foreclosure sale, but more than 37

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<sup>68</sup> § 1024.41(e)(1).

<sup>69</sup> § 1024.41(h)(1).

<sup>70</sup> § 1024.41(a).

<sup>71</sup> § 1024.41(d).

<sup>72</sup> § 1024.41(h).

days before a foreclosure sale, a servicer may not require a borrower to accept or reject an offer of a loss mitigation option earlier than 7 days after the offer.<sup>73</sup>

If a borrower makes an appeal, the servicer must extend the borrower's deadline for accepting a loss mitigation offer until 14 days after the servicer has provided the borrower with notice of its determination regarding the appeal.<sup>74</sup>

## **7. Other Liens**

In its Final RESPA Rules, the Bureau withdrew its proposed rule that would have required any servicer receiving a loss mitigation application to (i) within five days, determine if any other servicers service mortgage loans that have senior or subordinate liens encumbering the relevant property; and (ii) provide any other servicers so identified with a copy of the loss mitigation application.

## **8. Small Servicers**

The Final RESPA Rules add § 1024.41(j), which states (i) that a small servicer may not initiate foreclosure proceedings unless a borrower is more than 120 days delinquent, and (ii) that a small servicer must not proceed to foreclosure judgment or order of sale, or conduct a foreclosure sale, if a borrower is performing under the terms of a loss mitigation agreement.

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<sup>73</sup> § 1024.41(e).

<sup>74</sup> § 1024.41(e)(2)(iii).