New CFPB Mortgage Servicing Rules Part 1: Error Resolution; Force Placed Insurance; Periodic Statements, Other servicer duties

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This Webinar is provided by the National Consumer Law Center and the National Housing Law Project (NHLP).
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• He has served as an expert witness in court cases and has testified in Congress on consumer matters.
• Mr. Rao is a contributing author and editor of NCLC's Consumer Bankruptcy Law and Practice; co-author of NCLC’s Foreclosures; Bankruptcy Basics; Guide to Surviving Debt; and NCLC Reports: Bankruptcy and Foreclosures Edition.
• He is also a contributing author to Collier on Bankruptcy and the Collier Bankruptcy Practice Guide.
• Mr. Rao serves as a member of the federal Judicial Conference Advisory Committee on Bankruptcy Rules, appointed by Chief Justice John Roberts in 2006.
Presenter – Tara Twomey

• Is currently Of Counsel to the National Consumer Law Center and the Amicus Project Director for the National Association of Consumer Bankruptcy Attorneys.

• She has been a Lecturer in Law at Stanford, Harvard and Boston College Law Schools.

• Ms. Twomey is a former Clinical Instructor at the Hale and Dorr Legal Services Center of Harvard Law School where her practice focused, in part, on sustainable homeownership for low- and moderate-income homeowners.

• She is a contributing author of several books published by the National Consumer Law Center including, Foreclosures: Defenses, Workouts and Mortgage Servicing and Bankruptcy Basics.
Servicers’ Duties under RESPA

- Provide Requested Information and Correct Account Errors
- Provide Servicing Transfer Notices
- Comply with Force-Placed Insurance Procedures
- Maintain Escrow Accounts
- Comply with Loss Mitigation Procedures
What is a Qualified Written Request?

QWR under RESPA § 2605(e) must include:

- borrower’s name and account (or sufficient information to enable servicer to identify borrower and account); and

- “reasons for the belief of the borrower, to the extent applicable, that the account is in error,” or

- “sufficient detail to the servicer regarding other information sought by the borrower”
  – “other information” must be “information related to the servicing of the loan”

• New regime: separate qualifications and procedures for:
  – “notice of error” under Reg. X § 1024.35
  – “request for information” under Reg. X § 1024.36

• Written inquiry can be a NOE or RFI even if not a QWR
What is a QWR, NOE and RFI?
What is a QWR, NOE and RFI?
Notice of Error

• “Error” must fall within one of ten listed categories, plus
  – catchall category for “any other error related to the servicing of borrower’s mortgage loan”

• Most covered errors relate to duties imposed on servicers by RESPA
  – includes failing to transfer accurate and timely information about borrower’s mortgage account to a transferee servicer

• Two covered errors deal with dual tracking
Notice of Error

• Can a borrower assert under catch-all a servicer’s failure to correctly evaluate borrower for a loss mitigation option?

  – Reg. X changes clarify that loss mitigation is related to servicing of loan
  – CFPB said it did not add this as specific covered error because appeal process in § 1024.41(h) should provide effective review
  – but CFPB also noted that catch-all was added “to encompass the myriad and diverse types of errors that borrowers may encounter….”
  – loss mitigation evaluation was not excluded as a “noncovered error”
Request for Information

• Servicer is required to respond to any written request for information “with respect to the borrower’s mortgage loan”

• Unlike QWR, a RFI is not limited to information “related to the servicing” of the loan

• RFI may seek:
  – information about a loan modification application
  – “servicing file”
Limitations on NOE and RFI

• Servicer is not required to comply with a NOE that it reasonably determines is duplicative or overbroad
• Servicer is not required to comply with a RFI that it reasonably determines is duplicative, confidential, overbroad, or unduly burdensome
• Servicer must notify borrower in writing of basis for determination within 5 business days after making determination
Who Can Send a NOE and RFI?

• Borrower

• Borrower’s Attorney

• Borrower’s “Agent”

  – CFPB Commentary: Servicer may require proof of authority from agent and may not treat letter as notice of error or information request until documentation received
Where to Send a NOE and RFI?

• If servicer has an “exclusive address,” it must:
  – provide written notice designating the exclusive address
  – use same address for notices of error and requests for information
  – provide the exclusive address on: any website servicer maintains for servicing of the loan; any required periodic statement or coupon book; any notices required by early intervention or loss mitigation rules

  Reg. X, 12 C.F.R. § 1024.35(c) and 1024.36(b)

• Do not send to lock box address

• Do not send (solely) to servicer’s attorney
When to Send a NOE and RFI?

• To former servicer:
  – for inquiry not related to escrow accounts
    • up to one year from the date of transfer of servicing from servicer receiving request to new servicer, or
    • up to one year from the date loan balance is paid in full
  – for inquiry related to escrow account
    • up to five years from transfer or date loan is paid in full (changed to one year after Jan. 10, 2014)

• To current servicer – any time
Servicer Obligations

• 5 business days (20 days before Jan. 10, 2014)
  – acknowledge QWR, NOE, or RFI, or
  – take requested action

• 30 business days (60 days before Jan. 10, 2014)
  – correct borrower’s account, or
  – after conducting a reasonable investigation, provide borrower written explanation as to why servicer believes account is correct, or
  – provide borrower with requested information or explanation why information is unavailable.
Servicer Obligations

- Exceptions to 30-day response period (effective Jan. 10, 2014)
  - 7 business days for notice of error asserting failure to provide accurate payoff statement
  - prior to foreclosure sale or 30 business days after receipt of notice of error, whichever is earlier, for notice of error based on 120-day pre-foreclosure waiting period or dual-track requirements
  - 10 business days for request for information seeking identity of owner of mortgage
Servicer Obligations

• Extension of 30-day response period
  
  – additional 15 day extension to respond permitted if servicer notifies borrower of extension and reason for delay before end of initial 30-day period.
  
  – But no extension permitted for
    • timely notice of error based on 120-day pre-foreclosure waiting period or dual-track requirements, and
    • request for information seeking identity of mortgage owner
Servicer Obligations

• During the response period:
  – No adverse credit reporting of payment that is subject of notice of error, for 60 days after receipt of notice. § 2605(e)(3)
  – But servicer may pursue collection remedies, including foreclosure.
    • Except for notice of error based on 120-day pre-foreclosure waiting period or dual-track requirements, provided that notice is received more than 7 days before foreclosure sale. Reg. X, § 1024.35(i)
What if Servicer Says No Error?

- Within 15 business days of receiving borrower’s request, servicer must provide at no charge the documents and information it relied upon in making a determination that no error occurred.
- May include documents showing information entered in servicer’s collection system (such as a copy of screen shot of servicer’s system).
- Servicer is not required to provide documents that contain confidential, proprietary, or privileged information.
  - If a servicer withholds documents, must notify borrower in writing within 15 business days of receipt of borrower’s request.
Servicer Limited Safe Harbor

• No liability, if:
  – Servicer corrects error within 60 days of discovery, but before
    • Action filed under § 2605(f)
    • Receipt of written notice of error from borrower

• Unintentional mistakes are actionable

• No bankruptcy or litigation “exemption”
Identity of Mortgage Loan Owner

– Servicer must respond within 10 business days to request for identity, address, and other contact information about owner or assignee of loan

– Supplements TILA § 1641(f), but provides time deadline

– Final rule treats as request for information but provides 10 day rather than 30 day response time limit – Reg. X § 1024.36(d)(2)
Servicer Fees for Responding to QWR

• Arguments made before Jan. 10, 2014:
  – No express provision in RESPA (pre-Dodd-Frank)
  – Not authorized by contract (default or legal proceeding, and reasonable and appropriate?)
  – Against remedial purpose of RESPA and public policy

• Dodd-Frank amendment prohibiting fees added to Reg. X
  – § 1024.35(h) – error resolution
  – § 1024.36(g) – information requests
Force-Placed Insurance

• Before charging for force-placed insurance, servicer must:
  – reasonably believe borrower failed to comply with contract requirement to maintain insurance
  – send two notices to borrower requesting proof of insurance
    • first notice at least 45 days before charging borrower
    • second notice no earlier than 30 days after first notice and at least 15 days before charging borrower

• Servicer must terminate force-placed insurance within 15 days after receiving proof of coverage and refund premiums for period when both policies in effect
Force-Placed Insurance

• Final rule requires servicer to pay the borrower’s existing insurance policy, if there is an escrow account, except if servicer has reasonable basis to believe:
  – borrower’s insurance is being canceled for reasons other than nonpayment, or
  – property is vacant

• FPI charges must be for services actually performed and have reasonable relationship to cost of providing the service

• Amends RESPA § 2605, so private remedy
Transfer of Servicing Rights

No change to prior rule:

– Former servicer (transferor) must notify borrower in writing 15 days before effective date of transfer

– New servicer (transferee) must provide identical notice to borrower not more than 15 days after effective date of transfer

– Notices may be combined if sent no later than 15 days before the effective date of transfer
Notice of Transfer

Effective Date of Transfer

15 Days before effective date of transfer

Former Servicer

At least 15 days before effective date of transfer

15 Days

Effective Date of Transfer

New Servicer

No more than 15 days after effective date of transfer
Content of Transfer Notice

• effective date of transfer;
• name, address, and toll-free or collect call telephone number of transferee servicer;
• toll-free or collect call telephone number for servicing transfer inquiries;
• date old servicer will stop accepting loan payments and date new servicer will begin accepting the payments;
• any information concerning the effect, if any, that transfer may have upon the terms of mortgage life, disability or other type of optional insurance;
• what action, if any, the consumer must take to maintain insurance coverage
Payment Safe Harbor

• If consumer sends payment to former servicer during sixty-day period after effective date of transfer and it is received before the due date:
  – late fee cannot be imposed
  – payment cannot be treated as late for any other purposes

• Reg. X now provides that former servicer can send payment to new servicer or return it to the borrower
Other Transfer Requirements

• Covered error for NOE includes:
  – Failing to transfer accurately and timely information relating to servicing of a borrower’s mortgage loan to a transferee servicer

• New servicer must obtain loss mitigation documents and information submitted by borrower to former servicer and comply with loss mitigation rule

• Servicer should have transfer policies and procedures consistent with § 1024.38(b)(4) (no right of action)
Duty to Make Timely Escrow Disbursements

• “Timely” disbursements out of escrow required – 12 U.S.C. § 2605(g)
• “Timely” means made on or before deadline to avoid penalty - Reg. X, § 1024.17(k)(1)
  – Special rule for taxes
• Servicer must advance funds to make timely disbursements as long as borrower’s payments are not more than 30 days overdue,
  – except duty to disburse applies for hazard insurance even if borrower payments are overdue
    - Reg. X, § 1024.17(k)(5)
New Loss Mitigation Rules

• **Early Intervention** – servicer must attempt live contact with borrower and provide written notice about available loss mitigation options

• **Continuity of Contact** – servicer must assign a single person or a team of personnel to respond to a borrower in default

• **Loss Mitigation Procedures** - servicer must evaluate borrower for all available loss mitigation options once a complete application is received, provide notice of decision and right to appeal, and comply with dual-tracking restrictions
RESPA Remedies

• Actual Damages, Costs and Attorney’s Fees
  – Must plead actual damages to avoid 12(b)(6) dismissal
  – Includes emotional distress damages

• Statutory Damages
  – Up to $2,000 per violation if “pattern or practice of noncompliance”
  – Capped in class actions at $1 mil. or 1% of servicer net worth, whichever is less
Servicers’ Duties under TILA

• Promptly Credit Payments
• Provide Periodic Mortgage Statements
• Provide Payment Change Notices
• Provide Payoff Statements
• Provide Transfer of Ownership Notices
Prompt Crediting of Payments

• Servicer must credit “periodic payment” upon receipt, unless:
  – no charge to consumer and
  – no negative credit reporting; or
  – borrower doesn’t follow instructions about how to pay

• “Periodic payment” – defined as amount sufficient to cover principal, interest, and escrow for billing cycle

• No pyramiding of late fees - same as FTC Credit Practices Rule
Prompt Crediting of Payments

• Partial payments may be placed into a suspense account and not treated as accepted
  – suspense account may be used only if authorized by contract and permitted by state law
  – when funds held in suspense account are equal to or greater than a periodic payment, they must be applied
  – must disclose on periodic statement, if provided

• Non-conforming payments (do not comply with payment instructions) are treated as accepted and must be credited within 5 days of receipt

• No small servicer or bankruptcy exemption
Periodic Statements

• Servicer must send statement for each billing cycle with the following categories of information:
  – amount due for the billing period
  – explanation of amount due including fees imposed
  – past payment breakdown
  – transaction activity
  – partial payment information
  – contact and account information, and
  – delinquency information, if applicable

• Disclosure required of payments servicer decides to hold in suspense account rather than apply to account
Periodic Statements

• **Delinquency information**: If consumer is more than 45 days delinquent, statement must include:
  - date consumer became delinquent;
  - notification of possible risks, such as foreclosure, and expenses, if delinquency is not cured;
  - account history for previous six months or period since last time account was current showing the amount remaining past due from each billing cycle;
  - notice of any loss mitigation program to which the consumer has agreed;
  - notice of whether the servicer has initiated foreclosure by making the first notice or filing required by state law;
  - total payment amount needed to bring the account current; and
  - either the CFPB list or the HUD list of homeownership counseling organizations and the HUD toll-free telephone number.
Periodic Statements

- Exemptions from coverage:
  - fixed rate mortgages if substantially similar information provided on coupon book
  - but if borrower is more than 45 days delinquent, servicer must provide delinquency information separately in writing, including an account history for the delinquency period
  - mortgage loans that are serviced by small servicers (servicers that service 5,000 or fewer mortgage loans of which servicer or affiliate is creditor or assignee) and state housing finance agencies
  - reverse mortgages and timeshare plans
  - open-end home loans such as HELOCs
Periodic Statements

- Bankruptcy exemption – statements not required for any borrower in bankruptcy or for any portion of debt discharged in bankruptcy
  - for joint borrowers, exemption applies if any of the borrowers are in bankruptcy

- No default exemption – regulation is silent on when requirement terminates
  - servicers may argue statements required only when payment is due for a billing cycle
  - but regulation contemplates that statement provided even if borrower more than 45 days delinquent
Payment Change Notices

• For ARMs, notice must be provided between 210 and 240 days before first payment is due after first rate adjustment

• Notice also must be sent between 60 and 120 days before payment at new amount is due when payment change is caused by a rate adjustment

• CFPB found no conflict with 21 day payment change notice requirement in Bankr. Rule 3002.1(b)
  – sending TILA notice earlier than required under bankruptcy law “enhances consumer protection by providing these consumers with additional time to adjust to an increase in their mortgage payments.”
Payoff Statements – TILA Request

• Payoff statements must be sent within 7 business days after written request received

• Reg. X 1024.36(a) - servicers need not treat request for payoff balances as RESPA request for information
  – RESPA ban on servicer fees for response to information requests does not apply

• Failure to provide accurate payoff statement based on a TILA request is subject to error resolution under RESPA
Payoff Statements – TILA Request

• Rule applies to all loans secured by a consumer’s dwelling, including open-end loans (HELOCs) and reverse mortgages

• CFPB refused to create a blanket exemption for loans in default, foreclosure, or bankruptcy.
  – if servicer is unable to provide a payoff statement within 7 days because loan is in bankruptcy or foreclosure, or loan is a reverse mortgage, or because of natural disasters, payoff statement must be provided within a “reasonable time,” which is not defined.
Transfer of Ownership Notices

- Applies to “covered person” (not “creditor”), which is person acquiring legal title to the debt obligation
  - applies even if only partial interest acquired (must be single disclosure if multiple parties)
  - applies even if ownership is transferred to a different legal entity based on a merger
  - does not apply to person who acquires mortgage and then transfers it within 30 days (this exception makes it difficult to determine chain of title)
  - exception for servicer if legal title to loan is assigned to the servicer “solely for the administrative convenience of the servicer in servicing the obligation”
Transfer of Ownership Notices

• Notice to be given to “primarily liable” consumer

• Timing of disclosure
  – no later than 30 days after mortgage loan transferred
  – can be either acquisition date recognized by transferee or date recognized on books by transferror
Transfer of Ownership Notices

Content of Required Disclosure:

• Loan identity
• Identity, address, and telephone number of covered person
• Acquisition date
• Agent’s contact information
• Recording location
TILA Remedies

• Actual Damages, Costs and Attorney’s Fees

• Statutory Damages: twice the finance charge, up to $4,000 for closed-end mortgage violations
  • Statutory damages are not available for violations involving the periodic statement requirement

• TILA § 1640 refers to “creditor”, which is typically the loan originator
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