

**CFPB's Proposed Mortgage Servicing Rules  
Provide Some Benefits But  
Sets Back Progress on Loan Modifications  
August 2012**

**Overview**

The Consumer Financial Protection Bureau (CFPB) has proposed nine new regulations governing the activities of mortgage servicers.<sup>1</sup> The CFPB should be congratulated for its hard work on this complicated subject and for the proposed rules which benefit homeowners. However, other proposals do affirmative harm, and even the beneficial ones have some gaps and weaknesses. Omissions in the proposed loss mitigation rules, in particular, squander an opportunity to extend recent progress in this area and also appear to roll back existing protections for homeowners facing foreclosure.

The proposed regulations do not include the following necessary provisions on loss mitigation:

- Servicers should be required to offer affordable, NPV-positive loan modifications to qualified homeowners facing hardship.
- Servicers should be required to undertake loss mitigation, including loan modification reviews and offers, prior to initiation of foreclosure.
- Homeowners seeking assistance after a foreclosure has started should have their foreclosures paused while their files are reviewed, and if needed, appealed, in a timely fashion.
- The final regulation should retain the catch-all provision in the Real Estate Settlement Procedure Act (RESPA) that allows homeowners to challenge abuses by servicers that are not specifically listed in the regulation. Confining RESPA's protections to a closed list of servicer acts would mean that many abuses would lack these protections. The specific list proposed is a significant reduction of protections from those provided in the current law, which includes a general ground to challenge servicers' errors.

The CFPB's failure to require meaningful loss mitigation is a retreat from responsible, proven steps to save homes. Substantive loan modification standards—including net present value (NPV) evaluations—are now applicable to most of the mortgage market through the federal Home Affordable Modification Program (HAMP), the federal Attorneys General (AG) settlement with five large bank servicers, and the Servicing Alignment Initiative for Fannie Mae and Freddie Mac. However, many of these will expire and none of them apply to the entire industry. The CFPB regulations on loss mitigation should advance consumer protections for homeowners, not set them back. Further discussion of needed changes to the loss mitigation proposal follows, along with discussion of the whole range of issues covered in the CFPB's proposed regulations on mortgage servicing.

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<sup>1</sup> [http://files.consumerfinance.gov/f/201208\\_cfpb\\_tila\\_proposed\\_rules.pdf](http://files.consumerfinance.gov/f/201208_cfpb_tila_proposed_rules.pdf), and [http://files.consumerfinance.gov/f/201208\\_cfpb\\_respa\\_proposed\\_rules.pdf](http://files.consumerfinance.gov/f/201208_cfpb_respa_proposed_rules.pdf).

## Analysis of Specific Features of the Proposal

- 1. Loss mitigation procedures.** (Proposed 12 C.F.R. § 1024.41.) This proposed regulation provides that “servicers that offer loss mitigation options in the “ordinary course of business” to borrowers would be required to implement procedures to process those evaluations. Applications must be reasonably evaluated, and there are time limits by which the servicer must provide information and respond before proceeding to a foreclosure sale. For example, within 30 days of receiving a borrower’s complete application, the servicer would be required to evaluate the borrower for all available options, and then notify the borrower of the reasons for the decision. However, the proposed rule would take a major step backward by permitting dual track (proceeding with the foreclosure process while evaluating the homeowner for loss mitigation). As it stands, this provision represents a major retreat from current law and many existing requirements.

*The proposed rule fails to implement basic lessons of the recent foreclosure crisis. Seven issues must be improved in the final rules:*

- a) All servicers must be required to offer affordable, NPV-positive loan modifications to qualified homeowners facing hardship.*
  - b) Specific home saving strategies should be mandated, with affordable loan modifications ranked first, followed by a designated order of alternative strategies.*
  - c) Servicers should be required to undertake loss mitigation, including loan modification reviews and offers, prior to initiation of foreclosure.*
  - d) Homeowners seeking assistance after a foreclosure has started should have their foreclosures paused while their files are reviewed, and if needed, appealed, in a timely fashion.*
  - e) Successful trial loan modifications must be automatically converted to permanent modifications by the mortgage servicer.*
  - f) Notification to homeowners regarding their status must be provided in writing.*
  - g) The error resolution procedures should include a basis for a homeowner to assert an error for the servicer’s failure to evaluate for each strategy, as well as a general catch-all, which will allow homeowners the ability to challenge servicer abuses in real time to save their homes.*
- 2. Error resolution and information requests.** (Proposed 12 C.F.R. §§ 1024.35 and 1024.36.) The Dodd Frank Act sets a shorter time period for servicers to respond to Qualified Written Requests (QWRs), which are used by homeowners for a broad array of servicer inquiries, and requires that the response be without charge. The proposed regulation accomplishes these goals for the newly defined “requests for information” and the error resolution procedures.. The problem is that, unlike current regulation, the proposed regulation sets out only nine specific grounds under which a homeowner can request error resolution from the servicer, leaving homeowners without protections if they make such requests on other grounds. The lack of a general catch-all provision fails to follow the directive in RESPA itself, which requires error resolution for a servicers’ failure to timely respond to a “borrower’s request to avoid foreclosure or other standard servicer’s duties.” (12 U.S.C. § 2605 (k)(1)(C)), and it excludes key issues. For example, the proposed regulation would not

permit a borrower to request error resolution based on an improper denial of a loan modification application.

*The error resolution procedure must be expanded to include a general ground that covers any borrower request to avoid foreclosure or address other “standard servicer dut[y]”. Without this change, this provision represents a retreat from current legal consumer protections – when additional mandates are clearly necessary to prevent inappropriate foreclosures.*

3. **Information management policies and procedures.** (Proposed 12 C.F.R. § 1024.38.) The CFPB proposal would require servicers to establish reasonable information management policies and procedures. Accurate document retention and servicing file requirements are specified, and the servicer is required to provide a homeowner with the entire “servicer file” upon request, which includes the note, the mortgage, a schedule of all payments, and collection records. There is a safe harbor from legal liability when a servicer does not engage in a “pattern or practice” of meeting the objectives of the section. Surprisingly, however, there are no requirements for verification of the right to foreclose. Given the massive problems with servicers’ record keeping, this seems the most obvious of omissions.

*This provision should contain no safe harbor for servicer non-compliance and should affirmatively require servicers to provide borrowers with verification of the servicer’s right to foreclose before initiating one.*

4. **Early intervention with delinquent borrowers.** (Proposed 12 C.F.R. § 1024.39.) Servicers would be required to make good faith efforts to notify delinquent borrowers of their loss mitigation options and provide information to the borrower about the foreclosure process. The required early intervention efforts are good, but these efforts do not require a notice explaining the various loss mitigation strategies actually offered by the servicer and how to apply for them.

*This provision needs to include a specific requirement that servicers provide detailed information about all of the loss mitigation strategies employed by the servicer, the eligibility requirements, and the steps required for homeowners to apply for these options.*

5. **Continuity of contact with delinquent borrowers.** (Proposed 12 C.F.R. § 1024.40.) Servicers would be required to provide delinquent borrowers with access to dedicated personnel to assist them with loss mitigation options where applicable. This is a good requirement, yet critical protections are omitted.

*Servicers should be required to provide an electronic portal for communications with borrowers or their designated representatives, particularly for delivering documentation for a loan modification request. Non-electronic conventional application procedures should still be available as well.*

6. **Periodic billing statements.** (Proposed 12 C.F.R. § 1026.41.) Servicers of closed-end residential mortgage loans will be required to send a periodic statement for each billing cycle, unless the loan is a fixed-rate loan and a coupon book is provided.

*This proposal follows the statutory requirements and will be beneficial to homeowners.*

- 7. Adjustable-rate mortgage interest-rate adjustment notices.** (Proposed 12 C.F.R. § 1026.20.) Servicers will have to provide a consumer whose mortgage has an adjustable rate with a notice 60 to 120 days before an adjustment that causes the payment to change, as well as an earlier notice.

*This proposal also follows the statutory requirements and will be beneficial to homeowners.*

- 8. Prompt payment crediting and payoff payments.** (Proposed 12 C.F.R. § 1026.36(c).) Servicers will be required to promptly credit “full payments” from borrowers. Unfortunately, this provision fails to provide essential protections for daily accrual loans and appears to permit a servicer to assess a late fee for failure to pay the escrow portion of a payment. The language also supports use of a suspense account, where partial payments are held indefinitely, without mandating how payments from those accounts should be applied.

*This regulation should a) require immediate application of payments on daily accrual loans, b) only permit late fees when the principal and interest portion of the payment is late, and c) mandate that payments from suspense accounts be made according to the terms of the contract and the law.*

- 9. Force-placed insurance.** (Proposed 12 C.F.R. § 1024.37.) Servicers would not be permitted to charge a borrower for force-placed (mandatory) insurance coverage unless the servicer has a reasonable basis to believe the borrower’s insurance was cancelled for a reason other than non-payment of the premium, and has provided required notices. Additional notices are required when force-placed insurance will be provided. Most importantly, servicers must pay the borrower’s existing insurance policy rather than force-placed insurance if there is an escrow account and the reason for policy cancellation is nonpayment.

*This proposal would improve protections for consumers but it should also apply to homeowners without escrow accounts.*

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