

Servicing Transfers During Loss Mitigation

A. Privately Enforceable RESPA Provisions

1. The requirements for responding to a loss mitigation application generally continue to apply even after the servicing of the borrower's loan has been transferred.
2. Although a servicer is required to comply with section 1024.41 only for a single complete loss mitigation application for a borrower's mortgage loan under Reg. X, 12 C.F.R. § 1024.41(i), a transferee servicer is required to comply with the requirements of section 1024.41 regardless of whether a borrower received an evaluation of a complete loss mitigation application from a transferor servicer. *See* Official Interpretations to Reg. X, ¶ 41(i)-1.
3. Documents and information transferred from a transferor servicer to a transferee servicer may constitute a loss mitigation application and may require a transferee servicer to comply with the section 1024.41 loss mitigation requirements. *See* Official Interpretations to Reg. X, ¶ 41(i)-1.
4. In addition, when a mortgage is transferred, the transferee servicer must obtain any documents and information submitted by the borrower to the transferor servicer in connection with the loss mitigation application. If the borrower is in process of having a complete application evaluated when the mortgage is transferred, the transferee servicer should "continue the evaluation to the extent practicable." *See* Official Interpretations to Reg. X, ¶ 41(i)-2; *Dent v. Inv. Corp. of Am.*, 2015 WL 9694807, at *5 (E.D. Mich. Dec. 23, 2015) ("Mortgage servicers thus may not escape their duty to address loan modification requests by simply noting that such requests were made to a prior servicer."). *See also* Reg. X, 12 C.F.R. § 1024.38(b)(4).
5. For purposes of the time deadlines and other requirements in sections 1024.41(e)(1), 1024.41(f), 1024.41(g), and 1024.41(h), a transferee servicer must consider documents and information received from a transferor servicer that amount to a complete loss mitigation application to have been received by the transferee servicer as of the date such documents and information were provided to the transferor servicer. *See* Official Interpretations to Reg. X, ¶ 41(i)-2.

B. Servicing Transfer Requirements under RESPA § 1024.38

1. Regulation X section 1024.38 requires a servicer to maintain policies and procedures that are reasonably designed to achieve "objectives" in five categories: (1) accessing and providing timely and accurate information; (2) properly evaluating loss mitigation applications; (3) facilitating oversight of, and compliance by, service providers; (4) facilitating transfer of information during servicing transfers; and (5) informing borrowers of the written error resolution and information request procedures. Reg. X, 12 C.F.R. § 1024.38.
2. None of the requirements imposed by section 1024.38 are privately enforceable. However,

they establish baseline requirements for challenging servicer's noncompliance through RESPA's error resolution procedure.

3. Transferor servicers must have policies and procedures to ensure that documents and information relating to a transferred mortgage loan are transferred to the new servicer in a timely and accurate manner. Reg. X, 12 C.F.R. § 1024.38(b)(4)(i). *See* Guillermo v. Caliber Home Loans, Inc., 2015 WL 4572398 (N.D. Cal. July 29, 2015).
4. A transferee servicer must identify necessary documents or information that may not have been transferred by a transferor servicer and obtain such documents from the transferor servicer. Reg. X, 12 C.F.R. § 1024.38(b)(4)(ii).
5. With respect to electronic documents, the CFPB commentary provides : “A transferor servicer's policies and procedures may provide for transferring documents and information electronically, provided that the transfer is conducted in a manner that is reasonably designed to ensure the accuracy of the information and documents transferred and that enables a transferee servicer to comply with its obligations to the owner or assignee of the loan and with applicable law. For example, a transferor servicer must have policies and procedures reasonably designed to ensure that data can be properly and promptly boarded by a transferee servicer's electronic systems and that all necessary documents and information are available to, and can be appropriately identified by, a transferee servicer.” *See* Official Interpretations to Reg. X, ¶ 38(b)(4)(i)-1.
6. The CFPB commentary also addresses the loss mitigation documents that should be transferred: “A transferor servicer's policies and procedures must be reasonably designed to ensure that the transfer includes any information reflecting the current status of discussions with a borrower regarding loss mitigation options, any agreements entered into with a borrower on a loss mitigation option, and any analysis by a servicer with respect to potential recovery from a non-performing mortgage loan, as appropriate.” *See* Official Interpretations to Reg. X, ¶ 38(b)(4)(i)-2.
7. The CFPB commentary discusses the obligation on the transferee servicer to obtain missing loss mitigation documents: “A transferee servicer must have policies and procedures reasonably designed to ensure, in connection with a servicing transfer, that the transferee servicer receives information regarding any loss mitigation discussions with a borrower, including any copies of loss mitigation agreements. Further, the transferee servicer's policies and procedures must address obtaining any such missing information or documents from a transferor servicer before attempting to obtain such information from a borrower. For example, assume a servicer receives documents or information from a transferor servicer indicating that a borrower has made payments consistent with a trial or permanent loan modification but has not received information about the existence of a trial or permanent loan modification agreement. The servicer must have policies and procedures reasonably designed to identify whether any such loan modification agreement exists with the transferor servicer and to obtain any such agreement from the transferor servicer.” *See* Official Interpretations to Reg. X, ¶ 38(b)(4)(ii)-1.