

## RESPA to the Rescue

### *How to Stop a Foreclosure Sale by Sending a Notice of Error*

What can you do when the company servicing your mortgage loan has refused to listen to your complaints, denied your application for loss mitigation relief, and scheduled a foreclosure sale that is only a matter of weeks away?

Don't panic! There is power in your pen if you know how to write a "notice of error" that conforms to the requirements of the Real Estate Settlement Procedures Act ("RESPA") and its implementing Regulation X.<sup>1</sup>

Under certain conditions, a borrower or the borrower's agent can stop a foreclosure by sending a dual tracking notice of error provided the servicer receives the correspondence more than 7 days before a scheduled foreclosure sale. Upon receipt of a notice of error, the servicer must respond prior to the date of a foreclosure sale or within 30 business days after the servicer receives the notice of error, whichever is earlier.

The information below provides important details regarding your rights and remedies under Real Estate Settlement Procedures Act it also explains how to pack your notice of error with specific facts and citations to the law that the servicer cannot ignore.

For those of you who don't have the time to study the rules and regulations, McDonnell Property Analytics can handle the administrative process for you. Please give us a call at: 774-323-0892; or send us an e-mail at [marie@mcdonnellanalytics.com](mailto:marie@mcdonnellanalytics.com).

For more information on McDonnell Property Analytics' products and services, visit us at: <http://www.mcdonnellanalytics.com/>.

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<sup>1</sup> See Regulation X, Subpart C – Mortgage Servicing, which begins at 12 C.F.R. § 1024.1 and concludes with § 1024.41.

## New Rules Specify Procedures and Not the Substance of Offered Loss Mitigation Assistance

In drafting the loss mitigation requirements in Regulation X § 1024.41, the Consumer Financial Protection Bureau (“CFPB”) drew a distinction between “substantive” and “procedural” regulation of servicers’ loss mitigation activities.<sup>2</sup> The regulation expressly states that nothing in § 1024.41 imposes a duty on a servicer to provide any borrower with a specific loss mitigation option.<sup>3</sup> The CFPB leaves to the servicer the discretion to approve or disapprove an option.<sup>4</sup> Instead, the CFPB has mandated a procedural framework within which the evaluation of loss mitigation options must take place.<sup>5</sup>

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Borrowers have a private right of action to seek remedies for violations of the procedural requirements in § 1024.41, such as the failure to give required notices, failure to evaluate applications in accordance with required time frames, and the failure to refrain from foreclosure during certain periods of the review process.<sup>6</sup> However, borrowers do not have a private right of action under the CFPB’s rules to enforce the terms of an agreement between a servicer and an owner or assignee of a mortgage concerning the evaluation of borrowers for loss mitigation options.<sup>7</sup>

If the servicer fails to comply with the substantive standards of an applicable loss mitigation program, the CFPB regulatory scheme does not preclude borrowers from enforcing substantive rights under other state or federal laws.<sup>8</sup> It may also be possible for borrowers to use

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<sup>2</sup> See Section-by-Section Analysis, § 1024.41, 78 Fed. Reg. 10,816/-/18 (Feb. 14, 2013).

<sup>3</sup> Reg. X, 12 C.F.R. § 1024.41(a) (effective Jan. 10, 2014).

<sup>4</sup> See Official Bureau Interpretation, Supplement 1 to Part 1024, ¶ 41(c)(1)-1 (effective Jan. 10, 2014; “The conduct of a servicer’s evaluation with respect to any loss mitigation option is in the sole discretion of a servicer.”).

<sup>5</sup> 12 C.F.R. § 1024.41(a). See Section-by-Section Analysis, § 1024.41, 78 Fed. Reg. 10,818 (Feb. 14, 2013) (“The Bureau believes that this framework provides an appropriate mortgage servicing standard; servicers must implement the loss mitigation programs established by owners or assignees of mortgage loans and borrowers are entitled to receive certain protections regarding the process (but not the substance) of those evaluations.”).

<sup>6</sup> The CFPB relied on its authority under sections 6(j)(3), 6(k)(1)(C), 6(k)(1)(E), and 19(a) of RESPA to establish the loss mitigation procedures in § 1024.41. The CFPB also relied upon the general rulemaking authority under § 1022(b) of the Dodd-Frank Act to carry out the consumer protection purposes of RESPA. See Section-by-Section Analysis, § 1024.41, 78 Fed. Reg. 10,822 (Feb. 14, 2013).

<sup>7</sup> See Section-by-Section Analysis, § 1024.41, 78 Fed. Reg. 10,818 (Feb. 14, 2013).

<sup>8</sup> Reg. X, 12 C.F.R. § 1024.41(a) (effective Jan. 10, 2014; “Nothing in § 1024.41 should be construed to ... eliminate any such right that may exist pursuant to applicable law.”). See also Section-by-Section Analysis, § 1024.41, 78 Fed. Reg. 10,822 (Feb. 14, 2013). The CFPB’s analysis specifically notes the consistency between appeal remedies under CFPB rules and remedies available under the California Homeowner Bill of Rights. *Id.* at 10,835.

the error correction procedures under § 1024.35 to address a servicer's failure to correctly evaluate a borrower for a loss mitigation option.<sup>9</sup>

### Notice of Error of Dual Tracking Violations<sup>10</sup>

The Real Estate Settlement Procedures Act permits the borrower to demand that a mortgage servicer cancel or postpone a foreclosure sale when the servicer has initiated the foreclosure while still evaluating the borrower for loss mitigation options or during the 120-day pre-foreclosure waiting period. The borrower or the borrower's agent may assert this right by sending a notice of error to the servicer. Under the Regulation X provision implementing 12 U.S.C. § 2605(e), a written inquiry that asserts an error by the servicer with respect to the borrower's mortgage loan is referred to as "notice of error." To qualify as this type of notice of error, the notice must assert that the servicer either:

1. initiated a foreclosure before the 120th day of delinquency in violation of Regulation X § 1024.41 (f) or (j), which is a covered error under Regulation X § 1024.35(b)(9), or
2. moved for a foreclosure judgment or conducted a foreclosure sale in violation of Regulation X § 1024.41(g) or (j), which is a covered error under Regulation X § 1024.35(b)(10).

For most notices of error, a servicer must acknowledge the request within 5 business days of receipt, and respond within 30 business days of receipt.<sup>11</sup> However, if the borrower or borrower's agent sends a dual tracking notice of error that is received by the servicer more than 7 days before a scheduled foreclosure sale, the servicer must respond prior to the date of a foreclosure sale or within 30 business days after the servicer receives the notice of error, whichever is earlier.

Thus, if the servicer receives this notice of error more than 7 days before a scheduled foreclosure sale, the servicer may have to cancel or postpone the sale in order to comply with the error notice response requirements.<sup>12</sup> If the servicer receives this notice of error 7 or less days before a scheduled foreclosure sale, a servicer is not required to comply with the response obligations but must make a good faith attempt to respond to the borrower, orally or in writing,

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<sup>9</sup> See NCLC *eReports*, Dec. 2013, No. 4; NCLC *Foreclosures*, § 9.2.2.2.3 (4th ed. and 2013 Supp.).

<sup>10</sup> For additional information on this topic, consult the National Consumer Law Center's article titled, *Stopping Foreclosures with the RESPA Servicing Rules* found at: [https://www.nclc.org/images/pdf/conferences\\_and\\_webinars/mortgage-conference/2016/material/StoppingForeclosures.pdf](https://www.nclc.org/images/pdf/conferences_and_webinars/mortgage-conference/2016/material/StoppingForeclosures.pdf); or purchase their consumer law practice manual titled, *Foreclosures and Mortgage Servicing* at: <https://library.nclc.org/bookstore>.

<sup>11</sup> Reg. X, 12 C.F.R. § 1024.35(d) and (e).

<sup>12</sup> Reg. X, 12 C.F.R. § 1024.35(e)(3)(i)(B) and § 1024.35(f)(2); Official Bureau Interpretation, Supplement 1 to Part 1024, ¶ 35(e)(3)(i)(B)-1.

and either correct the error or state the reason the servicer has determined that no error has occurred.<sup>13</sup>

## 12 C.F.R. § 1024.35 – Error resolution procedures<sup>14</sup>

Pursuant to § 1024.35(b), *Scope of error resolution*, for purposes of this section, the term “error” refers to the following categories of covered errors:

1. Failure to accept a payment that conforms to the servicer’s written requirements for the borrower to follow in making payments.
2. Failure to apply an accepted payment to principal, interest, escrow, or other charges under the terms of the mortgage loan and applicable law.
3. Failure to credit a payment to a borrower’s mortgage loan account as of the date of receipt in violation of 12 CFR 1026.36(c)(1).
4. Failure to pay taxes, insurance premiums, or other charges, including charges that the borrower and servicer have voluntarily agreed that the servicer should collect and pay, in a timely manner as required by § 1024.34(a), or to refund an escrow account balance as required by § 1024.34(b).
5. Imposition of a fee or charge that the servicer lacks a reasonable basis to impose upon the borrower.
6. Failure to provide an accurate payoff balance amount upon a borrower’s request in violation of section 12 CFR 1026.36(c)(3).
7. Failure to provide accurate information to a borrower regarding loss mitigation options and foreclosure as required by § 1024.39.
8. Failure to transfer accurately and timely information relating to the servicing of a borrower’s mortgage loan account to a transferee servicer.
9. Making the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process in violation of § 1024.41(f) or (j).
10. Moving for foreclosure judgment or order of sale, or conducting a foreclosure sale in violation of § 1024.41(g) or (j).
11. Any other error relating to the servicing of a borrower’s mortgage loan.

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<sup>13</sup> Reg. X, 12 C.F.R. § 1024.35(f)(2).

<sup>14</sup> See Official Bureau Interpretation: <https://www.consumerfinance.gov/eregulations/1024-35/2015-18239#1024-35>.

Notices of error that fall under categories nine (#9), ten (#10), and possibly eleven (#11)<sup>15</sup> will stop a foreclosure sale providing that the servicer receives the correspondence more than 7 days before a scheduled foreclosure sale. Upon receipt of a notice of error, the servicer must respond prior to the date of a foreclosure sale or within 30 business days after the servicer receives the notice of error, whichever is earlier.

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<sup>15</sup> See Official Bureau Interpretation: [https://www.consumerfinance.gov/eregulations/sxs/1024-35-b-11/2013-01248?from\\_version=2015-18239](https://www.consumerfinance.gov/eregulations/sxs/1024-35-b-11/2013-01248?from_version=2015-18239).

New § 1024.35(b)(11) includes a catch-all that applies error resolution procedures to errors relating to the servicing of a borrower's mortgage loan.

Both consumer groups and industry commented regarding whether to include a servicer's failure to correctly evaluate a borrower for a loss mitigation option as an error. One consumer group urged the Bureau to do so, asserting that because the Dodd-Frank Act requires servicers to take timely action to correct errors relating to avoiding foreclosure, the plain language of the statute suggests that borrowers should be able to assert errors related to loss mitigation before they get to the point of a foreclosure sale. The commenter further contended that the appeals process set forth in proposed § 1024.41(h) will not hold servicers sufficiently accountable for uncorrected errors.

As noted in the proposal, the Bureau believes that the appeals process set forth in § 1024.41(h) provides an effective procedural means for borrowers to address issues relating to a servicer's evaluation of a borrower for a loan modification program. For this reason, and the reasons stated below with respect to loss mitigation practices, the Bureau declines to add a servicer's failure to correctly evaluate a borrower for a loss mitigation option as a covered error in the final rule.

The Bureau is, however, adding new § 1024.35(b)(11), which includes a catch-all that defines as an error subject to the requirements of § 1024.35 errors relating to the servicing of a borrower's mortgage loan. The Bureau believes that any error related to the servicing of a borrower's mortgage loan also relates to standard servicer duties. The Bureau also agrees with consumer advocacy commenters that the mortgage market is fluid and constantly changing and that it is impossible to anticipate with certainty the precise nature of the issues that borrowers will encounter. The Bureau, therefore, believes that it is necessary and appropriate to achieve the purposes of RESPA to craft error resolution procedures that are sufficiently flexible to adapt to changes in the mortgage market and to encompass the myriad and diverse types of errors that borrowers may encounter with respect to their mortgage loans. At the same time, the Bureau believes the costs and burdens created by having a more expansive definition of error are significantly mitigated because, as discussed above, under the final rule the requirements under § 1024.35 apply only to written notices of error. Moreover, the final rule adopts a process that is consistent with the existing process for responding to qualified written requests under RESPA section 6, which likewise includes a catch-all for servicing-related errors. The Bureau declines to add additional covered errors beyond the catch-all.

## 12 C.F.R. § 1024.35(e) –Response to Notice of Error<sup>16</sup>

12 C.F.R. § 1024.35 – Error resolution procedures, states in relevant part:

- (e) Response to notice of error - (1) Investigation and response requirements - (i) In general. Except as provided in paragraphs (f) and (g) of this section, a servicer must respond to a notice of error by either:
  - (A) Correcting the error or errors identified by the borrower and providing the borrower with a written notification of the correction, the effective date of the correction, and contact information, including a telephone number, for further assistance; or
  - (B) Conducting a reasonable investigation and providing the borrower with a written notification that includes a statement that the servicer has determined that no error occurred, a statement of the reason or reasons for this determination, a statement of the borrower's right to request documents relied upon by the servicer in reaching its determination, information regarding how the borrower can request such documents, and contact information, including a telephone number, for further assistance.

Accordingly, certain Notices of Error sent pursuant to the Real Estate Settlement Procedures Act, require a shortened response period as set forth in Regulation X, 12 C.F.R. § 1024.35(e)(3)(i)(B),<sup>17</sup> which mandates that the servicer respond: “Prior to the date of a

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<sup>16</sup> See Official Bureau Interpretation: [https://www.consumerfinance.gov/eregulations/sxs/1024-35-e/2013-01248?from\\_version=2015-18239](https://www.consumerfinance.gov/eregulations/sxs/1024-35-e/2013-01248?from_version=2015-18239).

<sup>17</sup> See Official Bureau Interpretation: [https://www.consumerfinance.gov/eregulations/sxs/1024-35-e-3-i/2013-01248?from\\_version=2015-18239](https://www.consumerfinance.gov/eregulations/sxs/1024-35-e-3-i/2013-01248?from_version=2015-18239).

### SHORTENED TIME LIMIT TO CORRECT CERTAIN ERRORS RELATING TO FORECLOSURE

Proposed § 1024.35(e)(3)(i)(B) would have provided that if a borrower submits a notice of error asserting, under § 1024.35(b)(9), that a servicer has failed to suspend a foreclosure sale, a servicer would be required to investigate and respond to the notice of error by the earlier of 30 days (excluding legal public holidays, Saturdays, and Sundays) or the date of a foreclosure sale. Proposed comment 35(e)(3)(i)(B)-1 would have clarified that a servicer could maintain a 30-day timeframe to respond to the notice of error if it cancels or postpones the foreclosure sale and a subsequent sale is not scheduled before the expiration of the 30-day deadline.

The Bureau believes the shortened timeframe is appropriate because, given the complexity of the process, servicers may mistakenly fail to suspend a foreclosure. Thus, the Bureau believes borrowers may reasonably benefit from the opportunity to have servicers investigate and respond to notices of error regarding such failures before the foreclosure sale. The Bureau believes that a timeframe that allowed a servicer to investigate and respond to the notice of error after the date of a foreclosure sale would cause irreparable harm to a borrower. Accordingly, the Bureau is adopting §

foreclosure sale or within 30 days (excluding legal public holidays, Saturdays, and Sundays) after the servicer receives the notice of error, whichever is earlier, for errors asserted under paragraphs (b)(9) and (10) of this section.”

## Servicer’s Duties upon Receipt of an “Incomplete” Application

Borrowers seeking loss mitigation often have to deal with multiple requests by servicers for information and documents (including documents previously submitted) over extended periods of time without ever getting confirmation that their applications are complete. The CFPB attempted to address this problem by adopting § 1024.41(b)(2), which imposes distinct obligations upon a servicer to respond to an application, whether or not it is complete.<sup>18</sup> These obligations extend over the post-default period up to forty-five days before a scheduled foreclosure sale date.<sup>19</sup>

When initially made aware of a communication that can reasonably be deemed to be an application for loss mitigation, the servicer must promptly conduct a review to determine whether the communication represents a complete or an incomplete application.<sup>20</sup> If the servicer determines that the application is complete, it must send the borrower a notice acknowledging that the application is complete within five business days of receipt of the application.<sup>21</sup>

If the servicer deems the application to be “incomplete” for any reason, the regulation requires two actions by the servicer. First, the servicer must act affirmatively to complete the application. The servicer must exercise “reasonable diligence” to obtain any documents and information it claims to require to complete the application.<sup>22</sup> Second, the regulation mandates that the servicer provide a written notice to the borrower describing the documents and information needed to complete the application.<sup>23</sup> This notice must include a “reasonable date” by which the borrower should submit the missing documents and information.<sup>24</sup> The servicer must send the notice within five business days of receipt of an application it deems incomplete.<sup>25</sup>

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1024.35(e)(3)(i)(B) and comment 35(e)(3)(i)(B)-1 as proposed, except for minor technical amendments and that the Bureau has revised § 1024.35(e)(3)(i)(B) to reference both § 1024.35(b)(9) and (10).

<sup>18</sup> Reg. X, 12 C.F.R. § 1024.41(b)(2) (effective Jan. 10, 2014).

<sup>19</sup> Reg. X, 12 C.F.R. § 1024.41(b)(2)(i) (effective Jan. 10, 2014).

<sup>20</sup> Reg. X, 12 C.F.R. § 1024.41(b)(2)(i)(A) (effective Jan. 10, 2014).

<sup>21</sup> Reg. X, 12 C.F.R. § 1024.41(b)(2)(i)(B) (effective Jan. 10, 2014).

<sup>22</sup> Reg. X, 12 C.F.R. § 1024.41(b)(1) (effective Jan. 10, 2014).

<sup>23</sup> Reg. X, 12 C.F.R. § 1024.41(b)(2)(i)(B) (effective Jan. 10, 2014).

<sup>24</sup> Reg. X, 12 C.F.R. § 1024.41(b)(2)(ii) (effective Jan. 10, 2014).

<sup>25</sup> Reg. X, 12 C.F.R. § 1024.41(b)(2)(i)(B) (effective Jan. 10, 2014).

## Real Estate Settlement Procedures Act (“RESPA”) Defined<sup>26</sup>

The Real Estate Settlement Procedures Act of 1974 (RESPA) (12 U.S.C. 2601 et seq.) (the Act) became effective on June 20, 1975. The Act requires lenders, mortgage brokers, or servicers of home loans to provide borrowers with pertinent and timely disclosures regarding the nature and costs of the real estate settlement process. The Act also prohibits specific practices, such as kickbacks, and places limitations upon the use of escrow accounts.

The Department of Housing and Urban Development (HUD) originally promulgated Regulation X which implements RESPA. However, the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203 (July 10, 2010) (Dodd-Frank Act) granted rule-making authority under RESPA to the Consumer Financial Protection Bureau (CFPB) and, with respect to entities under its jurisdiction, generally granted authority to the CFPB to supervise for and enforce compliance with RESPA and its implementing regulations.

In December 2011, the CFPB restated HUD’s implementing regulation at 12 CFR Part 1024 (76 Fed. Reg. 78978) (December 20, 2011). On January 17, 2013, the CFPB issued a final rule to amend Regulation X (78 Fed. Reg. 10695) (February 14, 2013). The final rule implemented certain provisions of Title XIV of the Dodd-Frank Act and included substantive and technical changes to the existing regulations.

Substantive changes included modifying the servicing transfer notice requirements and implementing new procedures and notice requirements related to borrowers’ error resolution requests and information requests. The amendments also included new provisions related to escrow payments, force-placed insurance, general servicing policies, procedures, and requirements, early intervention, continuity of contact, and loss mitigation.

These amendments became effective as of January 10, 2014, and are publicly available at: <https://www.gpo.gov/fdsys/pkg/CFR-2017-title12-vol8/xml/CFR-2017-title12-vol8-part1024.xml>.

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<sup>26</sup> See CFPB Consumer Laws and Regulations: Regulation X, Real Estate Settlement Procedures Act: [http://files.consumerfinance.gov/f/201503\\_cfpb\\_regulation-x-real-estate-settlement-procedures-act.pdf](http://files.consumerfinance.gov/f/201503_cfpb_regulation-x-real-estate-settlement-procedures-act.pdf).