LITIGATION EXPOSURE UNDER THE 2013 DODD-FRANK MORTGAGE SERVICING REGULATIONS

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I. Introduction

In response to the recent financial crisis, Congress passed the Dodd-Frank Wall Street and Consumer Protection Act of 2011 ("Dodd-Frank").[1] Congress focused much of its attention in Dodd-Frank on the mortgage servicing industry due to perceptions that the industry failed to do its part to minimize the impact of the collapse of the U.S. housing market.[2] Congress sought to remedy those issues through a series of substantial amendments to the Truth in Lending Act ("TILA")[3] and Real Estate Settlement Procedures Act ("RESPA").[4]

Created by Dodd-Frank, the Consumer Financial Protection Bureau ("CFPB") acquired primary regulatory authority to implement Congress's amendments to TILA and RESPA. On July 10, 2013, the CFPB issued mortgage rules under Regulation Z and Regulation X pursuant to its authority under Dodd-Frank (the "Mortgage Rules").[5] The CFPB further amended the

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[1] HR 4173, Pub. L. No. 111-203, 124 Stat. 1376 (July 21, 2010).

[2] Bureau of Consumer Financial Protection, Mortgage Servicing Rules under the Real Estate Settlement Procedures Act (Regulation X) and Truth in Lending Act (Regulation Z), 78 Fed. Reg. 10902, 10905 (Feb. 14, 2013) (to be codified at 12 C.F.R. pts. 1024, 1026) (specifically the section entitled "[o]verview of the Mortgage Servicing Market and Market Failures).

[3] 15 U.S.C. §§1601, *et seq.*

[4] 12 U.S.C. §§2602, *et seq.*

[5] Bureau of Consumer Financial Protection, Mortgage Servicing Rules under the Real Estate Settlement Procedures Act (Regulation X) and Truth in Lending Act (Regulation Z), 78 Fed. Reg. 10696 & 10902 (Feb. 14, 2013) (to be codified at 12 C.F.R. pts. 1024, 1026).

Mortgage Rules on September 15, 2013[6] and October 1, 2013.[7] The result is a super regulation which keeps the original framework of Regulations X and Z, but adds entirely new provisions addressing eight major topics: (1) ability to repay and qualified mortgages; (2) the 2013 Homeownership and Equity Protection Act ("HOEPA"); (3) loan originator compensation; (4) Equal Credit Opportunity Act ("ECOA") valuation; (5) TILA Higher-Priced Mortgage Loan ("HPML") appraisals; (6) escrow requirements for HPMLs; (7) TILA servicing; and (8) RESPA servicing.[8] Most of these regulations become effective on January 10, 2014, and will undoubtedly work fundamental changes in the mortgage servicing and origination industries.[9]

With so many dramatic changes implemented at once, the Mortgage Rules will present serious compliance issues. Since most provisions are also privately actionable, litigation exposure can be expected when compliance efforts fail. This paper focuses primarily on the potential for litigation under the TILA and RESPA servicing regulations, specifically those provisions that govern responses to borrower inquiries and requests for loss mitigation. Additionally, special attention will be paid to how these regulations and others interface with the foreclosure process.

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[6] Bureau of Consumer Financial Protection, Mortgage Servicing Rules under the Real Estate Settlement Procedures Act (Regulation X) and Truth in Lending Act (Regulation Z), 78 Fed. Reg. 44686 (July 24, 2013) (to be codified at 12 C.F.R. pts. 1024, 1026).

[7] Bureau of Consumer Financial Protection, Mortgage Servicing Rules under the Real Estate Settlement Procedures Act (Regulation X) and Truth in Lending Act (Regulation Z), 78 Fed. Reg. 60382 (Oct. 1, 2013) (to be codified at 12 C.F.R. pts. 1024, 1026).

[8] Bureau of Consumer Financial Protection, Mortgage Servicing Rules under the Real Estate Settlement Procedures Act (Regulation X) and Truth in Lending Act (Regulation Z), 78 Fed. Reg. 39902 (July 2, 2013) (to be codified at 12 C.F.R. pts. 1024, 1026).

[9] *Id*.

II. Potential Litigation Exposure Under the New Mortgage Servicing Regulations Governing Responses to Borrower Inquiries.

As amended, Regulations X and Z contain three new provisions impacting servicer responses to borrower inquires. While Dodd-Frank made certain changes directly to RESPA's existing framework for a Qualified Written Request ("QWR"),[10] the effect of the Notice of Error,[11] Information Request,[12] and Payoff Request[13] regulations will increase the number and type of written inquiries that trigger a legal obligation on the part of the servicer to respond in a specified time and manner. Failing to do so will potentially create litigation exposure under the private rights of action of both the TILA and RESPA.

A. Which of the New Servicing Regulations Governing Responses to Borrower Inquiries Are Privately Actionable And Which Are Not?

All of the new servicing regulations that impact servicer responses to borrower inquiries are privately enforceable.[14] Specifically, Sections 1024.35 (Notice of Error) and 1024.36 (Request For Information) of Regulation X were both promulgated pursuant to §6 of RESPA[15] and thus subject to RESPA's private right of action.[16] This private right of action entitles a

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[10] *See* 12 U.S.C. §2605(e); §1463(c) of the Dodd-Frank Act, amending RESPA to mandate that a servicer must acknowledge receipt of a QWR within 5 days and must provide a substantive response to the QWR within 30 days (as opposed to the original allotment of 60 days).

[11] 12 C.F.R. §1024.35.

[12] §1024.36.

[13] §1026.36(c)(3).

[14] Please note that the lists that follow are limited to those regulations which the authors believe most directly govern responses to borrower inquiries and requests for loss mitigation and should not be construed as an exhaustive list of the totality of amendments to Regulation X and Z which are privately enforceable, of which there are many more than those listed herein.

[15] S*ee* Bureau of Consumer Financial Protection, Mortgage Servicing Rules under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. 10696-01, 10737, 10753, 10763, 10822 (Feb. 14, 2013) (to be codified 12 C.F.R. pt. 1024).

[16] *See* 12 U.S.C. §2605(f); *see also* 78 Fed. Reg. at 10790 (describing the effect of promulgating a regulation pursuant to Section 6 of RESPA with respect to creating a private right of action).

successful plaintiff to actual damages and attorney's fees, and in the case of a pattern or practice of noncompliance, statutory damages not to exceed $2,000.00.[17] However, §1024.38 (General Servicing Policies, Procedures, and Requirements) and §1024.40 (Continuity of Contact) are restructured such that they are not subject to RESPA's private action.[18] Provisions not subject to private right of action are not discussed in this article, although they still present complicated compliance issues for loan servicers.

The third area of borrower inquiries, Section 1464 (Crediting of Payments/Payoff Statements) of Regulation Z, was promulgated pursuant to §105(a) of TILA,[19] which subjects it to private enforcement against creditors and assignees.[20] A successful plaintiff under the applicable provisions of TILA is entitled to actual damages, attorney's fees, and statutory

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[17] *Id.*

[18] *See* 78 Fed. Reg. at 10808–09 ("The Bureau proposed §1024.40 pursuant to authority under §§6(k)(1)(E), 6(j)(3), and 19(a) of RESPA, and accordingly, like other rules issued pursuant to the Bureau's authority under section 6 of RESPA, §1024.40 would have been enforceable through private rights of action. But as discussed above, the Bureau is adopting §1024.40 as an objectives-based policies and procedures requirement. As discussed above in the section-by-section analysis of §1024.38, the Bureau believes that private liability is not compatible with objectives-based policies and procedures requirements. The Bureau has therefore decided to finalize §1024.40 such that there will be no private liability for violations of the provision. Accordingly, the Bureau no longer relies on its authorities under §6 of RESPA to issue §1024.40. Instead, the Bureau is adopting §1024.40 pursuant to its authority under §19(a) of RESPA."); 78 Fed. Reg. at 10778–79 ("The Bureau believes that supervision and enforcement by the Bureau and other Federal regulators for compliance with and violations of §1024.38 respectively, would provide robust consumer protection without subjecting servicers to the same litigation risk and concomitant compliance costs as civil liability for asserted violations of §1024.38. . . . Therefore, the Bureau is restructuring the final rule so that it neither provides private liability for violations of §1024.38 nor contains a safe harbor limiting liability to situations where there is a pattern or practice of violations. . . . The Bureau believes that this approach more appropriately balances the need for robust consumer protections with respect to the general servicing policies, procedures, and requirements set forth in §1024.38 through supervision and enforcement by the Bureau and other agencies with the flexibility for industry to define how to achieve the important objectives set forth in §1024.38. Thus, the Bureau no longer relies on its authorities under §6 of RESPA to issue §1024.38. Instead, the Bureau is adopting §1024.38 pursuant to its authority under §19(a) of RESPA.").

[19] *See* Bureau of Consumer Financial Protection, Mortgage Servicing Rules Under the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 10902-01, 10958 (Feb. 14, 2013) (to be codified 12 C.F.R. pt. 1026).

[20] *See* 15 U.S.C. §§1640(a), 1641(a).

damages between $400 and $4,000.[21] Additionally, both private rights of action contain provisions for class actions, though class damages are capped.[22]

It should be noted that statutes providing for these types of recoveries, particularly attorney's fees, invariably lead to significant litigation. Specifically, plaintiffs' attorneys who specialize in these actions typically file a high volume of them, regardless of merit, with the objective of settling them quickly and recovering their fees and expenses. In addition, serious exposure can arise when such attorneys detect a systemic failure to comply with a particular provision. Under those circumstances, the attorney will send numerous letters on behalf of his or her client(s), thereby building a portfolio of hundreds, perhaps even thousands of technical violations before commencing the first action. Correspondingly, the servicer will be put on notice of the oversight only after considerable litigation exposure has accrued.

The existing "Qualified Written Request" provisions of RESPA[23] and the borrower response requirements of TILA[24] and Regulation Z[25] already generate substantial litigation.[26] Consequently, experience suggests that borrowers' counsel will seize upon the new regulations to add to their existing arsenal of written requests to create causes of action. Similarly, foreclosure

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[21] *See* 15 U.S.C. §1640 (a)(1)(2)(A)(iv).

[22] *See* 12 U.S.C. §2605(f)(2); 15 U.S.C.§1640(a). Class action damages are capped at the lesser of $1,000,000 or 1% of the net worth of the servicer.

[23] *See* 12 U.S.C. §2604(e).

[24] *See* 15 U.S.C. §1641(f)(2) (requiring loan servicers to respond to borrower inquiries regarding the owner or master servicer of the borrower's loan).

[25] *See* 12 C.F.R. §226.36(c)(1)(iii) (requiring prompt tendering of pay off statement upon borrower's written request).

[26] *See Qualified Written Requests, Today's Hot Complaint*, BANKERS LETTER OF THE LAW, Vol. 46 Issue 8, p2 (Aug. 2012) (documenting the year on year increase in frequency of QWR litigation as follows, "[a] quick online search found about 54 court opinions mentioning QWRs in 2008, 112 in 2009, 314 in 2010, 341 in 2011, and 214 in the first six months of 2012. It's hard to guess how many QWR complaints have been filed.").

and debt defense attorneys will use the new regulations to file collateral lawsuits or counterclaims based upon a servicer's alleged failure to properly respond to written inquiries.[27]

B. Potential Litigation Challenges Presented by Notices of Error and Requests for Information Under RESPA.

Amended Regulation X provides for error-resolution procedures when a borrower submits a written "Notice of Error"[28] or "Information Request."[29] These procedures are intended to increase the protection afforded to borrowers, particularly borrowers in delinquency. Under the new procedures, upon receiving a Notice of Error or Request for Information, a servicer must provide written notice to a borrower within five days acknowledging receipt.[30] Thereafter, the servicer has thirty days to investigate, correct, or respond to the borrower.[31] Given the relatively short deadlines, these new procedures have the potential to create serious litigation challenges.

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[27] *See e.g. Guillaume v. Fed. Nat. Mortg. Ass'n*, 928 F. Supp. 2d 1337 (S.D. Fla. 2013) (dismissing claim predicated on an alleged failure to respond to requests made under §1641(f)(2) of TILA and §226.36(c)(1)(iii) of Regulation Z as an improper attempt to gain leverage in related foreclosure litigation); *In re Carlton*, 10-40388-JJR-13, 2011 WL 3799885 at *6 (Bankr. N.D. Ala. Aug. 26, 2011) (describing a § 1641(f)(2) counterclaim as follows:

> [t]he request at issue was certainly authorized under the TILA statute, but the [c]ourt is uncomfortable with TILA being used as an attempt to gain leverage rather than an attempt to gain information. . . This strategy is particularly problematic where, as in this case, attorneys for both sides are involved and communicating regularly regarding the foreclosure, the filing of the bankruptcy, and the confirmation order issues. However, the information request upon which the claimed TILA violation hinged was apparently never put to rest by a simple request to the [b]ank's counsel that the missing information be supplied prior to the 'gotcha' moment at the filing of the counterclaim. Even after the filing of the counterclaim, the attorneys for both parties communicated regarding discovery, the parties' planning meeting and report to the court, and trial preparation. At no point in time does it appear the Debtor ever had any legitimate question as to the identity of the owner and servicer of her mortgage.)

[28] 12 C.F.R. §1024.35.

[29] §1024.36.

[30] §§1024.35(d), 1024.36(c).

[31] §§1024.35(e), 1026.36(d). "For asserted errors governed by the time limit . . . of this section, a servicer may extend the time period for responding by an additional [fifteen] days . . . if, before the end of the [thirty] day period, the servicer notifies the borrower of the extension and the reasons for the extension in writing." §§1024.35(e)(3)(i)(C)(ii); *see also* 1024.36(d)(2)(i)(B)(ii).

Both the Notice of Error and Request for Information regulations apply to "federally related mortgage loans" as the term is defined in §1024.2(b), subject to seven exemptions.[32] In addition, the provisions do not apply to home-equity lines of credit ("HELOCs"), reverse mortgages, mortgages not attached to real property,[33] and loans made by a creditor making five or fewer mortgages in a year.[34]

A "Notice of Error" from a borrower[35] must: (1) be written;[36] (2) be submitted to the servicer; (3) assert specific errors, including the error the consumer believes to have occurred; and (4) include the name of the consumer and enough information to identify the consumer's mortgage loan account.[37] If the borrower's submission meets these requirements, the mortgage loan servicer is required to acknowledge receipt of the notice of error, substantively respond to the notice of error, and correct any actual errors identified in the notice.[38]

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[32] *See* §1024.5 (regarding scope). Generally, RESPA applies to all federally related mortgage loans subject to the exemptions provided in subsection (b). These exemptions include HELOCs, open-end lines of credit, loans on property of twenty-five acres or more, business purpose loans, temporary financing, loans secured by vacant or unimproved property, any conversion of a federally related mortgage loan to different terms, and secondary market transactions involving a bona fide transfer of a loan. *Id*.

[33] e.g., mortgages secured by mobile homes.

[34] *See* Mortgage Servicing Rules Under the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 10696-01, 10698-99 (Feb. 14, 2013) (to be codified 12 C.F.R. pt. 1026).

[35] *See* 12 C.F.R. §1024, Supp. I, 35(a) (Additionally,

> [a] servicer may undertake reasonable procedures to determine if a person that claims to be an agent of a borrower has authority from the borrower to act on the borrower's behalf. For example, a servicer may require that a person claiming to be an agent of the borrower provide documentation from the borrower stating that the purported agent is acting on the borrower's behalf.)

[36] If a borrower orally reports the assertion of an error to a servicer's representative, comment 38(b)(5)-2 explains that §1024.38(b)(s) requires servicers to have policies and procedures reasonably designed to notify a borrower who is not satisfied with the resolution of the complaint of the procedures for submitting a written notice of error. Because of the possibility that borrowers may incorrectly submit a notice of error to the address designated for submitting loss mitigation documents, comment 38(b)(5)-3 clarifies a servicer's obligation to inform borrowers of the correct address for submitting a notice of error.

[37] 12 C.F.R. §1024.35(a).

[38] §1024.35(e).

Similarly, a "Request for Information" from a borrower[39] must: (1) be written; (2) include the name of the borrower; (3) include information enabling the servicer to identify the borrower's mortgage loan account; and (4) state the information the borrower is requesting with respect to the borrower's mortgage loan.[40] A servicer need not treat a request on a payment coupon or other payment form supplied by the servicer, or a request for payoff balance, as a request for information.[41]

The Dodd-Frank Notice of Error and Request for Information regulations build upon the pre-existing framework in RESPA for Qualified Written Requests ("QWR").[42] In fact, the regulations expressly provide that a QWR asserting an error or seeking information constitutes a Notice of Error or Request for Information.[43] In addition, the request need not satisfy the RESPA definition of a QWR in order to conceivably trigger the servicer's obligations for responding to Notices of Error and/or Requests for Information.[44]

Furthermore, a borrower need not expressly identify the correspondence as a Notice of Error or Request for Information to trigger the servicer's obligation(s) under the regulations.[45] In fact, a borrower may mislabel or even fail to label the correspondence, and as long as the

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[39] §1024, Supp. I, 36(a); *see supra*, n. 31.

[40] §1024.36(a).

[41] *Id*.

[42] *See* 12 U.S.C. §2605(e).

[43] 12 C.F.R. §§1024.35(a), 1024.36(a).

[44] 12 C.F.R. §1024, Supp. I, 31(2) (under the section for Qualified Written Requests, clarifying the overlap between a QWR and Notice of Error).

[45] 12 C.F.R. §1024, Supp. I, 35(a)(2). ("A servicer shall not rely solely on the borrower's description of the submission to determine whether the submission constitutes a notice of error under §1024.35(a), [an] information request under §1024.36(a), or both . . . but must evaluate whether the letter fulfills the substantive requirements of a notice of error, information request, or both."). This provision is silent as to whether a mislabeled Request for Payoff Balance trigger's a servicer's obligation(s) under the regulations.

borrower meets the substantive requirements for a Notice of Error, Request for Information, or both, the correspondence triggers the servicer's obligations under the regulation.[46] Such mislabeled or unlabeled requests could make it difficult for servicers to comply with the short five day acknowledgement and thirty day response deadlines.

Consequently, servicers should avail themselves of perhaps the regulations' only protection from mislabeled or deceptively labeled inquiries — the ability to designate a specific address for Notices of Error and Requests for Information.[47] Servicers must provide written notice to borrowers of the exclusive address for Notices of Error and Requests for Information, and must post it on the servicer's web site.[48] The disclosure must also meet the clear and conspicuous requirement in §1024.32(a)(1).[49] In the absence of such a designation, "a servicer must respond to a notice of error received by any office of the servicer,"[50] and thus all incoming written correspondence must be screened for covered Notices of Error/Requests for Information.

Even so, the CFPB's Official Interpretation of §1024.38 (governing required policies and procedures) requires that a servicer's policies and procedures be reasonably designed to ensure that if a borrower submits a notice of error to an incorrect address that was given to the borrower in connection with submission of a loss mitigation application, or in connection with the continuity of contact under §1024.40, the servicer will inform the borrower of the procedures for

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[46] *Id.*

[47] *See* 12 C.F.R. §1024.35(c) (providing, in pertinent part, that "[a] servicer may, by written notice provided to a borrower, establish an address that a borrower must use to submit a notice of error in accordance with the procedures in this section. The notice shall include a statement that the borrower must use the established address to assert an error."); §1024.36(b) (providing a mirror provision for requests for information).

[48] *Id.*

[49] 12 C.F.R. §§1024, Supp. I, 35(c)(2), 1024, Supp, 26(b)(2).

[50] §§1024, Supp. I, 35(c)(1), 1024, Supp, 26(b)(1).

submitting written Notices of Error, including the correct address, or redirect such notices to the proper exclusive address.[51]

When the CFPB first promulgated these rules, the industry raised concerns about conflicts between the Mortgage Rules and the Federal Debt Collection Practices Act ("FDCPA"),[52] which prohibits direct contact with borrowers who have sent cease and desist letters to the servicer. The CFPB responded with a Bulletin on October 15, 2013, stating in pertinent part that a servicer that is considered a debt collector under the FDCPA with respect to a borrower is not liable under the FDCPA for communicating with the borrower in connection with Notices of Error and Requests for Information, "notwithstanding a 'cease communication' instruction sent by the borrower . . . ".[53] Thus, a servicer must continue to respond to borrower Notices of Error and Requests for Information irrespective of a cease and desist notice under the FDCPA.

1. Potential Challenges Specific to "Notices of Error" Under §1024.35.

The term "error," for purposes of Notice of Error submissions, is broadly defined.[54] The regulation lists ten specific instances of an error which a borrower could properly identify in a Notice of Error.[55] In addition, an eleventh catch-all category renders "[a]ny other error relating to the servicing of a borrower's mortgage loan" as a covered Notice of Error.[56]

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[51] §1024, Supp. I, 38(b)(5)-3.

[52] 15 U.S.C. §1692, *et seq.*

[53] *See* CFPB Bulletin 2013-12 (Oct. 15, 2013), *available at* http://files.consumerfinance.gov/f/201310_cfpb_mortgage-servicing_bulletin.pdf.

[54] §1024.35(b).

[55] *Id.* (identifying the following covered errors: (1) Failing to accept a payment that conforms to the servicer's written requirements for the borrower to follow in making payments; (2) Failing to apply an accepted payment to principal, interest, escrow, or other charges under the terms of the mortgage loan and applicable law; (3) Failing to credit a payment to a borrower's mortgage loan account as of the date of receipt in violation of 12 C.F.R. §1026.36(c)(1); (4) Failing to pay taxes, insurance premiums, or other charges, including charges that the borrower

Fortunately, the regulation does carve out certain types of Notice of Error that do not require a substantive response, including a duplicative notice of error,[57] an overbroad notice of error,[58] and an untimely notice of error.[59] The regulation requires servicers to notify a borrower in writing within five days of making the determination that any of the exceptions apply. This notice must also explain the reason the exception applies.[60]

The CFPB's Official Interpretation states that servicers need not comply with the Notice of Error requirements "with respect to the borrower's assertion of an error that is not defined as

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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) Imposing a fee or charge that the servicer lacks a reasonable basis to impose upon the borrower; (6) Failing to provide an accurate payoff balance amount upon a borrower's request in violation of §1026.36(c)(3); (7) Failing to provide accurate information to a borrower regarding loss mitigation options and foreclosure, as required by §1024.39; (8) Failing 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).

[56] §1024.35(b)(11).

[57] §1024.35(g)(1)(i) (defining a duplicative notice of error as being:

> substantially the same as an error previously asserted by the borrower for which the servicer has previously complied with its obligation to respond . . . unless the borrower provides new and material information to support the asserted error. New and material information means information that was not reviewed by the servicer in connection with investigating a prior notice of the same error and is reasonably likely to change the servicer's prior determination about the error.)

[58] §1024.35(g)(1)(ii) (a notice of error is overbroad if "the servicer cannot reasonably determine from the notice of error the specific error that the borrower asserts has occurred on a borrower's account." It should be noted that while the regulation describes the carve-out as excluding "overbroad" notices of error, it appears to exclude vague notices of error, not overbroad notices. Nothing in this provision appears to permit failing to respond to a notice of error (e.g., those which did not cover servicing) but listed one covered notice of error. Such an "overbroad" notice still requires the servicer to respond to the covered notice of error.).

[59] §1024.35(g)(1)(iii) (A notice of error is untimely if it:

> delivered to the servicer more than one year after: (A) [s]ervicing for the mortgage loan that is the subject of the asserted error was transferred from the servicer receiving the notice of error to a transferee servicer; (B) [t]he mortgage loan balance was paid in full; or (C) [t]he mortgage loan is discharged.).

[60] *Id*. Arguably, it appears that such notice could be made outside the thirty day response window required for notices of covered errors.

an error in §1024.35(b).”[61] The Official Interpretation lists several such non-covered errors, including (1) an error relating to the origination of a mortgage loan; (2) an error relating to the underwriting of a mortgage loan; (3) an error relating to a subsequent sale or securitization of a mortgage loan; and (4) an error relating to a determination to sell, assign, or transfer the servicing of a mortgage loan.[62] “However, an error relating to the failure to transfer accurately and timely information relating to the servicing of a borrower’s mortgage loan account to a transferee servicer is an error for purposes of §1024.35.”[63]

One tactic borrowers' counsel have traditionally employed is the use of a laundry list of requests for information that do not trigger a legal obligation, but which camouflage requests under TILA or RESPA buried within the correspondence. This maneuver increases the likelihood that the servicer will fail to respond appropriately, and enhances the odds that the correspondence will elicit a technical violation of applicable law.

This tactic does not appear to be viable under §1024.35, which expressly excludes overbroad requests from its scope. A request is “overbroad” to the extent the “servicer cannot reasonably determine from the notice of error the specific error that the borrower asserts has occurred on a borrower’s account.”[64] Thus, servicers need not respond to overly vague or convoluted Notices of Error. The CFPB’s Official Interpretation defines "overbroad" notices as those asserting errors regarding substantially all aspects of a mortgage loan, including errors related to mortgage origination, mortgage servicing, and foreclosure, as well as errors related to the crediting of substantially every borrower payment and escrow account transaction. The

[61] *See* §1024, Supp. I, 35(b)(1).

[62] *Id.*

[63] *Id.*

[64] §1024.35(g)(1)(ii).

Interpretation also defines "overbroad" notices as those in a form that is not reasonably understandable or is included with voluminous tangential discussion or requests for information, such that a servicer cannot reasonably identify from the Notice of Error any error for which §1024.35 requires a response.[65]

Servicers must be careful to balance these examples with the regulation's requirement that if a servicer can reasonably identify a valid assertion of an error in a Notice of Error that is otherwise overbroad, the servicer must comply with the regulation's requirements.[66] In addition, the definition of "overbroad", as well as other provisions in these regulations, turns on what is "reasonable" under the circumstances. That analysis involves a question of fact that is unique to each Notice of Error. As a result, in lawsuits where an "overbroad" notice is at issue, courts will have to analyze Notices of Error on a case by case basis to determine whether they were sufficiently overbroad to prevent the servicer from reasonably ascertaining the existence of a covered error.

Complicated Notices of Error may also render it difficult for servicers to comply with the time limits imposed by the regulation.[67] Section 1024.35 provides that a servicer may notify the borrower of the servicer’s need for a fifteen day extension if the servicer does so, in writing, before the expiration of the thirty day response deadline.[68] The CFPB’s Official Interpretation of the regulation clarifies that a “servicer may treat a notice of error that alleges multiple errors as separate notices of error and may extend the time period for responding to each asserted error for

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[65] §1024, Supp. I, 35(g)(1) (clarifying ¶ 35(g)(1)(ii)).

[66] §1024.35(g)(1)(ii).

[67] §1024.35(e)(3).

[68] §1024.35(e)(3)(ii).

which an extension is permissible under §1024.35(e)(3)(ii)."[69] Servicers should avail themselves of these extended deadlines whenever necessary to ensure timely compliance.

Finally, those servicers that respond to a Notice of Error without acknowledging the existence of an error may be subject to a follow up request for "copies of documents and information relied upon by the servicer in making its determination that no error occurred…."[70] The servicer must respond to the borrower within fifteen days of receiving the borrower's request for such documents.[71] This is a separate request from Requests for Information authorized by §1024.36. The Official Interpretation by the CFPB emphasizes that "[a] servicer is required to provide only those documents actually relied upon by the servicer to determine that no error occurred."[72] Consequently, borrowers cannot request additional documentation upon which the servicer did not rely to determine whether an error occurred. Servicers are also free to withhold "confidential, proprietary or privileged information," so long as the servicer notifies the borrower in writing within fifteen days of receipt of the borrower's request that such information was withheld.[73]

2. Potential Challenges Specific to "Requests for Information" Under §1024.36.

Section 1024.36 establishes few specific limitations on the type of information the borrower can request, as long as it is "with respect to the borrower's mortgage loan."[74] Upon

[69] §1024, Supp. I, 35(e)(4).

[70] *Id.*

[71] §1024.35(e)(4).

[72] §1024, Supp. I, 35(e)(4).

[73] §1024.35(e)(4).

[74] *Id.*

acknowledging a request, the servicer must respond in one of two ways. Specifically, the servicer may provide the information requested and the appropriate contact information for further assistance, or the servicer may conduct a reasonable search for the requested information and provide the borrower with written notification that the requested information is unavailable to the servicer, the basis for its unavailability, and contact information for further assistance.[75]

The Official Interpretation of the CFPB defines "unavailable information" as that which is not in the servicer's "control or possession" or "cannot be retrieved in the ordinary course of business through reasonable efforts."[76] The Official Interpretation also provides several relevant examples of information being both available and unavailable to the servicer. For example, where a borrower asks for a copy of telephonic communications with a servicer, if the servicer's personnel have access to organized recordings or transcripts of borrower telephone calls in the ordinary course of business and can identify the communication(s) referred to by the borrower through reasonable efforts, the information is considered available to the servicer.[77] On the other hand, where a borrower requests information stored on electronic back-up media, and the information is not accessible by the servicer's personnel in the ordinary course of business without undertaking extraordinary efforts to identify and restore the information from the electronic back-up media, the information is considered unavailable to the servicer.[78] Finally, where a "borrower requests information stored at an offsite document storage facility," the Official Interpretation states that such information is "available" if "servicer personnel can access

[75] §1024.36(d).

[76] *Id.*

[77] *Id.*

[78] *Id.*

those documents through reasonable efforts in the ordinary course of business."[79] These examples make it clear that the "documents not available" defense is a particularized issue of fact that will need to be decided on a case by case basis.

The regulation carves out certain Requests for Information that are not covered, including duplicative requests;[80] requests for confidential, proprietary, or privileged information;[81] requests for irrelevant information;[82] overly broad or unduly burdensome requests;[83] and untimely requests.[84] A servicer must notify a borrower within five days of making the determination that one or more of these exceptions is applicable.[85]

The CFPB's Official Interpretation elaborates on requests that seek confidential, proprietary, or privileged information, stating that the exclusion covers information regarding profitability, compensation, bonuses, or personnel actions, as well as information regarding compliance audits, borrower complaints, internal or external investigations, and information covered by the attorney-client privilege.[86]

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[79] *Id.*

[80] §1024.36(f)(1)(i) (defining duplicative information as "[t]he information requested is substantially the same as information previously requested by the borrower for which the servicer has previously complied with its obligation to respond pursuant to paragraphs (c) and (d) of this section.").

[81] §1024.36(f)(1)(ii).

[82] §1024.36(f)(1)(iii) (defining irrelevant information as "[t]he information requested is not directly related to the borrower's mortgage loan account.").

[83] §1024.36(f)(1)(iv).

[84] §1024.36(f)(1)(v) (A request for information is untimely if the request is:

> delivered to a servicer more than one year after: (A) [s]ervicing for the mortgage loan that is the subject of the information request was transferred from the servicer receiving the request for information to a transferee servicer; (B) [t]he mortgage loan balance was paid in full; or (C) [t]he mortgage loan is discharged.")

[85] §1024.36(f)(2).

[86] §1024, Supp. I, 36(f)(1).

The CFPB Official Interpretation also addresses irrelevant information, stating that it includes information related to the servicing of mortgage loans other than the borrower's loan; information regarding training programs for the servicer's personnel; the servicer's servicing program guide; and investor instructions or requirements for servicing.[87]

Under the regulation, an information request is overbroad and unduly burdensome if a diligent servicer could not respond to the information request without either exceeding the thirty day time limit permitted by the section "or incurring costs (or dedicating resources) that would be unreasonable in light of the circumstances."[88] The CFPB Official Interpretation also addresses overbroad and unduly burdensome requests, stating that they include requests seeking "documents relating to substantially all aspects of mortgage origination, mortgage servicing, mortgage sale or securitization and foreclosure."[89] Similarly, requests that "are not reasonably understandable or are included with voluminous tangential discussion or assertions of errors" are deemed overbroad.[90] Additionally, a request for information that is not reasonably likely to assist a borrower with the borrower's account, or requests that information be provided in formats other than that in which the information is stored in the ordinary course of business, are also identified as falling within the exception.[91]

Finally, the CFPB has declared that if a borrower requests the servicer to identify the owner or assignee of the mortgage loan, the servicer satisfies the regulation by "identifying the

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[87] *Id.*

[88] *Id*.

[89] *Id.*

[90] *Id*.

[91] *Id.*

person on whose behalf the servicer receives payments from the borrower."[92] Thus, the CFPB has clarified that while Federal National Mortgage Association and others are exposed to some risk by virtue of investing or guaranteeing mortgage loans, they do not become the "owners" of such loans by virtue of their investment/guarantor rule.[93] Therefore, in a situation where a loan has been placed in a securitized loan trust, the servicer complies with the regulation merely by identifying the trust and providing contact information for the trustee, and need not identify the other players in the securitized transaction such as investors.

C. Potential Challenges Specific to Requests for Payoff Statements Under §1026.36.

With regard to payoff requests, Amended Regulation Z states:

> [i]n connection with a consumer credit transaction secured by a consumer's dwelling, a creditor, assignee or servicer, as applicable, must provide an accurate statement of the total outstanding balance that would be required to pay the consumer's obligation in full as of a specified date. The statement shall be sent within a reasonable time, but in no case more than seven business days, after receiving a written request from the consumer or any person acting on behalf of the consumer.[94]

The CFPB's commentary on this rule states that a "payoff balance request is any request from a consumer or appropriate party acting on behalf of the consumer, which inquires into the total amount outstanding on the loan, or the amount needed to pay off the loan."[95] Payoff information provided must be accurate "when issued."[96] This means that payoff information which is

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[92] §1024, Supp. I, 36(a).

[93] *Id.*

[94] §1026.36(c)(3).

[95] Consumer Financial Protection Bureau, Mortgage Servicing Rules Under the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 10902-01, 10957 (Feb. 14, 2013) (to be codified 12 C.F.R. pt. 1026).

[96] 12 C.F.R. pt. 1026, Supp. I, Part 3, 36(c)(1)(iii).

thereafter found to be inaccurate due to a payment reversal or other unforeseen circumstance will still fulfill the servicer's obligation.[97]

The regulation narrows Regulation Z's requirements governing payoff requests by requiring that they be made in writing.[98] However, the new regulation also expands the existing provisions in important ways. First, while the existing provisions apply to loans secured by a *principal* dwelling,[99] the new provision applies to loans secured by *any* dwelling.[100] Second, the new regulation applies to HELOC payoff requests whereas the old provision did not.[101]

Under the existing rule, a reasonable time for response was interpreted as five days.[102] The new regulation expands that time to seven days.[103] Moreover, under certain appropriate circumstances, the "reasonable time" can be extended from the seven day baseline.[104] Such circumstances arise when the loan is in "bankruptcy or foreclosure, the loan is a reverse mortgage or shared appreciation mortgage, or because of natural disasters or other similar circumstances."[105] The open ended definition of "other similar circumstances" begs the question of when it would otherwise be applicable, including a temporary man-power shortage or an unusually high volume of requests.

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97 78 Fed. Reg. at 10957.

98 *Compare* 12 C.F.R. §1026.36(c)(3) *with* §§226.36(c)(1)(iii), 1026.36(c)(1)(iii) (2013).

99 *Id.*

100 §1026.36(c)(3) (emphasis added).

101 *Id.*

102 §226.36(c)(1)(iii).

103 §1026.36(c)(3).

104 *Id.*

105 *Id.*

The Official Interpretation of the CFPB specifies that an authorized representative, such as an attorney, can make the request on the borrower's behalf.[106] Under such circumstances, however, a servicer may first "take reasonable measures to verify the identity of any person acting on behalf of the consumer and to obtain the consumer's authorization to release information to any such person before the 'reasonable time' period begins to run."[107]

Unfortunately, there is no provision authorizing servicers to create a specific address for submission of payoff requests. Thus, servicers must remain vigilant for payoff requests buried in otherwise irrelevant requests or mistitled or untitled correspondence. Likewise, the CFPB has not provided guidance about properly responding to a payoff request where the borrower has issued a cease and desist letter under the FDCPA. In addition, the CFPB's new rule does not provide any clarity in the confusing world of local, state and federal law requiring that a payoff be provided in less than seven days. While the CFPB expressly noted that known state and federal law may require shorter deadlines than the seven days under the new regulation, the CFPB expressly declined to interpret the new regulation as being in direct conflict.[108] Consequently, Dodd-Frank does not appear to preempt statutes requiring a shorter turn-around time.

III. Interface of the New Loss Mitigation and Mortgage Servicing Regulations with the Foreclosure Process.

TILA and RESPA have never before had so direct an impact on the foreclosure process. Unlike Regulations X and Z prior to Dodd-Frank, the requirements of §1024.39 (Early Intervention Requirements for Certain Borrowers) and §1041.41 (Loss Mitigation Procedures)

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[106] §1026, Supp. I, Part 3, 36(c)(1)(iii).

[107] *Id.*

[108] 78 Fed. Reg. at 10957-58 (specifically mentioning §1433(d) of the Dodd-Frank Act.)

now impose requirements that directly effect when a servicer can take certain actions with respect to foreclosure of residential mortgages. Foreclosure defense attorneys will utilize these provisions to gain leverage in foreclosure proceedings, delay final judgment and/or sale of the property, and ensure that borrowers are able to exhaust loss mitigation options prior to completion of the foreclosure process.

The Early Intervention and Loss Mitigation regulations apply to "federally related mortgage loans" as the term is defined in §1024.2(b).[109] They do not apply to HELOCs, reverse mortgages, mortgages not attached to real property, and loans made by a creditor making five or fewer mortgages in a year.[110]

A. Which of The New Loss Mitigation Regulations Are Privately Enforceable?

Both the Early Intervention Requirements and the Loss Mitigation Procedures arise under Regulation X and were promulgated pursuant to §6 of RESPA.[111] Therefore, they provide borrowers with a private right of action.[112] If a servicer fails to comply with this section, borrowers may seek an amount equal to the sum of any actual damages as a result of the failure, as well as any additional damages in the case of a pattern or practice of noncompliance with the requirements of this section in an amount not to exceed $2,000.[113] Damages awarded in borrower class actions may not exceed the lesser of $1,000,000 or 1% of the net worth of the

[109] 12 C.F.R. §1024.5 (regarding scope).

[110] *See* Mortgage Servicing Rules Under the Real Estate Settlement Procedures (Regulation X), 78 Fed. Reg. 10696-01, 10698-99 (Feb. 14, 2013) (to be codified 12 C.F.R. pt. 1026).

[111] S*ee* Bureau of Consumer Financial Protection, Mortgage Servicing Rules under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. 10696-01, 10737, 10753, 10763, 10822 (Feb. 14, 2013) (to be codified 12 C.F.R. pt. 1024).

[112] *See* 12 U.S.C. §2605(f); *see also* 78 Fed. Reg. at 10790 (describing the effect of promulgating a regulation pursuant to §6 of RESPA with respect to creating a private right of action).

[113] 12 U.S.C. §2605(f)(1) (emphasis added).

servicer.[114] In addition to these amounts, a borrower or class of borrowers may recover attorneys fees as the court determines to be reasonable.[115] As stated earlier, the opportunity to recover attorney's fees will undoubtedly lead to voluminous claims under these provisions. Moreover, many of the early intervention and loss mitigation provisions set deadlines for compliance, and with deadlines comes the increased likelihood of human error. Therefore, servicers must be diligent in monitoring and abiding by all deadlines.

B. Section 1024.39 - Early Intervention Requirements.

This section imposes two early intervention requirements for delinquent borrowers. First, a "servicer shall establish or make good faith efforts to establish live contact with a delinquent borrower not later than the thirty-sixth day of the borrower's delinquency and, promptly after establishing live contact, inform such borrower about the availability of loss mitigation options if appropriate."[116] The Official Interpretation of the CFPB clarifies the term "live contact" as including a telephone conversation or in-person meeting, but not a voicemail or recorded message.[117]

Second, the servicer must provide the borrower with a written notice, no later than the forty-fifth day of delinquency, which encourages the borrower to contact the servicer.[118] The notice must also convey required contact information, and if applicable, a brief description of examples of loss mitigation options which may be available, instructions or information on how to obtain additional information on loss mitigation from the servicer, and contact information for

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[114] *Id*. at §2605(f)(2).

[115] *Id*. at §2605(f)(3).

[116] 12 C.F.R. §1024.39(a).

[117] §1024, Supp. I, 39(a).

[118] §1024.39(b).

HUD homeownership counseling.[119] The Official Interpretation of the CFPB clarifies the term "date of delinquency" as beginning "on the day a payment sufficient to cover principal, interest, and, if applicable, escrow for a given billing cycle is due and unpaid, even if the borrower is afforded a period after the due date to pay before the servicer assesses a late fee."[120]

The Early Intervention Requirements generated substantial industry concern about conflicts with the FDCPA and/or Bankruptcy Code under certain circumstances. While the CFPB initially attempted to provide guidance on the issue through the Official Interpretation, the industry felt the commentary in the Official Interpretation did not provide the necessary certainty.[121] In response, the CFPB issued an amendment to the regulations stating that early intervention notifications need not be given if the borrower has filed for bankruptcy or has invoked the cease and desist provisions of the FDCPA.[122] The servicer must resume compliance with §1024.39 after the first delinquency that follows dismissal, closure, or discharge in bankruptcy.[123]

C. Section 1024.41 – Loss Mitigation Requirements.

Concerns about servicer conduct in evaluating loss mitigation applications, particularly in circumstances where a foreclosure action had already been initiated, became a prominent issue in

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[119] *Id*.

[120] §1024, Supp. I, 39(a).

[121] *See Bureau of Consumer Financial Protection*, Amendments to the 2013 Mortgage Rules under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z) (to be codified at 12 C.F.R. pt. 1024, 12 C.F.R. pt. 1026), Docket No. CFPB-2013-0031.

[122] §1024.39(d)(1)-(2).

[123] *See Bureau of Consumer Financial Protection*, Amendments to the 2013 Mortgage Rules under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z) (to be codified at 12 C.F.R. pt. 1024, 12 C.F.R. pt. 1026), Docket No. CFPB-2013-0031.

the National Mortgage Settlement.[124] Section 1024.41 has essentially codified the provisions of the National Mortgage Settlement concerning loss mitigation. These provisions create broad pre-foreclosure limitations and requirements for the evaluation of loss mitigation applications, and also significant limitations regarding "dual tracking."[125] They also require that servicers provide the right to appeal most loss mitigation denials, but subsequent loss mitigation applications do not trigger the regulation's protections.[126]

1. Defining "Application".

Much of the regulation turns on when a loss mitigation "application" is received and whether or not an application is "complete." The regulation defines a complete loss mitigation application as "an application in connection with which a servicer has received all the information that the servicer requires from a borrower in evaluating applications for the loss mitigation options available to the borrower."[127] The regulation further creates a duty for the servicer to "exercise reasonable diligence in obtaining documents and information to complete a

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[124] *See U.S. et al. v. Bank of America, et al.*, 12-cv-00361-RMC (D.D.C. 2013); *see also* www.nationalmortgagesettlement.org.

[125] *e.g.*, simultaneously evaluating a borrower for loss mitigation while actively prosecuting a foreclosure action.

[126] *Id.*

[127] §1024.41(b)(1); *see also* §1024.41(c)(2)(iv) (An application is facially complete if:

> a borrower submits all the missing documents and information as stated in the notice required pursuant to §1026.41(b)(2)(i)(B), or no additional information is requested in such notice . . . If the servicer later discovers additional information or corrections to a previously submitted document are required to complete the application, the servicer must promptly request the missing information or corrected documents and treat the application as complete for the purposes of paragraphs (f)(2) and (g) of this section until the borrower is given a reasonable opportunity to complete the application. If the borrower completes the application within this period, the application shall be considered complete as of the date it was facially complete, for the purposes of paragraphs (d), (e), (f)(2), (g), and (h) of this section, and as of the date the application was actually complete for the purposes of paragraph (c). A servicer that complies with this paragraph will be deemed to have fulfilled its obligation to provide an accurate notice under paragraph (b)(2)(i)(B).).

loss mitigation application."[128] Significantly, the application need not be in writing in order to trigger the acknowledgement requirements.[129]

The Official Interpretation of the CFPB provides guidance on distinguishing an informal loss mitigation "inquiry" from an "application." The following are examples of inquiries that would not constitute applications that trigger the regulation's protections:

> i. A borrower calls to ask about loss mitigation options and servicer personnel explain the loss mitigation options available to the borrower and the criteria for determining the borrower's eligibility for any such loss mitigation option. The borrower does not, however, provide any information that a servicer would consider for evaluating a loss mitigation application.
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> ii. A borrower calls to ask about the process for applying for a loss mitigation option but the borrower does not provide any information that a servicer would consider for evaluating a loss mitigation application.[130]

However, if a "borrower expresses an interest in applying for a loss mitigation option and provides information the servicer would evaluate in connection with a loss mitigation application, the borrower's inquiry or prequalification request has become a loss mitigation application."[131]

It should be noted that a servicer must only provide a substantive response to a completed loss mitigation application.[132] However, a "transferee servicer is required to comply with the requirements of §1024.41 regardless of whether a borrower received an evaluation of a complete loss mitigation application from a transferor servicer."[133] Furthermore, "[d]ocuments and

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[128] *Id.*

[129] §1024, Supp. I, 41(b)(1).

[130] *Id.*

[131] *Id.*

[132] §1024.41(i) (governing duplicative requests).

[133] §1024, Supp. I, 41(i).

information transferred from a transferor servicer to a transferee servicer may constitute a loss mitigation application to the transferee servicer and may cause a transferee servicer to be required to comply with the requirements of §1024.41 with respect to a borrower's mortgage loan account."[134] Thus, recipients of service transferred loans should be mindful of the preceding servicer's loss mitigation history to ensure compliance with §1024.41.

2. Pre-Foreclosure Limitations.

The regulation prohibits servicers from sending a notice of default, or filing a foreclosure, where the note and mortgage are not more than 120 days delinquent.[135] The servicer must observe this 120 day period regardless of whether or not the borrower expresses interest in loss mitigation. Additionally, where the borrower submits a completed loss mitigation application before the servicer has made the first notice or filing of foreclosure, the servicer may not issue the first notice or filing until the servicer has complied with the notice provisions for denying a loss mitigation application, or the borrower rejects all loss mitigation options or fails to perform under "an agreement on a loss mitigation option."[136]

3. Notice and Review Requirements For Loss Mitigation.

The regulation imposes a notice obligation upon receipt of loss mitigation applications and a substantive obligation to review complete loss mitigation applications that are timely submitted. Upon receipt of a loss mitigation application forty-five days or more before a foreclosure sale, the servicer must review the loss mitigation application and inform the borrower within five days of receipt whether or not the application constitutes a complete loss mitigation

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[134] *Id.*

[135] §1024.41(f)(1) (except where the foreclosure is based on violation of a due-on-sale clause or the servicer is joining the foreclosure action of a junior lien holder.). §1024, Supp. I, 41(f)(1) (expressly including a notice of default as a "first notice".).

[136] §1024.41(f)(2).

application.[137] There is no requirement to provide notice of completeness if the loss mitigation application is submitted less than forty-five days before a foreclosure sale.[138] The notice of incomplete application "must state the additional documents and information the borrower must submit to make the loss mitigation application complete," and provide a reasonable date by which the borrower must submit the documents.[139] This "reasonable date" can take into consideration the circumstances of the foreclosure process, such as an impending foreclosure sale date.[140]

If a servicer receives a complete loss mitigation application more than thirty-seven days before a foreclosure sale, then within thirty days of receiving the application, the servicer must evaluate the borrower for all loss mitigation options available to the borrower, and notify the borrower in writing of the loss mitigation options the servicer will offer the borrower.[141] The CFPB's Official Interpretation states that while the regulation affects when a servicer must evaluate a completed loss mitigation application, and notices associated with that review, "[t]he conduct of a servicer's evaluation with respect to any loss mitigation option is in the sole discretion of a servicer."[142] Thus, the regulation does not impose substantive requirements on the review process itself, which are largely determined by servicer participation agreements, pooling and servicing agreements, and/or servicing guides.

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[137] §1024.41(b)(2) (also providing additional content requirements for such notices).

[138] *Id.*

[139] *Id.*

[140] §1024, Supp. I, 41(c)(2).

[141] *Id.* (providing additional content requirements for such disclosures); §1024, Supp. I, 41(c)(1) (clarifying that "[t]he loss mitigation options available to a borrower are those options offered by an owner or assignee of the borrower's mortgage loan.").

[142] *Id.*

If the servicer denies a borrower's application, the notice must set forth the reasons for the denial.[143] An additional level of specificity is required where the denial is based on a requirement of the owner or assignee of a mortgage loan. In such circumstances, "the specific reasons in the notice provided to the borrower must identify the owner or assignee of the mortgage loan and the requirement that is the basis of the denial."[144] In situations where a net present value determination is the cause of the denial, the servicer must include in the notice of denial the inputs used to conduct such net present value determination.[145]

If the servicer offers a loss mitigation option, the regulation permits the servicer to set time limitations requiring borrowers to accept or reject loss mitigation options.[146] Those time limitations are allowed to be longer or shorter depending on the proximity of a foreclosure sale.[147]

4. Limitations on Dual Tracking.

If a servicer receives a completed loss mitigation application during a pending foreclosure action more than thirty-seven days before a foreclosure sale, a servicer cannot move for a foreclosure judgment or order of sale, or conduct a foreclosure sale, unless the servicer

[143] §1024.41(d).

[144] §1024, Supp. I, 41(d)(1).

[145] §1024, Supp. I, 41(d)(2).

[146] §1024.41(e) providing that

> [s]ubject to paragraphs (e)(2)(ii) and (iii) of this section, if a complete loss mitigation application is received [ninety] days or more before a foreclosure sale, a servicer may require that a borrower accept or reject an offer of a loss mitigation option no earlier than [fourteen] days after the servicer provides the offer of a loss mitigation option to the borrower. If a complete loss mitigation application is received less than 90 days before a foreclosure sale, but more than [thirty seven] days before a foreclosure sale, a servicer may require that a borrower accept or reject an offer of a loss mitigation option no earlier than [seven] days after the servicer provides the offer of a loss mitigation option to the borrower.).

[147] *Id.*

provides the required notice to deny the loss mitigation application, the borrower rejects all loss mitigation options, or the borrower fails to perform under an agreement on a loss mitigation option.[148] Servicers should be mindful to instruct counsel about the receipt of a completed loss mitigation application in order to ensure counsel facilitates compliance with this provision.[149]

Short sales are the subject of special attention in the CFPB's Official Interpretation. A borrower is deemed to be "performing" an agreement to conduct a short sale if the property is listed.[150] If the borrower fails to secure a short sale after one listing period, the borrower is deemed to have failed to perform the agreement for a short sale and the prohibition on dual tracking ceases to apply.[151]

Importantly, nothing in this section appears to limit motion practice calculated at closing pleadings or discovery.[152] Indeed, the Official Interpretation of the CFPB states:

> [n]othing in §1024.41(g) prevents a servicer from proceeding with the foreclosure process, including any publication, arbitration, or mediation requirements established by applicable law, when the first notice or filing for a foreclosure proceeding occurred before a servicer receives a complete loss mitigation application, so long as any such steps in the foreclosure process do not cause or directly result in the issuance of a foreclosure judgment or order of sale, or the conduct of a foreclosure sale, in violation of §1024.41.[153]

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[148] §1024.41(g).

[149] *See* §1024, Supp. I, 41(g) ("A servicer is responsible for promptly instructing foreclosure counsel retained by the servicer not to proceed with filing for foreclosure judgment or order of sale, or to conduct a foreclosure sale, in violation of § 1024.41(g) when a servicer has received a complete loss mitigation application, which may include instructing counsel to move for a continuance with respect to the deadline for filing a dispositive motion.").

[150] *See* §1024, Supp. I, 41(g)(3).

[151] *Id.*

[152] *Id.*

[153] §1024, Supp. I, 41(g)(2).

However, filing a motion for summary judgment or setting a foreclosure sale after timely receipt of a completed loss mitigation application would violate §1024.41.[154] If the motion is already on file, and the servicer receives a completed loss mitigation application within thirty-seven days of a foreclosure sale, the Official Interpretation provides that a servicer:

> has not moved for a foreclosure judgment or order of sale if the servicer takes reasonable steps to avoid a ruling on such motion or issuance of such order prior to completing the procedures required by §1024.41, notwithstanding whether any such action successfully avoids a ruling on a dispositive motion or issuance of an order of sale.[155]

In short, a servicer may advance the litigation to the point short of filing a dispositive motion while reviewing a completed loss mitigation application, and if it receives a completed loss mitigation application after making such a motion, the servicer should endeavor to avoid having a ruling rendered on such motion.

As with Notices of Error and Requests for Information, a servicer that is a debt collector will not be deemed in violation of the FDCPA by engaging in loss mitigation activities, even in the face of a cease communication instruction from the borrower.[156] Thus, with respect to the FDCPA, the CFPB interpretation is that a servicer must continue to meet its loss mitigation obligations under §1024.41 even after the borrower has invoked the cease and desist protections of the FDCPA.

5. Loss Mitigation Appeals.

The regulation states that a servicer must provide borrowers the opportunity to appeal any loss mitigation denial if the servicer receives a complete loss mitigation application ninety days

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[154] §1024.41(g).

[155] *Id.* at (g)(1).

[156] *See* CFPB Bulletin 2013-12 (October 15, 2013), *available at* http://files.consumerfinance.gov/f/201310_cfpb_mortgage-servicing_bulletin.pdf.

or more before a foreclosure sale.[157] Servicers must permit at least fourteen days after the denial for borrowers to request an appeal.[158] The regulation further provides that the appellate review must be conducted by personnel different than those responsible for evaluating the borrower's complete loss mitigation application.[159] The CFPB's Official Interpretation clarifies this provision with respect to supervisory personnel, stating "[t]he appeal may be evaluated by supervisory personnel that are responsible for oversight of the personnel that conducted the initial evaluation, as long as the supervisory personnel were not directly involved in the initial evaluation of the borrower's complete loss mitigation application."[160] The servicer is required to notify the borrower of its decision within thirty days of receiving the appeal.[161]

D. Back to Where We Started – Are §§1024.35 (Notice of Error) and 1024.36 (Request for Information) Conditions Precedent to Foreclosure?

While both provisions are privately actionable, the plain text of the regulations themselves make it is clear that with one exception, neither §1024.35 nor §1024.36 is a condition precedent to foreclosure or sale.[162] That exception is where the Notice of Error asserted a

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[157] *See* 12 C.F.R. §1024.41(h).

[158] *Id.* at (h)(2).

[159] *Id.* at (h)(3).

[160] §1024, Supp. I, 41(h)(3).

[161] *Id.* at (h)(4).

[162] §1024.35(i)(2); §1024.36 (h); *see also* 78 Fed. Reg. at 10752

> Proposed §1024.35(i)(2) stated that, with one exception, a servicer's obligation to comply with the requirements of proposed §1024.35 would not prohibit a lender or servicer from pursuing any remedies, including proceeding with a foreclosure sale, permitted by the applicable mortgage loan instrument. The Bureau proposed one exception to §1024.35(i)(2) where a borrower asserts an error under paragraph (b)(9) based on a servicer's failure to suspend a foreclosure sale in the circumstances described in proposed §1024.41(g). The Bureau proposed §1024.35(i)(2) to clarify that, in general, a notice of error could not be used to require a servicer to suspend a foreclosure sale. A consumer group commenter asserted that proposed §1024.35(i)(2) should be amended to prohibit a lender or servicer from pursuing a foreclosure sale upon receipt of any notice of error that disputes a servicers' ability to foreclose. As stated in the proposal, the Bureau believes that the purpose of RESPA of ensuring responsiveness to borrower requests

servicer's failure to suspend a foreclosure sale in the circumstances described in §1024.41(g) (regarding suspension of a foreclosure sale upon timely receipt of a completed loss mitigation application). Consequently, while §1024.35 and §1024.36 may support a defense in recoupment, neither is intended to delay a foreclosure action except in the limited circumstances of a Notice of Error that contends an error has occurred with respect to compliance with the rules governing dual tracking.

IV. Conclusion

The Mortgage Rules became effective January 10, 2014. With less than three months to go, the CFPB has continued to amend the Mortgage Rules and issue declarations clarifying their meaning. The Mortgage Rules rewrite much of Regulations X and Z and will fundamentally change the mortgage origination and servicing industry. The provisions governing responses to borrower inquiries - Sections 1024.35 and 1024.36 of Regulation X and §1026.36 of Regulation Z - add considerably to the number of methods borrowers can use to generate potential liability for servicers with written inquiries and requests. The requirement for early intervention in cases of default will lengthen the amount of time it takes to go from default to foreclosure, even in circumstances where the borrowers have no interest in loss mitigation. Furthermore, servicers must now review loss mitigation applications for completeness, and review completed applications for a final loss mitigation decision, at a higher rate of speed than is presently customary. Issues with compliance with any one of these provisions will create potential litigation exposure.

However, each new regulation is lengthy, and within each provision one can typically find provisions that protect the servicing industry from unreasonable application or abuse of the

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and complaints would be impeded by allowing a notice of error to obstruct a lender's or servicer's ability to pursue remedies permitted by the applicable mortgage loan instrument.)

new regulations. Servicers and their counsel will also need to stay abreast of the inevitable changes the CFPB will implement in the future to ensure that compliance issues and litigation exposure are minimized to the greatest extent possible.