BILLING CODE: 4810-AM-P

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1024

[Docket No. CFPB-2012-0034]

RIN 3170-AA14

Mortgage Servicing Rules under the Real Estate Settlement Procedures Act (Regulation X)

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Final rule; official interpretations.

SUMMARY: The Bureau of Consumer Financial Protection is amending Regulation X, which implements the Real Estate Settlement Procedures Act of 1974, and implementing a commentary that sets forth an official interpretation to the regulation. The final rule implements provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act regarding mortgage loan servicing. Specifically, this final rule implements Dodd-Frank Act sections addressing servicers' obligations to correct errors asserted by mortgage loan borrowers; to provide certain information requested by such borrowers; and to provide protections to such borrowers in connection with force-placed insurance. Additionally, this final rule addresses servicers' obligations to establish reasonable policies and procedures to achieve certain delineated objectives; to provide information about mortgage loss mitigation options to delinquent borrowers; to establish policies and procedures for providing delinquent borrowers with continuity of contact with servicer personnel capable of performing certain functions; and to evaluate borrowers' applications for available loss mitigation options. Further, this final rule modifies and streamlines certain existing servicing-related provisions of Regulation X. For instance, this final rule revises provisions relating to mortgage servicers' obligation to provide disclosures to borrowers in

connection with transfers of mortgage servicing, and mortgage servicers' obligation to manage escrow accounts, including restrictions on purchasing force-placed insurance for certain borrowers with escrow accounts and requirements to return amounts in an escrow account to a borrower upon payment in full of a mortgage loan. Concurrently with the issuance of this final rule, the Bureau is issuing a rule implementing amendments relating to mortgage servicing to the Truth in Lending Act in Regulation Z.

DATES: This final rule is effective on January 10, 2014.

FOR FURTHER INFORMATION CONTACT:

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Regulation Z (TILA): Whitney Patross, Attorney; Marta Tanenhaus or Mitchell E. Hochberg, Senior Counsels, Office of Regulations, at (202) 435-7700.

SUPPLEMENTARY INFORMATION:

I. Summary of the Final Rule

The Bureau of Consumer Financial Protection (Bureau) is amending Regulation X, which implements the Real Estate Settlement Procedures Act of 1974, and implementing a commentary that sets forth an official interpretation to the regulation (the 2013 RESPA Servicing Final Rule). The final rule implements provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act regarding mortgage loan servicing.[1] Specifically, this final rule implements Dodd-Frank Act sections addressing servicers' obligations to correct errors asserted by mortgage loan borrowers; to provide certain information requested by such borrowers; and to provide

[1] Public Law 111-203, 124 Stat. 1376 (2010).

protections to such borrowers in connection with force-placed insurance. Additionally, this final rule addresses servicers' obligations to establish reasonable policies and procedures to achieve certain delineated objectives; to provide information about mortgage loss mitigation options to delinquent borrowers; to establish policies and procedures for providing delinquent borrowers with continuity of contact with servicer personnel capable of performing certain functions; and to evaluate borrowers' applications for available loss mitigation options. Further, this final rule modifies and streamlines certain existing servicing-related provisions of Regulation X. For instance, this final rule revises provisions relating to mortgage servicers' obligation to provide disclosures to borrowers in connection with a transfer of mortgage servicing, and mortgage servicers' obligation to manage escrow accounts, including restrictions on purchasing force-placed insurance for certain borrowers with escrow accounts and requirements to return amounts in an escrow account to a borrower upon payment in full of a mortgage loan. Concurrently with the issuance of this final rule, the Bureau is issuing a rule implementing amendments relating to mortgage servicing to the Truth in Lending Act in Regulation Z (the 2013 TILA Servicing Final Rule).

On August 10, 2012, the Bureau issued proposed rules that would have amended Regulation X, which implements RESPA,[2] as well as Regulation Z, which implements TILA,[3]

[2] *See* Press Release, U.S. Consumer Fin. Prot. Bureau, *Consumer Financial Protection Bureau Proposes Rules to Protect Mortgage Borrowers* (Aug. 10, 2012) available at http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-proposes-rules-to-protect-mortgage-borrowers/. The proposal was published in the **Federal Register** on September 17, 2012. 77 FR 57200 (Sept. 17 2012) (2012 RESPA Servicing Proposal).

[3] *See* Press Release, U.S. Consumer Fin. Prot. Bureau, *Consumer Financial Protection Bureau Proposes Rules to Protect Mortgage Borrowers* (August 10, 2012) available at http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-proposes-rules-to-protect-mortgage-borrowers/. This proposal was also published in the **Federal Register** on September 17, 2012. 77 FR 57318 (Sept. 17, 2012) (2012 TILA Servicing Proposal; and, together with the 2012 RESPA Servicing Proposal, the Proposed Servicing Rules).

regarding mortgage servicing requirements.[4] The Proposed Servicing Rules proposed to implement the Dodd-Frank Act amendments to TILA and RESPA with respect to, among other things, periodic mortgage statements, disclosures for ARMs, prompt crediting of mortgage loan payments, requests for mortgage loan payoff statements, error resolution, information requests, and protections relating to force-placed insurance. In the 2012 RESPA Servicing Proposal, the Bureau also proposed to use its authority to adopt requirements relating to servicer policies and procedures, early intervention with delinquent borrowers, continuity of contact, and procedures for evaluating and responding to loss mitigation applications.[5] The proposals sought to address fundamental problems that underlie many consumer complaints and recent regulatory and enforcement actions, as set forth in more detail below.

The Bureau is finalizing the Proposed Servicing Rules with respect to nine major topics, as summarized below, as well as certain technical and streamlining amendments. The goals of the Final Servicing Rules are to provide better disclosure to consumers of their mortgage loan obligations and to better inform consumers of, and assist consumers with, options that may be available for consumers having difficulty with their mortgage loan obligations. The amendments also address critical servicer practices relating to, among other things, correcting errors, imposing charges for force-placed insurance, crediting mortgage loan payments, and providing payoff statements. The Bureau's final rules are set forth in two separate notices because some

[4] The 2013 RESPA Servicing Final Rule and the 2013 TILA Servicing Final Rule are referred to collectively as the Final Servicing Rules.

[5] For ease of discussion, this notice uses the term "discretionary rulemakings" to refer to a set of regulations implemented using the Bureau's authorities under section 6(j), 6(k)(1)(E), or 19(a) of RESPA to expand requirements beyond those explicit in RESPA. The "discretionary rulemakings" include requirements relating to servicer policies and procedures, early intervention with delinquent borrowers, continuity of contact, and procedures for evaluating and responding to loss mitigation applications, as set forth in §§ 1024.38-41.

provisions implement requirements that Congress imposed under TILA while other provisions implement requirements Congress imposed under RESPA.[6]

A. Major Topics in the Final Servicing Rules

1. Periodic billing statements (2013 TILA Servicing Final Rule). Creditors, assignees, and servicers must provide a periodic statement for each billing cycle containing, among other things, information on payments currently due and previously made, fees imposed, transaction activity, application of past payments, contact information for the servicer and housing counselors, and, where applicable, information regarding delinquencies. These statements must meet the timing, form, and content requirements provided in the rule. The rule contains sample forms that may be used. The periodic statement requirement generally does not apply to fixed-rate loans if the servicer provides a coupon book, so long as the coupon book contains certain information specified in the rule and certain other information specified in the rule is made available to the consumer. The rule also includes an exemption for small servicers as discussed below.

2. Interest rate adjustment notices (2013 TILA Servicing Final Rule). Creditors, assignees, and servicers must provide a consumer whose mortgage has an adjustable rate with a notice between 210 and 240 days prior to the first payment due after the rate first adjusts. This notice may contain an estimate of the new rate and new payment. Creditors, assignees, and servicers also must provide a notice between 60 and 120 days before payment at a new level is due when a rate adjustment causes the payment to change. The current annual notice that must be provided for adjustable-rate mortgages (ARMs) for which the interest rate, but not the

[6] Note that TILA and RESPA differ in their terminology. Whereas Regulation Z generally refers to "consumers" and "creditors," Regulation X generally refers to "borrowers" and "lenders."

payment, has changed over the course of the year is no longer required. The rule contains model and sample forms that servicers may use.

3. *Prompt payment crediting and payoff statements (2013 TILA Servicing Final Rule).* Servicers must promptly credit periodic payments from borrowers as of the day of receipt. A periodic payment consists of principal, interest, and escrow (if applicable). If a servicer receives a payment that is less than the amount due for a periodic payment, the payment may be held in a suspense account. When the amount in the suspense account covers a periodic payment, the servicer must apply the funds to the consumer's account. In addition, creditors, assignees, and servicers must provide an accurate payoff balance to a consumer no later than seven business days after receipt of a written request from the borrower for such information.

4. Force-placed insurance (2013 RESPA Servicing Final Rule). Servicers are prohibited from charging a borrower for force-placed insurance coverage unless the servicer has a reasonable basis to believe the borrower has failed to maintain hazard insurance, as required by the loan agreement, and has provided required notices. An initial notice must be sent to the borrower at least 45 days before charging the borrower for force-placed insurance coverage, and a second reminder notice must be sent no earlier than 30 days after the first notice. The rule contains model forms that servicers may use. If a borrower provides proof of hazard insurance coverage, the servicer must cancel any force-placed insurance policy and refund any premiums paid for overlapping periods in which the borrower's coverage was in place. The rule also provides that charges related to force-placed insurance (other than those subject to State regulation as the business of insurance or authorized by Federal law for flood insurance) must be for a service that was actually performed and must bear a reasonable relationship to the servicer's cost of providing the service. Where the borrower has an escrow account for the payment of hazard insurance premiums, the servicer is prohibited from obtaining force-place insurance where the servicer can continue the borrower's homeowner insurance, even if the servicer needs to advance funds to the borrower's escrow account to do so. The rule against obtaining force-placed insurance in cases in which hazard insurance may be maintained through an escrow account exempts small servicers, as discussed below, so long as any force-placed insurance purchased by the small servicer is less expensive to a borrower than the amount of any disbursement the servicer would have made to maintain hazard insurance coverage.

5. Error resolution and information requests (2013 RESPA Servicing Final Rule). Servicers are required to meet certain procedural requirements for responding to written information requests or complaints of errors. The rule requires servicers to comply with the error resolution procedures for certain listed errors as well as any error relating to the servicing of a mortgage loan. Servicers may designate a specific address for borrowers to use. Servicers generally are required to acknowledge the request or notice of error within five days. Servicers also generally are required to correct the error asserted by the borrower and provide the borrower written notification of the correction, or to conduct an investigation and provide the borrower written notification that no error occurred, within 30 to 45 days. Further, within a similar amount of time, servicers generally are required to acknowledge borrower written requests for information and either provide the information or explain why the information is not available.

6. General servicing policies, procedures, and requirements (2013 RESPA Servicing Final Rule). Servicers are required to establish policies and procedures reasonably designed to achieve objectives specified in the rule. The reasonableness of a servicer's policies and procedures takes into account the size, scope, and nature of the servicer's operations. Examples of the specified objectives include accessing and providing accurate and timely information to borrowers, investors, and courts; properly evaluating loss mitigation applications in accordance with the eligibility rules established by investors; facilitating oversight of, and compliance by, service providers; facilitating transfer of information during servicing transfers; and informing borrowers of the availability of written error resolution and information request procedures. In addition, servicers are required to retain records relating to each mortgage loan until one year after the mortgage loan is discharged or servicing is transferred, and to maintain certain documents and information for each mortgage loan in a manner that enables the services to compile it into a servicing file within five days. This section includes an exemption for small servicers as discussed below. The Bureau and prudential regulators will be able to supervise servicers within their jurisdiction to assure compliance with these requirements but there will not be a private right of action to enforce these provisions.

7. Early intervention with delinquent borrowers (2013 RESPA Servicing Final Rule). Servicers must establish or make good faith efforts to establish live contact with borrowers by the 36th day of their delinquency and promptly inform such borrowers, where appropriate, that loss mitigation options may be available. In addition, a servicer must provide a borrower a written notice with information about loss mitigation options by the 45th day of a borrower's delinquency. The rule contains model language servicers may use for the written notice. This section includes an exemption for small servicers as discussed below.

8. Continuity of contact with delinquent borrowers (2013 RESPA Servicing Final Rule). Servicers are required to maintain reasonable policies and procedures with respect to providing delinquent borrowers with access to personnel to assist them with loss mitigation options where applicable. The policies and procedures must be reasonably designed to ensure that a servicer assigns personnel to a delinquent borrower by the time a servicer provides such borrower with the written notice required by the early intervention requirements, but in any event, by the 45th day of a borrower's delinquency. These personnel should be accessible to the borrower by phone to assist the borrower in pursuing loss mitigation options, including advising the borrower on the status of any loss mitigation application and applicable timelines. The personnel should be able to access all of the information provided by the borrower to the servicer and provide that information, when appropriate, to those responsible for evaluating the borrower for loss mitigation options. This section includes an exemption for small servicers as discussed below. The Bureau and the prudential regulators will be able to supervise servicers within their jurisdiction to assure compliance with these requirements but there will not be a private right of action to enforce these provisions.

9. Loss Mitigation Procedures (2013 RESPA Servicing Final Rule). Servicers are required to follow specified loss mitigation procedures for a mortgage loan secured by a borrower's principal residence. If a borrower submits an application for a loss mitigation option, the servicer is generally required to acknowledge the receipt of the application in writing within five days and inform the borrower whether the application is complete and, if not, what information is needed to complete the application. The servicer is required to exercise reasonable diligence in obtaining documents and information to complete the application.

For a complete loss mitigation application received more than 37 days before a foreclosure sale, the servicer is required to evaluate the borrower, within 30 days, for all loss mitigation options for which the borrower may be eligible in accordance with the investor's eligibility rules, including both options that enable the borrower to retain the home (such as a loan modification) and non-retention options (such as a short sale). Servicers are free to follow "waterfalls" established by an investor to determine eligibility for particular loss mitigation options. The servicer must provide the borrower with a written decision, including an explanation of the reasons for denying the borrower for any loan modification option offered by an owner or assignee of a mortgage loan with any inputs used to make a net present value calculation to the extent such inputs were the basis for the denial. A borrower may appeal a denial of a loan modification program so long as the borrower's complete loss mitigation application is received 90 days or more before a scheduled foreclosure sale.

The rule restricts "dual tracking," where a servicer is simultaneously evaluating a consumer for loan modifications or other alternatives at the same time that it prepares to foreclose on the property. Specifically, the rule prohibits a servicer from making the first notice or filing required for a foreclosure process until a mortgage loan account is more than 120 days delinquent. Even if a borrower is more than 120 days delinquent, if a borrower submits a complete application for a loss mitigation option before a servicer has made the first notice or filing required for a foreclosure process, a servicer may not start the foreclosure process unless (1) the servicer informs the borrower that the borrower is not eligible for any loss mitigation option (and any appeal has been exhausted), (2) a borrower rejects all loss mitigation offers, or (3) a borrower fails to comply with the terms of a loss mitigation option such as a trial modification.

If a borrower submits a complete application for a loss mitigation option after the foreclosure process has commenced but more than 37 days before a foreclosure sale, a servicer may not move for a foreclosure judgment or order of sale, or conduct a foreclosure sale, until one of the same three conditions has been satisfied. In all of these situations, the 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, as applicable.

This section includes an exemption for small servicers as defined above. However, a small servicer is required to comply with two requirements: (1) a small servicer may not make the first notice or filing required for a foreclosure process unless a borrower is more than 120 days delinquent, and (2) a small servicer may not proceed to foreclosure judgment or order of sale, or conduct a foreclosure sale, if a borrower is performing pursuant to the terms of a loss mitigation agreement.

All of the provisions in the section relating to loss mitigation can be enforced by individuals. Additionally, the Bureau and the prudential regulators can also supervise servicers within their jurisdiction to assure compliance with these requirements.

B. Scope of the Final Servicing Rules

The Final Servicing Rules have somewhat different scopes, with respect to the types of mortgage loan transactions covered and the loans that are exempted. With respect to the 2013 TILA Servicing Final Rule, certain requirements, specifically the periodic statement and ARM disclosure requirements, only apply to closed-end mortgage loans, whereas other requirements, specifically the requirements for crediting of payments and providing payoff statements, apply to both open-end and closed-end mortgage loans. Reverse mortgage transactions and timeshare plans are exempt from the periodic statement requirement. ARMs with terms of one year or less are exempt from the ARM disclosure requirements.

With respect to the 2013 RESPA Servicing Final Rule, certain requirements generally apply to federally related mortgage loans that are closed-end, with certain exemptions for loans on property of 25 acres or more, business-purpose loans, temporary financing, loans secured by vacant land, and certain loan assumptions or conversions. Open-end lines of credit (home equity plans) are generally exempt from the requirements in the 2013 RESPA Servicing Final Rule. The general servicing policies, procedure, and requirements, early intervention, continuity of contact, and loss mitigation procedures provisions are generally inapplicable to servicers of reverse mortgage transactions or to servicers of mortgage loans for which the servicers are also qualified lenders under the Farm Credit Act of 1971.

In the 2013 TILA Servicing Final Rule, the Bureau is exercising its authority under TILA to provide an exemption from the periodic statement requirement for small servicers, defined as servicers that service 5,000 mortgage loans or less and only service mortgage loans the servicer or an affiliate owns or originated (small servicers). In this 2013 RESPA Servicing Final Rule, the Bureau has elected not to extend to these small servicers most provisions of the Final Rule that are not being promulgated to implement specific mandates in the Dodd-Frank Act but are, instead, being issued by the Bureau, in the exercise of its discretion, pursuant to its discretionary rulemaking authority under RESPA, as amended by the Dodd-Frank Act, and title X of the Dodd-Frank Act. The exemptions from the discretionary rulemakings include those relating to general servicing policies, procedures, and requirements; early intervention with delinquent borrowers; continuity of contact; and most of the requirements for evaluating and responding to loss mitigation applications. Further, the Bureau is not restricting small servicers from purchasing force-placed insurance for borrowers with escrow accounts for the payment of hazard insurance, so long as the cost to the borrower of the force-placed insurance obtained by a small servicer is less than the amount the small servicer would be required to disburse from the borrower’s escrow account to ensure that the borrower’s hazard insurance premium charges were paid in a timely manner. Small servicers are required to comply with limited loss mitigation procedure requirements. These include (1) a prohibition on making the first notice or filing required for a foreclosure process unless a borrower is more than 120 days delinquent and (2) a prohibition on making the first notice or filing or moving for foreclosure judgment or order of sale, or conducting a foreclosure sale, when a borrower is performing pursuant to the terms of a loss mitigation agreement. The exemptions applicable to small servicers in the 2013 TILA Servicing Rule and the 2013 RESPA Servicing Rule are also being extended to Housing Finance Agencies, without regard to the number of mortgage loans serviced by any such agency, and these agencies are included within the definition of small servicer.

II. Background

A. Overview of the Mortgage Servicing Market and Market Failures

The mortgage market is the single largest market for consumer financial products and services in the United States, with approximately $10.3 trillion in loans outstanding.[7] Mortgage servicers play a vital role within the broader market by undertaking the day-to-day management of mortgage loans on behalf of lenders who hold the loans in their portfolios or (where a loan has been securitized) investors who are entitled to the loan proceeds.[8] Over 60 percent of mortgage loans are serviced by mortgage servicers for investors.

[7] Inside Mortg. Fin., *Outstanding 1-4 Family Mortgage Securities*, *in* 2 The 2012 Mortgage Market Statistical Annual 7 (2012). For general background on the market and the recent crisis, *see* the 2012 TILA-RESPA Proposal available at http://www.consumerfinance.gov/knowbeforeyouowe/ (last accessed Jan. 10, 2013).

[8] As of June 2012, approximately 36 percent of outstanding mortgage loans were held in portfolio; 54 percent of mortgage loans were owned through mortgage-backed securities issued by Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac), together referred to as the government-sponsored enterprises (GSEs), as well as securities issued by the Government National Mortgage Association (Ginnie Mae); and 10 percent of loans were owned through private label mortgage-backed securities. *Strengthening the Housing Market and Minimizing Losses to Taxpayers, Hearing Before the S. Comm. on Banking, Housing and Urban Affairs* (2012)(Testimony of Laurie Goodman, Amherst Securities), available at http://banking.senate.gov/public/index.cfm?FuseAction=Hearings.Testimony&Hearing_ID=53bda60f-64c1-43d8-9adf-a693c31eb56b&Witness_ID=b06f2fb1-59dd-4881-86cb-1082464d3119. A securitization results in the economic separation of the legal title to the mortgage loan and a beneficial interest in the mortgage loan obligation. In a securitization transaction, a securitization trust is the owner or assignee of a mortgage loan. An investor is a creditor of the trust and is entitled to cash flows that are derived from the proceeds of the mortgage loans. In

Servicers' duties typically include billing borrowers for amounts due, collecting and allocating payments, maintaining and disbursing funds from escrow accounts, reporting to creditors or investors, and pursuing collection and loss mitigation activities (including foreclosures and loan modifications) with respect to delinquent borrowers. Indeed, without dedicated companies to perform these activities, it is questionable whether a secondary market for mortgage-backed securities would exist in this country.[9] Given the nature of their activities, servicers can have a direct and profound impact on borrowers.

Mortgage servicing is performed by banks, thrifts, credit unions, and non-banks under a variety of business models. In some cases, creditors service mortgage loans that they originate or purchase and hold in portfolio. Other creditors sell the ownership of the underlying mortgage loan, but retain the mortgage servicing rights in order to retain the relationship with the borrower, as well as the servicing fee and other ancillary income. In still other cases, servicers have no role at all in origination or loan ownership, but rather purchase mortgage servicing rights on securitized loans or are hired to service a portfolio lender's loans.[10]

These different servicing structures can create difficulties for borrowers if a servicer makes mistakes, fails to invest sufficient resources in its servicing operations, or avoids opportunities to work with borrowers for the mutual benefit of both borrowers and owners or assignees of mortgage loans. Although the mortgage servicing industry has numerous participants, the industry is highly concentrated, with the five largest servicers servicing

general, certain investors (or an insurer entitled to act on behalf of the investors) may direct the trust to take action as the owner or assignee of the mortgage loans for the benefit of the investors or insurers. *See, e.g.*, Adam Levitin & Tara Twomey, *Mortgage Servicing*, 28 Yale J. on Reg. 1, 11 (2011) (Levitin & Twomey).

[9] *See, e.g.*, Levitin & Twomey, at 11 ("All securitizations involved third-party servicers . . . [m]ortgage servicers provide the critical link between mortgage borrowers and the SPV and RMBS investors, and servicing arrangements are an indispensable part of securitization.").

[10] *See, e.g.,* Diane E. Thompson, *Foreclosing Modifications: How Servicer Incentives Discourage Loan Modifications*, 86 Wash. L. Rev. 755, 763 (2011) ("Thompson").

approximately 53 percent of outstanding mortgage loans in this country.[11] Small servicers generally operate in discrete segments of the market, for example, by specializing in servicing delinquent loans, or by servicing loans that they originate.[12]

Contracts between the servicer and the mortgage loan owner specify the rights and responsibilities of each party. In the context of securitized loans, the contracts may require the servicer to balance the competing interests of different classes of investors when borrowers become delinquent. Certain provisions in servicing contracts may limit the servicer's ability to offer certain types of loan modifications to borrowers. Such contracts also may limit the circumstances under which owners or assignees of mortgage loans can transfer servicing rights to a different servicer. Further, servicer contracts govern servicer requirements to advance payments to owners of mortgage loans, and to recoup advances made by servicers, including from ultimate recoveries on liquidated properties.

Compensation structures vary somewhat for loans held in portfolio and securitized loans,[13] but have tended to make pure mortgage servicing (where the servicer has no role in origination) a high-volume, low-margin business. Such compensation structures incentivize servicers to ensure that investment in operations closely tracks servicer expectations of

[11] *See Top 100 Mortgage Servicers in 2012*, Inside Mortg. Fin., Sept. 28, 2012, at 13 (As of the end of the fourth quarter of 2011, the top five largest servicers serviced $5.66 trillion of mortgage loans).

[12] Fitch Ratings, *U.S. Residential and Small Balance Commercial Mortgage Servicer Rating Criteria*, at 14-15 (Jan. 31, 2011), *available at* http://www.fitchratings.com. (account required to access information).

[13] At securitization, the cash flow that was part of interest income is bifurcated between the loan and the mortgage servicing right (MSR). The MSR represents the present value of all the cash flows, both positive and negative, related to servicing a mortgage. Prime MSRs are largely created by the GSE minimum servicing fee rate, which is calculated as 25 basis points (bps) per annum. The servicing fee rate is typically paid to the servicer monthly and the monthly amount owed is calculated by multiplying the pro rata portion of the servicing fee rate by the stated principal balance of the mortgage loan at the payment due date. Accounting rules require that a capitalized asset be created if the "compensation" for servicing (including float/ancillary) exceeds "adequate compensation." For loans held in portfolio, there is no bifurcation of the interest income from the loan. The owner of the loan simply negotiates pricing, terms, and standards with the servicer, which, at larger institutions, is typically a separate affiliate or subsidiary of the owner of the loans. Keefe, Bruyette & Woods, Inc., PowerPoint Presentation, *KBW Mortgage Matters: Mortgage Servicing Primer* (Apr. 2012).

delinquent accounts, and an increase in the number of delinquent accounts a servicer must service beyond that projected by the servicer strains available servicer resources. A servicer will expect to recoup its investment in purchasing mortgage servicing rights and earn a profit primarily through a net servicing fee (which is typically expressed as a constant rate assessed on unpaid mortgage balances), interest float on payment accounts between receipt and disbursement, and cross-marketing other products and services to borrowers. Under this business model, servicers act primarily as payment collectors and processors, and will have limited incentives to provide other customer service. Servicers greatly vary in the extent to which they invest in customer service infrastructure. For example, servicer staffing ratios have varied between approximately 100 loans per full-time employee to over 4,000 loans per full time employee.[14] Servicers are generally not subject to market discipline from consumers because consumers have little opportunity to switch servicers. Rather, servicers compete to obtain business from the owners of loans—investors, assignees, and creditors—and thus competitive pressures tend to drive servicers to lower the price of servicing and scale their investment in providing service to consumers accordingly.

Servicers also earn revenue from fees assessed on borrowers, including fees on late payments, fees for obtaining force-placed insurance, and fees for services, such as responding to

[14] Richard O'Brien, *High Time for High-Touch*, Mortg. Banking, Feb. 1, 2009, at 39. Industry participants generally indicated to the Bureau that servicers targeted a loan to employee ratio of 1,000 – 1,200 mortgage loans per full time employee for mortgage loans that are current, and 125 – 150 mortgage loans per full time employee for mortgage loans that are delinquent. Between 1992 and 2000, as servicers sought to make their operations more efficient, loans serviced per full time employee increased from approximately 700 loans in 1992 to over 1,200 loans by 2000. Michael A. Stegman et al., *Preventative Servicing is Good for Business and Affordable Homeownership Policy*, 18 Housing Pol'y Debate 243, 274 (2007). As an example of current mortgage servicing staffing levels, Ocwen services 162 mortgage loans per servicing employee. *See* Morningstar Credit Ratings, LLC, *Operational Risk Assessment – Ocwen Loan Servicing, LLC*, at 7 (2012) available at http://www.ocwen.com/docs/Morningstar-Sept-2012.pdf.

telephone inquiries, processing telephone payments, and providing payoff statements.[15] As a result, servicers have an incentive to look for opportunities to impose fees on borrowers to enhance revenues.

These attributes of the servicing market created problems for certain borrowers even prior to the financial crisis. For example, borrowers experienced problems with mortgage servicers even during regional mortgage market downturns that preceded the financial crisis.[16] There is evidence that borrowers were subjected to improper fees that servicers had no reasonable basis to impose, improper force-placed insurance practices, and improper foreclosure and bankruptcy practices.[17]

When the financial crisis erupted, many servicers—and especially the larger servicers with their scale business models—were ill-equipped to handle the high volumes of delinquent mortgages, loan modification requests, and foreclosures they were required to process. Mortgage loan delinquency rates nearly doubled between 2007 and 2009 from 5.4 percent of first-lien mortgage loans to 9.4 percent of first-lien mortgage loans.[18] Many servicers lacked the infrastructure, trained staff, controls, and procedures needed to manage effectively the flood of

[15] *See, e.g.*, Bank of America, Mortgage Servicing Fees, available at https://www8.bankofamerica.com/home-loans/mortgage-servicing-fees.go (last accessed Jan. 11, 2013); Metro Credit Union, Mortgage Servicing Fee Schedule, available at http://www.metrocu.org/home/fiFiles/static/documents/Mortgage_Servicing_Fee_Schedule.pdf (last accessed Jan. 6, 2013); Acqura Loan Services, Mortgage Loan Servicing Fee Schedule, available at http://www.acqurals.com/feeschedule.html (last accessed Jan. 11, 2013); Sovereign Bank, FAQ—*What are the* Mortgage Loan Servicing Fees*?*, available at https://customerservice.sovereignbank.com/app/answers/detail/a_id/22/~/what-are-the-mortgage-loan-servicing-fees%3F (last accessed Jan. 11, 2013).

[16] *See Problems in Mortgage Servicing from Modification to Foreclosure: Hearings Before the S. Comm. on Banking, Hous., & Urban Affairs*, 111th Cong. 53-54 (2010) (statement of Thomas J. Miller, Iowa Att'y Gen.) ("Miller Testimony"). *See also*, Kurt Eggert, *Limiting Abuse and Opportunism by Mortgage Servicers*, 15 Housing Pol'y Debate 753 (2004), available at http://ssrn.com/abstract=992095.

[17] *See* Kurt Eggert, *Limiting Abuse and Opportunism by Mortgage Servicers*, 15 Housing Pol'y Debate 753 (2004), available at http://ssrn.com/abstract=992095 (collecting cases).

[18] U.S. Census Bureau, *Table 1194: Mortgage Originations and Delinquency and Foreclosure Rates: 1990 to 2010*, in The 2012 Statistical Abstract of the United States, (2012), available at http://www.census.gov/compendia/statab/2012/tables/12s1194.pdf (last accessed Jan. 6, 2013).

delinquent mortgages they were forced to handle.[19] One study of complaints to the HOPE Hotline reported that over half of the complaints (27,000 out of 48,000) were from borrowers who could not reach their servicers and obtain information about the status of applications they had submitted for options to avoid foreclosure.[20]

Consumer harm has manifested in many different areas, and major servicers have entered into significant settlement agreements with Federal and State governmental authorities. For example, in April 2011, the Office of the Comptroller of the Currency (OCC) and the Board of Governors of the Federal Reserve System (Board), following on-site reviews of foreclosure processing at 14 federally regulated mortgage servicers, found significant deficiencies at each of the servicers reviewed. As a result, the OCC and the Board undertook formal enforcement actions against several major servicers for unsafe and unsound residential mortgage loan servicing practices.[21] These enforcement actions generally focused on practices relating to (1) filing of foreclosure documents without, for example, proper affidavits or notarizations; (2) failing to always ensure that loan documents were properly endorsed or assigned and, if necessary, in the possession of the appropriate party at the appropriate time; (3) failing to devote sufficient financial, staffing, and managerial resources to ensure proper administration of foreclosure processes; (4) failing to devote adequate oversight, internal controls, policies and

[19] *See* U.S. Dep't of the Treasury, *Making Contact: The Path to Improving Mortgage Industry Communication with Homeowners*, at 3 (2012), *available at* http://www.treasury.gov/initiatives/financial-stability/reports/Documents/SPOC%20Special%20Report_Final.pdf (last accessed Jan. 6, 2013).

[20] *See* U.S. Gov't Accountability Office, GAO-10-634, *Troubled Asset Relief Program: Further Actions Needed to Fully and Equitably Implement Foreclosure Mitigation Programs*, at 15 (2010).

[21] Press Release, Office of the Comptroller of the Currency, NR 2011-47, *OCC Takes Enforcement Action Against Eight Servicers for Unsafe and Unsound Foreclosure Practices* (Apr. 13, 2011), available at http://www.occ.gov/news-issuances/news-releases/2011/nr-occ-2011-47.html; Press Release, Fed. Reserve Bd., *Federal Reserve Issues Enforcement Actions Related to Deficient Practices in Residential Mortgage Loan Servicing* (April 13, 2011) ("Fed Press Release"), available at http://www.federalreserve.gov/newsevents/press/enforcement/20110413a.htm. In addition to enforcement actions against major servicers, Federal agencies have also undertaken formal enforcement actions against major service providers to mortgage servicers.

procedures, compliance risk management, internal audit, third-party management, and training to foreclosure processes; and (5) failing to oversee sufficiently outside counsel and other third-party providers handling foreclosure-related services.[22]

Other investigations of servicers have found similar problems. For example, the Government Accountability Office (GAO) has found pervasive problems in broad segments of the mortgage servicing industry impacting delinquent borrowers, such as servicers who have misled, or failed to communicate with, borrowers, lost or mishandled borrower-provided documents supporting loan modification requests, and generally provided inadequate service to delinquent borrowers. It has been recognized in Inspector General reports, and the Bureau has learned from outreach with mortgage investors, that servicers may be acting to maximize their self-interests in the handling of delinquent borrowers, rather than the interests of owners or assignees of mortgage loans.[23]

The mortgage servicing industry, however, is not monolithic. Some servicers provide high levels of customer service. Some of these servicers are compensated by investors in a way that incentivizes them to provide this level of service in order to optimize investor outcomes.[24]

[22] Press Release, Federal Reserve Bd., *Federal Reserve Issues Enforcement Actions Related to Deficient Practices in Residential Mortgage Loan Servicing* (April 13, 2011), available at http://www.federalreserve.gov/newsevents/press/enforcement/20110413a.htm. None of the servicers admitted or denied the OCC's or Federal Reserve Board's findings.

[23] *See, e.g.*, Jody Shenn, *PIMCO: This is who's actually going to be punished by the mortgage fraud settlement*, Bloomberg News, February 10, 2012; *cf.*, Office of Inspector Gen., Fed. Hous. Fin. Agency, *Evaluation of FHFA's Oversight of Fannie Mae's Transfer of Mortgage Servicing Rights from Bank of America to High Touch Servicers*, at 12 (Sept. 18, 2012) ("FHA OIG MSR Report"). The Inspector General for FHFA observed that "Fannie Mae may have had (what one of its executives described as) a 'misalignment of interests' with its servicers. As guarantor or loan holder, Fannie Mae could face significant losses from a default. However, a servicer earns only a fraction of a percent of the unpaid balance of a mortgage it services and, thus, the fees derived from any particular loan may not – at least for the servicer – provide adequate incentive to undertake anything more than the bare minimum of effort in order to prevent a default. This will typically include sending out delinquency notices to borrowers who have not made timely payments, telephoning delinquent borrowers, and, ultimately, initiating foreclosure proceedings."

[24] For example, Fannie Mae rewards servicers that provide high levels of customer service by compensating them through (1) base servicing fees, (2) incentive payments for mortgage modifications, and (3) a performance payment based on the servicer's success as contrasted with that of a benchmark portfolio. *See* FHA OIG MSR Report at 12.

Other servicers provide high levels of customer service because they are servicing loans of their own retail customers within their local community or (in the case of credit unions) membership base. These servicers seek to provide other products and services to consumers—and to others within the community or membership base—and thus have an interest in preserving their reputations and relationships with their consumers. For example, as discussed further below, small servicers that the Bureau consulted as part of a process required under the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) described their businesses as requiring a "high touch" model of customer service both to ensure loan performance and maintain a strong reputation in their local communities.[25]

B. The National Mortgage Settlement and Other Regulatory Requirements

In response to the unprecedented financial crisis and pervasive problems in mortgage servicing, including the systemic violation of State foreclosure laws by many of the largest servicers, State and Federal regulators have engaged in a number of individual servicing related enforcement and regulatory actions over the last few years and have begun discussions about comprehensive national standards.

For example, the Federal government, joined by 49 State attorneys general,[26] entered into settlements with the nation's five largest servicers in February 2012 (the National Mortgage

[25] *See* U.S. Consumer Fin. Prot. Bureau, Final Report of the Small Business Review Panel on CFPB's Proposals Under Consideration for Mortgage Servicing Rulemaking (Jun, 11, 2012)("Small Business Review Panel Report"), available at.

[26] Oklahoma elected not to participate in the National Mortgage Settlement and executed a separate settlement with the servicers that are parties to the National Mortgage Settlement. *See* State of Oklahoma, Oklahoma Mortgage Settlement Fact Sheet (Feb. 9, 2012), available at http://www.oag.ok.gov/oagweb.nsf/0/2737eec87426c427862579c10003c950/$FILE/Oklahoma%20Mortgage%20Settlement%20FAQs.pdf (last accessed Jan. 10, 2013).

Settlement).[27] Exhibit A to each of the settlements is a Settlement Term Sheet, which sets forth standards that each of the five largest servicers must follow to comply with the terms of the settlement.[28] The settlement standards contained in the Settlement Term Sheet are sub-divided into the following eight categories: (1) foreclosure and bankruptcy information and documentation; (2) third-party provider oversight; (3) bankruptcy; (4) loss mitigation; (5) protections for military personnel; (6) restrictions on servicing fees; (7) force-placed insurance; and (8) general servicer duties and prohibitions.

Apart from the National Mortgage Settlement, Federal regulatory agencies have also issued guidance on mortgage servicing and loan modifications,[29] conducted coordinated reviews of the nation's largest servicers,[30] and taken enforcement actions against individual companies.[31] Further, the Bureau and other Federal agencies have been engaged since spring 2011 in informal discussions about the potential development of national mortgage servicing standards through interagency regulations and guidance.

Servicers are currently required to navigate overlapping requirements governing their servicing responsibilities. Servicers must comply with requirements established by owners or

[27] The National Mortgage Settlement is available at: http://www.nationalmortgagesettlement.com/. The five servicers subject to the settlement are Bank of America, JP Morgan Chase, Wells Fargo, CitiMortgage, and Ally/GMAC.

[28] *See* Attys. Gen., *National Mortgage Settlement*, .

[29] *See* Press Release, Fed. Res. Bd., *Federal Reserve Board releases action plans and engagement letter to correct deficiencies in residential mortgage loan servicing and foreclosure processing* (May 24, 2012), *available at* ; Press Release, Fed. Res. Bd., *Federal Reserve Board releases action plans for supervised financial institutions to correct deficiencies in residential mortgage loan servicing and foreclosure processing* (Feb. 27, 2012), *available at* ; Press Release, Office of the Comptroller of the Currency, *OCC Takes Enforcement Action Against Eight Servicers for Unsafe and Unsound Foreclosure Practices* (Apr. 13, 2011), *available at* .

[30] *See* Fed. Res. Bd., *Federal Reserve Board releases action plans and engagement letter to correct deficiencies in residential mortgage loan servicing and foreclosure processing* (May 24, 2012), *available at* .

[31] *See* Press Release, Fed. Res. Bd., Federal Reserve Board *releases action plans and engagement letter to correct deficiencies in residential mortgage loan servicing and foreclosure processing* (May 24, 2012), available at; Press Release, Fed. Res. Bd., Federal Reserve Board *releases action plans for supervised financial institutions to correct deficiencies in residential mortgage loan servicing and foreclosure processing* (Feb. 27, 2012), available at; Press Release, Office of the Comptroller of the Currency, *OCC Takes Enforcement Action Against Eight Servicers for Unsafe and Unsound Foreclosure Practices* (Apr. 13, 2011), available at.

assignees of mortgage loans. These include, as applicable, (1) servicing guidelines required by Fannie Mae, Freddie Mac, and Ginnie Mae; (2) government insured program guidelines issued by the Federal Housing Administration (FHA), Department of Veterans Affairs (VA), and the Rural Housing Service; (3) contractual agreements with investors (such as pooling and servicing agreements and subservicing contracts); and (4) bank or institution policies.

Servicers are also required to consider the impact of State and even local regulation on mortgage servicing. Significantly, New York, California, and Oregon have all adopted varying statutory or regulatory restrictions on mortgage servicers. For example, the Superintendent of Banks of the State of New York repeatedly adopted short-term emergency regulations governing mortgage servicers on a continuous basis since July 2010.[32] These regulations impose obligations on servicers with respect to, among other things, consumer complaints and inquiries, statements of accounts, crediting of payments, payoff balances, and loss mitigation procedures.[33] The California Homeowner Bill of Rights, which was enacted in 2012, imposes requirements on servicers with respect to evaluations of borrowers for loss mitigation options before various foreclosure documents may be filed for California's non-judicial foreclosure process.[34] Further, Oregon implemented regulations on mortgage servicers not to engage in unfair or deceptive conduct by: assessing fees for payments made on or before a payment due date; assessing or collecting fees not authorized by a security instrument or mortgage, misrepresenting information relating to a loan modification or set forth in an affidavit, declaration, or other sworn statement detailing a borrower's default and the servicer's right to foreclose; failing to comply with certain

[32] New York State Department of Financial Services, Explanatory All Institutions Letter (October 7, 2012), available at http://www.dfs.ny.gov/legal/regulations/emergency/banking/ar419lt.htm (last accessed Dec. 7, 2012).

[33] 3 N.Y.C.R.R. 419.1 *et seq.*

[34] *See* Cal. Civ. Code § 2923.6.

provisions of RESPA; or failing to deal with a borrower in good faith.[35] Further, Massachusetts has recently proposed new regulations to protect consumers with respect to mortgage servicing practices, including with respect to loss mitigation procedures.[36]

C. RESPA and Regulation X

Congress originally enacted the Real Estate Settlement Procedures Act of 1974 (RESPA) based on findings that significant reforms in the real estate settlement process were needed to ensure that consumers are provided with greater and more timely information on the nature and costs of the residential real estate settlement process and are protected from unnecessarily high settlement charges caused by certain abusive practices found by Congress. *See* 12 U.S.C. 2601(a). In 1990, Congress amended RESPA by adding a new section 6 covering persons responsible for servicing federally related mortgage loans and imposing on such servicers certain obligations.[37] These included required disclosures at application concerning whether the lender intended to service the mortgage loan and disclosures upon an actual transfer of servicing rights.[38] RESPA section 6 further imposed substantive and disclosure requirements for escrow account management and required servicers to respond to "qualified written requests" – written error resolution or information requests relating to the "servicing" of the borrower's mortgage loan.[39]

[35] OAR 137-020-0805. Notably, Oregon's regulations initially implemented mortgage servicing requirements with respect to open-end lines of credit (home equity plans) and, further, required servicers to comply with GSE guidelines for loan modifications. Oregon suspended these requirements and reissued the rule as OAR 137-020-0805 on the basis that such suspension was necessary to facilitate compliance. *See* In the matter of: Suspension of OAR 137-020-0800 and Adoption of OAR 137-020-0805 (February 15, 2012), available at http://www.oregonmla.org/WebsiteAttachments/Misc%20Events%20Attachments/OAR%20137-020-0805%202%2015%2012%20AG%20Servicing%20Rules%20(00540177).pdf (last accessed Jan. 6, 2013).

[36] *See* Press Release, Massachusetts Division of Banks Proposes New Standards for Mortgage Servicing (Nov. 8, 2012), available at http://www.mass.gov/ocabr/docs/dob/standards-for-mort-servicing2012.pdf (last accessed Jan. 6, 2013).

[37] Pub. L. 101-625, 104 Stat. 4079 (1990), sections 941-42.

[38] *See* 12 U.S.C. 2605(a) through (e).

[39] *See* 12 U.S.C. 2605(e) and 2609.

Section 19(a) of RESPA authorizes the Bureau (and formerly directed the Department of Housing and Urban Development (HUD)) to prescribe such rules and regulations, to make such interpretations, and to grant such reasonable exemptions for classes of transactions, as may be necessary to achieve the purposes of RESPA. *See* 12 U.S.C. 2617(a).

Historically, Regulation X, 24 CFR part 3500, implemented RESPA. General rulemaking authority for RESPA transferred to the Bureau on July 21, 2011. *See* sections 1061 and 1098 of the Dodd-Frank Act. Pursuant to the Dodd-Frank Act and RESPA, as amended, the Bureau published for public comment an interim final rule establishing a new Regulation X, 12 CFR part 1024, implementing RESPA. 76 FR 78978 (Dec. 20, 2011). The Bureau's Regulation X took effect on December 30, 2011. The requirements in section 6 of RESPA for mortgage servicing are implemented primarily by § 1024.21.

D. The Dodd-Frank Act

The Dodd-Frank Act imposes certain new requirements related to mortgage servicing. As set forth above, some of these new requirements are amendments to RESPA addressed in this final rule and others are amendments to TILA, addressed in the 2013 TILA Servicing Final Rule.

Section 1463 of the Dodd-Frank Act added new sections 6(k), 6(*l*), and 6(m) to RESPA. 12 U.S.C. 2605. Sections 6(k)(1)(A), 6(k)(2), 6(*l*) and 6(m) impose restrictions on servicers with respect to force-placed insurance. Specifically, section 6(k)(1)(A) of RESPA provides that a servicer may not obtain force-placed hazard insurance with respect to any property secured by a federally related mortgage unless there is a reasonable basis to believe the borrower has failed to comply with the loan contract's requirement to maintain property insurance. Further, under section 6(*l*) of RESPA, a servicer is deemed not to have a reasonable basis for obtaining force-placed insurance, unless the servicer sends to the borrower, by first-class mail, two written notices. The first notice must be sent at least 45 days before imposing on the borrower any charge for force-placed insurance, and the second notice must be sent at least 30 days after the first written notice and at least 15 days before imposing on the borrower any charge for force-placed insurance. The notices must remind borrowers of their obligation to maintain hazard insurance on the property, alert borrowers to the servicer's lack of evidence of insurance coverage, tell borrowers what they must do to provide proof of hazard insurance coverage, and state that the servicer may obtain coverage at the borrower's expense if the borrower fails to provide evidence of coverage. Under section 6(*l*)(3) of RESPA, within fifteen days of receipt by a servicer of a borrower's existing insurance coverage, servicers must terminate force-placed insurance coverage and refund to the borrower any premiums charged during any period when the borrower had hazard insurance in place. Finally, section 6(m) of RESPA requires that all charges imposed on the borrower related to force-placed insurance, apart from charges subject to State regulation as the business of insurance, must be bona fide and reasonable.

Section 1463 of the Dodd-Frank Act further added section 6(k)(1)(B)-(D) of RESPA, which prohibits certain acts and practices by servicers of federally related mortgage loans with regard to responding to borrower assertions of error and requests for information. Specifically, section 6(k)(1)(B) of RESPA prohibits servicers from charging fees for responding to valid qualified written requests. Section 6(k)(1)(C) of RESPA provides that a servicer of a federally related mortgage loan must not fail to take timely action to respond to a borrower's requests to correct errors relating to: (1) allocation of payments; (2) final balances for purposes of paying off the loan; (3) avoiding foreclosure; or (4) other standard servicer duties. Finally, section 6(k)(1)(D) provides that a servicer must respond within ten business days to a request from a borrower to provide the identity, address, and other relevant contact information about the owner or assignee of the loan. In addition, section 1463(c) amends section 6(e) of RESPA to reduce the amount of time within which servicers must correct errors and respond to requests for information. Section 1463(b) and (d) of the Dodd-Frank Act amended sections 6(f) and 6(g) of RESPA with respect to penalties for violation of section 6 of RESPA, and refund of escrow account balances, respectively.[40]

Finally, section 1463(a) of the Dodd-Frank Act adds section 6(k)(1)(E) to RESPA, which provides that a servicer of a federally related mortgage loan must "comply with any other obligation found by the [Bureau], by regulation, to be appropriate to carry out the consumer protection purposes of this Act."[41] This provision provides the Bureau authority to establish prohibitions on servicers of federally related mortgage loans appropriate to carry out the consumer protection purposes of RESPA. As discussed below, in light of the systemic problems in the mortgage servicing industry discussed above, the Bureau is exercising this authority in this rulemaking to implement protections for borrowers with respect to mortgage servicing.

Section 1022(b)(1) of the Dodd-Frank Act authorizes the Bureau to prescribe rules "as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof[.]" 12 U.S.C. 5512(b)(1).   RESPA and title X of the Dodd-Frank Act are Federal consumer financial laws. Accordingly, the Bureau proposed to exercise its authority under section 1022(b) of the Dodd-Frank Act to prescribe rules to carry out the purposes of RESPA and title X and prevent evasion of those laws.

III. Summary of the Rulemaking Process

[40] As set forth below, section 1463(d) is implemented by § 1024.34(b) of this rule. Section 1463(b), however, is not implemented by this rulemaking. Accordingly, pursuant to section 1400(c) of the Dodd-Frank Act, the amendments to section 6(f) of RESPA in section 1463(b) of the Dodd-Frank Act are effective as of January 21, 2013.

[41] 12 U.S.C. 2605(k)(1)(E).

A. Outreach and Consumer Testing

The Bureau has conducted extensive outreach in developing the Final Servicing Rules. Prior to issuing the Proposed Servicing Rules on August 10, 2012, Bureau staff met with consumers, consumer advocates, mortgage servicers, force-placed insurance carriers, industry trade associations, other Federal regulatory agencies, and other interested parties to discuss various aspects of the statute, servicing industry operations, and consumer harm impacts. Outreach included meetings with numerous individual servicers to understand their operations and the potential benefits and burdens of the proposed mortgage servicing rules. As discussed above and in connection with section 1022 of the Dodd-Frank Act below, the Bureau has also consulted with relevant Federal regulators both regarding the Bureau's specific rules and the need for and potential contents of national mortgage servicing standards in general.

Further, the Bureau solicited input from small servicers through a Small Business Review Panel (Small Business Review Panel) with the Chief Counsel for Advocacy of the Small Business Administration (Advocacy) and the Administrator of the Office of Information and Regulatory Affairs within the Office of Management and Budget (OMB).[42] The Small Business Review Panel's findings and recommendations are contained in the Small Business Review Panel Report.[43] The Bureau has adopted recommendations provided by the participants on the Small Business Review Panel and includes below a discussion of such recommendations in connection with the applicable requirement.

[42] The Small Business Regulatory Enforcement Fairness Act of 1996 requires the Bureau to convene a Small Business Review Panel before proposing a rule that may have a significant economic impact on a substantial number of small entities. *See* Pub. L. 104-121, tit. II, 110 Stat. 847, 857 (1996) (as amended by Pub. L. 110-28, sec. 8302 (2007)).

[43] *See* U.S. Consumer Fin. Prot. Bureau, *Final Report of the Small Business Review Panel on CFPB's Proposals Under Consideration for Mortgage Servicing Rulemaking* (June 11, 2012) ("SBREFA Final Report"), available at http://www.consumerfinance.gov.

Further, prior to the issuing the Proposed Servicing Rules on August 10, 2012, the Bureau engaged ICF Macro (Macro), a research and consulting firm that specializes in designing disclosures and consumer testing, to conduct one-on-one cognitive interviews regarding disclosures connected with mortgage servicing. During the first quarter of 2012, the Bureau and Macro worked closely to develop and test disclosures that would satisfy the requirements of the Dodd-Frank Act and provide information to consumers in a manner that would be understandable and useful. These disclosures related to the force-placed insurance notices set forth in this rule, as well as the ARM interest rate adjustment notices and the periodic statement disclosure set forth in the 2013 TILA Servicing Final Rule.

Macro conducted three rounds of one-on-one cognitive interviews with a total of 31 participants in the Baltimore, Maryland metro area (Towson, Maryland), Memphis, Tennessee, and Los Angeles, California. Participants were all consumers who held a mortgage loan and represented a range of ages and education levels. Efforts were made to recruit a significant number of participants who had trouble making mortgage payments in the last two years. During the interviews, participants were shown disclosure forms for periodic statements, ARM interest rate adjustment notices, and force-placed insurance notices. Participants were asked specific questions to test their understanding of the information presented in each of the disclosures, how easily they could find various pieces of information presented in each of the disclosures, and how they would use the information presented in each of the disclosures. The disclosures were revised after each round of testing.

After the Bureau issued the Proposed Servicing Rules, Macro conducted a fourth round of one-on-one cognitive interviews with eight participants in Philadelphia, Pennsylvania. Again, participants were consumers who held a mortgage loan and represented a range of ages and education levels. During the interviews, participants were asked to review two different versions of a servicing transfer notice and early intervention model clauses, which relate to requirements the Bureau is implementing under RESPA. Participants were asked specific questions to test their reaction to and understanding of the content of the servicing transfer notice and the early intervention model clauses. This process was repeated for each of the five clauses being tested. Specific findings from the consumer testing are discussed in detail throughout where relevant.[44]

One commenter, identifying itself as a research organization, observed that the consumer testing the Bureau has conducted with respect to the mortgage servicing disclosures follows the path of evidence-based decision-making. This commenter asserted, however, that the Bureau should consider undertaking steps in evaluating the proposed forms, including possibly undertaking additional testing because other consumer financial disclosures, including the forms the Bureau proposed with the 2012 TILA-RESPA Proposal, have gone through more testing. At the same time, however, the commenter observed that the decreased level of testing might be justified on various grounds, such as, for example, the fact that studies have found that small numbers of individuals can identify the vast majority of usability problems, the fact that the testing was done with participants familiar with mortgages, and the fact that the Bureau is working on a tight schedule to finalize rules by January 21, 2013 when statutory provisions would go into effect.

The Bureau believes that the testing it conducted is appropriate. The Bureau observes that the forms the Bureau proposed as part of the 2012 TILA-RESPA Proposal contained significantly more complicated financial information than the forms finalized as part of the current rulemakings. Additionally, the 2012 TILA-RESPA Proposal, when finalized, would

[44] ICF Int'l, Inc., *Summary of Findings: Design and Testing of Mortgage Servicing Disclosures* (Aug. 2012) ("Macro Report"), *available at* http://www.regulations.gov/#!documentDetail;D=CFPB-2012-0033-0003

substantially change consumers’ mortgage shopping experience; by contrast, the Final Mortgage Servicing Rules are intended to improve, but not substantially alter, consumers’ experience with their mortgage servicers. These differences, in terms of level of complication and degree of change from current practice, justify the different levels of resources the Bureau allocated to the two different testing projects. Lastly, Macro’s findings show that there was notable consistency across the different rounds of testing in terms of participant comprehension that, in combination with the Bureau’s expertise and knowledge of consumer understanding and behavior, gave the Bureau confidence to rely on the forms that were developed and refined through testing as a basis for the model forms included in the Final Servicing Rules.

The Bureau further emphasizes that it is not relying solely on the consumer testing to determine that any particular disclosure will be effective. The Bureau is also relying on its knowledge of, and expertise in, consumer understanding and behavior, as well as principles of effective disclosure design.

B. Small Business Regulatory Enforcement Fairness Act

As required by SBREFA, the Bureau convened a Small Business Review Panel to assess the impact of the possible rules on small servicers and to help the Bureau determine to what extent it may be appropriate to consider adjusting these standards for small servicers, to the extent permitted by law. Thus, on April 9, 2012, the Bureau provided Advocacy with the formal notification and other information required under section 609(b)(1) of the Regulatory Flexibility Act (RFA) to convene the panel.

In order to obtain feedback from small servicers, the Bureau, in consultation with Advocacy, identified five categories of small entities that may be subject to the proposed rule: commercial banks/savings institutions, credit unions, non-depositories engaged primarily in lending funds with real estate as collateral, non-depositories primarily engaged in loan servicing, and certain non-profit organizations. The Bureau, in consultation with Advocacy, selected 16 representatives to participate in the Small Business Review Panel process from the categories of entities that may be subject to the Proposed Servicing Rules. The participants included representatives from each of the categories identified by the Bureau and comprised a diverse group of individuals with regard to geography and type of locality (*i.e.*, rural, urban, suburban, or metropolitan areas), as described in chapter 7 of the Small Business Review Panel Report.

On April 10, 2012, the Bureau convened the Small Business Review Panel. In order to collect the advice and recommendations of small entity participants, the Panel held an outreach meeting/teleconference on April 24, 2012 (Panel Outreach Meeting). To help the small entity participants prepare for the Panel Outreach Meeting, the Panel circulated briefing materials that summarized the proposals under consideration at that time, posed discussion issues, and provided information about the SBREFA process generally.[45] All 16 small entities participated in the Panel Outreach Meeting either in person or by telephone. The Small Business Review Panel also provided the small entities with an opportunity to submit written feedback until May 1, 2012. In response, the Small Business Review Panel received written feedback from 5 of the representatives.[46]

On June 11, 2012, the Small Business Review Panel submitted to the Director of the Bureau the written Small Business Review Panel Report, which includes the following: background information on the proposals under consideration at the time; information on the

[45] The Bureau posted these materials on its website and invited the public to email remarks on the materials. Press Release, U.S. Consumer Fin. Prot. Bureau, *Consumer Financial Protection Bureau Outlines Borrower-Friendly Approach to Mortgage Servicing* (Apr. 9, 2012), *available at* http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-outlines-borrower-friendly-approach-to-mortgage-servicing/ (last accessed Jan. 6, 2013).

[46] This written feedback is attached as appendix A to the Small Business Review Panel Report.

types of small entities that would be subject to those proposals and on the participants who were selected to advise the Small Business Review Panel; a summary of the Panel's outreach to obtain the advice and recommendations of those participants; a discussion of the comments and recommendations of the participants; and a discussion of the Small Business Review Panel findings, focusing on the statutory elements required under section 603 of the RFA, 5 U.S.C. 609(b)(5).

In connection with issuing the Proposed Servicing Rules, the Bureau carefully considered the feedback from the small entities participating in the SBREFA process and the findings and recommendations in the Small Business Review Panel Report. The section-by-section analyses for the Final Servicing Rules discuss this feedback and the specific findings and recommendations of the Small Business Review Panel, as applicable. The SBREFA process provided the Small Business Review Panel and the Bureau with an opportunity to identify and explore opportunities to mitigate the burden of the rule on small entities while achieving the rule's purposes. It is important to note, however, that the Small Business Review Panel prepared the Small Business Review Panel Report at a preliminary stage of the proposal's development and that the report—in particular, the findings and recommendations—should be considered in that light. Any options identified in the Small Business Review Panel Report for reducing the proposed rule's regulatory impact on small entities were expressly subject to further consideration, analysis, and data collection by the Bureau to ensure that the options identified were practicable, enforceable, and consistent with RESPA, TILA, the Dodd-Frank Act, and their statutory purposes.

C. Summary of the Proposed Servicing Rule

The 2012 RESPA Servicing Proposal contained numerous significant revisions to

Regulation X. As a preliminary matter, the Bureau proposed to reorganize Regulation X to include three distinct subparts. Subpart A (General) would have included general provisions of Regulation X, including provisions that applied to both subpart B and subpart C. Subpart B (Mortgage settlement and escrow accounts) would have included provisions relating to settlement services and escrow accounts, including disclosures provided to borrowers relating to settlement services. Subpart C (Mortgage servicing) would have included provisions relating to obligations of mortgage servicers. The Bureau also proposed to set forth a commentary that included official Bureau interpretations of Regulation X.

With respect to mortgage servicing-related provisions, the proposed rule would have amended existing provisions currently published in 12 CFR 1024.21 that relate to disclosures of mortgage servicing transfers and servicer obligations to borrowers. The Bureau proposed to include these provisions within subpart C as §§ 1024.33-1024.34. The Bureau also proposed to move certain clarifications in these provisions that were previously published in 12 CFR 1024.21 to the commentary to conform the organization of these provisions with the proposed additions to Regulation X.

The proposed rule would have established procedures for investigating and resolving alleged errors and responding to requests for information. The proposed requirements were set forth in proposed §§ 1024.35-1024.36. As proposed, these sections would have required servicers to respond to notices of error and information requests from borrowers, including qualified written requests. The Bureau's goal was to conform and consolidate the pre-existing requirements under RESPA applicable to qualified written requests, with the new requirements imposed by the Dodd-Frank Act through the addition of sections 6(k)(1)(C) and 6(k)(1)(D) of RESPA to respond to errors and information requests. The Bureau proposed to create a unified requirement for servicers to respond to notices of error and information requests provided by borrowers, without regard to whether the notices or requests constituted qualified written requests.[47] To that end, the proposed rule would have implemented the Dodd-Frank Act amendments to RESPA section 6(e) by adjusting the timeframes applicable to respond to qualified written requests, as well as errors and information requests generally, to conform to the new requirements.

Proposed § 1024.37 would have implemented limitations on servicers obtaining force-placed insurance. The proposed rule would have required servicers to provide notices to borrowers at certain timeframes before a servicer could impose a charge on a borrower for force-placed insurance. Further, the proposed rule would have required that charges related to force-placed insurance, other than charges subject to State regulation as the business of insurance or authorized by Federal flood laws, be bona fide and reasonable. Finally, the proposed rule sought to reduce the instances in which force-placed insurance would be needed by amending current § 1024.17 to require that where a borrower has escrowed for hazard insurance, servicers must advance funds to, and disburse from, an escrow account to maintain the borrower's own hazard insurance policy even if the loan obligation is more than 30 days overdue. The proposed rule also would have implemented the Dodd-Frank Act amendment to RESPA section 6(g) in proposed § 1024.34(b) by imposing requirements on servicers to refund or transfer funds in an escrow account when a mortgage loan is paid in full.

[47] As discussed below, RESPA sets forth a "qualified written request" mechanism through which a borrower can assert an error to a servicer or request information from a servicer. Section 6(k)(1)(C) and 6(k)(1)(D) of RESPA set forth separate obligations for servicers to correct certain types of errors asserted by borrowers and to provide information to a borrower regarding an owner or assignee of a mortgage loan without reference to the "qualified written request" process. The 2012 RESPA Servicing Proposal would have integrated the new requirements under RESPA to respond to errors and information requests with RESPA's preexisting qualified written request process Although a borrower would still have been able to submit a "qualified written request," under the proposed rule, a "qualified written request" would have been subject to the same error resolution or information request requirements applicable to any other type of written error notice or information request to a servicer.

The proposed rule would have imposed obligations on servicers in four additional areas not specifically required by the Dodd-Frank Act: (1) servicer policies and procedures, (2) early intervention for delinquent borrowers, (3) continuity of contact, and (4) loss mitigation procedures. The policies and procedures provision would have required servicers to implement policies and procedures to manage documents and information to achieve defined objectives intended to ensure that borrowers are not harmed by servicers' information management operations. Further, the policies and procedures provision would also have imposed requirements on servicers regarding record retention and management of servicing file documents. The early intervention provision would have required servicers to contact borrowers at an early stage of delinquency and provide information to borrowers about available loss mitigation options and the foreclosure process. The continuity of contact provision would have required servicers to make available to borrowers direct phone access to personnel who could assist borrowers in pursuing loss mitigation options. The loss mitigation procedures would have required servicers that offer loss mitigation options to borrowers to evaluate complete and timely applications for loss mitigation options. Servicers would have been required to permit borrowers to appeal denials of timely loss mitigation applications for loan modification programs. A servicer that received a complete and timely application for a loss mitigation option would not have been able to proceed with a foreclosure sale unless (1) the servicer denied the borrower's application and the time for any appeal had expired; (2) the borrower had declined or failed to accept an offer of a loss mitigation option within 14 days of the offer; or (3) the borrower failed to comply with the terms of a loss mitigation agreement.

D. Overview of the Comments Received

The Bureau received approximately 300 comments on the Proposed Servicing Rules. The comments came from individual consumers, consumer advocates, community banks, large bank holding companies, secondary market participants, credit unions, non-bank servicers, State and national trade associations for financial institutions in the mortgage business, local and national community groups, Federal and State regulators, academics, and others. Commenters provided feedback on all aspects of the Proposed Servicing Rules. Most commenters tended to focus on specific aspects of the proposals. Accordingly, in general, the comments are discussed below in the section-by-section analysis.

The majority of comments were submitted by mortgage servicers, industry groups representing servicers and businesses involved in the servicing industry. Large banks, community banks and credit unions, non-bank servicers, and industry trade associations submitted nearly all of these comments. The Small Business Administration Office of Advocacy submitted a comment and the remaining comments were submitted by vendors and attorney's representing industry interests. The Bureau also received a significant number of comments from consumer advocacy groups. The record also includes a 50-page comment by the Cornell e-Rulemaking Initiative synthesizing submissions of 144 registered participants to Cornell's Regulation Room project. Regulation Room is a pilot project designed to use different web technologies and approaches to enhance public understanding and participation in Bureau rulemakings and to evaluate the advantages and disadvantages of these techniques. Finally, the Bureau also received comments from the Small Business Administration, the Federal Housing Finance Agency, the GSEs, and from vendors and attorneys representing industry interests.

Industry commenters and their trade associations also provided comments regarding the rulemaking process, and those comments are addressed here.[48] In that regard, community banks and their trade associations stated that the Bureau should consider cumulative burden when writing regulations, setting comment deadlines, and effective dates. These commenters believed that the combination of the Bureau's rules as well as the impact of Basel III requirements with respect to accounting for mortgage servicing rights in Tier I capital may cause disruptions across all mortgage market segments. A community bank trade association indicated that community banks are likely to feel the impact of the rules more acutely, as they cannot take advantage of economies of scale in mitigating the compliance burden. A community bank trade association stated that the Bureau should consider the wide diversity among servicer business models and adapt regulations to preserve diversity within the servicing industry. The commenter emphasized that community banks have strong reputation and performance incentives to ensure that consumers are provided a high level of service.

A large bank and a number of trade association commenters stated that the Bureau should be cognizant of imposing requirements and standards potentially inconsistent with those required by settlement agreements, consent orders, and GSE or government insurance program requirements. One commenter stated that the Bureau should consider preempting State law

[48] Some commenters provided comments strictly with respect to the rulemaking process. One trade association commented that small servicers that participated in the Small Business Review Panel process did not have adequate time to prepare for the panel discussion and provide appropriate data, while another trade association commented that because the Bureau's proposed rules are lengthy and because some rules have overlapping comment periods, each of which has been limited to 60 days, the trade association has had difficulty dedicating staff to comment on the Bureau's proposals. As set forth in this section, the Bureau has conducted the rulemaking process, including the SBREFA process and the public comment period, in a manner that provided as much flexibility as possible to receive feedback from the SBREFA participants and public commenters in light of the deadlines required for the rulemaking. The Bureau assisted the SBA in calls and outreach with small entity participants to obtain any comments not set forth during the panel outreach with the small entity representatives. Further, with respect to public comments, the Bureau believes that the public had a meaningful opportunity to comment, which is evidenced by the significant number of comments received and their length. The Bureau offered 61 days from August 10, 2012 through October 9, 2012, for comment; and 22 days after the proposal was published in the **Federal Register** on September 17.

mortgage servicing requirements to provide legal and regulatory certainty to industry participants that are evaluating the future desirability of maintaining servicing operations. A number of trade associations stated that the Bureau should not issue regulations that would impose requirements substantially similar to the National Mortgage Settlement on mortgage servicers that are not parties to the National Mortgage Settlement.

The Bureau has considered each of these comments relating to the cumulative impact of mortgage regulation, including the mortgage servicing rules; the potential for inconsistent results with current servicing obligations, including State law and the National Mortgage Settlement; and comments regarding the diversity of servicing business models and servicer sizes. The Bureau's consideration of those comments is reflected below in the section-by-section analysis with respect to various determinations made in finalizing the 2012 RESPA Servicing Proposal, including the determination to create clear requirements, the determination to maintain consistency with current servicing obligations, including those imposed by State law and the National Mortgage Settlement, and the consideration of exemptions for small servicers.

With respect to preemption of state law, the Final Servicing Rules generally do not have the effect of prohibiting state law from affording borrowers broader consumer protections relating to mortgage servicing than those conferred under the Final Servicing Rules. However, in certain circumstances, the effect of specific requirements of the Final Servicing Rules is to preempt certain limited aspects of state law. Specifically, as set forth below, § 1024.41(f) bars a servicer from making the first notice or filing required for a foreclosure process unless a borrower is more than 120 days delinquent, notwithstanding that state law may permit any such filing. Further, § 1024.33(d) incorporates a pre-existing provision in Regulation X that implements RESPA with respect to preemption of certain state law disclosures relating to mortgage servicing transfers. In other circumstances, the Bureau explicitly took into account existing standards (both State and Federal) and either built in flexibility or designed its rules to coexist with those standards. For example, as discussed below, the Bureau took into account the loss mitigation timelines and “dual-tracking” provisions in the National Mortgage Settlement and the California Homeowner Bill of Rights and designed timelines that are consistent with those standards. Similarly, in designing its early intervention provision the Bureau included a statement that nothing in that provision shall require a servicer to make contact with a borrower in a manner that would be prohibited under applicable law.

A number of commenters provided comments regarding language access and community blight. Two national consumer groups urged the Bureau to take action to remove barriers borrowers with limited English-proficiency face with respect to understanding the terms of their mortgages because such barriers might make these borrowers more vulnerable to bad servicing practices. One national consumer group urged the Bureau to mandate translation of all notices, documents, and bills going to borrowers. Another national consumer group urged the Bureau to consider requiring servicers to provide disclosures and services in a borrower’s preferred language, noting that it represents a population that speaks more than 100 different dialects. Finally, one commenter suggests that the Bureau should not only mandate disclosures in other languages but also should require servicers to provide language-capable staff to assist borrowers with limited English skills. With respect to neighborhood blight, a coalition of consumer advocacy groups and a consumer advocate that participated in outreach with the Bureau commented that the Bureau should consider implementing regulations to manage neighborhood blight by requiring servicers to maintain real estate owned (REO) property to decent, safe, and sanitary standards capable of purchase by borrowers with FHA financing.

Although some of these specific requests exceed the scope of the rulemaking, the Bureau takes seriously the important considerations of avoiding neighborhood blight and language access. The Bureau recognizes the challenges borrowers with limited English proficiency face in understanding the terms of their mortgage. The Bureau believes that servicers should communicate with borrowers clearly, including in the borrower's native language, where possible, and especially when lenders advertise in the borrower's native language. The Bureau conducted Spanish testing to support proposed rules and forms combining the TILA mortgage loan disclosure with the Good Faith Estimate (GFE) and statement required under RESPA. *See* 77 FR 54843. That testing underscores both the value of disclosures in other languages but also the challenges in translating forms using English terms of art into other languages to assure that the foreign-language version of the form effectively communicates the required information to its readers.

The Bureau has not had the opportunity to test the disclosures that the Bureau is adopting, or the pre-existing RESPA disclosures, in other languages. Accordingly, the Bureau is not imposing mandatory foreign language translation requirements or other language access requirements at this time with respect to the mortgage servicing disclosures and other requirements the Bureau is adopting under new subpart C. Although the Bureau declines at this time to implement requirements regarding language access, the Bureau will continue to consider language access generally in connection with developing disclosures and will consider further requirements on servicer communication with borrowers if appropriate. With respect to REO properties, the Bureau continues to consider whether regulations are appropriate to address the maintenance of properties owned by lenders and any potential resulting harm from community blight.

E. Other Dodd-Frank Act Mortgage-Related Rulemakings

In addition to the Final Servicing Rules, the Bureau is adopting several other final rules and issuing one proposal, all relating to mortgage credit, to implement requirements of title XIV of the Dodd-Frank Act. The Bureau is also issuing a final rule and planning to issue a proposal jointly with other Federal agencies to implement requirements for mortgage appraisals in title XIV. Each of the final rules follows a proposal issued in 2011 by the Board or in 2012 by the Bureau alone or jointly with other Federal agencies. Collectively, these proposed and final rules are referred to as the Title XIV Rulemakings.

- *Ability to Repay*: The Bureau recently issued a rule, following a May 2011 proposal issued by the Board (the Board's 2011 ATR Proposal),[49] to implement provisions of the Dodd-Frank Act (1) requiring creditors to determine that a consumer has a reasonable ability to repay covered mortgage loans and establishing standards for compliance, such as by making a "qualified mortgage," and (2) establishing certain limitations on prepayment penalties, pursuant to TILA section 129C as established by Dodd-Frank Act sections 1411, 1412, and 1414. 15 U.S.C. 1639c. The Bureau's final rule is referred to as the 2013 ATR Final Rule. Simultaneously with the 2013 ATR Final Rule, the Bureau issued a proposal to amend the final rule implementing the ability-to-repay requirements, including by the addition of exemptions for certain nonprofit creditors and certain homeownership stabilization programs and a definition of a "qualified mortgage" for certain loans made and held in portfolio by small creditors (the 2013 ATR Concurrent Proposal). The Bureau expects to act on the 2013 ATR Concurrent Proposal on an expedited basis, so that any exceptions or adjustments to the 2013 ATR Final Rule can take effect simultaneously with that rule.

[49] 76 FR 27390 (May 11, 2011).

- *Escrows*: The Bureau recently issued a rule, following a March 2011 proposal issued by the Board (the Board's 2011 Escrows Proposal),[50] to implement certain provisions of the Dodd-Frank Act expanding on existing rules that require escrow accounts to be established for higher-priced mortgage loans and creating an exemption for certain loans held by creditors operating predominantly in rural or underserved areas, pursuant to TILA section 129D as established by Dodd-Frank Act sections 1461. 15 U.S.C. 1639d. The Bureau's final rule is referred to as the 2013 Escrows Final Rule.
- *HOEPA*: Following its July 2012 proposal (the 2012 HOEPA Proposal),[51] the Bureau recently issued a final rule to implement Dodd-Frank Act requirements expanding protections for "high-cost mortgages" under the Homeownership and Equity Protection Act (HOEPA), pursuant to TILA sections 103(bb) and 129, as amended by Dodd-Frank Act sections 1431 through 1433. 15 U.S.C. 1602(bb) and 1639. The Bureau also is finalizing rules to implement certain title XIV requirements concerning homeownership counseling, including a requirement that lenders provide lists of homeownership counselors to applicants for federally related mortgage loans, pursuant to RESPA section 5(c), as amended by Dodd-Frank Act section 1450. 12 U.S.C. 2604(c). The Bureau's final rule is referred to as the 2013 HOEPA Final Rule.
- *Loan Originator Compensation*: Following its August 2012 proposal (the 2012 Loan Originator Proposal),[52] the Bureau is issuing a final rule to implement provisions of the Dodd-Frank Act requiring certain creditors and loan originators to meet certain duties of care, including qualification requirements; requiring the establishment of certain compliance procedures by depository institutions; prohibiting loan originators, creditors, and the affiliates of

[50] 76 FR 11598 (Mar. 2, 2011).
[51] 77 FR 49090 (Aug. 15,2012).
[52] 77 FR 55272 (Sept. 7, 2012).

both from receiving compensation in various forms (including based on the terms of the transaction) and from sources other than the consumer, with specified exceptions; and establishing restrictions on mandatory arbitration and financing of single premium credit insurance, pursuant to TILA sections 129B and 129C as established by Dodd-Frank Act sections 1402, 1403, and 1414(a). 15 U.S.C. 1639b, 1639c. The Bureau's final rule is referred to as the 2013 Loan Originator Final Rule.

- *Appraisals*: The Bureau, jointly with other Federal agencies,[53] is issuing a final rule implementing Dodd-Frank Act requirements concerning appraisals for higher-risk mortgages, pursuant to TILA section 129H as established by Dodd-Frank Act section 1471. 15 U.S.C. 1639h. This rule follows the agencies' August 2012 joint proposal (the 2012 Interagency Appraisals Proposal).[54] The agencies' joint final rule is referred to as the 2013 Interagency Appraisals Final Rule. As discussed in that final rule, the agencies plan to issue a supplemental proposal addressing potential additional exemptions to the appraisal requirements. In addition, following its August 2012 proposal (the 2012 ECOA Appraisals Proposal),[55] the Bureau is issuing a final rule to implement provisions of the Dodd-Frank Act requiring that creditors provide applicants with a free copy of written appraisals and valuations developed in connection with applications for loans secured by a first lien on a dwelling, pursuant to section 701(e) of the Equal Credit Opportunity Act (ECOA) as amended by Dodd-Frank Act section 1474. 15 U.S.C. 1691(e). The Bureau's final rule is referred to as the 2013 ECOA Appraisals Final Rule.

[53] Specifically, the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the National Credit Union Administration, and the Federal Housing Finance Agency.

[54] 77 FR 54722 (Sept. 5, 2012).

[55] 77 FR 50390 (Aug. 21, 2012).

The Bureau is not at this time finalizing proposals concerning various disclosure requirements that were added by title XIV of the Dodd-Frank Act, integration of mortgage disclosures under TILA and RESPA, or a simpler, more inclusive definition of the finance charge for purposes of disclosures for closed-end mortgage transactions under Regulation Z. The Bureau expects to finalize these proposals and to consider whether to adjust regulatory thresholds under the Title XIV Rulemakings in connection with any change in the calculation of the finance charge later in 2013, after it has completed quantitative testing, and any additional qualitative testing deemed appropriate, of the forms that it proposed in July 2012 to combine TILA mortgage disclosures with the good faith estimate (RESPA GFE) and settlement statement (RESPA settlement statement) required under the Real Estate Settlement Procedures Act, pursuant to Dodd-Frank Act section 1032(f) and sections 4(a) of RESPA and 105(b) of TILA, as amended by Dodd-Frank Act sections 1098 and 1100A, respectively (the 2012 TILA-RESPA Proposal).[56] Accordingly, the Bureau already has issued a final rule delaying implementation of various affected title XIV disclosure provisions.[57]

Coordinated Implementation of Title XIV Rulemakings

As noted in all of its foregoing proposals, the Bureau regards each of the Title XIV Rulemakings as affecting aspects of the mortgage industry and its regulations. Accordingly, as noted in its proposals, the Bureau is coordinating carefully the Title XIV Rulemakings, particularly with respect to their effective dates. The Dodd-Frank Act requirements to be implemented by the Title XIV Rulemakings generally will take effect on January 21, 2013, unless final rules implementing those requirements are issued on or before that date and provide for a different effective date. *See* Dodd-Frank Act section 1400(c), 15 U.S.C. 1601 note. In

[56] 77 FR 51116 (Aug. 23, 2012).

[57] 77 FR 70105 (Nov. 23, 2012).

addition, some of the Title XIV Rulemakings are required by the Dodd-Frank Act to take effect no later than one year after they are issued. *Id.*

The comments on the appropriate effective date for this final rule are discussed in detail below in part VI of this notice. In general, however, consumer advocates requested that the Bureau put the protections in the Title XIV Rulemakings into effect as soon as practicable. In contrast, the Bureau received some industry comments indicating that implementing so many new requirements at the same time would create a significant cumulative burden for creditors. In addition, many commenters also acknowledged the advantages of implementing multiple revisions to the regulations in a coordinated fashion.[58] Thus, a tension exists between coordinating the adoption of the Title XIV Rulemakings and facilitating industry's implementation of such a large set of new requirements. Some have suggested that the Bureau resolve this tension by adopting a sequenced implementation, while others have requested that the Bureau simply provide a longer implementation period for all of the final rules.

The Bureau recognizes that many of the new provisions will require creditors to make changes to automated systems and, further, that most administrators of large systems are reluctant to make too many changes to their systems at once. At the same time, however, the Bureau notes that the Dodd-Frank Act established virtually all of these changes to institutions' compliance responsibilities, and contemplated that they be implemented in a relatively short period of time. And, as already noted, the extent of interaction among many of the Title XIV

[58] Of the several final rules being adopted under the Title XIV Rulemakings, six entail amendments to Regulation Z, with the only exceptions being the 2013 RESPA Servicing Final Rule (Regulation X) and the 2013 ECOA Appraisals Final Rule (Regulation B); the 2013 HOEPA Final Rule also amends Regulation X, in addition to Regulation Z. The six Regulation Z final rules involve numerous instances of intersecting provisions, either by cross-references to each other's provisions or by adopting parallel provisions. Thus, adopting some of those amendments without also adopting certain other, closely related provisions would create significant technical issues, *e.g.*, new provisions containing cross-references to other provisions that do not yet exist, which could undermine the ability of creditors and other parties subject to the rules to understand their obligations and implement appropriate systems changes in an integrated and efficient manner.

Rulemakings necessitates that many of their provisions take effect together. Finally, notwithstanding commenters' expressed concerns for cumulative burden, the Bureau expects that creditors actually may realize some efficiencies from adapting their systems for compliance with multiple new, closely related requirements at once, especially if given sufficient overall time to do so.

Accordingly, the Bureau is requiring that, as a general matter, creditors and other affected persons begin complying with the final rules on January 10, 2014. As noted above, section 1400(c) of the Dodd-Frank Act requires that some provisions of the Title XIV Rulemakings take effect no later than one year after the Bureau issues them. Accordingly, the Bureau is establishing January 10, 2014, one year after issuance of the Bureau's 2013 ATR, Escrows, and HOEPA Final Rules (*i.e.*, the earliest of the title XIV Rulemakings), as the baseline effective date for most of the Title XIV Rulemakings. The Bureau believes that, on balance, this approach will facilitate the implementation of the rules' overlapping provisions, while also affording creditors sufficient time to implement the more complex or resource-intensive new requirements.

The Bureau has identified certain rulemakings or selected aspects thereof, however, that do not present significant implementation burdens for industry. Accordingly, the Bureau is setting earlier effective dates for those final rules or certain aspects thereof, as applicable. Those effective dates are set forth and explained in the **Federal Register** notices for those final rules.

IV. Legal Authority

The final rule was issued on January 17, 2013, in accordance with 12 CFR 1074.1. The Bureau is issuing this final rule pursuant to its authority under RESPA and the Dodd-Frank Act. Section 1061 of the Dodd-Frank Act transferred to the Bureau the "consumer financial protection functions" previously vested in certain other Federal agencies, including HUD. The term "consumer financial protection function" is defined to include "all authority to prescribe rules or issue orders or guidelines pursuant to any Federal consumer financial law, including performing appropriate functions to promulgate and review such rules, orders, and guidelines."[59] RESPA and certain provisions of Title XIV of the Dodd-Frank Act are Federal consumer financial laws.[60] Accordingly, the Bureau has authority to issue regulations pursuant to RESPA and Title XIV of the Dodd-Frank Act, including implementing the additions and amendments to RESPA's mortgage servicing requirements made by Title XIV of the Dodd-Frank Act.

Section 1463 of the Dodd-Frank Act creates statutory mandates by adding new section 6(k) through (m) to RESPA. Section 1463 of the Dodd-Frank Act also amends certain consumer protection provisions set forth in existing section 6(e) through (g) of RESPA.

Regarding the statutory mandates, section 6(k) of RESPA contains prohibitions on servicers for servicing of federally related mortgage loans. Pursuant to section 6(k) of RESPA, servicers are prohibited from: (i) obtaining force-placed insurance unless there is a reasonable basis to believe the borrower has failed to comply with the loan contract's requirements to maintain property insurance; (ii) charging fees for responding to valid qualified written requests; (iii) failing to take timely action to respond to a borrower's requests to correct certain types of errors; (iv) failing to respond within ten business days to a request from a borrower to provide certain information about the owner or assignee of a mortgage loan; or (v) failing to comply with any other obligation found by the Bureau to be appropriate to carry out the consumer protection purposes of RESPA. *See* RESPA section 6(k).

[59] 12 U.S.C. 5581(a)(1).

[60] Dodd-Frank Act section 1002(14), 12 U.S.C. 5481(14) (defining "Federal consumer financial law" to include the "enumerated consumer laws" and the provisions of title X of the Dodd-Frank Act); Dodd-Frank Act section 1002(12), 12 U.S.C. 5481(12) (defining "enumerated consumer laws" to include RESPA), Dodd-Frank section 1400(b), 15 U.S.C. 1601 note (defining "enumerated consumer laws" to include certain subtitles and provisions of title XIV).

Section 6(*l*) of RESPA sets forth specific requirements for determining if a servicer has a reasonable basis to obtain force-placed insurance coverage. Section 6(*l*) of RESPA requires servicers to provide written notices to a borrower before imposing on the borrower a charge for a force-placed insurance policy. Section 6(*l*) of RESPA also requires a servicer to accept any reasonable form of written confirmation from a borrower of existing insurance coverage. Section 6(*l*) of RESPA further requires a servicer, within 15 days of the receipt of such confirmation, to terminate force-placed insurance and refund any premiums and fees paid during the period of overlapping coverage. Section 6(m) of RESPA requires that charges related to force-placed insurance, other than charges subject to State regulation as the business of insurance, be bona fide and reasonable.

The Dodd-Frank Act also amends existing section 6(e) through (g) of RESPA. Section 6(e) is amended by decreasing the response times currently applicable to a servicer's obligation to respond to a qualified written request. Section 6(f) is amended to increase the penalty amounts servicers may incur for violations of section 6 of RESPA. Further, section 6(g) is amended to protect borrowers by obligating servicers to refund escrow balances to borrowers when a mortgage loan is paid in full or to transfer the escrow balance in certain refinancing related situations.

The Bureau observes that in addition to the specific statutory mandates and amendments the Dodd-Frank Act established in RESPA, by adding section 6(k)(1)(E) to RESPA, the Dodd-Frank Act authorizes the Bureau, through section 6(k), to prescribe regulations that are appropriate to carry out the consumer protection purposes of the title. RESPA is a remedial consumer protection statute and imposes obligations upon servicers of federally related mortgage loans. RESPA has established a consumer protection paradigm of requiring disclosures to consumers, and establishing servicer requirements and prohibitions, for the purpose of protecting borrowers from certain potential harms. The disclosures include, for example, disclosures regarding escrow account balances and disbursements, transfers of mortgage servicing among mortgage servicers, and force-placed insurance notices. The requirements and prohibitions include requirements for servicers to respond to qualified written requests from borrowers and with respect to escrow account payments. Servicers are subject to civil liability for failure to comply with such requirements and prohibitions.

Considered as a whole, RESPA, as amended by the Dodd-Frank Act, reflects at least two significant consumer protection purposes: (1) to establish requirements that ensure that servicers have a reasonable basis for undertaking actions that may harm borrowers and (2) to establish servicers' duties to borrowers with respect to the servicing of federally related mortgage loans. Specifically, with respect to mortgage servicing, the consumer protection purposes of RESPA include responding to borrower requests and complaints in a timely manner, maintaining and providing accurate information, helping borrowers avoid unwarranted or unnecessary costs and fees, and facilitating review for foreclosure avoidance options. Each of the provisions adopted in this final rule is intended to achieve some or all of these purposes.

The final rule also relies on the rulemaking and exception authorities specifically granted to the Bureau by RESPA and Title X of the Dodd-Frank Act, including the authorities discussed below:

RESPA

Section 19(a) of RESPA authorizes the Bureau to prescribe such rules and regulations, to make such interpretations, and to grant such reasonable exemptions for classes of transactions, as may be necessary to achieve the purposes of RESPA, which includes the consumer protection purposes laid out above. 12 U.S.C. 2617(a). In addition, section 6(j)(3) of RESPA authorizes the Bureau to establish any requirements necessary to carry out section 6 of RESPA. 12 U.S.C. 2605(j)(3)

Title X of the Dodd-Frank Act

Dodd-Frank Act section 1022(b). Section 1022(b)(1) of the Dodd-Frank Act authorizes the Bureau to prescribe rules "as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof[.]" 12 U.S.C. 5512(b)(1). RESPA and Title X are Federal consumer financial laws. Accordingly, in adopting this final rule, the Bureau is exercising its authority under Dodd-Frank Act section 1022(b) to prescribe rules to carry out the purposes and objectives of RESPA and Title X and prevent evasion of those laws.

Dodd-Frank Act section 1032. Section 1032(a) of the Dodd-Frank Act provides that the Bureau "may prescribe rules to ensure that the features of any consumer financial product or service, both initially and over the term of the product or service, are fully, accurately, and effectively disclosed to consumers in a manner that permits consumers to understand the costs, benefits, and risks associated with the product or service, in light of the facts and circumstances." 12 U.S.C. 5532(a). The authority granted to the Bureau in Dodd-Frank Act section 1032(a) is broad, and empowers the Bureau to prescribe rules regarding the disclosure of the "features" of consumer financial products and services generally. Accordingly, the Bureau may prescribe rules containing disclosure requirements even if other Federal consumer financial laws do not specifically require disclosure of such features.

Dodd-Frank Act section 1032(c) provides that, in prescribing rules pursuant to Dodd-Frank Act section 1032, the Bureau "shall consider available evidence about consumer awareness, understanding of, and responses to disclosures or communications about the risks, costs, and benefits of consumer financial products or services." 12 U.S.C. 5532(c). Accordingly, in developing the final rule under Dodd-Frank Act section 1032(a), the Bureau has considered available studies, reports, and other evidence about consumer awareness, understanding of, and responses to disclosures or communications about the risks, costs, and benefits of consumer financial products or services. In addition, Dodd-Frank Act section 1032(b)(1) provides that "any final rule prescribed by the Bureau under this [section 1032] requiring disclosure may include a model form that may be used at the option of the covered person for provision of the required disclosures." 12 U.S.C. 5532(b)(1). As required under Dodd-Frank Act section 1032(b)(3), the Bureau has validated model forms issued under Dodd-Frank Act section 1032(b)(1) through consumer testing.

The Bureau uses the specific statutory authorities set forth above, as well as the broader authorities set forth in sections 6(j)(3), 6(k), and 19(a) of RESPA, and in sections 1022 and 1032 of the Dodd-Frank Act discussed above in adopting this final rule.

Commentary

The Bureau's final rule also includes official Bureau interpretations in a supplement to Regulation X. RESPA section 19(a) authorizes the Bureau to make such reasonable interpretations of RESPA as may be necessary to achieve the consumer protection purposes of RESPA. Good faith compliance with the interpretations would afford servicers protection from liability under section 19(b) of RESPA. The Bureau's adoption of these official Bureau interpretations in the supplement substitutes for the prior practice of HUD of publishing

Statements of Policy with respect to interpretations of RESPA.[61]

V. Section-by-Section Analysis

Subpart A—General

Existing Regulation X does not contain distinctive subparts. The Bureau proposed to create three distinct subparts within Regulation X. The Bureau did not receive any comments on the proposed reorganization of Regulation X. Therefore, the final rule adopts the reorganization as proposed.

Subpart A, titled "General," contains general provisions as well as provisions that would have been applicable to the other two subparts of Regulation X. The Bureau proposed to place current §§ 1024.1 through 1024.5 in subpart A and, as described below, proposed to make a number of largely technical corrections to those sections.

Current § 1024.2 sets forth defined terms that are applicable to transactions covered by Regulation X, including the defined term "Federally related mortgage loan" that is referenced in the proposed defined term "Mortgage loan" in proposed subpart C. The Bureau proposed to retain most of current § 1024.2 without change, except that the Bureau proposed deletions from the defined terms "Federally related mortgage loan" and "Mortgage broker" and additions to the defined terms "Public Guidance Documents" and "Servicer."

Specifically, the Bureau proposed to modify the defined term "Federally related mortgage loan" to eliminate the use of the short-hand reference to "mortgage loan" as a substitute for "Federally related mortgage loan" in light of the fact that proposed § 1024.31 would have provided that the term "mortgage loan" for purposes of subpart C's mortgage servicing

[61] The Bureau recognizes that the proposed supplement, which sets forth interpretations that relate to the proposed mortgage servicing rulemakings, is not inclusive of all interpretations of RESPA, including interpretations previously issued by the HUD. The Bureau does not intend that the publication of the supplement would withdraw or otherwise affect the status of any prior interpretations of RESPA not set forth in the supplement.

requirements is to be a defined term distinct from the defined term "Federally related mortgage loan." The Bureau also proposed conforming edits that would have replaced references to "mortgage loan" with "federally related mortgage loan" in the defined terms "Origination service," "Servicer," and "Servicing" set forth in current § 1024.2 and in current §§ 1024.7(f)(3), 1024.17(c)(8), 1024.17(f)(2)(ii), 1024.17(f)(4)(iii), 1024.17(i)(2), and 1024.17(i)(4)(iii). The Bureau did not receive comments on the proposed revision to the defined term "Federally related mortgage loan" or the conforming edits described above. The final rule adopts the proposed revision and conforming edits as proposed.

The 2012 RESPA Servicing Proposal also would have removed a reference to loan correspondents that are approved under 24 CFR 202.8 from the defined term "Mortgage broker" because the reference was made obsolete when HUD amended 24 CFR 202.8 on April 20, 2010, to eliminate the FHA approval process for loan correspondents after determining that loan correspondents would no longer be approved participants in FHA programs.[62] The Bureau did not receive comments on the proposal to remove the reference to loan correspondents from the current defined term "Mortgage broker," and the final rule adopts the proposed removal from the defined term "Mortgage broker" as proposed.

The proposal also would have modified the defined term "Public Guidance Documents" to clarify that such documents are available from the Bureau upon request and to provide an address for such requests. The Bureau did not receive comments on these proposed clarifications, and the final rule adopts the clarifications to the defined term "Public Guidance Documents" as proposed.

The proposal also would have added language to the defined term "Servicer" to clarify

[62] *See* 75 FR 20718.

the status of the National Credit Union Administration (NCUA) as conservator or liquidating agent of a servicer or in its role of providing special assistance to an insured credit union. The current definition of "Servicer" provides that the Federal Deposit Insurance Corporation (FDIC) is not a servicer (1) with respect to assets acquired, assigned, sold, or transferred pursuant to section 13(c) of the Federal Deposit Insurance Act or as receiver or conservator of an insured depository institution; or (2) in any case in which the assignment, sale, or transfer of the servicing of the mortgage loan is preceded by commencement of proceedings by the FDIC for conservatorship or receivership of a servicer (or an entity by which the servicer is owned or controlled). The proposed addition to the defined term "Servicer" would have clarified similarly that the NCUA is not a servicer (1) with respect to assets acquired, assigned, sold, or transferred, pursuant to section 208 of the Federal Credit Union Act or as conservator or liquidating agent of an insured credit union; or (2) in any case in which the assignment, sale, or transfer of the servicing of the mortgage loan was preceded by commencement of proceedings by the NCUA for appointment of a conservator or liquidating agent of a servicer (or an entity by which the servicer is owned or controlled). The Bureau does not believe there is a basis to impose on the NCUA, when it is providing assistance to an insured credit union or in its role as conservator or liquidating agent of an insured credit union, the obligations of a servicer. The Bureau did not receive any comments concerning the proposed language. Accordingly, the Bureau adopts the proposed addition to the defined term "Servicer" as proposed.

The Bureau proposed to delete the text of current § 1024.3 concerning the process for the public to submit questions or suggestions regarding RESPA or to receive copies of Public Guidance Documents and to replaced it with the substance of the regulation concerning electronic disclosures set forth in current § 1024.23. The Bureau did not believe a provision of

Regulation X was needed to address the process for submitting questions and requesting documents. The public may contact the Bureau to request documents, suggest changes to Regulation X, or submit questions, including questions concerning the interpretation of RESPA by mail to the Associate Director, Research, Markets, and Regulations, Bureau of Consumer Financial Protection, 1700 G St. NW, Washington, DC 20552, or by email to CFPB_RESPAInquiries@cfpb.gov. Further, the final rule includes contact information to request copies of Public Guidance Documents in the defined term "Public Guidance Documents" in § 1024.2, as discussed above.

Current § 1024.23 states that provisions of the Electronic Signatures in Global and National Commerce Act (E-Sign Act) permitting electronic disclosures to consumers if certain conditions are met apply to Regulation X. Because the Bureau believes that such E-Sign Act provisions are applicable to all provisions in Regulation X, it decided that the best place for the language was in § 1024.3. In the process of moving the language in current § 1024.23 to § 1024.3, the Bureau also made technical edits to conform the language to the language of other similar Bureau regulations. The Bureau did not receive comments on these revisions to current §§ 1024.3 and 1024.23. The Final rule adopts § 1024.3 as proposed and removes § 1024.23 as proposed.

Current § 1024.4 sets forth provisions relating to reliance upon rules, regulations, or interpretations by the Bureau. The Bureau proposed to remove current § 1024.4(b) and redesignate current § 1024.4(c) as proposed § 1024.4(b). Current § 1024.4(b) provides that the Bureau may, in its discretion, provide unofficial staff interpretations but that such interpretations do not provide protection under section 19(b) of RESPA and that staff will not ordinarily provide such interpretations on matters adequately covered by Regulation X, official interpretations, or commentaries. The Bureau's policy is to assist the public in understanding the Bureau's regulations, including, but not limited to, Regulation X. The Bureau believes that this provision, which states Bureau policy, is more appropriate for the commentary and, accordingly, proposed to include the substance of this provision in the introduction to the commentary. The Bureau did not receive comments on the proposed removal of current § 1024.4(b) and re-designation of current § 1024.4(c) as proposed § 1024.4(b). The final rule adopts these revisions as proposed.

Current § 1024.5 sets forth exemptions with respect to the applicability of Regulation X. The Bureau proposed a technical correction to current § 1024.5(b)(7) to reflect that mortgage servicing-related provisions of Regulation X will be included in new subpart C and will no longer be placed in current § 1024.21. The Bureau did not receive comments on this technical correction, and the final rule adopts the technical correction to § 1024.5 as proposed, with an additional technical change to clarify the applicability of subpart C to *bona fide* transfers in the secondary market.

For reasons discussed below, current § 1024.21 is deleted. In connection with the deletion of current § 1024.21 as discussed below, the Bureau is also making a technical correction to a cross-reference in current § 1024.13(d) to language in current § 1024.21(h) that is being moved to § 1024.33(d).

Subpart B—Mortgage Settlements and Escrow Accounts

In connection with the Bureau's proposal to create three distinct subparts in Regulation X, the Bureau is organizing §§ 1024.6 through 1024.20 under new subpart B. These provisions generally relate to settlement services and escrow accounts. As described above, the Bureau is adopting the conforming edits the Bureau proposed relating to §§ 1024.7(f)(3), 1024.17(c)(8), 1024.17(f)(2)(ii), 1024.17(f)(4)(iii), 1024.17(i)(2), and 1024.17(i)(4)(iii), *Section 1024.17 Escrow Accounts*

17(k) Timely Payments

Section 6(g) of RESPA establishes that if the terms of any federally related mortgage loan require a borrower to make payments to a servicer of the loan for deposit into an escrow account for the purpose of assuring payment of taxes, insurance premiums, and other charges with respect to the property, the servicer shall make such payments from the borrower's escrow account in a timely manner as such payments become due. Existing § 1024.21(g) provides that the requirements set forth in § 1024.17(k) govern the payment of such charges. Existing § 1024.17(k)(1) provides that if the terms of a federally related mortgage loan require a borrower to make payments to an escrow account, a servicer must pay the disbursements in a timely manner (specifically, on or before the deadline to avoid a penalty) unless a borrower's payment is more than 30 days overdue. Existing § 1024.17(k)(2) requires servicers to advance funds if necessary to make the disbursements in a timely manner unless the borrower's mortgage payment is more than 30 days past due. Upon advancing funds to pay a disbursement, a servicer may seek repayment from a borrower for the deficiency pursuant to § 1024.17(f).

The Bureau proposed a new § 1024.17(k)(5) to expand the scope of these obligations with regard to continuing a borrower's hazard insurance policy. Specifically, proposed § 1024.17(k)(5) would have required that, notwithstanding § 1024.17(k)(1) and (2), a servicer must make payments from a borrower's escrow account in a timely manner to pay the premium charge on a borrower's hazard insurance, as defined in § 1024.31, unless the servicer has a reasonable basis to believe that a borrower's hazard insurance has been canceled or not renewed for reasons other than nonpayment of premium charges. Thus, proposed § 1024.17(k)(5) would have required a servicer to both advance funds to an escrow account and to disburse such funds to pay a borrower’s hazard insurance notwithstanding that a borrower is more than 30 days delinquent.

The proposed requirement would not have applied where a servicer had “a reasonable basis to believe that such insurance has been canceled or not renewed for reasons other than nonpayment of premium charges” because the Bureau recognized that there were situations where timely payment by a servicer would not be sufficient to continue a policy that had already been canceled or was not renewed for other reasons, such as, for example, risks presented by the condition of the property.

The Bureau also proposed commentary to clarify the requirements in § 1024.17(k)(5). Specifically, the Bureau proposed to clarify in comment 17(k)(5)-1 that the receipt by a servicer of a notice of cancellation or non-renewal from the borrower’s insurance company before the insurance premium is due provides a reasonable basis to believe that the borrower’s hazard insurance has been canceled or not renewed for reasons other than nonpayment of premium charges. Comment 17(k)(5)-2 would have provided three examples of situations in which a borrower’s hazard insurance was canceled or not renewed for reasons other than the nonpayment of premium charges, including because the borrower cancelled the insurance policy, because the insurance company no longer writes the type of policy that the borrower carried or writes policies in the area where the borrower’s property is located, or because the insurance company is no longer willing to maintain the borrower’s individual policy to cover the borrower’s property because of a change in risk affecting the borrower’s property. Finally, proposed comment 17(k)(5)-3 would have clarified that a servicer that advances the premium payment as required by § 1024.17(k)(5) may advance the payment on a month-to-month basis, if permitted by State or other applicable law and accepted by the borrower’s hazard insurance company.

The Bureau proposed § 1024.17(k)(5) to protect consumers from the unwarranted force-placement of hazard insurance. Force-placed insurance generally provides substantially less coverage for a borrower's property at a substantially higher premium cost than a borrower-obtained hazard insurance policy, as discussed below in connection with § 1024.37. Section 1463 of the Dodd-Frank Act demonstrates that Congress was concerned about the unwarranted or unnecessary force-placement of hazard insurance for mortgage borrowers. Section 6(k) of RESPA, as amended by section 1463 of the Dodd-Frank Act, evinces Congress's intent to establish reasonable protections for borrowers to avoid unwarranted force-placed insurance coverage. Section 1024.17(k)(5), though articulated differently than the protections directly set forth in section 1463, draws directly from Congress's intent as set forth in section 1463 of the Dodd-Frank Act to protect borrowers from the force-placement of hazard insurance in situations where such force-placement is unwarranted and can be avoided. When a servicer is receiving bills for the borrower's hazard insurance in connection with administration of an escrow account, a servicer who elects not to advance to a delinquent borrower's escrow account to maintain the borrower's hazard insurance, allowing that insurance to lapse, and then advances a far greater amount to a borrower's escrow account to obtain a force-placed insurance policy unreasonably harms a borrower. Section 1024.17(k)(5) implements the purposes of section 1463 of the Dodd-Frank Act to protect borrowers from the unwarranted force-placement of insurance when a servicer does not have a reasonable basis to impose the charge on a borrower.

Further, considered as a whole, one of the consumer protection purposes of RESPA, as amended by the Dodd-Frank Act, is a requirement that servicers must have a reasonable basis for undertaking actions that may harm borrowers, including delinquent borrowers. Section 1024.17(k)(5) furthers this purpose by establishing that servicers may not unnecessarily obtain force-placed insurance in situations where such placement is not warranted, that is, when a servicer is able to maintain a borrower's current hazard insurance in force by advancing and disbursing funds to pay the premiums.

The Bureau further reasoned that proposed § 1024.17(k)(5) would not increase burdens on servicers generally, because the Bureau understood that many servicers already advance hazard insurance premiums for borrowers with escrow accounts even if the borrowers' mortgage payments are more than 30 days past due. The Bureau also understands that the proposed requirement would benefit owners or assignees of mortgage loans by preventing the placement of costly and unnecessary force-placed insurance policies, the higher costs for which may be recovered from an owner or assignee in the event the property is liquidated.

The Bureau sought comment on all aspects of the proposed escrow advance provision including on whether there should be additional limitations on a servicer's duty to advance funds. For instance, the Bureau sought comments on an alternative approach under which a servicer could not charge a borrower who has an escrow account established to pay hazard insurance for force-placed insurance unless those charges would be less expensive than the charges for reimbursing the servicer for advancing funds to continue the borrower's hazard insurance policy. The Bureau further requested comment regarding whether to require further that any such force-placed insurance policy protect the borrower's interest. In addition, the Bureau observed in the proposal that § 1024.17(k)(5) would only apply when a borrower has an escrow account established to pay hazard insurance, and also invited comments on whether a servicer should be required to pay the hazard insurance premiums on behalf of a borrower who has not established an escrow account to pay for such insurance. Finally, the Bureau further requested comment on whether a servicer should be required to ask such a borrower whether the borrower would consent to the servicer renewing the borrower’s hazard insurance and, with the borrower’s consent, be required to advance funds to pay such premiums.

Industry commenters and their trade associations varied significantly in their comments with respect to § 1024.17(k)(5). A number of commenters, including a force-placed insurance provider and two trade associations, stated that the proposed requirement was consistent with current industry practice and would not be onerous to implement. For example, one non-bank servicer indicated that it generally advanced funds to escrow and disbursed those funds to maintain hazard insurance so long as it viewed the advances as recoverable, notwithstanding the delinquency status of the borrower.

Numerous other servicers and their trade associations, however, objected to the requirement that a servicer timely disburse funds from escrow to pay hazard insurance for borrowers who are delinquent and further that servicers should advance funds to escrow accounts that would then be disbursed to pay hazard insurance. Some industry commenters indicated that force-placed insurance is the appropriate means for insuring a property for a borrower that has not paid for hazard insurance. For example, a national trade association representing property and casualty insurers stated that the inclusion of limitations on force-placed insurance in section 1463(a) of the Dodd-Frank Act recognized that an appropriate role exists for force-placed insurance. Some commenters indicated that the procedures for obtaining force-placed insurance, specifically notices provided to borrowers, spur borrower action to communicate with servicers and to obtain insurance. These commenters believe that the threat of forced placement of insurance causes borrowers to obtain hazard insurance to avoid force-placed insurance. If the threat is effective, they argue, servicers should not have to advance funds to escrow accounts for delinquent borrowers. One commenter, a force-placed insurance provider, urged the Bureau to first evaluate the effectiveness of the notices and procedures required by the Dodd-Frank Act before adopting a final rule requiring a servicer to advance funds for borrowers whose mortgage payments were more than 30 days overdue. Finally, one commenter hypothesized that the proposed requirement was intended as a step toward potential future actions by the Bureau to eliminate the force-placed insurance product market.

Some servicers and their trade associations questioned the Bureau's authority to require servicers to advance funds to, and disburse from, an escrow account to maintain hazard insurance. These commenters stated that (1) the Bureau does not have the authority to impose the requirement because it is not specifically set forth in the Dodd-Frank Act, (2) section 6(g) of RESPA only applies to insurance required pursuant to the terms of a federally related mortgage loan, whereas the duty to advance funds appeared to apply even for insurance not required by the terms of the loan, and (3) the requirement was an unnecessary exercise of the Bureau's authority to impose additional obligations on servicers pursuant to sections 6(k)(1)(E) and 19(a) of RESPA. Commenters further objected that the requirement to advance funds would require a servicer to provide funds to maintain coverage obtained by a borrower that exceeded the coverage required by the lender, including, for example, coverage for borrower possessions or coverage beyond hazards the lender required to be covered.

Some servicers and their trade associations further stated that the requirement to advance funds to, and disburse from, an escrow account to maintain hazard insurance would have adverse consequences for servicers, borrowers, and the insurance market. With respect to potential impact on servicers, some commenters indicated that the proposed requirement would create a disincentive to establish escrow accounts. These commenters also indicated that borrowers may incorrectly presume that servicers will advance to escrow accounts for delinquent borrowers to pay all escrow obligations, not just hazard insurance. Further, a credit union trade association commented that requiring disbursements for hazard insurance may deplete funds that may be available to pay other escrow obligations, such as tax liabilities. A commenter stated that a servicer may be responsible for a loss if a hazard insurance provider to whom it has advanced payments denies coverage because a property is vacant and is excluded from coverage; in such a situation, the commenter said that force-placed insurance is necessary because it would cover the loss.

Some servicers stated that borrowers may be unjustly enriched at the expense of their servicers by cancelling hazard insurance and obtaining for themselves refunds of premiums that were paid by their servicers. Although the Bureau had attempted to address this concern, which also was raised during the Small Business Review Panel, through proposed comment 17(k)(5)-3, servicers disagreed on the solution. Importantly, one state banking association stated that the risk of moral hazard and unjust enrichment was mitigated by proposed comment 17(k)(5)-3, which permitted the servicer to advance and disburse on a month-to-month basis, while another small bank commenter stated that the Bureau's comment permitting advancing on a month-to-month basis would increase its servicing costs because it would be paying a borrower's insurance twelve times per year.

With respect to potential impact on borrowers, several commenters suggested that the proposal would result in an increase in incidents of a borrower being double-billed for hazard insurance. These commenters incorrectly interpreted the proposal to require a servicer to pay to maintain coverage even though the borrower had decided to cancel the insurance and pay a new insurer directly. These commenters stated that borrowers may be harmed because borrowers would be responsible for duplicative hazard insurance costs, whereas a borrower would be entitled to a refund for overlapping force-placed insurance, including pursuant to the Dodd-Frank Act.

With respect to impacts on the insurance market, a number of commenters who are not insurance providers asserted that insurance providers generally view seriously delinquent borrowers as higher insurance risks compared to other borrowers. These commenters expressed concern that the Bureau's proposal could potentially mask this risk because the servicer would be required to advance premiums, even if a borrower is seriously delinquent. One commenter requested that the Bureau state that servicers may inform an insurance provider that a borrower is delinquent. In that regard, a commenter urged the Bureau to provide a form that servicers may provide to insurance providers stating that a lender is paying some identified portion of a borrower's insurance premium due to a deficiency in the borrower's escrow account.

Small banks and credit unions, as well as their trade associations and other small non-bank servicers, indicated that the impact of proposed § 1024.17(k)(5) would be particularly acute for small servicers. These commenters indicated that small servicers typically have different practices with regard to force-placed insurance than large servicers. Outreach with small servicers indicated that in certain circumstances, such servicers may not require borrowers to maintain insurance coverage, may self-insure, or may impose charges for collateral protection plans that may be less costly than advances to maintain a borrower's hazard insurance coverage. Further, commenters asserted that small servicers may be more significantly impacted by the cost of the funds required to be advanced to borrower escrow accounts.

Certain commenters requested clarification regarding whether a servicer would be entitled to recoup any required advances and whether a servicer may be liable to a borrower for failing to advance funds to, and disburse from, an escrow account to maintain hazard insurance.

Further, commenters requested clarification that advancing funds is only required if the owner or assignee of a mortgage loan requires the borrower to maintain hazard insurance.

Finally, one credit union commenter requested that the Bureau exempt servicers of home equity lines of credit (HELOCs) from the proposed requirement in § 1024.17(k)(5) to advance funds. The commenter asserted that HELOCs are largely in the subordinate-lien position and requiring a servicer of HELOCs to advance would generally be needless costly to such servicers because servicers servicing liens in the first position would also be advancing payment.

The Bureau received numerous comments from consumers and consumer advocacy groups with respect to proposed § 1024.17(k)(5). These commenters strongly supported all aspects of proposed § 1024.17(k)(5) as set forth in the proposal. These commenters generally stated, however that the Bureau should go farther than the proposal and implement requirements regarding advances and disbursements to maintain hazard insurance for delinquent borrowers that do not have escrow accounts.

Commenters significantly disagreed regarding the merits of requiring advances and disbursements to maintain hazard insurance of borrowers without escrow accounts. A number of consumer advocacy group commenters contended that the Bureau should make no distinction between homeowners that have escrow accounts and those that do not. Certain state attorney general commenters suggested instead that the Bureau should require a servicer, prior to force-placing insurance, to ask for a borrower’s consent to renew voluntary coverage and to advance funds for the premium if the borrower gives consent to the creation of an escrow account. Industry commenters were nearly uniformly opposed to requiring servicers to advance funds for the hazard insurance premiums of borrowers who have not escrowed for hazard insurance, citing most often the impracticality for servicers to reinstate a lapsed policy without any gap in coverage.

The Bureau is finalizing § 1024.17(k)(5) as proposed with adjustments to address pertinent issues raised by the comments. Specifically, the Bureau is not requiring that a servicer advance funds to, or disburse funds from, an escrow account to maintain hazard insurance in all circumstances. Rather, the Bureau had adjusted the requirement in § 1024.17(k)(5)(i) to provide that a servicer may not obtain force-placed insurance unless a servicer is unable to disburse funds from the borrower's escrow account to ensure that the borrower's hazard insurance is paid in a timely manner. Thus, for example, a servicer of a mortgage loan, including a HELOC, is not required to disburse funds from an escrow account to maintain a borrower's hazard insurance, so long as the servicer does not purchase force-placed insurance.

Pursuant to § 1024.17(k)(5)(ii)(A), a servicer is unable to disburse funds if the servicer has a reasonable basis to believe that a borrower's hazard insurance has been canceled or not renewed for reasons other than nonpayment of premium charges. Further, § 1024.17(k)(5)(ii)(B) states that a servicer is not considered unable to disburse funds solely because an escrow account contains insufficient funds. Section 1024.17(k)(5)(ii)(C) makes clear that a servicer may seek repayment from a borrower for funds advanced to pay hazard insurance premiums. Finally, the Bureau has determined to exempt small servicers, that is, servicers that service less than 5,000 mortgage loans and only service mortgage loans owned or originated by the servicer or an affiliate so long as any force-placed insurance purchased by the small servicer is less costly to a borrower than the amount that would be required to be disbursed to maintain the borrower's hazard insurance coverage. *See* § 1024.17(k)(5)(iii). The Bureau is not implementing any requirement that a servicer advance funds to pay for a hazard insurance policy for a borrower that does not have an escrow account.

The Bureau believes that a servicer should not obtain force-placed insurance when a servicer is able to make disbursements from an escrow account to maintain hazard insurance. As set forth above, unless a policy has been cancelled for reasons other than nonpayment, a borrower's delinquency should not cause a servicer to take actions (or make omissions) that would lead to the cancellation of the borrower's voluntary insurance policy and the potential replacement of that policy with a more expensive (and less protective) force-placed insurance policy. The Bureau acknowledges that in certain circumstances, force-placed insurance is necessary. Section 1024.17(k)(5) does not prevent a servicer from obtaining force-placed insurance, subject to the requirements in § 1024.37, when such a policy is appropriate, including, for instance, where a borrower's hazard insurance policy has been cancelled for reasons other than non-payment. In that situation, a servicer may impose a charge on a borrower for a force-placed insurance policy consistent with the requirements in § 1024.37. However, as set forth above and in the proposal, the Bureau does not believe imposition of a charge for force-placed insurance is appropriate where a hazard insurance policy has not been cancelled and a servicer is able to disburse funds from an escrow account to maintain the borrower's preferred hazard insurance policy in force.[63]

The Bureau is therefore adopting § 1024.17(k)(5) in reliance on section 6(k)(1)(E) of RESPA, which authorizes the Bureau to prescribe regulations that are appropriate to carry out

[63] Notably, the National Mortgage Settlement includes a similar protection for borrowers. *See e.g.*, Attorneys Gen. et al., *National Mortgage Settlement: Consent Agreement* A-37 (2012), *available at* *http://www.nationalmortgagesettlement.com*. (stating that "For escrowed accounts, servicer shall continue to advance payments for the homeowner's existing policy, unless the borrower or insurance company cancels the existing policy.").

the consumer protection purposes of RESPA. The Bureau has additional authority pursuant to section 6(j)(3) of RESPA to establish any requirements necessary to carry out section 6 of REPSA, including section 6(g) with respect to administration of escrow accounts, and has authority pursuant to section 19(a) of RESPA to prescribe such rules and regulations, and to make such interpretations, as may be necessary to achieve the consumer protection purposes of RESPA. The Bureau also has authority to establish consumer protection regulations pursuant to section 1022 of the Dodd-Frank Act. A consumer protection purpose of RESPA is to help borrowers avoid unwarranted or unnecessary costs and fees, and further, the amendments to section 6(k) of RESPA in section 1463 of the Dodd-Frank Act evince Congress's intent to establish reasonable protections for borrowers to avoid unwarranted force-placed insurance coverage. Section 1024.17(k)(5 furthers these purposes and is therefore an appropriate regulation under section 6(j) and 6(k)(1)(E) and section 19(a) of RESPA.[64]

The Bureau does not believe that § 1024.17(k)(5) will have adverse consequences on servicers, borrowers, or the insurance market. With respect to impacts on servicers, § 1024.17(k)(5) does not create significant disincentives to maintain escrow accounts for borrowers. Escrow accounts encourage borrowers to budget for costs of homeownership and to provide funds regularly to servicers to be used to pay those costs, including for insurance, taxes, and other obligations. Lenders include escrow requirements in mortgage contracts because the use of such an account reduces risk to an owner or assignee of a mortgage loan. Servicer also generally benefit from an escrow account both as a result of the improved performance of mortgage loans and also because of the opportunity to earn a return on funds held. Further, servicers manage the impact of an obligation to make advances to escrow accounts by ensuring

[64] The Bureau notes that regulations established pursuant to section 6 of RESPA are subject to section 6(f) of RESPA, which provides borrowers a private right of action to enforce such regulations.

that advances may be recouped from an owner or assignee of a mortgage loan in the event a property is foreclosed upon and liquidated. In the absence of § 1024.17(k)(5), a servicer that obtains force-placed insurance might advance a greater amount of funds for the force-placed insurance policy and would seek to obtain repayment of those funds either from a borrower or ultimately from an owner or assignee of a mortgage loan if a property is foreclosed upon and liquidated. For these reasons, the Bureau is not persuaded that § 1024.17(k)(5) creates an incentive that would materially affect whether servicers offer escrow accounts to borrowers.

With respect to the ability of servicers to use funds in an escrow account to pay obligations other than hazard insurance, the Bureau recognizes, of course, that escrow account funds are fungible and that payment of hazard insurance necessarily requires expending funds that would have been available for payment of other escrowed obligations, including tax obligations. Servicers, on behalf of owners or assignees of mortgage loans, currently manage this risk by advancing funds to escrow accounts to pay such obligations and seeking repayment from borrowers or ultimately from proceeds payable to the owners or assignees of mortgage loans. No contrary practice is required here. Further, such a practice does not create any new or enhanced risk for servicers. Further, the Bureau has clarified in § 1024.17(k)(5)(ii)(C) that servicers may seek repayment of advances unless otherwise prohibited by applicable law. Servicers, as well as owners and assignees of mortgage loans, are capable of managing risks arising from other escrow account obligations by advancing funds to pay any such obligations as appropriate.

The Bureau also does not believe that § 1024.17(k)(5) presents a material risk to servicers from borrowers cancelling policies, receiving refunds, and, thus, becoming unjustly enriched at the expense of a servicer. A borrower that is current on a mortgage loan obligation but anticipates a future delinquency could engage in the same type of behavior during a period of an escrow account deficiency. Commenters have not demonstrated that such actions typically occur. Further, the Bureau has mitigated this risk by finalizing comment 17(k)(5)(ii)(C)-1, which provides that servicers may, but are not required to, advance payment on a month-to-month basis. Because such advancement is not required on a month-to-month basis, servicers may determine not to undertake that schedule for advances if it would impose greater costs on servicers with respect to maintaining a borrower's hazard insurance.

The Bureau is not persuaded that requiring servicers to disburse funds for hazard insurance for borrowers that are more than 30 days overdue will create incentives for borrowers not to make mortgage loan payments or to fund escrow accounts. Nothing in § 1024.1(k)(5), nor Regulation X generally, prevents servicers from charging borrowers late fees or reporting borrower failures to pay to a consumer reporting agency. These consequences to borrowers provide appropriate disincentives from obtaining the far more limited benefit of non-cancellation of a hazard insurance policy.

The Bureau is persuaded, however, by the comment that hazard insurance coverage may not provide similar protections as force-placed insurance. Many hazard insurance policies contain exclusions from coverage for properties that are vacant. In these circumstances, losses may not be covered by insurance for vacant properties. Delinquent borrowers may have a higher incidence of abandoning properties as vacant. Accordingly, the Bureau has adjusted § 1024.17(k)(5)(ii) to provide that a servicer may be considered unable to disburse funds from escrow to maintain a borrower's hazard insurance policy if the servicer has a reasonable basis to believe the borrower's property is vacant.

The Bureau does not believe that § 1024.17(k)(5) will have adverse impacts on borrowers. The only borrower harm asserted by servicers and their trade associations is that the requirement will lead to an increase in double-billing when a borrower cancels hazard insurance and obtains a new policy for which the borrower pays the insurer directly. The commenters provide no reason to believe that borrowers that are more than 30 days overdue are more likely to cancel hazard insurance and pay insurance directly than borrowers that are current on a mortgage loan obligation or less than 30 days overdue. Further, if a servicer has a reasonable basis to believe that a borrower has cancelled a hazard insurance policy, a servicer is not required to disburse funds to pay for the hazard insurance policy. Finally, when a borrower has cancelled a policy, an insurance company is unlikely to credit the amounts paid by a servicer toward that policy after the date of cancellation.[65]

Further, the Bureau does not believe that § 1024.17(k)(5) will have adverse impacts on the insurance market. Section 1024.17(k)(5) does not, as commenters state, mask any risks presented by a borrower that is more than 30 days overdue on a mortgage loan obligation. Nothing in § 1024.17(k)(5) prevents a servicer from reporting a borrower's payment history to a consumer reporting agency, and an insurance provider could, to the extent permitted by applicable law, obtaining borrower information it deems relevant to underwriting insurance, including a consumer report. In addition, if insurers are harmed by insuring borrowers who are delinquent on their mortgage loans, they face that same harm already for borrowers that do not have escrow accounts and pay hazard insurance premiums directly to their insurers. Section 1024.17(k)(5) does not present a different category of risk in that regard. With respect to one

[65] Notably, as discussed further below, the risk of double-billing when a servicer is paying toward a policy that was currently in place is markedly different than the risk presented by a requirement that a servicer obtain or renew a previously cancelled policy, which would exist if a servicer were required to disburse funds to obtain a policy for a borrower that does not have an escrow account.

commenter’s request that the Bureau issue a form for lenders and servicers to provide to insurance providers stating that a servicer is paying some identified portion of a borrower’s insurance premium due to a deficiency in the borrower’s escrow account, the Bureau declines. To the extent applicable law permits a lender or servicer to communicate such information to an insurance provider, the lender or servicer should not need the Bureau to develop a form for the communication.

Finally, the Bureau believes that special treatment is warranted with respect to “small servicers” as defined in § 1026.41(e)(4). As explained in the section by section discussion of § 1024.30(b) and in the 2013 TILA Servicing Final Rule, the Bureau has identified a class of servicers, referred to as “small servicers” and defined by the combination of the number of loans they service and the servicer’s relationship to those loans that sets those servicers apart. With respect to the requirements set forth in § 1024.17(k)(5), outreach with small servicers indicates that small servicers’ practices with respect to obtaining force-placed insurance tend to be less costly to borrowers than those utilized by larger servicers. For example, the Bureau understands that small servicers often obtain force-placed insurance in the form of collateral protection policies. The charges passed through to borrowers for such coverage, if any, may be less expensive than the costs of either maintaining a borrower’s hazard insurance coverage or purchasing an individual force-placed insurance policy. At the same time, requiring such servicers to continue the borrower’s hazard insurance in force, which may require advancing funds to the borrower’s escrow, could cause these servicers to incur incremental expenses which, because of their size, would be burdensome for them. Because of this difference in practices, the Bureau believes it is appropriate to reduce the restrictions applicable to small servicers with respect to borrowers that have escrow accounts. Accordingly, the Bureau has exempted small servicers from the restriction in § 1024.17(k)(5)(i) and 1024.17(k)(5)(ii)(B), so long any force-placed insurance that is purchased by the small servicer is less costly to a borrower than the amount that would be required to be disbursed to maintain the borrower's hazard insurance coverage. The Bureau believes this partial exemption sets an appropriate balance of effectuating consumer protections for borrowers with escrow accounts and considerations that may be unique to small servicers.

After consideration of the comments received, the Bureau has also determined not to require servicers to continue hazard insurance policies and advance premium payments for borrowers who have not escrowed for hazard insurance. The Bureau understands the concern of the consumer groups that commented, but the Bureau is persuaded that it would generally be impracticable for servicers to renew the hazard insurance coverage obtained by a non-escrowed borrower without creating a significant risk of double-billing and/or a gap in coverage. For example, although the Bureau does not find concerns about double-billing of borrowers persuasive with respect to situations in which insurance coverage is being paid via disbursement from an escrow account, the Bureau is concerned that a substantially different situation results where the borrower is making direct payments and a policy is allowed to lapse due to non-payment. In those cases, it is far more likely that a consumer may have switched insurance providers without notifying the servicer, and requiring a servicer to obtain a new policy (or to reinstate a previously cancelled policy) may result in borrower harm through the purchase of duplicative insurance and double-billing of a borrower. Further, when a borrower does not have an escrow account, the servicer may not have notice before a policy lapses, and no ability to maintain the policy in continuous force. Were the Bureau to impose a duty on the servicer to pay for hazard insurance in such circumstance, such a duty would not necessarily be to maintain a current policy in force. Rather, the duty could well be to reinstate a lapsed policy or to obtain a new policy on behalf of the borrower to replace the cancelled policy. Requiring a servicer to obtain a new insurance policy on behalf of a borrower that did not have an escrow account to pay for hazard insurance may be burdensome and complex, and may not be justified. Accordingly, the Bureau declines at this time to impose requirements to obtain insurance for borrowers that do not have escrow accounts but will continue to monitor the impact of the requirements set forth in § 1024.37 with respect to force-placed insurance for any such borrowers.

Two consumer groups submitted joint comments urging the Bureau to amend current § 1024.17(k)(1) so that a servicer would be required to make timely disbursements with respect to any escrowed charge, not just hazard insurance, so long as the borrower's escrow account contained sufficient funds to do so. These consumer groups asserted that there is no reason to maintain the limitation for disbursements to borrowers that are less than 30 days overdue with respect to escrow obligations other than hazard insurance. For example, the commenters stated that the failure of a servicer to pay tax obligations in a timely manner would harm a borrower, and suggested that finalizing § 1024.17(k)(5) in isolation could cause borrower confusion because borrowers may not understand that the rule applies only to hazard insurance.

The Bureau understands the commenters' concern with respect to the impact on borrowers if an escrowed charge is not paid, but declines to amend § 1024.17(k)(1) as part of this rulemaking. Section 1024.17(k)(5), as adopted, is only a restriction on servicers' ability to obtain force-placed insurance. If a servicer will not be purchasing force-placed insurance, the servicer is not subject to the provisions of § 1024.17(k)(5). For example, a servicer that does not require a borrower to maintain insurance is not required to disburse funds to maintain the borrower's hazard insurance coverage other than as required pursuant to § 1024.17(k)(1).

Because the Bureau is not imposing a blanket obligation to advance funds to escrow to pay hazard insurance premiums, the Bureau does not believe that it would be appropriate to impose such an obligation with respect to other payments to be made from escrow. Accordingly, the Bureau declines to amend § 1024.17(k)(1) as suggested.

Finally, as discussed above, the Bureau requested comments on an alternative approach to § 1024.17(k)(5), which would have added language to § 1024.37 to provide that if a borrower has an escrow account established for hazard insurance, a servicer could not charge the borrower for force-placed insurance unless the force-placed insurance obtained by a servicer was less expensive to the borrower, for comparable coverage, than would be the servicer's advancing funds to continue the borrower's hazard insurance policy. The Bureau further requested comments on whether § 1024.37 should additionally require that force-placed insurance purchased by a servicer under these circumstances protect a borrower's interests.

One large force-placed insurance provider asserted that the proposed alternative is neither necessary or realistic because proposed § 1024.17(k)(5) reflects general industry practice and because the cost of force-placed insurance is invariably more expensive to the borrower than the servicer advancing funds to continue a borrower's hazard insurance policy. On the other hand, another large force-placed insurance provider and a national trade association expressed a preference for the alternative compared to proposed § 1024.17(k)(5). These commenters preferred, however, that the alternative be placed in § 1024.17(k), and not in § 1024.37, because they believed that this alternative should only limit a servicer's force-placement of insurance in situations where an escrowed borrower's hazard insurance was canceled due to a servicer's failure to disburse funds to maintain a borrower's hazard insurance. Commenters further expressed a variety of views concerning how the scope of comparable coverage would be determined. While industry commenters acknowledged that the industry standard is to obtain force-placed coverage equal to the replacement cost of the property, two national trade associations and a large force-placed insurance provider argued that servicers must be given flexibility to determine coverage levels. In contrast, another large force-placed insurance provider suggested that the Bureau should require coverage at replacement cost value.

After consideration of the comments received on the alternative, the Bureau believes that the alternative proposal's requirement regarding comparable coverage would add unnecessary complexity to the regulation. Whether a borrower may or may not benefit from any particular coverage level is dependent on the individual circumstances of the borrower. Further, differences between coverage provided for homeowners' insurance and force-placed insurance make a comparability determination and complex and difficult process. The Bureau declines to adopt the alternative proposal with respect to obtaining comparable coverage.

Section 1024.17(k)(5), as adopted, however, is informed by the alternative and the comments received in response to the alternative. The Bureau has adjusted the requirement in § 1024.17(k)(5), consistent with the alternative, to reflect that a servicer's ability to disburse funds to maintain hazard insurance coverage serves as a restriction on the servicer's purchasing force-placed insurance coverage. Thus, a servicer is not required in all instances to disburse funds to maintain hazard insurance coverage for borrowers that are more than 30 days overdue; instead, a servicer may not obtain force-placed insurance coverage unless the servicer is unable to disburse funds from the borrower's escrow account pursuant to § 1024.17(k)(5). Further, the exemption for small servicers in § 1024.17(k)(5)(iii) provides that a small servicer may obtain force-placed insurance, even if the small servicer is not unable to disburse funds from a borrower's escrow account, so long as the cost to the borrower is less than the amount the small servicer would need to disburse to maintain the borrower's hazard insurance, without consideration of the specific policy coverage provisions.

17(l) System of Recordkeeping

The Bureau proposed to remove current § 1024.17(*l*), which generally requires that a servicer maintain for five years records regarding the payment of amounts into and from an escrow account and escrow account statements provided to borrowers. Current § 1024.17(*l*) further provides that the Bureau may request information contained in the servicer's records for an escrow account and that a servicer's failure to provide such information may be deemed to be evidence of the servicer's failure to comply with its obligations with respect to providing escrow account statements to borrowers.

As discussed in the proposal, the Bureau believed that the obligations set forth in current § 1024.17(*l*) would no longer be warranted in light of the information management policies, procedures, and requirements that the Bureau proposed to impose under proposed § 1024.38 and the substantially different authorities available to the Bureau with regard to requesting information from entities subject to § 1024.17. No comments were received on the removal of current § 1024.17(*l*). Accordingly, the Bureau is adopting § 1024.17(*l*) as proposed.

Section 1024.18 Validity of contracts and liens

The Bureau is removing current § 1024.18. Current § 1024.18 states that "Section 17 of RESPA (12 U.S.C. 2615) governs the validity of contracts and liens under RESPA." 12 USC 2615 states "Nothing in this Act shall affect the validity or enforceability of any sale or contract for the sale of real property or any loan, loan agreement, mortgage, or lien made or arising in connection with a federally related mortgage loan." The Bureau believes that RESPA clearly delineates the validity and enforceability of contracts and liens and that § 1024.18 is an unnecessary restatement of the provisions of RESPA. Accordingly, in order to streamline the regulations, the Bureau is removing current § 1024.18.[66]

Section 1024.19 Enforcement

Similarly, the Bureau is removing § 1024.19. The first sentence of § 1024.19(a) states "[i]t is the policy of the Bureau regarding RESPA enforcement matters to cooperate with Federal, state, or local agencies having supervisory powers over lenders or other persons with responsibilities under RESPA." The Bureau believes this statement, which reflects the Bureau's general policy to cooperate with counterpart agencies, is unnecessary. The second sentence of § 1024.19(a) states "Federal agencies with supervisory powers over lenders may use their powers to require compliance with RESPA." Again, the Bureau believes this general statement of the supervisory authority of other federal agencies, which neither conveys authority nor creates limits or restrictions with respect to such authority, is unnecessary in Regulation X. Further, the third sentence of § 1024.19(a) states "[i]n addition, failure to comply with RESPA may be grounds for administrative action by HUD under HUD regulation 2 CFR part 2424 concerning debarment, suspension, ineligibility of contractors and grantees, or under HUD regulation 24 CFR part 25 concerning the HUD Mortgagee Review Board." Here the Bureau believes that the applicable regulations issued by HUD are controlling and whether RESPA may serve as grounds for any such enumerated action is based on those HUD regulations. Accordingly, the Bureau believes this provision, which repeats the scope of HUD regulations, is unnecessary.
Section 1024.19(a) states that "[n]othing in this paragraph is a limitation on any other form of enforcement that may be legally available." Because the Bureau believes the other provisions of

[66] Although the Bureau did not propose to remove § 1024.18, the Bureau finds there is good cause to finalize this aspect of the rule without notice and comment. Because § 1024.18 simply restates, verbatim, existing statutory text, its removal will have no impact on, or significance for, any person; notice and comment therefore would be unnecessary.

§ 1024.19(a) are unnecessary, this remaining sentence is no longer necessary. Finally, § 1024.19(b) states that the Bureau's procedures for investigations and investigational proceedings are set forth in 12 CFR part 1080. A cross-reference to the location of the Bureau's regulations regarding investigations and investigational proceedings in Regulation X is unnecessary. Accordingly, § 1024.19 is removed in its entirety.[67]

Subpart C—Mortgage Servicing

Section 6 of RESPA sets forth a number of protections for borrowers with respect to the servicing of federally related mortgage loans that are currently implemented through Regulation X in current § 1024.21. Section 1463 of the Dodd-Frank Act amended section 6 of RESPA by adding new section 6(k) through (m) to establish new obligations on servicers for federally related mortgage loans with respect to the purchase of force-placed insurance and responses to borrowers' requests to correct errors, among other things.[68] The Bureau observes that section 6(k) also establishes the Bureau's authority to create obligations the Bureau finds appropriate to carry out the consumer protection purposes of RESPA.

Section 1463 of the Dodd-Frank Act also amended existing provisions in section 6 of RESPA with respect to a servicer's obligation to respond to qualified written requests, a servicer's administration of an escrow account. Section 1463 also increased the dollar amounts for damages for which a servicer may be liable for violations of section 6 of RESPA.

In order to implement the amendments the Dodd-Frank Act added to RESPA in a consistent and clear manner, the Bureau proposed to reorganize Regulation X to combine current

[67] As with § 1024.18, the Bureau finds there is good cause to remove § 1024.19 without notice and comment. As the foregoing discussion demonstrates, § 1024.19 has no impact on, or significance for, any person; notice and comment therefore would be unnecessary.

[68] Section 1463 uses the term "federally related mortgage" but it amends and expands section 6 of RESPA that uses the term "federally related mortgage loan." Accordingly, the Bureau interprets the "federally related mortgage" and "federally related mortgage loan" to be the same.

Regulation X provisions relating to mortgage servicing in existing § 1024.21 with new mortgage servicing provisions the Bureau proposed to implement Dodd-Frank Act's amendment of section 6 of RESPA in a newly created subpart C. As discussed above, no comments were received on the proposed reorganization of Regulation X into three subparts and the Bureau is adopting subpart C as proposed as a separate subpart in Regulation X.

Section 1024.21 Mortgage Servicing Transfers

To incorporate mortgage servicing-related provisions within subpart C, the proposed rule would have removed § 1024.21 and would implement the provisions of § 1024.21, subject to proposed changes as discussed below, in proposed §§ 1024.31-1024.34 within subpart C. No comments were received on the removal of § 1024.21 and its incorporation within subpart C. The final rule adopts the removal of § 1024.21 as proposed and implements the provisions of § 1024.21, subject to changes adopted as discussed below, in §§ 1024.31-1024.34 within subpart C.

Section 1024.22 Severability

Current § 1024.22 states that if any particular provision of Regulation X, or its application to any particular person or circumstance is held invalid, the remainder of Regulation X or the application of such provision to any other person or circumstance shall not be affected. The Bureau proposed removing current § 1024.22 because the Bureau believes the section may create unnecessary inconsistency with respect to other Bureau regulations that do not contain corresponding provisions. By removing § 1024.22, the Bureau is not suggesting that the severability of Regulation X is changing or that the Bureau intends the new provisions to be non-severable. The Bureau intends that the provisions of Regulation X are severable and believes that if any particular provision of Regulation X, or its application to any particular person or circumstance is held invalid, the remainder of Regulation X or the application of such provision to any other provision or circumstance should not be affected. The Bureau's proposal to remove current § 1024.22 should not be construed to indicate a contrary position. The Bureau did not receive comments on the proposed removal of current § 1024.22, and accordingly, is adopting the removal of current § 1024.22 as proposed.

Section 1024.23 E-Sign Applicability

Current § 1024.23 states that provisions of the Electronic Signatures in Global and National Commerce Act (E-Sign Act) permitting electronic disclosures to consumers if certain conditions are met apply to Regulation X. For reasons discussed above in the section-by-section analysis of § 1024.3, the Bureau has concluded that the E-Sign Act provisions are applicable to all provisions in Regulation X. Accordingly, the Bureau decided that the best place for this language was in § 1024.3.Having received no comments on the removal of § 1024.3 or the placing of the E-Sign Act provisions in § 1024.3, the Bureau, as discussed above, is removing current § 1024.23 from Regulation X.

Section 1024.30 Scope

The proposal would have defined the scope of subpart C as any mortgage loan, as that term is defined in § 1024.31. A "mortgage loan," as proposed would be any federally related mortgage loan, as defined in § 1024.2, except for open-end loans (home equity plans) and except for loans exempt from RESPA and Regulation X pursuant to § 1024.5(b). The Bureau received a significant number of comments relating to the scope of the mortgage servicing rules.

Small servicer exemption. In the 2012 TILA Servicing Proposal, the Bureau proposed an exemption to the periodic statement requirement for small servicers, defined in the 2012 TILA Servicing Proposal as servicers that service 1,000 mortgage loans or fewer and only servicer mortgage loan that the servicer or an affiliate owns or originated. The Bureau requested comment in the 2012 TILA Servicing Proposal regarding that exemption and, in the 2012 RESPA Servicing Proposal, further requested comment regarding whether the Bureau should implement a small servicer exemption for any mortgage servicing requirements proposed in Regulation X.

The Bureau received three comment letters from consumer advocacy groups with respect to a small servicer exemption from certain requirements in Regulation X. One comment from three consumer advocacy groups indicated that small servicers should be exempt from the loss mitigation procedures requirements in § 1024.41 on the basis that these servicers already have an interest in mitigating any losses that might result from proceeding with foreclosure. Two other consumer advocacy groups, however, stated their view that if a servicer cannot afford to implement the required protections, the servicer should not be permitted to service mortgage loans. Further, a large bank joined in opposing an exemption for small servicers on the basis that such an exemption does not implement consumer protections for customers of small servicers and creates artificial distinctions that provide a competitive advantage to small servicers.

The Bureau also received a significant number of comments from small banks, credit unions, and non-bank servicers, as well as their trade associations, that requested that the Bureau consider an exemption for small servicers from the mortgage servicing rules, including the discretionary rulemakings. The Bureau also received a comment letter from Advocacy urging the implementation of a small servicer exemption for requirements in Regulation X.

Many of the small banks, credit unions, and non-bank servicers that provided comments stated that their business models necessarily facilitate communication with delinquent borrowers. Per the comments, such servicers have an incentive to work with borrowers to avoid losses because typically, for small servicers, either the mortgage loan is owned by the servicer (or an affiliate) or the servicer has a customer relationship with the borrower to consider. Community banks, credit unions, and Advocacy further stated that the servicing market should not be considered simplistically; small servicers have substantially different business practices than larger servicers, including with respect to considering borrowers for loss mitigation or managing force-placed insurance. Further, such servicers have not been shown to have engaged in the servicing failures that contributed to the financial crisis, including poor oversight of third-party providers, lost documents and other process failures relating to loss mitigation evaluations, or wrongful filing of foreclosure documents that contain false information or fail to comply with applicable law.

Comments from small banks, credit unions, non-bank servicers, and their trade associations, suggested various means for defining a small servicer. Most industry commenters indicated that the proposed 1,000 mortgage loan threshold was inadequate because it would capture only the smallest servicers in the market. One trade association commenter stated that a 1,000-mortgage-loan threshold would cover only single-employee servicing operations. Most commenters indicated that the small servicer exemption threshold should be raised to between 5,000 and 15,000 mortgage loans. One commenter indicated that a small servicer threshold should be based on a delinquency percentage or foreclosure filing threshold, while a large community bank servicer stated that a small servicer exemption should include all but the top five servicers by market share.

Small servicers indicated several components of the rulemaking that would have particularly problematic impacts on small servicers. For example, many small servicers and their trade associations raised concerns regarding the appeal process set forth in § 1024.41(h). Small servicers stated that required independent reviews for the appeal process would be difficult to implement because the size of a small servicer necessarily constrains the number of knowledgeable servicing personnel that would be able to conduct the independent review. Per the commenters, the resulting review would be without value because the independent review would be conducted by employees less familiar with, or skilled in, evaluating borrowers for loss mitigation options. Small servicers also indicated they would be burdened by implementing new notice requirements, including those set forth in § 1024.39 and § 1024.41, which, commenters believed, would only serve to require communications that are already occurring, but would impose the cost of requirements to track communications and demonstrate compliance to appropriate regulators.

In addition to the comments, the Bureau reviewed the input gained through outreach with small servicers during the Small Business Review Panel process. As discussed throughout, in order to gain feedback on small servicer impacts, the Bureau participated in a Small Business Review Panel and conducted outreach with small entities that would be subject to the regulations. The Bureau solicited feedback from the small entities participating in the Small Business Review Panel on many elements of the loss mitigation process in conjunction with other elements of the servicing proposals, including impacts on loss mitigation processes of small servicers from proposed rules relating to error resolution, reasonable information management policies and procedures, early intervention for troubled or delinquent borrowers, and continuity of contact. In particular, the Bureau requested feedback from small servicers on the following: (1) a duty to suspend a foreclosure sale while a borrower is performing as agreed under a loss mitigation option or other alternative to foreclosure; (2) the ability to adopt policies and procedures to facilitate review of borrowers for loss mitigation options; (3) the ability to provide information regarding loss mitigation early in the foreclosure process to borrowers; and (4) the ability to provide borrowers with the opportunity to discuss evaluations for loss mitigation options with designated servicer contact personnel.[69]

The small entities generally informed the Small Business Review Panel that they engaged in individualized contact with borrowers early in the foreclosure process, that some servicers completed discussions of loss mitigation options with borrowers prior to a point in time when borrowers should receive significant foreclosure-related information, and that small servicers generally worked closely with foreclosure counsel such that foreclosure processes and loss mitigation could be easily conducted simultaneously without prejudice to the loss mitigation process. Further, the small entities explained that they were willing to communicate with borrowers about loss mitigation contemporaneously with the foreclosure process, and one small entity indicated that it would be willing to halt the foreclosure process, if appropriate, in order to consider a modification.[70]

The Bureau carefully considered the comments regarding requested exemptions for small servicers, including the comments received from Advocacy. In addition, the Bureau carefully considered the specific aspects of the rule that community banks, small credit unions, and other small servicers indicated would potentially impact those institutions most significantly. The analysis conducted by the Bureau is set forth below, as well as in the analyses required pursuant to section 1022 of the Dodd-Frank Act and the Regulatory Flexibility Act.

In general, the Bureau is persuaded based on its experience, outreach, and the submission

[69] *See* U.S. Consumer Fin. Prot. Bureau, *Final Report of the Small Business Review Panel on CFPB's Proposals Under Consideration for Mortgage Servicing Rulemaking*, appendix C at 19, 22, 24-26 (Jun, 11, 2012), *available at* http://files.consumerfinance.gov/f/201208_cfpb_SBREFA_Report.pdf.

[70] *See* U.S. Consumer Fin. Prot. Bureau, *Final Report of the Small Business Review Panel on CFPB's Proposals Under Consideration for Mortgage Servicing Rulemaking*, 26 (Jun, 11, 2012).

of the comments that the problematic practices that have plagued the servicing industry, particularly in recent years, are to a large extent a function of a business model in which servicing is viewed as a discrete line of business and profit center, and in which servicers compete to secure business from owners or assignees of mortgage loans based upon price. As discussed in greater detail in part II, such a model leads to a high volume, low margin business, in which servicers are not incentivized to invest in operations necessary to handle large numbers of delinquent borrowers. The significant weight of evidence of servicer failures of which the Bureau is aware involved large servicers following such a business model.

In contrast, there is a segment of servicers who service a relatively small number of mortgage loans and do not purchase or hold mortgage servicing rights for mortgage loans they do not own or did not originate. Many community bank and small credit union servicers fit this model. For example, the Bureau estimates that 10,829 banks, thrifts, and credit unions service 5,000 or fewer loans. Of these, approximately 96 percent have assets of $1 billion or less, which is the traditional threshold for denoting a community bank. The Bureau is not aware of evidence indicating the performance of these types of institutions in servicing the mortgage loans they originate or own generally results in substantial consumer harm. To the contrary, data available to the Bureau indicates that such servicers achieve significantly reduced levels of borrowers rolling into 90 or more days of delinquency or having a mortgage loan charged-off when compared to the average for all banks. For example, in 2011, the 90+ delinquency rate for community banks was 0.27 percent compared with over 6 percent for all banks. Further, the net charge-off rate for community banks was 0.66 percent against 1.31 percent for all banks. Community bank performance with respect to levels of delinquencies and charge-offs has also remained relatively stable through the financial crisis. From 2007 through 2011, the 90+

delinquency rate fluctuated between 0.27 percent in 2007 to a high of only 0.31 percent in 2009. The equivalent metric for all banks showed the 90+ delinquency rate at 0.80 percent rising rapidly to a high of 6.29 percent in 2011.

The reasons for this performance may lay in the fact that small servicers have very different incentives than large servicers. Servicers that service 5,000 or fewer mortgage loans and only service mortgage loans that the servicer or an affiliate owns or originated generally must be conscientious of the impact of servicing operations on the borrower. Any such servicer has an interest in maintaining a relationship with borrower as a customer of the bank or thrift or member of the credit union to provide other banking services. Further, such servicers must be conscientious of reputational consequences within a community or member base. Further, to the extent a servicer or an affiliate owns a mortgage loan, the servicer bears risk from the borrower's potential delinquency and default on the mortgage loan obligation and does not have an incentive to engage in practices that may put the performance of the mortgage loan obligation at risk.

All of these considerations, as well as the performance data discussed above, persuades the Bureau that the small servicers are generally achieving the goals of the discretionary rulemakings to protect delinquent borrowers. The Bureau recognizes, however, that these small servicers may be achieving these ends through procedures that differ from those mandated in § 1024.39 and § 1024.41, with respect to early intervention and loss mitigation procedures, and that while the practice of these small servicers are, in the main, achieving the objectives delineated in § 104.38 and § 1024.40, with respect to general servicing policies, procedures, and requirements and continuity of contact, these servicers may not have systems in place to document how they are achieving these results. Thus, the Bureau believes that subjecting the small servicers to these provisions would impose costs that they could find difficult to absorb.

In sum, the Bureau is not persuaded at this time that the consumer protection purposes of RESPA necessarily would be furthered by requiring small servicers to comply with the discretionary rulemakings..

Accordingly, a small servicer as defined pursuant to 12 CFR 1026.41(e)(4), that is, a servicer that services 5,000 mortgage loans or less and only services mortgage loans that the servicer or an affiliate owns or originated, is exempt from the requirements of § 1024.38 through 41, with two exceptions.[71] First, § 1024.41(f) prohibits servicers from making the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process unless a borrower's mortgage loan obligation is greater than 120 days delinquent. Second, § 1024.41(g) prohibits a servicer from , among other things, proceeding with a foreclosure sale if the borrower is performing under an agreement on a loss mitigation option. The Bureau deems it highly unlikely, given the considerations discussed above, that a small servicer would initiate a foreclosure with respect to a borrower who is less than 120 days delinquent to conclude a foreclosure sale if a borrower was performing under a loss mitigation agreement. Nonetheless, the Bureau does not see any reason why these basic protections should not be extended to all borrowers or why subjecting small servicers to these prohibitions would create any burden for them. Accordingly, § 1024.41(j) extends these two rules to small servicers. The analysis pursuant to section 1022 of the Dodd-Frank Act, set forth in part VII below, and the final regulatory flexibility analysis, set forth in part VIII below, provide significant additional discussion regarding the assumptions used in determining an appropriate small servicer exemption threshold of 5,000 mortgage loans.

[71] The 5,000-loan threshold reflects the purposes of the exemptions that the rule establishes for these servicers and the structure of the mortgage servicing industry. The Bureau's choice of 5,000 in loans serviced for purposes of Regulation X does not imply that a threshold of that type or of that magnitude would be an appropriate way to distinguish small firms for other purposes or in other industries.

The Bureau received comments from a nonprofit lender/servicer indicating that the mortgage servicing rules would be costly and difficult to implement, in light of the commenter's nonprofit mission and volunteer workforce. The commenter indicated that the Bureau should carry over the small servicer exemption proposed with respect to the periodic statement requirement in Regulation Z to the Regulation X requirements and should also implement a narrow exemption for nonprofit servicers. Although the Bureau declines to exempt nonprofit servicers separately, the Bureau believes that such servicers will likely fall within the small servicer exemption established by the Bureau.[72] To the extent a nonprofit servicer services more than 5,000 mortgage loans or services mortgage loans that the servicer or an affiliate does not own or did not originate, then the Bureau believes any such servicer should be required to provide appropriate consumer protection by implementing the loss mitigation procedures, notwithstanding the non-profit status of the servicer.

Other exemptions. In addition to requests for a small servicer exemption, the Bureau received comments that it should implement exemptions for housing finance agencies, reverse mortgage transactions, and servicers that are qualified lenders as defined in regulations established by the Farm Credit Administration. Housing finance agencies and their associations commented that the mission orientation of these agencies weighs in favor of exempting such agencies from certain of the proposed mortgage servicing rules. A comment from one such agency with respect to the Homeowners' Emergency Mortgage Assistance Program is instructive. That program assists a borrower experiencing hardship by extending a loan, secured by a subordinate lien on a borrower's property, to bring a borrower's first-lien mortgage loan

[72] The nonprofit lenders/servicer did not object to the proposed 1,000-loan threshold; the Bureau infers that this nonprofit lender/servicer would qualify as a small servicer under that threshold, much less the 5,000-loan threshold that the Bureau has implemented pursuant to § 1024.30.

current and, for certain borrowers, to provide continuing assistance. Absent an exemption, the servicing of the subordinate-lien mortgage loan that secures such assistance would be subject to mortgage servicing rules relating to loss mitigation, notwithstanding that the loan itself is a form of loss mitigation. In addition, the Bureau received comments from housing finance agencies indicating that the costs of certain of the rulemakings may be burdensome for housing finance agencies.

The Bureau also received comments from a trade association for reverse mortgage lenders and servicers. The commenter stated that many of the rulemakings, including the discretionary rulemakings, are not appropriate for reverse mortgage transactions. For example, loss mitigation requirements in the proposed rule were based on days of delinquency, which is an imprecise and difficult concept with respect to a reverse mortgage transaction because of the structure of the transaction. Further, the vast majority of reverse mortgage transactions are subject to regulations implemented by FHA in connection with the Home Equity Conversion Mortgage Program.

The Bureau received comments from lenders subject to regulations established by the Farm Credit Administration with respect to loss mitigation. These entities requested exemptions for mortgage loans for which a servicer is required to comply with Farm Credit Administration requirements on loss mitigation because those requirements differ markedly from those proposed by the Bureau.

The Bureau agrees that additional exemptions are appropriate for certain of the rulemakings. As discussed in more detail below, the Bureau has determined not to implement these additional exemptions to those regulations that principally implement requirements set forth in the Dodd-Frank Act. These include the requirements in §§ 1024.35 (Error Resolution

Procedures), 1024.36 (Information Requests), and 1024.37 (Force-Placed Insurance). With respect to error resolution procedures and information requests, those provisions build upon the existing Qualified Written Request procedures, which are currently applicable to the servicers discussed above. Providing an exemption to these requirements would have removed a currently existing consumer protection.

The Bureau is persuaded that imposing the requirements in the discretionary rulemakings on housing finance agencies does not further the goals of those requirements and imposes undue costs on housing finance agencies. Such agencies are engaged in programs that assist mortgage loan borrowers facing hardship under the auspices of state or local governments. The Bureau believes the mission of these agencies, as articulated by the agencies and their associations, clearly demonstrates that the interests of such agencies are aligned with those of borrowers, so that imposing the discretionary rulemakings on such agencies would not further the consumer protection purposes of RESPA. Accordingly, the Bureau exempts housing finance agencies from the requirements of §§ 1024.38 through 1024.41 as well as the principal restrictions of § 1024.17(k)(5). To effectuate this exemption, the Bureau simply uses the term "small servicer," because Regulation Z, as amended by the 2013 TILA Servicing Rule, defines a housing finance agency as a small servicer without regard to the number of mortgage loans serviced by a housing finance agency.

The Bureau also is persuaded that the discretionary rulemakings are not appropriate for reverse mortgage transactions. For example, many of the timing requirements in § 1024.41 relate to the length of a borrower's delinquency, which is a concept that does not apply cleanly with respect to reverse mortgage transactions. Further, the vast majority of reverse mortgage transactions are subject to regulation by FHA pursuant to the Home Equity Conversion Mortgage program. These regulations provide many protections for borrowers that are appropriate for the specific circumstances of a reverse mortgage transaction. The Bureau continues to consider appropriate requirements for reverse mortgage transactions separately from the mortgage servicing rulemakings.

Similarly, the Bureau finds that "qualified lenders" subject to Farm Credit Administration regulation of their loss mitigation practices should be exempt from compliance with §§ 1024.38 - 41. The Bureau agrees with the commenters that the Farm Credit Administrations' regulations in this area offer consumer protections comparable to those in the mortgage servicing rules and subjecting such institutions to the new rules would subject such servicers to overlapping, and potentially inconsistent, regulatory requirements. Accordingly, the Bureau has determined to exempt a servicer with respect to any mortgage loan for which the servicer is a qualified lender as that term is defined in 12 CFR 617.7000 from the requirements of §§ 1024.38 through 41.

Finally, the Bureau has determined to revise the scope of certain sections. Section 1024.30(c) implements two limitations on the scope of subpart C. First, § 1024.33(a) is only applicable to mortgage loans that are secured by first liens. This limitation excludes from coverage subordinate-lien mortgage loans. Section 1024.33(a) is based on the existing § 1024.21, renumbered in accordance with the reorganization of Regulation X, and § 1024.21 is already limited to first-lien mortgage loans. When the TILA-RESPA Integrated Disclosure rulemaking is finalized, the Bureau anticipates that rule will alter the requirements for servicers to comply with § 1024.33(a). Accordingly, the Bureau does not believe it is beneficial to require servicers to begin implementing the requirements of § 1024.33(a) for subordinate -lien mortgage loans, only to have to adjust compliance with § 1024.33(a) upon finalization of the TILA-RESPA Integrated Disclosure rulemaking. Accordingly, the Bureau is not making a change to the scope of § 1024.33(a) and retains the limitation on the scope of that requirement to mortgage loans that are secured by a first lien.

The Bureau proposed to maintain the exclusion for open-end lines of credit (home-equity plans) covered by TILA and Regulation Z, including open-end lines of credit secured by a first lien, from the mortgage servicing requirements in subpart C of Regulation X. Open-end lines of credit, which may be federally related mortgage loans when secured by a first or subordinate lien on residential real property, have been historically excluded from regulations applicable to mortgage servicing under Regulation X. *See* current § 1024.21(a) (defining "mortgage servicing loan"). Further, open-end lines of credit are already regulated under Regulation Z. Certain provisions of Regulation Z would substantially overlap with the servicer obligations that would be set forth in subpart C, including, for example, billing error resolution procedures. *See* 12 CFR 1026.13. The Bureau requested comment regarding whether to maintain an exemption for open-end lines of credit for the requirements in subpart C.

To the extent industry commenters responded to the Bureau's request, they supported the continued exclusion of open-end lines of credit (home-equity plans). Two consumer advocacy groups, however, jointly commented that open-end credit transactions secured by a borrower's principal residence should be fully covered by RESPA. The two commenters stated that consumer protections for open-end lines of credit (home equity plans) are less robust than consumer protections for closed-end credit, particularly in the area of disclosures, error resolution, information requests, and penalties for violation. They expressed concerns that the Bureau has failed to appreciate these differences and the potential for consumer harm when predatory lenders exploit these differences. Additionally, the commenters questioned the Bureau's authority to exempt open-end lines of credit (home-equity plans) when the statutory definition of the term "federally related mortgage loan" does not include such an exemption.

The Bureau believes it is necessary and appropriate at this time not to apply the requirements in subpart C to open-end credit (home equity lines). Open-end lines of credit secured by a first or subordinate lien on residential real property can constitute a federally related mortgage loans. As stated in the proposal, home equity lines of credit (HELOCs) tend to reflect better credit quality than subordinate-lien closed-end mortgage loans and share risk characteristics more similar to other open-end consumer financial products, such as credit cards, because of the access to additional unutilized credit provided by a HELOC.[73] The Bureau understands from discussions with servicers and industry representatives that the servicing of HELOCs tends to differ significantly from closed-end mortgage loans, including with respect to information systems used, lender remedies (including restricting access to the line of credit), and borrower behavior. Further, the Bureau understands that although a household may finance a property solely with an open-end line of credit, the proportion that do so is very small.[74]

In addition, the protections proposed in subpart C of Regulation X are not necessary for open-end lines of credit. As set forth above, separate error resolution and information request requirements exist under Regulation Z for open-end lines of credit. Further, the Bureau understands from servicers of open-end lines of credit that such servicers typically do not maintain escrow accounts for open-end lines of credit, require borrowers to maintain insurance for properties secured by open-end lines of credit, or force-place insurance for such borrowers. The Bureau believes that it would contravene the consumer protection purposes of RESPA for

[73] *See* Donghoon Lee et al., *A New Look at Second Liens*, 3, 19 (Feb. 2012), *available at* http://ssrn.com/abstract=2014570 (chapter in Housing and the Financial Crisis, Edward Glaeser and Todd Sinai, eds.)

[74] *See, e.g.*, Julapa Jagtiani and William W. Lang, *Strategic Default on First and Second Lien Mortgages During The Financial Crisis*, at n.5 (Federal Reserve Bank of Philadelphia, Working Paper No. 11-3, Dec. 9, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1724947.

servicers to expend resources complying with overlapping or unnecessary requirements that would not benefit consumers.

Further, open-end lines of credit perform differently from closed-end mortgages with respect to loss mitigation. A borrower is in control of an open-end line of credit and can draw from that line as necessary to meet financial obligations. Many borrowers who have become delinquent on a first lien closed-end mortgage loan keep current on payments for subordinate lien open-end lines of credit in order to maintain their access to the line of credit.[75] Conversely, when borrowers experience difficulty meeting their obligations, lenders have the ability to cut off access to unutilized draws from the open-end line of credit. These features of open-end lines of credit weigh against imposing the requirements set forth for early intervention with delinquent borrowers, continuity of contact, and loss mitigation procedures on servicers for open-end lines of credit. Further, open-end lines of credit tend to differ from closed-end mortgage loans with respect to servicing information systems utilized.

For the reasons set forth above, the Bureau believes it is necessary and appropriate to achieve the purposes of RESPA to maintain the current exemption, which HUD originally adopted as 24 CFR 3500.21 nearly 20 years ago. Accordingly, this exemption is authorized under section 19(a) of RESPA.

In addition, § 1024.30(c)(2) limits the scope of §§ 1024.39 through 41 to mortgage loans that are secured by a borrower’s principal residence. The purpose of the early intervention requirement, the continuity of contact requirement, and the loss mitigation procedures is to help borrowers stay in their principal residences, where possible, while mitigating the losses of loan owners and assignees, by ensuring that servicers use clear standards of review for loss mitigation

[75] *See, e.g.*, Julapa Jagtiani and William W. Lang, *Strategic Default on First and Second Lien Mortgages During The Financial Crisis*, at n.11 (Federal Reserve Bank of Philadelphia, Working Paper No. 11-3, Dec. 9, 2010).

options. The Bureau does not believe that this purpose is furthered by extending those protections to mortgage loans for investment, vacation, or other properties that are not principal residences. For example, in such circumstances, the protections set forth in §§ 1024.39-41 may only serve to assist a non-occupying borrower to maintain cash flow from rental revenue during a period of delinquency. Further, for certain properties that are not principal residences, there is a significant risk that a property may not be maintained and may present hazards and blight to local communities. Thus, for investment or vacation properties, the lack of borrower occupancy, and the potential rental income obtained by the borrower, vitiates the justifications for ensuring that a foreclosure process is not undertaken unless the borrower has the opportunity for review for a loss mitigation option. Finally, this limitation is consistent with the California Homeowner Bill of Rights and the National Mortgage Settlement, and its incorporation here furthers the goal of creating uniform standards.[76] Accordingly, the Bureau has limited the scope of §§ 1024.39 through 41 to mortgage loans that are secured by properties that are borrowers' principal residences.

Section 1024.31 Definitions

For purposes of subpart C, proposed § 1024.31 would have provided definitions of the following terms: "Consumer reporting agency," "Day," "Hazard insurance," "Loss mitigation application," "Loss mitigation options," "Master servicer," "Mortgage loan," "Qualified written request," "Reverse mortgage transaction," "Subservicer," "Service provider," "Transferee servicer," and "Transferor servicer." For the reasons set forth below, and except as otherwise discussed, § 1024.31 is adopted as proposed.

[76] *See* Cal. Civ. Code § 2923.6; *see also* Attorneys Gen. et al., *National Mortgage Settlement: Consent Agreement* A-1 (2012), *available at* http://www.nationalmortgagesettlement.com stating "[t]he provisions outlined below are intended to apply to loans secured by owner-occupied properties that serve as the primary residence of the borrower unless otherwise noted herein").

"Consumer reporting agency"; "Day"; "Reverse mortgage transaction"; "Master servicer"; "Transferee servicer"; "Transferor servicer." The Bureau proposed to move the definitions of "Master servicer," "Transferee servicer," and "Transferor servicer" from current § 1024.21(a) to proposed § 1024.31 without change. The Bureau also proposed to add new defined terms for "Reverse mortgage transaction" and "Consumer reporting agency," in proposed § 1024.31 by adopting the same definition for those terms as is already provided in current Regulation Z and section 503 of the Fair Credit Reporting Act, 15 U.S.C. 1681a, respectively. The Bureau proposed to add a new defined term "Day" in proposed § 1024.31. The Bureau proposed to define "Day" to mean a calendar day because the Bureau believed that Congress intended that the term "day" by itself includes legal public holidays, Saturdays, and Sundays for purposes of RESPA. No comments were received on these proposed defined terms. The final rule adopts these terms as proposed.

"Hazard insurance." As discussed in the section-by-section analyses concerning §§ 1024.17(k)(5) and 1204.37, section 1463(a) of the Dodd-Frank Act amended section 6 of RESPA to establish new servicer duties with respect to the purchase of force-placed insurance on a property securing a federally related mortgage. The statute generally defines "force-placed insurance" as hazard insurance coverage obtained by a servicer of a federally related mortgage when the borrower has failed to maintain or renew hazard insurance on such property as required of the borrower under the terms of the mortgage." *See* section 6(k)(2). Thus, the statutory definition of "force-placed insurance" indicates that Congress intended the term "force-placed insurance" to mean a type of "hazard insurance." However, neither the statute nor current Regulation X defines "hazard insurance." The Bureau believed that it was necessary to define "hazard insurance" in order to implement the statute.

The Bureau proposed to add new defined term “Hazard insurance” in proposed § 1024.31 to mean insurance on the property securing a mortgage loan that protects the property against loss caused by fire, wind, flood, earthquake, theft, falling objects, freezing, and other similar hazards for which the owner or assignee of such loan requires insurance. The Bureau modeled the definition of “hazard insurance” on the definition of “property insurance” in typical mortgage loan contracts, in light of the fact that the statute generally prohibits servicers from obtaining force-placed insurance “unless there is a reasonable basis to believe the borrower has failed to comply with the loan contract’s requirement to maintain property insurance.” *See* section 6(k)(1)(A). The Bureau thus interpreted the statute to mean that “force-placed hazard insurance” refers to “property insurance” that the borrower has failed to maintain as required by the borrower’s mortgage loan contract.

The Bureau sought comment on the definition in general and in particular on the proposed inclusion of insurance to protect against flood loss. Although including flood insurance is consistent with the way typical mortgage loan contracts define “property insurance,” the Bureau did not believe that the Bureau’s force-placed insurance regulations should apply to servicers when they are required by the Flood Disaster Protection Act of 1973 (FDPA) to purchase hazard insurance to protect against flood loss. The FDPA provides an extensive set of restrictions on flood insurance provision, and the Bureau was concerned that overlapping regulatory restrictions would be unduly burdensome and produce little consumer benefit. The Bureau thus proposed to include flood insurance as part of the general definition of “Hazard insurance,” but to exclude flood insurance that is required under the FDPA from the definition of “force-placed insurance” in proposed § 1024.37(a)(2)(i).

The Bureau did not receive comments from consumer groups or industry commenters on the proposed defined term "Hazard insurance" other than with respect to the treatment of flood insurance. On that topic, most industry commenters believed that simply excluding flood insurance obtained by a servicer as required by the FDPA from the definition of the term "force-placed insurance" in proposed § 1024.37(a)(2)(i) was workable and adequately mitigated the risk of a servicer having to comply with both regulations under the FDPA and the Bureau's force-placed insurance regulations. But one large bank servicer and one large force-placed insurance provider urged the Bureau to exclude flood insurance from the defined term "Hazard insurance" in § 1024.31 instead.

The large bank servicer expressed concern that the proposed definitions of "hazard insurance" and "force-placed insurance" would effectively require a servicer to strictly monitor any potential change in a mortgage's property's flood zone designation because whether the FDPA requires a servicer to obtain hazard insurance to protect against flood loss depends, among other things, on whether a property is located in an area designated as a Special Flood Hazard Area (SFHA). The commenter thus worried that the force-placed insurance requirements of § 1024.37 would become applicable instantaneously after a change in SFHA designations if that change meant that flood insurance was no longer required under the FDPA for a particular property. The Bureau, however, does not interpret § 1024.37 to apply in this way. Compliance with § 1024.37 would be required if the servicer decides to renew or replace a flood insurance policy that had been previously been required under the FDPA with a new policy after the property's SFHA designation had changed. As discussed above, the Bureau proposed to exclude hazard insurance required by the FDPA from the definition of "force-placed insurance" because the Bureau believes that the FDPA and other related Federal laws adequately regulated this activity. However, if a servicer chooses to renew or replace hazard insurance to protect against flood loss even though the insurance the renewal or replacement is no longer required by the FDPA, then the FDPA would not apply. The Bureau's force-placed insurance regulations are intended to fill precisely this gap to ensure that consumers have basic procedural and substantive protections in the absence of FDPA coverage. Thus, a servicer would have to check a property's flood zone designation when a servicer is about to renew or replace hazard insurance to protect against flood loss that the servicer originally obtained pursuant to the FDPA to determine whether the status has changed such that § 1024.37 would apply going forward. The Bureau believes that this presents minimal if any burden on servicers and is justified to avoid imposing unnecessary costs on borrowers.

The large force-placed insurance provider urged the same result based on statutory interpretation grounds, asserting that Congress had not intended to include flood insurance as a type of hazard insurance that would potentially be subject to the force-placed insurance requirements because section 1461 of the Dodd-Frank Act, which governs the establishment of escrow accounts for certain higher-priced mortgage loans, contains separate definitions for "hazard insurance" and "flood insurance." The commenter acknowledged that section 1461 is distinct from section 1463 and amends different underlying statutes, TILA and RESPA respectively. Nonetheless, it asserted that both address insurance for which premiums could be paid through the establishment of escrow accounts and therefore should be interpreted in tandem.

Again, the Bureau declines to make this change. The Bureau does not believe that Congress intended the statutory definition of "flood insurance" and "hazard insurance" in section 1461 to control the interpretation of "hazard insurance" for purposes of section 1463(a). Indeed, section 1461 expressly limits its scope by stating that "For purposes of this section, the following definitions [of "flood insurance" and "hazard insurance"] shall apply." In light of this language, the Bureau does not believe that section 1461 controls. Section 1463(a) itself demonstrates that Congress expected the force-placed insurance provisions to apply to flood insurance other than that required by the FDPA. Section 6(*l*)(4) of RESPA states that nothing in the force-placed insurance provisions shall be construed as prohibiting a servicer from providing simultaneous or concurrent notice of a lack of flood insurance pursuant to the FDPA. This provision would have little impact if flood insurance could *never* be considered force-placed insurance within the meaning of section 1463. Thus, the Bureau believes its interpretation of the statutory terms to apply the force-place insurance requirements to flood insurance that is not required by the FDPA and thus not subject to that statute's extensive regulation is consistent with the statutory language, congressional intent, and consumers' interests. Accordingly, the Bureau adopts the proposed defined term "Hazard insurance" as proposed.

"Loss mitigation application." Proposed § 1024.31 would have defined a loss mitigation application as a submission from a borrower requesting evaluation for a loss mitigation option in accordance with procedures established by the servicer for the submission of such requests. As discussed below with respect to § 1024.41, the Bureau received comments from large bank servicers regarding the application of the loss mitigation requirements on pre-qualification and informal oral communications with borrowers.

Based on the consideration of those comments, the Bureau has determined to revise the definition of a loss mitigation application. The Bureau believes that a loss mitigation application differentiates a communication or inquiry from a borrower regarding loss mitigation options from a borrower's request for consideration for a loss mitigation option. When a borrower, orally or writing, expresses an interest in a loss mitigation option and provides any information that would be evaluated by a servicer, that communication should be considered a loss mitigation application. A servicer must then determine whether the loss mitigation application is complete or incomplete pursuant to the requirements of § 1024.41(b). This definition of a loss mitigation application is similar to framework established in Regulation B with respect to an application for credit.

Accordingly, § 1024.31 states that a loss mitigation application means an oral or written request for a loss mitigation option that is accompanied by any information required by a servicer for evaluation for a loss mitigation option.

"Loss mitigation option." Pursuant to the Bureau's authorities under RESPA sections 6(k)(1)(E), 6(j)(3), and 19(a), the Bureau proposed rules on error resolution (proposed § 1024.35), information management (proposed § 1024.38), early intervention (proposed § 1024.39), continuity of contact (proposed § 1024.40), and loss mitigation (proposed § 1024.41) that would have set forth servicer duties with respect to "Loss mitigation options."

The Bureau proposed to define "Loss mitigation options" at new § 1024.31 as "alternatives available from the servicer to the borrower to avoid foreclosure." The Bureau also proposed to clarify through comment 31 (Loss mitigation options)-1 that loss mitigation options include temporary and long-term relief, and options that allow borrowers to remain in or leave their homes, such as, without limitation, refinancing, trial or permanent modification, repayment of the amount owed over an extended period of time, forbearance of future payments, short-sale, deed-in-lieu of foreclosure, and loss mitigation programs sponsored by a State or the Federal Government. The Bureau also proposed to clarify through comment 31 (Loss mitigation options)-2 that loss mitigation options available from the servicer include options offered by the owner or assignee of the loan that are made available through the servicer.

Several industry commenters addressed the Bureau's proposed definition of "Loss mitigation options." One industry commenter recommended that the term "Loss mitigation options" should be defined as alternatives available "from the investor through the servicer to the borrower" to avoid foreclosure, in light of the general industry practice that loss mitigation options are generally authorized by investors rather than servicers. While one industry trade group supported the proposed definition, other commenters were concerned that the breadth of the definition could conflict with servicers' delinquency management programs because the definition would subject short-term cures to the same procedural requirements as more permanent options. Similarly, industry commenters were concerned that the proposed definition would be inconsistent with requirements under existing loss mitigation programs, such as Farm Credit Administration rules and portions of the National Mortgage Settlement.

In light of comments and upon further consideration, the Bureau is adopting a definition of the term "Loss mitigation option" substantially as proposed, but that incorporates the substance of proposed comment 31 (Loss mitigation options)-2 into the regulatory text. Accordingly, the final rule defines the term "Loss mitigation option" as an alternative to foreclosure offered by the owner or assignee of a mortgage loan that is made available through the servicer to the borrower.

The Bureau proposed to define "Loss mitigation options" as alternatives available "from the servicer" to reflect the practical, day-to-day relationship between borrowers and servicers, in which servicers pursue loss mitigation activities with respect to delinquent borrowers on behalf of the owners or assignees of the mortgage loans. The Bureau had proposed to add comment 31 (Loss mitigation options)-2 to clarify that the proposed definition should be read to include options offered by the owner and assignee and made available through the servicer in light of the actual legal relationship between servicers and owners or assignees, in which the owner or assignee authorizes the offering of loss mitigation options. Upon further consideration, the Bureau believes that the text of the definition should reflect the underlying legal relationship between servicers and owners or assignees to avoid confusion over whether servicers may be able to authorize loss mitigation options independent of the owner or assignee of the mortgage loan. Accordingly, the Bureau is not adopting comment 31 (Loss mitigation options)-2 as proposed, but instead is amending the proposed definition to incorporate the substance of proposed comment 31 (Loss mitigation option)-2.

The definition of the term “Loss mitigation option” is broad to account for the wide variety of options that may be available to a borrower, the availability of which may vary depending on the underlying loan documents, any servicer obligations to the lender or assignee of the loan, the borrower’s particular circumstances, and the flexibility the servicer has in arranging alternatives with the borrower. Accordingly, the Bureau is adopting proposed comment 31 (Loss mitigation option)-1 substantially as proposed to set forth examples of loss mitigation options “without limitation.” The Bureau has revised proposed comment 31 (Loss mitigation option)-1 to clarify that loss mitigation options include programs sponsored by “a locality” as well as a State or the Federal government and other non-substantive revisions describing options that allow borrowers “who are behind on their mortgage payments to remain in their homes or to leave their homes without a foreclosure.”

While the Bureau has developed a broad definition of loss mitigation options in order to accommodate the variety of loss mitigation programs, the Bureau does not intend for the provisions of Regulation X that use the term “Loss mitigation option” to require servicers to offer options that are inconsistent with any investor or guarantor requirements. Thus, under the

Bureau’s definition, an alternative that is not made available by the owner or assignee of the mortgage loan would not be a loss mitigation option for purposes of the final rule. The Bureau discusses the final rules that use the term “Loss mitigation option” in the applicable section-by-section analysis below.

The final rule includes new language in comment 31 (Loss mitigation option)-2, which explains that a loss mitigation option available through the servicer refers to an option for which a borrower may apply, even if the borrower ultimately does not qualify for such option. The Bureau has included this comment to clarify that the regulatory text’s reference to options “available” to borrowers is not intended to restrict the definition to options for which a borrower ultimately qualifies, but instead refers to options for which a borrower may apply.

“*Mortgage loan*.” As discussed in detail in the section-by-section analysis of § 1024.30, the Bureau proposed to add a new defined term “Mortgage loan” in proposed § 1024.31 to mean any federally related mortgage loan, as that term is defined in § 1024.2, subject to the exemptions in § 1024.5(b), but does not include open-end lines of credit (home equity plans). For the reasons discussed in the section-by-section analysis of § 1024.30, the Bureau is adopting the proposed definition to the defined term “Mortgage loan” as proposed.

“*Qualified written request.*” The Bureau proposed to adopt the defined term “Qualified written request” included in current § 1024.21(a) in proposed § 1024.31 without change, except to add related commentary, proposed 31 (qualified written request)-1, that would have explained that: (1) A qualified written request is a written notice a borrower provides to request a servicer either correct an error relating to the servicing of a loan or to request information relating to the servicing of the loan; and (2) a qualified written request is not required to include both types of requests. For example, a qualified written request may request information relating to the servicing of a mortgage loan but not assert that an error relating to the servicing of a loan has occurred.

One commenter suggested that the Bureau should clarify that the policies, procedures, and penalties related to a qualified written request are the same as those related to error resolution and information requests under §§ 1024.35 and 1024.36. The Bureau agrees that it would be helpful to clarify that the error resolution and information request requirements in §§ 1024.35 and 1024.36 apply as set forth in those sections irrespective of whether the servicer receives a qualified written request, and accordingly, is adopting new comment 31 (qualified written request)-2 for that purpose. However, the Bureau does not believe it is appropriate to discuss a servicer's penalties for violation of the Bureau's regulations in either the regulation or the commentary.

In addition, the Bureau has made slight modifications to the proposed definition of "qualified written request" so it more closely tracks the definition included in section 6(e)(1) of RESPA. The final rule defines "qualified written request" to mean a written correspondence from the borrower to the servicer that includes, or otherwise enables the servicer to identify, the name and account of the borrower, and either: (1) states the reasons the borrower believes the account is in error; or (2) provides sufficient detail to the servicer regarding information relating to the servicing of the mortgage loan sought by the borrower.

"Service provider." The Bureau proposed to add new defined term "Service provider" in proposed § 1024.31 to mean any party retained by a servicer that interacts with a borrower or provides a service to the servicer for which a borrower may incur a fee. The Bureau proposed related commentary, comment 31 (service provider)-1, that would have clarified that service providers may include attorneys retained to represent a servicer or an owner or assignee of a

mortgage loan in a foreclosure proceeding, as well as other professionals retained to provide appraisals or inspections of properties. Two industry groups representing appraisal professionals submitted joint comments that objected to the inclusion of appraisal professionals in the Bureau's proposed comment 31 (service provider)-1. The commenters sought clarification from the Bureau about the circumstances under which appraisers are "service providers" and what their obligations would be. The Bureau believes that comment 31 (service provider)-1 is clear in describing the circumstances under which appraisal professionals are "service providers" and thus feels no further explanation is required. While acknowledging that the Bureau's mortgage servicing rules do not directly regulate real estate appraisal services, the commenters claimed that individual appraisers and small appraisal firms would experience costly and unnecessary hardship if they were considered "service providers." The Bureau disagrees. The definition of the term "service provider" in § 1024.31, by its terms, applies only for purposes of subpart C, and the term "service provider" appears only in § 1024.38 of subpart C. Section 1024.38 requires servicers maintain policies and procedures reasonably designed to ensure that they can exercise reasonable oversight of their service providers. The Bureau does not believe that requiring servicers to exercise reasonable oversight of their service providers will lead to costly and unnecessary hardship on individual appraisers and small appraisal firms.

"*Subservicer.*" The Bureau proposed to adopt the defined term "Subservicer" included in current § 1024.21(a) in proposed § 1024.31 without change. The proposed defined term "Subservicer" provides that a "subservicer" is any servicer who does not own the right to perform servicing, but who performs servicing on behalf of the master servicer.

One commenter suggested that the Bureau should replace the reference to "master servicer" in the definition of "subservicer" with "servicer" to accommodate circumstances where there are multiple levels of subservicing. The example the commenter provided is one where there is one master servicer, but also a primary servicer and multiple subservicers. It appears that the commenter's concern is that people might be confused by thinking "primary servicers" would not be considered "subservicers" for purposes of subpart C of Regulation X. Based on the example provided by the commenter, the Bureau understands that a primary servicer is performing servicing on behalf of the master servicer, who owns the right to perform servicing. Because the primary servicer is not the owner of the right to perform servicing, it would be a "subservicer" pursuant to the proposed definition to the defined term "Subservicer."   Although industry practice may differentiate between levels of subservicing by referring to a servicer that directly performs servicing on behalf of a master servicer as the "primary servicer," and servicers performing on behalf of the "primary servicer" as "subservicers," for purposes of subpart C, any servicer that does not own the servicing right but performs servicing on behalf of a servicer that owns the servicing right is a subservicer.   Accordingly, the Bureau believes the proposed definition to the defined term "Subservicer" adequately captures situations where there are multiple levels of subservicing and the defined term "Subservicer" is adopted as proposed.

Section 1024.32 General Disclosure Requirements

The Bureau set forth requirements applicable to disclosures required by subpart C in proposed §1024.32. Specifically, proposed § 1024.32(a)(1) would have required that disclosures provided by servicers be clear and conspicuous, in writing, and in a form the consumer may keep. This standard is consistent with disclosure standards applicable in other regulations issued by the Bureau, including, for example, Regulation Z. *See, e.g.,* 12 CFR 1026.17(a)(1). Proposed § 1024.32(a)(2) would have permitted disclosures to be provided in languages other than English, so long as disclosures are made available in English upon a borrower's request. Further, proposed § 1024.32(b) would have permitted disclosures required under subpart C to be combined with disclosures required by applicable laws, including State laws, as well as disclosures required pursuant to the terms of an agreement between the servicer and a Federal or State regulatory agency.

The Bureau is adopting the final rule as proposed, with minor changes to § 1024.32(a)(1) to replace the term "consumer," with "recipient" as applicable and to improve the clarity of § 1024.32. Two commenters representing industry trade groups suggested that the clarity of §1024.32(a) could be enhanced if the final rule could remove the term "consumer" where permissible because the term "consumer" is more appropriate in the context of disclosures provided prior to the consummation of the mortgage loan transaction.

Section 1024.33 Mortgage Servicing Transfers

RESPA section 6(a) through (d) sets forth disclosure requirements for servicing transfers that are currently implemented in § 1024.21(b) through (d) of Regulation X. 12 U.S.C. 2605(a) through (d). As part of the Bureau's proposed reorganization of Regulation X, which would have created a new subpart C to contain the Bureau's mortgage servicing rules, the Bureau proposed to move the disclosure provisions in § 1024.21(b) through (d) to new § 1024.33 and new Regulation X official interpretations. The Bureau also proposed to move the existing State law preemption provision in § 1024.21(h) to § 1024.33(d). In addition to these conforming amendments, the Bureau proposed to add certain new provisions to § 1024.33 and official commentary to § 1024.33, as discussed in more detail below.[77]

[77] Further, the Bureau proposed to move and amend provisions in § 1024.21(e) (pertaining to servicer responses to borrower inquiries) to new § 1024.35 (error resolution) and § 1024.36 (information requests). The Bureau's proposal also would have removed current § 1024.21(f) (damages), which had restated the damages and costs provision in RESPA section 6(f). The Bureau is removing this provision from Regulation X, which is no longer

Section 1024.21(b) through (d) currently requires that borrowers receive two notices related to mortgage servicing: (1) a servicing disclosure statement provided at application notifying the applicant whether the servicing of the loan may be transferred at any time (§ 1024.21(b) and (c)); and (2) if servicing is transferred, a notice of transfer provided by the transferor and transferee servicer around the time of the transfer (§ 1024.21(d)).

33(a) Servicing Disclosure Statement

RESPA section 6(a) generally sets forth requirements for persons making federally related mortgage loans to disclose to loan applicants, at the time of application, whether servicing of the loan may be assigned, sold, or transferred to any other person at any time while the loan is outstanding. 12 U.S.C. 2605(a). Current § 1024.21(b) and (c) implements requirements in RESPA section 6(a) related to the servicing disclosure statement. The Bureau's proposed § 1024.33(a) would have made certain changes to the requirements currently set forth in § 1024.21(b) and (c) pertaining to the servicing disclosure statement, including changes to the scope of applicability and delivery of the servicing disclosure statement, and certain other non-substantive technical revisions.

The Bureau proposed to limit the scope of the servicing disclosure statement to closed-end reverse mortgage transactions to conform § 1024.33(a) to the comprehensive amendments to consumer mortgage disclosures proposed by the Bureau in the 2012 TILA-RESPA Proposal.[78] Because the Bureau intended to incorporate the servicing disclosure statement requirements of RESPA section 6(a) into the consolidated disclosure forms for the TILA-RESPA Integrated Disclosure rulemaking, the Bureau had proposed to limit the scope of the servicing disclosure

accurate following amendments to RESPA section 6(f) by section 1463(b) of the Dodd-Frank Act. The Bureau believes the damages and costs provision is more appropriate as a statutory provision.

[78] The Bureau issued the 2012 TILA-RESPA Proposal on July 9, 2012.

statement provisions in new § 1024.33 to closed-end reverse mortgage transactions because those transactions would not be covered by the 2012 TILA-RESPA Proposal.

After additional consideration, because the Bureau will not be finalizing the 2012 TILA-RESPA Proposal until after this final rule, the Bureau has decided not to finalize the language in proposed § 1024.33(a) that would have limited the scope of the provision to closed-end reverse mortgage transactions. Instead, the Bureau is finalizing § 1024.33(a) by conforming the scope to "mortgage loans" other than subordinate-lien mortgage loans, as discussed in the section-by-section analysis of § 1024.30(c) above. The Bureau is excluding subordinate liens in order to maintain the current coverage of the servicing disclosure statement requirement in Regulation X.[79] HUD initially implemented this exemption in reliance on its authority under section 19(a) of RESPA;[80] the Bureau relies on the same authority to maintain the current exemption. Accordingly, in the final rule, the Bureau has added language to § 1024.33(a) so that applicants for "first-lien mortgage loans" must receive the servicing disclosure statement, as indicated at § 1024.30(c)(1). Thus, applicants for both reverse and forward mortgage loans must receive the servicing disclosure statement. The Bureau expects to harmonize the scope of § 1024.33(a) in the final rule implementing the TILA–RESPA integrated disclosures and to provide for consolidated disclosure forms at that time.

The Bureau also proposed to add comment 33(a)(1)-2 to § 1024.33(a) to clarify that the servicing disclosure statement need only be provided to the "primary applicant." Current § 1024.21(b) requires that the servicing disclosure statement be provided to mortgage servicing

[79] The Bureau notes that it proposed in the 2012 TILA-RESPA Proposal to implement the servicing disclosure requirement in RESPA section 6(a) through a disclosure appearing on the Bureau's proposed Loan Estimate for both first and subordinate liens *See* 2012 TILA-RESPA Proposal, 77 FR 51116, 51230 (2012) and proposed § 1026.19(e)(1)(i).

[80] See 59 FR 65442, 65443 (1994).

loan applicants, and current § 1024.21(c) provides that if co-applicants indicate the same address on their application, one copy delivered to that address is sufficient, but that if different addresses are shown by co-applicants on the application, a copy must be delivered to each of the co-applicants. The Bureau proposed to implement through commentary to § 1024.33(a) a clarification relating to providing a servicing disclosure statement for co-applicants—that when an application involves more than one applicant, notification need only be given to one applicant but must be given to the primary applicant when one is readily apparent. A credit union trade association supported this proposed change.

In its proposal, the Bureau explained that the modified requirement would reduce burdens on servicers without significantly reducing consumer protections, given that the Bureau proposed to apply the regulation only to closed-end reverse mortgage transactions. The Bureau explained that such transactions are typically only conducted with regard to a borrower's principal residence and do not involve ongoing consumer payments for the life of the loan, so that contact with servicers is generally quite minimal. The Bureau also observed that amending the current requirement would be consistent with disclosure requirements applicable to other Bureau regulations, such as the adverse action notice required under Regulation B (Equal Credit Opportunity Act).[81]

Because the Bureau is not limiting § 1024.33(a) to closed-end reverse mortgage transactions in the final rule, as originally proposed, the Bureau is not adopting proposed comment 33(a)(1)-2 as proposed and is not amending the existing requirement in § 1024.21(c), under which the servicing disclosure statement must be provided to co-applicants if different addresses are shown by co-applicants. Instead, comment 33(a)-2 contains the same guidance

[81] *See* 12 CFR 1002.9(f).

that originally appeared in § 1024.21(c): that if co-applicants indicate the same address on their application, one copy of the servicing disclosure statement delivered to that address is sufficient; and that if different addresses are shown by co-applicants on the application, a copy must be delivered to each of the co-applicants.

Finally, in addition to proposing changes about the scope of the rule, the Bureau proposed in § 1024.33(a) to make certain non-substantive changes to language from current § 1024.21(b) and (c) to clarify the circumstances under which the servicing disclosure statement must be provided and the proper use of appendix MS-1, which provides a model form for the servicing disclosure statement. For example, § 1024.21(b) currently provides that the servicing disclosure statement must be provided "[a]t the time an application for a mortgage servicing loan is submitted, or within three days after submission of the application." The Bureau's proposed § 1024.33(a) stated that the servicing disclosure statement must be provided "[w]ithin three days (excluding legal public holidays, Saturdays, and Sundays) after a person applies [.]" The Bureau also proposed to incorporate some of the language currently in § 1024.21(b) and (c) into new Regulation X official commentary. For example, the Bureau proposed to move § 1024.21(b)(1), which explained use of appendix MS-2, to new comment 33(a)-1; the Bureau also included generally applicable instructions for use of model forms and clauses in commentary to appendix MS. The Bureau did not receive comment on this aspect of the proposal and adopts these revisions substantially as proposed, other than with respect to the scope of the rule, discussed above.

In the final rule, the Bureau has replaced the phrase "table funding mortgage broker" with the phrase "mortgage broker who anticipates using table funding," which the Bureau believes is clearer and better conforms to the term that currently appears in § 1024.21(b)(1). In addition, the

Bureau has consolidated proposed comments 33(a)(2)-1, -2, and -3 into comment 33(a)-3, which contains disclosure preparation instructions currently in § 1024.21(b)(2).[82] Comment 33(a)-3 explains that, if the lender, mortgage broker who anticipates using table funding, or dealer in a first lien dealer loan knows at the time of the disclosure whether it will service the mortgage loan for which the applicant has applied, the disclosure should, as applicable, state that such entity will service such loan and does not intend to sell, transfer, or assign the servicing of the loan, or that such entity intends to assign, sell, or transfer servicing of such mortgage loan before the first payment is due. The comment also provides that, in all other instances, a disclosure that states that the servicing of the loan may be assigned, sold, or transferred while the loan is outstanding complies with § 1024.33(a).

The final rule also makes a technical revision to the last sentence of proposed § 1024.33(a). The final rule provides that the servicing disclosure statement is not required to be delivered if "a person who applies for a first-lien mortgage loan is denied credit" within the three-day period.

33(b) Notice of Transfer of Loan Servicing

RESPA section 6(b) and (c) sets forth the general requirement for the transferor and transferee servicers of a federally related mortgage loan to notify the borrower in writing of any assignment, sale, or transfer of servicing. 12 U.S.C. 2605(b) and (c). These statutory requirements are implemented through current § 1024.21(d). The Bureau had proposed to move and adopt substantially all of these requirements to new § 1024.33(b), with a few exceptions, as explained in the section-by-section analysis below. The Bureau's proposal also would have

[82] The disclosure preparation instructions in current § 1024.21(b)(2) refer to "table funding mortgage broker." In implementing these instructions through comment 33(a)-3, the Bureau has replaced that phrase with the phrase "mortgage broker who anticipates using table funding" to better conform to the language in § 1024.33(a).

made certain non-substantive revisions to current § 1024.21(d) to clarify existing servicing transfer requirements.[83] New § 1024.33(b)(1) sets forth the general requirement to provide the servicing transfer notice. New § 1024.33(b)(2) sets forth the transfers for which a servicing transfer is not required. New § 1024.33(b)(3) sets forth the timing requirements of the notice. New § 1024.33(b)(4) sets forth the content requirements for the servicing transfer notice. The Bureau is generally adopting these provisions as proposed, except as noted in the section-by-section analysis below.

33(b)(1) Requirements for Notice and 33(b)(2) Certain Transfers Excluded

RESPA section 6(b)(1) and (c)(1) sets forth the general requirements for the transferor and transferee servicers to provide a notice of servicing transfer for any federally related mortgage loan that is assigned, sold, or transferred. 12 U.S.C. 2605(b)(1) and (c)(1). Current § 1024.21(d)(1)(i) implements the general requirement for the transferor and transferee servicers to provide the notice of transfer, which the Bureau proposed to move to new § 1024.33(b)(1). Unlike the servicing disclosure statement that the Bureau proposed in § 1024.33(a) to apply only to closed-end reverse mortgage transactions,[84] the Bureau proposed that the servicing transfer notice be provided with respect to the transfer of a "mortgage loan," including forward and reverse mortgage loans.

The Bureau proposed to include in § 1024.33(b)(1) a statement that appendix MS-2 contains a model form for the notice. The reference to appendix MS-2 was previously located in

[83] For example, the Bureau changed "consumer inquiry address," under § 1024.21(d)(3)(ii) to an address "that can be contacted by the borrower to obtain answers to servicing transfer inquiries," under § 1024.33(b)(4)(ii). The Bureau also changed the provision in § 1024.21(d)(3)(v) regarding "[i]nformation concerning any effect the transfer may have" on the terms of the continued availability of mortgage life or disability insurance, to a requirement in § 1024.33(d)(3)(v) to include information "[w]hether the transfer will affect" the terms or the continued availability of mortgage life or disability insurance.

[84] As noted in the section-by-section analysis of § 1024.33(a), the Bureau is finalizing the servicing disclosure statement requirement for first-lien mortgage loans, including forward and reverse mortgage loans.

§ 1024.21(d)(4). Section 1024.21(d)(4) also contained language indicating that servicers could make minor modifications to the sample language but that the substance of the sample language could not be omitted or substantially altered. Similar language now appears in a general comment to appendix MS in comment MS-2, discussed below in the section-by-section analysis of appendix MS. The Bureau did not receive comment on these proposed provisions and is adopting them in the final rule.

Current § 1024.21(d)(i) exempts certain transactions from the requirement to provide the notice of transfer (if there is no change in the payee, address to which payment must be delivered, account number, or amount of payment due): transfers between affiliates, transfers resulting from mergers or acquisitions of servicers or subservicers, and transfers between master servicers where the subservicer remains the same. The Bureau did not receive comment on these proposed provisions and is adopting them in the final rule.

Current § 1024.21(d)(ii) exempts the FHA from the requirement to provide a transfer notice where a mortgage insured under the National Housing Act is assigned to the FHA. The Bureau proposed to move this provisions to new § 1024.33(b)(2)(i)(ii). HUD initially implemented this exemption in reliance on its authority under section 19(a) of RESPA;[85] the Bureau relies on the same authority to maintain the current exemption. The Bureau did not receive comment on this proposed provision and is adopting it in the final rule.

33(b)(3) Time of the Notice

33(b)(3)(i) In General

Timing of the Transferor and Transferee Notices

RESPA section 6(b)(2)(A) requires that the transferor's notice be provided not less than

[85] *See* 59 FR 65442, 65443 (1994).

15 days before the effective date of transfer of servicing, except as provided in RESPA section 6(b)(2)(B) and (C), which provides that the notice may be provided under different timeframes in certain cases. 12 U.S.C. 2605(b)(2)(A). RESPA section 6(c)(2)(A) requires that the transferee's notice be provided not more than 15 days after the effective date of transfer, except as provided in RESPA section 6(c)(2)(B) and (C). 12 U.S.C. 2605(c)(2)(A). Current § 1024.21(d)(2)(i) implements these requirements and provides that, except as provided in paragraph (d)(1)(i) or(d)(2)(ii), the notice of transfer must be provided by the transferor not less than 15 days before the effective date of the transfer and by the transferee not more than 15 days after the effective date of the transfer. The Bureau proposed to move these requirements to new § 1024.33(b)(3)(i).

Several individual consumers suggested that a 15-day timeframe was too short a period for borrowers to make adjustments with respect to whom they should direct their mortgage payments. They recommended that transferees should be required to provide the transfer notice 30 to 45 days in advance of the effective date of transfer. In its final rule, the Bureau is not adjusting the exiting timing requirements. The 15-day time period was established by Congress, which reasonably concluded that this time period provides borrowers with sufficient time to make adjustments to any automated payment systems. In addition, the Bureau believes that there is minimal risk to borrowers who may be unable to send payments to the proper servicer after a transfer. Pursuant to § 1024.33(c)(1), servicers generally may not treat a payment as late for 60 days after a transfer if a borrower makes a timely but misdirected payment to the transferee servicer.

Delivery. Subparagraphs (b)(1) and (c)(1) of RESPA section 6 require that the transferor and transferee servicer notify "the borrower" of any assignment, sale, or transfer of servicing. Current § 1024.21(d)(1)(i) implements these requirements by requiring that notices be delivered to “the borrower.” However, unlike as set forth in current § 1024.21(c) with respect to the servicing disclosure statement, current § 1024.21(d) does not contain specific delivery instructions for delivering servicing transfer notice under § 1024.21(d) to multiple borrowers. The Bureau proposed comment 33(b)(3)-2 to clarify that a notice of transfer should be delivered to the mailing address listed by the borrower in the mortgage loan documents, unless the borrower has notified the servicer of a new address pursuant to the servicer’s requirements for receiving a notice of a change of address. Proposed comment 33(b)(3)-2 further clarified that when a mortgage loan has more than one borrower, the notice of transfer need only be given to one borrower, but must be given to the primary borrower when one is readily apparent.

The Bureau did not receive comment on the language in proposed comment 33(b)(3)-2 clarifying that a servicer deliver the notice of transfer to the mailing address listed by the borrower in the mortgage loan documents unless the borrower has notified the servicer of a new address pursuant to the servicer’s requirements for receiving a notice of a change in address. However, the Bureau did receive comment on the proposed language clarifying that servicers may provide the transfer notice to the “primary” borrower. Industry commenters supported the proposed limitation to provide the transfer notice only to the primary borrower. One industry commenter indicated, however, that servicers generally will not know who the primary borrower is, noting that servicers would likely rely on the owner’s or a prior servicer’s designation in servicer transfer instructions, or the party that is listed first on the note. The industry commenter recommended that the Bureau permit such reliance.

Two consumer advocacy groups recommended that the Bureau omit this comment. These commenters were concerned that providing notice to only one party would not ensure that multiple obligors, or even the party who is actually making payments on the mortgage, would receive it. For example, in the event of a divorce or separation, a "primary" borrower could be a spouse who is no longer living at home but who has submitted a change-of-address notice to the servicer. In another scenario, a borrower not living at home could be under a family court order to make mortgage payments even though the borrower is not a "primary" borrower. In these types of cases, the consumer groups were concerned that borrowers not considered "primary" would not receive the transfer notice. The consumer groups also raised concern about the lack of a definition of "primary" borrower and observed that, even if a definition were provided, a servicer's original designation of "primary" may become inaccurate over time if the obligors' relationship changes or other changed circumstances arise. The consumer groups also noted that sending two notices is not costly, would simplify compliance, and would reduce the risk that an interested borrower would not receive the notice.

In light of comments received, the Bureau is not adopting the proposed comment 33(b)(3)-2 regarding delivery to "primary" borrowers. The Bureau recognizes that a party who may be "primary" at application could change over time without the servicer's knowledge, which could be problematic for borrowers responsible for making ongoing payments to their servicer. The Bureau believes that servicers should be responsible for providing a notice to the address listed by the borrower in the mortgage loan documents or different addresses they have received through their own procedures, consistent with § 1024.11[86] and applicable case law.[87] The Bureau has otherwise retained proposed comment 33(b)(3)-2 substantially as proposed. The

[86] Section 1024.11 provides that "the provisions of [part 1024] requiring or permitting mailing of documents shall be deemed to be satisfied by placing the document in the mail (whether or not received by the addressee) addressed to the addresses stated in the loan application or in the other information submitted to or obtained by the lender at the time of loan application or submitted or obtained by the lender or settlement agent, except that a revised address shall be used where the lender or settlement agent has been expressly informed in writing of a change in address."

[87] *See Rodriguez v. Countrywide Homes* et al., 668 F. Supp. 2d 1239, 1245 (E.D. Ca. 2009) ("Countrywide submits, and the Court agrees, that RESPA requires a lender to send a Good Bye letter to the Mailing Address listed by the borrower in the loan documents. When the borrower submits an express change of mailing address, the lender is required to send the Good Bye letter to the new address.").

Bureau has omitted the comment limiting delivery to “primary” borrowers, added parenthetical language about providing the notice to “addresses,” and has renumbered the comment as 33(b)(3)-1 because of the deletion of proposed comment 33(b)(3)-1 discussed above. Comment 33(b)(3)-1 explains that a servicer mailing the notice of transfer must deliver the notice to the mailing address (or addresses) listed by the borrower in the mortgage loan documents, unless the borrower has notified the servicer of a new address (or addresses) pursuant to the servicer’s requirements for receiving a notice of a change in address.

33(b)(3)(ii) Extended Time

RESPA section (b)(2)(B) and (c)(2)(B) contains exemptions from the general requirements that the transferor notice be provided not less than 15 days before the effective date of transfer and that the transferee notice be provided not more than 15 days after the effective date of transfer. 12 U.S.C. 2605(b)(2)(B) and (c)(2)(B). Paragraphs (b)(2)(B) and (c)(2)(B) permit these notices to be provided not more than 30 days after the effective date of assignment, sale, or transfer that is preceded by the termination of a servicing contract for cause, a servicer’s bankruptcy, or the commencement of proceedings by the FDIC for conservatorship or receivership of the servicer. These exemptions to the general timing requirements are currently set forth in § 1024.21(d)(2)(ii).

The Bureau had proposed to adopt the existing exemptions and add § 1024.33(b)(3)(ii)(D), which would extend the current 30-day exemption to situations in which the transfer of servicing is preceded by commencement of proceedings by the NCUA for appointment of a conservator or liquidating agent of the servicer or an entity that owns or controls the servicer. The Bureau did not receive comment on this aspect of the proposal and is adopting new § 1024.33(b)(3)(ii)(D) as proposed.

As is evident by RESPA section 6(b)(2)(B) and (c)(2)(B), one of the purposes of RESPA is to provide exemptions from the general transfer notice timing requirements for servicing transfers occurring in the context of troubled institutions involving the appointment of an agent by a Federal agency, such as those in which a servicing transfer is preceded by the commencement of proceedings by the FDIC for conservatorship or receivership of the servicer (or an entity by which the servicer is owned or controlled). The Bureau does not believe that the timing for providing a servicing transfer disclosure should differ for an insured credit union in the process of conservatorship of liquidation by the NCUA compared to an insured depository institution in the process of conservatorship or receivership by the FDIC. Thus, because the Bureau believes institutions for which the NCUA has commenced proceedings to appoint a conservator or liquidating agent should be treated similarly to those for which the FDIC has commenced proceedings to appoint a conservator or receiver, the Bureau believes § 1024.33(b)(3)(ii)(D) is necessary to achieve the purposes of RESPA. Accordingly, the Bureau exercises its authority under RESPA section 19(a) to grant reasonable exemptions for classes of transactions necessary to achieve the purposes of RESPA.

33(b)(3)(iii) Notice Provided at Settlement

RESPA section 6(b)(2)(C) and (c)(2)(C) generally provides that the timing requirements of the transferor and transferee notices at RESPA section 6(b)(2)(A) and (B), and (c)(2)(A) and (B) do not apply if the person making the loan provides a transfer notice to the borrower at settlement. Current § 1024.21(d)(2)(iii) implements these provisions and provides that notices of transfer delivered at settlement by the transferor servicer and transferee servicer, whether as separate notices or as a combined notice, satisfy the timing requirements of § 1024.21(d)(2). The Bureau proposed to move this provision to new comment 33(b)(3)-1 substantially as in the original.[88] The Bureau did not receive comment on this aspect of the proposal. The Bureau is adopting the substance of the language in the proposed commentary but is placing the language in new § 1024.33(b)(3)(iii) instead of official commentary to more closely track the requirements of the statute.

33(b)(4) Contents of Notice

Overview

RESPA section 6(b)(3) sets forth content requirements for the transferor notice, and RESPA section 6(c)(3) requires that the transferee notice contain the same content required by RESPA section 6(b)(3). 12 U.S.C. 2605(b)(3) and (c)(3). RESPA section 6(b)(3)(A) through (G) requires that the transferor and transferee notice contain the effective date of transfer, contact information for the transferee servicer, the name of an individual or department of the transferor and transferee servicer who may be contacted for borrower inquiries, the date on which the transferor will stop accepting payments and the date on which the transferee servicers will begin accepting payments, any information about the effect of the transfer on the availability of insurance, and a statement that the transfer will not affect any term or condition of the mortgage loan, other than servicing. These requirements are currently implemented by § 1024.21(d)(3)(i) through (vi). Section 1024.21(d)(3)(vii) also requires servicers to include a statement of the borrower's rights in connection with complaint resolution, including the information set forth in § 1024.21(e), as illustrated by current appendix MS-2.

The Bureau proposed to adopt most of the existing content requirements from current § 1024.21(d)(3), with the exception of the complaint resolution statement in § 1024.21(d)(3)(viii)

[88] Whereas § 1024.21(d)(2)(iii) describes a notice of transfer "delivered" at settlement, § 1024.33(b)(3)(iii) describes a notice of transfer "provided" at settlement. The Bureau has made this change to conform to the language of RESPA section 6(b)(2)(C) and (c)(2)(C) and other similar technical amendments throughout Regulation X.

and certain other changes discussed in more detail below. Except as otherwise discussed below, the Bureau is adopting § 1024.33(b)(4) as proposed. Accordingly, § 1024.34(b)(4) sets forth content requirements for the transfer notice, including the effective date of the servicing transfer; the name, address, and telephone number for the transferor and transferee servicers to answer inquiries related to the transfer of servicing; the date on which the transferor will stop accepting payments and the date the transferee will begin accepting payments, as well as the address for the transferee servicer to which borrower payments should be sent; information about whether the transfer will affect the terms or availability of insurance coverage; and a statement indicating that the transfer does not affect any of the mortgage loan terms other than servicing.

Information about loan status. Two consumer advocacy groups also requested that the Bureau require that transfer notices provide information about the default status of the loan and include a full payment history. The groups explained that many servicing problems occur at or near the time of transferring servicing records and that errors involving one or two payments can spiral into a threatened foreclosure despite borrower efforts to prove that payments were in fact made. Thus, the consumer groups recommended that the transfer notices should advise if the homeowner is current and whether there are any unpaid fees, and the status of loss mitigation options being considered. They also recommended that a full payment history, including allocation of the payments to interest, principal, late fees, and other fees should be included by both the old and the new servicer, so that the homeowner may promptly ascertain if there is a discrepancy in the records. These commenters also requested that the Bureau require that fees not listed in a payment history provided at the transfer of servicing be waived.

The Bureau recognizes the problems that can arise when servicing is transferred, especially in the case of a borrower who is not current at the time of transfer. However, requiring individualized information about each borrower's loan could significantly affect the time required to produce the notice as well as the cost. Moreover, the Bureau believes that other new provisions being finalized in Regulation X and Regulation Z will adequately address borrowers' interests in ensuring the accuracy of transferred records concerning their payment history. First, borrowers will be able to obtain information about their current payment status on a monthly basis on the periodic statement required under the Regulation Z provision that the Bureau is finalizing in the 2013 TILA Mortgage Servicing Final Rule. That statement will show, among other things, the payment amount due, the amount of any late payment fee, the total sum of any fees or charges imposed since the last statement, the total of all payments received since the last statement, the total of all payments received since the beginning of the current calendar year, transaction activity since the last statement, the outstanding principal balance, the borrower's delinquency status, amounts past due from previous billing cycles, and the total payment amount needed to bring the account current. As a result, if there are discrepancies between the last statement provided by the prior servicer and the first statement provided by the new servicer, those discrepancies will be apparent on the face of the statements. Second, borrowers will also be able to assert errors and request information about their payment history and current status through the new error resolution and information request provisions of Regulation X §§ 1024.35 and 1024.36; and new § 1024.38(b)(1)(iii) requires servicers to maintain policies and procedures reasonably designed to ensure that the servicer can provide a borrower with accurate and timely information and documents in response to the borrower's requests for information with respect to the servicing of the borrower's mortgage loan account. Third, new § 1024.38(b)(4) generally requires servicers to maintain policies and procedures reasonably designed to ensure (as a transferor servicer) the timely transfer of all information and documents in a manner that ensures the accuracy of information and documents transferred, and (as a transferee servicer) identify necessary documents or information that may not have been transferred by a transferor servicer and obtain such documents from the transferor servicer. Fourth, new § 1024.38(c)(2) generally requires, among other things, that servicers maintain a schedule of all transactions credited or debited to the mortgage loan account, including any escrow account defined in § 1024.17(b) and any suspense account and data in a manner that facilitates compiling such documents and data into a servicing file within five days. In light of these provisions, the Bureau does not believe that the cost of providing the default status of the loan or a full payment history with the servicing transfer notice for all borrowers would be justified.

Statement of borrower's rights in connection with the complaint resolution process. Although not specifically required by RESPA section 6(b)(3), current § 1024.21(d)(3)(vii) requires that the transfer notice include a statement of the borrower's rights in connection with the complaint resolution process. The Bureau proposed to remove this requirement from the servicing transfer notice in new § 1024.33(b)(4). Two consumer advocacy groups requested that the Bureau retain the current requirement, noting that borrowers would benefit from being informed of their rights related to errors and information requests. They asserted that retaining an existing disclosure would not add new burden. Further, they asserted that omitting the disclosure would not significantly reduce burden because the language in the proposed revised model notice (without the complaint resolution statement) at appendix MS-2 would likely only comprise one page, and that adding a paragraph about the error resolution and information rights might at most extend some of the information to the back side of the notice, but would not require an additional page or increased postage.

After considering the comments received, the Bureau has decided to adopt § 1024.33(b)(4) without a requirement to provide information about complaint resolution, as proposed. The Bureau believes that borrowers are best served by providing a notice that clearly and concisely explains that the servicing of their mortgage is being transferred, and that detailed information about the error resolution and information request process may not always be optimally located in the transfer notice. Additionally, as a result of amendments to the error resolution and information request procedures that the Bureau is finalizing in this rule, the existing disclosure in current appendix MS-2 would no longer be completely accurate.

The Bureau agrees that borrowers should be notified of their rights in connection with errors and inquiries, but the Bureau believes that borrowers should be informed of the error resolution and information request process through mechanisms that do not necessarily depend on the transfer of servicing. To address this, the Bureau is adding a requirement in § 1024.38(b)(5) that servicers maintain policies and procedures reasonably designed to ensure that servicers inform borrowers of procedures for submitting written notices of error set forth in § 1024.35 and written information requests set forth in § 1024.36. New comment 38(b)(5)-1 explains, among other things, that a servicer may comply with § 1024.38(b)(5) by including in the periodic statement required pursuant to § 1026.41 a brief statement informing borrowers that borrowers have certain rights under Federal law related to resolving errors and requesting information about their account, and that they may learn more about their rights by contacting the servicer, and a statement directing borrowers to a website that provides the information about the procedures set forth in §§ 1024.35 and 1024.36.[89]

[89] During the fourth round of consumer testing in Philadelphia, Pennsylvania, the Bureau tested a brief statement informing borrowers that they have rights associated with resolving errors. While participants generally understood

The Bureau believes that a requirement to establish policies and procedures to achieve the objective of notifying borrowers of the written error resolution and information request procedures set forth in §§ 1024.35 and 36 will provide servicers with more flexibility to the time and in a manner in which to notify borrowers about the written error resolution and information request procedures. Specifically, the Bureau expects that servicers may decide to inform borrowers about these procedures at a time and in a manner that borrowers are more likely to find beneficial than at the time of servicing transfer. Further, as described in more detail in the section-by-section analysis of § 1024.40, pursuant to § 1024.40(b)(4), servicers must have policies and procedures reasonably designed to ensure that continuity of contact personnel assigned to assist delinquent borrowers provide such borrowers with information about the procedures for submitting a notice of error pursuant to § 1024.35 or an information request pursuant to § 1024.36.

Finally, the Bureau believes borrowers are most likely to raise questions and complaints with servicers outside of the formal process outlined in §§ 1024.35 and 36. To ensure that servicers have systems in place for responding to errors and information requests through informal means, the Bureau believes servicers should have reasonable policies and procedures in place for responding to errors and information requests that fall outside of the required error resolution and information request procedures set forth in §§ 1024.35 and 36. Accordingly, as discussed in more detail in the section-by-section analysis of § 1024.38(b)(1), the Bureau is adopting § 1024.38(b)(1)(ii) and (iii), which generally requires that servicers maintain policies and procedures that are reasonably designed to ensure that the servicer can investigate, respond to, and, as appropriate, make corrections in response to borrower complaints, and provide

the meaning of the clause, the Bureau is not finalizing model language for a statement informing borrowers of their rights to resolve errors and request information.

accurate and timely information and documents in response to borrower information requests. Therefore, for the reasons discussed above, the Bureau is adopting the proposal to remove the requirement that the servicing transfer notice describe the complaint resolution statement currently set forth in § 1024.21(d)(3)(vii).

33(b)(4)(ii) and (b)(4)(iii)

RESPA section 6(b)(3)(C) and (D) requires that the transferor and transferee notices include the name and a toll-free or collect call telephone number for an individual employee or the department of the transferor and transferee servicers that can be contacted by the borrower to answer inquiries relating to the transfer of servicing. 12 U.S.C. 2605(b)(3)(C) and (D). The Bureau proposed to implement these requirements, currently in § 1024.21(d)(3)(ii) and (iii), through new § 1024.33(b)(4)(ii) and (iii).

The Bureau's proposal would have retained the requirement to provide contact information for "an employee or department" of the transferor and transferee servicers. The Bureau had also proposed in § 1024.33(b)(4)(ii) and (iii) to remove the requirement that the transferor and transferee servicers provide collect call telephone numbers, but to retain the requirement to provide toll-free telephone numbers. Accordingly, proposed § 1024.33(b)(4)(ii) and (iii) would have required that servicers provide only a toll-free telephone number for an employee or department of the transferee servicer that can be contacted by the borrower to obtain answers to servicing transfer inquiries. The Bureau's proposal also would have required that the transferor notice include the address for an employee or department of the transferor servicer that can be contacted by the borrower to obtain answers to servicing transfer inquiries. Current § 1024.21(d)(3)(iii) requires only that the notice list telephone contact information to reach an employee or department of the transferor servicer.

One industry commenter indicated that providing an individual employee name may not be appropriate in all cases because individuals can change roles within a servicer's organization. The commenter requested that only contact information for a servicing department be required. One individual consumer recommended requiring that the notice of transfer identify the owner or assignee of the loan, without contact information, in addition to contact information for the transferor and transferee servicers. Another individual consumer also recommended that the transfer notice include a plain language explanation of what "owning" and "servicing" a loan mean.

The Bureau is adopting the requirements in proposed § 1024.33(b)(4)(ii) and (iii) substantially as proposed. However, the Bureau is retaining the option to include a collect call number because, upon further consideration, the Bureau believes some servicers may continue to use collect call numbers. The Bureau is also retaining the requirement to provide contact information for either an employee or department in the final rule. Neither the statute nor the regulatory provision requires servicers to list specific employees but instead gives servicers the option of listing personnel or a department contact number. The Bureau believes servicers should be able to determine the most appropriate point of contact within their organizations. While the Bureau recognizes that servicer personnel may change over time, the Bureau does not believe that there is significant risk from the potential that contact information may be inaccurate because servicers are required under § 1024.38 to have policies and procedures in place to achieve the objective of providing accurate information to borrowers. Servicers may choose to provide department-level contacts to ease their own compliance. The Bureau believes borrowers would likely benefit from the disclosure of specific employees to the extent the servicer decides to list them.

The Bureau has considered the recommendation to require that the servicing transfer notice identify the owner or assignee of the loan in addition to contact information for the transferor and transferee servicer but is not adopting such a requirement in the final rule. First, the Bureau notes that the servicing disclosure statement provided at application pursuant to § 1024.33(a) already provides information about whether the lender, mortgage broker who anticipates using table funding, or dealer may assign, sell, or transfer the mortgage servicing to any other person at any time. Additionally, the Bureau believes the language in the model form at appendix MS-2, explaining that a new servicer will be collecting the borrower's mortgage loan payments and that nothing else about the borrower's mortgage loan will change, will avoid potential confusion about what the transfer of servicing means for a borrower's loan. Additionally, as explained above, the Bureau believes that borrowers are best served by a transfer notice that sets forth the most relevant information related to the transfer of servicing of their loan and who should receive their payments requiring additional information in the notice about the owner or the loan may be confusing. Finally, the servicing transfer notice will include contact information for the transferor and transferee servicer that the borrower may contact with any questions.[90]

33(b)(4)(iv)

RESPA section 6(b)(3)(E) requires that the transferor and transferee notices provide the date on which the transferor will cease to accept payments relating to the loan and the date on which the transferee servicer will begin to accept such payments. 12 U.S.C. 2605(b)(3)(E). This requirement is currently in § 1024.21(d)(3)(iv), which the Bureau proposed to implement

[90] Pursuant to § 1024.36(d)(2)(i)(A), a servicer generally must respond within 10 days to borrower requests for information about the identify or, and address or relevant contact information for, the owner or assignee of the borrower's mortgage loan.

through proposed § 1024.33(b)(4)(iv).

Several individual consumers indicated that the transfer notice could provide clearer instructions for how borrowers should submit payments after the effective date of transfer date. One individual consumer recommended that the notice should list the website address for transferee servicer and the proper address to submit electronic payments. Other consumers recommended that the notice explain which servicer is responsible for making payments from any escrow account for property taxes and insurance and the effective date of such payments.

Current § 1024.21(d)(3)(i) requires and the current model form in appendix MS-2 include a statement directing borrowers to send all payments due on or after the effective date of transfer to the new servicer.[91] The Bureau's proposed amendments to the model notice contained similar language but included space for the transferee servicer's payment address.[92] The Bureau is adopting this change to the model form in the final rule. *See* appendix MS-2. The Bureau believes this change to the model form will provide clear instructions to borrowers for the submission of future payments to the transferee.

The Bureau does not believe it is necessary to amend the regulatory text of § 1024.33(b)(4)(iv) because the Bureau believes servicers have an incentive to instruct borrowers where to send future payments, and the Bureau is concerned that a regulatory requirement to identify payment instructions, including electronic payment instructions, could be overly prescriptive. Moreover, § 1024.33(b)(ii) and (iii) requires transferor and transferee servicers to provide the contact information for borrowers to obtain answers to inquiries about the transfer; the Bureau believes that borrowers requiring further instruction about submitting payments

[91] Appendix MS-2 currently states, "Send all payments due on or after that date to your new servicer."

[92] The Bureau proposed to amend appendix MS-2 to state, "Send all payments due on or after [Date] to [Name of new servicer] at this address: [New servicer address]."

would make use of this contact information.

33(c) Borrower Payments During Transfer of Servicing

33(c)(1) Payments Not Considered Late

RESPA section 6(d) provides that, during the 60-day period beginning on the effective date of transfer of servicing of any federally related mortgage loan, a late fee may not be imposed on the borrower with respect to any payment on such loan and no such payment may be treated as late for any other purposes, if the payment is received by the transferor servicer (rather than the transferee servicer who should properly receive the payment) before the due date applicable to such payment. This provision is implemented through § 1024.21(d)(5). The Bureau proposed to retain that general requirement in new § 1024.33(c) by making a clarifying revision to the regulatory text—*i.e.*, that such misdirected payment may not be treated as late "for any purpose."

The Bureau also proposed to add a qualification to that general prohibition to conform new § 1024.33(c)(1) with the requirements in new § 1024.39 by clarifying that a borrower's account may be considered late for purposes of contacting the borrower for early intervention. Proposed § 1024.39 would have required servicers to provide oral and written notices to borrowers about the availability of loss mitigation options within 30 and 40 days after a missed payment, respectively.

The Bureau did not receive comment on this aspect of the proposal and is adopting § 1024.33(c)(1) substantially as proposed, except with respect to the statement referencing § 1024.39. The Bureau is adding new comment 33(c)(1)-1, to clarify that the prohibition on treating a payment as late for any purpose in § 1024.33(c)(1) includes a prohibition on imposing a late fee on the borrower with respect to any payment on the mortgage loan, with a cross-reference to RESPA section 6(d) in order to clarify that the statutory prohibition on charging late fees remains in effect notwithstanding the change to the language of the regulatory provision.

In the final rule, the Bureau is not adopting the proposed qualifying language regarding § 1024.39 as regulatory text, but instead is adopting this language as new comment 33(c)(1)-2. New comment 33(c)(1)-2 clarifies that a transferee servicer's compliance with 1024.39 during the 60-day period beginning on the effective date of a servicing transfer does not constitute treating a payment as late for purposes of § 1024.33(c)(1). The Bureau believes this provision is more appropriately located as commentary than regulatory text because it is an interpretation of the prohibition on treating a payment as late.

The early intervention rules are new requirements designed to inform delinquent borrowers about loss mitigation options. While a borrower who has made a timely but misdirected payment is not likely to benefit from information about early intervention, transferee servicers may not know the reasons for a missed payment if they are unable to establish live contact with borrowers pursuant to § 1024.39(a) (requiring that servicers establish live contact or make good faith efforts to do so by the 36th day of a borrower's delinquency). In the face of this uncertainty, transferee servicers may decide the best course of action is to comply with § 1024.39, as applicable. In these situations, the Bureau does not believe a servicer complying with § 1024.39 is treating a borrower as late within the meaning of RESPA section 6(d).

33(c)(2) Treatment of Payments

The Bureau also proposed to add a requirement in proposed § 1024.33(c)(2) that, in connection with a servicing transfer, a transferor servicer shall promptly either transfer a payment it has received incorrectly to the transferee servicer for application to a borrower's mortgage loan account or return the payment to the person that made the payment to the transferor servicer. The Bureau explained that many servicers already transfer misdirected payments to the appropriate servicer in connection with a servicing transfer, and the Bureau requested comment regarding whether the option to return the payment to the borrower should be eliminated.

One industry commenter supported the proposed provision, but two consumer advocacy groups and a number of individual consumers requested that the Bureau require the transferring servicer to forward all payments received from borrowers after the transfer date to the appropriate servicer. Consumer groups and individual consumers were concerned that returning misdirected payments to the borrower would lead to confusion, defaults, unnecessary fees, and potentially more foreclosures. Consumer groups believed that the transferor servicer could easily pass payments on to the transferee servicer, reducing the opportunity for unnecessary harm to borrowers. Similarly, one individual consumer suggested that the borrower should be permitted to make payments to the transferor servicer during the 60 days after the transfer date. Another individual consumer recommended that the transferee servicer should be responsible for collecting payments from the transferor servicer. Another consumer recommended that transferee servicer should be required to take steps to remind the borrower to send payments to the new servicer.

After consideration of the comments received, the Bureau has decided to adopt § 1024.33(c)(2) substantially as proposed. As discussed in more detail below, the Bureau believes that this requirement is necessary and appropriate to achieve the consumer protection purposes of RESPA, including ensuring the avoidance of unnecessary and unwarranted charges and the provision of accurate information to borrowers. Accordingly, the provision is authorized under sections 6(j)(3), 6(k)(1)(E), and 19(a) of RESPA.

The Bureau has added clarifying language to § 1024.33(c)(2) and has made conforming edits to § 1024.33(c)(2)(i) and (ii) to clarify the circumstances under which the transferor servicer must take action with respect to misdirected payments. Section 1024.33(c)(2) now provides that, beginning on the effective date of transfer of the servicing of any mortgage loan, with respect to payments received incorrectly by the transferor servicer (rather than the transferee servicer that should properly receive the payment on the loan), the transferor servicer shall promptly take action described in either paragraph (c)(2)(i) or (c)(2)(ii). The Bureau has modeled this language on the language of § 1024.33(c)(1) (payments not considered late). The Bureau does not intend any substantive difference from proposed § 1024.33(c)(2).

The Bureau has also added language to § 1024.33(c)(2)(ii) to provide that if a servicer does not transfer a misdirected payment to the transferee servicer, the servicer must return the payment to the person that made the payment to the transferor servicer and notify the payor of the proper recipient of the payment. The Bureau believes § 1024.33(c)(2) will ensure that transferor servicers take some action with respect to misdirected payments; otherwise, transferor servicers may claim that they had no obligation with respect to misdirected payments. The Bureau also believes it is reasonable to permit transferors to either return a misdirected payment to the payor or transmit the payment to the transferee servicer because there may be circumstances in which a borrower would want to be notified that the payment had been mailed to the wrong servicer, recoup the misdirected payment, and forward it to the correct servicer. In addition, there may be situations in which a transferor servicer receives a payment from a party it does not recognize as the borrower associated with the mortgage loan account. In such situations, the Bureau believes servicers may reasonably determine the best course of action is to return such a payment to the payor. Moreover, the Bureau does not believe there is significant potential for borrower harm associated with § 1024.33(c)(2) because § 1024.33(c)(1) permits a 60-day grace period in which timely but misdirected payments to the transferor servicer may not be considered late for any purpose. In addition, § 1024.33(c)(2) requires the transferor servicer to take action with respect to the misdirected payment "promptly." The Bureau does not agree with individual consumers who suggest that borrowers should be permitted to make payments to the transferor during the 60 days after the transfer date, or that the transferee servicer should collect payments from the transferor. While § 1024.33(c)(1) would prevent timely but misdirected payments from being treated as late, the transferor servicer's contractual right to collect payments from the borrower would likely end after a servicing transfer.

In the final rule, the Bureau has added language to § 1024.33(c)(2)(ii) to require the transferor servicer to notify the payor of the proper recipient of payment. Although the servicing transfer notice will provide some notice to the borrower of a transfer, there may be situations in which the payor may be a different party than the borrower who received the transfer notice. In addition, the fact that the payment was sent to the transferor servicer would suggest that the transfer notice sent pursuant to § 1024.33(b) did not achieve its intended purpose. Thus, the Bureau believes it is appropriate to instruct the payor of the proper recipient of the payment and that borrowers will be better served by this requirement than by requiring the transferor to redirect the payment to the transferee.

33(d) Preemption of State Laws

RESPA section 6(h) generally provides that a person who makes a federally related mortgage loan or a servicer shall be considered to have complied with the provisions of any such State law or regulation requiring notice to a borrower at the time of application for a loan or transfer of the servicing of a loan if such person or servicer complies with the requirements under

RESPA section 6 regarding timing, content, and procedures for notification of the borrower. 12 U.S.C. 2605(h). Current § 1024.21(h) implements RESPA section 6(h) and was finalized as part of a HUD's 1994 final rule implementing RESPA section 6, which was added by section 921 of the Cranston-Gonzalez National Affordable Housing Act.[93]

Current § 1024.21(h) provides that a lender who makes a mortgage servicing loan or a servicer shall be considered to have complied with any State law or regulation requiring notice to a borrower at the time of application or transfer of servicing if the lender or servicer complies with the requirements of § 1024.21. The provision further states that any State law requiring notice to the borrower at application or transfer of servicing is preempted and that lenders and servicers shall have no other disclosure requirements. Finally, § 1024.21(h) provides that provisions of State law, such as those requiring additional notices to insurance companies or taxing authorities, are not preempted by RESPA section 6 or § 1024.21 and that this additional information may be added to a notice provided under § 1024.33 if permitted under State law.

The Bureau proposed to move § 1024.21(h) to new § 1024.33(d), along with several non-substantive amendments. The language of the Bureau's proposed preemption provision is substantially similar to the existing preemption provision with respect to the types of provisions of State laws or regulations preempted—*i.e.*, those requiring notices to the borrower at application or transfer of servicing where the servicer or lender complies with the Bureau's servicing transfer notice provisions. The Bureau notes, however, that consistent with the discussion above, the Bureau's proposal would have expanded the coverage of the preemption provision to cover subordinate-lien mortgage loans by replacing the term "mortgage servicing loan" in the current language with references to the term "mortgage loans." The Bureau notes

[93] *See* 59 FR 65442, 65443 (1994).

that expanded coverage of the preemption provision to subordinate-lien loans is consistent with the scope of statutory preemption provision in RESPA section 6(h), which applies to "person who makes a federally related mortgage loan or a servicer." As discussed above, the term "federally related mortgage loan" includes subordinate-lien loans. 12 U.S.C. 2602(1)(A).

The Bureau received one comment from an organization of State bank regulators that requested that the Bureau omit § 1024.33(d). The organization asserted that proposed § 1024.33(d) is broader than the statutory preemption provision in RESPA section 6(h) because the proposed rule would have invalidated State laws rather than having provided that any State requirements were fulfilled by compliance with the Federal regime. The organization explained it believes RESPA section 6(h) is sufficient to address the issue of duplicative or conflicting State laws, without promulgation of implementing regulations.

Specifically, the organization objected to language in proposed § 1024.33(d) stating that State laws requiring notices to borrowers were preempted, "and there shall be no additional borrower disclosure requirements." The commenter asserted that RESPA section 6(h) provides State notice laws are considered satisfied if the RESPA timing, content, and notice procedure requirements are met—not that State laws are invalidated. The commenter asserted that RESPA section 6(h) allows State laws to apply where the or servicer has not satisfied the RESPA requirements, and that State examination processes would be hampered by an interpretation that simply invalidates State law requirements.

The Bureau is finalizing § 1024.33(d) as proposed. The Bureau has considered these objections but disagrees that the language of § 1024.33(d) as proposed is broader than the language of RESPA section 6(h) or will introduce new difficulties for State bank examiners. By adopting § 1024.33(d), the Bureau is maintaining substantially all of the language of

§ 1024.21(h), which was originally adopted by HUD through its final rule implementing RESPA section 6(h). By implementing RESPA section 6(h) through § 1024.33(d), the Bureau intends to maintain the current coverage of § 1024.21(h) as it has existed for many years. Accordingly, the Bureau disagrees that § 1024.33(d) will introduce any new complications into the State examination process.

The commenter was also concerned that, by implementing RESPA section 6(h) through language similar but not identical to the statutory provision, proposed § 1024.33(d) would broaden the classes of State laws that are subject to RESPA section 6(h). The commenter focused on the omission in proposed § 1024.33(d) of the word "such" from the statutory phrase "complied with the provisions of any such State law"; and the omission of the phrase limiting the scope of RESPA section 6(h) to the "timing, content, and procedures" for notification to the borrower under RESPA section 6.[94]

The Bureau disagrees with the commenter's assertion that, by eliminating "such" from the statutory provision of "complied with the provisions of any *such* State law" (emphasis added), the Bureau has broadened the scope of the preemption from specific State laws requiring notice to broad classes of law. Section 1024.33(d) makes clear that the State laws at issue are those requiring notice to borrower at the time of application for a loan or transfer of servicing of a loan, which the Bureau believes is consistent with the types of notices identified in RESPA section 6(h). The Bureau also disagrees with the commenter's assertion that, by eliminating the

[94] RESPA section 6(h) provides, in full: "Notwithstanding any provision of any law or regulation of any State, a person who makes a federally related mortgage loan or a servicer shall be considered to have complied with the provisions of *any such State law or regulation* requiring notice to a borrower at the time of application for a loan or transfer of the servicing of a loan if such person or servicer complies with the requirements under this section *regarding timing, content, and procedures for notification to the borrower*" (emphasis added). Section 1024.33(d) provides, in relevant part: "A lender who makes a mortgage loan or a servicer shall be considered to have complied with the provisions of any State law or regulation requiring notice to a borrower at the time of application for a loan or transfer of servicing of a loan if the lender or servicer complies with the requirements of this section."

statutory phrase, “regarding timing, content, and procedures for notification of the borrower” from the description of the requirements under section 6 with which a servicer must comply to trigger preemption, the Bureau has broadened the preemption provision. Section 1024.33(d) indicates that State laws and regulations are considered to be complied with if the lender or servicer complies with the requirements of “this section,” which refers to the regulatory section (1024.33) containing requirements regarding timing, content, and procedures for notifying borrowers about servicing transfers. Accordingly, the omission of the phrase regarding timing, content, and procedures does not substantively alter the meaning of section 6(h) of RESPA.

Finally, the commenter suggested there may be tension between § 1024.33(d) and § 1024.32(b), which provides that servicers can combine disclosures required by other laws or the terms of an agreement with a Federal or State regulatory agency with the disclosures required by subpart C. The Bureau does not believe these provisions are in conflict. Paragraph 33(d) applies by its terms only to notification provisions in § 1024.33. To the extent § 1024.32(b) generally provides that servicers can combine disclosures required by other laws or the terms of an agreement with a Federal or State regulatory agency with the disclosures required by subpart C, the Bureau believes that servicers would understand that the more specific rule overrides the general rule with regard to servicing transfer disclosures.

Section 1024.34 Timely Escrow Payments and Treatment of Escrow Account Balances

In General

In the 2012 RESPA Mortgage Servicing Proposal, the Bureau proposed to move the substance of current § 1024.21(g) to new § 1024.34(a) to require a servicer to pay amounts owed for taxes, insurance premiums, and other charges from an escrow account in a timely manner, pursuant to the requirements of current § 1024.17(k). The Bureau also proposed in new

§ 1024.34(a) to make certain non-substantive amendments to the language of current § 1024.21(g). Further, the Bureau proposed to add new § 1024.34(b) to implement Dodd-Frank Act amendments to section 6(g) of RESPA. The Bureau is adopting § 1024.34 substantially as proposed, except as where noted in the section-by-section analysis below.

34(a) Timely Escrow Disbursements Required

RESPA section 6(g) provides that, if the terms of any federally related mortgage loan require the borrower to make payments to the servicer of the loan for deposit into an escrow account for the purpose of assuring payment of taxes, insurance premiums, and other charges with respect to the property, the servicer shall make payments from the escrow account for such taxes, insurance premiums, and other charges in a timely manner as such payments become due. 12 U.S.C. 2605(g). Current § 1024.21(g) implements this provision by replicating the statutory nearly verbatim. Current § 1024.21(g) uses the term "mortgage servicing loan" in place of the statutory term "federally related mortgage loan" and includes a cross-reference to § 1024.17(k), which sets forth more detailed requirements for how escrow payments are made in a timely manner.

The Bureau proposed to incorporate the substance of current § 1024.21(g) into new § 1024.34(a) to provide that, if the terms of a mortgage loan require the borrower to make payments to the servicer of the mortgage loan for deposit into an escrow account to pay taxes, insurance premiums, and other charges for the mortgaged property, the servicer shall make payments from the escrow account in a timely manner, that is, on or before the deadline to avoid a penalty, as governed by the requirements in § 1024.17(k).

As discussed above, the Bureau proposed to expand the scope of current § 1024.21(g); proposed § 1024.34(a) would have replaced the term "mortgage servicing loan" with the term “mortgage loan,” which includes subordinate-lien loans. Other than this change in scope, the Bureau proposed several non-substantive technical revisions to the current provision. One commenter indicated that subordinate-lien, closed-end loans typically do not have escrow accounts. The commenter asked that the Bureau clarify whether these rules would apply to subordinate-lien loans to avoid confusion.

The Bureau is adopting this provision as proposed. RESPA section 6(g), and both current § 1024.21(g) and new § 1024.34(a), limit the applicability of the provision, among other things, to loans whose terms require the borrower to make payments to the servicer of the loan for deposit into an escrow account to pay taxes, insurance premiums, and other charges for the mortgaged property. Thus, if a subordinate-lien mortgage loan does not require borrowers to make payments into an escrow account, § 1024.34(a) would not apply.

34(b) Refunds of Escrow Balance

34(b)(1) In General

As noted above, RESPA section 6(g) generally requires a servicer to make payments from an escrow account in a timely manner as payments become due. 12 U.S.C. 2605(g). Section 1463(d) of the Dodd-Frank Act amended RESPA section 6(g) by adding a provision requiring that any balance in any such account that is within the servicer’s control at the time the loan is paid off be promptly returned to the borrower within 20 business days or credited to a similar account for a new mortgage loan to the borrower with the “same lender.” The Bureau proposed to add § 1024.34(b)(1) through (2) to implement this amendment to RESPA section 6(g).

Proposed § 1024.34(b)(1) would have provided that, within 20 days (excluding legal public holidays, Saturdays, and Sundays) of a borrower’s payment of a mortgage loan in full, any amounts remaining in the escrow account shall be returned to the borrower. The Bureau explained in its proposal that the Bureau interprets the 20-day allowance in RESPA section 6(g) to apply only if the servicer refunds the escrow account balance to the borrower (and not if the servicer credits a new account with the same lender, as provided in proposed § 1024.34(b)(2)).

Several industry associations and a community bank commenter recommended that the Bureau permit servicers to net escrow funds against the payoff amount. These commenters noted that community banks frequently net escrow funds against a payoff balance, and they observed that requiring servicer to obtain a full payoff and then refund the escrow is costly and does not provide a benefit to the borrower. Another industry association commenter requested that the Bureau clarify that the borrower may direct how the escrow account funds should be applied.

Based on these comments and upon further consideration, the Bureau has decided to revise the proposed regulatory text and commentary. To clarify the relationship between § 1024.33(b)(1) and (b)(2), the Bureau has amended § 1024.34(b)(1) to provide that, "[e]xcept as provided in paragraph (b)(2)," a servicer shall return escrow funds to the borrower. Paragraph (b)(2) continues to give the servicer the option of applying the escrow account to the new loan in specified circumstances. Accordingly, servicers shall generally refund escrow amounts to the borrower, unless the servicer applies the escrow balance to a new account, as permitted under § 1024.33(b)(2). In addition, the Bureau has added language referring to amounts remaining in an escrow account "that is within the servicer's control" to replicate language appearing in the statutory provision. The Bureau has also made minor technical wording clarifications, but is otherwise adopting the text of § 1024.34(b)(1) as proposed.

The Bureau has also included comment 34(b)(1)-1 to clarify that § 1024.34(b)(1) does not prohibit a servicer from netting any remaining funds in an escrow account against the outstanding balance of the borrower's mortgage loan. The Bureau interprets RESPA section 6(g), as amended by the Dodd-Frank Act, as only requiring servicers to return escrow balances or credit a new account after the mortgage loan is paid off. The Bureau does not believe the Dodd-Frank Act amendment to RESPA section 6(g) was intended to affect the manner in which the loan is paid off. Accordingly, the Bureau has added comment 34(b)(1)-1 to clarify that servicers are not prohibited under § 1024.34(b)(1) from netting any remaining funds in an escrow account against the borrower's outstanding loan balance.

34(b)(2) Servicer May Credit Funds to a New Escrow Account

As amended by the Dodd-Frank Act, RESPA section 6(g) permits a servicer to credit the escrow account balance to an escrow account for a new mortgage loan to the borrower with the same lender if the servicer does not return the balance to the borrower within 20 business days. 12 U.S.C. 2605(g). To implement this provision, the Bureau proposed to add new § 1024.34(b)(2) to provide that a servicer may credit funds in an escrow account balance to an escrow account for a new mortgage loan as of the date of the settlement of the new mortgage loan if the new mortgage loan is provided to the borrower by a lender that: (i) was also the lender to whom the prior mortgage loan was initially payable; (ii) is the owner or assignee of the prior mortgage loan; or (iii) uses the same servicer that serviced the prior mortgage loan to service the new mortgage loan.[95] Thus, if the servicer credits the funds in the escrow account to an escrow account for a new mortgage loan, the credit should occur as of the settlement of the new

[95] As the Bureau explained in its proposal, the Bureau interprets the language "account with the same lender" consistent with secondary market practices. In addition, "lender" is defined in Regulation X to mean, generally, the secured creditor or creditors named in the debt obligation and document creating the lien. For loans originated by a mortgage broker that closes a federally related mortgage loan in its own name in a table funding transaction, the lender is the party to whom the obligation is initially assigned at or after settlement.

mortgage loan. The Bureau proposed to add comment 34(b)(2)-1 to clarify that a servicer is not required to credit an escrow account balance to a new mortgage loan in any circumstance in which it would be permitted to do so. Thus, a servicer would have been permitted, in all circumstances, to return funds in an escrow account to the borrower pursuant to proposed § 1024.34(a).

Several industry commenters supported proposed comment 34(b)(2)-1. However, several industry associations requested that the rule include an option for the borrower to direct how the escrow account funds should be applied. One industry trade association expressed concern that RESPA section 6(g) and proposed § 1024.34 contained an ambiguity regarding the ability of a servicer to transfer funds retained in the escrow account to a new lender with the borrower's consent. This commenter noted that, while neither RESPA section 6(g) nor § 1024.34 explicitly prohibits this practice, the use of the term "same lender" in the statute and proposed § 1024.34 creates uncertainty over whether a servicer may credit any excess escrow account balances to a new escrow account for a new mortgage loan with a *new lender* with the borrower's consent.

Section 1024.34(b)(2) provides that, notwithstanding § 1024.34(b)(1), if the borrower agrees, a servicer may credit any amounts remaining in an escrow account that is within the servicer's control to an escrow account for a new mortgage loan as of the date of the settlement of the new mortgage loan if the new mortgage loan is provided to the borrower by a lender specified in § 1024.34(b)(2)(i) through (iii). As in the proposal, these lenders are (i) the lender to whom the prior mortgage loan was initially payable; (ii) the lender that is the owner or assignee of the prior mortgage loan; or (iii) the lender that uses the same servicer that serviced the prior mortgage loan to service the new mortgage loan.

The Bureau has considered commenters' recommendations to revise § 1024.34 to permit servicers to credit escrow accounts for loans with a new lender with the borrower's consent, but the Bureau declines to further amend proposed § 1024.34(b)(2) to expand the types of lenders with whom a borrower's new mortgage loan may be credited. The Dodd-Frank Act amended RESPA section 6(g) to require that servicers either return remaining escrow account balances to the borrower within 20 days or credit a new escrow account for a new mortgage loan with the "same lender," which the Bureau has interpreted to be (i) the lender to whom the prior mortgage loan was initially payable; (ii) the lender that is the owner or assignee of the prior mortgage loan; or (iii) the lender that uses the same servicer that serviced the prior mortgage loan to service the new mortgage loan. The Bureau believes an additional exception to permit servicers to apply remaining escrow balances to lenders who are not the "same lender" within the meaning of RESPA section 6(g) would subsume the statutory provision. Moreover, the Bureau believes that the provision in § 1024.34(b)(1) (generally requiring servicers to return remaining escrow balances to borrowers within 20 days of loan payoff) provides borrowers with sufficient flexibility to apply their funds as they wish.

In addition, the Bureau has revised proposed § 1024.34(b)(2) to add the phrase "if the borrower agrees" to require servicers to obtain the borrower's consent before crediting an escrow balance to a new escrow account for a new mortgage loan. The Bureau has added this language to ensure borrowers are informed of and agree to a servicer's actions with respect to any remaining escrow balances if the servicer does not return the balance within 20 days under § 1024.34(b)(1). Moreover, unlike the 20-day period in which the servicer must otherwise refund escrow balances in § 1024.34(b)(1), § 1024.34(b)(2) does not require that funds be credited within a particular time frame; the Bureau believes it is appropriate to include a requirement in § 1024.34(b)(2) that the borrower agrees before the servicer takes an action that could delay the disposition of the borrower's escrow account balance. The Bureau also believes it is appropriate to include a requirement that borrowers agree to servicer actions under § 1024.34(b)(2) to avoid potential borrower confusion that might otherwise arise if a servicer did not refund an escrow balance within 20 days, as required under § 1024.34(b)(1). Accordingly, the Bureau believes that the addition of the requirement that a borrower must agree under § 1024.34(b)(2) is necessary and appropriate to achieve the consumer protection purposes of RESPA, including to achieve the purposes of RESPA section 6(g) and to ensure responsiveness to borrower requests. This change is therefore authorized under sections 6(j)(3), 6(k)(1)(E), and 19(a) of RESPA. The Bureau has also made technical revisions to proposed § 1024.34(b)(2) to clarify its relationship to § 1024.34(b)(1), in light of the Bureau's revision to § 1024.34(b)(1) in this final rule.[96]

To ensure servicers can easily credit funds to a new account, the Bureau has added comment 34(b)(2)-2, which explains that a borrower may provide consent either orally or in writing. The Bureau has also added language to § 1024.34(b)(2), referring to amounts remaining in an escrow account "that is within the servicer's control," to replicate language appearing in the statutory provision. Finally, the Bureau is adopting comment 34(b)(2)-1 substantially as proposed to clarify that a servicer is not required to credit funds in an escrow account to an escrow account for a new mortgage loan and may, in all circumstances, comply with the requirements of § 1024.34 by refunding the funds in the escrow account to the borrower pursuant to § 1024.34(b)(1).[97]

Section 1024.35 Error Resolution Procedures

[96] The Bureau has added the following language to § 1024.34(b)(2): "Notwithstanding paragraph (b)(1) of this section . . ."

[97] The Bureau has made a technical correction to comment 34(b)(2)-1 to replace the proposed comment's reference to "§ 1024.34(a)" with a corrected reference to "§ 1024.34(b)(1)."

Section 6(e) of RESPA requires servicers to respond to borrowers' "qualified written requests" that relate to the servicing of a loan, and § 6(k)(1)(B) of RESPA, added by the Dodd-Frank Act, separately prohibits servicers from charging fees for responding to valid qualified written requests. Section 1463(a) of the Dodd-Frank Act amended RESPA to add new servicer prohibitions regarding borrowers' assertions of error and requests for information. Specifically, section 1463(a) of the Dodd-Frank Act added section 6(k)(1)(C) to RESPA, which states that a servicer shall not "fail to take timely action to respond to a borrower's requests to correct errors relating to allocation of payments, final balances for purposes of paying off the loan, or avoiding foreclosure, or other standard servicer's duties." In addition, section 1463(a) of the Dodd-Frank Act added section 6(k)(1)(D) to RESPA which states that a servicer shall not fail to provide information regarding the owner or assignee of a borrower's loan within ten business days of a borrower's request. Neither Dodd-Frank Act provision suggests that a borrower request to correct an error or for information regarding the owner or assignee of the borrower's loan must be in the form of a "qualified written request" to trigger the new servicer prohibitions.

As explained in the proposal, the Bureau believed that both borrowers and servicers would be best served if the Bureau were to clearly define a servicer's obligation to correct errors or respond to information requests as required by RESPA sections 6(k)(1)(C) and (D) and the RESPA provisions regarding qualified written requests. Thus, the Bureau proposed to establish comprehensive, parallel requirements for servicers to respond to specified notices of error and information requests. The Bureau proposed § 1024.35 to set forth the error resolution requirements that servicers would be required to follow to respond to errors asserted by borrowers. The Bureau proposed § 1024.36 to set forth the information request requirements that servicers would be required to follow to respond to requests for information from borrowers.

In doing so, the Bureau intended to establish servicer procedural requirements for error resolution and information requests that are consistent with the requirements applicable to a "qualified written request" that relates to the servicing of a loan under RESPA. Rather than create overlapping regimes that might confuse and frustrate both borrowers and servicers alike, the Bureau intended to create a uniform regulatory regime by subsuming the qualified written request rules in the new regime established and authorized by the Dodd-Frank Act for notices of error and requests for information more generally. The Bureau believed such a single regulatory regime would reduce the burden on both borrowers and servicers who otherwise would expend wasteful resources navigating between two separate regulatory regimes and parsing form requirements applicable to qualified written requests. To that end, the Bureau proposed to delete current § 1024.21(e), the existing regulations concerning qualified written requests, and provide instead that a qualified written request asserting an error or requesting information regarding the servicing of a mortgage loan would be subject to the new provisions governing notices of error and information requests, as applicable.[98]

Because the Bureau understands that the majority of borrower complaints are submitted orally, the Bureau proposed that both written and oral notices of error would be subject to the error resolution provisions. At the same time, the Bureau recognized that permitting oral error notices would significantly expand servicers' responsibility to respond to notices of error. To enable servicers to allocate resources to respond to errors in a manner that would benefit borrowers, the Bureau proposed a limited list of errors to which the error resolution provisions would apply. As discussed in more detail below, industry commenters were unanimously opposed to applying error resolution requirements under proposed § 1024.35 to errors asserted

[98] Notably, a notice of error may also constitute a direct dispute under Regulation V, which implements the Fair Credit Reporting Act, if it complies with the requirements in 12 CFR 1022.43.

orally. Consumer advocacy group commenters expressed support for applying the requirements under § 1024.35 to oral error notices, but were strongly opposed to the proposal to limit those errors subject to error resolution procedures under proposed § 1024.35 to a finite list. Industry commenters supported inclusion of a limited list. Based on the Bureau's consideration of these comments and the analysis below, the final rule does not require servicers to comply with error resolution procedures under § 1024.35 for oral notices of error. At the same time, the final rule includes a catch-all provision that defines as an error subject to the error resolution procedures under § 1024.35 errors relating to the servicing of a borrower's mortgage loan. Moreover, the final rule provides that a servicer's policies and procedures should be reasonably designed to provide information to borrowers who are not satisfied with the resolution of a complaint or request for information submitted orally of the procedures for submitting written notices of error and information requests.

Some credit unions, community banks and their trade associations asserted that the Bureau should exempt small servicers from error resolution requirements under § 1024.35 and information request requirements under § 1024.36. Commenters argued that small servicers effectively communicate with borrowers regarding complaints and information requests, and especially disfavored the proposed requirement that small servicers respond to oral notices of error and information requests. In contrast, a consumer advocacy group commenter asserted that exempting small servicers would be inappropriate, as all servicers should be capable of complying with error resolution and information request requirements. Having carefully considered these comments, the Bureau declines to exempt small servicers from error resolution procedures under § 1024.35 and information request procedures under § 1024.36. As discussed above, §§ 1024.35 and 1024.36, as finalized, do not require servicers to comply with such procedures for oral submissions by borrowers. In light of this adjustment, final §§ 1024.35 and 1024.36 primarily provide clarification as to existing obligations under RESPA and Regulation X. Moreover, the burden on all servicers is significantly mitigated. For these reasons, and the reasons discussed below, the Bureau declines to exempt small servicers from error resolution and information request procedures.

Legal Authority

Section 1024.35 implements section 6(k)(1)(C) of RESPA, and to the extent the requirements are also applicable to qualified written requests, sections 6(e) and 6(k)(1)(B) of RESPA. Pursuant to the Bureau's authorities under sections 6(j), 6(k)(1)(E), and 19(a) of RESPA, the Bureau is also adopting certain additions and certain exemptions to these provisions. As explained in more detail below, these additions and exemptions are necessary and appropriate to achieve the consumer protection purposes of RESPA, including ensuring responsiveness to consumer requests and complaints and the provision and maintenance of accurate and relevant information.

35(a) Notice of Error

Section 6(k)(1)(C) of RESPA, as added by section 1463(a) of the Dodd-Frank Act, prohibits servicers from failing to take timely action to respond to requests of borrowers to correct certain errors. However, unlike section 6(e) of RESPA, which sets forth specific rules for submission of and response to "qualified written requests," section 6(k)(1)(C) of RESPA does not specify that borrowers' requests to correct errors must be submitted in any particular format to trigger the new prohibition.

Proposed § 1024.35(a) stated that a servicer must comply with the requirements of § 1024.35 for a notice of error made either orally or in writing and that included the name of the borrower, information that enabled a servicer to identify the borrower's mortgage loan account, and the error the borrower believed had occurred. Section 1024.35(a) was intended to implement RESPA section 6(k)(1)(C), with respect to borrower requests to assert errors generally, and RESPA section 6(e), with respect to qualified written requests by borrowers to correct errors, by defining what constituted a proper borrower request within the meaning of these provisions. The Bureau received comment on proposed § 1024.35(a) and is finalizing it with changes as discussed below.

Substance over Form

The proposal included proposed comment 35(a)-2, which would have clarified that the substance of the notice of error would determine the servicer's obligation to comply with the error resolution requirements, information request requirements, or both, as applicable. Proposed comment 35(a)-2 stated that no particular language (such as "qualified written request" or "notice of error") is necessary to set forth a notice of error. The Bureau did not receive comment regarding proposed comment 35(a)-2 and is adopting it as proposed.

Qualified Written Requests

Proposed § 1024.35(a) would have required a servicer to treat a qualified written request that asserts an error relating to the servicing of a loan as a notice of error subject to the requirements of § 1024.35. The Bureau intended to propose servicer obligations applicable to qualified written requests that were the same as requirements applicable to other notices of error that met the requirements for assertions of error under § 1024.35(a). One consumer group commenter expressed support for the proposal because it dispensed with technicalities about whether an assertion of error constituted a valid qualified written request. A trade association commenter said the Bureau failed to define a valid qualified written request and said that proposed § 1024.35 does not fully integrate section 6(e) of RESPA into the proposed error resolution procedures. Another trade association of private mortgage lenders said the proposal did not make clear what constitutes a qualified written request and to what extent servicers must continue to comply with existing law regarding qualified written requests. Having considered these comments, the Bureau notes that final § 1024.31 defines the term “qualified written request.” In addition, as discussed above, the Bureau has added new comment 31 (qualified written request)-2, which clarifies that the error resolution and information request requirements in §§ 1024.35 and 1024.36 apply as set forth in those sections irrespective of whether the servicer receives a qualified written request. Finally, the Bureau has revised proposed § 1024.35(a) to make clear in the final rule that a qualified written request that asserts an error relating to the servicing of a mortgage loan is a notice of error for purposes of § 1024.35 for which a servicer must comply with all requirements applicable to a notice of error.

Oral Notices of Error

The Bureau proposed to require servicers to comply with the requirements under § 1024.35 for errors asserted by a borrower either orally or in writing. The Bureau believed this approach was warranted because, based on its discussions with consumers, consumer advocates, servicers, and industry trade associations during outreach, the Bureau learned that the vast majority of borrower complaints are asserted orally rather than in writing. The proposal solicited comment regarding whether servicers should be required to comply with the error resolution requirements under § 1024.35 for notices of error received orally.

The Bureau received a number of comments from both consumer groups and various industry members on this question. Consumer advocacy group commenters reiterated their support for applying the requirements under § 1024.35 to notices of error made orally, noting that consumers most often assert errors and request information orally rather than in writing. In contrast, consumer commenters on Regulation Room disfavored the proposal's application of the error resolution requirements under § 1024.35 to notices of error received orally. Consumer commenters, citing their negative experiences attempting to request information from servicers orally, were concerned that encouraging an oral process would weaken consumer protections. Industry commenters also opposed the proposal's application of the error resolution requirements under § 1024.35 to oral notices of error, albeit for different reasons. Industry commenters asserted that applying error resolution requirements to oral notices of error would create new burdens for servicers regarding tracking the notices of error and monitoring borrowers' receipt of written acknowledgements and responses. Industry commenters further stressed that a written process would provide more clarity and certainty as to the nature of the error the borrower asserted and the communications from the servicer to the borrower during the conversation. Further, industry commenters asserted, written notices of error would help avoid situations in which the borrower and servicer have differing recollections as to the content of the borrower's notice of error and the servicer's response during the conversation. Absent a written record, commenters said, servicers would need to record conversations with borrowers to minimize the significant litigation risk. The commenters asserted that recording conversations could be especially costly for small servicers and would require the borrower's consent in many jurisdictions. Some industry commenters also noted their belief that RESPA requires that borrowers assert errors in writing.

Many of the concerns articulated by industry commenters were consistent with those expressed by small entity representatives with whom the Small Business Review Panel conducted outreach in advance of the proposal. The Small Business Review Panel recommended that the Bureau consider requiring small servicers to comply with the error resolution procedures under § 1024.35 only when borrowers asserted errors in writing.[99] The Small Business Review Panel also recommended that the Bureau consider adopting a more flexible process for tracking errors and demonstrating compliance that could be used by small servicers.[100]

The Bureau had anticipated many of these comments and had proposed to delimit the category of issues that could be raised through the error process to mitigate the challenges of identifying oral assertions of error. Nonetheless, after consideration of these comments and the comments received with respect to the Bureau's definition of error as discussed below, the Bureau is amending proposed § 1024.35(a) to apply the error resolution requirements under § 1024.35 solely to notices of error received in writing, and the Bureau is broadening the definition of error as well. While borrowers may continue to assert errors orally, servicers will not be required to comply with the formal error resolution requirements outlined in § 1024.35 for such assertions of errors. Instead, the Bureau has added § 1024.38(b)(1)(ii), which generally requires that servicers maintain policies and procedures that are reasonably designed to ensure that the servicer can investigate, respond to, and, as appropriate, make corrections in response to complaints, whether written or oral, asserted by borrowers. In addition, the Bureau has added a requirement in § 1024.38(b)(5) that servicers establish policies and procedures reasonably designed to achieve the objective of informing borrowers of the procedures for submitting written notices of error set forth in § 1024.35 and written information requests set forth in § 1024.36.

The Bureau believes that imposing the formal requirements under § 1024.35 only to

[99] *See* U.S. Consumer Fin. Prot. Bureau, *Final Report of the Small Business Review Panel on CFPB's Proposals Under Consideration for Mortgage Servicing Rulemaking*, 30 (Jun, 11, 2012).

[100] *See* U.S. Consumer Fin. Prot. Bureau, *Final Report of the Small Business Review Panel on CFPB's Proposals Under Consideration for Mortgage Servicing Rulemaking*, 30 (Jun, 11, 2012).

written notices of error and addressing oral notices of error instead through the policies and procedures requirements under § 1024.38 strikes the appropriate balance between ensuring responsiveness to consumer requests and complaints and mitigating the burden on servicers of following and demonstrating compliance with specific procedures with respect to oral notices of error. The Bureau believes that the need to provide additional flexibility to servicers with respect to responding to oral notices of error is particularly necessary in light of the Bureau's further decision, as discussed below, to expand the list of covered errors under § 1024.35 to include a catch-all provision for errors relating to the servicing of mortgage loans. On the one hand, the Bureau is persuaded, for the reasons discussed further below, that it should not delimit the set of issues that consumers should be able to raise within the error resolution process. On the other hand, the Bureau also is persuaded that determining from a telephone call from a borrower to a servicer whether the borrower is asserting an error rather than simply, for example, posing a question can be challenging. Drawing this line – and triggering the investigation and response requirement with respect to errors – would be exponentially more difficult if any concern relating to the servicing of the borrower's mortgage loan could constitute an error.

The final rule will thus require servicers to maintain policies and procedures reasonably designed to ensure that servicers investigate, respond to and, as appropriate, resolve oral complaints on a more informal basis, without having to follow the formal error resolution requirements, so long as the servicer has policies and procedures reasonably designed to ensure that borrowers are informed of the written error resolution procedures. At the same time, the final rule will provide a broader definition of errors subject to the requirements of § 1024.35.

Borrower's Representative

Proposed comment 35(a)-1 would have clarified that a notice of error submitted by an agent of the borrower is considered a notice of error submitted by the borrower. Proposed comment 35(a)-1 would have further permitted servicers to undertake reasonable procedures to determine if a person who claims to be an agent of a borrower has authority from the borrower to act on the borrower's behalf. Several industry commenters said it would be costly and burdensome to determine whether a third party has authority to act on a borrower's behalf. Many requested clarification as to what the Bureau believes constitutes acting on the borrower's behalf. Further, some industry commenters expressed concern about potential liability for the improper release of information, including the risk of violating State or Federal privacy laws, as well as what commenters perceived to be increased risk of identity theft and fraud. Finally, a few industry commenters took the position that only the borrower, but not the borrower's agent, should be permitted to assert notices of error.

Section 6(e)(1)(A) of RESPA states that a qualified written request may be provided by a "borrower (or an agent of the borrower)." Thus, one consumer advocacy group commenter noted that the proposal to permit borrowers' agents to submit notices of error is consistent with the statutory requirement. Consumer groups also requested that the Bureau clarify that the timelines for error resolution will not toll during the period in which the servicer attempts to validate through reasonable policies and procedures that a third party purporting to act on a borrower's behalf is, in fact, an agent of the borrower.

Having considered these comments, the Bureau is amending proposed comment 35(a)-1 to address servicers' concerns about potential liability for the improper release of information. The final comment clarifies that servicers may have 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, by requiring purported agents to provide documentation from the borrower stating that the purported agent is acting on the borrower’s behalf. Upon receipt of such documentation, the servicer shall treat a notice of error as having been submitted by the borrower. The Bureau acknowledges that requiring servicers to respond to error notices submitted by borrowers’ agents is more costly than limiting the requirement to borrowers’ notices, but notes that this approach is consistent with section 6(e)(1)(A) of RESPA with respect to a qualified written request. The Bureau believes that it is necessary and appropriate to achieve the consumer protection purposes of RESPA, including ensuring responsiveness to borrower requests and complaints, to apply this requirement to all written notices of error, especially since borrowers who are experiencing difficulty in making their mortgage payments or in dealing with their servicer may turn, for example, to a housing counselor or other knowledgeable persons to assist them in addressing such issues. The Bureau declines to define further the term “agent.” The concept of agency has historically been defined under State or other applicable law. Thus, it is appropriate for the definition to defer to applicable State law regarding agents.

35(b) Scope of Error Resolution

Section 6(e) of RESPA requires servicers to respond to “qualified written requests” asserting errors or requesting information relating to the servicing of a federally-related mortgage loan. Section 1463(a) of the Dodd-Frank Act amended RESPA to add section 6(k)(1)(C), which states that a servicer shall not “fail to take timely action to respond to a borrower’s request to correct errors relating to allocation of payments, final balances for purposes of paying off the loan, or avoiding foreclosure, or other standard servicer’s duties.” The Bureau believes that standard servicer duties are those typically undertaken by servicers in the ordinary course of business. Such duties include not only the obligations that are specifically identified in section 6(k)(1)(C) of RESPA, but also those duties that are defined as “servicing” by RESPA, as implemented by this rule, as well as duties customarily undertaken by servicers to investors and consumers in connection with the servicing of a mortgage loan. These standard servicer duties are not limited to duties that constitute "servicing," as defined in this rule, and include, for example, duties to comply with investor agreements and servicing program guides, to advance payments to investors, to process and pursue mortgage insurance claims, to monitor coverage for insurance (e.g., hazard insurance), to monitor tax delinquencies, to respond to borrowers regarding mortgage loan problems, to report data on loan performance to investors and guarantors, and to work with investors and borrowers on options to mitigate losses for defaulted mortgage loans.[101]

Limited List

The Bureau proposed § 1024.35(b) to implement section 6(k)(1)(C) of RESPA. Proposed § 1024.35(b) set forth a limited list of errors to which the error resolution provisions would apply. The Bureau proposed a limited list because it believed such a list would provide certainty to both borrowers and servicers regarding the types of errors that are subject to the error resolution process. Further, as discussed above, the Bureau believed a limited list would enable servicers to allocate resources to respond to errors in a manner that would ultimately benefit borrowers. The Bureau also considered that it was proposing to require servicers to respond to both oral and written error notices and information requests in compressed time periods. Finally, the Bureau considered the feedback the Small Business Review Panel received from small entity representatives regarding whether the error resolution procedures should include a catch-all provision to the enumerated list of errors. In general, small entity representatives commented favorably on the Bureau's proposal to delimit the list of errors.

[101] In providing these examples, the Bureau is making no judgment regarding whether they fall within the meaning of "servicing" as defined in this rule.

The Bureau solicited comment regarding whether the list of errors to which error resolution procedures would apply should include a catch-all provision or be limited to an enumerated list. Industry commenters supported the establishment of a limited list of errors, noting certainty, clarity, and notice as its primary benefits. Consumer group commenters generally opposed limiting notices of error to an enumerated list. Consumer advocates asserted that the proposal was a departure from and offered fewer consumer protections than the existing qualified written request process under section 6 of RESPA, which incorporates a catch-all provision for errors relating to the servicing of a borrower's mortgage loan. Some consumer advocates noted the reference in section 6(k)(1)(C) of RESPA to "standard servicer's duties," and argued that the catch-all provision should likewise cover all errors relating to "standard servicer's duties." In addition, some consumer group commenters noted the fluid nature of mortgage servicing and cautioned that a limited list of covered errors lacks the flexibility necessary to ensure that consumers will be adequately protected as servicing practices evolve.

After consideration of these comments, and as discussed further below, the Bureau has decided to revise proposed § 1024.35(b) to include a catch-all that includes as an error errors relating to the servicing of a borrower's mortgage loan. In addition, as discussed below, final § 1024.35(b) substantively retains the enumerated errors listed in the proposal. The Bureau believes revising proposed § 1024.35(b) in this manner is necessary and appropriate to achieve the consumer protection purposes of RESPA, including ensuring responsiveness to consumer requests and complaints in light of the fluidity of the mortgage market and the inability to anticipate in advance and delineate all types of errors related to servicing that borrowers may encounter, and which should be subject to the error resolution process under § 1024.35 to prevent borrower harm. At the same time, the Bureau believes that the costs and burdens created by having a more expansive definition of the term error are significantly mitigated because, as discussed above, the final rule applies error resolution requirements under § 1024.35 only to written assertions of error. Moreover, the final rule implements an error resolution process that is consistent with the existing process for responding to qualified written requests under RESPA section 6, which includes a catch-all for servicing-related errors.

Covered Errors

The Bureau proposed comment 35(b)-1, which would have clarified that a servicer would not be required to comply with the requirements of proposed § 1024.35(d) and (e) if a notice related to something other than one of the types of errors in proposed § 1024.35(b). The proposed comment provided examples of categories of excluded errors that would not be considered covered errors pursuant to proposed § 1024.35(b). These included matters relating to the origination or underwriting of a mortgage loan, matters relating to a subsequent sale or securitization of a mortgage loan, and matters relating to a determination to sell, assign, or transfer the servicing of a mortgage loan.

Industry commenters supported the proposed exclusion, noting that the categories the Bureau proposed to exclude are unrelated to servicing and largely beyond servicers' knowledge. Some consumer group commenters objected that the proposed exclusions were overly broad. The Bureau believes that a mortgage servicer is generally not in a position to investigate or resolve borrower complaints regarding potential errors that may have occurred during an origination, underwriting, sale, or securitization process. Accordingly, the Bureau is adopting comment 35(b)-1 substantially as proposed. The final comment clarifies that, in addition to § 1024.35(d) and (e), servicers need not comply with § 1024.35(i) with respect to a borrower's assertion of an error that is not defined as an error in § 1024.35(b). Final comment 35(b)-1 also includes a clarification that the failure to transfer accurately and timely information relating to a borrower’s loan account to a transferee servicer is an error for purposes of § 1024.35, while matters relating to an initial determination to transfer servicing are not.

A trade association of reverse mortgage lenders also commented regarding the scope of the error resolution procedures, urging the Bureau to exclude reverse mortgages from the scope of covered error. Having considered this comment, the Bureau notes that servicers of reverse mortgage transactions are already subject to the qualified written request procedures set forth in section 6(e) of RESPA and § 1024.21(e) of Regulation X. Likewise, pursuant to final § 1024.30, the error resolution requirements under § 1024.35 apply to reverse mortgage transactions that are mortgage loans, as that term is defined in final § 1024.31. Accordingly, to the extent that a borrower asserts an error under § 1024.35 that is applicable to such a reverse mortgage, the servicer shall comply with error resolution procedures as to the error. For example, because § 1024.30 generally excludes servicers of reverse mortgage transactions from § 1024.41, errors asserted under § 1024.35(b)(9) and (10), discussed below, are not applicable to reverse mortgage transactions.

35(b)(1)

Proposed § 1024.35(b)(1) would have included as a covered error a servicer’s failure to accept a payment that conforms to the servicer’s written requirements for the borrower to follow in making payments. The Bureau proposed § 1024.35(b)(1) to implement, in part, section 6(k)(1)(C) of RESPA with respect to borrower requests to correct errors relating to allocation of payments for a borrower’s account and “other standard servicer’s duties.”

A failure to accept a proper payment will necessarily have implications for the correct application of borrower payments. The Bureau further believes that proper acceptance of payments is a standard servicer duty. Moreover, proper acceptance of payments is, by definition, servicing, and already subject to the qualified written request procedure set forth in section 6(e) of RESPA and current § 1024.21(e) of Regulation X. The Bureau did not receive comment regarding proposed § 1024.35(b)(1) and is adopting it as proposed.

35(b)(2)

Proposed § 1024.35(b)(2) would have included as an error a servicer's failure to apply an accepted payment to the amounts due for principal, interest, escrow, or other items pursuant to the terms of the mortgage loan and applicable law. The Bureau proposed § 1024.35(b)(2) to implement, in part, section 6(k)(1)(C) of RESPA with respect to borrower requests to correct errors relating to the allocation of payments for a borrower's account and other standard servicer duties. Proper allocation of payments is also, by definition, servicing, and already subject to the qualified written request procedures set forth in section 6(e) of RESPA and current § 1024.21(e) of Regulation X. The Bureau did not receive comment regarding proposed § 1024.35(b)(2) and is adopting it as proposed.

35(b)(3)

Proposed § 1024.35(b)(3) would have included as an error a servicer's failure to credit a payment to a borrower's mortgage loan account as of the date of receipt, where such failure results in a charge to the consumer or the furnishing of negative information to a consumer reporting agency. The Bureau proposed § 1024.35(b)(3) to implement, in part, section 6(k)(1)(C) of RESPA with respect to borrower requests to correct errors relating to the allocation of payments for a borrower's account and other standard servicer duties. A failure to credit a payment as of the date of receipt may have implications for the correct application of borrower payments. A servicer's failure to credit a payment promptly may cause the servicer to report to a borrower improper information regarding the amounts owed by the borrower and may cause a servicer to misapply other payments received by the borrower. Further, a servicer's failure to credit borrower payments promptly may generate improper late fees and other charges. The Bureau further believes that prompt crediting of borrower payments is a standard servicer duty as set forth in section 6(k)(1)(C) of RESPA. The Bureau also observes that prompt crediting of borrower payments is, by definition, servicing and, therefore, is subject to the qualified written request procedure set forth in section 6(e) of RESPA.

As the Bureau noted in the 2012 RESPA Servicing Proposal, prompt crediting of payments to consumers is required by section 129F of TILA, which was added by section 1464 of the Dodd-Frank Act and will be implemented by § 1026.36(c)(1) in the 2013 TILA Servicing Final Rule. For a mortgage loan secured by a principal dwelling, TILA section 129F mandates that servicers shall not fail to credit a payment to a consumer's loan account as of the date of receipt, except when a delay in crediting does not result in any charge to the consumer, or in the furnishing of negative information to a consumer reporting agency. *See* 15 U.S.C. 1639f. TILA section 129F provides a specific exception for payments that do not conform to a servicer's written requirements, but nonetheless are accepted by the servicer, in which case the servicer shall credit the payment as of five days after receipt. *See* 15 U.S.C. 1639f(b). Servicers of mortgage loans covered by TILA section 129F have a duty to comply with that provision.

A credit union and a non-bank servicer commented on proposed § 1024.35(b)(3). The credit union requested greater flexibility as to payments received outside of the servicer's operating hours or at the end of the business day. The non-bank servicing company requested clarification that the proposal was not intended to impact servicers' ability as to scheduled interest loans to credit an account as of the receipt date and apply payment as of the scheduled due date. The Bureau believes § 1024.35(b)(3) as proposed would have provided servicers sufficient flexibility to credit payments, as it would have limited errors to where the failure to credit a payment as of the date of receipt results in a charge to consumers or furnishing of negative information to a credit reporting agency. Nevertheless, the Bureau recognizes that there would be little consumer benefit to subjecting servicers to potentially overlapping standards as to prompt crediting of borrowers' accounts. At the same time, for those loans that are not subject to TILA section 129F, the Bureau believes that it would be inappropriate to extend the requirements of that provision beyond the scope mandated by Congress, as implemented by § 1026.36(c)(1) of the 2013 TILA Servicing Final Rule. Accordingly, the Bureau is revising the proposed language in final § 1024.35(b)(3) to make clear that a servicer's failure to credit a payment to a borrower's mortgage loan account as of the date of receipt is an error only in those circumstances in which the failure to credit as of the date of receipt would contravene § 1026.36(c)(1). Final § 1024.35(b)(3) defines as an error the 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). Because servicers will already be required to comply with § 1026.36(c)(1) with respect to certain mortgage loans they service, the Bureau does not believe that defining their failure to do so as an error imposes additional burden on servicers.

35(b)(4)

Proposed § 1024.35(b)(4) would have included as an error a servicer's failure to make disbursements from an escrow account for taxes, insurance premiums, or other charges, including charges that the borrower and servicer have voluntarily agreed that the servicer should collect and pay, as required by current § 1024.17(k) and proposed § 1024.34(a), or to refund an escrow account balance in a timely manner as required by proposed § 1024.34(b). The Bureau proposed § 1024.35(b)(4) to implement, in part, section 6(k)(1)(C) of RESPA with respect to borrower requests to correct errors relating to the allocation of payments for a borrower's account and other standard servicer duties.

In the normal course of business, servicers typically engage in collecting payments from borrowers to fund escrow accounts and disburse payments from escrow accounts to pay borrower obligations for taxes, insurance premiums, and other charges. Servicers typically undertake this obligation on behalf of investors because a borrower's maintenance of an escrow account reduces risk for investors that unpaid taxes may generate tax liens that are higher in priority than a lender's mortgage lien and that unpaid insurance may cause lapses in insurance coverage that present risk for investors in the event of a loss. Servicers are required to make disbursements from escrow accounts in a timely manner pursuant to section 6(g) of RESPA and are required to account for the funds credited to an escrow account pursuant to section 10 of RESPA. In addition, the proper disbursement of escrow funds is, by definition, servicing and, therefore, is currently subject to the qualified written request procedure set forth in section 6(e) of RESPA and current § 1024.21(e) of Regulation X. A credit union commenter agreed that proposed § 1024.35(b)(4) should constitute an error. For the reasons set forth above and in the proposal, the Bureau is adopting § 1024.35(b)(4) as proposed.

35(b)(5)

Proposed § 1024.35(b)(5) would have included as an error a servicer's imposition of a fee or charge that the servicer lacks a reasonable basis to impose upon the borrower. The Bureau proposed § 1024.35(b)(5) to implement, in part, section 6(k)(1)(C) of RESPA with respect to standard servicer duties. The Bureau believes that it is a typical servicer duty, both to the borrower and to the servicer's principal, to ensure that the servicer has a reasonable basis to impose a charge on a borrower.

The Bureau believes that servicers should not impose fees on borrowers that are not bona fide – that is, fees that a servicer does not have a reasonable basis to impose upon a borrower. Examples of non-bona fide charges include such common sense errors as late fees for payments that were not late, default property management fees for borrowers that are not in a delinquency status that would justify the charge, charges from service providers for services that were not actually rendered with respect to a borrower's mortgage loan account, and charges for force-placed insurance in circumstances not permitted by final rule § 1024.37.

Improper fees harm both mortgage loan borrowers and the investors that are mortgage servicers' principals. Improper and uncorrected fees harm borrowers by taking funds that may otherwise be used to keep a mortgage loan current. Further, improper fees reduce recovery values available to investors from foreclosures or loss mitigation activities. Servicers that operate in good faith in the normal course of business refrain from imposing charges on borrowers that the servicer does not have a reasonable basis to impose and correct errors relating to those fees when they arise.

Industry commenters asserted that the term "reasonable basis" is open to interpretation and thus urged the Bureau to further define the term or to otherwise provide additional clarification. One credit union trade association suggested that the Bureau prohibit fees for which the servicer lacks a legal basis. Having considered these comments, the Bureau believes it is appropriate to provide more clarity as to what constitutes a fee for which a servicer lacks a reasonable basis. Accordingly, the Bureau has added new comment 35(b)-2, which provides examples of fees that a servicer lacks a reasonable basis to impose. The Bureau is otherwise adopting § 1024.35(b)(5) as proposed.

35(b)(6)

Proposed § 1024.35(b)(6) would have included as an error a servicer's failure to provide an accurate payoff balance to a borrower upon request pursuant to 12 CFR 1026.36(c)(3). The Bureau intended through this provision to implement TILA section 129G, which was added by section 1464 of the Dodd-Frank Act and which requires that a creditor or servicer of a home loan send an accurate payoff balance amount to the borrower within a reasonable time, but in no case more than seven business days after the receipt of a written request for such balance from or on behalf of a borrower. The Bureau proposed § 1024.35(b)(6) to implement, in part, section 6(k)(1)(C) of RESPA with respect to borrower requests to correct errors relating to a final balance for purposes of paying off a mortgage loan and standard servicer duties.

Servicers already have an obligation to comply with the timing requirements of section 129G of TILA with respect to any mortgage loan that constitutes a "home loan" as used in section 129G of TILA.[102] The Bureau proposed § 1024.35(b)(6) because it believed, consistent with TILA section 129G, that borrowers require accurate payoff statements to manage their mortgage loan obligations. A payoff statement is necessary any time a borrower repays a mortgage loan, and servicers routinely provide payoff statements for borrowers to refinance or pay in full their mortgage loan obligations. However, consumer advocates have indicated that servicers have failed, or refused, to provide payoff statements to certain borrowers or have required borrowers to make a payment on a mortgage loan as a condition of fulfilling the borrower's request for a payoff statement.[103] Any such conduct has the perverse effect of

[102] In the Bureau's 2013 TILA Servicing Final Rule, the Bureau interpreted the use of the term "home loans" to include consumer credit transactions secured by a consumer's dwelling.

[103] *See, e.g., Mortgage Servicing: An Examination of the Role of Federal Regulators in Settlement Negotiations and the Future of Mortgage Servicing Standards: Joint Hearing Before the Subcomm. on Fin. Inst. & Consumer Credit*

impeding a borrower's ability to pay a mortgage loan obligation in full.

The Bureau did not receive comment regarding proposed § 1024.35(b)(6) but is revising the proposed language in the final rule to make clear that the failure to provide a payoff balance is an error only in those circumstances in which TILA section 129G, as implemented by § 1026.36(c)(3) of the 2013 TILA Servicing Final Rule, applies. The Bureau recognizes that there would be little consumer benefit to subjecting servicers to potentially overlapping standards under TILA and RESPA as to the provision of a payoff statement. At the same time, for those loans that are not subject to TILA section 129G, the Bureau believes that it would be inappropriate to extend the requirements of the provision beyond the scope mandated by Congress, as implemented by § 1026.36(c)(3).

Final § 1024.35(b)(6) defines as an error the failure to provide an accurate payoff balance amount upon a borrower's request in violation of section § 1026.36(c)(3). Because servicers will already be required to comply with the timeframes set forth in § 1026.36(c)(3) with respect to certain mortgage loans they service, the Bureau does not believe that defining their failure to do so as an error imposes additional burden on servicers.

35(b)(7)

Proposed § 1024.35(b)(7) would have included as an error a servicer's failure to provide accurate information to a borrower with respect to loss mitigation options available to the borrower and foreclosure timelines that may be applicable to the borrower's mortgage loan account, as required by proposed §§ 1024.39 and 1024.40. The Bureau proposed § 1024.35(b)(7) to implement, in part, section 6(k)(1)(C) of RESPA with respect to borrower requests to correct errors relating to avoiding foreclosure, as well as errors relating to standard

& Subcomm. on Oversight & Investigations of the Hous. Fin. Serv. Comm., 112th Cong. 76 (July 7, 2011) (statement of Mike Calhoun, President, Center for Responsible Lending).

servicer duties.

In order to pursue loss mitigation options that may benefit both the borrower and the owner or assignee of the borrower's mortgage loan, a borrower requires accurate information about the loss mitigation options available to the borrower, the requirements for receiving an evaluation for any such loss mitigation option, and the applicable timelines relating to both the evaluation of the borrower for the loss mitigation options and any potential foreclosure process.

The Bureau believes that borrowers may benefit from asserting errors with respect to a servicer's failure to provide information regarding loss mitigation options that may be available to the borrower but for which the servicer has not provided information to the borrower. By correcting such errors and providing the borrower with accurate information regarding such loss mitigation options, a servicer can help a borrower receive an evaluation for available loss mitigation options pursuant to § 1024.41 and to potentially receive an offer of such an option, which may be mutually beneficial to the borrower and the owner or assignee of the borrower's mortgage loan.

Further, the Bureau believes that the National Mortgage Settlement, servicer participation in Home Affordable Modification Program (HAMP) sponsored by the U.S. Department of the Treasury (Treasury) and HUD, and servicer participation in other loss mitigation programs required by Fannie Mae and Freddie Mac demonstrate that, at present, servicers typically provide borrowers with information regarding loss mitigation options and foreclosure and that providing such information to borrowers is a standard servicer duty.

One non-bank servicer and one credit union commented on proposed § 1024.35(b)(7). Both advocated against inclusion of a servicer's failure to provide information regarding loss mitigation options as an error subject to error resolution procedures under § 1024.35. The credit union asserted that lenders are incentivized to provide accurate loss mitigation information, as they try to avoid foreclosing upon properties.

The Bureau believes it is critical for borrowers to have information regarding available loss mitigation options and requiring that a servicer comply with error resolution procedures as to a borrower assertion that a servicer failed to provide such information is important to ensure that borrowers receive this information. The Bureau does not believe there is significant risk that the rule will result in servicers limiting options offered to consumers, as investors and guarantors dictate the loss mitigation options available to borrowers. Further, the Bureau notes that the failure of a servicer to provide accurate information will create liability under this section only if the servicer fails to correct the error when called to its attention. Accordingly, the Bureau is adopting § 1024.35(b)(7) as proposed, except that the Bureau has removed the reference to § 1024.40 in light of other changes to the proposed rule.

35(b)(8)

Proposed § 1024.35(b)(8) would have included as an error a servicer's failure to accurately and timely transfer information relating to a borrower's mortgage loan account to a transferee servicer. The Bureau proposed § 1024.35(b)(8) to implement, in part, section 6(k)(1)(C) of RESPA with respect to borrower requests to correct errors relating to standard servicer duties.

The Bureau believes that the accurate and timely transfer of information relating to a borrower's mortgage account is a standard servicer duty. In the normal course of business, servicers typically anticipate that they will be required to transfer servicing for some mortgage loans they service. Owners or assignees of mortgage loans typically have rights to transfer servicing for a mortgage loan pursuant to the requirements set forth in mortgage servicing agreements. Servicers generally are required to develop capacity for transferring information to transferee servicers in order to comply with such obligations to owners or assignees of mortgage loans. Further, servicers generally are required to develop capacity to download data for transferred mortgage loans onto the servicer's servicing platform. Borrowers may be harmed, however, if information that is transferred to transferee servicers is not accurate, current, or is not properly captured by a transferee servicer. In certain circumstances, such failure may cause errors to occur relating to allocating payments, calculating final balances for purposes of paying off a mortgage loan, or avoiding foreclosure.

Accordingly, the 2013 RESPA Servicing Final Rule requires servicers to maintain policies and procedures reasonably designed to achieve the objective of facilitating servicing transfers. Specifically, § 1024.38(b)(4)(i) provides that as a transferor servicer, a servicer must maintain policies and procedures reasonably designed to ensure the timely transfer of all information and documents in the possession or control of the servicer relating to a transferred mortgage loan to a transferee servicer in a form and manner that ensures the accuracy of the information and enables a transferee servicer to comply with its obligations to the owner or assignee of the mortgage loan and applicable law.

Under proposed § 1024.35(b)(8), a servicer's failure to accurately and timely transfer information relating to a borrower's mortgage loan account to a transferee servicer would constitute an error. The Bureau believes that by defining an error in this way, a borrower will have a remedy to ensure that a transferor servicer provides information to a transferee servicer that accurately reflects the borrower's account consistent with the obligations applicable to a servicer's general servicing policies and procedures. The Bureau did not receive comment regarding § 1024.35(b)(8) and is adopting it as proposed.

35(b)(9) and 35(b)(10)

Proposed § 1024.35(b)(9) would have included as an error a servicer's failure to suspend a foreclosure sale in the circumstances described in proposed § 1024.41(g). The Bureau proposed § 1024.35(b)(9) to implement, in part, section 6(k)(1)(C) of RESPA with respect to borrower requests to correct errors relating to avoiding foreclosure and other standard servicer duties.

Proposed § 1024.41(g) provided that a servicer that offers loss mitigation options to borrowers in the ordinary course of business would be prohibited from proceeding with a foreclosure sale when a borrower has submitted a complete application for a loss mitigation option by a specified date unless the servicer denies the borrower's application for a loss mitigation option (including any appeal thereof), the borrower rejects the servicer's offer of a loss mitigation option, or the borrower fails to perform on a loss mitigation agreement. These requirements are discussed in more detail in the section-by-section analysis for § 1024.41 below.

A credit union commenter asserted that failure to suspend a foreclosure sale in the circumstances described in proposed § 1024.41(g) should not be considered an error subject to the error resolution requirements under § 1024.35 because, the commenter reasoned, a lender will delay foreclosure when there is a legitimate need to do so. Having considered the comment, and as explained with respect to § 1024.41, the Bureau continues to believe it is appropriate to prohibit a servicer from completing the foreclosure process until after a borrower has had a reasonable opportunity to submit an application for a loss mitigation option and the servicer has completed the evaluation of the borrower for a loss mitigation option, and that a borrower should be able to assert an error where a servicer fails to comply with these procedures.

The Bureau, however, is revising proposed § 1024.35(b)(9) in light of changes to proposed § 1024.41. Final § 1024.35(b)(9) defines as an error subject to error resolution requirements under § 1024.35 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). The Bureau has also added new § 1024.35(b)(10) which defines as an error moving for foreclosure judgment or order of sale, or conducting a foreclosure sale in violation of § 1024.41(g) or (j).

35(b)(11)

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. As discussed above, the Bureau solicited comment regarding whether the list of covered errors should include a catch-all provision. The Bureau also requested comment as to whether to add additional specific errors to the list of errors under § 1024.35. In particular, the Bureau solicited comment regarding whether to include as an error a servicer's failure to correctly evaluate a borrower for a loss mitigation option.

Industry commenters supported the inclusion of a limited list of errors, citing certainty, clarity, and notice as its primary benefits. Consumer group commenters generally opposed limiting notices of error to a finite list. Consumer advocates asserted that the proposal was a departure from and offered fewer consumer protections than the existing qualified written request process under section 6 of RESPA, which applies to all errors relating to servicing. In addition, some consumer group commenters noted the fluid nature of mortgage servicing and cautioned that a finite list lacks the flexibility necessary to ensure that consumers will be adequately protected as servicing practices evolve.

As to whether the Bureau should add additional specific errors to the list of covered errors, some consumer groups suggested the addition of specific errors, including errors relating to escrow accounts, servicing transfer, disclosures, and loss mitigation, while also reiterating their support for a broad catch-all provision. While most industry commenters said the proposed list of covered errors was adequate, a credit union commenter suggested that the Bureau add requests to cancel liens once accounts have been paid in full. 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. The commenter said that borrowers need a statutory remedy for uncorrected errors. Another consumer group advocated for a catch-all sufficiently broad to capture the array of servicer loss mitigation duties. An industry association took the opposing view, citing concerns about the inability to objectively measure whether a servicer evaluated a borrower for an option correctly. The industry commenter requested that should the Bureau add this category as a covered error, the Bureau also clarify that a servicer who complies with § 1024.41 has not committed the error.

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.

35(c) Contact information for borrowers to assert errors

The Bureau proposed § 1024.35(c), which would have permitted a servicer to establish an exclusive telephone number and address that a borrower must use to assert an error. If a servicer chose to establish a separate telephone number and address for receiving errors, the proposal would have required the servicer to provide the borrower a notice that states that the borrower may assert an error at the telephone number and address established by the servicer for that purpose. Proposed comment 35(c)-1 would have clarified that if a servicer has not designated a telephone number and address that a borrower must use to assert an error, then the servicer will be required to comply with the error resolution requirements for any notice of error received by any office of the servicer. Proposed comment 35(c)-2 would have further clarified that the written notice to the borrower may be set forth in another written notice provided to the borrower, such as a notice of transfer, periodic statement, or coupon book. Proposed comment 35(c)-2 would have further clarified that if a servicer establishes a telephone number and address for receipt of notices of error, the servicer must provide that telephone number and address in any communication in which the servicer provides the borrower with contact information for assistance from the servicer.

The Bureau proposed to allow servicers to establish a telephone number and address that a borrower must use to assert an error in order to allow servicers to direct oral and written errors to appropriate personnel that have been trained to ensure that the servicer responds appropriately. As the proposal noted, at larger servicers with other consumer financial service affiliates, many personnel simply do not typically deal with mortgage servicing-related issues. For instance, at a major bank servicer, a borrower might assert an error to local bank branch staff, who likely would not have access to the information necessary to address their error. Thus, the Bureau reasoned, if a servicer establishes a telephone number and address that a borrower must use, a servicer would not be required to comply with the error resolution requirements for errors that may be received by the servicer through a different method.

Most industry commenters favored allowing servicers to designate an address and telephone number to which borrowers must direct error notices. At the same time, such commenters asserted that creating an exclusive intake portal was not sufficient to offset the burdens inherent in permitting oral error notices to which error resolution requirements apply.

Some commenters said that designating telephone lines for error notices could be especially costly for small servicers. Thus, one community bank trade association argued that the proposal favored large institutions. Two industry commenters requested clarification regarding how servicers must treat error notices sent to the wrong address. Finally, one credit union commenter asserted that servicers should only be required to include designated telephone numbers and addresses in regular forms of communication to borrowers, such as the periodic statement. In contrast, consumer group commenters suggested that to the extent a servicer designates a telephone line or address, the servicer should be required to post such information on its website and to include it in mailed notices.

Because the final rule removes the requirement that servicers comply with error resolution requirements under § 1024.35 for oral notices of error, the Bureau believes that it is no longer necessary to regulate the circumstances under which servicers may direct oral errors to an exclusive telephone number that a borrower must use to assert an error. However, for written error notices, the Bureau continues to believe that it is reasonable to permit servicers to designate a specific address for the intake of notices of error. Allowing a servicer to designate a specific address is consistent with current requirements of Regulation X with respect to qualified written requests. Current § 1024.21(e)(1) permits a servicer to designate a "separate and exclusive office and address for the receipt and handling of qualified written requests." Moreover, the Bureau believes that identifying a specific address for receiving errors and information requests will benefit consumers. By providing a specific address, servicers will identify to consumers the office capable of addressing errors identified by consumers.

The Bureau believes it is critical for servicers to publicize any designated address to ensure that borrowers know how properly to assert an error and to avoid evasion by servicers of error resolution procedures. This is especially important because, as noted in the proposal, servicers who designate a specific address for receipt of error notices are not required to comply with error resolution procedures for notices sent to the wrong address. Accordingly, final § 1024.35(c) requires servicers that designate an address for receipt of notices of error to post the designated address on any website maintained by the servicer if the website lists any contact address for the servicer. In addition, final comment 35(c)-2 retains the clarification that servicers that establish an address that a borrower must use to assert an error, must provide the address to the borrower in any communication in which the servicer provides the borrower with contact information for assistance. The Bureau is otherwise adopting § 1024.35(c) and comments 35(c)-1 and 35(c)-2 as proposed, except that the Bureau has revised the provisions permitting servicers to designate a telephone number that a borrower must use to assert an error and clarified that the notice to the borrower must be written.

Multiple Offices

Proposed § 1024.35(c) also included language that would have required a servicer to use the same telephone number and address it designates for receiving notices of error for receiving information requests pursuant to proposed § 1024.36(b), and vice versa. Further, the Bureau proposed comment 35(c)-3, which would have clarified that any telephone numbers or address designated by a servicer for any borrower may be used by any other borrower to submit a notice of error. For instance, if a servicer set up regional call centers, it would have had to assist any borrowers who called in to a particular center to complain about an error, regardless of whether the borrower called the correct region.

One non-bank servicer expressed concern about the proposal’s requirement to designate the same address and telephone number for notices of error and information requests. The commenter explained that it assigns separate teams to address information requests and error notices. Thus, the commenter asserted, proposed § 1024.35(c) would negatively impact customer service. Having considered this comment, the Bureau notes that it proposed § 1024.35(c) because it was concerned that designating separate telephone numbers and addresses for notices of error and information requests could impede borrower attempts to submit notices of error and information requests to servicers due to debates over whether a particular communication constituted a notice of error or an information request. For the reasons set forth above and in the proposal, final § 1024.35(c) maintains the requirement that servicers designate the same address for receipt of notices of error and information requests. In addition, the Bureau is adopting comment 35(c)-3 as substantially as proposed, except that the Bureau has removed references to error notices received by telephone.

The Bureau proposed comment 35(c)-5 to further clarify that a servicer may use automated systems, such as an interactive voice response system, to manage the intake of borrower calls. The proposal provided that prompts for asserting errors must be clear and provide the borrower the option to connect to a live representative. Because the final rule does not require servicers to comply with error resolution procedures for oral error notices, the Bureau is withdrawing proposed comment 35(c)-5 from the final rule.

Internet Intake of Notices of Error

The Bureau proposed comment 35(c)-4 to clarify that a servicer would not be required to establish a process for receiving notices of error through email, website form, or other online methods. Proposed comment 35(c)-4 was intended to further clarify that if a servicer establishes a process for receiving notices of error through online methods, the servicer can designate it as the only online intake process that a borrower can use to assert an error. A servicer would not be required to provide a written notice to a borrower in order to gain the benefit of the online process being considered the exclusive online process for receiving notices of error. Proposed comment 35(c)-4 would have further clarified that a servicer's decision to accept notices of error through an online intake method shall be in addition to, not in place of, any processes for receiving error notices by phone or mail.

One consumer group commenter advocated requiring servicers to establish on online process for receipt of error notices. The Bureau agrees that online processes have significant promise to facilitate faster, cheaper communications between borrowers and servicers. However, the Bureau believes that this suggestion raises a broader issue around the use of electronic media for communications between servicers (and other financial service providers) and borrowers (and other consumers). The Bureau believes it would be most effective to address this issue in that larger context after study and outreach to enable the Bureau to develop principles or standards that would be appropriate on an industry-wide basis. The Bureau is therefore, at this time, finalizing language to permit, but not require, servicers to elect whether to adopt such a process. The Bureau intends to conduct broader analyses of electronic communications' potential for disclosure, error resolution, and information requests after the rule is released. Accordingly, the Bureau is adopting comment 35(c)-4 as proposed, with minor technical amendments, and the Bureau has removed references to error notices received by telephone.

35(d) Acknowledgment of Receipt

The Bureau proposed § 1024.35(d), which would have required a servicer to provide a borrower an acknowledgement of a notice of error within five days (excluding legal public holidays, Saturdays, and Sundays) of receiving a notice of error. Proposed § 1024.35(d) would have implemented section 1463(c) of the Dodd-Frank Act, which amended the current acknowledgement deadline of 20 days for qualified written requests to five days. Proposed § 1024.35(d) would have further implemented the language in section 6(k)(1)(C) of RESPA prohibiting the failure to take timely action to respond to requests to correct errors by applying the same timeline applicable to a qualified written request to any notice of error.

Industry commenters, including multiple credit union associations, requested that the Bureau lengthen the acknowledgment time period, asserting that five days is unreasonable, especially for smaller institutions. A nonprofit mortgage servicer said the timeframe is insufficient for its small volunteer staff. An industry trade association commenter argued that the acknowledgment requirement creates unnecessary paperwork and should be removed from the final rule altogether. In contrast, consumer group commenters were generally supportive of the acknowledgment requirement, noting that the timeline in the proposal was consistent with that in the Dodd-Frank Act for qualified written requests.

The Bureau believes that acknowledgment within five days is appropriate given that the Dodd-Frank Act expressly adopts that requirement for qualified written requests and differentiating between the two regimes would increase operational complexity. Moreover, the burden on servicers is significantly mitigated by the fact that the error resolution procedures are only applicable to written notices of error. The Bureau further notes that the contents of the acknowledgment are minimal. In addition, servicers need not provide an acknowledgment if the servicer corrects the error identified by the borrower and notifies the borrower of that correction in writing within five days of receiving the error notice. Accordingly, the Bureau is adopting § 1024.35(d) substantially as proposed, except that the Bureau has revised the provision to clarify that the acknowledgment must be written.

35(e) Response to Notice of Error

The Bureau proposed § 1024.35(e) to set forth requirements on servicers for responding to notices of error. As discussed in more detail below, proposed § 1024.35(e) would have implemented the response requirement in section 6(e)(2) of RESPA applicable to a qualified written request, including section 1463(c) of the Dodd-Frank Act, which changed the deadline for responding to qualified written requests from 60 days to 30 days. Proposed § 1024.35(e) would have further implemented section 6(k)(1)(C) of RESPA by applying the same requirements and timeline applicable to a qualified written request to any notice of error.

35(e)(1) Investigation and Response Requirements

Proposed § 1024.35(e)(1) would have required a servicer to correct an error within 30 days unless the servicer concluded after a reasonable investigation that no error occurred and notified the borrower of that finding. As discussed below, the Bureau maintains the 30-day timeline in the final rule.

Notices to Borrower

Proposed § 1024.35(e)(1)(i)(A) would have required a servicer that does not determine after a reasonable investigation that no error occurred as set forth under § 1024.35(e)(1)(i)(B), to correct the error identified by the borrower, and provide the borrower with notification that indicates that the error was corrected, the date of the correction, and contact information the borrower can use to get further information. One industry commenter asserted that RESPA does not require that servicers provide correction dates and questioned the utility of such a requirement. The commenter further requested clarification as to whether the date of correction was equivalent to the effective date of the correction.

The Bureau did not intend the reference to the date of correction in § 1024.35(e)(1)(i)(A) to refer to the date the correction was made by the servicer, but rather to the date the correction is made effective. Accordingly, the Bureau is amending proposed § 1024.35(e)(1)(i)(A) to add the word "effective" to the final rule in order to clarify that the date servicers must provide is the effective date of the correction. The Bureau believes that providing the effective date of the correction is meaningful information for a borrower to assess whether the servicer has satisfactorily corrected the error, particularly in cases involving changes to the balance of the borrower's account. Commenters did not comment on other aspects of proposed § 1024.35(e)(1)(i)(A), and the Bureau is adopting § 1024.35(e)(1)(i)(A) as proposed, except that the Bureau has revised the final rule to clarify that the notification must be provided in writing and the servicer's contact information must include a telephone number.

Proposed § 1024.35(e)(1)(i)(B) would have required a servicer that determines after conducting a reasonable investigation that no error occurred to provide the borrower a notice stating that the servicer has determined that no error has occurred, the reason(s) the servicer believes that no error has occurred, and contact information for servicer personnel that can provide further assistance. The proposal would have also required the servicer to inform the borrower in the notice that the borrower may request documents relied on by the servicer in reaching its determination and how the borrower can request such documents. In contrast, proposed § 1024.35(e)(1)(i)(A) would not have required a servicer who determines that an error has occurred and corrects the error to provide a statement in the notice to the borrower about requesting documents that were the basis for that determination.

One consumer group commenter requested that the Bureau amend the proposed rule to address situations in which servicers make inaccurate determinations that no error occurred. The Bureau believes that, as proposed, the rule adequately addresses such scenarios by requiring disclosures about borrowers' rights to request the information on which the servicer relied, so as to facilitate the borrower's opportunity to review and consider further action as appropriate. The Bureau believes that the rule will facilitate the timely correction of errors and that borrowers are less likely to need documents and information when errors are corrected per the borrower's requests. Accordingly, the Bureau is adopting § 1024.35(e)(1)(i)(B) as proposed, except that the Bureau has revised the provision to clarify that the notification must be written and the servicer's contact information must include a telephone number.

Multiple Responses

The Bureau proposed comment 35(e)(1)(i)-1 to clarify that if a notice of error asserts multiple errors, a servicer may respond to those errors through a single or separate written responses that address the alleged errors. The Bureau believes that the purpose of the rule, which is to require timely resolution of errors, is facilitated by allowing a servicer to respond to multiple errors set forth in a single notice of error through separate communications. For example, a servicer could correct one error and send a notice regarding the correction of that error, while an investigation is in process regarding another error that is the subject of the same notice of error. The Bureau did not receive any comments regarding proposed comment 35(e)(1)(i)-1 and is adopting it as proposed.

Different or Additional Error

The Bureau proposed § 1024.35(e)(1)(ii), which provided that if a servicer, during the course of a reasonable investigation, determines that a different or additional error has occurred, the servicer is required to correct that different or additional error and to provide a borrower a written notice about the error, the corrective action taken, the effective date of the corrective action, and contact information for further assistance. Because the servicer would be correcting an error, a servicer would not be required to provide a notice to the borrower about requesting documents that were the basis for that determination for the reasons discussed above. Proposed comment 35(e)(1)(ii)-1 would have clarified that a servicer may provide the response required by § 1024.35(e)(1)(ii) in the same notice that responds to errors asserted by the borrower pursuant to § 1024.35(e)(1)(i) or in a separate response that addresses the different or additional errors identified by the servicer. The Bureau did not receive any comments regarding proposed § 1024.35(e)(1)(ii) and comment 35(e)(1)(ii)-1 and is adopting both substantially as proposed.

As discussed above, the Bureau believes that a consumer protection purpose of RESPA is to facilitate the timely correction of errors. Where a servicer discovers an actual error, this purpose is best served by requiring the servicer to correct that error subject to the same procedures that would have applied had the borrower asserted the same error through a qualified written request or notice of error. Accordingly, the Bureau finds that § 1024.35(e)(1)(ii) is necessary and appropriate to achieve the consumer protection purposes of RESPA, including of facilitating the timely correction of errors.

35(e)(2) Requesting Information from Borrower

Proposed § 1024.35(e)(2) would have permitted a servicer to request that a borrower provide documentation if needed to investigate an error but would not have permitted a servicer to require the borrower to provide such documentation as a condition of investigating the asserted error. Further, proposed § 1024.35(e)(2) would have prohibited a servicer from determining that no error occurred simply because the borrower failed to provide the requested documentation. The Bureau proposed § 1024.35(e)(2) to allow servicers to obtain information that may assist in resolving notices of error.

Several industry commenters stressed the importance of permitting reasonable requests for information from borrowers. Commenters said that limiting servicers' access could impede the early resolution of errors. One industry commenter asked that the Bureau clarify that servicers may request documents so long as they do not condition investigation on the receipt of documents. Other commenters requested clarification that requiring a borrower to provide specific information about what the borrower is requesting does not constitute requiring a borrower to provide information as a condition of conducting the investigation.

Having considered these comments, the Bureau believes the proposed rule strikes the right balance by permitting servicers to request documents from borrowers so long as the servicer's investigation and conclusion that no error occurred is not dependent on the receipt of documents. As stated in the proposal, the Bureau believes that the process for servicers to obtain information from borrowers should not prejudice the ability of the borrower to seek the resolution of the error. Accordingly, the Bureau is adopting § 1024.35(e)(2) as proposed with minor technical amendments.

35(e)(3) Time Limits

35(e)(3)(i)

The Bureau proposed § 1024.35(e)(3)(i), which would have required a servicer to respond to a notice of error not later than 30 days (excluding legal public holidays, Saturdays, and Sundays) after the borrower notifies the servicer of the asserted error, with two exceptions: errors relating to accurate payoff balances and errors relating to failure to suspend a foreclosure sale where a borrower has submitted a complete application for a loss mitigation option. As discussed further below, the proposal would have required servicers to respond to errors relating to payoff balances within five days (excluding legal public holidays, Saturdays, and Sundays) after the servicer receives the notice of error. The Bureau believed this shortened timeframe was appropriate because a servicer's failure to correct such an error may prevent a borrowing from pursuing options in the interim, such as a refinancing transaction. The proposal would have also required servicers to respond to errors relating to the failure to suspend a foreclosure sale where a borrower has submitted a complete application the earlier of within 30 days (excluding legal public holidays, Saturdays, and Sundays) after the servicer receives the error notice or prior to the foreclosure sale. The Bureau believed the shorter timeline was appropriate because delaying the response and investigation until after the foreclosure sale could cause irreparable harm to the borrower.

While several industry commenters asserted that 30 days was insufficient for error notices, one credit union stated that the timeline was reasonable. Similarly, a consumer group commenter noted that the timeline was consistent with the time period for qualified written requests required by the Dodd-Frank Act. Consumer commenters on Regulation Room asserted that the timelines were too generous. The Bureau believes that the 30-day timeframe proposed is appropriate given that the Dodd-Frank Act expressly changed the timeframe for qualified written requests from 60 days to 30 days and differentiating between two regimes would increase operational complexity as well as burden on borrowers and servicers. Accordingly, the final rule adopts the 30-day timeline as proposed.

Shortened Time Limit to Correct Errors Relating to Payoff Balances

Proposed § 1024.35(e)(3)(i)(A) would have provided that if a borrower submits a notice of error asserting that a servicer has failed to provide an accurate payoff balance as set forth in proposed § 1024.35(b)(6), a servicer must respond to the notice of error not later than five days (excluding legal public holidays, Saturdays, and Sundays) after the borrower notifies the borrower of the alleged error. The Bureau proposed the accelerated timeframe because it believed that a 30-day deadline for responding to this type of notice of error would not provide adequate protection for borrowers because the servicer’s failure to correct the error promptly may prevent a borrower from pursuing options in the interim such as a refinancing transaction. Moreover, discussions with servicers during outreach suggested that a five day timeframe would be reasonable for a servicer to correct an error with respect to calculating a payoff balance.

Industry commenters noted the complexity involved in calculating payoff balances, especially where servicers need to collect information from third parties, such as fee information from vendors or prior servicers. In light of the complexity involved, industry commenters asserted that the timeframe was insufficient.

While the Bureau continues to believe it is important to have an accelerated timeline for errors associated with payoff balances, the Bureau acknowledges that in some circumstances the need to collect information from third parties may pose timing challenges. Accordingly, the Bureau has revised proposed § 1024.35(e)(3)(i)(A) to provide that a servicer must respond to a borrower’s notice of error asserting that a servicer has failed to provide an accurate payoff balance as set forth in § 1024.35(b)(6) not later than seven days (excluding legal public holidays, Saturdays, and Sundays) after the borrower notifies the servicer of the alleged errors. The Bureau believes that this modest increase in the timeline strikes the right balance between prompt provision of payoff information to consumers and the need for servicers to have sufficient time to access the required information. Moreover, the Bureau also notes that section 129G of TILA requires servicers to provide accurate payoff balance amounts to consumers within a reasonable time, but in no case more than seven business days. Otherwise, the Bureau is adopting § 1024.35(e)(3)(i)(A) as proposed, with minor technical amendments.

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 § 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).

Extensions of Time Limit

Proposed § 1024.35(e)(3)(ii) would have permitted, subject to certain exceptions discussed below, a servicer to extend the time period for investigating and responding to a notice of error by 15 days (excluding legal public holidays, Saturdays, and Sundays) if, before the end of the 30-day period set forth in proposed § 1024.35(e)(3)(i)(C), the servicer notifies the borrower of the extension and the reasons for the delay in responding. Proposed comment 35(e)(3)(ii)-1 would have clarified that if a notice of error asserts multiple errors, a servicer may extend the time period for investigating and responding to those errors for which extensions are permissible pursuant to proposed § 1024.35(e)(3)(ii).

While some consumer groups generally objected to the proposed extension, one industry commenter urged the Bureau to permit two automatic 15-day extensions. The Bureau does not believe that permitting a second 15-day extension would promote timely resolution of errors. Section 1463(c)(3) of the Dodd-Frank Act amended section 6(e) of RESPA to provide one 15-day extension of time with respect to qualified written requests, and the Bureau believes that differentiating between two regimes would increase operational complexity.

The Bureau did not propose to apply the extension allowance of proposed § 1024.35(e)(3)(ii) to investigate and respond to errors relating to a servicer's failure to provide an accurate payoff statement or to suspend a foreclosure sale. As discussed above, the final rule applies a shortened timeframe for responding to such errors in light of special statutory provisions and special considerations at the foreclosure stage. Permitting a 15-day extension of those timeframes would negate these shortened response periods and undermine the purposes served by shortening them. For the reasons set forth above and in the proposal, the Bureau is adopting § 1024.35(e)(3)(ii) and comment 35(e)(3)(ii)-1 substantially as proposed.

35(e)(4) Copies of Documentation

Proposed § 1024.35(e)(4) would have required that, where a servicer determines that no error occurred and a borrower requests the documents the servicer relied upon, the servicer must provide the documents within 15 days of the servicer's receipt of the borrower's request. The Bureau proposed comment 35(e)(4)-1 to clarify that a servicer would need only provide documents actually relied upon by the servicer to determine that no error occurred, not all documents reviewed by a servicer. Further, the proposed comment stated that where a servicer relies upon entries in its collection systems, a servicer may provide print-outs reflecting the information entered into the system.

Some industry commenters questioned the utility of providing documents relied upon to borrowers, noting that borrowers may not understand how to interpret the documents printed from servicers' systems. Industry commenters said providing such documents will be burdensome, and one commenter added that the Dodd-Frank Act neither requires nor contemplates such a requirement. One commenter urged the Bureau to clarify that servicers need only provide borrowers a summary of information that is stored electronically and not in a producible format. And several industry commenters urged the Bureau to limit servicers' responsibility to provide documents that reflect trade secrets or other sensitive information.

The Bureau believes the proposed rule strikes the right balance in that it does not subject servicers to undue paperwork burden but assures that borrowers will have access to underlying documentation if necessary. In certain cases, a borrower may determine that the servicer's response resolves an issue and that reviewing documents would be unnecessary. Thus, the Bureau believes that requiring a servicer to provide documents only upon a borrower's request limits burden. The Bureau understands that servicers may store information electronically and not in a readily producible format. Accordingly, the Bureau is adopting final comment 35(e)(4)-1, which clarifies that servicers may provide a printed screen capture in such situations, as proposed with minor technical amendments. In addition, the Bureau acknowledges industry commenters' concern regarding providing confidential or sensitive information to borrowers. Accordingly, the Bureau has revised proposed § 1024.35(e)(4) to provide that servicers need not produce to borrowers documents reflecting confidential, proprietary or privileged information. Final § 1024.35(e)(4) further provides that if a servicer withholds documents relied upon because such documents reflect confidential, proprietary or privileged information, the servicer must notify the borrower of its determination in writing. The Bureau is otherwise adopting § 1024.35(e)(4) as proposed.

35(f) Alternative Compliance

Proposed § 1024.35(f) provided that a servicer would not be required to comply with the timing and process requirements of paragraphs (d) and (e) of proposed § 1024.35 in two situations. First, a servicer that corrects the error identified by the borrower within five days of receiving the notice of error, and notifies the borrower of the correction in writing, would not be required to comply with the acknowledgment, notice and inspection requirements in paragraphs (d) and (e). Because such errors are corrected, an investigation would not be required. Second, a servicer that receives a notice of error for failure to suspend a foreclosure sale, pursuant to § 1024.35(b)(9), seven days or less before a scheduled foreclosure, would not be required to comply with paragraphs (d) and (e), if, within the time period set forth in paragraph (e)(3)(i)(B), the servicer responds to the borrower, orally or in writing, and corrects the error or states the reason the servicer has determined that no error has occurred.

35(f)(1) Early Correction

The Bureau proposed § 1024.35(f)(1) to permit alternative compliance as to errors resolved within the first five days. This provision is consistent with section 6(e)(1)(A) of RESPA, which requires servicers to provide written acknowledgment of a qualified written request within five days (excluding legal public holidays, Saturdays, and Sundays) “unless the action requested is taken within such period.” In addition, the alternative compliance mechanism in proposed § 1024.35(f)(1) was based on feedback from servicers during outreach, and especially small servicers, which indicated that the majority of errors are addressed promptly after a borrower’s communication and generally within five days. Small entity representatives communicated to the Small Business Review Panel that small servicers have a high-touch customer service model, which made it very easy for borrowers to report errors or make inquiries, and to receive real-time responses. The Bureau believed the alternative compliance method was necessary and appropriate to reduce the unwarranted burden of an acknowledgement and other response requirements on servicers, and especially small servicers, that are able to correct borrower errors within five days consistent with the Small Business Review Panel recommendation that the Bureau consider requirements that provide flexibility to small servicers.

Industry commenters supported the proposal's exemption of servicers from complying with paragraphs (d) and (e) where the servicer corrects the error identified by the borrower within five days of receiving the notice of error. However, industry commenters opposed the requirement that servicers notify borrowers of the correction in writing. Commenters reasoned that a significant number of errors are asserted and quickly resolved in a single telephone call. Accordingly, commenters argued that the requirement to advise borrowers of the correction in writing would be burdensome.

The Bureau believes that because the final rule subjects written but not oral notices to error resolution requirements under § 1024.35, the commenters' concerns regarding written notice of correction has been significantly mitigated. To the extent that a borrower asserts an error in writing which the servicer resolves within five days, the Bureau believes the borrower will benefit from receiving the written notification. For these reasons, the Bureau adopts § 1024.35(f)(1) as proposed, except that the Bureau has revised the provision to make clear that the servicer must provide such notification within five days of receiving the notice of error.

35(f)(2) Errors Asserted Before Foreclosure Sale

As explained in proposed § 1024.35(f)(2), the Bureau believes that it is appropriate to streamline acknowledgment and response requirements when servicers receive a notice of error that may impact a foreclosure sale less than seven days before a foreclosure sale. Notices of errors identified in § 1024.35(b)(9) and (10), which focus on the failure to suspend a foreclosure sale in the circumstances described in § 1024.41(f), (g), or (j), implicate this concern. Numerous entities, including other federal agencies and small entity representatives during the Small Business Review Panel outreach, expressed concern about borrower use of error resolution requirements as a procedural tool to impede proper foreclosures and promote litigation.[104]

Industry commenters reiterated concerns heard during pre-proposal outreach that borrowers could use the error resolution requirements to halt foreclosure sales, including minutes before a foreclosure sale. One industry commenter stressed that in some circumstances, whether to proceed with foreclosure will be beyond the servicer's control, as some courts will not cancel foreclosure after a certain date and Freddie Mac can override a servicer's request to postpone or cancel a sale. Thus, two commenters urged the Bureau to exempt from liability servicers required by an investor, insurer, guarantor or legal requirement to proceed with a foreclosure sale. Another industry commenter requested an exception for those borrowers who have had their claims heard by a court, asserting that servicers need finality and that extending foreclosure timelines is costly. In contrast, consumer group commenters opposed the alternative compliance option for errors asserted within seven days of a foreclosure sale. Consumer groups asserted that servicers should be required to communicate with borrowers in writing. In addition, some consumer group commenters reasoned that because proposed § 1024.35(f)(2) would exempt the servicer from the requirement to conduct an investigation or provide the borrower with the documents relied upon in reaching its determination that no error occurred, it would effectively

[104] *See* U.S. Consumer Fin. Prot. Bureau, *Final Report of the Small Business Review Panel on CFPB's Proposals Under Consideration for Mortgage Servicing Rulemaking*, 30 (Jun, 11, 2012).

permit servicers to ignore valid requests for postponement so long as the servicer sends a letter stating that no error occurred.

Having considered these comments, the final rule provides that for error notices submitted seven days or less before a foreclosure sale that assert an error identified in § 1024.35(b)(9) or (10), servicers are not required to comply with the requirements for acknowledgement and response to notices of error, but must make a good faith attempt to respond to borrowers, orally or in writing, and to either correct the error or state the reason the servicer has determined no error occurred. As stated in the proposal, the Bureau believes that reducing the procedural requirements for servicers to follow for such notices mitigates the concern that borrowers may use error resolution procedures to impede foreclosure, while maintaining protection for consumers. The Bureau believes that this alternative compliance method is also consistent with the Small Business Review Panel recommendation that the Bureau provide flexibility to small servicers and responds to small entity representatives' concern that error resolution procedures may be used in unwarranted litigation. Further, the Bureau understands the timing to be consistent with the GSE requirement that servicers conduct account reviews to document that all required actions have occurred at least seven days prior to a foreclosure sale. The Bureau declines to revise the proposal to require that servicers communicate with borrowers in writing, as the Bureau believes servicers require flexibility in communicating with borrowers close in time to a foreclosure sale.

35(g) Requirements Not Applicable

The Bureau proposed § 1024.35(g) to set forth the types of notices of error to which the error resolution requirements would not apply.

35(g)(1) In General

Proposed § 1024.35(g)(1) would have provided that a servicer is not required to comply with the error resolution requirements set forth in § 1024.35(d) and (e) if the servicer reasonably makes certain determinations specified in §§ 1024.35(g)(1)(i), (ii), or (iii). Specifically, subject to certain exceptions, a servicer need not comply with error resolution requirements with respect to a notice of error that asserts an error that is substantially the same as an error asserted previously by or on behalf of the borrower, that is overbroad or unduly burdensome, or that is untimely. A servicer would be liable to the borrower for its unreasonable determination that any of the listed categories apply and resulting failure to comply with proposed § 1024.35(d) and (e), however. Industry commenters generally favored the proposed exclusions, but requested that the Bureau expand the categories for which servicers would not be required to comply with error resolution requirements. Except as discussed below, the Bureau declines to do so. The Bureau has, however, revised proposed § 1024.35(g)(1) to state that, in addition to § 1024.35(d) and (e), a servicer is not required to comply with § 1024.35(i) if a servicer reasonably determines that §§ 1024.35(g)(i), (ii), or (iii) apply.

35(g)(1)(i)

Proposed § 1024.35(g)(1)(i) would have provided that a servicer is not required to comply with the notice of error requirements in proposed § 1024.35(d) and (e) with respect to a notice of error to the extent that the asserted error is substantially the same as an error asserted previously by or on behalf of the borrower for which the servicer had previously complied with its obligation to respond to the notice of error pursuant to § 1024.35(e)(1), unless the borrower provides new and material information. The proposed rule would have defined new and material information as information that was not reviewed by the servicer in connection with investigating the prior notice of error and was reasonably likely to change a servicer's determination with respect to the existence of an error.

As stated in the proposal, the Bureau believes that both elements of this requirement are important. First, the information must not have been reviewed by the servicer. If the information was reviewed by the servicer, then such information is not new and requiring a servicer to re-open an investigation will create unwarranted burden and delay. Second, even if the information is new, it must be material to the asserted error. A servicer may not have reviewed information because the information may not have been material to the error asserted by the borrower. The Bureau proposed § 1024.35(g)(1)(i) to ensure that a servicer is not required to expend resources conducting duplicative investigations of notices of error unless there is a reasonable basis for re-opening a prior investigation because of new and material information.

The Bureau proposed comment 35(g)(1)(i)-1 to further clarify that a dispute regarding whether a servicer previously reviewed information or whether a servicer properly determined that information reviewed was not material to its determination of the existence of an error, will not itself constitute new and material information and, consequently, does not require a servicer to re-open a prior, resolved investigation of a notice of error.

While industry commenters supported the proposed exclusion, some consumer groups expressed concern. One consumer group commenter argued that the proposal effectively requires that borrowers describe alleged errors with more specificity than is appropriate, given that borrowers often do not fully understand the nature of the alleged error. Another consumer group commenter urged the Bureau to require servicers to inform borrowers that servicers will reconsider a duplicative error notice to the extent that the borrower is able to more concisely describe an alleged error. Another commenter asserted that the proposed exclusion shields servicers from the consequences of incompletely addressing a notice of error the first time it is received. Finally, an anonymous commenter questioned the Bureau's authority to create the exclusion altogether.

Having considered these comments, the Bureau believes that § 1024.35(g)(1)(i), as proposed, strikes the appropriate balance in that it requires servicers to respond to duplicative error notices only to the extent that such notices present new and material information. The Bureau recognizes that borrowers will assert errors in lay terms, and this section is not intended to require any particular level of specificity in the errors that borrowers assert. All that this section provides is that if a borrower submits a second error claim that the servicer reasonably determines is substantially the same as a previous submission, the servicer is not obligated to go back through the investigative process unless the borrower has presented new and material information. Thus, to the extent that a borrower initially lacks sufficient information to articulate clearly an alleged error but is later privy to new and material information that enables the borrower to describe the error more clearly, proposed § 1024.35(g)(1)(i) requires a servicer to reconsider new and material information subsequently put forward by the borrower. Thus, for the reasons outlined in the proposal and set forth above, the Bureau is adopting § 1024.35(g)(1)(i) and comment 35(g)(1)(i)-1 as proposed, with minor technical amendments.

The Bureau's authority for § 1024.35 is addressed above. Moreover, the Bureau finds that § 1024.35 is necessary and appropriate to achieve the purposes of RESPA, including ensuring responsiveness to consumer requests and complaints because the Bureau believes that this purpose will best be met if servicers are not required to waste resources responding to duplicative requests that will not benefit consumers, but rather are allowed to focus their resources on responding to error requests where such responses are most likely to result in consumer benefit.

35(g)(1)(ii)

Proposed § 1024.35(g)(1)(ii) would have provided that a servicer is not required to comply with the notice of error requirements in proposed § 1024.35(d) and (e) with respect to a notice of error that is overbroad or unduly burdensome. The proposed rule would have defined "overbroad" and "unduly burdensome" for this purpose. It would have provided that a notice of error is overbroad if a servicer cannot reasonably determine from the notice of error the specific covered error that a borrower asserts has occurred on a borrower's account. The proposed rule would have provided that a notice of error is unduly burdensome if a diligent servicer could not respond to the notice of error without either exceeding the maximum timeframe permitted by § 1024.35(e)(3)(ii) or incurring costs (or dedicating resources) that would be unreasonable in light of the circumstances. The proposed rule would have further clarified that if a servicer can identify a proper assertion of a covered error in a notice of error that is otherwise overbroad or unduly burdensome, a servicer is required to respond to the covered error submissions it can identify. Finally, the Bureau proposed comment 35(g)(1)(ii)-1 to set forth characteristics that may indicate if a notice of error is overbroad or unduly burdensome.

During pre-proposal outreach, consumers, consumer advocates, servicers, and servicing industry representatives indicated to the Bureau that consumers do not typically use the current qualified written request process to resolve errors. During the Small Business Review Panel outreach, small entity representatives expressed that typically qualified written requests received from borrowers were vague forms found online or forms used by advocates as a form of pre-litigation discovery. Servicers and servicing industry representatives indicated that these types of qualified written requests are unreasonable and unduly burdensome. Small entity representatives in the Small Business Review Panel outreach requested that the Bureau consider an exclusion for abusive requests, or requests made with the intent to harass the servicer.

The Bureau requested comment regarding whether a servicer should not be required to undertake the error resolution procedures in proposed § 1024.35(d) and (e) for notices of error that are overbroad or unduly burdensome. Industry commenters supported the exclusion, but urged the Bureau to remove the requirement that servicers identify valid assertions of error in submissions that are otherwise overbroad or unduly burdensome. Industry commenters said servicers should not be required to parse through such submissions to locate a clear assertion of error. One large trade association of mortgage servicers said that the requirement effectively subsumes the exclusion. Consumer group commenters generally disfavored the exclusion. One commenter questioned the assertion that borrowers primarily use qualified written requests to obtain prelitigation discovery. One consumer group said the exclusion gives servicers too much discretion. Another said it requires borrowers to state the basis for their alleged error with too much specificity. An anonymous consumer advocate said a request from a single borrower should not be so voluminous as to be burdensome for servicers to respond. Another consumer group commenter requested that the Bureau address situations in which the servicer erroneously determines that a submission is overbroad or unduly burdensome. Finally, one consumer group commenter said the proposed exclusion for unduly burdensome notices of error leaves borrowers unprotected as to errors that are especially egregious or complex.

In proposing § 1024.35(g)(1)(ii), the Bureau did not intend to frustrate consumers' ability to assert actual complex errors and to have such errors investigated and corrected, as appropriate, by servicers. The Bureau believes it is critical that consumers have a mechanism by which to have complex errors addressed. Accordingly, the Bureau has revised proposed

§ 1024.35(g)(1)(ii) and proposed comment 35(g)(1)(ii)-1 to remove references to unduly burdensome notices of error. At the same time, the Bureau proposed § 1024.35(g)(1)(ii), in part, because the Bureau believes that requiring servicers to respond to overbroad notices of error from some borrowers may cause servicers to expend fewer resources to address other errors that may be more clearly stated and more clearly require servicer attention. As discussed above, the Bureau expands the definition of errors subject to the requirements of § 1024.35 to contain a catch-all for all errors relating to the servicing of the borrower's loan. Given the breadth of the errors subject to the requirements of § 1024.35, the Bureau continues to believe that a requirement for servicers to respond to notices of error that are overbroad may harm consumers and frustrate servicers' ability to comply with the new error resolution requirements. The Bureau does not believe that the error resolution procedures are the appropriate forum for borrowers to prosecute wide-ranging complaints against mortgage servicers that are more appropriate for resolution through litigation. Accordingly, the Bureau is adopting § 1024.35(g)(1)(ii) and comment 35(g)(1)(ii)-1 substantially as proposed, except that the Bureau has revised the provisions to remove references to unduly burdensome notices of error.

35(g)(1)(iii)

Proposed § 1024.35(g)(1)(iii) would have provided that a servicer is not required to comply with the notice of error requirements in proposed § 1024.35(d) and (e) for an untimely notice of error – that is, a notice of error received by a servicer more than one year after either servicing for the mortgage loan that is the subject of the notice of error was transferred by that servicer to a transferee servicer or the mortgage loan amount was paid in full, whichever date is applicable. The Bureau proposed this provision to set a specific and clear time that a servicer may be responsible for correcting errors for a mortgage loan.

Moreover, the Bureau proposed § 1024.35(g)(1)(iii) to achieve the same goal that currently exists in Regulation X with respect to qualified written requests. Specifically, current § 1024.21(e)(2)(ii) states that "a written request does not constitute a qualified written request if it is delivered to a servicer more than one year after either the date of transfer of servicing or the date that the mortgage servicing loan amount was paid in full, whichever date is applicable."

One industry trade association expressed support for proposed § 1024.35(g)(1)(iii). A credit union commenter requested that the Bureau impose an additional time limitation on borrowers' ability to assert errors, noting that it often services mortgages for the life of the loan. A consumer advocacy group commenter disagreed with proposed § 1024.35(g)(1)(iii) and asserted that borrowers should be permitted to raise errors with their current servicer regardless of whether the servicer was responsible for the error. Having considered these comments, the Bureau declines to impose additional time limits on a borrower's ability to assert errors, as borrowers may discover errors long after such errors were made. In addition, the Bureau does not believe that § 1024.35(g)(1)(iii), as proposed, prohibits a borrower from raising errors with the borrower's current servicer. Thus, for the reasons set forth above, the Bureau is adopting § 1024.35(g)(1)(iii) as proposed with a minor technical amendment.

35(g)(2) Notice to Borrower

Proposed § 1024.35(g)(2) would have required that if a servicer determines that it is not required to comply with the notice of error requirements in proposed § 1024.35(d) and (e) with respect to a notice of error, the servicer must provide a notice to the borrower informing the borrower of the servicer's determination. The servicer must send the notice not later than five days (excluding legal public holidays, Saturdays, and Sundays) after its determination and the notice must set forth the basis upon which the servicer has made the determination, noting the applicable provision of proposed § 1024.35(g)(1).

One credit union trade association disfavored the proposed requirement that a servicer send a notice informing the borrower that an error falls into one of the enumerated exceptions. The commenter suggested that the Bureau permit servicers to send a standard notice informing borrowers that the servicer received the notice of error and is not required to respond.

The Bureau proposed § 1024.35(g)(2) because it believes that borrowers should be notified that a servicer does not intend to take any action on the asserted error. The Bureau also believes borrowers should know the basis for the servicer's determination. By providing borrowers with notice of the basis for the servicer's determination, a borrower will know the servicer's basis and will have the opportunity to bring a legal action to challenge that determination where appropriate. Accordingly, having considered the comment, the Bureau is adopting § 1024.35(g)(2) as proposed.

35(h) Payment Requirements Prohibited

Proposed § 1024.35(h) would have prohibited a servicer from charging a fee, or requiring a borrower to make any payment that may be owed on a borrower's account, as a condition of investigating and responding to a notice of error. Proposed comment 35(h)-1 would have clarified that § 1024.35(h) does not alter or otherwise affect a borrower's obligation to make payments owed pursuant to the terms of the mortgage loan. The Bureau proposed § 1024.35(h) for three reasons. First, section 1463(a) of the Dodd-Frank Act added section 6(k)(1)(B) to RESPA, which prohibits a servicer from charging fees for responding to valid qualified written requests. Proposed § 1024.35(h) would implement that provision with respect to qualified written requests. Second, the Bureau believes that a servicer's practice of charging for responding to a notice of error impedes borrowers from pursuing valid notices of error and that the prohibition is therefore necessary and appropriate to achieve the consumer protection purposes of RESPA, including ensuring responsiveness to borrower requests and complaints. Third, the Bureau understands that, in some instances, servicer personnel have demanded that borrowers make payments before the servicer will correct errors or provide information requested by a borrower. The Bureau believes that a servicer should be required to correct errors notwithstanding the payment status of a borrower's account. A consumer advocacy group commenter noted, without elaborating, that it supported the fee prohibition reflected in proposed § 1024.35(h). For the reasons set out above, the Bureau is adopting § 1024.35(h) and comment 35(h)-1 as proposed.

35(i) Effect on Servicer Remedies

Adverse Information

Proposed § 1024.35(i)(1) would have provided that a servicer may not furnish adverse information regarding any payment that is the subject of a notice of error to any consumer reporting agency for 60 days after receipt of a notice of error. RESPA section 6(e) sets forth this prohibition on servicers with respect to a qualified written request that asserts an error. Proposed § 1024.35(i)(1) would implement section 6(e) of RESPA with respect to qualified written requests and would apply the same requirements to other notices of error.

The Bureau proposed to maintain the prohibition regarding supplying adverse information for the 60-day timeframe set forth in section 6(e)(3) of RESPA with respect to qualified written requests and to apply it to all notices of error. Even though a notice of error may be resolved by no later than 45 days after it is received pursuant to proposed § 1024.35(e)(3)(ii), the Bureau reasoned that the 60-day timeframe is appropriate in the event that there are follow-up inquiries or additional information provided to the borrower.

Industry commenters strongly objected to the 60-day reporting prohibition. Commenters said the proposal undermines the accuracy and integrity of credit reports. One commenter said the Fair Credit Reporting Act already governs credit reporting. One large bank commenter asserted that because credit reporting is a safety and soundness protection, banks have a duty to accurately report delinquencies. Several industry commenters also noted a concern that, based on prior experience, borrowers may use the reporting prohibition to manipulate the system by disputing legitimate delinquencies in order to apply for credit without derogatory marks on credit reports. The Bureau acknowledges the concerns expressed but notes that Congress specifically imposed the 60-day reporting prohibition with respect to qualified written requests in section 6(e) of RESPA. As discussed above, the Bureau believes it is necessary to achieve the consumer protection purposes of RESPA, including to ensure responsiveness to borrower requests and complaints and the provision of accurate and relevant information to borrowers, to apply the same procedures to all notices of error as applicable to qualified written requests. Otherwise, borrowers and servicers must expend wasteful resources parsing the form requirements applicable to qualified written requests and navigating between two separate regulatory regimes. As detailed above, the Bureau believes that the interests of borrowers and servicers are best served and the purposes of RESPA are best met through a single regulatory regime applicable to both qualified written requests and other notices of error. The Bureau is therefore adopting § 1024.35(i)(1) as proposed, as it is consistent with the 60-day reporting prohibition for qualified written requests required by section 6(e) of RESPA.

Ability to Pursue Foreclosure

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 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.

The requirements in proposed § 1024.41 establish procedures that servicers must follow for reviewing loss mitigation applications. Servicers are capable of complying with the requirements prior to a foreclosure sale. Nothing in this proposed requirement affects the validity or enforceability of the mortgage loan or lien. Further, a servicer has the opportunity to retain its remedies when a borrower submits a completed application for a loss mitigation option. A servicer may establish a deadline by which a borrower must submit a completed application for a loss mitigation option, and, so long as the servicer fulfills its duty to evaluate the borrower for a loss mitigation option before the date of a foreclosure sale, a servicer may comply with the requirements of § 1024.35 without suspending the foreclosure sale. For the reasons set forth above and in the proposal, the Bureau is adopting § 1024.35(i)(2) as proposed, except that the Bureau has revised the provision to reference both paragraphs (b)(9) and (10).

Section 1024.36 Requests for Information

Section 6(e) of RESPA requires servicers to respond to “qualified written requests” that relate to the servicing of a loan. Section 1463(a) of the Dodd-Frank Act amended RESPA to add section 6(k)(1)(B), which prohibits servicers from charging fees for responding to valid qualified written requests (as defined in regulations to be issued by the Bureau). In addition, section 1463(a) of the Dodd-Frank Act amended RESPA to add section 6(k)(1)(D), which states that a servicer shall not fail to provide information regarding the owner or assignee of a mortgage loan within ten business days of a borrower’s request.

Proposed § 1024.36 set forth requirements servicers would be required to follow to respond to information requests from borrowers with respect to their mortgage loans. The Bureau proposed § 1024.36 to implement the servicer prohibitions set forth in section 6(k)(1)(B) and 6(k)(1)(D) of RESPA, as well as the requirements applicable to qualified written requests set forth in section 6(e) of RESPA. In addition, as discussed above with respect to § 1024.35, the Bureau believed that it served the interests of borrowers and servicers alike to establish a uniform regulatory regime, parallel to that applicable to notices of error under § 1024.35, applicable to borrower requests for information relating to their mortgage loan irrespective of whether such requests were made in the form of a qualified written request. In the Bureau’s view, such requirements are necessary to ensure that servicers respond to borrowers’ requests and complaints and timely provide borrowers with relevant and accurate information about their mortgage loans.

Legal Authority

Section 1024.36 implements section 6(k)(1)(D) of RESPA, and to the extent the requirements are also applicable to qualified written requests, sections 6(e) and 6(k)(1)(B) of

RESPA. Pursuant to the Bureau's authorities under sections 6(j), 6(k)(1)(E), and 19(a) of RESPA, the Bureau is also adopting certain additions and certain exemptions to these provisions. As explained in more detail below, these additions and exemptions are necessary and appropriate to achieve the consumer protection purposes of RESPA, including ensuring responsiveness to consumer requests and complaints and the provision and maintenance of accurate and relevant information.

36(a) Information Requests

Proposed § 1024.36(a) would have required a servicer to comply with the requirements of proposed § 1024.36 for an information request from a borrower that includes the borrower's name, enables the servicer to identify the borrower's mortgage loan account, and states the information the borrower is requesting for the borrower's mortgage loan account. The Bureau received no comment on this aspect of proposed § 1024.36, and is finalizing these requirements as proposed. The Bureau is otherwise finalizing proposed § 1024.36 as discussed below.

Qualified Written Requests

Similar to the proposed requirements for notices of error, proposed § 1024.36(a) would have required a servicer to treat a qualified written request that requests information relating to the servicing of a loan as an information request subject to the requirements of § 1024.36. The Bureau intended to propose servicer obligations applicable to qualified written requests that were the same as requirements applicable to information requests under § 1024.36(a). One consumer group commenter expressed support for the proposal because it dispensed with technicalities about whether an information request constituted a valid qualified written request. One trade association commenter said the Bureau failed to define a valid qualified written request and said that proposed § 1024.36 does not fully integrate section 6(e) of RESPA into the proposed information request procedures. Another trade association of private mortgage lenders said the proposal did not make clear what constitutes a qualified written request and to what extent servicers must continue to comply with existing law regarding qualified written requests. Having considered these comments, the Bureau notes that final § 1024.31 defines the term “qualified written request.” In addition, as discussed above, the Bureau has added new comment 31 (qualified written request)-2, which clarifies that the error resolution and information request requirements in §§ 1024.35 and 1024.36 apply as set forth in those sections irrespective of whether the servicer receives a qualified written request. Finally, the Bureau has revised proposed § 1024.36(a) to make clear in the final rule that a qualified written request that requests information relating to the servicing of a mortgage loan is a request for information for purposes of § 1024.36 for which a servicer must comply with all requirements applicable to a request for information.

Oral Information Requests

The Bureau proposed to require servicers to comply with information request procedures under § 1024.36 for information requests made by borrowers orally or in writing. The Bureau believed this approach was warranted, in part, because discussions with consumers, consumer advocates, servicers, and industry trade associations during outreach suggested that the vast majority of borrowers orally request information from servicers.

As was the case for notices of error, the Bureau believed that a requirement that an information request be in writing would serve as a barrier that could unduly restrict the ability of borrowers to have errors resolved and requests fulfilled. At the same time, the Bureau recognized the burdens on servicers to ensure compliance with the proposed rule with respect to oral information requests. The Bureau believed that elements of the proposed rule would assist in mitigating servicer burden. For example, the Bureau considered that the proposal allowed servicers to designate a specific telephone number for receiving oral information requests and included an alternative compliance provision that allows a servicer to provide information orally if the information is provided within five days of the borrower's request.

In addition, the Bureau learned from pre-proposal discussions with servicers, including the small entity representatives in the Small Business Review Panel outreach, that most information requests are responded to by servicers either on the same telephone call with the borrower or within an hour of a borrower's communication.   The Bureau believed that allowing servicers to respond to information requests orally would significantly reduce the burden associated with the proposed information request requirements on servicers. Further, the Bureau believed that this requirement provided flexibility for small servicers consistent with the recommendations of the Small Business Review Panel and mitigates concerns by the small entity representatives regarding compliance costs.

The Bureau solicited comment regarding whether servicers should be required to comply with information request procedures for information requests asserted orally. The Bureau received a number of comments from both consumer groups and various industry members. Consumer group commenters reiterated their support for applying the information request provisions to requests made orally, noting that consumers most often request information orally rather than in writing. Consumer commenters on Regulation Room disfavored the proposal's application of the information request procedures under § 1024.36 to information requests received orally. Consumer commenters, citing their negative experiences attempting to request information from servicers orally, were concerned that encouraging an oral process would weaken consumer protections. Industry commenters also opposed the proposal's application of the information request requirements to oral information requests. Commenters said doing so would create new burdens for servicers regarding tracking the information requests and monitoring that a borrower receives written acknowledgements and responses. Industry commenters further stressed that a written process would provide more clarity and certainty as to the nature of the request and what the servicer communicated to the borrower during the conversation. Further, industry commenters asserted, requiring written information requests would help avoid situations in which the borrower and servicer have differing recollections as to the borrower's request and the servicer's response during the conversation. Absent a written record, commenters said, servicers would need to record conversations with borrowers to minimize the significant litigation risk. The commenters asserted that recording conversations could be especially costly for small servicers and would require the borrower's consent in many jurisdictions.

After consideration of these comments, the Bureau is amending proposed § 1024.36(a) to require servicers to comply with § 1024.36 solely with respect to written requests for information. While borrowers may continue to raise information requests orally, servicers will not be required to comply with the formal requirements outlined in § 1024.36 for such requests. Instead, the Bureau has added to the final rule § 1024.38(b)(1)(iii), which generally requires that servicers maintain policies and procedures that are reasonably designed to ensure that servicers provide borrowers with accurate and timely information and documents in response to borrowers' requests for information. In addition, the Bureau has added a requirement in § 1024.38(b)(5) that servicers establish policies and procedures reasonably designed to achieve the objective of informing borrowers about the availability of procedures for submitting written notices of error set forth in § 1024.35 and written information requests set forth in § 1024.36.

The Bureau believes that eliminating the requirement under proposed § 1024.36(a) for servicers to comply with the requirements under § 1024.36 with respect to oral requests for information from borrowers and instead requiring servicers to develop policies and procedures to ensure responsiveness to such oral requests and inform borrowers about the availability of the written process, strikes the appropriate balance between providing prompt responses to borrower requests and mitigating servicer burden. The final rule will thus require servicers to maintain policies and procedures reasonably designed to assure that the servicers respond to oral information requests on a more informal basis, without having to comply with all of the required steps for a formal information request under § 1024.36. As discussed more fully below, because only written information requests will be subject to the procedures outlined in § 1024.36, the Bureau believes it is logical and appropriate to require servicers to respond to such written requests in writing.

Borrower's Representative

Section 6(e)(1)(A) of RESPA states that a qualified written request may be provided by a "borrower (or an agent of the borrower)." *See* RESPA section 6(e)(1)(A). The Bureau proposed comment 36(a)-1 to clarify that this standard applies to all information requests, irrespective of whether they are qualified written requests. Specifically, proposed comment 36(a)-1 would have clarified that a servicer should treat an information request submitted by a person acting as an agent of the borrower as if it received the request directly from the borrower. Further, proposed comment 36(a)-1 stated that servicers 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.

Several industry commenters said it would be costly and burdensome to determine whether a third party has authority to act on a borrower's behalf. Many requested clarification as to what the Bureau believes constitutes acting on the borrower's behalf. Further, some industry commenters expressed concern about potential liability for the improper release of information, including the risk of violating State or Federal privacy laws, as well as what commenters perceived to be increased risk of identity theft and fraud. Finally, a few industry commenters took the position that only the borrower, but not the borrower's agent, should be permitted to request information pursuant to § 1024.36.

One consumer advocacy group noted that the proposal to permit borrowers' agents to submit information requests is consistent with the statutory language. Consumer groups also requested that the Bureau clarify that the timelines will not toll during the period in which the servicer attempts to validate through reasonable policies and procedures that a third party purporting to act on a borrower's behalf is, in fact, an agent of the borrower.

Having considered these comments, the Bureau is amending proposed comment 36(a)-1 to address servicers' concerns about potential liability for the improper release of information. The final comment clarifies that servicers may have 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, by requiring that purported agents provide documentation from the borrower stating that the purported agent is acting on the borrower's behalf. Upon receipt of such documentation, the servicer shall treat a request for information as having been submitted by the borrower. The Bureau acknowledges that requiring servicers to respond to information requests submitted by borrowers' agents is more costly than limiting the requirement to borrowers' requests, but notes that this approach is consistent with section 6(e)(1)(A) of RESPA with respect to a qualified written request. The Bureau finds that it is necessary and appropriate to achieve the consumer protection purposes of RESPA, including ensuring responsiveness to borrower requests and complaints, to apply this requirement to all written information requests, especially since borrowers who are experiencing difficulty in making their mortgage payments or dealing with their servicer may turn, for example, to a housing counselor or other knowledgeable persons to assist them in addressing such issues. The Bureau declines to further define the term "agent." The concept of agency has historically been defined in State and other applicable law. Thus, it is appropriate for the definition to defer to applicable State law regarding agents.

Information Subject to Information Request Procedures

Section 6(e)(1)(A) of RESPA requires servicers to respond to qualified written requests that request information relating to the servicing of a loan. Proposed § 1024.36(a) would have provided that any information requested by a borrower with respect to the borrower's mortgage loan is subject to the information request requirements in proposed § 1024.36 other than as provided in proposed § 1024.36(f), which defined specific circumstances in which a servicer is not obligated to comply with information request procedures.

One industry commenter expressed concern that borrowers or their attorneys may abuse the information request process. The commenter said that borrowers may request information that should already be in the borrower's possession, such as information received at closing. The commenter also urged the Bureau not to require that servicers produce the servicing file in response to a borrower's information request. The commenter said that such information will be of limited utility to borrowers and often reflects privileged communications. Having considered these comments, the Bureau notes that final § 1024.36, like the proposal, has mechanisms in place to limit abuse and to protect confidential communications. Specifically, as discussed more fully below, § 1024.36(f) lists circumstances under which servicers need not comply with information request requirements under § 1024.36. To the extent that a borrower requests a servicing file, the servicer shall provide the borrower with a copy of the information contained in the file subject to the limitations set forth in § 1024.36(f).

Another commenter requested clarification as to whether consumers may use the information request process to request payoff statements. The Bureau is amending proposed § 1024.36(a) to make clear that servicers need not treat borrowers' requests for payoff balances as requests for information for which servicers must comply with the information request procedures set forth in § 1024.36. The Bureau believes that this revision is appropriate, as borrowers already have a mechanism by which to request payoff balances under section 129G of TILA with respect to home loans. For those loans that are not subject to section 129G of TILA, the Bureau believes that it would be inappropriate to extend the requirements of that provision beyond the scope mandated by Congress, as implemented by § 1026.36(c)(3) of the 2013 TILA Servicing Final Rule.

Owner or Assignee

Section 1463(a) of the Dodd-Frank Act amended RESPA to add section 6(k)(1)(D), which states that a servicer shall not fail to provide information regarding the owner or assignee of a mortgage loan within ten business days of a borrower's request. Proposed comment 36(a)-2 would have clarified that if a borrower requests information regarding the owner or assignee of a mortgage loan, a servicer complies with its obligations to identify the owner or assignee of the mortgage loan by identifying the entity that holds the legal obligation to receive payments from a mortgage loan. Proposed comments 36(a)-2.i and 36(a)-2.ii would have provided examples of which party is the owner or assignee of a mortgage loan for different forms of mortgage loan ownership. These include situations when a mortgage loan is held in portfolio by an affiliate of a servicer, when a mortgage loan is owned by a trust in connection with a private label securitization transaction, and when a mortgage loan is held in connection with a GSE or Ginnie Mae guaranteed securitization transaction. The Bureau believes that it would not provide additional consumer protection to impose an obligation on a servicer to identify entities that may have an interest in a borrower's mortgage loan other than the owner or assignee of the mortgage loan, as such information would be of limited utility.

During outreach, servicers generally did not express concerns to the Bureau regarding the obligation to provide borrowers with the type of information subject to the information request requirements. Specifically, in the Small Business Review Panel outreach, small entity representatives indicated that they felt fairly comfortable with the types of information that would be subject to the requirements, indicating that this information was generally in the borrower's mortgage loan file.

The small entity representatives did express concern regarding the obligation to provide information regarding the owner or assignee of a mortgage loan. The small entity representatives stated that servicers may not have contact information for owners or assignees of mortgage loans, that such owners or assignees are not prepared to handle calls from borrowers, and that a typical servicer duty is to handle customer complaints so that owners or assignees of mortgage loans do not have to handle that responsibility.   Certain owners, assignees, and guarantors of mortgage loans, including other federal agencies, have expressed similar concerns to the Bureau.

Industry commenters expressed similar concerns in response to the proposal. One industry trade association suggested that the Bureau amend proposed comment 36(a)-2 to require that servicers identify the name of the trustee rather than the name of the legal entity that holds the legal right to receive payments. The commenter argued that the information that the Bureau proposes servicers provide would not be meaningful to borrowers, as the trust itself cannot act. Moreover, the commenter asserted that servicers do not typically track the trust name with the account, as such information is rarely used. One large bank commenter urged the Bureau to amend the comment to replace the reference to "obligation" with "right" as the commenter asserted the former is not technically accurate.

As outlined in the proposal, the Bureau understands the concerns asserted by servicers, owners, assignees, guarantors, and other federal agencies that requiring servicers to provide the proposed information to borrowers may confuse borrowers and lead to attempts to communicate with owners or assignees that are unprepared or unwilling to engage in such communications. The requirement that servicers identify to the borrower the owner or assignee of a mortgage loan was added as section 6(k)(1)(D) of RESPA by the Dodd-Frank Act. Section 6(k)(1)(D) requires that information regarding the owner or assignee of a mortgage loan must be provided to borrowers. The Bureau believes that the benefit to borrowers of obtaining the information, which was required by Congress, justifies any concerns about the potential for confusion. As to commenters' concern that trustee information is more relevant than trust information, the Bureau notes that proposed comment 36(a)-2 provided that where a trust is the owner or assignee of a loan, a servicer must provide the name of both the trustee and the trust. Also, for clarification purposes, the Bureau is revising proposed comment 36(a)-2 to state that when a borrower requests information regarding the owner or assignee of a mortgage loan, a servicer complies by identifying the person on whose behalf the servicer receives payments from the borrower. Otherwise, the Bureau is adopting comment 36(a)-2 substantially as proposed.

36(b) Contact Information for Borrowers to Request Information

The Bureau proposed § 1024.36(b), which would have permitted a servicer to establish an exclusive telephone number and address that a borrower must use to request information in accordance with the procedures in § 1024.36. If a servicer chose to establish a separate telephone number and address for information requests, the proposal would have required the servicer to provide the borrower a notice that states that the borrower may request information using the telephone number and address established by the servicer for that purpose. Proposed comment 36(b)-1 would have clarified that if a servicer has not designated a telephone number and address that a borrower must use to request information, then the servicer will be required to respond to an information request received at any office of the servicer. Proposed comment 36(b)-2 would have further clarified that the written notice to the borrower may be set forth in another written notice provided to the borrower, such as a notice of transfer, periodic statement, or coupon book. Proposed comment 36(b)-2 would have further clarified that if a servicer establishes a telephone number and address for receipt of information requests, the servicer must provide that telephone number and address in any communication in which the servicer provides the borrower with contact information for assistance from the servicer.

The Bureau proposed to allow servicers to establish a telephone number and address that a borrower must use to request information in order to allow servicers to direct oral and written requests to appropriate personnel that have been trained to ensure that the servicer responds appropriately. As the proposal noted, at larger servicers with other consumer financial service affiliates, many personnel simply do not typically deal with mortgage servicing-related issues. For instance, at a major bank servicer, a borrower might request information from a local bank branch staff, who likely would not have access to the information necessary to respond to the request. Thus, the Bureau reasoned, if a servicer establishes a telephone number and address that a borrower must use, a servicer would not be required to comply with the information request requirements set forth in § 1024.36 for requests that may be received by the servicer through a different method.

Most industry commenters favored allowing servicers to designate an address and telephone number to which borrowers must direct information requests. At the same time, such commenters asserted that the proposal constituted an insufficient remedy to the burdens inherent in permitting oral information requests. Some commenters said that designating telephone lines for information requests could be especially costly for small servicers. Thus, one community bank trade association argued that the proposal favored large institutions. Two industry commenters requested clarification regarding how servicers must handle information requests sent to the wrong address. Finally, one credit union commenter asserted that servicers should only be required to include designated telephone numbers and addresses in regular forms of communication to borrowers, such as the periodic statement. In contrast, consumer group commenters suggested that to the extent a servicer designates a telephone line or address, the servicer should be required to post such information on its website and to include it in mailed notices.

Because the final rule removes the requirement that servicers comply with information request requirements under § 1024.36 for oral information requests, the Bureau believes that it is no longer necessary to regulate the circumstances under which servicers may direct oral information requests to an exclusive telephone number that a borrower must use to request information. However, for written information requests, the Bureau continues to believe that it is reasonable to permit servicers to designate a specific address for the intake of information requests. Allowing a servicer to designate a specific address is consistent with current requirements of Regulation X with respect to qualified written requests. Current § 1024.21(e)(1) permits a servicer to designate a "separate and exclusive office and address for the receipt and handling of qualified written requests." Moreover, the Bureau believes that identifying a specific address for receiving information requests will benefit consumers. By providing a specific address, servicers will identify to consumers the office capable of addressing requests made by consumers.

The Bureau believes it is critical for servicers to publicize any designated address to ensure that borrowers know how properly to request information and to avoid evasion by servicers of information request procedures. This is especially important because, as noted in the proposal, servicers who designate a specific address for receipt of information requests are not required to comply with information request procedures for notices sent to the wrong address. Accordingly, final § 1024.36(b) requires servicers that designate addresses for receipt of requests for information to post the designated address on any website maintained by the servicer if the servicer lists any contact address for the servicer. In addition, final comment 36(b)-2 retains the clarification that servicers that establish an address that a borrower must use to request information, must provide the address to the borrower in any communication in which the servicer provides the borrower with contact information for assistance. The Bureau is otherwise adopting § 1024.36(b) and comments 36(b)-1 and 36(b)-2 as proposed, except that it has revised the provisions permitting servicers to designate a telephone number that a borrower must use to request information and clarified that the notice must be written.

Multiple Offices

Proposed § 1024.36(b), similar to proposed § 1024.35(c) for notices of error, would have required a servicer to use the same telephone number and address it designates for receiving notices of error for receiving information requests pursuant to proposed § 1024.36(b), and vice versa. Further, proposed comment 36(b)-3 would have clarified that any telephone numbers or addresses designated by a servicer for any borrower may be used by any other borrower to submit an information request. This clarifies that a servicer may not determine that an information request is invalid if it was received at any telephone number or address designated by the servicer for receipt of information requests just because it was not received by the specific phone number or address identified to a specific borrower.

One non-bank servicer expressed concern about the proposal's requirement to designate the same address and telephone number for notices of error and information requests. The commenter explained that it assigns separate teams to address information requests and error notices. Thus, the commenter asserted, proposed § 1024.36(b) would negatively impact customer service. Having considered this comment, the Bureau notes that it proposed § 1024.36(b) because it was concerned that designating separate telephone numbers and addresses for notices of error and information requests could impede borrower attempts to submit notices of error and information requests to servicers due to debates over whether a particular communication constituted a notice of error or an information request. For the reasons set forth above and in the proposal, final § 1024.36(b) retains the requirement that servicers designate the same address for receipt of information requests and notices of error. In addition, the Bureau is adopting comment 36(b)-3 substantially as proposed, except that the Bureau has removed references to information requests received by telephone.

Proposed comment 36(b)-5 would have further clarified that a servicer may use automated systems, such as an interactive voice response system, to manage the intake of borrower calls. The proposal provided that prompts for requesting information must be clear and provide the borrower the option to connect to a live representative. Because the final rule does not require servicers to comply with information request procedures for oral requests, the Bureau is withdrawing proposed comment 36(b)-5 from the final rule.

Internet Intake of Information Requests

The Bureau proposed comment 36(b)-4 to clarify that a servicer would not be required to establish a process for receiving information requests through email, website form, or other online methods. Proposed comment 36(b)-4 was intended to further clarify that if a servicer establishes a process for receiving information requests through online methods, the servicer can designate it as the only online intake process that a borrower can use to request information. A servicer would not be required to provide a written notice to a borrower in order to gain the benefit of the online process being considered the exclusive online process for receiving information requests. Proposed comment 36(b)-4 would have further clarified that a servicer's decision to accept requests for information through an online intake method shall be in addition to, not in place of, any processes for receiving information requests by phone or mail.

One consumer group commenter advocated requiring servicers to establish an online process for receipt of information requests. The Bureau agrees that online processes have significant promise to facilitate faster, cheaper communications between borrowers and servicers. However, the Bureau believes that this suggestion raises a broader issue around the use of electronic media for communications between servicers (and other financial services providers) and borrowers (and other consumers). The Bureau believes it would be most effective to address this issue in that larger context after study and outreach to enable the Bureau to develop principles or standards that would be appropriate on an industry-wide basis. The Bureau is therefore, at this time, finalizing language to permit, but not require, servicers to elect whether to adopt such a process. The Bureau intends to conduct broader analyses of electronic communications' potential for disclosure, error resolution, and information requests after the rule is released. Accordingly, the Bureau is adopting comment 36(b)-4 as proposed, with minor technical amendments, and having removed references to information requests received by telephone.

36(c) Acknowledgment of Receipt

Proposed § 1024.36(c) would have required a servicer to provide a borrower an acknowledgement of an information request within five days (excluding legal public holidays, Saturdays, and Sundays) of receiving an information request. Proposed § 1024.36(c) would have implemented section 1463(c) of the Dodd-Frank Act, which amended the current acknowledgement deadline of 20 days for qualified written requests to five days. Proposed § 1024.36(c) would have further applied the same timeline applicable to a qualified written request to any information request.

Industry commenters, including multiple credit union trade associations, requested that the Bureau lengthen the acknowledgment time period, asserting that five days was unreasonable, especially for smaller institutions. A nonprofit mortgage servicer said the timeframe was insufficient for its small volunteer staff. An industry trade association commenter argued that the acknowledgment requirement creates unnecessary paperwork and should be removed from the final rule altogether. In contrast, consumer group commenters were generally supportive of the acknowledgment requirement, noting that the timeline in the proposal was consistent with that in the Dodd-Frank Act for qualified written requests.

The Bureau believes acknowledgment within five days is appropriate given that the Dodd-Frank Act expressly adopts that requirement for qualified written requests and differentiating between two regimes would increase operational complexity. Moreover, the burden on servicers is significantly mitigated by the fact that the information request procedures are only applicable to written requests. The Bureau further notes that the contents of the acknowledgment are minimal. Moreover, servicers need not provide an acknowledgment if the servicer provides the information requested within five days. Accordingly, the Bureau is adopting § 1024.36(c) as proposed.

36(d) Response to Information Request

The Bureau proposed § 1024.36(d) to set forth requirements on servicers for responding to information requests. As discussed in more detail below, proposed § 1024.36(d) would have implemented the response requirement in section 6(e)(2) of RESPA applicable to a qualified written request, including section 1463(c) of the Dodd-Frank Act, which amended certain deadlines for responses to qualified written requests. Proposed § 1024.36(d) would have further implemented the ten business day timeline in section 6(k)(1)(D) of RESPA by applying the timeline to requests for information about the owner or assignee of the loan.

36(d)(1) Investigation and Response Requirements

Proposed § 1024.36(d)(1) would have required a servicer to respond to an information request within 30 days by either (i) providing the borrower with the requested information and contact information for further assistance, or (ii) conducting a reasonable search for the requested information and providing the borrower with a written notification that states that the servicer has determined that the requested information is not available or cannot reasonably be obtained by the servicer, as appropriate, the basis for the servicer's determination, and contact information for further assistance. The proposal would have only required a servicer to provide a written notice to the borrower in response to the information request if the information requested by the borrower is not available or cannot reasonably be obtained by the servicer. The proposal would have permitted a servicer to respond either orally or in writing to the borrower if the servicer is providing the information requested by the borrower. The Bureau proposed to allow servicers to respond orally because it believed that the goal of providing information to borrowers would be furthered by allowing servicers to respond orally. Additionally, the Bureau believed that allowing the servicer to respond orally would reduce the burden on servicers.

One consumer advocacy group commenter urged the Bureau to require that servicers respond to information requests in writing. The commenter argued that servicers regularly provide borrowers inconsistent and inaccurate information, which necessitates a written response. Because, as discussed above, the final rule requires borrowers to submit information requests in writing in order to gain the benefit of the information request procedures set forth in § 1024.36, the Bureau now believes it is appropriate and effectuates the consumer protection purposes of RESPA to require that servicers respond to borrowers' information requests in writing. Doing so will help ensure that there is a written record of both the borrower's request and the servicer's response, which the Bureau believes will reduce confusion regarding the accuracy of the information provided. For these reasons, the Bureau is adopting § 1024.36(d)(1) substantially as proposed, except that it has removed references to a servicer's oral response and clarified that the servicer's contact information must include a telephone number.

Information Not Available

Proposed comment 36(d)(1)(ii)-1 would have clarified that information should not be considered as available to a servicer if the information is not in the servicer’s possession or control or the servicer cannot retrieve the information in the ordinary course of business through reasonable efforts.

The purpose of the information request requirements is to provide an efficient means for borrowers to obtain information regarding their mortgage loan accounts and the Bureau believes that imposing obligations on servicers to provide information in response to an information request is an efficient means of achieving the goal of providing a borrower with access to requested information. However, the Bureau proposed comment 36(d)(1)(ii)-1 because it believes that burden for information requests will increase greatly if a servicer is required to undertake an investigation for documents that are not in a servicer’s possession or control. The same inefficiency exists even if information is in a servicer’s possession or control but, for appropriate business reasons, is stored in a medium that is not accessible by a servicer in the ordinary course of business. The Bureau believes that the marginal benefit of having additional information available to borrowers is not justified by the significant burdens that such investigations may incur. Moreover, the Bureau believes that it would frustrate the consumer protection purposes of RESPA to require that servicers devote considerable resources, which could otherwise be spent on responding to information requests that would benefit borrowers, to locating inaccessible information.

One mortgage servicer commented on proposed comment 36(d)(1)(ii)-1. The commenter requested that the Bureau provide examples in the commentary of what it considers to be unavailable information. Proposed comment 36(d)(1)(ii)-2 provides examples of when documents should and should not be considered to be available to a servicer in response to an information request, and such examples are reflected in the final comment as well. For the reasons discussed in the proposal and above, the Bureau is adopting comments 36(d)(1)(ii)-1 and 36(d)(1)(ii)-2 substantially as proposed.

36(d)(2) Time Limits

36(d)(2)(i)

Section 1463(b) of the Dodd-Frank Act amended section 6(e)(2) of RESPA to require a servicer to investigate and respond to a qualified written request within 30 days (excluding legal public holidays, Saturdays, and Sundays). Prior to the Dodd-Frank Act, servicers had 60 days to investigate and respond to a borrower's qualified written request. The Bureau proposed § 1024.36(d)(2)(i) to implement section 6(e)(2) of RESPA with respect to qualified written requests, and to impose the same timeframe on other requests for information from borrowers. Specifically, proposed § 1024.36(d)(2)(i) would have required a servicer to respond to an information request not later than 30 days (excluding legal public holidays, Saturdays, and Sundays) after the servicer receives the information request, with one exception discussed below.

While several industry commenters asserted that 30 days was insufficient, one credit union opined that the timeline was reasonable. Similarly, a consumer group commenter noted that the timeline was consistent with the time period for qualified written requests required by the Dodd-Frank Act. Consumer commenters on Regulation Room asserted that the timeline was too generous. The Bureau believes that the 30-day timeframe proposed is appropriate given that the Dodd-Frank Act expressly changed the timeframe for qualified written requests from 60 days to 30 days and differentiating between two regimes would increase operational complexity as well as burden on borrowers and servicers. Accordingly, the Bureau is adopting the 30-day timeline as proposed.

Shortened Time Limit to Provide Information Regarding the Identity of the Owner or Assignee

Section 1463(a) of the Dodd-Frank Act added section 6(k)(1)(D) to RESPA, which sets forth a ten business day limitation on a servicer to respond to a borrower's request for information regarding the owner or assignee of a mortgage loan. The Bureau proposed § 1024.36(d)(2)(i)(A) to implement this provision of RESPA. Proposed § 1024.36(d)(2)(i)(A) would have provided that if a borrower submits a request for information regarding the identity of, and address or relevant contact information for, the owner or assignee of a mortgage loan, a servicer shall respond to the information request with ten days (excluding legal public holidays, Saturdays, and Sundays). Proposed § 1024.36(d)(2)(i)(A) would have required a servicer to provide the requested information within ten days (excluding legal public holidays, Saturdays, and Sundays) instead of "10 business days," as the Bureau interprets the "10 business day" requirement in section 6(k)(1)(D) of RESPA to mean ten calendar days with an exclusion for intervening legal public holidays, Saturdays, and Sundays, and proposes to implement that interpretation in proposed § 1024.36(d)(2)(i)(A).

Two non-bank servicers commented that ten days is insufficient for those circumstances in which a servicer needs to obtain documentation confirming ownership, such as information contained in the collateral file. The Bureau acknowledges the concerns expressed but, as discussed in the proposal, the Bureau does not believe that the burden of obtaining this information for any borrower will be significant enough to justify additional time beyond the ten days (excluding legal public holidays, Saturdays, and Sundays) established by Congress for responding to borrower requests for information regarding the owner or assignee of the loan. Servicers generally have access to the identification of investors as that information is necessary to determine where to direct mortgage loan payments and reports with respect to the performance of serviced assets. The benefit to the borrower of obtaining the information, which Congress required, justifies the costs to servicers of complying within ten days (excluding legal public holidays, Saturdays, and Sundays). Accordingly, the Bureau is adopting § 1024.36(d)(2)(i)(A) as proposed.

Extensions of Time Limits

Section 1463(c)(3) of the Dodd-Frank Act amended section 6(e) of RESPA to permit servicers to extend the time for responding to a qualified written request by 15 days if, before the end of the 30-day period, the servicer notifies the borrower of the reasons for the extension. The Bureau proposed § 1024.36(d)(2)(ii) to implement this provision with respect to qualified written requests, and to impose the same timeframe with respect to other requests for information. Proposed § 1024.36(d)(2)(ii) would have permitted a servicer to extend the time period for responding to an information request by 15 days (excluding legal public holidays, Saturdays, and Sundays) if, before the end of the 30-day period set forth in proposed § 1024.36(d)(2)(i)(B), the servicer notifies the borrower of the extension and the reasons for the delay in responding. For the reasons discussed above, the Bureau did not propose to apply the extension allowance of proposed § 1024.36(d)(2)(ii) to information requests with respect to the owner or assignee of a mortgage loan. Permitting a 15-day extension of that timeframe would negate the shortened response period and undermine the purpose served by shortening it. While some consumer groups disfavored the extension, for the reasons discussed above and in the proposal, the Bureau is adopting § 1024.36(d)(2)(ii) as proposed with minor technical amendments.

36(e) Alternative Compliance

Proposed § 1024.36(e) would have provided that a servicer is not required to comply with the requirements of paragraphs (c) and (d) of proposed § 1024.36 if the information requested by a borrower is provided to the borrower within five days along with contact information the borrower can use for further assistance. This provision was consistent with section 6(e)(1)(A) of RESPA, which requires servicers to provide written acknowledgment of a qualified written request within five days (excluding legal public holidays, Saturdays, and Sundays) "unless the action requested is taken within such period." Proposed § 1024.36(e) would have permitted a servicer to provide the information requested either orally or in writing. Proposed comment 36(e)-1 would have permitted servicers that provide information orally to demonstrate compliance by, among other things, including a notation in the servicing file that the information requested was provided or maintaining a copy of a recorded telephone conversation.

Because, as discussed above, the final rule requires borrowers to submit information requests in writing in order to gain the benefit of the information request procedures set forth in § 1024.36, the Bureau now believes it is appropriate and consistent with the consumer protection purposes of RESPA to require that servicers respond to borrowers' information requests in writing. Doing so will help ensure that there is a written record of both the borrower's request and the servicer's response, which the Bureau believes will reduce confusion regarding the accuracy of the information provided. The Bureau did not receive comment regarding proposed § 1024.36(e) and, for the reasons set forth above, is adopting § 1024.36(e) substantially as proposed, except that it no longer permits servicers to respond orally and clarifies that the contact information must include a telephone number. The Bureau is removing proposed comment 36(e)-1 from the final rule.

36(f) Requirements not Applicable

The Bureau proposed § 1024.36(f) to set forth the types of information requests to which the information request requirements would not apply.

36(f)(1) In General

Proposed § 1024.36(f)(1) would have provided that a servicer is not required to comply with the information request requirements set forth in § 1024.36(c) and (d) if the servicer reasonably makes certain determinations specified in §§ 1024.36(f)(1)(i), (ii), (iii), (iv) or (v). Specifically, subject to certain exceptions, a servicer would not be required to comply with information request requirements under § 1024.36 as to information requests that are duplicative, overbroad or unduly burdensome, or untimely, as well as requests for confidential, proprietary, general corporate or irrelevant information. A servicer would be liable to the borrower for its unreasonable determination that any of the listed categories apply and resulting failure to comply with proposed § 1024.36(c) and (d).

36(f)(1)(i)

Proposed § 1024.36(f)(1)(i) would have provided that a servicer is not required to comply with the information request requirements in proposed § 1024.36(c) and (d) with respect to an information request that requests information that is substantially the same as information previously requested by or on behalf of the borrower, and for which the servicer has previously complied with its obligation to respond to the information request. Proposed comment 36(f)(1)(i)-1 would have clarified that a borrower's request for a type of information that can change over time should not be considered substantially the same as a previous request for the same type of information. The Bureau proposed § 1024.36(f)(1)(i) to ensure that a servicer is not required to expend resources conducting duplicative searches for documents, as such a requirement could divert resources from responding to other requests.

One anonymous commenter urged the Bureau to withdraw proposed § 1024.36(f)(1)(i), claiming that the Bureau lacked authority to narrow the requirements listed in RESPA. The

Bureau’s authority for § 1024.36 is discussed above. In addition, the Bureau believes that it would frustrate the consumer protection purposes of RESPA to require that servicers devote resources, which could otherwise be spent on responding to information requests that would benefit consumers, to respond to duplicative information requests. The Bureau therefore believes that § 1024.36(f)(1)(i) is necessary to achieve the purposes of RESPA, including of ensuring responsiveness to consumer requests and complaints and the provision and maintenance of accurate and relevant information. Accordingly, for the reasons set forth in the proposal and above, the Bureau is adopting § 1024.36(f)(1)(i) and comment 36(f)(1)(i)-1 substantially as proposed.

36(f)(1)(ii)

Proposed § 1024.36(f)(1)(ii) would have provided that a servicer is not required to comply with the information request requirements in proposed § 1024.36(c) and (d) with respect to an information request that requests confidential, proprietary, or general corporate information of a servicer. The Bureau proposed § 1024.36(f)(1)(ii) because it believed that the purpose of providing borrowers with a means to request information regarding a borrower’s mortgage loan account would be frustrated by permitting borrowers to request confidential, proprietary, or general corporation information of a servicer. Proposed comment 36(f)(1)(ii)-1 would have provided examples of confidential, proprietary, or general corporate information. These include information requests regarding: management and profitability of a servicer; other mortgage loans than the borrower’s; investor reports; compensation, bonuses, and personnel actions for servicer personnel; the servicer’s training programs; investor agreements; the evaluation or exercise of any owner or assignee remedy; the servicer’s servicing program guide; investor instructions or requirements regarding loss mitigation options, examination reports, compliance audits or other investigative materials.

Industry commenters expressed support for proposed § 1024.36(f)(1)(ii), but urged the Bureau to make clear that servicers need not turn over privileged documents. Multiple industry commenters said that servicers should not be required to produce pooling and servicing agreements, as such agreements are confidential, proprietary and also costly to mail. In contrast, one consumer advocate commenter said that such agreements are not typically confidential or proprietary, yet important because servicers rely on such documents to make erroneous claims that they are not authorized to offer certain loan modifications. Consumer advocacy groups also asserted that proposed § 1024.36(f)(1)(ii), as a whole, gives servicers too much discretion which may increase servicers’ nonresponsiveness. An anonymous commenter said it was unclear which information falls into proposed § 1024.36(f)(1)(ii) and also questioned the Bureau’s authority to narrow the requirements of RESPA.

Having considered these comments, the Bureau is amending proposed § 1024.36(f)(1)(ii) to provide that servicers need not provide borrowers with information that is confidential, proprietary or privileged, as the Bureau believes that permitting information requests for such information could impede the ability of servicers to operate effectively. In addition, the Bureau believes that it would frustrate the consumer protection purposes of RESPA to require that servicers devote resources, which could otherwise be spent responding to information requests that would benefit consumers, to determining how to respond to information requests for confidential, proprietary, or privileged information that generally would not directly benefit the borrower, but might pose considerable disclosure risk to the servicer.

The final rule further removes the reference to general corporate information, and references to such information have been removed from the examples listed in final comment 36(f)(1)(ii)-1 as well. For example, because the Bureau does not believe that pooling and servicing agreements are typically kept confidential, final comment 36(f)(1)(ii)-1 no longer lists such agreements as examples. However, the Bureau notes that to the extent that a borrower requests such agreements, a servicer is not required to comply with the requirements of § 1024.36(c) or (d) if the servicer reasonably determines that any of the exclusions set forth in § 1024.36(f) apply. The Bureau's authority for § 1024.36 is addressed above.

36(f)(1)(iii)

Proposed § 1024.36(f)(1)(iii) would have provided that a servicer is not required to comply with the information request requirements in proposed § 1024.36(c) and (d) with respect to information requests that are not directly related to the borrower's mortgage loan account. The Bureau proposed § 1024.36(f)(1)(iii) because it believes the protection in it is appropriate to fulfill the purpose of the proposed rule, which is to provide a means for borrowers to obtain information from servicers regarding their own mortgage loan accounts.

A consumer group commenter argued that the proposal requires that borrowers state the information requested with too much specificity, arguing that a general request for information about the status of the borrower's loan should suffice. An anonymous commenter asserted that the Bureau proposes to improperly narrow the scope of information requests. The commenter reasoned that section 6(e)(1)(B) of RESPA requires servicers to respond to qualified written requests for information relating to the servicing of the loan. The commenter argued that the Bureau proposes to narrow that definition by adding the requirement that such requests must "directly" relate to the "mortgage loan account" for the loan.

By relieving servicers of the duty to respond to requests for information that are not directly related to the borrower's mortgage loan account, the Bureau does not intend to impose an obligation on borrowers to identify with specificity the precise document or data point the borrower is seeking. Rather, the point of this section is to assure that servicers' resources are focused on securing relevant information for borrowers by excluding requests for information that are not relevant to the borrower's account. For the reasons discussed above, the Bureau finds that § 1024.36(f)(1)(iii) is necessary to achieve the purposes of RESPA by ensuring that servicer resources that could be devoted to responding to information requests that benefit borrowers are not diverted to responding to information requests that would not result in consumer benefit. Accordingly, for the reasons set forth in the proposal and above, the Bureau is adopting § 1024.36(f)(1)(iii) as proposed. The Bureau is also adopting new comment 36(f)(1)(iii)-1, which includes examples of information that is not directly related to a borrower's loan account.

36(f)(1)(iv)

Proposed § 1024.36(f)(1)(iv) would have provided that a servicer is not required to comply with the request for information requirements in proposed § 1024.36(c) and (d) with respect to a request for information that is overbroad or unduly burdensome. The proposed rule would have defined "overbroad" and "unduly burdensome" for this purpose. It would have provided that an information request is overbroad if a borrower requests a servicer provide an unreasonable volume of documents or information to a borrower. The proposed rule stated that an information request is unduly burdensome if a diligent servicer could not respond to the request without either exceeding the maximum timeframe permitted by § 1024.36(d)(2)(ii) or incurring costs (or dedicating resources) that would be unreasonable in light of the circumstances. The proposed rule would have further clarified that if a servicer can identify a valid information request in a submission that is otherwise overbroad or unduly burdensome, the servicer is required to respond to the information request that it can identify. Finally, the Bureau proposed comment 36(f)(1)(iv)-1 to set forth characteristics that may indicate if an information request is overbroad or unduly burdensome.

As discussed above for proposed § 1024.35(g)(1)(ii), during pre-proposal outreach, consumers, consumer advocates, servicers, and servicing industry representatives indicated to the Bureau that consumers do not typically use the current qualified written request process to request information. During the Small Business Review Panel outreach, small entity representatives expressed that typically qualified written requests received from borrowers were vague forms found online or forms used by advocates as a form of pre-litigation discovery. Servicers and servicing industry representatives indicated that these types of qualified written requests are unreasonable and unduly burdensome. Small entity representatives in the Small Business Review Panel outreach requested that the Bureau consider an exclusion for abusive requests, or requests made with the intent to harass the servicer.

The Bureau requested comment regarding whether a servicer should not be required to undertake the information request requirements in proposed § 1024.36(c) and (d) for information requests that are overbroad or unduly burdensome. Industry commenters supported the exclusion, but urged the Bureau to remove the requirement that servicers identify valid information requests in submissions that are otherwise overbroad or unduly burdensome. Industry commenters said servicers should not be required to parse through such submissions to locate a clear information request. One large trade association of mortgage servicers said that the requirement effectively subsumes the exclusion. Consumer group commenters generally disfavored the exclusion. One commenter questioned the assertion that borrowers primarily use qualified written requests to obtain prelitigation discovery. One consumer group said the exclusion gives servicers too much discretion. Another said it requires borrowers to state their information requests with too much specificity. An anonymous consumer advocate said a request from a single borrower should not be so voluminous as to be burdensome for servicers to respond. Another consumer group commenter requested that the Bureau address situations in which the servicer erroneously determines that a submission is overbroad or unduly burdensome.

The Bureau proposed § 1024.36(f)(1)(iv), in part, because the Bureau believes that requiring servicers to respond to overbroad or unduly burdensome information requests from some borrowers may cause servicers to expend fewer resources to address requests that may be more clearly stated and more clearly require servicer attention. The Bureau was especially concerned about this in light of the proposed rule's requirement that servicers respond to an expanded universe of information requests, including requests for information that do not specifically relate to "servicing" as defined in RESPA, as implemented by this rule, as well as information requests asserted orally. While the final rule does not require that servicers undertake the information request procedures in § 1024.36(c) and (d) for oral submissions, it does not limit information requests to those related to servicing. Thus, the Bureau continues to believe that a requirement for servicers to respond to information requests that are overbroad or unduly burdensome may harm consumers and frustrate servicers' ability to comply with the new information request requirements. Finally, as stated in the proposal, the Bureau does not believe that the information request procedures should replace or supplant civil litigation document requests and should not be used as a forum for pre-litigation discovery.   Accordingly, the Bureau is adopting § 1024.36(f)(1)(iv) and comment 36(f)(1)(iv)-1 substantially as proposed.

36(f)(1)(v)

Proposed § 1024.36(f)(1)(v) would have provided that a servicer is not required to comply with the information request requirements in proposed § 1024.36(c) and (d) for an untimely information request – that is, an information request delivered to the servicer more than one year after either servicing for the mortgage loan that is the subject of the request was transferred by that servicer to a transferee servicer or the mortgage loan amount was paid in full, whichever date is applicable. The Bureau proposed this provision to set a specific and clear time that a servicer may be responsible for responding to information requests for a mortgage loan.

Moreover, the Bureau proposed § 1024.36(f)(1)(v) to achieve the same goal that currently exists in Regulation X with respect to qualified written requests. Specifically, current § 1024.21(e)(2)(ii) states that "a written request does not constitute a qualified written request if it is delivered to a servicer more than one year after either the date of transfer of servicing or the date that the mortgage servicing loan amount was paid in full, whichever date is applicable."

One industry trade association expressed support for proposed § 1024.36(f)(1)(v). Consumer advocacy groups did not comment on proposed § 1024.36(f)(1)(v). For the reasons set forth above, the Bureau is adopting § 1024.36(f)(1)(v) as proposed with a minor technical amendment.

36(f)(2) Notice to Borrower

Proposed § 1024.36(f)(2) would have required that if a servicer determines that it is not required to comply with the information request requirements in proposed § 1024.36(c) and (d) with respect to an information request, the servicer must provide a notice to the borrower informing the borrower of the servicer's determination. The servicer must send the notice not later than five days (excluding legal public holidays, Saturdays, and Sundays) after its determination and the notice must set forth the basis upon which the servicer has made the determination, noting the applicable provision of proposed § 1024.36(f)(1).

One credit union trade association disfavored the proposed requirement that a servicer send a notice informing the borrower that an information request falls into one of the enumerated exclusions. The commenter suggested that the Bureau permit servicers to send a standard notice informing borrowers that the servicer received the information request and is not required to respond.

The Bureau proposed § 1024.36(f)(2) because it believes that borrowers should be notified that a servicer does not intend to take any action on the information request. The Bureau also believes borrowers should know the basis for the servicer's determination. By providing borrowers with notice of the basis for the servicer's determination, a borrower will know the servicer's basis and will have the opportunity to bring a legal action to challenge that determination where appropriate. Accordingly, having considered the comment, the Bureau is adopting § 1024.36(f)(2) as proposed.

36(g) Payment Requirement Limitations

Proposed § 1024.36(g)(1) would have prohibited a servicer from charging a fee, or requiring a borrower to make any payment that may be owed on a borrower's account as a condition of responding to an information request. Proposed § 1024.36(g)(2) would have, however, permitted fees for providing payoff statements or beneficiary notices under applicable law. The Bureau proposed § 1024.36(g)(1) and (2) for three reasons. First, section 1463(a) of the Dodd-Frank Act added section 6(k)(1)(B) to RESPA, which prohibits a servicer from charging fees for responding to valid qualified written requests. Proposed § 1024.36(g) would have implemented that provision with respect to qualified written requests for information relating to the servicing of a mortgage loan. Second, the Bureau believes that a servicer practice of charging for responding to an information request impedes borrowers from pursuing valid information requests, and that the prohibition is therefore necessary and appropriate to achieve the consumer protection purposes of RESPA, including ensuring responsiveness to borrower requests and complaints. Third, the Bureau learned from outreach with consumer advocates that, in some instances, servicers have demanded that borrowers make payments before the servicer will provide a borrower with information requested by the borrower or will correct errors identified by a borrower. The Bureau believes that a servicer is required to provide a borrower with information about the borrower's mortgage loan account notwithstanding the payment status of a borrower's account.

Some consumer advocacy group commenters expressed support for the fee prohibition, stating that the prohibition is statutorily required. In contrast, a large credit union trade association opposed the prohibition, noting that it bars fees for items for which credit unions routinely charge, such as fees for copies of cancelled checks and periodic statements. The trade association argued that the proposed rule should take the fact that a fee is legally permissible into account. A law firm that represents servicers argued that it would be unfair and economically burdensome to prohibit servicers from charging fees for duplicate statements, such as year-end statements and tax forms.

Having considered these comments, for the reasons stated above and in the proposal, the Bureau is adopting § 1024.36(g) as proposed, except that§ 1024.36(g)(2) no longer references payoff statements. The Bureau has removed the reference to payoff statements, as the final rule excludes such statements from information request requirements under § 1024.36 altogether.

36(h) Servicer Remedies

Proposed § 1024.36(h) would have provided that the existence of an outstanding information request does not prohibit a servicer from furnishing adverse information to any consumer reporting agency or from pursuing any remedies, including proceeding with a foreclosure sale, permitted by the applicable mortgage loan instrument. The proposed requirement is consistent with section 6(e)(3) of RESPA which prohibits servicers from furnishing adverse information only as to qualified written requests that assert an error with respect to the borrower's payments, but not to a qualified written request that requests information. Moreover, the Bureau does not believe that the consumer protection purposes of RESPA would be furthered by permitting borrowers to evade consumer reporting by submitting an information request. The Bureau did not receive comment regarding proposed § 1024.36(h) and is adopting it as proposed.

Section 1024.37 Force-Placed Insurance

Section 1463(a) of the Dodd-Frank Act amended section 6 of RESPA to establish new servicer duties with respect to servicers' purchase of force-placed insurance on a property securing a federally related mortgage loan. The statute generally defines "force-placed insurance" as hazard insurance coverage obtained by a servicer of a federally related mortgage loan when the borrower has failed to maintain or renew hazard insurance on such property as required of the borrower under the terms of the mortgage loan. New § 6(k)(1)(A) of RESPA states that a servicer shall not obtain force-placed insurance unless there is a reasonable basis to believe the borrower has failed to comply with the loan contract's requirements to maintain property insurance. New section 6(*l*) of RESPA further states that servicers must: (1) provide two written notices to a borrower over a notification period lasting at least 45 days before imposing a charge for force-placed insurance on the borrower; (2) accept any reasonable form of written confirmation from a borrower of existing insurance coverage; and (3) within 15 days of the receipt of confirmation of a borrower's existing insurance coverage, terminate force-placed insurance and refund all force-placed insurance premiums paid by the borrower during any period during which the borrower's insurance coverage and the force-placed insurance coverage were both in effect, as well as any related fees charged to the borrower's account with respect to force-placed insurance during such period. Section 6(*l*) of RESPA additionally states that no provisions of section 6(*l*) shall be construed as prohibiting a servicer from providing simultaneous or concurrent notice of a lack of flood insurance pursuant to section 102(e) of the Flood Disaster Protection Act of 1973. Section 6(m) of RESPA states that all charges related to force-placed insurance imposed on a borrower by or through a servicer, other than charges subject to State regulation as the business of insurance, must be bona fide and reasonable.

The Bureau proposed § 1024.37 to implement the new servicer duties established by section 1463(a) of the Dodd-Frank Act in section 6(k) through (m) of RESPA. Force-placed insurance was created by the insurance industry to provide mortgage loan owners and investors with a hazard insurance product that would protect the value of their investment by insuring properties securing mortgage loans when hazard insurance obtained by a borrower lapsed. In recent years, however, force-placed insurance has become a consumer protection concern and has attracted the attention of lawmakers, enforcement officials, and Federal and State regulators.[105] First, a force-placed insurance policy typically provides less coverage than the

[105] *See e.g.,* H.R. Rep. 111-94, at 55 (calling the force-placement of insurance without a reasonable basis a problematic method used by some servicers to increase revenue); *see also further*, Compl.,*United States of America* et al *v. Bank of America Corp.,* et al at ¶ 51 (alleging that the defendant servicers engaged in unfair and deceptive practices in the discharge of their loan servicing activities by imposing force-placed insurance without properly notifying the borrowers and when borrowers already had adequate coverage) (filed on March 14, 2012); *see further, N.Y. Orders 'Force-Placed' Insurers to Submit New Lower Rate Proposals,* Ins. J., June 13, 2012 (describing that New York State's Department of Financial Services ordered three force-placed insurance providers to submit new force-placed insurance premium rates after determining that the insurers overcharged New York homeowners).

typical homeowners' insurance policy because force-placed insurance has been designed to provide coverage limited to protecting the value of the dwelling, but not personal property, personal liabilities for injuries on site, and other types of loss included in the scope of coverage of a typical homeowners' insurance policy. Second, although a force-placed insurance policy generally provides less coverage than a homeowners' insurance policy, force-placed insurance policy premiums are generally substantially more expensive than homeowners' insurance policy premiums. One large force-placed insurance provider estimates that the force-placed policies it writes cost, on average, 1.5 to 2 times more than the prior hazard insurance purchased by a borrower.[106] But at the same time, it has been reported that an individual force-placed policy could cost 10 times as much as a homeowners' insurance policy.[107] Explanations for the cost of force-placed insurance differ. Industry stakeholders generally attribute the substantially higher cost of force-placed insurance (relative to homeowners' insurance) to the fact that force-placed insurance: (1) can be purchased for every mortgage loan in a servicer's portfolio (including vacant properties and other properties that homeowners' insurance providers will not insure); (2) ensures continuous coverage as of the date a homeowners' insurance policy lapses or is canceled; and (3) can be canceled by a servicer at any time, with a full refund back to the date of placement.

Consumer groups, however, assert that the higher cost of force-placed insurance can be largely explained by market mechanisms that drive force-placed insurance providers to compete for business from servicers. Consumer groups argue that the cost of force-placed insurance is

[104] *See* Assurant Specialty Property, Lender-Placed Insurance, *available at* http://newsroom.assurant.com/releasedetail.cfm?ReleaseID=645046&ReleaseType=Featured%20News.

[106] *See* Assurant Specialty Property, Lender-Placed Insurance, *available at* http://newsroom.assurant.com/releasedetail.cfm?ReleaseID=645046&ReleaseType=Featured%20News.

[107] *See* Jeff Horowitz, *Ties to Insurers Could Land Mortgage Servicers in More Trouble*, Am. Banker (Nov. 9, 2010.)

inflated by incentives like commissions to servicers (or their affiliates) that are licensed to engage in insurance transactions, no-cost or below-cost insurance tracking and monitoring services to servicers because the actual cost is passed on to borrowers in the force-placed insurance premium charge a force-placed insurance provider assesses on a borrower through the servicer, and payments for entering into reinsurance arrangements with servicers (or their affiliates) that are licensed to engage in insurance transactions. Consumer groups and mortgage investors have alleged that servicers have frequently improperly placed force-placed insurance, in some instances to receive lucrative commissions or reinsurance fees, or other consideration.[108] In some cases, consumer groups have asserted that the higher cost of force-placed insurance can drive borrowers, particularly those already facing financial hardship, into default.

As discussed above, RESPA is a remedial consumer protection statute and imposes obligations upon the servicing of federally related mortgage loans that are intended to protect borrowers. The Bureau believes that the obligations the Dodd-Frank Act established with respect to servicers' purchase of force-placed insurance were intended to impose, at minimum, (1) a duty to help borrowers avoid unwarranted and unnecessary charges related to force-placed insurance through both direct limitations on certain charges and several procedural safeguards; and (2) a duty to provide borrowers with reasonably accurate information about servicers'

[108] *See e.g., The Need for National Mortgage Servicing Standards: Hearing Before the Subcomm. on Hous., Transp., & Comm. Affairs of the Senate Comm. on Banking and Urban Affairs*, 112th Cong. 126 (2011)(statement of Laurie Goodman, Amherst Securities) (testifying that incentives to obtain force-placed insurance are such that it would be "unrealistic to expect a servicer to make an unbiased decision on when to buy [force-placed insurance]," and hence, national servicing standards should be established to require servicers to maintain a borrower's hazard insurance "as long as possible."); *see also*, N.Y. State Dep't of Fin. Services, *Public Hearings on Force-Placed Insurance* (2012) (statement of Alexis Iwanisziw, Neighborhood Economic Development Advocacy Project) (testifying that problems like mortgage servicers imposing force-placed insurance when homeowners have voluntary market policies persist because mortgage servicers receive commissions, reinsurance contracts, free insurance tracking and other kickbacks when they purchase force-placed insurance); *see further*, Compl., *United States of America* et al *v. Bank of America Corp.*, et al at ¶ 51 (alleging that the defendant servicers engaged in unfair and deceptive practices in the discharge of their loan servicing activities by imposing force-placed insurance without properly notifying the borrowers and when borrowers already had adequate coverage) (filed on March 14, 2012).

grounds for purchasing force-placed insurance and the financial impact that such purchase could have on the borrowers, in order to encourage borrowers to take appropriate steps to maintain their hazard insurance policies.

Legal Authority

Section 1024.37 implements section 6(k)(1)(A), 6(k)(2), 6(*l*), and 6(m) of RESPA. Pursuant to the Bureau's authorities under sections 6(j), 6(k)(1)(E), and 19(a) of RESPA, the Bureau is also adopting certain additions and certain exemptions to these provisions. As explained in more detail below, these additions and exemptions are necessary and appropriate to achieve the consumer protection purposes of RESPA, including the avoidance of unnecessary and unwarranted charges and fees and the provision to borrowers of accurate and relevant information.

37(a) Definition of Force-Placed Insurance

37(a)(1) In General

As added by the Dodd-Frank Act, section 6(k)(2) of RESPA states that for purposes of section 6(k) through (m) of RESPA, force-placed insurance means hazard insurance coverage obtained by a servicer of a federally related mortgage loan when the borrower has failed to maintain or renew hazard insurance on such property as required of the borrower under the terms of the mortgage. The Bureau proposed § 1024.37(a)(1) to implement section 6(k)(2) of RESPA. The proposed provision stated that in general, for purposes of § 1024.37, the term "force-placed insurance" means hazard insurance obtained by a servicer on behalf of the owner or assignee of a mortgage loan on a property securing such loan.

Proposed § 1024.37(a)(1) did not incorporate language from the statute referring to a borrower's failure to maintain or renew hazard insurance as required under the terms of the mortgage. As explained in the proposal, the Bureau was concerned that adopting that language might raise questions whether the Dodd-Frank Act protections applied to situations in which a borrower did, in fact, have hazard insurance in place but the borrower's servicer obtained force-placed insurance anyway. The Bureau noted that borrowers in such a situation are most in need of protection from unwarranted and unnecessary charges related to force-placed insurance. Indeed, in other respects, the force-placed insurance provisions added to RESPA by the Dodd-Frank Act expressly contemplate that the protections apply in circumstances where a borrower, in fact, has hazard insurance in place. For example, the notice to the borrower required under RESPA section 6(*l*)(1)(A) is required to include a statement of the procedures by which the borrower may demonstrate insurance coverage, and under RESPA section 6(*l*)(3), which provides that upon receipt by a servicer of confirmation that a borrower has hazard insurance in place, a servicer must terminate force-placed insurance and refund to the borrower all force-placed premiums and related charges for periods of overlapping coverage. Thus, notwithstanding the phrase "when the borrower has failed to maintain or renew hazard insurance," the Bureau interprets the definition of force-placed insurance to include situations in which a servicer obtains hazard insurance coverage on a property where the borrower has in fact maintained the borrower's own hazard insurance. The Bureau also proposed to add language to the definition of the term "force-placed insurance" in proposed § 1024.37(a)(i) to describe the insurance as being obtained by a servicer "on behalf of the owner or assignee of a mortgage loan on a property securing such loan." This language was intended to distinguish force-placed insurance from situations in which a servicer renews borrowers' own hazard insurance policies as described in § 1024.17 or otherwise. The Bureau observes that a servicer is simply renewing a borrower's own hazard insurance under these circumstances and does not interpret such insurance as hazard insurance “obtained” by a servicer within the statutory definition of “force-placed insurance” set forth in section 6(k)(2) of RESPA. The Bureau did not receive comments on the proposed definition of the term “force-placed insurance” set forth in proposed § 1024.37(a)(1). Accordingly, the Bureau is adopting § 1024.37(a)(1) as proposed.

37(a)(2) Types of Insurance Not Considered Force-Placed Insurance

37(a)(2)(i)

Proposed § 1024.37(a)(2)(i) would have provided that hazard insurance to protect against flood loss obtained by a servicer as required by the Flood Disaster Protection Act of 1973 is not force-placed insurance for the purposes of § 1024.37. The Bureau proposed to exclude flood insurance that is required under the Flood Disaster Protection Act of 1973 (FDPA) from the definition of the term “force-placed insurance,” because, as discussed above in the section-by-section analysis of the defined term “Hazard insurance,” the Bureau believed and continues to believe that the Bureau’s force-placed insurance regulations should not apply to servicers when they are required by the FDPA to purchase flood insurance. As discussed above, the FDPA provides an extensive set of restrictions on a servicers’ purchase of flood insurance required by the FDPA, and the Bureau was concerned that subjecting servicers to overlapping regulatory restrictions would be unduly burdensome and might result in consumer confusion.

Several consumer groups suggested that the Bureau should only exempt servicers from the Bureau’s force-placed insurance regulations to the extent they purchase force-placed flood policies from the National Flood Insurance Program (NFIP) because the FDPA can reasonably be interpreted to require servicers to purchase force-placed flood insurance through the NFIP. The consumer groups further asserted that it was important to ensure that RESPA’s consumer protections with respect to force-placed insurance apply when servicers force-place private flood insurance because private force-placed insurance policies are more expensive than the NFIP flood policies. As discussed above, industry commenters generally said that the proposed exclusion of hazard insurance to protect against flood loss obtained by a servicer as required by the FDPA from the definition of the term "force-placed insurance" was workable and adequately mitigated the risk of a servicer having to comply with both regulations under the FDPA and the Bureau's force-placed insurance regulations.

The Bureau has carefully considered these comments and is adopting proposed § 1024.37(a)(2)(i) as proposed. The Bureau does not administer the FDPA, and accordingly declines to opine on whether the FDPA requires servicers to purchase flood insurance policies from the NFIP. The Bureau, however, observes that there is existing guidance from Federal agencies that administer the FPDA that suggests that a servicer may reasonably interpret the FDPA to permit servicers to satisfy their obligations under the statute through the purchase of private flood insurance.[109]

Moreover, the consumer groups did not suggest that the consumer protections in the FDPA do not apply to a servicer's purchase of private flood insurance, and the Bureau has no reason to believe that they do not. Accordingly, the Bureau believes that if the Bureau were to adopt the consumer groups' suggestion to exclude from the definition of the term "force-placed insurance" only policies purchased under the NFIP, a servicer who purchased private flood insurance to comply with its obligations under the FDPA would have to comply with both the Bureau's regulations and regulations under the FDPA. As discussed above, this result would

[109] *See* Interagency Questions and Answers Regarding Flood Insurance, 74 FR 35914, 35944 (July 21, 2009)(question 63 & 64 provide guidance on the circumstances under which lenders could rely on private flood insurance policies to meet their obligations to maintain adequate flood insurance coverage); *see also*, Fed. Emergency Mgmt. Agency, *Mandatory Purchase of Flood Insurance Guidelines* 42 (September 2007)(stating that a lender has the option of force placing flood insurance through a private (non-NFIP) insurer).

impose unnecessary compliance burdens and frustrate the consumer protection purposes of RESPA's force-placed insurance provisions. For the reasons discussed above, § 1024.37(a)(2)(i) is necessary and appropriate to avoid undermining the consumer protection purposes of RESPA's force-placed provisions and is thus authorized under sections 6(k)(1)(E), 6(j)(3), and 19(a) of RESPA.

37(a)(2)(ii) and (iii)

The Bureau proposed § 1024.37(a)(2)(ii) to clarify that hazard insurance obtained by a borrower but renewed by the borrower's servicer as required by § 1024.17(k)(1), (2), or (5) is not force-placed insurance for purposes of § 1024.37. The Bureau proposed § 1024.37(a)(2)(iii) to clarify that hazard insurance renewed by the servicer at its discretion if the servicer is not required to renew the borrower's hazard insurance as required by § 1024.17(k)(1), (2), or (5) is also not force-placed insurance for purposes of § 1024.37. As discussed above, the Bureau observes that a servicer is simply renewing a borrower's own hazard insurance under these circumstances and does not interpret such insurance as hazard insurance "obtained" by a servicer within the statutory definition of "force-placed insurance" set forth in section 6(k)(2) of RESPA. Other than a large bank servicer commending the Bureau for the exclusion from the definition of "force-placed insurance" of hazard insurance renewed at the servicer's discretion for non-escrowed borrowers, the Bureau did not receive comments on either proposed § 1024.37(a)(2)(ii) or (iii). Accordingly, proposed § 1024.37(a)(2)(ii) and (iii) are adopted as proposed, except the Bureau has made technical revisions to proposed § 1024.37(a)(2)(ii) consistent with changes to the language of § 1024.17(k)(5), and adopts § 1024.37(a)(2)(iii) with the clarification that § 1024.37(a)(2)(iii) applies to the extent the borrower agrees. The Bureau believes it is appropriate to create incentives for servicers to work with non-escrowed borrowers to renew hazard insurance originally obtained by these borrowers, but not for servicers to renew such insurance without borrower consent.

One state housing finance agency commenter suggested that the Bureau should allow collateral protection plans as an acceptable alternative to force-placed insurance for subordinate liens. The Bureau's force-placed insurance regulations are not intended to regulate the type of hazard insurance a servicer obtains on behalf of the owner or assignee of a mortgage loan to insure the property securing such loan. But if a servicer attempts to seek payment from a borrower for such insurance, the Bureau's force-placed regulations will apply.

37(b) Basis for Charging a Borrower for Force-Placed Insurance

Section 6(k)(1)(A) of RESPA states that a servicer of a federally related mortgage loan shall not obtain force-placed insurance unless there is a reasonable basis to believe the borrower has failed to comply with the loan contract's requirements to maintain property insurance. The Bureau proposed § 1024.37(b) to implement section 6(k)(1)(A) of RESPA. Proposed § 1024.37(b) stated that a servicer may not obtain force-placed insurance unless the servicer has a reasonable basis to believe that the borrower has failed to comply with the mortgage loan contract's requirement to maintain hazard insurance.

The Bureau also proposed related commentary to provide illustrative examples of "a reasonable basis to believe" that a borrower has failed to maintain hazard insurance. Proposed comment 37(b)-1 would have provided two examples in the context of a borrower with an escrow account established to pay for hazard insurance premiums. Proposed comment 37(b)-2 would have provided an example of a borrower who has not established an escrow account to pay for hazard insurance premiums. During pre-proposal outreach, servicers and force-placed insurance providers told the Bureau that their process of verifying the existence of insurance coverage before obtaining force-placed insurance for borrowers with escrow and borrowers without escrow was different. Accordingly, the Bureau believed that it was appropriate to provide different examples based on whether the borrower had escrowed for hazard insurance.

Several consumer groups and a number of industry commenters suggested that the Bureau make changes to proposed § 1024.37(b). Consumer group commenters expressed the concern that proposed § 1024.37(b) would be too weak to motivate servicers to change their practices with respect to the purchase of force-placed insurance. Several consumer groups recommended that that the Bureau replace the proposed commentary to 1024.37(b) with a collective standard that would determine whether the servicer had a reasonable basis for obtaining force-placed insurance based on whether the percentage of cases in which borrowers receive a full refund for force-placed insurance charges exceed five percent per calendar year.

In contrast, a number of industry commenters suggested that proposed § 1024.37(b) was too limiting and might unduly chill servicer's use of force-placed insurance to protect a lender's collateral. A number of industry commenters requested that the Bureau change proposed § 1024.37(b) so that the reasonable basis standard in § 1024.37(b) would be defined solely by compliance with the procedural requirements enumerated in section 6(*l*) of RESPA and § 1024.37(c) and (d)[110] or, in the alternative, would provide a safe harbor for servicers that meet such requirements. One large force-placed insurance provider and one large bank servicer said that if the Bureau did not change proposed § 1024.37(b), then the Bureau should expressly state in commentary to §1024.37(b) that the examples are illustrative and do not provide the only situations in which a servicer has a reasonable basis to believe that the borrower's hazard insurance has lapsed. One national trade association representing federal credit unions suggested

[110] Section 6(*l*) provides that a servicer of a federally related mortgage shall not be construed as having a reasonable basis for obtaining force-placed insurance unless the requirements of [section 6(*l*) of RESPA] has been met.

that the Bureau provide a safe harbor for servicers acting in good faith when they obtained force-placed insurance.

After careful review of these comments and further consideration, the Bureau is adopting § 1024.37(b) with changes. First, the Bureau has concluded that when a servicer purchases force-placed insurance but does not charge a borrower for such insurance, the servicer does not "obtain" force-placed insurance within the meaning of section 6(k)(1)(A) of RESPA. The Bureau arrived at this conclusion after re-evaluating the connection between section 6(k)(1)(A) and (*l*). As described above, section 6(k)(1)(A) establishes that a servicer of a federally related mortgage loan shall not obtain force-placed insurance unless there is a reasonable basis to believe the borrower has failed to comply with the loan contract's requirements to maintain property insurance. Section 6(*l*) establishes that a servicer of a federally related mortgage loan shall not be construed as having a reasonable basis for obtaining force-placed insurance unless the requirements of [section 6(*l*)] has been met. But one of the requirements is that a servicer must terminate force-placed insurance within 15 days of the servicer receiving confirmation of a borrower's existing insurance coverage. The Bureau believes that this provision expressly contemplates that a servicer may purchase force-placed insurance before meeting the requirements of section 6(*l*). Accordingly, where "obtaining" is used in section 6(*l*), the Bureau interprets the statute to mean "charging." Because "obtain" appears in section 6(k)(1)(A) and 6(*l*), the Bureau has changed § 1024.37(b) to reflect more clearly the statutory prohibition against "charging." Accordingly, as finalized, § 1024.37(b) provides that a servicer may not assess on a borrower a premium charge or fee related to force-placed insurance unless the servicer has a reasonable basis to believe that the borrower has failed to comply with the mortgage loan contract's requirement to maintain hazard insurance.

The Bureau has also changed commentary intended to explain the circumstances that provide a servicer with a "reasonable basis to believe" for purposes of § 1024.37(b). The Bureau has decided not to provide specific examples of "a reasonable basis to believe." Instead, as adopted, comment 37(b)-1 provides that information about a borrower's hazard insurance received by a servicer from a borrower, the borrower's insurance provider or insurance agent, may provide a servicer with a reasonable basis to believe that the borrower has failed to comply with the loan contract's requirement to maintain hazard insurance. The Bureau believed that sometimes the absence of information may provide a servicer with a reasonable basis to believe that the borrower has failed to comply with the loan contract's requirement to maintain hazard insurance. Accordingly, proposed comment 37(b)-1 would have clarified that a servicer had a reasonable basis to believe that a borrower with an escrow account established for hazard insurance has failed to maintain hazard insurance if the servicer had not received a renewal bill within a reasonable time prior to the expiration date of the borrower's hazard insurance. Upon further consideration, the Bureau believes that the comment may convey that the absence of information would provide a servicer with a safe harbor. The Bureau believes that a safe harbor based on the absence of information would not adequately ensure that borrowers are protected from unwarranted and unnecessary charges related to force-placed insurance. Accordingly, the Bureau is adopting commentary to provide that in the absence of receiving information about a borrower's hazard insurance, a servicer may satisfy the reasonable basis to believe standard if a servicer acts with reasonable diligence to ascertain a borrower's hazard insurance status, and does not receive, from the borrower or otherwise have evidence of insurance coverage as provided in § 1024.37(c)(1)(iii).

The Bureau has concluded that a servicer following the notification procedure established by section 6(*l*) of RESPA has acted with reasonable diligence to ascertain a borrower's hazard insurance status, but compliance with those procedural elements alone are not sufficient to provide a safe harbor. The statute prohibits a servicer from imposing any charge on a borrower for force-placed insurance if the servicer has received demonstration of hazard insurance coverage by the end of the notification process. Accordingly, comment 37(b)-1, as adopted, explains that an example of acting with reasonable diligence is one in which a servicer complies with the notification requirements set forth in § 1024.37(c)(1)(i) and (ii), and if after complying with such requirements, the servicer does not receive, from the borrower or otherwise, evidence of insurance coverage as provided in § 1024.37(c)(1)(iii).

The Bureau does not believe that it is necessary to provide a separate safe harbor for servicers acting in good faith because the Bureau believes the standard set forth in § 1024.37(b) provides sufficient flexibility for servicers to balance their obligations to owners and assignees of mortgage loans to ensure that a property is adequately insured and to protect borrowers from unwarranted and unnecessary charges and fees. The Bureau also declines to adopt a collective standard to evaluate whether a servicer's purchase of force-placed insurance is proper. The Bureau believes that the percentage of cases in which a borrower receives a full refund for force-placed insurance charges may be relevant in assessing whether a servicer is maintaining reasonable policies and procedures to ensure that a servicer is maintaining accurate information about a borrower's mortgage loan. But the Bureau believes that section 6(k)(1)(A) of RESPA established a loan-level standard. Using a collective standard to evaluate whether a servicer has satisfied the reasonable basis to believe requirement in section 6(k)(1)(A) would not be appropriate because the standard would be overbroad and might discourage a servicer from obtaining force-placed insurance even though a servicer has actual information that a borrower has failed to comply with the loan contract's requirements to maintain property insurance.

A state trade association representing banks and one of its member banks urged the Bureau to eliminate proposed § 1024.37(b). They expressed concern that the reasonable basis standard, in combination with the prohibition on charging a borrower for insurance in proposed § 1024.37(c)(1) for at least 45 days, would increase the likelihood that homes go uninsured for a significant period of time. The Bureau declines to eliminate § 1024.37(b) because the Bureau believes the provision is necessary to implement RESPA's force-placed provisions. In addition, the Bureau believes that the commenters' concern is unwarranted, in particular, because § 1024.37(b) has been revised to reframe the prohibition as one on charging the borrower for, rather than purchasing, force-placed insurance.

Lastly, a state trade association representing banks and thrifts expressed concern that servicers may rely on information from an insurance provider that later turns out to be incorrect about the status of a borrower's hazard insurance coverage to purchase force-placed insurance. For example, the commenter said that insurance providers may send notices of cancellation to servicers before a borrower's insurance actually lapses. The Bureau recognizes that servicers may sometimes wrongly conclude that there is a reasonable basis to charge borrowers for force-placed insurance, even after complying with the procedures steps in § 1024.37(c)(1). But whether § 1024.37(b) is violated turns on whether or not a servicer had a reasonable basis to reach its conclusion based on the information the servicer has at the time the servicer charges a borrower for force-placed insurance.

37(c) Requirements for Charging Borrower Force-Placed Insurance

37(c)(1) In General

Section 6(*l*)(1) of RESPA, added by section 1463(a) of the Dodd-Frank Act, states that a servicer may not impose any charge on a borrower for force-placed insurance with respect to any property securing a federally related mortgage unless the servicer (1) sends a written notice by first-class mail to a borrower that contains disclosures about a borrower's obligation to maintain hazard insurance, a servicer's lack of evidence that a borrower has such insurance, a clear and conspicuous statement of how the borrower may demonstrate coverage, and a statement that a servicer may obtain insurance coverage at a borrower's expense if the borrower does not provide demonstration of coverage in a timely manner (*see* section 6(*1*)(1)(A)(i) through (iv)); (2) sends a second written notice by first-class mail containing the same disclosures to a borrower at least 30 days after mailing the first written notice (*see* section 6(*l*)(1)(B)); and (3) does not receive any demonstration of hazard insurance coverage by the end of the 15-day period beginning on the date the second written notice was sent to the borrower (*see* section 6(*l*)(1)(C)).

The Bureau proposed § 1024.37(c)(1) to implement section 6(*l*)(1). Proposed § 1024.37(c)(1) would have provided that a servicer may not charge a borrower for force-placed insurance unless: (1) a servicer delivers to the borrower or places in the mail a written notice with the disclosures set forth in § 1024.37(c)(2) at least 45 days before the premium charge or any fee is assessed; (2) it delivers to such borrower or places in the mail a written notice in accordance with § 1024.37(d)(1), which would have prohibited a servicer from delivering or placing in the mail this second notice until 30 days have passed after the servicer has delivered or placed in the mail the first written notice required by § 1024.37(c)(1)(i); and (3) during the 45-day notice period, the servicer has not received verification that such borrower has hazard insurance in place continuously. Proposed § 1024.37(c)(1)(iii) also stated that determining whether the borrower has hazard insurance in place continuously, the servicer shall take account of any grace period provided under State or other applicable law. The Bureau proposed to permit a servicer to choose between delivering the written notice to the borrower or mailing the written notices established by section 6(1)(1)(A) and (B) of RESPA because the Bureau believed it was necessary and proper to achieve the purposes of RESPA to provide servicers with flexibility to either deliver or mail the required notices, since delivery will often be faster than transmittal by mail.

Proposed comment 37(c)(1)-1 would have clarified the minimum length of the notice period. It stated that notice period set forth in § 1024.37(c)(1) begins on the day that the servicer delivers or mails the notice to the borrower and expires 45 days later, and that the servicer may assess the premium charge and any fees for force-placed insurance beginning on the 46th day if the servicer has fulfilled the requirements of § 1024.37(c) and (d). The comment further stated that if not prohibited by State or other applicable law, the servicer may retroactively charge a borrower for force-placed insurance obtained during the 45-day notice period. Proposed comment 37(c)(1)(iii)-1 would have provided examples of borrowers having hazard insurance in place continuously.

Two non-bank servicers stated that they supported proposed § 1024.37(c)(1) and related commentary. One of the commenters observed that the Bureau's proposal reflects its current practice. This is consistent with feedback from small servicers with whom the Small Business Review Panel conducted outreach in advance of the proposal. One participant stated that it currently provides two notices that are very similar to the ones that would be required, and another participant stated that it currently exceeds the number of notices that would be required.

The Bureau received comments on various aspects of proposed § 1024.37(c)(1). Except as discussed below, the majority of industry commenters did not raise concerns with the notification aspect of proposed § 1024.37(c)(1). The majority of industry commenters only sought clarification. First, they requested the Bureau clarify that a servicer may retroactively charge a borrower for force-placed insurance back to the date that a borrower's hazard insurance lapsed, even if the servicer sends the first notice after the date of lapse. Second, a number of industry commenters requested that the Bureau clarify how a servicer should account for grace periods when determining whether a borrower has hazard insurance in place continuously. They observed that a grace period under a typical hazard insurance policy extends a policyholder's insurance coverage past the expiration date only if the policyholder pays the past-due premium during such period. A bank servicer requested the Bureau clarify that "grace period" used in proposed § 1024.37 refer to grace periods applicable to the borrower's hazard insurance, and not grace periods applicable to the borrower's loan during which the borrower pays the mortgage payment after the due date without incurring a late charge. One large bank servicer sought clarification of whether the notice period could exceed 45 days.

A minority of industry commenters opposed the notification aspect of proposed § 1024.37(c)(1). One credit union contended that the proposed notices would be duplicative, unnecessary, and add to the overall cost of lending because borrowers already receive multiple notices from their insurers prior to cancellation. A trade association representing retail banks asserted that if a borrower's hazard insurance coverage lapses before the second notice is provided, then a servicer should be able to obtain force-placed insurance without having to send the second notice. A bank servicer argued that rather than requiring a servicer to send a second notice at least 15 days prior to charging a borrower for force-placed insurance, the Bureau should instead permit a servicer to simply provide a notice within five days of purchasing force-placed insurance. One state credit union league expressed concern about the aggregate notice burden servicers would be required to bear if the mortgage servicing rules are finalized as proposed and suggested that the burden could be reduced if the Bureau combines the first and second written notice into a single notice. One credit union asserted that the Bureau should allow a servicer to include the proposed force-placed insurance notices with the periodic statement because multiple documents mailed to the borrower could decrease the probability of the borrower actually paying attention to the information.

Several industry commenters urged the Bureau to reconsider the aspect of the proposal that would have required servicers to wait at least 45 days to charge a borrower for force-placed insurance. The commenters contended that servicers, especially small servicers, would incur significant costs because servicers would have to advance force-placed insurance charges for borrowers. One state credit union trade association urged the Bureau to exercise its exception authority to exempt small servicers from the requirements of § 1024.37(c). In addition to the cost of advancement, the commenter also asserted that it would be costly for small servicers to send the notices. One non-bank servicer suggested the Bureau shorten the notice period to 30 days, while a bank servicer urged the Bureau to shorten the notice period to 10 days. One bank servicer also requested the Bureau to preempt Texas law that addresses notification requirements that apply to creditors’ purchase of force-placed insurance for residential mortgages.

One bank servicer commented that a rule requiring servicers to provide notices like the proposed periodic statement or force-placed insurance notices to borrowers would be a waste of servicer resources without a corresponding benefit to consumers in situations involving a borrower whom the servicer has referred to foreclosure, a borrower who has declared bankruptcy, or a borrower who has made no payment or contacted the servicer for more than six months and whom the servicer has determined to have vacated the property. It sought an exemption from compliance with any force-placed insurance notification requirements with regard to those three categories of borrowers. One national trade association representing credit unions and a credit union commenter expressed concern that credit union members may believe that they should only be charged from the date that they received the first notice. Lastly, some industry commenters stated that a servicer should not be subject to a waiting period of 45 days to obtain force-placed insurance because it leaves collateral exposed and increase the risk to the borrower.

In contrast, one consumer advocacy group urged the Bureau to strengthen the notification requirement so that a servicer would be required to provide the first notice within 15 days of placing force-placed insurance. It further asserted that it would be unreasonable to permit a servicer to retroactively charge a borrower for more than 60 days of force-placed insurance because it is a servicer's responsibility to identify lapses in insurance and notify borrowers of such lapses in a timely fashion.

Lastly, several industry commenters requested the Bureau clarify what "verification" means because they were concerned that the proposal would have required servicers to accept any insurance information they received from borrowers. The commenters noted that the traditional means of establishing proof of insurance is by requiring a borrower to provide a copy of an insurance policy declaration page, a certificate of insurance, or the insurance policy. The commenters expressed concern that without any of these, servicers may might potentially not be able to provide mortgage investors with the proof such investors require as evidence of coverage.

After careful consideration of these comments and further consideration, the Bureau is adopting § 1024.37(c)(1) with several adjustments.   With respect to the notification aspect of § 1024.37(c)(1), the Bureau notes that RESPA establishes a very detailed scheme for any servicer (without consideration of the servicer’s size) to follow before a servicer imposes a charge on any borrower for force-placed insurance. The Bureau believes that the prescriptive nature of the statutory scheme suggests that Congress believed that each step was necessary to achieve the consumer protection purpose of RESPA’s force-placed insurance provisions. The notification procedures the Bureau proposed in § 1024.37(c)(1) mirror the prescriptive statutory scheme because they were necessary to achieve the intent of Congress. The Bureau declines to adopt suggestions received from commenters, which ranged from creating exemptions for small servicers and unresponsive borrowers to changing various aspects of the notification requirements, because they would make § 1024.37(c)(1) depart from the statutory scheme Congress established.

The Bureau has also worked to craft effective notices through consumer testing, and the results of those tests suggest that borrowers will in fact welcome and respond to the notices. The Bureau further believes that some of the commenters’ concerns are addressed by the fact that the Bureau is interpreting the statutory language to allow charges to be assessed retroactively for any period in which coverage was not maintained continuously once the procedural and substantive statutory criteria are met. Moreover, the Bureau believes that it is unnecessary to set limitations on a servicer’s right to assess on borrowers charges retroactively because the statute establishes that a borrower has an unconditional right to a full refund of force-placed insurance premium charges and related fees the borrower has paid for any period in which the borrower’s hazard insurance and the force-placed insurance were both in place.

With respect to the request for preemption, the Bureau observes that based on the way in which the commenter described Texas law, it does not appear that compliance with Texas law would prevent a servicer from complying with the Bureau’s force-placed insurance notification requirements. Accordingly, the Bureau believes preemption is not appropriate based on the information provided.

The Bureau is making several changes to § 1024.37(c)(1) for clarification purposes. The Bureau is adopting new comment § 1024.37(c)(1)(i) to clarify that a servicer may charge a borrower for force-placed insurance a servicer purchased, retroactive to the first day of any period in which the borrower did not have hazard insurance in place. The Bureau is clarifying the role of a grace period under applicable law in determining whether a borrower has hazard insurance in place continuously in new comment 37(c)(1)(iii)-1. The Bureau is adopting § 1024.37(c)(1)(iii) to clarify what "receiving verification" means by replacing the phrase "received verification that the borrower has hazard insurance in place continuously" in proposed § 1024.37(c)(1)(iii) with the phrase "received, from the borrower or otherwise, evidence demonstrating that the borrower has had in place continuously hazard insurance coverage that complies with the loan contract's requirements to maintain hazard insurance."

The Bureau has concluded that putting the responsibility entirely on a servicer to verify a borrower's hazard insurance coverage by requiring a servicer to accept any written information from a borrower as long as it contains the insurance policy number, and the name, mailing address and phone number of the borrower's insurance company or the borrower's insurance agency as evidence of insurance would impose too large of a burden on a servicer to determine whether the property is in fact insured in accordance with the terms and conditions of a borrower's loan contract. Accordingly, in new comment 1024.37(c)(1)(iii)-2, the Bureau is explaining that as evidence of continuous hazard insurance coverage that complies with the loan contract's requirements to maintain hazard insurance, a servicer may require a copy of the borrower's hazard insurance policy declaration page, the borrower's insurance certificate, the borrower’s insurance policy, or other similar forms of written confirmation because the Bureau interprets the statutory language “reasonable form of written confirmation of existing insurance coverage” in section 6(*l*)(2) of RESPA to mean documents servicers typically require borrowers to provide to establish proof of coverage. Further, comment 37(c)(1)(iii)-2 provides that a servicer may reject evidence of hazard insurance coverage submitted by the borrower if neither the borrower’s insurance provider nor insurance agent provides confirmation of the insurance information submitted by the borrower, or if the terms and conditions of the borrower’s hazard insurance policy do not comply with the borrower’s loan contract requirements because the Bureau interprets section 6(*l*)(3) of RESPA to permit a servicer to separately confirm insurance information that a borrower has proffered to establish proof of coverage and the statutory language in section 6(k)(1)(A) to permit a servicer to charge a borrower force-placed insurance when the servicer has a reasonable basis to believe that the borrower has failed to comply with the loan contract’s requirements to maintain property insurance.

With respect to the request to clarify that the 45-day notification period set forth in proposed § 1024.37(c)(1) establishes the minimum amount of time that must lapse between the time a servicer sends a borrower the first written notice required by section 6(*l*)(1) and the time a servicer imposes a premium charge or fee related to force-placed insurance, the Bureau believes that the fact that the Bureau intended the 45-days to be the minimum amount of time was clear in the proposal and thus, does not believe additional clarification in the final rule is necessary.

37(c)(2) Content of Notice

As discussed in the section-by-section analysis of § 1024.37(c)(1), section 6(*l*)(1)(A)(i) through (iv) of RESPA establishes the disclosures that a servicer of a federally related mortgage loan must provide in the written notices it sends to borrowers. The Bureau proposed

§ 1027.37(c)(2) to implement section 6(*l*)(1)(A)(i) through (iv). Proposed § 1024.37(c)(2) would have required a servicer to set forth, in the notice that would have been required under proposed § 1024.37(c)(1)(i), certain information about force-placed insurance. Specifically, proposed § 1024.37(c)(2)(i) through (iv) would have required a servicer to disclose the following information: (1) the date of the notice; (2) the servicer's name and mailing address; (3) the borrower's name and mailing address; and (4) a statement that requests the borrower to provide hazard insurance information for the borrower's property and identifies the property by its address. Proposed § 1024.37(c)(2)(v) would have required that a servicer provide a statement that the borrower's hazard insurance is expiring or expired, as applicable, and that the servicer does not have evidence that the borrower has hazard insurance coverage past the expiration date. For a borrower that has more than one type of hazard insurance on the property, the servicer must identify the type of hazard insurance for which the servicer lacks evidence of coverage. Proposed comment 37(c)(2)(v)-1 would have explained that if a borrower has purchased a homeowners' insurance policy and a separate hazard insurance policy to insure loss against hazards not covered under his or her homeowners' insurance policy, the servicer must disclose whether it is the borrower's homeowners' insurance policy or the separate hazard insurance policy for which it lacks evidence of coverage to comply with § 1024.37(c)(2)(v). Proposed § 1024.37(c)(2)(vi) would have required that a servicer provide a statement that hazard insurance is required on the borrower's property and that the servicer has obtained or will obtain, as applicable, insurance at the borrower's expense.

Proposed § 1024.37(c)(2)(vii) would have required that the initial notice to the borrower contain a statement requesting the borrower to promptly provide the servicer with the insurance policy number and the name, mailing address and phone number of the borrower's insurance company or the borrower's insurance agent. Proposed § 1024.37(c)(2)(viii) would have required the notice to contain a description of how the borrower may provide the information requested pursuant to § 1024.37(c)(2)(vii).

Finally, § 1024.37(c)(2)(ix) and (x) would have required information regarding the relative costs and scope of coverage of force-placed insurance versus hazard insurance obtained by the borrower, specifically: (1) The cost of the force-placed insurance, stated as an annual premium, or as a good faith estimate if actual pricing is not available; and (2) a statement that insurance the servicer obtains may cost significantly more than hazard insurance obtained by the borrower and may not provide as much coverage as hazard insurance obtained by the borrower. Proposed § 1024.37(c)(2)(xi) would have required that a servicer provide the servicer's telephone number for borrower questions.

The disclosures regarding the potential cost and scope of coverage for force-placed insurance were not specifically required under the Dodd-Frank Act, but the Bureau believed that it was appropriate to propose them pursuant to the Bureau's RESPA section 6(k)(1)(E) authority in order to provide borrowers with critical information about the benefits, costs, and risks of the insurance that would be imposed if they failed to act. The Bureau noted in the proposal that the Bureau tested the force-placed insurance disclosures established by the Dodd-Frank Act in three rounds of consumer testing. Participant response in consumer testing suggested that knowing about higher cost of force-placed insurance could motivate borrowers to act promptly and thus avoid being charged for force-placed insurance. All participants said upon receipt of the notice, they would immediately contact their insurance provider to find out whether or not their hazard insurance had expired or purchase new hazard insurance because they would not want to pay for the higher cost of force-placed insurance.

The Bureau proposed comment 37(c)(2)(ix)-1 to clarify that the good faith estimate of the cost of the force-placed insurance the servicer may obtain should be consistent with the best information reasonably available to the servicer at the time the disclosure is provided. The proposed comment stated that differences between the amount of the estimated cost disclosed under § 1024.37(c)(2)(ix) and the actual cost do not necessarily constitute a lack of good faith, so long as the estimated cost was based on the best information reasonably available to the servicer at the time the disclosure was provided. The Bureau believed that its proposed good faith standard would provide significant safeguards against the risk that some servicers might intentionally underestimate the cost of force-placed insurance while providing sufficient flexibility to account for the fact that costs may change due to legitimate reasons between the time the disclosure is made and the time the borrower is charged.

Several consumer groups applauded the content requirements the Bureau proposed, but with one caveat. They expressed concern that the proposed disclosure concerning the fact that force-placed insurance may not provide as much coverage as borrower-obtained hazard insurance was too generic, and thus would not provide information meaningful enough to alert the borrower to the risks of force-placed insurance and prompt the borrower to act. They suggested adding additional disclosures that force-placed insurance would not cover damage to the borrower’s personal property, personal liability for injuries to others while they are on the borrower’s property, or living expenses while the borrower’s home is under repair. The Bureau has considered the consumer groups’ concern but is reluctant to add further information without consumer testing in light of the risk that information overload could adversely impact the effectiveness of the notice. The Bureau also notes that results of the testing of the model forms suggest that the existing disclosures will prompt recipients of the force-placed insurance notices to act promptly. As summarized by Macro in its report on the consumer testing of mortgage servicing disclosures during the pre-proposal stage, all subjects who were shown samples of force-placed insurance notices said they would act immediately in response to receiving such notices, even though the samples did not contain detailed description of potential coverage differences.

One consumer group suggested that a statement informing a borrower of the availability of State-created hazard insurance programs should be a required disclosure because these programs are designed to make hazard insurance available to borrowers who have trouble qualifying for insurance from traditional sources. Again, the Bureau has considered the issue but is reluctant to add further information without consumer testing in light of the risks of information overload. The Bureau is also concerned that a completely generic notice that State programs "may" be available without contact information would not be very useful to consumers, and that tailoring the notices to particular States would be burdensome to servicers. Accordingly, the Bureau declines to implement the comment. The commenter also urged the Bureau to require servicers to include force-placed insurance charges in regular invoice statements that are sent to a borrower so that a borrower is constantly reminded of how much of the borrower's payments are going toward paying for such insurance. Another consumer group submitted similar comments recommending that the Bureau require servicers to identify force-placed insurance charges specifically in proposed periodic statements so that borrowers could easily recognize when force-placed insurance has been obtained. The Bureau notes that servicers will be required to list force-placed insurance charges like any other charge, in the periodic statement that the Bureau is finalizing in the 2012 TILA Servicing Final Rule.

Consumer advocates and some industry commenters praised the proposal to require actual cost information or estimated costs in the mandatory disclosures. A force-placed insurance commenter, for instance, stated that it currently provides its borrowers with such estimates and that it has proven successful in convincing borrowers of the benefit of obtaining their own coverage. Some industry commenters, however, opposed the proposed disclosure as unnecessary because the Bureau separately proposed to require servicers to inform borrowers that force-placed insurance may cost significantly more than borrower-obtained hazard insurance. One force-placed insurance provider further observed that the existing practice of most servicers is to provide a binder of the force-placed insurance coverage with the second notice to make borrowers aware of the cost of such insurance. These commenters and a large bank servicer further noted that the National Mortgage Settlement did not include a required disclosure about the cost of force-placed insurance and urged the Bureau to refrain from requiring more disclosures than required by the settlement.

Commenters also asserted that a servicer might not have enough information to provide an estimate of force-placed insurance costs because the first notice would be provided to a borrower at a point where a servicer might not have obtained the premium information. Estimates are also complicated by the fact that the cost of insurance is determined by factors not within the servicer's control (*e.g.*, insurers' pricing formulas, the number of days a borrower is delinquent on the mortgage loan). Two national trade associations representing the mortgage industry asserted that if a servicer does not rely on a third party to track a borrower's hazard insurance, the servicer would not have the information necessary to make good faith estimates of insurance premiums until the force-placed insurance is actually issued. One of the commenters asserted that this problem is likely to be most acute for small servicers because they often do not hire third parties to track a borrower's hazard insurance. The two commenters also questioned whether a servicer could be held liable for differences between an estimate and the actual cost under a theory that the differences were caused by unfair, deceptive, or abusive practices. They also questioned whether a servicer would have the authority to provide the estimate because for an estimate to be binding, an insurance binder from a licensed insurance agent or provider is required. The two commenters and a force-placed insurance provider also expressed concern that the potential inaccuracies with estimate costs may lead to customer confusion and complaints. Lastly, several industry commenters expressed concern with the use of the phrase "good faith estimate" because the phrase is a defined term in existing Regulation X with a different meaning than the meaning set forth in proposed comment 37(c)(2)(ix)-1.

After considering these comments, the Bureau is withdrawing the requirement to provide the cost of force-placed insurance (or a good faith estimate of the cost) in the notice required by § 1024.37(c)(1)(i), but keeping the requirement for purposes of the reminder notice required by § 1024.37(c)(1)(ii). The Bureau believes that this will reduce compliance burden concerns while continuing to assure that borrowers receive specific prices or estimates that are likely to provide strong motivation to renew their homeowners' insurance policies. Additionally, the regulatory text is changed to refer to a "reasonable estimate" rather than a "good faith estimate," and the commentary is changed to clarify what a "reasonable estimate" means.

A number of industry commenters recommended that the Bureau allow servicers to provide a borrower with additional information about force-placed insurance. They stated that servicers currently provide a number of disclosures in addition to the information the Bureau has proposed in response to State disclosure requirements, class action litigation, and industry best practices. Commenters expressed concern that the failure by servicers to include additional information may subject servicers to further litigation and extensive potential liability. Some commenters suggested that the Bureau permit servicers to include additional information and the required information in one document. One large bank servicer suggested an alternative approach where a servicer would be permitted to include additional information in the same transmittal that is used to provide notices containing the required information.

The Bureau believes that providing additional information in the same notice as the required information could obscure the most important information or tend to create information overload. For instance, one industry commenter provided a list of additional information that included 10 specific pieces of information and a catch-all category for disclosures related to force-placed insurance imposed by other State or Federal law. The Bureau believes it would be better if servicers have latitude to provide the additional information on separate pieces of paper in the same transmittal. Accordingly, the Bureau is adopting new § 1024.37(c)(4) to provide that a servicer may not include any information other than information required by § 1024.37(c)(2) in the written notice required by § 1024.37(c)(1)(i), but that a servicer may provide such additional information to a borrower in the same transmittal as the transmittal used to provide the notice required by § 1024.37(c)(1)(i) but on separate pieces of paper. The Bureau is adopting parallel provisions in § 1024.37(d) and (e), numbered as § 1024.37(d)(4) and (e)(4), respectively. The Bureau has also revised § 1024.37(c)(2) to permit the notice required by § 1024.37(c)(1)(i) to include, if applicable, a statement advising a borrower to review additional information provided in the same transmittal. The Bureau has adopted parallel provisions in § 1024.37(d) and (e).

37(c)(3) Format

As previously discussed, section 6(*l*)(1) of RESPA establishes that a servicer must provide a borrower with two written notices before charging a borrower for force-placed insurance. To implement this provision, the Bureau proposed § 1024.37(c)(3) and (d)(3) in parallel. Proposed 1024.37(c)(3) stated that disclosures set forth in proposed § 1024.37(c)(2) must be in a format substantially similar to form MS-3(A), set forth in appendix MS-3. Disclosures made pursuant to § 1024.37(c)(2)(vi) and (c)(2)(ix) must be in bold text. Disclosure made pursuant to § 1024.37(c)(2)(iv) must be in bold text, except that the physical address of the borrower's property may be in regular text. The Bureau believed the use of bold text to bring attention to important information would make it easier for borrowers to identify promptly the purpose of the notice and to find the information quickly and efficiently. Additionally, the Bureau stated in the proposal that the Bureau believed that it was important to bring attention to the cost of force-placed insurance so borrowers have a clear understanding of the cost to them of the service that servicers provide in obtaining force-placed insurance. The Bureau further noted that it believed that it was important for borrowers to understand that the servicer's purchase of force-placed insurance arises from the borrower's obligation to maintain hazard insurance. Although the notice contains additional information that is important, the Bureau believes the usefulness of highlighting in focusing a borrower's attention on important information decreases if highlighting is used unsparingly.

One large bank servicer commended the Bureau for the model forms the Bureau proposed. It observed that the forms were thoughtfully designed and should be readily understandable to consumers. Another large bank servicer agreed with the Bureau's rationale that model forms facilitate compliance with the new Dodd-Frank Act requirements concerning force-placed insurance disclosures and the Bureau's proposed supplemental disclosures, but sought clarification that servicers may use the model forms as guidance but are not required to demonstrate strict adherence to the language of the forms. One non-bank servicer argued that disclosure forms should generally be open-ended to allow the servicer to provide all the content required by the Bureau while allowing the servicer to tailor the form to its needs; however, the commenter stated that it did not have concerns with the model force-placed insurance forms the Bureau proposed.

In consideration of the comments received and based on further consideration, the Bureau is changing § 1024.37(c)(3) to no longer require a servicer to provide the information required by § 1024.37(c)(2) in a form "substantially similar" to form MS-3A, as set forth in appendix MS-3. As adopted, § 1024.37(c)(3) provides that a servicer may use form MS-3A in appendix MS-3 to comply with the requirements of § 1024.37(c)(1)(i) and (2). However, the Bureau is adopting a final § 1024.37(c)(3) that generally contains the highlighting requirements set forth in the proposal.

37(d) Reminder Notice

37(d)(1) In General

As discussed above, section 6(*l*)(1) of RESPA, added by section 1463(a) of the Dodd-Frank Act, states that a servicer must send two written notices to the borrower prior to charging the borrower for force-placed insurance. Specifically, RESPA section 6(*l*)(1)(B) requires servicers to use first-class mail to send a second written notice to the borrower, at least 30 days after mailing initial the notice required by RESPA section 6(*l*)(1)(A), that contains all the information described in section 6(*l*)(1)(A)(i) through (iv) of RESPA.

The Bureau proposed § 1024.37(d)(1) to implement section 6(*l*)(B) of RESPA. Proposed § 1024.37(d)(1) stated that one written notice in addition to the written notice required pursuant to § 1024.37(c)(1)(i) must be delivered to the borrower or placed in the mail prior to a servicer charging a borrower for force-placed insurance. It further stated that the servicer may not deliver or place this second written notice under § 1024.37(d)(1) in the mail until 30 days after delivering to the borrower or placing in the mail the first written notice under § 1024.37(c)(1)(i). Proposed § 1024.37(d)(1) would also have mandated that a servicer that receives no insurance information after delivering or placing in the mail the written notice required pursuant to in § 1024.37(c)(1)(i) must provide the disclosures set forth in § 1024.37(d)(2)(i), while a servicer that does receive insurance information but is unable to verify that the borrower has hazard insurance coverage continuously must provide the disclosures set forth in § 1024.37(d)(2)(ii).

Proposed comment 37(d)(1)-1 would have explained the content of the reminder notice will vary depending on the insurance information the servicer has received from the borrower. Two national trade associations representing the mortgage industry urged the Bureau to permit servicers to use the same letter they sent to a borrower to comply with the first written notice requirement to comply with the second written notice requirement.

As the Bureau noted in the proposal, section 6(k)(1)(B) of RESPA can be read to require a servicer to provide the same disclosures a borrower has previously received. However, where a borrower responds to the first notice by providing insurance information, the Bureau believed that the reminder notice would be more useful if it contained an acknowledgement of the information these borrowers provided in response to the first notice and informed these borrowers that the information provided was not sufficient for a servicer to verify that they had continuous coverage in place. The Bureau observed in the proposal that simply repeating the same content as the first notice might cause borrowers to become frustrated and confused by the fact that they are receiving another notice asking for insurance information when they thought they had already provided such information.

As discussed above in the section-by-section analysis of § 1024.37(c)(1), some industry commenters urged the Bureau to withdraw the requirement that a servicer send a borrower a second notice before charging a borrower for force-placed insurance. As the Bureau observed in the section-by-section analysis of § 1024.37(c)(1), Congress specifically required that two notices be provided before a servicer charges a borrower for force-placed insurance. For reasons discussed above, the Bureau does not believe that varying from this statutory scheme is appropriate. Further, comments from two large force-placed insurance providers suggest that at least by the time of the second notice, servicers will be able to provide borrowers with a reasonable estimate of the cost of the force-placed insurance, so that the second notice will complement the first.[111] Accordingly, the Bureau is adopting § 1024.37(d)(1) as proposed with an adjustment to emphasize that a servicer may not charge a borrower for force-placed insurance unless it has delivered or mailed the second written notice at least 15 days prior to imposing such charge.

37(d)(2) Content of Reminder Notice

The Bureau proposed § 1024.37(d)(2) to address the content of the second required notice. Proposed § 1024.37(d)(2)(i) would have set forth the information that a servicer must provide in the written notice established by section 6(*l*)(1)(B) of RESPA to a borrower from whom the servicer has not received any insurance information. Proposed §1024.37(d)(2)(ii) would have set forth the information required where the servicer received insurance information from the borrower within 30 days after delivering to the borrower or placing in the mail the

[111] The commenters suggested that if the Bureau was going to adopt the requirement that servicers must provide the actual cost (or good faith estimate of the cost) of force-placed insurance, the requirement should be limited to the second notice.

written notice set forth § 1024.37(c)(1)(i), but not was not able to verify that the borrower has hazard insurance in place continuously.

Proposed § 1024.37(d)(2)(i) would have required that if a servicer that has not received any insurance information from the borrower within 30 days after delivering or placing in the mail the notice required pursuant to § 1024.37(c)(1)(i), the servicer must provide a reminder notice that contains the disclosures forth in § 1024.37(c)(2)(ii) to (c)(2)(xi), the date of the notice, and a statement that the notice is the second and final notice. The Bureau explained in the proposal that it believes that the date of the notice and a statement that the notice is the second and final notice helps to distinguish the notice from the notice required pursuant to § 1024.37(c)(1)(i). Moreover, because the servicer would not have received any insurance information, the Bureau believed it would be appropriate to require the servicer to provide the disclosures set forth in § 1024.37(c)(2)(ii) to (c)(2)(xi) in the second written notice sent to a borrower who has not sent the servicer any insurance information in response to the first written notice.

Proposed § 1024.37(d)(2)(ii) would have required that if a servicer has received insurance information from the borrower within 30 days after delivering to the borrower or placing in the mail the written notice set forth in § 1024.37(c)(1)(i), but has not been able to verify that the borrower has hazard insurance in place continuously, then the servicer must deliver or place in the mail a written notice that contains the following: (1) The date of the notice; (2) a statement that the notice is the second and final notice; (3) the disclosures set forth in § 1024.37(c)(2)(ii), (c)(2)(iii), (c)(2)(iv), and (c)(2)(xi); (4) a statement that the servicer has received the hazard insurance information that the borrower provided; (5) a statement that indicates to the borrower that the servicer is unable to verify that the borrower has hazard insurance in place continuously; and (6) a statement that the borrower will be charged for insurance the servicer obtains for the period of time where the servicer is unable to verify hazard insurance coverage unless the borrower provides the servicer with hazard insurance information for such period.

As described above in the section-by-section analysis of §1024.37(c)(2), a number of industry commenters requested the Bureau to withdraw the requirement to provide the cost of force-placed insurance (or a good faith estimate of the cost) and to permit servicers to include additional information in the force-placed insurance notices the Bureau proposed. For reasons discussed above, the Bureau is keeping the requirement to provide the cost of force-placed insurance (revised to refer to a "reasonable estimate" rather than a "good faith estimate") in the second notice and not permitting a servicer to include additional information in a second reminder notice. The Bureau has also added new comment 37(d)(2)(i)(D)-1 to clarify what a "reasonable estimate" means.

37(d)(3) Format

As previously discussed, the Bureau proposed new §§ 1024.37(c)(3) and (d)(3) in parallel to implement section 6(*l*)(1). Proposed § 1024.37(d)(3) would have provided that the disclosures set forth in proposed § 1024.37(d)(2)(i) must be in a format substantially similar to form MS-3(B), and the disclosures set forth in § 1024.37(d)(2)(ii) must be in a format be substantially similar to form MS-3(C). Proposed § 1024.37(d)(3) would have provided that disclosures required by § 1024.37(d)(2)(i)(B), (d)(2)(ii)(B), and (d)(2)(ii)(F) must be in bold text. The Bureau observed in the proposal that the reasons the Bureau provided for requiring the use of highlighting (bold text) for purposes of § 1024.37(c)(3) also applied to § 1024.37(e)(3). As discussed above, the Bureau has made changes to § 1024.37(c)(3) in adopting § 1024.37(c)(3), and the Bureau is making conforming changes to § 1024.37(d)(3).

37(d)(4) Updating Notice with Borrower Information

The Bureau proposed § 1024.37(d)(4) to provide that if a servicer receives hazard insurance information from a borrower after the second written notice required pursuant to § 1024.37(d)(1) has been put into production, the servicer is not required to update the notice so long as the notice was put into production within a reasonable time prior to the servicer delivering the notice to the borrower or placing the notice in the mail. The Bureau proposed related commentary, comment 37(d)(4)-1, that would have provided that five days prior to the delivery or mailing of the second notice is a reasonable time and invited comments on whether, in certain circumstances, a longer time frame is reasonable.

As discussed above, the Bureau observes that one of the minimum consumer protection purposes Congress intended to establish by creating new servicer duties with respect to a servicer’s purchase of force-placed insurance is to provide a borrower with reasonably accurate information about a servicer’s grounds for purchasing force-placed insurance. The Bureau believes that a servicer has a duty to ensure that the second notice contains reasonably accurate information about an individual borrower’s hazard insurance status. Therefore, the Bureau believes that a servicer has a duty to update the second notice if it receives new insurance information about a borrower after sending the first written notice to the borrower. The Bureau, however, observed in the proposal that a servicer might have to prepare the written notice in advance of sending it. Accordingly, the Bureau explained that it believed that it was appropriate to create a safe harbor of five days to protect a servicer acting diligently from exposure to potential litigation if the information the servicer provided in the second notice turns out to be, in fact, inaccurate, due to information about a borrower's hazard insurance it receives subsequent to putting the second notice into production.

One force-placed insurance provider and two national trade associations representing the mortgage industry recommended the Bureau withdraw proposed § 1024.37(d)(4) or, in the alternative, expand the safe harbor to 10 days, excluding legal holidays, Saturdays and Sundays, because some servicers use third-party service providers to prepare force-placed insurance notices and need a period of longer than 5 days to prepare the notices. The force-placed insurance provider contended that servicers are going to update the second notice or not send the second notice at all if they have received verification of a borrower's hazard insurance because they would not want to send their customers unnecessary notices. Two other force-placed insurance providers also recommended that the safe harbor be expanded to 10 days from the date that a borrower's insurance is verified, but did not indicate whether 10 days should exclude legal holidays, Saturdays, and Sundays.

The Bureau observes that as discussed above, the intent of § 1024.37(d)(4) is to create a safe harbor to protect servicers who are diligent in ensuring that borrowers receive reasonably accurate information from potential litigation risk. Accordingly, the Bureau is concerned that a 10-day safe harbor, even one that includes legal public holidays, Saturdays and Sundays, would be overbroad and give the benefit of the safe harbor to servicers who are not diligent in ensuring that borrowers receive accurate information. But the Bureau has concluded that servicers that use third-party service providers to prepare force-placed insurance notices could reasonably require more than 5 days to prepare the second written notice in a timely manner, especially a five-day period that includes a legal public holiday, Saturday, or Sunday. Accordingly, the Bureau is adopting proposed comment 37(d)(4)-1 with a change to clarify that the 5-day period excludes legal public holidays, Saturdays, and Sundays. The Bureau believes this adjustment strikes the right balance between achieving the consumer protection of providing a borrower with accurate information about a servicer's grounds for purchasing force-placed insurance and providing diligent servicers with a safe harbor from potential litigation risk.

37(e) Renewal or Replacement of Force-Placed Insurance

The Bureau proposed § 1024.37(e) to prohibit a servicer from charging a borrower for the replacement or renewal of an existing force-placed insurance policy unless certain procedural requirements are followed as specified in proposed § 1024.37(e). The Bureau proposed the requirements because pre-proposal outreach suggested that there is no widespread industry standard that applies to renewal procedures for force-placed insurance. Moreover, commissions and reinsurance agreements may create strong incentives at renewal as well as at original placement. The Bureau believes that the renewal notice is authorized under RESPA section 6(*l*), which provides that a servicer does not have a reasonable basis to obtain force-placed insurance unless certain notice requirements are met, and does not limit such requirements to the first time a servicer obtains and charges a borrower for force-placed insurance. The Bureau has, however, made certain adjustments to the notice and procedure requirements set forth in RESPA section 6(*l*), as described below, to account for the fact that in the case of the renewal of forced-placed insurance, the borrower already will have received at least two prior force-placed insurance notices. Section 1024.37(e) is further authorized under sections 6(j)(3), 6(k)(1)(E), and 19(a) of RESPA as necessary and appropriate to achieve the consumer protection purposes of RESPA, including avoiding unwarranted charges and fees and ensuring the provision to borrowers of accurate and relevant information. As discussed below, the Bureau is adopting proposed

§ 1024.37(e) generally as proposed with a few changes to address issues that were raised in comments.

37(e)(1) In general

The Bureau proposed § 1024.37(e)(1) to provide that that a servicer may not charge a borrower for renewing or replacing existing force-placed insurance unless: (1) The servicer delivers or places in the mail a written notice to the borrower with the disclosures set forth in § 1024.37(e)(2) at least 45 days before the premium charge or any fee is assessed; and (2) during the 45-day notice period, the servicer has not received evidence that the borrower has obtained hazard insurance. The Bureau stated in the proposal that it believed that the procedures it proposed concerning renewal and replacement would provide advance notice to allow a borrower the time the borrower may need to buy hazard insurance before being charged again for the cost of force-placed insurance at renewal or replacement.

The Bureau did not believe a servicer should have to wait until the end of the notice period before charging a borrower for the cost of renewing the force-placed insurance if a borrower has confirmed that there was a gap in coverage with respect to a borrower who obtains hazard insurance after receiving the renewal notice. Accordingly, the Bureau proposed § 1024.37(e)(1)(iii) to permit a servicer who has renewed or replaced existing force-placed insurance during the notice period to charge a borrower for such renewal or replacement promptly after a servicer receives verification that the hazard insurance obtained by a borrower did not provide a borrower with insurance coverage for any period of time following the expiration of the existing force-placed insurance, notwithstanding § 1024.37(e)(1)(i) and (e)(1)(ii). The Bureau proposed comment 37(e)(1)(iii)-1 to provide an example of what this means.

Two national trade associations representing the mortgage industry observed that it is common industry practice for a servicer to send renewal notice to borrowers but urged that the Bureau permit servicers to charge a borrower for the renewal of existing force-placed insurance at the time of purchase because a servicer should not have to incur the burden of not being able to impose a charge on a borrower related to force-placed insurance at the time of renewal or replacement. The Bureau declines to modify the proposal because the Bureau believes imposing a notice period during which a servicer is prohibited from charging a borrower for force-placed insurance is appropriate and necessary to help a borrower avoid the cost associated with the borrower's servicer renewing or replacing the borrower's hazard insurance. The Bureau further notes that a servicer can provide the 45-day notice in advance of the expiration of the current forced place coverage, and accordingly, disagrees that§ 1024.37(e)(1) would invariably prohibit a servicer from imposing a charge on a borrower related to force-placed insurance at the time of renewal or replacement. Accordingly, the Bureau is adopting § 1024.37(e)(1) as proposed, except technical changes to clarify what evidence of borrower's coverage means for § 1024.37(e)(1). New comment 37(e)(1)-1 clarifies that a servicer may require a borrower to provide a form of written confirmation as described in comment 37(c)(1)(iii)-3 and may reject evidence of coverage submitted by the borrower for the reasons described in comment 37(c)(1)(iii)-2. Comment 37(e)(1)(iii) is adopted as proposed.

37(e)(2) Content of Renewal Notice

Proposed § 1024.37(e)(2) would have required a servicer to provide a number of the disclosures set forth in in proposed § 1024.37(c)(2) in the renewal notice. The Bureau explained in the proposal that the main differences between the disclosures set forth in proposed § 1024.37(c)(2) and proposed § 1024.37(e)(2) are that in proposed § 1024.37(e)(2), servicers must provide a statement that: (1) the servicer previously obtained insurance on the borrower's property and assessed the cost of the insurance to the borrower because the servicer did not have evidence that the borrower had hazard insurance coverage for the property; and (2) the servicer has the right to maintain insurance by renewing or replacing the insurance it previously obtained because insurance is required. The Bureau believes the differences are necessary to distinguish the notice required pursuant to proposed § 1024.37(e)(1) from the notice required pursuant to proposed § 1024.37(c)(1).   The proposed requirement in §1024.37(c)(2)(ix) concerning provision of the cost of the force-placed insurance, stated as an annual premium, or a good faith estimate of such cost, would have been replicated in proposed §1024.37(e)(2)(vii), with related commentary that would have explained that the good faith requirement set forth in § 1024.37(e)(2)(vii) is the same good faith requirement set forth in § 1024.37(c)(2)(ix).

The comments the Bureau received with respect to the content of the force-placed insurance notices under § 1024.37(c)(2) (*i.e.*, comments about the requirement to provide a good-faith estimate and requests to be allowed to provide additional information) also apply to proposed § 1024.37(e)(2). The Bureau believes that the burden of providing a good faith estimate is lower for purposes of § 1024.37(e)(2) than for purposes of providing such an estimate for purposes of § 1024.37(c)(2) because a servicer can provide such an estimate based on the amount of current premiums. Accordingly, the Bureau is adopting this requirement in the final rule (revised to refer to a "reasonable estimate") and made technical changes in related commentary to reflect this revision. For reasons discussed above, the Bureau is not permitting a servicer to include additional information in the notice required by § 1024.37(e)(1). But, as discussed above, the Bureau is adopting new § 1024.37(e)(4) to permit servicers to provide additional information in the same transmittal the servicer uses to provide the replacement or renewal notice.

37(e)(3) Format

Proposed § 1024.37(e)(3) would have provided that that the disclosures set forth in § 1024.37(e)(2) must be in a format substantially similar to form MS-3(D), set forth in appendix MS-3. It also stated that disclosures made pursuant to § 1024.37(e)(2)(vi)(B) and 37(e)(2)(vii) must be in bold text, and disclosures made pursuant to § 1024.37(e)(2)(iv) must be in bold text, except that the physical address of the property may be in regular text. Because proposed § 1024.37(e)(3) paralleled proposed §§ 1024.37(c)(3) and (d)(3), the Bureau is adopting § 1024.37(e)(3) with change to conform to changes made in § 1024.37(c)(3) and (d)(3).

37(e)(4) Compliance

Proposed § 1024.37(e)(4) would have provided that before the first anniversary of a servicer obtaining force-placed insurance on a borrower's property, the servicer shall deliver to the borrower or place in the mail the notice required by § 1024.37(e)(1). Further, proposed §1024.37(e)(4) would have provided that a servicer is not required to comply with § 1024.37(e)(1) before charging a borrower for renewing or replacing existing force-placed insurance more than once every 12 months.

The Bureau explained that the Bureau did not believe receiving more than one renewal or replacement notice in a 12-month period was necessary because borrowers should be able to retain the first notice under proposed § 1024.37(e)(1), including the cost or estimate information, for future reference. The Bureau also noted that some small servicers who participated in the Small Business Review Panel expressed concerns about the cost of sending renewal notices over a 12-month period because unlike large servicers, a number of small servicers purchase force-placed insurance policies that would have to be renewed monthly. The Bureau, however, solicited comments on whether providing the renewal or replacement notice once during a 12-month period would adequately inform borrowers about the costs, benefits, and risks associated with servicers' renewal or replacement of existing force-placed insurance.

One large force-placed insurance provider commented that one notice per year is sufficient to remind borrowers without overly burdening the servicer or potentially inundating borrowers with multiple and repetitive notices. In contrast, a state consumer group asserted that one notice over a 12-month period may not be enough to adequately inform borrowers of the costs, benefits, and risks of servicer's renewal or replacement of force-placed insurance and urged the Bureau to require a servicer to provide at least two renewal notices over a 12-month period to inform borrowers of the force-placed insurance premium they would be charged.

The Bureau has further considered the issue but continues to believe for the reasons stated in the proposal that one annual renewal notice will adequately inform borrowers of the costs, benefits, and risks of servicer's renewal or replacement of force-placed insurance. Additionally, the Bureau notes that in conjunction with the Bureau's periodic statement rule, most borrowers whose servicers are charging them for force-placed insurance will be made aware of that fact because a servicer will be required to list force-placed insurance charges on periodic statements. Accordingly, the Bureau is adopting proposed § 1024.37(e)(4) as proposed, renumbered as § 1024.37(e)(5) in the final rule.

37(f) Mailing the Notices

Section 6(*l*)(1) of RESPA, discussed previously, establishes that servicers must use first-class mail to send the notices established by section 6(*l*)(1)(A) and (B) of RESPA. The Bureau proposed to implement this aspect of section 6(*l*)(1) of RESPA by adding new § 1024.37(f) to provide that if a servicer mails a notice required pursuant to § 1024.37(c)(1)(i), (d)(1), or (e)(1) of this section, a servicer must use a class of mail not less than first-class mail.

As discussed above, the Bureau believes that it is necessary and appropriate to achieve the purposes of RESPA to allow servicers to transmit the force-placed notices required under § 1024.37 by a class of mail better than first. The Bureau observed in the proposal that although the notice required by proposed § 1024.37(e)(1) is not required by RESPA, applying the same mailing requirements to all notices under § 1024.37 would facilitate compliance by promoting consistency. The Bureau did not receive any comments on proposed § 1024.37(f) and is adopting § 1024.37(f) as proposed.

37(g) Cancellation of Force-Placed Insurance

Section 1463(a) added new section 6(*l*)(3) to RESPA, which states that within 15 days of receipt by a servicer of confirmation of a borrower's existing insurance coverage, the servicer must: (1) terminate the force-placed insurance; and (2) refund to the borrower all force-placed insurance premium charges and related fees paid by the borrower during any period in which the borrower's insurance and the force-placed insurance were both in effect. The Bureau proposed § 1024.37(g)(1) and (2) to implement section 6(*l*)(3) of RESPA. Section 1024.37(g)(1) and (2) would have provided that within 15 days of receiving verification that the borrower has hazard insurance in place, a servicer must cancel force-placed insurance obtained for a borrower's property and for any period during which the borrower's hazard insurance was in place, refund to the borrower all force-placed insurance premium charges and related fees paid by the borrower for such period. Proposed § 1024.37(g)(2) would have also required a servicer to remove all force-placed insurance charges and related fees that the servicer has assessed to the borrower for any period during which the borrower's hazard insurance was in place from the borrower's account. The Bureau believes that Congress, by establishing the duty to provide a full refund of the force-placed insurance premium and related charges paid by a borrower for any period of time during which the borrower's hazard insurance coverage and the force-placed insurance coverage were both in effect, also intended to establish the duty to remove a premium charge or fee related to force-placed insurance for such period. Accordingly, the Bureau interprets the statutory duty to provide such refund to include the duty to remove all force-placed insurance premium charges and related fees charged to a borrower's account for any period during which the borrower's hazard insurance coverage and the force-placed insurance coverage were both in effect.

Several industry commenters asserted that a borrower should not have an unconditional right to receive a refund for all force-placed insurance premium charges and related fees paid by the borrower during any period of overlapping coverage. They asserted that it would not be reasonable for a servicer to absorb the cost of the refund if a borrower does not provide evidence of insurance in a timely manner or if a servicer had a reasonable basis to purchase force-placed insurance. Some commenters asserted that an unconditional right to a refund would encourage borrowers to act irresponsibly by not providing evidence of insurance in a timely manner. One state housing finance agency and a force-placed insurance provider suggested that servicers needed 15 business days to cancel force-placed insurance and provide a borrower with refunds in an orderly manner and asked the Bureau to adjust the timelines accordingly.

The Bureau is finalizing § 1024.37(g) as proposed, with adjustments to the regulatory language for clarity. While a number of commenters indicated that they understood "receiving verification that the borrower has hazard insurance in place" meant receiving evidence of insurance coverage, just as the Bureau has adjusted the text of §§ 1024.37(c)(1)(iii), (d)(2)(ii), and (e)(1)(iii), to clarify what "receiving verification" means, the Bureau has made similar revisions to enhance the clarity of § 1024.37(g).

Additionally, in finalizing § 1024.37(g)(2), the Bureau has replaced the proposed phrase "for any period during which the borrower's hazard insurance was in place" with the phrase "for any period of overlapping insurance coverage" because the Bureau believes the language "periods of overlapping coverage" more closely aligns with the statutory language "any period during which the borrower's insurance coverage and the force-placed insurance coverage were each in effect" in RESPA section 6(*l*)(3). The Bureau is adopting new comment 37(g)(2)-1 to explain what "period of overlapping insurance coverage" means for purposes of § 1024.37(g)(2). The Bureau, however, is not adopting proposed comment 37(g)-1 because upon further consideration, the Bureau believes that further elaboration on what a servicer must do to comply with § 1024.37(g) is not required.

With respect to commenters asserting that a borrower should not have an unconditional right to a full refund of force-placed insurance premiums and related fees paid by the borrower, the Bureau notes that section 6(*l*)(3) of RESPA expressly establishes that a borrower's right to a full refund for any period during which the borrower's hazard insurance and the force-placed insurance were both in effect is an unconditional one. Moreover, based on consumer testing and other outreach, the Bureau is skeptical that the statutory regime will cause borrowers to be less diligent in responding to notices from their servicers asking them to provide evidence demonstrating insurance coverage and result in servicers having to absorb significant costs.

As discussed above, across all rounds of testing, participants uniformly understood the timeliness of their response upon the receipt of force-placed insurance notices affected whether or not they would have to pay for force-placed insurance. All participants said they would take immediate action because they did not want to bear the expense of force-placed insurance.[112] The uniformity of the responses supports the Bureau's belief that the substantially higher cost of force-placed insurance provides borrowers with a natural incentive to provide their servicers with evidence of insurance coverage in a timely manner.

Further, based on outreach the Bureau has done with force-placed insurance providers and servicers, as well as based on public statements made by these entities and comment letters the Bureau has received from industry, the Bureau observes that the typical force-placed insurance on the market provides for flat cancellation (*i.e.*, the force-placed insurance provider provides a full refund of force-placed insurance premiums paid by the borrower for any period of time where the force-placed insurance and the borrower's hazard insurance coverage were both in effect).[113] Accordingly, the Bureau does not believe that servicers will have to absorb significant costs.

The Bureau further declines to adjust the timeline a servicer must follow to cancel fore-placed insurance and refund force-place premium charges and related fees paid by the borrower. As discussed above in the section-by-section analysis of the defined term "Day" in § 1024.31, the Bureau believes that Congress intended the term "day" by itself to mean a calendar day for

[112] ICF Int'l, Inc., *Summary of Findings: Design and Testing of Mortgage Servicing Disclosures* 24-29 (Aug. 2012) ("Macro Report"), *available at* http://www.regulations.gov/#!documentDetail;D=CFPB-2012-0033-0003.

[113] *See e.g.,* N.Y. State Dep't of Fin. Services, *Testimony of John Frobose, President of American Security Insurance Company (ASIC)* 6 (describing that if ASIC receives proof that there was no gap in hazard insurance coverage on a borrower's property, ASIC refunds all force-placed insurance premiums paid); *see also*, N.Y. State Dep't of Fin. Services, *Written Testimony of Nicholas Pastor and Matthew Freeman on behalf of QBE Insurance Corporation and QBE FIRST Insurance Agency* 15 (stating that if the borrower provides proof of voluntary insurance such that there was no lapse in the voluntary coverage, all premiums paid by a borrower or deducted from a borrower's escrow account are refunded, regardless of when the borrower provided the proof of voluntary coverage): *see further*, N.Y. State Dep't of Fin. Services, *Written Testimony of Justin Crowley on behalf of Select Portfolio Servicing, Inc, Pelatis Insurance Agency Corp. and Pelatis Insurance Limited* 5 (stating that it provides a full refund equal to the total amount of force-placed insurance premiums charged to the borrower's account for any period during which the borrower maintained his or her own homeowners' coverage)(copies of the aforementioned testimonies are available at http://www.dfs.ny.gov/insurance/hearing/fp_052012_testimony.htm).

purposes of RESPA. The 15-day timeline for cancellation and refund is expressly established by section 6(*l*)(3) of RESPA.

Further, based on the Bureau's outreach and public statements made by force-placed insurance providers and servicers, the Bureau understands that servicers' purchase of force-placed insurance is generally a rare occurrence. If the volume of force-placement is small to begin with, then the Bureau is skeptical that requiring servicers to follow the statutorily-prescribed timeline would overwhelm a servicer or otherwise impose too large of a burden. Accordingly, the Bureau does not believe it is appropriate to deviate from the statutory-determined timeline set forth in section 6(*l*)(3).

A large force-placed insurance provider, a state trade association representing mortgage lenders, and a bank servicer expressed concern that § 1024.37(g), as proposed, would be construed as requiring a servicer to cancel force-placed insurance and provide a full refund even if a borrower's hazard insurance policy does not meet the loan contract's requirements. Although the Bureau does not believe that it was reasonable to construe proposed § 1024.37(g) to require a servicer to cancel force-placed insurance and provide a full refund even if a borrower's hazard insurance policy does not meet the loan contract's requirements, the Bureau believes that in any event, the commenters' concern is adequately addressed by § 1024.37(g), which, as adopted, clarifies that "receiving verification" in proposed § 1024.37(g) means receiving evidence demonstrating that the borrower has had hazard insurance in place that complies the loan contract's requirements to maintain hazard insurance.

Lastly, one large bank servicer expressed concern that the obligation to refund a borrower for force-placed insurance premiums and related fees paid by the borrower triggers a subsequent escrow analysis disclosure set forth in current § 1024.17(c)(3), which requires a servicer to perform an escrow account analysis at the completion of the escrow account computation year, which is defined in current § 1024.17(b) as "a 12-month period that a servicer establishes for the escrow account beginning with the borrower's initial payment date." Providing a refund to a borrower in accordance with § 1024.37(g), by itself, does not trigger the obligation to perform an escrow account analysis required by current § 1024.17(c)(3).

37(h) Limitation on Force-Placed Insurance Charges

Section 1463(a) of the Dodd-Frank Act amended RESPA section 6 by adding new section 6(m) to RESPA, which states that apart from charges subject to State regulation as the business of insurance, all charges related to force-placed insurance imposed on the borrower by or through the servicer must be bona fide and reasonable. Proposed § 1024.37(h)(1) generally mirrored the statutory language by providing that except for charges subject to State regulation as the business of insurance and charges authorized by the Flood Disaster Protection Act of 1973, all charges related to force-placed insurance assessed to a borrower by or through the servicer must be bona fide and reasonable. Proposed § 1024.37(h)(2) would have provided that a bona fide and reasonable charge is a charge for a service actually performed that bears a reasonable relationship to the servicer's cost of providing the service, and is not otherwise prohibited by applicable law.

The Bureau noted in the proposal that the Flood Disaster Protection Act of 1973 establishes that notwithstanding any Federal or State law, any servicer for a loan "secured by improved real estate or a mobile home" may charge a reasonable fee for determining whether the building or mobile home securing the loan is located or will be located in a special flood hazard zone. *See* 42 U.S.C. 4012a(h). As discussed in the proposal and explained above, the Bureau was concerned about issuing regulations that would overlap with regulations issued pursuant to the FDPA, and believed that borrowers would be confused by receiving overlapping notices under the two regimes with respect to the same flood insurance policy. Accordingly, as discussed above, the Bureau used its authority under section 19(a) of RESPA to exempt hazard insurance to protect against flood loss obtained by a servicer as required by the FDPA from the definition of force-placed insurance. Consistent with this exemption and for the same reasons, the Bureau believed that it was necessary to achieve the purposes of RESPA's force-placed insurance provisions to use it authority under section 19(a) of RESPA to exempt charges authorized by the FDPA from proposed § 1024.37(h). The Bureau received no comments on the exemption and is adopting this aspect of § 1024.37(h)(1) as proposed.

With respect to proposed § 1024.37(h)(2), which would have set forth the Bureau's proposed definition of "bona fide and reasonable charge," the Bureau noted in the proposal that the Bureau believed it was important that servicers do not try to inflate the already-high cost of force-placed insurance by assessing charges to borrowers that are not for services actually performed, do not bear a reasonable relationship to the servicer's cost of providing the service, or are prohibited by applicable law.

One non-bank servicer commended the proposed definition of "bona fide and reasonable charge" and predicted that the Bureau's proposal would stop many of the abusive servicer practices that have damaged the industry's reputation over the past few years. But a national trade association representing the consumer credit industry contended that the proposed definition would create an ambiguous standard that would expose lenders to class action lawsuits and infringe on state insurance departments' sole authority to regulate insurance rates.

Other comments received from a national trade association representing realtors and several consumer groups urged the Bureau to go further in regulating charges related to force-placed insurance that a servicer imposes on a borrower. The realtors association urged the Bureau to mandate affordable force-placed insurance premiums. One consumer group urged the Bureau to ban servicers or their affiliates from receiving any fee, commission, kickback, reinsurance contract, or any other thing of value for a force-placed insurance provider in exchange for purchasing force-placed insurance, and to prohibit a servicer from obtaining an amount of force-placed insurance coverage greater than the replacement cost value of the borrower's property. Two national consumer groups suggested that the Bureau should expressly exclude unreasonable costs and other costs unrelated to the provision of force-placed insurance. Two other national consumer groups asserted that the Bureau should expressly exclude commissions or other compensation paid by a force-placed insurance provider or its agent to a servicer or any affiliate of the servicer, costs associated with insurance tracking, cost for activities for which a servicer is being reimbursed by the owner of the mortgage, costs associated with the administration of reinsurance programs, cost to subsidize unrelated servicer activities, and any cost that is not directly related to the provision of force-placed insurance. They also urged the Bureau to provide guidance about prohibited fees that is consistent with Fannie Mae's proposed changes to its servicing guidelines on force-placed insurance.[114] These commenters further asserted that State insurance regulators have no authority over a charge that a servicer imposes on a borrower for force-placed insurance because a servicer is not an entity regulated by state insurance regulators.

[114] Fannie Mae issued a servicing announcement stating that any servicer requesting reimbursement of force-placed insurance premiums must exclude any lender-placed insurance commission earned on that policy by the servicer or any related entity, costs associated with insurance tracking or administration, or any other costs beyond the actual cost of the lender-placed insurance policy premium. *See* Fannie Mae, *Updates to Lender-Placed Property Insurance and Hazard Insurance Claims Processing* (Mar. 14, 2012), *available at* https://www.fanniemae.com/content/announcement/svc1204.pdf. The Bureau observes that Fannie Mae followed up in May of 2012 with a public statement announcing that it has postponed the implementation date of these guidelines until further notice. Fannie Mae, *Effective Date for Lender-Placed Property Insurance Requirements*, *available at* https://www.fanniemae.com/content/announcement/ntce052312.pdf.

After consideration of the comments submitted, the Bureau believes it is appropriate to finalize § 1024.37(h)(2) as proposed. The Bureau believes § 1024.37(h) appropriately implements RESPA 6(m)'s "bona fide and reasonable" requirement in a way that does not overlap with state insurance departments' authority to regulation insurance rates. Further, the Bureau believes § 1024.37(h) provides clear guidance for servicers by unambiguously prohibiting a servicer from charging a borrower for a service it did not perform, or charging a borrower a fee that does not bear a reasonable relationship to the servicer's cost of providing the service, or that would be otherwise prohibited by applicable law.

With respect to the request that the Bureau should revise the definition of "bona fide and reasonable charges" to exclude unreasonable costs, other costs unrelated to the provision of force-placed insurance, and cost to subsidize servicing activities unrelated to the provision of force-placed insurance, the Bureau believes that the proposed and final definition already exclude such charges.

With respect to requests that the Bureau mandate affordable force-placed insurance premiums, prohibit servicers from receiving commission or similar fees or things of value, prohibit fees associated with the cost of administration of reinsurance programs or insurance tracking, the Bureau recognizes the concerns, but believes the provisions of § 1024.37 provide adequate safeguards to borrowers and consistent with the regulatory scheme mandated by Congress.

With respect to the request that the Bureau prohibit servicers from charging borrowers for costs that could be reimbursed by the owner of the mortgage loan, the Bureau believes that where a servicer charges a borrower for first-placed insurance in accordance with the requirements under § 1024.37, it is reasonable for the borrower, rather than the owner or assignee of the mortgage loan, to bear the costs of such insurance. With respect to the request that the Bureau exclude costs not directly related to force-placed insurance from the definition of "bona fide and reasonable charges," the Bureau believes that the bona fide and reasonable standard provides adequate protection to borrowers without distinguishing between whether a charge is "directly" or "indirectly" related to force-placed insurance. Such a standard would thus inject addition complexity without concomitant consumer benefit.

With respect to the request that the Bureau provide guidance about prohibited fees that is consistent with Fannie Mae's proposed changes to its servicing guidelines, the Bureau carefully reviewed Fannie Mae's servicing announcement and concluded that it would not be appropriate to provide similar guidance. The draft guidance simply informs servicers that Fannie Mae no longer plans to reimburse a servicer for certain servicer expenses related to servicer's purchase of force-placed insurance and importantly, it offers no guidance on the charges a servicer may impose on a borrower with respect to a servicer's purchase of force-placed insurance. Additionally, the Bureau believes that the prohibitions and requirements with respect to force-placed insurance under § 1024.37 provide adequate protection to borrowers and that there is no reason to depart from the scheme established by Congress to regulate force-placed insurance by importing Fannie Mae's guidance regarding prohibited fees into the final rule.

Lastly, with regard to the argument that no charge imposed by a servicer is subject to State regulation as the business of insurance because a servicer is not regulated by State insurance regulators, the Bureau believes the language of section 6(m) of RESPA clearly contemplates that servicers may pass through charges that are subject to State regulation as the business of insurance to a borrower, and the fact that such charge is passed through by the servicer does not mean that such charge is no longer subject to State regulation as the business of insurance. For the foregoing reasons, the Bureau is adopting § 1024.37(h)(2) as proposed.

37(i) Relationship to Flood Disaster Protection Act of 1973

Section 1463 of the Dodd-Frank Act amended section 6 of RESPA to add new section 6(*l*)(4) to provide that the new Dodd-Frank Act requirements concerning force-placed insurance do not prohibit servicers from sending a simultaneous or concurrent notice of a lack of flood insurance pursuant to section 102(e) of the Flood Disaster Protection Act (FDPA). The Bureau proposed § 1024.37(i) to provide that if permitted by regulation under section 102(e) of the Flood Disaster Protection Act of 1973, a servicer subject to the requirements of § 1024.37 may deliver to the borrower or place in the mail any notice required by § 1024.37 together with the notice required by section 102(e) of the Flood Disaster Protection Act of 1973.

One national trade association representing banks and insurance providers urged the Bureau to permit servicers to combine the notice required pursuant to the FDPA with any notice required pursuant to § 1024.37. One state consumer group expressed concern that a borrower might be confused if it receives a notice required pursuant to § 1024.37 and a notice required pursuant to the FDPA at the same time. The commenter observed that the notices should be distinguishable from each other and should state that there is a difference between the two notices.

Congress vested other Federal regulators with the authority to issue regulations under the FDPA, and thus, the Bureau cannot revise the content of notices required under the FDPA. With respect to potential confusion caused by receiving concurrent notices, the Bureau notes that it has excluded insurance required under the FDPA from the definition of force-placed insurance so that borrowers will not receive overlapping notices under § 1024.37 and the FDPA with respect to the same insurance policy. To the extent borrowers receive separate notices under § 1024.37 and the FDPA with respect to separate insurance policies, the Bureau further believes that borrowers will be able to distinguish the notices under the two regulatory schemes based on their content. The Bureau also observes that it has addressed compliance burden by permitting under final § 1024.37(i) that notices under the FDPA and § 1024.37 could be provided to borrowers in the same transmittal. Accordingly, the Bureau is adopting § 1024.37(i) as proposed, except with adjustment just described. As adopted, § 1024.37(i) states if permitted by regulation under section 102(e) of the Flood Disaster Protection Act of 1973, a servicer subject to the requirements of § 1024.37 may deliver to the borrower or place in the mail any notice required by § 1024.37 and the notice required by section 102(e) of the Flood Disaster Protection Act of 1973 on separate pieces of paper in the same transmittal.

Section 1024.38 General Servicing Policies, Procedures, and Requirements

Background. As discussed above, the Bureau proposed rules that would amend Regulation X to implement the Dodd-Frank Act amendments to TILA and RESPA, with respect to among other things, error resolution and information requests. The Bureau also proposed to use its section 19(a) authority to require servicers to establish and to implement reasonable policies and procedures to manage information and documents, to evaluate and respond to loss mitigation applications, and to achieve other important objectives.

As described more fully above, the Bureau’s proposal sought to address pervasive consumer protection problems across major segments of the mortgage servicing industry that came to light during the recent financial crisis and that underlie many consumer complaints and recent regulatory and enforcement actions. In the 2012 RESPA Servicing Proposal, the Bureau stated that it believed that many servicers simply had not made the investments in resources and infrastructure necessary to service large numbers of delinquent loans. The Bureau noted that recent evaluations of mortgage servicer practices have indicated that borrowers have been harmed as a result of many servicers' lacking adequate policies and procedures to provide servicer personnel with appropriate borrower information. Federal regulatory agencies reviewing mortgage servicing practices have found that certain servicers demonstrated "significant weaknesses in risk-management, quality control, audit, and compliance practices."[115]

Further, the Bureau noted that major servicers demonstrated systemic failures to document and verify, in accordance with applicable law, information relating to borrower mortgage loan accounts in connection with foreclosure proceedings. Examinations by prudential regulators found "critical deficiencies in foreclosure governance processes, document preparation processes, and oversight and monitoring of third parties . . . [a]ll servicers [examined] exhibited similar deficiencies, although the number, nature, and severity of deficiencies varied by servicer."[116]

As the Bureau explained in the 2012 RESPA Servicing Proposal, a servicer's obligation to maintain accurate and timely information regarding a mortgage loan account and to be able to provide accurate and timely information to its own employees and to borrowers, owners, assignees, subsequent servicers, and courts, among others, is one of the most basic servicer duties. A servicer cannot comply with its myriad obligations to investors and applicable law, unless it maintains sound systems to manage the servicing of mortgage loan accounts, including

[115] *Problems in Mortg. Servicing From Modification to Foreclosure: Hearings Before the Senate Comm. on Banking, Hous. & Urban Affairs*, 111th Cong. 4 (2010) (statement of Daniel K. Tarullo, Board of Governors, Federal Reserve System), *available at* http://www.federalreserve.gov/newsevents/testimony/tarullo20101201a.htm.

[116] *Failure to Recover: The State of Hous. Mkts., Mortg. Servicing Practices and Foreclosures: Hearings Before the House Comm. on Oversight and Gov't Reform*, 112th Cong. 4 (2012) (statement of Morris Morgan, Office of the Comptroller of the Currency), *available at* http://www.occ.gov/news-issuances/congressional-testimony/2012/pub-test-2012-47-written.pdf.

information systems that maintain accurate and timely information with respect to mortgage loan accounts. To address those critical concerns, the Bureau decided to use RESPA section 19(a) authority to propose a rule to address servicers' information management and other general servicing policies and procedures across the industry.

The Bureau received general comments about whether it was appropriate for the Bureau to regulate servicers' practices related to information management and other servicer policies and procedures identified in the 2012 RESPA Servicing Proposal. Consumer group comments generally demonstrated support for the proposal. Industry comments, on the other hand, expressed skepticism about whether it is necessary for the Bureau to regulate servicers' information management and other operational practices. Some industry comments suggested that recent State and Federal remediation efforts, such as the National Mortgage Settlement, and other existing regulations obviated the need for any regulation by the Bureau. Some servicers also urged the Bureau to delay adopting the proposed rule. The Bureau also received a small number of comments about the scope of the rule, including whether the proposed rule would apply to mortgages other than federally regulated mortgages or to reverse mortgages.

In light of the potential harm to borrowers due to the deficiencies in servicer practices highlighted in the proposal, the Bureau continues to believe that servicers should achieve certain critical general servicing objectives and requirements. The Bureau declines to adopt the commenters' suggestions that regulation of these practices is not necessary at this time, and is adopting § 1024.38, as proposed with the modifications discussed in detail below. Through enforcement and supervision of § 1024.38, the Bureau will evaluate whether servicers are achieving the objectives and requirements set forth in § 1024.38. The Bureau also expects that servicers will measure their own ability to achieve the objectives and requirements set forth in

§ 1024.38. In addition, the Bureau expects that servicers' policies and procedures will address the core functions that they need to achieve those objectives and requirements, including providing adequate staffing and meaningful oversight of the resources engaged in achieving those important objectives and requirements, including servicer staff, service providers, and vendors.

As explained above, the Bureau believes that the general servicing policies, procedures, and requirements set forth in § 1024.38 are necessary and appropriate to achieve the consumer protective purposes of RESPA, including to avoid unwarranted or unnecessary costs and fees, to ensure that servicers are responsive to consumer requests and complaints, to ensure that servicers provide and maintain accurate and relevant information about the mortgage loan accounts that they service, and to facilitate the review of borrowers for foreclosure avoidance options. Moreover, as discussed in detail below in part VII, the Bureau believes that the burden imposed on servicers under the final rule is reasonable in light of the countervailing benefits of the provisions.

As discussed in detail above in the section-by-section analysis of § 1024.30, § 1024.38 applies only to the servicing of federally related mortgage loans, as defined in § 1024.2, and does not apply to the servicing of reverse mortgages, as defined in § 1024.31, or with respect to any mortgage loan for which a servicer is subject to regulation by the Farm Credit Administration as a "qualified lender," as defined in 12 CFR 617.7000. In addition, § 1024.38 does not apply to small servicers, as defined in 12 CFR 1026.41(e)(4). The Bureau has also modified the final rule to clarify that the policies, procedures, and requirements set forth in § 1024.38 are broader than information management and encompass general servicing policies, procedures, and requirements.

Legal Authority

In proposing § 1024.38, the Bureau relied on a number of authorities, including section 6(k)(1)(E) of RESPA. That provision, which was added by § 1463 of the Dodd-Frank Act as part of a broader set of servicing-related requirements, authorizes the Bureau to promulgate regulations "appropriate to carry out the consumer protection purposes of [RESPA]." In the proposal, the Bureau noted that § 1024.38 was further authorized under section 6(j)(3) of RESPA, as necessary to carry out section 6 of RESPA, and under section 19(a) of RESPA, as necessary to achieve the purposes of RESPA. Because rules issued under section 6 of RESPA, including under sections 6(k)(1) and 6(j)(3), are enforceable through private rights of action, the Bureau proposed § 1024.38(a)(2), which set forth a safe harbor under which a servicer would not violate proposed § 1024.38 unless it engaged in a pattern or practice of failing to achieve any of the objectives set forth in § 1024.38. The Bureau believed that creating a pattern or practice threshold would significantly improve industry practices but not subject servicers to lawsuits with respect to, for example, a single lost document or filing error.

The Bureau received many comments on the private liability suggested by the Bureau's reliance on its authority under section 6 of RESPA to propose § 1024.38. Numerous industry commenters expressed concern that authorizing § 1024.38 under section 6 of RESPA would create a private cause of action to enforce the provisions of the section. These commenters noted that the litigation risk created by the proposed rule would complicate compliance due to the potential for inconsistent judicial interpretations of the rule. In light of this concern, industry commenters asked the Bureau to provide detailed, specific guidance on how to comply with the objectives set forth in proposed § 1024.38. In addition, servicers argued that the Bureau and prudential regulators are better positioned to assess and supervise servicers' internal policies and procedures than courts through civil litigation. Industry commenters also stressed that the private litigation that would likely ensue under proposed § 1024.38 would increase the cost of servicing and thereby decrease the availability of credit.

Consumer group commenters generally supported the allowance of private rights of action to enforce § 1024.38 but expressed dissatisfaction with the proposed safe harbor, which they argued should be eliminated or revised to reduce the barriers to successful civil actions and to ensure sufficient protection for borrowers. They commented that the safe harbor definition would make it difficult for consumers to bring successful civil suits, and urged the Bureau to eliminate or to revise the safe harbor to provide relief for more borrowers. Consumer advocates argued that borrowers need strong protections because borrowers cannot select their servicers.

As stated in the proposal, the Bureau is concerned that a servicer's failure to achieve each of the objectives and standard requirements set forth in § 1024.38 creates the potential for adverse consequences harmful to borrowers. These may include imposing improper fees on borrowers, inability reasonably to evaluate borrowers for loss mitigation options that may benefit borrowers and owners or assignees of mortgage loans, unwarranted costs to borrowers, and the potential for fraud upon courts through inaccurate or unverifiable legal pleadings.

The Bureau sought to balance the need for consumer protections with the costs created by command-and-control regulation by proposing objectives-based policies and procedures that allowed servicers flexibility to set policies and procedures reasonably designed to achieve certain defined objectives. Because a single failure to achieve a desired objective or requirement is not necessarily indicative of a servicer's failure to implement appropriate policies and procedures and in light of the potential costs of civil litigation, the Bureau proposed a safe harbor under which servicers would be liable only for systemic violations of § 1024.38. Upon consideration of the comments and further consideration, however, the Bureau has concluded that the proposed formulation would not have adequately balanced the countervailing concerns of borrowers and industry. Requiring a showing of a pattern or practice could make it difficult for borrowers or regulators to obtain remedies until a servicer had inflicted widespread harm among its borrowers. At the same time, the prospect that many individual suits could be filed could threaten to undermine the basic goal of an objectives-based system, if servicers felt pressured to adopt models to reduce risk that were not in fact appropriately tailored to their particular operations.

Ultimately, the Bureau agrees with the commenters that allowing a private right of action for the provisions that set forth general servicing policies, procedures, and requirements would create significant litigation risk. As the commenters noted, courts potentially would interpret the proposed flexible objectives-based standards inconsistently, which would have created compliance challenges for servicers. To address such challenges, the Bureau believes that it would have needed to issue more prescriptive standards in the final rule. The Bureau continues to believe, however, for the reasons discussed above, that flexible objectives-based standards are best suited to address the information management and other servicing challenges faced by different servicers that the Bureau identified in the proposal. Policies and procedures best suited to achieve the desired objectives are often highly dependent on the facts and circumstances of an individual servicer, such as the number and type of loans being serviced, and the technology that the servicer has deployed.

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. Indeed, the Bureau believes that the Bureau and other Federal regulators have the experience and judgment necessary to evaluate a servicer’s compliance with § 1024.38 and to take action against servicers whose operational systems are not reasonably designed to achieve the stated objectives without waiting for evidence of a pattern or practice of undesirable outcomes. Prior to the enactment of the Dodd-Frank Act, there was no comprehensive Federal supervisory authority over non-bank mortgage servicers. The Dodd-Frank Act created a comprehensive regime of federal regulation over both bank and non-bank mortgage servicers. Under this new regime, the Bureau and other federal regulators can calibrate supervision to focus on practices that present the greatest risk to borrowers and work with servicers to assure that servicers have implemented effective systems that protect consumers and manage servicing portfolios. At the same time, the new comprehensive regulatory regime will allow the Bureau and other regulators to take prompt and effective action where a servicer’s policies and procedures are deficient without waiting for proof of a pattern or practice of abuse.

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. As discussed in more detail below, the Bureau has also revised some of the proposed objectives and added new requirements that the Bureau believes can be appropriately overseen by supervisory agencies but that would have been difficult for the courts to administer on a case-by-case basis. 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 section 6 of RESPA to issue § 1024.38. Instead, the Bureau is adopting § 1024.38 pursuant to its authority under section 19(a) of RESPA. As explained in more detail below, the Bureau believes that the servicing policies, procedures, and requirements set forth in § 1024.38 are necessary to achieve the purposes of RESPA, including to avoid unwarranted or unnecessary costs and fees, to ensure that servicers are responsive to consumer requests and complaints, to ensure that servicers provide and maintain accurate and relevant information about the mortgage loan accounts that they service, and to facilitate the review of borrowers for foreclosure avoidance options. The Bureau believes that without sound operational policies and procedures and without achieving certain standard requirements, servicers will not be able to achieve those purposes. The Bureau is also adopting § 1024.38 pursuant to its authority under section 1022(b) of the Dodd-Frank Act to prescribe regulations necessary or appropriate to carry out the purposes and objectives of Federal consumer financial laws. Specifically, the Bureau believes that § 1024.38 is necessary and appropriate to carry out the purpose under section 1021(a) of the Dodd-Frank Act of ensuring that markets for consumer financial products and services are fair, transparent, and competitive, and the objective under section 1021(b) of the Dodd-Frank Act of ensuring that markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation. The Bureau additionally relies on its authority under section 1032(a) of the Dodd-Frank Act, which authorizes the Bureau to prescribe rules to ensure that the features of any consumer financial product or service, both initially and over the term of the product or service, are fully, accurately, and effectively disclosed to consumers in a manner that permits consumers to understand the costs, benefits, and risks associated with the product or service, in light of the facts and circumstances.

38(a) Reasonable Policies and Procedures

Proposed § 1024.38(a)(1) would have required servicers to establish reasonable policies and procedures for achieving certain objectives relating to borrower mortgage loan accounts. Proposed § 1024.38(a)(1) provided that a servicer meets this requirement if the servicer's policies and procedures are reasonably designed to achieve certain objectives, which are set forth in proposed § 1024.38(b), and are reasonably designed to ensure compliance with certain specific requirements in proposed § 1024.38(c).

Proposed comment 38(a)-1 would have clarified that the proposed rule permits servicers to determine the specific methods by which they will implement reasonable policies and procedures to achieve the required objectives. The proposed comment also explained that servicers have flexibility to design the operations that are reasonable in light of the size, nature, and scope of the servicer's operations, including, for example, the volume and aggregate unpaid principal balance of mortgage loans serviced, the credit quality, including the default risk, of the mortgage loans serviced, and the servicer's history of consumer complaints. The Bureau noted in the proposal that it intended that this clarification would provide servicers flexibility to design policies and procedures that are appropriate for their servicing businesses.

The Bureau received a handful of comments on the structure of the requirements. Industry commenters, especially credit unions, were generally supportive of framing the requirements as objectives-based standards. A trade association expressed support for the flexibility included in the rule, but noted concern that examiners may not view servicers' programs flexibly and instead may ask servicers to change existing programs based on unpublished rules. A consumer group commented that framing the requirements as objectives-based standards would lead to inconsistent practices throughout the mortgage servicing industry.

The Bureau is adopting § 1024.38(a), which is re-numbered from proposed § 1024.38(a)(1), as proposed with non-substantive modifications. The Bureau believes that, due to diversity of servicer size, infrastructure, and work practices, flexible objectives-based standards are best-suited to manage servicers' operational practices. The Bureau understands as the commenters suggest that framing the requirements as objectives-based standards will lead to differences between how servicers implement the objectives, but believes that objectives-based standards best balance the burden on the industry with the protections for consumers.

The Bureau is adopting comment 38(a)-1, as proposed with non-substantive modifications to explain that a servicer may determine the specific policies and procedures it will adopt and the methods by which it will implement those policies and procedures so long as they are reasonably designed to achieve the objectives set forth in § 1024.38(b). A servicer has flexibility to determine such policies and procedures and methods in light of the size, nature, and scope of the servicer's operations, including, for example, the volume and aggregate unpaid principal balance of mortgage loans serviced, the credit quality, including the default risk, of the mortgage loans serviced, and the servicer's history of consumer complaints. Comment 38(a)-1 clarifies that servicers may retain existing procedures or design policies and procedures that are appropriately tailored to their operations, as long as the procedures are reasonably designed to achieve the important objectives set forth in § 1024.38(b). The Bureau is also adopting new comment 38(a)-2 to clarify the meaning of the term procedures. As stated in the comment, the term "procedures" refers to the actual practices followed by a servicer for achieving the objectives set forth in § 1024.38(b). This comment clarifies that the Bureau expects that servicers' policies and procedures will be reasonably designed to measure their ability to achieve the objectives set forth in § 1024.38 and to make ongoing improvements to their policies and procedures to address any deficiencies.

Safe harbor. As discussed above, the Bureau proposed § 1024.38(a)(2) to provide a safe harbor for servicers for non-systemic violations of § 1024.38 to manage the costs that would arise from the contemplated litigation risk created by the contemplated civil liability for violations of § 1024.38. Proposed § 1024.38(a)(2) stated that a servicer satisfies the requirement in proposed § 1024.38(a)(1) if the servicer does not engage in a pattern or practice of failing to achieve any of the objectives set forth in proposed § 1024.38(b) and did not engage in a pattern or practice of failing to comply with any of the standard requirements in proposed § 1024.38(c). Proposed comment 38(a)(1)-1 would have provided examples of potential pattern or practice failures by servicers. Proposed comment 38(a)(2)-1 would have provided further clarification about the operation of the safe harbor.

Comments received by the Bureau expressed uniform dissatisfaction with the proposed safe harbor definition. Industry commenters in general expressed the concern that the proposed safe harbor would not sufficiently insulate them from the large costs that they said that they would bear due to the litigation risk they saw embedded in the proposal as a result of civil liability, as discussed above in the section-by-section discussion of the legal authority for § 1024.38. In addition, some industry commenters stated that the safe harbor provision, which is based on the lack of a pattern or practice, would lead to costly discovery because servicers would be required to produce large volumes of documents to establish the absence of a pattern or practice.

Consumer group commenters also expressed opposition to the proposed safe harbor. They commented that the safe harbor definition would make it difficult for borrowers to bring successful civil suits, and urged the Bureau to eliminate or to revise the safe harbor to provide relief for more borrowers. Consumer advocates argued that borrowers need strong protections because borrowers cannot select their servicers.

As discussed above, the Bureau is adopting final general servicing policies, procedures, and requirements that are not enforceable through a private right of action. As violations of this § 1024.38 no longer carry potential civil liability, the Bureau does not believe that the proposed safe harbor is appropriate to include in the final rule. The Bureau is adopting a final rule that does not include proposed § 1024.38(a)(2) or proposed comments 38(a)(1)-1 and 38(a)(2)-1. This revision will also allow the Bureau to protect borrowers through robust supervision and enforcement of the servicing policies, procedures, and requirements set forth in § 1024.38 without having to demonstrate a pattern or practice of violations.

38(b) Objectives

38(b)(1) Accessing and Providing Timely and Accurate Information

38(b)(1)(i)

Proposed § 1024.38(b)(1)(i) would have required that a servicer's policies and procedures be reasonably designed to achieve the objective of providing accurate and timely disclosures to borrowers. As stated in the proposal, the Bureau believed that this was an important objective to protect borrowers by making sure that servicers provide borrowers with accurate and timely information about their mortgage loan accounts. Having received no comments on this provision, the Bureau is adopting § 1024.38(b)(1)(i), as proposed.

38(b)(1)(ii)

Proposed § 1024.38(b)(1)(ii) would have required that a servicer's policies and procedures be reasonably designed to achieve the objective of enabling the servicer to investigate, respond to, and, as appropriate, correct errors asserted by borrowers, in accordance with the procedures set forth in § 1024.35, including errors resulting from actions of service providers. A servicer's ability to investigate promptly and respond appropriately to an assertion of error is necessarily dependent upon the accuracy of the servicer's records and on the ability of the servicer's employees to access those records readily. As a result, the Bureau believed that including this objective as one of the objectives for a servicer's policies and procedures was an important supplement to the Dodd-Frank Act error resolution requirements that are implemented in § 1024.35.

The Bureau received one comment on proposed § 1024.38(b)(1)(ii). A trade association urged the Bureau to limit the applicability of § 1024.38(b)(1)(ii) to errors submitted pursuant to § 1024.35. The Bureau declines to adopt the commenter's suggestion. In light of the Bureau's decision to limit the applicability of § 1024.35 to notices of error submitted in writing, as discussed above in the section-by-section analysis of § 1024.35, the Bureau has decided to modify proposed § 1024.38(b)(1)(ii) to clarify that a servicer must have policies and procedures reasonably designed to respond to complaints asserted by borrowers, including those complaints that are not subject to the procedures set forth in § 1024.35. In particular, the Bureau believes that the modification is necessary and appropriate to ensure that consumers receive prompt and appropriate responses to oral complaints even though such complaints will not trigger the formal processes under § 1024.35.

The Bureau also is removing the reference to the actions of service providers from the text of the rule, and, instead, is adopting new comment 38(b)(1)(ii)-1 to clarify that policies and procedures to comply with § 1024.38(b)(1)(ii) must be reasonably designed to provide for promptly obtaining information from service providers to facilitate achieving the objective of correcting errors resulting from actions of service providers, including obligations arising pursuant to § 1024.35.

38(b)(1)(iii)

Proposed § 1024.38(b)(1)(iii) would have required servicers to develop policies and procedures reasonably designed to provide borrowers with accurate and timely information and documents in response to borrower requests for information or documents related to their mortgage loan accounts in accordance with the procedures set forth in § 1024.36. The Bureau believed that the proposed provision was an important supplement to the Dodd-Frank Act information request requirements that are implemented in § 1024.36 because the maintenance of accurate information regarding mortgage loan accounts is necessary for a servicer to respond to requests for information made by borrowers.

The Bureau received no comments on § 1024.38(b)(1)(iii). However, in light of the Bureau's decision to limit the applicability of § 1024.36 to requests for information submitted in writing, as discussed above in the section-by-section analysis of § 1024.36, the Bureau has decided to modify proposed § 1024.38(b)(1)(iii) to clarify that a servicer must have policies and procedures to provide a borrower with accurate and timely information and documents in response to the borrower's requests for information with respect to the borrower's mortgage loans, including those requests that are not asserted in accordance with the procedures set forth in § 1024.36. In particular, the Bureau continues to believe that servicers must have the capacity to respond to borrowers' requests for information reported to servicers orally, but the Bureau believes that it is appropriate to allow servicers to design policies and procedures best suited to their operations to achieve this objective. Accordingly, the Bureau is adopting § 1024.38(b)(1)(iii) with modifications from the proposal to broaden the scope of the objective to include borrower requests for information or documents with respect to the borrower's mortgage loan that are not encompassed by the written information request process set forth in § 1024.36.

38(b)(1)(iv)

Proposed § 1024.38(b)(1)(iv) would have required servicers to establish policies and procedures reasonably designed to achieve the objective of providing owners or assignees of mortgage loans with accurate and current information and documents about any mortgage loans that they own. As stated in the proposal, the Bureau believes that to protect borrowers, it is necessary for owners and assignees to receive accurate and timely information about the mortgage loans they own. As the Bureau stated, owners and assignees can play an important role in ensuring that servicers comply with the requirements of the owner or assignee which may inure to the benefit of borrowers.

The Bureau received a comment on this proposed provision from an investor, providing types of information that would benefit investors regarding loss mitigation evaluations conducted, and loss mitigation agreements entered into, by servicers. Having received no comments on the substance of the proposed rule, the Bureau is adopting § 1024.38(b)(1)(iv), as proposed. The Bureau is also adopting new comment 38(b)(1)(iv)-1 to clarify the information and documents contemplated by this section. Comment 38(b)(1)(iv)-1 provides that the relevant and current information to owners or assignees of mortgage loans includes, among other things, information about a servicer's evaluation of borrowers for loss mitigation options and a servicer's agreements with borrowers on loss mitigation options, including loan modifications. Such information includes, for example, information regarding the date, terms, and features of loan modifications, the components of any capitalized arrears, the amount of any servicer advances, and any assumptions regarding the value of a property used in evaluating any loss mitigation options.

38(b)(1)(v)

Proposed § 1024.38(b)(1)(v) would have required that a servicer's policies and procedures be reasonably designed to achieve the objective of enabling the servicer to submit documents or filings required for a foreclosure process, including documents or filings required by a court of competent jurisdiction, that reflect accurate and current information and that comply with applicable law. The Bureau believes that it is necessary and appropriate to protect borrowers from harms resulting from servicers' failure to submit accurate, current, and compliant documents in foreclosure proceedings. In issuing the proposed rule, the Bureau pointed to findings by the Office of the Comptroller of the Currency that major servicers demonstrated failures to document and verify, in accordance with applicable law, information relating to borrower mortgage loan accounts in connection with foreclosure proceedings.[117]

The Bureau received a number of comments on proposed § 1024.38(b)(1)(v). State attorneys general commented that the Bureau should adopt stricter standards to ensure the accuracy and validity of foreclosure documentation, such as the standards included in the recent National Mortgage Settlement. In addition, consumer groups urged the Bureau to require servicers who are initiating a foreclosure to provide documentation to borrowers of the right of the party initiating the action to foreclose, including providing evidence of an enforceable security interest and verification of supporting statements.

After consideration of the comments, the Bureau has concluded that the proposed language already appropriately addresses the concerns raised. Section 1024.38(b)(1)(v), as proposed, requires servicers to develop policies and procedures reasonably designed to achieve

[117] *Failure to Recover: The State of Hous. Mkts., Mortg. Servicing Practices and Foreclosures: Hearings Before the House Comm. on Oversight and Gov't Reform*, 112th Cong. 4 (2012) (statement of Morris Morgan, Office of the Comptroller of the Currency).

the objective of ensuring the accuracy of any documents filed in foreclosure proceedings, which would include affidavits or security instruments, and, therefore, is broad enough to cover the specific documents identified in the National Mortgage Settlement. Specifying particular documents which must be submitted accurately, or regulating the particulars of how documents are prepared and validated by servicers, would be inconsistent with the rule's broad objectives-based standards, which, as discussed above, are designed to provide flexibility for a wide range of servicers to develop policies and procedures that are appropriate to their business and that will achieve the stated objectives. Accordingly, the Bureau declines to adopt a final rule containing the specific details included in the National Mortgage Settlement. The Bureau expects that the court filings of servicers whose operational and information management policies and procedures are reasonably designed to achieve the objective of § 1024.38(b)(1)(v) will be accurate and authorized by the underlying security documents.

Second, the Bureau believes that the information request process defined in proposed § 1024.36 provides borrowers in foreclosure with access to the documentation described by consumer groups. Specifically, § 1024.36, as proposed, requires servicers to provide to borrowers upon their request information about their mortgage loan accounts, including their servicing files, which includes a complete payment history, a copy of their security instrument, collection notes, and other valuable information about their accounts. Accordingly, the Bureau does not believe that it is necessary to revise the proposed language to provide this protection. For the reasons discussed above, the Bureau is adopting § 1024.38(b)(1)(v), as proposed.

38(b)(1)(vi)

The Bureau's proposed servicing operational policies and procedures did not specifically address a servicer's obligations related to successors in interest upon the death of a borrower.

The Bureau received information about difficulties faced by surviving spouses, children, or other relatives who succeed in the interest of a deceased borrower to a property that they also occupied as a principal residence, when that property is secured by a mortgage loan account solely in the name of the deceased borrower. In particular, the Bureau understands that successors in interest may encounter challenges in communicating with mortgage servicers about a deceased borrower's mortgage loan account. The Bureau believes that it is essential that servicers' policies and procedures are reasonably designed to facilitate communication with successors in interest regarding a deceased borrower's mortgage loan accounts. Therefore, the Bureau is adopting § 1024.38(b)(1)(vi) to clarify that servicers should maintain policies and procedures that are reasonably designed to, upon notification of the death of a borrower, identify promptly and facilitate communication with the successor in interest of the deceased borrower with respect to the property secured by the deceased borrower's mortgage loan.

38(b)(2) Properly Evaluating Loss Mitigation Applications

Proposed § 1024.38(b)(2) would have established a number of objectives designed specifically to support servicers' loss mitigation activities and to facilitate compliance with various requirements under proposed § 1024.41. Specifically, proposed § 1024.38(b)(2) would have required that a servicer's policies and procedures be reasonably designed to achieve the objective of enabling the servicer to (i) provide accurate information to borrowers regarding loss mitigation options; (ii) identify all loss mitigation options for which a borrower may be eligible; (iii) provide servicer personnel with prompt access to all documents and information submitted by a borrower in connection with a loss mitigation option; (iv) enable servicer personnel to identify documents and information that a borrower is required to submit to make a loss mitigation application complete; and (v) enable servicer personnel to evaluate borrower applications properly, and any appeals, as appropriate.

In the proposal, the Bureau expressed its belief that requiring servicers to have reasonable policies and procedures to maintain and manage information and operations that are designed to enable the servicer to evaluate borrowers for loss mitigation options facilitates compliance with proposed § 1024.41. Further, such policies and procedures are likely to protect consumers by requiring servicers to consider, in advance of the potential delinquency of a particular mortgage loan, the loss mitigation options that are generally available to borrowers.

While acknowledging that servicers generally have begun to alter the manner in which they invest in infrastructure and are changing their approach to default management, the Bureau stated in the 2012 RESPA Servicing Proposal that it believes that a requirement to develop reasonable policies and procedures to enable a servicer to evaluate loss mitigation applications imposes a reasonable burden on servicers that will benefit delinquent borrowers once the rule takes effect and will protect borrowers in future years as servicers transition from reacting to the current financial crisis to a more steady market more likely to be punctuated by regional spikes in delinquencies and foreclosures. Absent regulation, servicers that have not yet invested in improving loss mitigation functions may find less incentive to do so as housing markets recover, leading to continued inadequate infrastructure during future regional or national housing downturns, which may lead to future borrower harm. The Bureau requested comment regarding whether the Bureau had identified the appropriate objectives with respect to proposed § 1024.38(b)(2) and whether objectives should be removed, or other objectives included, in the requirements.

Loss mitigation information. Proposed § 1024.38(b)(2) would have required that a servicer's policies and procedures be reasonably designed to achieve the objective of enabling the servicer to (i) provide accurate information to borrowers regarding loss mitigation options; (ii) identify all loss mitigation options for which a borrower may be eligible; (iii) provide servicer personnel with prompt access to all documents and information submitted by a borrower in connection with a loss mitigation option; (iv) enable servicer personnel to identify documents and information that a borrower is required to submit to make a loss mitigation application complete.[118]

The Bureau received a small number of comments on § 1024.38(b)(2). Consumer advocates supported proposed § 1024.38(b)(2), and urged the Bureau to specify that servicers are required to provide borrowers with a list of available loss mitigation options. Trade associations urged the Bureau to clarify servicers' obligations in this section, in particular whether servicers could limit the information provided to borrowers to only the loss mitigation programs that the servicer offers. The Bureau also received many comments about the servicers' obligations to offer loss mitigation options to borrowers, which are discussed in detail in the section-by-section analysis of § 1024.41.

For the reasons discussed above, the Bureau is adopting §§ 1024.38(b)(2)(i) through (b)(2)(iv), as proposed with slight modifications for clarification. Section 1024.38(b)(2)(ii) clarifies that the rule envisions that servicers will develop policies and procedures reasonably designed to identify with specificity all loss mitigation options available for mortgage loans currently serviced by a mortgage servicer and that the mortgage servicer may service in the future. The Bureau is also adopting new comment 38(b)(2)(ii)-1, which explains that servicers must develop policies and procedures reasonably designed to enable servicer personnel to

[118] Proposed § 1024.38(b)(2)(v), discussed above, would have required servicers to establish reasonable policies and procedures that enable servicer personnel to properly evaluate borrower applications, and any appeals, as appropriate.

identify all loss mitigation options available for mortgage loans currently serviced by the mortgage servicer. For example, a servicer's policies and procedures must be reasonably designed to address how a servicer specifically identifies, with respect to each owner or assignee, all of the loss mitigation options that the servicer may consider when evaluating any borrower for a loss mitigation option and the criteria that should be applied by a servicer when evaluating a borrower for such options. In addition, a servicer's policies and procedures must be reasonably designed to address how the servicer will apply any specific thresholds for eligibility for a particular loss mitigation option established by an owner or assignee of a mortgage loan (e.g., if the owner or assignee requires that a servicer only make a particular loss mitigation option available to a certain percentage of the loans that the servicer services for that owner or assignee, then the servicer's policies and procedures must be reasonably designed to determine in advance how the servicer will apply that threshold to those mortgage loans). A servicer's policies and procedures must also be reasonably designed to ensure that such information is readily accessible to the servicer personnel involved with loss mitigation, including personnel made available to the borrower as described in § 1024.40.

To meet the objectives of § 1024.38(b)(2)(ii), a servicer will have to establish policies and procedures that are reasonably designed to provide servicer personnel with the ability to determine, on a loan by loan basis, which loss mitigation options made available by the servicer are available to particular borrowers and to provide that information to such borrowers. This objective requires that servicers have access to accurate information about the available loss mitigation options for particular types of loans. The Bureau anticipates that for servicers that service mortgage loans held by the servicer or an affiliate in portfolio, providing access to the latter category of information will not present significant burdens with respect to such mortgage loans as any such policies likely will be uniformly set forth by the servicer or affiliate. Similarly, the Bureau anticipates that servicers that service mortgage loans that are included in securitizations guaranteed by Fannie Mae, Freddie Mac, or Ginnie Mae, or insured by FHA or other government sponsored insurance programs, will be familiar with policies that will be set forth by those entities regarding the requirements for loss mitigation options and will be able to make that information available to servicer personnel and borrowers. Servicers that service mortgage loans that are securitized through private label securities may need to undertake more detailed discussions with investors to identify which, if any, loss mitigation programs made available by the servicer are available to borrowers whose mortgage loans are owned by the securitization trust pursuant to the terms of any particular servicing agreement. However, the Bureau believes the burden is still reasonable and will abate over time as the industry does a better job of clarifying such issues at the time that the servicing agreements are first drafted.

The Bureau believes that the final rule will increase protection for borrowers by requiring servicers to adopt policies and procedures reasonably designed to ensure that servicers consider, in advance of the potential delinquency of a particular mortgage loan, the loss mitigation options that are generally available to borrowers. Further, the final rule provides a basis for Bureau supervision and enforcement regarding whether servicers are unjustifiably asserting investor limitations as a basis for avoiding the work of processing loss mitigation applications.

Proper evaluation of loss mitigation applications. Proposed § 1024.38(b)(2)(v) would have defined as an objective of a servicer’s policies and procedures, the proper evaluation of loss mitigation applications, and any appeals, pursuant to the requirements of proposed § 1024.41. As explained in the proposal, borrowers who are struggling to pay their mortgage have a vital interest in being properly considered for all available loss mitigation options, and the ability of servicers to do so is largely dependent upon servicers establishing and implementing policies and procedures that are reasonably designed to assure that servicer personnel have prompt and complete access to all relevant information, including documents and information submitted by the borrowers. Proposed § 1024.41, as discussed below, in turn defined procedures for evaluating loss mitigation applications.

Most of the comments received by the Bureau regarding proposed § 1024.38(b)(2)(v) focused on the procedures set forth in proposed § 1024.41. However, in light of the comments received, the Bureau is adopting § 1024.38(b)(2)(v), with modifications from the proposal to make clear that the objective of proper evaluation of a borrower's application for a loss mitigation option, or any appeal, extends to all loss mitigation options that are potentially available to the borrower pursuant to any requirements established by the owner or assignee of the borrower's mortgage loan. As explained below in the section-by-section analysis of § 1024.41, this objective is not inconsistent with the use of a waterfall of loss mitigation options that an investor or assignee may establish.

The Bureau is also adopting new comment 38(b)(2)(v)-1 to clarify that a servicer is required pursuant to § 1024.38(b)(2)(v) to maintain policies and procedures reasonably designed to evaluate a borrower for a loss mitigation option consistent with any owner or assignee requirements, even where the requirements of § 1024.41 may be inapplicable. For example, an owner or assignee may require that a servicer implement certain procedures to review a loss mitigation application submitted by a borrower less than 37 days before a foreclosure sale. Further, an owner or assignee may require that a servicer implement certain procedures to re-evaluate a borrower who has demonstrated a material change in the borrower's financial circumstances for a loss mitigation option after the servicer's initial evaluation. A servicer must maintain policies and procedures reasonably designed to implement these requirements even if such loss mitigation evaluations may not be required pursuant to § 1024.41. The Bureau believes that the final rule will provide borrowers with greater access to loss mitigation options and more transparency into the evaluation process.

38(b)(3) Facilitating Oversight of, and Compliance by, Service Providers

Proposed § 1024.38(b)(3) would have required that a servicer's policies and procedures be reasonably designed to achieve the objective of enabling the servicer to provide appropriate servicer personnel with accurate and current information reflecting actions performed by service providers, facilitating periodic reviews of service providers, and facilitating the sharing of accurate and current information among servicer personnel and service providers.

The Bureau explained that proposed § 1024.38(b)(3) was designed to address recent evaluations of mortgage servicer practices that had found that some major servicers "did not properly structure, carefully conduct, or prudently manage their third-party vendor relationships."[119] For example, certain servicers supervised by the Board of Governors of the Federal Reserve System and the Office of the Comptroller of the Currency were found by those agencies to have failed to monitor third-party vendor foreclosure law firms' compliance with the servicer's standards or to retain copies of documents maintained by third-party law firms.[120] Similar failures were found to be present in connection with servicer relationships with default management service providers and Mortgage Electronic Registration Systems, Inc. (MERS).[121] The Bureau noted in the proposal that these failures likely resulted in significant harms for

[119] Fed. Reserve Sys., Office of the Comptroller of the Currency & Office of Thrift Supervision, *Interagency Review of Foreclosure Policies and Practices* 9 (2011), *available at* http://www.occ.gov/news-issuances/news-releases/2011/nr-occ-2011-47a.pdf.

[120] Fed. Reserve Sys., Office of the Comptroller of the Currency, & Office of Thrift Supervision, *Interagency Review of Foreclosure Policies and Practices* 9 (2011).

[121] Fed. Reserve Sys., Office of the Comptroller of the Currency, & Office of Thrift Supervision, *Interagency Review of Foreclosure Policies and Practices* 10 (2011).

borrowers, including imposing unwarranted fees on borrowers and harms relating to so-called “dual tracking” from miscommunications between service providers and servicer loss mitigation personnel.

The Bureau requested comment regarding whether the Bureau had identified the appropriate objectives and whether objectives should be removed, or other objectives included, in the requirements. The Bureau received a small number of comments proposed § 1024.38(b)(3), all of which were submitted by industry. Commenters sought clarification about the scope of proposed § 1024.38(b)(3), including whether the provision would apply to vendors used for non-mortgage loan related tasks and whether the provision would create an independent obligation for service providers to comply with § 1024.38. Servicers also sought guidance on how to comply with the periodic review requirements of proposed § 1024.38(b)(3)(ii), including whether compliance with the recent National Mortgage Settlement or participation in shared assessment programs would satisfy a servicer’s obligations under the proposed rule.

Proposed § 1024.38(b)(3) would have imposed obligations on servicers with respect to maintaining and providing access to information about service providers, as defined by § 1024.31, discussed above in the section-by-section analysis of that section, which includes any party retained by a servicer that interacts with a borrower or provides a service to a servicer for which a borrower may incur a fee. The proposed provision would therefore not have created obligations with respect to vendors who do not meet this definition.

The Bureau is adopting § 1024.38(b)(3), as proposed. The Bureau remains concerned about servicers’ inadequate oversight of service providers, and believes that proposed § 1024.38(b)(3) appropriately addresses this concern by requiring servicers to maintain reasonable policies and procedures, which will provide servicer personnel with information about actions of service providers and facilitate review of service providers. The Bureau expects that servicers seeking to demonstrate that their policies and procedures are reasonably designed to achieve these objectives will demonstrate that, in fact, the servicer has been able to use its information to oversee its service providers effectively, such as through a shared assessment program of the type set forth in the National Mortgage Settlement.

38(b)(4) Facilitating Transfer of Information During Servicing Transfers

Proposed § 1024.38(b)(4) would have required that a servicer's policies and procedures be reasonably designed to achieve the objective of ensuring the timely transfer of all information and documents relating to a transferred mortgage loan to a transferee servicer in a form and manner that enables the transferee servicer to comply with the requirements of subpart C and the terms of the transferee servicer's contractual obligations to owners or assignees of the mortgage loans. Further, proposed § 1024.38(b)(4) would have provided an objective that a transferee servicer shall have documents and information regarding the status of discussions with a borrower regarding loss mitigation options, any agreements with a borrower for a loss mitigation option, and any analysis with respect to potential recovery from a non-performing mortgage loan, as appropriate (typically called a final recovery determination).

In proposing § 1024.38(b)(4), the Bureau expressed concern that servicing transfers could give rise to potential harms to consumers. Transferee servicers may experience problems relating to inaccurate transfer of past payment information, failures of the transferor servicer to transfer documents provided to it by a borrower or others, and inaccurate transfer of information relating to loss mitigation discussions with borrowers. Borrowers engaged in loss mitigation efforts may be transferred to transferee servicers that have no knowledge of the existence or status of the loss mitigation efforts.

The Bureau explained in the proposal that it believed it is a typical servicer duty for servicers to be able to effectuate sales, assignments, and transfers of mortgage servicing in a manner that does not adversely impact borrowers. Servicers generally should expect that servicing may be sold, assigned, or transferred for certain loans they service. Servicers may owe a duty to investors to ensure that mortgage servicing can be transferred without adversely impacting the value of the investor's asset. The Bureau stated that it believes it is appropriate for servicers to establish policies and procedures reasonably designed to achieve the objective of ensuring that in the event of any such transfer, documents and information regarding mortgage loan accounts are identified and transferred to a transferee servicer in a manner that permits the transferee servicer to continue providing appropriate service to the borrower.

The Bureau requested comments regarding whether the Bureau had identified the appropriate objectives and whether objectives should be removed, or other objectives included, in the requirements. The Bureau received a small number of comments on proposed § 1024.38(b)(4). Consumer advocates and some industry expressed support for the proposal. Other commenters asked for clarification about what the proposal would require, including whether transferor servicers must transfer all of the servicing file elements and whether the rule would require transferor servicers to obtain documents outside of the transferor servicers' possession or control. Servicers also asked for clarification about whether the rule would allow servicers to transfer files electronically.

In addition, the Bureau has received information that consumers often face difficulty enforcing a loss mitigation agreement reached with a transferor servicer prior to transfer with the transferee servicer. The Bureau has learned that transferee servicers often fail to request complete information about loss mitigation agreements from transferor servicers, and instead require borrowers to provide that documentation.

The Bureau is adopting § 1024.38(b)(4)(i), renumbered from proposed § 1024.38(b)(4), with modifications to address those comments. The Bureau has revised the proposal to add language to clarify that a transferor servicer's objectives regarding facilitating transfer relate only to documents within the transferor servicer's possession or control and that the transfer of information and documents must be in a form and manner that enables a transferee servicer to comply with obligations both under the terms of the mortgage loan and with applicable law. The Bureau is also removing the language concerning the transfer of information regarding loss mitigation discussions with borrowers from the text of proposed § 1024.38(b)(4) and, instead, is including new comment 38(b)(4)(i)-2, which clarifies the transferor servicer's obligation under § 1024.38(b)(4)(i) to establish policies and procedures reasonably designed to ensure that the transfer includes any information reflecting the current status of discussions with a borrower regarding loss mitigation options, any agreements entered into with a borrower on a loss mitigation option, and any analysis by a servicer with respect to potential recovery from a non-performing mortgage loan, as appropriate.

To address industry's comments about the manner in which transferor servicers may effectuate the transfer of documents and information, the Bureau is adopting new comment 38(b)(4)(i)-1, which clarifies that a transferor servicer's policies and procedures may provide for transferring documents and information electronically provided that the transfer is conducted in a manner that is reasonably designed to ensure the accuracy of the information and documents transferred and that enables a transferee servicer to comply with its obligations to the owner or assignee of the loan and with applicable law. For example, transferor servicers must have policies and procedures for ensuring that data can be properly and promptly boarded by a transferee servicer's electronic systems and that all necessary documents and information are available to, and can be appropriately identified by, a transferee servicer.

The Bureau is also adopting § 1024.38(b)(4)(ii) to more clearly define objectives for transferee servicers. Section 1024.38(b)(4)(ii) defines as an objective of a transferee servicer's reasonable policies and procedures identifying necessary documents or information that may not have been transferred by a transferor servicer and obtaining such documents from the transferor servicer. Comment 38(b)(4)(ii)-1 explains that a transferee servicer must have policies and procedures reasonably designed to ensure, in connection with a servicing transfer, that the servicer receives information regarding any loss mitigation discussions with a borrower, including any copies of loss mitigation agreements. Further, the comment clarifies that the transferee servicer's policies and procedures must address obtaining any such missing information or documents from a transferor servicer before attempting to obtain such information from a borrower.

The Bureau is also adopting § 1024.38(b)(4)(iii) to clarify that the obligations set forth in § 1024.38(b)(4) apply to circumstances when the performance of servicing of a mortgage loan is transferred, but the right to perform servicing of a mortgage loan is not transferred, such as a transfer between a master servicer and a subservicer or between subservicers.

38(b)(5) Informing Borrowers of Written Error Resolution and Information Request Procedures

As discussed above in the section-by-section analysis of § 1024.33, the Bureau is adopting a requirement for the servicing transfer notice that no longer requires a statement informing borrowers of the error resolution procedures required by existing § 1024.21(d)(3)(vii). To address concerns raised by commenters about the proposed revision of the transfer servicing notice, as discussed above, the Bureau is adopting § 1024.38(b)(5) to require servicers to maintain policies and procedures reasonably designed to achieve the objective of informing borrowers about the procedures for submitting written notices of error set forth in § 1024.35 and written requests for information set forth in § 1024.36.

The Bureau is also adopting new comment 38(b)(5)-1 to clarify the manner in which a servicer may inform borrowers about the procedures for submitting written notices of errors set forth in § 1024.35 and for submitting written requests for information set forth in § 1024.36. The Bureau is also adopting new comment 38(b)(5)-2 to clarify that a servicer's policies and procedures required by § 1024.38(b)(5) must be reasonably designed to provide information to borrowers who are not satisfied with the resolution of a complaint or request for information submitted orally about the procedures for submitting written notices of error set forth in § 1024.35 and for submitting written requests for information set forth in § 1024.36.

38(c) Standard Requirements

38(c)(1) Record Retention

Proposed § 1024.38(c)(1) would have required a servicer to retain records that document actions taken with respect to a borrower's mortgage loan account until one year after a mortgage loan is paid in full or servicing of a mortgage loan is transferred to a successor servicer. When issuing the proposed rule, the Bureau observed that proposed §§ 1024.35 and 1024.36 would have required servicers to respond to notices of error and information requests provided up to one year after a mortgage loan is paid in full or servicing of a mortgage loan is transferred to a successor servicer. The Bureau also noted that it believes that the record retention requirement was necessary for servicer compliance with obligations set forth in §§ 1024.35 and 1024.36. The Bureau also proposed to eliminate the systems of record keeping set forth in current § 1024.17(*l*), which required servicers to retain copies of documents related to borrower's escrow accounts for five years after the servicer last serviced the escrow account, which is likely to be close in time to when a mortgage loan is paid in full or servicing of a mortgage loan is transferred to a successor servicer. Further, the Bureau observed that servicers will require accurate information for the life of the mortgage loan to provide accurate payoff balances to borrowers or to exercise a right to foreclose. The Bureau requested comment regarding whether servicers should be required to retain documents and information relating to a mortgage file until one year after a mortgage loan is paid in full or servicing of a mortgage loan is transferred to a successor servicer and the potential burden of this requirement.

The Bureau received a handful of comments on proposed § 1024.38(c)(1). Consumer advocates urged the Bureau to extend the retention period from one year to five years to ensure that documents were available for discovery in civil litigation. Two servicers argued that the one year retention period would impose too great a cost on servicers. Another servicer commented that it agreed with the proposed one year retention period. A trade association also urged the Bureau to clarify that contractual rights to access records possessed by another entity would satisfy the servicer's requirements under this provision.

The Bureau is adopting § 1024.38(c)(1), as proposed. The Bureau believes that servicers should retain records that document actions taken by the servicer with respect to a borrower's mortgage loan account until one year after the date the mortgage loan is discharged or servicing of a mortgage loan is transferred by the servicer to a transferee servicer. As the Bureau stated in the proposal, the Bureau believes that the record retention requirement is necessary for servicer compliance with obligations set forth in §§ 1024.35 and 1024.36. Further, the Bureau believes that servicers require accurate information for the life of the mortgage loan to provide accurate payoff balances to borrowers or to exercise a right to foreclose. Requiring servicers to retain records until one year after the transfer or pay off of a mortgage loan may impose some marginal increase in the servicer's compliance burden in the form of incremental storage costs, but the Bureau believes that this burden is reasonable in light of the considerable benefits to borrowers. Moreover, the retention period is necessary to ensure that the Bureau and other regulators have an opportunity to supervise servicers' compliance with applicable laws effectively. The Bureau declines to adopt the longer period suggested by commenters. The Bureau believes that the final rule adequately addresses the commenters' concerns about the availability of documents for discovery by requiring retention of documents throughout the life of the loan and for one year following the pay off or transfer of servicing.

To clarify the methods that servicers may utilize to retain records, the Bureau is adopting new comment 38(c)(1)-1 that explains that retaining records that document actions taken with respect to a borrower's mortgage loan account does not necessarily mean actual paper copies of documents. The records may be retained by any method that reproduces the records accurately (including computer programs) and that ensures that the servicer can easily access the records (including a contractual right to access records possessed by another entity).

38(c)(2) Servicing File

Proposed § 1024.38(c)(2) would have required servicers to create a single servicing file for each mortgage loan account containing (1) a schedule of all payments credited or debited to the mortgage loan account, including any escrow account as defined in § 1024.17(b) and any suspense account; (2) a copy of the borrower's security instrument; (3) any collection notes created by servicer personnel reflecting communications with borrowers about the mortgage loan account; (4) a report of any data fields relating to a borrower's mortgage loan account created by a servicer’s electronic systems in connection with collection practices, including records of automatically or manually dialed telephonic communications; and (5) copies of any information or documents provided by a borrower to a servicer in accordance with the procedures set forth in §§ 1024.35 or 1024.41. The proposal also would have required that servicers provide borrowers with copies of the servicing file in accordance with the procedures set forth in § 1024.36.

In the proposal, the Bureau expressed concern that many large servicers maintained documents and information related to a borrower’s mortgage loan account in disparate systems and that this practice has led servicers to have difficulty identifying all necessary information regarding a borrower’s mortgage loan account, including collector’s notes, payment histories, note and deed of trust documents, and account debit and credit information, including escrow account information. Proposed § 1024.38(c)(2) would have required servicers to aggregate into a single system a servicing file for each mortgage loan account, containing the specific information described above. The Bureau solicited comment regarding whether servicers should be required to provide copies of a defined servicing file to a borrower upon request and on the burden of adopting this requirement. Further, the Bureau requested comment regarding whether the Bureau had identified the appropriate components of a servicing file and whether certain categories of documents and information should be included or removed from the proposed requirement. The comments that the Bureau received are described in detail below.

Providing copies of the servicing file to borrowers upon request. Proposed § 1024.38(c)(2) would have required servicers to provide a borrower with a copy of a servicing file, containing specifically listed elements, for the borrower’s mortgage loan account, in accordance with the procedures set forth in § 1024.36. The Bureau received a large number of comments on that aspect of the proposal.

The majority of the comments on proposed § 1024.38(c)(2) came from industry, and demonstrated confusion about the proposed provision. Industry commenters generally misunderstood the proposed provision as a requirement to provide borrowers with copies of their servicing files not subject to the procedures for information requests set forth in § 1024.36. Some servicers explicitly urged the Bureau to subject requests for servicing files to the procedural requirements of the information requests defined in § 1024.36. In addition, given this misunderstanding, industry comments urged the Bureau to adopt limits on borrowers' requests for servicing files to protect servicers from burdensome or duplicative requests. Servicers also suggested that the Bureau eliminate certain elements of the servicing file, such as payment histories, collection notes, and data fields, because they claimed that those elements would be too voluminous to provide to borrowers. A large servicer also urged the Bureau to allow flexibility in how servicers provide the information to borrowers, such as allowing borrowers to access the servicing file via a website.

Servicers also expressed concern that the proposed provision might require them to disclose privileged or proprietary information to borrowers. In particular, many commenters pointed to collection notes and data fields as elements potentially containing privileged or proprietary information.

Some comments also focused on a perceived litigation risk from providing copies of the servicing file to borrowers. Two comments cautioned that borrowers and their attorneys could use the request for the servicing file to obtain information normally only available to borrowers through court-ordered discovery in litigation. Commenters also stated that collection notes and data fields were created for strictly internal purposes, and would confuse borrowers, which might lead to litigation.

Consumer groups expressed support for providing borrowers with copies of their servicing files upon request. Consumer advocates noted that they specifically supported providing borrowers with a copy of a record of all payments credited to the account upon request and the data fields identifying the owner or assignee of the mortgage loan account. Also, one consumer advocate noted that the schedule of payments should include all payments made during the life of the loan and not just payments made to the current servicer.

To address the commenters' confusion about the relationship between proposed §§ 1024.38(c)(2) and 1024.36, the Bureau has removed the requirement to provide borrowers with copies of their servicing file from the language of proposed § 1024.38(c)(2). Instead, the Bureau is adopting new comment 38(c)(2)-2 that clarifies that § 1024.38(c)(2) does not confer upon any borrower an independent right to access information contained in the servicing file and that upon receipt of a borrower's request for a servicing file, a servicer shall provide the borrower with a copy of the information contained in the servicing file for the borrower's mortgage loan, subject to the procedures and limitations set forth in § 1024.36. This revision does not alter the substance of proposed § 1024.38(c)(2).

Aggregation of servicing file. Proposed § 1024.38(c)(2) would have required that servicers provide a defined set of information and data, i.e. a serving file, to borrowers upon request. Commenters interpreted this provision to require that servicers aggregate the elements of the servicing file defined in this section into a single file or information management system. Industry commenters, especially community banks, and credit unions, expressed concern about the potential implementation burden of aggregating the information regarding each borrower into a single system. Some of these commenters explained that their existing information systems stored some of the elements of the servicing file in separate systems. Some of these commenters also stated that their existing systems had not led to problems identified in the proposal, and urged the Bureau not to mandate that servicers with sound existing information management systems rebuild those systems to satisfy the technical details in the regulation.

The intent of the servicing file requirement in proposed § 1024.38(c)(2) was to prevent harm to borrowers and to investors by requiring servicers to have the capacity to access key information about a mortgage loan quickly. However, the Bureau recognizes that there are multiple ways to achieve this objective. The Bureau also does not want needlessly to require servicers with existing systems that work well to dismantle those systems by adopting an overly prescriptive regulatory framework. In light of the comments that the Bureau received, the Bureau is adopting § 1024.38(c)(2) with modifications to allow flexibility for the manner in which a servicer maintains a servicing file. Under the final rule, § 1024.38(c)(2) requires servicers to maintain a specific defined set of documents and data on each mortgage loan account serviced by the servicer in a manner that facilitates compiling such documents and data into a servicing file within five days. The Bureau believes that the final rule appropriately balances the benefits to borrowers and to investors by ensuring that servicers have ready access to all of the information necessary to service mortgage loan accounts with the flexibility required to enable servicers to design information management systems that correspond to the servicers' existing information management practices.

Content of servicing file. Proposed § 1024.38(c)(2) would have required servicers to create a single servicing file for each mortgage loan account containing, (i) a schedule of all payments credited or debited to the mortgage loan account, including any escrow account as defined in § 1024.17(b) and any suspense account; (ii) a copy of the borrower's security instrument; (iii) any collection notes created by servicer personnel reflecting communications with borrowers about the mortgage loan account; (iv) a report of any data fields relating to a borrower's mortgage loan account created by a servicer's electronic systems in connection with collection practices, including records of automatically or manually dialed telephonic communications; and (v) copies of any information or documents provided by a borrower to a servicer in accordance with the procedures set forth in §§ 1024.35 or 1024.41.

The Bureau received several comments on this aspect of the proposal. Consumer advocates highlighted their support for the requirement that servicers maintain a servicing file that includes a copy of the security instrument and the complete payment history. Some servicers commented that the Bureau should limit the payment history requirement due to the costs associated with maintaining a payment history for the life of the mortgage loan, especially with respect to partial payments. A large servicer urged the Bureau to delay implementation of this proposed provision to allow the Bureau to test what fields should be contained in a servicing file. Industry comments also noted that some servicers' existing files do not contain all of the required elements.

Some servicers also asked for clarification about the requirements for certain elements of the servicing file. A few servicers also asked for clarification about what type of communications with borrowers must be recorded in the collection notes, and in particular, whether a servicer must record communications with borrowers unrelated to mortgage loans. A few industry commenters asked the Bureau to clarify the data fields the servicer must maintain, described in proposed § 1024.38(c)(2)(iv).

As described above, the Bureau believes the interests of borrowers are best served if servicers are quickly able to access certain key information regarding a borrower's mortgage loan account, including a schedule of all transactions credited or debited to the mortgage loan account, including any escrow account as defined in § 1024.17(b) and any suspense account, a copy of the security instrument that establishes the lien securing the mortgage loan, any notes created by servicer personnel reflecting communications with borrowers about the mortgage loan account, data fields as defined by § 1024.38(c)(2)(iv), and copies of any information or documents provided by the borrower to the servicers in accordance with the procedures set forth in §§ 1024.35 or 1024.41. Therefore, the Bureau declines to remove any of the proposed elements from the servicing file definition. Also, the flexibility added to the final rule for servicers to determine how best to store the elements of the servicing file reduces the implementation burden on servicers. Therefore, for the reasons discussed above, the Bureau is adopting the elements of the servicing file in § 1024.38(c)(2), with minor technical adjustments, as proposed.

To address commenters' confusion about the information described in proposed § 1024.38(c)(iv), the Bureau is adopting new comment 38(c)(2)(iv)-1. Comment 38(c)(2)(iv)-1 clarifies that a report of the data fields relating to the borrower's mortgage loan account created by the servicer's electronic systems in connection with servicing practices means a report listing the relevant data fields by name, populated with any specific data relating to the borrower's mortgage loan account. Comment 38(c)(2)(iv)-1 also provides examples of data fields relating to a borrower's mortgage loan account created by the servicer's electronic systems in connection with servicing practices including fields used to identify the terms of the borrower's mortgage loan, fields used to identify the occurrence of automated or manual collection calls, fields reflecting the evaluation of a borrower for a loss mitigation option, fields used to identify the owner or assignee of a mortgage loan, and any credit reporting history. Also, § 1024.38(c)(2)(iii) only requires servicers to maintain any notes created by servicer personnel reflecting communications with a borrower about the mortgage loan account.

The Bureau also is adopting comment 38(c)(2)-1 to address commenters' confusion about the applicability of the servicing file requirements to existing servicer documents and information. Comment 38(c)(2)-1 explains that a servicer complies with § 1024.38(c)(2) if it maintains information in a manner that facilitates compliance with § 1024.38(c)(2) beginning on or after January 10, 2014. A servicer is not required to comply with § 1024.38(c)(2) with respect to information created prior to January 10, 2014.

Section 1024.39 Early Intervention Requirements for Certain Borrowers

Background

Proposed § 1024.39 would have required servicers to provide delinquent borrowers with two notices. First, proposed § 1024.39(a), would have required servicers to notify or make good faith efforts to notify a borrower orally that the borrower's payment is late and that loss mitigation options may be available, if applicable. Servicers would have been required to take this action not later than 30 days after the payment due date, unless the borrower satisfied the payment during that period. Second, proposed § 1024.39(b) would have required servicers to provide a written notice with information about the foreclosure process, housing counselors and the borrower's State housing finance authority, and, if applicable, information about loss mitigation options that may be available to the borrower. Servicers would have been required to provide the written notice not later than 40 days after the payment due date, unless the borrower satisfied the payment during that period. These two notices were designed primarily to encourage delinquent borrowers to work with their servicer to identify their options for avoiding foreclosure.

While a number of industry commenters supported the overall objective of encouraging communication between servicers and delinquent borrowers, many commenters, particularly small servicers, requested that the Bureau not issue regulations that are not required by the express provisions of the Dodd-Frank Act, citing compliance burden and the potential for overwhelming and confusing borrowers. Some industry commenters were concerned that the breadth of the definition of "Loss mitigation options" would require servicers to offer options or take actions inconsistent with investor or guarantor requirements. One industry commenter suggested, as an alternative to early intervention, that all borrowers be required to receive education about mortgages earlier in the process, before they become delinquent. Another stated that the Bureau's early intervention requirements would be ineffective because borrowers would not open mail or respond to phone calls.

Consumer advocacy groups were uniformly in favor of both an oral and written notice requirement. One consumer advocacy group explained that an oral and written notice requirement would help homeowners identify late payments quickly and engage in loss mitigation earlier to avoid foreclosure. Several consumer advocacy groups who submitted a joint comment stated that the Bureau was justified in proposing early intervention, explaining that early intervention is already an industry norm under GSE guidelines, the National Mortgage Settlement, and HAMP, which have standards for multiple phone calls and written notices at the early stages of a delinquency. These commenters also cited research that showed borrowers have a lower re-default rate the earlier they are reached in their delinquency.

However, most consumer advocacy groups requested that the Bureau require servicers to provide more information about the foreclosure process and loss mitigation options than the Bureau had proposed to require. Many consumer advocacy groups recommended that the

Bureau require servicers to provide information about all loss mitigation options potentially available to borrowers through the proposed oral and written notices. One mortgage investor commenter supported the Bureau's policy goal of requiring servicers to engage more actively with delinquent borrowers about loss mitigation options. This commenter also recommended that the final rule require that servicers maintain adequate staffing levels with respect to delinquent loans, maintain frequent contact with borrowers to remind borrowers of available options, review them for such options, and provide a user-friendly and up-to-date website on which borrowers could locate servicer contact information.

Industry commenters questioned whether the Bureau's rules were necessary in light of recent State and Federal remediation efforts, such as the National Mortgage Settlement and various consent agreements with bank regulators. One credit union trade association believed that the Bureau's proposed requirements were too rigid and would be ineffective, while another indicated that the early intervention requirements would not present issues because many of its affiliated members would be able to modify their current procedures without much difficulty. However, other industry trade associations and a nonprofit servicer indicated that, while most servicers already perform some form of early intervention, their programs are not identical to the Bureau's proposal, and that compliance would require adjustments to or formalization of servicer policies and procedures that may not necessarily be suited to a borrower's particular circumstances. Several industry commenters expressed concern that the Bureau's rules overlap and could conflict with existing State and Federal law.[122] With respect to addressing potential conflicts between the Bureau's rules and existing State and Federal law as well as existing

[122] For example, one credit union trade association identified a Michigan law that generally requires that, before a foreclosing party proceeds to foreclosure, it must provide borrowers with a notice containing information about foreclosure avoidance options and housing counselors. *See* Mich. Comp. Laws 600.3205a.

industry practice, commenters identified a variety of ways the Bureau could provide relief, including by not adopting rules that exceed or otherwise conflict with existing requirements, providing safe harbors (such as by clarifying that compliance with existing laws and agreements satisfies 1024.39), adopting more flexible standards, providing exemptions, including a mechanism in the rule to resolve compliance conflicts, or broadly preempting State laws.

Trade associations, smaller servicers, credit unions, and rural creditors subject to Farm Credit Administration rules generally requested exemptions from the early intervention requirements, citing a "high-touch" customer service model, problems with internalizing compliance costs relative to larger servicers, and potential conflicts arising from complying with conflicting sets of rules. Small servicers and credit unions expressed concern that higher compliance costs would make it difficult to maintain high levels of customer service.[123] A reverse mortgage trade association requested an exemption from the early intervention requirements because of the unique nature of reverse mortgage products and because the majority of reverse mortgages made in the current market are FHA Home Equity Conversion Mortgages already subject to specific requirements.

The Bureau has considered the comments submitted but continues to believe that rules governing early intervention are warranted. As the Bureau explained in its proposal, the Bureau believes that a servicer's delinquency management plays a significant role in whether the borrower cures the delinquency or ends up in foreclosure.[124] For a variety of reasons, at least among the larger players, servicers have not been consistent in managing delinquent accounts to

[123] One nonprofit servicer requested that the Bureau clarify how the early intervention requirements would apply if, as the Bureau proposed, small servicers are exempt from the periodic statement requirement in Regulation Z.

[124] *See* Diane Thompson, *Foreclosing Modifications: How Servicer Incentives Discourage Loan Modifications*, 86 Wash. L. Rev. 755, 768 (2011); Kristopher Gerardi & Wenli Li, *Mortgage Foreclosure Prevention Efforts*, 95 Fed. Reserve Bank of Atlanta Econ. Rev., 1, 8-9 (2010); Michael A. Stegman et al., *Preventative Servicing is Good for Business and Affordable Homeownership Policy*, 18 Housing Policy Debate 243, 274 (2007). *See also* part VII of the final rule.

provide borrowers with an opportunity to avoid foreclosure. In addition, incentives remain that may discourage these larger servicers from addressing a delinquency quickly as servicers may profit from late fees.[125] The Bureau also explained that delinquent borrowers may not make contact with servicers to discuss their options because they may be unaware that they have options[126] or that their servicer is able to assist them.[127] There is risk to borrowers who do not make contact with servicers and remain delinquent; the longer a borrower remains delinquent, the more difficult it can be to avoid foreclosure.[128] By requiring early intervention with delinquent borrowers, the Bureau has sought to correct impediments to borrower-servicer communication so that borrowers have a reasonable opportunity to avoid foreclosure at the early stages of a delinquency. As the Bureau recognized in its proposal, not all delinquent borrowers may respond to servicer outreach or pursue available loss mitigation options. However, the

[125] *See, e.g.*, *The Need for National Mortgage Servicing Standards: Hearing Before the Subcomm. on Hous., Transp., & Comm. Affairs of the Senate Comm. on Banking and Urban Affairs*, 112th Cong. 72-73 (2011) (statement of Diane Thompson); *see generally* Diane Thompson, Foreclolsing Modifications, 86 Wash. L. Rev. 755 (2011). The Bureau is aware that the GSEs and other programs, such as HAMP, align servicer incentives to encourage early intervention. *See, e.g.*, Fannie Mae, *Single-Family Servicing Guide*, Part VII § 602.04.05 (2012); Freddie Mac, *Single-Family Seller/Servicer Guide*, Volume 2, Ch. 65.42 (2012); U.S. Dep't of Treasury & U.S. Dep't of Hous. & Urban Dev., *Making Home Affordable Program Handbook*,106 (December 15, 2011). Through this rulemaking, the Bureau intends to make early intervention a uniform minimum national standard and part of established servicer practice.

[126] *See, e.g.*, *Are There Government Barriers to the Housing Recovery? Hearing Before the Subcomm. on Ins., Hous., and Comm. Opportunity of the House Comm. on Fin. Services*, 112th Cong. 50-51 (2011) (statement of Phyllis Caldwell, Chief, Homeownership Preservation Office, U.S. Dep't. of the Treasury); Freddie Mac, *Foreclosure Avoidance Research II: A Follow-Up to the 2005 Benchmark Study* 8 (2008), *available at* http://www.freddiemac.com/service/msp/pdf/foreclosure_avoidance_dec2007.pdf; Freddie Mac, *Foreclosure Avoidance Research* (2005), *available at* http://www.freddiemac.com/service/msp/pdf/foreclosure_avoidance_dec2005.pdf.

[127] *See* Office of the Comptroller of the Currency, *Foreclosure Prevention: Improving Contact with Borrowers*, Insights (June 2007), *available at* http://www.occ.gov/topics/communityaffairs/publications/insights/insights-foreclosure-prevention.pdf.

[128] *See, e.g.*, John C. Dugan, Comptroller, Office of the Comptroller of the Currency, *Remarks Before the NeighborWorks America Symposium on Promoting Foreclosure Solutions* (June 25, 2007), *available at* http://www.occ.gov/news-issuances/speeches/2007/pub-speech-2007-61.pdf; Laurie S. Goodman et al., Amherst Securities Group LP, *Modification Effectiveness: The Private Label Experience and Their Public Policy Implications* (June 19, 2012), at 5-6; Michael A. Stegman et al., *Preventative Servicing*, 18 Hous. Policy Debate 245 (2007); Amy Crews Cutts & William A. Merrill, *Interventions in Mortgage Default: Policies and Practices to Prevent Home Loss and Lower Costs* 11-12 (Freddie Mac, Working Paper No. 08-01, 2008).

Bureau believes that the notices will ensure, at a minimum, that covered borrowers have an opportunity to do so at the early stages of a delinquency.

The Bureau notes that the 2013 HOEPA Final Rule implements, among other things, RESPA section 5(c) requiring lenders to provide applicants of federally related mortgage loans with a list of homeownership counseling providers. Thus, borrowers will receive information to access counseling services at the time of application. In addition, the 2013 HOEPA Final Rule requires that applicants for "high cost" mortgages receive counseling prior to obtaining credit. While pre-mortgage counseling will help ensure borrowers understand the costs involved in obtaining a mortgage, borrowers who become delinquent may not know that they have options for avoiding foreclosure unless the servicer notifies them.

The Bureau understands that private lenders and investors, Fannie Mae and Freddie Mac, and Federal agencies, such as FHA and VA, already have early intervention servicing standards in place for delinquent borrowers.[129] However, servicers may vary as to how forthcoming they are in providing borrowers who are behind on their mortgage payments with options other than to pay only what is owed. The Bureau's goal with respect to its early intervention requirements is to identify consumer protection standards that are now best practices but were not consistently applied during the recent financial crisis and to apply these across the market, subject to exemptions identified in § 1024.30(b) and the scope limitation of § 1024.30(c)(2), to ensure that servicers are providing delinquent borrowers with a meaningful opportunity to avoid foreclosure.

[129] HUD and the VA have promulgated regulations and issued guidance on servicing practices for loans guaranteed or insured by their programs. *See* 24 CFR 203 subpart C (HUD); U.S. Hous. & Urban Dev., Handbook 4330.1 rev-5, Ch. 7; 38 CFR Ch. 1 pt. 36, Subpt. A. Fannie Mae & Freddie Mac have established recommended servicing practices for delinquent borrowers in their servicing guidelines and align their modification incentives with the number of days the mortgage loan is delinquent when the borrower enters a trial period plan. *See* Fannie Mae, *Single-Family Servicing Guide*, 700-1 (2012); Fannie Mae, *Outbound Call Attempts Guidelines* (Oct. 1, 2011), *available at* https://www.efanniemae.com/home/index.jsp; Fannie Mae, *Letters and Notice Guidelines* (Apr. 25, 2012), *available at* https://www.efanniemae.com/home/index.jsp; Freddie Mac, *Single-Family Seller/Servicer Guide*, Vol. 2, Ch. 64-69 (2012).

In light of comments received on the proposal, the Bureau has revised the proposed early intervention requirements to provide servicers with additional flexibility. Proposed § 1024.39(a) would have required servicers to notify, or make good faith efforts to notify, delinquent borrowers orally that loss mitigation options, if applicable, may be available by the 30th day of their delinquency. Under the proposal, servicers that make loss mitigation options available to borrowers would generally have been required to notify delinquent borrowers of the availability of such options not later than the 30th day of their delinquency.

The final rule does not require servicers to provide this notice to all borrowers and does not require servicers to inform borrowers of options that are not available from the owner or investor. Instead, under § 1024.39(a), servicers must establish or make good faith efforts to establish live contact with a delinquent borrower by the 36th day of the borrower's delinquency. Live contact includes telephoning or conducting an in-person meeting with the borrower. In addition, under § 1024.39(a), promptly after establishing live contact, servicers must inform the borrower about the availability of loss mitigation options if appropriate. Among other changes, the final rule includes commentary that clarifies that it is within a servicer's reasonable discretion to determine whether such a notice is appropriate under the circumstances. Commentary to the final rule also provides a more flexible good faith efforts standard that would permit servicers to comply by encouraging the borrower through written or electronic communication to make contact with the servicer. These changes are intended to help ensure servicers make efforts to contact delinquent borrowers who would be interested in learning about loss mitigation options and, at the same time, avoid causing servicers to spend resources notifying borrowers about loss mitigation options the servicer has reason to believe would not benefit from being informed of such options.

The final rule includes a written notice requirement similar to the one proposed at § 1024.39(b), but the Bureau has sought to mitigate compliance burden without undermining the protection of an early written notice by extending the deadline for providing the notice from 40 to 45 days of a borrower's delinquency to align with other notices that servicers may already provide to borrowers at that time. The Bureau has sought to develop flexible early intervention requirements to accommodate existing practices and requirements to avoid servicers having to duplicate existing early intervention practices. For example, if servicers are required by other laws to provide a notice that includes the content required by § 1024.39(b)(2) and if servicers may provide such notice within the first 45 days of a borrower's delinquency, the Bureau does not believe servicers would need to provide each notice separately.

The Bureau has further sought to accommodate existing practices by providing clarifying commentary to § 1024.39(b)(1) that servicers may combine notices that may already meet the content requirements of § 1024.39(b)(2) into a single mailing. In addition, comment 39(b)(2)-1 explains that the written notice contains minimum content requirements for the written notice and that a servicer may provide additional information that the servicer determines would be helpful or which may be required by applicable law or the owner or assignee of the mortgage loan. The Bureau has included this comment, in part, to accommodate similar notices that servicers may already be providing. Further, to assist with compliance, the Bureau has also developed model clauses, which the Bureau has tested with the assistance of Macro. A servicer's appropriate use of the model clauses will act as a safe harbor for compliance.

While the Bureau has designed its early intervention requirements to provide flexibility to servicers that already have early intervention practices in place or that are complying with external existing requirements, the Bureau acknowledges that some of the new requirements may not align perfectly with all existing practices. To address actual conflicts with State or Federal law, the Bureau has included new § 1024.39(c), which, as discussed in more detail below, provides that nothing in § 1024.39 shall require a servicer to make contact with a borrower in a manner that would be prohibited under applicable law. The Bureau believes this approach to conflicting laws is preferable to preempting other laws. Because § 1024.39 require servicers to proactively contact borrowers, the Bureau is concerned that preempting laws might override those that protect delinquent borrowers from certain contacts (*e.g.*, debt collection laws).

In addition, the Bureau is granting exemptions for small servicers as defined in 12 CFR 1026.41(e)(4); servicers with respect to any reverse mortgage transaction as that term is defined in § 1024.31; and servicers with respect to any mortgage loan for which the servicer is a qualified lender as that term is defined in 12 CFR 617.7000. *See* the section-by-section analysis of § 1024.30(b) above. The Bureau is further limiting the application of §§ 1024.39 through 41 to mortgage loans that are secured by a borrower's principal residence, as discussed in more detail in the section-by-section analysis of § 1024.30(c)(2) above.

The Bureau is not mandating that servicers maintain specific staffing levels to perform early intervention with delinquent borrowers, but the Bureau notes that, under § 1024.38, servicers must maintain policies and procedures reasonably designed to achieve the objective of properly evaluating borrowers for loss mitigation options. The Bureau is not requiring servicers to maintain a website for delinquent borrowers to provide early intervention information because the Bureau believes such a requirement may be burdensome for all servicers and is unnecessary in light of the written notice at § 1024.39(b), which includes contact information for servicer continuity of contact personnel assigned pursuant to § 1024.40(a).

The Bureau declines to grant an exemption from the early intervention requirements with respect to borrowers who have ceased making payments for the past six months and have not contacted their servicer. To the extent loss mitigation options are available for such borrowers, the Bureau believes these borrowers should be so informed in accordance with § 1024.39(a) and (b). Further, the Bureau believes servicers should make good faith efforts to establish live contact with borrowers who may be reluctant to reach out before taking action that may result in the loss of the borrower's home. In addition, the Bureau believes these borrowers would benefit from information about how to contact their servicer as well as information about how to access housing counseling resources.

Legal Authority

The Bureau proposed to implement § 1024.39 pursuant to authority under sections 6(k)(1)(E), 6(j)(3), and 19(a) of RESPA. Violations of section 6 of RESPA are subject to a private right of action. Industry commenters, including the GSEs, industry trade associations, and several large bank servicers were concerned that a private right of action would result in uncertainty for servicers and could delay loss mitigation efforts and the foreclosure process if a borrower claimed it did not receive a timely notice required by the Bureau's rules. Commenters indicated that increased litigation costs would limit access to and increase the cost of credit to borrowers. One commenter was concerned that a private right of action would result in loss mitigation being perceived as a substantive right. Instead, commenters requested that the Bureau issue the early intervention and other loss mitigation provisions solely in reliance on RESPA section 19(a) authority.

The Bureau has considered industry comments but continues to rely on RESPA section 6 authority as a basis for the Bureau's early intervention requirements under § 1024.39. The

Bureau does not believe § 1024.39 will result in loss mitigation being treated as a substantive right because it sets forth procedural requirements only. As finalized, § 1024.39 does not require servicers to offer any particular loss mitigation option to any particular borrower. The live contact requirement under § 1024.39(a) requires servicers to notify borrowers of the availability of loss mitigation options "if appropriate"; associated commentary clarifies that it is within a servicer's reasonable discretion to determine whether it is appropriate to inform borrowers of such options. The written notice requirement under § 1024.39(b)(2)(iii) requires servicers to inform borrowers, "if applicable," of examples of loss mitigation options available through the servicer. Nothing in § 1024.39 affects whether a borrower is permitted as a matter of contract law to enforce the terms of any contract or agreement between a servicer and an owner or assignee of a mortgage loan.

In addition, the Bureau has taken steps to clarify requirements in the rule, which the Bureau believes will help avoid uncertainty for servicers and help minimize litigation risk and compliance costs arising from a private right of action associated with RESPA section 6. For example, the final rule omits the proposed oral notice requirement under proposed § 1024.39(a) and instead requires that servicers establish or make good faith efforts to establish live contact with borrowers and, promptly after establishing live contact, inform borrowers of the availability of loss mitigation options "if appropriate." Comment 39(a)-3.i explains that it is within a servicer's reasonable discretion to determine whether informing a borrower about the availability of loss mitigation options is appropriate under the circumstances; the comment also includes illustrative examples to assist with compliance. While this guidance should provide servicers with some degree of certainty around compliance, the Bureau recognizes there may be limited situations that are less clear; in these cases, however, servicers could avoid compliance risk by informing borrowers of loss mitigation options. Comment 39(a)-3.ii explains that a servicer may inform borrowers about the availability of loss mitigation options either through an oral or written communication. The final rule also provides servicers with more flexibility in satisfying the good faith efforts standard; servicers may demonstrate compliance by providing written or electronic communication encouraging borrowers to establish live contact with their servicer. In addition, with respect to the written notice under § 1024.39(b), the final rule includes model clauses and clarifies in commentary that servicers may provide additional information about loss mitigation options not included in the model clauses. Further, the final rule includes flexible minimum content requirements for the written notice that will assist servicers in accommodating existing disclosures and other related disclosure requirements.

The Bureau does not believe that the risk of a private right of action will negatively impact access to, or cost of, credit. The requirements under § 1024.39 include clear procedural requirements as well as protections for a servicer's exercise of reasonable discretion. Further, the requirements have been implemented to reduce compliance burden and provide clear rules capable of efficient implementation by servicers, including through the use of model clauses. Accordingly, the Bureau believes that the early intervention rules under § 1024.39 provide necessary consumer protections and that servicers are capable of providing such protections without negative consequences for borrowers, including with respect to access to, or cost of, credit.

The Bureau is adopting § 1024.39 pursuant to its authorities under sections 6(j)(3), 6(k)(1)(E), and 19(a) of RESPA. As explained in more detail below, the Bureau finds, consistent with RESPA section 6(k)(1)(E), that § 1024.39 is appropriate to achieve the consumer protection purposes of RESPA, including to help borrowers avoid unwarranted or unnecessary costs and fees and to facilitate review of borrowers for foreclosure avoidance options.   For the same reasons, § 1024.39 is authorized under section 6(j)(3) of RESPA as necessary to carry out section 6 of RESPA, and under section 19(a) of RESPA as necessary to achieve the purposes of RESPA, including borrowers' avoidance of unwarranted or unnecessary costs and fees and the facilitation of review of borrowers for foreclosure avoidance options.

The Bureau is also adopting § 1024.39 pursuant to its authority under section 1022(b) of the Dodd-Frank Act to prescribe regulations necessary or appropriate to carry out the purposes and objectives of Federal consumer financial laws, including the purposes and objectives of Title X of the Dodd-Frank Act. Specifically, the Bureau believes that § 1024.39 is necessary and appropriate to carry out the purpose under section 1021(a) of the Dodd-Frank Act of ensuring that markets for consumer financial products and services are fair, transparent, and competitive, and the objectives under section 1021(b) of the Dodd-Frank Act of ensuring that consumers are provided with timely and understandable information to make responsible decisions about financial transactions, and markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation. The Bureau additionally relies on its authority under section 1032(a) of the Dodd-Frank Act, which authorizes the Bureau to prescribe rules to ensure that the features of any consumer financial product or service, both initially and over the term of the product or service, are fully, accurately, and effectively disclosed to consumers in a manner that permits consumers to understand the costs, benefits, and risks associated with the product or service, in light of the facts and circumstances. Consistent with section 1032(b) of the Dodd-Frank Act, the model clauses at appendix MS-4 have been validated through consumer testing.

39(a) Live Contact

Proposed § 1024.39(a)

Proposed § 1024.39(a) would have required that, if a borrower is late in making a payment sufficient to cover principal, interest, and, if applicable, escrow, the servicer must, not later than 30 days after the missed payment, notify or make good faith efforts to notify the borrower that the payment is late and that loss mitigation options, if applicable, may be available. Proposed § 1024.39(a) also provided that if the servicer attempts to notify the borrower by telephone, good faith efforts would require calling the borrower on at least three separate days in order to reach the borrower. The Bureau explained in the section-by-section analysis of the proposed rule that the "if applicable" qualification in proposed § 1024.39(a) meant that servicers that do not make any loss mitigation options available to borrowers would not be required to notify borrowers that loss mitigation options may be available.

The Bureau had proposed to clarify through comment 39(a)-1.i that the oral notice would have to be made through live contact or good faith efforts to make live contact with the borrower, such as by telephoning or meeting in-person with the borrower, and that oral contact does not include a recorded message delivered by phone. Proposed comment 39(a)-1.ii would have clarified that a servicer is not required to describe specific loss mitigation options, and that the servicer need only inform the borrower that loss mitigation options may be available, if applicable. The comment also would have clarified that a servicer may provide more detailed information that the servicer believes would be helpful. Proposed comment 39(a)-2 clarified that, in order to make a good faith effort by telephone, the servicer must complete the three phone calls attempting to reach the borrower by the end of the 30-day period after the payment due date.

The Bureau received significant comment on the proposed oral notice from consumer advocacy groups, trade associations, credit unions, community banks, rural servicers, large banks, non-bank servicers, and individual consumers. Consumer advocacy groups and two residential real estate trade associations were generally supportive of an oral notice requirement. One coalition of consumer advocacy groups explained that a mandatory phone call or visit would alert borrowers that loss mitigation options may be available and give borrowers an opportunity to ask questions and gather accurate information about the borrower's rights and responsibilities. Several consumer advocacy groups and individual consumers supported an oral notice requirement because it would permit borrowers to engage in an interactive conversation with servicers about their rights and responsibilities surrounding loss mitigation. A number of consumer advocacy groups, however, requested that the Bureau require that servicers provide more information about loss mitigation options than the notice set forth in proposed § 1024.39(a). These commenters recommended that servicers notify borrowers of all loss mitigation options that may be available, including application instructions and deadlines, and information about the foreclosure process at the time of the oral notice. Several consumer advocacy groups also recommended that the Bureau delete proposed comment 39(a)-1.ii, which explained that a servicer need not describe specific loss mitigation options during the oral notice and that the servicer need only inform borrowers that loss mitigation options may be available, if applicable.

Industry commenters expressed concern about the circumstances under which servicers would be required to notify borrowers about loss mitigation options. These commenters explained that a servicer's offer of loss mitigation depends on not only the stage of a borrower's delinquency but also the nature of the delinquency, as well as other circumstances, pursuant to investor or guarantor guidelines and could be perceived as misleading for borrowers who are ultimately ineligible based on owner or investor requirements. These commenters, including one Federal agency, also expressed concern that informing borrowers of loss mitigation options that are inappropriate for short-term delinquencies could impede the resolution of delinquent loans by discouraging borrowers from resolving a short-term delinquency they could have cured on their own. Industry commenters also asserted that notifying borrowers about loss mitigation options too early would be confusing or perceived as potentially harassing for those borrowers at low risk of default. In addition, several commenters cited concerns that requiring early intervention for low-risk borrowers would detract from helping high-risk borrowers. To address these concerns, they requested that the Bureau clarify the circumstances under which servicers would be required to notify borrowers that loss mitigation options may be available. In particular, several commenters requested that the Bureau clarify that, before providing the notice regarding loss mitigation options, a servicer may first determine whether a borrower is experiencing a short- or long-term delinquency, and that servicers be permitted to pursue collection efforts in the case of short-term delinquencies.

Industry commenters also expressed concern with demonstrating compliance with the oral notice requirement, particularly in light of the possibility of a private right of action under RESPA section 6, which the Bureau relied on as a source of legal authority for proposed § 1024.39. Rural, community bank, and credit union servicers recommended against an oral notice requirement because such requirements are difficult to track and verify, would require systems reprogramming or upgrades, may be misunderstood by borrowers, and would not guarantee establishing contact with borrowers. One community bank commenter stated that a simple delinquency notice should suffice, without a need to have a live conversation about loss mitigation options. Several rural and credit union servicers indicated that staffing and resource limitations would make it difficult to reach borrowers after normal work hours, when most borrowers are available by phone. One industry commenter recommended that the Bureau mandate in-person outreach in addition to the oral and written notice requirements while another industry commenter asked that the Bureau clarify that this provision does not mandate in-person outreach.

Several industry commenters and individual consumers recommended that other forms of contact, such as text messages or email should be permitted, but not required, to satisfy good faith efforts, or that email should be permitted in lieu of live contact. These commenters noted that a more flexible approach, such as permitting written or other forms of electronic contact, would help reach borrowers and address compliance issues because written methods are more easily tracked. Several industry commenters requested that the Bureau permit servicers to engage in any form of contact that is reasonable under the circumstances. One industry commenter suggested that servicers should be permitted to leave a recorded message instead of three phone calls.

By contrast, a number of consumer advocacy groups stated that the good faith effort standard as proposed was reasonable, although some recommended that servicers be required to engage in more efforts to contact the borrower, such as by attempting to contact borrowers on every telephone number on record in order to reach the borrower and by requiring that servicers leave a message when servicers have that option. Some consumer advocacy groups recommended that servicers be required to leave a message when a borrower’s telephone number provided a voicemail option, while an industry commenter indicated there may be privacy concerns with respect to any potential requirement for notices to be provided via text or email.

Final § 1024.39(a)

After considering comments on the proposal, the Bureau is revising the proposed oral notice requirement into a live contact requirement permits servicers to exercise reasonable discretion in determining whether informing delinquent borrowers of the availability of loss mitigation options is appropriate under the circumstances. The Bureau is also adjusting the timing of the contact requirement from the proposed 30-day timeframe to 36 days.

Under § 1024.39(a), a servicer must establish or make good faith efforts to establish live contact with a delinquent borrower not later than the 36th day of the borrower's delinquency and, promptly after establishing live contact, inform such borrower about the availability of loss mitigation options "if appropriate." The Bureau has added comment 39(a)-3.i to clarify that it is within a servicer's reasonable discretion to determine whether informing a borrower about the availability of loss mitigation options is appropriate under the circumstances. To illustrate, comment 39(a)-3.i provides examples demonstrating when a servicer has made a reasonable determination regarding the appropriateness of providing information about loss mitigation options. Comment 39(a)-3.i.A illustrates a scenario in which a servicer provides information about the availability of loss mitigation options to a borrower that notifies a servicer during live contact of a material adverse change in the borrower's financial circumstances that is likely to cause the borrower to experience a long-term delinquency for which loss mitigation options may be available. Comment 39(a)-3.i.B illustrates a scenario in which a servicer does not provide information about the availability of loss mitigation options to a borrower who has missed a January 1 payment and notified the servicer that full late payment will be transmitted to the servicer by February 15.

The Bureau is adopting a modified version of the proposed oral notice in § 1024.39(a) because the Bureau agrees that a prescriptive requirement to provide an oral notice for all delinquent borrowers, where loss mitigation options were available, within the first 30 days of a delinquency would be overbroad. The Bureau observes that the oral notice as proposed would not have required servicers to offer options in a manner that is inconsistent with investor or guarantor requirements because servicers would only have had to notify borrowers that loss mitigation options, if applicable, "may" be available; servicers would not have been required to provide information about or offer options that the servicer did not already offer. However, the Bureau recognizes the potential for borrower confusion if servicers are required in every instance to notify borrowers who are experiencing short-term delinquencies of available loss mitigation options if these borrowers ultimately are unlikely to need or be eligible for such options. The Bureau agrees that providing the notice within the first 30 days of a borrower's delinquency may be unwarranted if a borrower would not ultimately qualify based on investor or guarantor requirements or for whom loss mitigation options are unnecessary, such as for borrowers who are experiencing a short-term cash-flow problem. As the Bureau noted in its proposal, borrowers who are 30 days delinquent generally present a lower risk for default, (compared to borrowers with more extended delinquencies), and such borrowers typically resolve their delinquency without the assistance of loss mitigation options.[130]

Nonetheless, while many borrowers who miss a payment will be able to self-cure within 30 days, some portion of these borrowers are likely to fall further behind on their payments, and

[130] *See, e.g.,* Amy Crews Cutts & William A. Merrill, *Interventions in Mortgage Default: Policies and Practices to Prevent Home Loss and Lower Costs* 10 (Freddie Mac, Working Paper No. 08-01, 2008) (explaining that, in one study, there was a "significant cure rate out of the 30-day delinquency population without servicer intervention," but that "as the time in delinquency increases so does the hurdle the borrower has to overcome to reinstate the loan and the importance of calling the servicer").

the Bureau believes servicers should make efforts to inform such borrowers that help is available. As the Bureau noted in its proposal, evidence suggests that one of the barriers to communication between borrowers and servicers is that borrowers do not know that servicers may be helpful or that they have options to avoid foreclosure, and that as a result of these barriers, borrowers may not know that help is available until too late, when it can be more difficult to cure a delinquency. Although borrowers may receive notice of loss mitigation options through other written notices, such as the written early intervention notice proposed at § 1024.39(b), borrowers may be reluctant to contact a servicer on their own but would nonetheless benefit from early notification that help is available. By establishing early live contact with borrowers, servicers would be able to begin working with the borrower to develop appropriate relief at the early stages of a delinquency. The Bureau recognizes that, by giving servicers flexibility to determine whether it is appropriate under the circumstances to notify borrowers about loss mitigation options, there is some risk that servicers, despite their reasonable exercise of discretion, may incorrectly determine a borrower is experiencing a short-term delinquency. The Bureau believes that, on balance, the potential that delinquent borrowers may remain uninformed of their options is mitigated by the requirement in § 1024.39(b)(1), discussed below, to provide a written notice not later than the 45th day of a borrower's delinquency.

Proposed comment 39(a)-1.i would have clarified that the proposed oral notice would have to be made through live contact or good faith efforts to make live contact, such as by telephoning or conducting an in-person meeting with the borrower, but not leaving a recorded message. The final rule adopts proposed comment 39(a)-1.i substantially as proposed, which the Bureau has renumbered as comment 39(a)-2 for organizational purposes. Final comment 39(a)-2 includes guidance appearing in proposed comment 39(a)-1.i about the meaning of live contact, but omits reference to the notice required under 1024.39(a) because, as discussed immediately below, the final rule does not require servicers to inform borrowers of the availability of loss mitigation options under § 1024.39(a) during live contact. Final comment 39(a)-2 further clarifies that a servicer may, but need not, rely on live contact established at the borrower's initiative to satisfy the live contact requirement in § 1024.39(a). Final comment 39(a)-2 also explains that live contact provides servicers an opportunity to discuss the circumstances of a borrower's delinquency.

The Bureau has added comment 39(a)-3.ii to clarify that, if appropriate, servicers may inform borrowers about the availability of loss mitigation options orally, in writing, or through electronic communication, but that servicers must provide such information promptly after the servicer establishes live contact. This comment is intended to provide servicers flexibility in notifying borrowers about loss mitigation options at the early stages of delinquency. The Bureau believes establishing initial live contact is important for a servicer to learn about the circumstances for a borrower's delinquency and to determine whether it is appropriate under the circumstances to inform borrowers about the availability of loss mitigation options. The Bureau believes that providing borrowers with initial notice about the availability of loss mitigation options may be accomplished through an oral conversation or information delivered in writing, as long as it is provided promptly after the servicer establishes live contact, if appropriate.

Comment 39(a)-3.ii further explains that a servicer need not notify a borrower about any particular loss mitigation options promptly after the servicer determines that a borrower should be informed of loss mitigation options; a servicer need only inform a borrower generally that loss mitigation options may be available. This comment is substantially similar to proposed comment 39(a)-1.ii. The Bureau is not requiring that servicers to provide detailed information about all loss mitigation options, application deadlines, or foreclosure timelines because not all borrowers may benefit from such a conversation at the time of this contact. Further, the Bureau believes the continuity of contact provisions at § 1024.40 will serve to provide borrowers with access to personnel who can assist them with loss mitigation options. Comment 39(a)-3.ii also explains that, if appropriate, a servicer may satisfy the requirement in § 1024.39(a) to inform a borrower about loss mitigation options by providing the written notice required by § 1024.39(b)(1), but the servicer must provide such notice promptly after the servicer establishes live contact. The Bureau believes that the written notice that must be provided by the 45th day of a borrower's delinquency pursuant to § 1024.39(a) provides sufficient information about the availability of loss mitigation options.

Good Faith Efforts

The Bureau agrees with commenters who assert that servicers should be permitted to engage in a wide variety of methods of contacting borrowers who may be difficult to reach by telephone. Accordingly, in the final rule, the Bureau has developed a more flexible good faith efforts standard. Proposed § 1024.39(a) would have provided that, if the servicer attempts to notify the borrower about loss mitigation options by telephone, good faith efforts would require calling the borrower on at least three separate days in order to reach the borrower. The final rule does not define good faith efforts to establish live contact by identifying a particular number of days to reach the borrower. Instead, comment 39(a)-2 clarifies that good faith efforts to establish live contact consist of reasonable steps under the circumstances to reach a borrower and may include telephoning the borrower on more than one occasion or sending written or electronic communication encouraging the borrower to establish live contact with the servicer.

The Bureau believes that, by permitting servicers to satisfy the good faith efforts standard through a wider variety of methods, servicers will be able to reach borrowers who may be difficult to reach by phone, particularly if a servicer does not have access to a borrower’s mobile phone or if a borrower is unreachable by phone during the day. In addition, permitting servicers to satisfy the good faith efforts standard through written or electronic communication encouraging the borrower to establish live contact addresses servicer concerns about tracking and compliance risks associated with the proposed oral notice requirement.

Although the Bureau is permitting servicers to contact borrowers through a variety of means, the Bureau is not requiring servicers to contact borrowers through every means of contact possible because it would be difficult, if not impossible, to satisfy such a standard. The Bureau is not requiring servicers to leave a voicemail message when such an option is available because such a requirement may implicate privacy concerns. The Bureau is not adopting a requirement mandating that servicers establish in-person contact or so-called “field calls” to the borrower’s residence. While such methods of contact may be effective methods of reaching delinquent borrowers, the Bureau believes telephone calls are equally, if not more effective in certain circumstances, and mandating an in-person contact requirement would be unduly burdensome for most servicers. Of course, a servicer could choose to establish live contact through in-person meetings.

36th Day of Delinquency

Proposed § 1024.39(a) would have required servicers to provide the oral notice not later than 30 days after a payment due date. In light of comments received, the Bureau is not adopting the 30-day timeframe in proposed § 1024.39(a) and instead is adopting a requirement that a servicer establish live contact not later than the 36th day of a borrower’s delinquency to determine whether to inform such borrower that loss mitigation options may be available.

Industry commenters stated that providing notices too early would be unnecessary for borrowers capable of curing a short-term delinquency or for borrowers at low risk of default, and that providing notice of loss mitigation, in such circumstances, may interfere with sound delinquency management. A variety of servicers and trade associations recommended that the Bureau extend the deadline to 40 or 45 days and one trade association recommended that the Bureau extend the deadline to 60 days to provide servicers with maximum flexibility. One industry commenter indicated that a 30-day timeframe would be burdensome for servicers that honor a 15-day grace period because it would only leave servicers only 15 days to satisfy the good faith efforts standard. Trade associations, community banks, and rural lenders were concerned that the Bureau’s requirements might be duplicative of or not perfectly aligned with existing requirements. Some commenters requested that the Bureau create an exemption from the 30-day deadline for servicers that employ a behavior modeling tool. In contrast, consumer advocacy groups requested that the Bureau maintain the 30-day period and include more information in the oral notice. One consumer advocate recommended that borrowers be notified about their options as soon as their account is deemed delinquent by the servicer.

In the final rule, the Bureau is retaining a deadline by which a servicer must establish or make good faith efforts to establish live contact, but the Bureau is adjusting the timing of the deadline from the 30-day period originally proposed to a 36-day period. As the Bureau recognized in its proposal, certain borrowers may be temporarily delinquent because of an accidental missed payment, a technical error in transferring funds, a short-term payment difficulty, or some other reason. These borrowers may be able to cure a delinquency without a servicer's efforts to make live contact. Thus, if the borrower fully satisfies the payment before the end of the 36-day period, the servicer would not be required to establish live contact or otherwise comply with § 1024.39(a). Proposed comment 39(a)-4 explained that a servicer would not be required to notify or make good faith efforts to notify a borrower unless the borrower remains late in making a payment during the 30-day period after the payment due date. A similar comment appears in 39(a)-1.iv, revised to reflect the new 36-day period.

As the Bureau noted in its proposal, there is risk to borrowers as a result of a delay in notifying borrowers that loss mitigation options may be available; research indicates that the longer a borrower remains delinquent, the more difficult it can be to avoid foreclosure.[131] At the same time, the Bureau understands that a significant portion of borrowers who become delinquent are able to self-cure within 30 days of a missed payment.

The government-sponsored enterprises generally recommend that servicers initiate phone calls for borrowers who have missed a payment by the 16th day after a payment due date, although calling campaigns for high-risk borrowers must begin by the third day after a due date.[132] In general, calls must occur every three days through day 36 of delinquency, and follow-up calls are required after borrower solicitation packages have been sent. Other standards, such

[131] *See, e.g.*, John C. Dugan, Comptroller, Office of the Comptroller of the Currency, *Remarks Before the NeighborWorks America Symposium on Promoting Foreclosure Solutions* (June 25, 2007); Laurie S. Goodman et al., Amherst Securities Group LP, *Modification Effectiveness: The Private Label Experience and Their Public Policy Implications* 5-6 (June 19, 2012); Michael A. Stegman et al., *Preventative Servicing*, 18 Hous. Policy Debate 245 (2007); Amy Crews Cutts & William A. Merrill, *Interventions in Mortgage Default: Policies and Practices to Prevent Home Loss and Lower Costs* 11-12 (Freddie Mac, Working Paper No. 08-01, 2008).

[132] Freddie Mac recommends servicers contact borrowers within three days of a missed payment, unless the servicers use a behavior modeling tool that would support an alternate approach. Fannie Mae recommends servicers contact "high risk" borrowers within three days of a missed payment; campaigns for non-high-risk borrowers should begin within 16 days of a missed payment. *See* Fannie Mae, *Single-Family Servicing Guide* 700-1 (2012); Fannie Mae, *Outbound Call Attempts Guidelines* (Oct. 1, 2011), *available at* https://www.efanniemae.com/home/index.jsp; Fannie Mae, Letters and Notice Guidelines (Apr. 25, 2012), *available at* https://www.efanniemae.com/home/index.jsp.

as HAMP[133] and the National Mortgage Settlement,[134] typically provide for the commencement of outreach efforts to communicate loss mitigation options for potentially eligible borrowers after two missed payments. For FHA-insured mortgages, HUD has a general requirement to contact borrowers with FHA-insured mortgages by telephone between the 17th day of delinquency and the end of the month.[135] However, HUD Mortgagee Letter 98-18 provides that, at the lender's discretion following a formal risk assessment, borrowers with FHA loans at low risk for foreclosure may be contacted by phone by the 45th day of delinquency.

The Bureau is adjusting the timing by which a servicer must establish live contact from 30 to 36 days to be more consistent with GSE outbound call guidelines, HAMP, and the National Mortgage Settlement, and to give borrowers more time to cure a delinquency before a servicer attempts to establish live contact. In addition, a 36-day deadline would help servicers screen for delinquent borrowers who regularly pay late, by permitting servicers to identify borrowers at risk of missing two payment deadlines before attempting efforts to contact them. The Bureau understands that servicers may not be able to complete an initial eligibility evaluation prior to the deadline for contact (potentially within five days after a second missed payment due date). However, the Bureau's rule would only require servicers to establish or make good faith efforts to establish live contact with borrowers and inform such borrowers of the availability of loss

[133] Under HAMP, servicers must pre-screen all first lien mortgage loans where two or more payments are due and unpaid (at least 31 days delinquent). Servicers must proactively solicit for HAMP any borrower whose loan passes this pre-screen, unless the servicer has documented that the investor is not willing to participate in HAMP. *See* U.S. Dep't of Treasury & U.S. Dep't of Hous. & Urban Dev., *MHA Handbook version* 51 (June 1, 2011).

[134] "Servicer shall commence outreach efforts to communicate loss mitigation options for first lien mortgage loans to all potentially eligible delinquent borrowers (other than those in bankruptcy) beginning on timelines that are in accordance with HAMP borrower solicitation guidelines set forth in the MHA Handbook version 3.2, Chapter II, Section 2.2, regardless of whether the borrower is eligible for a HAMP modification." Attorneys Gen. et al., *National Mortgage Settlement: Consent Agreement* A-23 (2012)(Loss Mitigation Communications with Borrowers), *available at* http://www.nationalmortgagesettlement.com.

[135] *See* U.S. Hous. & Urban Dev., *Handbook 4330.1 REV-5*, ch. 7, para. 7-7B, *available at* http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_14710.pdf.

mitigation options promptly after establishing live contact "if appropriate." Where a servicer determines that it would be appropriate to inform a borrower about the availability of such options, comment 39(a)-3.ii clarifies that a servicer need not notify borrowers about specific loss mitigation options under 1024.39(a), but only that loss mitigation options may be available. In addition, even if servicers have not completed an initial eligibility evaluation by the time of oral contact, the Bureau believes delinquent borrowers would still benefit from hearing about any other loss mitigation options for which they may be eligible. The Bureau believes a 36-day standard would be consistent with the Settlement terms requiring servicers to commence outreach efforts after the second missed payment. Under § 1024.39(a), servicers must establish or make good faith efforts to establish live contact with borrowers by the 36th day of delinquency, which would occur after a second missed payment is due. Moreover, servicers need not inform borrowers of the availability of loss mitigation options at the time of establishing live contact (if appropriate); § 1024.39(a) requires that they do so promptly after establishing live contact. The Bureau declines to adopt a requirement to contact borrowers as soon as they become delinquent because the Bureau believes such a requirement would be overbroad, as discussed above.

The Bureau declines to adopt a general 40- or 45-day standard for all borrowers because the Bureau believes borrowers who may be experiencing the early stages of a long-term delinquency are, on balance, likely to benefit from earlier contact, and the Bureau believes that by the 36th day of a delinquency, servicers would know whether a borrower has missed two payments (subject only to the possibility that the payment will be received before the expiration of the grace period for the second payment). The Bureau believes that borrowers who miss two payments generally will present a greater financial risk than borrowers who are only one month late. The Bureau believes servicers should be required to establish live contact, or make good faith efforts to do so, not later than several days after a borrower has missed a second payment due date so the servicer may begin to learn about the circumstances of a borrower's delinquency. Of course, servicers may elect to contact borrowers sooner, and the Bureau believes most servicers will do so pursuant to GSE, FHA, and VA guidelines. Finally, the Bureau declines to permit servicers to delay contact for borrowers identified as low-risk based on a servicer's use of a behavior modeling tool. The Bureau is concerned that modeling tools used to predict future behavior are inherently imprecise and produce a certain percentage of false negatives—*i.e.*, borrowers who are predicted to self-cure but do not. As also discussed below, at this time, the Bureau does not have sufficient data to evaluate or validate such tools.

To account for situations in which a borrower proactively contacts the servicer about a late payment, proposed comment 39(a)-5 explained that, if the borrower contacts the servicer at any time prior to the end of the 30-day period to explain that the borrower expects to be late in making a payment, the servicer could provide the oral notice under proposed § 1024.39(a) by informing the borrower at that time that loss mitigation options, if applicable, may be available. The Bureau did not receive comment on proposed comment 39(a)-5 or the two illustrative examples at proposed 39(a)-5.i.A or -5.i.B. The Bureau is omitting these comments from the final rule because the Bureau does not believe they are necessary in light of the clarifications provided in comment 39(a)-2 (establishing live contact).

The Bureau proposed in § 1024.39(a) to require a servicer to provide an oral notice, or make good faith efforts to do so, if the borrower is late in making "a payment sufficient to cover principal, interest, and, if applicable, escrow." Thus, a servicer would not have been required to provide the oral notice if a borrower is late only with respect to paying a late fee for a given billing cycle. As explained in the proposal, the Bureau proposed this trigger because the Bureau believes there is low risk that borrowers will default solely because of accumulated late charges if they are otherwise current with respect to principal, interest, and escrow payments. The Bureau proposed to add comment 39(a)-3 to explain that, for purposes of proposed § 1024.39(a), a payment would be considered late the day after a payment due date, even if the borrower is afforded a grace period before the servicer assesses a late fee. Thus, for example, if a payment due date is January 1, the servicer would be required to notify or make good faith efforts to notify the borrower not later than 30 days after January 1 (*i.e.*, by January 31) if the borrower has not fully paid the amount owed as of January 1 and the full payment remains due during that period.

The Bureau did not receive comment on what constitutes a late payment for purposes of providing the oral notice and is adopting a substantially similar standard in the final rule, which the Bureau has defined as "delinquency" for purposes of § 1024.39. The Bureau has added comment 39(a)-1.i to clarify that, for purposes of § 1024.39, delinquency begins 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. For example, if a payment due date is January 1 and the amount due is not fully paid during the 36-day period after January 1, the servicer must establish or make good faith efforts to establish live contact not later than 36 days after January 1—*i.e.*, by February 6. Delinquency is calculated in a similar manner with respect to the written notice under § 1024.39(b)(1) that must be provided by the 45th day of a borrower's delinquency. The Bureau uses the term "delinquency" in the final rule to improve and clarify the proposed regulatory text and intends no substantive difference from the proposal. Unlike proposed comment 39(b)(1)-2, comment 39(a)(1)-1.i does not use the term "grace period" but instead uses the phrase "period of time after the due date has passed to pay before the servicer assesses a late fee." The Bureau intends no substantive difference between the final rule and the proposal, but has made this change to conform to similar changes in the Bureau's 2013 TILA Mortgage Servicing Final Rule.

Proposed comment 39(a)-6 clarified that a servicer would not be required under § 1024.39(a) to provide the oral notice to a borrower who is performing as agreed under a loss mitigation option designed to bring the borrower current on a previously missed payment. The Bureau did not receive comment on proposed comment 39(a)-6 and is adopting it substantially as proposed, but reorganized under comment 39(a)-1 as a clarification to whether a borrower is "delinquent" for purposes of § 1024.39(a). Thus, comment 39(a)-1.ii explains that a borrower who is performing as agreed under a loss mitigation option designed to bring the borrower current on a previously missed payment is not delinquent for purposes of § 1024.39.

Rural and community bank commenters requested clarification on whether the oral and written notices would be required to be provided on a recurring basis for borrowers who satisfy their mortgage payments late on a recurring basis and who may be unresponsive to servicer collection efforts. The Bureau has addressed the issue of recurring delinquencies with regard to the written notice below in the section-by-section analysis of § 1024.39(b), discussed below. With respect to the live contact requirement, servicers would be required to establish live contact or make good faith efforts to do so with borrowers to determine whether to inform borrowers of loss mitigation options. Thus, a servicer must establish live contact or make good faith effort to establish live contact, even with borrowers who are regularly delinquent, by the 36th day of a borrower's delinquency. However, it is within a servicer's reasonable discretion to determine whether it would be appropriate to inform a borrower who is delinquent on a recurring, month-to-month basis about the availability of loss mitigation options.

Servicing transfers. The Bureau has added comment 39(a)-1.iii, which explains that, during the 60-day period beginning on the effective date of transfer of the servicing of any mortgage loan, a borrower is not delinquent for purposes of § 1024.39 if the transferee servicer learns that the borrower has made a timely payment that has been misdirected to the transferor servicer and the transferee servicer documents its files accordingly.

The Bureau has added this comment to address situations that may arise during the 60 days after a servicing transfer. RESPA section 6(d) provides that, during the 60-day period beginning on the effective date of transfer of servicing of any federally related mortgage loan, a late fee may not be imposed on the borrower with respect to any payment on such loan and no such payment may be treated as late for any other purposes, if the payment is received by the transferor servicer (rather than the transferee servicer who should properly receive the payment) before the due date applicable to such payment. 12 U.S.C. 2605(d). This provision is implemented through current § 1024.21(d)(5), which the Bureau is moving and finalizing as § 1024.33(c)(1). As explained in more detail in the section-by-section analysis of § 1024.33(c)(1) above, the Bureau has added comment 33(c)(1)-2 to clarify a transferee servicer's compliance with 1024.39 during the 60-day period beginning on the effective date of a servicing transfer does not constitute treating a payment as late for purposes of § 1024.33(c)(1). The Bureau has added comment 33(c)(1)-2 to address situations in which a transferee servicer does not know the reasons for a late payment but may still need to comply with § 1024.39 in the face of this uncertainty.

To account for situations in which the transferee servicer learns that a borrower has simply misdirected a timely payment, the Bureau has added comment 39(a)-1.iii to clarify that, during the 60-day period beginning on the effective date of transfer of the servicing of any mortgage loan, a borrower is not delinquent for purposes of § 1024.39 if the transferee servicer learns that the borrower has made a timely payment that has been misdirected to the transferor servicer and the transferee servicer documents its files accordingly. In such cases, the Bureau does not believe such borrowers should be treated as delinquent for purposes of § 1024.39. Comment 39(a)-1.iii also contains cross-references to § 1024.33(c)(1) and comment 33(c)(1)-2. To clarify that this guidance also applies to § 1024.39(b), comment 39(b)(1)-1 includes a cross-reference to comment 39(a)-1.

Borrower's representative. Several consumer group commenters and a housing counseling organization requested that the Bureau clarify that a servicer must communicate with a borrower's representative. The Bureau agrees that, in certain situations, such as where the borrower is represented by an attorney, it may be appropriate for servicers to communicate with the borrower's authorized representative, particularly in situations involving delinquency that may result in foreclosure. Accordingly, the Bureau has added comment 39(a)-4 to explain that § 1024.39 does not prohibit a servicer from satisfying the requirements of § 1024.39 by establishing live contact with, and, if applicable, providing information about loss mitigation to a person authorized by the borrower to communicate with the servicer on the borrower's behalf. The comment provides that 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 by requiring that a person that claims to be an agent of the borrower provide documentation from the borrower stating that the purported agent is acting on the borrower's behalf. This comment is similar to comments 35(a)-1, 36(a)-1, and 40(a)-1.

The Bureau does not believe it is necessary to specifically require servicers to communicate with a borrower's representative for purposes of § 1024.39. By comparison, the requirements applicable to notices of error and information requests under §§ 1024.35 and 36 include comments 35(a)-1 and 36(a)-1, which explain that notices of error and information requests from a borrower's representative are treated the same way that servicers treat such communications from a borrower though the 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. In situations involving notices of error or information requests, in which a borrower requests through a representative that the servicer take some action that the servicer may not otherwise perform, there is some risk that a servicer might claim it had no obligation to act if the regulation only required actions with respect to the "borrower." However, § 1024.39 requires that servicers reach out to borrowers. Thus, the risk that servicers would claim they had no obligation to act with respect to a borrower is not present in this case; to the contrary, the Bureau believes it would mitigate the burden on the servicer to be able to communicate with either the borrower or the borrower's representative.

39(b) Written Notice

39(b)(1) Notice Required

As discussed below, the Bureau is adopting a written notice requirement that has been slightly revised from the proposal. The Bureau proposed § 1024.39(b)(1) to require servicers to provide borrowers who are late in making a payment with a written notice containing information about the foreclosure process, contact information for housing counselors and the borrower's State housing finance authority, and, if applicable, loss mitigation options. The Bureau proposed to require that this notice be provided not later than 40 days after the payment due date. Proposed comment 39(b)(1)-1 explained that the written notice would be required even if the servicer provided information about loss mitigation and the foreclosure process previously during the oral notice under § 1024.39(a).

Consumer advocacy groups were generally supportive of a written notice, although they recommended including more detail about loss mitigation options, application instructions, and foreclosure timelines. Industry commenters were concerned that the written notice requirement would conflict with existing early intervention requirements and recommended that the Bureau provide more flexibility with respect to the content of the notice and that the Bureau extend the deadline for providing the written notice. Some commenters questioned the necessity of the written notice in light of an oral notice requirement and other existing requirements.

The Bureau is adopting a written notice requirement in the final rule at § 1024.39(b). Borrowers may not receive information about loss mitigation options either because the servicer is unable to establish live contact with a borrower despite good faith efforts or because the servicer exercises reasonable discretion to determine that providing information about loss mitigation options is not appropriate. Further, as the Bureau noted in its proposal, even if a borrower receives information about the availability of loss mitigation options orally, the Bureau believes a written notice is still necessary if a borrower has not cured by day 45 because borrowers may be unable to adequately assess and recall detailed information provided orally and the written notice would provide more information than what would likely have been provided under § 1024.39(a).

In addition, a written disclosure would provide borrowers with the ability to review the information or discuss it with a housing counselor or other advisor. Accordingly, the Bureau is adopting comment 39(b)(1)-1 substantially as proposed. The proposed comment explained that the written notice would be required even if the servicer provided information about loss mitigation and the foreclosure process previously during an oral communication under § 1024.39(a). In the final rule, the Bureau has omitted the reference to foreclosure and renumbered this comment as 39(b)(1)-4 for organizational purposes. The Bureau has also included new comment 39(b)(1)-3 to provide a cross-reference to comment 39(a)-4 to clarify that the Bureau's guidance with respect to communicating with a borrower's representative also applies to the written notice provision at § 1024.39(b).

In response to comments, however, the Bureau is adjusting the timing of the notice from 40 to 45 days after a missed payment and is making certain adjustments to the proposed content of the notice. To assist servicers in complying with the notice requirement, the Bureau is adopting model clauses, referenced in § 1024.39(b)(3), which the Bureau has amended. The model clauses are discussed in the section-by-section analysis of appendix MS-4.

Some industry commenters were concerned that the breadth of the definition of "Loss mitigation options" would require servicers to offer options or take actions inconsistent with investor or guarantor requirements.

The Bureau does not believe the written notice requirement in § 1024.39(b) will pose a conflict with investor or guarantor requirements and is adopting it as applicable to servicers of all mortgage loans, with certain exemptions and limitations in scope, as discussed above.[136] Given the breadth of the definition of "Loss mitigation option" and the general industry practice of offering some sort of short-term relief or at least accepting a deed-in-lieu of foreclosure, the

[136] As discussed in the section-by-section analysis of § 1024.30(b), above, the Bureau is adopting exemptions from § 1024.39 for small servicers, servicers with respect to reverse mortgage transactions, and servicers with respect to mortgage loans for which the servicer is a qualified lender (as defined in 12 CFR 617.7000). In addition, as discussed in the section-by-section analysis of § 1024.30(c), § 1024.39 does not apply to any mortgage loan that is not secured by a borrower's principal residence.

Bureau expects that few servicers would not offer any loss mitigation options. In addition, the definition of "Loss mitigation option" is limited to options offered by the owner or assignee of a mortgage loan that are available through the servicer. Thus, options that are not offered by an owner or assignee and thus not available through the servicer would not be required to be listed. In addition, the Bureau has developed flexible content requirements in the written notice with regard to how and which loss mitigation options are described. Finally, the Bureau has retained the "if applicable" qualifier in § 1024.39(b)(2) setting forth requirements to describe loss mitigation options. Thus, if an owner or assignee of a loan offers no loss mitigation options for delinquent borrowers, the servicer would not be required to include statements describing loss mitigation options, but would still be required to send a notice encouraging the borrower to contact the servicer and containing information about housing counselors; the Bureau believes borrowers would benefit from information about how to contact their servicer or housing counselors to ask questions, for example, about how the foreclosure process works.

45th Day of Delinquency

Similar to the proposed oral notice, the Bureau proposed in § 1024.39(b) to require servicers to provide the written notice if a borrower is late in making a payment sufficient to cover principal, interest, and, if applicable, escrow. However, unlike the proposed oral notice that servicers would have been required to provide, or make good faith efforts to provide, not later than 30 days after a payment due date, the Bureau proposed to require that the written notice be provided not later than 40 days after the payment due date. The Bureau had proposed a 40-day deadline to provide borrowers a reasonable opportunity to cure a short-term delinquency while also ensuring that they received information on loss mitigation options at the early stages of a delinquency. The Bureau proposed to permit servicers to provide the written notice at any time during the 40-day period. The Bureau proposed a deadline for the written notice that occurred after the 30-day deadline for the proposed oral notice to provide servicers an opportunity to tailor the written notice and other information to the borrower's individual circumstances following the oral notice. However, servicers would also have had the option of sending the notice at any time after the borrower's missed payment. The Bureau proposed to include guidance at comment 39(b)(1)-2 to clarify that servicers should consider a payment late in the same manner as they would for purposes of calculating when the oral notice must be provided. The Bureau solicited comment on whether the written deadline should be extended to 45 days, 65 days, or longer.

Consumer advocacy groups and one industry commenter were generally supportive of the timing of the written notice as proposed, although one consumer advocacy group recommended that borrowers receive a more detailed notice 60 days after the missed payment following a lighter notice about loss mitigation options immediately after a delinquency. Most industry commenters recommended that the Bureau extend the deadline for the written notice to sometime between 45 and 70 days after a missed payment. Industry commenters argued that extending the deadline would preserve servicer flexibility in managing delinquencies and reduce the compliance burden in light of existing early intervention practices and requirements. Similar to arguments made about the proposed oral notice, industry commenters and a Federal agency expressed concern that informing a borrower of loss mitigation options that the borrower does not qualify for or that are not available to the borrower could cause borrower confusion and impede the resolution of delinquent loans.

Industry commenters and several consumer advocacy groups noted that extending the deadline for the written notice would allow servicers time to distinguish between high- and low-risk borrowers, allowing servicers to focus on high-risk borrowers while avoiding the need to make contact with borrowers who are able to self-cure the occasional late payment or those who are repeatedly delinquent but who eventually make their payments. Several industry commenters recommended that the Bureau extend the deadline to 60 days to permit servicers additional time to complete an eligibility assessment required under HAMP and the National Mortgage Settlement. One trade association noted that the Bureau's original outline of proposals under consideration included a proposal for servicers to provide borrowers with written information about loss mitigation options within five days after notifying the servicer that they may have trouble making their payments. The commenter requested that this be a requirement in the final rule.

In addition, as with the proposed oral notice, industry commenters were concerned that the Bureau's requirements may be duplicative of or not perfectly aligned with existing State and Federal requirements, GSE guidelines, consent orders, and settlement agreements. Many industry commenters noted that a 40-day deadline would be premature and that it would be more efficient, common, and would avoid borrower confusion to send the notice by 45 days after a missed payment, consistent with other notices that servicers send by that time, such as breach letters, a notice under section 106(c)(5) of the Housing and Urban Development Act of 1968, as amended, regarding the availability of housing counselors (12 U.S.C. 1701x(c)(5)(B)), and a notice under the Servicemembers Civil Relief Act (50 U.S.C. App. 501 *et seq.*).[137] One large servicer explained that extending the deadline from 40 to 45 days would still provide borrowers with sufficient notice of loss mitigation options before a servicer begins the foreclosure process. One industry commenter recommended that the Bureau extend the deadline to 50 days after the

[137] *See* Form, U.S. Hous. & Urban Dev., *Service Members Civil Relief Act Form HUD-92070* (June 30, 2011), *available at* http://portal.hud.gov/hudportal/documents/huddoc?id=92070.pdf.

payment due date to better accommodate other loss mitigation-related communications that go out by the 45th day of delinquency. In addition, a variety of servicers and trade associations requested additional flexibility in delivering the content of the written notice, such as by combining the proposed written notice requirement with existing notices.

The GSEs, certain large lenders, and trade associations, as well as several consumer advocacy groups, recommended that the Bureau permit servicers to send the written notice by the 60th, 65th or 70th day of a borrower's delinquency. Other industry commenters and a few consumer advocacy groups recommended that the Bureau extend the deadline to sometime between 60 and 70 days after a missed payment. A number of commenters expressed concern that the proposed 40-day notice was not in line with GSE guidelines that permit servicers to send a loss mitigation solicitation package to borrowers identified by the servicer as low default risks by the 65th day of the borrower's delinquency.   Other commenters recommended that the Bureau permit an exemption from the 40-day deadline for servicers to comply with a later deadline if the servicer uses behavior modeling to identify chronically late payers that do not appear at risk of serious delinquency and where the notice is unlikely to be helpful, in order to better align with GSE practice.

Based on comments received, the Bureau is adopting a 45-day deadline rather than a 40-day deadline in the final rule. First, the Bureau believes that a 45-day deadline strikes an appropriate balance between permitting servicers flexibility in managing delinquencies and providing borrowers information at the early stages of a delinquency. Some borrowers are in the habit of making their mortgage payments after the due date in order to take advantage of the 15-day period generally available to make payment without incurring a late fee. A borrower who has missed a payment entirely may likewise wait until up to the 15th day after the next payment is due (*i.e.*, the 45th day after the initial payment was due) before making a payment. A 45-day deadline would permit borrowers to receive a written notice of loss mitigation options at the early stages of their delinquency while also permitting servicers to distinguish between borrowers who can self-cure out of a 30-day delinquency and those experiencing longer-term problems. The Bureau believes that the fact that a borrower has not satisfied a late payment by the 45th day of a delinquency generally indicates that such borrower is having difficulty making payments and should be informed of the availability of loss mitigation options.

The Bureau understands that some servicers may not be able to complete eligibility assessments for borrowers by the 45th day of a delinquency under HAMP (which is set to expire by December 31, 2013).[138] However, the Bureau's rule would not require that servicers make a determination of eligibility of loss mitigation options by this time; they require only that they notify borrowers that loss mitigation options may be available. The Bureau has crafted flexible content standards that would not require servicers to list specific loss mitigation options in the written notice. With respect to the National Mortgage Settlement, the Bureau believes a 45-day standard would be in line with the Settlement terms requiring servicers to commence outreach efforts after the second missed payment.

The Bureau understands that GSE servicers have additional flexibility in providing the solicitation package to certain lower-risk borrowers as late as the 65th day of their delinquency.[139] As noted above, several industry commenters and consumer advocacy groups recommended that the Bureau extend the deadline for the written notice to sometime between 60

[138] *See* U.S. Dep't of Treasury & U.S. Dep't of Hous. & Urban Dev., *Home Affordable Modification Program*, *available at* http://www.makinghomeaffordable.gov/programs/lower-payments/Pages/hamp.aspx

[139] The GSEs allow servicers to rely on the results of a behavioral modeling tool to evaluate a borrower's risk profile. U.S. Consumer Fin. Prot. Bureau, *Final Report of the Small Business Review Panel on CFPB's Proposals Under Consideration for Mortgage Servicing Rulemaking*, 30 (Jun, 11, 2012).

and 70 days after a missed payment in order to accommodate this GSE practice. However, the Bureau is not adopting an exemption for servicers who use behavior modeling tools to identify lower-risk borrowers for the following reasons. Evidence available to the Bureau indicates that the longer a borrower remains delinquent, the more difficult it can be to avoid foreclosure,[140] particularly as a borrower experiences a delinquency lasting 60 days or longer.[141] While waiting to day 65 to see if a delinquent borrower has self-cured may be appropriate for low-risk borrowers, modeling tools to predict future behavior are inherently imprecise and identify a certain number of borrowers who are predicted to self-cure but do not. At this time, the Bureau does not have data with which to validate or evaluate such models. Further, the Bureau is concerned that if these borrowers are not informed of their options until the beginning of the third month of their delinquency, it may be more difficult for them to find a solution than if they were notified sooner.

The Bureau appreciates that a 45-day notice requirement might result in notices to borrowers who would self-cure without any notice. On balance, however, the Bureau believes it is appropriate to be potentially overbroad to avoid situations in which borrowers may not receive any information until potentially three months of missed payments. The Bureau has sought to address the compliance burden on GSE servicers who use behavior modeling tools by creating

[140] *See, e.g.,* John C. Dugan, Comptroller, Office of the Comptroller of the Currency, *Remarks Before the NeighborWorks America Symposium on Promoting Foreclosure Solutions* (June 25, 2007); Laurie S. Goodman et al., Amherst Securities Group LP, *Modification Effectiveness: The Private Label Experience and Their Public Policy Implications* 5-6 (June 19, 2012); Michael A. Stegman et al., *Preventative Servicing*, 18 Hous. Policy Debate 245 (2007); Amy Crews Cutts & William A. Merrill, *Interventions in Mortgage Default: Policies and Practices to Prevent Home Loss and Lower Costs* 11-12 (Freddie Mac, Working Paper No. 08-01, 2008).

[141] *See* Amy Crews Cutts & William A. Merrill, *Interventions in Mortgage Default: Policies and Practices to Prevent Home Loss and Lower Costs* 12 (Freddie Mac, Working Paper No. 08-01, 2008)(examining the success of repayment plans, the authors found that "[t]he cure rate among loans that are only 30 days delinquent is just under 60 percent, but that rate falls to less than 30 percent if they are 3 or more payments behind at the onset of the plan"); Laurie S. Goodman et al., Amherst Securities Group LP, *Modification Effectiveness: The Private Label Experience and Their Public Policy Implications* 6 (June 19, 2012).

flexible content standards for the written notice. The Bureau has also sought to limit the burden of sending the notice by limiting the number of times a borrower would receive the notice, as discussed in more detail below.

In addition, the Bureau believes a 45-day deadline would be more consistent with other notices that servicers send by that time than the 40-day deadline as originally proposed. As discussed in more detail in the section-by-section analysis of § 1024.39(b)(2), the Bureau has sought to adopt flexible content requirements for the 45-day written notice to accommodate existing early intervention notices. The Bureau agrees that permitting servicers to comply with § 1024.39(b) by combining other notices that go out at this time would reduce possible confusion among borrowers as well as compliance burden. *See* the discussion of comment 39(b)(2)-3 below. Servicers of VA loans generally must provide borrowers with a letter if payment has not been received within 30 days after it is due and telephone contact could not be made.[142] HUD generally requires servicers of FHA-insured loans to provide each mortgagor in default HUD's "Avoiding Foreclosure" pamphlet, or a form developed by the mortgagee and approved by HUD, not later than the end of the second month of delinquency, although HUD recommends sending the form by the 32nd day of delinquency in order to prevent foreclosures from proceeding where avoidable.[143]

Section 106(c)(5) of the Housing and Urban Development Act of 1968, as amended, generally requires creditors to provide notice of homeownership counseling to eligible delinquent borrowers not later than 45 days after a borrower misses a payment due date. 12

[142] "This letter should emphasize the seriousness of the delinquency and the importance of taking prompt action to resolve the default. It should also notify the borrower(s) that the loan is in default, state the total amount due and advise the borrower(s) how to contact the holder to make arrangements for curing the default." 38 CFR 36.4278(g)(iii).

[143] *See* 24 CFR 203.602; U.S. Hous. & Urban Dev., *HUD Handbook 4330.1 rev-5*, ch. 7, para. 7-7(G).

U.S.C. 1701x(c)(5)(B). In addition, HUD has developed a notice pursuant to the Servicemembers Civil Relief Act, as amended, providing notice of servicemembers' rights that must be provided within 45 days of a missed payment. Servicers of GSE loans are expected to send a written package soliciting delinquent borrowers to apply for loss mitigation options 31 to 35 days after a payment due date, unless the servicer has made contact with the borrower and received a promise to cure the delinquency within 30 days.[144]

The Bureau is not adopting a requirement in the final rule for servicers to provide the § 1024.39(b) written notice based solely on a borrower's indication of difficulty in making payment. The Bureau notes that, pursuant to § 1024.39(a) and comment 39(a)-3.i, servicers must promptly inform borrowers of the availability of loss mitigation options if appropriate, which servicers may determine based on their exercise of reasonable discretion. If the servicer determines informing a borrower of loss mitigation options is appropriate, they may choose to do so orally or in writing, in accordance with comment 39(a)-3.ii. The Bureau believes a strict 45-day deadline for the written notice required under § 1024.39(b) is necessary to mitigate the risk that borrowers may not receive notice of the availability of loss mitigation options pursuant § 1024.39(a): a servicer may not establish live contact with a borrower despite good faith efforts to do, or a servicer may make a reasonable determination that such notice is not appropriate under § 1024.39(a). In addition, as previously noted, a single deadline would provide servicers with flexibility, within the deadline, to determine the most appropriate time to provide the written notice, *e.g.*, for borrowers who may be able to self-cure. Finally, the Bureau believes that

[144] *See* Fannie Mae, Letters and Notice Guidelines (Apr. 25, 2012), *available at* https://www.efanniemae.com/home/index.jsp; Freddie Mac Single-Family Seller/Servicing Guide, Volume 2, Chapter 64.5 (2012). During the Small Business Panel Review outreach, SERs that service for Fannie Mae and Freddie Mac generally described strict rules and tight timeframes in dealing with delinquent borrowers. *See* Small Business Review Panel Report at 25.

new § 1024.36, which will require servicers to respond to information requests, and new §1024.38(b)(2)(i), which requires servicers to maintain policies and procedures that are reasonably designed to ensure that servicers provide accurate information regarding loss mitigation options available to a borrower, will address situations in which borrowers request information about loss mitigation and foreclosure.

In the final rule, the Bureau uses the term "delinquency" to identify when the 45-day period begins. The Bureau has clarified the meaning of delinquency in commentary in a manner substantially similar to the late payment trigger that was proposed in § 1024.39(b). Accordingly, in the final rule, § 1024.39(a) requires a servicer to provide the written notice not later than the 45th day of "a borrower's delinquency." Comment 39(b)(1)-1 contains a cross-reference to comment 39(a)-1, which generally explains that delinquency begins 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 of time after the due date has passed to pay before the servicer assesses a late fee. The cross-reference also clarifies that a borrower is not delinquent for purposes of § 1024.39 if the borrower is performing as agreed under a loss mitigation option designed to bring the borrower current on a previously missed payment.

Comment 39(b)(1)-1 provides an example substantially similar to the example proposed as comment 39(b)(1)-2, in which a borrower misses a January 1 payment that remains due during the 45-day period after January 1, requiring that the servicer provide the written notice by February 15. Comment 39(b)(1)-1 also contains an example similar to the example in proposed comment 39(b)(1)-3, which explained that a servicer is not required to provide the written notice if the borrower makes the payment during the 45 days after the payment due date. The Bureau has also replaced the 40-day period in the comment with a 45-day period to conform to changes adopted in the final rule regarding the timing of the written notice. The Bureau has made this change to clarify that the notice must be provided only if the borrower is delinquent, and must be provided not later than the 45th day of the borrower's delinquency.

Frequency of the Notice

Proposed § 1024.39(b)(1) would have provided that a servicer would not be required to provide the written notice under § 1024.39(b) more than once during any 180-day period beginning on the date on which the disclosure is provided. Proposed comment 39(b)(1)-4 further explained that, notwithstanding this limitation, a servicer would still be required to provide the oral notice required under § 1024.39(a) for each payment that is overdue. Several commenters provided feedback on the frequency of the written notice. Two consumer advocacy groups recommended that the Bureau require the notice be resent if the borrower redefaults on the mortgage loan. Other consumer advocacy groups recommended that servicers provide the notice again based on the results of a behavior modeling tool.

The Bureau is retaining the proposed 180-day limitation in § 1024.39(b)(1). The Bureau is also retaining substantially all of the language in comment 39(b)(1)-4, which the Bureau is renumbering to comment 39(b)(1)-2. The Bureau has replaced the 40-day time periods in the examples in the commentary with 45-day time periods to conform to the final rule; the Bureau is also omitting the reference in the proposed comment to 39(a) in the last example in light of the Bureau's change to the nature of the proposed oral notice.

The Bureau is requiring that servicers provide the notice once every 180 days to limit the number of times a servicer would have to send the notice to borrowers who consistently pay late but otherwise eventually make their payments. The Bureau does not believe that borrowers who consistently carry a short-term delinquency would benefit from receiving the same written notice every month. Because § 1024.32 requires that the written notice be provided in a form the borrower may keep, borrowers would be able to retain the disclosure for future reference. In addition, a 180-day timeframe is generally consistent with HUD's requirement that, in connection with FHA loans, HUD's "Avoiding Foreclosure" pamphlet must be resent to delinquent borrowers unless the beginning of the new delinquency occurs less than six months after the pamphlet was last mailed.[145]

The Bureau believes that the requirement to provide the notice once every 180 days as well as the requirement in § 1024.40(a) to make servicer personnel available to borrowers not later than the 45th day of a borrower's delinquency will, as a practical matter, address situations in which borrowers may redefault. Further, § 1024.39(a) requires that servicers establish or make good faith efforts to establish live contact with borrowers with respect to every delinquency and promptly inform such borrowers that loss mitigation options may be available if appropriate, subject to a servicer's reasonable exercise of discretion. In addition, borrowers who previously worked with servicer personnel assigned under the continuity of contact rule to develop a loss mitigation option would know that they may contact their servicer to discuss loss mitigation options. The Bureau is not adopting an exemption based on a servicer's use of a behavior modeling tool for the reasons discussed above with respect to the timing of the written notice.

39(b)(2) Content of the Written Notice

In General

The Bureau proposed to add new § 1024.39(b)(2) to set forth information that servicers would be required to include in the written notice. Under paragraphs (b)(2)(i) and (b)(2)(ii) of

[145] *See* 24 CFR 203.602; U.S. Hous. & Urban Dev., *HUD Handbook 4330.1 rev-5*, ch. 7, para. 7-7(G).

proposed § 1024.39, servicers would have been required to include a statement encouraging the borrower to contact the servicer, along with the servicer’s mailing address and telephone number. Under paragraphs (b)(2)(iii) and (b)(2)(iv) of proposed § 1024.39, servicers would have been required, if applicable, to include a statement providing a brief description of loss mitigation options that may be available, as well as a statement explaining how the borrower can obtain additional information about those options. Proposed § 1024.39(b)(2)(v) would have required servicers to include a statement explaining that foreclosure is a process to end the borrower’s ownership of the property. Proposed § 1024.39(b)(2)(v) also would have required servicers to provide an estimate for when the servicer may start the foreclosure process. This estimate would have been required to be expressed in a number of days from the date of a missed payment. Finally, proposed § 1024.39(b)(iv) would have required servicers to include contact information for any State housing finance authorities, as defined in FIRREA section 1301, for the State in which the property is located, and either the Bureau or HUD list of homeownership counselors or counseling organizations.

Industry commenters, particularly smaller servicers, were generally concerned that the written notice was too prescriptive. A number of industry commenters requested clarification whether the Bureau’s notice would be in addition to other similar notices that servicers may be already providing to borrowers. A variety of servicers and several trade associations recommended that the Bureau permit servicers to combine the § 1024.39(b) notice with other notices servicers send around the 45-day time period to improve efficiency and reduce the risk of information overload. One industry commenter recommended that the Bureau allow an exemption from the written notice where existing notices satisfy the content requirements of the rule, or permit servicers to consolidate the required information into an existing letter. A non-bank servicer requested clarification on whether servicers would have flexibility in how servicers delivered the content in the written notices, such as by permitting the use of logos, color, web sites, and additional information beyond what was required.

Many consumer advocacy groups requested that the Bureau require more information in the written notice, particularly information about all available loss mitigation options from the servicer, detailed application instructions and eligibility requirements, and foreclosure referral deadlines. One coalition of consumer advocacy groups supported the Bureau's proposal to include model clauses, explaining that they would mitigate the cost of creating written notice forms, but would also set an essential standard for content and level of detail, and help ensure that all borrowers receive the same information, regardless of the type of servicer.

As noted in the proposal, the Bureau sought to establish minimum standards such that servicers that are already providing adequate notices of loss mitigation options would already be in compliance. The Bureau is not adopting standardized written notices because the Bureau continues to believe an overly-prescriptive written notice may not account for the variety of situations posed by delinquent borrowers or the variety of loss mitigation options available from investors and guarantors. Thus, the Bureau is adopting generally applicable minimum content requirements that can be tailored to a specific situations, as discussed in more detail in the section-by-section analysis of § 1024.39(b)(2) below. As discussed above in the section-by-section analysis of § 1024.30(b), the Bureau is granting exemptions from § 1024.39 for small servicers, servicers with respect to reverse mortgages, and servicers with respect to any mortgage loan for which the servicer is a qualified lender as that term is defined in 12 CFR 617.7000.

The Bureau believes that permitting servicers to incorporate relevant portions of the notice required under § 1024.39(b)(1) into other disclosures that already include some or all of the statements required by § 1024.39(b)(2) would reduce the potential for borrower confusion otherwise resulting from duplicative statements. Accordingly, the Bureau has added comment 39(b)(2)-3 to clarify that servicers may satisfy the requirement to provide the written notice by grouping other notices that satisfy the content requirements of § 1024.39(b)(2) into the same mailing, provided each of the required statements satisfies the clear and conspicuous standard in § 1024.32(a)(1).

To accommodate existing servicer requirements and practices, proposed comment 39(b)(2)-1 explained that a servicer may provide additional information beyond the proposed content requirements that the servicer determines would be beneficial to the borrower. This would include any additional disclosures that servicers believe would be helpful, such as directing borrowers to websites. In addition, proposed comment 39(b)(2)-2 explained that any color, number of pages, size and quality of paper, type of print, and method of reproduction may be used so long as the disclosure is clearly legible. The Bureau is adopting comments 39(b)(2)-1 and 39(b)(2)-2 substantially as proposed. The Bureau has further amended proposed comment 39(b)(2)-1 to provide that servicers may provide additional information that the servicer determines would be helpful "or which may be required by applicable law or the owner or assignee of the mortgage loan." The Bureau has added this language to clarify that servicers may provide additional content that may be required by, for example, State law. The Bureau has revised guidance in proposed comment 39(b)(2)-2 that had clarified that the statements required by § 1024.39(b)(2) must be "clearly legible." Instead, comment 39(b)(2)-2 explains that the statements required by § 1024.39(b)(2) must satisfy the clear and conspicuous standard in § 1024.32(a)(1). The Bureau has made this revision in order to clarify that the § 1024.39(b) written notice is subject to the same legibility standard applicable to other notices, pursuant to § 1024.32(a)(1).

Finally, the Bureau notes that comment MS-2, which provides commentary that is generally applicable to the model forms and clauses in appendix MS, clarifies that, except as otherwise specifically required, servicers may add graphics or icons, such as the servicer's corporate logo, to the model forms and clauses. Thus, it is unnecessary to include a comment to § 1024.39(b)(2) to clarify that servicers may include corporate logos. The Bureau has addressed consumer group comments regarding additional content for the written notice below.

Statement Encouraging the Borrower to Contact the Servicer

Proposed § 1024.39(b)(2)(i) would have required the written notice to include a statement encouraging the borrower to contact the servicer. The Bureau did not receive comment on this requirement and is adopting it as proposed, renumbered as § 1024.39(b)(2)(i). As noted in its proposal, the Bureau believes that a statement informing borrowers that the servicer can provide assistance with respect to their delinquency is necessary to facilitate a discussion between the borrower and the servicer at the early stages of delinquency. Many borrowers do not know that their servicer can help them avoid foreclosure if they are having trouble making their monthly payments. The Bureau believes a statement encouraging the borrower to call would help remove this barrier to borrower-servicer communication.

Proposed comment 39(b)(2)(i)-1 explained that the servicer would not be required, for example, to specifically request the borrower to contact the servicer regarding any particular loss mitigation option. The Bureau is not adopting this comment in the final rule because the Bureau does not believe it is necessary in light of comment 39(b)(2)(iii)-1, which explains that

§ 1024.39(b)(2)(iii) does not require that a specific number of examples be disclosed in the written notice.

Contact Information for the Servicer

To facilitate a dialogue between the servicer and the borrower, proposed § 1024.39(b)(2)(ii) would have required the written notice to include the servicer's mailing address and telephone number. Proposed comment 39(b)(2)(ii)-1 had explained that, if applicable, a servicer should provide contact information that would put a borrower in touch with servicer personnel under the continuity of contact rule at § 1024.40. Under § 1024.40(a)(2), servicers are generally required to maintain policies and procedures that are reasonably designed to achieve the objective of ensuring that a servicer makes available to a delinquent borrower telephone access to servicer personnel to respond to borrower inquiries and, as applicable, assist with loss mitigation options by the time the servicer provides the borrower with the § 1024.39(b) written notice, but in any event not later than the 45th day of a borrower's delinquency. *See* the section-by-section analysis of § 1024.40(a) below.

The Bureau is moving language from comment 39(b)(2)(ii)-1 to regulation text to clarify that servicers are required to provide the telephone number to access servicer personnel assigned under § 1024.40(a) and the servicer's mailing address. The Bureau believes it is more appropriate to include as a requirement of § 1024.39(b)(2)(ii), rather than as commentary, that servicers must provide in the written notice the telephone number to access continuity of contact personnel. The Bureau believes that including this contact information will help direct borrowers to continuity of contact personnel who will be able to assist delinquent borrowers.

Brief Description of Loss Mitigation Options

Proposed § 1024.39(b)(2)(iii) would have required that the written notice include a statement, if applicable, providing a brief description of loss mitigation options that may be available from the servicer. Proposed comment 39(b)(2)(iii)-1 explained that § 1024.39(b)(2)(iii) does not mandate that a specific number of examples be disclosed, but explained that borrowers are likely to benefit from examples that permit them to remain in their homes and examples of options that would require that borrowers end their ownership of the property in order to avoid foreclosure. Proposed comment 39(b)(2)(iii)-2 explained that an example of a loss mitigation option may be described in one or more sentences. Proposed comment 39(b)(2)(iii)-2 also explained that if a servicer offers several loss mitigation programs, the servicer may provide a generic description of each option instead of providing detailed descriptions of each program. The comment explained, for example, that if a servicer provides several loan modification programs, it may simply provide a generic description of a loan modification.

Many consumer advocacy groups recommended that servicers should be required to provide detailed information about all loss mitigation options available from the servicer. One consumer group recommended that servicers provide individually tailored information about a borrower's options depending on the nature of the borrower's loan. Another recommended that servicers be required to inform borrowers specifically what type of loan they have and what options are available to them. By contrast, several industry commenters recommended that the description of loss mitigation options should be minimal, asserting that lengthy explanations could confuse, overwhelm, and discourage borrowers from reaching out to their servicer. One large servicer indicated that, in its experience, providing borrowers with more generic information about loss mitigation options resulted in better contact rates and pull through to complete loan modifications. One industry commenter recommended that any communication regarding loss mitigation options should explicitly state that all loss mitigation options have qualification requirements and that not all options are available to all consumers to address the risk that listing options that are not available to certain borrowers could be perceived as deceptive.

The Bureau is adopting proposed § 1024.39(b)(2)(iii) and the associated commentary substantially as proposed. The Bureau is amending the regulatory text of proposed § 1024.39(b)(2)(iii) to require that servicers are required to describe only "examples" of loss mitigation options that may be available. The Bureau has made this revision to clarify the nature of the requirement, consistent with proposed comment 39(a)(2)(iii)-1, which explained that the regulation does not mandate that a specific number of examples be disclosed.

At the time the Bureau proposed its early intervention requirements for the Small Business Panel, the Bureau considered requiring servicers to provide a brief description of any loss mitigation programs available to the borrower.[146] However, the Bureau did not propose, and is not requiring in the final rule, that servicers list all of the loss mitigation options they offer. The Bureau understands that, pursuant to investor or guarantor requirements, eligibility criteria for certain loss mitigation options are complex and may depend on circumstances that may arise over the course of a borrower's delinquency. In addition, the Bureau understands that loss mitigation options may comprise several programs; servicers may have, for example several different types of loan modification options. The Bureau understands that there may be operational difficulties associated with explaining subtle differences among these programs in a written notice. Moreover, the Bureau is concerned that a lengthy written notice may undermine

[146] *See* U.S. Consumer Fin. Prot. Bureau, *Final Report of the Small Business Review Panel on CFPB's Proposals Under Consideration for Mortgage Servicing Rulemaking*, appendix C (Jun, 11, 2012).

the intended effect of encouraging borrowers to contact their servicers to discuss their options. The Bureau is not requiring servicers to provide each borrower with an individually tailored written notice about that borrower's options because the Bureau does not believe it would be practicable for servicers to provide such a notice at this stage of a borrower's delinquency or without additional information about a borrower's particular circumstances. Instead, the Bureau believes borrowers would be better served by servicer continuity of contact personnel explaining, in accordance with policies and procedures required under § 1024.40(b), the various loss mitigation options for which borrowers may be eligible.

In lieu of providing borrowers with information about every option, the Bureau proposed that the written notice contain a statement, if applicable, informing borrowers how to obtain more information about loss mitigation options from the servicer, as well as contact information for housing counseling resources that could provide borrowers with information about other loss mitigation options that might not be listed on the written notice. As adopted in the final rule, the notice must also include the telephone number to access servicer personnel assigned under § 1024.40(a). In addition, the Bureau has included requirements in § 1024.40(b)(1) for servicers to establish policies and procedures reasonably designed to achieve the objectives of providing accurate information regarding loss mitigation options. Pursuant to § 1024.38(b)(2)(ii), servicers must also establish policies and procedures reasonably designed to achieve the objective of identifying all loss mitigation options for which a borrower may be eligible. For these reasons and those set forth in the proposal, the Bureau is adopting the § 1024.39(b)(2)(iii) substantially as proposed.

The Bureau is retaining proposed comment 39(b)(2)(iii)-1, which explains that § 1024.39(b)(2)(iii) does not require that a specific number of examples be disclosed, but that borrowers are likely to benefit from examples of options that would permit them to retain ownership of their home and examples of options that may require borrowers to end their ownership to avoid foreclosure. The comment further explains that a servicer may include a generic list of loss mitigation options that it offers to borrowers, and that it may include a statement that not all borrowers will qualify for all of the listed options, because different loss mitigation options may be available to borrowers depending on the borrower's qualifications or other factors. The Bureau proposed this comment to avoid borrower confusion regarding their eligibility for loss mitigation options listed in the materials. The Bureau agrees that servicers should be able to clarify that not all of the enumerated loss mitigation options will necessarily be available. During consumer testing of the proposed model clauses, all participants understood that the fact that they received this notice did not mean that they would necessarily qualify for these options. The Bureau is adopting this comment substantially as proposed.

The Bureau is also retaining proposed comment 39(b)(2)(iii)-2 substantially as proposed, which explains that an example of a loss mitigation option may be described in one or more sentences and that if a servicer offers several loss mitigation programs, the servicer may provide a generic description of the type of option instead of providing detailed descriptions of each program. The Bureau has included this comment because the Bureau recognizes that there may be operational difficulties associated with determining how to explain specialized loss mitigation programs. The Bureau recognizes that loss mitigation options are complex, and providing comprehensive explanations of each option may overwhelm borrowers and may undermine the intended effect of the written notice of encouraging borrowers to get in touch with their servicers to identify appropriate relief. The Bureau does not believe that borrowers would benefit from a disclosure with voluminous detail at the early stage of exploring available options. Instead, the

Bureau believes that servicers should provide borrowers with a brief explanation of loss mitigation options and encourage borrowers to contact their servicer to discuss whether any options may be appropriate.

Explanation of How the Borrower May Obtain More Information About Loss Mitigation Options

Proposed § 1024.39(b)(2)(iv) would have required the written notice to include an explanation of how the borrower may obtain more information about loss mitigation options, if applicable. Proposed comment 39(b)(2)(iv)-1 explained that, at a minimum, a servicer could comply with this requirement by directing the borrower to contact the servicer for more information, such as through a statement like, “contact us for instructions on how to apply.”

Consumer advocacy groups recommended that the Bureau require servicers to identify the deadline by which borrowers must send application materials. One consumer group indicated that a requirement to notify borrowers of application deadlines in the written notice was necessary to coordinate with the Bureau’s proposed requirement in 1024.41(g) that only applications received by the servicer’s deadline are subject to the prohibition on foreclosure sales. In addition to application deadlines, many consumer advocacy groups recommended that servicers be required to provide borrowers with eligibility requirements, an application form and application instructions, along with a clear list of required documentation necessary to be considered a complete application, consistent with GSE practice. By contrast, an industry commenter indicated that communications about loss mitigation options should be more general in nature rather than provide too much detail that might overwhelm borrowers. An individual consumer indicated that the most important element of the notice was to inform borrowers who they could contact to discuss their options.

While the Bureau appreciates that borrowers may benefit from knowing about the applicability of deadlines, the Bureau is concerned that there may be operational difficulties with a requirement to disclose application deadlines in the written notice at § 1024.39(b). Because the Bureau is not requiring servicers to disclose in the written notice all loss mitigation options available from the servicer, the Bureau does not believe it would be appropriate to require servicers to disclose all loss mitigation application deadlines that may apply; otherwise, such information could be confusing to borrowers. Moreover, the Bureau is concerned that there may be comprehension difficulties associated with an explanation in the § 1024.39(b) written notice of the interaction between application deadlines and deadlines in the Bureau's loss mitigation procedures at § 1024.41. The Bureau believes that a requirement to specifically identify application deadlines in the early intervention notice requires further analysis by the Bureau to address the concern that disclosure of deadlines occurring far in the future might discourage borrowers from acting quickly to resolve a delinquency. See the discussion below under the heading "Foreclosure Statement" for more discussion of the Bureau's concerns about borrower perception of deadlines in the early intervention notice. Further, the Bureau notes that servicers must maintain policies and procedures reasonably designed to ensure that servicer personnel assigned to a borrower pursuant to § 1024.40(a) provide borrowers accurate information about actions that the borrower must take to be evaluated for loss mitigation options and applicable loss mitigation deadlines established by an owner or assignee of a mortgage loan or § 1024.41. *See* § 1024.40(b)(1)(ii) and (v); § 1024.41 (setting forth various procedural requirements and timeframes governing a servicer's consideration of a borrower's loss mitigation application). Finally, because the Bureau is adopting § 1024.41(f)(1) to prohibit servicers from making the first notice or filing required by applicable law unless a borrower's mortgage loan is more than

120 days delinquent, borrowers will have more time to submit loss mitigation applications before a servicer initiates the foreclosure process.

The Bureau is not adopting a rule to require servicers to identify application materials in the written notice. At the time the Bureau proposed its early intervention requirements for the Small Business Review Panel, the Bureau considered requiring servicers to provide a brief outline of the requirements for qualifying for any available loss mitigation programs, including documents and other information the borrower must provide, and any timelines that apply.[147] The Bureau did not propose requiring servicers to provide this level of detail because each loss mitigation option may have its own specific documentation requirements and servicers may be unable to provide comprehensive application instructions generally applicable to all options. Additionally, because the Bureau had proposed that servicers provide only examples of loss mitigation options in the written notice, the proposal noted that detailed instructions for only the listed options may not be useful for all borrowers. The Bureau believes setting consistent and streamlined requirements best achieves the central purpose of the early intervention notice, which is to inform borrowers that help is available and to encourage them to contact their servicer. In addition, the Bureau understands that not all loss mitigation options are necessarily appropriate for every borrower. The Bureau is concerned that a requirement to provide application materials for all options listed in the notice might be overwhelming for borrowers at this stage in the process. Servicers might have multiple loss mitigation options and each may have its own documentation requirements. A requirement to prospectively disclose all documentation requirements for all listed options could prove voluminous. Additionally, a borrower’s eligibility for options depends on the borrower’s circumstances as well as the stage of

[147] *See* U.S. Consumer Fin. Prot. Bureau, *Final Report of the Small Business Review Panel on CFPB’s Proposals Under Consideration for Mortgage Servicing Rulemaking*, appendix C (Jun, 11, 2012).

delinquency, and the Bureau believes servicers or housing counselors are best suited to advising borrowers about their options during a live conversation.

The Bureau's continuity of contact requirements are designed to assist borrowers who are provided the § 1024.39(b) written notice or who reach a certain stage of delinquency. These requirements are designed to ensure servicers have servicer personnel dedicated to guiding such borrowers through the loss mitigation application process. Pursuant to § 1024.40(a), servicers must maintain policies and procedures that are reasonably designed to achieve the objective of making available to a delinquent borrower telephone access to servicer personnel to respond to the borrower's inquiries and, as applicable, assist the borrower with loss mitigation options to borrowers by the time the servicer provides the borrower with the § 1024.39(b) written notice but in any event no than the 45th day of a borrower's delinquency. Pursuant to § 1024.40(b)(1), the Bureau has set forth objectives that servicer policies and procedures for continuity of contact personnel must be reasonably designed to achieve. These objectives include providing accurate information about loss mitigation options available to a borrower from the owner or assignee of a mortgage loan; actions the borrower must take to be evaluated for such options, including actions the borrower must take to submit a complete loss mitigation application, as defined in § 1024.31, and, if applicable, actions the borrower must take to appeal the servicer's determination to deny the borrower's loss mitigation application for any trial or permanent loan modification program offered by the servicer; the status of any loss mitigation application that the borrower has submitted to the servicer; the circumstances under which the servicer may make a referral to foreclosure; and applicable loss mitigation deadlines established by an owner or assignee of a mortgage loan or § 1024.41. The Bureau believes these requirements will help ensure borrowers receive accurate information about how to submit a complete loss mitigation application.

Of course, servicers may choose to provide application materials with the written notice. Accordingly, the Bureau proposed comment 39(b)(2)(iv)-1 to explain that, to expedite the borrower’s timely application for any loss mitigation options, servicers may wish to provide more detailed instructions on how a borrower could apply, such as by listing representative documents the borrower should make available to the servicer, such as tax filings or income statements, and by providing estimates for when the servicer expects to make a decision on a loss mitigation option. Proposed comment 39(b)(2)(iv)-1 also provided that servicers may supplement the written notice with a loss mitigation application form. The Bureau is adopting this comment substantially as proposed in the final rule.

Foreclosure Statement

Proposed § 1024.39(b)(2)(v) would have required that the written notice include a statement explaining that foreclosure is a legal process to end the borrower’s ownership of the property. Proposed § 1024.39(b)(2)(v) also would have required that the notice include an estimate of how many days after a missed payment the servicer makes the referral to foreclosure. The Bureau proposed to clarify through comment 39(b)(2)(v)-1 that the servicer may explain that the foreclosure process may vary depending on the circumstances, such as the location of the borrower’s property that secures the loan, whether the borrower is covered by the Servicemembers Civil Relief Act, and the requirements of the owner or assignee of the borrower’s loan. The Bureau also proposed to clarify through comment 39(b)(2)(v)-2 that the servicer may qualify its estimates with a statement that different timelines may vary depending on the circumstances, such as those listed in comment 39(b)(2)(v)-1. Proposed comment 39(b)(2)(v)-2 also explained that the servicer may provide its estimate as a range of days.

Consumer advocacy groups and industry commenters were generally divided over whether servicers should be required to provide information about foreclosure in the written notice, although one industry trade group supported such a requirement. Several industry commenters supported the Bureau’s proposal to provide an estimated range of dates for when foreclosure may occur, citing the need to be flexible in light of unforeseen circumstances and the variety of timelines in which a foreclosure could proceed in light of the nature of the property. However, other industry commenters were concerned that including any range may be too inaccurate to provide meaningful guidance to borrowers because of the variety of factors that could influence a foreclosure referral. One large servicer explained that servicers do not typically review accounts for or pursue foreclosure until much later in a borrower’s delinquency and that including information about foreclosure could be construed as a threat to take action that is not likely to happen until much later. Another industry commenter and a trade group expressed concern that requiring prospective disclosure of possible foreclosure timelines could lead to litigation if the information turned out to be inaccurate. By contrast, some consumer advocacy groups recommended that the notices should include a narrower foreclosure timeline. Some consumer advocacy groups also believed it was appropriate to make servicers accountable to their estimates, such as by prohibiting servicers from initiating foreclosure earlier than the timeline in the notice.

Industry commenters and consumer advocacy groups were also divided over whether the estimated foreclosure timeline would undermine the purpose of the early intervention notice. Several industry commenters expressed concern that a foreclosure timeline estimate could confuse borrowers into believing that the referral date is the last day for loss mitigation options whereas help may be available even after the foreclosure referral date. One of these commenters recommended that the Bureau add qualifying language to address concerns that a foreclosure timeline estimate could mislead borrowers into believing they had more time to take action to avoid foreclosure.

Consumer advocacy groups, on the other hand, believed that a more detailed notice about the foreclosure process could serve an educational function. One consumer advocacy group recommended provision of detailed, State-specific foreclosure timelines tailored to the borrower’s residence. One coalition of consumer advocacy groups recommended that the foreclosure statement should provide more explanation of the steps occurring in the foreclosure process, such as a description of court procedures and a sheriff’s sale that occur in judicial foreclosure jurisdictions; this group explained that borrowers are often confused about how foreclosure referrals are related to the actual sale of their home. This group of advocates also explained that information when foreclosure will start and end is also important in non-judicial foreclosure jurisdictions, where the foreclosure process can occur quickly and with fewer opportunities for borrowers to object. In addition, this group of advocates recommended that the Bureau should specify a minimum period of time between a missed payment and the date on which foreclosure may begin.

The Bureau notes at the outset that because the Bureau is adopting § 1024.41(f)(1) to delay foreclosure referrals until 120 days after a missed payment, there is less risk of borrower confusion about when foreclosure may begin. Section 1024.41(f)(1) is discussed in more detail below in the applicable section-by-section analysis. Nonetheless, while a single foreclosure deadline would minimize compliance issues around potentially inaccurate estimates, the Bureau is concerned that requiring foreclosure information in the written early intervention notice may cause borrower confusion and may possibly discourage borrowers from seeking early assistance.

In addition, an explanation that a servicer will not initiate foreclosure until the 120th day of delinquency may suggest to some borrowers that they cannot submit a loss mitigation application after the initiation of foreclosure, which may not necessarily be the case. *See* § 1024.41(g).[148]

During consumer testing of the model clauses, participants had a mixed reaction to the foreclosure statement, which included an estimated timeline for when foreclosure may begin. The statement tested a timeline that explained foreclosure could occur 90-150 days after a missed payment. All participants understood before reading the statement that foreclosure was a process through which their lender could take their home if they did not make their mortgage payments.

With respect to the estimated timeline for when foreclosure may begin, some thought that the estimated timeline meant nothing would happen before that date, despite the fact that the clause stated that the process "may begin earlier or later." While some participants appeared to be motivated to act quickly because of the foreclosure statement, others commented that the estimated timeline implied that it was less important to act immediately because there would be a period of time during which they would be safe from foreclosure. One participant felt strongly that if it were true that the foreclosure process could start in less than 90 days, then the reference to the 90 to 150 day time period should be removed from the clause because it was misleading.

The Bureau is not finalizing the proposed requirement that servicers notify borrowers about foreclosure in the written notice. While the Bureau agrees that the early intervention written notice could serve an educational function with regard to the foreclosure process, the Bureau believes a requirement to notify borrowers about the foreclosure process in the written

[148] Section 1024.41(g) generally provides that, if a borrower submits a complete loss mitigation application after a servicer has made the first foreclosure filing but more than 37 days before a scheduled or anticipated foreclosure sale, a servicer may not move for foreclosure judgment or order of sale, or conduct a foreclosure sale until a borrower is notified of the borrower's ineligibility for a loss mitigation options, the borrower rejects a loss mitigation offer, or the borrower fails to perform as agreed under an option.

early intervention notice requires further evaluation by the Bureau because of the risk that such a disclosure could be perceived as confusing or negatively by borrowers, and may discourage some borrowers from reaching out to their servicer promptly. As the Bureau noted in its proposal, during the Small Business Review Panel outreach, some small servicer representatives explained that information about foreclosure is typically not provided until after loss mitigation options have been explored;[149] and during consumer testing, several participants indicated that the tone of the foreclosure statement seemed at odds with the tone of the rest of the clauses encouraging borrowers to resolve their delinquency as soon as possible. Further, the Bureau is concerned that, given the variation in State foreclosure processes, a prescriptive requirement to explain foreclosure may either result in explanations that are too generic to be useful or too complex to be easily understood. Accordingly, for the reasons set forth above, the Bureau is removing the proposed requirement that servicers provide information about the foreclosure process in the written early intervention notice.

Although the Bureau is not finalizing the requirement for servicers to provide a statement describing foreclosure in the written notice, the Bureau agrees that some borrowers would benefit from receiving information about foreclosure at the time of receiving information about loss mitigation options. Such information could help some borrowers understand their choices they face at the early stages of delinquency. The Bureau believes the requirements to include contact information for housing counselors and servicer personnel assigned under § 1024.40(a) will help address potential information shortcomings of the written notice. Pursuant to § 1024.40(b)(1)(iv), servicers must have policies and procedures reasonably designed to ensure that servicer continuity of contact personnel provide accurate information about the

[149] *See* U.S. Consumer Fin. Prot. Bureau, *Final Report of the Small Business Review Panel on CFPB's Proposals Under Consideration for Mortgage Servicing Rulemaking*, 31 (Jun, 11, 2012).

circumstances under which borrowers may be referred to foreclosure. Accordingly, for the reasons discussed above, the Bureau is not finalizing proposed § 1024.39(b)(2)(iv) or model clause MS-4(D), which contained language illustrating the foreclosure statement.

Contact Information for Housing Counselors and State Housing Finance Authorities

Proposed § 1024.39(b)(vi) would have required the written notice to include contact information for any State housing finance authority for the State in which the borrower's property is located, and contact information for either the Bureau list or the HUD list of homeownership counselors or counseling organizations.

With respect to contact information for homeownership counselors or counseling organizations, the Bureau proposed to require similar information pertaining to housing counseling resources that would be required on the ARM interest rate adjustment notice and the periodic statement, as provided in the Bureau's 2012 TILA Mortgage Servicing Proposal.[150] For these notices, the Bureau did not propose that servicers include a list of specific housing counseling programs or agencies (other than the State housing finance authority, discussed below), but instead that servicers provide contact information for either the Bureau list or the HUD list of homeownership counselors or counseling organizations. The Bureau solicited comment on whether the written early intervention notice should include a generic list to access counselors or counseling organizations, as proposed here, or a list of specific counselors or counseling organizations, as was proposed in the 2012 HOEPA Proposal.[151]

[150] *See* proposed Regulation Z §§ 1026.20(d) and 1026.41(d)(7) in the Bureau's 2012 TILA Mortgage Servicing Proposal.

[151] The 2013 HOEPA Final Rule, which, among other things, implements RESPA section 5(c), which requires lenders to provide applicants of federally related mortgage loans with a "reasonably complete or updated list of homeownership counselors who are certified pursuant to section 106(e) of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701x(e)) and located in the area of the lender." The list provided to applicants pursuant to this requirement will be obtained through a Bureau website Bureau or data made available by the Bureau or HUD to comply with this requirement.

Some consumer advocacy groups recommended that the Bureau require that servicers provide a list of specific counselors or HUD-certified agencies, citing the need to protect borrowers against so-called "foreclosure rescue" scams, and one organization recommended that the Bureau require servicers to refer borrowers directly to specific counselors upon the borrower's request. Industry commenters expressed support for the proposed requirement to provide generic contact information for borrowers to access a list of counselors. One industry commenter was concerned that requiring servicers to provide a list of counselors would require frequent updating by servicers to ensure the accuracy of the notice. In addition, the commenter was concerned that providing a list of counselors could be construed as the servicer advocating for a particular counselor. One housing counseling organization and an industry commenter explained that some States already require that servicers provide a list of nonprofit housing counseling agencies at the time of sending a written foreclosure notice. The housing counseling organization recommended that the final rule require servicers to provide a list of HUD-approved nonprofit counseling agencies in the written notice, while the industry commenter was concerned about complying with overlapping requirements.

During the fourth round of consumer testing in Philadelphia, all participants indicated they were likely to take advantage of the contact information contained in the notice, although they indicated they would try to contact their bank first.[152] Several participants said that they would contact HUD[153] or the State housing finance agency[154] if they were not satisfied with the

[152] During consumer testing, participants referred colloquially to their "bank." The Bureau does not believe this reflects comprehension difficulties with respect to the party borrowers must contact. During testing when asked whether the terms "servicer" and "lender" were identical, participants indicated that they were not.

[153] Macro tested a statement including HUD's housing counselor list and phone number because, at the time of testing, the Bureau did not have a web site containing this information. The Bureau believes consumers would have the same reaction if the Bureau's contact information were listed instead of HUD's.

[154] At the time of testing, the Bureau tested clauses that included contact information for a State housing finance agency, as the Bureau would have required to be listed under proposed § 1024.39(b)(2)(vi).

assistance they got from their bank. One participant indicated that this contact information would be useful to help verify that information provided by the lender was accurate and followed legal guidelines.

The Bureau is adopting the requirement substantially as proposed, renumbered as § 1024.39(b)(2)(v) from § 1024.39(b)(2)(vi). Section 1024.39(b)(2)(v) requires servicers to include in the written notice the website to access either the Bureau list or the HUD list of homeownership counselors or counseling organizations, and the HUD toll-free telephone number to access homeownership counselors or counseling organizations.[155] The Bureau is modifying the proposed requirement, which would have required servicers to list either the HUD telephone number or a Bureau telephone number. In the final rule, the Bureau is requiring servicers to list the HUD telephone number but not a Bureau telephone number because the Bureau believes the HUD telephone number that currently exists provides adequate access to approved counseling resources.

As noted in its proposal, the Bureau believes that delinquent borrowers would benefit from knowing how to access housing counselors because some borrowers may be more comfortable discussing their options with a third-party.[156] In addition, a housing counselor could provide a borrower with additional information about loss mitigation options that a servicer may not have listed on the written notice. The Bureau also believes the contact information to access the HUD or Bureau list would provide borrowers with access to qualified counselors or counseling organizations that could counsel borrowers about potential foreclosure rescue scams.

[155] The HUD list is available at http://www.hud.gov/offices/hsg/sfh/hcc/hcs.cfm and the HUD toll-free number is 800-569-4287. The Bureau list will be available by the effective date of this final rule at http://www.consumerfinance.gov/.

[156] Some servicers have found that borrowers may trust independent counseling agencies more than they trust servicers. *See* Office of the Comptroller of the Currency, *Foreclosure Prevention: Improving Contact with Borrowers*, Insights (June 2007) at 6, *available at* http://www.occ.gov/topics/community-affairs/publications/insights/insights-foreclosure-prevention.pdf.

While the Bureau agrees that borrowers may benefit from a list of specific counseling organizations or counselors, the Bureau also believes that there is value in keeping the content requirements in the written notice flexible to ensure the notice is able to accommodate existing requirements, such as State laws, that may overlap with the Bureau's requirements. The Bureau believes that providing borrowers with the website address for either the Bureau or HUD list of homeownership counseling agencies and programs would streamline the disclosure and present clear and concise information for borrowers.

In addition to information about accessing housing counselors, the Bureau proposed to require that the written notice include contact information for the State housing finance authority located in the State in which the property is located. In its proposal, the Bureau sought comment on the costs and benefits of the provision of information about housing counselors and State housing finance authorities to delinquent borrowers in the proposed written notice. The Bureau also sought comment on the potential effect of the Bureau's proposal on access to homeownership counseling generally by borrowers, and the effect of increased borrower demand for counseling on existing counseling resources, including demand on State housing finance authorities.

A State housing finance agency, an association of State housing finance agencies, and a large servicer recommended that the Bureau remove housing finance authority contact information from the written notice, citing resource limitations of State housing finance authorities. The large servicer expressed concern that borrowers would blame their servicer for directing them to State housing finance agencies that proved unable to provide assistance, or that such an experience would discourage borrowers from seeking other assistance. Two industry commenters also recommended that the Bureau eliminate the requirement to provide State housing finance authority contact information, citing the tracking burden associated with this requirement. One commenter explained that a phone number to access housing counselors (*e.g.*, through a HUD or Bureau phone number or website) would provide borrowers with sufficient access to assistance. As an alternative, the industry commenter suggested that the Bureau host this information or that the Bureau simply include language that there may be State-sponsored programs in the borrower's State that could be helpful. Another servicer recommended that the written notice simply reference that assistance may be available through the State Housing Finance Authority and provide a telephone number that borrowers could call to learn more about them.

In the final rule, the Bureau is omitting the proposed requirement to disclose State housing finance authority contact information in the written notice because the Bureau shares the concern of the State housing finance authorities that directing borrowers to specific State agencies may overwhelm their limited resources. The Bureau also understands that not all State housing finance authorities offer counseling services, which may cause confusion among delinquent borrowers directed to such entities. In addition, the Bureau believes providing contact information for housing counselors or counseling organizations through access to a HUD or Bureau website or telephone number will ensure borrowers have access to assistance. Accordingly, the Bureau is amending proposed paragraph (b)(2)(vi) to contain no subparagraphs and is renumbering it as paragraph (b)(2)(v) in light of the deletion of the proposed foreclosure statement. In addition, the Bureau is deleting the portion of model clause MS-4(E) containing language about State housing finance authorities.

39(b)(3) Model Clauses

The Bureau proposed to add new § 1024.39(b)(3), which contained a reference to proposed model clauses that servicers may use to comply with the written notice requirement. The Bureau proposed to include these model clauses are in new appendix MS-4. For more detailed discussion of the model clauses, see the section-by-section analysis of appendix MS below.

39(c) Conflicts with Other Law

As noted above, industry commenters were concerned that the Bureau's proposed early intervention requirements could conflict with existing law. Several commenters requested guidance on whether servicers would be required to comply with the early intervention requirements if the borrower instructed the servicer to cease collection efforts, not to contact the borrower by telephone, or that the borrower refuses to pay the debt. Several of these commenters requested that the Bureau include an exemption in cases involving debt collection or bankruptcy law. One industry commenter requested that the Bureau clarify whether servicers would have immunity from claims of harassment or improper conduct under the Fair Debt Collection Practices Act, 15 U.S.C. 1692.

To address concerns about conflicts with other law, the Bureau has added subsection (c) to § 1024.39 to provide that nothing in § 1024.39 shall require a servicer to communicate with a borrower in a manner otherwise prohibited under applicable law. The Bureau has added this provision to clarify that the Bureau does not intend for its early intervention requirements to require servicers to take any action that may be prohibited under State law, such as a statutory foreclosure regime that may prohibit certain types of contact with borrowers that may be required under § 1024.39. The Bureau has also added this provision to clarify that servicers are not required to make contact with borrowers in a manner that may be prohibited by Federal laws, such as the Fair Debt Collection Practices Act or the Bankruptcy Code's automatic stay provisions. The Bureau has also added comment 39(c)-1 to address borrowers in bankruptcy. Comment 39(c)-1 provides that § 1024.39 does not require a servicer to communicate with a borrower in a manner inconsistent with applicable bankruptcy law or a court order in a bankruptcy case; and that, to the extent permitted by such law or court order, servicers may adapt the requirements of § 1024.39 in any manner that would permit them to notify borrowers of loss mitigation options. Through this comment the Bureau has not sought to interpret the Bankruptcy Code, but instead intended to indicate that servicers may take a flexible approach to complying with § 1024.39 in order to provide information on loss mitigation options to borrowers in bankruptcy to the extent permitted by applicable law or court order.

Section 1024.40 Continuity of Contact

Background. As discussed above, this final rule addresses servicers' obligation to provide delinquent borrowers with access to servicer personnel to respond to inquiries, and as applicable, assist them with foreclosure avoidance options. Widespread reports of communication breakdowns between servicers and delinquent borrowers who present a heightened risk for default have revealed that one of the most significant impediments to the success of foreclosure mitigation programs is the inadequate manner by which servicer personnel at major servicers have provided assistance to these borrowers. The Bureau noted in the proposal that the problem was systemic. For example, Federal regulatory agencies reviewing mortgage servicing practices have found that "a majority of the [servicers examined] had inadequate staffing levels or had recently added staff with limited servicing experience."[157] The

[157] *See* Fed. Reserve Sys., Office of the Comptroller of the Currency, & Office of Thrift Supervision, Interagency Review of Foreclosure Policies and Practices, at 8 (2011).

Bureau proposed § 1024.40 to establish requirements to ensure that there would be a baseline level of standards that would address the issue.

Proposed § 1024.40(a)(1) would have provided that a servicer must assign personnel to respond to borrower inquiries and as applicable, assist a borrower with loss mitigation options no later than five days after a servicer has provided such borrower with the oral notice that would have been required by proposed § 1024.39(a). For a transferee servicer, proposed § 1024.40(a)(1) would have required such servicer to make the assignment within a reasonable time after the mortgage servicing right to a borrower's mortgage loan has been transferred to such servicer if the borrower's previous servicer had assigned personnel to such borrower as would have been required by proposed § 1024.40(a)(1) before the mortgage servicing right was transferred and the assignment had not ended when the servicing right was transferred. Proposed § 1024.40(a)(2) would have required a servicer to make access to assigned personnel available via telephone and would have set forth related requirements on what a servicer must do if a borrower contacts the servicer and does not receive a live response from the assigned personnel. Proposed § 1024.40(b) would have required a servicer to establish reasonable policies and procedures designed to ensure that the servicer personnel the servicer assigns to a borrower pursuant to proposed § 1024.40(a) perform certain enumerated functions. Proposed § 1024.40(c) would have set forth requirements with respect to how long the assigned personnel must be assigned and available to a borrower.

Although many servicers failed to adequately assist delinquent borrowers, the Bureau recognized that some servicers provide a high level of customer service to their borrowers both to ensure loan performance (because either they or one of their affiliates owned the loan) and maintain strong customer relationships (because they rely on providing borrowers with other products and services and thus have a strong interest in preserving their reputation and relationships with their customers). The Bureau believed that to the extent that a servicer's existing practices with respect to providing assistance to delinquent borrowers have been successful at helping borrowers avoid foreclosure, it was important that these practices be permitted to continue to exist within the framework of proposed § 1024.40. The Bureau sought to clarify the Bureau's intent by explaining in proposed comment 40(a)(1)-3.i that the continuity of contact provisions allowed a servicer to exercise discretion to determine the manner by which continuity of contact is implemented.

The Bureau received general comments about whether it was appropriate for the Bureau to regulate the manner by which servicer personnel at servicers provide assistance to delinquent borrowers. With one exception, consumer groups expressed support for proposed § 1024.40. One consumer group that identified itself as primarily serving Asian-Americans and Pacific Islander communities expressed concern that proposed § 1024.40 only appeared to address the initial assignment of servicer staff to assist delinquent borrowers. The commenter also urged the Bureau to mirror the more prescriptive approach of the National Mortgage Settlement and the California Homeowner Bill of Rights.

A number of consumer groups suggested that the Bureau add an additional requirement to require servicers to establish electronic loan portals to facilitate the exchange of documents related to a borrower's loan modification application. Consumer groups asserted that servicers' insistence that borrowers have not submitted requested documents remains a barrier to loan modification success and that the National Mortgage Settlement already requires the five largest servicers to develop online portals linked to a servicer's primary servicing system where borrowers can check the status of their first-lien loan modifications, at no cost to them.

Industry commenters generally expressed agreement with the principle that servicers must have adequate staffing levels to meet the needs of delinquent borrowers and commended the Bureau for recognizing the importance of permitting successful servicing practices with respect to how servicers provide assistance to delinquent borrowers to continue to exist. But smaller servicers and rural creditors subject to Farm Credit Administration rules generally requested exemptions from the continuity of contact requirements.

Smaller servicers predicted that the continuity of contact requirements will bring about a significant increase in borrower communication, which they will have to respond by significantly increasing the size of their staff and making substantial changes to their servicing platforms. Smaller servicers asserted that these adjustments will increase their compliance costs and result in the reduction in the high quality of customer service they already provide to their customers. Rural lenders subject to Farm Credit Administration rules asserted that they should be exempted from the Bureau's continuity of contact requirements because they are already required to follow a highly prescriptive set of regulations when working with borrowers with distressed loans issued by the Farm Credit Administration. They expressed concern about potentially having to comply with inconsistent regulations and borrower confusion.

A national trade association representing the reverse mortgage industry sought a general exemption for reverse mortgages, asserting that continuity of contact requirements would be duplicative of existing HUD regulations that require servicers of home equity conversion mortgages (HECM) to assign specific employees to assist HECM borrowers and provide the information to HECM borrowers on an annual basis and whenever the assigned employees change.

Several industry commenters urged the Bureau to make changes to § 1024.40 where they contend the proposal is inconsistent with the National Mortgage Settlement because of the cost of potentially being required to comply with different standards. One non-bank servicer requested that the Bureau specify that compliance with § 1024.40 would provide a safe harbor from compliance with similar applicable law, including State law, the National Mortgage Settlement, HAMP guidelines, and investor requirements. Another non-bank servicer asserted that several of the functions the Bureau proposed to require continuity of contact personnel to perform under § 1024.40 would require servicers under some States' law to make available licensed loan originators to assist borrowers and that the Bureau should preempt such laws because servicers may not have an adequate number of licensed staff.

One bank servicer and one non-bank servicer suggested the Bureau could reduce any potential compliance burden with § 1024.40 if the Bureau limited a servicer's duty to comply with § 1024.40 to borrowers who are responsive to servicers' attempts to engage them in foreclosure avoidance options and who have not vacated their principal residences. One non-bank servicer urged the Bureau create an exemption from compliance with continuity of contact requirements with respect to borrowers who have filed for bankruptcy.

In light of the comments received and upon further consideration, the Bureau has made a number of changes to § 1024.40. The Bureau has concluded that the best way to ensure that existing, successful servicing practices with respect to assisting delinquent borrowers be able to continue to exist would be to adopt proposed § 1024.40 as a requirement for servicers to maintain policies and procedures reasonably designed to achieved specified objectives, and leave it to each servicers to implement its own policies and procedures calculated to achieve the desired results. Given the flexibility provided by § 1024.40 as finalized, the Bureau does not discern a need to provide servicers with express safe harbors or preemptions or a need to make § 1024.40 align exactly with the terms of the National Mortgage Settlement.

The Bureau also declines to adopt the electronic portal requirement a number of consumers have urged the Bureau to impose on servicers. The Bureau agrees that servicers should, consistent with the purposes of RESPA, facilitate the exchange of documents related to a borrower's loan modification application and is adopting requirements in the final rule that would support this objective. For example, § 1024.38(b)(2)(iii) requires servicers to maintain policies and procedures reasonably designed to achieve the objective of providing prompt access to all documents and information submitted by a borrower in connection with a loss mitigation option to servicer personnel assigned to assist the borrower as described in § 1024.40. The Bureau believes that to fulfill this requirement, servicers must have policies and procedures for the use of reasonable means to track and maintain borrower-submitted loss mitigation documents. However, imposing on servicers a specific obligation to establish electronic portals would supplant other reasonable means to track and maintain borrower-submitted loss mitigation documents. As noted above, the Bureau expects to further consider the benefits of electronic portals, as well as requirements regarding electronic communication with servicers more broadly.

Further, for reasons discussed in the section-by-section analysis of § 1024.30, the Bureau has decided that requirements set forth in the Bureau's discretionary rulemakings are generally not appropriate to impose on small servicers (servicers that servicers 5,000 mortgage loans or less and only servicers mortgage loans that either they or their affiliates own or originated), housing finance agencies, servicers with respect to any mortgage loan for which the servicer is a qualified lender as that term is defined in 12 CFR 617.7000, and servicers of reverse mortgage transactions.

In addition, for reasons set forth above, the Bureau has limited the scope of §§ 1024.39 through 41 to mortgage loans that are secured by a borrower's principal residence. But the Bureau declines to further limit the scope of § 1024.40 to "responsive borrowers" or to exclude borrowers who have filed for bankruptcy. As discussed above, the purpose of the early intervention, continuity of contact, and loss mitigation procedure requirements is to ensure that a borrower who resides in a property as a principal residence have the protection of clear standards of review for loss mitigation options so that the borrower can be considered for an option that will assist the borrower in retaining the property and the owner or assignee in mitigating losses. The Bureau believes limiting the applicability of § 1024.40 to "responsive" borrowers introduces a notable degree of subjectivity that conflicts with this purpose. The Bureau additionally declines to create an exemption with respect to borrowers who have filed for bankruptcy because the exemption would be too broad. A borrower could have filed for bankruptcy but still be eligible for loss mitigation assistance.

Legal Authority

The Bureau proposed § 1024.40 pursuant to authority under sections 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 section 6 of RESPA to issue § 1024.40. Instead, the Bureau is adopting § 1024.40 pursuant to its authority under section 19(a) of RESPA. The Bureau believes that the objectives-based policies and procedures set forth in § 1024.40 that regulate the manner by which servicer personnel provide assistance to delinquent borrowers are necessary to achieve the purposes of RESPA, including avoiding unwarranted or unnecessary costs and fees, ensuring that servicers are responsive to consumer requests and complaints, and facilitating the review of borrowers for foreclosure avoidance options.

The Bureau is also adopting § 1024.40 pursuant to its authority under section 1022(b) of the Dodd-Frank Act to prescribe regulations necessary or appropriate to carry out the purposes and objectives of Federal consumer financial laws. Specifically, the Bureau believes that § 1024.40 is necessary and appropriate to carry out the purpose under section 1021(a) of the Dodd-Frank Act of ensuring that markets for consumer financial products and services are fair, transparent, and competitive, and the objective under section 1021(b) of the Dodd-Frank Act of ensuring that markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation. The Bureau additionally relies on its authority under section 1032(a) of the Dodd-Frank Act, which authorizes the Bureau to prescribe rules to ensure that the features of any consumer financial product or service, both initially and over the term of the product or service, are fully, accurately, and effectively disclosed to consumers in a manner that permits consumers to understand the costs, benefits, and risks associated with the product or service, in light of the facts and circumstances.

Proposed 40(a)

Proposed § 1024.40(a)(1) would have provided that no later than five days after a servicer has notified or made a good faith effort to notify a borrower to the extent required by proposed § 1024.39(a), the servicer must assign personnel to respond to the borrower's inquiries, and as applicable, assist the borrower with loss mitigation options. Proposed § 1024.40(a)(1) further provided that if a borrower has been assigned personnel as required by § 1024.40(a)(1) and the assignment has not ended when servicing for the borrower's mortgage loan has transferred to a transferee servicer, subject to § 1024.40(c)(1) through (4), the transferee servicer must assign personnel to respond to the borrower's inquiries, and as applicable, assist the borrower with loss mitigation options, within a reasonable time of the transfer of servicing for the borrower's mortgage loan. In support of the continuity of contact requirements with respect to the transfer of a borrower's mortgage loan, the Bureau reasoned that the transfer of a borrower's mortgage loan from one servicer to another should not negatively impact the borrower's pursuit of loss mitigation options.

Proposed comment 40(a)(1)-1 would have explained that for purposes of responding to borrower inquiries and assisting the borrower with loss mitigation options, the term "borrower" includes a person whom the borrower has authorized to act on behalf of the borrower (a borrower's agent), and may include, for example, a housing counselor or attorney. The comment would have further explained that servicers may undertake reasonable procedures to determine if such person has authority from the borrower to act on the borrower's behalf. Proposed comment 40(a)(1)-1 reflects the Bureau's understanding that some delinquent borrowers may authorize third parties to assist them as they pursue alternatives to foreclosure. Accordingly, the Bureau sought to clarify that a servicer's obligation in proposed § 1024.40 extends to persons authorized to act on behalf of the borrower.

Proposed comment 40(a)(1)-2 would have clarified that for purposes of § 1024.40(a)(1), a reasonable time for a transferee servicer to assign personnel to a borrower is by the end of the 30-day period of the transfer of servicing for the borrower's mortgage loan. Proposed comment 40(a)(1)-2 reflects the Bureau's belief that a transferee servicer may require some time after the transfer of servicing to identify delinquent borrowers who had personnel assigned to them by the transferor servicer. The Bureau believed that 30 days is a reasonable amount of time for a transferee servicer to assign personnel to a borrower whose mortgage loan has been transferred to the servicer through a servicing transfer. The Bureau invited comments on whether a longer time frame is appropriate.

Proposed comment 40(a)(1)-3.i. would have explained that a servicer has discretion to determine the manner by which continuity of contact is implemented and reflected the Bureau's belief that a one-size-fits-all approach to regulating the mortgage servicing industry may not be optimal, and thus servicers should be given flexibility to implement proposed § 1024.40 in the manner best suited to their particular circumstances. Proposed comment 40(a)(1)-3.ii would have explained that § 1024.40(a)(1) requires servicers to assign personnel to borrowers whom servicers are required to notify pursuant to § 1024.39(a). If a borrower whom a servicer is not required to notify pursuant to § 1024.39(a) contacts the servicer to explain that he or she expects to make be late in making a particular payment, the comment would have explained that the servicer may assign personnel to the borrower upon its own initiative. Proposed comment 40(a)(1)-4 would have explained that proposed § 1024.40(a)(1) does not permit or require a servicer to take any action inconsistent with applicable bankruptcy law or a court order in a bankruptcy case to avoid any potential conflict between the continuity of contact requirements and the automatic stay. The Bureau, however, invited comment on whether servicers should be required to continue providing delinquent borrowers continuity of contact after borrowers have filed for bankruptcy.

The Bureau proposed § 1024.40(a)(2) to require a servicer to make access to the assigned personnel available via telephone. If a borrower contacted the servicer and did not receive a live response from the assigned personnel, proposed § 1024.40(a)(2) would have required that the borrower be able to record his or her contact information and that the servicer respond to the borrower within a reasonable time. Proposed comment 40(a)(2)-1 would have provided that for purposes of § 1024.40(a)(2), three days (excluding legal public holidays, Saturdays, and Sundays) is a reasonable time to respond. The Bureau intended comment 40(a)(2)-1 to function as a safe harbor because the Bureau believed in most cases, it would be reasonable to expect that borrowers receive a response within the proposed time frame. The Bureau invited comments on whether the Bureau should provide for a longer response time.

As discussed above, consumer groups generally supported the Bureau's proposed continuity of contact requirements, but industry commenters urged the Bureau to make changes in various ways. With respect to proposed § 1024.40(a)(1), industry commenters overwhelmingly opposed the requirement that would have required a servicer to make contact personnel available to any borrower five days after a servicer has orally notified such borrower about the borrower's late payment in accordance with proposed § 1024.39(a). Commenters asserted that tying the assignment of contact staff to the oral notification requirement might require servicers to devote significant resources to assist borrowers who do not require formal loss mitigation assistance because in most cases, borrowers who are delinquent for 30 days or less self-cure. The commenters additionally asserted that the diversion of resources would adversely impact borrowers who actually need loss mitigation assistance by diverting servicer resources unnecessarily. One state credit union association suggested that there might be implementation challenges because servicers' current systems might not be set up to assign personnel based on a borrower's payment status.

Industry commenters suggested alternative methods of assignment that they asserted would be more effective: (1) delay assignment until borrowers become at least 45 days delinquent (the range was between 45 and 60 days); (2) permit servicers to rely on their internal policies and procedures to determine the timing of assignment; (3) require servicers to assign contact personnel to borrowers who request loss mitigation assistance, which could be demonstrated by either submitting a loss mitigation application or the first piece of documentation a servicer has requested from a borrower with respect to a loss mitigation application. Industry commenters who suggested the last alternative observed that limiting a servicer's obligation to assign contact personnel would be consistent with the National Mortgage Settlement and thus would make compliance with the Bureau's proposed rule less costly to servicers who have already implemented systems changes to comply with the National Mortgage Settlement.

With respect to comments received on proposed § 1024.40(a)(2), one non-bank servicer expressed concern about whether proposed § 1024.40(a)(2) would have required servicers to track voicemail messages left in the voicemail box of individual staff members and urged the Bureau to change the requirement such that borrowers are transferred to available live representatives or require servicers to call borrowers back within some set amount of time. With respect to proposed comment 40(a)(2)-1, one national non-profit organization urged the Bureau to provide that a servicer may take five days to respond because it saw the three-day response time as a requirement that it could not meet because it is mostly staffed by volunteers. A non-bank servicer requested clarification whether the three-day response time is guidance or a requirement.

Final 1024.40(a)

For reasons discussed above, the Bureau is adopting proposed § 1024.40 as a requirement that servicers maintain a set of policies and procedures reasonably designed to achieve specified objectives. Accordingly, the Bureau is withdrawing § 1024.40(a)(1) and (2) because they are proposed as specific requirements. But, the objectives the Bureau is adopting in § 1024.40(a) largely draw from the specific requirements concerning assignment of personnel in proposed § 1024.40(a), unless otherwise noted below. As adopted, § 1024.40(a) requires a servicer to maintain policies and procedures that are reasonably designed to achieve the following objectives: (1) assign personnel to a delinquent borrower by the time a servicer provides such borrower with the written notice required in § 1024.39(b), but in any event, not later than the 45th day of a borrower's delinquency; (2) make available to such borrower, via telephone, the assigned personnel to respond to the borrower's inquiries and, as applicable, assist the borrower with available loss mitigation options until the borrower has made two consecutive mortgage payments in accordance with the terms of a permanent loss mitigation agreement without incurring a late charge; and (3) ensure that the servicer can provide a live response to a delinquent borrower who contacts the assigned personnel but does not immediately receive a live response.

After carefully considering industry commenters' concern that tying the assignment of contact personnel to the oral notification requirement in proposed § 1024.39(a) might require servicers to devote significant resources to assist borrowers who do not require formal loss mitigation assistance, the Bureau has decided to delay the timing of the assignment of contact personnel to the 45th day of a borrower's delinquency, unless the servicer provides the written notice required by § 1024.39(b) beforehand. The Bureau believes that this change adequately addresses the concern of industry commenters that the proposal might require servicers to devote significant resources to assist borrowers who do not require formal loss mitigation assistance. To the extent a servicer becomes obligated to assign contact personnel to a borrower before such borrower becomes 45-days delinquent, it would be because the servicer has determined that such borrower should be informed of the availability of loss mitigation options before day 45.

The Bureau does not believe it is appropriate to make assignment and availability of contact personnel contingent on a borrower making a request for loss mitigation assistance. The Bureau believes that servicers have more information about the qualifications for various loss mitigation options than borrowers, and accordingly, the Bureau believes it is necessary to achieve the purposes of RESPA to require servicers to engage a borrower in communication that would facilitate reviewing a borrower for foreclosure avoidance options. The Bureau also disagrees that servicers would be unduly burdened by a continuity of contact provision that does not exactly align with the terms of the National Mortgage Settlement. The Bureau observes that the National Mortgage Settlement requires a servicer to identify the contact personnel to a borrower after a borrower has requested assistance. The Bureau is not requiring that a servicer provide borrowers with identifying information about the contact personnel, just that contact personnel be available to borrowers to whom a servicer has provided loss mitigation information to answer borrower inquiries and assist borrowers with loss mitigation options, as applicable. The Bureau believes the Bureau's requirement is less burdensome than the terms and conditions of the National Mortgage Settlement.

The Bureau has made changes to proposed comment 40(a)(1)-1 in response to general concerns expressed by several industry commenters about communicating with persons other than a borrower with respect to error resolution, information requests, and during the loss mitigation process.   Industry commenters asserted that it would be costly to servicers to verify whether such persons are in fact authorized to act on a borrower's behalf. They also expressed concern regarding potential liability for inadvertent release of confidential information and violation of applicable privacy laws.

The Bureau acknowledges that requiring servicers to provide continuity of contact personnel to borrowers' agents is more costly than limiting the requirement to borrowers. The Bureau believes, however, that borrowers who are experiencing difficulty in making their mortgage payments or in dealing with their servicer may turn, for example, to a housing counselor or other knowledgeable persons to assist them in addressing such issues. The Bureau believes that it is necessary to achieve the purposes of RESPA to permit such agents to communicate with the servicer on a borrower's behalf.

Proposed comment 40(a)(1)-1 is adopted as comment 40(a)-1 to clarify that a servicer may undertake reasonable procedures to determine if a person who claims to be an agent of a borrower has authority from the borrower to act on the borrower's behalf and that such reasonable policies and procedures may require that a person that claims to be an agent of the borrower provide documentation from the borrower stating that the purported agent is acting on the borrower's behalf. The Bureau believes that this clarification adequately balances the duty of servicers to communicate with third parties authorized by delinquent borrowers to act on their behalf in pursuing alternatives to foreclosure and the compliance cost and potential liability asserted by industry commenters and described above. Further, the Bureau notes that this comment is similar to commentary appearing in §§ 1024.35, 36, and 39.

In adopting § 1024.40(a), the Bureau has added to comment 40(a)-1 clarification of what the term "delinquent borrower" means for purposes of § 1024.40(a). Upon further consideration, the Bureau believes it would be better to state clearly in § 1024.40(a) that the continuity of contact requirements in § 1024.40 only apply to delinquent borrower rather than setting forth a separate section in proposed § 1024.40(c) to the same effect. Accordingly, the Bureau is not adopting proposed § 1024.40(c) and is instead moving the substance of proposed § 1024.40(c), which the Bureau has modified for reasons set forth below, into commentary as part of comment 40(a)-1 to explain the term "delinquent borrower."

The Bureau is adopting proposed comment 40(a)(1)-3.i as comment 40(a)-2. Two GSEs and a credit union commenter asked the Bureau to move the clarification in proposed comment 40(a)(1)-3.i that a servicer may assign a team of persons to assist a borrower as required by proposed § 1024.40(a)(1) from commentary to rule text. The Bureau declines because the proposed clarification is an example of how a servicer may exercise discretion to determine the manner by which continuity of contact is implemented. Accordingly, the Bureau believes that it is appropriate that the clarification remains in the commentary.

As adopted, comment 40(a)-2 additionally provides that a servicer may assign single-purpose or multi-purpose personnel. Single-purpose personnel are personnel whose primary responsibility is to respond to a delinquent borrower who meets the assignment criteria described in § 1024.40(a)(1). Multi-purpose personnel can be personnel that do not have a primary responsibility at all, or personnel for whom responding to a borrower who meet the assignment criteria set forth in § 1024.40(a)(1) is not the personnel's primary responsibility. The Bureau added this clarification to address comments by industry commenters expressing concern that some servicers do not have the capacity to dedicate staff members to assisting borrowers with loss mitigation options to the exclusion of other responsibilities. Comment 40(a)-2 further explains that when a borrower who meets the assignment criteria of § 1024.40(a) has filed for bankruptcy, a servicer may assign personnel with specialized knowledge in bankruptcy law to assist such borrowers in response to questions raised by industry commenters about whether the Bureau's continuity of contact requirement would allow servicers to reassign a borrower who has filed for bankruptcy to personnel with specialized knowledge and training in bankruptcy law. Because the Bureau is adopting this clarification in comment 40(a)-2, the Bureau is not adopting proposed comment 40(a)(1)-4, which, as explained above, was proposed to clarify the relationship between proposed § 1024.40 and bankruptcy law to address situations in which servicers transfer the borrower's file to a separate unit of personnel (*i.e.*, personnel who are not part of the servicer's loss mitigation unit), or to outside bankruptcy counsel to comply with bankruptcy law). The Bureau is also not adopting proposed comment 40(a)(1)-3.ii because the final rule no longer ties the assignment of contact personnel to a servicer's provision of the oral notice that would have been required pursuant to proposed § 1024.39(a).

As discussed above, proposed § 1024.40(a)(1) would have required a transferee servicer to assign contact personnel to a borrower if the borrower had been assigned personnel by the transferor servicer, and the assignment had not ended at the time of the borrower's mortgage loan had been transferred. The Bureau became concerned that transferee servicers may try to evade compliance with the obligation to provide continuity of contact by asserting that this obligation is contingent upon whether the borrower has been assigned contact personnel by the transferor servicer. The Bureau believes that preventing a servicer's evasion of its continuity of contact obligation is necessary to achieve the purposes of RESPA. The Bureau believes that finalized § 1024.40(a) makes it clear that a servicer’s obligation to maintain policies and procedures reasonably designed to assign contact personnel to certain delinquent borrowers is not contingent upon whether the borrower was assigned such personnel by the borrower’s previous servicer.

Proposed 40(b)

The Bureau proposed § 1024.40(b)(1) to require a servicer to establish policies and procedures reasonably designed to ensure that the servicer personnel the servicer makes available to the borrower pursuant to proposed § 1024.40(a) perform certain functions that the Bureau believed would facilitate servicers’ review of a borrower for loss mitigation options. The functions would have been as follows: (1) providing a borrower with accurate information about loss mitigation options offered by the servicer and available to the borrower based on information in the servicer’s possession (proposed § 1024.40(b)(1)(i)(A)), actions a borrower must take to be evaluated for loss mitigation options, including what the borrower must do to submit a complete loss mitigation application, as defined in proposed § 1024.41, and if applicable, what the borrower must do to appeal the servicer’s denial of the borrower’s application (proposed § 1024.40(b)(1)(i)(B)), the status of the borrower’s already-submitted loss mitigation application (proposed § 1024.40(b)(1)(i)(C)), the circumstances under which a servicer must make a foreclosure referral (proposed § 1024.40(b)(1)(i)(D)), and loss mitigation deadlines the servicer has established (proposed § 1024.40(b)(1)(i)(E)); (2) accessing a complete record of the borrower’s payment history in the servicer’s possession, all documents the borrower has submitted to the servicer in connection with the borrower’s application for a loss mitigation option offered by the servicer, and if applicable, documents the borrower has submitted to prior servicers in connection with the borrower’s application for loss mitigation options offered by those servicers, to the extent that those documents are in the servicer's possession (proposed § 1024.40(b)(1)(ii)(A through (C)); (3) providing the documents in § 1024.40(b)(1)(ii)(B) through (C) to persons authorized to evaluate a borrower for loss mitigation options offered by the servicer if the servicer personnel assigned to the borrower is not authorized to evaluate a borrower for loss mitigation options (proposed § 1024.40(b)(1)(iii)); and (4) within a reasonable time after a borrower request, provide the information to the borrower or inform the borrower of the telephone number and address the servicer has established for borrowers to assert an error pursuant to § 1024.35 or make an information request pursuant to § 1024.36 (proposed § 1024.40(b)(1)(iv)). Proposed comment 40(b)(1)(iv) would have clarified that for purposes of § 1024.40(b)(1)(iv), three days (excluding legal public holidays, Saturdays, and Sundays) is a reasonable time to provide the information the borrower has requested or inform the borrower of the telephone number and address the servicer has established for borrowers to assert an error pursuant to § 1024.35 or make an information request pursuant to § 1024.36.

Proposed § 1024.40(b)(1) reflected the Bureau's belief that having staff available to help delinquent borrowers is necessary, but not sufficient, to ensure that when a borrower at a significant risk of default reaches out to a servicer for assistance, the borrower is connected to personnel who can address the borrower's inquiries or loss mitigation requests adequately. The staff a servicer makes available to delinquent borrowers must be able to perform functions that are calibrated toward, among other things, facilitating the review of borrowers for foreclosure avoidance options. Further, as discussed in the proposal, § 1024.40 was intended to work together with proposed §§ 1024.39 and 1024.41. For example, proposed § 1024.41 would have required a servicer to notify a borrower if the borrower has submitted an incomplete loss mitigation application. Proposed § 1024.40(b)(1) would have addressed this duty by requiring the personnel assigned to the borrower to inform the borrower about the steps the borrower must take to complete his or her loss mitigation application.

The Bureau additionally proposed § 1024.40(b)(1) based on the recognition that mortgage investors and other regulators have responded to breakdowns in borrower-servicer communication by requiring servicers to adopt staffing standards. The Bureau believed that the functions set forth in proposed § 1024.40(b)(1) would have complemented existing standards. The Bureau did not receive comments in response to proposed § 1024.40(b)(1), with the exception that two national consumer groups questioned whether proposed § 1024.40(b)(1)(ii)(C) would unnecessarily dilute a transferor servicer' responsibility to ensure it transfers all relevant borrower information and a transferee servicer's responsibility to ensure that it take possession of all such information because proposed §1024.40(b)(1)(ii)(C) would have limited the transferred documents to ones in a transferee servicer's possession. The consumer groups also questioned whether § 1024.40(b)(1)(ii)(C) would have conflicted with proposed § 1024.38(b)(4), which would have required servicers to transfer all of the information and documents relating to a transferred mortgage loan. The Bureau observes that the limitation was proposed because the Bureau did not believe a transferee servicer should be exposed to potentially costly litigation if the lack of access to documents is due to the fault of the transferor servicer. The Bureau observes that several of the proposed objectives with respect to providing information or accessing information would have been limited to circumstances where the information was in the servicer's possession. This proposed limitation was intended to be a safeguard to help servicers manage costs arising from the litigation risk that would have been created by the existence of civil liability for violations of proposed § 1024.40. But because the

Bureau has decided to finalize § 1024.40 such that there will be no private liability for violations of the provision, the Bureau is not adopting the safeguard.

Proposed § 1024.40(b)(2) would have provided that a servicer's policies and procedures satisfy the requirements in §1024.40(b)(1) if servicer personnel do not engage in a pattern or practice of failing to perform the functions set forth in § 1024.40(b)(1) where applicable. Proposed comment 40(b)(2)-1.i would have provided that for purposes of § 1024.40(b)(2), a servicer exhibits a pattern or practice of failing to perform such functions, with respect to a single borrower, if servicer personnel assigned to the borrower fail to perform any of the functions listed in § 1024.40(b)(1) where applicable on multiple occasions, such as, for example, repeatedly providing the borrower with inaccurate information about the status of the loss mitigation application the borrower has submitted. Proposed comment 40(b)(2)-1.ii would have explained that a servicer exhibits a pattern or practice of failing to perform such functions, with respect to a large number of borrowers, if servicer personnel assigned to the borrowers fail to perform any of the functions listed in § 1024.40(b)(1) in similar ways, such as, for example, providing a large number of borrowers with inaccurate information about the status of the loss mitigation applications the borrowers have submitted.

The Bureau recognizes that contact personnel may occasionally make a mistake and fail to perform a function enumerated in proposed § 1024.40(b)(1). Proposed § 1024.40(b)(2) reflects the Bureau's belief that the occasional mistake is not necessarily indicative of servicers not complying with the servicing obligation set forth in proposed § 1024.40(b)(1). Accordingly, just as the Bureau proposed the safe harbor in proposed § 1024.38(a)(2) for servicers for non-systemic violations of § 1024.38 to manage the costs arising from the litigation risk created by the existence of civil liability for violations of § 1024.38, the Bureau proposed a safe harbor in proposed § 1024.40(b)(2) for servicers for non-systemic violations of § 1024.40(b)(1).

Both consumer groups and industry commenters opposed the safe harbor the Bureau proposed in § 1024.40(b)(2). Just as consumer groups urged the Bureau to eliminate the proposed safe harbor in proposed § 1024.38(a)(2) to reduce barriers to successful litigation and to ensure that the rule provides protection for more borrowers, they urged the Bureau to withdraw proposed § 1024.40(b)(2). Just as industry groups urged the Bureau to eliminate the pattern or practice private cause of action under § 1024.38(a)(2) to reduce significant litigation exposure, they urged the Bureau to do the same with respect to proposed § 1024.40(b)(2). Moreover, as is true in the general servicing policies and procedures context, the Bureau is concerned that the safe harbor in proposed § 1024.40(b)(2) would hamper the Bureau and other regulators in exercising supervisory authority and could preclude relief from being secured until there have been widespread or repeated incidents of consumer harm. Further, the safe harbor is no longer necessary because, as discussed above, the Bureau has decided to finalize § 1024.40 such that there will be no private liability for violations of the provision. Accordingly, the Bureau is not adopting § 1024.40(b)(2) and related comments 40(b)(2)-1.i and ii. Instead, the Bureau is only adopting § 1024.40(b)(1) as § 1024.40(b).

New 40(b)

Proposed § 1024.40(b)(1) is largely adopted as § 1024.40(b)(1) through (3). In addition to changes that have been noted above, the Bureau has made technical changes to proposed § 1024.40(b)(1)(i)(B) (redesignated as § 1024.40(b)(1)(ii)) to be consistent with changes to the language of § 1024.41, to clarify that the function of accessing the information set forth in proposed § 1024.40(b)(1)(ii) (redesignated as § 1024.40(b)(2)) means retrieval, and to clarify that the retrieval must be done in a timely manner. The Bureau is also clarifying that "document" means "written information" for purposes of proposed § 1024.40(b)(1)(ii)(B) (redesignated as § 1024.40(b)(2)(ii)).

Proposed 40(c)

The Bureau proposed § 1024.40(c) to provide that a servicer shall ensure that the personnel it assigns and makes available to a borrower pursuant to § 1024.40(a) remain assigned and available to the borrower until any of the following occur: (1) the borrower refinances the mortgage loan (*see* proposed § 1024.40(c)(1)); (2) the borrower pays off the mortgage loan (*see* proposed § 1024.40(c)(2)); (3) a reasonable time has passed since (i) the borrower has brought the mortgage loan current by paying all amounts owed in arrears, or (ii) the borrower and the servicer have entered into a permanent loss mitigation agreement in which the borrower keeps the property securing the mortgage loan (*see* proposed § 1024.40(c)(3)(i) through (ii)); (4) title to the borrower's property has been transferred to a new owner through, for example, a deed-in-lieu of foreclosure, a sale of the borrower's property, including, as applicable, a short sale, or a foreclosure sale (*see* proposed § 1024.40(c)(4)); or (5) if applicable, a reasonable time has passed since servicing for the borrower's mortgage loan was transferred to a transferee servicer (*see* proposed § 1024.40(c)(5)). The Bureau observes that proposed § 1024.40(c) clearly indicates that the Bureau intended § 1024.40 to apply to more than just the initial assignment of contact personnel.

The Bureau proposed comment 40(c)(3)-1 to provide that for purposes of § 1024.40(c)(3), a reasonable time has passed when the borrower has made on-time mortgage payments for three consecutive months. The Bureau noted in the 2012 RESPA Servicing Proposal that the ability of a borrower to make on-time mortgage payments for three consecutive months has gained wide acceptance as an indicator of whether a previously-delinquent borrower can succeed in keeping his or her mortgage loan current. For example, under Treasury's HAMP program, a borrower is put in a trial modification period lasting three months. The borrower must have made all trial period payments to qualify for a permanent loan modification.[158] The Bureau sought comment on whether criteria other than a borrower making on-time mortgage payments for three consecutive months should be used to determine what is a "reasonable time" for purposes of § 1024.40(c)(3).

A number of industry commenters asserted that three months of tracking a borrower who later becomes current would generally be excessive, particularly if the borrower cures without the aid of loan modification. Several industry commenters urged the Bureau to conform proposed § 1024.40(3) to the requirement in the National Mortgage Settlement, which permits a servicer to end the assignment of a single point of contact to a borrower upon the reinstatement of the loan, which occurs either due to voluntary reinstatement or the processing of a permanent loan modification program. They urged the Bureau to not discount a borrower's completion of a trial modification program, and several commenters urged servicers to count a borrower's trial modification payments toward meeting the proposed on-time payment requirement in § 1024.40(c)(3).

One bank servicer suggested that the Bureau should further clarify proposed § 1024.40(c)(3) by replacing the phrase "on-time mortgage payment" with "when the borrower has made payment for three consecutive months that have not incurred a late fee." The servicer expressed the concern that narrowly interpreting "on-time" payments as paying as of the due date

[158] Making Home Affordable Program Handbook, v3.4, at 89 (December 15, 2011); *see also* Fannie Mae Single Family Servicing Guide, Ch. 6, § 602 (2012).

could unnecessarily extend the duration of the continuity of contact and that the Bureau should take account of any grace period after the payment due date during which a borrower could pay without incurring a late fee.

Proposed comment 40(c)(5)-1 would have provided that for purposes of § 1024.40(c)(5), a reasonable time would have passed 30 days after servicing for the borrower's mortgage loan was transferred to a transferee servicer. As discussed above, the Bureau believed that the transferee servicer may require up to 30 days from the date of transfer of servicing to identify borrowers who had personnel assigned to them by the transferor servicer.

A large bank servicer and a national trade association representing large mortgage financing companies opposed requiring a transferor servicer to continue making continuity of contact personnel available to a borrower whose loan has been transferred because after servicing has been transferred, the transferor servicer would no long have access to any records or documents of the borrower and could no longer reasonably be expected to assist a borrower effectively. The large bank servicer suggested that if the Bureau adopts a rule that requires a transferor service to continue making continuity of contact personnel available after a borrower's loan has been transferred, the Bureau should require the assignment to last no more than 15 days following the transfer. The national trade association suggested that the Bureau should require contact information for the continuity of contact personnel made available by a transferee servicer be disclosed in the servicing transfer letter or provide an exemption for liability for potentially violating § 1024.40(b) as the personnel will be unable to perform many of the functions set forth in proposed § 1024.40(b). One bank servicer recommended that the Bureau provide a safe harbor for situations where a continuity of contact personnel is no longer available due to staffing changes in the normal course of business.

The Bureau has considered the comments the Bureau has received in response to proposed §1024.40(c) and is making several adjustments. The Bureau has reconsidered the appropriate continuity of contact objectives where a borrower's mortgage loan is made current through voluntary reinstatement. The Bureau believes that the objective should be to maintain continuity of contact until a borrower either brings a mortgage loan current by paying all amount owed in arrears or is able to make at least the first two payments following a permanent modification agreement. In the case of a borrower who brings her mortgage current, the Bureau believes that the likelihood of a near-term re-default is relatively low and thus the servicer should not be required to implement policies and procedures reasonably designed to maintain continuity of contact with such a borrower. On the other hand, The Bureau believes that the risk of a re-default for a borrower who has gone through formal loss mitigation assistance is sufficiently high that the servicer's policies and procedures should be reasonably designed to maintain continuity of contact with such a borrower throughout any trial modification and for a period of time after the borrower enters into a permanent loan modification agreement. The Bureau is adopting § 1024.40(a)(2), which reduces the number of consecutive monthly payments from three to two. This responds to concerns about whether three months of tracking might be excessive. The Bureau has also considered the request to permit a servicer to factor in grace periods when determining whether a payment was an on-time payment and believes that it would be an appropriate change. This change is reflected in final § 1024.40(a)(2).

The Bureau has considered the issue of a transferor servicer's obligation to continue making contact personnel available to a borrower whose loan has been transferred. As discussed above, the Bureau reasoned that it might reasonably take some time for transferee servicers to identify borrower who had personnel assigned to them by the transferor servicer. The Bureau believes this safeguard is no longer necessary when violations of finalized § 1024.40 no longer expose a servicer to civil liability. Accordingly, the Bureau is not finalizing proposed § 1024.40(c)(5).

As discussed above, one industry commenter suggested that the Bureau should relieve a servicer of its obligation to make continuity of contact personnel available due to staffing changes in the normal course of business. The Bureau disagrees. The Bureau expects that servicers already have existing policies and procedures in place to address the implication of staffing changes to their servicing operations, including the impact on borrower-servicer communications and accordingly, this limitation is unnecessary.

As discussed above, after further consideration, the Bureau believes it would be better to state clearly in § 1024.40(a) that the continuity of contact policy and procedures requirements in § 1024.40 only applies to delinquent borrower rather than setting forth a separate section in proposed § 1024.40(c) to the same effect. Accordingly, the Bureau is not adopting proposed § 1024.40(c) as a separate subsection of § 1024.40 and is instead moving the substance of proposed § 1024.40(c), revised as discussed above, to comment 40(a)-1, which elaborates on the meaning of the term “delinquent borrower” for purposes of § 1024.40(a). As adopted, comment 40(a)-1 clarifies that a borrower is no longer a “delinquent borrower” (for purposes of § 1024.40(a)) if a borrower has refinanced the mortgage loan, paid off the mortgage loan, brought the mortgage loan current by paying all amounts owed in arrears, or if title to the borrower’s property has been transferred to a new owner through, for example, a deed-in-lieu of foreclosure, a sale of the borrower’s property, including, as applicable, a short sale, or a foreclosure sale.

Proposed 40(d)

The Bureau proposed § 1024.40(d) to provide that a servicer has not violated § 1024.40 if the servicer's failure to comply with this section is caused by conditions beyond a servicer's control. Proposed comment 40(d)-1 would have explained that "conditions beyond the servicer's control" include natural disasters, wars, riots or other major upheaval, delays or failures caused by third parties, such as a borrower's delay or failure to submit any requested information, disruptions in telephone service, computer system malfunctions, and labor disputes, such as strikes. The Bureau intended proposed § 1024.40(d) to limit the liability of servicers to borrowers under RESPA. The Bureau did not believe that failures to comply with the continuity of contact requirements in proposed § 1024.40 caused by conditions beyond a servicer's control should expose a servicer to liability to a borrower under section 6 of RESPA. Even if servicers implement processes that would address staffing failures that had a significant adverse impact on borrowers seeking alternatives to foreclosure, the Bureau believes that such conditions may occasionally occur that could adversely affect a servicer's ability to provide adequate and appropriate staff to assist delinquent borrowers.

One non-bank servicer recommended that the Bureau add to the list of conditions beyond a servicer's control circumstances under which a servicer cannot establish reasonable contact with a borrower or the borrower is not responsive to reasonable attempts to make contact. Another servicer asked the Bureau to provide that major business reorganizations, such as mergers, be added to the list of conditions beyond a servicer's control. In response to the first commenter, the Bureau observes that a servicer's obligation under proposed § 1024.40 would have been to simply make contact personnel available in accordance with § 1024.40(a). The contact personnel would not have been required by § 1024.40 to make multiple attempts to contact a borrower. Making multiple attempts to contact a borrower is also not an objective of

§ 1024.40 as adopted. In response to the second commenter, the Bureau observes that major business organizations typically require advanced negotiation and planning. Accordingly, the Bureau believes that such transactions should not be added to the list of conditions beyond a servicer's control.

But importantly, the Bureau is withdrawing proposed § 1024.40(d) and related comment 40(d)-1. For reasons discussed above, violations of § 1024.40 will not give rise to civil liability. Accordingly, the Bureau believes that adopting proposed § 1024.40(d) is no longer necessary.

Section 1024.41 Loss mitigation procedures

As discussed in the Bureau's 2012 RESPA Servicing Proposal, and in part II above, there has been widespread concern among mortgage market participants, consumer advocates, and policymakers regarding pervasive problems with servicers' performance of loss mitigation activity in connection with the financial crisis, including lost documents, non-responsive servicers, and unwillingness to work with borrowers to reach agreement on loss mitigation options. In response, servicers, investors, guarantors, and State and Federal regulators have undertaken efforts to adjust servicer loss mitigation and foreclosure practices to address problems relating to evaluation of loss mitigation options. Specifically: (1) Treasury and HUD sponsored the Making Home Affordable program, which established guidelines for Federal government sponsored loss mitigation programs such as HAMP;[159] (2) the Federal Housing Finance Agency (FHFA) directed Fannie Mae and Freddie Mac to align their guidelines for servicing delinquent mortgages they own or guarantee to improve servicing practices;[160] (3) prudential regulators, including the Board and the OCC, undertook enforcement actions against

[159] www.makinghomeaffordable.gov.

[160] Press Release, Federal Housing Finance Agency, Fannie Mae and Freddie Mac to Align Guidelines for Servicing Delinquent Mortgages (Apr. 28, 2011), http://www.fhfa.gov/webfiles/21190/SAI42811.pdf. *See also* Comment letter submitted by Fannie Mae and Freddie Mac.

major servicers, resulting in consent orders imposing requirements on servicing practices;[161] (4) the National Mortgage Settlement agreement imposes obligations on five of the largest servicers, including on the conduct of loss mitigation evaluations;[162] and (5) a number of States have adopted, and others continue to propose, regulations relating to mortgage servicing and foreclosure processing, including requiring evaluation for loss mitigation options.[163]

Many of these initiatives imposed a similar set of consumer protective practices on covered servicers with respect to delinquent borrowers. For example, the FHFA servicing alignment initiative, the National Mortgage Settlement, and HAMP all require servicers to review loss mitigation applications within 30 days.[164] Further, the FHFA servicing alignment initiative and the National Mortgage Settlement require a servicer that receives an application for a loss mitigation option from a borrower before the 120th day of delinquency to postpone the referral of the borrower's mortgage loan account to foreclosure until the borrower has been evaluated for a loss mitigation option.[165]

While these various initiatives are starting to bring standardization to significant portions of the market, none of them to date has established a set of consistent national procedures and expectations regarding loss mitigation procedures. The Financial Stability Oversight Council, observing that the mortgage servicing industry was unprepared and poorly structured to address

[161] Press Release, Office of the Comptroller of the Currency, NR 2011-47, *OCC Takes Enforcement Action Against Eight Servicers for Unsafe and Unsound Foreclosure Practices* (Apr. 13, 2011); Federal Reserve Board Press Release, Federal Reserve Issues Enforcement Actions Related to Deficient Practices in Residential Mortgage Loan Servicing (April 13, 2011), available at: http://www.federalreserve.gov/newsevents/press/enforcement/20110413a.htm.

[162] www.nationalmortgagesettlement.com.

[163] *See, e.g.*, N.Y. Comp. Codes R. & Regs. tit. 3, § 419.1 *et seq.*; 2012 Cal. Legis. Serv. Ch. 86 (A.B. 278) (WEST) amending Cal. Civ. Code § 2923.6. *See also* Massachusetts proposed mortgage servicing regulations, *available at* http://www.mass.gov/ocabr/docs/dob/209cmr18proposedred.pdf. (last accessed November 19, 2012).

[164] *See e.g.*, National Mortgage Settlement at Appendix A, at A-26, available at ; Freddie Mac Single Family Seller/Servicer Guide, Vol. 2 § 64.6(d)(5) (2012); Fannie Mae Single Family Servicing Guide § 205.08 (2012); HAMP Guidelines, Ch. 6 (2011).

[165] *See e.g.*, National Mortgage Settlement at Appendix A, at A-17, available at http://www.nationalmortgagesettlement.com (last accessed January 15, 2013).

the rapid increase in defaults and foreclosures, recommended that federal regulators establish national mortgage servicing standards to address structural vulnerability in the mortgage servicing market.[166] Further, the GAO recommended that to the extent federal regulators create national servicing standards, such standards should address servicer foreclosure practices.[167]

In response to these recommendations, the Bureau has developed these final rules to serve as national mortgage servicing standards. The Bureau believes that because so many borrowers are more than 90 days delinquent and in need of consideration for loss mitigation, because borrowers often are not able to choose the servicer of their mortgage loan, and because the manner in which loss mitigation is handled has such potentially significant impacts on both individual consumers and the health of the larger housing market and economy, establishing national mortgage servicing standards is necessary and appropriate to protect borrowers and achieve the consumer protection purposes of RESPA. Such standards establish appropriate expectations for loss mitigation processes for borrowers and for owners or assignees of mortgage loans. Such standards also ensure that borrowers have a full and fair opportunity to receive an evaluation for a loss mitigation option before suffering the harms associated with foreclosure. These standards are appropriate and necessary to achieve the consumer protection purposes of RESPA, including facilitating borrowers' review for loss mitigation options, and to further the goals of the Dodd-Frank Act to ensure a fair, transparent, and competitive market for mortgage servicing.

As stated in the proposal, the Bureau has considered a number of different options for

[166] *See* Financial Stability Oversight Council, 2011 Annual Report (July 22, 2011), available at http://www.treasury.gov/initiatives/fsoc/Documents/FSOCAR2011.pdf (last accessed January 15, 2013).

[167] U.S. Government Accountability Office, Mortgage Foreclosures – Documentation Problems Reveal Need for Ongoing Regulatory Oversight (May 2011), available at http://www.gao.gov/assets/320/317923.pdf (last accessed January 15, 2013).

addressing consumer harms relating to loss mitigation. In general, the Federal government has at least three approaches to addressing loss mitigation: (1) establishing processes to facilitate actions by market participants; (2) mandating outcomes of loss mitigation process (implicitly raising costs to market participants of pursuing foreclosure actions in violation of the mandated outcomes); or (3) providing subsidies to incent the desired outcomes.[168] Only options (1) and (2) were considered by the Bureau in light of resources and other factors. These present a stark choice: whether to mandate processes that provide consumer protections without mandating specific outcomes or whether to mandate specific outcomes by establishing criteria for when such outcomes are required. For example, a requirement that a servicer review a completed loss mitigation application in a certain time period establishes a process requirement but does not impose upon the servicer a criterion for determining whether to offer a loss mitigation option. In contrast, a requirement that a servicer provide a loan modification when an evaluation of a loss mitigation application indicates that a loan modification may have a positive net present value would impose a substantive criterion. Mandating a methodology or set of assumptions for determining when a modification has a positive net present value would further constrain the investor's discretion in deciding under what circumstances to offer a loss mitigation option.

The 2012 RESPA Servicing Proposal included proposed procedural requirements for servicers to follow in reviewing borrowers for loss mitigation options. Specifically, proposed § 1024.41 provided that servicers that make loss mitigation options available to borrowers in the ordinary course of business must undertake certain duties in connection with the evaluation of borrower applications for loss mitigation options. The proposal was intended to achieve three main goals: First, it was designed to provide protections to borrowers to ensure that, to the

[168] *See* Patricia A. McCoy, Barriers to Home Mortgage Modifications During the Financial Crisis, at 4 (May 31, 2012).

extent a servicer offers loss mitigation options, a borrower would receive timely information about how to apply, and that a servicer would evaluate a complete application in a timely manner. Second, it was designed to prohibit a servicer from completing a foreclosure process by proceeding with a foreclosure sale until a borrower and a servicer had terminated discussions regarding loss mitigation options.[169] Third, it was designed to set timelines for loss mitigation evaluation that could be completed without requiring a suspension of the foreclosure sale date in order to avoid strategic use of these procedures to extend foreclosure timelines.

The Bureau intended that the protections that were set forth in proposed § 1024.41 would have been augmented and supplemented by protections in other sections of the 2012 RESPA Servicing Proposal that addressed loss mitigation issues. In proposed § 1024.39, for instance, the Bureau proposed to implement obligations on servicers that would have required servicers to contact borrowers early in the delinquency process and to provide information to borrowers regarding loss mitigation options. In proposed § 1024.40, the Bureau proposed to implement obligations on servicers that would have required servicers, in certain circumstances to provide

[169] Although there is a paucity of reliable data about the prevalence of problems resulting from proceeding with a foreclosure sale while loss mitigation discussions are ongoing, the Federal Reserve identified anecdotal evidence of these problems in 2008. *See* Larry Cordell *et al.*, *The Incentives of Mortgage Servicers: Myths and Realities*, at 9 (Federal Reserve Board, Working Paper No. 2008-46, Sept. 2008). Anecdotal evidence continues to accumulate. *See, e.g., Haskamp, et al. v. Federal National Mortgage Assoc.*, et al., No. 11-cv-2248, Plaintiff's Memorandum of Law In Support of Their Motion For Partial Summary Judgment (D. Minn. June 14, 2012); *Stovall v. Suntrust Mortgage, Inc.*, No. 10-2836, 2011 U.S. Dist. LEXIS 106137 (D. Md. September 20, 2011); Debra Gruszecki, *REAL ESTATE: Homeowner Protests "Dual Tracking,"* Press-Enterprise (June 19, 2012), available at: http://www.pe.com/local-news/local-news-headlines/20120619-real-estate-homeowner-protests-dual-tracking.ece. Information presented by consumer advocacy groups illustrates that consumers and their advocates continue to be frustrated by the process of dual tracking. For example, the NCLC conducted a survey of consumer attorneys to identify instances of foreclosure sales occurring while loss mitigation discussions were on-going. Per that survey, 80 percent of surveyed consumer attorneys surveyed reported an instance of an attempted foreclosure sale while awaiting a loan modification. National Consumer Law Center & National Association of Consumer Bankruptcy Attorneys, *Servicers Continue to Wrongfully Initiate Foreclosures: All Types of Loans Affected* (Feb. 2012), available at http://www.nclc.org/images/pdf/foreclosure_mortgage/mortgage_servicing/wrongful-foreclosure-survey-results.pdf. Further, a survey by the National Housing Resource Center stated that 73 percent of 285 housing counselors surveyed rate servicer performance in complying with dual tracking rules outlined in HAMP guidelines as "fair" or "poor." National CAPACD Comment Letter, at 7. These surveys, while certainly not conclusive evidence of the prevalence of dual tracking or compliance with requirements imposed on servicers, indicate that concurrent loss mitigation and foreclosure processes continue to negatively impact borrowers.

borrowers with contact personnel to assist them with the process of applying for a loss mitigation option. Such personnel would have been required to have access to, among other things, information regarding loss mitigation options available to the borrower, actions the borrower must take to be evaluated for such loss mitigation options, and the status of any loss mitigation application submitted by the borrower. Further, in proposed § 1024.38, the Bureau proposed to require that servicers implement policies and procedures reasonably designed to achieve the objective of reviewing borrowers for loss mitigation options. Finally, in proposed § 1024.35, the Bureau proposed to permit a borrower to assert an error as a result of a servicer's failure to postpone a scheduled foreclosure sale when a servicer has failed to comply with the requirements for proceeding with a foreclosure sale. The Bureau believed that all of these protections, when implemented together, would have a substantial impact on reducing consumer harm.

The Bureau requested comment on all aspects of the proposal, and, in particular, whether focusing on the provision of procedural rights was the appropriate approach to addressing the consumer harm it had identified. The Bureau sought comment on whether there were additional appropriate measures that could be required to improve loss mitigation outcomes for all parties. The Bureau also sought comment on whether the proposed requirements ensured that consumers' timely and complete applications would receive fair and full consideration and ensured the predictability of outcomes for consumers as well as owners and assignees of mortgage loans. Finally, and as discussed further below, the Bureau sought comment on whether proposed § 1024.41 would have required servicers to undertake practices that conflicted with other Federal regulatory requirements or State law or may have caused servicers to undertake practices that might reduce the availability of loss mitigation options or access to credit.[170]

The Bureau received comments from numerous individual consumers, consumer advocates, as well as some servicers and industry trade associations in support of the Bureau's implementation of loss mitigation procedures. Although many of these commenters indicated specific areas where adjustments to the proposed requirements might be warranted, a number of commenters indicated that the loss mitigation procedures proposed by the Bureau would provide necessary and appropriate tools to assist consumers in receiving evaluations for loss mitigation options. Other commenters disagreed with the Bureau's proposed approach with respect to loss mitigation requirements. Numerous consumer advocacy groups commented that the Bureau's proposed requirements were inadequate to address consumer harm, and that the Bureau should more aggressively regulate loss mitigation activities. Conversely, the majority of industry participants and their trade associations commented that the proposed requirements were burdensome, unnecessary to address consumer harm, and could create an incentive for servicers and owners or assignees of mortgage loans to withdraw current loss mitigation practices.

Consumer advocacy groups primarily commented on three main topics: (1) mandating specific loss mitigation criteria; (2) addressing consumer harms relating to dual tracking of processes for pursuing foreclosures and evaluating borrowers for loss mitigation; and (3) appropriate timelines for the loss mitigation procedures. These topics are addressed in turn below. In certain circumstances, because the Bureau's approach to loss mitigation is not limited to the loss mitigation procedures set forth in § 1024.41, but involves a coordinated use of tools set forth in different provisions of the mortgage servicing rules (including the error resolution

[170] With respect to investor or guarantor requirements that do not constitute Federal or State law, such as requirements of the GSEs, the Bureau observes that such entities may need to review and adjust their requirements in light of the consumer protections set forth in the final rules.

procedures in § 1024.35, the reasonable information management policies and procedures in § 1024.38, the early intervention requirements in § 1024.39, and the continuity of contact requirements in § 1024.40), the Bureau has implemented adjustments to other provisions in light of the comments received with respect to the loss mitigation procedures in § 1024.41 as discussed further below and in the discussions of the other sections as appropriate.

Mandating Specific Loss Mitigation Criteria

Consumer advocates submitted a significant number of comments requesting that the Bureau mandate criteria for loss mitigation programs. For example, twelve individual consumer advocacy groups, as well as two coalitions of consumer advocacy groups, commented that the Bureau's proposal to require loss mitigation procedures did not go far enough to protect consumers from harms relating to the loss mitigation process.

Many consumer advocate commenters set forth a list of goals that should be considered by the Bureau to guide the development of a fuller set of consumer protections relating to the loss mitigation process. These goals included: (1) the Bureau should mandate specific home-saving strategies, with affordable loan modifications ranked first and with an order of priority among types of modifications (*e.g.* temporary or permanent interest rate reduction, extension of term, reduction of principal, *etc.*); (2) the Bureau should require all servicers to offer affordable, net present value positive loan modifications to qualified homeowners facing hardship and should establish rules for determining what constitutes an affordable modification by establishing a maximum or target debt-to-income ratio;[171] (3) the Bureau should require that successful trial loan modifications must be automatically converted to permanent modifications

[171] One commenter added that servicers should be required to demonstrate that these models are accurate and do not result in discriminatory impacts.

by servicers;[172] and (4) the Bureau should require servicers to notify homeowners regarding the status of evaluations for loss mitigation options in writing. Notably, one commenter stated that the Bureau should require that if a homeowner is ineligible for a loan modification option, a servicer should fully explore non-home retention options, such as cash-for-keys or deed-in-lieu of foreclosure, with the homeowner before a foreclosure is filed.

Mandatory loan modifications were addressed by a number of other comment submissions. A coalition of 60 consumer advocacy groups further commented that the Bureau should require loan modification programs similar to HAMP using a public and transparent net-present-value test mandated by the Bureau. One consumer advocacy group commented that a servicer should be required to offer loss mitigation when the servicer is a participant in a Federal, State, or private loss mitigation program or process. Further, one commenter stated that servicers should be prohibited from offering loss mitigation options that grossly deviate from standard industry practices. Finally, individual consumers that participated in a discussion of the proposed rules in connection with the Regulation Room project commented that the Bureau should mandate specific loan modification programs and requirements.

On the other hand, three consumer advocacy groups expressly stated that the Bureau should not mandate specific loan modification programs and requirements. Although these groups advocated that the Bureau should mandate that all servicers engage in loss mitigation procedures and "include loan modifications that reduce payments to an affordable level as one of the loss mitigation options generally available to borrowers," these groups recommended against prescribing specific loss mitigation criteria, specified waterfalls or debt-to-income targets, or net

[172] The commenters indicated that they believed servicers unduly delayed conversion of trial modifications to permanent modifications and stated that homeowners should not bear the financial burden of undue delay in conversion of a trial modification to a permanent modification.

present value models or assumptions. Rather, these groups stated that servicers should be given discretion to implement loss mitigation programs. These groups did urge, however, that servicers should be responsible for implementing loss mitigation programs consistent with the requirements imposed by owners or assignees of mortgage loans with respect to the administration of those programs.

In contrast with consumer advocates, industry commenters stated that regulations concerning loss mitigation procedures will limit the availability of loss mitigation options and restrict the availability of credit. Specifically, a community bank, a credit union, and a non-bank mortgage lender commented that mandating outcomes would be a disincentive to offering loss mitigation programs. Further, these commenters indicated that such programs would be costly and burdensome to implement. Further, a number of servicers, their trade associations, and a law firm stated that allowing a private right of action for loss mitigation options would substantially increase costs for lenders, limit the offering of loss mitigation options, and more generally, restrict the availability of credit.

After careful consideration of the comments, the Bureau has decided to refrain at this time from mandating specific loss mitigation programs or outcomes. The Bureau continues to believe that it is necessary and appropriate to achieve the purposes of RESPA to implement required procedures for servicers' evaluations of borrowers for loss mitigation options and that this approach will maintain consumer access to credit.

As discussed in the 2012 RESPA Servicing Proposal, the Bureau is concerned that mandating specific loss mitigation programs or outcomes might adversely affect the housing market and the ability of consumers to access affordable credit. Even in its current constrained state, the mortgage market generates approximately $1.4 trillion dollars in new loans.[173] The mortgage market necessarily depends on a large number of creditors, investors, and guarantors who are willing to accept the credit risk entailed in mortgage lending. The market is constrained today at least in part because, in the wake of the financial crisis, private capital is largely unwilling to accept that risk without a government guarantee.

As with any secured lending, those who take the credit risk on mortgage loans do so in part in reliance on their security interest in the collateral. When a borrower is unable (or unwilling) to repay a loan, it is in the interest of those who own the loans to attempt to mitigate (*i.e.*, reduce) their losses. There are myriad options, ranging from forbearance, to loan modification, to short sales, to foreclosure or deed-in-lieu of foreclosure to achieve that end. Further, there is a wide range of borrower situations regarding which the borrower and owner or assignee of the mortgage loan must make judgments as to the desirable options. And for any given situation with respect to a borrower's willingness and ability to pay, there are a large number of issues to resolve in determining how to structure a particular option, such as a forbearance plan, loan modification, or short sale.

The Bureau understands that different creditors, investors, and guarantors have differing perspectives on how best to achieve loss mitigation based in part of their own individual circumstances and structures and in part on their market judgments and assessments. Community banks and credit unions with loans on portfolio may have a different viewpoint, for example, than large investors who purchased mortgage loans on the secondary market. Even government insurance programs adopt approaches that differ in material respects from each

[173] *See* Laurie Goodman, Outlook and Opportunities U.S. RMBS Market (October 2012) (estimated originations through the first six months of 2012 were approximately $777 billion; originations for CY2011 were approximately $1.308 trillion). *See also* Mortgage Bankers Association, MBA Increases Originations Estimate for 2012 by Almost $200 Billion (May 24, 2012) http://www.mortgagebankers.org/NewsandMedia/PressCenter/80910.htm

other, as well as from those programs implemented by the GSEs.

The Bureau does not believe that it can develop, at this time, rules that are sufficiently calibrated to protect the interests of all parties involved in the loss mitigation process and is concerned that an attempt to do so may have unintended negative consequences for consumers and the broader market. Loss mitigation programs have evolved significantly since the onset of the financial crisis and the Bureau is concerned that an attempt to mandate specific loss mitigation outcomes risks impeding innovation , that would allow such programs to evolve to the needs of the market. The Bureau further believes that if it were to attempt to impose substantive loss mitigation rules on the market at this time, consumers' access to affordable credit could be adversely affected. Creditors who were otherwise prepared to assume the credit risk on mortgages might be unwilling to do so, or might charge a higher price (interest rate) because they would no longer be able to establish their own criteria for determining when to offer a loss mitigation option in the event of a borrower's default. Investors in the secondary market might likewise reduce their willingness to invest in mortgage securities or pay less for securities at present rates (thereby requiring creditors to charge higher interest rates to maintain the same yield). The cost of servicing might increase substantially to compensate servicers for the burden of complying with prescribed criteria for evaluation of loss mitigation applications. Based upon these considerations, the Bureau declines to prescribe specific loss mitigation criteria at this time.

The Bureau is implementing requirements, however, for servicers to evaluate borrowers for loss mitigation options pursuant to guidelines established by the owner or assignee of a borrower's mortgage loan. In order to effectuate this policy, the Bureau has created certain requirements in § 1024.38, with respect to general servicing policies, procedures, and requirements, and other requirements in connection with the loss mitigation procedures in

§ 1024.41. Pursuant to § 1024.38, servicers are required to maintain policies and procedures to achieve the objective of (1) identifying, with specificity, all loss mitigation options for which borrowers may be eligible pursuant to any requirements established by an owner or assignee of the borrower's mortgage loan and (2) properly evaluating a borrower who submits an application for a loss mitigation option for all loss mitigation options for which the borrower may be eligible pursuant to any requirements established by the owner or assignee of the borrower's mortgage loan. Further, in § 1024.41, the Bureau is implementing procedural protections for borrowers with respect to the process of obtaining an evaluation for loss mitigation options, as well as restrictions on the foreclosure process while a borrower is being evaluated for a loss mitigation option. Borrowers have a private right of action to enforce the procedural requirements in § 1024.41, as set forth in § 1024.41(a); borrowers do not, however, have a private right of action under the Bureau's rules to enforce the requirements set forth in § 1024.38 or to enforce the terms of an agreement between a servicer and an owner or assignee of a mortgage loan with respect to the evaluation of borrowers for loss mitigation options. The Bureau believes 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.

In reaching the conclusion not to impose substantive requirements on loss mitigation programs, such as eligibility criteria, or to mandate the outcomes of loss mitigation processes, the Bureau recognizes that there is abundant evidence that the current system is not producing a level of loan modifications and other foreclosure alternatives that best meets the interests of distressed borrowers, the communities that would be hurt by borrowers' loss of their homes, and owners or assignees of mortgage loans. To the extent that is the result of process failures by servicers – specifically, the lack of infrastructure to handle the flood of delinquent borrowers resulting from the financial crisis – the Bureau believes that it can best contribute to solving that problem through the rules it is adopting which, as previously discussed, will require servicers to establish policies and procedures governing servicer operations, to implement continuity of contact policies and procedures, to engage in early intervention with delinquent borrowers, and to comply with procedures regarding the evaluation of a borrower for loss mitigation options. Together, these requirements are necessary and appropriate to achieve the consumer protection purposes of RESPA.

To the extent the failure of the current system to produce an optimal level of loss mitigation is the result of servicers pursuing their self-interest rather than the interest of their principals (*i.e.* the owners or assignees of the mortgage loans), the Bureau is addressing that issue by requiring servicers to maintain policies and procedures reasonably designed to identify all available loss mitigation options of their principals and properly consider delinquent borrowers for all such options.

The Bureau observes that the vast bulk of delinquent mortgages today are owned or guaranteed by governmental agencies such as FHA or by the GSEs in conservatorship. Those agencies, and the FHFA as conservator for the GSEs, are accountable to the public for meeting their statutory responsibilities to borrowers and taxpayers. The Bureau believes these agencies are best situated to establish loss mitigation programs for their mortgage loans, to determine the extent to which they believe it appropriate to allow individual borrowers to enforce their loss mitigation rules, and to evaluate whether a borrower should be able to obtain judicial review of the decision of a servicer in an individual case to offer a loss mitigation option. If the Bureau were to effectively mandate such review, the Bureau fears that investors and guarantors might dilute the obligations they impose on servicers or the loss mitigation options they make available. Such a result would not serve the interests of consumer or the housing market. Accordingly, the Bureau has determined not to establish substantive criteria for review of loss mitigation programs at this time and not to make investor guidelines with respect to loss mitigation enforceable against servicers by borrowers through RESPA. The Bureau will continue to monitor developments in the market and work with the prudential regulators, as well as other Federal agencies, to assess collectively whether additional rules are necessary and appropriate to improve outcomes for all participants in the mortgage market.

Although the Bureau is not mandating specific loss mitigation criteria and, instead, is adopting a procedural approach, the Bureau is finalizing the loss mitigation procedures as proposed with significant adjustments, as set forth below, that are designed to enhance the effectiveness of the proposed procedures in light of the public comments. Such adjustments include, for example, expanding the scope of the loss mitigation procedures to apply to all servicers, not just servicers that offer loss mitigation options in the ordinary course of business, adjusting the timelines for the loss mitigation procedures, and implementing protections for borrowers from the harms of dual tracking. Although the Bureau believes that substantially all, if not all, servicers offer loss mitigation options, as defined by the Bureau, in the ordinary course of business, the Bureau acknowledges, and agrees with, comments received from consumer advocates that requiring servicers to comply with the loss mitigation requirements notwithstanding their business practices better achieves the consumer protection purposes of RESPA.

As set forth more fully below (and above with respect to § 1024.38), the Bureau is also making adjustments to other sections of the rule to address concerns raised by certain consumer advocate commenters related to loss mitigation. For example, § 1024.38 requires servicers to maintain policies and procedures reasonably designed to implement the loss mitigation program requirements established by owners or assignees of mortgage loans. Such programs may require servicers to consider whether a borrower's material change in financial circumstances warrants further consideration of the availability of loss mitigation options and may require consideration of loss mitigation applications beyond the timelines required by the Bureau. Although the Bureau has determined not to adjust the loss mitigation procedures requirements in § 1024.41 to address such concerns, the Bureau has made adjustments to the requirements for servicers to adopt policies and procedures in § 1024.38, as set forth above, which has the effect of addressing such concerns.

Restricting Dual Tracking

The proposed rule would have required servicers to comply with the loss mitigation procedures by reviewing complete and timely loss mitigation applications before a servicer could proceed with a foreclosure sale. Timely applications included complete loss mitigation applications submitted within a deadline established by a servicer, which could be no earlier than 90 days before a foreclosure sale. By prohibiting servicers from proceeding to a foreclosure sale while a complete and timely loss mitigation application is pending, the proposed rule would have addressed one of the most direct consumer harms resulting from concurrent evaluation of loss mitigation options and prosecution of foreclosure proceedings.

The comments from consumer advocacy groups regarding dual tracking set forth three distinct themes: (1) borrowers should have the opportunity to be reviewed for a loss mitigation option before a servicer begins a foreclosure process, (2) borrowers should not receive inconsistent communications relating to, or incur costs for, continuing the foreclosure process when a loss mitigation review is underway, and (3) borrowers should receive the protection of required loss mitigation procedures closer in time to the date of a foreclosure sale than 90 days. The first two of these themes are addressed here and the third is addressed below with respect to timelines.

Consumer advocates submitted a significant number of comments stating that although the Bureau's proposal would address harms resulting from a foreclosure sale, other harms to consumers relating to dual tracking were not addressed by the proposed rule. These included consumer harms resulting from participating in the foreclosure process, including confusion from receiving inconsistent and confusing foreclosure communications, while loss mitigation reviews are on-going. Such harm potentially may lead to failures by borrowers to complete loss mitigation processes that may have more beneficial consequences for borrowers as well as owners or assignees of mortgage loans. Further, borrowers may be negatively impacted because borrowers are responsible for accruing foreclosure costs while an application for a loss mitigation option is under review. These costs burden already struggling borrowers and may impact the evaluation and ultimate outcome for a borrower for a loss mitigation option.

These commenters recommended that the Bureau restrict servicers from pursuing the foreclosure process and evaluating a borrower for loss mitigation options on dual tracks. For example, twelve individual consumer advocacy groups, as well as two coalitions of consumer advocacy groups stated that the Bureau should require servicers to undertake loss mitigation evaluations, including loan modification reviews and offers, prior to beginning the foreclosure process. These commenters further stated that homeowners applying for loss mitigation options after a foreclosure has started should have their foreclosures paused while their files are reviewed, and if needed, appealed, in a timely fashion. Further, three consumer advocacy groups commented that the Bureau should create a defined pre-foreclosure period of 120 days before a borrower can be referred to foreclosure. This period should also have a mandatory review of a borrower before proceeding with foreclosure.

Industry commenters also addressed whether the Bureau should implement protections relating to dual tracking apart from the prohibition on foreclosure sale set forth in the proposal. Outreach with servicers and their trade associations indicated general support for maintaining consistency among any “dual tracking” requirements established by the Bureau and the National Mortgage Settlement. A law firm commented that the Bureau’s requirements with respect to “dual tracking” should model the National Mortgage Settlement. Notably, a community bank and its trade association commented that, as a consequence of the Bureau’s regulations on loss mitigation procedures, servicers may try to begin foreclosures as soon as possible after delinquency in order to evade the requirements of the Bureau’s loss mitigation procedures and preserve flexibility in handling the foreclosure process.

The Bureau is persuaded by the comments that the potential harm to consumers of commencing a foreclosure proceeding before the consumer has had a reasonable opportunity to submit a loss mitigation application or while a complete loss mitigation application is pending is substantial. The fact that the GSEs and the National Mortgage Settlement both prohibit servicers from commencing foreclosure for a specified period of time to afford a borrower a reasonable opportunity to apply for a loss mitigation option is further persuasive that providing borrowers with the same protection would advance the consumer protection purposes of RESPA and would not present a significant risk of unintended consequences.

Accordingly, in light of the comments, the Bureau has determined to implement restrictions on dual tracking beyond those set forth in the proposal. These restrictions have three main components. First, the Bureau is prohibiting a servicer of a mortgage loan subject to § 1024.41 from making the first notice or filing required for a foreclosure process unless a borrower is more than 120 days delinquent. After a borrower is 120 days delinquent, a servicer may make the first notice or filing required for a foreclosure process unless the borrower has submitted a complete loss mitigation application, in which case, the servicer must complete the review and appeal procedures set forth in § 1024.41 before starting the foreclosure process. If a borrower is performing under an agreement on a loss mitigation option, such as a trial modification, the servicer may not commence the foreclosure process.

Second, the Bureau is expanding and clarifying the prohibition on proceeding with a foreclosure sale. If a borrower submits a complete loss mitigation application by an applicable deadline, as discussed below, a servicer must complete the loss mitigation procedures before proceeding to a foreclosure judgment, obtaining an order of sale for the property, or conducting a foreclosure sale. As set forth below, the Bureau has clarified that proceeding to a foreclosure judgment includes filing a dispositive motion, such as a motion for a default judgment, judgment on the pleadings, or summary judgment, which may result in the issuance of a foreclosure judgment. If such a motion is pending when a servicer receives a complete loss mitigation application, the servicer should take reasonable steps to avoid a ruling on such motion until completing the loss mitigation procedures. The Bureau is also finalizing the prohibition on proceeding with a foreclosure sale if a borrower is performing under a trial modification or other agreed upon loss mitigation option.

Third, as set forth below with respect to timelines, the Bureau is implementing procedures applicable to the evaluation of complete loss mitigation applications submitted by borrowers less than 90 days before a foreclosure sale, but 37 days or more before a foreclosure sale. These procedures expand the protections from the harms of dual tracking to borrowers that submit complete loss mitigation applications closer in time to a foreclosure sale. The Bureau received comments from consumer advocates in states with non-judicial foreclosure processes that operate on relatively short timelines indicating that consumers in such states may not benefit from the protections implemented by the Bureau. The Bureau agrees with these comments and is implementing protections on dual tracking that address different timing scenarios. The Bureau believes that such provisions are necessary and appropriate to achieve the consumer protection purposes of RESPA, including ensuring that consumers in all jurisdictions have an opportunity to submit a complete loss mitigation application and avoid certain of the harms resulting from dual tracking.

The Bureau is not, however, otherwise mandating a pause in foreclosure proceedings if a loss mitigation application is submitted after a foreclosure proceeding has been commenced. Once the foreclosure process is initiated, there are typically timelines for the steps that follow that are established by state law or, in judicial foreclosure jurisdictions, by court rules or orders entered in individual cases. Those timelines and steps vary from state to state and even from case to case. Some of these timelines and steps have been implemented to ensure that consumers receive the benefit of disclosures or processes enacted by state law to assist consumers. So long as a servicer does not proceed with a dispositive motion in a foreclosure action, the Bureau does not believe that the benefits that might accrue to borrowers from mandating a pause in a foreclosure proceeding (which pause may last for up to 88 days under the timelines the Bureau is mandating for resolving loss mitigation applications) are justified by the disruption that might result to state court proceedings from a mandated pause and the risk of a loss mitigation application being submitted strategically to delay or derail the foreclosure process.

The Bureau recognizes that requiring a pause in foreclosures while a complete loss mitigation application is being considered would create incentives for servicers to address such applications expeditiously. The Bureau believes, however, that the best way to address this issue is by mandating strict deadlines for review of a complete loss mitigation application, as the Bureau is doing, and providing for enforcement of those deadlines through private rights of action. The Bureau also recognizes that a pause could reduce costs to borrowers that would otherwise be incurred for the foreclosure process while a loss mitigation application is under review. However, so long as a servicer adheres to the timelines established by the Bureau, the Bureau does not believe that these costs are likely to be substantial.

Appropriate Timelines for the Loss Mitigation Procedures

The proposed rule would have required mortgage servicers to comply with the procedures set forth in proposed § 1024.41 with respect to a complete loss mitigation application that was received by a deadline established by a servicer, which deadline could be no earlier than 90 days before a foreclosure sale. In the proposal, the Bureau stated that a 90-day threshold set an appropriate line because a servicer who received a complete loss mitigation application 90 days before a foreclosure sale would have 30 days to review a borrower’s application for a loss mitigation option, would be able to provide the borrower with 14 days to respond to the servicer’s offer of a loss mitigation option and/or to file an appeal, would be able to consider any timely appeal during a subsequent 30 day period, and would be able to provide the borrower with an additional 14 days to respond to any offer of a loss mitigation option after an appeal. Thus, with the timeline set forth, a servicer would be able to complete the entire process within 88 days and a 90 day deadline could accommodate completing the process without rescheduling the foreclosure sale. Proposed comment 41(f)-1 would have clarified that where a foreclosure sale had not been scheduled, or where a foreclosure sale could occur less than 90 days after the sale is scheduled pursuant to State law, a servicer should establish a deadline that is no earlier than 90 days before the day that a servicer reasonably anticipates that a foreclosure sale will be scheduled.

Although some servicers and a trade association indicated support for the 90 day maximum deadline, in general, commenters indicated substantial disagreement regarding the appropriate deadlines and framework for structuring timing requirements for reviewing loss mitigation applications. A substantial number of consumer advocacy groups objected to the underlying premise of the deadline requirement. In addition to establishing timeframes prior to a foreclosure referral, as discussed above, consumer advocacy groups stated that borrowers should be permitted to provide complete loss mitigation applications less than 90 days before a foreclosure sale and receive the protection of the procedures required by the Bureau. A housing counselor and three consumer advocacy groups indicated that the deadline should be extended until a maximum of 14 days before a foreclosure sale. Another consumer advocacy group stated that the deadline should be no more than 7 days before a foreclosure sale. These commenters further recommended postponing a foreclosure sale if an application received at least 14 days before a sale is still in the review process by 14 days before a sale to allow time for review and appeals. Further, consumer advocacy groups operating in states with non-judicial foreclosure processes with relatively short timelines stated that borrowers may not be able to benefit from the loss mitigation procedures established by the Bureau within the 90-day deadline set forth in the proposal.

Conversely, banks, credit unions, and non-bank servicers, as well as their trade associations, objected to the proposed 90 day deadline requirement because it would purportedly provide too much time for borrowers to pursue loss mitigation applications. Two credit unions, two large banks, and two non-bank servicers objected to the 90 day deadline on the basis that the rules should encourage borrowers to seek assistance at the earliest possible time while the delinquency may be curable and allow the borrower to retain the home. A non-bank servicer stated that it appreciated the 90 day deadline but indicated that this deadline could be so far after an initial delinquency in certain jurisdictions that it may lead to a borrower submitting an application after so much time has passed that no option could reasonably assist the borrower with curing a delinquency. Further, a non-bank servicer suggested the Bureau implement staged timelines rather than requiring servicers to establish timelines that may be inconsistent with state law.[174]

In light of the comments, the Bureau has reconsidered the proposed approach to timelines for the loss mitigation procedures and has made certain adjustments. The Bureau is persuaded that, however regrettable, some borrowers simply may not be prepared to come to terms with their situations and explore the availability of loss mitigation options until foreclosure is close at hand. The Bureau also is persuaded that it is necessary, and appropriate, to implement protections for consumers that apply for loss mitigation options closer in time to a foreclosure sale than 90 days. At the same time, the Bureau is cognizant that if applications received at the last moment were allowed to unduly delay a foreclosure from proceeding, there is a risk that the application process could be used tactically to stall foreclosure. Given that foreclosure timelines are already very long in many jurisdictions; given that the Bureau is implementing protections to

[174] A large bank servicer also commented that in light of the incentives for the borrower, it should not be required to notify a consumer of a deadline so long as the communication with the consumer is not within 90 days of the foreclosure sale.

mandate early communication with borrowers regarding loss mitigation options; and given that the Bureau is prohibiting servicers from proceeding to foreclosure unless a borrower is more than 120 days delinquent to ensure that borrowers have the opportunity to apply for loss mitigation options early in the delinquency timeline; the Bureau does not believe it is appropriate to permit applications provided shortly before a foreclosure sale to delay the foreclosure.

Accordingly, as set forth below, instead of setting an overall deadline for the loss mitigation procedures, the Bureau is implementing timelines that provide different loss mitigation processes with differing levels of protection at certain stages of the foreclosure process. These requirements are: (1) pursuant to § 1024.41(b)(2), a servicer must comply with the requirements relating to acknowledgement of a loss mitigation application and notice of additional documents and information required to complete a loss mitigation application for any loss mitigation application received 45 days or more before a foreclosure sale; (2) pursuant to § 1024.41(c)(1), a servicer must evaluate within 30 days any complete loss mitigation application received more than 37 days before a foreclosure sale; (3) pursuant to § 1024.41(e)(1), if a servicer receives a complete loss mitigation application 90 days or more before a foreclosure sale, the servicer must provide the borrower at least 14 days to accept or reject an offer of a loss mitigation option; if a servicer receives a complete loss mitigation application less than 90 days before a foreclosure sale but more than 37 days before a foreclosure sale, the servicer must provide the borrower at least 7 days to accept or reject an offer of a loss mitigation option; and (4) pursuant to § 1024.41(h)(1), a servicer must comply with the appeal process for any complete loss mitigation application received 90 days or more before a foreclosure sale. Applying these timelines together yields four timing scenarios depending upon when a borrower submits a complete loss mitigation application.

Scenario 1. If a borrower is less than 120 days delinquent, or if a borrower is more than 120 days delinquent but the servicer has not made the first notice or filing required for a foreclosure process, and a borrower submits a complete loss mitigation application, the servicer (1) must review the complete loss mitigation application within 30 days, (2) must allow the borrower at least 14 days to accept or reject an offer of a loss mitigation option, and (3) must permit the borrower to appeal the denial of a loan modification option pursuant to § 1024.41(h)(1). Further, for all loss mitigation applications received in this timeframe, the servicer must comply with the requirements for acknowledging a loss mitigation application and providing notice of additional information and documents necessary to make an incomplete loss mitigation application complete. The servicer may not make the first notice or filing required for a foreclosure process unless these procedures are completed.

Scenario 2. If a borrower submits a complete loss mitigation application after a servicer has made the first notice or filing for a foreclosure process, but 90 days or more exist before a foreclosure sale, the servicer (1) must review the complete loss mitigation application within 30 days, (2) must allow the borrower at least 14 days to accept or reject an offer of a loss mitigation option, and (3) must permit the borrower to appeal the denial of a loan modification option pursuant to § 1024.41(h). Further, for all loss mitigation applications received in this timeframe, the servicer must comply with the requirements for acknowledging a loss mitigation application and providing notice of additional information and documents necessary to make an incomplete loss mitigation application complete. The servicer may not proceed to foreclosure judgment or order of sale, or conduct a foreclosure sale, unless these procedures are completed.

Scenario 3. If a borrower submits a complete loss mitigation application after a servicer has made the first notice or filing for a foreclosure process, and less than 90 days, but more than

37 days, exist before a foreclosure sale, the servicer (1) must review the complete loss mitigation application within 30 days, and (2) must allow the borrower at least 7 days to accept or reject an offer of a loss mitigation option. The servicer is not required to permit the borrower to appeal the denial of a loan modification option pursuant to § 1024.41(h)(1). Further, the servicer must comply with the requirements for acknowledging a loss mitigation application and providing notice of additional information and documents necessary to make an incomplete loss mitigation application complete only if the loss mitigation application was received 45 days or more before a foreclosure sale. The servicer may not proceed to foreclosure judgment or order of sale, or conduct a foreclosure sale, unless these procedures are completed.

Scenario 4. None of the loss mitigation procedures apply to a loss mitigation application, including a complete loss mitigation application, received 37 days or less before a foreclosure sale. Servicers are required, however, pursuant to § 1024.38 to implement policies and procedures reasonably designed to achieve the objective of reviewing borrowers for loss mitigation options pursuant to requirements established by an owner or assignee of a mortgage loan. As set forth below, nothing in § 1024.41 excuses a servicer from complying with additional requirements imposed by an owner or assignee of a mortgage loan. For example, the GSEs require servicers to engage in certain procedures to review loss mitigation applications submitted 37 days or less before a foreclosure sale, and servicers may be required by the GSEs to comply with those requirements. The requirement to implement policies and procedures to achieve the objective of reviewing borrowers for loss mitigation options pursuant to requirements established by an owner or assignee of a mortgage loan includes timelines established by any such owner or assignee of a mortgage loan.

Other servicer loss mitigation requirements

As set forth above, the Bureau recognizes that servicers have many layers of requirements with which they must comply. These include requirements imposed by owners or assignees of mortgage loans, as well as requirements imposed by State law or pursuant to settlement agreements and consent orders.

Notably, certain commenters requested clarification regarding the interaction between the proposed rules and certain existing servicing requirements. The GSEs commented that their processes allow reviews of loss mitigation applications closer in time to foreclosure than the 90 day timeline proposed by the Bureau and requested clarification regarding the impact of the proposed deadlines in the loss mitigation procedures and the GSE requirements. A non-bank servicer also requested clarification regarding the interaction of timelines imposed by the Bureau and existing State or local pre-foreclosure mediation requirements that may require a complete loss mitigation application package in advance of the mediation meeting.

In order to reduce burden to servicers and costs to borrowers, the Bureau has sought to maintain consistency among § 1024.41, the National Mortgage Settlement, FHFA's servicing alignment initiative, Federal regulatory agency consent orders, and State law mortgage servicing statutory requirements. In certain instances, each of these other sources of servicing requirements may be more restrictive or prescriptive than § 1024.41. That is intentional. Section 1024.41 establishes standard consumer protections and provides flexibility for Federal regulatory agency requirements, State law, or investor and guarantor requirements to impose obligations that may be more restrictive on servicers.

Servicers should comply with the most restrictive requirements to which they are subject. For example, § 1024.41 imposes requirements with respect to complete loss mitigation applications received more than 37 days before a foreclosure sale. This is consistent with the

National Mortgage Settlement and GSE requirements.[175] Notably, the National Mortgage Settlement and GSE requirements impose obligations to conduct an expedited loss mitigation evaluation for servicers with respect to loss mitigation applications received 37 days or less before a foreclosure sale (although in certain circumstances the servicer is not necessarily required to complete the review before foreclosure). Nothing in § 1024.41 prohibits or impedes a servicer from complying with these requirements and servicers may be required to comply with requirements that are more prescriptive than the regulations implemented by the Bureau. Indeed, as noted, § 1024.38 requires servicers to maintain policies and procedures reasonably designed to achieve the objective of evaluating borrower for loss mitigation options pursuant to requirements established by owners or assignees of mortgage loans. Similarly, if a servicer is required to proactively engage with a borrower to evaluate a borrower for a loss mitigation option prior to engaging in a mandatory mediation or arbitration process, § 1024.41 does not prohibit a servicer from obtaining a loss mitigation application before such process so long as the servicer complies with the procedures set forth in § 1024.41 with respect to such application.

Legal Authority

The Bureau relies on its authority under sections 6(j)(3), 6(k)(1)(C), 6(k)(1)(E) and 19(a) of RESPA to establish final rules setting forth obligations on servicers to comply with the loss mitigation procedures in § 1024.41. These loss mitigation procedures are necessary and appropriate to achieve the consumer protection purposes of RESPA, including by requiring servicers to provide borrowers with timely access to accurate and necessary information regarding an evaluation for a foreclosure avoidance option and to facilitate the evaluation of borrowers for foreclosure avoidance options. Further, the loss mitigation procedures implement,

[175] *See* National Mortgage Settlement., at Appendix A, at A-19.

in part, a servicer’s obligation to take timely action to correct errors relating to avoiding foreclosure under section 6(k)(1)(C) of RESPA by establishing servicer duties and procedures that must be followed where appropriate to avoid errors with respect to foreclosure.

In addition, the Bureau relies on its authority pursuant to section 1022(b) of the Dodd-Frank Act to prescribe regulations necessary or appropriate to carry out the purposes and objectives of Federal consumer financial law, including the purposes and objectives of Title X of the Dodd-Frank Act. Specifically, the Bureau believes that § 1024.41 is necessary and appropriate to carry out the purpose under section 1021(a) of the Dodd-Frank Act of ensuring that markets for consumer financial products and services are fair, transparent, and competitive, and the objective under section 1021(b) of the Dodd-Frank Act of ensuring that markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation. The Bureau additionally relies on its authority under section 1032(a) of the Dodd-Frank Act, which authorizes the Bureau to prescribe the rules to ensure that features of any consumer financial product or service, both initially and over the terms of the product or service, are fully, accurately, and effectively disclosed to consumers in a manner that permits consumers to understand the costs, benefits, and risks associated with the product or service, in light of the facts and circumstances.

41(a) Enforcement and limitations

Proposed § 1024.41(a) would have required any servicer that offers loss mitigation options in the ordinary course of business to comply with the requirements of § 1024.41. The purpose of this section was to clarify that the requirements in proposed § 1024.41 are applicable only to those servicers that are engaged in a practice, in the ordinary course of business, of evaluating loss mitigation options for their own portfolios or pursuant to duties owed to investors or guarantors of mortgage loans. Further, proposed comment 41(a)-1 clarified that nothing in proposed § 1024.41 was intended to impose a duty on a servicer to offer loss mitigation options to borrowers generally or to offer or approve any particular borrower for a loss mitigation option. As set forth in the 2012 RESPA Servicing Proposal, the Bureau did not intend to create a private right of action for borrowers to enforce, in private litigation, any requirements that are imposed by owners or assignees of mortgage loans (including investors or guarantors) on servicers to mitigate losses for such parties. Rather, the Bureau intended that borrowers could enforce the loss mitigation procedures against servicers to ensure that servicers complied with the appropriate procedural steps before completing the foreclosure process when a borrower had submitted a complete loss mitigation application.

If a servicer did not evaluate borrowers for loss mitigation options in the ordinary course of business, the servicer would not have been subject to proposed § 1024.41. In proposed comment 41(a)-2, the Bureau set forth examples of practices that, by themselves, would not have been considered indicia that a servicer had opted to offer loss mitigation options in the ordinary course of business. The Bureau notes, however, that the proposed definition of loss mitigation options in § 1024.31, however, was expansive, encompassing not just loan modifications, but also forbearance plans, short sale agreements, and deed-in-lieu of foreclosure programs. The Bureau believes that substantially all, if not all, servicers offer these loss mitigation options in the ordinary course of business.

Consumer advocate commenters stated that the loss mitigation procedures should not be limited to mortgage servicers that offered loss mitigation options in the ordinary course of business. These commenters stated that the recent financial crisis has demonstrated that reviewing borrowers for loss mitigation options has risen to the level of a standard servicer duty that should be expected of all mortgage servicers. Further, industry commenters did not take issue with the concept that engaging in loss mitigation should be considered a standard servicer duty. Rather, comments from industry focused instead on whether prescriptive loss mitigation requirements would adversely affect the manner in which servicers engage in reviews of borrowers for loss mitigation options. Specifically, a number of large banks and their trade associations stated that a private right of action for loss mitigation was a particular concern. These commenters indicated that borrowers should not be entitled to bring an action to enforce loss mitigation requirements set forth by an owner or assignee of a mortgage loan or a voluntary loss mitigation program (such as HAMP). In addition, the Bureau's outreach and additional analysis raised questions regarding whether the scope of the loss mitigation provisions should be limited to a borrower's principal residence consistent with other governmental initiatives.

Community banks, credit unions, and their trade associations commented that the loss mitigation procedures (and other rulemakings not specifically required by the Dodd-Frank Act) should exempt small servicers. These commenters also argued that the definition of small servicers should be large enough to cover most credit unions and community banks. A trade association for reverse mortgage lenders commented that reverse mortgage servicers should be exempt from the proposed rules. Further, four farm credit system institutions stated that they should be exempt because they are required to comply with distressed borrower regulations promulgated by the Farm Credit Administration in 12 CFR part 617. A nonprofit lender commented that bona-fide nonprofits should be exempt from the mortgage servicing rules.

The Bureau has adjusted § 1024.41(a) in response to the public comments. First, the Bureau has revised § 1024.41(a) to eliminate the limitation on the loss mitigation procedures to only those servicers that offer loss mitigation options in the ordinary course of business. The

Bureau has not identified from the comments or outreach any servicers that did not offer loss mitigation options in the ordinary course of business as contemplated by the Bureau and would not have been subject to § 1024.41 as proposed. Moreover, the Bureau believes that owners or assignees of mortgage loans should determine whether they will offer loss mitigation options and, if so, the Bureau does not believe an exemption from complying with the loss mitigation procedures should exist based on separate business practices of a servicer. Further, the Bureau believes that it is preferable that temporary or pilot programs should be addressed through clarifications regarding for which programs, if any, a servicer should evaluate a borrower's application, not by limiting the overall application of the loss mitigation procedures. Accordingly, § 1024.41(a) has been adjusted to require that servicers comply with the requirements of § 1024.41 without consideration of whether a servicer currently offers loss mitigation options in the ordinary course of business.

Second, for the reasons set forth above with respect to § 1024.30, the scope of § 1024.41 has been changed to limit the scope of the loss mitigation procedures to a borrower's principal residence. Third, for the reasons set forth above with respect to § 1024.30, the Bureau has exempted from the loss mitigation procedures requirements (1) small servicers (with the exception of § 1024.41(j)), (2) reverse mortgage transactions, and (3) "qualified lenders" that are required to comply with Farm Credit Administration regulations relating to distressed borrowers.

Finally, the Bureau observes that the loss mitigation procedures are issued, among other authorities, pursuant to the Bureau's authority under section 6 of RESPA. Violations of section 6 of RESPA are subject to a private right of action pursuant to section 6(f) of RESPA. Servicers may be liable to borrowers pursuant to section 6(f) of RESPA for failure to comply with the loss mitigation procedures in § 1024.41. The Bureau believes a private right of action for borrowers to enforce the loss mitigation procedures is necessary to ensure that individual borrowers have the necessary tools to ensure they receive the benefit of the loss mitigation procedures in their own individual circumstances. Further, the Bureau believes that the risk of a private right of action will not negatively impact access to, or cost of, credit. The requirements in § 1024.41 include clear procedural requirements and have been calibrated to avoid risks of litigation relating to owner or assignee contractual requirements, as discussed below. Further, the requirements in § 1024.41 are consistent with requirements already implemented by the GSEs, the National Mortgage Settlement, and certain State laws, with respect to certain servicers. Accordingly, the Bureau has revised § 1024.41(a) to reflect the effect of section 6(f) of RESPA with respect to a private right of action.

Although servicers are required to comply with the procedural requirements of § 1024.41, the Bureau has clarified in response to inquiries raised by commenters that servicers are not required by the Bureau's rules to offer any particular loss mitigation option to any particular borrower. Nothing in § 1024.41 should affect whether a borrower is permitted as a matter of contract law to enforce the terms of any contract or agreement between a servicer and an owner or assignee of a mortgage loan. Accordingly, the Bureau finalizes § 1024.41(a) by relocating the substance of proposed comment 41(a)-1 in the text of § 1024.41(a). Section 1024.41(a) provides that nothing in § 1024.41 imposes a duty on a servicer to offer any borrower any particular loss mitigation option. Further, § 1024.41(a) states nothing in § 1024.41 should be construed to permit a borrower to enforce the terms of any agreement between a servicer and the owner or assignee of a mortgage loan, including with respect to the evaluation for, or provision of, any loss mitigation option.

41(b) Loss Mitigation Application

Proposed § 1024.41(b) defined the term complete loss mitigation application and set forth requirements for servicers with regard to both complete and incomplete loss mitigation applications. Specifically, proposed § 1024.41(b)(1) stated that a complete loss mitigation application means a borrower's submission requesting evaluation for a loss mitigation option for which a servicer has received all the information the servicer regularly obtains and considers in evaluating a loss mitigation application by the deadline established by the servicer. Proposed § 1024.41(b)(2) would have required a servicer that receives an incomplete loss mitigation application to exercise reasonable diligence in obtaining information from a borrower to make the application complete. Further, proposed § 1024.41(b)(2) would have required a servicer that receives an incomplete loss mitigation application earlier than 5 days (excluding legal public holidays, Saturdays, and Sundays) before the deadline established by the servicer to notify the borrower that the application was incomplete, the documents and information necessary to make the application complete, and the date by which the borrower must submit such documents. The servicer would have been required to provide the notice within 5 days (excluding legal public holidays, Saturdays, and Sundays) after receiving an incomplete loss mitigation application.

The Bureau received numerous comments regarding these requirements. First, the Bureau received comments regarding the definition of a loss mitigation application and a complete loss mitigation application. A large bank servicer requested clarification regarding prequalification processes, including whether oral communications with borrowers should be considered a loss mitigation application. A non-bank servicer commented that defining a complete loss mitigation application as requiring all the information the servicer "regularly obtains" is both ambiguous and unduly limiting with respect to evaluations of borrowers in substantially different circumstances or subject to substantially different investor requirements.

The commenter suggested instead that the Bureau define a complete loss mitigation application as a borrower's submission requesting evaluation for a loss mitigation option for which a servicer has received all the information the servicer obtains and considers in evaluating a loss mitigation application for a particular loan type, investor, or other group of loans, as deemed appropriate by the servicer.

Second, the Bureau received comments regarding servicer obligations upon receipt of a loss mitigation application. Specifically, four consumer advocacy groups stated that servicers should be required to review a loss mitigation application for completeness promptly upon receipt. Conversely, a trade association commented that five days is too short a time to evaluate a loss mitigation application, determine that it is incomplete, determine what additional documentation is needed, and generate a notice to the borrower. A financial industry trade association requested that the Bureau provide guidance in the form of examples of "reasonable diligence" to obtain information from borrowers. The commenter suggested that one example be that the servicer sends a letter or electronic communication to the borrower with a list of what information is needed and how the borrower can submit that information.

Third, a non-bank servicer commented that the Bureau should create standard loss mitigation applications so that industry may align around similar loss mitigation strategies. Finally, a coalition of 60 consumer advocacy groups commented that the Bureau should mandate that servicers provide borrowers that submit incomplete loss mitigation applications a reasonable amount of time to complete the applications.

The Bureau has adjusted § 1024.41(b) in response to the public comments. First, the Bureau agrees with commenters that further clarification regarding the definitions of the term loss mitigation application and complete loss mitigation application is appropriate. Section

1024.31 defines a loss mitigation application to mean an oral or written request for a loss mitigation option that is accompanied by any information required by a servicer for evaluation for a loss mitigation option. This definition is intended to distinguish between inquiries regarding the availability of loss mitigation options and an actual request for an evaluation for a loss mitigation option. The Bureau intends the loss mitigation procedures to apply when servicers receive loss mitigation applications during oral communications with borrowers, including communications between the borrower and any contact personnel assigned to the borrower's mortgage loan account pursuant to § 1024.40.

The definition of a complete loss mitigation application (and, consequently, an incomplete loss mitigation application) has been designed similarly to the complete and incomplete application concepts underlying Regulation B. *See* 12 CFR 1002.2(f), 1002.9(c). Thus, at a point in a conversation between a borrower and a mortgage servicer, if the borrower requests an evaluation for a loss mitigation option and provides information to the servicer that will be used in the evaluation of a loss mitigation application, the borrower has made a loss mitigation application, and the servicer, pursuant to § 1024.41(b)(2)(i)(A), must review the application promptly to determine whether it is complete or incomplete.

If a loss mitigation application is complete and has been submitted by an applicable deadline, the servicer must evaluate the loss mitigation application pursuant to the requirements in § 1024.41. Under § 1024.41(b)(1), a complete loss mitigation application means 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. The Bureau has removed the requirement that a loss mitigation application must include all the information the servicer regularly obtains and considers in evaluating loss mitigation applications. This change is intended to further the goal of providing servicers flexibility to determine the information required for any individual mortgage loan borrower's application for a loss mitigation option and require servicers to consider an application complete notwithstanding that the borrower has not submitted certain information that the servicer may regularly require but is irrelevant with respect to a particular borrower. Thus, under § 1024.41(b)(1), a loss mitigation application is complete when a servicer receives all information that a servicer requires from a borrower.

Section 1024.41(b)(1) requires a servicer to exercise reasonable diligence in obtaining information to complete a loss mitigation application and to evaluate a complete loss mitigation application. Accordingly, a servicer is required to exercise reasonable diligence to follow up with borrowers to obtain any information the borrower has not submitted that is necessary to make the application complete and to ensure that the servicer timely receives any necessary third-party information, such as an automated valuation or consumer report. Contrary to requests from commenters, the Bureau declines to implement commentary that providing the notice required by § 1024.41(b)(2) constitutes reasonable diligence for purposes of § 1024.41(b)(1). Rather, reasonable diligence is based on the circumstances, including the circumstances of any continuing discussions between a borrower and the contact personnel assigned pursuant to § 1024.40. Such contact personnel should have information regarding the status of a borrower's loss mitigation application and should work with borrowers to make any such loss mitigation application complete. The Bureau has added commentary to clarify this requirement as set forth below.

The Bureau has added commentary to § 1024.41(b) to clarify the meaning of a complete loss mitigation application. The Bureau has added comment 41(b)(1)-1 to clarify that a servicer, consistent with the requirements of the investor or assignee with respect to a particular mortgage, has flexibility to establish application requirements for a loss mitigation option offered by an owner or assignee and to decide the type and amount of information it will require from borrowers applying for loss mitigation options. The Bureau agrees with the comments that servicers may require different application information for loss mitigation programs undertaken for different owners or assignees of mortgage loans. Different owners or assignees may establish widely varying criteria and requirements for loss mitigation evaluations, and servicers may require different forms and types of information to effectuate such programs. The Bureau believes the requirement that a complete loss mitigation application contain information required by servicers provides appropriate flexibility to servicers to determine application requirements consistent with the variety of borrower circumstances or owner or assignee requirements that servicers must evaluate and to ensure that individual borrowers are not obliged to provide information or documents that are unnecessary and inappropriate for a loss mitigation evaluation.

The Bureau has added comments 41(b)(1)-2 and 41(b)(1)-3 in response to comments requesting clarity regarding prequalification programs and other feedback seeking clarification regarding informal communications between servicers and borrowers. As set forth above, the Bureau received a comment from a large bank servicer requesting clarification regarding prequalification programs. Further, in outreach, another large bank servicer requested clarification regarding whether the Bureau’s regulations, and specifically, the error resolution and the loss mitigation procedures represented a policy of regulation of informal communication.

Although the Bureau has withdrawn the proposed requirements regarding oral error resolution and information request process with respect to §§ 1024.35-1024.36, the Bureau believes that the loss mitigation procedures should apply when a borrower orally requests evaluation for a loss mitigation option. One of the principal goals of the early intervention and continuity of contact requirements of the rule is to establish oral communications between servicers and borrowers; it would be inconsistent with that purpose to ignore these communications in determining whether a borrower has requested consideration for a loss mitigation option. Further, one of the purposes of the loss mitigation procedures is to provide accurate information to borrowers and to facilitate the evaluation of foreclosure avoidance options by creating uniform evaluation processes and ensuring that a borrower obtains an evaluation for all loss mitigation options available to the borrower. That purpose may be circumvented if the loss mitigation requirements focused only on written communications, and a servicer could steer a borrower into a specific loss mitigation option through oral communications. Consistent with the requirements set forth in Regulation B regarding applications for credit, the Bureau believes it is necessary and appropriate to achieve the purposes of RESPA to implement requirements on servicers to treat oral communications that have sufficiently passed the point of inquiries as loss mitigation applications subject to the loss mitigation procedures.

The Bureau has added comment 41(b)(1)-2 to clarify when an inquiry or prequalification request becomes an application. The Bureau recognizes there is substantial ambiguity in interpersonal communications but believes that loss mitigation applications should be considered expansively. For example, if a borrower indicates that the borrower would like to apply for a loss mitigation option and provides any information the servicer would evaluate in connection with a loss mitigation application, a borrower has submitted a loss mitigation application. Because a servicer must exercise reasonable diligence in making a loss mitigation application complete, the Bureau believes appropriate communication with a borrower that expresses an interest in a loss mitigation option is to clarify the borrower's intention regarding the submission and to obtain information from the borrower to make a loss mitigation application complete.

Not all communications regarding loss mitigation options will constitute loss mitigation applications. Accordingly, the Bureau has added comment 41(b)(1)-3 to illustrate circumstances where oral communications will not constitute a loss mitigation application. Comment 41(b)(1)-3.i states that 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. In this example, only an inquiry has taken place. The borrower has not submitted information that would be evaluated in connection with a loss mitigation option. Comment 41(b)(1)-3.ii states that 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. A servicer that provides information regarding the process for applying for a loss mitigation application has not taken a loss mitigation application in this circumstance.

The Bureau has added comment 41(b)(1)-4 to indicate how a servicer should comply with its requirement to undertake reasonable diligence to obtain the information necessary to make an incomplete loss mitigation application complete. For example, a servicer must request information necessary to make a loss mitigation application complete promptly after receiving the loss mitigation application. Comment 41(b)(1)-4.i provides that reasonable diligence requires contacting an applicant promptly to obtain information missing from a loss mitigation application, like an address or telephone number to verify employment. This obligation exists notwithstanding a servicer's obligation to provide a notice pursuant to § 1024.41(b)(2)(i)(B). Further, comment 41(b)(1)-4.ii provides that reasonable diligence also includes reviewing documents that may have been included in connection with a servicing transfer to determine if a borrower previously submitted information or documents to a transferor servicer that may complete a loss mitigation application.

The Bureau has added comment 41(b)(1)-5 regarding circumstances where a servicer requires information that is not in the borrower’s control. A loss mitigation application is complete when a borrower provides all information required from the borrower notwithstanding that additional information may be required by a servicer that is not in the control of a borrower. For example, if a servicer requires a consumer report for a loss mitigation evaluation, a loss mitigation application is considered complete if a borrower has submitted all information required from the borrower without regard to whether a servicer has obtained a consumer report that a servicer has requested from a consumer reporting agency.

The Bureau has also adjusted the requirements in § 1024.41(b)(2) with respect to a servicer’s obligation upon receipt of a loss mitigation application. The Bureau agrees with the comments it received that a servicer should be required to promptly evaluate a loss mitigation application to determine whether the application is complete or incomplete. Accordingly, § 1024.41(b)(2)(i)(A) requires a servicer that receives a loss mitigation application to determine promptly upon receipt whether such application is complete or incomplete. Further, under § 1024.41(b)(2)(i)(B), a servicer must notify a borrower in 5 days (excluding legal public holidays, Saturdays, and Sundays) regarding whether the servicer has determined an application is complete or incomplete.

Proposed § 1024.41(b)(2) would have required a servicer that receives a loss mitigation application to provide a notice to a borrower only in the event a loss mitigation application is incomplete. The Bureau recognizes, however, that a borrower that submits a complete loss mitigation application may not realize that such application has been considered complete and that an evaluation for a loss mitigation application is ongoing. Accordingly, § 1024.41(b)(2)(i)(B) requires providing a notice to a borrower regardless of whether the application is complete or incomplete.

Section 1024.41(b)(2)(i)(B) further requires a servicer that determines a loss mitigation application is incomplete to notify the borrower of the additional documents and information the borrower must submit to make the loss mitigation application complete and the date by which the borrower must submit the additional documents and information to be reviewed. The notice to the borrower must also include a statement that the borrower should consider contacting servicers of any other mortgage loans secured by the same property to discuss available loss mitigation options. The Bureau has added this statement to the notice in connection with withdrawing proposed § 1024.41(j), discussed below, with respect to providing a loss mitigation application to servicers of other mortgage loan liens. Further, because of the added content of the notice and the requirements with respect to oral communications constituting loss mitigation applications, the Bureau has determined to withdraw the proposal that the notice required pursuant to § 1024.41(b)(2)(i)(B) could be provided orally. Rather, the Bureau has determined the notice must be provided in writing.

Finally, the Bureau finds that 5 days (excluding legal public holidays, Saturdays, and Sundays) is a reasonable amount of time for a servicer to comply with the requirements for an incomplete loss mitigation application. Fannie Mae and Freddie Mac guidelines, as well as the National Mortgage Settlement, require servicers to provide a substantially similar but, in some cases, more prescriptive, notice within 5 business days of receipt of an incomplete loss mitigation application.[176]

The Bureau has added § 1024.41(b)(2)(ii) to clarify how a servicer communicates to a borrower the deadline by which the borrower should submit a complete loss mitigation application. A servicer must state to the borrower that the borrower should submit documents needed to complete the application by the earliest remaining date of four potential options. The rule provides that a servicer must disclose the date a borrower should complete a loss mitigation application, rather than the date a borrower must complete a loss mitigation application, because the effect of the various timelines is that a borrower may miss the deadline communicated by the servicer but still be able to submit a complete loss mitigation application in the future (and thus a requirement that a borrower must complete an application by an earlier deadline may be inaccurate). However, a borrower should complete the application by the applicable deadline in order to incur the lowest application burden and to gain the benefit of the most consumer protections for the loss mitigation application. Further, the Bureau agrees with comments received from a number of servicers and their trade associations that it is appropriate to encourage earlier submission of loss mitigation applications by borrowers.

A servicer must state that the borrower should provide the documents and information by the earliest remaining date of: (a) the date by which any document or information already submitted by a borrower will be considered stale or invalid pursuant to any requirements applicable to any loss mitigation program available to the borrower; (b) the date that is the 120th day of the borrower's delinquency; (c) the date that is 90 days before a foreclosure sale; or (d) the date that is 38 days before a foreclosure sale. Dates in (b), (c), and (d) are designed to match

[176] *See United States of America v. Bank of America Corp.*, at Appendix A, at A-26, http://www.nationalmortgagesettlement.com; Freddie Mac Single Family Seller/Servicer Guide, Vol. 2 § 64.6(d)(4) (2012); Fannie Mae Single Family Servicing Guide § 205.07 (2012).

the various scenarios set forth above with respect to the timing of the loss mitigation procedures. The date in (a) is meant to incorporate any internal servicer policy to ensure that borrowers do not submit documents beyond the date when documents and information previously provided are considered stale or invalid, which would frustrate the process of obtaining a complete loss mitigation application.

41(c) Evaluation of Loss Mitigation Applications

Proposed § 1024.41(c) would have required that, within 30 days of receiving a complete loss mitigation application, a servicer must evaluate the borrower for all loss mitigation options available to the borrower and provide the borrower with a written notice stating the servicer's determination of whether it will offer the borrower a loss mitigation option. In the proposal, the Bureau stated that it was appropriate to require servicers to evaluate complete loss mitigation applications within 30 days because review of a loss mitigation application in 30 days is an industry standard, as discussed above.

The Bureau further stated that it is appropriate to require a servicer to evaluate a borrower for all loss mitigation options available to the borrower rather than requiring borrowers to select options for which the borrower may be evaluated. A servicer is in a better position than a borrower to determine the loss mitigation programs for which a borrower may qualify. Requiring that a borrower select a loss mitigation option for which the borrower may be considered, or only evaluating a borrower for a few loss mitigation options, may cause a borrower to accept or reject an option without seeking evaluation for another option. This may lead to less effective programs, disparate outcomes for similarly situated borrowers, and longer timelines for effectuating loss mitigation options. Instead, the Bureau has proposed that a servicer evaluate a borrower for all loss mitigation programs available to the borrower. The

Bureau believes that this approach will ensure that all borrowers receive fair evaluations for all options available to them and will be able to select options appropriate for their circumstances. In sum, owners or assignees of mortgage loans (including investors, guarantors, and insurers that establish criteria governing loss mitigation programs) retain the ability to manage loss mitigation programs to ensure that borrower eligibility and program administration is consistent with their requirements, while borrowers will be able to understand all potential options that may be available.

Consumer advocate commenters supported the proposed requirement that a servicer evaluate a borrower for all loss mitigation options available to the borrower within 30 days. For example, one such commenter stated that the rule as proposed would add more transparency in the loss mitigation process, would enable borrowers to make a more informed decision on their loss mitigation options, and would actually reduce paperwork burdens on borrowers by eliminating the necessity of a borrower having to send duplicate and additional paperwork each time a borrower requested consideration for a different loss mitigation option.

Conversely, industry commenters, including numerous large banks, credit unions, community banks, non-bank servicers, and their trade associations, generally opposed the requirement that a servicer review a borrower for all loss mitigation options available to the borrower within 30 days. These commenters generally believed that servicers should be permitted to follow investor waterfalls for foreclosure prevention options. These commenters stated that the volume of documents borrowers may be required to submit to effectuate a review of all loss mitigation options may be substantial. Further, industry commenters stated that the rule as proposed would require overly complicated and unclear communications with customers and those customers should be entitled to a communication only about the option for which they specifically applied.

Commenters requested that the Bureau permit servicers to allow borrowers to choose between home retention and non-home retention options for evaluations. For example, a Federal agency stated that servicers should be able to separate borrowers for evaluation purposes based upon whether a hardship is temporary or permanent and, accordingly, whether a home retention or non-home retention option is appropriate. A law firm commented that servicers should be able to apply different evaluations for borrowers that indicate a preference for a home retention or non-home retention option. A small credit union and three community bank commenters stated that loss mitigation should be a flexible process and prescriptive requirements that servicers review for all options may reduce optionality in favor of a "one size fits all" process. Further, a credit union trade association stated that requiring credit unions to review for all loss mitigation options would be overly burdensome. One trade association requested that the requirement that a servicer be required to review for all loss mitigation options should be withdrawn because it is not required by the Dodd-Frank Act and because providing a notice of all options will result in appeals from borrowers seeking more attractive workout options.[177] Finally, a large bank servicer and a Federal agency requested clarification that a servicer is not required to provide borrowers with information about modifications that are not available to the borrower.

For the reasons discussed below, the Bureau is adopting § 1024.41(c) as proposed with minor modifications. Further, the Bureau is adopting the commentary to § 1024.41(c) with

[177] Notably, a large bank servicer stated that the 30 day requirement should be waived if a servicer does not have delegated authority to approve loss mitigation options. The commenter's suggestion is contrary to the purposes of the loss mitigation procedures and the general servicing policies, procedures, and requirements (which require a servicer to establish policies and procedures for identifying with specificity the loss mitigation options that are available to borrowers and evaluating borrowers for loss mitigation options pursuant to requirements established by an owner or assignee of a mortgage loan).

minor modifications. The requirements of proposed § 1024.41(c) are located within § 1024.41(c)(1). The Bureau has also added § 1024.41(c)(2) to implement requirements for offering loss mitigation options to borrowers that have not completed loss mitigation applications, which are discussed below.

Eligibility Criteria

The Bureau agrees with commenters that owners and assignees of mortgage loans should have latitude to establish appropriate loss mitigation programs and the eligibility criteria for such programs. For example, if a servicer services mortgage loans for itself and for the GSEs, a servicer is only required to review a borrower whose mortgage loan is guaranteed by the GSEs for programs approved by the GSEs, pursuant to criteria established by the GSEs. The servicer is not required to review the GSE borrower for loss mitigation options the servicer implements for mortgage loans owned by the servicer or another investor, because such loss mitigation options are not available to the borrower and any such evaluation is unnecessary and futile. Further, the applicable owner or assignee has latitude to set forth any evaluation criteria the owner or assignee deems appropriate. If a loss mitigation option is only available for military servicemembers, a servicer has conducted a proper evaluation if it determines that the borrower is not a servicemember and, therefore, does not meet the eligibility criteria for the program. Similarly, to the extent eligibility criteria for pilot programs, temporary programs, or programs that are limited by the number of participating borrowers, would exclude a borrower from eligibility, a servicer is not obligated to evaluate the borrower for any such loss mitigation option as if such eligibility criteria did not exist. The owner or assignee of a mortgage loan has the freedom to establish or authorize any programs it deems appropriate and to establish or authorize the eligibility criteria for such programs that the owner or assignee deems appropriate; a servicer is only obligated to provide the borrower a notice stating the results of the servicer’s review of the borrower’s complete loss mitigation application for the programs established or authorized by the owner or assignee of a mortgage loan. To this end, the Bureau has clarified in § 1024.41(c)(1) that a servicer is required to evaluate a borrower for all loss mitigation options available to the borrower.

Use of a “waterfall” as an eligibility criterion. The Bureau believes the requirements in § 1024.41(c)(1) to evaluate a loss mitigation application for all loss mitigation options available to the borrower is not inconsistent with a determination by an owner or assignee of a mortgage loan to evaluate a borrower for loss mitigation options by using a “waterfall” method. A waterfall is simply an evaluation rule. For example, an owner or assignee may provide six loss mitigation programs for which borrowers should be evaluated. The owner or assignee may further provide that the programs should be evaluated in order from one through six and that if a borrower is offered a program evaluated higher in the order, the borrower will be denied for all other programs lower in the order. Thus, in this example, if a borrower were offered program two, the borrower would necessarily be denied for programs three through six as a consequence of the owner’s or assignee’s requirements. Nothing in the loss mitigation procedures dictates a result different than that obtained using a waterfall.

Evaluation for all loss mitigation options. The requirement that a servicer evaluate a borrower for all loss mitigation options available to the borrower, in combination with the notice requirements of § 1024.41(d)(1), is intended to enable a borrower (1) to understand the loss mitigation options for which the servicer has determined the borrower is eligible, (2) to understand the results of the servicer’s evaluation of the borrower for any loan modification option, and (3) for any loan modification option, to obtain the reasons for the borrower’s denial for a loan modification option. The impact of the requirement that a borrower receive an evaluation for all loss mitigation options available to the borrower is that the borrower may, by submitting a single application, receive a complete review and either obtain a loss mitigation option that a borrower may or may not have known was available or, pursuant to § 1024.41(d)(1), understand the reasons why the borrower is not eligible for a loan modification option. The Bureau does not believe that the requirements in § 1024.41(c)(1) will impair an investor's or guarantor's ability to implement or manage loss mitigation programs.

The Bureau also does not believe that the requirement that a servicer evaluate a borrower for all loss mitigation options available to the borrower will impose onerous application burdens on a borrower, require a servicer to provide confusing or unhelpful communications to borrowers, or frustrate borrowers that, in theory, may only wish to obtain an evaluation for a specific type of loss mitigation option. Loss mitigation options generally fall into two categories, those involving home retention (most notably loan modifications) and non-home retention options. Insofar as commenters are suggesting that different retention options carry with them different application requirements and that servicers should be free to consider borrowers sequentially for different options through separate application processes, the Bureau disagrees. With respect to home retention options, outreach with consumer advocates and industry participants has not indicated that there are significant differences in the information required for consideration for differing retention options offered by a single investor or assignee such that requiring consideration for all of these options at once will add burden to the consumer or servicer. Importantly, the National Mortgage Settlement states that "[u]pon timely receipt of a complete loan modification application, Servicer shall evaluate borrowers for all available loan modification options for which they are eligible . . . ."[178]

Although it is true, as a large bank commenter stated, that the Bureau's requirements apply to all loss mitigation options and not just loan modification options, the Bureau does not believe that this additional requirement will add significant burden to consumers or servicers. The Bureau understands from outreach with servicers that most investors or guarantors do not permit a borrower to be evaluated for a non-home retention option (i.e., to walk away from a mortgage) unless a home retention option is not viable. Thus, in all events borrowers will be required to submit the financial and other information required for consideration of retention options and servicers will be required to obtain additional information about the borrower (such as a consumer report) and the property (such as an automated valuation). The Bureau is not persuaded that significant additional burdens are required to be able to consider a borrower for non-home retention options if the borrower is found not to be eligible for home retention options.

The Bureau understands that industry commenters and trade associations are concerned that evaluation for non-home retention options may cause servicers to incur additional work and cost, including by obtaining a title search or an appraisal. The Bureau has added comment 41(c)(1)-3 to clarify that an offer of a non-home retention option may be conditional upon receipt of further information not in the borrower's possession and necessary to establish the parameters of a servicer's offer. For example, a servicer complies with the requirement for evaluating the borrower for a short sale option if the servicer offers the borrower the opportunity to enter into a listing or marketing period agreement but indicates that specifics of an acceptable short sale transaction may be subject to further information obtained from an appraisal or title search.

The Bureau believes that significant consumer benefits will result from requiring that

[178] *See United States of America v. Bank of America Corp.*, at Appendix A, at A-16, http://www.nationalmortgagesettlement.com.

consumers be considered for all loss mitigation options in a single process. The Bureau understands that borrowers may incur more significant burdens in the current market as evaluations occur sequentially over time and borrower documents and information must be continuously updated to make such documents and information current. The requirements of § 1024.41(c)(1) will eliminate the need for borrowers to submit multiple applications for different loss mitigation options and will provide for more efficient compliance by servicers with the requirements of the rule. In addition, as set forth below with respect to § 1024.41(d), the Bureau believes providing information to borrowers on the result of their review for available loss mitigation options will assist consumers and is unlikely to create confusion.

Further, the Bureau believes that a process that imposes the obligation on the borrower to identify the appropriate loss mitigation option is inappropriate. The selection of a loss mitigation option is complex and requires an understanding of the potential eligibility of a borrower when compared against the complex rule systems applied to evaluate such options. The differences among loss mitigation programs befuddle industry experts, much less borrowers attempting to evaluate such options while under the fear of foreclosure. The Bureau simply does not believe that permitting servicers to steer borrowers to apply for particular loss mitigation options, when the servicer has a far superior capacity to make the relevant determination, reasonably protects the borrower's interest. Rather, the Bureau believes a more reasonable default is for the party with the knowledge of all loss mitigation options available to the borrower, and the capability of evaluating the borrower for all loss mitigation options available to the borrower, to carry the burden of evaluating the borrower for all loss mitigation options available from the owner or assignee of the mortgage loan and to communicate the results of that review to the borrower. If the borrower is found to be eligible for more than one option, the borrower can then make a more informed choice of the options available *after* the evaluation has occurred, not before; if the borrower is found to be eligible for only one option (as would likely be the case where the owner or assignee follows a waterfall) the borrower will at least receive information indicating why the borrower is being offered a particular option and not others and will, in certain circumstances, be able to seek further review from the servicer if the borrower believes that the waterfall has been misapplied.

In addition, review for non-home retention options may provide a valuable sorting function to the short sale market. Currently, a borrower who has been denied a loan modification and who is attempting to complete a short sale may proceed with little guidance from a servicer regarding whether the borrower will be eligible for a short sale. A short sale involves identifying a potential purchaser and working to obtain funding and a transaction that may be acceptable to an owner or assignee of a mortgage loan even before a determination regarding whether an owner or assignee would potentially consider a short sale. By requiring an evaluation for non-home retention options simultaneously with the evaluation for home retention options, the Bureau creates a process by which a borrower that is denied a home retention option will be told whether the borrower is eligible for a non-home retention option, such as a short sale. Borrowers who are told that they are eligible for a short sale may better undertake the effort necessary to reach a viable sale, and may make the market for short sale transactions more efficient by obtaining servicer agreement to consider a short sale transaction. Further, concurrent evaluation reduces the risk that borrowers do not pursue options that may be available as a result of exhaustion with the loss mitigation process.

The Bureau has added commentary to § 1024.41(c)(1) to clarify a servicer’s obligation to evaluate a complete loss mitigation application for all loss mitigation options available from the owner or assignee of a mortgage loan. Comment 41(c)(1)-1 states that the conduct of a servicer's evaluation with respect to any loss mitigation option is in the discretion of the servicer. A servicer meets the requirements of § 1024.41(c)(1)(i) if the servicer makes a determination regarding the borrower's eligibility for a loss mitigation program. Consistent with § 1024.41(a), because nothing in section 1024.41 should be construed to resolve whether borrower can enforce the terms of any agreement between a servicer and the owner or assignee of a mortgage loan, including with respect to the evaluation for, or provision of, any loss mitigation option, § 1024.41(c)(1) does not require that an evaluation meet any standard other than the discretion of the servicer. Accordingly, the Bureau intends that the requirement that a servicer evaluate a borrower for all loss mitigation options available from an owner or assignee of a mortgage loan sets forth the procedure that must be followed by servicers but does not create, in itself, a requirement that a servicer conduct such evaluation in any particular manner. Accordingly, the Bureau does not intend to create a private right of action to enforce the guidelines of any owner or assignee's loss mitigation program, including any HAMP requirements or GSE requirements, as a consequence of this requirement. Servicers should take note, however, that, pursuant to § 1024.38, above, and independent of the requirements of § 1024.41, a servicer may be required to implement policies and procedures to achieve the objective of properly evaluating borrowers for loss mitigation options pursuant to requirements established by an owner or assignee of a mortgage loan.

Comment 41(c)(1)-2 states that a servicer should evaluate a borrower for all loss mitigation options for which a borrower may qualify based upon eligibility criteria applicable to each loss mitigation option, as established by the owner or assignee of a mortgage loan. For example, a servicer services mortgage loans for two different investors or guarantors of mortgage loans. Those investors or guarantors each have different loss mitigation programs. A servicer is only required to evaluate the borrower for loss mitigation options offered by the owner or assignee of a borrower's mortgage loan and is not required to evaluate a borrower for any other program implemented by a mortgage servicer for an owner or assignee that is different than the owner or assignee of the borrower's mortgage loan. Further, if a servicer services mortgage loans for an owner or assignee of a mortgage loan that has established pilot programs, temporary programs, or programs that are limited by the number of participating borrowers, a servicer is only required to evaluate whether a borrower is eligible for any such program consistent with criteria established by an owner or assignee of a mortgage loan. For example, if an owner or assignee has limited a pilot program to a certain geographic area or to a limited number of participants, a servicer should evaluate the borrower in accordance with any such restrictions, which may include an owner or assignee's determination not to include the borrower in the pilot program or among the group of participants applying for a limited option.

Evaluation of incomplete loss mitigation applications

The Bureau also believes it is appropriate to clarify the impact of the loss mitigation procedures when a borrower submits an incomplete loss mitigation application. As set forth above, the definition of a loss mitigation application is expansive. When a borrower begins the process by submitting a loss mitigation application, a servicer should be required to work with that borrower to make the loss mitigation application complete, and thereby assure the borrower receives the protections set forth in § 1024.41. Accordingly, §1024.41(c)(2)(i) states that a servicer shall not evade the requirement to evaluate a complete loss mitigation option for all loss mitigation options available to the borrower, including, for example, by offering an individual loss mitigation option based upon an evaluation of borrower's incomplete loss mitigation application.

Comment 41(c)(2)(i)-1 clarifies that § 1024.41(c)(2)(i) does not prohibit a servicer from offering a loss mitigation option to a borrower that has not submitted a loss mitigation application. Further, a servicer may offer a borrower that has submitted an incomplete loss mitigation application a loss mitigation option, but only if the offer of the loss mitigation option is not based on an evaluation of the individual borrower's circumstances. Comment 41(c)(2)(i)-1 provides, for example, that if a servicer offers trial loan modification programs to all borrowers that become 150 days delinquent without an application or consideration of any information provided by a borrower in connection with a loss mitigation application, the servicer is not required to comply with the requirements of section 1024.41 with respect to any such trial loan modification program for any borrower that has not submitted a loss mitigation application or that has submitted an incomplete loss mitigation application. The example complies with § 1024.41(c)(2) because the offer of the loss mitigation option is based on a standard practice and not on an evaluation of any information or documents submitted by a borrower in connection with a loss mitigation application. Comment 41(c)(2)(i)-2 clarifies that although a review of a borrower's incomplete loss mitigation application is within a servicer's discretion, and is not required by § 1024.41, a servicer may be required separately, in accordance with policies and procedures maintained pursuant to § 1024.38(b)(2)(v), to properly evaluate a borrower who submits an application for a loss mitigation option for all loss mitigation options available to the borrower pursuant to any requirements established by the owner or assignee of the borrower's mortgage loan. Such evaluation may be subject to requirements applicable to loss mitigation applications otherwise considered incomplete pursuant to § 1024.41.

The Bureau recognizes that some borrowers may submit incomplete loss mitigation applications and may not submit the documents or information necessary to make those applications complete. The Bureau believes that the best approach for servicers to comply with the requirements of § 1024.41 is to work with borrowers to make incomplete loss mitigation applications complete and servicers have an obligation to undertake reasonable diligence in this regard. However, where such diligence has failed, the loss mitigation procedures should not serve as an impediment to working with borrowers that are not able to complete the loss mitigation application requirements. Accordingly, § 1024.41(c)(2)(ii) provides that notwithstanding § 1024.41(c)(2)(i), if a servicer has exercised reasonable diligence in obtaining documents and information to complete a loss mitigation application, but a loss mitigation application remains incomplete for a significant period of time under the circumstances without further progress by a borrower to make the loss mitigation application complete, a servicer may, in its discretion, evaluate an incomplete loss mitigation application and determine to offer a borrower a loss mitigation option. Any such evaluation and offer is not subject to the requirements of § 1024.41 and shall not constitute an evaluation of a single complete loss mitigation application for purposes of § 1024.41(i). The Bureau has further added comment 41(c)(2)(ii) to clarify the meaning of a significant period of time under the circumstances. Any such circumstances may include consideration of the relative timing of the foreclosure process. Thus, a delay of 10 or 15 days in providing documents or information to make a loss mitigation complete may be more significant if the period is close to a potential foreclosure sale than such period would be if it were to occur early in the foreclosure process, including, for example, in the time period that is less than 120 days of delinquency.

Timing

The Bureau is adjusting the requirement in § 1024.41(c) to implement the various staged timing requirements set forth above. Specifically, to implement the staged deadlines, a servicer is required to comply with the requirements of § 1024.41(c) for any complete loss mitigation application received more than 37 days before a foreclosure sale.

41(d) Denial of Loan Modification Options

Proposed § 1024.41(d) would have required that servicers comply with additional obligations with respect to a denial of a borrower's loss mitigation application with respect to trial or permanent loan modification options. A servicer would have been required to provide any such borrower a written notice stating the specific reasons for the determination and inform the borrower of the right to appeal the servicer's determination pursuant to proposed § 1024.41(h). The notice would have included the deadline for filing the appeal and any requirements for pursuing the appeal, such as, for example, forms or documents the borrower must file in connection with the appeal process. Further, proposed comments 41(d)(1)-1 and 41(d)(1)-2 would have provided examples regarding the information that should be included in the specific reasons provided to the borrower in the notice when a borrower is denied a loan modification on the basis of an investor requirement or a net present value calculation. The Bureau stated that it believed such information would assist borrowers in providing appropriate and relevant information to servicers in connection with the appeal process. Further, such requirements were consistent with the National Mortgage Settlement.[179]

Consumers and consumer advocacy group commenters generally supported the requirements in § 1024.41(d). One such commenter stated that the requirement would further the goal of protecting consumers against discriminatory servicing practices because the required notice would likely discourage those practices. A consumer advocacy group commented that the

[179] *See United States of America v. Bank of America Corp.*, at Appendix A, at A-27, http://www.nationalmortgagesettlement.com.

notification requirement should be expanded to all loss mitigation programs beyond loan modifications and a coalition of consumer advocacy groups commented that servicers should be required to provide specific information and documents about the investor denial to borrowers. Consumer commenters on Regulation Room were concerned that servicers misrepresented that investor requirements barred a loan modification when no such restriction existed and sought fuller disclosure in that regard.

Industry commenters submitted various requests for clarification regarding § 1024.41(d). Two credit unions and their trade associations, as well as a consumer advocacy group, requested clarification regarding the impact of the required notification regarding a denial of a loan modification option with the adverse action notice required by Regulation B when a consumer report is used in connection with a denial for a loan modification option. Further, the GSEs requested clarification regarding whether the offer of an alternative loss mitigation option (such as a forbearance or repayment plan) constitutes a denial of a loss mitigation option. Finally, a financial industry trade association requested clarification regarding whether servicers could use the "check-the-box" model clauses adopted by the Making Home Affordable Program to communicate with borrowers regarding denials of loss mitigation options pursuant to § 1024.41(d).

The Bureau is finalizing § 1024.41(d) as proposed, with technical changes to clarify that the requirement applies to complete loss mitigation applications and that loan modification options refers to programs offered by the applicable owner or assignee of a mortgage loan. In light of the comments, the Bureau believes that adjustments to the commentary are warranted. The Bureau is adjusting comments 41(d)(1)-1 and 41(d)(1)-2 as set forth below, and adding comments 41(d)(1)-3 and 41(d)(1)-4.

Accordingly, pursuant to § 1024.41(d), a servicer that denies a borrower's complete loss mitigation application for any trial or permanent loan modification option available from the owner or assignee of a mortgage loan shall state in the notice provided to the borrower pursuant to § 1024.41(c)(1)(ii) the specific reasons for the servicer's determination for each such trial or permanent loan modification program; and, if applicable, that the borrower may appeal the servicer's determination for any such trial or permanent loan modification option, the deadline for the borrower to make an appeal, and any requirements for making an appeal. Importantly, § 1024.41(d) provides special rules for those loss mitigation options that involve loan modifications. With respect to those options, the servicer is required to provide the borrower with the specific reasons for denying the borrower for each trial or permanent modification for which the borrower was considered and, if applicable, notice of the borrower's right to appeal. However, under § 1024.41(d), a servicer is not required to disclose to a borrower a denial for a loss mitigation option that is not a loan modification program (for non-loan modification options, such denial is implicit in the servicer's failure to offer such a loss mitigation option).

With respect to identifying the reasons for a servicer's denial of a borrower for a loan modification option, the Bureau recognizes the consumer frustration resulting from servicer statements that investor requirements or net present value tests bar a loan modification option when the proper application of such purported requirements or tests may or may not actually result in such a determination. To assist consumer understanding, and to effectuate the appeal process, the Bureau believes that servicers that deny a loan modification option on the basis of an investor requirement or net present value model must provide additional detail to support such statements. Accordingly, the Bureau has adjusted comment 41(d)(1)-1 to state that if a trial or permanent loan modification option is denied because of a requirement of an owner or assignee of a mortgage loan, 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. A statement that the denial of a loan modification option is based on an investor requirement, without additional information specifically identifying the relevant investor or guarantor and the specific applicable requirement, is insufficient. However, where an investor or guarantor has established a waterfall and a borrower has qualified for a particular option on the waterfall, it is sufficient for the servicer to inform the borrower, with respect to other options further down the waterfall that the investor's requirements include the use of a waterfall and that a determination to offer an option on the waterfall necessarily results in a denial for any other options below the option for which the borrower has qualified, to the extent applicable for any such option.

Further, the Bureau has adjusted comment 41(d)(1)-2 to provide that if a trial or permanent loan modification is denied because of a net present value calculation, the specific reasons in the notice provided to the borrower must include all the inputs used in the net present value calculation, rather than just the limited inputs identified in the proposed commentary.

The Bureau has also added comments to address the form of the notice required by § 1024.41(d). No specific format is required for the notice provided pursuant to § 1024.41(d). Accordingly, servicers may determine the appropriate form, so long as the form includes the content required pursuant to § 1024.41(d). Comment 41(d)(1)-3 clarifies that a servicer may combine other notices required by applicable law, including, without limitation, a notice with respect to an adverse action, as required by Regulation B (12 CFR 1002 *et seq.*), or a notice required pursuant to the Fair Credit Reporting Act, with the notice required pursuant to section 1024.41(d), unless otherwise prohibited by applicable law.

Further, servicers may develop standard language and forms that are appropriate to comply with this section. The Making Home Affordable Program has promulgated model clauses that servicers operating pursuant to that program may use in communications with borrowers regarding denials of applicable loan modification options. Those clauses are set forth in Appendix A to the Making Home Affordable Program Handbook.[180] Without endorsing the use of those model clauses in any instance, the model clauses adopted by the Making Home Affordable Program may be appropriate for use in specific circumstances.[181] A servicer is responsible for monitoring whether the use of the model clauses is accurate and appropriate for any individual borrower.

Finally, comment 41(d)(1)-4 clarifies that any determination not to offer a loan modification option, notwithstanding whether a servicer offers a borrower a different loan modification option or other loss mitigation option, constitutes a denial of a loan modification option. Thus, if a servicer offers a borrower a forbearance option or repayment plan after evaluation of a complete loss mitigation application, any such offer, without an offer of a loan modification option, constitutes a denial for a loan modification option and a servicer shall provide the disclosures required pursuant to § 1024.41(d) with respect to any loan modification program available to the borrower. Again, to the extent a waterfall was the basis for the determination, the disclosure may state, for example, that the investor's requirement do not permit a borrower to receive a loan modification offer if a determination is made that the borrower has the capacity to repay the mortgage with forbearance or repayment, along with an explanation of the reasons for the conclusion that the borrower can do so with a forbearance

[180] Making Home Affordable Program, Handbook for Servicers of Non-GSE Mortgages, Version 4.0, August 17, 2012, available at https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/mhahandbook_40.pdf (last accessed January 18, 2012).

[181] The model clauses set forth in Appendix A of the Making Home Affordable Program Handbook are not incorporated by reference in Regulation X and do not provide servicers a safe harbor pursuant to section 19(b) of RESPA.

plan.

41(e) Borrower Response

Proposed § 1024.41(e) would have imposed standards for when a borrower is considered to have accepted or rejected a loss mitigation option offered by a servicer. The proposal stated that a servicer may impose requirements on the manner in which a borrower must accept or reject a loss mitigation option, subject to standards for acceptance and rejection set forth in the rule. The proposed rule would have provided that a borrower must have no less than 14 days to accept or reject an offer of a loss mitigation option. Further, the proposed rule would have clarified that if a servicer has not received a response from a borrower to an offer of loss mitigation after 14 days, the servicer may deem the borrower's lack of a response as a rejection of the loss mitigation option. A 14-day timeframe for a borrower to respond to an offer of a loss mitigation option is consistent with GSE requirements, the National Mortgage Settlement, certain State laws, and Federal regulatory agency requirements.[182] The proposed rule also would have provided that if a borrower does not satisfy the servicer's requirements for accepting a loss mitigation option, but submits the first payment that would be owed pursuant to any such loss mitigation option within the deadline established by the servicer, the borrower was to be deemed to have accepted the offer of a loss mitigation option. This presumption was intended to maintain consistency with the terms of the National Mortgage Settlement.

Numerous commenters, including large bank servicers, non-bank servicers, community

[182] *See United States of America v. Bank of America Corp.*, at Appendix A, at A-17, http://www.nationalmortgagesettlement.com; Freddie Mac Single Family Seller/Servicer Guide § 64.6(d)(5) (2012); Fannie Mae Single Family Servicing Guide § 103.04 (2012); 2012 Cal. Legis. Serv. Ch. 86 (A.B. 278) (WEST) amending Cal. Civ. Code § 2923. Moreover, Fannie Mae servicing guidelines provide a servicer's review of a borrower's application for a loss mitigation option must not exceed 30 days and that if a servicer receives a borrower response package before 37 days prior to the foreclosure sale date, no delay in legal action is required, unless an offer is made and the foreclosure sale is within the borrower's 14-day response period. *See* Fannie Mae Single Family Servicing Guide §§ 103.04, 107.01.02 (2012).

banks, credit unions, their trade associations, and the GSEs objected to allowing a borrower to accept a loss mitigation option by submitting a payment. Two financial industry trade associations and a community bank indicated that compliance with the statute of frauds, as well as investor contracts, requires written acceptance of a loss mitigation option, and the lack of a written agreement would create unjustified risks for servicers and owners or assignees of mortgage loans. A non-bank servicer stated that allowing acceptance by payment would only work for trial loan modification plans, and then only if subject to future documentation. The commenter stated that written agreements must be required for permanent loan modifications, short sales, deed-in-lieu of foreclosure agreements, and longer term repayment plans.

Further, a large bank servicer, a credit union, and two industry trade associations commented that it would be impractical to allow a borrower to accept a loss mitigation offer while simultaneously appealing an offer of a loan modification option. A large bank servicer suggested instead that the time for accepting the loss mitigation option should be suspended until after an appeal has been considered.

The Bureau has revised § 1024.41(e) in response to the comments as set forth below. Specifically, the Bureau has revised § 1024.41(e) to reflect changes to the timeline, the manner by which a borrower can accept a trial loan modification program, and the interaction with the appeal process.

41(e)(1) In general

The Bureau has adjusted the applicable timelines as discussed above. The proposed rule would have provided that a borrower must have no less than 14 days to accept or reject an offer of a loss mitigation option. This requirement has been changed to set two stages of deadlines: (1) if a borrower submits a complete loss mitigation application 90 days or more before a foreclosure sale, a borrower shall have at least 14 days to accept or reject the offer of a loss mitigation option, and (2) if a borrower submits a complete loss mitigation application less than 90 days but more than 37 days before a foreclosure sale, a borrower shall have at least 7 days to accept or reject the offer of a loss mitigation option. As discussed above, the 14 day timeline requirement is consistent with the National Mortgage Settlement and certain State law requirements. Further, the secondary 7-day timeline is designed to implement appropriate procedures for timing scenario 3, discussed above. Nothing in the rule would preclude a servicer who considers an application received less than 37 days before a foreclosure sale to offer the borrower a loss mitigation option and require a response in less than 7 days.

41(e)(2) Rejection

41(e)(2)(i) In general

The Bureau has added § 1024.41(e)(2)(i), to set forth the general rule that a servicer may deem that a borrower that has not accepted an offer of a loss mitigation option within the deadlines established pursuant to paragraph (e)(1) to have rejected that offer. This general rule is subject to the exceptions provided in § 1024.41(e)(2)(ii) and (e)(2)(iii). This provision finalizes the provision previously set forth in proposed § 1024.41(e)(3). Proposed § 1024.41(e)(3) is withdrawn.

41(e)(2)(ii) Trial loan modification plan

The Bureau agrees with commenters that the requirement that a servicer consider a borrower that has made the first payment for a loss mitigation option to have accepted the option is infeasible as proposed. The Bureau finds persuasive the arguments made by commenters regarding the necessity of clear contractual arrangements, as well as, potential issues posed by various State law statutes of frauds. Accordingly, the Bureau has substantially modified ,and separately enumerated, this requirement, which was previously set forth in proposed § 1024.41(e)(2), as § 1024.41(e)(2)(ii). Pursuant to § 1024.41(e)(2)(ii), and consistent with the requirement suggested by servicers and their trade associations, a borrower that does not comply with the servicer's requirements for accepting a trial loan modification plan, but submits the payments that would be owed pursuant to any such plan, shall be provided a reasonable period of time to fulfill any remaining requirements of the servicer for acceptance of the trial loan modification plan beyond the time period established pursuant to § 1024.41(e)(1). A servicer would not be required to consider such payment as acceptance of a servicer's offer of a loan modification option.

41(e)(2)(iii) Interaction with appeal process

The Bureau agrees with commenters that the requirement that a servicer permit a borrower to both accept an offer of a loss mitigation option and appeal the denial of a different loan modification option is infeasible as proposed. Specifically, the Bureau agrees that it is infeasible to require a servicer to implement a loss mitigation option, only to potentially have to back out of the implementation of such option and implement a different loss mitigation option after an appeal has been determined. Accordingly, the Bureau has modified this requirement and separately enumerated the requirement, which was previously set forth in proposed § 1024.41(e)(4), as § 1024.41(e)(2)(iii). Proposed § 1024.41(e)(4) is withdrawn.

Pursuant to § 1024.41(e)(2)(iii), and consistent with the requirement suggested by a large bank servicer, if a borrower makes an appeal of a denial of a loan modification option pursuant to § 1024.41(h), the borrower's deadline for accepting a loss mitigation option offered pursuant to § 1024.41(c) shall be extended to 14 days after the servicer provides the notice required pursuant to § 1024.41(h)(4). Accordingly, a borrower will be able to have an appeal reviewed and receive the servicer's decision regarding the appeal before a borrower will be required to accept any offer of a loss mitigation option.

Thus, if an appeal is granted, the borrower will have 14 days to determine whether to accept the loss mitigation option offered as a result of the appeal or any other previous offer made pursuant to § 1024.41(c)(1)(ii). If an appeal is denied, the borrower will have 14 days to determine whether to accept an offer for another loss mitigation option previously offered pursuant to § 1024.41(c)(1)(ii). A borrower may voluntarily determine to accept an offer of a loss mitigation option and withdraw an appeal at any time.

41(f) Prohibition on foreclosure referral

Proposed § 1024.41(f) would have required servicers to comply with the loss mitigation procedures by reviewing complete and timely loss mitigation applications before a servicer could proceed with a foreclosure sale. Timely applications included complete loss mitigation applications submitted within a deadline established by a servicers, which could be no earlier than 90 days before a foreclosure sale. By prohibiting servicers from proceeding to a foreclosure sale while a complete and timely loss mitigation application is pending, the proposed rule would have addressed one of the most direct consumer harms relating to concurrent evaluation of loss mitigation options and prosecution of foreclosure proceedings. The proposed rule also would have prohibited a servicer from moving forward with a foreclosure sale while the borrower was performing under an agreement on a loss mitigation option.

As discussed above, the Bureau received a significant number of comments from consumer advocacy groups regarding dual tracking of evaluation of loss mitigation options and foreclosure processing. These comments generally stated that borrowers should have the opportunity to be reviewed for a loss mitigation option before a servicer begins a foreclosure process. Further, consumer advocates submitted a significant number of comments stating that although the Bureau's proposal would address harms resulting from a foreclosure sale, other harms to consumers relating to dual tracking were not addressed by the proposed rule. These included consumer harms resulting from participating in the foreclosure process, including confusion from receiving inconsistent and confusing foreclosure communications while loss mitigation reviews are on-going. Such confusion potentially may lead to failures by borrowers to complete loss mitigation processes, or impede borrowers' ability to identify errors committed by servicers reviewing applications for loss mitigation options that may have more beneficial consequences for borrowers as well as owners or assignees of mortgage loans. Further, borrowers may be negatively impacted because borrowers are responsible for accruing potentially unnecessary foreclosure costs while an application for a loss mitigation option is under review. These costs burden already struggling borrowers and may impact the evaluation for a loss mitigation option.

As stated above, consumer advocacy group commenters recommended that the Bureau restrict servicers from pursuing the foreclosure process as well as evaluations of borrowers for loss mitigation on dual tracks. Twelve individual consumer advocacy groups as well as two coalitions of consumer advocacy groups stated that the Bureau should require servicers to undertake loss mitigation evaluations, including loan modification reviews and offers, prior to beginning the foreclosure process. Further, three consumer advocacy groups commented that the Bureau should create a defined pre-foreclosure period of 120 days before a borrower can be referred to foreclosure, and that servicers should perform a mandatory review of a borrower for loss mitigation options during this period.

Industry commenters also addressed whether the Bureau should implement protections relating to dual tracking apart from the prohibition on foreclosure sale set forth in the proposal. Outreach with servicers and their trade associations, indicated general support for maintaining consistency among any “dual tracking” requirements established by the Bureau and the National Mortgage Settlement. A law firm commented that Bureau requirements with respect to “dual tracking” should model the National Mortgage Settlement. Notably, a community bank and its trade association commented that as a consequence of the Bureau’s regulations on loss mitigation procedures, servicers may try to begin foreclosures as soon as possible after delinquency in order to preserve flexibility to comply with the loss mitigation procedures.

As discussed more fully in the opening of the discussion of § 1024.41, the Bureau is persuaded by the comments that the potential harm to consumers of commencing a foreclosure proceeding before the consumer has had a reasonable opportunity to submit a loss mitigation application or while a complete loss mitigation application is pending is substantial. The fact that the GSEs and the National Mortgage Settlement defer commencing foreclosure proceedings until a borrower has had a reasonable opportunity to apply for a loss mitigation option is further persuasive that such a restriction on the commencement of foreclosure proceedings would further the consumer protection purposes of RESPA and would not present a significant risk of unintended consequences.

The Bureau further believes it is necessary and appropriate for borrowers, servicers, and courts to have a known early period during which a servicer shall not begin the foreclosure process. The Bureau also believes that a servicer should not be permitted to begin the foreclosure process when there is a pending complete loss mitigation application and believes that such a requirement, unless coupled with a restriction on when the foreclosure process can begin, might incentivize servicers to begin the foreclosure process earlier than would otherwise occur to avoid delay resulting from the submission of a complete loss mitigation application. Accordingly, the Bureau believes it is necessary and appropriate to implement the consumer protection purposes of RESPA by barring servicers from making the first notice or filing required for a foreclosure process if a borrower has submitted a complete loss mitigation application before any such filing. The Bureau further believes it is necessary and appropriate to implement the consumer protection purposes of RESPA to bar servicers from making the first notice or filing required for a foreclosure process if a borrower is not more than 120 days delinquent in order to provide the borrower sufficient time to submit a complete loss mitigation application. The Bureau understands and intends that any such requirement will preempt State laws to the extent such laws permit filing of foreclosure actions earlier than after the 120th day of delinquency.

Accordingly, § 1024.41(f) implements these prohibitions. First, pursuant to § 1024.41(f)(1), a servicer shall not make the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process unless a borrower's mortgage loan obligation is greater than 120 days delinquent. Second, pursuant to § 1024.41(f)(2), if a borrower submits a complete loss mitigation application during the pre-foreclosure review period set forth in paragraph (f)(1) or before a servicer has made the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process, a servicer shall not make the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process unless the borrower is not eligible for any loss mitigation option (and any appeal is inapplicable or has been exhausted), has rejected all offers of loss mitigation options, or has failed to comply with the terms of an agreement on a loss mitigation option.

The Bureau has also added comment 41(f)(1)-1 to clarify the prohibition on making the first notice or filing required by applicable law. Per comment 41(f)(1)-1, the first notice or filing required by applicable law refers to any document required to be filed with a court, entered into a land record, or provided to a borrower as a requirement for proceeding with a judicial or non-judicial foreclosure process. Such filings include, for example, a foreclosure complaint, a notice of default, a notice of election and demand, or any other notice that is required by applicable law in order to pursue acceleration of a mortgage loan obligation or sale of a property securing a mortgage loan obligation.

41(g) Prohibition on foreclosure sale

Proposed § 1024.41(g) would have required that if a servicer receives a complete loss mitigation application by a deadline established by a servicer that was no earlier than 90 days before a foreclosure sale, the servicer may not proceed to foreclosure sale unless: (1) the servicer denies the borrower’s application for a loss mitigation option and the appeal process is inapplicable, the borrower has not requested an appeal, or the time for requesting an appeal has expired; (2) the servicer denies the borrower’s appeal; (3) the borrower rejects a servicer’s offer of a loss mitigation option; or (4) a borrower fails to perform pursuant to the terms of a loss mitigation option.

The Bureau stated that it is appropriate to require that if a borrower submits a complete loss mitigation application by the deadline established by the servicer, a servicer should not proceed with a foreclosure sale until the servicer and borrower have terminated discussions regarding loss mitigation options. Further, the Bureau stated that it is appropriate to suspend a foreclosure sale when a borrower is performing under an agreement on a loss mitigation option. A servicer’s basis for servicing a mortgage loan, and undertaking actions to collect on an unpaid obligation, emanates from the contractual relationship between the owner or assignee of the mortgage loan and the borrower. A servicer's determination to hold a foreclosure sale when a borrower is performing under an agreement that forestalls foreclosure violates the agreement entered into with the borrower. Additionally, it is already standard industry practice for a servicer to suspend a foreclosure sale during any period where a borrower is making payments pursuant to the terms of a trial loan modification. The Bureau stated in the proposal that prohibiting a servicer from proceeding with a foreclosure sale until termination of the loss mitigation discussion will eliminate the clearest harms to borrowers resulting from servicers' pursuit of loss mitigation and foreclosure proceedings concurrently.

Proposed comments 41(g)(4)-1 and 41(g)(4)-2 would have clarified the application of the borrower performance definitions with respect to short sales. As stated in the proposal, a short sale typically will include a listing or marketing period during which a servicer will agree to postpone a foreclosure sale in order to allow a borrower to market a property for a short sale transaction. The proposed comments stated that a borrower is considered to be performing under the terms of a short sale agreement, or other similar loss mitigation agreement, during the term of any such marketing or listing period, and any time subsequent to such periods, if a short sale transaction is approved by all relevant parties, and the servicer has received proof of funds or financing.

The Bureau received comments from industry trade associations as well as consumer advocacy groups supporting a prohibition on proceeding with a foreclosure sale while a loss mitigation application is pending or an appeal from a loan modification denial is pending. Numerous consumer advocate commenters also stated, as discussed above with respect to § 1024.41(f), that the Bureau should go further to bar servicers from beginning or continuing with a foreclosure process even before a foreclosure sale. Specifically, a consumer advocate stated that a servicer should be barred from proceeding to foreclosure judgment in a judicial foreclosure, not just from completing a foreclosure sale, because of the difficulty in delaying a foreclosure sale once a foreclosure judgment has been rendered.

Conversely, a credit union trade association, a non-bank servicer, and an individual consumer stated that the Bureau should not implement regulations that may have the impact of further delaying the foreclosure process. An individual consumer indicated that regulations that delay foreclosure will reduce access to credit and disproportionately increase costs of credit for low and moderate income households and first time homebuyers. Further, a non-bank servicer stated that borrower action should not be required before a servicer can proceed to foreclosure.

Finally, a non-bank servicer requested clarification regarding application of the prohibition to a short sale. Specifically, the commenter requested clarification regarding whether a servicer can proceed with a foreclosure sale if a property does not sell during a listing or marketing period for a short sale transaction.

The Bureau finalizes the rule as proposed with three adjustments. First, the Bureau has adjusted the prohibition on proceeding with a foreclosure sale to state that a servicer shall not move for foreclosure judgment or order of sale, or conduct a foreclosure sale. Second, the Bureau has adopted further clarification regarding the impact of the requirements on short sale transactions. Third, the Bureau has adjusted the timing of the requirement consistent with other changes to the timing of § 1024.41 generally, as discussed above.

As the Bureau stated in the proposal, the Bureau believes it is consistent with the purposes of RESPA, as well as with current market practice, to prohibit a servicer from completing the foreclosure process if a borrower has submitted a timely and complete application for a loss mitigation option until the servicer has completed the evaluation of the borrower for a loss mitigation option. In light of current market practice, the Bureau does not believe that § 1024.41(g) will have a substantial impact on expected foreclosure timelines. Significantly, the Bureau has structured the timelines for borrowers to submit complete loss mitigation applications, and for servicers to evaluate loss mitigation applications, consistently with the National Mortgage Settlement, the California Homeowner Bill of Rights, and requirements currently imposed on servicers that service mortgage loans for the GSEs or government lending programs. Accordingly, there is no reason to believe that the Bureau's requirements will substantially impact foreclosure timelines separate and apart from the baseline established as a result of current market practices. The Bureau also believes that avoiding the consumer harm caused by conducting a foreclosure sale before a servicer has completed an evaluation of a borrower for a loss mitigation option justifies any remaining concern regarding the potential impact on foreclosure timelines.

The Bureau agrees that it is appropriate to clarify that the prohibition on conducting a foreclosure sale includes a prohibition that a servicer shall not move for foreclosure judgment or order of sale, or conduct a foreclosure sale. The final rule clarifies servicer obligations in judicial foreclosure jurisdictions and, moreover, is consistent with the requirements imposed on certain servicers under the National Mortgage Settlement.[183]

The Bureau is also adding commentary to clarify the impact of this requirement on the foreclosure process. Comment 41(g)-1 clarifies the impact of the prohibition on moving for foreclosure judgment by dispositive motions. Specifically, comment 41(g)-1 states that the prohibition on a servicer moving for judgment or order of sale includes making a dispositive motion for foreclosure judgment, such as a motion for default judgment, judgment on the

[183] *See e.g.*, National Mortgage Settlement at Appendix A, at A-18, available at http://www.nationalmortgagesettlement.com.

pleadings, or summary judgment, which may directly result in a judgment of foreclosure or order of sale. If a servicer has made any such motion before receiving a complete loss mitigation application, a servicer should make a good faith attempt to avoid the issuance of a judgment on any such motion prior to completing the procedures required by § 1024.41. In addition, comment 41(g)-2 clarifies how servicers may proceed with a foreclosure process. As stated in comment 41(g)-2, nothing in 1024.41(g) prohibits a servicer from continuing to move forward with a foreclosure process (assuming that the first notice or filing was made before a servicer received a complete loss mitigation application) so long as the servicer does not take an action that will directly result in the issuance of a foreclosure judgment or order of sale, or a foreclosure sale. For example, if a servicer is required to engage in mediation or to make publications in a local paper, a servicer may proceed with any such requirements, so long as the applicable result of a foreclosure judgment or order of sale, or conduct of a foreclosure sale does not result from such action. The Bureau has also added comment 41(g)-3, which provides that 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.

The Bureau has also clarified the application of § 1024.41 with respect to loss mitigation applications submitted 37 days or less before a foreclosure sale in comment 41(g)-4. Comment 41(g)-4 clarifies that although a servicer is not required to comply with the requirements in § 1024.41 with respect to a loss mitigation application submitted 37 days or less before a foreclosure sale, a servicer is required separately, in accordance with policies and procedures maintained pursuant to § 1024.38(b)(2)(v), to properly evaluate a borrower who submits an application for a loss mitigation option for all loss mitigation options for which the borrower may be eligible pursuant to any requirements established by the owner or assignee of the borrower's mortgage loan. Such evaluation may be subject to requirements applicable to a review of a loss mitigation application submitted by a borrower 37 days or less before a foreclosure sale.

The Bureau also agrees that clarity is warranted regarding the impact of the requirements of § 1024.41(g)(3) on short sale transactions. The Bureau is finalizing comments 41(g)(3)-1 and 41(g)(3)-2, the substance of which was previously proposed as comments 41(g)(4)-1 and 41(g)(4)-2.[184] Comment 41(g)(3)-1 provides that a borrower is deemed to be performing under an agreement on a short sale, or other similar loss mitigation option, during the term of a marketing or listing period. Further comment 41(g)(3)-2 states that a borrower should be deemed to have obtained an approved short sale transaction if a short sale transaction has been approved by all relevant parties, including the servicer, other affected lienholders, or insurers, if applicable, and the servicer has received proof of funds or financing, unless circumstances otherwise indicate that an approved short sale transaction is not likely to occur. The Bureau has revised comment 41(g)(3)-2 in light of the public comments to further provide that if a borrower has not obtained an approved short sale transaction at the end of any marketing or listing period, a servicer may determine that a borrower has failed to perform under an agreement on a loss mitigation option. Finally, the Bureau has adjusted the timing requirements for § 1024.41(g) consistent with the discussion above regarding timelines.

41(h) Appeal process

Proposed § 1024.41(h) would have required a servicer to establish an appeals process to review denials of complete loss mitigation applications for loan modifications. Pursuant to

[184] These comments had been identified as 41(g)(4)-1 and 41(g)(4)-2 in the proposal but have been relocated in light of a non-substantive adjustment to the numeration of § 1024.41(g).

proposed § 1024.41(h), if a servicer reviewed an appeal and determined to offer a loss mitigation option, the servicer would have been prohibited from proceeding with a foreclosure sale unless the borrower rejects the offer of the loss mitigation option or fails to comply with terms of the loss mitigation option. If a servicer denied a borrower's appeal of a loss mitigation option, the servicer would have been permitted to proceed with a foreclosure sale. A servicer would have been required to provide a notice to the borrower stating the servicer's determination of the borrower's appeal.

Proposed § 1024.41(h) also stated that an appeal must be reviewed by servicer personnel that were not directly involved in the initial evaluation. Further, proposed comment 41(h)(3)-1 would have clarified that individuals who supervised the personnel that conducted the initial evaluation may conduct the appeal evaluation if they were not directly involved in the initial evaluation.

The appeals process would have been limited to denials of loan modification options. The Bureau stated in the proposal that an appeal process for denials of loan modification options maintains consistency with existing appeals and escalation processes established under State law or Federal regulatory agency requirements. For example, the appeal processes established by the National Mortgage Settlement and the California Homeowner Bill of Rights relate to denials of first lien loan modification denials.[185] Moreover, loan modifications are some of the most complex loss mitigation programs with respect to the evaluation of borrowers, and the Bureau stated that loan modifications provide an appropriate scope for an appeal process. The Bureau requested comment regarding the appeal requirements, including the impact of the appeal process on small servicers.

[188] *See* National Mortgage Settlement, at Appendix A, at A-27, available at http://nationalmortgagesettlement.com; *see also* 2012 Cal. Legis. Serv. Ch. 86 (A.B. 278) (WEST) amending Cal. Civ. Code § 2923.6.

Consumer advocates commented that the scope of the appeal process should be expanded beyond loan modifications to include appeals of denials for any loss mitigation option. A consumer advocate further stated that there should be transparent standards for appeals, requirements on the information that servicers must review, and disclosure to the consumer of the reasons an appeal was denied. A housing counselor supported the appeal process requirement but requested clarification regarding the timing of the deadlines. The commenter suggested using a postmark to determine when applicable timelines start.

By contrast, industry commenters objected to the appeal process requirement. A credit union and a trade association stated that many investors, including the GSEs and government insurance programs, do not consider appeals and that requiring a second review is ultimately futile and wasteful. A law firm commented that the appeal process is unnecessary and overreaching because it is unreasonable to believe that servicers will not comply with current loss mitigation evaluation requirements. Further, the commenter stated that an appeals process will extend foreclosure timelines, which may ultimately harm the housing market without benefiting consumers.

The GSEs commented that they also generally oppose an appeal process but emphasized that, in any event, an appeal process should be limited to a denial of a loan modification option and only where a loss mitigation application is submitted 90 days or more before a scheduled foreclosure sale. A Federal regulatory agency further commented that instead of a formal appeal process, the Bureau should provide a less formalized escalation process.

Credit unions and their trade associations, as well as a community bank and a non-bank servicer, commented that the appeal process presents unique issues for small servicers. These commenters stated that small servicers could not implement the appeal process because small servicers generally have so few employees that it is not possible to assign a separate employee to handle an appeal. One trade association commented that, as a consequence, an appeal may be reviewed by staff that may not be appropriate to the task. A credit union and a credit union trade association also commented that supervisory personnel should be allowed to conduct appeals.

The Bureau believes that it is appropriate to require servicers to respond to appeals of denials for loan modification options. The Bureau's proposed requirement is consistent with other obligations imposed on servicers, including, as set forth above, obligations pursuant to the National Mortgage Settlement and the California Homeowner Bill of Right. Consumers have consistently and forcefully complained that servicers have failed to review borrowers for loan modification options authorized by investors or guarantors of mortgage loan. Significantly, consumers and consumer advocates dispute in many individual instances whether servicers have properly applied the requirements of the Making Home Affordable program and the loan modification review requirements of the National Mortgage Settlement. Further, the terms of loan modification program reviews and compliance are complex and the Bureau understands from outreach with investors and guarantors of mortgage loans that servicers continue to have difficulty conducting the evaluations for loan modification programs pursuant to the guidelines and programs established by those investors and guarantors. Considering these factors, the Bureau believes that, as with any complex and unique process, servicers may make mistakes in evaluating borrowers for loan modification options. The notice that the Bureau is requiring servicers provide borrowers to explain the reasons for the denial of a loan modification, which include inputs that may have been the basis for such denials, may help uncover such mistakes. Many of these mistakes can then be corrected if a servicer undertakes a second review where a borrower believes that such further review is warranted. Thus, the Bureau believes that borrowers may reasonably benefit from the opportunity to have an independent review at a servicer where the borrower believes a mistake was made in the evaluation of a loan modification option.

Further, the Bureau believes the scope and requirements of the appeal process as proposed are appropriate. The Bureau proposed limiting the scope of the appeal process to denials of loan modification options. Further, the appeal process would only have been available if a complete loss mitigation application was received 90 days or more before a scheduled foreclosure sale. These requirements are consistent with appeals processes set forth in the National Mortgage Settlement and the California Homeowner Bill of Rights and set an appropriate balance of processes that improve consumer protection when considered against burdens that may impact access and costs of credit for consumers. Although commenters focused on whether the process should be characterized as an "appeal" process or an "escalation" process, this semantic distinction does not affect the actual requirements that would be imposed on servicers. Essentially, if a borrower believes that a servicer made a mistake regarding the evaluation of a borrower for a loan modification option, the borrower can indicate that to the servicer. The servicer would be required to ensure that personnel other than those that made the initial determination review the borrower's evaluation and determine whether to offer the borrower a loss mitigation option. The Bureau also believes the timing of the loss mitigation procedures, including the appeal process, are clear. All such deadlines are based on when information is received or provided by a servicer.

Although the Bureau believes that servicers should review borrower appeals and make a determination regarding whether the servicer shall offer the borrower a loss mitigation option, the Bureau declines to establish guidelines for appeals. As set forth above, the Bureau believes it is appropriate to allow investors or guarantors, including most notably the GSEs and FHA, to establish their own requirements and to determine the extent to which they want those requirements to be enforceable through private litigation.

Accordingly, the Bureau finalizes § 1024.41(h) as proposed, with minor changes to reflect adjustments to the deadlines applicable to § 1024.41 generally, as discussed above, and certain non-substantive changes to clarify the text. Further, the Bureau finalizes comment 41(h)(3)-1 as proposed.

41(i) Duplicative requests

Proposed § 1024.41(i) would have clarified that a servicer is only required to comply with the requirements of proposed § 1024.41 for a single complete loss mitigation application submitted by a borrower. A servicer would not have been required to comply with the requirements of proposed § 1024.41 if a borrower had previously been evaluated for loss mitigation options for the borrower's mortgage loan account by that servicer.

In the proposal, the Bureau stated that where servicing was transferred after the borrower received an evaluation on a complete loss mitigation application from the transferor servicer, the transferee servicer still may be required to comply with the requirements of proposed § 1024.41. The Bureau believes that when an investor or guarantor is transferring servicing to a new servicer, which may have been driven by an investor's or guarantor's determination that the new servicer can better achieve loss mitigation options with borrowers, borrowers should be able to renew an application for a loss mitigation option with the transferee servicer, subject to the applicable deadlines and requirements in proposed § 1024.41.

The Bureau requested comment regarding whether a borrower should be entitled to renewed evaluation for a loss mitigation option if an appropriate time period has passed since the initial evaluation or if there is a material change in the borrower's circumstances.

A consumer advocate coalition commented that servicers should be required to review a subsequent loss mitigation submission when a borrower has demonstrated a material change in the borrower's financial circumstances. Conversely, a trade association supported the Bureau's proposal stating that it would ensure that adequate time and resources are devoted to borrowers applying for the first time for a loss mitigation option.

A non-bank servicer stated concerns that requiring review of renewed applications would obstruct a servicer's ability to proceed with an inevitable foreclosure sale. The commenter indicated that renewed applications may not actually reflect a material change in the borrower's financial circumstances and may only constitute a strategic attempt to delay the foreclosure process. The commenter suggested that if a servicer is required to review a renewed loss mitigation application, a borrower should have a restricted time period for submitting such information and a servicer should only be required to comply with an expedited review process. Finally, after further consideration, the Bureau believed it appropriate to clarify the application of the loss mitigation procedures if servicing is transferred for a borrower's mortgage loan account.

The Bureau believes that it is appropriate to limit the requirements in § 1024.41 to a review of a single complete loss mitigation application. Specifically, the Bureau believes that a limitation on the loss mitigation procedures to a single complete loss mitigation application provides appropriate incentives for borrowers to submit all appropriate information in the application and allows servicers to dedicate resources to reviewing applications most capable of succeeding on loss mitigation options. Further, the Bureau is cognizant that the borrowers may pursue a private right of action to enforce the procedures set forth in § 1024.41 and significant challenges exist to determine whether a material change in financial circumstances has occurred and, if so, what procedures should be required. Accordingly, the Bureau is finalizing the rule as proposed.

The Bureau agrees, however, that there is merit to providing protections for a borrower that has had a material change in the borrower's financial circumstances after a review of an initial loss mitigation application. Accordingly, as discussed above for § 1024.38(b)(2)(v), servicers are required to implement policies and procedures to achieve the objective of reviewing borrowers for loss mitigation options pursuant to requirements established by an owner or assignee of a mortgage loan. The Bureau understands from outreach that many owners or assignees of mortgage loans require servicers to consider material changes in financial circumstances in connection with evaluations of borrowers for loss mitigation options and servicer policies and procedures must be designed to implement those requirements.

Finally, the Bureau believes that it is appropriate to clarify the application of the requirements of § 1024.41 when servicing for a mortgage loan has been transferred. As set forth in the proposal, a transferee servicer would have been required to comply with the requirements of § 1024.41, notwithstanding whether a borrower has received a determination on a complete loss mitigation application from a transferor servicer. To the extent that an evaluation for a loss mitigation option is in process with a transferor servicer, but a borrower has not finalized an agreement on a loss mitigation option, the Bureau believes it is appropriate for a transferee servicer to comply with the loss mitigation procedures, including reviewing a borrower again for all available loss mitigation options.

The Bureau, therefore, has added comments 41(i)-1 and 41(i)-2 to clarify a transferee servicer's obligations in connection with a servicing transfer for a borrower that has submitted a loss mitigation application. Comment 41(i)-1 provides that 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. Further, comment 41(i)-1 states that documents and 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. Comment 41(i)-2 states that a transferee servicer must obtain documents and information submitted by a borrower in connection with a loss mitigation application pending at the time of a servicing transfer, consistent with policies and procedures adopted pursuant to § 1024.38, and must continue the evaluation of a complete loss mitigation application to the extent practicable. Comment 41(i)-2 further provides that for purposes of § 1024.41(e)(1), 1024.41(f), 1024.41(g), and 1024.41(h), a transferee servicer must consider documents and information received from a transferor servicer that constitute a complete loss mitigation application for the transferee servicer to have been received by the transferee servicer as of the date such documents and information were provided to the transferor servicer. The purpose of this clarification is to ensure that a servicing transfer does not have the consequence of depriving a borrower of protections to which a borrower was entitled from the transferor servicer in accordance with the requirements of § 1024.41.

Accordingly, the Bureau finalizes § 1024.41(i) as proposed. The Bureau finalizes the comments to § 1024.41(i) to clarify the impact of the requirements in § 1024.41 in connection with servicing transfers.

41(j) Other liens (withdrawn)

Proposed § 1024.41(j) would have required any servicer that receives a complete loss mitigation application to determine if any other servicers service mortgage loans that have senior or subordinate liens encumbering the property that is the subjection of the loss mitigation application within 5 days. If a servicer determines that any other servicers service a mortgage loan for the property, the servicer would be required to provide the loss mitigation application received from the borrower to the other servicer. This provision was intended to require servicers of other liens that were not the original recipient to become engaged in the loss mitigation evaluation process by requiring such servicers to apply the loss mitigation procedures to loss mitigation applications received from other servicers on behalf of the borrower.

Numerous commenters, including large banks, community banks, credit unions, their respective trade associations, the GSEs, a law firm, and a housing finance agency, objected to the proposed rule. These commenters stated that the proposed rule raises significant concerns regarding consumer welfare. First, the required transmittal of borrower personal information among servicers raises significant privacy concerns for borrowers. Second, borrowers that are current on other mortgage loans may be harmed by requiring information sharing among mortgage servicers. For example, a borrower that is current on a subordinate lien HELOC that is not fully utilized may find that the HELOC line has been frozen even though the borrower expects to need to draw on the additional credit that would have been available. Third, servicers would be required to undertake the expense of a title search to identify other liens, the costs for which would be passed on to a borrower, even though a borrower likely knows whether another lien and servicer exist.

Commenters also stated that servicers could not reasonably comply with the proposed rule. Servicers indicated that they could not identify whether other mortgage liens exist from a title search within 5 days. A small credit union commented that credit unions lack the expertise, staffing, and training to ensure compliance with the requirement. Commenters also identified other operational problems, including delays and logistical problems identifying appropriate personnel to receive loss mitigation applications at other servicers, and problems relating to exchanging potentially proprietary information relating to collecting information for a loss mitigation application.

Commenters suggested different approaches for involving servicers of other mortgage liens in loss mitigation evaluations. A financial industry trade association suggested that the Bureau require servicers to inform borrowers that they may wish to contact a servicer for another mortgage loan to obtain an evaluation for a loss mitigation option. Another industry commenter suggested that the Bureau sponsor a database for exchanging lienholder information and submitting and storing borrower applications. Further, a consumer advocate coalition suggested that the Bureau implement requirements regarding re-subordination of a junior lien after a loan modification. Specifically, the commenter states that a servicer should be required to secure a re-subordination of a junior lien to a modified mortgage loan secured by a senior lien. The commenter further states that a servicer should be prohibited from rejecting a loan modification even where a title problem exists or where another lienholder refuses to re-subordinate its lien to a modified mortgage loan.

Some of the most difficult loss mitigation situations for consumers and owners or assignees of mortgage loans involve properties secured by multiple mortgage liens. Loss mitigation options for such properties can be significantly impeded or delayed because of miscommunications, lack of coordination, and differing interests among servicers of senior and subordinate liens. As the Bureau stated in the proposal, when servicers hold a second lien that is behind a first lien owned by a different owner or assignee, one study has found a lower likelihood of liquidation and modification, and a higher likelihood of inaction by a servicer. Specifically, "liquidation and modification of securitized first mortgages are 60 percent [to] 70 percent less likely respectively and no action is 13 percent more likely when the servicer of that securitized first mortgage holds on its portfolio the second lien attached to the first mortgage."[186]

The Bureau proposed § 1024.41(j) to require servicers to coordinate on evaluations of borrowers for loss mitigation options. However, commenters have identified significant concerns with the requirement as proposed. For example, with respect to privacy concerns, the Bureau observed in the proposal that the Gramm-Leach-Bliley Act as implemented by Regulation P did not require provision of an initial notice and opt-out in connection with providing the loss mitigation application submitted by a borrower to another servicer under the exception set forth in 12 CFR 1016.15(a)(7). However, notwithstanding that servicers may provide personal information to additional servicers pursuant to applicable law, the Bureau finds persuasive the concerns raised by servicers with respect to the potential privacy implications regarding the circulation of borrower personal information among servicers.

In light of the comments, the Bureau has determined to withdraw the substance of proposed § 1024.41(j). The Bureau is requiring that a servicer inform a borrower in the notice required by § 1024.41(b)(2)(i)(B) that the borrower should consider contacting servicers of any other mortgage loans secured by the same property to discuss available loss mitigation options. Although a servicer is not required to comply with the requirements that would have been implemented by proposed § 1024.41(j), the Bureau believes that borrowers should be aware of the potential complications to achieving a loss mitigation option in situations where multiple liens exist.

[186] Sumit Agarwal et al., *Second Liens and the Holdup Problem in First Mortgage Renegotiation* (Dec. 14, 2011), *available at* available at http://ssrn.com/abstract=2022501.

41(j) Small Servicers

As previously stated above, the proposed rule applied all of the loss mitigation provisions to small servicers. For the reasons previously discussed with respect to § 1024.30, the Bureau has concluded that the available evidence indicates that the concerns underlying the loss mitigation provisions arise in the context of larger servicers and that the benefits of applying all of these requirements to small servicers who service loans they or an affiliate own or originated may not be justified by the burdens on these small servicers.

There are, however, two elements of the loss mitigation rules that the Bureau believes should be applied across all servicers. First, new § 1024.41(j) states that a small servicer is required to comply with requirements similar to those in § 1024.41(f)(1) by not making the first notice or filing required for a foreclosure process unless a borrower is more than 120 days delinquent. Second, a small servicer shall not proceed to foreclosure judgment or order of sale, or conduct a foreclosure sale, if a borrower is performing pursuant to the terms of an agreement on a loss mitigation option.

The Bureau has no reason to believe that any small servicers, servicing loans they or an affiliate owns or originated, in fact commence foreclosure before a borrower is at least 120 days delinquent or either commence a foreclosure process or conduct a foreclosure sale if a borrower is performing under an agreed-upon loss mitigation program. Nonetheless, the Bureau believes these protections, which are discussed in more detail above, are such essential standards that all borrowers should understand that they are entitled to protection from consumer harms relating to dual tracking notwithstanding the size of the servicer. The Bureau believes that imposing only these limited requirements on small servicers creates easily understood and clearly implemented consumer protections while appropriately calibrating the burdens that small servicers may incur.

Supplement I to Part 1024

As discussed throughout in this part VI, Section-by-Section Analysis, the Bureau is adopting a number of comments that are the Bureau's official interpretations to specific Regulation X provisions. In addition to these specific comments, the Bureau is adopting five comments of general applicability to the Bureau's official interpretations of Regulation X. Comment I-1 provides that the official Bureau interpretations in supplement I to part 1024 is the primary vehicle by which the Bureau issues official interpretations of Regulation X, and that good faith compliance with the official Bureau interpretations affords protection from liability under section 19(b) of the Real Estate Settlement Procedures Act (RESPA).

Comment I-2 provides that request for an official interpretation shall be in writing and addressed to the Associate Director, Research, Markets, and Regulations, Bureau of Consumer Financial Protection, 1700 G Street, NW, Washington, DC 20552. The requests shall contain a complete statement of all relevant facts concerning the issue, including copies of all pertinent documents. Except in unusual circumstances, such official interpretations will not be issued separately but will be incorporated in the official commentary to this part, which will be amended periodically. No official interpretations will be issued approving financial institutions' forms or statements. This restriction does not apply to forms or statements whose use is required or sanctioned by a government agency.

Comment I-3 provides that unofficial oral interpretations may be provided at the discretion of Bureau staff. Written requests for such interpretations should be sent to the address set forth for official interpretations. Unofficial oral interpretations provide no protection under section 19(b) of RESPA. Ordinarily, staff will not issue unofficial oral interpretations on matters adequately covered by this part or the official Bureau interpretations. The Bureau proposed I-1 through I-3 in the 2012 RESPA Servicing Proposal. Having received no comments on proposed I-1 through I-3, the Bureau adopts I-1 through I-3 as proposed.

The Bureau is adopting comment I-4 to provide instructions on rules of construction applicable to the comments set forth in Supplement I to Part 1024—Official Bureau Interpretations. Comment I-4 provides that: (1) lists that appear in the commentary may be exhaustive or illustrative; the appropriate construction should be clear from the context. In most cases, illustrative lists are introduced by phrases such as “including, but not limited to,” “among other things,” “for example,” or “such as”; and (2) throughout the commentary, reference to “this section” or “this paragraph” means the section or paragraph in the regulation that is the subject of the comment. The Bureau is also adopting comment I-5 to explain that each comment in the commentary is identified by a number and the regulatory section or paragraph that the comment interprets and that the comments are designated with as much specificity as possible according to the particular regulatory provision addressed. Although the Bureau did not propose comments I-4 and I-5, the Bureau believes that adopting these comments in the final rule promotes the proper use of commentary the Bureau has set forth in Supplement I to part 1024.

Legal Authority

As discussed in part V (Legal Authority), section 19(a) of RESPA authorizes the Bureau to make such reasonable interpretations of RESPA as may be necessary to achieve the consumer protection purposes of RESPA, and section 19(b) of RESPA provides that good faith compliance with the interpretations affords servicers protection from liability.

Appendix MS

Current appendix MS-1 to part 1024 contains a model form that a servicer could use in connection with providing a loan applicant, at the time of application, information about whether servicing of the loan such applicant is applying may be assigned, sold, or transferred at any time while the loan is outstanding, as required by current § 1024.21(b) and (c). Current appendix-MS-2 to part 1024 contains a model from that a servicer could use in connection with providing a borrower with information related to servicing transfers, as required by current § 1024.21(d)(1)(i). The Bureau proposed to revised modify the current model form that a servicer could use in connection with providing a borrower with information related to servicing transfers in current appendix MS-2. Additionally, the Bureau proposed adding four model forms that a servicer could use in connection with providing a borrower with information related to force-placed insurance that would have been required by proposed §§ 1024.37(c)(2), (d)(2)(i) and (ii), or (e)(2), as applicable, in proposed appendix MS-3 to part 1024, and adding five model clauses that a servicer could use in connection with providing delinquent borrowers with information about loss mitigation options, foreclosures, and housing counselors that would have been required by proposed § 1024.39(b) in proposed appendix MS-4 to part 1024. In adopting the final rule, the Bureau has organized current appendix MS-1, revised appendix MS-2, and new appendices MS-3 and 4 under the heading "Appendix MS."

The Bureau also proposed official commentary to provide general instructions on how to use model forms and clauses in appendix MS. Specifically, proposed comment 1 to appendix MS would have explained that appendix MS contains model forms and clauses for mortgage servicing disclosures, and that each such model form or clause is designated for use in a particular set of circumstances, as indicated by the title of such model form or clause. Proposed comment 1 to appendix MS would have additionally clarified that although a servicer is not required to use such model forms and clauses, a servicer that uses them properly will be deemed to be in compliance with the regulations with regard to the disclosure requirements connected with such model forms and clauses. Proposed comment 1 to appendix MS would have explained that to use such forms and clauses appropriately, information required by regulation must be set forth in the disclosures. Proposed comment 2 to appendix MS would have explained that servicers may make certain changes to the format or content of the model forms and clauses and may delete any disclosures that are inapplicable without losing the protection from liability so long as those changes do not affect the substance, clarity, or meaningful sequence of the forms and clauses, and that servicers making revisions to that effect will lose their protection from civil liability. Proposed comment 2 to appendix MS also would have provided examples of changes that the Bureau considered acceptable changes.

The Bureau solicited comments on the appropriateness of proposing official commentary to provide general instructions on how to use model forms and clauses in appendix MS to part 1024. No comments were received on either the substance of the proposed commentary or the appropriateness of using them to provide general instructions on how to use model forms and clauses in appendix MS to part 1024.

Appendix MS-2—Model Form for Mortgage Servicing Transfer Disclosure

Appendix MS-2 to part 1024 sets forth the format for the servicing transfer disclosure required pursuant to section 6(a)(3) of RESPA and proposed § 1024.33(b)(5). The Bureau proposed to revise the model form in appendix MS-2 to significantly reduce the length of the require disclosure to borrowers in connection with mortgage servicing transfers. As discussed below, the Bureau is adopting appendix MS-2 substantially as proposed, except as otherwise noted.

In its proposal, the Bureau observed that, unless a transferor and transferee servicer coordinate to provide a consolidated disclosure, a borrower will receive substantially similar disclosures in the form of appendix MS-2 from both a transferor servicer and a transferee servicer. The Bureau is concerned that the volume of the disclosure may overwhelm borrowers, who will not focus on the information set forth in the form, while also imposing a burden on servicers to provide lengthy and unnecessary disclosures. Thus, the Bureau proposed to streamline the language of the model form to focus on only the elements of information that a borrower needs in connection with a mortgage servicing transfer, specifically (1) the date of the transfer, (2) contact information for the transferor servicer, (3) contact information for the transferee servicer, (4) applicable dates for when each of the servicers will begin or cease to accept payments, (5) the impact of the transfer on any insurance products and (6) a statement that the transfer does not otherwise affect the terms or conditions of the mortgage loan.

The Bureau proposed to remove significant discussion in the model form regarding the complaint resolution process and the borrower’s rights pursuant to RESPA. Two consumer advocacy groups submitted comment requesting that the Bureau not remove information about a borrower’s complaint resolution rights under RESPA. For the reasons discussed in the section-by-section analysis of § 1024.33(b)(4) above, the Bureau is omitting language about complaint resolution from appendix MS-2.

The Bureau’s proposed amendments to appendix MS-2 also would have omitted language informing borrowers of the prohibition in RESPA section 6(d) (as implemented through current § 1024.21(d)(5)). Appendix MS-2 currently informs borrowers, in general, that pursuant to RESPA section 6, during the 60-day period following the effective date of the transfer of the loan servicing, a loan payment received by the borrower’s old servicer before its due date may not be treated by the new loan servicer as late, and a late fee may not be imposed on the borrower. Upon further consideration, and in light of comment received with respect to the complaint resolution statement, the Bureau believes this information should be retained in appendix MS-2 because the Bureau believes information about misdirected payments is uniquely relevant to borrowers during a servicing transfer (unlike the complaint resolution statement, which the Bureau believes should be made available to borrowers in circumstances that do not necessarily depend on the transfer of servicing). Additionally, in light of its brevity, the Bureau does not believe its inclusion will significantly add to the length of the form. While the Bureau did not test this statement, the Bureau does not believe it is likely to cause confusion or present comprehension problems in light of its simplicity and because it includes language substantially similar to what appears in the current model form. Accordingly, the Bureau has retained the substance of the current statement about late payments and has omitted the prefatory language about a borrower's rights under RESPA section 6 with a more general statement.

The Bureau has amended existing language in the statement that explains that a payment received "before its due date" would not be treated as late to more accurately reflect the requirement in § 1024.33(c)(1) . The language appearing in the model form now provides, "Under Federal law, during the 60-day period following the effective date of the transfer of the loan servicing, a loan payment received by your old servicer on or before its due date may not be treated by the new servicer as late, and a late fee may not be imposed on you."

Consumer testing. To test consumer comprehension of the revised model form proposed by the Bureau, the Bureau contracted with Macro to conduct eight qualitative interviews during one round of consumer testing in the Philadelphia, Pennsylvania area on November 7, 2012. After reading the notice, all participants understood that they would have to send their payments to a different servicer after the date listed in the notice. All participants saw the contact information for both the transferor and transferee servicers. Most participants also understood the basic relationship between a lender and a servicer.

During this round of testing, the Bureau was interested in whether participants preferred a form that listed the transferor and transferee servicer contact information in a side-by-side fashion, as opposed to a vertical fashion, as the form proposed by the Bureau would have been formatted. The Bureau expected that listing the transferor and transferee servicers in a side-by-side fashion would enhance consumer comprehension of who the old and new servicers are. To test this, the Macro showed participants the original notice (Version A) and asked participants a series of questions to measure their understanding of the notice. Macro then showed participants a reformatted notice (Version B) and asked which version they preferred. All participants said they preferred Version B. They commented that the format of Version B was easier to read and understand, and that the current and new servicers were easier to identify at a glance.

The Bureau is finalizing appendix MS-2 with substantially the same content as proposed. However, the Bureau has retained, with certain modifications discussed above, language in current appendix MS-2 about the treatment of payments during the 60-day period beginning on the effective date of transfer. The Bureau has also reformatted the model form to list the contact information for the transferor and transferee servicers in a side-by-side fashion.

Appendix MS-3—Model Force-Placed Insurance Notice Forms

The Bureau proposed to add appendix MS-3 to part 1024 to include four model forms that a servicer could use in connection with providing a borrower with information related to force-placed insurance that would have been required by proposed §§ 1024.37(c)(2), (d)(2)(i) and (ii), or (e)(2), as applicable. The Bureau observed in the 2012 RESPA Servicing Proposal that the model forms underwent three rounds of consumer testing. As discussed above in the section-by-section analysis of § 1024.37(c)(3), one large bank servicer commended the Bureau for proposing model forms that were thoughtfully designed. Having received no other comment on the design of the model forms, the Bureau is finalizing appendix MS-3 as proposed, except that the content of the model forms in appendix MS-3, as adopted, reflects changes the Bureau made with respect to the §§ 1024.37(c)(2), (d)(2)(i) and (ii), and (e)(2), as applicable.

The Bureau also proposed related commentary to appendix MS-3. Proposed comment MS-3-1 would have explained that the model form MS-3(A) illustrates how a servicer may comply with § 1024.37(c)(2). Proposed comment MS-3-2 would have explained that the model form MS-3(B) illustrates how a servicer may comply with § 1024.37(d)(2)(i). Proposed comment MS-3 would have explained that the model form MS-3(C) illustrates how a servicer may comply with § 1024.37(d)(2)(ii). Proposed comment MS-3-4 would have explained that model MS-3(D) illustrates how a servicer may comply with § 1024.37(e)(2). Proposed comment MS-3-5 would have clarified that where the model forms MS-3(A), MS-3(B), MS-3(C), and MS-3(D) use the term "hazard insurance," the servicer may substitute "hazard insurance" with, as applicable, "homeowners' insurance" or "property insurance."

The Bureau did not receive any comments on the proposed commentary. But upon further consideration, the Bureau believes that proposed comment MS-3-1 through 4 are not necessary because the title of each model form in appendix MS-3 already indicates the circumstances under which such model form is to be used. Accordingly, the Bureau is adopting proposed comment MS-3-5 as proposed, but renumbered as comment MS-3-1.

Appendix MS-4—Model Clauses for the Written Early Intervention Notice

In the 2012 RESPA Mortgage Servicing Proposal, the Bureau proposed model clauses in new appendix MS-4 to illustrate the disclosures that would be required under proposed

§ 1024.39(b)(1). The Bureau developed the proposed model clauses to encourage the borrower to contact the servicer and provide information about loss mitigation options, foreclosure, and housing counselors. The Bureau developed the proposed clauses based on its own analysis and review of existing notices for delinquent borrowers, such as the HUD "Avoiding Foreclosure" pamphlet.[187] Several consumer advocacy groups supported the Bureau's decision to provide model clauses but recommended that the Bureau require standardized notices for all servicers because they were concerned that servicers are not consistent in the way they describe loss mitigation options. Industry commenters generally requested more flexibility in the way the notices are provided. Macro conducted one round of consumer testing in Philadelphia, Pennsylvania to assess consumer comprehension of the proposed early intervention model clauses. The Bureau also notes that Macro conducted three rounds of one-on-one cognitive interviews to test disclosure forms for the Bureau's proposed ARM interest rate adjustment notices, which the Bureau is finalizing in the 2013 TILA Servicing Final Rule. The ARM interest rate adjustment notices contained clauses describing loss mitigation options and contact information to access housing counseling resources.

Proposed clauses in Model MS-4(A) illustrated how a servicer may provide its contact information and how a servicer may request that the borrower contact the servicer, as would have been required under proposed § 1024.39(b)(2)(i) and (ii). Consumer testing indicated that all participants understood from this statement[188] that if they were having trouble making their

[187] *See* 24 CFR 203.602; HUD Handbook 4330.1 rev-5, 7-7(G).

[188] The tested statement provided, "Please contact us. We may be able to make your mortgage more affordable. The longer you wait, or the further you fall behind on your payments, the harder it will be to find a solution." This was followed by a sample servicer's address and contact information.

payments, they should contact their bank to see what options may be available.[189] Several participants specifically noticed the sentence stating that "The longer you wait, or the further you fall behind on your payments, the harder it will be to find a solution." These participants said this sentence would make them more likely to contact their bank. Participants generally thought that this statement was similar to a separate statement illustrating how the servicer may inform the borrower how to obtain additional information about loss mitigation options, as would have been required under § 1024.39(b)(2)(iv), as illustrated in proposed MS-4(C).[190] Most participants responded positively to these statements and believed that their bank was reaching out towards a solution, although two participants thought that the statements could be more polite or resembled an advertisement rather than a communication from their bank. Separately, during the public comment process, one credit union commenter also noted that the tone in the model notices did not necessarily reflect the way it communicated with their borrowers and requested more flexibility with respect to how the notices are worded.

The Bureau believes that the clauses required under § 1024.39(b)(2)(i), (ii), and (iv) may be combined into a single clause, as illustrated in Model MS-4(A) that the Bureau is adopting in the final rule. Both clauses in proposed MS-4(C) and MS-4(A) instruct borrowers to contact the servicer to discuss their options, and the statement instructing borrowers to contact their servicer to learn more about how to apply in proposed MS-4(C) is very closely related. The Bureau is not otherwise changing the phrasing of statements as proposed. Most testing participants reacted favorably to the proposed clauses, and the Bureau notes that servicers can make minor

[189] Consumer testing of the servicing transfer notice, discussed above, during the Philadelphia round of testing indicated participants understood the distinction between their servicer and their lender and that this distinction did not present comprehension problems. The Bureau notes that, pursuant to comment MS-2.ii, servicers may freely substitute the words "lender" and "servicer" as appropriate.

[190] The tested statement provided, "Call us today to learn more about your options and instructions for how to apply."

modifications to the sample clauses, pursuant to general comment MS-2 to appendix MS. Moreover, the Bureau notes that the model clauses are not required; they only illustrated how the required statements in § 1024.39(b)(2) can be provided.

Model MS-4(A) contains a bracketed clause stating, “The longer you wait, or the further you fall behind on your payments, the harder it will be to find a solution.” The Bureau has included this statement in brackets because it is optional, but the Bureau is including it as recommended language that the Bureau believes will help encourage borrowers to contact their servicer.

Finally, the Bureau has omitted the clause stating “We may be able to make your mortgage more affordable” from proposed MS-4(A). During consumer testing, participants were concerned that the statement was potentially misleading. The Bureau does not believe this language is necessary to encourage delinquent borrowers to contact their servicer. That statement also appeared in proposed MS-4(B), illustrating proposed § 1024.39(b)(2)(iii) (brief description of loss mitigation options). The Bureau has deleted this clause in MS-4(B) for the same reason.

Proposed clauses in Model MS-4(B) illustrated how the servicer may inform the borrower of loss mitigation options that may be available, as would have been required under proposed § 1024.39(b)(2)(iii). The proposed clauses in Model MS-4(B) illustrated four commonly offered examples: (1) forbearance, (2) mortgage modification, (3) short-sale, and (4) deed-in-lieu of foreclosure. During consumer testing of proposed MS-4(B), all participants understood the overall message of the statement—that if they were having difficulty making a mortgage payment, their bank may be able to offer options to help them. After reading the clauses, while participants generally could explain what a forbearance and a loan modification were, only approximately half of the participants could explain “short-sale” and “deed-in-lieu.” All but one of the participants understood the primary difference between options that would let borrowers remain in their homes (forbearance and mortgage modification) and options that would require that the borrower leave their home (short-sale and deed-in-lieu of foreclosure). All participants understood that the fact that they received this notice did not mean that they would necessarily qualify for these options.

During the public comment process, one large servicer requested clarification that servicers only be required to list loss mitigation options to the extent those options are available from the servicer. Another large servicer recommended that clauses illustrating deeds-in-lieu of foreclosure and short sales include language noting that lenders may seek a deficiency obligation from the borrower, except in the case of bankruptcy.

The Bureau is not finalizing the Model Clauses proposed as Model MS-4(B). Instead, the Bureau is finalizing MS-4(B) by including clauses substantially similar to ones that the Bureau developed over the course of several rounds of consumer testing of the ARM disclosures contained in § 1026.20, which the Bureau tested prior to publication of the 2012 TILA Mortgage Servicing Proposal and that tested better than the options described in proposed MS-4. The Bureau recognizes that these examples of loss mitigation options may not necessarily accurately reflect a servicer’s loss mitigation programs. Thus, comment MS-4-2 explained that the language in Model MS-4(B) is optional, and that a servicer may add or substitute any examples of loss mitigation options the servicer offers, as long as the information required to be disclosed is accurate and clear and conspicuous. The Bureau noted in its proposal that if the servicer offered no loss mitigation options, a servicer may not include Models MS-4(B) and MS-4(C) because including those statements would be misleading.

The Bureau proposed comment MS-4-2 clarifying appropriate use of model clause MS-4(B). The comment explained that Model MS-4(B) does not contain sample clauses for all loss mitigation options that may be available. Comment MS-4-2 also explained that the language in the model clauses contained in square brackets is optional, and that a servicer may comply with the disclosure requirements of § 1024.39(b)(2)(iii) by using language substantially similar to the language in the model clauses, or by adding or substituting applicable loss mitigation options for options not represented in these model clauses, as long as the information required to be disclosed is accurate and clear and conspicuous. The Bureau is adopting comment MS-4-2 substantially as proposed.

In response to industry concerns, the Bureau has also added language to comment MS-4-2 to explain that servicers may use clauses to illustrate options to the extent they are available. In addition, the Bureau has clarified that servicers may provide additional detail about the options, provided the information disclosed is accurate and clear and conspicuous. This clarification responds to industry commenters' recommendation to clarify that servicers may explain that the discussion of certain options, such as a short sale, may require deficiency obligations from the borrower.

Proposed clauses in Model MS-4(D) illustrated how a servicer may explain foreclosure and provide the estimated number of days in which the servicer may begin the foreclosure process, as would have been required under proposed § 1024.39(b)(2)(v). During consumer testing of proposed MS-4(D), participants had mixed reactions to the foreclosure statement. Participants understood that this notice was intended to provide the consumer with a definition of the term "foreclosure" and to warn them that foreclosure could be a possibility in their future because of a missed payment. However, participants appeared to understand what foreclosure was even before reading this clause. Therefore, they did not appear to learn much from reading the first sentence of this clause.[191] A few participants specifically commented that this sentence seemed out of place, because it was a definition rather than a statement specifically about their situation. The Bureau tested a hypothetical estimated 90-150 day timeframe for when foreclosure could occur. When asked when lenders could begin to pursue foreclosure, all participants referred to the 90 to 150 day timeframe in the clause, and understood that this time period would start from the due date of their missed payment. However, at least two participants mistakenly thought that the reference to this time period implied that the foreclosure process could not start sooner than 90 days after the missed payment, despite the fact that the clause states that the process "may begin earlier or later."[192] One participant felt strongly that if it was true that the foreclosure process could start in less than 90 days, then the reference to the "90 to 150 day" time period should be removed from the clause because it was misleading. For the reasons explained in the section-by-section analysis of § 1024.39(b)(2) above, the Bureau has omitted the clauses in proposed MS-4(D) that illustrated how a servicer could explain foreclosure and provide the estimated number of days in which the servicer may begin the foreclosure process, as would have been required under proposed § 1024.39(b)(2)(v).

Proposed clauses in Model MS-4(E) illustrated how the servicer may provide contact information for the State housing finance authority and housing counselors, as would have been required under proposed § 1024.39(b)(2)(vi). During consumer testing of proposed MS-4(E), all participants understood that the purpose of this message was to provide contact information for

[191] "Foreclosure is a legal process a lender can use to take ownership of a property from a borrower who is behind on his or her mortgage payments."

[192] This specific question was not asked of all participants, so it is not possible to estimate exactly how many of the participants might have had this misconception.

the Federal government agency identified in the clause.[193] Contact information for accessing housing counseling resources was also tested during previous rounds of testing of the ARM interest rate adjustment notice. The Bureau is adopting in the final rule the clauses substantially as proposed setting forth contact information for either the Bureau or HUD website to access a list of housing counselor or counseling organizations, as well as the HUD telephone number to access the list of HUD-approved counselors. The Bureau is renumbering MS-4(E) as MS-4(C). For the reasons discussed above in the section-by-section analysis of § 1024.39(b)(2), the Bureau is omitting contact information for State housing finance authorities.

VI. Effective Date

This final rule is effective on January 10, 2014. The Bureau believes that this approach is consistent with the timeframes established in section 1400(c) of the Dodd-Frank Act and, on balance, will facilitate the implementation of the Title XIV Rulemakings' overlapping provisions, while also affording covered persons sufficient time to implement the more complex or resource-intensive new requirements. Certain of the regulations set forth in the Final Servicing Rules are required under title XIV. Specifically, section 1420 of the Dodd-Frank Act, which requires the periodic statement, states that the Bureau "shall develop and prescribe a standard form for the disclosure required under this subsection, taking into account that the statements required may be transmitted in writing or electronically." 15 U.S.C. 1638(f)(2). Other regulations set forth in the Final Servicing Rules, while implementing amendments under title XIV of the Dodd-Frank Act, are *not* regulations required under title XIV. Pursuant to section 1400(c)(2) of the Dodd-Frank Act, the effective dates of these regulations need not be within one year of issuance.

[193] Macro tested a statement including HUD's housing counselor list and phone number because, at the time of testing, the Bureau did not have a web site containing this information.

The Bureau received approximately 60 comments from industry participants with respect to the appropriate effective date. As stated above, comments from consumer advocacy groups generally urged earlier effective dates. A number of industry trade associations, as well as a large bank and a small credit union indicated that the Bureau should provide a sufficient amount of time, but did not express an opinion regarding an appropriate timeframe. The majority of servicers, including large and small banks, non-bank servicers, and numerous credit unions, as well as their trade associations, indicated that the Bureau should establish an effective date of between 12 and 18 months after issuance.[194] Some large banks, a bank servicer, numerous trade associations, the Office of Advocacy of the U.S. Small Business Administration, and the GSEs stated that the Bureau should consider an implementation period of approximately 18-24 months for certain of the requirements. Further, three banks and numerous trade associations for banks and manufactured housing servicers stated that the Bureau should consider an effective date between 24 and 36 months after issuance. Each of the industry commenters generally stated that the requested time was necessary to effectively implement the regulations because of the complexity of the proposed rules, the impact on systems changes and staff training, and the cumulative impact of the proposed mortgage servicing rules when combined with other requirements imposed by the Dodd-Frank Act or proposed by the Bureau. These letters provide some basis to believe that implementing the regulations within 12 months is challenging for many firms. They do not establish, however, that implementation in 12 months is impracticable.

For the reasons already discussed above, the Bureau believes that an effective date of January 10, 2014 for this final rule and most provisions of the other title XIV final rules will ensure that consumers receive the protections in these rules as soon as reasonably practicable,

[194] In addition, a force-placed insurer stated that it would be require between 6-12 months to implement regulations relating to force-placed insurance requirements.

taking into account the timeframes established by the Dodd-Frank Act, the need for a coordinated approach to facilitate implementation of the rules' overlapping provisions, and the need to afford covered persons sufficient time to implement the more complex or resource-intensive new requirements.

VII. Dodd-Frank Act Section 1022(b)(2) Analysis

A. Overview

In developing the final rule, the Bureau has considered potential benefits, costs, and impacts.[195] The 2012 RESPA Servicing Proposal set forth a preliminary analysis of these effects, and the Bureau requested and received comments on this topic. In addition, the Bureau has consulted, or offered to consult, with the prudential regulators, HUD, FHFA, the Federal Trade Commission, and the Federal Emergency Management Agency, including regarding consistency with any prudential, market, or systemic objectives administered by such agencies. The Bureau also held discussions with and solicited feedback from the United States Department of Agriculture Rural Housing Service, the Federal Housing Administration, Ginnie Mae, and the Department of Veterans Affairs regarding the potential impacts of the final rule on those entities' mortgage loan insurance or securitization programs.

In this rulemaking, the Bureau amends Regulation X, which implements RESPA, and the official commentary to the regulation, as part of the Bureau's implementation of the Dodd-Frank Act amendments to RESPA regarding mortgage loan servicing. The final rule includes amendments to Regulation X that implement, among other things, section 1463 of the Dodd-

[195] Specifically, section 1022(b)(2)(A) of the Dodd-Frank Act calls for the Bureau to consider the potential benefits and costs of a regulation to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services; the impact on depository institutions and credit unions with $10 billion or less in total assets as described in section 1026 of the Dodd-Frank Act; and the impact on consumers in rural areas.

Frank Act. In addition, the final rule includes amendments to Regulation X to impose servicer obligations that are not specifically required by RESPA pursuant to various authorities under RESPA and Title X. The amendments to Regulation X include new requirements with respect to error resolution and information requests; the placement of forced-placed insurance; general servicing policies, procedures and requirements; early intervention with delinquent borrowers; continuity of contact with delinquent borrowers; and loss mitigation procedures. The final rule would also reorganize and amend the mortgage servicing related provisions of Regulation X, currently published in 12 CFR part 1024.21. Such provisions relate to, for example, disclosures with respect to mortgage servicing transfers and servicers' obligations to manage escrow accounts.

Contemporaneously with issuing this rule, the Bureau is also issuing a final rule under TILA to amend Regulation Z (12 CFR part 1026). The amendments to Regulation Z implement the following sections of the Dodd-Frank Act: section 1418 (initial rate-adjustment notice for adjustable-rate mortgages (ARMs)), section 1420 (periodic statement), and section 1464 (prompt crediting of mortgage payments and response to requests for payoff amounts). The final rule also revises certain existing regulatory requirements in Regulation Z for disclosing rate and payment changes to ARMs in current § 1026.20(c).

Part II.A of the final rule ("Overview of the Mortgage Servicing Market and Market Failures") discusses the servicing market and servicer incentives. As stated above in the proposed rule, a fundamental feature of the market for servicing is that borrowers generally do not choose their own servicers.[196] It is therefore difficult for borrowers to protect themselves from shoddy service or harmful practices. A borrower may select a servicer at origination by

[196] *See* 77 FR 57200, 57203 (Sept. 17, 2012).

choosing a lender that pledges to service the loans that it originates. However, relatively few lenders commit to servicing the loans that they originate, most borrowers do not choose a servicer at origination, and some borrowers who do choose a servicer at origination may find that the servicer retains a subservicer that interacts with the borrower. A borrower may refinance a mortgage loan in order to receive a new servicer. However, refinancing is an expensive and generally impractical way for a homeowner to obtain a new servicer, and, similar to origination, the borrower does not generally select the new servicer.

The Bureau recognizes that certain servicers have incentives to service well. Servicers that rely on a local reputation—their ability to attract new consumers depends on how well they treat current consumers—have incentives to provide high quality servicing. This describes many of the small servicers that the Bureau consulted as part of a process required under SBREFA. They described their businesses as requiring a "high touch" model of customer service, both to ensure loan performance and to maintain a strong reputation in their local communities. The vast majority of smaller servicers are community banks and credit unions, which tend to operate in narrowly defined geographic areas, depend deeply on the economies of these communities for their profitability, offer a range of products and services in both deposits and loans, are known for a "relationship" model that depends on repeat business to obtain more deposits and extend more loans, and could suffer significant harm to the business from any major failure to treat customers properly because they are particularly vulnerable to "word of mouth." These small servicers also generally service only loans they either originated or hold on portfolio.

The Bureau believes that servicers that service relatively few loans, all of which they either originated or hold on portfolio, generally have incentives to service well: foregoing the returns to scale of a large servicing portfolio indicates that the servicer chooses not to profit from volume, and owning or having originated all of the loans serviced indicates a stake in either the performance of the loan or in an ongoing relationship with the borrower. In light of these favorable incentives, and to preserve access to this type of servicing, the Bureau is exempting many small servicers from the requirements regarding general servicing policies, procedures and requirements, early intervention with delinquent borrowers, continuity of contact with delinquent borrowers; and, with a few exceptions, the requirements regarding loss mitigation, as well as the restriction on obtaining force-placed insurance when a servicer is able to disburse funds from a borrower's escrow account and force-placed insurance would be more expensive for the borrower.

In general, however, mortgage servicing is influenced by the absence of avenues through which borrowers can effectively reward or penalize servicers for the quality of servicing. A borrower cannot readily leave a servicer if the quality of servicing proves to be unsatisfactory, and the borrower cannot control the selection of the new servicer. Borrowers also generally do not have other ways of imposing financial consequences on servicers for poor servicing. Markets are incomplete between borrowers and servicers, and incomplete markets are a form of market failure. This market failure leaves many servicers with only limited incentives to engage in certain activities of value to consumers.[197]

Of particular relevance to this rulemaking is the fact that servicers obtain limited benefits from providing a number of services that are important to borrowers, and especially to delinquent borrowers. As discussed in part II, compensation structures have tended to make

[197] *See* Joseph E. Stiglitz, *Market Failure,* in *Economics of the Public Sector* (W. W. Norton & Co., Inc., 3d ed. 2000). An alternative way to view the market failure is that servicers are both the agents of investors and, as a practical matter, monopoly providers of information to consumers about details of the loan and consumer payments. Market failures need not be mutually exclusive (Stiglitz, p. 85). Further, as discussed below in the section on general servicing policies, procedures and requirements, foreclosure produces negative externalities, and some reduction in foreclosure may result from provisions of the final rule, particularly general servicing policies, procedures and requirements; early intervention; continuity of contact; and loss mitigation.

mortgage servicing a high-volume, low margin business in which servicers have little incentive to invest in customer service. Servicers have an incentive to provide borrowers with information and services that keep collection costs low, and fees from default servicing may encourage servicers to invest in efficiently ordering and tracking billable work. However, there has generally been no such compensation for hands-on work with borrowers associated with error resolution, information requests, early intervention, continuity of contact, loss mitigation; and for effectively managing the information that is collected from borrowers and provided to them in this work.[198]

Congress included mortgage servicing provisions in the Dodd-Frank Act in response to pervasive and profound consumer protection problems. The new protections in the rules promulgated under TILA and RESPA will significantly improve the transparency of mortgage loans after origination, including by facilitating timely responses to borrower requests and complaints, requiring the maintenance and provision of accurate and relevant information, avoiding the imposition of unwarranted or unnecessary costs and fees, and requiring review of borrowers for foreclosure avoidance options.

B. Provisions to be Analyzed

The analysis below considers the potential benefits, costs, and impacts of the following major provisions:

1. Notices of error and requests for information.

2. Force-placed insurance.

[198] For documentation of problems with servicer foreclosure processes and general operating processes, and for discussions of servicer incentives, *see* Fed. Reserve Sys., Office of the Comptroller of the Currency, & Office of Thrift Supervision, *Interagency Review of Foreclosure Policies and Practices* (2011); Larry Cordell et al., *The Incentives of Mortgage Servicers: Myths and Realities*, at 9 (Fed. Reserve Board, Working Paper No. 2008-46, 2008); and Kurt Eggert*, Limiting Abuse and Opportunism by Mortgage Servicers 15 Housing. Pol'y Debate 753 (2004).*

3. General servicing policies, procedures and requirements.

4. Early intervention.

5. Continuity of contact.

6. Loss mitigation procedures.

With respect to each major provision, the analysis considers the benefits and costs to consumers and covered persons, and in certain instances other impacts. The analysis also addresses comments the Bureau received on the proposed section 1022 analysis, as well as certain other comments on the benefits or costs of provisions of the proposed rule that are helpful to understanding the section 1022 analysis. Comments that mention the benefits or costs of a provision of the proposed rule in the context of commenting on the merits of that provision are addressed in the section-by-section analysis for that provision. The analysis also addresses certain alternative provisions that were considered by the Bureau in the development of the proposed rule, the final rule, or in response to comments.

C. Data and Quantification of Benefits, Costs and Impacts

Section 1022 of the Dodd-Frank Act requires that the Bureau, in adopting the rule, consider potential benefits and costs to consumers and covered persons resulting from the rule, including the potential reduction of access by consumers to consumer financial products or services resulting from the rule. As noted above, it also requires the Bureau to consider the impact of proposed rules on covered persons and the impact on consumers in rural areas. These potential benefits and costs, and these impacts, however, are not generally susceptible to particularized or definitive calculation in connection with this rule. The incidence and scope of such potential benefits and costs, and such impacts, will be influenced very substantially by economic cycles, market developments, and business and consumer choices, which are substantially independent from adoption of the rule. No commenter has advanced data or methodology that it claims would enable precise calculation of these benefits, costs, or impacts. Moreover, the potential benefits of the rule on consumers and covered persons in creating market changes that are anticipated to address market failures are especially hard to quantify.

In considering the relevant potential benefits, costs, and impacts, the Bureau has utilized the available data discussed in this preamble, where the Bureau has found it informative, and applied its knowledge and expertise concerning consumer financial markets, potential business and consumer choices, and economic analyses that it regards as most reliable and helpful, to consider the relevant potential benefits and costs, and relevant impacts. The data relied upon by the Bureau includes the public comment record established by the proposed rule. The Bureau recognizes that some parties may have different perspectives or consider potential benefits and costs differently.

However, the Bureau notes that for some aspects of this analysis, there are limited data available with which to quantify the potential costs, benefits, and impacts of the final rule. For example, data on the number and volume of various loan products originated for the portfolios of bank and non-bank lenders exists only in certain circumstances. The Bureau has obtained available information about the cost of improving servicer operations, and the discussion below uses this information to quantify some of the costs to servicers of the final rule. However, comprehensive data on the costs of improving servicer operations is unavailable. Data regarding many of the benefits of the rule such as the benefits from prevented defaults or from prevented injuries to the financial system are also limited.

In light of these data limitations, the analysis below generally provides a qualitative discussion of the benefits, costs, and impacts of the final rule. General economic principles, together with the limited data that are available, provide insight into these benefits, costs, and impacts. Where possible, the Bureau has made quantitative estimates based on these principles and the data that are available.[199] For the reasons stated in this preamble, the Bureau considers that the rule as adopted faithfully implements the purposes and objectives of Congress in the statute. Based on each and all of these considerations, the Bureau has concluded that the rule is appropriate as an implementation of the Act.[200]

D. Baseline for Analysis

The amendments to RESPA made by Dodd-Frank Act section 1463 regarding error resolution, information requests, and force-placed insurance are largely self-effectuating, and the Dodd-Frank Act generally does not require the Bureau to adopt regulations to implement these amendments.[201] Thus, many costs and benefits of the provisions of the final rule regarding error resolution, information requests, and force-placed insurance derive largely or entirely from the statute and from regulations regarding qualified written requests previously issued by HUD and republished by the Bureau, not from the final rule. These provisions of the final rule provide substantial benefits to servicers compared to allowing the RESPA amendments to take effect

[199] The Bureau noted in the proposals associated with the Title XIV Rulemakings that it sought to obtain additional data to supplement its consideration of the rulemakings, including additional data from the National Mortgage License System (NMLS) and the NMLS Mortgage Call Report, loan file extracts from various lenders, and data from the pilot phases of the National Mortgage Database. Each of these data sources was not necessarily relevant to each of the rulemakings. The Bureau used the additional data from NMLS and NMLS Mortgage Call Report data to better corroborate its estimate of the contours of the non-depository segment of the mortgage market. The Bureau has received loan file extracts from three lenders, but at this point, the data from one lender is not usable and the data from the other two is not sufficiently standardized nor representative to inform consideration of the final rules. Additionally, the Bureau has thus far not yet received data from the National Mortgage Database pilot phases. The Bureau also requested that commenters submit relevant data. All probative data submitted by commenters were discussed in this document.

[200] The Bureau received one comment that stated that by failing to identify the extent to which servicers do not already operate in a manner that would meet the standards of the rule, the Bureau failed to identify whether there was a “compelling public need” for regulatory action. The Bureau, however, believes it has demonstrated a compelling public need for regulation, including, for example, through the review of material failures of private markets in part II and the discussion of incomplete markets above. In any event, the Bureau has described the authority and basis for the rule and a “compelling public need” is not a legal prerequisite for rulemaking.

[201] *See* 12 U.S.C. 2605(k)(1)(A) and 2605(k)(1)(C) through (D).

against the existing regulatory framework under Regulation X and without implementing regulations by clarifying ambiguous provisions of the statute and integrating the new statutory requirements into the existing regulatory regime. Greater clarity and integration, as provided by the final rule, should reduce the compliance burdens on covered persons by, for example, reducing costs for attorneys and compliance officers as well as potential costs of over-compliance and unnecessary litigation.

Section 1022 of the Dodd-Frank Act permits the Bureau to consider the benefits, costs and impacts of the final rule solely compared to the state of the world in which the statute takes effect without implementing regulations. To provide the public better information about the benefits and costs of the statute, however, the Bureau has chosen to consider the benefits, costs, and impacts of the major provisions of the final rule against a pre-statutory baseline. That is, the Bureau's analysis below considers the benefits, costs, and impacts of the relevant provisions of the Dodd-Frank Act combined with the final rule implementing those provisions relative to the regulatory regime that pre-dates the Dodd-Frank Act and remains in effect until the final rule takes effect.[202] As noted above, Regulation X currently regulates servicers' responses to assertions of error and requests for information through the qualified written request process.

As discussed above, RESPA and Title X also give the Bureau authority to develop mortgage servicing rules under Regulation X that are not required by specific statutory provisions. In addition to relying on these authorities to supplement certain of the requirements under RESPA added by the Dodd-Frank Act, the Bureau is relying on these authorities to require servicers to: maintain certain general servicing policies, procedures and requirements; undertake

[202] The Bureau has chosen, as a matter of discretion, to consider the benefits and costs of those provisions that are required by the Dodd-Frank Act in order to better inform the rulemaking. The Bureau has discretion in future rulemakings to choose the relevant provisions to discuss and to choose the most appropriate baseline for that particular rulemaking.

early intervention with delinquent borrowers; provide delinquent borrowers with continuity of contact with staff equipped to assist them; and follow certain procedures when evaluating loss mitigation applications. Because Dodd-Frank Act section 1463 does not specifically impose these obligations on servicers, the pre-statute and post-statute baseline are the same with respect to the analysis of these provisions.

E. Coverage of the Final rule

The coverage of the mortgage servicing rules is summarized in part I above. The rules generally apply to federally related mortgage loans that are closed-end, with certain exemptions. Open-end lines of credit are generally exempt. Small servicers are exempt from most of the discretionary rulemakings, as discussed below.

Size of the Small Servicer Exemption

As discussed above, the Bureau believes that servicers that service relatively few loans, all of which they either originated or hold on portfolio, generally have incentives to service well: foregoing the returns to scale of a large servicing portfolio indicates that the servicer chooses not to profit from volume, and owning or having originated all of the loans serviced indicates a stake in either the performance of the loan or in an ongoing relationship with the borrower. The vast majority of smaller servicers are community banks and credit unions, which tend to operate in narrowly defined geographic areas, depend deeply on the economies of these communities for their profitability, offer a range of products and services in both deposits and loans, are known for a “relationship” model that depends on repeat business to obtain more deposits and extend more loans, and could suffer significant harm to the business from any major failure to treat customers properly because they are particularly vulnerable to “word of mouth.” These small servicers generally maintain "high-touch," customer-centric customer service models. They also generally service only loans they either originated or hold on portfolio.

Where small servicers already have incentives to provide high levels of customer contact and information, the Bureau believes that the circumstances warrant exempting those servicers from complying with certain provisions. For community banks and credit unions in particular, affirmative communications with consumers help them (and their affiliates) to ensure loan performance, market other consumer financial products and services to the customers for whom they service mortgages and have a relationship, and protect their reputations in their local communities.[203] Because these servicers generally have a long-term relationship with the consumers, their incentives with regard to charging fees and other servicing practices tend to be more aligned with consumer interests.

The Bureau believes that two conditions are necessary to warrant a possible exemption from a provision of the rule—that is, that an exemption may be appropriate only for servicers that service a relatively small number of loans and either own or originated the loans. Larger servicers are likely to be much more reliant on, and sophisticated users of, computer technology in order to manage their operations efficiently. In such situations, compliance is likely to be somewhat easier to accomplish. Further, larger servicers also generally operate in a larger number of communities under circumstances in which the "high touch" model of customer service is not practical or service many loans in which they do not have as much of a stake in the long-term performance.

[203] *See* Lori J. Pinto et al., Prime Alliance Loan Servicing, *Re-Thinking Loan Serving*, at 8 (Apr. 2010) ("Pinto Paper"), *available at* http://cuinsight.com/media/doc/WhitePaper_CaseStudy/wpcs_ReThinking_LoanServicing_May2010.pdf.

In order to implement the small servicer exemption, the Bureau defines a small servicer to be any servicer that, together with any affiliates, services 5,000 or fewer mortgages loans, all of which the servicer or affiliates originated or own. [204] The definition incorporates the requirement that the servicer or affiliates originated or own the loans that the servicer services because, as explained above, the Bureau believes that this is a key indicator of servicers that generally have incentives to provide high levels of customer contact and information. To develop the loan count threshold, the Bureau computed loan counts for insured depository institutions using data on aggregate unpaid principal balance and a measure the Bureau derived for the average loan unpaid principal balance at insured depositories.[205] The Bureau's methodology takes into account the fact that servicers that service smaller numbers of loans also tend to service loans with smaller unpaid principal balances. For example, the Bureau finds that the average unpaid principal balance on mortgage loans at insured depositories and credit unions is about $160,000, but it is only about $80,000 at insured depositories and credit unions with under $1 billion in assets.

The Bureau believes that the 5,000 mortgage loan threshold further identifies the group of servicers that make loans only or largely in their local communities or more generally have incentives to provide high levels of customer contact and information. The Bureau also believes, in light of the available data, that no other threshold is superior in balancing potential over-

[204] As stated above, the 5,000-loan threshold reflects the purposes of the exemption that the rule establishes for these servicers and the structure of the mortgage servicing industry. The Bureau's choice of 5,000 in loans serviced for purposes of Regulation Z does not imply that a threshold of that type or of that magnitude would be an appropriate way to distinguish small firms for other purposes or in other industries.

[205] Credit unions report the number and aggregate balance of mortgages held in portfolio on their Call Report. Using these reports the Bureau calculated the average unpaid principal balance of portfolio mortgages by State for credit unions with less than $1 billion in assets and applied the State specific figures to banks and thrifts under $10 billion in assets. For banks and thrifts with over $10 billion in assets, the Bureau relied on the OCC Mortgage Metrics Report, which showed an average unpaid principal balance estimate of $175,000. For securitized loans, the Bureau relied on the FHFA's non-public Home Loan Performance database, which provides data by size of securitized loan book; this yielded average unpaid principal balances ranging from $141,000 to $189,000.

inclusion and under-inclusion. With the threshold set at 5,000 loans, the Bureau estimates that over 98 percent of insured depositories and credit unions with under $2 billion in assets fall beneath the threshold. In contrast, only 29 percent with over $2 billion in assets fall beneath the threshold and only 11 percent of those with over $10 billion in assets do so. Further, over 99.5 percent of insured depositories and credit unions that meet the traditional threshold for a community bank--$1 billion in assets--fall beneath the threshold.[206] The Bureau estimates there are about 60 million closed-end mortgage loans overall, with about 5.7 million serviced by insured depositories and credit unions that qualify for the exemption.[207]

The Bureau believes that the insured depositories and credit unions that fall below the 5,000 loan threshold consist overwhelmingly of entities that make loans only or largely in their local communities and have incentives to provide high levels of customer contact and information. Further, while some such entities may service more than 5,000 loans, the Bureau believes that relatively few do, so expanding the loan count above 5,000 is more likely to include entities that use a different servicing model. If the loan count threshold were set at 10,000 mortgage loans, over 99.5 percent of insured depositories and credit unions with under $2 billion in assets would fall beneath the threshold. However, 50 percent of insured depositories with over $2 billion in assets and 20 percent of those with over $10 billion in assets would fall beneath the threshold. The Bureau recognizes that some of these servicers may not qualify as

[206] The Bureau notes, however, that the FDIC recently released a new set of empirical criteria for identifying community banks in which some banks with under $1 billion in assets are excluded and some banks with over $1 billion in assets are included. *See* Fed. Deposit Ins. Corp., *FDIC Community Banking Study*, at 1-5(Dec. 2012), *available at* http://www.fdic.gov/regulations/resources/cbi/study.html. The study is somewhat critical of using a $1 billion threshold to define community banks, as has been traditional. The Bureau's rule equates roughly to a $2 billion threshold to the extent that the rule covers 98 percent of insured depositories and credit unions with fewer assets.

[207] To obtain estimates of aggregate loan counts, the Bureau aggregated mortgage loan counts obtained or derived from the FHFA "Home Loan Performance" data described above, the Board's Flow of Funds Accounts of the United States (statistical release z.1), the data from the credit union Call Report and the bank and thrift Call Report, the CoreLogic mortgage loan servicing data set, and the BBx data set from BlackBox Logic.

small servicers because some may not own or have originated all of the loans they service. However, the Bureau believes that these figures give a fair representation of the types of servicers that would qualify as small servicers given the respective thresholds.[208]

The Bureau concludes that the 5,000 mortgage loan threshold, coupled with the requirement to service only loans owned or originated, provides a reasonable balance between the goal of including a substantial number of servicers that make loans only or largely in their local communities or more generally have incentives to provide high levels of customer service and the goal of excluding servicers that use a different, less personal business model. The Bureau further believes that it is appropriate for a definition of small servicers, for purposes of an exemption to servicing rules, to include conditions specifically associated with the incentives and business model of servicers, such as owning or originating all loans. There is no perfect way, however, to identify servicers that have chosen a business model in which an essential component is providing high levels of customer service.[209]

Finally, the Bureau estimates that there are about 13.9 million closed-end mortgage loans serviced by non-depositories.[210] The data is not available with which to accurately estimate the number of exempt non-depository servicers or the number of loans they service. However, the

[208] The Bureau believes that almost all insured depositories and credit unions that service 5,000 or fewer loans own or originated those loans. Entities servicing loans they did not originate and do not own most likely view servicing as a stand-alone line of business, and they would choose to service substantially more than 5,000 loans in order to obtain a profitable return on their investment in servicing. To the extent the assumption does not hold, it is more likely not to hold for insured depositories and credit unions servicing more than 5,000 loans.

[209] In the 2012 RESPA Servicing Proposal, the Bureau solicited comment on whether to exempt small servicers from certain provisions. As discussed above in the analysis of § 1024.30, the Bureau received comments on this issue. Regarding a threshold for the number of mortgage loans in the definition of a small servicer, commenters recommended thresholds between 5,000 and 15,000 mortgage loans. For the reasons described above, the Bureau believes that the 5,000 loan count threshold coupled with the requirement that the servicer owns or originated the loans provide an appropriate definition of small servicer for purpose of the exemption.

[210] To obtain estimates of loan counts, the Bureau aggregated mortgage loan counts obtained or derived from the FHFA “Home Loan Performance” data described above, the Board’s Flow of Funds Accounts of the United States (statistical release z.1), the data from the credit union Call Report and the bank and thrift Call Report, the CoreLogic mortgage loan servicing data set, and the BBx data set from BlackBox Logic.

Bureau believes that the number of loans serviced is a small percentage of this total given the financial advantages of servicing large numbers of loans. The Bureau has therefore decided not to distinguish, in the definition of a small servicer, whether a mortgage servicer is an insured depository or credit union or has some other business form.

F. Potential Benefits and Costs to Consumers and Covered Persons

1. Notices of Error and Requests for Information

Section 1463 of the Dodd-Frank Act amends section 6 of RESPA by, among other things, establishing new servicer obligations with respect to handling notices of error and requests for information from borrowers and making certain changes to the existing qualified written request process under RESPA and Regulation X. Specifically, section 1463 of the Dodd-Frank Act (1) prohibits servicers from failing to take timely action to respond to borrower requests to correct errors relating to allocation of payments, final balances for purposes of paying off a mortgage loan, avoiding foreclosure, or other standard servicer duties, (2) prohibits servicers from failing to respond within ten business days to requests from borrowers regarding the identity of the owner or assignee of their mortgage loan, and (3) prohibits servicers from charging fees for responding to qualified written requests. Further, section 1463 of the Dodd-Frank Act shortens the timeframe for servicers to acknowledge and respond to qualified written requests.

The Bureau has implemented these amendments to RESPA through §§ 1024.35 and .36. Under § 1024.35, servicers are required to respond to written notices from borrowers regarding certain covered errors, including errors relating to the servicing of a borrower’s mortgage loan. Under § 1024.36, servicers are2 required to respond to borrowers’ written requests for information regarding their mortgage loan. Both §§ 1024.35 and 1024.36 apply to qualified written requests asserting covered errors or requesting information regarding the borrower’s mortgage loan, respectively, but notices of error and information requests need not meet the requirements for submission of a qualified written request to fall under §§ 1024.35 and 1024.36.[211]

Under § 1024.35, servicers must provide borrowers with a written acknowledgement within five days (excluding legal public holidays, Saturdays and Sundays) of receipt of a notice of error. In addition, § 1024.35 requires servicers to respond to a notice of error by either correcting the asserted error and notifying the borrower of such correction in writing, or conducting a reasonable investigation and providing the borrower with written notification including a statement that no error occurred and of the borrower's right to request documents relied upon by the servicer to reach this determination. For most asserted errors, § 1024.35 requires that the investigation must be completed and a response provided within 30 days (excluding legal public holidays, Saturdays and Sundays) after receipt of the notice of error. Servicers are not required to comply with these acknowledgement and response requirements if they correct the error asserted by the borrower and notify the borrower of the correction in writing within five days (excluding legal public holidays, Saturdays and Sundays). Servicers also are not required to comply with these requirements for notices of error that are duplicative, overbroad, or untimely.

The final rule provides for substantially similar requirements with respect to borrower requests for information. Under § 1024.36, servicers must provide borrowers with written acknowledgement within five days (excluding legal public holidays, Saturdays and Sundays) of receipt of an information request. In addition, § 1024.35 requires servicers to respond to an

[211] In the final rule, the provisions in § 1024.35 and § 1024.36 apply only to written notices or requests from borrowers. However, § 1024.38 provides obligations on servicers regarding oral assertions of error and oral requests for information.

information request by either providing a borrower with the requested information or conducting a reasonable search for the information and providing the borrower with a written notification that the information requested is not available to the servicer. For requests for most types of information, the servicer must respond to a borrower's request within 30 days (excluding legal public holidays, Saturdays and Sundays) after receipt of the information request. Servicers are not required to comply with these acknowledgement and response requirements if they provide the information requested to the borrower within five days (excluding legal public holidays, Saturdays and Sundays). Servicers also are not required to comply with these requirements for requests for confidential, proprietary, or privileged information, or requests for information that are overbroad, unduly burdensome, duplicative, or untimely.

Potential benefits and costs to consumers—error resolution. Section 1024.35 lists eleven categories of errors subject to the requirements of the section, including a catch-all category for any error relating to the servicing of a borrower's loan. Any qualified written request that asserts an error relating to the servicing of a mortgage loan is a notice of error under the rule. However, the rule also applies to notices of error that are not covered by the current qualified written request mechanism.

The benefits to borrowers of the new error resolution process depend on (a) the number of borrowers who use the new error resolution process who would otherwise assert errors informally, via phone calls or email, either because the new process is broader in scope or is easier to use than the qualified written request process, (b) the additional benefits to these borrowers from using the new error resolution process instead of an informal process, and (c) the additional benefits from reduced response times and enhanced investigation requirements to borrowers who, absent the rule, would use the qualified written request process.[212]

In developing the proposed rule, the Bureau conducted outreach with servicers regarding error resolution. The Bureau could not obtain representative, quantitative information about the number or types of errors currently asserted by borrowers under either informal processes or the qualified written request process. Thus, it is not possible to quantify the potential for greater use of the new process or the potential additional benefits to those who would use it instead of using current informal or formal processes.[213]

Some of the enumerated errors subject to the error resolution requirements under the final rule concern basic duties that servicers perform frequently for large numbers of borrowers (*e.g.*, accept conforming payments, properly apply payments as required under the terms of the mortgage loan, pay taxes and insurance). The Bureau believes that servicers currently generally perform these duties. Further, when servicers do not, the errors frequently are, and will continue to be, asserted and resolved adequately through an informal process. Borrowers who currently assert these errors through the qualified written request process may benefit given the simpler form requirements and faster response times required under the final rule. On occasion, however, borrowers who currently use an informal process may instead use the error resolution process under the final rule, perhaps because it is more convenient than the existing qualified written request process, and these borrowers may obtain a better outcome given the final rule's investigation and response requirements.

Other enumerated errors concern activities that servicers perform less frequently. With respect to these activities, errors are more likely to occur and informal mechanisms are less likely

[212] There may be benefits to borrowers generally if assertions of errors induce servicers to improve their operations, although whether this will occur is uncertain.

[213] See, however, the general discussion of servicing operations and avoidable foreclosure in the analysis of the provisions on reasonable information management, *infra*.

to lead to effective resolution. For example, under the final rule, it is a covered error for a servicer to fail to provide accurate information to a borrower with respect to loss mitigation options and foreclosure or to fail to suspend a foreclosure sale when, for example, the borrower is performing under a loss mitigation agreement. The greater scope and clarity of the new error resolution process will allow borrowers who would otherwise not assert errors relating to these issues at all or would assert them informally to obtain the benefits of the new investigation and response requirements of the error resolution process. Borrowers who would use the qualified written request process will also benefit from the new investigation and response requirements of the error resolution process. Because many of these errors have the potential to impose substantial financial and other costs on borrowers, the error resolution requirements under the final rule may provide substantial benefits to borrowers who experience such errors.

More generally, the Bureau believes that the rule would benefit borrowers because, as discussed above, there is reason to believe that many servicers do not currently invest sufficiently in providing robust error resolution procedures to borrowers. Borrowers do not choose their servicers, except indirectly by choosing their lenders, and have little recourse for poor customer service against either their servicers or the owners or assignees of their loans (for whom servicers are the agents). Thus, the market for servicing may not fully reflect the interests of borrowers in having robust error resolution procedures.

The Bureau recognizes the possibility that the provisions on error resolution may impose costs on some servicers. One-time training costs and system updates as well as higher ongoing costs from the new error resolution process may lead servicers to reduce other services. Servicers may, for example, reallocate resources from oral error resolution to written error resolution, reducing access to servicer personnel for some borrowers while increasing access and quality of outcomes for others. This particular effect should be limited given the requirements in § 1024.38 regarding policies and procedures for responding to oral assertions of complaints. Servicers may, however, reduce other services. Similarly, servicers may not charge a fee or require a borrower to make any payment that may be owed as a condition of responding to a notice of error. Servicers may, however, charge fees for other activities.

Potential benefits and costs to consumers—requests for information. The benefits to borrowers of the new information request process depend on (a) the number of borrowers who use the new process for requesting information who would otherwise make these requests informally, via phone calls or email, either because the new process is broader in scope or is easier to use than the qualified written request process, (b) the additional benefits to these borrowers from using the new process for requesting information instead of an informal process, and (c) the additional benefits from reduced response times and enhanced investigation requirements to borrowers who, absent the rule, would use the qualified written request process.

Regarding outcomes of the new information request process, the servicer is a convenient source of certain information that may be requested by borrowers (*e.g.*, details about the terms of the loan, the annual amount of interest paid, the remaining mortgage balance) and may be the only source of other information (*e.g.*, the date a payment was received or a disbursement from escrow was made, the new payment on an adjustable rate mortgage). Receipt of such information may provide many benefits to borrowers; both by facilitating household budgeting in the near term and over time, which can improve the household’s welfare, and by allowing borrowers to forestall or correct problems likely to cause them monetary losses (*e.g.*, by verifying that payments were received or taxes and insurance were paid from escrow).

In developing the proposed rule, the Bureau conducted outreach with servicers regarding existing information request processes. One servicer estimated that it receives 70,000 phone calls a month on a portfolio of 300,000 loans; another estimated it receives 160,000 phone calls per month on a portfolio of about 1 million loans. Borrowers may call servicers both to request information and to assert errors, but the Bureau was informed that the vast majority of phone calls are requests for information. The most common request for information is whether the servicer has received the borrower's payment. Most requests for information that are made by phone are addressed by servicers in the same call. The Bureau believes that other servicers generally follow the same practice.

Given the convenience of receiving information through informal oral processes, the Bureau does not believe that the final rule will cause large numbers of borrowers to change from using informal oral processes to formal written processes. However, borrowers who do make this change as well as borrowers who would use the qualified written request process if not for the rule will benefit from the reduced form requirements and the new investigation and response requirements applicable to requests.

More generally, the Bureau believes that the rule would benefit borrowers because, as discussed above, there is reason to believe that many servicers do not currently invest sufficiently in having robust procedures for addressing information requests from borrowers. Borrowers do not choose their servicers, except indirectly by choosing their lenders, and have little recourse for poor customer service against either their servicers or the owners or assignees of their loans (for whom servicers are the agents). Thus, the market for servicing may not fully reflect the interests of borrowers in having robust procedures for information requests.

The Bureau recognizes the possibility that the provisions on requests for information may impose costs on some borrowers. One-time training costs and system updates and higher ongoing costs from the new process for requesting information may lead servicers to reduce other services. Servicers may, for example, reallocate resources from addressing oral requests for information to written requests for information, reducing access to servicer personnel for some borrowers while increasing access and quality of outcomes for others. This particular effect should be limited given the requirements in § 1024.38 regarding maintaining policies and procedures to address oral complaints and requests for information. Similarly, servicers generally may not charge a fee or require a borrower to make any payment that may be owed as a condition of responding to an information request. Servicers may, however, charge fees for other activities.

Potential benefits and costs to covered persons. The Bureau has carefully considered whether there are any significant benefits to covered person from this provision and has determined that there are not.

Servicers currently incur costs responding to qualified written requests to correct errors and to provide information. Servicers will incur additional one-time and ongoing costs to comply with the new investigation and response requirements and meet the new time limits. Servicers will need new training materials and possibly better access to borrower data, in which case some servicers will need system updates and better data storage and data management capabilities. On the other hand, as discussed above, the convenience of oral and other informal means of asserting errors and requesting information should moderate the extent to which borrowers make use of even the expanded and streamlined formal written processes under §§ 1024.35 and 1024.36 for asserting errors and requesting information. Some servicers may also need to hire additional employees.

Certain provisions of § 1024.35 and 1024.36 are intended to mitigate the costs of complying with the procedures. Notices of error and information requests that are resolved within five days (excluding legal public holidays, Saturdays and Sundays) are not subject to the acknowledgement or response requirements of the error resolution and information request provisions. Servicers do not need to respond to notices of error or information requests that are overbroad or duplicative. Further, the provisions of the final rule provide substantial clarity to servicers regarding servicer duties compared to the current qualified written request mechanism. As noted, clarity reduces costs for attorney and compliance officer time as well as potential costs of over-compliance and unnecessary litigation.

The Bureau further considered whether to define as a covered error a servicer's failure to accurately and timely provide a disclosure to a borrower as required by applicable law. The Bureau determined that such a failure was not appropriate as a covered error because the information request provisions provide the borrower the ability to obtain the underlying information. Further, the Bureau believes that a servicer's action to attempt to correct the failure, such as by sending the disclosure after the deadline, would not actually correct the error and would not be helpful or useful to borrowers. In that circumstance, the error resolution request would create burden and impose costs on servicers without offering concomitant benefit for borrowers.

As discussed above in the section-by-section analysis for §§ 1024.35 and 1024.36, in light of comments received, the Bureau reconsidered its assessment in the 2012 RESPA Servicing Proposal of the costs of applying the error resolution procedures to oral notices of error. Specifically, the Bureau concluded that tracking, investigating, documenting, and providing written responses to oral notices of error—expanded under the final rule from a finite list of errors to include a limited catch-all provision—would impose significant new costs on servicers. Relative to the proposed rule, the final rule restricts the error resolution and information request requirements solely to notices of error and information requests received in writing, but adds a catch-all provision to the definition of covered errors similar to the current statutory requirement that servicers respond to qualified written requests relating to the servicing of a mortgage loan. By not applying the error resolution procedures to oral assertions of error or requests for information, the Bureau avoids imposing on servicers the incremental costs of compliance with the strict requirements of §§ 1024.35 and 1024.36 with respect to oral notices of error and requests for information, including with respect to errors that may be asserted by means of the catch-all category.

2. Requirements Regarding Force-Placed Insurance Policies

Dodd-Frank Act section 1463 amends RESPA to prohibit a servicer of a federally related mortgage loan from obtaining force-placed insurance unless there is a reasonable basis to believe the borrower has failed to comply with the loan contract's requirements to maintain property insurance. In addition, the statute sets forth a mandatory process servicers must follow before obtaining force-placed insurance. The process includes sending the borrower two written notices over a 45-day period. The statute also requires servicers to terminate force-placed insurance and refund to borrowers force-placed insurance premium charges and related fees paid during any period during which the borrower's hazard insurance coverage and the force-placed insurance coverage were both in effect. The statute also specifies that servicers must accept any reasonable form of written confirmation from a borrower of existing insurance coverage, and that charges related to force-placed insurance must be bona fide and reasonable.

The Bureau has implemented these requirements through § 1024.37 of the final rule. Section 1024.37 also requires servicers to provide borrowers with written notice before renewing existing force-placed insurance policies. The final rule provides model forms for the force-placed insurance notices to be sent to borrowers.

Additionally, with respect to borrowers with escrow accounts for the payment of hazard insurance, § 1024.17(k)(5) prohibits servicers from purchasing force-placed insurance where the servicer can continue the borrower's homeowner insurance, even if the servicer needs to advance funds to the borrower's escrow account to do so.

Potential benefits and costs to consumers. Borrowers pay for force-placed insurance, but they do not select the insurance provider or have other ways of providing consequential feedback to the insurance provider regarding its services. Further, incentives like commissions paid to servicers or their insurance affiliates may cause servicers to prefer purchasing force-placed insurance or renewing pre-existing force-placed insurance over ensuring that borrowers have adequate opportunity to renew their hazard insurance. Thus, the market for force-placed insurance may not fully reflect the interests of borrowers in minimizing force-placement and the amount of time force-placed insurance is in effect. Accordingly, mandated force-placed insurance disclosures and procedures may reduce the number of borrowers who pay for unnecessary force-placed insurance or the length of time during which borrowers pay for such insurance.

The Bureau and ICF Macro (Macro) worked closely during the first quarter of 2012 to develop and test force-placed insurance disclosures that would satisfy the requirements of the Dodd-Frank Act and provide information to consumers in a manner that would be understandable and useful. Specifically, the Bureau undertook three rounds of qualitative testing of the notices, and participants said that if they received force-placed insurance notices like the ones the Bureau is issuing, they would immediately contact their insurance provider to find out whether or not their hazard insurance was still in force. In light of our testing, anecdotal evidence and the Bureau's own judgment and expertise about consumer needs and behavior, the Bureau believes that these required disclosures will benefit consumer. This testing is summarized in part III and discussed further in part V, above.

The Bureau does not have representative data with which to quantify the extent to which industry practice currently meets the standards of the force-placed insurance provisions or the extent to which the provisions on force-placed insurance would reduce the need for force placement or the duration of force placement; however, as discussed in greater detail below, the Bureau believes that many servicers already send borrowers multiple notices before charging borrowers for force-placed insurance. Further, the Bureau understands that industry practice generally entails servicers terminating force-placed insurance coverage and refunding to borrowers any premiums charged during any period when the borrower had borrower-obtained insurance coverage in place. Borrowers whose servicers already provide multiple notice before charging borrowers for force-placed insurance and follow the provisions under § 1024.37 regarding termination and refunds will benefit less from § 1024.37 than borrowers whose servicers currently do not follow these practices. But even for the former category of borrowers, the final rule may result in benefits by ensuring that adequate time is given for borrowers to review the force-place insurance notices sent by servicers and that the form and content of the notices are tailored to enhance consumer understanding. Depending on their current servicers' practices, such borrowers may also benefit from the requirements under the final rule regarding the evidence that servicers are required to accept of existing hazard insurance, the requirement that charges related to force-placed insurance be bona fide and reasonable, and the requirement to provide notice before renewing or replacing existing force-placed insurance.

The Bureau notes that even a small reduction in force-placed insurance may provide borrowers with substantial benefits. In 2009, the average premium for homeowner's insurance was $880 while on average force-placed insurance cost about twice this amount.[214] Thus, on average, a homeowner who pays for force-placed insurance for one to six months pays an additional $73 to $440 dollars.[215] If the provisions of the final rule reduce the incidence of force-placed insurance by just 10 percent, approximately 171,000 homeowners will save between $7.6 million and $45.8 million in unnecessary premiums each year.[216]

For purposes of qualitative analysis, it is useful to first divide borrowers into those with insurance that has been force-placed by a servicer and those with hazard insurance coverage obtained by the borrower. Of those with borrower-obtained hazard insurance, it is useful to sub-divide this group into two additional groups: those with hazard insurance that is about to lapse and who have the funds to renew (whether the funds are kept in an escrow account or elsewhere); and those with hazard insurance that is about to lapse and who do not have the funds to renew. The force-placed insurance disclosures and procedures may provide different benefits to borrowers depending on the group to which they belong. In all cases, the benefits to borrowers from the rule are smaller to the extent the current business practices of servicers approximate the practices required by the rule.

Borrowers with force-placed insurance benefit from provisions that reduce the number of

[214] For the average homeowner's insurance premium, *see* data provided by Insurance Institute of America, available at: http://www.iii.org/facts_statistics/homeowners-and-renters-insurance.html. For information on the cost of force-placed insurance, see http://newsroom.assurant.com/releasedetail.cfm?ReleaseID=645046&ReleaseType=Featured%20News (reporting force-placed insurance costs 1.5 to 2 times hazard insurance).

[215] That is to say, the homeowner pays one-twelfth to one-half of the additional $880.

[216] Discussions with industry during the development of the proposed rule suggested that 2 percent of mortgages incurred force-placement each year. There are approximately 52 million first liens, so about 1.04 million homeowners incur force-placement each year. Ten percent of this figure multiplied by $73 (or $440) gives $7.6 million (or $45.8 million).

days the borrower has force-placed insurance and the charge per day. A borrower with forced-placed insurance and a servicer that does not currently comply with some of the requirements regarding renewal of force-placed insurance, evidence of hazard insurance, cancellation of force-placed insurance, or bona fide and reasonable charges may pay less each day and for a fewer number of days under the rule.

Next, consider a borrower who has hazard insurance the borrower obtained (i.e. the servicer did not force-place), the policy is about to lapse, and the borrower has the funds to renew the insurance. If the funds are not in an escrow account, then the borrower may fail to properly renew the insurance. The force-placed insurance procedures would not require the servicer to renew the hazard insurance of a borrower who does not have an escrow account established to pay the borrower’s hazard insurance; however, the servicer still has to provide two notices before charging such borrowers for force-placed insurance. Insofar as these forms are more effective than existing forms, compliance would reduce the chance that the borrower would pay for unnecessary force-placed insurance. Further, if the borrower’s insurance does lapse, compliance with the requirements regarding renewal of force-placed insurance, evidence of hazard insurance and cancellation of force-placed insurance may reduce both the number of days and the cost per day that the borrower has force-placed insurance.

Next, consider a borrower who has hazard insurance that is about to lapse and does not have the funds to renew the insurance. If the borrower does not have an escrow account and the servicer obtains force-placed insurance, but the borrower later acquires the funds to obtain hazard insurance, then compliance by the servicer with the requirements regarding evidence of hazard insurance and cancellation of force-placed insurance may reduce both the number of days and the cost per day that the borrower has force-placed insurance. If this borrower has escrowed for the payment of hazard insurance and the escrow account contains insufficient funds to pay his or her hazard insurance premium charges, the servicer is currently required under Regulation X to advance funds for the timely payment of escrowed items as long as the borrower’s payment is not more than 30 days overdue. For this borrower, compliance by the servicer removes the possibility that the borrower’s hazard insurance would be canceled for nonpayment after 30 days and accordingly, the chance that the borrower would pay for force-placed insurance.

The Bureau does not believe that the requirements of the final rule regarding force-placed insurance will increase costs to borrowers for mortgage credit or impose other significant costs on borrowers. The costs to servicers are discussed below, but servicers or force-placed insurers currently incur expenses associated with the activities required by the rule even if they do not comply with the rule. As discussed below, however, the Bureau recognizes that the rule may change financial relationships between servicers and force-placed insurers and servicers may eventually see some increase in costs. Servicers might pass these costs on to investors or, if they originate loans, at origination to borrowers who are more likely than others to require force-placed insurance.

Potential benefits and costs to covered persons. In general, to the extent servicers manage the force-placement of insurance and not the insurers or (for the disclosures) vendors, compliance will require the development of new disclosures, system updates to incorporate information specific to each loan into those disclosures, the development of internal policies and procedures consistent with the rule, staff training on those policies and procedures, internal monitoring for compliance, and other expenses discussed below. In all cases, the costs to servicers from the rule are smaller to the extent the current business practices of servicers approximate the practices required by the rule.

The first of the two required disclosures given before charging a borrower for force-placed insurance would require minimal customization to each loan, but the second disclosure would have to include the cost or a reasonable estimate of the cost of force-placed insurance, stated as an annual premium. Further, even if servicers provide the new disclosures, they will likely use vendors who will be developing and providing similar disclosures to many other servicers in light of the new rules. Thus, the one-time costs of the new disclosures will be spread over many servicers. The development costs are also mitigated by fact the Bureau has developed model forms. Servicers will not incur these costs to the extent force-placed insurance providers perform these duties for servicers and will continue to do so after the new rules take effect. However, the Bureau recognizes that these arrangements may change if the new rules make force-placement less frequent.

With respect to the renewal notice, there does not appear to be an industry standard for providing advance notice before a servicer renews or replaces existing force-placed insurance. Thus, this provision may impose new and ongoing costs on servicers of the types described above. The renewal notice need only be given once per year, however, so again the Bureau does not believe that this requirement imposes any substantial costs relative to the baseline.[217] The points made above regarding the use of vendors and force-placed insurance providers are applicable to renewal notices as well and would mitigate the cost of providing the notice.

The Bureau recognizes that under the final rule servicers (or insurers) may need to wait longer between the time they send disclosures to borrowers and when they may charge for force-placed insurance, as compared to current practice. Servicers (or insurers) may incur some initial

[217] Further, as discussed in greater detail in part V, above, servicers already are subject to a disclosure regime with some similar characteristics when obtaining force-placed flood insurance as required by the FDPA. The presence of these systems may make it less costly for servicers to comply with the Bureau's procedures for force-placed insurance, since systems are in place that could be adapted outside the force-placed flood insurance context.

expenses in adjusting how they monitor accounts in order to provide the notices in advance of imposing charges, or they may make greater use of retroactive provisions in force-placed insurance policies.

With respect to borrowers with escrow accounts, servicers may not purchase force-placed insurance unless a servicer is unable to disburse funds from the borrower's escrow account to ensure that the borrower's hazard insurance premium charges are paid in a timely manner. While servicers have priority in recovering these funds either from the homeowner or when the property is sold in foreclosure, they do not recover interest on these advances.[218] The Bureau is not aware of representative and reasonably available data that would it allow it to estimate the quantity of funds that will be advanced for different periods of time as a result of the final rule.

As discussed above, current industry practice generally entails servicers terminating force-placed insurance coverage and refunding to borrowers any premiums charged during any period when the borrower had borrower-obtained insurance coverage in place. Thus the Bureau does not believe that the required refund of premiums for force-placed insurance that overlapped with existing hazard insurance will impose substantial costs relative to the baseline for most servicers. Although the Bureau understands that most, if not all, servicers and force-placed insurers refund premiums paid for overlapping coverage, a servicer who does not follow this practice may incur costs to develop systems and train staff necessary to process such refunds. Further, because the servicer is obligated to refund the premiums, there may be interests costs on funds between the time the servicer refunds the premium to the borrower and the corresponding time when a premium advanced by the servicer to the insurer is refunded from the insurer to the

[218] *See e.g.*, Adam Levitin and Tara Twomey, *Mortgage Servicing*, 28 Yale J. on Reg. 48 (2011) (explaining that servicing advances, which include advances for taxes and insurance, are costly to servicers because they do not recover interest on the advances) .

servicer.

The Bureau notes that the owners or assignees of mortgage loans may also benefit from the force-placed insurance disclosures and procedures. As discussed in part V, above, force-placed insurance is often significantly more expensive than hazard insurance obtained by the borrower. If the final outcome is foreclosure, the additional cost of funds forwarded for force-placed insurance produces an additional expense to such persons, who benefit when this additional expense is minimized.

Finally, the Bureau recognizes that the force-placed insurance provisions may produce a number of changes in how force-placed insurance is provided and paid for. These changes may increase the costs to servicers from monitoring insurance coverage and placing and removing force-placed insurance. The Bureau believes that currently some servicers incur all of the costs associated with providing force-placed insurance notices, tracking borrower coverage, and placing and terminating the insurance. However, for other servicers, the Bureau believes that the force-placed insurance provider handles these activities and absorbs the costs or passes them on to the borrower. If the force-placed insurance provisions reduce the frequency with which servicers obtain force-placed insurance, then total payments by borrowers to servicers and force-placed insurers may fall. This may reduce commission income that in some cases is paid by insurers to servicers or their insurance affiliates, and it may also reduce the willingness of force-placed insurance providers to perform the tracking and other activities stated above as part of the service. Servicers may therefore see a reduction in commission income and an increase in costs.

3. General Servicing Policies, Procedures, and Requirements

Section 1024.38 imposes requirements on servicers to maintain policies and procedures that are reasonably designed to achieve certain objectives. These are: (1) accessing and providing timely and accurate information; (2) properly evaluating loss mitigation applications; (3) facilitating oversight of, and compliance by service providers; (4) facilitating transfer of information during servicing transfers; and (5) informing borrowers of written error resolution and information request procedures. Section 1024.38 also requires that servicers retain records for a specified time period and that servicers maintain certain documents and data on each mortgage loan account in a manner that facilitates compiling such documents and data into a servicing file within five days. Servicers that qualify as small servicers pursuant to 12 CFR 1026.41(e) are exempt from the requirements in this section of the final rule.

Potential benefits and cost to consumers. The Bureau does not have representative data with which to quantify the extent to which current business practices satisfy the general servicing policies, procedures and requirements in § 1024.38, the extent to which compliance would provide additional benefits to borrowers, or the monetary value of those additional benefits to borrowers. The discussion below therefore generally provides a qualitative analysis. In all cases, the benefits to borrowers from the rule are smaller to the extent the current business practices of servicers approximate the practices required by the rule.

In general, the Bureau believes that most servicers currently correctly perform the basic duty of receiving timely and conforming payments and allocating them. Borrowers who make timely and conforming payments every payment period may request information or assert errors about their accounts from time to time, but by assumption they do not need to be evaluated for loss mitigation options. Such borrowers are likely to derive just small benefits from the policies and procedures requirements in § 1024.38 because such borrowers are not likely to be directly affected by improved operations regarding accessing and providing accurate information, properly evaluating loss mitigation applications, facilitating oversight of service provider, and informing borrowers of written error resolution and information request procedures. These borrowers may still, however, benefit from the policies and procedures that relate to facilitating the transfer of information during servicing transfers. Borrowers may experience a servicing transfer irrespective of whether they make timely and conforming payments and information and documents may be lost during transfers even with respect to borrowers who make timely and conforming payments.

A substantial number of borrowers, however, do not make timely and conforming payments every payment period. Lender Processing Services reports that at the end of September 2012, about 5.6 million homes were 30 or more days delinquent or in foreclosure.[219] One large database of first-lien residential mortgages shows that about 12 percent of mortgages failed to be current and performing in each of the five quarters ending with the third quarter of 2012.[220] Extrapolating this figure to the national level indicates over 6 million loans in some type of distress.

Borrowers who do not make timely and conforming payments are likely to benefit from all the policies and procedures and other requirements in § 1024.38. First, delinquent borrowers are likely to derive substantial benefit from the requirement that servicers maintain policies and procedures to achieve the objective of accessing and providing accurate information. Such borrowers are both likely to need information from their servicer and to experience harm if the information needed is unavailable or inaccurate. For example, delinquent borrowers managing a number of different debts face an especially difficult challenge in determining how best to allocate scarce household resources. Managing this challenge requires accurate information

[219] *See* Lender Processing Servs., LPS *First Look* Mortgage Report, Oct. 22, 2012, *available at* . http://www.lpsvcs.com/LPSCorporateInformation/NewsRoom/Pages/20121022a.aspx .

[220] *See* Office of the Comptroller of Currency, Release 2012-178, *OCC Mortgage Metrics Report, Third Quarter 2012*, at 13 tbl. 7 (2012).

from a mortgage servicer about the consequences of paying different amounts on fees and penalties, unpaid interest, equity, and the likelihood of foreclosure. Further, accurate information is necessary for servicers to achieve other objectives and requirements to protect borrowers. For example, properly evaluating delinquent borrowers for loss mitigation options requires, among other things, accurate information regarding the borrower's mortgage loan account in addition to accurate information regarding the options available.

Second, delinquent borrowers are likely to derive substantial benefit from the requirement that servicers maintain policies and procedures to achieve the objective of properly evaluating loss mitigation applications. Loss mitigation options necessarily relate to borrowers that are delinquent or are likely to become delinquent because it is the losses resulting from such delinquency that such options are designed to mitigate. Delinquent borrowers benefit from servicers maintaining policies and procedures that facilitate servicers understanding which loss mitigation options, if any, are available for a delinquent borrower and facilitate reviewing the borrower for loss mitigation options available pursuant to requirements established by an owner or assignee of a mortgage loan. Improving loss mitigation evaluations for delinquent borrowers improves the accuracy of servicer determinations, causing more borrowers that may benefit from, and should receive, such options to be afforded the opportunity to benefit from such options. Further, improved operations reduce costs that borrowers may accrue from delays in loss mitigation evaluations (including costs relating to ongoing foreclosure processes).

Third, delinquent borrowers are likely to derive substantial benefit from the requirement that servicers maintain policies and procedures to achieve the objective of facilitating oversight of, and compliance by, service providers. Service providers typically provide services in connection with mortgage loan accounts for delinquent borrowers. Such services may include broker price opinions, property maintenance, or attorney costs for foreclosure processes. Delinquent borrowers, who are generally subject to incurring such costs, benefit from oversight of such service providers to ensure that such service providers do not pass charges on to borrowers for services that are unnecessary or were not actually performed.

Fourth, delinquent borrowers are likely to derive substantial benefit from the requirement that servicers maintain policies and procedures to achieve the objective of facilitating transfer of information during servicing transfers. As stated above, borrowers may experience a servicing transfer irrespective of whether they make timely and conforming payments. Further, delinquent borrowers, who may have been interacting with servicers on loss mitigation options, may benefit because such interactions are typically document intensive, and information and documents may be lost during transfers.

Fifth, delinquent borrowers are likely to derive substantial benefit from the requirement that servicers maintain policies and procedures to achieve the objective of informing borrowers of written error resolution and information request procedures. As discussed above, delinquent borrowers are more likely to need the written error resolution and information request provisions. The policies and procedures that require servicers to inform borrowers of the available options will help ensure delinquent borrowers have access to this information.

Finally, § 1024.38 requires that servicers comply with two requirements: servicers must retain documents with respect to the servicing of a mortgage loan until one year after a mortgage loan is paid in full or servicing for a mortgage loan is transferred. Further, a servicer must store certain information regarding a mortgage loan in a manner that facilitates compiling such information into a servicing file within five days. All borrowers, whether delinquent or not, derive some benefit from these requirements because these requirements facilitate the error resolution and information request requirements in §§ 1024.35 and 1024.36. Because borrowers may submit notices of error or information requests until one year after a mortgage loan has been paid in full or servicing has been transferred, borrowers benefit if servicers are required to have the documents and information that would be necessary to evaluate any such notices of error or to provide to the borrower in response to any such timely notice of error or information request. Further, all borrowers, and especially delinquent borrowers, benefit from the servicing file provision.

Although in general data is unavailable to quantify the benefits and costs of the policies and procedures required under § 1024.38, it is possible to provide a rough estimate of a key consumer benefit—an increase in the probability a borrower is offered a loan modification—that may result from the collective impact of all the provisions of the final rule that address loss mitigation (i.e., §§ 1024.38-1024.41) but may depend especially on the requirement under § 1024.38(b) that servicers maintain policies and procedures to achieve the objective of properly evaluating loss mitigation applications. It is also possible to provide a rough estimate of another benefit—the reduction in avoidable default (i.e., 90 day delinquency) associated with better servicers—that may be attributed to all of the provisions of the final rule regarding loss mitigation, including § 1024.38. These benefits are discussed below.

First, recent research strongly indicates that substantially similar borrowers receive different loss mitigation options from different servicers. Regression analysis of data in the OCC-OTS Mortgage Metrics database shows that the identity of a servicer is an important determinant of the loss mitigation options received by distressed borrowers, along with the characteristics of the borrower (*e.g.*, FICO score), the mortgage loan (*e.g.*, ARM, LTV, origination year), and the investor (*i.e.*, GSE, private label, or portfolio).[221] Research focusing on the HAMP program presents a similar result: some servicers renegotiate mortgage debt with borrowers at more than four times the rate of other servicers, even after taking into account the characteristics of loans, borrowers and investors.[222]

Second, this research shows that offering modifications is a persistent characteristic of certain servicers. Differences across servicers in the likelihood of giving HAMP modifications depend positively on the likelihood the servicer offered private modifications prior to HAMP, again taking into account the characteristics of loans, borrowers and investors. A borrower applying for a trial loan modification would have a 58 percent better chance of receiving it from the high-modifying "type" of servicer loans than from the low-modifying type. For permanent modifications, the difference between the two types is more than double (117 percent).

Finally, investigation into the differences across servicers in the likelihood of giving modifications prior to HAMP shows that these differences depend on the characteristics of the servicing staff and the technology used by the servicer. In particular, the likelihood of giving modifications prior to HAMP depends positively on the size of the staff and the number of training hours given the staff, negatively on the workload of the staff, and negatively on indicators of poor technology like the percentage of dropped calls and time callers spend on hold. Again, all of these results take into account the characteristics of loans, borrowers and investors—they are not an artifact of differences in the servicing portfolios of the servicers.

[221] "Servicer fixed effects [*i.e.*, servicer identities] explain at least as much variation in modification terms as do borrower characteristics." *See* Sumit Agarwal et al., *Market-Based Loss Mitigation Practices for Troubled Mortgages Following the Financial Crisis*, at 5, (Fed. Reserve Bank of Chi.,Working Paper No. 2011-03, 2010).

[222] Sumit Agarwal et al., *Policy Intervention in Debt Renegotiation: Evidence from the Home Affordable Modification Program*, at 25, Figure 6 (Nat'l Bureau of Economic Research, Working Paper No. 18311, 2012).

The Bureau believes that these results are broadly indicative of the benefits to consumers of the provisions relating to loss mitigation and in particular the provisions in § 1024.38(b) associated with properly evaluating loss mitigation applications. Servicers are required to maintain policies and procedures reasonably designed to ensure that servicers can properly evaluate borrowers for available loss mitigation options. Compliance with these policies and procedures will require servicers to devote resources to the proper evaluation of borrowers, presumably by investing in the staff, training and technology that the research shows leads, through some process, to more trial modifications. The Bureau cannot quantify the impact of the provisions for loss mitigation in § 1024.38 on resources devoted to the proper evaluation of borrowers and better outcomes for borrowers. However, the Bureau believes that these provisions of the final rule will tend to reduce the deficiencies in the abilities of certain servicers to evaluate borrowers for loss mitigation that recent research strongly indicates have been detrimental to borrowers.[223]

The estimate of avoidable default relies on a study of the performance of approximately 28,000 housing loans tracked from September 1998 to December 2004 (and originated prior to December 2003).[224] Most of the loans were serviced by eight servicers. After restricting the sample to loans that at some point experience a 30-day delinquency, the authors estimate a logic regression model to isolate the impact each servicer has on the probability a loan ever reaches 90-day delinquency (which they define as "default").

The authors show that there are significant differences among the servicers in the

[223] As discussed in part V, there is also a concern that certain servicers may pursue their self-interest to the detriment of both borrowers and investors. The final rule addresses this concern by requiring servicers to maintain policies and procedures reasonably designed to identify with specificity all loss mitigation options for which borrowers may be eligible pursuant to any requirements established by an owner or assignee of a mortgage loan (*see* § 1024.38(b)(2)(ii)) and to properly evaluate delinquent borrowers for all such options (§ 1024.38(b)(2)(v)).

[224] *See* Michael A. Stegman et al., *Preventative Servicing is Good for Business and Affordable Homeownership Policy*, 18 Housing Pol'y Debate 243, 257 (2007).

probability a loan defaults, even after controlling for borrower credit score and income, certain characteristics of the property, and other factors.[225] The best servicing (servicing performed by servicers with the highest cure rates for loans that become 30 days delinquent) achieves approximately a 41 percent reduction in the probability that a loan that becomes 30 days delinquent will eventually default, relative to the worst servicing (servicing performed by servicers with the lowest cure rates for loans that become 30 days delinquent).[226]

To translate this figure into an estimate of avoidable default, suppose that 1 million mortgages become 30-60 days late each year (currently the figure may be closer to 3 million).[227] The model predicts that about 19 percent would default if they were serviced by the worst performing servicer in the sample. However, only 11 percent would default if they were serviced by the best performing servicer in the sample. This is approximately a 41 percent reduction in default due to differences in servicing. This reduction corresponds to 80,000 mortgages (240,000 mortgages with current data). These defaults are avoidable with a change from the worst to the best servicing. Further, a substantial number of these defaults would likely

[225] Other authors have also noted substantial differences in loss mitigation practices by servicers that are not accounted for by differences in borrowers, types of mortgages and other observable factors. *See e.g.*, Sumit Agarwal et al., *Market-Based Loss Mitigation Practices for Troubled Mortgages Following the Financial Crisis*, at 5, (Fed. Reserve Bank of Chi., (Working Paper No. 2011-03, 2010) ("Agarwal et al."))..

[226] Specifically, the probability that a loan cures increases from .815 with the worst performing servicer (Servicer #2) to .8902 with a high-performing reference group of servicers. The figure .815 is the solution to ln[.8902/(1-.8902)]-.61=ln[x/(1-x)], where -.61 is the regression coefficient on Servicer #2 given on page 265 and 8902 is discussed on page 263. Thus, the probability a loan that is 30 days late actually defaults decreases from .185 (=1-.815) to .1098 (=1-.8902), which is approximately a 41 percent reduction. The Bureau notes that these estimates illustrate the possible impact that improvements in servicing may have on avoidable default and foreclosure. While the model is estimated using appropriate control variables, the sample is not representative, and it is not clear how well the model would predict the effects of improvements in servicing in different situations.

[227] The Federal Reserve Bank of New York reports that approximately 1.5 percent of mortgages in its consumer credit panel transition from current to 30+ days late each quarter, so roughly 6 percent annually. This corresponds to over 3 million mortgages at the national level. *See* Fed. Reserve Bank of NY, *Quarterly Report on Household Debt and Credit*, at 13 (2012) *available at* http://www.newyorkfed.org/research/national_economy/householdcredit/DistrictReport_Q32012.pdf

go to foreclosure, perhaps 70 percent.[228]

The Bureau does not currently have data that would allow it to further monetize the cost of default and foreclosure on borrowers or other consumers. Some recent research that controls for economic conditions documents the persistent negative effects of foreclosure on borrower's credit scores.[229] Other work establishes substantial negative effects that foreclosed homes have on nearby homes.[230] As mentioned above, the negative externalities from foreclosure are another market failure addressed by the provisions of the final rule that may reduce avoidable foreclosure. Other research establishes that children tend to switch to lower performing schools after foreclosure, and ongoing research is examining the effects of housing instability on student outcomes.[231]

More generally, servicers obtain limited benefits from having (and complying with) policies and procedures reasonably designed to achieve the objectives stated in this provision of

[228] In one study, only 30 percent of loans that were 90 days late and began a repayment plan were reinstated or paid in full during the period of the study. Presumably, loans that are 90 days late and never begin a repayment plan have an even lower success rate. *See* Amy Crews Cutts & William A. Merrill, *Interventions in Mortgage Default: Policies and Practices to Prevent Home Loss and Lower Costs*, 11-12 & Tbl. 2 (Freddie Mac, Working Paper No. 08-01, 2008).

[229] *See* Kenneth P. Brevoort & Cheryl R. Cooper, *Foreclosure's Wake: The Credit Experiences of Individuals Following Foreclosure* (2010), available at: http://www.federalreserve.gov/pubs/feds/2010/201059/201059pap.pdf.

[230] Many recent studies document the negative effect of a foreclosed property on the homeowners in its vicinity. There are several reasons for this effect. Among them are displacement of demand that otherwise would have increased the neighborhood prices, reduced valuations of future sales if the buyers and/or the appraisers are using the sold foreclosed property as a comparable, vandalism, and disinvestment. Using the data on house transactions in Massachusetts from 1987 to 2009, a foreclosure lowers the price of a house within 0.05 miles by 1 percent. *See* John Y. Campbell et al., *Forced Sales and House Prices*, 101 Am. Econ. Rev. 2108 (2011). According to Fannie Mae data for the Chicago MSA, a foreclosure within 0.9 kilometers can decrease the price of a house by as much as 8.7 percent; however, the magnitude decreases to under 2 percent within five years of the foreclosure. *See* Zhenguo Lin et al., *Spillover Effects of Foreclosures on Neighborhood Property Values*, 38 J. Real Est. Fin. & Econ. 387 (2009). Research using Maryland data for 2006-2009 finds that a foreclosure results in a 28 percent increase in the default risk to its nearest neighbors (*see* Charles Towe and Chad Lawley, *The Contagion Effect of Neighboring Foreclosures*, 2011, Social Science Research Network Working Paper 1834805). Other papers document various magnitudes of the negative effect on nearby properties (*see* W. Scott Frame, *Estimating the Effect of Mortgage Foreclosures on Nearby Property Values: A critical review of the literature*, 95 Econ. Rev. Fed. Reserve Bank of Atlanta 1 (2010).

[231] A summary of recent and ongoing research is presented in Julia B. Isaacs, *The Ongoing Impact of Foreclosures on Children*, The Brookings Inst., April 2012.

the final rule, other than where contractual requirements require them to perform certain duties and meet certain goals with respect to loss mitigation. Borrowers do not choose their servicer, except indirectly by choosing their lender, and have little recourse against either the servicer or the owner or assignee of the loan (for whom the servicer is the agent) for poor customer service. As a result, mortgage servicing is to a large extent a high-volume, low-margin business in which successful servicers attempt to keep costs down. While many servicers have and comply with policies and procedures similar to those required under § 1024.38, the mortgage crisis demonstrated that for some servicers the incentives to do so were lacking.

The Bureau is aware that servicers may incur additional costs as they come into compliance with the requirements in § 1024.38 and that some of these costs may be passed on to borrowers. However, the Bureau believes that the cost per borrower is likely to be small, as discussed below.

Finally, the Bureau observes that certain servicers may have implemented policies and procedures with respect to evaluating borrowers for loss mitigation options pursuant to the National Mortgage Settlement and Federal regulatory agency consent orders, as discussed in part II, above. Borrowers whose mortgage loans are serviced by such servicers may already receive certain benefits relating to loss mitigation evaluations as a result of such actions, and will thus receive fewer benefits as a result of this rule than they would have otherwise received. The Bureau believes that such borrowers will nevertheless benefit from the requirements in § 1024.38 because (1) many of the objectives of the policies and procedures required pursuant to § 1024.38 impose requirements beyond the National Mortgage Settlement and Federal regulatory agency consent orders and (2) the policies and procedures required by § 1024.38 may manage information that better facilitates such servicers complying with their obligations under the

National Mortgage Settlement and Federal regulatory agency consent orders in a manner that improves loss mitigation evaluations for borrowers whose mortgage loans are serviced by such servicers. Additionally, the Bureau notes that the National Mortgage Settlement is an agreed on term sheet with a limited timeline. The national servicing standards established by the Bureau will not automatically expire after a set period of time.

Potential benefits and costs to covered persons. Certain servicers currently incur costs associated with the requirements in the general servicing policies, procedures and requirements, despite generally not receiving consequential feedback from borrowers to do so. Depository institutions already are subject to interagency guidelines relating to safeguarding the institution's safety and soundness that facilitate reasonable information management for purposes of mortgage servicing. Servicers that service mortgage loans subject to investor or guarantor loss mitigation requirements, such as requirements imposed on Fannie Mae, Freddie Mac, and Ginnie Mae, or servicers subject to regulatory consent orders or the national mortgage settlement, must already comply with policies regarding evaluation for a loss mitigation option.[232]

Servicers that do not already have policies and procedures that are reasonably designed to meet the objectives in § 1024.38 will incur the cost both of establishing such policies and procedures (which may include training staff and updating existing procedures) as well as on-going costs associated with such procedures. To the extent any entity currently follows such policies and procedures, these additional costs will already have been incurred

The rule uses an objectives-based approach to defining its requirements and provides flexibility in implementation. An objectives-based approach has the advantage of allowing

[232] In addition, servicers are currently subject to record keeping requirements under current § 1024.17(l) of Regulation X. This will make it less costly for servicers to implement the changes in this rule since they should already have systems in place that can be adapted to the new requirements.

different servicers to find the least costly way of achieving the required objectives. Thus, the rule requires servicers to have policies and procedures reasonably designed to achieve the objective of investigating complaints and providing information; it does not specify specific steps required for investigating different types of complaints or for providing different types of information. Similarly, the rule requires servicers to have policies and procedures reasonably designed to achieve the objective of facilitating periodic reviews of service providers; it does not specify specific steps required for reviewing service providers.[233] Regarding implementation, a servicer can take into account the size, nature, and scope of its operations. In particular, a servicer may take into account the volume and aggregate unpaid principal balance of mortgage loans serviced, the credit quality, including the default risk, of the mortgage loans serviced, and the servicer's history of consumer complaints.

This advantage to regulated entities of objectives-based standards may be offset by costs to the regulated entity in at least two ways. First, a regulated entity may incur costs to measure and evaluate whether the entity is, in fact, achieving the objective required by the regulation. Second, a regulated entity may incur costs resulting from over-compensation to achieve an objective when the achievement of such objective depends on factors outside the control of the regulated entity. The general servicing policies, procedures, and requirements mandate policies and procedures, which are under the control of the servicer. The policies and procedures need only be reasonably designed to achieve the objectives, which will tend to mitigate the risks to servicers of over-complying to achieve objectives when the failure to achieve such objectives is based on factors beyond the servicer's control.

[233] *See* for example OMB's Circular A-4. "Performance standards express requirements in terms of outcomes rather than specifying the means to those ends. They are generally superior to engineering or design standards because performance standards give the regulated parties the flexibility to achieve regulatory objectives in the most cost-effective way."

Finally, § 1024.38 imposes a record retention requirement and a servicing file requirement. Servicers must retain records that document actions taken by servicers with respect to a borrower's mortgage loan until one year after the date a mortgage loan is discharged or servicing is transferred. The Bureau believes that currently servicers generally retain this information at least until the mortgage loan is discharged or servicing is transferred. Further, this requirement replaces a previous document retention requirement in § 1024.17(l) requiring servicers to retain documents relating to borrower escrow accounts for five years, notwithstanding whether a mortgage loan was discharged or servicing was transferred. Because documents and information relating to a servicing file are necessary for on-going servicer operations, the Bureau believes the cost of this provision to servicers comes from the additional year that they may need to retain documents not related to escrow charges after a mortgage loan is discharged or servicing is transferred. This retention expense is incremental to the expense associated with retaining the information before the mortgage loan is discharged or servicing is transferred. Further, certain costs may be reduced relative to the pre-statutory baseline of retaining documents relating to escrow accounts for five years. Accordingly, the Bureau believes any expense relating to the document retention requirement is likely small.

Finally, servicers are required to maintain certain documents and data in a manner that facilitates compiling them into a servicing file within five days. Servicers may need to develop faster access to some of this information than they currently have, and some may need to document the location and methods of access of this information in a more unified way than they currently do. However, servicers do not have to maintain all of the information on a single system.[234] Further, the Bureau is mitigating the cost of this provision by not requiring servicers to comply with it with respect to information created prior to January 10, 2014. Thus, servicers do not have to improve access to legacy information that may be missing or inaccessible.

4. Requirements Regarding Early Intervention

Section 1024.39 establishes early intervention requirements with respect to certain delinquent borrowers. Servicers are required to establish or make good faith efforts to establish live contact with a borrower not later than the 36th day of a borrower's delinquency and inform the borrower about the availability of loss mitigation options if appropriate. Section 1024.39 also requires servicers to provide a written notice to borrowers not later than the 45th day of the borrower's delinquency. Provisions of the rule prescribe the content of the written notice and provide model clauses. However, servicers can comply with the content requirement by sending borrowers a single mailing that contains separate notices that collectively provide all the model clauses. Servicers that qualify as small servicers pursuant to 12 CFR 1026.41(e) are exempt from the requirements of § 1024.39.

Potential benefits and costs to consumers. The provisions on early intervention with delinquent borrowers are intended to spur communication between servicers and borrowers that facilitates borrower's avoidance of foreclosure. The benefits of § 1024.39 to delinquent borrowers depend on whether servicers already meet the requirements of § 1024.39, servicers are successful in establishing live contact with borrowers under the live contact requirement, and information provided on loss mitigation options during the live contact or in the written notice helps borrowers manage their default and avoid foreclosure.

[234] The Bureau received numerous comments from industry describing the burden attributable to the proposed requirements for the servicing file. Many of such comments expressed that while servicers have the information for a serving file, they do not store such information grouped together. Such comments are discussed in part V with respect to § 1024.38(c)(2).

A number of early intervention standards exist and are issued by private mortgage investors, the GSEs, or government agencies offering guarantees or insurance for mortgage loans, such as FHA, the VA, or the Rural Housing Service. Servicers of FHA and VA loans are generally required to take action within the first 20 days of a delinquency, such as making telephone calls, and sending written delinquency notifications. Similarly, servicers of loans purchased by the GSEs are encouraged to contact borrowers within several days of a delinquency. Freddie Mac recommends that servicers begin initial call campaigns on the third day of delinquency, and Fannie Mae recommends that servicers take similar actions with respect to borrowers having a high risk of default. Regarding written notification, Federal agencies and the GSEs have established requirements and recommended practices with respect to written notifications that are similar to the Bureau's final rule under § 1024.39(b). However, the Bureau believes that some GSE servicers may not provide written notifications to certain lower-risk delinquent borrowers until the 65th day of delinquency.

Comprehensive data is generally unavailable on the extent to which servicers already reach out to delinquent borrowers; and for those that do, when and by what means they do, and what information they provide to borrowers. The discussion below therefore generally provides a qualitative analysis for borrowers not currently receiving such communications from their servicers. Given the ubiquity of some type of early intervention requirement on servicers, the benefit of the rule depends on the extent to which it is superior to existing requirements.

The requirement that servicers establish or make good faith efforts to establish live contact with borrowers may benefit the borrowers who are required to be contacted under the provision, possibly by increasing the efforts that servicers make to reach such borrowers. Older research shows that significant numbers of borrowers go to foreclosure without ever responding to the servicer.[235] While it is not possible to predict whether requiring servicers to make good faith efforts to establish live contact will change this particular result, the severity of the outcome makes it reasonable to ensure that borrowers are provided this type of effort by servicers. The requirements in § 1024.39 more generally ensure that those borrowers who would respond are informed about the availability of loss mitigation options where the servicer determines that it would be appropriate to provide such information to the borrower, and that all borrowers receive a written notice containing information on loss mitigation by the 45th day of a delinquency.

The Bureau also believes that such borrowers may benefit from the early intervention provisions to the extent that the provisions ensure that servicers inform borrowers of the availability of loss mitigation options shortly after delinquency, thus increasing the likelihood that borrowers take corrective action more quickly. In addition, one study using data from 2000 through 2006 found that the re-default rate was about 27 percent (15 percentage points) lower on repayment plans established when a loan was 30 days late instead of 60 days late.[236] Early corrective action benefits borrowers by reducing avoidable interest costs, limiting the impact on borrowers' credit reports (thereby expanding their access to less costly credit and other services that depend on credit reports), and facilitating household budgeting and planning (which may allow borrowers to save money).

Finally, it is essential to note that the repayment plans, loan modifications and other alternatives to default or foreclosure that servicers offer change regularly, often to make

[235] In one study using data from September 2005 through August 2007, Freddie Mac servicers reported that the borrower never responded to the servicer for 53.3 percent of the loans that went into foreclosure. *See* Amy Crews Cutts & William A. Merrill, *Interventions in Mortgage Default: Policies and Practices to Prevent Home Loss and Lower Costs* 10 (Freddie Mac, Working Paper No. 08-01, 2008).

[236] *See* Amy Crews Cutts & William A. Merrill, *Interventions in Mortgage Default: Policies and Practices to Prevent Home Loss and Lower Costs*k, at tbl. 2 (Freddie Mac, Working Paper No. 08-01, 2008). This statistic is merely suggestive of a benefit to early intervention, since borrowers who are willing to begin a repayment plan at 30 days may be more likely to become current even without a repayment plan.

additional borrowers eligible. For example, a number of TARP funded housing programs have been developed since the initial HAMP first-lien modification program was implemented in April 2009. Programs now exist that provide principal reduction for HAMP-eligible borrowers with high loan-to-value ratios, provide temporary principal forbearance for unemployed borrowers, and provide incentives for short-sales.[237] Further, the eligibility criteria for these programs change regularly.[238] The changing set of alternatives to default and foreclosure and eligibility for these alternatives mean that delinquent borrowers who have not had recent contact with their servicer regarding the alternatives for which they qualify are probably uninformed or misinformed about the options available to them. The provisions for early intervention, together with provisions in §§ 1024.38(b)(2) and 1024.40(b)(1) that, in general, require that servicers maintain policies and procedures with respect to providing borrowers with accurate information about loss mitigation options, benefit borrowers who may not have otherwise been contacted by their servicer by providing them with accurate information regarding loss mitigation that they otherwise likely would lack.

The Bureau received one comment that stated that the early intervention requirements would impose costs on all borrowers, including those who will never use the service. Given the ubiquity of some type of early intervention requirement, as described above, and the likelihood that servicers who are servicing loans that they own make every effort to reach out to delinquent borrowers, the Bureau believes that the incremental costs to most servicers of the early intervention provisions under § 1024.39 are minimal. Thus, any incremental cost to most

[237] *See* Gen. Accounting Office, *Actions Needed by Treasury to Address Challenges in Implementing Making Home Affordable Programs*, Tbl. 1 (2011).

[238] For a discussion of recent changes, including the implementation of the new "HAMP Tier 2" alternative, *see* Making Home Affordable, Supplemental Directive 12-02, *Making Home Affordable Program- MHA Extension and Expansion, (*2012), *available at* https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/sd1202.pdf

borrowers would be small. The Bureau also notes that borrowers may value early intervention requirements, whether or not they in fact ever receive such intervention, to the extent they believe they have a chance of becoming delinquent. As noted, for borrowers whose servicers are already subject to an early intervention requirement, the benefits of this provision would be reduced to that extent.

Potential benefits and costs to covered persons. For the reasons stated above, the Bureau believes that most servicers already comply with some type of early intervention requirement. To the extent that servicers already make efforts to establish live contact with borrowers and provide written notices to borrowers regarding loss mitigation options, servicers would likely incur minimal costs to conform to the time lines and content requirements under the final rule. These costs would generally consist of creating internal policies and procedures to implement the requirements, training personnel, and possibly modifying existing disclosures or establishing new disclosures. The Bureau has attempted to mitigate such costs by providing sample clauses in the rule. Services who are not subject to some type of early intervention requirement would of course incur greater costs, including for setting up policies and procedures, establishing disclosures, and potentially hiring more staff.

Regarding the written notice, the Bureau understands that many servicers use vendors who will be developing and providing similar disclosures to many other servicers in light of the new rules. Thus, the one-time costs of the new disclosures will be spread over many servicers. The Bureau is mitigating one-time burden of the written notice provision by providing servicers with model clauses. The model clauses provide servicers with examples of language explaining loss mitigation options that may be available, how borrowers can access housing counseling resources and encouraging the borrower to contact the servicer. The Bureau intends for the model clauses to provide servicers with examples of the level of detail that the Bureau expects servicers to provide in their written notice. The Bureau is mitigating the ongoing cost of the written notice provision by limiting the requirement to send the written notice to at most once every 180 days. The Bureau is further mitigating the ongoing cost by permitting servicers to incorporate the relevant portions of the written notice required under § 1024.39 into other disclosures, thus increasing the likelihood that servicers that are already providing loss mitigation disclosures will not need to provide additional disclosures.

5. Procedures for Continuity of Contact with Delinquent Borrowers

Section 1024.40 requires servicers to maintain policies and procedures that are reasonably designed to achieve certain objectives regarding continuity of contact. The objectives include making personnel available, by telephone, to delinquent borrowers by the time the servicer has provided the borrower with the written notice regarding loss mitigation options required under § 1024.39(b), but in any case not later than the 45th day of delinquency. Servicers are also required to establish policies and procedures reasonably designed to ensure that the personnel they assign to delinquent borrowers perform an enumerated list of functions, where applicable, including providing the borrower with accurate information about loss mitigation options available to the borrower and actions the borrower must take to complete a loss mitigation application. Servicers that qualify as small servicers pursuant to 12 CFR 1026.41(e) are exempt from the requirements of § 1024.40.

Potential benefits and costs to consumers. The continuity of contact provisions are intended to ensure that borrowers in delinquency have access to servicer personnel capable of assisting the borrower with loss mitigation applications. Other regulators and the GSEs have established certain staffing standards for servicers to meet when they assist delinquent borrowers. The benefits to borrowers from the rule discussed below will be mitigated to the extent servicers already provide access to such servicer personnel. One study of complaints to the HOPE Hotline reported that over half (27,000 out of 48,000) were from borrowers who could not reach their servicers and obtain information about the status of their applications for HAMP modification.[239] Other complaints concerned lost documentation and the inability of borrowers to speak with representatives who were knowledgeable about the status of the borrowers' applications for loss mitigation. While certain servicers may nonetheless have provided delinquent borrowers with the services described in the continuity of contact provisions, such as, for example, access to personnel who could provide the borrower with accurate information about the status of a loss mitigation application, the mortgage crisis demonstrated that a number of servicers did not provide such services.

As discussed in part V, above, widespread reports of communication breakdowns between servicers and delinquent borrowers who present a heightened risk for default have revealed that one of the most significant impediments to the success of foreclosure mitigation programs is the inadequate manner by which servicer personnel at major servicers have provided assistance to these borrowers. While the Bureau does not have the data with which to quantify the effects, the inability of a borrower to speak with personnel knowledgeable about the status of a loss mitigation application creates delay in rectifying problems (including problems with lost documentation) that may lead to avoidable foreclosure. Similarly, the inability of borrowers to obtain a complete record of their payment histories with the servicer or of servicer personnel to access all documents the borrowers have submitted to the servicer in connection with an application for a loss mitigation option may impair the ability of borrowers to generally advocate

[239] *See* General Accounting Office, *Troubled Asset Relief Program: Further Actions Needed to Fully and Equitably Implement Foreclosure Mitigation Programs*, at 15 (2010).

for themselves regarding loss mitigation and possibly to slow or halt foreclosure. Conversely, the ability of borrowers to speak with personnel knowledgeable about loss mitigation options available to the borrower and the actions the borrower must take to be evaluated for such options makes it easier for borrowers to effectively pursue these options. These provisions therefore increase the chances that certain delinquent borrowers are able to obtain a loss mitigation plan and avoid the substantial costs foreclosure imposes on them, their households, and their neighbors, as discussed above.[240] The Bureau is not aware of costs to borrowers from these provisions.

Potential benefits and costs to covered persons. Servicers currently incur costs associated with the requirements regarding continuity of contact. As discussed in the proposal, above, in response to reported problems with respect to how servicers respond to delinquent borrowers, other regulators and the GSEs have responded by establishing staffing standards for servicers to meet when they assist delinquent borrowers. Other servicers may incur costs of creating internal policies and procedures to implement the requirements and training personnel. The Bureau recognizes that some servicers may also need to increase staffing time to comply with these requirements or transfer servicing to servicers who are already in compliance.

The rule mandates an objectives-based approach to the requirements for continuity of contact. This approach provides servicers with useful flexibility in managing the costs of compliance relative to mandating specific inputs or narrow operational requirements. Servicers that have adopted continuity of contact requirements have done so through different models and the Bureau has provided flexibility to allow servicers to adopt models that comply with the

[240] *See* the general discussion of servicing operations and avoidable foreclosure in the analysis of the provisions on reasonable information management.

objectives of the continuity of contact requirements without highly prescriptive requirements.[241] The discussion of the merits of this approach that is provided in the analysis of the general servicing policies, procedures and requirements is applicable here.

6. Loss Mitigation Procedures

Section 1024.41 establishes requirements with respect to loss mitigation. The goal of § 1024.41 is to ensure that borrowers are protected from harm in connection with the process of evaluating a borrower for a loss mitigation option and proceeding to foreclosure. Under § 1024.41, servicers must, among other things, accept loss mitigation applications and evaluate complete applications for all loss mitigation options available to the borrower. Servicers must take these actions within a prescribed period of time and adhere to a prescribed framework for making offers of loss mitigation alternatives to borrowers. Servicers must give borrowers an opportunity to appeal rejection of complete loss mitigation applications in certain circumstances and must follow a prescribed framework with respect to these appeals.

Section 1024.41 also creates limitations with respect to starting and completing the foreclosure process. A servicer may not make the first notice or filing required for a foreclosure process if a borrower is not more than 120 days delinquent on the mortgage obligation. Further, if a borrower submits a timely and complete loss mitigation application, the servicer may not make the first notice or filing required for a foreclosure process until completing the requirements set forth in § 1024.41. If a servicer has started the foreclosure process, but a borrower submits a timely and complete loss mitigation application, a servicer is prohibited from

[241] U.S. Dep't of Treasury, *Making Contact: The Path to Improving Mortgage Industry Communication with Homeowners* (Dec. 2012), available at http://www.treasury.gov/initiatives/financial-stability/reports/Documents/SPOC%20Special%20Report_Final.pdf

proceeding to a foreclosure judgment, or order of sale, or conducting a foreclosure sale, until completing the requirements set forth in § 1024.41.

Servicers that qualify as small servicers pursuant to 12 CFR 1026.41(e) are exempt from § 1024.41, except for the prohibition on referring to foreclosure in the first 120 days of delinquency and proceeding to a foreclosure sale if a borrower is performing pursuant to the terms of an agreement on a loss mitigation option.

Potential benefits and costs to consumers. The analysis of the benefits to borrowers of § 1024.38 discussed the benefits to borrowers of the loss mitigation provisions collectively under the final rule. This analysis will not repeat that discussion, but focuses more specifically on key provisions of this section of the final rule. The benefits discussed below are mitigated to the extent that servicers are already in compliance with the provision of § 1024.41. For example servicers that are servicing loans subject to investor or guarantor loss mitigation requirements, such as requirements imposed by Fannie Mae, Freddie Mac, or government insurance programs, or servicers subject to regulatory consent orders or the national mortgage settlement, must already comply with policies regarding evaluation of a loss mitigation application for a loss mitigation option.

Restricting but not eliminating dual tracking

The loss mitigation provisions in § 1024.41 prevent servicers from commencing a foreclosure proceeding before the consumer has had a reasonable opportunity to submit a loss mitigation application or while a complete loss mitigation application is pending. As discussed in part V, this provision benefits borrowers by preventing foreclosure costs from accruing and by eliminating potentially confusing (and, as some commenters noted, discouraging) communications from servicers. Borrowers avoid costs of proceeding with the foreclosure process, including responsibility for attorneys' fees, legal filing costs, and services required (such as property preservation fees) occurring as a result of the foreclosure notwithstanding the concurrent evaluation of the borrower for a loss mitigation option. The administrative costs of foreclosure to borrowers are estimated, on average at $7,200.[242]

Servicers are allowed to commence a foreclosure proceeding in the period 120 days after delinquency if the borrower does not have a complete loss mitigation application pending. If a servicer has commenced a foreclosure proceeding after 120 days, it may proceed up to foreclosure sale regardless of whether the borrower subsequently submits a complete loss mitigation application. The servicer, however, is prohibited from moving for foreclosure judgment or order of sale or conducting a foreclosure sale before acting on a borrower's complete loss mitigation application that is submitted by certain deadlines in advance of foreclosure.

The potential loss of the prohibition on foreclosure referral after 120 days provides an incentive for borrowers to complete a loss mitigation application as quickly as possible. Establishing a loss mitigation plan within 120 days of delinquency reduces interest costs and limits the impact on borrowers' credit report. However, these future costs may not be salient to all consumers, and if these costs are heavily discounted they would provide little incentive to submit a loss mitigation application quickly. The Bureau notes that the borrower still has protections against foreclosure sale: a servicer may not complete the foreclosure process by proceeding to a foreclosure judgment or order of sale, or conducting a foreclosure sale, unless the servicer has completed the loss mitigation procedures in § 1024.41, described above.

As set forth in part V, above, with respect to § 1024.41, the Bureau considered, but

[242] Family Housing Fund, *Cost Effectiveness of Mortgage Foreclosure Prevention: Summary of Findings* (1998), *available at* http://www.fhfund.org/_dnld/reports/MFP_1995.pdf

ultimately rejected, a mandatory pause on foreclosure proceedings. The Bureau is concerned about higher costs to borrowers from a broader prohibition on referral to foreclosure or from a mandatory pause in foreclosure proceedings after the borrower submits a loss mitigation application. The tradeoff here is admittedly complex. Under the final rule, servicers (acting on the behalf of investors) are allowed to move all borrowers up to foreclosure sale, but cannot move for foreclosure or order of sale or conduct a foreclosure sale before acting on complete loss mitigation applications submitted by certain deadlines. If loss mitigation efforts ultimately succeed, borrowers generally pay the costs associated with the foreclosure process, not investors. If loss mitigation efforts ultimately fail, investors generally pay foreclosure costs, but investors benefit from being able to quickly recover the capital that remains.[243] In both cases, investors benefit from moving borrowers up to foreclosure sale.

Relative to the final rule, a mandatory pause would benefit borrowers by eliminating the foreclosure process costs in the case in which loss mitigation succeeds.[244] Servicers would not be able to move these borrowers closer to foreclosure. However, a mandatory pause would impose costs on investors in the case in which loss mitigation fails, by delaying foreclosure sales and capital recovery. These costs may be passed along to borrowers.

It is not possible to quantify these costs to borrowers. However, the Bureau believes that the foreclosure process costs under the final rule would likely be smaller than under a mandatory pause regime. A pause would likely delay a large number of foreclosure sales (beyond those already delayed by the prohibition on referral to foreclosure in the final rule) and temporarily

[243] This assumes that the foreclosure process itself does not change the probability that loss mitigation succeeds. The Bureau recognizes that this may not be true. Insofar as the foreclosure process reduces the probability that loss mitigation succeeds, servicers may benefit investors by trying to identify borrowers for this effect would be significant and not moving them to the brink of foreclosure.

[244] The Bureau believes that the final rule provides borrowers with sufficient protections against improper foreclosure sale. Thus, this analysis does not attribute additional consumer benefits to a mandatory pause in the foreclosure process due to additional protections against improper foreclosure sale.

reduce the return on a substantial amount of mortgage credit. This creates some risk of a perceptible increase in the cost of mortgage credit to at least certain borrowers.

Appeals

Section 1024.41 requires servicers to provide an appeals process to review denials of complete loss mitigation applications for loan modifications in certain circumstances. Improper denials may result from technical errors in the evaluation of applications, but they may also result when servicers fail to review borrowers for loss mitigation options authorized by investors or guarantors of mortgage loans. The Bureau believes that the appeals process may benefit borrowers by allowing servicers to identify and correct these (and other) improper denials. The Bureau notes that the National Mortgage Settlement and the California Homeowner Bill of Rights already provide for an appeals process related to denials of loan modifications. For borrowers and servicers covered by the National Mortgage Settlement or the California Homeowner Bill of Rights, the appeals process under § 1024.41 does not result in any benefits or costs.

The Bureau received one comment from a law firm that argued that an appeals process is unnecessary. The commenter argues that second review is unnecessary because penalties in existing federal guidelines (like those for HAMP) compel proper processing of loss mitigation applications. The Bureau notes that guidelines for administering federal programs, some of which will expire, have direct influence only on participating servicers and only for as long as the program exists. The evidence on servicer performance presented above and the basic analysis of servicer incentives suggest that guidelines are at best an uneven and temporary substitute for an evaluation process mandated by a rule and that a second evaluation may provide additional consumer benefits.

The same commenter argued that an appeals process would not benefit borrowers. The commenter cites research that in the view of the commenter shows that an appeals process would most likely just delay foreclosure.[245] The research shows that, controlling for numerous characteristics, cure rates for seriously delinquent borrowers are the same in both judicial foreclosure states and power-of-sale states; and cure rates in Massachusetts were unaffected after the passage of a law that provided a 90 day "right-to-cure" period for borrowers whose lenders initiated foreclosure proceedings on or after May 1, 2008.[246]

The Bureau recognizes the analytical strengths of the cited study. However, the Bureau questions the applicability of this research to predicting the impact of the appeals process provided for by § 1024.41. The simple halt to foreclosures in Massachusetts, which does not appear to have been coupled with mandates for review, is a poor analogy to the new appeals process in the rule. The lack of an effect on cure rates in judicial foreclosure states may be more analogous, since judicial review is likely to be at least as protective of consumers as an appeals process. Thus the research suggests that an appeals process would not have an effect on cure rates since judicial review did not.

First, it bears note that the costs of judicial foreclosure are likely far greater than the costs of the appeals process in the final rule. Assuming a borrower takes 14 days to accept or reject a loss mitigation option received on appeal, the entire appeals process could add as little 15 days (or as many as 44 days, depending on the servicer). The costs of preparing a loss mitigation application for reconsideration are likely small since the borrower has already incurred the

[245] Kristopher Gerardi, et al., *Do Borrower Rights Improve Borrower Outcomes? Evidence from the Foreclosure Process* (Fed. Reserve Bank of Atlanta Working Paper 2011-16, 2011)..

[246] The authors find that judicial foreclosure extends the timeline to foreclosure. In Massachusetts, however, delays created by the right-to-cure period were compensated for with faster action in other parts of the foreclosure process, with no overall effect on the foreclosure timeline.

greater cost of initial submission of the application. Further, the researchers discuss the substantial methodological difficulties (some of which they overcome) in isolating the causal effect of the additional protections in judicial foreclosure states. Overall, the Bureau believes that an appeals process may benefit borrowers by provide some borrowers with more options for loss mitigation, that some of these borrowers will avoid foreclosure as a result, and that the costs of this process are likely to be small.

Consideration for all alternatives for which borrowers are eligible.

The Bureau's loss mitigation provisions require the servicer to evaluate complete loss mitigation applications submitted by certain deadlines[247] for all loss mitigation options available to the borrower and to provide all of the loss mitigation options that the servicer intends to offer the borrower on a single notice.[248] The Bureau believes that in contrast to the process provided for under § 1024.41, current practice is closer to a sequential presentation of loss mitigation offers.[249] When options are presented sequentially, especially if there is some delay between offers, borrowers must choose or reject an option without knowing whether the incremental benefit of an unknown later offer would justify the delay. By contrast, the Bureau believes that borrowers are likely to choose and therefore have a greater likelihood of obtaining the most beneficial loss mitigation option available when all of the available options are presented

[247] The differing requirements for various timelines provide benefits and costs to covered persons. For a borrower who has not yet met a deadline, each deadline provides benefits both in the form of protections for the borrower. Depending on the timeline, a borrower will have the benefit of time to research loss mitigation options, assemble a loss mitigation application, benefit from the right to appeal a decision and benefit from certain disclosure from the servicer about the status of their application as well as information about the final decision. However, once a deadline has passed, such deadline may be a cost for a borrower in that a servicer may decide to no longer offer an option, whereas in the absence of any deadline they may have continued to offer such option.

[248] The notice must also state all loan modification options for which the servicer considered and denied the borrower.

[249] That is to say, borrowers are offered one loss mitigation alternative to accept or reject; and if they reject the alternative, they may be offered another one instead of proceeding to foreclosure sale. Bureau outreach indicates that options are generally presented sequentially. Further, the Bureau received comments indicating that borrowers are frequently evaluated for and presented with home retention options (if they qualify) before being considered for non-retention options.

simultaneously. When options are presented simultaneously, both the delay between offers and the uncertainty about future offers are eliminated.[250] The requirement for simultaneous presentation of offers under § 1024.41 is therefore likely to result in a benefit to borrower and an offsetting loss to investors.[251]

A more difficult question is the extent to which investors or servicers may change the offers (perhaps by changing the rules in loss mitigation waterfalls) as a result of having to present options simultaneously instead of sequentially.[252] The fact that servicers choose to present options sequentially when they could present all options at once suggests that servicers achieve better outcomes for themselves or investors when they present options sequentially. However, the Bureau acknowledges that it is difficult to predict how the set of alternatives over which borrowers decide may change in response to the rule. Further, the Bureau acknowledges that some borrowers—who might be confused by simultaneous presentation of offers and make poor choices or no choices—will achieve better outcomes when options are presented sequentially. Such borrowers are especially likely to benefit from sequential presentation if they are presented with the offer most beneficial to them first; however, servicers may not present this offer first.[253]

The Bureau acknowledges these concerns and the complexity of the general problem over which process provides consumers with greater benefits. However, the Bureau believes that the

[250] Even without delay between offers, certain borrowers may be less assertive in asking to see additional options or may not be clear on whether they can return to rejected options after seeing subsequent ones. Simultaneous presentation of offers removes these problems as well.

[251] The financial gain to the borrower would therefore be a transfer payment. The consideration of benefits and costs discusses transfer payments when they are significant and informative about the rule.

[252] In other words, the options that a servicer would present simultaneously to a borrower may differ from the options the servicer would present to the same borrower as she sequentially rejects options.

[253] One comment from industry stated that borrowers may be confused or discouraged when all options (retention and non-retention) are presented simultaneously and may stop communicating with the servicer. This commenter also stated that the servicer would also have to request a more expansive list of documents for review and this could slow down the initiation of the review process.

final rule creates requirements, such as the continuity of contact requirement and housing counselor information contained in the written early intervention notice, that reduce the likelihood that borrowers will be confused by simultaneous presentation of loss mitigation options. The Bureau believes that the ability of borrowers to make better decisions over the alternatives they are offered is likely to dominate any negative consequences from changes to the set of alternatives over which they decide as a result of the rule.

Potential benefits and costs to covered persons. Servicers currently incur costs associated with the requirements regarding loss mitigation. The Bureau has structured the timelines for borrowers to submit complete loss mitigation applications, and for servicers to evaluate loss mitigation applications, consistently with the National Mortgage Settlement, the California Homeowner Bill of Rights, and requirements currently imposed on servicers that service mortgage loans for the GSEs or government lending programs. Servicers that service mortgage loans subject to investor or guarantor loss mitigation requirements, such as requirements imposed by Fannie Mae, Freddie Mac, and Ginnie Mae, or servicers subject to regulatory consent orders or the national mortgage settlement, must already comply with policies regarding evaluation for a loss mitigation option.

Regarding dual tracking, as discussed above, the Bureau has provided servicers with valuable flexibility by requiring only a limited prohibition on referral to foreclosure. After 120 days of delinquency, servicers may initiate the foreclosure process unless they receive a complete loss mitigation application before they do so. Once they have so initiated foreclosure, they may continue with the foreclosure process even while the loss mitigation application is under review. This allows servicers to quickly recover the capital that remains should the prohibition on foreclosure sale be lifted.

Regarding the appeals process, the Bureau believes that some servicers already operate in a manner that meets the requirement in the rule. The National Mortgage Settlement and the California Homeowner Bill or Rights have an appeals process related to denials of loan modifications. For servicers that currently do not meet the rule's requirement, coming into compliance will likely entail moderate costs. The cost to the servicer of readying a loss mitigation application for review (*e.g.*, verifying all required documents are in the file, possibly creating electronic files or entering borrower information into software) should be less expensive for an appeal than for initial review. Further, assuming the borrower takes 14 days to accept or reject a loss mitigation option received on appeal, the servicer determines whether the full process takes 15 days or 44 days. On the other hand, servicers will also have to provide borrowers with continuity of contact during the appeal.[254]

The requirement to evaluate borrowers for all loss mitigation options available to the borrower will also impose costs on servicers. The Bureau recognizes that servicers generally do not evaluate borrowers for all loss mitigation options simultaneously. Thus, there will be an incremental cost arising from the cases in which the servicer and borrower would currently agree on an option and stop reviewing additional options. Based on industry comments, the Bureau believes that these additional options are likely to be short sale or other non-retention options. Thus, the number of borrowers who receive a home retention option in each year provides an estimate of the number of borrowers who will be evaluated for a non-retention option because of the rule. One large database of first-lien residential mortgages reports approximately 380,000

[254] The Bureau received one comment from a housing finance agency that noted that the proposed Dodd-Frank Act section 1022(b)(2) analysis did not discuss the costs and benefits of proposed § 1024.41(j) regarding other liens. The final rule does not include this provision.

home retention options in the third quarter of 2012.[255] However, it is not possible to determine what the cost to servicers would be of evaluating these homeowners for the additional options.

G. Potential Specific Impacts of the Final rule

1. Depository Institutions and Credit Unions with $10 Billion or Less in Total Assets, As Described in Dodd-Frank Section 1026

Of the major provisions in this rulemaking, all insured depository institutions and credit unions with $10 billion or less engaged in servicing mortgage loans must comply with the provisions regarding error resolution (§ 1024.35), requests for information (§ 1024.36), and force-placed insurance (§ 1024.37). However, servicers that service 5,000 mortgage loans or less, and only service mortgage loans the servicer or an affiliate owns or originated, are exempt from all of the provisions in §§ 1024.38 through .41 (with a minor exception). The Bureau estimates that about 97 percent of insured depositories and credit unions with $10 billion or less in total assets service 5,000 mortgage loans or less. Some of these institutions may not qualify for the exemption because they may service some loans that they neither own nor originated. However, the Bureau believes that servicers that service loans that they neither own nor originated tend to service more than 5,000 loans, given the returns to scale in servicing technology. Thus, the Bureau believes that 97 percent of insured depositories and credit unions with $10 billion or less in total assets are likely to be exempt from §§ 1024.38 through .41, with a minor exception.[256]

[255] *See* Office of the Comptroller of Currency, Release 2012-178, *OCC Mortgage Metrics Report, Third Quarter 2012*, at 22 Tbl. 12 (2012).

[256] Even assuming none of the approximately 373 insured depositories and credit unions with assets between $1 billion and $10 billion qualify for the exemption, it would still be true that over 94 percent of insured depositories and credit unions with $10 billion or less in total assets would qualify for the exemption.

Regarding §§ 1024.35 and 1024.36, the Bureau believes that the consideration of benefits and costs of covered persons presented above provides a largely accurate analysis of the impacts of the final rule on depository institutions and credit unions with $10 billion or less in total assets. The new written processes for error resolution and information requests have a broader scope and shorter timelines for response than the existing qualified written request process. However, as discussed above, the Bureau believes that the convenience of informal processes for asserting errors or requesting information, like email and phone calls, will limit the costs of these provisions to these institutions.

A number of credit unions and their trade associations commented that credit unions with under $10 billion in assets should be exempt from the provisions in §§ 1024.35 and .36. The commenters stated that these credit unions already effectively communicate with their members regarding requests for information and assertions of error. This comment was discussed above.

Regarding § 1024.37, the larger depositories and credit unions of those under $10 billion generally have contracts with force-placed insurance providers under which the providers would absorb the costs of the provisions. Thus, the Bureau believes there is little impact of the provisions on these institutions. For smaller depository institutions or credit unions, the Bureau believes that providers may pass along certain costs to such institutions. The impact of these provisions on small depository institutions and credit unions, including a discussion of input from Small Entity Representatives in the Small Business Review Panel process, is discussed in further detail in the Regulatory Flexibility Analysis in part VIII, below. Based on feedback received from the Small Entity Representatives, the Bureau believes that small mortgage servicers engage in relatively little force-placement.

As discussed above, the Bureau believes that about 97 percent of insured depositories and credit unions with $10 billion or less in total assets are likely to be exempt from §§ 1024.38 through .41, with a minor exception. Of the small fraction that must comply, they will most likely be the relatively larger servicers that have substantial experience servicing loans for Fannie Mae, Freddie Mac, FHA, or the VA. Thus, they should already have policies and procedures and resources dedicated to complying with their requirements and there is substantial overlap between those requirements and the requirements of the rule. Compliance with the Bureau's final rule may entail costs of adjustment and costs for extending compliance to other loans in the servicing portfolio. However, the Bureau notes that 80 percent of all outstanding mortgages are guaranteed by one of these institutions, larger servicers use technology and specialized inputs that provide economies of scale in servicing, and larger servicers may also be able to shift certain costs to vendors. Overall, the Bureau believes that few financial service providers are likely to increase fees and charges or reduce servicing activity as a result of these additional costs to an extent that they significantly reduce consumer access to credit.

Finally, the Bureau notes that one comment letter from a bank trade association indicated that the Bureau's section 1022 analysis in the proposal did not adequately identify the types of costs or the amounts of those costs that banks would incur as part of the servicing rulemakings. The Bureau, however, disagrees that the requirements in the final rule, especially in light of the exemptions in §§ 1024.38 through .41, require changes on the scale described by the commenter relating to technology-related projects preformed by vendors. As described above, the small fraction of insured depositories and credit unions that must comply with all provisions of the final rule will most likely be the relatively larger servicers that have substantial experience servicing loans for Fannie Mae, Freddie Mac, FHA, or the VA. Thus, they should already have policies and procedures and resources dedicated to complying with their requirements, and there is substantial overlap between those requirements and the requirements of the rule.

2. Impact of the Provisions on Consumer Access to Credit and on Consumers in Rural Areas

The Bureau believes that the additional costs on servicers from the final rule are not likely to be extensive enough to significantly reduce consumer access to credit. The exemption of small servicers from many provisions of the final rule will help maintain consumer access to credit through these providers. Finally, the Bureau believes that the provisions that support the proper evaluation of borrowers for loss mitigation options may reduce the frequency with which borrowers are denied loan modifications, and thus access to credit.

All servicers will need to comply with the provisions regarding error resolution and requests for information and most of the provisions regarding force-placed insurance. The Bureau believes that the procedures regarding error resolution and requests for information are similar enough to those regarding qualified written requests that the additional one-time and ongoing costs will be small. The Bureau recognizes that the provisions regarding force-placed insurance policies likely impose one-time costs for new disclosures and may entail new procedures (*e.g.*, regarding the renewal notice). However, servicers obtain force-placed insurance on very few loans and small servicers may purchase force-placed insurance and charge the cost of the insurance to the borrower if the cost to the borrower of the force-placed insurance is less than the amount the small servicer would need to disburse from the borrower’s escrow account to ensure that the borrower’s hazard insurance premium is paid in a timely manner.

Small servicers are exempt from all of the provisions in §§ 1024.38 through .41, with a minor exception. The Bureau believes that most of the remaining, larger servicers have substantial experience servicing loans for Fannie Mae, Freddie Mac, FHA, or the VA. Thus, they should already have policies and procedures and resources dedicated to complying with their requirements that overlap with the requirements regarding general servicing policies, procedures and requirements, early intervention with delinquent borrowers, continuity of contact and loss mitigation. Compliance with the Bureau’s final rule may entail costs of adjustment and costs for extending compliance to other loans in the servicing portfolio. However, the Bureau notes that 80 percent of all outstanding mortgages are guaranteed by one of these institutions, larger servicers use technology and specialized inputs that provide economies of scale in servicing, and larger servicers may also be able to shift certain costs to vendors. Overall, the Bureau believes that few financial service providers are likely to increase fees and charges or reduce servicing activity as a result of these additional costs to an extent that they significantly reduce consumer access to credit.

Consumers in rural areas may experience impacts from the final rule that are different in certain respects from the benefits experienced by consumers in general. Consumers in rural areas may be more likely to obtain mortgages from small local banks and credit unions that either service the loans in portfolio or sell the loans and retain the servicing rights. These servicers may already provide most of the benefits to consumers that the final rule is designed to provide. These servicers will benefit from the exemptions to the discretionary rulemakings by not incurring the costs associated with documenting compliance or modifying activities that the Bureau believes already provide substantial consumer protections. Borrowers in turn benefit, either as mortgagees or as customers at these insured depositories and credit unions, through lower fees and continued access to a lending and servicing model that they prefer.

VIII. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct an initial regulatory flexibility analysis (IRFA) and a final regulatory flexibility analysis (FRFA) of any rule subject to notice-and-comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.[257] The Bureau also is subject to certain additional procedures under the RFA involving the convening of panel to consult with small business representatives prior to proposing a rule for which an IFRA is required.[258]

An entity is considered "small" if it has $175 million or less in assets for the banks, and $7 million or less in revenue for non-bank mortgage lenders, mortgage brokers, and mortgage servicers.[259] The Bureau did not certify that the rule would not have a significant economic impact on a substantial number of small entities. Thus, the Bureau convened a Small Business Review Panel to obtain advice and recommendations of representatives of the regulated small entities. The 2012 RESPA Servicing Proposal preamble included detailed information on the Small Business Review Panel.[260] The Panel's advice and recommendations are found in the Small Business Review Panel Final Report;[261] several of these recommendations were incorporated into the proposed rule. The 2012 RESPA Servicing Proposal preamble also

[257] For purposes of assessing the impacts of the final rule on small entities, "small entities" is defined in the RFA to include small businesses, small not-for-profit organizations, and small government jurisdictions. 5 U.S.C. 601(6). A "small business" is determined by application of Small Business Administration regulations and reference to the North American Industry Classification System (NAICS) classifications and size standards. 5 U.S.C. 601(3). A "small organization" is any "not-for-profit enterprise which is independently owned and operated and is not dominant in its field." 5 U.S.C. 601(4). A "small governmental jurisdiction" is the government of a city, county, town, township, village, school district, or special district with a population of less than 50,000. 5 U.S.C. 601(5).

[258] 5 U.S.C. 609.

[259] *See* U.S. Small Bus. Admin., *Table of Small Business Size Standards Matched to North American Industry Classification System Codes* (Oct. 1, 2012) *available at* http://www.sba.gov/content/table-small-business-size-standards. ("SBA Size Standards").

[260] 77 FR 57200, 57285-57286 (Sept. 17, 2012).

[261] *See* U.S. Consumer Fin. Prot. Bureau, U.S. Small Bus. Admin., & Office of Mgmt. & Budget, *Final Report of the Small Business Review Panel on CFPB's Proposals Under Consideration for Mortgage Servicing Rulemaking* (2012) ("Small Business Review Panel Report"), *available at* http://www.regulations.gov/#!documentDetail;D=CFPB-2012-0033-0002.

included a discussion of each of the panel's recommendations in the section-by-section analysis for the proposed rule.

In the 2012 RESPA Servicing Proposal, the Bureau did not certify that the rule would not have a significant economic impact on a substantial number of small entities and therefor prepared an IRFA.[262] In the IRFA, the Bureau solicited comment on alternative means of compliance for small servicers with the proposed error resolution procedures and on whether the proposed rule would have any impact on the cost of credit for small entities. The Bureau did not receive comments in response to these requests. Elsewhere in the proposal, the Bureau sought comment on the small servicer exemption, specifically if a small servicer exemption should be established for any provisions of the proposed rules. These comments are addressed in the section-by-section analysis of each provision.

As discussed above, the Bureau is exempting servicers that service 5,000 mortgage loans or less, all of which the servicer or an affiliate owns or originated, from most of the requirements in §§ 1024.38 through .41. The Bureau also exempts small servicers in certain circumstances from the restriction described in § 1024.17(k)(5) that if borrower has an escrow account for hazard insurance, a servicer may not purchase force-placed insurance where the servicer could advance funds to the borrower's escrow account to ensure timely payment of the borrower's hazard insurance premium charges.[263] The Bureau believes that these exemptions remove a significant amount of the total compliance burden of the final rule that would otherwise fall on small servicers (as defined by the RFA). However, due to limited data with which to compute

[262] 77 FR 57200, 57286-57292 (Sept. 17, 2012).

[263] These rulemakings are the general servicing standards sections, the early intervention with delinquent borrowers requirement, the continuity of contact with delinquent borrowers requirement, and the loss mitigation procedures; however, regarding the loss mitigation procedures, these servicers are required to comply with (1) the prohibition on making the first notice or filing required for a foreclosure process unless a borrower is more than 120 days delinquent and (2) a prohibition on proceeding with a foreclosure sale when a borrower is performing pursuant to the terms of a loss mitigation agreement.

the remaining compliance burden on small servicers (as defined by the RFA), the Bureau is not certifying that the final rule will not have a significant economic impact on a substantial number of small entities. Accordingly, the Bureau has prepared the following final regulatory flexibility analysis as required under section 604 of the RFA.

1. A Statement of the Need For, and Objectives of, the Rule.

The Bureau is publishing this final rule to establish new regulatory protections for borrowers related to mortgage servicing. This rule is needed for the reasons discussed above in both the overview, the section-by-section analysis, and the Dodd-Frank Act section 1022(b) analysis above. The final rule amends Regulation X, among other things, to implement amendments to RESPA that were added by section 1463 of the Dodd-Frank Act to address harms related to mortgage servicing. Section 1463 of the Dodd-Frank Act requires servicers to provide new disclosures and to meet other standards with respect to on force-placed insurance, and it establishes obligations for servicers to respond to requests from borrower to correct errors or to provide certain information. Section 1463 of the Dodd-Frank Act also authorizes the Bureau, by regulation, to impose other obligations on servicers that the Bureau finds appropriate to carry out the consumer protection purposes of RESPA.

The amendments to Regulation X are intended to protect consumers by addressing seven servicer obligations: to correct errors asserted by mortgage loan borrowers; to provide information requested by mortgage loan borrowers; to meet certain procedural and other requirements regarding force-placed insurance; to maintain general servicing policies and procedures designed to achieve certain objectives; to engage in early intervention with delinquent borrowers; to provide delinquent borrowers with continuity of contact with servicer personnel who have access to the borrower's mortgage loan account; and to evaluate borrowers' applications for available loss mitigation options. These final rules also modify and streamline certain existing servicing-related provisions of Regulation X, including servicer requirements to provide disclosures to borrowers in connection with a transfer of mortgage servicing and to manage escrow accounts. These revisions include provisions on timely disbursements to maintain hazard insurance, and to return amounts in an escrow account to a borrower upon payment in full of a mortgage loan.

This rulemaking has multiple objectives. The provisions on error resolution require servicers promptly to correct errors, to conduct a reasonable investigation and to provide the borrower with a written notice. The provisions on requests for information requires servicers promptly to provide the information requested or to conduct a reasonable search for the information and provide the borrower with a notice stating, among other things, that the information is not available to the servicer. The provisions on force-placed insurance are intended to avoid unwarranted costs and fees in connection with force-placed insurance. The provisions prohibit servicers from charging borrowers for force-placed insurance unless they have a reasonable basis to believe the borrower has failed to maintain hazard insurance on the property, require that charges related to force-placed insurance be bona fide and reasonable, and impose obligations on servicers to promptly cancel force-place insurance upon a demonstration that the borrower has hazard insurance in place and refund the borrower for force-place premiums for periods of duplicative coverage. These provisions will reduce instances of servicers charging borrowers for force-placed insurance they do not need or charging more than is or charging more than is bona fide and reasonable.

The provisions on general servicing standards are intended to address wide-spread problems reported across the mortgage servicing industry. The provisions require servicers to maintain policies and procedures reasonably designed to achieve the objectives relating to accessing and providing accurate information; properly evaluating loss mitigation applications; facilitating oversight of, and compliance by, service providers; facilitating transfer of information during servicing transfers; and informing borrowers of written error resolution and information request procedures. Compliance also requires servicers to retain records for a specified time period and maintain certain documents and data in a manner that facilitates compiling the documents and data into a servicing file within five days.

The provisions on early intervention with delinquent borrowers are intended to spur communication between servicers and borrowers early in a borrower's delinquency in order to facilitate borrower's avoidance of foreclosure. Early intervention will also likely benefit borrowers by reducing avoidable interest costs, limiting the impact on borrowers' credit reports, and facilitating household budgeting and planning.

The provisions on continuity of contact are intended to ensure that servicer personnel with access to information about a delinquent borrower are made available to the borrowers so that they can appropriately assist the borrower in exploring loss mitigation options.

Finally, the provisions on loss mitigation are intended to facilitate the review of borrowers for loss mitigation options. The provisions require servicers to undertake certain duties in connection with the evaluation of borrower applications for loss mitigation options. These servicers must evaluate any borrower who submits an application for all loss mitigation options available to the borrower and meet timelines with respect to the review process. The provisions further impose a foreclosure ban during the first 120 days after delinquency and impose timelines for the review of a timely submitted complete loss mitigation application. The provisions also provide borrowers with the right to appeal a servicer's denial of a complete loss mitigation application in certain circumstances.

2. Summary of Significant Issues Raised by Comments in Response to the Initial Regulatory Flexibility Analysis.

In accordance with section 3(a) of the RFA, the Bureau prepared an IRFA. In the IFRA, the Bureau estimated the possible compliance costs for small entities with respect to each major component of the rule against a pre-statute baseline. The Bureau requested comments on the IRFA. An industry association submitted a comment letter that refers in passing to the Regulatory Flexibility Analysis. The comment raises three significant issues regarding the impact of the proposed rule on RFA small servicers. First, the commenter states that it would not be effective public policy to require servicers smaller than those in the top-50 to incur the costs of complying with the proposed rule. The commenter observes that the top-50 servicers service 80 percent of outstanding mortgage loans and compliance with the rule would impose significant costs on the well over 12,000 servicers that service the remaining 20 percent. The commenter states that the costs imposed on these 12,000 servicers would be disproportionate to their share of the market. Second, the commenter stated that neither the proposed Dodd-Frank Act section1022 analysis nor the IRFA adequately identifies the types of costs or the amount of those costs that bank servicers will incur as a result of the servicing rulemakings. Third, the commenter states that given the servicing performance of community banks and the incentives that drive their high level of customer service, there is no demonstrated need to apply to “small servicers” those elements of the proposal that are not required by the Dodd-Frank Act.[264]

[264] The commenter does not define small servicer, but the commenter does request that the Bureau revise the loan threshold in § 1026.41(e)(4) to 10,000. The Bureau notes that about 200 insured depositories and credit unions service over 10,000 loans and others service some loans for others.

As discussed above in the Dodd-Frank Act section 1022 analysis and the section-by-section analysis, the Bureau recognizes that servicers that service relatively few loans, all of which they either originated or hold on portfolio, may have stronger incentives than other servicers to ensure loan performance or maintain a strong reputation in their local communities. Further, the Bureau understands the many small servicers, including the Small Entity Representatives, use a business model that involves frequent, intensive consumer contact, both to ensure loan performance and maintain a strong reputation in their local communities. In light of these favorable incentives, and to preserve access to small servicers, the Bureau is exempting servicers that service 5,000 mortgage loans or less, all of which the servicer or an affiliate owns or originated, from most of the requirements under sections §§ 1024.38 to 41.[265] The Bureau estimates that 98 percent of insured depositories and credit unions that service 10,000 loans or less (*i.e.*, the ones that service 5,000 loans or less), all of which the servicer or an affiliate owns or originated, will qualify for the exemption.[266] Thus, the Bureau believes that the exemption in the final rule provides an outcome that is largely consistent with the outcome the commenter recommends.

Regarding the specific comments, the Bureau notes that the consequences of compliance costs for covered persons depend on the size of these costs relative to other costs and the ability of covered persons to absorb or shift these costs. The consequences for consumers depend on these factors as well as the improvements in products and services from compliance by servicers. These consequences are not summarized by the share of aggregate costs imposed on a particular

[265] The Bureau is also exempting these servicers from the amendment to § 1024.17(k)(5) requiring that a servicer advance funds to an escrow account when a borrower is more than 30 days delinquent.

[266] None of the approximately 178 insured depositories and credit unions that the Bureau estimates service between 5,001 and 10,000 loans would qualify for the exemption. On the other hand, for reasons discussed below, the Bureau believes that all of the insured depositories and credit unions that service 5,000 loans or less will qualify for the exemption.

segment. The Bureau also notes that the fact that a large number of small servicers will require new and revised disclosures means that each vendor will likely spread the one-time costs of developing and validating disclosures over a large number of servicers.[267]

Second, the proposed Dodd-Frank Act section 1022 analysis and IRFA both briefly described the one-time and ongoing costs that bank servicers would incur as part of the servicing rulemaking. Both also provided limited quantification of the costs attributable to the rule, from a pre-statutory baseline, in light of the limited amount of data that was reasonably available. As discussed in the final Dodd-Frank Act section 1022 analysis, the Bureau does not believe that the changes required of servicers in this rulemaking would impose the types of costs that the commenter describes.[268]

Finally, as discussed above, the Bureau carefully considered how to define small servicers for purposes of the exemption. The Bureau concluded after analysis of data that is reasonably available that the 5,000 mortgage loan threshold, coupled with the requirement to service only loans owned or originated, provides a reasonable balance between the goal of including a substantial number of servicers that make loans in their local communities or more generally have incentives to provide high levels of customer contact and information and excluding servicers that use a different business model. The Bureau further believes that it is appropriate for a definition of small servicers, for purposes of an exemption to servicing rules, to include conditions specifically associated with the incentives and business model of servicers, such as owning or originating all loans.

[267] This point was made briefly in the proposed Section 1022 analysis (s*ee* 77 FR 57200, at 57369 (Sept.17, 2012) and is discussed further in the final Section 1022 analysis.

[268] *See* part VII.B and the consideration of costs to covered persons from the revised § 1026.20(c) notice in part VII.D.1.

The Bureau received numerous comments describing in general terms the impact of the proposed rule on small servicers and the need for exemptions for small servicers from various provisions of the proposed rule. These comments, and the responses, are discussed in the section-by-section analysis above, and element 6-1 of this FRFA below.

3. Response to the Office of Advocacy of the Small Business Administration Comment.

The Office of Advocacy at the Small Business Administration (Advocacy) provided a formal comment letter to the Bureau in response to the proposed rules on mortgage servicing. Among other things, this letter expressed concern about the following issues: inadequate notice of the proposed rules, providing notice of information within 5 days, and the effective date of the regulation.

First, Advocacy expressed concern that small entities did not have adequate notice of the proposed rules, because although the proposed rules were posted on the Bureau website on August 10, 2012 the rules were not published in the **Federal Register** until September 17, 2012. Advocacy was concerned that small entities who rely on the **Federal Register** for notice of proposed rules did not have sufficient time to prepare comments in response to the proposed rule.

The Bureau believes that small entities were given adequate notice and had a full opportunity to comment on the proposed rule. The proposed servicing rules were press released and issued on the Bureau website a full 60 days before the close of the comment period.[269] The Bureau engaged in outreach to industry and other members of the public. Further, the Bureau believes that due to the recent attention on the industry, including the National Mortgage Settlement and the market changes, small entities were aware that the Dodd-Frank Act mandated

[269] *See* Press Release, Consumer Fin. Prot. Bureau, *Consumer Financial Protection Bureau Proposes Rules to Protect Mortgage Borrower* (Aug. 10, 2012) *available at* http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-proposes-rules-to-protect-mortgage-borrowers/

changes to the servicing industry and that proposed rules would be forthcoming from the Bureau, particularly as trade associations have taken an active role in the rulemaking. The Bureau believes such trade associations helped to inform small entities of the proposed rulemaking.[270] In light of the foregoing, the Bureau believes that small entities were given adequate notice of the proposed rules, as evidenced by the number of small entities who submitted formal comments.

Second, Advocacy expressed concern about the requirement that servicers provide a written notice and documenting compliance under the alternative compliance mechanism for information requests where a servicer responds to a request for information within five days. The concern is about unnecessary procedures being triggered when a request for information has already been resolved.

The Bureau agrees that if a borrower requests information and is quickly provided the answer, additional procedures including notification that the request has been received may not be appropriate. The Bureau has restructured the requirement under the final rule that servicers adhere to information request requirements under § 1024.36 with respect to oral notices of errors. Instead of the proposed prescriptive procedures, oral information requests and error notifications are addressed in § 1024.38, General Servicing Policies, Procedures and Requirements. Thus, the Bureau has provided servicers with more flexibility regarding responses to information requests,. Under the final rule, if a borrower calls with a question and is given an answer, no further actions would be required. Additionally, if a borrower submits a written request for information, and the servicer provides a written response within five days, the servicer is not also required to send a

[270] *See e.g.*, Nat'l Ass'n of Fed. Credit Unions, CFPB Proposes Mortgage Servicing Rule Changes, (Aug. 12, 2012), ("NAFCU Compliance Blog") *available at* http://www.nafcu.org/News/2012_News/August/CFPB_proposes_mortgage_servicing_rule_changes/

separate written response notifying the borrower that the request was received. The Bureau believes these amendments to the rule address the Advocacy's concern on this issue.

Third, Advocacy encouraged the Bureau to provide Small Entity Representatives with a sufficient amount of time for them to comply with the requirements of the proposal, and expressed this could take 18 – 24 months. A complete discussion of the effective date is found in the Overview above. While the Bureau understands the new rules will take time to implement, the Bureau also believes that consumers should have the benefit of the additional protections as soon as practical. In light of the comments received, the Bureau believes that 12 months is an appropriate implementation period. This time period is consistent with (1) the period requested by the vast majority of comments, (2) outreach conducted by the Bureau during development of the proposed rule with vendors and systems providers regarding timeframes for updating core systems, and (3) the implementation period for other requirements imposed by the Dodd-Frank Act or regulations issued by the Bureau that may have other impact on creditors, assignees, and servicers. Further, the Bureau believes that an approximately 12 month implementation period appropriately balances the needs of industry to appropriately adjust operations to implement the Final Servicing Rules with the goal of providing consumers the benefit of the protections implemented by the Final Servicing Rules as soon as practicable.

4. A Description of and An Estimate of the Number of Small Entities to which the Rule Will Apply.

As discussed in the Small Business Review Panel Report, for purposes of assessing the impacts of the proposed rule on small entities, "small entities" is defined in the RFA to include small businesses, small nonprofit organizations, and small government jurisdictions. 5 U.S.C. 601(6). A "small business" is determined by application of SBA regulations and reference to the

North American Industry Classification System (NAICS) classifications and size standards.[271] 5 U.S.C. 601(3). Under such standards, banks and other depository institutions are considered "small" if they have $175 million or less in assets, and for other financial businesses, the threshold is average annual receipts (*i.e.*, annual revenues) that do not exceed $7 million.[272]

During the Small Business Review Panel process, the Bureau identified five categories of small entities that may be subject to the proposed rule for purposes of the RFA: commercial banks/savings institutions[273] (NAICS 522110 and 522120), credit unions (NAICS 522130), firms providing real estate credit (NAICS 522292), firms engaged in other activities related to credit intermediation (NAICS 522390), and small non-profit organizations. Commercial banks, savings institutions, and credit unions are small businesses if they have $175 million or less in assets. Firms providing real estate credit and firms engaged in other activities related to credit intermediation are small businesses if average annual receipts do not exceed $7 million.

A small non-profit organization is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field. Small non-profit organizations engaged in mortgage servicing typically perform a number of activities directed at increasing the supply of affordable housing in their communities. Some small non-profit organizations originate and service mortgage loans for low and moderate income individuals while others purchase loans or the mortgage servicing rights on loans originated by local community development lenders. Servicing income is a substantial source of revenue for some small non-profit organizations while others receive most of their income from grants or investments.

[271] The current SBA size standards are found on SBA's website at http://www.sba.gov/content/table-small-business-size-standards.

[272] *See* SBA Size Standards.

[273] Savings institutions include thrifts, savings banks, mutual banks, and similar institutions.

The following table provides the Bureau's estimate of the number and types of entities to which the rule will apply:

Table 1: Estimated number of affected entities and small entities by NAICS code and engagement in closed-end mortgage loan servicing

Category	NAICS	Total entites	Small entities	Entities engaged in mortgage loan servicing	Small entities engaged in mortgage loan servicing
Commercial banks & savings institutions	522110, 522120	7,081	3,779	6,975	3,714
Credit unions	522130	7,040	6,079	4,889	3,951
Real estate credit	522292	5,791	5,152	1,388	800
Other activities related to credit intermediation (includes loan servicing)	522390	5,494	5,319		

For commercial banks, savings institutions, and credit unions, the number of entities and asset sizes were obtained from December 2011 Call Report data as compiled by SNL Financial.[274] Banks and savings institutions are counted as engaging in mortgage loan servicing if they hold closed-end loans secured by one to four family residential property or they are servicing mortgage loans for others. Credit unions are counted as engaging in mortgage loan servicing if they have closed-end one to four family mortgages in portfolio, or hold real estate loans that have been sold but remain serviced by the institution.

For firms providing real estate credit and firms engaged in other activities related to credit intermediation, the total number of entities and small entities comes from the 2007 Economic Census. The total number of these entities engaged in mortgage loan servicing is based on a special analysis of data from the Nationwide Mortgage Licensing System and Registry (NMLS) and is current as of Q1 2011. The total equals the number of non-depositories that engage in mortgage loan servicing, including tax-exempt entities, except for those mortgage loan servicers (if any) that do not engage in any mortgage-related activities that require a State

[274] The Bureau has updated these figures from the Initial Regulatory Flexibility Analysis, which used December 2010 Call Report data as compiled by SNL Financial.

license. The estimated number of small entities engaged in mortgage loan servicing is based on predicting the likelihood that an entity's revenue is less than the $7 million threshold based on the relationship between servicer portfolio size and servicer rank in data from Inside Mortgage Finance.

Non-profits and small non-profits engaged in mortgage loan servicing would be included under real estate credit if their primary activity is originating loans and under other activities related to credit intermediation if their primary activity is servicing. The Bureau has not been able to separately estimate the number of non-profits and small non-profits engaged in mortgage loan servicing. These non-profits may list loan servicing income on the IRS Form 990 Statement of Revenue, but it is not possible to search public databases on non-profit entities according to what they list on the Statement of Revenue.

The Bureau is exempting servicers that service 5,000 mortgage loans or less, all of which the servicer or an affiliate owns or originated, from most of the provisions in § 1024.38-41. The Bureau estimates that all but one insured depository or credit union that meets the SBA asset threshold will qualify for the exemption. The Bureau's methodology for this estimate is straightforward in the case of credit unions. The credit union Call Report presents the number of mortgages held in credit union portfolios and the amount of assets. The Bureau could readily determine which credit union small servicers (as defined by the SBA asset threshold) serviced 5,000 mortgage loans or less. In contrast, the bank and thrift Call Report does not present the number of mortgages, only the aggregate unpaid principal balance, and the amount of assets. The Bureau developed estimates of the average unpaid principal balance at banks and thrifts of different sizes and use this with the information on aggregate unpaid principal balance to derive loan counts at each bank and thrift.[275] The Bureau could then determine which bank and thrift small servicers (as defined by the SBA asset threshold) serviced 5,000 mortgage loans or less.

It is not possible to observe whether the loans that servicers are servicing for others were originated by those servicers. However, the Bureau believes that all insured depositories and credit unions that meet both the SBA asset threshold and the loan count threshold likely qualify for the exception. In principle, these entities may not qualify for the exception because they do not meet the other conditions of the exception, *i.e.*, they service loans that they did not originate and do not own. The Bureau believes that this is extremely unlikely, however. First, most entities servicing loans they did not originate and do not own most likely view servicing as a stand-alone line of business. In this case they would most likely choose to service substantially more than 5,000 loans in order to obtain a profitable return on their investment in servicing. Additionally, the Bureau believes it is highly unlikely that insured depositories and credit unions with $175 million in assets or less choose to make this investment, preferring to use their assets to support other activities. Taking both factors into account, the Bureau believes that essentially all insured depositories and credit unions that meet the SBA threshold and the loan count condition qualify for the exception.

The Bureau does not have the data necessary to precisely estimate the number of small entity non-depositories that would be covered by the exemption.[276] To obtain a rough estimate,

[275] For banks and thrifts with under $10 billion in assets, the Bureau calculated the average unpaid principal balance of portfolio mortgages by state for credit unions with less than $1 billion in assets and applied the state specific figures to these banks and thrifts. For banks and thrifts with over $10 billion in assets, the Bureau applied the OCC's mortgage metrics estimate of $175,000. For securitized loans, the Bureau derived the average unpaid principal balance based upon the size of the securitized loan book using the FHFA's Home Loan Performance database, which ranged from $141,000 to $189,000.

[276] In the proposed rule, the Bureau stated that it was working to gather data from the Nationwide Mortgage Licensing System and Registry (NMLS) that would be additional to the data used in Table 1. The Bureau considered that this additional data might allow the Bureau to refine its estimate of the number of small entity non depositories that would be covered by a closely related exemption in the Bureau's companion proposed mortgage

the Bureau notes that $7 million in servicing revenue would be generated from an aggregate unpaid principal balance of $2 billion.[277] The Bureau estimates that all but 4 percent of insured depositories and credit unions servicing an aggregate unpaid principal balance of $2 billion or less service 5,000 loans or less. Assuming a similar relationship between servicing revenue and loan counts holds for non-depository servicers, at least for relatively small depository and non-depository servicers, all but 4 percent of non-depository servicers would service 5,000 loans or less. This estimate and the limited data available imply that 768 (all but 4 percent of 800, or 32) non-depository servicers would service 5,000 loans or less. The Bureau considers these figures to be the best available approximations to the number of non-depository servicers that would and would not qualify for the exemption. However, the Bureau recognizes that these figures are rough.

5. Projected Reporting, Recordkeeping, and Other Compliance Requirements.

The final rule does not impose new reporting requirements. The final rule does, however, impose new recordkeeping and compliance requirements on certain small entities. The requirements on small entities from each major component of the rule are presented below.

The Bureau discusses impacts against a pre-statute baseline. This baseline assumes compliance with the Federal rules that overlap with the final rule. The Bureau expects that the impact of the rule relative to the pre-statute baseline will be smaller than the impact would be if

servicing rulemaking, the proposed 2012 TILA Mortgage Servicing Rule. The Bureau did obtain additional data from the NMLS. This data, however, does not contain information directly about mortgage servicing revenue and mortgage loans serviced and it has limited information with which to derive these amounts. The Bureau has therefore not used this additional NMLS data to estimate the number of small entity non-depositories that would be covered by the exemption in this final rule or in the final 2012 TILA Mortgage Servicing Rule.

[277] This calculation assumes the servicer receives 35 basis points on each dollar of unpaid principal balance. Typical annual servicing fees are 25 basis points for prime fixed-rate loans, 37.5 basis points for prime ARMs, 44 basis points for FHA loans, and 50 basis points for subprime loans ; *see* Larry Cordell et al., *The Incentives of Mortgage Servicers: Myths and Realities*, at 15 (Fed. Reserve Board, Working Paper No. 2008-46, 2008). The conclusion of the analysis would be the same regardless of which figure is used.

not for compliance with the existing Federal rules. In particular, certain ongoing costs regarding error resolution, early intervention and loss mitigation will have generally been incurred and budgeted for by servicers because they are already providing these services. These expenses will facilitate and thereby reduce the cost of compliance with the rule.

Recordkeeping Requirements

As discussed in detail in the section-by-section analysis above, the final rule amends the recordkeeping requirements imposed on servicers. The amendments to Regulation X eliminated the pre-existing requirement in § 1024.17(*l*) to keep records relating to escrow accounts for five years. The amendments also impose a new obligation in § 1024.39 to retain records that document actions taken by the servicer with respect to a borrower's mortgage account until one year after the date a mortgage loan is discharged or servicing of a mortgage loan is transferred by the servicer to a transferee servicer. In general, servicers will have to update their policies and procedures; additionally, servicers may have to update their systems, and increase storage capacity to ensure compliance.

Compliance Requirements

As discussed in detail in the section-by-section analysis above, the final rule imposes new compliance requirements on servicers. In general, servicers will have to update their policies and procedures; additionally, servicers may have to update their systems to ensure compliance.

(a) Force-Placed Insurance

Section 1024.37 prohibits servicers from charging a borrower for force-placed insurance unless there is a reasonable basis to believe the borrower has failed to comply with the loan contract's requirements to maintain property insurance. Servicers must follow a procedure including sending two notices before imposing any charge on a borrower, and terminating force-placed insurance and refunding force-placed insurance premiums paid during any period during which the borrower’s insurance coverage and the force-placed insurance coverage were each in effect. The final rule contains a provision prohibiting a servicer from purchasing force-placed insurance, with respect to a borrower who has established an escrow for hazard insurance, unless a servicer is unable to disburse funds from the borrower’s escrow account to ensure that the borrower’s hazard insurance premium charges are paid in a timely manner. Servicers will have to update their policies and procedures to ensure compliance with these requirements, as well as update their systems to ensure the proper notices are sent. The Bureau is mitigating the burden by providing model forms.

The final rule exempts servicers that service 5,000 mortgage loans or less, all of which the servicer or an affiliate owns or originated, from the provision prohibiting servicers from purchasing force-placed insurance, with respect to a borrower who has established an escrow account for hazard insurance if the amount of the disbursement would be greater than the cost of the force-placed insurance. For the reasons explained above, the Bureau believes that all small servicers (as defined by the SBA) would likely be exempt from this provision when the cost of the force-placed insurance is less than the amount the servicer would need to disburse from the borrower’s escrow account to ensure that the borrower’s hazard insurance premium charges were paid in a timely manner..

(b) Error Resolution and Response to Inquiries

Sections §§ 1024.35 and 1024.36 require servicers to follow procedures in resolving errors, and responding to inquiries, including acknowledging written requests from the borrower, investigating and correcting errors, and responding to the borrower. Servicers may need to develop compliance procedures and train staff and may need new or updated software and hardware in order to access the information required to address notices of error and inquiries.

(c) General Servicing Standards

Section § 1024.38 requires servicers to maintain policies and procedures that are reasonably designed to achieve certain objectives that related to: accessing and providing accurate information properly evaluating loss mitigation applications; facilitating oversight of, and compliance by, service providers; facilitating transfer of information during servicing transfers; and informing borrowers of written error resolution and information request procedures. Servicers will have to update their policies and procedures, and may have to update their information management systems.

To comply with these requirements, servicers may incur a cost to review and document their policies and procedures, obtain legal advice, train their staff to follow the policies and procedures, and monitor staff adherence to the policies and procedures, in addition to complying with expanded requirements. The rule mitigates all of these costs through the provision that the "reasonableness" of a servicer's policies and procedures would depend upon the size of the servicer and the nature and scope of its activities. Further, depository institutions already are subject to interagency guidelines relating to safeguarding the institution's safety and soundness that facilitate reasonable information management for purposes of mortgage servicing.

The final rule exempts servicers that service 5,000 mortgage loans or less, all of which the servicer or an affiliate owns or originated, from these provisions. For the reasons explained above, the Bureau believes that all small servicers (as defined by the SBA) would likely qualify for this exemption.

(d) Early Intervention for Delinquent Borrowers

Section 1024.39 requires servicers to make contact with delinquent borrowers. Servicers must establish or make good faith efforts to establish live contact with a delinquent borrower on or before the 36th day of delinquency. Servicers must also provide certain written information to borrowers not later than 45th day of delinquency.

The final rule exempts servicers that service 5,000 mortgage loans or less, all of which the servicer or an affiliate owns or originated, from these provisions. For the reasons explained above, the Bureau believes that all small servicers (as defined by the SBA) would likely qualify for this exemption.

(e) Continuity of Contact

Servicers are required to maintain policies and procedures that are reasonably designed (1) to achieve the objective that a servicer makes available, by telephone, personnel who can perform certain functions that assist delinquent borrowers, and (2) to ensure a servicer assigns such personnel by the time a servicer provides the written early intervention notice.

The final rule exempts servicers that service 5,000 mortgage loans or less, all of which the servicer or an affiliate owns or originated, from these provisions. For the reasons explained above, the Bureau believes that all small servicers (as defined by the SBA) would likely qualify for this exemption.

(f) Loss Mitigation

Section 1024.41 requires servicers to follow certain procedures and timelines in processing loss mitigation applications. Servicers are required to receive and evaluate complete loss mitigation applications within certain timeframes, and to provide an appeal process, with an independent evaluation, for loss mitigation applications received within a specified timeframe and with respect to which the servicer denies a borrower’s application for any trial or permanent modification program.   The rule also imposes a foreclosure ban during the first 120 days after delinquency and imposes timelines if a borrower submits a complete loss mitigation application during this 120 day period or before a servicer initiates foreclosure.

The final rule exempts servicers that service 5,000 mortgage loans or less, all of which the servicer or an affiliate owns or originated, from all of the requirements in this section of the final rule except (1) the prohibition on making the first notice or filing required for a foreclosure process unless a borrower is more than 120 days delinquent and (2) a prohibition on proceeding with a foreclosure sale when a borrower is performing pursuant to the terms of a loss mitigation agreement. Given current foreclosure timelines and the infrequency of foreclosure by small servicers (as defined by the SBA), the Bureau does not believe that these requirements will significantly delay foreclosures by small servicers that may occur or impose significant other costs on them.

(g) Estimate of the Classes of Small Entities Which will be Subject to the Requirement

Section 603(b)(4) of the RFA requires an estimate of the classes of small entities which will be subject to the requirement. The classes of small entities which will be subject to the reporting, recordkeeping, and compliance requirements of the proposed rule are the same classes of small entities that are identified above in part VII.B.4.

Section 603(b)(4) of the RFA also requires an estimate of the type of professional skills necessary for the preparation of the reports or records. The Bureau anticipates that the professional skills required for compliance with the proposed rule are the same or similar to those required in the ordinary course of business of the small entities affected by the proposed rule. Compliance by the small entities that will be affected by the proposed rule will require continued performance of the basic functions that they perform today: generating disclosure forms, addressing errors and providing information to borrowers, managing information about borrowers, contacting delinquent borrowers, providing continuity of contact for delinquent borrowers, and (as applicable) reviewing applications by borrowers for loss mitigation.

6-1. Description of the Steps the Agency has Taken to Minimize the Significant Economic Impact on Small Entities.

The Bureau understands the new provisions will impose certain costs on small entities, and has attempted to mitigate the burden where it can be done without unduly diminishing consumer protection. The section-by-section analysis of each provision contains a complete discussion of the following steps taken to minimize the burden.

Importantly, the Bureau is exempting servicers that service 5,000 mortgage loans or less, all of which the servicer or an affiliate owns or originated, from most of the requirements under 1024.38 to 1024.41. The Bureau is also exempting these servicers from the amendment to § 1024.17(k)(5) requiring that a servicer advance funds to an escrow account when a borrower is more than 30 days delinquent. The Bureau believes that these exemptions remove a significant amount of the total compliance burden of the final rule that would otherwise fall on small servicers as defined by the SBA. However, due to limited data with which to compute the remaining compliance burden on small servicers as defined by the SBA, the Bureau is providing this description of the *other* steps the agency has taken to minimize the economic impact on small entities.

(a) Force-Placed Insurance

Based on discussions with industry and the Small Entity Representatives, the Bureau understands that the force-placed insurance provision may not have the same impact on all small servicers. Some small servicers incur all of the costs associated with providing notices, tracking borrower coverage, and placing and terminating the insurance. For other small servicers, the force-placed insurance provider handles these activities and absorbs the costs or passes them on to the consumer indirectly through the insurance premium. Many small servicers already comply with most of the force-placed insurance provisions of the rule.

If small servicers are generally already comply with the force-placed insurance provisions of the proposed rule, then the impact of the rule will likely come from the one-time cost of developing disclosures that would meet the proposed disclosure requirements and the ongoing costs of providing information in the disclosures that they do not already provide.[278] In addition, some small servicers very rarely need to force-place insurance and therefore use informal procedures, such small servicers may need to develop written procedures to ensure they comply with the proposed rule. The Bureau believes the one-time cost of developing these policies will be minimal.

The Bureau attempted to mitigate the costs of the provisions addressing force-placed insurance. The Bureau attempted to mitigate costs by, for example, providing that a servicer is not required to send more than one force-placed renewal notice during any 12-month period. The Bureau attempted to mitigate the risk that borrower could cancel their own insurance and keep the refund,[279] by allowing servicers to advance premium payments for a borrower's hazard insurance in 30-day installments,[280] as recommended by the Small Business Review Panel Final Report. Finally, the Bureau modified the final rule by exempting small servicers in certain circumstances from the requirement that for a borrower who has escrowed for hazard insurance, a servicer may not purchase force-placed insurance where the servicer could advance funds to the borrower's escrow account to ensure timely payment of the borrower's hazard insurance

[278] For example, one Small Entity Representative stated that its current notice does not include an estimate of force-placed insurance costs.

[279] Small Business Review Panel Report, at 22.

[280] See comment 17(k)(5)-3

premium charges.[281]

The Bureau believes that essentially all small insured depositories and credit unions (as defined by the SBA) would likely be exempt from this requirement provided that cost to the borrower of the force-placed insurance purchased by the small servicer is less than the amount the small servicer would need to disburse from the borrower's escrow account to ensure that the borrower's hazard insurance premium charges were paid in a timely manner. As discussed above, the Bureau has only a rough estimate of the number of small non-depository servicers (as defined by the SBA) that would also be exempt under the same condition, but the estimate supports the view that vast majority would be exempt.

(b) Error Resolution and Response to Inquiries

Based on conversations with Small Entity Representatives, the Bureau understands that most small servicers already incur most of the costs that would be required to comply with the majority of the provisions. The Small Entity Representatives had no objection to the proposed response timeframes, they emphasized that their borrowers demanded immediate resolution of errors and response to inquiries and their high-touch customer service model was designed to meet the demands of these borrowers.

The Small Entity Representatives did generally object to the proposed written response requirements, stating that having to acknowledge and respond in writing to every notice of error or inquiry would be burdensome, particularly if the issue was resolved in the course of the initial phone call. In the final rule, the Bureau has amended the oral error resolution and inquiry response requirements such that servicers must only follow the prescriptive procedures in § 1024.35 and 1024.36 when the error notification or information request is received in

[281] For purposes of this exemption, a small servicer is one that services 5,000 or fewer loans all of which it either originated or owns.

writing.[282] Thus, if a servicer responds to an inquiry during the initial phone call, the servicer is not required to provide the acknowledgement notice. Further, a servicer who responds to a written error notification or information request within five days need not send an acknowledgment notification. The additional flexibility of this approach minimizes the burden on small servicers by allowing them to adopt process that work for their business model.

(c) Reasonable Information Management Policies and Procedures

The information management provisions require the servicer to maintain policies and procedures that are reasonably designed to achieve certain objectives. As clarified in comment 38(a)-1, servicers have flexibility in developing these policies and procedures in light of the size, nature, and scope of the servicer's operations. The flexibility minimizes the burden on small servicers.

The Small Entity Representatives appreciated the flexibility of the proposal and thought it was good that reasonableness depends on the size, nature, and scope of the entity. The Small Entity Representatives emphasized that small firms do not necessarily use automated or online systems to record and track all borrower communications. The Bureau does not believe such systems would be required by the rule.

(d) Early Intervention for Delinquent Borrowers

The Bureau believes that many small entities already incur most of the costs that would be required to comply with the provision of the early intervention rule. At the Small Business Review Panel, Small Entity Representatives explained that they generally contact delinquent borrowers well before the 45th day of a borrower's delinquency.

In the final rule, the Bureau has increased flexibility around the satisfying the 36-day live

[282] The procedures for receiving an oral notification of error or information request were moved to § 1024.38 (General Servicing Standards); small servicers are exempt from this section.

contact requirement. As discussed in more detail in the section-by-section analysis of § 1024.39, the final rule provides servicers with more flexibility in satisfying the live contact requirement by relaxing the good faith efforts standard and allowing servicers to demonstrate compliance by providing written or electronic communication encouraging borrowers to establish live contact with their servicer and, if appropriate, providing oral, written, or electronic information notifying borrowers that loss mitigation options may be available. Commentary also explains, in general, that a servicer may exercise reasonable discretion in determining whether informing a borrower of the availability of loss mitigation is appropriate under the circumstances. This flexibility minimizes the burden on small servicers by not requiring them to send information to certain borrowers when they believe such information would be premature.

In addition, the Bureau has minimized the burden by providing flexible requirements with respect to the content of the written notice, which will help accommodate existing practices, and by not requiring a servicer to provide the written notice to a borrower more than once during any 180-day period. Further, the Bureau is permitting the written notice to be combined with other disclosures being sent by the 45th day of delinquency, which will accommodate existing practices. Finally the Bureau is providing model clauses for the written notice.

(e) Continuity of Contact

The Bureau believes that small servicers generally incur most of the costs that would be required to comply with the provisions for continuity of contact. The Small Entity Representatives generally stated that with their small staffs, everyone had access to files and would be able to assist borrowers in delinquency. The final rule requires that servicers maintain policies and procedures reasonably designed to, among other things, ensure that servicers assign personnel to assist delinquent borrowers when certain loss mitigation information is provided to borrowers (the final rule allows servicers some flexibility in determining when this information should be sent pursuant to § 1024.39), but in any event, not later than the 45th day of a borrower's delinquency. Thus, the final rule minimizes burden by not requiring servicers to establish access to continuity of contact for certain borrowers who may not require this assistance. Additionally, the final rule is modified to allow the servicers to terminate access to continuity of contact personnel if the borrower brings their loan back to current without going through formal loss mitigation procedures.

(f) Loss Mitigation

The final rule requires servicers to receive and evaluate loss mitigation applications and appeals. However, the final rule mitigates the cost of properly evaluating loss mitigation applications and appeals through the provisions that the "reasonableness" of a servicer's policies and procedures would depend upon the size of the servicer and the nature and scope of its activities.

6-2. Description of the Steps the Agency has taken to Minimize Any Additional Cost of Credit for Small Entities.

Section 603(d) of the RFA requires the Bureau to consult with small entities regarding the potential impact of the proposed rule on the cost of credit for small entities and related matters. 5 U.S.C. 603(d). To satisfy these statutory requirements, the Bureau provided notification to the Chief Counsel on April 9, 2012 that the Bureau would collect the advice and recommendations of the same Small Entity Representatives identified in consultation with the Chief Counsel through the Small Business Review Panel process concerning any projected impact of the proposed rule on the cost of credit for small entities as well as any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any increase in the cost of credit for small entities. The Bureau sought the advice and recommendations of the Small Entity Representatives during the Small Business Review Panel outreach meeting regarding these issues because, as small financial service providers, the Small Entity Representatives could provide valuable input on any such impact related to the proposed rule.

At the time the Bureau circulated the Small Business Review Panel outreach materials to the Small Entity Representatives in advance of the Small Business Review Panel outreach meeting, it had no evidence that the proposals under consideration would result in an increase in the cost of business credit for small entities. Instead, the summary of the proposals stated that the proposals would apply only to mortgage loans obtained by consumers primarily for personal, family, or household purposes and the proposals would not apply to loans obtained primarily for business purposes.

At the Panel Outreach Meeting, the Bureau asked the Small Entity Representatives a series of questions regarding cost of business credit issues. The questions were focused on two areas. First, the Small Entity Representatives from commercial banks/savings institutions, credit unions, and mortgage companies were asked whether, and how often, they extend to their customers closed-end mortgage loans to be used primarily for personal, family, or household purposes but that are used secondarily to finance a small business, and whether the proposals then under consideration would result in an increase in their customers' cost of credit. Second, the Bureau inquired as to whether, and how often, the Small Entity Representatives take out closed-end, home-secured loans to be used primarily for personal, family, or household purposes and use them secondarily to finance their small businesses, and whether the proposals under consideration would increase the Small Entity Representatives' cost of credit.

The Small Entity Representatives had few comments on the impact on the cost of business credit. While they took this time to express concerns that these regulations would increase their costs, they said these regulations would have little to no impact on the cost of business credit. When asked, one Small Entity Representative mentioned that at times people may use a home-secured loan to finance a business, which was corroborated by a different Small Entity Representative based on his personal experience with starting a business.

In the IRFA, the Bureau asked interested parties to provide data and other factual information regarding the use of personal home-secured credit to finance a business. The Bureau received only one comment on this issue. The commenter stated that more than 52 percent of the 27.9 million small businesses in the United States are home-based and close to 80 percent of small businesses file taxes as individuals. The commenter further stated that, according to the Small Business Administration, 73.2 percent of small businesses in the United States are sole proprietors. Thus, in some instances, an increase in the cost of consumer credit is also an increase in the cost of business credit.[283]

The Bureau has taken numerous steps to minimize the costs of the rule, and therefore the impact of the rule, on the cost of consumer credit and the cost of credit for small entities. The Bureau believes that the small servicer exemption in the final rule will cover at least 12 percent of all mortgage loans, since this is just the fraction serviced by exempt insured depositories and credit unions; additional loans are serviced by exempt non-depositories. The Bureau believes it has also achieved significant cost reductions by eliminating the requirement to respond in writing to oral assertions of error and oral requests for information; eliminating the existence of a private right of action for certain provisions; providing flexibility in the general servicing standards

[283] Ex parte communication with Tom Sullivan, U.S. Chamber of Commerce (Nov. 13, 2012), available at http://www.regulations.gov/#!documentDetail;D=CFPB-2012-0034-0164.

provisions by having compliance depend on the size, nature and scope of the servicer’s operations; and providing additional flexibility in the general servicing standards provisions and continuity of contact provisions by basing them on objectives. Commenters also stated that the proposed requirement in loss mitigation to identify other servicers with senior or subordinate liens would have been very costly. This requirement has been entirely removed and does not appear in the final rule. Nevertheless, the rule will certainly create new one-time and ongoing costs for servicers. Servicers may attempt to recover these costs by increasing penalties for missed payments or other charges outside of origination, in which case individuals who incur these charges may make much larger one-time payments than they do now. Over time, however, servicers may be able to shift some or all of the costs to originators. All of the additional costs of servicing could be met by an origination fee or an increment to the cost of credit equal to the additional cost of servicing multiplied by the expected number of years the loan would be serviced. This cost is likely to be small, but the Bureau recognizes that it may change over time with the number of delinquent borrowers.

The impact of an increase in the cost of mortgage loan servicing on other forms of consumer credit that may be used to fund a business, and on business credit itself, would be even smaller. If a lender has made optimal (profit maximizing) decisions in one line of business, a change in the costs of another line of business would not disrupt or alter the optimal decisions in the first line of business absent some shared inputs or platforms (“economies of scope”) or other important interdependencies that are not obvious in regards to consumer credit. This is especially clear if there is competition in the other line of business, in this case business credit lending, from firms that do not service mortgage loans and therefore did not experience a cost increase. Absent collusion, firms that did not experience an increase in the costs have the ability and the incentive to under-price any firm that attempts to pass along a cost increase.

In summary, the Bureau believes that the effect of the mortgage servicing rule on the cost of credit for small businesses is likely to be small. Further, this cost is likely to be especially small for the small business relying on a small business loan or consumer credit apart from a closed-end mortgage loan.

IX. Paperwork Reduction Act

The collection of information contained in this rule, and identified as such, has been submitted to OMB for review under section 3507(d) of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (Paperwork Reduction Act or PRA). Notwithstanding any other provision of the law, under the Paperwork Reduction Act, the Bureau may not conduct or sponsor, and a person is not required to respond to, an information collection unless the information collection displays a valid OMB control number. The control number for this collection is 3170-0027.

This rule amends 12 CFR Part 1024 (Regulation X). Regulation X currently contains collections of information approved by OMB, and the Bureau's OMB control number for Regulation X is 3170-0016. The collection title is: Real Estate Settlement Procedures Act (Regulation X) 12 CFR 1024.

On September 17, 2012, notice of the proposed rule was published in the **Federal Register** (77 FR 57199). The Bureau invited comment on: (1) whether the proposed collection of information is necessary for the proper performance of the Bureau's functions, including whether the information has practical utility; (2) the accuracy of the Bureau's estimate of the burden of the proposed information collection, including the cost of compliance; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of information collection on respondents, including through the use of automated collection techniques or other forms of information technology. The comment period for the proposed rule with respect to the proposed information collection expired on November 16, 2012. The Bureau did not receive any comments on the burden of the proposed information collection. However, the Bureau did receive comment on the more general consideration of certain costs in the proposed Dodd-Frank Act section 1022 analysis. This comment is addressed in the final Dodd-Frank Act section 1022 analysis above.

The title of this information collection is Mortgage Servicing Amendment (Regulation X). The frequency of response is *on occasion*. These information collection requirements benefit consumers and would be mandatory. *See* 12 U.S.C. 2601 *et seq*. Because the Bureau does not collect any information, no issue of confidentiality arises. The likely respondents would be federally-insured depository institutions (such as commercial banks, savings banks, and credit unions) and non-depository institutions (such as mortgage brokers, real estate investment trusts, private-equity funds, *etc*.) that service consumer mortgages.[284]

Under the rule, the Bureau accounts for the paperwork burden for respondents under Regulation X. Using the Bureau's burden estimation methodology, the Bureau believes the total estimated one-time industry burden for the approximately 12,643 respondents subject to the proposed rule would be approximately 37,000 hours for one time changes and 1.1 million hours annually. The estimated burdens in this PRA analysis represent averages for all respondents. The Bureau expects that the amount of time required to implement each of the changes for a

[284] For purposes of this PRA analysis, references to "creditors" or "lenders" shall be deemed to refer collectively to commercial banks, savings institutions, credit unions, and mortgage companies (*i.e.*, non-depository lenders), unless otherwise stated. Moreover, reference to "respondents" shall generally mean all categories of entities identified in the sentence to which this footnote is appended, except as otherwise stated or if the context indicates otherwise.

given institution may vary based on the size, complexity, and practices of the respondent.

For purposes of this PRA analysis, the Bureau estimates that there are 11,255 depository institutions and credit unions subject to the proposed rule, and an additional 1,388 non-depository institutions. Based on discussions with industry, the Bureau assumes that all depository respondents except for one large entity and 95 percent of non-depository respondents (and 100 percent of small non-depository respondents) use third-party software and information technology vendors. Under existing contracts, vendors would absorb the one-time software and information technology costs associated with complying with the proposal for large- and medium- sized respondents but not for small respondents.

A. Information Collection Requirements

The Bureau is requiring six changes to the information collection requirements in Regulation X:

1. *Provisions regarding mortgage servicing transfer notices:* The Bureau's rule substantially reduces the length and complexity of the mortgage servicing transfer notice but expands coverage from closed-end first-lien mortgages to closed-end subordinate-lien mortgages as well. Additionally, the Bureau's rule imposes obligations on a transferor servicer who receives a misdirected payment during the 60 days after the effective date of a transfer.

2. *Provisions regarding the placement and termination of force-placed insurance, including three notices:* The Bureau's rule for force-placed insurance prohibits servicers from charging a borrower for force-placed insurance unless two notices are provided to the borrower beforehand. The first notice is required at least 45 days before charging the borrower for force-placed insurance, and the second notice is required at least 15 days before charging a borrower for force-placed insurance. In addition to the two notices, the Bureau is requiring servicers to

provide borrowers a written notice before charging a borrower for renewing or replacing existing force-placed insurance on an annual basis.

3. *Provisions regarding error resolution and requests for information:* The Bureau's rule for error resolution includes a requirement on servicers generally to provide written acknowledgement of receipt of a notice of error and to provide a written response to the stated error, when that error was submitted in writing. The Bureau's requirements for response to information requests requires servicers to provide a written response acknowledging receipt of an information request when that request was submitted in writing. Servicers are also required to provide the borrower with the requested information or a written notification that the information requested is not available to the servicer.

4. *Requirements for early intervention with delinquent borrowers:* The Bureau's rule requires servicers to establish or make good faith efforts to establish live contact by the 36th day of a borrower's delinquency and, if appropriate, promptly notify borrowers about the availability of loss mitigation options. In addition, servicers must provide a written notice by the 45th day of a borrower's delinquency.

5. *General servicing policies, procedures, and requirements:* Under the Bureau's rule, servicers are required to maintain policies and procedures reasonably designed to achieve certain objectives set forth in the rule. Further, servicers are required to comply with two standard information management requirements, including a requirement that servicers retain documents with respect to the servicing of a mortgage loan until one year after a mortgage loan is paid in full or servicing for a mortgage loan is transferred.

6. *Requirements regarding loss mitigation:* Under the Bureau's rule, servicers are required to follow certain procedures when evaluating loss mitigation applications, including (1)

providing a notice telling the borrower that the loss mitigation application was received and whether or not the application is complete, (2) providing a notice telling the borrower if the loss mitigation is approved, or denied (and, for denials of loan modification requests, a more detailed notice of the specific reason for denial and appeal rights), and (3) providing a notice of the appeal determination.

B. Analysis of the Bureau's Information Collection Requirements[285]

1. Mortgage Servicing Transfers

The Bureau's rule substantially reduces the length and complexity of the mortgage servicing transfer notice but expands coverage to closed-end second lien mortgages, in addition to closed-end first-lien mortgages. Additionally, the Bureau's rule imposes obligations on a transferor servicer who receives a misdirected payment during the 60 days after the effective date of a transfer.

Currently, lenders are required to notify closed-end first lien borrowers at origination whether their loan may be sold and the servicing transferred. Upon any mortgage transfer, the transferor servicer is required to provide written notice to the borrower notifying them of the transfer, while the transferee servicer is required to provide notification to the borrower that it will service the borrower's mortgage. The Bureau's provision substantially reduces the length and complexity of the existing mortgage servicing transfer disclosure. The Bureau is expanding coverage from closed-end first-lien mortgages to also include closed-end second lien mortgages.

All respondents will have a one-time burden under this requirement associated with reviewing the regulation. Certain respondents will have one-time burden in hours or vendor

[285] A detailed analysis of the burdens and costs described in this section can be found in the Paperwork Reduction Act Supporting Statement that corresponds with this final rule. The Supporting Statement is available at www.reginfo.gov.

costs from creating software and information technology capability to produce the new disclosure. The Bureau estimates this one-time burden to be 30 minutes and $90, on average, for each respondent.[286]

Certain Bureau respondents will have ongoing burden in hours or vendor costs associated with the information technology used in producing the disclosure. All Bureau respondents will have ongoing vendor costs associated with distributing (*e.g.*, mailing) the disclosure. The Bureau estimates this ongoing burden to be two hours and $210, on average, for each respondent.

2. Force-Placed Insurance Disclosures

The Bureau's rule for force-placed insurance prohibits servicers from charging a borrower for force-placed insurance unless two notices are provided to the borrower beforehand. The first notice is required at least 45 days before a borrower is charged for force-placed insurance, and the second notice is required at least 15 days before a borrower is charged for force-placed insurance. In addition to the two notices, the Bureau requires servicers to provide borrowers a written notice before charging a borrower for renewing or replacing existing force-placed insurance on an annual basis.

The Bureau understands that the requirement that servicers provide borrowers with two written notices prior to charging borrowers for force-placed insurance reflects common practices (*i.e.*, "usual and customary" business practices) today for the majority of mortgage servicers. However, the Bureau understands that the requirement that servicers provide a written notice prior to charging borrowers for the renewal or replacement of existing force-place insurance does not reflect common practices.

All respondents will have a one-time burden under this requirement associated with

[286] Dollar figures are vendor costs and do not include the dollar value of burden hours.

reviewing the regulation. Certain respondents will have one-time burden in hours or vendor costs from creating software and information technology capability to produce the new renewal disclosure. Further, while the Bureau considers borrower notifications of force-placed insurance prior to placement as the normal course of business, institutions may still have to incur one-time costs associated with modifying their existing disclosures to comply with the Bureau's proposed disclosure provisions. As a result, the Bureau's one-time burden incorporates these costs. The Bureau estimates this one-time burden to be 45 minutes and $90, on average, for each respondent.[287]

Certain respondents will have ongoing burden in hours or vendor costs associated with the information technology used in producing the disclosure. All respondents will have ongoing vendor costs associated with distributing (*e.g.*, mailing) the renewal disclosure. The Bureau estimates this ongoing burden to be 15 minutes and $24, on average, for each respondent.

3. Error Resolution and Requests for Information

The Bureau's requirements for error resolution and requests for information will require written acknowledgement of receiving a written notice of error or an information request, written notification of correction of error, and oral or written provision of the information requested by the borrower or a written notification that the information requested is not available to the servicer, and an internal record of engagement with the borrower, which are forms of information collection. All respondents will have a one-time burden under this requirement associated with reviewing the regulation of one hour per respondent.

Respondents will have ongoing burden in hours and/or vendor costs associated with the information technology used in producing the disclosure. All respondents will have ongoing

[287] Dollar figures are vendor costs and do not include the dollar value of burden hours.

vendor costs associated with distributing (*e.g.*, mailing) the disclosure and some will have production costs associated with the new disclosure. The Bureau estimates this ongoing burden to be 8 hours and $13, on average, for each respondent.

4. Early Intervention with Delinquent Borrowers

An information collection will be created by the Bureau's requirement to require servicers to establish or make good faith efforts to establish live contact by the 36th day of a borrower's delinquency and, if appropriate, promptly notify borrowers about the availability of loss mitigation options. In addition, servicers must provide a written notice by the 45th day of a borrower's delinquency. Most respondents currently provide some form of delinquency notice, and thus the expenses associated with this information collection are from the one-time costs to incorporate the Bureau's required information.

Fannie Mae, Freddie Mac, FHA, and the VA generally recommend that all institutions that service any of their guaranteed mortgages perform duties similar to those set forth in the Bureau's provisions regarding early intervention with delinquent borrowers; the Bureau estimates that 80 percent of outstanding mortgages are guaranteed by one of these institutions. The Bureau estimates that 75 percent of loans that are not guaranteed by one of these institutions are serviced by a servicer that is currently providing delinquency notices that would comply with the proposal. The Bureau estimates the one-time burden to be 0.4 hours, on average, for each institution. The Bureau estimates the ongoing burden to be 45 minutes and $1, on average for each respondent.

5. *General Servicing Policies Procedures, and Requirements*

The final rule modifies the recordkeeping requirements imposed on servicers. As discussed above in part V, the final rule requires servicers to retain records that document actions taken with respect to a borrower's mortgage loan account until one year after a mortgage loan is paid in full or servicing of a mortgage loan is transferred to a successor servicer. This recordkeeping requirement replaces the systems of recordkeeping set forth in current § 1024.17(*l*), which requires servicers to retain copies of documents related to borrower escrow accounts for five years after the servicer last serviced the escrow account. *See* part V above, section-by-section analysis of §§ 1024.17(*l*) and 1024.38(c)(1).

The Bureau believes that any burden associated with the final rule's recordkeeping requirement will be minimal or *de minimis*. Under current rules, servicers must retain records related to borrower escrow accounts until five years after the servicer last serviced the escrow account, which is likely to be close in time to when a mortgage loan is paid in full or servicing of a mortgage loan is transferred to a successor servicer. The final rule shortens the retention period for those records by four years, as the retention period set forth in the final rule ends one year after a mortgage loan is paid in full or servicing of a mortgage loan is transferred to a successor servicer. However, the final rule requires servicers to retain additional records, specifically records that document actions taken with respect to a borrower's mortgage loan account. Since the length of a mortgage loan varies, for example, the average life of a mortgage loan is currently less than 5 years, the length of the retention period required by the final rule will differ depending on individual circumstances and can be as short as one year.

The Bureau understands that servicers in the ordinary course of business retain both the records related to escrow accounts that servicers are required to retain by current rules and the additional records that the final rule requires servicers to retain (i.e. records that documents actions taken with respect to a borrower's mortgage loan account) for the life of a mortgage loan. Therefore, any burden created by the final rule not subject to current business practices is limited to any incremental costs of retaining for one additional year any records that document actions taken with respect to a borrower's mortgage loan account that a servicer is not currently required to retain. This burden is mitigated by the reduction in the storage costs of documents related to escrow accounts due to the reduction of the required retention period for those documents by four years. In addition, the final rule clarifies that servicers need not maintain actual paper copies of the required records and may satisfy the requirement through a contractual right to access records possessed by another entity. *See* comment 38(c)(1)-1. This further reduces any burden associated with the final rule.

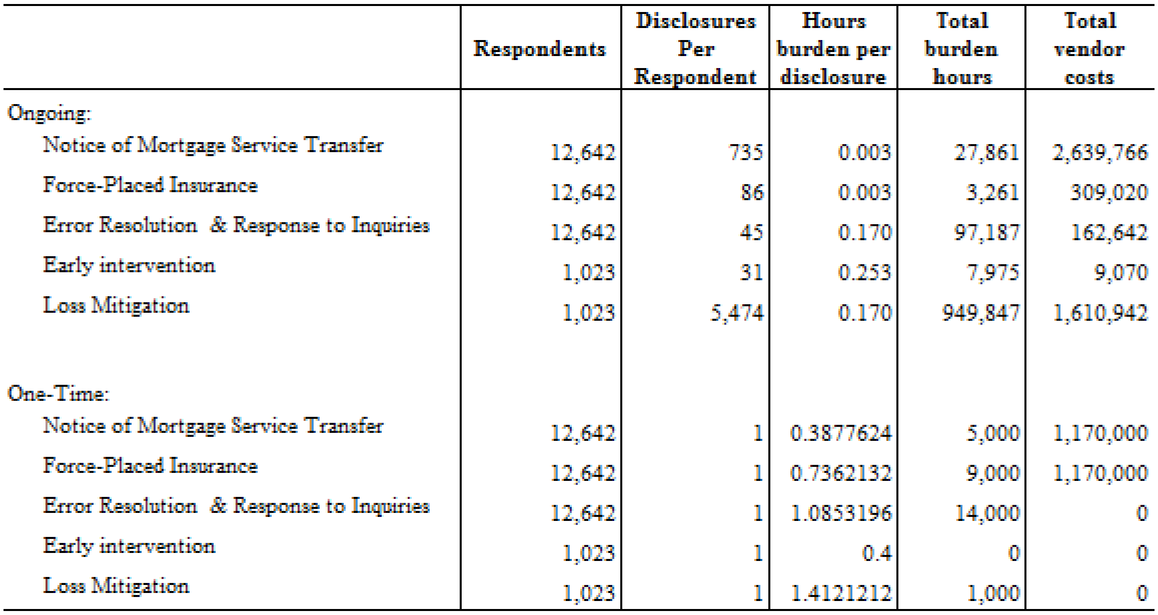
6. *Loss Mitigation*

Under the Bureau's rule, servicers are required to follow certain procedures when evaluating loss mitigation applications, including (1) providing a notice telling the borrower that the loss mitigation application was received, and whether or not the application is complete (2) providing a notice telling the borrower if the loss mitigation is approved, or denied (and, for denials of loan modification requests, a more detailed notice of the specific reason for denial and appeal rights), and, (3) if necessary providing a notice of the appeal determination.

The loss mitigation provision will create an information collection by requiring servicers to notify borrowers who submit loss mitigation applications. Servicers may be required to send up to three notices per loss mitigation application. For incomplete applications, servicers will be required to notify the borrower that their application is incomplete and explain the steps needed to complete the application. For complete applications, the servicer is required to notify the borrower the complete application has been received, and to notify the borrower of their decision.

All respondents will have a one-time burden under this requirement associated with reviewing the regulation. Certain respondents will have one-time burden in hours or vendor costs from creating software and information technology costs associated with changes in the payoff statement disclosure. The Bureau estimates this one-time burden to be 1.4 hours, on average, for each respondent. The Bureau estimates the ongoing burden to be 928 hours and $1,575, on average, for each respondent.

B. Summary of Burden Hours



	Respondents	Disclosures Per Respondent	Hours burden per disclosure	Total burden hours	Total vendor costs
Ongoing:					
Notice of Mortgage Service Transfer	12,642	735	0.003	27,861	2,639,766
Force-Placed Insurance	12,642	86	0.003	3,261	309,020
Error Resolution & Response to Inquiries	12,642	45	0.170	97,187	162,642
Early intervention	1,023	31	0.253	7,975	9,070
Loss Mitigation	1,023	5,474	0.170	949,847	1,610,942
One-Time:					
Notice of Mortgage Service Transfer	12,642	1	0.3877624	5,000	1,170,000
Force-Placed Insurance	12,642	1	0.7362132	9,000	1,170,000
Error Resolution & Response to Inquiries	12,642	1	1.0853196	14,000	0
Early intervention	1,023	1	0.4	0	0
Loss Mitigation	1,023	1	1.4121212	1,000	0

Totals may not be exact due to rounding.

Between the proposed and final rule the Bureau improved its methodology for estimating the average unpaid principal balance of outstanding mortgages. In addition, the Bureau updated the institution counts from 2010 year-end to 2011 year-end figures.