



Summary of the Consumer Financial Protection Bureau (CFPB) September 13, 2013 Amendments to Mortgage Rules

On Friday, September 13, 2013, the CFPB issued a final rule amending and clarifying the Servicing, Ability to Repay/Qualified Mortgage, Loan Originator Compensation and Appraisal rules following its consideration of comments requested earlier this summer. The latest revision to these rules is part of CFPB's effort to provide clarification in response to ongoing industry concerns about key aspects of the rules. In several areas, the CFPB was responsive to MBA comments seeking revisions that would facilitate compliance by the industry. The summary below addresses modifications to the servicing provisions of Regulation X. For more information, please contact John Snook at jsnook@mba.org or Sara Singhas at ssinghas@mba.org.

Foreclosure Referrals

First notice or filing (§1024.41(f))

The CFPB initially proposed to define first notice or filing under section 1024.41(f) very broadly to include any document that would be used as evidence of compliance with state foreclosure proceedings. MBA and numerous other organizations strongly urged the CFPB to narrow its definition and align it with the FHA definition of "first public action." The CFPB revised its interpretation to more closely track the FHA definition. Under the final rule, depending on the foreclosure process of a particular jurisdiction, the first notice or filing includes (1) the first document required to be filed in a court or other judicial body to commence a foreclosure proceeding, (2) the earliest document required to be recorded or published to commence a foreclosure proceeding, or (3) the first document that establishes, sets or schedules the foreclosure sale date.

Exceptions to the prohibition of early foreclosure referral (§ 1024.41(f)(1))

The final rule provides two exceptions to the prohibition on referral to foreclosure prior to the 120th day: (1) violation of due-on-sale clauses; and (2) when the servicer is joining the foreclosure action of a subordinate lienholder. The CFPB noted that it is not limiting exemptions for situations in which the same entity services both a first and second lien. The servicer will be required to complete pre-foreclosure review for second lien and to respond to a borrower's loss mitigation application with respect to the first mortgage as well. The CFPB expressly denied requests to broaden the exemptions to exclude a borrower committing "waste" in violation of the underlying mortgage agreement, vacating or abandoning the property, or failing to maintain insurance or pay property taxes.

Notices of Error and Information Requests

Designated Addresses (§1024.35(c) & §1024.36(b))

The CFPB addressed MBA's concerns that the proposed "address for assistance" requirements were overbroad and would have been both confusing to consumers and unduly burdensome to servicers. The final rule requires the designated address to be included only in:

- The written notice establishing a designated address
- Periodic statements or coupon books
- Any website maintained by the servicer in connection with the servicing of the loan
- Early intervention or loss mitigation notices required by §1024.39 or §1026.41 that include contact information for assistance

The final rule also requires a servicer to have policies and procedures reasonably designed to ensure that a borrower who incorrectly submits a notice of error to an address that was previously provided in connection with the submission of a loss mitigation application or the continuity of contact pursuant to §1024.40 is informed of the procedures for submitting written notices of error, *including the correct address*. Alternatively, the servicer may redirect incorrectly addressed notices of error to the designated address established pursuant to §1024.35(c). §1024.38(b)(5)-3.

Untimely Notices of Error and Information Requests (§1024.35(g)(1)(iii)(B) & §1024.36(f)(1)(v)(B))

The final rule replaces references to the date a mortgage loan balance is "paid in full," with the date the mortgage loan is "discharged" for the purposes of determining whether a notice of error or information request is untimely. Note that for purposes of the CFPB servicing rules, a mortgage loan is "discharged" when both the debt and all corresponding liens have been extinguished or released, as applicable.

Incomplete Loss Mitigation Applications

Time period to submit complete application (§1024.41(b)(2)(ii))

The CFPB made significant changes to the requirements for determining the date by which a borrower should submit information to complete a loss mitigation application. The proposed rule previously required a servicer to disclose to the borrower the earliest of four specific dates. The final rule removes that requirement and permits a servicer to determine a "reasonable date" by which the borrower should submit the missing information. The servicer must select the date that preserves the maximum borrower rights possible under the §1024.41, except when doing so would give the borrower less than seven days to obtain and submit the documentation needed. The CFPB notes that the standard is whether the date would be "impracticable" to permit the borrower sufficient time, and that while seven days should be considered a minimum, a servicer may extend this timeline if it believes a borrower would need more time than seven days to gather needed information. Of further note, the CFPB is also including a provision allowing servicers to estimate and use a foreclosure sale date for the

limited purposes of this time period disclosure provision.

Facially Complete Applications (§1024.41(c)(2)(iv))

The CFPB also made changes to this section, rejecting the proposed “reasonable expectation” standard, adopting a “facially complete” standard, and broadening the protections afforded to the borrower. Under the “facially complete” standard, if the 5-day Notice indicates that an application is complete, or a borrower submits all requested missing information, such application shall be considered complete *as of the date it was facially complete*. This date applies for the purposes of: notice of denial of loan modification (§1024.41(d)), borrower response and performance timelines (§1024.41(e)), foreclosure referral bans (§1024.41(f)(2)), foreclosure sale limitations (§1024.41(g)), and appeal rights (§1024.41(h)). However, the §1026.41(c) requirement that a servicer evaluate the borrower for all available loss mitigation options within 30 days is not triggered until the servicer receives the missing information.

A servicer may treat an application as incomplete if the borrower fails to complete the application within the newly required “reasonable timeframe” as detailed in §1024.41(b)(2)(ii) above.

Requesting Additional Information (§1024.41(b)(2)(i))

Servicers are required to review a borrower’s loss mitigation application within five business days and provide a notice informing the borrower that the application is either complete, or if incomplete, specify the information necessary to complete the application. The final rule clarifies that if, after sending the notice, a servicer discovers that additional information is necessary to evaluate an application, the servicer must promptly request the additional information. CFPB did **not** adopt proposed §1024.41(b)(2)(i)(B)(2), which would have attempted to differentiate the triggering of borrower protections based on whether an application ultimately turned out to actually complete or merely “facially” complete. Consequently, if a borrower submits documents requested pursuant to the 5-day Notice, the borrower receives the protection of the rule at the time they submit those documents, regardless of a potential future need for further information.

Short-term payment forbearances (§1024.41(c)(2)(iii))

The CFPB generally adopted its provisions creating a general exclusion for short-term forbearance from the prohibition on offering loss mitigation based on an incomplete application. However, there are certain important amendments to the provisions, many based on MBA recommendations:

- The definition of “short-term” forbearance is extended to periods from two months to no more than six months, including time both before and after the payment forbearance was granted (for example, if a borrower is one month delinquent when a servicer offers a payment forbearance program, the program may only extend 5 months into the future).
- Short-term forbearances **are not** excluded from the definition of loss mitigation. However, the CFPB is making a number of clarifications regarding a servicer’s

reasonable diligence obligation when offering a forbearance plan based on an incomplete application.

- When a servicer offers payment forbearance based on an incomplete application, the servicer should notify the borrower that the borrower may complete the application to receive a full evaluation of all loss mitigation options available to the borrower.
- Servicers may offer multiple successive short-term payment forbearance plans, but the CFPB will monitor after implementation for potential abuse.

Loss Mitigation Procedures

Timelines when no foreclosure sale is scheduled as of date a complete loss mitigation is received (§1024.41(b)(3))

Under the final rule, timelines based on the proximity of a foreclosure sale to the receipt of a complete loss mitigation application will be determined as of the date a complete loss mitigation application is received. If a foreclosure sale has not yet been scheduled as of the date that a complete loss mitigation application is received, the application shall be treated as if it were received at least 90 days before a foreclosure sale. Such timelines will remain in effect even if, at a later date, a foreclosure sale is rescheduled. The CFPB also notes that it expects servicers to take steps to prevent a foreclosure sale from taking place before loss mitigation review procedures run their course, including requesting courts to move scheduled foreclosure sales.

Time period to accept or reject loss mitigation offer (§1024.41(c))

Under the final rule, the required notice informing a borrower of a servicer's determination of which loss mitigation options, if any, it will offer to the borrower must state the date and procedures by which the borrower is required to respond to the offer. This requirement is in addition to the appeal notice requirements requiring a servicer to provide notification that the borrower may appeal the servicer's denial of a loan modification option, the deadline for doing so, and any requirements for making such an appeal.

Denial of loan modification options (§1024.41(d))

As adopted by the final rule, a servicer need only disclose their actual determination, and will not need to perform an additional evaluation of factors after the servicer has already decided to deny a borrower for a loss mitigation option. The denial notice provided by the servicer must state the "specific reason or reasons" for the denial and also, where applicable, disclose that the borrower was not evaluated based on other criteria. The CFPB also notes that if a denial is based upon a net present value (NPV) analysis, the servicer must disclose the factors used in that analysis. **Please note:** proposed §1024.41(d)(1) is re-codified as §1024.41(d).