

RESPA 101

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Moderator – Diane E. Thompson

- Has represented low-income homeowners since 1994.
- She is currently of counsel with the National Consumer Law Center, where she is the co-author of the NCLC treatise Truth in Lending and a contributing author to Cost of Credit.
- Among other publications, she wrote *Foreclosing Modifications*, 86 Wash. L. Rev. 755 (2011), and co-authored with Elizabeth Renuart *The Truth, the Whole Truth, and Nothing But the Truth: Fulfilling the Promise of Truth In Lending*, 25 Yale J. Reg. 181 (2008).
- From 1994 to 2007, Ms. Thompson represented individual low-income homeowners in East St. Louis at Land of Lincoln Legal Assistance Foundation. While there, Ms. Thompson served as the Homeownership Specialist, providing assistance to casehandlers representing homeowners in 65 counties in downstate Illinois, and the Supervising Attorney of the Housing and Consumer unit of the East St. Louis office.



Presenter – John Rao

- An attorney with the National Consumer Law Center, Inc. where he focuses on consumer credit and bankruptcy issues and has served as a panelist and instructor at numerous bankruptcy and consumer law trainings and conferences.
- He has served as an expert witness in court cases and has testified in Congress on consumer matters.
- Mr. Rao is a contributing author and editor of NCLC's *Consumer Bankruptcy Law and Practice*; co-author of NCLC's *Foreclosures*; *Bankruptcy Basics*; *Guide to Surviving Debt*; and NCLC Reports: *Bankruptcy and Foreclosures Edition*.
- He is also a contributing author to *Collier on Bankruptcy* and the *Collier Bankruptcy Practice Guide*.
- Mr. Rao serves as a member of the federal Judicial Conference Advisory Committee on Bankruptcy Rules, appointed by Chief Justice John Roberts in 2006.
- He is a conferee of the National Bankruptcy Conference, fellow of the American College of Bankruptcy, and vice-president of the National Association of Consumer Bankruptcy Attorneys.





RESPA 101

Legal Assistance Foundation (LAF) of Chicago



September 9, 2013

John Rao

Servicers' Duties under RESPA

- Provide Requested Information and Correct Account Errors
- Provide Servicing Transfer Notices
- Comply with Force-Placed Insurance Procedures
- Maintain Escrow Accounts
- Comply with Loss Mitigation Procedures



What is a Qualified Written Request?

QWR under RESPA § 2605(e) must include:

- borrower's name and account (or sufficient information to enable servicer to identify borrower and account); and
- “reasons for the belief of the borrower, to the extent applicable, that the account is in error,” or
- “sufficient detail to the servicer regarding other information sought by the borrower”
 - “other information” must be “information related to the servicing of the loan”



CFPB Final Rule – Jan. 10, 2014

- New regime: separate qualifications and procedures for:
 - “notice of error” under Reg. X § 1024.35
 - “request for information” under Reg. X § 1024.36
- Written inquiry can be a NOE or RFI even if not a QWR



What is a QWR, NOE and RFI?



What is a QWR, NOE and RFI?

① Print this form
② Fill out the information
③ Send to Juniper Bank along with your check

CREDIT CARD
PAYMENT COUPON

JUNIPER BANK

Your account # _____

Amount Enclosed \$ _____

Do

- Write your account number on the check
- **Mail to:**
Juniper Bank
P.O. Box 13337
Philadelphia, PA
19101-3337

Don't

- Use tape or staples
- Send cash

Name: _____
Address: _____
E-mail: _____

Check here if this information has changed



Notice of Error

- “Error” must fall within one of ten listed categories, plus
 - catchall category for “any other error related to the servicing of borrower’s mortgage loan”
- Most covered errors relate to duties imposed on servicers by RESPA
 - includes failing to transfer accurate and timely information about borrower’s mortgage account to a transferee servicer
- Two covered errors deal with dual tracking



Notice of Error

- Can a borrower assert under catch-all a servicer's failure to correctly evaluate borrower for a loss mitigation option?
 - Reg. X changes clearly make loss mitigation related to servicing of loan
 - CFPB said it did not add this as specific covered error because appeal process in § 1024.41(h) should provide effective review
 - but CFPB also noted that catch-all was added “to encompass the myriad and diverse types of errors that borrowers may encounter....”
 - loss mitigation evaluation was not excluded as a “noncovered error”



Request for Information

- Servicer is required to respond to any written request for information “with respect to the borrower’s mortgage loan”
- Unlike QWR, a RFI is not limited to information “related to the servicing” of the loan
- RFI may seek:
 - information about a loan modification application
 - “servicing file”



Limitations on NOE and RFI

- Servicer is not required to comply with a NOE that it reasonably determines is duplicative or overbroad
- Servicer is not required to comply with a RFI that it reasonably determines is duplicative, confidential, overbroad, or unduly burdensome
- Servicer must notify borrower in writing of basis for determination within 5 business days after making determination



Who Can Send a QWR?

- Borrower
- Borrower's Attorney
- Borrower's "Agent"
 - CFPB Commentary: Servicer may require proof of authority from agent and may not treat letter as notice of error or information request until documentation received



Where to Send a QWR?

- Servicer's designated address
 - Reg. X, 12 C.F.R. § 1024.35(c) and 1024.36(b)
 - must provide written notice that exclusive address
 - if designated, must have same address for notices of error and information requests
 - must post designated address on website if website lists contact address for servicer
- Do not send to lock box address
- Do not send (solely) to servicer's attorney



When to Send a QWR?

- To former servicer:
 - for inquiry not related to escrow accounts
 - up to one year from the date of transfer of servicing from servicer receiving request to new servicer, or
 - up to one year from the date loan balance is paid in full
 - for inquiry related to escrow account
 - up to five years from transfer or date loan is paid in full (changed to one year after Jan. 10, 2014)
- To current servicer – any time



Servicer Obligations

- 20 business days (5 days effective Jan. 10, 2014)
 - acknowledge QWR, error notice or information request, *or*
 - take requested action
- 60 business days (30 days effective Jan. 10, 2014)
 - correct borrower's account, *or*
 - after conducting a **reasonable** investigation, provide borrower written explanation as to why servicer believes account is correct, *or*
 - provide borrower with requested information or explanation why information is unavailable.



Servicer Obligations

- Exceptions to 30-day response period (effective Jan. 10, 2014)
 - 7 business days for notice of error asserting failure to provide accurate payoff statement
 - prior to foreclosure sale or 30 business days after receipt of notice of error, whichever is earlier, for notice of error based on 120-day pre-foreclosure waiting period or dual-track requirements
 - 10 business days for request for information seeking identity of owner of mortgage



Servicer Obligations

- Extension of 30-day response period
 - additional 15 day extension to respond permitted if servicer notifies borrower of extension and reason for delay before end of initial 30-day period.
 - But no extension permitted for
 - notice of error based on 120-day pre-foreclosure waiting period or dual-track requirements, and
 - request for information seeking identity of mortgage owner



Servicer Obligations

- During the 30-day response period:
 - No adverse credit reporting of payment that is subject of notice of error, for 60 days after receipt of notice. § 2605(e)(3)
 - But servicer may pursue collection remedies, including foreclosure.
 - Except for notice of error based on 120-day pre-foreclosure waiting period or dual-track requirements, provided that notice is received more than 7 days before foreclosure sale. Reg. X, § 1024.35(i)



Servicer Limited Safe Harbor

- No liability, if:
 - Servicer corrects error within 60 days of discovery, but before
 - Action filed under § 2605(f)
 - Receipt of written notice of error from borrower
- Unintentional mistakes are actionable
- No bankruptcy or litigation “exemption”



Identity of Mortgage Loan Owner

- Servicer must respond within 10 business days to request for identity, address, and other contact information about owner or assignee of loan
- Supplements TILA § 1641(f), but provides time deadline
- Final rule treats as request for information but provides 10 day rather than 30 day response time limit – Reg. X § 1024.36(d)(2)



Servicer Fees for Responding to QWR

- Arguments for requests made before Jan. 10, 2014:
 - No express provision in RESPA (pre-Dodd-Frank)
 - Not authorized by contract (default or legal proceeding, and reasonable and appropriate?)
 - Against remedial purpose of RESPA and public policy
- Dodd-Frank amendment prohibiting fees added to Reg. X
 - § 1024.35(h) – error resolution
 - § 1024.36(g) – information requests



Force-Placed Insurance (Jan. 10, 2014)

- Before charging for force-placed insurance, servicer must
 - reasonably believe borrower failed to comply with contract requirement to maintain insurance
 - send two notices to borrower requesting proof of insurance
 - first notice at least 45 days before charging borrower
 - second notice no earlier than 30 days after first notice and at least 15 days before charging borrower
- Servicer must terminate force-placed insurance within 15 days after receiving proof of coverage and refund premiums for period when both policies in effect



Force-Placed Insurance (Jan. 10, 2014)

- Final rule requires servicer to pay the borrower's existing insurance policy, if there is an escrow account, except if servicer has reasonable basis to believe
 - that the borrower's insurance is being canceled for reasons other than nonpayment, or
 - the property is vacant.
- FPI charges must be for services actually performed and have reasonable relationship to cost of providing the service
- Amends RESPA § 2605, so private remedy



Transfer of Servicing Rights

Disclosure at application:

- Lender must disclose within three business days of loan application
 - Whether servicing of loan may be assigned, sold or transferred at any time during the term of the loan.
 - Statement of borrower's rights under § 2605(e) to dispute and obtain information (no longer required after Jan. 10, 2014).



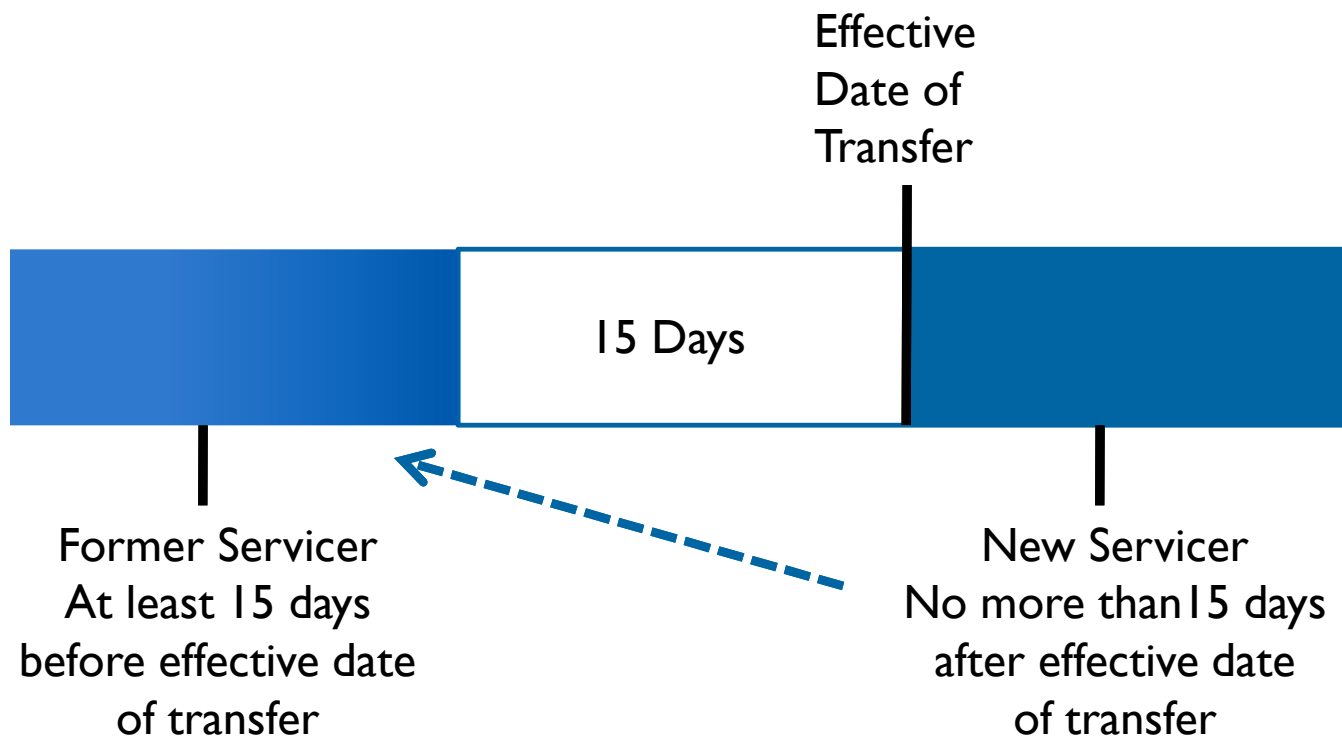
Transfer of Servicing Rights

All other transfers of servicing:

- Former servicer (transferor) must notify borrower in writing 15 days before effective date of transfer
- New servicer (transferee) must provide identical notice to borrower not more than 15 days after effective date of transfer
- Notices may be combined if sent no later than 15 days before the effective date of transfer



Notice of Transfer



Content of Transfer Notice

- effective date of transfer;
- name, address, and toll-free or collect call telephone number of transferee servicer;
- toll-free or collect call telephone number for servicing transfer inquiries;
- date old servicer will stop accepting loan payments and date new servicer will begin accepting the payments;
- any information concerning the effect, if any, that transfer may have upon the terms of mortgage life, disability or other type of optional insurance;
- what action, if any, the consumer must take to maintain insurance coverage



Payment Safe Harbor

- If consumer sends payment to former servicer during sixty-day period after effective date of transfer and it is received before the due date:
 - Late fee cannot be imposed
 - Payment cannot be treated as late for any other purposes
- Reg. X now provides that former servicer can send payment to new servicer or return it to the borrower



Duty to Make Timely Escrow Disbursements

- “Timely” payments out of escrow required – 12 U.S.C. § 2605(g)
- “Timely” means made on or before deadline to avoid penalty
- Reg. X, § 1024.17(k)(1)
- Special rule for taxes
- Borrower’s payment cannot be more than 30 days overdue, except duty to disburse applies for hazard insurance.
- Reg. X, § 1024.17(k)(2) and (k)(5)



Early Intervention

- No later than 36th day of delinquency, servicer must make good faith effort to establish “live contact” with the borrower
 - includes telephoning or conducting in-person meeting with the borrower, but not leaving a recorded phone message
 - purpose is to provide opportunity to discuss the circumstances of a borrower’s delinquency
 - servicer should inform the borrower about availability of loss mitigation options, if appropriate



Early Intervention

- No later than 45th day of delinquency, servicer must provide borrower with written notice containing information about available loss mitigation options
 - must also give telephone number for “continuity of contact” personnel and information on how to contact approved housing counselors
 - servicer is not required to give this notice more than once during any 180-day period
 - rule does not require communication prohibited by applicable law



Loss Mitigation Procedures

- If servicer receives loss mitigation application 45 days or more before foreclosure sale, servicer must:
 - promptly review to determine if complete;
 - notify borrower in writing within 5 business days stating:
 - whether application is complete;
 - any additional documents needed if determined to be incomplete; and
 - date by which borrower must submit additional documents



Loss Mitigation Procedures

- If servicer receives *complete* loss mitigation application more than 37 days before foreclosure sale, servicer must within 30 days of receipt:
 - Evaluate borrower for all loss mitigation options available to the borrower
 - provide borrower with written notice of decision
 - If denial of loan mod., written notice shall include specific reasons for the servicer's decision for each option available to the borrower, and information about appeal rights
- Complete loss mitigation application means all information the servicer requires from a borrower in evaluating applications for the options available to the borrower



Dual-Tracking Provisions

- Servicers must not make first notice or filing required for foreclosure process until mortgage loan is more than 120 days delinquent
- If borrower submits complete application during 120-day period or before servicer has made first notice or filing, a servicer shall not make first notice or filing to initiate the foreclosure process
- This provision (§1024.41(f)(1)) preempts state foreclosure timelines to the extent they allow an earlier commencement of foreclosure



Dual-Tracking Provisions

- If borrower submits complete application after first notice or filing but more than 37 days before a foreclosure sale, servicer may proceed with foreclosure process, but shall not move for foreclosure judgment or order of sale, or conduct sale, until decision given or borrower rejects offer or fails to perform
- Prohibition includes making a dispositive motion, such as motion for default judgment, judgment on pleadings, or summary judgment, which may directly result in a foreclosure judgment or order of sale
- If such a motion has been made before receiving a complete application, servicer must take reasonable steps to avoid a ruling or issuance of an order



RESPA Remedies

- Actual Damages, Costs and Attorney's Fees
 - Must plead actual damages to avoid 12(b)(6) dismissal
 - Includes emotional distress damages
- Statutory Damages
 - Up to \$2,000 per violation if “pattern or practice of noncompliance”
 - Capped in class actions at \$1 mil. or 1% of servicer net worth, whichever is less



Escrow Account Analysis



Purpose

- Determine appropriate target balances for items to be paid under account;
- Determine borrower's monthly escrow payments for upcoming twelve-month period; and
- Determine whether any surpluses, shortages, or deficiencies exist.



Escrow Account Analysis

- Trial running balance
- Projections of target balance
- Over escrow account computation year (generally 12-mo. period beginning with initial payment), but
 - “Short year” – 12 C.F.R. § 3500.17(i)(4)
 - Transfer of servicing – 12 C.F.R. § 3500.17(b)



RESPA Limits on Escrow Amounts

- Monthly escrow payments cannot exceed one-twelfth of total of all disbursements payable during computation year (not including shortage/deficiency repayment)
- Servicer may also require a “cushion” on account not to exceed amount equal to one-sixth of total disbursements for year (equivalent of two months of escrow payments)
- FDIC RESPA Escrow Program available at:
<http://www.fdic.gov/regulations/compliance/respa/>



Escrow Account Analysis

	PMT	DIS	RTB
Oct	-	-	300
Nov	130	500	-70
Dec	130	0	60
Jan	130	360	-170
Feb	130	0	-40
Mar	130	0	90
Apr	130	700	* -480
May	130	0	-220
Jun	130	0	-90
Jul	130	0	40
Aug	130	0	170
Sep	130	0	300
Oct	130	0	430



Escrow Account Analysis

	PMT	DIS	RTB1	RTB2
Oct	-	-	300	780
Nov	130	500	-70	410
Dec	130	0	60	540
Jan	130	360	-170	310
Feb	130	0	-40	440
Mar	130	0	90	570
Apr	130	700	* -480	* 0
May	130	0	-350	130
Jun	130	0	-220	260
Jul	130	0	-90	390
Aug	130	0	40	520
Sep	130	0	170	650
Oct	130	0	300	780



Escrow Account Analysis

	PMT	DIS	RTB2	RTB3
Oct	-	-	780	1040
Nov	130	500	410	670
Dec	130	0	540	800
Jan	130	360	310	570
Feb	130	0	440	700
Mar	130	0	570	570
Apr	130	700	* 0	*260
May	130	0	130	390
Jun	130	0	260	520
Jul	130	0	390	650
Aug	130	0	520	780
Sep	130	0	650	910
Oct	130	0	780	1040



Escrow Account Statement

- Initial Account Statement
 - Escrow payment, itemization of estimated charges, anticipated disbursement dates, cushion, trial running balance.
- Annual Account Statement
 - Once per year, within 30 days of end of escrow account computational year.
 - Current escrow payment; previous escrow payment; total paid in; amount paid out; balance; how surplus, shortage or deficiency will be dealt with; reason why low-monthly balance not reached.



Annual Account Statement

- Reg. X exception if borrower is in bankruptcy or account more than 30 days overdue
- May be required post-confirmation in chapter 13 case
- Reg. X exception applies only to delivery of statement – annual account calculations still required
- Information may be requested using request for information



Surplus, Shortage, Deficiencies

- Determined as part of annual escrow account analysis
- So long as borrower's mortgage payment not more than 30 days late, servicer must pay escrow items in timely manner even if insufficient funds in account.



Escrow Account Analysis

	PMT	DIS	RTB	
Oct		-	-	1300
Nov	130	500	930	
Dec	130	0	1060	
Jan	130	360	830	
Feb	130	0	960	
Mar	130	0	1090	
Apr	130	700	*520	
May	130	0	650	\$520 - \$260 (cushion) = \$260 surplus
Jun	130	0	780	
Jul	130	0	910	
Aug	130	0	1040	
Sep	130	0	1170	
Oct	130	0	1300	



Surplus Requirements

- Refund any surplus \geq \$50.
- If $<$ \$50, refund or credit amount against next year's escrow payments.
- Refunds must be made within 30 days of escrow account analysis.
- If borrower's payment more than 30 days overdue, servicer may keep surplus in escrow account.
- Surplus may be applied to amount in default if authorized by loan docs or state law.



Shortage Requirements

- If escrow analysis shows shortage of less than one month's escrow payment, servicer may:
 - do nothing and simply allow shortage to exist,
 - require borrower to repay shortage within 30 days, or
 - require borrower to repay shortage in equal monthly payments over at least 12-month period



Shortage Requirements

- If analysis shows shortage of **less** than one month's escrow payment, servicer shall:
 - do nothing and simply allow the shortage to exist
 - require borrower to repay shortage within 30 days, or
 - require the borrower to repay shortage in equal monthly payments over at least 12-month period
- Reg. X has no exemption for shortage requirements if borrower's payment is more than 30 days overdue at time of escrow analysis



Shortage Requirements

- If analysis shows shortage **greater than or equal to one month** escrow payment, servicer shall:
 - do nothing and simply allow the shortage to exist
 - require the borrower to repay shortage in equal monthly payments over at least 12-month period
- Reg. X has no exemption for shortage requirements if borrower's payment is more than 30 days overdue at time of escrow analysis



Escrow Account Analysis

	PMT	DIS	RTB
Oct	-	-	960
Nov	130	500	590
Dec	130	0	720
Jan	130	360	490
Feb	130	0	620
Mar	130	0	750
Apr	130	700	*180
May	130	0	310
Jun	130	0	440
Jul	130	0	570
Aug	130	0	700
Sep	130	0	830
Oct	130	0	960

\$180 - \$260 (cushion)
= -\$80 shortage



Deficiency Requirements

- If escrow analysis shows account has deficiency of **less** than one month's escrow payment, servicer shall:
 - do nothing and simply allow deficiency to exist,
 - require the borrower to repay the deficiency within 30 days, or
 - require borrower to repay deficiency in 2 or more equal monthly payments



Deficiency Requirements

- If deficiency is **greater than or equal to** one month's escrow payment, servicer shall:
 - do nothing and simply allow deficiency to exist, or
 - require borrower to repay deficiency in 2 or more equal monthly payments.
- Applies only if borrower is current at time of escrow analysis; if borrower's payment > 30 days overdue, deficiency may be collected pursuant to terms of mortgage



Notice Requirements

- Servicer is required to notify borrowers of escrow account shortages and deficiencies
- Applies even in foreclosure or bankruptcy because no default or bankruptcy exception
- Failure to provide notice may result in waiver of charges based on estoppel theory



Remedies for Escrow Violations

No private right of action under RESPA for escrow violations, but UDAP; breach of contract:

- Fannie/Freddie Uniform Instrument provides:
 - “Lender may ...collect ...Funds in an amount ... (b) not to exceed the maximum amount a lender can require under RESPA”
 - “Lender shall apply the Funds to pay the Escrow Items no later than the time specified under RESPA.”
 - “Lender shall give to Borrower, without charge, an annual accounting of the Funds as required by RESPA.”





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