

New CFPB Mortgage Servicing Rules Part 1: Error Resolution; Force Placed Insurance; Periodic Statements, Other servicer duties

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Presenter – John Rao

- An attorney with NCLC, 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.



Presenter – Tara Twomey

- Is currently Of Counsel to the National Consumer Law Center and the Amicus Project Director for the National Association of Consumer Bankruptcy Attorneys.
- She has been a Lecturer in Law at Stanford, Harvard and Boston College Law Schools.
- Ms. Twomey is a former Clinical Instructor at the Hale and Dorr Legal Services Center of Harvard Law School where her practice focused, in part, on sustainable homeownership for low- and moderate-income homeowners.
- She is a contributing author of several books published by the National Consumer Law Center including, *Foreclosures: Defenses, Workouts and Mortgage Servicing* and *Bankruptcy Basics*..



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 clarify that loss mitigation is 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 NOE and RFI?

- 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 NOE and RFI?

- If servicer has an “exclusive address,” it must:
 - provide written notice designating the exclusive address
 - use same address for notices of error and requests for information
 - provide the exclusive address on: any website servicer maintains for servicing of the loan; any required periodic statement or coupon book; any notices required by early intervention or loss mitigation rules

Reg. X, 12 C.F.R. § 1024.35(c) and 1024.36(b)

- Do not send to lock box address
- Do not send (solely) to servicer’s attorney



When to Send a NOE and RFI?

- 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

- 5 business days (20 days before Jan. 10, 2014)
 - acknowledge QWR, NOE, or RFI, *or*
 - take requested action
- 30 business days (60 days before 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
 - timely 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 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)



What if Servicer Says No Error?

- Within 15 business days of receiving borrower's request, servicer must provide at no charge the documents and information it relied upon in making a determination that no error occurred.
- May include documents showing information entered in servicer's collection system (such as a copy of screen shot of servicer's system).
- Servicer is not required to provide documents that contain confidential, proprietary, or privileged information.
 - If a servicer withholds documents, must notify borrower in writing within 15 business days of receipt of borrower's request



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 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

- 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

- 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:
 - borrower's insurance is being canceled for reasons other than nonpayment, or
 - 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



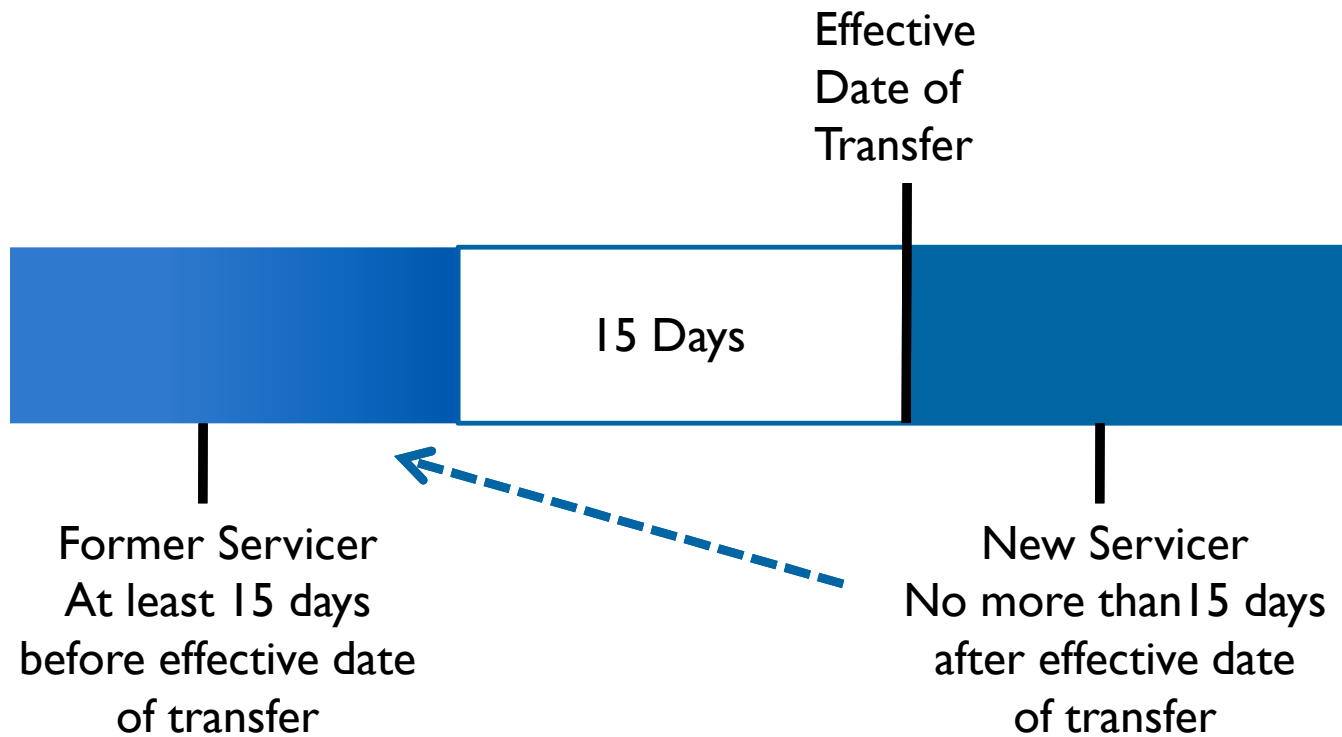
Transfer of Servicing Rights

No change to prior rule:

- 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



Other Transfer Requirements

- Covered error for NOE includes:
 - Failing to transfer accurately and timely information relating to servicing of a borrower's mortgage loan to a transferee servicer
- New servicer must obtain loss mitigation documents and information submitted by borrower to former servicer and comply with loss mitigation rule
- Servicer should have transfer policies and procedures consistent with § 1024.38(b)(4) (no right of action)



Duty to Make Timely Escrow Disbursements

- “Timely” disbursements 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
- Servicer must advance funds to make timely disbursements as long as borrower’s payments are not more than 30 days overdue,
 - except duty to disburse applies for hazard insurance even if borrower payments are overdue - Reg. X, § 1024.17(k)(5)



New Loss Mitigation Rules

- **Early Intervention** – servicer must attempt live contact with borrower and provide written notice about available loss mitigation options
- **Continuity of Contact** – servicer must assign a single person or a team of personnel to respond to a borrower in default
- **Loss Mitigation Procedures** - servicer must evaluate borrower for all available loss mitigation options once a complete application is received, provide notice of decision and right to appeal, and comply with dual-tracking restrictions



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



Servicers' Duties under TILA

- Promptly Credit Payments
- Provide Periodic Mortgage Statements
- Provide Payment Change Notices
- Provide Payoff Statements
- Provide Transfer of Ownership Notices



Prompt Crediting of Payments

- Servicer must credit “periodic payment” upon receipt, unless:
 - no charge to consumer and
 - no negative credit reporting; or
 - borrower doesn’t follow instructions about how to pay
- “Periodic payment” – defined as amount sufficient to cover principal, interest, and escrow for billing cycle
- No pyramiding of late fees - same as FTC Credit Practices Rule



Prompt Crediting of Payments

- Partial payments may be placed into a suspense account and not treated as accepted
 - suspense account may be used only if authorized by contract and permitted by state law
 - when funds held in suspense account are equal to or greater than a periodic payment, they must be applied
 - must disclose on periodic statement, if provided
- Non-conforming payments (do not comply with payment instructions) are treated as accepted and must be credited within 5 days of receipt
- No small servicer or bankruptcy exemption



Periodic Statements

- Servicer must send statement for each billing cycle with the following categories of information:
 - amount due for the billing period
 - explanation of amount due including fees imposed
 - past payment breakdown
 - transaction activity
 - partial payment information
 - contact and account information, and
 - delinquency information, if applicable
- Disclosure required of payments servicer decides to hold in suspense account rather than apply to account



Periodic Statements

- **Delinquency information:** If consumer is more than 45 days delinquent, statement must include:
 - date consumer became delinquent;
 - notification of possible risks, such as foreclosure, and expenses, if delinquency is not cured;
 - account history for previous six months or period since last time account was current showing the amount remaining past due from each billing cycle;
 - notice of any loss mitigation program to which the consumer has agreed;
 - notice of whether the servicer has initiated foreclosure by making the first notice or filing required by state law;
 - total payment amount needed to bring the account current; and
 - either the CFPB list or the HUD list of homeownership counseling organizations and the HUD toll-free telephone number



Periodic Statements

- Exemptions from coverage:
 - fixed rate mortgages if substantially similar information provided on coupon book
 - but if borrower is more than 45 days delinquent, servicer must provide delinquency information separately in writing, including an account history for the delinquency period
 - mortgage loans that are serviced by small servicers (servicers that service 5,000 or fewer mortgage loans of which servicer or affiliate is creditor or assignee) and state housing finance agencies
 - reverse mortgages and timeshare plans
 - open-end home loans such as HELOCs



Periodic Statements

- Bankruptcy exemption – statements not required for any borrower in bankruptcy or for any portion of debt discharged in bankruptcy
 - for joint borrowers, exemption applies if any of the borrowers are in bankruptcy
- No default exemption – regulation is silent on when requirement terminates
 - servicers may argue statements required only when payment is due for a billing cycle
 - but regulation contemplates that statement provided even if borrower more than 45 days delinquent



Payment Change Notices

- For ARMs, notice must be provided between 210 and 240 days before first payment is due after first rate adjustment
- Notice also must be sent between 60 and 120 days before payment at new amount is due when payment change is caused by a rate adjustment
- CFPB found no conflict with 21 day payment change notice requirement in Bankr. Rule 3002.1(b)
 - sending TILA notice earlier than required under bankruptcy law “enhances consumer protection by providing these consumers with additional time to adjust to an increase in their mortgage payments.”



Payoff Statements – TILA Request

- Payoff statements must be sent within 7 business days after written request received
- Reg. X 1024.36(a) - servicers need not treat request for payoff balances as RESPA request for information
 - RESPA ban on servicer fees for response to information requests does not apply
- Failure to provide accurate payoff statement based on a TILA request is subject to error resolution under RESPA



Payoff Statements – TILA Request

- Rule applies to all loans secured by a consumer's dwelling, including open-end loans (HELOCs) and reverse mortgages
- CFPB refused to create a blanket exemption for loans in default, foreclosure, or bankruptcy.
 - if servicer is unable to provide a payoff statement within 7 days because loan is in bankruptcy or foreclosure, or loan is a reverse mortgage, or because of natural disasters, payoff statement must be provided within a “reasonable time,” which is not defined.



Transfer of Ownership Notices

- Applies to “covered person” (not “creditor”), which is person acquiring legal title to the debt obligation
 - applies even if only partial interest acquired (must be single disclosure if multiple parties)
 - applies even if ownership is transferred to a different legal entity based on a merger
 - does not apply to person who acquires mortgage and then transfers it within 30 days (this exception makes it difficult to determine chain of title)
 - exception for servicer if legal title to loan is assigned to the servicer “solely for the administrative convenience of the servicer in servicing the obligation”



Transfer of Ownership Notices

- Notice to be given to “primarily liable” consumer
- Timing of disclosure
 - no later than 30 days after mortgage loan transferred
 - can be either acquisition date recognized by transferee or date recognized on books by transferrer



Transfer of Ownership Notices

Content of Required Disclosure:

- Loan identity
- Identity, address, and telephone number of covered person
- Acquisition date
- Agent's contact information
- Recording location



TILA Remedies

- Actual Damages, Costs and Attorney's Fees
- Statutory Damages: twice the finance charge, up to \$4,000 for closed-end mortgage violations
 - Statutory damages are not available for violations involving the periodic statement requirement
- TILA § 1640 refers to “creditor”, which is typically the loan originator





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