

New CFPB Mortgage Servicing Rules Part 2: Loss Mitigation Procedures

John Rao, staff attorney
Tara Twomey, of counsel
National Consumer Law Center

Jessica Hiemenz
National Consumer Law Center
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Moderator – 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*..



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 Servicing Rules

- Rules effective Jan. 10, 2014 dealing with foreclosure avoidance:
 - Early Intervention - Reg. X § 1024.39
 - Continuity of Contact - Reg. X § 1024.40
 - Loss Mitigation - Reg. X § 1024.41



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
 - servicer is not required to give this notice more than once during any 180-day period
 - CFPB has provided model clauses for the notice that may be used by servicers
 - nothing in rule requires servicers to communicate in manner prohibited by applicable law



Early Intervention

- Written notice must include:
 - statement encouraging the borrower to contact the servicer
 - telephone number for “continuity of contact” personnel and servicer’s mailing address
 - brief description of examples of available loss mitigation options
 - application instructions or general statement such as “contact us for instructions on how to apply”



Continuity of Contact

- Servicer must have policies and procedures reasonably designed to ensure that:
 - a single person or a team of personnel is assigned to borrower no later than 45th day of delinquency
 - assigned personnel are available by telephone to respond to the borrower's inquiries and assist with available loss mitigation options
 - assigned personnel provide the borrower with accurate information about available loss mitigation options, including actions needed to complete an application, time deadlines, status of borrower's application, and foreclosure referrals



Continuity of Contact

- Servicer must have policies and procedures reasonably designed to ensure that assigned personnel:
 - obtain information needed to properly evaluate the borrower for loss mitigation options
 - timely retrieve a complete record of borrower's payment history and all written information borrower has provided for a loss mitigation application
 - provide this information to other personnel who are required to evaluate the borrower for loss mitigation options
 - provide borrower with information about procedures for submitting a notice of error or an information request

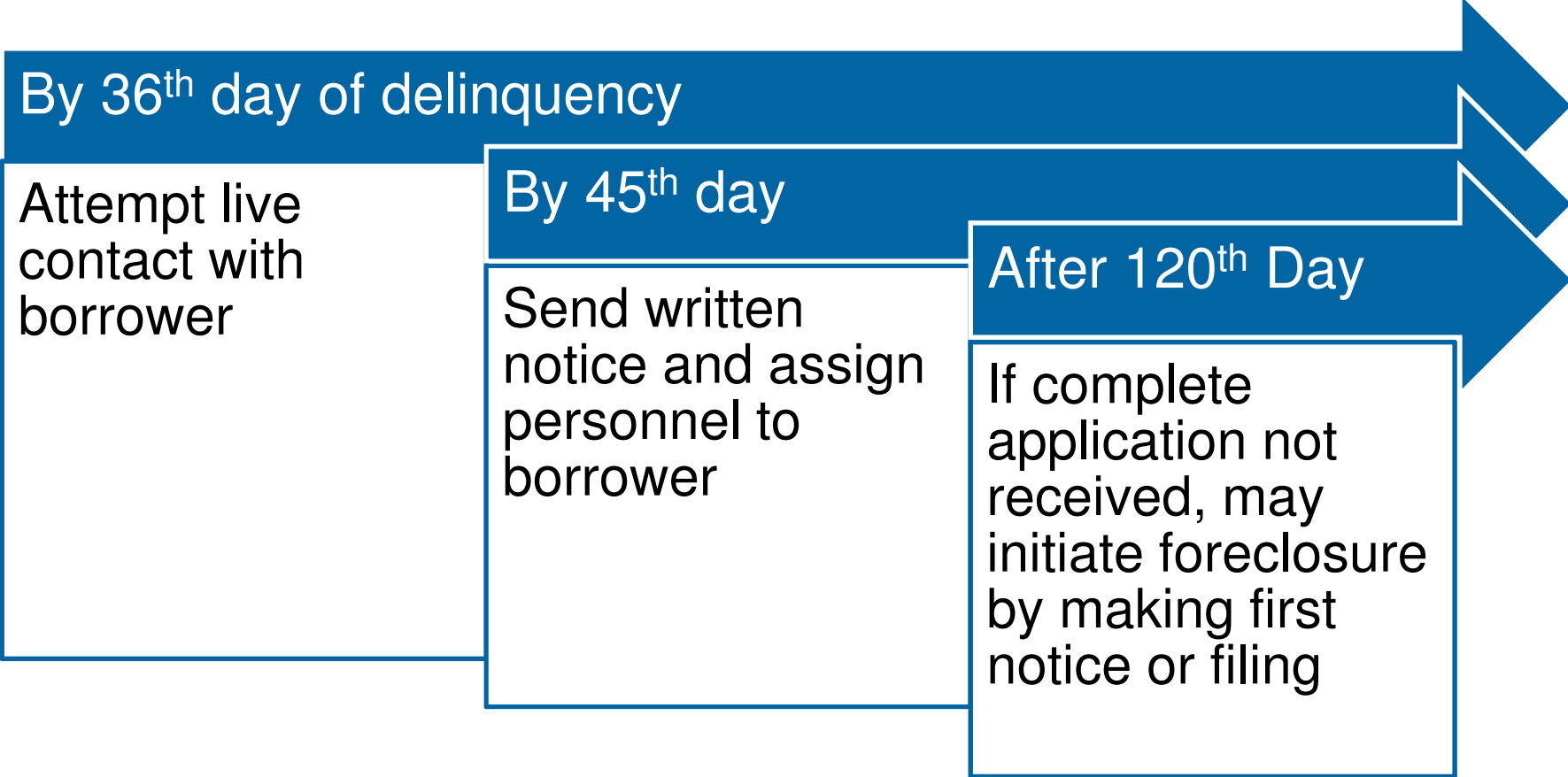


Day of Delinquency

- Delinquency begins on day a full payment (to cover PITI) for a given billing cycle is due and unpaid, even if there is grace period before assessment of a late fee
- *Example* - if payment is due January 1 and amount due is not fully paid during the 36-day period after January 1, servicer must attempt live contact not later than by February 6 (36 days after January 1)
- This definition of delinquency applies to § 1024.39 and § 1024.40, but not § 1024.41



Pre-Foreclosure Review Period



Loss Mitigation *Procedures*

- CFPB: nothing in § 1024.41 imposes duty on a servicer to provide borrower with a specific loss mitigation option
- Borrowers do not have private right of action under § 1024.41 to enforce terms of agreement between servicer and mortgage holder concerning evaluation for loss mitigation options
- Borrowers do have private right of action to enforce the procedural requirements in § 1024.41



Loss Mitigation *Procedures*

- Nothing in § 1024.41 precludes borrowers from enforcing substantive rights under state or other federal laws for servicers' failure to comply with substantive standards of loss mitigation programs
- No preemption of other loss mitigation laws that give borrowers greater protection
- Borrowers may use error correction procedures under § 1024.35 to address servicer's failure to follow procedures, including dual tracking protections
 - and possibly for failure to correctly evaluate borrower for a loss mitigation option



Receipt of Application

- If a loss mitigation application is received 45 days or more before a foreclosure sale, servicer must:
 - promptly conduct review to determine whether application is complete
 - within 5 business days of receiving application, provide written notice to borrower that:
 - acknowledges application is complete, or
 - describes documents and information needed to complete the application, and
 - provides “reasonable date” by which borrower should submit missing documents and information



“Reasonable Date” to Complete?

- A “reasonable date” should preserve the “maximum borrower rights,” except when it would be impracticable (*e.g.*, requesting docs in less than 7 days), based on the following milestones:
 - date when documents already submitted will be stale
 - date that is 120th day of delinquency
 - date that is 90 days before a foreclosure sale
 - date that is 38 days before a foreclosure sale



Date of Foreclosure Sale

- If date of foreclosure is not known, servicer may use reasonable estimate
- If no foreclosure sale has been scheduled as of date complete loss mitigation application is received, the application is considered to be received more than 90 days before any foreclosure sale
- Dual track and other protections that apply based on timelines remain in effect even if foreclosure sale is later scheduled or rescheduled



What is *Complete* Application?

- *Complete* loss mitigation application means all information the servicer requires from a borrower in evaluating applications for the options available to the borrower
- Servicers have flexibility to establish their own application requirements, but must exercise “reasonable diligence” to obtain information needed to complete the application
 - arguably requirements must be consistent with non-RESPA standards and guidelines for loss mitigation programs
- Application is complete if borrower provides all required information even if additional information not in the control of the borrower is required (e.g., credit report)



Receipt of *Incomplete* Application

- Servicer shall not evade duty to evaluate borrower for all loss mitigation options by offering option based on incomplete application
- But a servicer may offer:
 - a short-term payment forbearance (for payments due over no more than 6 months) if application is incomplete
 - other loss mitigation option if application remains incomplete for a significant period of time
- If forbearance provided, servicer must:
 - not initiate or continue with foreclosure if borrower is performing under agreement
 - continue to comply with § 1024.41 and seek documents to complete application and review if later becomes complete



Receipt of *Facially Complete* Application

- If borrower submits all missing documents and information as stated in the 5-day notice, or nothing additional is requested in the notice, the application is considered *facially complete*
 - if servicer later discovers more information is needed or 5-day notice was incorrect, servicer must promptly request missing information
 - servicer must treat application as complete for purposes of dual tracking provisions until borrower given reasonable opportunity to complete
 - if borrower completes application within this period, application is considered complete as of date it was *facially complete* for most timelines under rule



Receipt of *Complete* Application

- 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 options being offered to borrower
 - if denial of loan modification, written notice shall include specific reasons for the servicer's decision for each option available to the borrower



Loan Modification Denial

- If loan modification denial based on a requirement set by loan owner or assignee, notice must identify owner or assignee and specific requirement that was basis for denial
- If loan modification denial based on net present value test, notice must state this reason and include the inputs used for the calculation
- Denial notice must also describe borrower's right to appeal, the deadline to appeal, and any requirements for making an appeal



Borrower's Response

- If complete application received 90 days or more before a foreclosure sale, servicer may require that borrower accept or reject an offer no earlier than 14 days after offer made
- If a complete application received less than 90 days but more than 37 days before a foreclosure sale, servicer may require that borrower accept or reject offer no earlier than 7 days after offer made
- If a borrower requests an appeal, deadline for accepting option is extended until 14 days after servicer provides the appeal determination notice



Appeal Rights

- Appeal rights apply only to decisions:
 - involving eligibility for loan modifications
 - made on complete (or facially complete) applications submitted 90 days or more before a scheduled foreclosure sale or during the 120-day pre-foreclosure review period
- Borrower must request an appeal within 14 days after servicer provides initial notice of determination
- Review must be by “different personnel than those responsible for evaluating” application
- Servicer must decide appeal and provide notice of determination to borrower within 30 days of appeal request



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 loss mitigation application during the 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
- This provision does not apply if the foreclosure is based on borrower's violation of a due on sale clause or if servicer is joining foreclosure action by a subordinate lienholder



Dual-Tracking Provisions

- What is first notice or filing required by applicable law for foreclosure process?
 - where judicial foreclosure: the earliest document required to be filed with court
 - where non-judicial foreclosure: the earliest document required to be recorded or published
 - where no court filing or document required to recorded or published: the earliest document that sets or schedules a foreclosure sale date



Dual-Tracking Provisions

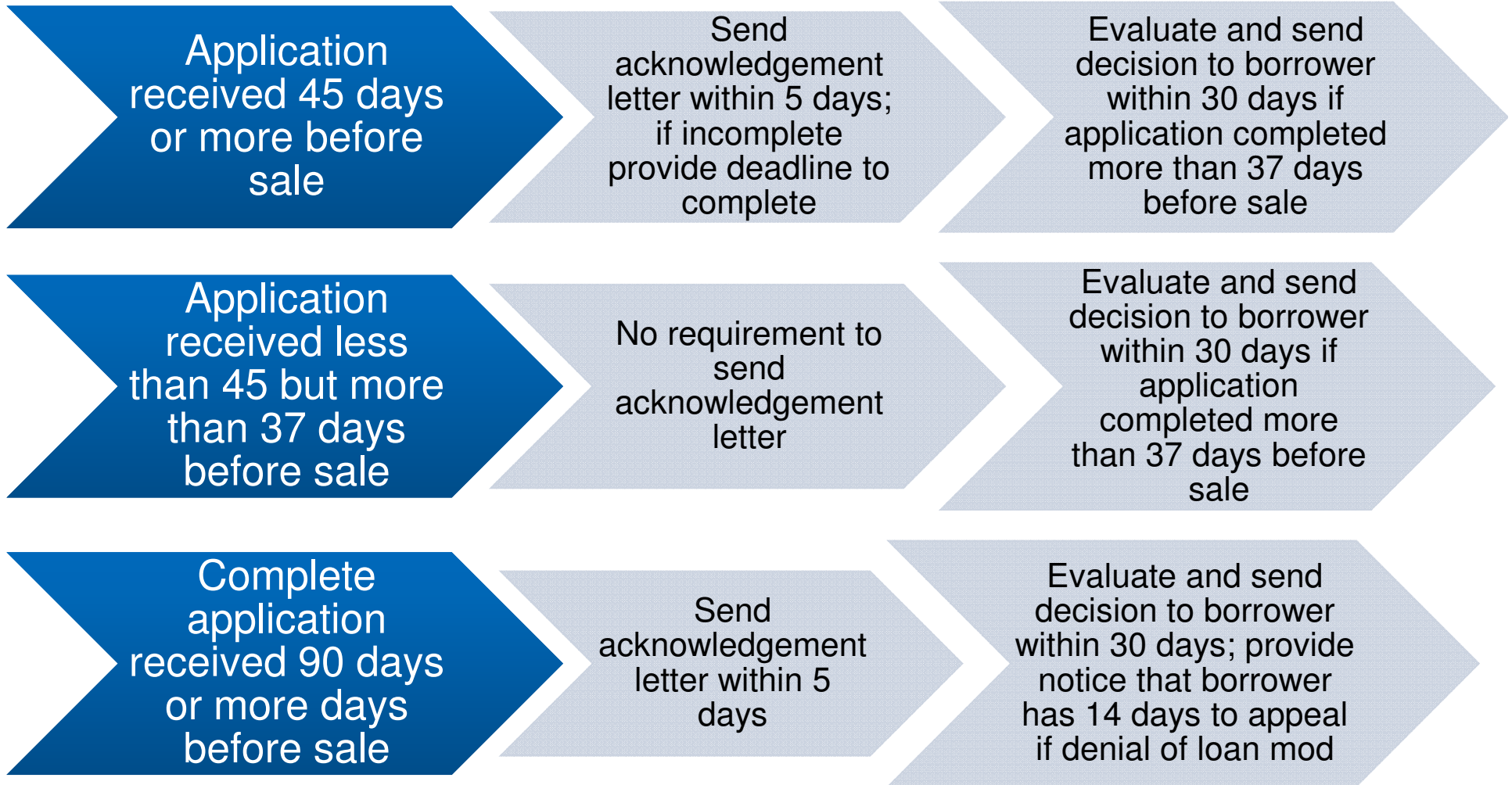
- If borrower submits complete application after first notice or filing but more than 37 days before foreclosure sale, servicer may proceed with foreclosure process, but shall not:
 - move for foreclosure judgment or order of sale, or conduct sale, until decision given or borrower rejects offer or fails to perform
 - make 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



What if Application Received 37 Days or Less Before Sale?

- Servicer may be obligated under non-RESPA applicable law to evaluate a borrower's application
- Consistent with the general RESPA preemption rule, CFPB explicitly stated in promulgating loss mitigation rule that “servicers should comply with the most restrictive requirements to which they are subject.”
- CFPB referred to National Mortgage Settlement and GSE requirements and stated that “[n]othing 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.”





“Duplicative” Applications

- Section 1024.41 (i): “A servicer is only required to comply with the requirements of this section for a single complete loss mitigation application for a borrower’s mortgage loan account”
- Does this really mean borrowers have only “one bite at the apple,” regardless of when earlier application was submitted or whether there haven been changed circumstances?
- Are there any limitations? Rule does not apply if:
 - application is made to a different servicer – Comment 41 (i) states that transferee servicer must comply (but does this include transfers between affiliates or through merger?)
 - servicer provides short-term forbearance or other loss mitigation option on an incomplete application



Transfer Requirements

- New servicer must obtain loss mitigation documents and information submitted by borrower to former servicer and comply with § 1024.41
- If borrower's complete application is being evaluated when mortgage is transferred, new servicer should "continue the evaluation to the extent practicable"
- Documents in a complete application are received for purposes of timelines as of date they were received by former servicer, not new servicer
- Covered error for notice of error includes:
 - Failing to transfer accurately and timely information relating to servicing of a borrower's mortgage loan account to a transferee servicer



Exemptions

- No bankruptcy exemptions for the loss mitigation procedures under Reg. X § 1024.41
- Early intervention requirements do not apply:
 - to 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
 - to any borrower who has sent a cease communication letter under FDCPA
- As to continuity of contact, Comment 40(a)–2 explains that servicer may assign personnel with specialized knowledge in bankruptcy law to assist the borrower



Exemptions

- Loss mitigation procedures apply only to a mortgage that is secured by the borrower's principal residence
- Small servicers are required to comply with the 120-day pre-foreclosure waiting period, and shall not make first notice or filing to initiate the foreclosure process if borrower is performing under a loss mitigation agreement
- Small servicers are exempt from all other loss mitigation procedures
- Servicers are exempt from all loss mitigation procedures with respect to reverse mortgage transactions



Using RESPA Error Resolution

- Potential loss mitigation covered errors:
 - failing to provide accurate information regarding loss mitigation options and foreclosure
 - failing to transfer accurate and timely information about borrower's mortgage account to a transferee servicer, including loss mitigation information
 - making the first notice or filing for any foreclosure process in violation of § 1024.41(f) or (j) - *NOE must be received more than 7 days before a scheduled foreclosure sale*
 - moving for foreclosure judgment or order of sale, or conducting a foreclosure sale in violation of § 1024.41(g) or (j) - *NOE must be received more than 7 days before a scheduled foreclosure sale*



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”
- CFPB stated that “it is critical for borrowers to have information regarding available loss mitigation options”
- RFI may seek:
 - information about a loan modification application
 - “servicing file,” which includes any notes created by servicer personnel reflecting communications with the borrower



RESPA Remedies

- RESPA § 2605(f) remedies apply to violations of early intervention (§ 1024.39) and loss mitigation rules (§ 1024.41), **but not** to continuity of contact rule (§ 1024.40)
- Actual damages, costs and attorney's fees may be recovered
 - 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



Checklist for Housing Counselors

- **Designed** for busy housing counselors
- **Streamlines** reporting of violations of the Settlement's servicing standards
- **Escalation tool** for resolving client complaints
- NCLC's website:
<http://www.nclc.org/nmschecklist-form.html>





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