COMMENTS
to the
Consumer Financial Protection Bureau

regarding

12 CFR Parts 1024 & 1026
[Docket No. CFPB-2014-0033]

79 Fed. Reg. 74176 (Dec. 15, 2014)

Amendments to the 2013 Mortgage Rules under the Real Estate Settlement Procedures Act and the Truth in Lending Act

by the
National Consumer Law Center
on behalf of its low-income clients

and

Americans for Financial Reform, Center for Responsible Lending, National Association of Consumer Advocates, National Association of Consumer Bankruptcy Attorneys, and National Fair Housing Alliance

March 16, 2015

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The National Consumer Law Center ("NCLC")[1] submits the following comments, on behalf of its low-income clients, with Americans for Financial Reform,[2] Center for Responsible Lending,[3] National Association of Consumer Advocates,[4] the National Association of Consumer Bankruptcy Attorneys,[5] and the National Fair Housing Alliance.[6]

I. Introduction

We applaud the CFPB's active engagement with mortgage servicing issues and the effort to further reform current regulations through a proposed rule. The proposal addresses a number of significant, ongoing challenges for homeowners nationwide. Below we provide comments on the breadth of issues in the current rulemaking. Our recommendations include:

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[1] The **National Consumer Law Center®** (NCLC®) is a non-profit Massachusetts corporation specializing in low-income consumer issues, with an emphasis on consumer credit. Since 1969, NCLC has used its expertise in consumer law and energy policy to work for consumer justice and economic security for low-income and other disadvantaged people, including older adults, in the United States. NCLC's expertise includes policy analysis and advocacy; consumer law and energy publications; litigation; expert witness services, and training and advice for advocates. NCLC works with nonprofit and legal services organizations, private attorneys, policymakers, and federal and state government and courts across the nation to stop exploitive practices, help financially stressed families build and retain wealth, and advance economic fairness. NCLC publishes a series of consumer law treatises including Mortgage Lending, Truth in Lending, and Foreclosures. These comments are written by NCLC attorneys Alys Cohen, Chantal Hernandez, Sarah Bolling Mancini, Andrew Pizor, John Rao and Geoff Walsh.

[2] **Americans for Financial Reform** (AFR) is a coalition of more than 200 civil rights, consumer, labor, business, investor, faith-based, and civic and community groups. Formed in the wake of the 2008 crisis, AFR works to lay the foundation for a strong, stable, and ethical financial system – one that serves the economy and the nation as a whole.

[3] The **Center for Responsible Lending** (CRL) is a nonprofit, non-partisan research and policy organization dedicated to protecting homeownership and family wealth by working to eliminate abusive financial practices. CRL is an affiliate of Self-Help, one of the nation's largest nonprofit community development financial institutions. Self-Help has provided $6 billion in financing to 70,000 homebuyers, small businesses, and nonprofits and serves more than 80,000 mostly low-income families through 30 retail credit union branches in North Carolina, California, and Chicago.

[4] The **National Association of Consumer Advocates** (NACA) is a non-profit corporation whose members are private and public sector attorneys, legal services attorneys, law professors, and law students, whose primary focus involves the protection and representation of consumers. NACA's mission is to promote justice for all consumers.

[5] The **National Association of Consumer Bankruptcy Attorneys** (http://www.nacba.org) is the only national organization dedicated to serving the needs of consumer bankruptcy attorneys and protecting the rights of consumer debtors in bankruptcy. Formed in 1992, NACBA now has 3,000 members located in all 50 states and Puerto Rico.

[6] Founded in 1988, the **National Fair Housing Alliance** is a consortium of more than 220 private, non-profit fair housing organizations, state and local civil rights agencies, and individuals from throughout the United States. Headquartered in Washington, D.C., the National Fair Housing Alliance, through comprehensive education, advocacy and enforcement programs, provides equal access to apartments, houses, mortgage loans and insurance policies for all residents in the nation.

- *The bureau has taken a substantial step to protect successors in interest and should expand the rule to ensure successors are protected at all stages of the process.*
- *The duplicative request proposal makes progress but must be expanded to cover other appropriate subsequent applications.*
- *The bureau should replace the complete application rule with an "initial package" rule; if it retains the complete application rule it should require the proposed notice of a complete application and make the five-day response time mandatory.*
- *The Bureau should adopt its proposed rules on transfers of servicing and further strengthen them.*
- *The Bureau should amend its proposal on the early intervention requirements because the amendment as written undermines and contradicts the purpose of the requirement.*
- *The specific conditions that trigger the proposed exemption for early intervention notifications to a borrower who has sent an FDCPA "cease communication" notice should be revised and the safe harbor should be eliminated or clarified to only apply where all notice requirements are met.*
- *Periodic statement and payment application requirements relating to temporary loss mitigation programs, acceleration and loan charge-off should be further amended.*
- *The Bureau should not adopt its proposed revision regarding requests for information related to GSE loans; the current rule distinguishing between guarantors and owners takes the correct approach.*
- *The rules on prohibitions on foreclosure sales must be revised to better promote compliance and to minimize avoidable sales.*
- *Persistent problems regarding the timing and method of correspondence of loss mitigation offers and appeals should be addressed.*
- *The Bureau should substantially strengthen the force-placed insurance rules, including how flood insurance is addressed.*

We also refer you to our separate filing with the National Association of Consumer Bankruptcy Attorneys for comments on the bankruptcy issues in this docket.

In addition, there are several areas not included in the rulemaking but in need of further attention by the Bureau. We note that the current proposal does not address the issue of access to loss mitigation for borrowers of Limited English Proficiency (LEP). Such an omission raises significant fair lending concerns and we urge the CFPB to consider additional rulemaking to require servicers to effectively meet the needs of LEP borrowers. Additional priority matters in need of further attention include patching the gaps in the dual tracking rule by allowing a loan modification application submitted fewer than 37 days prior to sale to trigger a temporary pause in a foreclosure and requiring servicers to process appeals for all applications submitted within the dual tracking timelines. Finally, the end of the HAMP program is not too far off and no other system establishes a standard for sustainable loan modifications that also benefit investors. The Bureau must require servicers to provide affordable loan modifications consistent with investor interests. We believe this can be done within the Bureau's authority and urge the Bureau to take on this important mission.[7]

[7] While these comments, and the rulemaking, focus on loss mitigation and other servicing issues, there are ongoing problems with how REO inventory is established, maintained and sold, including fair lending concerns, that we hope the CFPB will seek to address.

II. The Bureau has taken a substantial step to protect successors in interest and should further strengthen the proposed rule.

The Bureau's proposed regulation provides that once a servicer confirms a successor in interest's identity and ownership interest in a property that secures a covered mortgage loan, the successor shall be considered a borrower for purposes of Subpart C of Regulation X and a consumer for purposes of Regulation Z. "Successor in interest" is defined as a person who acquires an ownership interest in the home from a borrower through a transfer that is exempt from exercise of a due-on-sale clause under the Garn-St Germain Act. The proposed regulation creates a limited Request for Information enabling a potential successor in interest to obtain from a servicer a list of any documentation needed to establish successor status. The proposal also requires servicers to implement policies and procedures reasonably designed to communicate with potential successors in interest regarding how to confirm successor status.

We commend the CFPB for taking a substantial step forward to protect successors in interest from foreclosure. The benefits to successors in interest of adopting the proposed rule will be extremely significant, and even more so if the CFPB strengthens the proposed rule as we recommend in these comments. Many successors are eligible for loan modifications under the applicable program rules (HAMP, Fannie, Freddie, etc), but are experiencing unnecessary delays, frustrations, and an elevated risk of foreclosure due to servicers' unwillingness to properly review them for these loan modification programs.[8] For each month of delay imposed by servicers in recognizing successor status or processing successors' loan modification applications, the interest arrearage grows at the currently applicable note rate – instead of accruing at the significantly lower interest rate of the modification that should have been approved. Thus, unnecessary delay in communicating with successors and reviewing them for loan modifications eats away at the successor's equity in the home. Further, for the many successors who cannot afford to make the existing contractual payment, they slip further into default and face imminent foreclosure, and the risk of losing their homes. These delays also make it more difficult to pass a net present value test for a loan modification, where applicable. This vulnerable population is greatly in need of the kinds of protection the CFPB is making an effort to extend.

However, the proposed rule must be strengthened in order to provide meaningful protections to successors and to achieve the goals the CFPB has expressed in considering this amendment. The proposed regulation falls short of the protections needed for successors in interest because it creates no deterrent to unreasonable conduct by servicers in confirming successor status and fails to protect successors from the risk of foreclosure while they are going through this process. The CFPB should also improve the proposed rule by broadening the definition of successor in interest, addressing communication problems, and clarifying the duplicative application rule with regard to successors.

A. Protecting successors in interest remains a pressing matter.

1. *Failure to give successors in interest access to loan modifications continues to be widespread.*

One of the still-unsolved problems revealed by the recent financial crisis is the challenge that successor homeowner whose names are not on the mortgage loan face in keeping their homes.

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[8] *Id.*

Clarifying the rights of these successors to deal with the mortgages secured by their homes is a particularly important step for the CFPB to take because a substantial number of these homeowners are currently facing foreclosure due to widespread confusion about their rights and options.[9] Attorneys and counselors representing homeowners continue to cite successor problems as among the most difficult problems they face as they work to save homes from foreclosure.[10] These consumer advocates have been sounding the alarm over the problems faced by successor homeowners for over two years, asking lawmakers and regulators to ensure that successors have access to information and the ability to apply for a loan modification after a death or divorce.[11] Often referred to as the "widows and orphans" problem, this has been one of the most pernicious and persistent problems faced by homeowners and their advocates attempting to stop foreclosures. Even where a struggling homeowner might be eligible for a loan modification, the successor faces additional hurdles that too often leave that homeowner without any viable options for retaining the home.

Federal agencies and the Government Sponsored Enterprises ("GSEs") have gradually taken steps to address the problem. In February 2013, Fannie Mae and Freddie Mac changed their servicing rules to require servicers of loans held by Fannie and Freddie to evaluate successor homeowners for loan modification options as if they were the original borrower.[12] The Treasury Department followed suit in August 2013, adding language to the Making Home Affordable Handbook to require that successor homeowners be evaluated for HAMP loan modifications.[13]

The CFPB first took action to address these problems in January 2013, when it issued a regulation under RESPA, effective January 10, 2014, requiring servicers to identify and communicate with the successor in interest after learning of the death of the borrower.[14] The CFPB noted that it had

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9 *Are Mortgage Servicers Following the New Rules? A Snapshot of Compliance with CFPB Servicing Standards*, National Council of La Raza and National Housing Resource Center (Jan. 9, 2015), *available at* http://www.nclr.org/images/uploads/publications/mortgageservicesreport_11215.pdf; *Chasm Between Words and Deeds X: How Ongoing Mortgage Servicing Problems Hurt California Homeowners and Hardest-Hit Communities*, California Reinvestment Coalition (May 2014), http://www.calreinvest.org/publications/california-reinvestment-coalition-research.

10 *Id. See also* National Consumer Law Center, Examples of Cases Where Successors in Interest and Similar Parties Faced Challenges Seeking Loan Modifications and Communicating with Mortgage Servicers (July 1, 2014), *available at* http://www.nclc.org/images/pdf/foreclosure_mortgage/mortgage_servicing/successor-stories-2014.pdf.

11 *See, e.g.,* Letter from Housing and Economic Rights Advocates and California Reinvestment Coalition to Thomas Curry, Sarah Bloom Raskin and Richard Cordray (Dec. 10, 2012), http://calreinvest.org/system/resources/W1siZiIsIjIwMTQvMDUvMTcvMjFfNDNfNDZfMzEyX1dpZG93ZWRfSG9tZW93bmVyX0xldHRlcl8xMi4xMC4yMDEyLnBkZiJdXQ/Widowed%20Homeowner%20Letter%2012.10.2012.pdf; Testimony of Nadine Lang and Elaine Poon, Atlanta Legal Aid Society, CFPB Field Hearing, January 17, 2013, http://www.consumerfinance.gov/blog/2013/01/; Americans for Financial Reform, "Top Priorities for CFPB Servicing Regulations," April 2014, http://www.nclc.org/images/pdf/foreclosure_mortgage/mortgage_servicing/recommend-cfpb-servicing-april2014.pdf.

12 Fannie Mae, *Lender Letter LL-2013-04* at 1 (Feb. 27, 2013), *available at* https://www.fanniemae.com/content/announcement/ll1304.pdf; Freddie Mac, *Freddie Mac Bulletin 2013-3* (Feb. 15, 2013), *available at* http://www.freddiemac.com/singlefamily/guide/bulletins/pdf/bll1303.pdf.

13 Department of the Treasury, Supplemental Directive 13-06 (Aug. 30, 2013), *available at* https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/sd1306.pdf.

14 12 C.F.R. § 1024.38(b)(1)(vi), 78 Fed. Reg. 10696 (Feb. 14, 2013).

received information about the difficulties faced by successors in interest and believed it was essential that servicers develop policies and procedures to better address this problem.[15] In October 2013, the CFPB issued a Bulletin further clarifying how servicers could comply with 12 C.F.R. § 1024.38(b)(1)(vi), stating that it had "received reports of servicers either outright refusing to speak to a successor in interest or demanding documents to prove the successor in interest's claim to the property that either do not exist… or are not reasonably available."[16]

These actions by federal agencies have not resolved the problems faced by successor homeowners. The CFPB explained in its current proposed rulemaking that it has continued to receive reports of difficulties faced by successors attempting to save their homes despite the RESPA rule on successors that took effect in January 2014.[17] Homeowners' advocates, including attorneys and the nonprofit housing counselors who assist with submission of loan modification packages, still report widespread stonewalling and obfuscation by servicers as they attempt to help successors obtain information about the mortgage and apply for needed modifications. In one study, 63% of housing counselors surveyed reported that servicers rarely or never had policies in place to facilitate communication with successors in interest of deceased borrowers.[18] A survey of housing counselors and legal services attorneys in California found that 87% of respondents stated that the "widows and orphans problem" persists and more needs to be done.[19] Only 13% of respondents stated that the recent rule changes by the GSEs and the CFPB had solved the problem.[20] In 2013, the same annual survey found that 44% of California advocates responding to the survey said servicers "always" or "almost always" refuse to discuss loan modification options with widows because they are not borrowers on the loan.[21]

NCLC staff have presented five trainings on helping successors in interest obtain information and apply for loan modifications in the past six months. For a December 2014 webinar targeted to elder advocates (primarily legal services attorneys and housing counselors), 374 people registered. Out of the 374 registrants, 254 answered yes that within the past twelve months they had been contacted by a homeowner who was denied a loan modification or denied information about the mortgage loan because he or she was not a borrower on the mortgage loan. When polled during the webinar, 49% of respondents had experienced a servicer asking for a quitclaim deed when the successor had already provided a copy of a divorce decree clearly transferring the property; 24% of respondents had been asked for probate documents despite having provided the servicer with a right of survivorship deed; 60% of respondents had been asked to supply the same documents regarding proof of successor status multiple times; 63% of respondents had experienced a servicer refusing to communicate with the successor at all; and 51% of respondents had dealt with a servicer who was unclear about what documents were needed to establish successor status.

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15 *Id.*
16 Consumer Financial Protection Bureau*, CFPB Bulletin 2013-12* at 3 (Oct. 15, 2013), *available at* http://files.consumerfinance.gov/f/201310_cfpb_mortgage-servicing_bulletin.pdf.
17 *Id.* Amendments to the 2013 Mortgage Rules under the Real Estate Settlement and Procedures Act (Reg. X) and the Truth in Lending Act (Reg. Z), 79 Fed. Reg. 74176 (Dec. 15, 2014).
18 *A Snapshot of Compliance with CFPB Servicing Standards*, National Council of La Raza and National Housing Resource Center.
19 *Chasm Between Words and Deeds X: How Ongoing Mortgage Servicing Problems Hurt California Homeowners and Hardest-Hit Communities*, California Reinvestment Coalition.
20 *Id.*
21 *Chasm Between Words and Deeds IX: Bank Violations Hurt Hardest Hit Communities*, California Reinvestment Coalition (April 2013), http://www.calreinvest.org/publications/california-reinvestment-coalition-research.

For a similar webinar presented to legal services attorneys and housing counselors in New York, 95 advocates registered and 78 attended the webinar. When polled during the webinar, 58% of respondents had experienced a servicer asking for a quitclaim deed when the successor had already provided a copy of a divorce decree clearly transferring the property; 44% of respondents had been asked for probate documents despite having provided the servicer with a right of survivorship deed; 80% of respondents had been asked to supply the same documents regarding proof of successor status multiple times; 71% of respondents had experienced a servicer refusing to communicate with the successor at all; and 54% of respondents had dealt with a servicer who was unclear about what documents were needed to establish successor status.

NCLC recently conducted a nationwide survey of attorneys and housing counselors representing homeowners. One hundred and three advocates responded to the survey, from 24 different states.[22] When asked generally about their experiences representing successors in interest, 71% of respondents answered that people are contacting them with this problem, they are still having a great deal of difficulty getting loan modifications for successors, and they have not seen any recent improvement. Twelve percent of respondents said they had seen some improvement on these issues in the past six months. Five percent of respondents said they are having an easier time helping successors with Fannie Mae and Freddie Mac owned loans, but still having trouble with other loans. Twelve percent of respondents said they have not been contacted by successors in interest struggling to get a loan modification.

When asked which of the following they have experienced when trying to get a servicer to acknowledge a client as a successor in interest, and directed to check all that apply, 55% of respondents had been asked to supply a quitclaim deed where a divorce decree clearly transferred the property; 28% had been asked to supply a quitclaim deed where the borrower was deceased; 63% had been asked to provide probate documents or proof that the client is the estate representative where the property passed through a right of survivorship deed or tenancy by the entireties; 66% had been asked to submit the same documents over and over again; and only 11% of respondents had experienced none of the above.

Forty-five percent of respondents said that servicers "sometimes" refuse to communicate with a successor regarding the loan or allow the successor to apply for a loan modification even after the successor has provided all of the requested proof of successor status. Twenty-five percent of respondents answered that this happens "often" or "most of the time."

The survey responses revealed serious problems with getting servicers to stop foreclosures to review a successor for a potential loan modification. Forty-four percent of respondents said that the servicer refused to stop the foreclosure until the case was escalated (internally or with the HAMP Solutions Center, Fannie, or Freddie), and 17% of respondents said that they were required to seek a temporary restraining order or file a bankruptcy case to stop the foreclosure.

Sixty-seven percent of respondents answered yes to the question, "Have you been contacted by a joint owner of the house who is on the mortgage/deed of trust but not on the note, where your

[22] *See* attached Exhibit D, NCLC Survey of Housing Counselors and Attorneys. Survey data were collected from February 24, 2015 to March 3, 2015. Note that some respondents did not respond to all questions; the data we cite here is the percentage of people who gave a particular answer, out of the total number who responded to that individual question.

client is a co-owner and there has been no recent transfer of the house?" Seventy-four percent of respondents said they were having difficulty getting servicers to communicate with these clients regarding the loan, and 82% said they had difficulty getting servicers to let these clients apply for a loan modification. Respondents said these problems arose in the following situations: Client was abandoned by the borrower/co-owner (55% agreed); Separated but not divorced, spouse will not cooperate (81% agreed); Domestic violence involved (36% agreed).

NCLC has received information suggesting that successor problems are sufficiently common and difficult to solve to justify the additional costs to servicers of imposing new regulatory requirements. In NCLC's survey, 33% of respondents said 1-5% of the people contacting them for help are successors; 34% of respondents estimated that 5-10% are successors; 14% of respondents said 10-20% of are successors, and 11% of respondents said 20-30% of the people contacting them for help are successors. Successor issues present a significant problem on which servicer compliance has lagged behind existing requirements imposed by the CFPB and other agencies. Fannie Mae, Freddie Mac, HAMP, and FHA servicing rules all require servicers to evaluate successor homeowners for loan modifications.[23] Servicers are therefore already required to communicate with successors and to have protocols in place for establishing successor status and reviewing loan modification applications from successors.

However, the experiences of consumer advocates demonstrate that, while servicers are capable of communicating with successor homeowners and evaluating them for loss mitigation, they simply do not do so fairly or consistently. NCLC has heard from many attorneys and housing counselors who faced months or years of roadblocks in helping a successor homeowner apply for a loan modification. Fortunately, many of these attorney and housing counselors succeeded after persistent advocacy,. Their ultimate success illustrates that servicers are capable of responding properly to successor homeowners, but the difficulties they had to overcome illustrates how much improvement is needed.

One attorney from Connecticut explained: "I'm currently representing someone in a foreclosure action who acquired title outside of probate (joint tenancy with right of survivorship) when his wife died in 2011 and has been trying to get Nationstar to review him for a mod/assumption on a pick-a-pay loan for the last 4 years. … This should have been a simple issue to clear up, but instead it took 4 years and the resources of a housing counseling agency, a non-profit law firm, and the court's mediation program to get Nationstar to recognize it needed to let him apply for a mod. I don't think this case is all that unusual. I've been told repeatedly by numerous servicers that they cannot speak to an heir or review them for a mod without a 'power of attorney' from the deceased borrower, which is of course impossible."[24]

An attorney from Pennsylvania described a similar story: "For over a year, Mr. C worked with his housing counselor to try to save his home. Throughout this process, Mr. C and his housing counselor were repeatedly asked to resubmit documents that had already been submitted and were given misleading and inaccurate information about the process for modifying and assuming the

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[23] Fannie Mae Servicing Guide §D1-4.1-02; Freddie Mac Servicing Guide Ch. B65.28; Making Home Affordable Handbook, version 4.4, Ch. II, § 8.8; HUD Handbook 4330.1 Rev-5 Chapter 6; HUD Mortgagee Letter 2009-23, Attachment ("Eligibility - Mortgagors").

[24] *See* Exhibit A, Successor Stories.

mortgage. … Eventually, Mr. C obtained an attorney with Philadelphia Legal Assistance. However, even with an attorney advocating on his behalf, it still took five months, including two separate applications, dozens of phone calls and several escalations, before Chase finally conceded that Mr. C should be reviewed through 'LAMP' (Loan Assumption Modification Program)."[25]

These experiences demonstrate that servicers are capable of reviewing proof of successor status and reviewing successors' applications for loan modifications, but they have not yet implemented these programs with uniformity or clarity. Although challenges remain, we have seen improvement in servicers' loss mitigation programs for non-successors since the RESPA loss mitigation rules were adopted. We urge the CFPB to expand that positive trend to include loss mitigation involving successors by finalizing the proposed rule regarding successors in interest, with the changes we recommend here.

2. *The number of successors in need of protection is likely to grow.*

The number of successors facing foreclosure as a result of confusion in this area will likely increase over the coming years, and this issue will likely grow in importance as a cause of avoidable mortgage foreclosures. As the baby boomer generation continues to age, a significant number of older homeowners will experience the death of a spouse or partner.[26] Whereas 49% of households in their fifties are comprised of a married couple without children in the house, 60% of households in their eighties consist of a single person living alone.[27] Due to longer life expectancies, women make up three quarters of this group.[28] Because of historical disparate access to credit, a large number of women who become the sole owner of a home upon the death of a spouse will not have been an original borrower on the loan.[29] These widows will often experience a loss of income along with the loss of their partner, making loan modification and assumption the critical step needed to prevent foreclosure.

Moreover, for the substantial number of households whose homes are underwater, refinancing will be impossible for years to come. Through the third quarter of 2014, 10.3% of homes with a mortgage were carrying mortgage debt in excess of the value of the property.[30] Whereas in the past many heirs or divorced spouses would refinance to put the mortgages in their names, that will not be possible for many who will inherit or be awarded a home in the next decade where the mortgage balance exceeds the value of the home.

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[25] *Id.*
[26] *Housing America's Older Adults: Meeting the Needs of an Aging Population*, Joint Center on Housing Studies of Harvard University, 7-8 (Sept. 2, 2014) http://www.jchs.harvard.edu/research/housing_americas_older_adults.
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Equity Report: Third Quarter 2014*, Core Logic (Jan. 8, 2015). http://www.corelogic.com/about-us/researchtrends/equity-report.aspx#.VNOlbC58qJ8.

B. The Bureau's basic approach of integrating successors into existing RESPA protections is sound and cost-effective, but should be implemented more fully.

The Bureau's basic approach in the proposed rule is to integrate successors into the existing RESPA servicing rules. This approach is sound.

Because servicers are already evaluating successors for loan modifications, albeit with limited effectiveness, it makes sense for those loan modification applications to be covered by the RESPA loss mitigation rules. The majority of the loans in most servicers' servicing pools are already subject to requirements to communicate with successors and consider them for loss mitigation in the event of a transfer of ownership. Therefore, all servicers should have some system for dealing with successors, and no servicer should be starting from scratch in this regard – it should just be a matter of expanding the protocol to all loans and ensuring that they are satisfying the minimum level of fairness and timeliness required by the CFPB's rules. Therefore, the CFPB's proposed rule and the changes we recommend in these comments would not be costly to servicers to implement. Ultimately, it is inefficient and illogical to distinguish the rights of a homeowner to information and mortgage modification based on whether the homeowner was an original borrower on the note. Where successor homeowners seek information or a loan modification, their requests should be evaluated using the same standards used for any other homeowner.

The Bureau's proposed rule does not, however, go far enough in extending the protections of the RESPA servicing rules to successors. As discussed below, it should extend dual tracking protections to all successors immediately, not just once the servicer confirms successor status. It should also place successors under the protection of RESPA's escrow account rules.

C. The CFPB should incentivize servicer compliance by allowing successors to enforce their rights under the regulation at every step in the process.

1. The regulation gives successors no enforceable rights until a servicer "confirms" the successor's identity and ownership interest.

The most serious flaw in the proposed regulation regarding successors is that it gives a successor no ability to enforce any protections until a servicer "confirms" the successor's identity and ownership interest. The proposed regulation states that only a confirmed successor in interest shall be considered a borrower for purposes of RESPA's servicing rules. What it means for a servicer to "confirm" successor status is not defined or constrained, with no reasonableness requirement built into the proposed amended § 1024.30.

As the Section-by-Section Analysis acknowledges, successors have reported to the Bureau continuing problems getting servicers to confirm their status as successors, including being asked to provide documents that do not exist or are not reasonable under state law.[31] The Bureau attempts to address this problem with its proposed amendment to the Official Bureau Interpretation regarding § 1024.38. But the provisions of § 1024.38 are not privately enforceable. The proposed regulation in its current form enables servicers to continue to impose undue delays and burdensome procedures

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[31] Section-by-Section Analysis, 79 Fed. Reg. 74176, 74182-83 (Dec. 15, 2014).

as successors attempt to document their ownership interest. This is true because until a servicer "confirms" successor status, the successor has no enforceable rights.

The need for a private right of action to incentivize reasonable servicer behavior in the first step – verifying and confirming successor status – is clear. For the past year, since it took effect on January 10, 2014, 12 C.F.R. § 1024.38 has required servicers to have policies and procedures in place to identify and communicate with successors in interest after the death of a borrower. The CFPB explained in Bulletin 2013-12 much of the same information it now proposes to add to the Commentary to 1024.38 regarding the kinds of documentation a servicer could reasonably request to prove successor status. Despite these currently binding regulations and clear explanation in the Bulletin, servicers notified of a borrower's death continually refuse to communicate with successors at all, request unreasonable or nonexistent documentation to prove ownership, or request the same documentation over and over again – all while the homeowner slips further into default and closer to the precipice of foreclosure. The unenforceable requirements of § 1024.38 have not led to reasonable conduct by servicers in communicating with successors upon learning of the death of a borrower. In order to induce servicers to comply, the protections extended to successors must be privately enforceable. While the Bureau has its own enforcement authority, such oversight is necessarily limited by resources as well as delayed from the time at which a homeowner needs the servicer to act in order to prevent foreclosure.

The CFPB has recognized the importance of private enforceability by making most sections of its mortgage servicing rules privately enforceable. Protections for successors should be no exception. Private enforcement is especially needed when a potential successor is attempting to document successor status because it serves as a gateway to the rest of the process.

2. *The trigger for protection should be a successor providing information, not a servicer's decision to confirm successor status.*

The best way to enable successors to communicate with servicers regarding the mortgage and to apply for loss mitigation would be to extend RESPA's and TILA's protections to any successor who has *established* his or her identity and ownership interest by providing reasonable proof of successor status to the servicer. Once a successor has in fact provided the necessary documentation to a servicer, there is no reason for delay in allowing that successor to send a Request for Information, apply for a loan modification, or receive periodic statements. Tying coverage to a servicer's decision to "confirm" successor status simply introduces an opportunity for negligent or willful failure by servicers.

In the alternative, the CFPB should provide that the definition of borrower includes any successor in interest who has provided reasonable proof of his or her identity and ownership interest, unless the servicer provides a timely and reasonable response stating that the potential successor will not be confirmed as a successor and the reason for the lack of confirmation. Timeliness for this purpose should mean within five (5) business days.[32] Once a successor has provided the documentation

[32] We recommend a 5-day timeframe here to mirror the more general 5-day notice required to be sent upon receipt of a loss mitigation application. To the extent that the overall scheme is viewed as providing insufficient time, both deadlines could be extended to 10 days. It is essential that the timeframe not shift to a much lengthier time, which would result in costly delays and increased risks of foreclosure.

necessary to prove ownership under applicable state law, there is no reason to delay extending RESPA's and TILA's protections. Successors need these protections as quickly as possible.

The CFPB's proposed approach to this issue is to require in § 1024.38 that servicers have policies and procedures reasonably designed to confirm successor status promptly. In the proposed Official Bureau Interpretation, the CFPB has suggested a definition of promptness tied to the next applicable loss mitigation milestone. This is insufficient because § 1024.38 is not privately enforceable and, for the reasons explained below, tying promptness to the next milestone will often result in unreasonable and unnecessary delay.

3. *The CFPB should provide for a limited Notice of Error related to successor status and make clear that both the limited Request for Information and Notice of Error are privately enforceable.*

Another way the Bureau could alleviate the problem of lack of enforceability in the initial step of the proposed regulation, that of confirming successor status, would be to make it clear that successors may privately enforce servicer compliance with the limited Request for Information that a potential successor is authorized to send under proposed § 1024.36(i). Under the Bureau's proposal (which should be reconsidered as discussed in the previous section), a successor does not become a "borrower" for purposes of RESPA until the servicer confirms the successor's identity and interest in the property.[33] If a servicer violates proposed § 1024.36(i) by failing to respond to a Request for Information, it could then argue that the successor was not a "borrower" for purposes of RESPA. Thus, a successor in most instances will be barred from bringing an action seeking remedies under 12 U.S.C. § 2605(f) for violations of proposed § 1024.36(i). The Bureau should clarify that violations of proposed § 1024.36(i) are enforceable by a successor even before successor status has been confirmed.

In addition, the Bureau should create an analogous limited Notice of Error that a potential successor could send pointing out and asking servicers to correct errors related to confirmation of successor status. This limited Notice of Error must also be enforceable in order to be meaningful. Moreover, the limited Notice of Error and Request for Information related to establishing successor status should have a shortened response period of 10 business days. Much like responding to a request to identify the owner or assignee of a mortgage loan,[34] addressing this type of limited Request for Information or Notice of Error should not be difficult for servicers. Moreover, successors need this information urgently, so that they can establish successor status and apply for loss mitigation. Imposing RESPA's usual timeframe for response of 30 business days followed by a potential 15 business day extension means that a successor may have to wait 9 weeks to find out what documents must be submitted to establish successor status. In many states, a servicer could have long since completed the foreclosure process during such an extended time period.

D. The CFPB should extend dual tracking protections to successors immediately, rather than waiting until a servicer "confirms" successor status.

The second most significant problem with the proposed regulation on successors is that it fails to protect successors from the risk of foreclosure while the successor attempts to communicate with

[33] See proposed § 1024.30(d).
[34] 12 C.F.R. § 1024.36(d)(2)(i)(A).

the servicer and document his or her successor status. As the Bureau has acknowledged in the background information related to the proposed rulemaking, many successor homeowners face the risk of foreclosure because they have lost income related to a death or divorce, the mortgage has become unaffordable, and they have fallen behind on the payments.[35] These successors are in need a loan modification, and many of them qualify for loan modifications under the applicable rules of the HAMP, FHA, Fannie Mae, or Freddie Mac modification program. Unfortunately, many successors are losing their homes to foreclosure while they are in the process of communicating with a servicer about a potential loan modification and assumption.

The Bureau should extend dual tracking protections to this particularly vulnerable population. Once a successor has submitted a complete loan modification application, including reasonable documentation establishing the successor's identity and ownership interest in the home, within the timelines contained in § 1024.41(f) and (g), a servicer should not be permitted to initiate or continue with foreclosure until it has reviewed the proof of successor status and the application. The Bureau's proposed regulation does not allow a successor to benefit from the dual tracking protections of § 1024.41(f) and (g) until he or she has succeeded in getting the servicer to "confirm" successor status, which opens the door to potential delay and abuse. Moreover, just as it has done for Notices of Error related to dual tracking violations, the Bureau should require a servicer to respond to a limited Request for Information or Notice of Error related to successor status before a foreclosure sale (or delay foreclosure if necessary to allow time for a response).

E. The CFPB should expand the coverage of its proposed rule to protect the broad range of homeowners who may be eligible for loan modifications.

1. *The CFPB should expand and clarify the definition of successor in interest.*

The proposed definition of successor in interest would extend protections only to successors who obtain an interest in the home pursuant to exempt transfers under the Garn-St Germain Act. While the CFPB's inclination to align its regulations to this statute is understandable, limiting protected successors in this way excludes many homeowners who are otherwise free to assume a loan under state law or to apply for a loan modification under applicable program rules.[36]

Limiting the definition of successor in interest to Garn-exempt transferees would omit a substantial group of homeowners. Among the transferees who are not covered by Garn-St Germain are any unmarried partner, including a gay partner unable to marry under the law of their state,[37] and any relatives other than a spouse or child of the borrower who obtain an interest in the home through quitclaim deed - including a parent, sibling, or grandchild of the borrower. Any unrelated transferee also would not be covered under the Bureau's proposed rule.

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[35] 79 Fed. Reg. 74176, 74182-84.

[36] Fannie Mae allows a simultaneous loan modification and assumption after a much broader list of "exempt transactions" than the transfers exempt under Garn-St Germain. *See* Fannie Mae Servicing Guide, § D1-4.1-02.

[37] The CFPB is using the federal definition of marriage, meaning that anyone legally married in any state would be treated as a spouse under the rule. However, many gay couples in states that have not adopted marriage equality have not yet been in a position to travel to another state in order to marry.

The CFPB should expand the definition of successor in interest to include both Garn-St Germain exempt transferees and any other transfer where there is not an enforceable due-on-sale clause. This would include situations where there is no due-on-sale clause in the mortgage and situations where a due-on-sale clause is not enforceable under state law. Nothing requires a servicer to enforce a due-on-sale clause, and often servicers refrain from accelerating a loan after a transfer that is not exempt under Garn-St Germain. Some state courts may deem this failure to exercise the due-on-sale clause to be a waiver of that right.

The CFPB has rightly extended the servicing rules to successors regardless of whether they have assumed liability on the note under state law. However, once a person assumes liability on the note under state law, he or she should clearly be a borrower under RESPA. The CFPB should acknowledge this fact in the rule or, at a minimum, in the Official Interpretation. The CFPB should also state in the Official Interpretation that it is taking no position with regard to the right of any transferee to assume a loan under state law.

Finally, the CFPB should omit the word "prior" from the definition of successor in interest in both §§ 1024.31 and 1026.2. The proposed regulation defines successor in interest as a person "to whom an ownership interest in a property securing a mortgage loan is transferred from a *prior* borrower" (or, in the TILA definition, "from a *prior* consumer"). This is confusing and inaccurate, because in most cases the original borrower will still be a borrower. Only in the rare circumstance will an original borrower be released from liability. Thus, the definition in §§ 1024.31 and 1026.2 should refer to a transfer from "a borrower" or "an original borrower." References to the "prior borrower" and "prior consumer" occur in the Official Bureau Interpretation as well, and should be corrected throughout.

2. *The CFPB should make it clear that a mortgagor who did not sign the promissory note is a borrower under RESPA.*

The Bureau has solicited feedback on whether it should clearly include in the coverage of the servicing rules a co-owner of the home who is not a borrower on the note and did not receive an interest in the home from the original borrower.[38] This would generally include people who were original co-owners of the home but were not borrowers on the note. It is critical that the CFPB clarify that these co-owners are borrowers for purposes of RESPA. In almost every case, a co-owner of the home at the time a loan is taken out will be a signer of the security instrument, in order for a creditor to obtain a security interest in the whole property. These signers of the mortgage or deed of trust are defined as a borrower by that instrument.[39] At least one court has held that the signer of a security instrument has standing to raise a claim under RESPA.[40] This is a proper

[38] 79 Fed. Reg. 74176, 74190.

[39] In the definition section of the Uniform Instruments, a "borrower" is defined to include a "grantor [or trustor] under this Security Instrument." The Fannie Mae/Freddie Mac Uniform Mortgages, Deeds of Trust, or Security Deeds for each of the jurisdictions are available at: https://www.fanniemae.com/singlefamily/security-instruments.

[40] *See Washington v. Am. Home Loans*, 2011 WL 11651320, at *2 (C.D. Cal. Nov. 12, 2011) ("Having signed the deed of trust as a joint tenant with her son, Plaintiff stands to lose the equitable interest that she has in the subject property in the event of a default on her son's loan. As such, she has Article III standing to proceed with this action.")

interpretation of the statute, and the CFPB should clarify that any signer of a security instrument is a "borrower" for purposes of RESPA.

A mortgagor who is not obligated on the note should be a borrower under RESPA without having to establish or confirm successor status. Often such a person will not be a successor, as no transfer of the home may have occurred. The lender was aware of this person's ownership interest in the home when the transaction was consummated, and should have no argument against recognizing the mortgagor as a borrower for purposes of the servicing rules.

This group of homeowners - mortgagors who are not borrowers on the note - are experiencing all of the same frustrations and problems as successors in interest.[41] They face the same elevated risk of foreclosure when the original borrower is not available or not communicating with the servicer for a variety of reasons – perhaps because the original borrower has abandoned the home or, in some cases, been ordered to refrain from contacting the co-owner under a domestic violence restraining order.[42] These mortgagors face the same potential harms as successors in interest if they cannot apply for loss mitigation or obtain information about the mortgage: the risk of foreclosure, loss of equity, homelessness, and damage to credit.[43] For all of these reasons, the CFPB should include in the definition of "borrower" in § 1024.31 and "consumer" in § 1026.2 any signer of the mortgage security instrument.

3. *The CFPB should make it clear that the borrower's estate representative is protected by TILA and RESPA, and that TILA's obligation to promptly credit payments and refrain from pyramiding late fees always applies to a mortgage loan.*

The CFPB has proposed to amend the definition of a "consumer" for purposes of §§ 1026.20(c) through (e), 1026.36(e), and 1026.41 to include a confirmed successor in interest. While this is an appropriate and important change, the CFPB should not take away obligations that a servicer would otherwise have to comply with these regulations for a deceased consumer's estate. The estate of a borrower steps into the borrower's shoes, and should always be entitled to obtain information regarding the mortgage loan and to have payments applied correctly. The estate representative should be able to obtain a timely and accurate payoff quote for the loan. Several courts have held that an estate representative may pursue a claim under RESPA, and the CFPB should acknowledge and adopt this interpretation of the law.[44]

We support the CFPB's proposal to require that servicers continue to comply with RESPA and TILA for an original borrower, even when a successor in interest has been confirmed, unless and until the original borrower has been released from liability on the loan. However, the rule should also provide that confirmation of a successor does not terminate the protections of RESPA and TILA for a deceased borrower's estate. The estate representative should continue to be covered by

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[41] *See* Exhibit D, NCLC Survey of Housing Counselors and Attorneys (discussed above in background section).

[42] *Id.*

[43] As the Bureau has acknowledged, successors and other co-owners who are not obligated on the note may nonetheless experience a negative credit impact based on foreclosure or eviction, as a foreclosure lawsuit (in judicial foreclosure states) or eviction lawsuit is likely to show up on their credit reports.

[44] *See Kralovic v. JP Morgan Chase Bank*, N.A., 2015 WL 252315 (N.D. Ohio Jan. 20, 2015); *Wilson v. Bank of America*, __ F.Supp.3d __, 2014 WL 4744555 (E.D. Pa. Sept. 24, 2014).

RESPA and TILA until the estate has been closed. Even after one heir has been confirmed as a successor, it may take some time before all of the heirs can be identified and reach agreement with regard to the property. In that time period, the estate representative should still be entitled to receive information about the loan.

Moreover, even before a successor in interest has been confirmed, a servicer should always be required to credit payments promptly and refrain from improper pyramiding of late fees. If a potential successor is making payments on the mortgage, those payments should be applied correctly. That is simply part of the obligation to service the mortgage loan properly. That obligation should not go away when ownership of the home is in question. It may take a potential successor in interest several months (or even longer) to obtain and provide documentation of successor status – particularly if probate is complicated or contested.

The CFPB should make clear that a servicer always has the obligation to credit payments promptly and to assess only appropriate late fees. Whether someone who is not a confirmed successor in interest would have standing to sue for violation of these obligations is a question properly left to the courts.

4. *The CFPB should extend all RESPA servicing rules to successors in interest.*

The CFPB has proposed to amend the definition of borrower so that a successor shall be considered a borrower for purposes of Subpart C of Regulation X. However, the Bureau should extend all mortgage servicing regulations to successors. To achieve this, the definition of borrower must include successors also for Subpart B, § 1024.17, regarding escrow accounts. Successors are likely to face escrow issues, much like original borrowers, and perhaps even more so as a result of the transfer of ownership. A transfer of ownership requires the new owner to take steps to obtain homeowner's insurance in his or her own name and, usually, to apply for the property tax homestead exemption in his or her own name. Thus, escrow issues are all too likely to arise for successors in interest, and they require the protections of § 1024.17.

F. The CFPB should strengthen the rules to improve communication between servicers and potential successors in interest.

1. *All of the requirements of §1024.38 should be moved to a privately enforceable section of the rules.*

Requirements contained in § 1024.38 are of limited usefulness. For over a year, servicers have been required by § 1024.38 to have in place policies and procedures reasonably designed to identify and facilitate communication with successors in interest after the death of a borrower. Despite this rule, servicers have not put in place such policies and procedures.

Accordingly, in order to afford real protections to successors, any communication requirements must be privately enforceable. The Bureau should move the requirements of § 1024.28 to § 1024.30, 1024.39, or 1024.41. In addition, the Bureau should require small servicers to comply with these provisions.

2. *In response to verbal inquiries from potential successors, servicers should be required to send a written response that outlines what documents are needed to establish successor status.*

The CFPB has proposed to require servicers, upon identification of a potential successor in interest, to "promptly provide the potential successor in interest a description of the documents the servicer reasonably requires to confirm that person's identify and ownership interest in the property and how the person may submit a written request under § 1024.36(i) (including the appropriate address)."[45] The CFPB has not proposed requiring servicers to provide this information in writing.

Servicers should be required to provide this information to a potential successor in writing. Communication problems between servicers and successors have been widespread and persistent. Advocates tell of receiving contradictory information regarding what documents a successor needs to provide, being asked to submit the same documents over and over again, and being asked to submit documents that are not reasonable under state law or do not exist.[46] The best way to ensure reasonable and clear communication by servicers is to require them to put the information in writing. With a letter from the servicer in hand explaining what is needed, a potential successor can obtain the correct documents the first time and, if necessary, seek advice or help from an advocate who will see exactly what a servicer is asking for. This document could take the form of a generic document with a checklist for the required documents depending on the way a successor acquired his or her interest in the home.

The cost of requiring servicers to send this information in writing would be minimal. If a servicer is required to develop the information for internal policies, it would require minimal effort to convert that policy into a template or form that could be mailed to any potential successor. In essence, we are talking about the cost of a stamp. The savings servicers would experience by avoiding repeated duplicative communications and the need to review multiple submissions of documents would far outweigh these minimal costs.

Further, it makes no sense to have a servicer tell a potential successor how to submit a Request for Information in order to get this information in writing. This simply imposes additional and unnecessary delays. A successor would then have to write up a request, mail it to the servicer, and wait approximately nine weeks (30 business days plus an additional 15 business days if the servicer takes an extension, unless the time to respond is shortened as we recommend) before learning what documents the successor must submit to prove successor status. This response is likely to consist of a template document that the servicer will have to develop that lists the various ways a successor might have obtained an interest in the home, and what documentation is needed under each scenario. It defies logic and common sense not to send that template to a potential successor upon a verbal inquiry that indicates that a person may be a successor in interest.

Instead, the CFPB should allow for an oral Request for Information related to successor status, by replacing "written request" in proposed § 1024.36(i) with "oral or written request." Successors are unlikely to know about the RFI procedure, as they probably have not had any prior contact with the

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[45] Proposed § 1024.38(b)(1)(iv)(B), 79 Fed. Reg. 74176, 74286.

[46] *See* Exhibit D, NCLC Survey of Housing Counselors and Attorneys; *A Snapshot of Compliance with CFPB Servicing Standards*, National Council of La Raza and National Housing Resource Center (Jan. 9, 2015); *Chasm Between Words and Deeds X: How Ongoing Mortgage Servicing Problems Hurt California Homeowners and Hardest-Hit Communities*, California Reinvestment Coalition.

servicer. For this same reason, they are unlikely to know the servicer's "designated address" for RFI's. The CFPB should require servicers to send a written response upon receipt of an oral inquiry from a potential successor, and this requirement must be contained in an enforceable section of the regulation.

We agree with the Bureau's proposed comment highlighting four examples of documentation that servicers could reasonably require in common scenarios.[47] Based on feedback from advocates through NCLC's national survey and trainings we have conducted around the country on successor issues, clarifications like these are badly needed. However, it is important to note that much of the core of this proposed comment has already been clarified in CFPB Bulletin 2013-12,[48] yet servicers have continued to demand unreasonable and legally impossible documentation. This demonstrates the importance of moving this proposed comment and the specific examples of reasonable and unreasonable documentation to the commentary on an enforceable section of RESPA.

3. *After receiving documentation from a potential successor, a servicer should be required to send a written response notifying the potential successor of the servicer's determination.*

The CFPB has proposed to require servicers to develop policies and procedures reasonably designed, once the servicer has received documentation from a potential successor, to "promptly notify the person, as applicable, that the servicer has confirmed the person's status, has determined that additional documents are required (and what those documents are), or has determined that the person is not a successor in interest."[49] The CFPB has not proposed requiring servicers to provide this information in writing.

The CFPB should require servicers to provide this response in writing. As explained above, communication problems between successors and servicers are widespread and persistent. This is the kind of significant determination of a potential successor's rights (or lack thereof) that should be put in writing. That way, a potential successor will understand what determination a servicer has made and why the potential successor has not been confirmed as a successor. Having this information in writing enables a potential successor to seek help or advice from an advocate.

Moreover, any letter that notifies a potential successor of the servicer's determination that he or she is *not* a confirmed successor should include an explanation of why he or she was not confirmed. This would include explaining, if applicable, "We determined that you are not a successor because it does not appear that you acquired an interest in the property from the original borrower through a transfer:

(a) To a joint tenant by death, devise, or operation of law,
(b) Resulting from a divorce decree or legal separation agreement,
(c) To a relative resulting from the death of a borrower,
(d) To a spouse or child of the borrower, or
(e) To an inter vivos trust."

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47 Proposed Comment 38(b)(I)(vi).

48 The bulletin stated that the documents a servicer could require from a potential successor must be "reasonable in light of the laws of the relevant jurisdiction," and described the problem of a servicer to demanding "probate documents for an estate that is not required to go through probate."

49 Proposed § 1024.38(b)(1)(iv)(C), 79 Fed. Reg. 74176, 74286.

This kind of explanation would allow a potential successor to correct any misunderstanding if, in fact, he or she did obtain an interest in the home through one of these kinds of exempt transfers. And, as recommended above, a potential successor should be able to send a limited Notice of Error contesting a servicer's error related to a determination of successor status. The letter required by this section should also explain a successor's right to send a limited Notice of Error related to successor status and how to exercise that right.

4. *A potential successor should not be required to send the limited Request for Information or Notice of Error to a servicer's "designated address."*

The CFPB should not excuse a servicer from compliance with proposed § 1024.36(i) if a successor fails to send a written inquiry to the servicer's designated address. Most successors have no way of learning of the servicer's designated address, since they are most likely not receiving mortgage statements or other communications from the servicer, and the requirement in § 1024.38 that a servicer provide them with the designated address is not enforceable.

Servicers have the capacity to respond to an inquiry regarding successor status regardless of where the inquiry is received. Servicers are more than capable of funneling all letters related to the servicing of a mortgage loan to the designated office or department capable of responding to these requests. Particularly in an era where almost all documents servicers receive are instantly digitized and uploaded into an electronic system, getting a letter to the right department promptly is no burden at all to servicers. However, imposing a requirement that successors send an inquiry to an address they do not have is likely to be an insurmountable hurdle for them.

5. *Servicers should be required to respond to Requests for Information on other issues related to the servicing of the mortgage once they have received proof of successor status.*

The CFPB is soliciting comment on whether a servicer should be required to respond to a request for information from a potential successor that seeks information beyond how to document successor status. Once a successor establishes his or her identity and successor status, the servicer should be required to respond in writing to other information requests contained in the original oral or written Request for Information. The servicer's time to respond to these other requests should run from the date a successor provides the necessary documentation of his or her successor status. It would be overly burdensome to the successor, and no more convenient to a servicer, to require the successor to send a second letter after establishing her status.

6. *The CFPB should define "promptly" as within five (5) business days.*

The CFPB has proposed to define "promptly" for purposes of a servicer's obligation to respond promptly to an inquiry from a potential successor under § 1024.38 as at least 30 days prior to the next milestone under Official Bureau Interpretation 41(b)(2)(ii).

Although the CFPB does need to define what it means to provide information "promptly" (and preferably in the commentary to an enforceable section of the regulation), it is not logical to tie the deadline to the next 41(b)(2)(ii) foreclosure milestone. Linking the deadline for communicating with a successor to the next milestone could result in a timeframe that is unreasonably long, which harms the successor, or unreasonably short and therefore meaningless (as the CFPB has indicated it knows complying "may not be possible in every case."[50]) For example, if a mortgage loan has not yet fallen into default and the successor continues to struggle along with the payments, giving a servicer until 30 days before the 120th day of delinquency to notify a potential successor of the documents needed to confirm successor status could give the servicer no deadline at all (or, if a successor then begins to fall behind, 90 days). If a potential successor makes contact with the servicer on the 100th day of delinquency (meaning that it would be impossible to respond by 30 days before the 120th date of delinquency) and a foreclosure sale is estimated to be 6 months in the future, this scenario too would result in an unreasonably slow definition of "prompt" – approximately two months later.

Although the CFPB's desire to afford successors maximum protection is laudable and much needed, the best way to achieve this goal and also provide clarity to servicers would be to set a clear definition of "promptly." Within five (5) business days is a reasonable definition of promptly and should provide sufficient time for a servicer to do any of the things listed in 1024.38(b)(1)(vi). Although it may seem like a short timeframe to "identify and facilitate communication with" any potential successor in interest, this timeframe is triggered by receiving notice of the death of a borrower or any other transfer of the property. Upon receiving such notice, a servicer could comply with 1024.38(b)(1)(vi)(A) by simply sending a letter to the person who provided such notice of the death or other transfer (or to the property address, if no other address has been provided), explaining what information is reasonably needed to establish successor status.

A five-day rule would be simple, clear, and uniform. Requiring servicers to determine the next foreclosure milestone and respond 30 days before it is likely to lead to errors and confusion.

7. *The CFPB should add to 1024.41(k) a clarification that a transferee servicer must complete its review of documents submitted by a potential successor to establish successor status within five business days after a transfer of servicing.*

The Bureau has proposed adding several helpful clarifications regarding the obligations of a transferee servicer to promptly review loss mitigation documents when servicing rights are transferred in the midst of a review. It is important to include in this subsection a requirement that if a transferee servicer acquires the servicing of a mortgage loan before the five- day period to complete review of documentation of successor status has expired, the transferee servicer must review the documentation within five business days of the transfer date. A potential successor should be treated as a borrower if the transferee servicer has not within that time period provided a reasonable response stating the potential successor will not be confirmed as a successor.[51]

8. *The CFPB should clarify proposed comment 1026.41(a)-5.*

The CFPB has proposed a comment stating, "If a servicer sends a periodic statement meeting the requirements of § 1026.41 to another consumer, the servicer need not also send a periodic statement to a successor in interest; a single statement may be sent." We believe the CFPB meant this comment to clarify that a servicer need not send an additional periodic statement to a newly

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50 79 Fed. Reg. 74176, 74197.

43 This is consistent with our earlier recommendation that the CFPB should define borrower to include any successor in interest who has provided reasonable proof of his or her identity and ownership interest, unless the servicer provides a timely (within five business days) a reasonable response stating that the potential successor will not be confirmed as a successor.

confirmed successor in interest if it has already sent a statement to the original borrower for that month. However, as it reads, the comment is ambiguous and could suggest that a servicer need never send the confirmed successor a periodic statement. The Bureau should clarify the proposed comment by adding "in a given month" after "to another consumer," and "in that month" after "a single statement may be sent."

G. The CFPB should clarify the rule regarding duplicative applications as it applies to successors in interest.

It is crucial that the CFPB clarify that a previous loss mitigation application submitted by the original borrower rather than the successor should not make the successor's application "duplicative" for purposes of 1024.41(i). The CFPB should make clear in its amendment of 1024.41(i) that a servicer must comply with the requirements of the rule unless the servicer has previously complied for an application submitted by *this* borrower and the borrower has been delinquent at all times since the same borrower submitted the application.[52]

In the proposed Official Bureau Interpretation to 41(b), the CFPB gives servicers one of two options regarding a loan modification application it receives from a potential successor whose successor status it has not yet confirmed. The servicer may opt to review the loss mitigation application, triggering the limit on duplicative applications contained in 1024.41(i), only if confirmation of successor status would not affect the servicer's evaluation of the application. It is difficult to think of any scenario where this would be the case, as HAMP, FHA, Fannie Mae, and Freddie Mac loan modification rules all require a showing of proof of ownership of the home for a simultaneous modification and assumption. Or, a servicer may wait to review the application until it has confirmed successor status, and treat the application as having been received on the date when successor status is confirmed. The Bureau should eliminate the first option and require the latter course, with the caveat (explained previously in these comments) that the servicer's thirty-day timeframe to review the complete application should start to run from the date a successor provides the necessary proof of successor status, not from the date a servicer "confirms" this status.

III. The duplicative request proposal makes progress but must be substantially expanded.

We have strongly opposed the Bureau's harsh rule on subsequent applications that was included in the 2013 RESPA Servicing Rule. The Bureau refers to it as the "duplicative request" rule, but its broad scope covers borrower applications that could hardly be viewed as duplicative, because there are no time or material change limitations. Any request by the borrower for loss mitigation assistance on a mortgage account that is made after a prior complete application has been reviewed, even five or ten years later at a time when the borrower's circumstances have drastically changed, is deemed to be "duplicative." We commend the Bureau for proposing to somewhat limit the reach of the rule, but the proposal does not go far enough to address other appropriate subsequent applications.

[52] As discussed in the next section, the Bureau should further limit the exemption for duplicative requests.

A. The Bureau should add a comment to clarify the scope of the proposed exception.

The Bureau is proposing to revise § 1024.41(i) to provide that servicers are required to comply with the requirements of § 1024.41 unless the servicer has previously complied with § 1024.41 for a borrower's complete loss mitigation application and the borrower has been delinquent at all times since the borrower submitted the prior complete application. This is a sensible limitation on the duplicative request rule and should be adopted.

We agree with the Bureau that proposed § 1024.41(i) would require a servicer to comply with the requirements of § 1024.41 for a subsequent application submitted at any time after the borrower has cured a default that existed when the borrower submitted the prior complete application. The Bureau should include a new comment that clarifies when a borrower is no longer delinquent for purposes of this exception. For example, it would be helpful if a comment referred to a borrower who has obtained a permanent loan modification, noting that the modification cures the borrower's pre-modification delinquency.

B. The duplicative request rule should not apply to an application that a servicer is actually reviewing, even if the servicer had previously complied with § 1024.41 for a prior complete loss mitigation application.

It is critically important that the exception in proposed § 1024.41(i) be expanded further to cover an application that a servicer is actually reviewing, even if the servicer had previously complied with § 1024.41 for a prior complete loss mitigation application. Based on the requirements of loan modification programs and the investor guidelines for many mortgage loans, servicers are often required to review a loss mitigation application even if a prior application from the borrower has been reviewed. For example, under HAMP a borrower is permitted to reapply after previously being denied a loan modification, and the servicer is required to evaluate the borrower based on any subsequent requests. Under the FHA's loss mitigation program, if a borrower fails to successfully complete a trial plan, mortgagees must still re-evaluate the borrower's eligibility for other loss mitigation options.[53] If there has been a change in circumstances, the borrower is eligible to reapply for FHA assistance and begin a second trial plan if found eligible. If the borrower received a permanent loan modification or FHA-HAMP, the borrower is permitted to reapply after a period of 24 months. Under the Fannie Mae loss mitigation program, a servicer must evaluate a borrower's subsequent request for a Fannie Mae HAMP modification if a borrower experiences a change in circumstance and the borrower's previous application was denied because the borrower did not satisfy the eligibility criteria for a Fannie Mae HAMP modification.[54]

As these program guidelines suggest, servicers are reviewing subsequent applications in certain situations despite the existence of § 1024.41(i). NCLC recently conducted a nationwide survey of attorneys and housing counselors representing homeowners. As noted earlier, one hundred and

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[53] *See* HUD Mortgagee Letter 2012-22, Revisions to FHA's Loss Mitigation Home Retention Options, Nov. 16, 2012, available at: http://portal.hud.gov/hudportal/documents/huddoc?id=12-22ml.pdf.

[54] *See* Fannie Mae Servicing Guide, D2-3.2-07: Fannie Mae HAMP Modification (11/12/2014), available at: https://www.fanniemae.com/content/guide/servicing/d2/3.2/07.html.

three advocates responded to the survey, from 24 different states.[55] When asked how often they were handling cases in which a servicer has reviewed an application from a client even though a decision was made on an earlier complete application submitted after January 10, 2014, 52% of respondents answered "most of the time" or "often." These advocates also report that these subsequent applications can be successful in obtaining a positive outcome for the borrower. Five percent of the respondents reported that subsequent applications for a loan modification are approved "most of the time," 19% responded "often," and 56% said "sometimes;" only 20% responded "rarely" or "never."

When a servicer is required to review a subsequent application, or voluntarily elects to do so, it makes no sense to exempt the servicer from following the procedures set out in § 1024.41. One of the significant impacts of the 2013 RESPA Servicing Rule is that servicers are encouraged to use uniform loss mitigation procedures for all borrowers. Section 1024.41 has created an industry standard for handling loss mitigation applications. Borrowers will come to expect over time (if not already) that the minimum protections in § 1024.41 apply whenever a loss mitigation application is being reviewed by a servicer. Section 1024.41 has created certain expectations for borrowers, that they will receive notifications for incomplete applications and loan modification denials, that there are specific time deadlines for evaluations and appeals, and that they will be protected from dual tracking. Borrowers will be confused when these expectations are not met and different procedures are used by servicers for a subsequent application. They will not understand why the § 1024.41 protections do not apply when they are being reviewed on a "duplicative" request. Far worse, borrowers may fail to take action to save their homes from foreclosure, after erroneously concluding that they are protected by the Bureau's dual tracking rule.

The Bureau continues to believe that the duplicative request rule incentivizes servicers and borrowers to focus on and dedicate resources to an initial loss mitigation application. The Bureau stated when first adopting the rule that 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."[56] A similar view is expressed in the Section-by-Section Analysis for the current proposal.[57]

However, this goal is achieved only in the situation where a servicer does not expend resources in reviewing a subsequent application. The duplicative request rule does not actually have the effect of limiting burdens on a servicer's resources in the situation where the servicer is already re-evaluating a borrower who applies for loss mitigation after a prior review. Once a servicer sets out to review an application, the greatest efficiencies are gained by having that application reviewed under the uniform procedures under § 1024.41 that have been incorporated into the operating systems of all servicers.

Another factor that has weighed heavily on the Bureau's consideration of the duplicative request rule is that servicers must have a bright-line test for determining when the rule is applicable. Our proposal satisfies that condition and is easy to administer. Quite simply, if the servicer decides to review a subsequent application, the exemption under § 1024.41(i) does not apply.

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[55] See attached Exhibit D, NCLC Survey of Housing Counselors and Attorneys.
[56] *See* Section-by-Section Analysis, § 1024.41(i), 78 Fed. Reg. 10836 (Feb. 14, 2013).
[57] *See* Section-by-Section Analysis, 79 Fed. Reg. 74227 (Dec. 15, 2014).

Thus, we suggest that the duplicative request rule be revised as follows:

> (i) Duplicative requests. A servicer is exempt from the requirements of this section for a borrower's loss mitigation application if the servicer has previously complied with the requirements of this section for a complete loss mitigation application submitted by a borrower and the borrower has been delinquent at all times since the same borrower submitted the complete application. However, if a servicer reviews a borrower's loss mitigation application despite the exemption in this paragraph, the servicer must comply with the requirements of this section for that application.

C. The Bureau should require the servicer to notify the borrower in writing of its determination that an application is duplicative.

To avoid potential borrower confusion as discussed in the previous section, a servicer should be required to inform the borrower in writing if an application is not being reviewed due to the operation of § 1024.41(i). Similarly, if the Bureau does not adopt our proposal discussed in the previous section, a servicer should also be required to inform the borrower in writing that an application the servicer decides to review despite § 1024.41(i) will not be subject to the requirements of § 1024.41. Importantly, the servicer should not be permitted to raise the exemption in § 1024.41(i) for the first time as a defense when the borrower seeks to enforce a loss mitigation requirement that the borrower believes is applicable. Similar to the Bureau's treatment of the limitation for duplicative requests for information or notices of error, the exemption in § 1024.41(i) should apply only if timely notice is given to the borrower.[58]

We urge the Bureau to add this notification requirement as follows:

> (i) Duplicative requests. A servicer must comply with the requirements of this section for a borrower's loss mitigation application, unless the servicer has previously complied with the requirements of this section for a complete loss mitigation application submitted by a borrower and the borrower has been delinquent at all times since the same borrower submitted the complete application. If a servicer determines that, pursuant to this paragraph, the servicer is not required to comply with the requirements of this section for a borrower's loss mitigation application, the servicer shall notify the borrower of its determination in writing not later than five days (excluding legal public holidays, Saturdays, and Sundays) after making such a determination. The notice to the borrower shall set forth the consequences to the borrower of the determination.

The Bureau should also add a comment that clarifies how the consequences to the borrower of the determination should be described in the written notice. For example, if the servicer will not review the application because of the exemption in § 1024.41(i), the written notice should state this explicitly. If the servicer will review the application despite the exemption in § 1024.41(i), the written notice should provide an explanation of the procedural rights under § 1024.41 that the

[58] *See* 12 C.F.R. § 1024.35(g)(2) and § 1024.36(f)(2).

servicer has determined will not be applicable to the borrower, such as those relating to dual tracking and appeals, if applicable.

D. The Bureau should further limit the duplicative request rule by adding a time limitation.

We have repeatedly requested that the Bureau reconsider the duplicative request rule in its entirety. We feel strongly that no request for loss mitigation arising out of a change in circumstance should be considered a duplicative request. A rule based on a changed circumstance standard more appropriately directs servicer resources to borrowers who are deserving of a second look before losing their homes to foreclosure. However, the Bureau continues to remain concerned that changed circumstance standards will be difficult to administer by servicers, even though servicers are currently applying such standards under existing loss mitigation programs.
The Bureau's proposed exception based on a curing of the default is woefully inadequate and fails to address a large group of borrowers who remain in default and in need of loss mitigation assistance. If the Bureau will again refuse to consider in this docket a changed circumstance exception to the duplicative request rule, the Bureau should at a minimum include an alternative time limitation exception to the rule. Although it is an imperfect solution similar to the proposed default exception, it will provide some additional protection for borrowers and it meets the Bureau's qualification of being subject to a bright-line, simple-to-apply test. Section 1024.41(i) should provide that a servicer is required to comply with the requirements of § 1024.41 for a complete loss mitigation application received more than one year following the evaluation of a prior complete loss mitigation application (whether or not the cure standard has been met).

IV. The Bureau should replace the Complete Application rule with an "Initial Package" rule; if it retains the Complete Application Rule it should require the proposed notice of a complete application and make the five-day response time mandatory.

A. The CFPB should replace the Complete Application Rule with an "Initial Package" rule.

Dual tracking protections should apply when a homeowner has submitted an initial loss mitigation application package, not when a servicer deems the package complete. The current rule, even with the amendments proposed in this docket, fails to interrupt the system of incentives that often results in servicers promoting longer periods of default, less efficient loss mitigation reviews, and increased rates of avoidable foreclosures. While notice of a complete application will empower homeowners in the process once they have reached that stage (as discussed below), the challenge of getting to that coveted moment is in no way addressed by a notice of complete application.

An "initial package" standard would provide benefits to homeowners, communities and investors, including:

- Transforming servicer incentives to better align them with investor and homeowner interests;
- Harnessing the dual tracking protection to serve its intended role as a means to stimulate more efficient and fair loss mitigation reviews;

- Promoting clear and reasonable document requests from servicers;
- Minimizing the problem of lost loss mitigation application documents;
- Helping homeowners better respond to loss mitigation document requests by eliminating the confusion caused by a foreclosure proceeding during the application process; and
- Reducing opportunities for servicers to market less advantageous loss mitigation options to homeowners while they are waiting to complete their loan modification application.

1. *Servicers' incentives incline them toward modifications with increased fees and foreclosures over sustainable modifications.*

Once a loan is in default, servicers must choose to foreclose or modify. A foreclosure guarantees the loss of future income, but a modification will also likely reduce future income, cost more in the present in staffing, and delay recovery of expenses. Moreover, the foreclosure process itself generates significant income for servicers.[59]

Servicers do not make binary choices between modification and foreclosure. Servicers may offer temporary modifications, modifications that recapitalize delinquent payments, modifications that reduce interest, modifications that reduce principal or combinations of all of the above. Servicers may demand upfront payment of fees or waive certain fees. Or servicers may simply postpone a foreclosure, collecting significant fees in the process.

For servicers, the true sweet spot lies in stretching out a delinquency without either a modification or a foreclosure. Income from increasing default fees and payments to affiliated entities can outweigh the expense of financing advances for a long time. This nether-world status also boosts the monthly servicing fee and slows down servicers' largest non-cash expense, the amortization of mortgage servicing rights, since homeowners who are in default are unlikely to prepay via refinancing.[60] Finally, foreclosure or modification, not delinquency by itself, usually triggers loss recognition in the pool. Waiting to foreclose or modify postpones the day of reckoning for a servicer. But delay can cost a homeowner the opportunity to obtain a modification.

These dynamics are exacerbated by the CFPB's "complete application" trigger for dual tracking protections. Under current rules, a homeowner's complete application for loss mitigation will trigger a temporary pause in the initiation or continuation of foreclosure (depending on the timing of the completion). But the incentives to earn more default servicing fees and to delay either foreclosure or modification work against the servicer's duty to efficiently promote the completion of the homeowner's application.

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[59] *See generally* Diane E. Thompson, Foreclosing Modifications: How Servicer Incentives Discourage Loan Modifications, 86 Wash. Law Review 755 (2011); Adam J. Levitin & Tara Twomey, Mortgage Servicing, 28 Yale J. Reg. 1 (2011).

[60] *See, e.g.,* Ocwen Fin. Corp., Annual Report (Form 10-K) 30 (Mar. 12, 2009): Servicing continues to be our most profitable segment, despite absorbing the negative impact, first, of higher delinquencies and lower float balances that we have experienced because of current economic conditions and, second, of increased interest expense that resulted from our need to finance higher servicing advance balances. Lower amortization of MSRs [mortgage servicing rights] due to higher projected delinquencies and declines in both projected prepayment speeds and the average balance of MSRs offset these negative effects. As a result, income . . . improved by $52,107,000 or 42% in 2008 as compared to 2007.

2. *Current practices reflect misaligned incentives and have not been transformed by the CFPB's complete application rule.*

Recent data demonstrate that the problems endemic to the loss mitigation application process are alive and well, and have not been substantially changed by the CFPB privately enforceable "complete application" rule. As a result, the benefits intended to be delivered by the dual tracking protections—relief from the accrual of default servicing fees and an incentive for the servicer to finalize its review of the application—are still too elusive. The "complete application" standard assumes that the challenge resides primarily with homeowner delays in the application process, thus trying to create an incentive for homeowners to finalize the application. The data, however, squarely place a huge portion of the problem at the feet of the servicers. Moreover, as the numbers show, the "facially complete" aspect of the current rule has not stopped servicers from creating ongoing document submission loops, nor has it come close to eliminating the continuation of foreclosures after an application is facially complete.

In a recently conducted nationwide survey by NCLC of attorneys and housing counselors representing homeowners, respondents highlighted the ongoing problems with loss mitigation application submissions.[61]

- Over 80% of respondents stated that they "often" or "most of the time" face servicers requesting documents piecemeal.
- Almost 70% of respondents said that "often" or "most of the time" servicers repeatedly request the same documents.[62]
- Almost 70% of respondents said servicers "often" or "most" of the time ask for additional documents after the homeowner has submitted everything the servicer requested in the 5-day letter.
- Over 20% of respondents stated that servicers "often" initiate foreclosure after the homeowner was told the application was facially complete and the servicer then requested additional information. Almost 40% responded that servicers "sometimes" do this.

Not surprisingly, the timeline for applying for a modification and receiving an answer is still markedly extended. Almost 20% of respondents reported that the loan modification process from start to finish takes 6-9 months. Over one-third of respondents reported that the process on average takes 4-5 months.

Another recent survey by the National Council of La Raza and the National Housing Resource Center,[63] revealed similar problems. The survey, conducted 6-8 months after the effective date of the mortgage servicing regulations, showed substantial, ongoing problems with losing documents, requesting duplicate documents, and failing to seek missing documents in order to finalize a loss mitigation application.

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[61] *See* attached Exhibit D, NCLC Survey of Housing Counselors and Attorneys.
[62] The problem of servicers repeatedly asking for documents already submitted is the real "duplicative request" issue that the CFPB must address. In contrast, as discussed elsewhere in these comments, many requests that are formally identified by the rule as "duplicative" are in fact just the opposite.
[63] *Are Mortgage Servicers Following the New Rules? A Snapshot of Compliance with CFPB Servicing Standards*, National Council of La Raza and National Housing Resource Center (Jan. 9, 2015), *available at* http://www.nclr.org/images/uploads/publications/mortgageservicesreport_11215.pdf.

- 65% of housing counselors said servicers often or always lose documents or repeatedly ask borrowers to submit the same document(s) multiple times.
- 51% of respondents said that servicers occasionally, rarely, or never exercised reasonable diligence to obtain missing documents or information.

As one counselor described,

> *It is rare to get a prompt notice specifying which additional documents are needed to complete the application. We generally have to call to get the information. If we wait for a notice, it comes weeks later…Their notices are virtually incomprehensible. They will re-request documents that have already been supplied, without identifying the problem or issue that causes them to be insufficient.*[64]

3. *The "facially complete" designation does not resolve weaknesses in the "complete application" regime and in fact creates confusion and unneeded complexity.*

The Bureau suggests that consumers are not harmed by arbitrary or erroneous determinations by servicers on the completeness of an application because the rules protect borrowers who have submitted a facially complete application. The complex procedure under § 1024.41(c)(2)(iv) is confusing to borrowers and their advocates, as well as servicers. Participants in loss mitigation often do not know with certainty whether the dual tracking protections apply at various points in the process. This uncertainty and the complicated nature of the facially complete rules inevitably causes mistakes in their application.

In response to servicers' relentless requests for additional information, and duplicative requests for information previously submitted, borrowers can lose protections as the status of their applications as being facially complete changes over time. For example, assume the following timeline and that the servicer has scheduled a foreclosure sale for April 24:

February 1	Application submitted
February 6	5-day acknowledgement notice sent to borrower stating application complete
February 8	Letter sent to borrower that additional documents needed, to be submitted by borrower by March 17
March 20	Borrower submits missing documents

As of February 6, the borrower's application was complete and the borrower was entitled to the dual tracking protections. On February 8, the borrower's application became facially complete based on the operation of § 1024.41(c)(2)(iv), and the borrower continued to be protected. However, because the borrower submitted the missing documents a few days late on March 20 rather than March 17, the borrower's application was no longer facially complete as of March 18 because the borrower did not submit all the missing documents and information listed in the notice required pursuant to § 1024.41(b)(2)(i)(B) within the time period provided in the notice. While the borrower's application became complete or facially complete again on March 20, the application is not considered complete as of the date it was earlier facially complete. Moreover, the date it became complete or facially complete again on March 20 is not more than 37 days before the April 24 scheduled foreclosure sale. Thus, the servicer is not required to continue processing the borrower's

[64] *Id.* at 5.

application under § 1024.41(c), the protections under § 1024.41(d), (e), (f)(2), (g) and (h) do not apply, and the servicer may proceed with the foreclosure sale on April 24.

4. *An "initial package" trigger for dual tracking protections would directly address current problems in the loss mitigation application process.*

Allowing a servicer to be the arbiter of when an application is incomplete flies in the face of everything that is known about how servicers earn income, the challenges homeowners face in seeking loss mitigation from servicers, including home loss, and the stated purposes of the dual tracking rule.[65]

The Bureau should replace the "complete application" rule with an "initial package" standard. The Bureau should use the federal Home Affordable Modification Program ("HAMP") standard, which sets out an appropriate, finite and manageable list of documents that a homeowner must submit in order to qualify for a pause in the foreclosure process. These include:

- A standard application form
- A hardship affidavit
- An authorization for a release of tax returns (4056-T), and
- Evidence of income (which varies depending on the source of the income).

Submission of this package demonstrates good faith on the part of the homeowner and for many homeowners provides enough information for the servicer to make a decision. While under this standard homeowners have faced some challenges with lost documents, the short list of essential documents in the initial package minimizes opportunities for ambiguous requests and inefficient document management prior to the triggering of the pause in the foreclosure process.[66] Moreover, compliance with an initial package rule as part of the CFPB regulations would result in greater compliance than we have seen under HAMP because it would be a privately enforceable, marketwide standard.[67]

Adoption of an "initial package" standard would have multiple advantages. First, it would transform servicer incentives to better align them with investor and homeowner interests. The complete application standard invites servicers to drag out the completion process, which results in higher fees collected by the servicer, as well as a greater likelihood of foreclosure.

Second, the initial package standard would harness the dual tracking protection to serve its intended role as a means to stimulate more efficient and fair loss mitigation reviews. Because there would be a stop on a servicer's ability to charge default servicing fees once an initial package was submitted,

[65] *See generally* Katherine Porter, *The Third Report of the California Monitor: The Complete Application Problem: A Solution to Help Homeowners and Banks Work Together* (June 19, 2013).
[66] While there likely still would need to be a rule to address situations where the servicer stated the initial application was complete but in fact it was not, these instances should be vanishingly small, since the list of documents would be both transparent and quite limited.
[67] In response to those who would say that homeowners have little incentive to finalize the application once they receive a foreclosure stop, it is essential to note that a homeowner who has submitted an initial application still faces increasing arrears due to interest accrual, which itself can make a loan modification more expensive or less likely to garner the approval needed from a positive net present value test.

the servicer's interest would be better aligned with the investor and the homeowner. Servicers would be more likely to seek a quick and accurate loss mitigation review so that any possible foreclosure or loan modification could proceed.

Third, because under an initial package standard servicers would be seeking to finalize packages and finish loss mitigation reviews, they would be more likely to make clear and reasonable document requests. Ambiguous or burdensome document requests would undermine the servicer's interests as well as the homeowner's and investor's. Fourth, an initial package standard would also limit existing problems with lost documents and repeated requests for documents already submitted. Both of these advantages would have particular benefits in the context of transfers of servicing where an initial package was already submitted. The routine would be more likely to be comparable between servicers before and after transfer and thus the continuation of the dual tracking protection would be more clear and likely to stick during the loss mitigation review.

Fifth, under an initial package standard homeowners would be better able to manage document requests from servicers. By pausing the foreclosure process while the application is finalized, this approach would eliminate the confusion caused by foreclosure moving forward during the application process and allow the homeowner to focus on finalizing the application.

Finally, homeowners caught in the vortex of trying to complete a loss mitigation application, most of whom do not have the help of a housing counselor or attorney, often are recipients of ongoing marketing by the servicer of less advantageous resolutions, such as short sales or repayment plans. An earlier pause in the foreclosure process that incentivizes productive action by servicers may undermine the push for less sustainable solutions, and the sense on the part of homeowners that no other options will be on the horizon.

B. If the CFPB does not adopt an "Initial Package" Rule and maintains the "Complete Application" standard, the written notice requirement should be adopted.

Although an alternative "initial package" rule would, as explained above, be far more effective, the Bureau's proposed § 1024.41(c)(3), which requires servicers to provide a written notice of complete application, is a significant improvement to the existing approach. This amendment promotes greater transparency and accountability in the mortgage servicing industry by providing borrowers with important information on the current status of their loss mitigation application and the consumer protections afforded to them under the regulations. This common-sense approach has the potential to reduce confusion, uncertainty, and unjustified denials. However, as written the proposed rule still provides ample opportunity for servicers to continue to delay the review process and evade their obligations under the regulations. The Bureau should adopt the proposed rule with our suggested changes and stringently enforce them to ensure that homeowners are protected and that their loss mitigation applications are evaluated properly and efficiently.

1. *The CFPB should require servicers to provide a written notice promptly upon receipt of a complete loss mitigation application.*

We strongly support the addition of a notice requirement for complete applications. Receipt of a complete application notice would notify the homeowner that she qualifies for certain important protections, such as those against dual tracking. Under dual tracking, a borrower is affirmatively pursuing loss mitigation options while a servicer is simultaneously pursuing foreclosure. Dual tracking confuses borrowers about the status of their application and can lead to unnecessary fees and foreclosures.

Moreover, the Bureau's proposed contents for the notice should be adopted.[68] A notice of complete application should include text stating that the application is complete, the date it became complete, and that the servicer expects to complete its evaluation within 30 days of the date the application became complete. With such notice, homeowners will know when to expect a response from the servicer and thus, as the Bureau points out, make better, timely decisions about their finances.[69]

The notice also serves to limit confusion for both servicers and borrowers by creating a bright line and written record of when the dual tracking protections and other related requirements are triggered. The written notice can also be provided to servicers' counsel to prevent improper filings initiating foreclosures. As the CFPB notes, there have been reports that servicers' counsel lack accurate and current information on a borrower's completed application.[70] This written notice can address that issue by proving updated information to counsel and therefore promoting compliance with the relevant dual-tracking regulations.

We also suggest that the Bureau require servicers to state explicitly in the notice whether a scheduled sale has been canceled or postponed. As noted, the Bureau has received reports of the information disconnect between servicers and their counsel.[71] This amendment would ensure that the servicers and their counsel are taking affirmative steps to delay a foreclosure sale when obligated to do so under § 10241.41(g).

2. *The Bureau should adopt a five-day timing requirement for the notice of complete application.*

Proposed comment 41(c)(3)(i)-1 states that a servicer generally provides prompt notification by providing the written notice within five days of receiving the complete application. The Bureau should adopt the five-day requirement as mandatory and include it in proposed § 1024.41(c)(3)(i). This timing requirement would align proposed § 1024.41(c)(3)(i) with current § 1024.41(b)(2)(i)(B), which requires a servicer to send a five-day letter notifying a borrower whether an initial application is complete or incomplete.

We disagree with the Bureau's stance that a more flexible approach is preferable to a stricter timing requirement. Requiring a servicer to provide a complete notice requirement within five days of receipt would not cause undue delay. Instead, it will prompt servicers to evaluate submitted applications sooner rather than later. Furthermore, servicers are already required to submit a five-day notice in determining whether an initial application is complete or incomplete. Therefore, a five-day timing requirement is reasonable and servicers will not be unduly burdened in complying with this requirement.

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68 Proposed § 1024.41(c)(3)(i).

69 79 Fed. Reg. 74220 (Dec. 15, 2014).

70 79 Fed. Reg. 74224 (Dec. 15, 2014).

71 *Id.*

3. *The Bureau should rigorously enforce the loss mitigation evaluation timelines and ensure that servicers are not unduly delaying the loss mitigation process.*

The Bureau proposes to amend § 1024.41(c)(2)(iv) to expand the definition of a facially complete application to include applications for which a servicer is required to send a notice of complete application under proposed § 1024.41(c)(3). With this proposed change, the Bureau is attempting to reconcile a servicer's potential need for additional information after stating an application is complete with the preservation of borrower protections triggered from the date an application is considered complete under § 1024.41. This rule, while leaving room for reasonable conduct by servicers, also opens up opportunities for abuse and thus must be narrowly drawn and stringently enforced. Servicers routinely request additional documentation after receiving a complete application, which results in a prolonged review process. This rule must not justify such conduct, and any servicer availing itself of the exception must be required to document such additional need.

We applaud the Bureau for retaining the initial date of completeness in amended § 1024.41(c)(2)(iv) as the relevant date for application of the dual tracking protections. The rule provides clarity and consistency for both homeowners and servicers while ensuring that a homeowner will not lose crucial dual tracking protections when the servicer discovers additional information is needed. By holding servicers to the initial date of completeness, the rule should limit the incentives for servicers to promote unnecessary delay during which the servicer could seek to collect additional, unnecessary fees from the homeowner.

However, some servicers continue to ignore the prohibition on dual tracking. For example, when NCLC, as part of a nationwide survey, asked advocates how often are servicers initiating foreclosures after stating an application is complete or facially complete and subsequently requesting additional information, 59.46% of respondents answered "often" or "sometimes."[72] The Bureau must rigorously enforce the prohibition against dual tracking to prevent homeowners from unfairly incurring additional fees and facing improper foreclosures.

We are also generally concerned with servicers continuing to request duplicative and unnecessary documents to prolong the evaluation process. Amended § 1024.41(c)(2)(iv) preserves the rule that the date the application was actually complete is the relevant date for the evaluation timeframe under § 1024.41(c). Currently, § 1024.41(b)(1) defines a complete application as an application for which a servicer has received all the information the servicer requires to conduct a review for all loss mitigation options. Comment 41(b)(1)-1 further provides that the servicer has flexibility to establish the type and amount of information required from borrowers in connection with a loss mitigation review.

By continuing to tie the commencement of the 30-day deadline to the date an application is "actually complete," the rule leaves servicers in a position to request additional documents arbitrarily as a way to move the deadline forward. Although some borrowers may have unique situations, the documents required to evaluate borrowers for loss mitigation options are generally standard financial information documents (i.e., paystubs or profit and loss statement, tax returns, bank statements,

[72] *See* attached Exhibit D, NCLC Survey of Housing Counselors and Attorneys.

etc.).[73] As the rules are written, servicers can restart the 30-day review deadline by requesting additional information before the initial review period expires. By providing unlimited discretion to servicers in requesting additional documentation, the Bureau is inviting continued servicing abuses to the detriment of homeowners.

The Bureau is aware that these repeated requests could impede borrower protections under the rules.[74] Oddly, the Bureau has decided to take a "wait-and-see" approach rather than address the ongoing delay caused by servicers' requests for duplicative or unnecessary information.[75] We strongly urge the Bureau to reconsider this passive approach because borrowers continue to be harmed by servicers' dilatory tactics. For example, servicers continue to delay the evaluation process through piecemeal[76] and duplicative requests for documents.[77] One attorney noted that a servicer requested duplicative documents for close to a year resulting in approximately $15,000 harm (just in arrears) to his client.[78] Furthermore, servicers are rarely abiding by the 30-day review timeline and instead are generally taking closer to four to five months to complete loss mitigation evaluations.[79] To curb ongoing dilatory tactics, the Bureau should require servicers to document the need for additional information explicitly after an application has become complete or facially complete.

4. *The Bureau should adopt the proposed regulation and related comments regarding information not in the borrower's control.*

We support the Bureau's proposed § 1024.41(c)(4) requiring servicers to exercise reasonable diligence in obtaining information not in the borrower's control and explicitly prohibiting servicers from denying a loss mitigation application solely based on the lack of this information. We also applaud the proposed regulation requiring the servicer to provide written notice detailing the information not in the borrower's control that the servicer requires in making a determination on the application.[80]

These requirements are consistent with other proposed amendments aimed at promoting transparency and accountability. Although servicers continue to engage in dilatory tactics in

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[73] The FHFA guidelines, the National Mortgage Settlement, the HAMP program guidelines, and other non-RESPA loss mitigation protocols often define what constitutes a complete loss mitigation application. *See* National Consumer Law Center, *Foreclosures and Mortgage Servicing* (5th Ed. 2014), § 3.2.8.2.6.

[74] 79 Fed. Reg. 74220 (Dec. 15, 2014).

[75] *See id.* (Dec. 15, 2014) ("To determine whether further rulemaking or guidance is required in this area, the Bureau will continue to monitor the market to evaluate whether and to what extent servicers are complying with § 1024.41(c)(2)(iv) by requesting such additional information or corrected documents only when such information is required.").

[76] *See* attached Exhibit D, NCLC Survey of Housing Counselors and Attorneys (finding that when asked how often in the past year did servicers request documents in a piecemeal fashion, 50% of advocates responded "most of the time" and 32.05% responded "often").

[77] *See* attached Exhibit D, NCLC Survey of Housing Counselors and Attorneys (finding that when asked how often in the past year did servicers request the same documents, 42.31% of advocates responded "often" and 26.92% responded "most of the time").

[78] *See* attached Exhibit B, NCLC Survey of Housing Counselors and Attorneys, Complete Application Stories.

[79] *See* attached Exhibit D, NCLC Survey of Housing Counselors and Attorneys (finding that 38.46% of advocates responded that the average review time for a loan modification application was 4-5 months, while only one advocate stated that the average review time was 30 days).

[80] Proposed § 1024.41(c)(4)(B).

evaluating loss mitigation applications, this proposed regulation and related commentary will prompt servicers to seek information more quickly from third parties. If servicers are unable to obtain the information within 30 days of receipt of the complete application, they are required to keep a written record of their efforts.

This proposed rule will improve a borrower's understanding of the application process by providing explicit reasons why a decision has yet to be rendered. Furthermore, a borrower in possession of this information may make an affirmative effort to seek the required information herself or contact the third party to help the process move faster.

5. *Rules pertaining to inapplicable loss mitigation options should be adopted but a narrow rule and rigorous enforcement are key to avoiding abuse.*

In the proposed revision to comment 41(b)(1)-1, the Bureau clarifies that the requirement to review a borrower for all loss mitigation options does not require such consideration where information has been provided by the borrower demonstrating that certain loss mitigation options are inapplicable. It is essential, though, that this rule and its implementation remain narrow so that borrowers do not face exclusion from consideration for loss mitigation where that exclusion is to the detriment of the borrower and where the borrower in fact is eligible. Rightly, the Bureau clarifies that even where a servicer concludes based on information received that a borrower is ineligible for a particular loss mitigation option and thus that certain documents are not needed (allowing the servicer to not collect such documents even if the servicer had requested them), the servicer still must pursue document collection for all remaining loss mitigation options.[81] This process should be documented.

Moreover, we strongly support the Bureau's proposal to prohibit a servicer from stopping the collection of documents and information based only on the borrower's stated preference for a different loss mitigation option. As set out by the Bureau in the 2013 Final Rule, placing a burden on the borrower to choose loss mitigation options is neither appropriate nor efficient.[82] Reviewing a borrower for all applicable loss mitigation options addresses the uneven access to information between the servicer and the homeowner and gives the homeowner better access to home retention options. Moreover, it limits opportunities for steering homeowners into loss mitigation options that may not be optimal for the homeowner.

6. *The exception to the complete application rule for short term repayment agreements where there is an incomplete application only should be adopted with substantial revisions to ensure it is narrowly drawn and with more consumer protections.*

The Bureau's proposal adds comment 41(c)(2)(iii)-4, revises comments 41(c)(2)(iii)-1, 2 and 3, and revises Comment 41(b)(1)-4iii.[83]

Current §1024.41(c)(2)(iii) permits servicers to offer a short-term forbearance plan based upon evaluation of an incomplete loss mitigation application. This provision is an exception to the general principle that servicers must not evade the requirement to review a complete application by offering

81 79 Fed. Reg. 74214 (Dec. 15, 2014).
82 *Id.* (citing 78 FR 10695, 10828 (Feb. 14, 2013)).
83 79 Fed. Reg. 74216-74218 (Dec. 15, 2014).

a loss mitigation option after considering only an incomplete application. The proposed revision to § 1024.41(c)(2)(iii) would add a second option as an exception to the general rule. It would permit servicers to offer a short-term repayment plan without review of a complete application. The revision to comment 41(b)(1)-4 would allow the servicer to suspend due diligence document collection if the borrower accepts one of the two short-term options *and* while the borrower remains in compliance with the short-term option.[84] Under proposed comment 41(b)(1)-4iii the servicer must notify the borrower that that the suspension of efforts to complete the application will occur, offering the borrower the option to complete the application instead of accepting the short-term option.[85]

In our view, the issue addressed in comment 1024.41(b)(1)-4.iii is critical. This comment addresses, albeit in an unsatisfactory way, the consequences of the borrower's default in a repayment plan. The comment requires that a servicer resume due diligence efforts to complete the loss mitigation application the borrower defaults on a repayment plan. Unless this requirement is drafted in way that ensures strict enforcement, the Bureau should not revise § 1024.41(c)(2)(ii) at all to allow the exception for repayment plans. The negative consequences for borrowers of lax application of the exception could be severe. For example, if a borrower enters into a six-month repayment agreement and defaults after one payment (not an uncommon occurrence), five months of additional arrearages could accrue before the agreement ends by its own terms. If the servicer delays resumption of efforts to complete the loss mitigation application during this period, the five months' added arrearage could easily make the difference in whether the borrower keeps the home. The proposed comment addresses this situation by stating, "Near the end of the program or plan, and prior to the end of the forbearance or repayment period, if the borrower remains delinquent, a servicer should contact the borrower to determine if the borrower wishes to complete the application and proceed with a full loss mitigation evaluation."[86] This language is plainly inadequate to address the servicer's obligation upon the borrower's default in a repayment plan.

We recommend revisions to the text of proposed comment 41(b)(1)-4(iii) to address in more detail the consequences of a default in a repayment plan. First, the comment must state clearly that the borrower's default reinstates the servicer's due diligence duty to complete the loss mitigation application. The comment may define a default as the failure to make a payment due under the repayment agreement within thirty days of its due date. Second, the comment should state that the servicer *must* give the borrower a written notice upon default clearly stating that the borrower may submit a complete application and be considered for the full range of loss mitigation options.

Proposed comment 41(b)(1)-4.iii also states that the servicer should contact the borrower "near the end of the program or plan" and determine whether the borrower wishes to continue with a complete application.[87] This provision raises particular concerns for forbearance plans. A forbearance plan, unlike a repayment plan, has a foreseeable outcome that is not dependent on the absence of a payment default. The requirements for the resumption of due diligence efforts following a forbearance plan need not be left vague. Instead, the Bureau should require specific protections and notices for borrowers. For forbearance plans, we recommend that the comment require that the servicer give the borrower a clear written notice of the right to be considered for all

[84] *Id.* at 74217-74218.
[85] *Id.* at 74217.
[86] Proposed comment 41(b)(1)-4.iii), 79 Fed. Reg. 74218 (Dec. 15, 2014).
[87] 79 Fed. Reg. 74218 (Dec. 15, 2014).

loss mitigation options at a fixed time before the forbearance plan expires. This could be, for example, sixty days before the plan's fixed expiration date. The servicer's duties to complete the loss mitigation application and review for all options should resume at this point. For repayment plans, the situation is different. If the borrower is complying with a repayment plan that cures the default, there is no need for any particular notice prior to the expiration of the plan term. However, if the borrower is in default on a repayment plan, our recommended procedure for repayment plan defaults, described above, should apply.

The Bureau's proposed requirement that these short-term options be reduced to writing before they are implemented and that the writing clearly specify the payment terms and duration is very important.[88] Servicers occasionally mislabel these short-term agreements, leading to significant confusion among borrowers. For example, certain servicers confuse borrowers by labeling forbearance or repayment agreements as "modifications" or "forbearance to modification" agreements. These documents sometimes suggest that the forbearance or repayment agreement is the initial stage of a modification or a prerequisite to a modification. Borrowers who entered into one of these mislabeled agreements may believe that they already received a modification. This erroneous belief may deter them from seeking a modification in the future. In other instances, borrowers who fail the short-term options may believe they are ineligible for this reason to be considered for a modification. We recommend that the Bureau's comment address this labeling issue. In addition to requiring that short-term options be reduced to writing and contain well-defined terms, the agreement should state clearly that, regardless of outcome, the agreement does not preclude the borrower from seeking review for the full range of loss mitigation options in the future.

The prohibition on proceeding to foreclosure while the borrower is performing under a short-term repayment plan is entirely appropriate. However, we recommend that other time limits under § 1024.41 be suspended during periods of compliance with a repayment plan as well. For example, the running of the 120-period during which the first notice of filing under § 1024.41(f)(1)(i) is prohibited should be tolled while the borrower remains in compliance with a repayment plan. The scheduling of a foreclosure sale should also be prohibited while the borrower is in compliance with a repayment plan. Suspension of scheduling of a foreclosure sale would prevent triggering the other time limits affecting notices, appeals, and review of a complete application. This approach is fair because the servicer should be receiving at least the full monthly scheduled payments while the borrower is in compliance with a repayment plan. There will be no prejudice to the lender from extending the §1024.41 time frames while the borrower complies with a repayment agreement.

We believe that the limitation to three months arrearage and a six-month repayment period is appropriately narrow.[89]

7. *More precise guidance is needed from the Bureau on a servicer's obligations in setting a reasonable date for a borrower to return documents on an incomplete application.*

In order to address one of the many problems caused by the "complete" application approach in the 2013 Mortgage Servicing Rule for determining when borrower protections apply, the Bureau created the § 1024.41(b)(2)(ii) time period notice requirement. It requires a servicer to

[88] 79 Fed. Reg. 74218 (Dec. 15, 2014).

[89] *Id.*

provide a "reasonable date" in the 5-day acknowledgement notice by which a borrower should submit any missing documents and information to complete a loss mitigation application. Comment 41(b)(2)(ii)-1 was added to provide flexibility to servicers in suggesting an appropriate completion deadline. This comment instructs the servicer to consider four milestones relating to borrower protections under § 1024.41: (1) the date by which any document submitted by a borrower will be considered stale or invalid pursuant to applicable loss mitigation options, (2) the date that is the 120th day of the borrower's delinquency, (3) the date that is 90 days before a foreclosure sale, and (4) the date that is 38 days before a foreclosure sale.

Consumer advocates have reported problems with the time period disclosure to the Bureau. When the milestones referenced in the comment are many months in the future, some servicers have provided borrowers with return dates that are excessive. For example, a borrower in Georgia was sent an acknowledgement notice dated April 21, 2014 that listed August 19, 2014 as the date for the borrower to provide the requested information. We cannot conceive of any situation in which providing almost four months to complete an application is reasonable, yet it may conform to the guidance in current comment 41(b)(2)(ii)-1. Providing too much time to complete an application is harmful to borrowers as it encourages tardiness and may ultimately cause borrowers to lose interest in following through on a loss mitigation application.

The Bureau has responded to this problem by proposing to provide servicers with even more flexibility in setting a reasonable date. Proposed comment 41(b)(2)(ii)-3 states that "a servicer may select any date that it determines both maximizes borrower rights under § 1024.41 and allows the borrower a reasonable period of time to obtain and submit documents and information necessary to make the loss mitigation application complete." An example is provided in the comment that "a servicer may set a reasonable date that is earlier than the nearest remaining milestone listed in comment 41(b)(2)(ii)-2 and does not need to select that milestone as the reasonable date itself."

We believe servicers and borrowers would prefer to have more precise guidance from the Bureau, not more flexibility. The statement in the proposed comment that a servicer "may set a reasonable date that is earlier than the nearest remaining milestone" would not discourage a servicer from selecting a four month return date as in the above example. The Bureau should address explicitly the situation where the nearest remaining milestone will not occur for several months based on the date of a scheduled foreclosure sale when the servicer selects the reasonable date under § 1024.41(b)(2)(ii). The Bureau should create a general default rule for this situation clarifying if the milestones referenced in the comment are at least 45 days in the future, a reasonable period of time should not exceed 30 days.

V. The Bureau should adopt its proposed rules on transfers of servicing and further strengthen them.

We support the Bureau's inclusion in § 1024.41 of a separate, privately enforceable provision establishing requirements for the processing of loss mitigation applications when there has been a transfer of servicing. The servicing rights for a large number of consumer mortgage loans have been transferred in recent years, often to non-bank mortgage servicing companies. These transfers have been accompanied by significant problems, as the Bureau has identified in its Guidance[90] on servicing transfers and in this docket.[91] Despite the existence of the Guidance, and the provisions in existing § 1024.38 and comments 41(i)-1 and 2, consumer advocates continue to report widespread problems. Advocates regrettably have been forced to assume that a new servicer will start from square one no matter where in the application process their client was with the former servicer. In virtually all cases, the new servicer will demand that the borrower start over by submitting a new application or all new supporting documents and information.

Although servicer noncompliance with existing transfer requirements is inexcusable, it has not helped that current comments 41(i)-1 and 2 are placed in the Official Bureau Interpretations in connection with the duplicative request rule, a provision that is tangentially related to servicing transfers. Comments 41(i)-1 and 2 have been largely ignored by servicers, perhaps in part because they do not relate to any specific transfer requirements in § 1024.41. We have criticized this failing of the 2013 RESPA Servicing Rule. Thus, we commend the Bureau for proposing to set out clear transfer requirements in a new, stand-alone provision within § 1024.41.

In general, we strongly support the Bureau's proposals on servicing transfers. Many of the specific provisions are well conceived and will help to address the significant problems in this area. We hope the Bureau will retain in the final rule the many consumer protections contained in the proposal. Our comments focus on the how proposed § 1024.41(k) can be improved.

A. Proposed § 1024.41(k) must be strengthened to prohibit servicers from making duplicative and burdensome requests upon borrowers for information and documents that have been previously provided to a transferor servicer.

We support the proposal to move existing comments 41(i)-1 and 2 into proposed § 1024.41(k)(1)(i). This new provision also expands and clarifies the existing comments, making clear that a transferee servicer must be held to the same standards and timelines as a transferor servicer. It provides that a transferee servicer that acquires the servicing of a mortgage loan for which a loss mitigation application is pending as of the transfer date must comply with:

- § 1024.41's requirements for that application;
- § 1024.41's requirements within the timeframes that were applicable to the transferor servicer, subject to certain limited exemptions;
- § 1024.41(e) through (h)'s prohibitions on commencing foreclosure or conducting a foreclosure sale, to the extent these dual tracking protections applied to a borrower before a transfer.

However, proposed § 1024.41(k) and related comments do little to address the persistent problem of servicers demanding that borrowers effectively start over with a new loss mitigation application

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[90] See Bulletin 2014-01, Compliance Bulletin and Policy Guidance: Mortgage Servicing Transfers, Aug. 19, 2014.

[91] The Bureau has correctly noted that borrowers have no control over whether and when a mortgage loan is transferred and that there is a "heightened risk inherent in transferring loans in loss mitigation." *See* 79 Fed. Reg. 74229 (Dec. 15, 2014), *citing* 79 FR 63295, 63296 (Oct. 23, 2014).

upon transfer. Transferee servicers routinely make duplicative and burdensome requests upon borrowers for information and documents that have been previously provided to a transferor servicer. If a loan is transferred with a loss mitigation application pending or when a borrower is in a loss mitigation program, § 1024.41(k) should clearly specify the obligations of the transferor servicer and transferee servicer to ensure that there is a seamless transfer of information from one to the other.

Section 1024.41(k) should provide that the transferor servicer has an obligation to provide all documents and information that have been provided by a borrower on a loss mitigation application to the transferee servicer at loan boarding. This should include any records of the transferor's discussions with borrowers about loss mitigation and any copies of loss mitigation documents. To avoid problems with borrower accounts not properly flagged as being under loss mitigation review, §1024.41(k) should require that the transferor servicer provide a detailed list of loans with pending loss mitigation applications, as well as approved loss mitigation plans.

Section 1024.38(b)(4) currently requires a transferor servicer to have policies and procedures reasonably designed to provide for timely transfer of all information and documents in its possession or control to a transferee servicer in a form and manner that ensures the accuracy of the information and documents transferred. This regulation has been in place since January 10, 2014, and yet there is no evidence of any improvement with transfer problems in the loss mitigation context. Quite simply, § 1024.38(b)(4) is not effective and has not been taken seriously by servicers, perhaps because there is no private right of action to enforce it or that it merely requires servicers to adopt "policies and procedures that are reasonably designed to achieve the objectives" of the provision. The Bureau should impose specific requirements in § 1024.41(k) upon transferor servicers.

Proposed comment 41(k)(1)(i)-1.i states that a transferee servicer must obtain from the transferor servicer information and documents a borrower submitted to a transferor servicer in connection with a loss mitigation application, consistent with policies and procedures adopted pursuant to § 1024.38. Again, this is wholly inadequate. Section 1024.41(k) or a comment should require a transferee servicer to not only "obtain" information and documents from a transferor servicer, but to also review this information immediately upon boarding to determine if the previously provided information and documents may be used and are sufficient to process the loss mitigation application. Before requesting missing or additional documents and information from a borrower, the regulation should require that the transferee servicer first check with the transferor servicer to determine if those documents are available and can be transferred to the transferee servicer. A comment should explain that requesting additional documents from the borrower and requiring borrowers to resubmit loss mitigation application materials following a transfer should be the exception rather than the rule.

B. If the extension in proposed § 1024.41(k)(2) is provided to transferee servicers, borrowers should be given additional time to complete an application.

Proposed § 1024.41(k)(1)(i) states that subject to the exemptions set forth in § 1024.41(k)(2) through (4), a transferee servicer must comply with § 1024.41's requirements within the timeframes that were applicable to the transferor servicer. Proposed § 1024.41(k)(2) provides that if a transferee servicer acquires the servicing of a mortgage loan for which the period to provide the acknowledgement notice required by § 1024.41(b)(2)(i)(B) has not expired as of the transfer date, the transferee servicer must provide the notice within 10 days (excluding legal public holidays, Saturdays, or Sundays) after the date the transferor servicer received the application.

While providing additional time for transferee servicers to send the acknowledgement notice is reasonable, we are concerned that this may cause borrowers to lose appeal rights, dual tracking protections, and the right even to have a loss mitigation application considered under § 1024.41. Particularly in non-judicial foreclosure states where a foreclosure sale may be scheduled soon after the 120-day delinquency period expires, the delay of even a few additional days for a borrower to receive the acknowledgement notice informing them of what they need to do to complete an application may result in their completing the application past the 90th or 38th day before a foreclosure sale and foregoing the right to an evaluation under § 1024.41(c) or protections under § 1024.41(e) through (h).

Our concern would be alleviated if the Bureau replaced the current complete application rule with an "initial package" rule, so that borrower protections are not tied to a determination that is within the sole discretion of the servicer, as we have advocated elsewhere in these comments. If the Bureau does not abandon this approach, the Bureau should revise the proposal to provide that if proposed § 1024.41(k)(2) is applicable, the borrower should be given additional time to complete an application without losing the right to an evaluation under § 1024.41(c) or protections under § 1024.41(e) through (h). Specifically, when proposed § 1024.41(k)(2) is applicable, all of the time periods under § 1024.41(c) and § 1024.41(e) through (h) should be extended by 10 days as follows:

- If a complete application is received more than 27 days before a foreclosure sale, the borrower's application shall be evaluated under § 1024.41(c);
- If a complete application is received 80 days or more before a foreclosure sale, the borrower shall have at least 14 days to respond to a loss mitigation offer;
- If a complete application is received 27 days or more before a foreclosure sale, the borrower shall have at least 7 days to respond to a loss mitigation offer;
- If a complete application is received more than 27 days before a foreclosure sale, the dual tracking protections under § 1024.41(g) shall apply; and
- If a complete application is received 80 days or more before a foreclosure sale, the borrower shall have all appeal rights afforded under § 1024.41(h).

C. Transferee servicers should be required to send borrowers written notice about the status of their loss mitigation application following a transfer of servicing, regardless of whether the transferor servicer has provided other § 1024.41 notices.

We are concerned that the limited application of proposed § 1024.41(k)(2) will promote confusion and uncertainty by borrowers as to the status of their loss mitigation applications upon transfer. The most pressing concern for borrowers who are mid-stream in loss mitigation at transfer is whether the new servicer will continue with the loss mitigation evaluation. The Bureau's proposal does not require that this essential information be provided in all situations. All borrowers in loss mitigation should get some written confirmation of where they stand with the new servicer.

As discussed in the previous section, proposed § 1024.41(k)(2) provides that if a transferee servicer begins servicing a mortgage loan at a time when the period to provide the acknowledgement notice required by § 1024.41(b)(2)(i)(B) has not expired as of the transfer date, the transferee servicer must provide the notice within 10 days (excluding legal public holidays, Saturdays, or Sundays) after the date the transferor servicer received the application. This provision addresses only the situation in which the 5-business day time period for sending an acknowledgement notice "has not expired" as of the transfer date. At a minimum, proposed § 1024.41(k)(2) should also require the transferee servicer to send the acknowledgement notice if the transferor servicer was required to send the notice but failed to do so prior to the transfer date. The transferee servicer should be required to review the transferred documents to determine if an acknowledgement notice was sent to the borrower, and if not, proposed § 1024.41(k)(2) should apply and require that it be sent to the borrower.

Section 1024.41(k) should also require that within a specified time period the transferee servicer must either send the borrower an acknowledgement notice under § 1024.41(b)(2)(i)(B) stating that information and documents are needed and the deadline for the borrower to respond, or a notice of complete application under proposed § 1024.41(c)(3), regardless of whether the transferor servicer has provided such a notice. The specified time period for these notices should be the earlier of 1) any time deadline for the sending of these notices that would be imposed directly on the transferee servicer under proposed § 1024.41(k)(2) as revised or proposed § 1024.41(c)(3); or 2) no later than 20 days after the transfer date. A shorter time period should apply if a foreclosure sale has been scheduled and the borrower could lose the right to an evaluation under § 1024.41(c) or protections under § 1024.41(e) through (h).

Section 1024.41(k) should provide for an alternative form of compliance if the transferor servicer has sent an acknowledgement or complete application notice to the borrower prior to the transfer date, and the transferee servicer has determined that no additional information or corrections are needed. In that case the transferee servicer should send an abbreviated version of the written notices no later than 20 days after the transfer date reminding the borrower that the documents or information identified in the acknowledgement notice under § 1024.41(b)(2)(i)(B) sent by the transferor servicer are still needed (and the deadline for returning the documents), or stating that the information provided in the notice of complete application under proposed § 1024.41(c)(3) sent by the transferor servicer is still valid and that the transferee servicer will be evaluating the borrower's complete application.

The notice requirements we propose would also provide an opportunity for the transferee servicer to comply with proposed comment 41(k)(1)(i)-1.ii, by notifying the borrower of any changes to the application process, such as a change in the address to which the borrower should submit documents and information to complete the application. The Bureau should also require one of the notices that the servicer gives the borrower to the transferee servicer to include the telephone number for accessing the new servicer's loss mitigation personnel assigned to the borrower under the continuity of contact rule, § 1024.40(a).

D. The Bureau should set firm timeframes for compliance by transferor servicers with the loss mitigation requirements.

Proposed § 1024.41(k)(3)(iii) creates an exception to the duty of a transferee servicer to comply with the time deadlines for evaluating a loss mitigation application. If it is impracticable for a transferee servicer to complete an evaluation within the timeframes set out in § 1024.41(k)(3)(i) or (ii)(A), proposed § 1024.41(k)(3)(iii) requires a transferee servicer to comply with the requirements of § 1024.41(c)(1) and (4) within a reasonably prompt time after expiration of the applicable time period in § 1024.41(k)(3)(i) or (ii)(A).

While we do not question the need for some flexibility in exceptional circumstances, we believe that the exception as drafted will create a gaping loophole for less than diligent servicers to use to avoid compliance. We are concerned with the open-ended nature of an "impracticability" standard, and that the deadline is extended to a "reasonably prompt time" rather than a firm time deadline.

The Bureau suggests in the Section-by Section Analysis that "in most cases it will be practicable for a transferee servicer to evaluate a complete application within the prescribed timeframes, but that there may be unusual circumstances that arise in connection with servicing transfers that warrant an exception to the rule."[92] However, there is no reference to this in the proposed comments. We believe that proposed comment 41(k)(3)(iii)-1 should state explicitly that the Bureau expects that "in most cases it will be practicable for a transferee servicer to evaluate a complete application within the prescribed timeframes." Proposed comment 41(k)(3)(iii)-1 should also give examples of when, despite the transferee servicer's good faith efforts to comply, it would be impracticable for a transferee servicer to complete an evaluation within the timeframes. In our view, impracticability in most cases should not be based on circumstances related to an individual borrower, but rather extraordinary events beyond the control of the transferee servicer relating to unforeseen complications in the transfer of information from the transferor servicer.

Proposed comment 41(k)(3)(iii)-1 provides that for purposes of § 1024.41(k)(3)(iii), a servicer would generally be considered to have acted within a "reasonably prompt time" if the servicer complies with the applicable requirements of § 1024.41(c)(1) and (4) within five days after the expiration of the applicable timeframe in proposed § 1024.41(k)(3)(i) or (ii)(A). The additional five days is reasonable, but it should be incorporated into the exception itself. Proposed § 1024.41(k)(3)(iii) should provide that if compliance is impracticable as clarified in the proposed comment, a transferee servicer may comply with the applicable requirements of § 1024.41(c)(1) and (4) within five days after the expiration of the applicable timeframe in proposed § 1024.41(k)(3)(i) or (ii)(A).

E. The proposed changes that would extend protections to borrowers based on the timing of when a complete application is received by a transferor servicer should be adopted.

Proposed comment 41(k)(3)(i)-1 clarifies that if a borrower's application was complete for a transferor servicer but the transferee servicer needs additional documentation or corrections to evaluate the borrower for all loss mitigation options based upon the transferee servicer's criteria, the application is facially complete as of the date it was first facially complete or complete with respect

[92] *See* 79 Fed. Reg. 74232 (Dec. 15, 2014).

to the transferor servicer, and the borrower is entitled to all of the protections under § 1024.41(c)(2)(iv). If the borrower provides the requested information, proposed § 1024.41(c)(3) requires the transferee servicer to provide a notice of complete application. We strongly support this comment. A borrower should not lose protections under § 1024.41 if a transferee servicer determines that it needs additional documentation or corrections to a previously submitted application.

The proposed comment also clarifies that an application that was complete with the transferor servicer remains complete even if the transferee servicer requests that a borrower resubmit the same information in the transferee servicer's specified format or make clerical corrections to the application. Rather than adopt this comment, the Bureau should prohibit this practice. Borrowers in this situation should not have to resubmit information simply to accommodate the transferee's preferences as to the format of the information. The transferee servicer should have the obligation to takes steps necessary to convert the information into the format it deems appropriate.

Finally, proposed comment 41(k)(3)(i)-2 provides that if a borrower's application was incomplete based upon a transferor servicer's criteria prior to transfer but the transferee servicer determines that the application is complete based upon its own criteria, the application is considered complete as of the transfer date for purposes of proposed § 1024.41(k)(3), and complete as of the date the transferor servicer received the documents and information constituting the complete application for purposes of § 1024.41(e) through (h). We support this proposed comment. However, the comment also should protect the borrower from the application of § 1024.41(c)(1), which requires that the borrower's application must be received more than 37 days before a foreclosure sale in order for the evaluation to be required. Proposed § 1024.41(k)(3) should state that the application is complete as of the date the transferor servicer received the documents and information constituting the complete application for purposes of § 1024.41(c) and § 1024.41(e) through (h).

VI. The Bureau should amend its proposal on the early intervention requirements because the amendment as written undermines and contradicts the purpose of the requirement.

The Bureau's proposed amendments to 12 C.F.R. § 1024.39 and its commentary aim to clarify a servicer's early intervention live contact and written notice obligations to delinquent borrowers. The Bureau reiterates that the early intervention requirements are "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."[93]

Although a number of the proposals promote these aims, we have concerns and suggestions regarding the application of the 180-day limitation on written notices to borrowers who re-default during this period and to successors in interest. As written, these proposed amendments would undermine and contradict the purpose of the early intervention requirements to facilitate communication between a borrower and servicer to help the borrower avoid unnecessary foreclosure and other harms. To correct these two problems, we urge the Bureau to amend its proposed rule as follows:

[93] 79 Fed. Reg. 74176-01, 74186 (Dec. 15, 2014) (quoting 78 Fed. Reg. 10695, 10791 (Feb. 14, 2013).

- The 180-day limitation should not apply if the borrower cures the default after receiving the 45-day written notice and defaults again within the 180-day period.
- Eliminate proposed comment 39(b)(1)-(5) and instead clarify that the 180-day limitation does not apply to a successor in interest where the prior notice triggering the 180-day waiting period was provided to the prior borrower.

These and other aspects of the proposed rule are discussed below.

A. The Bureau should clarify that a servicer has recurring live contact obligations, but these obligations are satisfied when the servicer complies with the loss mitigation rules.

The proposed amendments to 12 C.F.R. § 1024.39(a) and its commentary clarify that "a servicer's early intervention live contact obligations recur in each billing cycle while a borrower is delinquent."[94] The Bureau, however, recognizes that the live contact requirements may be unnecessary in certain circumstances. Proposed comment 39(a)-(6) states that a servicer complies with § 1024.39(a) if the servicer is currently working with a borrower in completing or evaluating a borrower's loss mitigation application, or if the servicer has sent the borrower a written denial letter pursuant to § 1024.41(c)(1)(ii).[95] A servicer, however, is required to "resume compliance with the requirements of § 1024.39(a) for a borrower who cures a prior default but becomes delinquent again."[96]

Proposed comment 39(a)-6 is appropriate because the live contact requirements under § 1024.39(a) are superfluous when a borrower has already applied or is in the process of applying for loss mitigation pursuant to § 1024.41. We agree that in these instances, "repeated or parallel attempts by the servicer to establish live contact pursuant to the requirements of § 1024.39(a) may be confusing or harassing."[97] Similarly, a servicer's repeated attempts to establish live contact "may frustrate or even harass a borrower who was recently denied for loss mitigation."[98]

We also applaud the proposal requiring a servicer to resume its live contact obligations for a borrower who re-defaults.[99] This clarification recognizes that a borrower may face new hardships after curing a prior default and would benefit from the servicer resuming live contact compliance at the early stage of delinquency where loss mitigation success is most likely.

B. The Bureau should not apply the 180-day limitation on written notices to borrowers who have cured their default but fall behind during the same period.

Under the proposed revisions to § 1024.39(b)(1) and its commentary, the Bureau states that it is attempting "to clarify the frequency with which a servicer must provide the written early intervention notice and to ensure consistency with the proposed revisions to the live contact

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[94] 79 Fed. Reg. 74176-01, 74198 (Dec. 15, 2014).
[95] Proposed Official Interpretations to Reg. X, 1024.39(a)-6, 79 Fed. Reg. 74176-01, 74292 (Dec. 15, 2014).
[96] Proposed Official Interpretations to Reg. X, 1024.39(a)-6, 79 Fed. Reg. 74176-01, 74292 (Dec. 15, 2014).
[97] 79 Fed. Reg. 74176-01, 74199 (Dec. 15, 2014).
[98] 79 Fed. Reg. 74176-01, 74200 (Dec. 15, 2014).
[99] 79 Fed. Reg. 74176-01, 74200 (Dec. 15, 2014).

requirements in § 1024.39(a)."[100] The revisions are intended to preserve the servicer's recurring obligation to provide a written notice no later than the 45th day of the borrower's delinquency, but would not require a servicer to send such a notice more than once in any 180 day period.[101] The servicer, however, must send a written notice again if the borrower remains delinquent or becomes 45 days delinquent again after the 180-day period expires.[102]

The 180-day limitation is appropriate if there is a continuing default during the 180-day period. If the borrower cures the default after receiving the 45-day written notice and defaults again within the 180-day period, however, the early intervention notice requirements should apply. This exception to the 180-day limitation would be consistent with the proposal requiring servicers to resume live contact compliance under § 1024.39(a) for a borrower who cures a prior default but becomes delinquent again. The 180-day limitation in this situation would delay the transmission of important information to a borrower who would benefit from receiving a written notice sooner rather than later. Such a delay could increase the potential risk of foreclosure and other harms to the borrower. Furthermore, a written notice contains more information than is provided through live contact and can be reviewed by a borrower's housing counselor or attorney.

C. The Bureau should clarify that the 180-day limitation on written notices does not apply to a successor in interest where the prior notice triggering the 180-day waiting period was provided to the prior borrower.

Under proposed comment 39(b)(1)-(5), a servicer would not be required to send a written notice to a confirmed successor in interest if the servicer had previously provided the notice to the prior borrower pursuant to § 1024.39(b) before the successor in interest status was confirmed.[103] The servicer, however, would be obligated to provide a confirmed successor in interest with any additional written notices required under § 1024.39(b).[104]

This proposed comment should be eliminated because it would harm successors in interest by delaying their access to important information contained in the written notice until the 180-day period has expired. This delay undermines the purpose of the early intervention requirements to provide homeowners with access to information about the mortgage, help avoid unwarranted or unnecessary costs and fees, and prevent unnecessary foreclosure. Instead, the Bureau should clarify that the 180-day limitation does not apply to a successor in interest where the prior notice triggering the 180-day waiting period was provided to the prior borrower.

The Bureau incorrectly surmises that "it would be unnecessary and difficult for servicers to provide additional copies of the written early intervention notices that servicers have already provided to the prior borrower" and "in many cases, successors in interest may have received the original notice mailed by the servicer to the prior borrower."[105]

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[100] 79 Fed. Reg. 74176-01, 74200 (Dec. 15, 2014).
[101] Proposed 12 C.F.R. § 1024.39(b)(1), 79 Fed. Reg. 74176-01, 74286 (Dec. 15, 2014).
[102] Proposed 12 C.F.R. § 1024.39(b)(1), 79 Fed. Reg. 74176-01, 74200, 74286, (Dec. 15, 2014).
[103] Proposed Official Interpretations to Reg. X, 1024.39(b)(1)-5, 79 Fed. Reg. 74176-01, 74292 (Dec. 15, 2014).
[104] Proposed Official Interpretations to Reg. X, 1024.39(b)(1)-5, 79 Fed. Reg. 74176-01, 74292 (Dec. 15, 2014).
[105] 79 Fed. Reg. 74176-01, 74201 (Dec. 15, 2014).

Sending an additional written notice to a successor is not costly. The Bureau acknowledges that successors in interest comprise a vulnerable group and "providing consumer protections to this vulnerable group justifies the cost."[106] In this instance, servicers are already required to provide a written notice to a prior borrower and the additional cost of mailing the same notice to a successor is minimal. Furthermore, an additional written notice to a successor would serve to prevent unnecessary foreclosure by alerting successors in interest to any delinquency and assisting with the process of applying for loss mitigation options at an earlier stage instead of waiting until the 180-day period has expired.

The Bureau's assumption that a successor has most likely received the prior borrower's original notice is misguided and ignores the reality faced by many members of this vulnerable group. For example, in a divorce or separation, especially in situations where domestic violence is implicated, the prior borrower and successor may not have any form of communication. Also, a prior borrower may have provided the postal service with a change of address request and the successor who remains in the home may not be aware that a written notice had been mailed to the prior borrower. The unwarranted assumption that the successor has received the original notice, will harm successors by leading to delay in their receipt of the important information contained in the written notice, particularly information regarding loss mitigation options.

D. The Bureau should clarify that the 180-day limitation on written notices is not triggered for a transferee servicer when the transferor servicer provides the prior notice.

We applaud the Bureau for adding proposed comment 39(b)(1)-6 that clarifies the written notice obligations of transferee servicers and states that the 180-day limitation does not apply where the prior notice triggering the 180-day limitation was provided by the transferor servicer prior to the transfer.[107] We agree that a delinquent borrower would benefit from receiving a written notice from the transferee servicer sooner rather than later. This clarification is also particularly important given the current prevalence of mortgage servicing rights sales that subject many borrowers to new servicers.

VII. The specific conditions that trigger the proposed exemption for early intervention notifications to a borrower who has sent an FDCPA "cease communication" notice should be revised and the safe harbor should be eliminated or clarified to only apply where all notice requirements are met.

Section 1024.39(d)(2) currently exempts servicers who are subject to the FDCPA for a mortgage loan from the early intervention requirements if the borrower has sent a "cease communication" notification pursuant to FDCPA section 805(c), 15 U.S.C. 1692c(c). We opposed this exemption when it was adopted as part of the October 2013 Interim Final Rule (IFR). In our comments regarding the IFR, we expressed concern that the exemption would have a chilling effect on consumers exercising their rights under the FDCPA, and unnecessarily reduce the benefits of potential loss mitigation opportunities for these consumers. Consumers who have sent an FDCPA

[106] 79 Fed. Reg. 74176-01, 74187 (Dec. 15, 2014).
[107] Proposed Official Interpretations to Reg. X, 1024.39(b)(1)-6, 79 Fed. Reg. 74176-01, 74292 (Dec. 15, 2014).

"cease communication" notification have done so because they felt harassed by the servicer's collection efforts. But this does not mean that these consumers would not benefit from and wish to engage in loss mitigation discussions with the servicer and receive current information about loss mitigation options. Consumers should not be forced to make a choice between exercising their rights under the FDCPA and receiving information about potential loss mitigation options. Moreover, consumers who have provided the cease communication request are very likely not to know about the loss mitigation options that they are foregoing by sending the request.

We are pleased that the Bureau's proposal partially lifts the exemption from the written early intervention notice requirements of § 1024.39(b). However, we have concerns with the specific conditions that trigger the exemption, and we oppose the proposed "safe harbor" from liability under the FDCPA.

A. The Bureau should clarify that the exemption for the live contact requirement does not apply if the borrower has initiated contact with the servicer.

Subject to the caveat below, we agree with the proposal to maintain the current exemption from the live contact requirements of § 1024.39(a). Under proposed § 1024.39(d)(2)(i), a servicer subject to the FDCPA with respect to a mortgage loan is exempt from the early intervention live contact requirement under § 1024.39(a) if the borrower has sent a FDCPA section 805(c) notification. However, we urge the Bureau to ensure that there can be live contact between the consumer and the servicer if the borrower has initiated contact with the servicer and has sought assistance with a delinquency or requested information about potential loss mitigation options.

A borrower who has sent a cease communication notification under the FDCPA may be interested in pursuing loss mitigation options and may contact the servicer and request information about the availability of such options. The Bureau anticipates that this will happen, and has indicated that a servicer should respond under these circumstances even if a cease communication notice has been sent. The Bureau notes that a servicer may, for example, "discuss with a borrower available loss mitigation options that the owner or assignee of the borrower's mortgage loan offers, instructions on how the borrower can apply for loss mitigation, what documents and information the borrower would need to provide to complete a loss mitigation application, and the potential terms or details of a loan modification program, including the monthly payment and duration of the program."[108]

Our concern, however, is that the Bureau is proposing to address these borrower-initiated communications in a separate advisory opinion interpreting the FDCPA cease communication requirement. We believe that the Bureau should issue guidance in Regulation X itself, either as an amendment to proposed § 1024.39(d)(2)(i) or in a comment. Moreover, we oppose the Bureau's plan to provide in the advisory opinion that servicers will have a safe harbor from liability under the FDCPA for an act done or omitted in good faith in conformity with the advisory opinion. Our reasons for opposing the safe harbor are similar to those discussed below in relation to the proposed safe harbor for the written early intervention notice.

[108] See Section-by-Section Analysis, 79 Fed. Reg. 74212 (Dec. 15, 2014).

B. The availability of loss mitigation options should not determine whether a borrower is sent the early intervention written notice.

Proposed § 1024.39(d)(2)(ii) requires that a servicer must provide a modified written early intervention notice to a borrower who has sent an FDCPA cease communication notification, but only if loss mitigation options are available. While we support the Bureau's proposal to partially lift the exemption from the written early intervention notice requirements of § 1024.39(b), we urge the Bureau to reconsider its decision to make the lifting of the exemption conditioned upon the availability of loss mitigation options.

As we discuss in our separate comments on the bankruptcy exemptions, current comment 39(b)(2) instructs servicers that they may include a generic list of loss mitigation options that they offer to borrowers in the written early intervention notice, without making a determination whether the borrower receiving the notice would qualify for the listed options. Importantly, nothing in the current regulation or comment would excuse a servicer from sending the written notice if no loss mitigation options are available to consumers who had not provided the cease communication notice.

This is further reinforced by proposed comment 39(b)(2), which provides that if loss mitigation options are available, a servicer must include in the written notice the disclosures required by § 1024.39(b)(2)(iii) and (iv). The proposed comment further explains that loss mitigation options are available if the owner or assignee of the mortgage loan generally makes alternatives to foreclosure available through the servicer, irrespective of the borrower's eligibility for those alternatives. The obvious implication from the proposed comment and current regulation is that if no loss mitigation options are available, the written notice must still be sent, absent the disclosures required by § 1024.39(b)(2)(iii) and (iv). The requirement to provide the written notice does not turn on whether loss mitigation options are available. We agree with this requirement because the servicer may make a mistake in its determination of whether the borrower would be eligible for some option.

Contrary to proposed comment 39(b)(2) and current § 1024.39(b), proposed § 1024.39(d)(2)(ii) conditions the duty to send the early intervention written notice to a borrower who has sent an FDCPA notification upon the availability of loss mitigation options. We are concerned that the proposal will lead to erroneous determinations by servicers about the availability of options based on incomplete information, depriving borrowers of the written notice. It could provide an opportunity or pretext to circumvent the requirement and serve as an improper excuse for noncompliance by servicers. Proposed comment 39(b)(2) helps to clarify that the availability of loss mitigation options should not involve an individualized determination as to the borrower's eligibility for options. However, proposed comment 39(b)(2) provides commentary on the content of the written notice and it does not expressly state that it is applicable to the exemption under proposed § 1024.39(d)(2)(ii). Even if proposed comment 39(b)(2) is made expressly applicable, we believe that the FDCPA exemption should be consistent with the overall early intervention policy: the availability of loss mitigation options should affect only the disclosures required by § 1024.39(b)(2)(iii) and (iv), not whether the written notice should be provided at all. There is nothing unique about a borrower's cease communication notification that warrants a departure from the Bureau's current policy.

C. The Bureau should permit in limited circumstances the sending of the written early intervention notice more than once during a 180-day period.

Proposed § 1024.39(d)(2)(iii) modifies the written early intervention notice for borrowers who have sent an FDCPA cease-contact letter. In addition to the information required by § 1024.39(b)(2), the modified notice must include "a statement that the servicer may or intends to invoke its specified remedy of foreclosure." To assist servicers in complying with this requirement, the Bureau has prepared model clause MS-4(D), found in appendix MS-4 to Part 1024. Proposed model clause MS-4(D) states: "This is a legally required notice sent to borrowers who are at least 45 days delinquent. We have a right to invoke foreclosure. Loss mitigation or other alternatives may be available to help you avoid losing your home."

Proposed § 1024.39(d)(2)(iii) also prohibits a servicer from including a request for payment in the modified written notice, and from providing the written notice more than once during any 180-day period.

We do not oppose these modifications to the written early intervention notice. For the reasons stated in Section VI of these comments, however, the servicer should be required to send the written early intervention notice more than once during any 180-day period if there has been a cure of a default and subsequent re-default by the borrower within the 180-day period. Thus, we oppose the prohibition in § 1024.39(d)(2)(iii)(C) as currently written, and recommend that it be revised to require a new early intervention notice if the borrower cures and then redefaults.

D. The Bureau should not provide servicers with a safe harbor from liability for sending the modified early intervention written notice.

The Bureau is proposing in comment 39(d)(2)(iii)-1 to provide servicers a safe harbor from liability under the FDCPA with respect to the written early intervention notice requirement. Proposed comment 39(d)(2)(iii)-1 provides:

> To the extent the FDCPA applies to a servicer's communications with a borrower, a servicer does not violate FDCPA section 805(c) by providing the written notice required by § 1024.39(d)(2)(iii) after a borrower has sent a notification pursuant to FDCPA section 805(c) with respect to that borrower's loan. In providing the borrower the written notice, the servicer must continue to comply with all other applicable provisions of the FDCPA, including prohibitions on unfair, deceptive, and abusive practices as contained in FDCPA sections 805 through 808 (15 U.S.C. 1692c through 1692f).

The comment appears to provide servicers with blanket protection any time they provide the written notice required by § 1024.39(d)(2)(iii), under all circumstances, no matter what is contained in the letter. The first sentence of the comment does not specify that the safe harbor applies only if the written notice satisfies the requirements of § 1024.39(d)(2)(iii). For example, a "written notice required by § 1024.39(d)(2)(iii)" sent to a borrower could provide a servicer with a safe harbor from liability under the FDCPA even if it included a request for payment or a request that the borrower bring the account current, and even if the notice was sent multiple times within a short period to time. Although the second sentence in the comment warns the servicer that it must comply with "all other applicable provisions of the FDCPA," the servicer is in this example would not be liable for these clear violations of FDCPA section 805(c).

We urge the Bureau to delete comment 39(d)(2)(iii)-1. If the Bureau elects to retain this comment, it should clearly specify that the safe harbor applies only if the servicer complies in all respects with proposed § 1024.39(d)(2).

VIII. Periodic statement and payment application requirements relating to temporary loss mitigation programs, acceleration and loan charge-off should be further amended.

A. The Bureau should amend its proposed comments to § 1026.41(d) to require servicers to disclose the temporary loss mitigation payment amount when a borrower has agreed to a temporary loss mitigation program.

We agree with the Bureau's proposed comment 1026.41(d)-4,[109] which provides that the disclosures required by § 1026.41(d)(2), (3), and (5) regarding how payments will be and were applied should identify that payments are being applied according to the permanent loan contract, even when a borrower is in a temporary loss mitigation program. This is accurate, because during a temporary loss mitigation program, the permanent contract terms have not yet been changed.

However, the Bureau's proposed comments 41(d)(1)-2 and 41(d)(2)-2 regarding the content of periodic statements while a borrower is participating in a temporary loss mitigation program are problematic. The Bureau has proposed to allow servicers to list as the amount due on the periodic statement "either the payment due under the temporary loss mitigation program or the amount due under the loan contract."[110] The Bureau should instead require that servicers disclose as the amount due the payment due under the temporary loss mitigation program if the borrower has agreed to such a temporary program.

When a servicer offers and a borrower accepts a temporary loss mitigation program, such as a forbearance plan or trial modification, the servicer is contractually required to honor that temporary loss mitigation program so long as the borrower makes the required payments in a timely manner. Even though the contractual agreement does not include permanently changing the terms of the loan (until a borrower completes the trial modification payments), and the temporary payments will not be applied to the account until a full contractual payment accumulates, the servicer has agreed (and is bound by applicable program rules) not to foreclose so long as the borrower continues to make this reduced payment. When a borrower and servicer have entered into such an agreement, it is extremely confusing to the average borrower to receive a periodic statement that reflects the contractual amount due. This would lead the average borrower to believe that the servicer has rejected or will not honor the temporary loss mitigation agreement.

[109] Proposed Comment 1026.41(d)-4, 79 Fed. Reg. 74176, 74303.
[110] Proposed Comment 1026.41(d)(1)-2, 79 Fed. Reg. 74176, 74303.

The Bureau reasons that it might be burdensome to require a servicer to change the periodic statement during a temporary loss mitigation program because these programs "are common and may be entered into for very short durations."[111]

To suggest that temporary loss mitigation programs are so common and short-lived, as if borrowers are constantly bouncing in and out of them, is not accurate. Most borrowers will be offered one, or at most two, temporary loss mitigation programs while they are experiencing financial hardship. If a borrower is unemployed for a time, he or she may be offered a forbearance followed by a trial modification upon regaining employment. If a borrower never enters into a forbearance - and the vast majority will not – he or she is most likely to be offered only one temporary loss mitigation program. This one temporary program will be a trial loan modification, which should be followed by a permanent modification. If a borrower rejects a trial modification offer under HAMP, he or she cannot qualify for another HAMP modification unless there is a change of circumstances.[112] And, if the borrower defaults on a HAMP Tier 1 trial modification, no subsequent HAMP Tier 1 modification will be offered – leaving as the only potential option HAMP Tier 2. If servicers comply with the existing RESPA regulations and properly review borrowers for all available loss mitigation options at once, then complying with a requirement to modify the periodic statement when a borrower is in a temporary loss mitigation program should not be burdensome.

The Bureau also expresses a concern that requiring servicers to change the amount due on the periodic statement when a borrower has accepted a temporary loss mitigation program might deter servicers from extending offers for temporary loss mitigation program.[113] However, the cost to servicers of making this adjustment will be minimal, and servicers do not have discretion to deny a borrower a trial modification or forbearance when the applicable program rules (HAMP, Fannie, Freddie, or FHA) require approving a borrower for such a program. These rules, which govern the majority of mortgage loans, require servicers to extend temporary loss mitigation because it can lead to a permanent modification and home retention – which is better by far for the investor who owns the loan. When servicers are required to extend these options, they should clearly convey that the option is real, by modifying the periodic statement appropriately.

Servicers should be required to put on the periodic statement information that is accurate and not confusing. This means stating the required payment amount as the amount due under the temporary loss mitigation program. If servicers list the amount contractually due, most borrowers would think that they are required to send that amount and that the servicer has terminated their temporary loss mitigation program. This is particularly harmful to consumers in light of the Bureau's harsh "duplicative application rule," which may prevent borrowers from being evaluated for another temporary loss mitigation program if, prompted by confusion, they fail to perform on the initial program.

Giving servicers a choice between disclosing the contractual amount due and the amount due under the trial modification or forbearance makes no sense, and will result in a great deal of confusion and failed temporary loss mitigation attempts.

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111 Section-by-Section Analysis, 79 F.R. 74176, 74240.
112 Making Home Affordable Handbook, Version 4.4, Ch II, § 1.2.
113 Section-by-Section Analysis, 79 Fed. Reg. 74176, 74240.

B. **The Bureau should require servicers to include an explanation of amount due that includes both the contractual amount due and the temporary loss mitigation payment whenever a borrower has agreed to a temporary loss mitigation option.**

We strongly advocate requiring the periodic statement to disclose the temporary loss mitigation payment as the amount due. However, if the Bureau does not adopt that recommended change to the commentary on periodic statements, it should at the very least require that regardless of which amount is listed in the amount due when a borrower has agreed to a temporary loss mitigation program, all servicers must include in the periodic statement's "explanation of amount due" both the contractual amount due and the required payment under the temporary loss mitigation agreement and an explanation of why the two amounts are different. This explanation should be required on the first page of the periodic statement – not on a separate page and certainly not in a separate letter. The payment amount is <u>the</u> most critical piece of information contained on a periodic statement – it would make no sense to bury a crucial explanation of that information in a separate letter or page.

Therefore, the Bureau's proposed comment 41(d)(2)-2 should at least be amended as follows:

> 2. Temporary loss mitigation programs. If the consumer has agreed to a temporary loss mitigation program ~~and the amount due identifies the payment due under the temporary loss mitigation program~~, the explanation of amount due under § 1026.41(d)(2) should include both the amount due according to the loan contract and the payment due under the temporary loss mitigation program. The statement should also include an explanation <u>that the borrower may continue to participate in the temporary loss mitigation program by sending that payment amount</u>~~that the borrower may continue to participate in the temporary loss mitigation program by sending that payment amount~~. The explanation should be on the front page of the statement~~ or, alternatively, may be included on a separate page enclosed with the periodic statement or in a separate letter~~.

C. **The Bureau should clarify in proposed comment 36(c)(1)(i)-4 that payments under a temporary loss mitigation program are subject to the payment application requirements for partial payments.**

Proposed comment 36(c)(1)(i)-4 provides that if a consumer has agreed to a temporary loss mitigation program, the periodic payment under § 1026.36(c)(1)(i) does not change until the loan contract has been permanently modified. The periodic payment for purposes of the regulation remains an amount sufficient to cover principal, interest, and escrow (if applicable) for a given billing cycle under the loan contract, irrespective of the payment due under the temporary loss mitigation program.

We are concerned that proposed comment 36(c)(1)(i)-4, by itself, will cause servicers to mistakenly believe that payments under a temporary loss mitigation program are treated differently than other partial payments, and that they are not subject to the customary requirements for application of partial payments. Proposed comment 41(d)-4 could further this misperception, by stating that if the consumer has agreed to a temporary loss mitigation program, the disclosures required by § 1026.41(d)(3) regarding how temporary plan payments "will be and were applied should identify how payments are applied according to the loan contract, irrespective the loss mitigation program."

We agree that the periodic statement should reflect how payments are actually being applied under the contract, but are concerned that servicers may construe this as exempting temporary plan payments from the payment application requirements under § 1026.36(c)(1)(i).

To avoid any possible confusion, the Bureau should clarify in proposed comment 36(c)(1)(i)-4 that a servicer must treat a payment made under a temporary loss mitigation program as a partial payment under § 1026.36(c)(1)(i). The comment should specify that if the servicer places temporary plan payments in a suspense or unapplied funds account, the servicer must disclose this on the periodic statement as required by § 1026.41(d)(3), and the servicer must apply the temporary plan payments in a suspense account once there are sufficient funds in the suspense account to cover a periodic payment.

D. Periodic statements should clearly identify any conditions for payment of the reinstatement amount after acceleration.

After acceleration of a mortgage loan, state law or the mortgage loan documents typically require that a mortgage holder (and its servicer) accept a lesser amount to reinstate the loan. We agree with the Bureau that consumers may be confused by receiving a periodic statement after acceleration that lists as the amount due as the full accelerated loan balance. Thus, we support proposed comment 41(d)(1)-1, which provides that if the mortgage loan has been accelerated but the servicer will accept a lesser amount to reinstate the loan, the amount due disclosed on the periodic statement under § 1026.41(d)(1) should identify only the lesser amount that will be accepted to reinstate the loan, not the entire accelerated balance.

However, we are concerned that including this information on the periodic statement, without an explanation of any conditions placed on acceptance of the reinstatement amount by the servicer, may cause consumers to lose the right to reinstate the mortgage loan. For example, Paragraph 19 of the Fannie Mae/Freddie Mac Uniform Mortgages, Deeds of Trust, or Security Deeds provides that unless some other applicable law provides for a different time period, borrowers may reinstate the loan until "five days before sale of the Property pursuant to any power of sale contained in this Security Instrument." If a borrower receives a periodic statement on March 23 listing the reinstatement amount as due on April 1 (assuming payments are due on the first of the month), and a foreclosure sale has been scheduled for March 31, payment of the reinstatement amount on the due date listed on the statement will likely not be accepted as the home will have already been sold at a foreclosure sale. If the servicer lists in the amount due box the date for avoiding a late fee as required under § 1026.41(d)(1)((ii), such as April 15 in this example, the borrower may be encouraged to further delay payment at the risk of foreclosure or loss of the reinstatement right.

After acceleration, many servicers have specific requirements as to how the reinstatement amount must be paid. Servicers may specify in the acceleration notice that payment must be in the form of certified check sent to the attorney handling the foreclosure on behalf of the servicer. Sending a personal check by ordinary mail to the address for the servicer's payment center listed on the periodic statement, as would normally be done, will cause tender of the reinstatement amount to be rejected (or possibly late).

The Bureau should require that the periodic statement include an explanation of any requirements for the consumer to follow in making payment of the reinstatement amount. Importantly, any deadline for acceptance of the reinstatement amount must be clearly stated on the periodic statement. The servicer should be required to ensure that the periodic statement is consistent with any acceleration notice sent to the borrower under state law or the mortgage loan documents.

E. Further revisions are needed to the periodic statement exception for charged-off loans.

The Bureau's periodic statement rule requires that a creditor, assignee, or servicer of a home mortgage loan must provide the consumer with a periodic account statement in each billing cycle.[114] These are typically monthly statements. The rule sets out specific content and a recommended form for the periodic statement. There are very limited exemptions from the requirement to give these statements. The exemptions are listed in § 1026.41(e) (reverse mortgages, loans owned by certain small lenders, the provision of coupon books instead of periodic statements for loans not in default, and certain bankruptcy-related exemptions). The Bureau now proposes to add a new exemption from the periodic statement requirement, proposed as § 1026.41(e)(6).[115] This exemption would apply to a loan that the servicer/creditor charged off in accordance with its loan loss provisions and for which the servicer/creditor plans to assess no further fees or interest.

The general structure of this proposed exemption could work fairly for all parties involved. The exemption would ease the paperwork burden for servicers during periods when they are waiving any claims to ongoing interest, fees, and costs. However, the charge-off concept is confusing for borrowers. For this reason, the rule must require clear notices to borrowers regarding the nature of a charge-off and borrowers' rights under the rule. As proposed, the notices are likely to confuse borrowers and could lead to abuses.

According to the Bureau's proposal, within 30 days of charge-off the servicer "must provide the consumer with a final periodic statement, clearly and conspicuously labeled 'Final Statement - Retain this Copy for Your Records.'"[116] The Bureau suggests that the "Final Statement" explain to the consumer "in simple and clear terms" what a charge-off means.[117] The proposed language would include a statement to the effect that "the servicer will not charge any additional fees or interest on the loan."[118]

The suggested "Final Statement" language is problematic for several reasons. As the Bureau's proposal acknowledges, a charge-off may not be a "final" action at all.[119] After a charge-off, nothing prevents the creditor from changing its mind and aggressively pursuing collection on the account. One creditor may also sell the account to a different creditor, and the new creditor can decide to demand payment. Contrary to the suggested notice language, a creditor or its assignee *can* charge additional fees and interest on the loan in the future if the creditor or assignee resumes sending periodic statements. A charge-off may be nothing more than a temporary decision by a creditor, a decision that the creditor has unilateral discretion to revoke whenever it wishes.

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114 12 C.F.R. § 1026.41.
115 79 Fed. Reg. 74277, 74296 (Dec. 15, 2014).
116 79 Fed. Reg. 74255 (Dec. 15, 2014).
117 *Id.*
118 *Id.*
119 *Id.*

Charge-off standards are private, proprietary information belonging to individual creditors. This makes creation of a uniform notice intended to describe what a charge-off means inherently difficult. However, certain aspects of a charge-off are clear. The Bureau could significantly improve notices under the rule by including several clarifications in the required notice language. These should include: (1) deletion of any reference suggesting that that charge-off action is "final"[120]; (2) inclusion of a clear warning that nothing prevents the current creditor or a future creditor from reversing the charge-off decision and collecting interest and fees accruing on the account in the future; (3) a statement explaining that before the creditor can resume collection and allow accrual of interest and fees, the creditor must first notify the borrower of this action and resume providing periodic statements; (4) a statement explaining the prohibition on accrual of interest and fees during the period when the creditor is exempted from sending periodic statements, including the bar on retroactive collection.

Comment 2 highlights a particular concern we share regarding the proposed exemption.[121] The Comment addresses the situation in which a servicer/creditor resumes collection after a charge-off. According to Comment 2, upon resumption of collection, the servicer/creditor's obligation to provide periodic statements resumes. However, upon resuming collection, the creditor "may not retroactively assess fees or interest on the account for the period of time during which the exemption in § 1026.41(e)(6) applied."[122]

Unlike a transaction recorded in public records, a charge-off is not a permanently recorded event. After a creditor decides to enter a charge-off for an account and gives proper notice under this rule, the account could be sold several times. Years later, a successor-creditor may have no knowledge of the earlier charge-off statement sent by a predecessor. This successor may have no interest in the borrower's claim about a charge-off that occurred years earlier. Despite a statement on the charge-off notice about keeping a copy, the borrower may have lost the document. This is particularly likely if the notice was labeled a "final statement." Thus the fair application of § 1026.41(e)(6) depends heavily on a borrower's holding on to a single paper statement. Without the document, the borrower faces a real risk that a later assignee of the account will seek to impose accrued interest and costs retroactively, contrary to the terms of the exemption.

It is difficult to predict how serious any problems with improper attempts to retroactively collect interest and fees for charged-off accounts will be. If the § 1026.41(e)(6) exemption is implemented, the Bureau should monitor compliance closely. If patterns of abuse appear, the Bureau should reconsider this exemption. The Bureau can also take several steps in the current rulemaking process that would help to minimize abuses. For example, the mandatory language of the charge-off notice related to periodic statements should inform the borrower clearly about the bar on retroactive assessments. The notice should explain that this is a reason why holding on to the statement is important. The Bureau could also mandate account statements on some regular basis during periods of suspension, for example every six months. These statements could contain required content regarding the status of the charge-off and the suspension of accrual of interest and fees during the

[120] Instead of describing a charge-off as a "final" action, we suggest that the Bureau use of the term "suspension" of collection efforts and "suspension" of accrual of interest and fees. However, reference to a suspension must always be coupled with emphasis on the bar to retroactive collection of waived interest and fees that would otherwise accrue during the period of suspension.
[121] 79 Fed. Reg. 74255–74256 (Dec. 15, 2014).
[122] 79 Fed. Reg. 74255 (Dec. 15, 2014).

charge-off period. Finally, the Bureau should require a detailed notice of resumption of collection that requires a creditor or successor to inform the borrower accurately about the status of the account during the intervening charge-off period.

The Bureau should also consider an alternative to the proposed periodic statement exemption that would be less subject to creditor abuse. The Bureau suggests that the exemption in proposed § 1026.41(e)(6) is "similar to existing § 1026.5(b)(2)(i)," which provides for an exemption from periodic statements related to certain open-end credit transactions.[123] The obvious dissimilarity is that § 1026.5(b)(2)(i) applies to unsecured loans. Section 1026.41 applies to secured loans – to home mortgage loans. Unlike unsecured creditors, mortgage lenders continue to hold an enforceable lien on the consumer's home. In title theory mortgage states, the mortgagee holds a recognized property interest in the consumer's residence. The mortgagee holds equitable title to the home. Proposed § 1026.41(e)(6) does not require the mortgage holder to mark its lien satisfied in land records or otherwise modify its interest in the residential property. After a charge-off, the mortgagee holds significantly more coercive power over the consumer that the unsecured creditor regulated by § 1026.5(b)(2)(i). If a mortgagee finds compliance with § 1026.41 in connection with a charged-off account to be burdensome, we suggest that the mortgagee mark its mortgage satisfied and void its lien or other interest in the property. This would place the mortgagee in the position of the creditor subject to § 1026.5(b)(2)(i).

IX. The Bureau should not adopt its proposed revision regarding requests for information related to GSE loans; the current rule distinguishing between guarantors and owners takes the correct approach.

12 C.F.R. § 1024.36(a) and (d) implement provisions of the Dodd-Frank Act that direct servicers to respond on an expedited basis to consumer requests for information about "the identity of, and address or other relevant contact information for, the owner or assignee of a mortgage loan".[124] The Bureau proposes revisions to comment 36(a)-2 that would change how a servicer may respond to requests for information that seek ownership information regarding certain loans. The revised standard would apply to loans in trusts for which one of the GSEs (Fannie Mae or Freddie Mac) is the trustee, investor, or guarantor. The revision would permit servicers to respond to requests for loan ownership information about GSE-related mortgages in one of two ways. In most cases, the servicer could respond by identifying a GSE as the owner or assignee of the loan and provide contact information for the appropriate GSE. In these instances, the servicer would not have to identify the trustee or trust that actually owned the loan. However, in those cases where the borrower's information request asked specifically for the identity of the trust owning the loan, the servicer would have to provide the specific trust and trustee identifying information.

We urge the Bureau to reject the proposed revision to comment 36(a)-2. The Bureau correctly addressed this issue in its earlier Official Bureau Interpretation of § 1024.36(a) and (d).[125] There, the Bureau appropriately distinguished between the owner of a loan and the loan's guarantor or investor. The Bureau stated: "Although investors or guarantors, including among others the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, or the Government National Mortgage Association, may be exposed to risks related to the mortgage loans held by a

[123] 79 Fed. Reg. 74255 (Dec. 15, 2014).
[124] 12 U.S.C. § 2605(k)(1)(D).
[125] 78 Fed. Reg. 10,873 (Feb. 14, 2013).

trust either in connection with investment in securities issued by the trust or the issuance of a guaranty agreement to the trust, such investors or guarantors are not the owners or assignees of the mortgage loans solely as a result of their roles as such."[126] This distinction between guarantors and owners of loans remains valid today. We see no reason for the Bureau to change its position.

A. The identity of the specific trust that owns a loan remains relevant when a GSE guarantees the loan.

Even when a GSE guarantees a loan, the identity of the trust that owns the loan is important information. Fannie Mae makes this point clear in its own Servicing Guide.[127] Here, Fannie Mae acknowledges that its Servicing Guide does not cover all aspects of servicing for loans that it guarantees. According to Fannie Mae, "The servicing requirements of a MBS Trust Agreement or Trust Indenture vary depending on the MBS trust documents under which a particular MBS mortgage loan was pooled."[128] Thus, the borrower who wishes to know the scope of a servicer's authority has a legitimate reason to want to review trust documents related to a particular loan. The borrower cannot locate these trust documents without knowing the identity and contact information for the trust. Fannie Mae acknowledges that the identity of a trust that owns a loan affects loss mitigation options available to a borrower:

> Not all workout options will be available for all MBS mortgage loans. Since the availability of a particular workout option for an MBS mortgage loan depends on the MBS trust documents under which the loan was pooled, the servicer must identify the issue date of the MBS in order to determine whether a workout option is available to a borrower." . . . Factors determining whether a particular workout option is available to a borrower at a particular time include: "whether the workout option is available for the MBS mortgage loan based on which MBS trust documents apply to the MBS mortgage loan.[129]

The Bureau's proposed revision to Comment 36(a)-2 is based on the assumption that all relevant information for loss mitigation and other borrower concerns can be found in published GSE servicing guidance. This assumption is incorrect, as Fannie Mae itself acknowledges.

B. The contention that treating GSE-related loans like all other loans is burdensome for servicers is simply not credible.

The Bureau's current proposal acknowledges that the process the servicer must use to find out the name of a trust is not difficult and is a matter of routine. The Bureau states, "According to industry, servicers' systems do not typically track the name of the trust for each such loan, so a servicer must ask the trustee for this information each time it receives an information request asking for the loan's owner or assignee."[130] The statement assumes, we think fairly, that the servicer knows the name of

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126 *Id.*
127 Fannie Mae Single Family Servicing Guide Feb. 11, 2015 (See § A2-1-02 Servicing Duties and Responsibilities Related to MBS Mortgage Loans (originally published 11/12/2014) pp. 79, *et seq.*).
128 *Id.*, Fannie Mae Guide (pdf format), p. 82.
129 *Id.*
130 79 Fed. Reg. 74190 (Dec. 15, 2014).

the trustee for whom it is servicing a loan. It strains credulity to believe that the simple act of asking this known trustee for the name of the trust for which it acts as trustee is "burdensome." It is not clear why expecting a servicer to make this minimal effort is acceptable for some loans but not for others. In its Guide, Fannie Mae describes the response protocol for borrower inquiries to identify the owner of loan.[131] The Guide notes that servicers of GSE loans have access to a six-digit pool number as the trust identifier. According to Fannie Mae's Guide, this number appears in "Fannie Mae investor reporting system application under the 'View Loan' screen."[132] This suggests the specific trust-identifying information is readily available to servicers for the GSEs' MBS and portfolio loans.

C. The Bureau's proposed interpretation of the Dodd-Frank Act requirement is contrary to the Congressional intent set out in the plain language of the statute.

Congress intended that a servicer disclose the "owner or assignee" of the mortgage loan in response to borrower requests for this information. The Bureau's interpretation would rewrite the statute for roughly half the residential mortgage loans in the country. The Bureau would thus exceed its statutory authority and promulgate a rule that would operate contrary to the plain meaning of the statute. This would be arbitrary and capricious agency action and contrary to law. The statute requires disclosure of the "owner or assignee" of the mortgage loan.[133] To change this language to "guarantor" dramatically alters what Congress said. Further, it is arbitrary to apply an agency-created "guarantor" standard to some loans and not to others. As a result of the Bureau's unilateral re-writing of the statute, some borrowers would receive potentially inaccurate and incomplete information in response to their information requests, while others receive complete and accurate responses.

D. Congress already determined that trust-identifying information does in fact benefit borrowers.

The Bureau had no reasonable basis to opine that "receiving trust-identifying information, which could appear technical or unfamiliar, might be confusing and is unlikely to benefit borrowers."[134] Congress determined that this information must be provided to borrowers. The Bureau should not second-guess that determination and decide that for some borrowers receiving the name of the trust that owns their loan is confusing while for others borrowers it is not.

E. The bifurcated response option for GSE loans should be abandoned.

The bifurcated response option for GSE loans presumes that borrowers already know the answer to the question they are asking. Proposed comment 36(a)-2 would require a servicer to "provide specific trust-identifying information upon a request expressly seeking such information."[135] In other words, if the borrower: (1) knows that the loan is owned by a trust; (2) knows that a GSE plays a role in the securitized debt obligation; and (3) does not want the generic GSE response, then this

131 Fannie Mae Guide, § A4-1-03, p. 235.
132 *Id.*
133 12 U.S.C. § 2605(k)(1)(D).
134 79 Fed. Reg. 74191 (Dec. 15, 2014).
135135 *Id.*

borrower can craft a request for information that will produce the same response that non-GSE borrowers receive as a matter of course. It will often be a matter of chance that certain borrowers already know that their loan is owned by a GSE-related trust. These borrowers may have had access to a housing counselor or attorney and be able to draft a request for information that elicits the complete and accurate response. However, the Bureau should not draft its rule in a way that highlights fortuitous advantages that one borrower may have over another. Unsophisticated borrowers who have not had access to trained counselors or professional legal assistance do not understand the mortgage securitization process. They will not ask for the name of a specific trust.

F. The Bureau's interpretation of loan "owner" should be consistent with Regulation Z.

The Truth-in-Lending Act requires that a creditor provide the borrower with notice of the transfer of ownership of a mortgage loan.[136] The statute places this notice obligation upon "the creditor that is the new owner or assignee of the debt."[137] According to Regulation Z, the "owner or assignee of the debt" means the party that "becomes the owner of an existing mortgage loan by acquiring legal title to the debt obligation."[138] The Official Commentary to § 1026.39 elaborates on the definition of the owner of the loan by defining exclusions: "Exclusions. i. Beneficial interest. Section 1026.39 does not apply to a party that acquires only a beneficial interest or a security interest in the loan, or to a party that assumes the credit risk without acquiring legal title to the loan. For example, an investor that acquires mortgage-backed securities, pass-through certificates, or participation interests and does not acquire legal title in the underlying mortgage loans is not covered by this section."[139] Regulation Z's definition of the "owner" of a mortgage loan that must be disclosed upon transfer of ownership excludes an investor or guarantor that does not hold legal title to the loan. Where a trust holds legal title to the loan, it is the trust that it is the "owner" of the loan, not the guarantor. The Bureau should interpret § 1024.36 consistently with this view and require that the servicer provide the identity of the trust that owns the loan in response to a borrower request for information about loan ownership.

We acknowledge that a GSE's relationship to a loan is an important fact that a borrower should know. In many instances, the GSE's servicing guidelines determine what loss mitigation options are available to the borrower. Therefore, the servicer's response to a borrower's request for information about loan ownership should accurately describe the GSE's role, whether it be as investor or guarantor, and provide the GSE's contract information. However, the response should also identify the trust that is the legal owner of the loan. As described above, the specific trust's identity could also impact loss mitigation options. Accurately addressing both the GSE's role and identifying the loan's owner would comply with the statute's terms and be consistent with the overall goals of the Bureau's servicing rules. The borrower would have the complete information needed to participate in a loss mitigation review effectively.

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136 15 U.S.C. § 1641(g).
137 *Id.* § 1641(g)(1).
138 Reg. Z, 12 C.F.R. §1026.39(a)(1).
139 Regulation Z Official Interpretation, 12 C.F.R. § 1026.39 Comment 3.

X. The rules on prohibitions on foreclosure sales must be revised to better promote compliance and to minimize avoidable sales.

Under §1024.41(g), when a borrower submits a complete loss mitigation application more than 37 days before a scheduled foreclosure sale, the servicer must not move for a foreclosure judgment or order of sale or conduct a sale, unless the servicer has complied with the obligations to review the application. Comments 1 and 3 to § 1024.41(g) set out standards for servicer conduct that implement this dual tracking protection. Comment 1 defines certain "dispositive motions" and other actions that must be stopped to allow the servicer to review the application. The servicer must "take reasonable steps to avoid a ruling on such motions" and avoid the issuance of a dispositive order for foreclosure before the review is completed. Comment 3 describes the servicer's duty to interact with foreclosure counsel in order to facilitate compliance with the duty to stop certain foreclosure actions.

Current comment 1 explains that when the servicer receives a complete loss mitigation application the servicer must not allow entry of an order on a dispositive motion that "may directly result" in a judgment or order of sale. According to the comment, if the servicer "takes reasonable steps to avoid a ruling on such a motion or issuance of such order," the servicer does not violate § 1024.41(g) even if the action goes ahead despite these efforts. The proposed revised Comment 3 would add a provision to the effect that if the servicer *did not* take reasonable steps to avoid the court's dispositive ruling after receipt of a complete application, the servicer must dismiss the foreclosure proceeding in order to avoid the sale.[140]

The comments to § 1024.41(g) assume two possible scenarios. In one scenario the servicer took what the comments refer to as "reasonable steps" to avoid the entry of the dispositive order. In the other scenario the servicer did not take "reasonable steps" to prevent entry of the order. The proposed revised comment addresses only the latter situation – the servicer failed to take "reasonable steps' to prevent entry of the order. In this situation the comment states that the servicer "must dismiss the foreclosure proceeding if necessary to avoid the sale."[141] The unstated corollary under the first scenario is that, if the servicer took the "reasonable steps" to prevent the entry of the dispositive order and the court entered the order anyway, the servicer need not dismiss the foreclosure proceeding. The servicer may conduct the sale even though the court should not have entered the dispositive order or allowed the sale.

How the term "reasonable steps" is defined is critical to operation of § 1024.41(g). Setting the bar too low could effectively nullify the dual tracking protection. Unfortunately, as drafted, proposed comments 1 and 3 do little to preclude use of token efforts to meet the "reasonable steps" standard. In fact, the language actually encourages ineffective practices.

In all but the most extraordinary instances, state courts will comply routinely with requests for a stay made under section § 1024.41(g), just as they do when informed of the bankruptcy stay or when they enforce federal protections under the Servicemembers' Civil Relief Act. In a few isolated cases, some courts may be unsure about what weight to give the Bureau's servicing rules, and these courts may make mistakes. However the best way to ensure that state courts appropriately enforce the Bureau's rules will be to place some burden of educating the courts on the servicers. Borrowers,

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140 79 Fed. Reg. 74225 (Dec. 15, 2014).

141 *Id.*

most of whom appear *pro se,* will seldom be in a position to litigate to enforce the rules. A servicer will carry out this function if it has only two options when a state court fails to enforce § 1024.41(g): the servicer must seek to overturn the erroneous state court ruling, including by motion to vacate, reconsider, and appeal, or else the servicer must withdraw the foreclosure action.[142] If the servicer goes ahead and forecloses after a state court has ignored federal law, the servicer should be considered in violation of § 1024.41(g). In the long run, this will be the only way to ensure that the Bureau's dual tracking protections are respected.

We find the Bureau's position in comments 41(g)-1 and 41(g)-3 to be perplexing. Congress charged the Bureau to implement a federal statute. Under the Supremacy Clause of the U.S. Constitution, state courts are bound to enforce federal laws. Here, a federal agency is grounding an official policy on the assumption that state courts may ignore federal law and not enforce § 1024.41(g) when formally asked to do so. The comments absolve servicers from any role in state courts' non-compliance with federal law as long as the servicer "moves" or "requests" that the state courts comply.

In the Section-by-Section Analysis the Bureau states that it "understands that courts may be reluctant to delay foreclosure proceedings when lengthy backlogs of foreclosure matters create added pressure to expedite dockets."[143] The Bureau's deference to state courts' docket management concerns is simply inappropriate. We doubt that state courts would ignore the bankruptcy stay because ignoring the stay would speed up court dockets. In the example of the Florida courts referred to in the Section-by Section Analysis, it is unclear whether the courts were denying stays of proceedings in instances where § 1024.41(g) applied and where servicers had diligently sought to enforce the rule.[144] We believe that if the Bureau adopts our recommended position and mandates dismissal of foreclosure actions when a court refuses to stay proceedings despite § 1024.41(g), it is unlikely that any court system would persist in this practice. The consequence of the courts' adhering to such a policy would simply be to add the dismissed cases back on the court's crowded docket for consideration at a later date. Presumably the most recalcitrant state courts would see the futility of such a policy and begin to apply § 1024.41(g) appropriately. Under the Bureau's proposed revisions to comments 41(g)-1 and 41(g)-3, state courts have no incentive to comply with the Bureau's rules and servicers have no incentive to make the state courts comply.

We recommend that the "reasonable steps" exception to § 1024.41(g) be revised. When the borrower has submitted a complete application, the servicer must either successfully obtain postponement of rulings on dispositive motions or withdraw the foreclosure proceeding. Any other position encourages servicer incompetence and ultimately undermines the Bureau's authority. While we doubt it would ever become necessary, the Bureau should publicly adopt a policy of intervening in proceedings where state courts routinely refuse to stay proceedings as required by § 1024.41(g).

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[142] In most cases this will be accomplished through a voluntary dismissal of the foreclosure action. We understand that in some states, a similar outcome may be achieved by the servicer requesting that the action be removed from the docket or that the action be placed in an administrative status that stays any foreclosure sale.

[143] 79 Fed. Reg. 74226 (Dec. 15, 2014).

[144] 79 Fed. Reg. 74224 note 182. (Dec. 15, 2014).

The revised statement in comment 41(g)-3 that the servicer is ultimately responsible for the actions of its attorneys is an important clarification and improves the text.[145]

XI. Persistent problems regarding the timing and method of correspondence of loss mitigation offers and appeals should be addressed.

Although the Bureau makes no proposals at this time, the Bureau has sought comment on whether the timing and method of correspondence of loss mitigation offers and appeals is presenting problems for borrowers.[146] We strongly urge the Bureau to address the persistent problems in this area. Borrowers are facing much shorter response and appeal timeframes than intended by the Bureau, particularly due to the delay in receiving a servicer's decision by mail. Furthermore, some servicers engage in improper backdating of documents that severely hampers or eliminates a borrower's ability to respond to or appeal a servicer's decision.[147] The general guidance in § 1024.38(b)(1)(i) has proven to be ineffective in getting servicers to provide accurate and timely disclosures to borrowers as required by § 1024.41. These timing issues undermine the consumer protections of RESPA and harm homeowners by denying their right to properly review an offer or appeal a denial.

A. The deadline for a borrower to respond to or appeal a decision should commence from the date a borrower receives the written decision from the servicer.

Under the current rules, the loss mitigation deadlines, including responding to or appealing a decision, are based on when information is received by or provided by a servicer.[148] Specifically, if a complete application is received ninety days or more before a foreclosure sale, a servicer may require that a borrower accept or reject an offer of a loss mitigation option no earlier than fourteen days after the offer is provided to the borrower.[149] If a complete loss mitigation application is received less than ninety days but more than thirty-seven days before a foreclosure sale, a servicer may require that a borrower accept or reject an offer of a loss mitigation option no earlier than seven days after the offer is provided to the borrower.[150] Because the timing deadlines are based on when a decision is "provided by a servicer" and many decisions are sent by mail, homeowners generally have less than fourteen or seven days to respond to or appeal a decision once they actually receive it.

In response to NCLC's nationwide survey, a number of advocates shared stories detailing problems with timing and the method of correspondence.[151] One advocate stated that his client was approved for a loan modification on January 12th and informed via email that the documents would arrive "in

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145 79 Fed. Reg. 74294 (Dec. 15, 2014).
146 79 Fed. Reg. 74216 (Dec. 15, 2014).
147 See, e.g., Sudarshan Varadhan, Ocwen to Hire Independent Firm to Probe Backdated Foreclosure Letters, Reuters (Oct. 24, 2014), http://www.reuters.com/article/2014/10/24/ocwen-financial-new-york-mortgages-idUSL3N0SJ6JS20141024 (reporting that hundreds of thousands of borrowers may have been harmed by Ocwen's backdated documents that improperly cut off their appeal rights).
148 79 Fed. Reg. 74216 (Dec. 15, 2014) (citing 78 FR 10695, 10836 (Feb. 14, 2013)).
149 12 C.F.R. § 1024.41(e)(1).
150 *Id.*
151 *See* attached Exhibit C, NCLC Survey of Housing Counselors and Attorneys, Stories About Letters Appearing to be Backdated.

a few days."[152] The documents were dated January 12th, but did not arrive until January 23rd and were due January 26th.[153] By dating the documents to January 12th, the servicer technically complied with the fourteen-day deadline under § 1024.41(e)(1) for acceptance of the offer, but the borrower only had three days to respond. Such shortened timeframes place tremendous pressure on homeowners, particularly those that are unrepresented, to make a hasty decision without the opportunity to review the terms and consider the implications of accepting or rejecting an offer. A homeowner may also lose the opportunity to save her home if she receives a backdated letter and the deadline to accept the offer has passed.

Borrowers face similar timing issues in regards to their appeal rights. Under the current regulations, a borrower must request an appeal within fourteen days after the servicer provides a decision on loss mitigation options.[154] Again, due to the delay in receiving a servicer's decision by mail or due to improper backdating of letters, borrowers generally have less than fourteen days to appeal a denial. For example, an advocate's client received a HAMP Trial Period Plan offer that was dated February 4, 2015, but not actually received by the client until February 20, 2015.[155] The advocate, however, believed that the modification offer was improperly based on inflated income.[156] Under the CFPB rules, the fourteen-day deadline to appeal had passed. Luckily for this client, the 30-day appeal deadline under HAMP was still applicable. Other homeowners, however, may not be so lucky, especially if they are unrepresented and appealing a non-HAMP modification decision.

We urge the Bureau to consider amending the borrower response and appeal deadlines to commence from the date the borrower actually receives the servicer's decision. We believe that this change would provide borrowers the fourteen or seven days to respond to or appeal a decision and remove the incentive for servicers to backdate letters.

Alternatively, the Bureau should adopt a general rule for all Regulation X notice requirements that specifies the requirements for providing notice by mail and for time deadlines that are triggered by a notice sent by mail. Current § 1024.11 is inadequate, and it applies only to the provisions in Subpart B of Regulation X.
Advocates have reported that at least one servicer is sending notices under Regulation X by the U.S. Postal Service's "Standard Mail" rather than by First Class. Standard Mail is a slower, less expensive option that the Postal Service makes available to businesses for sending newsletters, bulletins, catalogs and marketing materials.[157] Unlike the one-to-three day delivery time for First Class mail, the Postal Services estimates that Standard Mail will take two to eight days to be delivered.[158] The Bureau should prohibit the use of Standard Mail, or any similar mail service that has a delivery time slower than First Class mail, for sending notices under Regulation X.

The Bureau should also specify in a new provision how time should be counted for purposes of deadlines under Regulation X. Similar to many court procedural rules, the provisions should specify

[152] *Id.,* Story #5.
[153] *Id.*
[154] 12 C.F.R. § 1024.41(h)(2).
[155] *See* Exhibit C, NCLC Survey of Housing Counselors and Attorneys, Stories about Letters Appearing to be Backdated, #10(b).
[156] *Id.*
[157] See https://www.usps.com/ship/mail-shipping-services.htm.
[158] *Id.*

that the day of the event that triggers the time period, such as the day the notice is mailed, is excluded from the time period calculation. Since borrowers are not likely to take action on weekends and holidays, if the last day of a time period falls on a Saturday, Sunday or legal holiday, servicers should be required to list the deadline on the notice as the next day that is not a Saturday, Sunday or legal holiday. More importantly, the Bureau should provide in a new mailing provision that if a notice sent by a servicer lists a time period or a date for the borrower to take action or exercise a right under Regulation X, and the notice is sent by First Class mail, three days should be added to the deadline specified in the notice. This partially addresses the time delay borrowers' experience in receiving notices by mail.

In addition to enhanced enforcement, the Bureau should address the backdating problem by mandating in a new mailing provision that the date listed on any notice as the mailing date must be the date the notice is placed in the mail. The provision should specify that a servicer is not relieved of its obligation to comply with this provision if the mailing is handled by a third-party vendor or any other party under contract with the servicer.

B. The Bureau should require servicers to postpone a scheduled sale when a complete loss mitigation application is received on or near the 38th day before a foreclosure sale to provide a borrower sufficient time to accept or reject an offer.

The Bureau recognizes that, when a complete application is received on or near the 38th day before a foreclosure sale, the timeline for a borrower to timely respond before the date of the sale may pose problems.[159] Under this scenario, a borrower has a minimum of seven days to accept or reject a loss mitigation offer, but will effectively have less time if the offer is mailed.[160] The Bureau further notes the possibility that a borrower's acceptance of an offer may not be received by the servicer until after the date of the foreclosure sale.[161]

The Bureau should amend the loss mitigation rules to require servicers under this scenario to postpone a scheduled foreclosure sale. By postponing the sale, a borrower would be afforded the seven days to decide whether to accept or reject an offer. Furthermore, this proposal would alleviate the Bureau's concern that a servicer may not receive a borrower's acceptance before the date of the foreclosure sale. Moreover, a postponement of the foreclosure sale would not unduly burden servicers because they would be able to conduct the sale at a later time if the borrower rejects the offer. This slight inconvenience to a servicer does not justify denying a borrower who qualifies for a modification the opportunity to accept an offer and save her home simply because the offer and acceptance were communicated by mail.

XII. The Bureau should substantially strengthen the force-placed insurance rules, including how flood insurance is addressed.

The Bureau should revisit the force-placed insurance provisions in its mortgage servicing rule to ensure that homeowners without escrow accounts are protected from force-placed insurance abuses. The Bureau also should flatly prohibit mortgage servicers from accepting any payments, including

159 79 Fed. Reg. 74216 (Dec. 15, 2014).
160 *Id.*
161 *Id.*

reinsurance deals and free or discounted administrative services, from force-placed insurance companies. The current rule leaves too many opportunities for continued abuse in an area with a long-history of such conduct. These gaps must be addressed.

A. The Bureau should require servicers to advance payment for property insurance for all homeowners, not just those with escrow accounts.

The CFPB should require mortgage servicers to continue payments of homeowners' existing insurance policies or reestablish the policies if homeowners miss payments of hazard, homeowners, wind, excess wind, flood or excess flood insurance premiums. The CFPB has taken a first step in this direction by requiring servicers to advance homeowners insurance premiums for borrowers with escrow accounts. Many homeowners who have force placed insurance imposed, however, do not have escrow accounts.

To protect homeowners who do not have escrow accounts, the CFPB should adopt the approach taken in Fannie Mae's proposed Servicing Guide Announcement SVC-2012-04 *Updates to Lender-Placed Property Insurance and Hazard Insurance Claims Processing* and require that, if a homeowner falls behind on their insurance payment, the servicer must advance its own funds to pay past due premiums and reinstate the homeowner's insurance coverage. If the homeowner does not have an existing escrow account, the servicer must establish an escrow account to pay future premiums. The CFPB should make clear that servicers must exhaust all options to keep homeowners' existing homeowners insurance policies in force before resorting to force placed insurance.

B. The Bureau should ban all forms of kickbacks and non-monetary compensation for force placed insurance.

The CFPB must ensure that when force placed insurance is necessary, the cost is reasonable and that all premiums paid are applied exclusively to the actual cost of the force placed insurance coverage and not diverted to cover routine servicing costs or to enrich servicers. The current rules leave substantial room for evasion and do not address the role that reinsurance deals play in servicers' business decisions about force placed insurance.

Many mortgage servicers receive commissions, reinsurance contracts, free insurance tracking and other kickbacks when they purchase force placed insurance. Affiliates of mortgage servicers often unnecessarily reinsure force placed insurance policies to share in potential underwriting profits. Since the loss ratios for force placed insurance are extremely low, using affiliates to reinsure force placed insurance policies is a low-risk way for the banks that own mortgage servicing companies to claim a portion of the exorbitant premiums charged for force placed insurance

The CFPB should make clear that neither mortgage servicers nor affiliated entities are permitted to receive any fee, commission, kickback, reinsurance contract, service such as insurance tracking or administration, or other thing of value in exchange for purchasing force placed insurance.

C. The Bureau should strengthen notice requirements and limit retroactive charges.

The CFPB should strengthen notice requirements by requiring servicers to provide the first required notice within 15 days of a force placed insurance policy coming into effect, and should not allow servicers to retroactively charge homeowners for more than 60 days of force placed insurance coverage.

Mortgage servicers are responsible for tracking insurance coverage on the loans they service. When there is a lapse in a homeowner's insurance coverage, the servicer, typically through an insurance tracking vendor, notifies the force placed insurer. It is reasonable to expect that servicers (or their vendors) may fail to identify a lapse in insurance at the instant the lapse occurs or even for a short period of time following the lapse. It is unreasonable, however, to allow a servicer to retroactively charge a borrower for a lengthy period of force placed insurance coverage, since it is the servicer's responsibility to identify lapses in insurance and notify homeowners of these lapses in a timely fashion. Servicers often delay notifying homeowners about force placed insurance for months, unfairly piling thousands of dollars of debt onto homeowners who are unaware that their homeowners insurance policies have been canceled.

D. The Bureau should limit the amount of force placed insurance coverage purchased.

Servicers routinely purchase more coverage for covered properties than is required by mortgage contracts or investors' requirements, unfairly inflating the costs to homeowners for their own gain. The CFPB should ensure that any force placed insurance obtained be the last known amount of the homeowner's coverage that was compliant with the requirements of the mortgage loan. In no circumstances should the amount of force placed insurance exceed the replacement cost of the improvements on the mortgaged property.

E. The Bureau should plug the gap in force-placed insurance coverage and require servicers to advance funds for *all* flood insurance.

1. *The rules for mandatory flood insurance have undergone a sea-change in recent years.*

In July 2012, after years of debate, the Biggert-Waters Flood Insurance Reform Act became law.[162] Intended to save the National Flood Insurance Program from insolvency, the changes in Biggert-Waters required the federal banking agencies to update their regulations for loans in areas having special flood hazards.

Several months later, the CFPB proposed amending Regulation X's coverage of hazard insurance for home mortgages.[163] As described below, the amendment covered flood insurance in some circumstances but specifically excluded it from coverage in others. This arrangement was largely to avoid the risk of overlap with the banking agencies' regulations.

In October 2013, the banking agencies jointly proposed amendments to the flood-insurance regulations,[164] after the CFPB's amendments had been finalized. But the banking agencies' proposal,

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[162] Public Law 112–141, 126 Stat. 916 (July 6, 2012)

[163] *See* 77 Fed. Reg. 57,199 (Sept. 17, 2012) (proposed rule). *See also* 78 Fed. Reg. 10,696 (Feb. 14, 2013) (final rule).

[164] 78 Fed. Reg. 65,108 (Oct. 30, 2013).

itself, had to be amended a year later[165] after the President signed into law the Homeowner Flood Insurance Affordability Act of 2014.[166] As a result, the flood insurance regulations are still pending. Not surprisingly, after all these changes involving multiple agencies and two branches of government, there remains a gap in the consumer protections for flood insurance.

2. *The Bureau excluded government-mandated flood insurance from the definition of "force-placed insurance" in the belief that other regulations provided adequate protection.*

When the CFPB amended Regulation X, the Bureau prohibited servicers from force-placing hazard insurance unless the servicer is unable to disburse funds from the borrower's escrow account.[167] In effect, this will often require servicers to advance the cost of maintaining the borrower's hazard insurance rather than force-placing more expensive coverage. But the Bureau defined "force-placed insurance" as excluding "[h]azard insurance required by the Flood Disaster Protection Act of 1973" (hereinafter "FDPA insurance").[168] This means a servicer may force-place FDPA insurance on properties in special flood hazard areas even when the servicer could avoid doing so as described in Reg. X § 1024.17(k).

The Bureau adopted this exclusion because the Bureau believed that the FDPA adequately protected homeowners in flood zones and that additional regulation would be unreasonably burdensome, without a countervailing benefit to consumers.[169]

At the same time, however, the Bureau identified a potential gap in the regulations covering flood insurance. As the Bureau explained, if a servicer requires a borrower to renew or replace flood insurance even though the insurance is no longer required by the FDPA, then the FDPA would not apply.[170] Therefore, the Bureau crafted Regulation X's definition of force-placed insurance to include flood insurance when required by the servicer but not the FDPA. The Bureau described this aspect of the regulations as "intended to fill precisely this gap to ensure that consumers have basic procedural and substantive protections in the absence of FDPA coverage."[171]

3. *The banking agencies' proposed FDPA flood regulations leave another gap in consumer protections.*

The banking agencies' proposed regulations do not include an equivalent to Regulation X's § 1024.17(k)(5). As a result, a servicer may force-place FDPA-mandated flood insurance even when the servicer could avoid doing so by advancing funds through the borrower's escrow account. While consumer advocates encouraged the banking agencies to adopt a requirement like paragraph (k)(5), the agencies said they lacked the necessary authority to do so. According to the Federal

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165 79 Fed. Reg. 64,518 (Oct. 30, 2014).
166 Pub. L. 113-89, 128 Stat. 1020 (Mar. 21, 2014).
167 Reg. X § 1024.17(k)(5)(i) (as amended).
168 Reg. X § 1024.37(a)(2)(i).
169 78 Fed. Reg. 10,696, 10,723 (Feb. 14, 2013) ("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.")
170 78 Fed. Reg. 10,696, 10,732 (Feb. 14, 2013).
171 78 Fed. Reg. 10,696, 10,732 (Feb. 14, 2013).

Register, the banking agencies believe such a requirement can only be adopted by exercising the CFPB's authority under the Real Estate Settlement Procedures Act.[172]

Because neither Regulation X nor the banking agencies' proposed (and likely final) flood insurance regulations prohibit the force-placement of FDPA flood insurance in the circumstances described by section 1024.17(k)(5), borrowers in flood zones will remain exposed to all the risks that the CFPB's amendments were designed to address.

4. *The Bureau can easily amend Regulation X to fill the gap in force-placed flood insurance protections.*

In 2013 the Bureau was correctly concerned about avoiding overlapping regulations when amending Regulation X. But the justification for excluding FDPA flood insurance from section 1024.17(k)(5) no longer stands. As interpreted by the banking agencies, the FDPA and its regulations cannot protect consumers in this area. Therefore, we encourage the Bureau to revise section 1024.17(k)(5) "to fill … this gap to ensure that consumers have basic procedural and substantive protections in the absence of FDPA coverage."[173]

This gap can easily be closed by amending section 1024.17(k)(5)(i) as indicated below. With this change, the existing restriction on purchasing force-placed insurance--as defined in Regulation X--will be extended to force-placed flood insurance required by the FDPA:

Timely payment of hazard insurance—(i) In general. Except as provided in paragraph (k)(5)(iii) of this section, with respect to a borrower whose mortgage payment is more than 30 days overdue, ~~but who has established an escrow account for the payment for hazard insurance, as defined in §1024.31,~~ a servicer may not purchase hazard insurance required by the Flood Disaster Protection Act of 1973 or force-placed insurance, as that term is defined in §1024.37(a), ...[174]

If the CFPB declines to make this change, a servicer would be required to advance the cost of non-flood-hazard insurance *and* flood insurance required by the servicer (for borrowers not in special flood hazard areas). But the same servicer would not be required to advance the premiums for FDPA-mandated insurance. There is no rational explanation for this difference. And it will inevitably confuse servicers and homeowners.

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172 *See* 79 Fed. Reg. 64518, 64523 n.27 (stating "the CFPB relied on its authority under section 19(a) of RESPA to prescribe such rules and to make such interpretations as may be necessary to achieve the consumer protection purposes of RESPA. The Agencies note that the Federal flood statutes do not contain a provision similar to the provision relied upon by the CFPB to require a servicer to advance funds to a borrower's escrow account.").

173 78 Fed. Reg. 10,696, 10,723 (Feb. 14, 2013).

174 This clause of section 1024.17(k)(5)(i) would need additional changes to reflect the other recommendations we make in these comments, such as expanding protections to borrowers without existing escrow accounts.

<u>Exhibit A: Successor Narratives</u>

These narrative examples of difficulties faced by successors in interest were provided in response to NCLC's national survey of attorneys and housing counselors in March 2015.

Attorney, CA

Client owned the home along with her husband "as husband and wife with right of survivorship" meaning that title transferred to her alone when he passed away. Chase refused to communicate with her about the account and refused to process her application to assume and modify the loan for over a year. Chase repeatedly told her that she must become the executor of the estate and open a probate case before she could assume and modify the loan. This went on for a year before servicing transferred to a different servicer who approved her for an assumption and modification.

I have had two clients who are domestic violence survivors currently in the process of divorcing their abusers. They are trying to get title to the home in the divorce. Both servicers- Nationstar and SPS - completely ignored my clients' applications and started the foreclosure process because my clients' abusers (and co-borrowers) had not signed the applications.

Mortgage Counselor, NJ

Still working with borrower on a file where spouse passed away. Servicer took four months to acknowledge non borrower and allow for a loan mod request.

Attorney, NM

Wells Fargo had my client fill out at least 4 packets before finally processing an assumption. He was required to fill out multiple loan mod packets. Even now after executing the assumption documents, WF is asking the homeowner to complete a NEW set of documents that bizarrely ask him to certify that he is the same person as his deceased father (from whom he assumed the mortgage). I have left at least 5 messages for the SPOC without a return call even though I have also faxed an Authorization to Release Financial Information.

Attorney, MA

Client was told she had to be named administrator of estate to request loan mod even though property was transferred to her prior to death of noteholder. Even then they refused to consider her RMA because they said she was "not on the note." I had to file an action to stop the foreclosure even though the property had been deeded over to client before noteholder passed away.

Attorney, GA

Client went through a legal separation, experienced serious domestic violence. She obtained a court order saying she owns the home, and provided that to the servicer, but the servicer still required a quitclaim deed from the completely uncooperative ex-husband.

Attorney, MD

We have a case now where the joint owner - who was a friend, not a spouse - signed a quitclaim deed to our client. Nationstar is requiring income information from the joint owner in order to review client for a loan modification.

Mortgage Counselor, MD

I recommended that this client seek legal advice, as the borrower had died and the servicer was not cooperating and was always asking us to call a different number. Client was initially denied for a modification, but after many times trying to work on the same problem, client was approved for modification.

Housing Counseling Agency, FL

I have experienced difficulties with these kinds of cases, including having to submit probate documents when they had already been supplied by the homeowner and a domestic violence issue where the husband had vanished to elude incarceration.

Attorney, CT

CitiMortgage refused to discuss modification of a loan taken out by a divorced wife's ex-husband.

Mortgage Counselor, MD

I submitted client's loan modification application through Hope Loan Port. Wife had died and he lived in the home and wanted a loan modification. Client was denied through Hope Loan Port because he was not on mortgage. I escalated the case and sent in support from MHA handbook regarding successors' rights, and then servicer reviewed case.

Non-borrowers have problems speaking with servicer and being able to apply for assistance. The housing counselors along with our legal partners help break through this.

Attorney, PA

Mr. C is a single father who currently lives in Philadelphia. In 2007, Mr. C and his wife purchased a home together. However, because Mr. C's wife's credit was significantly better than his, the mortgage loan was issued only in her name. In 2008, Mr. C and his wife divorced. As part of their divorce agreement, Mr. C's ex-wife moved out of the Property. Mr. C kept the property where he lives and cares for the couple's six children. Mr. C also cares for and has custody of his nephew, N., whose mother died in 2007. N. has a heart condition, which has required multiple surgeries and a pace-maker since he was 11 years old.

After their divorce, Mr. C regularly made the mortgage payments. Mr. C worked as a sidewalk vendor, which provided sufficient income to pay the mortgage and care for his children and nephew. However, in 2011, Mr. C began experiencing medical problems, including progressive deterioration in the discs in his back and several seizures, which prevented him from working, and he fell behind on the mortgage payments.

Eventually, Chase began foreclosure proceedings and Mr. C participated in Philadelphia's Residential Mortgage Foreclosure Diversion Program. For over a year, Mr. C worked with his housing counselor to try to save his home. Throughout this process, Mr. C and his housing counselor were repeatedly asked to resubmit documents that had already been submitted and were given misleading and inaccurate information about the process for modifying and assuming the mortgage.

For example, in January 2014, after receiving a second complete loan modification application, Chase's attorney informed Mr. C's housing counselor that if Mr. Clark were "approved" for the loan modification, he would need to submit a new loan workout package in order to be approved for the assumption. Chase's counsel then provided a new loan modification application to Mr. Clark's housing counselor for submission by Mr. C. This second loan modification application was identical to the January loan modification application already submitted by Mr. C. Mr. C and his housing counselor found this to be very confusing, but nevertheless complied with Chase's request and resubmitted a complete loan modification application on March 7, 2014. Chase eventually denied Mr. C's application for a loan modification due to missing documentation, despite the fact that Chase never requested additional information or documentation from Mr. C or his housing counselor.

Eventually, Mr. C obtained an attorney with Philadelphia Legal Assistance. However, even with an attorney advocating on his behalf, it still took five months, including two separate applications, dozens of phone calls and several escalations, before Chase finally conceded that Mr. C should be reviewed through "LAMP" (Loan Assumption Modification Program). Despite the fact that Mr. C and his ex-wife are legally divorced and despite the fact that Mr. C's ex-wife has quit-claimed the property to him (and the quitclaim deed is recorded), the underwriting department at Chase continued to insist on seeing a property settlement agreement that was incorporated into the divorce decree, even after being told multiple times that no such document existed.[175] Mr. C and his ex-wife simply entered into a written agreement between themselves regarding the division of their property. This is a fairly common practice in Philadelphia, especially among couples with lower incomes.

The underwriting department at Chase continued to insist on seeing a property settlement incorporated into the divorce decree even after HUD had already issued its approval for Mr. C to assume the loan because he had obtained the property as a result of his divorce.

Attorney, FL

It's getting better. But generally the servicers TAKE any money sent in by the joint owner and then foreclose anyway. When information is demanded (i.e. a reinstatement amount), servicers say they cannot deal with the successor. Then it's a fight to get information before they foreclose--which they generally do quickly.

I have ONE case where my client paid the reinstatement amount in full and on time and the servicer (PHH Mortgage Corp) continued with the foreclosure anyway! I am still working on that case.

Mortgage Counselor, MI

My issues have been were a successor is not on the mortgage but is on the deed. I've referred them to legal services. These are not issues that our office is equipped to handle.

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[175] Mr. C and his ex-wife simply entered into a written agreement between themselves regarding the division of their property. This is a fairly common practice in Philadelphia, especially among couples with lower incomes. In Pennsylvania, a married couple can get divorced in any county and some counties (two in particular) generate significant revenue by issuing a high volume of uncontested divorce decrees for a relatively low fee. Some divorce attorneys in Philadelphia take advantage of this fact by advertising a low flat fee to complete an uncontested divorce and then advise clients to enter into a separate agreement regarding any property. And while married couples getting divorced should incorporate any property settlement into the divorce decree in order for the agreement to be enforceable, many couples are unaware of the implications of this type of advice. Many other couples file *pro se* and do not understand what it means to have "marital property." Mr. C and his ex-wife paid an attorney a flat fee to get divorced, and that attorney filed the divorce papers in the county with the lowest cost and advised Mr. C and his ex-wife to draft their own agreement regarding the property.

Attorney, CA

Widow who was not on loan came to us after extensive difficulties getting Nationstar to acknowledge her status as successor and review her for modification of a Freddie Loan. Even after modification and assumption process moved forward, Nationstar sent mod agreement in deceased husband's name and assumption agreement referencing non-modified terms and requiring deceased husband's signature. Had a second Nationstar/Freddie successor case with similar issues regarding paperwork -- all issued in deceased son's name even after successor (the mother) was approved for mod and assumption.

Mortgage Counselor, VT

I am a housing counselor, working for a HUD certified counseling agency. My client, J.W., is recently divorced. She was awarded the house in the divorce decree and her ex-husband signed a quitclaim deed over to her. Prior to her divorce she was mortgagor on two mortgages, but not on either of the notes. Her husband was on both of the notes, as well as mortgages. Both mortgages are serviced by BOA. The first is a Fannie Mae loan and the second is a HELOC with a private, BOA investor. She is current on the first mortgage, but the second mortgage is in default and the lender has initiated foreclosure.

Shortly after the divorce was finalized and the quitclaim was signed, we submitted a Borrower Response Package, in the beginning of January of 2015, requesting that J.W. be reviewed for a simultaneous modification/assumption on the first and second mortgages. We had to submit this package through the lender's attorney, because of the foreclosure status of the second mortgage.

According to my analysis, J.W. should easily qualify for a HAMP modification on the first mortgage. Even though the first mortgage is current, she meets the "imminent default" criteria, because she is divorced and disabled. I anticipated that the second would be subject to 2MP and once the modification finalizes on the first, the second would be subject to 2MP and that is how the foreclosure would eventually get dealt with. However, I was also asking BOA if there are other viable, affordable options that may be available to J.W. to get her current on the second mortgage, rather than having to wait until the first mortgage receives a final modification.

We have had several mediation conferences. However this is where things still stand:

1) BOA continues to claim that in order for my client to be reviewed for a simultaneous modification/assumption, she must first apply for and be reviewed for a "qualified assumption" and if she gets denied, then they will review for a modification/assumption. They said if my client should get approved for the qualified assumption (which is highly unlikely, given her income and credit) that she doesn't have to accept it. But if she does accept it, then she can apply for a modification once she gets the assumption, based on her imminent default status. I have provided BOA with very recently updated Fannie Mae guidance which supports my claim that J.W. should not have to go through this qualified assumption review process, unless she was trying to get her ex-husband's name off the loan (which they are not trying to do right now). But BOA is not budging on this. The qualified assumption package is quite lengthy and includes a Relationship letter that needs to be signed by her ex-husband, acknowledging that if this qualifying process is completed, it would release him of liability from the loan.
2) BOA's attorney also told us that if J.W. does get approved for a modification/assumption, that her ex-husband would have to cooperate and sign off on the final documents. I am not sure if this is true, but I thought by signing the quitclaim, he would not have to be involved in this part.
3) Regarding the second mortgage, BOA has told us that the loan is not assumable and they sent me the TILA to show where it says that. However, BOA eventually said that they would

be willing to make an "exception" to this restriction in order help my client. I responded by sending them the section of the Garn-St. Germain Act that lists the types of transfers of ownership that are exempt from the due-on-sale clause, and stressed the point that BOA doesn't have to make an "exception" on my client's behalf , because she is already Garn-St. Germain Exempt. I don't think they even understood what I meant.

4) As part of the initial package we submitted, we included the quitclaim deed. However, BOA has also required us to send the final divorce decree, in addition to the quitclaim deed. Apparently, the final divorce order, itself, wasn't enough: They want to see the stipulation that awards the property to my client in the divorce decree.
5) BOA has said they are considering other ways to get my client current on the second mortgage in order to get her out of foreclosure status, so she can then pursue more long-term solutions (i.e. modify the first mortgage and maybe the second too). We have yet to see any real proposal on the table, even though this was initially in the first mediation about a month ago.

Mortgage Counselor, NY

Servicers routinely insist on a quitclaim deed when a divorce awards the home, or transfer loans to servicers who don't allow assumptions.

Attorney, CT

I'm currently representing someone in a foreclosure action who acquired title outside of probate (joint tenancy with right of survivorship) when his wife died in 2011 and has been trying to get Nationstar to review him for a mod./assumption on a pick-a-pay loan for the last 4 years. He was assisted by a housing counselor for approx. 2 years without success and was repeatedly told (1) he had to go through probate or (2) it didn't matter if he had title, etc. because he was not the borrower. Nationstar filed a foreclosure in 2013 and persisted in this conduct, even while he was in court sponsored mediation pro se. Nationstar did not ever substantively review any of his numerous loan modification applications over approx. 3 years. Its attorneys misrepresented to the court that no home retention options were available because he was not the borrower and appear to be entirely unfamiliar with Garn St Germain or HAMP/CFPB guidance on orphans and widows. I then spent around 6 months unsuccessfully trying to clear up the situation informally through a HAMP solution center escalation (HSC also did not understand that probate was unnecessary) and a CFPB complaint (Nationstar failed to respond to the substance of my complaint). I ultimately had to represent him in the foreclosure action and alert the court to the misrepresentations of Nationstar's attorneys to get them to review him for HAMP and walk them through why he had to be reviewed for a modification.

This should have been a simple issue to clear up, but instead it took 4 years and the resources of a housing counseling agency, a non-profit law firm, and the court's mediation program to get Nationstar to recognize it needed to let him apply for a mod. I don't think this case is all that unusual. I've been told repeatedly by numerous servicers that they cannot speak to an heir or review them for a mod without a "power of attorney" from the deceased borrower, which is of course impossible. Servicers (and their attorneys and the HAMP Solution Center, unfortunately) do not understand that title can pass outside of probate. While I occasionally hear stories from counselors about the process going smoothly, in my experience, getting a servicer to acknowledge/review a successor takes at least a year, possibly longer.

Attorney, Ohio

As a legal aid volunteer lawyer, I am still representing an 82-year-old man whose wife was the borrower – and who died before the first mortgage payment was due.

After 6 years of making regular payments, the Widower fell behind. Bank of America refused to deal with him because he was not the borrower – on BOA books, the borrower is "Estate of [Wife]".

I reopened the wife's estate in Probate Court with Widower as executor. BOA would then deal with Widower, & me as his attorney. Thanks to a HUD housing counselor and TARP funds, we were able to get a reasonable loan mod from BOA, and for 8 months Widower has paid every mortgage payment due on the modified loan. The loan modification document required the Widower to sign as an individual, not as executor for his late wife's estate. Therefore, I believe Widower has assumed the loan.

Bank of America still will not acknowledge him as the borrower or send bills or year-end interest statements in his name. The last time I talked to them, which was in December, BOA representatives still told me that, after a year of on-time payments, he can apply to assume the loan - but that he still would have to "qualify" to do so. But they do now say that he is "authorized" on the loan and they will talk to him.

Widower would like to get the loan in his name, in case he needs to negotiate with BOA in the future. BOA says they require a mortgage loan to be current before it can be assumed. (This seems to go against Fannie Mae's servicing guide – this loan is owned by Fannie Mae.) Now BOA clerks tell me that he also must have 1 year of current payments before they will consider an assumption. The year of on-time payments should be no problem, but I don't think he will ever meet other requirements listed online (have funds in a bank account to cover closing costs and 6 months of mortgage payments in reserve; have an acceptable credit score).

Attorney, NC

We see this constantly from servicers. Especially (unsupportable) demand for "letters of administration" or proof of executorship. Almost always takes significant push back, and complaints. We've received responses to CFPB complaints stating that the successor in interest "is not authorized" and that the "borrower is deceased."

In one case where we filed a CFPB complaint, our client was an elderly African American homeowner who purchased the home with her now-deceased husband in 1968. She is on the original deed. Has been her family home ever since and primary asset. Client fell behind after her husband's death and sons discovered several months later. Family was completely stymied by servicer's refusal to communicate coupled with the addition of fees/foreclosure costs almost doubling the amounts due to reinstate. Even after I undertook representation it took repeated letters and complaints to get servicer to comply with their obligations. Continued demands that wife had to be appointed executor when there was no need for estate to be opened. If client had not been referred to our office for direct legal representation, I have no doubt she would have lost the home. As it is, we were able to resolve the case with a favorable modification and principal reduction and affordable payments. We are still disputing through Notice of Error the foreclosure attorney fees that were added to the account during this time.

I've had two more come in recently – one where surviving spouse sent in death certificate and deed 4 times, to no avail, and required an RFI and NOE from our office to resolve. Another separated spouse with court ordered property settlement awarding him house and house deeded fully into his name. Servicer claiming he needs to "[credit] qualify for assumption" and that he cannot because loan is in default, and, anyway, as the non-owner separated spouse (sole signer on loan) no longer resides in home, client retaining ownership of family home and raising his children there has no ability to access loss mitigation. (Untrue, of course, but we are still fighting them.) Meanwhile he may lose ability to apply for North Carolina's Hardest Hits Funds.

We almost always open these cases because it takes a lawyer to resolve, even though it shouldn't.

Exhibit B: Complete Application Stories

These narrative examples were provided in response to NCLC's national survey of attorneys and housing counselors in March 2015.

1. **Attorney, OH**
   Complaints about documents being "cut off" so they can't see the whole thing, only the significant parts of multipage bank statements, pickiness about 4506T forms not having everything the way they want them.

2. **Attorney, GA**
   Client applied for a loan modification with M&T Bank (we dealt directly with the subservicer Bayview Loan Servicing) in 2014. After getting the initial 5-day acknowledgment letter, she was asked for additional information about her HOA that was not previously requested.

3. **Housing Counselor, MD**
   Was told all documents received and be sent to the underwriter. Underwriter requested additional documents and updated documents.

4. **Attorney, MS**
   I never see 5 day letters.

5. **Attorney, GA**
   In one case sent in complete application in October 2014 and application is still pending (as of March 2015). The servicer says because the applicant is an heir and the servicer is supposedly developing an assumption process (to go along with modification application process).

6. **Attorney, IL**
   One of my clients has submitted multiple loss mitigation packages. With each package, he has had to submit at least three 4506-T forms. He has been submitting documents for one year.

7. **Attorney, CT**
   Represented client in mediation with Ocwen. Ocwen requested duplicative documents for close to a year. She finally qualified for a HAMP TPP in October 2014 and got a permanent HAMP modification in January 2015. The delay cost her about $15,000.

8. **Attorney, NC**
   See this with servicers all the time. I almost never get the application acknowledgement letter within the 5 business day timeframe, but have seen, on numerous occasions, where servicer asked for additional/duplicate documents after servicer confirmed that the application was complete. (JPM Chase)

9. **Mortgage Counselor, MD**
   Yes, client sent all that was needed and at the end the lender said that the documents were not sent to the proper program and they never received the documents. Borrower sent the same documents many times. Borrower called lender to explain that she sent those documents on time and to confirm with her that they received them. Again they said never received those

documents. Borrower sent the same documents repeatedly for almost 9 months. Borrower was denied because of this and now she is applying again.

10. **Attorney, CA**
    Client sent a complete application (that an attorney helped her with) in May 2014 to Green Tree. Attorney spoke with Green Tree the following week to confirm receipt of application. Green Tree representative said that 4506T form had incorrect address (client's P.O. Box address was listed, not home address). Client sent new 4506T form with home address. A few days later, Green Tree asked (by phone) for updated income verification documentation, which the attorney provided. One week later, Green Tree asked (by phone) for additional verification of address from client, which client promptly provided. In June 2014, a Green Tree representative stated (by phone) that they had everything they needed to review the application. The same day as this conversation, Green Tree generated a letter denying client's modification because of missing documents.

    Attorney calls new SPOC to find out what is going on and he said he would "re-open" the application. A few days later, Green Tree sends out another denial letter for missing documents. Attorney sends appeal of denial on client's behalf. In July, 2014 Green Tree sends letter stating that client's account is under review and asking for documents client already provided- 4506T, bank statements, proof of insurance, tax return, utility bill. Attorney promptly re-sent loan modification packet containing all of these documents. August 2014, Green Tree sends another denial letter for missing documents. Attorney sends another appeal of the denial with copies of the documents previously provided along with fax receipts. Green Tree responds with a letter denying the appeal because of missing documents.

    September 2014 letter stating that client has provided complete financial information. The next day, Green Tree sent another denial letter for missing documents. (At this point we stopped sending appeal letters because we filed a lawsuit). October 2014 Green Tree sent a letter saying that they would not review client's application because it is incomplete. November 4, 2014 Green Tree sent a denial letter for failure to provide documents. On the same day, November 4, 2014, Green Tree sends Notice of Trustee Sale to client setting foreclosure date.

11. **Mortgage Counselor, MD**
    We use Hope Loan Port, so we have minimal problems with lost or duplicate documents requested. For the cases where there is no Hope Loan Port or client has submitted application, this is still a common problem.

12. **Mortgage Counselor, IL**
    I have files from 2013 and after the lender received all the documents the file was transferred and we had to start over. The new lender would have us start over and ask for a down payment. Lender Round Point Mortgage

13. **Attorney, PA**
    It is my experience that "underwriting" always comes back with follow-up requests for information or documents, and that those requests are never in writing. I have been told numerous times by all the various servicers to ignore the letters that are sent out and only go by what they tell me. Frankly, I don't know how anyone gets a modification without a lawyer.

The requests for follow-up information aren't typically repetitive (with some exceptions), but they are EXTREMELY picky. For example, I typically have to submit letters explaining very minor deviations in hours worked. I have also had a problem reaching the 'single point of contact' in time. In one case, the single point of contact left me numerous messages asking for follow-up information, but every time I called back he was not available. We literally played phone tag for weeks. However, as soon as the deadline for getting the information passed, he simply closed the file, despite the fact that I was still trying to reach him. I managed to get that case reopened by escalating it and the client is about to pay his 3rd trial mod payment.

As a result of this case, I also no longer wait to talk to the single point of contact but instead always talk to whatever representative is available so that they can at least read me what is in the notes in the file. But I suspect that most homeowners trying to do this on their own won't know to do that. I also do have cases involving requests for repetitive information, but they tend to be the more complicated cases. In one case I have with a successor (obtained house in divorce), the servicer continued to ask for the divorce decree multiple times for months.

14. **Attorney, FL**
Again, this varies with servicer. PNC and Ocwen are awful. Bank of America and Chase are better than most of the others but they also transferred their servicing rights to [worst] servicers around the time of the National Settlement.

15. **Mortgage Counselor, MI**
I've had this happen with the 4506t. A client was told that his 4506 t had been altered. I filed a complaint with the CFPB. The servicer acknowledged and the homeowner was allowed to resubmit the 4506t. This put a stop to the review for 1 month and the homeowner incurred further fees.

16. **Mortgage Counselor, MI**
A client submitted all documents requested and called to verify that everything was there. Told yes, no additional documents were needed then servicer proceeded with scheduling a sheriff sale. When called back, servicer explained still missing a document. The servicer sent out a letter 2 weeks prior letting the client know that this document was needed and the client did not see it. This document was not mentioned over the phone. As a counselor, I had to escalate the case and contact a manager in order to have the sale postponed. This was very stressful and upsetting to the client.

17. **Loss Mitigation Consultant, NJ**
I love the new proposed rule. Complete application notice. They rarely comply with 5-day acknowledgement and regularly ask for additional documents.

18. **Mortgage Counselor, PA**
Who is getting 5-day letters? I have not seen any servicer provide a 5-day letter other than one from Statebridge Mortgage that they didn't actually send out (only later produced after denying homeowner for not submitting additional documents).

Exhibit C: Stories About Letters Appearing to be Backdated

These narrative examples were provided in response to NCLC's national survey of attorneys and housing counselors in March 2015.

1. **Mortgage Counselor, NJ**
   Letter are mailed to borrowers from foreclosure attorneys months after filings have taken place.

2. **Attorney, NM**
   This happens so often that I can't even begin to try to document.

3. **Attorney, GA**
   Happens all the time, based on the time the letter is received by the homeowner (though I have not seen envelopes showing postmark).

4. **Attorney, CT**
   Ocwen provided a TPP dated August 2014 in October 2014. Then again when they provided client permanent modification it was dated 1/6/15, but I did not receive it until mid-February and that was only after I prompted the attorney on its status.

5. **Attorney, CT**
   Client was approved for a permanent modification on January 12, and informed via email that docs would arrive "in a few days". They were dated January 12, but did not arrive until January 23, and were due for January 26.

6. **Attorney, NM**
   I have seen lots of these.

7. **Attorney, CT**
   Greentree and PHH have done this.

8. **Attorney, CT**
   Suntrust and Bank of America.

9. **Mortgage Counselor, MI**
   I recently received a call from a homeowner who stated that her loan modification offer, permanent, and envelope post mark date all had different dates.

10. **Attorney, CT**
    (a) Borrower received FHA-HAMP permanent modification and partial claim from Citi both dated January 12, 2015 in two envelopes from Fed-Ex and UPS, both sent by overnight mail, the evening of January 23, 2015, which was a Friday. The modification and partial claim said they had to be returned to Citi by January 26 (a Monday). A foreclosure was scheduled for Feb. 3. Since the documents were overnighted to the borrower (she kept the envelopes) it's clear that Citi back-dated these documents, which gave her no time to consult with her housing counselor. Borrower had to scramble to find a notary and witnesses on a Friday night and overnight the docs back to Citi. Citi's

attorneys nevertheless opposed her motion to vacate the foreclosure judgment the following week.

(b) Client received HAMP TPP dated February 4, 2015 by mail on February 20, 2015. Offer appears to be based on inflated income, and while 30 day HAMP appeal deadline is still applicable, this means CFPB 14 day appeal deadline mentioned in offer had already passed by the time he received it.

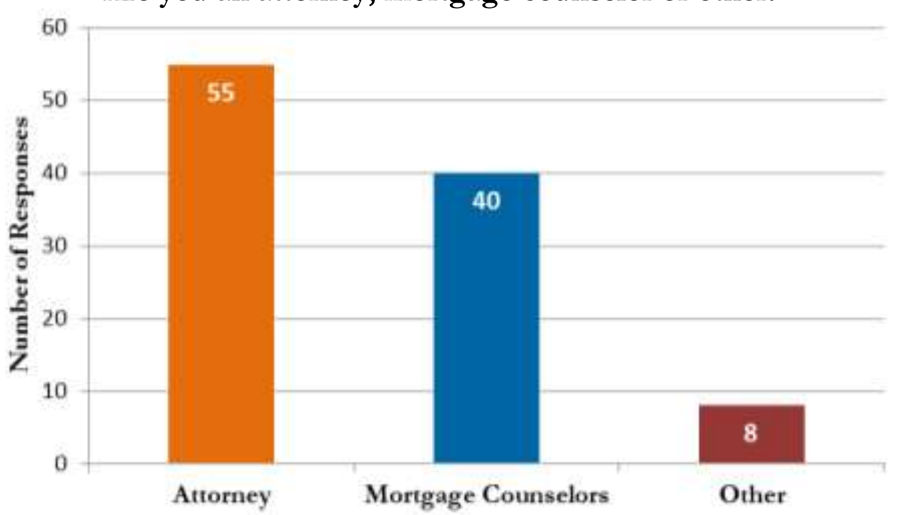
(c) (An older example, but a good one). Borrower received a trial plan from Wells Fargo for an in-house modification with the first payment due on October 1, 2013. The TPP specifically says there is no "grace period" allowance and the payment must actually be received by Wells Fargo on or before the due date. However, the letter was dated October 21, 2013, twenty days after the first payment was due, and the borrower didn't actually receive it until October 31. Wells Fargo refused to accept her late payment and subsequently denied her for another modification based on her default on a TPP she could not possibly have complied with.

Exhibit D

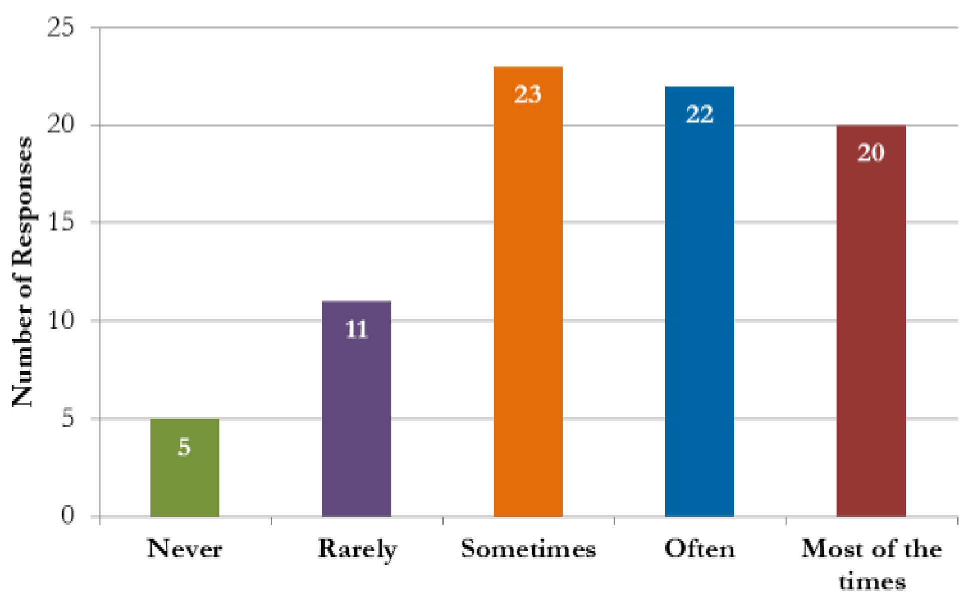
Nationwide Survey on Mortgage Servicing Practices in Communities

Survey Results

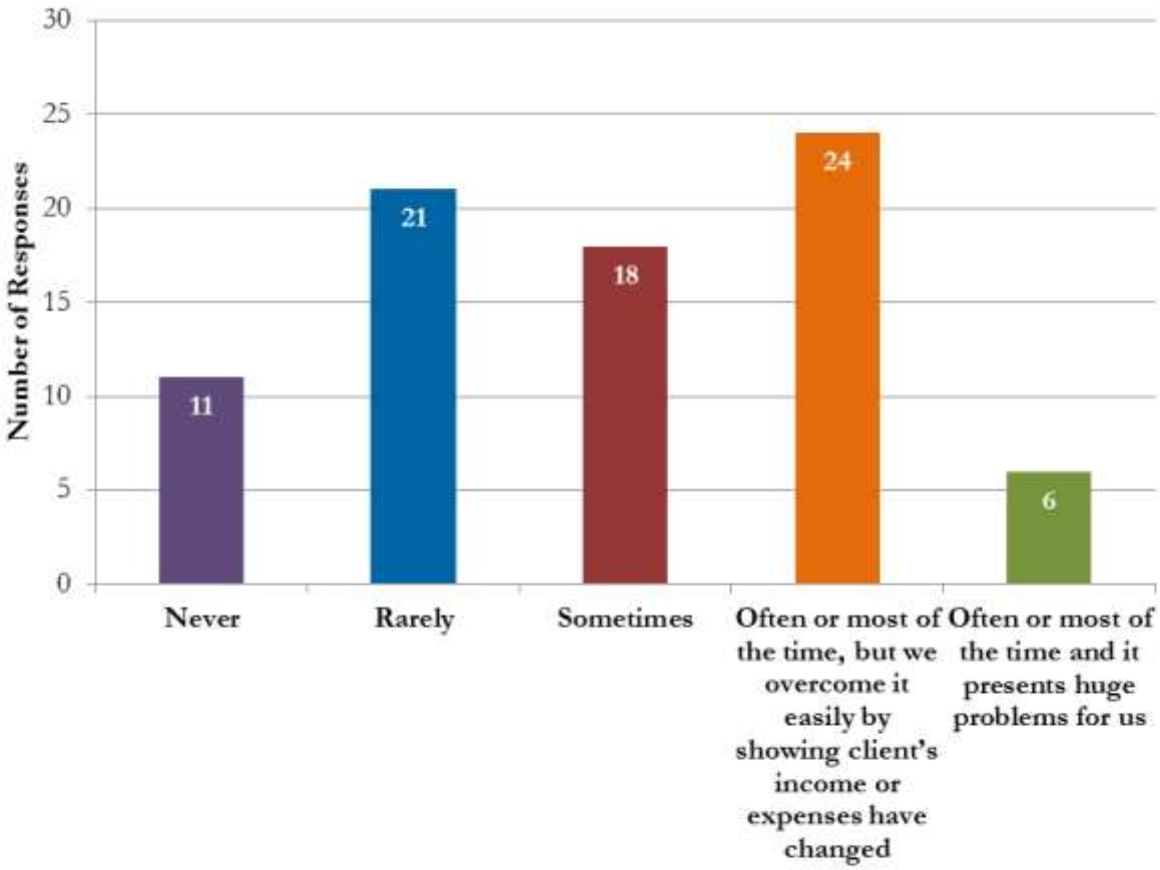
Are you an attorney, mortgage counselor or other?



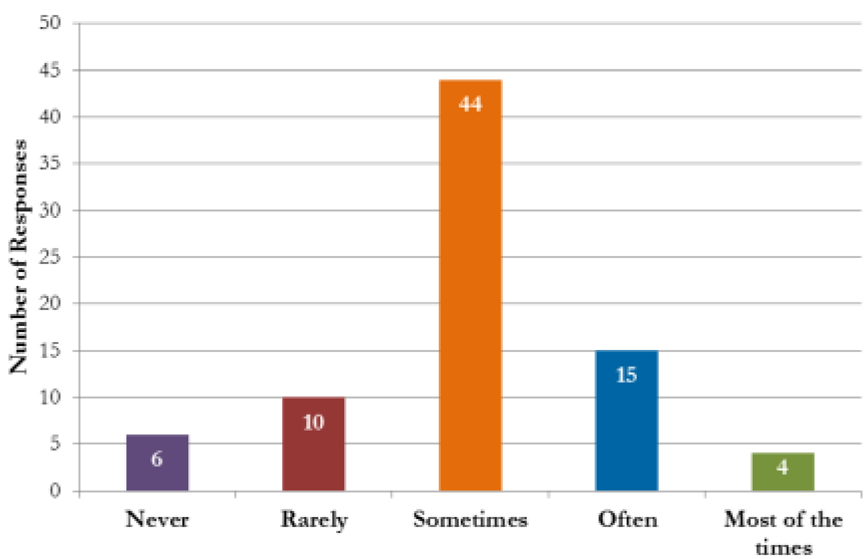
1. How often in the cases you are handling has a servicer reviewed an application from your client (where one was submitted) even though a decision was made on an earlier complete application submitted after 1/10/14? (In other words, how often are you representing people with "subsequent applications," and servicer does not object to reviewing the application):



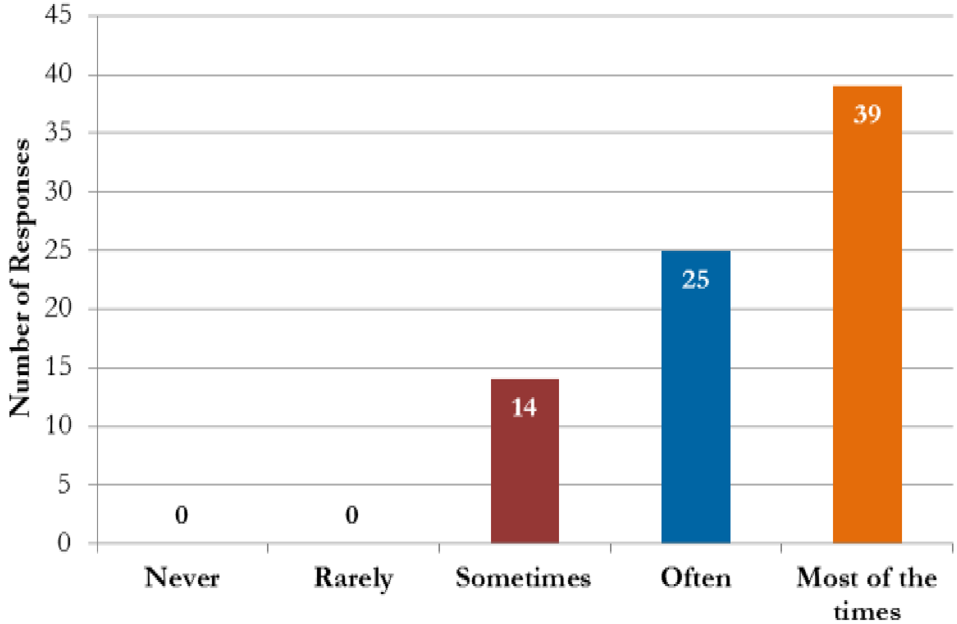
2. For servicers that will review a "subsequent application," how often did they tell you that you have to show changed circumstances in order to have the subsequent application reviewed?



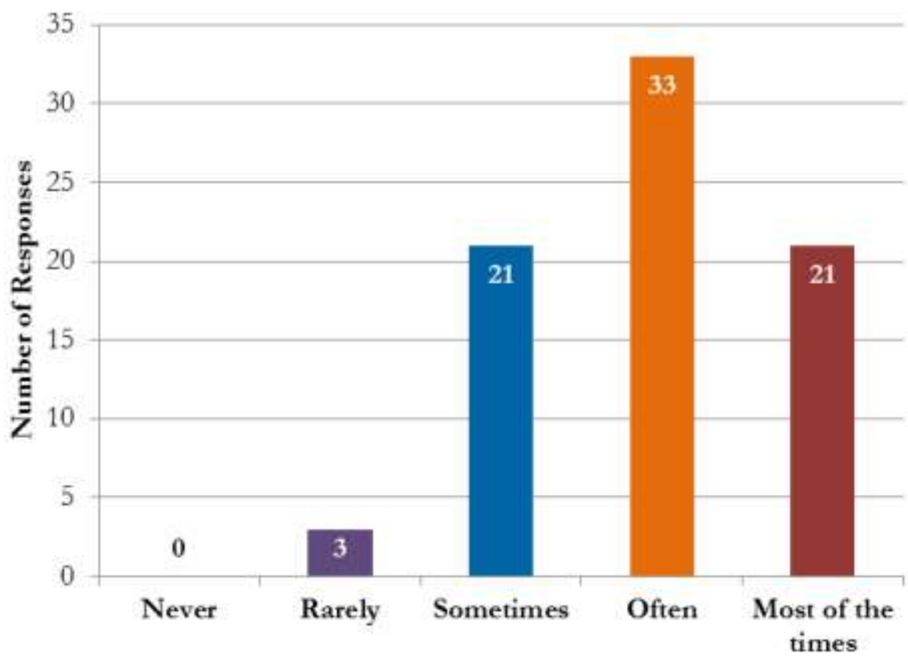
3. How often are "subsequent applications" for a loan mod approved?



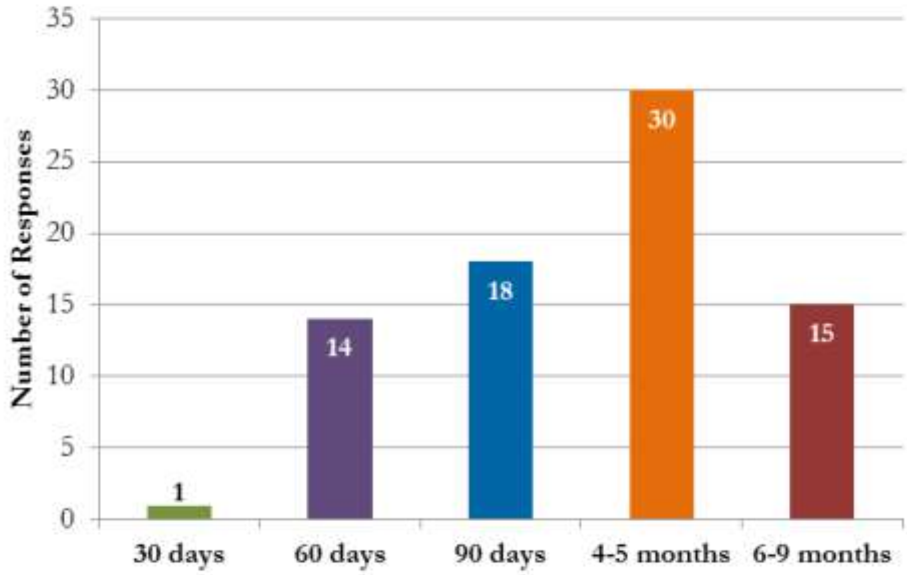
4. In the past year, how often have you had trouble with servicers requesting some documents, then requesting others (piecemeal)?



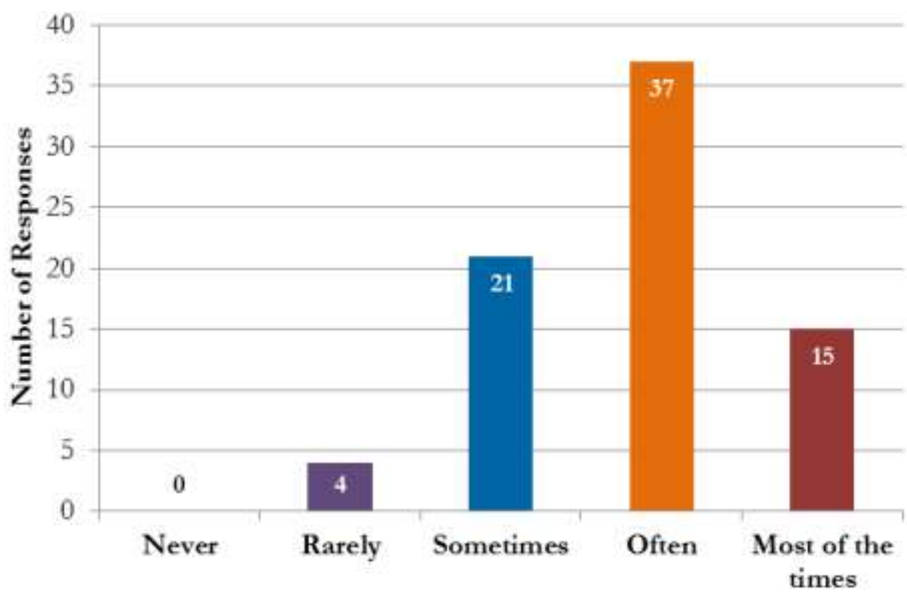
5. In the past year, how often have you had trouble with servicers asking for the same docs over and over again?



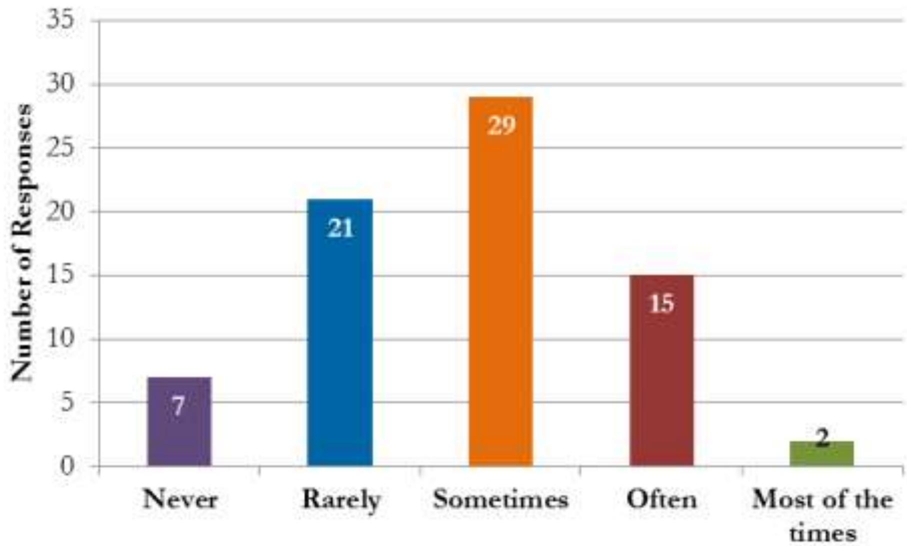
6. On average, how long is it taking for your clients to get their loan modifications reviewed, from start to finish?



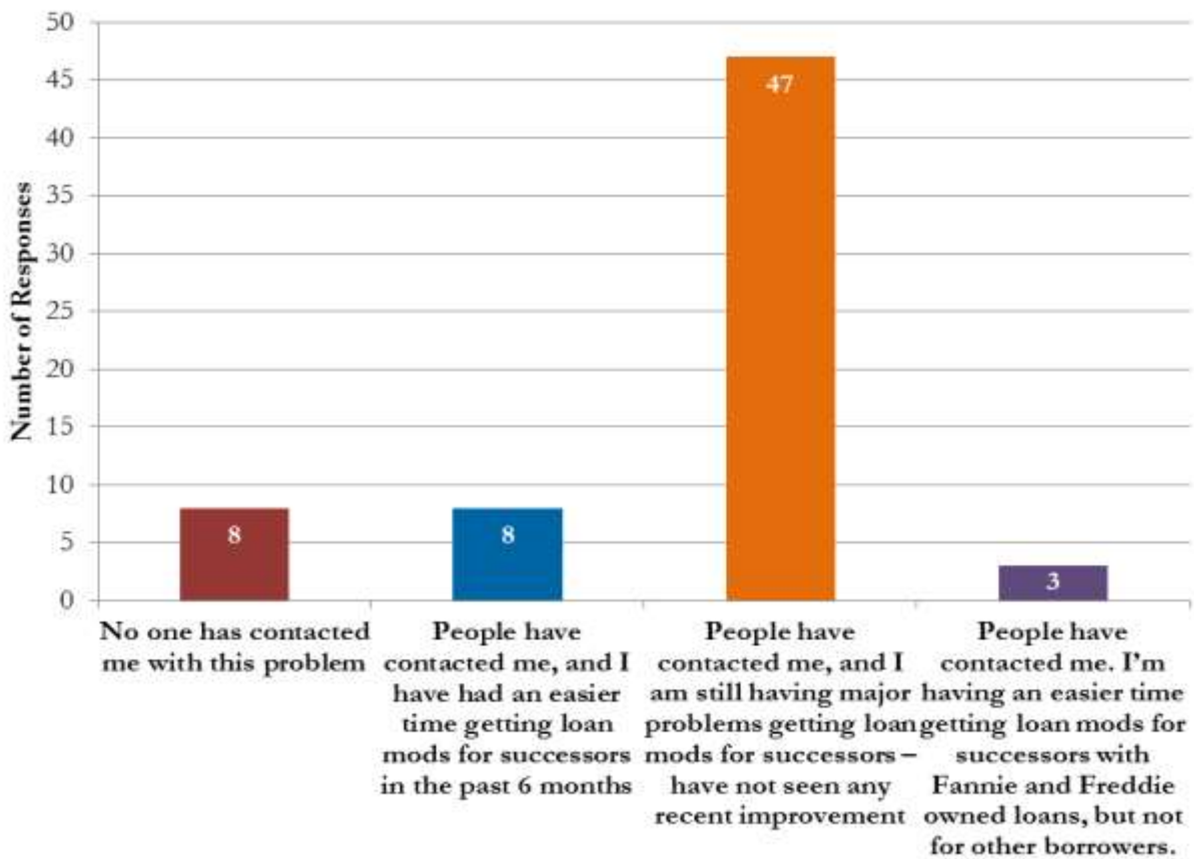
7. How often does a servicer ask for additional documents after your client has submitted everything the servicer requested in the 5-day letter?



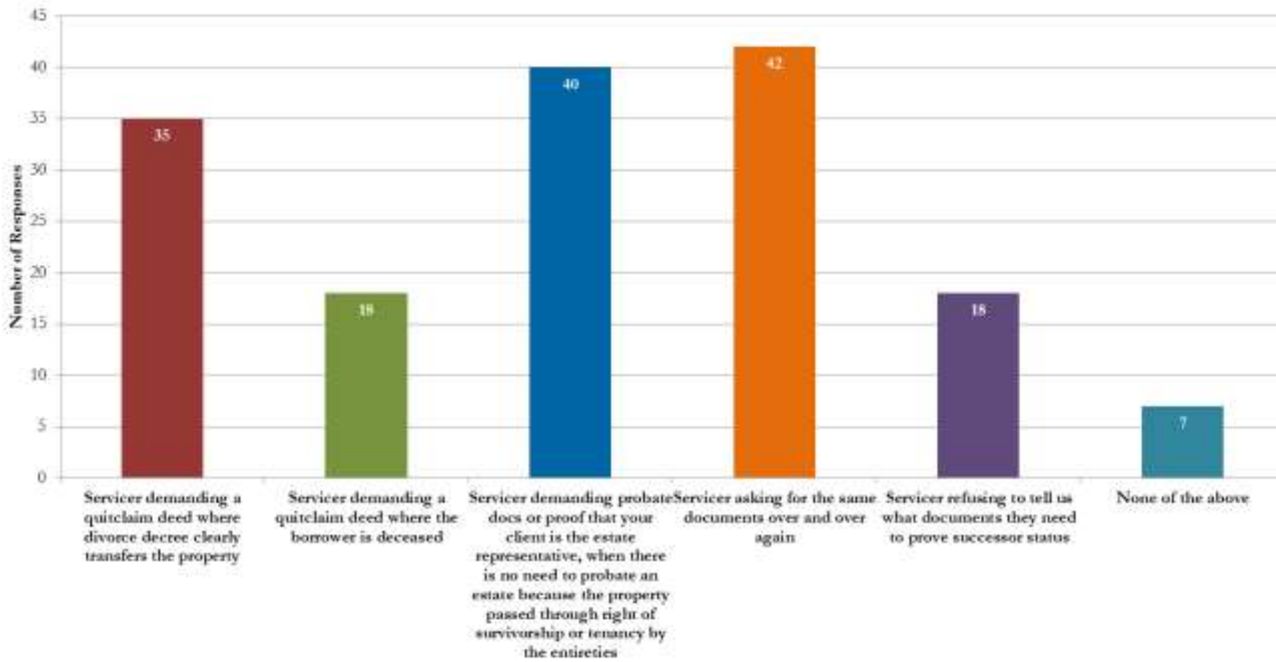
8. How often do servicers initiate foreclosure afteryou have been told (for the first time) that the application is complete (or your client has provided everything the servicer requested in the 5-day letter) but the servicer then requested additional or duplicative information?



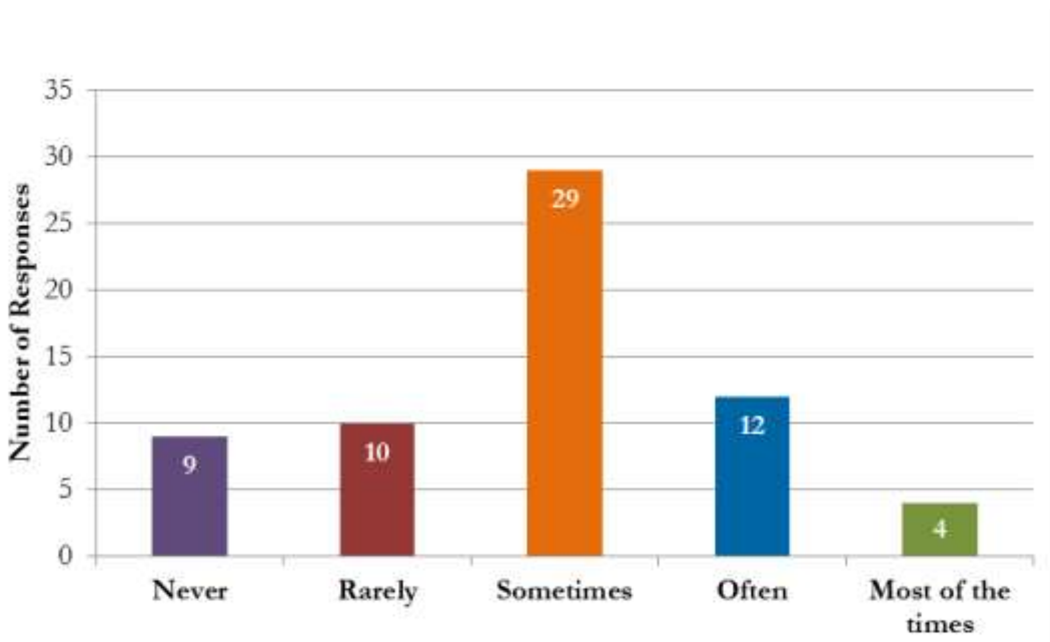
9. Which of the following is most accurate to describe your experience with successors due to divorce, death, etc.trying to get loan mods: (check one)



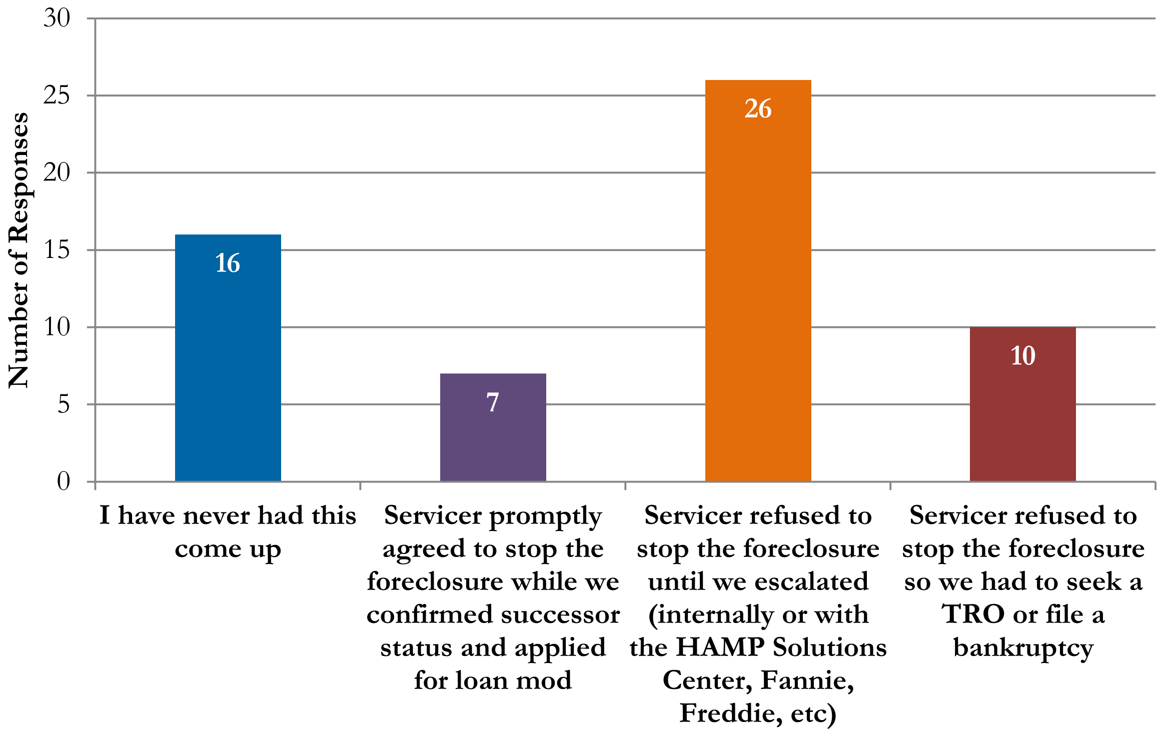
10. Which of the following have you experienced when trying to get the servicer to acknowledge your client as a successor? (check all that apply)



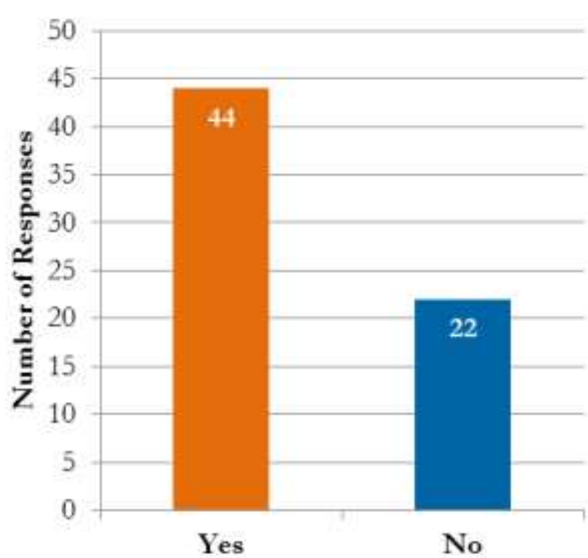
11. How often have you provided the servicer with all documents they requested to show proof of successor status, and the servicer still refuses to give your client info about the loan or let client apply for a loan mod?



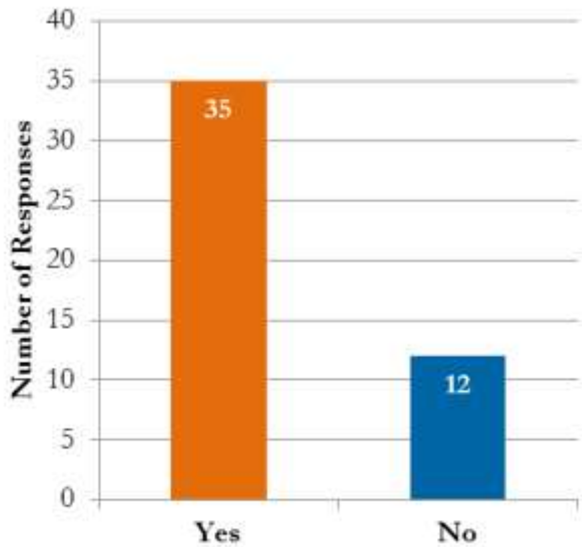
13. Where you have been contacted by a successor who needs a loan mod and is facing the risk of foreclosure, how did servicer respond?



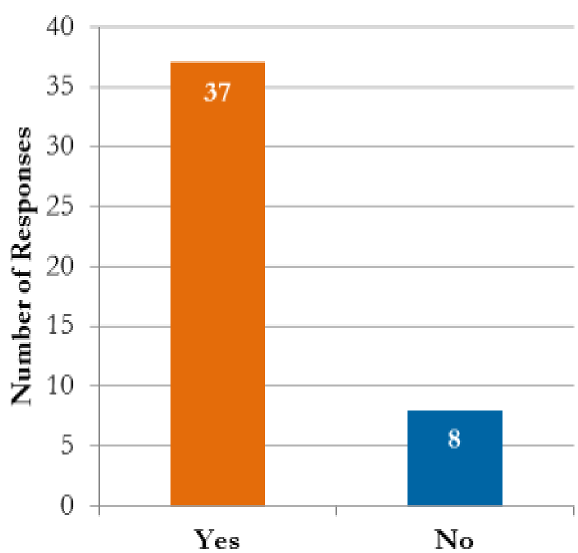
14. Have you been contacted by a joint owner of the house who is on the mortgage/deed of trust but not on the note, where your client is a co-owner and there has been no recent transfer of the house? This may come up in cases of separation, abandonment, domestic violence, unmarried partners, etc.



14a. If yes, did you have difficulty trying to get the servicer to communicate with your client?



14b. If yes, did you have difficulty getting the servicer to let your client apply for a loan modification?



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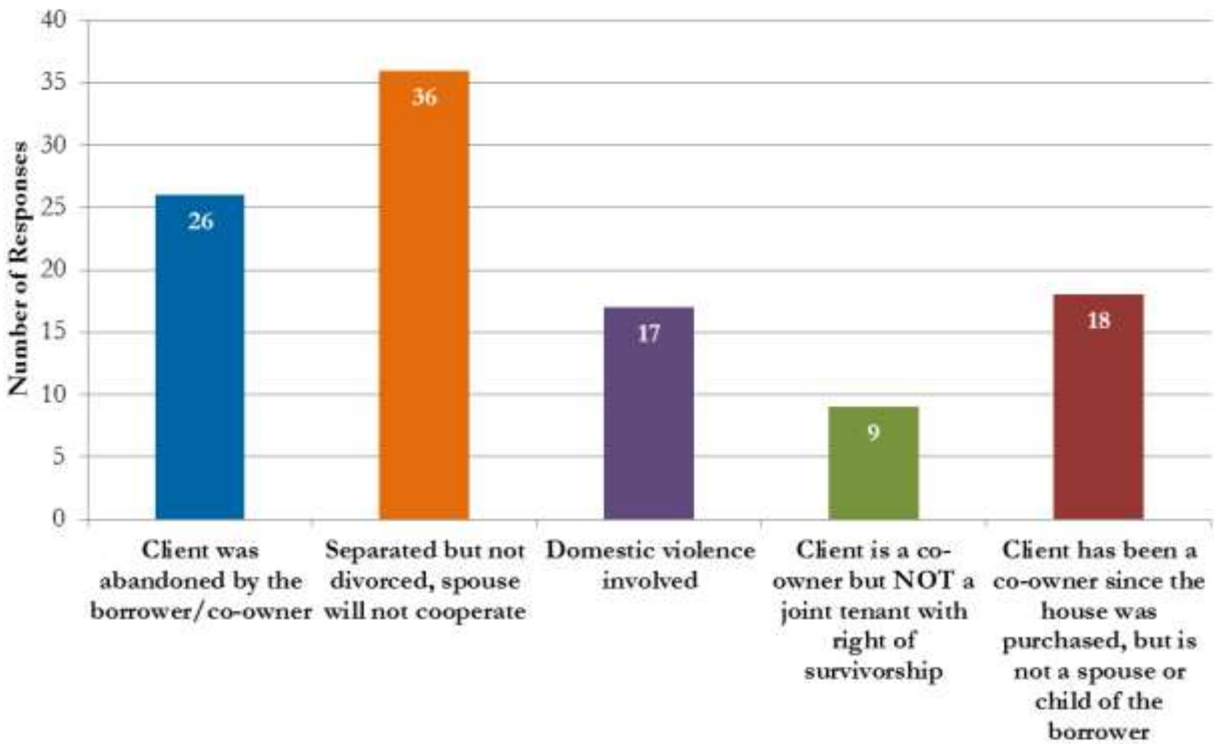
15. Which of these best describes the situation your client was facing (check all that you have seen):



16. How many of the people contacting you for help getting a loan mod are the owner of a house but not the borrower on the mortgage (because they got the house through death, divorce, or a deed)?