

Checklist for Reviewing RESPA Loss Mitigation Notices to Borrowers

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Review of written notices can be an important tool for assessing whether a servicer complied with various requirements under the RESPA loss mitigation rules. Regulation X requires that a servicer give the borrower written notices at distinct stages in the loss mitigation and foreclosure process. The servicer's failure to comply with these notice requirements may give rise to a private right of action for the borrower. Failure to give the notice in and of itself is a violation of the rules. In addition, the notice defect may signal a violation of other rules, including the dual tracking restrictions, and lead to further liability for the servicer.

The basic range of RESPA damages may be recoverable for violation of any of these written notice requirements.¹ Failure to comply with these requirements may also violate other statutes, regulations, consent decrees, and common law rules applicable to servicers' business practices. These non-RESPA claims may contain enforceable standards and offer a greater range of relief, including the ability to seek injunctive relief to stop a pending sale.

The following checklist describes the Regulation X early intervention and loss mitigation written notices and the questions to consider when reviewing them:

1. Pre-Foreclosure "Early Intervention" Notice²

- Did the servicer give this written notice no later than the forty-fifth day of the borrower's delinquency?³
- Did the notice encourage the borrower to contact the servicer?⁴
- Did the notice provide the servicer's telephone number for the continuity of contact personnel assigned to the borrower, and the servicer's mailing address?⁵
- Did the notice provide, if applicable, a brief description of examples of available loss mitigation options?⁶
- Did the notice include either application instructions or information on how the borrower may obtain more information about the loss mitigation application process?⁷

¹ 12 U.S.C. § 2605(f); NCLC *Foreclosures*, § 9.2.10 (4th ed. and 2013 Supp.).

² See NCLC *eReports*, Jan. 2014, No. 5; NCLC *Foreclosures*, § 9.2.6.2 (4th ed. and 2013 Supp.), discussing the early intervention written notice.

³ 12 C.F.R. § 1024.39(b)(1) (effective Jan. 10, 2014).

⁴ 12 C.F.R. § 1024.39(b)(2)(i) (effective Jan. 10, 2014).

⁵ 12 C.F.R. § 1024.39(b)(2)(ii) (effective Jan. 10, 2014).

⁶ 12 C.F.R. § 1024.39(b)(2)(iii) (effective Jan. 10, 2014).

⁷ 12 C.F.R. § 1024.39(b)(2)(iv) (effective Jan. 10, 2014).

- Did the notice provide the website address the borrower may use to access either the CFPB’s list or HUD’s list of homeownership counselors or organizations, and the HUD toll-free phone number.⁸

2. Five-Day Application Status Notice⁹

- Did the servicer send the borrower within five business days of receipt of a loss mitigation application a notice describing the documents and information needed to complete the application (if the borrower’s application was received forty-five days before a scheduled foreclosure sale and the servicer deemed the application to be incomplete)?¹⁰
- Did the notice described above include a “reasonable date” by which the borrower must submit the missing documents and information?¹¹
- Did the servicer send the borrower within five business days of receipt of an application a notice acknowledging that the application was complete (if the borrower’s application was received forty-five days before a scheduled foreclosure sale and the servicer deemed the application to be complete)?¹²
- Did the notice include a statement that the borrower should consider contacting servicers of any other mortgage loans secured by the same property to discuss available loss mitigation options (if the borrower’s application was received forty-five days before a scheduled foreclosure sale and the servicer deemed the application to be either complete or incomplete)?¹³

3. Thirty-Day Evaluation and Loan Modification Denial Notice¹⁴

- Did the servicer send the borrower within thirty days of receipt of a complete application a notice stating the servicer’s determination of which loss mitigation options, if any, are being offered to the borrower (if the servicer received a complete application more than thirty-seven days before a foreclosure sale)?¹⁵
- Did the evaluation notice described above inform the borrower of the amount of time the borrower had to accept or reject a loss mitigation offer?¹⁶
- Did the evaluation notice state the specific reasons for the denial of each modification option and if applicable, that the borrower was not evaluated on

⁸ 12 C.F.R. § 1024.39(b)(2)(v) (effective Jan. 10, 2014).

⁹ See NCLC *eReports*, Feb. 2014, No. 3; NCLC *Foreclosures*, § 9.2.8.2.2 (4th ed. and 2013 Supp.).

¹⁰ Reg. X, 12 C.F.R. § 1024.41(b)(2)(i)(B) (effective Jan. 10, 2014).

¹¹ Reg. X, 12 C.F.R. § 1024.41(b)(2)(ii) (effective Jan. 10, 2014).

¹² Reg. X, 12 C.F.R. § 1024.41(b)(2)(i)(B) (effective Jan. 10, 2014).

¹³ *Id.*

¹⁴ See NCLC *eReports*, Feb. 2014, No. 3; NCLC *Foreclosures*, §§ 9.2.8.2.3 and § 9.2.8.2.4 (4th ed. and 2013 Supp.).

¹⁵ Reg. X, 12 C.F.R. § 1024.41(c)(1)(ii) (effective Jan. 10, 2014).

¹⁶ Reg. X, 12 C.F.R. § 1024.41(c)(1)(ii) (effective Jan. 10, 2014).

other criteria (if the servicer denied the borrower for any trial or permanent loan modification option)?¹⁷

- Did the evaluation notice identify the owner or assignee of the loan and the specific requirement that was the basis for the denial (if a reason for denial of a loan modification was a requirement set by an owner or assignee of the loan)?¹⁸
- Did the evaluation notice state that the denial was based on a net present value calculation and include the inputs used for the calculation (if the servicer denied a loan modification option because of a net present value calculation)?¹⁹
- Did the evaluation notice describe the borrower's right to appeal the denial, the deadline to make an appeal, and any requirements for making an appeal (if the servicer denied the borrower for a loan modification option²⁰ and the borrower's complete application was received at least ninety days before a scheduled foreclosure sale)?²¹

4. Appeal Decision Notice²²

- Did the servicer make an appeal determination and provide the borrower with a notice of the determination within thirty days of the borrower's appeal request?²³
- Did the notice state how long the borrower has to accept or reject the offer, which should be no earlier than fourteen days after the appeal determination notice is provided to the borrower (if the servicer offered a loss mitigation option as part of the appeal determination)?²⁴

¹⁷ Reg. X, 12 C.F.R. § 1024.41(d) (effective Jan. 10, 2014).

¹⁸ See Official Bureau Interpretation, Supplement 1 to Part 1024, ¶ 41(d)-1 (effective Jan. 10, 2014).

¹⁹ See Official Bureau Interpretation, Supplement 1 to Part 1024, ¶ 41(d)-2 (effective Jan. 10, 2014).

²⁰ Reg. X, 12 C.F.R. § 1024.41(h)(1) (effective Jan. 10, 2014).

²¹ Reg. X, 12 C.F.R. § 1024.41(c)(1)(ii) (effective Jan. 10, 2014).

²² See NCLC *eReports*, Feb. 2014, No. 3 and Mar. 2014, No. 4; NCLC *Foreclosures*, § 9.2.8.5 (4th ed. and 2013 Supp.).

²³ Reg. X, 12 C.F.R. § 1024.41(h)(4) (effective Jan. 10, 2014).

²⁴ *Id.*