
NEW RESPA Rule: COVID-19 Mortgage Protections



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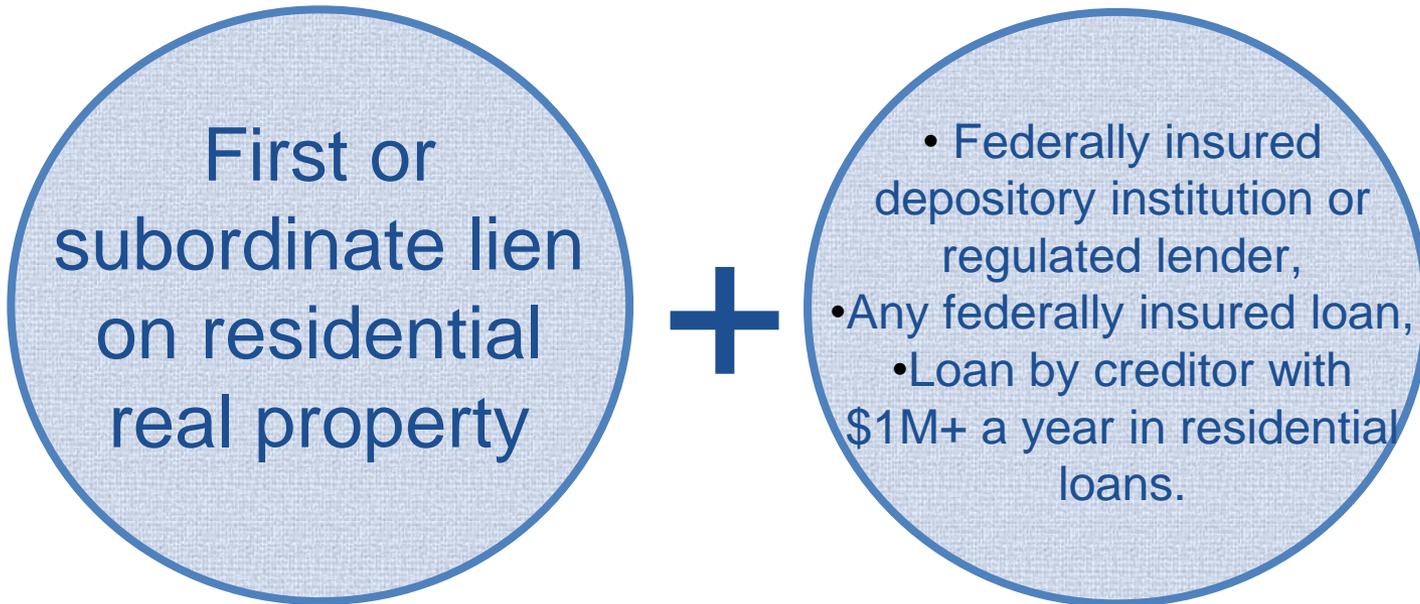
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Overview

- Pre-Foreclosure Procedural Safeguards
- Anti-Evasion: Streamlined Mods
- Reasonable diligence and (b)(2) notices
- Early Intervention Requirements

Coverage

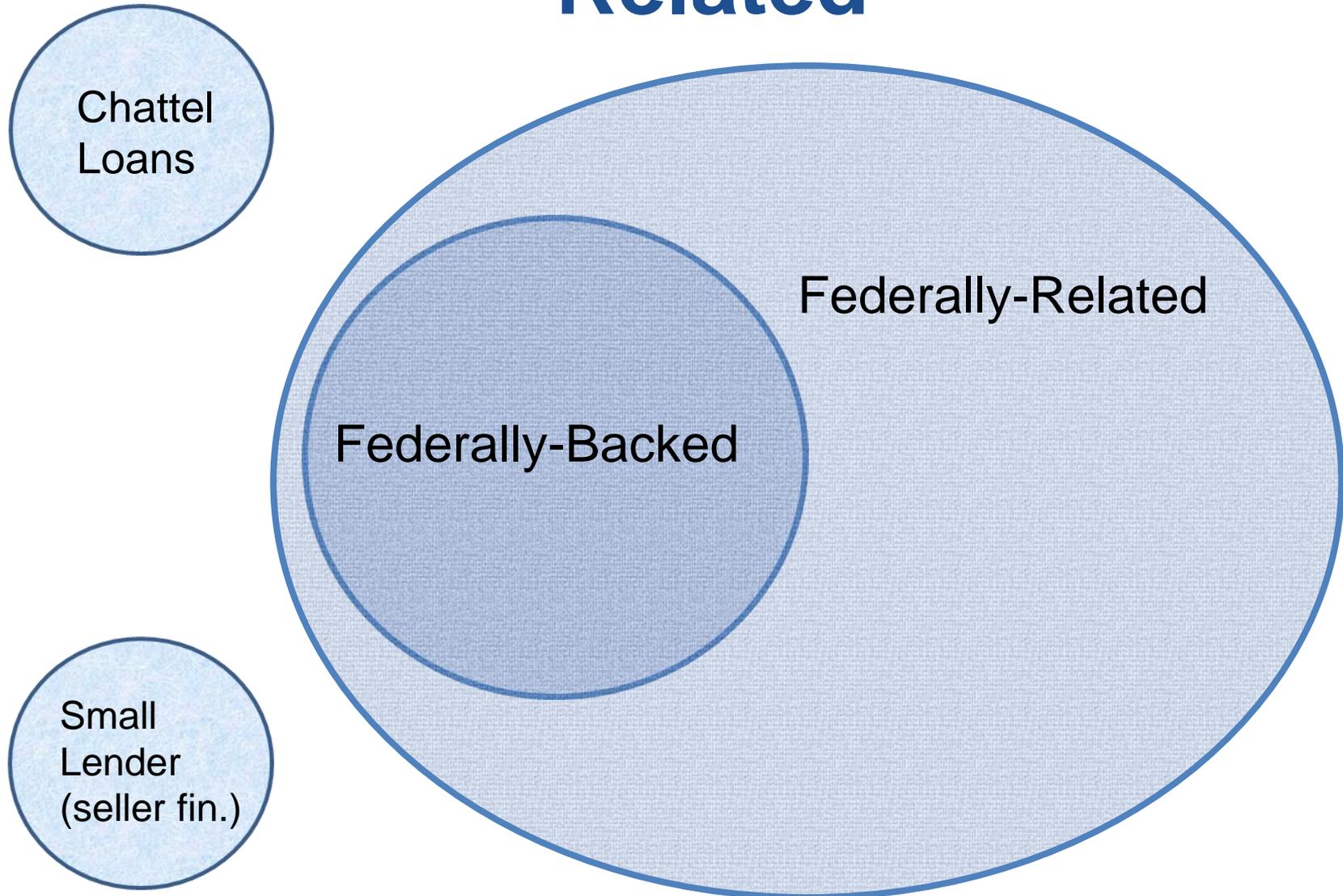
“Federally related mortgage loan”



Chattel
Mortgages

Small Lender
(seller fin.)

Federally-Backed vs Federally-Related



Procedural Safeguards



Procedural Safeguards

- From 8/31/21 to 12/31/21, servicer may not make the “**first notice or filing**” necessary to initiate foreclosure under state law unless one of three safeguards is satisfied

What is the First Notice or Filing?

- Where judicial foreclosure: the earliest document required to be filed with court
- Where non-judicial foreclosure: the earliest document required to be recorded or published
- Where no court filing or document required to recorded or published: the earliest document that sets or schedules a foreclosure sale date

Procedural Safeguards

- Servicer may not start foreclosure until after 12/31/21 unless it satisfies one of the procedural safeguards (“off ramps”)
- Who gets protection?
 - Servicer is **not** a “small servicer”
 - Fell 120 days DLQ after 3/1/20
 - SOL to foreclose not run prior to 1/1/22

Small Servicer Exemption

- Service 5,000 or fewer mortgage loans **AND**
- For all of which the servicer (or an affiliate) is the creditor or assignee

- Or, a Housing Finance Agency

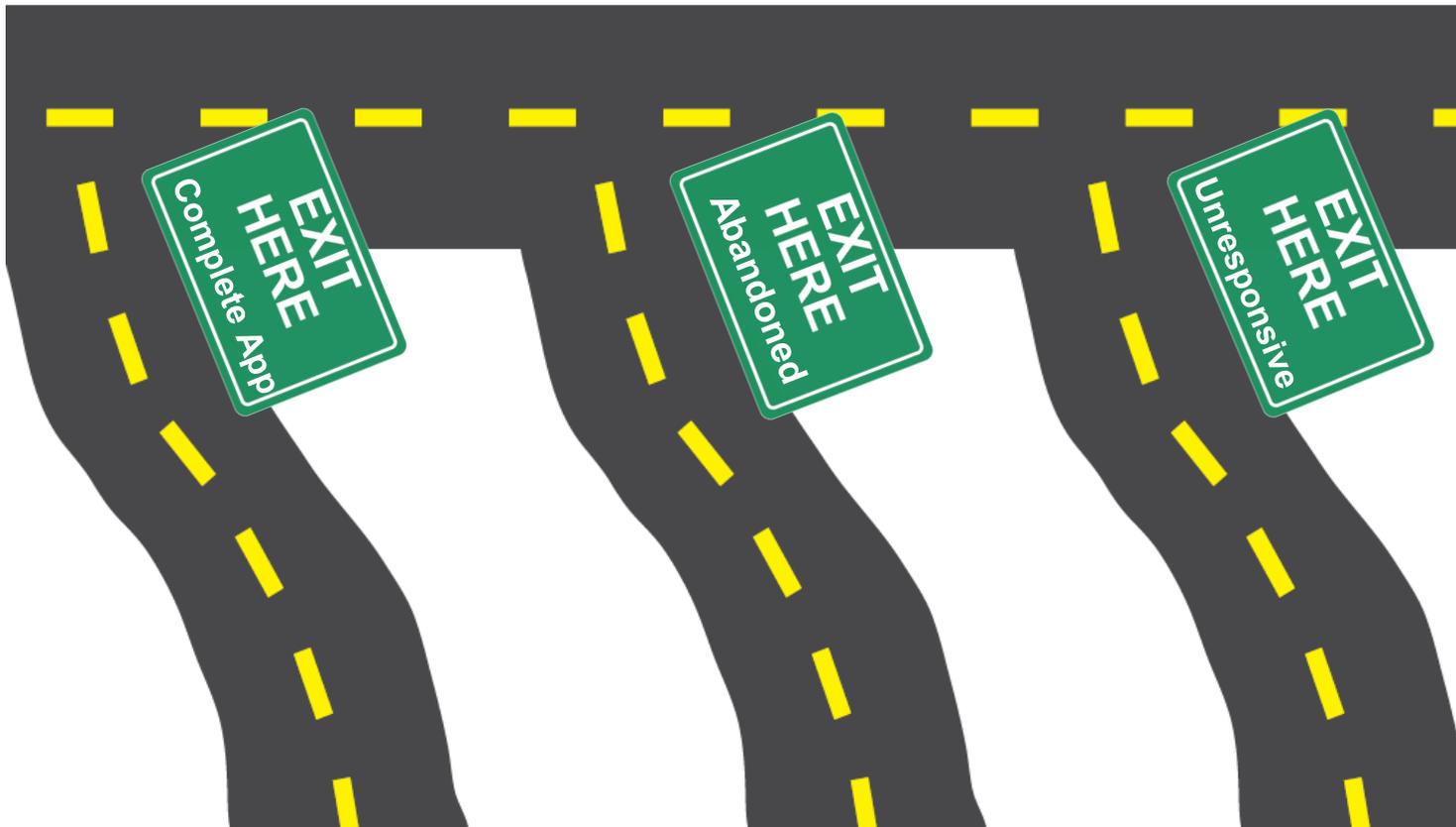
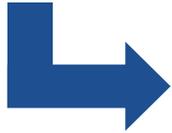
- Reg. Z, 12 CFR 1026.41(e)(4)

The “No Foreclosure Start” Highway

Who gets on the highway:

- Not a small servicer;
- Fell 120 days DLQ after 3/1/20;
- No SOL to fc prior to 1/1/22

Jan. 1, 2022:
Everybody
Gets Off



“Off-ramp” # 1: Complete App Reviewed

**EXIT
HERE**
Complete App

- Borrower submitted a complete application
- Borrower has remained delinquent at all times since the complete app
- Servicer has sent the written notice of any offer /denials
- No appeal and no acceptance within allowed time period

A green rectangular sign with rounded corners and a white border. The text is white and centered. The top two lines read "EXIT" and "HERE" in large, bold, sans-serif capital letters. The bottom line reads "Abandoned" in a smaller, sans-serif font.

**EXIT
HERE**
Abandoned

“Off-ramp” # 2: Property is Abandoned

- Property is abandoned according to the laws of the state or municipality where the property is located

“Off-ramp” # 3: Unresponsive Borrower

**EXIT
HERE**
Unresponsive

No communication from the borrower during the 90 days prior to “first notice or filing” **AND** all of the following:

- Servicer has satisfied Early Intervention live contact requirements during past 90 days
- Servicer sent an Early Intervention notice between 10-45 days prior to the “first notice or filing”
- Servicer has sent all notices required by RESPA in the past 90 days
- Any forbearance ended > 30 days ago



“Off-ramp” # 3: Unresponsive Borrower

What is “communication from the borrower”:

- Receiving any written or electronic communication from the borrower about the mortgage
- Receiving a telephone call from the borrower
- Establishing live contact with the borrower
- Receiving a payment from the borrower

**EXIT
HERE**
Unresponsive

“Off-ramp” # 3: Unresponsive Borrower

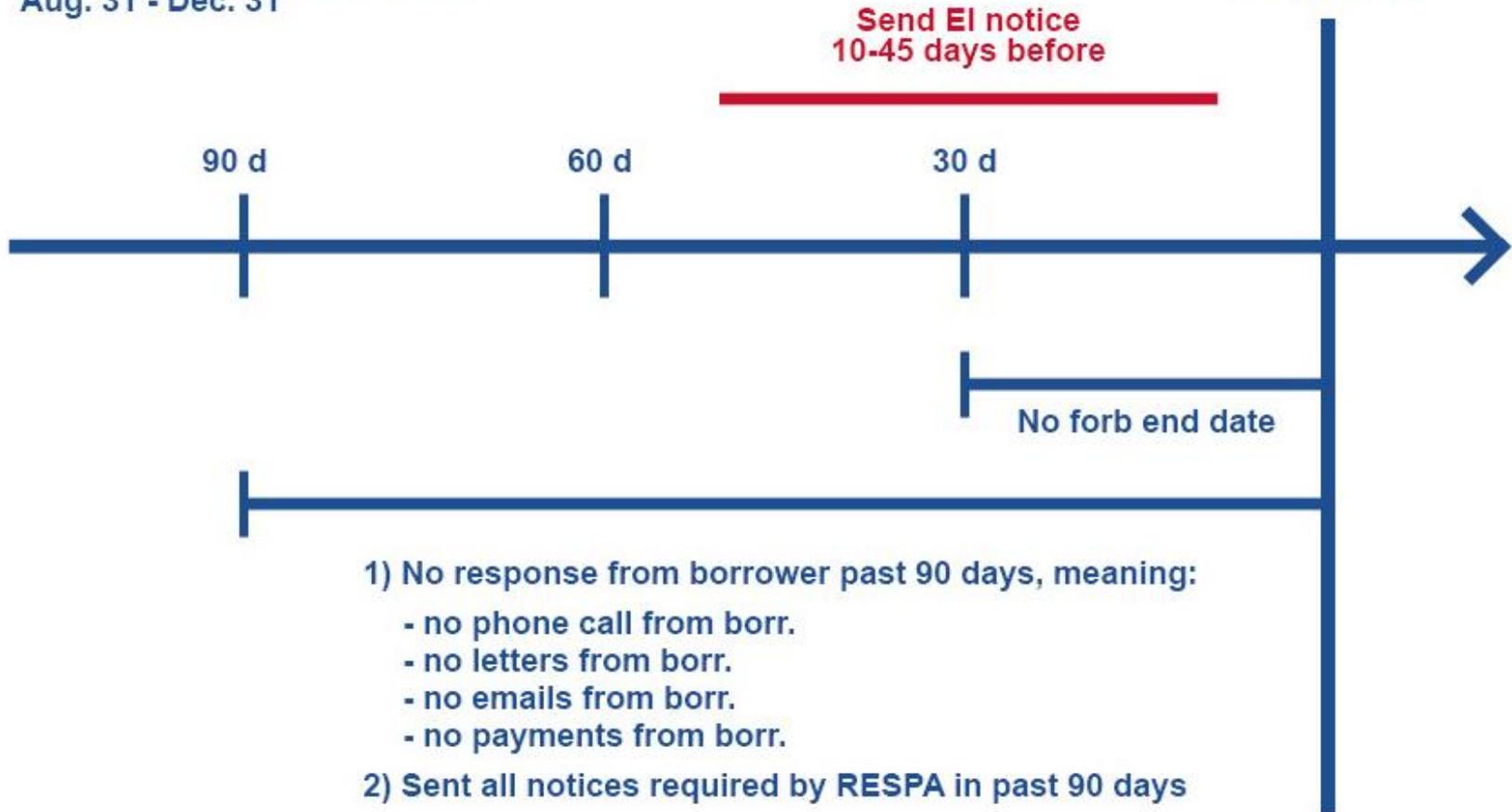
What is “communication from the borrower”:

- Communication from the borrower’s agent counts
- Servicers may set up “reasonable procedures” for determining whether a purported agent has authority
- CFPB will also be monitoring phone hold times

Unresponsive Borrower

If using unresponsive off-ramp
Aug. 31 - Dec. 31

F/C start



Duplicative Requests

- The “one bite” exception, § 1024.41(i)
- “A servicer must comply with [§ 1024.41] ..., unless the servicer has previously complied with the requirements of this section for a complete loss mitigation application submitted by the borrower and the borrower has been delinquent at all times since submitting the prior complete application.”
- Blind offer and offer based on incomplete application (e.g., forbearance or deferral) do not count as prior request

Normal RESPA Protections After Foreclosure Referral

- Nothing in the new rule prohibits continuation of f/c
- BUT 1024.41(g): If borrower submits complete application after first notice or filing but **more than 37 days before foreclosure sale date**, servicer may proceed with foreclosure process, but shall not:
 - move for foreclosure judgment or order of sale, or conduct sale, until decision given or borrower rejects offer or fails to perform
 - make a dispositive motion, such as motion for default judgment, judgment on pleadings, or summary judgment, which may directly result in a foreclosure judgment or order of sale

Practical Concerns

- If a servicer initiates foreclosure between 8/31/21 and 12/31/21 without satisfying a procedural safeguard, the servicer is violating RESPA
 - Private right of action for actual damages, statutory damages if P&P, attorney fees
 - Send an NOE to set up a claim for injunctive relief
- After January 1, 2022, no need to comply with any of the safeguards

Questions?

Streamlined Modifications

RESPA's Complete Application Framework

- Most RESPA protections are triggered by receipt of a “complete application”
 - Servicer “has received all the information that the servicer requires” to evaluate for “the loss mitigation options available to the borrower.” (§1024.41(b)(1))
 - Borrower provides all required information within borrower’s control even if additional information not in the control of the borrower is required (e.g., credit report, title search)
- Servicer has duty to assist in completion (reasonable diligence)
- Avoiding “piecemeal” reviews for one option at a time

“Application” under RESPA

- **Loss mitigation application** is broadly defined - an oral or written request for a loss mitigation option that is accompanied by any information required by a servicer for evaluation for a loss mitigation option. 12 CFR 1024.31(a).
- **Request for forbearance** is an application - attestation of financial hardship is information used by servicer to evaluate for option.

Duty to Get to Complete Application

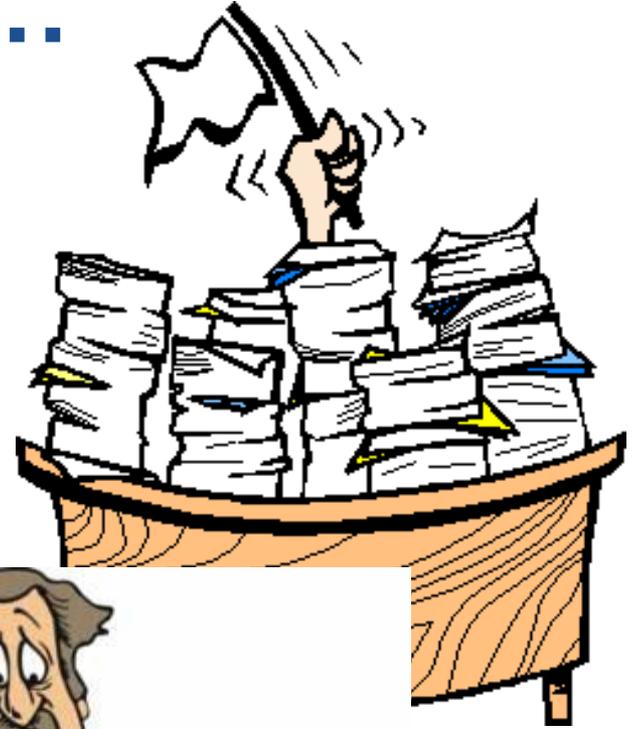
- **Reasonable Diligence** –
 - Upon receipt of an application, servicer “shall exercise reasonable diligence in obtaining documents and information to complete a loss mitigation application” (1024.41(b)(1))
- **Anti-Evasion Requirement** –
 - Upon receipt of complete application, servicer shall evaluate borrower for all loss mitigation options available to borrower (1024.41(c)(1))
 - Servicer shall not evade duty to evaluate borrower for all loss mitigation options by offering option based on incomplete application (1024.41(c)(2))

Acknowledgement Notice

Reg. X § 1024.41(b)(2)

- If Application is submitted > 45 days before foreclosure
- Servicer must conduct review to determine whether application is complete
- Within 5 business days of receiving application, provide written notice to borrower that:
 - acknowledges application is complete, or
 - describes documents and information needed to complete the application, and
 - provides “reasonable date” by which borrower should submit missing documents and information

But: The Paper Chase (and a pandemic)...



Joint Agency Statement

- Joint Statement
- As of April 3, 2020, and until further notice, no supervisory or enforcement action against servicers for:
 - missing 5-day deadline (of receipt of an incomplete application) for sending acknowledgement notice under 1024.41(b)(2)
 - provided that notice is sent before end of forbearance period

Joint Agency Statement

- As of April 3, 2020, and until further notice, no supervisory or enforcement actions against servicers for delays in taking following actions, if servicers make **good faith efforts to comply**:
 - forbearance notice under 41(c)(2)(iii)
 - written early intervention notice under 39(b)
 - 30-day evaluation and notices under 41(c) and (d)
 - escrow analyses

Joint Agency Statement

- The CFPB stated in the final rule's summary of the rulemaking process:
 - “The Joint Statement merely expresses the agencies’ intent regarding enforcement and supervision priorities and does not alter existing legal requirements, including a borrower’s private right of action under § 1024.41.” [86 Fed. Reg. 34854](#)

3/31/21 Compliance Bulletin

- Bureau urges servicers to devote sufficient resources to loss mit
- Bureau will measure servicers' overall effectiveness in communicating clearly with borrowers and promoting loss mitigation
- “Consistent with the flexibilities announced in the April 3, 2020 joint statement...”
 - [Compliance Bulletin](#)

Short-Term Offer Exception

- Reg. X § 1024.41(c)(2)(iii): Servicer may offer either a short-term forbearance plan or repayment plan to a borrower based on a incomplete application
- Must provide within 5 business days after offering forbearance notice stating:
 - terms and duration of forbearance,
 - that offer is based on incomplete app and other options may be available, and
 - borrower may submit a complete app to be evaluated for all options

“Blind Offer” Exception

- Official Interpretation 41(c)(2)(i)-1: Servicer may offer a loss mitigation option based on incomplete application when offer is not based on any evaluation of information submitted by the borrower in connection with the application
 - Example - servicer has program that offers trial loan modifications to all borrowers who become 150 days delinquent, without an application or consideration of any information provided by a borrower

Servicer Outreach During Forbearance: These Mods are Not “Blind” Offers

- Under GSE guidelines, servicer must try to establish at least “Limited QRPC” during forbearance. FHA also wants borrower contact.
 - Determine reason for delinquency and whether it is temporary or permanent;
 - Determine if borrower can reinstate or repay the arrearage;
 - Educate the borrower on the availability of workout options;
 - Ensure borrower has resolved hardship

CFPB's Interim Final Rule

- Deferral exception effective July 1, 2020
- Fixes the RESPA compliance issue by adding new § 1024.41(c)(2)(v)(A) to allow servicers to avoid completing application and evaluating for all options if they offer a permanent deferral to a borrower facing a COVID-19 related hardship.
- Deferral may be offered for any COVID-19 related payment default – prior forbearance not required

Interim Final Rule, Cont.

- Must defer the missed principal and interest payments
- May also defer escrow (or not)
- Deferred amounts must not accrue interest
- No other fees charged for the loss mitigation; waiver of any late fees, penalties

Interim Final Rule, Cont.

- Upon borrower's acceptance of the offer, any preexisting delinquency is cured (loan is current)
- If borrower accepts the offer, servicer need not evaluate any application that has been submitted
- "One-bite" exclusion under § 1024.41(i) does not apply based on borrower's request for forbearance or acceptance of deferral

Streamlined Mods

- New exception permits servicer to offer a loan modification based on an incomplete app, provided that:
 - Loan term no more than 480 months
 - Does not cause payment to increase
 - Deferred amounts, if any, are non-interest bearing (partial claim, etc)
 - Waiver of late charges, penalties, stop-payment fees

Streamlined Mods

(Requirements, continued):

- Mod is made available to borrowers experiencing a COVID-19 hardship
- Acceptance of the offer will end the delinquency (or it will end after a TPP)
- If the borrower fails to perform on a streamlined mod TPP, servicer must resume reasonable diligence

Escrow Advances and Shortages

- Escrow **advances** are included in deferred amount under GSE COVID-19 deferral option; escrow **shortage** is not necessarily
- Servicer is not required to perform short-year escrow analysis when deferral offered
- Potential payment shock if shortage recovered over 12-month escrow account period
- FHA partial claim avoids problem by including projected escrow shortage amount

CFPB 6/3/2021 FAQs: Escrow Shortages

- “Exclusive” repayment options for escrow shortage (1 month+) that may be *included in an annual escrow statement*.
 - Allow shortage to exist and do nothing to change it, or
 - Require borrower to repay the shortage in equal monthly payments over at least a 12-month period.
- **But:** FAQs clarify that servicer can accept voluntary lump-sum payment of escrow shortage from borrower
- Servicer can notify borrower of this option, as long as it is not on escrow statement & makes clear it is voluntary

CFPB Analysis: Escrow Shortage

- CFPB stated in the section-by-section analysis for final rule that servicers may capitalize both escrow advances and shortages in a loan modification without violating RESPA.
 - CFPB also said that it “strongly encourages” servicers to do a short-year escrow analysis in connection with a loss mitigation review.
- 86 Fed. Reg. 34871, 34866

Reasonable Diligence

Reasonable Diligence

- **Problem:** Reg X. and CFPB's Official Interpretations did not specify exactly when reasonable diligence efforts should resume at the end of forbearance.
- **Solution:** CFPB amended Official Interpretations to provide that servicer must contact the borrower no later than 30 days before the scheduled end of a COVID-19-related forbearance.
[OI 1024.41\(b\)1-4.iv](#)

Reasonable Diligence

- Servicer must determine if borrower wishes to complete application and proceed with a full loss mitigation evaluation.
- If borrower requests further assistance, servicer must exercise reasonable diligence to complete the application before the end of the forbearance.

Early Intervention

Early Intervention

- During live contact with borrower not in forbearance until Oct. 1, 2022, if loan owner or assignee generally makes forbearances available, servicer must inform borrower:
 - that forbearance programs exist for borrowers experiencing a COVID-19 hardship;
 - a list and brief description of available forbearance programs and actions borrower must take to be evaluated for them; and
 - at least one way that borrower can get contact information for homeownership counseling services (such as by referring borrower to this info on periodic statements).

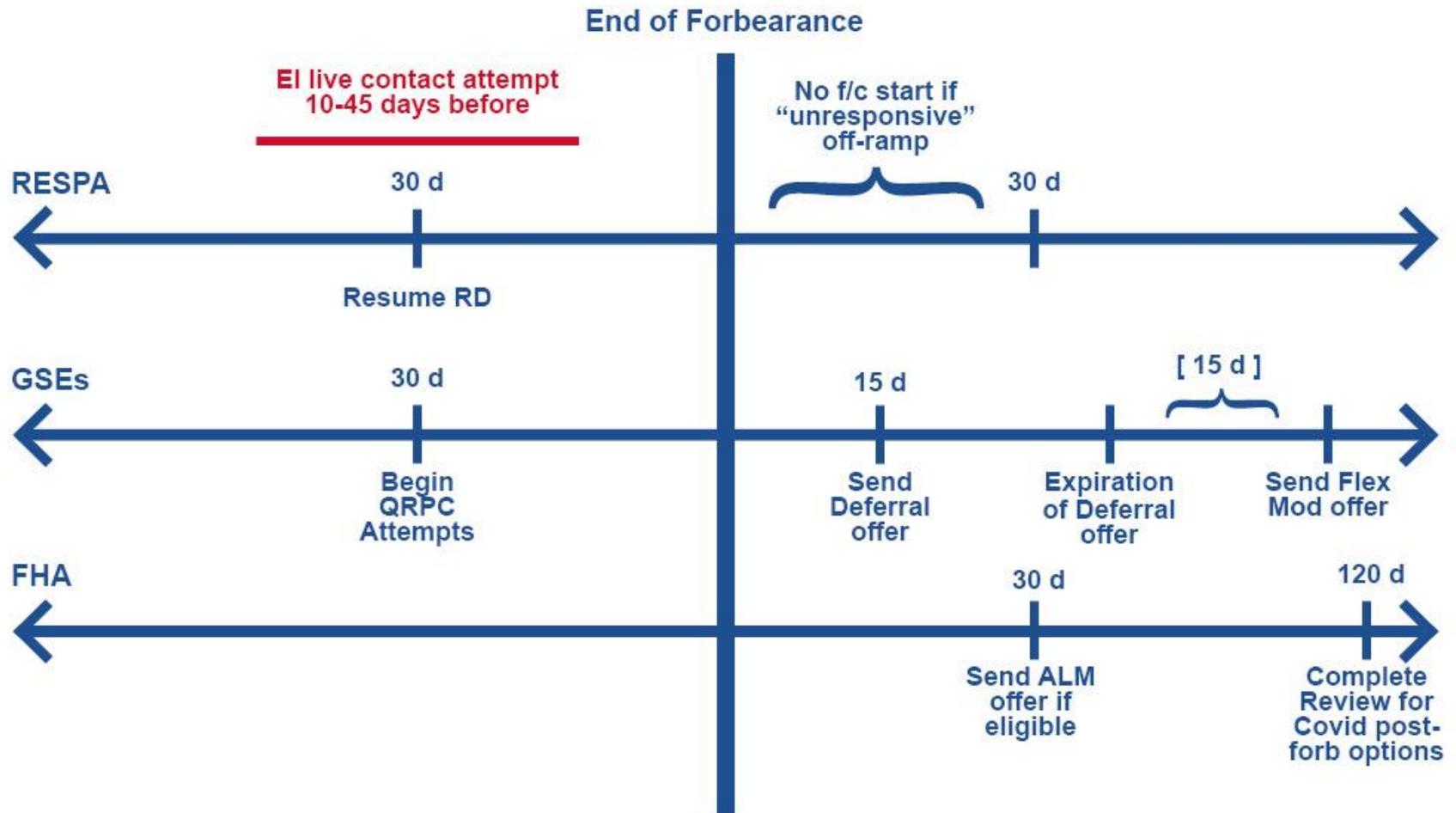
Early Intervention

- If borrower is in forbearance, additional information must be provided during live contact until Oct. 1, 2022, if:
 - live contact occurs at least 10 days and no more than 45 days before end of forbearance or,
 - during first live contact made after Aug. 31, 2021 if end of forbearance occurs between Aug. 31, 2021 and Sept. 10, 2021.

Early Intervention

- Additional information for borrowers in forbearance includes:
 - date borrower's current forbearance is scheduled to end;
 - a list and brief description of each type of forbearance extension, repayment options, and other currently available loss mitigation options, and actions borrower must take to be evaluated for such options; and
 - at least one way borrower can get contact information for homeownership counseling services.

Summary: Loss Mitigation at the End of Forbearance



Summary: Sunset Dates

Requirement	Sunset Date
Procedural Safeguards (Prior to making the “first notice or filing” to initiate foreclosure)	12/31/21
Streamlined Mod Exception to the Anti-Evasion Rule	No fixed date; mod must be one that is made available to borrowers experiencing a COVID-19 related hardship
Early Intervention (special live contact requirements)	10/1/22
Reasonable Diligence (resume 30 days prior to end of forbearance)	No fixed date; applies to borrowers experiencing a COVID-19 related hardship

Questions?



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