

~~Section 1463 of the Dodd Frank Act amended RESPA section 6 to add new section 6(1)(4) to provide that the new Dodd Frank Act requirements concerning force placed insurance do not prohibit servicers from sending a simultaneous or concurrent notice of a lack of flood insurance pursuant to section 102(e) of the FDPA. Proposed § 1024.37(i) provides that if permitted by regulation under section 102(e) of the Flood Disaster Protection Act of 1973, a servicer subject to the requirements of § 1024.37 may deliver to the borrower or place in the mail any notice required by § 1024.37 together with the notice required by section 102(e) of the Flood Disaster Protection Act of 1973.~~

~~*Legal authority.* The Bureau proposes to implement RESPA section 6(1)(4), pursuant to its authority under RESPA section 6(j)(3) to establish any requirements necessary to carry out section 6 of RESPA by adding § 1024.37(i) to Regulation X. Section 1024.37(i) is additionally proposed pursuant to the Bureau's authority under section 6(k)(1)(E) of RESPA to prescribe regulations that are appropriate to carry out the consumer protection purposes of RESPA, and under section 19(a) of RESPA to prescribe such rules and regulations, to make such interpretations, and to grant such reasonable exemptions, as may be necessary to achieve the purposes of RESPA.~~

### *Section 1024.38 Reasonable Information Management Policies and Procedures*

*Background.* A servicer's obligation to maintain accurate and timely information regarding a mortgage loan account is one of the most basic servicer duties. A servicer cannot comply with its myriad obligations to investors and under applicable law, unless it maintains accurate information regarding a mortgage loan account, including accurate and timely information with respect to borrower payments. Notwithstanding these obligations, recent evaluations of mortgage servicer practices have indicated that borrowers have been harmed as a result of servicer's lacking adequate practices to provide servicer personnel with appropriate borrower information. Federal regulatory agencies reviewing mortgage servicing practices have found that certain servicers demonstrated "significant weaknesses in risk-management, quality control, audit, and compliance practices."<sup>109</sup>

Further, and as discussed in detail above, major servicers demonstrated failures to document and verify, in accordance with applicable law, information relating to borrower mortgage loan accounts in connection with foreclosure proceedings.<sup>110</sup> Examinations by prudential regulators found "critical deficiencies in foreclosure governance processes, document preparation processes, and oversight and monitoring of third parties . . . [a]ll servicers [examined] exhibited similar deficiencies, although the number, nature, and severity of deficiencies varied by servicer."<sup>111</sup>

#### *38(a) In General*

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<sup>109</sup> *Problems in Mortgage Servicing From Modification to Foreclosure: Hearings Before the Senate Comm. on Banking, Housing and Urban Affairs*, S. Hrg. 111-987, 111th Cong. 360 (2010) (statement of Daniel K. Tarullo, Board of Governors, Federal Reserve System), available at <http://www.federalreserve.gov/newsevents/testimony/tarullo20101201a.htm>.

<sup>110</sup> The National Mortgage Settlement is available at <http://www.nationalmortgagesettlement.com/>.

<sup>111</sup> *Failure to Recover: The State of Housing Markets, Mortgage Servicing Practices and Foreclosures: Hearings Before the House Committee on Oversight and Government Reform*, No. 112-134, 112th Cong. 17 (2012) (statement of Morris Morgan, Office of the Comptroller of the Currency), available at <http://www.occ.gov/news-issuances/congressional-testimony/2012/pub-test-2012-47-written.pdf>.

Proposed § 1024.38(a) would require a servicer to establish reasonable policies and procedures for maintaining and managing information and documents relating to borrower mortgage loan accounts. The proposed rule would provide that a servicer meets this requirement if the servicer's policies and procedures are reasonably designed to achieve the objectives set forth in proposed § 1024.38(b) and are reasonably designed to ensure compliance with the standard requirements in proposed § 1024.38(c).

Proposed comment 38(a)-1 clarifies that a servicer may determine the specific methods by which it will implement reasonable information management policies and procedures to achieve the required objectives. Servicers have flexibility to design the operations that are reasonable in light of the size, nature, and scope of the servicer's operations, including, for example, the volume and aggregate unpaid principal balance of mortgage loans serviced, the credit quality, including the default risk, of the mortgage loans serviced, and the servicer's history of consumer complaints. This clarification is intended to provide servicers, including small servicers, flexibility to design policies and procedures that are appropriate for their servicing businesses. When this proposal was discussed with SERs during the Small Business Review Panel outreach, the SERs were supportive of a definition that provides inherent flexibility for small servicers to design policies and procedures that reflect the needs of their servicing operations.<sup>112</sup> Consistent with the Small Business Review Panel recommendations,<sup>113</sup> the Bureau requests comment on further guidance that should be included to clarify the types of policies and procedures that would be reasonable for small servicers.

Proposed § 1024.38(a)(2) provides a safe harbor, which states that a servicer satisfies the requirement in proposed § 1024.38(a)(1) if the servicer does not engage in a pattern or practice of failing to achieve any of the objectives set forth in proposed § 1024.38(b) and does not engage in a pattern or practice of failing to comply with any of the standard requirements in proposed § 1024.38(c). The purpose of this provision is to establish an objectives-based test for determining if a servicer's policies and procedures are reasonable. Thus, servicers have flexibility to develop policies and procedures that a servicer determines are appropriate so long as those policies and procedures do not result in a pattern or practice of failing to achieve an enumerated objective or comply with a standard requirement. If a servicer demonstrates a pattern or practice of failing to achieve an objective or comply with a standard requirement, a servicer may violate this provision if the policies and procedures are not reasonable. Proposed comment 38(a)(1)-1 provides examples of potential pattern and practice failures by servicers. Proposed comment 38(a)(2)-1 clarifies that in the event a servicer fails to comply with the safe harbor in proposed § 1024.38(a)(2) because the servicer has a pattern or practice of failing to achieve the objectives set forth in proposed § 1024.38(b) or failing to ensure compliance with the standard requirements in proposed § 1024.38(c), a servicer may still comply with the requirements of proposed § 1024.38 if the servicer's policies and procedures were reasonably designed to achieve the objectives set forth in proposed § 1024.38(b) and to ensure compliance with the standard requirements in proposed § 1024.38(c).

A servicer's failure to achieve each of the objectives harms borrowers because such failures create the potential for adverse consequences. These may include, without limitation,

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<sup>112</sup> See Small Business Review Panel Report at 31.

<sup>113</sup> *Id.*

imposing improper fees on borrowers, inability to reasonably evaluate loss mitigation applications for loss mitigation options that may benefit borrowers and owners or assignees of mortgage loans, unwarranted costs to borrowers, and the potential for fraud upon courts through inaccurate or unverifiable legal pleadings.

The Bureau relies on its authority in section 6(k)(1)(E) of RESPA to establish obligations appropriate to carry out the consumer protection purposes of RESPA to propose § 1024.38(a). The Bureau further has authority pursuant to section 6(j)(3) of RESPA to establish any requirements necessary to carry out section 6 of RESPA and has authority under section 19(a) of RESPA to prescribe such rules and regulations and to make such interpretations as may be necessary to achieve the consumer protection purposes of RESPA.

### *38(b) Objectives*

#### *38(b)(1) Accessing and Providing Accurate Information*

Proposed § 1024.38(b)(1) would mandate that a servicer's policies and procedures for maintaining and managing information and documents must be designed to enable the servicer to (1) provide accurate and timely disclosures to borrowers, (2) investigate, respond to, and, as appropriate, correct errors, (3) provide borrowers with requested information, (4) provide owners or assignees of mortgage loans with accurate and current information about any mortgage loans they own, and (5) submit documents or filings required for a foreclosure process that reflect accurate and current information and comply with applicable law.

For the reasons stated above in the background to proposed § 1024.38, the Bureau believes it is necessary to achieve the consumer protection purposes of RESPA that servicers implement policies and procedures to achieve the objectives set forth in proposed § 1024.38(b)(1). These objectives provide reasonable and appropriate protections for borrowers against harms resulting from actions based on improper or inaccurate servicer documentation or information. Further, the requirement in proposed § 1024.38(b)(4) ensures that owners and assignees of mortgage loans get better information reporting about the mortgage loans they own. Owners and assignees can play an important role in ensuring that servicers comply with requirements of the owner or assignee, which may inure to the benefit of consumers. For example, when a servicer improperly obtains force-placed insurance for a delinquent borrower, the costs of that insurance may push a borrower further into delinquency and ultimately foreclosure, where the costs of the more expensive policy will reduce the ultimate recovery to the owner or assignee.

The Bureau requests comment regarding whether the Bureau had identified the appropriate objectives and whether objectives should be removed, or other objectives included, in the requirements.

*Legal authority.* The Bureau relies on its authority pursuant to section 6(k)(1)(E) of RESPA to require servicers to comply with any obligation found by the Bureau to be appropriate to carry out the consumer protection purposes of RESPA. The Bureau further has authority pursuant to section 6(j)(3) of RESPA to establish any requirements necessary to carry out section 6 of RESPA and has authority under section 19(a) of RESPA to prescribe such rules and regulations and to make such interpretations as may be necessary to achieve the consumer protection purposes of RESPA.

#### *38(b)(2) Evaluating Loss Mitigation Options*

Proposed § 1024.38(b)(2) would mandate that a servicer's policies and procedures for maintaining and managing information and documents must be designed to enable the servicer to (1) provide accurate information to borrowers regarding loss mitigation options, (2) identify all loss mitigation options for which a borrower may be eligible, (3) provide prompt access to all documents and information submitted by a borrower in connection with a loss mitigation option, (4) identify documents and information that a borrower is required to submit to make a loss mitigation application complete, and (5) evaluate borrower applications, and any appeals, as appropriate.

The Bureau believes that requiring servicers to have reasonable policies and procedures to maintain and manage information and documents that are designed to enable the servicer to evaluate borrower's for loss mitigation options facilitates compliance with proposed § 1024.41. Further, such policies and procedures will lead to processes that are more protective of consumers by requiring servicers to consider, in advance of the potential delinquency of a particular mortgage loan, the loss mitigation options that are generally available to borrowers.

*Loss mitigation options for which borrowers may be eligible.* In order to meet the objectives, a servicer will have to determine, on a loan by loan basis, which loss mitigation options offered by the servicer are available to borrowers. The Bureau anticipates that for servicers that service mortgage loans held by the servicer or an affiliate in portfolio, this determination will not present significant burdens with respect to such mortgage loans as any such policies likely will be uniformly set forth by the servicer or affiliate. Similarly, the Bureau anticipates that servicers that service mortgage loans that are included in securitizations guaranteed by Fannie Mae, Freddie Mac, or Ginnie Mae, or insured by FHA or other government sponsored insurance programs, will be familiar with policies that will be set forth by those entities regarding the requirements for loss mitigation options.

Servicers that service mortgage loans that are securitized through private label securities will be required to undertake more burdensome efforts to identify which, if any, loss mitigation programs offered by the servicer are available to mortgage loan borrowers whose mortgage loans are owned by the securitization trust pursuant to the terms of any servicing agreement.

*Servicer failures to achieve optimal loss mitigation efforts.* The Bureau believes that regulations relating to the evaluation of borrowers for loss mitigation options, including the requirements of proposed § 1024.38(b)(2) and proposed § 1024.41 are necessary in light of the current servicing industry structure.

Servicing industry compensation is not structured to incentivize servicers to engage in loss mitigation efforts. In that regard, "the servicing industry's combination of two distinct business lines— transaction processing and default management—encourage servicers to underinvest in default management capabilities, leaving them with limited ability to mitigate losses."<sup>114</sup> Direct servicing compensation is generally fixed per loan. A servicer of a prime mortgage loan may earn 25 basis points for servicing that loan, whereas a servicer of a subprime mortgage loan may earn 50 basis points for servicing that loan.<sup>115</sup> The increased fee for

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<sup>114</sup> Levitin and Twomey, 28 Yale J. on Reg. 69 (2011).

<sup>115</sup> Robert W. Lee, Presentation, *MBA's Accounting, Tax and Financial Analysis Conference 2008 Mortgage Servicing Rights Discussion*, available at

servicing a loan with a lower credit quality should reflect the increased cost a servicer may incur to service the loans because of the higher default or cash flow advance assumptions related to those loans. However, the Bureau's outreach with consumers, servicers, GSEs, investors, and other federal regulators indicates that servicers have failed to invest in systems and processes necessary to undertake the work necessary to service mortgage loans that are not performing.

Further, mortgage servicing cash flows, including servicer expenses like advances to investors, incentivize servicers to pursue foreclosure. Servicers are required to advance payments to investors so long as a mortgage loan has not been "charged off." When a servicer modifies a mortgage loan on behalf of an investor, it is sometimes unclear how the modified payment amounts should be treated and whether a servicer must continue to advance funds to the investor to make up for any deficiency between a borrower's modified payment and the scheduled payment owed to an investor.

The Bureau observes that servicers have begun to alter the manner in which they invest in infrastructure and are changing their approach to default management. Notwithstanding these developments, reasonable policies and procedures to maintain and manage information and documents that are designed to enable a servicer to evaluate loss mitigation options impose a reasonable burden on servicers that will benefit borrowers in future years as servicers transition from reacting to the current crisis to a more steady market punctuated by regional spikes in delinquencies and foreclosures. Servicers that have not invested in improving loss mitigation functions may find less incentive to do so as housing markets recover, leading to continued inadequate infrastructure during future regional or national housing downturns, which may lead to future borrower harm.

The Bureau requests comment regarding whether the Bureau had identified the appropriate objectives and whether objectives should be removed, or other objectives included, in the requirements.

*Legal authority.* The Bureau relies on its authority pursuant to section 6(k)(1)(E) of RESPA to require servicers to comply with any obligation found by the Bureau to be appropriate to carry out the consumer protection purposes of RESPA. The Bureau further has authority pursuant to section 6(j)(3) of RESPA to establish any requirements necessary to carry out section 6 of RESPA and has authority under section 19(a) of RESPA to prescribe such rules and regulations and to make such interpretations as may be necessary to achieve the consumer protection purposes of RESPA.

### *38(b)(3) Facilitating Oversight of, and Compliance by, Service Providers*

Proposed § 1024.38(b)(3) would mandate that a servicer's policies and procedures for maintaining and managing information and documents must be designed to enable the servicer to provide appropriate servicer personnel with accurate and current information reflecting actions performed by service providers, facilitate periodic reviews of service providers, and facilitate the sharing of accurate and current information among servicer personnel and service providers.

Recent evaluations of mortgage servicer practices have found that some major servicers "did not properly structure, carefully conduct, or prudently manage their third-party vendor

relationships[.]”<sup>116</sup> For example, certain servicers supervised by the Board of Governors of the Federal Reserve System and the Office of the Comptroller of the Currency did not monitor third-party vendor foreclosure law firms compliance with the servicer’s standards, did not retain copies of documents maintained by third-party law firms, and did not provide formal guidance, policies, or procedures governing the selection, ongoing management, and termination of law firms used to manage foreclosures.<sup>117</sup> Similar failures were present in connection with servicer relationships with default management service providers and Mortgage Electronic Registration Systems, Inc. (MERS).<sup>118</sup> The Federal Reserve Board stated to Congress that federal regulatory agencies identified significant “shortcomings in staff training, coordination among loan modification and foreclosure staff, and management and oversight of service providers, including legal services.”<sup>119</sup> These failures have manifested in significant harms for borrowers, including imposing unwarranted fees on borrowers and harms relating to so-called “dual tracking” from miscommunications between service providers and servicer loss mitigation personnel.

The Bureau requests comment regarding whether the Bureau had identified the appropriate objectives and whether objectives should be removed, or other objectives included, in the requirements.

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#### *38(b)(4) Facilitating Servicing Transfers*

Proposed § 1024.38(b)(4) would mandate that a servicer’s policies and procedures for maintaining and managing information and documents must be designed to ensure the timely transfer of all information and documents relating to a transferred mortgage loan to a transferee servicer in a form and manner that enables the transferee servicer to comply with the requirements of subpart C and the terms of the transferee servicer’s contractual obligations to owners or assignees of the mortgage loans. Further, proposed § 1024.38(b)(4) provides that a transferee servicer shall have documents and information regarding the status of discussions with a borrower regarding loss mitigation options, any agreements with a borrower for a loss mitigation option, and any analysis be a servicer with respect to potential recovery from a non-performing mortgage loan, as appropriate (typically called a final recovery determination).

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<sup>116</sup> Federal Reserve System, Office of the Comptroller of the Currency, and Office of Thrift Supervision, *Interagency Review of Foreclosure Policies and Practices*, at 5 (April 2011), available at <http://www.occ.gov/news-issuances/news-releases/2011/nr-occ-2011-47a.pdf>.

<sup>117</sup> *Id.* at 9.

<sup>118</sup> *Id.* at 10.

<sup>119</sup> *Problems in Mortgage Servicing From Modification to Foreclosure: Hearings Before the Senate Comm. on Banking, Housing and Urban Affairs*, S. Hrg. 111-987, 111th Cong. 360 (2010) (statement of Daniel K. Tarullo, Board of Governors, Federal Reserve System), available at <http://www.federalreserve.gov/newsevents/testimony/tarullo20101201a.htm>.

Servicing transfers give rise to potential harms to consumers. Servicers may experience problems relating to inaccurate transfer of past payment information, failures to transfer documents provided to a transferor servicer, and inaccurate transfer of information relating to loss mitigation discussions with borrowers. Borrowers engaged in loss mitigation efforts may be transferred to transferee servicers who had no knowledge of the existence or status of the loss mitigation efforts.

The Bureau believes it is a typical servicer duty for servicers to be able to effectuate sales, assignments, and transfers of mortgage servicing in a manner that does not adversely impact mortgage loan borrowers. Servicers generally should expect that servicing may be sold, assigned, or transferred for certain loans they service. Servicers owe a duty to investors to ensure that mortgage servicing can be transferred without adversely impacting the value of the investor's asset.

The Bureau believes it is appropriate for servicers to implement reasonable information management policies and procedures to ensure that in the event of any such transfer, documents and information regarding mortgage loan accounts are identified and transferred to a transferee servicer in a manner that permits the transferee servicer to continue providing appropriate service to the borrower.

The Bureau requests comment regarding whether the Bureau had identified the appropriate objectives and whether objectives should be removed, or other objectives included, in the requirements.

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### *38(c) Standard Requirements*

In addition to the objectives set forth in proposed § 1024.38(b), proposed § 1024.38(c) sets forth two standard requirements that servicers must include in the required policies and procedures. These include provisions for record retention and identification of a servicing file. With respect to record retention, proposed § 1024.38(c)(1) would require a servicer to retain documents and information relating to a mortgage file until one year after a mortgage loan is paid in full or servicing of a mortgage loan was transferred to a successor servicer. The Bureau observes that proposed §§ 1024.35 and 1024.36 require servicers to respond to notices of error and information requests provided up to one year after a mortgage loan is paid in full or servicing of a mortgage loan was transferred to a successor servicer and the Bureau believes the record retention requirement is necessary for servicer compliance with obligations set forth in §§ 1024.35 and 1024.36. Further, the Bureau observes that servicers will require accurate information for the life of the mortgage loan in order to provide accurate payoff balances to borrowers or to exercise a right to foreclose for a mortgage loan account.

The Bureau requests comment regarding whether servicers should be required to retain documents and information relating to a mortgage file until one year after a mortgage loan is

paid in full or servicing of a mortgage loan was transferred to a successor servicer and the potential burden of this requirement.

Proposed § 1024.38(c)(2) would require a servicer to provide a borrower upon request a servicing file, which shall contain a schedule of all payments credited or debited to the mortgage loan account, including any escrow account as defined in § 1024.17(b) and any suspense account; a copy of the borrower's mortgage note; a copy of the borrower's deed of trust; any collection notes created by servicer personnel reflecting communications with borrowers about the mortgage loan account; a report of any data fields relating to a borrower's mortgage loan account created by a servicer's electronic systems in connection with collection practices, including records of automatically or manually dialed telephonic communications; and copies of any information or documents provided by a borrower to a servicer in accordance with the procedures set forth in §§ 1024.35 or 1024.41.

While document and information management practices vary among servicers, many large servicers maintain documents and information relating to a borrower's mortgage loan account in many different places and forms, including on separate electronic systems. The Bureau understands that in the absence of a required convention for storage of servicing related documents and information, servicers have difficulty identifying a central file containing all necessary information regarding a borrower's mortgage loan account, including collector's notes, payment histories, note and deed of trust documents, and account debit and credit information, including escrow account information. Proposed § 1024.38(c)(2) would require servicers, as part of the reasonable information management policies and procedures to adopt practices to provide an accurate, complete, and defined "servicing file" to a borrower upon request and would create a commonly understood industry convention.

The Bureau requests comment regarding whether servicers should be required to adopt reasonable information management policies and procedures that facilitate providing a defined servicing file to a borrower upon request. The Bureau requests comment on the burden of adopting this requirement. Further, the Bureau requests comment regarding whether the Bureau has identified the appropriate components of a servicing file and whether certain categories of documents and information should be included or removed from the proposed requirement.

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#### ~~Section 1024.39 Early Intervention Requirements for Certain Borrowers~~

~~*Background.* How a servicer manages a borrower's delinquency plays a significant role in whether the borrower cures the delinquency or ends up in foreclosure.<sup>120</sup> However, for a~~

<sup>120</sup> ~~See Diane Thompson, *Foreclosure Modifications: How Servicer Incentives Discourage Loan Modifications*, 86 Wash. L. Rev. 755, 768 (2011); Kristopher Gerardi & Wenli Li, *Mortgage Foreclosure Prevention Efforts*, 95 Fed. Reserve Bank of Atlanta Econ. Rev. 1, 8-9 (Nov. 2, 2010); Michael A. Stegman *et al.*, *Preventative Servicing is Good for Business and Affordable Homeownership Policy*, 18 Housing Pol'y Debate 243, 274 (2007).~~