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.

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.

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.[120] However, for a

[120] *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).

variety of reasons, servicers have not been consistent in managing delinquent accounts to provide borrowers with an opportunity to avoid foreclosure. At the outset of the recent financial crisis, many servicers had not developed the institutional capacity to manage delinquent accounts.[121] While servicers have gained some experience managing loss mitigation programs, incentives remain that may discourage servicers from addressing a delinquency quickly, and in some cases may even cause them to favor foreclosure.[122]

For their part, delinquent borrowers may not make contact with servicers to discuss their options because they may be unaware that they have options[123] or that their servicer is able to assist them.[124] As a result of these impediments to borrower-servicer communication, many borrowers are not informed of their options to avoid foreclosure at the early stages of a delinquency, when it can be most critical for them to reach out. There is significant risk to consumers as a result of this delay because the longer a borrower remains delinquent, the more difficult it can be to avoid foreclosure.[125]

Private lenders and investors, Fannie Mae and Freddie Mac, and Federal agencies, such as FHA and VA, already have early intervention servicing standards in place for delinquent borrowers.[126] However, there are currently no uniform minimum national standards for all

---

[121] *See, e.g.*, *The Need for National Mortgage Servicing Standards: Hearing Before the Subcomm. on Housing, Transportation, and Community Affairs of the Senate Comm. on Banking and Urban Affairs*, S. Hrg. 112-139, 112th Cong. 122 (2011) (statement of Laurie Goodman)..

[122] *See, e.g.*, *The Need for National Mortgage Servicing Standards: Hearing Before the Subcomm. on Housing, Transportation, and Community Affairs of the Senate Comm. on Banking and Urban Affairs*, S. Hrg. 112-139, 112th Cong. 72-73 (2011) (statement of Diane Thompson); *see generally* Thompson, 86 Wash. L. Rev. 755 (2011). The Bureau is aware that the GSEs and other programs, such as HAMP, align servicer incentives to encourage early intervention. *See, e.g.*, Fannie Mae Single-Family Servicing Guide, Part VII § 602.04.05 (2012); Freddie Mac Single-Family Seller/Servicing Guide, Volume 2, Ch. 65.42 (2012); Making Home Affordable Program Handbook, v3.4, at 106 (December 15, 2011). Through this rulemaking, the Bureau is proposing to make early intervention a uniform minimum national standard and part of established servicer practice.

[123] *See, e.g.*, *Are There Government Barriers to the Housing Recovery?: Hearing Before the Subcomm. on Insurance, Housing, and Community Opportunity of the House Comm. on Financial Services*, No. 112-7, 112th Cong. 50-51 (2011) (statement of Phyllis Caldwell, Chief, Homeownership Preservation Office, U.S. Dept. of the Treasury); Freddie Mac, *Foreclosure Avoidance Research II: A Follow-Up to the 2005 Benchmark Study* 8 (2008), available at http://www.freddiemac.com/service/msp/pdf/foreclosure_avoidance_dec2007.pdf; Freddie Mac, *Foreclosure Avoidance Research* (2005), available at http://www.freddiemac.com/service/msp/pdf/foreclosure_avoidance_dec2005.pdf.

[124] *See* Office of the Comptroller of the Currency, *Foreclosure Prevention: Improving Contact with Borrowers*, Insights (June 2007), available at www.occ.gov/topics/community-affairs/publications/insights/insights-foreclosure-prevention.pdf.

[125] *See, e.g.*, John C. Dugan, Comptroller, Office of the Comptroller of the Currency, Remarks Before the NeighborWorks America Symposium on Promoting Foreclosure Solutions (June 25, 2007), available at www.occ.gov/news-issuances/speeches/2007/pub-speech-2007-61.pdf, at 2-3; Laurie S. Goodman *et al.*, *Modification Effectiveness: The Private Label Experience and Their Public Policy Implications*, Amherst Mortgage Insight (Amherst Securities Group LP, June 19, 2012), at 5-6; Stegman *et al.*, *Preventative Servicing*, 18 Housing Pol'y Debate 245; Amy Crews Cutts & William A. Merrill, *Interventions in Mortgage Default: Policies and Practices to Prevent Home Loss and Lower Costs* 11-12 (Freddie Mac, Working Paper No. 08-01, Mar. 2008).

[126] HUD and the VA have promulgated regulations and issued guidance on servicing practices for loans guaranteed or insured by their programs. *See* 24 CFR 203 subpart C (HUD); HUD Handbook 4330.1 rev-5, Chapter 7; 38 CFR 36 subpart A (VA). Fannie Mae and Freddie Mac have established recommended servicing practices for delinquent borrowers in their servicing guidelines and align their modification incentives with the number of days the mortgage loan is delinquent when the borrower enters a trial period plan. *See* Fannie Mae Single-Family Servicing Guide,

servicers of federally related mortgage loans. In order to ensure that servicers are providing delinquent borrowers with information about their options at the early stages of delinquency, the Bureau is proposing to establish minimum early intervention requirements under RESPA.

Proposed section 1024.39 would require servicers to provide delinquent borrowers with two notices. First, proposed § 1024.39(a), would require servicers to notify or make good faith efforts to notify a borrower orally that the borrower's payment is late and that loss mitigation options may be available, if applicable. Servicers would be required to take this action 30 days after the payment due date, unless the borrower satisfies the payment during that period. Second, proposed § 1024.39(b) would require servicers to provide a written notice with information about the foreclosure process, housing counselors and the borrower's State housing finance authority, and, if applicable, information about loss mitigation options that may be available to the borrower. The servicer would be required to provide the written notice not later than 40 days after the payment due date, unless the borrower satisfies the payment during that period. These two notices are designed primarily to encourage delinquent borrowers to work with their servicer to identify their options for avoiding foreclosure. The Bureau recognizes that not all delinquent borrowers who receive these notices may respond to the servicer and pursue available loss mitigation options. However, the Bureau believes that the notices will ensure, at a minimum, that all borrowers have an opportunity to do so at the early stages of a delinquency.

39(a) Oral Notice

If a borrower is late in making a payment sufficient to cover principal, interest, and, if applicable, escrow, proposed § 1024.39(a) would require the servicer to notify or make good faith efforts to notify the borrower orally of that late payment and that loss mitigation options, if applicable, may be available. The term "loss mitigation options" is defined in proposed § 1024.31 and is discussed in more detail above. The Bureau is proposing this requirement because, as discussed above, evidence suggests that one of the barriers to communication between borrowers and servicers is that borrowers do not know that servicers may be helpful or that they have options to avoid foreclosure. By notifying borrowers through live contact that loss mitigation options may be available, servicers would be able to begin working with the borrower to develop appropriate relief.

Proposed § 1024.39(a) would require servicers to notify borrowers about loss mitigation options "if applicable." Thus, servicers that do not make any loss mitigation options available to borrowers would not be required to notify borrowers that loss mitigation options may be available. In addition, proposed comment 39(a)-1.ii explains that the servicer would not be required to describe any particular option, but instead would need only inform the borrower that loss mitigation options may be available. The Bureau is not proposing that servicers provide borrowers detailed information because not all borrowers may benefit from such a conversation at the time of this contact. However, as explained in proposed comment 39(a)-1.ii, nothing would preclude the servicer from providing more detailed information that the servicer believes would assist the borrower.

Part VII (2012); Fannie Mae, Outbound Call Attempts Guidelines (Oct. 1, 2011), available at www.eFannieMae.com; Fannie Mae, Letters and Notice Guidelines (Apr. 25, 2012), available at www.eFannieMae.com; Freddie Mac Single-Family Seller/Servicing Guide, Volume 2, Chapters 64-69 (2012).

During the Small Business Panel Review process, small servicer representatives explained that they are able to distinguish between borrowers who had simply forgotten to mail in a payment from borrowers who were actually having trouble making a payment.[127] The Bureau recognizes that not all borrowers may require information about loss mitigation options in order to become current on their payments, but the Bureau also understands that not all borrowers may be forthcoming regarding the reasons for a delinquency. The Bureau is concerned that these borrowers may not learn about loss mitigation options unless the servicer indicates that help may be available at the time of the proposed oral notice. The Bureau invites additional comment on how servicers typically determine whether and at what stage a borrower should be informed that loss mitigation options may be available.

Proposed comment 39(a)-1.i explains that the oral notice would have to be made through live contact with the borrower, such as by telephoning or meeting in-person with the borrower, and that oral contact does not include a recorded message delivered by phone. The Bureau has included this comment because the Bureau believes that servicers are likely to learn about the circumstances surrounding a borrower's delinquency through an interactive conversation and thus, for example, would be better able to help the borrower identify an appropriate loss mitigation option.

Proposed § 1024.39(a) would also require the servicer to notify or make good faith efforts to provide the oral notice that the borrower is late in making a payment. This oral notice is intended to work in concert with the written periodic statement proposed in the Bureau's 2012 TILA Mortgage Servicing Proposal, which would inform the borrower of any late fees that the borrower faces due to a delinquency. A servicer could, for example, use the oral notice to explain any late charge appearing on the periodic statement the borrower would receive. In addition, by providing this notice through live contact, a servicer could learn about the circumstances of the borrower's delinquency and the borrower's ability to self-cure without the assistance of a loss mitigation option.

Late payment. Proposed § 1024.39(a) would require the servicer to provide the oral notice, or make good faith efforts to do so, if the borrower is late in making "a payment sufficient to cover principal, interest, and, if applicable, escrow." Thus, a servicer would not be required to provide the oral notice if a borrower is late only with respect to paying a late fee for a given billing cycle. The Bureau is proposing this trigger because the Bureau believes there is low risk that borrowers will default solely because of accumulated late charges if they are otherwise current with respect to principal, interest, and escrow payments.

Regulation Z § 1026.36(c)(1)(ii) generally prohibits servicers from "pyramiding" late fees—*i.e.*, imposing a late fee or delinquency charge in connection with a payment, when the only delinquency is attributable to late fees or delinquency charges assessed on an earlier payment, and the payment is otherwise a full payment.[128] "Pyramiding" late fees can result in future payments being deemed late even if they are paid in full within the required time period, thus permitting the servicer to charge additional late fees. This practice can cause an account to appear to be in default, and thus can give rise to charging excessive or unwarranted fees to

[127] *See* Small Business Review Panel Report at 25.

[128] The Bureau's 2012 TILA Mortgage Servicing Proposal would redesignate this provision as § 1026.36(c)(2).

borrowers who may be unable to catch up on payments.[129] However, because this practice is prohibited under Regulation Z and other regulations, the Bureau does not expect that borrowers would be likely to be pushed into foreclosure solely because of accumulated late charges if they are otherwise current on their payment. The Bureau has taken the same approach with respect to the written notice that would be required by proposed § 1024.39(b)(1). See the section-by-section analysis below of proposed § 1024.39(b)(1).

Proposed comment 39(a)-3 explains that, for purposes of proposed § 1024.39(a), a payment would be considered late the day after a payment due date, even if the borrower is afforded a grace period before the servicer assesses a late fee. Thus, for example, if a payment due date is January 1, the servicer would be required to notify or make good faith efforts to notify the borrower not later than 30 days after January 1 (*i.e.*, by January 31) if the borrower has not fully paid the amount owed as of January 1 and the full payment remains due during that period. Proposed comment 39(a)-3 contains a cross-reference to proposed comment 39(a)-4, which, as discussed in more detail below, addresses situations in which the borrower satisfies the payment during the 30-day period.

The Bureau recognizes that certain borrowers may be temporarily delinquent because of an accidental missed payment, a technical error in transferring funds, a short-term payment difficulty, or some other reason. These borrowers may be able to cure a delinquency without a servicer's efforts to make live contact. Thus, proposed § 1024.39(a) provides that if the borrower fully satisfies the payment before the end of the 30-day period, the servicer would not be required to provide the notice under proposed § 1024.39(a). Proposed comment 39(a)-4 explains that a servicer would not be required to notify or make good faith efforts to notify a borrower unless the borrower remains late in making a payment during the 30-day period after the payment due date. To illustrate, proposed comment 39(a)-4 provides an example in which a borrower is initially overdue on a payment due January 1 but satisfies the payment on January 20. In this case, the servicer would not be required to notify or make good faith efforts to notify the borrower by January 31.

Proposed comment 39(a)-6 clarifies that a servicer would not be required under § 1024.39(a) to notify a borrower who is performing as agreed under a loss mitigation option designed to bring the borrower current on a previously missed payment. The Bureau is proposing this clarification because the Bureau believes it would be unnecessary for a servicer to notify a borrower of a previously missed payment if the borrower is performing under a loss mitigation option designed to cure that delinquency.

30-day period. Proposed § 1024.39(a) would require servicers to provide the oral notice not later than 30 days after a payment due date. In developing the proposed 30-day time period, the Bureau sought to harmonize the timing of the oral notice with the timing of the periodic statement under the Bureau's 2012 TILA Mortgage Servicing Proposal, as noted above. During the Small Business Review Panel process, some small servicer representatives expressed concern that those servicing loans for agencies with more restrictive timeframes and collection requirements would incur costs if they had to meet duplicative requirements.[130] To address this concern, the Bureau is proposing an outer bound timeframe for servicers to comply with the

[129] *See* 73 FR 44522, 44569 (July 30, 2008).
[130] *See* appendix A of the Small Business Review Panel Report.

proposed oral notice. In particular, the Bureau sought to harmonize the timing of the oral notice with existing early intervention standards established by the GSEs, FHA, and VA so that servicers already complying with those standards that meet the Bureau's proposed requirements could comply with proposed § 1024.39.

Fannie Mae and Freddie Mac generally recommend that servicers initiate phone calls for borrowers who have missed a payment by the 16th day after a payment due date.[131] Similarly, HUD generally requires that servicers of FHA loans take "prompt action" to collect on delinquent loans.[132] Although servicers may satisfy the "prompt action" requirement through a variety of means, HUD recommends that servicers that choose to contact borrowers by telephone begin efforts by the 17th day of a borrower's delinquency and complete them by the end of the month.[133] Servicers of VA loans are generally required to commence efforts to contact borrowers by phone concurrent with sending a written delinquency notice by the 20th day of a borrower's delinquency.[134]

In order to provide servicers with flexibility in contacting borrowers who may have different default risk profiles, the Bureau's proposal would provide servicers with discretion to make the contact at any time during the 30-day period. Thus, servicers who are already providing an oral notice with the information required in proposed § 1024.39(a) sooner than 30 days after a missed payment would be in compliance with the Bureau's proposal. Although some servicers may choose to contact borrowers at a high risk of default within several days after a borrower misses a payment due date,[135] there are drawbacks to requiring servicers to contact all borrowers too soon. Borrowers may not think of themselves as being delinquent until after the expiration of a grace period, which may occur on the 10th or the 15th of the month, and they may consider contact by the servicer before the grace period unwarranted. As noted above, certain borrowers may be temporarily delinquent because of an accidental missed payment, a technical error in transferring funds, a short-term payment difficulty, or some other reason. The Bureau believes these borrowers frequently would be able to self-cure within 30 days of a missed payment.[136]

---

[131] Freddie Mac recommends servicers contact borrowers within 3 days of a missed payment, unless the servicers uses a behavior modeling tool that would support an alternate approach. Fannie Mae recommends servicers contact "high risk" borrowers within 3 days of a missed payment; campaigns for non-high-risk borrowers should begin within 16 days of a missed payment. *See* Fannie Mae Single-Family Servicing Guide, Part VII (2012); Fannie Mae, Outbound Call Attempts Guidelines (Oct. 1, 2011), available at www.eFannieMae.com; Fannie Mae, Letters and Notice Guidelines (Apr. 25, 2012), available at www.eFannieMae.com; Freddie Mac Single-Family Seller/Servicing Guide, Volume 2, Chs. 64-69 (2012).

[132] 24 CFR 203.600.

[133] *See* HUD Handbook 4330.1 rev-5, 7-7(A).

[134] Servicers of VA loans must have collection procedures that include "An effort, concurrent with the written delinquency notice [mailed no later than the 20th day of delinquency], to establish contact with the borrower(s) by telephone. When talking with the borrower(s), the holder should attempt to determine why payment was not made and emphasize the importance of remitting loan installments as they come due." 38 CFR 36.4278(g)(i) and (ii).

[135] For example, the GSEs recommend that servicers begin calling borrowers considered to be at a high risk of default within three days of a missed payment. *See* Fannie Mae Single-Family Servicing Guide, Part VII (2012); Fannie Mae, Outbound Call Attempts Guidelines (Oct. 1, 2011), available at www.eFannieMae.com; Freddie Mac Single-Family Seller/Servicing Guide, Volume 2, Ch. 64.5 (2012).

[136] *See, e.g.*, Amy Crews Cutts & William A. Merrill, *Interventions in Mortgage Default: Policies and Practices to Prevent Home Loss and Lower Costs* 10 (Freddie Mac, Working Paper No. 08-01, Mar. 2008) (explaining that, in

At the time the Bureau proposed its early intervention requirements for the Small Business Panel, the Bureau considered requiring servicers to contact a delinquent borrower 45 days after the borrower misses a payment.[137] The Bureau is not proposing a 45-day period as the deadline for the oral notice because the Bureau is concerned that allowing servicers to wait this long after a borrower misses a payment to provide initial notice of loss mitigation options may not afford the borrower sufficient time to consider and pursue loss mitigation options. In addition, by 45 days after a payment due date, a borrower may have become late on a second missed payment. The Bureau is concerned that delaying the time in which a servicer must make initial live contact with the borrower may make it more difficult for borrowers to cure their delinquency.

Moreover, based on feedback received from small servicer representatives during the Small Business Panel Review process, the Bureau does not believe a 30-day deadline for the proposed oral notice will present a significant burden. During the Small Business Panel Review process, small servicer representatives explained that they are often in touch with delinquent borrowers well before the 45-day period initially considered by the Bureau,[138] and often within the first ten days of a delinquency.[139] Based on this feedback, the Bureau believe that, with respect to the timeframe in which the Bureau is proposing for servicers to make initial contact,[140] a 30-day deadline for the oral notice would not require small servicers to change their early intervention practices.

The Bureau invites comment on whether the proposed 30-day time period provides borrowers with adequate notice of loss mitigation options while providing servicers sufficient flexibility in managing delinquent borrowers with different risk profiles. The Bureau also invites comment on whether the 30-day requirement would pose a substantial conflict with existing servicer practices. The Bureau invites comment on whether servicers should provide the oral notice by some deadline before or after the proposed 30-day period.

Borrower contacts the servicer about a late payment. To account for situations in which a borrower proactively contacts the servicer about a late payment, proposed comment 39(a)-5 explains that, if the borrower contacts the servicer at any time prior to the end of the 30-day period to explain that the borrower expects to be late in making a payment, the servicer could provide the oral notice under proposed § 1024.39(a) by informing the borrower at that time that loss mitigation options, if applicable, may be available. The Bureau recognizes that borrowers may contact the servicer proactively to explain that the borrower expects to become overdue on a payment or to acknowledge an ongoing delinquency. In such cases, it would not be necessary for the servicer to notify the borrower of the delinquency. However, the Bureau believes that borrowers who contact the servicer proactively would benefit from knowing about loss mitigation options for the reasons discussed above.

---

one study, there was a "significant cure rate out of the 30-day delinquency population without servicer intervention," but that "as the time in delinquency increases so does the hurdle the borrower has to overcome to reinstate the loan and the importance of calling the servicer")

[137] *See* Small Business Review Panel Report at 12.

[138] *See id.* at 24 and at appendix A.

[139] *See id.* at 25.

[140] Small servicers, however, did express concerns about the written early intervention notice, as discussed more in the section-by-section analysis of proposed § 1024.39(b) below.

Proposed comment 39(a)-5.i provides two examples to clarify how servicers would comply with proposed § 1024.39(a) for borrowers who contact the servicer about a late payment. In the example in proposed comment 39(a)-5.i.A, a borrower contacts a servicer on January 25 to explain that he expects to miss a payment due February 1. The borrower satisfies the payment on February 8 and the servicer had not yet notified or made good faith efforts to notify the borrower that loss mitigation options may be available. In this case, the servicer would not be required to notify or make good faith efforts to notify the borrower that loss mitigation options may be available during the 30 days after February 1 because the borrower was able to satisfy the payment within the 30-day period after the payment due date. The proposed comment includes a cross-reference to proposed comment 39(a)-4, which addresses situations in which the borrower satisfies the payment within the 30-day period. The Bureau has included this example because many borrowers are only delinquent for short periods and may be able to self-cure within 30 days after a payment due date. In these cases, the Bureau does not believe it would be necessary to explain that loss mitigation options may be available.

In the example in proposed comment 39(a)-5.i.B, the borrower in the example at proposed comment 39(a)-5.i.A subsequently misses a payment due March 1. However, the borrower does not contact the servicer to explain the March 1 missed payment and the borrower remains late on that payment during the 30 days after March 1. In this case, not later than 30 days after March 1, the servicer would be required to notify or make good faith efforts to notify the borrower orally that he is overdue on the March 1 payment and that loss mitigation options, if applicable, may be available. This comment is intended to clarify that the servicer's obligations to notify a borrower of a late payment is tied to the 30-day period commencing on the date of the late or missed payment. The servicer in the example in proposed comment 39(a)-5.i.B would be required to notify the borrower of the March 1 late payment because the borrower has not contacted the servicer about that payment.

Good faith efforts. The Bureau recognizes that servicers may not always be able to reach a borrower despite the servicer's good faith efforts to make contact. Thus, under proposed § 1024.39(a), if a borrower is late in making a payment, not later than 30 days after the payment due date, the servicer would be required notify or "make good faith efforts to notify" the borrower. Proposed § 1024.39(a) also provides that if the servicer attempts to notify the borrower by telephone, good faith efforts would require calling the borrower on at least three separate days in order to reach the borrower. Proposed comment 39(a)-2 clarifies that, in order to make a good faith effort by telephone, the servicer must complete the three phone calls attempting to reach the borrower by the end of the 30-day period after the payment due date. The proposed comment also explains that a servicer attempting to reach the borrower by telephone should make the first call not later than the 28 days after the payment due date, in order to make three phone call attempts by the 30th day, because each phone call would be required to occur on a separate day, assuming the first two are unsuccessful. The Bureau believes servicers attempting to contact a borrower by phone should be required to make several attempts because of the importance of making contact. The Bureau is proposing to define good faith efforts as requiring that each attempt by phone occur on a different day because the Bureau does not believe that contacting an absent borrower in quick succession on the same day would constitute good faith efforts.

The Bureau is proposing requirements for good faith efforts by telephone because it understands this is a common method by which servicers attempt to reach delinquent borrowers.

However, this is not the only way to notify the borrower under proposed § 1024.39(a). Servicers may also provide the oral notice through a live, in-person meeting. The Bureau is interested in whether there are forms of communication other than oral contact that would promote a dialogue between the borrower and the servicer regarding the borrower's delinquency and any appropriate loss mitigation options. For example, the Bureau invites comment on whether text messages or email are as or more effective in communicating with a delinquent borrower and, if so, whether such communications should be required to meet any particular standards to satisfy a good faith effort.

Legal authority. As discussed above, the Bureau has authority to implement requirements for servicers to provide information about borrower options pursuant to section 6(k)(1)(E) of RESPA. As set forth above, the Bureau has determined that providing borrowers with timely information about loss mitigation options and encouraging servicers to work with borrowers to identify any appropriate loss mitigation options are necessary to provide borrowers a meaningful opportunity to avoid foreclosure. Proposed § 1024.39(a) would provide borrowers information about their options by requiring servicers to notify or make good faith efforts to notify borrowers that loss mitigation options, if applicable, may be available to assist them. Accordingly, the Bureau proposes to implement proposed § 1024.39(a) pursuant to its authority under section 6(k)(1)(E) 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, to make such interpretations, and to grant such reasonable exemptions for classes of transactions, as may be necessary to achieve the consumer protection purposes of RESPA.

39(b) Written Notice

39(b)(1) In General

Proposed § 1024.39(b)(1) would require the servicer to provide borrowers who are late in making a payment with a written notice containing information about the foreclosure process, contact information for housing counselors and the borrower's State housing finance authority, and, if applicable, loss mitigation options. This notice would be required to be provided not later than 40 days after the payment due date. The proposed content requirements are discussed in more detail below in the discussion of proposed § 1024.39(b)(2).

Proposed comment 39(b)(1)-1 explains that the written notice would be required even if the servicer provided information about loss mitigation and the foreclosure process previously during the oral notice under proposed § 1024.39(a). The Bureau is proposing to require a written disclosure because borrowers may be unable to adequately assess and recall detailed information provided orally. In addition, a written disclosure would provide borrowers with the ability to review the information or discuss it with a housing counselor or other advisor.

Based on feedback received during the Small Business Review Panel process, the Bureau understands that some small servicers may not provide a written notice to delinquent borrowers.[141] The Bureau recognizes that not all servicers may provide written information to borrowers because each borrower may present unique situations. However, as discussed in more

[141] *See* appendix A of the Small Business Review Panel Report. Other small servicer representatives explained, however, that they provide some form of written notice to delinquent borrowers.

detail below, the Bureau believes borrowers would benefit from receiving written information about loss mitigation options, if applicable, and the foreclosure process. To address concerns about requiring an overly-prescriptive written notice that may not account for the variety of situations posed by delinquent borrowers, the Bureau has proposed generally applicable minimum content requirements that can be tailored to specific situations, as discussed in more detail in the section-by-section analysis of proposed § 1024.39(b)(2) below.

In addition, during the Small Business Review Panel process, some small servicers indicated they may face costs in developing and providing the written notice.[142] To assist servicers in complying with the written notice, the Bureau has developed proposed model clauses, referenced in proposed § 1024.39(b)(3). The model clauses are discussed in the section-by-section analysis of appendix MS-4. The Bureau also notes that under proposed § 1024.32, discussed above, servicers would be permitted to provide the written notice to borrowers in electronic form, subject to compliance with the consent and other provisions of the E-Sign Act. .

Late payment. Similar to the oral notice under proposed § 1024.39(a), proposed § 1024.39(b) would require the servicer to provide the written notice if a borrower is late in making a payment sufficient to cover principal, interest, and, if applicable, escrow. However, unlike the oral notice, the written notice would be required to be provided not later than 40 days after the payment due date. Proposed comment 39(b)(1)-2 includes a cross-reference to proposed comment 39(a)-3 to clarify that, for purposes of calculating when the written notice must be provided, servicers should consider a payment late in the same manner as would they would for purposes of calculating when the oral notice must be provided. Proposed comment 39(b)(1)-2 also provides an example in which a borrower misses a payment due date of January 1 and the payment remains due during the 40-day period after January 1. In this case, the servicer would be required to provide the written notice not later than 40 days after January 1—*i.e.*, by February 10.

40-day time period. As with the oral notice, the Bureau is proposing to permit servicers to provide the written notice at any time during the 40-day period. Some servicers may choose to provide the written notice earlier for borrowers who pose a high risk of default. The Bureau is proposing a deadline that occurs after the 30-day deadline for the proposed oral notice under § 1024.39(a) to provide servicers an opportunity to tailor the written notice and other information to the borrower's individual circumstances following the oral notice. Some servicers may choose to provide the written notice prior to the oral notice. The Bureau believes servicers should retain flexibility in determining when to provide the written notice.

In addition, the Bureau has selected a 40-day time period to provide borrowers with a reasonable opportunity to cure the delinquency within ten days after servicers would be required to provide the oral notice under proposed § 1024.39(a). Accordingly, proposed comment 39(b)(1)-3 explains that a service would not be required to provide the written notice unless the borrower is late in paying the amount owed in full during the 40 days after the payment due date. Proposed comment 39(b)(1)-3 provides an example in which a borrower who is contacted by a servicer on January 20 regarding a missed January 1 payment later satisfies the payment by January 30. In this case, the servicer would not be required to provide the written notice 40 days after January 1—*i.e.*, by February 10. In addition, proposed comment 39(b)(1)-5 clarifies that a

[142] *See id.*

servicer would not be required under § 1024.39(b)(1) to notify a borrower who is performing as agreed under a loss mitigation option designed to bring the borrower current on a previously missed payment. *See* the section-by-section analysis of comment 39(a)-6 (borrower performing under a loss mitigation option) in the discussion of proposed § 1024.39(a) above.

In developing the proposed 40-day time period, the Bureau sought to harmonize the timing of the written notice with the recommended timing for the delivery of similar written notices under standards for servicers of FHA, VA, and GSE loans. HUD generally requires servicers of FHA-insured loans to provide each mortgagor in default HUD's "Avoiding Foreclosure" pamphlet, or a form developed by the mortgagee and approved by HUD, not later than the 60th day of delinquency, although HUD recommends sending the form by the 32nd day of delinquency in order to prevent foreclosures from proceeding where avoidable.[143] Servicers of VA loans generally must provide borrowers with a letter if payment has not been received within 30 days after it is due and telephone contact could not be made.[144] Servicers of GSE loans are expected to send a written package soliciting delinquent borrowers to apply for loss mitigation options 31 to 35 days after a payment due date, unless the servicer has made contact with the borrower and received a promise to cure the delinquency within 30 days,[145] although GSE servicers have additional flexibility in providing the solicitation package to certain lower-risk borrowers as late as the 65th day of their delinquency.[146] The Bureau also understands that section 106(c)(5) of the Housing and Urban Development Act of 1968, as amended, generally requires creditors to provide notice of homeownership counseling to eligible delinquent borrowers not later than 45 days after a borrower misses a payment due date. 12 U.S.C. 1701x(c)(5)(B). Similar to the information required under section 106(c)(5) of the Housing and Urban Development Act, the written notice in proposed § 1024.39(b)(2)(vi) would include contact information for housing counselors and the borrower's State housing finance authority, although servicers would be required to provide the written notice not later than 40 days after a borrower misses a payment due date.

At the time the Bureau proposed its early intervention requirements for the Small Business Panel, the Bureau considered requiring servicers to provide delinquent borrowers with written information not later than 45 days after the borrower misses a payment.[147] The Bureau is not proposing a 45-day period for the deadline for the written notice in proposed § 1024.39(a) because, as noted above, the Bureau intended to provide borrowers with a reasonable opportunity to cure a delinquency after receiving the oral notice (which, pursuant to proposed § 1024.39(a), would be required by the 30th day of the borrower's delinquency). The Bureau is aware that

---

[143] *See* 24 CFR 203.602; HUD Handbook 4330.1 rev-5, 7-7(G).

[144] "This letter should emphasize the seriousness of the delinquency and the importance of taking prompt action to resolve the default. It should also notify the borrower(s) that the loan is in default, state the total amount due and advise the borrower(s) how to contact the holder to make arrangements for curing the default." 38 CFR 36.4278(g)(iii).

[145] *See* Fannie Mae, Letters and Notice Guidelines (Apr. 25, 2012), *available at* www.eFannieMae.com; Freddie Mac Single-Family Seller/Servicing Guide, Volume 2, Chapter 64.5 (2012). During the Small Business Panel Review process, small servicer representatives that service for Fannie Mae and Freddie Mac generally described strict rules and tight timeframes in dealing with delinquent borrowers. *See* Small Business Review Panel Report at 25.

[146] The GSEs allow servicers to rely on the results of a behavioral modeling tool to evaluate a borrower's risk profile. *See id.*

[147] *See* Small Business Review Panel Report at 12.

some borrowers may be able to self-cure even after they become 30 days delinquent. In light of this, the Bureau invites comment on how far the deadline for the written notice could be extended to permit a borrower to self-cure, while still providing delinquent borrowers with adequate notice of loss mitigation options.

Based on feedback provided during the Small Business Review Panel process, the Bureau does not believe a 40-day timeframe for providing the written notice would impose a significant burden for small servicers; small servicer representatives explained that they are generally in touch with delinquent borrowers well ahead of the 45-day time period initially considered by the Bureau.[148]

During informal consultation, some commenters expressed concern that servicers may have difficulty complying with the Bureau's proposed 40-day deadline in light of existing servicer requirements. The Bureau understands that a single deadline for sending the written notice may require some servicers to change their practices with respect to certain borrowers, such as GSE servicers servicing loans for borrowers determined to be at lower risk for foreclosure. To the extent requirements proposed by Bureau overlap with standards imposed by Federal agencies, the GSEs, or others parties, the Bureau expects servicers would abide by stricter standard in order to comply with all requirements. The Bureau, however, continues to consider how it may align its requirements with best practices that help borrowers avoid foreclosure.

Some commenters recommended that the Bureau could address a compliance conflict by extending the deadline for sending the notice. The Bureau is concerned that extending the deadline for the written notice too far into a borrower's delinquency may not provide borrowers sufficient time to process loss mitigation applications before the foreclosure process begins. In addition, there is some risk that borrowers could fall further behind on their payments without knowing how to pursue loss mitigation options. The Bureau recognizes that providing the written notice to all delinquent borrowers within a 40-day period may be unnecessary for some borrowers, such as those who present a low risk of default. To mitigate this potential for unnecessary burden, the Bureau is proposing that the written notice be provided to delinquent borrowers only once every 180-day period, as discussed below in the paragraph heading, "Frequency of the notice." The Bureau invites comment on whether extending the 40-day deadline for the written notice to 45 days, 65 days, or longer would provide borrowers with sufficient notice of loss mitigation options before a servicer begins the foreclosure process.

In developing the proposed 40-day deadline, the Bureau also considered whether to require servicers to provide the written notice not later than five days after a borrower contacts the servicer about the borrower's anticipated difficulty with making a payment.[149] The Bureau has not proposed this requirement but instead is proposing a single 40-day deadline in order to balance the need to provide borrowers with assistance at the early stages of a delinquency with the need to provide clear and enforceable standards. The Bureau is concerned that it may be difficult to enforce a requirement to provide the written notice based on borrowers' explaining that they may have difficulty making a payment, particularly because such a communication may be subject to interpretation. A single 40-day deadline would ensure servicers are accountable to

[148] *See* Small Business Review Panel Report at 25 and at appendix A.
[149] *See* Small Business Review Panel Report at 12.

a clear standard that avoids the question of whether borrowers had, in fact, communicated that they expect to have difficulty making payment. In addition, as previously noted, the single 40-day deadline is intended to provide servicers with flexibility to determine the most appropriate time to provide the written notice and to provide borrowers with the opportunity to self-cure. Finally, the Bureau believes that proposed § 1024.36, which would require servicers to respond to information requests, will address situations in which borrowers request information about loss mitigation and foreclosure.

Frequency of the notice. Proposed comment 39(b)(1)-4 explains that a servicer would not be required to provide the written notice under § 1024.39(b) more than once during any 180-day period beginning on the date on which the disclosure is provided. Proposed comment 39(b)(1)-4 further explains that, notwithstanding this limitation, a servicer would still be required to provide the oral notice required under § 1024.39(a) for each payment that is overdue. Proposed comment 39(b)(1)-4 provides an example in which a borrower misses a payment due March 1 and the borrower remains late on that payment during the 40 days after March 1. As would be required under § 1024.39(b)(1), the servicer provides the written disclosure 40 days after March 1—*i.e.*, by April 10. If the borrower subsequently misses another payment due April 1 and remains late on that payment during the 40 days after April 1, the servicer would not be required to provide the written notice again for the 180-day period beginning on April 10, the date the servicer last provided the written notice. However, because the borrower missed payments due on March 1 and April 1, the servicer would be required to provide the oral notice under § 1024.39(a) within the 30-day periods beginning on March 1 and April 1.

During the Small Business Panel Review process, a small servicer representative expressed concern about sending a written notice each month for borrowers who are consistently behind on their payments.[150] The Bureau does not believe that borrowers who are consistently delinquent would benefit from receiving the same written notice every month. The Bureau expects borrowers would be able to retain the disclosure because, as discussed above, proposed § 1024.32 would require that the disclosure be provided in a form the borrower may keep. However, the Bureau does not believe servicers should only be permitted to provide the written notice once because the content in the written notice may be updated over time. The Bureau notes that providing the written disclosure once during any six-month period is generally consistent with HUD's requirements for servicers of FHA-insured loans. HUD's regulations provide that if an account is brought current and then again becomes delinquent, the "Avoiding Foreclosure" pamphlet must be sent again unless the beginning of the new delinquency occurs less than six months after the pamphlet was last mailed.[151] The Bureau solicits comment on whether providing the written disclosure once during any 180-day period is sufficient to provide borrowers with meaningful information.

Legal authority. As discussed above, the Bureau has authority to implement requirements for servicers to provide information about borrower options pursuant to section 6(k)(1)(E) of RESPA. As set forth above, the Bureau has determined that providing borrowers with timely information about loss mitigation options and the foreclosure process, and encouraging servicers to work with borrowers to identify any appropriate loss mitigation options,

[150] *See* Small Business Review Panel Report at 25.
[151] *See* 24 CFR 203.602; HUD Handbook 4330.1 rev-5, 7-7(G).

are necessary to provide borrowers a meaningful opportunity to avoid foreclosure. Proposed § 1024.39(b)(1) sets forth the general requirement that servicers provide borrowers with a written notice about their options by requiring servicers to provide them with a written notice about loss mitigation options and the foreclosure process. Proposed § 1024.39(b)(1) also sets forth timing requirements for the written notice. Accordingly, the Bureau proposes to implement proposed paragraph 39(b)(1) pursuant to its authority under section 6(k)(1)(E) 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 pursuant to section 19(a) of RESPA to prescribe such rules and regulations, to make such interpretations, and to grant such reasonable exemptions for classes of transactions, as may be necessary to achieve the consumer protection purposes of RESPA.

39(b)(2) Content of the Written Notice

Proposed § 1024.39(b)(2) sets forth information that servicers would be required to include in the written notice. Under paragraphs (b)(2)(i) and (b)(2)(ii) of proposed § 1024.39, the servicer would be required to include a statement encouraging the borrower to contact the servicer, along with the servicer's mailing address and telephone number. Under paragraphs (b)(2)(iii) and (b)(2)(iv) of proposed § 1024.39, the servicer would be required, if applicable, to include a statement providing a brief description of examples of loss mitigation options that may be available, as well as a statement explaining how the borrower can obtain additional information about those options. Proposed § 1024.39(b)(2)(v) would require the servicer to include a statement explaining that foreclosure is a process to end the borrower's ownership of the property. Proposed § 1024.39(b)(2)(v) would also require servicers to provide an estimate for when the servicer may start the foreclosure process. This estimate would be required to be expressed in a number of days from the date of a missed payment. Finally, proposed § 1024.39(b)(iv) would require servicers to include contact information for any State housing finance authorities, as defined in FIRREA section 1301, for the State in which the property is located, and either the Bureau or HUD list of homeownership counselors or counseling organizations.

The Bureau recognizes that some of the proposed content may not appear on forms currently used by servicers. For example, the estimated foreclosure timeline in proposed § 1024.39(b)(3)(v), does not appear on the HUD "Avoiding Foreclosure" brochure that servicers of FHA loans are required to send by end of the second month of a borrower's delinquency.[152] Additionally, during the Small Business Panel Review process, small servicer representatives expressed concern that the information contained in the written notice may differ from written information they currently provide to delinquent borrowers.[153] Small servicers representatives were generally concerned that overly-prescriptive early intervention requirements would interfere with "high-touch" engagement with delinquent borrowers, which they explained was frequently tailored to borrowers' particular circumstances; thus, the Small Business Review Panel recommended that the Bureau consider flexible early intervention requirements for small servicers in light of their existing practices.[154]

[152] *See* 24 CFR 203.602; HUD Handbook 4330.1 rev-5, 7-7(G).
[153] *See* Small Business Review Panel Report at 31.
[154] *See id.*

To accommodate existing servicer requirements and practices, proposed comment 39(b)(2)-1 explains that a servicer may provide additional information beyond the proposed content requirements that the servicer determines would be beneficial to the borrower. In addition, proposed comment 39(b)(2)-2 explains that any color, number of pages, size and quality of paper, type of print, and method of reproduction may be used so long as the disclosure is clearly legible. The Bureau has attempted to propose a minimum amount of content in the proposed notice that will provide delinquent borrowers with helpful information. The Bureau solicits comments on whether the content requirements in proposed § 1024.39(b)(2) would pose a substantial conflict with existing disclosure standards established by Federal agencies, the GSEs, or other existing servicer practices. To the extent the proposed the written notice would provide information not currently being provided by the Federal agencies or the GSEs, the Bureau solicits comment on whether such information would be beneficial to delinquent borrowers. The Bureau solicits comment on the proposed content requirements, described below, and whether alternative or additional content would be beneficial to borrowers.

Content requirements. Proposed § 1024.39(b)(2)(i) would require the written notice to include a statement encouraging the borrower to contact the servicer. The Bureau believes that a statement informing borrowers that the servicer can provide assistance with respect to their delinquency is necessary in order to facilitate a discussion between the borrower and the servicer at the early stages of delinquency. As noted above, many borrowers do not know that their servicer can help them avoid foreclosure if they are having trouble make their monthly payments. The Bureau believes a statement encouraging the borrower to call would remove this barrier to borrower-servicer communication. The Bureau recognizes that not every loss mitigation option may be available or appropriate for every borrower. Therefore, the Bureau is not proposing to require servicers to emphasize any particular loss mitigation option over another. Accordingly, proposed comment 39(b)(2)(i)-1 explains that the servicer would not be required, for example, to specifically request the borrower to contact the servicer regarding any particular loss mitigation option.

Contact information for the servicer. To facilitate a dialogue between the servicer and the borrower, proposed § 1024.39(b)(2)(ii) would require the written notice to include the servicer's mailing address and telephone number. Pursuant to proposed § 1024.40(a), a servicer would be required to make available direct access to servicer personnel for assistance with curing a delinquency or avoiding a delinquency, default, or foreclosure for any borrower whom a servicer is required to notify that loss mitigation options may be available under proposed § 1024.39(a). Thus, proposed comment 39(b)(2)(ii)-1 explains that, if applicable, a servicer should provide contact information that would put a borrower in touch with servicer personnel under proposed § 1024.40.

Brief description of loss mitigation options. Proposed § 1024.39(b)(2)(iii) would require that the written notice include a statement, if applicable, providing a brief description of examples of loss mitigation options that may be available from the servicer. Proposed comment 39(b)(2)(iii)-1 explains that proposed § 1024.39(b)(2)(iii) does not mandate that a specific number of examples be disclosed, but explains that borrowers are likely to benefit from examples that permit them to remain in their homes and examples of options that would require that borrowers end their ownership of the property in order to avoid foreclosure. The Bureau is not proposing a minimum number of examples because of the difficulty in identifying a minimum number given the variety of loss mitigation options offered by servicers.

At the time the Bureau proposed its early intervention requirements for the Small Business Panel, the Bureau considered requiring servicers to provide a brief description of any loss mitigation programs available to the borrower.[155] However, the Bureau is not proposing that servicers list all of the loss mitigation options they offer because the Bureau is concerned that servicers may have difficulty providing an accurate disclosure if the number of loss mitigation options they offer changes over time. In addition, the Bureau is concerned that a lengthy written notice would undermine the intended effect of encouraging borrowers to contact their servicer to discuss their options. To address the limitation of providing borrowers with information about every option, the Bureau is proposing that the written notice contain contact information for housing counselors and the borrower's State housing finance authority. Housing counselors and State housing finance authorities may be able to provide the borrowers with information about other loss mitigation options that may not be listed on the written notice.

Proposed comment 39(b)(2)(iii)-1 explains that a servicer may include a generic list of loss mitigation options that it offers to borrowers, and that it may include a statement that not all borrowers will qualify for the listed options. Different loss mitigation options may be available to borrowers depending on the borrower's qualifications or other factors. To avoid confusing borrowers, the Bureau believes servicers should be able to clarify that not all of the enumerated loss mitigation options will necessarily be available.

Proposed comment 39(b)(2)(iii)-2 explains that an example of loss mitigation option may be described in one or more sentences. Proposed comment 39(b)(2)(iii)-2 also explains that if a servicer offers several loss mitigation programs, the servicer may provide a generic description of each option instead of providing detailed descriptions of each program. For example, if a servicer provides several loan modification programs, it may simply provide a generic description of a loan modification. The Bureau recognizes that loss mitigation options are complex and providing comprehensive explanations to borrowers about each option may overwhelm a delinquent borrower with information. Thus, the Bureau does not believe that borrowers would benefit from a disclosure with voluminous detail at the early stage of exploring the options. Instead, the Bureau believes that servicers should provide borrowers with a brief explanation and encourage the borrower to contact the servicer to discuss whether any options may be appropriate. The Bureau solicits comment on whether the level of detail that would be required to describe loss mitigation options would be helpful to delinquent borrowers, and if more detail would be valuable, what specific information should be required.

Explanation of how the borrower may apply for loss mitigation options. Proposed § 1024.39(b)(2)(iv) would require the written notice to include an explanation of how the borrower may obtain more information about loss mitigation options, if applicable. Proposed comment 39(b)(2)(iv)-1 explains that, at a minimum, a servicer could comply with this requirement by directing the borrower to contact the servicer for more information, such as through a statement like, "contact us for instructions on how to apply."

Proposed comment 39(b)(2)(iv)-1 explains that, to expedite the borrower's timely application for any loss mitigation options, servicers may wish to provide more detailed instructions on how a borrower could apply, such as by listing representative documents the borrower should make available to the servicer, such as tax filings or income statements, and by

[155] *See* appendix C of the Small Business Review Panel Report.

providing estimates for when the servicer expects to make a decision on a loss mitigation option. Proposed comment 39(b)(2)(iv)-1 also provides that servicers may supplement the written notice with a loss mitigation application form. At the time the Bureau proposed its early intervention requirements for the Small Business Panel, the Bureau considered requiring servicers to provide a brief outline of the requirements for qualifying for any available loss mitigation programs, including documents and other information the borrower must provide, and any timelines that apply.[156] However, the Bureau is not proposing to require servicers to provide this level of detail in order to comply with proposed § 1024.39(b)(2)(iv). Each loss mitigation option may have its own specific documentation requirements and deadlines, and servicers may be unable to provide comprehensive application instructions generally applicable to all options. Additionally, because the Bureau is proposing that servicers only provide examples of loss mitigation options in the written notice, detailed instructions for only the listed options may not be useful for all borrowers.

Foreclosure statement. Proposed § 1024.39(b)(2)(v) would require that the written notice include a statement explaining that foreclosure is a legal process to end the borrower's ownership of the property. Proposed § 1024.39(b)(2)(v) would also require that the notice include an estimate of how many days after a missed payment the servicer makes the referral to foreclosure. Proposed comment 39(b)(2)(v)-1 clarifies that the servicer may explain that the foreclosure process may vary depending on the circumstances, such as the location of the borrower's property that secures the loan, whether the borrower is covered by the Servicemembers Civil Relief Act (50 U.S.C. App. 501 *et seq.*), and the requirements of the owner or assignee of the borrower's loan. Proposed comment 39(b)(2)(v)-2 clarifies that the servicer may qualify its estimates with a statement that different timelines may vary depending on the circumstances, such as those listed in comment 39(b)(2)(v)-1. Proposed comment 39(b)(2)(v)-2 also explains that the servicer may provide its estimate as a range of days.

During the Small Business Review Panel process, some small servicer representatives explained that information about foreclosure is typically not provided until after loss mitigation options have been explored.[157] The Bureau believes borrowers would benefit from receiving information about the foreclosure process at the same time the borrower receives information about loss mitigation options. In order for borrowers to understand the choices they face at the early stages of delinquency, the Bureau believes they would benefit from understanding what foreclosure is and approximately when it may begin at the same time that they receive information about loss mitigation options. The Bureau invites comment on this expectation and whether borrowers would benefit from receiving information about foreclosure after servicers provide information about loss mitigation options.

In addition, the Bureau is not proposing that servicers provide detailed information about foreclosure because the Bureau recognizes that foreclosure processes are complex and vary by jurisdiction. The Bureau questions whether borrowers are likely to benefit from detailed information, particularly if they are experiencing financial distress. Nonetheless, the Bureau believes that borrowers should be informed about foreclosure to some degree. The Bureau invites comment on whether borrowers would benefit from knowing when the servicer may

[156] *See* appendix C of the Small Business Review Panel Report.
[157] *See* Small Business Review Panel Report at 31.

begin the foreclosure process and whether servicers anticipate difficulty complying with this requirement.

Contact information for housing counselors and State housing finance authorities. Proposed § 1024.39(b)(vi) would require the written notice to include contact information for any State housing finance authority for the State in which the borrower's property is located, and contact information for either the Bureau list or the HUD list of homeownership counselors or counseling organizations.[158] The Bureau is proposing to include information about housing counselors to provide delinquent borrowers with additional resources to understand their loss mitigation options. The Bureau is proposing to require similar information pertaining to housing counseling resources that would be required on the ARM interest rate adjustment notice and the periodic statement, as provided in the Bureau's 2012 TILA Mortgage Servicing Proposal.[159]

The Bureau is proposing to require that servicers include housing counselor contact information because borrowers may be more willing to contact a housing counselor than their servicer to discuss their options.[160] In addition, a housing counselor could also provide a borrower with additional information about loss mitigation options that a servicer may not have listed on the written notice. However, distressed borrowers may be unaware that they can talk to a housing counselor.[161] The Bureau believes that including housing counseling contact information on the written notice will assist borrowers in learning more about their options and, in turn, help them engage in a constructive dialogue with their servicer.

On July 9, 2012, the Bureau released proposed rules to implement Dodd-Frank Act requirements expanding protections for "high-cost" mortgage loans under HOEPA, including a requirement that borrowers receive housing counseling (2012 HOEPA Proposal).[162] The 2012 HOEPA Proposal also proposed to implement other homeownership-counseling-related requirements that are not amendments to HOEPA, including a proposed amendment to Regulation X that lenders provide a list of five homeownership counselors or counseling organizations to applicants for a federally related mortgage loan.[163]

---

[158] At the time of publishing, the Bureau list was not yet available and the HUD list was available at http://www.hud.gov/offices/hsg/sfh/hcc/hcs.cfm (HUD Approved Housing Counseling Agencies).

[159] *See* proposed Regulation Z §§ 1026.20(d) and 1026.41(d)(7) in the Bureau's 2012 TILA Mortgage Servicing Proposal.

[160] Some servicers have found that borrowers may trust independent counseling agencies more than they trust servicers. *See* OCC, *Foreclosure Prevention: Improving Contact with Borrowers*, at 6 (June 2007).

[161] *See* Freddie Mac, *Foreclosure Avoidance Research* (2005).

[162] *See* 2012 HOEPA Proposal, available at http://files.consumerfinance.gov/f/201207_cfpb_proposed-rule_high-cost-mortgage-protections.pdf, at 29-35.

[163] The list provided by the lender pursuant to proposed requirement in the 2012 HOEPA Proposal would include only homeownership counselors or counseling organizations from either the most current list of homeownership counselors or counseling organizations made available by the Bureau, or the most current list maintained by HUD of homeownership counselors or counseling organizations certified by HUD, or otherwise approved by HUD. The 2012 HOEPA Proposal proposed that the list include five homeownership counselors or counseling organizations located in the zip code of the loan applicant's current address, or, if there are not the requisite five counselors or counseling organizations in that zip code, then counselors or organizations within the zip code or zip codes closest to the loan applicant's current address. To facilitate compliance with the proposed list requirement, the Bureau is expecting to develop a website portal that would allow lenders to type in the loan applicant's zip code to generate the requisite list, which could then be printed for distribution to the loan applicant. *See* 2012 HOEPA Proposal at 31-32 (discussing proposed Regulation X § 1024.20(a)).

In connection with the written notice for delinquent borrowers, however, the Bureau is not proposing to require that servicers include a list of specific housing counseling programs or agencies (other than the State housing finance authority, discussed below), but instead that servicers provide contact information for either the Bureau list or the HUD list of homeownership counselors or counseling organizations. During informal outreach, some commenters observed that delinquent borrowers may be confused by being directed to contact several different parties in the proposed § 1024.39(b) written notice—the servicer, housing counselors, and the State housing finance authority. As previously noted, the Bureau believes that delinquent borrowers would benefit from knowing how to access housing counselors because they may be more comfortable discussing their options with a third-party. However, the Bureau also understands that there is a benefit to providing distressed borrowers with a clear and concise notice. Providing contact information to access a list of counselors and counseling organizations would reduce the likelihood of information overload while still providing borrowers with access to assistance.

In addition to information about accessing housing counselors, the Bureau is proposing to require that the proposed § 1024.39(b) written notice include contact information for the State housing finance authority located in the State in which the property is located. The Bureau is proposing this because the Bureau believes borrowers are likely to benefit from knowing how to contact their State housing finance authority in the context of receiving information from their servicer about loss mitigation options. The Bureau is proposing that the § 1024.39(b) written notice include contact information for the State housing finance authority for the State in which the borrower's property is located. The proposed § 1024.39(b) written notice would be required for delinquent borrowers of federally related mortgages, which are not limited to loans secured by the borrower's principal dwelling. Thus, it is possible that the property securing the federally related mortgage may be located in a different State than the State in which the borrower resides. Accordingly, borrowers who are delinquent with respect to a federally related mortgage secured by a non-residential property may benefit from knowing how to access the State housing finance authority for the State in which the property is located, rather than the State in which the borrower resides.

The Bureau notes that the ARM initial interest rate adjustment notification in the 2012 TILA Mortgage Servicing Proposal would require the contact information for the State housing finance authority for the State *in which the consumer resides* (as opposed to the State in which the property is located).[164] While the Bureau expects the State in which the property is located will most often be the State where the consumer resides, there may be circumstances in which that is not the case. Additionally, the Bureau understands that a difference in requirements for different disclosures may increase compliance costs for servicers. The Bureau invites comment on how the Bureau can best mitigate any compliance difficulties.

More generally, the Bureau solicits comment on the costs and benefits of the provision of information about housing counselors and State housing finance authorities to delinquent borrowers in the proposed notice at § 1024.39(b). The Bureau also solicits comment on the

[164] *See* proposed Regulation Z § 1026.20(d) in the Bureau's 2012 TILA Mortgage Servicing Proposal. As noted in the section-by-section analysis of the periodic statement proposed in the Bureau's 2012 TILA Mortgage Servicing Proposal, the periodic statement would require servicers to include contact information for the State housing finance authority for State in which the property is located. *See id.* at proposed § 1026.41(d)(7).

potential effect of the Bureau's proposal on access to homeownership counseling generally by borrowers, and the effect of increased borrower demand for counseling on existing counseling resources, including demand on State housing finance authorities. In particular, the Bureau solicits comment on whether the proposed notice at § 1024.39(b) should include a generic list to access counselors or counseling organizations, as proposed here, or a list of specific counselors or counseling organizations, as was proposed in the 2012 HOEPA Proposal. The Bureau also invites comment on whether including the State housing finance authority would be a helpful additional resource.

Legal authority. As discussed above, the Bureau has authority to implement requirements for servicers to provide information about borrower options pursuant to section 6(k)(1)(E) of RESPA. As set forth above, the Bureau has determined that providing borrowers with timely information about housing counselors and State housing finance authorities, information about loss mitigation options and the foreclosure process, and disclosures encouraging servicers to work with borrowers to identify any appropriate loss mitigation options, are necessary to provide borrowers a meaningful opportunity to avoid foreclosure. Proposed § 1024.39(b)(2) would provide borrowers with information about their options by setting forth the content requirements of the written notice about loss mitigation options and the foreclosure process that would be required under proposed § 1024.39(b)(1). Accordingly, the Bureau proposes to implement proposed paragraph 39(b)(2) pursuant to its authority under section 6(k)(1)(E) 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 pursuant to section 19(a) of RESPA to prescribe such rules and regulations, to make such interpretations, and to grant such reasonable exemptions for classes of transactions, as may be necessary to achieve the consumer protection purposes of RESPA.

39(b)(3) Model Clauses

Proposed § 1024.39(b)(3) contains a reference to proposed model clauses that servicers may use to comply with the proposed written notice requirement. The proposed model clauses are contained in appendix MS-4. For more detailed discussion of the proposed model clauses, see the section-by-section analysis of appendix MS below.

Legal authority. As discussed above, the Bureau has authority to implement requirements for servicers to provide information about borrower options pursuant to section 6(k)(1)(E) of RESPA. As set forth above, the Bureau has determined that providing borrowers with timely information about housing counselors and State housing finance authorities, information about loss mitigation options and the foreclosure process, and disclosures encouraging servicers to work with borrowers to identify any appropriate loss mitigation options, are necessary to provide borrowers a meaningful opportunity to avoid foreclosure. . Proposed § 1024.39(b)(3) contains a reference to model clauses that provide borrowers with information about their options as required under paragraphs (b)(1) and (b)(2) of proposed § 1024.39. Accordingly, the Bureau proposes to implement proposed paragraph 39(b)(3) pursuant to its authority under section 6(k)(1)(E) 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 pursuant to section 19(a) of RESPA to prescribe such rules and regulations, to make such interpretations, and to grant such reasonable exemptions for classes of transactions, as may be necessary to achieve the consumer protection purposes of RESPA.

Small Servicers

As discussed above, through outreach with servicers and servicing industry representatives, small servicers expressed concern that compliance with the information request provisions for oral information requests would require small servicers to invest in systems and processes at substantial costs. However, many small servicers generally explained that they did not expect the Bureau's proposed early intervention requirements would impose significant burden because they were already providing early intervention for delinquent borrowers. Accordingly, the Bureau is not proposing to provide small servicers with an exemption from the proposed notice requirements under proposed § 1024.39. However, in light of the feedback provided by small entity representatives during the Small Business Panel Review process, as reflected in the Panel Report of the Small Business Panel, the Bureau solicits comment on whether the Bureau should consider alternative means of compliance with proposed § 1024.39 that would provide small servicers with additional flexibility, such as by permitting small servicers to develop a more streamlined written notice under proposed § 1024.39(b).[165]

Relationship with Other Applicable Laws

The Bureau understands that servicers may be subject to State and Federal laws related to debt collection practices, such as the Fair Debt Collection Practices Act, 15 U.S.C. 1692. In addition, the Bankruptcy Code's automatic stay provisions generally prohibit, among other things, actions to collect, assess, or recover a claim against a debtor that arose before the debtor filed for bankruptcy. The Bureau invites comment on whether servicers may reasonably question how they could comply with Bureau's proposal in light of these laws.

~~*Section 1024.40 Continuity of Contact*~~

~~*Background.* As discussed in part II above, the onset of the mortgage crisis revealed that many servicers did not have the infrastructure needed to handle the high volumes of delinquent mortgages, loan modification requests, and foreclosures they faced. Reports of servicers confusing delinquent borrowers with conflicting or misleading information, losing or mishandling borrower-provided documents supporting loan modifications requests, failing to respond to borrowers' inquiries about loss mitigation in a timely manner, and transferring borrowers seeking assistance with loss mitigation from department to department made it apparent that many servicers did not provide appropriately-trained staff to assist delinquent borrowers.~~[166]

[165] *See* Small Business Review Panel Report at 31 (recommending that the Bureau consider flexible early intervention requirements for small servicers).

~~[166] *See, e.g., Are There Government Barriers to the Housing Market Recover?: Hearings Before the Subcomm. on Insurance, Housing, and Community Opportunity of the House Comm. on Financial Services*, No. 112-7, 112th Cong. 51 (February 16, 2011) (statement of Phyllis Caldwell, Chief, Homeownership Preservation Office, U.S. Department of the Treasury), available at http://financialservices.house.gov/media/pdf/021611caldwell.pdf; *see also* Maryland Foreclosure Task Force, Report, at 22 (January 11, 2012) (describing that consumers continue to face problems of lost documentation, expired authorizations and confusing responses to requests for loss mitigation from multiple representatives within a given servicer) (Maryland Foreclosure Task Force Report), available at http://www.mdhousing.org/website/commTaskForce/documents/Foreclosure_Task_Force_Report_2012.pdf; *see also*, Peter S. Goodman, *A Plan to Stem Foreclosures, Buried in a Paper Avalanche*, New York Times (June 29, 2009) (reporting on a number of borrower frustrations with the loan modification process, such as getting transferred~~