Section 1024.41 Loss Mitigation

Background. As discussed above, there has been widespread concern among mortgage market participants, consumer advocates, and policymakers regarding servicers' performance of loss mitigation activity in connection with the mortgage market crisis. In response, servicers, investors, guarantors, and State and Federal regulators have undertaken efforts to adjust servicer loss mitigation and foreclosure practices to address problems relating to evaluation of loss mitigation options. For example:

- Treasury and HUD sponsored the Making Home Affordable program, which established guidelines for Federal government sponsored loss mitigation programs such as HAMP;[174]
- The Federal Housing Finance Agency (FHFA) directed Fannie Mae and Freddie Mac to align their guidelines for servicing delinquent mortgages they own or guarantee to improve servicing practices;[175]
- Prudential regulators, including the Board and the OCC undertook enforcement actions against major servicers, resulting in consent orders imposing requirements on servicing practices;[176]
- The recent national mortgage settlement agreement imposes obligations on servicers, including on the conduct of loss mitigation evaluations;[177]
- States have begun to adopt regulations relating to mortgage servicing and foreclosure processing, including requiring evaluation of loss mitigation options.[178]

Many of these requirements have coalesced around a common set of best practices for servicing. For example, the FHFA servicing alignment initiative, the National Mortgage Settlement, and HAMP all require servicers to review loss mitigation applications within 30 days.[179] While these various initiatives are starting to bring standardization to significant portions of the market, none of them to date have set a consistent national set of procedures and expectations regarding loss mitigation procedures. The Bureau believes that because so much loss mitigation activity is ongoing, and because that activity has such potentially significant impacts on both individual consumers and the health of the larger housing market and economy, consistent uniform minimum regulations would be appropriate and useful to set borrower and servicer expectations and provide necessary consumer protections.

The Bureau has considered a number of different options for addressing consumer harms relating to loss mitigation. In general, the Federal government has at least three approaches to addressing loss mitigation: (1) establishing processes to facilitate compliance by market

---

[174] www.makinghomeaffordable.gov.
[175] Federal Housing Finance Agency, Press Release: Fannie Mae and Freddie Mac to Align Guidelines for Servicing Delinquent Mortgages (April 28, 2011), available at http://www.fhfa.gov/webfiles/21190/SAI42811.pdf.
[176] OCC Press Release, *OCC Takes Enforcement Action Against Eight Servicers for Unsafe and Unsound Foreclosure Practices* (April 13, 2011), available at http://www.occ.gov/news-issuances/news-releases/2011/nr-occ-2011-47.html; Federal Reserve Board of Governors Press Release (April 13, 2011), available at http://federalreserve.gov/newsevents/press/enforcement/20110413a.htm.
[177] www.nationalmortgagesettlement.com.
[178] *See, e.g.*, N.Y. Comp. Codes R. & Regs. tit. 3, § 419.1 *et seq.*; 2012 Cal. Legis. Serv. Ch. 86 (A.B. 278) (WEST) amending Cal. Civ. Code § 2923.6.
[179] *See e.g.*, National Mortgage Settlement at Appendix A, at A-26, available at http://nationalmortgagesettlement.com; Freddie Mac Single Family Seller/Servicer Guide, Vol. 2 § 64.6(d)(5) (2012); Fannie Mae Single Family Servicing Guide § 205.08 (2012); HAMP Guidelines, Ch. 6 (2011).

participants; (2) mandating outcomes of loss mitigation process (implicitly raising costs to market participants of pursuing actions in violation of the mandated outcomes); or (3) providing subsidies to incentivize the desired outcomes.[180] Only options (1) and (2) were considered by the Bureau in light of the authorities available to the Bureau. Options (1) and (2) present a stark choice: whether to mandate processes that provide consumer protections without mandating specific outcomes or whether to mandate specific outcomes by establishing criteria. For example, a requirement that a servicer review a completed loss mitigation application establishes process requirements but does not impose requirements on the substance of the servicers review. In contrast, a requirement that a servicer provide a loan modification when an evaluation of a loss mitigation application indicates that a loan modification may be net present value positive would impose an outcome on the process.

At the outset, it is worth noting that the Bureau's goal is not to achieve any particular target with respect to the number or speed of foreclosures. The Bureau's goal rather is to ensure that borrowers are protected from harm in connection with the process of evaluating a borrower for a loss mitigation option and proceeding to foreclosure. For instance, a borrower should not be misled about the options available to the borrower or the steps necessary to seek evaluation for those options. Further, servicers should review complete loss mitigation applications and make appropriate decisions with respect to those submissions.

Evaluating the options available to the Bureau requires comparison across multiple dynamics, including, among others, whether the Bureau has properly identified consumer harm, whether the proposed solutions will effectively address the identified consumer harm, the risk of unintended market consequences and costs, and the appropriate scope of authorities available to the Bureau. By establishing appropriate loss mitigation procedures, the Bureau can ensure that borrowers receive information about loss mitigation options available to them and the process for applying for those options. Further, borrowers should be protected by ensuring that borrowers receive an evaluation for all options for which they may be eligible, have an opportunity to appeal decisions by the servicer regarding loan modification options, and are protected from foreclosure until the process of evaluating the borrower's complete loss mitigation application has ended.

At the same time, the Bureau is concerned that going beyond process rights to give borrowers the ability to file suit over the merits of individual loss mitigation options could have negative effects on the availability and structure of loss mitigation programs and, indeed, of mortgage credit generally. The Bureau is concerned that investors and guarantors could either eliminate loss mitigation efforts altogether or structure them as vague, formless discretionary activities rather than risk significant delays in foreclosure or incur potential liability over the structure and administration of the programs.[181] Alternatively, the prospect of delays and litigation risk might causing certain investors and guarantors to significantly reduce mortgage

[180] *See* Patricia A. McCoy, Barriers to Home Mortgage Modifications During the Financial Crisis, at 4 (May 31, 2012).

[181] Evidence exists that for certain investors and servicers loss mitigation activities may not actually mitigate losses from an investor's perspective when the impact across an entire portfolio is considered. Actions that impose additional costs on loss mitigation activities further incentives not to offer such programs. *See* Christopher Foote, et al., *Reducing Foreclosures: No Easy Answers*, Federal Reserve Bank of Atlanta Working Paper 2009-15 (May 2009), available at http://www.frbatlanta.org/filelegacydocs/wp0915.pdf.

market activity, thus potentially curtailing general access to credit. The Bureau acknowledges the deep frustration and desperate circumstances that record numbers of borrowers face as they struggle to keep their loans current in this difficult economy, and believes that a solution that eliminates or severely restricts the recent increase in loss mitigation initiatives and current access to credit may not be in consumers' best interest or the best interest of the broader market and economy.

Accordingly, proposed § 1024.41 requires servicers that make loss mitigation options available to borrowers in the ordinary course of business to undertake certain duties in connection with the evaluation of borrower applications for loss mitigation options. Proposed § 1024.41 is designed to achieve three main goals: First, proposed § 1024.41 provides protections to borrowers to ensure that, to the extent a servicer offers loss mitigation options, borrowers will receive timely information about how to apply and that a complete application will be evaluated in a timely manner. Second, proposed § 1024.41 prohibits a servicer from proceeding with the end of the foreclosure process – that is, the scheduled foreclosure sale – until a borrower and a servicer have terminated discussions regarding loss mitigation options.[182] Third, proposed § 1024.41 sets timelines that are designed to be completed without requiring a suspension of the foreclosure sale date to avoid strategic use of these procedures to extend foreclosure timelines and delay investor recover through foreclosure.

Although the proposed rule would prohibit a servicer from proceeding with a foreclosure sale while a complete and timely application for loss mitigation is pending, the proposal would not prohibit a servicer from taking other steps in the foreclosure process. The Bureau believes that addressing the problems associated with concurrent loss mitigation application and evaluation and foreclosure proceedings requires a balanced approach that considers the needs of consumers, servicers, and mortgage loan investors. This balance considers the interest of consumers in having servicers provide good faith evaluations and implementation of loss mitigation options as well as the interests of investors in obtaining timely recovery on assets for which losses cannot be mitigated consistent with investor requirements.

The Bureau believes that the proposed rule will require servicers to invest in processes to accomplish the regulatory requirements.

The Bureau notes that the steps prior to the scheduled foreclosure sale can vary by

---

[182] Although efforts to gather reliable data about the prevalence of problems resulting from proceeding with a foreclosure sale while loss mitigation discussion are ongoing, the Federal Reserve identified anecdotal evidence of these problems as far back as 2008. *See* Larry Cordell *et al*., *The Incentives of Mortgage Servicers: Myths and Realities*, at 9 (Federal Reserve Board, Working Paper No. 2008-46, Sept. 2008). Anecdotal evidence continues to accumulate. *See, e.g.*, *Haskamp, et al. v. Federal National Mortgage Assoc.,* et al., No. 11-cv-2248, Plaintiff's Memorandum of Law In Support of Their Motion For Partial Summary Judgment (D. Minn. June 14, 2012); *Stovall v. Suntrust Mortgage, Inc.,* No. 10-2836, 2011 U.S. Dist. LEXIS 106137 (D. Md. September 20, 2011); Debra Gruszecki, *REAL ESTATE: Homeowner Protests "Dual Tracking,"* Press-Enterprise (June 19, 2012), available at http://www.pe.com/local-news/local-news-headlines/20120619-real-estate-homeowner-protests-dual-tracking.ece. The NCLC conducted a survey of consumer attorneys to identify instances of foreclosure sales occurring while loss mitigation discussions were on-going. Per that survey, 80% of surveyed consumer attorneys surveyed reported an instance of an attempted foreclosure sale while awaiting a loan modification. National Consumer Law Center & National Association of Consumer Bankruptcy Attorneys, *Servicers Continue to Wrongfully Initiate Foreclosures: All Types of Loans Affected* (Feb. 2012), available at http://www.nclc.org/images/pdf/foreclosure_mortgage/mortgage_servicing/wrongful-foreclosure-survey-results.pdf.

servicer, by jurisdiction, by type of proceeding, including judicial and non-judicial foreclosure. Some steps may be internal to an individual servicer, such as referring a case to a foreclosure department. The timing for other steps may be controlled by State law or court rules, which vary among jurisdictions. In some instances, there may be filing deadlines established for a particular matter. The Bureau recognizes that concerns can arise when a servicer proceeds on loss mitigation and foreclosure proceeding tracks simultaneously. At the same time, the Bureau believes that by creating obligations on servicers to provide prompt notice of what is needed to complete a loss mitigation application and prompt decisions on completed applications – and by prohibiting servicers from proceeding to a foreclosure sale while a complete and timely loss mitigation application is pending – the proposed rule will address the most problematic issues posed by concurrent evaluation of loss mitigation options and foreclosure proceedings.

The Bureau notes that the protection s provided in proposed § 1024.41 will be further augmented by protections in other parts of the servicing proposals that address loss mitigation issues. In proposed § 1024.39, for instance, the Bureau proposes to implement obligations on servicers to contact borrowers early in the delinquency process and to provide information to borrowers regarding loss mitigation options. In proposed § 1024.40, the Bureau proposes to require servicers to provide borrowers with contact personnel to assist the borrower with the process of applying for a loss mitigation option. Such personnel must have access to, among other things, information regarding loss mitigation options available to the borrower, actions the borrower must take to be evaluated for such loss mitigation options, and the status of any loss mitigation application submitted by the borrower. Further, in proposed § 1024.38, the Bureau proposes to require that servicers implement policies and procedures that achieve the objective of reviewing borrowers for loss mitigation options. Finally, in proposed § 1024.35, the Bureau proposes to permit a borrower to assert an error as a result of a servicer's failure to postpone a scheduled foreclosure sale when a servicer has failed to comply with the requirements for proceeding with a foreclosure sale pursuant to proposed § 1024.41(g). All of these protections should be considered together and these protections, when implemented together, will have a substantial impact on reducing consumer harm.

In order to reduce burden to servicers and costs to borrowers, the Bureau has sought to maintain consistency among proposed § 1024.41, the national mortgage settlement, FHFA's servicing alignment initiative, federal regulatory agency consent orders, and State law mortgage servicing statutory requirements. In certain instances, each of these other sources of servicing requirements may be more restrictive or prescriptive than proposed § 1024.41. That is intentional. Proposed § 1024.41 establishes a floor of minimum consumer protections and provides flexibility for Federal regulatory agency requirements, State law, or investor and guarantor requirements to impose obligations that may be more restrictive on servicers.

The Bureau requests comment on all aspects of the proposal, and, in particular, whether focusing on the provision of procedural rights would be sufficient to significantly improve the efficiency and fairness of loss mitigation processing. The Bureau seeks comment on whether there are additional appropriate measures within the authority of the Bureau, or the federal agencies collectively, that could be taken to improve loss mitigation outcomes for all parties. The Bureau seeks comment on whether the proposed requirements strike the appropriate balance between ensuring that consumers' timely and complete applications receive fair and full consideration and ensuring predictability of outcomes for investors and guarantors. Finally, and as discussed further below, the Bureau seeks comment on whether the requirements of proposed

§ 1024.41 would require servicers to undertake practices that conflict with other federal regulatory agency requirements or State law or may cause servicers to undertake practices that may reduce the value to investors or guarantors of offering loss mitigation options.[183]

41(a) Scope.

Proposed § 1024.41(a) provides that the requirements in proposed § 1024.41 apply to any servicer that offers loss mitigation options in the ordinary course of business. The purpose of this provision is to clarify that the requirements in proposed § 1024.41 are applicable only to those servicers that are engaged in a practice in the ordinary course of business of evaluating loss mitigation options for their own portfolios or pursuant to duties owed to investors or guarantors of mortgage loans. These include servicers that participate in the HAMP program sponsored by HUD and Treasury, as well as servicers subject to investor or guarantor requirements, including requirements imposed by Fannie Mae, Freddie Mac, Ginnie Mae, private investors, or government or private guarantors of mortgage loans to evaluate loss mitigation options for non-performing mortgage loans.

Proposed comment 41(a)-1 clarifies that nothing in proposed § 1024.41 is intended to impose a duty on a servicer to offer loss mitigation options to borrowers generally or to offer or approve any particular borrower for a loss mitigation option. As set forth above, the Bureau does not intend to create a right for borrowers to enforce in private litigation requirements that are imposed by investors or guarantors on servicers to take steps to protect the investors or guarantors from losses that can be avoided. The Bureau believes it is appropriate to clarify in proposed comment 41(a)-1 that the rules do not impose a duty on a servicer to offer loss mitigation or to approve any particular borrower for a loss mitigation option and that the rules should not be construed to impose liability on a servicer, or any other party, for any failure to offer a loss mitigation option, so long as the servicer complies with the procedural requirements of proposed § 1024.41.

Certain servicers that do not evaluate borrowers for loss mitigation options in the ordinary course of business would not be subject to proposed § 1024.41. In proposed comment 41(a)-2, the Bureau sets forth examples of practices that should not be considered, by themselves, considered indicia that a servicer had opted to offer loss mitigation options in the ordinary course of business. For example, it is not the Bureau's intention to impose the requirements in proposed § 1024.41 on servicers that agree to limit adverse consequences to borrowers for making late payments, including by waiving late fees or declining to furnish negative information to a consumer reporting agency or on servicers that have decided to engage in a temporary or pilot program to explore the feasibility of offering certain loss mitigation options. Proposed comment 41(a)-2 clarifies that such practices, which may be the economic equivalent of a loss mitigation option, such as a forbearance plan, should not indicate by themselves that a servicer offers loss mitigation options to borrowers in the ordinary course of business.

[183] With respect to investor or guarantor requirements that do not constitute Federal or State law, such as requirements of Fannie Mae, Freddie Mac, or Ginnie Mae requirements, or requirements of federal or state agencies that serve as guarantors of mortgage loans, the Bureau observes that such entities may need to review and adjust their requirements in light of the consumer protections set forth in the proposed rules.

41(b) Loss Mitigation Application.

Proposed § 1024.41(b)(1) provides that a complete loss mitigation application includes all the information the servicer regularly obtains and considers in evaluating loss mitigation applications. This provision provides each servicer with flexibility to establish requirements regarding the type of information that the servicer deems necessary to determine whether a borrower is eligible for a loss mitigation option based on differing investor or guarantor guidelines.

Upon receipt of an incomplete loss mitigation application, proposed § 1024.41(b)(2) requires servicers to exercise reasonable diligence to obtain the additional information required to make a loss mitigation application complete. To that end, a servicer that receives an incomplete loss mitigation application earlier than 5 days before the timeline established for proposed § 1024.41(f) shall within a reasonable time, but in no event later than 5 days (excluding legal public holidays, Saturdays, or Sundays) provide a notice to a borrower. The notice must state that the application is incomplete, identify the additional information or documents necessary to make the application complete, and provide a deadline by which the borrower must submit the additional information or documents.

The Bureau believes it is appropriate to require that servicers provide the notice within a reasonable time, but in no event later than 5 days (excluding legal public holidays, Saturdays, or Sundays) after receiving the incomplete application. Fannie Mae and Freddie Mac guidelines, as well as the national mortgage settlement, require servicers to provide a substantially similar but, in some cases more prescriptive, notice within 5 business days of receipt of an incomplete application.[184] When a servicer receives an application more than 5 days before the deadline the servicer has established for submitting a complete application, the servicer has sufficient opportunity to review the loss mitigation application, determine the information or documents that have not been provided and provide that information to the borrower. Further, even when a loss mitigation application is submitted less than 5 days (excluding legal public holidays, Saturdays, or Sundays) before the applicable deadline, a servicer must undertake reasonable diligence to obtain the information even if the servicer is not required to provide the notice contemplated by proposed § 1024.41(b)(2).

Proposed § 1024.41(b) does not require a servicer to stop foreclosure proceedings when a borrower submits an incomplete loss mitigation application. Further, unless an incomplete loss mitigation application is made complete by the deadline established by the servicer pursuant to proposed § 1024.41(f), a servicer is not required to comply with the loss mitigation procedures for an incomplete loss mitigation application. The Bureau requests comment regarding whether servicers should be required to undertake any further obligations in connection with an incomplete or substantially complete loss mitigation application and what any further obligations should be.

41(c) Review of Loss Mitigation Applications

Proposed § 1024.41(c) states that, within 30 days of receiving a complete loss mitigation

[184] *See United States of America* et al. *v. Bank of America Corp.* et al., at Appendix A, at A-26, available at http://nationalmortgagesettlement.com; Freddie Mac Single Family Seller/Servicer Guide, Vol. 2 § 64.6(d)(4) (2012); Fannie Mae Single Family Servicing Guide § 205.07 (2012).

application, a servicer must evaluate the borrower for all loss mitigation options available from the servicer for which the borrower may qualify and provide the borrower with a written notice stating the servicer's determination of whether it will offer the borrower a loss mitigation option. The Bureau believes that it is appropriate to require servicers to evaluate complete loss mitigation applications within 30 days, which is an industry standard, as discussed above.

The Bureau further believes it is appropriate to require a servicer to evaluate a borrower for all loss mitigation options available from the servicer for which the borrower may qualify rather than to require borrowers to select options for which the borrower may be evaluated. A servicer is in a better position than a borrower to determine the loss mitigation programs for which a borrower may qualify. Currently, many investors and guarantors have established set priority orders for evaluating and offering loss mitigation options rather than requiring borrowers to select loss mitigation programs. While borrowers should not be required to select loss mitigation programs themselves for an evaluation, a consequence of ordering loss mitigation programs based on least cost to an investor is that a borrower that may qualify for a program farther down on the priority list may believe that the first option offered is the only option available to the borrower. This may lead to less effective programs, disparate outcomes for similarly situated borrowers, and longer timelines for effectuating loss mitigation options.

The Bureau has proposed that a servicer evaluate a borrower for all loss mitigation programs offered by the servicer for which the borrower may be eligible. The Bureau believes that this will ensure that all borrowers receive fair evaluations for all options available to them and will be able to identify options. Further, servicers will not be required to evaluate borrowers for any programs for which a borrower does not qualify based on eligibility criteria established by investors or guarantors. In sum, investors, guarantors, and servicers retain the ability to manage loss mitigation programs to ensure that borrower eligibility and program administration is consistent with investor and guarantor requirements, while borrowers will be able to understand all potential options that may be available.

The Bureau has received feedback that a requirement that servicers evaluate borrowers for all loss mitigation programs offered by the servicer will impact servicers' ability to manage programs through priority ordering of loss mitigation options. The Bureau agrees that the proposed rules would impact the ability to manage programs through the use of a loss mitigation option priority order, as a servicer will be required to evaluate a borrower for all programs and provide a notice of the results of the evaluation for all programs. However, the Bureau believes that servicers will be able to achieve the similar controls through the use of more detailed and comprehensive evaluation criteria and that the requirement will not ultimately impair a servicer's, investor's, or guarantor's ability to manage loss mitigation programs. The requirement that a servicer consider a borrower's application for all loss mitigation programs for which a borrower may qualify is consistent with the national mortgage settlement, which states that "[u]pon timely receipt of a complete loan modification application, Servicer shall evaluate borrowers for all available loan modification options for which they are eligible . . . ."[185] Further, the Bureau's proposed requirement eliminates the need for borrowers to submit multiple applications for different loss mitigation options and, thus, provides for more efficient compliance by servicers with the requirements of the rules.

---

[185] *See* National Mortgage Settlement at Appendix A, at A-16, available at http://nationalmortgagesettlement.com.

Proposed comment 41(c)(1)-1 clarifies that the servicer's evaluation of a borrower for a loss mitigation option is subject to the eligibility criteria for each loss mitigation option. For example, if a loss mitigation option is only available for military servicemembers, a servicer has conducted a proper evaluation if it determines that the borrower is not a servicemember and, therefore, as a threshold matter is ineligible for the program. Similarly, to the extent eligibility criteria for pilot programs, temporary programs, or programs that are limited by the number of participating borrowers, would exclude a borrower from eligibility, a servicer is not obligated to evaluate the borrower for any such loss mitigation option just as if the eligibility criteria did not exist. Because the requirements of proposed § 1024.41 are not intended to require that a borrower have a right to a loss mitigation option, nothing in proposed § 1024.41 should be construed to prohibit a servicer from imposing any eligibility criteria the servicer (or the investor or guarantor of a mortgage loan) determines is appropriate for a loss mitigation option.

Proposed § 1024.41(c) requires servicers to notify borrowers of the outcome of the servicer's evaluation of the borrower for a loss mitigation option. Notice from the servicer provides certainty to the borrower regarding the outcome and serves as a basis for a borrower to accept, reject, or, where permitted, appeal, the servicer's determination.

The Bureau requests comment regarding whether a servicer should be required to review a borrower for all loss mitigation options for which the borrower may be eligible. The Bureau further requests comment regarding what a servicer's obligation to review a borrower's complete application for a loss mitigation option should be if the obligation is not to review for all loss mitigation options for which the borrower may be eligible.

41(d) Denial of loan modification options

Proposed § 1024.41(d) imposes additional obligations on servicers that deny borrower loss mitigation applications with respect to trial or permanent loan modifications. When a servicer determines that a borrower is not eligible for a loan modification as a loss mitigation option, the written notice provided by the servicer to the borrower must state the specific reasons for the determination and inform the borrower of the right to appeal the servicer's determination pursuant to proposed § 1024.41(h). The notice must include the deadline for filing the appeal and any requirements, such as, for example, forms or documents the borrower must file in connection with the appeal process.

Because the determination that a borrower does not qualify for a loan modification option has significant consequences, the Bureau believes that borrowers should receive accurate information regarding the basis for the servicer's determination. In that regard, proposed comments 41(d)(1)-1 and 41(d)(1)-2 provide examples regarding the information that should be included in the specific reasons provided to the borrower in the notice when a borrower is denied a loan modification on the basis of an investor requirement or a net present value calculation. The Bureau believes this information can assist borrowers in providing appropriate and relevant information to servicers in connection with the appeal process. Further, these requirements are consistent with the national mortgage settlement.[186]

The Bureau requests comment regarding whether servicers should provide the basis for

[186] *See United States of America* et al. *v. Bank of America Corp.* et al., at Appendix A, at A-27, available at http://nationalmortgagesettlement.com.

the servicer's determination that a borrower does not qualify for each loan modification program. The Bureau further requests comment on whether servicers should be required to provide the information set forth in proposed comments 41(d)(1)-1 and 41(d)(1)-2 regarding investor requirements and net present value tests. In addition, the Bureau requests comment regarding whether servicers should be required to provide the basis for the servicer's determination that a borrower does not qualify for each loss mitigation program, including non-loan modification programs.

41(e) Borrower Response and Performance

Proposed § 1024.41(e) sets forth standards for when a borrower is considered to have accepted or rejected a loss mitigation option offered by a servicer. Proposed § 1024.41(e) provides that a servicer may impose requirements on the manner in which a borrower must accept or reject a loss mitigation option, subject to standards for acceptance and rejection set forth in the rule. The proposed rule provides that if a borrower does not satisfy the servicer's requirements for accepting a loss mitigation option, but submits the first payment that would be owed pursuant to any such loss mitigation option within the deadline established by the servicer, the borrower shall be deemed to have accepted the offer of a loss mitigation option. This presumption is consistent with the terms of the National Mortgage Settlement. The Bureau recognizes that this proposed standard would set forth a presumption with respect to the parties' intent to enter into an agreement on a loss mitigation option and requests comment regarding whether the Bureau should implement a presumption to establish when parties should be considered to have entered into an agreement on a loss mitigation option.

The Bureau further believes it is appropriate to allow a servicer that has not received a response from a borrower to an offer of a loss mitigation after 14 days to deem the borrower's lack of a response as a rejection of the loss mitigation option. A 14-day timeframe for a borrower to respond to an offer of a loss mitigation option is consistent with GSE requirements, the National Mortgage Settlement, State law, and Federal regulatory agency requirements.[187]

The Bureau requests comment on whether servicers should be required to allow borrowers to accept or reject offers of loss mitigation options orally, including any compliance burdens imposed as a result of any such requirement.

41(f) Deadline for Loss Mitigation Applications

Proposed § 1024.41(f) states that a servicer may set a deadline by which a borrower must submit a complete loss mitigation application, so long as any such deadline is no earlier than 90 days before a scheduled foreclosure sale. A 90-day threshold appears to set an appropriate balance. A servicer that sets a deadline for complete loss mitigation applications of 90 days before a scheduled foreclosure sale will have 30 days to review a borrower's application for a

[187] *See, e.g.*, National Mortgage Settlement., at Appendix A, at A-17, available at http://nationalmortgagesettlement.com; Freddie Mac Single Family Seller/Servicer Guide § 64.6(d)(5) (2012); Fannie Mae Single Family Servicing Guide § 103.04 (2012); 2012 Cal. Legis. Serv. Ch. 86 (A.B. 278) (WEST) amending Cal. Civ. Code § 2923. Moreover, Fannie Mae servicing guidelines provide a servicer's review of a borrower's application for a loss mitigation option must not exceed 30 days and that if a servicer receives a borrower response package before 37 days prior to the foreclosure sale date, no delay in legal action is required, unless an offer is made and the foreclosure sale is within the borrower's 14-day response period. *See* Fannie Mae Single Family Servicing Guide §§ 103.04, 107.01.02 (2012).

loss mitigation option, will be able to provide the borrower with 14 days to respond to the servicer's offer of a loss mitigation option and/or to file an appeal, will be able to consider any timely appeal during a subsequent 30 day period, and will be able to provide the borrower with an additional 14 days to respond to any offer of a loss mitigation option after an appeal. A servicer's decision on an appeal is not itself subject to appeal and a servicer is not required to consider any further appeals after the initial appeal. Thus, with the timeline set forth, a servicer must complete the entire process within 88 days. Because a servicer has the flexibility to establish a deadline that is no earlier than 90 days before foreclosure sale, the process can be completed without rescheduling the foreclosure sale.

Comment 41(f)-1 clarifies that where a foreclosure sale has not been scheduled, or where a foreclosure sale may occur less than 90 days after the sale is scheduled pursuant to State law, a servicer should establish a deadline that is no earlier than 90 days before the day that a servicer reasonably anticipates that a foreclosure sale will be scheduled.

41(g) Prohibition on Foreclosure Sale

Proposed § 1024.41(g) provides that if a servicer receives a complete loss mitigation application by the deadline established pursuant to proposed § 1024.41(f), the servicer may not proceed to foreclosure sale unless: (1) the servicer denies the borrower's application for a loss mitigation option and the appeal process is inapplicable, the borrower has not requested an appeal, or the time for requesting an appeal has expired; (2) the servicer denies the borrower's appeal; (3) the borrower rejects a servicer's offer of a loss mitigation option; or (4) a borrower fails to perform pursuant to the terms of a loss mitigation option.

The Bureau believes it is appropriate to require that if a servicer offers loss mitigation options to borrowers in the ordinary course of business, and the borrower submits a complete application for a loss mitigation application by the deadline established by the servicer, a servicer should not proceed with a scheduled foreclosure sale until the servicer and borrower have terminated discussions regarding the loss mitigation option. The Bureau believes this point occurs when a borrower is denied for a loss mitigation option (and any appeal process has ended) or where a borrower rejects a servicer's offer of a loss mitigation option.

Further, the Bureau believes it is appropriate to suspend a scheduled foreclosure sale when a borrower is performing under an agreement on a loss mitigation option. A servicer's basis for servicing a mortgage loan, and undertaking actions to collect on an unpaid obligation, emanates from the contractual relationship between the owner or assignee of the mortgage loan and the borrower. A servicer's determination to hold a scheduled foreclosure sale when a borrower is performing under an agreement that forestalls foreclosure violates the agreement entered into with the borrower. Additionally, it is already standard industry practice for a servicer to suspend a scheduled foreclosure sale during any period where a borrower is making payments pursuant to the terms of the trial loan modification.

In terms of workflow, when a servicer receives a complete loss mitigation application, it will either offer the borrower a loss mitigation option or deny the borrower's request for a loss mitigation option. If the borrower's request is denied, the borrower may file an appeal if the denial concerns a trial or permanent loan modification. Upon reviewing the appeal, a servicer will determine to either offer the borrower a loss mitigation option or, again, to deny the borrower's request for a loss mitigation option. If the request is denied, then the servicer may proceed to a foreclosure sale. If a loss mitigation option is offered, either after the initial

evaluation or after appeal, a borrower may either accept or reject the offer of the loss mitigation option. If the borrower rejects the loss mitigation option, the servicer may proceed to a foreclosure sale. If the borrower accepts the loss mitigation option, the borrower will either perform or fail to perform pursuant to the terms of the agreement on the loss mitigation option. If a borrower fails to perform pursuant to the terms of the agreement on the loss mitigation option, the servicer may proceed with the foreclosure sale.

Proposed comments 41(g)-1 and 41(g)-2 clarify the application of the borrower performance definitions with respect to short sales. Typically, a short sale will include a listing or marketing period during which a servicer will agree to postpone a foreclosure sale in order to allow a borrower to market a property for a short sale transaction. The proposed comments clarify that a borrower is performing under the terms of a short sale agreement or other similar loss mitigation agreement during the term of any such marketing or listing period, and any terms subsequent to such periods, if a short sale transaction is approved by all relevant parties, and the servicer has received proof of funds or financing.

Further, a servicer's failure to suspend a scheduled foreclosure sale when a servicer has failed to comply with the requirements of proposed § 1024.41(g) is defined as a covered error in proposed § 1024.35(b)(9). A borrower will be able to assert this error and require a servicer to engage in the error resolution procedures to address this error. In order to avoid the use of this requirements, and the error resolution procedures, as a strategic tool to delay foreclosure, the Bureau has proposed § 1024.35(f)(2), which provides that if an error relating to a servicer's failure to suspend a foreclosure sale is asserted seven days or less before a scheduled foreclosure sale, the servicer is not required to comply with the full error resolution procedures and may, alternatively, respond to the borrower orally or in writing in response to the notice of error. Because the requirements of proposed § 1024.41 are procedural in nature, the Bureau believes that servicers will be able to resolve and respond to any assertions of error on a very expedited basis by confirming that the appropriate procedure was followed.

By prohibiting a servicer from proceeding with a scheduled foreclosure sale until termination of loss mitigation discussion, the Bureau proposes to eliminate the clearest harms on borrowers resulting from servicers pursuing loss mitigation and foreclosure proceedings concurrently.

41(h) Appeal Process

Proposed § 1024.41(h) would require servicers to establish an appeals process to review denials of complete loss mitigation applications for loan modifications. Limiting the appeals process only to denials of loan modifications reduces burdens on servicers and maintains consistency with existing appeals and escalation processes established under State law or Federal regulatory agency requirements. For example, the appeal process established by the national mortgage settlement relates to denials of first lien loan modification denials.[188] Further, the recent California Homeowner Bill of Rights provides for an appeal process for denials of first lien loan modification.[189] Moreover, loan modifications are some of the most complex loss mitigation programs with respect to the evaluation of borrowers, and the Bureau believes that loan modification provides an appropriate scope for an appeal process.

---

[175] *See* National Mortgage Settlement, at Appendix A, at A-27, available at http://nationalmortgagesettlement.com.
[189] *See* 2012 Cal. Legis. Serv. Ch. 86 (A.B. 278) (WEST) amending Cal. Civ. Code § 2923.6.

Pursuant to proposed § 1024.41(h), if a servicer reviews an appeal and determines to offer a loss mitigation option, the servicer shall not foreclose on a borrower unless the borrower rejects the offer of the loss mitigation option or fails to comply with terms of the loss mitigation option. If a servicer denies a borrower's appeal of a loss mitigation option, the servicer may proceed with a foreclosure sale.

Proposed § 1024.41(h) would provide that an appeal must be reviewed by servicer personnel that were not directly involved in the initial evaluation. The Bureau believes that this basic safeguard would help to reduce the risk of bias in the appeals process, since the person who made the initial decision may have a particularly strong interest in upholding that decision. Proposed comment 41(h)(3)-1 clarifies that supervisory personnel that supervised the personnel that conducted the initial evaluation may conduct the appeal evaluation if they were not directly involved in the initial evaluation. Proposed § 1024.41(h)(4) provides for the servicer to provide a written notice to the borrower stating the servicer's determination.

The Bureau requests comment on whether to require servicers to engage in an appeals process. Further, the Bureau requests comment on whether the appeals process should be limited to denials of loan modifications and other similar loss mitigation options. Further, the Bureau requests comment regarding the impact on small servicers (as that term is defined in the 2012 TILA Servicing Proposal) of the requirement that the appeal must be evaluated by servicer personnel that were not directly involved in the initial loss mitigation application evaluation, and where such requirement should be modified or eliminated for small servicers.

41(i) Duplicative Requests

Proposed § 1024.41(i) provides that a servicer is only required to comply with the requirements of proposed § 1024.41 if a borrower has not previously been evaluated for loss mitigation options for the borrower's mortgage loan account by that servicer. Thus, a servicer is not required to apply the requirements of § 1024.41 to a subsequent complete application for a loss mitigation option. In situations where servicing has transferred after the borrower received an evaluation on a complete loss mitigation application from the transferor servicer, the transferee servicer may be required to comply with the requirements of proposed § 1024.41. The Bureau believes that when an investor is transferring servicing to a new servicer, which may have been driven by owner or assignee's determination that the new servicer can better achieve loss mitigation options with borrowers, borrowers should be able to renew an application for a loss mitigation option with the transferee servicer, subject to the applicable deadlines and requirements in proposed § 1024.41.

The Bureau requests comment regarding whether a borrower should be entitled to renewed evaluation for a loss mitigation option if an appropriate time period has passed since the initial evaluation or if there is a material change in the borrower's circumstances. If so, the Bureau requests comment on what should constitute appropriate time periods and requirements applicable to such reviews.

41(j) Other Liens

Proposed § 1024.41(j) provides that any servicer that receives a complete loss mitigation application shall (1) within 5 days, determine if any other servicers service mortgage loans that have senior or subordinate liens encumbering the property that is the subjection of the loss mitigation application, and (2) provide the loss mitigation application received from the

borrower to the other servicer.

Loss mitigation applications for properties encumbered by multiple liens present some of the most difficult loss mitigation situations for investors and borrowers. The Bureau believes it is appropriate to impose on servicers the obligation (1) to identify other servicers that may be impacted by loss mitigation evaluation for a property and (2) to provide the loss mitigation application from the borrower to the other servicers. When the other servicer receives the loss mitigation application, that servicer shall be required to comply with the requirements of proposed § 1024.41 if the servicer offers loss mitigation options to borrowers in the ordinary course as required by proposed § 1024.41(a). Further, the servicer that receives the loss mitigation application from another servicer shall be required to comply as if the servicer received the application from the borrower. For example, if the initial servicer passes an application to the other servicer that is incomplete under the other servicer's guidelines, the other servicer would be required pursuant to proposed § 1024.41(b)(2)(ii) to provide the borrower with the incomplete loss mitigation application notice.

The Bureau notes that the Gramm-Leach-Bliley Act as implemented by Regulation P does not require provision of an initial notice and opt-out in connection with providing the loss mitigation application submitted by a borrow to another servicer under the exception set forth in 12 CFR 1016.15(a)(7).

Small servicers. The Bureau is conscious of the potential impacts of the loss mitigation requirements on small servicers. In order to gain feedback on small servicer impacts, the Bureau participated in a Small Business Review Panel and conducted outreach with small entity representatives. At the time the panel process was conducted, the Bureau had not decided to include a separate provision concerning loss mitigation procedures. Rather, the Bureau solicited feedback from the small entity representatives on many elements of the loss mitigation process in conjunction with other elements of the servicing proposals, including impacts on loss mitigation processes of small servicers from proposed rules relating to error resolution, reasonable information management policies and procedures, early intervention for troubled or delinquent borrowers, and continuity of contact. In particular, the Bureau requested feedback from small servicers on the following: (1) a duty to suspend a foreclosure sale while a borrower is performing as agreed under a loss mitigation option or other alternative to foreclosure; (2) the ability to adopt policies and procedures to facilitate review of borrowers for loss mitigation options; (3) the ability to provide information regarding loss mitigation early in the foreclosure process to borrowers; and (4) the ability to provide borrowers with the opportunity to discuss evaluations for loss mitigation options with designated servicer contact personnel.[190]

The small entity representatives generally informed the Small Business Review Panel that they engaged in individualized contact with borrowers early in the foreclosure process, that some servicers completed discussions of loss mitigation options with borrowers prior to a point in time when borrowers should receiving significant foreclosure related information, and generally worked closely with foreclosure counsel such that foreclosure processes and loss mitigation could be easily conducted simultaneously without prejudice to the loss mitigation process. Further, the small entity representatives explained that they were willing to communicate with borrowers about loss mitigation contemporaneously with the foreclosure

[190] *See* Small Business Review Panel Report, appendix C at 19, 22, 24-26.

process, and one small entity representative indicated that it would be willing to bring a mortgage file back to the servicer for consideration of a modification and halt the foreclosure process, if appropriate.[191]

Based in part on the outreach with the small entity representatives on April 24, 2012, as well as other feedback obtained by the Bureau after that outreach meeting, the Bureau considered proposing clearer and more detailed requirements relating to loss mitigation practices. The Bureau determined, for the sake of clarity and consistency, to include loss mitigation obligations as a separate section, rather than embedding the requirements within the provisions relating to error resolution, reasonable information management policies and procedures, early intervention for troubled or delinquent borrowers, and continuity of contact.

The Bureau believes that adding a separate section to address loss mitigation builds upon the feedback received by the Bureau as set forth in the Small Business Review Panel Report, although that report and the outreach meeting with small entity representatives were not structured around the discussion of regulations relating to loss mitigation obligations as a separate section and did not focus in significant detail on some of the specific measures proposed here such as, for example, appeals of loss mitigation determinations. The Bureau also believes that adding a separate section to address loss mitigation provides greater regulatory clarity to servicers, including small servicers. Therefore, the Bureau specifically requests comment from small servicers (as that term is defined in the 2012 TILA Servicing Proposal) regarding the potential impacts of the loss mitigation requirements in proposed § 1024.41 on small servicers. Specifically, as set forth above, the Bureau requests comment of the requirement that an appeal must be evaluated by servicer personnel that were not directly involved in the initial loss mitigation application evaluation.

Legal authority. In proposing § 1024.41, the Bureau relies on its authority in section 6(k)(1)(E) of RESPA to set forth obligations appropriate to carry out the consumer protection purposes of RESPA and section 6(j)(3) of RESPA to set forth requirements necessary to carry out section 6 of RESPA. Further, proposed § 1024.41 implements, in part, a servicer's obligation to take timely action to correct errors relating to avoiding foreclosure in section 6(k)(1)(C) of RESPA by establishing servicer duties to avoid foreclosure that are the subject of the error resolution provisions in proposed § 1024.35.

The Bureau further relies on its authority in section 19(a) of RESPA to make such rules and regulations and to make such interpretations as may be necessary to achieve the consumer protection purposes of RESPA.

~~*Appendix MS*~~

~~Appendix MS to part 1024 sets forth model forms, model clauses that servicers may use to comply with the mortgage servicing requirements of Regulation X. As discussed in detail below, the Bureau proposes to modify the model form applicable to servicing transfer disclosure requirements, to add a new model for force-placed insurance disclosure requirements, and to add new model clauses for early intervention notice requirements. The Bureau is proposing official commentary that would apply to existing model forms MS-1 and MS-2, as well as a proposed model form MS-3 for the proposed force-placed insurance disclosure and proposed model~~

[191] *See* Small Business Review Panel Report at 26.