

~~light of the size, nature, and scope of the servicer's operations, including, for example, the volume and aggregate unpaid principal balance of mortgage loans serviced, the credit quality, including the default risk, of the mortgage loans serviced, and the servicer's history of consumer complaints.~~

~~Paragraph 38(a)(1).~~

~~1. Examples of pattern or practice failures. A servicer may exhibit a pattern or practice of failing to achieve the objectives in § 1024.38(b) in the following circumstances:~~

~~i. Disclosures provided to borrowers regularly contain inaccurate information or are not provided by required deadlines;~~

~~ii. Multiple covered errors as defined in § 1024.35(b) are documented with respect to the same or similar types of processes and a servicer does not modify its policies and procedures to seek to reduce the frequency or severity of such errors over a reasonable timeframe;~~

~~iii. Documents provided by borrowers are lost or misplaced on a regular basis and borrowers are requested to provide the same documents on multiple occasions;~~

~~iv. Servicer personnel regularly do not have access to accurate account information (such as information about credited payments, current balances, and reasons for fees) when responding to borrower inquiries, and thus provide borrowers with inaccurate information; or~~

~~v. Servicer personnel regularly do not have access to information regarding the substance of prior communications with borrowers.~~

~~38(a)(2) Safe harbor.~~

~~1. Impact of the safe harbor. A servicer is not liable for a violation under § 1024.38 if the servicer is in compliance with the safe harbor set forth in § 1024.38(a)(2). If a servicer is not in compliance with § 1024.38(a)(2), a servicer may be liable for a violation under § 1024.38. The servicer's liability in the event of a pattern or practice of failing to achieve the objectives in § 1024.38(b) or to ensure compliance with the standard requirements in § 1024.38(c) is based on whether the servicer's policies and procedures were reasonably designed to achieve the objectives in § 1024.38(b) and to ensure compliance with the standard requirements in § 1024.38(c), as appropriate.~~

*Section 1024.39—Early Intervention Requirements for Certain Borrowers*

*39(a) Oral notice.*

*1. In general.*

i. *Live contact.* The notice required under § 1024.39(a) must be made through live contact or good faith efforts to make live contact, such as by telephoning or conducting an in-person meeting with the borrower, but not by leaving a recorded phone message.

ii. A servicer is not required to describe specific loss mitigation options; the servicer need only inform the borrower that loss mitigation options may be available, if applicable. The servicer may provide more detailed information that the servicer believes would be helpful.

2. *Good faith efforts to notify—telephone calls.* In order to make a good faith effort by telephone, the servicer must have made the phone calls to the borrower on three separate days by the end of the 30-day period after the payment due date. Thus, if the servicer attempts to reach

the borrower by telephone, the servicer should make the first call not later than the 28th day after the payment due date in order to make a good faith effort by the 30th day, assuming the first two calls are unsuccessful.

3. *Timing requirements.* Under § 1024.39(a), a servicer must notify or make good faith efforts to notify the borrower if the borrower is late in making the payment during the 30-day period after the payment due date, unless the borrower satisfies the payment during that time. *See* comment 39(a)-4. For purposes of § 1024.39, a payment is considered late the day after the payment due date, even if the borrower is afforded a grace period before the servicer assesses a late fee. For example, if a payment due date is January 1 and the full payment remains due during the 30-day period after January 1, the servicer is 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.

4. *Borrower makes the payment.* A servicer is not required to notify the borrower unless the borrower is late in paying the amount owed in full during the 30 days after the payment due date. If the borrower satisfies the payment in full before the end of the 30-day period, the servicer is not required to notify or make good faith efforts to notify the borrower. For example, if a borrower misses a January 1 due date but makes that payment on January 20, a servicer would not be required to provide the oral notice by January 31.

5. *Borrower contacts the servicer about a late payment.* If the borrower contacts the servicer at any time prior to the end of the 30-day period in § 1024.39(a) to explain that the borrower is or expects to be late in making a particular payment, the servicer may satisfy the notification requirement in § 1024.39(a) by informing the borrower orally at that time that loss mitigation options, if applicable, may be available.

i. *Examples.*

A. A borrower contacts a servicer on January 25 to explain that he expects to miss a payment due February 1. The borrower makes the required payment on February 8 and the servicer did not notify or make good faith efforts to notify the borrower that loss mitigation may be available on January 25 or by February 8. The servicer is not required to provide the oral notice about loss mitigation options because the borrower made the required payment within the 30-day period after February 1. *See* comment 39(a)-4.

B. The borrower in comment 39(a)-5.i.A subsequently misses a payment due March 1 but does not contact the servicer to explain that he expects to become or acknowledges that he is late on that payment. The borrower remains late on that payment during the 30 days after March 1. Not later than 30 days after March 1, the servicer is required to notify or make good faith efforts to notify the borrower orally that he has missed the March 1 payment and that loss mitigation options, if applicable, may be available to assist him.

6. *Borrower performing under a loss mitigation option.* A servicer is not 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.

39(b) *Written notice.*

*Paragraph 39(b)(1) In general.*

1. *Relationship to § 1024.39(a).* The written notice required under § 1024.39(b)(1) must be provided even if the servicer provided information about loss mitigation and foreclosure

previously during an oral communication with the borrower under § 1024.39(a).

2. *Timing requirements.* As noted in comment 39(a)-3, a payment is considered late the day after the payment due date, even if the borrower is afforded a grace period before the servicer assesses a late fee. For example, if a payment due date is January 1 and the payment remains due during the 40-day period after January 1, the servicer is required to provide the written notice not later than 40 days after January 1—*i.e.*, by February 10.

3. *Borrower satisfies the payment.* A servicer is not be required to provide the written notice unless the borrower has not made the payment during the 40 days after the payment due date. For example, a servicer contacts a borrower on January 20 to notify him that he has missed a January 1 payment and that loss mitigation options may be available. The borrower explains that he forgot to send payment and will send the payment to the servicer. The servicer receives the full payment on January 30 and has not yet provided the written notice. Because the borrower has satisfied the January 1 payment within the 40-day time period, the servicer is not required to provide the written notice by February 10.

4. *Frequency of the written notice.* A servicer is not required to provide the written notice more than once during a 180-day period beginning on the date on which the written notice is provided. Notwithstanding this limitation, a servicer must still provide the oral notice required under § 1024.39(a) for each payment that is overdue. For example, a borrower is late in making a payment due March 1. The borrower remains late on that payment during the 40 days after March 1 and the servicer provides the written disclosure 40 days after March 1—*i.e.*, by April 10. If the borrower subsequently fails to make a payment due April 1 and remains late on that payment during the 40 days after April 1, the servicer is not required to provide the written notice again for the 180-day period beginning on April 10. However, the servicer is required to provide the oral notice under § 1024.39(a) for each of the 30-day periods beginning on March 1 and April 1.

5. *Borrower performing under a loss mitigation option.* A servicer is not required to provide the written notice to a borrower who is performing as agreed under a loss mitigation option designed to bring the borrower current on a previously missed payment.

*Paragraph 39(b)(2) Content of the written notice.*

1. *Minimum requirements.* Section 1024.39(b)(2) contains minimum content requirements for the written notice. A servicer may provide additional information that the servicer determines would be helpful.

2. *Format.* Any color, number of pages, size and quality of paper, size and type of print, and method of reproduction may be used, so long as the disclosure is clearly legible.

*Paragraph 39(b)(2)(i).*

1. *Statement encouraging the borrower to contact the servicer.* The servicer is not required to specifically request the borrower to contact the servicer about any particular loss mitigation option.

*Paragraph 39(b)(2)(ii).*

1. *Servicer's mailing address and telephone number.* If applicable, the servicer should provide contact information for the personnel assigned to the borrower pursuant to § 1024.40.

*Paragraph 39(b)(2)(iii).*

1. *Number of examples.* The regulation does not mandate that a specific number of examples be disclosed, but borrowers are likely to benefit from examples of options that would permit them to retain ownership of their home and examples of options may require the borrower to end their ownership in order to avoid foreclosure. The servicer may include a generic list of loss mitigation options that it offers to borrowers. The servicer may include a statement that not all borrowers will qualify for the listed options.

2. *Brief description.* An example of a loss mitigation option may be described in one or more sentences. If a servicer offers loss mitigation programs, the servicer may provide a generic description of each option without providing detailed descriptions of each program. For example, if the servicer offers several loan modification programs, the servicer may provide a generic description of “loan modification.”

*Paragraph 39(b)(2)(iv).*

1. *Explanation of how the borrower may obtain more information about loss mitigation options.* A servicer may comply with this requirement by directing the borrower to contact the servicer for more detailed information on how to apply for loss mitigation options. For example, a general statement such as, “contact us for instructions on how to apply” would satisfy § 1024.39(b)(2)(iv). However, to expedite the borrower’s timely application for any loss mitigation options, servicers may provide more detailed instructions, such as by listing representative documents the borrower should make available to the servicer (such as tax filings or income statements), and an estimate for how quickly the servicer expects to evaluate a completed application and make a decision on loss mitigation options. Servicers may also supplement the written notice required by § 1024.39(b)(1) with a loss mitigation application form.

*Paragraph 39(b)(2)(v).*

1. *Foreclosure statement.* The servicer may explain that a foreclosure may proceed in different ways 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.

2. *Estimated foreclosure timelines.* The servicer may qualify its estimate with a statement that different timelines may vary depending on the circumstances, such as those listed in comment 39(b)(2)(v)-1. The servicer may provide its estimate as a range of days.

~~*Section 1024.40—Continuity of Contact*~~

~~*40(a)(1) In general.*~~

~~1. For purposes of responding to borrower inquiries and assisting the borrower with loss mitigation options as required pursuant to § 1024.40, the term “borrower” includes a person the borrower has authorized to act on behalf of the borrower (a borrower’s agent), which may include, for example, a housing counselor or attorney. Servicers may undertake reasonable procedures to determine if such person has authority from the borrower to act on the borrower’s behalf.~~