Comments to the
Consumer Financial Protection Bureau

Regarding Streamlining Mortgage Servicing
for Borrowers Experiencing Payment Difficulties; Regulation X

Docket No. CFPB-2024-0024/RIN 3170-AB04

by National Consumer Law Center
(on behalf of its low-income clients)
and
National Housing Law Project

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Executive Summary

The National Consumer Law Center (NCLC), on behalf of its low-income clients, and the National Housing Law Project (NHLP) respectfully submit this comment in response to the Consumer Financial Protection Bureau's (CFPB) Notice of Proposed Rulemaking under the Real Estate Settlement Procedures Act (RESPA), Regulation X. We appreciate the significant effort by the Bureau to make streamlined loss mitigation reviews a permanent option while keeping fundamental consumer protections in place. We are writing to support the proposed rule and to offer recommendations on areas for refining the regulatory text.

While we provide detailed comments in this document, the following is a summary of key proposals we support and recommendations for targeted adjustments to the regulation

- **We strongly support the Bureau's proposal to link borrower protections to a request for assistance, which will help many borrowers avoid foreclosure.** To avoid confusion in implementing this important improvement, we recommend that the Bureau:
    - Clarify that protections being with a request for assistance even when the request is submitted by a third party whose authority has yet to be confirmed, and prohibit unreasonable demands in relation to proving authorization (*see* § II(A)(3).
    - Clarify that a request for loss mitigation assistance includes any communication in which a borrower expresses an interest in a loss mitigation option (*see* § II(A)(4)).
    - Require servicers to send a notice to the borrower stating that the servicer believes a request for assistance has been made and describing the attendant protections (*see* § II(A)(5)).
    - Revise the rule to make it clear that forbearances and other temporary options do not exclude the borrower from the foreclosure protections as a duplicative request (*see* § II(D)(2)).

- **The Bureau should require servicers to exercise "reasonable diligence" in the loss mitigation review process in order to promote responsive evaluations.**
    - This current "reasonable diligence" language is already an established standard and is more likely to promote engaged mortgage servicing (*see* § II(B)(1)).
    - The Bureau also should establish minimum standards for servicers to obtain missing documents and information from the borrower, including requiring a written notice to the borrower (*see* § II(B)(2)).

- **The Bureau should finalize the proposed prohibition on charging foreclosure and legal fees during foreclosure.**
    - Foreclosure and legal fees should not be incurred during a loss mitigation review. This rule must be combined with a "reasonable diligence" standard to promote efficient, sustainable loss mitigation reviews (*see* § II(C)).

- **The scope of the exclusion for duplicative requests should not be expanded to include temporary options such as forbearances or reviews by transferor servicers.**
    - The Bureau should state that the duplicative request rule does not apply to requests made to a different servicer, such as when there has been a transfer of servicing (*see* § II(D)(1)).
    - The Bureau should also state explicitly that the duplicative request exclusion does not apply if the borrower has been reviewed only for a forbearance (*see* § II(D)(2)) or is denied only due to the inability to obtain documents outside of the borrower's control (*see* § II(D)(3)).

- **The ban on advancing the foreclosure process is extremely helpful to borrowers, but servicers should be permitted to participate in court-supervised mediation or settlement processes if the borrower consents.**
    - These procedures can be very beneficial to resolving a default control (*see* § II(E)).

- **The Bureau should allow protections to terminate when a borrower is unresponsive to specific requests related to a loss mitigation review, with appropriate warning notices.**
    - For the "denied for all options" safeguard, the CFPB should clarify that reasonable diligence by the servicer and a written notice requesting the missing information is required (*see* § II(F)(1)).
    - For the "unresponsive borrower" safeguard, the CFPB should clarify that a borrower performing under a forbearance is not unresponsive (*see* § II(F)(2)).

- **The improved early intervention notice and end-of-forbearance notice will increase the likelihood that borrowers can obtain an appropriate permanent loss mitigation option.**
    - However the Bureau should require *specific* information about options available from the investor to be stated in the notice and on the servicer-hosted web site (*see* § II(G)).
    - The Bureau should use and define the term "investor" rather than requiring servicers to identify the "owner or assignee" (*see* § II(G)).
    - The end of forbearance notice should be sent to the borrower farther in advance than the proposed 30 days. We suggest 45-60 days prior to the end of forbearance, or both 30 and 60 days prior (*see* § II(G)).

- **The proposed determination notice contains information borrowers need in order to correct errors and ensure that they obtain the most appropriate loss mitigation option.**
    - The CFPB should clarify that if multiple options are reviewed simultaneously, they all should be captured in the same determination notice (*see* § II(H)(1)).
    - The CFPB should require servicers to disclose the relevant non-borrower-provided inputs in the determination notice as well, rather than putting them on a website (*see* § II(H)(2)).

    - If a determination notice lists other options that may be available from this investor, it also should include specific information about the limits of their availability for this borrower (*see* § II(H)(3)).
    - In addition to citing the amount of time a borrower has to appeal a determination, the notice should state the amount of time a borrower has to ask to be reviewed for other options and the fact that procedural protections (explained in plain language) will end if the borrower does not act within these time limits (*see* § II(H)(4)).

- **The proposed rule treating appeals like a Notice of Error will make it significantly more likely that erroneous loss mitigation decisions will get corrected.**
    - The Bureau should require, however, that servicers provide the designated NOE submission address in the determination notice as the address to send appeals, and should extend the 14 day appeal period to at least 21 days (*see* § II(I)).

- **The Bureau should lengthen any minimum response periods to at least 21 days to account for persistent mailing delays.**
    - The minimum time period to take any action should be 21 days from mailing, and the CFPB should require servicers to date the top of each correspondence and to send mail by a means that involves a postmark date (*see* § II(J)).

- **The Bureau's proposed rule does not create problematic inconsistencies with state laws (*see* § II(K)(1)).**

- **The Bureau should clarify that notifying a servicer that the borrower is seeking government assistance should be treated as a request for loss mitigation assistance (*see* § II(K)(2)).**

- **We support the CFPB's proposal to expand language access in loss mitigation, and suggest several modifications.**
    - We support the provision of bilingual essential documents in English and Spanish and the provision of translated documents in other languages, so long as the languages are chosen according to the language needs of the servicer's borrower population (*see* § II(L)).
    - Oral interpretation access should be expanded beyond the top languages used for written documents, as it can be used as an efficient tool to provide broader, meaningful access to LEP homeowners. In any event, the number of languages for which oral interpretation is provided should not be decreased (*see* § II(L)).

- **The CFPB should protect successors in interest beginning with the request for assistance, just like other borrowers.**

    - The CFPB should require, not permit, servicers to treat a request for assistance from a potential successor in interest as a request for assistance that triggers dual tracking protections (*see* § II(M)).

    - These protections should continue until the servicer determines the person is not a successor, the servicer provides the potential successor a reasonable deadline to send reasonable proof of ownership that the successor does not meet and that deadline has passed, or the procedural safeguards are otherwise satisfied for a confirmed successor (*see* § II(M)).

- **The CFPB should ensure that borrowers with zombie second mortgages have a reasonable opportunity to apply for loss mitigation and avoid unnecessary foreclosures.**
    - The Bureau should repeal the exemption for Home Equity Lines of Credit (HELOCs) from Regulation X's Subpart C (*see* § II(N).

- **The CFPB should clarify that the loss mitigation rule applies to contracts for deed (*see* § II(O)).**

- **The CFPB should clarify that refraining from negative credit reporting for mortgages in disaster areas or in a forbearance does not violate the FCRA (*see* § II(P)).**

I. Introduction

The CFPB's proposal to simplify Regulation X and allow for streamlined loss mitigation reviews while preserving key protections will help homeowners avoid unnecessary foreclosures. The rule balances costs to industry and benefits to homeowners in a well-reasoned way, particularly in light of the shift in mortgage servicing practices and investors' preference to avoid a heavily documented loss mitigation review process. This section discusses the market dynamics and industry practices the rule is meant to address, as well as evidence NCLC has gathered from a nationwide cross-section of homeowner advocates. Part II of these comments sets out our analysis and recommendations regarding the proposed rule.

A. The impact of foreclosures on borrowers and communities.

A key purpose of mortgage servicing is to provide loan modifications to homeowners facing hardship to help them avoid home loss, family displacement, and the loss of accrued equity, an important source of family wealth. Recent data indicate that many households still face the specter of home loss and will benefit from a strong, updated mortgage servicing rule.

In the first quarter of 2024, almost 100,000 households were in foreclosure, up 3% from the end of 2023, with approximately one in every 1,500 housing units the subject of a foreclosure filing.[1] For that same period, the Mortgage Bankers Association found that the single-family

[1] "U.S. Foreclosure Activity Increases Quarterly in Q1 2024," ATTOM (Apr. 10, 2024), https://www.attomdata.com/news/most-recent/u-s-foreclosure-activity-increases-quarterly-in-q1-2024/.

delinquency rate was up 38 basis points from one year prior.[2] That report also showed that FHA and VA loans had a much sharper increase in delinquencies from the previous year than conventional loans.[3]

There is a significant disparity in who is likely to be behind on their mortgage payments across both race and sex. According to Household Pulse Survey data_from the U.S. Census Bureau, among mortgage holders, women (6.4%) were more likely than men (4.9%) to report being behind on their mortgage payments. Black, non-Hispanic women (10.8%) were almost three times more likely than white, non-Hispanic men (3.9%) and over twice as likely as white, non-Hispanic women (5%) to report being behind on their mortgage payments.[4] Additionally, Latinas (10.2%) were over twice as likely as white, non-Hispanic men or women to report being behind. Similarly, men and women with disabilities were disproportionately likely to report being behind on their payments, as were LGBT adults.[5]

Successors in interest, who obtain a home through death or divorce and are not the original borrower on the mortgage, face increased risk of foreclosure because they face challenges having their paperwork approved by the servicer so that they can stand in the shoes of the borrower. Mortgage servicers often either delay or outright refuse to confirm heirs as successors in interest to the mortgage loan, preventing access to loss mitigation that may be the only option to save the family home, one that may have been in the family for generations. One research paper identified 496,994 parcels of heirs' property in the United States, worth an estimated $41.9 billion.[6] These inherited homes, jointly owned by a number of heirs, are at elevated risk of foreclosure when heirs struggle to get confirmed as successors in interest. Heirs' property disproportionately affects communities of color and rural homeowners. One study estimated that approximately half of the real property in the United States owned by Black Americans is owned as heirs' property.[7] A recent Housing Assistance Council report estimated that 65% of heirs' property parcels are in

[2] Mortgage Bankers Association, National Delinquency Survey (May 16, 2024), https://www.mba.org/news-and-research/newsroom/news/2024/05/16/mortgage-delinquencies-increase-slightly-in-the-first-quarter-of-2024.

[3] *Id*.

[4] Sarah Javaid and Kathryn Domina, "Women of Color, Disabled Women, and LGBT Adults Struggle to Afford Food and Housing Costs," National Women's Law Center (Dec. 2023), https://nwlc.org/wp-content/uploads/2024/01/nwlc_PulseWeek63FS-Accessible.pdf.

[5] *Id.* While the data are not necessarily proportional to the U.S. population, the data demonstrate significant disparities among groups.

[6] Ryan Thomson and Conner Bailey, "Identifying Heirs' Property: Extent and Value Across the South and Appalachia," (May 19, 2023) https://srdc.msstate.edu/sites/default/files/2023-06/thomson_bailey_pre-print-manuscript-5.19.23_0.pdf.

[7] National Public Radio, "How Jacob Loud's Land Was Lost," NPR.ORG (Apr. 7, 2021), https://www.npr.org/transcripts/983897990.

census tracts identified as "rural."[8] Recent studies of urban areas, such as Philadelphia and Duval County, Florida, have shown the prevalence of heirs property in metropolitan areas as well.[9]

Effective mortgage servicing can help alleviate some of the pressures on families of color and other groups already facing significant homeownership challenges by giving them the best chance to keep their homes. This opportunity to improve the servicing process comes at a time when the racial wealth gap and homeownership disparities persist. Following the passage of the Fair Housing Act in 1968, Black homeownership rates rose almost 6% across the subsequent three decades. However, between 2000 and 2015 that gain was more than erased, bringing the Black homeownership rate down to 41.2%.[10] As of the fourth quarter of 2023, 73.8% of non-Hispanic white Americans owned homes, whereas only 45.9% of Black Americans and 49.8% of Hispanic Americans owned homes. In fact, older Black homeowners have the lowest median equity at $123,000, compared to $251,000 for older white homeowners and $200,000 for older Hispanic owners.[11]

Those with limited English proficiency (LEP) also face greater challenges achieving homeownership and maintaining it. The Urban Institute found in a report that the homeownership rate of LEP households was 39.4% in 2021.[12] Even after controlling for household demographics and socioeconomic factors, LEP households are still 6.2% less likely to be homeowners than non-LEP households.

Mortgage debt is a rising problem for older adults, many of whom are no longer working, making loss mitigation a crucial issue for these homeowners. The Joint Center for Housing Studies of Harvard University found that between 1989 and 2022, the number of homeowners between the ages 65 and 79 who had a mortgage on their primary home increased from 24 to 41%.[13] The increase was more pronounced in homeowners over the age of 80, who went from 3% with mortgages to 31% over the same time frame. With respect to the amount of debt, the

[8] Natasha Moodie, et. al., "A Methodological Approach to Estimate Residential Heirs' Property in the United States," (Mar. 29, 2024), https://www.fanniemae.com/sites/g/files/koqyhd191/files/2024-04/heirs-property-research-report.pdf.

[9] The Pew Charitable Trusts, "How 'Tangled Titles' Affect Philadelphia," PEWTRUSTS.ORG (Aug. 17, 2021), https://www.pewtrusts.org/en/research-and-analysis/reports/2021/08/how-tangled-titles-affect-philadelphia. Sarah Stein and Ann Carpenter, "Heirs' Property In An Urban Context,", https://www.aeaweb.org/conference/2022/preliminary/paper/39rFzdTk.

[10] Laurie Goodman, et. al., "Are Gains in Black Homeownership History?", URBAN.ORG (Feb. 15, 2017) https://www.urban.org/urban-wire/are-gains-black-homeownership-history.

[11] Na Zhao, "Homeownership Rates by Race and Ethnicity", EYEONHOUSING.ORG (Feb. 6, 2024), https://eyeonhousing.org/2024/02/homeownership-rates-by-race-and-ethnicity-3/.

[12] Jung Hyun Choi, et. al., "Language Proficiency and Homeownership Access," (Jan. 2024), https://www.urban.org/sites/default/files/2024-01/Language%20Proficiency%20and%20Homeownership%20Access.pdf.

[13] Joint Center for Housing Studies of Harvard University, "Housing America's Older Adults," (Apr. 4, 2024), https://www.jchs.harvard.edu/sites/default/files/reports/files/Harvard_JCHS_Housing_Americas_Older_Adults_2023_Revised_040424.pdf.

Urban Institute found that for homeowners 75 and above, the median mortgage has been sharply rising, from $66,369 in 1998 to $106,800 in 2022, a 61% increase.[14]

While much attention is rightly paid to the need to expand homeownership opportunities, this proposed rule represents an opportunity to create a more equitable system for retaining homeownership and keeping it affordable where possible by updating procedures and expanding access to home retention options. This will, in turn, help prevent the growth of the racial wealth gap and eventually begin to reduce that gap, help homeowners age in place, and promote intergenerational wealth among a wider swath of families.

B. Nationwide Survey of Homeowner Advocates

In connection with our analysis of the proposed rule, NCLC conducted a survey of advocates and housing counselors to better understand the state of mortgage servicing and the potential effect of the Bureau's proposals. The survey, circulated among networks of advocates and counselors, was divided into two parts: a general loss mitigation survey and one focused only on language access issues. The general survey had 122 respondents, among whom 48% were legal services attorneys, 39% were housing counselors, and 5% were private consumer attorneys. These respondents hailed from 31 states plus Puerto Rico and the District of Columbia.[15] The language access survey, for those who have worked with limited English proficient clients, had 59 respondents, 53% of whom were legal services attorneys, 36% were housing counselors and 5% were private attorneys. Respondents to the language access survey worked in 16 states plus Puerto Rico and the District of Columbia.[16]

The general loss mitigation survey shows the need for the new rule and highlights significant challenges still faced by borrowers. On the issue of borrowers in forbearance and whether they were confused or uncertain of their options at the end of the forbearance, 56% of respondents said their clients were usually confused or uncertain, and 27% said their clients were always confused or uncertain about their post-forbearance options.[17] While streamlined loss mitigation has become more common, the survey highlights show that in many instances servicers are still not using a streamlined process. While 24% of respondents said their clients usually have access

[14] Laurie Goodman, et al, Expanding Access to Home Equity Could Improve the Financial Security of Older Homeowners (Feb. 28, 2024), https://www.urban.org/urban-wire/expanding-access-home-equity-could-improve-financial-security-older-homeowners#:~:text=Older%20homeowners%20have%20faced%20rising,to%2038%20percent%20in%202022.

[15] *See* Appendix A, Nationwide Survey of Homeowner Advocates on General Loss Mitigation Issues (Aug. 2024) (including summary of workplace settings and geographic spread of respondents).

[16] *See* Appendix C, Nationwide Survey of Homeowner Advocates on Language Access Issues (Aug. 2024) (respondents worked in California, Colorado, Connecticut, D.C., Florida, Illinois, Maryland, Mississippi, New Mexico, New York, Ohio, Pennsylvania, Puerto Rico, Tennessee, Texas, Virginia, Washington, and Wisconsin).

[17] *See* Appendix A.

to streamlining, 43% stated that their clients only sometimes have such access, 21% stated their clients rarely get streamlined modifications, and 7% said their clients never receive this benefit. Importantly, the appeal rules currently do not appear to be yielding meaningful results for many borrowers. Sixty-five percent of respondents said the appeals process either rarely or never results in changed outcomes for their clients.

On the subject of whether it is important for the early intervention notice to include the identity of the investor who owns or insures the loan, 64% of respondents stated that it was extremely important and 27% said it was very important.[18] Moreover, almost all respondents emphasized the importance of also receiving information on basic loss mitigation options in the notice, with 75% identifying it as extremely important and 22% selecting very important. The problem of identifying loss mitigation options available to the borrower and any relevant restrictions is a particular problem for mortgages held by private investors. Thirty-nine percent of respondents stated that it is always difficult to identify options from private investors and 35% usually find it difficult (and, notably, these are experienced professionals who find this difficult).

Similarly, most respondents also indicated the crucial importance of requiring a written determination notice that provides information on other options still available and how to pursue them, with 73% stating such information is extremely important and 20% stating it is very important.

The survey pointed to ongoing problems with mailing delays in written notices sent by servicers. Respondents were asked how often clients receive letters more than five days after the date on the letter, with 51% reporting that their clients *usually* receive letters more than five days after the letter is dated, 18% reporting this *always* occurs, and 27% reporting that this *sometimes* occurs.[19] Only 5% of respondents said that mailing delays of five or more days to receive a notice rarely or never occur.

The survey also showed that foreclosure and attorney fees are a significant barrier to mortgage reinstatement, with 31% of respondents stating that such fees *always* impact their clients' ability to reinstate the loan, 31% of respondents stating that such fees *usually* impact their clients' ability to reinstate the loan, and 32% saying such fees *sometimes* impact their clients' ability to reinstate the loan.[20]

Detailed survey data these questions are found in Appendix A, in addition to narrative responses found in Appendix B. The general loss mitigation survey also identified significant problems

[18] *Id.*
[19] *Id.*
[20] *Id.*

involving zombie second mortgages and successors struggling to get confirmed, discussed in later sections of this comment.

NCLC's language access survey, found in Appendix C (and narrative responses in Appendix D), highlights the need for better language access in mortgage servicing and the presence of barriers for limited English proficient borrowers. It also showed the need for access among borrowers who speak a broad range of languages. Sixty percent of respondents to the language access survey said they have worked with LEP borrowers who speak languages other than Spanish, with the results showing a wide range of languages. Sixty-four percent of respondents said they had worked with clients who were unable to access oral interpretation at all from their servicers.[21]

The survey reflected significant barriers for LEP homeowners caused by the lack of translated loss mitigation notices. Seventy percent of respondents who work with LEP clients had worked with LEP households that struggled to obtain loss mitigation because of notices being sent only in English. Specifically, 28% had often found that LEP homeowners they worked with struggled to get loss mitigation because of English-only notices, and 42% said they had sometimes had clients who had faced this problem. Only 14% of respondents working with LEP families said they had never come across this issue.[22]

The survey also revealed widespread problems with access to oral interpretation even when it is, in theory, available. Extensive waiting to connect with an interpreter was identified by 44% of the respondents, and 36% said borrowers were unable to access services because they were sent to a third party who had to manually connect back to the servicer. Further results from the language access survey can be found throughout our comment and the full results can be found in Appendix C.

In the section that follows, we provide comments on all aspects of the proposed rule, including the likely benefit to borrowers as well as ways the proposal could be modified to best achieve the goal of reducing unnecessary foreclosures and foreclosure costs.

[21] *See* Appendix C.
[22] *Id.*

II. Discussion

A. The Bureau’s proposal to define a request for loss mitigation assistance is necessary to ensure that borrowers are protected under the proposed procedural framework, but the Bureau should add a notice requirement and make revisions to address concerns related to the application of the duplicative request exclusion.

1. We strongly support the Bureau’s proposal to link borrower protections to a request for assistance.

The existing servicing rule has resulted in substantial benefits to borrowers who are attempting to obtain loss mitigation to save their homes from foreclosure. Its reliance on a complete application to trigger essential borrower protections, however, has made the procedures incompatible with current industry loss mitigation protocols and created incentives for servicers to avoid having borrowers complete the application process. This complete application framework has denied meaningful protections to borrowers, and discouraged servicers from offering loss mitigation options when borrowers have not submitted a complete application.

In contrast, the event that initiates loss mitigation review and triggers dual tracking protections under the Bureau’s proposal is a borrower’s request for loss mitigation assistance. We strongly support this change. The responses to our nationwide survey of homeowner advocates demonstrate the benefits of streamlining the process: 77% of respondents stated that streamlined loss mitigation reviews had always, usually, or sometimes made it easier for clients to access alternatives to foreclosure. We applaud the Bureau’s determination to streamline the process. We do, however, have several suggestions for clarifying the rule and improving communications with borrowers. In particular, as discussed in the next subsections, we urge the Bureau to address concerns with how this new request framework interacts with the duplicative request exclusion, and to require that servicers provide borrowers with a written notice acknowledging that the borrower has made a request for loss mitigation assistance.

2. Including a response to an unsolicited offer of loss mitigation within the definition of a request for assistance will substantially benefit many borrowers.

The CFPB has appropriately included in the definition of a request for assistance the situation in which a servicer sends an unsolicited offer of loss mitigation and the borrower responds expressing an interest in pursuing the offered option or any other loss mitigation option. The decision to include such circumstances in the procedural protections of the rule will significantly benefit borrowers who are offered unsolicited loss mitigation options.

Investors at the federal level have made such unsolicited offers a fixture of their loss mitigation waterfall since before the COVID-19 pandemic. At present, FHA, Fannie Mae, and Freddie Mac all require servicers to send an unsolicited loss mitigation offer if the loan reaches a certain level of delinquency and if it is possible to reach a certain payment reduction by following investor guidelines for the loan modification in question.[23]

In the past, borrowers offered such unsolicited options had none of the procedural protections of RESPA. They lacked a clear right to appeal improperly calculated loan modification terms, and they lacked clear dual tracking protections if a servicer initiated a foreclosure while the borrower was attempting to accept the modification and make trial payments. The ability to get a detailed determination notice, appeal errors, and stop the servicer from advancing the foreclosure process when a borrower responds to an unsolicited loss mitigation offer will meaningfully benefit many struggling homeowners.

3. The proposal to clearly acknowledge that a request for assistance may be submitted by the borrower's authorized third party representative will substantially benefit many borrowers, but protections should commence immediately and the Bureau should prohibit unreasonable requests related to third party authorizations.

The Bureau has proposed to establish a process for requests for loss mitigation assistance submitted on behalf of a borrower by a borrower's representative that is similar to the process provided in existing comment 31-1 for submission of a loss mitigation application. Servicers should be required to comply with § 1024.41 for requests made by the borrower's representative and therefore we support this proposal, with the qualifications related to confirming that a purported representative is acting on the borrower's behalf as in the existing comment.

Recommended improvements:

- We urge the CFPB to adopt additional commentary making clear that *unreasonable* requests related to confirming the authority of the representative, such as rejecting any authorization that is not on the servicer's form document, are improper.

- The Bureau should provide that the servicer is not permitted to advance the foreclosure process during the time that the servicer is confirming that a purported representative is acting on the borrower's behalf. Borrowers should be protected from the moment of an application submitted by a third party, rather than delaying such protections until the authority of the third-party representative is verified.

[23] *See, e.g.*, FHA Single Family Servicing Handbook 4000.1 section III(A)(2)(o)(i) (soliciting a borrower for the Advance Loan Modification); Fannie Mae Servicing Guide section D2-3.2-06 (soliciting the borrower for a Fannie Mae Flex Modification).

4. The CFPB should clarify the definition of request for assistance.

To implement the proposed change, the Bureau proposes to add "request for loss mitigation assistance" as a defined term in § 1024.31, meaning "any oral or written communication, occurring through any usual and customary channel for mortgage servicing communications, whereby a borrower asks a servicer for mortgage relief." The definition instructs that the term should be construed broadly and includes: (1) any communication in which a borrower expresses an interest in a loss mitigation option, (2) indicates that they have experienced a hardship and asks the servicer for assistance with making payments, retaining their home, or avoiding foreclosure, or (3) expresses, in response to a servicer's blind offer of a loss mitigation option, an interest in that option or any other option.

We generally support this broad application of the definition and the Bureau's decision to make the rule's procedural protections available immediately upon a borrower's request for loss mitigation assistance. Our concern is that some borrowers may become inadvertently subject to a loss mitigation review cycle, lose the procedural protections if they are unresponsive, and then be denied the procedural requirements under § 1024.41 for any subsequent request for assistance during the same delinquency, based on § 1024.41(i). For example, consider these three scenarios:

1. Borrower's monthly payment increases due to an escrow and interest rate adjustment. The borrower falls one month behind on payments and is contacted by the servicer. The borrower asks about whether the servicer offers any fixed rate refinancing options. The servicer states that it is not a lender. The borrower ends the call without asking about other options and has no further contact with the servicer for the next 90 days.

2. Borrower falls one month behind on payments and is contacted by the servicer. Borrower asks if there are any programs that could help and how someone might apply. The borrower does not provide any information that a servicer would consider for evaluating a loss mitigation request. The borrower has no further contact with the servicer for the next 90 days.

3. Borrower lives in an area that has had a natural disaster and falls one month behind on payments. Servicer sends an unsolicited offer of a forbearance to the borrower. Borrower calls and asks if a forbearance would have a negative effect on the borrower's credit rating. The servicer's response raises concerns for the borrower and nothing else is discussed on the call. The borrower has no further contact with the servicer for the next 90 days.

In all three scenarios, perhaps unbeknownst to the borrower, the borrower made a request for loss mitigation assistance under the proposed definition, and that request started a loss mitigation review cycle. Because the borrowers were unresponsive for a period of at least 90 days after their requests were made, they lost the procedural protections under § 1024.41. Equally concerning is that if they later became seriously interested in pursuing loss mitigation assistance after the 90-day period, their servicers would not be required to comply with § 1024.41 (until they cease to be delinquent) due to § 1024.41(i). This is likely to lead to avoidable foreclosures for borrowers eligible for loss mitigation.

In addition to our suggestions for addressing this concern that are discussed in our recommendations for revising the duplicative request exclusion (see § D of these comments), we urge the Bureau to revise the definition of "request for loss mitigation assistance" in § 1024.31 so that it is similar to the discussion of when an inquiry becomes a loss mitigation application in existing comment 41(b)(1)-2. A request for loss mitigation assistance should therefore include any communication in which a borrower expresses an interest in a loss mitigation option and the borrower either (1) affirmatively states that they wish to be evaluated for a loss mitigation option, or (2) provides some information that the servicer would use to evaluate the borrower for a loss mitigation option.

5. The CFPB should require a written notice informing the borrower that the servicer believes they have made a request for assistance, and informing them of their rights.

We also urge the Bureau to add a requirement that the servicer give the borrower a notice acknowledging the borrower's request for assistance. A written acknowledgement notice at this phase will serve two critical purposes. It will avoid any confusion or uncertainty by a borrower or servicer about whether a loss mitigation review cycle has started and provide an opportunity for a borrower who may have inadvertently started a review cycle or a servicer who may have misunderstood the borrower's intentions to correct the problem. The notice should explain that borrowers only get procedural protections for one loss mitigation review cycle, and advise the borrower to contact the servicer if they did not make a request for loss mitigation assistance.

The proposed definition specifies that the request for assistance must come through the servicer's "usual and customary channels" for mortgage servicing communications. While we do not have any specific recommendations with respect to this aspect of the proposal, we note that the lack of specificity in the proposed rule and commentary about what constitutes a servicer's usual and customary channels for communications will no doubt lead to misapprehensions by borrowers and servicers about whether a request has been made. A written acknowledgement notice will help address this problem.

For those borrowers who actually do request assistance, the second purpose for the acknowledgement notice would be to provide borrowers with confirmation that they are being reviewed for loss mitigation and give them information about what to expect. With the proposed elimination of both the § 1024.41(b)(2) acknowledgement notice and the § 1024.41(c)(3) notice of complete application, we are concerned that borrowers will not have even basic information about the review process or their rights at this stage.

Thus, we urge the Bureau to require that if a request for loss mitigation assistance is made more than 37 days before a foreclosure sale, the servicer must send the borrower within ten business days a written notice stating:

- That the borrower has made a request for loss mitigation assistance;
- That if the borrower did not make a request for loss mitigation assistance and does not wish to be reviewed for loss mitigation, the borrower must immediately notify the servicer;
- If applicable, the additional documents and information the borrower must submit for the servicer to review the borrower for a loss mitigation option and a date when they must be submitted;
- An estimate of when the servicer expects to complete its initial evaluation of a loss mitigation option, and that the borrower will be sent a loss mitigation determination notice;
- That the servicer may need and request additional information at a later date to evaluate the borrower for other options, in which case the servicer will give the borrower a reasonable opportunity to submit it; and
- That the borrower is entitled to certain foreclosure protections, with a description of the applicable protections, and that the borrower may lose protections if they are unresponsive.

B. The Bureau has made appropriate amendments to simplify the loss mitigation procedures, but the proposal should include specific requirements related to advancing the evaluation process.

In the various iterations of the existing mortgage servicing rule, the Bureau recognized that certain amendments were needed to implement the complete application framework. For example, the Bureau added a provision requiring that a facially complete application would invoke dual tracking protections, an exception to the reasonable diligence requirement for short-term loss mitigation options, a requirement of a notice informing the borrower than an application is complete, and provisions related to how an incomplete and complete application are handled when there has been a transfer of servicing. While these important provisions were necessary to protect borrowers, they also made the rule extremely complicated for both borrowers and servicers. We applaud the Bureau for proposing changes that simplify the loss mitigation process.

Much of the simplification to the process comes from the proposal's method of incentivizing servicers to complete the loss mitigation review process. Unlike the existing rule's application-based framework that relies upon the reasonable diligence requirement and a firm deadline for evaluation of a complete application for all loss mitigation options, the proposal encourages servicers to move the review process along by prohibiting them from advancing the foreclosure process and charging foreclosure fees until one of the procedural safeguards is met. While we support this general approach that facilitates evaluation for streamlined loss mitigation options, we urge the Bureau to add back several features of the existing rule, discussed in the next subsections. These suggested changes to the proposal will improve its effectiveness without adding complexity.

1. The "regularly taken steps" requirement incorporated only as part of the procedural protections is not sufficient and the "reasonable diligence" standard should be restored.

The proposed procedural safeguards require that servicers have "regularly taken steps" to communicate with borrowers, and to identify and obtain information and documents necessary to evaluate for loss mitigation options, at different stages of the loss mitigation review cycle before servicers can advance the foreclosure process. The Bureau noted that while it proposes to "replace the term 'reasonable diligence' with the 'regularly taken steps' phrasing that uses simpler language, it does not intend to reduce or lessen a servicer's existing obligation to identify and obtain needed information and to communicate with borrowers about their loss mitigation determination status."[24]

We concur with the Bureau's assessment that these changes will "protect borrowers from avoidable foreclosure."[25] But we are concerned that these changes alone are not sufficient to avoid long delays in loss mitigation evaluations by some servicers that can ultimately lead to a loss of homeownership.

The "regularly taken steps" requirement is found only in the procedural safeguard provision in proposed § 1024.41(f)(2)(ii) and the provision in proposed § 1024.41(c)(2) dealing with denial due to missing documents or information not in the borrower's control. Neither of these provisions requires the servicer to regularly take steps during the review cycle to communicate with the borrower or to collect the information and documents from the borrower to make a loss

[24] 89 Fed. Reg. 60214 (July 24, 2024).
[25] *Id*.

mitigation determination. Other than the minimal requirements imposed by the early intervention rule, nothing in the proposal imposes an affirmative duty on the servicer to engage with the borrower to advance the evaluation process. This can be especially problematic with a sequential review process that may grind to a halt if, for example, an offer is rejected.

In addition, the proposed rule does not compel a servicer to promptly make a determination to offer or deny any loss mitigation assistance to a borrower once it receives a request for assistance. Proposed § 1024.41(c)(1) requires a servicer to promptly notify the borrower of its determination, once that is made, but is silent on when that determination can be made.

The Bureau's proposal is based on the assumption that servicers will always want to quickly foreclose and charge fees. But there are a number of factors unrelated to borrowers' requests for loss mitigation that cause servicers to delay the foreclosure process. For example, economic conditions, particularly depressed real estate values and an increase in delinquencies, can result in long delays in the foreclosure process.[26] Without some duty to evaluate borrowers throughout the review cycle, we fear that some servicers will not be diligent, causing borrowers to get frustrated with the loss mitigation process and become unresponsive. A servicer that is not motivated to foreclose can allow a loss mitigation request to languish and not violate the proposed rule.

Borrowers are harmed by servicer delays in the loss mitigation review process. For example, a longer period of not making payments might make it harder for the borrower to get back on track. Delays can result in interest and arrears accruing on the borrower's account and related credit reporting can impact or delay a borrower's credit recovery.

We urge the Bureau to bring back a requirement similar to that in existing § 1024.41(b)(1) that attaches to an obligation to complete the review process, not simply as part of satisfying the procedural safeguards. While we understand that a firm deadline for review of a request may not be easily compatible with a sequential review process and that servicers should have some flexibility with timing when reviewing a waterfall of options, a general reasonable diligence requirement tied to the obligation to complete the review process will help ensure that the process does not get bogged down. Thus, we suggest that existing § 1024.41(b) (designated as reserved in the proposal) be replaced with the following:

> *A servicer shall exercise reasonable diligence to promptly evaluate a borrower's request for loss mitigation assistance and complete the loss mitigation review cycle.*

[26] For a discussion of how servicer delays can harm borrowers and impact federal insurance programs, see NCLC's 2016 report on HUD note sales. Geoff Walsh, "Opportunity Denied: How HUD's Note Sale Program Deprives Homeowners of the Basic Benefits of Their Government-Insured Loans", National Consumer Law Center (May 2016), https://www.nclc.org/wp-content/uploads/2022/10/opportunity-denied-report.pdf.

Our suggestion uses the term "reasonable diligence" rather than "has regularly taken steps." We understand that the Bureau believes the terms have a similar meaning. However, we see no reason to change the existing phrasing and we do not agree that "regularly taken steps" uses simpler language. Moreover, the mortgage servicing industry has had over a decade of experience with the concept of reasonable diligence and has incorporated it into loss mitigation protocols, policies and procedures. In addition, a body of court decisions has developed that has interpreted the term.[27] Future courts are unlikely to search old Federal Register notices to find the Bureau's discussion of "regularly taken steps," and may give this uncodified discussion less weight than a regulation or Official Interpretation even if they find it. This is particularly a concern since the usual rule of statutory interpretation is that an amendment is presumed to intend a change in meaning.

We also do not share the Bureau's belief that "regularly taken steps" conveys the same meaning as reasonable diligence. The word "regularly" refers to something that is done "on a regular basis" or "at regular intervals."[28] The phrase "regularly taken steps" therefore simply means actions or steps taken on a regular basis or at regular intervals. Nothing in this language requires that a servicer's actions be objectively reasonable. For example, assume that a borrower is given a forbearance after a natural disaster and requests that the servicer send any mail to an address where the borrower is temporarily residing until the home is repaired. Despite this request, the servicer sends three notices every 30 days to the borrower's home, not the temporary residence, requesting documents that the servicer needs to evaluate the borrower for post-forbearance loss mitigation options. The servicer in this example has complied with the "regularly taken steps" requirement in proposed § 1024.41(f)(2)(ii) by requesting documents it needs on a regular basis and at regular intervals and could therefore proceed with foreclosure even though it clearly has not exercised reasonable diligence.

In addition, some investors may continue to require that servicers review borrowers for all loss mitigation options simultaneously after obtaining a complete application. The Bureau has stated

[27] *E.g.*, Hurst v. Caliber Home Loans, Inc.,44 F.4th 418, 426 (6th Cir. 2022) (servicer's "misleading and conflicting communications" about the information and documents needed to complete an application could be the basis for a reasonable diligence claim); Ryan v. Flagstar Bank, F.S.B., 2023 WL 5610346 (S.D. Ohio Aug. 30, 2023) (plaintiff asserted reasonable diligence claim by alleging that servicer erroneously requested signature of former spouse on loan modification agreement); Cole-Grice v. Fannie Mae, 2022 WL 1239868 (W.D. Tenn. Apr. 27, 2022) (material fact dispute existed as to whether current servicer exercised reasonable diligence in failing to request the successor-in-interest documentation from former servicer); Yepez v. Specialized Loan Servicing, L.L.C., 2019 WL 2644255 (N.D. Ill. June 27, 2019) (borrowers sufficiently alleged that servicer's failure to adequately communicate the information it needed—combined with the servicer's boiler-plate responses to their notices of error—amounted to a failure of servicer to exercise reasonable diligence to complete the application); Benner v. Wells Fargo Bank, 2018 WL 1548683 (D. Me. Mar. 29, 2018); Washington v. Green Tree Servicing L.L.C., 2017 WL 1857258 (S.D. Ohio May 5, 2017) (Mag.), *adopted by* 2017 WL 2599252 (S.D. Ohio June 15, 2017) (granting summary judgment in favor of borrower based on servicers' failure to exercise reasonable diligence); Dionne v. Fed. Nat'l Mortg. Ass'n, 2016 WL 3264344 (D.N.H. June 14, 2016) (refusing to dismiss claim that servicer violated regulation by repeatedly requesting documents that had already been submitted multiple times).

[28] Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/regularly.

this would still be permissible under the proposed rule. However, the Bureau is proposing to delete all of the existing regulations that effectively make the complete application framework function, including the requirement to exercise reasonable diligence to complete the application. Our suggestion also addresses this concern by requiring the servicer to exercise reasonable diligence to promptly evaluate a borrower's request for loss mitigation assistance, regardless of whether that review is done sequentially or simultaneously, and with or without a complete application.

2. The Bureau should establish minimum standards for servicers to obtain missing documents and information from the borrower.

Existing § 1024.41(b)(2) includes detailed requirements for servicers to obtain the documents and information the borrower must submit to complete an application, including a written notice specifying the missing documents and a date when they must be submitted. These requirements have been deleted in the proposed rule, and the proposal contains no specific requirements for obtaining from the borrower missing documents and information that may be needed to make a determination of a loss mitigation option.

As mentioned, proposed § 1024.41(f)(2)(ii) provides that a servicer cannot proceed with foreclosure if it has not regularly taken steps to collect any information and documents from the borrower necessary to determine which loss mitigation options it may offer to the borrower. A servicer can ignore this requirement if it is not proceeding with foreclosure, until such time as it wishes to advance the foreclosure process.

In addition to being untethered from the loss mitigation determination process itself, proposed § 1024.41(f)(2)(ii) does not require a servicer to request missing documents or information in a written notice to the borrower. It does not specify whether a servicer must give the borrower a reasonable deadline to produce the missing items. The Bureau has not proposed a commentary section that would give examples of what constitutes and does not constitute "regularly taken steps" to collect missing information from the borrower.

We strongly urge the Bureau to require in the final regulation that servicers must give the borrower written notice of the specific information and documents the servicer needs from the borrower to make a loss mitigation determination. The notice must give the borrower a reasonable deadline to produce the information and documents. This requirement could be added to existing § 1024.41(b). Alternatively, the Bureau could amend proposed § 1024.41(c)(2), which has a notice requirement, to make it applicable to all missing information and documents, not simply those that are not in the borrower's control.

C. The Bureau’s proposed prohibition on incurring foreclosure and legal fees in advancing the foreclosure process during the loss mitigation review cycle will help borrowers avoid foreclosure and carry out the consumer protection purposes of RESPA.

Proposed § 1024.41(f)(3) prohibits the accrual on the borrower’s loan account of any fees during the loss mitigation review cycle beyond the amounts scheduled or calculated as if the borrower made all contractual payments on time and in full under the terms of the mortgage contract. The Bureau believes that prohibiting the accrual of all delinquency-related fees is necessary to incentivize servicers under the new request framework to promptly evaluate borrowers’ requests for loss mitigation assistance. While we strongly support the consumer protection purpose of this provision, we believe that restrictions on advancing the foreclosure process (and on charging to the borrower any foreclosure-related fees) combined with a reasonable diligence requirement accomplish the same result and are effective in incentivizing servicers to efficiently review requests for loss mitigation.

One of the most difficult challenges facing a borrower in default is the piling on of fees. Once the foreclosure process begins, the accumulation of fees and costs, particularly attorney fees, makes it more difficult for a borrower to cure a delinquency and avoid foreclosure. Even if these substantial fees are capitalized as part of a loan modification, the total amount of the delinquency fees and costs can have a negative impact on the type of modification that is offered or the terms of that option. For example, an increase in the total capitalized arrears can affect the mark-to-market-loan to value ratio in the GSE’s Flex Modification waterfall and ultimately result in a less favorable interest rate (and less affordable payment) offered to the borrower in a loan modification.[29] In our survey of advocates, 62% of respondents indicated that attorney fees or foreclosure fees always (31%) or usually (31%) impact whether their client can reinstate their mortgage after falling behind either through loss mitigation or some other means. Another 32% said foreclosure or legal fees sometimes impact whether their clients can reinstate the mortgage, and only 6% responded that such fees impact clients’ ability to reinstate rarely or never.

The most effective way to address foreclosure related fees during the review process is to prohibit them from being incurred in the first place rather than requiring that they be waived after they have been incurred. We believe that proposed § 1024.41(f)(2) does exactly that by preventing the servicer from advancing the foreclosure process during the loss mitigation review cycle unless one of the procedural safeguards is met. Requiring that a complete hold be placed on foreclosure activity during the review process ensures that fees and costs for interim foreclosure actions that advance the foreclosure process are not incurred and later charged to the borrower.[30]

[29] Fannie Mae Single-Family Servicing Guide, at F-1-27, Processing a Fannie Mae Flex Modification.
[30] As discussed elsewhere in these comments, we urge the Bureau to modify proposed § 1024.41(f)(2) to permit the parties to a foreclosure action to consent to the continuation of mediation or arbitration.

This sensible requirement in proposed § 1024.41(f)(2) falls squarely within the Bureau's authority to adopt regulations consistent with the consumer protection purposes of RESPA that help borrowers prevent avoidable costs and fees and facilitate review of foreclosure avoidance options. It does this without altering an investor's or servicer's contractual right to seek reimbursement from the borrower for fees and costs it has incurred or paid. A broader waiver requirement such as in proposed § 1024.41(f)(3) would include fees, such as late fees, that are not as closely connected to the status of being in a loss mitigation review.

The accrual of late fees during a loss mitigation review does harm borrowers, particularly when servicer delays lead to an unnecessarily drawn out process. In NCLC's national survey of advocates, 18% responded that late fees always impact whether clients can reinstate, 29% responded usually, and 36% responded that it sometimes has an impact. Only 18% responded that late fees either rarely or never impact clients' ability to reinstate the loan. Moreover, it seems reasonable that the prohibition on charging late fees during a loss mitigation review cycle might incentivize servicers to act diligently in the review process.

However, we believe that the prohibition on advancing the foreclosure process in proposed § 1024.41(f)(2), together with the litigation risks for servicers posed by not exercising reasonable diligence (as we have proposed in Part II, B), will provide the necessary incentives for servicers to promptly complete loss mitigation reviews.

D. The proposed amendments to § 1024.41(i) for duplicative requests are inadequate and inappropriately expand the scope of the exclusion.

As we have stated often in other mortgage servicing comments, the exemption from coverage of the rules for "duplicative" requests is extremely problematic. Servicers frequently review successive requests for loss mitigation assistance within the same delinquency. Oftentimes, a second or third request results in a loss mitigation offer – either because the borrower's circumstances have changed or because the servicer failed to evaluate a prior application properly. Investor guidelines applicable to many mortgage loans require a servicer to review a loss mitigation application even if a prior application from the borrower has been reviewed.

One significant impact of the 2013 RESPA Servicing Rule is that servicers have been encouraged to use uniform loss mitigation procedures for all borrowers. Section 1024.41 has created an industry standard for handling loss mitigation applications, and the proposals for revising § 1024.41 in this docket will have a similar impact. Borrowers and their representatives also have come to expect that these uniform procedures apply when a request for loss mitigation is being reviewed by a servicer and often do not take other actions to save their homes from foreclosure in reliance upon the protections in § 1024.41. Thus, we continue to urge the Bureau to make any exclusion or exemption from the application of § 1024.41 related to a duplicative request very narrow.

1. The Bureau should state explicitly in § 1024.41(i) that the duplicative request exclusion does not apply to a different servicer.

Existing § 1024.41(i) includes the language: "… unless the servicer has previously complied with the requirements of this section…." The Bureau intended this language to create an exception to the existing duplicative request exclusion when there has been a transfer of servicing. Thus, if "the servicer" is a different servicer, such as a transferee servicer, it is required to comply with the requirements of section 1024.41 even if a borrower received an evaluation of a complete loss mitigation application from a transferor servicer during the same period of delinquency. The Bureau discusses this in existing comment 1024.41(i)-2 to avoid any uncertainty, noting that a "transferee servicer and a transferor servicer … are not the same servicer."[31]

This exception applies even when a transferor servicer who is not required to evaluate a loss mitigation application based on the duplicative request exclusion nonetheless undertakes to review an application, and then there is a transfer of servicing. In this situation, the Bureau's existing comment 1024.41(k)(1)(i)-1.i provides that the duplicative request exclusion does not apply to the transferee servicer, and the application must be considered by the transferee servicer subject to the transfer requirements in section 1024.41(k).[32]

The proposed amended § 1024.41(i) refers only to "a servicer." This language appears not to create an exception for a different servicer. Moreover, the existing comment 1024.41(i)-2 is proposed to be deleted.

The Bureau has also proposed to amend existing comment 1024.41(k)(1)(i)-1.i, including the deletion of the reference to § 1024.41(i) as an example of when a transferee servicer must comply with § 1024.41 with respect a request for loss mitigation assistance received as a result of a transfer, even if the transferor servicer was not required to comply with § 1024.41 with respect to that request. While comment 1024.41(k)(1)(i)-1.i could still be construed as creating an exception to the duplicative request exclusion for a transferee servicer, we are concerned that the new language in the regulation itself, the deletion of comment 1024.41(i)-2, and the changes to comment 1024.41(k)(1)(i)-1.i will create ambiguity. Moreover, these changes are not discussed in any detail in the analysis issued with the proposal, adding to the uncertainty.

Thus, we urge the Bureau to state explicitly in § 1024.41(i) that the duplicative request exclusion does not apply to a different servicer and that a transferee servicer must comply with § 1024.41 with respect a request for loss mitigation assistance received following a transfer of servicing,

[31] Official Interpretations of Reg. X § 1024.41(i)-2.
[32] Official Interpretations of Reg. X § 1024.41(k)(1)(i)-1.i.

even if the procedural safeguards in § 1024.41(f)(2)(i) and (ii) were met by the transferor servicer during the same loss mitigation review cycle. Servicers do not promptly transfer complete information about pending and past loss mitigation reviews, and even when information is transferred it may not be immediately accessible to the transferee servicer's loss mitigation staff. Therefore, a transferee servicer should not be able to rely on a prior servicer's alleged loss mitigation review.

2. The Bureau should state explicitly in § 1024.41(i) that the duplicative request exclusion does not apply if the borrower is offered only a temporary loss mitigation option, such as a forbearance plan.

The existing duplicative request exclusion does not apply if the borrower's prior application is not treated by the servicer as a complete application. For example, a servicer may offer certain loss mitigation options based on an incomplete application, such as a short-term payment forbearance, without violating the duty to evaluate the borrower for all loss mitigation options. If the borrower is offered a short-term payment forbearance or repayment plan under these circumstances in response to an incomplete application, the duplicative request exclusion does not apply to a subsequent loss mitigation application submitted by the borrower to that servicer.

We are concerned that no similar exception has been retained in the proposed servicing rule. As we noted earlier, even an unsolicited forbearance offer can start the loss mitigation review cycle and result in a subsequent application being deemed a duplicative request. This could arise frequently in a disaster situation where servicers routinely respond by offering forbearances. Depending upon the severity of the disaster and the loss the borrower has suffered, a borrower could easily become unresponsive due to the effects of the disaster for an extended period after being offered the forbearance. Assuming the procedural safeguard in § 1024.41(f)(2)(ii) is met and the borrower recovering from a disaster later requests assistance, their servicer would not be required to comply with § 1024.41 under the Bureau's proposal.

While temporary options serve an important role in loss mitigation, many borrowers who accept a forbearance or other temporary option ultimately need a permanent solution to avoid foreclosure. As recognized by the Bureau in the existing servicing rule, the offer or acceptance of a temporary option should never be a barrier to consideration for a permanent foreclosure avoidance solution. The move away from the complete application framework does not change the importance of this critical borrower protection.

We urge the Bureau to state explicitly in § 1024.41(i) that the duplicative request exclusion does not apply when a borrower is offered a temporary loss mitigation option and is not evaluated for any permanent loss mitigation options during the loss mitigation review cycle.

3. The duplicative request exclusion should not apply to a denial of a request for loss mitigation assistance due to missing documents or information not in the borrower's control.

Proposed § 1024.41(c)(2) provides that a borrower's request for loss mitigation assistance may be denied due to missing documents or information not in the borrower's control, if the servicer is unable to determine without those documents or information which loss mitigation options it could offer. Based on the procedural protections added to this section, which we support, we believe that denials for this reason should be rare. Still, a denial due to missing documents or information not in the borrower's control means that the servicer was not able to complete the loss mitigation review process and did not review the borrower for loss mitigation options. Thus, a denial under these circumstances should not preclude the borrower from requesting assistance at a later point during the same delinquency period.

We urge the Bureau to state explicitly in § 1024.41(i) that the duplicative request exclusion does not apply when a borrower's request for loss mitigation assistance is denied under proposed § 1024.41(c)(2) due to missing documents or information not in the borrower's control.

E. The ban on "advancing the foreclosure process" is extremely helpful, and the CFPB should clarify that servicers can participate in court-supervised mediation or settlement conferences during a loss mitigation review cycle if the borrower consents to proceeding in mediation.

The proposed rule makes a helpful change to the dual tracking protections in the existing regulation. Beyond being barred from conducting a sale or moving for judgment of foreclosure, the proposed rule bars servicers from "advancing the foreclosure process" during a loss mitigation review, provided the request for assistance is made more than 37 days before a scheduled foreclosure sale. This broader mandated pause in foreclosure-related activity will prevent servicers from incurring unnecessary costs that make it more difficult for the borrower to cure the arrears, or increase the arrearage that gets capitalized into a loan modification. Moreover, when servicers continue taking intermediate steps involved in the foreclosure process, it creates an elevated risk that the foreclosure sale or judgment may be entered when it should not be.

However, the final rule should make clear that the provision forbidding servicers from "advance[ing] the foreclosure process" during a loss mitigation review cycle does not forbid participating in a court-sanctioned mediation or other settlement conference when the borrower consents to participating in such a process before completion of the loss mitigation review cycle. A number of states and territories utilize a mandatory or optional court-supervised mediation system for borrowers facing foreclosure, which halts other aspects of the litigation until the mediation or settlement conference is concluded, and which can result in positive outcomes for borrowers.

Ideally, many homeowners will make a request for assistance before the mortgage servicer makes the “first notice or filing” necessary to initiate a judicial or nonjudicial foreclosure. If that occurs, the loss mitigation review should be completed before the servicer can make such first notice or filing. But if the first notice or filing has already been made, in states that permit judicial foreclosure and might have a court-supervised mediation, servicers should be permitted to participate in the mediation process if the borrower consents. Such agreement is especially meaningful if the borrower is represented by either an attorney or housing counselor in the mediation; the CFPB could limit such consent to represented homeowners.

Mediation often leads to a successful loss mitigation result for the loan and dismissal of the foreclosure proceeding. In addition, the mediation process can operate as a means of informing borrowers of their rights, options, and other resources available to them. Courts often have free legal services providers staffing a table at first-time settlement conferences, so that borrowers can be informed of their rights and get self-help advice or full representation.[33] One New York attorney explained:

> We have a mandatory settlement conference process in our NY judicial foreclosure process, governed by a statutory scheme imposing a requirement to negotiate in good faith, overseen by the courts…. The statute prohibits plaintiffs from charging attorneys’ fees for settlement conference participation. It also requires that motions be held in abeyance during that phase of the case, except for motions to enforce the requirement to negotiate in good faith. That process is the venue in which much of the loss mitigation happens—indeed the conference process is, for many homeowners, the mechanism by which they first connect with an advocate, because at the first conference, even if a defendant has defaulted in appearing in the case, they have a statutory right to put in an answer within 30 days of the first conference, and the court is required to provide them with basic information about the process and to advise them of available legal services providers who can assist with pro se answers.[34]

Lawyers in a number of other states echoed the conviction that court-supervised mediation programs provide a substantial benefit to borrowers and should be permitted to continue even during a loss mitigation review cycle. One Connecticut attorney noted, “We think that the parties should be able to participate in mediation during loss mitigation review.”[35] An Illinois attorney

[33] Email from Jacob Inwald, Director of Litigation for Economic Justice, Legal Services NYC, Sept. 3, 2024.
[34] *Id*.
[35] Email from Theresa Dudek-Rolon, Senior Attorney, Connecticut Fair Housing Center, Sept. 3, 2024.

said, “It would negatively affect our clients if these programs could not continue.”[36] While there may be costs associated with this process due to attorney fees resulting from the mediation (other than in states like New York, which prohibit a foreclosing entity from charging fees in connection with the settlement conference process), it is still a net benefit for many borrowers facing the risk of foreclosure.

On the other hand, a Maryland advocate pointed out that in that state, the mediation process is not better for homeowners than a loss mitigation review outside of mediation, and that once the servicer files the document that triggers a homeowner’s deadline to request mediation, the mediation process is almost never continued or postponed. That advocate urged that in states with non-judicial or quasi-judicial (like Maryland) foreclosure processes, that the mortgage servicer be precluded from filing any document that triggers a homeowner’s deadline to request mediation until the loss mitigation review cycle has been completed.[37] Our recommendation that mediation or settlement conferences be permitted to continue only if the borrower consents would address this issue, as the Bureau could clarify in commentary that a servicer should not file any document that creates a deadline to request mediation unless the borrower consents to such action being pursued.

As the Bureau advances and refines its current rule, it should take care to not cut off this valuable option for borrowers. Language should be added to the rule creating a clear exception for court supervised mediation, allowing servicers to continue such programs when the borrower consents, while not otherwise advancing the foreclosure process, during a loss mitigation review cycle.

F. The proposed procedural safeguards framework is a sound approach, but the Bureau should clarify both proposed safeguards.

1. For the “denied for all options” safeguard, the Bureau should clarify that reasonable diligence and a written notice are required before a servicer may deny a borrower for an option based on a failure to provide documents that are necessary to a loss mitigation decision.

As discussed above, the Bureau’s proposal to trigger dual tracking protections with a request for assistance, rather than a complete application, would significantly benefit borrowers. Many borrowers fall off during the document submission process, and others incur foreclosure fees and charges while the servicer continues the foreclosure process as the borrower struggles to satisfy the servicer’s definition of “complete.”

[36] Email from Tiffany Allison Harvey, Senior Consumer Law Attorney, Prairie State Legal Services, Inc., Sept. 3, 2024.

[37] Email from Phillip Robinson, Consumer Law Center LLC, Aug. 31, 2024.

We support the change to having dual tracking protections begin with a request for assistance and continue through forbearances and trial plans until one of the procedural safeguards has been met. We support the concept of two key procedural safeguards that could be satisfied to terminate those protections: (a) no remaining loss mitigation options, or (b) unresponsive borrower.

The Bureau's "no remaining options" safeguard specifies that a servicer may commence or advance the foreclosure process once the servicers has "reviewed the borrower for loss mitigation and no available loss mitigation options remain," provided that the servicer has sent the borrower all notices required by paragraph (c) and the borrower has not requested an appeal or all appeals have been denied. The significant gap in this safeguard is the absence of any clarity around what steps a servicer must take in order to deny a borrower for an option due totally or in part to a failure to provide requested information or documents necessary to a loss mitigation review. This safeguard does not even require the servicer to have "regularly taken steps" to obtain any necessary information or documents (which, as we explain above in Section B, should be rephrased as a duty to exercise reasonable diligence). The Bureau should clarify that the "no remaining loss mitigation options" safeguard may be satisfied only if a servicer has exercised reasonable diligence and, if a borrower is rejected based on a failure to provide information or documents, the servicer has sent a *written notice* to the borrower requesting the applicable documents or information and providing a reasonable timeframe (no shorter than 21 days) in which to provide them.

If the servicer has requested such information and documents *in writing*, as discussed above, and has exercised *reasonable diligence* in attempting to collect such information, then after a certain period of time in which a borrower has made no reasonable attempt to provide the information sought, the servicer should be permitted to send a determination notice denying the borrower for that particular option, containing all other information required in a determination notice (including the information about whether any other options remain available).

2. For the "unresponsive borrower" safeguard, the Bureau should clarify that a borrower who is performing under a forbearance agreement is not unresponsive.

Finally, the unresponsive borrower safeguard must be refined to clarify that it cannot be satisfied while a borrower is complying with a forbearance agreement. Many forbearance agreements do not require monthly payments. It is entirely possible that a borrower who knows she has a 6-month forbearance might not call or otherwise contact the servicer during that time period. Under the proposed rule, making no payment and no other communication attempts could lead to a borrower being deemed unresponsive. This is especially a concern since the Bureau is proposing to delete the dual tracking protection under current § 1024.41(c)(2)(iii) for a borrower who is performing under a forbearance plan.

To avoid this potential problem, the Bureau should amend 1024.41(f)(2)(ii), or add commentary, clarifying that a borrower performing under a forbearance plan is not unresponsive.

G. The CFPB's improved early intervention notice and new end-of-forbearance notice and live contacts will substantially benefit borrowers at risk of foreclosure. The CFPB should make minor adjustments to the proposed rule as described below.

The changes the CFPB proposes to the early intervention framework will make a significant difference for borrowers facing the risk of foreclosure. Requiring inclusion of the name of the investor for the loan, as well as a brief description of each type of loss mitigation option available from this investor, is extremely important.

Consumer advocates have urged the CFPB in the past to include the identity of the investor in the early intervention (EI) notice precisely because the servicer is already required to know this information and this information is crucial to determining what options are available to the borrower. Homeowner advocates cannot help a homeowner identify what options a servicer should be reviewing, and what eligibility rules apply to each, without knowing the identity of the investor. We have also heard of many examples of servicing staff who are not properly aware of this information, and communicate with the borrower about loss mitigation without having the correct investor rules in mind, which makes it impossible to provide accurate information about available options as required by 12 CFR 1024.38.[38]

In NCLC's August 2024 nationwide survey of advocates, when asked about the importance of the early intervention notice to include the identity of the investor who owns or insures the loan, 64% of respondents stated that it was extremely important and 27% said it was very important. Moreover, almost all respondents emphasized the importance of also receiving information on basic loss mitigation options in the notice, with 75% identifying it as extremely important and 22% selecting very important.

The problem of identifying loss mitigation options available to the borrower and any relevant restrictions is a particular problem for mortgages held by private investors. Thirty-nine percent of respondents stated that it is always difficult to identify options from private investors and 35% usually find it difficult (and, notably, these are experienced professionals who find this difficult). Therefore, in addition to the identity of the investor, we strongly support the CFPB's decision to

[38] *See* Coalition Comments to the Consumer Financial Protection Bureau Regarding Protections for Borrowers Affected by the COVID-19 Emergency under the Real Estate Settlement Procedures Act (RESPA), Regulation X, at 44 (May 10, 2021), https://www.nclc.org/wp-content/uploads/2022/08/RESPA_NPRM_Comments.pdf (half of the 182 respondents had experienced a servicer point of contact not seeming to know which investor rules applied either at least once, several times, or many times).

require that the EI notice, and a web site listed in the notice, contain a list and brief description of the loss mitigation options available from the investor for the loan.

One legal services attorney commented as follows:

> "Getting clarity from private investors of their loan modification requirements is extremely difficult. Yet, this information is absolutely necessary for homeowners seeking to resolve their foreclosures through a loan modification. Homeowners with private loans are often tapping in the dark to find out what they need to show in terms of income and eligibility to qualify for a loan modification. It shouldn't be this way. If things were clear from the start, it would be a world change for homeowners in distress." – Legal services attorney in New York[39]

For years, consumer advocates have raised problems with a lack of transparency regarding the loss mitigation options available from private, non-government investors, a significant portion of the market. The options available for loans held in a private securitization, or in bank portfolio, are in the proverbial black box. Advocates report that very often servicers reject borrowers for loss mitigation, or claim that no loan modification options exist (only temporary and repayment-plan-type options), without providing adequate proof of those alleged restrictions. Represented borrowers who send NOEs and RFIs, and end up litigating, or finding investor documents from SEC filings often find that investor restrictions claimed by front line servicing personnel are not accurate. These actions should not be necessary to obtain such information, especially when lack of information results in denials and avoidable foreclosures.

More specific information on investor options is needed. In addition to requiring a generic description of the options available from the particular investor, we urge the CFPB to require slightly more detail on the servicer's investor-options websites. For example, rather than simply saying an investor permits a "loan modification" and describing what a loan modification is, the website would be much more useful if it contained basic information about what information or criteria form the basis of eligibility. For example, different loan modification options could be described as follows:

- **Streamlined loan modification.** This investor has a loan modification option without proof of income. Unpaid amounts are added to the loan balance, with a new interest rate and a new repayment term. The goal is to reduce the monthly payment. This investor does not permit us to offer a loan modification if your monthly payment will increase.

[39] Appendix B, Excerpts from Narrative Responses to Nationwide Survey of Homeowner Advocates on General Loss Mitigation Issues.

- **Streamlined loan modification.** This investor allows the unpaid amounts to be added to the loan balance. The goal is to bring your loan current. This investor does not permit us to change the interest rate or the repayment term for your loan.
- **Streamlined loan modification.** This investor allows the unpaid amounts to be added to the loan balance. The interest rate may be modified. This investor only allows a total of three loan modifications over the life of the mortgage loan. Other restrictions may apply.
- **Loan modification based on proof of income.** This investor allows a loan modification option for borrowers who provide proof of income. Unpaid amounts are added to the loan balance. The interest rate may be modified. The goal is to reduce the monthly payment to an affordable percent of monthly income, or debt-to-income ratio.

Identify the "investor," not the "owner or assignee." Finally, in both the EI and Determination notices, the CFPB should require servicers to identify the "investor" for the loan, rather than the "owner or assignee" of the loan. The goal is to identify the party whose rules control the available loss mitigation options. For loans insured by the Federal Housing Administration (FHA), the Veterans Administration (VA), or the U.S. Department of Agriculture (USDA), the party controlling available options is an insurer or guarantor, not an owner or assignee. The CFPB should use the term "investor" in the final rule, and define investor as the owner, assignee, insurer, guarantor, or other party with an interest in the loan whose rules control the loss mitigation options available for the mortgage. For a mortgage held in a private label securitization, the "investor" should include the Trustee as well as the name of the pool. For a mortgage held in portfolio, it should be the bank that holds the loan. For a government-insured loan, the "investor" should be the insurer.

The end-of-forbearance notice timing should be changed. The CFPB wisely paused EI efforts for borrowers who are in an active forbearance. Over time it became clear that requiring servicers to continue sending EI notices to borrowers in an active forbearance was a needless expense - and may have actually confused more borrowers than it helped. Pausing live contact and EI notices during forbearances makes sense.

The inclusion of a new end-of-forbearance notice is also extremely helpful and much needed. We support the information the Bureau proposes to require in live and written end-of-forbearance contacts. However, we urge the Bureau to adjust the timing of the end-of-forbearance notice. A number of homeowner advocates have expressed concern that 30-45 days prior to the end of forbearance is too late, especially in light of mailing delays. We urge the Bureau to require servicers to send the end-of-forbearance notice 45-60 days before the scheduled end date. In the alternative, the Bureau could require two end-of-forbearance notices be sent, one 60-days and the second one 30-days prior to the end of the forbearance.

H. The Bureau’s proposed determination notice appropriately balances the benefits and risks of a streamlined loss mitigation approach. The proposed rule should be finalized with a few minor edits.

The CFPB’s proposed determination notice plays a critical role in the shift away from a fully documented, simultaneous review for all options and towards a streamlined, sequential process. Many streamlined loss mitigation reviews operating currently, particularly the ones offered by FHA and VA, rely heavily on phone conversations with the borrower. The proposed rule recognizes this new reality but imposes a common-sense and important protection: loss mitigation options offered by phone must still be followed up with a written determination notice including certain key pieces of information. Given the complicated nature of loss mitigation options for borrowers and the stress borrowers face, borrowers cannot be expected to accurately remember and understand all communications that occur by phone. The written determination notice is an important summary, memorializing what the borrower and servicer discussed and what resolution they reached, and providing an opportunity to correct any misunderstandings or mistakes.

As discussed above in section A(2), we strongly support the CFPB’s decision to require, as part of proposed § 1024.41(c)(3), that a servicer send a determination notice even when the servicer is offering an unsolicited loss mitigation option. In addition to requiring that this notice include the information listed in proposed § 1024.41(c)(1)(vi) to (ix), the Bureau should require that this notice include the information described in § 1024.41(c)(1)(v), including the non-borrower provided inputs used in the calculation. As discussed below in section H(2), those inputs should be included in the determination notice, not posted on a website.

The other key protection achieved by the comprehensive determination notice is that it notifies the borrower whether other options may be available, how to ask to be reviewed for those options, and whether the option currently on the table will be preserved. This is crucial to protect against the primary risk of a sequential review process: that the borrower may not be offered the most appropriate loss mitigation option, and may accept the sub-optimal option based on fear or misunderstanding.

The CFPB should make several minor adjustments to the Determination notice, as described below.

1) The CFPB should clarify that if multiple options are reviewed simultaneously, they should all be captured in the same determination notice.

In the current loss mitigation framework of several government investors, borrowers might be reviewed for three or four loss mitigation options during one phone call. For example, a servicer might review an FHA borrower for a repayment plan, a stand-alone partial claim, and a recovery modification during one phone call. As drafted, the proposed rule is slightly ambiguous regarding whether a servicer would need to send three determination notices if the borrower was reviewed at the same time for three different streamlined options. We believe the more helpful approach, which was likely intended, is that the borrower would receive a single determination notice for all options that were reviewed at the same time (on the same day or during the same conversation). The proposed rule requires a servicer to include in the notice “the specific reason or reasons for the servicer’s determination to offer or deny *each such* loss mitigation option,” supporting this reading. § 1024.41(c)(1)(iii). However, other subsections refer to providing “a notice in writing” if the servicer makes a determination to offer or deny “any loss mitigation assistance.” § 1024.41(c)(1).

Borrowers would not be better served by receiving three notices on the same day with much of the same information and in fact the goals of the rule might be undermined. Receiving three notices on the same day might lead a borrower to discard all three letters as meaningless junk mail. It would be more costly to servicers to send three notices, without an accompanying benefit to borrowers. The Bureau should clarify in commentary that if a servicer reviewed the borrower on the same day or as part of the same review for multiple options, all such options can be captured in a single determination notice. Or, the Bureau could update the proposed regulatory text to specify that the notice should include “a statement of any loss mitigation options evaluated in the review.”

The Bureau could adopt language in the commentary as follows, or something similar, to clarify that one notice may be sent for multiple determinations made at the same time:

> 1. Memorializing the evaluation. The purpose of the determination notice is for the borrower to confirm the options the servicer considered at a particular time, the options the borrower qualified for, and the options that the borrower could not access. A separate determination notice should not be issued for each option the servicer considers; rather, it should memorialize all the options that the servicer considered during a particular time and provide the borrower the means for appealing each determination if the borrower does not agree with the servicer’s decision or if the borrower believes the notice does not accurately reflect what happened. While there may be instances in which more than one evaluation happens in a single day, we expect that servicers will not need to issue more than one determination notice in a day.
>
> For example, under the FHA COVID-19 waterfall in effect January 1, 2025, assume that the servicer and borrower have a discussion about what the borrower can afford, and the servicer bases its loss mitigation decision on that discussion and on information in the borrower’s file regarding their loan account. Assume the borrower indicates that the

existing monthly payment is not affordable and the servicer reviews the file and sees that the Payment Supplement will provide the appropriate targeted payment relief and that the Standalone Partial Claim and COVID-19 Recovery Modification will not. In this case, the determination notice should memorialize this discussion, state that the servicer did not approve the borrower for the Standalone Partial Claim and the COVID-19 Recovery Modification because the borrower indicated that the existing monthly payment was not affordable and neither of these options would reduce the monthly payment, and that the servicer did approve the Payment Supplement because the borrower communicated that the proposed payment under the Payment Supplement would be affordable. This should be done in one determination notice and should include the other information required by this section.

2) The CFPB should require servicers to disclose all borrower-provided inputs and the relevant non-borrower provided inputs in the determination notice, not on a website.

The CFPB has made a very important decision to require in proposed § 1024.41(c)(1)(iv) the key borrower-provided inputs that served as the basis for the determination to be disclosed in the determination notice. This will meaningfully help borrowers correct mistakes in the process. We have heard from many homeowner advocates that servicers sometimes wrongfully deny an option because, for example, they have used the wrong figure for the borrower's income.

However, we urge the CFPB to require the disclosure of *all* borrower-provided inputs that were collected by the servicer during the review process. Limiting the disclosure to inputs the servicer claims formed the basis for a determination may be subjective, and errors in any borrower input collected by the servicer in connection with the review could impact the terms of an option offered (or not offered) to the borrower.

The proposed rule also requires the servicer to make non-borrower provided inputs available to the borrower. Such inputs might include a borrower's credit score or the property's present value.[40] These inputs are also extremely important to borrowers. For example, one key non-borrower provided input is the value of the property. For the GSE Flex Modification, the value of the property is in many ways the most important data point driving the terms of the loan modification that will be offered to the borrower. This is true because the servicer can only offer principal forbearance resulting in a certain floor loan-to-value ratio. We have heard from a number of advocates that servicers used a property value that was incorrect, and that based on an appeal of that determination, the borrower was able to get a more fair, accurate calculation of the

[40] 89 Fed. Reg. 60204, at 60221.

investor modification terms.[41] Borrowers should be informed of the valuation figure that was used to calculate their loan modification terms and the right to appeal the determination if it is incorrect.

However, instead of requiring the servicer to disclose non-borrower provided inputs in the determination notice, the proposed rule merely requires servicers to include a telephone number, mailing address, and website where the borrower can access a list of those inputs. In addition, it only requires the list to include inputs that the servicer used in making the loss mitigation determination. Both of these limits are problematic.

In the section-by-section analysis, the CFPB posits that non-borrower provided inputs might not be useful to the borrower if they were "simply used in the review process" and did not "serve as the basis for the determination."[42] But the distinction between information that was "used in the review process" and was the basis of a determination is not meaningful. Any information used in the review process can impact the outcome and terms of an offer. Any information used in the review process should be accurate. The best way to ensure accuracy and identify mistakes when they happen is to disclose this information to the borrower.

As for the proposal to relegate information about non-borrower provided inputs to a website, it means that borrowers would have to jump through hoops to access the information. This would likely include creating online accounts and passwords that were not already established. This is particularly a problem for borrowers without internet access but is generally less efficient for all parties than including the information in the letter. Requiring servicers to put this information in the letter to the borrower would be more efficient for both the borrower and the servicer. It would be more work for servicers, without any net benefit, to require servicers to put certain inputs onto a web page instead of in the notice.

We therefore recommend that all inputs used in the review process, whether provided by the borrower or not, be included in the determination notice, and that the disclosure requirement for non-borrower provided inputs not be limited to those that served as the basis for the determination.

[41] *See* Coalition Comments to the Consumer Financial Protection Bureau Regarding Protections for Borrowers Affected by the COVID-19 Emergency under the Real Estate Settlement Procedures Act (RESPA), Regulation X, at 42 (May 10, 2021), https://www.nclc.org/wp-content/uploads/2022/08/RESPA_NPRM_Comments.pdf (advocates that got an improper denial of a Flex Modification, caused by an inaccurate property valuation, reversed).

[42] 89 Fed. Reg. 60204, at 60221.

3) If a determination notice lists other options that may be available from this investor, it should also include specific information about the limits of their availability for *this borrower*.

The CFPB proposes to require that the determination notice include a list of all other loss mitigation options that may remain available to the borrower, in addition to the steps the borrower must take to be reviewed for these loss mitigation options. 1024.41(c)(1)(vi). Without additional information specific to this borrower's situation, we fear this generic list of remaining available options might be confusing. The separate inclusion of the phone number or website where the borrower can obtain a list of all loss mitigation options that may be available from this investor serves a similar purpose, but will be more clearly generic and so less likely to lead to a borrower believing an option applies to them when it does not.

We support the idea of including a list of other options that may remain available to the borrower in the determination notice, but only if the list takes into account the borrower's specific circumstances. Given that the servicer is crafting each determination notice for a specific borrower after conducting an individualized review, it should not be burdensome to include such tailored information. For example, for an FHA borrower who has already received their statutory maximum partial claim, the determination notice should not list a stand-alone partial claim or payment supplement as a remaining available option, because each of these is only an available option for borrowers who have partial claim capacity available. For a GSE borrower who has already received the lifetime cap of three Flex Modifications, the determination notice should not include loan modification as another potentially available option. For a GSE borrower whose arrearage exceeds the cap for a deferral, the notice should not list deferral as an option, or should state that the GSE deferral is capped at 6 months and the borrower could not obtain it unless they could pay down the arrears to within that cap.

Another way to address this issue is for the CFPB to clarify in commentary that the information provided under section 1024.41(c)(1)(iii) should include mention of *all reasons* that a specific option from this investor is not available to this borrower based on their specific circumstances. Such a circumstance might be the specific reason for the denial, but it is possible a servicer might give a different reason for denial, and information about these limitations will still be helpful. For example, a servicer might be inclined to say, "We denied you for a stand-alone partial claim because you stated that you cannot afford to resume making your regular monthly payment" – but if it is also true that a borrower had no remaining available partial claim (or insufficient partial claim to cover the arrears), that fact should be disclosed as well. Otherwise, a borrower might decide to reject the offer of a loan modification and go back to ask for a partial claim, when in fact no partial claim is available.

Finally, we strongly support the CFPB's proposal to require a statement regarding whether the servicer has reviewed the borrower for all options and none remain. We support all other required details in the proposed determination notice.

4) In addition to citing the amount of time a borrower has to appeal, the determination notice should state the amount of time a borrower has to ask to be reviewed for other options and the fact that procedural protections will end if the borrower does not act within these time limits.

It is appropriate that, as the Bureau has proposed in section 1024.41(c)(1)(vi), the determination notice be required to tell borrowers what steps they would need to take to be reviewed for other remaining options. In addition, the notice should specifically state that the borrower should contact the servicer within 30 days to start that process, otherwise procedural protections may end and the servicer will be permitted to initiate or advance the foreclosure process.

Moreover, as with the EI notice, the determination notice should identify the investor that controls the borrower's mortgage loan, rather than simply the "owner or assignee."

I. The CFPB's proposed rule related to treating appeals like an NOE, and the expansion of the appeal process to cover determinations for any loss mitigation option, will make it significantly more likely that an erroneous loss mitigation decision gets corrected. The Bureau should require that servicers provide the designated Notice of Error address in the notice of appeal and should extend the 14-day appeal period to at least 21 days.

We support the CFPB's clarification that the scope of error resolution for Notices of Error (NOE's) includes errors in advancing the foreclosure process (1024.35(b)(9)) and the failure to make an accurate loss mitigation determination on a borrower's mortgage loan (1024.35(b)(11)). Courts have imposed improper limits on the scope of an NOE in the absence of this clarification.[43]

[43] *See, e.g.*, Morgan v. Caliber Home Loans, 26 F.4th 643, 651 (4th Cir. 2022) (letter challenging denial of a loan modification was not a notice of error because a "[a] loan modification is a contractual issue, not a servicing matter"); Fustolo v. Select Portfolio Servicing, Inc., 2023 WL 7496792 (D. Mass. Nov. 13, 2023) (alleged overvaluation of plaintiff's home in connection with loan modification application is a contractual issue and does not relate to the servicing of the loan); Fox v. Statebridge Co., L.L.C., 629 F. Supp. 3d 300, 310 (D. Md. 2022) (citing *Morgan*; notice of error that disputes payment amount for a proposed trial payment plan "was a contractual issue, not a servicing matter"); Smith v. Wells Fargo Bank, 2019 WL 2189285 (N.D. Ill. May 21, 2019); Sutton v. CitiMortgage, Inc., 228 F. Supp. 3d 254 (S.D.N.Y. 2017) (catch-all provision does not cover servicer errors in making loss mitigation decisions); *In re* Rosa, 2018 WL 4352168 (Bankr. D.N.J. Aug. 9, 2018).

Current § 1024.41(h) permits a borrower to appeal only a denial of loan modification. This regulation was adopted by the Bureau during the HAMP-era when servicers were primarily focused on providing HAMP loan modifications. Now that servicers routinely offer other loss mitigation options, such as loan forbearances, it makes sense to extend the appeal process to all loss mitigation determinations. We therefore support this amendment to § 1024.41(h).

We also support the proposal that, when an appeal of a loss mitigation determination meets the requirements of an NOE, servicers must treat such appeal as an NOE. A borrower might submit an appeal when receiving notice of the right to appeal, not realizing that they could also submit an NOE based on the same errors and receive the added protections and rights that § 1024.35 provides. The crucial change that this approach would produce is that in reviewing an appeal, servicers will have to conduct a reasonable investigation and correct any errors that have occurred. This will also provide protection from foreclosure while the servicer conducts a reasonable investigation of the notice of error and provides a response in accordance with § 1024.35(e).

In the existing rule, an appeal merely has to be reviewed by different servicer personnel. In NCLC's survey of homeowner advocates, 40% of respondents stated that appeals rarely successfully result in a change to the loss mitigation decision or terms, and 25% responded that it never does. The requirements that are inherent to reviewing an NOE are much more meaningful.

We are concerned, however, that this important change will not have its intended impact because borrowers will not submit an appeal "that meets the procedural requirements of section 1024.35" as required by proposed § 1024.41(h)(2). The CFPB should not assume that consumers are generally aware of their Reg. X dispute rights or that they will know how to validly exercise these rights in an appeal of their loss mitigation determination. Comprehensive disclosures must include details of dispute rights and the procedural requirements of section 1024.35, including the designated address requirement for notices of error. Borrowers must be effectively notified of the need to use a designated address and that sending a notice of error to the servicer's address other than the designated address will render it invalid. The CFPB should also require a servicer to notify the borrower if it is refusing to treat an appeal request as a notice of error because it was not sent to the exclusive address, using procedures similar to those set out in § 1024.35(g).

In order to ensure that borrowers are informed of and can take advantage of this proposal, we recommend that the CFPB require servicers to provide the following information in their appeal determination notices in § 1024.41(h)(4):

a. explain what an NOE is, the procedural requirements of an NOE, and when an appeal will be treated as an NOE,

b. outline the timeline for the servicer to respond to the NOE, and

c. provide the designated address(es) where the NOE and appeal should be sent. For simplification, the CFPB should require that the address for the appeal and NOE be the same.

The CFPB should also clarify that the 14-day appeal period under § 1024.41(h)(2), during which an NOE would be treated as an appeal, in no way affects the time period for sending an NOE under § 1024.35. Under § 1024.35, there is no time limit as to when a borrower can send an NOE to the servicer, other than the general requirement that an NOE must be sent no more than one year after either a transfer of servicing or a discharge of the mortgage loan.[44] The timing of an appeal period should not create a limit on the amount of time a borrower has to send an NOE alleging errors regarding the loss mitigation determination. However, an NOE that also qualifies as an appeal would entitle the borrower to ongoing dual tracking protections.

The CFPB should extend the deadline for a borrower to appeal a loss mitigation determination under § 1024.41(h)(2). The deadline to file an appeal "within 14 days after the servicer provides a loss mitigation determination to the borrower" could cause significant problems for borrowers. As described in detail in the next section regarding mailing issues, the determination letter may not reach the borrower for several days or even weeks, reducing or eliminating the time period to appeal. The CFPB should extend the 14 days to 30 days to account for such delay.

J. The Bureau should lengthen minimum response periods to at least 21 days to account for persistent delays in servicers' mailing practices.

The proposed rule contains several requirements for servicers to provide time-sensitive communications to borrowers that, if delayed, could have severe consequences to the borrower's ability to obtain a loss mitigation option. These proposed provisions all require the servicer to provide important information to the borrower so that the borrower can make an informed decision about options and next steps in resolving their loan delinquency: §1024.39(e)(2)(ii) (notice regarding the end of forbearance and next steps); § 1024.41(c)(1) (written determination notice that includes deadlines for a borrower to accept or reject an offer and to file an appeal); § 1024.41(c)(2) (notice that if the servicer does not receive certain documents in time, the application will be denied); § 1024.41(c)(3) (notice about amount of time the borrower has to accept or reject an unsolicited loss mitigation offer); § 1024.41(h) (notice of deadline for an appeal); § 1024.41(e)(2)(iii) (notice about time a borrower has to accept a loss mitigation option after receiving response from an appeal).

[44] § 1024.35(g)(1)(iii).

Under the proposed rules, the consequences of missing a deadline are dire. For example, a borrower who receives a notice regarding a loss mitigation offer after the deadline to respond will be deemed to have rejected an offer and the servicer can initiate the foreclosure process. § 1024.41(f). The borrower will also be deemed to have completed the loss mitigation review cycle and will have no other opportunity to submit a request for loss mitigation. § 1024.41(i) (including the commentary deletion).

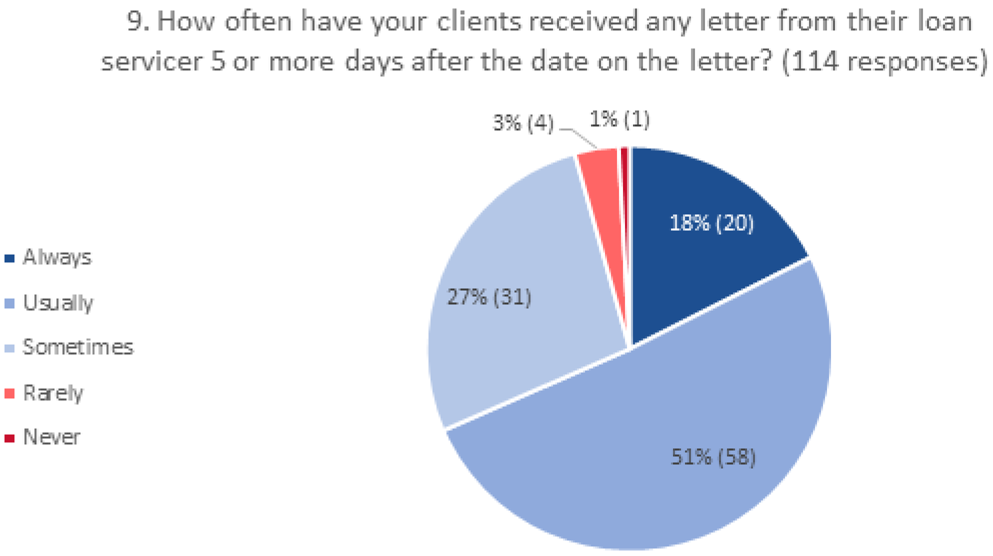
The timing deadlines listed above are all based on when a written notice is "sent" or "provided by a servicer." Since these communications are almost invariably sent by mail, there is a built-in delay between mailing and receipt. Obviously, any delay eats into the time a borrower has to review the communication, evaluate the options it presents, and send a response. And, equally obviously, if a delay in delivery of a mailed communication is substantial, the borrower's ability to respond will be severely impaired.

Unfortunately, delays in delivery of mail are a widespread and significant problem. NCLC and others have consistently raised issues regarding the problems created by severe delays in delivering mailed communications from servicers to borrowers. According to the US Post Office, mail can take up to 10 days to reach the borrower.[45] Recent reports detail that on-time delivery rates are at a 3-year low, and in some states, like Virginia, less than 80% of the mail is delivered on time.[46] Some servicers have also engaged in improper backdating of documents.[47]

The survey pointed to ongoing problems with mailing delays in written notices sent by servicers. Respondents were asked how often clients receive letters more than five days after the date on the letter, with 51% reporting that their clients *usually* receive letters more than five days after the letter is dated, 18% reporting this *always* occurs, and 27% reporting that this *sometimes*

[45] *See* https://www.uspsoig.gov/focus-areas/did-you-know/how-long-does-it-take-my-mail-and-packages-get-here
[46] Eric Katz, As USPS institutes network reforms, mail delivery hits a 3-year low (February 22, 2024) found at: https://www.govexec.com/management/2024/02/usps-institutes-network-reforms-mail-delivery-hits-three-year-low/394388/; Luca Powell, Virginia now just fourth worst in the country for mail (August 15, 2024) (the delivery rate for Virginia at the beginning of 2024 was 66%) found at: https://dailyprogress.com/news/state-regional/government-politics/virginia-now-just-fourth-worst-in-the-country-for-mail/article_0be557eb-b046-54d3-b255-f3784cfb9e36.html
[47] *See, e.g.,* DBO Reaches $225 Million Settlement with Ocwen Loan Servicing to Resolve Case Involving Hundreds of Violations: Firm Will Provide Borrowers Debt Relief and Restitution, Pay Penalties, Department of Business Oversight, February 2017. ("Ocwen mailed time-sensitive letters to borrowers after the date on the letter, often by many days. In some cases, the delays endangered borrowers' ability to obtain loan modifications"), https://dfpi.ca.gov/wp-content/uploads/sites/337/2019/02/Ocwen-Settlement-Announcement-Final-02-17-17.pdf; Sudarshan Varadhan, Ocwen to Hire Independent Firm to Probe Backdated Foreclosure Letters, Reuters, Oct. 24, 2014, http://www.reuters.com/article/2014/10/24/ocwen-financial-new-york-mortgages-idUSL3N0SJ6JS20141024 (reporting that hundreds of thousands of borrowers may have been harmed by Ocwen's backdated documents that improperly cut off their appeal rights).

occurs.[48] Only 5% of respondents said that mailing delays of five or more days to receive a notice rarely or never occur.



Advocates commented in narrative responses:

> "Sometimes the lender includes a letter that was never previously sent. I know this because the date is after my authorization letter was received, and the lender does not send or copy me in the letter. The letter can be 3 weeks to a month old. Although the address on the letter is correct, the letter either comes very late or not at all." – Legal services attorney in New York

> "I have often found with almost all services communication is extremely difficult. Letters are dated one day but don't arrive to my clients sometimes two to three weeks after they are dated causing us to have to rush through decision making. Servicers are also very rarely forthright with the investor and/or guidelines for the loan they are beginning the foreclosure process on and my clients often know very little about their own mortgages." – Housing counselor in New York

Further complicating the issue is that many servicers now use third-party mailing services that do not place a date on the envelope they send out. As a result, there is no evidence of when the letter was mailed. This can produce a triple whammy – the servicer delays in giving the notices to the mailing service, the mailing service delays in sending out the correspondence, and the lack of a

[48] *Id.*

mailing date makes it impossible to prove that the delay in the borrower’s receipt of the notice was caused by the servicer and the mailing service.

By reducing the borrower’s actual or apparent response time, delayed delivery or backdating severely undercuts or eliminates a borrower’s ability to respond to or appeal a servicer’s decision. These problems undermine the consumer protections of RESPA and harm homeowners by denying them their right to receive accurate, timely information and properly review an offer or appeal a denial.

For example, a borrower who receives a notice about the end of the forbearance period when only a few days remain in the forbearance will have insufficient time to review and obtain appropriate post-forbearance options. Likewise, the proposed rule purports to give a borrower 14 days to respond to an offer of loss mitigation. However, if the mailing of the notice is delayed so that when it arrives there are only 4 days left, there will be minimal time, if any, for a borrower to review the letter, seek advice, and contact the lender with a response. Such shortened timeframes place tremendous pressure on homeowners, particularly those that are unrepresented, to make a hasty decision without the opportunity to review the terms and consider the implications of accepting or rejecting an offer or making an appeal. The letter may even arrive after the date it lists as the deadline to respond. A homeowner who receives a backdated or delayed letter after the deadline to accept the offer has already passed may also lose the opportunity to save the home.

The general guidance in § 1024.38(b)(1)(i) has proven to be ineffective in getting servicers to provide accurate and timely disclosures to borrowers as required by §§ 1024.39 and 1024.41. Therefore, the response windows for borrowers must be longer to account for servicer delays in providing notices that require a time limited response or action or provide information on which a borrower can make an informed decision.

We have recommended specific extensions of time periods in certain sections of these comments. For example, we recommend that the 14-day period to appeal a loss mitigation determination in § 1024.41(h)(4) be extended to 30 business days to account for delays in delivery of the notice. In general, we recommend that no time period for any required action be shorter than 21 days. Given the realities of mail delivery, a 21-day response period will typically result in a borrower having about 14 days from receipt of the notice to act.

To address the underlying problem for all communications, particularly the ones highlighted above and others that contain a deadline for a response or action by the borrower, the CFPB should:

1. Require that the servicer state the date of mailing in the body of the communication, and if the communication is not dated, the time period shall be deemed to run from the date the borrower receives the notice; and
2. Clarify that "provide" or "send" means:
    a. depositing the communication in the US mail on or within 1 business day of the date on the communication
    b. by First Class mail or a delivery service that is at least as fast as First Class mail,
    c. in a manner that results in a postmark on the envelope.
3. Extend all response time periods to be at least 21 days, and longer for certain communications identified elsewhere in these comments.

These changes would give borrowers the time allotted in the Rule to take action, including responding to or appealing a decision, and would remove the incentive for servicers to backdate letters.

K. Other loss mitigation issues

1. The Bureau's proposal does not create problematic inconsistencies with existing state law, but the Bureau should add to the comment on the concept of "advancing the foreclosure process" to better align the updated federal dual tracking protections with state foreclosure procedures.

As modified in the ways recommended elsewhere in these comments, the changes proposed by the Bureau do not create inconsistencies or conflicts with state law. While some states may consider updating their laws to align with changes to Regulation X that become final (e.g., revisiting the use of the "complete application" as a trigger for dual tracking protections), to the extent that there are differences in, for example, the content or timing of certain disclosures, complying with both existing state law and revised Federal law requirements will remain feasible for mortgage servicers.

The one area where the Bureau's proposal could better align with state foreclosure procedures relates to the new language in § 1024.41(f)(2) clarifying that a servicer is prohibited from "advancing the foreclosure process" during a loss mitigation review cycle. The addition of that language will benefit borrowers and advance the consumer protection purposes of RESPA by providing more comprehensive dual tracking protections, particularly in states that primarily utilize non-judicial foreclosure processes. Borrowers will be even better protected, though, if the Bureau makes two additions to the comment to § 1024.41(f)(2).

First, while some non-judicial foreclosure states require only one recorded notice before a foreclosure sale is held,[49] others, like California[50] and Hawaii,[51] require recordation of a second notice setting a sale date. Because the current version of § 1024.41(f) only prohibits making the first notice or filing, moving for foreclosure judgment or order of sale, or conducting a foreclosure sale, borrowers in the latter group of states do not always get the full benefit of the dual tracking protections and end up having notices of sale recorded (and the accompanying costs billed to their loan accounts) even when they have a complete application under review. For example, (1) a borrower could become 120 days in default, (2) the servicer records the first notice, and (3) the borrower then requests assistance. A servicer should not at that point record any second notice setting the foreclosure date until completing the loss mitigation review. In order to avoid any confusion about whether the term "advance the foreclosure process" includes the recordation of any legally required notice pertaining to a foreclosure, we recommend that the Bureau specify in the comment to § 1024.41(f)(2) that recording a notice of sale or any other required notices subsequent to the initial notice or step constitutes advancing the foreclosure process.

Second, many states, particularly those that primarily utilize judicial foreclosures, either require or provide for some form of pre-foreclosure mediation or settlement conference to maximize the chances of achieving a resolution through loan modification or another loss mitigation option.[52] Such proceedings frequently benefit borrowers, particularly when they include a requirement that the parties negotiate in good faith. The Bureau should clarify in the comment to § 1024.41(f)(2) that borrowers have the option to pursue loss mitigation using such dispute resolution procedures and proceedings and that a servicer's participation in such proceedings, under the circumstances described in Section E of this comment, does not constitute "advancing the foreclosure process" in violation of § 1024.41(f)(2).

2. The Bureau should clarify that informing a mortgage servicer that a borrower is seeking assistance from a governmental mortgage relief program should be treated as a request for loss mitigation assistance.

During certain crises and natural disasters, federal, state and local government agencies make funds available to assist homeowners at risk of foreclosure. During the foreclosure crisis, 18 states and the District of Columbia were able to offer assistance through the Treasury Department's Hardest Hit Fund program,[53] and during the COVID-19 pandemic, we have had the much broader-based Homeowner Assistance Fund (HAF) program.[54] In addition, some state

[49] *See, e.g.*, Ala. Code §§ 35-10-8, 35-10-13; Alaska Stat. §§ 34.20.070 *et seq.*; Ariz. Rev. Stat. Ann. §§ 33-807.
[50] Cal. Civ. Code §§ 2924, 2924c.
[51] Haw. Rev. Stat. §§ 667-21 *et seq.*
[52] *See, e.g.*, New York Civil Practice Rule 3408; Vt. Stat. Ann. tit. 12, §§ 4631-4637.
[53] *See* https://home.treasury.gov/data/troubled-assets-relief-program/housing/hhf
[54] *See* https://home.treasury.gov/policy-issues/coronavirus/assistance-for-state-local-and-tribal-governments/homeowner-assistance-fund.

and local governments have offered financial assistance to help bring delinquent mortgages current.[55] Generally, these programs transmit funds directly to the mortgage servicer to reinstate the loan account or supplement another loss mitigation option offered by the servicer, and they require engagement by the servicer to verify amounts past due and confirm proper application of the government funds to a given borrower's loan account.

Homeowners seeking this kind of mortgage assistance have frequently encountered dual tracking, with servicers refusing to pause the foreclosure process despite being notified that the borrower had applied or even been preliminarily approved for assistance. Housing counselors responding to a survey about HAF programs recently reported that they had numerous clients either accrue substantial foreclosure-related fees or lose their homes to foreclosure even though their servicers knew about pending HAF applications. Apparently, existing regulations, a bulletin from the Bureau, and special guidance issued by federal agencies regarding HAF and dual tracking[56] were not sufficient to protect borrowers. It is therefore critical that the Bureau provide clearer guidance to servicers prohibiting dual tracking in such situations.

The Bureau's analysis of the proposed rule recognizes the importance of treating assistance from government-sponsored programs as forms of loss mitigation, stating that a request for loss mitigation assistance is to be construed broadly and includes "any request from a borrower for temporary or long-term relief, including options that allow borrowers who are behind on their mortgage payments to remain in their homes or to leave their homes without a foreclosure, such as, without limitation, refinancing, trial or permanent modification, repayment of the amount owed over an extended period of time, forbearance of future payments, short-sale, deed-in-lieu of foreclosure, *and loss mitigation programs sponsored by a locality, a State, or the Federal government*."[57] (emphasis added). In fact, existing Official Bureau Interpretations explicitly reference "loss mitigation programs sponsored by a locality, a State, or the Federal government" as a type of loss mitigation option. However, the Bureau has not proposed any change to the actual definition of a loss mitigation option, which is defined somewhat narrowly in current § 1024.31 as "an alternative to foreclosure offered by the owner or assignee of a mortgage loan that is made available through the servicer to the borrower."

In order to eliminate any possible confusion about how communications to servicers about government-sponsored mortgage relief programs should be treated, the Bureau should clarify that a communication from a borrower or some other source indicating that they are seeking

[55] *See, e.g.*, New York State Mortgage Assistance Program, https://www.nytimes.com/interactive/2024/upshot/buy-rent-calculator.html?unlocked_article_code=1.rk0.9uJf.mXeVmuqeMMtM&smid=url-share

[56] *See, e.g.*, https://www.consumerfinance.gov/about-us/blog/using-homeowner-assistance-fund-program-help-borrowers-prevent-foreclosure/; https://news.va.gov/press-room/statement-from-secretaries-fudge-mcdonough-vilsack-and-yellen-on-continued-efforts-to-connect-homeowners-to-pandemic-relief/; https://www.fhfa.gov/news/news-release/foreclosure-suspension-for-borrowers-applying-for-relief-through-the-homeowner-assistance-fund.

[57] 89 Fed. Reg 60204, 60211.

assistance from a mortgage relief program sponsored by a locality, a state or the federal government to resolve a mortgage delinquency or avoid foreclosure must be treated as a request for loss mitigation assistance that triggers dual tracking protections. This clarification could be made by revising the definition of loss mitigation option as follows:

Loss Mitigation Option means an alternative to foreclosure ~~offered by the owner or assignee of a mortgage loan~~ that is made available ~~through the servicer~~ to the borrower through the servicer or through a mortgage relief program sponsored by a locality, a State, or the Federal government.

In addition, the Bureau could include a comment to the definition of request for mortgage assistance in § 1024.31 stating that:

a request for loss mitigation assistance is deemed to be made by a borrower if the borrower, the borrower's representative, or a representative of a mortgage relief program sponsored by a locality, a State, or the Federal government, such as the Homeowner Assistance Fund program that operated during the COVID-19 pandemic, informs the servicer that the borrower is seeking assistance from such a program.

L. The Bureau's proposed language access requirements will significantly improve outcomes for borrowers with limited English proficiency, but the Bureau should consider making adjustments to improve implementation and breadth of access.

We support the Bureau's proposal to require servicers to provide language assistance to borrowers who would benefit from it. Homeowners who fall behind on their mortgage are usually in the midst of profound personal and financial hardship such as job loss, divorce, illness, or the death of a loved one. In times like these, borrowers need to be able to communicate with their servicers quickly and effectively. Regulation X's early intervention, live contact, and continuity of contact protections were designed to ensure that borrowers in distress are able to apply for loss mitigation in a timely manner, and in a manner that reduces the risk of preventable home loss. Yet, without any requirement that servicers attempt to accommodate borrowers with limited English proficiency ("LEP"), there is no guarantee that borrowers who have difficulties with the English language will be able to get the benefit of these protections. The Bureau's various language access proposals, other than the proposal related to marketing,[58] will work together to ensure that the majority of LEP borrowers will have access to accurate, timely language assistance from their servicers and in doing so, ensure that LEP borrowers have access to the protections federal consumer law provides to English-speaking homeowners.

[58] As discussed below in section L(8), we do not support tying additional servicing obligations to conduct that occurred at the time of loan origination in this proposal.

We are supportive of these measures overall, and have some suggestions for revisions that we believe will provide for smoother implementation and broader access. Specifically, we support:

1. Requiring that bilingual essential documents be provided in both English and Spanish to all mortgage borrowers;
2. Requiring that essential documents contain brief "tagline" or "babel" notices in five servicer-selected languages indicating that translated versions are available;
3. Providing that a failure to provide accurate translation is a violation of both the language access provision and the underlying communication requirements;
4. Requiring that servicers provide, directly or through a third party, oral interpretation services upon borrower request; and
5. Requiring that servicers choose the remaining languages that will receive translated written notices, so long as the languages are chosen according to the language needs of the servicer's specific borrower population.

We also recommend:

1. Requiring that servicers take reasonable steps to provide oral interpretation for specified oral communications with their servicer, extending beyond the proposal's approach of limiting this requirement to the five additional languages for which servicers will be required to provide written assistance.
2. Adding notices of transfers of servicing to the definition of "specified written communications."
3. Building a repository of translated sample notices contemplated by the proposal, to facilitate compliance and ensure that borrowers receive complete and accurate translations.
4. Not hinging language access requirements on originator marketing conduct.

These recommendations are discussed in greater detail below.

1. Inconsistencies in the quantity and quality of language services in the mortgage servicing industry necessitate a broad, industry-wide mandate like the one the proposal contemplates.

Federal agencies, including the CFPB, have engaged in numerous efforts to encourage mortgage lenders and servicers to serve consumers in their preferred language.[59] However, these efforts

[59] See, e.g., Federal Housing Finance Agency, Language Access: Policy Page, available at https://www.fhfa.gov/policy/language-access; Consumer Financial Protection Bureau, Spotlight on serving limited English proficient consumers: Language access in the consumer financial marketplace (Nov. 22, 2017), available at https://www.consumerfinance.gov/data-research/research-reports/spotlight-serving-limited-english-proficient-consumers/; Consumer Financial Protection Bureau, Statement Regarding the Provision of Financial Products and

have led to inconsistent results, even when there are clear financial motivations to serve consumers in other languages, such as the incentive to attract new customers. For instance, while there have been some recent efforts by mortgage lenders to provide language accommodations at the mortgage application stage,[60] we have not seen those shifts occur uniformly across the marketplace or across various points in the mortgage life cycle. This inconsistency means that LEP consumers do not feel entitled to ask for assistance. The lack of access is most pronounced in areas, like the mortgage servicing industry, where the overwhelming market incentive is to keep costs at a minimum.

Even when language services are potentially available, servicers may not see the benefit of having borrowers utilize those services, and thus may either obscure those services by not notifying borrowers that they are available, or make the services difficult for consumers to use. For example, we have observed for years that borrowers waiting to speak with Spanish-speaking servicer staff often experience longer wait times.[61] Borrowers who speak languages of lesser dispersion, who are not used to being accommodated in many financial transactions, also often have no way of knowing that they could even ask for an interpreter or a translated notice letter.

These inconsistencies persist despite the CFPB's best efforts to assuage industry concerns on the risks associated with providing language access, clarifying that it is permissible to start somewhere without providing end-to-end service in all languages.[62] They persist despite efforts by the CFPB, the Federal Housing Finance Administration, and the Federal Housing Administration to translate a large bank of mortgage-related forms and notices into the most prevalent languages spoken by LEP individuals in the U.S.[63]

Services to Consumers with Limited English Proficiency (Jan. 13, 2021), available at https://www.consumerfinance.gov/rules-policy/notice-opportunities-comment/archive-closed/statement-regarding-the-provision-of-financial-products-and-services-to-consumers-with-limited-english-proficiency/; Mortgage Translations, FED. HOUS. FIN. AGENCY, available at https://www.fhfa.gov/mortgage-translations#:~:text=Welcome%20to%20the%20Mortgage%20Translations,English%20proficiency%E2%80%8B%20; Language Access Resources: Translated Mortgage Documents, U.S. Dep't. Hous. & Urban Dev, Office of Hous. and Fed. Hous. Administration, available at https://www.hud.gov/program_offices/housing/translations.

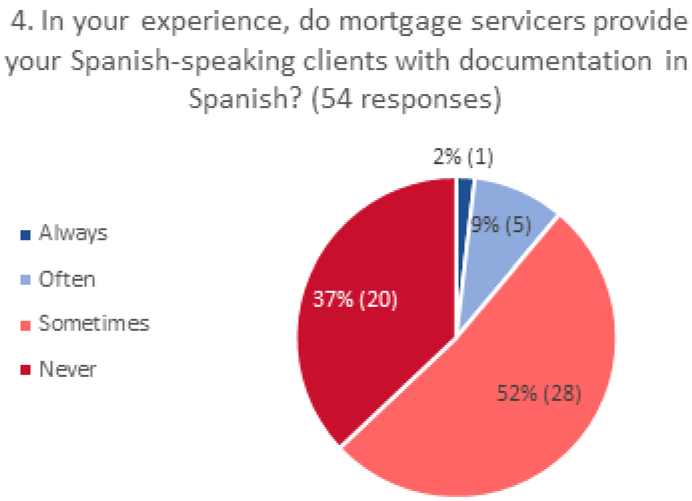
[60] *See, e.g.*, Guaranteed Rate Launches Spanish Language Mortgage Program, National Mortgage Professional (Sept. 22, 2022), https://nationalmortgageprofessional.com/news/guaranteed-rate-launches-spanish-language-mortgage-program.

[61] Americans for Financial Reform's Language Access Task Force, Comments on the Federal Housing Finance Agency's Request for Input on Improving Language Access in Mortgage Origination and Servicing 10 (July 31, 2017), available at https://www.nclc.org/wp-content/uploads/2022/11/comments-afr-task-force-fhfa-rfi-language-access.pdf

[62] Consumer Fin. Protection Bureau, Statement Regarding the Provision of Financial Products and Services to Consumers with Limited English Proficiency (Jan. 21, 2021), available at https://www.consumerfinance.gov/rules-policy/notice-opportunities-comment/archive-closed/statement-regarding-the-provision-of-financial-products-and-services-to-consumers-with-limited-english-proficiency/.

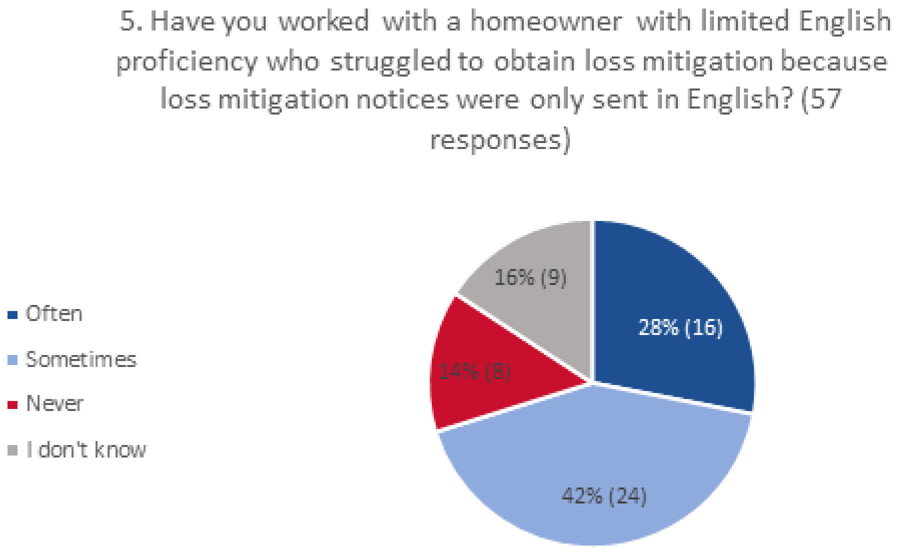
[63] Consumer Fin. Protection Bureau, Helping multilingual communities and newcomers, available at https://www.consumerfinance.gov/language/, Federal Housing Finance Agency, Mortgage Translations, available at https://www.fhfa.gov/mortgage-translations#:~:text=Welcome%20to%20the%20Mortgage%20Translations,English%20proficiency%E2%80%8B%

To illustrate these inconsistencies, the National Consumer Law Center conducted a survey of housing counselors and legal services attorneys that assist LEP homeowners facing the risk of foreclosure. Fifty-nine homeowner advocates from eighteen states responded to this survey, which invited responses from practitioners who serve LEP individuals. When asked whether mortgage servicers provide their Spanish-speaking clients with documentation in Spanish, only 11% of respondents answered "always" or "often," and 37% answered that their clients never receive documentation in Spanish.



When asked about whether they have worked with a homeowner who struggled to obtain loss mitigation because loss mitigation notices were only sent in English, 28% of respondents answered that this happens often, and 42% answered that it happens sometimes.

20(LEP); Language Access Resources: Translated Mortgage Documents, U.S. Dep't. Hous. & Urban Dev, Office of Hous. and Fed. Hous. Administration, available at https://www.hud.gov/program_offices/housing/translations;


5. Have you worked with a homeowner with limited English proficiency who struggled to obtain loss mitigation because loss mitigation notices were only sent in English? (57 responses)

These results indicate that language barriers pose a significant roadblock to many LEP borrowers being able to access available loss mitigation options. These inconsistencies will continue to lead to miscommunication, and preventable home loss, absent a uniform requirement that servicers provide language assistance to borrowers and alert borrowers that assistance is available.

2. **Translated written materials allow borrowers in need to take action quickly, and bilingual documents in English and Spanish provide immediate access to the majority of LEP mortgage borrowers.**

Consumer financial laws often require consumers to know that they have rights in order to exercise them. This is especially true in mortgage servicing. Regulation X, and the Bureau's proposed changes to the loss mitigation process, recognize that a borrower facing financial hardship who either missed a payment or entered a forbearance needs certain information about their status and options in order to apply for a long-term loss mitigation solution. Borrowers receive this information through written notices.

Without a written notice they can understand, LEP borrowers must take additional steps to find someone they trust to help them understand what the notice says and to contact their servicer. This added step of seeking out a third-party to review even the most basic of notices often puts borrowers in a vulnerable position, causes unnecessary delay, and opens the door for additional misunderstanding. This barrier has been long documented by advocates and is described in the

Bureau's proposal.[64] We thus appreciate and strongly support the CFPB's targeted proposal to require that the most essential written notices be sent bilingually to all borrowers in English and Spanish, and that servicers make use of brief "tagline," or "babel," notices in five other servicer-selected languages alerting LEP borrowers that a translation of the notice is available in that language. These requirements, especially for the early intervention notice and the proposed end of forbearance notice, will ensure that LEP borrowers have access to the baseline information to contact their servicers and, if applicable, request language assistance when they need it.

Some may argue that the costs associated with providing bilingual materials may not be justified by the benefits. We disagree. As the Bureau notes in its proposal, Spanish-speaking households with LEP constitute a significant proportion of the U.S. population. According to the 2022 results of the American Community Survey, about one fourth of the American population lives in a household that speaks a language other than English, and of those households, one in five is considered LEP, defined as when no household member over the age of 14 speaks only English, or speaks English "very well." Spanish speakers constitute about 59% of LEP individuals.

We support the CFPB's use of this figure in defining the scope of the relevant population, as opposed to any other figure that has the result of minimizing the overall population of LEP individuals in the country. Self perceptions of English proficiency are subjective, meaning they may vary according to social contexts. Someone may speak English well compared to other members of their community, or in an abstract sense, but would still benefit from language accommodations in highly technical contexts, including documents describing their mortgage loan and how to access potential loss mitigation. Indeed, in a study commissioned by Fannie Mae and Freddie Mac, the Kleimann Communication Group observed that bilingual focus group participants found that translated documents would be helpful to them, so that they could double-check their understanding.[65] We believe the Bureau's characterization of ACS data appropriately accounts for the universe of U.S. households that would benefit from receiving key information about potential loss mitigation from their mortgage servicers.

[64] *See, e.g.*, Americans for Financial Reform Education Fund, Barriers to Language Access in the Housing Market: Stories from the Field, (May 2016), https://ourfinancialsecurity.org/wp-content/uploads/2016/05/AFR_LEP_Narratives_05.26.2016.pdf; Americans for Financial Reform's Language Access Task Force, Comments on the Federal Housing Finance Agency's Request for Input on Improving Language Access in Mortgage Origination and Servicing 10 (July 31, 2017), https://www.nclc.org/wp-content/uploads/2022/11/comments-afr-task-force-fhfa-rfi-language-access.pdf; Americans for Financial Reform's Language Access Task Force, Supplemental Comments on the Federal Housing Finance Agency's Request for Input on Improving Language Access in Mortgage Origination and Servicing 10 (Sept. 1, 2017), https://www.nclc.org/wp-content/uploads/2022/11/letter-fhfa-lep-2nd-submission.pdf; Americans for Financial Reform's Language Access Task Force, Comments to the Consumer Financial Protection Bureau Request for Information on the Equal Credit Opportunity Act and Regulation B (Dec. 1, 2020), https://www.nclc.org/wp-content/uploads/2022/08/LEP_ECOA_Comments_CFPB.pdf.;

[65] Kleimann Communication Group, Language Access for Limited English Proficiency Borrowers: Final Report 9 (April 2017), https://www.fhfa.gov/PolicyProgramsResearch/Policy/Documents/Borrower-Language-AccessFinalReport-June-2017.pdf.

The Bureau's targeted approach to implementing this mandate, beginning with three essential documents, strikes a fair balance between improving access and managing the costs associated with providing documentation bilingually. Because most mortgage servicers have not been tracking language preference in their servicing files, they currently would not be able to reliably identify the borrowers in their portfolio who would benefit from translated notices. Moreover, by providing bilingual notices to all borrowers at the outset, servicers are able to provide immediate access to a majority of LEP borrowers without needing to devote resources to mailing separate notices whenever a Spanish-speaking borrower requests a translated notice. This approach reduces unnecessary friction for both borrowers and servicers. Default bilingual disclosures are a common feature in many aspects of our society, from healthcare, to education, to product safety. Documents alerting homeowners about how they can access potentially home-saving loss mitigation measures should employ this approach as well.

3. **We support the Bureau's decision to allow servicers to select the other languages in which to provide translated written materials, and we agree with the Bureau's decision to require that essential documents contain brief "tagline" or "babel" notices in those servicer-selected languages.**

We are pleased that the Bureau proposes to require servicers to provide specified written communications in languages other than English and Spanish. We recognize that it may be infeasible for servicers to provide translated written material in every single language represented in our country, but we nonetheless appreciate the Bureau's efforts to craft a requirement that will provide accommodations to a substantial majority of LEP mortgage borrowers.

We strongly support the Bureau's decision to make use of mandatory "tagline" or "babel" notices, which alert consumers of the availability of in-language resources and accommodations. Consumers who speak languages of lesser dispersion are often linguistically isolated, with fewer in-language resources available to them, and with often very low (or zero) expectations that they will be accommodated in their preferred language. Informing these borrowers of the availability of in-language resources is especially important, since these consumers are so rarely accommodated in other aspects of their lives in the U.S.

We disagree with any suggestion that the benefits of these requirements are outweighed by the costs. First, the benefits of providing language assistance in default servicing are often overlooked or underestimated because data on language preference, and thus data on loan performance for LEP borrowers, is incomplete. Servicers are not currently required to collect information on borrower language preference unless that information is transferred from the lender through the Supplementary Consumer Information Form, which only became mandatory in new loan originations as of March 2023 for GSE loans, and then later for FHA loans. As recently as 2021, the Bureau noted that servicer practices relating to the collection of language preference information from borrowers were incomplete, inaccurate, and inconsistent. Thus, many servicers have incomplete, or zero, information on the language needs of their specific borrower populations, and the differing default rates among LEP groups. Second, the costs associated with maintaining the status quo are often overlooked; and yet systematic miscommunication with borrowers is expensive to mortgage owners and servicers alike, as it likely leads to longer periods of delinquency and avoidable foreclosures.

Those assessing the cost of providing translated written communications often ignore that the majority of these expenditures are initial investments in translating materials and changing internal processes to allow for translated documents to be provided upon request. Over time, the costs associated with providing these in-language written materials will decrease. Even as the content of these notices may change over time, the vast majority of the text will remain unchanged, and thus require only minor adjustments.

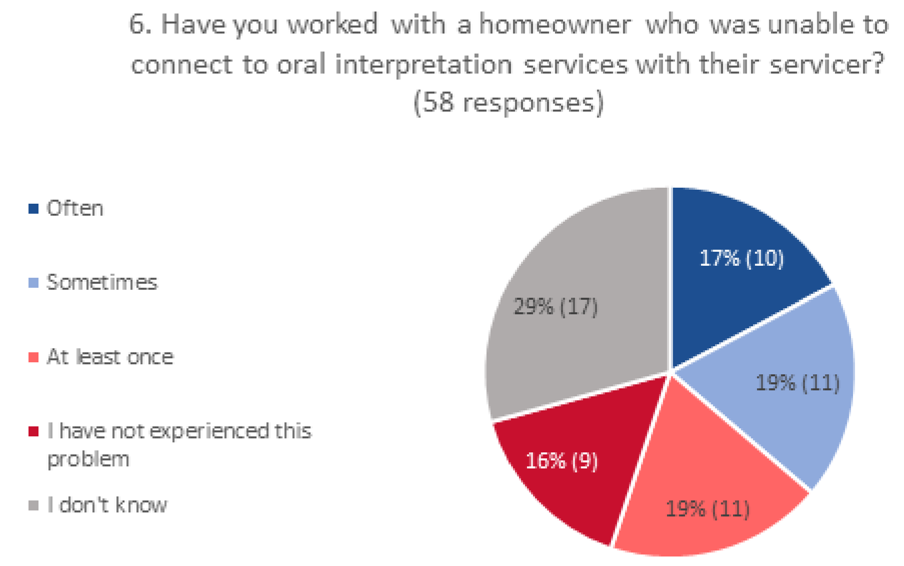
To the extent that the Bureau considers changing this requirement to allow for greater servicer flexibility, such as decreasing the number of languages under this mandate, we suggest that the Bureau incorporate numeric thresholds to determine when a servicer may provide translations in fewer than five languages. Guidance in the Title VI context here may offer a helpful framework. Under Title VI of the Civil Rights Act and Executive Order 13166, recipients of federal financial assistance have the duty to provide meaningful language access to federally funded programs and services. However, meaningful access does not mean providing all written materials in all languages. Rather, meaningful access has been interpreted to include the provision of vital documents, in circumstances when a language group constitutes a certain percentage of the population eligible for the service. The Department of Justice and Department of Housing and Urban Development have both included "safe harbors," or numeric thresholds, used to determine when declining to provide written essential documents does not violate the requirement to provide meaningful access. For example, HUD requires recipients to provide translated vital documents when the eligible LEP population, or current beneficiaries, exceeds one thousand individuals.[66] In the mortgage servicing context, these determinations should be driven by demographic data in the servicer's relevant service area, or by data from its specific borrower population, if complete and accurate data on borrower language preferences is available.

[66] Final Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, Dep't. Hous. Urban Dev., 72 Fed. Reg. 2732, 2736 (Jan. 22, 2007).

4. The Bureau should broaden the requirement for servicers to provide oral interpretation services.

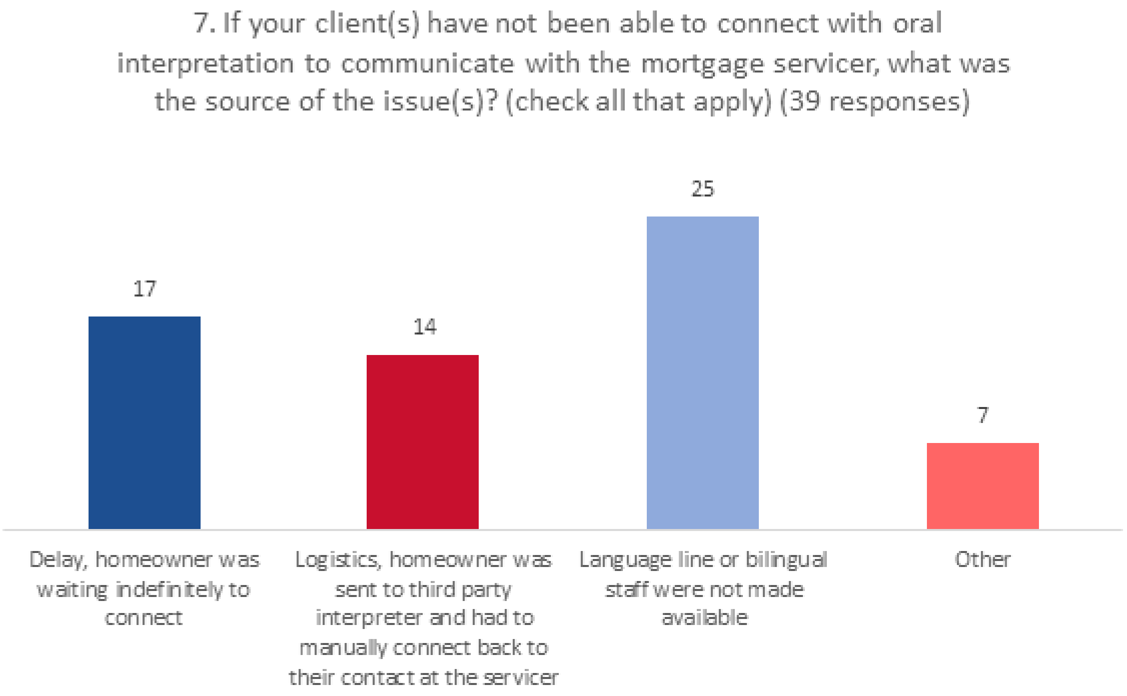
Borrowers who are behind on their mortgage and who may be facing foreclosure need to be able to call their servicers to ask questions about available loss mitigation options and steps required to apply. The Bureau has recognized this need in the general continuity of contact and live early intervention requirements in Regulation X. Borrowers also must be able to check on the status of a request for assistance once they are in a loss mitigation review cycle; this is fundamental to the system envisioned in the proposed rule. Yet, language barriers often get in the way of LEP borrowers receiving answers to even the simplest questions; long wait times, poorly trained bilingual staff, and difficulties connecting with interpreters often result in LEP consumers never being able to connect with in-language resources.

We support the Bureau's goal of requiring servicers to provide some oral language assistance to LEP borrowers, and placing the onus of connecting the borrowers to oral interpretation services on servicers. This will be more efficient and will remove a common barrier that LEP borrowers face in trying to communicate with their servicers. For example, in our August 2024 survey of advocates who serve LEP mortgage borrowers, we asked if the advocate had ever worked with a homeowner that was unable to connect to oral interpretation services with their servicer. Nearly 19% of respondents answered that they have experienced this at least once in their practice, another 19% answered "sometimes," and 17% answered that they experience this "often."



To further clarify this obligation, the CFPB should consider setting parameters around interpreter capacity to ensure that wait times do not exceed appropriate levels, and thus do not discourage LEP consumers from getting the help they need. For instance, the Bureau could fashion this requirement in a manner that is similar to the requirement that the nationwide credit bureaus ensure that the "centralized source" for requesting annual consumer file disclosures be "designed, funded, implemented, maintained, and operated in a manner that…[h]as adequate capacity to accept requests from the reasonably anticipated volume of consumers contacting the centralized source."[67] Similarly, servicer systems for connecting consumers with interpreters should be designed, funded, implemented, and maintained in a way that has appropriate capacity to connect borrowers with language assistance in a timely manner. And when connections cannot be made instantaneously, servicers should be encouraged to schedule a time to call the consumer with the interpreter already on the line.

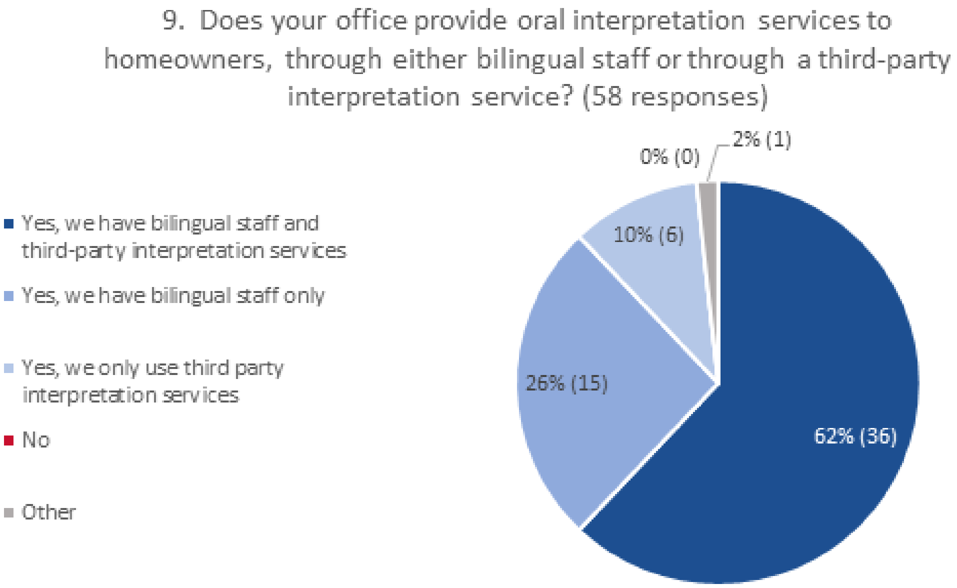
We also asked respondents to our survey to identify the source of the issues their LEP clients faced in connecting with oral interpretation services. Respondents were allowed to select more than one possible answer. Approximately 44% of respondents (17 out of 39) answered that their clients experienced an indefinite delay, and 36% (14 out of 39) answered that the logistics of connecting with the interpreter were too complicated (that the homeowner was the one that had to connect with the interpreter).

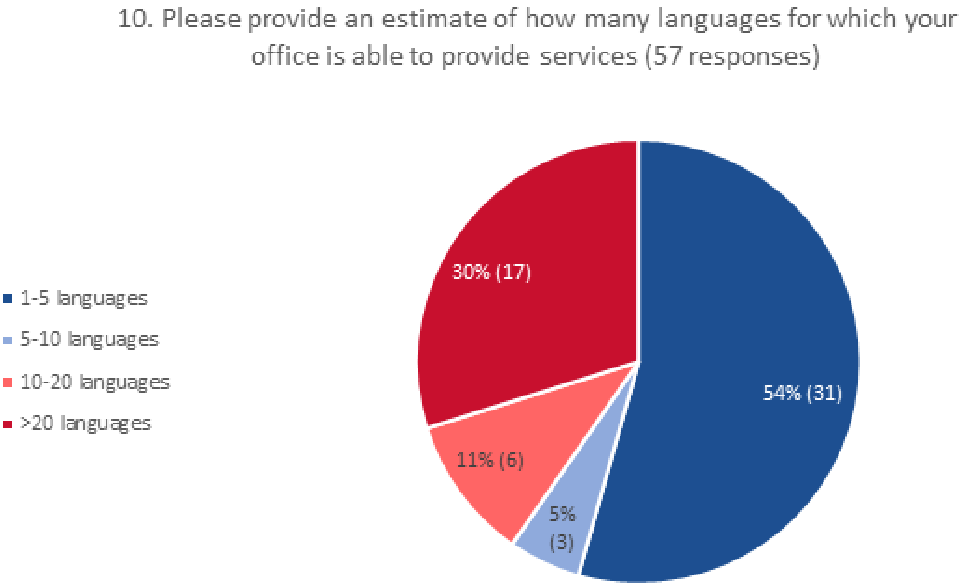

7. If your client(s) have not been able to connect with oral interpretation to communicate with the mortgage servicer, what was the source of the issue(s)? (check all that apply) (39 responses)

To ensure that all LEP borrowers have some baseline access to language assistance, we suggest that the CFPB broaden the number of languages for which servicers will be required to provide assistance. Conference calling has enabled third-party interpretation services to provide assistance to LEP individuals in a range of languages, at a reasonable cost. These third-party

[67] 12 C.F.R. §1022.136(b)(2).

providers enable hospitals, schools, housing counselors, and legal services offices to assist LEP individuals in a broad array of languages, despite often very limited resources. In our survey of advocates, all respondents noted being able to provide some degree of oral language assistance. In our August 2024 survey of advocates who represent LEP clients, all answered that they provide some form of interpretation services, and nearly 30% answered that they provide services in more than 20 languages.


9. Does your office provide oral interpretation services to homeowners, through either bilingual staff or through a third-party interpretation service? (58 responses)


10. Please provide an estimate of how many languages for which your office is able to provide services (57 responses)

If these, often severely resource-constrained, providers can offer assistance in multiple languages, mortgage servicers should be able to do the same. In fact, in our survey of advocates who represent LEP homeowners, many respondents identified the specific vendors they use to provide language assistance to clients, and expressed the point that if they could provide assistance, so could industry:

> "If Legal Services can afford a language line quality interpretation services, then the servicers should easily be able to afford this." (Advocate in Ohio)
>
> "I work at a legal aid service in Philadelphia, a very culturally diverse city. One of the most important tools we have to offer are language services. We have multiple paralegals and attorneys in our Consumer Housing Unit, and across the organization, who speak Spanish and English. Furthermore, we utilize Language Line, a third party service that helps connect us with translators for practically all languages. This service is amazing. Homeowners call our hotline, and once we identify they are not English speaking, we can patch in Language Line to do an intake. We also use Powerling for translating documents to other languages. There are countless times where clients have struggled to receive legal advice or information about their loan due to language barriers in the past, and once we connect with them, we are able to set them up with advice and actions that will help them save their home. If we, as an underfunded legal services organization, can afford to utilize these services for our clients, servicers certainly can afford to do the same." (Advocate in Pennsylvania)[68]

Because of the availability of translation services, providing oral assistance using a reputable interpretation service presents few logistic difficulties and requires little or no change in servicer software and systems. Indeed, as we discussed above, federal agencies in the Title VI context utilize numeric thresholds to determine whether a recipient of federal financial assistance has to provide translated written materials, but no such threshold exists when it comes to providing oral interpretation.[69] The standard in that context is that all recipients of federal financial assistance must provide oral interpretation to program participants and beneficiaries who need assistance.

We recommend that the Bureau implement a similar requirement that servicers engage in reasonable steps to ensure that LEP borrowers who request oral interpretation assistance get connected with a qualified interpreter. Such broad use of oral interpretation services should allow accessibility to expand beyond the five servicer-selected languages that will receive

[68] *See* Appendix D, Excerpts from Narrative Responses from Nationwide Survey of Homeowner Advocates on Language Access Issues.

[69] Final Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, Dep't. Hous. Urban Dev., 72 Fed. Reg. 2732, 2736 (Jan. 22, 2007).

written materials, and enable servicers to serve virtually any LEP homeowner. If the Bureau considers reducing the number of languages that will receive mandatory written assistance, or translated availability statements, that should not affect whether the servicer is required to provide oral interpretation.

5. The Bureau should require that interpreters be "qualified."

We agree that servicers should have some responsibility to ensure that the language services they offer are accurate. However, monitoring the accuracy of oral interpretation is a different task from monitoring the accuracy of a written communication, which can be tested in focus groups, and go through several layers of review for accuracy. Written communications are also able to be memorialized, making the review of such accuracy by bilingual housing counselors and attorneys more effective and more likely to occur. These characteristics make ex-post monitoring and enforcement for accuracy more feasible.

Oral interpretation, on the other hand, is more difficult to monitor for accuracy after the fact, and requires information that would be difficult for advocates to obtain, such as transcripts from calls with servicers. We also recognize that while there are specific credentialing bodies for certain types of interpretation, such as medical or legal interpretation,[70] there is no similar credentialing body for interpreters of financial terms. In the absence of these clear standards, and given the information asymmetries and difficulties in monitoring interpreter effectiveness ex-post, we think the best approach is for the Bureau to impose a general requirement that servicers be responsible for maintaining reasonable procedures to ensure maximum possible interpreter competency.

We recommend that the Bureau impose this reasonableness standard, and provide some examples for how a servicer could comply with this requirement through ongoing monitoring of third-party vendors, ensuring that interpreters are appropriately trained before they are hired, and collecting and addressing complaints on specific interpreters, including those who are employees of the servicer.

6. The Bureau should consider including notices of a transfer in loan servicing in the definition of "specified written communications," especially when transfers of loan servicing take place during a borrower's forbearance or loss mitigation review.

It is not uncommon for the servicing of a borrower's mortgage to transfer either during delinquency, while a borrower may be in forbearance, or in the middle of a loss mitigation review. These transfers can destabilize the process of being evaluated for loss mitigation, especially when a borrower is used to communicating with their servicer in their preferred language. To avoid unnecessary confusion or delay in the process of communicating with their

[70] American Translators Association, Credentialed Interpreter Designation, available at https://www.atanet.org/member-center/credentialed-interpreter-designation/.

new servicer, *the Bureau should consider adding notices of transfer of servicing under 12 C.F.R. 1024.33(b) under the definition of "specified written communications" to be provided bilingually to all borrowers. Transferor servicers should also be required to add translated availability statements in the same servicer-selected languages used for the other specified written communications.*

7. **The Bureau should consider providing the industry with sample notices translated into the eight most commonly spoken languages by homeowners with LEP.**

We recognize that the translation of very technical documents, such as those relating to financial terms, presents some challenges. Most notably, we know that many financial terms relate to unique features of the U.S. financial system, and may not have corollaries in other languages. We also know that the translated written communications contemplated in this proposal are of critical importance to low-income LEP consumers facing financial hardships. It is important to provide access, but it is also important to get it right.

In the interest of making sure that LEP consumers receive complete and accurate translated information, we recommend that the Bureau create a bank of translated model forms for industry to use as the baseline for translating the required information in at least the eight most commonly spoken languages among those individuals with LEP. Creating such a bank will also lower some of the initial compliance costs associated with providing written language access, and it will reduce inefficiencies associated with duplicating efforts to translate often boilerplate language.

The concept of providing model translations is not a novel one. Both the FHFA and FHA have developed repositories of translated model forms, to encourage the industry to voluntarily provide access.[71] And the Bureau itself also translated a sample loan estimate and closing disclosure in Spanish when it amended the TILA/RESPA disclosures and a model validation notice when it promulgated Regulation F, under the Fair Debt Collection Practices Act. The Bureau should consider expanding on this effort.

8. **Hinging servicing requirements on originator conduct is likely to present serious implementation challenges and that would be moot with more robust, uniform access to oral interpretation.**

We appreciate the CFPB's attention to the issue of in-language marketing being used as a tool to lure LEP consumers into transactions, only for servicers to later decline to provide language

[71] Mortgage Translations, FED. HOUS. FIN. AGENCY, available at https://www.fhfa.gov/mortgage-translations#:~:text=Welcome%20to%20the%20Mortgage%20Translations,English%20proficiency%E2%80%8B%20(LEP); Language Access Resources: Translated Mortgage Documents, U.S. Dep't. Hous. & Urban Dev, Office of Hous. and Fed. Hous. Administration, available at https://www.hud.gov/program_offices/housing/translations.

access when they need assistance. However, we have several concerns about the components of the proposed rule regarding in-language marketing and believe they will provide limited benefits to LEP consumers.

First, the requirements are only triggered by a borrower's request for assistance (for borrowers who received marketing in-language). As we discuss earlier in this letter, consumers must know they are entitled to something in order to ask for it. The proposal does not contemplate how an LEP consumer would find out that in-language marketing for their mortgage triggered additional rights, often years after taking out the mortgage.

The proposal also does not address what behavior or information may trigger the threshold for the servicer's knowledge, or imputed knowledge, of this in-language marketing behavior (generally conducted by another party). Information on lender/originator marketing conduct is not transferred with the servicing of the loan and is not regularly maintained by servicers. Thus, it is unclear whether any servicer that did not also originate the loan would, or, under current rules, should, have this information. This requirement is also easily evaded by selling the loan's servicing rights whenever the servicer learns, from the borrower or otherwise, that the borrower received in-language marketing materials or solicitations from the lender before origination. Evasion could occur because the new servicer would only have the obligation if the information were conveyed to it, and the initial servicer's knowledge about in-language marketing might not be conveyed to the new servicer.

Finally, and perhaps most importantly, if the CFPB were to implement a requirement for oral interpretation services in a broad array of languages, as we suggest above, the need for this additional requirement would become a moot point. *LEP homeowners who need assistance from their mortgage servicers should be able to get it, regardless of their lender's conduct years before.*

M. The Bureau should require, rather than permit, servicers to provide dual tracking protections for successors in interest upon receipt of a request for assistance, and should define "borrower" to include a signer of a security instrument.

The Bureau seeks comment on additional steps it could take to better protect successors in interest ("successors") and other joint homeowners who do not meet the strict definition of a successor but who need to be able to communicate about the mortgage secured by their home. The two most impactful steps the Bureau could take to protect these vulnerable homeowners would be: (1) require, rather than permit, servicers to provide procedural safeguards to potential successors from the time they make a request for assistance, and (2) define a "borrower" under RESPA to include a signer of the security instrument or the promissory note.

1. Successors need mandatory foreclosure protections beginning with a request for assistance, rather than having to be confirmed by the servicer before protections begin.

The CFPB issued its successor in interest amendments to Regulation X in 2016, effective April 2018, in response to reports of widespread difficulties faced by non-borrowers who had obtained a home through a death or divorce and were attempting to pay the mortgage or avoid foreclosure. The new rule gives these successors the protections of the RESPA and Truth in Lending Act (TILA) mortgage servicing rules, once they are "confirmed" by the mortgage servicer as a successor in interest. Over seven years after the successor rule took effect, however, attorneys and counselors representing homeowners continue to cite difficulties obtaining loss mitigation and information about the mortgage secured by their home, despite the existing successor rule.

Primarily, these difficulties stem from unreasonable conduct by servicers in the process of confirming a successor's identity and ownership interest. Servicers fail to timely evaluate documents submitted by successors, request the same document over and over again, and ask for documents that do not exist or are not reasonably necessary.[72] These communication difficulties create delays for potential successors in confirming their successor in interest status, frustrating their ability to proceed through a loss mitigation review and to obtain foreclosure protections.

a. Older adults, women, and communities of color are most impacted.

Successor-in-interest issues significantly impact older adults, as most people inheriting the home of a spouse or parent are in their 60s or older.[73] Older adults may also face technological barriers that make it difficult for them to communicate with servicers, particularly in the immediate aftermath of a family member's death. The harm also falls disproportionately on women, as they are more likely to survive a male spouse and to have been a non-borrower on the home loan due to the wage gap. The burden of these mortgage servicing problems is hitting the hardest in communities of color due to lower accumulated wealth and a slower full economic recovery after the COVID-19 pandemic.[74]

b. Examples of problematic servicer practices.

The current experience of homeowners seeking confirmation of their successor in interest status demonstrates that servicers too often fail to confirm successors in interest even when they qualify as such, highlighting the risks created for successors when servicers delay until confirmation to

[72] Comments of the National Consumer Law Center and other organizations on the Notice of Assessment of 2013 RESPA Servicing Rule and Request for Public Comment (July 10, 2017), https://www.nclc.org/resources/comments-2013-respa-rule/; Comments of the National Consumer Law Center and other organizations on the Request for Information Regarding Mortgage Refinances and Forbearances, 87 Fed. Reg. 58487, Docket No. CFPB-2022-0059 (Nov. 28, 2022), https://www.nclc.org/wp-content/uploads/2022/11/CFPB_group_mortgage_refinance_comment.pdf.

[73] Tanza Loudenback, "The Typical American Heir is Now a Middle Class 50-something Who Puts the Money Towards Retirement," Business Insider (Nov. 21, 2019), https://www. businessinsider.com/personal-finance/older-americans-get-more-inheritances-use-forretirement-2019-11.

[74] *See, e.g.*, American Civil Liberties Union and MFY Legal Services, Inc., *Here We Go Again: Communities of Color, the Foreclosure Crisis, and Loan Servicing Failures* (Apr. 9, 2015), https://www.aclu.org/documents/here-we-go-again-communities-color-foreclosure-crisis-and-loan-servicing-failures

provide them with foreclosure safeguards. In a January 2024 NCLC survey of homeowner advocates, 80% of respondents reported that they had worked with clients who, despite sending the documentation reasonably necessary to show their identity and ownership interest, still struggled to get a servicer to confirm their status. Over half of respondents said they had experienced this "several" or "many" times.[75] Three out of four respondents had worked with successors in interest whose servicers required them to submit the same document(s) multiple times. Nearly 40 percent of respondents said they had been in contact with a successor in interest whose servicer required them to submit documents that either do not exist or are not reasonably required under the applicable law and facts, with over a quarter of surveyed respondents expressing that they had experienced this "several" or "many" times.[76]

Even after being confirmed as successors in interest, servicers sometimes treat successors as if they were not yet confirmed. Nearly half of NCLC's survey respondents had been in contact with a successor who was confirmed as a successor in interest by a servicer, but was later treated as if they were not a confirmed successor by the same servicer. Roughly one in five respondents had experienced this "several" or "many" times.[77]

Difficulties in being deemed confirmed as a successor in interest result in significant delays that imperil a homeowner's ability to stay in their home. Nearly three in four survey respondents reported an unnecessary delay of three months or longer in a mortgage servicer's confirmation of a successor in interest, with over one in five respondents having seen clients experience an unnecessary delay of a year or more.[78]

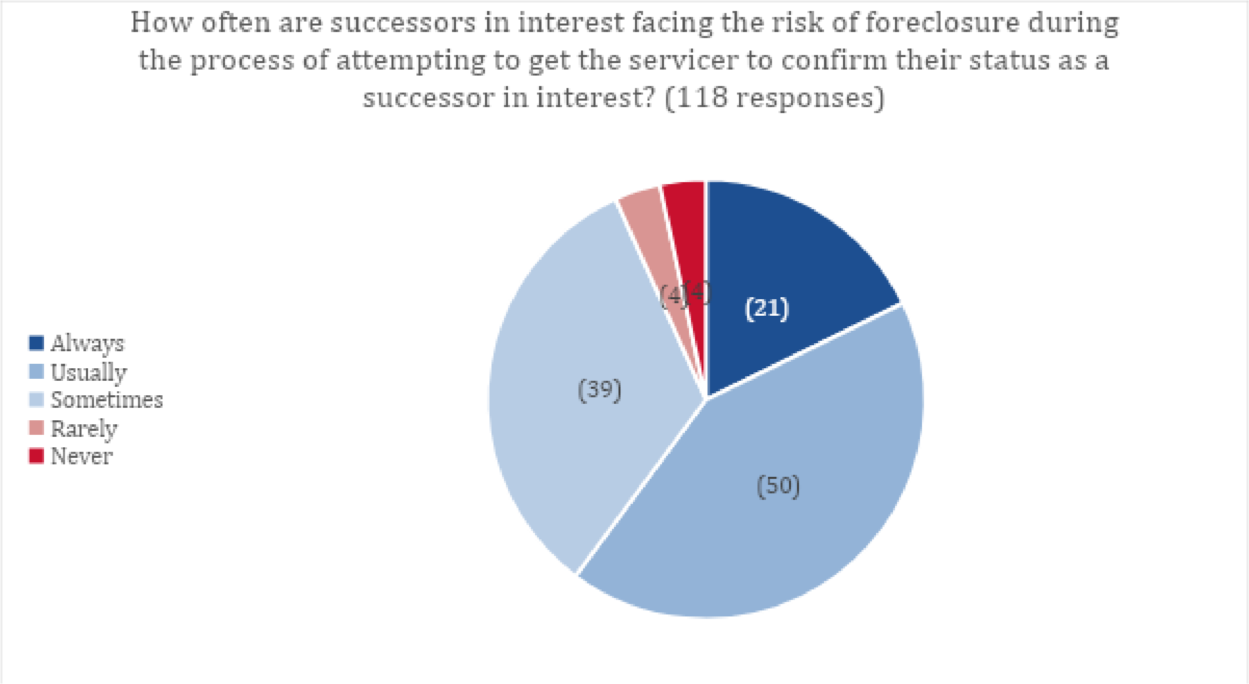
NCLC sought additional information from homeowner advocates in our August 2024 survey in connection with the proposed rule. More than 93% of respondents had experience assisting a successor in interest who was at risk of foreclosure while attempting to be confirmed as a successor. Eighteen percent responded that this is "always" the case in their experience, and 42% described it as "usually" occurring. Moreover, 93% of survey respondents had experienced unreasonable delays by servicers in confirming successor status, with 18% stating this "always" occurs and an additional 42% stating that it "usually" occurs in successor cases.

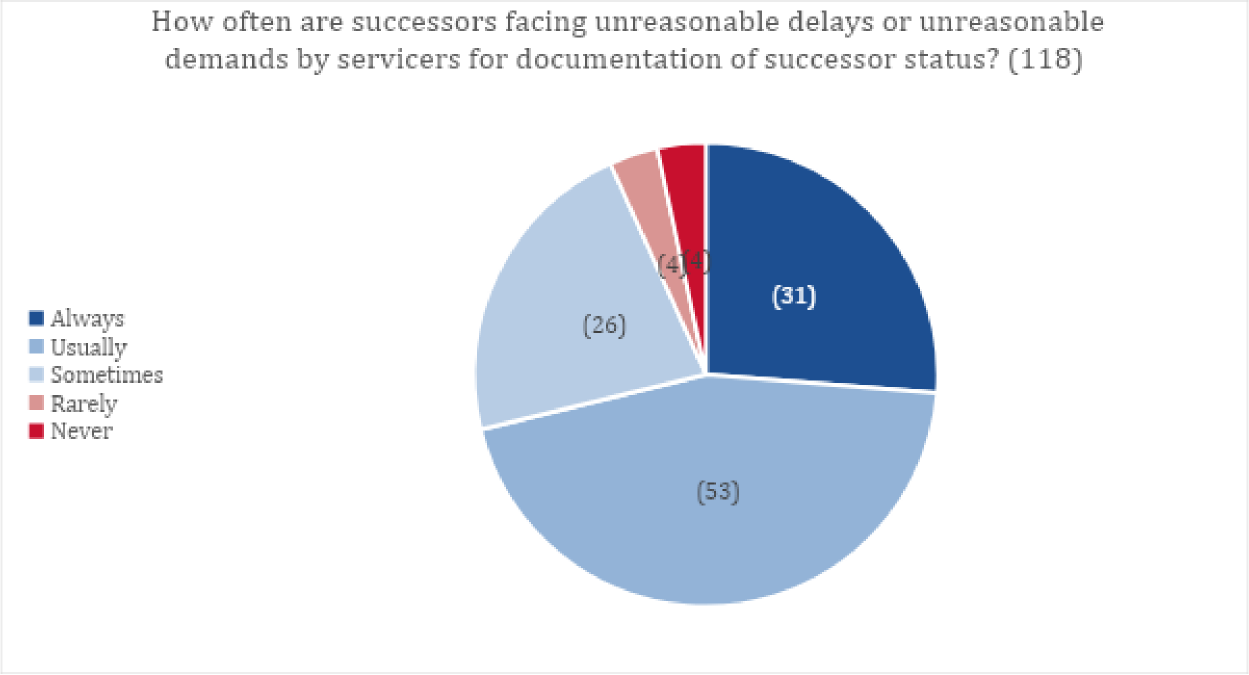
[75] National Consumer Law Center, *Homeowners at Risk: Nationwide Survey Reveals Critical Gaps the CFPB Must Address to Prevent Foreclosures (Feb. 2024)*, https://www.nclc.org/wp-content/uploads/2024/02/20240220_Issue-Brief_Homeowners-at-Risk_Combined.pdf. The survey was open from January 22 to January 29, 2024. More than 100 people working in 26 states responded to the survey. The respondents were HUD-certified housing counselors (46), legal services attorneys (43), private consumer attorneys (8), other nonprofit employees (3), and one court employee. The survey's results showed significant ongoing problems with successor-in-interest reviews, zombie second mortgages, and communication with LEP consumers about loss mitigation.

[76] *Id.*

[77] *Id.*

[78] *Id.*


How often are successors in interest facing the risk of foreclosure during the process of attempting to get the servicer to confirm their status as a successor in interest? (118 responses)


How often are successors facing unreasonable delays or unreasonable demands by servicers for documentation of successor status? (118)

One Georgia advocate highlighted the perils of delay. Her client, Mrs. B, was a 73-year-old African American widow who had lived in her home for over 29 years. Mrs. B's husband had always handled the mortgage payments and did not discuss the mortgage with his wife. Mrs. B did not realize that the mortgage payments had fallen behind during the illness that eventually led to her husband's death. After her husband died and she learned that the mortgage was in default, Mrs. B promptly began communicating with the mortgage servicer to try to find a way to save her home. Servicer representatives repeatedly told Mrs. B that they could not communicate with her because she was not on the loan. They did not tell her what she needed to do to be recognized as a successor in interest. In late March 2023, a supervisor at the servicer finally told Mrs. B that she could submit a loan modification application, which she did on March 31, 2023. On April 4, 2023, the mortgage servicer conducted a nonjudicial foreclosure of Mrs. B's home. On April 5, 2023, she called the mortgage servicer (believing the foreclosure had not gone through), and the representative she spoke with told her she needed to file for probate of her husband's estate. Despite her many prior phone calls, this was the first time the servicer had mentioned to Mrs. B the need for probate.[79] Of course, such conduct directly violates the requirements of 12 C.F.R. § 1024.38(b)(1)(vi) that servicers promptly determine the documents a servicer needs to confirm successor status and provide a description of those documents to the potential successor.

c. The proposed rule should be modified to require servicers to provide procedural safeguards to potential successors in interest beginning with a request for assistance.

Proposed comment 41(f)(2)-7.i provides, "[I]f a servicer receives a request for loss mitigation assistance from a potential successor in interest before confirming that person's identity and ownership interest in the property, the servicer may, but is not required to, comply with the foreclosure procedural safeguards in § 1024.41(f)(2) with respect to that person."[80] Proposed comment 41(f)-7.ii provides, "[I]f a servicer receives a request for loss mitigation assistance from a potential successor in interest and elects not to comply with the foreclosure procedural safeguards before confirming that person's status, the servicer must comply with those safeguards with respect to that person as soon as the person becomes a confirmed successor in interest and must treat the request for loss mitigation assistance as if it had been received on the date that the servicer confirmed the successor in interest's status."[81]

The Bureau's decision to commence foreclosure protections with a request for assistance, abandoning the prior rule that required a borrower to first achieve a "complete" application, is based in part on its own finding that difficulties and delays in such an exchange of paperwork led to many unnecessary foreclosure and the accumulation of foreclosure-related fees. The same reasoning applies to successors in interest.

In order to protect successors in interest from facing the risk of foreclosure and incurring foreclosure fees and costs while attempting to be confirmed, it is essential that these successors receive foreclosure procedural protections from the moment they make a request for assistance. Like other borrowers, a loss mitigation review cycle should be begin for successors with a request for assistance, and servicers should then be required to exercise reasonable diligence in obtaining whatever information they reasonably need to confirm successor status and evaluate

[79] *Homeowners at Risk: Nationwide Survey Reveals Critical Gaps the CFPB Must Address to Prevent Foreclosures (Feb. 2024)* (Details provided by J. Rachel Scott, Senior Attorney, Atlanta Legal Aid Society, January 2024. Fortunately, Ms. Scott was able to get the foreclosure sale rescinded, which would not have been possible without legal representation).

[80] 89 FR 60204, 60212.

[81] *Id.*

loss mitigation options. If the potential successor fails to provide reasonable proof of successor status or reasonable documents or information in response to the servicer's requests, the servicer could make a determination that the person is not a successor or deny them for loss mitigation options on that basis, ending the protections.

In order to fully effectuate protections for successors beginning with the request for assistance, the Bureau should modify § 1024.30(d) to provide that a "*successor in interest* shall be considered a borrower for purposes of 1024.17 and this subpart," rather than a "*confirmed* successor in interest" being considered a borrower. The Bureau should also withdraw proposed comments 41(f)(2)-7i and ii. If these changes are adopted, servicers will have to implement systems to honor procedural safeguards from the moment of a request for assistance from any potential successor, up through the moment when they are determined not to be a successor or through the time when a safeguard has been satisfied.

2. Other joint homeowners who are not transferees, but who signed the mortgage security instrument, should be included in the definition of "borrower" under Regulation X.

The Bureau also asks about other categories of homeowners who do not fit the definition of successor but need to communicate about the mortgage. Co-owners who signed the security instrument but did not sign the home's promissory note too often are denied information or loss mitigation reviews with respect to their home's mortgage.[82] Courts have held that a co-owners who has signed the security instrument but not the note is not a "borrower," so is not entitled to RESPA's loss mitigation protections.[83] Many of these co-owners also fall outside the definition of "successor in interest" because they did not acquire their ownership interest through inheritance, divorce, or one of the other types of transfers listed in that definition.[84] The January 2024 NCLC survey reveals that over three quarters of respondents surveyed had experienced a situation in which a co-owner of the property who signed the security instrument, such as a mortgage or deed of trust, but was not a borrower on the promissory note struggled to get information about the mortgage or apply for loss mitigation.[85]

Many of these cases involve domestic violence, where the homeowner seeking information or loss mitigation assistance is an individual who has remained in the home and has not yet been able to obtain a divorce or a quitclaim deed from an abusive ex-partner or spouse who has left the home. Nearly 40% of respondents had worked on cases where a co-owner of the property was a survivor of intimate partner violence or emotional, financial, or physical abuse, with nearly 20% of respondents experiencing these cases "several" or "many" times.[86] Often servicers will tell survivors that they cannot get information about the mortgage loan or apply for a loan modification unless the ex-partner or spouse participates in the process or signs a quitclaim deed;

[82] 89 FR 60230.

[83] *See* National Consumer Law Center, Mortgage Servicing and Loan Modifications § 3.2.3 (2d ed. 2023), *updated at nclc.org/library*.

[84] Reg. X § 1024.31.

[85] Homeowners at Risk, *supra* note 74**.**

[86] *Id.*

however, communicating with the ex-partner or spouse puts these homeowner-occupants in significant danger.

To protect these homeowners, the Bureau should propose a definition of “borrower” in Regulation X to include any person who signed the security instrument in connection with a mortgage loan even if they did not sign the promissory note. Currently, “borrower” is not defined in the RESPA statute or the regulation. This change would make sense for the same reasons it made sense to include successors in interest in the definition of borrower: a person is entitled to information and loss mitigation for the mortgage secured by their home.

N. In order to address persistent problems with zombie second mortgages, the Bureau should repeal the HELOC exemption in Regulation X’s Subpart C.

The current zombie second mortgage crisis arose from a surge of second mortgages originated in the early 2000s, pushed by subprime mortgage brokers and lenders to borrowers who needed the extra financing to purchase or refinance a home. When housing prices were still on the rise, second mortgages, also called 80/20 or piggyback loans, seemed like a sound financial risk for lenders. However, as housing values plummeted in the mid-2000s, many lenders unloaded the loans for pennies on the dollar to debt buyers. These loans then sat dormant, with little to no communication with borrowers–until recently, when housing prices soared and they emerged to foreclose and capture the consumers’ hard-earned home equity.

The CFPB has acknowledged this zombie mortgage crisis and the challenges it creates for borrowers. In April 2023, the Bureau took initial steps to address this issue through a public hearing in New York City and an advisory opinion regarding violations of the FDCPA for threatening to foreclose on time-barred debt. Since then, the CFPB has not taken any additional public steps to address this problem. In this notice of proposed rulemaking it has asked for information about data sources regarding zombie second mortgages, comments on whether zombie second mortgages are likely to continue causing consumer harm, and comments about additional steps it should take.

Our responses to these questions are set forth below. As for additional steps the CFPB should take, the most important is to repeal the agency-created exemption of HELOCs from subpart C of Regulation X. This would mean that HELOCs—which make up the majority of zombie second mortgages—would be subject to the same important protections to access information, allege errors, and receive loss mitigation as traditional second mortgages. Significant shifts in the mortgage lending and servicing markets over the last ten years have further illuminated the need to give HELOC borrowers the important protections of subpart C of Regulation X.

1. Data

The CFPB has asked for data and information on the prevalence of issues regarding zombie second mortgages. We do not know of any publicly available nationwide compilation of data about zombie second mortgages. However, we know of some data sources that can be tapped for information about the prevalence of foreclosure on zombie second mortgages in particular states. These are discussed in the next subsection.

In addition, recent news articles on the zombie second mortgage problem may be helpful, as the news outlets appear to have done the legwork to document the extent of the problem. For example, a July 2024 CBS News piece reported that, during 2006 and 2007, 30% of second mortgages became delinquent and many lenders wrote off the debt or sold the debt for less than what was owed.[87] These mortgages are now the ones that are coming to life and threatening foreclosure if homeowners do not pay a large alleged lump sum payment. An NPR piece in May 2024 reported that there is now foreclosure activity on at least 10,000 of these second mortgages.[88] In Maryland alone, holders of more than 700 zombie second mortgages initiated foreclosure proceedings against borrowers between January 2019 and July 2023.[89] The report also found that the Maryland foreclosures were concentrated mostly in predominantly Black neighborhoods.[90]

In NCLC's August 2024 survey of homeowner advocates, 90% of the 116 respondents to this question reported having seen clients with zombie second mortgages, and 56% of that total reported seeing clients with zombie second mortgages either always, usually, or sometimes.[91] Seventy-five percent of survey respondents reported that their zombie second mortgage clients always, usually, or sometimes have not received monthly mortgage statements for 2 years or more. Eighty-five percent of survey respondents said that either always, usually, or sometimes their clients with zombie seconds have been charged interest on the loan during the time they were not receiving monthly statements. Seventy-four percent of respondents said that their zombie second mortgage clients are always, usually, or sometimes on the verge of losing their homes, or have lost their homes, because of a zombie second mortgage. Seventy percent of respondents said that the zombie second mortgages they see are either always, usually, or sometimes Home Equity Lines of Credit (with 35% answering either "always" or "usually"). In

[87] Could a zombie mortgage put you at risk of foreclosure? Long-forgotten debt is coming back to haunt homeowners, Ash-har Quraishi, Josh Peña, Ryan Beard, Taylor Johnston, Amy Corral, CBS News, July 24, 2024. Found at: https://www.cbsnews.com/news/zombie-mortgages-debt-haunt-homeowners/

[88] Zombie 2nd mortgages are coming to life, threatening thousands of Americans' homes, Chris Arnold, Robert Smith, Jess Jiang, Sam Yellowhorse Kesler, Robert Benincasa, Nick McMillan, Planet Money, NPR May 18, 2024. Found at: https://www.npr.org/2024/05/10/1197959049/zombie-second-mortgages-homeowners-foreclosure

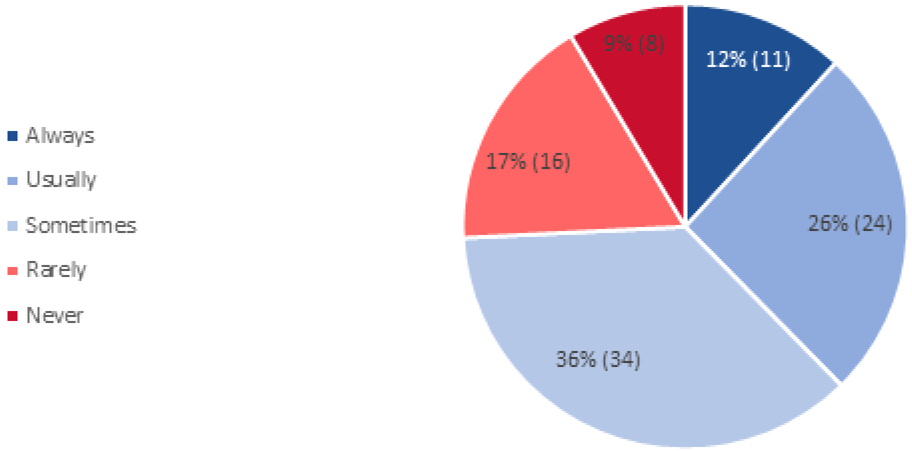
[89] *Id.*

[90] *Id.*

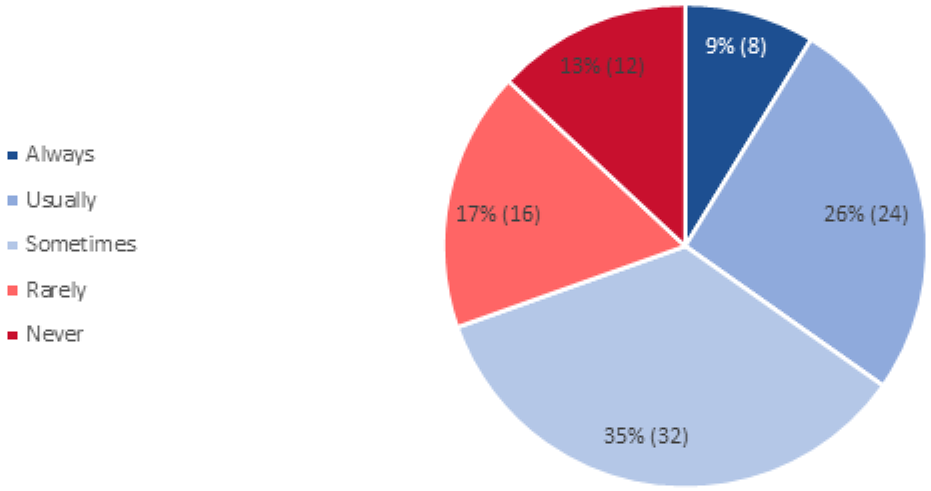
[91] Appendix A, Question 15.

addition, NCLC's January 2024 report included a number of examples of zombie second mortgages that were HELOCs.[92]

19. How often have your clients been on the verge of losing their homes, or have lost their homes, because of a zombie second mortgage when they come to you? (93 responses)



18. How often is the zombie second mortgage a HELOC (Home Equity Lines of Credit)? (92 responses)



[92] Homeowners at Risk, *supra* note 74, at 30.

2. Suggestions for collecting data

The CFPB has additional options for collecting data to better understand the scope of zombie second mortgage foreclosures. Certain states have very useful data sources. The NPR reporters who produced the news article discussed above found three states-- New York, Maryland, and Massachusetts--that require pre-foreclosure notices to be provided to the borrower and a state agency. They were able to access the Maryland and Massachusetts information and extract data from it about who owns these zombie seconds, and who are the servicers or debt collectors - without looking at each and every individual county.

In New York this data is shielded from disclosure under the state's public records law. NPR was able to get a general summation of the data from a non-profit that has access to the actual data for foreclosure prevention outreach purposes. The New York data comes from the required 90-day pre-foreclosure notices on junior-lien mortgages sent to the New York Department of Financial Services. New York may be a particularly fruitful state in which to review data, because there appear to be more than 10,000 zombie second mortgage loans in NY alone.

In Maryland, NPR got the actual data from the Maryland DOL Office of Financial Regulation. The data included information about a number of second mortgages that defaulted more than a decade ago, where the last payment received was more than a decade ago and where a Notice of Intent to Foreclose was filed between January 2019 and July 2023. Maryland requires the name of the servicer, the owner of the debt, the homeowner, and the original lender to be included on the pre-foreclosure notice.

In Massachusetts, NPR reviewed data from the Massachusetts Division of Banks.[93] Similar to Maryland, Massachusetts collects a number of data points about each of these old second mortgage loans.

There are other states that require pre-foreclosure notices. Maine is one such state, but because the information was protected by the state's open records law, NPR could not access it. This might not be a barrier for the CFPB under inter-agency information sharing. California also requires pre-foreclosure filings, and many of the court decisions on zombie second mortgages in the last three years have come from California.[94] It is likely there are tens of thousands of zombie

[93] This portal describes how a lender/servicer can initiate foreclosure proceedings: https://www.mass.gov/how-to/file-a-foreclosure-petition-with-the-division-of-banks.

[94] See e.g.: Warren v. Specialized Loan Servicing, LLC, 2024 WL 3207003 (C.D. Cal. 2024); Valladares v. Specialized Loan Servicing, LLC, 2023 WL 8435575 (E.D. Cal. 2023); Woods v. Wilmington Savings Fund Society, 2023 WL 6373064 (N.D. Ga. 2023); Supriyanto v. Bank of New York Mellon, 2023 WL 7107133 (C.D. Cal. 2023); Majano v. Specialized Loan Servicing, LLC, 2023 WL 2918729 (C.D. Cal. 2023); Novobilski v.

second mortgages in the state. In general, we recommend that the CFPB investigate what data about zombie second mortgages is available from states that require pre-foreclosure notices.

3. Risk of Future Harm

The CFPB also seeks comments on whether and to what extent this issue may
continue to cause consumer harm in the future. The zombie second mortgage crisis is not just a one-time phenomenon. While it arose from a surge of second mortgage lending in the early 2000s that was followed by a major mortgage market downturn, those conditions are not unique to that one time period.

Indeed, we are again in a time of increasing real estate prices, and once again there are signs of an upsurge of piggyback loans. These loans are marketed to borrowers who are unable to put down the required 20% downpayment and instead borrow the downpayment through a second mortgage. Piggyback FHA-sponsored purchase originations increased from 10.8% to 18% in June 2024.[95] Piggyback loans in the conventional market rose from 2.2% to 3.6%.[96] Since these loans tend to be pushed on lower-income families who need 100% financing, there is reason to be concerned that they may have a disproportionate impact on families of color, due to the racial wealth gap. Borrowers may also be using piggyback loans to avoid private mortgage insurance or to pay expensive closing costs.

We are also seeing a new, similar cycle begin with Home Equity Lines of Credit (HELOCs). A study conducted by ICE Mortgage Technology found that as of May 2024, 48 million homeowners with mortgages had some level of equity in their home and the average amount of equity was $206,000 per borrower.[97] This is an increase from $185K at the same time last year. Surging property values and increased interest rates that make a new purchase or refinance unaffordable have sparked a historic increase in HELOCs. HELOC originations and home equity loans increased 50% in 2022[98] and the numbers keep increasing.[99] The ICE report noted, "Second lien home equity products remain particularly attractive options for such borrowers wanting to access some of this abundant equity while maintaining their historically low interest

Specialized Loan Servicing, LLC, 2022 WL 17218504 (C.D. Cal. 2022); Nyingifa v. Specialized Loan Servicing, 2022 WL 2125145 (C.D. Cal. 2022); Gonzalez v. Specialized Loan Servicing, LLC, 691 F.Supp.3d 1162 (C.D. Cal. 2023); Habtemariam v. Vida Capital Group, LLC, 2021 WL 1966325 (E.D. Cal. 2021).

[95] Spencer Lee, "Piggyback mortgages make a comeback," National Mortgage News (August 12, 2024).

[96] *Id*.

[97] ICE Mortgage Monitor: Historically Strong Home Price Growth Pushes U.S. Mortgage Holders' Tappable Equity to Record $11T, May 6, 2004, https://s2.q4cdn.com/154085107/files/doc_news/ICE-Mortgage-Monitor-Historically-Strong-Home-Price-Growth-Pushes-U.S.-Mortgage-Holders-Tappable-Equity-to-Record-11T-2024.pdf

[98] MBA: Home Equity Lending Volume Rose in 2022 as Home Renovations Drive Demand, July 25, 2023, https://newslink.mba.org/servicing-newslink/2023/july/mba-servicing-newslink-tuesday-aug-1-2023/home-equity-lending-volume-rose-in-2022-as-home-renovations-drive-demand/

[99] HELOC Originations at 8-Month High, June 3, 2024, https://www.hel.news/articles/news/heloc-originations-060324/

lien rates."[100] This increase in interest in HELOC products has created a secondary market for HELOCs. Since 2022 there has been an increase in lenders offering HELOC-backed residential mortgage-backed securities. These include Rocket Mortgage, Figure, Achieve, JPMorgan and Goldman Sachs.[101]

These loans may be the zombie second mortgage loans of the future. The traditional cycle in the real estate market is a) recovery from a bottomed-out market, b) expansion of demand for real estate and therefore mortgage products, c) a hyper supply of real estate that leads to too much inventory and reduction in the demand for real estate and mortgages and d) recession where the market and demand slows down and home values plummet until it slowly moves into the recovery phase again.[102]

We can see this pattern in the early 2000s when there was a huge expansion of mortgages and home purchases, only to lead to a financial crisis that began in the fall of 2007 and developed into a collapse of housing values and a severe recession by 2009. This is when many lenders sold their now-worthless second mortgages at a discount rate or simply put them on the back burner to simmer until the cycle shifted. Slowly the economy began to improve in the mid-2000s and by 2020, housing prices in many areas were soaring. But this expansion phase will not last forever. Eventually housing values will stabilize and may even fall. When that happens, the second mortgages will again be worth very little and lenders will again sell them off or ignore them waiting for an up-turn in the housing cycle. Therefore it is imperative to put protections in place for borrowers now to prevent another zombie second mortgage crisis.

4. The HELOC exemption in Regulation X's Subpart C is no longer appropriate and should be repealed.

The CFPB seeks comments on any additional actions the CFPB could take, including amending existing rules, to better protect borrowers from harm caused by collection activity on these types of mortgages. We strongly urge the CFPB to repeal the exemption of HELOCs from Subpart C of Regulation X. This step will greatly improve protections for the many zombie second mortgages that are HELOCs, and for the HELOCs that are currently being originated. As described above, seventy percent of respondents to NCLC's nationwide survey of advocates said

[100] ICE Mortgage Monitor: Historically Strong Home Price Growth Pushes U.S. Mortgage Holders' Tappable Equity to Record $11T, May 6, 2004, https://s2.q4cdn.com/154085107/files/doc_news/ICE-Mortgage-Monitor-Historically-Strong-Home-Price-Growth-Pushes-U.S.-Mortgage-Holders-Tappable-Equity-to-Record-11T-2024.pdf

[101] How big can home equity securitizations get? Spencer Lee, National Mortgage News, June 14, 2024.

[102] *See* How to Use Real Estate Trends to Predict the Next Housing Bubble, Teo Nicolais, Harvard Extension School, Oct. 2016. Found at: https://extension.harvard.edu/blog/how-to-use-real-estate-trends-to-predict-the-next-housing-bubble/

that the zombie second mortgages they see are either always, usually, or sometimes Home Equity Lines of Credit (with 35% answering either "always" or "usually").

In 2013, during the financial crisis, the CFPB amended Regulation X by modifying and adding important home-retention protections to Subpart C for homeowners struggling to retain their homes. However, the Bureau retained the pre-existing exemption for HELOCs from these vital servicing protections. In this current proposed rulemaking, the CFPB has again failed to remove the exemption for HELOCs.

The HELOCs exemption was first adopted by HUD when it had authority over RESPA.[103] The scope of the Subpart C provisions of Regulation X (§§ 1024.30 through 1024.41) apply to "mortgage loans,"[104] and that term is defined as federally related mortgage loans, but does "not include open-end lines of credit (home equity plans)."[105] Thus, a servicer does not need to comply with the Subpart C requirements if the mortgage loan is a HELOC, even if the HELOC is a first lien (and only mortgage of the borrower) on the property. Thus, a HELOC servicer is exempt from complying with the following RESPA and Regulation X requirements:

- Duty to Provide Transfer of Servicing Statement and 60-day Payment Safe Harbor
- Duty to Respond to Notice of Error and Request for Information
- Duty to Respond to Request for Identity of Mortgage Owner
- General Servicing Requirements (§ 1024.38)
- Early Intervention Requirements
- Continuity of Contact Requirements
- Duty to Comply with Loss Mitigation Procedures

Whether or not the exemption of HELOCs made sense when HUD adopted it, it does not make sense now. In its analysis during the 2013 rulemaking, the CFPB declined to repeal the exemption on the ground that Regulation Z already provides HELOC borrowers with comparable protections.[106] But this simply is not true. Moreover, the CFPB in 2013 did not consider whether extending the HELOC exemption was appropriate in light of the Dodd-Frank Act amendment to RESPA § 2605(k)(1)(C), which states that a servicer shall not "fail to take timely action to respond to a borrower's request to correct errors relating to allocation of payments, final balances for purposes of paying off the loan, or avoiding foreclosure, or other standard servicer's duties."[107]

[103] 59 Fed. R. 65442, 65443 (Dec. 19,1994).
[104] 12 C.F.R. § 1024.30(a).
[105] 12 C.F.R. § 1024.31 (definition of "mortgage loan").
[106] 2012 Real Estate Settlement Procedures Act (Regulation X) Mortgage Servicing Proposal, 77 FR 57199, 57216. (Sept. 17, 2012); 78 Fed. Reg. 10695, 10721 (Feb. 14, 2013); *Lyons v. PNC Bank, N.A.*, 618 F. Supp. 3d 238 (D. Md. 2022), at 243.
[107] Because Congress has not exempted HELOCs from RESPA coverage, the CFPB should have considered the impact of the Dodd-Frank Act amendments on the CFPB's exercise of exemption authority for HELOCs.

The Fair Credit Billing Act dispute process set forth in Regulation Z is not an adequate substitute for Regulation X's servicing rules. Regulation Z's dispute process is better suited to unsecured, revolving debt that is used for purchasing retail goods and services—not a loan secured by the borrower's home.[108] HELOC borrowers are very different from credit card borrowers. Their volume of debt is likely to be much higher, and—most importantly—HELOC borrowers in default have much more to lose than credit card borrowers. Moreover, the Regulation Z's dispute process is largely meaningless and unhelpful once the draw period on a HELOC has terminated and when a HELOC borrower is in default.

While the Bureau cited data showing that HELOC borrowers delinquent on their first mortgages will often remain current on their HELOCs to retain access to the line of credit, the Bureau did not address delinquency and foreclosure rates among borrowers once the draw period ends.[109] At that point, the creditor cannot restrict access to the line of credit to mitigate loss, and the borrower cannot use it to mitigate an income reduction. While the CFPB previously stated that HELOCs tend to reflect better credit quality than closed-end subordinate loans, that statement appears to have been based on the consumer's credit score at origination and relied in part on access to the unutilized line of credit.[110] Newer research from a prime lender shows that "homeowners who obtained a cash-out refinance had no change in income whereas homeowners who extracted equity via a HELOC experienced declining income."[111] Thus, drawing down a line of credit may actually be a sign of impending financial distress. Greater home equity lending at the zip code level, especially with HELOCs, has been related to higher default rates on first mortgages in the same area.[112] That means extending protections to HELOC borrowers could help prevent first-mortgage distress too.

For too many borrowers, Regulation X's current treatment of HELOCs is a one-way street to foreclosure. We disagreed with the decision to preserve the HELOC exemption in 2013.[113]

[108] Reg. Z § 1026.13(a)(1)-(7). For example, while the CFPB has pointed to Reg. Z's § 1026.13 billing error resolution as a way for HELOC homeowners to assert an error on the loan, this provision is limited to billing errors related to the use of the account to finance retail purchases of goods and services, not servicing errors generally. The FCBA also does not include a provision to gather important information about the loan to help homeowners identify the owner of the loan and the accurate amounts due on the loan - both crucial questions for zombie second mortgages.

[109] Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. 10695, 10721 (Feb. 14, 2013)

[110] 2012 Real Estate Settlement Procedures Act (Regulation X) Mortgage Servicing Proposal, 77 Fed. Reg. 57199, 57216 (Sept. 17, 2012); 78 Fed. Reg. 10695, 10722 (Feb. 14, 2013)..

[111] Tapping Home Equity; Income and Spending Trends Around Cash-Out Refinances and HELOCs, JPMorgan Chase & Co., Dec. 2020, found at: https://www.jpmorganchase.com/institute/research/household-debt/report-tapping-home-equity

[112] LaCour-Little, Yu, and Sun (2014) cited in https://ssrn.com/abstract=3055371.

[113] National Consumer Law Center and National Association of Consumer Advocates, Comment Letter on the 2012 Real Estate Settlement Procedures Act (Regulation X) Mortgage Servicing Proposal 5–7 (Oct. 9, 2012),

Significant shifts in the mortgage lending and servicing markets over the last ten years have further illuminated the need to give HELOC borrowers these important protections. The CFPB should address this coverage gap in this upcoming RESPA rulemaking.

5. Other steps the CFPB could take to protect homeowners from zombie second mortgages

While not related to this rulemaking, there are other actions the CFPB could take to help homeowners combat zombie second mortgages.

a. The CFPB's issuance of an advisory opinion in April 2023, explaining that threatening to bring, or bringing a lawsuit to collect on time-barred zombie debt violating the FDCPA, was an important step in helping homeowners and advocates defend against zombie second mortgages. Similarly, the CFPB could provide an advisory opinion that interest that accrues on a loan while the servicer is in violation of Reg. Z of TILA, 12 CFR §1026.41 regarding periodic statements is considered actual damages under 15 U.S.C. § 1640. One of the overall goals of Reg. Z is to inform homeowners of who owns and services the mortgage, who they can make payments to and ask questions of, and how much they owe each month. Section 1026.41 requires lenders to provide borrowers with information to make an informed decision about how and who to pay, before a debt escalates and becomes unaffordable. This rule tries to eliminate just the kind of "laying in wait" conduct happening with zombie second mortgages. However, under the rule, if a lender fails to send periodic statements, the only relief available is actual damages, which can be hard to quantify. For loans that are charged off, the provisions of § 1026.41(e)(6) are confusing and limited. Loans exempt under (e)(6) and not retroactively assess interest and fees on the account. The same should be true for any lender or servicer for the time they did not send periodic statements and were not otherwise exempt.[114]

b. Provide guidance explaining that engaging in conduct such as the failure to provide communications including monthly statements and transfer of servicing and transfer of ownership notices to borrowers for years and then sending a notice threatening or initiating foreclosure can violate the prohibition on abusive acts or practices under the Consumer Financial Protection Act (CFPA). The CFPB can use the authority granted to it by Congress to combat unfair, deceptive, or abusive acts or practices as it has done many times in the past through enforcement actions and guidance.

https://www.nclc.org/resources/comments-to-the-cfpb-on-the-2012-real-estate-settlement-procedures-act-mortgage-servicing-proposal/.

[114] This recommendation was presented in more detail in testimony during the CFPB's April 2023 field hearing in Brooklyn, New York regarding zombie second mortgages.

O. The CFPB should clarify that the loss mitigation rule, like all of the RESPA servicing rules, apply to contracts for deed.

As the CFPB has acknowledged through recent public actions, contracts for deed (also known as land installment contracts) are a type of home loan that expose consumer borrowers to substantial risk.[115] Borrowers in these transactions take on all of the obligations of owning a home, with almost none of the key rights and protections that homeowners usually have. Borrowers who miss a single payment can in most states be summarily evicted and lose everything they have invested in the home.

The CFPB recently issued an Advisory Opinion confirming that the Truth in Lending Act applies to consumer contract for deed transactions, and walking through the various TILA origination protections that apply.[116] The Advisory Opinion should be extremely helpful in putting contract sellers on notice that if they violate the TILA origination rules, they face significant risk of public enforcement actions as well as private litigation.

The CFPB should clarify and confirm that by the same token, the RESPA mortgage servicing rules also apply to contracts for deed when these contracts meet the definition of a "federally related mortgage loan."[117] A federally related mortgage loan is a loan secured by a first or subordinate lien on residential real property which meets one additional prong of the definition.[118] For contracts for deed, the prong most likely to be satisfied is that the loan was made by a "creditor" as defined by TILA that makes residential real estate loans aggregating to at least $1 million per year.[119] Regulation X makes clear that land installment contracts are covered if the "contract is funded in whole or in part by proceeds of a loan made by any maker of mortgage loans specified" in the statute or regulation.[120] Alternatively, the transaction is covered if the loan is insured or guaranteed by a federal agency or will be sold to Fannie Mae, Freddie Mac, or Ginnie Mae.[121]

The primary focus is on the nature of the lender and, assuming the loans are not sold to or insured by a federal entity, what volume of loans they originate. The seller-creditors involved in making contract for deed loans are typically non-bank creditors. Therefore, it is necessary to determine: (1) whether the seller qualifies as a creditor under TILA, which the Advisory Opinion

[115] Consumer Financial Protection Bureau, Report on Contract for Deed Lending (Aug. 2024) ,https://files.consumerfinance.gov/f/documents/cfpb_contract-for-deed_report_2024-08.pdf; "CFPB Takes Action to Stop Contract-for-Deed Investors from Setting Borrowers Up to Fail," (Aug. 13, 2024), https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-to-stop-contract-for-deed-investors-from-setting-borrowers-up-to-fail/.

[116] Advisory Opinion, Truth in Lending (Regulation Z); Consumer Protections for Home Sales Financed Under Contracts for Deed (Aug. 13, 2024), https://www.consumerfinance.gov/rules-policy/final-rules/truth-in-lending-regulation-z-consumer-protections-for-home-sales-financed-under-contracts-for-deed/.

[117] *See* National Consumer Law Center, Mortgage Lending § 11.8.2 (4th Ed. 2024), updated at nclc.org/library.

[118] 12 U.S.C. § 2602(1).

[119] *Id*.

[120] Reg. X, 12 C.F.R. § 1024.2(b)(9)(2).

[121] 12 U.S.C. § 2602(1); Reg. X, 12 C.F.R. § 1024.2(b).

makes clear is just a matter of meeting TILA's numerical test;[122] and (2) whether the seller makes more than $1 million in "residential real estate loans" per year.

"Residential real estate loan" is not defined in the RESPA statute or in Regulation X, but drawing on the definition of federally related mortgage loan, it refers to a loan secured by residential real property.[123] In other words, RESPA does not govern a mortgage loan or contract for deed involving commercial property, nor a loan secured by a mobile home that is not "real property." Moreover, mortgage loans and contracts for deed secured by commercial or non-real estate properties cannot be included in the total necessary to meet the $1 million threshold.[124] Establishing that contracts for deed are "secured by" residential real property involves the same analysis the CFPB conducted in the Advisory Opinion in explaining why these contracts are "residential mortgage loans" subject to certain additional TILA origination rules.[125]

The RESPA servicing rules carry important protections for contract for deed borrowers. The right to have escrow accounts handled properly, to send RFIs and NOEs, and to have certain core loss mitigation protections is extremely important. Even though the small servicer exception may apply to some contract for deed servicers, the 120-day pre-foreclosure period provides a crucial window of time for borrowers to attempt to cure the default or sell the home and walk away with their equity.[126] Claims for violations of the RESPA servicing rules have been brought against servicers of land contracts in a number of cases.[127] The CFPB should clarify that the loss mitigation rule, like the entirety of the RESPA servicing rule, applies to contracts for deed when they meet the definition of a federally related mortgage loan. Similarly, the CFPB should clarify that the TILA servicing rules apply to contracts for deed when the appropriate circumstances are met.[128]

[122] *See* Advisory Opinion; *see also* National Consumer Law Center, Mortgage Lending § 11.8.1.1.

[123] 12 U.S.C. § 2602(1); Reg. X, 12 C.F.R. § 1024.2(b).

[124] *See* National Consumer Law Center, Mortgage Lending § 4.2.2.

[125] Advisory Opinion at 8-9.

[126] 12 C.F.R. § 1024.41(j) (small servicers are subject to the prohibition on foreclosure referral in 12 C.F.R. § 1024.41(f)(1)).

[127] Anderson v. Statebridge Co., 2020 WL 1816381 (W.D. Mich. Jan. 31, 2020) (land contract constituted a federally related mortgage loan subject to RESPA). *See also* First Amended Complaint, Henderson v. Vision Prop. Mgmt., L.L.C., No. 20-CV-12649 (E.D. Mich. Jan. 29, 2021); Second Amended Complaint, Horne v. Harbour Portfolio VI, L.P., Civ. Action No. 1:17-CV-954 (N.D. Ga. June 15, 2017).

[128] Some of the TILA servicing rules apply only to transactions secured by a dwelling or secured by the consumer's principal residence. The TILA servicing rules provide important protections, including the right to a timely and accurate payoff quote, the right to receive periodic statements, and the right to have payments properly credited to the account.

P. The CFPB should clarify that refraining from reporting negative credit information for borrowers who are impacted by a natural disaster or participating in a forbearance plan does not create an inaccuracy under the FCRA.

1. The CFPB should inform mortgage servicers that there is no inaccuracy created by refraining from negative reporting for consumers in designated emergency areas who have missed a payment.

The Bureau asks about what protocols or practices would be helpful to ensure that borrowers affected by a natural disaster are reported accurately and consistently.

Thousands of Americans are severely impacted both physically and financially by natural disasters each year. As a result of these disasters, homeowners can face death or illness of loved ones, severe damage to their homes, interruption or loss of their job, significant unexpected expenses, and dislocation for many months. From 2010 to 2019, the U.S. experienced 119 unique billion-dollar weather and climate-related disaster events, with total costs in excess of $800 billion. These events cause economic, emotional, and physical upheaval to millions of homeowners.

The last thing homeowners need during such times of crisis is damage to their credit reports and scores from mortgage payments that they unavoidably missed, through no fault of their own. They also cannot be expected to immediately obtain a short-term loss mitigation option such as a forbearance agreement when storm damage has disrupted their lives. In such times of crisis, a family's focus must be on their immediate safety and wellbeing; a borrower has little time or energy to wait on the phone, potentially for hours, to discuss loss mitigation options with a loan servicer. Homeowners impacted by disaster may not even have reliable phone, internet, or mail delivery service. Immediate, automatic protection of distressed homeowners' credit reports and scores is imperative to increase their ability to regain their financial footing and prevent compounding harms.

One fact has been clearly established: to prevent credit harm to these consumers, it is not sufficient to merely place the natural disaster code (AW) on an account, as described in the Consumer Data Industry Association's FAQ 58 –Reporting of Natural or Declared Disaster.[129] First, a 2018 report by the Consumer Financial Protection Bureau found that, since the AW code is optional on the part of lenders, many were choosing not to use it.[130] Second, the AW code does not remain on the report indefinitely; the CFPB's research showed that the code remains on a consumer's report for two months on average.[131] Finally, the AW code is essentially useless to protect a disaster survivor's credit score with respect to FICO scores. FICO has stated that the

[129] *See* Consumer Data Industry Association, Credit Reporting Resources Guide (2022), FAQ 58 – Reporting of a Natural or Declared Disaster.

[130] Consumer Financial Protection Bureau, Natural Disasters and Credit Reporting (Nov. 2018), available at https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/bcfp_quarterly-consumer-credit-trends_report_2018-11_natural-disaster-reporting.pdf.

[131] *Id.*

code does not affect a FICO Score; thus negative information (e.g., 30 or 60 day late) during a disaster period will still lower the consumer's score despite the code's presence.[132] The AW code does help protect a consumer's VantageScore, because that model will not score accounts flagged with the code.[133] However, FICO is the dominant scoring model, used in 90% of lending decisions.[134] Consumers impacted by natural disasters need more than an optional code that--even when the lender uses it--does not protect their FICO score from harm.

The keys to protecting a borrower's credit scores and credit history are the payment history and account status codes. For the payment history code, mortgage servicers should be encouraged to report a "D," for deferred or no information reported, whenever a borrower in a disaster zone misses a payment. For the account status code, which can range from current to 30, 60, or 90 days late, in foreclosure, etc., servicers should be encouraged to continue reporting the account status as of the day prior to the natural disaster, even if a consumer falls behind while a disaster declaration is in effect. These two steps together are necessary to suppress the negative payment history information that would otherwise be conveyed to the nationwide consumer reporting agencies ("CRAs").

During the COVID-19 pandemic, the CARES Act provided exactly this protection for borrowers who entered a loss mitigation plan or obtained another type of "accommodation." This special credit reporting treatment was established by Section 4021 of the Coronavirus Aid, Relief, and Economic Security (CARES) Act,[135] which required the account to be reported with the same status as it had just prior to the forbearance or accommodation so long as the consumer complied with the terms of that forbearance or accommodation.

Lenders, servicers and the credit reporting industry have already instituted the systems and procedures necessary to follow the CARES Act, and they now have several years of experience in such reporting. Continuing such practices should be of little burden. Indeed, the Federal Reserve Board appears to have supported this approach for survivors of Hurricane Fiona and Ian by endorsing the practice of "Offering payment accommodations, such as allowing loan customers to defer or skip some payments or extending the payment due dates, which would avoid delinquencies and negative credit bureau reporting caused by disaster-related disruptions."[136]

Mortgage servicers have expressed concern that they are not legally permitted to refrain from reporting negative credit information based on the fact that a consumer who is falling behind on monthly payments has been impacted by a natural disaster. They argue that such reporting might

[132] FICO, *Credit Reporting in the U.S. During the COVID-19 Pandemic* (June 16, 2020), available at https://www.fico.com/en/covid-19-credit-reporting-impact-US.

[133] FinRegLab, *Disaster-Related Credit Reporting Options* (May 2020), available at https://finreglab.org/wp-content/uploads/2020/05/FinRegLab-Disaster-Related-Credit-Reporting.pdf.

[134] Mercator Research, FICO® Scores Used in Over 90% of Lending Decisions According to New Study (Feb. 27, 2018), available at https://www.mercatoradvisorygroup.com/fico-scores-used-in-over-90-of-lending-decisions-according-to-new-study.

[135] As codified in Section 621(a)(1)(F) of the Fair Credit Reporting Act, 15 U.S.C. § 1681s-2(a)(1)(F).

[136] Federal Reserve Board, Disaster Preparedness and Recovery Resources - Hurricanes Fiona and Ian (2022), https://www.federalreserve.gov/supervisionreg/hurricanes-fiona-and-ian-2022.htm.

violate their duties under the Fair Credit Reporting Act (FCRA) because it would constitute inaccurate information. However, furnishers have no duty to report any information. They may delete an account or refrain from reporting for a time period.

Notably, mortgage investors like the Federal Housing Administration and the Federal Housing Finance Agency have permitted the granting of automatic forbearances to borrowers in a disaster zone.[137] As discussed below, the Metro 2 manual recommends reporting accounts in forbearance with the payment status they had prior to the forbearance. In the past, many servicers refused to follow investors' directives to suppress negative information for borrowers in a disaster forbearance based on the argument that to follow it would require violating the FCRA. CFPB guidance should prevent such refusals.

Recommendation:

The CFPB should issue guidance clarifying that reporting a "D" for the payment history whenever a borrower in a disaster zone falls behind on payments, and continuing to report the account status code that was in effect the day before the disaster rather than an advancing delinquency, does not create an inaccuracy. Rather than reporting inaccurately, this should be viewed as suppressing payment information during a situation in which it is appropriate to do so.

2. *If a consumer enters into a forbearance or other short-term loss mitigation option, then the lender or loan servicer should not advance any delinquencies and should continue to report the same account status as was in place prior to the accommodation*.

The Bureau also asks about what servicer practices result in the furnishing of inaccurate information about mortgages in the loss mitigation process. The fact that some servicers continue to advance delinquencies, i.e., the payment history and account status code continue to worsen, for a borrower who is performing under a forbearance or trial payment plan creates a misleading and inaccurate impression. It treats borrowers who have in good faith reached out to the servicer and agreed to a loss mitigation plan the same as a borrower who failed to make contractual payments with no agreement in place, despite the significant difference in their situations.

Accounts subject to forbearances and other short-term loss mitigation solutions should not be reported with additional or progressively worsening delinquencies in the payment history and account status fields on credit reports. Furthermore, as with the natural disaster code AW, the use of a special comment code like "CO" for a modification or "CP" for a forbearance is not sufficient, because it does not counter the negative effect of advancing delinquencies in the payment history and account status codes.

[137] See, e.g., FHA Info. 2023-67, Reminder Guidance for FHA-Approved Mortgagees and Servicers Regarding Presidentially-Declared Major Disaster Areas (Aug. 16, 2023), https://www.hud.gov/sites/dfiles/SFH/documents/SFH_FHA_INFO_2023-67.pdf (confirming that servicers may put a borrower into a forbearance even if the borrower cannot be reached to accept the offer; servicer "may offer and provide the forbearance unless the borrower affirmatively declines the offer").

The credit reporting steps required by the CARES Act for borrowers who obtained an accommodation during the pandemic are appropriate for any situation in which a consumer has experienced a hardship and requested and obtained payment relief. If the consumer was current at the time they were granted a payment accommodation, such as a forbearance, the servicer should be required to continue to report them as current so long as the consumer complies with the terms of the accommodation. If the consumer was 30 days or more overdue on a payment, a servicer should report the same past-due status during the accommodation, and if the consumer brought the account current during that period, the servicer should report them as current. Given that the servicer has agreed to a temporary pause or reduction (as in a trial plan) in the monthly payments, it is not accurate for the servicer to report a worsening contractual delinquency when the borrower is complying with that agreement.

Furthermore, the industry's own instructions for its common reporting format, Metro 2, actually specify that no negative information should be reported if a payment is not required because of a forbearance. The Consumer Data Industry Association's Credit Reporting Resource Guide states the following for Frequently Asked Questions 45, which asks "How should accounts in forbearance be reported?":[138]

> "Payment History Profile = appropriate code that specifies the previous month's Account Status for each month the account is in forbearance, plus prior history.
>
> (Increment the Payment History Profile with value D if no payments are due during the forbearance period.)"

FAQ 45 also states with respect to Account Status:

> "(If no payments are due during the forbearance period, report Account Status **11**.)"[139]

Account Status 11 is "Current." Thus, the industry's own guidance instructs servicers to engage in the type of reporting that we believe will protect the credit records of borrowers struggling due to natural disasters or other hardships.

The Bureau should affirm that this type of reporting, as instructed by the industry's own guidance, is not inaccurate under the FCRA. The CFPB should issue guidance clarifying that the reporting a "D" and Account Status 11 for a borrower granted a forbearance does ***not*** cause an inaccuracy under the Fair Credit Reporting Act.

Consumer report information is critical to consumers in accessing new credit, insurance, housing, and even employment. A homeowner who faces a financial hardship and receives temporary loss mitigation assistance in the form of a forbearance or other option should not be further harmed by having their credit report show they are falling further and further behind each month. The forbearance plan should pause the credit reporting clock to allow the homeowner to

[138] *See* Consumer Data Industry Association, Credit Reporting Resources Guide (2022), FAQ 45 – How should accounts in forbearance be reported?
[139] *Id*. (emphasis in original).

take full advantage of the temporary reprieve from making payments and eventually regain their financial footing.

Recommendation:

The Bureau should issue guidance confirming to mortgage servicers that implementing the CARES Act's credit reporting treatment for borrowers in forbearance, trial payment plans, or other loss mitigation solutions is permissible and encouraged. Rather than reporting inaccurately, this should be viewed as suppressing payment information during a situation in which none of the other payment history or account status codes give a fully accurate picture of the situation.

3. Creating a special code that would be used to flag all mortgages undergoing loss mitigation review would likely have a minimal effect.

The Bureau also asks whether it would be helpful to have a special code that could be used to flag all mortgages undergoing a loss mitigation review. As discussed above, such special codes have minimal impact on credit scores relative to the payment history and account status codes. Therefore, under our current credit scoring system, creation of such a code would not likely have much benefit.

III. Conclusion

The CFPB's proposed rule makes important strides to better protect homeowners from unnecessary foreclosures and from the accumulation of foreclosure-related fees during a loss mitigation review. Eliminating the need to collect a complete application in all circumstances, and instead permitting streamlined reviews, should benefit both mortgage servicers and many borrowers. The simplification of § 1024.41 also should reduce the burden on mortgage servicers and allow them to devote resources effectively.

However, the modifications to the proposed rule suggested throughout this comment are necessary in order to ensure that the loss mitigation review process operates efficiently and with clear expectations on both sides. If there are any questions about this comment, please contact Alys Cohen, acohen@nclc.org for additional information.