

PUBLICATION

RESPA Amendment Changes Rules, Deadlines Regarding Errors Communications

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In July of 2010, the Real Estate Settlement Procedures Act (RESPA) was amended by Congress to reduce the time period from twenty days to five days for a servicer to acknowledge receipt of a qualified written request, and from sixty days to thirty days the time for a servicer to respond to a qualified written request.¹ These amendments did not become effective until January 10, 2014. On January 17, 2013, the Consumer Financial Protection Bureau (CFPB) issued a final rule on mortgage servicing which implemented these changes and which revised the requirements found in Regulation X regarding qualified written requests.² These new regulations also became effective on January 10, 2014. The CFPB has also issued a "staff commentary" setting forth its interpretation of the new regulations.³

Although the prior regulations regarding qualified written requests treated both notices from the borrower asserting errors and requests for information from the borrower as qualified written requests,⁴ the new regulations split notices regarding errors and requests for information into two separate categories and establish separate requirements for handling each category.⁵ This article explores the requirements regarding notices of error.

The new regulations apply to all federally related mortgage loans as defined by RESPA.⁶ The new regulations define a "notice of error" as "any written notice from the borrower that asserts an error and that includes the name of the borrower, information that enables the servicer to identify the borrower's mortgage loan account, and the error the borrower believes has occurred."⁷ A note on a payment coupon or other payment form supplied by the servicer is not treated as a notice of error.⁸ The term "error" is defined to include eleven categories of covered errors:⁹

1. Failure to accept a payment that conforms to the servicer's written requirements for the borrower to follow in making payments.
2. Failure to apply an accepted payment to principal, interest, escrow or other charges under the terms of the mortgage loan and applicable law.
3. Failure to credit a payment to a borrower's mortgage loan account as of the date of receipt.
4. Failure to pay taxes, insurance premiums or other charges, including charges that the borrower and servicer have voluntarily agreed that the servicer should collect and pay, in a timely manner.
5. Imposition of a fee or charge that the servicer lacks a reasonable basis to impose upon the borrower.
6. Failure to provide an accurate payoff balance amount upon a borrower's request.¹⁰
7. Failure to provide accurate information to a borrower regarding loss mitigation options and foreclosure.
8. Failure to transfer accurate and timely information relating to the servicing of a borrower's mortgage loan account to a transferee servicer.
9. Making the first notice or filing for any judicial or non-judicial foreclosure process if the borrower is not more than 120 days delinquent, or before all completed applications for loss mitigation have been reviewed and it has been determined that the borrower is not eligible for loss mitigation and the time for appeal of this determination has expired, or the borrower has rejected the loss mitigation option offered, or the borrower failed to perform under a loss mitigation agreement.

10. Moving for foreclosure judgment or order of sale, or conducting a foreclosure sale if the borrower has submitted a completed application for loss mitigation no more than 37 days before the scheduled foreclosure sale, that the application has not been reviewed, it has been determined that the borrower is not eligible for loss mitigation and the time for appeal of this determination has expired; or the borrower has rejected the loss mitigation option offered; or the borrower failed to perform under a loss mitigation agreement.¹¹
11. Any other error relating to the servicing of a mortgage loan.

Correspondence does not qualify as a "notice of error" if it asserts an error which is not defined as an error in the list above. The staff commentary lists three examples of errors which a borrower might assert which are not errors as defined by Regulation X:¹²

12. An error relating to the origination of a mortgage loan.
13. An error relating to the underwriting of a mortgage loan.
14. An error relating to a subsequent sale or securitization of a mortgage loan.

Additionally, a servicer is not required to comply with the requirements regarding notices of error if:¹³

15. The asserted error is substantially the same as an error previously asserted by the borrower to which the servicer has previously responded, unless the borrower provides new, material information to support the asserted error.
16. The notice of error is overbroad, which is the case if the servicer cannot reasonably determine from the notice of error the specific error that the borrower asserts has occurred on a borrower's account.
17. The notice of error is delivered to the servicer more than one year after (a) the loan was
18. paid in full or (b) servicing of the loan was transferred to another servicer.

A servicer can designate an exclusive address to which all notices of error (and requests for information) must be sent.¹⁴ The servicer must inform the borrower of the designated address by written notice. Additionally the designated address must be identified in (a) any periodic statement or coupon book regarding the mortgage loan; (b) any web site the servicer maintains in connection with servicing of loans; and (c) all early intervention and loss mitigation notices sent to the borrower.¹⁵ Servicers are allowed, but not required, to establish an exclusive process for receiving notices of error by e-mail, through forms on web sites, or by other online methods.¹⁶ Establishing an electronic means of submission does not relieve a servicer of the obligation to establish a process for receiving notices of error by mail.

If a servicer receives a notice of error, within five business days of receipt, it must send the borrower a written response acknowledging receipt of the notice of error.¹⁷ The servicer must then, within 30 business days after receipt of the notice of error, conduct a reasonable investigation of the error(s) asserted by the borrower and either (1) correct the error(s) and send a written notice of correction to the borrower; or (b) send the borrower a written notice that no error occurred.¹⁸ The written notice of correction must include an explanation of the correction made, the effective date of the correction and contact information, including a telephone number the borrower may use to seek further assistance.¹⁹ The written notice that no error occurred must include a statement that the servicer has determined that no error occurred, a statement of the reason(s) for this determination, a statement of the borrower's right to request documents relied upon by the servicer in reaching its determination, information regarding how the borrower can request such documents, and contact information, including a telephone number, the borrower may use to seek further assistance.²⁰ If the borrower requests the documents that the servicer relied upon to determine that no error occurred, the servicer must provide copies of the documents to the borrower, at no charge, within 15 business days of receiving the borrower's request.²¹

A servicer may request additional documentation from a borrower in connection with the investigation of an asserted error, but the servicer may not: (1) require the borrower to provide the information as a condition of investigating the asserted error; or (2) determine that no error occurred because the borrower failed to provide any requested information without conducting a reasonable investigation.²² For most of the categories of errors, the servicer may extend the time period for response by an additional 15 business days by sending the borrower written notice of the extension and the reasons for the extension within the original 30-day response period.²³

A servicer may not charge a fee, or require a borrower to make any payment that may be owed on a borrower's account, as a condition of responding to a notice of error.²⁴ After receipt of a notice of error, a servicer cannot furnish adverse information to any consumer reporting agency for 60 days regarding any payment that is the subject of the notice of error.²⁵ Unless the asserted error falls into category 9 or 10, the regulations do not limit or restrict a lender or servicer from pursuing any remedy it has under applicable law, including initiating foreclosure or proceeding with a foreclosure sale.²⁶

If a servicer fails to comply with the requirements regarding notices of error, the borrower may file a lawsuit within three years of the date of the violation.²⁷ If the borrower is successful in the lawsuit, the court may award him or her any actual damages incurred as a result of the failure to comply; a civil penalty in an amount not to exceed \$2,000 and the costs and attorney fees incurred in bringing the action.²⁸ RESPA also provides for class actions regarding these provisions. A successful class may be awarded the actual damages incurred by each class member as a result of the failure to comply, a civil penalty which may exceed the lesser of \$1,000,000 or 1 percent of the net worth of the servicer and the costs and attorney fees incurred in bringing the action.²⁹

¹ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1463(c), 124 Stat. 1376, 2183-84 (2010).

² This rule was published in the Federal Register on February 14, 2013. 78 F.R. 10695.

³ 12 C.F.R. § 1024, Supp. I.

⁴ See, former 24 C.F.R. § 3500.21(e).

⁵ See, 12 C.F.R. §§ 1024.35 and 1024.36.

⁶ See, 12 C.F.R. §§ 1024.2 and 1024.5(b). The new regulations do not apply to home equity lines of credit or open-end lines of credit.

⁷ 12 C.F.R. §1024.35(a).

⁸ Id.

⁹ 12 C.F.R. §1024.35(b).

¹⁰ A reduced period of 7 business days applies to asserted errors regarding failure to provide payoff figures. 12 C.F.R. § 1024.35(e)(3)(i)(A).

¹¹ The response to an asserted error regarding foreclosure procedures (categories 9 and 10) must be sent by the earlier of the date of the foreclosure sale or 30 business days after receipt of the notice of error. 12 C.F.R.

§ 1024.35(e)(3)(i)(B). However, the response requirements do not apply to notices of error received 7 or fewer days before a foreclosure sale. 12 C.F.R. § 1024.35(f)(2).

¹² 12 C.F.R. § 1024, Supp. I., § 35(b)(1).

¹³ 12 C.F.R. §1024.35(g).

¹⁴ 12 C.F.R. § 1024.35(c).

¹⁵ 12 C.F.R. § 1024, Supp. I., § 35(c)(2).

¹⁶ 12 C.F.R. § 1024, Supp. I., § 35(c)(4).

¹⁷ 12 C.F.R. § 1024.35(d). Business days do not include Saturdays, Sundays or legal public holidays.

¹⁸ 12 C.F.R. §§ 1024.35(e)(1)(i)(A) and (B).

¹⁹ 12 C.F.R. § 1024.35(e)(1)(i)(A).

²⁰ 12 C.F.R. § 1024.35(e)(1)(i)(B).

²¹ 12 C.F.R. § 1024.35(e)(4).

²² 12 C.F.R. § 1024.35(e)(2).

²³ 12 C.F.R. § 1024.35(e)(3)(ii).

²⁴ 12 C.F.R. § 1024.35(h).

²⁵ 12 C.F.R. § 1024.35(h)(i)(1).

²⁶ 12 C.F.R. § 1024.35(h)(i)(2).

²⁷ 12 U.S.C. §§ 2605(f) and 2614.

²⁸ 12 U.S.C. §§ 2605(f)(1) and (3).

²⁹ 12 U.S.C. §§ 2605(f)(2) and (3).